WERKSMANS
ATTORNEYS

COMPETITION

Constitutional Court weakens a key defence for respondents in historical competition cases

5 August 2020 *4 min read*

by Pieter Steyn, Director

The recent decision by the Constitutional Court in the case involving the Competition Commission and Pickfords Removals has significant implications for respondents in historical competition cases, namely cases where the anti-competitive conduct ceased more than three years before the Commission initiated a complaint.

Section 67 (1) of the Competition Act previously provided that a complaint in respect of a prohibited practice (like a cartel or abuse of dominance) could not be initiated more than three years after the practice had ceased. Section 67 (1) was understood as imposing an absolute time bar on the Commission's ability to refer firms to the Competition Tribunal for prosecution. As such, it provided an absolute defence for respondents in historical competition cases. In the Pickfords case, both the Competition Tribunal and the Competition Appeal Court accepted this approach and found that the Commission's initiation of a complaint against Pickfords was time-barred.

The Constitutional Court noted that the interpretation of section 67(1) has a material effect on the constitutional right of access to the courts of both the Commission and members of the public who have suffered damages due to anti-competitive conduct. The Constitutional Court's approach was to determine which of the possible interpretations of section 67(1) is the "least limiting" of such constitutional right. The Court noted the important role of the Commission as a public body acting on behalf of the public interest and that the rationale for an absolute time bar provision was to bring certainty to the law and penalise "negligent inaction, not the inability to act". The Court held that it would be inequitable to penalise the Commission for its lack of knowledge of covert cartel conduct and that an absolute time bar defence "would be tantamount to rewarding cartels for their covert unlawful conduct" and "completely defeat the aims" of the Competition Act.

The Constitutional Court accordingly held that section 67 (1) did not impose an absolute time bar on the Commission and was merely a procedural time bar. Furthermore, the Court held that non-compliance by the Commission with the procedural time bar could be condoned by the Competition Tribunal "on good cause shown" as contemplated in section 58 of the Competition Act. Relevant factors would be 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 in the matter and the prospects of success. Ultimately, it was a matter of whether condonation would be in the interests of justice.

It is unfortunate that the Pickfords case dealt with the previous wording of section 67(1). The wording was amended by the 2018 Competition Amendment Act to read "a complaint in respect of a prohibited practice that ceased more than three years before the complaint was initiated may not be referred to the Competition Tribunal". The amended wording clearly supports an interpretation of an absolute time bar for the Commission. The reasoning of the Constitutional Court in the Pickfords case however did not focus on the precise wording of the section itself and its approach and conclusions may well apply to the amended section 67(1).

The current position is accordingly unfortunately not clear. However, the implications of the Constitutional Court decision are very significant. An important defence for respondents in competition cases has been weakened if not eliminated. The risk of being prosecuted for historical anti-competitive conduct has been increased although practical difficulties in successfully prosecuting historical conduct will remain (for example witnesses may have died or be otherwise unavailable) and the Competition Act itself only came into force on 1 September 1999. Furthermore, only cartel conduct occurring after 1 May 2016 has been criminalised and the Commission's leniency policy may provide relief from administrative penalties (although it only applies to cartels and not to other anticompetitive conduct like the abuse

of dominance). However, prevention is always preferable to cure and firms should accordingly adopt, review and actively implement competition law compliance policies and programs.



Pieter Steyn

Director

View Profile