COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: CR162Oct15/ARI187Dec16

In an application to compel between*:*

WBHO CONSTRUCTION LIMITED	Applicant
And	
THE COMPETITION COMMISSION	First Respondent
GROUP FIVE CONSTRUCTION LIMITED	Second Respondent

In re:
The Complaint referral between:

THE COMPETITION COMISSION	Applicant
And	
WBHO CONSTRUCTION LIMITED	First Respondent
GROUP FIVE CONSTRUCTION LIMITED	Second Respondent

Panel	: Andreas Wessels (Presiding Member) : Mondo Mazwai (Tribunal Member) : Enver Daniels (Tribunal Member)
Heard on	: 9 March 2017
Order Issued on	: 8 August 2017
Reasons Issued on	: 8 August 2017

REASONS FOR DECISION

Introduction

[1] This is an interlocutory application by WBHO Construction Limited ("WBHO") against the Competition Commission ("the Commission") and Group Five Construction Limited ("Group Five") for an order declaring that certain documents produced by Group Five, and claimed as legally privileged by the Commission are not so and should be discovered.

[2] In the main matter, WBHO and Group Five are alleged to have been involved in cartel conduct.

[3] We have decided to dismiss the application. Our reasons follow.

Background

[4] On 1 September 2009, the Commission initiated a complaint against a number of named firms in the construction industry, among which were Group Five and WBHO. Not only are Group Five and WBHO mentioned in the Commission's complaint initiation, but the type of conduct being investigated against them is also mentioned.

[5] Shortly afterwards, on 23 November 2009, Group Five applied for leniency in terms of the Commission's Corporate Leniency Policy ("CLP") for conduct mentioned by the Commission in its initiation. Thereafter Group Five, in its capacity as a corporate leniency applicant met with the Commission on 18 March 2010.

[6] Following Group Five's leniency application and further investigation, the Commission, on 26 October 2015, filed a complaint referral with the Competition Tribunal ("the Tribunal") against Group Five and WBHO.[1] Given Group Five's role as the corporate leniency applicant, the Commission only sought an administrative penalty against WBHO.

[7] In the complaint referral WBHO stands accused of contravening sections 4(1)(b)(i) and (iii), of the Competition Act 89 of 1998 ("the Act") by allegedly entering into a collusive agreement with Group Five to fix the trading conditions for an N17 Project in response to a tender issued by the South African National Road Agency ("SANRAL").

[8] On 17 February 2016, WBHO filed its answering affidavit. The Commission did not file a reply and thus pleadings closed on 17 February 2016. Following the close of

[1] Competition Tribunal Case No.: CR162Oct16.

pleadings the parties exchanged a number of discovery affidavits. Both the Commission and WBHO filed their discovery affidavits on 18 July 2016. WBHO filed its supplementary discovery affidavit on 19 August 2016. The Commission filed its first, second, and third supplementary discovery affidavits on 2 August 2016, 20 September 2016, and 9 November 2016 respectively.

[9] In part 2 of the schedule to the Commission's supplementary discovery affidavit, filed on 9 November 2016, the Commission listed five documents which it considered to be legally privileged or restricted. In the index presented below, we set out only the documents relevant to the dispute between the Commission and WBHO.

Table 1

Item	Date	Description	Status
1	23 Nov 2009	CLP Application by Group 5	Litigation Privilege
2	18 Mar 2010	Transcript of the First meeting of the CLP applicant – Group 5	Legally Privileged

[10] Following a directive issued by the Tribunal at a pre-hearing on 11 November 2016, the Commission provided an index of the annexures to Group Five's CLP application (item 1 in the above schedule). The index lists the following documents relevant to the dispute before us:

Table 2

Item	Date	Description of Document
1.	6 November 2009	E-mail from Richard Evans of Group Five to Steve Burnett.
2.	9 October 2009	Extract of transcript of Thomas Moolman.
3.	29 September 2009	E-mail from Steve Rynicks of Group Five to Guy Mottram of Group Five.

[11] It bears mention that the leniency application itself has been claimed by the Commission as legally privileged, which WBHO accepts.

[12] On 9 December 2016, WBHO launched the present application before us in which it essentially asked the Tribunal to:

12.1. Declare the annexures (to the CLP) listed in Table 2 above, not legally privileged; and

12.2. Declare the transcript of the first meeting between the Commission and Group Five as the CLP applicant (listed as items 2 in Table 1 above), not legally privileged.[2]

[13] The Commission opposes the application, having filed an answering affidavit on 9 February 2017 in which it alleges that the documents requested are legally privileged. Group Five did not file an answer. WBHO submitted a reply on 17 February 2017 and the matter was heard on 09 March 2017.

