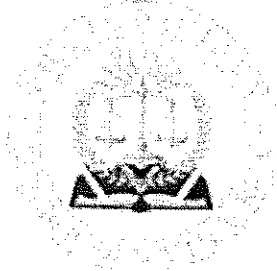


REPUBLIC OF SOUTH AFRICA



IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)

CAC CASE NO: 150/CAC/JUN17

REPORTABLE

In the matter between

CONTINENTAL TYRES SOUTH AFRICA (PTY) LTD

Appellant/
Applicant *a quo*

and

COMPETITION COMMISSION OF SOUTH AFRICA

First Respondent/
Respondent *a quo*

GOODYEAR SOUTH AFRICA (PTY) LTD

Second Respondent/
Applicant *a quo*

AND

CAC CASE NO: 151/CAC/JUN17

In the matter between:

GOODYEAR SOUTH AFRICA (PTY) LTD

Appellant

and

COMPETITION COMMISSION

First Respondent

APOLLO TYRES SOUTH AFRICA (PTY) LTD

Second Respondent

CONTINENTAL TYRES (PTY) LTD

Third Respondent

BRIDGESTONE SOUTH AFRICA (PTY) LTD

Fourth Respondent

**SOUTH AFRICAN TYRE MANUFACTURERS
CONFERENCE (PTY) LTD**

Fifth Respondent

J U D G M E N T

KATHREE-SETILOANE, AJA:

[1] This appeal concerns the question of whether the Competition Commission of South Africa ("Commission") lawfully referred a third-party complaint to the Competition Tribunal ("Tribunal") in terms of section 50(2)(a) read with section 50(4)(a) of the Competition Act.¹

[2] The appeal is against the decision of the Tribunal which it handed down on 2 June 2017. The Tribunal's decision relates to a special plea taken by both Goodyear South Africa (Pty) Ltd ("Good Year") and Continental South Africa (Pty) Ltd ("Continental") that the Tribunal had no jurisdiction to adjudicate the third-party complaint of Parsons Transport (Pty) Ltd ("Parsons"), as the Commission had failed to refer it to the Tribunal within the

¹ No 89 of 1998.

time frames prescribed in terms of section 50(2)(a) read sections 50(4)(a) and rules 4(1) and 6(4) of the Competition Tribunal Rules ("Tribunal rules").²

Background

[3] On 2 October 2006, Parsons lodged a complaint with the Commission against the South African Tyre Manufacturers ("the SATMs") under section 49B of the Act. The complaint concerned the alleged simultaneous setting adjustment of product prices by the SATMs, following "coffee table discussions" to agree on the price increases, in contravention of section 4(1)(b) of the Act.

[4] The Commission investigated the complaint from 2006 to 2010. On 28 September 2007 and prior to the expiry of the initial investigation period, the Commission obtained consent from Parsons for an extension in terms of section 50(4) of the Act, which allows for the Commission and the complainant to agree to extend the period for referral of the complaint contemplated in subsection (2). The Commission also obtained several further extensions. The extension last was granted on 26 May 2010. This agreement extended the period for the referral of the complaint to the Tribunal to 31 August 2010 ("the agreement"). It reads:

"I Christoffel Johannes Oelofse, being duly authorised to sign this agreement for and on behalf of the complainant, do hereby agree in terms of section 50(4) of the Competition Act 89 of 1998, as amended, to extend the time period in relation to case number: 2006OCT2537, which is against the South African Tyre Manufacturers to 31 August 2010."

² Competition Tribunal Rules GN 2, GG 22025 of 1 February 2001

[5] On 24 April 2009, the Commission initiated its own complaint against the SATMs alleging other contraventions of section 4(1)(b)(i) and (iii) of the Act.

