IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
(HELD AT PRETORIA)

Case No: 20/CR/Apr10

In the interlocutory applications of:

COMPUTICKET (PTY) LTD Applicant

And

THE COMPETITION COMMISSION Respondent

In Re:

THE COMPETITION COMMISSION Applicant

And

COMPUTICKET (PTY) LTD Respondent

Panel : Yasmin Carrim (Presiding Member),

Andreas Wessels (Tribunal Member) and

Lawrence Reyburn (Tribunal Member)

Heard on : 18 November 2011

Decision and order issued on : 22 March 2012

Decision and Order

Introduction

1] On 18 November 2011 the Tribunal heard three interlocutory applications between the parties in this matter. These applications arose in the context of an application brought by Computicket (Pty) Ltd ("Computicket") for the dismissal of a complaint referred by the Competition Commission ("the Commission") against it.

2] The grounds upon which Computicket seeks to have the complaint referral set aside are numerous but can be summarised as follows:

[2.1] The Commission is not empowered under section 50 of the Competition Act (No. 89 of 1998) (the "Act") to refer to the Tribunal a complaint which it has not itself initiated (i.e. which has been submitted to it by another person);.

[2.2] The Commission did not exercise its powers under section 49B and 50 of the Act *"reasonably, objectively and in good faith"* in that its complaint referral against Computicket *"lacks an evidential basis";*

[2.3] The complaint referral against Computicket is "*not consistent"* with the information obtained by the Commission during the course of its investigation, and is *"not sustained"* by that information or by the witness statements filed by the Commission;

[2.4] The Commission did not "*fairly assess"* the facts obtained during its investigation in deciding to refer the complaints against Computicket;

[2.5] The Complaint referral against Computicket displays a *"lack of good faith"*, and is "*vexatious"* in that the Commission's witness statements do not establish the *"Commission's case of prohibited practices entailed by the complaints"*, and "*canvass other matters outside the referral and/or which do not advance the complaints"*; and

[2.6] The Commission's witness statements *"establish no good faith basis capable of supporting expert evidence directed at confirming the allegations of prohibited practices contained in the complaints"*.

3] The Commission in answer to the dismissal application submits that as far as the challenge on the basis of factual issues is concerned the application is premature. Discovery is still under way in pre-trial preparations and further factual witness statements (Computicket's) and expert witness statements have yet to be filed. The full ambit of the evidence in this case is not yet known to the Tribunal and the

Tribunal is being asked to prematurely evaluate the evidence of witnesses without the benefit of cross-examination. In relation to the other grounds the Commission, relying on a number of decisions of the High Court and Supreme Court of Appeal (SCA), answered *inter alia* that the decision of the Commission to refer a matter to the Tribunal did not constitute an administrative act capable of being reviewed under PAJA[1]. If it was reviewable at all it would only have to meet the Constitutional standard of rationality.

4] The merits of the dismissal application are yet to be decided; we set out the details solely for context and because the interlocutory applications by both parties were motivated by reference to that application.

5] The interlocutory applications are -

- An application by the Commission that the Tribunal permit the filing of a supplementary answering affidavit in the dismissal proceedings (this application is referred to below as "the condonation application");
- An application by Computicket seeking a strike-out of documents inserted by the Commission into the record of the dismissal application; and
- An application by Computicket to compel discovery of the Commission's reports and recommendations which served before the Commissioner and/or the Commission's Executive Committee when the decision to refer the complaint referral was taken.

Background

6] The Commission filed a complaint referral against Computicket on 30 April 2010. The Commission's referral arises from five complaints that were lodged during the period 2008/2009 by the following complainants: Strictly Tickets CC, Soundalite CC (trading as Artslink), KZN Entertainment News and Reviews CC (trading as Going Places), L Square Technologies CC (trading as TicketSpace), and Ezimidlalo Technologies CC. The complainants compete with Computicket in the market for the provision of outsourced ticket distribution services to theatre owners, theatre producers, promoters and festival event organisers (the so-called "inventory providers") in the entertainment industry. Because the complaints raised overlapping issues, the Commission combined them for purposes of its investigation and subsequent referral ("the referral").

