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Humphreys, Russell

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University of the Witwatersrand, Johannesburg

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CONDONATION OF NON-COMPLIANCE UNDER SECTION 67(1) OF THE COMPETITION ACT 89 OF 1998

Submitted in partial fulfilment of the requirements for the degree of Master of Laws by Coursework and Research Report at the University of the Witwatersrand, Johannesburg

By

Student Number 251 3741

Date: August 2023

DECLARATION

I, declare that this research report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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ABSTRACT

The Competition Commission has long sought to extend its powers to investigate and refer complaints to the Competition Tribunal for prosecution. Prior to the decision of the Constitutional Court in the case of the *Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited 2021 (3) SA 1 (CC)* (the '*Pickfords*' case), the power of the Commission to initiate investigations and therefore refer matters to the Competition Tribunal was limited by section 67(1) of the Act. Those accused of breaching the Competition Act 89 of 1998 have, in their defence, relied on the limitations of section 49B of the Competition Act - the procedure for initiating a complaint and section 67(1) which provides for a time limitation on initiating/referring a complaint to the Competition Tribunal. The Constitutional Court in the *Pickfords* case considered whether in light of section 34 of the Constitution, section 67(1) of the Competition Act should be interpreted as an absolute bar (a prescriptive provision) or procedural time bar (capable of condonation). Section 67(1) was, however, amended in 2018 to limit the referral of a compliant to the Tribunal to no more than three years after the practice ceased. This paper considers the statutory limitations on the Commission to initiate and refer complaints to the Competition Tribunal in terms of sections 49B, 50, 67(1) and section 58(1)(c)(*ii*) and to examine how these limitations have been by interpreted by our courts.

LIST OF ACRONYMS AND ABBREVIATIONS

CT	Competition Tribunal
CAC	Competition Appeal Court
SCA	Supreme Court of Appeal
CC	Constitutional Court

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I INTRODUCTION

The enactment of the Competition Act 89 of 1998 (the 'Act') introduced a number of prohibited of practices, including restrictive horizontal and vertical practices, as well as the abuse of a dominant position.[1] The Competition Commission (the 'Commission') is the regulatory authority established in terms of Chapter 4 of the Act to investigate alleged contraventions of the Competition Act and initiate complaints against alleged prohibited practices, as well as refer matters to and appear before the Competition Tribunal (the 'Tribunal') to prosecute matters so referred.[2] Since the Commission is a creature of statute, its powers to investigate and refer matters to the Tribunal are limited by the Act.[3]

Before the decision in the Constitutional Court case of the *Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited*[4] (the '*Pickfords*' case), the power of the Commission to initiate investigations and therefore refer matters to the Competition Tribunal was limited by section 67(1) of the Act.[5] There was, until the *Pickfords* matter, an absolute prohibition on initiating complaints if the practice had ceased more than three years ago. The Constitutional Court in the *Pickfords* case considered whether in light of section 34 of the Constitution[6], section 67(1) of the Competition Act should be interpreted as an absolute bar (a prescriptive provision) or procedural time bar (capable of condonation)[7]. A second issue considered by the Constitutional Court was whether non-compliance with section 67(1) can be condoned in terms of section 58(1)(c)(ii) of the Competition Act.[8]

Section 67(1) was amended in 2018 to limit the referral of a compliant to the Tribunal to no more than three years after the practice ceased. This amendment was made after the Pickfords matter had been initiated. The effect of this amendment is, however, similar to the previous

[1] Deon Prins 'Assessing the nature of competition law enforcement in South Africa' in Pieter Koornhof (eds) *Law, Democracy & Development* (2014) volume 18 at 136.
[2] Competition Act 89 of 1998 s21 read with s49B.
[3] *SAPPI Fine Paper (Pty) Limited v Competition Commission and Another* (23/CAC/Sep02).
[4] *Competition Commission and Pickford Removals SA (Pty) Limited* 2021 (3) SA 1 (CC).
[5] Competition Act 89 of 1998 s67(1).
[6] The Constitution of the Republic of South Africa 1996.
[7] Supra note 5 para 13.
[8] Competition Act 89 of 1998 s67(1).

position in that both versions effectively impose a time limit on the Commission to bring matters before the Tribunal. This effectively meant that the constitutional challenge raised in the *Pickfords* case remained unaddressed. In terms of section 34 of the Constitution, everyone has 'the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum.'[9] Therefore, whether section 67(1) limits the time within which the Commission may initiate an investigation (prior to the amendment) or limits the time within which the Commission may refer a matter to the Tribunal, both interpretations (post the amendment) it, 'undoubtedly limit(s) the right of access to courts, as enshrined in section 34 of the Constitution.'[10]

This paper considers the statutory limitations on the Commission to initiate and refer complaints to the Competition Tribunal in terms of sections 49B (initiate), section 50 (outcome of a compliant), section 67(1) (limitation on bringing actions) and section 58(1)(c)(*ii*) (condonation of non-compliance) and how these limitations have been by interpreted by our courts.

Part II is a consideration of the power of the Commission to initiate investigations into alleged contraventions and refer matters to the Competition Tribunal as set out in section 49B. This section is critical as respondents have frequently relied on it to limit the Commission's power to prosecute alleged contravention of the Act.

Part III of this paper considers the time limitation of section 67(1). Specifically, whether in light of section 34 of the Constitution, section 67(1) of the Act should be interpreted as an absolute bar (a prescriptive provision) or procedural time bar (capable of condonation) and whether non-compliance with section 67(1) can be condoned in terms of section 58(1)(*c*)(ii) of the Act. The starting point for this discussion is a consideration of the impact of the 2018 amendment on section 67(1).

Part IV analyses the Constitutional Court's (CC) approach in the *Pickfords* matter.

[9] S34 of the Constitution.
[10] Supra 5 at para 36 refers to *Makate v Vodacom (Pty) Limited* 2016 (4) SA 121 (CC) at para 87.

II INITIATION AND REFERRAL OF COMPLAINTS AGAINST PROHIBITED PRACTICES

(a) The Power to Initiate Proceedings in terms of section 49B

Complaints against alleged prohibited practices may be initiated by the Commission in terms of section 49B(*1*) or submitted by any person in terms of section 49B(*2*) of the Competition Act. Complaints initiated in terms of section 49B(*2*) may be initiated as a result of information submitted regarding an alleged prohibited practice[11] or by submitting a formal complaint against an alleged prohibited practice in the prescribed form to the Commission.[12] Upon the initiation of a complaint by the Commissioner or on receipt of a complaint in the prescribed form, the Commissioner 'must' direct an inspector to investigate the complaint as quickly as practicable.[13] There are two avenues for initiating complaints in terms of section 49B. The first avenue is in terms of the powers given to the Commission to initiate a complaint against an alleged prohibited conduct (in terms of Section 49B(1).[14] The second avenue is by a third party submitting a formal complaint in the prescribed manner and form (in terms of Section 49B(2)(b).[15] There are no restrictions as to how the Commission may initiate a complaint. However, third parties must specifically initiate a complaint in the 'prescribed form.'

