COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: CRP148Dec23

In the consolidated exceptions of:[1]

National Health Laboratory Services	**First Excipient**
and	
Afrocentric Health (RF) Proprietary Limited	**Second Excipient**
and	
Glenmore Capital (Pty) Ltd South Africa	**First Respondent**
and	
The Department of Health	**Third Respondent**

In re* the Complaint Referral between[2]*:

Glenmore Capital (Pty) Ltd South Africa	**Applicant**
and	
National Health Laboratory Services	**First Respondent**
The Department of Health	**Second Respondent**
Afrocentric	**Third Respondent**

[1] Case Numbers: CRP148Dec23/EXC170Feb25 and CRP148Dec23/EXC175Feb25
[2] Case Number: CRP148Dec23

Panel	:	G Budlender (Presiding Member)
	:	A Ndoni (Tribunal Member)
	:	I Valodia (Tribunal Member)
Heard on	:	9 June 2025
Order issued on	:	29 July 2025
Reasons issued on	:	29 July 2025

REASONS FOR DECISION

INTRODUCTION

[1] This matter concerns two exceptions filed by the National Health Laboratory Service (NHLS) and AfroCentric Health (RF) (Pty) Ltd (AfroCentric) in response to a self-referral complaint lodged by Glenmore Capital (Pty) Ltd (Glenmore). Glenmore's complaint alleges anti-competitive conduct relating to the testing and market access of its COVID-19 rapid antigen test kits (COVID-19 test kits), and seeks damages of R1,950,000,960 plus interest.

[2] The NHLS and AfroCentric have excepted to the complaint on a variety of grounds. We have decided to uphold the exceptions and dismiss Glenmore's complaint referral. These are the reasons for our decision.

BACKGROUND AND PROCEDURAL HISTORY

[3] This matter arises from events dating back to 22 February 2021, when Glenmore, at the request of the South African Health Products Regulatory Authority (SAPHRA), supplied COVID-19 test kits sourced from CTK Biotech Inc.[3] to the NHLS.

[4] On 26 April 2021, the NHLS and SAHPRA issued a non-recommendation for Glenmore's COVID-19 test kits. This effectively excluded its CTK-supplied COVID-19 test kits from the public and private sectors. Glenmore contends that this exclusion was irrational and intended to block both from the market. Glenmore's attempts to reverse the decision failed. It later, in September 2021,

[3] A global manufacturer and supplier of diagnostic test kits, including COVID-19 test kits.

entered the market with the Strong Step COVID-19 rapid antigen tests through a joint venture with VCareMed.

[5] Glenmore remained aggrieved by the decision not to recommend its COVID-19 test kits, as this effectively excluded their use in both the public and private sectors for an extended period. Although Glenmore was eventually able to supply COVID-19 test kits, it continued to be aggrieved because of the consequences of its initial exclusion.

[6] Glenmore lodged a complaint with the Competition Commission (Commission) on 30 August 2022, alleging that NHLS and AfroCentric had engaged in exclusionary conduct that impeded its access to the market for COVID-19 test kits. The Commission investigated the matter. It issued a Notice of Non-Referral on 3 November 2023, having concluded that Glenmore's failure to gain market acceptance was due to genuine commercial factors, including the timing of regulatory approval, and the low market demand as a result of the subsiding of the COVID-19 pandemic.

[7] Dissatisfied with the Commission’s decision, Glenmore referred the matter to this Tribunal. Upon receipt of the complaint, NHLS and AfroCentric raised various concerns about the nature of Glenmore’s case. Following exchanges between the parties, a pre-hearing was held on 12 December 2024, at which Glenmore was granted an opportunity to amend or supplement its founding affidavit. It amended its papers, but the Respondents argued that the amended papers still failed to disclose a valid cause of action. They then both filed exceptions. They submit that Glenmore was given multiple opportunities to clarify its case but continued to file vague and defective pleadings.