7] In the referral the Commission alleges that Computicket is engaged in on-going prohibited conduct by imposing exclusivity provisions in the contracts it concludes

1 Promotion of Justice Act (No. 3 of 2000).

with the inventory providers, thereby preventing them from using any other ticketing provider. This conduct, according to the Commission, is in contravention of section 8(d)(i), alternatively section 8(c) and/or section 5(1) of the Act.

8] Computicket filed its answering affidavit to the referral and the Commission filed its reply thereto on 30 June 2010 and 30 July 2010 respectively. The matter was set down for hearing from 18 to 29 July 2011.

9] Pre-trial preparations then got under way. Both parties were engaged in discovery of documents. On 04 April 2011 the Commission filed an urgent application for further and better discovery in which it required Computicket to produce certain categories of documents.[2] Computicket did not file an answer to this application. Notwithstanding this discovery application the Commission proceeded to file its factual witness statements (in order to comply with the agreed timetable) on 05 April 2011. It filed further factual witness statements on 11 and 19 April 2011.

10] On 12 May 2011 Computicket filed an application for the dismissal of the complaint referral against it. The Commission filed its answering affidavit in that application on 17 June 2011 and Computicket its replying affidavit on 01 July 2011.

11] A second pre-hearing meeting was held on 02 June 2011, and it was agreed that the two applications (the Commission's discovery application and Computicket's dismissal application) would be heard on 21 and 22 July 2011.[3] The ruling that the complaint referral be heard in the period 18 to 29 July 2011 was rescinded.

12] Due to circumstances beyond our control, the hearing of the two applications could not go ahead on 21 and 22 July as scheduled and this hearing was rescheduled to a later date.

13] On 03 August 2011 the Commission filed a supplementary affidavit in the dismissal application proceedings. Computicket objected to the filing of this affidavit and informed the Commission that it would only discuss the way forward in the dismissal

2 In terms of the timetable agreed by the parties at the pre-hearing of 16 November 2010, a hearing on any dispute on discovery and/or confidentiality was to take place on 17 March 2010. However, no such application was filed with the Tribunal. We were informed by the Commission that the reason it held off filing its discovery application was that Computicket had stated (in a letter dated 28 February 2011 and in response to the Commission's request for further and better discovery) that it would file a supplementary discovery affidavit in due course which would include some of the additional documents requested by the Commission. The Commission submits that upon inspection of the supplementary discovery affidavit (filed on 29 March 2011), it became apparent that Computicket had discovered very few of the requested documents.

3 We further provisionally set aside 07 to 18 November 2011 for the hearing of the merits of the case (in the event that Computicket was unsuccessful in its dismissal application).

application after the Commission had filed a condonation application and once Computicket had answered it. The condonation application was filed by the Commission on 19 August 2011. Computicket filed its answer to it on 02 September 2011.

14] The dismissal and the condonation applications were both set down for 13 October 2011.

15] On 05 October 2011 Computicket submitted indices for both applications. On 06 October 2011 the Commission submitted a "consolidated index" in the record of the dismissal application, listing additional documents. Computicket objected to the inclusion of the additional documents on the ground that they were not properly before the Tribunal and should have been annexed to the Commission's answering affidavits. Computicket therefore requested (in a letter dated 11 October 2011) that the matter be postponed so as to give it an opportunity to study the additional documentation.

16] A letter was sent by the Tribunal to the parties confirming that the hearing would proceed as planned and that the dispute regarding the additional documents would be dealt with first.

17] At the hearing on 13 October 2011 it emerged that at least one of the documents listed in the Commission's consolidated index and inserted into the record had not been previously discovered. Consequently both the Commission and Computicket requested a postponement of the matter to afford Computicket an opportunity to examine the undiscovered document and to respond to the inclusion of the additional documents. The request was granted. At that hearing Computicket for the first time mentioned that it would also be filing an application requiring the Commission to discover the internal report(s) or recommendations made to the Commissioner in support of its referral.

18] Subsequently Computicket elected to bring a strike-out application in relation to all the documents that the Commission had inserted into the record on 06 October 2011 and an application to compel discovery of the Commission's internal documents. Directions were later sent to the parties confirming that the Commission's condonation application and Computicket's two applications, i.e. the strike-out and discovery applications, were set down for 18 November 2011. The dismissal application was postponed to 13 December 2011.[4]

The Commission's Condonation Application

4 At the end of the 18 November 2011 hearing it was postponed *sine die*.

19] The application referred to above as the condonation application in essence seeks leave for the Commission to file the supplementary affidavit in the dismissal application. Computicket opposes this application on the basis that supplementary affidavits cannot simply be filed without leave of a court and that in this matter no valid reason for permitting the filing of an additional affidavit has been made out.

