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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR212Feb17/DSC027Apr17

In the application to compel of:

The Standard Bank of South Africa Limited	Applicant
And	
The Competition Commission of South Africa	Respondent

Panel	: Norman Manoim (Presiding Member) : Yasmin Carrim (Tribunal Member) : Mondo Mazwai (Tribunal Member)
Heard on	: 18 September 2017
Order Issued on	: 6 November 2017
Reasons Issued on	: 6 November 2017

Reasons for Decision and Order

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[1] The Standard Bank of South Africa Limited ("**Standard Bank**"), the applicant in this matter, is one of eighteen respondents in a complaint referral that the Competition Commission ("**Commission**") has brought against local and international banks, concerning alleged collusive conduct with regard to trading in foreign currencies (the "**Forex case**").

[2] It brings this application to compel the Commission to produce its record of investigation in the Forex case, relying on the access to information regime contained in Rule 15 of the Competition Commission's rules of procedure. [1]

[1] More formally these rules are styled "*Rules for the Conduct of Proceedings in the Competition Commission.*"

[3] This rule 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*
>
> *(i) this Rule; or*
>
> *(ii) an order of the Tribunal, or the Court.*

[4] The Commission opposed the application. Its opposition was two-fold. First, it argued that Standard Bank should have brought a review of the Commission's decision to refuse to produce the record and not an application to compel. Since Standard Bank adopted the wrong procedure, the Commission argued, its application should be dismissed on that ground alone. Second, it argued that even if this procedural challenge was unsuccessful, Standard Bank was not entitled to the record because it had been leveraging its position as a litigant to bring the application for the record in terms of Rule 15, a rule that is intended for a member of the public to obtain access to information, not a litigant to obtain premature discovery. It also stated as a separate ground that the application was an abuse of process, but this seems to be a conclusion that follows from the first ground and not a self-standing ground.[2]

[5] Since the procedural challenge is logically anterior to a consideration of the grounds for refusal, we must deal with it first.

[6] Before we do so it is necessary to set out the history of this case.

PART A

HISTORY

[7] The Commission initiated the complaint in the Forex case on 1 April 2015. At that stage the initiation was against eleven banks. On 31 August 2016, the complaint was amended and Standard Bank was included as a respondent. On 15 February 2017, the Commission referred the Forex case to the Tribunal. Standard Bank was one of the eighteen respondents. Standard Bank alleged this was the first time it became aware of the case against it.

[8] On 22 February 2017, Standard Bank's attorney wrote to the Commission to request a meeting to discuss *"...further specifics concerning the referral"*. She stated that

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[2] See answering affidavit, paragraph 27, record page 57.

Standard Bank had, in the short period since the referral had been served on it, not been able to find any evidence of *"...improper or unlawful conduct."*[3]

[9] The follow up e-mail from the Commission dated 23 February 2017 stated the referral contained sufficient detail for Standard Bank to be able to plead and that the Commission expected delivery of the Bank's answering affidavit in the normal course. Although not specified, presumably the Commission meant the time period for filing an answer in terms of the Tribunal rules which is 20 days after receipt of the referral.[4]

[10] Standard Bank through its attorney wrote to the Commission again on 1 March 2017.[5] It repeated its request to engage with the Commission. In the same letter it also requested access to the Commission's record of investigation. More specifically, it asked, relying on the Competition Appeal Court's ("CAC") decision in *Group Five*[6] for *"...an index of its record, indicating which portions are restricted and the reasons thereof...and copies of the portions of the record that are not restricted."*

[11] The Commission simply acknowledged receipt. Standard Bank repeated this request on 27 March 2017 but this time it asked the Commission to produce the record by 7 April 2017 on the basis that this would have been a period of five weeks after the initial request and that this was a reasonable time to require production.[7]

[12] On the same day the Commission replied to advise that it was preparing the record and the index and that once finalized the Commission would provide Standard Bank with a copy of the index for it to decide what from the record it would require.[8]

[13] Not hearing from the Commission, Standard Bank wrote again on 20 April 2017 asking when the index of the record would be made available. The Commission wrote back the following day indicating that it was attending to the request but this reply had a sting in the tail. The Commission asked Standard Bank to *"... inform us about the basis for the urgency of your request."*

[14] An hour later, Standard Bank wrote back advising that it was bringing an application to compel the record. Standard Bank indicated that a reasonable time had elapsed since

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[3] Record page 19.
[4] Record page 21.
[5] Record page23.
[6] *Group Five Ltd v the Competition Commission* case no 139/CAC/Feb16.
[7] Record page 25.
[8] Record page 26.

its request (it noted that by now two months had elapsed). It did not, however, respond to the Commission's request to indicate the basis for the urgency of its request.