[6] The Commission delivered the notice of motion and the referral founding affidavit in the Parson's complaint ("the complaint referral") to the Tribunal's offices at 16h50 on 31 August 2010. It was received by the registrar at the time, Ms. Tebogo Mputle. She stamped it with the Tribunal stamp dated 31 August 2010 and filled in her name and the time of receipt. She also allocated a case number to the complaint referral on 31 August 2010, i.e. "CR053Aug10".

[7] Since the referral of the complaint, there have been various interlocutory applications which amongst others concerned the particularity in the complaint referral and access to documents. The Commission was ordered, pursuant to these applications, to supplement its complaint referral and to make certain documents available to the appellants.

[8] Some six years later in June-July 2016, the appellants filed their respective answering affidavits in which they raised two special pleas. The first is related to the failure of the Commission to file the complaint referral by 15h30 on 31 August 2010, which they contended resulted in the lapsing of the Parsons' complaint in terms of section 50(5) of the Act. The second related to the Tribunal's failure to note a case number on the electronic version of the

complaint referral in accordance with rule 8(2)(b)³ which, the appellants contended, rendered service on them defective.

The Tribunal decision

[9] The Tribunal heard the appellants' special pleas on 16 March 2017 and dismissed them on 2 June 2017. In relation to the first special plea, the Tribunal found that the Parsons' complaint was a valid referral under section 50 of the Act and the Tribunal Rules and it, therefore, had jurisdiction over the complaint. It reasoned as follows:

"The Tribunal's office hours are between 08h30 and 15h30. Notwithstanding these office hours, the registrar, at his or her discretion may accept documents for filing on 'any day and at any time.' Rule 4(2)(a) thus confers a wide discretion on the registrar to accept documents at any time of any day, the only requirement being that the circumstances must be exceptional. The assessment of whether the circumstances are exceptional or not also lies within the discretion of the registrar. Were it not so then there would be no need for Rule 4(2)(b) which stipulates that the registrar must accept documents for filing as directed in that rule. Hence Rule 4(1) (which stipulates the office hours of the Tribunal) cannot be interpreted to place limitations on the registrar's wide discretion to accept documents at 'any time and any place' simply because that wide discretion is qualified by the rule itself namely the existence of exceptional circumstances.

...

The rationale for the existence of Rule 4(2)(a) and (b) is obvious. These rules permit the filing of urgent applications, filing via electronic service and significantly the filing of documents outside of the official hours of the

³ Rule 8(2) of the Tribunal rules provides:

"Before serving a copy of an initiating document on any person, the initiating party must –
(a) obtain a case number for that document from the registrar ; and
(b) note the case number on every copy of that document ."

registrar. They serve to expand the public's constitutional right of access to the Tribunal.

In summary, on a plain reading of Rule 4, documents can be accepted by the registrar in the following three ways: first the registrar can accept documents during the office hours of the Tribunal, second the registrar can accept documents outside the office hours of the Tribunal, in his or her discretion, at any time and on any day and third the registrar may accept documents at the direction of the Tribunal or member of the Tribunal assigned by its Chairperson.

The registrar in this case accepted the Commission's referral at 16h50 on 31 August 2010. She was empowered to do so in terms of Rule 4(2)(a). The Commission's referral was thus filed in accordance with the rules of the Tribunal on 31 August 2010."⁴

[10] In relation to the second special plea the Tribunal concluded as follows:

"The relevant facts of this case are that the registrar after accepting the referral allocated a case number to it on 31 August 2010 i.e. CR053Aug10. The Commission, after having filed the referral on 31 August 2010, sent an electronic version of the referral to the [appellants] via e-mail on 1 September 2010 with the accompanying message;

'Dear All, Herewith the Commission's referral affidavit.'

The [appellants] were thus made aware of the fact that the Commission had filed a referral with the Tribunal on 31 August 2010 one day thereafter. Hence the Commission had complied with the provisions of Rule 14(3)(a) which required it to serve the referral on the respondents within three days of filing it with the Tribunal. The attached document however did not reflect a case number although the registrar had in fact allocated such on 31 August 2010 as contemplated in Rule 8(2)."

