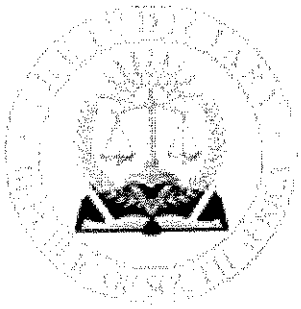
REPUBLIC OF SOUTH AFRICA



IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CAC CASE NO: 153/CAC/AUG17

In the matter between:

GLENN LLEWELLYN GELDENHUIS	FIRST APPELLANT
MARIA MANUELA GONCALVES DA FONSECA	SECOND APPELLANT
THE SOUTH AFRICAN BATTERY MANUFACTURERS' ASSOCIATION	THIRD APPELLANT

and

THE SOUTH AFRICAN BATTERIES IMPORTERS' ASSOCIATION	FIRST RESPONDENT
HUDACO TRADING PROPRIETARY LIMITED T/A DELTEC POWER DISTRIBUTORS	SECOND RESPONDENT
HUDACO TRADING PROPRIETARY LIMITED T/A BATTERY SYSTEMS	THIRD RESPONDENT
ENERTEC BATTERIES PROPRIETARY LIMITED	FOURTH RESPONDENT
PROBE CORPORATION SOUTH AFRICA PROPRIETARY LIMITED	FIFTH RESPONDENT
TIAUTO PROPRIETARY LIMITED T/A YSA	SIXTH RESPONDENT

JUDGMENT

MNGUNI AJA:

[1] This appeal lies against the order of the Competition Tribunal (the Tribunal) directing the first and second appellants to disclose the documents referred to in items 18, 19 and 21 of annexure A to the subpoenas (disputed documents), issued by the Tribunal on 5 April 2015, against the first and second appellants, at the behest of the respondents. The respondents have also lodged a conditional cross-appeal against the costs order and the Tribunal's failure to direct the appellants to furnish affidavits dealing with items 1 to 6, 11 to 14, 16, 20 and 24 to 27 of annexure A to the subpoenas as modified in the letter of the first respondent dated 31 March 2017. The conditionality of the cross-appeal is dependent on this court's decision on the appealability of the Tribunal's order.

The Background

[2] To better understand the genesis of the dispute between the parties it is helpful to briefly set out the background facts.

[3] The third appellant is an association of manufacturers in the lead acid battery manufacturing industry in South Africa and was established in 1970. Its members include First National Battery (Pty) Ltd (FNB), Powertech Industries (Pty) Ltd trading as Willard Batteries (Willard), Donaventa Holdings (Pty) Ltd trading as Dixon Batteries (Dixon), Bridgestone South Africa Retail (Pty) Ltd trading as Supa Quick, HI-Q Automotive and Battery Centre (Pty) Ltd. FNB, Willard and Dixon are the three largest automotive battery manufacturers in South Africa. The three entities distribute

their batteries in South Africa through various distribution channels, including major tyre fitment centres across the country. The first and second appellants are the chairman and secretary of the third appellant respectively.

[4] The first respondent is an association whose main objectives are to, inter alia, examine legislative or policy proposals likely to affect importers of batteries in South Africa; to coordinate their collective action in relation to those proposals; engage and lobby the Competition Commission (the Commission), the Department of Trade and Industry (DTI), the International Trade Administration Committee (ITAC), the South African Parliament, the South African Revenue Services and other legislative or regulatory authorities to further the general interests of the association and its members in order to enable its members to maintain their competiveness and viability; and, generally promote and advance the best interests of battery importers in South Africa. The second to sixth respondents are members of the first respondent.

[5] On 13 August 2014, the first respondent lodged a complaint with the Commission against FNB, Willard and Dixon, alleging that the entities contravened and continued to contravene s 4(1)*(b)*(i) and (ii) of the Competition Act 89 of 1998 (the Act) by agreeing to fix the price of batteries. The complaint also alleged that FNB and Willard contravened ss 5(1) and 8*(c)* of the Act by virtue of their distribution arrangements with retailers. The third appellant is not cited as one of the respondents in the complaint. The substance of the complaint is captured in para 82 of the respondents' complaint referral document as follows:

'FNB, Willard and Dixon are all members of the South African Battery Manufactures' Association (SABMA). The applicants believe that FNB, Willard and Dixon have through the

auspices of SABMA agreed on the amount of so-called scrap surcharge and have also reached an agreement and/or understanding as to how to price their respective batteries in respect of the sales into so-called after market segment.'[1]

The third appellant and the first respondent are the competitors for the supply of automotive batteries to the aftermarket in South Africa.