20] We were asked by Computicket to have regard to the factors that a High Court would take into account when deciding such an application. These would include factors such as the reason why the evidence was not produced timeously; the degree of materiality of the evidence; the possibility that the evidence may have been shaped to "relieve the pinch of the shoe"; the balance of prejudice to the applicant and to the respondent if the application is granted; the stage that the litigation has reached, the "healing balm" of an appropriate costs order and a general need for finality in judicial proceedings.

21] This Tribunal often refers to the practice or procedure in the High Courts in cases not provided for in its own Rules.[5]

22] The general rule in the High Court is that while only the three sets of affidavits namely the founding, answering and replying affidavits are usually permitted, a court may in its discretion permit the filing of further affidavits.[6] This is because the courts consider that the parties should normally be permitted to have the case adjudicated on the full facts. However an explanation is required for the filing of an additional affidavit and a court must be satisfied that the applicant for the admission of the additional affidavit into the evidence did not act *mala fides* and was not culpably remiss. A court will exercise its discretion subject to considerations of fairness and justice. [7]

23] In this case the Commission's explanation for the supplementary affidavit is as follows. When the dismissal application was lodged the Commission had taken the view that there was sufficient authority in law for the proposition that the decision by the Commission to refer a complaint to the Tribunal in terms of section 50(2) was not an administrative act capable of being reviewed under the grounds of reasonableness in section 6 of PAJA but only under the constitutional standard of rationality. This

5 See Tribunal Rule 55(1)(b).

6 Harms Civil Procedure in the Supreme Court B6.38.

7 Harms above.

approach was in the Commission's view supported by the SCA's decision in the *Seven Eleven* case.[8] When the Commission had regard to the founding affidavit in the dismissal application it took the view that Computicket had not made out a rationality ground of review. Accordingly the Commission considered that it was unnecessary to provide details of every fact it had at its disposal at the time it made the decision to refer the complaint to the Tribunal ("the referral decision").

24] However when Computicket filed its replying affidavit it challenged the Commission not on the legal issues but on its *bona fides,* suggesting that the Commission had not made a clean breast of things with the Tribunal. It was for this reason that the Commission felt it necessary to file the supplementary affidavit in which it sought to and placed before the Tribunal all the information it had at the time it made its referral decision. However the Commission still persists with its first line of defence, namely that on the basis of the prevailing jurisprudence Computicket has not made out a case of irrationality and that there is no need for the Tribunal to have regard to any evidence in order to decide the dismissal application. But in the event that the Tribunal may favour Computicket's approach, the Commission wishes to have all the relevant facts before the Tribunal. These facts and the underlying documents were placed before the Tribunal through the supplementary affidavit. The underlying documents referred to in the supplementary affidavit had all by then been discovered (except one, as was later found).[9]

25] We find the Commission's explanation reasonable. It sought to advance a defence on the basis of the decisions of the High Court and the SCA (discussed later). It still persists with its initial answer, namely that Computicket had not made out a case of irrationality. However it has elected to place before us information in the abundance of caution, having been alerted to Computicket's argument of irrationality only on receiving Computicket's replying affidavit.

26] Moreover the evidence placed before us through the supplementary affidavit is potentially highly material to the determination of the matter. Recall that Computicket has asked us to dismiss serious allegations of anti-competitive conduct levelled against it. It seeks to do that only on an *ex-facie* reading of the Commission's referral, the Commission's witness statements and a handful of discovered documents. In other words we are being asked to dismiss the complaint on the basis of evidence of a factual nature but without the benefit of cross-examination or the benefit of the evidence of the other side. This is a highly novel approach. In both civil and criminal proceedings absolution from the instance or dismissal of the State's case is applied for *after* evidence of one of the parties has been led and its witnesses

8 Simelane NO v Seven-Eleven Corporation SA (Pty) Ltd 2003 (3) SA 64 (SCA).

9 This had been regularised by the time of the hearing by the filing of an affidavit.

have been cross-examined. Likewise in opposed motion proceedings a high court will not dismiss an application simply on the basis of the facts made out in the applicant's affidavit but on all the evidence before it.

