CONSTITUTIONAL COURT OF SOUTH AFRICA

Cases CCT 158/18, 179/18 and 218/18

Case CCT 158/18

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA Applicant

and

STANDARD BANK OF SOUTH AFRICA LIMITED Respondent

Case CCT 179/18

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA Applicant

and

STANDARD BANK OF SOUTH AFRICA LIMITED Respondent

Case CCT 218/18

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA Applicant

and

WACO AFRICA (PTY) LIMITED	First Respondent
TEDOC SGB CAPE JV	Second Respondent
SUPERFECTA SGB CAPE JV	Third Respondent
MTSWENI SGB CAPE JV	Fourth Respondent
TEDOC INDUSTRIES (PTY) LIMITED	Fifth Respondent
SUPERFECTA TRADING 159 CC	Sixth Respondent
MTSWENI CORROSION CONTROL (PTY) LIMITED	Seventh Respondent

Neutral citation:	Competition Commission Of South Africa v Standard Bank Of South Africa Limited [2020] ZACC 1
Coram:	Cameron J, Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ, and Theron J.
Judgments:	The Court: [1] to [2] Theron J (minority): [3] to [124] Jafta J and Khampepe J (majority): [125] to [206] Froneman J (part concurrence / part dissent): [207] to [224] Madlanga J (concurrence with majority): [225]
Heard on:	5 March 2019
Decided on:	20 February 2020
Summary:	[Competition Commission Rules] — [Rule 15] — [access to record of investigation] — [public access to information] — [section 32(1) of the Constitution] — [Competition Tribunal Rules] — [Rule 22(1)(c)(v)] — [discovery procedures] [Competition Act 89 of 1998] — [section 38(2A)] — [procedural directions] — [Uniform Rules of Court] — [Rule 53] — [competence to order production of the Rule 53 record] — [Rule 53] — [jurisdiction of Competition Appeal Court]

ORDER

On appeal from the Competition Appeal Court (hearing an appeal from the Competition Tribunal) and on direct appeal from the Competition Tribunal:

In CCT 158/18:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Competition Appeal Court is set aside and replaced with the following:

   "The appeal is dismissed."
4. There is no order as to costs in this Court and in the Competition Appeal Court.

In CCT 179/18:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Competition Appeal Court is set aside.
4. The matter is remitted to the Judge President of the Competition Appeal Court.
5. There is no order as to costs in this Court and in the Competition Appeal Court.

In CCT 218/18:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Competition Appeal Court is set aside and replaced with the following:

"The Rule 15 application is dismissed."

4. There is no order as to costs in this Court and in the Competition Appeal Court.

JUDGMENT

THE COURT

[1] The first judgment, written by Theron J, dismisses the appeals in CCT158/18 and CCT218/18 (the Rule 15 appeals), upholds the appeal in CCT179/18 (the review appeal), and remits it to the Competition Appeal Court. The second judgment (majority), written by Jafta J and Khampepe J, with Ledwaba AJ, Mhlantla J, and Nicholls AJ concurring, upholds the Rule 15 appeals. It agrees with the outcome of the first judgment regarding the review appeal. The third judgment, written by Froneman J, with Cameron J concurring, agrees with the outcome of the second judgment in respect of the Rule 15 appeals. Froneman J dissents from the first and second judgments in respect of the review appeal. The fourth judgment, written by Madlanga J, agrees with the outcome of the second judgment in relation to the Rule 15 appeals, but does so on the reasoning of the third judgment. Madlanga J also agrees with the outcome in the first and second judgments in relation to the review appeal.

[2] The effect of these four judgments is that eight members of the Court grant leave to appeal and uphold the appeal in the Rule 15 appeals. Seven members of the Court grant leave to appeal and uphold the appeal in the review appeal.

THERON J:

Introduction

[3] This matter concerns three consolidated applications by the Competition Commission of South Africa (Commission). These applications involve companies which stand accused by the Commission of egregious anti-competitive behaviour. After complaints against the companies were referred by the Commission to the Competition Tribunal (Tribunal), the companies sought to access certain information held by the Commission. The Commission disputes the companies' entitlement to access the information at this stage.

[4] This case turns on the relationship between various pieces of legislation and rules. As a point of departure, it is necessary to lay out a schema of these laws and rules before considering the facts of this case.

Rules 14 and 15 of the Commission Rules

[5] The Competition Act[1] was passed in 1998 to promote and maintain competition.[2] It establishes the Competition Commission,[3] a regulatory body tasked with monitoring South Africa's economic markets, investigating prohibited anti-competitive conduct and approving mergers between firms.[4] Section 21(4) of the Competition Act empowers the Minister of Trade and Industry (Minister) to promulgate regulations, in consultation with the Commissioner of the Commission, for matters relating to the functions of the Commission. To this end, the Minister promulgated the Commission Rules.[5]

---

[1] 89 of 1998.

[2] See section 2 of the Competition Act.

[3] Section 19 of the Competition Act.

[4] See the Long Title of the Competition Act and section 21. See further *Competition Commission of South Africa v Senwes Limited* [2012] ZACC 6; 2012 JDR 0579 (CC); 2012 (7) BCLR 667 (CC) (*Senwes*) at paras 3-4.

[5] Rules for the Conduct of Proceedings in the Competition Commission, Proc R12 *GG* 22025 of 1 February 2001 (Commission Rules).

[6] Rules 14 and 15 of the Commission Rules are at the heart of the dispute in both CCT 158/18 and CCT 218/18. The two rules are located in Part 3 of the Commission Rules, which is headed "Access to Commission Records". From the outset, I emphasise that these disputes directly implicate the right in section 32(1) of the Constitution which provides that everyone has the right of access to any information held by the State.[6] This right is enjoyed by natural and juristic persons.

[7] Rule 15 of the Commission Rules, which is headed "Access to information", provides that "any person" may have access to any Commission record, so long as it is not restricted information.[7] It therefore provides a means by which the public can access information held by the Commission, giving effect to the right of access to information in section 32 of the Constitution. Rule 14 of the Commission Rules, which is headed "Restricted information", prescribes when access to information is restricted under this access to information regime.[8]

---

[6] Section 32 of the Constitution reads:

> "(1) Everyone has the right of access to—
>
> (a) any information held by the state; and
>
> (b) any information that is held by another person and that is required for the exercise or protection of any rights.
>
> (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state."

[7] Rule 15 reads in relevant part:

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

Rule 15 was amended with effect from 25 January 2019 to expressly introduce the qualifications that are present in section 7 of the Promotion of Access to Information Act 2 of 2000 (PAIA). See the Amended Regulation 15 of the Rules for the Conduct of Proceedings in the Competition Commission GN R64 *GG* 42191 of 25 January 2019. This amendment may impact the ability of respondents to seek access to information held by the Commission under rule 15 with effect from 25 January 2019. Nothing further, however, needs to be said of this amendment for the purposes of this case. This matter implicates a live dispute between the parties regarding the entitlement of the respondents to invoke rule 15 as it read at the time they submitted their applications.

[8] Rule 14(1) provides:

"For the purpose of this Part, the following five classes of information are restricted:

(a) Information—

(i) that has been determined to be confidential information in terms of section 45(4), or

(ii) that, in terms of section 45(3), must be treated as confidential information.

(b) Identity of a complainant, in the following circumstances:

(i) A person who provides information in terms of section 49B(2)(a) may request that the Commission treat their identity as restricted information; but that person may be a complainant in the relevant matter only if they subsequently waive the request in writing.

(ii) If a person has requested in terms of subparagraph (i) that the Commission treat their identity as restricted information—

(aa) The Commission must accept that request; and

(bb) That information is restricted unless the person subsequently waives the request in writing.

(c) Information that has been received by the Commission in a particular matter, other than that referred to in paragraphs (a) and (b), as follows:

(i) The Description of Conduct attached to a complaint, and any other information received by the Commission during its investigation of the complaint, is restricted information until the Competition Commission issues a referral or notice of non-referral in respect of that complaint, but a completed form CC 1 is not restricted information;

(ii) A Statement of Merger Information and any information annexed to it, or received by the Commission during its investigation of that merger, is restricted information until the Commission has issued a certificate, or been deemed to have approved the merger, in terms of section 13 or 14, or made a recommendation in terms of section 14A, as the case may be;

(iii) An application and any information received by the Commission during its consideration of the application, or revocation of an exemption granted to the applicant, is restricted information only to the extent that it is restricted in terms of paragraph (a).

(d) A document:

(i) that contains—

(aa) an internal communication between officials of the Competition Commission, or between one or more such officials and their advisors;

(bb) an opinion, advice, report or recommendation obtained or prepared by or for the Competition Commission;

(cc) an account of a consultation, discussion or deliberation that has occurred, including, but not limited to, minutes of a meeting, for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed on the Commission by law; or

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

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

[8] In summary, it restricts access to five classes of information held by the Commission:

(a) confidential information;

(b) the identity of a person who has submitted information in connection with an alleged prohibited practice who has requested to remain anonymous;

(c) certain information received by the Commission relating to a complaint, a merger or an exemption;

(d) documents relating to the Commission's internal communications, recommendations or discussions relating to policy formulation or the performance of its statutory duties; and

(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[9] (PAIA).

[9] The last category of restricted information in rule 14 expressly links the access to information regime that is provided in the Commission Rules to PAIA. This link is also implicit in the purpose of the Commission Rules, which is to give effect to the right to access information contained in section 32 of the Constitution. The access to information mechanisms provided for in the Commission Rules and PAIA thus both fall within the family of access to information provisions envisaged by section 32(2) of the Constitution.

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

(iii) the disclosure of which could, by premature disclosure of a policy or contemplated policy, reasonably be expected to frustrate the success of that policy.

(e) Any other document to which a public body would be required or entitled to restrict access in terms of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000)."

[9] 2 of 2000.

[10] Against the backdrop of secrecy that epitomised the apartheid state,[10] section 32 of the Constitution constitutes an essential element of the constitutional guarantee of an open and democratic society which requires that the exercise of public power be transparent and justified. The preamble to PAIA notes:

> "[T]he system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations."

[11] In *Brümmer*, this Court noted, in respect of the right to access information, that:

> "The importance of this right [in section 32], in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency 'must be fostered by providing the public with timely, accessible and accurate information'."[11]

[12] In contrast to its predecessor in the interim Constitution,[12] the ambit of the right of access to information held by the State in section 32(1)(a) is wide. Section 32(1)(a) provides that everyone has the right of access to *any* information held by the State. Unlike the section 32(1)(b) right to access information held by private parties, there is no stipulation in section 32(1)(a) that the information held by the State be "required for the exercise or protection of any rights." The right in section 32(1)(a) can only be limited in terms of section 36 of the Constitution.

---

[10] *Shabalala v Attorney-General, Transvaal* [1995] ZACC 12; 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC) at para 26.

[11] *Brümmer v Minister for Social Development* [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC) at para 62.

[12] Section 23 of the interim Constitution reads:

> "Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights."

[13] PAIA, as the legislation envisaged in section 32(2) of the Constitution, was passed to give effect to the rights in section 32(1). It provides that if the body in question is public, then an applicant need not show that the record sought is required for the exercise or protection of any right. If the procedural requirements in PAIA are complied with, the request must be granted unless the public body refuses access to the record in terms of a valid ground of refusal contemplated in Chapter 4 of PAIA.[13] In addition, PAIA provides that a requester's right of access to information held by a public body is not affected by any reasons given by or imputed to the requestor for the request.[14] As this Court recently held in *Helen Suzman*:

> "PAIA affords any person the right of access to any information held by the State. The person seeking the information need not give any explanation whatsoever as to why [they] require the information. The person could be the classic busybody who wants access to information held by the State for the sake of it."[15]

[14] Chapter 4 of PAIA envisages various grounds upon which a public body may deny a request for access to information.[16] Chapter 2 of PAIA is headed "General Application Provisions". The most relevant of these provisions to this matter is section 7. It provides that PAIA *does not apply* to information sought for the purpose

---

[13] Section 11(1) of PAIA, mimicking the inherent right to State-held information in section 32(1)(a) of the Constitution, reads:

> "A requestor must be given access to a record of a public body if—
>
> (a) that requestor complies with all the procedural requirements in this Act relating to a request for access to that record; and
>
> (b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part."

[14] Section 11(3) of PAIA provides:

> "A requestor's right of access contemplated in subsection (1) is, subject to this Act, not affected by—
>
> (a) any reasons the requestor gives for requesting access; or
>
> (b) the information officer's belief as to what the requestor's reasons are for requesting access."

[15] *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) (*Helen Suzman*) at para 44.

[16] For the most part, these grounds of refusal are irrelevant to this matter.

of civil or criminal proceedings if the request for access is made after the commencement of these proceedings and access to that information is provided for in another law.[17] This is the position irrespective of whether the information is held by a public or private body.[18]

[15] It is significant that section 7 of PAIA does not provide a ground upon which a public body may restrict access to requested information under PAIA. Conversely, it expressly limits PAIA's scope of application from extending to information requested for the purpose of court proceedings which have already commenced. It is also important to note that rules 14 and 15 of the Commission Rules did not (at the relevant time) contain similar provisions preventing their application where the information sought relates to litigation.

[16] Section 7 of PAIA reflects the rationale that the right of access to information, as given effect to by PAIA, should not be used to circumvent the particular rules of procedure in litigation – litigants should not be afforded a dual system of access to information. In *PFE International SCA*, it was held that permitting "a dual system of access to information, in terms of both PAIA and the particular court rules, has the potential to be extremely disruptive to court proceedings".[19] The Supreme Court of Appeal explained that:

---

[17] Section 7(1) of PAIA provides that:

> "This Act does not apply to a record of a public body or a private body if—
>
> (a) that record is requested for the purpose of criminal or civil proceedings;
>
> (b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and
>
> (c) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law."

[18] *PFE International v Industrial Development Corporation of South Africa Ltd* [2012] ZACC 21; 2013 (1) SA 1 (CC); 2013 (1) BCLR 55 (CC) at para 7.

[19] *Industrial Development Corporation of South Africa Ltd v PFE International Inc (BVI)* [2011] ZASCA 245; 2012 (2) SA 269 (SCA) (*PFE International* SCA) at para 15.

> "This anomaly, that [a litigant] may be entitled to information the day before the commencement of proceedings but not the day thereafter, must be seen as a necessary consequence of the intention, on the part of the Legislature, to protect the process of the court. Once proceedings are instituted then the parties should be governed by the applicable rules of court."[20]

[17] This Court in *PFE International* endorsed the approach of the Supreme Court of Appeal on the basis of the plain meaning of the language of section 7 of PAIA, and in light of the presumed legislative intent of preventing a dual system of access to documents and information that would be disruptive to court proceedings.[21] Notwithstanding this, the Court recognised that section 7 must be interpreted restrictively:

> "When construing section 7(1) it must be borne in mind that the purpose of PAIA is to give effect to the right of access to information. On the contrary, section 7 excludes the application of PAIA. A restrictive interpretation of the section is warranted so as to limit the exclusion to circumstances contemplated in the section only. A restrictive meaning of section 7(1) will thus ensure greater protection of the right."[22]

[18] The Competition Act also establishes a key public body, the Tribunal, with the primary purpose of adjudicating matters provided for in the Competition Act.[23] These include matters concerning prohibited anti-competitive conduct.[24] The Competition Act empowers the Minister to promulgate regulations, in consultation with the Tribunal, concerning the functions of the Tribunal.[25] The Minister has exercised this power by

---

[20] Id at para 10.

[21] *PFE International* above n 18 at para 31.

[22] Id at para 18.

[23] Section 26 to 27 of the Competition Act.

[24] Section 27 of the Competition Act. See further the Long Title of the Competition Act.

[25] Section 27(2) read with section 21(4) of the Competition Act.

promulgating the Rules for the conduct of proceedings in the Competition Tribunal (Tribunal Rules).[26]

[19] After initiating a complaint regarding alleged prohibited practices, the Commission is empowered by the Competition Act to refer a complaint to the Tribunal for adjudication.[27] The referral must be on affidavit and must contain a concise statement of the grounds of the complaint and the material facts or the points of law that are relevant to the complaint and relied on by the Commission.[28] The Tribunal Rules do not oblige the Commission to provide any further details at the referral stage, and accordingly exclude the record of the Commission's investigation which gave rise to the referral. Instead, a respondent who wishes to oppose a complaint must file an answer within 20 business days.[29] The answer must be on affidavit, and must contain—

(a) a concise statement of the grounds on which the complaint referral is opposed;

(b) the material facts or points of law on which the respondent relies; and

(c) an admission or denial of each ground and each material fact relevant to each ground set out in the complaint referral.[30]

[20] The Commission then has the opportunity to reply to the answer.[31] The Tribunal Rules also permit the amending of documents.[32] Once the filing of documents has been completed, a member of the Tribunal who is assigned by the Chairperson of the Tribunal may convene a pre-hearing conference.[33] This Tribunal member has various procedural powers and discretions. Most importantly for this case, the member has a *discretion*

---

[26] Competition Tribunal Rules *GG* 22025 GN 253 of 1 February 2001.

[27] See section 50(1) of the Competition Act.

[28] Rule 15(2) of the Tribunal Rules.

[29] Rule 16(1) of the Tribunal Rules.

[30] Rule 16(4) of the Tribunal Rules.

[31] Rule 17 of the Tribunal Rules.

[32] Rule 18 of the Tribunal Rules.

[33] Rule 21 of the Tribunal Rules.

under rule 22(1)(c)(v) of the Tribunal Rules to issue directions concerning discovery. The rule provides:

> "At a prehearing conference, the assigned member of the Tribunal *may*—
>
> . . .
>
> (c) give directions in respect of—
>
> . . .
>
> (v) the production and discovery of documents whether formal or informal."

