REPUBLIC OF SOUTH AFRICA

IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CAC CASE NO: **160/CAC/Nov17**

CT CASE NO:**CR212Feb17/DSC027Apr17**

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED

31.5.18

Date **WHG VAN DER LINDE**

In the matter between:

THE STANDARD BANK OF
SOUTH AFRICA LIMITED — APPELLANT
(Applicant in the Application to Compel)

and

THE COMPETITION COMMISSION OF
SOUTH AFRICA — RESPONDENT
(Respondent in the Application to Compel)

Judgment

Van der Linde, AJA (Davis, JP and Mnguni, JA concurring):

Introduction and background

[1] This appeal is concerned with the proper interpretation of Competition Commission Rule 15(1)[1] and its application by the Competition Tribunal to the appellant's application to the Tribunal for the respondent to produce its record of investigation into the alleged collusive conduct by banks with regard to trading in foreign currency ("the Forex case").

[2] It is apparent from the Tribunal's Reasons for Decision and Order[2] that the appellant is one of eighteen respondent banks who were joined in the complaint referral of the Forex case to the Tribunal on 15 February 2017. The case is that the respondents had engaged in cartel conduct offensive of s.4(1)(b)(i) of the Competition Act 89 of 1998 ("the Act").

[3] On 22 February 2017 the appellant's attorney wrote to the Commission, saying that the first time it became aware of the allegation that it had been involved in the offensive conduct was when the Commission told the press about the referral.[3] It recorded that the Commission had been widely reported as being willing to treat cooperative respondents more leniently than non-cooperative ones; and, since the appellant had not been able to find any evidence of improper or unlawful conduct but preferred to engage constructively with the Commission, it requested a meeting with the Commission to discuss the complaint

[1] These rules were made by the Minister of Trade and Industry, in consultation with the Competition Commission, in terms of s.21(4) of the Competition Act 89 of 1998, and published as Government Notice No.22025 in Government Gazette 428 on 1 February 2001.
[2] Vol 3/118 ff.
[3] Vol 1/19/27 – 29.

referral. The Commission's response on 23 February 2017[4] was to decline the invitation, saying that the appellant had enough detail in the complaint referral itself to plead or consider its position.

[4] Not deterred, the appellant wrote again on 1 March 2017,[5] requesting the Commission to reconsider its refusal to meet, but this time requesting the Commission's record of the investigation in terms of rule 15(1) of the Rules for the Conduct of Proceedings in the Competition Commission. Relying expressly on the judgment of this court in Group Five Ltd v The Competition Commission,[6] the appellant asked for an index of the record, indicating which portions were restricted and the reasons therefor, and for copies of the unrestricted portions. The appellant asked that this be done by 15 March 2017.

[5] Rule 15(1) of the Commission Rules provides as follows:

> ***"15. Access to information***
> *(1) Any person, upon payment of the prescribed fee, may inspect or copy any Commission record-*
> *(a) if it is not restricted information; or*
> *(b) if it is restricted information, to the extent permitted, and subject to any conditions imposed, by-*
> *(i) this Rule; or*
> *(ii) an order of the Tribunal, or the Court."*

[6] Since rule 14(1)(e) will also feature below, I quote it here:

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

[7] This court had held in Group Five only some eight months earlier, on 23 June 2016, that rule 15(1) allowed *"any person"* to inspect the record, whether a litigant or not, and the Commission was duty-bound within a reasonable time – importantly, to be determined

---

[4] Vol 1/21/10 – 11.
[5] Vol 1/23, 24.
[6] [2016] 2 CPLR 386 (CAC).

without reference to the Commission's post-pleading discovery obligations in pending litigation - to avail it.[7] I return more fully to this below.

[8] The Commission acknowledged receipt[8] but said nothing more. Specifically, it expressed no position on the appellant's request for the record.

[9] On 27 March 2017 the appellant followed up, requesting compliance with the request for the record by 7 April 2017.[9] The Commission responded on the same day,[10] agreeing to make the record available: *"We advise that the Commission is preparing the record of the investigation and the index thereto. The Commission will furnish your client with the index of the record as soon as the record is finalised in order for your client to decide which part of the record it wants copied."*

[10] When by 20 April 2017 the appellant had not yet received the index, it wrote[11] asking when it would be made available. It concluded its letter: *"We look forward to hearing from you as a matter of urgency."* On 21 April 2017 the Commission responded,[12] again saying that it was attending to the request, but asking the appellant to inform it about the basis for the urgency of the request. The appellant responded on the same day,[13] saying that a reasonable time – almost two and a half months – had passed and the record had still not been provided.

