IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 247/CAC/Jul23

In the matter between:

COCA COLA BEVERAGES SOUTH AFRICA (PTY) LTD **Applicant**

and

THE COMPETITION COMMISSION OF SOUTH AFRICA **First Respondent**

ILLOVO SUGAR AFRICA (PTY) LTD **Second Respondent**

TONGAAT HULETT SUGAR SOUTH AFRICA LIMITED **Third Respondent**

RCL FOODS LIMITED **Fourth Respondent**

SUGAR ASSOCIATION OF SOUTH AFRICA **Fifth Respondent**

SOUTH AFRICAN CANE GROWERS' ASSOCIATION **Sixth Respondent**

SOUTH AFRICAN FARMERS DEVELOPMENT ASSOCIATION **Seventh Respondent**

SOUTH AFRICAN SUGAR MILLERS ASSOCIATION NPC **Eighth Respondent**

Coram: MANOIM JP, NUKU JA AND POYO DLWATI AJA
Heard: 26 August 2024
Delivered: 7 October 2024

Summary: Competition law – Tribunal's review jurisdiction – effect of *Group Five* decision – application for transfer – whether this Court has the power to transfer a matter from the Tribunal to itself – this Court not competent to grant such order – no statutory authority to order such a transfer – Section 173 of the Constitution also cannot give the court a transfer power – applicant's review was brought in terms of section 27 of the Competition Act, - such a review cannot be transformed into a legality or PAJA review by transfer – transfer application refused.

ORDER

An application for transfer: from the Competition Tribunal:

1 The application is dismissed.

2 The applicant is liable for the costs of the opposing respondents on a party and party basis, scale C, including the costs of two counsel, where so employed.

JUDGMENT

Manoim JP (Nuku JA and Poyo Dlwati AJA concurring)

Introduction

[1] The central issue in this case is whether this Court has the power to transfer a matter that commenced before the Competition Tribunal (the Tribunal) to itself. In this decision I explain firstly why this problem has arisen and then consider whether this Court has the competence to make a transfer order.

[2] The applicant in this matter is Coca Cola Beverages South Africa (Pty) Ltd (CCBSA), the local bottler of well-known beverages. In the Tribunal matter CCBSA was seeking to review a decision of the Competition Commission (the Commission), the first respondent in this matter, not to refer a complaint of excessive pricing that CCBSA had brought to it against some of the respondents. The Commission does not oppose this transfer application. However, some of the other respondents do.

[3] A key input into the manufacture of these beverages is sugar, which CCBSA purchases from local milling companies, *inter alia*, the second respondent, Illovo Sugar Africa (Pty) Ltd (Illovo), the third respondent, Tongaat Hulett Sugar South Africa Limited (Tongaat), and the fourth respondent, RCL Foods Limited (RCL). These manufacturers are members of the eighth respondent, the South African Sugar Millers Association NPC (SASMA). For convenience, Illovo, Tongaat, RCL and SASMA are collectively referred to as the miller respondents.

Background

[4] In 2018, CCBSA was faced with rising input costs for sugar. It states that at that time the price of sugar had increased materially with the nominal price increasing by 40% over the preceding four years. It decided to lodge a complaint with the Commission

alleging that the respondents were responsible for engaging in conduct resulting in excessive prices for sugar. The respondents in the complaint were the three milling companies (the second to fourth respondents) as well as associations representing cane growers and developing farmers (sixth to eight respondents). In the complaint, CCBSA alleged that the respondents had contravened section 8*(a)* of the Competition Act 89 of 1998 (the Act). This section prohibits a dominant firm from charging an excessive price to the detriment of consumers. That provision has since been amended but that is not presently relevant.

[5] The Commission is required to investigate any complaint made to it. During this period there were various interactions between CCBSA and the Commission's investigation team. Eventually, on 29 July 2021, the Commission wrote to CCBSA's attorneys to advise that it had decided not to refer the complaint. It gave two reasons for doing so. First, it said that to bring a case under section 8*(a)* of the Act, it had to be shown that the respondent is a dominant firm. The Commission stated that most of the respondents were unlikely to be found to be dominant and hence to have market power. Secondly, it found that the economic indicators (gross profit margins, mark-ups etc) showed a '. . . distinct lack of supra-competitive profits which would be expected from firms charging excessive prices'.