[21] The Commission argues that rule 22(1)(c)(v) is relevant because it provides for access to the information sought by the respondents. The Commission contends that the respondents must instead rely on these ordinary rules of discovery under the Tribunal Rules to access the information sought. This access can only be granted under the Tribunal Rules after pleadings have closed. The Commission argues that the Tribunal proceedings would be disrupted if a respondent to a complaint referral were permitted to invoke both rule 15 of the Commission Rules and the discovery process under the Tribunal Rules.[34]

Rule 53

[22] The Competition Act also establishes the Competition Appeal Court.[35] The Competition Appeal Court hears reviews and appeals from the Competition Tribunal.[36] Moreover, and as discussed later, it may be possible for the Competition Appeal Court to hear a review of a decision taken by the Commission as a court of first instance under section 62 of the Competition Act.[37]

---

[34] As envisaged in *PFE International* above n 18 at para 31.

[35] Section 36 of the Competition Act.

[36] Section 37 of the Competition Act.

[37] See [117].

[23] Rule 34 of the Competition Appeal Court Rules,[38] which is headed "Conduct of hearings", provides that:

> "(1) The Judge President may give any directions that are considered just and expedient in matters of practice and procedure.
>
> (2) If, in the course of proceedings, a person is uncertain as to the practice and procedure to be followed, the presiding judge—
>
> (a) may give directions on how to proceed; and
>
> (b) for that purpose, if a question arises as to the practice or procedure to be followed in cases not provided for by these Rules or by a direction of the Judge President in terms of subrule (1), the judge may have regard to the High Court Rules or the Rules of the Supreme Court of Appeal."

[24] Rule 34 gives the presiding judge a fairly wide power to issue procedural directions when questions concerning practice and procedure arise in the course of proceedings. In addition, rule 34 empowers presiding judges to have regard to the Uniform Rules of Court (Uniform Rules) to regulate procedure in the Competition Appeal Court where there is a lacuna in the Competition Appeal Court Rules. Of particular relevance to this matter is rule 53 of the Uniform Rules, which provides:

> "(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected—
>
> (a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside; and

[38] Rules for the conduct of proceedings in the Competition Appeal Court *GG* 21504 GNR 857 of 1 September 2000 (Competition Appeal Court Rules).

(b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he or she has done so."

[25] In *Helen Suzman*, this Court held that a rule 53 record is integral to review proceedings:

"The purpose of rule 53 is to 'facilitate and regulate applications for review'. The requirement in rule 53(1)(b) that the decision-maker file the record of decision is primarily intended to operate in favour of an applicant in review proceedings. It helps ensure that review proceedings are not launched in the dark. The record enables the applicant and the court fully and properly to assess the lawfulness of the decision making process. It allows an applicant to interrogate the decision and, if necessary, to amend its notice of motion and supplement its grounds for review.

Our courts have recognised that rule 53 plays a vital role in enabling a court to perform its constitutionally entrenched review function:

> 'Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of section 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed.'

The filing of the full record furthers an applicant's right of access to court by ensuring both that the court has the relevant information before it and that there is equality of arms between the person challenging a decision and the decision-maker. Equality of arms requires that parties to the review proceedings must each have a reasonable opportunity of presenting their case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponents. This requires that —

> 'all the parties have identical copies of the relevant documents on which to draft their affidavits and that they and the court have identical papers before them when the matter comes to court'."[39]

[26] The Judge President is authorised to supervise and direct the work of the Competition Appeal Court.[40] The Judge President assigns each matter before the Court to a bench composed of three judges of that Court.[41] This is with one exception: the Judge President may assign a single judge to sit in circumstances specified in section 38(2A) of the Competition Act. The provision reads:

> "The Judge President, or any other judge of the Competition Appeal Court designated by the Judge President, may sit alone to consider an—
>
> (a) appeal against a decision of an interlocutory nature, as prescribed by the rules of the Competition Appeal Court;
>
> (b) application concerning the determination or use of confidential information;
>
> (c) application for leave to appeal, as prescribed by the rules of the Competition Appeal Court;
>
> (d) application to suspend the operation and execution of an order that is the subject of a review or appeal; or
>
> (e) application for procedural directions."

[27] Section 38(2A) is relevant because one of the issues raised in this matter is whether a direction to produce the record under rule 53 is a "procedural direction" as envisaged in section 38(2A)(e).

---

[39] *Helen Suzman* above n 15 at paras 13-5. See further *Turnbull-Jackson v Hibiscus Coast Municipality* [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) at para 37.

[40] Section 38(1)(a) of the Competition Act.

[41] Section 38(2) of the Competition Act.

Background to CCT 158/18 and CCT 179/18

[28] In CCT 158/18, the Commission referred a complaint against eighteen banks, including Standard Bank (the respondent in CCT 158/18 and 179/18) to the Competition Tribunal. The complaint concerned alleged collusive practices in the buying and selling of the South African Rand in contravention of section 4(1)(b)(i) and (ii) of the Act (Forex Referral).[42] Tribunal Rule 16(1) required Standard Bank to file an answer within 20 business days of being served with the complaint referral. Standard Bank, however, raised an exception to the Forex Referral and had not yet filed an answer at the time of the hearing of this matter. At the same time, Standard Bank brought an application for access to the Commission's record of investigation in the Forex Referral in terms of rule 15 of the Commission Rules.

[29] It is important to understand that Standard Bank's exception to the complaint referral stands separately from its application for access to the record under rule 15. The rule 15 application had no effect on Standard Bank's obligation to answer the Forex Referral. It is clear that a litigant cannot refuse to answer a complaint against them on the basis that a rule 15 application has been instituted and has not yet been finalised. It is the exception to the complaint referral, rather than the rule 15 application, which occasioned the delay in the filing of Standard Bank's answer.

[30] The history of the proceedings in the Tribunal reveals that the considerable delay which has occurred in the finalisation of the adjudication of the Forex Referral stems exclusively from the exception proceedings. The hearing of the exceptions that were brought by Standard Bank and a number of other respondents against the complaint referral was beset by postponements and delays. The first postponement was occasioned by the Commission's late expression of its intent to join further respondents. A further postponement was occasioned by the Commission's filing of a supplementary affidavit nearly a year after the complaint was referred, which led to the filing of fresh exceptions.

[42] This was done in terms of the Tribunal Rules.

[31] In relation to Standard Bank's rule 15 application, the Tribunal held that Standard Bank was only entitled to the record of investigation at the time of discovery.[43] Dissatisfied with this result, Standard Bank appealed to the Competition Appeal Court. On appeal, the Competition Appeal Court reversed the Tribunal's decision and ordered that the Commission produce the record.[44] It held that under rule 15 of the Commission Rules, Standard Bank was entitled to access to the record of investigation. The Commission approaches this Court seeking leave to appeal against this order (rule 15 appeal).

[32] In CCT 179/18, Standard Bank launched a separate and direct application in the Competition Appeal Court, bypassing the Tribunal, to review and set aside the Commission's referral decision. As part of the review proceedings, Standard Bank sought access to the record of the Commission's referral decision, including the Commission's record of investigation. When the Commission refused to produce the record on the basis that the rule 15 appeal was not yet finalised, Standard Bank requested directions from the Judge President. The Judge President assigned the matter for hearing by a single judge, Boqwana JA, in terms of section 38(2A).

[33] The Commission contended before Boqwana JA that the Competition Appeal Court did not have the jurisdiction to hear the review as a court of first instance and that a single judge was not empowered to order the production of a rule 53 record under section 38(2A). On 22 June 2018, Boqwana JA directed the Commission to produce the rule 53 record in the review proceedings.[45] Boqwana JA did so without first determining whether the Competition Appeal Court had jurisdiction to hear the review as a court of first instance. The Commission seeks leave to appeal

---

[43] *Standard Bank of South Africa Limited v Competition Commission of South Africa* [2017] 2 CPLR 883 (CT) (*Standard Bank* Tribunal decision) at 895.

[44] *Standard Bank of South Africa Limited v Competition Commission of South Africa* [2018] ZACAC 5; [2018] JOL 40244 (CAC) (Rule 15 judgment) at para 60.

[45] *Standard Bank of South Africa Limited v Competition Commission of South Africa* [2018] ZACAC 3; [2018] 1 CPLR 121 (CAC) (Rule 53 judgment) at para 33.

against that direction on the ground, among others, that Boqwana JA should first have determined the question of jurisdiction before granting the direction (review appeal).

Background to CCT 218/18

[34] On 18 March 2016, the Commission received a complaint from Eskom that the respondents in CCT 218/18 (Waco respondents) had colluded in bidding for a tender.[46] On 6 February 2018, after conducting an investigation, the Commission referred the complaint to the Tribunal.[47] On 16 February 2018, and following the referral to the Tribunal, the Waco respondents requested access to the Commission's record of investigation. The Commission refused to comply with this request. Invoking rule 15 of the Commission Rules, the Waco respondents brought an application in the Tribunal to compel the Commission to produce its record of investigation.[48] The Tribunal granted the Waco respondents the relief they sought and directed that the Commission produce its record of investigation.[49]

[35] The Commission then launched proceedings in this Court seeking leave to directly appeal against the Tribunal's order. The issues raised in this application are substantively similar to the rule 15 appeal.

[46] The Waco respondents are seven juristic persons. At the time, Eskom had received four bids from these seven juristic persons: (a) the first respondent tendering on its own; (b) the first respondent tendering together with the fifth respondent by forming the second respondent to submit the tender; (c) the first respondent tendering together with the sixth respondent by forming the third respondent to submit the tender; and (d) the first respondent tendering together with the seventh respondent by forming the fourth respondent to submit the tender.

[47] Eskom withdrew its complaint for unknown reasons on 13 March 2017, but the Commission initiated a complaint and pursued it.

[48] The Waco respondents also brought three other applications to: (a) dismiss the referral because it was not lawfully initiated; (b) dismiss the referral because it did not make out a cause of action; and (c) strike out certain parts of the Commission's complaint referral. These are irrelevant to this matter.

[49] *Waco Africa (Pty) Ltd v Competition Commission: In re: Competition Commission v Waco Africa (Pty) Ltd* [2018] 2 CPLR 888 (CT) (*Waco* Tribunal decision).

In this Court

Issues

[36] There are, as always, the preliminary issues of jurisdiction and leave to appeal. In the rule 15 appeal, the substantive issues raised are:

(a) May a litigant rely on rule 15 of the Commission Rules to gain access to the Commission's record of investigation before the close of pleadings?

(b) If rule 15 is available to a litigant, what factors may the Commission and the Tribunal take into account in determining a reasonable time for the production of the record?

[37] In the review appeal, the issues raised are whether the Competition Appeal Court:

(a) Sitting as a single judge, can direct the production of a rule 53 record under section 38(2A) of the Competition Act; and

(b) Has first instance jurisdiction to entertain the review application and to order the production of the rule 53 record.

Jurisdiction

[38] The rule 15 appeal concerns the overarching question of whether (and, if so, when) respondents in referral proceedings before the Tribunal may lawfully demand access to information held by the Commission regarding the complaint referral before the discovery stage.

[39] The rule 15 appeal directly concerns the constitutional right of access to information, and the legislation and rules giving effect to this right.[50] It requires careful consideration of the delicate balance between ensuring the fulfilment of Standard Bank and the Waco respondents' right of access to information, and the public interest in

[50] Section 32 of the Constitution. See, for example, *PFE International* above n 18 at para 16.

safeguarding the Commission's ability to efficiently prosecute anti-competitive conduct and in fair litigation. This Court has repeatedly affirmed the principle that the interpretation of legislation in conformity with the constitutional imperative to best promote the spirit, purport and object of the Bill of Rights constitutes a constitutional issue that engages our jurisdiction.[51]

[40] The review appeal raises the question whether the Competition Appeal Court, sitting as a single judge and a court of first instance, may order the Commission to produce the record of its referral decision, without first deciding the question of its jurisdiction.

[41] This Court has held that disputes regarding the powers of the Tribunal, and the determination of whether the Tribunal acted within its legal powers invoke the principle of legality, are constitutional matters.[52] There is no reason that these authorities should not apply with equal force to the powers of the Competition Appeal Court. Furthermore, the correct interpretation of the Competition Appeal Court's powers in relation to first instance record disclosure is critical to fair litigation and to enabling the effective prosecution of collusion.[53]

[42] In my view, the disputes raise constitutional issues and therefore engage this Court's jurisdiction.

---

[51] *Jordaan v City of Tshwane Metropolitan Municipality* [2017] ZACC 31; 2017 (6) SA 287 (CC); 2017 (11) BCLR 1370 at para 8 and *S v Shaik* [2007] ZACC 19; 2008 (2) SA 208 (CC); 2007 (12) BCLR 1360 (CC) at para 83.

[52] *Senwes* above n 4 at para 17, which reads:

> "The question whether the Tribunal had exceeded its statutory power in entertaining the margin squeeze abuse concerns one of the most important principles in the control of public power in our constitutional order, the principle of legality."

See also *Competition Commission v Yara South Africa (Pty) Ltd* [2012] ZACC 14; 2012 JDR 1118 (CC); 2012 (9) BCLR 923 (CC) (*Yara*) at para 13.

[53] See *Senwes* above n 4 at para 19.

Interests of justice

The rule 15 appeals

[43] I would grant leave to appeal in CCT 158/18 because the matter raises important issues in respect of rule 15 that need to be clarified. This is especially so in light of the implicated right of access to information and the alleged impact of the Competition Appeal Court's approach to the Commission's capacity to prosecute cartels. The Commission has also been unyielding in its view that the Competition Appeal Court's decision in *Group Five* is incorrect.[54] This Court thus needs to pronounce upon *Group Five*.[55]

[44] In CCT 218/18, the Commission applies for a direct appeal primarily on the basis of convenience, claiming that it would be futile for it to follow the prescribed path of appealing the Tribunal's decision to the Competition Appeal Court first. It submits that an appeal would be fruitless given that the Competition Appeal Court has already ruled on this matter in the rule 15 judgment and *Group Five*.

[45] It cannot be ignored that the Competition Appeal Court is an apex specialist court in competition matters, and that this Court derives substantial benefit from its views.[56] Nonetheless, I would grant leave for a direct appeal in CCT 218/18 on the basis of this Court's judgment in *Union of Refugee Women*.[57] In this regard, it is noteworthy that there will be little disadvantage flowing from the bypassing of the Competition Appeal Court as it has repeatedly aired its views on the relevant issues. Some of the other

---

[54] *Group Five Ltd v Competition Commission* [2016] ZACAC 1 (*Group Five*)

[55] In an order dated 25 October 2016, this Court summarily dismissed an application by the Commission for leave to appeal against the Competition Appeal Court's order in *Group Five* on the basis that the application did not bear any reasonable prospects of success. I am prepared to assume in the Commission's favour that such an order does not bind this Court in the same way that its judgments do. The question regarding the precedential force of such an order dismissing an appeal for lack of prospects of success is left open for another day.

[56] *Yara* above n 52 at para 71. This Court's comments in respect of bypassing the Labour Appeal Court in *Dudley v City of Cape Town* [2004] ZACC 4; 2005 (5) SA 429 (CC); 2004 (8) BCLR 805 (CC) at para 9 are equally apposite in the context of the Competition Appeal Court, which is also a specialist court.

[57] *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* [2006] ZACC 23; 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC) at para 21.

factors in *Union of Refugee Women* also support granting leave. For instance, the matter involves constitutional issues arising from common cause facts, the issues are important, and there is an advantage in this Court simultaneously addressing two substantively similar applications.[58]

Review appeal

[46] Standard Bank contends that the order of Boqwana JA is interlocutory and therefore not appealable. The test for appealability has, however, been developed to accord with "the equitable and more context-sensitive standard of the interests of justice".[59] What is paramount is not whether the order is final or interim but whether it is in the interests of justice to grant leave to appeal.[60]

[47] The rule 53 order is final in effect and determinative of the relevant rights between the Commission and Standard Bank.[61] This is because the order requires the Commission to disclose the record – which would have the final effect of furnishing Standard Bank with the information it seeks to pursue its review under rule 53. The handing over by the Commission of the record under rule 53 would be irrevocable. Standard Bank would have access to the information contained in it, and no subsequent court order could materially change that.

[48] In this Court, the Commission persisted in its argument that Boqwana JA should not have ordered the production of the record before settling the issue of the Competition Appeal Court's jurisdiction as a court of first instance. The Commission has strong prospects of succeeding with this argument. Therefore, it is in the interests of justice to grant the Commission leave to appeal against the Boqwana JA procedural direction. Leave to appeal is accordingly granted in CCT 179/18.

---

[58] Id.

[59] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) at para 53.

[60] *Tshwane City v Afriforum* [2016] ZACC 19; 2016 (6) SA 279 (CC); 2016 (9) BCLR 1133 (CC) at para 40 and *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 8.

[61] *Zweni v Minister of Law and Order* [1992] ZASCA 197; 1993 (1) SA 523 (A) at 536A-B.

Rule 15 appeal

[49] In its application in terms of rule 15 for an order compelling the Commission to produce its record of investigation in the Forex Referral, Standard Bank simply alleged that it was entitled to access the record because rule 15 empowers "any person" to access "any Commission record". Standard Bank also accepts, as it must, that if rule 15 is available to it, then the Commission is empowered to invoke the various grounds in rule 14 to limit access to restricted information in the record.