The initiation must at least have the same particularity or clarity of a summons.[16] 'It must survive the test of legality and intelligibility.'[17] In terms of section 50(1), complaints initiated by the Commission may be referred to Tribunal at any time, while in terms of section 50(2), the Commission has one year after receiving a compliant in terms of section 49B(*2*)(b) to either refer the compliant to the Tribunal or issue a notice of non-referral in terms of section 50(2)(*b*).

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[11] Competition Act 89 of 1998 s49B(*2*)(*a*).
[12] Competition Act 89 of 1998 s49B(*2*)(*b*).
[13] Section 49B(*3*) of the Competition Act. See also *Woodlands Dairy (Pty) Ltd and Another v Competition Commission* 2010 (6) SA 108 (SCA) para 15.
[14] Killian Procedural formalities in terms of the Competition Act 89 of 1998: The Woodlands Omnia debate – A critical review of the Supreme Court of Appeal's approach to Complaint initiation and Referral in Competition Law Enforcement. (LLM Dissertation, University of Pretoria, 2015) 9.
[15] Killian (LLM Dissertation, University of Pretoria, 2015) 10.
[16] *Woodlands Dairy (Pty) Ltd and Another v Competition Commission* 2010 (6) SA 108 (SCA) para 35.
[17] Ibid.

(b) Complaints initiated by the Competition Commission

The leading case regarding the requirements to initiate and refer complaints is *Woodlands Dairy (Pty) Ltd and Another v Competition Commission*[18] (the *'Woodlands'* case). The referral in *Woodlands* was based on information provided by Mrs Louise Malherebe who alleged price fixing between Nestle, Parmalat and Ladismith Cheese. An investigation was conducted by two investigators in the employ of the Commission in terms of section 49B(*2*)(b). After investigating, they prepared a memorandum indicating that no evidence had been obtained against Nestle, but that in addition to a potential breach of section 4 (against Parmalat and Ladismith Cheese), a compliant should also be made against Clover in terms of section 8 (abuse of dominance). No mention was made of Woodlands Dairy.[19]

The Competition Commissioner failed to follow the advice provided in the inspectors' memorandum and initiated a single compliant against Parmalat, Ladismith Cheese and Clover. In his referral, he indicated that he believed that 'there existed anti-competitive behaviour in the milk industry'[20]

When considering this matter, the Supreme Court of Appeal (SCA) stated that 'the Commissioner seems to have been oblivious to the fact that he was supposed to initiate a complaint against an alleged prohibited practice and that this should have led to a direction to an inspector to investigate'[21] According to SCA,[22] the processes followed by the Commissioner ignored the Competition Appeal Court's (CAC) finding in *SAPPI Fine Paper (Pty) Ltd v Competition Commission of SA and Another*[23] (the '*Sappi*' case) that the Commission does not have the power to investigate conduct which it generally considers to constitute anti-competitive behaviour[24] and that a complaint must relate to 'an alleged contravention of the Act as specifically contemplated by an applicable provision thereof by that complainant.'[25]

[18] Ibid.
[19] Ibid para 23.
[20] Ibid para 24.
[21] Ibid para 26.
[22] Ibid para 19.
[23] *SAPPI Fine Paper (Pty) Limited v Competition Commission and Another* (23/CAC/Sep02) para 39.
[24] Ibid.
[25] Ibid.

The SCA in *Woodlands* went on to state that the initiation must, at the very least, have a jurisdictional ground and should be based on a realistic suspicion. The SCA further stipulated that initiation, and the consequent investigation must relate to the information available, or the complaint filed by a complainant.[26]

On appeal, the respondents challenged the validity of the referral on the basis that in terms of section 50(2) the Commission had one year within which to refer a matter to the Tribunal failing which it must issue a notice of non-referral.[27] The SCA dismissed the appeal on the basis that information had been submitted by Mrs Malherebe in terms of section 49B(*2*)(a), rather than a formal complaint in terms of section 49B(*2*)(b). The time limit set in terms of section 50(2) therefore did not apply as section 50(1) applied.[28]

(c) Complaints Initiated by Third Parties

In the matter of *Competition Commission v Yara (South Africa) (Pty) Ltd and Others*[29] (the '*Yara*' case), the SCA considered whether the referral and Tribunal were limited by the scope of the complaint initiated in terms of section 49B(*2*)(b) or section 49B(*1*) - the so called 'referral rule.' In this matter, Nutri-Flo lodged a complaint in the prescribed form against Sasol Chemical Industries (Pty) Ltd, for the abuse of a dominant position in contravention of section 8 and section 9 of the Act. Nutri-Flo alleged that Sasol, Omnia and Yara had colluding in the fertiliser market. While Nutri-flo mentioned Omnia and Yara, they only asked the Commission for relief against Sasol.[30] The Commission then referred the complaint to the Tribunal, alleging abuse of dominance by Sasol, Omnia and Yara collectively. On review, Omnia contended that Nutri-Flo had not submitted a complaint against it for abuse of dominance and, consequently, that the allegations of abuse of dominance could not have been validly investigated and referred.[31][32]

[26] Supra note 17 para 34.
[27] Supra note 17 para 38.
[28] Ndumiso Ndlovu and Yasmin Carrim (eds) *Handbook of Case Law: The Competition Tribunal's guide to select cases decided from 1999 to 2019* (2020) at 162.
[29] *Competition Commission v Yara (South Africa) (Pty) Ltd and Others* 2013 (6) SA 404 (SCA).
[30] Ndumiso Ndlovu op cit note 29 at 163.
[31] Supra note 30 para 24.
[32] Clare Reidy 'Waiting with bated breath: a detailed analysis of the Yara and Loungefoam matters' in Robert Legh (eds) *Sibergramme* (2012) volume 6 at 5-7.

The SCA supported the CAC ruling that the Nutri-Flo complaint was only directed against Sasol and not Omnia. However, the SCA went on to say that once it is determined that what was submitted was indeed intended to be a complaint, it made no difference at whom the complaint was aimed.[33]

> 'It concluded that the extended "referral rule" the CAC had relied on could not be sustained and concluded that it was of no consequence that the Nutri-Flo complaint was exclusively aimed at Sasol and not at Omnia or Yara.'[34]

According to the SCA, section 49B(*1*) required no more than the decision of the Commissioner to open a case. This decision could be informal and even tacit.[35]

The SCA also placed reliance on the CC judgement in *Competition Commission of South Africa v Senwes Ltd*[36] (the '*Senwes*' case) where the court found that the Tribunal was not precluded from determining a complaint not covered by the referral.[37] According to *Senwes*, the fact that the Tribunal can consider a complaint not raised in the referral means that the referral need not be confined to the parameters of the original compliant.[38] Respondents such as *Woodlands*[39] and *Yara*[40] argued that they were not cited when the compliant was initiated.

