CompTribOrion001

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case no.19/R/April 2003

In the matter between:

Orion Cellular (Proprietary) Limited	**First Applicant**
and	
Telkom South Africa Limited	**First Respondent**
The Standard Bank of South Africa Limited	**Second Respondent**
Edgars Consolidated Stores Limited	**Third Respondent**

DECISION

Introduction

This case deals with the protection given to confidential information under the Competition Act, and with circumstances in which the Tribunal may order that access to a firm's confidential information be provided to a competitor.

Following a hearing on 15 December 2003, an order in the matter was issued on 23 December 2003. The reasons for the order follow.

Factual background

Two applications with overlapping subject-matter which were heard on 15 December 2003 are to be decided. The parties to them are identical. The applicant, Orion Cellular (Pty) Ltd ("Orion"), is a company which provides services to users of telephone systems, and in particular provides a least-cost routing system for cellular-to-cellular telephone calls. The first respondent is Telkom SA Limited ("Telkom"), a listed company which has a statutory monopoly in landline telephone communications in South Africa. The second respondent is The Standard Bank of SA Limited ("Standard Bank"), the banking arm of a listed financial services group. The third respondent is Edgars Consolidated Stores Limited ("Edcon"), a listed retail group.

The applications are interlocutory applications in a proceeding ("the main application") which Orion has brought before the Tribunal for interim relief while a complaint brought by Orion against Telkom before the Competition Commission is being investigated. In the main application, Orion alleges, in effect, that Telkom is engaging in a campaign of predatory activities of which Orion is the victim. Orion alleges that Telkom negotiated with two of Orion's customers, Standard Bank and Edcon, and entered into agreements with both of them which undercut Orion and induced them to choose Telkom over Orion. A prime part of the alleged inducement was discounts provided by Telkom for its services. Orion alleges that the conduct of Telkom in concluding these agreements amounted to contraventions of ss. 8(d)(i) or 8(c) or 8(d)(iv) and/or 9 of the Competition Act, 1998, as amended ("the Act").

In the first application ("the production application"), dated 17 September 2003, Orion sought an order compelling the respondents to produce all signed and unsigned agreements between them in respect of the services provided by Telkom relating to the subject-matter of the main application.

In the second application ("the s. 45 application"), dated 14 November 2003, Orion claimed an order in terms of s. 45 of the Act directing that a so-called "volume and term voice discount plan agreement" dated 13 March 2003 between Telkom and Standard Bank, and a "volume and term voice discount plan agreement" between Telkom and Edcon dated 15 July 2003, be made available to Orion, and that it be declared that the information contained in these agreements is not confidential. These are in effect the same agreements as those referred to in the production application.

From the evidence it is clear that, when it filed the main application, Orion and its attorneys had not seen these agreements. By the time the production application was filed, Orion's attorneys (but not anybody at Orion) had been allowed by Telkom to inspect the agreement with Standard Bank, but subject to conditions which prevented the attorneys from making copies of the agreement or extracts from it, and also preventing them from disclosing the contents of the agreement to their client or its external consultants.

The attorneys who inspected the agreement, Messrs Stein and Scop, considered that the agreement was not confidential but that it and the Edcon agreement, which had been concluded later, were pivotal to Orion's case in the main application, and that it was essential that Orion be enabled to inspect them in order to prepare its replying evidence in the main application. Telkom had denied in its answering evidence in the main application that the conclusion of the agreements had been illegal, and there was thus a basic dispute about their effect, and this question would have to be taken further in the replying evidence.

The two interlocutory applications were opposed by Telkom, which filed affidavits setting out its attitude towards them. The applications were not

opposed by Standard Bank and Edcon, but both those companies submitted letters to the Tribunal stating that, while they would abide by the Tribunal's decision, they regarded the agreements as confidential.

Copies of the agreements were made available to the Tribunal by Telkom when it filed its answering evidence in the production application, under cover of a Form CC7 claiming confidentiality for them in terms of s. 44 of the Act.