⁴ Tribunal Decision (Case No.CR053/Aug 10 /PIL22 5 December 2016) at paras 32 to 36.

First Special Plea

[11] The Parsons complaint was submitted to the Commission in terms of section 49B(2)(b) of the Act, which provides that any person may submit a complaint, against an alleged prohibited practice, to the Commission in the prescribed form. Section 49B(3) requires the Commission, upon initiating or receiving a complaint in terms of this section, to direct an inspector to investigate the complaint as quickly as practicable.

[12] Section 50(2)(a) obliges the Commission, if it decides to refer the complaint to the Tribunal, to do so within one year of the complaint having been filed. This period may be extended by agreement between the complainant and the Commission in terms of section 50(4)(a) of the Act. The Tribunal may, in terms of section 50(4)(b), extend that period further on application by the Commission before its expiry.

[13] In the absence of an agreed extension in terms of section 50(4)(a) of the Act, or an extension granted by the Tribunal in terms of subsection 4(b), the complaint must be regarded as being non-referred by the Commission. Section 50(5) of the Act provides that if the Commission has not referred a complaint to the Tribunal or issued a notice of non-referral, within one year as contemplated in subsection (2) or the extended period contemplated in subsection (4), the Commission must be regarded as having issued a notice of non-referral on the expiry of the relevant period.

[14] In *GlaxoSmithKline South Africa (Pty) Ltd v Lewis NO*⁵, the Competition Appeal Court stated:

"... section 50(5) is a deeming provision. If the Commission has not referred a complaint to the Tribunal nor issued a notice of non-referral, within the one year contemplated in subsection (2), or any period extended in accordance with subsection (4), the Commission "must be regarded as having issued a notice of non-referral on the expiry of the relevant period"

Where the Commission is deemed to have issued a notice of non-referral, the Tribunal will have no prosecutorial power in respect of that complaint. The complainant may, however, refer the complaint directly to the Tribunal in terms of section 51(1) of the Act.

[15] The one year period contemplated in section 50(2) of the Act is not applicable to the complaint referral, because Parsons had agreed to extend that period to 31 August 2017 in terms of the agreement. The issue for determination is, therefore, whether the Commission referred the Parsons' complaint "within the extended period" agreed to in terms of section 50(4)(a) of the Act.

[16] The agreement extended the period within which the Commission was required to refer the Parsons' complaint to the Tribunal "to 31 August 2010". This is the ordinary meaning of the phrase "to extend the time-period...to 31 August 2010." Properly construed, the agreement gave the Commission until midnight on 31 August 2010 (ie until the end of that day) to refer the Parsons' complaint to the Tribunal.

⁵ *GlaxoSmithKline South Africa (Pty) Ltd v Lewis NO and Others* [2007] 1 CPLR 18 (CAC) at 29F-H.

The Tribunal Rules

[17] It is common cause that the Commission filed the Parsons' complaint at 16h50 on 31 August 2010. This was outside of the office hours of the Tribunal. Rule 4(1) of the Tribunal Rules stipulates that "the offices of the Tribunal are open to the public every Monday to Friday, excluding public holidays, from 08h30 to 13h00 and from 13h30 to 15h30". However, rule 4(2) provides:

"(2) Despite subparagraph (1) –

- (a) In exceptional circumstances the registrar may accept documents for filing on any day and at any time; and
- (b) The registrar must accept documents for filing as directed by either the Tribunal or a member of the Tribunal assigned by its Chairperson."

[18] Rule 6(4) of the Tribunal rules provides:

"Subject to Rule 4(2), if the date and time for the delivery of a document referred to in Table CTR1 is outside of the office hours of the Tribunal as set out in Rule 4(1), that document will be deemed to have been delivered on the next business day."

Continental contends that; by filing the complaint referral after 15h30 on 31 August 2010, the Commission must be deemed to have referred it on 1 September 2010, being the following business day. This, so it contends, means that the Commission lost prosecutorial competence, and it fell to Parsons to refer the complaint to the Tribunal if it intended to pursue it.