[50] In Standard Bank's rule 15 application, the Tribunal held that the rule established by the Competition Appeal Court's decision in *Group Five* is that "regardless of whether the party knocking at the window of the Commission's registry is a litigant or someone just off the street they should be treated in an equal fashion of their request".[62] The Tribunal stressed that its decision in relation to Standard Bank's application would be no different if a member of the public had requested the record.[63] The Tribunal interpreted *Group Five* as granting it a discretion to determine a reasonable time period for the production of the requested information, depending on the facts of each case.[64] The Tribunal reasoned that when the applicant is a litigant, the fact that discovery proceedings are impending could be a relevant factor to the exercise of this discretion.[65]

[51] The Tribunal granted Standard Bank's request for the record of investigation and ordered the Commission to provide Standard Bank with the record of investigation at the same time as it produces discovery in the Forex Referral. The Tribunal held that Standard Bank had not put forward a factual basis to justify the production of the record prior to discovery in the Forex Referral.

---

[62] *Standard Bank* Tribunal decision above n 43 at para 56.

[63] Id at para 74.

[64] Id at para 58.

[65] Id at para 67.

[52] On appeal, the Competition Appeal Court overruled the Tribunal's decision, holding that it was bound by its judgment in *Group Five*. It explained that on a proper interpretation, the rule emerging from *Group Five* is that access to the record under rule 15 of the Commission Rules is a general public-access right which applies irrespective of whether the requestor is a litigant in proceedings before the Tribunal.[66] This is notwithstanding section 7, which provides that the provisions of PAIA cannot be used to obtain access to information for the purposes of litigation once litigation has commenced. According to *Group Five*, section 7 of PAIA cannot be a basis to withhold information as contemplated in rule 14(1)(e) of the Commission Rules.[67] The Competition Appeal Court reasoned that this is because section 7 of PAIA does not empower a body to restrict access to information (as contemplated in rule 14(1)(e)). Instead, the effect of section 7 of PAIA is that PAIA does not apply to information requested for the purpose of litigation.[68] The Competition Appeal Court further held that the only consideration to be taken into account by the Tribunal in determining a reasonable time for the production of the record under rule 15 was the practical time which the Commission would require to compile the record.

[53] The Tribunal in the Waco matter similarly found for the Waco respondents on the basis that it was bound by the *Group Five* and *Standard Bank* rule 15 judgments.[69]

[54] Before the Tribunal and the Competition Appeal Court, the Commission accepted the binding authority of *Group Five*. It says it did so because those forums are bound by the precedent of the Competition Appeal Court.[70] However, in this Court, the Commission submits that *Group Five* was incorrectly decided or was, at the very least, misapplied by the Competition Appeal Court. The Commission's argument regarding *Group Five* and rule 15 can be summarised into four independent arguments:

---

[66] Rule 15 judgment above n 44 at para 24.

[67] Id at para 33.

[68] Id at para 34.

[69] *Waco* Tribunal decision above n 49 at para 76.

[70] The principle of *stare decisis et non quieta movere* requires that a court is bound by the previous decisions of a higher court and by its own previous decisions in similar matters.

(a) Rules 14 and 15 incorporate section 7 of PAIA into the Commission Rules, and so rule 15 does not avail the respondents;

(b) The Commission Rules no longer apply once a matter is referred to the Tribunal – the latter's rules take over entirely;

(c) *Group Five* is contrary to the Competition Appeal Court's decision in *Continental Tyres*;[71] and

(d) Policy considerations and the purpose of rule 15 demand that rule 15 should not avail the respondents after a complaint has been referred to the Tribunal.

[55] Before addressing the arguments raised by the Commission in this Court, I set out what is, in my view, the proper interpretation of rule 15 of the Commission Rules. It is well-established that this interpretive exercise depends on the plain wording, context and purpose of rule 15 informed by the spirit, purport and object of the Bill of Rights.[72]

[56] The wording of rule 15 is clear. It provides that "any person" may have access to information held by the Commission, subject only to the proviso that the information is not restricted in terms of rule 14. There is nothing in the text of rule 15 that excludes access by litigants in proceedings before the Tribunal.

[57] The purpose of rule 15, which is to facilitate access to information held by the Commission and to give effect to section 32 of the Constitution, bolsters my reasoning. In addition, the interpretation of rule 15 must be informed by the right in section 32 and the constitutional values of openness and transparency. In the context of a different rule that implicated the right of access to information, this Court held in *PFE International*:

---

[71] *Continental Tyres South Africa (Pty) Limited v Competition Commission*, unreported judgment of the Competition Appeal Court 157/CAC/Nov 2017 (11 October 2018) (*Continental Tyres*).

[72] For a recent summary of legislative interpretation under the Constitution see *Road Traffic Management Corporation v Waymark Infotech (Pty) Limited* [2018] ZACC 12; 2019 (5) SA 29 (CC); 2019 (6) BCLR 749 (CC) at paras 29-32.

"[T]he rule must be generously and purposively interpreted so as to give the holders of the right the fullest protection they need.

In addition, section 39(2) of the Constitution plays an important role in the interpretation of the rule. In peremptory terms, this section imposes an obligation on all courts to promote 'the spirit, purport and the objects of the Bill of Rights', when interpreting legislation. In *Phumelela Gaming And Leisure Limited v André Gründlingh* this Court observed:

> 'A court is required to promote the spirit, purport and objects of the Bill of Rights when 'interpreting any legislation, and when developing the common law or customary law'. In this no court has a discretion. The duty applies to the interpretation of all legislation and whenever a court embarks on the exercise of developing the common law or customary law. The initial question is not whether interpreting legislation through the prism of the Bill of Rights will bring about a different result. A court is simply obliged to deal with the legislation it has to interpret in a manner that promotes the spirit, purport and objects of the Bill of Rights. The same applies to the development of the common law or customary law.'

The Supreme Court of Appeal rejected the narrow, literal reading of the rule and opted for a construction that promotes wider access to information. This construction is also in line with the purpose for the exclusion of PAIA in cases where access to information is regulated by the rules of court. Even before the adoption of the Constitution in 1994, our courts construed the rules in a manner that advanced the process of litigation if the literal reading would hamper its progress."[73]

[58] In sum, the constitutional imperative of interpreting legislation and rules to promote the right of access to information, as contained in section 32 of the Constitution, must govern this Court's approach to interpreting rule 15. This Court must prefer an interpretation which best promotes the right of access to information held by the State.[74] This favours a generous, rather than a restrictive reading of rule 15.

---

[73] Id at paras 25-7.

[74] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) at paras 46-7.

[59] It follows, in my view, that rule 15 must be read as conferring upon litigants in proceedings before the Tribunal a right of access to information held by the Commission.

Rule 15 and PAIA

[60] The Commission contends that rule 15 is subject to the same qualifications on the right of access to information as provided for in section 7 of PAIA. It argues that the right that is founded in rule 15 is subject to the express limitation of the wording of rule 14, which provides that the right does not extend to "restricted" information. One class of information that rule 14(1)(e) classifies as "restricted information" is any "document to which a public body would be required or entitled to restrict access in terms of [PAIA]".

[61] The Commission is a public body as envisaged in PAIA.[75] The intention and effect of rule 14(1)(e) of the Commission's Rules, so the Commission's argument goes, is to afford the Commission the same grounds for refusing disclosure as other public bodies facing applications for access to information under PAIA. This must ostensibly include the qualifications provided for in section 7 of PAIA. The Commission argues that because section 7 applies in this case, Standard Bank and the Waco respondents cannot be granted access to the respective records of investigation.

[62] The Commission's argument must fail for a number of reasons. The ordinary meaning of the language used in rule 14 does not support the Commission's argument. As mentioned, rule 14(1)(e) envisages the Commission being entitled to restrict access to any "document to which a public body would be required or entitled to restrict access in terms of [PAIA]". Section 7 of PAIA does not provide any grounds upon which a public body would be required or entitled to restrict access to information. This is

[75] The definition in section 1 of PAIA provides that a public body includes a functionary or institution when: (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation.

because section 7 concerns PAIA's scope of application. Section 7 is located in Part 1, Chapter 2 of PAIA, which is headed "General Application Provisions", and specifically provides "[t]his Act does not apply" to certain information. Access to information sought for the purposes of litigation cannot be restricted *in terms of PAIA*, because section 7 expressly states that PAIA is inapplicable to requests for information under these circumstances. It follows that the Commission may not restrict access to the information sought by Standard Bank by invoking PAIA even if the jurisdictional requirements of section 7 of PAIA are met. PAIA also makes this explicit by placing section 7 outside of Part 2, Chapter 4 of PAIA, which concerns the grounds which are available to a public body to refuse access to information. It is only these grounds of refusal that are incorporated by rule 14(1)(e).

[63] In other words, rule 14(1)(e) of the Commission Rules includes, by reference, the substantive grounds upon which access to records may be restricted under PAIA. It does not render rule 15 of the Commission Rules inapplicable in the same manner in which PAIA is rendered inapplicable to civil and criminal proceedings by the operation of section 7(1)(a) of PAIA.

[64] The interpretation of rule 14 contended for by the Commission is not only contrary to the ordinary meaning of the words in the text, but would also fall foul of the constitutional injunction to interpret the provision to promote the spirit, purport and objects of the Bill of Rights.[76] On this interpretation, rule 14 would restrict the wide ambit of the right of access to information in section 32 of the Constitution. As recognised by this Court in *PFE International,* rules facilitating access to information must be restrictively interpreted so as to ensure greater protection of the constitutional right of access to information.[77] The interpretation contended for by the Commission

[76] Section 39(2) of the Constitution. See *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2000 (2) SACR 349 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) at paras 23-4.

[77] *PFE International* above n 18 at para 18.

would have the effect of reading in a restriction which is not contemplated within the clear meaning of the text of the rule.

[65] However, even if section 7 were available to the Commission as a basis upon which to refuse Standard Bank access to the record of its investigation under rule 14(1)(e), it is unclear whether its jurisdictional requirements could be met in this case.[78] Assuming that the proceedings before the Tribunal are criminal or civil in nature, section 7(1)(c) of PAIA expressly provides that PAIA does not apply where the production of the record is provided for in another law. As *Group Five* recognised, there is no other law regarding the production of the information sought by the respondents under rule 15. In this regard, I emphasise that the Tribunal Rules do not provide for access to the documents contained in the record as of right. Instead, as already indicated, the presiding officer at a pre-hearing conference has the *discretion* to issue directions concerning discovery.[79] The presiding officer determines the documents to be disclosed at discovery, and the Commission is able to rely on litigation privilege to resist disclosure.[80]

[66] Finally, the Commission argued that rule 15 "domesticates PAIA" and, like PAIA, gives effect to the constitutional right of access to information. It sought to deduce from this premise that section 7 applied, and so access to the information sought by Standard Bank should be restricted. However, rule 15 seeks to give effect to the

---

[78] The three conditions for the application of section 7 are: (a) the record must be requested for the purpose of criminal or civil proceedings; (b) after the commencement of such proceedings; and (c) any other law provides for access to the record in question. See *PFE International SCA* above n 19 at para 8: "[a]ll three of the requirements of section 7(1) must be met in order to render PAIA inapplicable to the request". This Court held on appeal that it "is plain from its language that the section lays down three conditions which must be met if the application of PAIA is to be denied". See *PFE International* above n 18 at para 20.

[79] The Competition Appeal Court in *Group Five* above n 54 at para 16 noted that the Tribunal Rules make provision for discovery within the *discretion* of the Tribunal, unlike the rules in civil litigation. In accordance with rule 20 of the Tribunal Rules, complaint proceedings are governed by the orders made by the Tribunal at a pre-hearing. The assigned member of the Tribunal presiding at a pre-hearing "*may*" give directions in respect of "*the production and discovery of documents whether formal or informal*" (rule 22(1)(c)(v) of the Tribunal Rules), but there is no obligation to do so.

[80] This is clearly different from rule 15, which provides for a public access right, with the Commission able to rely on rule 14's restrictions to restrict access to certain categories of information.

right of access to information in section 32 of the Constitution and must be interpreted to promote that right.[81] This means that, contrary to the Commission's submissions, rule 15 cannot be restrictively interpreted to incorporate section 7. To do so would undermine the right in section 32, because access to information would be restricted. It follows that to interpret the rule as incorporating section 7 would be contrary to the constitutional imperative to interpret the rule to best promote the spirit, purport and objects of the Bill of Rights.[82]

Commission Rules versus Tribunal Rules

[67] The Commission's second argument is that its rules categorically do not apply to litigants once a matter is before the Tribunal. According to the Commission, rule 15 therefore cannot avail the respondents because the proceedings have been referred to the Tribunal, and Standard Bank and the Waco respondents are litigants in these proceedings.

[68] Instead, the Commission submits that the Tribunal Rules are the only rules that can avail Standard Bank and the Waco respondents once a matter has been referred to the Tribunal. The Commission argues that the Tribunal Rules do not provide for the automatic disclosure of documents before the close of pleadings.[83] Rule 22(1)(c)(v) of the Tribunal Rules provides that the Tribunal decides when and how discovery should occur. It does so at the pre-hearing conference, but only after pleadings have closed. According to the Commission, the position under the Tribunal Rules is that access to the Commission's record of investigation and other documents may only be granted after pleadings have closed.

---

[81] Section 39(2) of the Constitution; *Hyundai* above n 76; and *PFE International* above n 18 at paras 25-7.

[82] Id.

[83] See *Group Five Ltd v Competition Commission: In re: Competition Commission v Group Five Ltd* [2016] 1 CPLR 359 (CT) (*Group Five* Tribunal decision) at para 66. The Tribunal correctly held that its rules "do not contemplate premature discovery by the Commission or any other litigant".

[69] The Commission accepted that the Tribunal Rules provide for pre-discovery access in certain circumstances. Rule 55 of the Tribunal Rules allows for the application of the Uniform Rules in Tribunal proceedings. The Uniform Rules make provision for discovery before the close of pleadings, but only in certain circumstances. Rule 35(12) and (14) of the Uniform Rules permit access to documents before the close of pleadings. Rule 35(12) may be invoked only where the document is referred to in the pleadings and rule 35(14) only where a litigant can show that the documents are reasonably necessary to plead. The Commission submitted that these rules should not be negated by rule 15. Instead, they contend that the respondents should have relied on rule 35(12) or (14) of the Uniform Rules to access the record of investigation after referral. The Commission says that the respondents should have alleged and proven that the record of investigation was necessary for them to answer to the complaints.

[70] There is no merit in the Commission's argument that the Commission Rules should be interpreted as being applicable only until a complaint is referred to the Tribunal, and that once litigation commences, the Tribunal Rules are all-encompassing. There is nothing in the language of the Commission Rules that provides that they no longer apply once a complaint is referred to the Tribunal. To the contrary, the preamble to the Commission Rules provides that the rules relate to the "functions of the Competition Commission", which necessarily extend to the Commission's appearance in proceedings before the Tribunal. It is an express function of the Commission to refer complaints to the Tribunal and to appear before the Tribunal as the latter adjudicates on these complaints.[84] Quite clearly, the two sets of rules envisage a nuanced inter-relationship, where certain Commission rules apply when a matter is before the Tribunal. Whether a Commission rule applies despite proceedings being before the Tribunal depends on the rule. It does not follow that a Commission rule cannot apply or be invoked by the Commission or other parties once a referral to the Tribunal is made.

[84] Section 21(1)(g) of the Competition Act.

[71] To hold otherwise would be absurd. The Commission must act in terms of its own rules. These rules constrain its powers and functions, and also empower the Commission. If the Commission Rules no longer apply to it, or cannot be invoked by anyone else the moment the Commission is a litigant before the Tribunal, then it is unclear where the Commission sources its authority to act. This would have absurd consequences[85] and the Commission's argument accordingly stands to be rejected.

[72] Rule 15 clearly continues to apply after a complaint is referred to the Tribunal. A request for access to information held by the Commission under rule 15 is entirely separate from proceedings before the Tribunal. It cannot be suggested that a member of the public can no longer request access to information relating to a matter simply because the matter is before the Tribunal. On the contrary, rule 14(1)(c)(i) envisages that the record of investigation only becomes accessible upon referral of a complaint to the Tribunal. Moreover, the Tribunal Rules do not contain a mechanism through which a member of the public may request access to information held by the Commission.

Continental Tyres

[73] The third ground of appeal advanced by the Commission places reliance on the Competition Appeal Court's findings in *Continental Tyres*. The Commission invokes *Continental Tyres* in support of its proposition that rule 15 of the Commission Rules does not apply to a litigant before the Tribunal. The Commission emphasises that in *Continental Tyres*, the Competition Appeal Court noted that the term "any person" in rule 15 refers to a very wide category, and might appear to include persons who are respondents in a referral complaint by the Commission. According to the Commission, the Competition Appeal Court concluded in *Continental Tyres* that "this is not the correct construction of rule 15".[86] Instead, the Commission submits that the

[85] For example, rule 6 of the Commission Rules provides that "[t]he Commissioner, in writing, may assign any function or power to a member of the staff of the Commission, either generally or in connection with a particular matter". If a matter is before the Tribunal, then on the Commission's argument its rules cannot apply to it, and so the Commissioner cannot assign a function or power to staff in relation to a matter.

[86] *Continental Tyres* above n 71 at para 31.

Competition Appeal Court held that "rule 15 cannot be interpreted expansively to be of application to respondents in referral proceedings".[87]

[74] These isolated comments by the Competition Appeal Court in *Continental Tyres* must, however, be seen in their proper context. The dicta relied upon by the Commission concerned discovery and are wholly distinguishable from the present matter. Standard Bank and the Waco respondents do not seek discovery (under rule 22(1)(a)(v) of the Tribunal Rules), but rather access to the investigation record under rule 15. In *Continental Tyres*, the Commission invoked the restrictions in rule 14 in an attempt to refuse to make full discovery.[88] The Competition Appeal Court held that the Commission is not entitled to invoke the grounds for restriction in rule 14 when a respondent seeks *discovery* of documents. This finding, and the associated reasoning advanced by the Competition Appeal Court, is clearly distinguishable from the present matter.[89] Discovery is available after pleadings have closed and takes place in terms of the Tribunal Rules, while access to the record under rule 15 can be sought at any stage and is in terms of the Commission Rules.

