IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO.~~

(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO.~~

(3) REVISED.

12/11/2014 .....

DATE **SIGNATURE**

12/11/2014

CASE NO: 47050/13

IN THE MATTER BETWEEN

MONDI LIMITED	1ST APPLICANT
HATHORN, DAVID	2ND APPLICANT
and	
THE COMPETITION COMMISSION	1ST RESPONDENT
SAPPI SOUTHERN AFRICA LIMITED	2ND RESPONDENT

JUDGMENT

LEGODI, J

HEARD ON: **30 OCTOBER 2014**
JUDGMENT HANDED DOWN ON: **12 NOVEMBER 2014**

INTRODUCTION

[1] This is an interlocutory application in terms of which the applicant, Mondi Limited (" Mondi") wants the respondent, Competition Commission ("the Commission") to be ordered to dispatch to the Registrar of this court the record in respect of its decision of the 6 June 2013 to initiate a complaint against Mondi and the second respondent, SAPPI Southern Africa Limited (SAPPI). It also wants the Commission to give such reasons as it is by law required or desires to give or make and to notify the applicant that it has done so, within five days of service of the order in this regard on its legal representatives

BACKGROUND

[2] On the 5 September 2012, the Commission initiated a complaint against Mondi. The initiation was in terms of section 48B of the Competition Act no 89 of 1998 ("Act") and was based mainly on a scoping study procured at its instance. The Commissioner may initiate a complaint against an alleged prohibited practice in terms of subsection (1) thereof.

[3] On the 12 October 2012 the Commission summoned Mr David Hathorn, Chief Executive Officer of Mondi who is cited as the second applicant in these proceedings. He was required to provide information to the Commission regarding the activities of Mondi.

[4] Based on a number of grounds, Mondi objected to the initiation of the complaint and the issuing of summons against its CEO. On the 9 November 2012, Mondi was advised of the withdrawal of the summons until further notice. On the 6 June 2013 the Commission initiated another complaint against Mondi and SAPPI. The summons was also re-issued against Mr Hathorn.

[5] On the 31 July 2013, Mondi instituted review proceedings in terms of Rule 53 of the Uniform Rules seeking relief as follows:

'1. The decision by the Competition Commission (the Commission) to initiate a complaint against the first applicant and second respondents, as amended on the 6 June 2013, (the amended initiation statement) is reviewed and set aside.

2. The decision by the Commission to serve summons on the second applicant, in his capacity as Chief Executive Officer of the first applicant on 2 July 2013, is reviewed and set aside.

3. The first respondent is ordered to pay the costs of this application including the costs of three counsels.

4. Further and or alternative relief'.

[6] SAPPI is not a participant in the present interlocutory application. Secondly, the summons has been withdrawn against Mr Hathorn for the second time after the institution of the review proceedings. Therefore, the main participants in these proceedings are Mondi and the Commission.

[7] The application to compel in terms of Rule 30A was launched on the 27 September 2013. The application was set down on the unopposed motion roll for the 20 November 2013. Intention to oppose was served on the 15 October 2013. At the same time, the Commission delivered the record relating to its decision to initiate a complaint of the 6 June 2013.

[8] The Commission delivered a document titled 'schedule of documents in the Commission's record'. In the schedule a total number of 68 separate items are listed. This constitutes the decision record according to the Commission. I do not find it necessary to set out every item on the list.

[9] It suffices to mention that the schedule consists of columns from left to right. There are six columns. That is, "NO", "ITEM", "DESCRIPTION", "DATE", "CONFIDENTIAL/RESTRICTED/PRIVILLEGED" and ACCESS". Under access column, fifty two of the sixty eight items are indicated with a "NO". These are items to which Mondi was not given access. The items are either "confidential, restricted and or privileged". Those marked "Restricted" are said to be restricted in terms of the Commission's Rule 14. Those made available to Mondi are 11 reported judgments

consisting of five European judgments and six South African judgments. All of these and other five documents are public documents not subject to any confidentiality, restriction and or privilege.

[10] Mondi objected to this non-disclosure and withholding of the rest of the documents. It contends that the Commission is obliged to disclose them in terms of Rule 53 (1) (b). The delivery of the restricted record did not change Mondi's stance on its application to compel. It is however now focused on specific documents. These are all the documents in the schedule which have not been provided to it.

ISSUES RAISED

[11] At the start of the hearing, and in the course of oral argument, the following issues emerged:

- Whether the initiation on the 6 June 2013 of a complaint against Mondi adversely affects any right entitling it to have documents upon which the decision to initiate a complaint was made? In addition,

- Whether the Commission properly exercised its public power conferred on it in terms of the Act. And if so,

- Whether the review proceedings in terms of Rule 53 dispose of the applicability of the provisions of the Act? And if not,

- Whether confidentiality to the documents in question have been claimed in terms of section 44(1)(a) of the Act? And if so,

- Whether those who claimed confidentiality on the documents have made a written statement in terms of section 44(1)(b) describing the nature of the confidentiality claim so made?

- Whether the documents marked "Restricted" are excluded from disclosure in terms of Rule 14?

WHETHER THE INITIATION OF COMPLAINT ON 6 JUNE ADVERSELY AFFECTS ANY RIGHT OF MONDI?

[12] The question as I see it is premised from the fact that in paragraphs 98 and 99 of the founding affidavit Mondi expresses itself as follows:

> *"98. I am advised and submit that the decisions of the Commission to issue the two summonses and to initiate the complaint against Mondi amounts to administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 (**"PAJA"**).*
>
> *99. In light of the facts set out in this affidavit, I submit that the decisions fall to be reviewed and set aside in terms of:*
>
> *99.1 section 6(2)(b) of PAJA in that a mandatory and material condition prescribed by the relevant provisions of the Competition Act was not complied with;*
>
> *99.2 section 6(2)(d) of PAJA in that the decisions were materially influenced by an error of law;*
>
> *99.3 section 6(2)(e)(i)-(iii) of PAJA in that the decisions were taken for a reason not authorized by the relevant provisions of the Competition Act, for an ulterior purpose or motive and because irrelevant considerations were taken into account and relevant considerations were not considered;*
>
> *99.4 section 6(2)(e)(vi) of PAJA in that the decisions were taken arbitrarily and capriciously;*
>
> *99.5 section 6(2)(f)(i) PAJA in that the decisions contravene and are not authorized by the relevant provisions of the Competition Act;*
>
> *99.6 section 6(2)(f)(ii) of PAJA in that the decisions are not rationally connected to the purpose for which they were taken, the purpose of the relevant provisions of the Competition Act and the information before the Commission;*
>
> *99.7 section 6(2)(h) of PAJA in that the decision was unreasonable, and/or*
>
> *99.8 section 6(2)(i) of PAJA in that the decisions were otherwise unconstitutional and lawful.*

[13] Mondi is having a problem insofar as it wishes to rely on the statement as its cause of action. The nature of the decision does not adversely affect its rights to a fair

procedural hearing. I have been referred to several authorities in this regard. I do not find it necessary to refer to all of them.