The SCA *Woodlands* judgement makes it clear that even though each respondent need not initially be cited,

> 'The Commissioner must at the very least been in possession of information concerning an alleged practice which, objectively speaking, could give rise to a reasonable suspicion of the existence of a prohibited practice. Without such information there could not be a rational exercise of the power.'[41]

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[33] Ndumiso Ndlovu op cit note 29 at 165.
[34] Ndumiso Ndlovu op cit note 29 at 165 refers to *Competition Commission v Yara (South Africa) (Pty) Ltd and Others 2013 (6) SA 404 (SCA)* par 16.
[35] Ndumiso Ndlovu op cit note 29 at 167 refers to *Competition Commission v Senwes Ltd* 2012 (7) BCLR 667 (CC) para 21.
[36] *Competition Commission of South Africa v Senwes Ltd* 2012 (7) BCLR 667 (CC).
[37] Ndumiso Ndlovu op cit note 29 at 166 refers to *Competition Commission of South Africa v Senwes Ltd* 2012 (7) BCLR 667 (CC) para 48.
[38] Ndumiso Ndlovu op cit note 29 at 166 refers to *Senwes* supra note 36 para 27-8.
[39] Supra note 17 para 28 where Woodlands was not cited in the complaint initiation.
[40] Supra note 30 para 5. The compliant in the prescribed form indicated that the complaint was againt Sasol Chemical Industries Proprietary. In para 8 Yara object to the referral because it fell outside of the scope of the Nutri-flo compliant.
[41] Supra note 17 para 13.

In accordance with the *Sappi* judgement, the Commission is not empowered to investigate conduct which it generally considers to constitute 'anti-competitive behaviour'. The investigation must relate to an allegation of a contravention of a particular section of the Act by a complainant.[42]

From a procedural perspective, the *Woodlands* judgement suggested that,

> '[t]he submission or initiation of a complaint is a jurisdictional prerequisite for a prohibited practice to be referred to the Tribunal. This is so because s49B(*3*) of the Act[43] allows the firm under investigation to engage with the Commission and to demonstrate its innocence before the matter proceeds to the referral stage, thus avoiding potential reputational damage caused by a public charge of anti-competitive conduct.'[44]

However, the SCA in *Yara* disagreed. Ndlovu, writing in the *Handbook of Case Law: The Competition Tribunal's guide to select cases decided from 1999 to 2019* says that,

> 'the SCA referred to its decision in *Simelane NO v Seven-Eleven Corporation SA (Pty) Ltd*[45] in which it ruled that a complaint initiation is a preliminary step – a process which[46] does not affect any respondent's rights. The Commission at this stage is not required to engage with the respondents. It is only after the Commission has referred the matter to the Tribunal that "the principles of administrative justice are observed in the referral and the hearing before the Tribunal. That is when the suspect firm becomes entitled to put its side of the case."'[47]

In summary, the Commission is entitled to initiate an investigation into an alleged practice in terms of section 49(B) provided it is in possession of information which objectively speaking can form the basis of a reasonable suspicion of the existence of a prohibited practice. Without this reasonable suspicion, there can be no rational exercise of the statutory powers. The Commission has one year within which to either refer a formal complaint in terms of section 50(2)(a) or issue a certificate of non-referral in terms of section 50(2)(b). This time limit is not applicable to investigations initiated by Commission. The decision to refer a matter need not be formal and may

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[42] Ibid.
[43] Competition Act 89 of 1998 s49B(*3*) says that, 'Upon initiating or receiving a complaint in terms of this section, the Commissioner must direct an inspector to investigate the complaint as quickly as practicable.'
[44] *Loungefoam (Pty) Ltd and Others v Competition Commission South Africa and Others, Feltex Holdings (Pty) Ltd v Competition Commission South Africa and Others* (102/CAC/Jun10) para 10.
[45] *Simelane NO v Seven-Eleven Corporation SA (Pty) Ltd* 2003 (3) SA 64 (SCA) para 17.
[46] Ibid para 24.
[47] Ndumiso Ndlovu op cit note 29 at 166 quotes *Simelane NO v Seven-Eleven Corporation SA (Pty) Ltd* 2003 (3) SA 64 (SCA) para 24.

even be tacit.[48] The Commission is not obliged to engage with the accused at this stage of the proceedings.[49]

Once the Commission refers a matter to the Tribunal, the matter becomes public, and the respondent is subject to the immense pressure of public scrutiny. Even innocent respondents will face substantial time and costs in exonerating themselves[50]. Considering the significant consequences, it is critical that the Commission properly investigate matters (using the powers set out in Part B of Chapter 5 of the Act) prior to referring matters to the tribunal.

III LIMITATIONS ON COMPLAINTS INITIATION AND REFERRALS IN TERMS OF SECTION 67(1)

(a) Section 67(1)

The Competition Act of 1998 introduced in section 67(1), a prescription regime which prohibited the initiation of a compliant more than three years after the conduct had ceased. Prior to *Pickfords*, this section operated as a prescriptive time bar. The Act does not make use of the word 'prescription,' however, the Commission has received a series of complaint initiations challenges on the basis that the conduct had ceased more than three years prior to the initiation.[51] These complaints have been referred to as 'prescription' challenges. 'Prescription' is the common means for referring to the time restrictions on the Commission's powers of initiation.[52]

A party who wished to raise 'prescription' as a defence had to properly plead in their papers as per the requirement of the Tribunal Rule (CTR) 16(4).[53] This means that every allegation and / or statement that the conduct has ceased needs to be supported by material facts.[54] Although section 67(1) was silent on who bears the onus of proof that the conduct has ceased, in the case of the

[48] Ndumiso Ndlovu op cit note 29 at 167 refers to *Competition Commission v Senwes Ltd* 2012 (7) BCLR 667 (CC) para 21.
[49] Ndumiso Ndlovu op cit note 29 at 166 quotes *Simelane NO v Seven-Eleven Corporation SA (Pty) Ltd* 2003 (3) SA 64 (SCA) para 24.
[50] Supra note 45.
[51] Ndumiso Ndlovu op cit note 29 at 121.
[52] Ibid.
[53] Ndumiso Ndlovu op cit note 29 at 122.
[54] *Paramount Mills (Pty) Ltd v Competition Commission* (112/CAC/Sep11) para 45.

Competition Commission v Pioneer Foods (Pty) Ltd[55] (the '*Pioneer Foods'* case), the Tribunal stated that the party who raises prescription as a defence must prove that the conduct has ceased as contemplated in section 67(1).[56] However, the courts also acknowledge that in civil matters the question of onus is not strict or unalterable like the presumption of innocence in criminal matters.[57]

To complete the enquiry under section 67(1), the Tribunal had to determine the date when the conduct ceased.[58] In considering the meaning of "practice has ceased" under section 67(1), the Tribunal has previously found that it was not the intention of the legislature to have a narrow meaning as it is evident that the practice is defined as having ceased when its effects have ceased.[59]

As discussed above, the procedure for initiating a compliant under section 49B is informal[60] and may even be tacit (as in the *Yara* matter). The Commission is able to bring parties into scope without having to specifically mention them and by alleging that the transgression is ongoing the onus falls on the accused to prove that the conduct ceased.[61]

Practically, it may be very difficult for a respondent to prove when their prohibited conduct ceased. Even though the procedures before the Tribunal are *sui generis* and not criminal procedures, in a criminal setting it would certainly offend the presumption of innocence[62] to place the burden of proof on an accused to prove that they did not commit a crime. Considered from a different perspective, this is not simply a commercial dispute between two equal parties but a limitation on the exercise of public power by a statutory body[63] (the Commission). The consequences of being accused of breaching the Act are significant while the Commission has significant powers of investigation to establish the facts.