The Form CC7 stated that confidentiality was claimed in respect of the whole of both agreements and, in each case, an annexure to the agreement. The firm owning the relevant information was said to be Telkom and its customer (Standard Bank in the case of one agreement and Edcon in the case of the other). The forms stated further in the relevant place that the nature of the economic value associated with the confidential information was that "such information is of a sensitive commercial nature and has economic value. Should the information be divulged to unauthorised parties, it would seriously prejudice the interests of the parties and their shareholders."

In making the agreements available for inspection by Orion's attorneys on the conditions outlined above, Telkom maintained that it was abiding by the principles set out by the Competition Appeal Court in ***The Competition Commission of South Africa and Unilever PLC and others*** **(case no. 13/CACJan02)**. In that case a merger was under consideration by the Tribunal and access to the record supplied by the Commission to the Tribunal was sought by the parties to the merger after the Commission had recommended conditional approval of the merger and had withheld from the parties certain information on which it had relied in formulating its recommendation. The parties to the merger wanted access in order to consider whether to challenge claims that the withheld information was confidential. The Competition Appeal Court ruled that access should be provided to the parties' legal representatives at the offices of the Commission, that the legal representatives were not entitled to reproduce the record, and that the legal representatives were to give undertakings of confidentiality to the Commission before having sight of the record.

This case is not the only litigation between the parties. We were informed at the hearing that in a High Court case heard in the Transvaal Provincial Division earlier in 2003, in which a decision had been issued some weeks before the hearing in this matter, Telkom alleged that Orion had acted unlawfully in providing to certain corporate customers a system having the capacity to route cellular-to-cellular ("CTC") calls from a customer's switchboard directly into the cellular network, thereby bypassing Telkom and hence depriving Telkom of some of its revenue. It appears that the High Court has ruled largely in favour of Orion. Its decision is, however, being taken on appeal by Telkom.

The two applications before the Tribunal were argued together and since the relief sought in them is in practice identical they are treated in the Tribunal's order and in this decision as one matter.

The questions posed to the Tribunal by both applications are whether the Standard Bank agreement and the Edcon agreement are confidential, and whether they are to be made available to Orion and others, conditionally or

otherwise.

We point out at the outset that the ***Unilever*** decision cited above takes a dispute about the confidentiality of information under consideration by the Commission or Tribunal only to the point where a potential litigant is enabled to make a decision whether there is a basis to challenge a claim to confidentiality of the information. Once that party's legal representatives have inspected the allegedly confidential document and on their advice their client proceeds with the challenge, the matter reaches another plane, and the rules in the ***Unilever*** case reach their ambital limit. Other considerations then apply.

Telkom also made a claim to confidentiality, supported by a Form CC7, in respect of paragraph 17 of its answering affidavit in the s. 45 application. A copy of this paragraph was supplied to the Tribunal but not to Orion. The claim to confidentiality in the Form CC7 contained the assertion that the information in that paragraph was owned by Telkom. The nature of the economic value of the relevant information was stated in the same wording as in the Form CC7 relating to the agreements which Telkom entered into with Standard Bank and Edcon. That wording is set out above.

Regrettably, the status of paragraph 17 was not argued by the parties' counsel on 15 December 2003, and the claim to confidentiality in regard to it was accordingly left in limbo. In order to preserve any justification which Telkom may have for it, a ruling that paragraph 17 should provisionally be treated as confidential, but subject to restricted access by Orion and its advisors, was included in the order made on 23 December 2003.

Relevant statutory provisions

Confidential information is defined in s. 1 of the Act as:

> "*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*".

S. 44 provides that a person who submits information to the Commission or the Tribunal, may identify information as confidential. Such a claim must be supported by a written statement explaining why the information is considered to be confidential. Form CC7 has been prescribed for this purpose.

In terms of s. 44(3), the Tribunal may determine whether or not the information is confidential, and if it finds that the information is confidential, may make any appropriate order concerning access to that information.

