THE SUPREME COURT OF APPEAL

REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 623/2008

THE COMPETITION COMMISSION OF

SOUTH AFRICA **Appellant**

and

TELKOM SA LIMITED **First Respondent**

THE COMPETITION TRIBUNAL OF

SOUTH AFRICA **Second Respondent**

Neutral citation:	*Competition Commission v Telkom* (623/2008) [2009] ZASCA 155 (27 November 2009)
Coram:	Harms DP, Brand, Malan JJA and Wallis AJA
Heard:	2 November 2009
Delivered:	27 November 2009
Summary:	**Competition Act 89 of 1998 – s 3(1A)(a) – concurrent jurisdiction – telecommunications industry – review of complaint referral – bias - non-compliance with s 50(4)(a) concerning extension of time for complaint referral - memorandum of agreement between Commission and ICASA – s 82 Competition Act**

ORDER

On appeal from: The Pretoria High Court (RD Claassen J sitting as court of first instance)

The following order is made;

(1) The appeal is upheld with costs including the costs of two counsel;

(2) The cross-appeal is dismissed with costs including the costs of two counsel;

(3) The order of the court a quo is set aside and replaced with the following;

'the application is dismissed with costs including the costs of two counsel.'

JUDGMENT

MALAN JA (Harms DP, Brand JA and Wallis AJA concurring):

[1] On 23 February 2009 the Competition Commission referred a complaint against Telkom to the Competition Tribunal. In the complaint referral, consisting of a notice of motion and founding affidavit, the Commission alleged that Telkom contravened ss 8 (a), (b), (c), (d)(i) and 9 of the Competition Act 89 of 1998. Telkom did not file an answering affidavit but instead launched proceedings in the High Court to set aside the Commission's decision to refer the complaint to the Tribunal as well as the complaint referral itself. In addition, it applied for an order declaring that neither the Commission

nor the Tribunal had the power or competence to either refer the complaint to the Tribunal or to adjudicate the conduct complained of and grant a consequent remedy.

[2] In May 2002, a complaint was lodged with the Commission in terms of s 49B(2)(b) of the Competition Act by the South African VANS Association ('SAVA'), the Internet Service Providers Association ('ISPA') and eighteen value-added network service providers. In August 2002, Omnilink (Pty) Ltd and Internet Solutions (Pty) Ltd lodged another complaint. The two complaints, both directed against Telkom, were consolidated under Competition Commission Rule 17(2) and the consolidated complaint investigated in terms of s 49B(3). The investigating team submitted its final report to the Commission on 3 October 2003, recommending that the matter should be referred to the Tribunal in terms of s 50(2)(a). On 11 February 2004, the Commission resolved to issue a notice of referral in respect of both the SAVA and the Omnilink complaints. On 23 February the Commission referred a substantial part of the consolidated complaint to the Tribunal in terms of s 50(2)(a). A notice was published in the *Government Gazette* of 23 April 2004 in terms of s 51(3) and (4) of the Competition Act that the complaint referral was received on 27 February 2004.

[3] The court a quo found in favour of Telkom and set aside the Commission's decision. It did so on narrow grounds holding that the Commission evinced bias in coming to the decision to refer the complaint and that the complaint referral was, in any event, made outside the time limits prescribed by s 50 of the Competition Act. RD Claassen J also dealt with two issues that were raised *in limine*. First, he held that

the decision of the Commission to refer the complaint was not administrative action subject to review under the Promotion of Administrative Justice Act 3 of 2000. Secondly, he dismissed the contention that the issues raised by Telkom should preferably or appropriately have been raised before the Tribunal.

[4] This is an appeal with leave of the court a quo against its setting aside the Commission's decision of 23 February 2004 and complaint referral. In addition, Telkom was given leave to cross-appeal against the failure, and hence refusal, of the court a quo to grant the declaratory relief sought

[5] Telkom was established in terms of the Post Office Act 44 of 1958. Section 4 transferred to Telkom the 'postal enterprise' of the State. Telkom had 'the exclusive power to conduct the telecommunications service'.[1] Telkom was and is the holder of a licence to provide both public switched telecommunication services ('PSTS')[2] and value-added network services ('VANS').[3] Telkom, through its business unit, Televans, provides a range of these services and products that compete with the services offered by others, including members of SAVA and IPSA and other complainants. These members and other complainants who lodged complaints with the Commission are all

[1] Section 4(1)(a) of the Post Office Act 44 of 1958. See also s 78(1). The Post Office Act was repealed by s 106 of the Telecommunications Act 103 of 1996.

[2] Sections 32A(1) and 36(1) of the Telecommunications Act repealed by s 97 of the Electronic Communications Act All existing licences remain in force until converted in terms of the Electronic Communications Act (s 92(1)). 'PSTS' is described in ss 36A(1) and 36B of the Telecommunications Act.

[3] Section 40(1)(a) of the Telecommunications Act. 'VANS' is defined in s 1.

holders of VANS licences issued in terms of the Telecommunications Act. They are referred to as the 'licensees'. Telkom was obliged under the provisions of the Telecommunications Act, when requested, to lease to or make telecommunication facilities available to a person providing a telecommunication service, and had to do so pursuant to an agreement entered into between them, unless the request was unreasonable.[4] In the event of a dispute as to the reasonableness of a request or the inability or unwillingness of the parties to negotiate or agree, the regulating authority was entitled to resolve the dispute and impose certain terms and conditions on the parties.[5] The regulating authority is ICASA, the Independent Communications Authority of South Africa.[6]

[6] The complaints relate to Telkom's alleged failure to provide telecommunication facilities to the licensees. (a) The *first* complaint is that Telkom imposed standard contractual restrictions on the licensees in respect of 'backbone and access' facilities. Telkom prohibited them from providing private networks to their customers; reselling spare capacity; from carrying voice on behalf of customers; utilizing its facilities for the conveyance of data signals between different premises of any single customer; and from bypassing Telkom's public switched telecommunications network by receiving a data signal and allowing it to break out of the licensee's network at a point other than

[4] Section 44(2) of the Telecommunications Act and further s 44(3) incorporating s 43(1)(b)(i) and (ii), (b) and (d). On Telkom's obligation to provide interconnection services see s 43.

[5] Section 44(3) read with s 43(1)(bb)(i) and (ii), (c) and (d) and also s 43 of the Telecommunications Act.