The difficulties faced by respondents in demonstrating that they no longer participate in cartel conduct are illustrated in *Cross Fire Management (Pty) Ltd v Competition Commission of*

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[55] *Competition Commission v Pioneer Foods* (Pty) Ltd (15/CR/Feb07) & (50/CR/May08).
[56] Ibid.
[57] Constitutional Court's dicta in *Willem Prinsloo v Van der Linde and the Ministry of Water Affairs* 1997 (6) BCLR 759.
[58] Ndumiso Ndlovu op cit note 29 at 123.
[59] *Competition Commission v RSC Ekusasa Mining (Pty) Ltd* (65/CR/Sep09) para 146.
[60] Supra note 17 para 13.
[61] Supra note 5 para 27 and 30.
[62] Section 35(3) of the Constitution states that every accused person has the right to a fair trial and specifically in subsection (3)(h) the 'right to be presumed innocent, to remain silent, and not to testify during the proceedings.'
[63] *Competition Commission v Pickfords Removals & Others* (129/CR/Sep15) para 104.

South Africa[64] *(the 'Cross Fire' case)*. In this matter, the burden of proof fell on *Cross Fire* (the respondent) to prove, on a balance of probabilities[65], that their involvement in a cartel conduct ceased in 2009, more than three years before the initiation of the compliant in March 2015. The respondent had to prove that they had distanced themselves 'clear[ly] and unambiguous[ly]'[66] from the cartel conduct. Cross Fire argued that they had distanced themselves from the collusive conduct almost six years before the Commission initiated proceeds and almost 10 years before the Commission sought condonation for the late filing of the initiation. The Commission presented no evidence[67] of collusion by Cross fire after 2009. The CAC overturned the Tribunal's decision and held that Cross Fire's inclusion was time barred in terms of section 67(1). Accordingly, *Cross Fire* was released from the proceedings.

The precedents in the *Pioneer, Competition Commission v RSC Ekusasa Mining (Pty) Ltd (RSC Ekusasa)*[68] and *Power Construction (West Cape) (Pty) Ltd and Another v Competition Commission*[69]matters collectively open the door for the Commission to initiate and refer matters to the Tribunal on the basis that that the offending conduct has not ceased because the effects are on-going. Following *Pioneer,* the onus rests on the respondent to prove that the conduct has ceased and therefore that the constraints of section 67(1) apply. By placing the burden of proof on the respondent to prove that the conduct and its ongoing effects has ceased also means that only once the respondent proves that the conduct ceased more than three years prior to the referral, the Commission will need to obtain condonation in terms of Section 58(1)(*c*) to proceed even if such condonation is procedural.

[64] *Cross Fire Management (Pty) Ltd v Competition Commission of South Africa* (192/CAC/Feb21).
[65] Competition Act 89 of 1998 s68.
[66] Supra note 65 para 46 regarding where the burden of proof lies and para 56 regarding what needs to be proved.
[67] Supra note 65 paras 8, 73 and 82.
[68] *Competition Commission v RSC Ekusasa Mining (Pty) Ltd* (65/CR/Sep09).
[69] *Power Construction (West Cape) (Pty) Ltd and Another v Competition Commission* (145/CAC/Sep16).

(b) The amendment of section 67(1) of the Act

Section 67 (1) was amended by section 32 of the Competition Law Amendment Act 18 of 2018. The amendment of section 67(1) is as follows:

> 'A complaint in respect of a prohibited practice that ceased more than three years before the complaint was initiated [initiated more than three years after the practice has ceased] may not be referred to the Competition Tribunal.'[70]

The Background Note to the 2018 Competition Amendment Bill[71] states that the amendment to section 67(1) is meant to give clarity to the wording of the provision regarding the prescription of claims so that firms cannot argue that the Commission is unable to investigate a matter because it has prescribed.[72] The Commission must be able to investigate a matter even if it is to determine whether it has prescribed.[73]

In terms of the 2018 amendment, there is no longer a time limit on the initiation of a complaint (the investigation stage) but rather a time limit within which a matter can be referred to the Tribunal (prosecuted) after the prohibited practice has ceased.[74] A delay in initiation of a complaint can therefore no longer be raised as a defence by a respondent firm accused of a prohibited practice, but rather the time constraint is on the referral of the complaint to the Tribunal. This approach is consistent with the informal nature of an initiation, as set out in *Yara*.[75]

Although the Tribunal has not yet adjudicated on the 2018 amendment, it has on a number of occasions as discussed in the previous section, been faced with challenges that were brought

[70] S32 of the Competition Law Amendment Act 18 of 2018.
[71] Competition Amendment Bill, 2017 and Explanatory Memorandum, published in GG 41294 of 1 December 2017.
[72] Ibid at 24.
[73] Ibid.
[74] Ndumiso Ndlovu op cit note 29 at 121.
[75] Ndumiso Ndlovu op cit note 29 at 166.

about by the pre-amendment wording of section 67(1). In particular, the debates related to the 'prescription' provision were centred around, inter alia:

i. 'the date when a complaint was initiated, either by the Commission or a complainant in terms of section 49B;

ii. the date on which the conduct ceased; and

iii. on whom the onus rests to prove that such conduct has ceased.' [76]

The amended wording of section 67(1) does not address the constitutional challenge of section 34, as both versions limit the Commissions right to bring matters before the Tribunal either by limiting the time within which initiation or referral must take place. The 2018 amendment does, however, allow the Commission to investigate, even if it ultimately determines that the matter ceased more than three years prior. [77]

(c) Condonation of non-compliance in terms of section 58(1)(c)

Section 58(1)(*c*) of the Competition Act grants the Tribunal the power to condone, on good cause shown, any non-compliance with (i) the rules of the Commission or the Tribunal and (ii) of any time limit set out in the Competition Act.

> 'The only proviso is that those powers are subject to section 13(6) and section 14(2) of the Act. Section 13 deals with small merger notification and implementation. Section 14 concerns intermediate merger proceedings. Both section 13(6) and section 14(2) make it clear that the Commission's failure to issue merger approval certificates after the expiry of certain periods, will result in the deemed approval of the small or intermediate merger, as the case may be. There is thus no room for the condonation of the Commission's failure to issue the certificates. Sections 13(6) and 14(2) clearly do not entail the ambit of the Tribunal's powers of condonation but are the exceptions that are excluded from it.'[78]

[76] Ndumiso Ndlovu op cit note 29 at 121.
[77] Supra note 72 at 24.
[78] Supra note 5 para 49.