Legal Principles for Exceptions

[8] Section 51(1) of the Act permits a complainant, where the Commission issues a Notice of Non-Referral, to refer the complaint to the Tribunal. The Tribunal must, in terms of section 52(2)(a) of the Act, conduct its hearings in accordance with

the principles of natural justice. A fundamental aspect of this requirement is that a respondent must be able to understand and respond to the case it is required to meet. A legal principle underlying an exception is that a respondent must be adequately informed of the case against it.

[9] This principle is supported by Tribunal Rule 15(2) (Rule 15(2)). Rule 15(2) requires that a complaint referral must be supported by an affidavit which must contain: (i) a concise statement of the grounds of the complaint and (ii) the material facts or points of law relevant to, and relied upon, in support of the complaint.

First Exception: Lack of a Cause of Action

Submissions by NHLS and AfroCentric

[10] The core of NHLS's exception is that Glenmore's complaint does not disclose a valid cause of action under the Act. NHLS contends that the allegations focus mainly on its testing of Glenmore's COVID-19 test kits and allegedly inappropriate procedures, which led to the product not being approved and excluded from the market. However, Glenmore fails to link this alleged conduct to any contravention of the Act.

[11] In particular, Glenmore fails to link the alleged conduct to any specific contraventions under sections 8 (abuse of dominance) or 9 (price discrimination) of the Act. The complaint further does not include a proper definition of the relevant market or demonstrate that NHLS or AfroCentric is dominant in any such market, both of which are threshold requirements for claims under these sections of the Act. It also lacks allegations of anti-competitive effects or an explanation of how the conduct complained of amounts to any of the specific acts prohibited under sections 8 or 9 of the Act. While Glenmore's heads of argument attempted to narrow the complaint, they did not cure these deficiencies or establish a clear legal foundation for the claim.

[12] NHLS explains that its role is primarily a statutory function of evaluating diagnostic tests. Allegedly poor or negligent performance of this statutory function does not amount to an exercise of market power or abuse of dominance under the Act.

[13] Glenmore alleges that NHLS refused to procure its COVID-19 test kits, despite Glenmore having met regulatory requirements and having offered competitive pricing. This is described as a “refusal to deal” in paragraph 5.1 of the complaint, but it is not linked to any specific provision of the Act.

[14] NHLS submits that if the allegation relates to section 8(1)(d)(i) of the Act, Glenmore has to show that NHLS is its competitor, and that NHLS induced or required a supplier or customer not to deal with it, none of which is alleged. In fact, NHLS is a statutory body that provides laboratory services, and is not Glenmore’s competitor.

[15] Alternatively, if the complaint is intended to fall under section 8(4)(b) of the Act, NHLS contends that Glenmore does not allege that NHLS operates in a designated sector or that the refusal was directed at a qualifying small or medium firm. Rather, the true nature of the complaint appears to concern NHLS’s alleged failure to properly evaluate Glenmore’s tests, which does not fall within the scope of either section 8(1)(d)(i) or 8(4)(b) of the Act.

[16] In essence, Glenmore’s grievance appears to be that NHLS improperly evaluated or failed to approve its COVID-19 test kits, thereby denying it access to the market. NHLS performs a statutory function under the National Health Laboratory Service Act 27 of 2000, which requires it to provide laboratory services to the public sector and to the private sector on request. An alleged failure to perform its functions properly, without more, cannot constitute a contravention under the Act.

[17] Glenmore’s other complaints, such as claims of NHLS favouring large multinationals, conflicts of interest, public procurement concerns, and general

unfairness, may raise public law issues, but they do not give rise to prohibited conduct under section 8 of the Act. There are no allegations of predatory pricing or other conduct falling within section 8(d)(iv) of the Act, and the claims under section 8(c) of the Act are not supported by factual allegations of dominance, exclusionary conduct, and anti-competitive effects.