[6] The Commission assessed the complaint under ss 4(1), 5(1) and 8*(c)* of the Act and concluded that the allegations failed to sustain a contravention of the Act. The Commission decided not to refer the matter to the Tribunal for determination as it could not find any evidence of collusion on the part of the appellants. The Commission concluded that there is no agreement or concerted practice between the appellants to fix the price of the scrap deposit in contravention of s 4(1) and found that the appellants calculated the scrap deposit independently of each other with due consideration to the market value of scrap batteries.

[7] On 25 February 2015, the Commission issued a notice of non-referral of the complaint to the Tribunal. Aggrieved by this outcome, on 25 March 2015, the respondents referred the complaint (complaint referral) to the Tribunal as contemplated in s 51 of the Act read with rule 14*(b)* of the Competition Commission Rules, contending that the Commission had erred in its conclusion that there was insufficient evidence to sustain their complaint against the three entities and in not referring the complaint for adjudication before the Tribunal.

[8] On 22 September 2015, the parties held a pre-hearing meeting at which they agreed to a timetable for the further conduct of the matter. The agreed timetable was

[1] Vol. 27, pg 2467 of the Supplementary Record.

issued as a directive of the Tribunal. **On** 5 February 2016 and 1 April 2016, FNB and Willard concluded settlement agreements with the respondents **respectively**, resulting in the complaint referral being withdrawn against the two entities. Dixon is the only entity against which the complaint referral is still pending on the allegation of contravention of s 4(1) of the Act.

[9] On 6 April 2016, the respondents approached and caused the Tribunal to issue two identically worded subpoena *duces tecum* against the first and second appellants in their capacities as foreshadowed in para 3 above, requiring the first and second appellants to produce various categories of documents contained in annexure A of the subpoenas.

[10] This action on the part of the respondents gave rise to this present application (the subpoena application) before the Tribunal, brought by the appellants on 5 May 2016, seeking an order to set aside and to declare of no force and effect various parts of the subpoenas. Nonetheless, on 6 May 2016, the third appellant, with full reservation of its rights, made available to the respondents some of the requested documents comprising of minutes of all its meetings from 1999 to date, as well as copies of its constitution. The first and second appellants contend that they made these documents available in order to make plain that the third appellant is not opposed to the furnishing of relevant documents to the respondents, but is opposed to the over-breadth and abuse of the process that underpins the subpoenas.

[11] The subpoena application was argued before the Tribunal on 28 September 2016. At the commencement of the hearing the respondents contended that the Tribunal did not have the requisite jurisdiction to set aside the subpoenas. As such,

Mr *Bhana* ***on behalf of*** respondents', argued that the Tribunal should determine the jurisdiction issue first before hearing argument on the merits of the subpoena application. After hearing argument on the issue of jurisdiction, the Tribunal directed that the parties deal with the merits and intimated to the parties that the ruling on the jurisdiction issue would be made together with the merits of the subpoena application. In the course of argument, Mr *Bhana* sought to introduce and made reference to the documents apparently furnished by Russel Dixon, the managing director of Donaventa Holding (Pty) Ltd, under subpoena. This elicited an objection from Mr *Cockrell for* appellants', on the ground that the documents did not form part of the pleadings in the subpoena application. The matter was subsequently postponed sine die.

[12] Before the matter was set down for the resumption of argument, the respondents brought an application to have the Dixon documents admitted into evidence. The appellants opposed the application. Thereafter, the Tribunal set the matter down on 19 April 2017 for the resumption of argument. In the run up to the hearing, the parties exchanged correspondence in an attempt to limit the ambit of the dispute. On the morning of resumed hearing, the parties' legal representatives agreed that only items 18, 19 and 21 in the Tribunal's subpoenas remained in dispute .The **appellants persisted** with their call to have their production set aside.

[13] The disputed documents are the following:

(a) Item 18: All documents and communications relating to the third appellant's engagements with DTI in respect of scrap batteries being exported from South Africa;

(b) Item 19: All documents and communications relating to the third appellant's engagements with ITAC in respect of scrap batteries being exported from South Africa and;

(c) Item 21: All documents and communications relating to engagements between the third appellant and/or any of its members with ITAC relating to the imposition of increased tariffs in respect of imported batteries.

[14] The respondents did not move the application for the Dixon documents. Mr *Kelly* for the respondents informed the Tribunal that the Dixon documents application had been overtaken by the events and the only issue that remained to be argued was the question of costs on that application. After hearing argument the Tribunal reserved its decision. Subsequent **thereto,** the appellants furnished the respondents with the affidavits which the appellants had undertaken to provide, dealing with some of the documents in their possession, referred to in annexure A to the subpoenas.

