competitiontribunal
south africa

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

HELD AT PRETORIA

CASE NO: CR093Jan07/CNF094Jul15

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In the Applications for Production and Inspection of Confidential Documents between:

ALLENS MESHCO (PTY) LTD	**First Applicant**
HENDOK (PTY) LTD	**Second Applicant**
WIRE FORCE (PTY) LTD	**Third Applicant**
AGRI WIRE (PTY) LTD	**Fourth Applicant**
AGRI WIRE NORTH (PTY) LTD	**Fifth Applicant**
AGRI WIRE UPINGTON (PTY) LTD	**Sixth Applicant**
CAPE WIRE (PTY) LTD	**Seventh Applicant**
FOREST WIRE (PTY) LTD	**Eighth Applicant**
INDEPENDENT GALVANISING (PTY) LTD	**Ninth Applicant**
ASSOCIATED WIRE INDUSTRIES (PTY) LTD t/a MESHRITE	**Tenth Applicant**

and

CAPE GATE (PTY) LTD	**First Respondent**
THE COMPETITION COMMISSION	**Second Respondent**

In re:

The complaint referrals between:

THE COMPETITION COMMISSION	**Applicant**

and

CAPE GATE (PTY) LTD	**First Respondent**
ALLENS MESHCO (PTY) LTD	**Second Respondent**
HENDOK (PTY) LTD	**Third Respondent**
WIRE FORCE (PTY) LTD	**Fourth Respondent**
AGRI WIRE (PTY) LTD	**Fifth Respondent**
AGRI WIRE NORTH (PTY) LTD	**Sixth Respondent**
AGRI WIRE UPINGTON (PTY) LTD	**Seventh Respondent**
CAPE WIRE (PTY) LTD	**Eighth Respondent**
FOREST WIRE (PTY) LTD	**Ninth Respondent**
INDEPENDENT GALVANISING (PTY) LTD	**Tenth Respondent**
ASSOCIATED WIRE INDUSTRIES (PTY) LTD t/a MESHRITE	**Eleventh Respondent**
CONSOLIDATED WIRE INDUSTRIES (PTY) LTD	**Twelfth Respondent**

Panel:	Anton Roskam (Presiding Member)
	Andreas Wessels (Tribunal Member)
	Fiona Tregenna (Tribunal Member)
Heard on:	8, 9 and 15 July 2015
Orders issued on:	10 July and 5 August 2015
Reasons issued on:	5 August 2015

RULINGS AND REASONS: APPLICATIONS FOR PRODUCTION AND INSPECTION OF CONFIDENTIAL DOCUMENTS

INTRODUCTION

[1] On 8 July 2015 the second to eleventh respondents in the main matter ("**the Allens Meshco Group**" or "**AMG**") brought an application in which they sought an order that the first respondent in the main matter ("**Cape Gate**") be ordered to make available to the legal representatives and economic advisors of AMG a copy of their complete bundle of documents. Cape Gate opposed the application.

[2] Having heard all the parties and on 10 July 2015 the Competition Tribunal ("**the Tribunal**") made its ruling, which was as follows:

1. Subject to the conditions set out below and for the purpose of these proceedings, the following persons are granted access to the documents in the Cape Gate (Pty) Ltd ("CG") trial bundles that CG claims as confidential ("the confidential documents") (i.e. the confidential documents listed in CG's CC7 Forms:

    1.1. Mr. Ratz of Roestoff & Kruse Attorneys, the second to the eleventh respondents' attorneys of record;

    1.2. Mr. Kruse of Roestoff & Kruse Attorneys;

    1.3. Advocate Geach SC, Counsel for the second to the eleventh respondents;

    1.4. Mr. Constantinou from DNA Economics, the economic advisors of the second to the eleventh respondents;

    1.5. Ms. Robb from DNA Economics.

2. The above persons will have access to the confidential documents at the Competition Commission's offices at a pre-arranged time and only in the presence of CG's legal and/or other representatives.

