BEFORE THE COMPETITION TRIBUNAL OF SOUTH AFRICA
(HELD IN PRETORIA)

CT CASE NO: 61/CR/Sep09

In the matter between:

COMPETITION COMMISSION	First Respondent/Applicant
and	
ARCELORMITTAL SOUTH AFRICA LIMITED	Applicant /First Respondent
SCAW SOUTH AFRICA (PTY) LTD	Second Respondent
CAPE GATE (PTY) LIMITED	Applicant/Third Respondent
CAPE TOWN IRON STEEL WORKS (PTY) LIMITED	Fourth Respondent
SOUTH AFRICAN IRON AND STEEL INSTITUTE	Fifth Respondent

Panel : Norman Manoim (Presiding Member), Yasmin Carrim (Tribunal Member) and Medi Mokuena (Tribunal Member)

Heard on : 1 April 2010

Decided on : 3 September 2010

Reasons for Decision and Order

Discovery application

[1] The two applicants in this matter, Arcelor Mittal South Africa Limited ('AMSA') and Cape Gate (Pty) Ltd ('Cape Gate') seek the production of documents from the Competition Commission ('the Commission').

[2] Both applicants are respondents in a complaint referral action brought against them and three other respondents[1] by the Commission, in which it is alleged that they with

[1] That is; Scaw South Africa (Pty) Ltd, Cape Town Iron Steel Works (Pty) Limited, and South African Iron and Steel Institute.

other firms, contravened sections 4(1) (b) (i) and or (ii) of the Competition Act, No. 89 of 1998 (the 'Act'), by engaging in various acts of price fixing, information sharing and market division in respect of certain long steel and flat steel products.[2] The applicants have not filed their answers to the referral because they consider that they are entitled to certain documentation before they plead, which they allege is in the Commission's possession and which, despite request, the Commission refuses to supply them.

[3] Although the document requests are not identical - because as we shall see the applicants follow different legal routes to obtain them - both seek documents relating to a leniency application brought to the Commission by the second respondent in the complaint referral, Scaw South Africa (Pty) Limited ('Scaw').

[4] The Commission and Scaw resist the production of these documents and the Commission further resists production of the remaining documents sought.

[5] The case of Cape Gate is solely reliant on the adoption of Rule 35 of the High Court rules to our proceedings. Cape Gate has restricted its request to the leniency application document and documents submitted by Scaw to the Commission.

[6] Issues between Cape Gate and the Commission on this aspect are narrow in focus – the principal points of dispute here are whether a claim of privilege over the leniency application documents has been properly raised and whether documents furnished by Scaw pursuant to the leniency application have been referred to in the complaint referral.

[7] AMSA's position is different. It relies principally not on an entitlement to discover *qua* litigant, but on the general right to inspect and copy documents in terms of the Commission's Rules once a matter has been referred to the Tribunal. It argues in the alternative that discovery remains competent under a Rule 35 approach, although we understand that it accepts this would entitle it to a lesser yield of documents.

[8] Scaw which also filed opposing papers in these proceedings, supports the Commission's claim of privilege over the leniency application documents.

Background

[9] Since 2004 the Commission has adopted a policy in relation to the prosecution of members of cartels, known as the Corporate Leniency Policy ('CLP'). In terms of this policy a cartel member which comes forward and provides information to implicate its fellow cartelists in violation of section 4 of the Act will be entitled to 'leniency' from the Commission, effectively immunity from the Commission proceeding against it, provided it

[2] The applicants are the first and third respondents in the complaint referral.

meets certain requirements. Immunity is limited to the first cartel member to come forward.

[10] In this case the Commission commenced an investigation into the steel industry initiating two complaints; one on 21 April 2008 and the other on 5 June 2008. On 19 June 2008 the Commission searched the premises of certain firms in connection with these investigations. The Commission then released a press statement about the search and its purpose. Following this Scaw's attorneys contacted the Commission to ascertain whether they had had another leniency applicant in relation to this investigation. On being informed that they did not, Scaw decided to apply for leniency. It did so by applying for what is termed a marker. A marker allows a firm to claim priority lest other members of the alleged cartel also apply for leniency, as the Commission's policy is to grant leniency only to the first successful applicant. After meeting with the Commission, further information was provided in clarification of the marker application. On 2 July 2008 the Commission emailed Scaw, requesting that the leniency application contain certain specific information. On 9 July 2008 Scaw submitted its leniency application, and on the 17 July the Commission granted Scaw conditional leniency.[3] Since that date Scaw says it has provided numerous documents to the Commission and been involved in a number of consultations with the Commission to discuss matters relating to the complaint referral in *casu*.

