THE COMPETITION APPEAL COURT OF SOUTH AFRICA

Case No: 165/CAC/Mar 18

In the matter between:

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| **THE STANDARD BANK OF SOUTH AFRICA LIMITED** | Applicant |
| and | |
| **THE COMPETITION COMMISSION OF SOUTH AFRICA** | Respondent |

**Heard**: 14 June 2018

**Delivered:** 22 June 2018

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# JUDGMENT

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**BOQWANA JA**

[1] On 20 March 2018 the applicant ('Standard Bank') lodged an application to review and set aside the decision of the respondent ('the Commission') to refer it to the Competition Tribunal ('the Tribunal'), wherein the Commission alleged that Standard Bank, together with other banks, engaged in cartel conduct prohibited by section 4 (1) (b) (i) and (ii) of the Competition Act 89 of 1998 ('the Act'). Standard Bank contends that that decision is invalid and unlawful in terms of section 62 (2) (b) of the Act. The Notice of Motion called for the Commission to

file a complete record of the decision to refer Standard Bank to the Tribunal ('the Record') within 15 days of receipt of the Notice of Motion.

[2] The Commission refused to file the Record. It lodged a counter-application, contending that the Competition Appeal Court ('CAC') does not have jurisdiction to hear the review application; alternatively that the review application be stayed pending the outcome of the appeal, to be heard by the CAC, in relation to the Commission's obligation to produce the record of its decision in response to a request for access to the record, made in terms of Rule 15 (1) of the Commission Rules, and the determination by the Tribunal of an exception filed by Standard Bank in the pending complaint referral proceedings.

[3] On 20 April 2018 Standard Bank wrote to the Judge President, requesting directions in terms of Rule 34 (2) (a) of the Rules for the Conduct of Proceedings in the Competition Appeal Court ('the CAC Rules'), to direct the Commission to produce the Record in order to enable the review to proceed, to specify the date by which the Record must be produced, and to make such directions as it may deem fit.

[4] Rule 34 (1) and (2) (a) provides that:

> " (1) The Judge President may give any directions that are considered just and expedient in matters of practice and procedure.
>
> (2) If, in the course of proceedings, a person is uncertain as to the practice and procedure to be followed, the presiding judge –
>
> (a) may give directions on how to proceed;..."

[5] The Judge President designated me to hear the matter as a single judge. The matter was set down on 29 May 2018. It was postponed at the instance of the Commission and argued on 14 June 2018. Parties filed written submissions to assist the Court in determining this matter.

[6] Section 38 (2A) of the Act lists a number of instances where the Judge President, or a judge of the CAC, designated by the Judge President, may sit alone, as follows:

> "(a) appeal against a decision of an interlocutory nature, as prescribed by the rules of the Competition Appeal Court;
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> (b) application concerning the determination or use of confidential information;
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> (c) application for leave to appeal, as prescribed by the rules of the Competition Appeal Court;
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> (d) application to suspend the operation and execution of an order that is the subject of a review or appeal; or
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> (e) <u>application for procedural directions</u>." (Own emphasis)

[7] The Commission contends that a single judge has no power to direct the Commission to produce the Record, because section 38 (2A) restricts his or her powers to matters of "*practise and procedure*" to be followed, and only "*procedural directions*" may be issued in terms of that section. The current matter is not a procedural issue.

[8] According to it, the issue of the Record is disputed on substantive grounds. Directions, as contemplated in section 38 (2A) (e), may only be competently granted if the CAC has the jurisdiction to hear the matter in the first place. It accordingly argues that that jurisdictional point must be determined first before the issue of whether the Record should be dispatched can arise. This, it contends, can only be done by a full court.

[9] In Standard Bank's view section 38 (2A) (e) perfectly allows a single judge to direct the Commission to file the Record, as this is a procedural matter prescribed in Rule 53 of the Uniform Rules of Court ("High Court Rules"). Rule 53 (1) (b) calls for the despatching "*within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside…*"

[10] It is not disputed that Rule 53 finds application, because of the provision in Rule 34 (2) (b) of the CAC Rules which states that: *"…if a question arises as to the practice or procedure to be followed in cases not provided for by these Rules or by a direction of the Judge President in terms of subrule (1), the judge may have regard to the High Court Rules or Rules of the Supreme Court of Appeal*."

