THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 195/20

In the matter between:

THE COMPETITION COMMISSION

OF SOUTH AFRICA **APPELLANT**

and

GROUP FIVE CONSTRUCTION LIMITED **RESPONDENT**

Neutral citation: *The Competition Commission of South Africa v Group Five Construction Limited* (Case no 195/20) [2021] ZASCA 37 (8 April 2021)

Coram: NAVSA ADP and ZONDI and DAMBUZA JJA and ROGERS and MABINDLA-BOQWANA AJJA

Heard: 5 March 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 8 April 2021.

Summary: Competition Act 89 of 1998 – interpretation and application of s 62 – whether the high court has jurisdiction to hear review application – whether the Competition Tribunal has exclusive jurisdiction.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mngqibisa- Thusi J, sitting as a court of first instance):

The appeal is dismissed with costs including costs occasioned by the employment of two counsel.

JUDGMENT

Mabindla-Boqwana AJA (Navsa ADP, Zondi and Dambuza JJA and Rogers AJA concurring)

[1] This is an appeal against a decision of the Gauteng Division of the High Court, Pretoria (the high court), in terms of which it dismissed an application under rule 30 of the Uniform Rules[1], brought by the appellant, the Competition Commission (the Commission) established in terms of s 19 of the Competition Act 89 of 1998 (the Act). In that application the Commission challenged, inter alia, the high court's jurisdiction to determine a review application initiated by the respondent, Group Five Construction Ltd (Group Five).

[1] The relevant part of 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] In the review application before the high court Group Five sought the following principal orders:

'1. Declaring that the initiation of the complaint under CC case number 2009Feb279 in terms of section 49B(1) of the Competition Act 89 of 1998, by the respondent, as well as all steps taken by the respondent pursuant thereto, were and are unlawful and invalid;

2. Declaring that the respondent granted the applicant immunity from prosecution of a contravention of the Competition Act 89 of 1998 in respect of the construction and refurbishment of stadia for the 2010 FIFA World Cup;

3. Reviewing, setting aside and declaring invalid the respondent's decisions:

3.1 to refer a complaint against the applicant to the Competition Tribunal in respect of the construction and refurbishment of stadia for the 2010 FIFA World Cup; and/or

3.2 in that referral, to seek an administrative penalty against the applicant;

(collectively referred to as decisions)'

[3] The background leading to proceedings in the high court and culminating in the present appeal are set out hereafter. On 10 February 2009, the Commission initiated a complaint in terms of s 49B(1)[2] of the Act against various construction companies, including Group Five, into conduct relating to the construction in South Africa of FIFA 2010 World Cup stadia. This followed a research project that was conducted by the Commission in May 2008 prompted by an escalation in costs in the construction of the stadia. The Commission decided to investigate possible collusive conduct between various companies in contravention of s 4(1) of the Act.

[4] Section 4(1)*(b)* prohibits restrictive practices between firms in horizontal relationships (competitors). Prohibited conduct involves (i) directly or indirectly fixing a purchase or selling price or any other trading condition;

[2] In terms of s 49B (1) 'The Commissioner may initiate a complaint against an alleged *prohibited practice'*.

(ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or (iii) collusive tendering.

[5] Due to the secretive nature of cartels involved in collusive dealings of the kind targeted by the Act, the Commission had devised a policy known as the Corporate Leniency Policy (CLP), which is geared towards encouraging those involved in cartels to disclose to the Commission prohibited practices in order to combat offensive conduct.[3] Those who approach the Commission with the necessary information that would result in institution of proceedings against a cartel will not be subjected to prosecution in relation to their involvement in or with the alleged cartel.[4] They are initially granted conditional immunity, which is made final when conditions set out in the CLP have been met.[5] Immunity is granted in return for full disclosure and full co-operation in pursuing the other cartel members before the Tribunal established in terms of s 26 of the Act.[6]

[6] Group Five alleges that it sought to take advantage of the Commission's CLP by providing information that would assist to uncover the prohibited practices. It applied for immunity in respect of a cover price[7] it had sought from another firm; and in exchange for submitting a cover bid in respect of the Greenpoint World cup stadium, among others. Group Five alleges that the

[3] Clause 3 of the Corporate Leniency Policy (CLP) - GN 195 *GG* 25963 of 6 February 2004 and GN 31064 of 23 May 2008.
[4] Clause 3.4 of the CLP. See also *Agri Wire (Pty) Ltd and Another v Commissioner of the Competition Commission and Others* [2012] ZASCA 134; [2012] 4 All SA 365 (SCA); 2013 (5) SA 484 (SCA) paras 6-10.
[5] Clause 9 of the CLP.
[6] See para 7 of *Agri Wire*.
[7] Cover pricing entails submitting a tender price higher than the cover price (obtained from a competitor) so as to increase the chances of the competitor winning the bid.

