THE COMPETITION APPEAL COURT OF SOUTH AFRICA

Case No: 157/CAC/Nov 2017

In the matter between:

CONTINTNENTAL TYRES SOUTH AFRICA (PTY) LTD	1st Appellant
GOODYEAR SOUTH AFRICA (PTY) LTD	2nd Appellant
and	
THE COMPETITION COMMISSION OF SOUTH AFRICA	1st Respondent
APOLLO TYRES SOUTH AFRICA (PTY) LTD	2nd Respondent
BRIDGESTONE SOUTH AFRICA (PTY) LTD	3th Respondent
SOUTH AFRICAN TYRE MANUFACTURERS CONFERENCE (PTY) LTD	4th Respondent

JUDGMENT

UNTERHALTER J

INTRODUCTION

1. The appellants before us, Continental Tyres South Africa (Pty) Ltd ("Continental") and Goodyear South Africa (Pty) Ltd ("Goodyear") are respondents in a complaint that the Competition Commission ("the Commission ") has referred to the Competition Tribunal. The complaint alleges that Continental and Goodyear, with others, have engaged in price fixing.

2. Continental sought the production by the Commission of its record of investigation. Goodyear sought discovery from the Commission. The Commission disclosed the documents sought, save for three classes of documents: certain correspondence between the Commission and the complainant, Parsons Transport (Pty) Ltd; transcripts of certain interrogations conducted by the Commission in the course of its investigation; and certain correspondence between the Commission and Bridgestone South Africa (Pty) Ltd, the leniency applicant.

3. Continental and Goodyear made application to the Competition Tribunal ("the Tribunal") to compel production of the documents the

Commission had declined to disclose. The Commission opposed on the basis that the documents were either protected from disclosure by litigation privilege, alternatively, the documents constitute restricted information in terms of Commission Rule 14, and, for this reason, may not be disclosed.

4. The Tribunal, save for granting Goodyear access to the transcript of Mr Wustmann, since it had already been disclosed to Continental, dismissed the applications. Continental and Goodyear appeal to this Court. Continental does so on the more limited basis that it seeks only the transcripts. Goodyear persists in seeking the production of the documents in all three classes.

5. Since both Continental and Goodyear appeal the Tribunal's dismissal of their applications for the production of the transcripts, I deal firstly with this issue. I then consider the remaining issues raised by Goodyear's appeal: the production of the correspondence with the complainant and the leniency applicant.

THE TRANSCRIPTS

6. The transcripts, to which Continental and Goodyear seek access, record interrogations conducted by the Commission with a number of persons who were issued with a summons in terms of 49A of the

Competition Act 89 of 1998 ("the Act"). These interrogations took place at different times in the period 5 May 2009 – 11 September 2009.

7. The Commission contends in the first place that the transcripts are protected by litigation privilege. The Supreme Court of Appeal in *Arcelormittal*[1] set out the requirements that must be met for a litigant to claim litigation privilege. First, the privilege protects communications between a litigant or her legal advisor and a third party that come about for the purpose of a litigant's submission of the communication to a legal advisor for legal advice. Second, at the time that the communication takes place, litigation must be pending or contemplated as likely.

8. Other features of the privilege have been emphasized.[2] The privilege is not assumed, it must be established. The privilege is a right to withhold from disclosure evidence that might otherwise be of value and

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[1] *Competition Commission v Arcelormittal South Africa Ltd and Others* 2013 (5) SA 538 (SCA).

[2] *Arcelormittal* id. *R (on the application of Prudential Plc & Ano) (appellants) v Special Commissioner of Income Tax & Ano (respondents)* [2013] UKSC 1 at para 18 (Lord Neuberger). *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing and Others* 1979 (1) SA 637 (C) at 643 I – J. *Comfort Hotels Ltd v Wembley Stadium Ltd [1988] 3 All ER 53 at page 57 H- J. United Tabacco Companies (South) Ltd v International Tabacco Company of SA Ltd* 1953 (1) SA 66 (T) at 68F. *General Accident, Fire & Life Assurance Corporation Ltd v Goldberg* 1912 TPD 494 at 504. *Bagwandeen and Others v City of Pietermaritzburg* 1977 (3) SA 727 (N) at 733C.

require production. The privilege protects important values that underpin the litigation process. But the privilege also restricts the production of evidence, and evidence is the lifeblood of the duty of a Tribunal or Court to find the facts. Accordingly, a litigant who claims the privilege must prove the facts that establish the right asserted.

9. The Commission, in its answering affidavits to the compelling applications, could not have adopted a more perfunctory approach to its assertion of litigation privilege. It contented itself with the following averment:

"*Both the correspondence and the transcripts to which Continental seeks access were obtained for the purpose of pending or anticipated litigation against the respondent parties to the referral.*"[3]

10. This averment fails to state facts. It simply asserts, in truncated form, the requirements that would need to be established by facts in order to claim the privilege. Elsewhere in the answering affidavits, the Commission simply claims that the documents sought are protected by the privilege. But a claim does not afford proof.

11. In order to overcome this absence of proof, the Tribunal, and now the Commission before us, sought to rely on what are described as inferences that may be drawn from common cause facts on the papers.

[3] Para 5 Answering Affidavit, identical words are used in para 5 of the Answering Affidavit to Goodyear.

This is not a warranted approach. When a person asserts litigation privilege, they must clearly adduce the evidence they rely upon to establish the privilege and make that plain in the answering affidavit so that the applicants who seek disclosure understand the case that is sought to be made out to resist the disclosure of documents. It will not suffice to trawl the record to find common cause facts from which inferences might be drawn. That is a case neither pleaded nor intelligible from the papers, but an exercise of *ex post* reconstruction.

12. The Commission simply failed to adduce evidence to make out a case for the privilege. And that ends the Commission's claim that it is entitled to resist disclosure on the basis of an assertion of privilege.

13. However, even reliance on inference from common cause facts, a flawed approach, renders ambiguous outcomes that fail to establish the privilege.

14. There were three actions taken by the Commission, reflected in the papers, that are consistent with the contemplation of litigation by the Commission. First, the Commission executed a warrant of search and seizure on 4 April 2008 under powers granted under section 46 of the Act. Second, on 24 April 2009, the Commission initiated its own complaint. Third, in May 2009 the Commission issued summonses pursuant to its powers in section 49A to interrogate various persons. It was the exercise of these powers that gave rise to the interrogations,

and in turn, the transcripts that are sought by Continental and Goodyear.

15. On 11 September 2009, Bridgestone filed a marker and thereafter a leniency application. I return to the significance of this conduct. But given the timing of Bridgestone's marker, the Tribunal appeared to accept, correctly, that this was not a fact relevant to whether the Commission already contemplated litigation as likely during the period 5 May 2009 - 11 September 2009 when it conducted the interrogations at issue in this case.

16. The Tribunal considered that the execution of the search warrant, reflected in a letter attached to the papers, permitted of the reasonable inference that the Commission then contemplated litigation as likely. This inferential reasoning is flawed. A warrant can be obtained not only when the Commission has information that a prohibited practice has taken place or is likely. It is also competent to issue a warrant under section 46 if there are reasonable grounds for the judge or magistrate to believe that anything connected to an investigation is in the possession or under the control of a person in the premises. A warrant may be issued in the course of an investigation and without any affirmative belief on the part of the Commission that a prohibited practice has taken place. The warrant may be issued to assist the Commission to find evidence of the complaint under investigation. No evidence may be forthcoming. The mere fact that a warrant is obtained

and executed does not establish that the Commission had sufficient evidence so as to contemplate litigation as likely.