[15] Standard Bank then filed this application on the 26 April 2017.

[16] Whilst all this was happening in respect of the record, litigation in the Forex case was proceeding at snail's pace. A pre-hearing was called by the Tribunal on 10 March 2017, in response to requests from the various respondents who wanted to know if they would be required to file an answer before the 20 day period in the rules elapsed, as they indicated that they wished to bring objections to the referral prior to being required to file an answer. These objections ranged from challenges to the jurisdiction of the Tribunal to hear the case, to that the referral did not make out a cause of action, to that it was vague and embarrassing.

[17] The Commission, then represented by Mr Maenetje, proposed a timetable for the further progress of litigation. According to Maenetje the Commission would, in anticipation of some of the challenges, file a supplementary affidavit to the referral. If the supplementary affidavit did not suffice, the objecting respondents could file exceptions to which the Commission would reply. In terms of the timetable, two days were set down in July for the hearing of any exceptions brought. As a precaution, since at that stage it was not clear how many of the fourteen respondents would bring a challenge, and if so, what the basis was, a pre-hearing was set for 23 June 2017 to further plan the July hearing.[9] At this pre-hearing on 23 June 2017, everything unravelled. Finger pointing as to whom was to blame is pointless for the purpose of this decision. The upshot was the matter was not ripe for the hearing of the objections in July and the matter was taken off the roll to enable the Commission to make its election as to how to proceed.

[18] In a surprising move the Commission brought default judgment applications against several of the respondents, on the basis that their exceptions were defective and since they had not answered the referral in the requisite time period, default judgement was competent. At the same, time the Commission also brought an application for separation of the various exceptions.[10] This application, which was opposed by most of the respondents including Standard Bank, was heard on 28 August 2017.

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[9] Since the filing of the referral it appears that three respondents have received conditional immunity whilst another has settled in terms of a consent agreement.

[10] The Commission wanted to separate the hearings of the default judgment applications from the objections. The latter were then classified into three classes depending on whether they had been taken by way of an affidavit, were pure exceptions or were in the form of a special plea i.e. requiring evidence to be determined.

[19] On that day Mr Ngcukaitobi, who was now appearing for the Commission, advised that it was withdrawing the default judgment applications, but still wanted a separation order. With some pushing and prodding from the Tribunal the matter was put back on track. The detail of it does not concern us here. What is relevant from that outcome are two issues.

[20] First, the exceptions insofar as they raise only issues of law were set down for three days of hearing, 24-26 January 2018, as these were the first dates that all counsel were available. What this means is that until those exceptions are determined the respondents, including Standard Bank, are not being required to file their answering affidavits.

[21] The second outcome was that Standard Bank's application to compel, which was also a subject of the separation application, was set down for hearing on 18 September 2017.

[22] At the stage we heard the separation application i.e. on 28 August 2017 the Commission had not yet filed its answering affidavit in this case. Prior to doing so, its attorneys wrote a letter to Standard Bank on 4 September 2017 ("the September letter") in which they stated the reason for the delay was because preparing the record was a complex task.[11] This appeared to be preparatory to explaining when the record might be made available. But this was not to be. In the final paragraphs of this letter the Commission accused Standard Bank of seeking the record not as a member of the public but as a litigant. The Commission asserted that it thus had no *locus standi* to compel application of the record. They indicated that the Commission had decided to decline the request.[12]

[23] Three days after writing the September letter the Commission filed its answering affidavit in this case.[13] Here for the first time it alleged that Standard Bank should have come by way of review proceedings and not an application to compel.[14]

[24] With this background we now consider the basis of the Commission's opposition to the application to compel.