27] If we are being asked to dismiss the Commission's referral on the basis of deficiency of the *evidence* before us then it would not be in the interests of justice for us have only partial sight of that evidence. All the relevant facts must be placed before us, not only those that are selected by one side.

28] We cannot see what prejudice would be caused to Computicket by the inclusion of the Commission's supplementary affidavit in the evidence. Indeed Computicket's own case might be assisted if we have regard to *all* the relevant facts.

29] In the circumstances the Commission is granted leave to file its supplementary affidavit.

Computicket's Strike-Out Application

30] In this application Computicket seeks an order to strike out the 334 pages that the Commission had unilaterally added to the record that had been prepared by Computicket's attorneys for purposes of the dismissal application hearing.

31] It is not unusual for parties in a matter to prepare a joint trial or hearing bundle of relevant documents with a jointly prepared index. However this is usually done by agreement between the parties and/or by direction of the Tribunal. It is also common for parties to prepare separate bundles, arranged at their separate convenience. The Commission's conduct in this case was quite unusual. It sought neither the agreement of Computicket's attorneys nor the direction of the Tribunal. It simply went ahead and inserted 334 pages into the bundle prepared by Computicket's attorneys.

32] The 334 pages consisted of a mix of documents – affidavits, heads of arguments and documents that had been discovered by the Commission over the previous six months. (As stated above, it subsequently emerged at the hearing on 13 October 2011 that one document had not been discovered.[10]) The Commission's explanation for doing this was that for convenience's sake it decided after receiving Computicket's replying affidavit to place all the relevant documents in front of the Tribunal in one bundle.

10 By the time of the hearing of this matter however the Commission had regularised this by the filing of an affidavit.

33] Computicket also complained about the piecemeal manner in which the Commission had discovered its documents[11] thereby implying that the Commission did not have the discovered documents in its possession when it had made the decision to refer the matter to the Tribunal and therefore fell short of the requirement in the *Woodlands* test. [12]

34] Mr Gauntlett on behalf of Computicket argued that because the SCA in *Woodlands* required that the Commission must have before it, at the stage of deciding to initiate a complaint, evidence which when viewed objectively would support the decision to refer a complaint to the Tribunal, the Commission had to show that it was in possession of that evidence at the time of its decision to refer the complaint to the Tribunal. The Commission's piecemeal discovery was indicative, so Computicket asserted, of the fact that the Commission had not had evidence before it at the time when it made its referral decision sufficient to meet the test set out in *Woodlands*. Hence, it was contended, the evidence or documents that the Commission had produced over the preceding six months and which it sought to include in the record of the dismissal application ought to be struck out.

35] We were told that the "test now established by the SCA and followed by the CAC, is whether or not there was before the Commission in taking the referral decision such material, as objectively viewed, <u>founded a reasonable suspicion of the facts necessarily entailed by the complaints</u>".[13] This test was also relied upon by Computicket in its application to compel, which we discuss later.

36] In *Woodlands* at para 13 the court states –

> "*A complaint has to be 'initiated'. The commissioner has exclusive jurisdiction to initiate a complaint under s49B(1). The question then arises whether there are any jurisdictional requirements for the <u>initiation</u> of a complaint by the commissioner. I would have thought, as a matter of principle, that the commissioner must at the very least have been in possession of information 'concerning an alleged practice' which objectively speaking, could give rise to a reasonable suspicion of the existence of a prohibited practice. Without such information there could not have been a rational exercise of power.*" (our emphasis)

37] The paragraph clearly refers to the initiation of a complaint. The court asks and

11 The Commission has discovered documents on some seven occasions.

12 Woodlands Dairy (Pty) Ltd & Another v Competition Commission [2010] JOL 26108 (SCA).

13 Para 8 of Computicket's Founding Affidavit.

answers the question whether there is a jurisdictional requirement for an initiation. Nothing is said about the nature of the evidence which the Commission should possess at the time of the Commissioner's decision to *refer* the complaint to the Tribunal.

38] Nowhere else in the decision by the SCA in *Woodlands* is such a test to be found and no other authority was put before us to define the nature and characteristics of the evidence which should be possessed by the Commission at the time when the Commissioner decides to refer a complaint that has been duly initiated. However it does not behove us to pursue that question in these proceedings -- it will arise in the dismissal application which has still to be heard. The only question we can properly decide in this context in these proceedings was whether the Commission's conduct in filing its discovery was tainted by *mala fides*.

