IN THE COMPETITION APPEAL COURT

CAC CASE NO. 38/CAC/JAN04

TRIBUNAL CASE NO. 19/IR/APRIL03

In the matter between:

Telkom SA Limited **Appellant**

And

Orion Cellular (Pty) Ltd **First Respondent**
Standard Bank of South Africa Ltd **Second Respondent**
Edgars Consolidated Stores Ltd **Third Respondent**

JUDGMENT:

DAVIS JP

Introduction.

This is an appeal against an order and decision of the Competition Tribunal ('the Tribunal') dated 23 December 2003 and a further order dated 24 February 2004 in which two interlocutory applications brought by first respondent against appellant were granted.

In its first application of 17 September 2003, first respondent sought the disclosure of all signed and/or unsigned documents concluded or exchanged between appellant, second and third respondents. This application has been referred to in these proceedings as the 'production application'. In a second application of 14 November 2003, first respondent sought access to the same documents in terms of section 45 of the Competition Act 89 of 1998 ('the Act'). This application has been referred to in these proceedings as the 'section 45 application'.

The factual background.

During April 2003 first respondent submitted a complaint regarding anti-competitive conduct by appellant to the Competition Commission ('the Competition') in terms of

section 49 B of the Act. Simultaneously it launched an application for interim relief against appellant in terms of section 49 C of the Act. First respondent contended in its complaint and its interim relief application that appellant had exploited its position as the sole provider of land line telecommunication services in South Africa to induce the customers of first respondent to terminate their agreements with first respondent for the connection of calls from fixed phones to cell phones and to contract with appellant instead for these and various other bundled telecommunication services. Central to both first respondent's complaint and its interim relief application were agreements that appellant concluded with customers of first respondent, including second and third respondents. According to first respondent, these agreements were evidence of anti competitive conduct.

In its answering affidavit in the interim relief proceedings, appellant contended that its contract with second respondent was of a confidential nature and accordingly could not be disclosed to first respondent. It was only prepared to make a copy of this agreement available to first respondent's attorneys and then subject to a confidentiality undertaking. As regards its agreement with third respondent, appellant stated that this agreement was only in draft form and was still subject to finalization.

Upon signing a confidentiality undertaking, first respondent's attorneys examined the agreement with second respondent and determined, in their view, that its contents were not confidential and in any event were pivotal to, and determinative of, first respondent's complaint against appellant. Accordingly, they contended that these documents constituted material evidence which should be placed before the Tribunal for the purposes of its determination of the complaint and interim relief application.

Upon a refusal by appellant to disclose this agreement, first respondent brought the production application. In its answering affidavit in the production application, appellant stated that in order to assist the Tribunal in assessing the allegation, it was attaching copies of the agreements to its answering affidavit under a Form CC 7 claim of confidentiality. In terms of the Form CC7, appellant claimed confidentiality in respect of the entire contents of both second and third respondent agreements and also the annexures thereto.

The attachment of these agreements to appellant's answering affidavit in the production

application gave rise to a further application by first respondent for access to these documents; this time in terms of section 45 of the Act. Specifically, first respondent requested the Tribunal to order, in terms of section 45 of the Act, that information referred to in appellant's Form CC7 was not confidential and thus should be made available to first respondent. This relief was also resisted by first respondent, essentially on the same grounds as it had opposed the production application.

Both applications were heard by the Tribunal on 15 December 2003. The Tribunal found for first respondent and ordered that information contained in the two agreements was not confidential, save that the allegedly confidential information was (on an interim basis) to be treated as confidential. It further ordered that appellant be directed to provide copies of both agreements to first respondent's attorneys subject to certain conditions, being:

1. These agreements could be disclosed to first respondents directors, officials, counsel, experts in consultants only and to no other persons;
2. Such disclosure was for the purpose of pursuing the interim relief application and any related interlocutory litigation, but for no other purpose; and
3. all the recipients were required to sign written confidentiality undertakings.

Appellant has appealed the decision of the Tribunal, specifically on the basis that the Tribunal erred in ordering that the information of the agreements could be disclosed to directors and other officials of first respondent as well as first respondent's consultants. Appellant avers that the Tribunal ought to have ordered that the confidential information should only be disclosed to respondent's legal representatives and independent experts identified by first respondent. Furthermore appellant contends that the Tribunal erred in ordering that the two agreements attached to appellant's answering affidavit in the section 45 application and identified in the order as confidential could be disclosed to directors and

other officials of first respondent as well as the first respondent's consultants. Similarly, it contends that the Tribunal should have ordered that this information be disclosed only to first respondent's legal representatives and independent experts identified by first respondent.

The Right of Appeal to this Court.

When this matter first came before this Court on June 14 2004, the question arose as to whether the decision of the Tribunal was appealable to this Court. The matter was then postponed until 29 July 2004 at which hearing, this particular issue became the central point of argument. Before any consideration can be given to the merits of the appeal the question of the appealability of the Tribunal's decision must be decided.