[6] Attached to the letter was a Notice of Non-referral. This Notice would have entitled CCBSA to refer its complaint to the Tribunal directly.[1] But CCBSA chose not to go this route. Instead, on 15 October 2021, it opted to review the Commission's decision to non-refer. At the Tribunal, CCBSA sought the following relief:

(a) To review and set aside the Commission's decision not to refer the complaint;

(b) To remit the complaint back to the Commission for investigation;

(c) To order the Commission to conduct the investigation within 120 days of the order 'and to take the necessary consequential steps';

(d) To review the Commission's decision to refuse access to its investigation record; and

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[1] Section 51 of the Competition Act 89 of 1998 (the Act).

(e) To direct the Commission to grant CCBSA access to the investigation record.

[7] CCBSA sets out several reasons for the review in the application to the Tribunal. It is not necessary for the purposes of this decision to consider them; save to observe they combine both procedural and substantive grounds. For instance, CCBSA accuses the Commission, variously, of a predisposition in favour of the milling companies; failing to allow it to comment on the submissions made by the millers; taking into account irrelevant information; and failing to take into account relevant information, arbitrariness, and making a decision that was unreasonable.

[8] In response to the application several of the respondents wrote to CCBSA's attorneys making the point that it was not competent for the Tribunal to entertain the review. CCBSA disagreed and insisted that it wanted to persist with its review. At a case management meeting, the Tribunal directed that the point *in limine* that it had no jurisdiction should be argued first. The miller respondents then filed opposing affidavits raising the jurisdiction issue as a point *in limine*.

[9] The Tribunal never got to hear the point *in limine*. What happened is that in October 2022, the Constitutional Court issued its judgment in a case called *Competition Commission of South Africa v Group Five Construction Limited (Group Five).*[2] Whilst not directly concerned with the point of whether the Tribunal could hear a review of a Commission decision to non-refer a complaint, the Court made a broader determination of the Tribunal's power to hear reviews.[3] The Court held that:

'The grounds upon which Group Five seeks to review the decision of the Commission relate to the validity and lawfulness of the initiation and subsequent referral, of the complaint to the Tribunal. These are questions of *vires* or legality, issues which typically fall within the ambit of the

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[2] *Competition Commission of South Africa v Group Five Construction Limited* [2022] ZASCA 36; 2023 (1) BCLR 1 (CC); [2023] 1 CPLR 1 (CC).

The issue in that case was whether a review of a decision of the Commission not to grant leniency to an alleged cartelist was a decision that was reviewable by the Tribunal or should have been instituted in the High Court or the CAC.

jurisdiction of the superior courts. Thus, although they arise out of a complaint referred and initiated under the Act, the issues on review are not pure competition law matters – that is, matters that, according to the Act, fall within the exclusive competence of the Tribunal and the Competition Appeal Court.'[4]

[10] The Court explained that:

'Section 27(1)(c) recognises the power of the Tribunal to hear appeals and reviews in respect of any decision of the Commission that may be referred to it in terms of the Act. Thus, the appeal and review jurisdiction of the Tribunal is limited in terms of the powers conferred upon it in the Act. Those powers are to "hear appeals from, or review any decision of, the Competition Commission that may in terms of this Act be referred to it".'[5]

[11] Having made clear what types of review the Tribunal could hear, the Court went on to make it clear what types of review the Tribunal could not hear:

'For all these reasons, the Tribunal does not have jurisdiction to adjudicate a PAJA or legality review.'[6]

[12] The Constitutional Court however held that the Competition Appeal Court (the CAC) and an ordinary High Court would have jurisdiction to hear reviews of decisions of the Commission. It held that:

'Unlike the Tribunal, the Competition Appeal Court, which has "a status similar to that of the High Court", does have jurisdiction to hear PAJA and legality reviews in terms of two provisions of the Act. First, the Competition Appeal Court is expressly empowered to review any decision of the Tribunal – this power is limited to decisions of the Tribunal and does not include decisions of the Commission. Second, in addition to any other jurisdiction granted in the Act, it has jurisdiction over constitutional matters arising in terms of the Act. That includes the power to review the exercise of the Commission's public powers derived from the Act. And, as stated, in terms of section 62(2)(a) of the Act, the Competition Appeal Court is also clothed with additional,

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[4] Fn 2 above para 139.

[5] Ibid para 120.

