competitiontribunal
south africa

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 73/CR/Oct09

In the matter between:

The Competition Commission	**Applicant**
and	
Telkom SA Ltd	**Respondent**

and

In the matter between:

Telkom SA Ltd	**Applicant**
and	
The Competition Commission	**Respondent**

Panel:	Yasmin Carrim (Presiding Member) A Wessels (Tribunal Member) T Madima (Tribunal Member)
Heard on:	25 January 2013
Order issued on:	13 February 2013
Reasons issued on:	13 February 2013

Reasons for Decision and Order

Introduction

1. In these applications Telkom and the Competition Commission ("Commission") are both seeking orders compelling further and better discovery. The Commission and Telkom SA Limited ("Telkom') are parties to a complaint referral by the Commission against Telkom. The Commission's complaint deals with Telkom's alleged abuse of

its dominance in various product markets concerning wholesale internet access between 2004 and 2009.

Background

2. The Commission referred the complaint against Telkom to the Tribunal on 26 October 2009 and pleadings closed on 16 March 2012. During a pre-hearing conference held in early 2012 a time-table was agreed to by the parties for discovery, interlocutory applications and the filing of witness statements and expert witness reports. The matter was set down for hearing before the Tribunal from 18 June to 5 July 2013.

3. The discovery hearing was initially set down for 19 November 2012 but was eventually postponed to 25 January 2013 by agreement of the parties. The Commission's application was argued first and Telkom's second.

Commission's application

4. After the Commission presented its case, the matter was adjourned to allow the parties an opportunity to explore a possible agreement. On resumption both Telkom and the Commission submitted that they had arrived at settlement as follows:

"Telkom undertakes to conduct a search for and to provide to the Commission by 18 February 2013, all such documents in its possession as it may find, and which fall under items 1,10,11,12,17 (wholesale market only) and 23 of the Commission's request for discovery, and in relation only to the following markets:

1.1 the market for the provision of ADSL-based wholesale IP network services for Internet access for the purpose of retail supply of Internet access;

1.2 the market for the retail supply of ADSL-based Internet access to large business customers (i.e. corporate customers) (except for item 17)."

5. The Commission indicated further that in relation to items listed under paragraph 2.27 of Exhibit 1 Category 1: Relevance it intended sending a letter Telkom indicating which of those were still in issue and would approach the Tribunal only if the parties were unable to arrive at a resolution.

6. We confirm the settlement and the undertakings given by Telkom as an order of this Tribunal. This then deals with the Commission's application and we turn to consider Telkom's application.

Telkom's application

7. The documents listed in Schedules RA1 and RA2 are documents that were sought by Telkom from the Commission.[1]

8. The background to this application is that the Commission in its discovery affidavit claimed these documents as falling within the ambit of Rule 14(1)(d) of the 'Rules for the Conduct of Proceedings in the Competition Commission' or in the alternative were subject to litigation privilege. At that stage of the proceedings Telkom indicated that it intended to argue that Rule 14(1)(d) was *ultra vires*.[2] Telkom filed a request for categories of these documents (reproduced in schedules RA1 and RA2) which formed the basis of this application. The application was initially set down for 19 November 2012 but the parties indicated that they were not ready to proceed then. The hearing on 19 November 2012 was converted into a pre-hearing.

9. At the pre-hearing the parties agreed that the Commission would draw up a detailed list of the documents it claimed to be restricted under Rule 14(1)(d) or were subject to litigation privilege and Telkom would be afforded an opportunity to object if it so wished.[3] The Commission filed its Supplementary Answering Affidavit on 8 January 2013, para 6 of which listed the 12 categories of documents that it regarded as restricted or privileged. In that affidavit the Commission also stated that it has no other documents in its possession (as suggested by Telkom in its request reproduced in RA1 and RA2) that fell within the restricted class of information and set out the steps it had taken to search for these documents.[4] In paras 17 – 22 the Commission explains that it conducted searches for third party information requested by Telkom by contacting them and provided an account for information belonging to Gillwald & Esselaar, Verizon, Internet Solutions, MWeb, ICASA and Genesis Analytics. By way of summary the third party information requested by

[1] These schedules appear on p 364 of Telkom's discovery record and should be read with a letter dated 21 January 2013, on p 468 of the record, in which Telkom indicates the documents it will be persisting with at this Tribunal hearing.
[2] Telkom FA p 109 of the record.
[3] See Minutes of Meeting between the Commission and Telkom – 19 November 2012.
[4] See para 13 onwards at page 449 of the record.