17. Since the Commission failed to state in its affidavits on what basis it obtained the search warrants, the mere execution of the warrants does not give rise to the inference that its investigation had proceeded to the point that the Commission had secured evidence sufficient to consider litigation likely. The execution of the warrants is consistent with the contemplation of litigation. But consistency is not the same as proof that the Commission contemplated litigation as likely.

18. The initiation of the Commission's own complaint on 24 April 2009, without more, provides no better basis for drawing the required inference.

19. The complaint is attached to the papers.[4] The initiation statement references what it describes as allegations of price fixing. The allegations, it is said, may amount to an infringement of section 4(1)(a) or (b) of the Act. The complaint is said to be required so as to broaden the scope of the investigation.

20. The initiation statement, unsurprisingly, does not state whether litigation is likely. Its purpose is to frame the scope of the investigation. The statement can say no more than that the allegations may amount

[4] Annexure NS 2 vol 6 546.

to an infringement of the Act. The initiation of the complaint does not anticipate the outcome of the investigation. Whether there is ultimately sufficient evidence of an infringement is the purpose of the investigation.

21. It follows that the initiation of the investigation by the Commission, without more, does not establish whether the Commission contemplated litigation as likely. It may have done, but the Commission was required to put up the facts as to what the investigation had yielded to that point and whether litigation was considered likely or not as a result. This the Commission failed to do.

22. That the Commission issued summonses in order to interrogate various persons takes the case for the asserted privilege no further. Section 49A provides that the Commission may summon any person to furnish information on the subject of the investigation. The power is widely framed precisely because the Commission should not have to exercise the power only in circumstances where it already has sufficient evidence to contemplate litigation as likely. The power of summons may be exercised to secure such evidence. But the issue of the summons is simply equivocal as to what evidence the Commission has already found and hence whether litigation is likely.

23. Accordingly, the Commission cannot establish, based on inference from the facts relied upon, that it considered litigation at the relevant

time to be likely. Hence, the Commission's assertion of litigation privilege must fail.

24. I make two further observations on this aspect of the matter. First, it is the failure of the Commission to put up the facts that gives rise to the conclusion that the case for the privilege has not been made out. It is not that such evidence, if it exists, is difficult to adduce. It simply requires that the Commission references what the Commission knew at the relevant time that made litigation likely. Second, if a court is too ready to assume without proper proof that litigation was contemplated by the Commission, similar reasoning will have to apply to those persons who are subject to investigation, permitting them to claim privilege on the same slender assumption that the receipt of a summons entails the likelihood of litigation. That would protect the communications of persons whose communications would otherwise be open to investigative scrutiny by the Commission – an undesirable limitation upon the investigative remit of the Commission.

25. Finally, *Mr Gotz*, who appeared with *Ms Lewis and Mr Nyangiwe* for Goodyear, made an ambitious and important submission that the Commission could not assert litigation privilege as might an ordinary litigant because the Commission exercises investigative powers akin to police powers and the fruits of its investigations are subject to production as a matter of fairness. The argument invoked by way of

analogical authority the constitutional principles applied in *Shabalala*.[5] There is no need to determine this issue because the Commission has not established its right to claim the privilege, and hence the attenuation of that right does not arise for consideration.

26. The Commission contended before the Tribunal, and does so again before us, that quite apart from its reliance on litigation privilege, the transcripts are immune from production as restricted information as provided for in Commission Rule 14(1)(d)(ii)(bb) ("the rule"). The Tribunal upheld this contention. The Tribunal found that the rule affords the Commission even more generous protection than does litigation privilege as a necessary adjunct to the discharge by the Commission of its investigative functions.

27. Goodyear and Continental contest the Tribunal's findings on various grounds, including the Commission's failure squarely to invoke the rule in its affidavit or adduce facts in support of the rule's application.

28. The threshold question however is this: is the rule available to the Commission when documents are sought from it by a litigant against whom the Commission has referred a complaint to the Tribunal?

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[5] *Shabalala and Others v Attorney-General of the Transvaal and Another* 1996 (1) SA 725 (CC).

29. The rule must be read together with Commission Rule 15. Rule 15(1) permits any person to inspect or copy any Commission record, subject to the restrictions set out in this rule.

30. Plainly any person is a very wide class, and might seem to include persons who are respondents in the referral of a complaint by the Commission to the Tribunal. Certain of the sub-rules in Rule 14 may lend support to this construction because there are types of restricted information that remain restricted only to the point of referral or non-referral by the Commission.[6]

31. However, this is not the correct construction of Rule 15. It is precisely because the class of "any persons" is so wide that the regime of exclusion that is set out in Rule 14 cannot be of application to the class of persons constituting litigants who are respondents in a referral brought against them by the Commission. The Commission has duties of disclosure to respondents that it does not have to the public at large. The Commission is engaged upon adversarial litigation with respondents in proceedings of great consequence for the public and the respondents. Such litigation must be fair. One aspect of fairness is disclosure. The Commission is given large powers to conduct investigations. The yield of that investigation must be disclosed to respondents, unless it is privileged, and subjected to an appropriate confidentiality regime.

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[6] See Rule 14 (1)(c)(i).

32. The matter may be tested in this way. If the Commission obtained an exculpatory statement from a witness in a consultation with that witness recorded in a minute, and this minute formed part of the record on the basis of which the Commission decided to refer a complaint to the Tribunal: could the Commission avoid production of this minute under Rule 14(1)(d)(i)(cc)? Plainly not. The duty to give exculpatory statements to a respondent is an attribute of fairness.

33. The majority of the Constitutional Court has recently held that a public body subject to judicial review has a duty to disclose the record of its decision that is not co-extensive with its duty to make disclosures of information to the public under PAIA.[7]

34. For like reasons, Rule 15 cannot be interpreted expansively to be of application to respondents in referral proceedings because the Commission has a duty to disclose all relevant documents (absent a valid claim of privilege) so as promote truth finding and fairness. A regime of restriction of application to respondents that was wider than the protection already given by privilege would damage the fairness of proceedings. That is not an interpretation of Rule 15 that should lightly be countenanced.

[7] *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC).

35. Rather, Rule 15 should be understood to create a regime of access by the public to information held by the Commission. This Court has held Rule 15 to be a rule of public access,[8] and we affirm that position.

36. A respondent secures disclosure as a litigant under the powers conferred on the Tribunal by Sections 52 (1) read with Tribunal Rule 22 (1)(c)(v). It is the Tribunal that determines the duty of litigants to make discovery. Rule 15 of the Commission Rules cannot be read as a derogation from the Tribunal's powers to stipulate for a regime of disclosure that ensures a fair and effective hearing for the litigants.

37. If Rule 15 is read to apply to litigants then it would create a restrictive regime of disclosure, favouring the Commission – one of the litigants before it. That could not have been the intention behind Rule 15.

38. I find that Rule 15 read with the rule is not of application when a litigant seeks discovery of documents. Accordingly, the Commission could not rely upon the rule to resist production of the transcripts.

39. In any event, in so far as the Commission sought to rely on the rule, it had to set out the facts as to how disclosure would frustrate its deliberative process. This it has failed to do. And for this reason also, the Tribunal fell into error in finding that the rule could be invoked to prevent production of the transcripts.

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[8] *Group Five Ltd v Competition Commission* (139/CAC/ Feb 2016) [2016] ZACAC 1(23 June 2016).

40. Goodyear has been at pains to point out that it never sought the disclosure of a Commission record under Rule 15. Rather it sought discovery. That is accepted by the Commission. I have found that Rule 15 does not restrict the disclosure of documents to a litigant who seeks discovery.

