THE COMPETITION APPEAL COURT OF SOUTH AFRICA

(SITTING IN CAPE TOWN)

In the matter between 139/CAC/Feb16

GROUP FIVE LTD **APPELLANT**

and

THE COMPETITION COMMISSION **FIRST RESPONDENT**

Coram: DAVIS JP, ROGERS AJA & BOQWANA AJA

Heard: **17 JUNE 2016**

Delivered: **23 JUNE 2016**

JUDGMENT

ROGERS AJA (DAVIS JP & BOQWANA AJA concurring):

Introduction

[1] We have before us (i) an appeal by the appellant ('Group Five') against an order by the Tribunal dismissing an application by Group Five for production of documents by the respondent ('the Commission'); and (ii) an application by Group Five to suspend, pending the determination of the appeal, a direction by the Tribunal that Group Five file its answering affidavit in a pending referral within a specified time failing which the Commission was authorized to seek default relief. Counsel were agreed that we need only address the appeal.

[2] On 17 March 2015 the Commission referred to the Tribunal a complaint that Group Five and two other civil engineering companies had engaged in collusive tendering in respect of a road rehabilitation contract. In terms of Tribunal rule 16 Group Five was obliged to file its answering papers 20 business days after service of the referral papers.

[3] During April 2015 Group Five's attorneys asked the Commission to produce the record of its investigation, initially relying on High Court rules 35(12) and (14) and later also on Commission rule 15. On 18 June 2015 the Commission provided an index of its record and invited Group Five's attorneys to inspect and copy those parts that were not 'privileged'. Subsequently the Commission changed its mind, demanding that Group Five deliver its answering papers and asserting that Group Five was only entitled to the non-privileged part of the record during the ordinary course of discovery.

[4] On 3 August 2015 the Commission served an application for default relief because Group Five had not filed its answering papers. Following some further skirmishing Group Five on 7 September 2015 served an application to compel production of the record. The Commission did not file an answering affidavit, instead contending that as a matter of law Group Five was not entitled to production of the record prior to filing its answering papers.

[5] Having heard argument, the Tribunal on 18 January 2016 delivered its decision in which it upheld the Commission's stance, dismissed Group Five's

application and directed it to file its answering papers within 20 business days, failing which the Commission could approach the Tribunal for default relief.

High Court rules 35(12 and (14)

[6] In terms of rule 55(1)(b) of the Tribunal's rules the Tribunal may have regard to the High Court rules in respect of any matter not governed by the Tribunal's rules. The Tribunal could thus, upon application by a respondent in complaint proceedings, direct the Commission to produce in accordance with High Court rule 35(12) a document mentioned in the referral affidavit or direct the Commission in accordance with High Court rule 35 (14) to make available for inspection specified documents reasonably required by the respondent for purposes of filing its answering papers.

[7] I can find no fault with the Tribunal's decision refusing production in terms of these High Court rules. The referral affidavit did not mention any particular documents to which High Court rule 35(12) could have applied. In accordance with usual practice, the Commission made introductory allegations that it had investigated the complaint and received information pursuant thereto. Although one may readily infer that the Commission came into possession of documents during the course of its investigation, the Commission did not refer to any such documents. Even if the generalised reference to an investigation and information was impliedly a reference to its investigation record, the Tribunal was not obliged to apply High Court rule 35(12) and I think it was right not to do so.

[8] Group Five also did not show that it reasonably required the investigation record to prepare its answering papers. The Commission's case concerning the alleged collusive conduct is straightforward. The Commission alleges that, by way of contact between Group Five's managing director and named representatives of the other firms in November 2006, the latter were asked to provide, and did provide, cover prices for Group Five, ie prices which would be higher than the price which Group Five intended to bid. Group Five did not need the Commission's record to answer these allegations. In its application to compel, Group Five identified certain respects in which the referral affidavit was said to be vague and contradictory. If these criticisms have any merit (which it is unnecessary to decide), they would not

be resolved by production of the Commissioner's record. The appropriate procedural response would have been to attack the referral affidavit as non-compliant with Tribunal rule 15. Such an attack would be in the nature of a High Court exception, a procedure which the Tribunal has often entertained under Tribunal rule 55(1)(b).