Telkom was not in the possession of the Commission but could be provided (Gillwald) or only some or none could be located by either the Commission or the third party and/or had to be sought by Telkom from the third party (Verizon, Internet Solutions, MWeb, ICASA and Genesis Analytics).

10. In response to this affidavit Telkom wrote an email on 18 January 2013 stating that it "*denies that there is any basis in fact or in law for such assertions.*" This was a general comment and there was no indication from Telkom that it found the description of any of the categories of documents or information provided by the Commission as inadequate or vague.

11. The documents at paras 6.1 – 6.12 of the supplementary affidavit have been grouped together and are listed in the Commission's heads at paras 13.1 – 13.6. They include internal reports and comments by the external economists/advisors of the Commission, reports to its EXCO, opinions and advice by third parties and internal emails and opinions by its investigation team, all relating to the case referred to the Tribunal as follows -

11.1. "Competition Commission Enforcement and Exemptions Final Report and appendices dated May 2009. This is a report as contemplated in Rule 14(1)(d)(i)(bb), read with (ii) and (iii).

11.2. Comments by Genesis Analytics dated 3 March 2009, or given at any other time, on the report in paragraph 6.1 above.

11.3. Comments by Genesis Analytics dated 5 May 2009 on the report in paragraph 6.1 above. All comments by Genesis Analytics referred to above constitute opinion, advice, report or recommendation prepared for the Commission as contemplated in Rule 14(1)(d)(i)(bb), read with (ii) and (iii).

11.4. Peer Review of Telkom cases by Massimo Motta relating to complaints in the present complaint referral.

11.5. Peer Review on the revised Report on the Telkom cases by Massimo Motta relating to the complaints in the present complaint referral. Both peer reviews constitute opinion, advice, report or recommendation prepared for the Commission as contemplated in Rule 14(1)(d)(i)(bb), read with (ii) and (iii).

11.6. A written note prepared by Bill Melody for the Commission relating to the complaints that are the subject matter of the present complaint referral.

11.7. High Speed Circuit Price Benchmarking Report prepared by Teligen for the Commission relating to the complaints that are the subject matter of the present complaint referral. Both the written note by Melody and the High Speed Circuit Price Benchmarking

report constitute opinion, advice, report or recommendation prepared for the Commission as contemplated in Rule 14(1)(d)(i)(bb), read with (ii) and (iii).

11.8. E-mail communications between various members of the Commission's investigating team relating to the complaints that are the subject matter of the present complaint referral, as well as the report in paragraph 6.1 above.

11.9. E-mail communications between the various members of the Commission's investigating team and the experts consulted during the investigation related to the complaints that are the subject matter of the present complaint referral, as well as the report in paragraph 6.1 above.

11.10. Memorandum to the Commission's Executive Committee related to the complaints that are the subject matter of the present complaint referral, as well as the report in paragraph 6.1 above.

11.11. *Commission's internal presentation on the complaints that form the subject matter of the present complaint referral. The email communications, the memorandum and internal presentation constitute internal communications, opinion, advice, report or recommendation as contemplated in Rule 14(1)(d)(i)(aa) and (bb), as well as containing accounts of consultations and discussions as contemplated in (cc), read with (ii) and (iii).*

11.12. *Various documents relating to calculations undertaken by the Commission's investigating team which were used as inputs into the Commission's report in paragraph 6.1 above. This related to market share calculations, assessment of various providers' pricing, assessment of margin squeeze on the various services, assessment of excessive pricing on the relevant services/products and cost models. These fall within the ambit of Rule (14)(1)(d)(i)(aa), (bb) and/or (cc), read with (ii) and (iii)."*

[Note that in these reasons we will refer to these documents as: the documents listed in paras 6.1 – 6.12, as referred to in the Commission's supplementary answering affidavit].

