THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 680/12

Reportable

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA	**APPELLANT**

and

ARCERLORMITTAL SOUTH AFRICA LIMITED	**FIRST RESPONDENT**
CAPE GATE (PTY) LTD	**SECOND RESPONDENT**
SCAW SOUTH AFRICA (PTY) LTD	**THIRD RESPONDENT**
SOUTH AFRICAN IRON AND STEEL INSTITUTE	**FOURTH RESPONDENT**

Neutral citation: *Competition Commission of SA v Arcerlormittal SA Ltd* (680/12) [2013] ZASCA 84 (31 May 2013)

Coram: Brand, Nugent, Cachalia, Pillay JJA and Mbha AJA

Heard: **21 May 2013**

Delivered: **31 May 2013**

Summary: Litigation privilege – requirements – purpose of document claimed to be privileged not to be ascertained by reference to its author, but by reference to the person under whose authority it was procured – waiver of privilege – party disclosing privileged document in pleading – implied waiver – litigant's access to Competition Commission record under Commission rule 15 – confidential information – disclosure.

ORDER

On appeal from: Competition Appeal Court (Davis JP, Mailula and Dambuza JJA concurring sitting as court of appeal):

‘1. The appeal by the Commission is dismissed and the cross-appeals by AMSA and Cape Gate are upheld. In each case the Commission is to pay the costs of AMSA and Cape Gate, including the costs of two counsel.

2. No order is made regarding the costs incurred by Scaw on appeal.

3. The order of the Competition Appeal Court is replaced with the following order:

(i) The appeal by AMSA and Cape Gate is upheld and the order of the tribunal is set aside;

(ii) The Commission is ordered to provide to AMSA the documents listed as items 3–42 in para 14 of the judgment of the Competition Appeal Court;

(iii) The Commission is ordered to provide the leniency application and marker application to AMSA, and to provide the leniency application to Cape Gate, subject to the finding by the tribunal on Scaw’s claim to confidentiality in form CC7 dated 9 July 2008. That claim to confidentiality is remitted to the tribunal for determination and the making of an appropriate order regarding access to the information;

(iv) The Commission is ordered to provide to AMSA its record of information collected during its investigation, subject to any claims to privilege made by the Commission in relation to any of the information, and to any claims that it is restricted information, including confidential information. Should any such claims be made they are to be submitted to and determined by the tribunal;

(v) The Commission is to pay AMSA’s and Cape Gate’s costs in the appeal and its costs in the proceedings before the tribunal, including the costs of two counsel where employed;

(vi) No order is made regarding the costs of Scaw.'

JUDGMENT

CACHALIA JA (BRAND, NUGENT, PILLAY JJA AND MBHA AJA CONCURRING):

[1] This is an appeal by the Competition Commission (the Commission) and two cross-appeals by the first and second respondents, ArcelorMittal South Africa Limited and Cape Gate (Pty) Limited, that arise from proceedings before the Competition Appeal Court (CAC). It is convenient to refer to these respondents as AMSA and Cape Gate. And where, in the judgment, reference is made to the 'respondents' this refers to AMSA and Cape Gate collectively.

[2] The nature and status of the appeals needs some explanation and to do that requires an account of how the dispute that is before us arose.

[3] There is a dispute between the Commission and the respondents over the latters' entitlement to the production of documents from the Commission. They require the documents, they say, to properly consider their written responses to a complaint that the Commission has lodged against them with the Competition Tribunal (the tribunal). The Commission alleges they have engaged in prohibited practices as part of a steel cartel in contravention of the Competition Act 89 of 1998 (the Act). It refuses to hand over the documents, saying they are privileged and also contain 'restricted information' under the Commission's rules.[1]

[4] Scaw South Africa (Pty) Ltd (Scaw), the third respondent, which admits to being part of the alleged cartel, gave the documents to the Commission. It did so to avoid prosecution by taking advantage of the Commission's Corporate Leniency Policy ('the CLP').[2] The rationale of the policy was recently explained in *Agri Wire*

[1] Rule 14 of the Rules for the Conduct of Proceedings in the Competition Commission, Proclamation No. 12, *GG* 22025, 1 February 2001.
[2] Corporate Leniency Policy, GN 628, *GG* 31064, 23 May 2008.

(Pty) Ltd & another v Commissioner of the Competition Commission & others[3] as follows:

'[T]he CLP has been developed to encourage participants to break ranks and disclose information that enables the Commission to tackle cartel behaviour. This information is furnished "in return for immunity from prosecution", the latter being the term used in the policy for a reference to the Tribunal and adjudication on a complaint of cartel activity, in which an administrative penalty is sought. Clause 3.1 says that the CLP outlines the process through which "the Commission will grant a self-confessing cartel member . . . immunity for its participation in cartel activity". That immunity is granted in return for full disclosure and full co-operation in pursuing the other cartel members before the Tribunal.'

