COMPANIES TRIBUNAL OF SOUTH AFRICA

Case/File Number: CT004OCT2015

In the matter between:

THE NEW RECLAMATION GROUP (PTY) LTD Applicant

and

COMPANIES AND INTELLECTUAL PROPERTY COMMISSION Respondent

[a review application in terms of section 172 of the Companies Act 71 of 2008 (the Companies Act) concerning a claim of confidentiality in terms of section 212 of the Companies Act]

Presiding Member	:	Khashane La M. Manamela (Mr.),
Dates of Decision	:	10 October 2016

DECISION (Reasons and an Order)

K.La M. Manamela

Introduction

[1] The applicant conducts business in recyclable materials and is considered the leading producer of recyclable ferrous and non-ferrous metals in South Africa.[1] The applicant's public interest score[2] exceeds 350 and the applicant is therefore required in terms of section 33(1)(a)[3] of the Companies Act 71 of 2008 (the Companies Act), read with regulation 30(2)[4] of the Companies Regulations, 2011,[5] to file with the respondent together with its annual returns audited financial statements.

[2] In a letter dated 31 August 2015 the applicant, purportedly acting in terms section 212(1)[6] of the Companies Act, claimed confidentiality in respect of its audited financial statements for the years ending 30 June 2012; 2013, 2014 and those required to be filed in the future (the AFS). The request or claim of confidentiality regarding the AFS was made on behalf of the applicant by its current representatives (the Confidentiality Claim).

[1] See pars 10-11 of the supporting affidavit; see par 9 below.

[2] The public interest score of a company is calculated in terms of Regulation 26(2) of the Companies Regulations, 2011. This regulation reads in the material part: " For the purposes of regulations … 30… every company must calculate its 'public interest score' at the end of each financial year, calculated as the sum of the following:— (a) a number of points equal to the average number of employees of the company during the financial year; (b) one point for every R 1 million (or portion thereof) in third party liability of the company, at the financial year end; (c) one point for every R 1 million (or portion thereof) in turnover during the financial year; and (d) one point for every individual who, at the end of the financial year, is known by the company— (i) in the case of a profit company, to directly or indirectly have a beneficial interest in any of the company's issued securities…"

[3] Section 33(1)(a) reads: "(1) Every company must file an annual return in the prescribed form with the prescribed fee, and within the prescribed period after the end of the anniversary of the date of its incorporation, including in that return- (a) a copy of its annual financial statements, if it is required to have such statements audited in terms of section 30(2) or the regulations contemplated in section 30(7)…"

[4] Regulation 30(2) reads: "(2) A company that is required by the Act or regulation 28 to have its annual financial statements audited must file a copy of the latest approved audited financial statements on the date that it files its annual return." And the material part of regulation 28(2) reads: "In addition to public companies and state owned companies, any company that falls within any of the following categories in any particular financial year must have its annual financial statements for that financial year audited: (a) … (b) … (c) any other company whose public interest score in that financial year, as calculated in accordance with regulation 26 (2)— (i) is 350 or more…"

[5] The Companies Regulations, 2011 were determined by the Minister of Trade and Industry in terms of section 223 of the Companies Act and published under GN R351 in Government Gazette 34239 of 26 April 2011 (the Companies Regulations).

[6] See par 11 below for a reading of section 212 of the Companies Act.

The Confidentiality Claim was wholly rejected by the respondent. The respondent communicated its decision and reasons for rejection of the Confidentiality Claim in a letter dated 16 September 2015 (the Decision).

[3] Dissatisfied with the Decision, the applicant approached this Tribunal on 08 October 2015 for a review in terms of section 172[7] of the Companies Act. The review application was dismissed. However, the applicant had this Tribunal's decision reversed by launching an application in the Gauteng Division, Pretoria High Court.[8] This then constitutes determination of the matter *de novo* by this Tribunal. Although inextricably linked with the merits hereof, I will begin with a brief narrative of the background material of the matter.

Brief background

[4] As stated above, the applicant, through its current legal representatives, addressed a letter to the respondent raising the Confidentiality Claim in respect of its AFS to be filed with the respondent for past, current and future financial years.

[5] The following is the material part of the Confidentiality Claim:

> "**Claim for Confidentiality in terms of section 212 of the Companies Act, 2008: The New Reclamation Group (Pty) Ltd …**

[7] See par 14 below for a reading of the material part of section 172 of the Companies Act.
[8] The documents in the Gauteng Division, Pretoria matter are under Case Number: 100944/15 and there is an order dated 05 February 2016.