12. At the hearing of the matter Telkom accepted that Rule 14(1)(d) was *in vires.* However it submitted that the rule only applied to proceedings at the Commission and had no application in the Tribunal's proceedings ("the non-application argument"). Telkom further argued that Rule 14(1)(d) was unconstitutional in that it was inconsistent with PAIA.[5] The documents did not enjoy protection from disclosure under litigation privilege as argued by the Commission. In any event even if they did fall under 14(1)(d) or were privileged the Commission's affidavit was defective in that it did not set out sufficient detail to indicate that the documents listed were "*internal communications*". This also demonstrated that the Commission had not properly applied its mind (and was therefore irrational) to which documents actually fell within

[5]Promotion of Access to Information Act, Act no. 3 of 2000.

the ambit of Rule 14(1)(d). On this basis they should be handed over. Finally Telkom submitted that it needed to see those documents in the interest of fair administrative justice.

13. Telkom did not persist with its request for third party information at this hearing .

14. While a multitude of reasons were offered up by Telkom as to why we ought to compel discovery of these documents, the central plank of its argument, was the non-application argument. As indicated by Mr Maritz on behalf of Telkom, in response to the Commission's submission that the CAC in *Computicket (Pty) Ltd v The Competition Commission of South Africa, CAC Case No: 118/CAC/Apr12* had accepted that documents such as those sought in this application enjoyed the protection of rule 14(1)(d) -

> "*We are arguing another point. We are saying it doesn't apply. Everyone has been wrong up to now, because they didn't take the point and Mr Gauntlett in the Computicket decision, it is important, he made the concession that it is subject to Rule 14 and, with respect, we submit he was wrong to have made the concession. He shouldn't have conceded the limitation, but it is something which is going to have to be decided. Sometime some court at some level is going to be asked to decide the question.*"[6]

Non-application of Rule 14(1)(d)

15. Part 3 of the Commission's Rules regulates access to Commission records. Two rules apply in relation to this, namely, Rule 14 which lists the 5 classes of information that are restricted and Rule 15 which sets out the categories of persons who may inspect or copy the Commission's records in the case of non-restricted and restricted information. Rule 14(1)(c)(i) deals with information that is restricted by operation of time and becomes unrestricted once certain events occur. Documents in rule 14(1)(d) are restricted by their nature.

16. Rule 14(1)(d) states as follows:

[6] T108 line 11.

"14. Restricted information

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

(a)...

(b) ....

(c) ...

(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 take a decision in the exercise of a power or performance of a duty conferred or imposed on 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 recommendation; 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) ....."

17. Rule 14(1)(d) should be read disjunctively and not cumulatively with sub-rules (1)(d)(ii) and (iii) by the presence of the word "or" (underlined in text above).

18. Mr Maritz argued that documents or information that had been submitted to the Commission and which attracted the protection of Rule 14(1)(d) enjoyed such protection only during the Commission's proceedings. The fact that access to documents might be restricted in Commission proceedings does not render them restricted for purposes of Tribunal proceedings because section 52 of the Act states that the Tribunal must conduct its hearing subject to its Rules in every matter. Since

there is nothing in the Tribunal's Rules or in the Act which limits Telkom's right to discovery, documents contemplated in the *Commission's proceedings* by Rule 14(1)(d) are not restricted for purposes of *Tribunal* proceedings. Because the Tribunal must conduct its proceedings in accordance with the principles of natural justice Telkom is entitled to access all information which may assist it in presenting its case.

19. At the heart of this argument is a misconstruction of the status of Rule 14(1)(d). Rule 14(1)(d) is not a practice or custom of the Commission but has been promulgated by the Minister of Trade & Industry (at that time) in regulations as empowered by section 78 of the Competition Act. Thus it has the status of subordinate legislation and is of general application. This Tribunal, the Competition Appeal Court, other Courts and *any* person, not only a respondent in complaint proceedings, who seeks access to the Commission's record, is bound by it. Rule 14 and 15 read together establish an access regime peculiar to the system of Competition Law enforcement by the three agencies namely the Commission, the Tribunal and the Competition Appeal Court, as designed by the legislature in the Competition Act. The access regime reflects the structure of the enforcement system of investigation, adjudication and appeal. Certain documents generated during the Commission's investigation, by their nature, are deemed to be restricted by Rule 14(1)(d). Rule 15 (1)(b) contemplates that access to those documents can be obtained by any person, not only respondents in complaint proceedings, by an order of the Tribunal (the adjudicative agency) or the Court[7] (the Competition Appeal Court) or can be released by the Commission itself in certain limited circumstances (Rule 15(2)).