[6] Ibid para 132.

concurrent jurisdiction over the "the question whether an action taken or proposed to be taken by the Competition Commission . . . is within [its] . . . jurisdiction . . . in terms of this Act".'[7]

[13] In March 2023, CCBSA indicated that consequent upon the decision in *Group Five* it would accept that the Tribunal did not have jurisdiction to hear the review. What CCBSA proposed was that the respondents consent to the application being transferred to the CAC to obviate the need for it to commence proceedings *de novo*. The miller respondents again objected as they contended, *inter alia*, that there was no procedure for such a transfer. CCBSA did not accept this criticism and on 4 July 2023 brought the present application for a transfer to this Court. CCBSA seeks the following orders in the transfer application:

(a) That the application originally launched in the Tribunal be transferred to the roll of this Court for determination; and

(b) That the pleadings be permitted to stand as the pleadings in the matter subject to CCBSA's right to amend its case once the Commission's record had been received.

[14] The Commission does not oppose the transfer application. Nor does the sixth respondent, the South African Sugar Cane Growers Association, which filed a notice to abide. The seventh respondent has not filed papers to oppose. This leaves the opposition to the transfer coming from the miller respondents. Since the same legal team represents both Illovo and SASMA, and advanced the same arguments for both, I will for convenience just refer to them collectively as Illovo.

Legal issues not in dispute

[15] Several legal issues are not in dispute, so it is worth setting them out first. Neither the Act or the Rules of the CAC or the Tribunal, prescribe a rule for transferring cases from the Tribunal to the CAC. However, the CAC also does not have any rules regulating reviews of the Commission. The current review procedure in the CAC's rules is limited to

[7] Fn 5 above.

reviews of Tribunal decisions.[8] Nevertheless, in terms of the Act, the CAC is a Court as contemplated in section 166(1)*(e)* of the Constitution.[9] This gives it a status similar to that of a High Court. The implication of having the status similar to that of a High Court, is that it enjoys inherent jurisdiction in terms of section 173 of the Constitution. That section states:

'The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

[16] CCBSA argues that section 173 of the Constitution gives the CAC the power to transfer the matter from the Tribunal to itself in order to protect and regulate its own process. The miller respondents argue that section 173 cannot be read to go that far.

CCBSA's argument on the transfer power

[17] CCBSA's argument is quite straightforward. It concedes that the Constitutional Court's decision in *Group Five* has finally closed the door on any uncertainty as to the ambit of the Tribunal's power to review decisions of the Commission. But it argues that up until then, the position was far from clear. Litigants seeking a review were faced with a legal conundrum. The Act conferred on the Tribunal and the CAC exclusive jurisdiction over the core issues of competition law. This is in terms of section 62(1) of the Act, which states that the Tribunal and CAC share exclusive jurisdiction over Chapters 2, 3 and 5 of the Act. Chapters 2 and 3 deal respectively with the prohibited practices and mergers. Put differently these are the issues that lie in the heartland of what is specialised in competition jurisprudence. Thus, the question of whether a dominant firm has charged an excessive price falls under section 8*(a),* which is part of Chapter 2.

[18] Chapter 5 is less straightforward. It deals in several sections with investigative and adjudicative procedures. Section 50, which deals with the outcome of a complaint,

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[8] Rules 23 to 27 of the Competition Appeal Court Rules.

[9] Section 36(1*)(a)* of Act.

including the provision on which the Commission relied in the present matter to non-refer the complaint, forms part of Chapter 5. This all suggests that a review of a decision by the Commission not to refer a complaint that concerns alleged excessive pricing might well, at least arguably, if reviewable, form part of the exclusive jurisdiction carve out in section 62(1).

[19] However, section 62(2) partly takes back what section 62(1) has seemingly given. It makes clear that questions over whether the Commission or Tribunal have jurisdiction over certain actions is a power that the CAC has as an additional power to the one it has in terms of exclusive jurisdiction. Put differently the power to decide on what power the Commission has, is not one given to the Tribunal, but to the CAC.

[20] It is not difficult to imagine that the boundary lines of whether a legal question falls within the exclusive jurisdiction box of issues or outside of it, will frequently be covered in fog. This was, to put it at its most sympathetic, the problem facing CCBSA in 2021 when it commenced its review before the Tribunal. Had it instituted the review directly in the CAC or a High Court, the party it was seeking to review, the Commission, may well have argued that it had chosen the wrong forum, and it should have brought the matter to the Tribunal.

[21] As a litigant the Commission had historically defended these exclusivity powers as it had done, albeit unsuccessfully, in *Group Five*. Prior to *Group Five* there were some decisions by this Court, and the SCA, which suggested a wider remit of the review jurisdiction of the Tribunal. Indeed, even in *Group Five* there was still a minority judgment which favoured the Tribunal's review jurisdiction.

