THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE
Case no: 660/2011

In the matter between:

AGRI WIRE (PTY) LTD	First Appellant
AGRI WIRE UPINGTON (PTY) LTD	Second Appellant
and	
THE COMMISSIONER OF THE COMPETITION COMMISSION	First Respondent
MINISTER OF TRADE AND INDUSTRY	Second Respondent
CONSOLIDATED WIRE INDUSTRIES (PTY) LTD	Third Respondent
CAPE GATE (PTY) LTD	Fourth Respondent
ALLENS MESHCO (PTY) LTD	Fifth Respondent
HENDOK (PTY) LTD	Sixth Respondent
WIRE FORCE (PTY) LTD	Seventh Respondent
AGRI WIRE NORTH (PTY) LTD	Eighth Respondent
CAPE WIRE (PTY) LTD	Ninth Respondent
FOREST WIRE (PTY) LTD	Tenth Respondent
INDEPENDENT GALVANISING (PTY) LTD	Eleventh Respondent
ASSOCIATED WIRE INDUSTRIES (PTY) LTD	

t/a MESHRITE Twelfth Respondent

THE COMPETITION TRIBUNAL Thirteenth Respondent

Neutral citation: *Agri Wire (Pty) Ltd v The Competition Commissioner* **[**2012] ZASCA 134 (660/2011)(27 September 2012)

Coram: NUGENT, LEACH, TSHIQI, WALLIS et PILLAY JJA.

Heard: 30 AUGUST 2012

Delivered: 27 SEPTEMBER 2012

Summary: Cartel – reference to Competition Tribunal in terms of s 4(1) of the Competition Act 89 of 1998 – reference arising from evidence obtained by the Competition Commission under its corporate leniency policy – application to set aside reference on the basis that the Competition Act provides no lawful basis for the adoption of the corporate leniency policy – claim that evidence obtained by means of the corporate leniency policy obtained unlawfully – claim that this rendered reference unlawful.

ORDER

On appeal from: North Gauteng High Court (Zondo J sitting as court of first instance):

The appeal is dismissed with costs, such costs to include the costs of two counsel where two counsel were employed.

JUDGMENT

WALLIS and PILLAY JJA (NUGENT, LEACH and TSHIQI JJA concurring)

[1] Cartel conduct, where ostensible competitors collude to set prices, or terms of trade, or divide markets, fix tenders or engage in similar conduct, is one of the most difficult types of anti-competitive behaviour to identify, prove and bring to an end. This is because a successful cartel is conducted secretly and its continued success depends on its members not breaking ranks to disclose their unlawful behaviour to the competition authorities. In a number of jurisdictions, the response of the competition authorities has been to introduce policies that offer either complete or partial leniency to cartel participants, who break ranks and disclose the existence and nature of the cartel, and provide evidence that enables the authorities to pursue and break the cartel, by bringing it before the appropriate tribunal.

[2] The Competition Commission (the Commission), which, in the

form of the Competition Commissioner, is the first respondent in this appeal, has adopted such a policy. This is the Corporate Leniency Policy (CLP) that is in issue in this appeal. The appellants, to whom we shall refer as Agri Wire, challenge the legal basis of the CLP. They contend that evidence obtained by the Commission from the third respondent, Consolidated Wire Industries (Pty) Ltd (CWI), in terms of the policy was unlawfully obtained. They say that this, in turn, tainted the Commission's referral of a complaint of alleged cartel behaviour in the wire and wire related products sector of the South African market to the Competition Tribunal in terms of s 51 of the Competition Act 89 of 1998 (the Act). Agri Wire accordingly sought to review and set aside the referral, together with certain ancillary relief, in proceedings before the North Gauteng High Court, which dismissed the application, but granted leave to appeal to this court.

The referral

[3] CWI is a member of a larger group of companies operating generally in the steel industry. Its parent company was the subject of an investigation by the Commission. A decision was taken at group level to undertake an internal audit aimed at identifying all anti-competitive conduct by the parent company or any other company in the group. Pursuant to this audit CWI indicated that it had been involved in a cartel, and identified the other members as being Agri Wire and the fourth to twelfth respondents, none of which have played any part in this litigation. CWI accordingly approached the Commission under the CLP and disclosed the existence of the alleged cartel and the information it had relating to the operation of the cartel. In consequence of that disclosure the Commission granted it leniency on a conditional basis in terms of the CLP, conducted an investigation and referred the allegations concerning

the cartel to the Competition Tribunal (the Tribunal).

