

ConCourt rules against Pickfords in cartel case

The Competition Commission of South Africa has welcomed the Constitutional Court judgment delivered on Wednesday in the matter between the Commission and Pickfords Removals.



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In its judgment, the Constitutional Court upheld the Commission's appeal that section 67(1) of the Competition Act does not prevent the Commission from investigating and prosecuting cartel conduct, which stopped three years before the investigation started.

The court had also awarded costs in favour of the Commission against Pickfords. It ordered Pickfords to pay the Commission's costs at the tribunal, the costs at the Competition Appeal Court (CAC) and the costs at the Constitutional Court.

The court further held that it is not necessary for the Commissioner to list all firms in a cartel when initiating a complaint. The complaint is initiated against a restrictive practice.

The case emanated from an interlocutory application brought before the Competition Tribunal by Pickfords Removals after the Commission referred 37 instances of collusive tendering in September 2015 against Pickfords to the Tribunal for prosecution.

Pickfords raised an objection that out of the 37 instances of collusion, 20 should be dismissed, as 14 of them occurred and stopped three years before the investigation started and six were not sufficiently pleaded. The Commission opposed this exception at the tribunal.

The Tribunal ruled in Pickfords's favour that the Commission could not investigate and prosecute the 14 cartel instances, as these stopped three years before the commission started its investigation into the matter.

The Commission appealed the Tribunal decision to the CAC, which was dismissed on the basis of the same reasoning that section 67(1) prevents the Commission from investigating and prosecuting cartels that stopped three years before the investigation started.

The Commission approached the Constitutional Court for relief, which upheld the Commission's appeal and set aside the judgment of the CAC.

Said the Court: "It bears emphasis that prescription is aimed at penalising negligent inaction, not the inability to act. In the case of prohibited practices under section 4[1](b), it is trite that cartels are, by their very nature, secretive.

"It would be inequitable to penalise the Commission, which would invariably have no knowledge of, for instance, surreptitious price fixing by cartels, for its failure to act within the three-year period.

"That would be tantamount to rewarding cartels for their covert unlawful conduct and would not be in the interests of justice."

Competition Commissioner Tembinkosi Bonakele said: "This is a seminal judgment that vindicates the Commission's approach in tackling cartels, which are so prevalent in South Africa.

"The highest court in the land has sent a very strong message that it has no tolerance for technical explanations for not answering allegations of cartel behaviour, which is very encouraging."

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