[15] On 3 August 2017, the Tribunal handed down its decision ordering the first and second appellants to disclose the disputed documents, subject to a confidentiality regime. It also ordered the respondents to pay the costs of the subpoena application and Dixon documents application.

[16] The appellants advanced two contentions before the Tribunal why the subpoenas constituted an abuse of process in this particular case, namely:

(a) These documents were irrelevant as they concern the export of scrap batteries and not the scrap surcharge on locally produced batteries and;

(b) The Tribunal has no power or jurisdiction to order the disclosure of these documents, as they had been claimed as confidential documents in terms of

the International Trade Administration Act 71 of 2002 (ITA Act), and in terms of that Act, only the ITAC and the High Court could order their disclosure.

[17] In rejecting the appellants' contention that the respondents had failed to establish the relevance of the documents, and concluding that the documents may directly or indirectly be relevant and therefore discoverable, the Tribunal placed reliance on a dictum in *Rellams (Pty) Ltd v James Brown & Hamer Ltd to the effect that every documentt which either may directly or indirectly advance the case of the requesting party should be disclosed..*[2]

[18] With regard to the contention that the Tribunal has no power or jurisdiction to order the disclosure of these documents as the confidentiality claim on them has been made under the ITA Act, the Tribunal concluded that a pragmatic approach can resolve these difficulties. The Tribunal then ordered the disclosure of the disputed documents to the respondents' legal representatives and expert witnesses **provided the latter furnished a suitable written undertaking.** The Tribunal ordered further that the disputed documents should be used for the purposes of the determination of the referral in this matter and may not be used in any proceedings under the ITA Act unless permission for the disclosure of the documents is granted in terms of the ITA Act.

[19] As already noted, each side has appealed the order of the Tribunal insofar as it adversely affects it. In the notice of conditional cross-appeal, the respondents contend that the order of the Tribunal is not appealable. In argument before us Mr

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[2] *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 564.

Budlender for the respondents correctly abandoned this leg of the appeal. With regard to the issue of jurisdiction, the Tribunal correctly found that the issuing of summons or subpoena is a function of the presiding member at a Tribunal. It went further and said that the variation, setting aside or the release of a person from a subpoena are matters that are incidental to the performance of the Tribunal's function. It then concluded that it has jurisdiction to vary or set aside a subpoena in terms of s 27(1)*(b)*. The correctness of this finding is not in issue before us.

[20] The subpoenas were issued in terms of s 54*(c)*(i) which authorises the member of the Tribunal presiding at a hearing to summon or order any person to produce any book, document or item necessary for the purposes of the hearing. The appellants contend that the issue and service of the impugned subpoenas on the first and second appellants in the circumstances of this case constituted an abuse of the process of the Tribunal.

[21] **It is trite that** there is a general duty vesting on all members of society to give whatever evidence they are capable of giving, coupled with a concomitant right of litigants to command such assistance. However, should the court be satisfied in any particular case that the issue of a subpoena constitutes an abuse it is entitled to set it aside.

[22] The legal position **regarding abuse of process** was neatly summed up in *Beinash v Wixley*[3] by Mahomed CJ , **who cited with approval the following passage** from*Hudson v Hudson & another*[4] where the following was said by De Villiers JA:

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[3] *Beinash v Wixley* 1997 (3) SA 721 (SCA).
[4] *Hudson v Hudson & another* 1927 AD 259 at 268.

'When . . . the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse.'

The learned CJ went on to say :[5]

'There can be no doubt that every Court is entitled to protect itself and others against an abuse of its processes. Where it is satisfied that the issue of a subpoena in a particular case indeed constitutes an abuse it is quite entitled to set it aside. . . .What constitutes an abuse of the process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of 'abuse of process'. It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective. . . .A subpoena *duces tecum* must have a legitimate purpose. . . .Ordinarily, a litigant is of course entitled to obtain the production of any document relevant to his or her case in the pursuit of truth, unless the disclosure of the document is protected by law. The process of a subpoena is designed precisely to protect that right. The ends of justice would be prejudiced if that right was impeded. For this reason the Court must be cautious in exercising its power to set aside a subpoena on the grounds that it constitutes an abuse of process. It is a power which will be exercised in rare cases, but once it is clear that the subpoena in issue in any particular matter constitutes an abuse of process, the Court will not hesitate to say so and to protect both the Court and the parties affected thereby from such abuse.'

[23] *In Meyers v Marcus & another*[6] Griesel J **amplified on the concept of abuse of process:**

'Thus, a subpoena issued in respect of a witness unable to give relevant evidence or to produce relevant documents will ordinarily amount to an abuse of the process of the court.