A person seeking such a determination may in terms of s. 45(1) apply to the Tribunal in the prescribed manner and form for the determination. Rule 42 of the rules for the Conduct of Proceedings in the Competition Tribunal ("the Tribunal's rules") lays down the procedure for such an application, namely the filing of a notice of motion and supporting affidavit. Until a final determination has been made concerning the status of the information, the Tribunal must, in

terms of s. 45(3) of the Act, treat the information as confidential.

Telkom made much in the proceedings of rules 21 and 28 of the Tribunal's rules. Rule 21 deals generally with the convening of pre-hearing conferences for matters which are to be heard by the Tribunal, and their subject-matter. Rule 22 sets out powers which the presiding Tribunal member at a pre-hearing conference may exercise. These include, under sub-rule 22(1))(c)(v), the power to give directions regarding the production and discovery of documents whether formal or informal. Rule 28 states that rules 21 and 22 (*inter alia*) apply to pre-hearing procedures in cases of interim relief applications.

Reference should also be made to s. 27(1)(d) of the Act, which empowers the Tribunal to make any ruling or order necessary or incidental to the performance of its functions in terms of the Act.

The parties' submissions at the hearing

Orion was represented at the hearing on 15 December 2003 by Messrs Kuper and Bhana. Mr Kuper made it clear at the outset that he and Mr Bhana had not seen the agreements in contention, and were not prepared to enter into any undertaking which paved the way for them to read the agreements but which prevented them from discussing the contents of the agreements with their client. They felt that this arrangement would place them in an invidious position and would clash with their duty to render advice to their client. Telkom's counsel, Mr Unterhalter, insisted that such undertakings be provided if Messrs Kuper and Bhana were to read the agreements. Mr Kuper said that if Telkom's requirement was upheld, he and Mr Bhana would not make the undertakings and would be forced to withdraw from the hearing while the contents of the agreements were under consideration.

This issue was debated for some time. The Tribunal made it clear that it would prefer to have Messrs Kuper and Bhana present throughout the hearing, and also made it clear that it expected Mr Unterhalter to take the Tribunal through an analysis of the agreements in order to point out why Telkom considered them to be confidential.

At the point when the contents of the agreement were about to be considered in this context, Mr Kuper announced that he and Mr Bhana had reconsidered the matter and were now prepared to make the undertakings which Telkom had insisted upon. Mr Unterhalter accepted their oral undertakings on behalf of Telkom. The hearing then proceeded on the basis that Orion's counsel and attorneys, but not directors or other officials of Orion, nor any members of the public, would be present while Telkom's counsel made his analysis of the agreements and submissions regarding them. Representatives of Standard Bank and Edcon remained in the hearing room, or were admitted to it, only while the agreements applicable to their respective companies were under discussion.

Mr Unterhalter announced that Telkom was revising its position on the contents of the agreements and would now not claim any confidentiality in the body of the agreements. The only confidentiality which Telkom would now claim lay in certain numerical data in an annexure to each of the agreements. He handed in copies of the annexures in which these data had been blocked out. He conceded that, in regard to one item of blocked-out data, namely the dates of commencement of the agreements, there was no confidentiality, but he persisted with the confidentiality claims in respect of the remaining blocked-out data. He asserted that the agreements represented the outcome of commercial negotiations that differed from customer to customer and led to different outcomes and hence different data.

The subject of discounts in an industry such as telecommunications in South Africa was, he said, inherently non-transparent. Tariffs might be set by a regulatory body, specifying maximum charges, but, he asserted, this did not oblige Telkom to disclose the nature and magnitude of discounts from those maxima which it might give to any of its customers. Any discounts given in such an industry must be regarded, he contended, as confidential. The "particular economic value" associated with this information, within the definition of confidential information in the Act, lay in the fact that the data reflected specially negotiated regimes with particular customers, achieving a competitive advantage which enabled Telkom to procure the customer at the expense of a competitor. The information was the basis on which a participant in the industry such as Telkom secured business in a competitive market.

