



*competition***tribunal**
SOUTH AFRICA

HANDBOOK OF CASE LAW

The Competition Tribunal's guide to select cases decided from 1999 to 2019.

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FOREWORD

The Competition Tribunal of South Africa (Tribunal) adjudicates competition matters, in accordance with the Competition Act No. 89 of 1998 (Competition Act), as amended and has jurisdiction throughout South Africa. The Tribunal, together with the Competition Commission of South Africa (Commission), is responsible for the enforcement of the Competition Act.

The idea of the handbook first came about when I joined the Tribunal as a full-time member. Whilst the Butterworths service provided a valuable record of published decisions at that time, there was no database of jurisprudence which captured the unique institutional approach of the Tribunal and which could serve as a guide to new members and case managers.

The Tribunal began operating on 1 September 1999 and has produced jurisprudence since its first case decided on 26 January 2000. In the early years of the Tribunal the focus of the agencies was in the area of merger control. The case mix started changing gradually until 2007 when we witnessed a step change in cartel and abuse of dominance enforcement. This growth in Chapter 2 enforcement led to a concomitant increase in interlocutory cases involving discovery, exceptions and strike out applications. The introduction of the Commission's corporate leniency policy also brought about novel cases in the area of litigation privilege, challenges to the validity of the Commission's initiation, disputes about the ambit of provisions of the Act such as Commission Rule 14 and section 67(1), reviews of Commission decisions and several applications for dismissals on various grounds. The volume of cases increased exponentially after the Commission's industry wide CLP and settlement process for the construction sector. While the substantive cases under Chapter 2 and 3 were widely reported, many of the 'procedural' type of cases went underreported.

The cases in the handbook have been selected on the basis of the most common issues that the Tribunal has had to consider over time. In order to ensure that the handbook could be produced in the 20th anniversary year of the Tribunal, 31 March 2019 was used as the cut-off date for inclusion of cases. Because of the large volume of cases involved, there might well be topics or themes that have not been covered in this edition. However, the handbook is meant to be a living document and we intend to update it on an annual basis. We have already identified several topics to be included in the next version such as indivisibility of transactions, reviews of commission referrals, section 45 applications, extra-territorial jurisdiction of the Competition Act and significant developments in the area of section 4(1)(b) contraventions and public interest provisions in the Act.

PURPOSE OF THE HANDBOOK

This handbook contains a summary of a selection of decided cases of the Tribunal and the Competition Appeal Court (CAC), spanning some 20 years. The primary objective of the handbook is to serve as a guide for members, researchers, practitioners and registry officials. The handbook summarises important cases in order to demonstrate the approach the Tribunal has taken in the past. It does not serve as a book of precedents. At the same time, this handbook is not a definitive guide on competition law cases, neither is the list of cases selected here exhaustive of each topic addressed. For example, in the section dealing with merger evaluation the jurisprudence and theory on market definition is too voluminous and vast to include in this publication. In the area of prohibited practices, we have set out the approach taken by the Tribunal to section 4 but have included only a selection of these cases due to their volume. All users are therefore encouraged to consult official law reports for updated law on the topics covered here, as well as the Tribunal website. For guidance on substantive aspects of competition law, users are encouraged to consult reputable authorities and guidelines published by for instance the European Commission, the US Department of Justice and the International Competition Network.

The Handbook is designed to capture not only the approach of the Tribunal as a *sui generis* institution to cases but also to serve as a resource and a guide to all practitioners in the field of competition law.

It must be emphasised that the handbook cannot be relied upon as views of the Tribunal members, staff or the authors but simply contains a summary of some of cases already decided which are in the public domain.

HOW TO USE THE HANDBOOK

The handbook is arranged thematically with substantive merger control issues dealt with in the first part, matters generally considered to be procedural in nature are in the middle section cases and the last section contains cases dealing with prohibited conduct and remedies. All aspects of a case have not necessarily been included and the user is encouraged to read the entire case themselves.

Concerning the style: footnotes in the handbook refer to cases by their case numbers as archived on the Tribunal's website. However, many of these cases are reported in Juta's South African Law Reports and Butterworth's Competition Law Reports. As far as possible cases are discussed in chronological order and the dates (month & year) of judgments are indicated in brackets next to the first mention of a case. Paragraphs are numbered for ease

of reference. Chapters can be directly accessed by clicking on the headings in the Table of Contents. Cited cases are hyperlinked to the Tribunal website for the convenience of the user.

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Contents

<i>FOREWORD</i>	2
<i>PURPOSE OF THE HANDBOOK</i>	3
<i>HOW TO USE THE HANDBOOK</i>	3
MERGER CLASSIFICATION	7
THE MEANING OF CONTROL.....	10
MERGER EVALUATION.....	27
PARTICIPATION IN HEARINGS	51
MERGER PROHIBITIONS.....	58
SUSPENSION OF MERGER CONDITIONS	63
VARIATION OF MERGER CONDITIONS.....	65
BREACH OF MERGER CONDITIONS.....	69
FAILURE TO NOTIFY	72
EXCEPTIONS TO PLEADINGS.....	78
AMENDMENT APPLICATIONS.....	82
CONDONATION APPLICATIONS.....	89
STRIKE-OUT APPLICATIONS.....	93
JOINER APPLICATIONS.....	96
SEPARATION APPLICATIONS	100
STAY APPLICATIONS.....	105
RE-OPENING A CASE	114
DEFAULT JUDGMENTS.....	118
PRESCRIPTION	121
INTERDICTIONARY RELIEF	127
SUMMONS (SUBPOENA).....	131
DISCOVERY	138
LITIGATION PRIVILEGE	147
COMMISSION’S POWERS IN TERMS OF SECTION 49B: VALID INITIATION.....	158
GRANTING OF IMMUNITY AGAINST PROSECUTION PURSUANT TO THE CLP	170
INTERIM RELIEF UNDER SECTION 49C.....	176
APPROACH TO SECTION 4.....	185
APPROACH TO SECTION 5.....	200

ABUSE OF DOMINANCE: APPROACH TO SECTIONS 8 AND 9	203
APPEALS FROM EXEMPTIONS GRANTED BY THE COMMISSION	216
REMEDIES	219
CONSENT ORDERS	228
COSTS.....	234
CIVIL ACTIONS	242
<i>ABBREVIATIONS AND ACRONYMS</i>	249
<i>TABLE OF CASES ARRANGED BY TOPIC</i>	250

Merger Classification

1. According to the Tribunal's judgment issued in [*Tiger Equity \(Pty\) Ltd and Murray & Roberts \(Pty\) Ltd v Competition Commission*](#)¹ (*Tiger Equity*) the manner in which a merger is classified has significant jurisdictional and procedural consequences which include whether or not the merger is classified as notifiable; whether the merger is approved by the Commission or the Tribunal; the applicable filing fee payable; as well as the time periods given for the Commission to investigate and consider the merger.²
2. In terms of Rule 27(1)(a) of the Rules for the Conduct of Proceedings in the Competition Commission (CCR), when merging parties notify their transaction, they are required to state in their opinion whether the merger is small, intermediate or large and to pay the prescribed filing fee.³
3. If the merger is filed incorrectly, the Commission must issue a Form CC13(2) – a Notice of Incomplete Filing (the Notice). Until the filing deficiency has been rectified, the prescribed time periods for the Commission to investigate the merger remain suspended.⁴
4. Primarily, a merger's classification is dependent on the merger thresholds prescribed in terms of section 11(5) of the Competition Act 89 of 1998, as amended, (the Act). The values of the thresholds are contained in regulations made by the Minister.⁵
5. Determining the values of the thresholds involves two considerations. The first is deciding which firms are to be included in the computation, the second is the basis of the computation.⁶ The Act defines the acquiring firm and the target firm – the latter is usually not a controversial topic however the former can be,

¹ 019174.

² *Tiger Equity* para 4.

³ *Tiger Equity* para 5.

⁴ *Tiger Equity* para 7.

⁵ Amendment of Regulation 2 of General Notice 216 of 2009 (GG No. 40902) dated 9 June 2017.

⁶ *Tiger Equity* para 11.

as the acquiring firm might not only include the firm actually purchasing the target but could also include all its controllers.⁷

6. In the *Tiger Equity* case the applicants sought to challenge the Commission's decision to classify its merger as a large merger. The parties contended it to be a small merger.
7. The issue to be decided was whether Tiger One, on its own, was the acquiring firm that would exercise control over the target or whether the shareholder companies of Tiger One were to be included in the definition of the 'acquiring firm'.
8. The Tribunal considered the definition of 'acquiring firm' in terms of section 1(1)(i) of the Act. This section defines 'acquiring firm' as one which directly or indirectly acquires or establishes direct or indirect control over, the whole or part of the business of another firm. By definition, this would include the primary firm's parent and grandparent companies.⁸
9. The Tribunal went on to examine the shareholding structure of the acquiring firm (Tiger One). Even though all six shareholders of Tiger One could appoint a director on the board (each having voting rights in proportion to their shareholding in Tiger One) the Tribunal found that it could not be said that all six shareholders had control over Tiger One. Further, neither board member could veto the decisions of the other. The Tribunal considered whether two or more shareholders could exercise control through certain allegiances. The Tribunal found that even if a vote *en bloc* took place this was not the basis to assess whether any of the shareholders of Tiger One in fact exercised control.⁹ Something more would be needed in order to establish control of an enduring nature.¹⁰

⁷ *Tiger Equity* para 11.

⁸ *Tiger Equity* para 14.

⁹ *Tiger Equity* paras 24-26.

¹⁰ *Tiger Equity* para 27.

10. The Tribunal concluded that the Commission failed to establish that Tiger One's shareholders could be included in the definition of 'acquiring firm'. The Tribunal issued an order setting aside the Commission's merger classification.
11. At paragraphs 41 to 45 of the *Tiger Equity* judgment, the Tribunal considered the effect of setting aside the Commission's Notice. However, we do not elaborate on this part of the judgment here as the circumstances assessed and consequences that followed were unique to the *Tiger Equity* case and not useful for general application.
12. A related matter which comes up often is whether one or more transactions which are considered by the parties to be indivisible are required to be notified as one or two mergers. The debate is probably better located within the meaning of control.

The Meaning of Control

1. According to section 12(1)(a) of the Act, a transaction is defined as a merger when “*one or more firms directly or indirectly acquire or establish control over the whole or part of the business of another firm*”. The meaning of ‘control’ is of great significance because it is the key criteria in determining whether or not a merger has occurred. The breadth of jurisprudence dealing with the meaning of control is vast because all applications for merger approval constitute a consideration of the concept of control. This section does not canvas the entire breadth of this jurisprudence but provides a brief overview of some seminal cases.

2. The manner in which control can be acquired is expressly set out under section 12(2) of the Act. A person controls a firm if that person:
 - “(a) *beneficially owns more than one half of the issued share capital of the firm;*
 - (b) *is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;*
 - (c) *is able to appoint or to veto the appointment of a majority of the directors of the firm;*
 - (d) *is a holding company, and the firm is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act, 1973 (Act No. 61 of 1973);*
 - (e) *in the case of a firm that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;*
 - (f) *in the case of a close corporation, owns the majority of members’ interest or controls directly or has the right to control the majority of members’ votes in the close corporation; or*
 - (g) *has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial*

practice, can exercise an element of control referred to in paragraphs (a) to (f).”

3. Section 12(1)(b) provides for the means of achieving a merger. In addition, section 13 requires parties to intermediate or large mergers (as defined in terms of section 12) to notify the Commission of the relevant merger within the prescribed period. Failure to notify a merger is sanctioned by the Act, as is the implementation of a merger without approval.
4. In [*Distillers Corporation \(SA\) Ltd v Bulmer \(SA\) \(Pty\) Ltd*](#)¹ the Competition Appeal Court (CAC) held that section 12 is to be interpreted broadly to “*ensure that the competition authorities examine the widest possible range of potential merger transactions to examine whether competition was impaired*” by the conduct of the parties in any matter being adjudicated upon.² Further, and pursuant to this interpretative approach, the CAC held that section 12 is not only concerned with a change in ultimate control but also with any change in control due either to an indirect or direct change in shareholding. The latter form of control in fact constitutes a merger.³ The CAC also held that a firm could be controlled by more than one firm simultaneously (joint control).⁴
5. In [*Iscor Ltd v Saldanha Steel \(Pty\) Ltd*](#)⁵ (*Iscor*) it was held that notification is required when there is a change from joint control to sole control. [*Anglo American Holdings v Kumba Resources*](#)⁶ (*Anglo*) reiterated the *Iscor* decision by holding that a merger had to be notified when the acquiring firm is able to exercise control. In the *Anglo* matter, Anglo American Holdings (Anglo) had purchased 34.9% of Kumba Resources’ shareholding. The Tribunal had to decide whether this acquisition amounted to an acquisition of control over Kumba Resources by Anglo. Anglo had already notified the merger, although the sufficiency of this notification was under challenge. The Industrial

¹ 2002 (2) SA 346 (CAC).

² *Distillers* pg. 358.

³ *Ibid.*

⁴ *Ibid.*

⁵ 67/LM/Dec01.

⁶ 46/LM/Jun02.

Development Corporation of South Africa (IDC), which intervened in this matter, argued that Anglo's notification was a nullity as it was not detailed enough regarding future acquisitions.⁷

6. The Tribunal found that Anglo's 34.9% shareholding amounted to control over Kumba Resources because Anglo commanded a majority vote at shareholders' meetings.⁸ It found that Anglo had expressly stated its intention to acquire control over Kumba Resources by up to 49%.⁹ Notification was however necessary at the 34.9% shareholding stage because Anglo was in fact (*de facto*) able to exercise control even though it had not yet acquired its desired 49% shareholding. The Tribunal found that Anglo had disclosed all facts at its disposal and therefore the notification was competent.¹⁰ The Tribunal approved the merger subject to one condition relating to a horizontal issue in the iron ore market.¹¹ The details of the competition analysis are not provided here as this section is concerned only with control.

7. In [*Ethos Private Equity Fund IV v The Tsebo Outsourcing Group \(Pty\) Ltd*](#)¹² (*Ethos*) the Tribunal held that a merger should be notified once the "*bright lines in section 12(2) had been crossed*". In this case, Ethos Private Equity Fund IV had acquired sole control in addition to its previously held joint control and was required to notify its acquisition.¹³ The Tribunal restated the position that a firm could be subject to more than one form of control by two or more persons simultaneously.¹⁴ The Tribunal also took the opportunity to elaborate on the significance and meaning of section 12(2) as follows:¹⁵

"Merger policy is not confined to an assessment of control via the legal form. The Act recognises that control is not confined to exercise through the same legal form and that a firm can be controlled by another's economic or

⁷ *Anglo* para 32.

⁸ *Anglo* para 29.

⁹ *Anglo* para 29 and 35-36.

¹⁰ *Anglo* paras 33-40.

¹¹ *Anglo* para 171.

¹² 30/LM/Jun03.

¹³ *Ethos* para 42.

¹⁴ *Ethos* paras 28-29.

¹⁵ *Ethos* para 32.

commercial leverage over it. Because of this, the legislature recognised the possibility of the separation of the economic and 'political' benefits of ownership and so provided for each in section 12(2) through subsection 12(2)(a) and (d) (ownership) and 12(2)(b) and (c) (voting rights). But it also had to go beyond recognising even these two traditional company law forms of control and provide for control over other entities 12(2)(e) trusts and 12(2)(f) close corporations. It went further still, recognising that even these instances may be deficient in capturing all notions of control and so provided a catch all in 12(2)(g). Notwithstanding sub-section (g), the Court has held that the list is non-exhaustive recognising that control is too elastic a notion to confine to a closed list. In so doing it held that the legislature had instanced separate notions of control”.

8. It must be emphasised that the meaning of control in competition law is not necessarily afforded the same meaning under the Companies Act¹⁶ or for triggering other regulatory provisions. For example, a 24.9% shareholding may only confer negative control under the Companies Act but not confer control as contemplated in competition law.
9. The following cases are examples of how the Tribunal has applied the abovementioned key principles of control.
10. In [Caxton and CTP Publishers & Printers Ltd v Naspers Ltd & others](#)¹⁷ the Tribunal held that in calculating a firm's shareholding for the purpose of determining whether or not it wielded control over another firm, only those shares that the acquiring firm controlled should be considered.
11. In [Goldfields Ltd v Harmony Gold Mining Company Ltd & the Competition Commission](#)¹⁸ the Tribunal held that acquisitions of 35% of the target firm's shareholding motivated by an intention to acquire sufficient control to effect a merger were not notifiable unless the prescribed thresholds were met.¹⁹

¹⁶ Act No 71 of 2008.

¹⁷ 16/FN/Mar04.

¹⁸ 86/FN/Oct04.

¹⁹ *Goldfields* para 62.

The Tribunal also held that an agreement between shareholders in relation to voting on a particular resolution accompanied by an undertaking to conclude a sale of shares did not constitute joint control by those two shareholders.²⁰ On appeal to the CAC,²¹ this decision was overturned and the CAC held that the acquisition of 35% of the target firm's shareholding was notifiable because it was an integral part of a merger, even though it was merely the first stage of the scheme. Further, the CAC held that the shareholders' agreement described above constituted joint control and accordingly interdicted Harmony from exercising voting rights prior to merger approval.²² The merger was subsequently notified and approved with conditions by the Tribunal.²³

12. In [*Johnnic Holdings Ltd v Hosken Consolidated Limited & the Competition Commission*](#)²⁴ the Tribunal considered whether or not Hosken Consolidated Limited (Hosken) had control over Johnnic Holdings Ltd (Johnnic) in terms of section 12(2)(g). Johnnic sought an interdict to restrain Hosken from exercising its voting rights as it argued that this would be tantamount to implementing a merger without approval and thus in contravention of the Act. The Tribunal stressed that there were strong institutional investors involved in Johnnic. They held more voting rights in Johnnic than Hosken. Hosken was not yet able to have its nominees appointed to the board of Johnnic. The Tribunal also stressed that too much emphasis could not be placed on authorities from other jurisdictions where shareholding is more dispersed.²⁵ The Tribunal therefore found that control had not be established.
13. In [*Cape Empowerment Trust Ltd v Sanlam Life Insurance Ltd & Sancino Projects Ltd*](#)²⁶ (*Cape Empowerment*), the Tribunal had to determine when and how Sanlam had acquired control over Sancino Projects. This was pertinent to an application for an interdict filed by Cape Empowerment Trust in a bid to

²⁰ Para 81.

²¹ 43/CAC/Nov04, decision correcting order and refusing leave to appeal, dated 10 May 2005. Reported as [2005] 1 CPLR 74 and its consequent decision reported as [2005] 1 CPLR 97.

²² Order pg. 8.

²³ 93/LM/NOV04.

²⁴ 65/FN/Jul05.

²⁵ *Johnnic* para 101.

²⁶ 05/X/Jan06.

thwart what it characterised as the implementation of a large merger without approval.

14. The facts were that Sanlam had acquired cumulative redeemable preference shares in Sancino in 1998 which constituted a majority of Sancino's issued share capital. The voting rights attached to these preference shares would be exercisable when dividend payments fell into arrears and Sancino was unable to redeem the shares. Sancino found itself in this unfortunate position in March 2002 and Sanlam gained voting rights in 2006 after Sancino's indebtedness to it was in the region of R23 million. Sanlam wished to have the preference shares converted into ordinary shares. At the same time Cape Empowerment Trust was intensifying its efforts to obtain a controlling stake in Sancino. A special meeting of shareholders was then scheduled for 8 February 2006 so a vote would be put on special resolutions authorising the conversion of shares. Cape Empowerment Trust was opposed to this conversion as it wished to acquire a significant stake in Sancino. It accordingly called for another special meeting scheduled for 7 February 2006 at which it intended to put an alternative proposal to Sanlam. However, before either meeting was held, Cape Empowerment Trust filed an application for an interdict with the Tribunal which was heard on an urgent basis on 2 February 2006.

15. Cape Empowerment Trust contended that Sanlam's acquisition of the right to exercise voting rights in respect of its preference shares amounted to an acquisition of control and this constituted a merger under section 12(2)(b). Cape Empowerment Trust further averred that if Sanlam exercised its voting rights at the meetings scheduled for 7-8 February 2006, this would amount to implementing a merger without notification or obtaining approval which would be a contravention of section 13A(1) and (3) of the Act. Sanlam and Sancino's reply to this argument was that Sanlam had in fact obtained control of Sancino in 1998 in terms of section 12(2)(a) when it purchased the preference shares which constituted a majority of Sancino's issued share capital.

16. The Tribunal found in favour of Sanlam and Sancino's arguments.²⁷ It held that any shifts in the balance of power and control around 2002 when Sanlam acquired voting rights “*did not mean a change of control for the overall purpose of section 12*”²⁸ since simultaneous control is possible. The Tribunal also briefly considered the applicability of *Ethos* to this matter as it had been raised in argument but found that the two matters were distinguishable. The distinction being that in *Ethos* there had been a prior merger notification and a completed adjudication of control prior to the acquisition of a second form of control. In this case, there had been no prior notification because control was acquired at a time before notification was required by the Act. Moreover, after the relevant sections of the Act had come into effect, there had been no change of control. Instead Sanlam had acquired another form of control over Sancino. The Tribunal therefore found that no additional potential threat to competition came into being when Sanlam gained the majority voting rights in Sancino. Notification in those circumstances would have served no practical purpose.²⁹ Cape Empowerment Trust’s application was accordingly dismissed.
17. In [*Primedia Ltd and Others v Competition Commission and African Media Entertainment Ltd*](#)³⁰ (*Primedia Capricorn*) the Tribunal was called to determine whether or not Primedia would have joint or sole control over Kaya FM after the merger for which approval was sought. The Tribunal found that Primedia would not have sole control over Kaya FM in terms of sections 12(2)(a) to (c) or 12(2) (g).³¹ Similarly, the Tribunal found that there was neither convincing argument nor evidence that Primedia would have joint control over Kaya FM post-merger³² and accordingly approved the proposed merger without conditions.³³
18. African Media Entertainment Ltd (AME) then approached the CAC to review the Tribunal’s decision. In [*African Media Entertainment Ltd v Lewis NO and*](#)

²⁷ *Cape Empowerment* paras 49 and 54.

²⁸ *Cape Empowerment* para 54.

²⁹ *Cape Empowerment* para 60.

³⁰ 39/AM/May06.

³¹ *Primedia Capricorn* paras 67-76.

³² *Primedia Capricorn* para 79.

³³ *Primedia Capricorn* paras 80-81.

Others,³⁴ the CAC set aside the Tribunal's decision because it found that the Tribunal had erred on a point of law. According to the CAC, the Tribunal had conflated the question of control under section 12 with the enquiry under section 12A concerning the impact of the merger on competition in the defined market.³⁵ The matter was referred back to the Tribunal for re-consideration of the competition effects of a partial (minority) shareholding. The Tribunal handed down a second decision pursuant to the CAC's ruling in May 2008. The Tribunal again approved the merger without conditions. It addressed the CAC's finding that it had conflated the enquiry as to control with the enquiry as to the merger's effects on competition in a postscript to its decision.

19. In Caxton and CTP Publishers and Printers Limited v Media 24 (Pty) Ltd and Others³⁶ (Caxton CAC) the CAC was called to determine whether the joint control shared between Retief (a shareholder in Novus) and Media24 under an old prior agreement had been diminished by the provisions of a new agreement (the restated agreement) to the extent that Media24 acquired sole control of Novus which necessitated notification of the merger in terms of the Act. It was intended by the parties that the new agreement would result in the listing of Novus on the JSE.
20. As the court of first instance, the Tribunal³⁷ held that the new agreement was surrounded with ambivalence as it failed to make clear whether Retief would be totally deprived of control in Novus. Further, it was not shown whether Retief had exercised his powers of joint control at all in terms of the old agreement. In comparing the provisions of the old agreement to the new one, it was not clearly illustrated that Media24 would acquire sole control. The Tribunal accordingly found that that the new agreement did not constitute a change from joint to sole control and thus did not amount to a notifiable merger.³⁸

³⁴ *African Media Entertainment Ltd v Lewis NO and Others* (68/CAC/Mar/07).

³⁵ 68/CAC/Mar/07 para 60.

³⁶ 136/CAC/Mar15.

³⁷ *Caxton and CTP Publishers and Printers Limited v Media 24 (Pty) Ltd and Others* (020974).

³⁸ *Caxton* paras 96-111.

21. The matter was taken on appeal to the CAC. At the CAC, the matter turned on the proper interpretation of section 12(2)(g) of the Act.³⁹ The court held when looking at section 12(2)(g), one must have regard to the extent of influence the holder of such power would have when exercising it. Therefore, the focus was on the powers Retief *possessed* rather than the powers he *in fact exercised*. The factual enquiry to the actual powers exercised is irrelevant.⁴⁰
22. The old agreement illustrated that Retief had control in terms of section 12(2)(g) and the new agreement illustrated a dilution of Retief's powers as he had retained some powers and relinquished others. The new agreement was drafted in an effort to complement the listing of Novus on the Johannesburg Stock Exchange (JSE) and had to conform with section 66(1) of the new Companies Act of 2011, the JSE Listing Requirements and the King III Code. In terms of section 66(1) of the Companies Act, the business and affairs of a company must be managed by or under the direction of its board which has the authority to exercise all its powers and perform all its functions, except to the extent that the Companies Act or the Memorandum of Incorporation (MOI) provides otherwise. The new MOI for Novus did not mention the new agreement or derogate from the board's authority to exercise all power and perform all functions of the company. The absence of this derogation is consistent with the Listing Requirements and the King III Code. In the new agreement, Retief's powers were diluted to such an extent that he could not be seen to enjoy the kind of influence contemplated in section 12(2)(g) mainly because he was subject to being overridden at any time by the CEO and the board, which included Media24.⁴¹ Further, the JSE would not permit Novus' listing unless the MOI placed management control squarely in the board's hands. The CAC ultimately found that the new agreement amounted to a move from joint to sole control and thus the Tribunal erred in finding that the implementation of the new agreement was not a notifiable merger in terms of section 12(2) of the Act.⁴²

³⁹ *Caxton (CAC)* para 38.

⁴⁰ *Caxton (CAC)* paras 38, 49 and 51.

⁴¹ *Caxton (CAC)* para 72.

⁴² *Caxton (CAC)* para 81.

23. Recently, the Constitutional Court (ConCourt) in [Competition Commission v Hosken Consolidated Investment Holdings and Another](#)⁴³ had to determine two issues. The first was whether it was appropriate, in the circumstances, to grant a declaratory order and secondly, whether a merger transaction required notification where the Commission had granted prior approval to an entity for a merger that resulted in it acquiring *de facto* control but subsequently transformed the nature of this control to *de jure* control. Both these questions were answered in favour of the respondents, Hosken Consolidated Investment Holdings (HCI) and Tsogo Sun (Tsogo).
24. In 2014, HCI sought the approval from the Commission of a merger transaction wherein SABMiller sought to disinvest its shareholding in Tsogo. At the time, HCI held 39% in Tsogo and, post-merger, it would hold 47.61% making HCI the largest shareholder in Tsogo and an acquirer of sole control in terms of section 12(2)(c) and (g) of the Act.⁴⁴ It is important to note that, as part of the 2014 transaction, HCI informed the Commission of its intention to acquire sole control of Tsogo in the future in terms of section 12(2)(a), which would take HCI's holding in Tsogo above 50%. At the time of the 2014 notification however, HCI had not managed to reach the 50% shareholding as contemplated under section 12(2)(a).⁴⁵
25. The Commission investigated the 2014 merger notification and recommended to the Tribunal that the transaction be approved unconditionally as it *inter alia*, raised no competition concerns and no job losses were envisaged at the time. The Tribunal accordingly approved the merger.⁴⁶
26. At the time of the 2014 notification, HCI also held a 51.7% controlling shareholding in various gaming and leisure activities through Niveus Investments Limited (Niveus) which wholly owned a number of entities including GameCo, which held all of Niveus' South African gaming interests (other than

⁴³ [2019] ZACC 2.

⁴⁴ HCI ZACC para 4.

⁴⁵ HCI ZACC para 7.

⁴⁶ HCI ZACC para 8.

sports betting and lottery interests). HCI's gaming interests were held under Niveus and its hotel and casino interests through Tsogo.⁴⁷

27. In 2017, HCI intended to restructure its gaming interests (excluding its sports betting and lottery interests) held under Niveus to Tsogo. The intended restructure would effectively increase HCI's shareholding in Tsogo to more than 50%, and therefore HCI would exercise *de jure* control over Tsogo in terms of section 12(2)(a) of the Act ("the 2017 transaction").⁴⁸
28. In 2016, HCI approached the Commission to seek an advisory opinion on the intended restructure in order to ascertain whether such would require notification in terms of the Act. HCI set out the rationale for its restructure, highlighting that it had already obtained control over Niveus and Tsogo and that the restructure would merely consolidate its gaming interests under one entity.⁴⁹
29. The Commission issued an information request for further details about HCI's shareholding in Tsogo and Niveus which HCI duly complied with. After considering the matter in greater detail, the Commission prefaced its advisory opinion by stating that its opinion was not binding on the parties.⁵⁰ Nevertheless, the Commission was of the view that the intended restructure was a notifiable transaction as HCI would be crossing a so-called "bright line" in terms of section 12(2)(a), which triggered notification of the transaction to the competition authorities. In addition, the Commission indicated its desire to assess whether market conditions had changed given that some time had elapsed since the 2014 transaction. Further, the Commission thought it was necessary to investigate public interest issues given that the 2017 transaction would involve a transfer of a business.⁵¹
30. HCI then approached the Tribunal on an urgent basis for a declaratory order, declaring that it was not required to notify its intended restructure in terms of the provisions of the Act. The Commission contended that HCI's intended

⁴⁷ HCI ZACC para 8.

⁴⁸ See pre- and post-merger corporate structure on para 11 (pgs. 6-7) of the HCI ZACC judgment.

⁴⁹ HCI ZACC para 12.

⁵⁰ HCI ZACC para 14.

⁵¹ HCI ZACC para 17-19.

restructure constituted a notifiable transaction within the meaning of section 12(2)(a).⁵²

31. In its decision, the Tribunal first considered whether it had jurisdiction to entertain HCI's application for a declaratory order in light of the fact that the transaction had not in fact been notified and that the Commission's opinion was only advisory and not binding on the parties. The Tribunal found against HCI on this point principally on the basis that its jurisdiction is only triggered once a transaction has been notified with the Commission.⁵³ The Tribunal therefore found that it lacked jurisdiction to consider this matter and therefore could not exercise its powers under section 27(1) and section 58 of the Act.
32. Although the Tribunal found it lacked jurisdiction to consider the matter, it nevertheless considered whether or not it ought to exercise its discretion in favour of HCI and Tsogo assuming that its jurisdiction was triggered by a direct application to it. It found that even if its jurisdiction was triggered by a direct application, there would be no justification for the exercise of its discretion under 27(1)(d) in favour of HCI and Tsogo.⁵⁴ In the first instance the Tribunal's jurisdiction to consider disputes about whether a merger is within the jurisdiction of the Act is regulated by CTR 31(1)(c) and CCR 33.⁵⁵ Granting relief to HCI and Tsogo would have the effect of bypassing the Commission's investigation role and the provisions of CTR 31 and 33. Furthermore the Commission's advisory opinion is not binding. Hence there was no live dispute between the parties and that HCI had alternative remedies it could pursue such as, implementing the transaction without notification, notifying the transaction, and notifying the transaction under protest and question this notification before the Tribunal in terms of CTR31(1)(c) as illustrated in the *Ethos* case.⁵⁶
33. HCI and Tsogo then appealed the matter to the CAC where it identified two issues to be decided.⁵⁷ First, whether the Tribunal had jurisdiction to entertain

⁵² HCI ZACC para 20 – 21.

⁵³ HCI ZACC para 22.

⁵⁴ HCI ZACC para 24.

⁵⁵ HCI ZACC para 23.

⁵⁶ HCI ZACC para 24. See *Ethos* case as discussed above in this section.

⁵⁷ HCI ZACC para 25.

a matter that was not notified with the Commission in terms of section 13A. Secondly, whether a party was again required to notify a transaction to the Commission when it had previously sought and obtained approval must again obtain approval to transact with that entity.

34. The CAC held that the Tribunal's powers in terms of sections 27(1) and 58 were wide enough to include a declaratory order. Secondly, in many other instances, the Tribunal has issued declaratory orders before. Thirdly, it would be incomprehensible that the Tribunal would have the power to declare a transaction as a merger, prevent the implementation of a merger prior to approval but somehow not have the power to issue a declarator when approached by a party arguing that a transaction is not notifiable.⁵⁸ In addition, the CAC pointed out that given the Tribunal and the CAC's exclusive jurisdiction to determine competition law matters, if the Tribunal refuses to assume jurisdiction to decide a declarator where the transaction had not been notified in terms of the Act, the parties would not be able to approach the High Court for relief.⁵⁹ In essence, the parties would be deprived of their right to access to courts under section 34 of the Constitution. The CAC concluded that the Tribunal had jurisdiction to decide the declaratory order.⁶⁰
35. Having made this finding, the CAC considered whether the Tribunal should have exercised its discretion in favour of HCI and Tsogo.⁶¹ The CAC held that there was in fact a live dispute between the parties and that a declaratory order would provide some legal certainty to the parties concerned.⁶² The CAC held that the intended restructure was not notifiable because HCI had already notified *de facto* control over Tsogo, and a party did not have to notify the Commission when *de jure* control was subsequently acquired. Merger approval is a "*once-off affair*".⁶³ The CAC concluded that the notification could not be required by the Commission simply to reassess the implication of the intended

⁵⁸ HCI ZACC para 26.

⁵⁹ Ibid.

⁶⁰ HCI ZACC para 27.

⁶¹ Ibid.

⁶² Ibid.

⁶³ HCI ZACC para 28.

restructure.⁶⁴ The effects of the acquisition of control are sought on a forward-looking assessment of the likelihood of competition and public interest. Once this exercise has been complete, it cannot be re-determined.⁶⁵

36. The Commission thereafter sought leave to appeal to the ConCourt against the decision of the CAC, which was granted.⁶⁶ The ConCourt was tasked to determine whether the Tribunal should have granted the declaratory order and whether the intended restructure was notifiable in terms of the Act.
37. At the ConCourt, the Commission argued that there was a merger and the only question was whether such merger was notifiable. HCI and Tsogo contended that there was no merger in terms of section 12 and thus notification was not required. It relied on the 'once-off' principle, supported by the assertion that the 2017 transaction had received approval in 2014.⁶⁷
38. With regard to whether there was a merger and, if so, whether it was notifiable - the ConCourt firstly highlighted the statutory provisions of the Act that necessitated parties to notify their transactions with the Commission. This obligation stems from section 13A(1) and (3) read with section 59(1)(d)(i) of the Act. The Court then set out the two jurisdictional facts that ought to be satisfied before one concludes that a transaction is notifiable: the first, is that the transaction must meet the definition of a merger under section 12 and secondly, the transaction must satisfy the financial thresholds for an intermediate or large merger. It is clear that the substantive consideration of a merger under section 12A only applies once the transaction constitutes a merger under section 12.⁶⁸
39. The ConCourt went on to outline the forms in which control could take place under section 12(2) of the Act. It recognised that subsection (2) encompasses clear ideas of control such as subsection (2)(a) which would constitute *de jure* control and more broader ideas of control such as subsection 2(g) that

⁶⁴ HCI ZACC para 28.

⁶⁵ HCI ZACC para 29.

⁶⁶ See further HCI ZACC paras 31-34 including the issue of condonation.

⁶⁷ HCI ZACC para 39.

⁶⁸ HCI ZACC para 38.

envisages the power to materially influence the policy of a firm to the extent that a firm can exercise control in terms of subsection 2(a)-(f), which would constitute *de facto* control. The ConCourt recognised that “*material influence*” is an important consideration when looking at section 12(2)(g).⁶⁹ It also noted, as stated in previous Tribunal decisions, that the list in section 12(2) is not an exhaustive one.

40. The ConCourt then considered the concept of “*bright lines*” under section 12(2) in reference to *Ethos*. The ConCourt was of the view that although subsections (2)(b)-(g) constituted bright lines, these were not as “*bright*” as subsection (2)(a). In the instance of section 12(2)(g), it was anything but bright. The ConCourt emphasised that nowhere in section 12(2) was it suggested that one form of control was more important than the other. The ConCourt recognised that each of the seven instances of control were freestanding on their own and each contemplated some form of control.⁷⁰
41. The ConCourt then considered whether the subsequent change from *de facto* control to *de jure* control required notification and whether a party could rely on the ‘once-off’ principle to avoid subsequent notification.⁷¹
42. HCI and Tsogo argued that once HCI acquired sole *de facto* control of Tsogo by virtue of section 12(2)(g) it was not required to notify if it subsequently obtained another form of control in terms of section 12(2). The ConCourt found in favour of the HCI and Tsogo on the basis that this approach was supported by case law. Firstly, if the legislature had required that a new notification take place after the prevailing form of control changed to *de jure* control, it would have done so.⁷² The ConCourt relied on the approach adopted in *Ethos* in this respect which was further supported in its own decision in *S.O.S.*⁷³ Once a firm

⁶⁹ *HCI ZACC* para 44.

⁷⁰ *HCI ZACC* para 48.

⁷¹ *HCI ZACC* para 51.

⁷² *HCI ZACC* para 54.

⁷³ See further para 56-57. *S.O.S Support Public Broadcasting Coalition v South African Broadcasting Corporation (SOC) Limited* 2018 (12) BCLR 1533 (CC).

has crossed one bright line, the crossing of another did not necessitate a new notification.⁷⁴

43. Recognising the 'once-off' principle, the ConCourt observed the entire schema of the Act and the powers of the Commission and held that the 'once-off' principle did not shackle the Commission from investigating where it suspected potential irregularities. The court therefore held that the 'once-off' principle did not imply that the Commission could not investigate further. It simply meant that the acquiring firm did not need to re-notify.⁷⁵
44. The Commission, if it was of the view that the 2017 transaction was markedly different from that of 2014, would be empowered to exercise its wide powers under the Act such as those envisaged under section 15 and 16(3) – revoke merger approval of the 2014 transaction if the 2017 transaction resulted in adverse effects on employment, for instance. Therefore the court held that the CAC's declaratory order did not prevent the Commission from investigating the merger.⁷⁶
45. The ConCourt further held, in accordance with the CAC, that the Tribunal could issue a declaratory order even if a transaction was not notified to the Commission, prior to the Tribunal being approached by a party. This was because of the wide powers given to the Tribunal in terms of sections 27(1) and 58 of the Act.
46. In terms of the issue of a 'live dispute' the ConCourt held that there was indeed such a dispute between the parties.⁷⁷ The mere fact there was a difference in views between the parties concerning a jurisdictional issue, suggested that there was a live dispute. The parties had a legal interest in whether the transaction was a notifiable one.

⁷⁴ Para 56-57. *S.O.S Support Public Broadcasting Coalition v South African Broadcasting Corporation (SOC) Limited* 2018 (12) BCLR 1533 (CC).

⁷⁵ *HCI ZACC*, para 59.

⁷⁶ *HCI ZACC* paras 66 – 71.

⁷⁷ *HCI ZACC* para 85.

47. The ConCourt upheld the appeal on the basis that it was always within the Commission's power to investigate the assurances provided by the merging parties in the 2014 merger transaction in terms of section 15 and 16(3) of the Act.⁷⁸
48. Froneman J, at the end of Basson J's judgment, concurred but cautioned that this decision was merely to clarify the legal position. It was not to say that the Tribunal may be flooded with requests for declaratory orders of this kind.⁷⁹ Froneman J stated that part of the considerations for the Commission in bringing the appeal before the ConCourt was that of being afforded more time to investigate competitive and public interest issues. The Act's objectives would not be served by granting declaratory orders where the Commission simply needs more time to investigate. In exercising its discretion in granting declaratory orders, the Tribunal must take this into account.⁸⁰

⁷⁸ *HCI ZACC* para 89.

⁷⁹ *HCI ZACC* para 93.

⁸⁰ *HCI ZACC* para 93.

Merger Evaluation

1. The Act sets out two-stage analysis for mergers. First, the Competition Commission or the Tribunal must conduct a competition assessment and secondly, evaluate the public interest issues. Section 12A of the Act sets out in detail how the two-stage analysis ought to be conducted.
2. Section 12A(1) of the Act states that when considering a merger, the Commission or the Tribunal must initially determine “*whether or not the merger is likely to substantially prevent or lessen competition...*”
3. The competition assessment can be divided into two stages. Firstly, it must be determined whether the “*merger is likely to substantially prevent or lessen competition*”. If it is found that the merger is anti-competitive, it must be established whether the merger has pro-competitive consequences that outweigh those negative effects. These two processes are regarded as the competition evaluation of a transaction. Regardless of whether the transaction leads to a substantial lessening or prevention of competition (SLC), the transaction must then still be evaluated for its impact on public interest aspects as listed in the Act.

Substantial lessening or prevention of competition

4. In doing this analysis, section 12A of the Act requires the assessment of factors listed under section 12A(2).
5. Section 12A(2) states the when assessing the strength of competition in the relevant market and the probability the that firms in the market after the merger will behave competitively or cooperatively, the Commission or the Tribunal must consider the following factors –
 - (a) *the actual and potential level of import competition in the market;*
 - (b) *the ease of entry into the market, including tariff and regulatory barriers;*
 - (c) *the level and trends of concentration, and history of collusion, in the market;*
 - (d) *the degree of countervailing power in the market;*

- (e) *the dynamic characteristics of the market, including growth, innovation, and product differentiation;*
- (f) *the nature and extent of vertical integration in the market;*
- (g) *whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail;*
- (h) *whether the merger will result in the removal of an effective competitor.*

6. It must be noted that the new amendments have added additional factors that must be considered:

- (i) *the extent of ownership by a party to the merger in another firm or other firms in related markets;*
- (j) *the extent to which a party to the merger is related to another firm or other firms in related markets, including through common members or directors; and;*
- (k) *any other mergers engaged in by a party to a merger for such period as may be stipulated by the Competition Commission.*

7. This list set out is not a closed one and other factors not listed therein could be considered. It also can be considered whether the merger may result in the merging parties engaging in collusive conduct.¹ In determining the competitive consequences of a merger, the intention, motive or rationale of the merging parties is important.

8. Section 12A(3) then requires that after considering the factors set out in 12A(2), if it appears that the merger is likely to substantially prevent or lessen competition, it must be determined:

- “(a) *if it appears that the merger is likely to substantially prevent or lessen competition, then determine –*
 - (i) *whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of*

¹ *Sasol Ltd/Sasol Oil Ltd* (101/LM/Dec04) para 221.

competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and

(ii) *whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3); or*

(b) *otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3)."*

9. Before the competition authorities delve into the competition assessment, they must first consider the relevant markets which would be affected by the proposed merger transaction.

Market definition

10. In [Medicross Healthcare Group \(Pty\) Ltd v Competition Commission](#)² (*Medicross*) the CAC stated that the competition analysis in mergers must be "preceded by a proper definition of the relevant market". The failure however to define the exact and precise market definition has not been viewed as a fatal defect to the assessment of a merger. In [Primedia Ltd v Competition Commission](#)³ (*Primedia*) the Tribunal held that the role of market definition should not be overstated. The Tribunal stated "[a]lthough we are obliged in terms of the Act, to examine the strength of competition in the relevant market we are not obliged to determine, when this is not feasible, a closed list of who may be considered to participate in that market."⁴ In this case, the Tribunal then concentrated on the relationship between firms relevant to the merger.
11. In determining the relevant market, the CAC in *Medicross*⁵ stated that regard must be had to the totality of evidence in determining the relevant market. Such

² 55/CAC/Sep05 para 25.

³ 39/AM/May06 09/05/2008 para 70.

⁴ *Primedia* para 70.

⁵ 55/CAC/Sept05 para 34.

evidence would include testimony of witnesses called by the Tribunal and the parties to the merger transaction.

12. A market has two dimensions: the product market and the geographic market. The market must be defined with reference to a product or group of products and a territory within which those products are sold.
13. Defining the relevant market is fundamental to assessing whether firms are competitors or potential competitors. Hence the jurisprudence in this regard is immensely voluminous and beyond the scope of this handbook. Users are encouraged to refer to well established principles of market definition in the Tribunal's cases published on its website, well regarded authorities on the subject such as Hovenkamp,⁶ Whish,⁷ Motta,⁸ the European Commission's (EC) guidelines⁹ and the International Competition Network (ICN) guidelines.¹⁰
14. We deal below with the two further grounds set out in section 12A.

Efficiency defence

15. In *Trident Steel (Pty) Ltd v Dorbyl Ltd*,¹¹ (*Trident Steel*) the Tribunal set out several important questions that should be asked when an efficiency defence is raised:¹²
 - a) *Who bears the onus of proving that a merger can be justified on the basis of efficiency?*
 - b) *When should a fact be considered in determining the efficiencies of a merger and when should it be considered in determining whether the merger is anti-competitive or in the public interest?*
 - c) *What may be considered as an efficiency gain?*

⁶ P Areeda and Hovenkamp *Antitrust law*: 2 2007 (Wolters Kluwer Law & Business).

⁷ R Whish and D Bailey *Competition Law* 9 ed 2018 (Oxford University Press: New York).

⁸ M Motta *Competition Policy: Theory and Practice* 2004 (Cambridge University Press: New York).

⁹ *Commission Notice on the definition of relevant market for the purposes of Community competition law* (C 372/5) available: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209(01)&from=EN).

¹⁰ ICN *Merger Guidelines Workbook* April 2006 available:

https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_MergerGuidelinesWorkbook.pdf

¹¹ 89/LM/Oct00.

¹² *Trident Steel* para 49.

- d) *Will the gain have to be merger specific and, if so, how should the requirement of merger specificity be applied?*
- e) *How should an efficiency gain be balanced against anti-competitive effects?*

Who bears the onus of proving that a merger can be justified on the basis of efficiency?

16. The merging parties bear the onus of proving efficiencies as they will have the information to do so and therefore are placed in the best position to do so.¹³

When should a fact be considered in determining the efficiencies of a merger and when should it be considered in determining whether the merger is anti-competitive or in the public interest?

17. Section 12A(1)(a)(i) is clear that the assessment of efficiencies will only be relevant once it is established that the merger prevents or lessens competition.¹⁴ The question of whether a particular fact causes a merger not to be anti-competitive at all, and the question of whether it is relevant in showing that an anti-competitive merger is justifiable on efficiency grounds, must be distinguished and considered separately under the Act.¹⁵

What may be considered as an efficiency gain?

18. Three types of efficiencies are recognised. These are dynamic efficiencies, pecuniary or commercial benefits and productive efficiencies.¹⁶ Dynamic efficiencies are those of innovation. Pecuniary efficiencies include commercial benefits. Productive efficiencies can take the form of plant level, multi-plant level, distribution, capital cost, administration, as well as research and development, efficiencies.¹⁷ Pecuniary efficiencies are not considered as pro-competitive gains in defence of an SLC. In *Trident Steel* the Tribunal stated that “*pecuniary efficiencies would not constitute real economies nor would*

¹³ *Tongaat-Hulett Group Ltd/Transvaal Suiker Bpk* 83/LM/Jul00 para 100; *Sasol Ltd/Sasol Oil Ltd* 101/LM/Dec04 para 545; *Trident Steel (Pty) Ltd/Dorbyl Ltd* 89/LM/Oct00 para 51.

¹⁴ *Trident Steel* para 41.

¹⁵ See Sutherland and Kemp “Competition law of South Africa” (LexisNexis). This discussion is under “Pro-competitive efficiency of horizontal mergers”.

¹⁶ *Ibid.*

¹⁷ *Trident Steel* para 56.

*those that result in a mere redistribution of income from the customers, suppliers or employees to the merged entity”.*¹⁸

Will the gain have to be merger specific and, if so, how should the requirement of merger specificity be applied?

19. A merger will most likely be saved if it can be shown that the merger pro-competitive gains are in fact merger specific. In other words, the pro-competitive gains cannot be obtained in any other manner. It must be determined whether there are realistic, and less restrictive, alternative ways in which the same pro-competitive gains can be achieved.¹⁹

20. In addition, efficiencies claimed by parties must be verifiable. Competition authorities should be careful in considering efficiencies as they are “*easy to assert and sometimes difficult to disprove*”.²⁰ Efficiencies that are vague and speculative that cannot be verified by reasonable means should not be taken into account.²¹ Competition authorities should be hesitant to accept evidence of efficiencies that is generated outside the normal business planning processes. The Competition Appeal Court has nevertheless found that “*verification of the existence of such efficiencies, rather than their precise quantification, should be emphasised*”.²² Moreover, the efficiencies must be substantial and timely.²³

How should an efficiency gain be balanced against anti-competitive effects?

21. The Act requires that efficiencies must be traded-off against anti-competitive effects. The efficiencies must “*offset the effects of any prevention or lessening of competition*”.²⁴

¹⁸ *Trident Steel* para 81.

¹⁹ *Pioneer Hi-Bred International v Competition Commission* (113/CAC/Dec10 28/05/2012) paras 48, 52.

²⁰ *Trident Steel* para 55.

²¹ *Trident Steel* para 63.

²² *Pioneer Hi-Bred International* (CAC) para 37.

²³ *Trident Steel* para 91.

²⁴ *Tongaat-Hulett Group* par 99.

22. When performing this analysis, the Tribunal has cautioned against a formulaic approach. In *Trident Steel*, the Tribunal stated that:

*“[t]he case law and the literature suggest that two approaches can be followed; a formulaic approach such as that favored in the Superior case and a discretionary approach such as the US Merger Guidelines. The formulaic leads one to approach the problem as an economist would do in a classroom.”*²⁵

23. The Tribunal prefers a discretionary approach. It pointed out that:

*“[w]hen adopting the flexible approach the competition adjudicator relies on its discretion rather than an equation. But the adjudicator can’t begin exercising its discretion unless it has formulated a policy approach to guide it in its evaluation. The danger with this approach is that it can lead to uncertainty – how will parties know in advance whether claims of efficiency will be accepted? Nevertheless, we would not see these two approaches as mutually exclusive and a flexible approach that recognises and weighs the evidence of a formulaic result has merit.”*²⁶

24. From this, the Tribunal formulated its own test:

*“where efficiencies constitute “real” efficiencies and there is evidence to verify them [efficiencies] of a quantitative and qualitative nature, evidence that the efficiencies will benefit consumers, is less compelling. On the other hand, where efficiencies demonstrate less compelling economies, evidence of a pass through to consumers should be demonstrated and although no threshold for this is suggested, they need to be more than trivial, but neither is it necessary that they are wholly passed on. The test is thus one where real economies and benefit to consumers exist in an inverse relationship”*²⁷

Public interest

25. Subsection 12A(3) requires the competition authorities to determine “*whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3)*”.

²⁵ *Trident Steel* para 65.

²⁶ *Trident Steel* para 66.

²⁷ *Trident Steel* para 81.

26. Prior to the 2009 amendments, subsection (3) contained only four factors to be considered, namely those in subsections (3)(a) – (d). The amendments introduced an additional factor under subsection (3)(e) and changed the language of subsections (3)(c) and (d) as indicated below in the underlined portions of the text.

27. Subsection (3) now reads as follows:

“When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on-

- (a) a particular industrial sector or region;*
- (b) employment;*
- (c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and*
- (d) the ability of national industries to compete in international markets.*
- (e) the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in the market.”*

28. The public interest test may lead to the rejection of a merger which is not anti-competitive, but it could also save a merger that would have been rejected on the basis of pure competition criteria.