Application of Rule 14 and 15 of the Commission Rules[4]

[11] AMSA, contrary to Cape Gate, relies on Rules 14 and 15 of the Commission's Rules to demand the production of the Commission's record in this matter for inspection and copying. Subsequently it filed an amendment to its application in order to cater for the fact that some of the documents claimed might be confidential.

[12] Reliance on these rules stems from Rule 15(1) of the Commission rules which states:

> *" 15(1) Any person upon payment of the prescribed fee, may inspect or copy any Commission record –*
>
> *(a) if it is not restricted information; or*
> *(b) if it is restricted information, to the extent permitted, and subject to any conditions imposed by this Rule; or*
> *(c) an order of the Tribunal or the Court."*

[13] The key issue here, and the one on which the debate between the Commission and AMSA turns, is the concept of restricted information. AMSA contends that if the

[3] This version of the events is based on Scaw's answering affidavit paragraphs 16-23. See Cape Gate application, pages 75 -77.
[4] More formally known as the Rules for the Conduct of Proceedings in the Competition Commission.

information it seeks is not restricted, it is entitled to access to it, subject to a regime to protect that information if it is confidential.

[14] AMSA argues further that the information in the Commission's investigation docket is no longer restricted information as it falls within an exception set out in Rule 14(1)(c)(i) of the Commission rules which provides that:

> "14(1) For *the purpose of this Part, the following five classes of information are restricted:*
>
> *(a)....*
>
> *(b)....*
>
> *(c) Information that has been received by the Commission in a particular matter, other than that referred to in paragraphs (a) and (b) as follows:*
>
> *(i) the Description of Conduct attached to a complaint, and any information received by the Commission during its investigation of the complaint, is restricted information until the Competition Commission issues a referral or notice of non-referral in respect of that complaint, but a completed form CC1 is not restricted information." (Our emphasis)*

[15] AMSA argues that since the Commission has referred the matter, it is now entitled to this information, subject to it not being restricted information in terms of paragraphs (d) or (e) of Rule 14(1), which provide as follows:

> *"(d) A document -*
>
> (i) *that contains -*
>
> *(aa) an internal communication between officials of the Competition Commission, or between one or more such officials and their advisors;*
>
> *(bb) an opinion, advice, report or recommendation obtained or prepared by or for the Competition Commission;*
>
> *(cc) an account of a consultation, discussion or deliberation that has occurred, including, but not limited to, minutes of a meeting, for the purpose of assisting to formulate a policy or take a decision in the*

exercise of a power or performance of a duty conferred or imposed on the Commission by law; or

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

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

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

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

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

[16] Rule 14, as we previously observed in the *Netcare decision*,[5] caters for the category of restricted information in a dualistic sense. Information may be restricted at a point in time, but later ceases to be, or it is restricted by nature and this categorisation endures, notwithstanding an event in time, although their distinct dualism may be elided - even these documents may become 'unrestricted by later events'.

[17] It is clear from Rule 14(1)(c) quoted above that the time restriction on the information in the Commission's docket has now expired because the matter has been referred. Thus the question is, have the documents retained their character as restricted information because of their inherent nature? In this respect the parties are in agreement that documents that are the Commission's work product are not in issue, but remain restricted information, and AMSA acknowledges it is not entitled to them.[6]

[18] The Commission contends the documents remain restricted information because of their inherent nature and relies on paragraph (e), which as we have seen entitles the Commission to restrict access to in the terms of the Promotion of Access to Information Act, no. 2 of 2000 ('PAIA'). In particular the Commission seeks to rely on section 37(1)(b) of PAIA which states:

"Subject to subsection (2), the information officer of a public body –
(a) ...; or
(b) may refuse a request for access to a record of the body if the record consists of information that was supplied in confidence by a third party-
(i) the disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source; and

[5] Netcare Hospital Group (Pty) Ltd and Community Hospital Group (Pty) Ltd, Case No: 68/LM/Aug06.
[6] We discuss the concept of 'work product' later.

