

# Keeping confidentiality in Competition Law hearings

The Competition Act specifically provides that when submitting information to the Competition Commission or the Tribunal, one may identify confidential information. The confidential information provision affords businesses protection from their commercially sensitive information making its way into the public domain after it has been submitted to the Commission and/or Tribunal.

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The mandate of the Commission is such that it requires access to this competitively sensitive information in order to fulfil its role of promoting and maintaining competition within South Africa. Competition authorities would not be able to perform this function if they could not gain access to a businesses' competitively sensitive and confidential information.

However, what if during the course and scope of a matter before the Tribunal, a third party to the proceedings wishes to partake in the Tribunal hearing and therefore requires access to confidential information in order to critically assess and make submissions to the Tribunal?

Case No: CR093Jan07/CNF094Ju115; and Case No: CR093Jan07/CNF0953u115 - 'Confidential Information' means trade business or industrial information that belongs to a firm, has a particular economic value, and is not generally available to be known by others.

There has been a long-standing principle, since the commencement of the Competition Act, that competition practitioners exchange documents amongst themselves together with a confidentiality undertaking, which in most instances gives the parties supplying the documents comfort that the information will not be abused. This process is preferable to legal practitioners bringing applications to the Tribunal for access to information every time documents were claimed to be confidential. Such a principle was first considered in the Competition Appeal Court decision involving Unilever.

## Tribunal ruling

In a recent decision handed down by the Competition Tribunal in the long running cartel investigation involving, amongst others, Allens Mescho and Cape Gate, the Tribunal was called upon to consider the issues of access to a competitor's confidential information during tribunal proceedings.

The ruling has provided some insightful guidance when considering the appropriate principles to be considered when seeking to protect confidential information.

The Tribunal stated unequivocally that, "Legal representatives and economic advisors to a respondent in a matter must have access to confidential documents in order for justice to be achieved. Were AMG's legal representatives and economic advisors to be denied all access to the confidential documents in question, the hearing would be profoundly unfair.

"AMG's legal representatives and economic advisors should, of course, provide the necessary confidentiality undertakings so as to protect the rights of the holder of that information."

In order to allay the concerns of the owners of the confidential information, the Tribunal went on to state. "...if any one of them [professionals i.e. lawyers or economists] breached the confidentiality undertakings, these individuals could be sanctioned most severely by their professional association, sued civilly for damages and criminally prosecuted in terms of Section 66 of the Competition Act.

"Accordingly, the Tribunal views these possible sanctions sufficient extent to ensure that another party's legal representatives and expert witnesses will protect the confidentiality of information made available to them."

## **Protection mechanisms**

In addition, the Tribunal made certain suggestions in relation to protection mechanisms that can be put in place when disclosing confidential information, particularly to one's competitors:

- i. access to the confidential documents can be granted at a particular place and in the presence of the owners' legal and/or other representatives
- ii. those who are inspecting the confidential information can be restricted from removing or making copies of the confidential documents; and
- iii. confidentiality agreements should be signed by those professionals and expert witnesses inspecting the confidential information.

Confidential information and claims to access confidential information can be a contentious matter. One cannot be overambitious as to a claim of confidentiality and the Tribunal will critically assess the claim of confidentiality and permit access to such information if it appears that such a claim does not meet the definition of confidential information as contained in the Competition Act. However, clear guidance by the Tribunal will definitely empower both lawyers and clients to make informed decisions when it comes to claiming that certain information is confidential as well as when they have to consider a request by a third party to gain access and insight into submitted confidential information.

## **Conclusion**

Competition cannot take place in a vacuum without information. Furthermore, adjudication of competition matters cannot take place within an information vacuum. Paramount, however, is the protection of confidential information.

## **ABOUT THE AUTHOR**

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