[6] ICASA was established in July 2000 (s 67 of the Independent Communications Authority Act 13 of 2000).

the point of entry. This conduct is alleged to have contravened ss 8(b) and (c) of the Competition Act and a declarator is sought to the effect that Telkom committed a prohibited practice by requiring licensees not to compete with Telkom in breach of Telkom's exclusive rights and by withdrawing these facilities when it considers that a breach had been committed. (b) The *second* complaint is that Telkom refused to lease access facilities to licensees as it had done until September 1999 but instead required customers of the licensees to do so directly. The Commission seeks a declarator to the effect that Telkom commited a prohibited practice under ss 8(b) and or (c) and or 8(d)(i) by refusing to lease the facilities to the licensees as principals. (c) The *third* complaint is that Telkom engaged in excessive pricing or price discrimination in contravention of ss 8(a) and (c) and 9. The first aspect of this complaint is that it is claimed that Telkom charged customers of Telvans, its own value-added network services provider, lower prices than it charged licensees and their customers for Diginet and DiginetPlus line rental services. The second aspect is the claim that Telkom charged its own customers about half the price it charged private licensees and their customers for value-added services and other competing products. The Commission seeks a declarator that Telkom committed a prohibited practice in contravention of ss 8 (a) and (b) and 9. (d) The *fourth* complaint is that Telkom refused to peer, ie to pool, its telecommunications facilities with AT&T and refused to provide facilities to SDN to enable them to peer with AT&T. The complaint characterizes the refusal to peer as an exclusionary act in contravention of s 8(c) and the refusal to facilitate AT&T's peering with SDN as a refusal to provide access to an essential facility in contravention of s 8(b).

[7] In the complaint referral the Commission set out the allegations which it intended to establish before the Tribunal. It referred to the applicable markets and Telkom's dominance in them and to the alleged abuses of dominance committed by it.[7] The functional market within which Telkom's conduct had to be assessed was the market for the provision of value-added network and competing services, a separate division of the telephony market. These services could not be provided except pursuant to a licence under the then operative Telecommunications Act and now the Electronic Communications Act. This market was described in the complaint as consisting of two segments, ie the upstream telecommunications market for the supply of telecommunications facilities (described as 'backbone and access facilities') and the downstream market for the supply of value-added network and other services. Telkom competed in this market through Televans. Both the upstream and downstream markets were national and comprised the whole of South Africa. Both Telkom and the licensees were licenced to provide telecommunications services. The telecommunications facilities that the licensees require from Telkom were needed for the purposes of supplying value-added network services to South African consumers. Telkom's dominance in the upstream market gave it market power in the downstream market leading to its dominance there. It was alleged that Telkom, the sole supplier of backbone and access facilities, could determine and influence their conduct by threatening to withhold telecommunication facilities from licensees. Televans was said to have occupied a strategic position in this respect.

[7] See para 30 below.

[8] The broad basis of the review is that the conduct of Telkom complained of was authorised by the Telecommunications Act and by Telkom's public switched telecommunications licence or by ICASA, and was not conduct, save as authorised by the value-added network service licences, upon which the licensees could have embarked. The declarator prayed for in the cross-appeal thus challenges the jurisdiction of the Commission as well as that of the Tribunal. In addition, in its supplementary affidavit made pursuant to Rule 53(4) of the Uniform Rules, Telkom added three further grounds of review: that the Commission's decision and subsequent referral was affected by bias; that the Commission in coming to its decision did not adhere to the terms of the memorandum of agreement concluded with ICASA; and that the complaint referral was time barred in that it was not made within the periods set out in s 50(2) of the Competition Act.

Promotion of Administrative Justice Act 3 of 2000 (PAJA)

[9] In concluding that the decision of the Commission and the referral to the Tribunal did not constitute administrative action RD Claassen J relied on the decision of this Court in *Simelane and Others NNO v Seven-Eleven Corporation SA (Pty) Ltd and Another*.[8] He also held, with reference to Telkom's reliance on *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*,[9] and its conclusion that under PAJA a decision constitutes administrative action only if it has the capacity to

[8] 2003 (3) SA 64 (SCA).

[9] 2005 (6) SA 313 (SCA) para 23.

affect legal rights, that Telkom's need to defend itself before the Tribunal, whilst affecting Telkom, did not affect any of its rights.

[10] Care must be taken here not to conflate two different aspects of the definition of administrative action in PAJA, namely the requirement that the decision be one of an administrative nature and the separate requirement that it must have the capacity to affect legal rights. I consider that Telkom has failed to establish both requirements. As to the second of these although the complaint referral indeed affects Telkom in the sense that it may be obliged to give evidence under oath, be subject to a hearing before the Tribunal,[10] and be required to submit its business affairs and documentation to public scrutiny it cannot be said that its *rights* have been affected or that the action complained of had that capacity.

[11] As to the requirement that the decision be one of an administrative nature a consideration of the functions of the Commission shows they have remained essentially the same since their discussion in *Simelane's* case.[11] The Commission must exercise its functions in terms of the Act (s 19(1)(c)). The Commission is independent and subject only to the Constitution and the law (s 20(1)(a)). It must be impartial and perform its functions without fear, favour and prejudice (s 20(1)(b)). Its functions include the investigation and evaluation of alleged contraventions of Chapter 2 (s 21(1)(c)), the

[10] See ss 49A, 54 and 56 of the Competition Act.

[11] *Simelane and Others NNO v Seven-Eleven Corporation (Pty) Ltd and Another* 2003 (3) SA 64 (SCA) para 12.

referral of complaints to the Tribunal and appearances before the Tribunal (s 21(1)(g) and 53(a)). It may appoint inspectors and assistants (ss 24(1) and 49B(4)), and must investigate a complaint as quickly as practicable upon initiating or receiving a complaint (s 49B(3)). Powers of search and summons are conferred by ss 46 to 49A. At any time after initiating a complaint the Commission may refer it to the Tribunal (s 50(1)). However, it must within one year after the complaint (or an extended period (s 50(4)) was submitted to it, refer it to the Tribunal if it determines that a prohibited practice has been established (s 50(1)(a)),[12] or issue a notice of non-referral (s 50(1)(b)). In the latter event, the complainant may refer the complaint directly to the Tribunal (s 51(1)). In my view the decision in *Simelane* that the ultimate decision to refer a matter to the Tribunal and the referral itself are of an investigative and not an administrative nature remains a correct reflection of the position under PAJA and the decision that PAJA does not apply in this review is correct.

[12] In *Simelane and Others NNO v Seven-Eleven Corporation (Pty) Ltd and Another* 2003 (3) SA 64 (SCA) para 16 this court approved of the following interpretation of the words 'determines that a prohibited practice has been established' in *Novartis SA (Pty) Ltd and Others v Competition Commission and Others* (CT 22/CR/B/Jun 01, 2.7.2001) para 61: 'On the basis of its investigation the commission determines whether or not a prohibited practice has occurred. If the commission determines that a prohibited practice has occurred it cannot impose a fine or any other remedy, it must refer the complaint to the tribunal. Referring a complaint to the tribunal is not determinative of the complaint. All it means is that the respondent will have to face a hearing before the tribunal where it will be given an opportunity to respond to the allegations that it has engaged in a prohibited practice.'

