



**IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA**

**Case No: 165/CAC/Mar18**

In the matter between:

**THE STANDARD BANK OF SOUTH AFRICA LIMITED**      Appellant  
(Respondent in the Counter-application)

and

**THE COMPETITION COMMISSION OF SOUTH AFRICA**      Respondent  
(Applicant in the Counter-application)

*Heard virtually on* : 21 February 2023

*Date of Judgment* : 24 March 2023

*Coram* : Vally JA, Nuku and Nkosi AJJA

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**J U D G M E N T**

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**NUKU, AJA (VALLY JA and NKOSI AJA concurring)**

*Introduction*

[1] This matter comes before us as a counter-application by the Competition Commission ("the Commission"). It seeks an order staying a review application ("the review application") launched by the Standard Bank of South Africa

**("SBSA") to set aside its decision to include SBSA as one of the respondents in a complaint ("the complaint") it referred to the Competition Tribunal ("the Tribunal"). The complaint alleges that SBSA, together with twenty-seven other currency dealers, has contravened the provisions of section 4(1)(b)(i) and (ii) of the Competition Act 89 of 1998 ("the Competition Act").**

[2] The review application was preceded by an interlocutory application by SBSA to the Tribunal in which it sought access to the Commission's record of investigation in terms of rule 15(1) of the Rules for the Conduct of the Proceedings in the Competition Commission (**"the Commission Rules"**). For convenience I refer to this interlocutory application as the rule 15 application. The rule 15 application was unsuccessful, and the review application was launched on its heels. In response, the Commission launched an application to stay the review proceedings, either permanently or pending finalisation of all appeals arising out of the dismissal of the rule 15 application and/or the finalisation of an exception application filed by SBSA (**"the exception application"**) that was then pending before the Tribunal.

[3] The argument raised by the Commission in support of its application to stay the review proceedings is primarily that this court should exercise its inherent power to protect and regulate its process by granting the stay, because failure to do so would result in SBSA achieving the outcome it had failed to achieve in the rule 15 application. This is because, unless an order to stay the review proceedings is granted by this court, the Commission will be obliged, in terms of rule 53(1)(b) of the Uniform Rules of Court (**rule 53**), to grant SBSA access to the record.

[4] SBSA opposes the application, essentially on the basis that the Commission has failed to satisfy the requirements for either a permanent or temporary stay of proceedings. It argued that the Commission should be directed to despatch the record in terms of rule 53 within such period as this court may deem fit.

### *Factual Background*

[5] The matter has a long and tortuous history, some of which is not particularly relevant for the purposes of this application. It started with a decision taken by the Commission during or about April 2015 to initiate the complaint against eleven multinational banks for an alleged involvement in the prohibited practice of price-fixing in respect of the USD/ZAR currency pair. This allegedly occurred in relation to bids, offers and bid-offer spreads in respect of spot trades<sup>1</sup>, forward trading<sup>2</sup> and future trades<sup>3</sup> in the USD/ZAR exchange market in contravention of section 4(1)(b)(i) of the Competition Act. SBSA, at that stage, was not one of the named multinational banks.

[6] The complaint was amended on or about 23 August 2016 to include SBSA and eleven other multinational banks. The complaint, as amended, also included a further prohibited practice in contravention of section 4(1)(b)(ii) of the Competition

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<sup>1</sup> The spot trade is a transaction whereby a trade is done immediately and executed at the current spot rate at that specific point in time.

<sup>2</sup> A forward trading is a transaction between two traders and relates to where rates and quantity of currency being bought or sold are agreed ahead of time at a price set now and the sale is concluded at the point of agreement. The effect of this is that the transaction takes place at a future date at prices agreed upon on the date of the conclusion of the agreement.

<sup>3</sup> A future trade is a transaction between traders which involves a clearing house. It gives an investor the right to buy or sell an underlying currency at a fixed exchange rate at a specified date in the future.

