COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case no.61/IR/Nov2003

In the matter between:

Nutri-Flo CC	**First Applicant**
Nutri-Fertilizer CC	**Second Applicant**
and	
Sasol Limited	**First Respondent**
Sasol Chemical Industries (Proprietary) Limited	**Second Respondent**
Kynoch (Proprietary) Limited	**Third Respondent**
Nitrochem (Proprietary) Limited	**Fourth Respondent**
The Competition Commission	**Fifth Respondent**

DECISION

Introduction

1. In this case the applicants seek access to portions of the first and second respondents answering affidavits over which those respondents have asserted a confidentiality claim.[1] These respondents have permitted the applicants' counsel and experts access, but refuse to give access to the applicants themselves, on the basis that this would compromise the confidentiality.

2. The applicants assert that certain of the information withheld from them is

1 Although there are five respondents in this matter only the first and second respondents, i.e., the companies in the Sasol group, have opposed the application.

not confidential. In respect of this class of information it follows that if it is not confidential they are entitled to access. They also assert that they are entitled to have access to the confidential information. Denying them the right of access to the information claimed as confidential, is a violation of the principles of natural justice and will inhibit their right to have their case properly ventilated.

3. We have to decide whether the information is confidential, and if so, whether it is appropriate for the applicants to have access to this information pursuant to furnishing suitable undertakings to the respondents.

Background

4. In November 2002, the applicants filed a complaint ("the first complaint') with the Competition Commission ("Commission") in which they alleged that the first and second respondents had engaged in certain restrictive horizontal and vertical practices as well as excessive pricing, exclusionary acts and price discrimination in contravention of sections 4(1)(b)(i), 4(1)(b)(ii), 5(1), 8(a), 8(c), 8(d)(iii) and 9(1)(c)(ii) of the Competition Act ("the Act"). Following an investigation, the Commission issued a notice of non-referral in respect of this complaint on 24 October 2003.

5. By coincidence it seems, on the same day that the Commission issued its notice of non-referral in respect of the first complaint, the applicants launched an application for interim relief against the first and second respondents. We will refer to this as the "main application" and for convenience, since at this stage nothing turns on the distinction, to the first and second respondents collectively as "Sasol".

6. At the same time they lodged a second complaint against Sasol with the Commission. The main application for interim relief is contingent upon this second complaint, not the first.[2]

7. It is not necessary for us to go into the allegations contained in the main application in any detail.

8. The essence of the main application is this. The applicants are firms that sell agricultural fertilisers to the sugarcane industry. They operate both as agents and dealers in selling products manufactured by Sasol. They also purchase chemicals in bulk from Sasol, which they then blend to meet specialised customer specifications.

9. Sasol not only supplies the wholesale market in which the applicants are among its customers, but also sells chemicals directly to the retail market. The

2 Sasol do in their papers suggest that vestiges of the first complaint permeate the main application but that is not an issue that concerns us for the present.

applicants are thus both customers and competitors of Sasol.

10. Sasol is a major producer in the chemical industry. The applicants aver that it is dominant in the markets for certain chemical inputs which they (the applicants) purchase from Sasol. These markets include the supply of ammonia and ammonia nitrate.

11. In September 2003, that is, after the first complaint had been lodged with the Commission, Sasol announced a price increase in respect of the raw materials it supplies the applicants. These price increases constitute the *casus belli* that led to the main application. The applicants allege Sasol increased the prices in retaliation for the first complaint, and that they are of such a magnitude as to render their continued operation in the relevant market impossible.[3]

12. They allege that the September price increases constitute:

a) A contravention of section 8 (a) of the Act (excessive pricing);
b) A contravention of section 8 (c) of the Act (An exclusionary act by a dominant firm);
c) A contravention of section 9(1) of the Act (Price discrimination by dominant firm).

13. The applicants seek relief against Sasol in the following form: ***firstly***, for an order restraining and interdicting the first and second respondents from implementing and/or continuing to implement its September 2003 price increases with regard to the raw materials and/or products required by the applicants. ***Secondly***, for an order directing the first and second respondents to supply those raw materials ("fertilizer products") at the prices that prevailed immediately prior to the implementation of the first and second respondents' September 2003 price increases.

14. Sasol filed answering papers in the main application on 15 December 2003. Although Sasol has raised various defences in its main application the essence of its defence on the merits is that the September increase was not an exclusionary practice, but a return to normal pricing after a period in which the applicants, due to financial difficulties, had enjoyed preferential pricing.[4]

15. Sasol has claimed that certain portions of its answering affidavit, and a report from its economic experts that is annexed to it, constitute confidential information.[5]

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3 See Founding affidavit in the Main application paragraph 21.