[18] Glenmore also relies on Section 7 of the Act, but that provision does not prohibit conduct; it merely sets out how to assess whether a firm is dominant.

[19] Several of the sections relied on by Glenmore do not exist.

Submissions by Glenmore

[20] Glenmore contends that NHLS, as the statutory evaluator and sole supplier for rapid diagnostic testing in the public sector, holds a dominant position, and that its alleged negligent or improper testing of Glenmore's product led to exclusion from the market.

[21] During the hearing, and for the first time, Glenmore alleged that exclusionary conduct emanated from the intercompany agreements within the AfroCentric Group, which allegedly cornered the market, including with medical aids, further excluding Glenmore from the private sector market.

[22] Glenmore claims that the improper conduct and exclusion warrant declarations that such agreements are void, and requests market access as a remedy.

[23] During the hearing, after some back and forth, Glenmore's counsel, Mr Gordon, finally clarified the substance of their complaint:[4]

***CHAIRPERSON**: If NHLS didn't do its job properly, what's it got to do with the Competition Act?*

***MR GORDON**: So, it had the effect of being exclusionary from the market for tests. In other words, it excluded the CTK, it excluded Glenmore from that market because of the way in which*

[4] Page 49 of the Transcript

the testing was conducted and not approved. That was – that's where the Competition Act comes in, it was an exclusionary act. That's what we say in regards to NHLS. That essentially, in a nutshell, that's what our case is.

[24] Glenmore alleges that MMed Distribution (Pty) Ltd (MMed), once a subsidiary of the Afrocentric Group[5]. controlled the distribution of rapid COVID-19 tests in 2020/2021, and appointed other suppliers while excluding Glenmore, an exclusion it claimed amounts to an abuse of dominance. Moreover, AfroCentric administers for large medical aids such as GEMS, Polmed, Medihelp and others. These medical aids could not approve the use of COVID-19 test kits without prior approval from both AfroCentric and MMed, who were responsible for authorising the supply of such kits to their members.

[25] In response, Professor Valodia asked how MMed could have been expected to request the supply of a product that had not yet been approved. Mr Gordon, Glenmore's counsel, replied that the reason the product was not approved was the NHLS's conduct, which lies at the heart of Glenmore's complaint. He concluded, "*That's why we are complaining that we were excluded by both parties. That's essentially the complaint*."[6]

Analysis by Tribunal

[26] The Tribunal upholds the first exception on the basis that Glenmore's complaint fails to disclose a cause of action under the Act. The central grievance concerns NHLS's alleged failure to properly evaluate and approve Glenmore's COVID-19 test kits. NHLS performs this role pursuant to a statutory mandate under the National Health Laboratory Service Act 27 of 2000. As held in *Buchanan v Health Professions Council of South Africa,*[7] a statutory restriction, no matter its effect on competition, is not a contravention of the Act unless it arises from conduct by firms. Glenmore's allegations relate to NHLS's statutory obligations and not to the exercise of market power or conduct prohibited by the Act.

[5] On 1 June 2023, MMed was sold to Bophelo Group
[6] Page 65 of the transcript
[7] Case No: [2015] 1 CPLR 37 / [2021] ZAGPPHC 7

[27] While the Tribunal applies a flexible approach to exceptions, they serve an important purpose in helping to identify and remove cases that should not proceed before the Tribunal. In this matter, Glenmore fails to link NHLS and Afrocentric conduct to any specific contraventions under sections 8 or 9 of the Act. The complaint lacks a proper definition of the relevant market, fails to establish dominance on the part of NHLS or AfroCentric, and does not allege any anti-competitive effects. The "refusal to deal" claim is not tied to any applicable provision, such as section 8(1)(d)(i) or 8(4)(b) of the Act, nor are any supporting facts pleaded to sustain such a claim.

