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COMPETITION TRIBUNAL OF SOUTH AFRICA

CASE NO: CR229MAR15/DSC124SEP15

In an Application to Compel between:

GROUP FIVE LTD	**Applicant**
and	
THE COMPETITION COMMISSION	**Respondent**

In re:

The complaint referral between:

THE COMPETITION COMMISSION	**Applicant**
and	
GROUP FIVE LTD	**First Respondent**
WBHO CONSTRUCTION (PTY) LTD	**Second Respondent**
MURRAY AND ROBERTS LTD	**Third Respondent**

Panel	:	Norman Manoim (Presiding Member)
		Medi Mokuena (Tribunal Member)

Imraan Valodia (Tribunal Member)

Heard on	:	30 October 2015
Final submissions received on	:	27 November 2015
Order and Reasons issued	:	18 January 2016

REASONS: APPLICATION TO COMPEL

INTRODUCTION

[1] This case asks the following legal question – at what stage of a complaint proceeding may a respondent require the Competition Commission to discover its investigative record?

[2] The Competition Commission ("Commission") has brought a complaint referral against Group Five Ltd ("Group Five") a construction firm, in which it alleges that the latter rigged a tender with the two other respondents in respect of a road rehabilitation project for the South African National Roads Agency Ltd ("Sanral") known as the Senekal project.[1]

[3] One respondent namely, WBHO Construction (Pty) Ltd ("WBHO") has received conditional leniency from the Commission in accordance with its leniency policy, another namely, Murray and Roberts Ltd ("Murray& Roberts"), has since entered into a settlement agreement with the Commission, which has been approved by the Tribunal.[2]

[4] Group Five remains the sole respondent in this matter. It has not yet filed its answer. The reason for this is that Group Five asserts it is entitled to the Commission's record of investigation and at this stage of the matter. The

[1] The rehabilitation of National Route 5, Section 4 between Senekal and Vaalpenspruit in the Free State Province.

[2] The agreement was confirmed as an order of the Tribunal on 22 July 2013 under case Number: 017277.

Commission asserts that it is only entitled to the record after close of pleadings.

[5] This case concerns whether Group Five is entitled to these documents at this stage of proceedings. According to Group Five, it was entitled to them now and on two self-standing bases; first, in terms of Rules 35(12) and (14) of the High Court rules, which the Tribunal has a discretion to apply to its own proceedings; second, in terms of Commission rule 15, which regulates the right of access to the Commission's record.[3]

[6] The Commission argued that Group Five was not entitled to the documents sought on either basis; in respect of Rule 35(12) because no case had been made out for its application on the facts of this case; in respect of rule 15, because this would amount to compelling discovery prematurely. The Commission alleges that Group Five ought to have filed its answering affidavit and in a separate, but as yet still to be concluded proceeding, seeks default judgement against Group Five on the basis that it has not filed its answer within the period set out in the Tribunal Rules.

BACKGROUND

[7] The Commission initiated a complaint in this matter on 01 September 2009. On 17 March 2015 it filed its complaint referral. In paragraph 25 of the referral it states the following:

> *"This referral is based on the Commission's findings that Group Five entered into collusive tendering agreements with each of WBHO and Murray & Roberts between November and December 2006 in respect of the Senekal project in contravention of section 4(1)(b)(iii), alternatively section 4(1)(b)(i) and/or section 4(1)(b)(ii) of the Act".*

[3] Note as a convention we have referred to the High Court Rules with an upper case "R" and the Tribunal and Commission rules with one in the lower case.

[8] On 02 April 2015 – Group Five's attorney wrote to the Commission to request the Commission's record. The basis for this request according to the letter was:[4]

> *"... we note that the allegations contained in the Referral are both vague and contradictory. We note further that the lack of specificity in the Referral hinders our client's ability to respond to the allegations levelled against it".*

[9] The Commission replied on 23 April 2015 denying that Group Five was entitled to the record. The Commission further stated that Group Five did not set out in its letter any basis for asserting that the referral is vague and contradictory.

