IN THE COMPETITION COMMISSION OF THE REPUBLIC OF BOTSWANA HELD IN GABORONE

CASE NO: CC-CR/01/A/15 I

IN THE MATTER BETWEEN:

COMPETITION AUTHORITY	APPLICANT

AND

CREATIVE BUSINESS SOLUTIONS (PTY) LTD	FIRST RESPONDENT
RABBIT GROUP (PTY) LTD	SECOND RESPONDENT

CONSTITUTION OF PANEL

TENDEKANI E. MALEBESWA	Presiding Member
GAYLARD KOMBANI	Member
DR JAY SALKIN	Member
DR SELINAH PETERS	Member
MRS THEMBISILE PHUTHEGO	Member
MS NELLY W. SENEGELO	Member

FOR THE APPLICANT:

A.W. MODIMO (with DUNCAN T MOROTSI AND T.M. RASETSHWANE)

FOR THE FIRST RESPONDENT:

O.O. ITUMELENG (with T. JEREMIAH)

FOR THE SECOND RESPONDENT:

M.M. CHILISA

PLACE AND DATE OF PROCEEDINGS:
GABORONE
2nd JULY 2015

DECISION

BACKGROUND

[1] On the 26th August 2014 the Competition Authority ("the Applicant" or "the Authority") lodged an application with the Competition Commission ("the Commission") seeking to extend an investigation into prohibited practices it suspected the Respondents were engaged in. This was an *ex parte* application which is permitted by the Competition Act (Cap. 46:09) ("the Act"), and the

application was received by the Registrar and Advisor to the Commission ("the Registrar") at 1506 hrs.

[2] The Commission met on the 27th August 2014 and extended the investigation period by six (6) months.

[3] After completing its investigation the Applicant, in a referral form dated 24th February 2015, referred the matter to the Commission. However, the referral was filed with the Registrar on the 26th February 2015 at 0917 hrs. The notice of motion accompanying the referral form was served on the first Respondent on the 26th February 2015 at 1529 hrs, although it was also dated 24th February 2015.

[4] On the 10th March 2015 the second Respondent filed its notice of opposition and notice to raise points in limine with the Registrar. The first Respondent similarly filed on the 12th March 2015, also giving notice to raise points of law.

[5] The Applicant alleges that both the first and second Respondents rigged Tender Number PR 11/1/1/12 for the supply of 1, 500 000 units of infant formula in 400 gram cans to the Department of HIV/AIDS Prevention and Cure (Ministry of Health of the Government of Botswana). The award of the tender in this matter ("Infant Formula Case") to the Respondents was made on the 13th December 2012. Such rigging, as alleged by the Applicant, was in contravention of section 25 (c) of the Act.

[6] On the 29th July 2013 the Applicant received a complaint from a whistleblower to the effect that the Respondents had rigged the tender. Subsequent to that it initiated an investigation.

[7] At a pre-hearing conference on the 26th May 2015 the Respondents and the Applicant agreed that the points of law raised by the Respondents should be argued first. To this end, they listed the issues in a consent order, and the Commission set the 2nd July 2015 as the day on which to hear arguments on those issues.

ISSUES

[8] The points of law were listed as follows:

" (a) whether the proceedings are a nullity as they are founded on an invalid time-extension granted following the expiration of 12 months laid down for the carrying out of an investigation in terms of section 39(2) of the Act;

(b) whether the time-extension by the Commission was in itself invalid because the last day on which an extension could be lawfully granted was 25 August 2014 in terms of section 39(4) (b) of the Act;

(c) whether the time extension by the Commission is invalid by reason of the fact that it was in breach of the rules of natural justice as implied from sections 35(2) and 39(1) of the Act;

(d) whether (at any rate) the complaint has not been brought within 6 months following the extension granted on 26 August 2014 in accordance with section 39(4)(b) of the Act;

(e) whether *in casu* the Competition Commission can declare its order of 26 (sic) [27] August 2014 a nullity;

(f) whether the referral is fatally defective for the reason that it was filed woefully out of the within one year time statutorily stipulated in section 39(2) of the Act;

(g) whether the Applicant's deponent is authorised to and competent by reason of her aforesaid position to depose to the said Applicant's Founding Affidavit or to refer the matter to the Commission on behalf of the Applicant."

NOMENCLATURE

[9] In previous referrals to the Commission, the Authority referred to itself as the Applicant, and the other party as Respondent or Respondents, as the case may be. However, in the previous matter - CC-CR/01/A/14 I - ("the Sugar-Beans Case") involving the same parties as in the instant case, the Authority referred to itself as

"Complainant". We thought it was a mere aberration and ignored it. However, in the current matter it has again referred to itself as "Complainant".

[10] In section 39 of the Act a person from whom the Authority has received a complaint in accordance with section 35(1) is referred to as a "complainant".

[11] The Act defines neither "applicant", "complainant", nor "respondent". However, the Rules for the Conduct of Proceedings of the Competition Commission of October 2012 ("the Rules") provide as follows in the interpretation section:

(a) ""applicant" means a person who files an application to the Commission in terms of Part VIII of the Act";

(b) ""respondent" means -

(i) in respect of an application, the person or enterprise against whom the relief is sought;

(ii) in respect of complaint referral, a person or enterprise against whom that complaint has been initiated;

(iii) in respect of an appeal –

(aa) the Authority, and

(bb) the person or enterprise concerned, if that person or enterprise is not the appellant, or applicant, as the case may be."

[12] In view of the above, the Authority should revert to consistently using the prescribed nomenclature.

[13] In Glaxo Smith Kline South Africa (Pty) Ltd v David Lewis N. O. & Others (Case No. 62/CAC/APR06) Selikowitz JA, writing for the South African Competition Appeal Court (SACAC), said:

> "None of the Respondents opposed the review or the appeal and none of them were represented before this Court.
>
> As Glaxosmithkline South Africa (Pty) Ltd is both Applicant in the review as also the Appellant, I will, in the interests of simplicity, refer the company as Applicant. Because the Act refers to the party against whom a complaint has been made regarding an alleged prohibited practice as the "respondent", I will adopt that nomenclature when discussing the relevant provisions of the Act. References to "respondent" will be consistent with the wording of the Act. References to the

> Respondents who are cited in the review and in the appeal will be made using an upper case first letter."

RATIONALE OF COMPETITION LAW PROHIBITIONS

[14] Since Canada enacted the very first competition law through the Act for the Prevention and Suppression of Combinations formed in Restraint of Trade in 1889, the courts generally in their enforcement role have pronounced themselves in very clear terms as to how they perceive contraventions of competition law, especially their impact on the public interest.

[15] In the United States of America, competition law is referred to as antitrust law, whilst in Canada it is known as anti-combines legislation.

[16] Delivering the majority judgment in the Privy Council on 14 July 2004 in Carter Holt Harvey Building Products Group Ltd v The Commerce Commission [2004] UKPC 37; [2006] 1 NZLR 145 Lord Hope of Craighead said at paragraph 55:

> "The starting point is to be found in the principle that competition is in the public interest."

At paragraph 73, Lord Hope noted:

> "The public interest lies in preserving the ability of firms to compete with each other in a competitive market, on price as well as on quality."

[17] These have been the guiding principles for the courts in enforcing competition law, particularly the central role occupied by the public interest, or society's interest.

[18] In Samson v Canada (C.A.) [1995] 3 F. C. 306 of June 13, 1995 Hugessen J. A., writing for the Court of Appeal in Canada, stated:

> "The goal of protecting our economy is a goal of paramount importance."

Judge Hugessen further observed:

> "The Act aims to protect the public from unscrupulous trading practices which may result in investors being defrauded. It is designed to ensure that the public may rely on honest traders of good repute to carry out their business in a manner that does not harm the market or society generally."

[19] La Forest J, delivering an opinion in the Supreme Court of Canada in Thomson Newspapers Limited & Ors v Director of Investigation and Research, *Combines*

Investigation Act, Restrictive Trade Practices Commission & Ors [1990] 1 SCR 425 wrote:

> "At bottom, the Act is really aimed at the regulation of the economy and business, with a view to the preservation of the competitive conditions which are crucial to the operation of a free market economy. This goal has obvious implications for Canada's material prosperity. It also has broad political overtones in that it is aimed at preventing concentration of power - - -
>
> The conduct regulated or prohibited by the Act is not conduct which is by its very nature morally or socially reprehensible. It is instead conduct we wish to discourage because of our desire to maintain an economic system which is at once productive and consistent with our values on individual liberty. It is, in short, not conduct which would be generally regarded as by its very nature criminal and worthy of criminal sanction. It is conduct which is only criminal in the sense that it is in fact prohibited by law. One's view of whether it should be so proscribed is likely to be functional or utilitarian, in the sense that it will be based on an assessment of the desirability of the economic goals to which combines legislation is directed or its potential

effectiveness in achieving those goals. It is conduct which is made criminal for strictly instrumental reasons.

The Act is thus not concerned with "real crimes" but with what has been called "regulatory" or "public welfare" offences."

[20] The overarching aim of competition law is, therefore, to protect competition; and this can only be achieved through the effective enforcement of the law. In the above case La Forest J further observed:

"For this reason, as both Canadian and American writers have maintained, the effective implementation of anti-combines or anti-trust legislation depends on the willingness of businesses to conform to the standards of conduct defined in such legislation independently of the frequency or likelihood of state inspection - - -".

[21] Also writing a separate opinion in the above case, L'Heurex-Dubé J said:

"The public interest in the eradication of practices inhibiting free competition must be balanced against the rights of each individual to be free from unwarranted state intrusion into their lives. There is no doubt in my mind that public interest in the freedom and protection of citizens in the market-place prevails

over the minimal infringement of the privacy interests of those required to disclose information of an economic nature." (emphasis added)

[22] This triumph of the public interest over the private interest is necessitated by the complexities of the contraventions that take place within the economic sphere.

[23] In General Motors of Canada Ltd v City National Leasing [1989] 1 SCR 641 Dickson C. J., speaking for a unanimous Supreme Court, said the following:

> "From this overview of the *Combines Investigation Act* I have no difficulty in concluding that the Act as a whole embodies a complex scheme of economic regulation. The purpose of the Act is to eliminate activities that reduce competition in the market-place. The entire Act identifies and defines anti-competitive conduct. It establishes an investigatory mechanism for revealing prohibited activities and provides an extensive range of criminal and administrative redress against companies engaging in behaviour that tends to reduce competition. In my view, these three components, elucidation of prohibited conduct, creation of an investigatory procedure and the establishment of a remedial mechanism, constitute a well-integrated scheme of regulation designed to discourage forms

of commercial behaviour viewed as detrimental to Canada and the Canadian economy."

[24] In circumstances where an investigation procedure is provided for, it has to be robust in order to penetrate and reveal anti-competitive conduct. This is because the practitioners of such conduct, due to its nature, do not want it to be brought into public glare.

[25] Speaking for the Supreme Court of Canada in Irvine v Canada (Restrictive Trade Practices Commission) [1987] 1 S. C. R. 181 Estey J said at paragraph 92:

"The area under investigation concerns trading crimes which by nature are difficult of investigation. Persons conspiring to profit improperly from trade combinations do not create much physical evidence and have every opportunity to disguise their conduct. The impact of the crime on the individuals affected is in each case very small in economic terms but in gross produces sizeable criminal profit. Again this type of crime requires more than the usual combination of informants and complainants from the public at large. The demonstration of the crime generally requires the early and active investigative action by the State itself. An awareness of these concerns by the

> legislators is apparent when the investigative program established in the Act is read as a whole." (emphasis added)

[26] In Agri Wire (Pty) Ltd & Ano. v The Commissioner of the Competition Commission & Others (Case No: 660/2011) Wallis and Pillay JJA, delivering judgment on behalf of the South African Supreme Court of Appeal (SASCA), noted at paragraph 1:

> "Cartel conduct, where ostensible competitors collude to set prices, or terms of trade, or divide markets, fix tenders or engage in similar conduct, is one of the most difficult types of anti- competitive behaviour to identify, prove and bring to an end. This is because a successful cartel is conducted secretly and its continued success depends on its members not breaking ranks to disclose their unlawful behaviour to the competition authorities."

[27] Delivering the opinion of the Supreme Court of the United States of America (SCOTUS) in United States v Morton Salt 338 U.S. 632 (1950), Justice Jackson said:

> "This entire subject of unfair competition, it is true, came into the bill late in its legislative history, and dealt with a commercial evil quite different from the target of prior antitrust laws."

[28] It is therefore imperative that where robust powers have been given to competition agencies by the legislature they should be exercised and enforced effectively.

[29] The point was made by the South African Constitutional Court (SACC) in Competition Commission of South Africa v Senwes Ltd (CCT 61/11; [2012] ZACC 6; 2012 (7) BCLR 667 (CC)) when Jafta J, writing for the Court, said the following at paragraph 18:

> "The Tribunal was established to exercise powers in the interest of the general public by creating and maintaining "markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire"."

The Competition Tribunal of South Africa enjoys similar status to the Competition Commission in Botswana.

[30] The sum total is that the private interest must yield to the public interest.

OBSERVANCE OF THE RULES OF NATURAL JUSTICE

[31] At issue number (iii), the question was framed as to whether by extending the time requested by the Applicant on an *ex parte* basis (that

is, in the absence of the Respondents), the Commission had not breached the rules of natural justice as implied in section 35(2) and section 39(1) of the Act. Secondly, whether such time extension is not invalid by reason of such breach.

[32] Section 5(1) of the Act reads:

> "The Authority shall be responsible for the prevention of, and redress for, anti-competitive practices in the economy, and the removal of constraints on the free play of competition in the market."

[33] In light of the preceding section, the mandate given to the Applicant, unless specifically circumscribed, endows it with a lot of power to deal with anti-competitive practices in the economy.

[34] At section 35(2) the Act provides:

> "Where the Authority decides to conduct an investigation, the Authority shall as soon as practicable, give written notice of the proposed investigation to every enterprise which is suspected to be a party to the practice to be investigated and shall in the notice –

(a) indicate the subject matter and the purpose of the investigation, and

(b) invite the enterprise concerned to submit to the Authority, any representation which the enterprise may wish to make to the Authority in connection with the matter to be investigated, within such period as the Authority shall specify in the notice."

[35] The Respondents, who at the hearing of the points of law decided to argue the issues together, contended that section 35(2) entitled them, by implication, to be involved in any application for extension of time before the Commission.

[36] Section 39(1) states:

> "The Authority may at any time following the opening of an investigation, and shall, if any party under investigation so requests, convene a hearing at which the Commission shall hear the views of any person they consider to have a relevant interest in the case." (emphasis added)

[37] There was no evidence submitted to the Commission to show that the Respondents had requested a hearing in accordance with section 39(1). In the circumstances, the Commission concludes that no such request was made.