29. In [Anglo American Holdings Ltd and Kumba Resources Ltd](#)²⁸ after the Tribunal concluded that the merger was unlikely to result in any substantial lessening of competition, it stated that it must nevertheless evaluate whether the merger can be prohibited on public interest grounds.

30. The Tribunal in [Shell South Africa \(Pty\) Ltd/Tepco Petroleum \(Pty\) Ltd](#)²⁹ (Shell) said:

²⁸ 46/LM/Jun02 pars 137–139.

²⁹ 66/LM/Oct01.

“It is important to emphasize that in terms of the Act our assessment of the public interest impact of the transaction may lead to the prohibition of (or the imposition of conditions on) a pro-competitive merger. Or it may result in us approving an anti-competitive merger. Hence, in balancing public interest and competition we are obliged to consider whether a merger that passes muster on the competition evaluation nevertheless falls to be prohibited because of its negative impact on any of the specified public interest factors including, in terms of Section 12A(3)(c), ‘the effect that the merger will have on the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive’.”

31. In addition:

“...we are obliged to consider whether a ‘bad’ merger, that is a merger that will lead to a substantial lessening of competition, should nevertheless be approved because of its positive impact on the public interest, including the competitive potential of firms owned or controlled by historically disadvantaged persons. Note that the Act does not otherwise guide us in balancing the competition and public interest assessments except insofar as Section 12A(1)(b) requires that the public interest grounds should be ‘substantial.’”

32. In the assessment of a merger the competition analysis and the public interest will sometimes point in the same direction and, in such cases, competition authorities can utilise public interest to bolster their decisions on competition grounds.

33. In [Telkom SA Ltd and Business Connexion Group Ltd](#)³⁰ (*Business Connexion*) the Tribunal accepted and recognised that public interest can be used to strengthen a competition finding where there is a clear relationship between the conclusion from the competition assessment and the public interest finding. The Tribunal further stated that *“while the competition and public interest analyses are, following the CAC decision in Medicross, not to be conflated, nor*

³⁰ 51/LM/Jun06 para 297.

*can they be hermetically sealed from each other in the manner contended for by the merging parties”.*³¹

34. Merger specificity in the competition assessment also applies to the public interest analysis. Public interest concerns can be considered only in so far as they are caused by the merger. It is not for competition law to venture beyond the specific transaction and address concerns unrelated to the merger. The Tribunal in [Wal-Mart Inc and Massmart Holdings Ltd](#)³² stated that “*unless the merger is the cause of the public interest concerns, we have no remit to do anything about them*”.³³
35. We now consider the nature and application of the specific factors under subsection 3 of the Act.

A particular industrial sector or region

36. Various sectors and industries have been considered by the Tribunal in merger transactions where the merger was thought to have a negative impact on a particular sector or region. In the merger between [Nasionale Pers Ltd and Education Investment Corporation Ltd](#),³⁴ the Tribunal had to evaluate a merger in the education sector. The Tribunal noted that education is central to the South African economy and society, and that apartheid has left a scar upon, and massive challenges to, this sector. Education is particularly important in addressing the legacy of apartheid, which left many students unprepared for the world of work and so hampered the social and economic development of South Africa. The Tribunal accordingly paid careful attention to the merger to protect the access of prospective students to education. This was clearly regarded as significant in terms of section 12A(3)(a), but also considered this as part of its competition assessment in terms of section 12A(1).³⁵ The Tribunal approved the merger subject to conditions. In relation to the public interest, the Tribunal required the merged entity over the next two years, to identify and

³¹ *Business Connexion* par 300.

³² [2011] 1 CPLR 145 (CT).

³³ *Walmart* para 32.

³⁴ 45/LM/Apr00.

³⁵ *Nasionale Pers* paras 24, 46 – 50.

participate in joint programmes with the Department of Education aimed at building capacity in public education.³⁶

37. In [Telkom v Business Connexion](#),³⁷ the Tribunal considered the impact of the merger on the information and communication technology sector under section 12A(3)(d).

38. In this merger, the Tribunal found that there was a clear relationship between its competition finding and harm to the public interest arising from the mergers' impact on a '*particular industrial sector*' (12A(3)(a)) and on '*the ability of national industries to compete in international markets*' (12A(3)(d)).³⁸ The Tribunal noted that the merger was taking place in a pivotal segment of the ICT sector with implications for the sector as a whole. Secondly, the ICT sector has an unusually significant impact on the international competitiveness of South African firms generally and lastly, it is widely accepted that the character and effectiveness of the regulatory framework plays an important role in the development of the broader ICT sector, most specifically the telecommunications components of the sector.³⁹

39. The Tribunal prohibited this merger on competition grounds but recognised that its decision was bolstered by the adverse public interest impact.

40. In [Glencore International PLC v Xstrata PLC](#),⁴⁰ a cause for concern arose regarding the future of coal prices in the domestic market and the impact of this on South Africa's electricity prices. The Tribunal acknowledged that while this was of concern, these concerns were industry-wide occurring separate to the merger transaction which could be addressed through other policy instruments.⁴¹

³⁶ *Nasionale Pers para 55.*

³⁷ (51/LM/Jun06).

³⁸ *Business Connexion para 298.*

³⁹ *Business Connexion para 301.*

⁴⁰ 33/LM/Mar12.

⁴¹ *Glencore paras 103 -104.*

41. In the recent case of [Mediclinic Southern Africa \(Pty\) Ltd and Matlosana Medical Health Services \(Pty\) Ltd](#),⁴² concerning a merger in the in-patient private hospital services market, the Tribunal noted that the healthcare services sector is an essential public good which the Constitution protects under section 27. The merger would have a significant effect on health care costs of both insured and uninsured patients living in the rural Potchefstroom and Klerksdorp region. As a result of the merger, patients would have less choice of cheaper hospitals post-merger.⁴³ In light of the public interest context, the Tribunal found that the merging parties did not raise any positive impacts on public interest nor did they tender adequate or appropriate remedies that would serve a permanent solution to the merger.⁴⁴

Employment

42. The competition authorities are enjoined by the Act to take into account the effect of the merger on employment. Not only is this prescribed by 12A(3)(b), but this obligation must also be read in the context of section 2(b) of the Act which states amongst other purposes that the Act, must promote and maintain competition in order to promote employment. In [Telkom SA Ltd and Another and Praysa Trade 1062 \(Pty\) Ltd](#)⁴⁵ the Tribunal stated that this means that “we must look at whether the merger will result in the creation or loss of employment and weigh this against other factors that we have to consider in terms of the Act”.⁴⁶
43. Because of the potential adverse effects a merger may have on employees, trade unions and employee representatives are given the right to access meaningful information (section 13A(2)); the right to timeous information (section 13A(2)) and the right to make meaningful representations to the Commission (CTR 37). This aspect was explored by the Tribunal in [Unilever plc and others v Competition Commission and others](#)⁴⁷ (*Unilever plc*). From a

⁴² LM124/Oct16.

⁴³ *Mediclinic* para 455.

⁴⁴ See *Mediclinic* paras 440 – 459.

⁴⁵ 81/LM/Aug00.

⁴⁶ *Telkom* para 39.

⁴⁷ 55/LM/Sep01.

public interest perspective, the main concern in this merger was job losses. The merging parties argued that the actual number of jobs lost constituted confidential information. The Tribunal rejected this argument. The Tribunal held that the number of jobs lost does not constitute 'confidential information' as defined by the Act. The unionised employees were aware of the number of jobs lost and the union was not under an obligation to not disclose this information.⁴⁸

44. Moreover, the Tribunal found that keeping the information confidential would deprive employees not only of the right to access to information that the legislature clearly gave them (via section 13A(2) and attendant form CC4(1) of the Rules of the Competition Commission), but also their right to make meaningful representation to the competition authorities on an issue which directly affected their interests.⁴⁹ It concluded that the legislature could never have intended that such information could be claimed as confidential.⁵⁰
45. As much as employees and unions have rights recognised under the Act, the Tribunal however, will not be prepared to interfere with issues pertaining to wages, collective bargaining and working conditions. The Tribunal in the *Walmart* merger stated the following:

“There could be grave dangers if the Tribunal imposed itself on labour issues that must be thrashed out at the bargaining table. Whilst in this case protecting existing collective rights is a legitimate concern that our public interest mandate allows us to intervene on because we are protecting existing rights from the apprehension that they may be eroded post-merger, we must be careful of how far down this path we go. Protecting existing rights is legitimate, creating new rights is beyond our competence.”⁵¹

⁴⁸ *Unilever Plc* para 38.

⁴⁹ *Unilever Plc* para 40.

⁵⁰ *Ibid.*

⁵¹ *Walmart* para 68.

46. The Appeal Court in the [*Minister of Economic Development and Others v Competition Tribunal and Others*](#)⁵² (*Walmart CAC*) case confirmed that it is not the function of competition law to interfere with the interests that should be promoted through collective bargaining, but that rights could be protected.⁵³
47. Employees and trade unions enjoy additional rights in terms of section 17(1)(d) of the Act which confers the right to appeal a merger decision of the Tribunal to the CAC.

Merger-specific retrenchments

48. If a merger will result in job losses, the Commission may seek to prevent this from occurring through the imposition of a moratorium on retrenchments. The leading case in this respect is the *Walmart* decision.
49. In that merger, Walmart sought to acquire 51% of the ordinary share capital of Massmart. After the Commission concluded its investigation, it recommended to the Tribunal an unconditional approval of the transaction.⁵⁴
50. Prior the commencement of the hearing, six trade unions⁵⁵ and three Ministers⁵⁶ informed the Tribunal of their intention to intervene in the merger (hereinafter collectively referred to as the “intervening parties”).
51. The merger, as indicated in the Commission’s recommendation, did not raise any competition issues. The interveners objected to the merger on the basis of various public interest concerns under section 12 of the Act. In summary, the interveners raised three concerns:
- (i) The merger would negatively affect the existing relationships that Massmart had with trade unions;

⁵² 110/CAC/Jul11, 111/CAC/Jun11.

⁵³ *Walmart CAC* para 136.

⁵⁴ The Commission did change its position at the end of the Tribunal hearings arguing for conditions related to employment

⁵⁵ SACCAWU, COSATU, FAWU, NUMSA, SMMEF and SACTWU

⁵⁶ Minister of Economic Development, Minister of Trade and Industry and Minister of Agriculture, Forestry and Fisheries.

- (ii) there would be a substantial scaling down of employment terms and conditions within the merged entity and amongst the merged entity's competitors; and
- (iii) the merger would cause a marked increase in the importation of goods at the expense of locally manufactured goods, thereby reducing pre-merger levels of local procurement and causing substantial job losses in the South African manufacturing and agro-processing sectors, as well as amongst the merged entity's suppliers.

52. In order to cure these concerns, the interveners proposed a number of remedies ranging from a prohibition of the merger to a wide set of conditions addressing the concerns. Of these remedies tendered, the most contentious between the parties was the imposition of a local procurement quota on the procurement policy of the merged entity post-merger. Another issue considered by the Tribunal was in relation to the retrenchments of 503 employees by Massdiscounters (a division of Massmart) in June 2010 which the trade unions argued occurred as a result of the merger.

53. In an effort to alleviate the concerns raised by the interveners, the merging parties offered a number of undertakings: (i) no merger related retrenchments would occur for a period of 2 years; (ii) the current relationship Massmart has with the trade unions would remain unchanged and the merged entity will continue to recognise SACCWU for a period of three years post-merger; (iii) the 503 employees retrenched in July 2010 would be given preference for re-employment when employment opportunities arose within the merged entity and (iv) the merged entity would establish a R100 million fund for the development of suppliers and small, micro and medium enterprises ("SMMEs") in South Africa.

54. In this subheading we shall only explore the issue surrounding the merger specificity of the July 2010 retrenchments. The issue of local procurement will be dealt with under the subheading "*the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive*" below.

55. The Tribunal first outlined that in circumstances where the merging parties offer remedies to address concerns raised by third parties (or interveners) the Tribunal must examine the adequacy of the conditions. In other words, the conditions must sufficiently and adequately address the public interest concerns raised. The Tribunal found that the conditions were satisfactory.
56. The Tribunal espoused two important principles when considering public interest conditions. Firstly, subject matter and substantiality are not the only limitations to bear in mind. Second, the public interest issues must be merger specific. In other words, these issues must have arisen as a result of the merger. If they fall outside the merger, the Tribunal need not concern itself with such issues. In addition, the Tribunal noted that its jurisdiction to consider public interest issues does not extend to concerns that fall outside an industry that is unrelated to the proposed merger before it.⁵⁷

In relation to the employment moratorium condition, the Tribunal was of the view that given the probabilities of job creation were more likely than job losses going forward, in these circumstances a two-year moratorium on merger related retrenchments was adequate.⁵⁸

57. At issue was whether the retrenchment of 503 employees in July 2010 was merger related. SACCAWU alleged that these retrenchments came about in an anticipation of the merger. SACCAWU's submission was not based on any direct evidence but on an inference about the timing of the retrenchments relative to the final phases of the negotiations in respect of the merger.⁵⁹ Massmart submitted that the retrenchments occurred as a result of operational reasons independent of any merger specific consideration. A second group of retrenchments occurred when Massmart was conducting a process of re-engineering its regional distribution centers as it needed fewer employees in these centers and so a number of them were retrenched. SACCAWU disputed

⁵⁷ *Walmart* para 35.

⁵⁸ *Walmart* para 37.

⁵⁹ *Walmart* para 45.

this stating that this was a strategy by Massmart to use the services of labour brokers instead of full-time employees.⁶⁰

58. The number of employees retrenched was not a disputed issue. What was disputed was the remedy. SACCAWU sought the Tribunal to impose a condition ordering re-instatement or re-employment of all the affected employees.⁶¹ Alternatively, that the affected employees be the first to be hired as employment opportunities arise in the future in the Massmart group as a whole. The Tribunal held that SACCAWU bore the burden of showing that the retrenchments were merger specific. Only then would the burden of justification shift to the merging parties. The Tribunal was of the view that SACCAWU had not been able to cross this first hurdle. Massmart had given plausible reasons for the retrenchments that are not merger specific. SACCAWU would need to show on a balance of probabilities that this explanation is untrue and that but for the merger, the prior retrenchments would not have happened. It had not been able to prove this.⁶² The Tribunal's reasons were based on the following:

- a. At the time, Massmart was one of three companies that Walmart considered buying and all parties had signed confidentiality agreements. The day Walmart decided to go with Massmart coincided with the day the deal was announced (27 September 2010). Although there were discussions before then about the deal, this was a part of commercial negotiation between the firms. There may have been some coincidence that the retrenchments occurred during the time of deliberations and negotiations with Walmart, but this was no causality.⁶³
- b. The coincidence in timing of the deal's imminence with the retrenchments was not strong enough to show its connection. Even if the operational justification for the retrenchments were exaggerated this might make, at best for the union, an unfair retrenchment scenario, but not a merger linked one. There was no evidence for instance that

⁶⁰ *Walmart* para 47.

⁶¹ *Walmart* para 49.

⁶² *Walmart* para 51.

⁶³ *Walmart* para 53.

Walmart was requiring Massmart to engage in these particular retrenchments or that it knew of them at the time.⁶⁴

- c. There was nothing in this documentation that suggested that Walmart was informed of the retrenchments or showed a specific interest in day to day employment issues at Massmart.⁶⁵
- d. Prior to 2010, Walmart had a third party prepare a document for it on, *inter alia*, labour disputes. Labour conflict at Massmart in 2009 is mentioned, but the conclusion was that these issues would not affect Massmart's ability to operate or its reputation. In other documents, there was no mention of the proposed retrenchments at all nor of the need for Walmart to deal with negative perceptions about its labour relations governance policy.⁶⁶

59. The Tribunal found that the impugned retrenchments were not linked to the merger. In the absence of evidence indicating merger specificity, the Tribunal was of the view that it could not impose a condition that requires a reinstatement of such employees. Be that as it may, the Tribunal was of the view that the merging parties' undertaking to give employment preference opportunities in the merged entity when opportunities arose therein was prudently made.

60. The matter was taken on appeal to the CAC by SACCAWU. The CAC also considered a review application of the Tribunal's decision by the three Ministers. The main dispute in the appeal fell squarely on the public interest issues under section 12 of the Act – specifically the retrenchments of the 503 employees. We do not deal with the review application in this discussion.

61. The CAC first described the procedure and interaction between section 12A(3) read with section 12(1) of the Act. When considering a merger, it must be examined whether the merger will result in a substantial lessening or prevention of competition ("SLC") in the market by considering the factors set out in section

⁶⁴ *Walmart* para 55.

⁶⁵ *Walmart* para 56.

⁶⁶ *Walmart* para 57.

12A(2). If the conclusion is that the merger is likely to result in an SLC, it must be determined whether the merger is likely to result in any technological, efficiency or pro-competitive (“efficiencies”) gains that would outweigh the likely SLC. Further and irrespective of the competition assessment, it must be determined whether the merger can be justified on public interest grounds by having due regard to the factors under section 12A(3).

62. When the court considered the issue of the 503 retrenched employees, it stated that *“a retrenchment, which takes place shortly before the merger is consummated may raise questions as to whether this decision forms part of the broad merger decision making process and would, accordingly, be sufficiently closely related to the merger in order to demand that the merging parties must justify their retrenchment decision”*.⁶⁷
63. The CAC however was of the view that the impugned retrenchments were in fact merger specific because of the following:
- a. Massmart retrenched 503 workers in June 2010, almost two years after its decision to build the particular distribution center and eight years after the so-called "initial decision" to retrench.⁶⁸
 - b. It was clear from documentation generated from meetings of Massmart's board, that talks had taken place between the merging parties as from 2009.⁶⁹ In addition, in November 2009, Walmart had indicated in a document that, in 2010, there was a possible acquisition in South Africa.⁷⁰
 - c. The strategy of Massmart at this time, going back particularly around 2009 was to manoeuvre its business into a situation which would be good for business overall. The merging parties could not deny this proposition. In addition, Massmart had applied "the Walmart approach" to operational issues which manifestly, given the Walmart model, even

⁶⁷ Walmart CAC para 140.

⁶⁸ Walmart CAC para 141.

⁶⁹ Walmart CAC para 142.

⁷⁰ Walmart CAC para 142.

as evidenced on the due diligence and Project Memphis reports, would have included issues of employment.⁷¹

64. In view of the above, the CAC ordered that the employees retrenched by Massmart on July 2010 be re-instated as sought by SACCWU.
65. Another case that articulated the principle of merger specificity regarding retrenchments is [*BB Investments, BB Investment Company Pty Ltd v Adcock Ingram Holdings \(Pty\) Ltd*](#)⁷² Here the tribunal stated that "merger specific" means conceptually an outcome that can be shown, as a matter of probability, to have some *nexus* associated with the incentives of the new controller. Pre- merger management plans in operation already or proposed may be useful to compare to the plans the firm has post-merger, if available. If the differences are stark, and particularly if the change in plans takes place within a short period of time, then it is reasonable to infer that the post-merger plans of the acquirer reflect a different set of incentives to those of the pre-merger management and hence can be considered merger specific.⁷³ In this case the Tribunal found that the retrenchments were merger related.
66. Other cases have also dealt with the question of merger specificity in relation to job losses.
67. In [*Bucket Full \(Pty\) Ltd v The Cartons and Labels business of Nampak Products Ltd*](#)⁷⁴ (*Bucket Full*) the Tribunal had to determine three issues: (i) whether the retrenchments envisaged by the merging parties were merger specific; (ii) the actual number of non-merger specific retrenchments and (iii) how many years a moratorium on retrenchments should be in place.
68. The Cartons and Labels Business indicated that it intended to retrench 151 employees irrespective of the merger due to current declining profitability. In

⁷¹ *Walmart* CAC para 144.

⁷² [2014] 2 CPLR 451 (CT).

⁷³ *BB Investments* paras 55 – 57.

⁷⁴ 018457.

addition, CTP submitted that it would need to retrench 122 employees due to poor financial performance of the target firm and duplication of employment positions. The merging parties claimed these retrenchments were not merger specific and were necessary in order to lower the employee costs of the target firm in order to become globally competitive and as efficient as its rivals. The Commission submitted that it had evidence that these retrenchments were merger specific. The Tribunal disagreed. The Tribunal found that the e-mails and correspondence it had in its possession were not sufficient to demonstrate that the decision to retrench was directly related to the merger.⁷⁵

69. As to the non-merger specific retrenchments, the Tribunal was of view that it did not have the jurisdiction to decide on non-merger related retrenchments and that it would be best for the parties to only engage the tribunal on merger specific retrenchments.⁷⁶
70. In cases where it can be said that retrenchments are merger related, a two-step mechanism was developed by the Tribunal. In [Metropolitan Holdings Ltd and Momentum Group Ltd](#)⁷⁷ (*MMI*) the Tribunal stated that :
- a. *a rational process has been followed to arrive at the determination of the number of jobs to be lost, i.e. that the reason for the job reduction and the number of jobs proposed to be shed are rationally connected; and*
 - b. *the public interest in preventing employment loss is balanced by an equally weighty, but countervailing public interest, justifying the job loss and which is cognisable under the Act.*⁷⁸
71. In *MMI*, the Tribunal held that private interests of shareholders cannot balance out a substantial loss of employment brought about by the merger. The types of public interest criteria that would be relevant are other public interest criteria listed in the Act or broader public interest factors not mentioned in the Act.⁷⁹

⁷⁵ *Bucket Full* para 30.

⁷⁶ *Bucket Full* para 34.

⁷⁷ [2010] 2 CPLR 337 (CT).

⁷⁸ *MMI* para 70.

⁷⁹ *MMI* para 75.

The supporters of the merger may therefore justify job losses flowing from a merger by arguing that it will allow for a factory to be kept open in a region and thus protect that region's economy (one of the public interest grounds specifically mentioned in section 12A(3)).

72. In many cases, the problem of job losses can be addressed by imposing conditions.⁸⁰ Where the merging firms agree with employees or their representatives on conditions to ameliorate reductions in employment, competition authorities will not necessarily challenge these conditions.
73. As stated above, employees are given an active role in a merger process and competition authorities will allow them to participate. However, where employees oppose conditions proposed by the merged firm, a more robust analysis of those conditions will be undertaken.⁸¹
74. A merger that saves a failing firm may also save jobs in that firm.⁸² However, it will have to be shown that it is the merger that saves the jobs. Even where a firm fails, some parts of its business may survive and the same will apply to jobs in such businesses. They will not necessarily owe their continued existence to a merger. Moreover, failing firm arguments will succeed only if it can be shown that a firm is failing.⁸³

The ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive;

75. One of the objectives of the Act is ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy.⁸⁴ Moreover, the Act must promote a greater spread of ownership, in particular to increase the spread of ownership stakes of historically disadvantaged persons.⁸⁵ This requires the Commission to monitor the markets to ensure that there are no unreasonable barriers for SMMEs and HDI firms to enter such

⁸⁰ *Cherry Creek Trading 14 (Pty) Ltd/Northwest Star (Pty) Ltd* (52/LM/Jul04) para 20.

⁸¹ *Metropolitan Holdings Ltd/Momentum Group Ltd* [2010] 2 CPLR 337 (CT) para 104.

⁸² *JD Group Ltd/Profurn Ltd* 60/LM/Aug02.

⁸³ *JD Group* paras 174–177.

⁸⁴ Section 2(e) of the Act.

⁸⁵ Section 2(f) of the Act.

markets, that the competitiveness of SMMEs and HDI firms is not hampered by collusive and/or exclusive arrangements and that SMMEs and HDI firms are not forced to exit the market because of abusive behaviour by dominant firms.⁸⁶

76. In *Anglo*, the Tribunal suggested that to embark on a narrow interpretation of section 12A(2)(3)(c) would be contrary to the ordinary language of the provision but would also have dangerous policy consequences.⁸⁷
77. In *Walmart*, the Tribunal had to consider the effect of the merger transaction on local suppliers to Massmart. Two key issues arose. The first was the dependence on low cost suppliers decreasing as a result of Walmart switching to imports through its expansive global network and therefore reducing the dependence on domestic employment. The second was Walmart's reputation as an employer in other countries which caused concern around employment conditions for employees in South Africa.
78. With regards to the issue of local procurement, the Tribunal was of the view that the imposition of a percentage on local procurement was impermissible reason being that it would render the country in breach of its trade obligations and would be irregular in nature if it were only imposed on one firm in the sector. The Tribunal did not consider the condition as a viable option as it would contradict the major objective of competition regulation, that is, to secure lower prices.
79. The Tribunal's decision was challenged in the CAC. The unions argued that the Tribunal had failed to adequately consider the likelihood that the merger would result in an increased reliance on imports by the merged firms; a reliance that would adversely affect the ability of small businesses to compete with the lower import prices, and which would in turn result in the closure of small businesses and subsequent job losses. Government, through the three Ministers also argued that the firm's entry into South Africa had the potential to alter the local retail and manufacturing landscape and that on that basis alone

⁸⁶ Competition Commission "Background Note to the Public Interest Guideline" 23 January 2015, pg. 27.

⁸⁷ *Anglo* para 156.

it was obliged to intervene to secure the long-term interests of the economy. The CAC, in its decision criticised the Tribunal in two aspects. It stated that the Tribunal failed to adequately interrogate the effect of Walmart's value chain models on small and medium sized firm in South Africa. In addition, the Tribunal failed to properly assess the terms and conditions the investment fund would operate. This investment fund entails the merging parties expending R100 million over three years through the establishment of a program aimed at the development of local suppliers, including SMMEs.⁸⁸ The CAC then ordered the capital amount of the fund to be increased to R200 million and to be spent over a period of 5 years and that the success of this fund would be measured by the extent to which small and medium sized businesses benefit as a result of the work of the fund.

The ability of national industries to compete in international markets.

80. There are a few mergers that deal specifically with the ability of national industries to compete internationally (National Champions). In [*Tiger Brands Ltd and others v Langeberg Foods International and Ashton Canning*](#)⁸⁹ (*Ashton Canning*) the merger was approved on this basis but a number of conditions were imposed such as the re-skilling of employees, a moratorium on retrenchments regarding a certain number of employees and the establishment of a training fund for the benefit of affected persons as defined in the conditions.
81. In the recent [*Klein Karoo and Mosstrich*](#)⁹⁰ merger conditions of supply of ostrich meat to domestic markets were imposed to ensure that the merger did not distort supply post-merger.

⁸⁸ See *Walmart* para 119.

⁸⁹ [2006] 1 CPLR 370 (CT).

⁹⁰ IM238Jan19.

Participation in hearings

1. Section 53 of the Act provides for the right to participate or intervene in a hearing. Section 53 expressly grants rights of participation in relation to three types of procedures, namely: restrictive practices, exemption applications and mergers. In each of these procedures of the Act recognises specifically named persons as participants and then also recognises a residual or general class of persons who have a material interest if the Tribunal grants them permission to intervene.
2. The ambit of this section was succinctly outlined by the Tribunal in [*Industrial Development Corporation of South Africa Ltd v Anglo American Holdings*](#)¹ (*IDC Anglo*) (September 2002: intervention application in the Anglo Kumba merger).² In that matter the Tribunal noted while section 53(1)(c)(v) provides for this residual class of persons in a merger, the subsection does not provide for any *grounds* for participation. This is in stark contrast to section 53 (1)(a)(iv) which provides for participation in a restrictive hearing and sets the criteria that a participant should have a material interest that is not represented by any other participant. It is similarly different from section 53(1)(b)(iv) which provides for residual participation in exemption hearings and sets the criteria as an interest in the proceedings. This criterion is upped by section 10(8) which refers to 'substantial financial interest'. After noting this distinction, the Tribunal held that *'the legislature clearly provided a less demanding threshold for participation in merger proceedings as compared with restrictive practice and exemption proceedings'*.³ The Tribunal then considered Rule 46 of The Rules for the Conduct of Proceedings in the Competition Tribunal (CTR)⁴ which requires that a participant must have a material interest in the matter. It then held that the rule cannot limit or restrict the interpretation of the Act.⁵ Therefore 'material interest' was to be accorded a broad meaning. The Tribunal then found that

¹ (45/LM/Jun02 and 46/LM/Jun02) *IDC Anglo* at p4 para 14.

² Note that the IDC had filed an application to intervene in the merger.

³ *IDC Anglo* para 16.

⁴ GG Notice 22025 of 1 February 2001.

⁵ *IDC Anglo* para 22.

IDC had sufficient interest to be permitted to intervene in the merger hearing.⁶ It also held that even if it was wrong in its finding that the phrase 'material interest' was to be given a broad meaning, the IDC still had a material interest within the ordinary meaning of the phrase.⁷ This was because the IDC was a shareholder in the target firm, Kumba, and in Kumba's major customer for iron ore: Iscor.⁸ Further, IDC had a representative on Kumba's board⁹ and IDC was a statutory body concerned with industrial development issues.¹⁰

3. In October 2002, the Tribunal handed down a decision on the scope of IDC's participation. The finer details of this scope are not recounted here, except to say that the decision clearly expressed the Tribunal's two-step approach in such matters as, first, the identification of the interest and, second, determining a scope that is consistent with that interest.¹¹ Anglo successfully appealed the Tribunal's decisions permitting IDC to intervene in this matter, outlining the scope of its intervention and granting it access to confidential information ([Anglo South Africa \(Pty\) Ltd and Others v Industrial Development Corporation of South Africa Ltd](#)).¹²
4. However, Anglo's success at the CAC was based purely on a technicality namely that the matter had been decided by only one Tribunal member and not a panel of three.¹³ The CAC sent the matter back to the Tribunal for reconsideration with an order that it be dealt with as a matter of urgency. In December 2002, another decision was handed down by a three-member Tribunal panel confirming the IDC's right to intervene, the scope of its intervention and access to confidential information on terms identical to those ordered in the overturned earlier decisions.¹⁴

⁶ *IDC Anglo* para 23.

⁷ *IDC Anglo* para 24.

⁸ *IDC Anglo* para 25.

⁹ *IDC Anglo* para 26.

¹⁰ *IDC Anglo* para 27.

¹¹ Decision dated 23 October 2002 para 19.

¹² 24/CAC/Oct02 pg. 8.

¹³ *IDC Anglo* CAC pg. 4.

¹⁴ Decision dated 24 December 2002.

5. Notwithstanding the CAC upholding the appeal on technical grounds, the Tribunal's finding that a participant is not required to have a material interest in a merger hearing was upheld by the CAC.¹⁵ It has also been reiterated by the CAC in [Community Healthcare Holdings \(Pty\) Ltd and another v Competition Tribunal and others](#)¹⁶ (*Community Healthcare*) and in [Caxton and CTP Publishers and Printers Ltd v Naspers Ltd and others](#).¹⁷ The Tribunal also reiterated and applied this position in other matters such as [Supreme Health Administrators \(Pty\) Ltd and others v the Competition Commission and others](#).¹⁸
6. In an earlier case, [Anglo-American Corporation Medical Scheme v the Competition Commission and others](#)¹⁹ (*Anglo Medical Scheme*), the Tribunal considered a complainant's right to intervene in a complaint referral and the scope of such intervention, if it was found to be warranted. The relevant provision, section 53 (a)(ii)(bb), provided that a complainant may intervene if its interest was not adequately represented by another participant. The CTR 46 requirement for material interest was held to not to be applicable.²⁰ The Tribunal held that the complainant was entitled to participate in the matter on the strength of its status as a complainant. The Tribunal also found that the only other participant, the Commission, did not adequately represent the complainant's interest because the complainant sought a different remedy. In this case, the Tribunal granted the complainant full rights of intervention as it did not wish to have to determine the scope of intervention at intermittent stages during the hearing.
7. Soon after the above decision, the Tribunal was again called upon to determine the scope of an intervener's participation in [Healthbridge \(Pty\) Ltd v Digital Healthcare Solutions \(Pty\) Ltd](#)²¹ (*Healthbridge DHS*). In this matter Healthbridge's application to intervene was initially opposed but this opposition was abandoned on the day of the hearing of the intervention application. The

¹⁵ *Anglo South Africa Capital (Pty) Ltd and others v Industrial Development Corporation of South Africa and another* 2004 (6) SA 196 (CAC) at 202-3.

¹⁶ 2005 (5) SA 175 (CAC) para 28.

¹⁷ 72/CAC/AUG 2007 paras 24-26.

¹⁸ *Ibid* pg 5, para 14

¹⁹ 04/CR/Jan02.

²⁰ *Anglo Medical Scheme* pg. 4.

²¹ 41/AM/Jun02.

respondent sought limitations on Healthbridge's participation but did not offer a draft of what it considered to be an appropriate limitation of Healthbridge's participation. The Tribunal found that Healthbridge's suggested scope was appropriate and granted it. The Tribunal, citing the CAC's *Anglo-American*²² decision referred to above, stated that the CAC preferred a wide scope of intervention.²³ The Tribunal also stated that it exercises its judicial discretion in determining whether or not to grant participant status and the extent of such participation, if granted.²⁴

8. In exercising such discretion, the Tribunal is alive to whether or not a prospective participant will bring value to the matter or assistance to the Tribunal. Where there is no evidence of such value, an application will be dismissed. This is precisely what occurred in *Community Healthcare*. This was also the case in [*Cornucopia v the Competition Commission and others*](#)²⁵ (*Cornucopia*) where the Tribunal said the following about the applicants:

"We have found that the first applicant has not made out a case that it is a credible intervener and secondly that it will be able to provide any value or assistance to the Tribunal in its deliberations"²⁶ 'the second applicant...has failed to indicate either way why the merger if consummated should have an adverse effect on it or on what value it can bring to our proceedings if allowed to intervene'²⁷

9. In [*Comair Ltd v the Competition Commission and SAA*](#)²⁸ (*Comair SAA*) the Tribunal permitted Comair to participate in complaint proceedings because it had sufficient interest simply by its status as the complainant²⁹ and because the relief it sought demonstrated an interest not adequately represented by the Commission.³⁰ The Tribunal's order delineated Comair's extent of

²² (2004 (6) SA 196 (CAC).

²³ *Anglo Medical Scheme* pg. 9.

²⁴ *Anglo Medical Scheme* pg. 9.

²⁵ 105/LM/Dec04.

²⁶ *Cornucopia* para 34.

²⁷ *Cornucopia* para 32.

²⁸ 83/CR/Oct04.

²⁹ *Comair SAA* para 18.

³⁰ *Comair SAA* paras 23-27.

participation.³¹ It also made some comments in relation to the extent of a complainant's scope of intervention generally. The first of these was that intervention is not limited to questioning witnesses or examining documents but also extends to addressing the Tribunal and to formulating and claiming relief.³² The second was that a complainant is not required to allege or prove any damages in order to seek interdictory relief.³³

10. A complainant's right to participate in a prohibited practice case was considered in *Barnes Fencing Industries (Pty) Ltd & Dunrose (Pty) Ltd v Iscor Limited (Mittal SA) & others*³⁴ (*Barnes Fencing*). In this matter only one of the respondents, Mittal, opposed the application to intervene. The pertinent facts are that after a complaint lodged with the Commission by the applicants, the Commission referred the matter to the Tribunal alleging that Mittal had engaged in unlawful price discrimination in contravention of section 9 of the Act. The applicants brought an application to intervene on the basis that the Commission had not relied on sections 8(c) and 8(d)(ii) of the Act although the complainant had initially alleged that Mittal had contravened sections 4, 5, 8 and 9 of the Act. In other words, the complainant was alleging that the Commission had made an inadequate case in its referral to the Tribunal. The applicants also argued that they did not seek the same relief as the Commission.
11. Mittal objected to the application for intervention on three grounds namely: (i) that it was incompetent to bring the alleged section 8 contraventions through intervention in a section 9 matter; (ii) the applicants were not entitled to intervene in relation to the section 9 issue because they had failed to show that they had an interest not adequately represented by the Commission; and (iii) the relief sought by the applicants could be granted in the discretion of the Tribunal. It also argued for limited scope should the Tribunal nevertheless grant the intervention. Relying on the CAC's decision in [*Glaxo Wellcome \(Pty\) Ltd & others v National Association of Pharmaceutical Wholesalers & others*](#)³⁵ the

³¹ *Comair SAA* paras 35-36.

³² *Comair SAA* para 28, relying on ANSAC (CAC) 2003 (5) SA 633 para 4.

³³ *Comair SAA*, relying on ANSAC para 5.

³⁴ 08/CR/Jan07.

³⁵ 15/CAC/Feb02.

Tribunal found that the complainants were not precluded from bringing an application to intervene in relation to the section 8 counts as long as it related to conduct that was substantially the same as that alleged in relation to the section 9 counts.³⁶

12. The Tribunal then permitted the applicants to intervene in relation to the section 9 count because it would be impractical to attempt to demarcate areas to the section 8 dispute from those relevant to the section 9 dispute due to the substantial overlap between the two.³⁷ The applicants were permitted to intervene in this matter not only because of the alternative framing of the counts under section 8 but because they had established an interest not adequately represented by the Commission. This was the case because if their theory of harm was not advanced, they would lose their chance of obtaining an appropriate remedy. However, the Tribunal denied the applicants the opportunity to intervene for the purposes of seeking the imposition of an administrative penalty on the respondents in respect of the section 8(d)(ii) count. This was because the applicants had failed to make a case for such relief in their papers.³⁸

13. In granting the complainants rights to intervene, the Tribunal cautioned that:

"However, it does not follow that a complainant would always be allowed to intervene in the Commissions' referral, every time it thought that referral could have been made under another section of the Act. The section is not there for private players to second guess the Commission's prosecutorial judgment. To allow complainants to intervene simply because the Commission has not proceeded with some alternative contravention of the Act, that the complainants deem appropriate, would interfere unduly with the rights of the Commission to bring a case as the legislature's preferred prosecutor, burden respondents and prolong proceedings — even if the alternative count alleged by the would be intervenor might be a competent verdict on the same facts.

³⁶ *Barnes Fencing* para 32.

³⁷ *Barnes Fencing* para 43

³⁸ *Barnes Fencing* paras 45-46.

Complainants should be assisting the Commission in prosecuting its case not attempting to usurp its function”.

14. The Tribunal also possesses the discretion to allow interveners to participate in merger proceedings upon filing an intervention application in terms of section 18 of the Act, read with CTR 46. In [*Caxton and CTP Publishers and Printers Ltd and Media 24 \(Pty\) Ltd and Others*](#)³⁹ the Tribunal allowed the applicants to intervene but limited to the likely effect of the merger under section 12A(2) and 12A(3) of the Act.
15. As previously outlined, the Tribunal can demarcate the scope of intervention. For example, the intervenor could be granted rights to attend and participate in pre-trial proceedings, interlocutory proceedings and/or cross-examine witnesses.⁴⁰ In order for the intervenor to be fully appraised on the issues of the particular matter, the Tribunal may order the Commission, subject to the furnishing of appropriate confidentiality undertakings, to provide the applicant with the confidential record of the proceedings.⁴¹

³⁹ (019232).

⁴⁰ *Caxton* para 3.

⁴¹ *Caxton* para 4.

Merger Prohibitions

1. In terms of section 16(1)(a) of the Act, if the Commission prohibits or conditionally approves an intermediate merger, any party to the merger may, by written notice, apply to the Tribunal to reconsider the decision of the Commission.
2. The recent seminal case dealing with this is [*Imerys South Africa \(Pty\) Ltd and Andalusite Resources \(Pty\) Ltd*](#)¹ (*Imerys*) which ultimately ended up before the CAC ([*Imerys South Africa \(Pty\) Ltd and Another v Competition Commission*](#))²
3. This was an intermediate merger transaction between Imerys South Africa (Pty) Ltd (ISA) and Andalusite Resources (Pty) Ltd (AR) whereby ISA intended to acquire 100% ownership of AR. Both ISA and AR are involved in the mining, processing and sale of andalusite which is used to produce refractories for high temperature industrial processes. South Africa is the largest andalusite producer in the world and the merging parties were the only producers of this mineral in South Africa.
4. The merger was investigated by the Commission and was subsequently prohibited as the proposed transaction was effectively a 2-to-1 merger and would have resulted in the merged entity becoming the monopoly producer of andalusite in South Africa. The Commission viewed this to be highly problematic as the merger would result in a substantial lessening or prevention of competition, commonly referred to as an *SLC*, in the andalusite market and have negative effects on the public interest. In addition, the merging parties' proposed remedies did not adequately address the permanent structural changes in the relevant market.
5. Following the Commission's decision, the merging parties filed a request for consideration to the Tribunal in terms of section 16(1)(a) of the Act. The Tribunal was tasked to determine two issues: i) the relevant counterfactual

¹ IM013May15.

² 147/CAC/Oct16.

absent the proposed merger and ii) the adequacy of the proposed behavioural remedies tendered by the merging parties in an effort to cure the concerns raised by the Commission.

6. With regards to the counterfactual, the merging parties argued that absent the merger, both merging parties would become capacity constrained and as a result, prices of andalusite would rise to export parity prices and this would therefore not have any effect on their market power. If the merger was considered in view of this and the proposed behavioural remedies, the proposed transaction would not have an SLC effect in the andalusite market nor would it adversely affect any of the public interest factors. As such, it would be sufficient for the proposed transaction to be approved subject to the tendered conditions. Conversely, the Commission argued that the correct counterfactual was the status *quo*, and that the tendered behavioural conditions did not adequately address the SLC or the public interest concerns raised as a result of the merger. As a result, the merger should be prohibited.
7. In arriving to its decision, the Tribunal focused on the following:
 - a. The significant pre- and post-merger market shares of the merging parties;
 - b. Economic substitution: the possibility of customers to switch to imported substitutes in the event the price of andalusite increased by a small but significant non-transitory increase in price (5-10%) (this is commonly referred to as the *SSNIP test*);
 - c. Testimonies from various customers and end-users about post-merger unilateral effects considering the high barriers to entry in the relevant market.
8. In terms of the competition assessment, the Tribunal found that the merging parties were effective competitors (on price and non-price factors) and the proposed transaction would result in the removal of an effective competitor; the barriers to entry in the market for the mining and sale of andalusite can be characterized as very high and with no likelihood of entry into the market and;

there was no evidence that customers would switch from andalusite to imported substitutes if a SSNIP was imposed on the price of andalusite.

9. In terms of the relevant counterfactual, the Tribunal found against the merging parties' proposed counterfactual holding that there was no evidence to conclude that the merging parties would both be capacity constrained post-merger. The foreseeable counterfactual was that one of the merging parties would be capacity constrained. As such, the Tribunal found that the merger was likely to result in unilateral anti-competitive effects that would not be outweighed by any efficiencies.
10. Regarding the public interest, the Tribunal concluded that the proposed transaction had an adverse impact on public interest particularly on small firms' ability to compete. The proposed transaction would deprive customers and end users of a precious and scarce resource in terms of price and other non-price factors such as innovation.
11. Lastly, the tendered behavioural remedies envisaged that i) a five-year supply agreement with domestic customers with yearly price increases not exceeding the producer price index (PPI) and; ii) upon expiry of the five years, there would be a volume cap for domestic customers and prices would be capped at the export parity price (EPP). The Tribunal found that these conditions were complex; they imposed a significant monitoring burden on the Commission; did not address the non-price concerns raised and were inadequate and insufficient to address the anti-competitive and public interest concerns. Accordingly, the Tribunal prohibited the merger.
12. Dissatisfied with the above, the merging parties launched an appeal to the CAC. The CAC had to decide whether the Tribunal was correct in prohibiting the merger.
13. The CAC isolated the following issues to be determined:
 - a. Burden of proof
 - b. Adequacy of the tendered behavioral conditions;

- c. The relevant counterfactual
- d. The substitutability of andalusite to import substitutes;
- e. Public interest

14. With regards to the burden of proof, the CAC held that it was for the Tribunal to approve a merger where no SLC was found and no substantial public interest grounds justified a prohibition of the merger. In the CAC's view, given that the Tribunal was endowed with inquisitorial powers, it did not hold that the Commission bore the onus of proving an SLC. The Tribunal must make its decision based on all the evidence presented before it. Where the Tribunal finds that an SLC was likely and no pro-competitive gains were found or overriding public interest grounds justifying the merger, the merger should either be conditionally approved or prohibited. The CAC went on to state that in circumstances where the Tribunal was asked to conditionally approve a merger, the burden of proof did not rest on the Commission to show that the conditions did not adequately address the likely SLC. The choice of remedies was in the Tribunal's discretion. In exercising its discretion, the Tribunal should consider the likelihood and extent of the SLC and the risk that the conditions would fail to remedy the SLC and the public interest if the merger was approved.
15. In relation to the relevant counterfactual, the CAC took into consideration the demand growth projections and the relevant sustainable capacity of the merging parties and found that the merging parties would be capacity constrained in the next eight years. As such, an eight-year supply agreement would resolve the concern of the merging parties' unilateral effects. However, to ascertain whether an eight-year supply agreement was desirable, the CAC considered the potential of global shocks on the market akin to that of the 2008 global financial crisis. In addition, it was important to consider that the merging parties would expand their capacity which would increase the number of years it would take the merging parties to be capacity constrained. Even though the merging parties argued that there was a variation mechanism in the conditions to deal with such situations, the CAC found that this mechanism would result in practical difficulties and a lengthy trial to determine the required variations to

the conditions. In relation to the PPI proposed in the conditions, the CAC found that should the production capacity freed up, absent the merger, the PPI would increase therefore depriving domestic customers of any price reductions that could have been a result of free capacity.

16. In relation to public interest, the CAC found that the conditions did not address the customers' concerns given that once the eight-year supply agreement ended and the domestic price was higher than the EPP, the merged entity would be able to charge domestic customers a higher price. If the merger did not take place, ISA and AR would be incentivised to compete domestically as they would be able to divert export volumes into the domestic market and prevent domestic prices from going above EPP. In addition, the CAC found that the second part of the conditions that were meant to apply in perpetuity added further prejudice to the domestic customers as EPP would be the higher price cap.
17. In view of the above, the CAC concluded that if the merger was conditionally approved, this would only protect domestic consumers for a certain period and would deprive consumers of any price competition after such period, if market circumstances changed. Accordingly, the CAC confirmed the Tribunal's decision to prohibit the merger and the appeal was dismissed.
18. In [*Mondi Ltd v Kohler Cores and Tubes \(a division of Kohler Packaging Limited\)*](#)³ the CAC confirmed the Tribunal's decision to prohibit the merger.
19. In other earlier cases however, the CAC has overturned the Tribunal's decision to prohibit mergers. See the following cases:
 - a. [*Medicross Healthcare Group \(Pty\) Lt and Prime Cure \(Pty\) Ltd*](#)⁴
 - b. [*Schumann Sasol \(South Africa\) \(Pty\) Ltd and Price's Daelite \(Pty\) Ltd*](#)⁵
 - c. [*Pioneer Hi-Bred International and Another v Competition Commission*](#)⁶

³ 20/CAC/Jun02.

⁴ (55/CAC/Sept05).

⁵ (10/CAC/Aug01).

⁶ (113/CAC/NOV11).

Suspension of Merger Conditions

1. The leading case regarding this topic is [*MTO Forestry \(Pty\) Ltd and Others v Competition Commission and Others*](#)¹ (*MTO Forestry*).
2. The transaction between MTO Forestry (Pty) Ltd and Boskor Sawmill (Pty) Ltd (the merging parties) was approved unconditionally. One of MTO's customers sought to have the merger reviewed by the Tribunal. The Tribunal dismissed the review application and this decision was then taken on appeal to the CAC. The CAC set aside the review decision of the Tribunal and ordered that the matter be remitted to the Commission for consideration. Thereafter, the Commission conditionally approved the merger. Dissatisfied with the outcome of the Commission's assessment, a few days later the merging parties filed an application for suspension of the operation of the conditions pending the outcome of the reconsideration before the Tribunal.
3. The merging parties argued that the conditions were impractical, expensive to apply and compliance with them was impossible.²
4. At issue was whether the Tribunal could grant interim relief by temporarily suspending the conditions imposed by the Commission in an intermediate merger.³ The only section in the Act that dealt with interim relief was section 49C of the Act and there, the provision only dealt with complaints related to prohibited practices.⁴
5. The merging parties argued that the Tribunal did possess the power to grant interim relief in these circumstances. In doing so, the applicants relied on the CAC's decision in *Gold Fields*⁵ where the court held that the Tribunal possessed the power to interdict a notifiable merger which had not yet been approved.

¹ 10/AM/Feb11.

² *MTO Forestry* para 15.

³ *MTO Forestry* para 21.

⁴ *MTO Forestry* para 22.

⁵ (43/CAC/Nov04) [2005] 1 CPLR 74 (CAC).

6. The Tribunal was of the view that the CAC's judgment did not assist the applicants as the Tribunal's power to grant an interdict was not on all fours with the relief sought, namely a suspension of conditions. The Tribunal stated that interdictory power found to exist is directed at preventing or halting illegal conduct, whereas the power to suspend the operation of conditions would in fact condone what seems to be a contravention of the Act and hence illegal conduct.⁶

7. Further, the Tribunal was of the view that when the CAC set aside the original unconditional approval of the merger by the Commission, its ruling vacated the entire decision of the Commission.⁷ When the Commission provided its second decision, the merging parties had a choice to either abide with the newly imposed decision or reject the conditional merger by having it considered by the Tribunal in terms of section 16(1)(a).⁸ Section 15 of the Act clearly provides the Commission with avenues it can pursue if there has been non-compliance with its decision in an intermediate merger which leaves no room for the possibility that the Tribunal has implied powers under section 27(1)(d) to hear the suspension application. From this it is clear, that the legislature had deliberately excluded the Tribunal from having such jurisdiction.⁹ The application was accordingly dismissed.

⁶ *MTO Forestry* para 48.

⁷ *MTO Forestry* para 51.

⁸ *MTO Forestry* para 52.

⁹ *MTO Forestry* para 53.

Variation of Merger Conditions

1. The Act provides for a regime to vary an order of the Tribunal or the CAC under section 66 of the Act. However, the Act is silent on the variation of merger conditions imposed by the Commission, in small or intermediate mergers, and by the Tribunal in the case of large mergers. Most, if not all, merger conditions contain a variation clause which the Commission and/or the Tribunal primarily resort to should a dispute arise as a result of a condition. An aggrieved applicant may apply to the Tribunal to vary a merger condition in terms of CTR 42 but only if the Tribunal has jurisdiction to do so.
2. The seminal case on this issue is the Tribunal's decision in [AMEC Foster Wheeler SA \(Pty\) Ltd v Competition Commission](#)¹ where the Tribunal had to decide whether it had jurisdiction to vary conditions of an intermediate merger where the Commission had explicitly reserved its rights to amend its own conditions.
3. Sections 13(5)(b) and 14(1)(b) of the Act states that the Commission has the power to approve, conditionally approve or prohibit small or intermediate mergers. It does not however set out whether the Commission would have jurisdiction to amend the conditions imposed by it.² The Tribunal was of the view that the power to impose conditions, absent any statutory provision to the contrary, includes the power to subsequently amend conditions. In this case, the Commission possessed such power more so as it explicitly reserved its right to do so.
4. The Tribunal then set out three instructive points regarding its jurisdiction:

“In circumstances where an application is brought by way of consideration under section 16 read with Tribunal Rule 32 to amend conditions to an intermediate merger (or reverse a prohibition decision by the

¹ VAR252Mar16.

² Amec para 12.

Commission, as the case may be), the Tribunal would naturally have jurisdiction over the matter.

However, in circumstances where the Commission imposes conditions in an intermediate merger in which it reserves the right to revisit its own conditions, and where no consideration application is brought under section 16, the Tribunal would not have the required jurisdiction to amend the conditions.

