IN THE COMPETITION APPEAL COURT
OF SOUTH AFRICA

In the matter between: CAC CASE NO.: 118/CAC/APR12
[CT CASE NO: 20/CR/APR10]

COMPUTICKET (PTY) LIMITED Appellant

and

THE COMPETITION COMMISSION OF SOUTH AFRICA Respondent

JUDGMENT 29 October 2012

SWAIN A J A

[1] The appellant unsuccessfully sought an order before the Competition Tribunal (the Tribunal) directing the respondent to make discovery of and to produce to the appellant copies of

" [1.1] all materials including the report(s) and the recommendation(s) to the Competition Commissioner and/or the Executive Committee of the Competition Commission based on which the decision to refer the complaints of alleged abuses of dominance against the applicant under Case No. 20/CR/APR/10 was taken and

[1.2] any further documentation related to the decision itself".

[2] The order sought was interlocutory to an application brought by the applicant, referred to by the applicant as "the dismissal application", in which the applicant sought an order, *inter alia*, declaring the referral invalid, alternatively, reviewing and setting aside the "purported referral".

Is the decision appealable?

[3] The first challenge raised by the respondent was that the refusal by the Tribunal of the "discovery application" was not appealable, primarily on the ground that an appeal against that order should not be heard at this stage of the proceedings, unless the balance of convenience favoured a piecemeal consideration of the case, and that would lead to a "just and reasonably prompt resolution of the real issue between the parties".

Zweni v Minister of Law and Order
1993 (1) SA 523 (A) at 531 D – E

It was submitted that this was so, even if the order was not subject to reconsideration by the Tribunal.

[4] This Court has jurisdiction to hear an appeal against a decision which is interlocutory in nature, provided that the appeal is made in terms of the Rules of this Court.

Sections 37 (1) (b) (ii) and 38 (2A) (a) of the Competition Act
No. 89 of 1998

[5] The documentation, which the appellant seeks to compel discovery and production by the respondent, forms part of the basis for the applicant's contention in the dismissal application, that the respondent did not validly refer the complaint to the Tribunal because the information upon which the respondent relied, did not justify a determination by the respondent, that a prohibitive practice on the part of the appellant had been established, in terms of Section 50 (2) (a) of the Competition Act No. 89 of 1998 (the Act).

[6] The challenge raised by the appellant is that the Tribunal, absent a valid referral of the complaint to it by the respondent, does not have jurisdiction to entertain the referral. Consequently, a determination of whether the referral is valid, involves at the same time a determination of the jurisdiction of the Tribunal. For the reasons and on the grounds set out in this Judgment, the discovery and production of certain of the documents by the respondent, as sought by the appellant, is necessary to enable the appellant to properly evaluate and challenge the validity of the determination made by the respondent, to refer the complaints to the Tribunal. If the refusal of the relief by the Tribunal, sought by the appellant, was not capable of being remedied by the current appeal, the appellant may be irretrievably prejudiced because such refusal will not be revisited by the Tribunal, when hearing the dismissal application. In addition, I agree with the appellant's contention that, in any subsequent appeal by the appellant, in the event that the Tribunal refuses the dismissal application, the appellant will not be able to challenge the refusal by the Tribunal to order discovery and production of the documents sought.

Shepstone & Wylie v Geyser N.O.
1998 (3) SA 1036 (SCA)

This conclusion does not involve a piecemeal consideration of the issue of whether the referral by the respondent was valid or not. It simply seeks to remedy irretrievable prejudice that may be suffered by the appellant, if the refusal by the Tribunal of the discovery application, is permitted to stand.

[7] The order made by the Tribunal, refusing the discovery application, is accordingly susceptible to an appeal to this Court and I therefore turn to consider the merits of the appeal.

<u>The legal basis upon which the decision to refer the complaint by the respondent may be reviewed.</u>

[8] At the outset, it seems to me that some of the opposing arguments advanced before this Court by the parties, found their source in the fact that the main application was referred to as the "dismissal application", in respect of which further and better discovery was sought by the appellant from the respondent. Greater clarity is brought to the dispute if the main application is correctly classified as an application to review the determination of the respondent, to refer the complaint to the Tribunal, in which the respondent is requested to produce "the record of the proceedings", namely the material that was before the decision maker, when the decision was made.