[38] In its heads of argument, the second Respondent presented its views as follows (without reproducing all the paragraphs dealing with this point):

> "24. The limb of natural justice relevant in this enquiry is the *audi alteram partem* rule, which means to hear the other side. It is fundamental to fair procedure that both sides should be heard. The character of the authority is not decisive: what matters was the character of the power exercised. If the exercise of that power adversely affects legal rights or interests, it must be exercised fairly.
>
> 25. What then is the character of the power exercised here. The power granted is the power to extend the period of investigation from the period of one year allowed for the completion of investigations under Section 39(2) of the Act. This is a matter which the persons being investigated and even a complainant would have a direct interest. They would have a direct interest because after one year, the Act deems a non-referral by the Commission. If this period is therefore to be

extended, it is imperative in the interests of fairness that all affected and interested persons be given a chance to be heard prior to the decision to grant an extension.

26. So sacrosanct is this principle that even where the statutory provision in question is silent on its application, the courts have been quick to hold that the common law supply the omission of the legislature. - - -

27. And due to its sacrosanct nature, there is ample authority under the common law that where legal proceedings are initiated against a party and that party is not cited to appear, such legal proceedings are null and void and such decisions may be disregarded and cannot be saved by the *functus officio* principle and are a nullity and should be disregarded.

- - -

31. In the proceedings where the extension was granted, affected parties such as the Respondents were not cited nor made parties to the proceedings. The order was sought and obtained without notice to them.

32. On the basis of the above authorities, the grant of extension without notice to them is a nullity with the result that the Commission would be perfectly within the law to revisit it and issue an order inconsistent with it." (sic) (emphasis added)

[39] On this point, the first Respondent did not specifically deal with section 39(1).

[40] For its part, in its application for an extension, the Applicant said in its notice of motion that this was an "[a]pplication for an extension of a period of investigations in terms of Section 39(4)(b) of the Competition Act CAP (46:09)". (sic)

[41] The Applicant in its heads of argument maintained that the Commission is *functus officio* and therefore this issue as stated does not arise.

[42] Section 39(4)(b) states:

"In a particular case –

- - -

(b) on application by the Authority made before the end of the period referred to under subsection (2), the Commission may extend that period". (emphasis added)

[43] In making their case that the Commission failed to observe the rules of natural justice, the Respondents have not dealt with this provision, seeking to invoke sections 35(2) (reproduced at paragraph 34 above) and section 39(1) (at paragraph 36 above) instead.

[44] This approach by the Respondents is instructive. Section 39(4)(b) embodies an *ex parte* procedure, whereby during the course of an investigation the Applicant alone can apply to the Commission for an extension of time. The Respondents' case is further undermined by section 39(4)(a). It permits the Applicant and a complainant, where the Applicant is conducting an investigation on the basis of a complaint received from a complainant, to agree to extend the investigation period. It cannot be argued that those being investigated in such circumstances should be heard by the two before they agree to extend the period of investigation. Secondly, in a somewhat analogous situation, section 36(4) of the Act allows the Applicant to apply to a magistrate's court for a search warrant in relation to the premises of those being investigated. This provision again incorporates an *ex parte* procedure. Again, it cannot conceivably be argued that those being investigated should, as a matter of course, be afforded a hearing in such situations.

[45] Section 35(2) enjoins the Applicant to inform those being investigated:

(a) that they are being investigated;

(b) about the subject matter and purpose of the investigation;

(c) within a period specified by the Applicant, to submit any representations they may wish to make in connection with the investigation.

The section 35(2) process is at the start of an investigation. The section 39(4)(b) *ex parte* procedure is invoked only close to the lapse of a one year investigation. It appears to us to be tenuous therefore to argue that section 35(2) should, by implication, be read into the section 39(4) (b) procedure.

[46] It is important in this matter to bear the above in mind, as well as the statutory context in which the Applicant will be permitted to use an *ex parte* procedure. In Irvine v Canada (Restrictive Trade Practices Commission) Estey J, delivering judgment on behalf of the Supreme Court of Canada (while making reference to the case of Martineau v Matsqui Institution (No. 2) [1981] S. C. R. 602) said at paragraph 58:

> "The process of discerning the propriety of the application of the principle was again discussed at p. 755 where the Court stated:
>
> "While it is true that a duty to observe procedural fairness, as expressed in the maxim *audi alteram partem*, need not be

express *(Alliance des Professeurs Catholiques de Montréal v Commission des Relations Ouvriéres de la Province de Quebec),* it will not be implied in every case. It is always a question of construing the statutory scheme as a whole to see to what degree, if any, the legislator intended the principle to apply.

The judgment continued at p.785:

The answer is not to be found in continuing the search for words that will clearly and invariably differentiate between judicial and administrative on the one hand, or administrative and legislative on the other. It may be said that the use of the fairness principle as in *Nicholson, supra*, will obviate the distinction in instances where the tribunal or agency is discharging a function with reference to something akin to a *lis* or, where the agency may be described as an 'investigating body' as in the *Selvarajan* case, *supra*." (underlining added)

[47] Writing for the Swaziland Supreme Court, Dr S. Twum, J. A. noted in Eagle Nest (Pty) Limited and Ors v Swaziland Competition Commission and Another (Civil Appeal Case No. 1/2014):

"This demand must be confined to their right to be advised of and meet the case against them. To resolve this impasse, my

view is that the court must always consider the statutory framework within which natural justice is to operate. What is essential is substantial fairness to the person adversely affected. This may sometimes be adequately achieved by telling him the substance of the case he has to meet without disclosing the full plenitude or sources of information. The extent of the disclosure required by natural justice may have to be weighed against the prejudice to the scheme of the Act which disclosure may involve." (emphasis added)

[48] The words "adversely affected" are key. In the "Sugar-Beans Case" we said at paragraph 152:

"Although section 36(5)(d) says an inspector who has a warrant to search premises should "allow the enterprise under investigation a reasonable period within which to obtain legal advice" this does not apply to the whole investigation, but only to that stage of the investigation. The enterprise gets the opportunity to state its defence before the Commission in the event that a proper referral has been made and a hearing is held."

[49] Section 11 of the Competition Act of Canada (which was previously section 17 of the Combines Investigation Act) reads:

> "11 (1) If, on the *ex parte* application of the Commissioner or his or her authorized representative, a judge of a superior or county court is satisfied by information on oath or solemn affirmation that an inquiry is being made under section 10 and that a person has or is likely to have information that is relevant to the inquiry, the judge may order the person to - - -".

[50] Discussing the above provision in Canada (Commissioner of Competition v Pearson Canada Inc., 2014 FC 376 Crampton C. J. of the Federal Court observed at paragraph 47:

> "Notwithstanding the foregoing, the Court recognizes that section 11 applications are made at the investigatory stage, before an application for an order under one of the substantive provisions of Part VII. 1 or Part VIII has been made. The reason to "cause an inquiry to be made" under subsection 10(1) is with a "view to determining the facts.""

[51] At paragraphs 90 and 92, the Court went on to say, starting with paragraph 92:

"Pursuant to the express terms of section 11, applications are to be made on an *ex parte* basis. Accordingly, parties other than the Commissioner have no right to participate in the hearing, file evidence or cross-examine on the Commissioner's affidavit."

The Court noted at paragraph 90:

"A section 11 application is made during the investigatory phase of the administration and enforcement of the Act by the Commissioner. The purpose of such investigations is to determine whether there is sufficient evidence to warrant an application to the Tribunal. - - - Absent evidence of bad faith or the existence of other exceptional circumstances, which I have difficulty identifying at this point in time, the Court should refrain from making determinations at this fact finding stage which essentially reach final conclusions regarding the final merits of an inquiry."

[52] This, therefore, shows that other jurisdictions have interpreted provisions analogous to section 39 (4)(b) of the Act to exclude all other parties except for, in our case, the Applicant and the Commission. As shown by our discussion in preceding paragraphs, this is our understanding as well.

[53] In an opinion which was prepared for the Competition Bureau of Canada to review section 11 of the Competition Act of Canada (section 11 opinion), it was observed that:

> "*ex parte* hearings are a departure from the fundamental principle of procedural fairness: *audi alteram partem*. On a motion for *ex parte* relief, the party against whom the relief is sought is denied the opportunity to be heard and to present to the Court the case for why the requested relief should not be granted."
>
> "(http://www.competitionbureau.gc.ca//eic/site/cb-bc.nsf/eng/02709.html)

[54] In the instant case, the *ex parte* application is simply an aid in the investigatory process. There is no relief sought against the Respondents. There is only an investigation involving them at this stage. Their rights are not being determined, or liabilities imposed on them.

[55] It is important here to quote *in extenso* from the dictum of Lord Mustill in *ex parte* Doody [1994] 1 AC 531 (H. L.) when he said:

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of

the often – cited authorities in which the courts have explained what is essentially an instructive judgment. They are far too well known. From them, I derive that:- 1. Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. 2. The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. 3. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. 4. An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. 5. Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to procuring a favourable result; or after it is taken, with a view to its modification; or both. 6. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is

informed of the gist of the case which he has to answer."

(emphasis added)

[56] In the context of an investigation conducted by the Applicant, the Respondents get "the gist of the case" they have to answer when the matter is referred to the Commission, as is the case now. Prior to that they have no interests to safeguard.

[57] As Lord Mustill observed in his dictum at paragraph 55 above, "the standards of fairness are not immutable." This position was articulated in Irvine at paragraph 78 when it was said:

> "Fairness is a flexible concept and its content varies depending on the nature of the inquiry and the consequences for the individuals involved. The characteristics of the proceeding, the nature of the resulting report and its circulation to the public, and the penalties which will result when events succeeding the report are put in train will determine the extent of the right to counsel and, where counsel is authorised by statute without further directive, the role of such counsel. The investigating body must control its own procedure. When that body has determinative powers, different considerations enter the process." (emphasis added)

[58] In the case of investigations by the Applicant, it does not have any power of final determination, except to refer matters to the Commission for a hearing and adjudication. Secondly, it does not impose any penalties as these are the preserve of the Commission and the superior courts. In short, it does not determine the rights of those it investigates. As Richard, J put it in North American Van Lines Canada Ltd v Canada (Director of Investigation and Research, Competition Act) (1997 Canlii 5665 (FC), 78 CPR (3d) 221):

> "Here, the process is investigative and not adjudicative or determinative."

Or, as was said in Irvine:

> "The Director's role in this section is clearly of a purely investigatory nature and entirely preliminary to any action which might adversely affect any person."

[59] It is of critical importance to appreciate that an investigation may absolve the person who is being investigated and the matter will end there. If, however, an investigation indicates that they have a case to answer, the hearing provided for in the Act gives them the forum where they need to be heard in accordance with the rules of natural justice. This is the scheme that has been set out in the Act by the legislature, and there is no void to be filled by the common law.

[60] The Applicant, in its investigations, is engaged in a fact-finding exercise in the public interest. In Federal Trade Commission v Texaco (U.S. Court of Appeals for the District of Columbia Circuit – 555 F. 2d 862 (D.C. Cir. 1977)) the Court said:

> "The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigatory and accusatory duties are delegated by statute to an administrative body, it too, may take steps to inform itself as to whether there is probable violation of the law."

In certain respects, the Federal Trade Commission carries out functions similar to those of the Applicant.

[61] Therefore, when such investigations have been embarked upon in accordance with the scheme of the Act, they need to be protected and the private interest should yield to the public interest. In Oklahoma Press Publishing Co. v Walling 327 U.S. 186 (1946) the SCOTUS cautioned:

> "On the other hand, petitioners' view, if accepted, would stop much if not all investigation in the public interest at the threshold of inquiry and, in the case of the Administrator, is designed avowedly to do so. This would render substantially impossible his effective discharge of the duties of investigation and enforcement which Congress has placed upon him. And if his functions could be thus blocked, so might many others of equal importance."

[62] In the case of the Applicant, allowing those being investigated to assert rights of hearing at the stage of investigation would stultify the investigatory process and render it nugatory. Those being investigated, therefore, need to wait for the investigation to be concluded to see whether it inculpates them and thus there is a referral or they are absolved. If there is a referral, and this is where their rights may be affected by a decision or determination of the Commission, that is when their own rights to be heard are protected. This is a position that has been reinforced by

a number of authorities. In Roberts (FC) v Parole Board [2005] UKHL 45 Lord Woolf eloquently framed this position in this manner at paragraph 40:

> "The principles have been set out in many cases of high authority, with greater elegance, but I would summarise them as follows:
>
> (i) An administrative body is required to act fairly when reaching a decision which could adversely affect those who are the subject of the decision.
>
> (ii) This requirement of fairness is not fixed and its content depends upon all the circumstances and, in particular, the nature of the decision which the body is required to make.
>
> (iii) The obligation of fairness to which I refer can be confined by legislation and, in particular, by rules of procedure, provided that the language used makes its effect clear - - -" (emphasis added)

[63] Axiomatically, the Applicant would have to make a decision which affects the rights of the Respondents, or imposes liabilities or sanctions on them. We have demonstrated that this the Applicant does not do during an investigation. In Klein v

Dainfern College and Another ((33033/4) [2005] ZAGPHC 102) C. J. Claassen, J of the High Court of South Africa (TPD) wrote at paragraph 14:

> "What is to be regarded as "principles of natural justice" was examined in **Martin v Durban Turf Club and Others 1945 AD 122** at 125 – 6 where Tindall JA concluded that the expression:
>
> "- - - - - when applied to the procedure of tribunals such as those just mentioned, seems to me merely a compendious (but somewhat obscure) way of saying such tribunals must observe certain fundamental principles of fairness which underlie our system of law as well as the English Law. Some of these principles were stated, in relation to tribunals created by statute by Innes CJ in **Dabner v South African Railways 1920 AD 583**, in these terms:
>
> 'Certain elementary principles, speaking generally, they must observe; they must hear the parties concerned; these parties must have due and proper opportunity of producing evidence and stating their contentions and the statutory duties must be honestly and impartially discharged.'"

The Commission is the statutory body mandated by section 9 of the Act to hear the Applicant and the Respondents (procedural fairness) and render a decision.

[64] The fact that a decision or determination is not being made plays a pivotal role in considering whether the rights of those being investigated are being violated. It is necessary to reproduce at length the observations of the SCOTUS in Hannah v Larche 363 U.S. 420 (1960) as they are instructive on this issue, when Chief Justice Warren, delivering the opinion of the Court said:

> "As is apparent from this brief sketch of the statutory duties imposed upon the Commission, its function is purely investigative and factfinding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action.
>
> - - -
>
> "Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or

make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general facfinding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play which through the years have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account. An analysis of these factors demonstrates why it is that the particular rights claimed by the respondents need not be conferred upon those appearing before purely investigative agencies, of which the Commission on Civil Rights is one.