Commission rule 15

[9] In terms of Commission rule 15(1) 'any person' is entitled to access to 'any Commission record' provided the document in question is not 'restricted information' contemplated in rule 14(1). It was held in *Competition Commissioner v ArcelorMittal South Africa Ltd & Others* 2013 (5) SA 538 (SCA) that 'any person' includes a litigant (paras 45-50). Group Five was thus entitled to access to the Commission's record of its investigation save to the extent that any part thereof was restricted information in terms of rule 14(1). Both the Commissioner and Tribunal accepted this.

[10] Rule 15(1) does not specify a time within which the Commission must give access to the unrestricted part of the record. The Tribunal correctly held that by necessary implication access had to be given within a reasonable time. The Tribunal considered, however, that what was reasonable was affected by Group Five's position as a litigant. It was not reasonable, in the Tribunal's view, that access should have to be given prior to the close of pleadings. The rules of the Commission and Tribunal would be better 'harmonised' if access were deferred until post-pleading discovery.

[11] In so holding the Tribunal fell into error. The Tribunal correctly recognised that the right of access in rule 15(1) is a public-access right, not a right given specifically to litigants. Group Five's right in terms of rule 15(1) vests in it as part of the unlimited class of 'any person', not as a respondent in complaint proceedings. From this it follows that the determination of a reasonable period within which the Commissioner must give access is not affected by whether or not the requester is a litigant. Put differently, Group Five's entitlement to the record within a reasonable period of time cannot be negatively affected by its status as a respondent. The determination of a reasonable period is only concerned, in my view, with the time

the Commission would reasonably require to prepare its record and identify what parts are restricted. That may vary from case to case but would not be affected by the identity of the requester.

[12] There is nothing in the Tribunal's rules which expressly or by necessary implication extends, in the case of litigants, the reasonable period within which the Commission must comply with Commission rule 15(1). A respondent in complaint proceedings does not have an automatic right to discovery once the pleadings are closed. Whether and to what extent the parties must make discovery is determined from case to case by directions given by the Tribunal in terms of Tribunal rule 22(1)(c)(v). It may well be that in most if not all cases the Tribunal will give directions for general discovery but that is not as such a right afforded by the Tribunal's rules.

[13] In any event, the entitlement of a litigant to discovery is a right which vests in it specifically in its capacity as a litigant. It is distinct from a general right of access such as Commission rule 15(1) affords. The obligation to make discovery in litigation is limited by relevance as determined by the pleadings. The right of access afforded by Commission rule 15(1) is in the nature of things not limited in this way. The Commission might have to produce more in response to rule 15(1 than it would by way of post-pleading discovery. Conversely the Commission's obligation to make discovery might include documents which were not part of its record when it afforded access in terms of rule 15(1).

[14] Even if in some cases there would be nothing for the Commission to discover once it has afforded access to a respondent in terms of rule 15(1), this would not justify a limited reading of 15(1). The process of discovery would not thereby be rendered otiose. Post-pleading discovery would be the means by which the Commission would gain access to relevant documents in possession of respondents. If this places respondents in a more advantageous position (ie earlier access to documents), it is an advantage which flows from the fact that the Commission, unlike them, is a public body in relation to whose records the rule-maker has afforded a general right of access.

[15] The supposed harmonisation of the Commission and Tribunal rules is illusory. If the Commission is obliged in due course to produce its record by way of post-pleading discovery, that will be because of Tribunal Rule 22(1)(c)(v) and a discovery direction given pursuant thereto, not because of Commission rule 15. On the Tribunal's approach, rule 15 in truth never comes into play in relation to documents which are relevant to the pleaded issues and thus discoverable. And in relation to documents which are not relevant to pleaded issues but nevertheless producible in terms of rule 15, the Tribunal's rationale for linking production to discovery is absent.