[11] The first question to be answered is whether the dispatching of the Record is a procedural issue, with regard to which I would be empowered to give directions. It has been held to be so by the courts, for example, in the seminal decision of *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 660 D-E, where the Court held, amongst others, "[*m*]*anifestly the procedure created by the Rule* [53] *is to his* [private citizen's] *advantage in that it obviates the delay and expense of an application to amend and provides him with access to the record."* In *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 at 669B, the Court said: "*With the coming into operation of Rule 53 of the Uniform Rules of Court a standard procedure for all types of review, save where any law otherwise provided, was laid down*." Lastly, in *Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others* 1999 (2) SA 599 (T), at 629 A, referring to the furnishing of the record in review proceedings in terms of Rule 53, the Court stated that "[*t*]*he applicant should not be deprived of the benefit of this procedural right unless there is clear justification therefor*...". These findings were repeated in numerous judgments, including in *Helen Suzman Foundation v Judicial Service Commission* 2015 (2) SA 498 (WCC) ('*Helen Suzman WCC'*), at para 14. See also Erasmus, *Superior Court Practise*, D1-707.

[12] The Court in *General Council of the Bar of South Africa v Jiba and Others* 2017 (2) SA 122 (GP), at paras 111 to 112, enhanced the point further by expressing the purpose of the Rule requiring the record in some length, as follows:

> "[111] …The objective of rule 53 is obvious. The time frames are to ensure that review proceedings are not unnecessarily delayed. Secondly, despatching to the registrar the record of the proceedings sought to be corrected or set aside, together with such reasons

as the decision-maker is by law required to give, and notifying the applicant that this has been done and making such record available to the applicant, is to ensure that a party aggrieved by the decision is properly informed as to the route to follow. The rule serves as a tool to ensure that any challenge to the proceedings sought to be reviewed is well considered and properly pleaded. For this purpose, the applicant or aggrieved party is under subrule (4) given an opportunity, by delivery of a notice and accompanying affidavit, to amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit if need be. Similarly, the decision-maker is in terms of subrule (5) (b) given the opportunity to deliver any affidavit he or she may desire in answer to allegations made therein and any further reasons as contemplated in subrule (1) (b).

[112] Therefore compliance with rule 53 regarding time frames and providing a complete record is not just a procedural process, but is a substantive requirement which serves to ensure that the substance of the decision is properly put to the fore at an early stage. Any attempt to frustrate this should be met with displeasure by our courts." (Own emphasis)

[13] The matters above recognised compliance with Rule 53 as being a procedural process. The substantive requirement mentioned in *Jiba* supra, at para 112, is simply pointed to the importance of placing the content of the record to the fore at an early stage of the proceedings. It is a step imposed by the Rules, with timeframes, and is important for the party aggrieved by the decision of the decision maker, so as to ensure that such a party *"is properly informed as to the route to follow*". The Court also referred to this Rule "*as a tool to ensure that any challenge to the proceedings sought to be reviewed is well considered and properly pleaded*." In *Turnbull-Jackson v Hibiscus Coast Municipality and Others* 2014 (6) SA 592 (CC), at para 37, the Rule 53 record was referred to as undeniably "*an invaluable tool in the review process*".

[14] Many other decisions, before and after those mentioned above, emphasised the duty of the decision maker in filing the record in review proceedings, the most recent being the sequel decision of *Helen Suzman Foundation v Judicial Service Commission* (CCT289/16) [2018] ZACC 8 (24 April 2018) ('*Helen Suzman CC'*), where the Constitutional Court re-iterated the already established purpose of Rule

53 as to "*facilitate and regulate applications for review. The requirement in rule 53 (1) (b) that the decision-maker file the record of decision is primarily intended to operate in favour of an applicant in review proceedings. It helps ensure that review proceedings are not launched in the dark. The record enables the applicant and the court fully and properly to assess the lawfulness of the decision-making process. It allows an applicant to interrogate the decision and, if necessary, to amend its notice of motion and supplement its grounds for review*." (Footnotes omitted)