It is probably sufficient merely to indicate that the rights claimed by respondents are normally associated only with adjudicatory proceedings, and that, since the Commission does

not adjudicate, it need not be bound by adjudicatory procedures." (emphasis added)

[65] The "possible burden" on the proceeding essentially refers to the disruption that would descend upon an investigation if those linked to an investigation were to be granted the right to be heard either at *ex parte* application stage or at any other stage. This would have the potential of torpedoing the whole investigation. This line of reasoning spelt out by the SCOTUS has also been embraced within the human rights context.

[66] In Fayed v The United Kingdom (Application No. 17101/90) the European Court of Human Rights in its judgment of 21 September 1994 said at paragraphs 61, 62 and 63:

"61. However, the Court is satisfied that the functions performed by the inspectors were, in practice as well as in theory, essentially investigative (see the similar analysis by the Supreme Court of the United States of America of the function of the Federal Civil Rights Commission in the case of Hannah v Larche (363 US 420 (1960)). The Inspectors did not adjudicate, either in form or in substance. They themselves said in their report that their findings would not be dispositive of anything. - - - They did not make a legal determination as to criminal or civil

liability concerning the Fayed brothers, and in particular concerning the latter's civil right to honour and reputation. The purpose of their inquiry was to ascertain and record facts which might subsequently be used as the basis for action by other competent authorities – prosecuting, regulatory, disciplinary or even legislative. - - -

In short, it cannot be said that the Inspectors' inquiry "determined" the applicants' civil right to a good reputation - - -, or that its result was directly decisive for that right.

62. Acceptance of the applicants' argument would entail that a body carrying out preparatory investigations at the instance of regulatory or other authorities should always be subject to the guarantees of a judicial procedure set forth in Article 6 para. 1 (art. 6-1) by reason of the fact that publication of its findings is liable to damage the reputation of the individuals whose conduct is being investigated. Such an interpretation of Article 6 para.1 (art. 6-1) would unduly hamper the effective regulation in the public interest of complex financial and commercial activities. In the Court's view, investigative proceedings of the kind in issue in the present case fall outside the ambit and intendment of Article 6 para. 1 (art. 6-1).

63. The Court accordingly concludes that the investigation by the Inspectors was not such as to attract the application of Article 6 para. 1 (art. 6-1)." (emphasis added)

[67] In Hannah v Larche the SCOTUS closely analogised the investigatory proceedings that were at issue in that case with those carried out by the Federal Trade Commission in the United States. In order to appreciate the context of the discussion by the SCOTUS, it is necessary once again to quote its opinion at length as it is decisive on the point at issue in the instant case. It said:

"On the other hand, the investigative process could be completely disrupted if investigative hearings were transformed into trial – like proceedings, and if persons who might be directly affected by an investigation were given an absolute right to cross – examine every witness called to testify. Factfinding agencies without any power to adjudicate would be diverted from their legitimate duties and would be plagued by the injection of collateral issues that would make the investigation interminable. Even a person not called as a witness could demand the right to appear at the hearing, cross-examine any witness whose testimony or sworn affidavit allegedly defamed or incriminated him, and call an unlimited number of witnesses of his own selection. This type of

proceeding would make a shambles of the investigation and stifle the agency in its gathering of facts.

- - -

The history of investigations conducted by the executive branch of the Government is also marked by a decided absence of those procedures here in issue. The best example is provided by the administrative regulatory agencies. Although these agencies normally make determinations of a quasi-judicial nature, they also frequently conduct purely factfinding investigations. When doing the former, they are governed by the Administrative Procedure Act, - - - and the parties to the adjudication are accorded the traditional safeguards of a trial. However, when these agencies are conducting nonadjudicative, factfinding investigations, rights such as appraisal, confrontation and cross–examination generally do not obtain.

A typical agency is the Federal Trade Commission. Its rules draw a clear distinction between adjudicative proceedings and investigative proceedings. - - - Although the latter are frequently initiated by complaints from undisclosed informants, - - - and although the Commission may use the information obtained during investigations to initiate adjudicative proceedings, - - - nevertheless persons summoned to appear before investigative proceedings are entitled only to a general

> notice of "the purpose and scope of the investigation," - - - and, while they may have the advice of counsel, "counsel may not, as a matter of right, otherwise participate in the investigation." - - - The reason for these rules is obvious. The Federal Trade Commission could not conduct an efficient investigation if persons being investigated were permitted to convert it into a trial. We have found no authorities suggesting that the rules governing Federal Trade Commission investigations violate the Constitution, and this is understandable, since any person investigated by the Federal Trade Commission will be accorded all the traditional safeguards at a subsequent adjudicative proceeding, just as any person investigated by the Civil Rights Commission will have all of these safeguards, should some type of adjudicative proceeding subsequently be instituted."

[68] As we have already said above, the rights of those who are the subject of an investigation are asserted at the point of referral, or if this leads to a hearing, then during the hearing itself. To do otherwise would dangerously tilt the balance between the public interest and the private interest inexorably in favour of the private interest.

[69] Delivering a concurring opinion in Hannah v Larche, Justice Frankfurter wrote:

"The issue thus raised turns exclusively on the application of the Due Process Clause of the Fifth Amendment. The Commission's hearing are not proceedings requiring a person to answer for an "infamous crime", which must be based on an indictment of a grand jury (Amendment V), nor are they "criminal prosecutions" giving an accused the rights defined by Amendment VI. Since due process is the constitutional axis on which decision must turn, our concern is not with absolutes, either of governmental power or of safeguards protecting individuals. Inquiry must be directed to the validity of the adjustment between these clashing interests - - that of the Government and of the individual, respectively - - in the procedural scheme devised by the Congress and the Commission. Whether the scheme satisfies those strivings for justice which due process guarantees, must be judged in the light of reason drawn from the considerations of fairness that reflect our traditions of legal and political thought, duly related to the public interest Congress sought to meet by this legislation as against the hazards or hardship to the individual that the Commission procedure would entail.

> Barring rare lapses, this Court has not unduly confined those who have the responsibility of governing within a doctrinaire conception of "due process." The Court has been mindful of the manifold variety and perplexity of the tasks which the Constitution has vested in the legislative and executive branches of the Government by recognizing that what is unfair in one situation may be fair in another. - - - Whether the procedure now questioned offends "the rudiments of fair play," - - - is not to be tested by loose generalities or sentiments abstractly appealing. The precise nature of the interest alleged to be adversely affected or of the freedom of action claimed to be curtailed, the manner in which this is to be done and the reasons for doing it, the balance of individual hurt and the justifying public good - - these and such like are the considerations, avowed or implicit, that determine the judicial judgment when appeal is made to "due process.""

[70] The courts have been crystal clear regarding the invocation of the rules of natural justice, or procedural fairness, or the right to be heard, during investigations such as the one mounted by the Applicant.

[71] Writing for the majority in Jenkins v McKeithen 395 U.S. 411(1969) in the SCOTUS Justice Marshall said:

> "For obvious reasons, it has not been seriously suggested that a "person under investigation" by a district attorney has any of the "adjudicative" constitutional rights at the investigative stage. These rights attach only after formal proceedings have been initiated. Nor, of course, does one under investigation have a constitutional right that the investigations be conducted in secrecy, or that the official keep his plans to prosecute confidential."

[72] This review of the authorities demonstrates that no rights of hearing can be claimed by those subject to an investigation under the Act. This is fortified by the fact that the legislature itself deliberately ordained that the process at that stage of the investigation should be *ex parte*, thus the argument that *audi alteram partem* should be implied cannot be sustained.

[73] Ackermann J, delivering judgment for the SACC in National Director of Public Prosecutions v Mohamed NO and Others (CCT 44/02); [2003] ZACC 4; 2003 (4) SA 1 (CC), said at paragraph 37:

> "It is well established that, as a matter of statutory construction, the *audi* rule should be enforced unless it is clear that the legislature has expressly or by necessary implication

enacted that it should not apply or that there are exceptional circumstances which would justify a court not giving effect to it."

In Roberts v Parole Board at paragraph 30 Lord Bingham of Cornhill explained:

"The examples considered above show plainly that Parliament in practice observes the principle of legality. If it intends that a tribunal shall have power to depart from the ordinary rules of procedural fairness, it legislates to confer such power in clear and express terms and it requires that subordinate legislation regulating such departures should be the subject of Parliamentary control."

Aguda, C.J. (as he then was), wrote in Attorney General v Harrison Thipe and Others 1972 (2) BLR 6 (HC):

"But as Strafford, A. C. J, said in Sachs v Minister of Justice 1934 A.D. 11 at p. 38 – "Sacred though the maxim (audi alteram partem) is held to be, Parliament is free to violate it. In cases where by judicial interpretation it has been invoked, this has been justified on the ground that the enactment impliedly

incorporated it. When on the true interpretation of the Act, the implication is excluded, there is an end of the matter.""

[74] In section 39(4)(b) the legislature deliberately and expressly, through a statutory scheme, decided on *ex parte* proceedings, and therefore it is not necessary to imply or infer the application of rules of natural justice for parties under investigation. We, therefore, reject the contention by the Respondents that the time extension is invalid by reason of the fact that it was in breach of the rules of natural justice as implied from sections 35(2) and 39(1).

EX PARTE APPLICATIONS AND THE ROLE OF AFFIDAVITS

[75] The proceedings contemplated under section 39(4) (b) are "on application by the Authority" before the Commission. Since this is an *ex parte* procedure, affidavits are used to initiate proceedings. Affidavits are a central feature of the proceedings before the Commission.

[76] Rule 12 (2) of the Rules provides:

"A complaint referral must be accompanied by an affidavit setting out in numbered paragraphs –

(a) a concise statement of the grounds of the complaint; and

(b) the material facts or the points of law relevant to the complaint and relied on by the Authority or complainant, as the case may be." (emphasis added)

[77] In Rule 13(4) of the Rules it is stated:

"Any other answer must be in affidavit form, setting out in numbered paragraphs –

(a) a concise statement of the grounds on which the complaint referral is opposed;

(b) the material facts or points of law on which the respondent relies; and

(c) an admission or denial of each ground and of each material fact relevant to each ground set out in the complaint referral." (emphasis added)

[78] Rule 14(2) of the Rules reads:

"The reply must be in an affidavit form, setting out in numbered paragraphs –

(a) an admission or denial of each new ground or material fact raised in the answer; and

(b) the position of the replying party on any point of law raised in the answer." (emphasis added)

[79] Rule 35(1) of the Rules says:

"If in the course of proceedings, a person is uncertain as to the practice and procedure to be followed, the Chairperson of the Commission or assigned member presiding over a matter –

(a) may give directions on how to proceed; and

(b) for that purpose, if a question arises as to the practice and procedure to be followed in cases not provided for by these Rules, the Chairperson or assigned member presiding may have regard to the Rules of the High Court."

[80] Order 13, rule 3 of the Rules of the High Court ("RCH") reads:

"(1) Every affidavit shall contain only statements of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true stating the sources and grounds thereof.

(2) An affidavit shall not contain extraneous matters by way of objection, prayer, legal argument or conclusion."

[81] In essence, an affidavit should provide sufficient and relevant information to enable others to appreciate what the issues to be resolved are. In R v Araujo [2000] SCC 65; [2000] 2 S. C. R. 992, delivering judgment on behalf of the Supreme Court of Canada, Le Bel J said at paragraph 46:

"Looking at matters practically in order to learn from this case for the future, what kind of affidavit should the police submit in order to seek permission to use wiretapping? The legal obligation on anyone seeking an *ex parte* authorization is full and frank disclosure of material facts - - - So long as the affidavit meets the requisite legal norm, there is no need for it be as lengthy as *À la recherche du temps perdu,* as lively as the *Kama Sutra*, or as detailed as an automotive repair manual. All that it must do is set out the facts fully and frankly for the

authorizing judge in order that he or she can make an assessment of whether these rise to the standard required in the legal test for authorization. Ideally, an affidavit should be not only full and frank but also clear and concise. It need not include every minute detail of the police investigation over a number of months or even of years." (underlining in original)

[82] We would maintain that the above passage applies with equal force to affidavits submitting matters to the Commission in *ex parte* applications in particular, and those concerning referrals in general. This is moreso in *ex parte* applications where the Commission is wholly dependent on what is being presented by the Authority.

[83] In Professional Conduct and Advocacy: Avoiding a Breach of the Professional Conduct and Practice Rules (https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent) Virginia Shirvington said:

"These decided cases involving misleading the Court in relation to preparation of affidavits are:

- **Myers – v Elman [1940] AC 282; [1939] 4 AllER 484** in which the House of Lords said a solicitor "cannot simply allow the client to make whatever affidavit of documents

he thinks fit, nor can he escape the responsibility of careful investigation or supervision - - - a solicitor who has innocently put upon the file an affidavit by his client, which he subsequently discovers to be false, owes a duty to the Court to put the matter right at the earliest moment if he continues to act as solicitor on the record. - - -"

[84] Binns–Ward J in Web Call (Pty) Ltd v Botha and Another ((A 50/2014); [2014] ZAWCHC 179) wrote at paragraph 5:

"- - - It may be accepted for present purposes that the deponent to the founding affidavit did not act perjuriously in making the aforementioned false averments, but that does not excuse the appellant from the consequences of having put up a materially misleading case. It was incumbent upon someone in the position of the appellant's managing director to have taken the greatest care to get the facts right in making an affidavit in an *ex parte* application for a search and seizure order. The policy of the courts to insist on the highest standard of care and circumspection in applications for search and seizure orders, which are virtually invariably brought without notice to the affected respondent party, is because of the extremely invasive

effect of such order and the attendant infringement of the affected party's fundamental right to privacy and dignity."

[85] We have established that respondents do not have the right to appear before the Commission when it considers *ex parte* applications for extension of time with regard to investigations. Nor are we dealing with warrants for search and seizure. The fundamental issue is the nature of information conveyed through affidavits.

[86] Writing for the SASCA in Lancelot Stellenbosch Mountain Retreat (Pty) Ltd v Stephen Malcolm Gore NO and Others ((108/14); [2015] ZASCA 37) Zondi JA said at paragraph 13:

"Affidavits in motion proceedings serve to define not only the issues between the parties, but also to place the essential evidence before the court. They must contain factual averments that are sufficient to support the relief sought. As was held in Swissborough Diamond Mines v Government of the Republic of South Africa & Others 1999 (2) SA 279 (T) at 324C:

'The more complex the dispute between the parties, the greater the precision that is required in the formulation of the issues.'"