---

[7] Op cit, [11] (emphasis supplied): *"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."* See also [13] and [15].

[8] Vol 1/13/10 – 12.

[9] Vol 1/25.

[10] Vol 1/26.

[11] Vol 1/28.

[12] Vol 1/32/10.

[13] Vol 1/37/9 – 17.

[11]Five days later, on 26 April 2017, the appellant brought the application to compel production of the record within five days.[14] The founding affidavit drew attention to the fact that the application was being launched ten weeks after the Commission had made the complaint referral, nine weeks after the appellant had first requested the record, and a little over four weeks since the Commission had undertaken to give access to the record.[15]That application was only set down for hearing on 18 September 2017.

[12]On 4 September 2017 the Commission declined[16] the appellant's request for the record. The reason for this change in attitude was this: *"The Commission acknowledges that SBSA's request to the record in terms of rule 15(1) vests in it as an ordinary member of the public, not a litigant. Despite this, SBSA has not conducted itself as ordinary member of the public. It has conducted itself in a manner that is contrary to the Competition Appeal Court's judgment in Group Five v Competition Commission. It has also used its position as a litigant to approach the Tribunal in the compelling application when it has no locus standi to do so."*[17]

[13] The Commission filed its answering affidavit on 7 September 2017, asking that the appellant's application be dismissed, amongst other reasons, on the basis that the appellant should have applied to review the Commission's decision.[18] After the replying affidavit was filed on 12 September 2017, the matter was heard on 18 September 2017. The Tribunal's order and its reasons for them were issued on 6 November 2017.

[14]The Tribunal dismissed the Commission's point that a review should have been brought; it dismissed the appellant's application that the record should be produced in five days; and it directed the Commission to provide the appellant with the record at the same time as it produces discovery in the Forex case.

---

[14] Vol 1/1 – 3.
[15] Vol 1/14/16 – 20.
[16] Vol 2/89 – 93.
[17] Vol 2/93/6 – 12.
[18] Vol 1/44/10 – 15. S.27(1)(c) of the Act provides that the Tribunal may: *"... hear appeals from, or review any decision of, the Competition Commission that may, in terms of this Act, be referred to it; .. ."*

[15]On appeal, the appellant argued that the Tribunal erred because Group Five constituted *"the clearest authority ... that there is no rationale for linking production of a record under rule 15(1) of the ... Commission Rules to discovery."*[19]The Commission argued that the record is *"restricted"* for purposes of Commission rule 15; that in any event the Tribunal retains the residual discretion to determine a "reasonable time" within which to make the record available; and – regardless of the first two points - the appellant must fail because its persistence in asking for the record is an abuse of process and should not be countenanced.[20]

Discussion: introduction

[16]Perhaps the best place to begin the discussion of these submissions is with the first and third arguments advanced by the Commission. If either of them is correct, then the Tribunal's order that the Commission is obliged to make the record available to the appellant must be set aside. Yet there is no cross-appeal[21] by the Commission, except to the limited extent of the Tribunal's dismissal of the Commission's argument that the appellant should have applied to review, and not appeal, the Commission's decision.[22] And that proposition was expressly abandoned before us by Adv. Ngcukaitobi for the Commission, in my view rightly so.

[17]That really disposes of the Commission's first and third arguments. But as will appear from what follows, in my view the *ratio decidendi* of this court's judgment in Group Five in any event answers the Commission's first and second arguments, unless this court finds that Group Five was clearly wrong. And in this regard both the appellant and the Commission proceeded from the unexpressed premise that the principles of *stare decisis* and precedent applied not only as between the Tribunal and this court, despite the Tribunal not being a

[19] Appellant's heads of argument, p2, para 1.
[20] Commission's "notes for oral argument", paras 2.1, 2.2, and 2.3.
[21] Rules 18 and 16 of the Competition Appeal Court rules.
[22] Vol 3/142/15 – 16.

court of law; but also to this court as regards its own earlier judgments. Group Five also implicates the sustainability of the Commission's second argument and so it is appropriate that something be said about precedent and its applicability to the Tribunal and to this court.