[10] On 24 April 2015 Group Five sent a further letter to the Commission in which it stated that it is entitled to the full investigation record in accordance with the principles of fairness underlying Rules 35(12) and 14 of the Uniform Rules of Court. Group Five also stated that the investigation record is sought in accordance with the Supreme Court of Appeal ("SCA") *Arcelomittal* judgment.[5] On 18 June 2015 the Commission provided Group Five with an index of the record, itemising its contents variously, as 'privileged', 'confidential' and 'not restricted'. It tendered the production of the 'not restricted items' and then asked Group Five to indicate when it would plead.

[11] Thereafter an exchange of letters followed; on 8 July 2015 from Group Five, a response from the Commission the same day and again on 13 July 2015 from Group Five. In this correspondence Group Five continued to maintain that it was entitled to the full record and then went on to cite the SCA's *Arcelomittal* decision as it basis for doing so. As we discuss later, this case dealt with a number of issues and the mere reference to it by Group Five, without asserting which proposition was being relied on, was not illuminating. Nor did

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[4] Paragraphs 4 and 5 of the letter.

[5] *Competition Commission of South Africa v Arcelormittal SA Ltd (680/12) [2013] ZASCA 84 (31 May 2013).*

the Commission change its posture. It remained steadfast in its opposition to production and equally obdurate about not setting out its reasons for not producing the record.

[12] The impasse continued until the Commission filed an application for default judgment in terms of rule 53 of the Tribunal rules. This rule applies to a situation where a respondent has not filed an answering affidavit in the time period set out in the rules. In addition, the Commission requested a pre-hearing from the Tribunal as to how to proceed further with the dispute.

[13] At the pre-hearing held on 18 August 2015 the impasse became clear. The Commission considered that it was entitled to have its default judgement application set down as Group Five had not yet filed an answer and the period for doing so had elapsed. Group Five alleged that a default judgement application was premature as it was entitled to be furnished the record before it was obliged to file its answer; i.e. the Commission not it (Group 5) was in default. After hearing the parties the Tribunal gave the following direction:

[13.1] The Competition Commission ("Commission") must reply to First Respondents/Group Five's letter dated 23 April 2015 and indicate which documents it will not produce to Group Five and the reasons for not producing the said documents.

Application to compel discovery

[13.2] In the event that Group Five is not satisfied with the Commission's reasons for not producing the documents, Group Five will file an application to compel discovery by 4 September 2015.

[13.3] The Commission will file an answering affidavit to the application by 18 September 2015.

[13.4] Group Five will file a replying affidavit by 25 September 2015.

[13.5] The matter will be set down for hearing for one day in the week of 26 October. The exact day will be confirmed next week Wednesday 26 August 2015.

Rule 53 Application

[13.6] The First Respondent/Group Five will file an answering affidavit by 19 August 2015.

[13.7] The Commission will file a replying affidavit by 26 August 2015.

[14] The Commission in accordance with the direction wrote its letter on 20 August 2015. However contrary to the direction, it did not disclose the basis for its refusal and simply repeated that Group Five was not entitled to production.

[15] Group Five then brought the present application on 09 September 2015. The Commission elected not to file papers in answer although it opposed the application.

[16] In its application Group Five principally argued that it was entitled to the record because of the reference to the leniency application in the complaint referral. In this respect, it relied on the SCA decision in *Arcelomittal*.[6] As its deponent put it in the affidavit:

> "*...The principles of fairness in issue are enshrined in the right to just administrative action in section 33(1) of the Constitution of the Republic of South Africa, 108 of 1996. This section says that "everyone has the right to administrative action that is lawful, reasonable and procedurally fair". As a respondent to the Complaint Referral, which accuses Group Five of engaging in a very serious contravention of the Act, Group Five is entitled to*

[6] See paragraphs 57 – 63 of the founding affidavit in this matter by Guy Mottram of Group Five.

understand the case being made against it, and to adequately plead to the allegations against it".