[4] In its referral to the Tribunal, the Commission cited Agri Wire and the fourth to twelfth respondents. It claimed an order declaring that they had contravened s 4(1)*(b)*(i), (ii) and (iii) of the Act; an order directing them to refrain from engaging in the conduct constituting those alleged contraventions and the imposition of an administrative penalty of ten per cent of the annual turnover of each participant in the 2008 financial year. CWI was also cited as a respondent but no relief was sought against it. The Commission explained that this was because it had sought and been granted conditional leniency in terms of what it described as the 'Applicant's corporate leniency policy'. In those circumstances it had been cited 'purely for the interest it may have in these proceedings'.

Agri Wire's complaints

[5] In attacking the grant by the Commission of conditional leniency to CWI, Agri Wire sought an order declaring that the grant was 'not authorised by any law and unlawful'. It also sought an order that the evidence obtained from CWI pursuant to the grant of conditional immunity was unlawfully obtained, and an order declaring that the complaint referral to the Tribunal was unlawful and should be set aside. In the founding affidavit it described the main issue as being:

'… whether or not it was competent for the [Commission] to make promises of conditional immunity to [CWI] to obtain evidence and, if it was not competent for it to do so, whether such evidence is inadmissible in subsequent proceedings.'

The argument was developed on the basis that the Commission is a creature of statute and has only those powers conferred upon it under the Act. It was said that the Act does not permit the Commission to be selective in deciding which participants in a cartel it investigates and

makes the subject of a reference to the Tribunal, nor does it authorise the Commission to grant immunity from a referral and a possible adverse adjudication, including the imposition of an administrative penalty, in consideration for the furnishing of information under the CLP. If it refers a complaint concerning participation in a cartel to the Tribunal, it is obliged, so the argument went, to refer the complaint in respect of all participants and to seek relief against all of them. The most that it can do to ameliorate the position of a 'whistleblower' is to ask the Tribunal to take its co-operation into account in assessing the amount of any administrative penalty, as it is entitled to do under s 59(3)*(f)* of the Act.

The Corporate Leniency Policy (CLP)

[6] It is convenient at this stage, in order to understand the arguments on behalf of Agri Wire, to deal briefly with the contents of the CLP. The policy is embodied in a document that has been published for information in the Government Gazette.[1] It records that it is difficult to detect or prove the existence of a cartel and that the CLP has been developed to encourage participants to break ranks and disclose information that enables the Commission to tackle cartel behaviour. This information is furnished 'in return for immunity from prosecution', the latter being the term used in the policy for a reference to the Tribunal and adjudication on a complaint of cartel activity, in which an administrative penalty is sought. Clause 3.1 says that the CLP outlines the process through which 'the Commission will grant a self-confessing cartel member … immunity for its participation in cartel activity'. That immunity is granted in return for full disclosure and full co-operation in pursuing the other cartel members before the Tribunal. For the avoidance of doubt, clause 4.2 states that immunity refers to immunity from prosecution before the

1 GN 195 *GG* 25963 of 6 February 2004 and GN 628 *GG* 31064 of 23 May 2008.

Tribunal in relation to the alleged cartel that is the subject of the application for immunity.

[7] A conspicuous feature of the CLP is that, wherever it refers to immunity being granted, it identifies the Commission as the party that grants immunity. Thus, in clause 5.3 it says, in regard to cartel activity outside South Africa, that immunity granted by another competition authority would not 'automatically qualify the applicant for immunity by the Commission'. In clause 5.6 it is said that parties to cartels, who 'come clean' after the initial disclosure, do not qualify for immunity but the Commission will explore with them the possibility of them receiving a reduced fine.[2] Clause 6.4 warns those to whom 'the Commission has granted immunity' that a grant of immunity does not prevent third parties from seeking civil or criminal remedies against them. In dealing with the immunity process, clause 9.1 states that at the initial stage 'conditional immunity is given to an applicant … to create a good atmosphere and trust between the applicant and the Commission'. As conditional immunity is granted prior to any reference to the Tribunal, only the Commission can grant conditional immunity. Clause 9.1.1.2 is important. It provides that:

'Conditional immunity therefore precedes total immunity or no immunity. The Commission will give the applicant total immunity after it has completed its investigation and referred the matter to the Tribunal and once a final determination has been made by the Tribunal or the Appeal Court, as the case may be, provided the applicant has met the conditions and requirements set out in the CLP on a continuous basis throughout the proceedings.'