3. The above persons may not make copies of the documents.

4. The confidential documents must remain under the control and in the possession of CG.

5. The above persons must sign an appropriate confidentiality undertaking to the effect that the confidential information contained in the confidential documents may not be divulged to:

    5.1. the second to eleventh respondents (or any employee or officer of these respondents);

    5.2. any person not listed in paragraph one; and,

    5.3. any person who has not signed a confidentiality undertaking.

6. The confidentiality undertaking must be drafted by CG. If there is a dispute about the terms of the undertaking CG or the second to the eleventh respondents may approach the Competition Tribunal for a ruling in regard thereto.

7. Copies of the signed confidentiality undertakings must be filed with the Competition Tribunal prior to access being granted.

[3] When the Tribunal handed down this ruling, it indicated that the reasons for its ruling would be provided at a later date. The reasons are set out below.

[4] Following this ruling and on 13 July 2015, Cape Gate delivered a Notice of Appeal to the Competition Appeal Court (**CAC**) against this ruling. Cape Gate also indicated that it would also consider filing a review.

[5] Thereafter, AMG brought an application to the effect that despite Cape Gate's Notice of Appeal, it be ordered that AMG is entitled forthwith to inspect the confidential documents listed in Cape Gate's CC7 forms[1] and that Cape Gate be ordered to make available a copy of the complete Cape Gate witness bundle to the legal representatives and economic advisors of AMG.

[6] The second application was heard on 15 July 2015. The Tribunal reserved its ruling. The ruling and the reasons for the second ruling are set out below.

BACKGROUND

[7] Much of the background history of the litigation in this matter is set out in the Tribunal's reasons for refusing AMG's stay application, which was heard on 22 January 2015. We do not intend to repeat this history here, save to note that the litigation has been protracted and the subject of numerous legal challenges, including challenges in the High Court to the legality of the leniency regime of the Competition Commission ("**Commission**"), which was the subject of an appeal to the Supreme Court of Appeal (**SCA**) and an application for leave to appeal to the Constitutional Court, and to the Commission's granting of conditional leniency to the twelfth respondent in the main matter, Consolidated Wire Industries (Pty) Ltd ("**CWI**").

[8] Following the Tribunal's refusal of AMG's stay application, AMG lodged a Notice of Appeal to the CAC. At the instance of the parties, the matter was postponed pending the outcome of this appeal.

[1] The CC7 Form is issued in terms of *s* 44 of the Competition Act, 1998 (Act 89 of 1998) and sets out the documents that a party claims as confidential.

[9] The CAC delivered its judgement on 26 March 2015.[2] AMG's appeal was dismissed on the basis that the Tribunal's refusal of a stay was not a final decision as contemplated in *s* 37(1)(b)(i) of the Competition Act, 1998 (Act 89 of 1998) ("**the Competition Act**"). The CAC held that it was an interim or interlocutory decision as referred to in *s* 37(1)(b)(ii) of the Competition Act for which there was no provision in the Act to the effect that this particular kind of decision may be taken on appeal.[3]

[10] In its judgement the CAC criticised the Tribunal for not providing reasons for its refusal to grant the stay application[4] and for agreeing to the postponement pending an urgent appeal. As regards the latter criticism, the CAC stated that *"both the Commission and the Tribunal went astray in allowing the referral hearing to be postponed pending an urgent appeal"* to the CAC and that the Tribunal should not have allowed the parties to agree to a postponement of the hearing pending an urgent appeal.[5]

[11] Following the CAC's judgment the Tribunal's hearing was set down from 1 to 15 July 2015.

[12] Prior to the commencement of this hearing and on 5 June 2015 the Commission delivered upon Cape Gate a *Request for Further and Better Discovery*. In this request the Commission requested documents relating to costs and volume data, including domestic and export sales volumes, quarterly turnover, production costs, margins per product, and volume data during the period 2001 to 2013 *"in order to undertake an analysis of the effect of the cartel over time."* In response to this request Cape Gate referred the Commission to item 272 of its discovery affidavit of 23 April 2014 and provided the Commission with further documents.