4 See Answering affidavit in the Main application paragraph 10.

5 In terms of section 44(1)(a) of the Act a person when submitting information to the Commission or Tribunal, may identify that information as confidential. The procedure for this is to lodge a form CC7 where the confidential information is identified. As part of compliance with the Act the party claiming confidentiality must in the CC 7 explain why the information is

16. Sasol, through its attorneys, indicated that it would provide Nutri-flo's legal advisors, and any independent experts that they might wish to retain, with access to the confidential information, provided that these persons signed an undertaking to regulate their access to this information. A material term of the agreement is a requirement that the signatory not divulge the information to anyone else without the prior written consent of Sasol. This means that the lawyers may not show the confidential material to their clients.

17. Concerned by this, the applicants' attorneys sought access to the confidential material on behalf of their clients, tendering that they would sign a confidentiality undertaking on the same terms that the legal advisors had. Sasol rejected the tender and repeated its previous offer to restrict access to the legal advisors and experts.

18. The applicants' legal advisors then reluctantly signed the undertaking. After being given access to the confidential information they decided to launch the present application.

19. The applicants argue that they have been frustrated in their attempts to file a replying affidavit in the main application because their legal advisors cannot take instructions from them on how to respond to the confidential portions of Sasol's answering affidavit. Hence they bring the present application.

The section 45 application

20. The applicants brought the present application in terms of section 45 of the Competition Act on the 23rd December 2003. The application is brought against the following respondents: Sasol Limited, Sasol Chemical Industries (Pty) Limited, Kynoch (Pty) Limited, Nitrochem (Pty) Limited, and the Competition Commission.

21. No relief is sought against the third to fifth respondents who are cited only because of their interest in the matter. Only the first and second respondents (again for convenience referred to collectively as Sasol) oppose the application.

22. The applicants seek an order declaring that the information in respect of which Sasol has claimed confidentiality is not confidential information as contemplated in the Act.

23. In the alternative they ask for an order granting release of the confidential

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confidential. Once confidentiality is asserted a person who seeks access to it must either get the permission of the claimant or failing that apply to the Tribunal in terms of section 45 of the Act, for a determination as to whether the information is confidential or for an appropriate order permitting access.

information to the applicants upon them signing a confidentiality undertaking.[6]

24. Subsequently Sasol has acknowledged that of the 25 items which it sought to claim confidentiality over, six should not be regarded as confidential vis a vis the applicants and it will grant them access to these items. In view of this we make no ruling in respect of these items and they remain subject to the claim for confidentiality as against persons other than the applicants.

25. This leaves 19 items for us to consider. The applicants have also modified their position. Although they persist in their application for access to all the items, on tender of a confidentiality undertaking, they only challenge the confidentiality status of 3 of the remaining 19 items.

26. Section 45(1) in terms of which this application is brought states:

> *"A person who seeks access to information that is subject to a claim that it is confidential information may apply to the Competition Tribunal in the prescribed manner and form, and the Competition Tribunal may–*
>
> *a) determine whether or not the information is confidential information; and*
> *b) if it finds that the information is confidential, make any appropriate order concerning access to that confidential information."*

27. The term confidential information is defined in the Act as *"trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available to or known by others".*

28. It is clear from these provisions that what the Tribunal must do when faced with a section 45 application is to first determine whether the information is confidential and secondly, if it is, to make an *"… appropriate order concerning access to that confidential information"* (Our emphasis)

Is the information confidential?

29. As stated earlier the applicants confine their confidentiality challenge to three items. These are:

a) Item 4, which is a table setting out Sasol Nitro's market shares in the downstream market for the periods 1997 to 2002, according to figures provided by the Fertilizer Society of South Africa (the 'F.S.A.').

6 In the Notice of Motion the applicants also sought access for their experts, but this has since been granted by Sasol which said it had never been its intention to deny access to that class of person, provided they signed an undertaking. (See answering affidavit in the section 45 application paragraph 15).

b) Item 10, which is a table setting out the indebtedness of [*] one of Sasol's customers to various creditors among which is Sasol. [*] is a competitor of the applicants.[7]
c) Item 15, which contains a reference to the name of the firm referred to in item 10.

30. The applicants' challenge in respect of item 4 is that the information is that of the F.S.A. and not that of Sasol. It is therefore not information belonging to Sasol and secondly, would be available to or known by others.

> 31. Sasol has alleged, albeit only in heads of argument and not in its answering affidavits, that this information from the F.S.A. is supplied only to the firm requesting the information and not to any other firms in the market. As we understand it, Sasol has access to its own figures, but not other firms and vice versa. It is therefore on this basis, so it alleges, that the information is it's own and not known by others.

32. In respect of items 10 and 15, the applicants argue that the information is not that of Sasol, but of [*], the firm concerned. It is only competent for that firm to assert a confidentiality claim.

