



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no.: CR152Feb20/INT145Nov22

In the *intervention application* between:

Eagle Liner Transport (Pty) Ltd t/a Eagle Liner & Intercity Xpress	Applicant
And	
The Competition Commission of South Africa	First Respondent
Passenger Rail Agency of South Africa	Second Respondent
Autopax Passenger Services SOC Limited	Third Respondent
Intercape Ferreira Mainliner (Pty) Ltd	Fourth Respondent

Case no.: CR152Feb20/INT146Nov22

And in the *intervention application* between:

David Bus Service (Pty) Ltd t/a Eldo Coaches	Applicant
And	
The Competition Commission of South Africa	First Respondent
Passenger Rail Agency of South Africa	Second Respondent
Autopax Passenger Services SOC Limited	Third Respondent
Intercape Ferreira Mainliner (Pty) Ltd	Fourth Respondent

Case no.: CR152Feb20

In re: the complaint referral between:

The Competition Commission of South Africa	Complainant
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And

Passenger Rail Agency of South Africa

First Respondent

Autopax Passenger Services SOC Limited

Second Respondent

Intercape Ferreira Mainliner (Pty) Ltd

Third Respondent

Panel: A Wessels (Presiding Member)
T Vilakazi (Tribunal Member)
G Budlender (Tribunal Member)
Heard on: 25 July 2023
Order issued on: 22 December 2023
Reasons issued on: 22 December 2023

REASONS FOR DECISION AND ORDER

Introduction

- [1] The Competition Commission (“Commission”) has referred to the Competition Tribunal (“Tribunal”) an abuse of dominance complaint against the Passenger Rail Agency of South Africa (“PRASA”) and Autopax Passenger Services SOC Ltd (“Autopax”) (the “Referral”). Eagle Liner Transport (Pty) Ltd t/a Eagle Liner & Intercity Xpress (“Eagle”) and David Bus Service (Pty) Ltd t/a Eldo Coaches (“Eldo”) both applied to intervene in the matter.
- [2] The Commission stated that it would abide the Tribunal’s decision. PRASA opposed the applications of both Eagle and Eldo.¹
- [3] For the reasons that follow, we have decided to dismiss both intervention applications.

¹ Intercape Ferreira Mainliner (Pty) Ltd (“Intercape”), a previously admitted intervenor, was cited in its capacity as a respondent in the Referral. It too has chosen to abide the Tribunal’s decision.

Background to the application

- [4] PRASA owns and manages all of the intermodal terminal facilities in South Africa. The facilities link rail, bus and taxi transport. At the facilities, PRASA offers interprovincial bus operators *inter alia* loading bays, office space and ticketing offices.² Interprovincial bus operators lease these services from PRASA.
- [5] Autopax entered the long-distance passenger services market in 2000. It is a wholly-owned subsidiary of PRASA.
- [6] In December 2013 PRASA implemented a "Pay-on-Use" billing system at Park Station for the existing bus operators.
- [7] Between March 2017 and July 2019, the Commission received complaints against PRASA from five different interprovincial bus operators, including Eagle and Eldo.³ The Commission consolidated the five complaints under a common investigation.⁴
- [8] Eagle lodged its complaint with the Commission on 24 April 2019. It alleges *inter alia* that:

- 8.1 PRASA owns the majority of the loading facilities in South Africa.
- 8.2 PRASA implemented a billing system at Park Station which resulted in Eagle's monthly billings increasing by 3000%.
- 8.3 PRASA gives Autopax an unfair advantage over other bus operators in the market.⁵

² Intervention FA [24].

³ Africa People Mover (Pty) Ltd; Moolla's Transport Services CC; Intercape Ferreira Mainliner (Pty) Ltd; Cream Magenta 326 (Pty) Ltd t/a Eagle Liner and Intercity Xpress; David Bus Services (Pty) Ltd t/a Eldo Coaches.

⁴ Complaint Affidavit page 14.