[28] Additional concerns raised, including procurement practices, alleged favouritism, and conflicts of interest, may be relevant to other legislation, such as section 217 of the Constitution of South Africa 1996, the Promotion of Administrative Justice Act 3 of 2000, the Public Finance Management Act 1 of 1999 and the Preferential Procurement Policy Framework Act 5 of 2000, but they do not constitute prohibited conduct under the Act.

[29] As a result, the complaint lacks the necessary legal and factual foundation, and this exception must be upheld.

Second Exception: Improper citation of Entity

Submission by AfroCentric

[30] Afrocentric contends that despite repeated requests, the complaint (as supplemented) fails to identify the respondent. The founding affidavit cites "AfroCentric" without specifying any legal entity. In its heads of argument, Glenmore alleges that AfroCentric Investment Corporation is the party under scrutiny, but it is not cited.

[31] The improper citation of parties and the shifting focus between AfroCentric, MMed, Activo Health and other entities creates confusion and prejudice to the respondents, who are unable to respond meaningfully to an unclear case.

Glenmore initially identified MMed as the relevant firm, not AfroCentric. In its heads of argument, it complains about a firm called Activo Health.

[32] AfroCentric submits that the Tribunal should not permit the joinder or substitution of parties through heads of argument, nor allow the piercing of the corporate veil in the absence of any allegations of abuse or fraud. It points out that Glenmore had multiple opportunities to cure these defects, including through its supplementary and answering affidavits, but failed to do so. In these circumstances, it would be unfair to expect the respondents to answer a case where they do not know which entity is accused of contravening the Act.

Submission by Glenmore

[33] Glenmore submits that the AfroCentric Group is cited as a whole in the founding papers, and that the reference to AfroCentric Investment Corporation in the heads of argument is an attempt to clarify the parties involved, not to join new parties.

[34] Glenmore seeks a further opportunity to amend and clarify the identity of respondents and the relevant market, given the complex corporate structure and the fact that pleadings are by affidavit rather than traditional pleadings, making amendment more challenging.

Analysis by Tribunal

[35] The Tribunal upholds the second exception on the basis that Glenmore has failed to properly and consistently identify the legal entity which alleged to have contravened the Act, this despite its being afforded multiple opportunities to do so. The shifting and imprecise citation creates confusion and prejudice, as the respondents cannot reasonably be expected to answer to an unclear case.

[36] Glenmore had at least four opportunities, including in its supplementary and answering affidavits, to correct these defects but failed to do so. Even now, it

continues to cite incorrect entities. In the absence of any proper basis for piercing the corporate veil or joining new parties at this stage, the exception must be upheld. A case where the Tribunal has pierced the corporate veil is *Delatoy Investments (Pty) Ltd v Independent Communications Authority of South Africa*[8], where it found that fraudulent misuse of corporate personality justified such an extraordinary remedy. The Tribunal emphasised that the threshold is high.

[37] In *Competition Commission v Shoprite Checkers (Pty) Ltd and Another*[9], it was held that the pleadings must clearly set out: The definition of the relevant market, the specific conduct alleged to contravene the Act, and the connection between the conduct and the alleged lessening or prevention of competition

Third Exception: Lack of Proper Market Definition

Submissions by NHLS and AfroCentric

[38] Both Excipients argue that Glenmore failed to define a relevant market with sufficient particularity or factual basis, which is a critical element of a competition complaint, especially in dominance matters. The pleadings are vague and inconsistent, sometimes referring to the health market broadly, sometimes to antigen tests, and sometimes to unrelated products like medical gloves or vitamins. Without a properly pleaded market, the Tribunal cannot assess dominance or anti-competitive effects.

Submission by Glenmore

[39] Glenmore stated that the market is the rapid antigen diagnostic test market, through reference to emails and correspondence attached to its papers that relate to the testing and procurement of antigen tests. When asked where in the

[8] Case No: CRP 432/20 at para 44
[9] Case No.: 183/CAC/Apr20 CT at para 26 -39

papers, Glenmore states that this is the market in which there's dominance, its counsel replied, "*It's not specifically stated, but it's definitely implied".*[10] Glenmore stated its willingness to clarify this upon amendment.