[15] As was held in another oft quoted case, *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) SA 486 (SCA), at para 37:

> "…Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of s 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed…"

[16] These judgments clearly point out that the filing of the Record is a procedural step which is there to facilitate the review, and to ensure that relevant parties are informed of the substance informing the decision, early on in the process, so as to decide on the course to take. With that entire backdrop, I have no reason but to find that the dispatching of the Record is an issue within the contemplation of section 38 (2A) (e) of the Act.

[17] The Courts in *Afrisun and Helen Suzman* WCC supra posited that an applicant can only be deprived of the benefit of this <u>procedural right</u> if there is clear justification therefor. The question is whether such justification exists in this case.

[18] Referring to the process whereby Standard Bank had requested the Commission's record of investigation, in terms of Rule 15 (1) of the Commission Rules ('the Rule 15 (1) process'), the Commission submits that directions cannot be granted in favour of Standard Bank because it has a right to insist on a

respondent to plead before it is entitled to a record. This point it also asserted in the matter of *Standard Bank of South Africa Limited v The Competition Commission* (CASE no: 160/CAC/Nov 2017), i.e. the Rule 15 (1) appeal that went to the CAC. In that matter, however, it invited the CAC to introduce a qualification into Rule 15, by incorporating section 7 of the Promotion of Access to Information Act 2 of 2000 ('PAIA') in Commission Rule 14 (1) (e), by holding that proceedings before the Tribunal were equivalent to civil proceedings as contemplated by section 7 of PAIA, and therefore that that section qualified the record as "restricted information". The Court rejected this approach. In its judgment delivered on 01 June 2018, it found, at para 35, that the earlier precedent set by it in *Group Five Ltd v Competition Commission* (139/CAC/Feb16) [2016] ZACAC 1 (23 June 2016) applied in that matter, unabatedly. It found that: "*as a matter of law the Commission was obliged to have availed the record of its investigation to the appellant, to have done so within a reasonable time, and to have disregarded the appellant's status as litigant in determining the extent of a reasonable time*." The Court then directed the Commission to make available its record of investigation to Standard Bank in terms of the Notice of Motion (I was informed by Counsel for Standard Bank that the provision was within five days).

[19] Counsel for the Commission advised that the Commission intends appealing the decision of the CAC in that matter to the Constitutional Court, although no papers have yet been filed to petition. I am not certain how the Commission would be able to cross over the hurdle that it was refused leave to appeal by the Constitutional Court in *Group Five,* having regard to the fact that the issues are essentially the same, as was found by the Court in *Standard Bank* supra, notwithstanding the Commission introducing a PAIA argument.

[20] In any event, in relation to these proceedings, the Constitutional Court in *Helen Suzman CC* supra, at para 44, held that PAIA and Rule 53 serve different purposes. "*Rule 53 helps a review applicant in the exercise of his or her right of access to court under section 34 of the Constitution. On the other hand, in one*

*instance PAIA affords any person the right of access to any information held by the state*." (Footnote omitted) It again said, at para 46, that the difference in the nature of, and purposes served, by these provisions, "*underscore the reality that it is inapt simply to transpose PAIA proscriptions on access to information to the rule 53 scenario. There is a principled basis for drawing a distinction.*" See also *Nova Property Group Holdings Ltd and others v Cobbett and another (MandG Centre for Investigative Journalism NPC as amicus curiae)* [2016] 3 All SA 32 (SCA) at para 32 where a clear distinction is drawn between a right to information in terms of section 26 of the Companies Act 71 of 2008 and PAIA.

[21] The Commission also contends that it has the right to conduct an investigation without being constrained by interlocutory applications and to get the complaint heard and finalised by the Tribunal. According to the Commission, these rights take this matter outside the realm of procedural matters envisaged in section 38 (2A).