Act and the allegations in this regard were that the multinational banks concerned were accused of entering into an agreement and/or engaging in a concerted practice to divide markets by allocating customers.

[7] The Commission, acting in terms of section 50(1) of the Competition Act, referred the complaint to the Tribunal on 15 February 2017 (**"the complaint referral"**). Upon becoming aware of the complaint referral, SBSA instructed its attorneys of record, Herbert Smith Freehills South Africa LLP (**"HSF"**), to engage the Commission in an attempt to resolve the matter. On 22 February 2017, HSF addressed a letter to the Commission requesting a meeting for the purposes of discussing the complaint referral and obtaining more specific details regarding SBSA's alleged involvement in the prohibited practices. The Commission responded the next day advising of its view that the complaint referral contained sufficient particularity necessary to enable SBSA to plead or consider its position. In the same correspondence, the Commission advised that it expected SBSA to answer to the complaint referral in the normal course.

[8] On 1 March 2017, HSF addressed a further letter to the Commission, this time requesting the Commission's record of investigation in terms of rule 15(1) of the Commission Rules. This was followed by a further letter dated 27 March 2017 demanding the production of the Commission's record by no later than 7 April 2017, failing which SBSA would institute legal proceedings.

[9] The Commission responded on 27 March 2017 advising that it was in the process of preparing the record, whereafter it would provide HSF with the index to enable them to indicate the parts of the record they required copies of. On 20 April 2017, HSF sent a follow up email to the Commission enquiring about the finalisation of the record. The Commission responded the next day advising that it was attending to the request. The Commission, in turn, requested HSF to explain the basis of the urgency of the request for the record. HSF responded on the same day advising that a reasonable time had elapsed since a request for the record was made, and that they were in the process of preparing an application to compel the production of the record as they had been instructed by SBSA to do so.

[10] On 26 April 2017, SBSA launched an application in the Tribunal to compel the production of the record by the Commission ("**the rule 15 application**"). The Commission opposed the application. On 6 November 2017, after hearing the application, the Tribunal directed the Commission to produce the record of its investigation. However, it directed the Commission to do so at the time when the Commission makes discovery in the complaint referral proceedings. Dissatisfied with the order made by the Tribunal, SBSA filed its appeal with this court on 22 November 2017.

[11] In the meantime, the complaint referral proceedings continued. A pre-hearing conference was held by the Tribunal on 10 March 2017 wherein the Commission was directed to file a supplementary affidavit to the complaint referral by no later

than 31 March 2017, with the respondents to file their exceptions, if any, by no later than 3 May 2017.

[12] The Commission filed its supplementary affidavit to the complaint referral on 31 March 2017. This was followed by a further supplementary affidavit filed on 7 April 2017. SBSA filed an exception to the complaint referral in terms of rule 42 of the Rules for the Conduct of Proceedings before the Competition Tribunal (**"the Tribunal Rules"**) on 3 May 2017.

[13] The grounds relied upon by SBSA in its exception were essentially the following:

(i) that SBSA is cited in the complaint referral on the basis of its alleged involvement in only one of the identified prohibited practices without any disclosure of particular or identifiable dates (**"the single instance of Involvement ground"**);

(ii) that SBSA cannot be said to be in a horizontal relationship with all of the Banks cited by the Commission in the complaint referral (**"the lack of horizontality ground"**); and

(iii) that the commission initiated the complaint in respect of SBSA on 31 August 2016 and had failed to plead facts to support the necessary conclusion that the conduct relied on occurred, or had a continuing effect,

within the three-year period prior to the initiation of the complaint (“**the time-bar ground**”).

[14] A pre-hearing conference was held on 6 September 2017, wherein the Tribunal directed that the exceptions would be heard from 24 to 26 January 2018. The Tribunal further directed that the hearing would be confined to only those exceptions that do not require consideration of facts not contained in the complaint referral, and that no exceptions in the form of special pleas or in the form of a defence on the merits would be heard.