(ii) if it is in the public interest that similar information or information from the same source, should continue to be supplied."

[19] The debate between the parties is now confined to an interpretation of this section of PAIA. We have not been referred to any authority that previously considered this section. The Commission argues that if informants are told that documents that they give to it in the course of their investigation, would be susceptible to disclosure to the public, unless it met the definition of confidential information, this would prejudice its ability to collect information. Thus if a firm in a position of Scaw were to be told that information was to be disclosed this would chill the free flow of information to the Commission.

[20] AMSA counters this by arguing that the information from Scaw has already been disclosed and hence reliance on this provision of PAIA is misplaced. However the provision cannot be read to apply only once off and to a specific source. It is quite clear from the language that it also applies to the "*future supply of similar information*" which is posited as an alternative to the formulation *"or information from the same source"*. Nor does the term '*source*' have to be interpreted specifically, as AMSA would have it; i.e. specific to a particular individual or firm. '*Source*' here can be interpreted generically as a generic class of '*source*' i.e. a leniency applicant. Support for this generic interpretation is fortified by the fact that when the legislature seeks to be specific it uses the term '*third party*', as for instance, it does in section 37(2)(b).[7]

[21] Thus the Commission has discretion to refuse to supply records if it could be reasonably expected to prejudice the future supply of similar information or information from the same source. The Commission is an investigative body whose purpose is *inter alia*, to investigate and refer prohibited practice cases to the Tribunal. It does this on an ongoing basis. For this reason sources and informants must trust the Commission not to disclose information provided in the course of an investigation to anyone. This is what Rule 15 requires, but only in limited circumstances and sometimes, never. Thus leniency applicants would be more reluctant to come forward if they knew their applications would be disclosed, and as the Commission has argued, an important weapon in their enforcement arsenal would be compromised by disclosure. That they would know they might have to testify later in proceedings is a different matter. The application for leniency may well be refused. Indeed it is always made conditionally in terms of the policy, thus premature disclosure would prejudice sources of this kind supplying information to the Commission which is not in the public interest.

[22] The same consideration applies to other information supplied by third parties even if they are not leniency applicants. If their information is supplied without their consent prematurely in proceedings where their relevance has not been determined, this too would chill providers of information from co-operating with the Commission. Whilst

[7] Section 37(2)(b) states,*"(b) about the third party concerned that has consented ..."*

this type of information, if it is not subject to privilege, may have to be yielded later at discovery stage, it does at least require the filter of relevance to be exercised before the information is disclosed. Given that discovery in our proceedings as in civil courts takes place after close of pleadings, when relevance is more carefully defined as a result of a completed set of pleadings, the reasonable source of information would at least expect disclosure of its documents to be subject to such a process, where relevance to the case to be tried becomes the filter for disclosure of its documents to others, not the exercise of a general information right open to all; including non – litigants, as is the case with Rule 15.

[23] Rule 15 as we have indicated in the *Netcare decision, is* not a discovery rule, although it affords a right of access to documentation to all. This is acknowledged by AMSA which argues that for this reason relevance of the documents is not a consideration as it would be if it were a discovery right. However AMSA also argues why it has an even greater entitlement as a litigant to the documents. This approach is contradictory. If AMSA seeks to rely on a general right, equally available to non litigants, it cannot argue for special treatment. Either there is a general right to these documents or not. If they wish to exercise a litigant's rights then the approach of Cape Gate's reliance on discovery rights is the correct one to be followed. For this reason when analysing the right exercised by AMSA in terms of Rule 15 we do so from the vantage point of this being a general right available to all and not a litigant's right.

[24] We find that the documents sought remain susceptible to being claimed as restricted information in terms of Rule 14(1) (e) of the Commission Rules. The Commission has exercised a discretion to withhold these documents in terms of a discretion afforded to it by section 37(1) (b) of PAIA, and has done so on reasonable grounds thus making them restricted information. In the circumstances AMSA's application for the documents to be disclosed in terms of Commission Rule 15(1) is dismissed.

