IN THE COMPETITION APPEAL COURT

OF SOUTH AFRICA

CASE NUMBER: 118/CAC/APR12

DATE: 20 SEPTEMBER 2013

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA Applicant

and

COMPUTICKET (PTY) LIMITED Respondent

J U D G M E N T

DAVIS, JP:

Between 2008 and 2009 five complaints were submitted to the Commission (the applicant in this set of proceedings to whom I shall continue to refer as "the Commission") relating to exclusivity clauses contained in contracts entered into by the respondent ("Computicket") with inventory providers throughout South Africa.

The Commission investigated the complaints and, pursuant to its investigation, filed a complaint referral against Computicket

with the Competition Tribunal ("the Tribunal") in terms of Section 50 (2) of the Competition Act 89 of 1998 ("the Act"). Computicket then launched an application to dismiss the referral (referred to as a dismissal application) and this was followed by an application to compel discovery of the Commission's internal documents relating to its decision to refer the complaints.

The discovery application was clearly interlocutory in that Computicket had sought to compel production of the documents that served before the Commission at the time that it determined to refer the complaint against Computicket to the Tribunal. In the discovery application Computicket sought all materials, including the reports and the recommendations to the Competition Commissioner and or the executive committee of the Commission, upon which the decision to refer the complaints of the alleged abuse of dominance against the applicant was taken and any further documentation relating to the decision itself.

After the application was refused by the Tribunal the matter came before this Court on appeal. On the 29th of October 2012 this Court upheld the appeal and granted an order in the following terms:

(b) The respondent [The Commission] is directed to discover the reports and recommendations which were placed before the Commissioner and or the executive committee of the Competition Commission when the decision was taken to refer the complaints of alleged dominance against the appellant to the Competition Tribunal save however the respondent is not obliged to produce the contents of such reports and recommendations in the Court in accordance with Rule 14 of the Rules of the Commission except to the extent and in the respects set out in paragraph (c).

(c) The respondent is directed to discover and produce for inspection all of the evidence which was placed before the Commissioner and/or the Executive Committee of the Competition Commission when the decision was taken to refer the complaints of alleged dominance against the appellant to the Competition Tribunal including the evidence upon which the reports and recommendations referred to in paragraph (b) were based.)

It is against this decision that the Commission now seeks leave to appeal to the Supreme Court of Appeal, alternatively to the Constitutional Court against the judgment and thus the

order of this Court in terms of Section 62 (4) together with Section 62 (2) and Section 63 (2) of the Act. The application has been opposed by Computicket before I deal with the merits I should record that the Court condoned the Commission's late filing for leave to appeal.

Briefly, having launched what is referred to as the dismissal application, being a review, the Commission discovered a battery of documents in the course of the proceedings before the Tribunal. The respondent then sought specification, meaning the specific record of decision upon which the referral was based. It is this set of documentation and hence the specification which is resisted by the Commission.

Mr Marcus, who appeared together with Mr Wilson and Ms Goodman and Mr Ngcongo on behalf of the Commission, argued that this Court had erred by taking a view that an application for review by a party such as Computicket triggered the right to have access to documentation such as the record of decision without in the first place insisting that Computicket make out a *prima facie* case that the Commission's referral decision was unlawful.

In other words, Mr Marcus' key submission was, to the effect, that, if a party such as Computicket, seeks production of

documents, as they did in this case, in order to assist it in a review application, it must show some form of exceptional circumstances which would justify bringing the review and hence being entitled to any documentation. To put it in the manner expressed by Mr Marcus, there were two components to this submission. In the first place, Computicket would have to show a *prima facie* case which would justify the bringing of a review application and secondly, even if it was able to so show, it would have to prove exceptional circumstances to justify, why in a case such as this, the review should be brought and the application for further documentation should be justified.

In this connection, Mr Marcus relied heavily on the authority of the decision of the Supreme Court of Appeal in Simelane and others NNO v Seven Eleven Corporation 2003 (3) SA 64 (SCA) in particular at paragraph 17 where Schutz, JA said:

> "I cannot do better than refer to what was said in the Norvatis case. For the reasons there stated it is clear that in a case such as the one we are concerned with the function of a commission is investigative and not subject to review, save in cases of ill faith, oppression, vexation or the like".

In other words, Mr Marcus sought to argue that there is no automatic right to review a decision of the Commission to refer a matter to the Tribunal. The Commission's function is investigative and ultimately it is for the Tribunal to make the necessary determination, pursuant to the referral of a complaint. Notwithstanding the restrictive nature of the *dictum* in Simelane, it would have been surprising in the extreme for the Supreme Court of Appeal to have concluded that there was no right to review any decision of the Commissioner. I say this in the light of the fundamental principle of legality enshrined in section 1, section 7 and section 34 of the Republic of South Africa Constitution Act 108 of 1996.