41. Continental did seek the record under Rule 15. But it did not do so as a member of the public but as a litigant. As such, it sought what is in effect discovery, and no different result is warranted in its case.

42. In the result, the Commission has failed to provide a defensible basis for resisting disclosure of the transcripts: it has not established litigation privilege; the rule is not of application when a litigant seeks discovery; and even if it was, the Commission has failed to set out facts that permit of the rule's application.

THE CORRESPONDENCE

43. Goodyear appeals the Tribunal's decision to refuse it access to the correspondence that took place between the Commission and the complainant, as also between the Commission and the leniency applicant.

44. I consider first the correspondence between the leniency applicant and the Commission. The Tribunal found that the Commission could permissibly resist disclosure of these documents both on the grounds of litigation privilege and upon an application of the rule.

45. Goodyear submitted that neither ground was properly pleaded or proven by the Commission. For reasons already stated above, these criticisms are warranted.

46. However, it may be argued that whenever a leniency application is made its contents (including correspondence) constitutes privileged material in the hands of the Commission. The Tribunal considered this to be the holding of the Supreme Court of Appeal ("SCA") in *Arcelormittal*.

47. A careful reading of the case does not bear this out. The SCA emphasized that establishing privilege is a fact bound exercise.[9] In that case it was the facts put up in the Commission's answering affidavit which made out the case for the privilege. In particular, the leniency application was the result of discussions with the Commission and its lawyers. It was made at the request of the Commission and contained information for the purposes of prosecuting a complaint against firms in

[9] *Competition Commission v Arcelormittal South Africa Ltd and Others* 2013 (5) SA 538 (SCA) para 28.

the steel industry.[10] There were specific factual averments made in the affidavit of the Commission that established the privilege.

48. That was not done by the Commission in the case before us.

49. Might it nevertheless be held that since the purpose of a leniency application is to obtain leniency in exchange for information and co-operation that assists the Commission to prosecute other firms, an application for leniency must axiomatically be privileged in the hands of the Commission? This does not follow. A leniency applicant may make an application with insufficient information to place the Commission in a position to consider litigation likely. Of course to obtain conditional leniency, an applicant will seek to put up information of value to the

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[10] See *Arcelormittal* id where it was held at 29:

> "It emerges from the commission's affidavits that it contemplated litigation as a result of its investigation into the steel industry. Scaw became aware of the investigation and applied to the commission for a marker, which was granted. The commission then requested Scaw to file a leniency application, which contained certain specific information. Scaw did so on 9 July 2008. Of importance in this regard is that the commission pertinently says that the leniency application was prepared for its use, even though it would be of benefit to Scaw. And it was made clear to Scaw from the outset of its engagement with the commission that the information contained in the leniency application was required so that a complaint could be initiated against the respondents. Moreover, the commission's in-house and external legal advisors were involved throughout this process, including providing advice on the leniency application."

And at 31 where it was held:

> "I therefore consider that the circumstances under which Scaw created the document and the commission obtained it are inseparable. The document came into existence at the instance of the commission for the purpose of prosecuting firms alleged to be part of a cartel. And the fact that there was, in the process, to borrow from the tribunal's phraseology in the *Pioneer Foods* case, 'an ancillary outcome . . . of indemnity' does not detract from this purpose. Furthermore, the accepted facts support the commission's averment that litigation was likely when the document was procured, that its lawyers were involved in the process — including advising on the leniency application — and that the purpose for the preparation of the leniency application was to support the envisaged litigation. The leniency application was, in substance, Scaw's witness statement in the contemplated litigation. The document was therefore privileged in the hands of the commission."

Commission. But it is for the Commission to assess that information and determine whether to grant conditional leniency and, in the context of privilege, state on oath whether, at the time the leniency application was made, litigation was contemplated as likely. A successful leniency application will usually support this conclusion. But it is for the Commission to explain what it thought as to the likelihood of litigation in the light of the information that it had available. The mere making of an application for leniency, without more, does not establish the privilege.

50. It follows that the paucity of facts offered by the Commission simply fails to establish the privilege claimed by the Commission. Even accepting that an application for leniency was made, this fact alone says nothing as to what the application contained and what effect it had on the Commission's contemplation of litigation.

51. The claim of privilege must fail. And so too, for reasons already explained, the reliance that the Commission has placed on the rule is unavailing against a litigant seeking the production of documents.

52. I deal finally, and briefly, with the last category of documents sought: correspondence between the Commission and the Complainant. Little is known of what these documents consist of, or even the dates on which they were written or received. The Commission does not say. Without a date, it is impossible to know what facts, if any, might be relevant to the contemplation of litigation by the Commission.

53. The Tribunal rightly did not decide this aspect of the matter on the basis of privilege. It did however apply the rule. For reasons set out above, I do not find the rule to be of application.

CONCLUSION

54. It follows that the Tribunal's decision dismissing Continental and Goodyear's application for disclosure by the Commission of the three categories of documents cannot be allowed to stand. The Tribunal found that the Commission enjoyed a privilege it had not established. The Tribunal inferred the privilege from facts that do not support this inference. And finally, the Tribunal allowed for the application to litigants of a rule of restriction, wider than litigation privilege, that is simply a public access rule. In this the Tribunal erred.

In the result the following orders are made:

(a) The appeals are upheld;

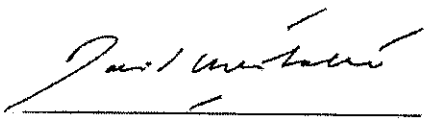
(b) The orders made by the Tribunal are set aside and replaced with the following:

(i) The Commission is ordered to disclose to Continental Tyres South Africa (Pty) Ltd and Goodyear South Africa (Pty) Ltd the transcripts listed in paragraph 95 of the Tribunal's decision;

(ii) The Commission is ordered to disclose to Goodyear South Africa (Pty) Ltd the correspondence between the Commission and Bridgestone South Africa (Pty) Ltd, as identified in the revised schedule of the Competition Commission annexed to the founding affidavit as "CT6" ("the revised schedule").

(iii) The Commission is ordered to disclose to Goodyear South Africa (Pty) Ltd the correspondence between the Commission and Parsons Transport (Pty) Ltd, as identified in the revised schedule.

(c) The Commission is to pay the costs of the appeals, including the costs consequent upon the employment of two counsel.



David Unterhalter

Acting Justice of the Competition Appeal Court

Appearances:

For the 1st Appellant: Adv. JPV McNally SC and MJ Engelbrecht

Instructed by: Bowman Gilfillan Inc.

For the 2nd Appellant: Adv. A Gotz, Adv. N Lewis and Adv. L Nyangiwe

Instructed by: Judin Combrinck Inc.