Rule 35

[25] In *Allens Meshco and others v the Competition Commission*[8] we considered the application of High Court Rule 35 to our proceedings. We held that:

> *"...We see no reason to formally adopt rule 35 to applications to compel discovery of documents to refer to pleadings. Basing that discretion on administrative fairness to respondents is a sufficient basis for finding our powers to order discovery when appropriate. We do not need to find rule 35 through the door of tribunal rule 55 to do so. Granted in most cases the outcomes would be identical regardless of which approach we adopted. But there may be subtle*

[8] Case No: 63/CR/Sep09. This decision was not available at the time the present matter was argued.

distinctions in some cases – although not in this one- where outcomes may differ."[9]

[26] We then went on to discuss how we would approach such applications:

> *"...The first principle we apply is that where a document is relied on to support a relevant allegation in the pleading, it should be provided, usually by way of attachment as an annexure to the pleading, although for practical reasons this may not always be possible. Typically if one quotes from a document it should be provided. However a document may also be relied on without being expressly quoted, and in these circumstances it should be provided as well. For instance the pleader may rely instead of making use of direct quotation, on a summary of what is contained in the document...*
>
> *The second principle we apply is that the inference of the existence of a document is not sufficient to create an obligation to disclose such a document. This is an approach consistent with one taken by the High Court in a rule 35(12) case."*[10]

[27] Applying this approach to the current case, we consider first whether any documents are discoverable and secondly, we consider the issue of the leniency application and documents supplied by the leniency applicant.

Rule 35 – Non Leniency Application Documents

[28] Applying the principles in *Cape Gate* referred to above to the non-leniency application documents, we find that only three of the documents claimed are mentioned in the complaint referral and are required to be discovered. They are:

[28.1] the email which is quoted in paragraph 36.6 of the referral but which is not attached;

[28.2] the minutes of the export monitoring sub-committee of the SAISI dated 5 April 2005 and 15 November 2005 which are referred to in paragraph 46 of the referral where the following is stated:

"*Minutes of the export monitoring subcommittee of meetings held on 5 April 2005 and 15 November 2005 show that SAISI members discussed export tonnages for long steel and flat steel products and allocated quotas for each producer*".

[9] See *Allens Mescho* op cit paragraph 6.
[10] See *Allens Meshco* op cit paragraph 8.

Rule 35 Leniency Application- Documents Submitted by the Leniency Applicant

[29] It is convenient to deal with the issue of these documents first. In its notice of motion Cape Gate firstly sought the leniency application and secondly, any other documents which were annexed to it or were submitted by Scaw in its application for leniency.[11] The second category is described as constituting letters, emails, minutes of meetings etc. What Cape Gate had in mind was in the first place the documents produced for the purpose of applying for leniency and a second category not produced for such a purpose, but produced independently of it, and presumably prior to it, and which was supplied to the Commission during the course of the leniency application process.

[30] Cape Gate is not in a position to know whether such documents in the second category were produced in what form and when. This becomes apparent when it has to deal with the different responses of the Commission and Scaw to this request in their respective answering affidavits.

[31] The Commission states in its answering affidavits in this application that it has not stated in its complaint referral affidavit that the leniency application had annexures.[12] Nor for that matter does Scaw. The best that Cape Gate can rely on is a statement made by Scaw's attorney in its answering affidavit in this application that since the date it was granted conditional leniency it has been co-operating with the Commission and to that end it states that it has provided a number of documents to the Commission.[13]

[32] Cape Gate argues that because the documents were submitted as part of Scaw's obligations as a leniency applicant they are as much part of the leniency application as the document that was submitted on 9 July 2008 in which it applied for leniency. For convenience we refer to the latter document as the leniency application.