39] The question is then whether Computicket has made out such a case of *mala fides* on the part of the Commission. The alleged grounds for the existence of *mala fides* are in our view lame and unconvincing. They come down merely to the piecemeal and sporadic nature of the Commission's discovery and its conduct in unilaterally adding documents to the record, as discussed above. In our view the Commission's piecemeal discovery and its unilateral and initially unexplained expansion of the index and bundle of documents in the record appear to be more a case of poor case management than *mala fides*. Indeed on one occasion discovery of a document was made only after Computicket insisted that the Commission ought to have it in its possession, and after a search it was in fact found by the Commission to be in its possession and was duly produced in discovery.[14] As was explained by Mr Wilson, who represented the Commission at the hearing, the core of the matter was that Commission's central registry did not operate at the desired level of efficiency. It seems that because personnel of the Commission from different divisions worked on the investigation, "the documents were in many different places". The fact that this represented poor case management or inexperience on the part of the Commission's officials who dealt with different aspects of the case is supported by the fact that documents such as heads of argument were among the late additions to the bundle.[15]

40] The application to strike out is accordingly dismissed. However the Commission is ordered to compile a separate bundle of its discovered documents with its own index, even at the cost of some duplication, for the purposes of the dismissal application.

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14 Transcript, page 9, 18 November 2011 hearing.

15 These are usually given up by Counsel at the hearing or placed in a separate file for Tribunal members.

Computicket's Application to Compel Discovery

41] At the hearing on 13 October 2011 Computicket took the opportunity to indicate for the first time that it intended to apply for the production of the Commission's internal reports or recommendations on the basis of which the Commission made its referral decision.

42] We subsequently made an order, by agreement between the parties, that *inter alia* Computicket could bring any application for the discovery of the documents founding the referral by 26 October 2011.[16]

43] That application was brought. In it Computicket seeks the discovery by the Commission of "all materials including the report(s) and the recommendation(s) to the Competition Commissioner and/or the Executive Committee of the Commission based on which the decision to refer the complaints of alleged abuses of dominance against Computicket was taken". The request is referred to as "the recommendation".

44] The Commission resists the production of these documents on what we understand to be three grounds The first is that discovery in application proceedings is a discretionary remedy granted only in exceptional circumstances. The Commission argues that Computicket has failed to make out any such circumstances and the Tribunal ought not to exercise this discretion when the documents sought are restricted under rule 14(1)(d) of the Rules for the Conduct of Proceedings in the Competition Commission (Commission's rules). Second, insofar as the documents have not already been discovered by the Commission, they are subject to litigation privilege. There is a third ground, that the request is vague and incapable of enforcement.

45] Computicket argues that there are compelling reasons why the Tribunal should order production of the documents, that rule 14 does not assist the Commission, and it denies that the request is vague or incapable of enforcement.

46] Rules 14(1)(d) and (e) provide –

> *"14 (1) For the purpose of this Part, the following five classes of information are restricted:*
> *.....*
> *(d) A document*

16 See order dated 13 October 2011.

(i) that contains –

(aa) an internal communication between officials of the Competition Commission, or between one or more such officials and their advisors;

(bb) an opinion, advice, report or recommendation obtained or prepared by or for the Competition Commission;

(cc) an account of a consultation, discussion or deliberation that has occurred, including, but not limited to, minutes of a meeting, for the purposes of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed on the Commission by law; or

(ii) the disclosure of which could reasonably be expected to frustrate the deliberative process of the Competition Commission by inhibiting the candid –

(aa) communication of an opinion, advice, report or recommendation; or

(bb) conduct of a consultation, discussion or deliberation; or

(iii) the disclosure of which could, by premature disclosure of a policy or contemplated policy, reasonably be expected to frustrate the success of that policy.

(e) Any other document to which a public body would be required or entitled to restrict access in terms of the Promotion of Access to Information Act 2000 (Act No 2 of 2000)."