It should not be assumed that condonation will automatically be granted. Good cause must be shown.[79] Courts and indeed the Tribunal are afforded a wide discretion in evaluating what constitutes good cause, to ensure that condonation is in the interest of justice.[80]

Factors germane to this enquiry may include: the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the issue(s) to be raised in the matter; and the prospects of success.[81] In the *Ferris v Firstrand Bank Limited*[82] the Constitutional Court said:

> 'Lateness is not the only consideration in determining whether condonation may be granted . . . the test for condonation is whether it is in the interests of justice to grant it . . . an applicant's prospects of success and the importance of the issue to be determined are relevant factors.'[83]

According to Ndlovu, following the Commission's approach in the *Pickfords* Tribunal matter of allowing condonation in terms of section 58(1)(*c*) would mean 'that the Commission could at first exercise their powers unlawfully but later be capable of subsequent restoration, if good cause is shown.'[84]

The CAC in *Cross Fire*[85] clarified the procedural requirements. In this matter, the Commission proceeded on the basis that it was not time barred by section 67(1). However, *Cross Fire* successfully argued that the Commission was time barred in terms of section 67(1). The Commission eventually brought an application for condonation in terms of section 58(1)(*c*) three and half years after the application should have been delivered.[86] The Commission brought the application for condonation to the CAC and not to the Tribunal.

The CAC found that the function of the Competition Appeal Court is 'to review decisions of the Tribunal and to consider appeals arising from the Tribunal'[87], but applications for

[79] Supra note 5 para 54.
[80] *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A.
[81] *Van Wyk v Unitas Hospital* 2008 (2) SA 472 (CC) at para 20.
[82] *Ferris v Firstrand Bank Limited* 2014 (3) SA 39 (CC).
[83] *Ferris v Firstrand Bank Limited* 2014 (3) SA 39 (CC) at para 10, citing *Bertie Van Zyl (Pty) Ltd v Minister for Safety and Security* 2010 (2) SA 181 (CC). See also *National Police Service Union v Minister of Safety and Security* 2000 (4) SA 1110.
[84] Ndumiso Ndlovu op cit note 29 at 125 refers to the *Pickfords Tribunal* judgement para 107.
[85] Supra note 65.
[86] Supra note 65 para 120.
[87] Supra note 65 para 101.

condonation must, in terms of section 58(1)(*c*), be brought to the Tribunal 'as soon as the need for it is realised.'[88] The CAC held that it could not consider a condonation application that was not first made to the Tribunal.[89]

[88] Supra note 65 para 114.
[89] Supra note 65 para 101.

IV THE CONSITTUTIONAL COURT'S APPROACH TO SECTION 67(1)

(a) Competition Commission of South Africa v Pickford Removals SA (Pty) Limited

(i) Background

In *Competition Commission v Pickford Removals SA (Pty) Limited*,[90] the Constitutional Court considered the power of the Competition Tribunal in terms of section 58(1)(*c*)(ii) to condone non-compliance with section 67(1). The Court considered whether section 67(1) of the Act constitutes a substantive time-bar, which places an absolute prohibition on the initiation of a complaint in respect of a prohibited practice more than three years after the cessation of that practice or is merely a procedural time-bar, in which instance the event of non-compliance may be condoned in terms of section 58(1)(*c*)(ii) of the Act.[91]

In this matter, the Commission alleged that *Pickfords* had been involved in 37 separate instances of collusive tendering in the furniture removal industry going as far back as 2008.[92] The Commission alleged that this collusive tendering constituted a breach of section 4(1)(*b*)(i), (ii) and (iii) of the Act.[93] The Commission initiated a complaint in respect of the furniture removal industry on 3 November 2010.[94] *Pickfords* was not mentioned in the 2010 initiation statement and the Commission said that 'the main companies implicated in the alleged conduct include…'[95] without naming *Pickfords*.

Six months later, on 1 June 2011, the Commission issued a further initiation statement which now specifically cited *Pickfords* and other firms in the industry.

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[90] Supra note 5.
[91] Supra note 5 para 2.
[92] Supra note 5 para 3.
[93] Supra note 5 para 4.
[94] In terms s49B of the Competition Act 89 of 1998 a complaint against a prohibited practice by a firm may be initiated by the Commissioner or may be submitted to the Commission by any person. An investigation then ensues (in terms of s45), that results in the Commission either referring the matter to the Tribunal or issuing a notice of non-referral (in terms of s50).
[95] Supra note 5 para 5.

Until the 2018 Amendment to the Competition Act, section 67(1) prevented the initiation of an investigation of any matter that had ceased more than three years previously. The 2018 Amendment Act changed the wording of section 67(1) to limit the referral to the Competition Tribunal of conduct which had ceased more than three years prior to the referral.[96] In the *Pickfords* matter, the prohibited practice was ultimately referred to the Competition Tribunal on 11 September 2015 in terms of section 50(1).[97]

In the referral the Commission stated that, 'on 1 June 2011 the Commissioner amended its complaint initiation to include Pickfords under case number 2011Jun0069.'[98]

> 'Pickfords excepted to the complaint referral. It alleged that 20 of the 37 counts of the alleged collusive conduct against it should be dismissed, as 14 of them were time-barred in terms of section 67(1) of the Competition Act and the remaining six were not sufficiently pleaded. The dispute before us concerns the 14 allegedly time-barred counts. In respect of those, Pickfords alleged that it was the 2011 initiation, rather than the 2010 initiation, that was the "trigger event" for the commencement of the running of the three-year period referred to in section 67(1). As stated, the Commission's case is the converse: it contended that the 2011 initiation was merely an amendment of the 2010 initiation and that the latter was thus the "trigger event."'[99]

The Tribunal found that the 2011 initiation was not an amendment of the 2010 initiation, but a self-standing initiation.[100] The 2011 initiation was thus the event that ended the running of the three-year period. The Tribunal dismissed the argument advanced by the Commission that a 'knowledge requirement' similar to that found in section 12(3) of the Prescription Act 68 of 1969[101] should be read into section 67(1) of the Competition Act.[102] The Tribunal further held that it could not invoke its powers of condonation under section 58(1)(*c*)(ii) of the Competition Act as

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[96] Competition Amendment Bill, 2017 and Explanatory Memorandum, published in GG 41294of 1 December 2017 s32.
[97] S50(1) of the Competition Act 89 of 1998 states that, 'If the Competition Commission issues a notice of non-referral in response to a compliant, the complainant may refer the complaint directly to Competition Tribunal, subject to the rules of procedure'.
[98] Supra note 5 para 7 quotes the Competition Commission Compliant referral of Pickfords.
[99] Supra note 5 para 8.
[100] Supra note 65 para 52.
[101] s12(3) of the Prescription Act 68 of 1969 says that 'A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'
[102] Supra note 4 paras 93-7.

this power does not apply to section 67(1) of the Competition Act.[103] In this regard, it distinguished the Labour Court's powers of condonation in terms of section 191 of the Labour Relations Act 66 of 1995, as decided in *Food and Allied Workers' Union v Pieman's Pantry (Pty) Limited*,[104] from those of the Tribunal to condone non-compliance with section 67(1) of the Competition Act.[105]