Clause 9.1.1.3 warns that, at any stage until total immunity is granted, the Commission reserves the right to revoke the grant of conditional immunity for lack of co-operation and pursue a prosecution before the

2 This can only be a reference to s 59(3)*(f)* of the Act.

Tribunal. That signals quite clearly that 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. It will only be referred to the Tribunal for the purpose of an adverse determination and the imposition of an administrative penalty if the Commission revokes its conditional immunity.

[8] Quite extraordinarily, in the face of these explicit provisions, both the Commission and CWI sought to argue that under the CLP all that the Commission undertook to do was not to seek relief against CWI in the referral proceedings before the Tribunal. It was submitted that in the end result, after taking account of the Commission's stance, the Tribunal would take the final decision whether to grant relief against CWI. Reference was made to clause 3.3 of the CLP, which reads:

'Immunity in this context means that the Commission would not subject the successful applicant to adjudication before the Tribunal for its involvement in the cartel activity, which is part of the application under consideration. Furthermore the Commission would not propose to have any fines imposed to that successful applicant.'

Although this appears to leave the grant of immunity in the hands of the Commission, we were referred to a footnote explaining (in extremely fine print) that:

'Adjudication means a referral of a contravention of chapter 2 to the Tribunal by the Commission with a view to getting a prescribed fine imposed on the wrongdoer. Prosecution has a similar import to adjudication herein.'

It was argued that this footnote clarified that the Commission was only promising not to seek an adjudication involving the imposition of administrative penalties against the person receiving conditional immunity, but that this did not preclude the Tribunal from imposing such

a penalty.

[9] There is no merit in this argument. It flies in the face of the provisions of the CLP that state expressly that it is the Commission that grants immunity. Nowhere does it suggest that the entitlement to total immunity is dependent on the Tribunal, acting within its own unfettered discretion, not imposing a penalty on the applicant for immunity. The distinction drawn between conditional immunity and total immunity makes no sense if the Tribunal is entitled to ignore the Commission's grant of conditional immunity and impose administrative penalties upon the party to whom such immunity had been granted. On the suggested construction the following absurd situation could arise. Conditional immunity has been granted and the recipient has co-operated fully in the investigation and the Tribunal proceedings, thereby qualifying for total immunity under clause 9.1.1.2. Nonetheless it is compelled to pay administrative penalties imposed by the Tribunal. What meaning is to be given to the concept of total immunity in that situation? It would be small comfort to the recipient to know that it had received total immunity if it had nonetheless been ordered to pay ten per cent of its annual turnover during the years of the cartel's existence as an administrative penalty. We venture to suggest that the CLP would be far less effective, if not entirely useless, if it contained a disclaimer to the effect that the Commission would not seek an order against the party seeking leniency, but that the Tribunal would be free to impose such administrative penalty as the Act permitted against them. Hard-headed businessmen, contemplating baring their souls to the competition authorities, will generally want a more secure undertaking of a tangible benefit, before furnishing the co-operation that the Commission seeks from them.

[10] The case must therefore be approached on the basis of Agri Wire's contention, namely, that the Commission has granted CWI conditional immunity under the CLP and that it is not pursuing CWI before the Tribunal. As explained in the Commissioner's affidavit, CWI has been joined in the light of the Commission's view, on the correctness of which we express no opinion, that such joinder is necessary to preserve the right of third parties to bring civil proceedings against it if they see fit to do so. That argument is based on a construction of ss 65 and 67 of the Act, but it is unnecessary for the purposes of this case to deal with it.

[11] We thus arrive at the central issue in this case, namely, whether the CLP is lawful and whether the Act permits the Commission to refer a complaint to the Tribunal in respect of cartel behaviour, without citing and seeking relief against all the members of the cartel. However, before dealing with that question it is necessary to divert to deal with a challenge raised by both the Commission and CWI to the jurisdiction of the high court, and hence this court on appeal from it, to deal with and determine these issues. That challenge was upheld in the court below but on a basis that ultimately was not pursued in this appeal. It must be dealt with at this stage because any question of jurisdiction is logically anterior to a consideration of the merits.[3]

Jurisdiction

[12] In the Commissioner's affidavit the objection to the jurisdiction of the high court was based on s 27(1)*(c)* of the Act. This section provides that the Competition Tribunal may:

'hear appeals from, or review any decision of, the Competition Commission that may in terms of *this Act* be referred to it.'