[17] In the alternative, in the latter parts of the affidavit Group Five puts forward an argument why, even if the Rule 35(12) was not successful it was entitled to relief in terms of rule 15 of the Commission rules.[7] In oral argument however, counsel flipped the approach around and commenced with the rule 15 argument and, relied on the Rule 35(12) argument in the alternative. (Note that in its affidavit Group Five asserted that it would not be necessary for the Tribunal to decide whether it had a right to the Commission record; i.e. this was an invitation to decide the case on a Rule 35(12) and (14) basis, not on Commission rule 15. [8] Yet subsequently, in heads of argument presented at the hearing, it reversed the emphasis stating: *"Given the fact that Group Five is clearly entitled to the order that it seeks in terms of the Arcelomittal judgement, it is not necessary for the Tribunal to consider and determine whether Group Five is also entitled to the documents pursuant to the principles which underpin Rules 35(12) and (14)).*[9])

[18] However we do not understand this to mean that Group Five has abandoned its Rule 35 argument; rather this seems to assert its confidence in the correctness of its rule 15 argument. Since both arguments (i.e. Rule 35 and rule 15) are relied upon, both need to be considered by us. What the switch in emphasis illustrates is Group Five's own ambivalence on the law, despite the fact that it was highly critical of the Commission for not being clear on its approach. But it cannot be criticised for this any more than the Commission. There is no doubt that on this point there is legal uncertainty, because as the Commission argued, this was an issue left open by the SCA in *Arcelomittal.* We will go on to discuss this later in this decision but first we must deal with the Rule 35(12) argument.

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[7] Mottram affidavit supra, paragraphs 64 – 81

[8] Mottram affidavit supra, paragraph 55.

[9] See Group Five heads of argument dated 30 October 2015, paragraph 7.10

The Rule 35(12) argument

[19] This High Court rule states the following:

> *"Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding, provided that any other party may use such document or tape recording".*

[20] Rule 35(12) is thus an exception to the general rule in litigation that discovery takes place only after the close of pleadings.

[21] The Tribunal has in several cases now, applied Rule 35(12) to its proceedings.[10] This legal basis for this is rule 55 of the Tribunal rules, which states as follows:

> *(1) If, in the course of proceedings, a person is uncertain as to the practice and procedure to be followed, the member of the Tribunal presiding over a matter –*
>
> *(a) May give directions on how to proceed; and*
>
> *(b) For that purpose, if a question arises as to the practice or procedure to be followed in cases not provided for by these Rules, the member may have regard to the High Court Rules.*

[10] See for instance *Allens Meshco and nine others v Competition Commission and others* Case number 63/CR/Sep09 at paragraph 6.

[22] There was no disagreement in argument that we were entitled to apply Rule 35(12) and we do not consider this aspect further.

[23] In *Arcelomittal* the SCA was required to decide three issues in relation to the application of Rule 35(12)

[24] First, was the Commission entitled to raise litigation privilege in relation to a leniency application? The court decided that it was.

[25] The second point was whether this privilege could be waived? Here the court decided that it could.

[26] The third point was whether in that case there had been a reference to the document in the complaint referral for the purpose of the Rule? The court decided there had been.

[27] The relevant passage the Court relied on for coming to this conclusion stated as follows:

> *"8.7 ... Scaw applied for leniency in terms of the Commission's CLP for price fixing and market allocation in relation to rebar, wire rod, sections (including rounds, squares, angles and profiles).*
>
> *8.8 Scaw confirmed in the application for leniency that there has been long standing culture of cooperation amongst the steel mills regarding the prices to be charged, and discounts to be offered, for their steel products such as rebar, wire rod, sections (including rounds and squares, angles and profiles). The cooperation extended to arrangements on market allocation.*
>
> *8.9 In addition to the information submitted by Scaw in its leniency application, the Commission conducted its own investigations which largely confirmed the allegations made by Scaw and provided further evidence of anticompetitive practices in contravention of section 4(1)(b) of the Act – involving both price fixing and market division.*

8.10 It is as a consequence of information contained in the Scaw application for leniency and that obtained from the Commission's investigations that this referral is made".[11]

[28] The Court then explained its conclusion:

> *"These paragraphs, in my view, amount to much more than a bare or oblique reference to the leniency application. The allegation in para 8.8. that a long standing culture of cooperation was 'confirmed in the application for leniency' makes it clear that the application contained a full recital of facts that supported that conclusion. Whether the application indeed contained those facts is a matter that the respondents will be called upon to respond to in their answering affidavits. It is precisely to enable it to do so that [R]ule 35(12) requires documents referred to in pleadings to be disclosed".*[12]

[29] In this matter, Group Five alleges that the Commission had in its investigation referred on numerous occasions to investigations that it carried out. It then avers that these references are made out in four specific paragraphs in the complaint referral. It itemises these but does not quote them.