Introduction

1. We refer to the above matter and confirm that we act on behalf of The New Reclamation Group (Pty) Ltd …, a company specialising in the collection and recycling of various waste materials.
2. Our client has a public interest score in excess of 350 and is accordingly required (in terms of section 33(1)(a) of the Companies Act, 2008, read with regulation 30(2) of the Companies Regulations, 2011) to file a copy of its latest approved audited financial statements ("**AFS**") together with its annual return.
3. As requested by Mr Cuma Zwane in his email dated 10 July 2015, the Commission requires our client's AFS for the financial years ending 30 June 2012, 2013, and 2014.
4. Since its incorporation, our client has consistently filed its annual returns and complied with the Companies Act and the regulations thereto in all respects save to file its AFS as required. In accordance with our client's evident effort to achieve full compliance, our client desires to comply with the requirement to file its AFS as well. However, for the reasons set out below, our client can only do so if the AFS to be submitted pursuant to Mr Zwane's request as well as all AFS to be submitted in future are kept confidential in terms of section 212 of the Companies Act.

Claim for confidentiality

5. In terms of section 212(1) of the Companies Act, our client hereby claims confidentiality of its AFS for the financial years ending 30 June 2012, 2013, 2014, as well as all AFS to be submitted in future. This claim relates to all the aforesaid AFS and the entire contents thereof.
6. As required by section 212(2), this entire letter shall constitute a written statement explaining why the AFS are confidential. In addition to the aforesaid, our client submits the following in support of this claim:

6.1 The content of the AFS is private and confidential and not publically [sic] available;

6.2 Our client is a private profit company;

6.3 As the AFS fairly represent the state of affairs and business of the company, and explain the transactions and financial position of the business of the company, the information contained in the AFS contain

price sensitive information and may be used by competitors to easily determine our client's pricing structure. Accordingly, disclosure of the AFS would be extremely detrimental to our client's business as our client operates within an extremely competitive environment, especially in as far as pricing is concerned;

6.4 The AFS contains [sic] taxpayer information as defined by section 67 of the Tax Administration Act, 2011, as "…*any information provided by a taxpayer … in respect of the taxpayer…*". As required by section 67(3) of the Tax Administration Act and if taxpayer information is disclosed to the CIPC, the CIPC may not in any manner disclose, publish, or make such information known to any other person. Naturally, in instances of conflict between the Companies Act and the Tax Administration Act, the latter will prevail as it is later in time and the Companies Act is not a tax Act;

6.5 The AFS contains [sic] financial and commercial information, the disclosure of which would be likely to cause harm to the commercial or financial interests of our client;

6.6 The discourse of the AFS would put our client at a disadvantage in contractual or other negotiations with customers and suppliers of our client *vis-à-vis* third party competitors; and

6.7 Generally, the information contained in the AFS is proprietary of our client and has inherent economic value. The maintenance of its confidentiality is essential on the basis that, if our client's competitors were to have access to such information, it would provide them with insights into our client's business which they would not otherwise have. Such insight would give them a competitive advantage over our client and thereby cause material and irreparable harm to our client, its staff, and service providers.

Conclusion

7. In light of the above and in accordance with section 212(3) of the Companies Act, we look forward to receiving your decision regarding our client's claim for confidentiality, and the written reasons for that decision, as soon as practicable.

8. Naturally, please do not hesitate to contact us should you have any comments or queries regarding the above."

[underlining added for emphasis]

[6] I find it necessary to interrupt the narration on the background in order to say a thing or two about what is quoted above. From the submissions grounding the Confidentiality Claim quoted above, it is clear that the applicant, despite knowing that it was obliged to do so, had not submitted audited financial statements together with its annual returns since 2012. It also appears that no audited financial statements were included as part of the documents submitted to the respondent for determination of the Confidentiality Claim. Should this be correct, it would mean that the respondent determined and rejected the Confidentiality Claim without being privy to the contents of the AFS, but only relying on what the applicant said in its representatives' letter. It is indeed so that, no audited financial statements are included in this Tribunal's file for this matter.[9] This means that this Tribunal is also required to review the Decision without being aware of the impugned material in the AFS. This, in my view, is very critical or even decisive for this matter. I will return to deal with this below.

[9] Other than the letters containing the Confidentiality Claim (as annexure "A") and the Decision (as annexure "B"), copies of the following documents make up this Tribunal's file for this matter: Form CTR142; supporting affidavit; resolution of the board of directors of 07 October 2015; the applicant's memorandum of incorporation bearing the respondent's date impression stamp of 05 April 2013; extracts of electronic mail exchanges of 15 October 2015 regarding service of this application on the respondent, as well as, the applicant's filing sheet to the papers.