[5] Unable to obtain the documents from the Commission, AMSA and Cape Gate separately applied to the tribunal for an order directing the Commission to produce them. The Commission opposed the applications, alleging both that the documents were privileged and that they constituted restricted information. Scaw was a party to the proceedings, alleging that it had a claim to have the documents kept confidential. Save for ordering limited disclosure of certain documents, the tribunal dismissed both applications.

[6] Both respondents then appealed to the CAC against the order of the tribunal. The Commission opposed the respondents' appeals. Scaw was again a party to the appeals. The CAC made no order on the appeals by the respondents, considering it unnecessary to decide the issues upon which the tribunal had pronounced. Instead it upheld Scaw's contention that the documents were protected from disclosure by a claim it had made to confidentiality in terms of s 44(1)*(a)* of the Act. The position, so it reasoned, was thus governed by the provisions of the Act[4] concerning access to information over which confidentiality had been claimed – a matter for the tribunal, rather than the CAC. In view of its decision to refuse access on other grounds, the tribunal had had no reason to consider that contention by Scaw. The CAC therefore remitted the matter to the tribunal to determine Scaw's confidentiality claim.

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[3] *Agri Wire (Pty) Ltd & another v Commissioner of the Competition Commission & others* [2012] 4 All SA 365 (SCA) para 6.

[4] Under s 45 of the Act.

[7] The order of the CAC – or rather, its failure to rule upon the order made by the tribunal, which is what was before it on appeal – has created a dilemma for all the parties. Had the appeal against the order of the tribunal been dismissed then the documents would have been protected from disclosure, and the question whether they were subject to a confidentiality claim by Scaw would have had no practical effect (which is what the tribunal concluded, hence it did not deal with that claim). It was only if the CAC had upheld the appeal against the order of the tribunal that it would have been necessary for the matter to be remitted to the tribunal to rule on Scaw's confidentiality claim.

[8] As it is, by failing to either confirm or set aside the tribunal's order, the parties are back to square one. When the tribunal is called upon to consider the confidentiality issue, which has been referred back for its ruling, the Commission will again be entitled to invoke the same defences to disclosure, which have already been upheld by the tribunal. It is in an effort to avoid that occurring that the matter is now before us. Strictly, an appeal lies against an order of a court. Absent an order of the CAC on the appeal that was before it there was nothing to appeal against. What has brought the matter before us is that the parties need a decision on the issues that were before the tribunal, without which they have reached a stalemate. I think it is clear that they cannot be left in that position, and we ought to accede to their unanimous request to resolve these issues, notwithstanding that strictly there was nothing to appeal.

[9] The dispute has its genesis in an investigation by the Commission against alleged prohibited practices in the steel industry that began more than five years ago.[5] The Commission commenced the investigation by initiating two complaints in terms of s 49B of the Act: one on 21 April 2008 and the other on 5 June 2008. AMSA, Cape Gate, Scaw and the South African and Iron and Steel Institute were among the companies being investigated. The Institute is cited as the fourth respondent but it plays no part in these proceedings.

[5]This Court has drawn the following dates from the judgment of the tribunal, noting that there are some immaterial discrepancies between those listed by the CAC and the dates submitted to the court in the affidavits.

[10] On 19 June 2008 the Commission conducted searches at the premises of various companies as part of the investigation. Following the search, and after learning that no other company had applied for leniency under the CLP, Scaw took the opportunity to do so.

[11] In applying for leniency Scaw first applied for what is known as a 'marker', which allows the applicant to claim priority ahead of other cartel members who may also apply for leniency. The Commission's policy allows leniency only to the first successful applicant. On 2 July 2008, after the marker application was submitted, the Commission requested further specific information from Scaw. A week later, on 9 July, Scaw submitted its leniency application, and on 17 July the Commission granted Scaw conditional immunity from prosecution. Thereafter, Scaw handed over numerous further documents to the Commission, at the Commission's behest, and attended several consultations with the Commission concerning the complaints.

[12] In consequence of the information received from Scaw, including the information in the leniency application, and from its own investigations, the Commission determined that the respondents had engaged in prohibited practices in contravention of ss 4(1)*(b)*(i) and 4(1)*(b)*(ii) of the Act.

[13] On 1 September 2009 the Commission referred a complaint regarding the alleged prohibited practices to the tribunal for adjudication.[6] It alleged that the respondents were party to 'agreements', as defined in the Act, to fix prices, trading conditions and to divide markets between themselves. In addition to seeking declaratory and interdictory relief against the respondents, excluding Scaw, which had been granted conditional immunity, the Commission sought the imposition of an administrative penalty of 10 per cent of each respondent's annual turnover in South Africa, including their exports, for the preceding year.