[19] As I understand this contention, it is that where the complaint referral is filed outside the office hours of the Tribunal, then the deeming provision in rule 6(4) would be triggered and the date of filing would be deemed to be the next day, even where the registrar has exercised her discretion in terms of

section 4(2)(a) of the Act and determined that exceptional circumstances exist for filing outside of the Tribunal's office hours. On this basis, Continental contends that the complaint referral was deemed to have been made on 1 September 2010 and not 31 August 2010 as contended by the Commission.

[20] I disagree with the interpretation of rule 6(4) for which Continental contends. Where the Registrar has exercised her discretionary power under rule 4(2)(a), rule 6(4) has no application. Rule 6(4) is prefaced by the words: "Subject to Rule 4(2) ...". In relation to the meaning of this phrase, the SCA said this in *Sekeleni*⁶:

"... The expression 'subject to' has no a priori meaning. ... While it is often used in statutory context to establish what is dominant and what is subservient its meaning in a statutory context is not confined thereto and it frequently means no more than a qualification or limitation is introduced so that it can be read as meaning 'except as curtailed' ..."

[21] Rule 6(4) is qualified and limited in its application. As correctly concluded by the Tribunal, rule 6(4) has no application in circumstances where the Registrar has exercised her discretion, in terms of rule 4(2) of the Act, to accept documents for filing outside of the Tribunal office hours in exceptional circumstances.

⁶ *Premier of the Eastern Cape Province and Another v Sekeleni* 2003 (4) SA 369 (SCA) at para 14. See also *Omnia Fertiliser Limited v The Competition Commission* [2009] ZACAC 5 at para 13.

Tribunal rules do not alter substantive law

[22] The Tribunal rules are directed at facilitating the administration of the Act and the functions of the Tribunal.⁷ They are the consequence of a statutory power conferred, by section 27 of the Act, at the time on the Minister of Trade and Industry in consultation with the Chairperson of the Tribunal to prescribe regulations on matters relating to the functions of the Tribunal.⁸ Although the Tribunal rules are binding with the force of law, they cannot impose requirements that are additional to, or inconsistent with, the Act. They also cannot circumscribe the ambit of the Act. They remain subordinate to the Act.

[23] Rule 6(4), in particular, is a rational procedural mechanism aimed at facilitating the administrative working of the Tribunal. It applies, not only to the delivery of documents to the Tribunal but to all the entities listed in Table CTR1 (the Table).⁹ The date and time of delivery of documents on the entities listed in the Table are deemed according to the third column of the Table.¹⁰ The delivery of any document to any of the entities listed in the Table,

⁷ The Tribunal rules are promulgated under section 27(2) of the Act, Government Gazette No. 22025 of 1 February 2001.

⁸ Section 27(2) of the Act.

⁹ This includes the Commission, trade unions, municipalities, natural and juristic persons, statutory bodies, employees and others.

¹⁰ Section 6(1) of the Act provides:

“(1) A notice or document may be delivered in any matter set out in Table CTR1.

(2) Subject to sub-rule (4), a document delivered by a method listed in the second column of Table CTR1 will be deemed to have been delivered to the intended recipient on the day and at the time shown office of the method, in the third column of that Table.

(3) If, in a particular matter, it proves impossible to serve a document in any manner provided for in these rules –

- (a) If the Tribunal is required the document, the registrar may apply to the High Court for an order of substituted service; and
- (b) In any other case the person concerned may apply to the Tribunal for an order of substituted service.”

outside of the office hours of the Tribunal will, in terms of rule 6(4) be deemed to have taken place on the following day.