[7] In its letter communicating the Decision to the applicant, the respondent, among others, states the following as reasons for the Decision:

> "The contents of your above mentioned letter and the motivation on why the contents of the annual financial statements should be kept confidential from your competitors and as per the Tax Administration Act, has [sic] been noted.
>
> However, the Companies Act…71 of 2008 …has as one of its policy objectives, corporate transparency and high standard of corporate governance. Corporate transparency according to RM Bushman and AJ Smith, entails that there should be widespread availability of relevant, reliable information about the periodic performance, financial position, investment opportunities, governance, value and risk of companies. Corporate transparency is therefore a key element of ensuring good corporate governance as it enables evaluation of a company and board performance. Section 187(4)(c) lists the following as a function of the Commission, viz. "The Commission must make the information in those registers efficiently and effectively available to the public, and to other organs of state."
>
> The New Reclamation Group (Pty) Ltd as a company with a public interest score above 350, it has a social and economic significance and owes accountability to the public, public [sic] includes creditors; employees; customers; potential investors; shareholders; directors; prescribed officers and regulators, etc. Information presented in the annual financial statements and with the International Financial Reporting Standards informing [sic] the disclosures to be made by all such companies.
>
> In order to ensure that there is attainment of the policy objectives of the Companies Act…being corporate transparency and high standard of corporate governance, your claim for confidentiality in terms of Section 212 of the Companies Act is therefore not granted.
>
> Companies with regards to the submission of Audited or Independently Reviewed Financial Statements for the New Reclamation Group (Pty) Ltd for the last three financial years is required as was requested by Mr C Zwane of our

> Office. Continued failure to comply in this regard may lead to a formal investigation as prescribed in Section 169 of the Companies Act and possible sanctions as prescribed in Section 171 of the same Act."
>
> [underlining added for emphasis]

[8] It appears from the above that, the applicant didn't assert the Confidentiality Claim over the AFS whilst voluntarily complying with the relevant statutory provisions, but only did so after the respondent requested the applicant to file the AFS.[10] The respondent appears to be even contemplating instituting an investigation against the respondent in this regard.[11] But, whether or not the applicant was prompted to make the Confidentiality Claim is not relevant for a decision to be made herein. What is relevant are the grounds given by the applicant regarding its dissatisfaction with the Decision by the respondent, besides other issues to be dealt with later. The grounds of review are considered next.

Grounds of review

[9] The applicant's grounds of review and other information provided by way of background possibly to put context to the Confidentiality Claim, read as follows in the material part:

> "10. Reclam operates in the recyclable materials industry. The industry incorporates a wide range of activities involving the purchasing, collection, processing and trading of various recyclable materials.

[10] See last paragraph of the Decision quoted under par 7 above.
[11] *Ibid.*

11. Reclam is the leading producer in South Africa of recycled ferrous and non-ferrous metals. Reclam operates more than 70 collection, processing and production sites.

12. The recycling process in regard to the ferrous and non-ferrous metals commences with obtaining recyclable metals from a supplier. Recyclable ferrous and non-ferrous metals are supplied by Reclam to local and international manufacturers of metal products, ranging from steel, stainless steel, cast iron, copper, lead, zinc aluminium and tin. The recycling industry in regard to ferrous and non-ferrous metals is highly competitive.

13. Reclam is concerned that the disclosure of the AFS [i.e. audited financial statements] to the public will enable competitors of Reclam to ascertain the profit margin on Reclam's recyclable ferrous and non-ferrous metals and the price at which it procures and sells those products.

14. The AFS discloses Reclam's businesses' turnover and expenditure figures. Reclam's concern is that disclosure of the AFS to competitors will enable those competitors to discern Reclam's purchase and selling prices of recyclable ferrous and non-ferrous metals and Reclam's profit margin on those products. Knowing this information will enable competitors to adjust their margins and offer more competitive prices to suppliers and buyers of recyclable metals. It will result in Reclam's suppliers being offered higher purchase prices for their recyclable metals and Reclam's customers being offered lower selling prices for recyclable metals.

15. The cost at which Reclam buys and sells recyclable metals is not public knowledge nor is its profit margin. Knowing this information will be of value to competitors (it is information capable of application in trade). The information is valuable to Reclam since its disclosure to competitors will likely be detrimental to Reclam.

…

17. I submit, with respect, the Commission, in making its decision in terms of s 212(3) of the Act that the AFS is not confidential information, had regard to irrelevant information in determining the question of confidentiality, and failed to

consider relevant information, being the nature of **the information contained in the AFS** and whether the information was of a confidential nature.

18. The request to declare the AFS to be confidential was rejected on the basis of the Commission's conclusion that corporate transparency outweighed the request for confidentiality. That, with respect, amounted to a failure to consider the nature of the information in question and **whether the information in the AFS is of a confidential nature.** The question of the importance of corporate transparency is separate from the question whether information possesses qualities which make it confidential and qualifies to be treated as such in terms of s 212 of the Act. "[12]

[underlining and bold ink added for emphasis]

[10] The respondent is not taking part in these proceedings. No other document apart from the Decision appears to be from the respondent.[13] However, a review in terms of section 172 of the Companies Act actually doesn't provide for the decision maker, like the respondent, to make any representations, but only the applicant.[14] Be that as it may, I am satisfied that this application was adequately served on the respondent and will determine same on the basis or merits of the papers filed.[15] This will follow the discussion of the applicable legal principles to which I now turn.