[14] The question that thus falls to us to determine is whether i) the annexures to the CLP application listed in Table 2 above are, in fact, legally privileged and ii) whether the transcript of the interview between the Commission and Group Five (item 2 in Table 1 above) as the leniency applicant also falls under such legal privilege.

[15] It is common cause that the case is concerned only with litigation privilege on the basis of 'contemplated litigation', not for purposes of obtaining or giving advice between a client and his or her attorney.

Litigation Privilege over Corporate Leniency Applications

[16] This Tribunal, the Competition Appeal Court ("CAC") and the Supreme Court of Appeal ("SCA") have had the opportunity to consider the attachment of litigation privilege to Corporate Leniency Applications in cartel matters. In the case of

[2] WBHO also sought delivery of the relevant documents, if found not to be privileged, within two days of the Tribunal's order, as well as costs against the Commission.

Arcelormittal South Africa,[3] the SCA, having heard a matter that had been considered in both the Tribunal and CAC decided that:

> *"[28] The inquiry into whether litigation privilege attaches to the leniency application is fact-bound. In this case that inquiry must focus on the facts set out in the Commission's answering affidavits in response to the respondents' discovery applications. The Commission says that the CLP is founded upon an expectation of litigation. The commencement of discussions with a leniency applicant is always with a view to instituting prosecutions against cartelists. And the grant of immunity flows from the process. Put simply the grant of immunity, to secure the cooperation of a cartelist, is inseparable from the litigation process itself. This much is clear from the Tribunal's characterisation of the purpose of the CLP in the Pioneer Foods case:*
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> > *" [38] The very purpose of the CLP . . . is for firms who have been part of a cartel to come forward with the carrot of immunity offered in return for information and cooperation. 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 the 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 inescapable conclusion is that inherent in this process is the contemplation of litigation."*
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> *[29] It emerges from the Commission's affidavits that it contemplated litigation as a result of its investigation into the steel industry. Scaw became aware of the investigation and applied to the Commission for a marker, which was granted. The Commission then requested Scaw to file a leniency application, which contained certain specific information. Scaw did so on 9 July 2008. Of importance in this regard is that the Commission pertinently says that the leniency application was prepared for its use, even though it would be of a benefit to Scaw. And it was made clear to Scaw from the outset of its engagement with the Commission that the information contained in the leniency application was required so that a complaint could be initiated against the respondents. Moreover, the Commission's in-house and external legal advisors were involved throughout this process, including providing advice on the leniency application.*
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> *[30] There is no reason to doubt that explanation. Moreover, our courts have held that, subject to certain limited exceptions:*
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> > *"the statements in the affidavits of documents are conclusive with regard to the documents that are in the possession . . . of a party giving the discovery . . . as to the grounds stated in support of a claim of privilege from production for inspection".*

[3] The Competition Commission of South Africa v Arcelormittal South Africa [2013] 1 CPLR 1 (SCA).

A court will, therefore, not lightly go behind averments in an affidavit to the effect that the likelihood of litigation was contemplated when the document was procured."[4]

[17] Both Mr Trengove for WBHO and Mr Ndzabandzaba who appeared for the Commission, concurred that whether litigation privilege attaches to a leniency application is ultimately a question of fact. They differed on whether the Commission had sufficiently justified its claims for privilege in this case.

[18] As mentioned, there is no dispute between the parties that the leniency application itself is legally privileged.

[19] In respect of the annexures, the Commission indicates in its answering affidavit that, over and above the fact that the annexures are not severable from the leniency application, *"the annexures were internal discussions within Group Five in preparation of the drafting of the leniency application and therefore are subject to litigation privilege."*[5]

[20] WBHO argued that the Commission's claim of litigation privilege as set out in its answer was bald and unsubstantiated, since it does not follow that litigation was contemplated as likely simply because a leniency application had been filed.

[21] Mr Trengove attempted to differentiate the facts of *Arcelormittal* from the matter before us by introducing a temporal element. He argued firstly that, on the facts of this matter, the annexures to Group Five's leniency application were written before Group Five applied for leniency and thus, the Commission did not contemplate litigation to be a likelihood at the point in time when the documents were generated, since it did not even have the leniency application.[6]

[22] We are not persuaded by this argument. Firstly, no argument was lead as to how the CLP annexures were severable from the leniency application itself merely because they were generated before the leniency application was filed by Group Five with the Commission.

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[4] *Arcelormittal*, supra, para 28-30.
[5] Respondent's Answering Affidavit, para 7, page 178 of hearing bundle.
[6] Applicant's Heads of Argument, page 10, paragraph 19.