On the other hand, in Schering (Pty) Ltd & Others v New United Pharmaceutical Distributors (Pty) Ltd (formerly Mainstreet2 (Pty) Ltd & Others (Case No: 11/CAC/AUG01) the SACAC said that "[i]t is a known fact that in application proceedings, affidavits constitute both the pleadings and the evidence - - -".

[87] The section 11 opinion noted:

"On all *ex parte* applications, the moving party is under an obligation to make full, frank and fair disclosure to the Court. In the context of s.11, this means that the Commissioner should state his or her case for obtaining a s.11 order fairly and must inform the Court of any point of fact or law known to the Commissioner why the s.11 order should not be granted. The standard of disclosure is the same whether the enforcement process ultimately invoked under the *Act* is civil or criminal."

[88] Full, fair and frank disclosure in *ex parte* proceedings, especially in the context of section 39(4) of the Act, is a *sine qua non* for the use of affidavits. This was buttressed in Pearson Canada, when the Federal Court in Canada observed at paragraph 44:

> "However, given that section 11 applications proceed on an *ex parte* basis, there is a "heavy burden on the Commissioner to make full and frank disclosure" of all the relevant circumstances surrounding the application - - - This burden, which can also be expressed as an "utmost duty of good faith", is not focused on circumstances supporting the Commissioner's application, but rather on two other things. The first is ensuring that the Court is informed of "any points of fact or law known to it which favour the other side" - - - The second is ensuring that the Court is able to detect and redress abuses of its own processes - - -."

[89] Undoubtedly this is a heavy burden on an applicant. But it is an even trickier problem, in the case of the Act, for the Commission to be able to discern if the information placed before it on material facts is relevant and sufficient, especially since at that stage there is no specific respondent who can later on contradict or challenge the information. The information at that stage is a one-sided view which is simply provided as an aid of the investigatory process.

[90] In Kockjeu v National Director of Public Prosecutions ((CA 333/2011); [2012] ZAECGHC 17) Goosen, J of the High Court of South Africa, Eastern Cape, articulated the position in this manner:

"33. Mr Paterson, however, further argued that when the national director elects to proceed *ex parte* he or she is bound, in terms of the ordinary principles, to display the utmost good faith in such application and is bound therefore to make full disclosure of all material facts which may have a bearing upon the granting of such an order.

34. I agree. There can be no doubt that where the national director proceeds by way of an *ex parte* application a full and proper disclosure of all relevant facts must be made in the application papers. *In National Director of Public Prosecutions v Braun and Another* ***2007(1)SA 189(C)*** it was found, in relation to *ex parte* proceedings in terms of ***section 38*** of POCA, that the provisions of ***section 38*** do not relieve the national director of the normal burden imposed on every applicant who approaches a court for an *ex parte* order. - - -

35. The burden imposed upon an applicant who seeks relief by way of an *ex parte* application requires that he or she adheres to the requirements of *uberrima fides*. Thus, all material facts that *might* influence a court in coming to a decision must be disclosed - - -

- - -

38. In my view the court *a quo* misdirected itself in regard to the approach to a failure to disclose material facts. The court was required to determine whether the requirement that *uberrima fides* be displayed by an applicant who was in possession of relevant facts has been complied with. When once it had made such a finding the court could then, in the exercise of its discretion, decide whether to discharge the interim order or confirm it notwithstanding the non-disclosure."

[91] *Uberrima fides* simply means utmost good faith.

[92] In its heads of argument, the first Respondent at paragraph 18 said:

"Applicant having resultantly pursued this matter Ex-Parte against the Respondents was then obliged to conform to the duty of good faith."

The Commission was referred to the dictum of Tafa, J in B & E International (Botswana) (Pty) Ltd v Ed – U Compt (Pty) Ltd and Another (MAHLB – 175 of 2005) and Masuku, J in Tuscan Mood 1186 CL v The Branded Clothing Co. (Pty) Ltd (MISCA 509 of 2004) fortifying the above principles. We were further referred

to Schlesinger v Schlesinger 1979(4) SA 342 WLD at 349 A-B where Le Roux, J noted:

"It appears quite clearly from these authors that:

(1) In ex parte applications all material facts must be disclosed which might influence a court in coming to a decision;

(2) the non disclosure or suppression of facts need not be wilful or mala fide or incur the penalty of rescission; and

(3) the court, apprised of the true facts has a discretion to set aside the former order or to preserve it."

[93] In Pearson Canada at paragraph 40 Crampton C. J. made the same point aptly:

"As Justice Mactavish elaborated, to properly exercise its discretion and its independent judicial oversight role with respect to the extensive investigative powers granted to the Commissioner under section 11, the Court must be fully apprised of the relevant circumstances surrounding the Commissioner's application - - -

[94] This applies with equal force to the role of the Commission under the Act. In recognition of the role played by agencies in a position similar to that of the Applicant in the public interest, the courts have urged that a certain measure of deference be accorded to them, subject, always, to their demonstration of a duty of utmost good faith. In the section 11 opinion it was noted that "the Commissioner is a public officer with a statutory obligation to act fairly and in the public interest. As a result, the Commissioner's good faith is properly presumed by the court."

[95] The point was put thus at paragraph 43 of Pearson Canada:

> "It is now well established that, as a statutory authority responsible for the administration and enforcement of the Act, the Commissioner benefits from a presumption that actions taken pursuant to the Act are *bona fide* and in the public interest. - - - Accordingly, in the absence of bad faith or other evidence that the Commissioner's inquiry is not a *bona fide* inquiry, it will be presumed to be so."

Further, at paragraph 48 the Court said:

> "A certain degree of latitude will also ordinarily be warranted in recognition of the fact that the Commissioner may well need additional information to better understand the nature of the

conduct that is the subject of the inquiry, whether it raises issues under additional sections of the Act, and the market(s) in which there is reason to believe the conduct is or may be taking place. Stated differently: "Courts must, in the exercise of [their] discretion, remain alert to the danger of unduly burdening and complicating the law enforcement investigative process. Where that process is in embryonic form engaged in the gathering of the raw material for further consideration, the inclination of the Courts is away from intervention"."

[96] However, in matters that are *inter partes,* non-disclosure can be detrimental to the non-disclosing applicant. Aguda C. J. observed in Attorney-General v Harrison Thipe:

"There is no doubt that non-disclosure of material facts before the District Commissioner, if this had been brought to his notice, might have been detrimental to the case of the applicants before him. - - - Indeed, Counsel for the Applicant in this case admitted before me – and I have no doubt he is correct – that such non–disclosure in an ex parte application may be sufficient reason for a court not to grant the order sought: Spilg v Walker 1947 (3) S.A. 495; or if possible to

rescind it upon the application of a person aggrieved by the decision."

[97] Clearly, lack of full, fair and frank disclosure by an applicant in an *ex parte* matter, which is part of *inter partes* proceedings, can have dire consequences for him or her. Where there are attorneys involved, the greater burden rests on them. In Avoiding a Breach of the Professional Conduct and Practice Rules there is a passage which reads:

"In **Rondel – v – Worsley [1969] 1 AC 191 at 227; [1967] AllER 993 at 998** Lord Reid put the duty to the client and to the Court in perspective:

"Every Counsel has a duty to his client fearlessly to raise every issue, advance every argument and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the Court concerned in the administration of justice, he has an overriding duty to the Court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which

there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his client but which the law or the standards of his profession require him to produce.""(sic)

[98] Judicial authorities have generally cautioned against the use of the *ex parte* procedure. However, the Act itself has, as part of the investigatory process, endowed the Commission with the power, in certain circumstances and on application by the Authority, to authorise the extension of an investigation period. In this regard, section 39(4) of the Act provides:

"In a particular case –

(b) on application by the Authority made before the end of the period referred to under subsection (2), the Commission may extend that period." (emphasis added)

This grant of discretionary power has not been accompanied by any test to guide the Commission on when to allow an extension, or to refuse to extend.

[99] Section 45 of the Interpretation Act (Cap .01:04) states:

"In an enactment "shall" shall be construed as imperative and "may" as permissive and empowering."

[100] In Easterbrook Transport (Pty) Ltd v Commissioner of Police and Another ((CN/APN/58/95) [1995] LSCA 45), when speaking generally about the nature of *ex parte* proceedings, Maqutu, J of the High Court of Lesotho said:

"I am fortified in my view by the remarks of Beck J in Republic Motors v Lytton Road Service Station 1971(2), SA 516 at 518 F-H where he said:

"The procedure of approaching the court ex parte for relief that affects the rights of other persons is one which, in my opinion, is somewhat lightly employed. Although the relief that is sought when this procedure is resorted to is only temporary in nature, it necessarily invades, for the time being, the freedom of action of a person or persons who have not been heard and it is, to that extent a negation of a fundamental precept of audi alteram partem. It is accordingly a procedure that should be sparingly employed and carefully disciplined by the existence of factors such as urgency, or well-grounded apprehension of perverse conduct on the part of the respondent who if informed before – hand - - - the course of justice is in danger of

> frustration unless temporary curial intervention can be unilaterally obtained.

[101] The court in the above passage was cautioning about the traditional *ex parte* procedure when used in *inter partes* proceedings. In the present matter, the procedure is prescribed by the Act as an accessory to investigations. The danger would be for the Commission to proceed in *ex parte* proceedings on the basis of incomplete information, and there is no party to controvert it at a later stage or in the main proceedings. The Kansas Supreme Court in State of Kansas v Johnnie P. Scales 261 Kan. 734 (933 P2d 737) observed:

> "*Ex parte* conversations or correspondence can be misleading; the information given to the judge 'may be incomplete or inaccurate, the problem can be incorrectly stated.' At the very least, participation in *ex parte* communications will expose the judge to one-sided argumentation, which carries the attendant risk of an erroneous ruling on the law or facts. At worst, *ex parte* communication is an invitation to improper influence if not outright corruption." Shaman, Judicial Conduct and Ethics - - "

[102] Admittedly, the above passage deals with *ex parte* communications or contact, but the underlying principle resonates in *ex parte* proceedings as well. Given the

scheme designed in the Act by the legislature, it is up to the Commission to see how this procedure is optimally used to attain the public interest objective. This is an issue that other jurisdictions have had to encounter as well. In National Director of Public Prosecutions v Mohamed Ackermann, J, on behalf of the SACC, said at paragraph 33:

> "I would at the outset point out that it is not the *ex parte* nature of the initial application under 38 that the High Court found to be objectionable - - - The phrase in section 38 "[t]he National Director may by way of an *ex parte* application apply" means no more than that, if the National Director is desirous of obtaining an order under section 38, she or he may use an *ex parte* application, in the sense defined in paragraph 27 above. It sanctions a particular initiating procedure to be employed when relief of a particular nature is being sought. An important consequence of this is that an application by the National Director under section 38 can never be dismissed solely on the ground that it has been brought *ex parte*."

[103] Clearly the power to proceed *ex parte* lies with the applicant. In the case of the Act, at times the Authority can deal with a complainant, or on its own apply to the Commission for an extension. In Pearson Canada, the Federal Court said in relation to section 11 of the Competition Act of Canada:

> "The test for the Court on such an application simply requires the Court to be satisfied of two things, namely, that an inquiry is being made under section 10 and that a person is likely to have information that is relevant to the inquiry. In contrast to the situation in *Symbol Technologies*, there is no requirement in section 11 for the Court to consider whether there is reason to believe, or reasonable grounds to believe, that grounds exist for the making of an order under Part VII. 1 or Part VIII of the Act - - - That function was given by Parliament to the Commissioner, pursuant to subparagraph 10(1)(b)(ii) of the Act. This is an important difference from the test that must be satisfied to obtain a search warrant under subparagraph 15(1)(a)(ii) of the Act. Under that provision, it is the Court which must be satisfied by information on oath or solemn affirmation that there are reasonable grounds to believe that grounds exist for the making of an order under Part VII.1 or Part VIII of the Act." (underlining in original)

[104] This obviously makes it very difficult to draw a bright line as to when a court, or in this instance the Commission, should decline or approve an *ex parte* application, using its discretion. In Federal Trade Commission v Texaco, the U.S. Court of Appeals for the District of Columbia Circuit adverted to this in this manner:

> "There is no rule requiring a court to act against conscience. The proceeding (judicial enforcement of administrative subpoenas) is equitable in character. Equitable considerations should prevail. There is no power to compel a court to rubberstamp action of an administrative agency simply because the latter demands such action. By arguing as if it had been denied the ability to proceed with its investigation, and by arguing that its subpoena must be enforced unless "the evidence sought is plainly irrelevant to any purpose within (its) statutory authority - - -," the Trade Commission demonstrates that its real purpose is to strip the federal judiciary of any discretion in subpoena enforcement proceedings."

[105] In Araujo, the Supreme Court of Canada said at paragraph 29:

> "All this must be performed within a procedural framework where certain actions are authorised on an *ex parte* basis. Thus, the authorizing judge stands as the guardian of the law and of the constitutional principles protecting privacy interests. The judge should not view himself or herself as a mere rubber stamp, but should take a close look at the material submitted by the applicant. He or she should not be reluctant to ask

questions from the applicant, to discuss or to require more information or to narrow down the authorization requested if it seems too wide or too vague. The authorizing judge should grant the authorization only as far as need is demonstrated by the material submitted by the applicant. The judge should remember that the citizens of his country must be protected against unwanted fishing expeditions by the state and its law enforcement agencies." (emphasis added)

[106] The critical words in the above passage are "the material submitted by the applicant." It has to be material that is sufficient for the Commission, in this instance, to ask questions that will assist it in formulating its test on the use of its discretion as to whether to approve or decline an *ex parte* application.

[107] A survey of the authorities therefore suggests that a holder of a discretionary power in the mould of the Commission should bear in mind:

(a) the public interest and not refuse an extension unnecessarily;

(b) that the *ex parte* application is an aid in the investigatory process, or an "investigative technique";

(c) that the applicant being a statutory authority is presumed to act in utmost good faith but still should be held to the standard of frank, fair and full disclosure of all material facts.

[108] A number of authorities have urged that there is no final determination being made at this stage. In Regina v Criminal Injuries Compensation Board Ex Parte A (A.P), in a judgment delivered by Lord Slynn of Hadley for the House of Lords on 25 March 1999, it was said that "[t]he judge's task on the ex parte application was to do no more than to decide that there was an arguable case for judicial review and not to "determine any issue finally in favour of the applicant."" In The Commissioner of Competition v Air Canada and Others [2001]1 F.C. 219 Reed, J of the Federal Court said at paragraph 41:

> "I do not find it necessary to consider the argument that the constitutional guarantee does not apply in the present case, because the information that Air Canada is being required to produce, is for the purposes of an inquiry only, not for the purpose of a prosecution."