[75] According to Unterhalter AJA in *Continental Tyres*, "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",[90] because the Commission "has duties of disclosure to respondents that it does not have to the public at large".[91] Unterhalter AJA's statement regarding rule 14 is clearly limited to the discovery mechanism provided for in the Tribunal Rules. The Commission's heightened duties of disclosure to a respondent vis-à-vis a member of the public cannot be used to justify a more restrictive approach to access to information

[87] Id.

[88] Id at paras 5-9.

[89] Id at paras 28 and 38.

[90] Id at para 31.

[91] Id.

being applied to a respondent. Unterhalter AJA concluded that the Commission must discover the yield of its investigation to respondents in complaint referrals to the extent that the information is not covered by recognised privilege.[92] According to Unterhalter AJA, a "regime of restriction of application to respondents that was wider than the protection already given by privilege would damage the fairness of proceedings".[93]

[76] The rationale for the decision in *Continental Tyres* is therefore that the Commission cannot invoke rule 14 to restrict access when a respondent relies on the discovery process under the Tribunal Rules to seek access to the investigative record. Instead, the Commission can only rely on the established rules of privilege to limit its disclosure.

[77] *Continental Tyres* clearly does not mean that rule 15 cannot be relied on by a respondent in the position of Standard Bank and the Waco respondents. The Competition Appeal Court did not purport to curtail the right of access to the investigation record afforded under rule 15, and did not purport to overturn *Group Five*. To the contrary, Unterhalter AJA emphasised that rule 15 "should be understood to create a regime of access by the public to information held by the Commission".[94] Unterhalter AJA further affirmed the position adopted in *Group Five* that rule 15 is a public access rule.[95] It is clear from Unterhalter AJA's affirmations of the findings in *Group Five* that *Continental Tyres* cannot constitute authority for the proposition that rule 15 of the Commission Rules does not apply to a litigant.

---

[92] Id.

[93] Id at para 34.

[94] Id at para 35. The concurring judgment of Davis JP in *Continental Tyres* further affirmed the Competition Appeal Court's decision in *Group Five*. In this regard, Davis JP stated:

> "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*]."

[95] Id at para 35.

[78] In any event, even if Unterhalter AJA's comments in *Continental Tyres* suggested that a litigant cannot demand access to information held by the Commission under rule 15 of the Commission Rules once a complaint against them has been referred, these comments would be *obiter dicta* (what is said by the way). In this regard, the doctrine of precedent decrees that only the *ratio decidendi* (rationale or basis of the decision), and not *obiter dicta*, have binding effect.[96] It would be contrary to the doctrine of precedent to prefer any *obiter dicta* that were ostensibly made by Unterhalter AJA in *Continental Tyres* over the clear *ratio decidendi* in *Group Five* and by the Supreme Court of Appeal in *Arcelormittal* that a litigant may invoke rule 15 of the Commission Rules.[97] The judgment penned by my colleagues Jafta J and Khampepe J (second judgment) finds that *Arcelormittal* is not authority for the proposition that the Commission's rules apply to proceedings before the Tribunal as this issue appears to have been common cause between the parties in that matter. The Commission in that matter, however, submitted that rule 15 finds no application once litigation has commenced.[98] In rejecting this submission, the Supreme Court of Appeal correctly held that it would be absurd to prohibit a litigant from invoking rule 15 when a member of the public would be entitled to make use of the rule.[99]

[79] The Commission's third ground of appeal is accordingly without merit.

Purpose and policy

[80] Finally, the Commission submitted that *Group Five* undermines the role of the Commission in investigating anti-competitive behaviour. The Commission argued that the purpose of rule 15 and public policy considerations demand that rule 15 must not

---

[96] See *Turnbull-Jackson* above n 39 at para 56; *Camps Bay Ratepayers and Residents Association v Harrison* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC) at para 30; and *R v Crause* 1959 (1) SA 272 (A) at 281C-D.

[97] *Competition Commission v Arcelormittal South Africa Ltd* [2013] ZASCA 84; 2013 (5) SA 538 (SCA) (*Arcelormittal*).

[98] Id at para 19.

[99] Id at para 46.

avail the respondents. The Commission invoked four policy bogeys in support of this contention.

[81] The first was that to allow the invocation of rule 15 would disrupt the Commission's investigative powers and the Tribunal's ability to effectively adjudicate a complaint referral. According to the Commission, the purpose of section 7 of PAIA is to prevent the right of access to information from negatively impacting on the law governing discovery or compulsion of evidence in civil and criminal proceedings. Section 7 ostensibly achieves this by prohibiting access after the commencement of litigation. It contends that the underlying rationale for this prohibition is to ensure that "litigants make use of the remedies as to discovery in terms of the rules . . . and to avoid the possibility that one litigant gets an unfair advantage over his adversary".[100]

[82] What the Commission's argument ultimately boils down to is that a respondent, upon receiving the record of investigation and before pleading, could tailor its answer to the detriment of the Commission and the Tribunal. Assuming that a respondent's access to the record would allow for tailoring, it is unclear how this tailoring would legally prejudice the Commission. On the contrary, the record would allow the respondent to better understand the material facts on which the complaint referral is based. This enables a respondent to respond fully to the complaint and assists in the fair adjudication of the complaint. This is particularly significant given that the Tribunal Rules require that an answer "must be in affidavit form" with detailed requirements for specificity. In particular, respondents are required to "qualify or explain" any denial "if necessary in the circumstances".[101] This is a level of exaction, plus oath-taking, that is generally not present in other forms of pleading. It accentuates the importance of and need for access to the investigation record.

---

[100] *CCII Systems (Pty) Ltd v Fakie (Open Democracy Advice Centre as Amicus Curiae)* 2003 (2) SA 325 (T) at para 21.

[101] See [19].

[83] To the extent that the Commission is "losing out" on respondents implicating themselves in illicit anti-competitive conduct, it is unclear why this justifies a denial of access to the record under rule 15 (which in turn promotes a litigant's right under section 32 of the Constitution). The Commission has no right to "catch out" respondents in their answer, or to procedures which prompt respondents to implicate themselves. On the other hand, respondents have a constitutional right of access to information held by public bodies.

[84] Under the scheme of the Competition Act, the Commission first initiates a complaint.[102] It then investigates the complaint, invoking its powers under Part B of Chapter 5 where necessary.[103] Once the investigation is concluded, the Commission decides whether to refer the complaint to the Tribunal for adjudication.[104] Initiation, investigation and referral are thus three jurisdictionally interdependent steps.[105] At the stage of investigation, the Commission has wide investigatory powers.[106] The Commission's powers have been likened by this Court and the Supreme Court of Appeal to those exercised by police in criminal investigations.[107] In terms of the Competition Act, the Commission may during its investigation:

(a) search and seize documents, with or even without warrant (sections 46 to 49 of the Competition Act); and

(b) issue summons requiring a person to answer questions under oath.[108]

---

[102] Section 49B of the Competition Act.

[103] Part B of Chapter 5 of the Competition Act provides for coercive powers of search and seizure (sections 47 to 49) and of subpoena (section 49A).

[104] Section 50 read with section 51 of the Competition Act.

[105] *Woodlands Dairy (Pty) Ltd v Competition Commission* [2010] ZASCA 104; 2010 (6) SA 108 (SCA) at para 43.

[106] Id at para 20, where they are described as "far-reaching invasive powers".

[107] Id at para 10 and *Senwes* above n 4 at para 65.

[108] Section 49A of the Competition Act.

[85] In addition, the Competition Act imposes criminal liability on any person who fails to appear when summoned to do so by the Commission,[109] fails to answer fully or truthfully[110] or fails to comply with the Competition Act in certain respects.[111]

[86] The Commission clearly has powerful statutory tools at its disposal for its investigations. The Competition Act envisages the use of these powers to gather evidence before the Commission refers a complaint to the Tribunal. There is no reason why the Commission should be entitled to rely on an answer to sustain or bolster its case against a respondent. If a referral to the Tribunal is premature, or premised on insufficient evidence, then the Commission should bear the risk of losing its referral. It should not rely on its rules to mitigate that risk by prohibiting access to its record of investigation. It should use its extensive powers to investigate and gather evidence against a respondent. As the Competition Appeal Court held in *Continental Tyres*:

> "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."[112]

[87] If the Commission is hamstrung in the effective and successful prosecution of cartels (no conclusive evidence was placed before this Court in this regard), then the solution may be found in legislative amendment to alter the definition of cartel activity, enhance the Commission's capacity or give the Commission more powers. The solution cannot be to interpret the Commission Rules to co-opt the Tribunal as the appropriate forum to catch out a litigant. The Tribunal is not there to assist the Commission in the

---

[109] Section 71 of the Competition Act.

[110] Section 72 of the Competition Act.

[111] Section 73 of the Competition Act.

[112] *Continental Tyres* above n 71 at para 31.

investigation of anti-competitive behaviour, but to fairly adjudicate on the complaint referral.[113] To amend the purpose of the Tribunal to become a forum for the enticement of a litigant to self-incriminate would not only blur the lines between adjudication and investigation (which the Competition Act envisages as distinct), but would also undermine the Tribunal's independence and impartiality.

[88] The Commission also argued that access by the respondents to the record before discovery could jeopardise its investigations of suspected cartel members who are not (yet) joined in the complaint referral because the Commission may not yet have sufficient evidence against them. In this regard, the Commission emphasised the secrecy which is inherent in cartel activity and the resultant difficulty faced by it in prosecuting cartel members. It also cited the following statement by the Competition Tribunal:

> "The attitude in other jurisdictions towards hard core cartels or conduct of the type contemplated in [section 4(1)(b)(i) and (ii) of the Competition Act] has been one of utmost repugnance. Cartels are viewed as the most abhorrent anti-trust practices and have been described as a cancer to competition and harmful to consumers and economic development:
>
> > 'Fighting cartels is one of the most important areas of activity of any competition authority . . . . Of all restrictions of competition, cartels contradict most radically the principle of a market economy based on competition.'
>
> While fighting cartels is viewed as one of the most important areas of activity for competition agencies globally, the ability of agencies to effectively do so is often hampered by the difficulties pertaining to the gathering of direct evidence. This is not surprising given the nature of cartel activity. Competitors engaging in co-ordination rather than competition tend to conduct themselves in secretive and stealthy ways; meeting behind closed doors, ensuring that there is no paper trail, agreeing on signals which they can send to each other and at times cloaking their activities in the guise of

[113] See section 27 of the Competition Act.

> normal commercial practices thereby seeking to mislead and divert anti-trust agencies."[114]

[89] There is no doubt that cartels engage in egregious and pernicious forms of anti-competitive behaviour, that they are difficult to prosecute and the Commission must be properly empowered to deal with them. But it is unclear how preventing the respondents from accessing the record under rule 15 would in any way prevent third parties who are members of a cartel, but against whom there is no complaint referral in the Tribunal, from accessing the information sought by the respondents. On the Commission's own argument, third parties (including potential suspects in cartel activity) can be granted access to the records under rule 15 because they are not respondents in the complaint referral. Instead, they would be regarded as members of the public. On the Commission's approach, the prohibition against accessing its record of investigation under rule 15 applies only to a respondent. In any event, the Tribunal Rules require the Commission to plead the material facts regarding the complaint referral in its supporting affidavit.[115] In this sense, the Commission's pleadings will always enable respondents accused of cartel activity to "tailor" their defence to the specific pleaded activity. The "tailoring" which the Commission seeks to avoid could then occur whenever a complaint is referred. The Commission has failed to demonstrate either that its prosecutions of cartels would be frustrated if access is allowed after referral and before the close of pleadings, or that it would be more successful if access is not allowed.

[90] The interpretation of rule 15 advanced by the Commission yields absurd results: all persons other than a respondent in referral proceedings would be entitled to obtain the record of the Commission's investigation. An unidentified member of a cartel, a journalist, a ratings analyst, an academic researcher, a potential intervening party, a possible damages claimant or a witness could obtain the record, but not the party whose rights are materially and potentially adversely affected by the referral. It would also

---

[114] *Competition Commission v Pioneer Foods (Pty) Ltd* [2010] ZACT 9; [2010] JOL 25542 (CT) at paras 31-2.

[115] Rule 17(2) of the Tribunal Rules.

mean that a party like Standard Bank, which only learnt of the Commission's investigation when the complaint was referred to the Tribunal, could never exercise a right of access to information under rule 15(1). The Commission's interpretation of rule 15 yields the absurd outcome that the public may access its record of investigation but that this mechanism is unavailable to a respondent who, after the complaint has been referred to the Tribunal, learns of the complaint and wishes to oppose the proceedings in the Tribunal.

[91] This outcome results in a Kafkaesque state of affairs.[116] The Commission can accuse a firm of cartel behaviour, and when the firm asks: "Why?", the Commission responds: "No. You tell us why." Generally, even in civil proceedings, the onus is on an applicant to establish its claim. A respondent is not usually under a duty to make or bolster an applicant's case. No cogent reason has been advanced why firms accused of cartel activity should be an exception.

[92] At no point did the respondents claim unrestricted access to the record. The Commission, both in its written and oral submissions, repeatedly mischaracterised the respondents' request for access as being for "the full evidence" against them, or "full discovery". The respondents seek access only to the record of the Commission's investigation under rule 15(1), and then only to the extent that it is not covered by the restrictions on disclosure provided for under rule 14 (which are more extensive than and inclusive of legal privilege). They do not seek "full evidence" or "full discovery". On the contrary, the respondents demand exactly what the Commission claimed to be offering: restricted, controlled access to the record. This is precisely what is envisaged in rule 14, which empowers the Commission to restrict access to avoid the ills identified by the Commission. It is unclear how this restricted access could cause any legally recognised harm to the Commission.

[116] This is with reference to *The Trial*, the famous 1925 novel by Franz Kafka in which a man is arrested by an unknown authority for a crime that is never revealed to him.

[93] It is also unclear whether the Commission is arguing for the restriction of access to information to be limited to alleged cartel behaviour. In relation to access to information, the Commission Rules do not expressly distinguish between different forms of anti-competitive conduct or complaint referrals. For this Court to make a finding that only litigants who are alleged to have engaged in cartel activity cannot rely on rule 15 would be tantamount to reading in an exception to the Commission Rules.

[94] There is merit in Standard Bank's submission that the Commission's argument regarding the disruption that would be caused by access to the record after referral is inconsistent with the position adopted by competition authorities in various foreign jurisdictions. In the European Union, companies that receive Statement of Objections (the equivalent of a complaint referral) are allowed to access the European Commission's file.[117] In the United Kingdom, generally at the same time as the Statement of Objections is issued, the Competition and Markets Authority will also give the respondent an opportunity to inspect the file.[118] The fact that certain foreign jurisdictions grant access before the close of pleadings suggests that this approach is workable.[119]

[95] The second policy reason advanced by the Commission was that discovery is rendered nugatory by the approach in *Group Five*. But, as Rogers AJA held in *Group Five*, this is clearly not so.[120] In discovery proceedings, rule 14 would not avail the Commission, and so the content of the record under discovery could be totally different to that of a rule 15 disclosure.[121] The Commission would also need to invoke discovery to gain access to the respondent's documents as (until that stage) it would not

---

[117] Article 17 of the European Commission (EC) Regulation No 802/2004. Alternative procedures aimed at enhancing efficiency (such as negotiated disclosure and data room procedures) are used to alleviate the burden of drawing up non-confidential versions of submissions.

[118] Rule 6 of the United Kingdom Competition and Markets Authority's Competition Act 1998 Rules.

[119] This Court has repeatedly been guided by the methods adopted by foreign jurisdictions. See recently *S v Mlungwana* [2018] ZACC 45; 2019 (1) SACR 429 (CC); 2019 (1) BCLR 88 (CC) at para 100.

[120] *Group Five* above n 54 at paras 13-4.

[121] Id at para 13.

be entitled to access certain documents held by the respondent.[122] The two processes (rule 15 and discovery) are geared towards different aims (even where, in the circumstances of a case, they may factually yield the production of the same record). Discovery is aimed at securing documentation required for litigation, while rule 15 concerns a member of the public's constitutional right to access documents held by a public body. Allowing a respondent access by means of rule 15 does not necessarily extinguish the purpose of discovery. Discovery is therefore not rendered nugatory by the application of rule 15.

[96] The third policy bogey raised by the Commission was delay. The Commission argued that respondents will use rule 15 to subvert their obligations to plead within the applicable time frames. This argument assumes that the lodging of an application to access information from the Commission by a respondent via rule 15 relieves the respondent of its duty to answer the complaint referral against them. There is, however, no connection whatsoever between the obligation of a respondent to plead and their right under rule 15 to access to information held by the Commission.

[97] As explained in relation to CCT 158/18, there have been considerable delays in finalising the adjudication of the Forex Referral and Standard Bank had, by the date of hearing, not been required to file an answer to the complaint. I agree with the second judgment that the delays in the proceedings in the Tribunal are unfortunate. However, it is clear that these delays result entirely from the exception proceedings brought before the Tribunal. In terms of the Uniform Rules applicable to exceptions in the High Court, it is not necessary to deliver any further pleadings if an exception is taken.[123] In addition, the Tribunal made plain in a direction that it did not expect any of the respondents to the Forex Referral (including Standard Bank) to plead until such time as all of the exceptions had been disposed of. It is clear that the delay in finalising the adjudication of the Forex Referral is wholly independent of Standard Bank's separate

[122] This is with exception to any documents that the Commission may have had access to during its investigation stage.