[13] The reason the Commission requested this information was to deal with Cape Gate's pleaded contention that the cartel was ineffective, which Cape Gate argued meant that the penalty to be levied

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[2] *Allens Meshco (Pty) Ltd and others v Competition Commission and others* (Case 135/CAC/Jan15).

[3] para 29.

[4] See para 30. Quite why the CAC did not have the Tribunal's reasons when it considered the appeal is perplexing because the reasons were issued on 6 March 2015 and sent to the CAC and all the parties involved.

[5] para 31.

against it should be reduced. (Cape Gate admits to being involved in the cartel conduct and therefore is not contesting the merits.)

[14] The documents Cape Gate discovered pursuant to the Commission's request in June 2015[6] and certain of the documents referred to in its discovery affidavit[7] were the documents in issue in AMG's applications.

[15] At the hearing on 1 July 2015 the Commission commenced its case by calling Mr JJ Botha, a factual witness and the Chief Executive Officer (CEO) of CWI. During his cross-examination by Mr Campbell, Cape Gate's counsel, AMG objected to the fact that it did not have copies of some of the documents being referred to. The hearing was adjourned and AMG was provided with a copy of Cape Gate's Bundle of Documents save for the confidential information.

[16] During the cross-examination of Mr Botha by Mr Geach, AMG's counsel, AMG moved its application for the production of Cape Gate's confidential documents.

[17] The application to produce the documents was heard on 8 and 9 July 2015. Pending its ruling, Mr Geach agreed to complete his cross-examination of Mr Botha.[8] Mr Botha's evidence was then completed.

[18] Following argument on the application to produce documents, the Tribunal adjourned proceedings and requested the parties to try to resolve this matter. When they were unable to, the Tribunal made its ruling.

[19] Following this ruling, the Commission called Mr TP Muzata. He was called as an expert witness. During his evidence-in-chief it became apparent that he was being referred to Cape Gate's confidential documents and information referred to in these documents. In particular, the Commission handed in Exhibit 8, which was a copy of a slide presentation prepared by Mr Muzata. The slide

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[6] Pages 1150 to 1195 and 1106 to 1137 of Cape Gate's Bundle of Documents.

[7] Items 266 to 272 of Cape Gate's discovery affidavit (pages 919 to 1137 of Cape Gate's Bundle of Documents).

[8] The Tribunal did, however, indicate that if AMG was of the view that it was necessary for it to cross-examine Mr Botha on these documents if and when its representatives had perused these documents in terms of a possible ruling granting access, AMG could apply for Mr Botha to be recalled and the Tribunal would consider its application.

presentation referred to information in Cape Gate's confidential documents. Accordingly, a redacted version of the exhibit that removed reference to the confidential information was prepared and handed in as Exhibit 8A. Copies of Exhibit 8A was given to AMG's legal representatives and economic advisors.

[20] The Commission also handed in Exhibit 10, which included copies of Cape Gate's invoices during the "price war" period (2005 and 2006). Cape Gate had claimed these documents as confidential. Upon perusal of these documents, the Tribunal requested Cape Gate to reconsider its refusal to grant access, as these documents were historical in nature, being almost 10 years old, and unlikely to still have any economic value.[9] Cape Gate then reconsidered its position and agreed that the documents in Exhibit 10 could be handed in. Later Cape Gate requested AMG's legal representatives and economic advisors to sign confidentiality undertakings in regard to these documents, which they agreed to do.

[21] At the end of Mr Muzata's examination-in-chief the Tribunal requested the parties to consider how the matter should proceed in the light of the limited time available and the fact that Cape Gate had appealed the Tribunal's ruling to produce documents, and evidently did not intend to implement it.[10] The parties were unable to agree upon a proposal and AMG then moved its second application, the application to inspect the documents.

[22] After expressing their frustration with the manner in which this matter was being dealt with, the Tribunal adjourned the matter to the following day and set time periods for the filing of answering and replying affidavits. The second application was heard on 15 July 2015.