20. To accept Telkom's argument that Rule 14(1)(d) suddenly becomes inoperable because it does not appear in the rules of the Tribunal or in the rules of the CAC would seriously undermine enforcement of the Competition Act. Taken to its extreme it could jettison centuries' old jurisprudence relating to documents claimed to be privileged in litigation proceedings. This is not to say that the documents claimed by the Commission are privileged (we discuss this issue later) but consider the following hypothetical situation from the perspective of a similar application brought by the Commission: In these proceedings the Commission seeks access to communications between Telkom and its economic and/or legal experts, Telkom

[7] "Court" means the Competition Appeal Court as defined in section 3(4)(h).

claims litigation privilege over these. On Telkom's non-application argument the Commission would be entitled to argue that because the Tribunal's rules do not provide for any claims of litigation privilege by parties in its proceedings, Telkom's claims cannot be sustained and it must be ordered to hand over documents which would otherwise enjoy the protection of privilege in a high court.

21. We find Telkom's non-application argument to be without any merit whatsoever. Telkom's counsel unusually announced at the hearing that if we were against them on this point the matter might be taken on appeal. Whilst Telkom is fully entitled to pursue its rights as a litigant it would be most unfortunate if the hearing of the matter was delayed to decide this point as an interlocutory matter.

Unconstitutionality argument

22. We understood Telkom's argument to suggest that Rule 14(1)(d) is unconstitutional because it exceeds the grounds of exclusion set out in s44 of PAIA. However it seems that the argument is made at a somewhat lower level namely that Rule 14(1)(d) should be interpreted in the spirit of PAIA. It was pointed out correctly by the Commission's counsel that the Tribunal has no jurisdiction to decide the constitutionality or otherwise of a provision of the Act. Nevertheless we note that while Rule 14(1)(d) sets out the circumstances in which documents may be restricted with greater detail than that contained in section 44, the language of and the substantive grounds for restriction contained in Rule 14(1)(d) reflect those in section 44 of PAIA. The underlying policy governing both Rule 14(1)(d) and section 44 is to promote the free exchange of ideas and communications between officials of a public body *intra se* or with their advisors, the disclosure of which could reasonably be expected to frustrate the deliberative process of a public body. In other words, even if Rule 14(1)(d) had not been promulgated, the Commission like any other public body could rely equally on the provisions of section 44 of PAIA to resist production of its internal communications and the types of documents contemplated in Rule 14(1)(d). Indeed Rule 14(1)(e) anticipates this in the catch-all language of "*any other document to which a public body would be required to or entitled to restrict access in terms of the Promotion of Access to Information Act.*[8]

[8] CCR 14(1)(e).

Disclosure in review proceedings

23. In argument, and in passing, Telkom put forward the proposition that the Commission would in any event be obliged to disclose the documents sought by it in review proceedings. For this reason Rule 14(1)(d) in complaint proceedings was ineffective. Again this is a misconstruction of the applicable law. The Commission is entitled to claim that documents are restricted under Rule 14(1)(d) or privileged even in review proceedings as was recently confirmed by the CAC in *Computicket (Pty) Ltd v The Competition Commission of South Africa, CAC Case No: 118/CAC/Apr12.* The reliance by Telkom on the recent SCA decision of *Democratic Alliance v The Acting National Director of Public Prosecutions (288/11) [2012] ZASCA 15 (20 March 2012)* in which the court held that tapes in the possession of the NPA should be handed over does not assist because that case concerned information belonging to a third party and which was claimed to be confidential not privileged.

24. This then leaves us to determine only two issues, whether the documents sought by Telkom fall within the restricted information contemplated in Rule 14(1)(d), alternatively are the subject of litigation privilege and whether the refusal to disclose these by the Commission would constitute a breach of Telkom's right to a fair proceeding.