47] The recommendation, which contains internal documents of the Commission, clearly falls within the classes of documents contemplated in rules 14(1)(d)(i)(aa), (bb) and (cc) and constitutes restricted information. [17]

48] Documents in these sub-rules, unlike those in sub-rule (1)(c), continue to be restricted information after the Commission has referred a complaint to the Tribunal. Access to such information could however be granted to persons contemplated in rule 15 or by the Tribunal.[18]

17 We are not concerned with those documents which might form part of the Commission's recommendation but which do not fall into any of the categories contemplated in rule 14(1)(d).

18 See Commission Rule 15.

49] It is trite law that discovery in application proceedings is a rare and unusual procedure and that it should be ordered only in exceptional circumstances. It is also established law that this Tribunal has the discretion to order discovery of documents and to order production of documents that might otherwise be confidential or restricted, as in this case by rule 14.[19]

50] We start our enquiry by considering whether there are compelling reasons for ordering the production of documents that would otherwise be restricted information under rule 14. If we find that there are no compelling reasons for the production of these documents the matter rests. If we find that there are indeed compelling reasons we will then look to see whether the production will have a chilling effect on the deliberative process of the Commission or whether they are protected by the claim of privilege.

51] Computicket argued that because it has brought an application for the dismissal of the Commission's referral on the basis of the test laid down in *Woodlands*, the Commission is obliged to produce its recommendation. This recommendation will assist the Tribunal, when it hears the dismissal application brought by Computicket, in assessing whether at the time the decision was made to refer the complaint to the Tribunal, there was such material before it that "*objectively founded a reasonable suspicion that Computicket has contravened the Act in the manner set out in the complaint referral*".[20]

52] We have already referred to the *Woodlands* case in our earlier discussion and have not found support in it for the test formulated by Computicket.

53] But let us for present purposes assume in Computicket's favour that *Woodlands* did establish such a test. The standard would then be "*the objective assessment of information in front of the Commission, when it made the decision to refer the complaint to the Tribunal, giving rise to a reasonable suspicion of the existence of a prohibited practice*". The requirement would be for the Commission to have information of this nature before it at that time.

54] This Tribunal has previously held that the reports and recommendations of the Commission are nothing but the views of the Commission and its staff or its advisors, where these opinions have been sought, and would not be relevant or even admissible in Tribunal proceedings.

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19 *Netcare Hospital Group (Pty) Ltd v Community Hospital Group (Pty) Ltd, Case No: 68/LM/Aug08, Astral Operations Ltd v Competition Commission, Case No: 74/CR/Jun08. See also section 54 and 55, Commission rule 15(1)(b)(ii).*

20 Paras 8 and 12 of Computicket's heads.

55] In *Astral* the Tribunal concluded –

> "*.....Of the documents sought in this case, Astral's claims for access to the Commission's internal deliberations is the weakest. They reflect the opinion of the Commission and its staff on their case, matters that would never be relevant or admissible in our proceedings*."[21]

56] Since these reports would only constitute the views of the Commission and its staff, we cannot see how disclosure of these documents would assist Computicket in applying this notional standard in which information when objectively viewed founded a reasonable suspicion that a prohibited practice had occurred. It would be the information and not the Commission's interpretation of or views about that information that is relevant for the test as so formulated.

57] The Commission has already discovered all the information it had before it at the time of the referral through the seven discovery affidavits referred to earlier in this decision. The documents containing this information have been placed before the Tribunal in the expanded bundle. There is no need, even on Computicket's own version, for the Commission to produce the recommendation.

58] To sum up, we do not consider that *Woodlands* creates the test propounded by Computicket in relation to the Commission's referral. Even if Computicket were correct in this assertion, the test requires an objective assessment of the information before the Commission at the time when it decided to refer and not an assessment of the Commission's views. Hence there is no compelling case for us to order the disclosure of the Commission's recommendation.

59] The remaining issues to deal with are the challenges made by Computicket regarding rule 14.

60] The first of these is the claim by Computicket that the recommendation, i.e. a document contemplated in rule 14(1)(d), has lost its restricted status by the passage of time as a result of rule 14(1)(c).

61] Rule 14(1)(c) is limited to certain classes of information listed in 14(1)(c)(i)-(iii).

62] Rule 14(1)(c)(i) provides that –

> "*The Description of Conduct attached to a complaint and any other information received by the Commission during its investigation of the complaint is restricted*

21 Para 31 and 32.

information until the Competition Commission issues a referral or notice of non-referral in respect of that complaint, but a completed form CC1 is not restricted information".

