THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case No: 538/2011

In the matter between:

BRIDON INTERNATIONAL GMBH	**APPELLANT**
v	
INTERNATIONAL TRADE ADMINISTRATION COMMISSION	**FIRST RESPONDENT**
THE MINISTER OF TRADE AND INDUSTRY	**SECOND RESPONDENT**
SCAW SOUTH AFRICA (PTY) LTD	**THIRD RESPONDENT**
CASAR DRAHTSEIWERK SAAR GMBH	**FOURTH RESPONDENT**

Neutral citation: *Bridon International GMBH v International Trade Administration Commission* (538/2011) [2012] ZASCA 82 (30 May 2012)

Coram: **Brand, Cloete, Mhlantla, Wallis JJA *et* Southwood AJA**

Heard: **15 May 2012**

Delivered: **30 May 2012**

Summary: **Confidential information submitted to Commission during investigation in terms of International Trade Administration Act 71 of 2002 – Commission relying on that information for its decision – disclosure claimed by third party for purposes of reviewing that decision - weighing-up of competing interests.**

ORDER

On appeal from: North Gauteng High Court, Pretoria. (Preller J sitting as court of first instance):

The appeal is dismissed and the appellant is ordered to pay the costs of the first respondent.

JUDGMENT

BRAND JA (**CLOETE, MHLANTLA, WALLIS JJA *ET* SOUTHWOOD AJA concurring**):

[1] This appeal arises from an interlocutory application for access to confidential information that was submitted to the International Trade Administration Commission (the Commission) during the course of an investigation by the Commission into the imposition of anti-dumping duties. The issues arising require a more detailed account of the facts. I find it convenient to start that account by introducing the parties. The appellant is Bridon International GMBH (Bridon), a German based manufacturer of steel wire ropes. The first respondent is the Commission, which was created in terms of s 7 of the International Trade Administration Act 71 of 2002. The second respondent is the Minister of Trade and Industry (the Minister). The third respondent is Scaw South Africa (Pty) Ltd (Scaw), a large South African manufacturer of steel products. The fourth respondent is Casar Drahtseiwerk Saar GMBH (Casar), another German-based exporter of steel wire ropes to South Africa. Bridon, Casar and Scaw are competitors in the Republic as well as in several international markets insofar as the manufacturing of steel wire ropes is concerned.

[2] From 2002 anti-dumping duties were levied on steel wire ropes imported into the Southern African Customs Union from various countries, including Germany.

Those duties were due to expire in August 2007. During February 2007, however, Scaw applied for the continuation of these duties. This led to a so-called 'sunset review' by the Commission, which is essentially an investigation in terms of the Act into the need for the reconfirmation or the amendment of the anti-dumping duties originally imposed. The period for investigation was confined to the 2006 calendar year. As part of the investigation the Commission sent questionnaires to known interested parties for completion. In response to the questionnaires, various importers and exporters of steel wire rope submitted information to the Commission. Two of these were Bridon and Casar.

[3] After the questionnaires were submitted to the Commission, it conducted a verification exercise of their contents. Bridon alleges, and it is not denied, that as part of the questionnaire and during the verification exercise, it provided the Commission with information 'comprising literally hundreds of electronic and hardcopy documents many of which were clearly indicated to be of an extremely sensitive commercial and highly confidential nature'. The completeness of its submission seemingly stood Bridon in good stead. I say that because, in its final report, dated 15 January 2009, the Commission recommended the continuation of and an increase in anti-dumping duties levied on wire ropes exported by some German manufacturers, including exports by Casar. But with reference to exports by Bridon, the Commission recommended that no anti-dumping duties be imposed.

[4] The Commission's recommendations, contained in its final report, were accepted by the Minister. In consequence, the anti-dumping duties recommended by the Commission were imposed by way of publication in the Government Gazette of 13 February 2009. This led to a review application by Casar in the North Gauteng High Court, pursuant to s 46 of the Act ('the main application'). What Casar sought in the main application was an order reviewing and setting aside both the Commission's decision to recommend the continued and increased duties to be imposed on its exports and the Minister's decision to accept and implement that recommendation. Bridon was not a party to the main application.