Precedent

[18]The first proposition in this regard is that precedent is squarely part of our post 1994 law. This is, with respect, well said by Madlanga, J in the Constitutional Court in Turnbull-Jackson v Hibiscus Court Municipality and Others (footnotes omitted):[23] [24]

"[54] The Walele – True Motives controversy brings to the fore the important doctrine of precedent, a core component of the rule of law, without which deciding legal issues would be directionless and hazardous. Deviation from it is to invite legal chaos. The doctrine is a means to an end. This Court has previously endorsed the important purpose it serves:
'The doctrine of precedent] is widely recognized in developed legal systems. Hahlo and Kahn describe this deference of law for precedent as a manifestation of the general human tendency to have respect for experience. They explain why the doctrine of stare decisis is so important, saying:
'In the legal system the calls of justice are paramount. The maintenance of certainty of the law and of equality before it, the satisfaction of legitimate expectations, entail a general duty of judges to follow the legal rules in previous judicial decisions. The individual litigant would feel himself unjustly treated if a past ruling applicable to his case were not followed where the material facts were the same. This authority given to past judgments is called the doctrine of precedent.
...
It enables the citizen, if necessary with the aid of practising lawyers, to plan his private and professional activities with some degree of assurance as to their legal effects; it prevents the dislocation of rights, particularly contractual and proprietary ones, created in the belief of an existing rule of law; it cuts down the prospect of litigation; it keeps the weaker judge along right and rational paths, drastically limiting the play allowed to partiality, caprice or prejudice, thereby not only securing justice in the instance but also retaining public confidence in the judicial machine through like being dealt with alike. . . . Certainty,

[23] (CCT 104/13) [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) (11 September 2014).
[24] And see too True Motives 84 (Pty) Ltd v Madhi and Others (543/2007) [2009] ZASCA 4; 2009 (4) SA 153 (SCA); 2009 (7) BCLR 712 (SCA) ; [2009] 2 All SA 548 (SCA) (3 March 2009) at [100] ff; Camps Bay Ratepayers and Residents Association and Another v Harrison and Another (CCT 18/10) [2010] ZACC 19; 2011 (2) BCLR 121 (CC) ; 2011 (4) SA 42 (CC) (4 November 2010) at [28]; Laubscher N.O. v Duplan and Another (CCT234/15) [2016] ZACC 44; 2017 (2) SA 264 (CC); 2017 (4) BCLR 415 (CC) (30 November 2016); and Living Hands (Pty) Ltd NO and Another v Ditz and Others (42728/2012) [2012] ZAGPJHC 218; 2013 (2) SA 368 (GSJ) (11 September 2012).

predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of stare decisis.'"

[19]This court is established in terms of the Competition Act,[25] pursuant to the Constitution,[26] as a court of record with jurisdiction throughout the Republic, similar in status to that of the High Court of South Africa.[27] As such, its own precedent – meaning its *rationes decidendi* - binds it unless it finds that the earlier judgment was clearly wrong.

[20]The Tribunal is a specialist administrative tribunal created under the Act, not a court of law.[28] [29] This is not to say that it does not perform functions akin to that of a court. As Sachs, J said in Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (footnotes omitted):[30]

"218 The performance of judicial functions is not confined to courts of law. Administrative tribunals are increasingly performing the same functions as courts of law do and they do so by similar process. Thus an administrative body may in the discharge of its duties under a statute function as if it were a court of law and perform judicial functions. And at times it is not easy to draw a clear line of demarcation between tribunals which are and those which are not Courts of Law. What characterises a judicial function are proceedings in which rights are legally determined and liability imposed by a competent authority upon a consideration of the facts and the circumstances placed before it.

...

220 But the performance of judicial functions does not transform an administrative tribunal into a court of law."

[21]Following from this proposition concerning the Tribunal's status, flows the consequence that the Tribunal is not bound by its own previous decisions. In Canada the Queen's Bench of Alberta has put it thus:[31]

---

[25] S.36.
[26] S.166(e).
[27] Since this court sits with three judges, it has the status of a full court.
[28]Competition Law of South Africa, Sutherland and Kemp, LexisNexis (loose leaf), para 11.4.1, p 11-20.
[29] And the Tribunal does not view itself any different: Competition Commission South Africa v Sasol Chemical Industries Ltd, In re: Competition Commission South Africa v Sasol Chemical Industries Ltd and Others (45/CR/May06, 31/CR/May05) [2010] ZACT 48 (20 July 2010) at [29].
[30](CCT 85/06) [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) ; (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) (5 October 2007).
[31] Construction Workers Union (CLAC), Local No. 63 v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 488, 2012 ABQB 540.