Price-sensitive negotiations, said Mr Unterhalter, are specifically held in confidence for the purpose of determining the level at which a participant is willing to make an offering to induce a customer to switch suppliers. Once this information is made known, it offers all other participants the opportunity to enter the picture and undercut the incumbent. Its value was ultimately that "you win the business, nothing more and nothing less." There was nothing to prevent Orion, once it knew this "base price" from approaching Standard Bank and Edcon and soliciting their business by offering them suitably pitched alternative offerings. The same would apply to other competitors of Telkom such as Nashua, Autopage, M-Tel and Vodacom, which had a collective turnover of about R1.2 billion and hence represented a real competitive threat to Telkom.

Mr Unterhalter emphasised that the data in the two agreements were to some extent different, reflecting the different sizes of the periodical payments made by Standard Bank and Edcon for Telkom's telephone services, and also the give-and-take of the negotiations. He asserted that the allegedly confidential information "belonged" (in the phraseology of the definition in s. 1 of the Act) to both Telkom and its customer, Standard Bank or Edcon. He rejected the suggestion put to him by the Tribunal that there is little inherent confidentiality in the size of a firm's telephone account or, if there is such confidentiality, that

it belongs solely to the customer and not to Telkom. He claimed that information regarding the volume of business transacted with Telkom by Standard Bank and Edcon, and the projections for future volume set out in the agreements, had been "procured" or calculated by Telkom, and was "vital" to Telkom's assessment of these customers' businesses and the way in which Telkom had structured its own business.

He referred to several High Court decisions in the field of delictual unlawful competition and other fields in which information had been found to be confidential.

Apart from asserting the confidentiality of the information in contention, Mr Unterhalter went on to allege that Orion had in effect mistaken its remedy, and that it should have called upon Telkom to make the contested information available to an independent expert, such as an accountant, acting on Orion's behalf, who could have entered into a confidentiality undertaking with Telkom to use the information for the purposes of the main application and for no other purpose. The expert would be entitled to share the information with legal representatives of Orion who had made similar undertakings. This procedure, he asserted, would have been acceptable to Telkom and would have made it unnecessary for Orion's directors and other personnel to have access to the relevant information at any stage. The experts and Orion's legal representatives could between them have drawn up such papers as were necessary for Orion's case.

Orion had failed entirely, Mr Unterhalter contended, to provide evidence in its founding papers in the main application about predatory pricing. Even if Orion were permitted access to the agreements with Standard Bank and Edcon, that would not enable Orion to cure the lack of crucial information in the main application since the agreements would not disclose to Orion any information about Telkom's cost structures and, in particular, its average variable costs. Without setting out this information and demonstrating its relationship to Telkom's charges to its customers, Orion would, he asserted, be unable to make out a case of predation.

Had Orion taken the route of requesting access to the agreements by an independent expert on the basis outlined above, Orion could have awaited the expert's reports after scrutinising the agreements, and her or his recommendations on how to proceed with Orion's case. Only if the expert was "stumped" and found it essential to exchange ideas with Orion's officials, would it have been permissible and timely to bring an application to the Tribunal seeking leave for Orion's officials to have access to the agreements. This, he contended, would have been the logical route for Orion to follow after there had been compliance with the rules set out in the ***Unilever*** decision. Telkom accepted that to date there had been compliance with those rules.