[16] Unlike the Tribunal, I do not find assistance in the cases decided under the Promotion of Access to Information Act 2 of 2000 ('PAIA'). *Industrial Development Corporation of South Africa Ltd v PFE International Inc (BVI) & Others* 2012 (2) SA 269 (SCA) and the further appeal in the same case reported at 2013 (1) SA 1 (CC) were concerned with the interpretation of s 7(1) of PAIA in relation to the right of a litigant to obtain documents by way of subpoena duces tecum. Section 7(1) expressly excludes PAIA's operation (i) if the record is requested for purposes of criminal or civil proceedings; and (ii) after the commencement of such proceedings; and (iii) any other law provides for access to the record in question. I leave open whether complaint proceedings are 'civil proceedings' (they are certainly not 'criminal' proceedings) and whether the Tribunal's rules provide for the production of the Commission's record (bearing in mind, as I have observed, that discovery in complaint proceedings strictly speaking depends on the extent to which the Tribunal in its discretion directs discovery to be made). The simple point is that Group Five sought access in terms of Commission rule 15(1), not in terms of PAIA. Rule 15(1) does not contain the same limitation as s 7(1).

[17] One of the cases mentioned by the Tribunal was *Unitas Hospital v Van Wyk & Another* 2006 (4) SA 436 (SCA). The matter in issue was whether the requester, Mrs van Wyk, required the record for the exercise or protection of any rights as contemplated in s 50(1)(a) of PIAIA. She wanted the record for a proposed damages claim against a private hospital. In assessing whether the record was 'required' within the meaning of s 50(1)(a), Brand JA (from whose judgment the Tribunal quoted) referred to s 7, with its 'deference' to the rules for discovery once litigation

has begun, as indicating that pre-action discovery should not be regarded as the norm under s 50. He did not say that reliance on s 50 was precluded merely because the record in question would in due course be discoverable but considered that the element of need dictated by s 50(1)(a)'s use of the word 'required' was not satisfied on the facts of the case, given that Mrs van Wyk was able to formulate her claim without reference to the requested record.

[18] *Unitas* does not in my view cast any light on our case. Commission rule 15 does not contain the sort of qualification found in s 50(1)(a) of PAIA or an equivalent of s 7 from which 'deference' to the Tribunal's rules of discovery might be inferred. A supposed deference to discovery is entirely at odds with the *ArcelorMittal* decision. After all, the Commission's contention in *ArcelorMittal* was that rule 15 did not apply to litigants. That contention could only have been founded on the premise that once litigation has started a respondent's rights to production of documents is regulated by the Tribunal's rules of discovery, not by Commission rule 15. The Supreme Court of Appeal's decision was a clear rejection of that premise.

[19] The policy considerations underlying s 7 of PAIA might justify the introduction of a similar qualification in Commission rule 15. An exclusion defined with reference to the purpose for which a record is requested (ie for purposes of litigation which has already commenced) rather than with reference to the identity of the requester does not give rise to the absurdity mentioned in *ArcelorMittal* (para 46). Where litigation has commenced and a record is requested by a close associate of the litigant, it may not be difficult to show that it has been requested for purposes of the litigation, ie that the requester is a front for the litigant. However, and as I have said, rule 15 does not currently contain any such qualification.

Group Five's obligation to file answering papers

[20] The Commission was thus wrong to assert that it did not have to comply with rule 15(1) until the post-pleading discovery stage. By the same token, though, Group Five was wrong in linking its obligation to file answering papers to the Commission's obligation in terms of rule 15(1). Because Group Five's entitlement to the record in terms of rule 15(1) vests in it as an ordinary member of the public, not a litigant,

there is no logical connection between its right to the record and its obligation to plead.