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[5] *Beinash v Wixley supra* at 734D-735A.
[6] *Meyers v Marcus & another* 2004 (5) SA 315 para 24.

However, the converse is not necessarily true: the evidence sought to be obtained may be relevant and yet amount to an abuse of the process. This will be so, *inter alia*, where the subpoena is issued for an improper purpose.'

[24] On appeal the appellants have put in issue the findings of the Tribunal, contending that it erred in dismissing their challenge to the disputed documents and that the Tribunal was deprived of competence to grant the order by the provisions of the ITA Act.

The issues on appeal

[25] It is against this background that I turn to deal with the issues isolated for determination in this appeal, which are whether:

(a) The Tribunal was correct in dismissing the appellants' challenge to the disputed documents;

(b) The Tribunal was deprived of competency to grant the order by the provisions of the ITA Act;

(c) The respondents were entitled to the affidavits they seek in the cross-appeal and;

(d) The court should interfere with costs orders against the respondents.

I deal with them in sequence.

[26] It is common cause that the complaint referral is continuing against Dixon only **There is a** single complaint advanced against it **, namely** that it is involved in price-fixing in contravention of s 4(1) of the Act. The question therefore is whether the disputed documents are of any relevance to the complaint of price-fixing advanced against Dixon in the complaint referral. As stated, items 18 and 19 refer to

communications between the third appellant and DTI or ITAC in respect of scrap batteries being exported from South Africa. Mr *Cockrell* contended that this question ought to be answered in the negative because the complaint referral does not make any mention of the export of scrap batteries from South Africa and the exportation of scrap batteries is not an issue in the complaint referral. He further submitted that in the answering affidavit in the subpoena application, the respondents made no attempt to establish the relevance of the disputed documents but instead only made a bald denial without putting up a positive case to show why these documents should be considered relevant.

[27] Item 21 refers to all documents and communications relating to engagements between the third appellant and/or any of its members with ITAC relating to the imposition of increased tariffs in respect of imported batteries. Mr *Cockrell* submitted that the disputed documents are of no relevance to the complaint of price-fixing against Dixon in the complaint referral because the complaint referral does not make any mention of the imposition of tariffs on imported batteries. He submitted that the respondents have made no meaningful attempt in the answering affidavit to demonstrate how the disputed documents are relevant in the complaint referral against Dixon.

[28] **By contrast** , Mr *Budlender* contended that the respondents pleaded the existence of a cartel through the auspices of the third appellant and that the third appellant's members were engaged in direct or indirect price-fixing through a scrap surcharge. He submitted that in the answering affidavits filed in the complaint referral by FNB, Willard and Dixon as well as in the limited documentation produced by the third appellant in terms of the subpoenas, there is evidence that the scrap surcharge

is the component of a system implemented by the third appellant and its members referred to as the one-for-one system. He submitted that in terms of this system the third appellant's members charge retailers a surcharge over and above the price of the battery, and every battery manufactured by a member of the third appellant was sold with a scrap surcharge which inflates the wholesale price charged to retailers, and ultimately to consumers. According to Mr *Budlender* the third appellant's members reimburse retailers for all scrap batteries which are unused and returned. He submitted that with this system, it is anticipated that a scrap battery is purchased by the manufacturer in question. He submitted that the evidence from the minutes produced by the third appellant demonstrates that the third appellant's members collect and submit to the third appellant data about their respective sales and collections, and this data is discussed in the third appellant's meetings when determinations are made as to the scrap surcharge. He submitted that the third appellant's members clearly understood that a key aspect of ensuring the stability of the one-for-one battery system would require the restriction of the export of scrap batteries from South Africa.

[29] Relying on *Ansac & another v Botash & others (1)*[7] Mr *Budlender* submitted that the third appellant's criticism that the respondents **did** not make out a case of relevance in their pleadings is unwarranted and misdirected as the Tribunal is not bound by the strictures of pleadings in the same way as **is** a civil court. **Unlike** in the investigative stage or in civil proceedings before a High Court, the Tribunal may, through an instrument such as a summons, require a party to address evidential issues that travel outside of that which is strictly pleaded in the complaint.

Evaluation

[7] *Ansac & another v Botash & others (1)* [2001] ZACT 10 (27 March 2001).

