




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG HIGH COURT DIVISION, PRETORIA**

Case no: 75995/17

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
25.10.19	
DATE	SIGNATURE

In the matter between:

**THE COMPETITION COMMISSION
OF SOUTH AFRICA**

Applicant

and

GROUP FIVE CONSTRUCTION LTD

Respondent

In re:

GROUP FIVE CONSTRUCTION LTD

Applicant

and

J U D G M E N T

MNGQIBISA-THUSI, J

- [1] The applicant, the Competition Commission of South Africa ("the Commission") seeks, in terms of uniform rule 30, an order declaring and setting aside the review application instituted by the respondent, Group Five Construction Ltd ("Group Five"), as an irregular step.

Factual background

- [2] In contemplation of and in preparation for the 2010 FIFA soccer world cup competition, the local organising committee issued tenders for the building of new stadia and the refurbishment of existing ones. Group Five was one of the construction companies which had submitted a bid for tender. On 10 February 2009, the commission initiated a complaint in terms of s 49B against Group Five and other companies within the construction sector. As a result of a preliminary investigation by the Commission, on 12 November 2014, the Commission referred a complaint to the Competition Tribunal ("the Tribunal") in which it alleged that Group Five together with other companies were involved in

collusive dealings in their tendering bids, as contemplated in s 4(1)(b)¹ of Chapter 2 of the Competition Act 89 of 1998 ("the Act").

- [3] On 7 November 2017 Group Five instituted an application in which it sought the review and setting aside of the complaint referral on the ground, *inter alia*, that it is unlawful and invalid, and other ancillary relief. In its founding affidavit to the review application, Group Five alleges that the complaint referral is unlawful and invalid in that the commission had conducted an unlawful investigation before initiating the complaint and had granted Group Five immunity in terms of the Commission's Corporate Leniency Policy which it now reneges.
- [4] Without filing its answering affidavit, on 8 December 2017, the Commission served Group Five with a notice in terms of Rule 30 in which it asserted that Group Five's review application was an irregular step and requested Group Five to remove the cause of the complaint by withdrawing its application within 10 days of the notice, failing which it would apply to court for its withdrawal.
- [5] On 23 January 2018 the Commission instituted these proceedings. The Commission seeks an order declaring and setting aside Group Five's review application as an irregular step on grounds as set out in its Rule 30 notice, that:

¹ Section 4(1) provides that "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 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.

- 5.1 this court does not have jurisdiction to adjudicate on the matter as the dispute between the parties falls within the exclusive jurisdiction of the Tribunal (jurisdiction); and
- 5.2 there is currently litigation pending before the Tribunal between the same parties on the same cause of action and in respect of the same subject matter (the *lis pendens* defence).

[6] On 2 May 2018 Group Five filed a notice opposing the Commission's application on the following grounds:

- 6.1 that the Commission's Rule 30 notice and application are irregular as the legal issues as set out in its Rule 30 notice ought to have been raised by way of a special plea;
- 6.2 that this court does have jurisdiction to entertain its review application; and
- 6.3 that there is no basis for the *lis alibi pendens* defence as the review application was not instituted in the Tribunal.

[7] Group Five also raises a preliminary point, namely, that the Commission has not complied with the timeframes prescribed in Rule 30.

[8] Rule 30 reads as follows:

- "(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.
- (2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if-

- (a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;
 - (b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;
 - (c) the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of subrule 2.
- (3) If at the hearing of such application, the court is of opinion that the proceedings or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.
- (4) Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order”.

[9] In *SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO 1981 (4) SA 329 (O)* the court stated at 333G-H that:

“I have no doubt that Rule 30(1) was intended as a procedure whereby a hindrance to the future conducting of the litigation, whether it is created by a non-observance of what the Rules of Court intended or otherwise, is removed”.

Preliminary point

[10] It was submitted on behalf of Group Five that the service of the Rule 30 notice and this application was not in compliance with the Uniform Rules of Court and that the Commission has failed to apply for condonation. Mr Gotz, counsel for Group Five argued on behalf of Group Five that since Group Five’s application was served on the Commission, the period of 10 days within which to deliver a notice of an alleged irregular step to the other party in terms of subrule 30(2)(b) expired on 24 November, 2017, the Commission only served Group Five’s

attorneys with a notice on 8 December 2017. Further that this application was also served late in that instead of the Commission serving Group Five with the current application by 17 January 2018 in terms of subrule 30(2)(c), it only served Group Five's attorneys on 24 January, 2018.

[11] On behalf of the Commission it was submitted that the issue raised by Group Five about its lateness in instituting this application should be dismissed as the complaint should have been raised by notice.