33. Sasol argues that it is not the sole prerogative of the firm that owns the information to assert the confidentiality claim. If Sasol is in possession of confidential information that belongs to another firm and seeks to rely on it then it is entitled to assert a claim for confidentiality over it. Sasol argues that it therefore has standing to claim confidentiality in respect of [*]'s information, which leaves the question as to whether the information is in fact confidential, as the only remaining issue. Sasol asserts that as the information relates to [*}'s credit standing with certain creditors this is inherently confidential information.

34. Although we have our doubts as to whether the information claimed is legitimately confidential and whether Sasol is entitled to assert a claim on behalf of a third party this is not an issue that we need to decide now.

35. Following the approach taken in the Orion v Telkom [8] case we regard the classification of information as an interlocutory determination and one that we can alter at a later stage in the light of further evidence.

36. That being the case we will in this case adopt a cautious approach to the classification of the claimed information.

37. Given that the applicants no longer contest the confidentiality claims in respect of items 1 - 3, 6, 9, 11, 13, 14, 17, and 19 - 25 we will accept the

7 The name of the firm is confidential information.
8 Case No.: 19/IR/April2003.

determination for the time being. We will allow the applicants to challenge this status at a later stage if they so wish. We can of course in terms of section 44(3) make that determination ourselves, but we will not alter the present ruling without giving Sasol a further opportunity to be heard.

38. We will follow the same approach with the three remaining items. Not because Sasol has persuaded us of the merits of its claim, but owing to some uncertainty that we have about the status of the information in relation to the third parties involved. In respect of item 4, more information about the nature of access to the FSA's records may be required before we can make a determination as to whether the information is publicly known. In relation to the remaining two items, [*] the firm to whom the information relates, has not been given an opportunity to be heard. Caution thus favours protection over disclosure at this stage.

39. We have taken an ad hoc approach, largely determined by the circumstances of this case, which, like that of Orion, is an interim relief application, where the applicants want to get a move on to the main application and not haggle over classification, provided that they can do their own case justice. It should therefore not be seen as an invitation to the obsessively secretive or opportunistic litigant to file confidentiality claims, without a proper basis, in the hope that we will allow this practice to go unchallenged.

What is an appropriate order concerning access to the confidential information?

40. This is the second stage of our enquiry and the one to which both sides have devoted most of their argument.

41. The issue is whether the applicants are entitled to access to the confidential material albeit on a restricted basis. Recall that their legal advisors and experts have been granted access. Thus the only issue is whether the clients should be allowed to see what their advisors can see.

42. The applicants' attorney Lance Coubrough alleges that it is:

> " .self evident that the information in respect of whereof confidentiality is claimed is relevant and would have a material bearing on the relief sought by the applicants."[9]

43. He goes on to say that granting his client access to the information is fundamental to a fair adjudication of the main application. He states:

> *"I am not in a position to respond to the averments in respect whereof*

9 See Founding affidavit in the section 45 application paragraph 22.

confidentiality is claimed. It is only the applicant who would meaningfully be able to do so."[10]

44. The applicants argue that this denial is an infringement of their right to a fair public hearing in terms of section 34 of the Constitution. That provision states:

> *"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."*

45. They argue that although we are not a court we are an independent and impartial tribunal. Whilst the Competition Act places restrictions on the openness of a hearing in certain circumstances there can be no limit placed on the fairness of a hearing.

46. Section 34, they argue, entrenches the rights of natural justice not only in courts, but also in administrative tribunals.

47. Whilst the applicants acknowledge that the right to protect confidential information is a competing interest to that of the right of a party to a fair hearing it cannot be the case that the right to protect confidentiality trumps a right to a fair hearing.

48. As an approach to the balancing of the contending rights they recommend following either the well known general test of proportionality set out in section 36 of the Constitution or that set out in section 16 of the Labour Relations Act for resolving disputes over disclosure of information.[11]

49. The applicants argue that the onus is on the party asserting confidentiality to establish what harm can come from disclosure. This onus they say has not been discharged by Sasol, which has made only the baldest assertions on this point. On this basis alone, they argue, the application should succeed.

50. The applicants then go on to deal with the suggestion made by Sasol that access by legal advisors and experts would adequately ensure fairness.

51. Sasol had suggested that some of the information was of a purely technical nature and could be dealt with by experts without assistance. The applicants point out that some of this information, including that found in Sasol's expert's report, contains averments on facts that are not common

10 See Founding affidavit in the section 45 application, paragraph 24.
11 The LRA test involves a balance between competing harms to the employer and Trade Unions. See Section 16(11).

cause and on which a legal representative would require instructions.[12]

52. Sasol argues that it has, like its better-known petroleum product, gone the extra mile. It has limited its confidentiality claims to the bare minimum and allowed access to those who can necessarily deal with the information so as to secure the applicants rights. It asserts that much of the information can be dealt with by the experts and on these points the input of the applicants is not required.