[15] On 20 December 2017, the Commission filed a further supplementary affidavit to the complaint referral. As a result, the hearing of the exceptions which had been scheduled to commence on 24 January 2018 could not proceed. Instead, a further pre-hearing conference was held on 24 January 2018 wherein the Commission was granted leave to file a further supplementary affidavit to the complaint referral. The respondents were, in turn, directed to file their revised exceptions, if any, by 29 March 2018. It was further directed that the revised exceptions would be heard from 30 July 2018 to 3 August 2018.

[16] On 20 March 2018, while the appeal relating to the production of the record was still pending before this court, and the exception proceedings were still pending before the Tribunal, SBSA launched the review application in this court. In this application – which is presently before us - it contends that the complaint referral is

invalid and unlawful in terms of section 62(2) of the Competition Act and that, consequently, the Tribunal had no jurisdiction to entertain the complaint referral.

[17] The case of SBSA in the review application is that the decision of the Commission to refer it to the Tribunal was unlawful and invalid because:

(i) the Commission's entire case is premised on a single discussion between an employee of SBSA and an employee of Barclays Bank Plc (**Barclays**) which took place on 1 October 2012. This is a repetition of the single instance of involvement ground;

(ii) SBSA, as an authorised foreign currency dealer, in South Africa, in terms of the South African Exchange Control Regulations, 1961 (**"the EXCON Regulations"**) engaged with Barclays as a potential customer as the latter was not an authorised foreign currency dealer in South Africa and, as such, was prohibited by law from competing with SBSA. In short, its argument was that it engaged with Barclays in a vertical relationship and not in a horizontal one as contemplated in section 4 (1) (b) of the Competition Act. This is a repetition of the lack of horizontality ground; and,

(iii) the complaint was initiated more than three years after the discussion of 1 October 2012 that was relied upon by the Commission, and the Commission made no allegation of the said discussion having an effect within



the three years prior to the complaint. This is a repetition of the time-bar ground.

[18] On 20 April 2018 the Commission brought this counter-application. It challenged the jurisdiction of this court to entertain the review application and, in the alternative, it sought an order for the permanent stay of the review application. In the further alternative, it sought an order for the temporary stay of the review application pending the finalisation of SBSA's appeal relating to the production of the Commission's record of investigation which was then pending before this court, including any further appeals emanating therefrom, as well as the finalisation of an exception application brought by SBSA in the Tribunal.

[19] The issue of this court's jurisdiction to hear legality reviews has been settled by the Constitutional Court in *Group Five*<sup>4</sup>, and the Commission abandoned its challenge to this court's jurisdiction to entertain the review application. However, it persisted in seeking relief in the form of either a permanent or a temporary stay of the review application.

[20] The rule 15 application, which was pending at the time of the institution of this counter-application has since been finalised by the Constitutional Court on 20 February 2020.

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<sup>4</sup> *Competition Commission of South Africa v Group Five Construction Ltd* 2023 (1) BCLR 1 (CC)

[21] The exception application that was pending before the Tribunal at the time when this counter-application was launched was also finalised by the Tribunal on 12 June 2019 when it dismissed some and upheld some of the exceptions raised by the respondents, including those raised by SBSA. As part of its ruling in the exception applications, the Tribunal directed the Commission to file a new complaint referral affidavit to substitute for and replace all the previous complaint referral affidavits. The Tribunal further directed the respondents, including SBSA, to file their answering affidavits within twenty days of the filing of the Commission's new complaint referral affidavit.

