
The Competition Tribunal does not have the power to grant absolution from the instance

Proceedings before the Competition Tribunal – absolution from the instance – the Tribunal’s adjudicative purpose

The Competition Appeal Court (“the CAC”) in *Competition Commission v X-Moor Transport (Pty) Ltd t/a Crossmoor Transport* (273/CAC/Aug25) [2026] ZACAC 4 (22 June 2026), considered the question of whether the Competition Tribunal (“the Tribunal”) has the power to grant absolution from the instance in a prohibited practice case. In two prior cases the Tribunal had been open to considering the question of granting absolution but has not considered the issue definitively since in both cases absolution was declined.¹

The matter originates from a complaint referred by the Competition Commission (“the Commission”) to the Tribunal, in which the Commission alleged that the conduct of two firms, namely, Crossmoor and Casalinga Investments t/a Waste Rite, contravened the provisions of section 4(1)(b)(i) and (iii) of the Competition Act 89 of 1998 (“the Act”). The conduct concerned tender documents completed by the two firms in a tender issued by Pikitup, the refuse division of the City of Johannesburg, for its waste management services in 2012.

Waste Rite settled with the Commission before the hearing commenced. The Commission proceeded with its case against Crossmoor before the Tribunal. At the close of the Commission’s evidence, Crossmoor applied for and was granted absolution from the instance. In granting absolution from the instance, the Tribunal recognised that neither the Act nor the Tribunal’s Rules expressly vested the Tribunal with such a power. However, the Tribunal relied on Rule 55(1) of the Tribunal’s Rules which provides that if in the course of proceedings before the Tribunal, there is uncertainty as to the practice and procedure to be followed in cases not provided for by the Tribunal’s Rules, the Tribunal “*may have regard to the High Court Rules*”. Rule 39(6) of the High Court Rules provides for the granting of absolution from the instance. The Tribunal further relied on its earlier decision in *Thembekile*² where the Tribunal’s practice to permit applications for absolution was recognised.

The Tribunal further reasoned that its power to grant absolution from the instance derives from its inherent authority to manage its own proceedings, and to ensure that “*parties are not unduly burdened by cases where the initiating party has failed to lay a foundational case.*”

On appeal to the CAC, the CAC found that the Tribunal did not have the power to grant absolution from the instance. In making this finding, the CAC stated that the purpose of adjudication in prohibited practices, as contained in section 27(1)(a) of the Act, is to determine whether prohibited conduct has “occurred” and if so, to impose a remedy. This clearly indicates that what adjudication means in section 27(1)(a) is to adjudicate to finality. It found that the adjudication of an application

¹ *Competition Commission of South Africa v Afrion Property Services CC and Others* (CR245Mar17) [2021] ZACT79 (15 January 2021); and *Competition Commission of South Africa v Thembekile Maritime Services (Pty) Ltd* CR067May17/SA103Jun18.

² *Competition Commission of South Africa v Thembekile Maritime Services (Pty) Ltd* CR067May17/SA103Jun18.

for absolution from the instance does not entail adjudication to finality “*because if absolution is granted the complainant can in theory revive the case*”. Furthermore, if absolution from the instance is refused, “*the case continues and hence there is no finality.*”

The CAC also found that there were other indications in the mechanisms of the Act that the Tribunal is required to come to final decisions in its adjudication. For example, the Act gives a person who has suffered loss arising from a prohibited practice, the right to sue for damages. In order to exercise this right, the Chairperson of the Tribunal must certify that the conduct complaint of constitutes a prohibited practice. Certification, so the CAC found, “*could only come about after a case has been finally concluded*”. The CAC found that the same principle applies in respect of criminal prosecutions of people whose firms have been found to contravene section 4(1)(b) of the Act.

The CAC further held that, unlike private proceedings of a private litigant that litigates in its own interest, complaint proceedings are there to vindicate a public interest. For this reason, absolution from the instance is not appropriate in complaint proceedings.

A further factor which, in the CAC’s view, supports the finding that the Tribunal does not have the power to grant absolution from the instance, is because section 67(1) of the Act provides for a procedural time-bar against a complaint of conduct which has ceased three years prior to it being initiated. According to the CAC, if absolution from the instance is granted and the Commission were to institute fresh proceedings, the Commission would have to overcome the time-bar issue created by section 67(1) of the Act.

Another factor, according to the CAC, is that section 52(2)(b) of the Act provides that the Tribunal may conduct its hearings informally and in an inquisitorial manner. This is contrary to civil proceedings which are adversarial. The CAC held that in an adversarial system the adjudicator has to decide between two competing private rights. In this system, absolution only has private consequences. Under the Act, the adjudicator has to balance between a public right of determining whether a prohibited practice has occurred, and a private right of a respondent to the expeditious outcome of a complaint. The CAC held that in such a system “*the public right to finality must prevail over the private right to expedition.*” For this reason, as well, the CAC found that the grant of absolution from the instance is not consistent with such an inquisitorial system.

The implications of the CAC’s judgment are far-reaching for a respondent who elects not to lead evidence. While such a respondent is entitled not to lead its evidence, it runs the risk of the case being determined on the initiating party’s evidence only. Under these circumstances, the Tribunal, upon a finding that sufficient evidence has been led to establish the conduct complained of, may rule that the respondent has contravened the Act. On the other hand, a respondent who elects to lead its evidence in response to the initiating party’s case despite its belief that the initiating party has failed to lay a foundational case, runs the risk of leading evidence which may assist to establish the existence of the conduct in question. A respondent must therefore make an informed election on whether to lead evidence, as either election may carry unintended consequences.

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