Do the documents fall within the ambit of Rule 14(1)(d)

25. Mr Maritz complained that the list provided by the Commission did not contain sufficient detail as to allow a reader to conclude that the document fell within one of the sub-sections of 14(1)(d). On this basis the Commission should be ordered to hand over the documents. However when it was pointed out to him that most of the documents listed contained a description and in some case dates and identities of people, Mr Maritz focused his criticism to the items in paras 6.8 and 6.9 which list the Commission's internal emails.[9]

[9] See T57 line 3.

26. A plain reading of the descriptions in paras 6.1 - 6.7 of the Commission's supplementary affidavit shows that these all fall within the ambit of Rule 14(1)(d)(bb). The Enforcement and Exemptions Final Report and appendices dated May 2009[10] is a report described with sufficient particularity for the reader to identify what it is and on what date it was prepared and is a report prepared for the Commission. It could also be viewed as an internal communication between officials of the Commission. Likewise the comments by Genesis Analytics,[11] economic experts for the Commission, fall within "*opinion, advice, report or recommendation prepared for the Commission*" of Rule 14(1)(d)(i)(bb). As do the peer reviews by Professor Massimo Motta.[12] Mr Maritz complained that it could not be discerned from this description that Motta for example was an external advisor to the Commission. This criticism is without any foundation simply because the words "*peer review*" indicate that he is external to the Commission. The same level of detail is given by the Commission in relation to Bill Melody's notes and reports in paras 6.5 and 6.7. The Commission by mentioning the individuals and providing additional details of the type of documents has given the reader more than sufficient information about why the document in question would fall into the ambit of 14(1)(d)(i)(bb).

27. Telkom could not provide any cogent argument why the documents listed under para 6.12 did not fall within Rule 14(1)(d)(i)(aa), (bb) or (cc). Documents relating to the Commission's calculations undertaken by its investigating team that were used as inputs patently fall within any of the provisions of any of sub-rules (aa), (bb) or (cc). The Commission has provided sufficient information – namely that the documents relate to calculations done by the Commission's investigating team serving as inputs into the Commission's reports and which relate to market shares, provider's pricing, margin squeeze, etc – to justify its claim. It is of no moment which of the three categories in 14(1)(d)(i) they could fall into because they would qualify under one or more of (aa), (bb) or (cc). What is of importance is that the documents contain the type of information and communication of an internal nature utilised by the Commission in the course of its investigation.

28. In paras 6.8 and 6.9 the Commission describes email communications between various members of its investigating team (6.8) and email communications between

[10] Para 6.1 of Commission's SAA.
[11] Para 6.2 & 6.3 of Commission's SAA.
[12] Para 6.4 & 6.5 of Commission's SAA.

various members of its investigating team and the experts consulted (6.9) during the investigation related to the "*subject matter of the present complaint referral as well as the report contemplated in 6.1*".

29. Telkom was highly critical of these items arguing that the Commission by not specifying who the various members of the teams or the experts were and the general time frames in which these took place, had not made out a case on the balance of probabilities, that the affidavit was defective and for these reasons the information ought to be handed up. Mr Maritz referred us to the applicable law and commentary on motion proceedings and the sufficiency of affidavits in pleadings. Suffice to say that Telkom did not file a supplementary answering affidavit in response to the Commission's supplementary affidavit. If we were to adopt the approach urged upon us by Mr Maritz then the Commission's affidavit, on oath, would stand unchallenged. No basis whatsoever was established by Telkom to warrant us going behind the Commission's description given on affidavit and we are enjoined to accept it. However the standard by which we assess an applicant's claim for discovery is fairness and not by the technical formalities of motion proceedings in the high courts.[13] Formalities aside, there is no basis for Telkom's contention. A plain reading of para 6.7 shows that it refers to a number of email communications between members of the Commission's investigating team (identity) relating to the complaints that are the subject matter of the present complaint (nature and time frames) as well as the report in para 6.1 (nature and more specificity on time frame i.e. sometime before May 2009). This is sufficient detail to conclude that the documents fall within the ambit of Rule 14(1)(d)(i)(aa) and/or (bb).