[22] On 20 February 2020 the Constitutional Court delivered its judgment in the rule 15 application.<sup>5</sup> The majority judgment, penned by Jafta J and Khampepe J, held that once 'litigation commences the rules relating to discovery take over.'<sup>6</sup> Stating the same principle differently, it opined: '(o)nce a complaint is referred to the Tribunal, the Tribunal Rules are triggered and govern the disclosure and discovery of documents between the litigating parties.'<sup>7</sup> The majority judgment recognises that SBSA is entitled to the record that is in the possession of the Commission as it is a litigant before the Tribunal. It then went on to consider the question as to when would it be 'reasonable' for the Commission to produce the record, and held:

'It is important that "reasonable" in this context be understood against the facts of the case. If the requestor of the record is a litigant in the matter, it is

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<sup>5</sup> *Competition Commission of South Africa v Standard Bank of South Africa Limited* [2020] ZACC 2; 2020 (4) BCLR 429 (CC)

<sup>6</sup> *Id* at [161]

<sup>7</sup> *Id* at [181]

most likely that the record is being requested for purposes of litigation. These are important factors to take into consideration when determining a reasonable time period. This is because litigation would be ongoing and the litigant would have an opportunity to request further discovery under rule 22 of the Tribunal Rules. Therefore, it may be efficacious and reasonable for the record to be provided at the close of pleadings.<sup>8</sup>

[23] In short, the Constitutional Court held that the most suitable approach to follow in a case where an accused firm which has been referred to the Tribunal seeks the record in the possession of the Commission, it should access the record in terms of the rules of the Tribunal. The rules of the Tribunal allow for the record to be accessed through the process of discovery, which generally occurs after the close of pleadings.

[24] The Commission filed its new complaint referral affidavit on 1 June 2020. SBSA and the other respondents were, in terms of rule 16 of the Tribunal rules required to plead – the rule employs the word ‘answer’ – to the complaint referral within 20 business days of 1 June 2020. Neither SBSA nor any of the other respondents did so. However, on 5 August 2020, SBSA’s attorneys addressed a letter to the Commission claiming that its records do not match the Commission’s allegations, and so in order for it to answer to the complaint it requires the ‘stored data sets that are in the Commission’s possession and upon which’ the Commission ‘has relied for these allegations’. The ‘stored data’ have also been referred to as ‘market data’<sup>9</sup>. It is some of the evidence the Commission would be relying upon to

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<sup>8</sup> Id at [196]

<sup>9</sup> This data, according to the complaint referral affidavit demonstrably show that the respondents, including SBSA, held the focal point of US\$/ZAR rate, maintained a spot exchange rate in order to

prove its case against the respondents. SBSA, therefore, sought access to these records, as 'they are necessary for purposes of pleading.' SBSA asserts that it is 'entitled' to be provided with these documents in terms of rule 55 of the Tribunal rules, read with rule 35(14) of the Uniform rules. The assertion is neither explained nor elaborated upon. rule 55 of the Tribunal rules deals with the 'Conduct of hearings' and sub-rule 35(14) of the Uniform Rules allow for a party to seek a specific document, precisely described, of which it has knowledge, to be discovered before it pleads. By its own account, SBSA seeks to access this data which, no doubt would constitute a significant part of the record in the review application, prior to answering to the allegations in the complaint referral.

[25] The Commission's attorneys responded the next day, stating that it is the Commission's view that SBSA does not require any 'further particulars or documents' to plead to the complaint referral and that it will not be furnishing the 'data sets'. The attorneys further recorded the following:

'The new Referral affidavit was filed on 1 June 2020. Your client has waited over two months to make this request. Your client's contention at this very late stage that it is unable to plead to the new Referral without the underlying evidence appears to be another strategy to raise interlocutory disputes and to avoid responding to the merits of the case made against it. The Commission encourages your client to take seriously the comments by the Constitutional Court in its judgment on your client's previous interlocutory applications that parties should not be permitted to drag out the proceedings through interlocutory disputes designed to delay and prevent the cartel dispute from being determined on its merits.'

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reduce volatility in the exchange rate and withheld quotes which enabled them to dominate the market.