[21] Whether due compliance by the Commission with rule 15(1) would result in respondents getting access to the requested record before they have to file answering papers would depend inter alia on when the respondent requests access and the amount of time the Commission reasonably requires, in the particular circumstances of the case, to list the documents in its record and identify those parts which constitute restricted information. If there is a dispute about whether particular information is restricted, that would need to be determined independently of the procedural timetable applicable to the complaint proceedings. It would obviously be improper for the Commission to delay production of its record for tactical reasons or to contrive disputes about privilege and confidentiality. By the same token, however, respondents should not be encouraged to delay the filing of their answering papers on the basis of a right of access to information which has nothing to do with their status as litigants.

Conclusion

[22] In the present case, and because of their incorrect views, the Commission and Group Five did not comply with their respective obligations. And because the Commission wrongly believed it only had to produce its record at the post-pleading discovery stage, it did not elaborate upon its claim that certain documents listed in its record were ‘legally privileged’ or ‘confidential’. The only practical way to resolve this is to treat the parties’ respective obligations as running from the date of our order, since our judgment will clarify what those obligations are.

[23] This means that the Commission must produce its record within a reasonable period of time from the date of our judgment and that Group Five must file its answering papers within 20 business days from the date of our judgment.

[24] Since the Commission has already prepared an index of its record and identified parts of that record as ‘not restricted’, there is no reason why those parts should not be made available forthwith. This will result in Group Five’s obtaining

access to those parts of the record before the expiry of 20 business days from the date of our judgment.

[25] In regard to those parts of the record which are said to be 'legally privileged' or 'confidential', such disputes will have to be resolved, as I have previously observed, by a process which is independent of Group Five's obligation to file its answering papers. If this means that Group Five has to file its answering papers before disputes about production are resolved, so be it.

[26] As to costs, the Commission has failed in its contention that its obligation in terms of Commission rule 15 is deferred until the discovery stage. Group Five, for its part, has failed in showing an entitlement to production in terms of High Court rules 35(12) and (14) and has failed in its attempt to link the timing of its answering papers to production in terms of rule 15. Put differently, the Tribunal was right in directing Group Five to file its answering papers within 20 business days and in dismissing Group Five's application for discovery in terms of High Court rules 35(12) and (14) but wrong in dismissing Group Five's rule 15 application. I thus think that the parties should bear their own costs of appeal.

[27] The following order is made:

(a) The appeal succeeds in part.

(b) Save for para 78.3 thereof, the Tribunal's order and directions contained in para 78 of its decision of 18 January 2016 are set aside and replaced with an order in the following terms:

> (i) The respondent ('the Commission') must, in terms of Commission rule 15, forthwith afford the appellant ('Group Five') access to those portions of its record identified as 'not restricted' in the index of its record attached to its letter of 18 June 2015 and to any further portions of its record which it no longer claims are restricted.
>
> (ii) Group Five must, within 20 business days after the date of this judgment (that is, the Competition Court of Appeal's judgment), file its answer (as contemplated in rule 16 of the Tribunal's rules) in the complaint proceedings under CC Case 2009SEP4641/CT Case 021014.

(iii) If Group Five has not filed its answer within the aforesaid period, the Commission may approach the Tribunal's registrar to set down its application for default judgment.

(c) If Group Five contends that those portions of the record which the Commission contends are protected are not protected or that access thereto should be permitted (with or without conditions) in terms of Commission rule 15(1)(b), the Tribunal must determine the said dispute after receiving such further affidavits (by way of supplementation of Group Five's application dated 7 September 2015) as it may direct to be filed.

(d) The parties shall bear their own costs in the appeal.

APPEARANCES

For Appellant	Mr AR Bhana SC & Mr AG Gotz Instructed by: Baker & McKenzie 1 Commerce Square, 39 Rivonia Road Sandhurst
For Respondent	Messrs T Ngcukaitobi & T Motloenya Instructed by: Ndzabandzaba Attorneys Inc Unit 3, Ground Floor, 65 Peter Place Road Bryanston