[5] The main application triggered the provisions of Rule 53(1)*(b)* of the Uniform Rules of Court. This rule provides that, in an application for review, the public body whose decision is under review must disclose the record of the proceedings on which the decision was based. In the process of complying with Rule 53(1)*(b)* the Commission 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 – to which I shall presently return – precluded it from disclosing confidential information without the consent of the owner of that information. Since Bridon refused its consent to the disclosure of its confidential information included in the confidential part, the Commission found itself constrained to refuse disclosure of that information, despite the wide wording of rule 53(1)*(b)*.

[6] That gave rise to the interlocutory application by Casar before Preller J in the court a quo which in turn led to the present appeal. All parties to the appeal were joined in the interlocutory application. The latter was opposed by Bridon only, while the Commission, the Minister and Scaw all abided the decision of the court.

[7] In the correspondence that preceded the application, the battle lines were fairly clearly drawn. Thus it became apparent that the information submitted by Bridon to the Commission, including that contained in the confidential part, was relevant to the Commission's recommendation that anti-dumping duties should be imposed on exports by Casar. In fact, after some toing and froing, the Commission confirmed in a letter to Casar's attorneys that its recommendation was based solely on confidential and non-confidential information provided by Bridon and two other parties. In subsequent correspondence the Commission went further and stated that the only confidential information that was used in the calculation of the anti-dumping duties imposed on Casar, derived from Bridon. Self-evidently, that part of Bridon's confidential information relied upon by the Commission, in arriving at its impugned decision, is relevant in the main application. As interpreted by our courts, rule 53(1)

(b) requires the decision-maker to disclose 'the documents, evidence, arguments and other information before the tribunal' (see eg *MEC for Roads and Public Works, Eastern Cape v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA) para 15). In the normal course of events, Bridon's confidential information would therefore form part of the record which the Commission is required to produce.

[8] Despite the general import of the rule, Casar appreciated that the disclosure of Bridon's confidential information to its competitors, including Casar itself and Scaw, would have a significant adverse effect upon Bridon, and that it would potentially be of significant benefit to its competitors. In recognition of Bridon's right to insist on protection of its confidential information, Casar therefore did not ask for unqualified access to the confidential part of the Commission's record. What it sought was an order, firstly, confining access to that part of the record which the Commission regarded as relevant in arriving at its impugned decision and, secondly, subjecting that access to a strict confidentiality regime.

[9] In granting the relief sought by Casar in the interlocutory application, Preller J essentially incorporated the confidentiality regime proposed by Casar into the court's order with a few minor changes of his own. Bridon nonetheless considered the confidentiality regime set out in the court's order as inadequate for the protection of its confidential information. It therefore sought and obtained the leave of the court a quo to appeal against that order. Shorn of unnecessary detail, the order limits access to the confidential part of the Commission's record to legal representatives of the parties in the main application and one independent expert appointed by each party to assist in that application. In addition, these persons will only have access after they have signed a confidentiality undertaking in the form dictated by the order. In terms of that undertaking the signatory pledges not to divulge the information that he or she obtained from the record to anybody outside the stipulated group of persons, which group does not include the parties themselves or any of their employees. The order further requires that any pleading, affidavit or argument filed in the main application be made up in two parts – a confidential version and a non-

confidential version; that all references to confidential information be expunged from the non-confidential version; and that access to the confidential version be reserved to permitted persons and the judge presiding in the main application. The appeal is opposed by Casar only. All other respondents, including the Commission, elected to abide the decision of this court.

[10] Despite its election to abide, the Commission filed an answering affidavit in the court a quo which explained why it regarded itself as constrained to refuse disclosure of Bridon's confidential information without a court order compelling it to do so. In this court the Commission briefed counsel to communicate the position it took and to make submissions in support of that position. I believe we should express our appreciation for the contribution made by the Commission in this way, which I found of considerable assistance. In the court a quo the Commission expressed the view that the confidentiality regime proposed by Casar was inadequate to protect Bridon's confidential information. It seems, however, that the changes brought about by Preller J in the order he eventually granted, were sufficient to allay the Commission's misgivings. I say this because of the position it took on appeal. That position is succinctly summarised as follows in the heads of argument on behalf of the Commission and endorsed by its counsel in oral argument:

'7.1 The information which comprises the confidential record to which access is sought is information which has been recognised by [the Commission] as "confidential" under section 34(1)(a) of the International Trade Administration Act 71 of 2002 ("The Act");

7.2. Despite this determination, [the Commission] accepts that in the context of the pending review application the question of access to confidential portions of the review record raises competing rights and interests on the part of Casar and Bridon. The adjudication of this issue thus requires the exercise of a discretion by a Court as to, having regard to the facts and circumstances of this case, what is in the interests of justice;

7.3. The confidentiality regime set out in the order of Preller J cannot be argued to be an improper exercise of a discretion by the Court *a quo* given that it seeks to strike a balance between protecting the rights and commercial interests of Bridon while ensuring the protection of Casar's rights as a litigant.'