[109] The limited role of the *ex parte* procedure in investigations was noted in R v S. A. B. ([2003] 2 S.C.R. 678; 2003 SCC 60) where Arbour, J, speaking for the Supreme Court of Canada, noted at paragraph 56:

"Finally, the appellant contends that the *ex parte* nature of the proceedings renders the legislation unconstitutional. Requiring an *inter partes* hearing for a search warrant that is part of the investigative process could unnecessarily draw out and frustrate the criminal investigation. - - - But, as with most investigative techniques, the *ex parte* nature of the proceedings is constitutionally acceptable as a norm - - -"

Writing about Section 11: Good, Bad and Ambiguous in Canada Competition Law Review (2014, 275), James Musgrove and Jun Chao Meng commented:

"Section 11 of the Competition Act (the Act) is one of the principal investigative tools available to the Commissioner. - - - While not unique, section 11 grants the Commissioner broad and, for the Commissioner, a very efficient mechanism to gather information."

(http://www.mcmillan.ca.Files/172828_Section%2011%20-%20Good,%20Bad%20and%20)

[110] Therefore, while the *ex parte* procedure is used as part of the investigatory process in accordance with section 39(4)(b) of the Act, the question would be about the parameters within which material facts should be disclosed, and what the effect of a disclosure, which does not meet the standard of *uberrima fides,* should be. It has to be borne in mind that the *ex parte* procedure envisaged by section 39(4)(b) is not

employed within *inter partes* proceedings and also that the Authority is presumed, as a statutory body, to be *bona fide* at all times and acting in the public interest.

[111] The Applicant filed a number of papers with the Registrar in this matter. It is therefore proper at this juncture to look at some of the information contained in them.

(a) On the 26th August 2014, through a notice of motion in terms of section 39(4)(b) of the Act, the Applicant applied for a six (6) months' extension of the period of investigation. The Founding Affidavit deposed to by Mokubung Mokubung on the 26th August 2014 read at paragraphs 5 to 8:

> "5. I am bringing this application under section 39(4)(b) of the Competition Act which gives the Applicant the right to approach the Competition Commission for an extension of a period of investigation.
>
> 6. On 26th August 2013, the Competition Authority opened an investigation into a possible collusive tendering arrangement entered into by and between Creative Business Solutions (Pty) Ltd and Rabbit Group (Pty) Ltd with respect to the Tender to supply the Government of Botswana through Ministry of Health with Infant formula milk powder. The bidding patterns in the

bids submitted by the said enterprises in the said tender were analyzed and the Authority found them to be so close as to indicate that the bids were not independently done.

7. The Authority is currently still consulting and interviewing witnesses from the First National Bank, Public Procurement and Asset Disposal Board and the Ministry of Local Government who are relevant to this matter so as to wind up the investigative process.

8. It is the above facts that have necessitated this application to be brought as of urgency, in that, the period of investigation for this case will lapse on 27th August 2014 and the investigative process would not yet be complete. Therefore, the Competition Authority is approaching the Competition Commission for relief as sought in the Draft Order." (sic) (emphasis added)

Since section 39 of the Act gives the Authority the right to apply for an extension at any time before the lapse of one year, it does not, in our view, contemplate an approach on the basis of urgency as it would otherwise be the case in an *inter partes* matter. Secondly, and crucially, the Authority informed the Commission that it had "opened an investigation on 26th August 2013".

(b) In his oral submission before the Commission on 27th August 2014, the Authority's Director of Legal and Enforcement, Duncan Morotsi said:

> "The Authority may together with the complainant, the person who is filing complaint agree to extend investigation period, but in this particular case honourable Commissioners we did not receive a complaint from anybody, the Authority initiated the investigation itself, so section 38(4)(p) now says if the Authority has initiated the investigation itself and it is about to run out of time - - - 12 months - - we have to approach the Commission by way of application to apply for an extension period so that is why we are here today and as per the Affidavit filed by Dr Mokubung, as the Acting CEO, we have indicated today is the last day of the twelfth month of this particular case and we are saying the Authority is not done with their investigations and we are therefore asking for an extension in terms of the draft Order filed." (sic) (emphasis added)

(c) In respect of the referral, the Applicant's Founding Affidavit was deposed to by Goitseone Modungwa on 18 February 2015 and, amongst others, she said:

"14. The background of the case is that on 29 July 2013, the complainant received a complaint from a whistle blower, regarding the award of the tender to the respondents. - - -

15. The informant had suspected bid rigging and collusion between the respondents.

- - -

17. The Public Procurement and Asset Disposal Board (PPADB) was contacted by letter dated 06 August 2013 to request all the documents relating to the tender.

- - -

25. Following the preliminary analysis of the bid documents the complainant was reasonably convinced that a possible case of bid rigging may have been made out. It was then that the complainant took the decision to investigate the matter; the respondents were accordingly served with the notice of Intention to Investigate. The 1st respondent was served on the 03 September 2013 while the 2nd respondent received the notice on 29 August 2013.

26. To commence the investigation a letter was written on 03 September 2013 to the Ministry of Health - - - All said documentation requested by letter of 03 September 2013 was

provided under cover of a letter dated 18 September 2013 by the Ministry of Health.

27. I must clarify that since investigations commenced and the respondents were served with notice of intention to investigate on 29 August 2013 and 03 September 2013 respectively, the Complainant had one year within which to investigate and refer the matter to the Commission - - - Seeing that investigations were incomplete yet the one year period was lapsing, the Complainant approached the Commission on 26 August 2014 in terms of s.39 (14)(b). Upon hearing the Complainant's application the Commission granted the relief sought and extended the period within which the matter could be referred to the Commission by a period of 6 months. The said period lapses on 26 February 2015." (sic) (emphasis added)

The referral itself was filed with the Registrar on the 26th February 2015 at 0917 hrs, while the notice of motion was served on the first Respondent on the 26/02/2015 at 1529 hrs.

It is significant that, while the Applicant in its application to the Commission for an extension it mentioned that it was "still consulting and interviewing witnesses from the First National Bank, Public Procurement and Asset Disposal Board and the

Ministry of Local Government", in the Founding Affidavit the last recorded activity was the receipt of documents from the Ministry of Health "under cover of a letter dated 18 September 2013". This leaves the period between 18th September 2013 and 25th August 2014 unaccounted for, until the Commission was approached "as of urgency" on the 26th August 2014. The only major pieces of information that were availed to the Commission at the time of application were that the investigation was opened on 26th August 2013, and that the one year investigation period would lapse on 27th August 2014.

d) In the Applicant's Reply to the 1st Respondent's Points in Limine, through an Affidavit again deposed to by Mokubung Mokubung on the 26th March 2015, it is said in part:

> "13. *I wish to reiterate the complainant's averments as contained in the founding papers that a tip-off from an informant was received on* **29 July 2013**, on **06 August 2013** the complainant wrote to the PPADB requesting basic information around the tender, then on **29 August 2013** (and 03 September 2013) the complainant officially informed the respondents that it was going to investigate them. - - - Their time (the one year period in terms of section 39(2) of the Act) started ticking when they were told of investigations to be launched against them.

14. The complainant's computations going by the first notice issued on 29 August 2013 reveal that the one year period was set to lapse by **29 August 2014**, not sooner – not later. - - -

- - -

22. The complainant avers therefore that an investigation is opened in terms of section 39(2) upon the giving of a notice in accordance with section 35(2) of the Act. As I have stated above, the complainant issued notices to investigate to the respondents on 29 August 2013 (and 03 September 2013), *therefore the referral ought to have been made latest by **29 August 2014**.*

23. By the said date of 29 August 2014 the complainant had invoked the provisions of section 39(4)(b) and obtained an order of the Commission extending the time.

- - -

Investigations began on 29 August 2013 when the respondents got to know of the intended investigations against them." (sic) (underlining and bold in original)

e) Again, supplying an affidavit on behalf of the Applicant titled Reply to the 2nd Respondent's Points in Limine, dated 26th March 2015 and filed with the Registrar on the 26 March 2015 at 1504 hrs, Mokubung Mokubung said in part:

"12. *I wish to reiterate the complainant's averments as contained in the founding papers; that the complainant*

received a tip-off from an informant on ***29 July 2013***, on ***06 August 2013*** the complainant wrote to the PPADB requesting basic information around the tender, then on ***29th August 2013*** (and on 03 September 2013) the complainant officially informed the respondents that it was going to investigate them. The respondent's time (the one year period in terms of **section 39 (2)** of the Act) started ticking when they were told of investigations to be launched against them.

13. The complainant's computations going by the first notice issued on 29 August 2013 reveal that the one year period was set to lapse on **29 August 2014**, not sooner – not later. By the said date the complainant had already approached the Competition Commission successfully and obtained leave for extension of the period for investigations.

- - -

21. The complainant avers therefore that an investigation is opened in terms of section 39(2) upon the giving of a notice in accordance with section 35(2) of the Act. As I have stated above, the complainant issued notices to investigate to the respondents on 29 August 2013 (and 03 September 2013), therefore the referral ought to have been made latest by **29 August 2014**.

22. By the said date of **29 August 2014** the complainant had invoked the provisions of section 39(4)(b) and obtained an order of the Commission extending the time. - - - (underlining and bold in original)

[112] While on approaching the Commission on a sworn affidavit on 26 August 2014 "as of urgency", the Acting Chief Executive Officer, Mokubung Mokubung, informed the Commission that "the period of investigation for this case will lapse on 27th August 2014 and the investigative process would not yet be complete", as it had been opened on 26th August 2013, the Applicant absolutely abandoned that affidavit, and, in affidavits supporting the referral, adopted the 29th August 2013 as the new date on which it started its investigation in this matter.

PRESCRIPTION, JURISDICTION AND THE PRINCIPLE OF FUNCTUS OFFICIO

[113] The Applicant and the Respondents in the consent order of 26th May 2015 agreed on a number of issues which should be addressed, and because of their close affinity, the Commission will take the five (5) issues together. They are:

(a) whether the proceedings are a nullity as they are founded on an invalid time-extension granted following the expiration of 12 months laid down for the carrying out of an investigation in terms of section 39(2) of the Competition Act (Cap 46:09);

(b) whether the time extension by the Commission was itself invalid because the last day on which an extension could be lawfully granted was 25 August 2014 in terms of section 39(4)(b);

(c) whether (at any rate) the complaint has not been brought within 6 months following the extension granted on 26 August 2014 in accordance to section 39(4)(b);(sic)

(d) whether in *casu* the Competition Commission can declare its order of 26 August 2014 a nullity; (sic)

(e) whether the referral is fatally defective for the reason that it was filed woefully out of the within one year time statutorily stipulated in section 39(2). (sic)

[114] It is the contention of the Respondents that the application to the Commission by the Applicant on the 26th August 2014 was time-barred as it should have been made on the 25th August 2014 to bring it within the one year provided for in section 39(2) of the Act. In short, that the period of such action prescribed on the 25th August 2014, and beyond that date no valid application could have been made, and any order emanating from such a purported application is a nullity, which infects the entire process up to the referral of 26th February 2015. As a corollary, any

extension of the period of investigation by the Commission would have been valid only if it was issued on or before the 25th August 2014. We take it that the "complaint" at paragraph (c) above actually refers to "referral".

[115] It is our understanding, from the points above extracted from the consent order, that the Respondents are arguing that the application to the Commission before its order of extension of time on the 27th August 2014 was a nullity. If this is correct, then this challenge precedes the order, and the Commission cannot review anything, including the order of the 27th August 2014. The second point was submitted in two parts. The first was that the referral to the Commission by the Authority on the 26th February 2015 was made six (6) months after the Commission's order of the 27th August 2014 extending the time for investigations. Second, and this was raised at the hearing of 2nd July 2015, that the referral was made eighteen (18) months after the start of the investigation on the 26th August 2013. On this line of argument, the referral should have been made on the 25th February, 2015.

[116] On the other hand, we understand the Applicant's point to be that the order by the Commission on the 27th August 2014 was valid, and validates everything else that happened after that date. Second, that by allowing the Respondents to challenge this order, the Commission is reviewing the said order but that the Commission cannot do that as it is now *functus officio*.

[117] At paragraph 114 above, we expressed the view that the application which is being challenged by the Respondents was made on the 26th August 2014, and is therefore independent of the 27th August 2014 order. If that is the case, then the issues of prescription and jurisdiction are being raised.

[118] In the Sugar-Beans Case, at paragraph 173 we said:

> "In short, a non-referral because of time-bar or prescription has to be pleaded specifically by the party seeking to rely on it, and then factually demonstrate why it contends that the matter is time-barred. As a result of this position, the Commission does not mero motu raise prescription or time-bar. In their papers the Respondents argued that the Commission can do so, but this is not supported by applicable case law."

[119] We again said at paragraph 182 in the same case:

> "The Commission, therefore, being an institution set up to adjudicate competition or antitrust law matters in the public interest, will not decline to hear a matter unless it is proved that a matter is not properly before it. However, in the event that it is shown that it does not have the jurisdiction to deal

with a matter, then it will consider that such matter has been non-referred, in accordance with the law."

[120] In the preceding paragraphs we concluded that the Respondents could not participate in the *ex parte* application for extension of time by the Applicant since that was part of the investigatory process, and they were not incurring any liability or sanction, as their rights were not affected at that stage. The referral stage gives them the opportunity to raise prescription, as they have done; as well as to challenge the jurisdiction of the Commission, and that of the Applicant to refer the matter, if they are so inclined. To deny them this opportunity would be a travesty of justice.

[121] In terms of section 9 of the Act, the Commission has to adjudicate on matters brought before it by the Authority. It reads partially:

> "(2) Notwithstanding the generality of subsection (1), the Commission shall –
> adjudicate on matters brought before it by the Authority under this Act - - -".

> This provision has to be considered in tandem with sections 5 and 39 of the Act since, read together, they confer jurisdiction on the Commission to hear referrals. Section 5(2) (0) states:

"Notwithstanding the generality of subsection (1), the Authority shall –

refer matters it has investigated under this Act to the Commission for adjudication - - -."

[122] Section 39(2) provides:

"(2) Within one year after an investigation is opened by the Authority the Executive Secretary shall –

(a) subject to subsection (3), refer the matter to the Commission if the Authority determines that a prohibited practice has been established - - -".

[123] It is on the basis of the above provisions that the Commission has assumed jurisdiction in this matter. Jafta, J in Competition Commission of South Africa v Senwes Ltd ((CCT 61/11) [2012] ZACC 6; 2012 (7) BCLR 667 (CC)), delivering the majority judgment in the SACC, said at paragraph 23:

"Once a complaint has been referred, the Tribunal is obliged to conduct a hearing into the matter. It is the mere referral of a complaint that triggers the exercise of the Tribunal's adjudicative powers."