[12] See pp 3-5 of the supporting affidavit.
[13] See footnote 9 above.
[14] See par 14 below for a reading of section 172 of the Companies Act.
[15] See regulation 153 of the Companies Regulations, which reads as follows: "(1) If a person served with an initiating document has not filed a response within the prescribed period, the initiating party may apply to have the order, as applied for, issued against that person by the Tribunal. (2) On an application in terms of sub-regulation (1), the Tribunal may make an appropriate order— (a) after it has heard any required evidence concerning the motion; and (b) if it is satisfied that the notice or application was adequately served. (3) Upon an order being made in terms of sub-regulation (2), the recording officer must serve the order on the person described in subsection (1) and on every other party."

Applicable legal principles

[11] The applicant contends that based on the abovementioned grounds, the Decision is wrong in not allowing the Confidentiality Claim in terms of section 212 of the Companies Act. Section 212 reads in the material part:

> "(1) When submitting information to the Commission, … the Companies Tribunal…, a person may claim that all or part of that information is confidential.
> (2) Any claim contemplated in subsection (1) must be supported by a written statement explaining why the information is confidential.
> (3) The Commission,… Companies Tribunal … must-
> (a) consider a claim made in terms of subsection (1); and
> (b) as soon as practicable, make a decision on the confidentiality of the information and access to that information, and provide written reasons for that decision.
> (4) Section 172, read with the changes required by the context, applies to a decision in terms of subsection (3).
> (5) When making any ruling, decision or order in terms of this Act, the Commission…, the Companies Tribunal … may take confidential information into account.
> (6) If any reasons for a decision in terms of this Act would reveal any confidential information, the Commission …, the Companies Tribunal … as the case may be, must provide a copy of the proposed reasons to the party claiming confidentiality at least 10 business days before publishing those reasons."
>
> [underlining added for emphasis]

[12] I hasten to point out, while I have the wording of this provision in clear sight that, in my view, section 212 clearly provides for a ruling on a claim for confidentiality by a person before, among others, the Commission or this Tribunal, on the basis of submitted information. This much I gather from the introductory part of section 212(1), which is

foreworded: "When submitting information". But, I will deal with this in more detail below.

[13] Section 213 of the Companies Act appears to be directly linked to section 212, although the former is located under Part A (dealing with offences and penalties) of Chapter 9 of the Companies Act.[16] It provides for breach of confidence in respect of confidential information obtained in terms of provisions of the Companies Act. Therefore, section 213 has apparent relevance to the discussion of the facts of this matter. It reads in the material part:

> "**213. Breach of confidence**
> (1) It is an offence to disclose any confidential information concerning the affairs of any person obtained-
> (a) in carrying out any function in terms of this Act; or
> (b) as a result of initiating a complaint, or participating in any proceedings in terms of this Act.
> (2) Subsection (1) does not apply to information disclosed-
> (a) as contemplated in section 206(2)(e)(i) or (ii) or 212(5) to (7);
> (b) for the purpose of the proper administration or enforcement of this Act;
> (c) for the purpose of the administration of justice;
> (d) at the request of the Commission, the Panel, an inspector or investigator, the Companies Tribunal, or a court entitled to receive the information; or
> (e) when required to do so by any court or under any law."

I will deal with the relevance of this provision later below.

[16] Section 212 is in Part E (Administrative provisions applicable to Agencies) of Chapter 8 (Regulatory Agencies and Administration of Act) of the Companies Act.

[14] Back to other legal principles of relevance. As indicated above, this application is a review contemplated by section 172 of the Companies Act. This statutory provision reads in the material part:

> "(1) Any person issued with a compliance notice in terms of this Act may apply to the Companies Tribunal in the case of a notice issued by the Commission…to review the notice within –
> (a) 15 business days after receiving that notice; or
> (b) such longer period as may be allowed on good cause shown.
> (2) After considering any representations by the applicant and any other relevant information, the Companies Tribunal… may confirm, modify or cancel all or part of a compliance notice.
> (3) If the Companies Tribunal … confirms or modifies all or part of a notice, the applicant must comply with that notice as confirmed or modified, within the time period specified in it, subject to subsection (4).
> (4) A decision by the Companies Tribunal … in terms of this section is binding, subject to any right of review by or appeal to a court."
>
> [underlining added for emphasis]

[15] The nature and extent of the review are, in my view, demarcated by the inclusion of the words: "considering any representations by the applicant and any other relevant information". It appears as if the review jurisdiction of this Tribunal may be in the wider sense of the process, as the Tribunal appears to be at large to consider any other relevant information.[17] But, this ought not to be construed a ruling or binding characterisation of the review process of this Tribunal. There is no need for such ruling for current purposes.

[17] See generally *Herbstein and Van Winsen The Civil Practice of the High Courts of South Africa* 5th ed (Juta Cape Town 2009) (*Herbstein and Van Winsen*) at 1265-1294.

[16] Further, the outcome of the review process could be either to "confirm, modify or cancel all or part of" the Decision made by the respondent.[18] This also alludes to whether the review is of a narrow or wider sense.[19] But again, the issue doesn't arise for determination in this application. Issues to be determined in this review are discussed next, primarily against the abovementioned legal principles.