[14] In the *Competition Commission v Yara (South Africa (PTY) Ltd & Others*[1] Brand JA had an occasion to deal with the purpose of initiating a complaint in terms of the Act. He referred to statements by the Competition Appeal Court in the matter of Norvatis SA (PTY) Ltd v Competition Commission[2] and then stated:

> *"What these statements of Norvatis make plain is that the purpose of initiating compliant is to trigger an investigation which might eventually lead to referral. It is merely the preliminary step of a process that does not affect the respondent's rights. Conversely stated, the purpose of an initiating complaint, and investigation that follows upon it, is not to offer the suspect firm an opportunity to give notice of the complaint and of its investigation to the suspect. Least of all is the Commission is required to engage with the suspect on the question whether its suspicions are justified. The principles of administrative justice are observed in the referral and hearing before the tribunal. That is when the suspect firm becomes entitled to put its side of the case".*

[15] Similarly in *Simelane NO v Seven-Eleven Corporation SA (PTY) Ltd*[3] Schultz JA having quoted the statements in Novartis, stated:

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

[16] Perhaps a brief discussion on the legislative framework is necessary, although counsel for Mondi did not much argue the process of administrative action as its main cause of action. In my view correctly so. The Commission may initiate a complaint against an alleged prohibited practice[4]. Any person may submit information concerning

[1] 2013 (4) ALL SA 302 (SCA) par 24.
[2] CT 22/CR/B June 01 pars 35-61.
[3] 2003 (3) SA 64 (SCA) par 17.
[4] Section 49B(1) of the Act.

an alleged prohibited practice to the Competition Commission, in any manner or form[5], or may submit a complaint in terms of section 49B against an alleged prohibited practice to the Commission in the prescribed form[6]. Upon initiating or receiving a complaint in terms of section 49B, the Commissioner must direct an inspector to investigate the complaint as quickly as practicable[7].

[17] At any time during an investigation, the Commissioner may designate one or more persons to assist the inspector[8]. Any time during an investigation in terms of the Act, the Commissioner may summon any person who is believed to be able to furnish any information on the subject of investigation or to have possession or control of any book, document or other subject that has a bearing on the subject of investigation[9]. The Commission initiated the complaint in terms of subsection (1) of section 49B. The initiation of the complaint was based on most of the information it purportedly received in terms of subsection (2).

[18] Mondi requires disclosure of information or record upon which the Commission initiated the complaint. The prohibited practice upon which the complaint was initiated, are according to the Commission for contravention of sections 4 and 8. I will deal later with these contraventions when dealing with the second issue. The quotation in paragraph 12 of this judgment does not entitle Mondi to procedural fairness. The initiation of the complaint is not administrative action as it does not adversely affect Mondi's right to procedural fairness. This then brings me to the next issue.

WHETHER THE COMMISSION PROPERLY EXERCISED ITS PUBLIC POWER IN INITIATING THE COMPLAINT? PUT DIFFERENTLY, WHETHER MONDI ESTABLISHED A CAUSE OF ACTION BASED ON IMPROBER EXERCISE OF PUBLIC POWER?

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[5] Section 49B(2)(a).
[6] Section 49B(2)(b).
[7] Section 49B(3).
[8] Section 49B(4).
[9] Section 49C(1).

[19] I want to caution, whatever I say in this judgment, should not be seen as making a final determination on the merits of the main application. For example, the Commission has not filed its answering affidavit in the main application. Therefore, insofar as it concerns the main application, there is only one affidavit.

[20] In its founding affidavit, Mondi states:

> *"100. I emphasized that, even if this Court were to conclude that the decisions do not constitute administrative action in terms of PAJA, they (at the very least) amount to the exercise of public power and are therefore subject to the principle of legality. Essentially all of the applicants' grounds of review set out above can be accommodated under the principle of legality.*
>
> *101. In so doing (and in initiating the "scoping study" in the first instance, the Commission has acted beyond the powers conferred upon it in terms of the Competition Act. It must, before it initiate complaints against market participants have reasonable suspicion that that market participant has potentially contravened the Competition Act. Clearly, for all the reasons already given, it does not hold a reasonable suspicion of potential wrongdoing at all.*
>
> The underlining in the quotation is my own emphasis.

[21] The sentiments in the quotation were repeated in both Mondi's written heads of argument and its notes for oral argument. For example, in paragraph 7 of the notes for oral argument, is stated:

> *"7.2 Review under the principle of legality is not confined to or even focused on questions of procedural fairness. Rather the principle of legality allows for review on various grounds, including irrationality, a failure to comply with an empowering statute and an abuse of discretion".*

[22] The legislature does not in section 49B prescribe the minimum requirements to be met before the Commission can initiate a complaint. No doubt such initiation has to be lawful and compliance with the rule of law. In paragraph 14 above, I dealt with the purpose of initiating a complaint. At the heart of this are the minimum requirements for such initiation.