53. Although not expressed in these terms Sasol argued that the application for confidentiality is sought in order to protect the information from the sight of the very eyes to which the applicant would now have it made subject. In essence the protection sought would be rendered nugatory if the applicants could view the material.

54. Sasol asserts that despite the eloquence in which the applicants sought to clothe their arguments around fairness and its constitutional provenance, these rights are relative and context based. In the context of a conflict with equally compelling interests, namely those of privacy or property, no hard and fast rules operate.

55. Sasol argues that we should eschew developing any rule that requires an onus or at least placing an onus on a party asserting a confidentiality claim. As an administrative body with some flexibility to determine our procedures, we must perform a balancing test in assessing the competing claims. We should thus see the scales balanced equally and not make a decision that says one party or the other has not discharged an onus and hence fails. This argument has not been entirely consistent, as Sasol has, in its heads of argument, contended that the applicants have not made out:

> " …a case for why the information that is now conceded to be confidential needs to be made available directly to them, and why their experts and legal advisors cannot at least attempt to formulate a response while preserving the confidentiality constraints."[13]

56. Thus the thrust of Sasol's argument seems to be this. There is no absolute right to confidential information, rules of natural justice and constitutional rights to fair proceedings notwithstanding. You have not been denied access in any event; rather you have been given a limited form of access, which is adequate unless you show to the contrary, which you have not.

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12 See Replying affidavit in the section 45 application, paragraph 11.

13 See Heads of Argument for the respondents' paragraph 79. Indeed at paragraph 28 Sasol argues that the applicants carry the onus and bear the evidentiary burden of showing why they should be afforded access to the information that is covered by Sasol's confidentiality claim.

57. Sasol contends that all that procedural fairness requires is that the gist of the information is given to the person who is required to answer. Section 34 is not *"in the main"* applicable to proceedings before an administrative tribunal. Sasol argues that we are not a curial body. It maintains that it is frequent practice in like procedures, such as anti-dumping cases, to provide summaries of confidential information to opposing parties, not access to all the filings.

58. Secondly, Sasol argues that support for an attenuated right of access to information can be found in many sources. The procedure it has suggested – access to lawyers and experts has also been utilised as an adequate *via media* in balancing the conflicting objectives of privacy and fairness. [14]

59. Against this policy background Sasol argues that if the information that it seeks to protect is given to the applicants it will suffer prejudice. It classes the information broadly into the following categories –

1) Information relating to Sasol's downstream production capacity (items 1 and 2)
2) Information relating to Sasol's market shares from 1995 to 2003 in the downstream market (items 4 and 9)
3) Information relating to Sasol's margins on intermediate products which Sasol supplies to the applicants (items 11, 17, 21, 24)
4) Information relating to the discounts that Sasol offers to the applicants' rivals. (items 13, 16, 23, 25)
5) Information relating to the indebtedness of one of the applicants competitors to Sasol and other third parties. (items 10 and 15)
6) Information relating to the identity and activities of the applicants'

14 In its contentions, Sasol made reference amongst others to one Canadian case *BASF Inc. v Max Auto Supply (1986) Inc* 30 C.P.C. (4th) 23, [1999] O.J. No. 515 in which a protective order was granted which would allow the parties to designate as confidential certain documents which are of a commercially sensitive nature. Such documents were restricted to review by counsel for the opposite party and third-party experts subject to the signing of a confidentiality undertaking.

We should be wary of placing too much reliance on such authorities. Not only is the context of this order not entirely clear from what is a brief decision, but also it is not representative as the approach always taken in that jurisdiction. In another conflicting decision, *Deprenyl Research Ltd v Canguard Health Technologies Inc*,(1992) 41 C.P.R. (3d) 228, (Fed T.D.) the defendants sought an order declaring confidential the identity of its supplier, the supplier's sales agents and distributors and its manufacturing process. The Court had to decide if it could grant an order preventing the applicants' access to the information claimed to be confidential. The court consequently held that *"an order preventing counsel from showing relev*ant evidence to his client in order to get instructions, while not unknown, should only be granted in very unusual circumstances. *The* onus is on the defendants to establish the need for such a restriction on the ordinary disclosure of materials which may be relevant to the issues in the case, and the evidence so far is not compelling". (Our emphasis)

competitors (items 19,20 and 22).

60. Insofar as harm to it is concerned Sasol argues that if for instance, the applicants are apprised about the extent of their suppliers' production capacity they will be able to adopt a strategic approach to bargaining, which absent this information, they might otherwise not be able to do. The same argument is raised by Sasol to justify denying the applicants access to the remaining items.