[30] The purpose of the subpoena is to obtain evidence that is relevant to a complaint referral. This much is clear from s 54*(c)*(i) of the Act which requires that a document or the item must be necessary for the purposes of the hearing. In assessing relevance regard must be had to a complaint referral. The respondents bear the onus to establish the relevance of the documents they seek to be produced under the subpoenas. It is common cause that save for Dixon, there is no *lis* between the third appellant and the respondents in the complaint referral. FNB and Willard have already settled **their dispute** with the respondents. **Notwithstanding this settlement** , the subpoenas require the appellants to furnish documents in relation to all members of the third appellant, including those members in respect of whom there is no *lis*. In my view, the difficulty confronting the respondents is that these documents are sought from the third appellant who is not cited as a party in these proceedings. In *Meyers supra* Griesel J said **at** para 69:

'In the final analysis, Meyers has a constitutionally protected right to privacy. As he is not a party to the pending litigation, the impugned subpoena constitutes a gross invasion of such right to privacy. Before such an invasion will be sanctioned, the party seeking to infringe such right bears an onus of persuading the court that it is justified.'

This reasoning commends itself to me as applying equally to the present matter. I am unable to find that the disputed documents are relevant to the complaint referral and therefore necessary for the purposes of the hearing as envisaged in s 54*(c)*. In all the circumstances, I find that the respondents have failed to discharge the **requisite** onus.

[31] I turn to deal with the second issue. Mr *Cockrell* contended that the Tribunal was deprived of competence to grant such an order by the provisions of the ITA Act.

The evidence reveals that the first respondent has always been in possession of the non-confidential submissions made by the third appellant to ITAC. Mr *Cockrell* submitted that the purpose of the subpoenas was to allow the first respondent to gain access to the documents over which the third appellant had asserted confidentiality in relation to the trade dispute[8] before ITAC,[9] by circumventing ss 33 and 34 of the ITA Act. He pointed out that it is only the High Court that may determine that the information is not confidential, and that if the High Court makes a determination that the information is confidential, it may make an appropriate order concerning access to that confidential information. He submitted that unless and until the High Court makes such a determination that information is not confidential. ITAC

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[8] Section 33 provides: 'Right of informants to claim confidentiality.-(1) A person may, when submitting information to the Commission, identify information that the person claims to be information that-
(a) is confidential by its nature; or
(b) the person otherwise wishes to be recognised as confidential.
(2) A person making a claim in terms of subsection (1) must support that claim with-
(a) a written statement in the prescribed form-
(i) explaining, in the case of information that is confidential by its nature, how the information satisfies the requirements set out in the definition of "information that is by nature confidential" in section 1 (2); or
(ii) motivating, in the case of other information, why that information should be recognised as confidential, and
(b) either-
(i) a written abstract of the information in a non-confidential form; or
(ii) a sworn statement setting out the reasons why it is impossible to comply with subparagraph (i).

[9] Section 34 provides: 'Determination by Commission.-(1) If a person makes a claim in terms of section 33, the Commission must-
(a) in the case of information claimed to be confidential by nature, determine whether the information satisfies the requirements of the definition of "information that is by nature confidential" set out in section 1 (2); or
(b) in the case of other information, determine whether the information should be recognised as confidential.
(2) If, upon considering a claim in terms of subsection (1) *(a)*, the Commission determines that the information is not, by nature, confidential-
(a) the Commission must invite the claimant to submit a further motivation for the information to be recognised as otherwise confidential; and
(b) if the claimant submits such a motivation within the prescribed time, the Commission must reconsider the claim in terms of subsection (1) *(b)*.
(3) Upon making a final determination in terms of subsection (1) or (2) *(b)*, the Commission-
(a) must notify the claimant in writing of its determination; and
(b) may, if it has determined that the information is not, by nature, confidential or should not be recognised as being otherwise confidential, advise the claimant that the information will not be considered in determining the merits of an application or other matter in question.'

is required to treat any information that is the subject of a confidentiality claim as confidential.

[32] Mr *Budlender* sought to overcome these difficulties by submitting that the respondents' **had** made an undertaking before the Tribunal that the disputed documents may be used only in proceedings before the Tribunal and may not be disclosed to the respondents, but only to the respondents' legal representatives and expert economists for the purposes of the Tribunal proceedings. He submitted that the two undertakings were captured in the Tribunal's order. He also submitted that the appellants did not lay a proper evidential basis for the assertion that the respondents appear to seek the disputed documents for an ulterior purpose. He pointed out that the first appellant was successful in obtaining an increase in duties on imported batteries from ITAC and that **this** decision has not been appealed by the respondents. He submitted that there is no dispute before ITAC in which these documents could conceivably be of assistance and the proceedings before ITAC **were** concluded some three years ago and were not taken on review.

[33] He further submitted that the ITA Act contains a procedure which regulates what ITAC may do with this information and it does not mean that the party who submitted the information is entitled to assert that the information which is in that party's possession is protected from disclosure in all cases where confidentiality had been claimed before ITAC. In his submission, while ITAC may be precluded from producing the disputed documents subject to the confidentiality regime, the third appellant is not entitled to rely on its claim of confidentiality before ITAC as a means to preclude the Tribunal from requiring it to disclose the disputed documents in the

same way that this information would not be protected from discovery in civil or criminal proceedings before a High Court.