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[11] Record page 98.
[12] Record page 101.
[13] This was on 7 September 2017.
[14] See paragraphs 6 and 7 of the answering affidavit, record page 52.

PART B

ANALYSIS

(I) Is the application procedurally competent?

[25] The Commission argued what is at issue in this case is its decision to refuse Standard Bank the record of investigation. Such a decision it argues would *"fall squarely under section 27(1)(c) of the Act"*. Section 27(1)(c) of the Act gives the Tribunal jurisdiction to hear appeals or reviews of any decision of the Commission.

[26] The Commission argued that its decision constitutes 'administrative action' and hence falls squarely within the definition of that concept in the Promotion of Administrative Justice Act 3, of 2000 ("PAJA"). Thus reading the two statutes together section 27(1)(c) of the Act, gives the Tribunal jurisdiction to apply PAJA to its decision to refuse to provide the record. Since Standard Bank had instead proceeded by way of an application to compel, this was not a competent procedure and on that ground alone the application should be dismissed.

[27] Standard Bank argued that PAJA did not apply as the Commission's conduct in refusing to produce the record did not constitute administrative action and that the Tribunal could consider an application to compel in terms of its incidental powers in terms of section 27(1)(d) of the Act.

[28] We agree with Standard Bank on this point.

[29] The term *"administrative action"* has a defined meaning in PAJA. It is a lengthy definition, but pertinent to this case is the requirement that the decision *"... adversely affects the rights of any person and which has a direct external effect...."*

[30] Although there are a number of decisions as to what constitutes administrative action they do not offer much in respect of the present matter. In the leading case on this point Mogoeng J, as he then was, in *Viking Pony* held that whether a decision amounts to administrative action for the purposes of PAJA must always be assessed within the factual context of the case, holding that *"Whether or not administrative action, which would make PAJA applicable, has been taken cannot be determined in the abstract. Regard must always be had to the facts of each case"*[15]

[15] *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* 2011 SA 327 (CC) para 37.

[31] Two other decisions have sought to specifically interpret the phrase "*... direct external legal effect*". In one case, the court suggested it meant that the decision in question should be final in character[16] and in another, that it should have an immediate effect.[17]

[32] Following *Viking Pony,* we need not decide whether in all cases the response by the Commission to a Rule 15 request must be decided by way of review as opposed to an application to compel, because this would be making a decision in the abstract, and not on the facts of each case. Following the approach taken in the two other cases, we look to see whether on the facts of this case, what purported to be the decision of the Commission, had the elements of finality and immediate effect.

[33] The reason we describe this as a purported decision is that it is not clear when the Commission made its decision, what the content of the decision was and who made it.

[34] From the time the first request was made by Standard Bank for the record until the letter from its attorneys on 4 September 2017 the Commission's response varied. Initially the Commission's inspector responsible for investigating the Forex case, ignored the request, then when cajoled, intimated on two occasions, that the record was being prepared; then later, after further cajoling, asked Standard Bank what the urgency of its request was. Finally the Commission through its attorneys in the September letter declined the request completely.

[35] Standard Bank brought this application on 26 April 2017. Up until this moment it would be difficult to describe the response of the inspector as constituting a decision let alone one meeting the requirements of finality and immediate effect. Indeed we do not understand the Commission to suggest it was.

[36] What the Commission relies on as constituting its decision – and hence its administrative action - came in the September letter – thus more than four months after Standard Bank had filed the present application, and before the Commission had filed any answering papers.[18] But even the contents of this letter are not clear. Certainly the final paragraph states *".. In light of the above, the Commission has decided to decline SBSA's request for the Commission's record of investigation."*

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[16] See *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd 2001 (4) BCLR 344 (W) para 14*, wherein the court held that the decision to institute proceedings lacked the finality required to attract administrative rights.

[17] *See Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works 2005 (6) SA313 (SCA),* para 23, where the SCA held that the phrase direct legal effect *"serves to emphasise that administrative action impacts directly and immediately on individuals."*

[18] See Answering affidavit paragraph 40, record page 62.