For the 1st Respondent: Daniel Berger SS and Sha'ista Kazee

Instructed by: Competition Commission of South Africa

Heard: 29 June 2018

Delivered:11 October 2018

REPUBLIC OF SOUTH AFRICA

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IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CAC CASE NO: 156/CAC/NOV17

In the matter between:

Continental Tyres South Africa (Pty) Ltd — Appellant

and

Competition Commission of South Africa — Respondent

CAC CASE NO.: 157/CACNOV17

Goodyear South Africa (Pty) Ltd — Appellant

and

Competition Commission of South Africa — Respondent

Judgment

Vally JA

[1] On 2 October 2006 the Commission received a complaint from a Parsons Transport (Pty) Ltd (Parsons) of unlawful conduct against a number of parties which included Goodyear South Africa (Pty) Ltd (Goodyear). On 4 April 2008 the Commission conducted a number of search and seizure raids on the premises of a number of companies it believed may be involved in the unlawful conduct. On 24 April

2009 the Commission issued an Initiation Statement concerning the complaint. The Statement records the following:

> "The complainant alleged that:
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> - The respondents unilaterally adjusted their prices at a similar time, within the same parameters, for reasons such as the change in the exchange rate and the escalating costs of raw materials;
> - The respondents used "*clever*" marketing structures and pricing techniques to disguise their price fixing; and
> - They worked together in order to manipulate their pricing mechanisms and prices for their products. This co-operation amongst the tyre manufacturers was commonly referred to as "coffee table talks" in the transportation industry.
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> ...
>
> Following the complaint and investigation conducted thus far, it appears that:
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> - ...
> - The Respondents are not only involved in price fixing, but also potentially in the division of markets, collusive tendering as well as price information exchange in respect of [numerous tyre products]
> - There has been an exchange of market share information, industry statistics and list prices through the medium of the South African Tyre Manufacturers Conference (Pty) Ltd.
>
> ...
>
> The Allegations:
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> - Price fixing, the division of markets and/or collusive tendering in contravention of sections 4(1)(b)(i), 4(1)(b)(ii) and 4(1)(b)(iii) of the Act
> - Price information exchange in contravention of section 4(1)(a) and/or 4(1)(b) of the Act in respect of the tyre products."(Underlining added.)

[2] In May 2009 the Commission issued summonses and interrogated certain individuals connected with the alleged unlawful conduct discovered by it and referred to in its Initiation Statement.[1] After its investigations were complete, on 31 August 2010 the Commission referred, *inter alia*, Continental Tyres (Pty) Ltd (Continental) and Goodyear to the Tribunal for breaching s 4(1)(a) and (b) of the Competition Act of SA. The affidavit filed in support of the

[1] See underlined portion of quote in previous paragraph

referral details extensive collusion on the part of the respondents[2] in, *inter alia*, manipulating price increases of their tyre products and on the discount structure they would all apply, as well as on how to manipulate the market's responses to their increases. It is pointed out in that affidavit that they are in a horizontal relationship with each other and would therefore have been prohibited from engaging in such collusive conduct. There are two sets of documents referenced in the affidavit: documents arising from the complaint received from Parsons and documents arising from a leniency application brought by Bridgestone (Pty) Ltd (Bridgestone) in terms of the Commission's Corporate Leniency Policy (CLP). Bridgestone filed a marker application on 11 September 2009 and the leniency application on 16 October 2009 admitting to being part of the cartel.

[3] There is an averment in the founding affidavit supporting the referral that is pertinent to the issue in these two cases that serve before us. It is to the effect that after it had executed a search warrant on the premises of some of the parties involved in the alleged cartel on 4 April 2008 it uncovered evidence of what it believed to be unlawful conduct by the tyre manufacturers.[3] It is not

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[2] The respondents in the referral are: Apollo Tyres South Africa (Pty) Ltd (Apollo), Goodyear, Continental, Bridgestone, and the South African Tyre Manufacturers Conference (Pty) Ltd (SATMC). Any reference to respondents in this judgment is a reference to all of them.

[3] For the benefit of the reader this averment is reproduced in full here. It reads:

> "22. As a result of the complaint filed by Parsons the applicant applied for and was granted a search warrant for the premises of Bridgestone, Apollo and SATMC. The search was conducted on 04 April 2008 and numerous documents were seized. The investigation revealed [sic] following:
> 22.1 representatives of the tyre manufacturers discussed the reduction of the dealer price list;
> 22.2 tyre manufacturers discussed and agreed on the timing for requesting price adjustments from the STB;
> 22.3 that during 2006 representatives of the tyre manufacturers discussed price increases; and
> 22.4 the tyre manufacturers coordinated the percentage and timing of price increases"

stated in the Commission's affidavits as to when exactly it uncovered this unlawful conduct, but it is clear from the Initiation Statement that by 24 April 2009 it had received sufficient information demonstrating that there was unlawful conduct on the part of the respondents.

[4] Since then some of the respondents, including Continental and Goodyear as well as the SATMC have brought a number of interlocutory applications at the Tribunal against the Commission. The present matter is one of them. In an affidavit filed by the Commission in one of the interlocutory applications it is made plain that during its interactions with Bridgestone's representatives on 6 November 2009 the Commission unambiguously informed Bridgestone that "*it required full disclosure of the cartel conduct in order for it to prosecute the other cartel members*". It could only have said this to Bridgestone if it had contemplated litigation against members of the cartel. And, in any event, as from 6 November 2009 there could be no doubt that the Commission had accepted that litigation against the rest of the alleged members of the cartel was inevitable and not just contemplative.

[5] Six years after the referral, on 21 July 2016, Goodyear filed its answering affidavit. Like Continental it too raised a number of preliminary points, two of which are identical to that of Continental. They are: (i) the complaint had lapsed and, (ii) the referral is invalid as "*all the allegations*" had prescribed. On the merits, Goodyear denies that it was party to any cartel or to any agreement with its competitors to manipulate price increases; any agreement on the discount structure of their products or on how they would all

apply as well as on how to manipulate the market's responses to their increases. But unlike Continental, Goodyear does provide a substantial amount of factual material to support its denial. Goodyear also annexed to their answer some of the documents from the leniency application of Bridgestone. These were handed to all the respondents by the Commission.

[6] Eight weeks later, on 9 September 2016 the Commission filed its replying affidavits to the two answering affidavits. The Commission stands by its referral on the merits and denies that any of the preliminary points hold merit. Thereafter the present interlocutory applications were brought: Continental's was brought on 2 May 2017 and Goodyear's was brought on 23 May 2017.

[7] Both called on the Tribunal to order the Commission to disclose a number of documents. Continental sought the following documents: (i) correspondence between the Commission and the legal representative of Bridgestone with regard to the leniency application of Bridgestone; (ii) correspondence between the Commission and the complainant and between the Commission and the complainant's legal representative; and (iii) transcripts of all interviews conducted by the Commission in this matter. Goodyear, in the main, sought all correspondence between the Commission and the complainant and copies of all transcripts of interviews conducted in the course of its investigation. As for the transcripts, the parties were able to narrow these down to the following:

Witness	Company	Date of interview
Mr Jan Maeda	Bridgestone	11 Sept 2009
Mr Tony Burns	Bridgestone	25 May 2009
Ms Chantal Henriques	Bridgestone	22 May 2009
Mr Raymond Waldeck	Bridgestone	Unclear
Mr Julio Fava	Bridgestone	22 May 2009
Mr Shaun Wustmunn	Bridgestone	2 March 2010
Mr Pierre Dreyer	Dunlop	5 May 2009
Ms Kathy Roberts	Dunlop	5 May 2009
Mr Carlo Raffanti	State Tender Board	Unclear

[8] While they both seek essentially the same documents, their respective causes of action are not the same. Continental brought its application in terms of rule 15 read with rule 14 of the Commission's rules.[4] Goodyear brought its application in terms of rule 35(12) of the Uniform Rules of the High Court. Goodyear also relies on the legal doctrine of waiver to secure access to the transcripts of the Wustmann interview.

[9] The Commission refused to furnished the documents on the bases that they were immunised from disclosure by the provisions of sub-rules 14(1)(d) or

[4] The relevant part of Rule 15 provides:

"Access to information-

(1) Any person, ... 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 condition and subject to any condition imposed, by
    (i) this Rule; or
    (ii) an order of the Tribunal, or the Court."