Where a dispute between the Commission and the merging parties regarding a variation or amendments to merger conditions imposed by the Commission arises in circumstances described in (b) above, then the Tribunal would have jurisdiction in terms of the general powers provided for in Tribunal Rule 42 to amend the conditions.”³

5. The Tribunal also pointed out that one must not only pay particular attention to the language of the variation clause in the merger conditions but also consider the reasons why the merger conditions were imposed in the first place.
6. In [Zimco Metals \(Pty\) Ltd and Another v Competition](#)⁴ the variation clause referred to a “change in circumstance” as one of the factors that had to be satisfied in order to grant the variation. The Tribunal was satisfied with the evidence put before it by the applicant to show such a change in circumstance and the variation was accordingly granted.
7. In [Ferro South Africa \(Pty\) Ltd and Others v Atland Chemicals CC t/a Atlin Chemicals](#)⁵ (Ferro SA), the Tribunal considered whether the alleged misappropriation of Ferro’s information would qualify as “exceptional

³ Amec para 13.

⁴ AME160Oct15.

⁵ LM179Jan14/VAR152Nov16.

circumstances” contemplated in the merger conditions and therefore allow the variation of the conditions in terms of CTR 42.⁶

8. The Commission prohibited an intermediate merger between Ferro South Africa (Pty) Ltd (“Ferro” – the applicant) and Arkema Resins. Dissatisfied, the merging parties approached the Tribunal for a consideration of the merger, which the Tribunal conditionally approved after Ferro had tendered various conditions. One of the conditions was a divestiture which would see Ferro divest of intangible assets in its resins business to a third party and conclude a toll manufacturing agreement with said third party, which became Atlin Chemicals (“Atlin” – the respondent). Atlin was set to begin producing resins with the aid of Ferro vis-à-vis the toll manufacturing agreement. The conditions provided that the Commission may on good cause shown waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in the conditions.
9. Ferro alleged that one of its former employees misappropriated competitively sensitive information and provided it to Atlin, where she was now employed. Ferro approached the Commission with its grievances requiring the Commission to delete the condition pertaining to the toll manufacturing agreement. The Commission declined to intervene on the basis that there was a dispute of fact whether the information was stolen and pending litigation in the High Court. Ferro then approached the Tribunal for relief.
10. Ferro argued that this alleged misappropriation of its propriety information qualified as “*exceptional circumstances*” as contemplated by the conditions and good cause had been shown to justify the deletion of the toll manufacturing agreement. Atlin and the Commission argued the contrary.⁷
11. The Tribunal stated that the courts have understood “*exceptional circumstances*” to be unusual and unexpected circumstances and they must be determined on the facts of each case, be incidental to or arise from a particular

⁶ *Ferro SA* para 44.

⁷ *Ferro SA* para 38.

case.⁸ The Tribunal ruled that the divestiture conditions were imposed as a result of substantial competition concerns and this should not be overlooked.⁹ The conditions were imposed not for the benefit of Ferro, but in the public interest.¹⁰ The Tribunal reiterated that it was concerned with the enforcement of the Act and not the interest of private parties. As unfortunate and outrightly deplorable as the theft of information was, it did not however make it a competition issue, nor did it amount to an exceptional circumstance in the context of the conditions. The theft of Ferro's information did not raise any facts that altered the rationale for imposing the conditions.¹¹ The Tribunal declined to lift the conditions as sought by Ferro.¹²

⁸ *Ferro SA* para 37.

⁹ *Ferro SA* paras 45-46.

¹⁰ *Ibid.*

¹¹ *Ferro SA* paras 50-51 and 53.

¹² Other justifications were raised by Ferro as to how Atlin could continue to produce resins if the toll manufacturing agreement was cancelled. We need not go into these reasons for the purpose of our discussion here.

Breach of Merger Conditions

1. Should any party to a conditional merger approval act contrary to the conditions imposed either by the Commission or the Tribunal, the Commission can have resort to CCR 39.
2. The Tribunal considered this rule in the matter between [Sibanye Gold Ltd v Competition Commission](#)¹ (*Sibanye Gold*) where the applicant (Sibanye) sought to set aside the Commission's Notice of Apparent Breach (the notice) made in terms of section 14 read with CCR 39. The notice was issued for the alleged breach by Sibanye of an employment condition imposed by the Tribunal in a large merger transaction between Sibanye and Newshelf 1114 (Pty) Ltd.
3. The employment condition envisaged a moratorium on retrenchments for two years. Nonetheless, Sibanye commenced the process of retrenchment consultations for operational requirements in terms of section 189 of the Labour Relations Act 66 of 1995 (LRA) as one of its mining shafts was experiencing serious losses over a specified period. Shortly thereafter, the National Union of Mineworkers (NUM) filed a complaint with the Commission (who is mandated with monitoring compliance of merger conditions recommended by the Commission and imposed by the Tribunal) alleging that Sibanye's conduct was contrary to the employment condition imposed by the Tribunal and that Sibanye contemplated the retrenchment of support service staff. Subsequently, the Commission served a notice on Sibanye. Sibanye denied that it had breached the merger conditions and questioned whether a remedial plan was appropriate or possible. Notwithstanding this, Sibanye attempted to resolve the matter with the Commission without success. Sibanye then approached the Tribunal for appropriate relief.

¹ (Case No 020453). See further *Digital Healthcare Solutions (Pty) Ltd v Competition Commission and Another* (41/AM/Jun02).

4. The Commission argued, *inter alia*, that the intended retrenchments of employees at the mine shaft constituted a breach of the merger conditions and if the retrenchments survived labour law scrutiny and were implemented, the retrenchments would be irreversible. In addition, since Sibanye had submitted a remedial plan and this was under consideration, Sibanye was barred from instituting review proceedings.²
5. In turn, Sibanye argued, *inter alia*, that no retrenchments had taken place; that section 189 consultations were not as a result of the merger; and that the notice had been issued on a misconception of law.³
6. The Tribunal was of the view that CCR 39 clearly stated that the consequences of a notice could result in the revocation of merger approval, the imposition of an administrative penalty or an order of divestiture.⁴ However, before the Commission resorts to the above, it must engage with the merging parties and discuss remedial plans.⁵ The merging parties may either submit these remedial plans to the Commission for their consideration or come before the Tribunal to review the Commission's notice. In terms of CCR 39(2)(b), if it is found that the merging parties have substantially complied with the obligation of the merger condition, the notice ought to be set aside.⁶
7. It is important to note that CCR 39(1) contemplates that in order for a notice to be valid, a breach of a merger condition must have *occurred*. It will not suffice if the envisaged breach is imminent or *about to occur*.⁷
8. The Tribunal found that since no retrenchments had *actually* occurred, there was no breach of the merger condition. The Commission's argument that a breach of the condition was imminent did not suffice as this is not what the reading of CCR 39(1) envisages. There must be an *actual* breach before the notice is issued. The term "*apparent*" does not rescue the Commission because it means ostensible and not imminent.⁸

² *Sibanye Gold* para 26.

³ *Sibanye Gold* para 25.

⁴ *Sibanye Gold* para 19.

⁵ *Sibanye Gold* para 20.

⁶ *Sibanye Gold* para 21.

⁷ *Sibanye Gold* paras 22-23.

⁸ *Sibanye Gold* para 27.

9. Finally, the Tribunal stated that in terms of section 27(1)(d) it was empowered to make a decision on matters brought before it by the Commission. On the basis of the legality principle, it was correct to set aside the notice as the Commission, in these circumstances, was not empowered to issue such a notice.⁹ The notice was set aside by the Tribunal.

⁹ *Sibanye Gold* paras 32 and 34.

Failure to Notify

1. There are two leading cases in which the Tribunal has considered a firm's failure to notify a merger transaction to the Commission, which is conduct in contravention of section 13A(1) and (3) of the Act. The leading cases are [Competition Commission v Deican Investments \(Pty\) Ltd and Another](#)¹ (*Deican*) and [Competition Commission v Standard Bank of South Africa Ltd](#)² (*Standard Bank*).
2. In both cases, it was common cause that the respondents had failed to notify the Commission of their respective transactions causing the Commission to pursue a case of prior implementation against the respondents. The essential contention in both matters pertained to the penalty payable for the contravention of section 13A(1) and (3) of the Act.
3. In both *Standard Bank* and *Deican*, the Commission sought to impose an administrative penalty in terms of section 59(1) and section 59(2) of the Act on the basis of the six-step approach developed in [Competition Commission v Aveng t/a Steeldale and Others](#)³ (*Aveng*). This methodology was applied by the Tribunal in the context of a section 4(1)(b) contravention, as captured under Chapter 2 of the Act.
4. In *Deican*, a special purpose vehicle – Deican – increased its shareholding in New Seasons by 30% resulting in it obtaining the right to veto any decisions of New Seasons shareholders which required a special resolution (*Deican* transaction).⁴ Deican is jointly controlled by Dickerson Investments (Dickerson) and Nodus Equity (Nodus). In another transaction, Dickerson increased its shareholding in Nodus from 22% to 28% which gave rise to Dickerson acquiring the ability to veto certain strategic decisions of Nodus (*Dickerson* transaction).⁵ Neither the *Deican* nor the *Dickerson* transactions were notified to the

¹ FTN 151 Aug15, FTN 127Aug15.

² FTN228Feb16.

³ (84/CR/Dec09).

⁴ *Deican* para 2.

⁵ *Deican* para 3.

Commission prior to implementation although they were notified a short period thereafter. The Commission persisted in seeking an administrative penalty equivalent to 10% of each respondent's annual turnover for failure to notify the merger.⁶

5. In its decision, the Tribunal considered section 59(1)(d)(i) and (iii), section 59(2) and section 59(3) of the Act. Section 59(1)(d)(i) and (iii) allow for the imposition of an administrative penalty if the parties failed to give notice of the merger as required by Chapter 3 of the Act and if the parties proceed to implement the merger without the approval of the Commission or the Tribunal. Section 59(2) states that the administrative penalty imposed must not exceed 10% of the firm's annual turnover. Finally, section 59(3) lists the factors that must be taken into consideration when determining an administrative penalty. The administrative penalty regime does not make a distinction between chapter 2 and chapter 3 transgressions.
6. The Tribunal pointed out that there are three distinct types of contraventions that would attract the imposition of a penalty. It stated that:

“Notably section 59(1) distinguishes between three species or types of contraventions for which an administrative penalty may be imposed namely Chapter 2 type contraventions (prohibited practices), Chapter 3 type contraventions (merger control) and failure to comply with or contravention of an order of the Tribunal or CAC...Unlike other jurisdictions our section 59(1) does not prescribe different sanctions for Chapter 2 and 3 contraventions.”⁷

7. The Tribunal went on to consider the various approaches followed by other foreign competition law jurisdictions when dealing with failure to notify. Briefly, the EU regime is similar to ours in that different transgressions attract markedly different sanctions.⁸ According to US law, the FTC possesses the power to impose civil penalties for non-notification of merger transactions and various

⁶ *Deican* para 13.

⁷ *Deican* paras 21 and 23.

⁸ *Deican* para 24.

factors are taken into account when doing so.⁹ In Australia, however, the competition regime does not have a compulsory notification framework. If the merger transaction were to be implemented and results in a substantial lessening of competition, or SLC, the ACCC may apply to the Federal Court for an order for divestiture to unwind the merger.¹⁰

8. The Tribunal was of the view that in cases of this nature, the filing fee would be the rational base or minimum floor amount from which to compute an appropriate penalty. Thereafter, one would enquire firstly as to the type of contravention that is being dealt with, secondly, the nature, duration, gravity and extent of the contravention and thirdly, apply the factors in aggravation and mitigation. Ultimately, the Tribunal imposed different administrative penalties against Deican and Dickerson in relation to their respective transactions.

9. In *Standard Bank*, Standard Bank acquired the entire shareholding of Autocast South Africa (Pty) Ltd (Autocast) as a result of Autocast's default on its loan obligations to Standard Bank. Standard Bank's acquisition of Autocast was foreshadowed by the Commission's Practitioner's Update, Issue 4 titled "*The application of merger provisions of the Competition Act 89 of 1998, as amended to risk mitigation financial transactions*" (the Practitioner Update) that allows for financial institutions such as banks to acquire a defaulting debtor's interests with the view of selling the new acquisition at a later date once the business has been turned around. If the financial institutions have not disposed of the asset within 12 months, the acquisition will trigger a notifiable merger. After the expiry of the 12-month period, Standard Bank failed to dispose of its Autocast acquisition within the requisite time. It later communicated this to the Commission and requested an extension for twelve additional months. The Commission denied Standard Bank's request despite their efforts to dispose of the acquisition timeously. The Commission then indicated that it would be investigating Standard Bank for prior implementation.¹¹

⁹ *Deican* paras 25-27.

¹⁰ *Deican* para 29.

¹¹ *Standard Bank* paras 1 – 10.

10. In determining an appropriate penalty, the Tribunal followed the approach espoused in *Deican*,¹² and applied section 59(1), (2) and (3) of the Act. Standard Bank submitted that its failure to obtain an extension of the 12-month period was a *bona fide* error and should be considered in mitigation.¹³ The Commission accepted that there was no indication that Standard Bank would have derived any profit from the alleged contravention and it had co-operated with the Commission by providing information to the Commission. After taking all mitigating and aggravating factors into consideration, the Tribunal was of the view that a penalty not exceeding R350000 was appropriate and did not exceed 10% of Standard Bank's annual turnover.¹⁴
11. When the Tribunal exercises its discretion, in the imposition of an administrative penalty, like in *Deican* and *Standard Bank*, each case is considered on its own factual matrix. The Tribunal does not apply a rigid test, even though there are certain steps it follows in terms of section 59(1), (2) and (3) of the Act.
12. A case in which the Tribunal imposed a nominal fine was in [Competition Commission v Structa Technology \(Pty\) Ltd and Others](#)¹⁵ (*Structa*) where the Tribunal imposed a fine in the amount of R1.¹⁶ In this instance, the flaw to the Commission's case was to not have regard to the factors in section 59(3). The merging parties offered some points in mitigation which assisted their case. Further, the Tribunal pointed out the Commission's tasks set out in the Act were namely to ensure that businesses comply with the provisions of the Act and that businesses should be encouraged to seek the advice and opinion of the Commission before they act and not approach the Commission *ex post facto* when the situation the merging parties find themselves has gone pear-shaped.¹⁷

¹² *Standard Bank* para 25.

¹³ *Standard Bank* para 31.

¹⁴ *Standard Bank* para 35.

¹⁵ 83/LM/Nov02

¹⁶ *Structa* pg. 5.

¹⁷ *Structa* pg. 3.

13. In [Competition Commission v Edgars Consolidated and Another](#)¹⁸ (*Edgars*) the Tribunal had to determine whether the first part of a two part transaction constituted a notifiable merger and if so, the respondents would have implemented a merger prior to notifying the Commission in violation of section 13A(1) and (3) of the Act.¹⁹ The second part of the transaction was an acquisition of assets which was properly notified by the respondents. The Commission unconditionally approved the second part of the transaction.
14. In the first transaction Edcon acquired the Retail Apparel Group's (RAG) debts and customer books. The Commission contended that the transaction constituted an acquisition of a whole or part of a business's assets. The merging parties disputed the Commission's contention.²⁰
15. The Tribunal ruled that the debts and books acquired by Edcon included customer details in order to pursue customers to settle what was owed to RAG and to proceed to offer them credit extension. This would further ensure that customers would not be lost to other credit advancing retailers in competition with RAG. The Tribunal was of the view that these debts and customer books were clearly acquired to carry on the business of RAG. It followed that the first part of the transaction constituted an acquisition of a part or the whole of a business' assets. Accordingly, the Tribunal found the respondents had acted contrary to section 13A(1) and (3).²¹
16. With regards to the penalty, the merging parties put forward factors in mitigation pursuant to section 59(3) of the Act. The Commission did not put up any factors in aggravation but instead proposed a rather significant penalty. However, during the proceedings, the Commission agreed to reduce the penalty by half. After considering factors in mitigation, the Tribunal imposed a lower penalty than envisaged by the Commission.²² Once again, the Tribunal was of the view

¹⁸ 95/FN/Dec02

¹⁹ *Edgars* para 19.

²⁰ *Edgars* para 21.

²¹ *Edgars* paras 68, 70, 73 and 75.

²² *Edgars* para 83.

that a significant penalty of the magnitude as suggested by the Commission was not warranted in these circumstances.

Exceptions to Pleadings

1. Although its rules do not expressly provide for exceptions, the Tribunal exercises its jurisdiction to hear these in appropriate circumstances in terms of CTR 21(2) which provides for the determination of some legal issues prior to the commencement of a full hearing.¹ Further, the Tribunal does not take a technical approach to these matters and has held that it would be entirely academic for it to determine whether or not it has the power to hear exceptions. The Tribunal has the discretion to consider objections to pleadings and it is not necessary to label such proceedings as being either a special plea, point *in limine* or exception.²
2. In this topic we do not make technical distinctions between the various grounds of exception, such as vague and embarrassing or failure to disclose a cause of action, but rather provide an overview of the approach of the Tribunal to objections raised as to the sufficiency of pleadings. Other objections to pleadings which involve points of law, such as invalidity of initiation, lack of jurisdiction, *res judicata* or prescription, are dealt with separately in other sections of the handbook.
3. The Tribunal's approach when considering exception applications takes into consideration the *sui generis* nature of its proceedings as it does not approach pleadings in the same way as civil or criminal courts.³ Its approach to pleadings is less strict than that of the high courts.⁴
4. While the Tribunal's proceedings are adversarial in nature it also enjoys inquisitorial powers.⁵ In [*American Natural Soda Ash Corporation and CHC Global v the Competition Commission, Botswana Ash \(Pty\) Ltd and Chemserve*](#)

¹ *American Natural Soda Ash Corporation and CHC Global v the Competition Commission, Botswana Ash (Pty) Ltd and Chemserve Technical Products (Pty) Ltd* Case No. 49/CR/Apr00 at 3, *Federal Mogul decision; National Association of Pharmaceutical Wholesalers; Sappi Papers (Pty) Ltd v The Competition Commission* (62/CR. Nov01 at 10).

² ANSAC at pg. 3.

³ *Rooibos Ltd v Competition Commission* (129/CR/Dec08) para 5.

⁴ *Competition Commission, Anglo American Medical Scheme and Engen Medical Fund v United South African Pharmacies and Members of United South African Pharmacies* (04/CR/Jan02) at pg. 2.

⁵ *Invensys PLC and Another v Protea Automation Solutions (Pty) Ltd* (019315) para 5.

Technical Products (Ply) Ltd⁶ (ANSAC), the Tribunal held that as its proceedings were inquisitorial rather than adversarial and because it had enjoyed express powers to give directions to parties in relation to their pleadings and even to call witnesses, its approach to pleadings was more flexible than that of a civil court. Whilst there have been numerous appeals to both the CAC and the SCA, these original findings have been consistently upheld.

5. Each case is considered on its own merits and circumstances and an overly technical approach is to be avoided.⁷ At the pleadings stage, all the applicant is required to do is set out a concise statement containing the material facts and points of law relevant to the complaint in accordance with CTR 15(2).⁸ When considering matters of this nature, the Tribunal is always guided by the principles of fairness.⁹

6. CTR 15(2) states the following:

“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.”

7. In Rooibos Ltd v Competition Commission¹⁰ (Rooibos), the applicant took exception to the Commission’s complaint referral and argued that on the principle of fairness in hearings before the Tribunal, the Commission ought to provide more information in its complaint referral to enable Rooibos to understand and meet the case put against it.¹¹ The Tribunal disagreed with this argument. CTR 15(2) clearly requires a concise statement of the grounds of

⁶ 49/CR/Apr00.

⁷ *Invensys* para 13.

⁸ *Ibid* para 14. See also *BMW South Africa (Pty) Ltd t/a BMW Motorrad v Fourier Holdings (Pty) Ltd t/a Bryanston Motocycles* (97/CR/Sep08) para 30 and 31.

⁹ *Invensys* para 16.

¹⁰ (129/CR/Dec08).

¹¹ *Rooibos* para 6.

complaint and the material facts or point of law relied on. This does not require the Commission to put up every minute detail of its case. In other words, the Commission need only to put up *sufficient particularity* to enable the respondent to plead. CTR 15(2) does not oblige the Commission to do more.¹²

8. The Tribunal confirmed its approach to CTR 15(2) in [Competition Commission v AGS Frasers International \(Pty\) Ltd](#)¹³ (*AGS Frasers*) where it considered whether alleging the facts of an agreement without pleading any further conduct suffices at referral stage. In this case which dealt with cover pricing, the Tribunal found that it did not suffice for the Commission to simply allege what one of the parties did. An allegation of cover pricing under section 4(1)(b)(iii) supports coordinated not unilateral conduct. The Commission ought to have alleged what the *other* party to the collusive agreement had done. This is a material fact which CTR 15(2) would require to be pleaded.¹⁴ According to the Tribunal: for the Commission to allege the existence of an agreement is no more than to state a legal conclusion. More information was required to support such allegation.¹⁵
9. At times, exceptions can serve as a useful tool in cases where there is no reasonable prospect of success and can curtail proceedings.¹⁶
10. The usual remedy for exceptions brought on the grounds of vague and embarrassing pleadings or failure to disclose a cause of action is to afford an offending party the opportunity to file a supplementary affidavit to the excipiable pleading.¹⁷ The Tribunal would not readily dismiss the matter on the merits of the case if the prospects of success for a complainant are low without *first* providing the complainant with an opportunity to amend its case.¹⁸

¹² Para 7 and 9. See *FFS Refiners (Pty) Ltd and Eskom & others* (64/CR/Sep02); See also *BMW South Africa (Pty) Ltd* para 31. Furthermore, *Casalinga Investments CC t/a Waste Rite* (CR133Sep15/Exc152Oct15) supports the approaches adopted by the Tribunal in its previous cases.

¹³ DEF098Aug15/EXC099Jul15.

¹⁴ *AGS Frasers* para 19-21.

¹⁵ *AGS Frasers* para 23.

¹⁶ *Coolheat Cycle Agencies v Competition Commission* (015438).

¹⁷ *Invensys* para 17. See also *Foodcorp (Pty) Ltd t/a Marpro v Competition Commission* (CR213Mar14/EXC250Oct15)

¹⁸ *Invensys* para 20.

11. In some cases, if the Tribunal, after considering all the circumstances and merits of the respondent's case, finds that the exception goes to the core of the complaint and thus cannot be cured by filing a supplementary affidavit, the Tribunal may be inclined to grant the exception and dismiss the complaint as a whole. For example, the Tribunal may dismiss the complaint referral entirely because it was not brought properly before it and it failed to satisfy an allegation under section 4(1)(a) or 4(1)(b).¹⁹
12. Recently, the Tribunal considered its approach to exceptions where the Commission's main case was based on inference. In [*Tourvest Holdings \(Pty\) Ltd and Another v Competition Commission*](#)²⁰ the Tribunal held that even on a case based on inference, the Commission had pleaded sufficiently in its supplementary affidavit to establish a cause of action that cured the alleged vagueness of its referral.

¹⁹ See *Discovery Health Medical Scheme and Another v Afrocentric Healthcare Limited* (CRP003Apr15/EXC265May15). Also see CAC's decision in *Phutuma Networks (Pty) Ltd v Telkom SA Ltd* (108/CAC/Mar11) and *Air Products South Africa v Alba Gas (Pty) Ltd* (CRP221Feb17/Exc074Jun17).

²⁰ CR209Feb17/EXC134Aug17, CR209Feb17/EXC132Aug17.

Amendment Applications

1. The amendment of documents is catered for under CTR 18(1) which states the following:

- (1) *The person who filed a Complaint Referral may apply to the Tribunal by Notice of Motion in Form CT 6 at any time prior to the end of the hearing of that complaint for an order authorising them to amend their Form CT 1(1), CT 1(2) or CT 1(3), as the case may be, as filed.*
- (2) *If the Tribunal allows the amendment, it must allow any other party affected by the amendment to file additional documents consequential to those amendments within a time period allowed by the Tribunal.*

2. While CTR 18 clearly contemplates a procedure for the amendment of a complaint referral, the ability of the Commission to amend the *contents* or ambit of a complaint referral have been set out in case law. We deal with two broad themes in this topic. First, we deal with the procedure for amending a complaint referral and then with the jurisdictional requirements as set out by the CAC for amendment to the substance of a complaint referral.

3. The CAC in [Competition Commission v Loungefoam \(Pty\) Ltd](#)¹ (Loungefoam) set out its approach on how CTR 18(1) operates:

“The proper procedure for the Commission to follow when it wishes to amplify or widen the scope of a referral to the Tribunal is to apply under [CTR] 18(1) to amend the referral from CT1(1) and simultaneously seek leave to deliver a supplementary affidavit in support of the amended allegations. Where that involves a retraction of previous factual statements an explanation should be given for the change in stance”²

¹ 102/CAC/Jun10.

² Loungefoam para 16.

3. The above quote was echoed in the Tribunal's decision of [South African Medical Association v Council for Medical Schemes](#)³ (SAMA) where Counsel for Medical Schemes (CMS) sought to amend the founding affidavit of its self-referral by substituting with it a new founding affidavit ("substitute affidavit"). The Tribunal ruled that this was an irregular procedure as CMS ought to have first sought leave to file a supplementary affidavit in order to provide clarity to its case, and not file a substitute affidavit.

4. In earlier cases, the Tribunal contrasted the practice of the High Court against that of the Tribunal. In [Competition Commission v South African Airways](#)⁴ (SAA) the Tribunal dealt with the Commission's application for amendment of its complaint referral. The Tribunal noted that the practice in the High Court is that an amendment takes the form of a notice to amend to which the respondent can object. It is only in extreme circumstances that an amendment is objected to, much less rejected by the court.⁵ The courts do not easily dismiss amendment applications which cannot be resolved by postponing the matter or awarding costs. The Tribunal is a creature of statute and may adopt an approach that is more flexible to pleadings than the High Court in civil matters. In adopting such an approach, the Tribunal secures the objective of the Act.⁶ The Tribunal was of the view that the complaint in this matter should be fully ventilated. Because of this, the Commission was allowed to file its amendments and the respondent was afforded an opportunity to respond to these amendments.⁷

5. Similarly, the Tribunal in [Competition Commission v Sasol Chemical Industries and Others](#)⁸ (Sasol) was of the view that in general amendment applications should be permitted. If there is, however, a delay in bringing the amendment application, an explanation for such delay is required.⁹

³ CRP066Jul13/AME023May16, CRP065Jul13/AME022May16.

⁴ 18/CR/Mar01.

⁵ SAA pg. 3.

⁶ SAA pg. 6.

⁷ SAA pg. 6.

⁸ 45/CR/May06.

⁹ Sasol para 7. See Harms Civil Procedure in the Supreme Court: Commentary pg. 189.

6. In terms of CTR 18 the Tribunal can exercise its discretion in the context of a particular application taking into regard possible prejudice that can be caused to the parties to the proceedings and the interest of justice.¹⁰
7. In later cases, it can be seen that the Tribunal has not deviated from its earlier approach even though additional considerations have been taken into account when deciding cases of this nature. For example, in [Alba Gas \(Pty\) Ltd v Air Products South Africa](#)¹¹ the Tribunal ruled that:

*“[It] will grant amendments in the instances where the application is not made mala fide and where the application would not cause harm to the opposite party which could not be remedied by a cost order if appropriate.”*¹²
8. The following are examples of amendment applications the Tribunal has dealt with.
 - a. Where a party seeks to amend its affidavits, it must justify its reasons for doing so. If the reasons are not clear and if the amendment application was brought late absent a reasonable justification, the Tribunal will dismiss the amendment application ([Competition Commission and Telkom SA Ltd](#)).¹³ In the same vein, The Tribunal will most likely reject a proposed amendment to pleadings when it is not adequately pleaded in terms of CTR15(2) ([Competition Commission and Telkom SA Ltd](#)).¹⁴
 - b. If the amendment application seeks to introduce new allegations into the referral that were not the subject of a complaint filed with the Commission,

¹⁰ Sasol/ para 8.

¹¹ CRP221Feb17/AME092Jun17.

¹² Sasol/ para 21.

¹³ (11/CR/Febr04) paras 3,4, 14 and 17. This Telkom decision was decided on 23/06/2011.

¹⁴ (11/CR/Febr04) paras 1 and 10. This Telkom decision was decided on 14/12/2010. Further, see *Pistorius HWC NO and others v Competition Commission* (148/CAC/Nov16) where the court viewed the resistance to the Commission’s amendment application as unwarranted. The Commission in its pleadings and annexures thereto had clearly set out the facts contained in the amendment application. The court however queried the necessity of filing the impugned application when the contents therein were adequately pleaded in the Commission’s papers. The appeal was accordingly dismissed.

the amendment will be rejected because the Tribunal would not have jurisdiction to adjudicate that case ([*1time Airline \(Pty\) Ltd v Lanseria International Airport \(Pty\) Ltd*](#)).¹⁵

- c. If the amendment application to a self-referral seeks to introduce an allegation of prohibited conduct that is substantially the same as the conduct contained in the Commission's complaint referral, the Tribunal will dismiss the application because it is viewed as 'incompetent'. A complainant cannot self-refer conduct that is substantially the same as that in the Commission's complaint referral ([*Dimension Data \(Pty\) Ltd t/a Internet Solutions v Telkom SA Ltd*](#)).¹⁶
 - d. Where a party to a merger seeks to amend or vary merger conditions due to a change in market circumstances, the Tribunal is most likely to grant such an application if it can be sufficiently shown by the applicant that it is in dire financial circumstances because of a change in market circumstances ([*Zimco Metals \(Pty\) Ltd and Another v Competition*](#)).¹⁷
9. In one of the leading cases on this issue, *Loungefoam*,¹⁸ the CAC on appeal had to determine whether or not the Tribunal erred in allowing the Commission to amend its founding affidavit to its complaint referral. Before the court could consider the merits of the appeal, it first had to determine whether the order of the Tribunal was appealable.
10. Briefly, the facts of this case are that the Commission had referred two complaints to the Tribunal. In the first complaint, the Commission alleged that Loungefoam, Vitafoam and Gommagomma had engaged in price fixing in terms of section 4(1)(b)(i) ("chemical cartel"). In the second, Loungefoam and

¹⁵ (91/CR/Dec09) para 16, 51 – 60. Here, the Tribunal followed the CAC's guidance in *National Association of Pharmaceutical Wholesalers v Glaxo Wellcome and Others* (45/CR/Jul01) para 88, where the court said: "We ignore the fact that in the CC 1 the complainant may have alleged that certain sections of the Act have been contravened by the respondent inconsistent with the subsequent contraventions alleged in the referral. We then examine the conduct alleged in the CC1 and see if it is substantially the same as that alleged in the referral."

¹⁶ (01531) paras 38 and 40.

¹⁷ (AME160Oct15) paras 14 -16.

¹⁸ (102/CAC/Jun10).

Vitafoam on one occasion, and Feltex on the other, engaged in market division in terms of section 4(1)(b)(ii) of the Act.¹⁹ Loungefoam, Vitafoam, Gommagomma and Feltex are collectively referred to as 'the applicants'.

11. In preparation for proceedings before the Tribunal, the Commission obtained information that Feltex was also party to the chemical cartel but had not been included in the referral. The Commission then sought to amend its founding affidavit to join Feltex to the chemical cartel (the first amendment). The Commission sought to amend its founding affidavit to include Steinhoff International and Steinhoff Africa regarding the liability of the administrative penalty (second amendment). The reason for the second amendment appears to be the defence put up by Loungefoam and Vitafoam that they formed part of one single economic entity in terms of section 4(5)(b) of the Act. The Commission was of the view that even if this was so and it could prove a wider co-operation or collusion amongst the appellants, then its controlling companies, Steinhoff International and Steinhoff Africa would be liable to pay the administrative penalty. Feltex objected to the first amendment whilst Loungefoam and Vitafoam objected to the second amendment. The Tribunal granted both the amendments and the decision was taken on appeal to the CAC. The CAC referred to the two sets of amendments as the Feltex amendments and the Steinhoff amendments respectively.
12. The court first underlined the proper procedure to be followed in terms of CTR 18(1) if the Commission sought to widen the scope of its referral to the Tribunal as discussed above.²⁰ Thereafter the court ventured to determine whether the Tribunal's order granting the amendments was appealable.
13. In coming to its decision, the court considered its powers to adjudicate appeals arising from the Tribunal's decisions in terms of section 61(1) of the Act, subject to section 37(1)(b). The court then considered whether the Tribunal's decision to grant the amendment application was a final decision. In doing so, the court

¹⁹ Loungefoam, Vitafoam.

²⁰ See para 16 of the Loungefoam decision. For ease of reference, see para 2 of this section.

referred to and applied the test in *Zweni v Minister of Law and Order (Zweni test)*:²¹

- 1) Is the decision final in effect and not susceptible to alteration by the court *a quo*?
 - 2) Whether the judgment or order is definitive of the parties rights.
 - 3) Whether the judgment or order disposes of at least a significant portion of the relief sought.
14. The court discussed a few judgments that served to illustrate how decisions in procedural cases have final effect on a litigant's rights which make them final orders subject to appeal.²²
15. The main objection to the Feltex amendment was that the Commission sought to introduce an allegation, namely that Feltex was party to the chemical cartel, that was not initiated by it in terms of section 49B of the Act. Accordingly, the Tribunal lacked jurisdiction because a valid initiation was a jurisdictional requirement for a valid referral. The CAC was of the view that this objection contemplated the Tribunal's jurisdiction and by allowing the amendment application, the Tribunal's decision had final effect in respect of the *jurisdictional* question.²³ The decision would stand on the same footing as a dismissal of a special plea of jurisdiction. As such the court held that the Tribunal's decision was appealable.²⁴
16. In terms of the second amendment the court noted that this was not an issue of jurisdiction.²⁵ Steinhoff argued that what the Commission sought to achieve was impermissible and contrary to the construction of the Act. In other words, it was bad in law. The court was of the view that the Tribunal erred in allowing this amendment on the basis that if the first amendment was allowed, the second amendment would also be allowed. The court held that the second

²¹ 1991 (4) SA 166 (W) para 18 -20.

²² *Loungefoam* para 22 – 23.

²³ *Loungefoam* para 24.

²⁴ *Loungefoam* para 25.

²⁵ *Loungefoam* para 26.

amendment served to introduce a new paragraph in the Commission's founding affidavit, therefore it stood on a different legal footing to the first amendment.²⁶

17. Further, the court held that the Commission's second amendment would require it to prove that the appellants formed part of a single economic unit. This would compel the Commission to consider the corporate structure, management and relations between the companies of the group and lead evidence on its various operations. The court held that to allow this amendment would be to introduce a new cause of complaint or a different claim which would materially affect the proceedings before the Tribunal. As such, the decision by the Tribunal to allow the amendment was final in effect and therefore subject to appeal.²⁷ The court overturned the Tribunal's order and disallowed the amendments.
18. The Commission thereafter sought leave to appeal directly to the Constitutional Court (ConCourt) against the judgment of the CAC. The ConCourt however did not grant the Commission leave to appeal.²⁸
19. In [Woodlands Dairy \(Pty\) Ltd and Another v Competition Commission](#),²⁹ (*Woodlands*) the SCA did mention in passing that a complaint is capable of amendment by the Commission. Since then the seminal case of [Competition Commission v Yara \(South Africa\) \(Pty\) Ltd and Others](#)³⁰ (*Yara*) has decided that the Commission may tacitly initiate complaints and the Tribunal's jurisdiction would not be excluded on the basis of an invalid initiation. For a further discussion of this see the topic dealing with the powers of the Commissioner under section 49B.

²⁶ *Loungefoam* para 27.

²⁷ *Loungefoam* para 28.

²⁸ See further *Competition Commission v Loungefoam (Pty) Ltd and Others* (CCT 90/11) [2012] ZACC 15.

²⁹ 2010 (6) SA 108 (SCA).

³⁰ 2013 (6) SA 404 (SCA).

Condonation Applications

1. The Tribunal may condone the late filing of a document or approve a reduction or extension for the time of filing a document in terms of section 54 of the Act. This section states the following:

- “(1) A party to any matter may apply to the Tribunal to condone late filing of a document, or to request an extension or reduction of the time for filing a document, by filing a request in Form CT 6.
- (2) Upon receiving a request in terms of sub-rule (1), the registrar, after consulting the parties to the matter, must set the matter down for hearing in terms of section 31(5) at the earliest convenient date.”

2. It is worth noting that section 58(1)(c) of the Act provides that the Tribunal may, on good cause shown, condone the non-compliance with any of the time periods set out in the Act or its Rules. Therefore, section 54 read with section 58(1)(c) confers on the Tribunal discretionary powers to either allow or decline a request for condonation.
3. In [in *Mpho Makhathnini and Others v GlaxoSmithKline*¹ \(Makhathnini\)](#) the Tribunal was called to consider the applicant’s condonation application in respect of its complaint referral that was overdue by 40 days. The respondents opposed the application and argued, *inter alia*, that the applicant ought to have filed its condonation application simultaneously with its complaint referral to the Tribunal. The Tribunal held that this exercise would have been futile as the complaint referral could not come before the Tribunal when late filing was condoned. There may be some circumstances however which would require simultaneous filing in the interest of minimising costs of litigation. In this case, no such circumstances existed and the sensible approach to follow was to seek

¹ 34/CR/Apr04.

condonation prior to preparing the complaint referral.² Further, the respondents argued that the applicant's case had no prospect of success. The Tribunal dismissed this point on the basis that the Act did not require the Tribunal to consider such a requirement at this stage of the enquiry. The Tribunal did point out, however, that if one were to consider whether the complaint had no prospect of success, this consideration would be better suited in circumstances where the applicant sought condonation in respect of the filing of an appeal.³

4. Lastly, it was argued by the respondents that the balance of convenience favoured the finding for them as they had suffered prejudice in the form of adverse publicity in relation to the main complaint. The Tribunal observed that if it were to refuse the condonation application that would be the end of the road for the applicant's complaint and it would not have been afforded the opportunity to fully ventilate and resolve the matter. The Tribunal held that the balance of convenience favoured the granting of the condonation application.⁴
5. The reasoning in condonation cases has continued to follow the guidance established in *Makhathnini*. What is increasingly emphasised is that the Tribunal will place less weight on the requirement of '*prospects of success*' especially in instances where the applicant has not had the benefit of a hearing in an open court.⁵
6. The approach of the Tribunal set out *Makhathnini* is in line with SCA jurisprudence where the court, on numerous occasions, has held that this discretionary power is not fettered as the court will apply a holistic approach and consider each matter on a case by case basis in order to establish whether good cause has been shown.⁶ In doing so, the courts have also refrained from developing an exhaustive list of circumstances where good cause can be

² *Makhathnini* para 24.

³ *Makhathnini* para 25.

⁴ *Makhathnini* paras 26-27.

⁵ See *Amalgamated Real Estate Principals Group CC t/a Charter Property Sales v The Home Trader (Eastern Cape) (Pty) Ltd t/a East Cape Property Guide* (16/CR/Feb07) para 29; *Council for Medical Schemes and South African Medical Association* (01859,018598,018788) para 12.

⁶ *Ibid* para 16. Also see *Massmart Holdings Ltd v Shoprite Checkers (Pty) Ltd* (CRP034Jun15/CON211Nov16) paras 20,23,28-36.

shown because to do so would unnecessarily hamper the court's discretion.⁷ In *Uitenhage Transitional Local Council v South African Revenue Services*⁸ the court stated the following:

“Condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of delay and their effects must be furnished as to enable the court to understand clearly the reasons and assess the responsibility. It must be obvious that if non-compliance is time-related, then the date, duration and extent of any obstacle on which reliance is placed must be spelt out.”

7. There are a number of inexhaustive considerations that a court may take into account in determining whether late filing should be condoned. These include the importance of a case, the respondent's interest in finality, the convenience of the court, the degree of non-compliance with the rules, the explanation for delay and the avoidance of unnecessary delay in the administration of justice.⁹
8. The Tribunal has also made it clear that to allow condonation for late filing is not tantamount to a variation of its order. In [*Massmart Holdings Ltd v Shoprite Checkers \(Pty\) Ltd*](#),¹⁰ (*Massmart*) Shoprite argued that since the condonation for the late filing of the amended referral would amount to the deviation of the Tribunal's order, it would amount to a variation of the order. The Tribunal disagreed. The applicants were seeking condonation for not complying with the time frames set out in the Tribunal order. What a condonation application achieves is compliance with the existing terms of that order and does not alter the terms of the order itself.¹¹ In a condonation application, the enquiry is whether the Tribunal should excuse the applicant's non-compliance with the order, not whether grounds exist to change the terms of the order.¹² The latter

⁷ Ibid para 17 and 19.

⁸ 2004 (1) SA 292 (SCA).

⁹ See *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A). Also *Mpho Makhathnini* para 19.

¹⁰ CRP034Jun15/CON211Nov16.

¹¹ *Massmart* para 17.

¹² Ibid.

enquiry pertains to variation of orders. The time periods stipulated in the order are procedural and not substantive.¹³

9. Other cases that have come before the Tribunal on this issue speak to the different circumstances that can establish 'good cause'. For example:
 - a. Where an applicant seeks to introduce a supplementary affidavit to provide further details to a complaint referral;¹⁴
 - b. An applicant finds itself a victim of misfortune where its legal representative absconds, and its expert witness dies suddenly¹⁵ and;
 - c. An applicant only files its amended referral 4 years after the Tribunal instructed it to do so.¹⁶

¹³ *Massmart* para 19.

¹⁴ *Computicket (Pty) Ltd and Competition Commission* (20/CR/Apr10).

¹⁵ *Autobid (Pty) Ltd and TransUnion Auto Information Solutions (Pty) Ltd* (59/CR/May12).

¹⁶ *Amalgamated Real Estate Principals Group CC t/a Charter Property Sales v The Home Trader (Eastern Cape) (Pty) Ltd t/a East Cape Property Guide* (16/CR/Feb07).

Strike-Out Applications

1. In the High Court, applications to strike out are brought in terms of High Court Rules (HCR) 23(2) where any pleadings that contain scandalous, vexatious or irrelevant averments may be struck out.¹ A court may also grant an application to strike out if the applicant will be prejudiced if the application is not granted.² As always, each application is assessed on its own facts and circumstances.
2. The Tribunal rules do not expressly provide for strike out applications. However, in accordance with CTR 55(1)(b) the Tribunal may have regard to the rules of the High Court in cases not provided for in the Tribunal rules.³
3. The Tribunal has permitted applications for strike out in its proceedings, with due regard to the High Court rules, but has always required the applicant to establish a substantial basis as to why a strike out must be granted. For example, in [Allens Meshco \(Pty\) Ltd and Others v Competition Commission](#)⁴ the Tribunal found that the applicant failed to establish a basis for its strike out application as the impugned affidavit complained of did not contain any confidential information as alleged by the applicant.
4. If an allegation in any pleading fails to disclose a cause of action, an applicant may apply for that allegation to be struck out. In [The New Reclamation Group \(Pty\) Ltd v Gerhardus Johannes Jacobs](#),⁵ (New Reclamation) Jacobs, the complainant, alleged that The New Reclamation Group acquired control over a scrap metal merchant, Golden Metals, located on premises across from Jacob's business and that this acquisition allowed The New Reclamation Group to abuse its dominance in the scrap metal market. This complaint was investigated under section 8(c) and 8(d)(i) of the Act by the Commission which then issued a certificate of non-referral on the basis that Golden Metals was

¹ Herbstein and Van Winsen *Civil Practice of the High Courts of South Africa* Vol 1 (Juta) pg. 650.

² Ibid pg. 656.

³ CTR 55(1)(b).

⁴ CR093Jan07/STR087Aug16 & CR093Jan07/STR088Aug16.

⁵ 21/CR/Mar11.

actually not acquired by Reclam but only occupied its premises. The complainant, Jacobs, then referred the case to the Tribunal along with other allegations which the respondent successfully refuted. The Tribunal ordered certain paragraphs in the founding affidavit to be struck out *inter alia* on the grounds that they were excipiable and failed to disclose a cause of action. ⁶

5. If certain allegations in any pleading will prejudice an applicant in other related proceedings and a case to that effect is made out, the Tribunal will strike out the offending paragraphs. In [AGS Frasers International \(Pty\) Ltd v Competition Commission](#)⁷ (*AGS Frasers*), the applicant (AGS) sought to strike out a paragraph in the Commission's referral affidavit which stated that AGS, in response to the Commission's invitation to settle, admitted to two instances of collusive tendering but refused to pay an administrative penalty in line with the invitation.⁸ AGS argued that the contents of the impugned paragraph related to settlement negotiations which were made without prejudice. If these admissions were allowed to be entered as evidence, it would have a chilling effect on settlement negotiations with the Commission, as respondents would not be assured that admissions made therein might be used against them in subsequent proceedings if the negotiations were unsuccessful.⁹ The Commission contended that it would be premature for the Tribunal to decide the point prior to the close of pleadings, in other words, this point should only be decided once AGS had filed its answering papers.

6. The Tribunal was not persuaded by the Commission's argument. By their nature, settlement negotiations are without prejudice and should be treated as such to enable their success and to avoid lengthy litigation.¹⁰ Furthermore, the admissions made in the context of negotiations could raise other disputes in the main matter that would not take the matter forward. If such evidence was allowed to be admitted, lengthy disputes regarding the context in which these admissions were made would ensue.¹¹ The argument that admissibility of

⁶ *New Reclamation* para 55.

⁷ DEF098Aug15/EXC099Jul15.

⁸ *AGS Frasers* para 39.

⁹ *AGS Frasers* para 40.

¹⁰ *AGS Frasers* para 42.

¹¹ *Ibid.*

admissions made in the context of without prejudice negotiations would be against public policy is compelling. The Commission failed to establish otherwise. Therefore, the Tribunal granted the strike out application as sought by AGS.¹²

7. Other cases before the Tribunal illustrate how applicants failed to substantiate their claims to strike out averments in pleadings. For example:
 - a. In [Pioneer Fishing \(Pty\) Ltd v Competition Commission](#), the applicant failed to establish that a collusive agreement was not contemplated in the Commission's initiation statement and therefore did not form part of the referral;¹³
 - b. In [Computicket \(Pty\) Ltd and Competition Commission](#), the applicant failed to establish that certain documents discovered by the Commission which form part of the bundle were not before the Commission when it made the decision to refer the matter to the Tribunal. The Tribunal held that the applicant had misinterpreted the law in relation to valid initiation. It concluded that the inclusion of the discovered documents into the trial bundle was not tainted by bad faith on the part of the Commission. The application to strike out was accordingly dismissed.¹⁴

¹² AGS Frasers para 43.

¹³ CR206Mar14/OTH214Feb15.

¹⁴20/CR/Apr10.

Joinder Applications

1. The action of joinder involves the joining of more than one party or more than one cause of action in a single proceeding. Mostly, joinder is used for convenience in order to avoid instituting a number of separate actions that could be considered as one or when the party or parties to be joined have a direct and substantial interest in the matter that would have an effect on their respective rights. It is trite that an interested party must be afforded an opportunity to be heard if such party has a substantial and direct interest in the matter.¹
2. Tribunal Rule (CTR) 45 primarily provides for the action of joinder. Specifically, CTR 45(1) states that:

“The Tribunal, or the assigned member, as the case may be, may combine any number of persons, whether jointly, jointly and severally, separately, or in the alternative, as parties in the same proceedings, if their respective rights to relief depend on the determination of substantially the same question of law or facts.”
3. The Tribunal’s power in respect of joinder under the rule is discretionary in nature.² However this is not only in terms of CTR 45(1) but also section 55 and CTR 55 which confers on the Tribunal a wide discretion in managing and conducting its proceedings. Such discretion ought to be exercised on a case by case basis.³ It then follows that whether or not joinder ought to be permitted by the Tribunal at the referral stage is a matter of the Tribunal’s discretion subject to the CAC jurisprudence regarding initiation under section 49B.⁴
4. Prior to legislative intervention in the rules of joinder, the common law position was that an applicant who had two separate causes of action against two or

¹ See *Ex Parte Body Corporate of Caroline Court* 2001 (4) SA 1230 (SCA). See further Herbstein and Van Winsen *Civil Practice of the High Courts of South Africa* Vol 1 (Juta) pg. 208.

² *Afrocentric Health Limited and Discovery and Others* (CP003Apr15/JOI120Sep15) (*Afrocentric*).

³ *Afrocentric* para 27.

⁴ *Ibid*.

more defendants would not be able to plead these in one summons. The introduction of High Court Uniform Rule (HCR) 10 altered and allowed this position.⁵ It is worth noting that the common law position on obligatory joinder remains unaltered in that anyone with a direct or substantial interest in a matter must be joined.⁶

5. In [Afrocentric](#),⁷ the Tribunal was tasked to decide whether or not it should allow the joinder application launched by Afrocentric Health (the applicant) to join 15 other respondents (proposed respondents) in a private referral brought against Discovery Health Medical Scheme (DHMS) and Discovery Health Limited (DH) (collectively the respondents). The applicant had submitted a complaint to the Commission in terms of section 49B(2) of the Act alleging various prohibited practices carried out by the respondents (section 49B complaint). After its investigation, the Commission issued a notice of non-referral and thereafter the applicant referred its complaint to the Tribunal pursuant to section 51(1) of the Act. In their answering affidavits, the respondents raised two objections; namely non-joinder and that the referral failed to disclose a cause of action (an exception to the referral). The applicant subsequently filed its joinder application which the respondents and prospective respondents objected to on two grounds. Firstly, the respondents argued that the applicants could not expand the section 49B complaint through joinder at the referral stage. Instead, the applicants would be required to file a new section 49B complaint (which would include the prospective respondents) for the Commission's consideration.⁸ Secondly, the referral to the Tribunal did not disclose a cause of action and therefore there was no substantive basis to bring before the Tribunal a joinder application.⁹
6. The Tribunal held that the test for joinder is not whether or not the referral discloses a cause of action. This issue should be reserved and tested in the

⁵ HCR 10 and CTR 45(1) are analogous to each other.

⁶ *Afrocentric* para 25. It follows that in this case, a court has no discretion to allow or deny joinder.

⁷ (CP003Apr15/JOI120Sep15).

⁸ *Afrocentric* para 17.

⁹ *Afrocentric* para 19.

main matter. Be that as it may, the Tribunal stated that it could not simply ignore the fact that the cause of action argument was raised by the respondents in the exception and by the proposed respondents in the joinder application.¹⁰

7. The Tribunal held that given that all respondents had raised the defence of no cause of action, it would be in the interest of justice for the exception to be determined first before putting the proposed respondents to the cost of putting up a defence to a case that is already alleged to be unclear.¹¹ If the exception were upheld, the referral might be dismissed and therefore render the joinder application unnecessary.¹² If the exception were upheld, it would be a better articulated case (through supplementation) which would afford the proposed respondents an opportunity to assess their positions in relation thereto. In the interest of fairness, the proposed respondents were entitled to clarity about a case to which they were being joined.¹³
8. The Tribunal was of the further view that in these circumstances, to allow joinder prior to the determination of the exception application would be unfair as this would put the proposed respondents to unnecessary costs of putting up a defence to a case that is not clear and is already being challenged at a substantive level.¹⁴ In light of the above, the joinder application was dismissed.
9. The case of [*Pistorius HWC NO and others v Competition Commission*](#)¹⁵ (*Pistorius*) had to determine joinder in the context of trust law.
10. Briefly, the Commission applied to join the fifth and sixth appellants to the complaint referral because they were the remaining two trustees of a trust (the Hendrick Pistorius Trust) which was a respondent in the complaint referral. The Tribunal granted the Commission's joinder application which resulted in an appeal to the CAC. The four appellants, who vigorously opposed the joinder application, were the trustees of the Trust. [In a related case the CAC also

¹⁰ *Afrocentric* para 30.

¹¹ *Afrocentric* para 31.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Afrocentric* para 32.