[34] It is common cause that by letter dated 12 August 2014, the respondents lodged the original complaint with the Commission wherein they informed the Commission that FNB and Willard had applied to ITAC for an increase in the customs duties applicable to automotive batteries and that ITAC was investigating the matter. The respondents requested the Commission to liaise with ITAC in order to indicate that a formal complaint had been filed with the Commission. In para 29.5 of the founding affidavit, the second appellant states:[10]

'Most of the demands have nothing to do with the complaint referral, but are a "fishing expedition" in which documents are apparently sought for some ulterior purpose, such as institution of a new complaint or a representation to the International Trade Administration Commission ("ITAC"). Having regard to the enormous breadth of the requests and as the documents requested are entirely irrelevant to the complaint referral, the only reasonable inference is that these documents are sought for a reason other than the proper adjudication of the complaint referral.'

In response to this paragraph, Warwick Ian Radford, who deposed to the answering affidavit on behalf of the respondents states in paras 30 and 31:[11]

'30. The content of these paragraphs has been addressed above. In particular, and for the avoidance of any doubt, the Respondents deny that the subpoenas are in any way overbroad, are abusive or oppressive, or seek the disclosure of irrelevant documentation.
31. The contents of these paragraphs also contains matters for legal argument, which would be addressed at the hearing.'

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[10] Vol. 1, pg 13 of the Record.
[11] Vol. 1, pg 84, lines 30-31 of the Record.

[35] A perusal of Mr Warwick's response demonstrates that the respondents do not deny the allegation that the documents are being sought for use in the ITAC proceedings. In my view this failure leads to the ineluctable conclusion that the subpoenas seek to circumvent the confidentiality regime by claiming access to documents submitted by the first appellant to ITAC under claims of confidentiality. The Tribunal did not offer any justification for its finding in this regard. Importantly, there is no evidential basis for the Tribunal's statement that it was likely that the first respondent's submissions to ITAC and DTI would have raised the issue of scrap surcharges.

[36] It is trite that in motion proceedings affidavits serve as both the pleadings and evidence relevant to the issue between the parties, and a party can only be expected to deal with averments raised by the other side and not with allegations possibly anticipated but which are not made (see *Minister of Law and Order & another v Dempsey* 1988 (3) SA 19 (A) at 37G-H). Having regard to the nature of the complaint referral, it seems to me that no evidential basis was placed before the Tribunal to enable it to arrive at the decision that the disputed documents 'may, directly or indirectly, be relevant and are therefore discoverable'. I arrived at this conclusion mindful of the fact that the Tribunal is required to discharge its **adjudicative** functions under the Act as an inquisition specialist administrative Tribunal.

[37] In concluding that the documents protected by the confidentiality regime in the ITA Act be disclosed, the Tribunal reasoned as follows:[12]

'[32] Mr Cockrell's submission that we are precluded from ordering the disclosure of these documents because they have been claimed as confidential in terms of International Trade

[12] Vol. 7, pg 538, paras 32 to 33 of the Record.

and Administration Act raises some difficulties. However, a pragmatic approach can resolve them.

[33] Mr Cockrell's contention means that once the documents are claimed to be confidential in terms of the International Trade and Administration Act, the Tribunal cannot order their disclosure in terms of the Competition Act and they cannot be used in the determination of the referral before their disclosure is permitted by ITAC or the High Court in terms of the International Trade and Administration Act.'

It appears that the Tribunal recognised at the same time that it cannot act in a manner that undermines the processes and rules contemplated in the ITA Act.

[38] It is an established principle of our law that when a party to an action refuses to make discovery of or to produce for inspection, any documents on the ground that they are not relevant to the dispute, a court is not entitled to go behind the oath of that party unless reasonably satisfied that the denial of relevancy is incorrect.[13] Section 35(3) of the ITA Act makes it clear that it is the High Court that may determine that the information is not confidential and if it finds that the information is confidential, it may make an appropriate order concerning access to that confidential information. There seems to be no provision in the Act which gives powers to the Tribunal to make such an order. In my view, the pragmatic approach adopted by the Tribunal in this matter is founded on an unsound foundation.

[39] I turn now to deal with the issue of affidavits sought by the respondents. The first respondent contends that the appellants undertook to, in relation to items 1 to 6, 11 to 14, 16, 20 and 24 to 27 of annexure A to the subpoenas modified in the letter from the first respondent dated 31 March 2017, furnish affidavits stating:

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[13] *Continental Ore Construction v Highveld Steel & Vanadium Corporation* 1971 (4) SA 589 (W) at 597E-F.