[26] SBSA did not respond to this letter. At the same time, neither it nor any of the other respondents filed their pleas as directed. Instead, on 17 August 2020 they filed applications for the dismissal of the complaint referral (**"the dismissal applications"**). SBSA, in its dismissal application, decries the Commission's refusal to grant it access to the 'data sets' it claimed it is 'entitled' to, and recorded that its rights in that regard remained reserved. It, further, sought an order dismissing the complaint referral on the basis that, among others, it did not comply with the order of this court, and further it did not make out a case of an alleged contravention of the Competition Act as: (i) it is grounded in a single instance of involvement on the part of SBSA; (ii) it fails to demonstrate that a horizontal relationship existed between SBSA and the alleged co-colluder, Barclays Bank; and (iii) it is time-barred. It is evident then, that SBSA's case in the dismissal application is, in essence, a repetition of its case in the exception as well as its case in the review application.

#### *Issue for determination*

[27] The issue for determination by this court is whether the Commission has satisfied the requirements of the relief it seeks, namely, an order for either the permanent stay or the temporary stay of the review proceedings.

#### *The applicable legal principles*

[28] This court derives its authority to grant an order for the stay of proceedings in appropriate circumstances from the provisions of the Competition Act, read with the relevant provisions of the Constitution of the Republic of South Africa, 1996 (**the Constitution**). In this regard section 36(1)(a) of the Competition Act provides that:

'There is hereby established a court to be known as the Competition Appeal Court, which is a court contemplated in section 166(e) of the Constitution with a status similar to that of a High Court.'

[29] For its part, section 166(e) of the Constitution provides that:

'The courts are ... any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrate's Courts.'

[30] Section 166(e) of the Constitution contemplates that an Act of Parliament can only create one of the two courts, namely, a court of a status similar to that High Court or a court of a status similar to that of the Magistrate's Court.

[31] The Competition Act is the Act of Parliament contemplated in section 166 (e) of the Constitution. As the Competition Appeal Court enjoys a status equivalent to that of the High Court, it is endowed with the inherent power that flows from the provisions of section 173 of the Constitution which provides that:

'The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

[32] Commenting on the provisions of s 173 of the Constitution Madlanga J, writing for the majority in *Mokone*<sup>10</sup> had this to say:

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<sup>10</sup> *Mokone v Tassos Properties* 2017 (5) 456 (CC) at [67] – [68]

[67] Put simply, this says that the mentioned courts may regulate their own process taking into account the interests of justice...., I do not see why proceedings may not be stayed on grounds dictated by the interests of justice. Whatever the import of what was said by the courts previously may be, the Constitution lays down its own test; and it has everything to do with the interests of justice.

[68] In this context, the idea of interests of justice is quite wide. I will not attempt to delineate what it encompasses. Suffice it to say, what justice requires will depend on the circumstances of each case.'

[33] Counsel who appeared before us were in agreement that an applicant in the stay application must satisfy the court, firstly, about its prospects of success; secondly, that the balance of convenience favours the granting of the stay, and thirdly, that it is in the interest of justice to stay the proceedings.<sup>11</sup>

[34] Having regard to the test as explained by the Constitutional Court in *Makone (supra)*, I think that the interest of justice is of paramount importance in this court's determination of the Commission's application to stay the review proceedings in this matter. The decision as to whether or not to grant such application on the grounds dictated by the interest of justice lies entirely in the discretion of this court, which is wide but must be exercised judiciously taking into account such other factors as the court may, depending on the circumstances of each case, consider relevant, such as the prospects of success and the balance of convenience.

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<sup>11</sup> The test adopted by the Competition Tribunal from the High Court in *Novartis SA (Pty) Ltd v Main Street (2) (Pty) Ltd* (2) [2001-2002] CPLR 470 (CT) paras 14-16 and confirmed by this Court in *Monsanto South Africa (Pty) Ltd and Another v Bowmann Gilfillan and Others* (109/CAC/JUN11) [2011] ZACAC 5 (18 August 2011 at p. 17, lines 14 – 16).