63] The ordinary language of the rule clearly relates to the conduct complained of by a complainant and *information* received by the Commission *in the course of its investigation* of that complaint. The rule does not apply to communications *between* officials and employees of the Commission or opinions or advice that may have been sought by the Commission from its own advisors in preparation for its report to the Commissioner or Executive. If the rule did apply to all categories of information or documents in the possession of the Commission then there would have been no need for the legislature to carve out further special classes of restricted information in rules 14(1)(a), (b), (d) or (e). Rule 14(1)(c) would have simply read as "*all information in the possession of the Commission*". This is not what the rule says and to adopt such a blanket interpretation of it would render meaningless the other sub-sections of the rule. For example if we would adopt the construction pressed upon us by Computicket, the protection offered by rule 14(1)(a) to respondents in respect of confidential information such as turnover figures or customer identities, would also fall away at the date of referral. This would be undermining of the provisions of section 45 and prejudicial to the owners of that information.

64] This conclusion is further supported by the language of rules 14(1)(c)(ii) and (iii) which contain similar language in relation to the Commission's investigation of a merger and its consideration of an application for exemption. Computicket is not assisted by rule 14(1)(c).

65] A second argument raised against the Commission's reliance on rules 14(1)(d)(i) and (ii) was that the Commission had not set out a factual basis to seek the protection of 14(1)(d)(ii). In other words if the Commission's recommendation was capable of being classified as an internal communication between officials of the Commission as contemplated within rule 14(1)(d)(aa) the Commission still had the onus, so Computicket asserted, of establishing a factual basis why its disclosure post referral cannot be said to "be reasonably expected to frustrate the deliberative process of the Competition Commission" . This argument is plainly wrong. Rule 14(d) (i)-(iii) taken as whole reads as follows :

> 1) *For purposes of this Part, the following five classes of information are restricted:*
>
> *.....*

(d) A document –

(i) that contains.....

(cc) ...Commission by law, ***or***

(ii) the disclosure of which ....

.....

(bb)... or deliberation; ***or***

(iii) the disclosure of which ....policy.

66] Rule 14(1)(d)(i), (ii) and (iii) are all to be read in the alternative as indicated by the use of the word "or" at the end of each section. On an ordinary reading, the rule does not require the Commission to show that a document is an internal communication (in (i)(aa)) *and* that the disclosure of it could reasonably be expected to frustrate the deliberative process of the Competition Commission (in (iii)).

67] In addition, categories (i), (ii) and (iii) of rule 14(1)(d) clearly deal with different types of documents. Category (i) deals with internal communications between officials or between one or more officials and their advisors, opinions, advice, reports, recommendations obtained or prepared, accounts of consultations, discussions and deliberations including minutes. No further qualification is attached to the documents described in category (i). Category (ii) deals with any other type of document that the disclosure of which could reasonably be expected to frustrate the deliberative process of the Commission by inhibiting candid communications or consultations as described in (aa) and (bb) thereof. Documents in this category could include documents contemplated in (i) above and any other document not specified in the rule above the disclosure of which could have the consequence contemplated. Finally, category (iii) deals with documents which may contain policy or contemplated policy.

68] In our view there was no need for the Commission, in order to claim that the information is restricted under rule 14(1)(d)(i), to set out any facts other than to allege that the recommendation fell into the categories of documents contemplated in that sub-rule. However the Commission is not precluded from making the argument, as it did in this case, that disclosure of otherwise restricted information ought not to be ordered because disclosure in these circumstances could reasonably be expected to frustrate the deliberative process of the Commission by inhibiting the candid communication of an opinion, advice, report, etc.

69] A further attack on rule 14 made by Computicket was that the rule was unconstitutional because it granted the Commission more extensive grounds on which to restrict information than was permitted by the provisions of PAIA. This argument is unfounded. Rule 14 does nothing more than echo section 44 of PAIA,

which reads as follows: [22]

44. Operations of public bodies-

1) Subject to subsections (3) and (4), the information officer of a public body may refuse a request for access to a record of the body –

a) If the record contains –

i) An opinion, advice, report or recommendation obtained or prepared; or

ii) An account of a consultation, discussion, or deliberation that has occurred, including, but not limited to, minutes of a meeting for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law; or

b) If –

i) The disclosure of the record could reasonably be expected to frustrate the deliberative process in a public body or between public bodies by inhibiting the candid –

(aa) communication of an opinion, advise, report or recommendation; or

(bb) conduct of a consultation, discussion, or deliberation; or

ii) The disclosure of the record could, by premature disclosure of a policy or contemplated policy, reasonably be expected to frustrate to success of that policy.