This question requires an analysis of the Act's treatment of confidential information.
Confidential information is defined in section 1 of the Act, as meaning 'trade, business or industrial information that belongs to a firm, has a particular economic value and is not generally available to or known by others'.
Confidential information is dealt with in part A of Chapter 5 of the Act. For the purposes of this dispute, sections 44 and 45 are of particular relevance.
Section 44 provides as follows:

'(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 a claim contemplated in sub-section (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.'

Section 45 provides as follows:

'(1) A person who seeks access to information that is subject to a claim that it is *confidential information* may apply to the Competition Tribunal in the *prescribed* manner and form, and the Competition Tribunal may –

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

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

2) Within 10 business days after an order of the Competition Tribunal is made in terms of section 44(3), a party concerned may appeal against that decision to the Competition Appeal Court, subject to its rules

3) From the time information comes into the possession of the Competition Commission or Competition Tribunal until a final determination has been made concerning it, the Commission and Tribunal must treat as confidential, any information that –

(a) the Competition Tribunal has determined is *confidential information*; or

(b) is the subject of a claim in terms of this section.

4) Once a final determination has been made concerning any information, it is confidential only to that extent that it has been accepted to be *confidential information* by the Competition Tribunal or the Competition Appeal Court.'

The structure of this part of the Act can be summarized thus:

Any person submitting information to the Commission or to the Tribunal may identify some or all of that information to be classified as confidential. Once this claim of confidentiality has been made, the Commission can itself dispute the claim in terms of section 44(2) of the Act or the Tribunal may itself make a determination regarding the claim and accordingly make an appropriate order in terms of section 44(3)(b).

Section 45 gives the right to 'a person who seeks access to information that is subject to a claim that is confidential information' to apply in a prescribed manner to the Tribunal for disclosure of such information. The Tribunal has the power to decide whether the information is confidential and, if so, it may then decide how disclosure should be managed.

There is no express right of appeal from a decision in respect of an application brought in terms of section 45(1). To the extent that there is reference to a right of appeal, section 45(2) provides for an appeal only in cases where a decision has been made in terms of section 44(3) and then, it would appear, in cases in which the Commission has referred the claim of confidentiality to the Tribunal in terms of section 44(2).

The present case.

In the present case, the Tribunal's decision was not made in response to a referral of the claim for confidentiality in terms of section 44(2). The first application, being the production application, concerned the discovery in the application for interim relief of agreements which had been concluded between appellant and second and third respondents. The second application, referred to as the section 45 application, was launched by first respondent expressly in terms of section 45(1) of the Act.

On a reading of the express wording of section 45(2), it is clear that no right of appeal is given to appellant in respect of either of the two applications. Mr Unterhalter who appeared together with Mr Wesley on behalf of appellants, submitted however that section 45(2) of the Act refers to a right of appeal in respect of decisions made by the Tribunal in terms of s 44(3). He submitted that this confirms that a right of appeal exists in respect of decisions on confidentiality made in terms of s 44(3). In his view, the purpose of the section is not to confer a right but simply to regulate the time period within such an appeal must be brought. On this basis, the purpose of s 45(2) is no more than an expression of legislative concern that appeals against decisions made during the Commission's investigations are brought expeditiously in order to facilitate the investigations of the Commission.

Mr Unterhalter contended that a finding that there is a right of appeal from decisions made in terms of s 44(3) but not in terms of s 45(1) would render the Act arbitrary in its operation. In his view, subsections 44(2) and 44(3) provide a special regime for the determination of whether information is confidential during the course of investigations by the Commission. This is the meaning of the phrase '*at any time during its proceedings'*. In those cases where the Commission has referred a complaint to the Tribunal the proceedings become those of the Tribunal, not of the Commission.

The general regime for the determination of the confidentiality of information in litigation before the Tribunal is contained in s 45. Mr Unterhalter submitted that it could not have been the intention of the legislature to confer a right of appeal in respect of the specific regime created in s 44, at the preparatory stage, and not the general regime set out in s 45(1), during the subsequent hearing itself. He contended that the arbitrariness of such a regime is highlighted by the fact that a right of appeal has been expressly conferred in respect of decisions made by the Tribunal in terms of s 45 A(2), that is an appeal against a decision of the Tribunal which reveals confidential information in its decision.

The effect of Mr Unterhalter's submission would be to read into section 45(2) the words 'or section 45(1)' after the words section 44(3). To read in these words would, in effect, give rise to an appeal both in respect of a decision taken by the Tribunal in terms of section 44 and section 45(1). This would ignore the difference between the two situations contemplated. Section 44 is concerned with the communication to a third party by the Commission or Tribunal of information that they have acquired from an informant. Section 45 is concerned with a third party's right to acquire information already held by the Commission or Tribunal; the first deals with a claim of confidentiality; the second with the access by a third party of information already subject to a claim of confidentiality.

Section 45(2) is connected to the first procedure and effectively the process of a claim to confidentiality as set out in section 44. Section 45(2) gives a party the right to challenge a decision of the Tribunal to whether information is confidential and if so, how such information could be accessed. In my view, there is a clear difference between a procedure in which information is classified as confidential and a mechanism whereby a third party can lay claim to information of another which has already been so classified.