61. In response, the applicants reject the notion that tribunal proceedings are not analogous to those of a court. They argue that for this reason most of the cases cited by Sasol are not in point. Where cases do refer to judicial proceedings where access has been restricted to legal advisors these have been in relation to discovery or inspections. In short they allege that there is no authority that a party can be denied access to the evidence in judicial proceedings. The analogy to other administrative proceedings does not hold. The constitutional rights clearly apply to bodies such as the Tribunal.

Analysis

62. The regime for protecting confidential information in terms of the Act applies to all the functions the Tribunal performs in terms of the Act, mergers, prohibited practice cases and appeals against Commission decisions in respect of exemptions.

63. Nevertheless these functions are all distinct, both procedurally in terms of the Act and rules, and in terms of the interests that may be advanced. It is clear from both the Act and rules that rights of parties, and indeed even who may be recognised as a party, varies according to what function the tribunal is performing. A good example of this is section 53 which sets out who may participate in Tribunal hearings. Instead of opting for an omnibus provision that regulates participation uniformly irrespective of the function being performed, the legislature has provided each with a distinctive regime.

64. This suggests that the legislature appreciated that functional heterogeneity requires procedural variation. Reference has to be had to the nature of the function being performed in order to determine the extent of the rights to be accorded a participant. Thus a third party who seeks to be an intervenor in a merger proceeding is not to be regarded as being on all fours with a complainant who has referred a complaint to the Tribunal.

65. In the case of the latter, standing is automatic, whilst the former

only has standing if leave to intervene is granted.[15]

66. This means that when exercising the complex balancing that all seem to agree we must embark on in a section 45(1) application we may exercise our discretion differently. The rights to procedural fairness of an intervenor in a merger proceeding, seeking access to the merging parties business plans might be less compelling than an applicant or a respondent's rights to unrestricted access to it's opponent's affidavits in a prohibited practice case.

67. It might suffice to achieve the balance between fairness and privacy to tell a third party intervenor in a merger case that it should be content to receive a summary of the confidential information from the merging parties or to be limited to access by its lawyers and experts. In a prohibited practice case we approach the balancing from a different vantage point.

68. This is because unlike a prohibited practice complaint, a merger is a non-adversarial procedure, without formalities in respect of adducing or constraining evidence such as pleadings or rules regulating the admission or denial of allegations. The prejudice to a third party intervenor who receives access to confidential information on some limited basis is not the same as that of the party in prohibited practice proceedings. Both are entitled to fairness, but it will be measured differently according to the context of the particular proceeding. In this respect Sasol is correct - fairness is relative.

69. But Sasol errs in assuming that the exigencies of fairness are less compelling in interim relief applications than they would be in curial proceedings. The interim relief procedure is the only means by which a private complainant can seek redress for injury in terms of the Act on an urgent basis. The Act accordingly provides a procedure not dissimilar to applications for urgent relief in the High Courts. Indeed section 49(C) refers expressly to the fact that in interim relief proceedings the standard of proof is the same as that in the High Court on a common law application for an interdict.

70. Procedurally too it is not dissimilar. The rules provide for the exchange of three sets of papers, make clear what the consequences are of a failure to deal with any allegations, and what is required of a denial for it to be effective.[16]

71. What we have then are all the formalities and trappings of a court procedure. It follows that the standard of fairness applied in this type of

15 Compare section 53(1)(a)(ii)(aa) of the Act with section 53(1)(c)(v).
16 See Rules 14 to 17 of the Tribunal Rules.

procedure should be that expected in a court. To argue that curial standards do not apply because we are an administrative body places form ahead of content. When we look, sound and have the powers of a court we should adhere to its standards of fairness. Sasol is correct to argue that section 34 treats the courts and non-curial bodies differently. The entitlement to the right is of automatic application in the courts, but qualified by the language *"where appropriate"* in relation to non-curial bodies. Nevertheless we have demonstrated why interim relief applications are an "a*ppropriate"* occasion to give full recognition to this right.

72. In this application the confidential information is contained in the pleadings of the party asserting confidentiality. This is a pleading to which the applicants are entitled to respond in terms of our rules of procedure. Failure to do so or failure to do so adequately may result in an adverse conclusion on factual allegations that may be in dispute. It is, as we noted earlier, a proceeding where an applicant to succeed must meet a standard of proof.

73. Fairness requires that an applicant or, for that matter, a respondent in prohibited practice proceedings is entitled to have sight of allegations made by its opponent and which may be prejudicial to its interest.

74. It does not suffice to argue that because the applicants' lawyers or experts are seized with the information that the applicant is treated fairly. The lawyers may not consult with their client on the contents. They do not know what they can or might say about it nor can they be expected to. Sasol requires the lawyers to preserve confidentiality but then in the next breath asserts that they are not prevented from making enquiries to formulate a replying affidavit. This places the applicants legal team in an unenviable position. If they enquire to vigorously they risk infringing the undertaking given to Sasol. If they err on the side of deference to this obligation they risk prejudicing the interests of their own clients defence.