[123] Rule 23(4) of the Uniform Rules.

application under rule 15 of the Commission Rules to be granted access to the Commission's record of investigation.

[98] Where a respondent does plead late, or refuses to plead at all, the Commission is empowered to take appropriate steps under the Tribunal Rules.[124] For example, the Commission can apply to bar a respondent from answering.[125]

[99] Finally, the Commission submitted that a balanced approach would require the respondents to prove that they need the record to plead as envisaged in rule 35(14) of the Uniform Rules. There is, however, no reason why the potential availability of this rule to a respondent should detract from the right given to respondents under rule 15. In any event, placing the onus on a private party to justify access to a record held by a public body runs roughshod over the right in section 32 of the Constitution. This Court held in *Helen Suzman* that section 32 of the Constitution means that a person seeking access to information held by the State need not give an explanation as to why the information is required.[126] The interpretive approach advanced by the Commission falls foul of this Court's obligation to interpret legislation and rules in a manner which best promotes the spirit, purport and object of the Bill of Rights.

Conclusion on the rule 15 appeal

[100] Transparency and accountability are key constitutional values which govern the conduct of an administrative body like the Commission.[127] The Commission is no

---

[124] Rule 54 of the Tribunal Rules provides:

> "(1) If, in the course of proceedings, a person is uncertain as to the practice and procedure to be followed, the member of the Tribunal presiding over a matter—
>
> (a) may give directions on how to proceed; and
>
> (b) for that purpose, if a question arises as to the practice or procedure to be followed in cases not provided for by these Rules, the member may have regard to the High Court Rules."

[125] Rule 26 of the Uniform Rules.

[126] *Helen Suzman* above n 15 at para 44.

[127] Section 195 of the Constitution.

ordinary litigant. It is a regulator and ought to act responsibly, conscious of its role as a crucial organ of State. The Competition Appeal Court has expressed similar sentiments:

> "Laudable as the work of the Commission is, it is also subject to the rubrics as well as the principles of accountability and transparency, and I say this conscious of the Commission's work and its efforts in ensuring that transgressors of the Act are held to account."[128]

[101] The right to access information held by the State established by section 32 of the Constitution is broadly and generously framed – "everyone" may access "any information held by the State." With this overarching reason in mind, as well as the reasons discussed, the Commission's arguments for this Court overturning *Group Five* do not withstand scrutiny.

[102] This conclusion may appear to create an inexplicable discrepancy. Why should a litigant before the High Court be precluded from relying on PAIA while a litigant before the Tribunal is entitled to rely on rule 15 of the Commission Rules?

[103] The answer is simple: Standard Bank and the Waco respondents are not relying on PAIA and have never argued that PAIA should apply before the Tribunal. It is the Commission who argues that PAIA "applies" to *prevent* access to information. Standard Bank and the Waco respondents are relying on rule 15 – not PAIA – to access the record of investigation. They invoke section 32 of the Constitution indirectly to guide the interpretation of rule 15 (in a manner similar to that adopted in *PFE International*).[129] Rules 14 and 15 thus need to be interpreted to ascertain whether they allow a litigant in proceedings before the Tribunal to obtain access to the Commission's record after referral but before pleadings close. Textual, purposive and constitutional reasons why rule 15 does allow access have already been addressed.

---

[128] Rule 53 judgment above n 45 at para 31.

[129] *PFE International* above n 18 at para 25.

[104] On a deeper level, the apparent contradiction may be that if *access* to a record is not allowed in the High Court before pleadings close, then *access* similarly should not be allowed before the Tribunal. The problem with this premise is that the Minister, in consultation with the Competition Commissioner, decided to promulgate rules 14 and 15. The lawfulness of this decision has not been challenged in this matter. The rules promulgated by the Minister could quite easily make procedure before the Tribunal different from that of the High Court. It is the Minister's prerogative to make policy decisions to this effect.[130] It is not for this Court to usurp the role of the Minister and the Commissioner in this regard, absent a constitutional challenge or review of these rules. As explained by this Court in the First Certification judgment:

> "The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another."[131]

[105] In *Economic Freedom Fighters*, this Court further cautioned that:

> "The Judiciary is but one of the three branches of government. It does not have unlimited powers and must always be sensitive to the need to refrain from undue interference with the functional independence of other branches of government."[132]

[106] This Court cannot interfere with the Minister's decision merely because a litigant before the Tribunal may be in a different position regarding access to information before the close of pleadings as opposed to a litigant before the High Court. The mere fact that access to information is governed in the High Court in a particular way does not mean

---

[130] As previously explained at [5] and [18], the Minister may promulgate regulations for matters relating to the functions of the Commission under section 21(4) of the Competition Act.

[131] *Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (*First Certification judgment*) at para 109.

[132] *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) at para 92.

that the Minister and Commissioner are bound to regulate access to information before the Tribunal in the same fashion.

[107] Without a constitutional challenge or review, the only question before us is *how* access to information is regulated before the Tribunal. As I have demonstrated, rule 15, properly interpreted, allows a litigant, as a member of the public, to access information held by the Commission post-referral and before pleadings close.

[108] The Commission argued in the alternative, and only in its written submissions, that even if *Group Five* was considered to be correct, it was incorrectly applied by the Competition Appeal Court. This is, so the argument went, because the Competition Appeal Court unduly narrowed the factors which the Tribunal can have regard to when determining a reasonable period for the production of the record. For instance, the Tribunal can have regard to the reason why the information is sought. According to this argument, the Tribunal can order disclosure only after the pleadings have closed in order to prevent disruption to proceedings.

[109] I agree with the second judgment that this ground of appeal falls within our jurisdiction because it raises an arguable point of law. It requires this Court to engage in an interpretive exercise concerning what constitutes a "reasonable" period in relation to the time within which the Commission is required to produce its record of investigation.[133] However, I differ from the conclusion reached in the second judgment that the identity of the requestor and the purpose of the request are relevant to the determination of a reasonable period. *Group Five* made it clear that the right of access in rule 15(1) is a public access right and not a right given specifically to litigants.[134] It held:

> "From this it follows that the determination of a reasonable period within which the Commissioner must give access is not affected by whether or not the requestor is a

[133] Second judgment at [189].

[134] *Group Five* above n 54 at para 11.

> litigant. Put differently, Group Five's entitlement to the record within a reasonable period of time cannot be negatively affected by its status as a respondent. The determination of a reasonable period is only concerned, in my view, with the time the Commission would reasonably require to prepare its record and identify what parts are restricted. That may vary from case to case but would not be affected by the identity of the requestor."[135]

[110] The Competition Appeal Court applied this test correctly. It refused to factor in the close of pleadings when determining a "reasonable time" for disclosure as envisaged in rule 15. It correctly determined reasonableness by having regard to the length of time that the Commission might need to prepare its record.

[111] I would accordingly dismiss the appeals in CCT 158/18 and CCT 218/18.

Review appeal

[112] Standard Bank launched its review application in the Competition Appeal Court while its rule 15 challenge was pending. The Commission alleges that Standard Bank sought access to essentially the same documents and evidence as it sought in its rule 15 application. The Commission counter-applied for an order that the Competition Appeal Court lacked jurisdiction to hear the review; alternatively, that the review (and the production of a rule 53 record) be stayed either permanently or pending the finalisation of Standard Bank's rule 15 challenge and Standard Bank's exception before the Tribunal.

[113] Standard Bank sought directions from the Judge President in terms of rule 34(2)(a) of the Competition Appeal Court Rules. The Judge President designated Boqwana JA to preside as a single judge under section 38(2A) of the Competition Act.

[114] Boqwana JA directed that the Commission must file the record of its decision to refer Standard Bank to the Tribunal. With reference to a long list of authorities,

---

[135] Id.

Boqwana JA concluded that compliance with rule 53 is a procedural matter. She accordingly concluded that that she was empowered, sitting as a single judge, to issue a "procedural direction" envisaged in section 38(2A)(e) compelling the production of the rule 53 record. She held that "the filing of the record is a procedural step which is there to facilitate the review" and accordingly that the "dispatching of the record is an issue within the contemplation of section 38(2A)(e) of the Competition Act".[136]

[115] The Competition Appeal Court made this order while leaving open the issue of whether it had jurisdiction as a court of first instance to hear the review. Boqwana JA rejected the Commission's contention that the Competition Appeal Court was precluded from directing that the record be produced because the Commission had challenged its jurisdiction.[137] In doing so, she referred to *Computicket*,[138] in which the Supreme Court of Appeal held, in the face of a similar refusal by the Commission to produce the record, that in terms of rule 53, "the obligation to produce the record automatically follows upon the launch of the application, however ill-founded the application may later turn out to be".[139]

[116] Boqwana JA further held that, having regard to the distinction between "pure competition" reviews and legality reviews, the rule 53 record may be relevant to the determination of the Competition Appeal Court's jurisdiction to hear the review as a court of first instance.[140]

---

[136] Rule 53 judgment above n 45 at para 16. The cases cited by Boqwana JA include *Democratic Alliance v Acting National Director of Public Prosecutions* [2012] ZASCA 15; 2012 (3) SA 486 (SCA) at para 37 where the Court held:

> "[w]ithout the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's rights in terms of section 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed".

[137] Rule 53 judgment above n 45 at paras 25ff.

[138] *Competition Commission v Computicket (Pty) Ltd* [2014] ZASCA 185; 2014 JDR 2507 (SCA) (*Computicket*).

[139] Id at para 20.

[140] Rule 53 judgment above n 45 at para 29.

[117] In my view, it would be inappropriate for this Court to adjudicate on the Competition Appeal Court's jurisdiction in relation to Standard Bank's review application. This is because the Competition Appeal Court is yet to pronounce on whether it has jurisdiction in the review application as a court of first instance. There is simply no reason why this Court, as a court of first and last instance, should pre-empt the Competition Appeal Court's finding regarding its jurisdiction. The Competition Appeal Court is a specialist Court with a status similar to that of a High Court.[141] It accordingly enjoys the inherent power to regulate its own processes.[142] It is also most familiar with its processes and jurisdiction. It would therefore be inappropriate for this Court to make a pronouncement on the Competition Appeal Court's jurisdiction before the Competition Appeal Court has first applied its independent mind to the question.[143]

[118] The question then is whether Boqwana JA could have ordered the production of the record before deciding whether the Competition Appeal Court had jurisdiction to hear the review application. The answer must be no. Although the information contained in the record might later be relevant to determining jurisdiction once Standard Bank has supplemented its founding papers, Boqwana JA should have first decided the question of jurisdiction on the founding papers before her. Her failure to do so could result in the order which she issued being a nullity should the Competition Appeal Court find that it is incompetent to hear the review application as a court of first instance. This would have irrevocable implications in the context of this case. Compliance with the Boqwana JA order would have required the Commission to disclose the record of its

---

[141] Section 36(1) of the Competition Act provides that the Competition Appeal Court is a court contemplated in section 166(e) of the Constitution with a status similar to that of a High Court.

[142] This Court has held that the Labour Court and the Land Claims Court both enjoy the inherent power to protect and regulate their own process, and to develop the common law. See *Mwelase v Director-General for the Department of Rural Development and Land Reform* [2019] ZACC 30; 2019 (6) SA 597 (CC); 2019 (11) BCLR 1358 (CC) at para 66 and *Public Servants Association on behalf of Ubogu v Department of Health, Gauteng; Head of the Department of Health, Gauteng v Public Servants Association on behalf of Ubogu* [2017] ZACC 45; 2018 (2) SA 365 (CC); 2018 (2) BCLR 184 (CC) at para 32. The same logic would apply to the Competition Appeal Court, which is similarly a specialist court.

[143] See *Yara* above n 52 and *Dudley* above n 56.

investigation, giving Standard Bank the information which it sought. No subsequent court order could have changed that outcome.

[119] Boqwana JA was correct to find that the rule 53 record may be relevant to jurisdiction, since the test for assessing the jurisdiction of the Competition Appeal Court in a review application is connected to the grounds of review.[144] This does not, however, imply that jurisdiction should not be established up front on the basis of what is pleaded in the founding papers. The court chosen by an applicant in a review application must be able to assert its jurisdiction on the basis of the founding papers.[145] Where no facts are alleged in the founding papers upon which jurisdiction could be founded, the applicant is not entitled to the production of the record in the hope that it will help clothe the court with the necessary jurisdiction. Standard Bank was required to first establish jurisdiction in its founding papers before the Competition Appeal Court could direct the production of a rule 53 record. As mentioned, the question of jurisdiction has not yet been adjudicated by the Competition Appeal Court. Boqwana JA should not have directed that the rule 53 record be produced without first deciding whether the Competition Appeal Court was competent to hear the review application as a court of first instance.

[120] This finding is entirely consistent with what the Supreme Court of Appeal and this Court have said about the importance of the rule 53 record and its availability to litigants. This is because a distinction must be made between the jurisdiction of the forum to hear the review application and the merits of the review application. If a review application is launched in a forum that enjoys jurisdiction, then a party is entitled to the record even if their grounds of review are meritless. As the

---

[144] In *TWK Agriculture Limited v Competition Commission* [2007] ZACAC 3; [2007] JOL 20764 (CAC) and *Johnnic Holdings Limited v Competition Tribunal in re: Mercanto (Pty) Ltd v Johnnic Holdings Ltd* [2008] ZACAC 2, the Competition Appeal Court held that a purely competition law matter cannot be directly reviewed to the Competition Appeal Court, whereas a constitutional matter can. The correctness of these decisions was not before us.

[145] As this Court has held, jurisdiction must be assessed from the pleadings. See *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 75.

Supreme Court of Appeal put it, "the obligation to produce the record automatically follows upon the launch of the application, however ill-founded that application may later turn out to be".[146] This is because, as recognised by the majority decision in *Helen Suzman*, rule 53 envisages the grounds of review changing after the record has been furnished.[147] The record is essential to a party's ability to make out a case for review. It is for this reason that a *prima facie* case on the merits need not be made out prior to the filing of record.

[121] I accept that there are good reasons for the obligation to produce the record following automatically upon the launching of a review application. Delaying the production of the record is inimical to the exercise of the courts' constitutionally mandated review function. A lengthy delay may impede the courts' ability to assess the lawfulness, reasonableness and procedural fairness of the decision in question and undermine the purpose of judicial review.[148] One reason for this is that documents and evidence, which should be included within the rule 53 record, may be lost if there is a considerable delay in the production of the review record.[149] This does not, however, imply that a court should order production of a rule 53 record without first determining its competence to hear the review application.

[122] I leave open the question whether a judge of the Competition Appeal Court may order production of a rule 53 record sitting as a single judge. I do so because the question of the Competition Appeal Court's jurisdiction as a court of first instance in review applications impacts upon a single judge's competence under section 38(2A). It

---

[146] *Computicket* above n 138 at para 20.

[147] *Helen Suzman* above n 15 at para 26.

[148] As stated by this Court in *Khumalo v Member of the Executive Council for Education: KwaZulu Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC) at para 48—

> "In addition, it is important to understand that the passage of a considerable length of time may weaken the ability of a court to assess an instance of unlawfulness on the facts. The clarity and accuracy of decision-makers' memories are bound to decline with time. Documents and evidence may be lost, or destroyed when no longer required to be kept in archives. Thus the very purpose of a court undertaking the review is potentially undermined where, at the cause of a lengthy delay, its ability to evaluate fully an allegation of illegality is impaired."

[149] Id.

is only if the Competition Appeal Court can be approached as a court of first instance in respect of review proceedings that it would be in a position to direct the production of the record. This is because only courts of first instance may order the production of a review record in respect of review proceedings in that court. In other words, if the Competition Appeal Court does not have the jurisdiction to be the court of first instance, then a single judge of the Competition Appeal Court would not be able to direct the production of the record, because the record would have been produced in the review before the Tribunal. A finding by this Court that a single judge of the Competition Appeal Court has the competence to direct the production of a rule 53 record would presuppose that the Competition Appeal Court can be approached as a court of first instance for that review. It would be inappropriate for this Court to make a pronouncement in this regard, as any finding may impact directly on the question of the jurisdiction of the Competition Appeal Court.

[123] In my view it follows that the Commission should succeed in its appeal in CCT 179/18. For the reasons mentioned, this Court should not pre-empt the Competition Appeal Court's decision on its jurisdiction, and it would be in the interests of justice to remit the matter to the Judge President of the Competition Appeal Court.

Order

[124] I would have made the following order:

In CCT 158/18:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The applicant is ordered to pay the costs of the respondent in this Court.

In CCT 179/18:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Competition Appeal Court is set aside.

4. The matter is remitted to the Judge President of the Competition Appeal Court.
5. There is no order as to costs in this Court and in the Competition Appeal Court.

In CCT 218/18:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The applicant is ordered to pay the costs of the respondents in this Court.

JAFTA J and KHAMPEPE J (Ledwaba AJ, Mhlantla J and Nicholls AJ concurring)

Introduction

[125] We have had the benefit of reading the judgment of our colleague, Theron J (first judgment). We agree that the appeal in the review matter should succeed. With regard to the claim for access to the Commission's record of investigation based on rule 15 of the Commission Rules, we take a view dissimilar to the one expressed in the first judgment. In our opinion, this appeal too should succeed.

[126] The facts and litigation history of both cases are common cause and we gratefully adopt the first judgment's detailed account thereof.