Legality

[12] The Commission's decision may, however, be set aside on the principle of legality even if it is not reviewable under PAJA.[13] The principle of legality entails that no public power may be exercised and no function performed beyond that conferred by law.[14] The decision of the Commission to refer the complaint to the Tribunal is a matter that must be authorised by law. It is accordingly to the three additional grounds of review relied upon by Telkom that I now turn.

Bias

[13] The court a quo set aside the Commission's decision and complaint referral on the basis of bias holding that 'bias' falls within the expression 'ill-faith, oppression, vexation or the like' referred to in *Simelane NO and Others v Seven-Eleven SA Corporation (Pty) Ltd and Another.*[15] I am prepared to accept for the purposes of this judgment that 'bias' can be comprehended within this phrase. The court a quo opined that if the source of the Commission's complaint referral was disclosed and the source tainted, the source could have been the object of a perception of bias. In addition,

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[13] *Eskom Holdings Ltd and Another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) para 9; *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) para 97; *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) paras 56-9; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) para 148.

[14] *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) para 80.

[15] 2003 (3) SA 64 (SCA).

counsel for Telkom relied on s 20(1)(b) of the Competition Act, which requires the Commission to be impartial and 'perform its functions without fear, favour, or prejudice.' The essence of Telkom's complaint is that the Commission lacked technological expertise and relied heavily on the Link Centre's professed expertise. The Link Centre was biased and indeed caused the Commission to refer the complaint to the Tribunal. Accordingly, so the argument rather illogically went, Telkom has a reasonable suspicion that the Commission was also biased. Reference was made to the 'indiscriminate and virtually exclusive' reliance on the report of the Link Centre. The decision to refer the complaint was therefore 'arbitrary and capricious'.

[14] The Commission's senior investigator requested 'expert assistance' in the investigation of the complaints against Telkom and the Link Centre was appointed on 14 February 2003 to assist. It was instructed to submit a draft report on which the Commission would comment before submission of its final report. An agreement was concluded between four consultants at the Link Centre and the Commission. The Commission relied on the report of the Link Centre when deciding to refer the complaint. In fact, the Commission's investigative team made extensive use of the report taking over some of its recommendations in so many words.

[15] Three principal grounds for the alleged perception of bias are relied upon. First, the Link Centre received funding from some of the complainants in the SAVA complaint. This is disposed of quite easily. The Link Centre is a research and training body in the field of information and communications technology, policy, regulation and

management. It is the only major organization in South Africa that focuses on these matters. It has published internationally and presented papers at conferences. While it is correct that the some of the complainants funded the Centre, the Link Centre also received funding from the government and from Vodacom, a company in which Telkom had a 50 percent shareholding. Its largest funding during the time of the investigation was from Vodacom. Telkom was approached for funding as well but declined to contribute. The donations from industry participants were less than a fifth of local donor contributions and a fraction of the multimillion Rand foreign donor contribution from the Canadian Independent Development Research Centre. The second ground is that, the advisory board of the Link Centre included various people who were closely involved with the complainants at the relevant time, in particular, the co-president of SAVA and the co-president of ISPA. Thirdly, the authors of the Link Centre report made statements and pronouncements that were highly critical of Telkom prior to being employed to prepare the report. These statements are to the effect that Telkom's profits were outrageous; that ICASA's decisions were regularly overturned because of Telkom's influence; and that Telkom by using its monopoly power sought to retard growth of the value-added network and internet sectors and so interfered with the effectiveness of South African business. For example, Ms Gillwald, one of the authors of the Report, stated that 'a consequence of Telkom's unchecked dominance has also had a chilling effect on the partially-liberalised value-added services segment of the telecommunications market, which includes the internet service providers.' None of the statements or publications ascribed to the authors of the report was denied: however, all

claims of bias were rejected, and Ms Gillwald deposed that the views of the authors of the report were founded on research.

[16] On the assumption, as I have remarked, that 'bias' can be comprehended within the phrase 'ill-faith, oppression, vexation or the like', it seems to me that reliance on it can neither be supported by the evidence nor justified as a conclusion of law. The very nature of the Commission's function in referring a complaint to the Tribunal presupposes its taking a view of the matter. It is entitled to consider partisan material in arriving at its conclusion.[16] The Commission's reliance on the Link Centre report and the expressed views of its authors do not evidence bias or give rise to a reasonable apprehension of bias on the part of the Commission: no reasonable person would reasonably conclude that the *Commission* by relying on the Link Centre report would be biased.[17] It is not a case of the Commission having had any ulterior motive.[18] The

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[16] *Simelane NO and Others v Seven-Eleven SA Corporation (Pty) Ltd and Another* 2003 (3) SA 64 (SCA) paras 33 and 34. See *Chairman, Board on Tariffs and Trade and Others v Brenco Inc and Others* 2001 (4) SA 511 (SCA) para 65 and JR de Ville *Judicial Review of Administrative Action in South Africa Revised First Edition* (2005) 270-1 n 462.

[17] See *S v Harksen; Harksen v President of the Republic of South Africa and Others; Harksen v Wagner NO and Another* 2000 (1) SA 1185 (C) para 71 and *Sager v Smith* 2001 (3) SA 1004 (SCA); [2001] 3 All SA 401 (A) where it was said (para 17): 'The test to be applied is an objective one, requiring not only that the person apprehending the bias must be a reasonable person but also that the complaint must be reasonable … This two-fold feature of the required objective standard has been described … as the double requirement of reasonableness. In *SACCAWU* [*South African Commercial Catering and Allied Workers Union and others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC)] … at paragraphs [11] to [17]] it was said that the double reasonableness requirement highlights the

Commission stated that in addition to the Link Centre report it conducted its own investigations and obtained legal advice from outside counsel, all of which were among the considerations relied upon in coming to its decision to refer the complaint. It did not rubber stamp the report.[19] Nor is there any factual evidence that the Commission was prejudiced. It was entitled to obtain outside assistance.[20] No illegality on the part of the Commission in referring the complaint was shown.

Memorandum of Agreement

[17] Section 3(1A)(b) provides that the manner in which the concurrent jurisdiction provided for in s 3(1A)(a) or other public regulation is exercised,[21] 'must be managed, to the extent possible' in accordance any agreement between the two regulatory bodies. In its supplementary affidavit Telkom makes reference to the memorandum of agreement concluded between the Commission and ICASA pursuant to ss 3(1A)(b) and 82(1) and (2) of the Competition Act and published in the *Government Gazette* of 20 September 2002[22] with effect from 16 September 2002.[23]

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fact that mere apprehension on the part of a litigant that a Judge will be biased – even a strongly and honestly felt anxiety – is not enough.'

[18] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 38.

[19] See *Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA); [2005] 2 All SA 239 (SCA) para 20.

[20] Section 25(a).

[21] See para 27 ff below.

[22] GN 1747 of 2002 (*GG* 23857 of 20 September 2002).