Commission gave it an unequivocal undertaking to grant it the immunity, but later reneged on its earlier decision.

[7] On 12 November 2014, despite the alleged undertaking, the Commission referred a complaint against Group Five and other construction companies for contravening s 4(1)*(b)*(i) and (ii) of the Act to the Tribunal. The allegations were that Group Five had engaged with other firms in pervasive, anti-competitive conduct in the construction industry. It was alleged that the members of the alleged cartel had agreed to: allocate between them projects for the construction of the various stadia; submit cover prices and recover a net profit of 17.5% per project. The Commission sought an administrative penalty equal to 10% of Group Five's total turnover, which is the maximum penalty that could be imposed under ss 58(1)*(a)*(iii) and 59 of the Act.

[8] Against this background, Group Five, in its approach to the high court, submitted that the decision by the Commission to refer the complaint to the Tribunal was reviewable: firstly, because the complaint and the investigation were not underpinned by a valid initiation; secondly, the referral and the ordering of penalties were precluded by the Commission's grant of immunity to it; and thirdly, the referral was, in any event, oppressive, vexatious and motivated by bad faith.

[9] In reaction to the review application, the Commission did not file an answering affidavit. Instead, it lodged a rule 30 application, contending that the high court lacked jurisdiction to adjudicate the matter as the dispute between the parties fell within the exclusive jurisdiction of the Tribunal. It

further submitted that litigation between the parties was pending before the Tribunal on the same cause of action and in respect of the same subject matter.

[10] The high court dismissed the Commission's application on the basis that the Commission ought to have raised its objections by way of a special plea. It nevertheless proceeded to determine the merits of the rule 30 application. Relying on this Court's decision in *Agri Wire (Pty) Ltd and Another v Commissioner of the Competition Commission and Others*[8] it dismissed the jurisdictional challenge. Furthermore, it found the *lis pendens* point to be without merit, as the issue before it was different to that which the Tribunal had to determine. In this regard, it said: 'The Tribunal is expected to investigate the allegations made by the Commission 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'. The appeal to this Court is with the leave of the high court.

[11] At the hearing of the appeal, counsel for both parties agreed that this Court need not concern itself with whether the rule 30 procedure was the proper one to raise the jurisdictional issue, and that the appeal should be decided on the question of whether the high court had jurisdiction to entertain the review application.

[12] The Commission was adamant that s 62 of the Act, dealt with hereunder, viewed contextually, was the irrefutable basis for its contention

[8] *Agri Wire (Pty) Ltd and Another v Commissioner of the Competition Commission and Others* [2012] ZASCA 134; [2012] 4 All SA 365 (SCA); 2013 (5) SA 484 (SCA).

that the review application fell within the exclusive jurisdiction of the Tribunal and was not within the remit of the high court. Counsel for the Commission submitted that the initiation and referral of a complaint as provided in ss 49B and 50[9] of the Act which are part of Chapter 5 were foundational, and that they were matters that were undoubtedly within the exclusive jurisdiction of the Commission, the Tribunal and the Competition Appeal Court (CAC).

[13] The Commission's alternative argument was that if this Court did not accept its submissions on the exclusive jurisdiction point, then the Tribunal should be found to have concurrent jurisdiction with the high court in terms of s 62(2) of the Act. The Commission contended that the high court should have declined to hear the matter and ought to have deferred to the Tribunal for two reasons: firstly, because the Tribunal is a specialist structure designed to resolve these kinds of matters and secondly, the dispute is already pending before it. Thus, Group Five ought to have raised the issue of the validity of the referral at the Tribunal. In this regard the Commission relied on a passage in *The Competition Commission of South Africa v Telkom SA Ltd and Another*[10] where the court stated that '[w]here structures have been designed for the effective and speedy resolution of particular disputes it is preferable to use that system'.

[9] In terms of section 50(1) of the Competition Act 89 of 1998 (the Act) 'At any time after initiating a complaint, the Competition Commission may refer the complaint to the Competition Tribunal'.
[10] *The Competition Commission of South Africa v Telkom SA Ltd and Another* [2009] ZASCA 155; [2010] 2 All SA 433 (SCA) para 36.

[14] In opposition, Group Five's contention, in short, was that the issues raised in the review application are contemplated in s 62(2)*(a)* of the Act, in respect of which the Tribunal has no jurisdiction.

[15] Section 62 of the Act provides:

'(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 a 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 Constitutional Court, subject to section 63 and its 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.'