Referring to the Tribunal's rules 21 and 28, Mr Unterhalter contended that the production application and the s 45 application were premature. Orion should, he asserted, have completed its evidence in the main application and then ensured that a pre-hearing conference was held in terms of the Tribunal's rules at which to press for access to the agreements in contention on the basis of the presiding Tribunal member's powers to grant discovery. Until then, its case was "unripe". In motion proceedings, in the absence of exceptional circumstances, he contended, the kind of discovery sought by Orion was not permissible since its goal was to enable Orion to make out its original case. That case should have been made out in Orion's founding papers. If Orion were now permitted access to the agreements, the evidential basis for its case would emerge only in its replying affidavits, and the courts had become irritated with this trend and had "declared war" on "unnecessarily prolix" replying affidavits. He referred in this regard to the case of ***Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another*** **[2003] 2 All S.A. 616 (SCA) at 641 para. 80.**

Mr Kuper's approach, on behalf of Orion, was that Telkom was unjustifiably resisting access to its agreements with Standard Bank and Edcon and then, in the name of confidentiality, making a virtue of that denial of access. In its evidence Telkom steadfastly averred that Orion was a "pirate" and was operating illegally – a contention which was under debate in the High Court proceedings and in which the first round of the litigation had gone in favour of Orion.

The documents to which Orion requested access could now be limited, Mr Kuper said, to Telkom's signed agreements with Standard Bank and Edcon since it had emerged that signed agreements were now in existence.

Telkom's argument about the alleged prematurity of the production application and the section 45 application was denied by Mr Kuper. It would be "purposeless" for Orion to file replying evidence in the main application without having inspected the agreements in contention, and only then pick up the cudgels to obtain access to those documents.

Telkom's original stance, as set out in its affidavits, that only Orion's legal representatives, and not any officials of Orion, should have access to the agreements, and that the case should be completed and heard by the Tribunal on that basis, would, Mr Kuper submitted, be "a travesty of a right to fair process."

The proposition advanced on behalf of Telkom at the hearing that Orion had mistakenly sought access on its own behalf to the agreement, instead of access by an independent expert, was untenable, Mr Kuper argued. What would be the position if it emerged that the only true experts were officials of Orion or of another competitor of Telkom? It was possible that the

complexities of determining average variable costs of Telkom and other necessary features of Orion's case of predation would be above the capacity of an ordinary accountant or similar witness as had been posited by Telkom, and Orion would then again be unable to present its case properly.

In the circumstances where Orion's attorneys had been permitted by Telkom to read the agreements but not take copies or extracts, nor to discuss the contents with Orion's officials, it would be impossible for those legal representatives to give meaningful advice to Orion. They would be hamstrung at every turn by their obligations of confidentiality when it came to the practical business of preparing evidence. This would lead to a denial to Orion of its constitutional and other rights to fair process.

In regard to the position of Standard Bank and Edcon in the litigation, Mr Kuper considered that it was clear that they were not seeking to impose any rights in regard to the allegedly confidential information in their agreements with Telkom, and it could be inferred that they did not attach significant importance to that information, being content to abide by any ruling the Tribunal saw fit to make.

The concessions made by Telkom at the hearing about the extent of the confidential information, by limiting its claims to the blocked-out numerals in the annexures, was so large a backdown on its original stance, that Orion was now, at the eleventh hour, dealing with an entirely different case from the one which had confronted it at the outset, Mr Kuper said. Had this been Telkom's stance originally, Orion's evidence in the matter would have been very different.

Mr Kuper considered that the case for claiming confidentiality in the blocked-out data referred to above had been overstated by Telkom, but he was not averse to some restrictions on access to that information if the Tribunal found confidentiality to exist, provided Orion was left free to pursue its case effectively and make use of the advice of the best consultants available to it, whether inside or outside its organsation. He contended that such restrictions would be easy for Telkom to monitor or "police". He submitted that precedents about the nature of confidential information from the realms of delictual unlawful competition and other branches of the law outside the ambit of the Act were inapplicable in view of the very precise definition of confidential information in the Act, and he emphasised that the test of confidentiality involved not only "economic value" but the more stringent criterion of "particular economic value".

Tribunal's approach to the issue of confidentiality and its rulings on that issue

The Tribunal considers that the panel dealing with the main application will, after hearing what will be extensive evidence about the nature and commercial importance of the various elements of the discount "packages" provided by Telkom to Standard Bank and Edcon in terms of the agreements in contention, be in a better position than the current panel to make a final and definitive statement about the correctness of Telkom's claims to the confidentiality of the blocked-out data in the annexures to the agreements handed in at the hearing.