Analysis by Tribunal

[40] The Tribunal upholds the third exception on the basis that Glenmore failed to plead a clear and coherent relevant market, which is essential for assessing dominance and anti-competitive effects under the Act. The pleadings are vague and inconsistent, shifting between broad references to the health market, antigen tests, and unrelated products like gloves and vitamins, without identifying the relevant product or geographic market.

[41] While Glenmore suggests in its submissions that the market is for rapid antigen diagnostic tests, this is not clearly or consistently set out in the founding or supplementary affidavits. Market definition is a foundational element in competition proceedings and cannot be left to implication or post-hoc clarification. Despite being given opportunities to amend, Glenmore has not rectified this defect, and accordingly, this exception must be upheld.

Fourth Exception: Lack of Jurisdiction and Procedural Issues

Submission by NHLS and AfroCentric

[42] The Tribunal lacks jurisdiction to award damages sought by Glenmore, as damage claims fall under section 65 of the Act and must be dealt with by the civil courts. While Section 58 of the Act outlines the Tribunal's powers, it does not allow for damages awards except when included in a consent order under Section 49D of the Act. The Tribunal may only grant damages as part of a consent agreement, not in contested proceedings.

[10] Page 59 of the transcript

[43] Glenmore's damages claim is vague and embarrassing. Initially, it sought R62 million in respect of the period up to July 2022. It later increased the claim to almost R2 billion without providing any clear basis for this claim. The supplementary affidavit claims R385 million for 2021 alone, despite regulatory approval having only been granted at the end of September 2021. These contradictory and vague claims undermine the calculations made by Glenmore's expert and make it unfair to expect respondents to answer properly.

[44] Further, the Tribunal does not have jurisdiction to adjudicate on some of Glenmore's claims, such as alleged irregular procurement under the Public Finance Management Act, insider trading, or breaches of the Medical Schemes Act, which fall outside competition law and the Act.

Submission by Glenmore

[45] Glenmore maintains that its complaint is *bona fide* and concerns exclusionary conduct and abuse of dominance, which it believes merits a full hearing. Now that it has participated in the hearing and understands the case it must meet and the applicable standard, Glenmore seeks a further opportunity to amend and supplement its papers to clarify its case and address any procedural shortcomings.

Analysis by Tribunal

[46] The Tribunal upholds the fourth exception on the basis that the Tribunal cannot award damages outside the context of consent orders, as contemplated under section 65 of the Act. In addition, elements of the complaint, such as allegations of irregular procurement under the Public Finance Management Act, insider trading, and violations of the Medical Schemes Act, fall outside the scope of competition law and the Tribunal's mandate. These jurisdictional defects are not procedural oversights that can be cured by amendment.

[47] Glenmore's claim fluctuates vastly, rendering it vague and embarrassing. It cannot be remedied by amendment, because the Tribunal does not have the power to make an award of damages, in whatever amount.

The consequence of upholding the exceptions

[48] The Tribunal is mindful of the importance of access to justice and the need to enable the legitimate pursuit of competition complaints. However, the Tribunal must also ensure that its processes are not abused and that only properly pleaded and triable matters proceed. Glenmore's complaint fails to meet the threshold for adjudication under the Act. The Tribunal's role is to adjudicate competition disputes, not to serve as a forum for regulatory complaints or concerns about state procurement processes.

[49] Ultimately, Glenmore's counsel conceded that the pleadings were deficient and stated that Glenmore would need an opportunity to correct this by identifying the relevant entities and establishing dominance.