[124] The Respondents, however, have launched a vigorous attack on such assumption of jurisdiction, on the basis that there has been a non-referral since each and every action taken after the 25th August 2014 was after the lapse of one year. With regard to the lack of jurisdiction by the Applicant, the Respondents have relied on section 39 (4) of the Act which says:

> "(4) In a particular case –
>
> on application by the Authority made before the end of the period referred to under subsection (2), the Commission may extend that period." (emphasis added)

[125] The Applicant filed its application for extension with the Commission on the 26th August 2014. In the application, on a sworn affidavit by its Acting Chief Executive Officer, it informed the Commission that it had opened an investigation on the 26th August 2013. The contention of the Respondents is that the one year period lapsed on the 25th August 2014 and no application for extension or referral could validly and lawfully have been made beyond this date. The Respondents rely on section 41 of the Interpretation Act (Cap.01:04) to buttress their point. For its part, the Applicant has referred to "a method of computation known as the Common law computation of time" (sic) which "requires that the day when the order is made be excluded from the reckoning; it is not a full day and is thus not included in the computations." (see paragraphs 35 and 36 of the Applicant's reply to the 2nd Respondent's points in limine, in particular when dealing with the Commission's

order of 27th August 2014). We will revert to this issue of computation of time later in this decision.

[126] It is somewhat telling, however, that even though the Applicant, on a sworn affidavit by its Acting Chief Executive Officer, informed the Commission that it opened its investigation on 26th August 2013, it completely abandoned this date and came up with the 29th August 2013 as the new date on which it started the investigation. The net result has been that it has failed to answer the Respondents when they claim that it had (the Applicant) no jurisdiction to make the application for extension of time on the 26th August 2014 since it was time-barred.

[127] The Commission has to consider this issue to determine whether it has jurisdiction or not. In Senwes, writing in a separation opinion in the SACC, Froneman, J said at paragraph 62:

> "The Tribunal has an obligation to determine the proper ambit of the referral in accordance with the provisions of the Act. It also has an obligation to ensure that its determination of that issue is made in a manner and at a time that is fair to the parties involved in the proceedings. The content of both these obligations depends on the proper interpretation of the Act. It is the determination of these obligations that establishes the contours of the legality of the Tribunal's conduct during a

hearing. And those are the constitutional issues that need to be decided - - -"

[128] At paragraph 17 in Agri Wire the SASCA said:

> "Whilst there would be no difficulty in recognising jurisdiction vested in the Tribunal and the Competition Appeal Court if s 27 (1) (c) is confined to the situations referred to in paragraph 13, supra, it becomes problematic when it is extended to a challenge to the validity of a referral, because that is a question whether the referral is an action within the jurisdiction of the Commission. Unlawful actions are not within its jurisdiction and an unlawful referral would accordingly not be within its jurisdiction."

[129] The question then is whether the Commission can determine its own jurisdiction in such an instance. In S.O. Ntuks and Others v Nigerian Ports Authority (SC 190/2003) Niki Tobi, J.S.C., of the Supreme Court of Nigeria said:

> "It is elementary law that where a party raises an objection to jurisdiction, the court must take the objection first and that is what the learned trial Judge did in her Ruling of 7th December 2001. I cannot fault the learned trial Judge."

[130] This is in harmony with what the authors H. W. R. Wade and C. F. Forsyth say in Administrative Law (Tenth Edition) at page 214:

> "Where a jurisdictional question is disputed before a tribunal, the tribunal must necessarily decide it. If it refuses to do so, it is wrongfully declining jurisdiction and the court will order it to act properly. - - - It follows that the question is within the tribunal's own jurisdiction, but with this difference, that the tribunal's decision about it cannot be conclusive."

[131] In Marine Inquiries (https:lr.law.qut.edu.au/article/download369/358) Michael White Q.C. propounds the same view:

> "The question of whether a Tribunal has jurisdiction is often challenged at its outset by one or more of the parties called for investigation where there are significant stakes at issue in the inquiry. A successful challenge can halt the inquiry before it even gets started. In deciding whether a Tribunal has jurisdiction, a distinction is made between jurisdictional and nonjurisdictional issues - - - Where a challenge is made to an inferior tribunal's jurisdiction or a jurisdictional issue is raised, the tribunal must first decide the issue for itself; - - - and the

matter may be later tested elsewhere. If it refuses to do so, it is wrongfully declining jurisdiction and it will be ordered to decide the issue of jurisdiction."

[132] In Anisminic Ltd v Foreign Compensation Commission [1968] UKHL 6, Lord Morris of Borth – Y – Gest said of inferior tribunals:

"The control which is exercised by the High Court over inferior tribunals (a categorising but not a derogatory description) is of a supervisory but not of an appellate nature. It enables the High Court to correct errors of law if they are revealed on the face of the record."

[133] Hussain, JA, writing for the SACAC in Glaxo Wellcome (Pty) Ltd and Others v National Association of Pharmaceutical Wholesalers (Case No: 15/CAC/Feb02) said at paragraph 29:

"The submission of particulars of a complaint to the Commission is the jurisdictional fact or precondition which must be satisfied before the Tribunal can exercise its powers over a respondent."

This clearly dovetails with section 9(2)(a) of the Act, read in conjunction with section 39(2).

[134] Jurisdiction is a fundamental prerequisite for the Applicant to bring any matter before the Commission, and for the Commission to satisfy itself that, indeed, it has jurisdiction before it can deal with any matter. This becomes even more paramount when jurisdiction itself is challenged. Justice Scalia, delivering the majority opinion in the SCOTUS in Steel Company v Citizens for a Better Environment 523 U.S 83(1998) said:

> ""This conclusion should come as no surprise, since it is reflected in a long and venerable line of our cases." Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 7 Wall. 506, 514 (1869)".

[135] As shown earlier, a tribunal should deal with a jurisdictional issue when it is raised. In this regard, in Shosholoza Finance CC v National Credit Regulator (Case No: NCT/09/2008/57(1)(P), Ms Y. Carrim, writing for the National Consumer Tribunal of South Africa, said:

"12. In similar vein, our courts have held that a court or a Tribunal should not easily divest itself of jurisdiction. Courts do not act on abstract ideas of justice and equity but must act on principle.

13. The underlying principle for the courts' approach is, with respect, obvious. It is not a foregone conclusion that a party facing prosecution, whether criminal or civil in nature, will be found guilty by the adjudicating body. A court of first instance or a Tribunal, after hearing the evidence, may reach a verdict in favour of the respondent or the accused as the case may be, rather than against it. That forum may also interpret its own jurisdiction, if persuaded by a party bringing such challenge, in favour of that party. If it went against a respondent, that respondent still has the right to approach a higher court."

[136] The logic encapsulated in the above passage is that this avoids unnecessary delays in resolving disputes, as well as obviating the need for piece-meal litigation. This was crisply captured in Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another ((CCT28/01) [2002] ZACC 6; 2002 (4) SA 613; 2002 (7) BCLR 663) where Kriegler, J said in the SACC:

"63. - - - - It is an established principle that the public interest is served by bringing litigation to a close with all due expedition. The law and the judicial process, in performing their vital conflict-resolution role, must provide a structure and a mechanism whereby conflicts can be resolved and their consequent tensions can be relieved openly, fairly and efficiently. Delays and interruptions in the smooth course of litigation inevitably frustrate the proper performance of this role: justice delayed is justice denied. - - -

64. The mere fact that constitutional issues have arisen in a case does not justify piecemeal litigation. In *S v Mhlungu* Kentridge AJ formulated the following rule of practice:

"I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. One may conceive of cases where an immediate reference under s 102(1) would be in the interests of justice – for example, a criminal trial likely to last many months, where a declaration by this Court of the invalidity of a statute would put an end to the whole prosecution. But those cases would be exceptional. One may compare the practice of the Supreme Court with regard to reviews of criminal trials. It is only in very

special circumstances that it would entertain a review before verdict.""

[137] It is thus clear that the Commission's jurisdiction in this matter is anchored in statute, triggered by the referral that was made by the Applicant. The only remaining question then is whether the referral itself is proper, and meets the requirements of the Act.

[138] We have already referred to the relevant provisions of the Act which impact directly on referrals. Since section 39(2) enjoins the Applicant to refer a matter to the Commission "[w]ithin one year after an investigation is opened", and section 39 (4) (b) states that "on application by the Authority made before the end of the period referred to under subsection (2), the Commission may extend that period", and the Respondents have strenuously argued that the Applicant did not apply for an extension before the end of one year, the Commission now has to deal with this aspect.

[139] This issue was captured in the consent order as follows: "whether the time extension by the Commission was in itself invalid because the last day on which an extension could be lawfully granted was 25 August 2014 in terms of section 39 (4)(b)".

[140] We have said an examination of the lapse of the one year period is independent of the granting of the order of 27th August 2014 extending the period of investigation. It is, therefore, not conceivable that this could be viewed as a review of that order.

[141] It is appropriate that we reproduce some excerpts from the heads of argument of counsel for both the first Respondent and the second Respondent.

(i) Counsel for the first Respondent has said in part:

> "d) On the strength of Section 39(4)(b) however, the Competition Authority is entitled to make an application in a *particular case* before the end of the *within one year after investigations have been opened* to have the period extended by the Commission.
>
> e) It is on the basis of the foregoing provision that the Authority alleges in its Complaint referral that it has sought a time extension from the Commission on Application and same was granted.
>
> f) The Respondents contend that the said application was not made within the one year period after the opening of investigations.

g) The Authority has not contended or alleged in its papers that the application was made within the prescribed period.

h) On the Applicant's own version of events, the investigations were opened on the 26th August 2013.

(i) It is the Respondent's contention that if the investigations were opened on the 26th August 2013, one year would have lapsed on the 25th August 2014.

j) In terms of the *Interpretation* Act, *Section 41*, reckoning of periods of time by the calendar month and year are as follows;

(1) In an enactment "month" means a calendar month, that is to say, a month reckoned according to the calendar.

(2) If the period indicated in the enactment begins on any date other than the first day of any of the 12 months of the calendar it is to be reckoned from the date on which it is to begin to the date in the next month numerically corresponding, less one, or, if there is no corresponding date, to the last day of that month.

For example: a month beginning on 15 January ends on 14th February; a month beginning on 31st January ends on 28th February (or 29th in a leap year).

(3) If the indicated period is one of two, three or more months, it is to be reckoned from the date on which it is to begin to the date, numerically corresponding, less one, in the second, third or other successive month thereafter or, if there is no such corresponding date, to the last day of the latter month.

For example: a period of six months beginning on 15th August ends on 14th February; a period of six months beginning on 30th or 31st August ends on 28th February (or 29th February in a leap year).

In an enactment "year" means a period of 12 months.

k) Any application that would have been made thereafter would be null and void as at that stage there would be no investigations to extend period for.

- - -

m) The Respondents contend that on the expiry of one year after the opening of investigations, which in this matter is the

25th August 2014, the Authority was statutorily considered to have issued a notice of non-referral.

n) The commencement of proceedings on the 26th August 2014 for extension of time was outside *the within one year after opening of investigations."* (sic)

(ii) Counsel for the second Respondent said in part:

"11. On the Complainant's version investigations commenced on the 26th August 2013.

- - -

13. Applying the Interpretation Act, regardless of the date chosen, the extension of time was granted after the one year period. If the correct date of the 6th August 2013 is accepted as the date on which the investigations commenced, one year lapsed on the 5th August 2014. However, if the date of the 26th August 2013 is preferred, one year lapsed on the 25th August 2014.

14. The proceedings are a nullity because it is founded on a nullity. As will be shown below, the Commission has no powers to grant an extension after the one year period has elapsed.

Any extension granted after the lapse of one year is a nullity and any proceedings flowing therefrom are equally a nullity.

- - -

21. As pointed out above one year after the commencement of investigations on the Complainant's version elapsed at the very latest on the 25th August 2014. The Commission could only grant an extension on or before this date and not later." (sic)

[142] The Applicant has not directly confronted this issue as raised by the Respondents. In its Reply to the 2nd Respondent's Points in Limine, the Applicant, particularly dealing with the period after the order of 27th August 2014, said in part:

"32. The complainant holds the view that the Commission pronounced a competent order after assessing the application that was properly before it. The method of computation of time used by the 2nd respondent is clearly erroneous and is mischievously misguided.

- - -

34. Going by the time difference it is already glaringly apparent that the 2nd respondent is clutching at straws; there is every attempt to avoid a hearing on the merits by the 2nd respondent.

35. I am advised that 6 months from the order of court lapsed no later than 27 February 2015, going by a method of computation known as the Common law computation of time; the complainant's attorneys will address the Commission in greater detail in respect hereof; I hasten to say only that:

36. The common law method of computation requires that the day when the order is made be excluded from the reckoning; it is not a full day and is thus not included in the computations. Going by this method, which I am made to understand is applicable unless expressly excluded; the referral was made on time." (sic)

[143] The Applicant in its reply papers refers to the order of 26th August 2014, instead of 27th August 2014.

[144] However, nowhere does the Applicant deal with the assertion of the Respondents that it (as the Authority) no longer had jurisdiction on the 26th August 2014 to apply to the Commission for the extension of the one year investigation, as the one year period had lapsed on the 25th August 2014. Additionally, counsel for the Applicant did not address the Commission on the mechanics of the common law computation of time. No legal authorities were referred to by counsel for the Applicant in support of the common law method of computing time.

[145] Instead, counsel for the Applicant put forward what can only be seen as an approach based on a scorched earth policy. Despite the fact that in all affidavits filed with the Commission since the 26th August 2014, the Applicant had maintained that it acted on a tip-off from a whistleblower, during oral arguments Mr Modimo turned around and said that there had been no complainant in this matter. The only incongruent statement prior to this had been made by Mr Morotsi, when he appeared before the Commission on the 27th August 2014, where he had also said that the Applicant "did not receive a complaint from anybody, the Authority initiated the investigation itself". This just simply cannot be reconciled with sworn affidavits deposed to by officers of the Authority, as well as with paragraph 13 of the heads of argument prepared by counsel for the Applicant where it is said:

> "On **29 July 2013** the Authority received a tipoff from a whistleblower whose identity has not been disclosed in these proceedings (see paragraph 14 of the founding affidavit).
> (bold in original)

[146] A close analysis of this new approach (which discards sworn statements) is to avoid dealing with the 25th August 2014. This new approach is effectively meant to give the Applicant carte blanche, to say that where the Applicant initiates an investigation itself then it does not have to apply to the Commission for an

extension of the investigation period. In doing so, it avoids the 25th August 2014 knot.