[23] In *Woodlands Dairy (PTY) Ltd and Another v Competition Commission*[10] Harms DP stated:

> *"A complaint has to be initiated. The Commission has exclusive jurisdiction to initiate a complaint under section 49B (1). The question then arises whether there are jurisdictional requirements for the initiation of a complaint by the Commissioner. I would have thought, as matter of principle that the Commissioner must at the very least have been in possession of information concerning an alleged practice which, objectively speaking, could give rise to a reasonable suspicion of the existence of prohibited practice. Without such information there could not be a rational exercise of the power. This is consonant with the provisions of section 49B(2)(a) which permit anyone to provide the Commission with information concerning a prohibited practice without submitting a formal complaint".*

The underlining is my emphasis. Subsection (2) (a) of section 49B provides that any person may submit information concerning an alleged prohibited practice to the Commission in any manner or form. A complaint must be initiated against an alleged prohibited practice[11].

[24] Harms DP proceeded and further stated:

> *"It is only during this investigation 'an investigation in terms of this Act', that the Commissioner may summon persons for purposes of interrogation and production of documents (section 49A(1) read with section 49B(4).* I do not accept the submission on behalf of the Commission that these far-reaching invasive powers may be used by the Commissioner for the purposes of a fishing expedition without first having initiated a valid complaint based on a reasonable suspicion. It would otherwise mean that the exercise of this power would be unrestricted because there is no prior judicial **scrutiny** as is the case with a search warrant under section 46".

[25] Further in paragraph 35 of his judgment, Harms DP stated:

> *"There is in any event no reason to assume that an initiation requires less particularity or clarity than a summons. It must survive the test of legality and*

[10] 2010 (6) SA 108 SCA at par 13.
[11] Woodlands *supra* par 19.

intelligibility. There are reasons for this. The first is that any interrogation or discovery summons depends on the terms of the initiation".

[26] In the present case, Counsel for the Commission suggested that what was said in *Woodlands* should be seen in context. That context is said to be found in a subsequent judgment by the Supreme Court of Appeal in Yara's case paragraph 26 wherein Brand JA stated:

"The CAC also found support for the referral rule in the judgment of this court in Woodlands Dairy (PTY) Ltd... As I see it, however, Woodlands dos not provide that support. Woodlands concerned the validity of two summonses issued by the Commission in terms of section 49A of the Act, pursuant to an investigation into the milk industry as a whole. This court considered the scope of initiating complaint to determine whether the summons issued during the course of this investigation were valid ..."

[27] Based on this statement, Counsel for the Commission argued that what was said in *Woodlands* as a whole did not concern the validity of the initiation of a complainant, but rather that of the summons. Secondly, the submission was that one cannot challenge the validity of an initiation of a complaint. To do so will plunge the activities of the Commission into disarray as suspect firms will do everything in their power, like in the present case, not to be investigated for contraventions of the Act and in particular section 4, so it was contended.

[28] I had difficulties with this submission. The submission goes contrary to what is stated not only in *Woodlands* but also in *Yara,* the very case and paragraph on which the contention is based. For example, Brand JA continued in paragraph 26 and in referring to *Woodlands,* stated:

"What it held, in essence was that there can be no investigation in terms of the Act without a complaint submitted by complainant or initiated by the Commission against an alleged prohibited practice, that a complaint can only be initiated by the Commission against on the basis of a reasonable suspicion, and that information of a prohibited practice involving nominated members of the milk industries did not warrant the initiation of a complaint not an investigation into the milk industry as a whole".

[29] Clear from the authorities that an initiation of a complaint by the Commission is not absolved from scrutiny. Legality and rationality must be satisfied. In other words, if there are no facts before the Commission justifying such initiation based on reasonable suspicion, the initiation and subsequent investigation will be unlawful and challengeable.

FACTS UPON WHICH THE INITIATION IS BASED

[30] The decision of the 6 June 2013 to initiate a complaint was taken against Mondi and SAPPI for possible contraventions of the provisions of section 4(1)(a), 4(1)(b)(i), 4(1)(b)(ii), 8(a) and 8(a)(i) of Act. Of relevance, section 4 reads as follows:

> *"**4. Restrictive horizontal practice prohibited***
>
> *(1) An agreement between, or concerted practice by, firms or a decision by an association of firms, is prohibited if it is between parties in horizontal relationship and if-*
>
> *(a) it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect; or*
>
> *(b) it involves any of the following restrictive horizontal practices:*
>
> *(i) directly or indirectly fixing a purchase or selling price or any other trading condition;*
>
> *(ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or*
>
> *(iii) collusive tendering.*

[31] On the other hand, section 8 deals with abuse of dominance. Paragraphs (a), (c) and (d) (i) thereof read as follows:

> *"**8. Abuse of dominance prohibited***
>
> *It is prohibited for a dominant firm to –*
>
> *(a) charge an excessive price to the detriment of consumers;*
>
> *(b) ...*

(c) Engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or

(d) Engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act-

(i) Requiring or inducing a supplier or customer to not deal with a competitor;

(ii) ...

(iii) ...

(iv) ...

(v) ...

[32] In paragraph 1 of its answering affidavit the Commission states:

"*1.1 The Competition Commission ("the Commission) has obtained information from mergers that have taken place in pulp and paper industry, and has conducted a scoping study on the state of competition in the pulp and paper industries.*

1.2 Based on available information I have reasonable grounds to suspect that Mondi Limited and its subsidiaries and SAPPI Southern Africa ("Proprietary) Limited and its subsidiaries may have engaged in which constitute a contravention of section 4(1)(a), 4(1)(b)(i), 4(1)(b)(ii), 8(a), 8(c) and 8(a)(i) of the Act as described below".

It is clear from the quotation that the Commission was mindful of the fact that for it to have a valid initiation of a complaint, it must have reasonable grounds to suspect that Mondi was engaged in prohibited practices as envisaged in sections 4 and 8.

[33] The Commission in its amended initiation statement deals with the alleged contraventions by Mondi. At the risk of prolonging this judgment, I find it necessary to quote what are alleged to be the contraventions:

"***3.2 Alleged direct and/or indirect price-fixing in contravention of sections 4(1)(b)(i) and/or 4(1)(a) of the Act***

3.2.1 Information Sharing

3.2.1.1 Mondi and Sappi submit information to the Paper Manufactures Association of South Africa ("PAMSA") on a monthly basis. The information submitted to PAMSA relates, inter alia to each supplier's capacity, total national production volumes, raw material consumption and trade data. This information covers all types of pulp (including virgin pulp of which Mondi and Sappi are the only producers), printing and writing paper, packaging paper and newsprint and magazine paper. The information is disaggregated further into sub-grades e.g. coated and uncoated for printing and writing paper; liner board and fluting for packaging paper. PAMSA collates the information submitted and produces quarterly and annual reports which are made available to its members, including Mondi and Sappi.