(a) whether the first appellant has the item in his or her possession or under his or her control and;

(b) if the item is not in the possession or control of the first appellant, to state whether or not, to the best of his or her knowledge and belief, the relevant requested item exists and, if so, who has possession or control of it.

The respondents assert that it was agreed between the parties, and recorded before the Tribunal, that the aforesaid undertaking as formulated would be made an order of the Tribunal. The appellants disagree with this contention. The appellants assert the correct position is that they undertook to furnish affidavits in relation to component (a) only. The appellants contend that they have already complied with this by delivering the affidavits that dealt with component (a). The appellants contend further that the correspondence leading up to the hearing on 19 April 2017 makes it plain that the first respondent requested the appellants to furnish an affidavit that dealt with component (a) only.

[40] The record reveals that on the morning of the hearing on 19 April 2017, the legal representatives for the parties met to discuss the prospect of resolving some of the disputed issues. The parties thereafter addressed the Tribunal in open session about the issues which remained in dispute, and about affidavits which would be provided by the third appellant's representatives. This is recorded in the following passages of the transcript:

'ADV KELLY: "Perhaps I should just mention for the record that my learned friend has undertaken that his client will provide an affidavit or affidavits from M[s] Fonseca and Mr Geldenhuis indicating ...which will indicate that the documents requested in items 1, 5, sorry

1, 2 to 4, 5, 6, 11 to 14, 16, 20 and 24 to 27 either do not exist or are not in its possession. So really Chair and members of the Tribunal, the dispute centres on 18, 19 and 21."'[14]

And

'ADV COCKRELL: "This morning, before we commenced argument, we reached agreement with our learned friends regarding what parts are not in dispute and what parts are in dispute. As he indicated, we will give them an affidavit by the relevant functionaries within my client, indicating where documents don't exist and they've indicated that they would be happy to receive that affidavit."'[15]

[41] The parties then agreed before the Tribunal that the wording of the order would be transmitted to the Tribunal for inclusion in the Tribunal's order. The third appellant undertook to do so by no later than close of business on 20 April 2017. This, however, did not occur because a dispute arose between the parties about the wording of the order to be provided to the Tribunal.

[42] **It is significant that** the Tribunal was not asked to adjudicate what was in fact agreed to between the appellants and respondents regarding the affidavits to be provided.

[43] Mr *Cockrell* submitted that it would be impossible for the appellants to furnish an affidavit dealing with component (b) given the over-breadth of the summons. He submitted that it would also be impossible for the appellants to state under oath whether documents of such an enormous ambit covering a period of almost ten years existed and, if so, **was in** possession of them. He contended that the most

[14] Vol. 25, pg 2234 of the Record.
[15] Vol. 25, pg 2237 of the Record.

that the appellants could say is that they do not have those documents in their possession.

[44] According to Mr *Budlender* in the respondents' letter of 31 March 2017, the third appellant was expressly called upon to furnish affidavits addressing whether the documents sought are in its possession, or, **at least** whether its representatives have knowledge as to whether they exist. The issue of whether the third appellant would deal with the existence of the documents was, therefore, clearly at issue between the parties in the lead up to the hearing. He expressed the view that it is not "inconceivable" for the third appellant to have agreed to provide the affidavits sought by the respondents because by their very nature settlement discussions involve a process of give and take and thus shifting positions in an effort to reach a settlement.

[45] He submitted that the statements made by counsel for the appellants and the respondents were made during an open session of the Tribunal, in the presence of the third appellant's attorneys and client representatives, yet none of them caused any query or concern to be raised about what was stated. He expressed the view that it is not impossible for the third appellant's officials to produce affidavits dealing with whether or not documents not in the third appellant's possession exist.
The deponents need simply confirm whether, to the best of their knowledge, the documents exist, and, if so, their whereabouts, and if they have no such knowledge of whether the documents exist, then they will simply record this in the affidavit. He submitted that the Tribunal ought to have included in its order the undertaking by the third appellant to furnish affidavits in relation to items 1 to 6, 11 to 14, 16, 20, and 24 to 27 of annexure A to the subpoenas. This ought now to be corrected by this court on appeal to reflect the position set out during the hearing by both counsel.

[46] It is important to state that the discussions referred to were held on a 'without prejudice' basis .The agreement between the parties was that the wording of the order would be transmitted to the Tribunal for inclusion in the Tribunal's order. The evidence demonstrates that no agreement was ever reached between the parties about the wording of the order to be provided to the Tribunal.