The Competition Appeal Court overruled the finding of the Tribunal regarding the correct date of the "trigger event".[106] The CAC held, based on the facts and the language employed in the 2010 and 2011 initiation statements, read with the provisions of the Competition Act, that the 2011 initiation was merely an amendment of the 2010 initiation.[107] Despite this finding, the Competition Appeal Court held that Pickfords 'only became a named party when the second complaint initiation occurred in 2011; before that, the alleged prohibited practice did not involve it'.[108] It further held that section 67(1) of the Competition Act is a limitation or expiry period and that a knowledge requirement, similar to that contained in section 12(3) of the Prescription Act, cannot be read into section 67(1).[109] Section 67(1) of the Competition Act has as its purpose to bar, in the public interest, investigations into cartel behaviour that ceased an appreciable time ago and thus no longer endangers the public weal.[110] In conclusion, the Competition Appeal Court held that the language employed in section 67(1) of the Competition Act does not lend itself to condonation and that the time-bar in that section is absolute.[111]

(ii) The Constitutional Court decision

When the *Pickfords* matter came before the Constitutional Court it considered two issues: whether section 67(1) of the Competition Act is a prescription provision proper, which constitutes an absolute bar, or a procedural time-bar, capable of condonation in the event of non-compliance[112]

[103] Supra note 5 paras 109-10.
[104] *Food and Allied Workers' Union v Pieman's Pantry (Pty) Limited* 2018 (5) BCLR 527 (CC).
[105] Supra note 5 paras 101-4.
[106] *Competition Commission of South Africa v Pickfords Removals SA* (Pty) Ltd (167/CAC/Jul18) para 29.
[107] Supra note 5 para 10 refers to the Pickfords CAC judgement Id paras 30-3.
[108] Supra note 5 para 10 refers to the Pickfords CAC judgement Id at para 33.
[109] Supra note 5 para 10 refers to the Pickfords CAC judgement Id at para 40.
[110] Supra note 5 para 10 refers to the Pickfords CAC judgement Id at para 39.
[111] Supra note 5 para 10 refers to the Pickfords CAC judgement Id at paras 46-8.
[112] Supra note 5 para 13.

and whether the Tribunal may, in terms of section 58(1)(*c*)(ii) of the Competition Act, condone, on good cause shown, non-compliance with section 67(1). [113]

The Constitutional Court found that it had jurisdiction to consider this matter because the interpretation of the prescription provision of section 67(1) could limit the right to access to courts in terms of the section 34 of the Constitution. Section 34 of the Constitution gives everyone 'the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum.'[114]

The Court followed *Links v Member of the Executive Council, Department of Health, Northern Cape Province*[115] (which also dealt with prescription) where Zondo J held that '[t]his court has jurisdiction because the matter involves an interpretation of legislation that limits the applicant's right in terms of section 34 of the Constitution.'[116]

Jurisdiction having been established; the Court set out to determine the correct initiation date. The 'initiation date sets in motion the investigation of the complaint and the alleged prohibited practice.'[117] The Court relied on the threshold determined in *Woodlands,* which required that the Commissioner must at a minimum, be in possession of some information about an alleged practice 'which objectively speaking, could give rise to a reasonable suspicion of the existence of a prohibited practice.'[118] The 'alleged prohibited practices' are set out in Chapter 2 of the Act, and the Constitutional Court confirmed that, 'this does not mean that the names of all the firms or parties must be included'.[119]

According to the CC,[120]

> 'There are no formalities required, save for a decision by the Commissioner to cause the commencement of an investigation into the alleged prohibited practice.[121] The initial omission of a

[113] Supra note 5 para 14.
[114] S34 of the Constitution.
[115] *Links v Member of the Executive Council, Department of Health, Northern Cape Province* 2016 (5) BCLR 656 (CC) para 22. See also *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) paras 1-2.
[116] Ibid.
[117] Supra note 5 para 20.
[118] Supra note 17 para 13.
[119] Supra note 5 para 21.
[120] Ibid.
[121] Supra note 5 para 21 quotes the *Competition Commission v Yara SA (Pty) Ltd* 2013 (6) SA 404 (SCA) para 21.

> firm or party at the stage when the complaint is first initiated by the Commission and its subsequent addition to the complaint are not fatal, given the wording of section 49B(*1*) and the informality of the procedure.'[122]

The Court followed the precedent set in *Woodlands* and said that the Commission 'is fully entitled to use the information so obtained for amending the complaint or the initiation of another complaint and fuller investigation'.[123] The basis for the Constitutional Court's reasoning are as follows: The referral arose from the Commission's further investigations into the 2010 initiation. The 2010 initiation alleged that the collusion had not ceased. Reference to the 'main companies'[124] suggested that other firms could be added at a later stage. The 2011 initiation said that it was an extension of the 2010 initiation and suggested that as further information had arisen that this was the basis for adding further respondents and additional charges.[125]

Pickfords argued in accordance with *Loungefoam (Pty) Ltd and Others v Competition Commission South Africa and Others*[126] that the prohibited practice 'cannot exist apart from the conduct of a firm.'[127] The Constitutional Court did not agree and stated that 'simply because a prohibited practice cannot exist without an attached firm does not mean that all firms or parties need to be cited in an initiation.'[128] The Constitutional Court concluded that Pickfords' argument was in conflict with the precedent set in *Woodlands* and *Loungefoam*.[129]

In the *Woodlands* matter the Supreme Court of Appeal held that:

> '[a] suspicion against some cannot be used as a springboard to investigate all and sundry. This does not mean that the commission may not, during the course of a properly initiated investigation, obtain information about others or about other transgressions. If it does, it is fully entitled to use

[122] Supra note 5 para 21 refers to *Competition Commission v Yara SA* (Pty) Ltd 2013 (6) SA 404 (SCA) para 21 which compares *Woodlands Dairy (Pty) Ltd v Competition Commission* 2010 (6) SA 108 (SCA) para 13 with *Power Construction (West Cape) (Pty) Ltd v Competition Commission of South Africa* (145/CAC/Sep16).
[123] Supra note 5 para 36. See also Supra 18 para 53.
[124] Supra note 5 para 27.
[125] Supra note 5 para 27.
[126] Supra note 45.
[127] Supra note 45 para 41.
[128] Supra note 5 para 28.
[129] Supra note 5 footnote 37 refers to *Woodlands Dairy (Pty) Ltd v Competition Commission* 2010 (6) SA 108 (SCA), decided before *Loungefoam (Pty) Ltd v Competition Commission* (102/CAC/Jun10).

the information so obtained for amending the complaint or the initiation of another complaint and fuller investigation.'[130]

The Constitutional Court responded by saying that,

'Woodlands Dairy is entirely distinguishable on the facts. That case concerned a full investigation into the milk industry. That investigation was undertaken by the Commission in the absence of an initiation of a complaint against an alleged prohibited practice, which would have resulted in a direction to an inspector to investigate. The investigation into the milk industry followed upon information submitted to the Commission by a dairy farmer, alleging price fixing by three milk distributors. Instead of following the inspectors' recommendation, pursuant to his/her investigations, that a complaint be initiated against two of the three milk distributors, the Commissioner ordered the investigation into the entire industry. It was in this context that Harms DP, writing for the Supreme Court of Appeal, said that—