3.2.1.2 In addition, Mondi and Sappi publish bi-annual reports setting out, inter alia, their actual production volumes of various pulp and paper products (namely, containerboard, uncoated fine paper, hardwood pulp, softwood and newsprint). These reports are accessible on each respondent's website.

3.2.1.3 Economic theory and the Commission's own experience indicates that the frequent exchange of individual, disaggregated date on price, raw material, capacity, costs, production volumes and quantity, as well as the sharing of strategic, future plans between rivals facilitates collusion. Moreover, aggregated information that allows for individual company date to be easily identified, can also be problematic. This is especially the case in markets that are highly concentrated with large barriers to entry and relatively homogenous products. Such information exchange reduces uncertainty about a competitor's actions and is likely to provide the opportunity for parties to each agreement or to adopt a concerted practice on prices and to monitor adherence thereto.

3.2.1.4 In the light of the above and the nature of the information exchanged by Mondi and Sappi through PAMSA, and/or disclosed on their websites, I have reasonable grounds to suspect that Mondi and Sappi have reached an agreement or

engaged in a concerted practice to fix prices of pulp, printing and writing paper, packaging paper, newsprint paper and magazine paper in contravention of section 4(1)(b)(i) and/or 4(1)(a) of the Act.

3.2.2 ***Pricing Mechanism***

3.2.2.1 ***Delivered prices***

3.2.2.1.1 *According to economic theory, the practice of setting uniform delivered prices can facilitate price observability among rivals, especially where prices are expected to vary with transportation costs given the geographic spread of rivals' and consumers' operations. A firm is likely to achieve this by setting the same price inclusive of transportation cost throughout its territory, independent of its customers' locations, such that a customer located next to the firm's plant would pay exactly the same price as one located hundreds of kilometres away.*

3.2.2.1.2 *The Commission is in possession of information indicating that Mondi and Sappi respectively set the prices for pulp, corrugated bulk paper, Kraft paper and newsprint paper on a uniform delivered basis (that is, the price do not vary with delivery costs, despite the fact that Mondi and Sappi supply their customers nationally from mills located in different geographic areas in South Africa).*

3.2.2.1.3 *In the light of the above, I have reasonable grounds to suspect that Mondi and Sappi have reached an agreement or engaged, in a concerted practice to fix prices of pulp, corrugated bulk paper, kraftpaper and newspaper paper in contravention of sections 4(1)(b)(i) and/or 4(1)(a) of the Act.*

3.2.2.2 ***PIX index for pulp***

3.2.2.2.1 *Available information also indicates that Mondi and Sappi use the same pricing mechanism to determine prices for pulp.*

3.2.2.2.2 *Mondi and Sappi's pulp prices are calculated from the PIX index. This index is published by FOEX Indexes Ltd and companies can gain access by subscription. The PIX price indices are calculated from price data received from buyers and sellers of the commodity in question. The Index is calculated for Europe (CIF), United States of America (delivered) and China (C&F). The pricing mechanism used by Mondi and Sappi gives the delivered price that is applicable for a quarter and is calculated based on the month preceding the first month of the quarter.*

3.2.2.2.3 *Given that the South African pulp market is duopolistic in nature, the use of this pricing mechanism provides for transparency and allows Mondi and Sappi to observe each other's prices. Thus this pricing mechanism enables each firm to anticipate its competitor's pricing of its pulp and therefore could be facilitating price-fixing.*

3.2.2.2.4 *On the basis of the above, I have reasonable grounds to suspect that Mondi and Sappi have reached an agreement or engaged in a concerted practice to fix prices of pulp in contravention of section 4(1)(b)(i) and/or 4(1)(a) of the Act.*

3.2.3 ***Alleged pricing conduct in contravention of sections 4(1)(b)(i) and/or 4(1)(a) of the Act***

3.2.3.1 *Mondi and Sappi are the only producers of kraft paper and newsprint. These two products' prices, among other, are used in the calculation of the industry average producer price index, i.e. the pulp, paper and paperboard price index (PPI). Available information indicate that the individual price indices for kraft paper and newsprint are significantly*

higher than the industry average PPI. In addition, Mondi and Sappi's prices were observed to increase in a coordinated fashion namely at relatively the same time and by relatively the same magnitude.

3.2.3.2 This observed phenomenon in the PPI data and the price movements gives rise to a suspicion that Mondi and Sappi have reached an agreement or engagement in a concerted price to fix prices of newsprint and kraftpaper in contravention of sections 4(1)(b)(i) and/or 4(1)(b)(i) and/or 4(1)(a) of the Act.

3.3 Alleged market and customer allocation in contravention of section 491)(b)(ii) of the Act

3.3.1 Mondi and Sappi are the only producers of uncoated fine paper and newsprint in South Africa:

3.3.1.1. In the uncoated fine paper market, Mondi holds about 70% market share whilst the remaining 30% is held by Sappi.

3.3.1.2 In the newsprint market, Mondi holds about 62% market share and Sappi has 32% of the share.

3.3.1.3 Mondi used to produce coated fine paper but exited this market, leaving Sappi as the monopoly producer of coated fine paper.

3.3.1.4 As both entities have the capacity to manufacture all of the above products and having regard to the observed market shares, I have reasonable grounds to suspect that Mondi and Sappi have reached an agreement or engaged in concerted practice to allocate markets and customers.

3.3.2 In addition, the Commission has received information which indicates that Mondi and Sappi charge similar delivered prices for newsprint and uncoated woodfree paper, and then apply varying rebates. This information reveals that both Mondi and Sappi have different rebate structures for different groups of newsprint customers. Specifically, Mondi will not offer rebates to a customer that receives rebates from

Sappi, and vice versa. These rebates may be used as a mechanism to allocate customers between the two suppliers and to discourage switching.