⁵ Eagle FA [19] and Annexure MS2.

[9] Eldo lodged its complaint with the Commission on 16 July 2019. It alleges *inter alia* that:

9.1 PRASA charges bus operators excessive fees for using bus facilities at Park Station.

9.2 PRASA provides favourable trading terms to Autopax by affording Autopax extended payment terms for the use of its bus terminal facilities and allocating Autopax exclusive loading bays at Park Station.⁶

[10] On 7 February 2020, the Commission lodged the Referral to the Tribunal against PRASA and Autopax with regard to PRASA's conduct at Park Station in Johannesburg.⁷ The Commission alleged that PRASA contravened the Competition Act No 89 of 1998 ("the Act") by engaging in exclusionary acts with anticompetitive effects; alternatively refusing to give a competitor access to an essential facility when it is economically feasible to do so; and in the further alternative charging an excessive price to the detriment of consumers or customers.

[11] The Applicants allege that since the Referral, they were subjected to threats, intimidation and refusal of access to Park Station until all arrear payments were settled, this notwithstanding the Referral's findings regarding the unlawfulness of the access fees.⁸

[12] When it was informed of this, on 11 March 2020 the Commission sent a letter ("March 2020 Letter") to PRASA stating "*[s]hould PRASA continue to threaten to bar intercity bus operators from operating at Park Station or bar any intercity bus operator from operating at Park Station as a result of inability to pay access*

⁶ Eldo FA [20] and Annexure W2.

⁷ On 19 February 2020, the Commission also published the Land Based Public Passenger Transport Inquiry's provisional report. The inquiry had been initiated by the Commission as features of the public passenger transport sector were seen as inhibiting competition.

⁸ Eagle FA [22], Annexure MS3, Eldo FA [23].

*fees which at current levels have been found to constitute a prohibited practice, the Commission will have no option but to apply to the Tribunal for an interdict pendente lite until the hearing of the complaint referral is finalised”.*⁹

- [13] For most of 2020, coinciding with the advent of the Covid-19 pandemic and the nation-wide lockdown, PRASA did not pursue the issue of arrear payments, or make any significant threats or attempts to prevent entry to Park Station unless the arrears were paid.¹⁰
- [14] Proceedings in respect of the Referral continued: In 2021 InterCape was recognised as an Intervenor in the Referral, and the Commission filed its factual witness statements (June 2021). The Commission’s factual witnesses include Mr Wynand Jacobus Jansen Van Nieuwenhuizen, the current Chief Executive Officer (CEO) of Eldo; and Mr Ghalib Ismail, the erstwhile CEO of Eagle, who resigned in March 2020.
- [15] In 2022, PRASA wrote to the interprovincial bus operators advising them that it had appointed Servest Parking Technologies to manage the parking and bus billing systems at Park Station on its behalf. This, as well as PRASA communications regarding its intent to seek settlement of outstanding fees through the making of payment plans, led the Applicants to write to the Commission on 26 August 2022, reminding the Commission of its demand in its March 2020 Letter, and asking for assistance. The Applicants allegedly did not receive responses to these letters from the Commission.
- [16] On 7 September 2022 the Applicants received notice, by way of a letter, that PRASA intended to implement a new billing system at Park Station, to be operated by Servest (the “pre-payment system”). The pre-payment system would entail payment of monies into a pre-paid account linked to each operator before registered buses would be allowed entry into Park Station. Once money was loaded into the operator specific account, operators would be allowed to

⁹ Eagle FA [24], Annexure MS4, Eldo FA [24], Annexure W3.

¹⁰ Eagle FA [26], Eldo FA [26].

collect cards for entry and exit into Park Station. If there were insufficient funds in the operator's account, the access card would not allow entry.

[17] On 12 September 2022 PRASA implemented the new pre-payment system. The Applicants again wrote to the Commission seeking guidance. On 24 October 2022 the Applicants met with the Commission. The Commission informed them that it would not be approaching the Tribunal for relief, as contemplated in its March 2020 Letter.