[22] CCBSA reprises this history to explain that when it initiated its review in the Tribunal, prior to the *Group Five* decision on the law as it was then, this seemed the correct forum to choose. After all, CCBSA argued, the review required a consideration of whether the Commission had applied the correct approach to determining an excessive pricing case. This meant going into the jurisprudence of excessive pricing and economic

questions that go into the heartland of exclusivity of section 62(1). If it instead went to this Court directly or a High Court, it could anticipate that the party being reviewed – the Commission – would take the point that the case was in the wrong forum.

[23] I will assume, simply for the purpose of this decision, that until the Constitutional Court handed down *Group Five*, CCBSA reasonably assumed that its case was brought in the correct forum. But that is not the question I have to decide in this matter. The question is whether this Court has the power to transfer the application before the Tribunal.

[24] CCBSA originally invoked section 34 of the Constitution. That is that fairness required it to have its case transferred since there had been a change in the legal understanding from the time the case was instituted and prior to it being determined. This argument was not pursued at the hearing. Correctly so since CCBSA still has a remedy – to approach the CAC *de novo*. Thus, there is no infringement of its section 34 rights. This case is not about denying it the right to bring a review rather about whether this Court has the competence to make a transfer order.

[25] The main argument pursued by CCBSA relies on its interpretation of section 173 of the Constitution. The argument is that the CAC as a court with inherent powers can determine its own procedures. Absent a rule for transferring matters from the Tribunal it can use this power to rectify the lacuna. The argument is that given that the CAC in any event has no procedures to hear reviews from the Commission (a power the Constitutional Court says it has) it would have to use this inherent power to 'protect and regulate its own process'. It is thus a small leap on CCBSA's logic to infer an added power to transfer those review cases still moored in the Tribunal, pre-*Group Five*, to its own jurisdiction.

[26] CCBSA argues that the objections of its opponents are purely technical and advance form over substance. Moreover, it points out that recently this Court allowed a transfer in the *Sasol Gas Proprietary Limited v the Competition Commission and Others*

(Sasol) matter.[10] It is correct that this Court did so in *Sasol.* But it must be pointed out that the *Sasol* transfer was not opposed. CCBSA may have hoped its opponents may have been similarly co-operative but there is nothing in the history of their engagements that suggested this would be the case. The miller respondents had from the earliest moment in this litigation indicated that CCBSA was wrong to have proceeded before the Tribunal. CCBSA also argues that transfers from one court to another are not unusual as I discuss later.

The respondent's arguments against transfer

[27] The miller respondents have advanced several arguments as to why transfer is not competent. They are aligned on some issues whilst some raised additional arguments. All three legal teams were aligned on the following points:

(a) Section 173 has historically been given a narrow interpretation – there is no instance where a court assumed the powers being contended for by CCBSA. Moreover, it was argued that a court cannot transfer a case to itself.

(b) The review before the Tribunal is a nullity. It is therefore incapable of being transferred.

(c) The review before the Tribunal was neither a PAJA review nor a legality review. It was premised on being a statutory review in terms of section 27(1)*(c)* of the Competition Act. It is not permissible to transfer an application premised on a different legal basis.

(d) The transfer is being sought to avoid its being brought unduly late.

[28] Illovo also argued that as an additional ground, the relief should not be granted because of CCBSA's '… lack of candour regarding the true reason for the transfer application'. I understand this to be a criticism of the fact that CCBSA had failed or been reluctant to explain why it had taken them so long to decide on the transfer application (this was signalled in correspondence four months after *Group Five* had been handed

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[10] *Sasol Gas Proprietary Limited v the Competition Commission of South Africa and Others* Case No 212/CAC/Apr23 (5 March 2024).

down) and then having stated in correspondence that it would bring such an application, why it had still taken another four months to bring it.

[29] RCL argued that the entire basis for the review was incompetent as one could not review a decision of the Commission not to refer a complaint. Rather the correct remedy was for CCBSA as the complainant, to bring the referral itself in terms of section 51(1) of the Act.[11]

Analysis

[30] The starting point in considering whether this Court has the power to transfer a case from the Tribunal to itself, is the Act and its rules. There is agreement between all the parties that no such power exists, in either the statute or its rules, because this situation was never contemplated. CCBSA argues that the notion of transferring cases from one court, which does not have jurisdiction to one that does, is not unknown to our legal system.

