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The cost of speaking ill of the Competition Commission

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Proceedings before the Competition Commission

Litigation is, by its very nature, adversarial and in consequence, litigants are sometimes prone to making rash and unfounded assertions and allegations. Proceedings before the Competition Commission ("**Commission**") and the Competition Tribunal ("**Tribunal**") are unfortunately no exception. A recent Tribunal decision illustrates, however, that such conduct may have consequences for those who exceed the bounds of acceptable behaviour.

On 16 October 2020, the Tribunal granted an order sought by the Commission, striking out certain allegations by the South Africa Energy Forum ("**SAEF**") relating to political interference in the large merger between Thabong Coal Proprietary Limited and South32 SA Coal Holdings Proprietary Limited ("**the SAEF judgement**").[1] This arose in the following context: SAEF defines itself as a "gathering of activists that advocates for equitable involvement in energy and mining technologies and seeks a mix of investments that maximise benefits for South Africa and its sister Sub-Saharan African countries". During the Commission's investigation of the merger, SAEF made submissions to the Commission against the desirability of the merger. In the course thereof, SAEF made a number of unsubstantiated allegations relating to the Commission and its employees. After the Commission recommended to the Tribunal that the merger be approved, SAEF launched an application in which it sought to intervene in the Tribunal proceedings. However, a few days before the Tribunal hearing, SAEF indicated that it would not be able to attend the hearing (after initially confirming the hearing date with the Tribunal) and its application for intervention was dismissed.

In the striking out application, the Commission described SAEF's attacks as 'xenophobic, abusive and vitriolic'. SAEF advanced allegations of political interference in various letters which were described by the Commission as combative and argumentative. The Tribunal held that SAEF had not provided any evidence to substantiate its assertion that political interference had tainted the Commission's investigation into the proposed merger, and that the allegations were based on 'unfounded speculation and conjecture'. The Tribunal found that the Commission met the requirements as stipulated in Uniform Rule 23(2) for their striking out application to be granted, in that the averments by the SAEF were 'scandalous, vexatious or irrelevant' and prejudicial to the Commission. In an unusual step, the Tribunal then ordered that SAEF to pay the costs of the striking out application on a punitive attorney and own client scale, to mark its displeasure at the SAEF's conduct.

Tribunal's judgment

The Tribunal's judgment, released on 1 April 2021, referred to the Constitutional Court judgment of *Hugh Glenister and President of the Republic of South Africa and others*[2] which stated that assertions which are scandalous, vexatious or irrelevant should not lightly be permitted to form part of the record and "courts should not be seen to be condoning this kind of inappropriate behaviour, embarked upon under the guide of robustness". A punitive costs order (i.e. costs on an attorney and own client scale) against a litigant is an extraordinarily rare order, utilised to indicate a court's extreme displeasure and disapproval of a party's conduct during the litigation. Similarly, in the recent Constitutional Court case of *Mkhatshwa and Others v Mkhatshwa and Others*[3], the court held that the applicant had conducted itself in a vexatious and reprehensible way, and had attacked a member of the judiciary, thereby justifying the award of a punitive costs order against it.

Whilst it is totally understandable that the offensive conduct of SAEF cried out for sanction from the Tribunal, some doubt must be cast on whether the Tribunal had the power make a costs order in this instance.

It is trite that the Tribunal is an administrative body and accordingly that its powers are circumscribed by legislation, in this case the Competition Act 89 of 1998 ("**the Act**"). Section 57(1) of the Act provides that each party is liable to bear its own costs, unless the exceptions in sections 57(2)

(a) and (b) of the Act are applicable, in which case the Tribunal may make an order for costs in accordance with the provisions of the Competition Tribunal Rules. Those exceptions relate only to cases where a complainant has referred a complaint to the Tribunal in respect of a prohibited practice in terms of section 51(1) of the Act, after receiving a notice of non-referral from the Commission. The award of costs does not apply when the Commission refers the complaint itself to the Tribunal, or where there is no complaint involved (for example in exemption or merger proceedings).

Despite this, the Tribunal in some cases awarded costs against litigants, even though the exceptions in section 57(2) did not apply to the litigation in question. However, in *Competition Commission v Pioneer Hi-Bred International Inc. and Others* **[4]**, the Constitutional Court dealt definitively with the principle of legality in relation to cost orders issued in the Tribunal proceedings (in that case, costs awarded against the Commission). The Court confirmed that the exceptions in section 57(2) of the Act refers only to cases where a private complainant party has referred a complaint directly to the Tribunal. Accordingly, the Tribunal does not have power to award costs in other instances, even if the Tribunal Rules may be interpreted to the contrary. The Court's decision was in accordance with the rulings of the Tribunal and the Competition Appeal Court in *Omnia Fertilizer Ltd v Competition Commission* **[5]** which preceded the *Pioneer* decision[6].

Seeing that the Constitutional Court is the apex court in South Africa and its decisions have precedential value, one would have expected the *Pioneer* decision to be followed, or at least discussed, in the SAEF judgement. Regrettably, the Tribunal's reasons on costs are scant and do not deal with the *Omnia* and *Pioneer* decisions.

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Conclusion

In conclusion: the SAEF judgement has cast doubt on whether costs orders are available against vexatious litigants in the Tribunal. One can only hope that the matter is clarified in later Tribunal or Court judgments or addressed in a legislative amendment.

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[1] CT Case No: STR132Oct20/LM144Jan20

[2] 2015 (2) SA 1 (CC)

[3] 2021 JDR 1216 (CC)

[4] [2013] ZACC 50

[5] CT Case Number: 81/LM/Jul08 CAC Case number: 77/CAC/Jul08.

[6] Unfortunately the Tribunal has not always followed the decision in *Omnia*. See *Altech Technologies Ltd v Mobile Telephone Networks* Case No: 81/LM/Jul08 and *MTO Forestry v Competition Commission* Case Number: 10/AM/Feb11.



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