[23] We now turn to the first application, the application to produce documents.

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[9] Confidential information is defined in *s* 1 of the Competition 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;*".

[10] At that stage the hearing was only set down for just less than two further days, being 14 and 15 July 2015.

THE APPLICATION TO PRODUCE DOCUMENTS ("THE FIRST APPLICATION")

[24] Mr Campbell contended a number of reasons why the application should be dismissed. The first related to whether or not the application was an application in terms of *s* 45 of the Competition Act. Section 45 regulates the disclosure of information that is subject to a claim of confidentiality.

[25] Mr Campbell submitted that there was no challenge to the confidentiality of the documents and that in terms of *s* 45(3), read with *s* 44 of the Competition Act, the documents that Cape Gate claimed to be confidential must be treated as confidential until determined otherwise.[11] He argued that AMG's application did not invoke *s* 45 of the Competition Act and therefore must fail.

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[11] Sections 44 and 45 of the Competition Act state the following:

"**44. Right of informants to claim confidentiality.**

(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 subsection (1), but may at any time during its proceedings refer the claim to the Competition Tribunal to determine whether or not the information is *confidential information*.

(3) The Competition Tribunal may—

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

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

45. Disclosure of information.

(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*

[26] As authority for this submission he referred the Tribunal to the SCA case of *Competition Commission of SA v Acerlormittal SA Ltd*[12] where his lordship, Mr Justice Cachalia held that " ... *until the respondents apply through the legislatively prescribed procedure under section 45(1) for access to the information and the Tribunal determines whether or not the information is confidential, the documents remain confidential."*

[27] Mr Geach contended that it was common cause that the documents were confidential, but invited the Tribunal to determine the issue in terms of section 45(1)(b) of the Competition Act; namely, by making an appropriate order concerning access to the confidential information.

[28] Mr Campbell submitted that AMG's application could not be converted into a *s* 45(1)(b) application because there were a number of unsatisfactory factual issues relating to the confidentiality undertakings, which raised issues of trust, and which Cape Gate would have dealt with more fully had it known that it was a *s* 45 application. These issues included the conditions that should be attached to an order for access should the Tribunal be inclined to grant access.

[29] Mr Campbell also argued that the documents were not relevant to AMG's case. He contended that the Commission sought the documents from Cape Gate for the purposes of assessing the quantum of the penalty to be levied on Cape Gate, which was an issue between Cape Gate and the Commission and had nothing to do with AMG. The Commission's request specifically states that the request was made as a result of Cape Gate's pleaded case to the effect that the cartel was ineffective, which was relevant to penalty. During the hearing the Commission stated that the documents in question relate not only to the quantum of penalty of Cape Gate, but also to the Commission's case against AMG.

[30] Mr Campbell also argued that AMG's pleaded case and the versions put to Mr Botha by AMG's counsel did not reflect a defence that was

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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 the extent that it has been accepted to be *confidential information* by the Competition Tribunal or the Competition Appeal Court."

[12] [2013] ZASCA 84 at para 43.

relevant to these documents. Mr Geach denied that the documents did not relate to AMG's case, as they were at least relevant to the penalty.

[31] Mr Geach contended that Cape Gate had through its conduct waived their right to confidentiality. This was strenuously denied by Cape Gate. In the light of the reasons for our ruling it was not necessary to consider this issue.

[32] Notwithstanding the submission that the application was not and could not be construed as a *s* 45 application, Mr Campbell also made submissions to the effect that AMG's representatives could not be trusted and that AMG did not have economic advisors.

[33] As regards the claim that AMG did not have economic advisors, it became apparent that Cape Gate's contention was based on the fact that AMG had not submitted an expert report and had not indicated that it intended to call an expert witness. But the fact that AMG had not done so did not mean that AMG did not have economic advisors who had and were advising AMG during this process. Indeed, the economic advisors were in the hearing for some of the days.