[31] It is correct that cases do get transferred from one court to another. But those transfers are carried out in terms of a specific statutory authorisation. Thus section 27(1) of the Superior Courts Act 10 of 2013 provides that:

'(1) If any proceedings have been instituted in a Division or at a seat of a Division, and it appears to the court that such proceedings –

(a) should have been instituted in another Division or at another seat of that Division; or

(b) would be more conveniently or more appropriately heard or determined –

(i) at another seat of that Division; or

(ii) by another Division,

that court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that other Division or seat, as the case may be.'

[11] Section 51(1) of the Act entitles a complainant in a non-referral case to refer a case itself to the Tribunal.

[32] Section 27(1)'s predecessor was the Interim Rationalisation of Jurisdiction of High Courts Act 41 of 2001. In *Road Accident Fund v Rampukar (Rampukar),* the SCA explained that the purpose of the statute was to give the transferring court:

'. . . the limited jurisdiction – which otherwise it would not have had – to transfer the matter to the "right" court, ie the court with proper jurisdiction to determine the dispute. . ..' [12]

[33] *Rampukar's* essential finding – that it is the statute that gives a court the jurisdiction it otherwise would not have – has been followed in later cases.[13] But even in cases where the statutory jurisdiction has been given, the courts have been reluctant to interpret it to widen its remit. Thus, in *Oosthuizen v Road Accident Fund* the issue was whether the statutory remit to transfer cases from a Magistrates Court to the High Court at the instance of the defendant, can be interpreted to allow a plaintiff the right to transfer a case where the claim now exceeded the lower court's jurisdiction.[14] The SCA held it could not:

'The appellant's access to court was not impeded by some lacuna in the law. His attorneys chose the wrong forum and persisted therein when it was clear on the available evidence that a change of forum was imperative.

. . .

A high court may not use its inherent jurisdiction to create a right. The appellant's reliance on the expression "*ubi jus ibi remedium*" is misplaced. The appellant had a right to institute action in the appropriate forum to the full extent of his claim. Prescription has extinguished part of his claim. For that consequence his attorneys are to blame. As pointed out above, he has a remedy in that regard.'[15]

[34] Thus far, the discussion has been about how courts have approached the issue of transfer where a statutory remit is in existence. I now turn to CCBSA's argument that even

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[12] *Road Accident Fund v Rampukar* [2007] ZASCA 148; 2008 (2) SA 534 (SCA) para 10.

[13] See for instance *Ngqula v South African Airways (Pty) Ltd* 2013 (1) SA 155 (SCA) and *Kamupungu v Road Accident Fund* 2023 (4) SA 627 (ECM).

[14] *Oosthuizen v Road Accident Fund* [2011] ZASCA 118; 2011 (6) SA 31 (SCA); [2011] 4 All SA 71 (SCA).

[15] Ibid para 25 & 26.

absent an express statutory remit, where there is a lacuna one can still rely on section 173 of the Constitution.

[35] This provision too has been given a narrow interpretation. Moseneke DCJ held in *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others:*

'In my view it must be added that the power conferred on the High Courts, Supreme Court of Appeal and this Court in s 173 is not an unbounded additional instrument to limit or deny vested or entrenched rights. The power in section 173 vests in the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering justice in a regular, orderly and effective manner. Said otherwise, it is the authority to prevent any possible abuse of process and to allow a court to act effectively within its jurisdiction. However, the inherent power to regulate and control process and to preserve what is in the interests of justice does not translate into judicial authority to impinge on a right that has otherwise vested or has been conferred by the Constitution.'[16]

[36] In *Cape Town City v South African National Roads Authority and Others*, the SCA explained:

'Even were it open to the high court to invoke s 173, that section does not empower a court to create a procedural rule in the absence of a lacuna. And it has not been suggested that the existing law is insufficient.'[17]

[37] In short, there is no case authority to support a wide interpretation of section 173 that would permit a court, absent a statutory power to do so, to transfer a case from one court to another, let alone a court to transfer to itself a case from an administrative tribunal found not to have jurisdiction.

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[16] *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) para 90.

[17] *Cape Town City v South African National Roads Authority and Others* [2015] ZASCA 58; 2015 (3) SA 386 (SCA); [2015] 2 All SA 517 (SCA) para 30.

[38] The court does not need to invent a transfer power to assist CCBSA. Its application was brought before the wrong forum. All the parties are agreed that it is competent for it to approach this Court directly with its review. But it does mean that it has to start *de novo*. There is thus no lacuna here that needs to be rectified.