[37] But in an earlier paragraph in the same letter the attorneys stated the following:

> "*The Commission has been addressing [Standard Bank]'s request for access to the record. However, what will constitute a reasonable time is what time the Commission would reasonably require for preparing its record and identify what parts are restricted. This is an assessment on a case by case basis.*"[19]

[38] This paragraph suggests the Commission was not refusing to provide the record, but rather, is explaining why its conception of what constitutes a reasonable time, is longer than Standard Bank's. Indeed in the next paragraph reasons are offered as to why the preparation of the record would require more time.[20]

[39] There are several problems with the Commission's approach.

[40] First, if the September letter constituted the Commission's administrative action, it needs to be emphasised this "decision" took place after Standard Bank had filed its application to compel.

[41] Standard Bank can hardly be criticised for not reviewing a decision that had not yet been made. Nor can it be criticised for acting too hastily i.e. waiting until an act of administrative action had occurred, given that it had patiently corresponded on this issue for some months and had indicated it was bringing this application, with no suggestion from the Commission that such a procedure was legally defective or that administrative action could be anticipated.

[42] Second, the very fact that the Commission could make its decision only after the commencement of litigation calls into question as to whether a review is the correct remedy for disputes about Rule 15 requests. If the Commission, faced with a request for a record, vacillates as it has in this case, then there is no decision with a final effect; in such instances an application to compel is the appropriate and most efficient form of process.

[43] Third, even if the considerations mentioned above are disregarded and a review under PAJA was still competent, we still have to analyse, if on the facts, a decision constituting administrative action was made. Certainly prior to the September letter the communications from the Commission could not constitute such a decision. What characterised them at best were temporization and vacillation – not finality and immediacy.

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[19] Paragraph 2 of the September letter, record page 99.
[20] Paragraph 3 of the September letter, record page 99.

[44] Nor does the September letter improve the situation for the Commission. It may have ended on a note of apparent finality, but its earlier suggestion that the record would be furnished in a reasonable time was wholly inconsistent with this.

[45] We are not criticising the Commission for its vacillation. Rather its vacillation is evidence that such decisions when conveyed to a requester are typically provisional, not final in nature, and can be changed when new reasons are offered by a requester or circumstances change in the Commission.

[46] On these facts, an application to compel is the appropriate procedure for Standard Bank to have followed and it is competent for us to give an order in terms of section 27(1)(d) of the Act which empowers the Tribunal to give any order, *"... necessary or incidental to the performance of its functions in terms of this Act."*

[47] It may well be that all decisions of the Commission in terms of Rule 15 should be treated as provisional and not final in nature and hence not reviewable. However we do not need to make such a far reaching finding in this case.

[48] We also leave open the point, because it was not argued in this matter, as to whether the discretion that the Commission exercises in responding to a Rule 15 request is of such a nature as to render it susceptible to review, let alone PAJA review. The rule states that when it receives such a request the Commission must grant the requester access, subject to checking whether the record contains restricted information. Since the rule does not provide a time period for access to be granted, the case law, as we discuss further below, has decided that this has to be done within a reasonable time period.[21] Thus all that is left for the Commission to decide are two issues: (i) the classification of the material as restricted or not, and (ii) the time for compliance; decisions more suited to an application to compel, than a review in terms of PAJA.

[49] However, on the facts of this case we are satisfied that PAJA is not applicable and the Commission's procedural objection is dismissed.

(II) Is the request to compel reasonable?

[50] Rule 15 does not provide a time period in which the Commission must provide the record to the requesting party. In the leading case on the subject, *Group Five*, the CAC has held that the Commission must do so within a *reasonable time* period. [22]

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[21] See *Group Five supra.*
[22] *Group Five supra.*

[51] The CAC explained this as follows:

> *"The determination of a reasonable time is only concerned, in my view, with the time the Commission would reasonably require to prepare its record and identify what parts are restricted."*[23]

[52] Standard Bank maintained that some six months have elapsed since the time of their request and that this is certainly a reasonable time. In its notice of motion it sought the record within five days of the order. In argument, it was less insistent on this time period; but no less persistent that the Commission had had sufficient time to prepare the record, pointing out that the Commission had claimed to be working on the record since 27 March 2017 and had initiated the investigation on 1 April 2015. This, said Standard Bank, was more than enough time.