3.3.3 *With regard to packaging paper (such as carton-board and sackraft for paper bags), the Commission has information indicating that Mondi only supplies heavier grammage (thickness) cartonboard, whilst Sappi supplies the lighter grammage sackraft. This is despite the fact that both entities have the capacity to manufacture all types of grammage. There are reasonable grounds to suspect that there is a market allocation arrangement between Mondi and Sappi.*

3.3.4 *On the basis of the above, I have reasonable grounds to suspect that Mondi and Sappi have reached an agreement or engaged in a concerted practice to allocate customers and/or markets in the supply of coated and uncoated fine paper, packaging and newsprint paper in contravention of section 4(1)(b)(ii) of the Act.*

3.4 ***Alleged conduct in respect of rebates in contravention of section 8(d)(i) and/or 8(c) of the Act.***

3.4.1 *According to economic theory and case law, a dominant firm can use its rebate structure as a mechanism to achieve anti-competitive outcomes in a market. For instance, in Competition Commission v South African Airways' the Competition Tribunal found that the override incentive scheme introduced by South African Airways ("SAA") raised competition concerns in that it was a mechanism used to induce travel agents to sell SAA tickets to the detriment of its rivals.*

3.4.2 *As mentioned above, Mondi and Sappi, respectively, offer rebates to their customers for newsprint, liner board, kraft paper and carton board. These rebates are volume-based, retroactive (back to Rand one) and individualized. Retroactive rebates are of particular concern as they may be used as a mechanism to lock-in and induce customers not to switch.*

3.4.3 *The nature and structure of Mondi and Sappi's rebates therefore give*

rise to a reasonable suspicion that Mondi and Sappi respectively have engaged in a prohibited practice in contravention of sections 8(d)(i) and/or 8(c) of the Act.

3.5 ***Alleged pricing conduct in contravention of section 8(a) of the Act***

3.5.1 Available information suggest that it is cheaper to import kraft liner board, including inland transportation cost from the coast to Gauteng, than it is to buy locally from Mondi and Sappi. This is despite the fact that South Africa is a net exporter of kraft liner board.

3.5.2 According to economic theory and case law import parity pricing in an exporting economy can only be artificially maintained through, inter alia, a collusive agreement or unilateral exercise of market power. Prices at import partly in an net exporting country give rise to a reasonable inference of the exertion of monopoly (or, in this case, duopolistic) power by Mondi and Sappi.

3.5.3 I have reasonable grounds to suspect that Mondi and Sappi's pricing policies (reinforced by cartel conduct and information exchange referred to above), couples with the duopolistic nature of the pulp and paper industry, has made it possible for the two firms to maintain prices of kraft liner board at supra-competitive levels and to keep the prices of kraft liner board artificially inflated. I therefore have reasonable grounds to suspect that Mondi and Sappi's respective prices for kraft liner board contravene section 8(a) of the Act.

[34] Based on the quotation above, I am unable to find that the Commission had no legal basis to initiate the complaint. Prima facie there exists information to reasonably suspect commission of prohibited practices. This must not be understood as making a final determination on the merits. Similarly, the contention that Mondi established no cause of action should be seen in the context of its cause of action based on an alleged improper exercise of public power. Whether Mondi will be able to prove the allegation is not for this court to decide. All of this is the subject of ventilation in the review proceedings. I do not have to make a final determination in this regard. Before me is interlocutory application for disclosure of documents in terms of Rule 53(1)(b). This then brings me to the third issue.

WHETHER REVIEW PROCEEDINGS IN TERMS OF RULE 53 DISPOSE OF THE APPLICABILITY OF THE PROVISIONS OF THE ACT?

[35] Rule 53(1)(b) provides that in an application for review, the public body where decision is under review, must disclose the record of the proceedings by which it took the decision. Counsel for Mondi suggested that the provisions of the Act, in particular sections 44 and 45 find no application in the present proceedings and that therefore irrespective whether a document is marked confidential, restricted and or privileged, the Commission is obliged to provide such documents due to this court's inherent powers of review and in particular in Rule 53 (1)(b) which obliges the Commission to do so. The procedure set out in section 45 for disclosure of confidential information is applicable and applicable only to the proceedings before the Competition Tribunal and or the Competition Appeal Court, so was the contention.

[36] I had difficulties with this submission. What was said in *Briton International Gmbh v International Trade Administration Commission and Others*[12] is on point regarding this issue. The International Trade Administration Commission in the process of complying with Rule 53(1)(b) of Rules of Court divided the record into a confidential part and a non-confidential part. It then tendered disclosure of the non-confidential part in compliance with its obligation under Rule 53(1)(b). But with regard to the confidential part of the record, it contended that the relevant legislative provisions precluded it from disclosing confidential information of that information. The information owner, *Briton*, refused its consent to the disclosure of its confidential information included in the confidential part. The Commission in that case found itself constrained to refuse to disclosure of that information despite the wide wording of Rule 53(1)(b). These facts are no different to the present case.

[37] In the normal course of events, *Brinton*'s confidential information would therefore form part of the record which the Commission is required to produce[13]. Brand JA having considered the applicable provisions of the Act in *Brinton*'s case, substantially similar to those applicable in the present case, and having listened to the similar argument as it was the case in this case, stated:

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[12] 2013 (3) SA 197 SCA.
[13] Brinton *Supra* par 7.

'I have no doubt that the Commission has a legitimate interest in protecting information submitted to it by third parties in confidence. However, I do not believe that the exclusion of public interest privilege contended for by Brinton is needed to afford that protection. On the contrary, I agree with the viewpoint advanced by the Commission that the solution to the problem is provided by section 35(3) of the Act. This means that I do not accept Brinton's contention that the section is limited to proceedings before the Commission. In my view, its ambit to disclosure extends to disclosure in review proceedings'.

[38] Section 35(2) and (3) of the *International Trade Administration Act 71 of 2002* provides as follows:

'(2) A person who seeks access to the information which the Commission had determined is by nature, confidential or should be recognized as otherwise confidential, may-

(a) first request that the Commission mediate between the owner of the information and the person; and

(b) failing mediation in terms of paragraph (a), apply to High Court for-

(i) an order setting aside the determination of the Commission; or

(ii) any appropriate order concerning access to that information.