Grounds of review and applicable legal principles (a discussion)

[17] The essence of the applicant's objection to the Decision is that the respondent should have found that the information contained in the AFS constitutes confidential information. The Companies Act (or its accompanying Companies Regulations) does not explain what constitutes "confidential information" (or cognates of the word "confidential" like confidentiality). Tools of interpretation are made available in the decision of *National Joint Municipal Pension Fund v Endumeni Municipality.*[20] But, there is no need for current purposes to delve further in this.

[18] As indicated above, the applicant's Confidentiality Claim is predicated upon multiplicity of grounds.[21] In summarised form, the grounds include that, (1) the AFS contain "price sensitive information" which could be used by competitors to the applicant's detriment; (2) the AFS contain taxpayer information as defined by section 67

[18] See section 172(2) quoted under par 14 above.
[19] See *Herbstein and Van Winsen* at 1287-1289.
[20] 2012 (4) SA 593 (SCA) (*Endumeni*) at par 18. See further *Cross-Border RDA v Central African Road Surfaces* 2015 (5) SA 370 (CC) at par 22; *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) at footnote 105;
[21] See par 9 above.

of the Tax Administration Act, 2011;[22] (3) the disclosure of financial and commercial information contained in the AFS would harm applicant's commercial or financial interests; create disadvantages for the applicant in respect of contractual or other negotiations with customers and suppliers in relation to competitors, and (5) disclosure would, in general, provide competitors with insight, ordinarily unavailable, into the applicant's business, with resultant irreparable harm to the applicant and its stakeholders.

[19] In order to determine whether or not there is merit in the applicant's grounds of review, one would have to consider the nature and substance of the information in the AFS. This, in my view, is a factual inquiry and therefore depends on the specific contents of the AFS. It is not a generic inquiry or something done in a vacuum. Also the applicant's *ipse dixit* is not sufficient for the determination to be made by the Commission or this Tribunal, as the decider of fact.[23] The AFS need to be available to the decider for him or her or it to make the necessary informed determination.

[22] Section 67 of the Tax Administration Act 28 of 2011 reads: "(1) This Chapter applies to— (*a*) SARS confidential information as referred to in section 68 (1); and (*b*) taxpayer information, which means any information provided by a taxpayer or obtained by SARS in respect of the taxpayer, including biometric information. (2) An oath or solemn declaration undertaking to comply with the requirements of this Chapter in the prescribed form, must be taken before a magistrate, justice of the peace or commissioner of oaths by— (*a*) a SARS official and the Tax Ombud, before commencing duties or exercising any powers under a tax Act; and (*b*) a person referred to in section 70 who performs any function referred to in that section, before the disclosure described in that section may be made. (3) In the event of the disclosure of SARS confidential information or taxpayer information contrary to this Chapter, the person to whom it was so disclosed may not in any manner disclose, publish or make it known to any other person who is not a SARS official. (4) A person who receives information under section 68, 69, 70 or 71, must preserve the secrecy of the information and may only disclose the information to another person if the disclosure is necessary to perform the functions specified in those sections. (5) The Commissioner may, for purposes of protecting the integrity and reputation of SARS as an organisation and after giving the taxpayer at least 24 hours' notice, disclose taxpayer information to the extent necessary to counter or rebut false allegations or information disclosed by the taxpayer, the taxpayer's duly authorised representative or other person acting under the instructions of the taxpayer and published in the media or in any other manner."

[23] See par 28 below.

[20] Further, on a reading of section 212 of the Companies Act, this very same provision can only be invoked when a person submits information to the Commission or this Tribunal. It cannot be invoked before, let alone in respect of documents which may only exist in the future. In this matter, it is common cause that, the applicant is required to submit the AFS in compliance with section 33(1)(a), read with regulation 30(2). Therefore, the applicant is indeed required to submit some information and as such this jurisdictional fact of section 212 is met. Further, in terms of section 212 the claim of confidentiality is made by providing a "written statement explaining why the information being submitted is confidential".[24] But, the applicant has not submitted the AFS and as such there was no information before the Commission when the Decision was made and there is currently no information before this Tribunal for purposes of review of the Decision. Therefore, in my view, the relevant jurisdictional fact is not triggered to entitle the applicant to invoke provisions of section 212. The applicant prematurely made the Confidentiality Claim before submission of the AFS to the respondent. Put differently, the Commission, being the respondent herein, was asked to rule on something which did not exist or was only in contemplation. But, as we have it, the respondent did in fact decide that the information had to be disclosed, mainly, for reasons to do with transparency and accountability.[25] But, I must respectfully say, I have never come across a better example of the proverbial putting the cart before the horse. This, in my view, is not within the contemplation of section 212. The legislature, as I understand the provision, had intended that companies or any other persons use the provision when submitting whatever information required in terms of the Companies Act considered to

[24] See section 212(2) quoted in par 11 above.
[25] See par 7 above.

be or to include confidential information. The determination of confidentiality is made within the framework of the Companies Act and is to assist those affected in ensuring that they are not adversely affected by their compliance with the Companies Act.