[11] Section 34(1)*(a)*, to which reference is made in the quotation, is one of the sections in Part D of Chapter 4 of the Act – comprising sections 33 to 37 – which specifically deals with the protection of confidential information submitted to the Commission in the course of anti-dumping investigations. These sections, together with the Anti-Dumping Regulations, promulgated by the Minister in GN 3197 of 14 November 2003, were clearly intended to give effect to South Africa's obligations in terms of international instruments to protect confidential information in the course of anti-dumping proceedings.

[12] The first of these international instruments to which South Africa became a signatory, was the General Agreement on Tariffs and Trade of 1947 (GATT). That was followed by the World Trade Organisation Agreement (WTO Agreement) which was signed by South Africa in 1994. Part of the WTO Agreement was the Agreement on Implementation of Article VI of GATT (the Anti-Dumping Agreement). Both GATT and the WTO Agreement were approved by Parliament. Consequently they became binding on the Republic in terms of s 231(2) of the Constitution, 1996. Yet because they were not enacted into our municipal law by national legislation, as contemplated in s 231(4) of the Constitution, the provisions of these agreements did not in themselves become part of South African law. (See *Progress Office Machines CC v South African Revenue Service* 2008 (2) SA 13 (SCA) paras 5 and 6; J Dugard *International Law, A South African Perspective* 4 ed (2011) at 436; E C Schlemmer 'South Africa and the WTO: Ten Years into Democracy' (2004) 29 *SAYIL* 125 at 135).

[13] This does not mean that these international instruments have no relevance to the present enquiry. As I have said, Part D of Chapter 4 of the Act was a clear attempt to give effect to South Africa's obligations under these international instruments. Hence s 233 of the Constitution comes into play. This section provides:

'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'

[14] Article 6 of the Anti-Dumping Agreement deals specifically with the protection of confidential information submitted by interested parties. Thus article 6.5 provides that any information which is by nature confidential, for example, because its disclosure would be of significant competitive advantage to a competitor, or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Once recognised as confidential, such information shall not be disclosed without specific permission of the party submitting it. Notwithstanding this injunction, however, note 17 to article 6.5 expressly provides that this treatment gives way to domestic law which may require publication. Note 17 states:

'Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.'

[15] This brings me back to Part D of Chapter 4 of the Act. It starts with s 33. This section provides:

'(1) A person may, when submitting information to the Commission, identify information that the person claims to be information that-

(a) is confidential by its nature; or

(b) the person otherwise wishes to be recognised as confidential.

(2) A person making a claim in terms of subsection (1) must support that claim with-

(a) a written statement in the prescribed form-

(i) explaining, in the case of information that is confidential by its nature, how the information satisfies the requirements set out in the definition of "information that is by nature confidential" in section 1 (2); or

(ii) motivating, in the case of other information, why that information should be recognised as confidential; and

(*b)* either-

(i) a written abstract of the information in a non-confidential form; or

(ii) a sworn statement setting out the reasons why it is impossible to comply with subparagraph (i).'

[16] Section 1(2) referred to in s 33(2)*(a)*(i), broadly defines 'information that is by nature confidential' as information in the sphere of trade or business that is not

generally available and the disclosure of which would harm the owner or 'give a significant competitive advantage to a competitor of the owner'. In the event of a claim of confidentiality under s 33, the Commission is enjoined by s 34(1) to determine its validity. If the Commission decides against the claimant, the latter has a right of appeal to the High Court. If, on the other hand, the Commission finds that the claim of confidentiality should be recognised, s 35(2) and s 35(3) find application. These subsections provide:

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

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

(b) failing mediation in terms of paragraph *(a)*, apply to a 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-

(a) 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.'