[23] The Commission states on affidavit that the annexures form part and parcel of the leniency application. They were generated "*in preparation for the drafting of the leniency application and therefore are subject to litigation privilege".* It goes on further to state that the annexures were *"produced for use by the Commission in contemplation of litigation".* The Commission further states that: *"The central object of producing the CLP application is to use information contained therein to conduct litigation in the Tribunal against such members of the alleged cartel that contest proceedings."*

[24] We have no reason to doubt the explanation in the Commission's affidavit, particularly given the proximity of the dates of the annexures to the filing of the leniency application. The documents were generated on 29 September 2009, 9 October 2009 and 6 November 2009 respectively, and the leniency application was filed on 23 November 2009. It is not improbable, as alleged by the Commission in its answering affidavit, that they were produced in preparation for the leniency application for use by the Commission in contemplation of litigation.

[25] As noted by the SCA in *Arcelormittal*, courts will not lightly go beyond claims on affidavit to the effect that litigation was contemplated when the document was procured.

[26] Secondly, the argument as presented by Mr Trengove places undue emphasis on the generation of the annexures and their author. As mentioned, he submitted that the Commission could not have contemplated litigation when the annexures were generated since it did not have the leniency application before it.

[27] However, as held by the SCA in *Arcelormittal,*

> *"The purpose of the document is not to be ascertained by reference to its author, either at the time at which the document was prepared or at the time it is handed over to the litigant or the litigant's legal representative. Instead, the purpose of the document is to be determined by reference to "the person or authority under whose direction, whether particular or general, it was produced or brought into existence". In that case it is the intention of the person who procured the document, not the author's intention, that is*

relevant for ascertaining the document's purpose. The author need not even know of possible litigation when the document was prepared."[7]

[28] The CLP has been developed and published in the Government Gazette by the Commission in the exercise of its authority as a statutory body responsible, *inter alia*, for prosecuting cartels before the Tribunal. By their nature, leniency applications are brought under the direction of the Commission to aid in eradicating cartels. The High Court, in *Allens Meshco*[8] comprehensively set out the process for leniency applications. As mentioned in the CLP itself (and observed by the High Court in *Allens Meshco*), a leniency application may be brought before or after the Commission has initiated its own investigation. It may or may not be preceded by a marker.

[29] Mr Trengove placed much emphasis on the fact that in *Arcelormittal* the leniency application was filed at the behest of the Commission. He tried to distinguish the facts of this case from *Arcelormittal* on the basis that in the latter, the leniency application was not 'cold' off the street, but happened at the behest of the Commission when the Commission had already initiated an investigation which was far down the line and therefore litigation was contemplated.[9]

[30] However, the characterisation of WBHO's application as a 'cold' application is factually inaccurate. The simple facts of the matter are that the Commission had already initiated a complaint against the construction industry on 1 September 2009 against named firms, including WBHO. In the course of the Commission's investigation, Group Five applied for leniency on 23 November 2009 (having generated the annexures in question). These facts are no different to the facts in *Arcelormittal*.

[31] It transpired during the hearing that Group Five had filed a marker on 8 October 2009, prior to submitting its leniency application. The Commission had not discovered the marker as it claimed it was privileged. Mr Trengove did not seek to

[7] Arcelormittal, supra, para 27.
[8] Case No.31044/13, as yet unreported, 17 July 2015.
[9] Tribunal Transcript of Proceedings, 9 March 2017, page 8, lines 1-15; *see also* page 11, lines 10-20.

make much of this since he submitted correctly that the case before us was not to determine the defective procedure followed by the Commission, but to determine whether the documents in question were legally privileged.[10]

[32] On the facts of this case, there is no dispute that the CLP is privileged. The Commission's explanation of the annexures to the CLP, from its answering affidavit, is that they were generated for its use in contemplation of litigation. Even though they were generated before the CLP, given their proximity to the filing of the CLP, we have no reason to doubt the Commission's explanation. Moreover, as the SCA held, privilege attaches to the person under whose authority the document is produced, not its author.[11] The annexures, even though produced before the filing of the CLP by Group Five, are privileged in the hands of the Commission since they were produced for the Commission's use.

[33] Moreover, contrary to Mr Trengove's characterisation of the Commission's application as a 'cold' application, it was in fact filed after the Commission had initiated its investigation, following a marker. The Commission does not rely on the existence of the marker for its claim of privilege. We are satisfied, nevertheless on the explanations given, that the annexures are privileged and there is no basis to sever them from the application. Put differently, we are not persuaded by WBHO's reasons for severing the annexures from the CLP, particularly where they accept that the CLP itself is privileged.

[34] We thus find no reason to sever the annexures of the leniency application in this matter from the leniency application itself.

[35] Turning then to the transcript of the meeting between WBHO and Group Five on 18 March 2010. The Commission submits in its answering affidavit that the transcript thereof was generated in contemplation of the litigation against WBHO. It states further that *"the transcript was produced in relation to litigation that had*

[10]Tribunal Transcript of Proceedings, 9 March 2017, page 79, lines 9-13.
[11] *Arcelormittal*, supra, para 27.

not only commenced, but that the Commission fully expected to pursue." Again, we have no reason to question this explanation.