(e) of the Commission's rules,[5] and/or because they constitute litigation privilege. One document which the Commission intended to refuse, the transcript of an interview with a Mr Shaun Wustmann, an employee of Bridgestone, was inadvertently handed over to Continental's attorneys. The Commission had asked Continental's attorneys to return the documents or to destroy them. The Tribunal dealt with this issue and as all parties are satisfied with the outcome, there is no need to focus on it anymore.

[10] Continental's affidavit is extremely short and terse. In two very brief paragraphs it lays the bases for its claim as to why it disputes the claim of protection in terms of rule 14(1)(d) or in terms of litigation privilege. These are: (i) the claim is asserted without any explanation and, (ii) the Commission, Bridgestone and the complainant have already provided its legal representative with "*correspondence*" between the three of them with regard to Bridgestone's leniency application and, therefore, the privilege attached to the documents sought (assuming that such privilege existed), had been waived. Goodyear's affidavit is a bit more detailed. It initially sought a great deal of documents, almost everything that the Commission claimed to be privileged as well as any other documents the Commission had not yet discovered, but this has been

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[5] The provisions of these rules read:

"Restricted information

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

...

(d) A document –

(i) ...

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

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

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

(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"

narrowed down to the correspondence with the complainant and the transcripts of the interviews referred to in the table at [7] above.

The Tribunal's decision

[11] The Tribunal agreed to consolidate the two applications. Concerning Goodyear's application, it found that the request for the correspondence between the Commission and the complainant fell within the ambit of the protection offered by rule 14(1)(d)(ii). Quintessentially, the Tribunal came to the conclusion that the disclosure would "*frustrate*" the open communication between the complainant and the Commission ("*the deliberative process*") that is fundamental to the efficacy of the Commission. It is for protection of this kind of communication that rule14(1)(d)(ii) was established. The Tribunal made explicit that it is important to note that the Commission's work after receipt of a complaint "*consists of many decisions made along the way where it might be required to evaluate issues, assess evidence, decide whether or not to follow a particular direction in its investigation, to narrow its ambit, to expand its scope or make any other type of decision related to the performance of its functions.*"[6] The correspondence with the complainant took place in this context.[7] It is only natural in matters of this kind that once the complainant registered the complaint the Commission would over time be engaging with it on, *inter alia*, the precise nature of its complaint and the evidence on which it bases its complaint. The engagement would in all probability be robust and would

[6] Tribunal's decision at [73]

[7] Tribunal's decision at [30]. The thrust of its reasoning is expressed in a single sentence:

> "Under rule 14(1)(d), documents such as the Commission's internal investigation had to remain confidential, regardless of the stage of the investigation and even after the conclusion thereof, so as not to compromise candid and open deliberations within the Commission."

certainly have to be frank, full and be conducted on the basis that they both observe *uberrima fide* in their dealings with each other. Phrased differently, the communication has to enjoy absolute candour. To allow for this take place rule 14(1)(d)(ii) was promulgated. It is this principled understanding of the work of the Commission that underscores the Tribunal's decision that the communication was immunised from disclosure. Anything short of this would bear too great a risk of "*frustrating the deliberative process of the*" Commission "*by inhibiting the candour*". So reasoned the Tribunal. [8]

[12] As to the call for the transcripts identified in the table at [7] above the Tribunal found that they were immunised from disclosure on the basis that they constitute litigation privilege. Utilising inferential logic the Tribunal came to the conclusion that the Commission had at the very least by 4 April 2008, when it conducted the dawn raids, contemplated litigation between itself and the respondents. Here, once again, the Tribunal drew on the understanding of the work of the Commission and reiterated what it said earlier[9] that the Commission's investigation of the complaint is a process and not an event and that the process is "*made up of more than the sum of its parts*".[10] Therefore, "(i)*t would be artificial indeed to place the individual components of the Commission's investigative process into silos and draw atomistic conclusions about them.*"[11] As the interviews took place after the Commission had

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[8] *Id.* It bears emphasising that this approach to sub-rules 14(1)(d) and (e) has been consistently followed by the Tribunal. On a number of occasions it made explicit that in its understanding the rationale for these sub-rules lies in the need to protect the "*integrity*" and work of the Commission: See also the cases cited and discussed in [30], [31], [32] and [33]

[9] *Id*

[10] At [100]

[11] *Id*

contemplated litigation the transcripts thereof were immunised from disclosure on the grounds of litigation privilege. In the words of the Tribunal:

> "The most relevant fact here is that all of the interviews took place after the Commission had made the decision to invoke its invasive powers of search and seizure on 4 April 2008, a decision that could not have been taken lightly and which had to be justified to a High Court. It is reasonable to infer that the Commission contemplated litigation during this period of time (and not only on that singular date of 4 April 2008) and the documents procured by it were subject to litigation privilege. Hence we find the transcripts to be privilieged."[12]

[13] The Tribunal also found that they were immunised from disclosure in terms of sub-rule 14(1)(d)(ii)(bb). The logic here is exactly the same as that explained above in [11] above.

Litigation privilege

[14] Both Continental and Goodyear accept that the Commission is entitled to rely on litigation privilege to withhold disclosure of the documents they seek, but claim that on the conspectus of all the facts, including those alleged in the answering affidavits of the Commission, the Commission has failed to make out a case for litigation privilege.

[15] In *Arcelormittal*[13] the Supreme Court of Appeal (SCA) observed that litigation privilege protects communication between a party or its legal representatives and other parties if that communication was "*made for the purpose of pending or contemplated litigation*"[14] For a party to successfully invoke the protection it must demonstrate that the communication came into

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[12] At [101]
[13] *Competition Commission v Arecelormittal South Africa Ltd and Others* 2013 (5) SA 538 (SCA)
[14] *Id* at [20]

existence "*for the purpose*" of obtaining legal advice and the "*litigation must be pending or contemplated at the time*"[15] the communication came into existence.

[16] Conscious of the duty to meet the two legs of this requirement, the Commission in one of the earlier interlocutory applications brought by the respondents made explicit that it informed Bridgestone at the time of its marker and CLP applications that it wanted full disclosure of the cartel's activities so that it could prosecute the respondents. Hence, all communication post the marker application are immunised from disclosure. There is no issue in this regard between the parties. It also avers that by the time all the other documents which are sought were procured litigation was contemplated.

[17] On a conspectus of the facts outline above it is likely, in my view, that by 24 April 2009, when the Initiation Statement was issued, the Commission had contemplated litigation against the respondents. This is borne out by what it says in the Initiation Statement about the complaint and the knowledge it acquired during its investigation.[16] Therein it is recorded that the information received from the complainant and from its own investigations reveal that the respondents were operating in certain circumstances as part of a cartel. It states categorically that from the complaint and the investigation thus far it had come to learn that the "*respondents are not only involved in price fixing, but also potentially in the division of markets, collusive tendering as well as price information exchange in respect of*" numerous tyre products and "*that there has been an exchange of market share information, industry statistics and list prices*

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[15] *Id* at [21]
[16] See the quote in [2] above.

through the medium" of the SATMC. In other words, based on the information received from the complainant as well as from its own independent investigation, the Commission may well have satisfied itself, at least on a *prima facie* basis, that there was unlawful conduct on the part of the respondents as a result of which there was a reasonable prospect that litigation against some of the respondents is bound, or likely, to ensue. The Commission is, however, silent on this.