[53] The Commission did not indicate in its answering affidavit when it would produce the record. In oral argument, it said that a reasonable time was when discovery was made in the Forex case.[24]

[54] Standard Bank countered by arguing that the *Group Five* case had expressly rejected this argument. This is partly correct.

[55] It is true that in *Group Five* the CAC held that a requester's entitlement to the record could not be negatively affected by its status as a litigant.[25]

[56] What the CAC was holding was that regardless of whether the party knocking at the window of the Commission's registry is a litigant or someone just off the street they should be treated in an equal fashion in respect of their request.

[57] The CAC also rejected the Tribunal's approach in its *Group Five* decision, which had sought to harmonise the public access rule (Rule 15) and the discovery practice in the Tribunal, by holding that a reasonable time for access to the record was when discovery took place.

[58] Nevertheless the CAC was not prescriptive about what a reasonable time was and this is an issue to be decided on the facts of each case.[26]

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[23] *Group Five* paragraph 11.
[24] Transcript line 4 page 54.
[25] *Group Five* paragraph 11.
[26] The CAC held that: *"The determination of a reasonable period is only concerned in my view with the time the Commission would reasonably require to prepare its record and identify what parts are restricted. That may vary from case to case but would not have to be affected by the identity of the requester."* [*Group Five,* supra paragraph 11.]

[59] We examine below what might constitute such an analysis.

[60] There are two vantage points from which to determine what constitutes a reasonable time; how soon the requester needs the record and what challenges confront the Commission in responding to such a request.

[61] Sometimes these two needs may be in tension and the test for reasonableness will involve a compromise between them.

[62] In other instances the interests of one may be more compelling and hence outweigh the interest of the other.

[63] For this reason the Commission is entitled to know the requester's reasons for obtaining the record. It is not a prerequisite, but if it is not furnished or satisfactorily furnished, the Commission is entitled to prioritise its own logistical requirements ahead of the needs of the requester.

[64] If a party can motivate why the production is urgent then a reasonable period might be shorter for that requester than another who makes out no case for urgency assuming the logistical burden of the Commission is the same in both instances.

[65] Applying the same approach to the Commission's needs it may matter in some cases as to whether the case for which the record has been created is ongoing and if it is, whether discovery has otherwise taken place which of course depends on the timing of the Rule 15 request.

[66] It is important not to lose sight of the fact that Rule 15 applies to all record requests; either where the Commission has referred a complaint or where it has been non-referred. Where there is a non-referral the Commission is never going to have to deal with a later discovery request and hence this factor would be irrelevant to the consideration of a reasonable time period in such a circumstance.

[67] But equally, even if the underlying case had been referred and discovery had not yet taken place, it may be regarded as perfectly reasonable for the Commission to be obliged to produce the record and unreasonable for the requester to wait for discovery to take place in the underlying matter. Thus even in a case that has been referred, where a record is small and the documents do not unduly comprise restricted information, a reasonable time should be brief. It would not be a great burden on the Commission, in such a situation, to provide the record to the requester irrespective of whether discovery has taken place.

[68] The situation becomes more complex in cases involving a lengthy record that is subject to numerous claims that documents in the record may constitute restricted information and where discovery has not yet taken place. Here the burden on the Commission of undergoing a lengthy preparation of the record first for the requester and then later for the litigants may justify delaying production of the record until the record is ready to be discovered in the underlying case.

[69] Here the approach is not to harmonise the two processes - which the CAC has held one may not do - but to apply a reasonableness test; to weigh up the burden on the Commission and thus the public interest in the most efficient allocation of its resources with the right of the requester to obtain the record more expeditiously than the litigants otherwise would.