3 *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) para 29.

In its heads of argument the Commission contended that this section conferred on the Tribunal a general power to review any decision of the Commission taken in terms of the Act that falls within its jurisdiction. The weakness of that argument is illustrated by the facts of this case. Agri Wire wishes to review and set aside the referral to the Tribunal. There is no need for the Act to confer on the Tribunal the power to review a decision to refer a matter to it. If the referral is improper for any reason, the Tribunal can dismiss it on that ground. If it is thought desirable to do that at an early stage of the proceedings, before substantial costs are incurred, the Tribunal can adjudicate the point before it holds a hearing into the merits. That is consistent with the powers given to the Tribunal by s 55(1) of the Act to adopt a procedure that it deems appropriate with due regard to the circumstances of the case. This places 'an emphasis on speed, informality and a non-technical approach to its task'.[4] Accordingly, had Agri Wire approached the Tribunal to determine whether the referral to it was lawful, the Tribunal could have determined that question in the exercise of its functions in dealing with referrals under Part D of Chapter 5 of the Act. There was no need for it to have resort to s 27(1)*(c)* for that purpose.

[13] The Commission's purpose in invoking s 27(1)*(c)* was not to identify the source of the Tribunal's power to deal with Agri Wire's complaints, but to advance an argument that the high court's jurisdiction is excluded. In our view that is not the effect of the section. Its language refers to appeals against and reviews of decisions by the Competition Commission. In determining the scope of this provision it is best to start with those provisions of the Act that, in terms, provide for the Commission to take decisions. These are s 10(2), under which the

4 *Competition Commission of South Africa v Senwes Ltd* [2012] ZACC 6; 2012 (7) BCLR 667 (CC) at para 69.

Commission grants exemptions; s 13(5)*(b)* dealing with the approval or prohibition of small mergers; s 14(1)*(b)* dealing with the approval or prohibition of intermediate mergers; and s 15 dealing with the revocation of merger approval.[5] In the absence of a provision such as s 27(1)*(c)* any challenge to these decisions would have to be brought before the high court and not the Tribunal or the Competition Appeal Court. That is an unsatisfactory situation as it departs from the hierarchy of decision-making under the Act and removes matters that are appropriate for decision by those bodies from their purview. To make those decisions subject to appeal to, or review by, the Tribunal is therefore consistent with the general scheme of the Act.

[14] It was suggested by CWI that, in referring to decisions 'that may in terms of *this Act* be referred to it', s 27(1)*(c)* is referring to decisions that must be referred to the Tribunal in terms of the Act. But, as it pointed out, there are no such decisions. This led CWI to proffer a construction of the section that ignores these words. However, that is not a permissible approach to statutory interpretation, save in rare and extreme situations. There is no need for it in this instance. Whilst the section is clumsily worded, if one accepts that it is referring to decisions that the Act provides must be taken by the Commission, the reference to decisions that may in terms of the Act 'be referred to it' is a reference to those decisions, which are referred to the Commission for it to make in terms of the Act. In other words the 'it' in the section is the Commission not the Tribunal.[6] That is consistent with the powers of the Commission as set

5 No other decisions in this sense were identified by counsel in response to questions from the Bench. If there are other decisions of the Commission under the Act of a similar type, that does not affect the matter.

6 There is a dictum in *Competition Commission of South Africa v Telkom SA Ltd & another* [2010] 2 All SA 433 (SCA) para 38 that may suggest a wider meaning of s 27(1)*(c)*, but the point was not argued in that case and it was unnecessary for the actual decision. Similarly the two cases in the Competition Appeal Court to which counsel referred us in support of the argument about the Tribunal's review jurisdiction (*AC Whitcher (Pty) Ltd v The Competition Commission of SA & another* [2009] 2

out in ss 21(1)*(d)* and *(e)* of the Act.

