Competition Law
ALERT

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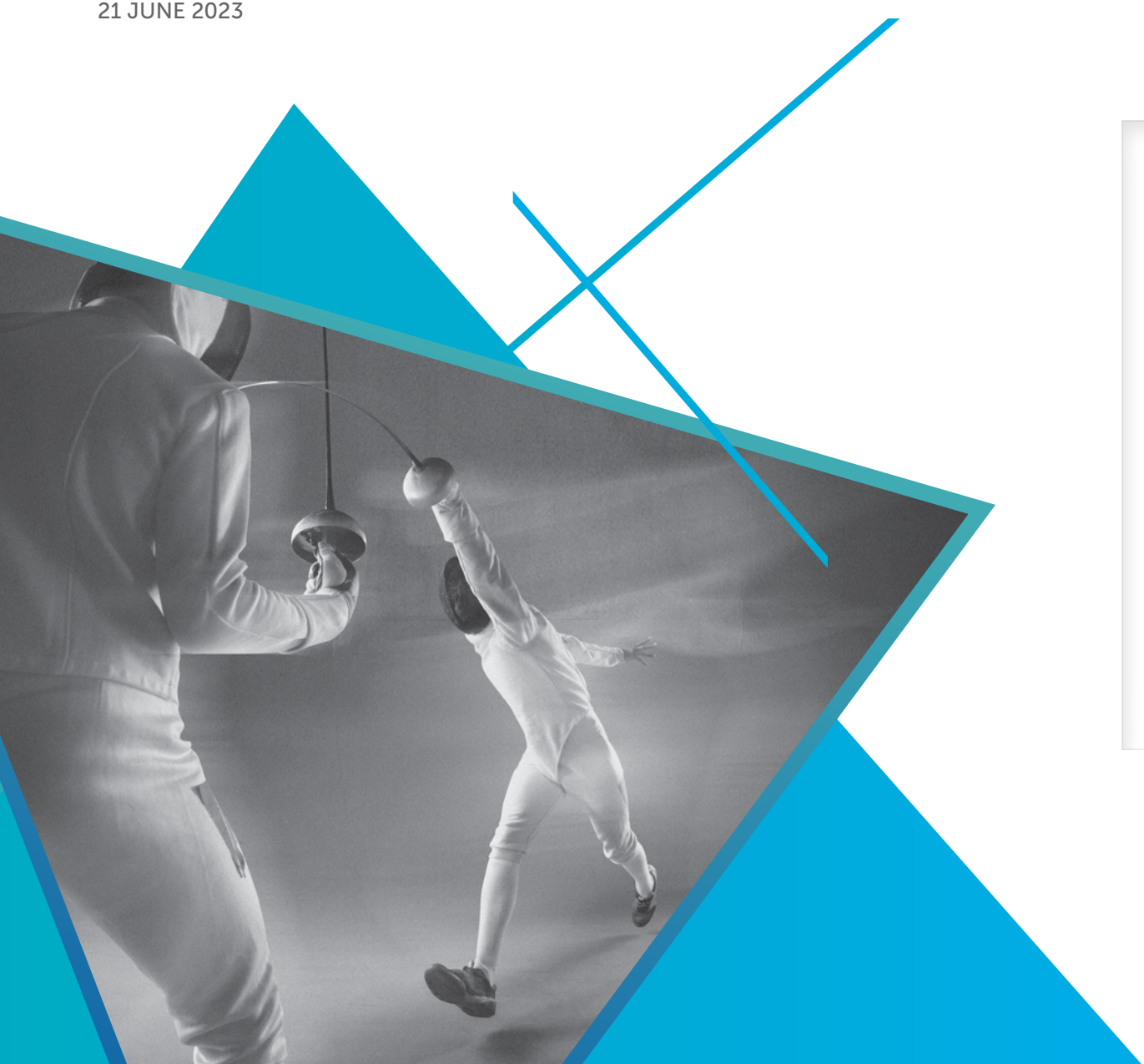

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Ain't no appeal wide enough[1]: New rules for appeals arising from market inquiries

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The amended Competition Act 89 of 1998 (Act), specifically Section 43F, empowers firms that have been materially and adversely affected by the Commission's determinations in an inquiry to lodge an appeal with the Competition Tribunal (Tribunal).

The Appeal Rules create a unique category of administrative appeal; one which is narrow in nature, or wider, depending on whether a party successfully applies to adduce new evidence.

This confusion is bound to set the battle ground for interlocutory squabbles which will ultimately delay the implementation of any of the Commission's remedial determinations.