[70] We now apply this analysis to the present case. Standard Bank had not advanced any facts as to why it should acquire the record prior to discovery. When asked specifically by the Commission to explain why it needed the record it refused to do so. The Commission suspected that Standard Bank seeks the record for the purpose of its litigation in the Forex case given that it has yet to file an answer. While that alone does not justify refusing a party the record, it does mean Standard Bank has not made out any case for urgency in obtaining the record. Rather Standard Bank has relied on pure logistics to suggest that the delay has been unreasonable. It's an argument based on viewing the Commission as a printing shop that by now could have copied out its record.

[71] However as we point out in the earlier analysis, the concept of reasonableness whilst informed by issues of logistics, is not solely defined by them. What is 'reasonable', is also informed by a consideration of the investment of public resources to perform an onerous task that is independent of the litigation then proceeding that in any event it will largely have to perform again at some later stage in the litigation process.[27]

[72] In this regard, we know the following facts from the Commission's vantage point. The relevant period to which the Forex referral relates is a period of at least seven years. There are five separately detailed counts of alleged co-operation, involving some or all of the respondents. Some of these instances, the referral suggests, are based on

[27] It is true, as the CAC suggests in *Group Five,* that production of the record of the investigation may not be identical to documents that the Commission might discover. Whilst legally this distinction is correct, practically the Commission typically gathers documentation in its investigation that either it or the respondent parties would consider relevant to the issues in the case. Thus from a logistical point of view the burden on the Commission in performing two tasks that largely overlap but are required to be performed at different times cannot be underestimated.

communications which presumably exist in some documentary form. Given the number of respondents (eighteen), the lengthy period and the number of counts, the record, as the Commission claims it is, is likely to be voluminous. In its September letter the Commission raised additional logistical issues:

a. The record apart from being voluminous contains highly sensitive and complex information;

b. Some of the documents are in "technical industry specific language". This adds to the burden of preparing the record as it would require persons with expert knowledge to determine whether the documents constitute restricted information;

c. The Commission has limited staff devoted to this matter. It is not practical for it to outsource material of this nature to other service providers;

d. If it has to provide the record to Standard Bank then other respondents are likely to make similar requests to the Commission.

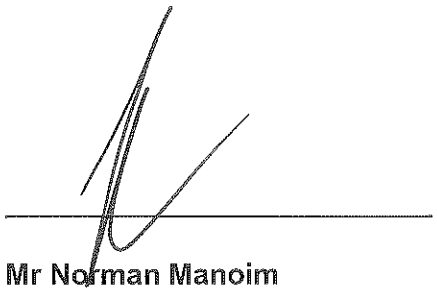
[73] After considering all these facts we do not consider the Commission's tender to produce the record when it makes discovery in this matter to be unreasonable when weighed against the fact that Standard Bank advanced no reasons why it should be produced before then. Of course if Standard Bank had such reasons, nothing prevents it from bringing a further request to the Commission in terms of Rule 15 in which these reasons are motivated as decisions such as this are of an interlocutory nature.

[74] Our decision would have been no different if the requester had been a member of the public who was not a litigant in this matter. The same considerations in respect of reasonableness would still apply.

ORDER

We make the following order:

1. The Commission's motion to have the application dismissed on the basis that it took the form of an application to compel and not a review is dismissed;
2. Standard Bank's application to compel the record to be produced within five days of date of this order is dismissed;
3. The Commission must provide Standard Bank with the record of investigation in respect of the referral in the matter of *Bank of America Merrill Lynch International Limited and Seventeen others* case number CR212Feb17 at the same time as it produces discovery in that matter. To the extent that the record is more extensive than that required to be disclosed for the purpose of discovery, it must be disclosed, subject to the Commission's right to exclude any restricted information.
4. There is no order as to costs.



6 November 2017

Mr Norman Manoim **DATE**

Ms Yasmin Carrim and Ms Mondo Mazwai concurring

Tribunal Researchers:	**Ms Aneesa Ravat, Ms Karissa Moothoo Padayachie and Mr Alistair Dey-Van Heerden**
For the applicant:	Adv MJ Engelbrecht instructed by Herbert Smith Freehills
For the respondent:	Adv T Ngcukaitobi assisted by Adv L Zikalala and Adv I Kentridge instructed by Ndzabandzaba Attorneys.