75. The High Courts have previously had occasion to view this kind of arrangement with concern. In Unilever plc and Another v Polagric (Pty) Ltd[17]
Thring J noted:

"It is unwise, in my view, unless very special circumstances exist, to create a situation in which the legal advisers or experts of a party to opposed litigation may find themselves in the possession of information which may be highly relevant to the litigation but which they are precluded from communicating to their client. What are they to do

17 2001 (2) SA 329 (CPD) at 341 C-F.

with such information? How are they to obtain instructions in relation thereto? How are they to advise their client on the further conduct of the litigation or on whether it should be proceeded with at all?"

76. Frequently in competition cases the confidential information relates to matter within the experience or competence of the party from whom it is withheld. Rarely will the factual issues be so exotic that the client can have nothing to say about them or make no contribution to their appreciation. More often than not in our experience clients' instructions to counsel are vital to understanding the workings of an industry. The confidential information in this case on the face of it appears to be no exception.

77. In the *Orion / Telkom case*[18] the panel followed the same approach. There the Tribunal observed:

"What is clear to us is that basic justice will not be served if Orion is not enabled to study the blocked-out data in the agreements in issue, using its own directors and other personnel if they are the people best able to advise it, and also using any independent external experts if their evidence should prove necessary."

78. If we were to find for Sasol and deny access to the applicants then the following scenario is not too fanciful. Denied access to the confidential portion of the answering papers, except by their lawyers and experts, the applicants then file replying papers. In those papers are affidavits from its experts or lawyers rebutting the confidential information in the answering affidavits and thus, because they engage with the confidential information these affidavits are themselves confidential and withheld from the applicants. The Tribunal hearing the matter eventually decides the matter in Sasol's favour finding that on the basis of the confidential information, which the applicants have not successfully rebutted, they have no case. The Tribunal's reasons for its decision on this point also refer to the forbidden material and must too be withheld from the applicants. The applicants must consider whether to appeal or review the Tribunal to the Competition Appeal Court. Assume they choose to do so. The matter comes before the Court which decides to uphold the Tribunal. In its discussion of the lack of merits of the appellants' case the Court also finds that the confidential information is decisive. That too must be withheld from the applicants.

79. The applicants would have exhausted all the procedural rights afforded them, but never know exactly why they lost. No-one least of all their own legal team may tell them why. It is not hard to see why such a

18 Supra footnote 8.

scenario constitutes a perversion of any notion of fairness.

80. What of the harm occasioned by the disclosure of the confidential information? One cannot doubt that there is also a scenario of horror in which the *mala fide* competitor brings a case for interim relief against its supplier/competitor alleging predatory pricing and price discrimination. Its motive is not to seek the succour of remedies afforded it by the Competition Act, but to use the mechanism of litigation in its statutory institutions to raid its rival's safe for secrets which are obtainable to it as a litigant but not otherwise in ordinary commerce. Having thus forced its way into the forbidden sanctum it finds some spurious basis for withdrawing the litigation and uses the information so obtained to its advantage and its rivals prejudice.

81. Doubtless such applicants may exist. However the strategy contains several inherent dangers that make the frequency of its occurrence less likely. Firstly, an unsuccessful applicant faces a cost order. Secondly, it cannot be certain whether it will gain access to the information it seeks. In this case it is worth noting that it is the respondents, not the applicants on a fishing trip, who have adduced the confidential information in dispute. Nor if they engage in such litigation can they be sure that their own secrets will in the heat of litigation not become the subject of their rivals' scrutiny.

82. Bear in mind as well that whilst applicants can be *mala fide* in their claims so can those asserting claims of confidentiality. If anything the solution proposed by Sasol, if it became a policy, poses a greater likelihood for abuse. If parties knew that they could disadvantage an opponent by restricting access to material they might well be inclined to assert spurious grounds for confidentiality as a matter of course.

83. The conclusion that we come to from this analysis is that in prohibited practice cases a party to the proceeding is entitled to the same rights to fairness, as would a litigant in curial proceedings.

84. That being so, we find that in a prohibited practice case a party will as a general proposition be entitled to the access to confidential information of the opposing party where that information is adduced by the other party as evidence. We are not here faced with issues of discovery and inspection and we make no finding in this regard.

85. This is not stated as a categorical proposition. There may be cases where access to the confidential information of a party by another may not be appropriate and limitations of the kind proposed by Sasol or

other solutions may be acceptable.[19]

86. But in those cases where the applicants' rights of access to the information are restricted the interests of the party claiming confidentiality over the information ('the claimant') would need to be sufficiently compelling to justify a departure from the normal rule.[20] This is where we differ from the approach suggested by Sasol, which favours placing the two interests on the same plane and then balancing the respective harms. We, in contrast, start by finding the scale firmly tilted in favour of fairness and require a considerable showing of harm by the claimant to tilt the scales the other way.[21]

Procedural requirements of a section 45 application

87. In general in section 45 applications, regardless of the type of proceeding applicants requiring access should allege why -

1) the information is relevant;
2) the information is of probative value; and
3) the applicant will be prejudiced by not having access, or access in a form that is not being allowed by the claimant.