(3) Upon an application in terms of subsection (2)(b), the High Court may determine whether the information-

(i) is by nature, confidential; or

(ii) should be recognised as being otherwise confidential; and

(b) if it determines that it is confidential, make any appropriate order concerning access to that confidential information'.

[39] In the present case, section 45 of the Act, that is, the *Competition Act no 89 of 1998 is relevant. It* deals with disclosure of information. Subsections 1 and 2 thereof, provide as follows:

"45. ***Disclosure of information***

> *(1) 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.*
>
> *(2) Within 10 business days after an order of the Competition Tribunal is made in terms of section 44(3), a party concerned may appeal against that decision to the Competition Appeal Court, subject to its rules".*

[40] Now, in Briton's matter, the argument was that the provisions of the *International Trade Administration Act*, in particular section 35 thereof were confined only to the proceedings before the Commission. The same argument was raised in the present case. Brand JA dealing with the contention in Briton's case stated:

> *"... However, I fail to see the difficulty. First of all, the Commission is a public body which is supposed to act fairly and whose mediation is subject to judicial control in the terms of section 35(3). Secondly, the Commission itself has an interest in the protection of confirming information submitted to it, because third parties may otherwise be unwilling to co-operate. On the other hand, it has an interest in showing the rationality of its decisions, which requires disclosure of as much as possible of the information it relied upon for that decision. It therefore has an inherent conflict of interest. On the one hand, it has an interest to protect both ways. Thirdly, I can think of no entity better qualifying than the Commission to perform the mediation function. Not only does the Commission consist of a body of experts. It knows exactly what confidential information it considered for purposes of its decision*[14].
>
> *In short, I find nothing in the wording of the Act that limits the operation of sections 35(2) and 35(3) to proceedings before the Commission. On the contrary, I can think of good reason why section 35(3) should also extend to proceedings which are aimed at a review of the Commission's decision...*

[14] *Briton* supra par 25.

> *One of these obligations is to protect confidential information submitted in anti-dumping investigations as far as possibly. Self-evidently this protection may be required, not only in proceedings before the Commission, but also in subsequent proceedings aimed at a review of the Commission's decisions*[15]".

[41] I am unable find any reason why the principle enunciated in *Briton's* case as quoted above cannot find application to the present case. Therefore, Mondi should be found to have jumped the queue by coming to this court for disclosure of the documents in terms of Rule 53(1)(b). Its remedies are provided in section 45 of the Act. Section 45(1) and (2) has been quoted in paragraph 39 of this judgment. Ordinarily this finding will mean that a person who seeks disclosure of information claimed confidential under section 44, must first apply to the Competition Tribunal. However, jurisdictional factors in my view must be met before such a directive could be made. It must first be shown that information in respect of which a disclosure is required, is confidential in terms of section 44. I now turn to deal with the other issue.

WHETHER CONFIDENTIALITY TO THE DOCUMNTS HAS BEEN CLAIMED?

[42] Section 44(1) (a) requires a person when submitting information to the Competition Commission or the Competition Tribunal to identify information if any, which is claimed to be confidential.

[43] There is a form titled "Form CC7" that is used in confidentiality claim. It is a document addressed to the Competition Commission and the Competition Tribunal. It provides for the name and file number concerned. On the left side of Form CC7, is indicated that the form is issued in terms of section 44(1) of the Act. In the middle of the form is stated:

> *"On a separate sheet of paper, list the following information, and set out the facts and contentions supporting your claim that the identified information is confidential.*
>
> *Column 1 - name of the document that contains (sic) the confidential information.*
>
> *Column 2 - the page and line number at which the confidential information begins and ends.*

[15] *Briton* supra par 26.

Column 3 - the name of the firm that owns the particular information.

Column 4 - the nature of the economic value of the information.

Column 5 - the existing restrictions on access to the information.

Statement of confidentiality:

I, _____ compiled, or supervised the person who compiled, the attached list. I believe that the information identified in that list is confidential information as defined in section 1(1) of the Competition Act".

[44] The confidentiality claim is articulated in the Commission's answering affidavit as follows:

"THIRD PARTY INFORMANTS' CONFIDENTIAL DOCUMENTS

16. In the research process that led to the initiation of the complaint against Mondi and Sappi, the Commission obtained information about the relevant markets from various informants. In their submissions, these informants identified the information as confidential in terms of section 44(1) of the Competition Act 89 of 1998.

17. In terms of section 44(2) of the Competition Act, the Commission is bound by a confidentiality claim contemplated in subsection (1). In terms of section 45(3), from the time information comes into the possession of the Commission until a final determination has been made concerning it, the Commission must treat as confidential any information that is subject to a claim of confidentiality.

18. The Competition Act provides that, if a party seeks access information that is subject to a claim of confidentiality in terms of section 44(1), it is must (sic) to apply to the Competition Tribunal. In terms of section 45(1), the Competition Tribunal is empowered to determine whether or not the information is confidential and, if it finds that the information is confidential, to make an appropriate order concerning access to that confidential information.

19. *In Competition Commission of South Africa v Arcelormittal SA Ltd (670/12) [2013] ZASCA 84 (31 May 2013), the SCA held that, if the Competition Tribunal has made no decision on the issue of confidentiality pursuant to section 45(1), the Competition Appeal Court does not have original power to decide the issue. It can only make a determination on appeal from a decision of the Tribunal.*

20. *In the circumstances:*

    20.1 *the Competition Commission did not produce the documents subject to confidentiality claims in the hands of third party informants as part of the Rule 53 record as it would have been unlawful to do so; and*

    20.2 *this court does not have jurisdiction to determine the confidentiality or otherwise of those documents. That is the exclusive domain of the Competition Tribunal.*

21. *Accordingly, if Mondi wants to contest the legitimacy of the claim to confidentiality of those documents that the Competition Commission has marked "confidential" on its schedule of documents, it must apply to the Competition Tribunal for a determination in terms of section 45(1). In those proceedings, Mondi would be required to cite the owners of the confidential information (who are not parties to this application or to the review application) as they have a right in terms of section 53 of the Competition Act to participate in the Tribunal's hearing of the matter.*