[127] Before we set out the reasons for our conclusion, it is necessary to clear the air and state what this case is about. It is not about whether Standard Bank and the Waco respondents are legally entitled to have access to the Commission's record of investigation. That Standard Bank and the Waco respondents have this entitlement emerges from a number of legislative instruments, which give effect to section 34 of

the Constitution.[150] This provision confers the right of access to courts and other independent and impartial tribunals. The Tribunal is a body envisaged in the provision and the same provision also bestows on everyone the right to a fair hearing. The content of this right includes being entitled to the resolution of a dispute before a court or tribunal in a hearing that is fair to all parties concerned. The fairness required extends to all procedural steps preceding the hearing. Therefore, access to information in preparation for the hearing is a component of the right to fairness.

[128] However, in the context of hearings, access to information of that nature is regulated by the rules of courts or tribunals. Consequently, recourse must be had to relevant rules in determining whether a litigant is entitled to the disclosure it seeks. Therefore, in our opinion, the issue that arises here is a narrow one. It is whether Standard Bank and the Waco respondents are entitled to the disclosure claimed under rule 15 of the Commission Rules. The answer to this question requires us to determine first whether rule 15, on which Standard Bank and the Waco respondents rely, regulates disclosure of information relevant to complaints pending before the Tribunal.

[129] It must further be underscored that the complaint and, by extension, the litigation procedure employed by the competition authorities, have been subjected to protracted legal challenges. Recognising this, the Competition Appeal Court in *Senwes* likened the acts of attempting to avoid and evade responsibility to the "Stalingrad" method of litigation.[151] This was further echoed by the Supreme Court of Appeal in *Woodlands Dairy*, where it stated that "a veritable forest of interlocutory paper is generated in order to prevent cartel disputes from being determined on their merits".[152] A legion of cases is not adjudicated on the merits due to these prolonged procedural challenges. The prolonged challenges are made possible due to the extensive resources often available

---

[150] Section 34 of the Constitution reads:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[151] *Senwes* above n 4 at para 2.

[152] *Woodlands Dairy (Pty) Ltd v Competition Commission* (88/CAC/MAR09) at para 8.

to respondents in competition matters and the secretive, at times almost untraceable, nature of the prohibited practices that the Competition Act aims to regulate. These considerations challenge the notion that the Commission is an omnipotent state organ that enjoys unfettered powers and attacks defenceless and resource-constrained individuals. The courts have to be alive to the reality that the Commission is engrossed in complex legal and economic challenges against well-resourced, powerful entities.

[130] It is against this backdrop that if the Commission is to fulfil the sundry of objectives and purposes that are envisaged by the Competition Act, the rules and procedures governing the litigation process must be read in a way that permits the expeditious yet effective enforcement of substantive competition rules. It is trite that this cannot be achieved to the detriment of the rights of the respondents. Therefore, there is a delicate balance that has to be struck between the rights of the respondents and proceedings being handled expeditiously.

Rule 15 Appeal

Tribunal Rules

[131] Once a complaint is delivered to the Tribunal's offices, its rules are activated. The party that has filed the complaint is required to serve a copy on the respondents and the Commission, if the complaint was not lodged by the Commission.[153] This service

[153] Rule 14 of the Tribunal Rules provides:

"Initiating complaint proceedings

(1) A Complaint Referral may be filed—

(a) by the Commission, in terms of section 50(1) or 50(2)(a), in Form CT 1(1);

(b) by a complainant, in terms of section 51(1), in Form CT1(2) within 20 business days after the Commission has issued, or has been deemed to have issued, a Notice of non-referral to that complainant; or

(c) by any party to an action in a civil court that has been referred to the Tribunal in terms of section 65(2), in Form CT 1(3).

(2) If, in respect of a particular matter, more than one person files a Complaint Referral in terms of sub-rule (1), the registrar must combine those referrals under a common case number.

must be done within three business days from the date of lodging the complaint. Rule 15 of the Tribunal Rules prescribes the form that must be followed when filing a complaint. A complaint must be supported by an affidavit, concisely setting out the grounds of the complaint and the material facts supporting the complaint. This affidavit must also set out points of law on which the party that lodged the complaint relies.[154]

[132] It is apparent from the details required that the complaint must contain sufficient information to enable respondents to answer and oppose the complaint, if they so wish. The level of detail demanded is equivalent to the one prescribed for pleadings initiating proceedings in a court of law.

[133] Should the complaint be insufficiently detailed, a party can raise an exception before the Tribunal alleging that the complaint or referral contains a deficiency in its details and fails to conform to the requirements in rule 15 of the Tribunal Rules. The excipient may then demand further particulars in order to remedy the deficiency.[155]

---

(3) The person who files a Complaint Referral must serve a copy of it within 3 business days after filing on—

(a) The respondent;

(b) The Commission, if the Commission did not file the Referral; and

(c) On each other person who has previously filed a Complaint Referral in that matter."

[154] Rule 15 of the Tribunal Rules provides:

"Form of Complaint Referral

(1) A complaint proceeding may be initiated only by filing a Complaint Referral in Form CT 1(1), CT 1(2) or CT 1(3), as required by Rule 14.

(2) Subject to Rule 24 (1), a Complaint Referral must be supported by an affidavit setting out in numbered paragraphs—

(a) a concise statement of the grounds of the complaint; and

(b) the material facts or the points of law relevant to the complaint and relied on by the Commission or complainant, as the case may be.

(3) A Complaint Referral may allege alternative prohibited practices based on the same facts."

[155] See generally *Ags Frasers International (Pty) Ltd v Competition Commission; Competition Commission v Ags Frasers International (Pty) Ltd; In re: Competition Commission v Ags Frasers International (Pty) Ltd* [2016] ZACT 25 and *Pickfords Removals SA (Pty) Ltd v Competition Commission* [2018] 1 CPLR 390 (CT).

[134] Parties who wish to oppose the complaint must file their answer within 20 business days and serve it on the party that initiated the process by lodging the complaint. The answer must also be in the form of an affidavit, which must concisely set out the grounds upon which the complaint is opposed and the material facts and points of law on which the respondent relies. The respondent must respond to allegations in the complaint and indicate if they are denied. A failure to deny may result in an allegation being deemed to have been admitted.[156]

[135] Within 15 business days from the date of service of an answer, a reply in the form of an affidavit must be filed. The reply must address facts and points of law raised in the answer. If no reply is filed, the allegations in the answer are deemed to have been denied.[157]

[136] Within 20 business days from the date on which the reply was filed, a member of the Tribunal, designated by the Chairperson of the Tribunal, may convene a pre-hearing conference on a date determined by the Tribunal, after consulting the parties.[158] A host of issues are considered at this conference, including but not limited to, the production and discovery of documents whether formal or informal. Rule 22 empowers the convenor of a pre-hearing conference to make rulings and orders on a range of issues, including the terms under which parties to a hearing may have access to information.

[137] Unless ruled otherwise, a hearing is conducted in terms of rulings and orders made at a pre-hearing conference. Of importance for present purposes are rulings and orders made in relation to the production and discovery of documents as well as terms under which parties may have access to information.

---

[156] See rule 16 of the Tribunal Rules.

[157] See rule 17 of the Tribunal Rules.

[158] See rule 21 of the Tribunal Rules.

[138] It is apparent from this scheme that the rules of the Tribunal do not envisage production and discovery of documents before a pre-hearing conference is held. This will be discussed in further detail later. Before the pre-hearing stage, access to information is regulated by rule 13. However, this rule permits access to records of the Tribunal and not documents in possession of litigants. If a document referred to in a complaint does not form part of the record submitted to the Tribunal, access to that document may not be sought in terms of rule 13, which may be invoked by litigants and non-litigants alike.

[139] A careful reading of the Tribunal Rules suggests that the Commission Rules do not apply to matters pending before the Tribunal, except where they are specifically incorporated into the Tribunal's rules. For example, rule 31(7) of the Tribunal Rules empowers the Tribunal to hear an appeal in terms of rule 30(3) of the Commission Rules and grant certain specified orders.[159]

[140] There is no linguistic basis for concluding that the Commission Rules apply to matters pending before the Tribunal, excluding the few that are incorporated by the Tribunal Rules. Indeed, it would be remarkable to hold that rules of a lower body govern proceedings in the appellate body where that appellate body has its own rules. Appeals against decisions of the Commission lie to the Tribunal.[160] A list of those appeals appears in rule 31 of the Tribunal Rules.

---

[159] Rule 31(7) provides:

> "Upon hearing an appeal in terms of Competition Commission Rule 30(3), the Tribunal may make an order—
>
> (a) Setting aside Form CC 13(2) entirely;
>
> (b) Confirming any or all of the requirements set out in Form CC 13(2);
>
> (c) Substituting other requirements for any of the requirements set out in Form CC 13(2); or
>
> (d) Combining any or all of the requirements set out in Form CC 13(2) with additional or substitute requirements."

[160] Section 10(8) of the Competition Act provides:

> "The firm concerned, or any other person with a substantial financial interest affected by a decision of the Competition Commission in terms of subsection (2), (4A) or (5), may appeal that decision to the Competition Tribunal, in the prescribed manner."

[141] However, the fact that Tribunal Rules are seemingly silent on discovery required before the pre-hearing conference does not mean that disclosure may not be demanded. As it appears below, a lacuna in the Tribunal Rules is filled by the Uniform Rules.

Relevant principles

[142] A general principle is that where it is contemplated that rules of a lower body would apply to proceedings in the appellate body, those rules must be specifically incorporated in the rules of the appellate body. This principle was invoked in the Rules of this Court. Rule 29 of the Rules of this Court incorporated certain specified rules of the Uniform Rules into the Rules of this Court. This means that only those so incorporated apply to proceedings in this Court. It can hardly be argued that all of the Uniform Rules apply to proceedings in this Court. Nor can it be said that they apply to appeals pending before the Supreme Court of Appeal. Moreover, in determining which of those rules apply to proceedings in this Court, recourse is not had to their wording but to the Rules of this Court.

[143] In *Chonco II*, this Court affirmed that rule 42 of the Uniform Rules applies to matters in this Court by reason of being incorporated by rule 29 of the Rules of this Court.[161] This Court stated:

> "The dispute makes it necessary for the Court to remedy this. It has power to do so under rule 29 of its Rules. This provides that, with such modifications as may be necessary, rule 42 of the Rules of the High Court apply to proceedings in this Court. rule 42 provides in relevant part that, in addition to any other powers it may have, 'the Court' may, of its own accord or on application, rescind or vary 'an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission'. In view of the Constitution's requirement that 'at least eight judges' of this Court must hear a matter before it, and this Court's practice

[161] *Minister for Justice and Constitutional Development v Chonco* [2010] ZACC 9; 2010 JDR 0378 (CC); 2010 (7) BCLR 629 (CC) (*Chonco II*) at para 11.

> of sitting *en banc*, with all available judges, it is appropriate to read 'the Court' in this Rule as referring to the quorate Court, as constituted from time to time."[162]

[144] Notably, rule 42 of the Uniform Rules does not apply to proceedings before the Supreme Court of Appeal, despite the fact that in its text the rule uses language which may be construed as covering all courts. The reason for its inapplicability is that the rules of the Supreme Court of Appeal do not incorporate this rule.

High Court Rules

[145] As mentioned, litigants before the Tribunal may seek disclosure of documents even before a pre-hearing conference. Tribunal Rules expressly incorporate, with the necessary adjustments, Uniform Rules.[163] The Competition Appeal Court has rightly construed rule 55 as authorising the application of rules 35 and 38 of the Uniform Rules.[164]

[146] In *Group Five*, the Competition Appeal Court stated:

> "In terms of rule 55(1)(b) of the Tribunal's rules the Tribunal may have regard to the High Court rules in respect of any matter not governed by the Tribunal's rules. The Tribunal could thus, upon application by a respondent in complaint proceedings, direct the Commission to produce in accordance with High Court rule 35(12) a document mentioned in the referral affidavit or direct the Commission in accordance with High

---

[162] Id. See also *Baphalane Ba Ramokoka Community v Mphela Family; In re Mphela Family v Haakdoornbult Boerdery CC* [2011] ZACC 15; 2011 JDR 0394 (CC); 2011 (9) BCLR 891 (CC) at para 26.

[163] Rule 55(1) of the Tribunal Rules provides:

> "Conduct of hearings
>
> (1) If, in the course of proceedings, a person is uncertain as to the practice and procedure to be followed, the member of the Tribunal presiding over a matter—
>
> (a) may give directions on how to proceed; and
>
> (b) for that purpose, if a question arises as to the practice or procedure to be followed in cases not provided for by these Rules, the member may have regard to the High Court Rules."

[164] See *Glaxo Wellcome (Pty) Ltd v National Association of Pharmaceutical Wholesalers* (15/CAC/FEB02) [2002] ZACAC 3 and *Arcelormittal South Africa Ltd v Competition Commission* [2013] JOL 30105 (CAC) (*Arcelormittal* CAC).

> Court rule 35(14) to make available for inspection specified documents reasonably required by the respondent for purposes of filing its answering papers."[165]

[147] Rule 35(12) of the Uniform Rules entitles a party to proceedings to demand discovery of documents referred to in the pleadings or affidavit of any party to litigation. This demand may be made at any time before a hearing. But the rule only entitles a party to discovery of documents specified in the affidavit or pleadings. In addition, rule 35(14) entitles a party to demand production of any documents or recordings in the possession of the other party if the documents are relevant to a reasonably anticipated issue in litigation. Once the document is produced, the requesting party is entitled to make a copy of the document. The production of the document must be sought for the purposes of pleading.

[148] Here, Standard Bank and the Waco respondents sought discovery of the Commission's investigation record for purposes of formulating their answer, as contemplated in rule 16 of the Tribunal Rules. Therefore, it was open to Standard Bank and the Waco respondents to invoke rule 35 of the Uniform Rules to seek production of the investigation record. They, however, chose to ground their claim on rule 15 of the Commission Rules.

[149] The question at the heart of this enquiry is whether rule 15 of the Commission Rules may be applied to matters which are governed by the Uniform Rules, as incorporated by the Tribunal Rules. In other words, may the Commission Rules be applied contemporaneously with the Uniform Rules?

[150] The Competition Appeal Court appears to have taken conflicting positions on the issue. First, its decision in *Group Five* provides that rule 15 of the Commission Rules applies to litigation pending before the Tribunal. In that matter and following a referral by the Commission, Group Five, against which a complaint was

[165] *Group Five* above n 54 at para 6.

lodged, demanded production of the record of investigation in terms of rule 35(12) and (14) of the Uniform Rules. The Commission failed to comply and Group Five also failed to file its answer within 20 business days from the date of lodging the complaint. When the Commission sought relief on default, Group Five instituted an application to compel production of the record of investigation.

[151] In opposing the application to compel, the Commission raised a legal point to the effect that Group Five was not entitled to production of the record before the filing of its answer. The Tribunal upheld this argument and dismissed Group Five's application. The Tribunal also ordered Group Five to file its answer within 20 business days.

[152] Dissatisfied, Group Five appealed to the Competition Appeal Court. It is not clear from the judgment of that Court whether Group Five's application to compel was limited to the earlier demand that was based on rule 35 of the Uniform Rules or whether that application included a claim based on rule 15 of the Commission Rules. But what is apparent is that the Competition Appeal Court dealt with the appeal under both the Uniform Rules and rule 15 of the Commission Rules. With regard to the Uniform Rules, the Competition Appeal Court endorsed the conclusion that the demand did not comply with rule 35, pertaining to specifying documents which are sought to be produced.

[153] Regarding the reliance on rule 15 of the Commission Rules, the Tribunal had concluded that the rule should be read as entitling Group Five to access the relevant record only after the close of pleadings. The Tribunal had reasoned that this meaning would better harmonise the Commission Rules with the Tribunal Rules. The Competition Appeal Court disagreed. Placing reliance mainly on the language of rule 15, that Court pointed out that the rule serves a purpose different to the object of the discovery rules of the Tribunal. The Court emphasised that whilst the Tribunal Rules apply after the close of pleadings, rule 15 facilitates access to information held by the Commission and the right of access is available to all persons,

including litigants. The Court reasoned that the rule in its terms is not restricted to a stage after the closing of pleadings.[166]

[154] The Competition Appeal Court ordered the Commission to grant Group Five access to portions of its record of investigation in terms of rule 15. But the disclosure was limited to parts of the record which were not restricted information.

[155] A careful reading of the judgment in *Group Five* reveals that the Competition Appeal Court approached the matter on a footing similar to that followed by the Tribunal. Both the Court and the Tribunal assumed, without deciding, that rule 15 of the Commission Rules applied. They did not interrogate the basis of the applicability of rule 15. We think that they erred in not first determining whether rule 15 applied.

[156] In our view, the difficulty with the approach adopted in *Group Five* is that the source of the authority to apply rule 15 to matters pending before the Tribunal is not identified. As mentioned, the Tribunal Rules do not stipulate that rule 15 applies. Nor does rule 15 itself say so. It is extraordinary to conclude that, without any provision authorising its application, the Commission rule applies to complaints pending before the Tribunal. This is compounded by the fact that the Commission appears as a litigant before the Tribunal. It has not occurred in our law that rules of a litigant govern process in which the same party participates as a litigant.

[157] We do not share the view adopted by the Competition Appeal Court in *Group Five* to the effect that rule 15 of the Commission Rules applies to a stage before the close of pleadings and the discovery rules of the Tribunal apply once pleadings are closed. While it is true that the Tribunal Rules themselves contemplate discovery to be dealt with at a pre-hearing conference, this does not mean that under those rules discovery may be done only after the exchange of pleadings. This is because the same

[166] *Group Five* above n 54 at paras 12-5.