[36] The applicants argue that because the meeting was held in 2010 and the referral only made in 2015, it could not be said that litigation was contemplated as a likelihood at the time of the meeting and thus the transcript could not be considered legally privileged.[12]

[37] We find such an argument to be unsustainable. To assert that, because there has been a passage of time between the first meeting with a leniency applicant and the referral of a complaint as a result of such meeting indicates that litigation was never contemplated at the time of the first meeting is unpersuasive. There may be many factors delaying the eventual referral of a matter. This does not detract from the fact that litigation was contemplated as likely well before the matter is heard.

[38] The fact that the Commission also invited firms to settle any contraventions they may have been involved in, which may also account for some of the delay, does not mean that the contemplation of litigation ceased. It is a matter of public record that settlement negotiations were entered into to expedite the conclusion of an industry wide investigation. [13]

[39] We find that the transcript of the meeting between the Commission and Group Five was generated in contemplation of litigation and thus the Commission is within its right to claim privilege over the document.

Docket Privilege

[40] The Applicants argued, at some length in both their heads of argument and in oral argument that the Commission's claim of legal privilege over the documents in question amounts to the outlawed and outdated claim of 'docket privilege.'

[12] Applicant's Heads of Argument page 9-10, para 17-18. Tribunal Transcript of Proceedings, 9 March 2017, pages 5-10.

[13] WBHO itself concluded a settlement agreement with the Commission regarding its involvement in cartel activity, and according to WBHO its settlement with the Commission includes the N17 Project which is the subject matter of the Commission's referral in the main matter. This however has no bearing on the privilege dispute before us as it will be decided in the main hearing.

Although the issue of litigation privilege reached the SCA in the *Arcelormittal* matter, docket privilege is not raised by the SCA.

[41] Adv. Trengove implored us to utilise our discretionary power in terms of Competition Tribunal Rule 55(1) to interpret litigation privilege with the principle of fairness followed by the Constitutional Court in *Shabalala v Attorney General, Transvaal*,[14] which required organisations assuming a prosecutorial role to provide full disclosure of the docket.

[42] Whilst we appreciate that Mr Trengove was advancing a more nuanced line than that which was dealt with succinctly by the CAC in the *Federal Mogul*,[15] where Davis JP held that "*The proceedings in the Tribunal, which eventually lead to the imposition of an administrative penalty are civil and not criminal in nature*", we disagree with his submissions.

[43] In the *Pioneer Foods* matter, the CAC held that:

> "*The Supreme court of Appeal has recently said in passing that administrative penalties imposed by the Tribunal bear a close resemblance to criminal penalties. This should not be taken as detracting from the decision by this court that proceedings before the Tribunal are not criminal proceedings for the purposes of the Constitution, but is merely a reflection of the fact that in their amount, their intended deterrent purpose and undoubted punitive effect and the fact that they are paid into the consolidated revenue fund, they bear a resemblance to fines as reflected in the language of section 59(4)."* [16]

[44] In *Group Five Ltd v The Competition Commission of South Africa*,[17] this Tribunal found that:

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[14] 1996(1) SA 725 (CC).
[15] Federal Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission and Another [2005] 1 CPLR 50 (CAC).
[16] Competition Commission v Pioneer Foods (Pty) Ltd [2010] 2 CPLR 195 (CAC), para 8.
[17] Group Five Ltd v Competition Commission; in re: Competition Commission v Group Five Ltd and others [2016] 1 CPLR 359 (CT).

Complaint referral proceedings are not criminal proceedings, nor have our courts recognised rights that would avail a criminal accused to a firm in administrative law proceedings where the individual's right to liberty is not in question.[18]

[45] The CAC and Tribunal, in our view, have thus already decided on the line of argument presented by Mr Trengove, long after the *Shabalala* decision. In light of the fact that any firm before the Tribunal is not at risk of losing its liberty in a finding by the Tribunal, the principles determining fairness in criminal proceedings cannot be said to be applicable to the determination of fairness before the Tribunal. We see no reason to differ in our conclusion from the decisions that have come before on this issue.

[46] Of course there is nothing stopping the Commission from making a policy choice to give access to its entire docket despite its claim of privilege over some documents in the docket, but there is no legal obligation on it to do so.

[18] Supra, para 71.

Order

The following order is made:

1. The application is dismissed

2. No order is made as to costs.

Ms Mondo Mazwai

8 August 2017
Date

Andreas Wessels and Enver Daniels concurring

Tribunal Researcher:	Alistair Dey-van Heerden
For the Applicant:	Adv. W Trengove SC assisted by Adv. G Marriott *Instructed by* Nortons Inc.
For the Commission:	Mr A. Ndzabandzaba of Nzabanzaba Attorneys Inc.