Accordingly the Tribunal at this stage made only an interim finding and ruling, which it considers will conveniently reconcile the interests of the parties while meeting the needs of equity and fairness.

Thus, for this limited purpose, the Tribunal's order provides that the only information which Telkom ultimately claimed as confidential, namely the blocked-out data in the annexures to its agreements with Standard Bank and Edcon (excluding dates of commencement) is provisionally to be treated as confidential.

This ruling should not be taken as an indication of sympathy on the Tribunal's part with the arguments advanced by Telkom for such confidentiality. On the contrary, we consider that the matter will best be considered afresh and with an open mind when the main application is heard.

While this ruling is to some extent adverse to Orion, which argued that the information in question was not confidential, we consider that the potential harm to Orion if it is ultimately found by the Tribunal that the blocked-out information is not confidential, is fully mitigated by our order on the question of access to the information in the interim. Orion has in any case succeeded in having the ambit of the confidentiality reduced, from Telkom's original claims to the whole of the agreements, to a few numerical parameters in the annexures.

Equally, if the Tribunal finally concludes, having heard the main application, that Telkom's claim to confidentiality is sound, our order on the issue of confidentiality will have preserved Telkom's rights up to that point except in the limited manner explained in the next section of this decision.

Conclusions and rulings on the issue of access to information which is to be treated as confidential

What is clear to us is that basic justice will not be served if Orion is not enabled to study the blocked-out data in the agreements in issue, using its own directors and other personnel if they are the people best able to advise it, and also using any independent external experts if their evidence should

prove necessary.

Orion has presented a case which, if it is upheld when the main application is decided, will mean that Telkom has committed a serious contravention of the Act. We have heard and read nothing to suggest that Orion is making its accusations frivolously or speculatively. Its evidence on the financial details of the allegations of predation is indeed sketchy, but in the face of the kind of opposition which Telkom mounted in the applications before us, conceding access to the body of the agreements only at the eleventh hour, it is clear that Telkom has made strenuous efforts to prevent Orion from finding the kind of information it would have needed to mount a fully documented case at the outset. We say so while not prejudging the main application in any way. If Telkom is correct and the case Orion has brought on its papers in the main application is defective and is not cured in Orion's replying evidence, then Orion must at that stage suffer the consequences. We are only concerned with the interim issue of access to documents.

The argument which Telkom has now for the first time advanced, that Orion should have nominated an independent expert to inspect the agreements in contention but not reveal their contents to Orion, and then to conduct the case for Orion with legal representatives of Orion similarly equipped with information about the agreements which they are not entitled to disclose to their client, has in our view been successfully demolished by Mr Kuper. It is Kafkaesque in its distance from fairness and openness.

In any case, if Telkom was willing to subject its agreement to scrutiny by an independent expert acting for Orion, why has this willingness emerged only on the date of the hearing and at the stage of argument? Why was the sanctity of the entire contents of the agreements claimed by Telkom in its Form CC7 but abandoned in respect of all but a few items of numerical data at the very last moment, namely when Telkom had to address oral argument to the Tribunal on its claims to that confidentiality? These facts suggest to us that there might be some substance in Orion's arguments that Telkom is obfuscating the issues of access to information, with obvious benefits to itself in terms of delay and corresponding inconvenience and even danger to the viability of Orion. We make no finding in this regard.

Similar considerations apply to Telkom's arguments that Orion's applications are premature, and that the appropriate time to seek access to the agreements would have been after Orion had filed its replying evidence and could use rules 22 and 28 of the Tribunal's rules to seek a ruling at a pre-hearing conference giving it discovery of the agreements. It takes little imagination to see that at that stage Telkom would plausibly have argued that discovery was irrelevant and should not be granted because Orion's evidence had been completed. The threat to Orion's prospects at that stage of mounting a successful case of predation based on the contents of the

agreements would be terminal.