[24] In most cases, rule 6(4) will not impact on the substantive law relating to time bar provisions in the Act. However, in the context of a matter such as the present one, where the complainant and the Commission have agreed, in terms of section 50(4) of the Act, that the Commission has until 31 August 2010 to refer the complaint to the Tribunal, the appellants' argument regarding rule 6(4) would not only impose a fictional filing date on the referral but also result in the referral being out of time. It does this even though the referral was actually made on 31 August 2010 (being the last day of the extended period and, therefore, within it) under an agreement sanctioned by the Act.

[25] So, although the complaint had not lapsed at the time of its referral in terms of section 50(2)(a) read with section 50(4)(a) of the Act, the imposition of the fictional filing date of 1 September 2010 would, on the appellants' argument, render it non-referred and lapsed, even though it was referred within the extended period contemplated in sub-sections (4) and (5) of the Act. The effect of this would be that the complaint would be rendered non-referred (and lapsed), on the basis a Tribunal rule that renders it as such, in a manner simply not contemplated in the Act.

[26] It bears emphasis that section 50(5) of the Act specifically contemplates that a complaint will be regarded as non-referred only if the Commission has not referred a complaint to the Tribunal, or issued a notice of

non-referral, within the time contemplated in subsection (2) or the extended period contemplated in subsection (4). In *Zalvest Twenty* Rogers J held that:

"The rules of court exist to facilitate the ventilation of disputes arising from substantive law. The rules of court may only regulate matters of procedure; they cannot make or alter substantive law."¹¹

[27] The Parsons' complaint was lawfully and timeously referred to the Tribunal by the extended period provided for in the agreement concluded in terms of section 50(4)(a) of the Act. Neither rule 6(4) nor rule 4(1) have the legislative standing to negate that position. It was open to the Commission and the complainant, in terms of section 50(4)(a) of the Act to extend the period of the investigation of the complaint, at any time after 15h30 and before midnight on 31 August 2010. This is because the complaint would have lapsed on 31 August 2010 at midnight only.

[28] The argument that a valid referral could not be made after 15h30 on 31 August 2010 as rule 6(4) deemed the referral to have been made on 1 September 2010, ignores the intention of the parties and the clear and ordinary meaning of the words in the agreement. It also ignores the impact that the application of rule 6(4) will have on the on the complainant's rights of access to court in terms of section 34 of the Constitution,¹² because the

¹¹ *ABSA Bank Limited v Zalvest Twenty (Pty) Limited* 2014 (2) SA 119 (WCC) para [11].

¹² Section 34 of the Constitution provides that:

imposition of a fictional filing date will result in a deemed non-referral of the Parsons' complaint.¹³

[29] Although the complainant would have had 20 business days in terms of section 51(1) read with Rule 14(1)(b) to refer the complaint directly to the Tribunal, the appellants' six-year delay in raising the special plea effectively negated that right. As argued by the Commission, even if the complainant were now to be given the opportunity to refer the complaint directly to the Tribunal, "the prejudice it would suffer, as a result of the inordinate delay, would be practically insurmountable."¹⁴

[30] In my view, rule 6(4) has a more modest scope than the appellants' argument attributes to it. Where the rules require some further document in a case to be delivered within a specified period after the "filing" of some earlier document (for example, the three days "after filing" specified in rule 14(3) for the serving of the complaint referral on the respondent), the deemed date of filing specified in rule 6(4) would be the date of "filing" for purposes of computing the specified period. This would be part of the setting of procedural time periods and within the legitimate scope of the rules.

"Everyone has the right to have any disputes that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

¹³ Section 1(2)(a) of the Act provides that the Act must be interpreted in a manner that is consistent with the Constitution and gives effect to the purposes set out in section 2.

¹⁴ See *Allens Meshco Group of Companies and Others v Competition Commission* (Case No. 31044/13, dated 17 July 2015) [2015] ZAGPPHC 1078 at paras 48-49.