2) Subject to subsection (4), the information officer of a public body may refuse a request for access to a record of the body if –

a) The disclosure of the record could reasonably be expected to jeopardise the effectiveness of a testing, examining, or auditing procedure or method used by a public body;

b) The record contains evaluative material, whether or not the person who supplied it is identified in the record, and the disclosure of the

22 Promotion of Access to Information Act No. 2 of 2000.

material would breach an express or implied promise which was –

i) Made to the person who supplied the material; and

ii) To the effect that the material or the identity of the person who supplied it, or both, would be held in confidence; or

c) The record contains a preliminary, working or other draft of an official of the public body.

70] A final attack on rule 14 was made by Mr Gauntlett in argument. He argued that section 19(2) states that the Commission consists of the Commissioner and one or more Deputy Commissioners appointed by the Minister. Thus, he argued, wherever the word "Commission" appeared in rule 14 we should read that as applying only to communications between the Commissioner and the deputy Commissioner(s). When it was pointed out to Mr Gauntlett that section 19(1) also established the Commission as a juristic person and that the meaning of the word would be determined by the context in which it occurred, he conceded as much and the argument was dropped.

71] We find therefore that Computicket's application to compel has no merit and it is refused.

Costs

72] In *Omnia v Competition Commission*[23] we took the view that section 57 did not empower this Tribunal to award costs as between the Commission and respondents but could only do this as between complainants and respondents. In that decision we also held that this does not mean that costs could not be awarded against the Commission by the Competition Appeal Court in its proceedings. This view was confirmed by the CAC in *Omnia v Competition Commission*. [24]

73] Notwithstanding these decisions, Computicket persists with a request that the Tribunal award costs against the Commission occasioned by the postponement of the hearing on 13 October 2011.

74] Even if we were entitled to award costs against the Commission in terms of section 57, we would be inclined not to make such an award in this case for the following reasons.

75] At the hearing of 13 October 2011, and in response to Computicket's complaints

23 *Omnia Fertilizer Ltd v the Competition Commission, Case No: 31/CR/May05.*

24 *Omnia Fertilizer Ltd v the Competition Commission, Case No: 77/CAC/Jul08.*

about the Commission's supplementary affidavit and expanded bundle for the hearing, Computicket was asked by the Tribunal whether it could proceed with its argument in the dismissal case on the basis of the papers that had been filed to date. Computicket agreed that it could but stated that it needed more time to consider the arguments put up by the Commission in the supplementary affidavit and to examine properly the documents that had been placed in the bundle by the Commission. The Tribunal then adjourned to afford the parties an opportunity to discuss the matter. In response and by agreement the matter was resolved in the manner set out in the draft order.

76] The postponement afforded Computicket an opportunity to file its application to compel and for the Commission to file its condonation application.

77] At the hearing of this matter on 18 November 2011, and in order to ensure that the hearing of the dismissal application went ahead on 13 December 2011, the Chairperson enquired whether the parties were willing to accept an order on the merits of these applications, with reasons to be given with the reasons for the dismissal application. The Commission was amenable to this arrangement. Computicket however was not, on the basis that it might seek to appeal our decisions in these applications. The dismissal application was accordingly postponed *sine die*.

78] In our view neither party has been prejudiced by the postponement of the dismissal application. Computicket was provided with a proper opportunity to object to the supplementary affidavit and the bundle of documents, and used the opportunity moreover to file a discovery request. The Commission was provided with an opportunity to seek leave to file its supplementary affidavit and to regularise its additions to the bundle.

79] Accordingly there is no order of costs.

_____ **22 March 2012**

Yasmin Carrim Date

Andreas Wessels and Lawrence Reyburn concurring.

Tribunal Researcher : Ipeleng Selaledi

For the Commission	: J. Wilson and P.M.P. Ngcongo instructed by the State Attorney
For Computicket	: J. J. Gauntlett SC, L. Kuschke SC and M. J Engelbrecht instructed by Cliffe Dekker Hofmeyr Inc.