[9] The distinction is not one simply of form. It is one of substance and avoids the unnecessary complications which arise in the context of discovery being sought in application proceedings and the entitlement of the appellant to obtain further and better discovery in this context. In addition such a classification more clearly focuses the enquiry into the nature of the discretion exercised by the respondent, in referring a complaint to the Tribunal, as well as the enquiry into the grounds upon which the exercise of this discretion is reviewable.

[10] On the facts of this case, the distinction is not an artificial one, because, as pointed out above, the appellant in the alternative, seeks an order reviewing and setting aside the "purported referral".

[11] The Tribunal has the power in terms of Section 27 (1) (c) of the Act to review decisions of the respondent. It is clear that the decision of the respondent to refer the complaint to the Tribunal, did not constitute administrative action and was not reviewable under the Promotion of Administrative Justice Act No. 3 of 2000 (PAJA).

The Competition Commission of SA v Telkom SA Ltd & another [2010] 2 All SA 433 (SCA) at para 12

The decision may however be reviewed and set aside, under the constitutional principle of legality.

[12] A complaint referral by the respondent to the Tribunal is a jurisdictional fact, for the exercise of the Tribunal's powers, in respect of prohibitive practices.

Woodlands Dairy v Competition Commission
2010 (6) SA 108 (SCA) pg 112 para 12

[13] The constitutional principle of legality demands that the exercise of public power, even if it does not constitute administrative action, must comply with the Constitution

DA v Acting NDPP
2012 (3) SA 486 (SCA) at 496 A

The grounds of review articulated in

Shidiack v Union Government (Minister of the Interior)
1912 AD 642 at 651 – 652

are "consistent with the foundational principle of the rule of law enshrined in our Constitution".

Pharmaceutical Manufacturers Association of South Africa & another:
in re ex parte President of the Republic of South Africa & others
2000 (2) SA 674 (CC) para 83

These grounds are whether the official concerned acted *mala fide*, or with an ulterior motive, or failed to consider the question in the sense that he failed to apply his mind to the matter. As Galgut J (as he then was) said in ***Mitchell v Attorney General Natal 1992 (2) SACR 68 (N) at 71 b*** "He could only be considered to have applied his mind properly, if, *inter alia*, he took into account all relevant matter and disregarded irrelevant matter".

[14] The exercise of discretion must be objectively rational, in that it must be rationally related to the purpose for which the power was given.

Pharmaceutical Manufacturers paras 85 – 86

[15] In addition,

"as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately".

Pharmaceutical Manufacturers para 90

However, if the decision maker's opinion is challenged on the basis that it was irrational, the decision maker must show "that the subjective opinion it relied on for exercising power was based on reasonable grounds"

Walele v City of Cape Town and others
2008 (6) SA 129 (CC) at 160 A – C

The nature of the discretion exercised by the respondent in referring the complaint to the Tribunal

[16] Section 50 (1) (a) of the Act, provides that the respondent must

"refer the complaint to the Competition Tribunal, if it determines that a prohibited practice has been established".

[17] Mr. Gauntlett S C, who together with Mr. Kuschke S C and Ms Engelbrecht appeared for the appellant, relying upon the decision of the Supreme Court of Appeal in **Woodlands at para 13** submitted that three sets of jurisdictional facts are necessary for a valid referral of a complaint by the respondent to the Tribunal in terms of Section 50 (1) (a) of the Act. These are that the decision maker must at the very least, have been in possession of information concerning an alleged practice, which objectively speaking enabled it to determine that the existence of a prohibited practice, has been established. The decision maker has to, as a minimum, form a reasonable suspicion of the existence of a prohibited practice on what was before the decision maker. Mr. Gauntlett submitted that, although **Woodlands** dealt with the step anterior to referral, namely the initiation of an investigation, referral is an *a fortiori* case compared to investigation-initiation. He submitted that referral exposes the subject to immediate reputational harm and constitutes the inception of the trial.