[17] The Commission's viewpoint is that the dispute between Bridon and Casar is to be resolved with reference to s 35(2) and (3) of the Act. Departing from that premise, it explained in its answering affidavit how it sought to mediate between the rivals, as envisaged in s 35(2)*(a)*, but without any successful outcome. This meant, so the Commission contended, that it was precluded from disclosing information which it recognised as confidential for purposes of the main application in the absence of a court order. In consequence, so the Commission further contended, the court a quo was enjoined to decide the matter in terms of s 35(3) and more pertinently s 35(3)*(b)*, by weighing the conflicting interests of the two opposing parties. In the court a quo Bridon essentially proceeded from the same premise. In this court, however, it contended that s 35(3) finds no application. The mechanism

created in Part D of Chapter 4, so Bridon contended in this court, is confined to proceedings before the Commission which terminates with its decision on the merits. According to this argument, s 35(3) thus finds no application in a case like the present where access is required in order to review that decision. This is borne out, so Bridon's argument went, by the Anti-Dumping Regulations which are clearly confined to proceedings before the Commission.

[18] The position taken by Bridon in this court starts out from the premise that disclosure by the Commission in review proceedings is governed by rule 53(1)*(b)*. That rule, so Bridon's argument proceeded, requires in principle that the Commission disclose all information relevant to its impugned decision, regardless of confidentiality. But, so the argument went, the court has the power to exclude confidential information by virtue of an extended form of public interest privilege (strictly speaking, more aptly described as a public interest immunity – see eg *Duncan v Cammell Laird* [1942] AC 624 (HL) 641, Hodge M. Malek QC ed *Phipson on Evidence* (16 ed) para 25-08, P J Schwikkard and S E van der Merwe *Principles of Evidence* 3 ed at para 11.1.1). I say extended because Bridon rightly conceded that the public interest privilege thus far recognised by our courts, for example in *Van der Linde v Calitz* 1967 (2) SA 239 (A), would find no application in this case. Yet Bridon argued that the extension for which it contends has been recognised in both the United Kingdom and Canada and that there is no reason in principle why we should not follow the same course.

[19] In support of its contentions relying on the law of the United Kingdom, Bridon referred to a number of decisions from that jurisdiction, viz *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners* [1974] 2 AC 405; *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171; and *R v Chief Constable of West Midlands Police, Ex parte Wiley* [1995] 1 AC 274. Of these decisions, *Crompton* shows the closest resemblance to the facts of this case. It concerned a dispute about the disclosure of documents in the possession of the Customs and Excise Commissioners in their litigation against Crompton. The

Commissioners objected to the disclosure to Crompton of various categories of documents gathered in the course of their investigation of Crompton's business. One of the categories comprised documents which made reference to information obtained from third party traders with regard to their trading practices. The Commissioners objected that if it were known that information of this kind was liable to be disclosed, the third party informants would no longer give the Commissioners such information, which would hamper them in the execution of their duties.

[20] The House of Lords upheld the Commissioners' objection to the disclosure of these documents on the ground of public interest privilege. In the course of his judgment Lord Cross made the point that although this information was obtained from the third party traders in confidence, its mere confidentiality did not render the documents immune from disclosure, but that 'it may be a very material consideration to bear in mind when privilege is claimed on the ground of public interest' (at 433H). What the court has to do when such privilege is claimed, so Lord Cross continued, 'is to weigh on the one hand the considerations which suggest that it is in the public interest that the documents in question should be disclosed and on the other hand those which suggest that it is in the public interest that they should not be disclosed and to balance one against the other. Plainly there is much to be said in favour of disclosure. The documents in question constitute an important part of the material on which the commissioners based their conclusion . . . On the other hand, there is much to be said against disclosure . . . Here . . . one can well see that the third parties who have supplied this information to the commissioners because of the existence of their statutory powers would very much resent its disclosure by the commissioners to the appellants and that it is not at all fanciful . . . to say that the knowledge that the commissioners cannot keep such information secret may be harmful to the efficient working of the Act' (at 433H-434F).