[33] The reason that Cape Gate has to resort to this argument about leniency being a process is that there is no mention of any documents which accompanied the leniency application in the complaint referral, but only reference to the leniency application. In order to bring the second category of documents into the purview of Rule 35, Cape Gate needs to show that they have been referred to in the complaint referral. Since express referral is absent it has attempted to infer referral to them by conceptualising the leniency application not as a single document prepared for this purpose, but all documents supplied by the leniency applicant pursuant thereto. This is a highly artificial exercise and exhibits the dangers of considering a reference to a

[11] See Notice of Motion prayers 1.1. and 1.2 in the Cape Gate application, record page 3. Cape Gate does not describe the first document as the leniency application, but uses the term the "document in which leniency is sought by the second respondent [Scaw]"
[12] See Commission's answering affidavit in the Cape Gate Application, paragraph 6 record page 26.
[13] Scaw answering affidavit in the Cape Gate application, paragraphs 23 and 27, pages 77-8.

document too widely, so that a Rule 35 type process becomes the back door through which a general discovery application can be made prematurely.

[34] The case relied on to support this proposition is based on very different facts. In *Unilever plc v Pologaric Pty Ltd*[14] a litigant had referred to an archive in its possession and relied on information gleaned from this archive to make certain submissions in its papers. The Court held that under Rule 35(12) this was a sufficient reference to the archive to make it available for inspection.

[35] In this case there is no reference to the other documents furnished by Scaw or reliance placed on them. We thus do not need to consider any privilege arguments in respect of these documents – they are not referred to and are not discoverable under a Rule 35 type application.

Rule 35 leniency application document

[36] The Commission outlines in the complaint referral the history of Scaw in applying for a marker, (paragraph 8.6) then applying for leniency (paragraph 8.7) and then a conclusion that as a consequence of the information contained in the leniency application as well as other evidence obtained by the Commission in the investigations the present referral had been made (paragraph 8.10). Taken in isolation these two paragraphs are merely descriptive of the procedural history leading to the referral and would not amount to a reference to the content of the leniency application.

[37] In paragraph 8.8 however, the Commission does rely on the content of the application for leniency to come to certain conclusions. We set this out below:

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

[38] The Commission concedes that it has 'made mention' of the leniency application by Scaw. It does not debate whether this act of 'mention' was sufficient to actuate a Rule 35 type obligation to discover the documents, although, arguably, given the context in which it is referred to, the Commission might have had a basis for doing so.[15] For this reason we will assume for the applicants that it amounts to a reliance on the contents of the leniency application.

[14] 2001(2) SA 329 (C) at 332-3.
[15] Indeed the respondent could simply have stated in its answering affidavit that as it did not have sight of the leniency application it could not confirm or deny whether Scaw had indeed stated this.

[39] The Commission has argued that the leniency application is not susceptible to discovery as it is the subject of litigation privilege. By providing information to the Commission on an alleged prohibited practice the leniency applicant is its witness. Its information was given to the Commission's legal advisors who then requested additional information.

[40] This is the approach that we recognised in the *Pioneer decision* on interlocutory applications brought by Pioneer where we held:[16]

> *"[37] Pioneer argues that because the documents were obtained for the purpose of the CLP, even if litigation privilege can be claimed in our proceedings, it does not apply in these circumstances. The argument is that the CLP is a process outside of the present litigation, hence documents owing their genesis to the former, cannot be privileged in the latter.*
>
> *[38]This suggests that the CLP is a proceeding, independent of and external to, litigation in the tribunal. But it is not. The very purpose of the CLP as Mokoena explains in her supplementary affidavit is for firms who have been part of a cartel to come forward with the carrot of immunity offered in return for information and co-operation. But that is not an end in itself. The information obtained from immunity applicants under the CLP is intended for the purpose of litigation against the remaining firms alleged to be part of the cartel. The informants furnish the Commission with the information which forms the basis of its decision to refer a complaint. The extract from the CLP that we cited above clearly obliges applicants to cooperate with the Commission "until the Commission's investigations are finalised and the subsequent proceedings in the Tribunal are completed."*
>
> *[39]That in the process an ancillary outcome, the award of indemnity is afforded, does not detract from fact that the Commission's central object is to use the information to conduct litigation in the Tribunal against such members of the alleged cartel as contest proceedings. Thus the*

[16] Case No:15/CR/Feb07 and 50/CR/May08, paras 37- 41.

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

[40]There is thus no basis for refusing to recognise litigation privilege because the statements in question were generated through the CLP process.