[23] Section 21(1)(h) requires the Commission to 'negotiate agreements with any regulatory authority to co-ordinate and harmonise the exercise of jurisdiction over competition matters within the relevant industry

[18] The agreement records that it was entered into to establish the manner in which the two regulatory bodies would interact in respect of the investigation, evaluation and analysis of mergers and acquisitions and complaints involving telecommunication and broadcasting matters (clause 1.1). It was entered into on the basis of mutual respect and in a spirit of goodwill. Its conclusion, however, does not affect the independence of the two regulatory bodies (clause 1.2). The agreement deals with mergers (clause s 2), complaints (clause 3), the establishment of a joint working committee (clause 4), the sharing of resources (clause 5), the exchange of information (clause 6), confidentiality (clause 7) and contains some general provisions (clauses 8 to 13).

[19] The agreement provides that the Commission would deal with complaints concerning restrictive practices and the abuse of a dominant position, and ICASA to deal with contraventions of telecommunications and broadcasting licence conditions and legislation (clauses 3.1 and 3.2). Provision was made for the process to be followed

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or sector, and to ensure the consistent application of the principles of this Act …' Section 82 concerns the Commission's relationship with other regulatory agencies: '(1) A regulatory authority which, in terms of any public regulation, has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 within a particular sector - (a) must negotiate agreements with the Competition Commission, as anticipated in section 21 (1) (h); and (b) in respect of a particular matter within its jurisdiction, may exercise its jurisdiction by way of such an agreement. (2) Subsection (1) (a) and (b), read with the changes required by the context, applies to the Competition Commission. (3) In addition to the matters contemplated in section 21 (1) (h), an agreement in terms of subsection (1) must - (a) identify and establish procedures for the management of areas of concurrent jurisdiction; (b) promote co-operation between the regulatory authority and the Competition Commission; (c) provide for the exchange of information and the protection of confidential information; and (d) be published in the Gazette.'

in the case of complaints: those relating to matters that fall within the concurrent jurisdiction of both regulators must be made available by the recipient regulator to the other regulator (clause 3.3.1). The complainant must be informed that the complaint would be discussed jointly by both regulators (clause 3.3.2). The regulators are required to 'consult with each other and evaluate the complaint in order to establish how the matter should be managed in terms of this agreement' (clause 3.3.3). The recipient regulator must advise the complainant of the outcome of the discussion between the two regulators (clause 3.3.4) and give him or her further directions regarding the prosecution of the complaint (clause 3.3.5). Provision is also made for the participation of the other regulator in an advisory capacity in any process regarding the complaint (clause 3.3.6 and 7). Clause 3.4 states explicitly that nothing in the procedures referred to shall 'detract from the jurisdiction of the Commission or the Authority to receive and deal with complaints in terms of their enabling statutes' or 'preclude parties from lodging a complaint with both regulators' (clauses 3.4.1 and 3.4.2). Clause 3.5 deals with matters where there is no concurrent jurisdiction.[24]

[20] The case relied on in Telkom's supplementary affidavit was not that the Commission failed to adhere to the terms of the agreement but that 'a proper application' of the agreement and the Competition Act would have required the Commission to allow or request ICASA to take the lead during the investigation of the

[24] See the discussion by Wellington Ngwepe 'Serving Two Masters: Concurrent Jurisdiction between the Competition Commission and the Independent Communications Authority of South Africa' (2003) 120 *SALJ* 243 249 ff.

complaints. Reference was made in the supplementary affidavit to the interaction between the Commission and ICASA and Telkom's contention that the conduct forming the subject matter of the referral related to Telkom's licences and Telkom's powers in terms of the Telecommunications Act. It was suggested that ICASA was entrusted with the determination of these disputes because of its specialized expertise in the field of telecommunications, expertise both the Commission and the Tribunal lack. It was submitted that a mandatory and material procedure or condition of the Competition Act was not complied with, which rendered the decision to refer and the referral ultra vires, tainted by an error of law or otherwise unconstitutional or unlawful.

[21] In its replying affidavit the case for Telkom underwent a metamorphosis. Telkom no longer only contended that the Commission should have allowed ICASA to have been the lead regulating agency but that the alleged failure to comply with clause 3.3.4 vitiated the Commission's decision and subsequent complaint referral. Clauses 3.3.3 and 3.3.5, which require the recipient regulator to inform the complainant of the outcome and consultations between the regulators and to give directions to it, have also allegedly been contravened. Clause 3.3.3 is said to impose a 'mandatory and material procedure or condition' to be followed and failure to follow the procedure is a ground for setting aside the decision as contemplated by s 6(2)(b) of PAJA. Introducing a new cause of action in reply is not permissible.[25] The Commission had no opportunity to reply to these new averments. In any event, I do not agree that clause 3.3.3 imposes a 'mandatory and material procedure or condition' for the making of the complaint referral

[25] *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) 635H – 636B.

nor that PAJA is applicable. The agreement does not affect the independence of the parties to it (clause 1.2) and clause 3.4 referred to above provides that nothing in the procedures contemplated in clause 3.3 shall 'detract from the jurisdiction of the Commission … to receive and deal with complaints' in terms of its enabling statutes. It follows that alleged non-compliance with clause 3.3.3 did not affect the power of the Commission to deal with the complaints, nor any rights of Telkom. The evidence, in any event, shows co-operation and consultation between the two authorities and substantial compliance with the terms of the agreement. Telkom has not shown any illegality in the Commission's decision to refer the complaint to the Tribunal.

Referral time-barred

[22] Section 49B(2)(b) of the Competition Act allows any person to submit a complaint concerning an alleged prohibited practice to the Commission. The Commissioner must in terms of s 50(2) within one year after submission of the complaint either refer it to the Tribunal, if the Commission determines that a prohibited practice has been established, or issue a notice of non-referral to the complainant. Section 50(4)(a) provides that in a particular case the 'Commission and the complainant may agree to extend the period allowed in subsection (2).' If the Commission has not referred the complaint to the Tribunal or issued a notice of non-referral within the one year or extended period 'the Commission must be regarded as having issued a notice of non-referral on the expiry of the relevant period' (s 50(5)).

[23] A 'complainant' is 'the person who has submitted a complaint in terms of section

49B(2)(b))'. It was submitted on behalf of Telkom that where multiple parties have lodged similar complaints, they all have to be regarded as 'complainants' and the consent of all is required for an extension in terms of s 50(4)(a).[26] I do not agree. The consequence of Telkom's argument would be that where one of several complainants fails to consent to an extension or is for some reason, such as its liquidation, unable to do so, the whole of the referral would lapse. This cannot be the position. Even if only one of several complainants consented to an extension of the period of time the complaint referred stands supported by that complainant. Each of the complainants is a 'complainant' who can agree to an extension of time. To require all to agree to the extension of time would mean that the complaints of those who have agreed would be regarded as being non-referred (in terms of s 50(5)). It would be absurd to require them to refer and prosecute the complaint themselves under s 51(1). The purpose of s 50(4) is to protect the interests of complainants: they are entitled to extend the period of time to ensure that it is the Commission that makes the referral and prosecutes the complaint before the Tribunal. [27]

[24] The court a quo found that that the Commission did not obtain the consent of all the complainants concerned. It observed that '[w]hen the so-called consent by the various people who have given such consent is analysed, it is clear that they did not represent all the complainants, although they claimed to have.' The uncontroverted

[26] See ss 1 and 6 of the Interpretation Act 33 of 1957.