[21] In further support of its argument for an extension of public interest privilege to the facts of this case, Bridon also referred to the decisions of the Canadian courts, which seemingly adopt a more nuanced approach by introducing the concept of

'partial privilege'. This appears eg from the following dictum by McLachlin J in *M (A) v Ryan* [1997] 1 SCR 157 at para 33:

'It follows that if the court considering a claim for privilege determines that a particular document . . . must be produced to get at the truth and prevent an unjust verdict, it must permit production to the extent required to avoid that result. On the other hand, the need to get at the truth and avoid injustice does not automatically negate the possibility of protection from full disclosure. In some cases, the court may well decide that the truth permits of nothing less than full production . . . Disclosure of a limited number of documents, editing by the court to remove non-essential material, and the imposition of conditions on who may see and copy the documents are techniques which may be used to ensure the highest degree of confidentiality and the least damage to the protected relationship, while guarding against the injustice of cloaking the truth.'

[22] As I see it, the approach to the recognition of public interest privilege on the facts of a particular case in both the United Kingdom and Canada therefore depends on a judicial evaluation of the balance between two conflicting public interests. On the one hand there is the public interest in finding the truth in court proceedings. This is to be weighed up against the countervailing public interest which sometimes requires that the confidentiality of information be maintained. In support of its argument that in this case the latter interest outweighs the former, Bridon relied on evidence produced in the answering affidavit of both itself and the Commission. What this evidence shows, in broad outline, is that, in the same way as in *Crompton,* the Commission is vitally dependant in its investigations into anti-dumping, on receiving commercially sensitive evidence supplied by third parties who may refuse to cooperate if the confidentiality of their information is not ensured.

[23] 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 extension of public interest privilege contended for by Bridon 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 s 35(3) of the Act. This means that I do not accept Bridon's contention that the section is limited to

proceedings before the Commission. In my view its ambit extends to disclosure in review proceedings.

[24] In this case the route we decide to follow will probably make no difference to the result. This is so because all parties are in agreement that the outcome depends on a weighing up of their conflicting interests. Yet, the right answer as to the source of the court's power to perform the weighing-up exercise may in different circumstances lead to a different result. My first problem with the extended privilege route is that I have serious doubt as to whether it is available to a third party, in the position of Bridon, where it is not invoked by the public body, in the position of the Commission. But even in that doubtful event, it stands to reason that little weight will be afforded to the mooted public interest in the weighing-up process if, in the view of the public body itself, that interest is sufficiently protected. That perhaps directs the focus to the heart of my difficulty. It is this. The public privilege route requires a balance to be struck between the conflicting interests of two parties, the Commission, on the one hand, and Casar, on the other. It leaves little, if any, room for consideration of the discrete interest of a third party, such as Bridon. As opposed to that, the application of s 35(3), as I see it, facilitates the weighing-up of all three interests.

[25] Bridon's first argument as to why s 35(3) is confined to proceedings before the Commission, is that the ambit of the anti-dumping regulations is so limited. But as I see it, the argument amounts to a *non sequitur.* Moreover, it is a trite principle that subsequent regulations cannot serve to give meaning to an Act. Bridon's further argument was that it would be invidious for the Commission to perform the mediator's role contemplated in s 35(2) once it became the respondent in review proceedings. 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 terms of s 35(3). Secondly, the Commission itself has an inherent conflict of interest. On the one hand, it has an interest in the protection of confidential 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 decision, which requires disclosure of as much as possible of the information it relied upon for that decision. It therefore has an interest to protect both ways. Thirdly, I can think of no entity better qualified 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.

[26] In short, I find nothing in the wording of the Act that limits the operation of s 35(2) and s 35(3) to proceedings before the Commission. On the contrary, I can think of good reason why s 35(3) should also extend to proceedings which are aimed at a review of the Commission's decision. As I have said, Part D of Chapter 4 of the Act is, in my view, intended to give effect to South Africa's obligations in terms of international instruments. One of these obligations is to protect confidential information submitted in anti-dumping investigations as far as possible. 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. It is difficult to think why, in the circumstances, s 35(3) should be intended to stop short of affording that protection in review proceedings, particularly where it is at least uncertain whether that protection is afforded by any other instrument of our law. Finally, with regard to the interpretation of s 35(3), I do not believe that the balance it requires can be described, as the Commission appears to think, in terms referring to the exercise of a judicial discretion where there can be more than one right answer. As I see it, it amounts to a value judgment which is subject to unrestricted re-evaluation on appeal.