[18] Put differently, under these conditions, the Commission behaving reasonably could have contemplated litigation against one or more of the respondents. In its answering affidavit,[17] it says that it uncovered evidence of unlawful conduct from the search and seizure initiative it undertook but it does not say more than that. It is also clear from the papers that its investigation took more than a year to complete and was at times conducted by investigators who have since left the employ of the Commission.[18] These facts notwithstanding I hold that it is not unfair or unduly burdensome on the Commission to at least make an effort to give some indication as to whether it contemplated a possibility of litigation against the respondents and when this was so. It is not required to spell out the exact date when the contemplation arose, but simply to give an indication as to when it occurred. It could have been sometime between the issuing of the Initiation Statement and the referral. Simply saying that sometime during this period the evidence it accumulated had given it pause to reasonably contemplate the possibility of litigation against some of the respondents, and that everything that occurred thereafter was influenced with

[17] See the quote in n3 above
[18] This fact was conveyed in a letter by the Commission to the attorneys of Goodyear on 15 May 2017

this in mind is all that was required. It would then have been able to say that whether a document received or produced thereafter had been clothed with the necessary protection preventing its disclosure on the basis of litigation privilege. Such an averment in my view would have sufficed. After all, the averment would have to be understood in the context of all the developments in the Commission's work in this matter starting from the moment the complaint was lodged on 2 October 2006. All the respondents were aware of these developments. They knew from the moment the dawn raids were executed that they were under investigation. They received notice of the Initiation Statement where they were told of the nature of the unlawful conduct they are alleged to have engaged in. Their attorneys were in constant contact with the Commission. They were informed of Bridgestone's marker and CLP applications. They received the referral notice. They brought a number of interlocutory applications. They received a large amount of the documents in the possession of the Commission. They pleaded (albeit with bare denials in the case of Continental) many years[19] after the referral notice was issued. After pleadings were closed, they engaged extensively with the Commission and succeeded in securing all the documents in the possession of the Commission save for those that are the subject of these cases. Only after all these developments had taken place did they bring the present applications. In one sentence: the averment would not have been without context. In any event, the SCA reminds us that "(a) *court will not lightly go behind averments in an*

[19] I am not unmindful of the fact that the papers do not state exactly when Continental filed its plea. It can be inferred that it was around the same time that Goodyear filed its plea which was six years after the referral was issued. The referral was issued on 31 August 2010

affidavit to the effect that the likelihood of litigation was contemplated when the document was procured." [20]

The CLP, cartels, rules 14 and 15 and the public interest

[19] The Commission is dealing here with allegations of the existence of a cartel in the tyre industry. The conduct of cartels is a particularly egregious form of anti-competitive conduct, not only because it causes considerable harm to the public interest, but also because it is extremely difficult to detect and to prove. Despite being given extensive powers to investigate this kind of anti-competitive conduct the Commission's task in this area is never easy. More often than not it is only able to attend to this conduct because one of the participants in the cartel is willing to co-operate with it, even if that co-operation is motivated by selfish interests. Lord Sumption, expresses this problem well when he says:

> "Cartel investigations are notoriously difficult without inside information or the active co-operation of at least one participant and are not necessarily straightforward even then. Early Resolution Agreements [Agreements in terms of the CLP in our case] are a standard tool at the disposal of competition authorities for settling them by consent at an early stage after the investigation has been notified to those under investigation. A party under investigation is offered the prospect of settling the allegation on the basis of a negotiated admission and a discount on the penalty which would otherwise have been imposed. Properly used, they enable an investigation to be conducted expeditiously, economically and fairly and are in principle in the public interest. The practice, however, raises questions of some delicacy. A competition authority is not an ordinary litigant, but a public authority charged with enforcing the law. It therefore has wider responsibilities than the extraction of the maximum of penalties for the minimum of effort. A party under investigation must not be subjected to undue pressure to make admissions."[21]

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[20] See n13, at [30]

[21] *R (on the application of Gallaher Group Ltd and others) v The Competition and Markets Authority* [2018] UKSC 25 at [46]

[20] I accept without more that a party who is willing to provide information, albeit through a CLP application, which may be crucial for the successful prosecution of the other parties to the cartel, should not be hamstrung by the fear that its revelations may cause it further harm. It must, no doubt, have confidence that its revelations are protected. If not, the capacity of the Commission to attend to the conduct of cartels would be significantly diminished to the detriment of the public interest in ensuring the Commission performs its statutory duties effectively. The public interest here is not distinct from the public interest in ensuring the justice is done and seen to be done. There is no conflict in this regard in my mind. Parties that are denied the benefits of disclosure would still have their cases fully ventilated and the outcome would be determined on an objective and reasoned evaluation of the strength of their and the Commission's evidence, documentary and *viva voce*. In such cases, the social value of non-disclosure is greater than the social value of disclosure. It is this principle that inspired the approach of the Commission in these two cases. The lack of disclosure does not necessarily lead to an unfair hearing.

[21] The Commission argued that granting Continental and Goodyear access to the documents they seek, especially the information that flowed from the CLP, would set an unhealthy precedent. It bears a considerable risk of sterilising the work of the Commission as no person who enters into a contract with the Commission in terms of its CLP can have complete confidence that the disclosure they make to the Commission will not prejudice them in the future.

The only prejudice they should be required to bear is the penalty the Commission would impose upon them for their participation in the cartel. The lack of this protection would be a hindrance to the work of the Commission. Rule 14 anticipates this hindrance and is aimed at overcoming it by ensuring that there is an uninhibited flow of information to the Commission so that it can perform its statutory functions, which include that of protecting the public from the injurious effects of cartel activity. By this measure the efficacy of the Commission is protected and enhanced. The argument, I accept, bears great force.

[22] However, what is required of the Commission is at least to indicate that the disclosure would harm the free-flow of information exposing the unlawful activities it is tasked to deal with. Again, a simple averment indicating that this is so and why it is so in a particular case would suffice. This can be done without compromising the work of the Commission. In our cases, the Commission could simply have stated that the information it received from the interviews is sensitive and if disclosed would result in the impairment of the public interest or in the loss of justice, or it could claim that the deliberative process advancing the cause of candour would be impaired. And, it must give some indication, albeit a brief one, as to why this is so. In our cases, given what is said in [18] above, a simple averment to this effect would not only bear heavy weight but would have been decisive. Unfortunately, the Commission makes no such averment and therefore makes out no case for the contention that rule 14 immunises the information from disclosure. In short, rule 14 certainly

immunises certain information from disclosure, but the Commission must present a fact or two to justify its operation or applicability.

[23] Once the information is immunised from disclosure by operation of rule 14 then that is the end of the matter. Rule 15 does not re-open the door to disclosure. Rule 15, it is clear to me, is predicated on rule 14. It enjoys no presence or value independent of rule 14. Any person (whether it be the litigant in the case or not) cannot access any information not accessible in terms of rule 14.[22] This interpretation is consonant with that of the Tribunal.[23]

[24] Goodyear claimed that rule 14 has no application as it brought its application in terms of rule 35(12) of the Uniform Rules and not under rule 15. I am not persuaded by this contention. In my view, rule 14 provides an immunity that is necessary to protect the free flow of information concerning unlawful conduct. It has to be invoked and a case for its application has to be made out, but to allow rule 35(12) of the Uniform Rules to trump it would, in my view, undermine the very purpose and object of it and essentially deprive it of all value. I therefore agree with the Tribunal's reasoning as outlined in [11] above. I have read the judgment of my colleague Davis JP and regret the fact that we part company on this as well as other issues. I do not believe that by holding that the application of rule 35(12) of the Uniform Rules is subject to the proviso or qualification set out in rule 14 of the Commission's rules results in a loss of natural justice as claimed by Davis JP. My view is that once the Commission has made out a case for the protection from disclosure of certain information in

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[22] See rule 15(1)(a) quoted in n 4 above
[23] See the Tribunal decision at [39] – [40]

terms of rule 14, especially rule 14(1)(d) then it cannot be denied this protection by the application of rule 35(12). In such a case rule 35(12) must, in my view, yield to rule 14 otherwise the very purpose of rule 14 is lost. Further I hold the view that it would be incorrect to simply transpose the learning of the majority judgment in *Helen Suzman Foundation*[24] to the issues that befalls determination in the two cases before us here. The context of the two cases (the case in the Constitutional Court (CC) and the two cases here) are significantly different as are the facts. To simply transpose a particular *dictum* from that case, without more, is in my view, not helpful.