[22] I disagree with the Commission; the review is a separate process to the process at the Tribunal, brought in terms of different provisions which attract different obligations. The process before the Tribunal and the intended appeal of the CAC decision to the Constitutional Court do not suspend the continuation of the review process as of normal course. The issue of the stay and of whether Standard Bank's approach is cynical, or calculated to by-pass a process already in place, or that it smacks of abuse of process, is, insofar as it is sought in the counter-application, a matter for the review court to decide.

[23] As to the jurisdictional point, the Commission contends that section 62 (2) (b) of the Act only allows for purely constitutional questions. In its view, the matter Standard Bank has brought on review is entirely a competition issue, which this Court cannot hear as a Court of first instance. It relies on section 37 of the Act, amongst others, which identifies the functions of the CAC, including its ability to review any decision of the Tribunal, as well as the dictum of this Court in *TWK Agriculture Limited and Competition Commission & Others*

(67/CAC/Jan07) [2007] ZACAC 3 (7 August 2007), at para 23, where the Court seemed to accept the possibility of the review of the decision of the Commission by the Tribunal in terms of section 27 (1) of the Act, and at para 24 where the Court postulated the structure of the Act to be "*designed to ensure that this Court is, as its name suggests, an appeal court. Were Mr Brassey to be correct, this court would be a court of first instance insofar as the review of decisions of the Commission were concerned. It would not have the benefit of the considered decision of a specialist body, being the Tribunal. In this way, applicant's interpretation would undermine the careful construction of the competition institutions as provided for by the Act*."

[24] In *Johnnic Holdings Limited and Another v Competition Tribunal and Others in re: Mercanto (Pty) Ltd v Johnnic Holdings Ltd* [2008] ZACAC 2 (23 September 2008), however, the Court, while distinguishing *TKW* on the facts, seemed to accept that an applicant wishing to bring the review of the decision of the Commission to this Court, could do so relying on section 62 (2) (b) of the Act. It held as follows at para 35.2:

> "I agree with the submission by Counsel for the applicants that the facts in **TWK** supra are distinguishable from the present matter. In that case the applicants sought the review of the Commission's decision relating to merger proceedings, a purely competition issue. The applicants relied on section 62 (2) alternatively section 62 (1) of the Act. The Court held that it did not have jurisdiction to hear the matter as a court of first instance. <u>In casu, the applicants rely on the provisions of section 62 (2) (b). The review sought by the applicants relating to the decision of the Commission is based on constitutional grounds. Section 1 (c) of the Constitution entrenches the supremacy of the Constitution and the rule of law, and the right to just administrative action in Section 33 thereof. PAJA is constitutionally mandated legislation contemplated in Section 33(3) of the Constitution. Section 6 of PAJA provides for circumstances under which an administrative action may be subject to review. The present application is not a competition but a constitutional matter</u>."
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> (Own emphasis)

[25] The Commission's concern, that parties' reliance on s 62 (2) to approach this Court directly may allow for the by-passing of the Tribunal and undermine the processes of the Act, or render provisions such as sections 27 (1) and 37 (1) nugatory, is not unimportant. I agree that this issue, coupled with the findings of the Court in *Johnnic* and *TKW*, may require some teasing out by the full court. The question, however, is whether, in the meantime, Standard Bank should be deprived of the Record, and until such time that the full Court has determined and settled the issue of jurisdiction.

[26] Counsel for the Commission seemed to suggest that as a matter of law, the issues raised by the Commission should be determined first and thereafter the issue of the Record would become relevant. He referred to the decision of *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) at para 29, to support this proposition. Apart from the fact that *Makhanya* dealt with a usual situation in action proceedings, that of special pleas and exceptions having to be disposed of first before merits were determined, *Makhanya* did not lay down the law that every time a jurisdictional point *in limine* is raised, and particularly in motion proceedings, the court must hear and dispose of the point first, separate from and in advance of the merits. That, in my view, would be usurping the power of the Court to determine its own process. It is upon the court hearing the review to decide what it seeks to do, either by itself or having considered the grounds tendered for separation of issues by a party seeking it.

