



SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal
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The Competition Commission of South Africa v Group Five Construction Limited (Case no 195/20) [2021] ZASCA 37 (8 April 2021)

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Today the Supreme Court of Appeal (the SCA) upheld the order of the Gauteng Division of the High Court, Pretoria (high court) by dismissing the appeal brought by the Competition Commission (Commission) of South Africa against Group Five Limited (Group Five).

The issue before the SCA concerned the interpretation and application of s 62 of the Competition Act 89 of 1998 (the Act). On 10 February 2009, the Commission initiated a complaint in terms of s 49B(1) 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. The Commission decided to investigate possible collusive conduct between various companies in contravention of s 4(1) of the Act. Group Five allegedly sought to take advantage of the Commission's Corporate Leniency Policy (CLP) by providing information that would assist to uncover the prohibited practices. It applied for immunity in respect of a cover price 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 alleged that the Commission gave it an unequivocal undertaking to grant it immunity, but later reneged on its earlier decision. On 12 November 2014, despite the alleged undertaking, the Commission referred a complaint against Group Five and other construction companies for contravening ss 4(1)(b)(i) and 4(1)(b)(ii) of the Act to the Competition Tribunal (Tribunal) and sought a 10% administrative penalty against Group Five.

Group Five brought an application in the high court seeking to review and set aside the initiation and the referral of the complaint to the Tribunal on the basis that the complaint and the investigation were not underpinned by a valid initiation; secondly, the referral and the ordering of penalties was 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. In response, the Commission filed a rule 30 application challenging the jurisdiction of the high court on the matter. The high court dismissed the Commission's challenge.

On appeal, the SCA found that s 62(1) of the Act conferred exclusive jurisdiction on the Tribunal and the Competition Appeal Court (CAC) in respect of specialist 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 was also conferred on adjudication of matters in ss 21(1), 27(1) and s 37 pertaining to the functions of the Commission, the Tribunal and the CAC. Section 62(1) excluded matters listed in s 62(2), in respect of which the CAC had additional jurisdiction. The SCA held further that as indicated in 62(3) of the Act, the CAC's jurisdiction was neither exclusive nor final in respect of a matter in s 62(2). This indicated that the jurisdiction of the high court was not excluded in respect of matters listed under s 62(2).

The SCA concluded that the issues of the validity and lawfulness of the initiation and subsequent referral to the Tribunal were questions of *vires* or of legality, quintessentially issues within the jurisdiction of the Superior Courts. The CAC has concurrent jurisdiction with the high court to hear these matters, and such matters fell outside the jurisdiction of the Tribunal.