[18] Mr. Wilson, who together with Mr. Ncongo appeared for the respondent, submitted however, in reliance upon the decision in

Telkom, that the respondent, in subjectively determining that a prohibited practice had been established simply had to act *bona fide*, without ulterior or improper motives and apply its mind properly to the issue. The latter exercise would require that the respondent take into account relevant matter and disregard irrelevant matter. The decision would also have to be objectively rational in that the respondent would have to show that its subjective determination that it made, that a prohibited practice had been established, which formed the basis for the referral, was based on reasonable grounds.

Walele at 160 B - C

[19] The distinction between the jurisdictional facts which have to exist based upon these opposing submissions are, in my view, more apparent than real. Corbett J (as he then was) in **South African Defence Force and Aid Fund & Another v Minister of Justice 1967 (1) SA 31 (C) at 34 H – 35 D** had the following to say with regard to jurisdictional facts in general.

"Upon a proper construction of the legislation concerned, a jurisdictional fact may fall into one or other of two broad categories. It may consist of a fact, or state of affairs, which, objectively speaking, must have existed before the statutory power could validly be exercised. In such a case, the objective existence of the jurisdictional fact as a prelude to the exercise of that power in a particular case is justiciable in a court of law. If the Court finds that objectively the fact did not exist, it may then declare invalid the purported exercise of the power (see *Kellermann v Minister of the Interior* 1945 TPD 179; *Tefu v Minister of Justice and Another* 1953 (2) SA 61 (T)). On the other hand, it may fall into the category comprised by instance where the statute itself has entrusted to the repository of the power the

sole and exclusive function of determining whether in its opinion the prerequisite fact, or state of affairs, existed prior to the exercise of the power. In that event, the jurisdictional fact is, in truth, not whether the prescribed fact, or state of affairs, existed in an objective sense but whether, subjectively speaking, the repository of the power had decided that it did. In cases falling into this category the objective existence of the fact, or state of affairs, is not justiciable in a court of law. The Court can interfere and declare the exercise of the power invalid on the ground of a non-observance of the jurisdictional fact only where it is shown that the repository of the power, in deciding that the pre-requisite fact or state of affairs existed, acted *mala fide* or from ulterior motive or failed to apply his mind to the matter".

As stated in

Lucky Horseshoe (Pty) Ltd v Minister of Mineral & Energy Affairs 1992 (3) SA 838 (T) at 848 H – I

"The content of the opinion is subjective. It is the Minister's opinion, not that of a notional reasonable man or of the Court".

However, as stated in **Walele** at para 60

"[60] There can be no doubt that these documents could not reasonably have satisfied the decision-maker that none of the disqualifying factors would be triggered. None of these documents refer to those factors. If indeed the decision-maker was so satisfied on the basis of these three documents, his satisfaction was not based on reasonable grounds. The documents fall far short as a basis for forming a rational opinion. Nor does the mere statement by the City to the effect that the decision-maker was satisfied suffice. In the past, when reasonableness was not taken as a self-standing ground for review, the City's *ipse dixit* could have been adequate. But that is no longer the position in our law. More is now required if the decision-maker's opinion is challenged on the basis that the subjective

precondition did not exist. The decision-maker must now show that the subjective opinion it relied on for exercising power was based on reasonable grounds. In this case, it cannot be said that the information, which the City admitted had been placed before the decision-maker, constituted reasonable grounds for the latter to be satisfied".

[20] According to Mr. Gauntlett the jurisdictional facts necessary for a determination by the respondent that a prohibitive practice has been established are information which objectively speaking enables the respondent to form a reasonable suspicion of its existence. On the approach of Mr.Wilson, the subjective determination by the respondent that a prohibited practice has been established has to be based upon reasonable grounds. Whether reasonable grounds existed for the determination, requires an objective assessment of the information which was before the respondent, when the decision to refer the complaint to the Tribunal was taken. In addition, a reasonable suspicion could only be entertained, if reasonable grounds justified its existence. I can accordingly see no difference in substance between the competing submissions of the parties, as to the jurisdictional facts which have to be present, to constitute a valid determination by the respondent that a prohibited practice has been established, which has as its consequence, a valid referral to the Tribunal. The test to be adopted in the kind of application which appellants seek to launch may well be that of rationality rather than reasonableness. Most recently the test for rationality review has been expressed by Yacoob J in **Democratic Alliance**, *supra* at para 37 as follows: "In my view, the decision of the President as Head of the National Executive can be successfully

challenged only if a step in the process bears no rational relation to the purpose for which the power is conferred and the absence of this connection colours the process as a whole and hence the ultimate decision with irrationality. We must look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality." On the basis of this test, the question remains: to what documents are appellants entitled in order to exercise their right to review the respondent decision for lack of rationality?