[31] Even where the registrar has accepted a document out of hours in exceptional circumstances in terms of rule 4(2)(a), rule 6(4) will have this effect. The purpose of rule 6(4) is evidently to ensure that parties affected by late filing (ie parties who may need to take a further procedural step in response to the filing) have an additional day. In other words, they are – in respect of time periods triggered by the filing – in the same position as if the document had been filed in due course on the day following its actual filing. On this interpretation, the opening words of rule 6(4), "Subject to Rule 4(2)", merely remind the reader that in terms of rule 4(2) documents will not necessarily be accepted late and that late filing is subject to the provisions of the latter rule.

[32] I must add that, in my view, the existence of "exceptional circumstances" is not a jurisdictional prerequisite in order for the registrar to accept the filing of a document outside of ordinary working hours. To the extent that the Tribunal's reasons suggested such a jurisdictional requirement, I respectfully disagree. Rule 4(2)(a) conveys to users of the registrar's office that they cannot expect filing services to be made available outside of the working hours specified in rule 4(1). This is subject to the two exceptions mentioned in rule 4(2).

[33] In the case of a direction from the Tribunal, the registrar must accept the late filing. Absent such a direction, where "exceptional circumstances" exist the registrar has at least a duty to consider whether to accept a late filing. I need not decide whether, if "exceptional circumstances" exist, the

registrar's power is coupled with the duty to exercise it. On the face of it, it would seem strange to hold that, despite the existence of "exceptional circumstances", the registrar could rationally refuse to accept the late document.

[33] Be that as it may, it by no means follows that the absence of "exceptional circumstances" limits the power of the registrar to accept the filing. Efficiency in the public service should be encouraged. It would be perverse to say that a diligent official who still happens to be at her desk cannot receive a document filed out of time. Rule 4(2)(a) protects the registrar without restraining her. (By "protecting" I mean that she cannot for example, and absent exceptional circumstances, be expected to come back to the office out of hours to receive a late filing).

[34] It is accordingly unnecessary to decide whether, in the present case, "exceptional circumstances" existed. The registrar was still in office and was willing to receive the late filing. That is sufficient.

Does the civilian computation apply?

[30] Good Year seeks to persuade the Court that in terms of the extension agreement the Commission had to refer the complaint to the Tribunal by midnight on 30 August (ie by the end of that day) at the latest, and by doing so on 31 August at 16h50 there was no valid referral to the Tribunal. Good Year relies on the civilian method of computation to support its argument. It contends that regardless of whether the phrase "to 31 August 2010" is found

to be ambiguous, the Court is enjoined to determine the correct date of referral by applying the civilian method of computation. I disagree.

[31] The precise method of calculating time periods depends on the wording used by the legislature in the case of a statute,¹⁵ and on the terms used by the contracting parties in the case of a contract.¹⁶ In the interpretation process, a court must have regard to the context and the purposes for which the computation of time is to be made. Where the language is equivocal or ambiguous, and it is not clear whether it was intended to include or exclude the first and last days of computation, the ordinary civilian method of computation must be applied.

[32] The ordinary civilian method of computation treats the calendar days as the unit in terms of which the first day, i.e., the day upon which the event occurred is included and the last day is excluded. Unless the language of a statute or contract indicates a contrary intention, the ordinary civilian method of computing time must be adopted.¹⁷

[33] The civilian method will, for instance, apply to the calculation of the time in section 50(2)(a) of the Act because it prescribes a referral period of one year from the date upon which the complaint was submitted to the Commission. But would it apply to the situation, such as we have here, where there is an agreement extending the referral period contemplated in section

¹⁵ *Kleynhans v Yorkshire* 1957 (3) SA 544 (A) at 549.

¹⁶ *Dormell Properties 282 CC v Renasa Insurance Company Limited and Another* 2011 (1) SA 17 (SCA); [2011] 1 All SA 557 (SCA) at paras 26 and 55.

¹⁷ *Kleynhans* at 549.

50(2)(a) of the Act to 31 August 2010? In relation to agreements specifically, the Supreme Court of Appeal held in *Dormell Properties*,¹⁸ that the terms of a contract are the decisive criterion by which any potential expiry of a deadline has to be determined. And it is only when the contract is not decisive on the point that it is permissible to introduce the rules of law with regard to computation of time.