[18] On 10 November 2022, the Applicants filed nearly identical applications in terms of section 53(1)(a)(ii)(bb) of the Act read with Tribunal Rule 46, seeking their recognition as participants in the hearing of the Referral.

[19] The scope of the proposed intervention would be –

“issues identified by the Commission in the complaint referral and the pursuit of consequential relief in respect of the levying of access fees at the Park Station terminal. Notwithstanding the limitation above, [Applicant]'s right to participate shall not exclude its rights to present and rely on evidence of other charges and charging practices of PRASA relevant to the determination of issues in the complaint referral.”¹¹

[20] The core part of the Commission’s notice of motion seeks a declaration that “PRASA, during the period December 2013 to date, inclusive of the period in which the conduct subsists subsequent to the referral of this complaint to the Tribunal contravened section 8(1)(c), alternatively section 8(1)(b) of the Act and in the further alternative, section 8(1)(a)” (emphasis added).

[21] The Referral’s other prayers for relief are for the imposition of an administrative penalty, and interdicts directing PRASA to (i) provide access to loading bays and office space to interprovincial bus operators which have applied for access to loading bays and office space at Park Station; (ii) terminate Autopax’s

¹¹ Eagle NoM [12], Eldo NoM [7].

exclusive use of the Autopax-only-Area at Park Station; (iii) grant interprovincial bus operators which have applied for access to loading bays access to loading bays located at the Autopax-only-Area at Park Station; and (iv) refrain from engaging in contravention of sections 8(1)(c), 8(1)(b), or 8(1)(a) in terms of section 58(1)(a)(i) of the Act.

[22] The Applicants sought the full suite of procedural rights in respect of their proposed intervention.¹²

[23] Approximately a month before the scheduled hearing of the intervention applications, PRASA filed applications for leave to file supplementary affidavits in respect of each of those applications on the basis that new allegations had been made in reply, that PRASA could not have anticipated. It was agreed that the applications for leave to file supplementary affidavits would be argued immediately before the intervention applications and this was done. The alleged need for supplementary affidavits arises only if the intervention applications are granted. We therefore first address the intervention applications.

¹² "2. The Applicants' right to participate in the complaint referral proceedings shall include the right to:

- 2.1. *Its lawyers, economists and consultants obtaining access to the entire record of the complaint referral proceedings on receipt of standard confidentiality undertakings by the applicants and respondents;*
- 2.2. *Call for discovery of further documents from all participants;*
- 2.3. *Request the Tribunal to direct, summon and/or order any person to appear at the hearing of the complaint referrals and/or to produce documents relevant to the hearing of the complaint referral;*
- 2.4. *Attend pre-hearing conferences;*
- 2.5. *File witness statements to the extent that it does not duplicate that which is already before the Tribunal;*
 - 2.5.1. *Evidence contained in their witness statements (as supplemented) to the extent that same has not been already led by the Commission;*
- 2.6. *Cross examine the parties' witnesses to the extent that same does not result in a duplication of the Commission's cross examination of the witnesses; and*
- 2.7. *Access third party confidential information (subject to confidentiality undertakings) which access the Commission shall endeavour to procure. If the Commission does not procure said access, [Applicant] shall be entitled to approach the Tribunal with an application for the release of said information."*