[30] This is not surprising because in none of these paragraphs do we find a reference to the record in any manner comparable to that in the *Arcelomittal* case. One paragraph refers to the fact that following the initiation of a complaint the Commission conducted an investigation.[13] There is nothing remarkable about this, that is what the Act requires the Commission to do in each case following a complaint initiation. The Commission merely recites procedural steps it is obliged to take in every case. The next paragraph relied on, merely states that following the investigation, the Commission found that the respondents had entered into a collusive agreement in respect of the

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[11] *Arcelomittal* ibid paragraph 35.

[12] *Arcelomittal* ibid, paragraph 36.

[13] Complaint referral paragraph 17.

Senekal project. These references to the investigation cannot give rise to a sufficient reference for Rule 35(12) purposes.

[31] The strongest reference is to be found in paragraph 25 of the complaint referral which we quote below:

> *"This complaint referral is based on the Commission's findings that Group Five entered into collusive agreements with each of WBHO and Murray and Roberts between November and December 2006 in respect of the Senekal project in contravention of ..."* [it then itemises the sections of the Act relied on.]

[32] There is thus in the present case, no referral to a document which would give rise to the possible application of Rule 35(12). Reference to the existence of the fact of an investigation which, is a procedure, should not be confused with a reference to a document. The fact that an investigation may be premised on documents does not suffice. As the SCA held in *Arcelormittal* *"A bare reference to a document or a pleading, without more, may be insufficient to constitute a waiver whereas the disclosure of its full contents may constitute a waiver."*[14]

[33] We thus find that the reliance on Rule 35(12) is misplaced and in this matter does not give rise to a right to claim production of the record or even the leniency part of the record.

[34] Reliance on Rule 35(14) which is the general discovery rule parties rely on after pleadings have been closed is not made clear by Group Five and, we do not consider further because, the Commission's refusal relates to premature discovery not discovery per se.

Right to production in terms of rule 15 of the Commission rules

[35] Rule 15(1)(a) of the Commission rules states:

[14] See SCA in *Arcelormittal* ibid paragraph 34.

"Any person, upon payment of the prescribed fee, may inspect or copy any Commission record…

(a) if it is not restricted information; or…" (our emphasis)

[36] The term '*restricted information*' is defined in the prior rule 14, where various classes of information are itemised and then described as restricted. Some restrictions are of permanent duration whilst others apply for only a period of time. Of relevance to this case is the definition contained in rule 14(1)(c):

14(1) For the purpose of this Part, the following classes of information are restricted:

(a) …

(b)….

(c) Information that has been received by the Commission in a particular matter, other than that referred to in paragraphs (a) and (b) as follows:

(i) The Description of Conduct attached to a complaint, and any other information received by the Commission during its investigation of the complaint is restricted 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.

(d)…

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

[37] Thus we see that the information Group Five seeks in this case is of the time-bound variety. Access is restricted only until the Commission has referred or non-referred the complaint thereafter it loses its character as restricted information.

[38] Thus the consequence of rule 14(1)(c) is to bring to an end the period on which information is classified as restricted. This sub-rule is silent on the right of any person to have access to the information.

[39] That right finds expression in rule 15(1) and hence Group Five argues that the two must be read together; once the time bar on restricted information has been lifted, any person may seek access to it, and if any person may seek access, no less should a litigant to whom the referral relates. This, argues Group Five, is the basis of the SCA decision in *Arcelormittal.*

[40] The Court there held:

> *"The Commission suggested in an argument that AMSA is not entitled to invoke rule 15 to obtain access to the record as the rule is aimed at providing access to information to the public, and not a litigant. If it is correct that a member of the public may gain access to the Commission record under rule 15, subject to any restrictions under rule 14, and this must be so on a plain reading of the rule, it would be absurd to prevent a litigant from being given access. This would mean, for example, that access could be denied to the Chief Executive Officer of AMSA, but not to her relatives or friends, who are members of the public. It follows that AMSA is entitled to the Commission record subject to any claims of privilege or any restriction under rule 14".* (Our emphasis)

[41] It is common cause between the Commission and Group Five that one consequence of this decision is that the Commission's argument in that case to the effect that a litigant could not rely on this right, whilst a third party could, was wrong and has been rejected by the Court. Where the parties differ is on the further consequences of this decision.