"[59] Both applicants submit that the Board was not only interpreting its own statute, but also that it had to follow the principle of stare decisis. The correctness standard will apply if an issue is one of general law that is of central importance to the legal system as a whole and outside the tribunal's specialized area of expertise: Dunsmuir at para 60. The proper application of the stare decisis doctrine fits within this description. However, I do not need to decide on this matter because, as is elaborated below, the doctrine of stare decisis does not affect the Panel's decision in this case. The Board can alter its own precedents: see e.g. Health Sciences. Furthermore, the Court has merely decided whether the Board's prior decisions were reasonable or within the Board's jurisdiction to decide, not whether its decisions were correct on the issue of open periods. The Court has declined to interpret the relevant section of the Code. The jurisprudence developed by the Courts and referred to by the applicants does not address the question before the Panel in this case. Therefore, there is no question of whether the doctrine of stare decisis was correctly followed."

[22]Self-evidently, when the Tribunal applies the general law – as it always must - it must apply it as it finds it, whether in previous decisions by itself, or in decisions of this court. But since it is not a court, it does not itself establish precedent, whether binding on itself or anyone else. It is however bound by decisions of this court.

Group Five: *ratio decidendi*

[23] It is appropriate now to move on to Group Five and what to it decided. In that matter too the respondent had under rule 15 asked for the record of the Commission's investigation. And there too, although the Commission initially agreed to make the record available without qualification, it later changed its position and conveyed that the respondent could access the record during the ordinary course of post-pleading discovery. The Tribunal upheld the Commission's position.

[24]On appeal, this court held that the entitlement to the record under rule 15 is not derived from a litigant's status as such, but from a general public-access right.[32] It followed that, although the record had to be provided within a reasonable time, the Tribunal erred in holding that what was reasonable was affected by the respondent's position as litigant.[33]

---

[32] Para [13].
[33] At [10], [11].

[25]Concerning the Commission's argument that the record was restricted under rule 14(1)(e), Rogers, JA on behalf of this court held:

"[16] ...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)."

[26]The court thus underscored that s.7 of PAIA disapplies that Act altogether if three features are present: the record is requested for criminal or civil proceedings; after the commencement of such proceedings; and *" ... the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law."* I revert to this latter aspect below.

[27]But, following the language of rule 14(1)(e), Group Five held that a public body is only *"required or entitled"* to restrict access in terms of chapter 4 of PAIA, whose sections are not relied on by the Commission in this matter. Perhaps more plainly put: when PAIA does not apply under s.7, the public body is not restricting access; it is not acting at all in terms of PAIA and accordingly rule 14 (1)(e) is not of application.

[28]In oral argument before us the Commission expressly accepted the correctness of Group Five, provided that court's reasoning was understood in the way for which the Commission was contending. Specifically, the Commission submitted that properly construed Group Five held that it was wrong to exclude access to the record by reference to the identity of the requester, but that it was perfectly legitimate to exclude access by reference to the purpose for which the record is requested. However, since rule 15 did not contain an exclusion by reference to the purpose for which the record was required, Group Five held that the Commission was obliged to avail it.

[29]Moving from this premise, the Commission then submitted that what is excluded from the Commission's obligation is *"restricted information,"* and under rule 14(1)(e) the information referred to in s.7 of PAIA qualifies as *"restricted information."* S.7 of PAIA qualifies information with reference to the purpose for which it was obtained, according to this argument. Paragraph [19] of the judgment in Group Five, expressly left open the introduction of such a qualification (with reference to purpose, as does s.7 of PAIA) to rule 15.

[30]Therefore, according to this argument, this court was free to introduce such a qualification into rule 15, through the incorporation of s.7 of PAIA in rule 14(1)(e), by holding that proceedings before the Tribunal are akin to *"civil proceedings"* as envisaged in s.7 of PAIA, and that that section therefore served to qualify the record as *"restricted information."*

[31]I do not agree with this interpretation of Group Five. First it is necessary to quote s.7 of PAIA:

"7. Act not applying to records requested for criminal or civil proceedings after commencement of proceedings

(1) 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.

(2) Any record obtained in a manner that contravenes subsection (1) is not admissible as evidence in the criminal or civil proceedings referred to in that subsection unless the exclusion of such record by the court in question would, in its opinion, be detrimental to the interests of justice."