[47] There appears to be a dispute of fact as to what was agreed by the parties. Obviously, this cannot be resolved by this court as it has no admissible evidence before it and the issue has not been properly ventilated.

The costs order

[48] What remains to be considered is the appeal on the costs order. The question is whether the Tribunal exercised its discretion in a manner that was irregular. In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & another*, Khampepe J stated as follows:[16]

'When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised –

> "judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles".'

(Footnote omitted)

[49] Mr *Budlender* submitted that on 31 March 2017, the respondents proposed to narrow the scope of the subpoenas. He also pointed out that the respondents

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[16] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & another* 2015 (5) 245 SA (CC) para 88.

proposed, without accepting any obligation to do so and "with prejudice", to pay the appellants' costs of the subpoena application until that date. On 11 April 2017, the appellants' attorneys acknowledged receipt of the proposal, advised that they were taking instructions, and enquired about the ambit of the tender including whether it included the costs of two counsel. On 12 April 2017, the respondents replied, indicating that the tender for costs encompassed the costs of all proceedings before the Tribunal between the parties, and included the costs of one counsel.

[50] The appellants rejected this proposal. Ultimately, the parties argued over the disputed documents before the Tribunal, and the appellants' application to have items 18, 19 and 21 of the subpoenas set aside was dismissed. Mr *Budlender* submitted that the Tribunal awarded costs against the respondents without having regard to the tender made on 31 March 2017 and that the respondents had made an eminently reasonable tender to the appellants, and had succeeded in having that which remained of the appellants' application dismissed. He submitted that the Tribunal misdirected itself on the costs issue, and that its misdirection **infected** all its reasoning and was instrumental to the conclusion to which it came. He submitted further that the Tribunal ought to have ordered that the appellants should bear the costs incurred after the respondents' tender of 31 March 2017.

[51] Mr *Cockrell* submitted that although the Tribunal ordered the appellants to furnish the disputed documents, this order was limited only to three items in the subpoena because the respondents had abandoned the other items in the run-up to the hearing in April 2017. In these circumstances, he submitted, on any account, the appellants had achieved substantial success in the subpoena application.

[52] In concluding that the respondents should pay the costs in the subpoena application, the Tribunal reasons as follow:[17]

'The second issue is the subpoena application. In our view, the respondents should be liable for the costs of this application, despite being partially successful. The reasons for this relate: (a) the over-breadth of the documents sought, and the fact that many of the documents for which they required disclosure were abandoned; (b) the result vis-á-vis the jurisdiction point; and, (c) the way in which the jurisdiction point was raised – it was not raised in the papers, which would have allowed the parties and the Tribunal to prepare properly on the issue.'

[53] It seems to me in those circumstances that the appellants have raised issues and achieved substantial success in the subpoena application. Having regard to all these circumstances I am satisfied that the order of the Tribunal on costs should remain undisturbed.

[54] **In respect of** costs in the Dixon documents application, Mr *Cockrell* submitted that the respondents elected not to move the Dixon documents application and thereby abandoned it. He submitted that in the circumstances the respondents are liable for the costs of that application. The difficulty facing the respondents in this regard is that the effect of the Dixon documents application was that the respondents applied for leave to re-open its case by adducing fresh evidence into the record in the subpoena application at a time when the appellants had already completed their argument. The respondents furnished no adequate explanation for why they had not put up the Dixon documents when they filed their answering affidavit in the subpoena application. It needs to be recorded that the respondents' answering affidavit in the

[17] Vol. 7, pg 539, para 41 of the Record.

subpoena application had referred to the Dixon documents but the respondents did not annex those documents to their answering affidavit. The general rule is that in the ordinary course costs follow the result. I am unable to find any circumstances which persuades me to depart from this rule.

Order

[55] In the result the following order is made :

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

(2) Paragraphs 43.1 and 43.2 of the order of the Competition Tribunal are set aside and replaced with the following order:

'The subpoenas issued on 6 April 2016 are set aside in their entirety and are declared to be of no force or effect.'

(3) The cross-appeal is dismissed with costs including the costs of two counsel.

RP

MNGUNI AJA

DAVIS JP (concurring)

Appearances

Heard:	12 December 2017
Delivered:	3 April 2018
For the Appellants:	Mr A. Cockrell SC
Assisted by:	Mr N. Luthuli
INSTRUCTED BY:	Webber Wentzel
REF.:	Mr D Dingley/Mr V Movshovich/Ms J Coyle 2538353
TEL.:	011- 530 6867
For the Respondents:	Mr S. Budlender
Assisted by:	Mr L. Kelly
INSTRUCTED BY:	Nortons Inc.
REF:	Mr A Norton/Mr W Radford
TEL:	011-666 7560