Arguments of the Parties

- [24] Section 53(1)(a)(ii)(bb) of the Act requires the Applicants to demonstrate that they have an interest that is not adequately represented by another participant, i.e. the Commission and/or Intercape. PRASA accepted that both Applicants, being complainants to the Commission and customers of PRASA, have a material interest in the matter.¹³ The main dispute was thus as to whether their interest was adequately represented by another participant.
- [25] The Applicants point to the events occurring after the Referral as evidence of the ongoing nature of PRASA's conduct as embodied by the (i) payment plans, and the (ii) pre-payment system. They say that they are experiencing hardship in relation to the requirement to make payments under the payment plans which are underpinned by the pricing methodology of the Pay-On-Use system. They say that they are not opposed to the pre-payment system *per se*, but are opposed to it being an extension of the methodology adopted in the Pay-On-Use system. PRASA's continuing to charge the same access fee during and immediately after the Covid-19 pandemic; and the effects of the access fee on the Applicants' respective labour forces and more broadly on competition in the market since June 2021, must, they say, be put before the Tribunal by the Applicants.
- [26] The Applicants contend that they can only ensure that their interests are adequately represented by participating fully in the complaint referral proceedings, and by placing first-hand and direct evidence before the Tribunal of the effect on their businesses and on stakeholders (such as customers and employees) of the events that have occurred after the lodgement of the complaint referral. They further rely on the prayer for an order that, whilst limiting their participation on issues identified by the Commission in the referral, includes the right to pursue "*consequential relief*" in respect of the levying of access fees at Park Station.

¹³ .PRASA's AA to Eagle [5], PRASA's AA to Eldo [4].

- [27] The Applicants refer to the occasions on which they sought guidance from the Commission without response, and to the fact that the Commission stated that it would not be pursuing the steps outlined in its March 2020 Letter. They argue that this demonstrates that the Commission will not adequately represent their interests.
- [28] The Applicants also say that the Commission cannot adequately represent their interests. Eldo says that events have overtaken the details set out in Mr van Nieuwenhuizen's witness statement. It says that Mr Isshaad Hassan, Eldo's CFO, may be better placed than Mr Ismail (the Commission's witness) to speak to the financial effects of the conduct on the business, especially since the advent of the Covid-19 pandemic. Mr Ismail is Eagle's former CEO, and so his knowledge of the conduct stops at a certain point in time. There are factual matters that are not addressed in his witness statement, including those arising from events that have occurred since the filing of the witness statement. Eagle wishes to call its data consultants or current directors, who will be able to testify to the deleterious effects of the conduct on Eagle's business.
- [29] The Applicants also say that their interests cannot be adequately represented by Intercape as it is a competitor. They say that as they have not received the confidential version of the papers in Intercape's intervention application, they do not fully know what case Intercape has made to the Tribunal.
- [30] The Applicants say that they laboured under the misapprehension, during 2020 and 2021, that the cessation of threats from PRASA during the harshest period of the Covid-19 pandemic indicated a change in approach from PRASA, which took into account the gravity of the charges levelled against them by the Commission. However, now that PRASA has resumed its stance, they need to take steps to vindicate their rights. They say that not permitting intervention would have the effect of prejudicing two of the original complainants in the matter.
- [31] PRASA contends that the Tribunal must refuse an application for intervention if the interests of a prospective intervenor are not within the scope of the matter

or are already represented by another participant in the proceeding. The Tribunal must ensure the non-duplication of the case. The law requires parties in the first instance to assist the Commission, as the preferred prosecutor, and not to attempt to supplant it.

[32] PRASA points out that the Applicants do not assert that the relief formulated by the Commission is inadequate or incorrect. Nor do they say that they rely on a different cause of action. The Commission's case covers all the issues and theories of harm identified by the would-be Intervenors, namely (i) the importance of Park Station, (ii) the excessive nature of the bus access fees, (iii) impact of the bus access fees on long-distance bus operators and the industry as a whole, (iv) the payment plans, and (v) alleged favourable treatment of Autopax. Neither of the Applicants contends in its application that some aspect of its complaints was not captured in the Commission's complaint referral. Nor do they say that the existing witness statements are incorrect in any respect, or that they do not reflect the Applicants' complaints.