[42] Group Five argues that this means that the right must be given its ordinary meaning and anyone including a litigant can seek access to the record once the act of referral has taken place. Since in this case it has, Group Five contends it is entitled to the record and moreover, to receive it before it files its answer. Group Five argues that it was clear to all the parties in the

Arcelormittal matter that the respondents there had not pleaded and hence this entitlement was implicit if not expressly mentioned by the Court.

[43] The Commission says the decision resolved only the access but not the timing of the access. In this respect the Commission is correct; nowhere in the judgment is there any consideration of whether a respondent is entitled to production before it files its answer or to express it in the language used by the Commission, premature discovery.

[44] The Commission's argument is that rule 15(1) is a 'PAIA' type rule; i.e. a rule that regulates any person's right of access to information held by a public entity. The reason it takes this approach is that it wants to rely on a series of decisions where courts have considered the apparent conflict between PAIA rights to production and the rights to production afforded in terms of High Court rules and the common law.

[45] These decisions turn around an interpretation of section 7(1) of PAIA, which excludes from the operation of PAIA, litigation proceedings. In other words section 7(1) operates to insulate ordinary litigation from the operation of PAIA. This section states as follows:

> *"This Act does not apply to a record of a public body or a private body if—*
>
> *(a) that record is requested for the purpose of criminal or civil proceedings;*
>
> *(b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and*
>
> *(c) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law."*

[46] In several of the cases the courts acknowledge the anomaly of the two systems existing side by side, but have where the conflict manifest itself, given

the exception a wider reading, and let the process of litigation continue as normal regulated by court rules without alteration to comply with the PAIA process.

[47] In the case of *Unitas Hospital v Van Wyk and Another*[15] the SCA denied pre-action production under PAIA to a prospective litigant. In the *IDC v PFE International and four others*[16] the SCA denied a party the right to use PAIA to get documents that the court held could have been gained by use of a subpoena *duces tecum*. In this case both the SCA and the Constitutional Court, which upheld it took a wide reading of the High Court rules to exclude the operation of PAIA.[17]

[48] The cases thus suggest a consistent policy approach – litigation must march to its own drum as set out in rules of Court not in accordance with any rights created by PAIA.

[49] As Brand JA put it in *Unitas Hospital:*

> *"The deference shown by section 7* [of PAIA] *to the rules of discovery is, in my view, not without reason. These rules have served us well for many years. They have their own built-in measures of control to promote fairness and avoid abuse. Documents are only discoverable if they are relevant to the litigation while relevance is determined by the issues on the pleadings. The deference shown to discovery rules is a clear indication, I think, that the legislature had no intention to allow prospective litigants to avoid these measures of control by compelling pre-action discovery under s50 as a matter of course".*[18]

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[15] *Unitas Hospital v Van Wyk and Another 2006 (4) SA 436 (SCA).*

[16] *Industrial Development Corporation of South Africa Ltd v PFE International Inc (BVI)* and others 2012 (2) SA 269 (SCA).

[17] See also Harms DP in *National Director of Public Prosecutions v King* [2010] 3 AI SA 304 (SCA) paragraph 39 and *Ingledew v Financial Services Board: In Re Financial Services Board v Van der Merwe and another* 2003(4) SA 584 (CC) paragraph 29.

[18] *Unitas Hospital* ibid paragraph 21.

[50] The Commission argues that in terms of Tribunal rules a respondent only becomes entitled to discovery and hence production of its record of investigation after close of pleadings. This, the Commission points out is also the normal rule in High Court matters and the common law approach as well. Hence the Commission has termed requests for discovery that follow the complaint referral but before the close of pleadings as premature discovery.

[51] We should, the Commission argues, follow a similar approach. The reason why courts do not permit early discovery, and hence the PAIA provision in section 7(1), to exclude litigation from its scope, is that pleadings are there to define relevance and since discovery of documents in litigation is premised on relevance, any attempt to require production before that time is unfocussed and hence premature.

[52] Thus the Commission argues that absent any provision to the contrary in the Tribunal rules (which are the rules that govern the litigation in referral proceedings) – and there is none - the general approach in the courts ought to be followed.