[27] *Omnia Fertilizer Ltd v Competition Commission and Others; Sasol Chemical Industries Ltd v Competition Commission and Others* [2006] 1 CPLR 27 (CAC) para 11.

evidence on behalf of the Commission does not support this conclusion.[28] Twenty one complainants filed complaints. The complaint referral was made on 24 February 2004. The joint complaint of the first twenty complainants is referred to as the SAVA complaint. The twenty first complainant, Omnilink, together with Internet Solutions filed a further complaint on 22 August 2002, the 'Omnilink complaint'. The Commission consolidated both the Omnilink and SAVA complaints since they involved similar issues.

[25] The Omnilink complaint was extended to 31 October 2003 by Angus MacRobert. Telkom objected to this extension on the basis that it is not clear which complainant he represented. However, the Commission alleges that he acted on behalf of both Omnilink and Internet Solutions. When the consent is read with the covering letter of the attorney it is clear that he signed on behalf of both complainants. He indeed signed the original complaint on behalf of both Omnilink and Internet Solutions and there identified himself as the managing director of both complainants. On 29 October 2003 a further extension was given by M Furman on behalf of both these complainants to 29 February 2004. Telkom submitted that there was no satisfactory evidence establishing that he acted on behalf of both complainants. However, this is the allegation made in the answering papers and it is apparent from the consent itself. The time period in respect of both Omnilink and Internet Solutions provided for in s 50 therefore did not lapse.

[26] The SAVA complaint was submitted on 8 May 2002. On 11 April 2003 the Commission requested the complainants to extend the period. On 14 April 2003 SAVA's

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[28] See the approach in *Eskom v Soweto City Council* 1992 (2) SA 703 (W) 706 C–F.

chairman, Mr Mike van den Bergh, funished a consent signed by Mr EJ Thompson extending the investigation to 30 October 2003. Van den Bergh's letter to the Commission said that he enclosed the 'the signed agreement from SAVA'. Thompson signed 'on behalf of ISPA'. ISPA is one of the twenty complainants in the SAVA complaint. Van den Bergh and Thompson signed the original referral on behalf of all complainants and there is nothing to indicate that their authority to represent them all had lapsed. However, the Commission produced an affidavit from Thompson to the effect that the extension 'was intended to cover SAVA and its members who were also complainants, and not only ISPA.' Thompson was the joint chairman of ISPA at the time. His authority to consent on behalf of all the SAVA complainants is confirmed by Van den Bergh the then chairman of the SAVA, one of the complainants in the VANS complaint. Another complainant was ISPA. Van den Bergh stated specifically, and also Thompson, that the latter consented on behalf of 'SAVA and its members who were also complainants'. The Commission acknowledged receipt the letter of 14 April 2003 by writing to Van den Bergh. The attorneys for the complainants in the SAVA complaint furnished a signed extension agreement to the Commission on behalf of their clients dated 23 October 2003 enclosing an extension signed by Van den Bergh on behalf of the complainants extending the period to 29 February 2004. The Competition Act does not prescribe a specific format for the consent of a complainant. The complaint was referred to the Tribunal on 24 February 2004 which is within the extended period of time.

Concurrent Jurisdiction

[27] The Competition Act 'applies to all economic activity within, or having an effect within the Republic …[29] These are, as was remarked, 'words of great generality extending the operation of the section to 'the countless forms of activity which people undertake in order to earn a living.'[30] Originally, the now repealed s 3(1)(d) excluded from the application of the Competition Act 'acts subject to or authorised by public regulation'.[31] The effect of this provision was that certain anti-competitive acts were immune from the Competition Act despite their anti-competitive aspects not being regulated by the other regulatory authorities. The repeal of s 3(1)(d) expanded the range of economic activities to which the Competition Act applies. ICASA is a 'regulatory authority' as defined. Following the repeal of s 3(1)(d) ICASA no longer has exclusive jurisdiction in competition matters since the Competition Act by virtue of s 3(1) now applies to all economic activity within or having an effect within South Africa, including those that are authorised by or subject to public regulation.[32] The legislature established the competition authorities as the primary authority in competition matters

[29] Section 3(1).

[30] *Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty life Association of Africa Ltd v Competition Commission and Others* 2000 (2) SA 797 (SCA) para 9. On the meaning of 'effect' see *American Natural Soda Ash Corporation and Another v Competition Commission and Others* 2005 (6) SA 158 (SCA) paras 224 - 29. The two exceptions in s 3(1)(a) and (b) are not relevant for the purposes of this appeal.

[31] Section 3(1)(d). 'Public regulation' means 'any national, provincial or local government legislation or subordinate legislation, or any license, tariff, directive or similar authorisation issued by a regulatory authority or pursuant to any statutory authority' (s 1(1)).

[32] See also the discussion in paras 33-5 below.

and by introducing s 3(1A)(a) established that where another regulator has jurisdiction over any area of matters covered by the Competition Act their jurisdiction would be concurrent with that of the competition authorities.[33] The section provides as follows:[34]

'(1A) (a) In so far as this Act applies to an industry, or sector of an industry, that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of this Act, this Act must be construed as establishing concurrent jurisdiction in respect of that conduct.

(b) The manner in which the concurrent jurisdiction is exercised in terms of this Act and any other public regulation, must be managed, to the extent possible, in accordance with any applicable agreement concluded in terms of sections 21(1) (h) and 82(1) and (2).'

[28] The term 'jurisdiction'[35] in s 3(1A)(a) refers to the power or competence to hear and determine matters concerning the conduct regulated in terms of Chapters 2 and 3

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[33] Philip Sutherland and Katherine Kemp *Competition Law in South Africa* loose leaf ed October 2008 para 4.8 at 4-44 to 4-49.

[34] Its insertion by s 2(b) of Act 39 of 2000 is the legislative response to the decision in *Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others* 2000 (2) SA 797 (SCA). See Wellington Ngwepe 'Serving Two Masters: Concurrent Jurisdiction between the Competition Commission and the Independent Communications Authority of South Africa' (2003) 120 *SALJ* 242; Sutherland and Kemp para 4.8 at 4-44 ff for the history of the section and cf Richard Whish *Competition Law* (2009) 6ed 435 ff for a discussion of similar issues in the UK.