[21] For all those concerned about parting with their perceived confidential information, section 212 has internal safeguards regarding the handling of the perceived confidential information. These safeguards are, in the main, represented by the right to review in terms of section 172 ushered in by section 212(4), which the applicant evidently invoked. The external (to section 212, that is) safeguards include section 213, referred to above, which proscribes the disclosure of information in breach of confidence.[26] But there is more. For example, both the Commission (the respondent herein)[27] and this Tribunal[28] are specifically enjoined from divulging confidential information or directed how to handle such information.

---

[26] See par 13 above.

[27] See, among others, sections 187(5) and (6) which read in their material part: (5) Subject to the provisions of subsections (6) and (7), any person, on payment of the prescribed fee, may- (a) inspect a document filed under this Act; (b) obtain a certificate from the Commission as to the contents or part of the contents of any document that- (i) has been filed under this Act in respect of any company; and (ii) is open to inspection; or (c) obtain a copy of or extract from any document contemplated in paragraph (b); or (d) through any electronic medium approved by the Commission (i) inspect, or obtain a copy of or extract from, any document contemplated in paragraph (b) that has been converted into electronic format; or (ii) obtain a certificate contemplated in paragraph (b). (6) Subsection (5) does not apply to any part of a filed document if that part has been determined to be confidential, or contain confidential information, in accordance with section 212." [underlining added for emphasis]

[28] See section 180 of the Companies Act, which reads in the material part: "(2) If adjudication proceedings before the Tribunal are open to the public, the Tribunal may exclude members of the public, or specific persons or categories of persons, from attending the proceedings- (a) if evidence to be presented is confidential information, but only to the extent that the information cannot otherwise be protected…"; section 206(2) of the Companies Act which says in the material part: "A member of the Companies Tribunal … must not- (a) …(d) make private use of, or profit from, any confidential information obtained as a result of performing that person's functions as a member of the Companies Tribunal …; or (e) divulge any confidential information referred to in paragraph (d) to any third party, except as contemplated in section 212(6)…" See further regulation 149(5)(a) of the Companies Regulations, which reads in the material part: "(5) At a pre-hearing conference, the assigned member of the Tribunal may— (a) establish procedures for protecting confidential information, including the terms under which participants may have access to that information…" and regulation 177 regarding access to information.

[22] This is only logical as the Companies Act is pivoted, among others, on purposes aimed towards the promotion of the development of the South African economy by "encouraging transparency and high standards of corporate governance"[29] and in order to "encourage the efficient and responsible management of companies".[30] The submission of audited financial records for private companies (with public interest score above the designated threshold) is considered to be in the public interest.[31] But obviously the end doesn't justify the means in this regard. As indicated in paragraph 21 above, there are safeguards within the Companies Act to allay apprehensions, real or perceived, of any person in the position of the applicant. In fact, this application manifests one of such safeguards: a review of decision refusing a claim of confidentiality. Therefore, there cannot be any justification to withholding the information, including on the very basis that such information is confidential.

[23] The protections in place in respect of disclosure and accessibility of confidential information are not unique to the Companies Act. In fact, those in the Companies Act appear to have been copied from preceding legislation, like the Competition Act 89 of 1998 (the Competition Act) and the Consumer Protection Act 68 of 2008.[32]

[24] Section 44 of the Competition Act is similar in wording to (or actually the same as) section 212 of the Companies Act. Section 44 reads in the material part:

[29] See section 7(b)(iii) of the Companies Act; par 7 above.
[30] See section 7(j) of the Companies Act.
[31] See footnotes 2-4 above.
[32] See section 106 of Consumer Protection Act 68 of 2008.

"(1) (a) A person, when submitting information to the Competition Commission or the Competition Tribunal, may identify information that the person claims to be *confidential information.*

(b) Any claim contemplated in paragraph *(a)* must be supported by a written statement in the *prescribed* form, explaining why the information is confidential.

(2) The Competition Commission is bound by that a claim contemplated in subsection (1), but may at any time during its proceedings refer the claim to the Competition Tribunal to determine whether or not the information is *confidential information*.

(3) The Competition Tribunal may—

(a) determine whether or not the information is confidential; and

(b) if it finds that the information is confidential, make any appropriate order concerning access to that information."

[25] In a decision of the Competition Tribunal [which appears to involve the same applicant as herein] of *The New Reclamation Group (Pty) Ltd v The Competition Commission*[33] contentions were made, which although arising from a different factual setting, I nevertheless consider relevant for current purpose. It was said that:

> "Reclamations' [sic] case is that the Commission was not entitled to make public information submitted to it under a claim of confidentiality. This is because in terms of section 44(2) of the Act it is bound by a claim of confidentiality until the Tribunal has ruled otherwise. It is also common cause that the Commission was aware of the claim of confidentiality. Reclamation argues that it was not the Commission's function to determine the validity of its claim; it was obliged once made, to act in accordance with them and by publicising portions of the content of "GW2" in the press release it had breached its statutory duties. Reclamation claims that it has suffered reputational harm as a result of the publication and that as the press release has not been removed from the website at the time of this application, it is suffering ongoing harm."
>
> [underlining added]

[33] Unreported decision Competition Tribunal Case Number: 81/X/Jul07 of 01 August 2007.