[16] Section 62(1) confers exclusive jurisdiction on the Tribunal and the CAC in respect of matters dealing with the interpretation and application of prohibited practices in Chapter 2, merger control in Chapter 3, and investigation and adjudication procedures in Chapter 5 of the Act. Exclusive jurisdiction is also assigned to the Tribunal and CAC in adjudicating on matters dealing with the functions of the Commission, the Tribunal and the CAC respectively referred, to in ss 21(1), 27(1) and s 37. In terms of s 27(1)*(c)* the Tribunal 'may hear appeals from, or review any decision of, the Competition Commission that may in terms of this Act be referred to it'.

[17] Section 62(1) excludes matters referred to in s 62(2), in regard to which the CAC has additional jurisdiction. It should be noted that in terms of s 62(3)*(b)* the jurisdiction of the CAC '*is neither exclusive nor final in respect of a matter within its jurisdiction in terms of subsection (2)'*. (My emphasis.) This indicates that the jurisdiction of the high court is not excluded in respect of matters listed under s 62(2), since in the ordinary course the high court would have jurisdiction over matters of the kind specified in s 62(2) unless such jurisdiction was specifically and expressly ousted in a constitutionally compliant manner. The same cannot be said of the Tribunal, for two reasons: firstly, because the provision expressly refers to the CAC as the court with the specified additional jurisdiction and secondly, unlike the high court, the Tribunal is not possessed of inherent powers to hear matters listed in s 62(2). The CAC, on the other hand, is designated as a court with a status similar to that of a high court.[11]

[11] Section 36(1) of the Act.

[18] It is not difficult to discern why exclusive jurisdiction would be granted to the CAC and the Tribunal in relation to interpretation and application of matters in Chapters 2, 3 and 5. These are matters related to the investigation, control and evaluation of alleged restrictive practices, the abuse of dominant positions and mergers. They involve matters of a specialist nature, which require technical expertise, and which lie at the complex intersection between law and economics. The Act has been very careful in assigning these functions to the institutions best equipped to deal with them.[12]

[19] Referring to the exclusive jurisdiction of the Labour Court and the Labour Appeal Court, the Constitutional Court, in the recent decision of *Baloyi v Public Protector and Others*,[13] had this to say:

'The reason for this delineation is that the Labour Court and the Labour Appeal Court were "designed as specialist courts that would be steeped in workplace issues and be best able to deal with complaints relating to labour practices and collective bargaining". While accepting that section 157(1) does not confer exclusive jurisdiction on the Labour Court in every employment-related matter, this Court, in *Chirwa*, made it clear that the Labour Court and other specialist tribunals created under the LRA are uniquely qualified to handle labour-related disputes.' (Footnotes omitted.)

[20] As to concurrent jurisdiction it made the following observations:

'The concurrent jurisdiction afforded to the Labour Court and the High Court in terms of section 77(3) of the Employment Act and section 157(2) of the LRA adds to, rather than diminishes, their jurisdiction. In doing so, it affords litigants an additional right to approach either court where a dispute falls within the ambit of those sections.'[14]

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[12] See *Competition Commission of South Africa v Media 24 (Pty) Limited* [2019] ZACC 26; 2019 (9) BCLR 1049 (CC); 2019 (5) SA 598 (CC), where the Constitutional Court, inter alia, stated at para 136: '. . . The adjudicative institutions under the Competition Act are expert bodies and due recognition must be given to this . . . '.

[13] *Baloyi v Public Protector and Others* [2020] ZACC 27; 2021 (2) BCLR 101 (CC) para 30.

[14] Ibid fn 11.

[21] The question in this case is whether the issues raised by Group Five are those in respect of which the Tribunal and the CAC have exclusive jurisdiction, or, whether they are within the contemplation of s 62(2). The grounds for review raised by Group Five, as already mentioned in para 8, relate to the validity and lawfulness of the initiation and subsequent referral to the Tribunal. Simply put, they are questions of *vires* or of legality, quintessentially issues within the jurisdiction of our Superior Courts.

[22] In *Agri Wire*, this Court dealt with a similar challenge to jurisdiction, which was also raised there by the Commission. Agri Wire had launched a review application for the setting aside of conditional immunity granted to another firm, Consolidated Wire Industries (Pty) Ltd (CWI), in terms of the CLP, on the basis that it was unlawfully obtained. The Commission contended that s 27(1)*(c)* conferred a general power on the Tribunal to review any decision of the Commission taken in terms of the Act that fell within its jurisdiction. The Court dismissed that argument on the basis that the Act limited the decisions that can be reviewed by the Tribunal. It referred to provisions of the Act which provide for the Commission to take decisions.[15] The Commission has not relied on that provision in this case, but instead on s 62(1)*(a)*. It is thus not necessary to discuss it any further.