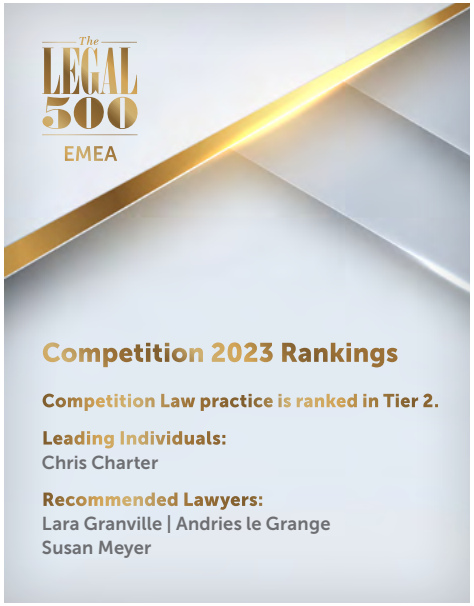
Administrative appeals

As the Commission and Tribunal are creatures of statute, whose abilities are defined by the four corners of the Act, appeals arising from market inquiries are inherently administrative appeals. These should be distinguished from judicial appeals.

In the realm of administrative procedure, the High Court has held that administrative appeal bodies can conduct one of two broad categories of appeal[2]:

- A wide appeal: denotes appeals which allow for the complete re-hearing of evidence and fresh determination on the merits of the matter.
- An ordinary/narrow appeal: involves a limited reconsideration of the merits, focusing solely on the evidence or information that formed the basis of the appealed decision.

In the context of administrative appeals, there is some room to argue that an 'appeal' includes a **review** process, which rather focuses on **the way** in which the decision was reached, and not on the justice or correctness of the decision itself.



[1] With apologies to Mr Marvin Gaye.
[2] *Tikly v Johannes N.O [1963] (2) SA 588 (T) at 590F-519A.*

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In this regard, only those appeal bodies empowered to conduct wide appeals would have the ability to review decisions because reviews may require the secondary decision-maker to consider new evidence.

Practically, the distinction between a wide and ordinary appeal is important because it serves as an indication of the remedial powers an administrative appellate body might justifiably exercise. In a narrow appeal, an appellate body would not be entitled to correct illegalities committed by the administrator and would more likely be obliged to remit the impugned decision back to the initial decision-maker. In a wider appeal, the appellate body would be more likely able to substitute the decision of a lower decision-maker with its own.

Baxter argues that there are certain key pointers in legislation which indicate the existence of a wide appellate jurisdiction. These are:

- Presence of record: if there is no provision for the keeping of a record by the primary decision maker, the appeal jurisdiction will almost certainly be wide.
- Procedural powers: where the procedural powers of the appeal body are identical to those of the administrator, this is a strong indication of a wide appeal.
- Decisional powers: where the decision of the appellate body is deemed to be that of the administrator, a wide appellate jurisdiction is intended. A narrower appeal jurisdiction may be intended where the appellate body is empowered only to substitute, confirm, vary, or set aside the original decision.

Courts have grappled widely with the distinction between wide and narrow appeals:

In *Caledonian Airways v Transnet t/a South African Airways* [1997] 1 All SA 673 (W), section 37 of the Air Services Act 60 of 1993 was deemed to confer wide appeal power because the initial decision-maker had no obligation to keep a record. A failure to keep a record was also the court's reasoning in finding that an appeal under section 20 of the Health Professions Act 56 of 1974 amounted to a wide appeal in *Emergency Medical Supplies v Health Professions Council of South Africa* [2011] JDR 1450 (WCC).

In *Nichol v Registrar of Pension Funds* [2008] (1) SA 383, the court found that the Financial Services Board Act 97 of 1990 conferred wide appeal powers by virtue of allowing an appeal board to exercise all the powers of a High Court, including summoning and examining witnesses and calling for the production of books, documents, and objects. The same was found to be true for the Medical Schemes Act 131 of 1998 in *Cotty and Others v Registrar, Council for Medical Schemes and Others* [2021] (4) SA 466 (GP).

In *Steyn v Registrar of Medical Schemes and Others* [2021] (3) SA 551 (WC) the appeal board was again found to possess wide appeal powers and could consider a document that was not before the initial court.

In the case of *Somali Association of South Africa and Others v Refugee Appeal Board and Others* [2022] (3) SA 166 (SCA), the Refugee Appeal Board was found to have wide appeal

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powers concerning appeals arising from the determination of refugee status determination officers, which was not confined to the record of such officers.

In each instance, there were clear legislative markers indicating an intent towards wide appeal jurisdiction even if there was no real reference to wide or narrow appeals within the text.

Appeals arising from a market inquiry

Market inquiry appeals are unique in that the Act and Appeal Rules, contain elements of wide and narrow appeals.