[147] In all the affidavits by the Applicant in this matter it has mentioned (a) that it started its investigation after a tip-off from a whistleblower; and (b) in the affidavit that supported the extension of the period of investigation, that the investigation was started on the 26th August 2013. We recognize the probative value of affidavits. We therefore accept the affidavits to be true and correct. And it is the Applicant that approached the Commission to seek an extension of time on the 26th August 2014. We do not accept the new approach by the Applicant.

[148] If the Applicant is of the view that the referral system under the Act should be reconsidered as "it creates a gridlock for referrals," as Mr Modimo put it, then it will make the case at an opportune moment. That has no impact on the instant case. Moreover, the new approach by the Applicant was only raised when its counsel was responding to points raised by the Respondents in their heads of argument. The Commission thus did not benefit from full argument on this new approach.

[149] With regard to computation of time, the Applicant referred to the common law method while the Respondents used section 41 of the Interpretation Act. Where statute law has been promulgated, it supersedes the common law if they address the same point, unless a clear exception has been made. We are fortified on this by

the views of L'Heureux – Dubé, J when, in the Supreme Court of Canada case of Laurentide Motels Ltd v Beauport [1989] 1 S.C.R. 705, she said:

> "No writer nor court of law has ever defended such an argument, since the common law which applies in Canada in the area of public law, in criminal as in administrative law, in the absence of legislation excluding it, is the common law as subsequently amended by statute and case law". (emphasis added)

[150] In the Tasmanian Handbook on Elements of the Criminal Justice System it is said that:

> "It is a well – established principle inherited from British constitutional law that parliament is sovereign or all powerful.
>
> - - -
>
> The practical result of the principle of parliamentary sovereignity is that legislation prevails over common law. If there is a conflict between legislation and the common law, legislation will over-ride the common law."
>
> (http://www.hobartlegal.org.au/tasmanian-la-handbook/courts - lawyers- and-law/l - - -)

[151] The computation of time is, therefore, to be reckoned in accordance with section 41 of the Interpretation Act. In this regard, the one year period from the 26th August 2013 lapsed on the 25th August 2014. The Applicant no longer had jurisdiction to deal with this matter beyond that date and its application to the Commission on the 26th August 2014 was of no force or effect. Consequently, the Commission had no jurisdiction to entertain the application and give an order extending the period of investigation. As the SASCA noted at paragraph 17 in Agri Wire:

> "- - - it becomes problematic when it is extended to a challenge to the validity of a referral, because that is a question whether the referral is within the jurisdiction of the Commission. Unlawful actions are not within its jurisdiction and an unlawful referral would accordingly not be within its jurisdiction."

[152] We find that there has been a non-referral in this matter.

[153] The other limb in the Applicant's argument was that, in giving the order of the 27th August 2014, the Commission became *functus officio.* Given our finding above, ordinarily this would now be otiose. However, in light of how forcefully and trenchantly the point was pursued, it is fitting that we address it.

[154] The thrust of the Applicant's case here was that, having made the order of the 27th August 2014, the Commission could not revisit and reverse it. Paragraphs 39 and 40 of its heads of argument read in part:

> "39. - - - In other words it is being contended that the Commission has the power and jurisdiction to reverse its own decisions.
>
> 40. It is submitted that the Commission has neither a statutory nor common law jurisdiction to review and set aside its own orders. That authority resides in the High Court - - -".

[155] Counsel for the Applicant maintained that, in rendering the time-extension order on the 27th August 2014, the Commission was now bereft of all jurisdiction in the matter, hence "functus officio and therefore it cannot and is not permitted in law to correct, alter or supplement its order." The Applicant referred to a number of leading authorities on this point, including, amongst others, Monnanyana v The State 2002 (1) BLR 72 (CA); Tlhalefang v The State 1999 (1) BLR 555 (CA); Mminakgomo v The State 1998 BLR 395 (CA); Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298.

[156] The most crucial, however, is Vandecasteele and Another v AGS Construction (Pty) Ltd 2010 (3) BLR 498 where Lord Abernethy JA said:

"The point that arises sharply in this appeal is whether or not Tafa J was functus officio after he had dismissed the matter on 6 August 2008 with the consequence that it was not open to him to reinstate it.

The general principles of law governing this matter were not in dispute. A number of authorities were relied on by counsel on both sides. It is not necessary to refer to them all. It is sufficient for present purposes to refer to Monnanyana v The State [2002] 1 B. L. R. 72, CA (Full Bench). In his judgment in that case Tebbutt AJP conducted a wide-ranging review of the authorities as to when a court was functus officio. At p 78 he said this:

'The general principle, now well-established both in South African law as well as in Botswana, is that once a court has duly pronounced a final judgment or order it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes functus officio: its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased - - -

> In the Firestone case, supra, the court stated that there were four exceptions to the general principle and that the court may correct, alter or supplement its judgment or order (i) in respect of accessory or consequential matters e.g. costs or interest on a judgment debt which the court overlooked or inadvertently omitted to grant (ii) in order to clarify it if its meaning is obscure, ambiguous or uncertain provided it does not alter the "sense or substance" of the judgment or order; (iii) to correct a clerical, arithmetic or other error in expressing the judgment or order but not altering its sense or substance; (iv) making an appropriate order for costs which had not been argued, the question of costs depending on the merits of the case.'" (emphasis added)

[157] Counsel for the Applicant raised a further point from the bar, submitting that in terms of sections 67 and 70 of the Act "a decision or determination made by the Commission or direction given by the Commission is binding unless appealed to the High Court."

[158] In reply counsel for the Respondents submitted that "[t]he *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality", and that "[w]here - - - a decision made is one taken without

jurisdiction, there can be no question of a decision having been arrived at" and "is a nullity", being "one of the exceptions to the *functus officio* doctrine".

[159] As argument concerning sections 67 and 70 of the Act was only raised from the bar by counsel for the Applicant, it was clear that counsel for the Respondents had not been prepared to argue this fresh point.

[160] In the Sugar-Beans Case at paragraphs 97 and 98 we said:

> "97. The High Court Act (Cap. 04:02) defines "judgment" as including "any decision, decree, determination, finding, sentence or any order of any court." (emphasis added)
>
> 98. The Essential Dictionary of Law (Barnes & Noble Books, 2004) defines "determination" as "the decision made by a judge, court, or agency that ends a lawsuit or controversy; a final judgment." (emphasis added)

Two things come out of these definitions: finality and controversy. More often than not a controversy is *inter partes*. In the Sugar-Beans Case we also referred to the dictum of Lawrence AJ in Tsogang Investments (Pty) Ltd t/a Tsogang Supermarket v Phoenix

Investments (Pty) Ltd t/a Spar Supermarket and Another 1989 BLR 512 (HC) when he observed:

> "The word "decision" in the Act means conclusion. In Winter and Calder v Winter [1933] N. Z. L. R. 289 the court held that the word "decision" implies the exercise of a judicial determination as the final and definite result of examining a question."

The emphasis is yet again on finality and conclusiveness. Self-evidently, decision and determination are seen as synonymous. It is not clear if this also applies to "direction". Section 67 of the Act says:

> "Except as otherwise provided for in this Part, a decision or determination made by the Commission or direction given by the Commission is binding unless appealed to the High Court."

For its part subsection (1) of section 70 reads:

> "An enterprise or person aggrieved by any decision of the Commission may appeal to the High Court against that decision."

[161] Paragraph (b) of section 39 (4) is very short, as it simply says that " on application by the Authority made before the end of the period referred to under subsection (2), the Commission may extend that period."

The legislature gave the Commission the discretion to extend or not to extend the period. If the Commission does not extend, can the Authority invoke section 67 or 70? If so, on what grounds?

[162] As we have said in this decision, an order of the Commission under section 39(4)(b) does not finally determine an issue, nor does it affect any rights or impose any liabilities.

[163] The spine that holds the judicial process together is the doctrine of *stare decisis.* In this respect as an inferior tribunal we can only add to what Lord Abernethy said in Vandecasteele. As Willis, J of the South Gauteng High Court (South Africa) said at paragraph 3 in Randa v Radopile Projects CC((A3003/2011) [2012] 4 AllSA 434 (GSJ):

> "Following the British system, South African judges operate under a system of precedent. In the case of Cassell & Co ltd v Broome the House of Lords made it clear that courts lower in the judicial hierarchy may disagree with decisions of those that are higher and may even say so but they are bound to follow

the decisions in higher courts. This decision has been approved by our Supreme Court of Appeal in the case of S v Kgafela."

[164] This position was reinforced by the SACC in Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another when it observed at paragraphs 60 and 61:

"60. - - - It does not matter, as Cloete J correctly observed in *Bookworks*, that the Constitution enjoins all courts to interpret legislation and to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights. In doing so, courts are bound to accept the authority and the binding force of applicable decisions of higher tribunals.

61. It follows that the trial court in the instant matter was bound by the interpretation put on section 49 by the SCA in *Govender.* The judge was obliged to approach the case before him on the basis that such interpretation was correct, however much he may personally have had misgivings about it. High courts are obliged to follow legal interpretations of the SCA, whether they relate to constitutional or to other issues, and remain so obliged unless and until the SCA itself decides

otherwise or this Court does so in respect of a constitutional issue."

[165] Jurisdictions around the world have wrestled with the doctrine or principle of *functus officio*. We highlight here some of those examples.

[166] In Chandler v Alberta Association of Architects [1989] 2 SCR 848 in the Supreme Court of Canada, Sopinka, J said, when considering the principle of *functus officio:*

> "In these circumstances is the decision of the Board final so as to attract the principle of *functus officio?*
>
> The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in In *re St.Nazaire Co.* (1879), 12 Ch.D.88. The basis for it was that the power to rehear was transferred by the *Judicature Acts* to the appellate division. The rule applied only after the formal judgment has been drawn up, issued and entered, and was subject to two exceptions:
>
> 1. where there had been a slip in drawing it up, and,

2. where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.,* [1934] S-C.R. 186" (emphasis added)

[167] Referring to Pretorius, Musi, AJA said at paragraph 24 in PT Operational Services (Pty) Ltd v RAWU obo L. Ngwetsana (Case No: JA7/11), when writing for the Labour Appeal Court of South Africa:

"Pretorius explains the *functus officio* doctrine as follows:

"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter. This applies with particular force, but not only, in circumstances where the exercise of such adjudicative or decision- making powers has the effect of determining a person's legal rights or of conferring rights or benefits of a legally cognizable nature on a person. The result is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker. However, this is not on absolute rule. The instrument from which the decision-maker derives his adjudicative power may empower him to interfere with his own decision. Furthermore, it is permitted to

make variations necessary to explain ambiguities or to correct errors of expression in an order, or to deal with accessory matters which were inadvertently overlooked when the order was made, or to correct costs orders made without having heard argument on costs. This list of exceptions might not be exhaustive and a court might have discretionary power to vary its orders in other cases. However, this power is exercised very sparingly, for public policy demands that the principle of finality in litigation should generally be preserved rather than eroded." (emphasis added).

[168] The dictates of public policy and statutory context are imperatives to be taken on board when considering the principle of *functus officio*. Sopinka, J noted in Chandler:

> "In order to determine whether the Board was empowered to continue its proceedings against the appellants it is necessary to examine the statutory framework within which it operates. The Act does not purport to confer on the Board the power to rescind, vary, amend or reconsider a final decision that it has made. Such a provision is not uncommon in the enabling statutes of many tribunals."

[169] The Federal Magistrates Court of Australia, in SZQQC v Minister for Immigration & Anor [2012] FMCA 410 said at paragraph 29:

"But even if a statutory purpose of the sort advocated by the applicant were to be discerned, the Act is the superior authority on how the Tribunal is to operate and the direction must defer to the statute under whose authority it was published."

[170] Musi, AJA, also said at paragraph 28 in PT Operational Services:

"In **Minister for Immigration and Multicultural Affairs v Bhardwaj**, Lehane J of the Federal Court of Australia suggests that one should have regard to the statutory context in order to decide whether there is a contrary intention. He put it thus:

"Generally, section 33 (1) of the Acts Interpretation Act will apply in relation to a statutory power or duty. But the statutory context may reveal a contrary intention. In my opinion, the present statutory context does so. It is one which plainly places a high value on certainty. There are strict time limits, detailed provisions governing the conduct of review proceedings and precise requirements as to the way in which the Tribunal is to record its decisions and the reasons for it and is to notify and publish its decisions. There is then a limited form of judicial review, for which application may be made only

within a time limit of twenty-eight days which cannot be extended. I would, in my view, be incongruous with that scheme for the Tribunal to have, in relation to a particular application for review a power from time to time as occasion requires to make (and revoke) decisions.""

[171] Sopinka, J, again in Chandler, observed:

"I do not understand Martland J. to go as far as to hold that *functus officio* has no application to administrative tribunals. Apart from the English practice which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J. O. Ross Engineering Corp., supra.*

> To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
>
> Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. - - -
>
> Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised in the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task." (emphasis added).

[172] The Supreme Court of Canada further said in Chandler through the dissenting opinion of L' Heureux - Dubé, J."

"Treatise authors dealing with administrative law issues have been surprisingly frugal in their treatment of the *functus officio* doctrine. Perhaps the most concise statement of the doctrine can be found in Pepin and Ouellette, *Principles de contentieux adminstratif* (2nd ed. 1982) at p. 221:

> "[TRANSLATION] In the case of quasi-judicial acts, the courts have held that decisions made in due form are irrevocable. To some extent the approach taken has been that once a government body has granted or recognized the rights of an individual, they cannot be challenged by the power of review: individuals are entitled to legal security in decisions. Once the decision is made, the decision is closed and the government body is "*functus officio.*" The legislature will often also take the trouble to specify that the decision is "final and not appealable". The rule that quasi-judicial decisions are irrevocable also seems to apply to domestic tribunals. However, there may be exceptions to the rule when the initial decision is vitiated by a serious procedural defect, such as failure to observe the rules of natural justice.""

[173] In defining the contours of *functus officio*, some courts have considered whether rights have been affected. The Supreme Court of India in State of Punjab vs

Davinder Pal Singh Bhullar & Ors (Criminal Appeal Nos. 753-755 of 2009) said at paragraphs 26 and 27:

> "There is no power of review with the Criminal Court after judgment has been rendered. The High Court can alter or review its judgment before it is signed. When an order is passed, it cannot be reviewed. Section 362 Cr. P.C is based on an acknowledged principle of law that once a matter is finally disposed of by a Court, the said Court in the absence of a specific statutory provision becomes *functus officio* and is disentitled to entertain a fresh prayer for any relief unless the former order of final disposal is set aside by a Court of competent jurisdiction in a manner prescribed by law. The Court becomes *functus officio* the moment the order for disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or arithmetical error. There is no provision for modification of the judgment.
>
> Moreover, the prohibition contained in Section 362 G.P.C is absolute; after the judgment is signed, even the High Court in exercise of its inherent power - - - has no authority or jurisdiction to alter/review the same.