*Is it in the interest of justice to grant or refuse the stay of the review application?*

[35] Stripped of all the legal nomenclature, what this case is about is SBSA's access to the Commission's investigation record before it pleads to the Commission's case before the Tribunal. SBSA's pursuit of the Commission's investigation record commenced in a matter of weeks after the referral of the complaint on 1 March 2017. Having instituted an application for the production of the Commission's record of investigation – the rule 15 application - SBSA was content to await the outcome of its application to the Tribunal before launching the review application. In fact, SBSA waited for over a year before launching the review application, and it had been relentlessly pursuing the Commission's record of investigation in the period prior to launching the review application. It is also of some significance that SBSA instituted the review after it had been met with an unfavourable outcome in the Tribunal proceedings for the production of the Commission's record.

[36] SBSA contends that there is a difference between the Commission's record of investigation and the record that the Commission must produce under rule 53. With respect I disagree. One only needs to look at the grounds relied upon by SBSA in its exception, the review application, as well as the dismissal application to dispel this proposition. SBSA raised exactly the same arguments in the three applications with the difference that the review application, so far, is limited to the three grounds, whereas the exception application and the dismissal application raised additional grounds. These extra grounds, however, do not detract from the fact that the three



grounds raised in the review are key to SBSA's claim in its exception – which has been finalised - and its dismissal application.

[37] SBSA's grounds of review really go to its defence on the merits in the referral matter that is pending before the Tribunal. Before it can respond to SBSA's grounds in the review application, the Commission would first be required to make available to SBSA the record of its investigation which forms the basis of its decision to refer to the complaint to the Tribunal. Such record will, of course, contain the same information and/or documentation as would be contained in the Commission's record of investigation which SBSA had failed to obtain through the rule 15 application, but which it will have access to during the discovery process in the complaint proceedings before the Tribunal.

[38] In the event of this court not granting the application to stay, the Commission will be obliged to produce the record. The production of the record would grant SBSA access to the documents and information it sought but failed to obtain through its rule 15 application and its request made – albeit in letter form at this stage – in terms of rule 55 of the Tribunal Rules and rule 35(14) of the Uniform Rules. That application and request were made because it claims that it is unable to answer to the complaint referral without first scrutinising the record, or part thereof, in the possession of the Commission. It is very clear that SBSA is determined to gain access to the record before answering to the case in the complaint referral.

[39] The review application grants it access to all the information, including the market/stored data it has sought but failed to obtain, that is in the possession of the Commission. It would, in essence, gain access to the evidence of the Commission before it answers to allegations of the Commission, which it is required to do in terms of the rules of the Tribunal. In my judgment, this consequence would be unfair to the Commission. For that reason, it should not be countenanced. I hold, following upon the *dictum* in the majority judgment of the Constitutional Court, that it is 'efficacious and reasonable' that it should only have access to this information 'at the close of pleadings'<sup>12</sup> in the complaint referral proceedings before the Tribunal. The Tribunal rules provide it with sufficient avenues and protections to ensure that it eventually gains access to the condemnatory as well as exculpatory evidence against it. Those rules are designed to ensure that both it and the Commission have a fair and reasonable opportunity to pursue their respective cases. They would be circumvented if the review application is allowed to proceed prior to the conclusion of the discovery stage of the complaint referral proceedings. Their circumvention would be unfair and could also be prejudicial to Commission. Hence, there is much merit in the Commission's call for a temporary stay of the review application.

[40] Further, the production of the record by the Commission would, in my view, place SBSA in an advantageous position where, unlike all the other litigants in the Tribunal proceedings, it will have access to documents which it would ordinarily be unable to access before discovery in the Tribunal proceedings. This, of course, is

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<sup>12</sup> See [22] above

not of SBSA's making but an unintended consequence of the reviewability of the Commission's decision to refer the complaint to the Tribunal. It is a consequence that may well open the floodgates to future reviews. An accused firm may immediately upon receiving notice of a complaint referral launch a review application in this court where it would seek to set aside the complaint referral. Such a consequence would intolerably frustrate the Commission's efforts to give effect to the Competition Act. A temporary stay of review proceedings, as in this case, until the conclusion of the discovery stage in complaint referral proceedings before the Tribunal avoids the undesirable consequence.