22. *Even if the Commission were not obliged at law to withhold documents subject to confidentiality claims, I submit that maintaining the confidentiality of these documents is in the public interest. If the Commission were to disclose information of this kind every time a party reviewed one of its decisions, third party informants would no longer give the Commission such information, which would hamper the Commission in the execution of its duties.*

[45] There is no mention of completion of Form CC7 in the quotation. Not a single form is attached to the answering affidavit. There is no statement of confidentiality as

indicated in Form CC7 reproduced in part in paragraph 43 above. No explanation is given as to why confidentiality claim form has not been completed, signed by those claiming confidentiality and attached to the Commission's answering affidavit. For the purpose of the proceedings before me, I need to be satisfied that there is a claim of confidentiality as envisaged in section 44(1) to the documents marked 'Confidential'. Subsection (1)(a) and completion of Form CC7, in my view, seek to clarify and identify what is claimed as confidential information. Paragraph (b) of subsection (1) requires claim of confidentiality in terms of paragraph (a) to be in a prescribed form. That is Form CC7. The quotation from the answering referred to in paragraph 44 of this judgment, is silent on the completion of the form. In the absence of any averment to this effect, it must be inferred that it does not exist and that there is no compliance with the provisions of subsection (1) (a) of section 44.

WHETHER THOSE WHO CLAIMED CONFIDETIALITY COMPLIED WITH THE PROVISIONS OF SECTION 44 (1) (b)?

[46] Few things must happen under paragraph (b) of subsection (1). One, a claim for confidentiality must be supported by a written statement. Two, a claim of confidentiality in terms of paragraph (a) must be in a prescribed form. In the statement, there must be an explanation as to why the information is confidential. Anything short of this would not be subject to protection from disclosure. Section 45(3) and (4) provides that:

> *"3. From the time information comes into the possession of the Competition Commission or Competition Tribunal until a final determination has been made concerning it, the Commission and Tribunal must treat as confidential, any information that-*
>
> *(a) the Competition Tribunal has determined a confidential information; or*
> *(b) is the subject of a claim in terms of this section.*
>
> *(4) Once a final determination has been made concerning any information, it is confidential only to the extent that it has been accepted to be confidential information by the Competition Tribunal or the Competition Appeal Court".*

[47] The protection from disclosure under these subsections will only kick in if the claim to confidentiality is compliant. That is, compliant with subparagraphs (a) and (b) of section 44(1). Assuming that the Commission wanted to protect its informants, the least

it could have done in the answering affidavit was to aver that claim of confidentiality has been made and that a written statement as required in subparagraph (b) of subsection (1) has been obtained. Therefore the Commission must be found to have failed to show protection of the information from disclosure. In other words, before it can claim to be bound in terms of section 44(2) and or section 45 (3) by the confidentiality claim, there must first be compliance with the provisions subsection (1) of section 44. These are jurisdictional requirements to be met for a valid claim of confidentiality. I am mindful of the provisions of section 45 (1) (a) quoted in paragraph 39 of this judgment. I find it necessary to make determination envisaged in paragraph (a) of section 45 (1) bearing in mind the nature of the application before me and the order I make in paragraph 57.2.1 and 57.2.1.1 of this judgment. I turn to deal with the remaining issue.

WHETHER RESTRICTED DOCUMENTS ARE PROTECTED FROM DISCLOSURE?

[48] Refusal to disclose what is marked 'restricted' in the schedule, is articulated in the answering affidavit as follows:

> *"23. The remaining documents in dispute are those, which in terms of Rule 14(1)(c), (d) and (e) are regarded as "restricted information". These include documents that contain internal communication between officials of the Competition Commission; reports obtained or prepared by or for the Commission; minutes of meetings and internal memoranda; and so on. What all of these documents have in common is that their premature disclosure would hamper the Commission in the execution of its statutory duties.*
>
> *24. The Commission has invoked the provisions of rule 14 in respect of these documents in order to protect two interests. The first is the public's interest in ensuring that the Commission's internal deliberative process is not unnecessarily or unreasonably restrained. The second is the public's interest in protecting the integrity and efficacy of the Commission's investigatory process.*
>
> *25. If the Commission's deliberative process is exposed to public view before a matter is investigated, our researches and economists would be discouraged from openly deliberating on the strengths and weaknesses of the facts and theories at hand and from adopting opposing views where appropriate. The full diversity of conflicting views is included in the documents protected by Rule 14 so that the decision-makers are properly informed. The disclosure of these reports prior to referral – rather than*

their key findings – would inhibit the open and contested deliberation that currently informs the research process.

26. *In addition, the restriction of these documents protects the efficacy of the Commission's investigatory process that is triggered by the complaint initiation. The Commission believes that a respondent like Mondi would not be entitled to look over the Commission's shoulder as the investigation against Mondi runs its course. The premature disclosure of the contents of these documents could seriously prejudice the course of justice.*

27. *The Commission has no objection to disclosing those documents it is legally required to disclose if and when it refers a complaint against Mondi to the Competition Tribunal. That is when Mondi becomes entitled to put its side of the case. Mondi is not however entitled to watch the deliberative process of the Commission by having sight of pre-decisions documents unless and until the Commission prosecutes.*

28. *Mondi's invocation of the provisions of Rule 53 to get sight of the record prior to the investigation against it constitutes an abuse of process.*

[49] Rule 14(1) (c) to (e):

*"**14. Restricted information***

(1) For the purpose of this Part, the following five classes of information are restricted:

(c) Information that has been received by the Commission in a particular matter, other than that referred to in paragraphs (a) and (b), as follows:

(i) The Description of Conduct attached to a complaint, and any other information received by the Commission during its investigation of the complainant, is restricted information until the Competition Commission issues a referral or notice of non-referral in respect of that complaint, but a completed form CC1 is not restricted information.