[27] This brings me to the balancing exercise between the conflicting interests which s 35(3) requires and the ultimate question whether the order issued by the court a quo constitutes a fair outcome of that exercise. The Commission's answer is that it does. That means, as I see it, that as far as the Commission is concerned, its own interests are sufficiently protected by the order. In this light, Bridon's contentions to the contrary based on the protection of the Commission's interests

cannot be sustained. As I see it, it is not open to a foreign company to contradict our own government agency, as the guardian of the international trade commission function, as to where its best interests lie.

[28] As to Bridon's own interests, it is conceded by Casar that Bridon is entitled to protection of its confidential information. In fact, Casar pertinently stated in its founding papers that it 'recognises the sensitive nature of the confidential information which [Bridon] . . . provided to the Commission . . . [and] accepts that it is necessary to establish a mechanism that will protect the Confidential Information when the Record is furnished . . . in the main application'. To this the Commission adds that the disclosure of Bridon's confidential information 'would give a significant competitive advantage to a competitor like [Casar]'. It is accordingly common cause that Bridon has an interest worthy of protection. Moreover, I believe it is an interest underwritten as part of Bridon's right to privacy guaranteed by s 14 of the Constitution, 1996 (see eg *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A); and *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smith NO* 2001 (1) SA 545 (CC)).

[29] A further consideration which should, according to Bridon, weigh in its favour, is that it provided its confidential information to the Commission on the specific understanding that it would only be used with reference to itself and not in relation to third parties. But whatever Bridon's subjective motive might have been, I find it difficult to accept that the Commission could and would agree to this restraint in the face of s 37(1)*(a)* of the Act which pertinently authorises the Commission to take confidential information into account '[w]hen making any decision in terms of this Act'. However, be that as it may, we know that as a fact the Commission took Bridon's confidential information into account – as it was entitled to do in terms of s 37(1)*(a)* – in making its challenged decision against Casar. In this light it goes without saying, I think, that any breach by the Commission of an agreement between itself and Bridon cannot be held against Casar.

[30] According to Bridon's argument, another factor which should count in its favour is that Casar deliberately elected not to cooperate with the Commission and thereby chose to run the risk of a decision against it. In these circumstances, so Bridon argued, Casar should not be rewarded for its unsuccessful gamble by being provided with access to the confidential information of its competitor, who elected to cooperate with the Commission. The first answer to this contention, I believe, is that in terms of the court a quo's order, Casar itself will not be provided with access to Bridon's confidential information. Secondly, it is denied by Casar that it did not fully cooperate with the Commission. Its counter allegation is that it submitted information as an interested party as best it could. Whether or not it did so, would probably be relevant in the main application. But in these proceedings I believe it is of no consequence. Even if Casar was in the wrong in not submitting information to the Commission, it cannot be punished by frustrating it in the review proceedings it is entitled to bring against the Commission.

[31] Nonetheless, all this does not detract from Bridon's constitutional right to its confidential information which is protected by both our Constitution and our international agreements, that I have already underscored. Equally self-evident, however, is Casar's countervailing interest in disclosure of that same confidential information for purposes of the main application. The Commission expressly stated that it had relied on Bridon's confidential information in arriving at the decision which Casar seeks to challenge in the main application. It follows that, without knowing the basis for the decision, Casar will have to mount that challenge in the dark against an opponent with perfect night vision, in that it knows exactly what information it had considered. For example, Casar will hardly be able to contend that the decision was irrational; that irrelevant considerations were taken into account; or that the decision was taken arbitrarily or capriciously. These, of course, would all constitute legitimate grounds for review under s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). What is more, it is not only the confidential information actually relied upon by the Commission that may potentially be material. Disclosure of Bridon's confidential information that was available to the Commission may show that it had

failed to have regard to relevant considerations which is another review ground contemplated in s 6(2)*(e)* of PAJA.

[32] In short, I agree with the sentiment expressed by Preller J in the court a quo that a ban on disclosure of Bridon's confidential information will effectively deprive Casar of a fair hearing in the main application. As I see it, Casar's interest in disclosure therefore enjoys constitutional protection, not only under s 32 which guarantees everyone's right of access to any information held by the State, but also under s 34 which guarantees the right to a fair public hearing before a court. The importance of the latter right has, in turn, been emphasised as follows in *De Beer NO v North-Central Local Council and South-Central Local Council* 2002 (1) SA 429 (CC) para 11:

'This s 34 fair hearing right affirms the rule of law, which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law.'