Tribunal Rules incorporate the Uniform Rules. Indeed, in *Group Five*, the Competition Appeal Court recognised that a claim based on rule 35 of the Uniform Rules may be asserted even before the close of pleadings.[167]

[158] It does not appear to us that had the Competition Appeal Court borne this in mind it could have reached the same conclusion as to the stages at which the different rules applied. We cannot appreciate the utility of rule 15 in litigation. As it was observed by that Court in *Group Five*, rule 15 confers a general right of access to information. It domesticates the constitutional right of access to information, given effect by PAIA.

[159] In the Tribunal the equivalent of rule 15 is rule 13 of the Tribunal Rules. The latter rule regulates access to and use of information in the Tribunal's possession. Like rule 15, it confers a general right on everybody on condition of paying a prescribed fee. It is not designed to facilitate access to information for purposes of litigation and consequently it is not suitable for claims of discovery. It cannot be applied where a party seeks disclosure for purposes of taking steps in litigation. Likewise, rule 15 of the Commission Rules was not designed to enable disclosure of information relating to litigation in the Tribunal. We can think of no sound basis for holding that rule 13 of the Tribunal Rules does not apply to litigation but rule 15 of the Commission Rules does.

[160] It seems to us that since rule 15 of the Commission Rules and rule 13 of the Tribunal Rules play a role similar to PAIA, the proper approach to them must be the one similar to what is envisaged in section 7 of PAIA. This is apparent from the judgment of the Competition Appeal Court in *Group Five*. In that matter it was stated:

> "The policy considerations underlying section 7 of PAIA might justify the introduction of a similar qualification in Commission rule 15. An exclusion, defined with reference to the purpose for which a record is requested (i.e. for purposes of litigation which has already commenced) rather than with reference to the identity of the requester, does not give rise to the absurdity mentioned in *Arcelormittal*. Where litigation has

[167] *Group Five* above n 54 at para 6.

> commenced and a record is requested by a close associate of the litigant, it may not be difficult to show that it has been requested for purposes of the litigation, i.e. that the requester is a front for the litigant. However, and as I have said, rule 15 does not currently contain any such qualification."[168]

[161] We can conceive of no policy consideration warranting that those who are facing complaints in the Tribunal should be accorded more rights of access to information in addition to the rights they enjoy under the Uniform Rules. The Uniform Rules on discovery apply to both situations with equal force. The principle is that once litigation commences the rules relating to discovery take over.[169] This takeover occurs regardless of the fact that rule 15 and the Tribunal Rules do not contain a provision similar to section 7 of PAIA. And those who seek discovery in both situations exercise the right to a fair hearing and not the right guaranteed in PAIA or section 32 of the Constitution.

[162] The first judgment holds that the Commission Rules regulate the functions of the Commission, and that these rules do not cease to apply when the Commission becomes a litigant. The first judgment goes further and makes the argument that to find that the Commission Rules do not apply to proceedings before the Tribunal once a referral has been made would lead to absurd consequences because "if the Commission Rules no longer apply to it, or cannot be invoked by anyone else the moment the Commission is a litigant before the Tribunal, then it is unclear where the Commission sources its authority to act".[170]

[163] Respectfully, there is no absurdity created. The Commission is a multi-faceted body and has various functions. It has two primary functions – one being prosecutorial and the other being regulatory. On a reading of the Commission Rules, it appears that these rules govern the rights and obligations of the Commission when it is performing

---

[168] *Group Five* above n 54 at para 19.

[169] See *PFE International SCA* above n 19 at para 9; *National Director of Public Prosecutions v King* [2010] ZASCA 8; 2010 (2) SACR 146 (SCA) at para 39 and *Unitas Hospital v Van Wyk* [2006] ZASCA 34; 2006 (4) SA 436 (SCA) at para 19.

[170] First judgment at [71].

its regulatory role. Thus, the Commission Rules will still find application and members of the public may rely on these rules, especially rule 15, to exercise their right to access to information, amongst other rights. However, once a referral is made, the Tribunal Rules apply to both the Commission, as a litigant, and the other party against whom the referral is made. Thus, the Tribunal Rules appear to find application when the Commission is engaged in its prosecutorial functions as a litigator. Once a party appeals a decision made by the Tribunal in a matter, the rules of the relevant appellate court will find application and govern the Commission's rights and obligations before that court. Accordingly, the Commission Rules and Tribunal Rules govern different aspects of the Commission and the Commission Rules will only find application before the Tribunal in matters where those rules have been expressly incorporated as mentioned before.

[164] It must be buttressed that the incorporation of the Uniform Rules in the Tribunal Rules ensures that litigants in competition law matters are not in a better or worse position than litigants in ordinary civil or criminal matters. There is no provision in either the Commission Rules or the Tribunal Rules that suggests parties who are involved in competition law litigation should be treated differently.

[165] Once a referral is made to the Tribunal, all rights and obligations pertaining to the referral and its ensuing litigation are governed by the Tribunal Rules. This includes the procedural steps to be complied with. This is not to find that the Commission Rules are rendered nugatory after referral as the Commission will still perform its regulatory functions and thus will still be governed by the Commission Rules, which the public can rely on to enforce their rights.

[166] Recently, the Competition Appeal Court in *Continental Tyres*[171] adopted a position that was at variance with a view it had previously adopted in *Group Five.*

[171] *Continental Tyres* above n 71.

Continental Tyres

[167] The first judgment mischaracterises the facts of *Continental Tyres*, which it purports supports the *Group Five* decision. In order to properly understand the import of *Continental Tyres*, the facts are crucial. In that case, the Commission accused Continental Tyres and Goodyear of price fixing. Continental Tyres sought the production by the Commission of its record of investigation and Goodyear sought discovery from the Commission.[172] The Commission disclosed the documents sought except for three categories of documents, on the basis that those documents were subject to litigation privilege, alternatively, that the documents constituted restricted information in terms of Commission rule 14.[173] The parties both challenged the Commission's decision before the Tribunal on both grounds. The Tribunal dismissed both these parties' applications.

[168] On appeal to the Competition Appeal Court, the Commission invoked rule 15 read with rule 14 of the Commission Rules in defending the Tribunal's decision. The Commission argued that what is disclosable under rule 15 is restricted by rule 14. The majority in the Competition Appeal Court noted that discovery under the Uniform Rules promotes the fairness of a hearing and that rule 15 read with rule 14 seriously undermines this purpose by restricting what may be disclosed.

[169] In that case the Competition Appeal Court affirmed the position it held in *Group Five* to the effect that rule 15 must be understood as creating a regime of access by the public to information held by the Commission.[174] The Court proceeded to state that rule 15 was not intended to restrict access to documents disclosable under the Uniform Rules and thereby create an advantage for the Commission, one of the litigants.[175] The Competition Appeal Court concluded that—

---

[172] Id at para 2.

[173] Id.

[174] Id at para 35.

[175] Id at para 37.

> "rule 15 read with the rule [14 of the Tribunal Rules] 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."[176]

[170] Evidently the Competition Appeal Court held that rule 15 does not apply to a request for discovery of documents. The *ratio* in support of this conclusion was articulated in Unterhalter AJA's judgment. He said:

> "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."[177]

[171] He further expatiated that—

> "[R]ule 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 to promote truth finding and fairness.
>
> . . .
>
> A respondent secures disclosure as a litigant under the powers conferred on the Tribunal by section 52(1) [of the Competition Act] read with Tribunal rule 22(1)(c)(v). It is the Tribunal that determines the duty of litigants to make discovery. Rule 15 of

[176] Id at para 38.

[177] Id at para 31.

> 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."[178]

[172] He finally concluded that "Continental sought 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."[179]

[173] There are two fundamental principles arising from this case. First, the rule 15 record and the discovery record are different. This is primarily because of the broader restrictions that are housed under rule 14. Accordingly, if a litigant relies on rule 15 after referral of a complaint to the Tribunal, it would be furnished with a thin record because of the carving out of restricted information in terms of rule 14. Unterhalter AJA perspicuously states that a litigant would be prejudiced if they were to be furnished with this record of investigation, as it is a record that is prepared for and provided to the public, and not a litigant. It is trite that rule 15 is a public access right, which is geared to give effect to section 32 of the Constitution. It is equally trite that the rules of discovery are geared towards a different purpose, which is to give effect to fair hearing. Therefore, discovery is only subject to limited grounds of restrictions, for example, legal privilege.

[174] This is so because rule 15(1) of the Commission Rules is a right of public access and not a right given to a litigant, and it is not intended to facilitate a litigant with formulating a defence. There are multiple reasons to support this. Rule 15(1) gives effect to section 32(1)(a) of the Constitution, which provides that everyone has a right of access to any information held by the State. Rule 15(1) also does not mention any timelines as to when the record ought to be disclosed, which makes this provision different from a myriad of provisions that govern litigation which generally impose timelines to be complied with for purposes of efficiency and certainty. Furthermore,

---

[178] Id at paras 34 and 36.

[179] Id at para 41.

the provisions of rule 15(1) are mirrored in rule 13(1) of the Tribunal Rules and the Competition Appeal Court Rules. The Tribunal and the Competition Appeal Court, unlike the Commission, are neither litigants nor investigative entities – they are entities that hold public records. Accordingly, rule 15(1) is a right enjoyed by the public and is not specifically given to litigants.

[175] Second, although Continental Tyres invoked rule 15 to acquire the record, it could not do so because it was a litigant and not a member of the public. Thus, Unterhalter AJA correctly concluded that because it was a litigant, what Continental Tyres wanted, in seeking the record of the Commission's investigation, was discovery. This is because the Commission has different obligations and duties to the public and a litigant. Rule 15 is a duty that the Commission owes to the public, and not a litigant. Discovery is a duty that the Commission owes to a litigant. This is in harmony with the different roles that the Commission occupies.

[176] *Continental Tyres* affirms and endorses the view in *Group Five* that rule 15 is a public access rule but it does not endorse the proposition that litigants can invoke rule 15 in Tribunal proceedings. This is more evident in light of perspicuous statements, for example that "[i]t is the Tribunal that determines the duty of litigants to make discovery".[180] *Continental Tyres* therefore should be understood to mean that rule 15 in litigation proceedings before the Tribunal finds no application because it is restrictive and a litigant should utilise the discovery procedure provided under rule 22 of the Tribunal Rules or the relevant provisions of the Uniform Rules, which would give the litigant broader access to information and documents.

[177] To the extent that *Continental Tyres* concludes that rule 15 does not apply to requests for discovery, it contradicts *Group Five* and the judgment of the Competition Appeal Court in this matter. Both these judgments were decided before *Continental Tyres*. Therefore, *Continental Tyres* must be taken as having overruled the

[180] *Continental Tyres* above n 71 at para 36.

earlier judgment on the applicability of rule 15 to discovery. It is a principle of our law that where a court of the same status hands down successive conflicting judgments, the latest judgment is regarded as having overruled the earlier ones. This principle applies in cases where the later judgment does not say expressly that the earlier one is overturned.[181]

[178] However, we need to point out that in *Group Five* the Competition Appeal Court made reference to *Arcelormittal*, a decision of the Supreme Court of Appeal which applied rule 15 to proceedings in the Tribunal.[182]

[179] But this does not mean that *Arcelormittal* was correct in applying rule 15 and that the decision is authority for the proposition that the Commission's Rules apply to proceedings before the Tribunal, parallel to the Tribunal's Rules and the Uniform Rules. This is because the Supreme Court of Appeal in that matter proceeded from the assumption that the Commission Rules apply because this appears to have been common cause between the parties.[183]

[180] The Supreme Court of Appeal does not explicate the basis for why rule 15 should apply to proceedings before the Tribunal. The primary reasoning proffered for the application of rule 15 is that—

---

[181] In *Nonzamo Cleaning Services Cooperative v Appie* 2009 (3) SA 276 (CkH) at para 33, with regard to conflicting decisions of this Court in *Fredericks v MEC for Education & Training, Eastern Cape* 2002 (2) SA 693 (CC) and *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC), the High Court observed: "In the absence of express indication, a judgment will overrule an earlier decision of the court if the two judgments are mutually irreconcilable. And the court will be assumed to intend to overrule the earlier judgment if it delivers its judgment with knowledge of the conflict". See also *Makhanya v University of Zululand* [2009] ZASCA 69; 2010 (1) SA 62 (SCA) at para 8 and *Gcaba* above n 145 at para 77.

[182] *Group Five* above n 54 at para 9, which refers to *Arcelormittal* above n 164 at paras 45-50.

[183] In *Group Five* above n 54 at para 9, the Competition Appeal Court clarified this point in these words:

> "In terms of Commission rule 15(1) 'any person' is entitled to . . . access to 'any Commission record' provided the document in question is not 'restricted information' contemplated in rule 14(1). It was held in *Arcelormittal* that 'any person' includes a litigant. Group Five was thus entitled to access to the Commission's record of its investigation save to the extent that any part thereof was restricted information in terms of rule 14(1). Both the Commissioner and Tribunal accepted this."

> "[i]f it is correct that a member of the public may gain access to the Commission record under rule 15, subject to any restrictions under rule 14, and this must be so on a plain reading of the rule, it would be absurd to prevent a litigant from being given access."[184]

[181] As discussed above, rule 15 cannot be interpreted so expansively as to include litigants. Once a complaint is referred to the Tribunal, the Tribunal Rules are triggered and govern the disclosure and discovery of documents between the litigating parties. There is no absurdity created by this because both regimes of disclosure are different. Nevertheless, Ngcobo J, in *Ingledew*, noted that the adoption of the approach that once litigation has commenced discovery should be regulated by the Uniform Rules, can give rise to "certain anomalies".[185] To this end, this Court held that:

> "Under the wording of section 32(1)(a), the applicant would prima facie have been entitled to all the documents he now seeks until the day before summons was served on him. Moreover, a third party might have approached another for access to those documents during the course of the applicant's litigation."[186]

This dictum found support in *PFE International SCA*, where the Supreme Court of Appeal found that:

> "This anomaly, that an applicant may be entitled to information the day before the commencement of proceedings but not the day thereafter, must be seen as a necessary consequence of the intention, on the part of the Legislature, to protect the process of the court. Once proceedings are instituted then the parties should be governed by the applicable rules of court."[187]

[182] Since Standard Bank and the Waco respondents sought discovery of the record, their reliance on rule 15 of the Commission Rules was mistaken. That rule does not

---

[184] *Arcelormittal* above n 164 at para 46.

[185] *Ingledew v Financial Services Board: In re Financial Services Board v Van der Merwe* [2003] ZACC 8; 2003 (4) SA 584 (CC); 2003 (8) BCLR 825 (CC) at para 29.

[186] Id.

[187] *PFE International SCA* above n 18 at para 10.

apply. As litigants, Standard Bank and the Waco respondents ought to have relied on the powers conferred on the Tribunal by section 52(1) of the Competition Act read with Tribunal rule 22(1)(c)(v).

Rule 22(1)(c)(v)

[183] Standard Bank and the Waco respondents contend that rule 22(1)(c)(v) does not confer a right to discovery but, instead, they contend that the Tribunal is vested with the discretion to permit the production of discovery. This, as the argument goes, means that the respondents in a referral do not enjoy an automatic general right to discovery. They cite *Group Five* to support this proposition, which states:

> "A respondent in complaint proceedings does not have an automatic right to discovery once the pleadings are closed. Whether and to what extent the parties must make discovery is determined from case to case by directions given by the Tribunal in terms of Tribunal rule 22(1)(c)(v). It may well be that in most if not all cases the Tribunal will give directions for general discovery but that is not as such a right afforded by the Tribunal's rules."[188]

[184] Rule 22(1) of the Tribunal Rules provides:

> "At a prehearing conference, the assigned member of the Tribunal may—
>
> . . .
>
> (c) give directions in respect of—
>
> . . .
>
> (v) the production and discovery of documents whether formal or informal."

[185] The use of the word "may" in this provision suggests that the assigned Tribunal member enjoys a discretion. Thus, we agree with Standard Bank and the Waco respondents that this section vests a discretion to a Tribunal member; however, we disagree that this discretion is in terms of the decision to permit the production of

[188] *Group Five* above n 54 at para 12.

discovery. Respondents in referral proceedings enjoy an automatic right to discovery after close of pleadings; however, a Tribunal member has the discretion to decide when and how the production of the discovery will occur, informal or formal. On a proper construction of the rule, it is clear that the Tribunal member's discretion is restricted to the questions of when and how discovery will take place, and does not extend to the question of whether or not parties in a particular case are entitled to discovery.

[186] This construction of the rule would be in accordance with the principles of natural justice as required in terms of section 52(2)(a).[189] The role of discovery in litigation proceedings is fundamental and paramount, and it would be incorrect to interpret the rules in a manner that denies litigants a general right to discovery. In any event, on a proper reading of rule 22(1)(c)(v), the Tribunal member has a discretion in deciding when and how discovery is to take place on a case by case basis, taking into account the provisions in section 52 of the Competition Act. This is to allow the Tribunal to conduct the proceedings before it in an expeditious manner in light of the facts of the case before it. However, this does not mean that this discretion is unfettered – it is still naturally bound by the requirements of reasonableness, fairness and lawfulness.

[187] It is on this proper construction of rule 22, read with section 52, that the following becomes evident. An accused firm does not lose its right of access to documents and information upon the referral of a complaint to a Tribunal; it is still entitled to information and documents held by the Commission. The principal and material difference is that the right is not exercised through rule 15; it is now exercised through rule 22 of the Tribunal rules, which gives the litigant a right to discovery and leads to a record that is different to the record envisaged in rule 15 of the Commission Rules.

---

[189] Section 52(2)(a) of the Competition Act provides:

> "(2) Subject to subsections (3) and (4), the Competition Tribunal—
>
> (a) must conduct its hearings in public, as expeditiously as possible, and in accordance with the principles of natural justice."