[32]Paragraph [19] of Group Five reads:

"[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."

[33]The first and last sentences are the key to the correct meaning of this paragraph. The judgment is saying that although there might be legitimate cause for amending rule 15, not re-interpreting it, as yet it has not been amended; and in the light of paragraph [16] (quoted earlier), the rule as it currently stands leaves no scope for the suggested reading in, even through rule 14(1)(e), of a s.7 PAIA carve-out.

[34]Nor, with respect, do I believe that Group Five was incorrectly decided. As submitted by the appellant before us, a public body restricts access, i.e. it acts in making a decision to restrict access, when it acts in terms of the power conferred in sections 33 to 46 collected under the later chapter 4 of PAIA. S.7 of PAIA finds no application at all, because under that section the public body does not act at all. Under that section PAIA as a whole simply does not apply, and the *"purpose"* qualification in s.7(1) of PAIA does not enter the interpretative endeavour.

[35]It follows then that Group Five applies unabatedly in the present matter. That has the implication – quite apart from the absence of a cross-appeal – that as a matter of law the Commission was obliged to have availed the record of its investigation to the appellant, to have done so within a reasonable time, and to have disregarded the appellant's status as litigant in determining the extent of a reasonable time.

[36]The Tribunal, although acknowledging the binding force of Group Five, nevertheless arrived at precisely the result which Group Five, as a matter of principle, eschewed. In embarking on its assessment of what would, in the circumstances, constitute a reasonable time, the Tribunal moved straight into considering the appellant's position as litigant.[34]

---

[34] Vol 3/129/12 – 21; 130/15 – 20.

[37]It reasoned, for example, that: *"Standard bank has not advanced any facts as to why it should acquire the record prior to discovery."* And it said: *"After considering all these facts we do not consider the Commission's tender to produce the record when it makes discovery in this matter to be unreasonable when weighed against the fact that Standard Bank advanced no reasons why it should be produced before then."*

[38]In view of this approach, the Tribunal's concluding paragraph, that *"Our decision would have been no different if the requester had been a member of the public who was not a litigant in this matter. The same considerations in respect of reasonableness would still apply"*, is not convincing. It plainly took into account the fact that the appellant was a litigant who was getting discovery anyway, and so it again fell into the very conceptual error that Group Five expressly identified in paragraph [11]. In doing so, it misdirected itself. It is regrettable that the Tribunal eschewed adherence to a recent clearly expressed precedent from this court. The consequence is to create legal uncertainty of a kind that the principle of precedent is designed to prevent.

[39]It follows that the Commission's first two propositions cannot be upheld. That leaves the third argument, that the appeal must fail because the appellant's persistence in asking for the record is an abuse of process and should therefore not be countenanced. As pointed out above, there is no cross-appeal to this effect,[35] despite this point having been pertinently argued before the Tribunal.[36] Since the point was fully argued before us, we deal with it.

[40]First it is necessary to decide on the time-frame within which the appellant's conduct must be scrutinised. This is relevant, because it cannot be that the Commission can unlawfully deny the record, and then convert the appellant's responsive persistence into abusive conduct thereby relying on its own unlawful denial. That would offend a fundamental principle of our law, that a person is not permitted to take advantage from his/her own

---

[35] Vol 3/142 – 148.
[36] Vol 3/119/9 – 19, although the Tribunal made no finding in regard thereto.

unlawful conduct. In Comwezi Security Services (Pty) Ltd and Another v Cape Empowerment Trust Ltd[37] Van Zyl, AJA said in this context:

"[12] The rationale for this rule is twofold: A party to a contract should not by its own unlawful conduct be allowed to obtain an advantage for himself to the disadvantage of his counterpart. 'It is a fundamental principle of our law that no man can take advantage of his own wrong' and 'to permit the repudiating party to take advantage of the other side's failure to do something, when that failure is attributable to his own repudiation, is to reward him for his repudiation'. The converse is that the innocent party is not expected to make the effort or incur the expense of performing some act when, by reason of the repudiation, 'it has become nothing but an idle gesture'. This is consistent with the general principle that the law does not require the performance of a futile or useless act. These principles are of general application and may find application in a variety of circumstances. The doctrine of fictional fulfilment of contractual terms is, for example, similarly based on the principle that a contractant cannot take advantage of its own wrongful conduct to escape the consequences of the contract."