[26] I consider it to be of no less significance the fact that in the Competition Tribunal case cited above, the applicant had submitted or made available the information on which confidentiality is claimed, but herein the same applicant appears to expect the Confidentiality Claim to be determined in the absence of alleged confidential documents. There is no need for this change of tack when dealing with a statutory provision (i.e. section 212 of the Companies Act) similarly worded as section 44 of the Competition Act. The applicant was actually required to comply with the provisions of 33(1)(a) of the Companies Act since about twelve months from 01 May 2011 already, when the Companies Act generally came into operation. But, I will allow nothing to turn on these.

[27] Other cases under the Competition Act indicate that confidentiality can also be claimed in respect of information contained in affidavits[34] or in attachments to affidavits[35] submitted before the tribunal. Therefore, there is no conceivable ground to justify a different treatment of this Tribunal, particularly considering the similarity of the enabling statutory provisions.

[28] Our Courts have also had the recent opportunity to pronounce on issues of confidentiality. In *Democratic Alliance v Acting Director of Public Prosecutions and Others*[36] the following was said regarding a party who decides what information not to produce due to a claim of confidentiality:

[34] See the unreported decision of *Nutriflo CC and Another v Sasol Limited and Others*, Competition Tribunal Case Number: 61/IR/Nov2003 of 31 March 2004.
[35] See the unreported decision of *Orion Cellular (Proprietary) Limited v Telkom South Africa Limited and Others*, Competition Tribunal Case Number:19/R/April 2003 of 24 February 2004.
[36] [2013] 4 All SA 610 (GNP).

"In my view, it is not appropriate for a court exercising its powers of scrutiny and legality to have its powers limited by the *ipse dixit* of one party. A substantial prejudice will occur if reliance is placed on the value judgment of the first respondent. To permit the first respondent to be final arbiter and determine which documents must be produced is illogical. First respondent is not an impartial stakeholder. It was a party to the SCA order. The SCA order obliges it to produce the record save where the third respondent raises confidentiality or privilege. The third respondent has not put up any case why the representations are confidential. Accordingly I fail to understand how, and on what basis the first respondent is objecting to the disclosure. Paragraph 33 of the SCA order makes it clear that the concerns of the third respondent must be addressed. No such concerns have been raised by the third respondent. In the absence of such concerns the first respondent has no right to independently edit the record. It must produce everything. To the extent that the third respondent claims confidentiality, he must set out the relevant facts why he is entitled to confidentiality. The first respondent is not entitled to accommodate the third respondent in vacuum. Sufficient basis must exist. In my view, none has been shown to exist."[37]

Further on the same Court had this to say:

"[43] In a nutshell, the argument of the applicant is that absent any cogent or plausible evidence to the contrary, the documents should be disclosed. It was further submitted any concerns raised by the third respondent relating to the confidentiality can be dealt with by making an order similar to that of *ABBM Printing & Publishing* (*Pty*) *Ltd v Transnet Ltd* 1998 (2) SA 109 (W) [also reported at [1997] 4 All SA 94 (W) – Ed] where the court dealing with the issue of confidentiality relating to commercial tenders held as follows:

"[24.2] I do not have a copy of the tender document. Part of it, such as the tender price, the tenderer's experience and expertise cannot be confidential. Other parts of it may well contain confidential information as this term is understood in the considerable case law involving confidential information and which should be

[37] See *Democratic Alliance v Acting Director of Public Prosecutions and Others* at par 29.

protected from disclosure. On the facts before me I cannot decide whether any tender contains confidential information.

…

[44] In the alternative, it was submitted that if I am disinclined to grant the order, the first respondent should be directed to produce the memoranda minutes, notes etc and delete the parts which infringes upon the confidentiality of the third respondent. In support of this, alternative argument, reliance was placed on the case of *Tetra Mobile Radio* (*Pty*) *Ltd v MEC Department of Works and others* 2008 (1) SA 438 (SCA) [also reported at [2007] JOL 20719 (SCA) – Ed] where the court *per* Mthiyane JA held as follows:

> "[14] The appellant contended that the respondents had not made out a case for reliance on confidentiality: if there was any apprehension on the part of the respondent regarding any specific document, that concern could be met by making an order similar to the one granted by Schwartzman J in *ABBM Printing & Publishing* (*Pty*) *Ltd v Transnet Ltd*, where the parts of the documents in respect of which disclosure might result in breach of confidence were to be identified and marked as confidential and the applicant's attorney was prohibited from disclosing such parts to any other party, including the applicant, save for the purpose of consulting with counsel or an independent expert. In that way a fair balance could be achieved between the appellant's right of access to documentation necessary for prosecuting its appeal, on the one hand, and the third respondent's right to confidentiality, on the other."