[34] Contrary to the submissions of Good Year, *Dormell Properties* supports the Commission's case. Referring to *Cock v Cape of Good Hope Marine Insurance Company*¹⁹ in which a marine insurance policy that was taken out for a period of "twelve months from" from 14 August 1857 to 14 August 1858, was held to have expired at midnight on 13 August 1858, the SCA held:

"The present matter may be contrasted with *Cock v Cape of Good Hope Marine Insurance Co.* In that case, the insurance cover was for a period of 12 calendar months from January 14th 1857 to January 14th 1858. There, a calculation of the period of time was required and the court, in applying the civilian method for computation of time, held that the twelve months expired at midnight on 13 January 1858. Here no period of time has to be calculated and the guarantee expired on 28 February 2008. Once that is so, there is ancient and modern authority in support of the proposition that the guarantee could be called up at any time, or at least during business hours on 28 February 2008."

¹⁸ *Dormell Properties* at para 26

¹⁹ *Cock v Cape of Good Hope Marine Insurance Company* 3 Searle 114 C.

[35] Equally, in the agreement concluded between the Commission and the complainant, there is no period to be calculated as the complainant, and the Commission agreed to extend the complaint referral date "to 31 August 2010." They intended 31 August 2010 – and not 30 August or 1 September 2010 – to be the day until which the Commission could file the complaint referral.

The agreement is incorporated into the Act

[36] The agreement extending the date for the filing of the complaint referral to 31 August 2010 is expressly incorporated into the Act on account of section 50(4)(a). As such, it has the force and stature of the provisions of the Act. Neither rule 6(4) nor any other Tribunal rules may cut-down that date because, in the absence of express language to the contrary, that date would include the hours right up until midnight

[37] For these reasons, I conclude that the complaint referral was filed timeously and in accordance with section 50 of the Act..

[38] Thus, whether it was Ms. Tebogo Mputle (the registrar of the Tribunal at the time) who accepted the filing of the complaint referral at 16h50 on 31 August 2010, or someone else on duty that afternoon (as suggested by the appellants), is immaterial. Public law acts are to be regarded and relied upon as lawful unless and until they are set aside by the courts.²⁰ Accordingly, the registrar is presumed to have acted lawfully and within the confines of her authority in accepting the complaint referral.

²⁰ *MEC for Health, Eastern Cape v Kirkland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) at para 102; *Community Healthcare Holdings (Pty) Ltd v Competition Tribunal* [2006] ZACAC 4 at para 10.

Second Special Plea

[39] Rule 14 of the Tribunal rules deals with the initiation of a complaint. Sub-rule 14(3) provides that a complaint referral must be served on the respondents (and other listed parties) within three days of filing the complaint referral.²¹ Rule 8(2)(b) provides that before serving a copy of the complaint referral on any person, "the initiating party must note the case number on every copy of that document."

[40] The Commission complied with Rule 14(3) by serving an electronic copy of the referral on the appellants on 1 September 2010. However, the electronic copy did not contain a case number as required by rule 8(2)(b). The appellants contend that the Commission's failure to comply with rule 8(2)(b) rendered the service of the complaint referral on them irregular. Consequently the referral was not initiated before the Tribunal and, therefore, not validly referred to it for purposes of section 50 of the Act.

[41] This argument is flawed. Indeed, the conclusion (quoted below) reached by the Tribunal on this issue is unassailable:

"In our view the failure by the Commission to place the case number on the electronic version of the referral sent to the respondents on 1 September 2010 does not amount to a grievous non-compliance with the rules so as to

²¹ Rule 14(3) of the Tribunal rules provides:

"The person who files a Complaint Referral must serve a copy of it within 3 business days after filing on -

(a) The respondent;

(b) The Commission, if the Commission did not file the Referral; and

On each other person who has previously filed a Complaint Referral in that matter."

warrant a dismissal of the complaint referral. The Commission had only omitted to place the case number on the document it had served on the respondents on 1 September 2010. Since then however all the material documents in this matter have reflected the case number, the respondents had accepted service of the referral at that time and that acceptance has been amply demonstrated by the fact that they have embarked on extensive litigation over a period of seven years regarding the referral. Clearly no prejudice can adduce to the respondents were the Tribunal to condone the Commission's omission."