¹⁵ 148/CAC/Nov16.

considered the appeal against an amendment application launched by the Commission (and granted by the Tribunal) in respect of its complaint referral. The appeal in that respect was dismissed by the CAC].¹⁶

11. With respect to the joinder application, two points of appeal were raised by the appellants at the CAC. Firstly, because not all trustees were joined as respondents from the outset, the institution of complaint proceedings and the complaint referral itself were a nullity.¹⁷ Secondly, the joinder ought not to be permitted as the complaint referral would have been defeated by prescription by the time the trust was properly joined by joining all the trustees accordingly.¹⁸
12. In respect of the first point of appeal, the CAC dismissed it on the basis that trust law did not follow this argument.¹⁹ In essence, the CAC applied the principle that not all trustees of a trust must be cited in proceedings “*provided that the trustee[s] actually joined [were] authorised by the remaining trustees to represent the trust – and presumably, provided the trust deed permitted such authorisation*”.²⁰
13. The CAC also dismissed the second point of appeal. The court pointed out that the appellants did not make mention of a particular statutory provision to form the basis of their contention. If the appellants relied on section 67(1) of the Act, this provision would not find any application as it dealt with the period between the cessation of the prohibited conduct and commencement of the complaint initiation.²¹ If the appellants perhaps had the Prescription Act 68 of 1969 in mind, this too unfortunately would not apply as the period between the date of the complaint referral and joinder applications did not echo any provisions of that Act. In light of the above, the CAC dismissed the appeal.²²

¹⁶ This aspect of the judgment is dealt with in amendment applications. See further *Competition Commission v Loungefoam (Pty) Ltd* (103/CR/Sep08) where the approval of the Commission’s amendment application lead to the automatic approval of its joinder application.

¹⁷ *Pistorius* para 3.

¹⁸ *Ibid.*

¹⁹ *Pistorius* para 43. Various cases pertaining to trust law – specifically issues of authority and capacity of trustees to enter into agreement or institute proceedings.

²⁰ *Pistorius* para 36.

²¹ *Pistorius* para 44.

²² *Pistorius* para 45-46.

Separation Applications

1. The Tribunal rules do not expressly provide for separation applications. Accordingly, in accordance with CTR 55(1)(b), guidance is sought from High Court Uniform Rule (HCR) 33(4) for the separation of issues. HCR 33(4) states:

“If, in any pending action, it appears to the court mero motu that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.”

2. HCR 33(4) aims at facilitating convenience and the expeditious resolution of litigation. A separation of issues should only be considered when all the facts and issues of the case have been carefully considered and whether it is convenient to separate such issues. In [*Denel \(Pty\) Ltd v Vorster*](#),¹ the court stated the following:

“[HCR] 33(4) ... is aimed at facilitating the convenient and expeditious disposal of litigation. It should not always be assumed that that result is always achieved by separating issues. In many cases, once properly considered, the issues will be found to be inextricably linked even though at first sight they might appear to be discrete. And even where the issues are discrete the expeditious disposal of the litigation is often best served

¹ [2004] ZASCA 4. See further Tribunal's decision in *Sasol Chemical Industries Ltd v Omnia Group (Pty) Ltd* (38/CR/Apr12, (016907) para 18. The Tribunal was of the view that no advantage or convenience would be gained by separating the issues. The separated issue is not only a question of law as was posited by Sasol, but a mix of law and fact in which the facts are disputed. The Tribunal certainly would not be capable of making a clear determination of the separated issue without determining the dispute between the parties in relation to those facts. In such case, parties would be required to lead evidence and each party be afforded the opportunity to exercise its right of cross-examining the other parties' witnesses.

by ventilating all the issues at one hearing particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately.”

3. Depending on the circumstance of each case, the Tribunal may grant a separation order if the requirements of HCR 33(4) are satisfied.
4. In [Allens Meshco \(Pty\) Ltd and Others v Competition Commission](#),² the Tribunal stated that convenience does not only relate to the parties' convenience but also the convenience of the court granting the separation.
5. In [Loungefoam \(Pty\) Ltd and Another v Competition Commission](#)³ (*Loungefoam*), the Tribunal had to decide whether or not it should grant a separation order where the applicant, Loungefoam, sought to have its defence of a single economic entity heard separately from the other wider issues arising from the complaint referral against it. The Commission did not oppose this application.⁴
6. After considering the submissions made by all parties and the legal authorities cited above, the Tribunal declined to separate the single economic entity issue from the wider issues. The Tribunal listed the number of factors it had regard to in arriving at its decision.
7. First there was no consensus between the parties whether the matter was capable of separation. It would indeed be futile to order separation if the parties remain in dispute as to where the separating line gets drawn.⁵ Second, if the Tribunal had to order the separation, it would effectively be denying the

² (CR093Jan07/SEP086Aug16) para 11. The Tribunal was of the view that the facts in relation to the merits and remedies were intertwined and couldn't easily be pigeonholed. To grant the separation order would lead to piecemeal litigation because once the merits have been decided, they could be appealed which would lead to delay in the final determination of the matter.

³ 103/CR/Sep08.

⁴ *Loungefoam* para 4.

⁵ *Loungefoam* para 26.

Commission to bring a case in the manner that it wished to do so. After all, the Commission is *dominus litis* in a complaint referral and must be given a fair opportunity to present its case before prematurely confining it.⁶ Proceeding with a case in its entirety does not restrict respondents from objecting to the leading of evidence that does not form part of a case against them.⁷ In addition, hearing a case in its entirety avoids having to run two proceedings and calling witnesses for the second time. Finally, on the issue of fairness the Tribunal considered that Feltex, the 3rd respondent, could have an interest in the evidence led in respect of the three counts. If such evidence was led in its absence, this would be unfair to Feltex. Nor would it be fair for the witnesses, were the issues separated, to give the same testimony in subsequent proceedings.⁸

8. The Tribunal concluded that the separation would neither be convenient nor lead to orderly proceedings.⁹ It was accordingly ordered that the matter proceed as originally conceived in the referral.¹⁰ Prior to the application the parties had seemingly agreed to a separation, and an order to this effect had been obtained from the Tribunal, but they could not subsequently agree on where the lines of separation should be drawn. For this reason, the Tribunal cautioned that parties like the Commission must think these issues through more carefully before agreeing to a separation of issues. The parties are placed in the best position to determine whether issues are ripe for separation. The panel hearing a matter of this nature on an unopposed basis cannot be fully appraised of issues that may arise.¹¹
9. In [South African Breweries Ltd and Others v Competition Commission](#)¹² (SA Breweries) the Commission had referred a complaint against SAB (1st respondent) and its 13 distributors (2nd – 14th respondent) for conduct in contravention of section 4(1)(b)(ii), 5(1), 5(2), and section 9 of the Act

⁶ *Loungefoam* para 27.

⁷ *Loungefoam* para 28.

⁸ *Loungefoam* para 33.

⁹ *Loungefoam* para 39.

¹⁰ *Ibid.*

¹¹ *Loungefoam* para 38.

¹² 134/CR/Dec07.

("distribution case"). SAB alone was accused of engaging in conduct which constituted a violation of section 8(d)(i) and/or 8(c) ("abuse case").

10. SAB and its distributors sought a separation order on the basis that the distribution case was easily separable, both legally and factually, from the abuse case. If there were any factual overlaps between the two cases, the evidence deduced in the distribution case could be used in the abuse case. SAB further argued that the separation could provide an opportunity for certainty and clarity regarding SAB's distribution business, which had been subject to regulatory scrutiny.
11. The 2nd to 14th respondents aligned themselves with SAB's argument that the distribution case was distinct from the abuse case and that the distributors had no legal interest in the Commission's abuse case which was solely directed at SAB. If the separation were not allowed, the distributors would be prejudiced, and that would have significant effects on their respective business operations.
12. The Commission opposed the separation application, contending that there was no distinct distribution case capable of being separated from the abuse case and that the distribution and abuse case were inextricably factually linked. Be that as it may, the Commission was of the view that if the case were split, it would favour a separation of section 4(1)(b) and 5(1). The Commission relied heavily on the Tribunal's decision in *Loungefoam*.
13. Relying on HCR 33(4) and various authorities on this issue, the Tribunal was of the view that the separation ought to be granted. The Tribunal distinguished this case *Loungefoam*. In *Loungefoam* an order of separation had first been granted but the was subsequently withdrawn when it became clear that the parties could not draw a line between the issues to be separated. In SAB however, there were two discrete complaints, one which dealt with distributors and the other with retailers (abuse case). What further complicated the matter was that the Commission had instituted an additional section 8 complaint, which it had not yet referred to the Tribunal. It would have been to both parties' advantage to have the additional section 8 complaint, after the Commission had

brought it to the Tribunal, consolidated with the abuse complaint that had already been referred.

14. Although there would be some overlap regarding the proof of dominance in both the abuse and the distribution cases, this should not be overstated when considering the issue of separation. Dominance had already been conceded by SAB in respect of section 9 which would avoid the need to present evidence on market definition and market power.¹³ There was no doubt in the Tribunal's mind that a coherent case on the basis of sections 4,5 and 9 could go ahead. Any further postponements of the distribution case would be unfair to the distributors as the Commission, on its own version, was not ready to proceed with its abuse case.¹⁴ The section 8 case was accordingly separated from the section 4, 5 and 9 case.

¹³ *SA Breweries* para 25.

¹⁴ *SA Breweries* para 26.

Stay Applications

1. A stay application is usually brought to temporarily suspend proceedings whilst another matter, related to the case before the Tribunal, is being adjudicated, usually in another forum or court. Stay applications centre highly around the factual matrix of a particular case and thus the facts and circumstances of each case must be carefully scrutinised and considered in the context of the Act and the applicable legal tests.
2. The Tribunal has adopted a test for granting a stay of proceedings based on the jurisprudence of the High Court. In *Novartis SA (Pty) Ltd v Main Street 2 (Pty) Ltd*¹ (Novartis – Novartis test) as follows:
 - a. *“Whether the applicant has a reasonable prospect of success in the High Court.*
 - b. *Whether it is in the interest of justice to stay the proceedings.*
 - c. *The balance of convenience.”*
3. This test has been subsequently confirmed by the CAC in [*Monsanto South Africa \(Pty\) Ltd and Another v Bowman Gilfillan*](#)² (*Monsanto*), [*Allens Meshco \(Pty\) Ltd and Others v Competition Commission*](#)³ (*Allens Meshco*) and [*Council for Medical Schemes and Another v South African Medical Association*](#)⁴ (*CMS*).
4. In *Monsanto* the Tribunal was tasked with determining whether or not it should grant a stay of merger proceedings pending an interdict in the High Court where the applicant, Monsanto South Africa, sought to interdict the first respondent - Bowman Gilfillan - from acting or advising or otherwise assisting the second and third respondents (Pioneer and Pannar Seed) with any merger or proposed

¹ [2001-2002] CPLR 470 (CT).

² 109/CAC/Jun11.

³ 153/CAC/Jan15.

⁴ 133/CAC/Dec14.

transaction between them, including but not limited to the proceedings already before the Tribunal (interdict application).⁵

5. The Tribunal applied the Novartis test and viewed the conflict of interest as one of commercial and not legal interest.⁶ South African courts had not faced such an issue before and thus the prospects of success were by no means certain.⁷ Monsanto had not shown how the continued presence of the legal advisors, Bowman Gilfillan, would cause any harm to the merger proceedings.⁸ A stay would have caused substantial prejudice to the second and third respondent as there would have been no certainty as to when the proceedings would commence.⁹ The Tribunal dismissed the application which Monsanto then appealed to the CAC.
6. At the CAC, Monsanto argued that Bowman Gilfillan was in possession of confidential information that remained as such and relevant to the proposed merger proceedings.¹⁰ If this information was divulged to third parties it could potentially be used to the disadvantage of the appellants. Therefore, the appellants had a right to be protected; sufficient to justify the relief as sought.¹¹ The respondents argued that the allegations made by the appellants did not justify the conclusion that confidential information was at risk of being disclosed¹² and thus no apprehension of breach of confidentiality was justified.
7. The CAC, like the Tribunal, applied the *Novartis* approach.¹³ The test advances proportionality between protecting the legitimate interests of both sides and safe-guarding the integrity of proceedings.¹⁴ In determining the reasonable prospect of success in interdict procedures, the test of confidentiality set out in [*American Natural Soda Ash Corporation and Others v Botswana Ash and*](#)

⁵ *Monsanto* pg. 3.

⁶ *Monsanto* pg. 4.

⁷ *Monsanto* pg. 5.

⁸ *Monsanto* pg. 6.

⁹ *Monsanto* pg. 5.

¹⁰ *Monsanto* pg. 8.

¹¹ *Monsanto* pg. 10.

¹² *Monsanto* pg. 14.

¹³ *Monsanto* pg. 17.

¹⁴ *Ibid.*

others¹⁵ (*ANSAC*) must be applied. On the basis of the facts alleged, the CAC held that the *prima facie* right that entitled the applicant to interim relief, would be converted into a basis for final relief.¹⁶

8. The CAC pointed out that it was significant that the appellants sought neither to have the attorney/client relationship between the first and second respondent terminated nor prevent the first respondent from consulting or seeking instructions from the second respondent.¹⁷ On any reading of the averments in the papers could it be ascertained, on a reasonable basis, that the information remained confidential.¹⁸ On the test adopted in *ANSAC* it could not be said that the appellant's case satisfied the requirements.¹⁹
9. Considering the interest of justice, this requires an exercise of balancing of interests.²⁰ In assessing the balance of convenience, the court considered the nature of merger proceedings. Merger proceedings by their very nature are urgent and once parties have agreed to a merger, they ought to be free to implement such merger without unreasonable delay.²¹ The process that would follow from granting the stay and hearing the matter, would take long and further time for the judgment to be released. The nature of the seed industry as explained showed that, in the circumstances, the merger could not be delayed. Had the confidential information been at such risk of being divulged, the appellants would have embarked on a different legal avenue available to it such as approaching the High Court on an urgent basis to dispose of the matter.²² The appeal was dismissed.
10. When stay applications are appealed to the CAC, the court always considers whether it has jurisdiction to entertain the matter. In *Allens Meshco* and *CMS*

¹⁵ [2007] 1 CPLR 1 (CAC) at pg. 18. The requirements that must be satisfied: 1) was the first respondent given confidential information? 2) is the information still confidential? 3) is the information relevant to the merger?

¹⁶ *Monsanto* pg. 19.

¹⁷ *Monsanto* pg. 21.

¹⁸ *Monsanto* pg. 23.

¹⁹ *Monsanto* pg. 24.

²⁰ *Ibid.*

²¹ *Monsanto* pg. 26.

²² *Monsanto* pg. 29.

the CAC arrived at different outcomes. In *Allens Meshco* the court found that it did not have jurisdiction to entertain a stay application and therefore did not consider the merits of the appeal. In *CMS*, the CAC found that it did have jurisdiction. The reasons of each case are set out in full below.

11. In *Allens Meshco*, the appellant - Allens Meshco Group or AMG - appealed to the CAC against the Tribunal's decision refusing the stay of complaint proceedings pending the delivery of a judgment of the North Gauteng High Court in review proceedings instituted by AMG.²³ The Commission argued that the complaint referral and the review in the HC were distinguishable and could run separately from each other.²⁴
12. In approaching the CAC, the appellants invoked the court's appeal powers in terms of section 61(1) of the Act where, subject to section 37(1), the court has jurisdiction to hear the appeal. The CAC can hear appeals arising from final decisions of the Tribunal (except for consent orders) or any interlocutory or interim decisions that can be taken on appeal.²⁵ The Act is the only instrument that can confer jurisdiction on the court and not an agreement concluded between parties.²⁶
13. When looking at section 37(1)(b), the court was of the view that it must interpret the meaning of 'judgment or order' in terms of section 20(1) of the repealed Supreme Court Act 59 of 1959. In [*Zweni v Minister of Law and Order*](#),²⁷ the court had to distinguish between 'judgments' or 'orders' that were appealable and those that were not. A final judgment or order has three attributes (*Zweni* test):
 - a. *The decision is final in effect and is not susceptible to alteration by the court of first instance.*
 - b. *The decision is definitive of the parties' rights.*

²³ *Allens Meshco* para 1.

²⁴ *Allens Meshco* para 9. Review proceedings pertained to the Commission denying AMG leniency in respect of its CLP as AMG was said to be 'second through the door'.

²⁵ Section 37(1).

²⁶ *Allens Meshco* para 21.

²⁷ 1993 (1) SA 523 (A).

c. *The decision must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.*

13. The court held that an order granting a postponement, or a stay of proceedings does not have the attributes of a final judgment or order in the civil jurisprudence. The refusal of a stay or postponement was not final in effect as the court, after further consideration, may alter its decision.²⁸
14. Further, the CAC held that the Tribunal's refusal to grant the stay was not definitive of the parties' rights in the main proceedings, namely the complaint referral proceedings, and it did not dispose at least a substantial part of the relief sought (an order that the accused firms contravened the Act and thus an administrative penalty ought to be imposed on them).²⁹
15. The Tribunal's refusal to stay was not a final decision as contemplated by section 37(1)(b)(i) but an interlocutory decision as phrased in s37(1)(b)(ii). There is no provision in the Act to the effect that this interlocutory decision – a refusal of a stay – may be taken on appeal.³⁰ The court therefore held that it did not have the jurisdiction, on the basis of *Zweni*, to hear the appeal.
16. In the *CMS* case, the Council for Medical Schemes (Council) appealed the Tribunal's decision to grant the South African Medical Association (SAMA) a stay of proceedings in the Tribunal pending the outcome of review proceedings in the High Court.
17. The Council lodged a complaint with the Commission alleging that SAMA partook in conduct in contravention of section 4(1)(b)(i). The Commission did not consider the merits of the complaint as it was conducting a health market inquiry focusing on rising prices of health care in South Africa. The Commission

²⁸ The court noted that even if this was unlikely in practice, it was beside the point.

²⁹ Para 28. **Note:** This is precisely where the courts approach differs in *Allens Meshco* and *CMS*. In *CMS*, the court held that this element ought to be considered in the context of the stay application, and not the main proceedings because the stay application is the matter the court is confronted with. Not the other.

³⁰ *Allens Meshco* para 29.

- issued a notice of non-referral and the Council proceeded to self-refer its complaint to the Tribunal.
18. Thereafter, SAMA launched a review application in the High Court seeking to review and set aside the Council's decision to self-refer the complaint to the Tribunal. SAMA then launched a stay application before the Tribunal to stay the complaint proceedings pending the outcome of the High Court review application. The Tribunal granted the stay on the basis of the *Novartis* test.
 19. CMS appealed the Tribunal's decision to the CAC. The court had to decide whether the Tribunal's decision was appealable to the CAC.³¹ If so, the merits of the appeal could be considered.³² The court set out section 37(1)(b) which indicates the types of Tribunal decisions that can be brought on appeal before it. The court then briefly detailed its findings in *Allens Meshco* and emphasised the view of Rogers AJA in that decision, which was that the CAC could re-visit its approach to stay proceedings.³³
 20. The CAC then highlighted various High Court cases where the courts had stated that it was the stay application that constituted the main proceedings and not the matter which formed the subject of the stay.³⁴ The question was whether the stay application was definitive of the parties' rights and disposed of at least a substantial portion of the relief sought. If the answer to this question was in the affirmative, it followed that the court's decision was appealable.³⁵
 21. In determining whether the Tribunal's decision was appealable, the court held that the *Zweni* test ³⁶ must be considered with a further jurisdictional fact outlined in section 37(1)(b) – the context and purpose of the Act.³⁷
 22. In other words, the issue of appealability must be considered within the context of the purpose of the Competition Act – specifically section 2(b) which provides

³¹ CMS para 11.

³² CMS para 22.

³³ CMS para 13.

³⁴ Note: this is where *Allens Meshco* case differs from the *CMS* case.

³⁵ CMS paras 16 and 17.

³⁶ CMS para 12.

³⁷ CMS para 19.

that the Act aims to promote and maintain competition in the Republic. The court then described the possible effects of granting a stay application. It was of the view that, in these circumstances, granting a stay would allow for the alleged prohibited practice to persist whilst the High Court litigation continued and could become the subject to appeals that might take years to complete.³⁸ From that, the court stated that the granting of a stay may be in direct conflict with the purpose of the Act.³⁹ In view of the above considerations, the court held that the decision in *Allens Meshco* was not applicable to this matter.⁴⁰

23. In *CMS* the CAC found, contrary to its approach in *Allens Meshco*, that on the proper application of the *Zweni* test together with the context and framework of section 2(b) of the Act, the granting of a stay application was final in effect. As such, the decision by the Tribunal to stay was appealable and the merits of the appeal could be considered.⁴¹
24. When considering the merits, the court considered whether the Tribunal applied the *Novartis* test correctly. *CMS* contended that the Tribunal erred in its decision as it failed to properly address the ‘prospects of success’ requirement and addressed the subsequent requirements, that is public interest and balance of convenience, as a single enquiry.⁴²
25. In addressing the first requirement: prospects of success, the court held that the Tribunal should not shy away from considering this issue because it believes it cannot deal with public law issues. By considering the prospects of success, it does not pronounce on the final determination of the public law issue or usurp the High Court’s jurisdiction.⁴³ The court held that SAMA had little prospect of success in the High Court because its argument that *CMS* cannot refer a matter against it to the Commission was thinly supported by section 7 of the Medical Schemes Act and section 41(3) of the Constitution.⁴⁴

³⁸ *CMS* para 20.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *CMS* paras 21-22.

⁴² *CMS* para 23.

⁴³ *CMS* para 26.

⁴⁴ See *CMS* paras 27 – 33 for a full detailed analysis.

26. For the sake of completeness, the court went on to consider firstly whether the laying of a complaint with statutory bodies such as the Commission amounted to the initiation of litigation. The court was of the view that it did not. It stated the following:⁴⁵

“Such a step is a preliminary or investigative step [...]. The second step taken by CMS to self-refer the complaint to the Tribunal does also not amount to the initiation of litigation. CMS in self-referring a complaint to the Tribunal is requesting the Tribunal to investigate and consider whether SAMA has breached a potential restrictive horizontal practice relating to fixing purchase or selling prices of medical services to the public. The stage of the initiation of litigation has not been reached.”

27. Lastly, it was considered whether the Commission’s decision to refer a complaint amounted to administrative action. The SCA in [Competition Commission of South Africa v Telkom](#)⁴⁶ was instructive on this issue. It held that the Commission’s decision to refer is investigative in nature and not of an administrative nature.⁴⁷
28. In conclusion, the CAC was of the view that the Tribunal could have taken consideration of factors set out in the *Zweni* test as it would have been more convenient for the parties and for the benefit of the public to dismiss the stay.⁴⁸
29. The meaning of the CAC statement that a self-referral does not amount to an initiation of litigation but rather an “*investigation by the Tribunal*” is somewhat unclear because in terms of the Act the Commission is mandated with investigation and enforcement functions and the Tribunal with adjudicative functions. While the Tribunal enjoys inquisitorial powers, these cannot be said to supplant the investigative powers of the Commission.
30. In other stay application cases, in which it was argued that the one proceeding will impede on another, for example, the determination of complaint

⁴⁵ CMS para 34.

⁴⁶ 2009 ZASCA 155.

⁴⁷ CMS para 36.

⁴⁸ CMS para 37.

proceedings and an investigation in a market inquiry, the Tribunal (applying the *Zweni* test) has denied a stay of complaint proceedings on the basis that the two proceedings are separate and cannot impede on each other.⁴⁹

⁴⁹ See *Shoprite Checkers Proprietary Limited and Others v Massmart Holdings Limited* (CRP034Jun15, EXC088Jul15, EXC107AUG15, EXC109AUG15, STA204DEC15) [2016] ZACT 74.

Re-opening a case

1. The Act does not contain a stand-alone provision regulating the re-opening of a case after evidence has been heard. For example, when a litigant seeks to lead evidence on a portion or the whole of its case which it had previously abandoned, or where a litigant seeks to revive its case by seeking to introduce new evidence after the Tribunal has already concluded the hearing of evidence and has reserved judgment. Parties are entitled to approach the Tribunal in terms of Rule 42 if they wish to do so.
2. The seminal decision on this issue is [National Association of Pharmaceutical Wholesalers and Others v Glaxo Wellcome \(Pty\) Ltd and Others](#)¹ (*Pharmaceutical Wholesalers*). In this case, after the Tribunal had reserved judgment in the interim relief application, the applicants filed an application to re-open its case on the grounds that certain amendments of the Medicines and Related Substances Act² constituted a “material new development” to be considered by the Tribunal when determining the outcome of the interim relief application. In support of its approach the Tribunal relied on the authoritative decision in the judgment of the Appellate Division (as it was then) in *Mkhwanazi v Van der Merwe*³ (*Mkhwanazi*).
3. The Tribunal stated that the re-opening of a case is an extraordinary measure and the courts have clearly identified circumstances under which it ought to be permitted.⁴ In *Mkhwanazi* the court held that Magistrate Court Rule (MCR) 28(11)⁵ must be exercised judicially after considering all the relevant factors and it is a matter of fairness to both sides. Such factors must not be viewed as inflexible or as being individually decisive. Some are more cogent than others,

¹ 68/IR/Jun00.

² Act 101 of 1965.

³ 1970 (1) SA 609 (A).

⁴ *Pharmaceutical Wholesalers* para 187.

⁵ “Either party may, with the leave of the court, adduce further evidence at any time before judgment; but such leave shall not be granted if it appears to the court that such evidence was intentionally withheld out of its proper order.”

but they should be all weighed in the scales. MCR 28(11) sets out the following factors to re-opening a case:

- (i) *The reason why the evidence was not led timeously.*
- (ii) *The degree of materiality of the evidence.*
- (iii) *The possibility that it may have been shaped to relieve the pinch of the shoe.*
- (iv) *The balance of prejudice, i.e. the prejudice to the plaintiff if the application is refused, and the prejudice to the defendant if it is granted. This is a wide field. It may include such factors as the amount or importance of the issue at stake; the fact that the defendant's witnesses may already have dispersed; the question whether the refusal might result in a judgment of absolution, in which event whether it might not be as broad as it is long to let the plaintiff lead the evidence rather than to put the parties to the expense of proceedings de novo.*
- (v) *The stage which the particular litigation has reached. Where judgment has been reserved after all evidence has been led on both sides and, just before judgment is delivered, the plaintiff asks for leave to lead further evidence, it may well be that he will have a harder row to hoe, because of factors such as the increased possibility of prejudice to the defendant, the greater need for finality, and the undesirability of throwing the whole case into the melting pot again, and perhaps also the convenience of the court, which is usually under some pressure in its roster of cases. On the other hand, where a plaintiff closes his case and, before his opponents have taken any steps, asks for leave to add some further evidence, the case is then still in medias res as it were.*
- (vi) *The healing balm of an appropriate order as to costs.*
- (vii) *The general need for finality in judicial proceedings. This factor is usually cited against the applicant for leave to lead further evidence. However, depending on the circumstances, finality might be sooner achieved by allowing such evidence and getting on with the case,*

than by granting absolution and opening the indeterminate way to litigation de novo in all its tedious amplitude.

(viii) The appropriateness, or otherwise, in all the circumstances, of visiting the remissness of the attorney upon the head of his client.

4. This approach was followed by the Tribunal in *Pharmaceutical Wholesalers*. After considering the applicants' submissions in view of the above cited factors, the Tribunal dismissed the application.
5. Depending on the factual matrix and the circumstances of each case, the Tribunal will grant a re-opening of the case especially where the evidence sought to be led will result in the full ventilation and informed determination of an important issue.
6. In [*Allens Meshco \(Pty\) Ltd and Others v Competition Commission*](#)⁶, the Commission sought to re-open its case in two respects. The first was in relation to the determination of the statutory cap in accordance with imposing an administrative penalty and only in respect of determining the last completed financial year of normal economic activity. This issue arose because the financials of June 2016 reflected a zero turnover or significantly reduced turnover. The second was the determination of firms which would be held liable for the payment of the administrative penalty should such firms be found to have contravened the Act as the possibility existed that some of the Allens Meshco Group (AMG) businesses had been transferred to other or related firms.⁷
7. The Tribunal held that when an applicant wishes to re-open its case, it must primarily put forward an explanation as to why its evidence was not placed before the court or Tribunal before it closed its case.⁸ The Tribunal then consulted the authoritative judgments on this issue – *Mkhwanazi*⁹ and

⁶ CR093Jan07/OTH058Jul16.

⁷ *Allens Meshco* para 25.

⁸ *Allens Meshco* para 29.

⁹ 1970 (1) SA 609 (A).

*Pharmaceutical Wholesalers*¹⁰ and the necessary factors to be considered in a case of this nature.

8. The Tribunal found that the evidence brought forward by the Commission was material and necessary for it to make an informed decision.¹¹ The documents were important for two reasons. Firstly, the evidence would establish a relevant year for determining the cap of the administrative penalty. What was important to determine was which year the AMG firms had a normal turnover.¹² Secondly, it was necessary to determine on which firm or firms the penalties should be imposed.¹³ The Tribunal should guard against a situation where one or many of the AMG firms are found to have contravened the Act and whatever amount owing pursuant the administrative penalty cannot be recovered because the companies that form part of AMG are a mere shell.¹⁴
9. The Tribunal pointed out that it is not a civil court of law. It has statutory obligations and functions that must be fulfilled notwithstanding whether or not the Commission should have presented its evidence prior to closing its case. If the Commission did not investigate the evidence, the Tribunal would be required to obtain the evidence and conduct a hearing in an inquisitorial manner. If it did not, it would be unable to properly determine the issues brought before it. In these circumstances, the Tribunal ruled that it would make far greater sense for the Commission to present its evidence and for AMG to be granted the opportunity to counter it without the Tribunal having to conduct a purely inquisitorial process.¹⁵ Because of the high degree of materiality of the evidence, the Tribunal granted the Commission's application to re-open its case.¹⁶

¹⁰ 68/IR/Jun00.

¹¹ *Allens Meshco* para 30.

¹² *Allens Meshco* para 31-32.

¹³ *Allens Meshco* para 33.

¹⁴ *Ibid.*

¹⁵ *Allens Meshco* para 34.

¹⁶ *Allens Meshco* para 35.

Default Judgments

1. The Act makes specific provision for default orders under CTR 53, which states:
 - (1) *If a person served with an initiating document has not filed a response within the prescribed period, the initiating party may apply in accordance with Part 4 – Division E to have the order sought issued against that person by the Tribunal.*
 - (2) *On an application in terms of sub-rule (1), the Tribunal may make an appropriate order –*
 - (a) *after it has heard any required evidence concerning the motion; and*
 - (b) *if it is satisfied that the initiating document was adequately served.*
 - (3) *Upon an order being made in terms of sub-rule (2), the registrar must serve the order on the person described in subsection (1) and on every other party.*
2. In [Competition Commission v AGS Frasers International \(Pty\) Ltd](#)¹ (AGS Frasers) the Commission sought default judgment against AGS Frasers International on the basis that AGS Frasers International should have pleaded over by setting out its objections (as contained in its exceptions and strike-out applications) in answer to its complaint referral.
3. In terms of CTR 53, if the applicant who serves initiation documents (in this instance, a complaint referral) has not received a ‘response’ from the respondent party within the time limit stipulated under CTR 6, the applicant may launch an application for default judgment. The Tribunal noted that the CTR 53 does not define ‘response’ nor does it refer to an ‘answer’, a term used in complaint proceedings. From the above, the Tribunal was of the view that a ‘response’ is defined more widely than an ‘answer’.²

¹ DEF098Aug15/EXC099Jul15.

² AGS Frasers para 45.

4. The Tribunal contemplated that if the above was accepted, then an objection made by the respondent party within the prescribed time limits would constitute a response. However, the real question would be whether any objection brought within the prescribed time limits without pleading over should be regarded as a response.³
5. AGS Frasers International argued that the exception application it brought before the Tribunal was reasonable. Without its resolution, it would have been prejudicial for it to answer to the Commission's allegations and that the past practice of the Tribunal has been that an objection could be brought prior to pleading over. The Commission wanted clarity from the Tribunal that respondents who wished to raise exceptions should plead over to avoid delay in the finalisation of litigation.
6. The Tribunal was of the view that in these circumstances, granting default judgment would be inappropriate. AGS Frasers International had not been a delinquent litigant that showed blatant disregard to the complaint referral. It had proceeded to engage with the Commission, first by correspondence which was followed by an exception. Effectively, AGS Frasers International did respond.
7. The Tribunal pointed out that the successful exceptions raised by AGS Frasers International were an example of what one would consider sound and justified objections that did not need to be pleaded over.⁴ It further went on to say that "*generally where a respondent wishes to raise an objection it should plead over unless the nature of the objection goes to the root of the referral and the respondent is unable to plead over*".⁵ The Tribunal however declined to set out a list of objections that would fall into this category as this would be too categorical an approach.⁶ The Tribunal reaffirmed its approach in *National Association of Pharmaceutical Wholesalers v Glaxo Welcome and Others*⁷

³ AGS Frasers para 46.

⁴ AGS Frasers para 50.

⁵ AGS Frasers para 51.

⁶ AGS Frasers para 51

⁷ (45/CR/Jul01) paras 55-65.

where it ruled that an objection taken prior to the respondent pleading would be considered premature unless it can be shown that the objection could curtail further pleadings.⁸ The application for default judgment was accordingly dismissed.

⁸ *AGS Frasers* para 52.

Prescription

1. The 'prescription' regime is set out under section 67(1) of the Act which states:

“A complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased.”

2. The amendments have introduced a slight change to the prescription regime which, however, have not yet been promulgated by the President. The new section 67(1) now reads as follows:

Section 67 – Limitation of bringing action
(1) A complaint in respect of a <i>prohibited practice</i> that ceased more than three years before the complaint was initiated may not be referred to the Competition Tribunal. [Sub-s. (1) substituted by s. 37 of Act 18 of 2018 , (wef 12 July 2019.)]

3. In terms of this new amendment, instead of the Commission being barred from initiating a complaint three years after the prohibited practice has ceased, it is now barred from *referring* such complaint if the prohibited practice has ceased more than three years after the complaint was initiated. In essence, it is not the initiation of a complaint that will be the subject of attack by a respondent firm accused of a prohibited practice, but the referral of such a complaint to the Tribunal. This amendment has not come into effect. The Tribunal is yet to adjudicate a case concerning this new amendment.
4. Below we set-out the cases under the old section.
5. Section 67(1) does not use the word 'prescription' however, a series of challenges to the Commission's complaint initiations have been brought under section 67(1) on the basis that the conduct has ceased. These have been dubbed as 'prescription' challenges and 'prescription' is the common means for referring to the time limitations on the Commission's powers of initiation.

6. The debates pertaining to prescription centre around the following issues: the date when a complaint was initiated, either by the Commission or a complainant in terms of section 49B; the date on which the conduct ceased; and on whom the onus rests to prove that such conduct has ceased.
7. First and foremost, a party raising prescription as a defence must properly plead in its papers as required by Tribunal Rule (CTR) 16(4). In other words, material facts must be provided in support of an allegation and/or statement that the conduct has ceased.¹ The Tribunal has been of the view that prescription challenges under section 67(1) can only be determined after evidence has been heard and the facts are fully ventilated. Prescription cannot be determined on the basis of legal argument without resorting to a full factual enquiry.²
8. Section 67(1) is silent on whom the onus rests to prove that the conduct has ceased. In [Competition Commission v Pioneer Foods \(Pty\) Ltd](#)³ (*Pioneer Foods*) the Tribunal was of the view that the party who raises prescription as a defence must prove that the conduct has ceased as contemplated in section 67(1).

“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 and prove, on a balance of probabilities that the conduct complained of by the Commission in its complaint referral of 2007 ceased three years before this date.”⁴

9. The Tribunal adopted the approach in *Pioneer Foods* because cartels are secretive in nature, and knowledge of these arrangements lie solely with the conspirators. However in [Pickfords Removals SA \(Pty\) Ltd v Competition Commission](#)⁵ (*Pickfords*) the Tribunal ruled that this approach is not absolute,

¹ *Paramount Mills (Pty) Ltd v Competition Commission* (112/CAC/Sep11) para 45.

² *Paramount Mills* para 32.

³ (15/CR/Feb07) & (50/CR/May08).

⁴ *Paramount Mills* para 86.

⁵ (CR129Sep15/PIL162Sep17).

relying on the Constitutional Court's *dicta* in [Willem Prinsloo v Van der Linde and the Ministry of Water Affairs](#)⁶ where the court held that in civil matters the question of onus is not rigid or unchanging like the presumption of innocence in criminal matters.⁷ The Tribunal was of the view that we should avoid rigidity in determining on which party the onus rests and rely on experience and fairness.⁸

10. In *Pickfords*, the Tribunal ruled that where the Commission alleges an ongoing conspiracy, it would be correct to follow *Pioneer* and that the onus would have shifted onto Pickfords Removals SA.⁹ However, this case did not deal with an ongoing conspiracy but several conspiracies which ended when the last payment was made by the affected customer in respect of each allegation. In such circumstances, it would not be unfair for the Commission to bear the onus where the bid was won by Pickfords Removals SA, pursuant to a cartel arrangement, because the knowledge of when the practice ceased for its competitors would not necessarily be known to Pickfords Removals SA. In such circumstances the Commission could obtain the information through its investigative powers as it would be in the best position to receive this information from a customer. In situations where Pickfords Removals SA won the bid, it would obviously not be unfair to place the evidentiary burden on Pickfords Removals SA as it would be in the best position access its own records and obtain the information.¹⁰
11. To complete the enquiry under section 67(1), the Tribunal must determine the date when the conduct ceased.
12. In [Competition Commission v RSC Ekusasa Mining \(Pty\) Ltd](#)¹¹ (*RSC Ekusasa*) the Tribunal considered the meaning of "*practice has ceased*" under section 67(1). The Tribunal found that the legislature could not have intended a narrow meaning as it is clear that the practice is defined as having ceased when its

⁶ 1997 (6) BCLR 759.

⁷ *Willem Prinsloo v Van der Linde and the Ministry of Water Affairs* 1997 (6) BCLR 759, at para 38.

⁸ *Pickfords* para 74.

⁹ *Pickfords* para 77.

¹⁰ *Pickfords* para 78.

¹¹ (65/CR/Sep09).

effects have ceased.¹² The inquiry, therefore, focuses precisely on the cessation of the effects of the practice.¹³ This approach has been consistently followed by the Tribunal and the CAC. In *Pioneer Foods*,¹⁴ the CAC stated:

“The prohibited conduct does not end or cease with the conclusion of the agreement fixing the selling price. It continues to exist, and its effect continues to be felt when the future prices agreed upon pursuant thereto are implemented.”

13. The CAC in [*Power Construction \(West Cape\) \(Pty\) Ltd and Another v Competition Commission*](#)¹⁵ (*Power Construction*) referred to and relied on the aforementioned *dicta* and its own judgments in *Paramount Mills*¹⁶ and *Videx Wire* where it was expressed that prohibited conduct in terms of the Act constitutes the initiating conduct (the illicit agreement concluded) and the intended on-going effects (e.g. the continued performance of the illicit act). This is what section 67(1) of the Act envisaged prohibited conduct to be.¹⁷
14. The Tribunal has ruled that the interpretation of section 67(1) followed in previous decisions is justified. In *Pickfords* the Commission sought to change the established interpretation of the section 67(1). It argued that the three-year prescription period should run only from the date when the Commission acquired knowledge of the identity of Pickfords Removals SA as the offender. On such an approach the Commission would not be out of time in initiating the complaint.¹⁸ In other words, the Commission’s proposed interpretation of section 67(1) required the Tribunal to ‘read in’ the requirement that prescription runs only from the date that the Commissioner acquired knowledge of the existence of the prohibited practice. This approach is borrowed from the approach to section 12(3) of the Prescription Act 68 of 1969. The Commission

¹² *RSC Ekusasa* para 146.

¹³ *RSC Ekusasa* para 145.

¹⁴ *Pioneer Foods* para 44.

¹⁵ 145/CAC/Sep16.

¹⁶ *Paramount Mills*.

¹⁷ *Power Construction* paras 43-44.

¹⁸ *Pickfords* para 16.

argued further that the Tribunal can invoke its power to condone non-compliance with any time period set in the Act on “good cause shown”.¹⁹

15. The Tribunal found that the interpretation proposed by the Commission lacked precision and would amount to an interference with the legislature’s schema for imposing a limitation on actions and would have consequences for the implementation of the investigative process – a vital component of the Act.²⁰
16. With regard to the condonation issue, the Commission relied on section 58(1)(c)(ii) of the Act that grants the Tribunal the power to, subject to sections 13(6) and 14(2) of the Act, condone on good cause shown, any non-compliance of the Commission or the Tribunal rules and any time limit set out in the Act. Further, the Commission relied on the Labour Relations Act 66 of 1995 (LRA) where the Constitutional Court in [*Food and Allied Workers Union obo Gaoshubelwe v Pieman’s Pantry \(Pty\) Ltd*](#)²¹ interpreted the LRA to condone a late referral relating to unfair dismissal.
17. It was noted that sections 13(6) and 14(2) are specific to merger proceedings. Nonetheless, the Tribunal was of the view that condonation powers cannot be invoked in respect of section 67(1). Even though the LRA has a condonation provision similar to section 58(1), the comparison ends there. The right to bring a complaint in terms of the LRA is not similar to the complaint initiation in terms of the Competition Act. The LRA deals with a private right to bring a complaint whereas section 67(1) deals with the limitation on the exercise of a public power by a public functionary. Section 58(1) is invoked only after a requisite time period. On the Commission’s interpretation, it would mean that the Commission could at first exercise their powers unlawfully but later be capable of subsequent restoration, if good cause is shown. It also would not be clear as to how condonation should be sought. Whatever the ambit of section 58(1), it did not apply to section 67(1).²²

¹⁹ *Pickfords* para 86.

²⁰ *Pickfords* paras 88-97.

²¹ 2018 (5) BCLR 527 (CC).

²² *Pickfords* paras 104-110.

18. The Commission's proposed purposive interpretation was rejected by the Tribunal.
19. Other cases pertaining to section 67(1) challenges have shown the following:
 - a. Where multiple extensions are granted for the purpose of investigating an alleged prohibited conduct, they are not barred by the Act and do not result in the complaint being initiated out of time.²³
 - b. A litigant may raise a defence of prescription even if the matter has been referred to the Tribunal from the High Court.²⁴

²³ *SAPPI Fine Paper (Pty) Ltd v Competition Commission and Another* (23/CAC/Sep02). See *Omnia Fertilizer Limited v Competition Commission and Others*; *Sasol Chemical Industries Limited v Competition Commission and Others* [2006] ZACAC 8 where the same approach was followed in *SAPPI*.

²⁴ *Raymond Leonard and others v Nedbank Limited and Others* (84/CR/AUG07).

Interdictory relief

1. Interdicts are orders which inhibit or compel certain conduct in order to circumvent any injustices and prejudice. Generally, interdicts are sought when the conduct complained of may cause irreparable harm and no other alternative remedies are at the applicant's disposal.¹
2. In order for an applicant to succeed in obtaining an interdict, it must satisfy the following requirements as expressed in [Setlogelo v Setlogelo](#):²
 - a. *A clear right on the part of the applicant;*
 - b. *An injury actually committed or reasonably apprehended and;*
 - c. *The absence of any other satisfactory remedy to the applicant.*
3. The applicant must show on a balance of probabilities that a clear and definite right exists, whether it be in common law or statutory law and that it is capable of protection.³ The second requirement must be understood to mean any prejudice that can be suffered by the applicant as a result of the violation of his/her clear right. The injury suffered need not be capable of monetary valuation.⁴ Lastly, the applicant must establish that no other alternative remedy is available. Such remedy would be one that is reasonable, grants similar protection as the interdict, adequate in the circumstance and of course legal.⁵
4. In the context of competition law, there is no provision that grants the Tribunal explicit general powers to grant interdictory relief other than interdicting a prohibited practice under section 58(1)(a)(i). However, this does not exclude the Tribunal from doing so. In [Seagram Africa \(Pty\) Ltd v Stellenbosch Farmers Winery Group Ltd and Others](#)⁶ (*Seagram Africa*) the court there held that

¹ Herbstein and Van Winsen *Civil Practice of the High Courts of South Africa* Vol 1 (Juta) pgs. 1454-1455.

² 1914 AD 221.

³ *Minister of Law and Order v Committee of the Church Summit* 1994 (3) SA 89 (B).

⁴ *Minister of law and Order, Bophuthatswana v Committee of the Church Summit of Bophuthatswana* 1994 (3) SA 89 (B).

⁵ Ibid.

⁶ 2001 (2) SA 1129 (C).

“section 27(1)(c) of the Act gives the Tribunal the right to adjudicate in relation to any conduct in terms of Chapter 2 and 3. The duty given to the Tribunal to adjudicate does not exclude the duty to grant an interdict”. This issue was considered by the CAC in [Gold Fields Limited v Harmony Gold Mining Company Limited and Another](#)⁷ (*Gold Fields*) in the context of mergers where the court relied on *Seagram Africa* to come to the same conclusion.

5. In *Gold Fields* the CAC was primarily called to determine whether Harmony’s initial offer to Goldfields Ltd (Goldfields) shareholders amounted to a merger but in deciding the matter confirmed that the Tribunal enjoyed the power under s27(1)(c) to grant interdictory relief.
6. In October 2004, Harmony sought to acquire the entire issued share capital of Goldfields (proposed transaction). Early that year, Goldfields was engaged in discussions to acquire Canadian company IAMGold Corporation (IAMGold transaction). At the time, Norimet Ltd, a subsidiary of Norlisk, acquired 20.3% shareholding in Goldfields. Norilsk had considered the IAMGold transaction and was of the view that it would diminish shareholder value and therefore announced that it would cast votes against this transaction. Norlisk gave Harmony an irrevocable undertaking to this effect. When Harmony had approached Goldfields regarding its proposed transaction, Goldfields’ board of directors required further particulars but before these were furnished, Harmony made a public announcement regarding the proposed transaction.
7. The proposed transaction was structured in two steps. Firstly, Harmony would acquire 34,9% of the shares in Goldfields (“settlement offer”) and this offer would be subject to conditions that certain resolutions are to be passed at Harmony’s meeting. Thereafter, the acquisition of the remaining share capital (“subsequent offer”) would kick in and this offer was subject to a number of conditions *inter alia* that Harmony receives valid acceptances for over 50% of Goldfields’ entire issued share capital and that the IAMGold transaction is not implemented for whatever reason including that the shareholders do not

⁷(43/CAC/Nov04).

approve it at the general meeting and that the merger is approved by the relevant competition authorities.

8. Goldfields launched an urgent application before the Tribunal seeking to interdict and restrain Harmony from acquiring 34.9% of the share capital in Goldfields; and interdict and restrain Goldfields' shareholders from exercising any voting rights in favour of the settlement offer or to any conditions in relation to the settlement offer. Goldfields argued that the settlement offer amounted to an acquisition of control of Goldfields. When this control was exercised at the general meeting, it would amount to prior implementation in contravention of section 13A of the Act. In view of the facts and evidence brought before it, the Tribunal ruled that the settlement offer and the subsequent offer did not comprise one single transaction. Further, the settlement offer on its own did not amount to a change in control nor could it be said that the undertaking between Norlisk and Harmony to block the IAMGold transaction established joint control.⁸ The Tribunal declined to grant interdictory relief on this basis.
9. Goldfields took the matter on appeal to the CAC. While the issue to be determined was whether Harmony's offer constituted a merger, the CAC confirmed that the Tribunal had jurisdiction to grant interdictory relief as expressed in the judgment of *Seagram Africa*.⁹ On the merits the CAC held that there was a change in control and upheld the appeal by granting interdictory relief.¹⁰
10. In its latest decision on interdictory relief, the Tribunal in [*Murray and Roberts Holdings Limited v Aton Holdings GmbH and Others*](#)¹¹ (*Murray*) considered whether the urgent relief to interdict and restrain Aton Holdings GmbH (Aton) from exercising the voting rights attached to the shares in Murray and Roberts Holdings Limited (M&R) should be granted.

⁸ *Goldfields* pg. 6.

⁹ *Goldfields* pg. 8.

¹⁰ The *Gold Fields* case is discussed in further detail under the topic 'The Meaning of control'.

¹¹ IDT079Jun18.

11. M&R argued that if Aton were to exercise its shareholding (44.06%) in M&R, it would effectively implement a merger without prior approval from the competition authorities.
12. At the hearing, Aton amended an undertaking it had made, and confirmed that: “in the (highly unlikely) event that Aton’s voting rights would otherwise constitute more than 50% of the votes cast on the section 126 resolution at the meeting on 19 June 2018, Aton will not vote that percentage of its voting rights that represent more than 50% less 1 vote of the votes cast in respect of that resolution”¹² It was conceded that such an undertaking would be capable of implementation at the shareholders meeting.¹³
13. When considering the matter, the Tribunal took into account *inter alia*, the historic voting patterns, the relationship between the shareholders and the context of Aton’s offer to acquire all the shares of M&R.¹⁴ The Tribunal was of the view that the undertaking tendered by Aton would resolve the issue in dispute and thus granted the interdict as pleaded subject to the undertaking tendered by Aton, only in respect of the general meeting of 19 June 2018. The Tribunal’s decision has since been taken on appeal to the CAC. Its finding had not been issued at the time of publication.

¹² *Murray* para 38.

¹³ *Murray* para 37.

¹⁴ *Murray* paras 48-49.

Summons (Subpoena)

1. The issuing of summons is regulated under section 49A of the Act. A summons contemplated in section 49A is not equivalent to a summons commencing action in the ordinary courts, but rather equivalent to the issuing of a subpoena requiring a person to attend at the Commission for purposes of interrogation, with or without documents. Section 49A(1) stipulates that:

(1) At any time during an investigation in terms of this Act, the Commissioner may summon any person who is believed to be able to furnish any information on the subject of the investigation, or to have possession or control of any book, document or other object that has a bearing on that subject –

(a) to appear before the Commissioner or a person authorised by the Commissioner, to be interrogated at a time and place specified in the summons; or

(b) at a time and place specified in the summons, to deliver or produce to the Commissioner, or a person authorised by the Commissioner, any book, document or other object specified in the summons.

2. In terms of the section, the Commissioner is authorised to summon any person to avail themselves for interrogations before the Commission or furnish information that is the subject of an ongoing investigation as specified by the summons.
3. The seminal case on the validity of a summons is the Supreme Court of Appeal's (SCA) judgment in [Woodlands Dairy \(Pty\) Ltd and Another v Competition Commission](#)¹ (*Woodlands*). From *Woodlands* it is understood that the Commissioner may summon persons for the purposes of interrogation and production of documents under section 49A read with section 49B(4) of the Act²

¹ (2010 (6) SA 108 (SCA).