[12] Where there is non-compliance with the rules of court, rule 30A provides that:

- "(1) Where a party fails to comply with these rules of within the requests made on notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such a rule, notice or request complied with or that the claim or defence is struck out.
- (2) Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet".

[13] In its notice to oppose the Rule 30 application, Group Five did not raise the issue of the non-compliance with the rules by the Commission and its failure to apply for condonation. This issue was raised for the first time in its heads of argument. I am of the view that without giving notice to the Commission about its objection to the non-compliance with the rules, it is not open to Group Five to raise its objection at the start of these proceedings. As a result the objection ought to fail.

[14] The issues to be determined are:

- 14.1 whether the Rule 30 procedure adopted by the Commission is appropriate for raising its objection to Group Five's review application;
- 14.2 whether the High Court has jurisdiction to entertain Group Five's review application.

Appropriateness of the Rule 30 procedure

- [15] On the issue of the suitability of the Rule 30 procedure with regard to raising objections of lack of jurisdiction and the defence of *lis alibi pendens*, counsel for the Commission submitted that the rule 30 procedure can be used as long as there is a cause in that the wording of the rule was wide enough to include the issue of jurisdiction. Further, counsel submitted that contrary to the view of Group Five, the *SA Metropolitan* matter (above) cannot be interpreted to mean that Rule 30 finds application only in cases where there has been non-compliance with the Rules of Court. Counsel argued that had the drafters of the Rules sought to limit the application of Rule 30, they would have done so expressly.
- [16] Relying on the *SA Metropolitan* case (above) Counsel for Group Five submitted that since jurisdiction was a substantive issue and did not pertain to form, the Commissioner ought to have raised its objection to the court's jurisdiction by way of a special plea in its answering affidavit. Counsel submitted that Rule 30 could only be used where there was non-compliance with the Rules. Counsel further submitted that the Rule 30 procedure was intended as a procedure whereby a hindrance to the future conduct of the litigation, is removed. Furthermore that jurisdiction as a substantive issue is not regulated by the Rules of Court but by the Superior Courts Act (including other legislation) and

the common law. In *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) at [29] the court held that challenges to the jurisdiction of the court are raised either by an exception or by a special plea depending upon the existence of a particular fact.

[17] In dealing with the purpose of Rule 30, the court in *Cochrane v The City of Johannesburg* 2011 (1) SA 553 (GSJ), a decision relied upon by Group Five, held at para [31] that:

“The “irregular step” mentioned in the rule related only to an irregular step taken by a party in respect of the Uniform Rules of Court. I am, accordingly, of the view that if Rule 30 was intended to serve as a notice of objection in respect of proceedings other than the Uniform Rules of Court, it will be casting the net far too wide and would lead to abuse. In any event, Rule 30 was never intended to serve as a basis for the objection to procedural irregularities in respect of other legislation. Rule 30, was meant to deal with irregular steps taken by the parties involved in litigation where the irregularity emanated from the use of the Rules of Court”.

[18] In the circumstances, I am of the view that Commission should not have proceeded in terms of Rule 30 with a view of objecting to the High Court's jurisdiction to adjudicate the review application. As suggested by counsel for Group Five, the commission should have filed its answering affidavit to the review application, incorporating a special plea, where it raises its objection to the applicant's jurisdiction and the issue of *lis pendens*.

Jurisdiction

[19] The Commission bases its the issue of lack of jurisdiction on s 62(1)(a) of the Act read with s 169(1)(a)(ii)² of the Constitution. Section 62 of the Act reads in part as follows:

- “(1) The Competition Tribunal and Competition Appeal Court share exclusive jurisdiction in respect of the following matters:
 - (a) Interpretation and application of Chapters 2, 3 and 5, other than-
 - (i) a question or matter referred to in subsection (2); or
 - (ii) a review of the certificate issued by the Minister of Finance in terms of section 18 (2); and
 - (b) the functions referred to in sections 21(1), 27(1), and 37, other than a question or matter referred to in subsection (2).
- (2) In addition to any other jurisdiction granted in this Act to the Competition Appeal Court, the Court has jurisdiction over-
 - (a) the question whether an action taken or proposed to be taken by the Competition Commission or the Competition Tribunal is within their respective jurisdictions in terms of this Act;
 - (b) any constitutional matter arising in terms of this Act; and
 - (c) the question whether a matter falls within the exclusive jurisdiction granted under subsection (1)
- (3) The jurisdiction of the Competition Appeal Court-
 - (a) is final over a matter within its exclusive jurisdiction in terms of subsection (1); and
 - (b) is neither exclusive nor final in respect of a matter within its jurisdiction in terms of subsection (2).
- (4) An appeal from a decision of the Competition Appeal Court in respect of a matter within its jurisdiction in terms of subsection (2) lies to the Supreme Court of Appeal or Constitutional Court, subject to section 63 and their respective rules.
- (5) For greater certainty, the Competition Tribunal and the Competition Appeal Court have no jurisdiction over the assessment of the amount, and awarding, of damages arising out of a prohibited practice”. ”.