[14] Shortly after the Commission delivered its founding affidavit ('the referral affidavit') Cape Gate and AMSA sought the production of documents from the

[6] Pursuant to the provisions of s 50(1) read with s 51(2) of the Act and the Competition Tribunal rule 15(2), published in Proclamation No. 12*, GG* 22025, 1 February 2001.

Commission. The Commission provided some documents to AMSA, but refused to hand over the rest.

[15] In December 2009 the respondents applied to the tribunal for access to the documents. Cape Gate sought access only to Scaw's leniency application document, the annexures and all supporting documents that were submitted in support of the application ('the leniency application'). For this purpose it relied on rule 35(12) of the Uniform Rules of Court, which the tribunal applies. The rule permits any party, after delivering a notice to any other party in whose pleadings or affidavit there is reference to a document, to inspect and copy the document.

[16] AMSA sought access to a much broader set of documents than Cape Gate did. First, it wanted all the documents the Commission generated during its investigation of the complaint. Put simply it sought the 'Commission record' pertaining to the complaint. It contends that Commission rule 15(1), which gives a right to 'any person' – not only to a person being investigated for a prohibited practice – to inspect or copy any Commission record, permits this. Second, AMSA also relied on rule 35(12) for discovery of an extensive set of documents described in a table attached to the Notice of Motion.[7] This included the leniency application, the marker application and other documents to which reference was made in the referral affidavit. The other documents include letters, faxes, e-mails and all other forms of correspondence, notes, tape recordings, photographs, electronic data, website and other publications, as well as minutes of meetings.

[17] The tribunal granted AMSA 'limited discovery' of three documents, which were referred to in the referral affidavit, but for the rest dismissed both applications. The Commission was ordered to provide copies of only those documents that were specifically referred to: an e-mail dated 25 September 2003 and the minutes of export monitoring subcommittee meetings held on 5 April 2005 and 15 November 2005.

[18] Before the CAC, AMSA no longer persevered with its application for the full list of documents in respect of which it sought discovery, but it persisted for access to a

[7] It relied also on Uniform rule 35(14), but this was misplaced as the rule applies only to actions.

truncated list set out in a table in para 14 in the CAC's judgment. These documents, other than the leniency application, are no longer in issue, the Commission having accepted before us that they are disclosable under rule 35(12). In summary, therefore, AMSA and Cape Gate seek access to the leniency application and AMSA also seeks access to the Commission record.

[19] The Commission's stance has remained consistent throughout proceedings before the tribunal and the CAC, and has not altered before this court; it claims that it is entitled to withhold the documents from the respondents. In respect of the leniency application, it claims this entitlement for two reasons: first, because the leniency application is protected by litigation privilege and, secondly, because it is claimed as restricted information in terms of Commission rule 14(1)(e),[8] which gives it a discretion to withhold it under s 37(1)*(b)* of the Promotion of Access to Information Act 2 of 2000 (PAIA). Concerning AMSA's claim to disclosure of the Commission record, the Commission's submission in this court was that rule 15 finds no application once litigation commenced. I turn to consider the Commission's claim that the leniency application is protected from disclosure by litigation privilege.

Litigation Privilege

[20] Litigation privilege is one of two components of legal professional privilege, the other being the privilege that attaches to communications between a client and his attorney for the purpose of obtaining and giving legal advice. Litigation privilege, with which we are concerned in this case, protects communications between a litigant or his legal advisor and third parties, if such communications are made for the purpose of pending or contemplated litigation. It applies typically to witness statements prepared at a litigant's instance for this purpose. The privilege belongs to the litigant, not the witness, and may be waived only by the litigant.

[21] Litigation privilege has two established requirements: The first is that the document must have been obtained or brought into existence for the purpose of a litigant's submission to a legal advisor for legal advice; and second that litigation was pending or contemplated as likely at the time.[9]

[8] See para 47 below.

[9] D T Zeffertt and A P Paizes *The South African Law of Evidence* 2 ed (2009) at 674, 688. The formulation in Zeffertt and Paizes drawn from the cases there cited does not include the phrase

[22] There is some uncertainty as to whether documents prepared for litigation must have submission to legal advisers as it sole purpose, substantial purpose, definite purpose or dominant purpose. A suggestion that the document must have been prepared substantially for that purpose was rejected as having been based on a misreading of earlier authority.[10] In *Sweiden and King v Zim Israel Navigation*[11] Booysen J said it suffices if it is a definite purpose, whether there are other purposes or not. He considered that the weighty authority of the House of Lords in the seminal case of *Waugh v British Railways Board*,[12] which adopted the dominant purpose test, did not accord with our practice.[13] The dominant purpose test has since been applied in Canadian[14] and Australian courts.[15] And the parties appear to adopt it in their submissions.