The entitlement of the appellant to discovery and production of the specified documents

[21] As pointed out above, an appreciation of the fact that the relief sought by the applicant in the dismissal application is more correctly couched in the context of a review of the decision of the respondent referring the complaint to the Tribunal, facilitates an application of the correct principles to the dispute between the parties.

[22] In order to be in a position validly and effectively to exercise its right to review the decision of the respondent, the appellant is entitled to the production of "the record". In the context of review proceedings, this is "whatever was before" the respondent when it determined that a prohibited practice has been established.

DA at 499 H – I

The significance of the record in this sense is that "ít will then fall to the reviewing court to assess its value in answering the questions posed in the review application".

DA at 499 H – I

The need for the production of the material that was before the decision maker at the time the decision was taken, to enable a court to perform its constitutionally entrenched review function, is illustrated by the following passage in DA

"[37] In the constitutional era courts are clearly empowered beyond the confines of PAJA to scrutinise the exercise of public power for compliance with constitutional prescripts. That much is clear from the Constitutional Court judgments set out above. It can hardly be argued that, in an era of greater transparency, accountability and access to information, a record of decision related to the exercise of public power that can be reviewed should not be made available, whether in terms of rule 53 or by courts exercising their inherent power to regulate their own process. 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. The DA, in its application to compel discovery, has merely asked for an order directing the office of the NDPP to despatch within such time as the court may prescribe the record of proceedings relating to the decision to discontinue the prosecution, excluding the written representations made on behalf of Mr. Zuma to the office of the NDPP. Subject to the question of standing which is dealt with next I can see no bar to such an order being made".

As pointed out in **Walele**, the information which was "placed before the decision maker" was relevant in determining whether reasonable grounds

had been established for the decision.

[23] The production of the evidence which was before the respondent when it determined that a prohibitive practice had been established, is clearly necessary to enable the Tribunal to objectively assess this evidence, to decide whether reasonable grounds existed for the referral.

[24] It is no answer for the respondent to say that the decision was based upon all of the information discovered in the seven discovery affidavits. This does not enable the Tribunal to decide whether the respondent properly considered the matter, by considering relevant information and disregarding irrelevant information, or whether there was a rational connection between the evidence and the determination made by the respondent.

[25] I accordingly disagree with the submission of Mr. Wilson that it would be incumbent upon the appellant at the very least, to make out a *prima facie* case that the referral was unlawful, before the requested documents should be produced. Such a submission effectively places the cart before the horse. It is only when the appellant is placed in possession of the evidence which was before the respondent, when the determination was made, that the appellant will be able to objectively assess the evidence and decide whether reasonable grounds existed for the referral.

[26] I disagree with Mr. Wilson's further submission that this will subvert the principle that pre-trial discovery, which is simply a "fishing expedition", should not be countenanced, because it will be open to every party to a complaint referral, to obtain access prior to filing its answer and merely on the asking, to all of the documents in the possession of the respondent when it made its referral decision. This is not so. The documents to which a party in such a case would be entitled, would only be those documents which served before the decision maker, when the determination was made, subject to any legitimate claims in terms of Rules 14 and 15 by the respondent, that such information is restricted. Such an approach will have a salutary effect upon the efficient administration of referral decisions by the respondent, to ensure that a proper record is kept of the information which was placed before the decision maker. This documentation could quite simply be discovered in a separate identifiable schedule, in which privilege could be claimed in respect of documents which the respondent identified as containing restricted information. In addition, if the production of these documents is correctly viewed as part of "the record" of the proceedings relevant to any review of the referral decision, they cannot be regarded as part of a discovery "fishing expedition". It also obviates the difficulty expressed by the Tribunal that discovery in application proceedings is a rare and unusual procedure, which should only be ordered in exceptional circumstances.