30. Of course more detailed descriptions by the Commission would always be preferred but in this instance we are concerned with sufficiency not completeness for purposes of Rule 14(1)(d). For example the Commission is likely to be in possession of thousands of emails spanning years of investigative work. It would not be in the public interest for us to require the Commission to provide us with detailed descriptions of each of these. All that is required is a proper identification of the nature of the document (e.g. report or email or minute) and what it relates to and dates where possible. In any event, the appropriate remedy for failure by the

[13] See Astral Operations and Elite Breeding Farms v The Competition Commission, Tribunal Case No: 74/CR/Jun08 dated 25 January 2010 and Pioneer Foods (Pty) Ltd v The Competition Commission, Tribunal Case No: 15/CR/Feb07 and 50/CR/May08 dated 21 May 2009.

Commission to mention parties to such email communications and dates thereof, grouped in broad time-frames, is not that the documents should not enjoy the status conferred upon them by Rule 14(1)(d)(i) but that the Commission should be required to provide more detail. Telkom could have asked for more detail on 8 January 2013 but it elected not to. The Commission, in a spirit of co-operation and not wishing to delay proceedings, has volunteered to provide further details should the Tribunal so require. Given this undertaking by the Commission there is no need for us to decide the issue in order to avoid any further disputes and delays.

31. Similarly descriptions in paras 6.9, 6.10 and 6.11 all provide the reader with sufficient information to garner that the documents described there are internal to the Commission as contemplated in Rule 14(1)(d) and relate to the *present* complaint referral.

32. Recall that Rule 14(1)(d) is to be read disjunctively by the presence of the word "or" at the end of sub-rule (d)(i)(cc) and at the end of sub-rule (d)(ii)(bb). At the same time it is not inconceivable that a document being considered under 14(1)(d)(i) could fall into more than one type of category contemplated in that sub-rule. For example an account of a consultation could also contain in its text a summary of advice received by the Commission from an expert in that consultation. However if a document did not fall into any of the categories contemplated in sub-rule (1)(d)(i) then the Commission is still entitled to claim it as restricted if its disclosure is likely to lead to the frustration of the deliberative process of the Commission by inhibiting the candid communication of opinions, advice, reports or recommendations ((d)(ii)(aa)) or the conduct of a consultation, discussion or deliberation ((d)(ii)(bb)) or the disclosure of which could by premature disclosure of a policy or contemplated policy, reasonably be expected to frustrate the success of that policy ((d)(iii)).

33. Sub-rules (d)(ii) and (iii) articulate the underlying rationale for restricting documents of the type contemplated in sub-rule (i). Public bodies and investigators, in order to arrive at informed decisions, need to be able to express views and exchange opinions in an environment that affords them the opportunity to do so with openness and candour. Such exchanges ought not to be chilled by the threat that subsequent disclosure thereof might be relied upon by a respondent to advance its own case. For example an investigator in the early stages of an investigation might hold the view that a matter did not warrant referral to the Tribunal. After discussion with his colleagues and advice prepared by experts, he might change his opinion and now is

of the view that the matter should be referred. Conversely, he might continue to hold his original view but with better information and more insight gained through discussion and advice. In matters of the complexity of most abuse of dominance cases it would not be unusual for an individual investigator to change his/her opinion over time as he/she learns more about the case, has a better understanding of the market(s) in question and of the competition issues. Apart from the fact that a respondent is unlikely to gain any real benefit from viewing such an iteration of an investigator's views, free and candid exchanges such as these can only contribute to the making of informed, and reasoned decisions by public bodies and should be encouraged and not frustrated. The documents listed in 6.1 - 6.12 clearly fall within those contemplated in sub-rule (ii).

34. Since we have found that the documents in question all fall within the ambit of Rule 14(1)(d)(i) there is no need for us to decide whether they fall within the self-standing ground contained in sub-rule (1)(d)(ii) or whether they are the subject of litigation privilege. Suffice to say that the Tribunal has previously held that documents of the type under consideration here are subject to litigation privilege.[14] While each case must be decided on its own facts, at the level of principle we see no reason why the documents listed in paras 6.1- 6.12 relating to the present complaint referral would not enjoy the protection afforded by litigation privilege. As we discussed earlier, if we were to accept Telkom's arguments that the opinions of experts such as Prof Motta on the merits or demerits of the Commission's complaint referral against Telkom are not subject to litigation privilege then we would also have to accept that opinions sought by Telkom from its economic or legal advisors on the merits or demerits of the Commission's case would not enjoy such protection.