[23] It is, however, not always apparent what the definite or dominant purpose is. In *Waugh*, where the two purposes of a document carried equal weight, the court found that no dominant purpose attached to the document and it was therefore not protected by litigation privilege.[16] But the courts have also looked at these separate or dual purposes as part of a single overarching purpose related to litigation. So where, in *Re Highgrade Traders Ltd*,[17] insurers had commissioned reports to establish the cause of a fire that had destroyed an insured's business the Court of Appeal was not prepared to find separate purposes. Instead it said the following:

'What then is the purpose of these reports? The learned judge [a quo] found duality of purpose because, he said, the Insurers wanted not only to obtain the advice of solicitors, but

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'brought into existence' in the first requirement for litigation privilege. The phrase is used in *United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd* 1953 (1) SA 66 (T) at 70A. This phrase is also used in: C Tapper *Cross & Tapper on Evidence* 12 ed (2010) at 454. Tapper also points out that English courts require a definite prospect of litigation in contemplation by the client, and not a mere vague anticipation of it. But that it was not necessary for the likelihood to exceed 50 per cent. (at 453-454). In *General Accident Fire and Life Assurance Corporation Ltd. v Goldberg* 1912 TPD 494 at 594 Mason J used the phrase 'likely or probable'. As the words 'likely' and 'probable' are synonymous I consider that their use together is redundant.

[10] Zeffert and Paizes (above) at 680.

[11] *Sweiden and King v Zim Israel Navigation* 1986 (1) SA 515 (D) at 519.

[12] *Waugh v British Railways Board* [1979] 2 All ER 1169.

[13] D T Zeffertt and A P Paizes *The South African Law of Evidence* 2 ed at 680.

[14] *Blank v Canada (Minister of Justice)* [2006] 2 SCR 319 (SCC) para 60.

[15] *Mitsubishi Electric Australia (Pty) Ltd v Victorian Work Cover Authority* (2002) 4 VR 332.

[16] *Waugh* (above) at 1173C and 1174B-C**.**; See also *Axa Seguros S A de C V v Allianz Insurance plc* [2011] EWHC 268 (England and Wales High Court (Commercial Court)) para 13..

[17] *Re Highgrade Traders Ltd* [1984] BCLC 151 (CA).

also wanted to ascertain the cause of the fire. Now, for my part, I find these two quite inseparable.'[18]

[24] Here the parties differ over the purpose for which the leniency application was brought into existence, let alone its definite or dominant purpose. It is therefore not necessary in this case for us to consider whether *Sweiden* was correctly decided, and if so, whether our common law should be developed to accord with developments in other jurisdictions. I shall leave the question open.

[25] The Commission contends that consistent with the purpose of the CLP, it obtained the application for the purpose of prosecuting the steel cartelists and seeking advice from its legal advisors on the contemplated litigation. AMSA's submission is that the document was *created* not for that purpose, but for Scaw to be given immunity against prosecution in exchange for the information. And the fact that the Commission may have considered it useful in litigation after having received it cannot alter the fact that it was not created for this purpose. The Commission therefore could not claim the privilege. In short, AMSA submits that it is the purpose of the creator of the document, at the moment of its creation, that is material to the test for the document's purpose.

[26] Cape Gate adds a gloss to this submission. It contends that the document was prepared at Scaw's instance, and not that of the Commission's or its legal advisors'. On Cape Gate's argument, in order to fall within the protection of the rule, the leniency application had to have originated in answer to inquiries made by the Commission or its lawyers; in other words, the Commission can only claim privilege over information it actively sought with a view to its litigation, not information that comes into its hands for any other purpose. The facts, say Cape Gate, do not support the claim for privilege on this basis.