[35] Sir William Wade *Administrative Law* (2004) 9ed by Sir William Wade and Christopher Forsyth remarked at 251: 'In this area "jurisdiction" is a hard-worked word. Commonly it is used in its broadest sense, meaning simply 'power'. In some contexts it will bear the narrower sense of 'power to decide' or 'power to determine', but there will be no technical difference. In fact, except in the special case of error

of the Competition Act. Section 3(1A)(a) applies only where the other regulatory authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of the Competition Act, ie 'restrictive practices' (which include restrictive horizontal and vertical practices, and abuses of dominance) and mergers. The Telecommunications Act which provided for 'piecemeal competition jurisdiction',[36] did not in so many words regulate these matters but the conduct regulated overlapped to some extent with the conduct referred to in Chapters 2 and 3 of the Competition Act. In respect of this conduct ICASA enjoyed competition jurisdiction. Concurrent jurisdiction exists only where the other regulatory authority has the competence to adjudicate the competition aspects of the conduct.[37]

[29] Section 3(1A)(a) establishes concurrent jurisdiction 'in so far as' the Competition Act may be applicable to an industry, or sector of an industry, that is subject to the jurisdiction of another regulatory authority, and which authority has jurisdiction in respect of the conduct regulated in terms of Chapter 2 and 3 of the Competition Act. It is conceivable that the jurisdiction of the competition authorities may by legislation be

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on the face of the record, the principle here at work is basically that of ultra vires, which is synonymous with "outside jurisdiction" or "in excess of power".' In *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 (2) SA 420 (A) at 424 defines 'jurisdiction' as the 'power or competence of a Court to hear and determine an issue between parties'. See *Ewing McDonald & Co Ltd v M & M Products Co* 1991 (1) SA 252 (A) 256 G.

[36] See Ngwepe 247 and paras 31-2 below.

[37] Sutherland and Kemp 4-46 and cf *Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others* 2000 (2) SA 797 (SCA) para 9.

excluded entirely from a particular industry. The operation of competition legislation may also be retained expressly such as under ss 52 and 53 of the Telecommunications Act which in a limited sense provided for concurrent jurisdiction between the competition and telecommunication authorities.[38] The jurisdiction of the competition authorities may also continue but subject to certain reservations such as under s 67(9) of the Electronic Communications Act which provides that '[s]ubject to the provisions of this Act, the Competition Act applies to competition matters in the electronic industry.' It was submitted on behalf of Telkom, with reference to this section, that the Commission and the Tribunal lacked the power or competence to refer the complaint to the tribunal and to adjudicate on it. The Electronic Communications Act came into operation on 19 July 2006, long after the complaint referral was made. There is no suggestion that it applies retrospectively and, consequently, cannot affect the validity of the Commission's decision and the complaint referral. Nor can it affect the competence of the Tribunal to adjudicate the matter. The Tribunal's jurisdiction to adjudicate the complaint referral derives from the law as it stood at the time the complaint referral was made, 23 February 2004, and continues to exist to the end of the proceedings.

[30] Section 3(1A)(a) potentially establishes concurrent jurisdiction between the competition authorities and ICASA for conduct regulated in terms of Chapters 2 and 3 of the Competition Act. Chapter 2 deals with prohibited practices. Restrictive horizontal

[38] Section 52(3). The Maintenance and Promotion of Competition Act 96 of 1979 was repealed by the Competition Act but, in terms of 83(1) and Schedule 3 paragraph 4(a), any reference in any other statute to the Maintenance and Promotion of Competition Act, 1979 must be regarded as a reference to the Competition Act. See also s 12(1) of the Interpretation Act 33 of 1957.

practices and restrictive vertical practices are prohibited in terms of ss 4 and 5. Sections 6, 7, 8 and 9 concern the abuse of a dominant position. Chapter 3 is concerned with merger control. The conduct of Telkom complained of concerns alleged contraventions of ss 8 and 9. In its complaint referral the Commission alleges contraventions of ss 8(a), (b), (c), (d)(i) and 9 of the Competition Act. The prohibitions in ss 8 and 9 depend on showing that the firm concerned is 'dominant'.[39] Section 8(a) and (b) describe *per se* abuses.[40] An 'exclusionary act' is defined as 'an act that impedes or prevents a firm entering into, or expanding, within a market'. Section 8(a) prohibits the charging of an excessive price by a dominant firm.[41] Section 8(b) condemns the refusal by a dominant firm to give a competitor access to an essential facility[42] when it is economically feasible to do so.[43] Subsections (c) and (d) require that both the elements of the exclusionary act and its alleged anti-competitive effect be proved in order to undertake the balancing required by the pro-competitive defence that is permitted in respect of these exclusionary acts.[44] Subsection (c) prohibits a dominant firm from engaging in an exclusionary act, other than those listed in paragraph (d), when the anti-competitive

[39] See s 7 as well as s 1 for the definition of 'market power'.

[40] See Sutherland and Kemp paras 7.4 ff at 7-8 ff but see para 7.10.1 at 7-40(7) ff.

[41] See *Mittal Steel South Africa Ltd; MacSteel International BV; MacSteel Holdings (Pty) Ltd v Harmony Gold Mining Company Ltd; Durban Roodepoort Deep Ltd* 29/05/2009 (70/CAC/Apr07).

[42] Section 1 defines an 'essential facility' as 'an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers.'

[43] Sutherland and Kemp para 7.10 at 7-40(7) ff.

[44] Sutherland and Kemp para 7.11 at 7-45 ff.

effects outweigh its pro-competitive gains. Subsection (d)(i) specifically prohibits as an abuse of dominance conduct by which a dominant firm requires or induces a supplier or customer not to deal with a competitor unless the dominant firm can show pro-competitive gains outweighing anti-competitive effects. Section 9 requires the Commission to prove the existence of price discrimination by the dominant firm and that the discrimination is likely to have the effect of substantially preventing or lessening competition in a market.[45] The price discrimination must relate to a sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers, and that the discrimination involves discriminating between those purchasers in terms of the aspects listed in s 9(1)(c).

[31] The primary object of the Telecommunications Act was to provide for the regulation and control of telecommunication matters in the public interest. Its objects included ensuring the development of a competitive and effective telecommunications manufacturing and supply sector as well as fair competition within the telecommunications industry.[46] ICASA is the regulating authority.[47] In so far as the conduct regulated under Chapter 2 of the Competition Act is concerned it had some jurisdiction but it was limited. The remedies to regulate anti-competitive conduct were equally limited. The Competition Act also contains more comprehensive criminal sanctions.[48] Section 36(1)(d) of the Telecommunications Act, for example, provided:

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[45] On this requirement see *Sasol Oil (Pty) Ltd v Nationwide Poles CC* [2006] 1 CPLR 37 (CAC) at 51.

[46] Section 2.

[47] Section 3 of the Independent Communications Authority Act 13 of 2000.