To summarise, once it is accepted, as it must, that a party, in the position of appellant, is entitled, as of right, to launch an application for a review of the respondent's decision to refer a complaint based on grounds of rationality, then such a party is entitled to documents which are relevant to such a review. Whatever the merits of an argument

based upon the expeditious resolution of the dispute relating to the complaint, the right to review a decision of respondent, on the grounds of irrationality, must trump the former argument.

The specific documents which should be discovered and produced

[27] The appellant applied for the discovery and production of copies of all materials including the report(s) and recommendation(s) on which the referral decision was taken. At the hearing, Mr. Gauntlett amended the relief sought by the appellant, to make the discovery and production of these documents "subject to Rule 14 exclusions" claimed by the respondent and that the documents should be those which "served before the decision maker".

[28] In this regard Mr. Gauntlett submitted that the respondent, on at least two previous occasions, had the opportunity to make discovery of these documents and claim privilege in respect of the production of certain of them in terms of Rule 14, but had simply refused to discover them.

[29] The approach of the Tribunal was to have regard solely to the reports and recommendations submitted to the decision maker, in respect of which the appellant sought discovery and production. The Tribunal concluded that this constituted restricted information in terms of Rule 14, to which the appellant was not entitled. It did not consider that, in addition, what was sought was the discovery and production of

all material, and more specifically that material upon which the decision was based. In this regard the Tribunal concluded that the respondent "had already discovered all the information it had before it at the time of the referral through the seven discovery affidavits referred to earlier in this decision. The documents containing this information have been placed before the Tribunal in the expanded bundle. There is no need, even on Computicket's own version, for the Commission to produce the recommendation". The Tribunal emphasised that even if the appellant was correct in its reliance upon the test formulated in Woodlands, this required "an objective assessment of the information before the Commission at the time when it decided to refer and not an assessment of the Commission's views. Hence there is no compelling case for us to order the disclosure of the Commission's recommendation".

[30] It was, with respect, no answer for the Tribunal to say that the respondent had already discovered all the information it had before it at the time of the referral, by way of the seven discovery affidavits. For the reasons set out above, what had to be discovered was the information that was placed before the decision maker. Clearly, all of the documents discovered in seven discovery affidavits were not placed before the decision maker.

[31] As regards the reports and recommendations made to the decision maker, having carefully considered the contents of the dismissal application, I am satisfied that this is not a case where an order should be made in terms of Rule 15 (1) (b) (ii) directing that they may be inspected by the appellant. In coming to this conclusion, I do not overlook the amendment which Mr. Gauntlett proposed to the relief

sought, providing for the respondent to claim that such reports and recommendations constitute restricted information in terms of Rule 14. My object in dealing with this issue is to prevent any further delays in the hearing of this matter. However this finding does not exonerate the respondent from discovering the reports and recommendations which were placed before the decision maker, albeit that privilege may be claimed in respect of their contents, save and except in respect of the evidence upon which such reports and recommendations are based. In other words, the respondent will be obliged to discover and produce the evidence upon which such reports and recommendations were based, as well as any other evidence which was placed before the decision maker.

[32] As regards the issue of costs. The appellant has achieved substantial success in this appeal, albeit not in the precise form and, to the extent originally sought, and consequently is entitled to an award of costs in its favour.

I grant the following order

(a) The appeal is upheld and paragraph 71 of the Tribunal's decision is substituted by the orders in paragraphs (b), (c) and (d) below.

(b) The respondent is directed to discover the reports and recommendations which were placed before the Competition 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 that the respondent is not obliged to produce the contents of such reports and recommendations 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 Competition 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.

(d) The appellant is awarded costs, such costs to include the costs of two Counsel.

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SWAIN A J A

DAVIS J P and DAMBUZA J A agreed

Appearances:/

Appearances:

For the Appellants	**:**	Adv J Gauntlett S C Adv L Kuschke Adv G Engelbrecht
Instructed by:	**:**	Cliff Dekker Hofmeyer Inc Cape Town
For the 1st Respondent	**:**	Adv J Wilson Adv P M P Ngcongo
Instructed by	**:**	The Competition Commission Pretoria

Date of Hearing : 25 September 2012

Date of Filing of Judgment : 2012