Reasonable time to produce the record

[188] The Commission argued, in the alternative, that should *Group Five* be found to be correct, it was incorrectly applied by the Competition Appeal Court. Standard Bank and the Waco Respondents argue that this Court does not have jurisdiction to adjudicate this matter because it concerns the application of the law.[190] This cannot be correct.

[189] In our view, this is an unduly narrow approach, which overlooks the fundamental issue in question. The true issue is the interpretation of "reasonable" in relation to the reasonable period in which the Commission is required to produce its record of investigation. The Tribunal in *Competition Commission v Standard Bank* had a particular view concerning what constitutes a reasonable period.[191] In this regard, the Tribunal held that a reasonable period would be dependent on the facts of each case.[192] Relevant factors would be the identity of the person requesting the record and the reason for or purpose of the request.

[190] In contrast, the Competition Appeal Court held a divergent view.[193] In essence, it held that what constitutes a reasonable period is dependent on how long the Commission would take to carve out the information and documents that are considered to be restricted under rule 14.[194] Therefore, according to the Competition Appeal Court, the identity of the requestor and the reason for or purpose of the request are immaterial and do not play a role in determining a reasonable time period.[195]

[191] In the *Group Five* matter, the Tribunal and the Competition Appeal Court held similarly divergent views.[196] In our view, there is an arguable point of law of general

---

[190] It should be noted that the reasonable time argument is raised in the alternative. While we find in favour of the Commission in respect of its main argument, we also decided to engage this argument.

[191] *Standard Bank* Tribunal decision above n 43.

[192] Id at paras 58 and 60-8.

[193] Rule 53 judgment above n 45 at para 38.

[194] Id at para 56.

[195] Id at para 35.

[196] See *Group Five* Tribunal decision above n 83 at para 77 and *Group Five* above n 54 at para 11.

public importance which this Court ought to consider in light of the conflicting views that have been expressed by the specialist courts.

[192] For a decision or action to be reasonable, one has to consider the facts of that specific case. Reasonableness is context-specific and cannot be determined in the abstract – divorced from the facts and context of each case. Accordingly, reasonableness has a subjective element to it. Therefore, in order for the time by which the record is produced to be considered reasonable, there are certain relevant factors that the Commission has to consider. The identity of the requestor is one of these factors as is the purpose of the request.

[193] The Competition Appeal Court took a narrow view on the reasonableness aspect of this leg of the argument and finding of the Tribunal.

[194] The right created by rule 15(1) is not intended to facilitate, or furnish the respondent with, a defence.[197] This is supported by the fact that the same right to the record is provided both when the Commission elects to refer a case and where it elects not to. The same right to the record exists in both situations.[198] This strongly points to the fact that the rule is disconnected and divorced from the litigation process.[199] Accordingly, the argument by the respondents that they cannot properly plead without the investigative record must fail on this ground.

[195] 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 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

[197] *Group Five* Tribunal decision above n 83 at para 67.

[198] Id.

[199] Id.

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.

[196] This is further buttressed by the fact that section 32(2) of the Constitution states that the right to access to information will be subject to "reasonable measures to alleviate the administrative financial burden on the state." The Commission would be financially prejudiced if it were obliged to produce a record under rule 15 and then later to produce a substantially similar record again for the purposes of discovery. This would be an unnecessary burden, particularly when the "reasonable" period can be interpreted in a manner that would lead to efficacious and expeditious proceedings before the Tribunal. This preferred interpretation would also lead to less disruptive proceedings as elucidated in *PFE International*.

[197] Although *PFE International* concerned the application of PAIA, it is relevant as it sets out an important policy approach. The Competition Appeal Court's proposed approach would be to interpret rules and procedures in a way that would disrupt the ordinary rules of litigation. As the Supreme Court of Appeal stated:

> "[T]o create a dual system of access to information, in terms of PAIA and the particular court rules, has the potential to be extremely disruptive to court proceedings."[200]

This was echoed by this Court when it held that "allowing PAIA to apply in cases such as this would be disruptive to court proceedings."[201]

[198] The same principle applies here. To narrowly interpret "reasonable period" in a way that would allow for disruptive and unrestricted requests for information would be untenable.

---

[200] *PFE International* above n 18 at para 15.

[201] *PFE International* above n 18 at para 31.

[199] A reasonable period requires the Commission, as the decision-maker, to employ the reasonableness test and apply its mind to the prevailing set of facts before it and then "weigh up the burden on the Commission and thus the public interest in the most efficient allocation of its resources with the right of the requester to obtain the record more expeditiously than the litigants otherwise would."[202]

[200] Accordingly, the appeal in respect of CCT 158/18 and CCT 218/18 must, in our view, succeed.

Review Appeal

[201] As mentioned, we agree with the first judgment that the appeal should succeed. Where the jurisdiction of the court before which a review application is brought is contested, a ruling on this issue must precede all other orders.[203] This is because a court must be competent to make whatever orders it issues. If a court lacks authority to make an order it grants, that order constitutes a nullity. Scarce judicial resources should not be wasted by engaging in fruitless exercises like making orders which cannot be enforced.

[202] By its very nature, rule 53 of the Uniform Rules finds application where review proceedings are instituted before a competent court. The rule was designed to serve a dual purpose of informing both the applicant for a review and the court of what actually happened in the process of making the impugned decision.[204] Before 1994, administrative functionaries had no duty to give reasons for their decisions and did not uphold the value of openness in making decisions. More often than not, those on whom decisions had an adverse impact had no knowledge of what transpired in the process and were placed at a disadvantage when they sought to challenge the decisions in

[202] *Standard Bank* Tribunal decision above n 43 at para 69.

[203] *Makhanya* above n 181 at para 29.

[204] *Helen Suzman* above n 15 at paras 13 and 123 and *Democratic Alliance* above n 136 at paras 13-5.

question. Rule 53 became a useful tool in terms of which access to information could be achieved.

[203] Therefore, the rule enables an applicant to raise relevant grounds of review, and the court adjudicating the matter to properly perform its review function. However, for a court to perform this function, it must have the necessary authority. It is not prudent for a court whose authority to adjudicate a review application is challenged to proceed to enforce rule 53 and order that disclosure should be made, before the issue of jurisdiction is settled. The object of rule 53 may not be achieved in a court that lacks jurisdiction.

[204] For these additional reasons, we agree with the first judgment that Boqwana JA erred in ordering that the Commission should disclose its record of investigation before the question of jurisdiction was determined. Once carried out, and in the event that the Competition Appeal Court concluded that is has no jurisdiction, what is to be done in terms of the order cannot be undone.

[205] It is unfortunate that proceedings in the Tribunal have been delayed unduly by procedural skirmishes which have been pursued up to the highest court in the land. The present parties should have heeded the Competition Appeal Court's caution which was sounded in *Group Five*. That Court said:

> "It would obviously be improper for the Commission to delay production of its record for tactical reasons or to contrive disputes about privilege and confidentiality. By the same token, however, respondents should not be encouraged to delay the filing of their answering papers on the basis of a right of access to information which has nothing to do with their status as litigants."[205]

[206] An important objective of the Tribunal Rules read with the Uniform Rules is to facilitate the speedy resolution of disputes. Had those rules been properly followed,

[205] *Group Five* above n 54 at para 21.

there can be no doubt that finality could have been reached a long time ago. Both the Tribunal and the Competition Appeal Court should not allow parties to drag proceedings for lengthy periods of time.

[207] Although the Commission has been successful, as we have concluded that the matter raises a constitutional issue together with the fact that the Commission is an organ of state, it follows that each party should pay their own costs.

Order

[208] The following order is made:

In CCT 158/18:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Competition Appeal Court is set aside and replaced with the following:

   "The appeal is dismissed."
4. There is no order as to costs in this Court and in the Competition Appeal Court.

In CCT 179/18:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Competition Appeal Court is set aside.
4. The matter is remitted to the Judge President of the Competition Appeal Court.
5. There is no order as to costs in this Court and in the Competition Appeal Court.

In CCT 218/18:

1. Leave to appeal is granted.

2. The appeal is upheld.
3. The order of the Competition Appeal Court is set aside and replaced with the following:

"The Rule 15 application is dismissed."

4. There is no order as to costs in this Court and in the Competition Appeal Court.

FRONEMAN J (Cameron J concurring):

[209] I have had the privilege of reading both the judgment of Theron J (first judgment) and the judgment of Khampepe J and Jafta J (second judgment). I am in the rather unenviable position that I agree with parts of each of the judgments in the rule 15 appeal, but disagree with both on the outcome of the review appeal. My reasons will be brief.

The public access rule appeal

[210] I accept that we have jurisdiction and I would in the normal course also have had little difficulty in accepting that it is in the interests of justice to determine the appeal. But rule 15 was amended on 25 January 2019, about a month and a half before the hearing. The amendment provides that the public access right to any Commission record under the rule does not apply to a record that is requested (i) for the purpose of proceedings in criminal or civil proceedings or proceedings before an administrative body, including the Competition Tribunal; and (ii) after the commencement of these proceedings.[206]

---

[206] Rule 15(1) now formulates a public access right that is "[s]ubject to sub-rule (5)". Rule 15(5) provides as follows:

"Sub-rule (1) does not apply to a record if—

(a) that record is requested—

(i) for the purpose of proceedings in criminal or civil proceedings or proceedings before an administrative body, including the Competition Tribunal; and

(ii) after the commencement of the proceedings referred to [in] sub-paragraph (i); and

[211] This amendment might be thought to make the constitutional legal issue moot. It was however argued that the emphasis in the amendment on the purpose for which the public access record might be sought remains contentious for the future and needs to be clarified. As will be seen, I consider the purpose for the request for public access as the key to resolving the apparent tension between the public access rule (rule 15 of the Commission Rules) and the litigation discovery rule (rule 22(1)(c)(iv) of the Tribunal Rules) and will thus accept that it remains relevant.

[212] The Commission's public access rule and the Tribunal's litigation discovery rule create different entitlements to aspects of information relating to the Commission's investigation. They serve different purposes. The former creates and regulates the entitlement of any member of the public to the record of the Commission's investigation in order to give specific content to the fundamental right of access to information in the Constitution.[207] The latter regulates a litigant's entitlement to access the record of discovery ordered by the Tribunal for purposes of the litigation before it.

[213] Although the record of investigation under the public access rule and the record under the litigation discovery rule may often overlap, they are not always identical. The exclusions under the public access rule are those set out in rule 14,[208] while the exclusions under discovery are the ordinary ones requiring a fair process, like those relating to privilege.[209] Each rule and its own respective exceptions serve different purposes: the one a general purpose as part of public entitlement to access information; the other a specific purpose to prepare for litigation.

(b) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in, or may be determined in terms of, any other law or the rules of any court or administrative body, including the rules of the Competition Tribunal."

[207] Section 32 of the Constitution.

[208] See rule 14 as fully set out in the first judgment above at fn 8.

[209] The leading case on litigation privilege in the competition law context is *Arcelormittal* above n 97. On privilege generally, see Schmidt and Rademeyer "Privilege" in *Law of Evidence* Service 15 (2017) and Zeffert and Paizes "Privilege" in *Essential Evidence* (LexisNexis, Durban 2010).

[214] As long as a member of the public, including a litigant, seeks public access under the public access rule strictly in accordance with its purpose and requirements, there should in principle be no objection to it being done even after the commencement of legal proceedings under the Competition Act. But here principled theory and practical reality may well collide.

[215] The litigant seeking the record under the public access rule will only be entitled to a record that is subject to the exclusions under rule 14.[210] If access under the public access rule is sought after the commencement of Tribunal proceedings, not for public entitlement purposes but rather for litigation purposes, the clash between ostensible principle and practical strategy occurs.

[216] How is that to be reconciled?

[217] A practical and sensible solution lies in determining what a "reasonable period" for providing the public access record might then be. Pending litigation in the Tribunal would be a relevant factor to consider in determining the "reasonable period" for providing access, if there is a reasonable probability that the public access record is sought not for general public interest purposes, but for strategic purposes in gaining advantages in the Tribunal proceedings. It presents itself as an appropriate and practical control mechanism for preventing abuse of the public access process for an ulterior purpose. That would also address any possible absurdity in allowing members of the public access during litigation, but not litigants. Litigants will simply be under stricter scrutiny to prevent them from using public access for an ulterior purpose.

---

[210] *Group Five* above n 54 and *Continental Tyres* above n 71 are not in conflict with each other in this regard. Both insist on the clear identification of the right-holder for determining their entitlement: "any person" may request the Commission's record of investigation in terms of rule 15's public access right, while only litigants are entitled to the record of discovery under the Tribunal's regime of discovery. Further, both cases address mismatches between the right-holder and the entitlement sought to be claimed or restricted: *Group Five* clarifies that a litigant remains "any person" entitled to access the rule 15 record of investigation, while *Continental Tyres* affirms that rule 14 restrictions cannot be used to resist disclosure of the record of discovery as directed by the Tribunal during litigation.

[218] It follows that I am of the view that the Tribunal got things more or less right. For these different reasons, I agree with the second judgment that the appeal in respect of the public access record appeal must succeed.

The review appeal

[219] Section 38(2A) of the Competition Act provides that the Judge President, or any other Judge of the Competition Appeal Court designated by the Judge President, may sit alone to consider, amongst others, an "application for procedural directions".[211]

[220] Rule 53 of the Uniform Rules is a rule of procedure. Disclosure of the record under the rule decides nothing about the substance of the dispute between the parties.

[221] I know of no authority that jurisdictional disputes must be determined before a matter is procedurally ripe for hearing in accordance with court rules. Substantive legal and factual issues are only determined after pleadings have closed and *litis contestatio* has thus been reached. *Makhanya* made this clear:

> "When cases come before a court on appeal or on application the issues are presented to the court simultaneously and that might at times obscure the various issues if they logically arise sequentially. I think it is useful, for proper analysis in such cases, to envisage how they would have arisen in an action, *where the issues are often pleaded and disposed of sequentially.*
>
> *Jurisdictional challenges will be raised either by an exception or by a special plea, depending on the grounds upon which the challenge arises.* There will be some cases in which the jurisdiction of a court is dependent upon the existence of a particular fact (often called a 'jurisdictional fact'). *Where the existence of that fact is challenged it will usually be in a special plea, and the matter will proceed to a factual enquiry confined to that issue. In other cases the existence or otherwise of jurisdiction to consider the case will appear from the particulars of claim* and in those cases the challenge will be raised by an exception. In such cases a court that considers the

[211] See section 38(2A) as reproduced in the first judgment at [26] above.

> challenge might not even be aware of whether or not the plaintiff intends raising any defence at all to the claim. But in both cases the issue must necessarily be disposed of first, because upon it depends the power of the court to make any further orders.[212]

[222] In applications, the parties' affidavits serve as the pleadings that define the issues a court must decide.[213] Disclosure of the review record under rule 53 is a valued procedural mechanism to provide further evidence for the proper decision to be made by the court eventually hearing the review. An order for production of the review record decides no factual or legal issue in dispute in the main review application – it merely provides the court with further evidential material upon which it must decide those factual or legal issues. If a party contends that a legal point should be determined at the outset of application proceedings, the rules make provision for it.[214] So too for striking out irrelevant evidential material,[215] or for non-disclosure of parts or the whole of the record.[216] All these procedural rules could have been raised before Boqwana JA.

---

[212] *Makhanya* above n 181 at paras 28-9.

[213] Rule 6(1) of the Uniform Rules provides as follows:

> "Save where proceedings by way of petition are prescribed by law, every application must be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief."

On the role of affidavits for defining the issues in application proceedings, see *Molusi v Voges N.O.* [2016] ZACC 6; 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) at paras 27-8 and *Naidoo v Sunker* [2011] ZASCA 216; 2011 JDR 1634 (SCA) at para 19. See further Cilliers, Loots and Nel *Herbstein and Van Winsen*: *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (Juta, 2009) at 439-440.

[214] Rule 6(5)(d) of the Uniform Rules provides as follows:

> "Any person opposing the grant of an order sought in the notice of motion must—
>
> . . .
>
> (iii) if he or she intends to raise any question of law only he or she must deliver notice of his or her intention to do so, within the time stated in the preceding sub-paragraph, setting forth such question."

[215] Rule 23(2) of the Uniform Rules provides as follows:

> "Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the matter aforesaid, and may set such application down for hearing in terms of paragraph (f) of subrule (5) of rule 6, but the court shall not grant the same unless it is satisfied that the applicant will be prejudiced in the conduct of his claim or defence if it be not granted."

[216] See authorities referred to above fn 209.

[223] A determination of any of them would still not have disposed of any factual or legal issue that may or may not be determined by the Competition Appeal Court, depending on its review jurisdiction.

[224] I would accordingly dismiss the review appeal.

MADLANGA J:

[225] Having read the judgments by my colleagues Theron J (first judgment), Jafta J and Khampepe J (second judgment) and Froneman J (third judgment), I concur in parts of each. Here is how. In the applications for leave to appeal under CCT158/18 and CCT218/18, I concur in the outcome set out in the second judgment, but I do so for the reasons set out in the third judgment. On what the first and second judgments refer to as the "review appeal", I concur in the outcome and reasons set out in those judgments.

For the Applicant in CCT 158/18, 179/18 and CCT 218/18	T Ngcukaitobi, F Hobden, L Zikalala, I Kentridge, H Drake instructed by Ndzabandzaba Attorneys Inc.
For the Respondent in CCT 158/18 and 179/18	J Gauntlett SC, M Engelbrecht, L Kelly, T Ramogale instructed by Herbert Smith Freehills South Africa Attorneys Inc.
For the Respondents in CCT 218/18	MM Le Roux instructed by Werksmans Attorneys