"[m]embers of the supposed cartel were in fact mentioned in the initiating statement. It was therefore not a case where no cartel member had been identified. The problem is that there were no facts that could have given rise to any suspicion that others were involved. A suspicion against some cannot be used as a springboard to investigate all and sundry."'[131]

The Constitutional Court emphasised that an investigation is initiated into the prohibited practice concerned, rather than a particular party.[132]The Constitutional Court therefore held that the date from which the three-year period for purposes of section 67(1) of the Competition Act must be calculated is the date of the first initiation on 3 November 2010.[133]The Constitutional Court then turned to consider the issue of whether section 67(1) of the Competition Act is a prescription provision which terminates the ability of the Commission to initiate proceedings, or a procedural time-bar, capable of condonation in the event of non-compliance.[134]

[130] Supra note 17 para 36.
[131] Supra note 5 para 34.
[132] Supra note 5 para 30.
[133] Supra note 5 para 31.
[134] Supra note 5 paras 34-48

The Constitutional Court argued that section 67(1) is open to two possible interpretations:

(a) first, it is a substantive time-bar, i.e., a prescription provision which extinguishes the right and therefore prevents the initiation of a complaint in respect of a prohibited practice which ceased more than three years prior to initiation; or

(b) secondly, a procedural limitation, which is cable of being condoned by the Tribunal in terms of its powers in section 58(1)(*c*)(ii) of the Act, provided that good cause is shown as to why the initiation occurred more than three years after the conduct ceased.[135]

This distinction between these two interpretations was considered by the SCA in *Society of Lloyd's v Price*[136]

> 'A distinction has traditionally been drawn, in both South African and English law, between two kinds of prescription/limitation statutes: those which extinguish a right, on the one hand, and those which merely bar a remedy by imposing a procedural bar on the institution of an action to enforce the right or to take steps in execution pursuant to a judgment, on the other. Statutes of the former kind are regarded as substantive in nature, while statutes of the latter kind are regarded as procedural.'[137]

In determining the correct statutory approach to section 67(1), the Constitutional Court relied on the guidance provided in *Cool Ideas 1186 CC v Hubbard* [138] (the '*Cool Ideas'* case) and *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd*[139] *(*the *'Wary Holding'* case*)*. In *Cool Ideas* the court said:

> 'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:
>
> (a) that statutory provisions should always be interpreted purposively;
>
> (b) the relevant statutory provision must be properly contextualised; and

[135] Supra note 5 para 32.
[136] Supra note 5 para 33 refers to *Food and Allied Workers' Union v Pieman's Pantry (Pty) Limited* 2018 (5) BCLR 527 (CC) para 184 cited *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) para 10.
[137] *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) at para 10.
[138] *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC).
[139] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 (1) SA 337 (CC).

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).'[140]

Wary Holdings[141] provides the following guidance regarding the interpretation of constitutional matters, 'this Court is required to adopt the interpretation which better promotes the spirit, purport and objects of the Bill of Rights.'[142]Following Wary Holdings, the Constitutional Court held that 'one must determine which of the two possible interpretations is the least limiting of the right of access to courts. Put differently, which of these two interpretations better promotes the spirit, purport and objects of the Bill of Rights?'[143]

The Constitutional Court found that, interpreting section 67(1) of the Act as imposing an absolute time-bar would limit access to the Tribunal[144] and undermine the Commission's work as a public body which is not desirable.[145] 'A purposive, constitutionally compliant interpretation is thus required.'[146] In addition, the Court opined that this approach would protect the rights of claimants to sue for damage in terms of section 65 of the Act[147] and that allowing this flexibility is important since the Competition Act is the only legislation specifically directed towards countering anti-competitive conduct .[148]

In the light of these arguments, the Constitutional Court considered whether all prescriptive provisions should be considered unconstitutional. The Court said that 'In order to pass constitutional muster, the degree of limitation must be considered in each case. No fixed rules can be laid down as the enquiry turns wholly on estimations of degree.'[149]

[140] Ibid para 28.
[141] Ibid.
[142] Ibid paras 46-7.
[143] Supra note 5 para 37.
[144] Supra note 5 para 38.
[145] Supra note 5 para 39.
[146] Supra note 5 para 38.
[147] Supra note 5 para 40.
[148] Supra note 5 para 42.
[149] *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) para 12.

The Constitutional Court further considered whether the existence of the power to condone non-compliance could save the prescriptive provision from being declared unconstitutional. Pickfords relied on *Mohlomi v Minister of Defence*[150] which explained that,

> 'What counts . . . is the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the limitation leaves open in the beginning for the exercise of the right.'[151]

The Court found that the most constitutionally compliant interpretation is that section 67(1) is a procedural time-bar,[152] because this interpretation accommodates section 34 of the Constitution. Notwithstanding this finding, the CC did support the CAC in saying that it is not in the public interest to investigate cartel matters which ceased an appreciable time ago[153] and specifically followed *Brümmer*[154] which emphasizes that although 'time-bars limit the right to seek judicial redress…they serve an important purpose in that they prevent inordinate delays which may be detrimental to the interests of justice'.[155]

The CC then went on to consider whether non-compliance with section 67(1) can be condoned by the Tribunal in terms of its powers in section 58(1)(*c*)(ii) of the Competition Act, provided that good cause was shown. Although the CAC found that there was 'no express power in the Competition Act for the Tribunal to condone non-compliance'[156] and that 'the power must therefore be implied.'[157] The CC disagreed and said that the Competition Act 'expressly provides a general power of condonation, save for the exclusions mentioned.' [158]

In explaining its stance, the CC stipulated that the exclusion of the condonation of non-compliance of section 67(1) under the normal condonation powers would encourage secrecy and non-disclosure.[159] The CC further explained that the exclusion does not necessarily mean that once a prohibited practice has ceased, there will be no ensuing consequences even if these occur more

[150] *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC).
[151] Ibid para 12.
[152] Supra note 5 para 47.
[153] Supra note 5 para 47.
[154] *Brümmer v Minister of Social Development* 2009 (6) SA 323 (CC).
[155] Ibid para 51.
[156] Supra note 5 para 50.
[157] Supra note 5 para 50.
[158] Supra note 5 para 50.
[159] Supra note 5 para 51.

than three years after the cessation.[160]The CC emphasised that the Act does not only punish past behaviour but also seeks to discourage future breaches.[161] The CC therefore found that section 67(1) of the Competition Act must be interpreted as a procedural time-bar[162] and that in terms of section 58(1)(*c*)(ii) of the Act the Tribunal may condone non-compliance with section 67(1) provided good cause is shown.[163]

VI THE INTERPRETATION OF SECTION 67(1) IN TERMS OF SECTION 34 OF THE CONSTITUTION

As already stated above, section 34 of the Constitution affords everyone 'the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum.'[164] The interpretation of the Competition Act should be done in a manner that is consistent with the Constitution. While the Constitution provides for the right to access to courts as enshrined in section 34, the Constitution also provides the restriction clause in terms of which rights may be limited.[165] In particular, section 36 provides that 'rights may be limited by a law of general application that is 'reasonable and justifiable in an open and democratic society based on dignity, freedom, and equality'.