[27] The Supreme Court of Appeal in *Competition Commission v Computicket (Pty) Ltd* (853/2013) [2014] ZASCA 185 (26 November 2014), at para 20, was clear that the filing of the Record automatically follows from the launching of the review. It held as follows:

> "…Nonetheless, the Commission offered not only one, but two answers. Its first answer was that in order to demand the record, Computicket had to make out a *prima facie* case for review. The only basis relied upon for this contention was that Computicket bears the onus of establishing its review grounds. But as I see it, the

> basis relied upon amounts to a *non sequitur*. I agree with the CAC's finding that this argument effectively places the cart before the horse. Not infrequently the ability of an applicant for review to discharge the onus resting on it to make out a case, will depend on considerations appearing – or not appearing – from the record of the material upon which the challenged decision had been made. Moreover, upholding the Commission's argument would give rise to a two stage enquiry on the merits of the case: first, without the record to determine whether the applicant had made out a prima facie case. If the applicant clears that hurdle, the second stage enquiry then follows to finally determine the merits, this time with the benefit of the record which had now been made available. The proposed scenario, for which there appears to be no justification in logic, is clearly unsustainable. Finally, the argument under consideration is not supported by Rule 53. <u>In terms of this rule, the obligation to produce the record automatically follows upon the launch of the application, however ill-founded that application may later turn out to be."</u> (Own emphasis)

[28] Counsel for the Commission argued that *Computicket* did not deal with jurisdiction, but with a different question of whether *Computicket* had to make out a *prima facie* case for the review. I do not agree with this distinction; whilst the jurisdictional point may not have been in issue there, *Computicket* raised a principle that an applicant does not need to clear a hurdle of showing a competent case, before it can be entitled to a record. The launching of the review entitles it; whether it would succeed with its case at the end or not, or whether its case would be found to have been ill-conceived, is a different issue.

[29] The Record may be necessary to assess the jurisdictional point too. It cannot be assumed that the Record will play no role in that exercise. Also, from a practical point of view the Commission's approach may result in a three stage enquiry. First, the Court, without the benefit of the Record, would decide whether the matter is one falling under section 62 (2) (b); if it finds that it has jurisdiction to hear the matter, the Record would then be made available or may still be contested on other grounds, the applicants' papers may be amended once the Record has come to the fore, thereafter the Court would hear the merits. To the extent that this path becomes unavoidable due to the nature of the case, that would

be an issue that the Court would have to deal with at that stage. For the moment, though, this approach may result in the delays that the Court in *Jiba* supra decried.

[30] Having taken into consideration all the submissions made before me, I find no legally cognisable reason as to why Standard Bank should be deprived of the Record so the review can continue. *Helen Suzman CC* supra puts the obligation to produce a record beyond question. The fact that the matter was argued extensively in that case did not change the fact that the filing of the Record is a procedural issue. Substantial questions there had to do with 'content of the record' (i.e. inclusion of the deliberations of the JSC as part of the record) rather than whether, as a matter of procedure, the applicant was not entitled to a record.

[31] I might add that my reading of the law on this issue is, in my view, congruent with the spirit, purport and objects of the Constitution. Laudable as the work of the Commission is, it is also subject to the rubrics as well as the principles of accountability and transparency, and I say this conscious of the Commission's work and its efforts in ensuring that transgressors of the Act are held to account.

[32] In the circumstances, I find no basis for permitting the Commission to withhold the Record from Standard Bank.

[33] I therefore make the following order:

1. The Respondent is directed to, within 15 days from the date of this Order, file with the Registrar of this Court, the complete record of its decision to refer the Applicant to the Competition Tribunal under case number CR212Feb17.

2. The Respondent is ordered to pay the costs of the Applicant including the costs of two counsel to the extent employed.

**NP BOQWANA**
**Judge of Appeal**

**APPEARANCES**

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| For Applicants: | Adv. J J Gauntlett SC; QC (written submissions only) and Adv. L C Kelly<br>Instructed by: Herbert Smith Freehills South Africa Attorneys Inc, Rosebank, Johannesburg |
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