[50] The Tribunal has cautioned against prolonging proceedings which have little or no prospect of success. In *Alba Gas (Pty) Ltd v Sasol Gas (Pty) Ltd and Others*[11], the Tribunal stated:

> "*The Tribunal has held that public interest cannot be advanced by permitting the protraction of proceedings with little or no possibility of success… The circumstances of this matter do not call out to grant Alba the further opportunity to amend. The proceedings would be unnecessarily prolonged, more than they need to be, thus denying swift justice for both parties. Both parties would suffer prejudice with little to no conceivable change in the outcome of the proceedings*."

[51] Similarly, in *Invensys PLC and Others v Protea Technology (Pty) Ltd and Others*[12], the Tribunal held that a supplementary affidavit which fails to clarify or render coherent the complainant's case does not cure the defects in the

[11] Case No. CRP188Feb16 at para 34
[12] Case No: 31/IR/Apr11 ZACT 97 at para 10 - 26

founding papers. In that matter, the Tribunal found that Protea's case remained unclear on critical issues, including market definition, the existence of dominance, the nature of the alleged exclusion, and the precise contravention under section 4 of the Act. Although Protea argued that it should be granted a further opportunity to clarify its case, the Tribunal held that this was precisely what it had been required to do in its supplementary affidavit. On that basis, the Tribunal upheld the exception and dismissed the complaint.

[52] This applies equally here: Glenmore had ample opportunity to address the defects in its case, and failed to do so. When pressed on the remedy Glenmore sought, Mr Gordon was not able to clearly articulate the basis for relief. He stated that Glenmore sought a declaratory order that certain intercompany agreements were void due to exclusionary effects, referencing section 58(1)(a)(vi) of the Act. However, he could not identify which were the parties to those agreements or how the requirements for such a declaration were met. Despite having repeated opportunities, Glenmore was unable to clarify the legal basis or facts supporting its claims. This strongly suggests that even if afforded another opportunity, Glenmore would still fail to present a clear and coherent case.

[53] Glenmore submitted that it should be granted another opportunity to amend its case, claiming that some issues only became clear after it had received the exception applications and during argument. However, it has already had multiple opportunities to clarify its case, and still fails to identify the relevant markets, the respondents, or the legal basis for the relief sought.

[54] Under the circumstances, the Tribunal finds that exceptions should be upheld and the claim should be dismissed.

Costs

[55] The Respondents requested a costs order in terms of Rule 58 of the Tribunal Rules, which permits an award of costs where a complaint is dismissed under Part 4 of the Act. They argued that dismissal of the referral constitutes a finding

against the complainant, entitling them to costs. Glenmore opposed the request, submitting that the complaint was brought in good faith to protect its interests, and that a costs order would be inappropriate despite the Tribunal upholding the exceptions.

[56] The Tribunal has decided not to award costs. As held *in Nu-Africa Duty Free Shops CC v South African Airways (Pty) Ltd*,[13] the Tribunal has generally adopted a cautious approach to awarding costs, particularly where the complainant is a small entity acting in good faith. Furthermore, while Rule 58 of the Tribunal Rules permits a costs order in complaint referrals, it is more commonly applied to final determinations rather than interlocutory applications.

[57] In light of these considerations, and given that Glenmore brought the matter in bona fide (if misguided) pursuit of market access, we consider it just and equitable not to award costs in this instance.

Signed by:Geoff Budlender
Signed at:2025-07-29 15:10:46 +02:00
Reason:Witnessing Geoff Budlender

Geoff Budlender

29 July 2025

Geoff Budlender SC **Date**

Ms Andiswa Ndoni and Prof Imraan Valodia concur.

Tribunal Case Manager:	Moleboheng Mhlati
For the First Applicant:	Adv Ngwako Maenetje SC instructed by Andries Le Grange Cliff Dekker Hofmeyr
For the Second Applicant	Adv Shannon Quinn instructed by Mark Griffiths of Norton Rose Fulbright
For the Respondent	Clifford Gordon of Gordon Attorneys Inc.

[13] Case No: 18/CR/Mar01