[25] Lastly, Goodyear drew parallels between the proceedings at the Tribunal with that of criminal proceedings. It contended that it was in a similar position to that of an accused in a criminal proceeding while the Commission held the position of the state prosecution services. Goodyear placed particular emphasis on the fact that the Commission has extensive powers when investigating unlawful conduct and then becomes a litigant against the party it refers to the Tribunal. This, it contended, placed a respondent like itself at a disadvantage when it is deprived of certain information that is in the hands of the Commission. The disadvantage is so great that it results in an "*unfair trial or unfair hearing*". Goodyear drew inspiration from an *obiter dictum* from the SCA that the administrative penalties the Tribunal is empowered to impose "*bear a close resemblance to criminal penalties*, [which] *means that its procedural powers must be interpreted in a manner that least impinges on* [constitutional]

[24] *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at [44]

values and rights",[25] as well as from the CC judgment on access to the contents of a docket[26] for support of its contention. I do not find the contention persuasive. Firstly, the *obiter dictum* did not establish a principle to the effect that the rights accrued to an accused person are automatically transferred to all respondents appearing before the Tribunal. Secondly, two justices of the CC have categorically pronounced that the proceedings of the Tribunal are not akin to that of the adversarial proceedings of the civil courts and that the Tribunal is not a passive adjudicator, but is instead encouraged to actively engage with the parties, the issues and the evidence in order to do justice.

> "These provisions [of the Competition Act] indicate that there is indeed a material and significant difference between the Tribunal and civil courts. One of the functions of the Tribunal is to adjudicate on any conduct prohibited under Chapter 2 of the Act. In order to do so, the provisions for hearings referred to the Tribunal place an emphasis on speed, informality and a non-technical approach to its task. There is no indication in the Act that the interpretation and determination of the ambit of a referral should be narrowly or restrictively interpreted. Excessive formality would not be in keeping with the purpose of the Act."[27]

The logic applies with equal force to the criminal court proceedings. Thirdly, it is not axiomatic that the right to a fair trial of an accused person in criminal proceedings can be transposed without more to proceedings of the Tribunal. But we need not engage with that here and now. What is important though is that even in *Shabalala* the CC, per Mahomed DP (as he then was), recognised that there may well be circumstances where affording an accused access to some statements in the docket "*may impede the proper ends of justice.*"[28]

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[25] *Woodlands Dairy v Competition Commission* 2010 (6) SA 108 (SCA) at [10]
[26] *Shabalala and Others v Attorney-General, Transvaal & Another* 1996 (1) SA 725 (CC)
[27] *Competition Commission of South Africa v Senwes Ltd* 2012 (7) BCLR 667 at [69] (per Froneman J with Cameron J concurring). See also [64] – [68].
[28] *Shabalala*, n 26 at [51].

Mahomed DP indicated that in such a case the trial court is best suited to decide whether disclosure is in the public interest or not:

> "The court in each case would have to exercise a proper discretion balancing an accused's need for a fair trial against the legitimate interests of the State in enhancing and protecting the ends of justice."[29]

Hence, even if we accept that the proceedings of the Tribunal must be conducted in that same manner and on the same footing as that of a criminal proceeding, it is not automatic that a respondent will gain access to all the information in the possession of the Commission. Rule 14 will still be applicable and the Tribunal will make the necessary call on its applicability in a specific case.

[26] In our two cases, had the Commission made the necessary averment(s) to support its claim that disclosure was protected by the provisions of rule 14, I have little doubt that it would have succeeded, bearing in mind what is said in [11] and [18] above as well as the Tribunal's observation that the investigative process of the Commission is a dynamic and not static one (in its words, the process is "*made up of more than the sum of its parts*").

Order

[27] On the above analysis, I would allow the appeal and issue the same order as my colleague Unterhalter AJA, although my reasoning is different.

Postscript

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[29] *Id.* at [52]

[28] It would be remiss of me to leave these cases without voicing my disquiet about how the processes in the Tribunal and in this Court have been applied, and the impact this has had for the finalisation of the merits of the matter. Unfortunately, this is not unique to these cases. The experience is being replicated in many cases that presently await finalisation.

[29] On 27 October 2010 Continental's attorneys informed the Commission by letter that Continental intends to raise an exception against the referral. In that letter the attorneys asked the Commission a number of detailed questions regarding most of the essential averments in the founding affidavit. Basically it asked the Commission to provide detailed evidential material about each essential averment. The material they sought would normally be provided *viva voce* at the hearing. The Commission responded by expressing its ire at having to field such detailed questions, but answered some of them anyway.

[30] After the referral was filed, some of the respondents objected to the founding affidavit on the basis that it was not detailed enough. Thereafter, the Commission supplemented its founding affidavit on 23 April 2012. SATMC then brought an exception. This resulted in the Commission being ordered to file a second supplementary founding affidavit. The Commission filed this affidavit on 27 March 2013. Thereafter, Continental filed its answering affidavit. It is not clear on the papers when this was done.[30] The answering affidavit consists of 17 pages of criticisms of the founding, supplementary and further affidavits of the Commission. Then there is a lengthy exposition (consisting of another 16

[30] An unsigned copy was annexed to the papers, hence the date as to when it was commissioned was not revealed in these papers.

pages) of sections of the statutory and common law relevant to a case of this nature, followed by a criticism of the Parsons' complaint and a contention that the Commission is time-barred from pursuing any remedy that may arise from the complaint as the complaint had lapsed. Hereto there is a lengthy discussion as why the complaint had lapsed. Thereafter there are bare denials supplemented by a constant repetition of the contention that the Commission is time-barred from prosecuting the respondents. This contention that the referral is prescribed has been raised as a preliminary point.[31] There is thus a strong likelihood that once the present applications are finalised and the Tribunal is once again invested with the matter Continental (or Goodyear or both) will request that the issue of prescription be determined and even finalised before the merits could be considered. This could result in that issue coming before this Court[32] before the merits of the Commission's claim of cartel conduct is entertained by the Tribunal. It bears reminding that the Parsons complaint was lodged on 2 October 2006. For reasons set out in the next paragraph it is hoped that these preliminary points and the merits are considered once and for all. Should the appeal process be invoked then it too can be a single final hearing.

[31] It has become a notorious practice at the Tribunal for respondents accused of unlawful conduct to refuse to plead and instead to bring interlocutory applications or to raise exceptions to the referral and to pursue the interlocutory applications or exceptions in this Court (assuming they fail at the

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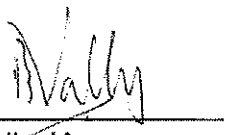
[31] Goodyear, too, raised two preliminary points – the complaint had lapsed and "*the allegations*" had prescribed

[32] In theory, it could go further than this Court too, but I would discount that possibility for the moment.