[15] On this approach the procedural provisions of rule 42 of the rules of the Tribunal are irrelevant in order to give meaning to s 27(1)*(c)*. However, it is necessary to say that the approach of the high court, that it is permissible to look to the rules in order to ascertain the scope of s 27(1) *(c)*, is not correct. Whilst, for definition purposes, 'the Act' is defined as including the rules made under the Act, that cannot mean that the Tribunal can, by promulgating rules, confer a jurisdiction on itself that is not to be found in the Act itself. It is appropriate to recall that a definition section is always to be read in context and applies unless that context otherwise indicates.[7] The jurisdiction of the various statutory bodies set up under the Act is defined in the Act. It is not for them to determine their own jurisdiction by way of the rules under which they perform their statutory functions. That would be entirely inconsistent with the rule of law and the principle of legality that underpins our Constitution.

[16] In any event it was insufficient for the Commission's purpose for s 27(1)*(c)* to confer appellate and review jurisdiction on the Tribunal. It was also necessary for it to show that any such jurisdiction was exclusive. It sought to do this by relying on s 62 of the Act, which provides that;

'(1) The Competition Tribunal and the 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) …

b) the functions referred to in section 21(1), 27(1) and 37, other than a question or matter referred to in subsection(2).

CPLR 291 (CAC) paras 16-17 and *Africa Media Entertainment Ltd v Lewis NO & others* [2008] 1 CPLR 1 (CAC)) do not support the argument.

7 *Town Council of Springs v Moosa & another* 1929 AD 401 at 416-417.

(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*…'

Section 62(3)*(b)* provides that the jurisdiction of the Competition Appeal Court in respect of matters set out in s 62(2) of the Act 'is neither exclusive nor final'.

[17] Whilst there would be no difficulty in recognising an exclusive jurisdiction vested in the Tribunal and the 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 within its jurisdiction. But, whether an act by the Commission is within its jurisdiction is a matter within s 62(2)*(a)* of the Act and is therefore not within the exclusive jurisdiction conferred by s 62(1)*(b)* of the Act.

[18] Those considerations led 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 that 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 are 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.

[19] The argument that the high court's jurisdiction was excluded in favour of an exclusive jurisdiction conferred on the Tribunal under the Act was therefore incorrect. Counsel then submitted that nonetheless the high court should defer to the Tribunal and allow the challenge to be dealt with by that body. For this they relied upon two passages in the judgment of this court in *Competition Commission of South Africa v Telkom SA Ltd & another*.[8] The first, in which it was observed that the legislature had established the competition authorities as the primary regulator in competition matters, is disposed of quite easily. The court there dealt with the concurrent jurisdiction of different regulatory agencies and not with concurrent jurisdiction between the Tribunal and the high court. The second merely indicates that, where the legislature has created specialist structures to resolve particular disputes effectively and speedily, it is best to use those structures. The court went on to hold, on the facts of that case, that the court before which the review proceedings were brought should have exercised its discretion to decline to grant relief by way of review and left the issues in the case to be dealt with by the Tribunal in the course of the referral. That is a different matter from the court declining to exercise the jurisdiction with which it is vested by law. Save in admiralty matters, our law does not recognise the doctrine of *forum non conveniens*, and our courts are not entitled to decline to hear cases properly brought before them in the exercise of their jurisdiction.[9]

[20] For those reasons the challenge to the high court's jurisdiction was

8 *Competition Commission of South Africa v Telkom SA Ltd & another*, supra, paras 27 and 36.
9 *Makhanya v University of Zululand*, supra, paras 33 and 34; *Longman Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty) Ltd* 1990 (2) SA 906 (A) at 914E-G; *Standard Credit Corporation Ltd v Bester & others* 1987 (1) SA 812 (T) at 815E-F and 819D-E; *Marth NO v Collier & others* [1996] 3 All SA 506 (C) at 508e-f.

misconceived and should have been rejected. We turn therefore to deal with the merits of Agri Wire's case.

Authority to issue the CLP

[21] In the high court the argument was accepted that, in providing for conditional immunity to whistleblowers, the CLP does no more than embody an undertaking by the Commission that it will not seek an order from the Tribunal imposing an administrative penalty on the party afforded immunity. The court held that notwithstanding the grant of such immunity the Tribunal was not precluded from making such an order. This was erroneous for the reasons set out in paras 6 to 9, supra. The question is whether the Act vested the power in the Commission to formulate the CLP in terms that involved it in granting first conditional, and then final, immunity to whistleblowers in cartel cases?