[15] See paras 13- 15 of *Agri Wire*. At para 13, the court, inter alia, said that the language of s 27(1)*(c)* '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 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'.

[23] As regards s 62 this court held:

'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.*[16]

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.'[17] (Emphasis added.)

[24] A question whether the referral by the Commission is valid or unlawful, or whether the Commission acted beyond the scope of the Act and accordingly ultra vires the powers conferred on it, is a jurisdictional question which falls within the purview of s 62(2)*(a)* as stated in *Agri Wire*. The legality of a public body's conduct is also a constitutional matter (s 62(2)*(b)*). The Constitutional Court has repeatedly said so in relation to the *Biowatch*[18] principle. It stated

[16] See para 17 of *Agri Wire*.
[17] See para 18 of *Agri Wire*.
[18] *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) para 56.

the following in *Justice Alliance of South Africa v Minister for Safety and Security and Others*:[19]

'The Minister contends that because there was no challenge to the constitutional validity of any of the provisions of the Act, no constitutional issue in the *Biowatch* sense was raised. That is not, without more, a proper basis for finding that no constitutional issue was raised. *The attack on the validity of the guidelines as being ultra vires section 137 of the Act is based on the principle of legality. Legality is decidedly a constitutional issue.* The interpretation of the provisions of the Act in order to decide whether the guidelines fell within their ambit is also a constitutional issue because statutory interpretation must be done in accordance with the dictates of the Constitution. In addition it is clear that the original order forcing the Minister for Police to promulgate guidelines was founded on his failure to comply with the provisions of the Constitution.' (My emphasis.)

[25] Also in *Harrielall v University of KwaZulu-Natal* the Constitutional Court stated the following*:*[20]

'The constitutional issues raised by the case are two-fold. First, a review of administrative action under PAJA constitutes a constitutional issue. This is so because PAJA was passed specifically to give effect to administrative justice rights guaranteed by section 33 of the Constitution. Moreover, when the University determined the application for admission, it exercised a public power.

According to jurisprudence of this Court, the review of the exercise of public power is now controlled by the Constitution and legislation enacted to give effect to it. *It is not controversial that a review of administrative action amounts to a constitutional issue . . .* .'

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[19] *Justice Alliance of South Africa v Minister for Safety and Security and* Others [2013] ZACC 12; 2013 (7) BCLR 785 (CC) para 10.

[20] *Harrielall v University of KwaZulu-Natal* [2017] ZACC 38 paras 17 and 18. See also *Johnnic Holdings Limited and Another v Competition Tribunal and Others in re: Mercanto (Pty) Ltd v Johnnic Holdings Ltd* [2008] ZACAC 2 para 35.2.

[26] For this kind of review the Tribunal's jurisdiction is not mentioned in s 62(2). Only the CAC is, and its powers are not exclusive either. The jurisdiction of the high court is not excluded under that section in terms of s 62(3)*(b)*. Accordingly, this means that the Commission's alternative argument in relation to concurrent jurisdiction must also fail. In any event, *Telkom* is no authority for the proposition advanced by counsel for the Commission, regarding concurrent jurisdiction. That case dealt with concurrent jurisdiction between the Commission and another regulatory body, ICASA. In that case Telkom had instituted review proceedings in the high court to set aside the Commission's decision to refer a complaint to the Tribunal in terms of s 8 of the Act. It argued that the issue initiated and referred to the Commission and the Tribunal fell outside the powers of the competition authorities but was a matter for ICASA to deal with. The Tribunal was held to be an appropriate forum to determine whether the provisions in Chapter 2 of the Act were contravened.

[27] In conclusion, the issues raised on review by Group Five are not of a specialist nature which s 62(1) exclusively reserves for the CAC and the Tribunal. They do not pertain to the interpretation of issues in Chapters 2, 3 and 5 of the Act which are pending before the Tribunal. Instead, they relate to questions of legality concerning the validity and lawfulness of the initiation and the referral of the complaint. Notably, the Commission's powers are set out in Chapter 4, which is not mentioned among the Chapters in s 62(1)*(a)*. In the circumstances, the high court was correct in its finding that the challenge of jurisdiction had no merit.

[28] For these reasons, the appeal is dismissed with costs, including costs occasioned by the employment of two counsel.

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N P MABINDLA-BOQWANA

ACTING JUDGE OF APPEAL

Appearances

For the appellant:	V Notshe SC (with him K K Maputla)
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