[53] Group Five does not dispute that this correctly reflects the approach taken in the High Courts. However it argues that the approach in Tribunal proceedings should not follow this course, as there is no equivalent provision of section 7(1) of PAIA.

[54] Rule 15(1) might be a 'PAIA type' rule but it is not PAIA, with its section 7(1) exclusion of litigation.

[55] In fact Group Five argues that the Commission rule 14 (1) cited above expressly incorporates PAIA because it says access to documents may be restricted if they could be restricted under PAIA. This differs from section 7(1) which excludes PAIA. An exclusion provision, as Group Five correctly argues, has legally different consequences to a restriction provision. Under the former the law does not apply; under the latter it does, albeit it restricts certain classes of documents from the requirement for their production.

[56] If litigation exclusion had been contemplated, asks Group Five, why is this not expressly mentioned in rule 14? That read with rule 14(1)(e)'s implicit inclusion of PAIA (not section 7(1)'s exclusion of PAIA) must mean that the rules do not contemplate the same discovery regime applied in the common law and High Court rules.

[57] On the face of it, if we only have regard to the provisions of rule 14(1) this argument seems to be appealing. However when we consider other rules the answer is less convincing.

[58] Recall that the central question in this case is not the entitlement to the record but when entitlement occurs.

[59] Rule 14(1) indicates an end to the restriction on entitlement of the record i.e. it amounts to the removal of an impediment or a negative.

[60] Rule 15(1) is expressed in the positive. Once the impediment (classification as restricted information) is removed the entitlement to the record arises.

[61] However the question is, is this a litigant's right? To answer this we must observe two notable features of rule 15(1).

[62] In the first place, as observed by both the SCA and the Tribunal in *Arcelormittal*, the right is not a litigants' right, but rather a right given to "*any person*". *Arcelormittal* only decides that a litigant cannot be less privileged than a non-litigant insofar as the rule applies.

[63] Rights of access to information have their foundation in section 32 of the Constitution, which provides for two instances:

> *32(1) Everyone has the right of access to –*
>
> *(a) any information held by the state; and*
>
> *(b) any information that is held by another person and that is required for the exercise or protection of any rights.*

[64] It would appear that the rule 15(1) is there to give effect to section 32(1)(a) as opposed to section 32(1)(b). Put differently, it is a public-access right, not a right given specifically to a litigant. This observation is strengthened by the fact that this right has its mirror image in Tribunal rule 13(1) and the Competition Appeal Court rule 13(1). The latter two bodies hold records not as litigants or investigative bodies like the Commission, but as bodies which, hold public records. This suggests that the right of access must be considered in the Commission's rule in a similar manner. A right of access to a record held by a public body not a right of access by a litigant to use to compel early discovery from another litigant in this case the Commission.

[65] In the second place and strengthening this interpretation, it sets out no time requirement by when the record must be provided by the Commission. This is a significant omission. Moreover this distinguishes it from all the litigation rules where the time of compliance with an obligation by a party is expressly mentioned. There is good reason for this distinction. Litigants' rights must be disciplined by time periods in rules to create certainty over the exercise of rights and obligations. However since rule 15(1) is a right of access rule, open to all, no time period need be provided.

[66] The Tribunal rules set out time periods including the time for a respondent to file its answer. Nowhere do the Tribunal rules cater for this right for litigants, in terms of rule 15(1) of the Commission rule, or make the filing of an answer contingent upon the prior realisation of this duty by the Commission. In short the Tribunal rules do not contemplate premature discovery by the Commission or any other litigant.

[67] The implication is clear. The right created under rule 15(1) is not intended to facilitate the conduct of a defence for a respondent. Indeed the structure of rule 14(1) is premised more on the end of the investigation period than future rights of litigants. This is because the same right to the record is given where the Commission does not refer a case as when it does refer, suggesting the rule's disconnectedness to the litigation process. It follows then that if no time period is given in rule 15 for the Commission to produce the record that time period must be implied. Typically in law absence of a time period would lead

one to conclude that the obligation must be exercised within a reasonable time. If follows then that deciding on what a reasonable time would constitute would be an opportunity for harmonising the general right of production and the discovery rights afforded in terms of the Tribunal Rules.

[68] The approaches to both can be harmonised if we read into the Commission rule that the duty to produce must be exercised in a reasonable time and where litigation is on-going, a reasonable time would be the time when, in any event, the Commission is obliged to produce in terms of the post pleading obligations to discover.