(ii) A statement of Merger Information and any information annexed to it, or received by the Commission during its investigation of that merger, is restricted information until the Commission has issued a certificate, or been deemed to have approved the merger, in terms of section 13 and 14, or made recommendation in terms of section 14A, as the case may be;

(iii) An application and any information received by the Commission during its consideration of the application, or revocation of an exemption granted to the applicant, is restricted information only to the extent that it is restricted in terms of paragraph (a).

(d) A document-

(i) that contains-

(aa) an internal communication between officials of the Competition Commission, or between one or more such officials and their advisors;

(bb) an opinion, advice, report or recommendation obtained or prepared by or for the Competition Commission

(cc) an account of a consultation, discussion or deliberation that has occurred, including, but not limited to, minutes of a meeting, for the purpose of assisting to formulate a policy or to take a decision in the exercise of a power or performance of a duty conferred or imposed of the Commission by law; or

(ii) the disclosure of which could reasonably be expected to frustrate the deliberative process of the Competition Commission by inhibiting the candid-

(aa) communication of an opinion, advice, report or recommendations; or

(bb) conduct of a consultation, discussion or deliberation; or

(iii) the disclosure of which could, by premature disclosure of a policy or contemplated policy, reasonably be expected to frustrate the success of that policy.

(e) Any other document to which a public body would be required or entitled to restrict access in terms of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).

[50] In its replying affidavit, Mondi takes the view that without access to the internal document referred to in the Commission's answering affidavit it will not be in a position to assess the rationality and reasonableness of the Commission's decision to initiate a complaint. The fact that the Commission may debate, internally the merits and demerits of a particular complaint would not render a subsequent decision to proceed with that complaint irrational or otherwise subject to review. The claim that disclosure of internal

communication would discourage the Commission's staff from engaging in debate is thus without merit, so it was contended. Mondi also criticized the classification of the Genesis Report as restricted. I agree that this report can neither be confidential nor restricted. It is in the public domain. For example, Mondi found it through the internet.

[51] Coming back to the rest of the restricted documents, it is not insignificant concern that if the Commission's deliberation process is exposed to public view, before a matter is investigated other people or informants would be discouraged from openly deliberate on the strengths and weakness of the facts and theories at hand and from adopting opposing views where appropriate. For example, it is said full diversity of conflicting views is included in the documents protected by Rule 14 so that the decision makers are properly informed. That in my view should include initiation of complaints. That is, requirement of rationality and legality must be met before initiating a complaint. I dealt with such a requirement earlier in this judgment.

[52] However Mondi is also entitled to challenge the Commission's decisions like in the present, if such decisions are challenged on the principle of rationality and legality. Challenge to such decisions would require background information that preceded and resulted in the taking of the decision, in this case to initiate a complaint. It is a balancing exercise that is required. A blanket non-disclosure may be prejudicial to Mondi. In the circumstances of the case, I prefer to resort to restricted access. Some of the information referred to in the quotation under paragraph 48 of this judgment, appears to be based on documents belonging to Mondi and or SAPPI. Therefore insofar as any document relied upon for the initiation of complaint might be belonging to Mondi and or Sappi, and forms part of the documents referred to in the Commission's Schedule, there can be no basis to impose restrictions except insofar as it relates to irrelevant portion of such documents.

CONCLUSION

[53] In *Briton* case, Preller J, had an occasion to subject access to a strict confidentiality regime. In granting the relief sought in the interlocutory application, he essentially incorporated the confidentiality regime proposed to him into the court order with minor changes of his own. Similarly, in the present case on behalf of Mondi, I have been provided with draft order which I intend to change insofar as it is necessary to do so.

[54] The Commission is likely to feel aggrieved with the adoption of such an order. But, it has only itself to blame as it failed to furnish sufficient information in making a claim of confidentiality. It could well be that in some instances there is full compliance with the provisions of section 44. If there is, there will be a need to restrict access, bearing in mind that the Commission is not totally opposed to disclosure. For example, in its answering affidavit, it states:

> *"27. The Commission has no objection to disclosing those documents it is legally required to disclose if and when it refers a complaint against Mondi to the Competition Tribunal. That is when Mondi becomes entitled to put its side of the case. Mondi is not entitled to watch the deliberative process of the Commission by having sight of pre-decision documents unless and until the Commission prosecutes".*

[55] The Commission is challenged on the basis that it has no reasonable suspicion that Mondi has committed any of the prohibited practices. As this is a requirement for the initiation of a complaint, Mondi should therefore be entitled to the disclosure of the information or documents upon which the initiation is based. As I said, I am inclined to grant Mondi restricted information.

[56] Insofar as is suggested in the draft order that the Commission must dispatch to the Registrar of this court the record in respect of the decision to initiate a complaint, such a record has already been delivered with some restrictions. I therefore do not find it necessary to make such an order.

ORDER

[57] Consequently an order is hereby made as follows:

57.1 The Commission (the first respondent) is hereby ordered to furnish Mondi (the first applicant) with the Genesis Report insofar as it has already been in the public domain.

57.2 Mondi is entitled access to the record and in particular to documents referred to in what is titled '*Schedule of documents* in the Commission's *record*' subject to the following qualifications:

57.2.1 to all document marked "*confidential,*" except insofar as a claim of confidentiality on such documents complies with paragraphs (a) and (b) of section 44(1) of the Act, in which event;

57.2.1.1 the applicants shall request for disclosure of such documents in terms of section 45 of the Act.

57.3 Insofar as documents marked "*restricted" are concerned,* the Commission shall allow access to all documents belonging to or generated by Mondi & Sappi except insofar as such documents are not relevant to the initiation of complaint in question. The other access relating to 'restricted documents', shall be limited to the portions only of each document upon which reliance was placed in taking the decision to initiate the complaint, unless is not possible to excise such portions from the main document; and

57.3.1 such documents will only be made available to the applicants' attorneys; and

57.3.2 the applicants' attorneys shall not disclose such documents to the applicants or any other party save for the applicants' counsel.

57.4 The Commission is hereby ordered to deliver the documents mentioned in paragraphs 57.1, 57.2 to 57.3.2 of this order within seven days from the date of handing down of this order.

57.5 The Commission is ordered to pay the costs of this application including the costs of two counsels.

M F LEGODI
JUDGE OF THE GAUTENG DIVISION, PRETORIA

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