[33] In the same vein is the following succinct statement about the importance of disclosure in court proceedings by Moseneke DCJ in *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa* 2008 (5) SA 31 (CC) para 25:

'Ordinarily courts would look favourably on a claim of a litigant to gain access to documents or other information reasonably required to assert or protect a threatened right or to advance a cause of action. This is so because courts take seriously the valid interest of a litigant to be placed in a position to present its case fully during the course of litigation. Whilst weighing meticulously where the interests of justice lie, courts strive to afford a party a reasonable opportunity to achieve its purpose in advancing its case. After all, an adequate opportunity to prepare and present one's case is a time-honoured part of a litigating party's right to a fair trial.'

[34] This brings me to the crucial question as to the outcome of the weighing-up exercise. Two answers had been proposed. The one was accepted by the court a quo and embodied in its order. The alternative was suggested by Bridon. In broad outline it amounted to this. The Commission must reveal to Bridon exactly what

confidential information it relied upon. If possible, Bridon will then permit disclosure of that information in the form of a non-confidential summary. Though on the face of it, the offer may seem reasonable, closer analysis reveals why the court a quo found it unacceptable. From Bridon's answering affidavit it is apparent that it had a good idea which of its confidential information was involved. Pursuant to s 33(2)*(b)* of the Act, it was obliged, when it claimed confidentiality in respect of that information, to provide a non-confidential summary of the information or to state under oath why a non-confidential summary was not possible. Having opted for the latter, it is scarcely open to Bridon to offer the very non-confidential summary, which it previously stated under oath to be impossible. In addition, according to Bridon's answering affidavit the confidential information probably relied upon by the Commission consists of exact figures pertaining to cost prices, input costs, percentage mark-ups and so forth, which are hardly capable of being summarised in a non-confidential form. Finally I have already alluded to the fact that it is not only the confidential information actually used by the Commission that may prove relevant in the main application, but also confidential information which it did not use.

[35] As to the solution preferred by the court a quo, Bridon's main objection is that it is difficult to apply in practice and that it provides no absolute guarantee against leakage. Though these objections are not without substance, the types of restrictions imposed in the court a quo's order are not novel. Despite Bridon's pessimistic predictions similar orders had been granted before, for example, in *Moulded Components and Rotomoulding SA (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) and in *Crown Cork & Seal Co Inc v Rheem SA (Pty) Ltd* 1980 (3) SA 1093 (W). More recently, this type of order has also been used as a mechanism in the application of s 45(1) of the Competition Act 89 of 1998, which is very similar in wording to s 35(3), in that it requires the Competition Tribunal to 'make any appropriate order concerning access to that confidential information' (see *Competition Commission v Unilever Plc* 2004 (3) SA 23 (CAC) at 30F-I).

[36] As rightly pointed out by Bridon this type of order has been criticised in other

cases (see eg *Unilever Plc v Polagric (Pty) Ltd* 2001 (2) SA 329 (C) at 341C-F; *Ekuphumleni Resort (Pty) Ltd v Gambling and Betting Board, Eastern Cape* 2010 (1) SA 228 (E) para 12). But the criticism was aimed at the inequity these restrictions may bring about for the litigant who seeks disclosure. Since Casar is seemingly prepared to accept the inequitable result in the interests of a compromise, this objection hardly lies in the mouth of Bridon. In all the circumstances I believe that the order granted by the court a quo strikes an appropriate balance between the conflicting interests by affording Casar access to Bridon's confidential information in the most restrictive manner possible without denying Casar its right to a fair hearing.

[37] In the result the appeal is dismissed and the appellant is ordered to pay the costs of the first respondent.

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F D J BRAND
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	W TRENGOVE SC F ISHMAIL
Instructed by:	VAN DER MERWE ATTORNEYS PRETORIA
Correspondents:	KRAMER WEIHMANN & JOUBERT ATTORNEYS BLOEMFONTEIN
For First Respondent:	K PILLAY -
Instructed by:	THE STATE ATTORNEY PRETORIA
Correspondents:	THE STATE ATTORNEY BLOEMFONTEIN
For Fourth Respondent:	M C SEALE