[33] The assertion that the Applicants may seek different relief was not raised in the notice of motion or founding affidavit. It was only raised in the Applicants' heads of argument. This is impermissible. In any event, the relief which the Applicants will seek is not described, and nor do they explain how that relief will differ from the relief sought by the Commission in the Referral. While the Applicants point to the potential to demonstrate effects on their businesses and their unique commercial interests, this is not sufficient to warrant intervention. If the existence of a commercial interest was sufficient to justify intervention, then every bus operator would be entitled to be admitted as an intervenor. The real purpose of these intervention applications is that the applicants wish to present additional evidence which is not already contained in the witness statements that have been filed. That is not a basis for intervention.

[34] PRASA argues that the issue of the payment plans is covered by the Referral, and the witness statements will cover these issues. The Applicants treat the issue of the pre-payment systems as both new and separate from the Referral, in that the Applicants disclose that they lodged a separate complaint with the

Commission about the pre-payment system, while simultaneously maintaining that the pre-payment system amounts to a continuation of PRASA's excessive pricing conduct.

[35] The pre-payment system did not exist at the time when the Applicants filed their complaints with the Commission. It does not form the basis of the complaints submitted by the Applicants to the Commission, and neither does it form part of the complaint referral. The Commission has stated that it is still investigating the pre-payment system complaint. There is no reason to believe that if that complaint has apparent merit, the Commission will not raise it.¹⁴

[36] As to the adequacy of the factual witnesses to be called, no evidence is provided that the Commission has refused or will refuse the Applicants the opportunity to supplement the witness statements. PRASA has stated that it will not object to the filing of further witness statements by the Commission. PRASA further argues that the Commission has decided to utilise witnesses who have intimate knowledge of the businesses of both of the applicants, and has filed detailed witness statements by them. In relation to Eldo, Mr Van Nieuwenhuizen's alleged inadequacy is not explained, beyond that another witness would now be needed to address more recent events. There is no basis for any conclusion that to the extent that this is necessary, the Commission will not call a further witness in that regard. To the contrary, it will likely need to do so in order to pursue the order it seeks in respect of continuing conduct.¹⁵ In relation to Eagle, the fact that Mr Ismail is an ex-employee has no relevance to the question of adequate representation. Mr Ismail was no ordinary employee, he was Eagle's CEO. PRASA states that it was Eagle that selected Mr Ismail to provide evidence relevant to its interests. His witness statement was provided after his resignation.

[37] PRASA contends that the fact that Intercape is a competitor does not lead to the conclusion that it is not able to adequately represent the Applicants'

¹⁴ PRASA's AA to Eagle [16], PRASA's AA to Eldo [14] and [21].

¹⁵ See para [40] below.

interests.¹⁶ Intercape and the Applicants wish to deal with essentially the same matter, from a similar perspective. In *Barnes Fencing Pty Ltd*¹⁷ the Tribunal explained, in the context of intervention applications, that it seeks to “*minimise duplication between co-prosecutors*” so as to “*avoid prolonging proceedings and hardship for respondents*”.

Applicable Law and Analysis

- [38] Section 53(1)(a)(ii)(bb) of the Act provides that the complainant may participate in a hearing if, in the opinion of the presiding member of the Tribunal, the complainant's interest is not adequately represented by another participant, and then only to the extent required for the complainant's interest to be adequately represented.
- [39] A complainant which applies for leave to intervene on this ground must, in its founding papers, detail the unique contribution that it is able to make.¹⁸ Inference or speculation will not suffice.
- [40] The Referral refers to conduct that is alleged to continue beyond the date of referral. The Commission's notice of motion seeks a declaration covering a period “*during December 2013 to date, inclusive of the period in which the conduct subsists subsequent to the referral of the complaint to the Tribunal*”. This means that the Commission will need to introduce relevant facts from the period after its referral. There is nothing before us to suggest that it will not do so.
- [41] The Applicants' complaints are annexures to the Referral, and are directly incorporated in the Referral. During the hearing of the application for leave to file supplementary affidavits, counsel for the Applicants was asked where, in the founding papers, the effect of the fees on the Applicants was pleaded.

¹⁶ PRASA's AA to Eagle [24] to [27], PRASA's AA to Eldo [44].