[27] In my view the flaw in the respondents' approach is that they incorrectly focus on Scaw's motive in composing the leniency application to determine the purpose – whether definite or dominant – instead of focusing on the Commission's reason for obtaining or procuring it. The purpose of the document is not to be ascertained by

[18] At 25E.

reference to its author, either at the time at which the document was prepared or at the time it is handed over to the litigant or the litigant's legal representative. Instead, the purpose of the document is to be determined by reference to 'the person or authority under whose direction, whether particular or general, it was produced or brought into existence'.[19] In that case it is the intention of the person who procured the document, and not the author's intention, that is relevant for ascertaining the document's purpose.[20] The author need not even have known of possible litigation when the document was prepared.[21]

[28] The inquiry into whether litigation privilege attaches to the leniency application is fact-bound. In this case that inquiry must focus on the facts set out in the Commission's answering affidavits in response to the respondents' discovery applications. The Commission says that the CLP is founded upon an expectation of litigation. The commencement of discussions with a leniency applicant is always with a view to instituting prosecutions against cartelists. And the grant of immunity flows from the process. Put simply the grant of immunity, to secure the cooperation of a cartelist, is inseparable from the litigation process itself. This much is clear from the tribunal's characterization of the purpose of the CLP in the *Pioneer Foods* case:[22]

'[38] The very purpose of the CLP . . . is for firms who have been part of a cartel to come forward with the carrot of immunity offered in return for information and co-operation. But that is not an end in itself. The information obtained from immunity applicants under the CLP is intended for the purpose of litigation against the remaining firms alleged to be part of the cartel. The informants furnish the Commission with the information which forms the basis of its decision to refer a complaint. The extract from the CLP that we cited above clearly obliges applicants to cooperate with the Commission "until the Commission's investigations are finalized and the subsequent proceedings in the Tribunal are completed".

[39] That in the process an ancillary outcome, the award of indemnity is afforded, does not detract from the fact that the Commission's central object is to use the information to conduct litigation in the Tribunal against such members of the alleged cartel as contest

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[19] This formulation was first expounded by Barwick CJ in *Grant v Downs* (1976) 135 CLR 674 at 677, and approved in *Waugh V British Railways Board* [1979] 2 All ER 1169 at 1174, 1178, 1183, [1980] AC 521 at 533, 537, 543-544.

[20] *Guinness Peat Properties Ltd & others v Fitzroy Robinson Partnership (a firm)* [1987] 2 All ER 716 at 723.

[21] C Tapper *Cross & Tapper on Evidence* 12 ed at 454.

[22] *Pioneer Foods (Pty) Ltd v Competition Commission in re: Competition Commission v Tiger Brands Ltd t/a Albany & another*; *Competition Commission v Pioneer Foods (Pty) Ltd t/a Sasko & another* [2009] 1 CPLR 239 (CT).

proceedings. Thus the inescapable conclusion is that inherent in this process is the contemplation of litigation.'

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

[30] There is no reason to doubt that explanation. Moreover, our courts have held that, subject to certain limited exceptions, 'the statements in the affidavits of documents are conclusive with regard to the documents that are . . . in the possession . . . of a party giving the discovery . . . as to the grounds stated in support of a claim of privilege from production for inspection'.[23] A court will therefore not lightly go behind averments in an affidavit to the effect that the likelihood of litigation was contemplated when the document was procured.[24]

[31] I therefore consider that the circumstances under which Scaw created the document and the Commission obtained it are inseparable. The document came into existence at the instance of the Commission for the purpose of prosecuting firms alleged to be part of a cartel. And the fact that there was, in the process, to borrow from the tribunal's phraseology in the *Pioneer Food's* case, 'an ancillary outcome of indemnity' does not detract from this purpose. Furthermore, the accepted facts support the Commission's averment that litigation was likely when the document was procured, that its lawyers were involved in the process – including advising on the

[23] *United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd* 1953 (1) SA 66 (T) at 70H, quoting from *Halsbury*, the *Hailsham* edition, Vol. 10, para 445.
[24] *Ibid* 72.

leniency application, and that the purpose for the preparation of the leniency application was to support the envisaged litigation. The leniency application was, in substance, Scaw's witness statement in the contemplated litigation. The document was therefore privileged in the hands of the Commission.

[32] In the light of this finding the question that arises is whether the Commission waived its privilege by referring to the leniency application in the referral affidavit, as the respondents' contend it did. Under rule 35(12) a document becomes disclosable if reference is made to it in a pleading. The tribunal dismissed this contention somewhat cursorily: waiver, it said, is not lightly inferred and the 'oblique references' to the leniency application in the referral affidavit are not sufficient to constitute a waiver. The CAC did not consider the point.

[33] Waiver may be express, implied or imputed. It is implied if the person who claims the privilege discloses the contents of a document, or relies upon it in its pleadings or during court proceedings. It would be implied too if only part of the document is disclosed or relied upon. For a waiver to be implied the test is objective, meaning that it must be judged by its outward manifestations; in other words from the perspective of how a reasonable person would view it.[25] It follows that privilege may be lost, as the English courts have held, even if the disclosure was inadvertent or made in error.[26] Imputed waiver occurs when fairness requires the court to conclude that privilege was abandoned.[27] The respondents contend that in this case the loss of privilege is implied or to be imputed to the Commission. The Commission submits that the bare references to the leniency application in the referral affidavit did not amount to a waiver of privilege.