[48] Compare ss 100 to 102 Telecommunications Act with Chapter 7 of the Competition Act.

'Where it appears to the Authority that Telkom, in the provision of its telecommunication services, is taking or proposing to take any step which confers or may confer on it an undue advantage over any person who may in future be granted a licence in competition with Telkom, the Authority may direct Telkom to cease or refrain from taking such step, as the case may be.'

Conduct of the kind regulated by s 36(1)(d) invariably involved conduct falling within the ambit of Chapter 2, for example, the abuse of dominance. ICASA was also given powers to regulate the terms of telecommunications supply contracts in relation to the interconnection of services,[49] and the leasing or making available of telecommunication services.[50] Similar issues could arise under s 43 which obliged the holder of a public switched telecommunication service licence to interconnect its systems to that of a provider of telecommunications services pursuant to an agreement to be concluded between them. ICASA was empowered to resolve disputes between the parties and to determine the reasonableness of a request for interconnection as well as a dispute as to the terms and conditions of an agreement providing for the interconnection of systems. It could impose the terms and conditions on the agreement (s 43(4)). ICASA had similar powers where Telkom was requested to lease or make available telecommunications services to a telecommunications service provider (s 44(2) and (6)). Moreover, s 53(1) of the Telecommunications Act dealt expressly with 'uncompetitive actions':

'If it appears to the Authority that the holder of a telecommunication licence is taking or intends taking any action which has or is likely to have the effect of giving an undue preference to or causing undue discrimination against any person or category of persons, the Authority may, after giving the licensee concerned an opportunity to be heard, direct the licensee by written notice to cease or refrain from taking such action, as the case may be.'

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[49] Section 43(3) and (4) Telecommunications Act.

[50] Section 44(6) Telecommunications Act.

The conduct regulated by this section would also involve conduct falling within Chapter 2 of the Competition Act, the applicability of which to the conduct in question was specifically retained.[51] Section 53 applied to a very narrow ambit, viz conduct

'which has or is likely to have the effect of giving an undue preference to or causing undue discrimination against any person or category of persons'.

However, It is apparent that the same conduct that could, for example, constitute a contravention of s 9 of the Competitions Act could also fall within the ambit of s 53.

[32] Section 100 of the Telecommunications Act gave ICASA powers to investigate and adjudicate alleged contraventions of the Act, licences, any agreement for the provision of telecommunications facilities or directions given in terms of ss 36(1), 53 or 98; or a failure by a telecommunications service provider to provide those services to a customer of an end-user. ICASA had the power to direct the licensee to desist, to pay a fine, to take remedial action or, in the case of repeated failures or contraventions, to revoke the licence (s 100(3)).

Jurisdiction

[33] Telkom contends that the subject matter of the complaint referral falls within the exclusive jurisdiction of ICASA and beyond that of the competition authorities. This submission relates to both the appeal and the cross-appeal. Its contention is that the conduct in question was authorised by the Telecommunications Act and its licence and that, consequently, the legislature could not have intended the competition authorities to

[51] See above n 44.

have the power or competence to adjudicate on conduct that is authorised by the Telecommunications Act, by the regulations made under it or by Telkom's licence or that might have been authorised by ICASA under its empowering provisions.

[34] In response[52] to the *first* complaint concerning Telkom's imposition of contractual restrictions in the provision of backbone and access facilities, Telkom relies on the terms of its licence authorizing its conduct. For example, by virtue of its licence Telkom was entitled to bind a licensee contractually not to obtain a telecommunications facility from a person other than Telkom; not to resell capacity on any telecommunications facility; and not to convey voice telephony as part of any value–added network service.[53] In addition, Telkom invokes several provisions of the Telecommunications Act that authorised it to act in the manner of which the Commission complains.[54] Telkom's answer to the *second* complaint justifying its refusal to lease access facilities to licensees directly as it had done until September 1999 is that it did so because the provision of telecommunication facilities directly to licensees would facilitate the illegal operation of a private network. Its conduct was otherwise justified in terms of the provisions of its licence.[55] In response to the *third* complaint that it engaged in price discrimination and or excessive pricing in contravention of ss 8(a) and (c) and 9 of the Competition Act, Telkom contends that the rates and tariffs that form the subject matter of the complaint were regulated by ICASA. Section 45 of the Telecommunications Act

[52] See para 6 above.

[53] Para 2.5 (a) – (c). See also para 13.4.3 (a) and (c).

[54] See s 44(2) and further eg ss 41(2)(a), 41(2)(a), and s 41(7).

[55] See para 2.2 of its licence and s 36B(1)(c)(iii).

dealt with the fees and charges that may be levied by a licensee. Clause 7.1 of the Telkom's licence requires Telkom to file with ICASA the rates and terms for those services that it wished to provide pursuant to its public switched telecommunications service licence. These rates were subject to control in terms of paragraph 7 of the licence and the Telecommunications Act, and formed part of a basket that was approved by ICASA. Telkom's answer to the *fourth* complaint that it refused to peer is that peering is a matter that falls solely within the technical competence of ICASA and a matter that was provided for in its licence. Peering, in addition, is a discretionary matter.

[35] It was contended on behalf of Telkom that conduct authorised under specific legislation will ordinarily not be conduct to which a general enactment applies: what Parliament regulates specifically it does not undo by general enactment: *generalia specialibus non derogant*.[56] The implication of exclusivity contended for will be refuted where it is clear that the intention is that the later general enactment should regulate the subject matter. Where this is the position the later enactment necessarily supersedes the earlier specific legislation to the extent that they may differ. Both the repeal of s 3(1)(d) and the introduction of s 3(1A)(a) brought about a complete change from the earlier position. They are general provisions intended to regulate the subject matter comprehensively and intended to establish the general jurisdiction of the competition authorities in all competition matters. The Competition Act applies to all economic

[56] *New Modderfontein Gold Mining Co v Transvaal Provincial Administration* 1919 AD 397 401; *R v Gwantshu* 1931 EDL 29 31; *Sasol Synthetic Fuels (Pty) Ltd and Others v Lambert and Others* 2002 (2) SA 21 (SCA) para 17 and *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) 603 B-E.

activity within or having an effect within South Africa. It provides for wide powers and general remedies more effective than the limited ones given by the Telecommunications Act. There is no room for the implication of exclusive jurisdiction vested in ICASA contended for. The authorising legislative and other provisions Telkom relied upon did not oust the jurisdiction of the Commission and the Tribunal but could well give rise to defences to the complaints referred. The competition authorities not only have the required jurisdiction but are also the appropriate authorities to deal with the complaint referred.