88. Once an applicant has established these elements, the onus is then on the claimant to demonstrate that it is not appropriate for the confidential information to be released in the form proposed by the applicant because it will suffer harm.

89. The degree of proof required in respect of each of these stages and the onus on the claimant will vary as suggested earlier in relation to the specific procedure where the balance between fairness and privacy will be weighed differently. So that while in a merger case the first three elements will be more burdensome for an applicant and the onus to allege harm less burdensome

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19 Another solution may be that the party seeking confidentiality is not entitled to rely on the information if the other party is denied full access to it.

20 In Unilever v Polagric in the passage we cited earlier the court referred to the exception to the general of access arising when "*very special circumstances exist"*

21 Both parties have referred us to examples of where decision makers adopt a balancing test to this form of interest weighing. The tests typically involve the decision maker asking the following questions:

!) Is the information relevant to the case
2) Is the information of probative value
3) What is the balance of harm to the applicant on the one hand and the discloser on the other.

Balancing tests thus have no default rule or onus but rather involve putting the different interests on either side of the scale and seeing which one tilts the scale downwards. Balancing tests provide easy answers where the weights of the respective interests are asymmetrical. Balancing is less helpful when the weights on the scale leave it level i.e. the interests in opposition are either equally weighty or equally light. Nor is comparing a loss to fairness with a loss to privacy that easy as they are qualitatively different.

on the claimant, in a prohibited practice case the reverse will apply.

90. Let us apply this approach to the facts of the present case. Given that the information is to be found in Sasol's answering affidavits they can hardly deny its relevance and indeed they do not. So relevance is common cause.

> 91. The information is also of probative value. Although Sasol suggests that items 1 and 2 dealing with the production capacity of its Secunda and Sasolburg plants plant were by way of background only, it is difficult for us without the full context of the case to conclude that its probative value is so low as to negate its restriction from the applicant when Sasol deemed it necessary to include it.
>
> 92. The applicants have also established that it will be prejudiced by not having access to the information. Granted they have done this by general assertion, rather than making allegations in respect of each item, *seriatim*. But, as we indicated earlier, the prejudice to the applicant in a prohibited practice case is largely self-evident because the legal consequences of not being able to deal properly with allegations prejudicial to its case. The burden of the applicants is met by Mr Coubrough's assertion that the legal advisors and experts have considered the issues and require instructions on these issues from their clients, and that even the information which is of a technical nature is also capable of a response at a factual level for which they need instructions from their client.[22] They are not required to go further than this when they contend for the normal rule not the exception.

93. Since the applicants have established the essential elements of their case, relevance, probative value and prejudice, the onus then shifts to Sasol to establish that the form of access proposed will result in prejudice. As this is a prohibited practice case this burden on Sasol will be high and Sasol will have to establish that disclosure to the applicants will result in considerable harm to it.

94. When it filed its first CC 7 Sasol claimed that the information was confidential because *"this is proprietary market sensitive information which could cause irreparable harm to Sasol if it becomes available to the public".* The same assertion was made in respect of each item.

> 95. On filing its answering papers this was supplemented by the assertion that *"this is proprietary business information relating to operational aspects of Sasol's business, which is not in the public domain and could cause irreparable harm to Sasol's business if it were*

22 See references to the portions in the applicants' papers in footnotes 6 and 7 supra. In relation to the allegation of the adequacy of experts to deal with the information on their own without instruction, see the applicants' replying affidavit paragraph 11(b).

to become publicly known. As such the confidentiality of such information has economic value to Sasol."

96. In its heads of argument Sasol dealt for the first time in any depth with the nature of prejudice it would suffer if the confidential information was made accessible to the applicants.

97. Sasol alleged that if the applicants had sight of the confidential information they would acquire –

1. knowledge of Sasol's downstream production capacity (items 1 and 2);
2. knowledge of the costs incurred by Sasol in establishing a production facility (item 3);
3. knowledge of Sasol's market shares from 1995 to 2003 in the downstream market (items 4 and 9);
4. knowledge of Sasol's margins on intermediate products which Sasol supplies to the applicants (items 11, 17, 21 and 24);
5. knowledge of the discounts that Sasol offers to the applicants' rivals. (items 6,13,14, 23 and 25);
6. knowledge of the indebtedness of one of the applicants' competitors to Sasol and other third parties. (items 10 and 15)
7. the name of one of Sasol's agents (items 19,20 and 22).