² *Woodlands* para 20.

only once the Commission has initiated a valid complaint against an alleged prohibited practice in terms of the provisions of the Act and during an investigation into such prohibited practice. These powers may not be used to embark on a fishing expedition by the Commission without first having validly initiated a complaint based on a reasonable suspicion.³

4. The facts this case pertained to a complaint referred by the Commission against two milk producers, Woodlands Dairy (Pty) Ltd (Woodlands Dairy) and Milkwood Dairy (Pty) Ltd (Milkwood), the respondents at the Tribunal. Prior to the main hearing, the respondents raised a number of points *in limine* that, if granted, in their view would vacate the Commission's referral in so far it related to them. One of these was in relation to the summons issued by the Commission against them during the Commission's investigation.
5. The Commission received information through a letter from one Mrs Malherbe who complained of price fixing conduct by milk distributors Parmalat, Nestlé and Ladismith Cheese. It was common cause that this letter was classified as information obtained by the Commission under section 49B(2)(a). Commission inspectors sought to gather information on this allegation and found information from sources that corroborated Mrs Malherbe's allegations of price fixing only by Parmalat and Ladismith Cheese and found other information that Clover could be abusing its dominance.
6. The inspectors drew up a memorandum to the Commission setting out the information at the inspectors' disposal and recommended that a complaint be initiated against Parmalat and Ladismith Cheese regarding the fixing of the purchase price of milk in terms of section 4(1)(b). Instead of following the recommendation, the Commissioner initiated a complaint concerning the three entities and stated, *inter alia*, that there exists anti-competitive behaviour in the milk industry as a whole.⁴ Without any other qualification, a full investigation into the milk industry was initiated. In the initiation statement no further

³ *Woodlands* para 20.

⁴ *Woodlands* paras 24-25.

evidence was alluded to in support of the Commissioner's views that there was illegal anti-competitive behaviour in the industry as a whole.⁵

7. On 22 March 2005, a Commission summons was issued against Dr Kleynhans (Managing Director at Woodlands Dairy) which required him to be interrogated and produce documents in relation to an investigation into the milk industry based on the Commissioner's reasonable belief of anti-competitive conduct in violation of, not only section 4(1)(b), but section 8 and section 5(1), the latter allegation not having formed part of the complaint initiation. When Woodlands' attorneys sought particulars in order for Dr Kleynhans to comply with the summons, the Commission responded that a complaint had been initiated against Parmalat, Ladismith Cheese and Clover. Further requests for clarification from the Commission went unanswered.⁶
8. What followed was a summons for the interrogation of Mr Fick (of Milkwood) concerning the investigation in the milk industry. This summons differed from that of Dr Kleynhans in that it only talked about possible price fixing in the market and also about issues arising from the information submitted in response to the Woodlands' summons of 22 March 2005.
9. The summons' were subsequently challenged, although some information had been handed over. The Tribunal found that both summons' were invalid on the basis that they did not contain a clear stipulation of the prohibited practice accompanied by some particularity as to its nature.⁷ The CAC however held otherwise. It was of the view that the Milkwood summons was valid because the prohibited practices had been disclosed to Mr Fick as he was entitled to see the information pursuant the 22 March summons.⁸
10. The Tribunal found that two summonses issued in terms of section 49A of the Act, one against Woodlands Dairy and the other against Milkwood, were void. The Tribunal however ruled that the documents and information obtained pursuant to these summonses were not inadmissible as the question of

⁵ *Woodlands* para 26.

⁶ *Woodlands* para 29.

⁷ *Woodlands* para 31.

⁸ *Ibid.*

admissibility would be determined at the main hearing. The Tribunal issued a preservation order to this effect. This meant that the main proceedings would continue.

11. The respondents went on to appeal the preservation order and the Commission decided to cross-appeal the Tribunal's decision. The CAC upheld the appeal against the preservation order holding that the Tribunal did not have the power to issue such an order and thus set it aside. The CAC ordered the Commission to return all evidence obtained by virtue of the Woodlands Dairy summons back to Woodlands Dairy. However, the CAC partly upheld the cross appeal and found that while the Woodlands Dairy summons was void and the Milkwood summons was not.
12. The order to return Woodlands' inadmissible evidence to Woodlands sparked disagreement between the parties and the CAC was asked to clarify its order. At the same time, special leave to appeal to the SCA was sought by the appellants and the Commission applied for leave to cross-appeal. The CAC granted some of the clarification sought and dismissed the applications to appeal or cross appeal⁹ The appellants however succeeded in obtaining special leave to the SCA. However, the Commission neither sought nor was granted similar leave. As such, the CAC's order setting aside the Woodlands Dairy summons together with its clarification stood.¹⁰ The SCA found that the summons against Milkwood was invalid because the Commission had not validly initiated a complaint against it.
13. The SCA found the CAC's reasoning in this regard problematic because firstly, the validity of a summons must appear on the face of the document and does not depend on a possible request of further particulars¹¹ Since the CAC had ruled the information used by the Commission was tainted, the SCA found it difficult to comprehend how this information could give validity to the summons used to extract information from Mr Fick¹² Further the CAC did not consider

⁹ The CAC was of the view that the Tribunal and itself are specialist tribunals while the SCA is not.

¹⁰ *Woodlands* para 5-6.

¹¹ *Ibid.*

¹² *Ibid.*

the other problems with the summons, such as an unbounded request for documents or whether there was any indication on the papers that Mr Fick was in fact entitled to see the information (see sections 45 and 45A).¹³

14. The SCA also found that the CAC failed to consider the proceedings pursuant to the summons Mr Fick was informed during his interrogation that the Commission's investigation pertained to certain collusive conduct in the milk industry and that the subject of the complaint was Parmalat. This, the SCA found to be profoundly untrue as three firms were named in the initiation and Parmalat was but one of them. It was not Parmalat that was accused of abusing its dominance – it was Clover¹⁴ Further, it was not said that the focus of the interrogation was to extract information pertaining to the relationship between Milkwood and Woodlands Dairy. Not one question was asked about Parmalat which the Commission alleged was the subject of the referral.¹⁵
15. The SCA opined that the ambit of a summons cannot be wider than that of complaint initiated by the Commission. The SCA held that:

*“There is in any event no reason to assume that an initiation requires less particularity or clarity than a summons. It must survive the test of legality and intelligibility. There are reasons for this. The first is that any interrogation or discovery summons depends on the terms of its initiation statement. The scope of a summons may not be wider than the initiation.”*¹⁶

16. The Milkwood summons was accordingly set aside.
17. It follows that any information and/or documents obtained in terms of invalid summonses must be returned to their respective owners. ¹⁷

¹³ *Woodlands* para 31.

¹⁴ *Woodlands* para 32.

¹⁵ *Ibid.*

¹⁶ *Woodlands* para 35.

¹⁷ *Woodlands* para 47. After the SCA in *Woodlands* found the summonses issued against Woodlands and Milkwood to be invalid, it ordered that all information, documents and transcriptions of interrogations obtained by the Commission be returned to them.

18. The consequences of the *Woodlands* decision were far reaching for the question of a valid initiation under section 49B as discussed under that topic.
19. In [*Media24 Ltd and Another v Competition Commission*](#)¹⁸ (*Media24*) the Tribunal was tasked to consider whether the summons issued by the Commission fell to be set aside if it was *ultra vires* the Commissioner's powers or void for vagueness. The facts of *Media24* are as follows:
20. The Commissioner issued a summons in terms of section 49A of the Act against the chief executive of Media24 after issuing a letter requesting additional information from Media24 in relation to the Commission's investigation into Media24 for alleged exclusionary and predatory conduct. Media24 objected to the summons on the basis that the request was vague and the impermissible interrogatories were placed under a schedule for document requests in the summons. It was alleged that such interrogatories would not be susceptible to answer by way of documents but only by actually answering the questions and therefore such a request was unlawful.¹⁹ Media24 further argued that the information request was unintelligible as the Commission could not simply request data in relation to two different and unrelated geographical areas to form a conclusion on predation without considering various factors.
21. The Tribunal held that even if one were to characterise the interrogatories as questions, the Commission is nonetheless empowered by the Act to request both documents and have persons under the summons answer interrogatories.²⁰ Even if the interrogatories were placed under the *incorrect* heading or part of the summons, given that the summons did not confuse the addressee and that he understood what was required, Media24's contention did not hold.²¹
22. In addition, the Tribunal dismissed the void for vagueness argument on the grounds that the information request by the Commission was a legitimate investigative exercise and would aid it in better understanding the market

¹⁸ 18/X/Apr10.

¹⁹ *Media 24* para 12 and 13.

²⁰ *Media 24* para 17.

²¹ *Ibid.*

dynamics and price-cost structures across geographic markets in order to properly ascertain whether or not predation had occurred.²² The Commission's reasons for seeking information were both intelligible and within its orthodox investigatory approach.²³ In view of the above, the application was dismissed.

²² *Media 24* para 27-28.

²³ *Media 24* para 30.

Discovery

1. The process of discovery allows for parties in litigation proceedings to exchange documents.¹
2. Neither the Act nor the rules contain a specific provision in relation to the discovery process. There is no equivalent to HCR 35 in the Tribunal rules, but the Tribunal has had regard to the principles of HCR 35 in its proceedings as provided by section 55 of the Act and CTR 55(1)(b), read with CTR 22.
3. The overarching principle in determining whether documents sought by an applicant ought to be discovered is whether the documents are relevant to the main proceedings.²
4. In some cases, relevance, as the only consideration, will not suffice - especially when discovery is wide in nature. This point was considered in [*Economic Development Department and Others v Wal-Mart Stores, Inc. and Another*](#)³ (*Walmart*) where documents and information sought by the applicant were purportedly relevant to public interest issues in terms of section 12A(3) of the Act. The public interest canvas is much broader than it would be in conventional litigation.
5. In order to avoid the production of copious documents, the Tribunal considered additional filters to relevance to determine this application.⁴ The Tribunal had to ask whether the documents sought were relevant to better informing the Tribunal on macroscopic issues. Where the yield is minimal or uncertain, but the burden of producing documents is greater, the denial of discovery would be

¹ *Allens Meshco* 2009 para 3.

² See further *Competition Commission v Sasol Chemical Industries Ltd* (48/CR/Aug10) paras 35, 43,45 and 48. *Jacobus Petrus Hendrik Du Plessis and Another v Linpac Plastics Ltd (UK) and Others* (CRH126Nov11/DSC091Jun16) para 18-20. In *Jacobus*, the Tribunal held that It is not enough for an applicant to merely allege that the documents is seeks are relevant. An applicant must fully make out a case as to why the documents sought are relevant for a dispute.

³ 73/LM/Dec10.

⁴ *Walmart* para 8.

favoured.⁵ Thus where a discovery request will result in cumbersome effort of compiling and procuring documents that require complex calculations and sourcing of information, the Tribunal will be reluctant to grant such request especially when it is uncertain whether such documents will yield some robust conclusion or be of probative value.⁶

6. To merely propose that documents could possibly provide information (shed light) on the happenings of a particular event (such as cartel activity) is rather speculative. It would also be unclear whether the documents are in fact in the possession of the person from whom the documents are sought.⁷
7. In [South African Medical Association v Council for Medical Schemes](#)⁸ (SAMA) it was held that where a sufficient number of documents have been furnished by a litigant in response to an applicant's request and such documents provide particularity regarding a certain issue, an application for further particularity will not be granted.⁹ Further, if information sought is likely to be the subject of discovery requests during the course of pre-trial proceedings, the request for further particulars in this regard will be rejected.¹⁰

Application of High Court Rule 35(12) and Tribunal Rule 55(1)

8. The Tribunal in [Allens Meshco \(Pty\) Ltd and Others v Competition Commission](#)¹¹ (*Allens Meshco*) set out the principles to the application of High Court Rule (HCR) 35(12) and CTR 55(1)(b).
9. In terms of CTR 55(1)(b), where a lacuna exists in its rules, the Tribunal may refer to the HCRs, in particular HCR 35(12). HCR 35(12) states that any documents or tape recordings relied on in pleadings or affidavits must be made available for inspection and to permit the requesting party to make copy or transcription of such documents or tape recordings.

⁵ *Walmart* para 9.

⁶ *Walmart* paras 18-39.

⁷ *Ibid.*

⁸ CRP065Jul13/DSC197Dec16.

⁹ *SAMA* para 19.

¹⁰ *Ibid.*

¹¹ (63/CR/Sep09).

10. The Tribunal is not obligated to make use of HCR 35(12) as CTR 55(1)(b) confers a discretion on the Tribunal to do so.¹² It must always be borne in mind that the Tribunal's proceedings are *sui generis* and an "*uncritical borrowing of a High Court rule in toto may lead to impracticability*".¹³ The Tribunal does not see a reason to formally adopt HCR 35(12) in applications to compel discovery. If a discovery application meets the requirements set out in CTR 42, it will suffice. It would be advisable for an applicant to request documents by way of correspondence from the opposing party to remove the need for litigation.¹⁴
11. The following are circumstances when documents ought to be discovered:
- a. Where a party relies on them in their pleadings and affidavit (usually attached as annexures but sometimes this may not be the most practical solution);
 - b. Excerpts from documents reproduced in the affidavit.
 - c. No express quotations are made but reliance is made on documents in their affidavits;
 - d. A summary of what is contained in the document.¹⁵
12. An inference of the existence of a document does not create an obligation for the discovery of such document. This approach is consistent with the application of HCR 35(12).¹⁶
13. In [*Caxton and CTP Publishers and Printers Limited v Media 24 \(Pty\) Ltd*](#)¹⁷ the Tribunal was called to determine whether Caxton was entitled to a set of documents belonging to the respondents and in the Tribunal's possession. These documents were subject to confidentiality claims by the respondents.

¹² *Allens Meshco* para 6. Also see *Goodyear South Africa (Pty) Ltd v Competition Commission, Continental Tyres South Africa (Pty) Ltd v Competition Commission* (CR053Aug10/INS079Sep12, CR053Aug10/DSC073Aug12) para 15.

¹³ *Allens Meshco* para 6.

¹⁴ *Ibid.*

¹⁵ *Allens Meshco* para 8. See further *Group Five v Competition Commission* (139/CAC/Feb16) para 6 to 8 where the court held that no mention of the document sought in the affidavit was made. As such HCR 35(12) does not apply. Further, if it is not reasonably shown that the investigation record is required to prepare answering papers, then access will be refused, more so if the Commission's case against the applicant is straightforward.

¹⁶ *Allens Meshco* para 9.

¹⁷ OTH216Feb15/DSC096Jul15.

Caxton made two arguments. Firstly, it was entitled to the documents contained in the record by relying on CTR 13(1) read in context with section 32 of the Constitution which affords a party the right to access to information (the right to information argument). Secondly, that the respondents made mention of the record in their affidavits and Caxton was therefore entitled to it under HCR 35(12) (the HCR 35(12) argument). The Tribunal did not consider Caxton's right to information argument on the basis that it would be unfair towards the respondents because it had not been raised by Caxton in its papers nor in its heads of argument but was only raised at the hearing.¹⁸

14. In terms of the HCR 35(12) argument, the question was whether the record as sought by Caxton was relevant to the issues in the main application and on whom the onus rested. The Tribunal highlighted that HCR 35(12) does require a document to be relevant for a party to seek its production. However, the courts have not always relied on this requirement in the context of this rule.¹⁹ As to with whom the onus lies, the Tribunal relied on and adopted the SCA approach in [Centre for Child Law v The Governing Body of Hoërskool Fochville](#).²⁰ In that case the court held that the proper approach to onus was “to use a general discretion to try and strike a balance between the conflicting interests of the parties to the case”.²¹ In accordance with the above, the Tribunal exercised its discretion and ordered the disclosure of certain documents in the record subject to various restrictions.
15. The questions raised in *Allens Meshco* and *Caxton* respectively are classic HCR 35(12) examples that creep up in applications of this nature. In [Goodyear South Africa \(Pty\) Ltd and Continental Tyres South Africa \(Pty\) Ltd v Competition Commission](#)²² (*Goodyear*), the Tribunal relied on the aforementioned judgments but elucidated further on the application of HCR 35(12). The Tribunal, *inter alia*, held that fairness is an important principle that the Tribunal must uphold and have regard to on a case by case basis.²³ Where

¹⁸ *Caxton* para 21.

¹⁹ *Caxton* para 43.

²⁰ 2016 (2) SA 121 (SCA).

²¹ *Caxton* paras 44-48.

²² (CR053Aug10/DSC063May17, CR053Aug10/DSC056May17).

²³ *Goodyear* para 26.

a general statement in relation to documents is made but no specific reference is given, HCR 35(12) will not apply. In accordance with the principle of fairness, an applicant would not be entitled to numerous documents the Commission obtained from its investigation:

*“The mere fact that an investigation may be premised on documents does not suffice to trigger a request for production of those documents.”*²⁴

16. The Tribunal dismissed the application by Goodyear South Africa and partially granted Continental Tyres’ application.

Competition Commission Rule (CR) 14

17. CR 14 restricts five classes of information in the Commission’s possession from disclosure to litigants or any third party. These include confidential information and, restricted information such as the Commission’s internal documents.²⁵ Documents captured under CR 14 are restricted by their nature.²⁶
18. In order to determine whether documents have been sufficiently claimed as restricted under CR 14, the test is whether - on an objective basis and on the facts of the case - the Tribunal is satisfied that the documents are claimed as restricted. It is not for the requester to be satisfied that the Commission has properly claimed litigation privilege or restriction, but it is for the Tribunal to be satisfied.²⁷
19. Where documents sought are purported to be restricted under CR 14 but are necessary for a review application pertaining to a referral of a complaint, these documents, notwithstanding their status, must be furnished to the requesting party. This was held in the CAC’s decision of [Computicket \(Pty\) Limited v](#)

²⁴ *Goodyear* para 22.

²⁵ CR 14(1)(e) recognises the restriction of access to documents in terms of the Promotion of Access to Information Act 2 of 2000.

²⁶ *Competition Commission v Telkom SA Ltd* (73/CR/Oct09), at para 15.

²⁷ *Goodyear South Africa (Pty) Ltd and Continental Tyres South Africa (Pty) Ltd v Competition Commission* (CR053Aug10/DSC063May17, CR053Aug10/DSC056May17) para 84.

Competition Commission²⁸ (*Computicket*). The documents sought by the appellant in this matter were internal memoranda, EXCO minutes and documents that were before the Commission when it made its decision to refer the complaint. These documents were restricted under CR 14. The Tribunal had refused the disclosure²⁹ however, on appeal the CAC concurred with the appellants. The CAC found that once a party in the position of the appellant (*Computicket*) is entitled to launch review proceedings of the Commission's decision to refer a complaint to the Tribunal on the grounds of rationality, then such party would be entitled to documents which are relevant to the review proceedings.³⁰

20. In Competition Commission v Telkom SA Ltd³¹ (*Telkom*), the Tribunal expressed the view that documents claimed as restricted under CR 14 do not have to be described in detail in the discovery affidavits. Detailed descriptions of documents are not the real concern. What is of the Tribunal's concern is the sufficiency of the information and/or documents. It would not be in the public interest to require from the Commission detailed descriptions of each document.³² All that is required is proper identification of the nature of the documents, i.e. what the document relates to and the relevant dates, if applicable.³³

Competition Commission Rule (CR) 15

21. CR 15 allows for access to information in the Commission's possession. Any person can inspect or make copies of the Commission's record if the information is not restricted, or access is granted subject to conditions or granted by an order of the Tribunal or the court.³⁴ Access to documents

²⁸ 118/CAC/Apr12.

²⁹ *Competition Commission v Computicket (Pty) Ltd* ZASCA 185 (26 November 2014). Here the Commission was not granted leave to appeal.

³⁰ *Computicket*, at para 23, 25 and 26.

³¹ 73/CR/Oct09.

³² *Telkom* para 30.

³³ *Ibid.*

³⁴ CR 15(1)(b). See further *Omnia Fertilizer Limited v Competition Commission* (CR006May05/DSC206Dec15) where the Tribunal held that if the Commission were to rely on tacit imitation, it would have to state and produce the documents on which it relies.

pursuant to this rule can be obtained by any person, not only respondents in complaint proceedings before the Tribunal. The Commission may choose to release information on its own accord or information/documents may be obtained through an order of the Tribunal or the court.³⁵

22. In [Group Five Ltd v Competition Commission](#)³⁶ (*Group Five*), Group Five had requested to a copy of the Commission's record under CR 15 before filing its answering affidavit to the Commission's complaint referral. The Commission had refused the request. Group Five brought an application to the Tribunal to compel the Commission to comply with CR 15. The Tribunal held that if Group Five were granted access to the record and it was to be provided within a reasonable period, the determination of a 'reasonable time' would be affected by Group Five's status as a litigant in the matter.³⁷ Because of its status as a litigant, Group Five could not be granted prior access to the Commission's record prior to the close of pleadings. This matter was taken on appeal.
23. On appeal the CAC held, in [Group Five Ltd v Competition Commission](#)³⁸ (*Group Five CAC*), that the Tribunal had erred regarding both its points.³⁹ The Tribunal correctly stated that CR 15 is a public access right and not a right specifically given to litigants. However, Group Five's right to access in terms of CR 15 vests in it as 'any person' and not as a litigant in complaint proceedings.⁴⁰ Group Five's status as a litigant should not have affected the determination of a reasonable time period within which the Commission should grant access to its investigatory record. The CAC held that the determination of a reasonable time period is the time which the Commission would reasonably require to prepare its record and identify what parts thereof are restricted.⁴¹

³⁵ See *Group Five Ltd v Competition Commission* (139/CAC/Feb16). Also see further *Allens Meshco (Pty) Ltd and Others v Cape Gate (Pty) Ltd and Another* (CR093Jan07/CNF095Jul15), CR093Jan07/CNF095Jul15).

³⁶ CR229Mar15/DSC124Sep15.

³⁷ *Group Five CAC* para 10.

³⁸ 139/CAC/Feb16.

³⁹ *Group Five CAC* para 10.

⁴⁰ *Group Five CAC* para 11. See also *Standard Bank of SA Ltd and Competition Commission* (CR212Feb17/DSC027Apr17).

⁴¹ *Group Five CAC* para 11.

24. In addition, the CAC outlined several points with regards to a litigant's right to discovery. A litigant in complaint proceedings does not possess an automatic right to discovery once pleadings are closed. The nature and extent to which discovery is granted rests on the Tribunal's determination in terms of CTR 22(1)(c)(v).⁴² A litigant's right to discovery vests specifically in its status and capacity as a litigant which is distinct from right of access pursuant to CR 15(1).⁴³ The obligation to make discovery in litigation is restricted by the principle of relevance whereas access in terms of CR 15(1) is not restricted by this notion.⁴⁴
25. In addition, the premise that once litigation has commenced, a respondent's right to production of documents is regulated only by the Tribunal's rules of discovery and not by CR 15, is false.
26. A related issue here was whether Group Five could delay filing its answer pending the production of the Commission's record. The CAC held that Group Five was also incorrect to link its obligation to file its answering papers with the Commission's obligations in terms of CR 15, as its right to access in terms of the latter rule vests in it as an ordinary person and not a litigant.⁴⁵
27. In conclusion, the CAC ordered the Commission to produce its record within a reasonable time and for Group Five to file its answering papers.⁴⁶
28. The CAC dealt with a similar issue in [Standard Bank of South Africa Ltd v Competition Commission](#),⁴⁷ where the Tribunal had refused Standard Bank's application to compel the Commission to hand over its record of investigation. The CAC upheld the appeal, relying on its *ratio* in Group Five. The matter has been appealed by the Commission to the Constitutional Court. At the time of printing this publication, the outcome of this matter was pending.

⁴² *Group Five CAC* para 12

⁴³ *Group Five CAC* para 13

⁴⁴ *Ibid.*

⁴⁵ *Group Five CAC* para 20.

⁴⁶ *Group Five CAC* para 23.

⁴⁷ 165/CAC/Mar 18.

29. Postscript: there has been a recent amendment to CR 14 and 15.⁴⁸

⁴⁸ See [Government Gazette No. 42191 \(25 January 2019\)](#).

Litigation privilege

1. The first Tribunal decision that dealt with litigation privilege was [*Pioneer Foods \(Pty\) Ltd v Competition Commission*](#)¹ (*Pioneer Foods*) which was then followed by the authoritative decision of [*Competition Commission v ArcelorMittal South Africa Ltd and Others*](#)² (*ArcelorMittal*). From thereon, the Tribunal has dealt with other cases involving litigation privilege which are discussed below.
2. In *Pioneer Foods*, the Tribunal was called to determine whether the documents in the Commission's possession were protected by litigation privilege.³ The Tribunal held that litigation privilege applies to Tribunal proceedings, contrary to the averments made by Pioneer Foods (Pty) Ltd that litigation privilege only applies to courts.⁴ The Tribunal ruled that throughout the litigation process, parties are afforded procedural rights of fairness which are applicable in an adversarial system – a system in which litigation privilege has long been recognised.⁵ Tribunal proceedings are akin to those of a court and parties in Tribunal proceedings are entitled to litigation privilege and no exception exists to deny such privilege to the Commission.⁶
3. Litigation privilege may be claimed in CLP proceedings as proceedings of this nature are inextricably linked to Tribunal proceedings. Information sought pursuant to a CLP application is, amongst other things, used by the Commission to determine whether or not a complaint should be referred to the Tribunal. In other words, the information is procured when litigation is contemplated against respondents implicated in an alleged contravention of the Act.⁷ In the circumstances, the Commission's claim of litigation privilege was granted and the Tribunal refused discovery of documents sought by Pioneer Foods.⁸

¹ 15/CR/Feb07, 50/CR/May08.

² 2013 (5) SA 538 (SCA).

³ *Pioneer Foods* para 6.

⁴ *Pioneer Foods* para 22.

⁵ *Pioneer Foods* para 31.

⁶ *Pioneer Foods* paras 35-36.

⁷ *Pioneer Foods* paras 38-39.

⁸ *Pioneer Foods* para 41.

4. The *ArcelorMittal* case ascended all the way to the SCA and involved a claim of litigation privilege by the Commission over a leniency application. The issues for determination were whether the Commission's claim of privilege was properly raised, and whether such privilege was waived by referring to the leniency application in the complaint referral.
5. Arcelor Mittal South Africa (AMSA) and Cape Gate (collectively, the appellants) sought documents from the Commission relating to a leniency application submitted to the Commission by Scaw South Africa (Pty) Ltd (Scaw) pursuant to the CLP. The appellants believed they were entitled to the leniency application and documents attached thereto which were in the Commission's possession. On one hand, Cape Gate sought Scaw's leniency application and all supporting documents thereto and relied on HCR 35(12) to obtain them. On the other hand, AMSA sought the Commission's record of investigation and relied on CTR 15(1) to obtain it.
6. The appellants argued that the documents sought were necessary for them to file an answering affidavit. In response, the Commission refused to supply the leniency application, the supporting documents thereto and other documents sought on the basis that they were subject to litigation privilege and amounted to restricted information in terms of CR 14.⁹ Apart from ordering limited disclosure, the Tribunal dismissed the appellant's applications.
7. The matter was taken on appeal to the CAC, which upheld the outcome of the Tribunal's order but on the basis that Scaw's documents were protected from disclosure through a claim of confidentiality in terms of section 44(1)(a) of the Act. The Tribunal had already pronounced on this matter and thus the CAC deemed it unnecessary to decide this issue. The matter was thus remitted to the Tribunal to determine Scaw's confidentiality claim.

⁹ *ArcelorMittal* paras 2-4. AMSA's request is different as it relies on the general right to inspect documents after the matter has been referred to the Tribunal in terms of the Commission's Rules. Alternatively, it seeks discovery in terms of High Court Rule 35 even though it knows this will only result in a much more limited yield of documents. See para 7. See also paras 1-3 of SCA judgment.

8. The CAC decision was taken on appeal to the SCA. The SCA found that it would only have been necessary for the CAC to remit the matter to the Tribunal for determination of confidentiality if it had upheld the appeal. As such the effect of the CAC decision was to render the matter back to square one.¹⁰
9. In its decision, the SCA stated that legal professional privilege consists of attorney and client privilege and litigation privilege. The two requirements for litigation privilege are i) the document has been obtained or brought into existence for the purpose of a litigant's submission to a legal advisor for legal advice and ii) litigation was pending or contemplated as likely at the time.¹¹
10. The issue before the SCA rested on the second requirement. The court examined the purpose of the document in order to ascertain whether litigation was contemplated as likely at the time. It was of the view that the purpose of the document must be ascertained not from the creator of the document and its motive but from whom the document is procured or produced for. In this case that would be the Commission. The Commission procures the leniency application and the documents submitted for the purpose of initiating litigation. In other words, the document is procured to refer a complaint for prohibited practices in violation of the Act. In addition, the immunity granted to the CLP applicant is not the primary purpose of the CLP application but flows from its primary purpose – which is to launch legal proceedings against other cartelists. It therefore follows that the CLP application and the documents pursuant to it are covered by litigation privilege.
11. The second issue to consider was whether litigation privilege had been waived by the Commission when it referred to the CLP application in its referral affidavit to the complaint referral. The SCA canvassed the types of waiver: express, implied and imputed waiver. Whether waiver has in fact occurred, would depend on the facts of each case. In the factual matrix of this case, the SCA held that there was more than mere reference to the CLP application by the

¹⁰ *ArcelorMittal* para 7.

¹¹ *ArcelorMittal* para 21.

Commission in its referral affidavit. As such, the litigation privileged attached to the CLP application and the documents thereto had effectively been waived, and any other restriction claimed in terms of CR 14(1) had fallen away.

12. In relation to AMSA's CR 15 claim, the SCA concurred with the CAC that the determination of confidentiality is to be decided by the Tribunal and thus correctly remitted this issue to the Tribunal.¹²
13. In conclusion, the SCA held that the CLP application was covered by litigation privilege until this privilege was waived by the Commission when it referenced the CLP application in its referral affidavit of its complaint referral. AMSA's application for access to the Commission's record of investigation was upheld subject to any claims of confidentiality that would be assessed by the Tribunal.
14. The Tribunal's decision in [WBHO Construction v Competition Commission and Another](#)¹³ (*WBHO*) dealt with similar issues to those traversed in the *ArcelorMittal* decision. However, the nuanced issues in *WBHO* were firstly, whether annexures to the leniency application and transcripts of interviews with the employees of the leniency applicant were covered by litigation privilege and secondly whether litigation privilege is tantamount to docket privilege. The first issue rested on the second requirement of litigation privilege namely that litigation at the time was contemplated as likely.
15. The Commission argued that the annexures to the CLP application were protected by litigation privilege because they were not severable from the leniency application. These annexures consisted of internal documents generated by the leniency applicant in preparation for the drafting of the leniency application and therefore litigation privilege attached.¹⁴ Furthermore, the fact that the annexures were generated prior to the filing of the leniency application did not lead to the inference, without any further evidence, that they ought to be severed from the application.

¹² Please see full discussion above under the heading 'Commission rule 14 and 15'.

¹³ CR162Oct15/ARI187Dec16.

¹⁴ *WBHO* paras 17-20.

16. The Tribunal agreed with the Commission that the annexures were part and parcel to the leniency application given the proximity of the dates of the annexures to the filing of the leniency application and there was no apparent reason to doubt this claim as was made in the Commission's affidavit. As the SCA in *ArcelorMittal* held, courts will not lightly go behind the claims on affidavit that litigation was contemplated when the document was procured.¹⁵
17. In relation to the interview transcripts, the Tribunal ruled that because there had been a passage of time between the first meeting with a leniency applicant and when the complaint was referred does not negate the likelihood that litigation was contemplated at the time the meeting took place. A delay in referring the matter could have been occasioned by many factors. These delays did not undermine the claim of privilege.¹⁶ Accordingly the Tribunal found that litigation privileged attached to the transcripts.
18. Finally, with regards to the issue as to whether litigation privilege is tantamount to docket privilege the Tribunal ruled that its proceedings were not akin to criminal proceedings because firms do not face the prospects of losing their liberty by a finding of the Tribunal.¹⁷ WBHO's application was dismissed.
19. In [*Goodyear South Africa \(Pty\) Ltd and Continental Tyres South Africa \(Pty\) Ltd v Competition Commission*](#)¹⁸ (*Goodyear*) the applicants (sought access to documents purportedly protected by litigation privilege and CR 14. Specifically, Continental Tyres sought various correspondence between the Commission and the CLP applicant's legal representative, the complainant and the complainant's legal representative respectively and certain interrogation transcripts. Continental Tyres sought these documents in terms of CR 15. Goodyear sought correspondence between the Commission and the complainant and interrogation transcript referred to as the 'Wustmann transcript'. Goodyear sought the disclosure of the correspondence in terms of

¹⁵ *WBHO* paras 23-25.

¹⁶ *WBHO* paras 36-38.

¹⁷ *WBHO* paras 41-45.

¹⁸ CR053Aug10/DSC063May17, CR053Aug10/DSC056May17.

HCR 35(12) and the disclosure of the Wustmann transcript on the grounds of waiver.

20. The Commission resisted the disclosure of the abovementioned documents based on CR 14(1)(d) and litigation privilege.
21. In its reasons, the Tribunal stated that when a question of litigation privilege arises, the focus is on the factual circumstances surrounding the document(s) in question. Such circumstances must be set out in the papers of the person claiming litigation privilege.¹⁹
22. The Tribunal emphasised that there is a subtle difference between the common law claim of litigation privilege and the protections granted under CR 14(1)(d)(i) and (ii).²⁰ The document to which litigation privilege purports to cover must have been produced in contemplation of litigation. This requirement does not exist for protection under CR 14(1)(d).²¹ The proper approach is to ascertain whether the disputed documents fall within the protection of either litigation privilege or CR 14(1)(d)(i). In addition, the correct approach in law would be to ascertain the circumstances surrounding litigation privilege which cannot be confined only to the Commission's answering affidavit but must be considered in totality of the relevant facts presented.²²
23. On the facts, the Tribunal found that the Commission's dawn raid was a clear indication that after the initial investigation of the complaint, the Commission had contemplated litigation and the documents seized in the course of that would be subject to litigation privilege.²³ It would not have made logical sense for the Commission to pursue such a resource intensive exercise sanctioned by a warrant obtained from the High Court with the assistance of legal advisors to merely go on a fishing expedition.

¹⁹ *Goodyear* para 26.

²⁰ *Goodyear* para 35.

²¹ *Goodyear* paras 37 - 38.

²² *Goodyear* para 47.

²³ *Goodyear* paras 57-58.

24. Further, the Tribunal was of the view that some of the documents in relation to the CLP application had already been handed over by the Commission. Just because the Commission did so did not mean that waiver (whatever form it may take) would extend to other documents in the same category. To hold a contrary view would render the protection of litigation privilege obsolete.²⁴ In addition, the Commission was not obliged to explain why it elected not to waive privilege over these other documents. Thus, the Tribunal held that various documents and interview transcripts sought by the applicant were protected in terms of litigation privilege and CR 14(1)(d).²⁵
25. The Tribunal further dealt with a unique issue of waiver on the facts of this case. A privileged transcript (“Wustmann transcript”) had erroneously been handed over to Continental Tyres by the CLP applicant’s legal representative. When Goodyear South Africa became aware of this fact, it too requested access to the Wustmann transcript on the basis that litigation privilege had been waived and on the grounds of fairness.²⁶ The Tribunal found that the Commission had not waived privilege over the Wustmann transcript and the error of disclosure was not due to the Commission’s fault but of the CLP applicant’s legal representative. However, on the facts of the case, Continental Tyre’s legal representatives had been in possession of the transcript for almost 2 years and had probably read the transcripts. The Tribunal ruled that the Commission’s prayer that all copies of the Wustmann transcript be destroyed would not undo the deed. Flowing from the above, the principle of fairness dictated that other respondents should have access to the Wustmann transcript subject to confidentiality undertakings.²⁷ The Tribunal cautioned that in future the Commission ought to exercise better control over its privileged documents.²⁸
26. [On appeal](#), the CAC issued three separate concurring judgments²⁹ to the same conclusion to uphold the appeal. Unterhalter J was of the view that when

²⁴ *Goodyear* para 89.

²⁵ *Goodyear* para 103.

²⁶ *Goodyear* para 105.

²⁷ *Goodyear* paras 111-112.

²⁸ *Ibid.*

²⁹ Unterhalter J, Vally J and Davis J.

litigation privilege is raised, a clear case must be made out so that the applicants who seek the disclosure of such information understand the case made out as to why disclosure is resisted.³⁰ It will not be enough to trawl through the record to find common cause facts from which an inference can be drawn.³¹ In his view the Commission had failed to adduce evidence to make out a case for privilege.

27. Further, the Tribunal's approach was flawed when it drew an inference that the Commission contemplated litigation from the execution of the search warrant and letters attached to the papers.³² He held that the mere fact that a warrant is obtained does not establish that the Commission had sufficient evidence so as to contemplate litigation as likely.³³ While the warrants are consistent with the contemplation of litigation however consistency is not the same as proof of the Commission having contemplated litigation as likely.³⁴
28. In terms of the initiation statement, it was held that these do not state whether litigation is contemplated as likely because its purpose is to frame the scope of the investigation, not to anticipate the outcome of the investigation.³⁵ Without more, the Commission does not establish whether litigation is contemplated as likely. It was concluded that the Commission failed to put up facts that pointed out whether litigation was contemplated as likely.
29. Unterhalter J referred to the nature of CR 15, in that it is a rule that creates a regime of access to public information held by the Commission. The Commission therefore cannot rely upon the rule to resist the production of documents such as transcripts when requested by a litigant.³⁶ The Commission would have had to set out facts why the disclosure would have frustrated the deliberative process, however it failed to do so.³⁷

³⁰ *Goodyear CAC* para 11.

³¹ *Ibid.*

³² *Goodyear CAC* para 16.

³³ *Ibid.*

³⁴ *Goodyear CAC* para 17.

³⁵ *Goodyear CAC* para 20.

³⁶ *Goodyear CAC* paras 35-38.

³⁷ *Goodyear CAC* para 39.

30. In respect of the correspondence and the leniency application, Unterhalter J found that the Commission failed to establish the privilege claimed over the documents.³⁸ The mere making of the application of leniency without more, did not establish privilege and this did not say anything as to what the application contained and what effect it had on the Commission's contemplation of litigation.³⁹ Hence the claim of privilege had to fail.
31. Vally J was of the view that the Commission's answering affidavit only set out that from the search and seizure process. He held that it would not have been burdensome for the Commission to indicate when it had contemplated litigation. The Commission, however, is not obligated to spell out the explicit date but it must give an indication when it had contemplated litigation.⁴⁰ For example, was litigation contemplated on the date between the initiation statement and the date of referral. From thereon, the Commission would have to state whether the documents produced within such a period were cloaked by privilege. This would have sufficed. As the SCA in *ArcelorMittal* opined, the courts will not go behind averments of an affidavit to ascertain the likelihood that litigation was contemplated.⁴¹
32. In terms of the correspondence pertaining to the CLP alleged to be protected by CR 14, Vally J found that the Commission did not make out a case why such information ought not be disclosed. At least, the Commission could have said the disclosure of such information was sensitive to disclosure and would result in the impairment of the public interest and loss of justice⁴² and indicate to the court why this is so. However, the Commission failed to do that. The Commission must present a fact or two to justify the operation or applicability of CR 14.

³⁸ *Goodyear CAC* para 50.

³⁹ *Ibid.*

⁴⁰ *Goodyear CAC* para 18.

⁴¹ *Goodyear CAC* para 18

⁴² *Goodyear CAC* para 22.

33. Goodyear's application for disclosure in terms of HCR 35(12) the court held that the rationale for CR 14 is justifiable and therefore to allow HCR 35(12) to trump it would undermine its very purpose and objective and deprive it of its value.⁴³
34. The CAC found that once the Commission has made out a case for protection under CR 14, especially CR14(1)(d) in this case, it cannot be deprived of that protection by HCR35(12).
35. Goodyear, in its argument, attempted to draw parallels of Tribunal proceedings to criminal proceedings in that administrative penalties imposed by the Tribunal have close resemblance to criminal penalties. Vally J did not agree with this line of argument.⁴⁴ He held that criminal proceedings are not akin to those of the Tribunal. For example, the rights to a fair trial afforded to an accused person cannot be transposed to the proceedings of the Tribunal without something more.⁴⁵ Further, it is not automatic that respondents would get access to the Commission's record if the respondents thought of CT proceedings to be akin to criminal proceedings because in some circumstance an accused's access to some statements in the police docket "*may impede the proper ends of justice*" as stated by the ConCourt in *Shabalala and five others v Attorney-General of the Transvaal and another*.⁴⁶
36. Davis J too agreed with his fellow judges in that the Commission failed to provide affidavit evidence as to why litigation privilege covered the impugned documents and on this basis alone, found that the Commission had failed to make out a case to invoke litigation privilege.⁴⁷
37. Davis J was also of the view that at the complaint initiation stage, it cannot be said that the litigation was contemplated because at that stage, the Commission must direct an inspector to investigate the alleged prohibited practice.⁴⁸

⁴³ *Goodyear CAC* para 24.

⁴⁴ *Goodyear CAC* para 25.

⁴⁵ *Ibid.*

⁴⁶ 1996 (1) SA 725 para 51.

⁴⁷ Davis J para 2.

⁴⁸ *Goodyear CAC* para 2.

38. In terms of the relation between CR 14 and HCR 35(12), Davis J was of the view that Vally J's interpretation was based on an incorrect reading of the rule. CR 14 and CR 15 are public access rules whereas HCR 35(12) is a fundamental rule that allows litigants to obtain relevant material to assess the strength and weakness of their case. He ruled that it would be difficult to see how a public access rule could trump a fundamental rule.⁴⁹
39. In relation to Goodyear's attempt to draw parallels of Tribunal proceedings to criminal proceedings, Davis J shied away from this. He ruled that to attempt to illustrate that the Commission exercises criminal powers when investigating a complaint raises complex issues including policy considerations that informed the decision in *Shabalala*. It was therefore unnecessary to canvass these issues.⁵⁰

⁴⁹ See further para 5.

⁵⁰ *Goodyear CAC* para 6.

Commission's powers in terms of section 49B: Valid initiation

1. Sections 49B outlines the manner in which the Commissioner may initiate a complaint against a prohibited practice and allows for private parties to submit a complaint to the Commission. Once a complaint has been initiated, the Commissioner must assign an investigator to investigate the alleged prohibited practice. Many respondents have challenged the validity of the Commission's complaint referral on the basis that the initiation was invalid. In this section we explore the main cases under section 49B.
2. Section 49(B) states that:
 - (1) *The Commissioner may initiate a complaint against an alleged prohibited practice.*
 - (2) *Any person may –*
 - (a) *submit information concerning an alleged prohibited practice to the Competition Commission, in any manner or form; or*
 - (b) *submit a complaint against an alleged prohibited practice to the Competition Commission in the prescribed form.*
 - (3) *Upon initiating or receiving a complaint in terms of this section, the Commissioner must direct an inspector to investigate the complaint as quickly as practicable.*
 - (4) *At any time during an investigation, the Commissioner may designate one or more persons to assist the inspector.*
3. Section 49B(1) makes provision for the Commissioner to initiate a complaint against an alleged prohibited practice on its own accord from information submitted to it by a member of the public (49B(2)(a)) or from a formal complaint which has been submitted to it under section 49B(2)(b). Thereafter, the Commissioner must direct an investigator to investigate the complaint.
4. Legal consequences that flow from the operation of section 49B(1) and (2) differ in many respects such as the time in which the Commission has to investigate the complaint and when such complaint can be referred to the Tribunal.

Section 49B(1)

5. In terms of section 49B(1), there are jurisdictional requirements that must be met for the initiation of a complaint by the Commissioner. In the leading case of [Woodlands Dairy \(Pty\) Ltd and Another v Competition Commission](#)¹ (Woodlands SCA) the SCA held that:

“[A]s a matter of principle, that the commissioner must at the very least have been in possession of information ‘concerning an alleged practice’ which, objectively speaking, could give rise to a reasonable suspicion of the existence of a prohibited practice. Without such information there could not be a rational exercise of the power.”

6. The CAC in *Sappi Fine Paper (Pty) Ltd v Competition Commission of SA and Papercor CC*² (*Sappi*), was of the view that the Commission can only investigate anti-competitive conduct which is contemplated by the Act. It held:

*“[T]he Commission is not empowered to investigate conduct which it generally considers to constitute ‘anti-competitive behaviour’ and that a complaint can relate only to ‘an alleged contravention of the Act as specifically contemplated by an applicable provision thereof by that complainant’.”*³

7. If the Commission would do the contrary, it would be acting beyond its jurisdiction.⁴
8. In *Woodlands SCA*, the initiation of the Commission’s complaint was challenged in the course of a challenge to the validity of a subpoena (summons)

¹ 2010 (6) SA 108 (SCA).

² 23/CAC/Sep02.

³ *Sappi* para 35 and 39.

⁴ See *Woodlands* (SCA) para 19.

that had been issued against Woodlands Dairy (Pty) Ltd (Woodlands) and Milkwood Dairy (Pty) Ltd (Milkwood).

9. The facts in this case were that Commission received information through a letter from one Mrs Malherbe who complained of price fixing conduct by milk distributors Parmalat, Nestlé and Ladismith Cheese. The Commission inspectors sought to gather information on this allegation and found information from sources that corroborated Mrs Malherbe's allegations of price fixing concerning only Parmalat and Ladismith Cheese. The Commission did not find any evidence of wrongdoing by Nestlé but found that Clover may be abusing its dominance in contravention of the Act.
10. The inspectors then drew up a memorandum to the Commissioner setting out the information at their disposal and recommended that a complaint be initiated against Parmalat and Ladismith Cheese regarding the fixing of the purchase price of milk in terms of section 4(1)(b). Instead of following the recommendation, the Commissioner initiated a complaint concerning the three entities and stated, *inter alia*, that there exists anti-competitive behaviour in the milk industry (the 2005 initiation).⁵ Without any other qualification, a full investigation into the milk industry was initiated. In addition, the Commissioner did not have any material to support his belief that there was illegal anti-competitive behaviour in the industry as a whole.⁶ Woodlands and Milkwood had challenged a summons that had been issued to them after the 2005 initiation, which is discussed in detail under the chapter dealing with summons. However, the second challenge brought by them was that the Commission's initiation against them was invalid.
11. In terms of the 2005 initiation, the SCA held that the Commissioner was supposed to initiate a complaint against a prohibited practice and not against general anti-competitive practices as was set out in *Sappi*.⁷ In addition, the

⁵ *Woodlands SCA* at paras 24-25.

⁶ *Woodlands SCA* at para 26.

⁷ *Ibid.*

Commissioner did not have any material evidence to support his belief that there was anti-competitive behaviour in the milk industry as a whole.⁸

12. The Commission did not refer the 2005 complaint. The Commissioner instead referred six complaints that were initiated during 2006 (2006 initiation). The first was dated 13 March and accused Woodlands and others of fixing the purchase price of raw milk. Two other complaints involving Woodlands were initiated on 12 May and, finally, on 6 December one was initiated against Woodlands and Milkwood. The remaining complaint did not affect either of the appellants. All the complaints involving one or both of the appellants related to practices prohibited by section 4(1).
13. In terms of the 2006 initiations, the SCA found in favour of the appellants and held that the 2006 initiations explicitly refer back to the investigation under the 2005 complaint and state that they were drawn as a consequence of an invalid complaints procedure.⁹ Because the 2005 initiation was held to be invalid, the subsequent investigations and the 2006 initiation were found to be invalid and set them aside.¹⁰

Section 49B(2)

14. In *Woodlands*, the appellants also challenged the Commission's initiation on the basis that the letter submitted by Mrs Malherbe, was a complaint in terms of section 49B(2) of the Act and, the Commission was therefore required to investigate the matter within one year, failing which would be deemed to have issued a notice of non-referral in terms of section 50(1) of the Act. The appellants argued that the Commission had not obtained extensions from the complainant or the Tribunal section 50(4) and the matter was therefore deemed to have been non-referred.
15. The Commission argued that the letter submitted by Ms Malherbe at best was a catalyst for a full investigation conducted by the Commission into the milk

⁸ *Woodlands SCA* para 26.

⁹ *Woodlands SCA* para 43.

¹⁰ *Woodlands SCA* para 43.

industry in South Africa and not a complaint contemplated under section 49B(2). The Commission had self-initiated its investigation under section 49B(1) and thus in terms of section 50(1) the Commission's time was not barred.

16. The primary issue to be decided was whether what was submitted by Ms Malherbe constituted a third- party complaint under s49B(2).
17. In the case at the Tribunal it was found that that Ms Malherbe had no intention to be a complainant in terms of section 49B(2)(b) and that her letter constituted no more than submission of information under section 49B(2)(a) thus the time limits set out in section 59(2) did not apply.¹¹ The SCA was in full support of the Tribunal's findings and agreed with the Tribunal's view that not every grievance of submission of information can be equated to a complaint under section 49B(2)(b):

“However our tolerance of informality as to the matter in which a particular complaint is articulated does not extend to interpreting every articulation of a grievance, every submission of information, as tantamount to the initiation of a complaint as contemplated by section 49B(2)(b). At best, Ms Malherbe's letter can be viewed as a grievance alternatively a submission of information.”¹²

18. The word “complaint” must be interpreted contextually as opposed to its ordinary grammatic meaning in terms of which ordinary members of the public's grievances are contemplated as complaints.¹³
19. The court further held that to hold contrary to the Tribunal's findings would have two consequences. Firstly, it would stifle the very purpose of the Act in that persons will be inhibited from submitting information to the Commission in fear of becoming litigants when they had no intention of doing so. Secondly, it would

¹¹ *Woodlands SCA* para 8. See further para 11.

¹² *Woodlands SCA* para 11.

¹³ *Woodlands SCA* para 12.

disallow the Commission from entertaining information submitted to it when accompanied by a request of anonymity.¹⁴

20. Lastly the court highlighted that subsection (a) and (b) differ in language. The former refers to the submission of a complaint and the second, submission of information. It is clear that the legislature contemplated two different procedures and that the change in expressions is taken to be a *prima facie* a change of intention.¹⁵

Tacit initiation

21. Thus far the cases above have been decided in the context where the Commission has explicitly initiated a complaint against various respondents. In [*Competition Commission v Yara \(South Africa\) \(Pty\) Ltd and Others*](#)¹⁶ (*Yara*) the SCA decided that the Commission could tacitly initiate a complaint against a respondent. Here, the SCA had to determine whether a particular complaint referral to the Tribunal by the Commission, and an amendment to that referral, complied with the requirements of the Act. The outcome of this decision rested on the interpretation of sections 49B and 50.¹⁷
22. The facts in *Yara* were as follows. Nutri-Flo, a distributor, blender and supplier of fertiliser in Kwa-Zulu Natal filed a complaint with the Commission against Sasol Chemical Industries (Pty) Ltd (including Yara and Omnia) for the abuse of a dominant position in contravention of section 8 and 9 of the Act. In its complaint, Nutri-Flo also alleged that Sasol, Omnia and Yara were colluding in the fertiliser market. While it had cited Omnia and Yara as parties, Nutri-Flo sought relief only against Sasol for abuse of dominance.
23. On 4 May 2005, the Commission concluded its investigation and referred a complaint against Sasol, Omnia and Yara to the Tribunal alleging that the respondents had contravened sections 8(a), and 8(c) of the Act. The

¹⁴ *Woodlands* SCA para 12.

¹⁵ *Woodlands* SCA para 13.

¹⁶ 2013 (6) SA 404 (SCA).

¹⁷ *Yara* para 3.

Commission also made allegations of collusive conduct in contravention of section 4(1)(b) of the Act.¹⁸

24. On 18 May 2009, Sasol concluded a settlement agreement with the Commission for contravening section 4(1)(b) of the Act. Sasol provided the Commission with details of how these agreements were reached and enforced. Sasol also undertook to provide the Commission further details in witness statements. Yara and Omnia opposed the consent agreement on the basis that the information to be provided by Sasol went beyond the scope of the complaint referral. The settlement agreement was confirmed by the Tribunal to and included particulars of collusive meetings disclosed by Sasol in support of the existing complaints. Thereafter, the Commission gave notice of its intention to amend its referral. Yara and Omnia opposed the amendments.¹⁹ and filed and a counter application for dismissal of the referral on the basis that it went beyond the scope of the Nutri-Flo complaint.²⁰
25. The Tribunal granted the amendment and dismissed the counter application. The matter was taken on appeal. The CAC, on appeal, found in favour of the appellants, effectively reversing the decision of the Tribunal. The matter was taken to the SCA by the Commission which found in favour of the Commission and agreed with the Tribunal's decision.
26. In its decision, the CAC relied on the so-called 'referral rule' which envisages that the Commission's referral must correspond or must not be wider than the complaint submitted by the complainant in terms of section 49B(2)(b) or initiated by itself in terms of section 49B(1).²¹ It relied on a 'strict approach' in terms of which, absent any initiation by the Commission itself, the Commission may only refer to the Tribunal the prohibited practices *intended* by the complainant to constitute distinct complaints.²² The CAC concluded that first, the Nutri-Flo complaint was targeted against Sasol and not Omnia or Yara. Secondly, the complaints of prohibited practices against Yara and Omnia in the referral went

¹⁸ *Yara* paras 6 and 7.