Tribunal). In the meantime, the case drags on for many years. This, in my view, is an extremely unhealthy practice. It carries a significant risk of the case not being justly finalised as, *inter alia*, much of the evidence the Commission intends to rely upon at the hearing is significantly compromised: memories of witnesses are weakened, or the potential witnesses are no longer available for whatever reason (disappearance or death being two of them), or the persons involved in the investigations may have left the employ of the Commission. In fact, in one of the present cases the Commission made clear to the attorneys of Goodyear on 15 May 2017 that "*due to the long standing* [sic] *nature of this matter and the fact that there have been multiple Commission officials (some of whom have left the Commission), the record provided to the respondents contains all the relevant documents in the matter at the disposal of the officials currently in the matter*". These are only some of the consequences of the litigation being dragged-out. They bring disrepute to the law. The general public wearies from this experience, and gives up all hope of justice ever prevailing. The public deserves better. Their weariness, in my judgment, is unfortunate. The process of never-ending delay has to be halted immediately otherwise the rule of law will be gravely harmed. In my view, judicial silence in the face of this kind of practice, which adversely affect the administration of justice, is not an option. Judicial silence in such circumstances is easily misread to be judicial meekness.



Vally JA

THE COMPETITION APPEAL COURT OF SOUTH AFRICA

HELD IN CAPE TOWN

In the matter between

CAC CASE NO:
157/CAC/Nov 17

GOODYEAR SOUTH AFRICA (PTY) LTD	First Appellant
and	
THE COMPETITION COMMISSION	First Respondent
APOLLO TYRES SOUTH AFRICA (PTY) LTD	Second Respondent
CONTINENTAL TYRES (PTY) LTD	Third Respondent
BRIDGESTONE SOUTH AFRICA (PTY) LTD	Fourth Respondent
SOUTH AFRICAN TYRE MANUFACTURERS CONFERENCE (PTY) LTD	Fifth Respondent

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JUDGMENT:

DAVIS JP

[1] I have had the distinct pleasure of reading the separate judgments of my colleagues Vally JA and Unterhalter AJA. I agree with the order proposed by

Unterhalter AJA. For this purpose the narrow approach adopted by Vally JA in his concurrence, namely that on the papers first respondent (the Commission) did not comply with the law as set down in *Competition Commission v Arcelor Mittal SA* 2013 (5) SA 538 (SCA) when it sought to invoke the doctrine of litigation privilege, is sufficient to justify this order. The *Arcelor Mittal* judgment *supra* at paras 29-31 makes it clear that, in the circumstances of that case, the documents which were the subject of a debate about litigation privilege had come into existence for the purpose of ensuring that the Commission prosecute firms alleged to be part of a cartel. The affidavits provided by the Commission made that clear. By contrast, in this case that which is set out by the Commission falls far short of the affidavit evidence provided by *Arcelor Mittal.* In addition, as Vally JA notes:

> 'It is not unfair or unduly burdensome on the Commission to at least make an effort to give some indication as to whether it contemplated a possibility of litigation against the respondents and when this was so.'

[2] On this basis alone, the Commission did not make out a sufficient case to invoke the doctrine of litigation privilege in this case. I part company with Vally JA and concur with the approach adopted by Unterhalter AJA in two respects. I hold to a different approach to litigation privilege when it is raised in terms of an initiation statement. Given the nature of an initiation statement, I do not consider that this suffices to justify a claim of litigation privilege. Once a complaint is initiated against a prohibited practice, the Commission must direct an inspector to investigate the complaint. Section 49 B (2) of the Act. Thus, on its own, an initiation cannot be the stage of contemplation of litigation as set out in *Arcelor Mittal, supra.*

[3] I also have a different approach to the interpretation of Rules 14 and 15 of the Rules of the Competition Commission. The approach adopted by my colleague Vally JA is to the effect that Rules 14 and 15 somehow overrides Rule 35 (12) of the Uniforms Rules of Court. As he says:

> 'Rule 14 provides an immunity that is necessary to protect the free flow of information concerning unlawful conduct. It has to be invoked in the case for

> its application has to be made out but to allow Rule 35 (12) of the Uniform Rules to trump it would ... undermine the very purpose and object of it and essentially deprive it of all value.'

[4] I respectfully am of the view that this finding, is based, on an incorrect reading of the two rules. Rule 14 read together with Rule 15 is a rule which regulates access by members of the public to the records of the Commission. It is, in short, a public access rule and confers a public access right. So much is clear from the jurisprudence of this court in *Group Five Ltd v Competition Commission* (2016) 2 CPLR 386 (CAC) at para 13. That much is clear from the wording of Rule 15 (1): 'Any person, upon payment of the prescribed fee may inspect or copy any Commission record; (a) If it is not restricted information; (b) If it is restricted information to the extent permitted and subject to any conditions imposed ...'

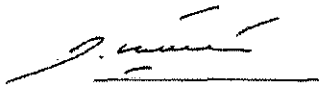
[5] That which is restricted is then set out in Rule 14. Hence, Rule 14 must be read with Rule 15. Rule 15 grants the general right of the public to access to Commission records and Rule 14 restricts that right in terms of its own provisions. By contrast, Rule 35 (12) of the Uniform Rules of Court serves fundamental objectives relating to a fair trial. It is a foundational rule for proceedings before our courts. Its function is to provide parties with the relevant material before a hearing so as to assist them to appraise the strength or weakness of their respective cases and to provide a basis for a fair disposition of the proceedings at the hearing. It is difficult to see how a public access rule, without more, can trump so foundational a rule as Rule 35 (12). In other words, to provide a litigant, such as the Commission, with the power to circumscribe a rule so that an opposing litigant can circumscribe the rights of a party to proceedings must surely be contrary to any system of natural justice. Understandably our law will not countenance such a proposition. To an extent, there is support for this proposition in the Constitutional Courts judgement in *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) which, in relation to an argument that the provisions of the Promotion of Access to Information Act 2 of 2000 can be applied to resist the production of documents sought in a review application under Uniform Rule 53 (1), Madlanga J said at para 44:

> 'PAIA and Rule 53 serve different purposes. Rule 53 helps a review applicant in the exercise of her or his right of access to court under s 34 of the Constitution. On the other hand, in one instance PAIA affords any person the right of access to any information held by the State. [50] The person seeking the information need not give any explanation whatsoever as to why she or he requires the information. The person could be the classic busybody who wants access to information held by the State for the sake of it.'

[6] I should also add that I would prefer not to deal with the implications of the judgment of *Shabalala v Attorney General Transvaal* 1996 (1) SA 725 (CC). The attempt by Mr Gotz to invoke the decision of the Constitutional Court in *Shabalala,* which overturned 'the docket privilege', was based on the submission that the Commission exercises 'criminal powers' when it investigates a compliant. Accordingly, the policy considerations which underpinned the overturning of 'docket privilege' should apply to the disclosure of transcripts that were in dispute in this case. This argument raises a number of complex questions, including an interrogation of the policy considerations that informed *Shabalala,* its possible effect on the powers which are granted to the Commission as well as the consequences of remedies that might be applied against a party such as appellant. I do not consider that it is necessary to canvass these issues for the purposes of this case. It would, in my view, be wise to leave this issue open until it requires determination in a further dispute where such determination may be dispositive of the case.

[7] Some mention has been by Vally JA made of 'a notorious practice' by which parties accused of cartel conduct bring interlocutory applications to raise exceptions which cause cases to drag on for a lengthy period. This evidence was not placed before the Court in papers nor has this Court heard sufficient cases to conclude that this is a well-known fact or one to which it can authoritatively attest. Suffice to say that, if it is shown that unjustifiable delays in the disposition of a case are caused by a party's resort to unnecessary interlocutory applications or exceptions, this court will frown upon them and deal with the problem accordingly.

[8] For these reasons, I agree with the reasoning adopted by Unterhalter AJA and the order that he proposes.



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