98. On the basis of this knowledge so it was argued Sasol would be prejudiced in the following manner:

1. the applicants would be able to estimate whether Sasol was under or over supplied with raw materials and to calculate its profit margin. This type of information could help in negotiations with Sasol or in setting the price of competing products;
2. the applicants would discover the markets in which Sasol enjoyed strong or poor market share and be able to respond strategically;
3. the applicants would be able to assess which of Sasol's customers are involved in a particular region and thus gain a strategic advantage.
4. they would obtain information on Sasol's customers which would help them assess the latter's profit margins and help to undercut them. Furthermore Sasol's business relationships with some of its customers could be damaged if it is seen to make their information know to competitors.

99. Albeit that the heads of argument seem to make assertions lacking in the answering affidavit we will grant some latitude to these assertions as being legal conclusions.

100. The strongest allegation of prejudice made by Sasol is that if the applicants have sight of this information they will be in a position as a customer to strategically bargain with Sasol in a manner they have not been able to previously, or qua competitor to behave more strategically in a manner they were not able to previously. Finally they would possess strategic information on Sasol's customers who are likewise the applicants' competitors.

101. Given that on Sasol's papers the applicant is described as a troubled business lurching on insolvency and only kept alive because of Sasol's decision to accommodate its outstanding loans, it seems that the bargaining power of the applicants is somewhat constrained, to put it mildly. Nor is it likely that this minnow in a downstream market will benefit from knowledge of Sasol's capacity in the upstream market.

102. Although we have accepted that all information claimed is confidential, this just means that it is not contested that they meet the statutory test on the evidence before us thus far. We do not know, unless the claimant properly enlightens us, whether we are dealing with information whose disclosure may cause blushes or ruin. Indeed none of the information is on the face of it obviously confidential. Discounts are not inherently confidential and are often transparent. So too are market shares, margins, capital costs and production capacities. [23]

103. Sasol's arguments are speculative, argued at a level of generality and lack a foundation in the circumstances of the applicants in relation to it. They have not in our view demonstrated that there is a sufficient degree of harm to them by the limited disclosure to the applicants. As we stated earlier, against the competing interest of fairness in a prohibited practice case, the threshold of harm is set high and Sasol has not demonstrated a likelihood of harm that crosses it.

104. In our view if one is to err, less danger is apparent by erring on the side of fairness even at the expense of diluting the right to privacy. It must be borne in mind that the order we propose does not impel the information into the public domain nor may it be used for a purpose outside of these proceedings. In this view we are entirely in agreement with the approach of the panel in Orion.

23 By way of example Sasol has in its annual reports, which are public documents, referred to its capacity in other plants within the group. At page 26 of Sasol Limited 2003 Annual Report it is stated that the *"The Petlin plant has the capacity to produce 255 000 tpa of LDPE."* At page 30 of the same report Sasol notes that *"the Sasolburg ammonia plant capacity will be increased by 36 000 tpa."* The total ammonia plant capacity is one of the items Sasol alleges is confidential information. Sasol has also previously advised the applicants what its margin is. For instance on page 161 of the Record where Sasol in a letter to Nutri- Flo refer to raw materials being supplied at " total import parity cost plus 10% mark up as per the average of the FMB report." A further sentence refers to products being determined on total actual costs plus a 10% mark up.

105. We accordingly make the following order:

1. The information contained in Sasol's confidential answering affidavit under cover of Form CC7 as amended (being items 1-4,6,9-11,13-15,17,19-25) is in the interim declared confidential.

2. Sasol must provide copies of the confidential version of its answering affidavit to employees and/ or members of the applicants subject to the following:

2.1 Such disclosure will be made for the purpose of pursuing the interim relief application brought by the applicants under case number 61/IR/Nov2003 and any related interlocutory litigation; but for no other purpose;

2.2 Prior to being permitted access the persons referred to in paragraph 2 will be required to:

2.2.1 undertake in writing that they are aware of the contents of this order and are prepared to abide by it; and

2.2.2 furnish the first and second respondents' attorneys with a signed confidentiality undertaking on similar terms to that contained in the Annexure to the founding affidavit marked LC 14 to 22.

3. The applicants or any other interested third party may apply to the Tribunal at any stage for the arrangements set out in paragraphs 1 to 2 to be lifted or made less restrictive on good cause shown.

4. Costs in respect of this application are awarded to the applicants, including costs of two legal representatives.

_____ 31 March 2004

N. Manoim Date

Concurring: D. Lewis, T. Orleyn

For the Applicants: Adv. V Gajoo SC with him Adv. I. Moodley instructed by Lance Coubrough of Livingston Leandy Inc.

<u>For the Respondents:</u> Adv. D Unterhalter SC instructed by Anthony Norton of Webber Wentzel Bowens.