In the *Pickfords* case, the CC concluded that section 67(1) remains valid as a procedural time-bar as that interpretation accommodates section 34 of the Constitution.[166] According to the CC, non-compliance can be condoned in terms of section 58(1)(c) provided good cause is shown. The overriding consideration being that condonation is in 'the interests of justice' - a consideration which must be assessed on the merits of each case.[167]

[160] Supra note 5 para 52.
[161] Supra note 5 para 52.
[162] Supra note 5 para 56.
[163] Supra note 5 para 56.
[164] S34 of the Constitution.
[165] S36 of the Constitution.
[166] Supra note 4 para 47.
[167] Supra note 4 para 54.

Pickfords did not argue any constitutional grounds for limiting the Commission's section 34 rights and Majiedt J went so far as to award costs in favour of the Commission as a result.[168] According to the CC, *Pickfords* could have argued that the Commission had failed to fulfil its statutory or constitutional obligations.[169] *Pickfords* could also have argued that the flexibility afforded to the Commission by being permitted condonation in terms of section 58(1)(*c*) introduces uncertainty, significantly compromised their constitutional rights (their right to just administrative action[170], and the right to a fair trial[171]) introduced significant prejudice or amounted to harassment or an abuse of power.[172] The CC in *Pickfords* cited *Brümmer*[173] where the point was made that time-bars 'serve an important purpose in that they prevent inordinate delays which may be detrimental to the interests of justice'.[174]

The CAC in *Cross Fire* emphasised that,

> '[t]he overriding consideration is the interests of justice, considered on the facts of each case. Factors germane to the inquiry might include the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the issues raised by the matter; and prospects of success.'[175]

[168]*International Trade Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) para 113.

[169]Supra note 5 para 62.

[170]Supra note 64, s33 of the Constitution: Just Administrative Action '(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.'

[171]Supra note 64, s35 of the Constitution: (3) Every accused person has a right to a fair trial, which includes the right '(d) to have the trail begin and conclude without unreasonable delay.'

[172]*Competition Commission v Beefcor (Pty) Ltd and Others* (177/CAC/Jul19) para 49.

[173]*Brümmer v Minister of Social Development* 2009 (6) SA 323 (CC).

[174]Ibid para 51.

[175]Supra note 64 para 95.

VII CONCLUSION

The procedure for the Competition Commission to initiate an investigation into an alleged prohibited practice is informal and flexible. The Commission need not engage with the accused[176] and merely needs to demonstrate that its power is rationally exercised. According to *Senwes*[177] the Tribunal may even adjudicate on a compliant not covered in the referral. In summary, the Commission is granted considerable leeway to investigate and ultimately refer matters to the Competition Tribunal.

While this leeway is essential to uncover secret cartel activities, it risks introducing uncertainty, and significant prejudice to accused parties. *Pickfords* effectively found that the time limit restrictions of section 67(1) must be interpreted as a procedural time bar which can be overcome in the 'interests of justice' provided that good cause is shown.

Allowing the Commission to initiate and refer matters more than three years after the conduct and its enduring effects ceased increases the risk of the Commission prosecuting matters, which no longer have an impact on the market.

Litigating matters which occurred in the distant past expends the state's limited resources, introduces commercial uncertainty, and places a disproportionate burden on an accused party, like Cross Fire.[178] The burden of proof shifts to an accused parties like Cross Fire when the Commission allege, as the often do that the conduct is ongoing. The accused, like Cross Fire then face the burden to prove the date from when they no longer participated in collusive behaviour[179] and the older a matter the more difficult it is to obtain relevant evidence. Ms Steward, the managing director of Cross Fire, in fact reached out to Webber Wentzel to obtain certainty[180] and presented her strategy to distance Cross Fire from the cartel in June 2010. In contrast, the Commission did not lead any evidence to prove that Cross Fire had continued to participate in the cartel after July

[176] Ndumiso Ndlovu op cit note 29 at 166 quotes *Simelane NO v Seven-Eleven Corporation SA (Pty) Ltd* para 24.
[177] Supra note 5 para 21.
[178] Supra note 65 para 94.
[179] Supra note 65 para 51.
[180] Supra note 85 and 112.

2009.[181] The Commission made the allegation of ongoing involvement[182] and left it up to Cross Fire to prove that they had clearly and unambiguously distanced themselves from the cartel. This is in sharp contrast to criminal matters where the accused is presumed to be innocent until the prosecution leads evidence to prove a contravention of the law beyond any reasonable doubt. If, in criminal law matters the prosecution fails to lead sufficient evidence, the accused is exonerated.

Condoning non-compliance with Section 67(1) depends on the facts of each case. On the facts of *Pickfords,* the Constitutional Court (and indeed the Tribunal) may have reached the correct decision, but it is still open to a respondent to argue that on the particular facts that it is not in the interests of justice to condone non-compliance with the time limits of section 67(1) as successfully argued in the *Cross Fire* matter.

In *Pickfords,* the time-period between the initial initiation (in November 2010) and the addition of Pickfords (in June 2011) was only six months. Given this relatively short period of time it is easy to conclude that granting condonation was in the interests of justice. It is also understandable why Pickfords did not effectively raise the constitutional arguments as outlined in Part VI of this paper in their exception argument. This does however not mean that it will always be in the interests of justice for the Tribunal to grant condonation in terms of section 58(1)(*c*). By way of contrast, Cross Fire successfully raised a defence that it was not in the interest of justice to grant condonation in July 2021 some six years after initiating the compliant in March 2015 with respect to conduct which ceased in 2009.

Cross Fire also highlighted a critical procedural aspect, that is, that condonation must be sought from and granted by the Competition Tribunal.[183] Obtaining condonation for non-compliance with Section 67(1) from the Tribunal when the referral is made will ensure that the Commission addresses Ndlovu's concern 'that the Commission could at first exercise their powers unlawfully but later be capable of subsequent restoration, if good cause is shown.'[184]

This area of law will benefit from further examples where the Tribunal might establish the limitations of tolerance for granting latitude to the Commission to initiate proceedings or refer

[181] Supra note 65 para 82.
[182] Supra note 65 para 112 and 115.
[183] Supra note 65 para 99.
[184] Ndumiso Ndlovu op cit note 29 at 125 refers to the *Pickfords Tribunal* judgement para 107.

matters more than three years after the conduct and its ongoing effects have ceased. The latitude granted by the Tribunal is however not simply based on the timeframe but rather whether when all circumstances are considered, condonation is in the interests of justice.

In Cross Fire the Commission failed to bring the application for condonation promptly (since the complaint was initiated nearly six years after Cross Fire withdrew from the collusive conduct),[185] failed to demonstrate good cause for condonation[186] and the Commission should ultimately have in terms of Section 58(1) sought condonation from the Competition Tribunal and not the Competition Appeal Court.

[185] Supra note 65 para 113.
[186] Supra note 65 para 107.

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