[69] This approach is also the more efficient one. The Commission thus prepares a record at one time, which requires considerations of confidentiality, relevance and litigation privilege. Note that the Constitution, in section 32(2), recognises that the right of access may be subject to *"... reasonable measures to alleviate the administrative and financial burden on the state."*

[70] Group Five also argued that there were policy reasons in favour of its approach and that the respondent was entitled to know the case against it.[19] But the case against it is laid out in the requirements for a proper referral in the Tribunal Rules; that is the basis on which to test this right, not what may or may not exist in the investigation docket at the time of the referral. Second, the reference to criminal law and the right of an accused to the docket is not analogous.

[71] Complaint referral proceedings are not criminal proceedings nor have our courts recognised rights that would avail a criminal accused to a firm in administrative law proceedings where the individual's right to liberty is not in question.

[72] As the Competition Appeal Court held in *Federal-Mogul Aftermarket Southern Africa (Pty) Limited v Competition Commission and the Minister of Trade and Industry*:

[19] It relied on several docket cases in criminal matters such as *National Director of Public Prosecutions v King 2010 (7) BCLR 656* and *Shabalala v Attorney-General Transvaal 1996 (1) SA 725 (CC).*

"In our view, the payment of an administrative penalty can never be equated to the imposition of a fine by a criminal court. The proceedings of the Tribunal, which eventually lead to the imposition of the administrative penalty, are civil and not criminal in nature." [20]

[73] Furthermore the policy approach followed by the courts in all the cases referred to above, is to favour litigation rules above public disclosure rules in the event of a conflict.

[74] As the SCA put it in *PFE International*:

" Third to create a dual system of access to information, in terms of PAIA and the particular court rules, has the potential to be extremely disruptive to court proceedings..."[21]

[75] In a similar vein in the same case on appeal to the Constitutional Court Jafta J stated:

"I agree with the Supreme Court of Appeal that allowing PAIA to apply in cases such as this would be disruptive to court proceedings." [22]

[76] Whilst the case in the SCA and Constitutional Court consider the application of PAIA in the context of an exclusionary provision not present in the Commission rules, this does not make them distinguishable from the present case at a level of informing a policy approach to interpretation. That approach is to interpret rules in a way that does not disrupt the ordinary course of litigation rules.

[77] Similarly in this case we have favoured an interpretation that avoids a conflict between the Commission rules and the Tribunal litigation rules. That conflict is

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[20] Case No.: 33/CAC/Sep03

[21] See *PFE, SCA* decision, paragraph 15.

[22] *PFE International Inc (BVI) and Others v Industrial Development Corporation of South Africa Ltd (CCT 129/11) [2012] ZACC 21; 2013.*

resolved by recognising the rights of all persons including litigants to access to the Commission's record, but interpreting the corresponding duty imposed on the Commission to be one performed within a reasonable time. Where the referral is made by the Commission, a reasonable time is the time for production of discovered documents in terms of the Tribunal rules i.e. *after* the close of pleading.[23] We thus find that Group Five's request for the record to be produced to it, prior to it filing its answer, is premature, and the application is also unsuccessful on this ground.

Conclusion

[78] The application is dismissed. As the law on this point was uncertain we find that Group Five was entitled to assert its rights on this point even if ultimately unsuccessful especially given the confusion created by the Commission's often opaque approach in the correspondence. For this reason we give the following direction to avoid the parties coming back to us again:

[78.1] Group Five must file its answer within 20 business days of date of these reasons.

[78.2] If Group Five has not filed an answer within this period, the Commission may approach the registrar to set down its application for default judgment that is pending.

[78.3] There is no order as to costs.

Mr Norman Manoim

18 January 2016
Date

Professor Imraan Valodia and Ms Medi Mokuena concurring

[23] Recall rule 14(1)(c) also applies when there is a non-referral and hence no litigation by the Commission is contemplated.

Tribunal Researcher	: Ipeleng Selaledi
For Group Five	: Adv. A R Bhana SC with Adv. A G Gotz instructed by Baker & Mckenzie Attorneys
For the Commission	: Adv. T Ngcukaitobi instructed by Ndzabandzaba Attorneys