[34] I appreciate that a bare reference to a document in a pleading, without more, may be insufficient to constitute a waiver, whereas the disclosure of its full contents may constitute a waiver. Where the line is drawn between these extremes is a question of degree, which calls for a value judgment by the court. When that line is crossed the privilege attached to the whole document, and not just the part of the

[25] *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) para 16.
[26] *Guinness Peat Properties Ltd & others v Fitzroy Robinson Partnership (a firm)* [1987] 2 All ER 716 at 729.
[27] *S v Tandwa* 2008 (1) SACR 613 (SCA) paras 18-19.

document that was referred to, is waived. The reason is that courts are loath to order disclosure of only part of a document because its meaning may be distorted. But it must also be so that it does not inevitably follow that because part of document is disclosed, privilege is lost in respect of the whole document. This would be so where a document consists of severable parts and is capable of severance.[28] I turn to the facts here.

[35] The Commission referred to the leniency application in its referral affidavit in these terms:

'8.7 . . . Scaw applied for leniency in terms of the Commission's CLP for price fixing and market allocation in relation to rebar, wire rod, sections (including rounds, squares angles and profiles).

8.8 Scaw confirmed in the application for leniency that there has been a long standing culture of cooperation amongst the steel mills regarding the prices to be charged, and discounts to be offered, for their steel products such as rebar, wire rod, sections (including rounds and squares, angels and profiles). The cooperation extended to arrangements on market division.

8.9 In addition to information submitted by Scaw in its leniency application, the Commission conducted its own investigations which largely confirmed the allegations made by Scaw and provided further evidence of anticompetitive practices in contravention of section 4(1)(b) of the Act – involving both price fixing and market division.

8.10 It is as a consequence of information contained in the Scaw application for leniency and that obtained from the Commission's investigations that this referral is made.'

[36] These paragraphs, in my view, amount to much more than a bare or oblique reference to the leniency application. The allegation in para 8.8 that a long standing culture of cooperation was 'confirmed in the application for leniency' makes it clear that the application contained a full recital of facts that supported that conclusion. Whether the application indeed contained those facts is a matter that the respondents will be called upon to respond to in their answering affidavits. It is precisely to enable it to do so that rule 35(12) requires documents referred to in pleadings to be disclosed.[29]

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[28] A Keane *The Modern Law of Evidence* 3 ed (1994) at 486.

[29] *Unilever v Polagric (Pty) Ltd* 2001 (2) SA 329 (C) at 336G-J.

[37] The Commission must be taken to be aware of the rule and the circumstances under which the privilege that attaches to a document may be lost or waived. It must be borne in mind that a complaint referral requires no more than a concise statement of the grounds of the complaint and the material facts or point of law relied on.[30] The referral is in the form of an affidavit and it may contain evidence that is intended to be led in the proceedings. The tribunal may adopt a more flexible approach to pleadings than is the practice in the high court.[31] This means that the Commission is under no obligation to refer to any documents and was under no obligation to refer to the leniency application; it needed to set out only the material facts that supported the allegation of collusive conduct against the respondents. Objectively viewed, therefore, the Commission's reference to the leniency application in the referral affidavit is consistent with an implied waiver of the privilege, and I so hold.

[38] Once it is accepted that the Commission waived its privilege to the leniency application, it follows that any entitlement of the Commission to claim the information as restricted information under rule 14(1)(e) was similarly waived.

[39] What remains is Scaw's claim of confidentiality concerning the information that was part of the leniency application. Cape Gate contests the claim. As I understand its submission, Cape Gate contends that once Scaw and the Commission agreed that the information provided was discoverable for use in proceedings before the tribunal in terms of s 11.1.3.3,[32] Scaw no longer had any reasonable expectation that the information provided would be treated as confidential in litigation proceedings. And so, it submits, Scaw cannot claim any of the documents provided to the Commission as confidential information.

[40] Before I consider this submission, it bears mentioning that the Act carefully regulates 'confidential information' to protect the confidential commercial interests of

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[30] Tribunal rule 15(2).

[31] M Brassey, J Cambell, R Legh, C Simkins, D Unterhalter & J Wilson *Competition Law* 1 ed (2002) at 308-309.

[32] Clause 11.1.3.3 of the CLP says: 'The Commission shall maintain confidentiality on all information, evidence and documents given to it throughout the process. Use of documents and information obtained from the applicant at the Tribunal in terms of the Act shall not amount to the breach of confidentiality.'

complainants and informants.[33] It has an important underlying public purpose: Absent guarantees that their confidential information will be protected from disclosure to third parties, firms submitting information to the Commission as informants may be reluctant to do so. Were this to be the case, the Commission would be severely hampered in its ability to investigate breaches of the Act.