[42] There is merit in the submission of the Commission that the irregularity complained of is merely technical, and manifestly an instance where the maxim *de minimis non curat lex* (the law does not concern itself with trifles) would apply. The Commission's omission to note the case number on the electronic version of the complaint referral is, therefore, so trifling as to be overlooked. It certainly does not warrant a finding that there was no valid referral in terms of section 50 of the Act.

[43] Crucially, neither Good Year nor Continental has demonstrated that they will suffer prejudice as a result of the Tribunal's omission to note the case number on the electronic copy of the complaint referral in terms of rule 8(2)(b). They waited some six years to take this special plea, even though they were aware of the case number assigned to the referral and engaged with the Commission and the Tribunal in accordance with the state of affairs of a valid complaint referral. Good Year, in particular, effectively pursued its rights of access to documents and information, despite this omission.

[44] Having recognised the technical nature of the defect complained of, and that the appellants suffered no prejudice in pursuing their rights following upon the referral, the Tribunal exercised its wide discretionary powers under section 55(2) of the Act in favour of condoning the technical non-compliance.²² The appellants rely on the *SAD Holdings*²³ in support of the contention that the Tribunal could not condone the irregularity. Their reliance on *SAD* is misplaced principally because in *SAD* it was common cause that the Commission did not comply with section 50 of the Act. The Tribunal, consequently, had no jurisdiction over the complaint and was unable to exercise its statutory authority in terms of sections 55(2) or 58(1)(c)²⁴ of the Act to condone any non-compliance of its Rules.

[45] In *SAD* the Tribunal cautioned that its powers under section 58(1)(c) of the Act cannot be invoked to “defeat non-compliance with threshold jurisdictional issues, which relate to whether the Tribunal or Commission has jurisdiction to determine a matter”, since the provision applies “to matters over which they already have jurisdiction and not those where jurisdiction may have lapsed”.²⁵

²² Section 55(2) of the Act provides:

“The Tribunal may condone any technical irregularities arising in any of its proceedings.”

²³ *SAD Holdings Limited and Another v Competition Commission In re: Competition Commission v SAD Holdings Limited and Another* [2001] ZACT 40 (23 October 2001).

²⁴ Section 58(1)(c) of the Act provides:

“In addition to its powers in terms of this Act, the Competition Tribunal may –

(c) subject to sections 13(6) and 14(2) condone, on good cause shown, any non-compliance

of –

(i) The Competition Commission or Competition Tribunal rules; or

(ii) a time limit set out in this Act.”

²⁵ *SAD* at 7.

[46] For all of the above reasons we conclude that the Commission had complied with section 50 of the Act and that the Parsons' complaint was validly referred to the Tribunal. Accordingly, the Good Year and Continental appeals must be dismissed with costs.

Order

[47] In the result, we order that:

1. The appeals in CAC Case No: 150/CAC/ June 2017 and CAC Case No: 151/CAC/June 2017 are dismissed with costs, including the costs of two counsel.



F KATHREE-SETILOANE AJA

DAVIS JP and ROGERS JA concurring

Appearances

Counsel for Continental:	J P V McNally SC with M Engelbrecht
Instructed by	Bowman Gilfillan Inc
Counsel for Good Year	A Gotz with N Lewis and L Nyangiwa
Instructed by	Judi Combrinck Inc
Counsel for the Competition Commission:	D Berger with S Kazee
Instructed by	The Competition Commission
Date of Hearing:	9 April 2018
Date of Judgment:	27 September 2018