We do not consider it necessary to venture any conclusion regarding Telkom's allegations that it has no case to meet in the main application on the basis of lack of relevant averments and defective evidence by Orion, and the argument that Orion should not be allowed to make out its case in its replying evidence. If Telkom is correct about these allegations, it will have its way when the main application is decided.

Mr Kuper was quick to point out that it would have been easy for Telkom, if there was no targeting of Orion and no illegal deep discounting, to produce evidence to say that its discount packages had been provided to customers other than those it had in common with Orion and that the depth of the discounts was such that nobody could regard them as predatory. We have not taken any such factors into account in reaching our conclusions since they are relevant to the main application and not to the interlocutory applications before us.

It would, of course, be wholly unacceptable for the Tribunal to fail to come to the assistance of a firm which is the victim of true predatory pricing practices by paying excessive regard to claims for confidentiality in any documents, let alone the very documents which form the basis for the complaint of predation. If it allows itself to be mesmerised by claims of confidentiality in those circumstances, the Tribunal would be delaying remedies and providing mechanisms for the predator to cover it traces, and it would effectively be playing the role of an accomplice. This consideration is relevant in this case, but the Tribunal has balanced it by giving careful attention to Telkom's interests at this stage and to the need to refrain from pre-judging the merits of the main application.

The order we have made provides for Orion's personnel and legal representatives, and any outside experts which Orion selects, to have access to the data to which Telkom claims confidentiality, but on strict terms. These include the terms that the individuals concerned make written undertakings of confidentiality, and that they use the information only for the purposes of the main application and any further interlocutory litigation which may be necessary in the course of bringing the main application to finality. Telkom is to be provided with the names of all the individuals concerned. We consider that the strictness of these terms is adequate for the protection of Telkom's interests.

The order also provides that if Orion or other firms having an interest in the subject-matter choose to approach the Tribunal to obtain less onerous conditions for access to the allegedly confidential information, they may do so. We see no need for Telkom to have a reciprocal right to approach the Tribunal for a variation which sets more onerous terms: once the existing

terms have been exercised by Orion, it would be inequitable or in practice impossible to reduce its corresponding rights.

Orion's attorneys are, on the evidence, subject to written undertakings of confidentiality in favour of Telkom which were drawn and imposed by Telkom and which prohibit the attorneys from disclosing the contents of those agreements to Orion and its officials, its counsel, and Orion's outside witnesses and consultants. It would be inconsistent for these undertakings to be maintained in the face of our order. Our order therefore includes provision for those undertakings to be superseded by the confidentiality regime set out in the order, which will naturally bind the same attorneys.

The information to which the order extends includes paragraph 17 of Telkom's answering affidavit in the section 45 application. Our reading of that paragraph suggests to us that nothing in it is truly confidential, but in the absence of the parties' submissions on it we have in Telkom's favour assumed that confidentiality may exist. Orion's interest in that information is safeguarded by the access which our order provides, but the access is subject to limitations. We doubt whether Orion will in practice suffer any deprivation by viewing the relevant paragraph subject to this regimen.

We have made a single order since it appears to us that the relief in both applications should be identical, even if the basis for granting it may be formally different. If the production application alone had been heard, we consider that we could by the exercise of our residual powers under section 27 of the Act, if not under the Tribunal's statutory powers to direct discovery, have made the relevant order. Telkom's argument that that the production application was premature is in our view, as mentioned above, incorrect. S. 45(1) (b) of the Act provides the basis for our findings and orders to the extent that they correspond to Orion's claims in the s. 45 application.

Costs

As Orion has substantially succeeded in both applications, our order provides that Telkom should pay Orion's costs, including those of three legal representatives.

_____ 24 February 2004

M. Moerane Date

Concurring: L. Reyburn, T. Orleyn