[41]In summary then we find that the Commission is entitled to claim litigation privilege in our proceedings and that the statements made in this matter in the course of the CLP fall within that privilege."

[41] However, AMSA and Cape Gate advanced certain new arguments which they contend we were not asked to consider in *Pioneer*, or make that case distinguishable from the present.

[42] We summarise these arguments below:

[42.1] The *Pioneer* case was distinguishable, because what was being sought were answers the leniency applicant had made to the Commission in response to the latter's questions. Here what is being sought are not the answers to questions, but the application itself;

[42.2] The leniency application was drafted by Scaw's attorneys and is thus not the Commission's 'work product' and hence not subject to a claim of legal privilege;

[42.3] A leniency applicant is not a witness in contemplation of litigation as the leniency applicant is applying for immunity from prosecution;

[42.4] As a variation of the above proposition, no litigation was contemplated prior to the granting of leniency and hence any information provided prior to this was not provided in contemplation of litigation;

[42.5] Even if the litigation privilege prevails it has been waived because of the mention of it in the complaint referral and reliance on its terms;

[42.6] The leniency application contains admissions of Scaw's involvement in unlawful activity and as such is not entitled to be treated as confidential information – this is because if it is not confidential it cannot be

considered as privileged as confidentiality is an essential element of a claim for privilege.

[43] As for the application itself, it seems that Cape Gate at least, is not seeking any statements made pursuant to the grant of leniency. However it seeks the leniency application itself. Cape Gate seems to argue that this becomes subject to litigation privilege once leniency has been granted, although not to earlier communications.

[44] Cape Gate also argues that the distinction between this case and that of *Pioneer* is that the statements produced in the latter were produced under different circumstances, because they were furnished after the Commission had forwarded questions to the attorneys representing the leniency applicant, and that those documents were furnished after the filing of the application for leniency. Cape Gate says it is not seeking the production of such statements or summaries; it seeks the leniency application itself.[17]

[45] The case law makes it clear that litigation privilege arises when litigation is "in prospect or pending." Other cases have adopted a test of litigation being in prospect or "anticipated".[18] On either test this would apply to a leniency applicant's submissions to the Commission. The Commission is a body whose purpose it is to bring prohibited practice cases to the Tribunal as part of its enforcement role as the prosecutor in the system. The leniency program it has established has as its purpose, the gathering of information from cartel participants with a view to prosecuting the remaining members of the cartel in exchange for immunity from prosecution for the applicant. The sole purpose of this system is litigation – thus regardless of whether the Commission has already commenced an investigation prior to an application for leniency – this information is always furnished in a context when litigation is in prospect or anticipated. Indeed it is difficult to think of any other reason for why the information is being furnished other than for the purpose of litigation. It was suggested by Cape Gate during argument that the leniency applicant seeks immunity from prosecution; it does not do so with the intention of providing information for the purpose of litigation. This approach confuses motive and intention. The leniency applicant may well have as its motive for providing information to the Commission the prospect of leniency. However its intention is to provide the Commission with evidence with which it can litigate against the remaining cartel members.

[46] Nor does it matter whether the statements that form part of the leniency application have as their scribe the Commission's or the applicants' attorneys. We have not been referred to any case in which this distinction has been made. AMSA argued that the recent SCA decision in *King* was authority for the proposition that the state can only

[17] Record pages 10-11.
[18] See Phipson on Evidence 16th Edition pages 633 -636.

claim privilege over documents that are its own 'work product'.[19] Since Scaw's attorneys prepared the documents, such would constitute their 'work product' not those of the Commission. The term 'work product' emerges from US law. Although the Court in this case uses the language of work product, as Scaw's counsel argued it is by no means clear from this decision and the slender reference to work product that the SCA may have intended to overturn settled law on the notion of litigation privilege. As Phipson observes:

> *"In the US there is work product privilege which resembles litigation privilege, albeit not identical".*[20]

[47] The question is for what purpose the document was drawn up. The fact that the applicant may have got its attorney to assist it in drawing up the document does not detract from the fact that it was made in contemplation of the Commission's use of it in litigation. In formulating the leniency application Scaw's attorneys were meeting the Commission's litigation needs for the purpose of prosecuting an alleged cartel.