¹⁹ *Yara*, at para 9.

²⁰ *Ibid.*

²¹ *Yara*, para 11.

²² *Ibid.*

wider than the Nutri-Flo complaint. On this basis, the referrals fell to be dismissed.²³

27. In its decision, the SCA agreed with the CAC that factually, the Nutri-Flo complaint was only directed against Sasol, not Omnia. However, the court was of the view that once it is determined that what was submitted was indeed intended to be a complaint, it makes no difference at whom the complaint was aimed.²⁴ If the complaint submitted alleges that A and B were involved in a collusive arrangement, it makes no difference whether the complainant's quarrel was only with A and not B. Ordinary language would dictate that the complaint of a collusive arrangement is also against B. The court could not find any other contradictory wording in the Act that would go against this view. It concluded that the extended "*referral rule*" the CAC had relied on could not be sustained and concluded that it was of no consequence that the Nutri-Flo complaint was exclusively aimed at Sasol and not at Omnia or Yara.²⁵
28. In overturning the CAC, the SCA compared the complaint submitted by the complainant and the one referred to the Tribunal by the Commission.²⁶ to demonstrate that the referral rule developed by the CAC conflated the requirements of an initiation with that of a referral. The CAC had treated Nutri-Flo's document as if it was a referral and not a document initiating a complaint. The court referred to the CAC's decision in [*Netstar \(Pty\) Ltd v Competition Commission*](#)²⁷ (*Netstar*), in which it found this conflation was evident. In *Netstar* the CAC had also found that the alleged conduct said to have contravened the Act must be described with sufficient clarity for the party who must answer to these allegations and rebut them. The CAC then went further than this in its decision of [*Loungefoam \(Pty\) Ltd v Competition Commission*](#)²⁸ where it was of the view that the complaint must afford the firm under investigation an opportunity to engage with the Commission to dispel its concerns and

²³ *Yara* para 12.

²⁴ *Ibid.*

²⁵ *Yara* para 16

²⁶ *Yara* para 18.

²⁷ 2011 (3) SA 171 (CAC) para 26.

²⁸ [2011] 1 CPLR 19 (CAC).

demonstrate that it has not committed the alleged infringing conduct.²⁹ It also relied on this in its decision in *Yara*.

29. The SCA disagreed with that approach. To illustrate this point, the SCA referred to its decision in [Simelane NO v Seven-Eleven Corporation SA \(Pty\) Ltd](#)³⁰ in which it ruled that a complaint initiation is a *preliminary* step – a process which does not affect any respondent’s rights.³¹ The Commission at this stage is not required to engage with the respondents. It is only after the Commission has referred the matter to the Tribunal that “*the principles of administrative justice are observed in the referral and the hearing before the Tribunal. That is when the suspect firm becomes entitled to put its side of the case*”.³²
30. The SCA also noted that the CAC in *Yara* found support for the “referral rule” in *Woodlands*. The court however disagreed with this because *Woodlands* dealt with validity of two summonses issued by the Commission and only considered the scope of the initiating complaint to determine whether the summonses issued during the course of an investigation were valid.³³ *Woodlands* did not deal with the degree of correlation between a complaint initiation, on the one hand, and the ultimate referral on the other.³⁴
31. The court also relied on the ConCourt’s judgment in [Competition Commission of South Africa v Senwes Ltd](#)³⁵ where the court found that the Tribunal was not precluded from determining a complaint not covered by the referral. Although the Tribunal cannot initiate a hearing, this does not mean that it cannot determine a complaint brought to its attention during the course of deciding a referral.³⁶ If the Tribunal can consider a complaint not raised in the referral it follows that the referral is not confined to the parameters of the original

²⁹ Ibid paras 22-23.

³⁰ 2003 (3) SA 64 (SCA) para 17.

³¹ *Simelane* para 24.

³² Ibid.

³³ *Yara* para 26.

³⁴ Ibid.

³⁵ 2012 (7) BCLR 667 (CC).

³⁶ *Senwes* (CC) para 48.

complaint. The SCA held that the above was destructive of the CAC's formulation of the referral rule.³⁷

32. The SCA was therefore of the view that the proper enquiry should be:³⁸

"[W]hether the additional complaint had, as a matter of fact, been initiated by the Commission. Absent any evidence of an express – albeit informal – initiation, the question will be whether a tacit initiation had been established. That will be a matter of inference which depends on the enquiry whether or not it is the most probable conclusion from all the facts, that the Commission had decided to initiate the additional complaint?"

33. The SCA was of the view that section 49B(1) required no more than the decision of the Commissioner to open a case. This decision could be informal and also tacit.³⁹

34. When the Commission decided to investigate the additional complaints and subsequently referred them to the Tribunal, the Commission had effectively tacitly initiated the complaints not covered in the original Nutri-Flo complaint.⁴⁰

35. On the facts of this case, the SCA was of the view that the probabilities favour the inference that the Commission decided to initiate complaints that fell outside the ambit of the original Nutri-Flo complaint against all three respondents.⁴¹

Section 49B3: Commission's powers to investigate a complaint

36. Section 49B(3) pertains to the Commission's powers to appoint an inspector. It reads:

"Upon initiating or receiving a complaint in terms of this section, the Commissioner must direct an inspector to investigate the complaint as quickly as practicable."

³⁷ Senwes paras 27 and 28.

³⁸ Senwes para 29.

³⁹ Senwes para 21.

⁴⁰ Senwes para 31.

⁴¹ Senwes para 29.

37. In [*Competition Commission v Pentel South Africa \(Pty\) Ltd*](#)⁴² (Pentel) the Tribunal was called to determine whether the Commissioner failed to direct an inspector to investigate the case against Pentel as required by section 49B(3) of the Act. If this were the case, the Commission would have acted ultra vires, therefore ousting the Commission's jurisdiction.⁴³ Pentel argued that the Commission stated that it had "assigned" an inspector which is contrary to the wording used in section 49B(3), namely that an inspector must be "directed" to investigate a complaint.⁴⁴
38. The Tribunal held that inspectors are not appointed to specific cases, rather they receive an appointment to the office of inspector pursuant to section 24 of the Act⁴⁵ This interpretation is consistent with the wording of section 24 of the Act. The wording of section 49B(3) illustrates that the Commission is only obliged to direct an inspector to investigate a complaint.
39. The Tribunal was of the view that nothing turns on the choice of wording in the Commission's papers. Both words (directed and assigned) presuppose that an instruction is given by the Commissioner to an inspector to investigate a complaint.⁴⁶ Once the Commission, in its founding affidavit states that an inspector is assigned, without evidence to the contrary, the Tribunal may assume that an inspector has been directed to investigate the complaint.⁴⁷ Section 49B(3) does not set out any formalities as to how the inspector should be directed to investigate a complaint. ⁴⁸ An oral instruction is sufficient and thus it is not expected that the Commission produce documentary proof thereof.⁴⁹

⁴² (27/CR/Apr11).

⁴³ paras 1-2, 19-20. Note that this issue was the argument in the alternative to that of prescription which is dealt with under the heading '**Prescription**'.

⁴⁴ *Pentel* para 25

⁴⁵ *Pentel* para 21.

⁴⁶ *Pentel* para 26.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

40. The Tribunal found that the Commission had lawfully appointed an investigator pursuant to section 49B(3), therefore the investigation conducted by the Commission was *intra vires*.

Granting of immunity against prosecution pursuant to the CLP

1. The Commission's Corporate Leniency Policy (CLP) was introduced by the Commission in an effort to effectively prosecute firms participating in cartel conduct. The policy encourages a cartel member, on its own accord, to approach the Commission to apply for immunity from prosecution in exchange for full disclosure of relevant information pertaining to the cartel conduct subject to a set of requirements that must be met by the applicant. The CLP only applies to prohibited practices envisaged under section 4(1)(b) of the Act and such practices must have had an effect in South Africa. In order for an applicant to be granted immunity, the firm must be, *inter alia*, 'first to the door'¹ of the Commission and admit to all its activities and involvement in the cartel.

Binding nature of CLP agreements

2. It is important to note that the terms of a CLP agreement are specific to the conduct disclosed in a CLP application. In other words, the CLP applicant cannot later seek relief from either the Tribunal or the CAC to include other prohibited practices not covered by the agreement.
3. An issue of this nature was raised in [*Clover Industries Limited and Another v Competition Commission and Others; Ladismith Cheese \(Pty\) Ltd v Competition Commission of South Africa and Others*](#)² (Clover).
4. In this case the Commission had granted Clover conditional immunity in respect of its involvement in a milk balancing scheme in contravention of section 4(1)(b) of the Act (the sixth complaint) and denied Clover immunity in respect of the surplus removal scheme (third complaint). Notwithstanding this, Clover entered into the CLP agreement. Thereafter, Clover challenged the denial of leniency before the Tribunal arguing that the third complaint formed an integral and indivisible part of the sixth complaint and thus Clover should have been granted

¹ Para 5.6 of the Commission's Corporate Leniency Policy of 2008 ("the CLP").

² (81/CAC/Jul08).

immunity in respect of the sixth complaint as it would be unfair and prejudicial for the Tribunal to adjudicate the third complaint against Clover where it, in respect of the CLP agreement is to assist in the prosecution of the third complaint against itself. ³ Clover also argued that it would be unfair for it to simultaneously act as an accuser and accused in the same factual matter. ⁴ On the contrary, the Commission argued that the third and sixth complaints were distinct contraventions and were not indivisible or integral. ⁵

5. Clover's challenge was brought as three points *in limine* in the Commission's referral to the Tribunal and was argued prior to the merits. The Tribunal dismissed Clover's challenges after which Clover took the Tribunal's dismissal of its three points in *limine* on review to the CAC.
6. At the CAC, the court concurred with the Tribunal. The CAC held that the third and sixth complaints were distinct and separate contraventions of the Act. Even if the contrary were so, this was an issue that could only be decided once evidence in relation to both contraventions had been given during trial. ⁶ The Tribunal, not the CAC, is the proper forum to decide on issues of this nature. Clover's arguments clearly purported to show a factual dispute which, contrary to established law, cannot be resolved in motion proceedings. ⁷ It would be premature to resolve the factual dispute in the CAC and doing so would undermine and usurp the powers and functions of the Commission. ⁸
7. On the issue of fairness, the CAC held that prior to Clover binding itself to the CLP agreement, it was fully appraised of the facts and had knowledge of the offence the Commission sought to prosecute. ⁹ The facts and circumstances of the case did not result in any unfairness towards Clover. ¹⁰ Ultimately, the CAC concurred with the Tribunal's ruling in that it would be premature to

³ *Clover* paras 21 -22.

⁴ *Clover* para 23.

⁵ *Clover* para 26.

⁶ *Ibid.*

⁷ *Clover* para 29. The principle is enshrined in *Plascon-Evans Paints Ltd v Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

⁸ *Clover* para 30.

⁹ *Clover* para 29.

¹⁰ *Clover* para 32.

determine the question of fairness in motion proceedings. The issue of whether any prejudice occurred could only be dealt with at a later stage.¹¹ The CAC dismissed the case with costs.

Review of CLP applications

8. In [*Allens Meshco Group of Companies and Others v Competition Commission*](#)¹² (*Allens Meshco*) the High Court was called to determine on review i) whether an unreasonable delay in bringing the review application could be condoned, ii) whether a distinction can be drawn between a marker application and an application for leniency and iii) whether all relevant factors were considered when the leniency application came before the Commission.
9. Allens Meshco Group (AMG) had submitted a marker application in accordance with the Commission's CLP to mark its place in the queue for immunity in respect of certain prohibited practices in the wire and wire products market. The Commission informed AMG that it was 'second to the door' as another firm, Consolidated Wire Industries (CWI), had already filed a leniency application. Thereafter, pursuant to its marker application, AMG submitted further documents. The Commission found that the documents did not disclose sufficient information of prohibited conduct or any information that was different to that submitted by CWI. It is worth noting that AMG did not file a leniency application after it had filed its marker application.¹³
10. AMG objected to the granting of leniency to CWI on a number of grounds and took the Commission's decision on review to the CAC. It was argued, *inter alia*, that CWI could not rely on the CLP application made by its parent company and that the products underlying AMG's marker application fell outside the product market of CWI's pending leniency application;¹⁴ the marker application and the granting of immunity was an integrated process and ought not to involve two applications as provided in the CLP document;. that the Commission failed

¹¹ *Clover* para 34.

¹² 31044/13.

¹³ *Allens Meshco* para 23.

¹⁴ *Allens Meshco* para 21.

to consider all the relevant facts of AMG's application; the Commission was obliged to consider each application on its own merits which it failed to do; and the granting of immunity to CWI was made by another official of the Commission who did not have the authority to do so – such authority being only of the Commissioner or Deputy Commissioner.¹⁵ AMG's review application was filed 4 years and 8 months after the granting of leniency to CWI, hence the CAC also had to consider whether this extraordinary delay could be condoned.

11. The CAC ruled that sections 3 and 9 of Promotion of Administrative Justice Act No. 3 of 2000 (PAJA) allows for an applicant to review a decision of an administrator within 180 days. After the lapse of 180 days, a court may grant an extension to a successful applicant who wishes to review an administrator's decision. In this case, AMG argued that it only became aware of a ground of review after the matter was litigated in the SCA and leave to appeal was denied by the Constitutional Court (ConCourt). The CAC was not convinced by AMG's argument and held that it was very clear that the Commission is an administrative body whose decisions can be reviewed in terms of PAJA. AMG did not need the ruling of the SCA or the ConCourt to make them aware of the provisions of PAJA.¹⁶ In addition, AMG should have sought legal advice how it should proceed timeously following the Commission's decision.¹⁷ As such, the CAC held that AMG had not shown good cause for the delay in bringing the review timeously.
12. The issue of prejudice in relation to the above was also considered by the CAC. AMG argued that when it filed its review application at the time, it did not cause substantial prejudice to the Commission. To the contrary the Commission argued that the delay was highly prejudicial to the Commission and to the public at large. The CAC was not convinced by AMG's argument. It held that further prejudice could be caused to the Commission due to the fact that review applications require extensive facts and may result in the inability of officials to

¹⁵ *Allens Meshco* para 26.

¹⁶ *Allens Meshco* para 34.

¹⁷ *Allens Meshco* para 35.

recall facts and details either due to normal turnover of personnel or the passage of time.¹⁸

13. With regard to the second issue (distinction between marker and leniency applications), the court was of the view that it was clear from the wording of the CLP, that the marker application and leniency application are two distinct and separate applications as each has to comply with its own set of procedures and requirements.¹⁹
14. Lastly, whether all relevant factors were considered when the leniency application came before the Commission, the court found against AMG and ruled that it was clear from the Commission's letters that the Commission had fully investigated the marker application, the additional documents and information, and had compared such to CWI's applications.²⁰ In addition, it was confirmed by the Deputy Commissioner on affidavit that he and the Commissioner had at the time considered the CWI's application for leniency and evaluated the marker application.²¹ Accordingly, the review was dismissed with costs.

Deviation from the CLP

15. In some cases, the Commission may choose to deviate slightly from the CLP document, if such deviation aims to achieve a rational means to an end. In *Blinkwater Mills (Pty) Ltd v Competition Commission* (CR087Mar10/DSM021May11) (Blinkwater Mills) the Tribunal was called to determine whether the granting of immunity to Tiger Consumer Brands Limited ("Tiger Brands") was *ultra vires* the Commission's CLP.
16. It is common cause that Tiger Brands was 'second to the door' in respect of a cartel in the milled white maize market while another applicant (Premier Foods (Pty) Ltd) had been granted leniency. The Commission nonetheless granted Tiger Brands leniency as well.

¹⁸ *Allens Meshco* para 49.

¹⁹ All correspondence exchanged between the parties showed the Commission always referred to the marker application and not a leniency application. See paras 43-45.

²⁰ *Allens Meshco* para 46.

²¹ *Ibid.*

17. Blinkwater Mills (Pty) Ltd (“Blinkwater”), one of many respondents in the Commission’s complaint referral, argued that the granting of immunity to Tiger Brands was irrational as the Commission had deviated from its own leniency policy by granting leniency to a firm that was not first through the door.²² In other words, the leniency policy has a clear rationale and to act contrary to it would be to undermine it.²³ It was argued that Tiger Brands should not have been granted leniency and the initiation of the complaint against Blinkwater was accordingly unlawful as was the subsequent referral.²⁴
18. The Tribunal was of the view that on policy grounds, it could not be said that the Commission acted irrationally. In terms of the Commission’s statutory functions it has an objective to prosecute as many cartelists as possible in the main matter. In this case, it needed more evidence than what Premier (the first through the door applicant) could provide. Therefore, leniency was granted to the second applicant. The Tribunal ruled that the means and ends are rationally connected.²⁵ The Commission’s departure from the CLP, on the facts of this case, was not irrational.²⁶ Since the decision was not irrational, averments that the initiation was unlawful on the basis that the leniency granted was unlawful and fell to be set aside.²⁷

²² *Blinkwater* para 70.

²³ *Blinkwater* para 74.

²⁴ *Ibid.*

²⁵ *Blinkwater* para 82.

²⁶ *Blinkwater* para 103.

²⁷ *Blinkwater* para 104.

Interim relief under section 49C

1. This section outlines only those matters that were decided under s49C of the Act. The cases decided under 'the old' section 59 will not be canvassed. Section 49C(2)(b) provides that interim relief may only be granted where:

'...it is reasonable and just to do so, having regard to the following factors:

- (i) The evidence relating to the alleged prohibited practice;*
- (ii) The need to prevent serious or irreparable damage to the applicant; and*
- (iii) The balance of convenience'.*

2. The main differences between the old section 59 and section 49 are that the latter section's standard of proof is less exacting than the normal balance of probabilities which was required by the former section.¹ Under section 49C(3) the applicant for interim relief merely has to establish a *prima facie* case.² This is equivalent to the standard of proof adopted by the High Court in that the applicant must show that it is entitled to the relief sought.³
3. Secondly, the section 59 requirement that an applicant could prove that the relief sought was needed to prevent the purposes of the Act being frustrated as an alternative to proving irreparable harm has been omitted from section 49C.⁴ The applicant must now show that serious and irreparable harm could arise from a contravention of the Act.⁵
4. Thirdly, under section 49C the Tribunal no longer seeks the proof of all three requirements in isolation but takes a holistic view which considers the

¹ *Natal Wholesale Chemists (Pty) Ltd v Astra Pharmaceuticals (Pty) Ltd and Others* (98/IR/Dec00 (March 2001) at 7-8, *York Timbers Ltd v South African Forestry Company* (15/IR/Feb01 (decided May 2001) at 7-13. *Nuco Chrome (Pty) Ltd and Xstrata South Africa (Pty) Ltd & Rand York Minerals (Pty) Ltd* (31/IR/Apr04) at 6; *National Association of Pharmaceutical Wholesalers and others v Glaxo Wellcome (Pty) Ltd and Others* (68/IR/Jun00) (June 2003) at 8.

² *Ibid.*

³ *Anchor Zedo Outdoor CC* para 17.

⁴ *Natal Wholesale Chemists (Pty) Ltd* *supra*.

⁵ *Anchor Zedo Outdoor CC v Passenger Rail Agency of South Africa* (017616) para 16. Also see *Normandien Farms (Pty) Ltd v Komatiland Forests (Pty) Ltd* para 16; *Nyobo Moses Malefo and Others v Street Pole Ads (SA) (Pty) Ltd and Others* (35/IR/May05) para 38.

requirements in conjunction with each other.⁶ The requirements are therefore balanced against each other and it is possible that interim relief will be granted even where the applicant's case on one of these requirements is somewhat lacking.⁷

5. The Tribunal set out its approach to interim relief under section 49C in the seminal case of *York Timbers* wherein it endorsed the common law approach to interim relief as set out in *Webster v Mitchell*⁸ and *Gool v Minister of Justice and Another*⁹ at paras 62 to 66:

"62. We conclude that the approach taken in Webster's case as supplemented by Gool's case correctly reflects the standard of proof in a common law application for an interim interdict in the High Court which we must apply for the purposes of section 49C.

63. Although the Webster test is often stated as a single requirement Selikowitz J has pointed out that it involves two stages.

"Once the prima facie right has been assessed, that part of the requirement which refers to the doubt involves a further enquiry in terms whereof the Court looks at the facts set up by the respondent in contradiction of the applicant's case in order to see whether serious doubt is thrown on the applicant's case and if there is a mere contradiction or unconvincing explanation, then the right will be protected. Where, however, there is serious doubt then the applicant cannot succeed."

64. Applying this analysis to our Act means that we must first establish if there is evidence of a prohibited practice, which is the Act's analogue of a prima facie right. We do this by taking the facts alleged by the applicant, together with the facts alleged by the

⁶ *Natal Wholesale Chemists (Pty) Ltd* supra; *York Timbers Ltd v South African Forestry Company* (15/IR/Feb01) at 13; *Glaxo Wellcome (Pty) Ltd* supra note 1; *Anchor Zedo Outdoor CC v Passenger Rail Agency of South Africa* (017616) para 16.

⁷ *Natal Wholesale Chemists (Pty) Ltd* supra.

⁸ 1948 (1) SA 1186 (W).

⁹ 1955 (2) SA 682 (C).

respondent that the applicant cannot dispute, and consider whether having regard to the inherent probabilities, the applicant should on those facts establish the existence of a prohibited practice at the hearing of the complaint referral.

65. *If the applicant has succeeded in doing so we then consider the “doubt’ leg of the enquiry. Do the facts set out by the respondent in contradiction of the applicants case raises serious doubt or do they constitute mere contradiction or an unconvincing explanation. If they do raise serious doubt the applicant cannot succeed.*

66. *As far as the remaining factors in 49C(3) are concerned viz. irreparable damage and the balance of convenience, these are not looked at in isolation or separately but are taken in conjunction with one another when we determine our overall discretion.”*

6. Even in circumstances where all three requirements of section 49C(2)(b) are proven, the Tribunal retains its discretion and may refuse to grant interim relief where it is reasonable and just to do so.¹⁰ This approach has been endorsed by the CAC in [National Association of Pharmaceutical Wholesalers and others v Glaxo Wellcome \(Pty\) Ltd](#).¹¹
7. The Tribunal has made it clear that it is very reticent to grant interim relief where there is insufficient proof of a prohibited practice and has dismissed applications for interim relief in such circumstances.¹²
8. In [Normandien Farms \(Pty\) Ltd v Komatiland Forests \(Pty\) Ltd](#),¹³ (Normandien) the Tribunal held that conduct which amounts to a breach of contract may, in certain circumstances, amount to a contravention of the Act. However, the

¹⁰ *Replication Technology Group (Pty) Ltd v Gallo Africa Ltd* Case no 92/IR/Sep07 at 13.

¹¹ (29/CAC/Jul03) para 8.

¹² *York Timbers Ltd v South African Forestry Company* at 13 and 22-2; *National Association of Pharmaceutical Wholesalers and others v Glaxo Wellcome (Pty) Ltd and others* at 8; *South African Fruit Terminals (Pty) Ltd v Portnet and others* (52/IR/Seo01) at 22; *Nkosinauth Ronald Msomiand others v British American Tobacco SA (Pty) Ltd* (49/IR/Jul02) at 15-16; *Nuco Chrome (Pty) Ltd and Xstrata South Africa (Pty) Ltd & Rand York Minerals (Pty) Ltd* ; *Nyobo Moses Malefo and another v Street Pole Ads (SA) (Pty) Ltd and others* (35/IR/May05); *Nqobion Arts Business Enterprise CC v the Business Place Joburg and another* (80/IR/Aug05); *The Bulb Man (SA) Pty Ltd v HADECO (Pty) Ltd* (81/IR/Apr06) at 18; *Replication Technology Group (Pty) Ltd v Gallo Africa Ltd* supra at 7.

¹³ (018507).

latter is not dependant on the former. That is, one simply cannot assume that once a breach of contract occurs, a contravention of the Act follows. A nexus between competition and contract law must be shown.¹⁴ The Tribunal is not competent to pronounce on an issue that simply involves a breach of contract *without the applicant showing more* which will bring its case into the ambit of the Act.¹⁵

9. This was further seen in a case that came before the Tribunal. In [Simba Chitando v Michael Fitzgerald and Others](#)¹⁶ (*Simba*), the Tribunal was called to determine whether the social exclusion of black attorneys and advocates (on the basis of their race or nationality) from receiving briefs in relation to shipping law matters, as alleged by Simba Chitando (the applicant), could be remedied by the Act. The applicant alleged that the conduct of the respondents contravened sections 4(1)(a), 4(1)(b)(ii), 5(1), 8(c) and 8(d)(i) of the Act. The Tribunal found that the applicant fell short of satisfying the requirements to prove an agreement or concerted practice even by way of inference in terms of section 4(1)(a) and (b).¹⁷ In terms of section 5(1), the applicant failed to submit evidence of the existence of an agreement but relied on his own inferences.¹⁸ In terms of section 8, there was no attempt made by the applicant to engage in a proper market definition exercise. If no persuasive view of the relevant market is given, it is not possible to make a finding of dominance.¹⁹ The applicant further failed to establish *prima facie* right and thus the balance of convenience did not favour him and also failed to prove that he will suffer irreparable harm if the interim relief sought was not granted. The Tribunal expressed the view that while skewed briefing patterns are an issue that require remedial action, this was not an issue that could be remedied through the Act.²⁰

¹⁴ *Normandien* para 19.

¹⁵ *Normandien* para 20.

¹⁶ 016550.

¹⁷ *Simba* para 20.

¹⁸ *Simba* para 29.

¹⁹ *Simba* paras 40 and 44.

²⁰ *Simba* para 64.

10. In order to be granted interim relief, an applicant must have filed a complaint with the Commission or in the event of a non-referral by the Commission directly with the Tribunal.²¹
11. In [Hayley Ann Cassim and others v Virgin Active South Africa \(Pty\) Ltd](#)²² the Tribunal held that it had no jurisdiction to hear applications for interim relief where a complaint has not been filed with the Competition Commission. In cases where an application for interim relief is filed after a complaint is lodged with the Commission which thereafter issues a notice of non-referral, the applicant must either withdraw the application for interim relief and tender costs to the respondent or refer a complaint directly with the Tribunal in terms of section 51. If the applicant fails to withdraw the application for interim relief it will be liable for the respondent's costs, as was ordered in this matter.
12. A similar situation arose in [Nqobion Arts Business Enterprise CC v the Business Place Joburg and Another](#)²³ (*Nqobion*). The Tribunal confirmed that the '*existence of a valid complaint is a prior jurisdictional fact*'.²⁴ However, because the applicant was a layperson, instead of summarily dismissing the application the Tribunal considered the prospects of success of his case and found that there was no evidence of a prohibited practice.²⁵ The application for interim relief was accordingly dismissed.
13. Another aspect of applications for interim relief upon which the Tribunal has pronounced is the dismissal of applications for abuse of process and whether or not evidence becomes 'stale' in protracted proceedings. Both these issues were decided upon in [Schering \(Pty\) Ltd and Others v New United Pharmaceutical Distributors \(Pty\) Ltd and Others](#)²⁶ (*Schering*) where an application for interim relief had been filed in 1999 and was still pending in 2001. On the facts of this matter the Tribunal found that the delay was reasonable due to its 'extraordinary complexity' and a reasonable desire to mitigate the costs of

²¹ S49C (1).

²² (57/IR/Oct01) at para 4.

²³ 80/IR/Aug05.

²⁴ *Nqobion* para 3.

²⁵ *Nqobion* para 5.

²⁶ 05/IR/Jul01.

litigation.²⁷ It also found that the evidence, contained in affidavits prepared in 1999, was not stale.²⁸

14. In [National Association of Pharmaceutical Wholesalers and others v Glaxo Wellcome \(Pty\) Ltd and others](#)²⁹ (NAPW), the Tribunal considered an application for the extension of an interim order under section 49C(5) which provides:

“If an interim order has been granted, and a hearing into that matter has not been concluded within six months after the date of that order, the Competition Tribunal, on good cause shown, may extend the interim order for a further period not exceeding six months”.

15. The Tribunal was asked to issue a *rule nisi* extending the relevant interim order and allowing the respondents a reasonable time to show why this order should not be converted into a final order. The Tribunal found that it was not competent to issue the requested *rule nisi* and that even if it had misconstrued its powers, it would have been inappropriate to issue a *rule nisi* in this matter.³⁰ The Tribunal also held that the applicant had failed to adequately show good cause for the extension of the interim order. It found the applicant's pleadings in this regard too brief and entirely lacking with regard to the balance of convenience.³¹
16. In [Nedschroef Johannesburg \(Pty\) Ltd v Teamcor Limited and Others](#)³² (*Nedschroef*) the Tribunal was asked to consider whether or not a 5-year delay in bringing a complaint was just and reasonable to deny interim relief. Briefly, the facts of the matter were that the complainant/applicant Nedschroef had signed an agreement with the respondent which contained a restraint of trade clause that barred the applicant from entering into certain sectors of the relevant market. Whilst the applicant seemed to have always been generally unhappy with this agreement it only received legal advice that the restraint clause might

²⁷ *Schering* para 11.

²⁸ *Ibid.*

²⁹ 53/IR/Apr00.

³⁰ *NAPW* para 5.

³¹ *NAPW* para 6.

³² 95/IR/Oct05.

be in contravention of section 4(b)(ii) of the Act much later, after which it filed its complaint. The interim relief application seeking the suspension of the allegedly illegal clause was brought two months after the complaint was filed. The respondents argued that the delay of 5 years between signing the agreement and the filing of the complaint coupled with the additional two months between the filing of the complaint and the lodging of the interim relief application should be held against the applicant as proof of a lack of urgency which should then deprive it of the relief it sought.

17. The Tribunal began its assessment of this argument by stating that its approach to the consequences of delay was less strict than that of a civil court because an applicant was not in total control of the situation as evidenced by the one year period granted to the Commission to investigate the complaint.³³ The Tribunal found that although much time had elapsed between the signing of the agreement and the lodging of the interim relief application, there had *'not been an unreasonable delay in bringing the matter to finality once the application was launched'*.³⁴ Further, the Tribunal was of the view that the other aspects of the applicant's case were of sufficient strength to counterbalance the effects of the delay. It would therefore not be just and reasonable to deny the applicant relief merely because of the delay.

18. As already indicated, the Tribunal found the applicant's case to be strong on proving a contravention of section 4(b)(i) and held that it had *prima face* established evidence of an alleged prohibited practice.³⁵ It however found that the applicant's evidence relating to the harm it would suffer if interim relief was *'less direct'* but that this was counterbalanced by the strong evidence it had shown with regard to harm to be suffered by consumers, or more generally, competition.³⁶ Finally the Tribunal held that the applicant had convincingly shown that the balance of convenience favoured the granting of interim relief and thus awarded it.³⁷

³³ *Nedschroef* para 11.

³⁴ *Ibid.*

³⁵ *Nedschroef* para 14.

³⁶ *Nedschroef* paras 14-15.

³⁷ *Nedschroef* para 16.

19. Another important issue that has arisen is whether an appeal lies against an order of the Tribunal arising from interim relief applications. In [Trudon \(Pty\) Ltd v Directory Solutions CC and Another](#),³⁸ (*Trudon*) the CAC was called to decide whether or not the interim order granted by the Tribunal was appealable, and if so the CAC would be entitled to consider the merits of the appeal.
20. The test for determining whether a judgment or order is appealable is whether the *final word* on the matter has been spoken by the court *a quo*. An attribute of a final order is that it disposes of at least a substantial part of the relief claimed in the main proceedings. Not all interim interdicts are mere procedural steps in the main proceedings.³⁹ In this case, the CAC found that the Tribunal's order was final and that the order was appealable.⁴⁰
21. The CAC ruled that the respondent (Directory Solutions), in its founding papers, did not make out a case that Trudon's conduct amounted to prohibited practice.⁴¹ An applicant must set out a coherent case in its founding papers.⁴² The necessary allegations on which the applicant relies must be set out as he or she generally may not be allowed to supplement the affidavit by adducing supporting facts in a replying affidavit. Failure to include the necessary allegations and only including them in reply deprives a respondent from addressing those allegations in its answering affidavit.⁴³ No evidence was adduced to show that Trudon's conduct was anti-competitive.⁴⁴ Having failed to satisfy the first leg of the section 49C(2)(b) requirement, it was unnecessary for the CAC to deal with the requirements of serious or irreparable harm and balance of convenience.⁴⁵ The CAC therefore ruled that the Tribunal erred in granting the interim order and accordingly upheld the appeal.⁴⁶

³⁸ 96/CAC/Apr10.

³⁹ *Trudon* paras 13 and 14. The finality of an order lies in the wording of the order itself.

⁴⁰ *Ibid* paras 14, 16 and 17.

⁴¹ *Trudon* paras 19 and 20.

⁴² *Trudon* para 25.

⁴³ *Trudon* para 26.

⁴⁴ *Trudon* para 37.

⁴⁵ *Trudon* para 39.

⁴⁶ *Ibid*.

22. It must be noted that the Tribunal will not grant the interim relief sought on matters that have become moot. In [JG Grant v Schoemansville Oewer Klub](#)⁴⁷ (*JG Grant*) the Tribunal decided that at the time when the interim relief application was being considered by it, the applicant had already been granted the relief sought by the respondent. The matter accordingly became moot and was dismissed.⁴⁸

⁴⁷ (IR/202/Dec15).

⁴⁸ *JG Grant* para 21.

Approach to Section 4

1. Section 4 of the Act regulates the prohibition of restrictive horizontal practices by firms. In this section, we deal with section 4 in three parts. The first part deals with the different approaches to section 4(1)(a) and 4(1)(b). The second part provides some examples of collusive conduct specified in section 4(1)(b) and the third part deals with the single economic entity defence contemplated in section 4(5).
2. Section 4(1)(a) and (b) of the Act state the following:
 - (1) *An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if –*
 - (a) *it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other procompetitive gain resulting from it outweighs that effect; or*
 - (b) *it involves any of the following restrictive horizontal practices:*
 - (i) *directly or indirectly fixing a purchase or selling price or any other trading condition;*
 - (ii) *dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or*
 - (iii) *collusive tendering.*
3. The 2019 amendments introduce a new section 4(1)(b)(ii) that has, however, not been promulgated. Once it has, it shall read as follows:

Section 4(1)(b)(ii) – Market division

(ii) dividing markets by allocating *market shares*, customers, suppliers, territories or specific types of goods or services; or

[Sub-para. (ii) has been substituted by s. 3 (a) of the Competition Amendment [Act 18 of 2018](#), a provision which will be put into operation by proclamation. See PENDLEX.]

4. As is clear from the wording of the provisions, s4(1)(a) pertains to general agreements that have the effect of substantially preventing or lessening competition in the market; and section 4(1)(b) pertains to specific types of conduct listed therein.
5. It is well established that in order to find a contravention under section 4(1), the following jurisdictional facts must first be satisfied:
 - a) An agreement or concerted practice; and
 - b) Firms that are in a horizontal relationship; or
 - c) A decision by an association of firms in a horizontal relationship.
6. Section 1(ii) defines an agreement as “...*a contract, arrangement or understanding, whether or not legally enforceable*” whereas section 1(vi) defines a concerted practice as a “...*co-operative or co-ordinated conduct between firms, achieved through direct contact, that replaces their independent action but which does not amount to an agreement*”.
7. The CAC in [Netstar v Competition Commission](#)¹ distinguished an agreement from concerted practice as follows:

“An agreement arises from actions of and discussions among parties directed at arriving at an arrangement that will bind them either contractually or by virtue of moral suasion or commercial interest. It may be a contract, which is legally binding, or an arrangement or understanding that is not, but which the parties regard as binding upon them. The parties have reached consensus. To the contrary, a concerted practice examines the conduct of the parties to determine whether it is

¹ 2011 (3) SA 171 (CAC).

coordinated conduct or if they are acting in concert. The absence of an arrangement between them or any belief that they are obliged to act in that fashion does not have an effect. A concerted practice is based on evidence that assesses the nature of the conduct of the firms said to be party to the practice.”²

8. It is important to note that the Commission need only prove the existence of an agreement. To show whether the impugned agreement was implemented is not necessary nor required.³
9. Where the Commission fails to prove the existence of an agreement or the fact that the respondent firm did not participate in meetings that could link the firm to the agreement, the Commission’s case will be undone therefore allowing for the complaint referral to fail. This is the hurdle the Commission could not overcome in [Competition Commission v Alvern Cables \(Pty\) Ltd and Others](#).⁴
10. With regards to the second jurisdictional fact, firms in a horizontal relationship simply means that the firms are competitors, in other words, they are in the same line of business.
11. When the jurisdictional facts have been satisfied, the complainant (be it the Commission or a private party having launched a self-referral) must then show that the agreement has the effect of substantially preventing or lessening competition in a market. In other words, the onus rests on the complainant to show that the agreement will adversely affect competition.
12. If the contravention is alleged to be under section 4(1)(a) the respondent firm must show that the agreement results in technological, efficiency and or any other pro-competitive gains that outweighs the anti-competitive effects of the agreement. This is commonly referred to as the ‘efficiency defence’. In essence, once the Commission has established a *prima facie* case that an agreement is likely to lead to adverse effects on competition, the burden of

² *Netstar* CAC para 25.

³ *Reinforcing Mesh Solutions (Pty) Ltd and Another v Competition Commission* (119/120/CAC/May2013).

⁴CR205Mar14.

proof then shifts to the respondent firm to rebut the Commission's case by putting up the efficiency defence.

13. However, if the alleged contravention is under section 4(1)(b) no efficiency defence is available to the respondent. This interpretation has been consistently followed by the Tribunal and confirmed by the CAC. The specific types of collusive conduct listed in section 4(1)(b) are (i) price fixing, (ii) market division/allocation and (iii) collusive tendering, commonly referred to as 'bid-rigging'. These contraventions are viewed to be the most egregious infractions in competition law and are presumed to distort competition in any market.
14. The crucial difference between the operation of subsections (a) and (b) is that subsection (b) does not afford a respondent firm an efficiency defence. Because of this, the prohibitions under subsection (b) are termed '*per se*' prohibitions.
15. Under section 4(1)(b) where a firm does not expressly object to participating in the cartel, the CAC has confirmed that a firm will be implicated in the illicit conduct. In [*Reinforcing Mesh Solutions \(Pty\) Ltd and Another v Competition Commission*](#)⁵ (*Reinforcing Mesh*) the CAC held that the basic rationale of European law, that passive participation without some indication that the firm in question distances itself from the arrangement, is not incongruent with the principle in our common law that silence may amount to acceptance of an offer where there is a duty to speak. The court found that there was a duty on firms to reject participation in a cartel and this ought to be done expressly.⁶
16. A further noteworthy difference between the two subsections (a) and (b) is that until the 2019 amendments a respondent firm found to have contravened section 4(1)(a) was not liable to pay an administrative penalty unless the conduct was substantially a repeat by the same firm of conduct previously found by the Act to be a prohibited practice.⁷

⁵ 119/120/CAC/May2013.

⁶ *Reinforcing Mesh* para 21. See also CAC's judgments in *Videx Wire Products (Pty) Ltd v Competition Commission* (124/CAC/Oct12) and *MacNeil Agencies (Pty) Ltd v Competition Commission* (121/CAC/Jul12).

⁷ Section 59(1)(b) of the Act.

Characterisation

17. When establishing its case, the Commission must satisfy the Tribunal that the conduct alleged fits in squarely within either of the defined provisions of price fixing, market division or big rigging. The respondent firm(s) may put up evidence to the contrary as an explanation to *characterise* the conduct but not to *justify* the conduct as an efficiency defence.⁸
18. The notion of characterisation in the operation of section 4(1)(b) was introduced by the SCA judgment in [America Natural Soda Ash Corporation and Another v Competition Commission](#) (ANSAC),⁹ when it expressed the view that any conduct alleged to contravene subsection (b) must be properly characterised in order to ascertain whether such conduct squarely falls within the confines of subsection (b).¹⁰ The SCA expanded on the approach followed in the US and set out the manner in which characterisation is performed. Firstly, the ambit of subsection (b) must be defined. In other words, the court must identify the true nature of the conduct that is central to the complaint. Once this has been done, the enquiry moves on to whether or not the conduct in issue falls within the terms of the prohibition – that is, whether the alleged conduct is that which is contemplated by the prohibition, for example price fixing. That is a factual question that must be answered by recourse to relevant evidence.¹¹
19. The issue of characterisation has arisen in recent cases involving market division and collusive tendering. Usually the inquiry revolves around whether parties, when they concluded an agreement, were in a horizontal or vertical relationship.
20. In [Competition Commission v South African Breweries Ltd and others](#)¹² the Commission referred a complaint against South African Breweries (“SAB”) and its 13 appointed distributors (“ADs”) (2nd to 14th respondent) for engaging in

⁸ *America Natural Soda Ash Corporation and Another v Competition Commission* [2005] 1 CPLR 1 (SCA) para 37 (ANSAC).

⁹ ANSAC para 37

¹⁰ The court held that characterisation must be performed in order to ascertain whether the conduct *complained of is found to fall within the scope of the prohibition*, that is the end of the enquiry - para 37.

¹¹ ANSAC para 45.

¹² 134/CR/Dec07,

conduct in contravention of sections 4(1)(b)(ii); 5(1), (2) and 9(1) of the Act. Key to this discussion is the Commission's allegation of section 4(1)(b) and whether SAB and its distributors were in a horizontal relationship.

21. This case concerns the beer distribution practices of SAB, in terms of which SAB appointed ADs and granted them exclusive territories to distribute its products in exchange for compensation. The theory of harm advanced by the Commission, during the Tribunal proceedings, was that the arrangements between SAB and the ADs lessened intra-brand competition for SAB products.
22. SAB is a licensed manufacturer and distributor of clear beer products with seven breweries across South Africa. SAB distributes its beer products to approximately 34 000 wholesale and retail customers. In this regard, SAB has set up a primary distribution channel through which it distributes beer from its breweries to its 40 wholly owned depots as well as to its 13 ADs. Approximately 90% of SAB's production is distributed through its depots and 10% through the ADs. Under exceptional circumstances, SAB may distribute directly to a customer, however, this is not the norm. SAB has also established a secondary distribution channel in terms of which beer is moved from depots and ADs to retail customers. SAB's distribution system is designed such that there are no geographic overlaps in terms of the areas serviced by each of its depots and each of the Ads (i.e. territorial exclusivity). The ADs were introduced by SAB in the early 1980s, primarily, as part of its strategy to increase its volume sales by increasing the quality of its service to rural customers. Importantly, the ADs are required to service all customers within their allocated jurisdictions irrespective of their location. Although ADs are not contractually required to exclusively stock SAB products, as a result of amendments to the agreements, the ADs have never stocked any other products because they are at capacity with SAB products.
23. The Commission's case in respect of section 4(1)(b) was that SAB's agreements with the Ads, which effectively carved out geographic markets between each of the SAB depots and each of the ADs' allocated territories, amounted to market division in contravention of s4(1)(b)(ii).

24. In its assessment, the Tribunal conducted a characterisation exercise to ascertain whether the conduct complained coincided with a prohibited practice contemplated and captured under section 4(1)(b). In conducting this exercise, the Tribunal considered the scope and nature of the conduct complained of.¹³
25. The Tribunal examined whether one views the “firm” for the purpose of the Act, solely as a self-standing legal entity or whether it has to be additionally, a self-standing economic unit. In other words, whether the ADs constituted independent economic units contemplated in classic antitrust law or whether they constituted something less than this. Here the focus was not on the content of the agreements but on the relationship between the parties to those agreements. In other words, could they be understood to be competitors as contemplated by section 4(1)(b)(ii)?¹⁴
26. The Tribunal noted that neither SAB nor the AD raised the principle of single economic entity under section 4(5) which provides that agreements between firms under a single economic entity do contravene section 4(1).¹⁵
27. The Tribunal’s assessment found that although the ADs do not comprise a single economic entity with SAB, they are not and have never been sufficiently independent of SAB, by virtue of their operations, such that they would be considered competitors of SAB in the distribution of its products, or competitors of one another such that section 4(1)(b) would apply. The Tribunal was careful in highlighting the unique circumstances of the relationship between SAB and ADs in arriving at this conclusion lest it be relied upon by firms to evade the provisions of section 4(1)(b) through contrived structures. The Tribunal relied on 12 factors to reach its conclusion.¹⁶ One such factor was that ADs were not created autonomously but were the creation of SAB in response to a need to better supply outlying regions with an improved system of delivery. Expressed

¹³ The characterisation exercise was commended by the SCA in ANSAC having considered the principles and *dicta* espoused in the USA jurisprudence – specifically the case of *Broadcast Music, Inc. v Columbia Broadcasting System, Inc* (44 US 1 (1979)).

¹⁴ SAB para 83.

¹⁵ SAB para 84.

¹⁶ SAB para 88.

differently, but for SAB, the ADs would not have come into existence.¹⁷ The Tribunal concluded that SABs agreements with ADs did not contravene section 4(1)(b)(ii).

28. In terms of the other alleged contraventions, the Tribunal found against the Commission holding that the respondents had not contravened the Act. The Commission then appealed the Tribunal's decision to the CAC.¹⁸ In so far as the appeal concerned section 4(1)(b), the CAC adopted the EU approach contained in the [European Commission's Guidelines to Technology Transfer Agreements \(2004\)](#) ("EC Transfer Agreement Guide") as a guide to determine whether or not firms are in a horizontal relationship. In other words, whether there is a competitive relationship between firms. The EC Transfer Agreement Guide states:

*"In order to determine the competitive relationship between the parties it is necessary to examine whether the parties would have been actual or potential competitors in the absence of the agreement. If without the agreement the parties would not have been actual or potential competitors in any relevant market affected by the agreement, they are deemed to be non-competitors."*¹⁹

29. In view of the above, the CAC held that if an undertaking would have not competed, absent the impugned agreement, then the agreement itself cannot be said to have been entered into between horizontal competitors but rather stands to be classified as an agreement between an upstream manufacturer who is engaged in a new distribution strategy with its downstream suppliers.

30. In line with the facts of this case, the CAC held that:

"The core relationship between the ADs and SAB remains to be described as of a vertical nature, that is between a producer of a product and

¹⁷ SAB para 88.

¹⁸ [Competition Commission v South African Breweries Limited and Others](#) (2015 (3) SA 329 (CAC)) ("SAB CAC").

¹⁹ SAB CAC para 41.

distributors of this product. The true economic nature of the relationship, which the characterisation principle seeks to unlock, was, in this case, a vertical relationship between a producer and distributors of the former's product. Although the parties were also, at the distribution level, in a horizontal relationship, the horizontal elements of the agreement were incorporated in aid of the primary vertical purposes of the agreement. They were rational incidents of a vertical arrangement, not independent arrangements incorporated merely for convenience into a distribution contract. Viewed in this context, the horizontal elements, facially, have none of the features which would cause a Tribunal versed in competition economics to say that no defence should be countenanced.”²⁰

31. The CAC was of the view that the relationship between SAB and the ADs is vertical in nature. Although there were horizontal elements, these were incidental to and flowed from the vertical arrangement. The conduct of the respondents, therefore fell short to fall within the scope of section 4(1)(b) once the characterisation exercise had been applied.²¹

32. In [*Dawn Consolidated Holdings \(Pty\) Ltd and Others v Competition Commission*](#)²² the CAC was called to determine the correctness of the Tribunal's decision when it found that a non-compete clause in a shareholder's agreement contravened section 4(1)(b)(ii) of the Act. In that case the respondents Dawn and Sangio had concluded an agreement which contained a non-compete clause. Dawn, a wholesale trader and distributor of various hardware products including plastic pipes (such as HDPE pipe), acquired a 49% stake in a plastic pipe manufacturing business that was previously owned by the seller, Warplas Share Trust (WST). Dawn transferred this business into a new company, Sangio Pipe (Pty) Ltd (Sangio) in which Dawn held a 49% share and WST 51%. The second appellant in this matter, DPI Plastics, is wholly owned subsidiary of Dawn. In clause 20 of the agreement Dawn had undertaken not to manufacture HDPE piping (other than corrugated pipes) in the entire Republic of South Africa, for as long as it or its associates held shares

²⁰ SAB CAC para 43.

²¹ SAB CAC paras 45 – 46.

²² (155/CAC/Oct2017).

in Sangio. Dawn also undertook to procure all its South African HDPE piping (other than corrugated pipes) from Sangio. , Dawn and its subsidiaries were not entitled to).

33. Two questions were debated before the Tribunal and the CAC. The first was whether or not at the time the shareholders agreement was concluded, the parties were in a horizontal relationship. The second was the characterisation of clause 20.²³
34. The Tribunal found Dawn and Sangio were at the very least potential competitors at the time the agreement was concluded. that it was apparent, on a plain reading of clause 20, that It concluded that the purpose of the clause was clearly to keep Dawn out of the market for the manufacture of regular HDPE piping (at a national level) and was not an ordinary restraint of trade obligation. The Tribunal had come to this conclusion after finding that the shareholders agreement had standard restraint of trade and joint venture clauses. The case was taken on appeal.
35. In the CAC, the court drew attention to the SCA's decision in *ANSAC* where the court held that in cases of section 4(1)(b) it is necessary to establish whether the conduct complained of coincides with the character of the prohibited practice. Once properly characterised, the impugned conduct may be found not to contravene the prohibition.²⁴
36. In an effort to characterise the restraint clause, the court ventured on to reference and rely on the [EC's Guidelines on the Applicability of Article 101 of the TFEU to horizontal co-operation](#)²⁵ and the [Guidelines on the application of Article 81\(3\) of the Treaty](#)²⁶ (the Guidelines) issued by the EC which relate to ancillary restraints to a particular agreement and how they should be construed.

²³ *Dawn* paras 12 and 13.

²⁴ *Dawn* para 13. See further characterisation applied in *Competition Commission v South African Breweries Ltd and Others* [2014] 2 CPLR 339.

²⁵ 2011/C 11/01.

²⁶ 2004/C 101/08.

37. The CAC viewed the approach reflected in the Guidelines as a sensible one. It then proceeded to set out an appropriate test:

*“(a) Is the main agreement (i. e. disregarding the impugned restraint) unobjectionable from a competition law perspective?
(b) If so, is a restraint of the kind in question reasonably required for the conclusion and implementation of the main agreement?
(c) If so, is the particular restraint reasonably proportionate to the requirement served?”*

38. The court viewed the test as an objective one and since the burden of proof in cases of section 4(1)(b)(ii) rests on the referring party, it was for the Commission or a private complainant to show that these requirements were not met. Put differently, the onus rests on the Commission to properly characterise the agreement to prove that it falls squarely with the prohibition.²⁷

39. The court then considered whether clause 20 was reasonably required for the conclusion and implementation of the shareholders agreement and proportionate to the requirements which the restraint clause served.²⁸ The court was of the view that it was a sensible approach to acknowledge that Dawn was unlikely to enter the HDPE pipe market however it was also reasonable for WTS not to purely place its trust only on the good faith of its partner Dawn.²⁹

40. Accordingly, the court was satisfied that the non-compete clause was reasonably required for the conclusion and implementation of the shareholders agreement and concluded that clause 20, properly characterised, did not amount to a violation of section 4(1)(b)(ii). The appeal was upheld.