[34] Mr Campbell stated, correctly in our view, that since the commencement of the Competition Act it had become a practice between competition practitioners that instead of bringing applications to the Tribunal every time documents were claimed to be confidential, the practitioners (and not the persons from their client) exchanged the documents amongst themselves together with a confidentiality undertaking, which gave the party supplying the documents comfort that they would not be abused.

[35] Notwithstanding this, Mr Campbell argued that the conduct of AMG's legal representatives meant that Cape Gate could not agree to the implementation of this practice.

[36] In this regard Cape Gate cited the following: First it referred to a statement by Mr Geach to the effect that he did not know what was going to come out of these documents. This statement was made in the context of a discussion about whether or not he could finalise the cross-examination of Mr Botha without AMG's application being determined. Cape Gate argued that Mr Geach's statement was wrong since he did not disclose that he and his attorney had had an opportunity on 2 July 2015 for about half an hour to consider the documents at pages 1150 to 1195 of Cape Gate's Bundle.

[37] Second, Cape Gate contended that in breach of their undertakings, AMG's representatives had not signed confidentiality undertakings in respect of these documents. Mr Campbell informed us, although this was not contained in Cape Gate's answering affidavit, that Mr Kruse, an attorney from AMG's attorneys of record, had informed one of Cape Gate's legal representatives that he was not going to sign anything.

[38] AMG denied that it had breached its undertakings to sign a confidentiality undertaking by stating that its attorney had signed a confidentiality undertaking in 2014 and that this undertaking should cover these documents as well.

[39] It appears that prior to the Commission's request for disclosure in June 2015, one of AMG's attorneys, Mr Ratz, inspected Cape Gate's confidential documents[13] at Cape Gate's attorneys' offices. Mr Ratz claimed that he provided a confidentiality undertaking, which Cape Gate denied – Cape Gate alleged that Mr Ratz was granted access to the confidential documents on the understanding that a confidentiality undertaking would be provided, but that its attorneys had no such undertaking in their file. There was thus a dispute as to whether a confidentiality undertaking was provided. In our view it would be strange, and therefore improbable, for Cape Gate's attorneys to have allowed Mr Ratz to view these documents without fist receiving a signed confidentiality undertaking from him.

[40] Mr Geach argued that the matter was easily resolved by way of AMG's legal representatives providing another confidentiality undertaking.

[41] The panel queried a letter in the Commission's Bundle in which the Commission alleged that AMG's attorneys breached a confidentiality undertaking previously signed by them. Mr Geach stated that AMG denied the Commission's accusation and had always done so.

[42] It should also be noted that CWI's attorney was granted access to the confidential information after he signed a confidentiality undertaking.

[13] This inspection could not have included the documents discovered as a result of the Commission's request in June 2015.

THE TRIBUNAL'S REASONS

[43] The Tribunal is required to conduct its proceedings as expeditiously as possible and in accordance with the principles of natural justice.[14] One of the principles of natural justice is that in general parties to a matter may participate in a hearing, in person or through a representative, and may put questions to witnesses and inspect any books, documents or items presented at the hearing. This is spelt out in *s* 53 of the Competition Act, in particular *s* 53(a)(iii) insofar as it refers to AMG as a respondent.

[44] The Competition Act provides that hearings must be conducted in public[15] unless the provisions of *s* 52(3) are applicable, which includes the situation where the evidence to be presented is confidential information.

[45] In the case of confidential information, the Tribunal is empowered in terms of *s* 27(1)(d) to make any ruling or order necessary or incidental to its performance in terms of the Competition Act. In addition, the Tribunal may make any appropriate order concerning access to the confidential information in terms of *s* 45(1)(b).

[46] It is also important to note that the Tribunal may conduct its hearings informally and in an inquisitorial manner[16] and that the Tribunal member presiding at a hearing may, subject to the Tribunal's rules of procedure, determine any matter of procedure for that hearing with due regard to the circumstances of the case and the requirements of *s* 52(2)[17], which refer to, amongst others, the need for the hearing to be conducted in public, as expeditiously as possible and in accordance with the principals of natural justice.