[48] The final argument advanced by Cape Gate is that in order to qualify for the privilege, information has to be confidential. Since the application by its very nature involves an admission by the applicant of involvement in unlawful behaviour, public policy would prevent such information from being considered confidential – a fortiori, once no longer confidential it is no longer privileged. Again no relevant authority was advanced for this proposition which, if correct would strike at the core of many claims for litigation privilege.

[49] We are thus not persuaded that that the application for leniency itself including the so- called marker application are not the subject of a valid claim for legal privilege.

[50] We now deal with the final argument that even if the privilege exists it has been waived by the mention of it in the complaint referral.

[51] The case law on waiver is very clear. Waiver is not lightly inferred. The oblique references to the leniency application in the referral are not sufficient to constitute a waiver. At best for the applicants they can rely on the statement quoted above that suggests that the leniency application, *inter alia,* formed the basis of the material on which the decision to refer was made. This is insufficient to constitute a waiver. The fact that the referral may traverse issues which are referred to in the leniency application is not sufficient to conclude that it has been waived.

Conclusion

[52] Except to the extent that limited discovery is granted in respect of paragraphs 36.6 and 46 of the Complaint referral, both applications are dismissed.

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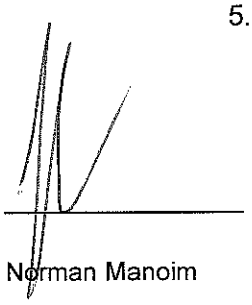
[19] *National Director of Public Prosecutions v King* (86/09) [2010] ZASCA 8 (8 March 2010).
[20] See Phipson op cit. Page 633.

[53] Scaw Metals is entitled to its costs for opposing the application.

Order

It is ordered that:

1. The Commission must furnish the applicants with copies of the documents referred to in paragraphs 36.6 and 46 of the complaint referral, being an email of 25 September 2003 from Coetzee to Walton and other steel mills, and the minutes of the export monitoring subcommittee of meetings held on 5 April 2005 and 15 November 2005.
2. The documents referred to in paragraph 1 of this order must be provided to the applicants within 7 business days of date of this order;
3. The applications in respect of the remaining documents sought are dismissed;
4. The applicants must furnish their answering affidavits in the main matter within 20 business days after being served with the documents referred to in paragraph 1 of this order; and
5. The applicants jointly and severally are liable for the costs of Scaw South Africa Limited in opposing the application, on a party and party basis, such costs to include the costs of one counsel.



Norman Manoim

Presiding Member

3 September 2010

Date

Concurring: Yasmin Carrim and Medi Mokuena

Tribunal Researcher : Londiwe Senona

For the Commission : Adv Maenetje instructed by the State Attorney

For the First Respondent : Adv. Van Der Nest SC with Adv. Turner and Adv. Smith instructed by Bell Dewar Attorneys

For the Second Respondent : Adv. Unterhalter SC instructed by Nortons Inc.

For the Third Respondent	: Adv. Campbell SC with Adv Gotz instructed by Bowman Gilfillan Inc.

Tebogo Mputle

From: Tebogo Mputle
Sent: Friday, September 03, 2010 2:48 PM
To: Mosh Thulare; 'Stephen.langbridge@belldewar.co.za'; 'anton@nortonsinc.com'; 'r.leigh@bowman.co.za'; 'lverster@bowman.co.za'
Cc: Londiwe Senona; Lerato Motaung
Subject: Competition Commission v Arcelormittal SA Ltd & Others - 61/CR/Sep09
Attachments: 20100903143911529.tif

Dear All

Please see attached the Tribunal's reasons for the decision in the discovery application in the above matter.

Regards

Tebogo Mputle
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Tracking:

Recipient	Delivery	Read
Mosh Thulare		
'Stephen.langbridge@belldewar.co.z		
'anton@nortonsinc.com'		
'r.leigh@bowman.co.za'		
'lverster@bowman.co.za'		
Londiwe Senona	Delivered: 3/9/2010 2:48 PM	Read: 3/9/2010 2:52 PM
Lerato Motaung	Delivered: 3/9/2010 2:48 PM	Read: 3/9/2010 2:49 PM