¹⁷ *Barnes* [2008] 1 CPLR 17 (CT).

¹⁸ *Community Healthcare* (Tribunal) para 56.

Counsel for the Applicants pointed to the annexures attached to the Referral, and further documents that are already part of the Commission's referred case.¹⁹ The contribution that the Applicants allege to be additional to the Commission's case is thus already directly incorporated into the Commission's case.

[42] In *Comair* the Tribunal stated that “a textual analysis of s53(1)(a) contemplates a situation where the Commission may not refer a complaint to the Tribunal in identical terms to that of the complaint. It is precisely in anticipation of such differences that s53(1)(ii)(aa) and (bb) provide for a complainant to seek intervention so that its interests may be adequately represented”.²⁰

[43] This raises the core question: What exactly are the Applicants' interests that are different, and are not already represented?

[44] PRASA's demands for payment plans with the intercity bus operators, as an alleged continuation of the anti-competitive conduct, appears to be part of the Commission's case. Mr Van Nieuwenhuizen's witness statement sets out the facts with regard to the requirement of payment plans, and canvasses allegations of PRASA's conduct in trying to enforce payment under these plans.²¹

[45] The issue of the pre-payment system is already before the Commission. During the hearing the Commission stated that it is still investigating whether this conduct amounts to a subsistence of the conduct underlying the Referral.²² We must give the Commission the opportunity to complete its investigation of the pre-payment system, and to take the actions it deems fit after it has completed its investigation into this alleged conduct.

¹⁹ Transcript p25-7.

²⁰ *Comair Limited and Competition Commission South African Airways (Pty) Ltd (83/CR/Oct04) [2005] ZACT 20 (6 April 2005) para 28.*

²¹ Mr Van Nieuwenhuizen witness statement paras 43, 56, 61 and 64 as quoted in PRASA's HoA para 80.

²² Transcript p80 line 21-p82 line 20, p84 line 21-p85 line 16.

- [46] In its notice of motion, the Commission seeks a declaration in relation to conduct both prior to referral and after referral. We cannot speculate what this will be, but the Commission will inevitably have to rely on the evidence of market participants in this regard. What we do know is that it is likely that the evidence of these two market participants, Eagle and Eldo, will be relied on. This is so because the Commission intends to place the evidence of their current and erstwhile employees before the Tribunal.
- [47] The Applicants struggled to articulate precisely what issues they wish to raise which one can reasonably anticipate will not already be before the Commission. During the debate at the hearing, it appeared that the Applicants have two main issues that they wish to advance: (i) the financial harm of the conduct to their businesses specifically,²³ and (ii) the leading of witnesses, cross examination and the testing of versions in relation to conduct that took place after referral.²⁴ They argued that this will assist the Tribunal to understand market participants' specific nuanced understanding of the market, and the effects of the anticompetitive conduct on the market and on consumers.²⁵
- [48] When specifically asked what evidence there is that this will not be led by the Commission itself, counsel conceded that there was no evidence that this will not be done.²⁶ Rather it was contended that the Applicants "*are best placed through the assistance of their own legal representatives to adduce their evidence*".²⁷ The Commission, during the hearing, expressed its willingness to supplement witness statements where this is called for.²⁸
- [49] The Applicants referred to case-law indicating that a generous approach is to be taken to intervention applications.²⁹ This however does not mean that

²³ Transcript p45 lines 19-22, p48 lines 17-21, p50 lines 3-7, p57 lines 1-13.

²⁴ Transcript p51 line19- p52 line3, p57 line17-20, p62 lines 7-11.

²⁵ Transcript p57 line 20-p58 line 3, p58 line 19-p59 line 15.

²⁶ Transcript p61 lines 9-17.

²⁷ Transcript p62 lines 2-3.

²⁸ Transcript p83 lines 18-21, p84 lines 13-20.