41. We mention a few other cases below under each of section 4(1)(b)(i) – (iii).

Section 4(1)(b)(i) – Price fixing

²⁷ Dawn para 33.

²⁸ Dawn para 35.

²⁹ Dawn para 37.

42. This is where firms conclude an agreement to control or maintain prices, discounts or rebates in relation to goods bought or services rendered to any party. The fixing of a “price” is not limited to the nominal rand value of the goods or services but could include an agreement on a discount, or a range of discounts, limit credit given to customers, an agreement on a formula to be applied by competitors, adopt identical cost accounting methods.³⁰
43. Some classic cases of price fixing are the following:
- [*Competition Commission v Pioneer Foods \(Pty\) Ltd*](#)³¹ in which bread producers agreed to fix the prices of bread and trading conditions.
 - [*Competition Commission v Fritz Pienaar Cycles \(Pty\) Ltd and Other \(Pty\) Ltd*](#)³² which involved collusion to fix prices and/or trading conditions of bicycles and cycling accessories.
 - [*Competition Commission v DPI Plastics \(Pty\) Ltd*](#)³³ in which firms fixed the prices of various types of plastic pipes.
 - [*Competition Commission v Wasteman Holdings \(Pty\) Ltd and Another*](#)³⁴ where firms engaging in waste removal services fixed the prices of their services and further engaged in market division.

Section 4(1)(b)(ii) – Market Division

44. This is where firms agree to allocate amongst themselves various products or customers or geographical areas to avoid any overlaps in the supply of goods or services rendered. Some cases on this issue include:
- [*Competition Commission v Pioneer Fishing \(Pty\) Ltd*](#)³⁵ where firms agreed to allocate the supply of horse mackerel in different territories such as Limpopo, Mpumalanga and the North West Provinces.

³⁰ See further R Whish and D Bailey *Competition Law* 8 ed pg. 560.

³¹ (15/CR/Feb07, 50/CR/May08).

³² CR049JUL12.

³³ 15/CR/Feb09.

³⁴ CR210Feb17.

³⁵ CR206Mar14/OTH214Feb15.

- [Competition Commission v Pioneer Foods \(Pty\) Ltd](#)³⁶ where firms agreed not to compete in geographic markets or in product markets or for customers such as in the bread cartel.
- [Competition Commission v SAB Ltd and others](#)³⁷ where firms were said to have divided markets but in fact were found to be in a vertical relationship (see summary above.)
- [Luxembourg Breweries](#)³⁸ where firms concluded a market sharing agreement to which aims to protect competitors from imports.

Section 4(1)(b)(iii) – Collusive tendering or bid rigging

45. Collusive tendering takes place when competing firms agree the terms of each other's bids, prior to submitting their respective bids for a tender. The aim of such conduct is usually to secure the outcome of the tender at artificially inflated prices. A common example of collusive tendering is cover pricing. In this form of collusive tendering, one bidder will "cover" another bidder by submitting a fake bid intended to ensure the lower priced bidder's success, while the lower priced bid remains inflated. The *modus operandi* of cover pricing or bid rigging differs from case to case because of differences in tender structure and industry specifications. Public tenders and private tenders may also differ in their objectives such as promotion of small businesses or BBBEE. However ultimately the overriding objectives of tenders is to promote price competition.
46. A case involving cover pricing is the Tribunal's decision in [Competition Commission v Giuricich Coastal Projects and Another](#).³⁹
47. Other noteworthy cases involving bid rigging are the following:
- Where two parties submitted bids containing similarities such as price ([Competition Commission v A' Africa Pest Control CC and Another](#)).⁴⁰

³⁶ 15/CR/Feb07.

³⁷ 2015 (3) SA 329 (CAC).

³⁸ OJ [2002] L253/21.

³⁹ CR162Dec14.

⁴⁰ CR129Oct16. This case has been appealed to the CAC.

- Collusive tendering in the mining roof bolts ([Competition Commission v RSC Ekusasa Mining \(Pty\) Ltd and Others](#)).⁴¹
- Collusive tendering in the supply of fabrics to manufacture uniforms for various state departments ([Competition Commission v Eye Way Trading \(Pty\) Ltd and another](#)).⁴²
- Wide scale bid rigging in the construction industry which led to an industry wide settlement dispensation offered by the Commission (“the fast track settlement process”) which was launched in February 2011. Whilst 300 instances of bid rigging were revealed through this initiative, settlements were only reached regarding transgressions after September 2006 as some transgressions went beyond the prosecutorial reach of the Act. From the fast track settlement process, 15 firms settled and penalties were awarded against them. Firms included Aveng, Basil Read, Raubex, Murray & Roberts, Stefanutti, WBHO.⁴³

Single economic entity defence

48. Section 4(5) of the Act states:

“The provisions of subsection (1) do not apply to an agreement between, or concerted practice engaged in by, –

- (a) *a company, its wholly owned subsidiary as contemplated in section 1(5) of the Companies Act, 1973, a wholly owned subsidiary of that subsidiary, or any combination of them; or*
- (b) *the constituent firms within a single economic entity similar in structure to those referred to in paragraph (a)”*

49. The leading Tribunal case on this issue [Competition Commission v Delatoy Investments \(Pty\) Ltd and Others](#)⁴⁴ (Delatoy) where the primary issue was

⁴¹ 65/CR/Sep09.

⁴² CR074Aug16.

⁴³ See further: <http://www.compcom.co.za/wp-content/uploads/2014/09/Construction-Fast-Track-Settlement-Process-Media-Release.pdf>

⁴⁴ CR212Feb15.

whether the respondents constituted a single firm for the purposes of section 4(5) of the Act. The Act defines a firm as a *person, partnership or a trust*.⁴⁵

50. The Tribunal held that a 'firm' may indeed denote different things in different contexts. The term could refer to an economic entity, or a group where the component parts of it are related to each other in such a way that they constitute a single economic entity.⁴⁶ The Tribunal noted that where revenues due to one firm are received by another and where invoices are sent out intra-group and monies transferred *sans* due counter performance, such is indicative of a single economic entity.⁴⁷ Moreover, the presence of uncommercial loans between members of the group absent any fixed repayment terms or for an indefinite period is also suggestive of a single economic entity.⁴⁸ In addition, the directors of the firm were found to have conflated their fiduciary duties owed to the individual companies with the interests of the overall group⁴⁹
51. The Tribunal found that where a group of companies acts as a single economic entity, it constitutes a firm under, or for the purposes of, the Act.
52. Other cases where the single economic entity doctrine was discussed is the CAC's judgments in [A'frica Pest Prevention CC and another v Competition Commission of South Africa](#)⁵⁰ and [Loungefoam \(Pty\) Ltd v Competition Commission and others](#).⁵¹

⁴⁵ *Delatoy* para 38.

⁴⁶ *Delatoy* para 40.

⁴⁷ *Delatoy* para 44.

⁴⁸ *Delatoy* para 47.

⁴⁹ *Delatoy* para 52.

⁵⁰ (168/CAC/Oct18).

⁵¹ (102/CAC/June10).

Approach to Section 5

1. Section 5(1) of the Act states the following:

(1) *An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive, gain resulting from that agreement outweighs that effect.*

(2) *The practice of minimum resale price maintenance is prohibited.*

(3) *Despite subsection (2), a supplier or producer may recommend a minimum resale price to the reseller of a good or service provided*

–

(a) *the supplier or producer makes it clear to the reseller that the recommendation is not binding; and*

(b) *if the product has its price stated on it, the words “recommended price” appear next to the stated price.*

2. Section 1(xxxvi) of the Act defines a vertical relationship as one “*between a firm and its suppliers, its customers or both*”. In other words, these firms would conduct their respective operations in different levels of the supply chain e.g. wholesaler and retailer, retailer and consumer.

3. Section 5(1) prohibits agreements between firms in a vertical relationship if that agreement will have an adverse effect on competition. The onus to prove an adverse impact on competition rests on the complainant. Section 5(1) like section 4(1)(a), also permits the respondent firm an efficiency defence to rebut a complainant’s *prima facie* case. It follows that once the complainant has established a *prima facie* case, the burden of proof shifts to the respondent to

assert its efficiency or pro-competitive defence. Should it fail to do so, it may be concluded that the respondent has contravened section 5(1).

4. On the other hand, section 5(2) is defined as a *per se* prohibition where once the illegality of the practice is established, the respondent firm is barred from justifying its conduct or establishing its motive for engaging in the practice. Section 5(2) like section 4(1)(b) does not permit an efficiency defence. Thus retail price maintenance (RPM) is absolutely prohibited.
5. RPM can be defined as conduct exercised by an upstream supplier to control and maintain the price at which its products are sold to end customers.
6. To establish a case of RPM, the following factors must be alleged and proved:¹
 - A minimum resale price;
 - The RPM practice has been implemented and;
 - Measures are in place to enforce or maintain the practice of minimum RPM.
7. The *locus classicus* on this issue is [*Federal Mogul Aftermarket Southern Africa \(Pty\) Ltd v Competition Commission*](#)² (*Federal Mogul*). Here, Federal Mogul, a wholesale distributor of a range of motor vehicle components, imposed on a number of its suppliers a price at which they were obligated to sell its products. Pee Dee Wholesalers, (Pee Dee) which Federal Mogul supplied with its Fedoro products, alleged that it was forced out of business because Federal Mogul imposed on it sanctions - in the form of reduced rebates - for selling Federal Mogul's products at a lower price than that imposed on other suppliers.
8. The Tribunal found that there was a well-established pricing practice in terms of Ferodo products that was commonly known and understood in the industry such as strict rebates offered on Ferodo products and meetings that were held to ensure compliance to the pricing regime. The Tribunal concluded Federal

¹ M Neuhoﬀ (ed) *et al A Practical Guide to the South African Competition Act 2ed* (2007) 116.

² (33/CAC/Sep03).

Mogul's conduct was in violation of section 5(1) and an administrative penalty followed. The matter went on appeal and the Tribunal's decision was upheld.³

³ Other cases see *Competition Commission v Pentel South Africa* (27/CR/Apr11).

Abuse of Dominance: Approach to Sections 8 and 9

Section 8

1. The Act prohibits conduct of a firm that amounts to an abuse of its dominant position. First, it must be established whether a firm accused of such conduct occupies a *dominant* position in a market. One must consult section 7 of the Act which states the following:

A firm is dominant in a market if –

- (a) It has at least 45% of that market;*
- (b) It has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or*
- (c) It has less than 35% of that market but has market power.*

2. In terms of section 7(b), if a firm has 45% or more of a market, it is deemed to be dominant. There is a rebuttable presumption of dominance where a firm has market share between 35% and less than 45%.¹ The firm may show that it is not dominant by showing that it does not have market power. The onus therefore rests on the respondent to do so. If the firm's share is below 35%, it is dominant if it can be shown that it nevertheless has market power.² The onus then rests on the Commission. In essence any firm that has market power is considered dominant, regardless of its market share.
3. Section 8 does not prohibit dominance itself, but rather an *abuse* of that dominance.
4. The old section 8 contained four classes of contraventions and reads as follows:

¹ *Nationwide Airlines and Others v South African Airways (Pty) Ltd and Others* (92/1ROct00) at page 9: "Even if SAA's market share is below this figure of 45% the onus in terms of section 7(b) is on it to rebut the inference of market power".

² Section 1(xiv) of the Act: 'market power' means the power of a firm to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers.

It is prohibited for a dominant firm to –

- (a) charge an excessive price to the detriment of consumers;*
- (b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;*
- (c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or*
- (d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act –*
 - (i) requiring or inducing a supplier or customer to not deal with a competitor;*
 - (ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;*
 - (iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;*
 - (iv) selling goods or services below their marginal or average variable cost; or*
 - (v) buying-up a scarce supply of intermediate goods or resources required by a competitor.*

5. There are two species of abuse of dominance. The first is ‘exploitative’ as it focuses on the abuse targeted at consumers. Such an example is section 8(a) which prohibits a dominant firm from charging consumers excessive prices.³ The second type are ‘exclusionary’ as these impede or prevent rivals from expanding in a market. This type of abuse is expressed under sections 8(c) and (d).

³ *Nationwide* para 114.

Section 8(a) – Excessive pricing

6. The Act, before the amendments were introduced in 14 February 2019 and deleted the definition, defined an ‘**excessive price**’ as a price for a good or service which bears no reasonable relationship to economic value of that good or service and is in excess of the value referred to above. In order to determine “economic value” many proxies have been used such as price cost tests, the price of the product in similar sized competitive markets and the price differences between the product sold by the same firm in different markets (e.g. domestic and export).⁴ In other words, an excessive price is one where there is an unreasonable relationship between the price charged for a product and the costs incurred in producing it plus a reasonable return. Excessive pricing is prohibited as a *per se* prohibition without considering anti-competitive effects.
7. In [Mittal Steel South Africa Ltd and Others v Harmony Gold Mining Company Ltd](#)⁵ the CAC overturned the Tribunal decision where it found Mittal Steel had engaged in excessive pricing. Another relevant case is [Sasol Chemical Industries Ltd v Competition Commission](#)⁶ where the Commission sought to prosecute Sasol for charging customers exercise prices for polypropylene. The Tribunal found that Sasol had contravened section 8(a) of the Act. On appeal to the CAC, the Tribunal’s decision was overturned. Some guidance on this issue has also been provided by the work of the OECD and EC which are referred to in these cases.

Section 8(b) – Refusing a competitor access to an essential facility

8. The Act defines an “essential facility” as a “resource or infrastructure that cannot reasonably be duplicated and without access to which competitors cannot reasonably provide goods or services to their customers”.⁷ A violation of section 8(b) cannot be countervailed by efficiency gains – it is, in other words,

⁴ In the EC, see the *United Brands* test.

⁵ 70/CAC/Apr07.

⁶ 131/CACJun14.

⁷ Section 1(viii).

per se illegal. The CAC in [Glaxo Wellcome \(Pty\) Ltd & Others and National Association of Pharmaceutical Wholesalers & Others](#),⁸ has held that:

“to allege a contravention of section 8(b) a complainant will have to aver in its complaint that:

- a) the dominant firm concerned refuses to give the complainant access to an infrastructure or a resource;*
- b) the complainant and the dominant firm are competitors;*
- c) the infrastructure or resource⁹ concerned cannot reasonably be duplicated;*
- d) the complainant cannot reasonably provide goods or services to its competitors without access to the infrastructure or resource; and*
- e) it is economically feasible for the dominant firm to provide its competitors with access to the infrastructure or resource.”¹⁰*

9. The most recent case on essential facility is the [Competition Commission v Telkom SA SOC Ltd](#)¹¹ (*Telkom 1*) decision in which the Tribunal found Telkom to have contravened section 8(b) and imposed a penalty of R449m. See also the subsequent case of Telkom (*Telkom 2*) which resulted in a settlement with the Commission in terms of which Telkom agreed to a functional separation between its wholesale and retail divisions.¹²

Section 8(c) and 8(d)

10. The Tribunal’s approach to section 8 (c) and (d) was authoritatively set out in [Competition Commission v South Africa Airways \(Pty\) Ltd](#)¹³ (SAA). It must be noted however, that SAA was not the first decision to tackle issues under section 8.¹⁴ SAA simply built on the principles expressed in *Patensie Sitrus*¹⁵

⁸ 15/CAC/Feb02.

⁹ *Glaxo* pg. 30. The CAC has stated that “resource” was not meant to be interpreted as products, goods or services.

¹⁰ *Glaxo* pgs. 31-32.

¹¹ 016865.

¹² *Competition Commission v Telkom SA SOC Ltd* (016865) (Date: 18 July 2013).

¹³ 18/CR/Mar01. See also *Nationwide Airlines* paras 142-143 where the Tribunal followed the exact test laid out in SAA.

¹⁴ See *York Timbers Ltd and South African Forestry Company Ltd* (15/IR/Feb01) and *Competition Commission and Patensie Sitrus Beherend Beperk* (37/CR/Jun01).

¹⁵ *Ibid.*

and concretised the Tribunal's approach to section 8 cases. Other cases dealing with section 8 have consistently relied on SAA as shown below.

11. The Tribunal must first examine whether the alleged conduct is exclusionary in nature. Section 1(x) of the Act defines an exclusionary act as "*an act that impedes or prevents a firm from entering into or expanding within a market*".
12. In terms of section 8(c), the conduct must meet the definition of 'exclusionary act' that has the effect of substantially lessening or preventing competition (SLC) and that there are no technological, efficiency and pro-competitive gains that outweigh the exclusionary effect of the conduct.¹⁶
13. In terms of section 8(d), the conduct must meet the definitions set out in the sub-paragraphs. The listed prohibited acts are presumed to be exclusionary. If the conduct meets the definition, the Tribunal must then determine whether or not the exclusionary conduct has an anti-competitive effect. This can be answered in two ways, first by showing the evidence of actual harm to consumer welfare or that the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals.¹⁷ The second method is partly based on facts and drawing a reasonable inference from the proven facts. If the answer to this question is in the affirmative, it can be concluded that the exclusionary conduct has anti-competitive effects. The burden of showing pro-competitive gains then shifts to the respondent firm.

Onus of efficiency defence

14. In terms of section 8(c), the onus is on the complainant to show that the anti-competitive effects of the conduct outweighs the technological, efficiency and pro-competitive gains (efficiency justification or the objective justification¹⁸). If

¹⁶ *Patensie Citrus* para 88. Also see BATSA para 312.

¹⁷ See also *J T International SA (Pty) Ltd vs British American Tobacco SA (Pty) Ltd*(55/CR/Jun05) para 296. It follows that the absence of evidence of significant foreclosure, the allegation of exclusionary conduct cannot be sustained. See para 299.

¹⁸ *Competition Commission v Senwes Ltd* (110/CR/Dec06) para 170.

the complainant successfully discharges the onus, it will have proved an abuse of dominance.¹⁹

15. In terms of section 8(d), the burden of proof shifts to the respondent firm who must prove that the efficiency justifications outweighs the anti-competitive effect of the conduct. If the respondent firm fails to do so, the complainant would be seen to have proved an abuse of dominance.²⁰ *Senwes* however points out that the shift in burden of proof is not that simple. It follows that under section 8(d) the respondent firm must establish the existence of an objective justification in order for the Tribunal to invoke the balancing exercise to weigh up the anti-competitive effect versus the justification.²¹ However, this simply cannot be just an objective justification, but one that is rational in order for it to be held that a proper defence has been raised.²²
16. If the firm fails to do so, it is not for the complainant to conjure every objective justification imaginable so the Tribunal can invoke the balancing exercise. As the Tribunal in *Senwes* put it: “*the existence of the justification is one best known to the firm concerned.*”²³ Where a firm does not raise an objective and rational justification or fails to do so, it will be deemed that the anti-competitive effects outweigh any pro-competitive gain.²⁴
17. Section 8(c) and (d) also differed in respect of penalties. If a firm is found to have contravened section 8(c), a fine may not be imposed on the firm unless the conduct is substantially a repeat by the same firm for conduct previously found by the Tribunal to be a prohibited practice. This is referred to the “yellow card” regime for section 8(c). The 2019 amendments have removed the yellow card regime.
18. The following are examples of cases that fall under the various subsections of section 8(c) and (d).

¹⁹ SAA para 134.

²⁰ *Senwes* para 135.

²¹ *Senwes* paras 170 – 171.

²² *Senwes* para 173.

²³ *Senwes* para 171.

²⁴ *Ibid.*

Section 8(c) – Exclusionary act

19. The leading case on this issue is *Senwes* held that margin squeeze would fall within the exclusionary act contemplated in s8(c). See also *Telkom SA Ltd* and the principles discussed above and the *SAA* and *Comair*²⁵ decisions.
20. See also the recent cases of [Competition Commission v Media 24](#)²⁶ in which the Tribunal found that Media 24 contravened section 8(c) by engaging in a predatory strategy to exclude a community newspaper from the market in the Welkom area. The case is important for making the distinction between cost benchmarks for purposes of predatory pricing under section 8(d)(iv) and other types of predatory pricing which might fall under section 8(c). This case was overturned by the CAC.²⁷

Section 8(d)(i) – Inducing a supplier or customer to not deal with a competitor

21. This section provides that a dominant firm may not require or induce a supplier or customer to not deal with a competitor. While the Act does not impose an obligation on any firm to supply, or buy a product or service, from another business, it does prohibit a firm from imposing a condition or giving incentives or inducements to another firm to not deal with its competitors. If a dominant firm engages in conduct thus described it is presumed to have engaged in an 'exclusionary act' defined by the statute. Where the firm is dominant in the relevant market, its behaviour would influence the structure of a market and hinder either the maintenance of competition still existing in that market or the growth of that competition.
22. The leading cases on this issue are [Nationwide v South African Airways and Competition Commission v South Africa Airways](#)²⁸ where the Tribunal in both cases found that SAA's incentive schemes, in terms of which money was paid to travel agents to incentivise them to book their clients onto SAA's flights

²⁵ *South African Airways (Pty) Ltd v Comair* (92/CAC/Mar10).

²⁶ Discussed below.

²⁷ *Media 24 Proprietary Limited v Competition Commission* 2018 (4) SA 278 (CAC).

²⁸ 18/CR/Mar01.

instead of competitor airlines such as Comair and Nationwide, was a contravention of section 8(d)(i).

23. See the recent case of [Competition Commission v Computicket \(Pty\) Ltd](#)²⁹ where the Tribunal found Computicket to have contravened section 8(d)(i) by imposing exclusive agreements on its inventory providers and imposed a fine of R20 million. Computicket appealed against the Tribunal's decision to the CAC. The CAC dismissed the appeal and found in favour of the Tribunal's decision ([Computicket \(Pty\) Ltd v Competition Commission](#)).³⁰

Section 8(d)(ii) – Refusing to supply scarce goods

24. Refusing to supply scarce goods³¹ to a competitor when supplying those goods is economically feasible, is prohibited in terms of this section. A refusal to supply is prohibited when it is aimed at eliminating actual or potential competitors. This may take the form of an outright refusal to supply, a refusal based on terms, which the supplier knows are not acceptable, or refusal on unfair conditions. This has to impact on a secondary market, where the dominant firm competes with the customer, which it refuses to supply.
25. The onus rests on the complainant to show that the elements of the act have been established. Thereafter, the dominant firm may raise various defences or justifications for its behaviour.³² It can also show that there has been no detriment to the state of competitiveness within the market, or that the refusal was a reasonable means to achieve a legitimate end. Justifications based on efficiency will be measured using the balancing test. The case of [J T International SA \(Pty\) Ltd vs British American Tobacco SA \(Pty\) Ltd](#)³³ addresses this issue albeit briefly.

²⁹ CR008Apr10.

³⁰ 170/CAC/Feb19.

³¹ Note that *services* are excluded from the prohibition. A refusal to supply a product or service (excluding scarce goods) will be caught by the general prohibition against engaging in exclusionary acts under section 8(c).

³² A respondent can of course show that the goods are not scarce and indeed available from other competitors; that there has been no refusal to supply or that the complainant is not a competitor. In other words that the elements of the prohibition do not exist.

³³ 55/CR/Jun05.

Section 8(d)(iv) – Predatory Pricing

26. Predatory pricing is pricing below an appropriate specified cost benchmark, which in the Act is defined as marginal cost or average variable cost.³⁴ It involves strategic conduct where a firm deliberately incurs short-term losses in order to eliminate a competitor so as to be able to charge excessive prices in the future (recoupment). This provision does not, therefore, imply that when an activity is run at a loss, it is in itself an infringement of the law; neither does it mean that consumers cannot benefit from such short-term conduct. The key in assessing this conduct is whether the dominant firm is covering its cost. Evidence of recoupment is relevant. Evidence of the firm's intention has recently been held to be irrelevant.
27. The leading case on this prohibition is [*Media 24 \(Pty\) Ltd vs Competition Commission of South Africa*](#)³⁵ where the CAC overturned the Tribunal's decision. The Tribunal had concluded that Media 24 had contravened section 8(c) by selling a loss-making community newspaper below its average total cost (ATC). In this case the Commission had advanced the argument that the appropriate cost measure to rely upon was average avoidable cost (AAC) which could be found within the meaning of section 8(d)(iv). The Tribunal rejected that argument but found that Media 24 did engage in exclusionary conduct akin to predatory conduct by selling below ATC with the intention (as reflected in its strategy documents) to exclude its rival from the market. The Tribunal concluded that this species of predatory pricing was a contravention of section 8(c) and not 8(d)(iv).
28. The CAC held that the architecture of section 8 does not favour the interpretation that 'intention' of the wrongdoer be considered. Intention is irrelevant. Accordingly, there was no predatory pricing because that was described as pricing below marginal or average variable cost.

³⁴ A complaint of predation may also be brought under the residual class of exclusionary act captured by section 8(c). Note that the onus differs under section 8(c).

³⁵ 146/CAC/Sep16.

29. The Commission took the CAC decision on appeal to the Constitutional Court, which handed down a decision which effectively dismissed the appeal on lack of jurisdiction and not merits.
30. This section has also been amended in the 2019 amendments.
31. The new section 8 introduced by the 2019 amendments has taken the following form:

Section 8 – Abuse of dominance prohibited

- (1) It is prohibited for a dominant *firm* to-
- (a) charge an excessive price to the detriment of consumers or customers;
 - (b) refuse to give a competitor access to an *essential facility* when it is economically feasible to do so;
 - (c) engage in an *exclusionary act*, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or
 - (d) engage in any of the following *exclusionary acts*, unless the *firm* concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act-
 - (i) requiring or inducing a supplier or customer to not deal with a competitor;
 - (ii) refusing to supply scarce *goods or services* to a competitor or customer when supplying those *goods or services* is economically feasible;
 - (iii) selling *goods or services* on condition that the buyer purchases separate *goods or services* unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;
 - (iv) selling *goods or services* at *predatory prices*;
 - (v) buying-up a scarce supply of intermediate goods or resources required by a competitor; or
 - (vi) engaging in a *margin squeeze*
- (2) If there is a prima facie case of abuse of dominance because the dominant firm charged an excessive price, the dominant firm must show that the price was reasonable.
- (3) Any person determining whether a price is an excessive price must determine if that price is higher than a competitive price and whether such difference is unreasonable, determined by taking into account all relevant factors, which may include-
- (a) the respondent's price-cost margin, internal rate of return, return on capital invested or profit history;
 - (b) the *respondent's* prices for the *goods or services*-
 - (i) in markets in which there are competing products;
 - (ii) to customers in other geographic markets;
 - (iii) for similar products in other markets; and
 - (iv) historically;
 - (c) relevant comparator *firm's* prices and level of profits for the *goods or services* in a competitive market for those *goods or services*;
 - (d) the length of time the prices have been charged at that level;

<p>(e) the structural characteristics of the relevant market, including the extent of the <i>respondent's</i> market share, the degree of contestability of the market, barriers to entry and past or current advantage that is not due to the <i>respondent's</i> own commercial efficiency or investment, such as direct or indirect state support for a <i>firm</i> or <i>firms</i> in the market; and</p> <p>(f) any regulations made by the <i>Minister</i>, in terms of section 78 regarding the calculation and determination of an excessive price.</p> <p>(4) (a) It is prohibited for a dominant firm in a sector designated by the Minister in terms of paragraph (d) to directly or indirectly, require from or impose on a supplier that is a small and medium business or a firm controlled or owned by historically disadvantaged persons, unfair-</p> <p style="padding-left: 40px;">(i) prices; or</p> <p style="padding-left: 40px;">(ii) other trading conditions.</p> <p>(b) It is prohibited for a dominant <i>firm</i> in a sector designated by the <i>Minister</i> in terms of paragraph (d) to avoid purchasing, or refuse to purchase, <i>goods or services</i> from a supplier that is a <i>small and medium business</i> or a <i>firm</i> controlled or owned by historically disadvantaged persons in order to circumvent the operation of paragraph (a).</p> <p>(c) If there is a <i>prima facie</i> case of a contravention of paragraph (a) or (b), the dominant <i>firm</i> alleged to be in contravention must show that-</p> <p style="padding-left: 40px;">(i) in the case of paragraph (a), the price or other trading condition is not unfair; and</p> <p style="padding-left: 40px;">(ii) in the case of paragraph (b), it has not avoided purchasing, or refused to purchase, <i>goods or services</i> from a supplier referred to in paragraph (b) in order to circumvent the operation of paragraph (a).</p> <p>(d) The <i>Minister</i> must, in terms of section 78, make regulation;</p> <p style="padding-left: 40px;">(i) designating the sectors, and in respect of <i>firms</i> owned or controlled by historically disadvantaged persons, the benchmarks for determining the <i>firms</i>, to which this subsection will apply; and</p> <p style="padding-left: 40px;">(ii) setting out the relevant factors and benchmarks in those sectors for determining whether prices and other trading conditions contemplated in paragraph (a) are unfair.</p> <p>[S. 8 substituted by s. 5 of Act 18 of 2018 (wef 12 July 2019 other than in so far as it relates to sub-s. (4), which will be put into operation on a date to be proclaimed).]</p>

Section 9(1) – Price discrimination

32. For a contravention under section 9, it must first be shown that a firm is dominant in terms of section 7. For price discrimination to be an abuse, the conduct must or likely have:
- a. the effect of substantially preventing or lessening competition; and the sale must relate to the sale of goods or services of like grade and quality to different buyers in an equivalent transaction;
 - b. the buyers must be discriminated against in terms of price charged; discount, rebate or credit given or allowed or the provision of services in

respect of goods and services, or payment method and terms of payment of goods and services.

33. Price discrimination refers to a set of circumstances where customers of a dominant firm, who themselves are competitors, receive different treatment from their supplier. The firm who receives the benefit of the discrimination is, therefore, able to source its inputs cheaper than its competitors from the same source, and it follows that it is able to sell the products cheaper or have lower input costs if intermediate products are at issue. An absolute pre-requisite is that it must involve competitors as the customers.
34. In deciding whether or not there has been any discrimination, it is necessary to first determine what is similar and what is different. The Act states the requirement that the transactions be equivalent and involves products or services of like grade and quality.
35. Sub-section 2 lists defences available to a firm accused of being involved in price discrimination. However, apart from the defences listed in section 9(2) the respondents can show that i) there is not a substantial lessening or prevention of competition; and ii) the transactions are not equivalent.
36. The leading case for price discrimination is [Nationwide Poles v Sasol \(Oil\) \(Pty\) Ltd](#).³⁶ In that case the Tribunal found that Sasol had engaged in unlawful price discrimination in the sale of creosote. Sasol offered discounts to larger customers which it did not extend to small players such as Nationwide Poles. The matter was taken on appeal and the Tribunal was overturned by the CAC in [Sasol Oil \(Pty\) Ltd v Nationwide Poles CC](#).³⁷
37. The amended section 9 (which has been promulgated) is as follows:

³⁶ 72/CR/Dec03.

³⁷ 49/CAC/Apr05.

Section 9 – Price discrimination by dominant firm prohibited

[NB: The heading has been substituted by s. 6 (a) of the Competition Amendment [Act 18 of 2018](#), a provision which will be put into operation by proclamation. See PENDLEX.]

- (1) An action by a dominant *firm*, as the seller of *goods or services*, is prohibited price discrimination, if-
- (a) it is likely to have the effect of substantially preventing or lessening competition;
[NB: Para. (a) has been substituted by s. 6 (b) of the Competition Amendment [Act 18 of 2018](#), a provision which will be put into operation by proclamation. See PENDLEX.]
 - (b) it relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers; and
 - (c) it involves discriminating between those purchasers in terms of-
 - (i) the price charged for the *goods or services*;
 - (ii) any discount, allowance, rebate or credit given or allowed in relation to the supply of *goods or services*;
 - (iii) the provision of services in respect of the *goods or services*; or
 - (iv) payment for services provided in respect of the *goods or services*.

[NB: A sub-s. (1A) has been inserted by s. 6 (c) of the Competition Amendment [Act 18 of 2018](#), a provision which will be put into operation by proclamation. See PENDLEX.]

- (2) Despite subsection (1), conduct involving differential treatment of purchasers in terms of any matter listed in paragraph (c) of that subsection is not prohibited price discrimination if the dominant *firm* establishes that the differential treatment-
- (a) makes only reasonable allowance for differences in cost or likely cost of manufacture, distribution, sale, promotion or delivery resulting from the differing places to which, methods by which, or quantities in which, goods or services are supplied to different purchasers;
 - (b) is constituted by doing acts in good faith to meet a price or benefit offered by a competitor; or
 - (c) is in response to changing conditions affecting the market for the *goods or services* concerned, including-
 - (i) any action in response to the actual or imminent deterioration of perishable goods;
 - (ii) any action in response to the obsolescence of goods;
 - (iii) a sale pursuant to a liquidation or sequestration procedure; or
 - (iv) a sale in good faith in discontinuance of business in the *goods or services* concerned.

[NB: Sub-s. (2) has been substituted and sub-ss. (3), (3A) and (4) have been added by s. 6 (d) and (e), respectively, of the Competition Amendment [Act 18 of 2018](#), provisions which will be put into operation by proclamation. See PENDLEX.]

Appeals from exemptions granted by the Commission

1. Exemption applications must be made in terms of s10(1) and the provisions therein must be read in conjunction with sections 10(2) and 10(3) which set out the requirements of exemption applications. Section 10(3) provides that once an application has been made, the Commission may only grant the exemption if:

“(a) any restriction imposed on the firms concerned by the agreement, or practice, or category of either agreements, or practices, concerned, is required to attain an objective mentioned in paragraph (b): and

(b) the agreement, or practice, or category of either agreements, or practices, concerned, contributes to any of the following objectives:

(i) maintenance or promotion of exports:

(ii) promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive;

(iii) change in productive capacity necessary to stop decline in an industry; or

(iv) the economic stability of any industry designated by the Minister, after consulting the minister responsible for that industry”

2. The Tribunal set out its approach to exemption appeals in the seminal case of [Gas2Liquids \(Pty\) Ltd v Competition Commission and Others](#).¹ In that case the Commission had granted an exemption in terms of section 10(3)(b)(iv), to the South African Petroleum Association (SAPIA).² The exemption related to a set of agreements concluded by members of SAPIA in the liquid fuel industry to stabilise the supply of liquid fuels.³ Gas2Liquids (the appellant), appealed the Commission’s decision to the Tribunal on various grounds, notably, that the agreements allow for the exchange of detailed competitively sensitive information which will have significant anti-competitive effects and the

¹ [2013] ZACT 3.

² *Gas2Liquids* paras 1-2.

³ *Gas2Liquids* para 3.

agreements taken individually or together are not required to ensure economic stability of the industry.⁴

3. The Tribunal found that in essence there are two requirements in s10(3)(b)(iv): the Commission is to establish whether the restrictive practice is required to achieve an objective in subsect (b) and whether the agreement or practice will contribute to the listed objectives in subsect (b).⁵
4. The restriction referred to in subsection (a) refers to restriction of competition. It would be difficult to understand why a broader meaning would be imposed.⁶ When the Tribunal considers exemptions, its primary concern is whether the restrictions on competition by the agreement or practice are required to achieve the object for which the exemption is sought.⁷ In other words, the applicants to the exemption application must contribute to the objectives set out in subsect (b).
5. The Tribunal indicated that it was worth noting that the fact that the agreement is anti-competitive is not a ground of appeal because likely anti-competitive effects are the very rationale for an exemption application.⁸ Further, when considering exemptions, the Commission is not obliged to take into account other legislation and policy affecting the specific industry. This is an industrial policy argument.⁹ Nothing in section 10 requires the consideration of broader industrial policy.¹⁰ Section 10 confers upon the Commission a discretion which it can rightfully exercise.¹¹
6. In considering the specific case at hand, the Tribunal found that the Commission conducted its investigations thoroughly and concluded that the practices envisaged by SAPIA would indeed be unlawful. Furthermore, the

⁴ *Gas2Liquids* para 25. See all 6 points of appeal.

⁵ *Gas2Liquids* para 19.

⁶ *Gas2Liquids* para 22.

⁷ *Ibid.*

⁸ *Gas2Liquids* para 37.

⁹ *Gas2Liquids* para 45.

¹⁰ *Ibid.*

¹¹ *Ibid.*

exemption did not preclude non-parties such as the applicant from becoming party to the agreement. The language of the exemption was inclusive.¹² The Tribunal granted the exemption with additional conditions to which limited the ambit of the exemption.¹³

7. The Act also contains Schedule 1: Exemption of Professional Rules which allows, upon application to the Commission, for all or part of the rules of a professional association to be exempted from the provision of Part A of Chapter 2 of the Act for a specified period.
8. Section 10 has been amended and promulgated. As the provision is substantially lengthy, we do not quote it here

¹² *Gas2Liquids* para 38.

¹³ *Gas2Liquids* para 33.

Remedies

1. Section 58 of the Act and CTR 42 allow the Tribunal to make various orders in addition its other powers in terms of the Act. Some examples are discussed below.
2. Section 58(1)(a)(i): interdicting any prohibited practices. The Tribunal may make this order when it has found that a practice of a firm has contravened the Act. One of the first cases instructive on this issue is that of [Cancun Trading No 24 CC v Seven Eleven Corporation South Africa \(Pty\) Ltd.](#)¹
3. Section 58(1)(a)(ii): ordering a party to supply or distribute goods or services to another party on terms reasonably required to end a prohibited practice. In [National Association of Pharmaceutical Wholesalers and Others v Glaxo Welcome \(Pty\) Ltd and Others](#)² the Tribunal in interim relief proceedings, ordered the respondents to continue to supply their products directly to the wholesalers on terms on conditions they enjoyed prior to the establishment of the exclusive distributor. However, this decision was taken on review and overturned by the CAC for being overly broad and vague.³
4. Section 58(1)(a)(iii): imposing an administrative penalty, in terms of section 59, with or without the addition of any other order in terms of this section.
5. Penalties under the Act are were regulated under the old⁴ section 59of the Act which reads as follows:

(1) *The Competition Tribunal may impose an administrative penalty only –*

(a) *for a prohibited practice in terms of section 4(1)(b), 5(2) or 8(a), (b) or (d);*

¹ 18/IR/Dec99.

² 68/IR/Jun00.

³ See appeal decision (02/CAC/Sep00).

⁴ The section has been amended to remove the yellow card and increase the cap to 25%.

- (b) *for a prohibited practice in terms of section 4(1)(a), 5 (1), 8(c) or 9(1), if the conduct is substantially a repeat by the same firm of conduct previously found by the Competition Tribunal to be a prohibited practice;*
 - (c) ...
 - (d) ...
- (2) *An administrative penalty imposed in terms of subsection (1) may not exceed 10% of the firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year.*
- (3) *When determining an appropriate penalty, the Competition Tribunal must consider the following factors:*
- (a) *the nature, duration, gravity and extent of the contravention;*
 - (b) *the loss of damage suffered as a result of the contravention;*
 - (c) *the behaviour of the respondent;*
 - (d) *the market circumstances in which the contravention took place;*
 - (e) *the level of profit derived from the contravention;*
 - (f) *the degree to which the respondent has co-operated with the Competition Commission and the Competition Tribunal; and*
 - (g) *whether the respondent has previously been found in contravention of this Act.*

6. The new section 59 of the Act has taken the following form:

Section 59 – Administrative Penalties	
(1)	The Competition Tribunal may impose an administrative penalty only-
(a)	for a prohibited practice in terms of section 4 (1), 5 (1) and (2), 8 (1), 8 (4), 13 9 (1) or 9 (1A); ¹⁴
[Para. (a) substituted by s. 33 (a) of Act 18 of 2018 (wef 12 July 2019 other than in relation to the references to ss. 8 (4) and 9 (1A), which remain to be proclaimed).]	

[NB: Para. (a) has been substituted by [s. 10](#) of the Competition Amendment [Act 1 of 2009](#), a provision which will be put into operation by proclamation. See PENDLEX.]

.....

[Para. (b) deleted by s. 33 (b) of [Act 18 of 2018](#) (wef 12 July 2019).]

[NB: Para. (b) has been substituted by [s. 10](#) of the Competition Amendment [Act 1 of 2009](#), a provision which will be put into operation by proclamation. See PENDLEX.]

(c)...(d)

(2)...

(2A) An administrative penalty imposed in terms of subsection (1) may not exceed 25 per cent of the *firm's* annual turnover in the Republic and its exports from the Republic during the *firm's* preceding financial year if the conduct is substantially a repeat by the same *firm* of conduct previously found by the Competition Tribunal to be a *prohibited practices*

[Sub-s. (2A) inserted by s. 33 (c) of [Act 18 of 2018](#) (wef 12 July 2019).]

(3) When determining an appropriate penalty, the Competition Tribunal must consider the following factors:

(a)...(g)

(h) whether the conduct has previously been found to be a contravention of *this Act* or is substantially the same as conduct regarding which Guidelines have been issued by the Competition Commission in terms of section 79.

[Sub-s. (3) substituted by s. 33 (d) of [Act 18 of 2018](#) (wef 12 July 2019).]

(3A) In determining the extent of the administrative penalty to be imposed, the Competition Tribunal may-

(a) increase the administrative penalty referred to in subsections (2) and (2A) to include the turnover of any *firm* or *firms* that control the *respondent*, where the controlling *firm* or *firms* knew or should reasonably have known that the *respondent* was engaging in the prohibited conduct; and

(b) on notice to the controlling *firm* or *firms*, order that the controlling *firm* or *firms* be jointly and severally liable for the payment of the administrative penalty imposed.

[Sub-s. (3A) inserted by s. 33 (e) of [Act 18 of 2018](#) (wef 12 July 2019).]

7. In terms of section 59(1)(a), the Tribunal may only impose penalties for a first contravention of sections 4(1)(b), 5(2) or 8(a),(b) or (d) of the Act. Section 59(1)(b) is commonly referred to as the “yellow card regime” in terms of which the Tribunal can only impose penalties for repeat contravention of the sections 4(1)(a), 5 (1), 8(c) or 9(1).⁵ The yellow card regime has been removed following the amendment and therefore a firm contravening the aforementioned sections is now liable to pay an administrative penalty.
8. Key amendments to note are those contained in subsections (2A) and (3A). In (2A), the Tribunal may impose an administrative penalty not exceeding 25% of such firm’s annual turnover if the Tribunal finds a firm guilty of repeat conduct. In terms of (3A), an administrative penalty may include the turnover of a parent

⁵ Section 59(1)(a) of the Act.

company of a firm where such parent company knew or should have reasonably known that the firm was engaging in prohibited conduct.

9. When determining a penalty, the Tribunal will have to determine the maximum penalty that can possibly be imposed only after having considered the factors set out in section 59(3),⁶ the purpose of which is to consider mitigating and aggravating factors. These factors must be observed, considered, weighed and applied in relation to each other within the particular circumstances of each case.⁷ Further, the Tribunal is required to apply its mind to each factor present in the matter before it. Depending on the circumstances of the case some factors may not be present, nor will they bear equal weight in the consideration.⁸
10. The penalty calculated must fall under the statutory cap of 10% contained in section 59(2). The upper cap of 10% is reserved for the most egregious of contraventions in the absence of any mitigating factors.⁹ The Tribunal set out its six-step method of calculating penalties in [Competition Commission v Aveng \(Africa\) Limited and others](#)¹⁰ which incorporates the factors laid out in section 59(3).¹¹ The six-step method was developed by the Tribunal, after the CAC decision in [Southern Pipeline Contractors](#) and by reference to the methodology used by the European Commission (EC).
11. Six-step method
The six-step method in *Aveng* is as follows:¹²

Step one: determination of the affected turnover in the relevant year of assessment.

⁶ *Southern Pipeline Contractors v Competition Commission* (105/CAC/Dec10, 106/CAC/Dec10) para 10.

⁷ *Pioneer Foods* para 147.

⁸ *Ibid.*

⁹ *Federal Mogul* para 167.

¹⁰ 84/CR/Dec09.

¹¹ See *Stanley's Removals CC* para 28. The Tribunal is not obligation to apply the six-step method approach where it will not be an appropriate template to come to an adequate and proportional penalty within the confines of the circumstances of each case. The principles of proportionality and fairness where applied in order to determine the appropriate penalty in the circumstances.

¹² Para 133.

Step two: calculation of the ‘base amount,’ being that proportion of the relevant turnover relied upon.

Step three: where the contravention exceeds one year, multiplying the amount obtained in step two by the duration of the contravention.

Step four: rounding-off the figure obtained in step three, if it exceeds the cap provided for by section 59(2).

Step five: considering factors that might mitigate or aggravate the amount reached in step four, by way of a discount or premium expressed as a percentage of that amount that is either subtracted from or added to it.

Step six: rounding-off this amount if it exceeds the cap provided for in section 59(2). If it does, it must be adjusted downwards so that it does not exceed the cap.

12. Application of the six-step method

(1) **Step one**

The affected turnover is an amount expressed in terms of the sale of goods or services that have been tainted by the alleged contravention.¹³ In other words, these are benefits that have accrued to the offending firm as a result of the contravention.¹⁴ The rationale for using the affected turnover rests on the premise that a firm may be active in more than one product market and the prohibited practice may not bear any relationship to the firm’s total turnover of the firm.¹⁵ The affected turnover is the primary starting point to determining an appropriate penalty in terms of section 59(3).

Logically, the year of assessment will be the last year in which evidence can show when last activity occurred.¹⁶ In other words, it is the final complete year

¹³ *Aveng* para 134; *Southern Pipeline Contractors* para 60.

¹⁴ *Southern Pipeline Contractors* para 51.

¹⁵ *Pioneer Foods* para 141.

¹⁶ *Aveng* para 135.

in which there is evidence of cartel or abusive conduct ¹⁷ or as held in *Power Construction*¹⁸ in the case of bid-rigging cases the last year in which the *effects* of the cartel conduct can be found.

(2) Step two

Once again, a discretion is exercised in computing the base amount. The Tribunal follows the approach adopted by the EC where the base amount is expressed as a proportion of the value of goods sold or services performed set at a maximum level of 30% of affected turnover.¹⁹ Therefore, to calculate the base amount, the affected turnover is multiplied by the computed % (between 0% and 30%). The maximum percentage of 30%²⁰ is reserved only for the most egregious of cartel contraventions. Whether or not the maximum percentage will be imposed is based on the following factors in section 59(3): the nature of the contravention (section 59(3)(a)); any loss or damage suffered as result of the contravention (s59(3)(b)); the combined market share of the relevant firms concerned – which is comprised as a sub-factor to the market circumstances in which the contravention took place (s59(3)(d)); the geographical scope, and whether or not the contravening agreement had been implemented.²¹ The purpose of this step is to scrutinise and determine the overall effect of the cartel in the relevant market.²² For the purpose of calculating the base amount all cartelists shall be scrutinised and treated equally. Individual evaluation is only carried out later in step five when considering various mitigating and aggravating factors.

(3) Step three

Firstly, the duration of the contravention ought to be determined. The method of calculating duration is not explicitly set out in the Act which allows the Tribunal to exercise a discretion in this respect.²³ Lengthy contraventions

¹⁷ para 139.

¹⁸ 145/CAC/Sep16.

¹⁹ European Commission *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003*, para 21.

²⁰ Not to be confused with the final total statutory cap of 10%.

²¹ *Aveng* 140 and 143.

²² *Aveng* para 141.

²³ *Aveng* para 138.

attract heavier fines.²⁴ This is based on the assumption that the longer the contravention the greater the harm to the market. This reasoning is consistent with the principle of proportionality which requires the contravening conduct to be sanctioned with an appropriate penalty.²⁵ Once the duration has been determined, it is multiplied with the base amount calculated in step two.

(4) Step four

If the amount calculated in step three exceeds the statutory cap of 10% of total annual turnover, it must be rounded down for the purpose of considering mitigating and aggravating factors in the proceeding step. This is an additional step absent in the approach adopted by the EC in its fining guidelines but required for our legislative framework which provides for the cap²⁶

(5) Step five

Here, the remaining factors of section 59(3) are considered such as the behaviour of the respondent (s59 (3)(c)); the level of profit derived from the contravention (s59(3)(e)); the degree to which the respondent has co-operated with the Commission and the Tribunal (s59(3)(f)) and; any previous contraventions which the respondent has been sanctioned (s59(3)(g)).²⁷ Whilst not all the above factors will be relevant in this assessment, regard to all factors must be had. Depending on the circumstances of each individual case, some factors may be considered as mitigating or aggravating. Finally, all mitigating and aggravating circumstances must be considered in totality to determine whether a discount or a premium should be implemented in the base amount.²⁸

(6) Step six

Finally, one must ensure that the amount arrived at in step five does not exceed the cap of 10% of the firm's annual turnover during the firm's preceding financial year. If the amount calculated in step 5 exceeds the 10% cap, it must be

²⁴ Ibid para 148.

²⁵ *Southern Pipeline Contractors* para 9.

²⁶ *Aveng* para 150-152 for background as to why the South African and EC approaches differ.

²⁷ *Aveng* 153.

²⁸ Ibid.

rounded down. The ‘*preceding* financial year’ has been defined as the financial year prior to the imposition of the penalty.²⁹ It is important to note that the financial year used to calculate the affected turnover in step one may differ to the financial year used in this step to determine the total turnover in the *preceding* financial year.³⁰

13. Section 58(1)(a)(iv): ordering a divestiture, subject to section 60 of the Act. Divestiture orders can be made where the a merger has been implemented in contravention of Chapter 3. In such circumstances the Tribunal can order a party to a merger to sell any shares, interest or other assets it has required in terms of the merger or declare void any provisions of an agreement to which the merger was subject.³¹ When the Commission considered this merger, it was of the view that post-merger, an effective competitor would be removed from the roofing insulation market and therefore recommended to the Tribunal that the merging parties ought to divest an insulation machine. The Tribunal considered the matter and ordered the divestiture as recommended by the Commission.

14. In [*JD Group Ltd v Ellerine Holdings Ltd*](#),³² the Tribunal set out a number of important considerations when ordering a divestiture. These included:
 - The precise assets to be divested;
 - The identity of the purchaser;
 - The price;
 - The length of time required for the divestiture;
 - The post-divestiture relationship between the merged and divested entities; and
 - The prospect of competition being maintained in the relevant market post-merger.

²⁹ *Southern Pipeline Contractors* para 61. The CAC found that this interpretation was in support of the plain text and reading of section 59(2).

³⁰ *Aveng* para 154.

³¹ See section 60(1).

³² 78/LM/Jul00.

15. In the recent case of [Netcare Hospital Group \(Pty\) Ltd and Akeso Group](#)³³ the Tribunal ordered the divestiture of two psychiatric hospitals because of the likelihood of an SLC in psychiatric hospital beds.
16. Divestitures have also been ordered in Chapter 2 cases. For example, in the case of [Competition Commission v Sasol Chemical Industries Ltd](#)³⁴ where Sasol divested of its nitro granular and liquid fertiliser blending facilities in settlement of a complaint launched by the Commission against Sasol.
17. Section 58(1)(a)(vi): declaring the whole or any part of an agreement to be void. The Tribunal in [Nedschroef Johannesburg \(Pty\) Ltd v Teamcor Ltd and Others](#)³⁵ found that there was *prima facie* evidence that a restraint of trade clause in a sale of business agreement contravened section 4(1)(b) of the Act. The Tribunal therefore ordered interdicted and restrained the applicant from abiding by the restraint clause and further ordered that the interdictory relief be in force until the final determination as to whether the restraint clause constituted a prohibited practice and therefore should be declared void.
18. In consent proceedings, the Tribunal has confirmed various consent agreements where the Commission imposed an administrative penalty and additional remedies where the parties would have to contribute a certain quantum into a development fund of sorts. In [Competition Commission v DSTV Media Sales \(Pty\) Ltd](#),³⁶ the Commission found DSTV Media Sales (DSTV) to have contravened section 4(1)(b) of the Act for fixing the price of advertising space for accredited and non-accredited advertising agencies. In addition to the administrative penalty, DSTV agreed to, *inter alia*, contribute R8 million into an economic development fund, which was set up to benefit small media advertising agencies. The Commission has followed the same approach in subsequent cases where it has uncovered practices of this nature.