[41] In my view Cape Gate's submission conflates the two senses in which the term confidentiality is dealt with in the CLP: The first concerns the confidentiality of the CLP process, and the second relates to the confidentiality of an informant's information. The process is undertaken under a confidentiality agreement as envisaged in the CLP.[34] Under the agreement, the leniency applicant agrees to submit information in exchange for immunity. The Commission, for its part, agrees to undertake the process on a confidential basis and to treat all the information submitted by the leniency applicant as confidential,[35] whether or not the information is in fact 'confidential information' in terms of the Act. If the applicant applies for leniency, the parties will enter into a written agreement in terms of which the applicant is granted conditional immunity.[36] And once the Commission decides to use the information at the tribunal, clause 11.1.3.3 says this shall not constitute a 'breach of confidentiality'. Properly construed, therefore, *all* information submitted by the applicant must be treated in confidence by the Commission until it decides to use the information before the tribunal, in which case only information specifically claimed to be 'confidential information' must be dealt with in terms of the Act.

[42] The relevant sections are s 44(1)*(a)*, which provides for the right of informants to claim confidentiality for information submitted to the Commission, and s 45, for the manner and form under which a person seeking access to such information may apply to the tribunal for disclosure. Once an informant submits information claimed to be confidential in the prescribed manner, explaining why the information is confidential, the Commission is bound by the claim until the tribunal rules to the

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[33] See the definition of 'confidential information' in s 1 of the Act. See also M Brassey, J Cambell, R Legh, C Simkins, D Unterhalter & J Wilson *Competition Law* 1 ed at 303.

[34] Section 11.1.3.3 of the CLP. See also Currie & Klaaren *The Promotion of Access to Information Act Commentary* at 8.63.

[35] See clause 8.2, which says: 'A firm that chooses to disclose its identity or any relevant information at this stage does so at its own risk because it would not be protected by the CLP at this stage. However, the Commission will protect information submitted by applicants and treat it with utmost confidentiality.'

[36] Clause 11.1.3.2.

contrary.[37] This means that 'confidential information' so described must fall within the ambit of the Act, which defines it to mean 'trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available or known by others'.[38] It is therefore necessary for an informant who submits information, which he claims to be confidential, to the Commission to describe the nature of the information with sufficient precision in order to support any subsequent claim that it should not be published or disclosed to anyone else.[39]

[43] The CAC, I think, correctly held that until the respondents apply through the legislatively prescribed procedure under s 45(1) for access to the information, and the tribunal determines whether or not the information is confidential, the documents remain confidential. I do, however, have doubts as to whether Scaw's claim to confidentiality falls within the terms of the section. In its written statement in the prescribed form[40] explaining why the information is confidential, and under a column requiring an applicant to describe the 'nature of the economic value of the information', Scaw made no attempt to bring any of the information within the ambit of the definition. It merely stated, formulaically, and in respective of each of four categories of information claimed to be confidential, that it is '[i]nformation belonging to a private entity which is strictly private and confidential and made in pursuance of corporate leniency and which is clearly not in the public domain and which could cause irreparable harm if it becomes available to competitors or other third parties'. What Scaw describes here are the *consequences* of the information being disclosed, not the *nature* and economic value of the information. Scaw's mere assertion, in the prescribed form, that the information is confidential, does not make it so.

[44] But it was submitted on behalf of Scaw, and I accept the submission, that the tribunal is the proper forum in which a claim to confidentiality under the section, both in its form and its substance, is to be tested. The CAC therefore correctly remitted this question to the tribunal, and Cape Gate's submission to the contrary falls to be dismissed.

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[37] Sections 44(1)*(b)* and 44(2).
[38] Section 1 of the Act.
[39] Cf R Whish *Competition Law* 6 ed (2008) at 391.
[40] Form C 77.

AMSA's Rule 15 application

[45] As mentioned earlier, AMSA also seeks access to the Commission record (apart from the leniency application) under Commission rule 15(1) read with rule 14. Rule 15(1) allows 'any person' to have access to 'any Commission record', provided it is not 'restricted information' contemplated in rule 14(1). The Commission opposes this.

[46] The Commission suggested in argument that AMSA is not entitled to invoke rule 15 to obtain access to the record as the rule is aimed at providing access to information to the public, and not to a litigant. If 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. This would mean, for example, that access could be denied to the Chief Executive Officer of AMSA, but not to her relatives or friends, who are members of the public. It follows that AMSA is entitled to the Commission record subject to any claims of privilege or any restriction under rule 14.