[47] It was common cause amongst all the parties that the information in question was confidential. We were therefore required to chart a course that complies with the principles of natural justice, ensures that the hearing takes place as expeditiously as possible and which preserves the confidentiality of the information as far as possible.[18]

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[14] *s* 52(2)(a) of the Competition Act.

[15] *s* 52(2)(a).

[16] *s* 52(2)(b).

[17] *s* 55(1).

[18] *Competition Commission v Unilever PLC and Others* [2001–2002] CPLR 29 (CAC).

[48] In our view it was not necessary for AMG to refer specifically to the provisions of *s* 45 of the Competition Act. The order sought clearly related to the question of access to the documents. To dismiss the application on this basis would be overly formalistic and ignore the substance of the application. In any event, one of the Tribunal's functions is to make rulings incidental to and necessary for the performance of its others functions, which includes adjudicating matters referred to it in terms of the Competition Act.

[49] In our view legal representatives and economic advisors to a respondent in a matter must have access to confidential documents in order for justice to be achieved. [19] Were AMG's legal representatives and economic advisors to be denied all access to the confidential documents in question, the hearing would be profoundly unfair. They would, for example, be required to leave the hearing during the questioning of witnesses about these documents.

[50] AMG's legal representatives and economic advisors should, of course, provide the necessary confidentiality undertakings so as to protect the rights of the holder of that information.

[51] If the Tribunal grants a party's legal representatives access to the confidential information subject to them providing a confidentiality undertaking, and, if any one of them breached it, they could be sanctioned most severely by their professional association, sued civilly for damages and criminally prosecuted in terms of *s* 69 of the Competition Act. Accordingly, if a party alleges that the provision of a confidentiality undertaking by another party's legal representatives is not sufficient to protect the confidentiality of that information, or given the prior conduct of those representatives it is reasonable to believe that they will not abide by their undertaking, then convincing evidence to this effect must be adduced (especially where other parties' legal representatives have been granted access to the information). In our view no convincing evidence was presented.

[52] That one attorney may have said that he would not sign anything is not directly relevant because our ruling was that the specified people specified in the ruling would only be given access once a confidentiality undertaking was signed and filed with the Tribunal.

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[19] See in this regard *Independent Newspapers v Minister for Intelligence Services In re Masetlha v President of the RSA* 2008(5) SA 31 (CC) at 25 to 27.

[53] In the light of the sensitivities of the information, we granted limited access to the confidential information so as to preserve confidentiality as far as possible. In addition, the ruling provided for stringent conditions to ensure that no abuse would occur. In this way Cape Gate's right to privacy and its interest in keeping the information confidential, most importantly, not falling into the hands of Cape Gate's competitors, is maintained without denying AMG its right to a fair hearing.

[54] The submission that the documents were not relevant to AMG is incorrect. The documents are relevant to the issue of the effectiveness of the cartel and the question of penalty, which AMG is participating in. While AMG's pleadings as regards the quantum of the penalty to be imposed (should we find that there has been a contravention by AMG of the Competition Act) are bald in nature, we are able, and often do, *"adopt a more flexible approach to pleadings than is the practice in the high court."*[20] It would be inappropriate to deny AMG's legal representatives and economic advisors access to these documents simply because their pleadings do not specifically refer to the effectiveness of the cartel.

THE APPLICATION TO INSPECT DOCUMENTS ("THE SECOND APPLICATION")

[55] AMG's second application included confidentiality undertakings signed by the persons referred to in our ruling. AMG's legal representatives drafted them, as Cape Gate had not provided them with draft confidentiality undertakings.

[56] The key issue in this application was whether our previous ruling was capable of being appealed, and if so, whether Cape Gate's Notice of Appeal suspended the operation of the ruling.