Mr Unterhalter thus submitted that, were a construction of section 45 to be adopted whereby appeals were confined to decisions taken in terms of section 44(3), the legislative procedure would be arbitrary in its operation. Mr Brassey, who appeared together with Mr Wilson, on behalf of respondents, contended that an order made under section 44(3) is made by one organ in the hierarchy of anti competition regulators, being the Tribunal in respect of a decision of another regulator, being the Commission. Concerns of public perception and consideration of regularity made it important that the two bodies remain independent and that their adjudicative dealings be clearly transparent. The provision of a mechanism for scrutiny by a Court of their interactions **per se** ensures that this imperative of policy is safeguarded. For these reasons, Mr Brassey contended, the grant of a right of

appeal only in respect of decisions taken in terms of section 44(3) was based on sound policy grounds..

Whatever the policy considerations for providing a specific appeal in respect of a section 44 claim as opposed to section 45 claim, it is extremely dangerous to speculate on the intention of the legislature when this Court is asked to depart so markedly from the express wording of a section. See **Summit Industrial Corporation v Claimants against the Fund comprising the Proceeds of the Sale of M V Jay Transporter** 1987 (2) SA 583 (A) at 596 J-597 B.

Appellants argument amounts to a claim of a **casus omissus.** However an interpretation based on an appeal in respect of one procedure and the absence thereof in respect of an entirely different procedure does not give rise to so glaring an error, so unfortunate a consequence, that if it can be confidently concluded that Parliament had overlooked a right of appeal in respect of the one procedure, being the claim by a third party to confidential information.

A General Right of Appeal.

Section 37(1) of the Act provides that the Competition Appeal Court may –

a) review any decision of the Competition Tribunal; or

b) consider an appeal arising from the Competition Tribunal in respect of –

(i) any of its final decisions, other than a consent order made in terms of section 63; or

(ii) any of its interim or interlocutory decisions that may, in terms of that be taken on appeal.

In the alternative appellant relied on a residual right of appeal in terms of s 37(1). This argument appears to accept the inapplicability of the express provisions, namely section 44 and 45 of the Act in conferring a right of appeal against orders pertaining to a claim for confidential information by a third party.

Mr Unterhalter submitted that a decision on confidentiality in terms of section 45(1) of the

Act is 'a final decision' in terms of section 37(b)(i) of the Act and that the Tribunal's decision was appealable, notwithstanding that section 45 might not specifically confer such a right.

Mr Unterhalter submitted that the decision of the Tribunal in the present case effectively amounted to a final decision. The inroads made on appellant's right of confidentiality by an order compelling disclosure of such information were substantial and irreversible. In his view, confidentiality once lost, cannot be restored. As was held in **Southern African Motor Industry Employers Association v South African Bank of Athens Ltd** 1980 (3) SA 91 (A) at 96 H, in determining whether an order is final it is important to bear in mind that 'not merely the form of the order must be considered but also predominantly its effect'. Recently, in **Metlika Trading Limited and 4 Others** v **CSARS (**unreported decision of the Supreme Court of Appeal case No. 427/03) an order was granted by the High Court that the respondent take all necessary steps to procure the return of an aircraft to South Africa. The order was stated to be an interim order pending the finalization of an action by the respondent against some of the appellants. The question arose as to whether such an order was appealable on appeal. **Streicher JA** said 'The order that steps be taken to procure the return of the aircraft to South Africa, as well as the other orders relating to the aircraft, were intended to have immediate effect, they will not be reconsidered at the trial and will not be reconsidered on the same facts by the court **a quo**. For these reasons they are in effect final orders'. (at para 24).

This approach sought to follow the well known test laid down in **Zweni v Minister of Law and Order** 1993(1) SA 523 (A) at 536 B where the Appellate Division held that a decision is only appealable if it complies with three attributes, being that the order is final, that it has definitive of the right to the parties and has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

The decisions in **Metlika, supra** which dealt with an appeal against an order to return an aircraft to South Africa and **Macosand v Macassar Land Claims Committee and Others** (unreported decision of Supreme Court of Appeal case No. 594/03) which dealt with an appeal against an interim interdict preventing the undertaking of further mining operations, effectively for a lengthy period, are clearly distinguishable from the facts of this case. The present dispute deals with a question of procedure which is inextricably limited to the manner in which the primary dispute between the parties will be litigated. Compare in this connection the judgment of **Cloete JA** in **Mantruck & Bus (SA) v Dorbyl Ltd** 2004 (5) SA 226 (SCA) at para 21. In short, the present dispute does not comply with the **Zweni** test and is thus not a judgment or order which is appealable.

Even if a decision is an interim or interlocutory it 'may, be taken on appeal' but only if

the Act so provides (section 37(1)(b)(ii). Certain interim or interlocutory decisions can be taken on appeal, where the Act so specifies such as, for example, in section 49 C(7). However, for the reasons already given, the Act does not grant any specific right of appeal to an aggrieved party where the Tribunal has provided access to confidential information under section 45(1).

For these reasons, the appeal is dismissed with costs including the costs of two counsel.

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DAVIS JP

I agree

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SELIKOWITZ JA

I agree

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MAILULA AJA