It is clear that a public body such as the Commission is subject to this principle of legality and its decisions therefore can be reviewed, albeit in the set of limited circumstances as foreshadowed in the *dictum* of Schutz, JA to which I have already made reference. But does this then mean that a Court in the position of this Court would have to make a *prima facie* determination of the merits of the review to determine whether there was sufficient legal weight in this application to review to sustain the further request for documentation such as the record of decision?

In my view, the principle of legality which underpins a right to review, albeit a narrow one, must mean that a party that seeks to review a decision of the Commission is entitled to documentation which illustrates the basis upon which the very decision was taken. This approach would obviate, as is made abundantly clear from the reasons set out comprehensively in the principle judgment, why the approach of this Court was to determine whether, if there is a right to review, albeit qualified, there is a concomitant right to documentation, whether in the form of discovery or, in this case, in the form of a specific compliance with an order to produce the record of decision.

Mr Marcus correctly cautioned this Court that this was not a matter for re-argument of the case but merely a determination as to whether another Court might reasonably come to a decision different to this Court. But the question does arise as to what the implications of a different decision would be? It may mean either that there would have to be two forms of hearing with regard to review, firstly, a *prima facie* determination in order to decide whether documentation should be produced and then a further hearing begun in the Tribunal, to determine the review application leaving aside the implications of the first judgment of the Court.

Secondly, it could surely never be the case, given our

constitutional state and the right of access to courts enshrined in Section 34, that a review, albeit limited, could not be brought. If a review can be brought, then Mr Gauntlett who appeared together with Ms Engelbrecht on behalf of the respondent, was correct to submit that principles of discovery and access to documentation sufficient to ensure the vindication of such a right should be produced. To the extent that Mr Marcus sought to caution this Court that some drastic new principle had now been developed which would burden a body such as the Commission to produce all forms of documentation on the basis of a frivolous review, recall that in this case discovery has already been made. What is required is the specification of the documents relied upon when the decision was made; a procedure of increasing importance, in any event, to other parties in many competition disputes so that a party may understand the economic basis of a referral under the Act.

In this case, documentation had already been available to the respondent. All that was required was a specification as to what documents formed part of the record of decision which triggered the referral. This is hardly a radical request which will hold major administrative implications for the Commission in cases going forward.

In my view, there is no prospect that another court would come to a decision different to this Court, namely that once it was accepted that there is a right to review, as the Commission was constraint to accept, in terms of our law, a party seeking to review such a decision is not entitled to the essential documents upon which the initial decision was predicated. Nothing in the Simelane case indicates that this proposition of law was changed and it would be highly surprising if it was.

It is important to emphasise that there are some foundational principles of the Constitution. They include transparency, integrity and accountability. The Commission, as a public body, is susceptible in its work to all three of those foundational principles and, if it is, once it is subject to review there are consequences which follow. These consequences have eloquently been set out in the judgment of my brother Swain in the principle judgment.

It is unnecessary for me, in the light of the conclusion to which I have come, to consider the further argument about the appropriate court to which an appeal should be heard. There is one aspect about this which does necessitate a comment. This application for leave to appeal takes place subsequent to the introduction of the 17th Constitutional Amendment to the Constitution. In terms of this amendment the position as set

out in Section 62 of the Act has now been restored to what it was prior to the decision in American Natural Soda Corporation v Competition Commission 2005 (6) SA 158 (SCA).

Thus, in cases such as the present, the jurisdiction of this Court is final, save for the ultimate jurisdiction of the Constitutional Court and appeals, in terms of Section 62 (2) in which the Supreme Court of Appeal or the Constitutional Court can determine questions whether an action taken or proposed to be taken by the Commission or the Tribunal's falls within their respective jurisdictions in terms of the Act, a constitutional matter arising in terms of this Act, or a question whether a matter falls within the exclusive jurisdiction granted under subsection 1 of Section 62.

In essence this means that, outside of these three specific categories, this Court has exclusive jurisdiction. Mr Marcus submitted that the Commission was bringing this application for leave to appeal in terms of the dispute being classified as a constitutional matter. Further, he contended, that the Constitutional Court would prefer to have the view of the Supreme Court of Appeal thereon although, if it is a purely constitutional matter, I have doubt about the source of this submission. Suffice it to say, there is no necessity to make a determination thereon, save that other than the specific

categories, an application for leave to appeal on a purely constitutional matter should only be granted by the Constitutional Court.

IN THE RESULT I WOULD DISMISS THE APPLICATION FOR LEAVE TO APPEAL WITH COSTS INCLUDING THE COSTS OF TWO COUNSEL.

I agree.

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DAVIS, JP

DAMBUZA JA and SWAIN AJA agreed