[57] The Commission and AMG argued that the ruling was not appealable and therefore Cape Gate's Notice of Appeal to the CAC could not suspend the ruling. The Commission cited *ABSA Bank Ltd v Olivia Properties*[21] where it was held that if an order was not appealable, the exercise of an application for leave to appeal was an exercise in futility and reliance on the rule concerning the

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[20] *Acerlormittal SA Ltd* at para 37. As authority for this, his Lordship, Mr Justice Cachalia cited the work of M Brassey, J Cambell, R Legh, C Simkins, D Unterhalter & J Wilson *Competition Law* 1 ed (2002) at 308-309.

[21] 1999 (4) SA 554 (W) at 555E.

automatic suspension of the order was an abuse of the court's process.

[58] The Commission and AMG also relied upon *Telkom SA Ltd v Orion Cellular (Pty) Ltd and Others*[22]. On the face of it this judgment, which is markedly similar in that it also concerns whether a decision about access to confidential information is appealable, suggests that our ruling is not appealable.

[59] However, Mr Campbell argued that *Orion Cellular* had been overturned. He submitted the following: *Orion Cellular* was based upon the test laid down in *Zweni v Minister of Law & Order*[23]. *Zweni* held that a decision was only appealable if it complied with three attributes, being (1) that the order is final, (2) that it is definitive of the right of the parties and (3) had the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. [24] The test espoused in *Zweni* had been overturned. In this regard Mr Campbell cited the following: *S v Western Areas Ltd & Others*[25]; *NDPP v King*[26]; *Machele & Others v Mailula & Others*[27]; *Philani-ma-Afrika & Others v Mailula & Others*[28]; *International Trade Administration Commission v Scaw SA (Pty) Ltd*[29]; *National Treasury & Others v Opposition to Urban Tolling Alliance & Others*[30]; and, *SA Informal Traders Forum v City of Johannesburg*[31].

[60] From these judgements the following appears: The applicable test is whether hearing the appeal serves the interests of justice. All the circumstances, which vary from case to case, must be carefully

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[22] (2005) 1 CPLR 113 (CAC) which was cited with approval in *Allens Meshco (Pty) Ltd and others v Competition Commission and others*, 135/CAC/Jan15, 26 March 2015.

[23] 1993 (1) SA 523 (AD) at 536B.

[24] If this were the test, then our ruling would not be appealable because our ruling did not dispose of at least a substantial portion of the relief claimed in the main proceedings.

[25] 2005 (5) SA 214 (SCA) at headnote and pp 225E and paras 25 and 28.

[26] 2010 (2) SACR 146 (SCA) at headnote and paras 43 to 45 and 50 to 51.

[27] 2010 (2) SA 257 (CC) at headnote.

[28] 2010 (2) SA 573 (SCA) at headnote and para 20.

[29] 2012 (4) SA 618 (CC) at paras 47 to 61.

[30] 2012 (6) SA 223 (CC) at paras 24 to 30.

[31] 2014 (4) SA 371 (CC) at paras 20 and 21.

weighed. Notwithstanding this, the courts have developed a number of factors to help with the decision-making process, which include: the nature and importance of the constitutional issue raised, whether irreparable harm would result if leave to appeal were not granted, whether the interim order has a final effect or disposes of a substantial portion of the relief sought in the main proceedings, and whether allowing the appeal would lead to piecemeal adjudication, prolong the litigation or lead to a wasteful use of judicial resources.

[61] In our view Mr Campbell is correct that the test articulated in *Zweni* has been replaced. However, what is not clear is the basis upon which the court in *Orion Cellular* found that the decision in that case was not appealable. This is because the CAC did not expressly classify the decision in that case as either a final decision (i.e. one contemplated in *s* 37(1)(b)(i)) or an interim or interlocutory decision (i.e. one contemplated in *s* 37(1)(b)(ii)).[32]

[62] The CAC held that the decision was not appealable because it failed the *Zweni* test and was therefore not appealable. This appears to be the court's conclusion in response to the submission that the decision was a final decision as contemplated in *s* 37(1)(a)(i) of the Competition Act.