Appropriate Forum

[36] The court a quo dismissed the contention advanced on behalf of the Commission that the Tribunal was the appropriate or preferred forum to hear the matter by observing that since the case had been fully argued there was no point in referring it to the Tribunal. This contention was not an objection to the jurisdiction of the court but rather a submission that, given the nature of the alleged contraventions, it would have been preferable that the Tribunal hear the matter. As will be shown, Parliament has conferred the competence to investigate, evaluate, refer and adjudicate complaints concerning infringements of Chapter 2 on a series of specialist bodies. The Competition Act creates a hierarchy of institutions to apply and enforce its provisions: the Commission, the Tribunal and the Competition Appeal Court.[57] The Commission's functions include the investigation of mergers and the investigation and referral of complaints of prohibited

[57] See *Seagram Africa (Pty) Ltd v Stellenbosch Farmers' Winery Group Ltd and Others* 2001 (2) SA 1129 (C) 1141 ff; Sutherland and Kemp Chapter 11.

practices to the Tribunal. The Tribunal is the adjudicative body of first instance. It is a specialist administrative tribunal adjudicating referrals from the Commission and by private individuals. It also has the power hear appeals from certain decisions of the Commission and to review them. The Competition Appeal Court is a specialist court hearing appeals from and reviews of decisions of the Tribunal. Where specialist structures have been designed for the effective and speedy resolution of particular disputes it is preferable to use that system.[58]

[37] Determining whether a matter involves a contravention of Chapter 2 may be complex and technical. The Tribunal should not be lightly deprived of the authority to decide whether the complaints referred to involve such contraventions.[59] It was submitted on behalf of the Commission that it would have been appropriate, perhaps preferable, for Telkom to have raised the objection to the Tribunal's jurisdiction at the commencement of the proceedings. Exercising its specialist authority under the Act, the Tribunal would have been able to determine whether the matters fell within its authority, ie whether they involved contraventions of Chapter 2.

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[58] Cf the remarks of Van der Westhuizen J in *Gcaba v Minister for Safety and Security and Others CCT 64/08 [2009] ZACC 26 (7 October 2009)* para 56

[59] Cf the remarks on the Competition Appeal Court referring a matter back to the Tribunal in *Mittal Steel South Africa Ltd; MacSteel International BV; MacSteel Holdings (Pty) Ltd v Harmony Gold Mining Company Ltd; Durban Roodepoort Deep Ltd* 29/05/2009 (70/CAC/Apr07) para 75; *Anglo South Africa Capital (Pty) Ltd v Industrial Development Corporation of South Africa Ltd (Intervening)* 24/CAC/Oct02 5-6 and see *Erf 167 Orchards CC v The Greater Johannesburg Metropolitan Council* 1999(1) SA 104 (SCA) paras 21 and 22.

[38] The Competition Tribunal is a specialist administrative tribunal created by s 26(1). Its functions must be exercised in accordance with the Act.[60] It must adjudicate on any matter referred to it under the Act, and each matter will be referred to a panel of three. Members need not be lawyers: they may have qualifications and experience in economics, law, commerce, industry or public affairs.[61] However, the chairperson must, when assigning a matter to the Tribunal, ensure that at least one member of the panel is a person who has legal training and experience. The Chairperson designates one of the three members of a panel to preside over each proceeding.[62] The Tribunal does not function as an ordinary court does.[63] Competition proceedings involve the public interest, and under the Act, the Tribunal has an active role to play in protecting that interest.[64] The Tribunal may conduct its proceedings in an inquisitorial manner,[65] calling its own witnesses, accepting evidence not normally admissible in a court, allowing a broad range of participants, and adjusting its procedures as it sees fit.[66] It is a tribunal of record (s 26(1)(c)). Its functions include the power to adjudicate any conduct prohibited in terms of Chapter 2, to determine whether prohibited conduct has occurred, and, if so,

[60] Sections 26(1)(d); 27.

[61] Section 28(2)(b).

[62] Section 31.

[63] Cf *American Natural Soda Ash Corporation v Botswana Ash (Pty) Ltd* [2001-2] CPLR 430 (CT) 442.

[64] See ss 54-5.

[65] Section 52(2)(b).

[66] Sutherland and Kemp 11-24, para 11.4.6.1.

to impose any remedy provided for by the Act (s 27(1)(a)).[67] It must conduct its hearings in public and in accordance with the principles of natural justice.[68] Legal representation is permitted (s 53). Powers are given to it to summon and interrogate and to order the production of books, documents or items required for the hearing (ss 54(c) and 56). After the conclusion of a hearing it must make an order permitted by the Act and must issue reasons for the order (s 52(4). It may also

'(b) adjudicate on any other matter that may, in terms of this Act, be considered by it, and make any order provided for in this Act;

(c) hear appeals from, or review any decision of, the Competition Commission that may in terms of this Act be referred to it; and

(d) make any ruling or order necessary or incidental to the performance of its functions in terms of this Act.'

It follows that the Tribunal may hear appeals from, or review, decisions of the Commission referred to it. It may thus adjudicate on the matter under consideration.[69] A

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[67] The remedies are referred to in inter alia ss 59, 60 and 61.

[68] Section 52(2).

[69] Section 62 of the Competition Act provides for the Tribunal and the Competition Appeal Court to share exclusive jurisdiction in respect of the interpretation and application of Chapters 2, 3 and 5 as well as the functions referred to in ss 21(1), 27(1) and 37. In addition to its appeal jurisdiction, jurisdiction concerning 'the question whether an action taken or proposed by the Competition Commission or the Competition Tribunal is within their respective jurisdictions in terms of this Act' (see s 62(2)(a) is vested in the Competition Appeal Court (s 62(2)(a)). The jurisdiction of the Competition Appeal Court in this respect is original and as a court of first instance (*Sappi Fine Paper (Pty) Ltd v Competition Commission of South Africa and Another* [2003] 2 CPLR 272 (CAC); (23/CAC/Sep02) para 4). The jurisdiction of the Competition Appeal Court is not final in this respect (s 62(3)(b)) and an appeal lies to the Supreme Court of Appeal or the Constitutional Court (s 62(4)).

direction may also be given in terms of Rule 21(2) that a point of law be heard by the Tribunal separately and prior to further proceedings. It would have been the preferred forum to adjudicate the matter. For these reasons as well the court a quo should in the exercise of its discretion,[70] have declined to review and set aside the decision of the Commission and the complaint referral.

[39] My colleague Van Heerden JA was present during the hearing of the appeal but has, by reason of subsequent indisposition, been incapable of being a party to the final decision. The judgment of the remaining members of the court consequently becomes the judgment of the court (see s 12(3) of the Supreme Court Act 59 of 1959).

[40] The following order is made:

(1) The appeal is upheld with costs including the costs of two counsel;

(2) The cross-appeal is dismissed with costs including the costs of two counsel;

(3) The order of the court a quo is set aside and replaced with the following;

'the application is dismissed with costs including the costs of two counsel.'

Malan JA

Judge of Appeal

[70] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] 3 All SA 1; 2004 (6) SA 222 (SCA) para 36.

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