Section 43F(2) of the Act grants the Tribunal the power to confirm, amend, or set aside the determination under appeal. Section 43F(3-5) establishes the process to be followed in remitting the decision back to the Commission pursuant to an appeal. On Baxter's criteria, the Tribunal's appeal jurisdiction would seem to be narrow in scope, as the Tribunal is constrained in its ability to substitute its own decision for the decision in question.

Section 43F(2)(c) presents room for some pause. It affords the Tribunal the ability to *"make any determination or order that is appropriate in the circumstances"* after hearing an appeal. This remedial power may be viewed as one allowing the Tribunal to pronounce on the merits of a decision and substitute the order of a lower court with one of its own. Proponents for the narrower interpretation would argue that what is *"appropriate"* would be determined by the resolution of the wide/narrow debate.

The Appeal Rules themselves are equally unhelpful in determining the matter.

Rule 2 of the Appeal Rules confines an appeal to the market inquiry record. This confirms that the Commission has an obligation to maintain a record throughout its market inquiry. This, along with the confinement of appeal to the record, are both characteristic of narrow appeals.

In terms of procedure, the market inquiry appeal mirrors an appeal of a decision of the Tribunal to the Competition Appeal Court (CAC), which is a narrow appeal process:

- a party files a notice of appeal within 25 days of the Commission's report;
- a record is prepared by the Commission within 40 days;
- the appellant is permitted to supplement the appeal record only with other information it deems relevant from the broader market inquiry record;

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- the Commission and appellant thereafter file heads of argument; and
- a hearing is convened allowing to the parties to present oral argument.

There is one large thorn in the side of the proponents of the narrow appeal. The Appeal Rules allow for an appellant to bring an application to submit new evidence. The Appeal Rules require the Tribunal to grant such an application only under "*exceptional circumstances*" if the appellant party can provide a reasonable explanation for not presenting the evidence during the market inquiry, establish its relevance to the issues before the Tribunal, prove its weightiness and materiality, and demonstrate that it is incontrovertible or easily verifiable.

The ability of an appellate body to consider new evidence is the hallmark of a wide appeal. Where appellants are successful in their application to present new evidence, there can be no question that the appeal will become a broad one. In amplification, the Appeal Rules do not specify how appeals with new evidence are to be conducted. In these cases, the Tribunal will likely rely on its inherent authority to regulate its own procedures and establish a process in which the appellant evidence can be led by the appellant and tested by the Commission.

Implications of the Appeal Rules

The Appeal Rules envision both types of appeal: wide and narrow. The determination of the type will depend on whether the appellant meets the rigorous criteria for introducing new evidence. This decision will significantly impact the various aspects of the appeal, including the available remedial actions for the Tribunal.

In the case of an ordinary or narrow appeal, the Tribunal's considerations will be bound to the record and it will be obliged to follow the procedures set out in section 43F(3-5) and remit the matter to the market inquiry for further consideration.

Where new evidence is permitted, the appeal becomes a broad one and the Tribunal's ability to regulate its own affairs is engaged. Theoretically, the Tribunal could allow the Commission to test the appellant's evidence. If it does so, it would undoubtedly be bound to ascribe more weight to such evidence than to the untested market inquiry evidence. Thereafter, remitting the decision back to the market inquiry would be unwise. By this stage the Commission may have opposed the application to adduce the new evidence and fought the weight of the evidence before the Tribunal. There would be little hope of an unbiased decision, should the

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matter be remitted. Here the Tribunal should feel comfortable 'slipping into the shoes' of the market inquiry and making the decision afresh.

Although not squarely the fault of the Appeal Rules, the appeal process is bound to place more of a burden on the Competition Tribunal.

First, with the admission of new evidence or in seeking to conclude on the nature of the appeal process, there is likely to be a barrage of interlocutory applications.

Then, in the case of narrow appeals, panel members will need to grapple with extensive appeal records and intricate heads of argument without the benefit of witness testimony or evidence leaders, or the inquisitorial powers they're used to exercising.

In the context of wide appeals, the Tribunal will most likely need to burn many calories by closely regulating hearing procedures; constantly balancing the specter of deference to the market inquiry proceedings with the new evidence they have been provided with.

Conclusion

The newly introduced Appeal Rules aim to ensure administrative fairness and accountability within market inquiries by providing a mechanism for challenging the Commission's determinations. However, their implementation presents many challenges.

Appellants of the Commission's findings will need to carefully consider their options in launching an appeal and will, amongst other things, need to carefully assess the need to bring an application to present new evidence if they wish to invoke the Tribunal's wider appeal powers.

The debates surrounding the ambit of appeals to the Tribunal against market inquiry remedies or finding will occur against the backdrop of possible challenges from a constitutional and administrative law perspective, adding to the factors that will need to be considered by a potential appellant in addition to a consideration of the scope of the appeal rights.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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