

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 81/X/Jul07

In the matter between:

The New Reclamation Group (Pty) Ltd

Applicant

And

The Competition Commission

Respondent

Panel : D Lewis (Presiding Member), N Manoim (Tribunal Member)
and Y Carrim (Tribunal Member)

Heard on : 31 July 2007

Order issued : 1 August 2007

Reasons Issued: 1 August 2007

Reasons for Decision

Introduction

- 1] This is an urgent application in which the applicant, The New Reclamation Group (Pty) Ltd, ("Reclamation") seeks an order against the respondent, the Competition Commission ("Commission") relating to information which Reclamation has provided to the Commission, subject to a claim of confidentiality. Reclamation seeks relief to protect the confidentiality claim.

Background

- 2] In 2006 the Commission initiated a prohibited practice investigation against various firms including Reclamation. In the course of the investigation the Commission served a summons on Reclamation, in terms of section 49A of the Competition Act ("the Act"), requiring it to produce various documents. Pursuant

to this summons, Reclamation submitted a number of files of documents to the Commission. All the documents were submitted under a claim of confidentiality.

3] Among these documents were emails between employees of Reclamation, which is Annexure “GW2” to the founding affidavit. In the Commission’s opinion the contents of these emails, inter alia, purport to demonstrate Reclamation’s involvement in a scheme that is unlawful in terms of the Act. The contents of this email became the basis on which the Commission obtained search warrants from various divisions of the High Court to search Reclamation’s premises in Johannesburg, Durban and Port Elizabeth. The search warrants were granted and the searches all took place on 20 July 2007 at all three premises.

4] Following the searches, on 22 July 2007, the Commission issued a press statement, which is published on its website, in which it describes its “*raids on Reclam*”. In the course of the press release, the Commission describes the evidence that led to its decision to conduct the raids. It is common cause that the evidence cited in the press release is quoted from “GW2”.

5] On 26 July, Reclamation’s attorneys wrote to the Commission and requested that it:

[5.1] remove the press release from its website;

[5.2] refrain from disclosing any confidential information to third parties; and

[5.3] instruct its public relations consultant not to make any further disclosures to any third party of the confidential information.

6] On 26 July, the State Attorney, acting for the Commission, denied any wrongdoing and declined to make any undertaking.

7] The net result was this application, in which Reclamation seeks the following relief:

1. *That this application be heard as one of urgency and that the applicant’s*

non compliance with the Rules of the Tribunal relating to service and time periods be condoned;

2. The respondents be ordered to:

2.1. Remove the press release, annexure "GW4" to the founding affidavit, from its website and refrain from any further conduct that would disclose in the public domain the contents of the documents in respect of which confidentiality has been claimed by the applicant;

2.2. Treat as confidential all documents provided by the applicant to the respondent, and in respect of which confidentiality has been claimed by the applicant;

2.3. Pay the cost of this application including the costs of two counsel, should the application be opposed;

2.4. Further and/or alternative relief.

The Argument

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

9] Reclamation is further concerned, that beyond "GW2", the Commission may make other documents it submitted under a claim of confidentiality public, as the Commission does not seem to regard its confidentiality claim as valid.

10] The Commission, however, claims that it was not bound to respect the

confidentiality claim as it was made invalidly. Accordingly it not only opposed the application, but also brought a counter application seeking an order that the entire confidentiality claim made by Reclamation be declared invalid. Central to the Commission's defence to the application and the counter application is the contention that the claim for confidentiality is invalid on two grounds:

[10.1] The claim had not met the prerequisites of the Act;

[10.2] In respect of "GW2", that the claim related to a document whose contents "*evidences unlawful activity or was used in communicating information aimed at unlawful activity*", and hence, for that reason, loses its character as confidential information.

Procedure for claiming confidentiality

11] Section 44 of the Act provides:

"Right to informants to claim confidentiality

44 (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."*¹

12] A form is provided in the rules for doing so; this is form CC7. It is common cause that Reclamation has submitted a form CC7, annexure "GW1" to the Notice of Motion, which purports to comply with the Act. The document in question "GW2", forms part of a series of files which are identified in the CC7 as Item 9 in the following manner:

[12.1] under the column headed "Name of document / Category of document" is inserted "*Files titled Reclam Eastern Cape Electronic documents*";

1 The words in bold are defined in the Act.

[12.2] under the column headed "Name of file and page number at which information begins and ends" is inserted *"For each document referred to in column 1, the entire document"*;

[12.3] under the column headed "Owner of the information" is inserted *"The New Reclamation Group (Proprietary) Limited"*;

[12.4] under the column headed "Nature of the economic value" is inserted *"The information constitutes trade and business information belonging to Reclam, has an economic value and is not generally available to others. The nature of the economic value lies in the value of the information to Reclam and the economic loss that Reclam may suffer if the information is disclosed to unauthorised persons"*; and

[12.5] under the column headed "Existing restrictions on access to information" is inserted *"The existing restrictions are those in respect of all confidential information of Reclam, whereby disclosure of the information is restricted to employees of Reclam and authorised third persons"*.