[45] In my view, whatever prejudice the third respondent may have can be protected by an order similar to the ABBM, which appears to be logical and on sound legal basis. However, what I find more persuasive is the order granted in the *Tetra Mobile* case (*supra*), in terms of which the third respondent would be ordered to produce the documents but record the parts which infringe upon his confidentiality. This approach finds favour with me because it does not leave the determination as to confidentiality to the first respondent or the third respondent alone. Thus, where confidentiality is claimed both parties will be required to set

> out the basis why those particular documents should not be disclosed. To deny the applicant the remedy in this case would in my view be contrary to the spirit and purport of the SCA order. The approach in *Tetra Mobile* will take into account the third respondent's right to privilege and confidentiality in relation to the specific documents."

[underlining added for emphasis]

[29] Therefore, from the authorities, it is clear that a call on whether or not information is confidential can only be reasonably made when the particular information is made available to the decider of that fact. No valid ground can exist for non-disclosure of the allegedly confidential information to the decider of fact, like the Commission or this Tribunal. For, the information is not confidential to the decider of fact, which is statutorily a non-interested agency, but to third parties. The applicant ought to have included the AFS with the letter grounding the Confidentiality Claim when submitting the documents in terms of section 212 to the respondent. The same documents ought to have been included, as part of the review process in this Tribunal. The omission is material and will be fatal to this application.

[30] My findings above do not change even on considerations of the applicant's ground of review based on section 67 of the Tax Administration Act 28 of 2011.[38] Actually, I do not consider the aforesaid provision to find application in this matter. But, even if it does section 5 of the Companies Act would apply to the extent that there is

[38] See footnote 22 above.

inconsistency between the two pieces of legislation.[39] However, I can hardly imagine this ground being valid for non-disclosure of audited financial statements. For every company required to file audited financial statements would object on the basis that same constitute disclosure of taxpayer information. It would be easy to scupper the intended statutory objective. With respect, I think the legislature deserves more credit than the submissions on behalf of the applicant suggest.

Conclusion

[31] Against the background of what is stated above I agree that the Decision ought to be interfered with. Obviously as I have already indicated this outcome is not on the basis of submissions made on behalf of the applicant. I have stated above that the respondent reached the Decision without the impugned AFS, but only on the basis of the applicant's say so. This is not the proper exercise of the respondent's powers in terms of section 212 of the Companies Act. The respondent had to have had unhindered access to the material in respect of which its decision is required to be made. The same applies to this Tribunal. Therefore, absent such material there is no rational basis on which the Decision was made and as such the Decision is invalid and ought to be set aside.[40] To employ the parlance in section 172 the Decision is cancelled. Unfortunately, as a creature of statute, this Tribunal's jurisdiction doesn't include the power to refer the matter back to the Commission for a re-run of the process, after setting the Decision aside. But a state of *limbo* is not possible.

---

[39] Section 5(4) provides: " If there is an inconsistency between any provision of this Act and a provision of any other national legislation- (a) the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second…"

[40] See *Pharmaceutical Manufacturers Association of SA and Others; In Re: Ex Parte Application of President of the RSA and Others* 2000 (3) BCLR 241 (CC) for a reading on the rationality test.

[32] To avoid doubt, the effect of the cancellation or setting aside of the Decision is that the applicant has to file the AFS or to commence the process for claiming confidentiality over the AFS in terms of section 212 *de novo*. For, in the absence of the Decision, nothing stops the respondent from proceeding against the applicant in terms of the relevant provisions of the Companies Act, should the respondent be so minded.

[33] Before I conclude let me record this. In the unlikely event that the applicant had submitted the impugned AFS (obviously this would not include those in respect of future financial years) when lodging its papers in terms of which the Confidentiality Claim was raised, but that the AFS were only inadvertently or deliberately for some reason omitted from the papers of this Tribunal, then the application may be relaunched directly with this Tribunal or the court. The new application would obviously have to be accompanied by a substantive explanation for the omission and condonation for the delay in the launch thereof.

[34] I mention what appears above quite mindful of the applicant's right to appeal or review this Tribunal's decision to court in terms of section 172(4) of the Companies Act.

Order

[35] In the premises the following order is made:

(a) the application for review of the decision of the respondent [contained in the respondent's letter of 16 September 2015 under reference: 2005/041029/07 addressed to the applicant] is upheld, albeit for other reasons;

(b) the decision of the respondent [contained in the respondent's letter of 16 September 2015 under reference: 2005/041029/07 addressed to the applicant] is reviewed and set aside or cancelled, and

(c) the registrar of this Tribunal is requested to bring this order and reasons therefor to the attention of the respondent.

_____

Khashane La M. Manamela

Member, Companies Tribunal

10 October 2016