[41] The factual background is set out above. It seems fair to conclude, as the Tribunal appears to have done, that the Commission changed its mind about making the record available when the appellant asked for a response as a matter of urgency. Whether that response was out of pique is not now relevant. The point is can it be said that the appellant's conduct before that time evidences abuse of process?

[42]Dewrance, AJ had occasion recently to consider the meaning and reach of this concept in Fourie NO and Another v Smith and Another.[38] The learned judge, having collected a number of authorities, said:

"[48] Court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused. A legal process is abused when it is used for a purpose other than for what it has been intended or designed for."

[43]In the course of discussing the authorities, the learned judge remarked that fraudulent motive cannot of itself constitute abuse; the fraudulent motive must couple with conduct

---

[37] (759/2011) [2012] ZASCA 126 (21 September 2012).
[38] (57474/13) [2015] ZAGPPHC 388 (9 June 2015).

that ultimately leads to defeat the rights of others.[39] And relying on the Appellate Division in Hudson v Hudson and Another,[40] the learned judge remarked[41] that the court's duty to intervene to stop an abuse of process *"... is a power which has to be exercised with great caution, and only in a clear case."* Although that case was concerned with court process, it is akin to the present matter, concerned as it is with procedural provisions.[42]

[44]The central tenet of the Commission's argument here was that the appellant's conduct was abusive because its persistence in seeking the record was intended to delay its obligation to file its answer; and in any event was aimed at getting access to evidence. Does the evidence sustain the asserted inference?

[45]The appellant's assertion in its founding affidavit reads thus:[43]

"Extraordinarily, SBSA became aware of the fact that it was alleged to be involved in the conduct that is the subject of the forex referral through the Commission's press release on 15 February 2017. SBSA, as a party that had not been informed that the Commission was investigating it, was not provided the courtesy even of access to the referral affidavit before a media release containing damaging allegations was sent out by the Commission. Only after the fact of the referral had been widely publicised was SBSA favoured with a copy of the complaint referral."

[46]This evidence was met with a tactical denial, not one that engaged substantively with the point. This is the type of denial of which Heher, JA said in Wightman t/a JW Construction v Headfour (Pty) Ltd and Another:[44]

"[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to

---

[39] See [46], [47].
[40] 1927 AD 259 at p 268.
[41] At [44].
[42] See generally also Lawyers for Human Rights v Minister in the Presidency and Others, 2017 (1) SA 645 (CC) at [20], quoted by the Commission.
[43] Vol 1/19/27 – 29.
[44] 2008 (3) SA 371 (SCA).

provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

[47] A real dispute of fact is thus not created unless the point is properly challenged. This is a self-evident proposition that has always been[45] central to our civil process by way of affidavit evidence, such as was this application before the Tribunal. So it remained uncontested that the Commission surprised the appellant, and did so publicly, by the fact and contents of the referral.

[48] The appellant's response was to make internal inquiries, and a week later to ask to meet with the Commission, in the context of the Commission's known willingness to treat more leniently those respondents that co-operate, so as to discuss the referral.[46] The Commission's two-sentence response the next day rebuffed the request. It said the appellant's Answer was expected in the normal course. On 1 March 2017[47] the appellant then formally asked for the record in terms of rule 15(1), to be provided by 15 March 2017.

[49]There is no doubt, as the Commission contends – here relying on Group Five – that the appellant cannot use the guise of rule 15(1) to avoid its obligation to plead. And it would also be naïve, given the appellant's ignorance of its alleged involvement, to suppose that the appellant would not be far better enabled to plead once it had the record of the investigation.

---

[45] At least since Peterson v Cuthbert & Co, 1945 AD 420 at 428 – 429, and likely before that.
[46] Vol 1/19, 20.
[47] Vol 1/23, 24.

[50]But it is equally true that the Commission's decision to surprise the appellant cannot operate to prejudice the appellant's entitlement as a member of the public to obtain the record. The fact that the appellant would want to use that information to plead is, standing alone, quite irrelevant. It only becomes relevant if the objective in seeking the record is to delay pleading.

[51]I do not consider that one can find, on these papers, that the record was being sought deliberately in order to delay pleading. I say so for two reasons. First, it is a completely natural response for a person being accused of egregious conduct, and in the public glare too, to want to know what the facts are that sustain the allegations. And second, if delaying the obligation to plead were the true (disingenuous) objective, it would seem that formally (but disingenuously) objecting to the legal sustainability of the referral would securely avoid filing the answer for some considerable time.