Unfairness to Telkom if documents not disclosed

35. Telkom argued that even if we held that the documents fell within the ambit of Rule 14(1)(d) a failure by the Commission to disclose these to Telkom would result in unfair proceedings. By this we assume that Telkom meant that it would be prejudiced in some way. We have previously held that such a claim for discovery is the weakest since the internal reports, recommendations and views of the Commission's investigators, officials and advisors remain simply those – opinions. The Tribunal is only concerned with the evidence that is put up by the Commission

[14] See Computicket (Pty) Ltd v The Competition Commission Tribunal, Case No: 20/CR/Apr10 dated 22 March 2012.

in our proceedings and not the opinions of its investigators or its advisors.[15] We cannot see how Telkom, who on the basis of fairness, is entitled to receive all the underlying information, data and methodologies relied upon by the Commission to arrive at its opinions, will be prejudiced by not seeing the views of the Commission's internal investigators or advisors.

36. The only submission in support of this "unfairness" put up by Telkom, relying on a criminal trial analogy, was that the Commission might have in its possession some exculpatory information which it was not disclosing and/or suppressing under the guise of a Rule 14(1)(d) or litigation privilege claim.

37. While we have often used the word "prosecutor" and "prosecutions" to distinguish the investigative function from the enforcement role of the Commission, the proceedings in the Tribunal are not equivalent to criminal proceedings. The enforcement of anti-competitive conduct involves assessing a set of complex facts against a backdrop of market dynamics through the lens of economic effects and arriving at conclusions on a balance of probabilities. Nevertheless if expert opinions or email communications between the Commission's investigators contain facts that are exculpatory these are likely to have been disclosed elsewhere in the documents that the Commission is obliged to discover or are within the respondent's own knowledge. The opinion of an expert or an individual Commission investigator is itself of no value even if it seeks to make out an argument that favours Telkom. In any event one cannot claim access to documents otherwise privileged on the basis that they may reveal exculpatory evidence otherwise the shield of privilege would always fall away. If a party states under oath that it has disclosed all non privileged evidence in its possession an opposing party cannot go behind it on a fishing trip without a basis for doing so. Mere speculation is insufficient to demand disclosure and cry unfairness.

38. Moreover the evidence in this matter is yet to be filed in the form of factual and expert witness statements. If the Commission fails to provide Telkom with the underlying information that it relies upon to advance its case then Telkom might have some cause for complaint.

[15] Expert economists that appear before us interpret evidence in a particular light and we often find that, they differ in their interpretation thereof to such an extent that we are faced with polarity of views rather than different shades of grey. See also our discussion in Astral Operations Ltd and Elite Breeding Firms v The Competition Commission, Tribunal Case No: 74/CR/Jun08 dated 25 January 2010.

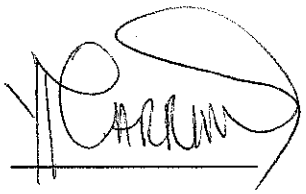
39. We find that the non-disclosure of the documents listed in paras 6.1 - 6.12 is unlikely to result in any prejudice to Telkom and will not lead to any unfairness in proceedings.

Conclusion

40. We are satisfied that all the documents listed in paras 6.1 - 6.12 fall within the ambit of Rule 14(1)(d)(i)(aa) and/or (bb) and/or (cc). These documents contain internal deliberations of the Commission's investigation team alternatively reports, communications between its investigators and opinions, advice and recommendations of the Commission's internal officials or its experts prepared for the Commission in relation to the present complaint referral. The non-disclosure of these documents will not result in any unfairness to Telkom.

41. Telkom's application is dismissed.

42. There is no order as to costs.



13 February 2013

Y Carrim **Date**

A Wessels and T Madima concurring

Tribunal Researcher: Rietsie Badenhorst

For Telkom: NGD Maritz SC assisted by S Stein and PMP Ngcongo, instructed by Mothle Jooma Sabdia

For the Competition Commission: NH Maenetje SC instructed by Gildenhuys Lessing Malatji Inc