[63] The CAC also held that the decision could only be taken on appeal only if the Competition Act so provides, which it held it did not. This appears to be the court's conclusion in response to the submission that if the decision was an interim or interlocutory one (i.e. one contemplated by *s* 37(1)(b)(ii)), the Act still contemplated an appeal.

[64] Therefore, if the decision is a final decision (i.e. *s* 37(1)(b)(i) applies), it appears that we are not obliged to follow *Orion Cellular*, which adopted the *Zweni* test, but rather to follow the test enunciated in the cases referred to above. However, if the decision

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[32] Section 37(1) of the Competition Act states the following:

"**37. Functions of Competition Appeal Court.**

(1) 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 this Act, be taken on appeal.

is an interim or interlocutory one (i.e. *s* 37(1)(b)(ii) applies), then in terms of *Orion Cellular* we are bound to find that the ruling is not appealable, as the Competition Act does not provide for an appeal.

[65] Mr Campbell argued that our ruling was a final decision because its effect was final. However, many interlocutory decisions have a final effect, and notwithstanding this, the Legislature sought to distinguish between an interlocutory decision and a final decision, providing that in the case of a final decision there was an appeal, but in the case of an interlocutory decision, there was only an appeal if the Competition Act so provided.

[66] It appears to us that our ruling of 10 July 2015 is quintessentially an interlocutory decision, as it does not dispose of any issue or any portion of the issue in the main action and it does not irreparably anticipate or preclude some of the relief which would or might have been given at the hearing.[33] The Competition Act therefore does not provide for an appeal, as the decision does not arise from an application by the Commission in terms of *s* 44. Therefore, our ruling is not appealable.

[67] However, even if we are wrong in this conclusion and our ruling should be regarded as a final decision as contemplated in *s* 37(1)(b)(i), we believe that after weighing up the relevant circumstances and the interests of justice, the ruling is not appealable.

[68] The reasons for this are: On the one hand, the issue relates to an important and constitutional issue – the proprietal right to documents that are private and confidential. In addition, the ruling is in effect final in the sense that once AMG's legal representatives are granted access to these documents, then the proverbial ship has sailed.

[69] On the other hand, it is questionable whether irreparable harm would result because all that the ruling does is give limited access to legal representatives and advisors of a party. This is the usual practice in regard to adjudication before the Tribunal in the context where there is no compelling evidence that this practice should be deviated from. The representatives and advisors who sign the

[33] *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A) at 870.

confidentiality undertaking are bound not to disclose it to their clients or anyone else and their access is stringently regulated.

[70] Furthermore, allowing the appeal would certainly promote piecemeal litigation and prolong the litigation, which has already been the unfortunate feature of this litigation to date. We are mindful of the fact that the CAC has already criticised the Commission and the Tribunal for allowing a postponement of the main matter due to the last appeal about another interlocutory decision, the refusal to grant a stay of the proceedings.

[71] We are obliged to deal with this matter as expeditiously as possible. In this context, the interests of justice require appeals of this nature to be curtailed so that this matter can be disposed of without further unnecessary waste of judicial resources.

[72] Therefore, weighing up the relevant circumstances, we are of the view that the ruling is not appealable. As a result there is no valid appeal and our ruling is not suspended.

[73] The ruling must therefore be implemented. We are also of the view that the confidentiality undertakings provided by AMG are satisfactory. Accordingly, AMG's legal representatives and economic advisors must be granted access to Cape Gate's confidential documents in accordance with our ruling of 10 July 2015.

5 August 2015

Mr. Anton Roskam **Date**

Prof. Fiona Tregenna and Mr. Andreas Wessels concurring

Tribunal Researchers:	Ipeleng Selaledi and Caroline Sserufusa
For the Allens Meshco Group:	Adv. BP Geach SC instructed by Roestoff and Kruse Attorneys
For Cape Gate:	Adv. J Campbell SC and Adv. B Makola instructed by Bowman Gilfillan Attorneys
For the Commission:	Adv. NH Maenetje SC and BD Lekokotla instructed by the State Attorney