[22] Although this was the central issue in the case, and in the heads of argument it was said that the Act did not empower the Commission to adopt the CLP, there was no real debate that, apart from one argument, the Act does, in general terms empower the Commission to adopt a CLP in these terms. In our view there can be no doubt that this is so. The purpose of the Act, as set out in s 2 thereof, is to promote competition in South Africa. To that end the Commission is empowered to promote market transparency (s 21(1)*(a)*) and to investigate and evaluate alleged contraventions of Chapter 2 of the Act, under which cartels fall (s 21(1) *(c*)). Breaking up cartels serves to promote market transparency, as cartel behaviour is the antithesis of transparency in the market place. Investigating contraventions of the Act must entitle the Commission to put in place measures that will enable it to perform this function. That is the whole purpose of the CLP. Accordingly, and subject only to the

argument that follows, the Commission was empowered under the Act to adopt and implement the CLP by giving conditional and total immunity to parties who make disclosure and provide evidence that enables it to pursue cartels and bring them to an end.

[23] Agri Wire contended that, whilst the adoption of the CLP may have been permissible in general terms, it was impermissible for it to provide that immunity would be granted by the Commission. That according to it is the prerogative of the Tribunal when exercising its powers in determining an appropriate penalty under s 59 of the Act. It relied for this argument on two propositions. First it said that when the Commission refers a complaint to the Tribunal under s 51 of the Act it is obliged to refer the entire complaint and that means, in the context of cartel behaviour, that it is obliged to refer all members of the cartel to the Tribunal for the latter to adjudicate upon their conduct and determine what order should be made and what penalty imposed. It complained that otherwise the playing fields were not level and the party that obtained leniency would be unfairly advantaged. Second it said that the provisions of s 59(3)*(f)* require the Tribunal to take into account the degree to which a participant in a cartel has co-operated with the Commission and the Tribunal and that this indicates that it is the Tribunal, and not the Commission, that must determine whether any immunity should be granted.

[24] Counsel was unable to point to anything in the Act itself, beyond the general words providing that the Commission refers a complaint to the Tribunal, to support this argument. He submitted that a complaint involving a cartel must necessarily involve all the members of the cartel. Otherwise, so he submitted, the complaint would not have been referred

as required by the Act. There is no merit in these submissions. A complaint is initiated under s 49B, either by the Commissioner or by a third party. The complaint is then investigated. If, at the conclusion of the investigation, the Commissioner decides to refer the complaint to the Tribunal, the Act specifically provides that the Commissioner may refer all or some of the particulars of the complaint and may add particulars to the complaint submitted by the complainant. One of the central particulars in respect of cartel conduct is the identity of the members of the cartel. If the complaint is that A and B and C have engaged in cartel behaviour the Commissioner may decide to refer only A and B. In that way the Commissioner exercises the express statutory power to exclude certain particulars, namely C, from the referral. Equally, when the Commissioner decides to add D as a participant in the cartel, that is in accordance with the express provisions of the statute.

[25] That is also a sensible construction of the Act. It is easy to envisage situations in which it will be impossible, say because one of the participants has been liquidated, or merged into another entity, to refer all the participants to the Tribunal. It is also easy to conceive of situations where it would be undesirable to do so, as for example where a small participant might go into liquidation if a penalty was imposed upon it or where the costs of pursuing a particular participant were out of proportion to the advantages to be gained from doing so.

[26] As to s 59(3), the fact that the Tribunal can take a party's co-operation into account in determining an administrative penalty does not have as a corollary that the Commission may not grant immunity. Accordingly the challenges to the CLP; the grant of conditional immunity to CWI; the admissibility of the evidence obtained from CWI by way of

the grant of conditional immunity and the validity of the referral were all without merit. The application was correctly dismissed, albeit for reasons other than those of the court below, and the appeal must likewise be dismissed.

[27] The appeal is dismissed with costs, such costs to include the costs of two counsel, where two counsel were employed.

M J D WALLIS
JUDGE OF APPEAL

R PILLAY
JUDGE OF APPEAL

Appearances

For appellant:	S J du Plessis SC (with him Kevin Hopkins) Instructed by: Roestoff and Kruse, Menlo Park, Pretoria Symington & De Kok, Bloemfontein
For first and second respondent:	Gilbert Marcus SC (with him Isabel Goodman) State Attorney, Pretoria and Bloemfontein.
For third respondent:	Wim Trengove SC (with him J Wilson and M M le Roux) Instructed by: Nortons Incorporated, Johannesburg McIntyre & Van der Post, Bloemfontein.