[47] The tribunal accepted that when analysing the right exercised by AMSA in terms of rule 15(1) it must do so from the vantage of this being a general right available to all, and not a litigant's right. On this basis it found that the documents sought by AMSA constituted restricted information in terms of rule 14(1)(e) read with s 37(1)*(b)* of PAIA. (Section 37(1)*(b)* allows a public body such as the Commission to restrict access to its record in the public interest if the disclosure of the information could reasonably be expected to prejudice the future supply of similar information, or information from the same source.)[41] The tribunal thus dismissed AMSA's application for the documents to be disclosed in terms of rule 15(1).

[48] Rule 14(1) provides for five categories of restricted information: confidential information;[42] information concerning the identity of a complainant;[43] information concerning the conduct attached to a complaint until a referral or notice of non-

[41] Section 37(1)*(b)*(i) and (ii) of PAIA.
[42] Rule 14(1)(a).
[43] Rule 14(1)(b).

referral is issued;[44] the Commission's work product;[45] and finally any document to which the Commission is 'required or entitled to restrict access in terms the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000)' (PAIA),[46] which is in issue here.

[49] There is no dispute that once the complaint had been referred to the tribunal for adjudication, any restriction under rule 14(1)(c)[47] fell away because access to the record could no longer be restricted on this ground. The tribunal, however, held that the Commission was entitled to withhold access to the record because disclosure would reasonably compromise the future supply of similar information or information from the same source. The tribunal thus held that the information could be withheld from AMSA at the Commission's discretion because of its 'inherent nature'.[48] As I have already held that the information forming part of the leniency application must be disclosed, the question whether information from the same source – ie the leniency applicant – may be withheld falls away. The Commission may therefore not withhold this part of the record on this ground.

[50] I accept though that the record may also contain similar information pertaining to the investigation that may emanate from sources other than the leniency applicant, which the Commission may well be entitled to restrict; indeed it may be obliged to restrict this information in the public interest if it reasonably believes that disclosure would prejudice the future supply of such information. But it does not follow that all information in the record may be withheld even if it does not fall into this category, or any other category, contemplated in rule 14. If the Commission seeks to prevent AMSA from gaining access to the record, it cannot do so generally but is required to identify specific documents or categories of documents to which it may wish to restrict access. In this regard AMSA has made it clear that it does not seek access to documents that may legitimately be claimed to be part of the Commission's work product as contemplated by rule 14(1)(d). Consequently AMSA's

[44]Rule 14(1)(c).
[45]Rule 14(1)(d).
[46]Rule 14(1)(e).
[47]See n 45 above.
[48] At para 18.

claim to the record succeeds, subject to any claim that specific documents are privileged, restricted or confidential.

[51] To conclude, I hold that the leniency application was privileged, but that the Commission waived its privilege by referring to it in the referral affidavit, as it did to the claim that the application was restricted under rule 14(1)(e). The leniency application must therefore be disclosed to the respondents subject to the tribunal determining Scaw's claim of confidentiality in terms of s 45(1) of the Act. In respect of AMSA's application for disclosure of the Commission record, this too is upheld, subject to any claim that the record or any part of it may be restricted under rule 14, or on the grounds of privilege, or any other ground that provides a recognised defence to the disclosure of information. Those claims are to be adjudicated by the tribunal, if any such claims arise.

[52] The following order is made:

'1. The appeal by the Commission is dismissed and the cross-appeals by AMSA and Cape Gate are upheld. In each case the Commission is to pay the costs of AMSA and Cape Gate, including the costs of two counsel.
2. No order is made regarding the costs incurred by Scaw on appeal.
3. The order of the Competition Appeal Court is replaced with the following order:
(i) The appeal by AMSA and Cape Gate is upheld and the order of the tribunal is set aside;
(ii) The Commission is ordered to provide to AMSA the documents listed as items 3–42 in para 14 of the judgment of the Competition Appeal Court;
(iii) The Commission is ordered to provide the leniency application and marker application to AMSA, and to provide the leniency application to Cape Gate, subject to the finding by the tribunal on Scaw's claim to confidentiality in form CC7 dated 9 July 2008. That claim to confidentiality is remitted to the tribunal for determination and the making of an appropriate order regarding access to the information;
(iv) The Commission is ordered to provide to AMSA its record of information collected during its investigation, subject to any claims to privilege made by

the Commission in relation to any of the information, and to any claims that it is restricted information, including confidential information. Should any such claims be made they are to be submitted to and determined by the tribunal;

(v) The Commission is to pay AMSA's and Cape Gate's costs in the appeal and its costs in the proceedings before the tribunal, including the costs of two counsel where employed;

(vi) No order is made regarding the costs of Scaw.'

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A CACHALIA

JUDGE OF APPEAL

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