²⁹ Competition Commission and others v American Natural Soda Ash Corp and others 49/CR/Apr00 and 87/CR/Sep00, decision of 30 November 2001 [reported as Competition Commission and others v

intervention is simply for the asking, or that the requirements of the Act can be ignored or overlooked. The case-law reflects the fact that under the Act, the Commission is the preferred prosecutor, and represents both the public interest and the particular interests of complainants.³⁰ This was correctly conceded by counsel for the Applicants.³¹

[50] The Applicants advance the same case as in the Commission's Referral on how the conduct played out, and the same theories of harm. In *Barnes*,³² the would-be intervenors had a stronger case than the present Applicants, in that they relied on a different section of the Act. Yet in that case the Tribunal held:

*"However, it does not follow that a complainant would always be allowed to intervene in the Commission's 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. Complainants should be assisting the Commission in prosecuting its case not attempting to usurp its function."*³³

[51] To repeat: In their heads of argument, the Applicants stated that they would seek different relief, but did not identify what that different relief would be. They

American Natural Soda Ash Corp CHC Global (Pty) Ltd and others; American Natural Soda Ash Corp CHC Global(Pty) Ltd v Botswana Ash (Pty) Ltd and another [2005] 1 CPLR 121 (CT) at paras 153-154

³⁰ Glaxo Wellcome (Pty) Ltd and Others v National Association of Pharmaceutical Wholesalers and Others (15/CAC/Feb02) [2002] ZACAC 3 (21 October 2002) para 27.

³¹ Transcript p49 lines 16-18.

³² Barnes Fencing Pty Ltd and another v Iscor Ltd (Mittal SA) and others; The Competition Commission v Iscor Ltd (Mittal SA) and others [2008] 1 CPLR 17 (CT).

³³ Ibid para 34.

did not assert that the relief sought by the Commission is either inadequate or inappropriate.

[52] In summary, for the reasons set out above, we find that the Applicants have not discharged the onus of showing that their interests are not adequately represented by another participant.

[53] For all of these reasons, we dismiss both applications for intervention. It is therefore unnecessary to decide PRASA's applications for leave to file further supplementary affidavits.

ORDER

Having heard counsel for the parties, the Competition Tribunal makes the following order:

- [1] The application by Eagle Liner Transport (Pty) Ltd T/A Eagle Liner & Intercity Xpress under case number CR152Feb20/INT145Nov22 to intervene in the Commission's complaint referral proceedings in case number CR152Feb20 is dismissed.
- [2] The application by David Bus Service (Pty) Ltd T/A Eldo Coaches under case number CR152Feb20/INT146Nov22 to intervene in the Commission's complaint referral proceedings in case number CR152Feb20 is dismissed.
- [3] No order is made as to costs in the intervention applications CR152Feb20/INT145Nov22 and CR152Feb20/INT146Nov22.
- [4] In the light of the dismissal of the applications for intervention, there is no need to decide the applications by Passenger Rail Agency of South Africa for leave to file a further affidavit under case number CR152Feb20/SUP038Jun23 in respect of application CR152Feb20/INT145Nov22, and for leave to file a further affidavit under case number CR152Feb20/SUP039Jun23 in respect of application CR152Feb20/INT146Nov22.
- [5] No order is made as to costs in applications CR152Feb20/SUP038Jun23 and CR152Feb20/SUP039Jun23.

Adv Geoff Budlender SC

Mr Andreas Wessels and Prof Thando Vilakazi concurring.

22 December 2023

Date

Tribunal case managers: Mpumelelo Tshabalala and Sinethemba Mbeki

For the Applicants: Adv Phumlani Ngcongco assisted by Adv Ziyaad Minty, Adv Elizabeth Chabalala and Adv Lebo Mokwena instructed by Cuzen Randeree Attorneys

For PRASA: Adv Antony Gotz SC assisted by Adv Tsakane Marolen, Adv Ammara Cachalia and Adv Lucelle Buchler instructed by Mkhabela Huntley Attorneys Inc.

For the Commission: Thabo Khumalo