27. If a judgment has been pronounced without jurisdiction or in violation of principles of natural justice or where the order has been pronounced without giving an opportunity of being heard to a party affected by it or where an order was obtained by abuse of the process of court which would really amount to its being without jurisdiction, inherent powers can be exercised to recall such order for the reason that in such eventuality the order becomes a nullity - - - In such eventuality, the judgment is manifestly contrary to the audi alteram partem rule of natural justice. The power of recall is different from the power of altering/reviewing the judgment. However, the party seeking recall/alteration has to establish that it was not at fault." (emphasis added).

[174] Plasket, AJA, writing for the SASCA in Retail Motor Industry Organisation and Another v Minister of Water & Environmental Affairs and Another ((145/13)[2013] ZASCA 70; [2013] 3 All SA 435 (SCA); 2014 (3) SA 251 (SCA)) observed at paragraph 25.

"It is not necessary in this judgment to define the exact boundaries of the *functus officio* principle, save to say the following: first, the principle only applies to final decisions; secondly, it usually applies where rights or benefits have been

granted – and thus when it would be unfair to deprive a person of an entitlement that has already vested; thirdly, an administrative decision-maker may vary or revoke even such a decision if the empowering legislation authorises him or her to do so (although such a decision would be subject to procedural fairness having been observed and any other conditions); fourthly, the *functus officio* principle does not apply to the amendment or repeal of subordinate legislation." (emphasis added)

[175] Finality is central in the application of *functus officio*. This was crystal clear in the opinion of Lord Abernethy in Vandercasteele. The cases he reviewed also had reached finality. They were conducted in *inter partes* proceedings. None of them were at a stage where discretion was being exercised to aid the main proceedings. In PT Operational Services, Musi, AJA said at paragraph 30:

"I fully agree with Erasmus, J's reasoning and conclusion. One can strengthen it by stating that it is only after an administrative agency has finally performed all its statutory duties or functions in relation to a particular matter which is subject to its jurisdiction that it can be said that its powers or functions were spent by its first exercise." (emphasis added)

[176] In a passage in his judgment delivered on 13th April 2015 in Republic v Chairperson, Business Premises Rent Tribunal Ex-Parte Ibrahim Sheik Abdulla & Others (Judicial Review Application 45 of 2013), Judge Edward M. Muriithi of the High Court of Kenya observed:

> "I find that my decision of the question whether the order of the Tribunal should be set aside *ex debito justitiae* is sufficient to dispose the dispute before the Court and there is no need to determine the other issues of illegality and irrationality raised in the application. I, however, do not agree that the Tribunal became *functus officio* upon the adoption of the consent order of 23rd April 2013 as the order itself contemplated further proceedings upon a liberty to apply reserved under clause 3 of the said consent order. Accordingly, the Tribunal may proceed to determine an application filed pursuant to the liberty to apply under the consent order."

[177] At paragraphs 46 and 47 in SZQQC v Minister for Immigration & Anor the court said:

> "46. When the Act speaks of a decision of the Tribunal, it must be taken to be speaking of a final decision - - - That conclusion then focuses attention on determining the point at which the Tribunal has made a final decision - - - i.e. one which cannot be revisited. - - -

47. Although each of their Honours reached a different conclusion on what step was or might be sufficient or necessary to render the Tribunal *functus officio*, the common thread in all their judgments was that this occurred at a point when its decision became beyond recall."

[178] Adverting to the issue of finality, Chan Sek Keong, CJ, of the Singapore High Court in Azman Bin Jamaludin v Public Prosecutor [2011] SGHC 250 said at paragraph 42:

"The concern was with whether the dispute the district judge's order was appealable on the basis that it was not a final order. *Although not expressly stipulated by statute, case law has yielded the overriding requirement of finality in the judgment, sentence or order appealed against to qualify for a right of appeal.* - - - The court in *Malib bin Su v Public Prosecutor* [1984]1 MLJ 311 applied the *ejusdem generis rule* --- and held, at 312B of the judgment:

The order must therefore be a final order in the sense that it is final in effect as in the case of judgment or a sentence. The test for determining the finality of an order is to see whether the judgment order finally disposes of the rights of the parties."

[179] We refer here *in extenso* to a passage in Hungwe, J's judgment in the High Court of Zimbabwe in African Consolidated Resources and Others v Minister of Mines and Mining Development and Others (HC 6411/07; [2010] ZWHHC 205):

> "Under the common law, a judgment can be altered or set aside only under limited circumstances.
>
> In *Stumbles & Rowe v Mattinson; Mattinson v Stephens & Others* 1989 (1) ZLR 172 GREENLAND J had occasion to consider whether this court can set aside its own interlocutory orders. He held that while the court normally does not have jurisdiction to temper or interfere with its own judgments, because in relation thereto, it is *functus officio*, it does have jurisdiction over orders made in interlocutory and procedural matters. He held further that in terms of this jurisdiction, the court has powers to set aside such orders on good and sufficient reasons, including the fact that the basis of the order has been destroyed or shown to be non-existent. At page 178 he stated;
>
> "This is particularly so when the matter is interlocutory, (per SQUIRES J in *Sayprint Textiles v Girdlestone* 1983 (2) ZLR 322). It is also so where the matter is procedural; (per STRATFORD JA in **Ex parte Barclays Bank 1936 AD 431**. I support the propositions that the court is entitled to regulate its own rules.

> It is trite that the rules are intended to expedite procedure and relief. To insist that the court is bound by a procedural order which it knows to be fatally defective is to insist on the court conducting a sham trial. It is illogical, senseless unjust and unreasonable to say to a litigant, "We will proceed with this expensive and protracted exercise, which is a trial and you can start all over again when the Supreme Court rightly sets aside the proceedings because of this fatal procedural defect."

He goes on to make a very clear distinction between interlocutory matters and those in which final orders are made and observed that the distinguishing feature is that in final orders and judgments, the matter takes in the character of *res judicata*, the essence of which is that the issue, having been **fairly contested** by the parties, is finally resolved. It seems to me that, by extension, it cannot be said that a matter was fairly contested when the party resorted to concealing relevant information from the court in what may amount to fraud. Where therefore a party could show such fraudulent concealment of information relevant to the determination of the issue to be decided then the court should under its common law discretion, exercise its powers and grant rescission.

In *Harare Sports Club & Another v United Bottlers Ltd* 2000 (1) ZLR 264 @ p 268 GILLESPIE J took up the discussion on the discretionary powers of court in respect of rescission at common law thus:

> "The perceived strictures of this common law were seen as abated by rules of court. These permit rescission of default

judgment ‘on good and sufficient cause’; the rescission, variation or correction of judgments or orders for error and the rescission of judgments entered in terms of a written consent for ‘good and sufficient cause’. The rules - - - were seen as relaxing the common law.

Our law, however, is not aptly a casuistic set of rules and exceptions but rather a just and logical application of principle. It is therefore not surprising, and most to be welcomed, that this rigid and brittle view of this area of the law has been reconsidered. It is now recognised that the complicated rules may be explained in principle and that the principle is by no means as intractable as was defined earlier in the last century.

Thus, where the judgment sought to be rescinded was given in default, no question of a final judgment having been given on the merits can arise. Hence, no considerations of functus officio or *res judicata* apply to thwart an application for rescission. In such a case, even at common law, it is recognised that the court has a very broad discretion to rescind (on sufficient cause shown) a judgment given by default.

Even where judgment is given in the presence of the parties, and where the merits of the cause are considered, the court

still retains the power to rescind that judgment. The power in this case would be more sparingly exercised since final judgment would be *res judicata* as between the parties and would appear to be a complete discharge of the court's office. **On principle, however, justice demands that a final discharge tainted by fraud should not be permitted to stand.** The other traditionally recognised exceptions are also explained on the basis that policy prefers a judgment procured in some circumstances of ignorance of relevant documents to the contrary (for example) as not constituting a final discharge of the court's function. Further instances where the court is not held to be *functus officio* are those specified - - - As has been said in connection with the counterpart in South Africa of this rule, this rule -

"sets out exceptions to the general principle that a final order, correctly expressing the true decision of the court cannot be altered by the court - - - the court has a general discretion whether or not to grant an application for rescission under r 42 (1)."

The apparently ill-assorted, eclectic instances gathered under that rule do share a common thread that in each case there are sound policy reasons, counteracting any suggestion of *functus*

officio, for recognising a court's discretion to revisit its order. The rule does not provide statutory exceptions to, but has been said to codify (or perhaps better consolidate) the common law."

I respectfully associate myself with these sentiments.

- - - Consequently I find that this matter is properly before me. The line of authorities which caution against revisiting one's judgment proceed on the basis that the final judgment has been fairly obtained. I doubt whether in cases where there is strong evidence that judgment was not properly procured these authorities would maintain the same position. I express no views on this but leave the question open as to what constitute a fairly procured judgment. One that was obtained by fraud or some such malfeasance cannot qualify to be treated as having been fairly obtained."(sic)

[180] In other jurisdictions the courts have found that there is a conflation between power of review, and power of setting aside or "procedural review"; and have therefore sought to differentiate between the two. The Kerala High Court in Commissioner of Income-Tax vs Income-Tax Appellate Tribunal 1979 120 ITR 231 Ker had this to say at paragraphs 10 and 11:

"10. In our opinion, the petitioner appears to be under a misconception that the power of setting aside an ex parte order to afford an opportunity of being heard to the aggrieved party is the same as the power of review. The question of review ordinarily arises where the order impugned is vitiated on account of some mistake or error apparent on the face of the record, or where there was failure to consider the material on record. The purpose of setting aside an ex parte order is to consider the whole matter afresh affording an opportunity of being heard to the respondent. When this distinction is borne in mind, there is no scope for the argument for the position that because the Tribunal has no power to review its own order, it cannot also set aside the ex parte order for affording an opportunity of being heard to the respondent.

11. After all, the Tribunal has only set aside the ex parte order and reopened the matter to afford an opportunity of being heard to the aggrieved party. In the absence of manifest injustice to any party, even assuming that the Tribunal had committed an irregularity, a technical error in doing so, this court will be slow to exercise the extraordinary power under Article 226 of the Constitution to perpetuate an injustice."

[181] For its part, in Grindlays Bank Ltd vs Central Government Industrial Tribunal and Ors 1981 AIR 606, 1981 SCR (2) 341 the Supreme Court of India said:

> "The question whether a party must be heard before it is proceeded against is one of procedure and not of power. - - - Furthermore, different considerations arise on review. The expression 'review' is used in two distinct senses, namely (1) procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. It is in the latter sense that the Court in Narshi Thakershi's case held that no review lies on merits unless a status specifically provides for it. Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected ex debito justitiae to prevent the abuse of its process, and such power inheres in every court or Tribunal.
>
> The contention that the Tribunal had become functus officio and therefore, had no jurisdiction to set aside the ex parte award and that the Central Government alone could set it aside, does not commend to us. - - -

> There is no finality attached to an ex parte award because it is always subject to its being set aside on sufficient cause being shown. The Tribunal had the power to deal with an application properly made before it for setting aside the ex parte award and pass suitable orders." (sic)

[182] The majority in the Supreme Court of Canada in Chandler seemed to adopt a broader approach when they said:

> "Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. - - -
>
> In this appeal we are concerned with the failure of the Board to dispose of the matter before it in a manner permitted by the *Architects Act*. The Board intended to make a final disposition but that disposition is a nullity. Traditionally, a tribunal, which makes a determination which is nullity, has been permitted to reconsider the matter afresh and render a valid decision. In *Re Trizec Equities Ltd and Area Assessor Burnaby – New Westminster* - - - McLachlin J. (as she then was) summarized the law in this respect in the following passage, at p. 643:

I am satisfied both as a matter of logic and on the authorities that a tribunal which makes a decision on the purported exercise of its power which is a nullity, may thereafter enter into a proper hearing and render a valid decision --- In the latter case, the Supreme Court of Canada quoted from Lord Reid's reasons for judgment in Ridge v Baldwin, [1964] A.C. 40 at p. 79, where he said:

> I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present its case, then its latter decision will be valid.

If the error which renders the decision a nullity is one that taints the whole proceeding, then the tribunal must start afresh. Cases - - - referred to above, are in this category. They involve a denial of natural justice which vitiated the whole proceeding. The tribunal was bound to start afresh in order to cure the defect."

[183] Having already found that the Applicant did not have jurisdiction to file an application for the extension of the period of investigation with the Commission on the 26th August 2014, and that consequently the Commission also did not have

jurisdiction to hear the *ex parte* application, it is not necessary for us to answer whether the Commission became *functus officio* after the 27th August 2014.

[184] The first Respondent presented an issue as to "whether the Applicant's deponent is authorised to and competent by reason of her aforesaid position to depose to the said Applicant's Founding Affidavit or to refer the matter to the Commission on behalf of the Applicant."

[185] In the "Sugar-Beans Case" we said at paragraph 117:

> "We find that the word "shall" as used in section 39 of the Act and regulation 14 of the Regulations concerning the Executive Secretary's referrals is only directory. We therefore hold that the Executive Secretary's functions under section 39 of the Act, taking into account regulation 14 of the Regulations, can be delegated provided all formalities are satisfied."

[186] The first Respondent, *inter alia*, states in its heads of argument:

> "xxi) There is no proof and the deponent or the Executive Secretary does not however lay any proof before the Commission that he validly delegated any powers and/or authority to the deponent so as to enable the deponent or any other person to competently refer the matter to the Commission.

xxii) The facts on whether or not the Executive Secretary validly delegated his powers and authority to make the decision in issue to the deponent lies peculiarly within the Complainant's knowledge."

[187] The first Respondent, apart from these bald assertions, has not demonstrated that a demand was made, and the Applicant failed, to produce an instrument or evidence of delegation.

[188] We therefore affirm the holding we made in the "Sugar-Beans Case".

ORDER

[189] We find that the Applicant had no jurisdiction to file an application with the Commission on the 26th August 2014 as the one year period for investigation had lapsed on the 25th August 2014. Consequently, the Commission also had no jurisdiction to hear the application and extend the period of investigation.

[190] Therefore, there has been a non-referral.

[191] There is no order as to costs.

[192] A party aggrieved by this decision may appeal within fourteen (14) days.

Decision read in public session in Gaborone on this 18th day of August 2015.

_____

Tendekani E. Malebeswa

(Presiding Member)

I agree _____

Gaylard Kombani

(Member)

I agree _____

Dr Jay Salkin

(Member)

I agree _____

Dr Selinah Peters

(Member)

I agree

_____

Mrs Thembisile Phuthego

(Member)

I agree

_____

Ms Nelly W. Senegelo

(Member)