[41] The question to ask then is whether it would be in the interest of justice to allow this unintended consequence to benefit SBSA in circumstances where the review grounds are nothing more than SBSA's defence on the merits. The answer to this question must, in my view, be a resounding no, particularly because all litigants are entitled to, and must receive, equal treatment and benefit of the law as s 9 of the Constitution demands. To allow SBSA to obtain what amounts to an unfair advantage over the Commission in the complaint referral proceedings as well as preferential treatment in comparison to the other respondents, merely by dint of having instituted the review application would be wrong. In my judgment, this subverts the fair and just process carefully set out in the Rules of the Tribunal. It is therefore in the interests of justice that the review application be stayed.

[42] Having come to the conclusion that the interests of justice dictate the granting of the stay, the next question to consider is whether to grant a permanent stay or temporary stay. An order for the permanent stay of proceedings is an extra-ordinary remedy that has far-reaching consequences. Its consequences have the potential to render nugatory a person's right to access to courts as contained in section 34 of the Constitution. In my view, a permanent stay would not be appropriate in the present circumstances as all that this court is required to do is to manage the unintended consequence referred to above.

[43] Ms Engelbrecht submitted that it is not competent to grant the temporary stay because the exception application, as well as the appeal, have been finalised and the Commission has not amended its notice of motion. As already stated above, the appeal in respect of the application for the production of the Commission's record has already been finalised, and it is highly unlikely that further appeals may arise from that appeal. Therefore, an order staying the review application pending the finalisation of such appeal is no longer competent.

[44] It is also correct that the exception application has since been finalised. However, the finalisation of the exception has not affected the progression of the complaint referral proceedings. As already stated, this matter is about ensuring that SBSA is not treated differently from the other litigants who litigate in the Tribunal. The effect of the dismissal application is that SBSA is not required to plead yet and, consequently, the discovery stage has not been reached. To uphold SBSA's

submission that the temporary stay is incompetent in the absence of an amendment to the Commission's notice of motion would be to place form over substance. In my view, it is quite competent for this court to craft an order that would delay the production of the record by the Commission until the discovery stage. Such an order would be fair to both the Commission and SBSA. For the Commission, it would deal with the concern of producing documents before SBSA pleads in the referral proceedings, while for SBSA it would not delay its review application unreasonably. The delay in the finalisation of the review application is, I hold, necessary to ensure that justice prevails in this matter.

### *Conclusion*

[45] In conclusion, I am satisfied that the interests of justice dictate that the temporary stay of the review should be granted until the discovery process in the referral proceedings before the Tribunal is complete.

### *Costs*

[46] The Commission has been successful in its counter-application. I see no reason why it should not be awarded its costs. It had employed three counsel. I believe that it would be fair to award it the costs consequent upon the employment of two counsel. The matter has a long history, has spawned a number of interlocutory applications and consists of a voluminous record, all of which, in my view, justified the employment of two counsel.

## **Order**

**[47] In the premises the following order shall issue:**

- a. The counter-application succeeds**
- b. The review application is stayed until the complaint referral proceedings before the Tribunal have passed the discovery stage;**
- c. The Commission is directed to produce the record in terms of rule 53 simultaneously with the delivery of its discovery affidavit in the complaint referral proceedings before the Tribunal; and**
- d. The applicant is to pay the costs of the counter-application, including the costs consequent upon the employment of two counsel.**

  

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**L.G Nuku**  
**Acting Judge of Appeal**  
**Competition Appeal Court of South Africa**

  

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**B Vally**  
**Judge of Appeal**  
**Competition Appeal Court of South Africa**

  

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**M E Nkosi**  
**Acting Judge of Appeal**  
**Competition Appeal Court of South Africa**

## **APPEARANCES**

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**Instructed by:**

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**Counsel for the Respondent:**

**Advocate T Ngcukaitobi SC  
Advocate I Kentridge  
Advocate H Drake**

**Instructed by:**

**Ndzabandzaba Attorneys**