13] The Commission argues that the claim is invalid in that it does not meet the requirement on the form CC7 which obliges the claimant to state the page and line number at which the confidential information begins and ends. In its form CC7 Reclamation has claimed the entire contents of each file submitted as constituting the confidential information. Furthermore, that Reclamation does not, in the language of the CC7 form as it appears in the Commission's rules, *"...set out the facts and contentions supporting that your claim that the identified information is confidential"*

14] Also of relevance is section 44(1)(b) which requires the claimant to submit a written statement in the prescribed form *"explaining why the information is confidential."*

15] The Commission argues that in purporting to comply with this requirement Reclamation has in its CC7 not applied its mind. It has simply parroted the

language of the Act and asserted this as an explanation. In short what the Commission is saying is that compliance with the Act requires the rendering of a reason substantiating a claim of confidentiality, and not a mere conclusion, before there can be proper compliance with the prerequisites of the Act.

- 16] Reclamation argues that whilst its description may be succinct, it meets the requirements of the Act, and once claimed in this way, the Commission is not entitled to take its own view on its formal validity. The Commission has no jurisdiction to determine the validity of a CC7 form; it is bound by it, and its remedy to spurious claims is to be found in section 44(2) of the Act which states:

*44(2) "The Competition Commission is bound by that a claim contemplated in subsection (1), but may at any time during its proceedings refer the claim to the Competition Tribunal to determine whether or not the information is **confidential information**".*

- 17] Reclamation is further aggrieved by the fact that at no time has the Commission queried the propriety of its CC7 form and the first time it made this challenge has been in these proceedings after the alleged breach of confidence had occurred.
- 18] According to Reclamation, and the Commission does not dispute this, confidentiality claims of this succinct nature have been accepted by the Commission in the past, and not having any reason on this occasion to apprehend that they would not be accepted now, it proceeded to formulate them in the time honoured way.
- 19] We have some sympathy with this latter point. We will not decide today whether the claims for confidentiality have been validly made out in "GW1". However as a public body engaged in law enforcement, elementary fairness requires the Commission to at least advise the party concerned that its claims were considered inadequate and allow them to rectify the situation or debate it with the Commission, before it made them public.² Given that no jurisprudence

² We have not burdened this decision with authority on this point, as we have been asked to make this decision expeditiously, given the circumstances.

exists yet on what constitutes compliance with section 44(1) of the Act and the Commission's past practice, it is unfair for it, having sought documents as part of its enforcement regime, not to respect the validity of the claim until it had challenged them by a proper process. If the Commission wants to discourage the practice of parties claiming confidentiality in note form, then its response must be to bring applications challenging the practice, or issue a practice note for guidance. If it does not, and remains passive in the face of a practice it disapproves of, it cannot be surprised that parties claiming confidentiality repeat old habits.

Order

20] We have limited our order to prayer 2.2 contained in the notice of motion. Granting prayer 2.1 may have exceeded our jurisdiction, but we do not have to consider that further, given the Commission's undertaking that it would abide by the decision of the Tribunal in respect of the future treatment of the documents, and both parties express wish, that the Tribunal deal with the problem before it, and not wish it away to another forum.

21] It is not our practice to award costs between the Commission and respondents in interlocutory matters and this case does not justify a departure from that approach.

22] We make the following order:

[22.1] The Competition Commission must treat as confidential all documents provided to it by The New Reclamation Group (Pty) Ltd, and in respect of which confidentiality has been claimed by The New Reclamation Group (Pty) Ltd, until ordered otherwise by the Tribunal in terms of section 44(2) of the Competition Act, 1998, as amended.

[22.2] The counter application is dismissed

[22.3] No order is made as to costs.

1 August 2007

N Manoim

DATE

Tribunal Member

D Lewis and Y Carrim concur in the judgment of N Manoim

Tribunal Researcher : R Kariga

For the Applicant : D Unterhalter S.C., instructed by Bowman Gilfillan
Attorneys

For the Respondent : P Ellis S.C., assisted by J Motepe, instructed by the
State Attorney