[39] Although that alone would end the matter, there is still a further problem. The review brought before the Tribunal was a statutory review. Hoexter and Penfold have indicated that statutes can offer grounds of review distinct from PAJA and a legality review. In a passage cited with approval by the Constitutional Court in another competition matter involving CCBSA, the authors explain:

'The legislature may and often does confer on the courts a statutory power of review. This is "special" because it differs from "ordinary" judicial review in the administrative law sense. The adjective also helps to distinguish other statutory reviews from PAJA review, which is of course statutory too. Statutory review is often a wider power than ordinary review, and thus more akin to an appeal, but it may well be narrower, with the court being confined to particular grounds of review or particular remedies. While in *Johannesburg Consolidated Investment Co* Innes CJ spoke of the statutory review power as being 'far wider' than the first two kinds of review mentioned by him, it is clear that the precise extent of the power always depends on the particular statutory provision concerned.'[18]

[40] CCBSA understood this when it brought the review stating expressly that it was not bringing a PAJA review. Its difficulty was that past cases had made it clear that the Tribunal does not enjoy PAJA jurisdiction. To navigate this thicket CCBSA had to explain that this was not a PAJA review. This much was stated in its founding affidavit before the Tribunal. When challenged by the miller respondents in correspondence it repeated this position. Its clearest exposition came in the founding affidavit before the Tribunal, where it stated it relied on section 27(1)*(c)*, which is 'a statutory review power, being one of the pathways to administrative review that operates to the exclusion of default review under

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[18] Hoexter and Penfold *Administrative Law in South Africa* 3 ed (Juta & Co Ltd, Cape Town 2021) at 143- 4, 154-6. Referred to in *Coca-Cola Beverages Africa (Pty) Ltd v Competition Commission and Another* [2024] ZACC 3; 2024 (6) BCLR 771 (CC); 2024 (4) SA 391 (CC) para 51.

the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and also where the offending conduct does not qualify as administrative action'. In the founding affidavit in the transfer application this is confirmed once again when it stated it had:

'…launched the Review Application before the Tribunal in terms of section 27(1)(c) of the Competition Act'.

[41] The review that will come before the CAC cannot be a statutory review in terms of section 27(1)*(c)* of the Act. That type of review is only competent to be brought before the Tribunal as a tribunal of first instance. CCBSA now says the review as transferred must be regarded as a legality review. It was also argued that the distinction was technical as the review grounds although not based on PAJA were 'infused' by grounds that are co-extensive with those in PAJA. But a transfer, even if it was permissible, cannot change the species of review. If it was a statutory review when it was instituted, it cannot be transformed by some act of transfer to a review premised on a different legal standard. An application for review is not a legal chameleon that can change its colours depending on which forum it is in. This is more than just a technicality. CCBSA in its Notice of Motion seeks a direction that its pleadings before the Tribunal '. . . stand as the pleadings for the purposes of this Court, in the manner they would have had the matter proceeded in the Tribunal. . .'. But given that those pleadings were premised on a statutory review, that direction would only serve to further complicate the matter. The respondents are entitled to know the legal basis of the application that has been brought so they can respond. They need to know what their rights are both procedurally and substantively.

[42] Thus, on both grounds I find that it is not competent to grant the relief sought. It is not appropriate for me to pronounce at this stage on some of the other objections raised, which I referred to earlier. These relate to opposition to the review rather than the limited issue we must decide which is whether we have the jurisdiction to order a transfer. Having decided we cannot, that ends the issues we must presently consider.

Costs

[43] Counsel for CCBSA argued that even it was not successful, costs should be left to costs in the review application once it is brought. I do not think this would be fair to the respondents who opposed. They had signalled from the beginning that they considered the review had been brought in the wrong forum and had then advised that a transfer application was not competent. CCBSA thus had ample opportunity to consider its options and having chosen to press on it must face the consequences of an adverse costs order. Having said that, I also do not agree that this case merits a punitive costs order as sought by Illovo.

Order

[44] As a result:

1 The application is dismissed.

2 The applicant is liable for the costs of the opposing respondents on a party and party basis, scale C, including the costs of two counsel, where so employed.

____[redacted]_____
N M Manoim
Judge President
Competition Appeal Court of South Africa

I agree

__p.p___[redacted]_
Nuku JA

I agree

__p.p___[redacted]
Poyo DlwatiAJA

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