² Section 169(1)(a)(ii) of the Constitution provides that: “the High Court of South Africa may decide any constitutional matter, except a matter that is assigned by an Act of Parliament to another court of a status similar to the High Court of South Africa”.

[20] Mr Notshe, counsel for the Commission argued that based on s 62(1)(a), the High Court lacks jurisdiction in respect of the interpretation and application in that the complaint referral relates to a matter which falls within the provisions of Chapter 2 of the Act. Counsel further argued that the decision in *Agri Wire ((Pty) Ltd and another v Commissioner, Competition Commission and others* 2013 (5) SA 484 (SCA), relied upon by Group Five, was distinguishable on the facts in that in the *Agri Wire* matter (above) the court dealt with the provisions of s 27(1) and s 62(2) of the Act and not with s 62(1)(a) which applies to the present case.

[21] On the issue of whether this court has jurisdiction to hear Group Five's review application, Counsel submitted that the review application raises the issue of the validity of the complaint referral which is clearly within the provisions of s 62(2)(a) of the Act. In this regard Counsel referred to the decision in *Agri Wire* (above) where the Supreme Court of appeal held that :

"[17] Whilst there will be no difficulty in recognising an exclusive jurisdiction vested in the Tribunal and Competition Appeal Court if s 27(1)(c) is confined to the situations referred to in paragraph 13, *supra*, it becomes problematic when it is extended to a challenge to the validity of a referral, because that is a question whether the referral is an action within the jurisdiction of the Commission. Unlawful actions are not within its jurisdiction and an unlawful referral would accordingly not be in its jurisdiction. But, whether an act by the Commission is within its jurisdiction is a matter within s 62(2)(a) of the Act is therefore not within the exclusive jurisdiction conferred by s 62(1)(b) of the Act.

[18] Those considerations lead counsel for the Commission to abandon the argument based on s 27(1)(c) in favour of one based on s 62(1)(a) of the Act. However the argument foundered on two points. The first was that the section confers exclusive jurisdiction only in respect of matters arising under Chapters 2, 3 and 5 of the Act. *Agri Wire's* objections were advanced on the basis that

the Commission's powers as set out in Chapter 4 of the Act and, properly construed, those provisions do not permit the Commission to adopt the CLP in its present form. The second was that in any event the challenge was one under s 62(2)(a) of the Act where there is no exclusive jurisdiction".

[22] It is common cause that the High Court lacks the jurisdiction to deal with matters pertaining to the interpretation and application of chapters 2, 3 and 5 of the Act. However, as stated in the *Agri Wire* matter (above) with regard to matters pertaining to section 62(2) of the act, the tribunal does not have exclusive jurisdiction. As correctly pointed out by counsel for Group Five, the Commission seems to be of the view that the High Court lacks jurisdiction because the underlying complaint referral raises issues which fall within the exclusive jurisdiction of the Tribunal. However, as correctly submitted by counsel for Group Five, the review application is challenging the lawfulness and validity of the referral itself³.

[23] I am therefore satisfied that the Commission's objection to the jurisdiction of the High Court has no merit.

[24] With regard to the issue of *lis pendens* it was submitted on behalf of the Commission that the same issue between the same parties was pending before the Tribunal and therefore that this court lacked jurisdiction to hear the review application and that the review application be dismissed. On behalf of Group Five it was submitted that even though the same parties in the matter before the Tribunal are before this court, the issues before the two courts differ. The Tribunal is expected to investigate the allegations made by the Commission

³ See also in this regard *Competition Commission v Computicket* (853/2013) [2014] ZASCA 185 (26 November 2014).

against the alleged unlawful conduct of Group Five in relation to the 2010 soccer World Cup. Whereas this court was to determine the lawfulness of the Commission's initiation of a referral and its withdrawal of the immunity granted to Group Five.

[25] I am in agreement with the submissions made by Counsel for Group Five that the issues dealt with by this court are different to the issue the Tribunal will be dealing with. I am therefore of the view that the Commission's point of lis pendens ought to fail.

[26] I am satisfied that there is no merit in the Rule 30 application.

[27] In the result the following order is made:

"The application is dismissed with costs of two counsels.



NP MNGQIBISA-THUSI
Judge of the High Court

Appearances:

For the Commission: Advocate V Notshe SC with Advocate KK Maputla (instructed by Judin Combrink Inc)

For Group Five: Advocate R Bhana SC with Advocate A Gotz (instructed by Morare Thobejane Inc)