³³ LM017Apr17.

³⁴ 45/CR/May06, 31/CR/May05.

³⁵ 95/IR/Oct05.

³⁶ CO06May17.

Consent Orders

1. The Act provides a unique framework in section 49D for settlement of contraventions of the Act between the Commission and a party prior to it being referred to the Tribunal. When adjudicating matters of this nature, the Tribunal may confirm, indicate changes to be made in the draft order, or refuse to confirm consent agreements concluded between the Commission and consenting parties and may do so without hearing any evidence.¹ This section does not preclude the Commission from concluding settlement agreements with respondents after the matter has been referred to the Tribunal or during the course of a proceeding at the Tribunal. These are treated for all intents and purposes in the same way by the Tribunal. However, the jurisprudence in relation to consent orders is unique because the framework is expressly set out in the section 49D.
2. In [*GlaxoSmithKline v David Lewis NO and Others*](#)², the CAC held that for the Tribunal to possess jurisdiction to entertain any consent agreement, the application must be launched before the period for the referral of the complaint expires.³ After such time, the Commission is deemed to have forfeited its powers to prosecute or settle a matter.⁴ The Tribunal will not have the jurisdiction to consider the consent application even if the agreement was concluded prior to the expiry of the 1 year referral period but the application under s49D was launched after the expiry of such period.⁵ In the same vein, the Tribunal will lack jurisdiction in terms of section 49D where the consent agreement has been withdrawn. In [*American Natural Soda Ash Corporation and Another v Competition Commission and Others*](#)⁶ the Tribunal refused to confirm a consent order as the Commission had withdrawn its agreement.⁷ The applicant nevertheless brought a motion for confirmation of the 'consent' order

¹ Section 49D.

² 62/CAC/Apr06.

³ *GlaxoSmithKline v David Lewis N. O and Others* (Case No: 62/CAC/APR06).

⁴ Section 50 of the Act.

⁵ Ibid.

⁶ 49/CR/Apr00 and 87/CR/Sep08.

⁷ ANSAC (CT) paras 19-21.

which was opposed by the Commission. The Tribunal held that it lacked jurisdiction in such circumstances.⁸

3. The Tribunal will not confirm a consent agreement that will have the effect of nullifying contractual provisions, where the other parties to the contractual clauses have not consented. This was the decision given by the Tribunal in [*Competition Commission v South African Forestry Company Limited and Others*](#)⁹ where it was of the view that contracting parties who will be affected by the nullification of an agreement as a result of a consent order must be afforded the opportunity to be heard. This approach is consistent with the notions of natural justice and fairness.¹⁰
4. On a few occasions the Tribunal has used the mechanism of providing reasons for its order in relation to consent and settlement agreements to provide guidance to the Commission and consenting parties.
5. In [*Competition Commission v Netcare Hospital Group \(Pty\) Ltd*](#),¹¹ the Tribunal refused to confirm the consent order and the proposed penalty on the basis that the Commission had not given adequate consideration to the parties' failure to notify a merger. Further, the Tribunal expressed its disapproval of the Commission's conclusion of a consent order prior to the conclusion of the merger hearing.¹² The matter was taken on review by Netcare.
6. On review in [*Netcare Hospital Group \(Pty\) Ltd and Another v Norman Manojm NO and Others*](#),¹³ the CAC disagreed with the Tribunal's approach. It held that during consent agreement proceedings, the Tribunal should accord due deference to the views of the Commission. In exercising its discretion, the Tribunal must enquire whether the consent agreement before it is a rational

⁸ ANSAC (CT) para 22.

⁹ 100/CR/Dec00.

¹⁰ *South African Forestry* para 14-15.

¹¹ 27/CR/Mar07.

¹² *Netcare* para 16.

¹³ 75/CAC/Apr08.

one, and whether it serves to uphold the objectives of the Competition Act together with the public interest.¹⁴ The CAC stated the following:

“In exercising its discretion whether to approve a consent order it must obviously be satisfied that the objectives of the Competition Act, together with the public interest are served by the agreement... .. It seems to me that the true enquiry before the Tribunal in this context is whether the agreement is a rational one, whether it meets the objectives set out above and is not so shockingly inappropriate that it will bring the Competition authorities into disrepute”¹⁵

7. Even if the Tribunal has to determine the appropriateness of an agreed administrative penalty in a consent agreement, it must consider whether the consent agreement is a rational one, whether it meets the objectives of the Competition Act and it is not *shockingly inappropriate* that it will bring the competition authorities into disrepute (the *Netcare* test).¹⁶

8. Consent orders concluded between the Commission and a respondent need not contain an admission of liability. In [Competition Commission v SAA and others](#)¹⁷ SAA and the Commission had agreed to a settlement order which included an administrative penalty of R15 million. Nationwide and Comair, the intervenors in this matter, objected to the penalty on three grounds. The first objection was that the penalty should be accompanied by an admission of liability by SAA as the appropriate penalty could only be determined with recourse to the nature and severity of the contravention concerned. The second and third objections are not relevant to this point and are dealt with in a subsequent section on administrative penalties. The Tribunal found against the intervenors and confirmed that there was no requirement that a consent order incorporating an administrative penalty be accompanied by an admission of liability. In this regard the Tribunal said:

¹⁴ *Netcare Hospital Group (Pty) Ltd and Another v Norman Manoim NO and Others* para 29.

¹⁵ *Ibid.*

¹⁶ *Caxton and CTP Publishers and Printers Limited and Another v Natal Witness Printing and Publishing Company (Pty) Ltd* (FTN190dec15/OTH135Sep16) para 39.

¹⁷ 83/CR/Oct04.

*'Thus the Tribunal performs different functions in approving a consent agreement containing an administrative penalty, which has been arrived at by way of negotiation between the Commission and the respondent, and imposing a penalty as a remedy pursuant to a full complaint proceeding where the Tribunal has to exercise its discretion as to whether, in the first place to impose a penalty and secondly, if it does, where to set it. This does not mean that we must not enquire into the justification for the penalty, but justification can be addressed without an admission of guilt. Thus we may enquire from the Commission how it arrived at the fine, as we are testing whether the public representative has acted rationally in discharging its function; we are not testing whether the respondent can justify the fine. Hence, no admission by the respondent is required in this respect, even a pronouncement of innocence, if it should so choose, would not interfere with our ability to confirm the order. We might in certain cases require more information from the Commission to justify its agreement, we would also have regard to the provisions of section 59(3) in doing so, but this is different to requiring an admission from the respondent. Here we act in terms of section 58(1)(b) relying not on an admission, but on the Commission's version of the facts.'*¹⁸

9. The Tribunal however did caution that in not admitting liability for specified conduct in a consent order a respondent ran the risk of being prosecuted by private complainants for that same conduct. This is precisely what ensued in [Comair Ltd v South African Airways \(Pty\) Ltd](#).¹⁹
10. A recent issue before the Tribunal was whether, in terms of section 49D of the Act, the Tribunal could confirm a consent agreement where the Commission failed to establish a proper theory of harm. In [Competition Commission v AECL and Others](#),²⁰ the Commission entered into a consent agreement with AECL, Omnia, Foskor and Sasol (the respondents) wherein they agreed to remove a clause in their partnership agreement that contained a pricing formula used for the sale of ammonia amongst each respondent. The Commission alleged that

¹⁸ SAA para 65.

¹⁹ [2017] 2 All SA 78 (GJ).

²⁰ CO204Oct17.

the pricing formula had the *potential* of price fixing effects, however not explicitly stating whether the pricing formula was in violation of either section 4(1)(a) or 4(1)(b)(i). Nevertheless, the respondents tendered to remove clause 12 from their partnership agreement and replaced it with a loan-based mechanism, which the Commission acquiesced to.

11. The Tribunal relied on the test established in the CAC's decision in *Netcare* which is whether the consent agreement is a 'rational' one, whether it meets the objectives of the Act and the penalty imposed is not shockingly inappropriate that it will bring the Competition authorities into disrepute. What constitutes an agreement as rational is the nexus between the resultant harm and the remedy offered.²¹ The Tribunal held that without a theory of harm, it is difficult to assess the practicability of the remedy imposed or to consider whether it is appropriate in the circumstances. Even if the Tribunal were to exercise its powers in terms of section 49D(2)(c), this would still not make the consent agreement a rational one.²² In addition, the parties, through an addendum to the partnership agreement, deleted clause 12 and therefore the conclusion of a consent agreement would have been unnecessary.²³ Ultimately, the Tribunal refused to confirm the consent agreement as it deemed it not to be rational.

12. It is worth noting that after the hearing of this matter, and before the Tribunal had made its decision, the Commission and the respondents were granted an opportunity to make further submissions which eventually culminated in the Commission submitting a notice of withdrawal. Omnia, the third respondent, objected to the basis of the withdrawal. However, the Tribunal was of the view that it did not need to decide the issue of withdrawal and considered the consent agreement was still before it and decided the matter anyway.²⁴

²¹ *AECI* para 18.

²² *Ibid.*

²³ *AECI* para 25.

²⁴ *AECI* paras 27 -30.

13. Lastly, the withdrawal issue in *AECI* is vastly different from that in *ANSAC*. In *ANSAC*, the settlement agreement was signed by the parties and later withdrawn by the Commission before it was referred to the Tribunal for consideration. In *AECI*, the consent order was referred to and entertained by the Tribunal only for it to be withdrawn when the Tribunal was due to make its decision.

Costs

1. In competition law, costs are primarily regulated under section 57 of the Act which states the following:

“(1) Subject to subsection (2), and the Competition Tribunal’s rules of procedure, each party participating in a hearing must bear its own costs.

(2) If the Competition Tribunal –

(a) has not made a finding against a respondent, the Tribunal member presiding at a hearing may award costs to the respondent, and against a complainant who referred the complaint in terms of section 51(1); or

(b) has made a finding against a respondent, the Tribunal member presiding at a hearing may award costs against the respondent, and to a complainant who referred the complaint in terms of section 51(1).”

2. As a general rule, each party participating in Tribunal proceedings is liable to bear its own costs under section 57(1). There are two exceptions that apply, and these are captured under section 57(2)(a) and (b). It is apparent that the Tribunal has the power to award costs against an unsuccessful party in proceedings emanating from a private referral in terms of section 51(1). However, this is not the only instance where the Tribunal may award of costs. Subject to section 57, CTR 50(3) provides that where an application is withdrawn and a consent to pay costs has not been tendered, the other party to the withdrawn application may file an application seeking an award of costs. There are numerous cases where CTR 50(3) has been invoked and cost orders where granted in favour of applicants. In addition, CTR 58 deals with the procedural aspects of cost such as taxation that must be read together with section 57 of the Act.
3. For example, in terms of section 57(1) of the Act read together with CTRs 58(1), and 42 (which deals with the initiation of other proceedings not specifically

provided for elsewhere in the Act such as suspension applications), the Tribunal may exercise its discretion in awarding costs against the unsuccessful party especially when the successful party had vigorously defended the matter and costs of doing so were incurred.¹

4. Below we set out the various cases involving cost awards. Prior to the case of [Omnia Fertilizer Ltd v Competition Commission](#)² (*Omnia*) the Tribunal often awarded costs against parties in terms of CTR 50(3) and 58 in merger cases. The position after *Omnia* is slightly different.

The earlier position

5. In earlier cases, the Tribunal applied section 57 in merger intervention proceedings. Two Tribunal cases illustrate this point, that of [Londoloza Forestry Consortium \(Pty\) Ltd and Bonheur 50 General Trading \(Pty\) Ltd and Others](#)³ (*Londoloza*) and [Altech Technologies Ltd v Mobile Telephone Networks](#)⁴ (*Altech*). The Tribunal's decisions were primarily premised on section 57 and CTR 58.
6. In *Londoloza*, the Tribunal refused to award costs to an intervening party in merger proceedings where the merging parties elected to withdraw their merger transaction. The Tribunal held that merging parties (the respondents in this matter) by law are required to notify their transaction in terms of section 13A of the Act. Unlike in civil proceedings, in merger proceedings, the Commission and the merging parties do not come before the Tribunal as adversaries but rather as parties exercising legal obligations and rights conferred to them by legislation.⁵ Intervenors on the other hand may elect to participate in Tribunal proceedings once they have obtained leave to do so from the Tribunal. They participate in merger proceedings to pursue their own interests and are not

¹ *MTO Forestry (Pty) Ltd and Others v Competition Commission and Others* (10/AM/Feb11) para 57-63.

² 77/CAC/Jul08.

³ 80/AM/Oct04.

⁴ 81/LM/Jul08.

⁵ *Londoloza* para 23.

compelled by any means to do so.⁶ Thus they participate at their own risk and may face an adverse cost order. In this case, the merging parties were simply exercising their rights under the Act and therefore, the interveners were not entitled to further costs. Ultimately, the Tribunal awarded costs of the application in favour of the merging parties.

7. In *Altech*, the Tribunal awarded costs against Altech after it withdrew its intervention application the day before the hearing. The Tribunal was of the view that Altech's intervention application was open ended and was not confined to limited issues as directed by the Tribunal. Further the intervention did not live up to what it promised and did not achieve what Altech originally sought. Instead, the intervention application burdened the merging parties with costs, delay and inconvenience.⁷
8. Up until this point, the law remained as cited above until the decision of the Tribunal and the subsequent appeal in *Omnia* ⁸.

The present position

9. In *Omnia* the Commission sought to consolidate two complaints in relation to alleged prohibited practices by Omnia Fertilizer (Omnia) and Sasol Chemical Industries (Sasol). Omnia opposed the consolidation application. The matter was set down for hearing but was subsequently withdrawn the day before. Omnia applied for wasted costs to be awarded against the Commission. The Tribunal dismissed the application on the basis that section 57 of the Act read with the Tribunal rules effectively bars the Tribunal from awarding costs against the Commission.⁹ The general rule is that each party bears its own costs. Costs could however be awarded in private referrals brought under section 51(1) of the Act.

⁶ *Londoloza* para 31.

⁷ *Altech* para 25-29.

⁸ 77/CAC/Jul08.

⁹ *Omnia* paras 1-2.

10. On appeal, the CAC upheld the Tribunal's decision. The court held that the Tribunal rules merely set out procedures to be followed when costs are awarded. If the legislature intended to bestow upon the Tribunal powers to award costs against the Commission, it would have done so expressly.¹⁰

11. The CAC pointed out that as a general rule, a court will not make an order as to costs if the litigant was unsuccessful in its opposition but acted *bona fide*.¹¹ The Commission is like a prosecutor and it is not uncommon for a prosecutor to withdraw a case the day before trial and therefore this should not be different with the Commission.¹² It must however be borne in mind that the CAC may award costs against any party in the hearing or any person who represented a party in the hearing, according to the requirements of the law and fairness.¹³ Perhaps the Commission ought to have realised the issues it would confront when consolidating complaints, however this was not a reason to levy a cost order against it. The fact that the consolidation application was withdrawn the day before hearing must be considered with the pressures under which the Commission operates. The functions and operation of the Commission could be severely affected if is every misjudgement was put under a microscope.¹⁴ Lastly, the CAC held that in preparation of the application, costs would not have been wasted when the merits would be adjudicated before the Tribunal.¹⁵

12. The approach by the CAC was followed and confirmed by the ConCourt in the leading case [of Competition Commission v Pioneer Hi-Bred International Inc. and Others](#).¹⁶

13. Here, the Constitutional Court (ConCourt) considered three issues: i) Whether leave to appeal from the CAC should be granted; ii) the scope of the CAC's powers to award costs against the Commission when it litigates in the course of its duties in terms of the Act (i.e. awarding costs against the Commission on

¹⁰ *Omnia* para 15.

¹¹ *Omnia* para 18.

¹² *Omnia* para 19.

¹³ *Omnia* para 20.

¹⁴ *Omnia* para 21.

¹⁵ *Ibid.*

¹⁶ CCT58/13.

appeal and in relation to Tribunal proceedings) and; iii) whether the CAC's discretion to award costs was exercised judicially.

14. Briefly, the Commission prohibited the intermediate merger between Pioneer Hi-Bred International Inc. (Pioneer) and Panaar Seeds (Pty) Ltd (Panaar). The merging parties sought a consideration of the merger before the Tribunal. It, in turn, prohibited the merger on the same grounds as the Commission. This was taken on appeal to the CAC. In the CAC, the merging parties successfully appealed the judgment and the transaction was conditionally approved. In its notice of appeal, the merging parties sought that the Commission pay only the costs of the appeal. However, in their heads of argument, the merging parties sought costs of the appeal against the Commission in the CAC and in the Tribunal proceedings. The CAC awarded costs as sought. Thereafter the Commission endeavoured to appeal the judgment and order of the CAC to the SCA but failed. It then successfully sought leave to appeal from the CAC to the ConCourt only against the cost order.
15. The ConCourt granted leave to appeal because the case related to the exercise of statutory powers that raise constitutional issues on the principle of legality which are a matter of statutory interpretation that are not trivial or insubstantial. The Commission had reasonable prospects of success and it would be in the interest of justice to grant leave to appeal.¹⁷
16. The ConCourt held that in terms of section 61 of the Act, the CAC has the power to award costs in its proceedings and the exercise of that power ought to be in accordance with the requirements of law and fairness. The latter is achieved when all factors have been considered.¹⁸
17. Further the ConCourt held that when exercising its discretion, the CAC should have borne in mind that the Commission is not an ordinary civil litigant. When it litigates, it does so in the course of fulfilling its statutory duties and it would be undesirable for it to be curtailed from exercising its duties or fulfilling its mandate

¹⁷ *Pioneer Hi-Bred* paras 12-13.

¹⁸ *Pioneer Hi-Bred* para 21.

by the threat of an adverse costs order.¹⁹ Even if the CAC were to disagree with the Commission's position or finds its actions to be questionable, this would not necessarily justify an adverse cost order. The fairness principle requires the CAC to be sensitive to creating sufficient space for the Commission to make independent decisions without the threat of an adverse cost order.²⁰ In this matter, the Commission conducted its case and litigated in the course of its functions. The CAC lost sight of this. It is perhaps only where the Commission pursues unreasonable, frivolous or vexatious litigation where a cost order could be justified however, this was not the case. The ConCourt found that the CAC did not exercise its discretion judicially when it granted the costs order.

18. Further it was held that the CAC could not award costs against the Commission for proceedings in the Tribunal because in terms of section 57, each party is responsible for its own costs. Only when the Commission is not a party to proceedings, may the Tribunal award costs against an unsuccessful party in terms of section 57(2). The rules of procedure (e. g. CTR 58) do not expand the Tribunal's powers but merely regulate the procedure for the award of costs. Their confirmed that under s57(1) Tribunal cannot award costs against the Commission.²¹
19. In terms of section 61, the CAC may award costs against a litigant in its own proceedings. Since the Tribunal cannot award costs against the Commission, it would be contrary for the CAC as an appellate body in terms of section 61(2) to include the power to award costs in relation to Tribunal proceedings which it is not empowered to make.²²
20. It is noteworthy to point out that it is not only in complaint procedures subject to section 51(1) where the Tribunal can order costs. It can do so in proceedings pertaining to applications for interim relief or interlocutory disputes between private parties.

¹⁹ *Pioneer Hi-Bred* para 23-26.

²⁰ *Pioneer Hi-Bred* para 27.

²¹ See further *Omnia Fertilizer* (77/CAC/Jul08).

²² *Pioneer Hi-Bred* para 41-43.

21. In [*Invensys PLC and Others v Protea Technology \(Pty\) Ltd and Others*](#)²³ the applicants sought costs against the respondents after the latter had withdrawn a private complaint referral and interim relief application brought before the Tribunal. The respondents argued that the Tribunal was barred from ordering costs against them in terms of section 57 because the only exception that applies to section 57 is in section 57(2). Since the interim relief application was not captured in section 57(2), the applicant was not entitled to costs. In addition, CTR 50(3) does not advance the matter any further as this rule is made subject to section 57.²⁴
22. The Tribunal did not find any merit in the respondent's argument as the previous CAC and Tribunal jurisprudence speak to this point. In *Omnia*, the CAC held that the Tribunal's authority to award costs is not limited to circumstances prescribed by section 57. In any event the parties to the interim relief application in this case would have been the same in a private referral namely the complainant and respondent as contemplated in s57(2). The Tribunal is entitled to make costs award in terms of CTR 50(2) of the Tribunal Rules.²⁵ The Tribunal also referred to [*Hayley Ann Cassim and Other v Virgin Active SA \(Pty\) Ltd*](#)²⁶ where the Tribunal held that if a party avails itself to an additional remedy (in terms of interim relief) they must be mindful of the consequences of pursuing such remedy.²⁷ In addition, a complainant that abandons an interim relief application may demonstrate that there are special circumstances that do not warrant an adverse cost award against the complainant. In this case, the respondent attempted to put up facts in effort to show special circumstances. The Tribunal however held that such facts did not amount to special circumstances as contemplated in the *Hayley Ann Cassim* case.²⁸ Ultimately the Tribunal awarded costs in favour of the applicants.²⁹

²³ 31/IR/Apr11.

²⁴ *Invensys PLC* para 14.

²⁵ *Invensys PLC* para 17. This was also followed in *Mainstreet 2 Limited & Others v Norvatis Limited and Others* (25/IR/A/Dec99).

²⁶ 57/IR/Oct01.

²⁷ *Hayley Ann Cassim* para 20.

²⁸ *Hayley Ann Cassim* paras 22-23.

²⁹ *Hayley Ann Cassim* paras 23-26. See also *EOH Holdings Ltd and Others v Protea Automation Solutions (Pty) Ltd* (018725, 081283, 018267).

23. Below are other cases in which the Tribunal determined the issue of costs:

- a. The Tribunal refused to award costs for the withdrawal of a review application in circumstances where the withdrawal was not done *mala fide* ([National Union of Metal Workers of South Africa v Marely Pipe Systems \(Pty\) Ltd and Another](#)).³⁰
- b. The Tribunal cannot order a company to provide security of costs.³¹

³⁰ 018656.

³¹ The High Court in *Siemens Telecommunications v Datagencies* 2013 (1) SA 65 (GNP) held that a resident company cannot be compelled to give security of costs even if it ventured to ensue in vexatious and speculative litigation.

Civil Actions

1. A party who seeks damages against a firm as a result of a prohibited practice may seek such relief from a civil in court in terms of section 65(6) and (7) of the Act which state the following:

“(6) A person who has suffered loss or damage as a result of a prohibited practice–

(a) may not commence an action in a civil court for the assessment of the amount or awarding of damages if that person has been awarded damages in a consent order confirmed in terms of section 49D(1); or

(b) If entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the Registrar or Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or the Judge President of the Competition Appeal Court, in the prescribed form –

(i) certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of this Act;

(ii) stating the date of the Tribunal or Competition Appeal Court finding; and

(iii) setting out the section of this Act in terms of which the Tribunal or the Competition Appeal Court made its finding.

(7) A certificate referred to in subsection (6)(b) is conclusive proof of its contents and is binding on a civil court.”

2. In terms of the aforementioned provision, before the applicant may approach a civil court to seek a damages award, it is obligatory that the applicant file a request with the Tribunal Registrar from the Tribunal Chairperson or the Judge President of the CAC for a certificate, that the alleged conduct amounts to a

prohibited practice in contravention of a provision in the Act. It follows that this certificate is binding on the civil court.

3. The Tribunal is not empowered to consider damages actions but is required to issue a certificate as provided in section 65(6) and (7).
4. In [Premier Foods \(Pty\) Ltd v Norman Manoim NO and others](#)¹ (Premier Foods SCA) the SCA held that the Tribunal may not issue a certification under section 65(6)(b) of the Act if an order on which that certificate is based is a nullity. In this case, Premier was granted conditional immunity in terms of the Commission's leniency programme ("CLP") in exchange for giving evidence before the Tribunal concerning allegations of fixing the price of bread ('the bread cartel') against Premier, Pioneer Foods and Tiger Consumer Brands ("Tiger"). What invoked this appeal is that the Tribunal granted an order declaring that Premier's conduct amounted to a prohibited practice in respect of its involvement in the bread cartel. Premier argued that the Tribunal was not empowered to make such a declaration because Premier's conduct was not included in the complaint referred to the Tribunal. As a result, according to Premier, the Tribunal's declaration is a nullity.²
5. The facts of this case are that the Commission initiated a complaint against Premier, Tiger and Pioneer Foods (the first complaint). Premier sought leniency from the Commission and revealed that it and two other firms had been operating a cartel in the Western Cape. Premier further disclosed that it, Pioneer and Foodcorp had operated a bread cartel in other parts of the country (the second complaint). This involved agreements to allocate territories. As a result of this information, the Commission initiated a second complaint. The Commission referred two complaints to the Tribunal. In both referrals, Premier was not cited as a respondent. During the time of the declaration, Tiger Brands and Foodcorp had consented to the conduct in terms of section 49D of the Act (settlement/consent agreement), including administrative penalties. Pioneer was the remaining respondent, was

¹ 2016 (1) SA 445 (SCA).

² *Premier Foods* (SCA) para 2.

prosecuted, found guilty and paid an administrative penalty of R195 million.³ Premier was granted final immunity from prosecution as a result of the evidence given.

6. The appeal also arose because the 4th to the 12th respondents (the claimants) sought to sue the four respondents for damages sustained as a result of the bread producers' cartel conduct. The claimants could only institute their damages claim if they filed with the Registrar or Clerk of the Court a notice contemplated under section 65(6)(b) of the Act from the Chairperson of the Tribunal in the prescribed form.
7. The claimants obtained the notices in respect of Tiger and Pioneer Foods. They then approached the Cape High Court to institute a class action against Premier, Tiger and Pioneer Foods. The application was dismissed because there was no section 65(6)(b) notice filed for Premier. The claimants proceeded to apply to the Tribunal for the impugned notice against Premier. This was opposed. Whilst this application was pending, Premier approached the Gauteng Division of the High Court to declare that neither the Chairperson or the Tribunal could lawfully issue the notice certifying that Premier's conduct constituted a prohibited practice under the Act and the Tribunal's decision. The court dismissed Premier's application holding that the declaration under section 65(6)(b) was competent because an order in section 58(1)(a)(v)⁴ had been granted and thus a certificate could be issued in respect of Premier. Leave to appeal was granted in favour of Premier to the SCA. In the appeal, only the Commission and the claimants opposed the appeal.
8. In its decision, the SCA generally described the process of obtaining a certificate under section 65. The court held that section 65(9)(a) provides that a person's right to bring a claim for damages arising out of a prohibited practice comes into existence on the date that the Tribunal or the CAC makes a declaration. Without a declaration, no right to claim damages comes into existence. Once a declaration has been made, a section 65(6)(b) notice can

³ *Competition Commission v Pioneer Foods (Pty) Ltd* (15/CR/Feb07, 50/CR/May08).

⁴ "declaring conduct of a firm to be a prohibited practice in terms of this Act, for the purposes of section 65".

be obtained by a person wishing to claim damages. Such a notice 'is conclusive proof of its contents and is binding on a civil court.' Without that notice, therefore, a claim for damages cannot be prosecuted.⁵

9. Because this dispute was centred against the backdrop of the CLP, the court stated that the CLP expressly provides that leniency applicants do not enjoy immunity in civil actions. No immunity is offered from a declaration because this is what gives rise to the right to claim damages.⁶
10. Having appreciated the procedures outlined in the CLP and the consequences flowing from such procedures, the court looked at the status of Premier in the Commission's complaint. The court found that the Commission neither cited Premier as a respondent nor did it seek any relief, including a declaration, against it. The referrals were covered by Form CT1(1) as was required by the rules. This comprised orders against only the cited respondents (Pioneer Foods and Foodcorp) in terms of section 58(1)(a)(v), that they desist from such conduct and that an administrative penalty be imposed on them. In the first referral, the relief was set out in the covering form as well as in the prayer to the affidavit. It sought identical relief to the second referral, but also only against the cited respondents, Pioneer and Tiger.⁷ From this, the court found that the Commission consciously exercised its right to exclude certain particulars, namely the involvement of Premier in the cartel activity, from the referrals. There was thus only a partial referral of the complaints to the Tribunal as is allowed by section 50(3)(a)(ii).
11. The court held that the decision not to cite Premier as a respondent in the referrals provides an additional basis why the Tribunal was not empowered to make the declaration against Premier.⁸ Furthermore, Premier knew that the other members of the cartel had been cited as respondents and that relief was sought against them. The court stated that however, this does not mean Premier should have anticipated that relief would be sought against it since the

⁵*Premier Foods (SCA)* para 14.

⁶ *Premier Foods (SCA)* para 16.

⁷ *Premier Foods (SCA)* para 26.

⁸ *Premier Foods (SCA)* para 28.

referral told it the opposite.⁹ The court held the view that the Tribunal lacked the power to make the declaration.

12. The court then considered the consequences flowing from the Tribunal's lack of power to make the declaration. The court stated that it is the decision of the Commission not to include Premier in the referrals, or any referral, for the purposes of seeking an order in terms of section 58(1)(a)(v) of the Act.¹⁰ "*A party that has been afforded conditional immunity, is not before the Tribunal for the purposes of the latter making a determination against it, including the imposition of an administrative penalty.*"¹¹ In summation the court held that based on the fact that the conduct of Premier was not part of the referral to the Tribunal, the Tribunal had no power to grant any order against it. In addition, Premier was not cited as a respondent. The declaration was therefore a nullity.. Being a nullity, it is competent for a court to find that there is simply no declaration to certify. This in turn means that, in this matter, no notice in terms of section 65(6)(b) should be issued against Premier.¹²
13. For purposes of information we deal with the two seminal cases of follow-on damages pursuant to a Tribunal order. In these cases, the applicants were successful in obtaining their damages awards. The two leading cases are [*Nationwide Airlines \(Pty\) Ltd \(in liquidation\) v South African Airways*](#)¹³ (*Nationwide*) and [*Comair Ltd v South African Airways \(Pty\) Ltd*](#)¹⁴ (*Comair*) where the High Court (HC) granted damages to both Nationwide and Comair in separate judgments for loss suffered as a result of SAA's contravention of section 8(d)(i) of the Act. These cases were heard and decided together.
14. The Tribunal found SAA had contravened section 8(d)(i) for imposing an overriding incentive schemes with travel agents in terms of which considerable sums of money were paid to travel agents to book its customers onto SAA flights rather than on rival airlines such as Comair and Nationwide. SAA's

⁹ *Premier Foods* (SCA) para 30.

¹⁰ *Premier Foods* (SCA) para 44.

¹¹ *Premier Foods* (SCA) para 45.

¹² *Premier Foods* (SCA) para 47.

¹³ 2016 (6) SA 19 (GJ).

¹⁴ [2017] 2 All SA 78 (GJ).

conduct was held to have resulted in loss of profit to competing airlines and harm to consumers. The matter was taken on appeal in which the CAC upheld the Tribunal's decision.¹⁵

15. Thereafter the Comair and Nationwide launched damages claims against SAA (in separate cases) where the court was tasked to determine whether SAA's incentive scheme caused loss of profits and if so, the quantum of that loss.
16. For the sake of completeness, we summarise the approach and findings of the high court in these two cases although technically the competition authority's involvement only related to the issuing of a certificate in terms of section 65(6).
17. The central issue in *Nationwide*¹⁶ was whether the conduct engaged in by SAA gave rise to any damages suffered by Nationwide and if so, the quantification of the damages award to Nationwide. In *Nationwide*, the court explained that in quantifying damages, the many variables make it impossible to compute an exact figure. Whatever figure the court arrives at is an estimation. With that said, it was therefore the plaintiff's obligation to produce all evidence at its disposal to assist the court in making as accurate a decision as possible.
18. Economic experts on both sides submitted detailed reports on the most appropriate methods to quantify damages. The parties proposed their respective calculations and both parties agreed on the *linear interpolation method* which uses passenger numbers and market shares. It is this method that the court utilised to determine damages. Despite using one method, the parties advanced and relied on different data sets and assumptions. The court came to the finding that the appropriate data set to use was the passenger number data set. In addition, any interpolation must be based on the market share data on all routes.
19. The starting period of the interpolation became a point in dispute and the court, having regard to multiple factors, concluded that the date when the abuse of dominance ceased to have an effect must be the correct starting point for the

¹⁵ *Nationwide* (CT decision) para 163.

¹⁶ *Nationwide* (High Court) para 12.

end averaging period. Therefore, the end point average period would run from October 2004 to September 2005.

20. Having regard to the evidence, the court adopted Nationwide's three step approach and the appropriate figures for interpolation by using market shares for the period October 1999 to March 2005 making various adjustments. Using this approach, the court found that the total damages owed to Nationwide was R104 625 000.
21. In *Comair*,¹⁷ SAA denied Comair's claim that Comair's loss of market share was attributable to SAA's prohibited conduct. SAA argued that the damages suffered by Comair would be negligible because during the infringement period there were other changes in the market that might have had an effect on Comair's market share. This was essentially an attempt by SAA to impugn the findings of the Tribunal. The court confirmed that in terms of section 65(7), the finding of the Tribunal or CAC is binding on the court and thus the court cannot change or disregard the finding of the Tribunal. The core issue to be decided by the court was the quantum of damages suffered by Comair as a result of SAA's conduct.
22. At trial, the experts agreed on a broad methodology in that the damages Comair had suffered would amount to the lost revenues as a result of the incentive schemes, adjusted for the costs Comair might have avoided because of reduced passenger numbers. In other words, the method is to place Comair in *status quo ante* absent SAA's illicit conduct.
23. In determining the period in which damages were sustained by Comair, the court took into account the lingering effect of the anti-competitive conduct of SAA. The court found that Comair continued to suffer damages due to the incentive schemes after they had ceased operation. In view of the above, Comair was award damages in the amount of R555 200 000.¹⁸

¹⁷ *Comair* para 23.

¹⁸ *Comair* para 238.

ABBREVIATIONS AND ACRONYMS

Competition Tribunal of South Africa	Tribunal
Competition Commission of South Africa	Commission
Competition Appeal Court	CAC
Rules for the Conduct of Proceedings in the Competition Commission	CCR
Competition Act 89 of 1998, as amended	The Act
Industrial Development Corporation of South Africa	IDC
Memorandum of Incorporation	MOI
Constitutional Court of South Africa	ConCourt
Rules for the Conduct of Proceedings in the Competition Tribunal	CTR
Substantial lessening of competition	SLC

TABLE OF CASES ARRANGED BY TOPIC

Topic	Seminal case
Classification of mergers	<i>Tiger Equity (Pty) Ltd and Murray & Roberts (Pty) Ltd v Competition Commission</i> (019174)
Meaning of control in section 12 of the Act	<i>Distillers Corporation (SA) Ltd v Bulmer (SA) (Pty) Ltd 2002 (2) SA 346 (CAC)</i>
Change in the form of control	<i>Iscor Ltd v Saldanha Steel (Pty) Ltd</i> (67/LM/Dec01)
	<i>Anglo American Holdings v Kumba Resources</i> 46/LM/Jun02
	<i>Ethos Private Equity Fund IV v The Tsebo Outsourcing Group (Pty) Ltd</i> 30/LM/Jun03
Key principles of control	<i>Caxton and CTP Publishers & Printers Ltd v Naspers Ltd & others</i> 16/FN/Mar04
	<i>Goldfields Ltd v Harmony Gold Mining Company Ltd & the Competition Commission</i> 86/FN/Oct04
	<i>Johnnic Holdings Ltd v Hosken Consolidated Limited & the Competition Commission</i> 65/FN/Jul06
	<i>Cape Empowerment Trust Ltd v Sanlam Life Insurance Ltd & Sancino Projects Ltd</i> 05/X/Jan06
	<i>Primedia Ltd, Capricorn Capital Partners (Pty) Ltd and New Africa Investments Ltd v The Competition Commission and African Media Entertainment Ltd</i> 39/AM/May06
	<i>Caxton and CTP Publishers and Printers Limited v Media 24 (Pty) Ltd and Others Caxton and CTP Publishers and Printers Limited v Media 24 (Pty) Ltd and Others</i> 36/CAC/Mar15
	<i>Competition Commission v Hosken Consolidated Investment Holdings and Another</i> [2019] ZACC 2
	<i>Medicross Healthcare Group (Pty) Ltd v Competition Commission</i> 55/CAC/Sep05
Merger Evaluation	<i>Primedia Ltd v Competition Commission</i> 39/AM/May06 09/05/2008
	<i>Trident Steel (Pty) Ltd v Dorbyl Ltd</i> 89/LM/Oct0
	<i>Anglo American Holdings Ltd and Kumba Resources Ltd</i> 46/LM/Jun02
	<i>Shell South Africa (Pty) Ltd/Tepco Petroleum (Pty) Ltd</i> 66/LM/Oct01
	<i>Telkom SA Ltd and Business Connexion Group Ltd</i> 51/LM/Jun06
	<i>Wal-Mart Inc and Massmart Holdings Ltd</i> [2011] 1 CPLR 145 (CT)
	<i>Glencore International PLC v Xstrata PLC</i> 33/LM/Mar12
	<i>Mediclinic Southern Africa (Pty) Ltd and Matlosana Medical Health Services (Pty) Ltd</i> LM124Oct16
	<i>Telkom SA Ltd and Another and Praysa Trade 1062 (Pty) Ltd</i> 81/LM/Aug00
	<i>Unilever plc and others v Competition Commission and others</i> 55/LM/Sep01

	<p><i>Minister of Economic Development and Others v Competition Tribunal and Others</i> 110/CAC/Jul11, 111/CAC/Jun11</p> <p><i>Bucket Full (Pty) Ltd v The Cartons and Labels business of Nampak Products Ltd</i> 018457.</p> <p><i>Metropolitan Holdings Ltd and Momentum Group Ltd</i> [2010] 2 CPLR 337 (CT).</p> <p><i>Tiger Brands Ltd and others v Langeberg Foods International and Ashton Canning</i> [2006] 1 CPLR 370 (CT)</p> <p><i>Klein Karoo and Mosstrich</i> IM238Jan19</p>
Right to participate in a hearing	<p><i>Industrial Development Corporation of South Africa Ltd v Anglo American Holdings</i> 45/LM/Jun02 and 46/LM/Jun02</p> <p><i>Community Healthcare Holdings (Pty) Ltd and another v Competition Tribunal and others</i> 2005 (5) SA 175 (CAC)</p> <p><i>Caxton and CTP Publishers and Printers Ltd v Naspers Ltd and others</i> 72/CAC/AUG 2007</p> <p><i>Supreme Health Administrators (Pty) Ltd and others v the Competition Commission and others</i> 122/LM/Dec05</p> <p><i>Healthbridge (Pty) Ltd v Digital Healthcare Solutions (Pty) Ltd</i> 41/AM/Jun02</p> <p><i>Comair Ltd v the Competition Commission and SAA</i> Case no 83/CR/Oct04</p> <p><i>Barnes Fencing Industries (Pty) Ltd & Dunrose (Pty) Ltd v Iscor Limited (Mittal SA) & others</i> Case no 08/CR/Jan07 (March 2008)</p>
Prohibited mergers	<p><i>Imerys South Africa (Pty) Ltd and Another v Competition Commission</i> 147/CAC/Oct16</p>
	<p><i>Mondi Ltd a Kohler Cores and Tubes (a division of Kohler Packaging Limited)</i></p>
Suspension of merger conditions	<p><i>MTO Forestry (Pty) Ltd and Others v Competition Commission and Others</i> 10/AM/Feb11</p>
Variation of merger conditions	<p><i>AMEC Foster Wheeler SA (Pty) Ltd v Competition Commission</i> VAR252Mar16</p> <p><i>Ferro South Africa (Pty) Ltd and Others v Atland Chemicals CC t/a Atlin Chemicals</i> LM179Jan14/VAR152Nov16</p> <p><i>Zimco Metals (Pty) Ltd and Another v Competition Commission</i> AME160Oct15</p>
Breach of merger conditions	<p><i>Sibanye Gold Ltd v Competition Commission</i> 020453</p>
Failure to notify	<p><i>Competition Commission v Deican Investments (Pty) Ltd and Another</i> (FTN 151 Aug15, FTN 127Aug15)</p> <p><i>Competition Commission v Standard Bank of South Africa Ltd</i> (FTN228Feb16)</p> <p><i>Competition Commission v Edgars Consolidated and Another</i> (95/FN/Dec02)</p>
Exceptions to pleadings	<p><i>American Natural Soda Ash Corporation and CHC Global v the Competition Commission, Botswana Ash (Pty) Ltd and Chemserve Technical Products (Pty) Ltd</i> Case No. 49/CR/Apr00</p>

	<i>The Competition Commission of South Africa and Federal Mogul Aftermarket Southern Africa (Pty) Ltd</i> <i>Federal Mogul Friction Products (Pty) Ltd T & N Holdings Ltd T & N Friction products (Pty) Ltd (08/CR/Mar01)</i>
	<i>National Association of Pharmaceutical Wholesalers; Sappi Papers (Pty) Ltd v The Competition Commission (62/CR/Nov01)</i>
	<i>Competition Commission, Anglo American Medical Scheme and Engen Medical Fund v United South African Pharmacies and Members of United South African Pharmacies (04/CR/Jan02)</i>
	<i>Competition Commission v AGS Frasers International (Pty) Ltd DEF098Aug15/EXC099Jul15</i>
	<i>Invensys PLC and Another v Protea Automation Solutions (Pty) Ltd (019315)</i>
Amendment applications	<i>Competition Commission v Loungefoam (Pty) Ltd (102/CAC/Jun10)</i>
	<i>South African Medical Association v Council for Medical Schemes (CRP066Jul13/AME023May16, CRP065Jul13/AME022May16)</i>
	<i>Alba Gas (Pty) Ltd v Air Products South Africa (CRP221Feb17/AME092Jun17)</i>
	<i>Competition Commission v Sasol Chemical Industries and Others (45/CR/May06)</i>
	<i>Competition Commission v South African Airways (18/CR/Mar01) (SAA)</i>
Condonation applications	<i>Mpho Makhathini and Others v GlaxoSmithKline (34/CR/Apr04)</i>
Strike out applications	<i>Allens Meshco (Pty) Ltd and Others v Competition Commission (CR093Jan07/STR087Aug16 & CR093Jan07/STR088Aug16)</i>
	<i>The New Reclamation Group (Pty) Ltd v Gerhardus Johannes Jacobs (21/CR/Mar11).</i>
	<i>AGS Frasers International (Pty) Ltd v Competition Commission (DEF098Aug15/EXC099Jul15)</i>
Joinder application	<i>Afrocentric Health Limited and Discovery and Others (CP003Apr15/JOI120Sep15)</i>
	<i>Pistorius HWC NO and others v Competition Commission (148/CAC/Nov16)</i>
Separation applications	<i>Allens Meshco (Pty) Ltd and Others v Competition Commission</i>
	<i>Loungefoam (Pty) Ltd and Another v Competition Commission</i>
	<i>Denel (Pty) Ltd v Vorster [2004] ZASCA 4.</i>
	<i>South African Breweries Ltd and Others v Competition Commission (134/CR/Dec07)</i>
Stay applications	<i>Novartis SA (Pty) Ltd v Main Street 2 (Pty) Ltd</i>
	<i>Monsanto South Africa (Pty) Ltd and Another v Bowman Gilfillan (109/CAC/Jun11)</i>
	<i>Allens Meshco (Pty) Ltd and Others v Competition Commission (135/CAC/Jan15)</i>

	<i>Council for Medical Schemes and Another v South African Medical Association (133/CAC/Dec14)</i>
Re-opening a case	<i>National Association of Pharmaceutical Wholesalers and Others v Glaxo Wellcome (Pty) Ltd and Others (68/IR/Jun00)</i>
Default judgements	<i>Competition Commission v AGS Frasers International (Pty) Ltd (DEF098Aug15/EXC099Jul15)</i>
Prescription	<i>Pickfords Removals SA (Pty) Ltd v Competition Commission (CR129Sep15/PIL162Sep17)</i>
	<i>Competition Commission v RSC Ekusasa Mining (Pty) Ltd (65/CR/Sep09)</i>
Interdict	<i>Murray and Roberts Holdings Limited v Aton Holdings GmbH and Others (IDT079Jun18)</i>
	<i>Gold Fields Limited v Harmony Gold Mining Company Limited and Another (43/CAC/Nov04)</i>
Summons	<i>Woodlands Dairy (Pty) Ltd and Another v Competition Commission (2010 (6) SA 108 (SCA))</i>
	<i>Media24 Ltd and Another v Competition Commission (18/X/Apr10)</i>
Discovery	<i>Goodyear South Africa (Pty) Ltd and Continental Tyres South Africa (Pty) Ltd v Competition Commission (CR053Aug10/DSC063May17, CR053Aug10/DSC056May17)</i>
Litigation privilege	<i>Pioneer Foods (Pty) Ltd v Competition Commission (15/CR/Feb07, 50/CR/May08)</i>
	<i>Competition Commission v ArcelorMittal South Africa Ltd and Others. 2013 (5) SA 538</i>
	<i>WBHO Construction v Competition Commission and Another (CR162Oct15/AR1187Dec16)</i>
Commission's powers to in terms of section 49B: Valid initiation	<i>Woodlands Dairy (Pty) Ltd and Another v Competition Commission (2010 (6) SA 108 (SCA))</i>
	<i>Competition Commission v Yara (South Africa) (Pty) Ltd and Others (2013 (6) SA 404 (SCA))</i>
	<i>Competition Commission v Pentel South Africa (Pty) Ltd (27/CR/Apr11)</i>
Binding nature of corporate leniency agreements	<i>Clover Industries Limited and Another v Competition Commission and Others; Ladismith Cheese (Pty) Ltd v Competition Commission of South Africa and Others. (81/CAC/Jul08)</i>
Review of corporate leniency policy applications	<i>Allens Meshco Group of Companies and Others v Competition Commission (31044/13)</i>
Deviation from the corporate leniency policy	<i>Blinkwater Mills (Pty) Ltd v Competition Commission (CR087Mar10/DSM021May11)</i>
Interim relief	<i>Normandien Farms (Pty) Ltd v Komatiland Forests (Pty) Ltd, (018507)</i>
	<i>Simba Chitando v Michael Fitzgerald and Others (016550)</i>
	<i>Nqobion Arts Business Enterprise CC v the Business Place Joburg and Another (80/IR/Aug05)</i>

	<i>Schering (Pty) Ltd and Others v New United Pharmaceutical Distributors (Pty) Ltd and Others (05/IR/Jul01)</i>
	<i>National Association of Pharmaceutical Wholesalers and others v Glaxo Wellcome (Pty) Ltd and others (53/IR/Apr00)</i>
	<i>Nedschroef Johannesburg (Pty) Ltd v Teamcor Limited and Others (95/IR/Oct05)</i>
	<i>Trudon (Pty) Ltd v Directory Solutions CC and Another (96/CAC/Apr10)</i>
	<i>JG Grant v Schoemansville Oewer Klub (IR/202/Dec15)</i>
Approach to section 4	<i>America Natural Soda Ash Corporation and Another v Competition Commission [2005] 1 CPLR 1 (SCA)</i>
	<i>Reinforcing Mesh Solutions (Pty) Ltd and Another v Competition Commission (119/120/CAC/May2013)</i>
	<i>Competition Commission v Alvern Cables (Pty) Ltd and Others (CR049Jul12)</i>
	<i>Netstar v Competition Commission (2011 (3) SA 171 (CAC)</i>
Approach to section 4(1)(b)(ii)	<i>Dawn Consolidated Holdings (Pty) Ltd (155/CAC/Oct2017)</i>
Cover pricing in terms of section 4(1)(b)(iii)	<i>Competition Commission v Giuricich Coastal Projects and Another (CR162Dec14)</i>
	<i>Competition Commission v Eye Way Trading (Pty) Ltd and another (CR074Aug16)</i>
Single economic entity within the meaning of section 4(5) of the Act	<i>Competition Commission v Delatoy Investments (Pty) Ltd and Others (CR212Feb15)</i>
	<i>A’Africa Pest Prevention CC and another v Competition Commission of South Africa (168/CAC/Oct18)</i>
	<i>Loungefoam (Pty) Ltd v Competition Commission and others (102/CAC/June10)</i>
Minimum resale price maintenance	<i>Federal Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission (33/CAC/Sep03)</i>
Excessive pricing	<i>Mittal Steel South Africa Ltd and Others v Harmony Gold Mining Company Ltd (70/CAC/Apr07)</i>
	<i>Sasol Chemical Industries Ltd v Competition Commission 131/CACJun14)</i>
Refusing a competitor access to an essential facility	<i>Glaxo Wellcome (Pty) Ltd & Others and National Association of Pharmaceutical Wholesalers & Others 15/CAC/Feb02</i>
Section 8(c) and 8(d)	<i>Competition Commission v South Africa Airways (Pty) Ltd 18/CR/Mar01</i>
Onus of efficiency defence	<i>Competition Commission v Senwes Ltd (110/CR/Dec06)</i>
Inducement not to deal with a competitor	<i>Nationwide v South African Airways and Competition Commission v South Africa Airways (18/CR/Mar01)</i>
Refusal to supply scarce goods	<i>J T International SA (Pty) Ltd vs British American Tobacco SA (Pty) Ltd (55/CR/Jun05)</i>
Predatory pricing	<i>Media 24 (Pty) Ltd vs Competition Commission of South Africa (146/CAC/Sep16)</i>

Price discrimination	<i>Sasol Oil (Pty) Ltd v Nationwide Poles CC (49/CAC/Apr05)</i>
Exemption applications	<i>Gas2Liquids (Pty) Ltd (013607)</i>
Remedies	<i>Cancun Trading No 24 CC v Seven Eleven Corporation South Africa (Pty) Ltd 18/IR/Dec99</i>
	<i>National Association of Pharmaceutical Wholesalers and Others v Glaxo Welcome (Pty) Ltd and Others 68/IR/Jun00</i>
	<i>JD Group Ltd v Ellerine Holdings Ltd 78/LM/Jul00</i>
	<i>Nedschroef Johannesburg (Pty) Ltd v Teamcor Ltd and Others 95/IR/Oct05</i>
	<i>American Natural Soda Ash Corporation and Another v Competition Commission and Others (49/CR/Apr00 and 87/CR/Sep08)</i>
	<i>Competition Commission v South African Forestry Company Limited and Others (100/CR/Dec00).</i>
	<i>Competition Commission v Netcare Hospital Group (Pty) Ltd 27/CR/Mar07</i>
	<i>Competition Commission v SAA and others (83/CR/Oct04)</i>
	<i>Competition Commission v AECl and Others (CO204Oct17)</i>
Costs	<i>Omnia Fertilizer Ltd v Competition Commission (77/CAC/Jul08)</i>
	<i>Competition Commission v Pioneer Hi-Bred International Inc. and Others (CCT58/13)</i>
Civil actions	<i>Premier Foods (Pty) Ltd v Norman Manoim NO and others 2016 (1) SA 445 (SCA)</i>
	<i>Nationwide Airlines (Pty) Ltd (in liquidation) v South African Airways 2016 (6) SA 19 (GJ)</i>
	<i>Comair Ltd v South African Airways (Pty) Ltd [2017] 2 All SA 78 (GJ)</i>