[52]It is obviously not suggested for a moment that such objections, or "exceptions" as they have been referred to, as have been raised in this matter are disingenuous. The point is that the Tribunal has been at pains, both in this case and in others, to lean over backwards to accommodate respondents that raise legal objections to a referral. Here a timetable was accepted that provided for the filing of a supplementary affidavit by the Commission, and provision was made for a reply by the Commission to the exceptions. A date for a pre-hearing was set. No doubt there was provision for preparation and exchange of heads of argument. As it happens, the pre-hearing collapsed, and a date for hearing the exceptions was in the event only fixed for 24 – 26 January 2018.

[53]And so, if a dishonest litigant had set out to abuse the system by deliberately retarding the process before the Tribunal, there were easier ways to delay justice, just as often occurs in our courts.

[54]That leaves the point that seeking the record is abusive because the appellant is attempting to obtain access to the evidence. This argument is met completely, I believe, by the

proposition articulated in Group Five, that a member of the public who seeks access to the record cannot be prejudiced by the fact that such a member is also a litigant.

Conclusion and order

[55]This then disposes of the merits of the appeal. The appellant must succeed and the next question relates to the order that ought to follow. Since this court will in the normal course simply have substituted its order for that of the Tribunal, the question is whether a reasonable period for the provision of the record of the investigation had lapsed by 18 September 2017 when the matter was heard by the Tribunal.

[56]Group Five made it plain that what would constitute a *"reasonable period"* is concerned only with the time the Commission would reasonably require to prepare its record and identify what parts are restricted.

[57]It is difficult to work out precisely what could have delayed the Commission's provision of the record since 1 March 2018 when it was first requested. The answering affidavit deals with this issue at paragraphs 36 (with six sub-paragraphs) and 37.[48] The assertions relevant to this issue are regrettably of a generalised nature, e.g.: *"It takes time, resource and the assistance of experts and witnesses to determine what should reasonably be classified as restricted information for the purposes of disclosing the record."*[49] And: *"The Commission has a defined limited staff that have been dedicated to this matter."*[50] And: *"A lot of the Commission's time and resources in the matter were diverted and have been devoted to dealing with the exceptions and various interlocutory applications that have been filed in the matter."*[51]

[58]It did not help that the Commission later - before the hearing on 18 September 2017 - declined to make the record available, but did not say whether it had stopped preparing it as

[48] Vol 1/52 – 54.
[49] Para 36.2.
[50] Para 36.3.
[51] Para 36.4.

it had earlier undertaken to do and, if so, on what date. Given its own, changed, stance, the Commission also did not predict – with reference to facts – when the record would be available.

[59]In consequence the Tribunal was poorly equipped to determine a reasonable period, absent the litigation of course; and so is this court. Should this court refer the matter back to the Tribunal? In my view not, given that so much time has already elapsed.

[60]In the result I propose the following order:

(a) The appeal is upheld with costs, including the costs of two counsel.

(b) Paragraph (1) of the order of the Tribunal dated 6 November 2017 remains unaltered.

(c) Paragraph (4) of that order is renumbered as (3).

(d) Paragraphs (2) and (3) of that order are deleted, and there is substituted for them the following:

(2) "An order is granted in terms of prayer 2 of Standard Bank's Notice of Motion dated 26 April 2017."

Van der Linde, AJA

I agree, and it is so ordered.

Davis, JP

I agree.

Mnguni, JA

For the appellant:
Adv. A Subel, SC
Adv. MJ Engelbrecht

Instructed by:
Herbert Smith Freehills
15 Biermann Ave
Rosebank Towers, 4th floor
Rosebank
Ref: J Meijer/S Naidoo
Tel: 010 500 2642/3
Jean.meijer@hsf.com/sandhya.naidoo@hsf.com

For the Commission:
Adv. T Ncgukaitobi
Adv. F Hobden
Adv. L Zikalala
Adv. I Kentridge
Instructed by:
Ndzabandzaba Attorneys Inc
Unit 3, Ground Floor
65 Peter Place Road
Bryanston
Sandton
Johannesburg
Tel: 011 463 8448
Ref AC Ndzabandzaba/CCSA0050
Anthony@nalegal.co.za/musa@nalegal.co.za