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COMPETITION **ALERT**

IN THIS ISSUE >

Access denied! The Constitutional Court puts the debate on rule 15 to rest.

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Fasten your seatbelts as the Competition Commission revs up the motor industry

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Access denied! The Constitutional Court puts the debate on rule 15 to rest

One of the questions before the court was whether a litigant may rely on Rule 15 to gain access to the record.

The Constitutional Court (ConCourt) has upheld the Competition Commission's (Commission) appeal in Standard Bank's and the Waco respondents' respective bids to access the Commission's record after complaints against the companies were referred to the Competition Tribunal (Tribunal).

In *Competition Commission of South Africa v Standard Bank South Africa Limited* (CCT 158/18), Standard Bank was one of 18 banks that the Commission referred a complaint against to the Tribunal for conduct alleged to be in contravention of the Competition Act 89 of 1998. Standard Bank raised an exception to the referral and separately also brought an application in terms of rule 15 of the Commission Rules for access to the Commission's record of investigation. In the rule 15 application, the Tribunal ruled that Standard Bank was only entitled to access the record at a "reasonable time", which the Tribunal considered to be at discovery, because Standard Bank was also a litigant. The effect of this was to create a distinction between persons who are litigants and any other person that requests access to the record.

Consequently, Standard Bank appealed the matter to the Competition Appeal Court (CAC), which ordered the Commission to produce the record. The Commission then approached the ConCourt seeking leave to appeal the Tribunal's order.

In another matter, *Competition Commission of South Africa v Waco Africa (Pty) Limited* (CCT 218/18), the Waco respondents brought an application in the Tribunal to compel the Commission to produce its record on the basis of rule 15, after the Commission denied their request for access to the record. Following precedent set by the CAC, the Tribunal found in favour of the Waco respondents and directed the Commission to produce the record. Again, the Commission approached the ConCourt seeking to set aside the Tribunal's decision.

The questions before the ConCourt for consideration were:

a. Firstly, whether a litigant may rely on rule 15 to gain access to the Commission's record before close of pleadings; and

b. Secondly, if rule 15 is indeed available to the litigant, what factors may be considered when determining a reasonable time to produce the record.

Although there were four judgments by the ConCourt, there were only three divergent views by the bench.

The first judgment by Theron J, dismissed the appeals on the basis that rule 15 is a public access rule, which continues to apply even after a complaint has been referred to the Tribunal. Theron J also agreed with the CAC that a "reasonable time" for purposes of producing the record is determined by having regard only to the length of time the Commission might require to prepare the record of investigation. The identity of the requestor should then not have an impact on the request.

The second judgment, which is the majority judgment penned by Jafta J and Khampepe J, upheld the Commission's respective appeals on the basis that a litigant is not entitled to rely on rule 15 to access the Commission's record.

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When determining a "reasonable time", the Commission has to consider certain relevant factors, including the identity of the requestor as a litigant.

According to the majority judgment, *"once a complaint is referred to the Tribunal, the Tribunal rules are triggered and as such, govern the disclosure and discovery of documents between litigating parties. For a litigant to access information, the litigant has to rely on rule 22 of the Tribunal rules, which gives the litigant the right to discovery."*

The majority judgment also disagreed with the CAC's view on what a "reasonable time" entails and held that when determining a "reasonable time", the Commission has to consider certain relevant factors, including the identity of the requestor as a litigant.

The third judgment, which also upheld the appeals, agreed with the first judgment that rule 15 is a public access rule which provides any member of the public, including a litigant, the right to request access to the record. However, the third judgment agreed with the second judgment that, if the requestor of the record is a litigant, the record should only be made available to the litigant within a reasonable period, which considers the pending litigation before the Tribunal as a relevant factor. The third judgment in effect agrees with the order of the Tribunal.

The fourth judgment also upheld the appeals based on the reasoning in the third judgment.

The ConCourt's decision also dealt with the question of whether the CAC has jurisdiction in a review application as a court of first instance, which arose as a result of Standard Bank in CCT 179/18 applying directly to the CAC to review and set aside the Commission's referral decision. For purposes of the review, Standard Bank requested access to the Commission's record, which the Commission refused to provide. As a result, Standard Bank requested direction from the CAC, which through a single judge sitting, directed the Commission to produce the record in the review proceedings in terms of rule 53 of the Uniform Rules. The Commission applied for leave to appeal the CAC's decision on the basis that the CAC should have first determined the question of jurisdiction before making the order. The first, second and fourth judgment set aside the order of the CAC and remitted the matter to the Judge President of the CAC to pronounce on the CAC's jurisdiction to hear the review as a court of first instance. The third judgment dismissed the appeal on the basis that jurisdictional disputes need not be determined first as rule 53 of the Uniform Rules is a rule of procedure.

A final point to note in relation to rule 15 of the Commission Rules is that although the ConCourt has put to rest the long standing debate around whether a litigant is entitled to access the record prior to discovery, the Department of Economic Development amended rule 15 last year already. The amendments provide that rule 15(1) does not apply to a record if that record is requested in relation to civil or criminal proceedings or proceedings before an administrative body, including the Competition Tribunal, and after the commencement of the proceedings.

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Fasten your seatbelts as the Competition Commission revs up the motor industry

Whilst the Guidelines are not binding, they seem to stipulate a set of "rules" that will apply to Original Equipment Manufacturers or OEMs; Service Providers; Dealers; Insurers; and Independent Service Providers or ISPs.

The Competition Commission (Commission) has released draft guidelines for competition in the automotive aftermarket industry (Guidelines) for public comment. The Guidelines have been labelled as controversial by some bodies, with some claiming that the Guidelines could have serious negative consequences for consumers and the country's road safety initiatives. Below, we unpack the Guidelines and what they could mean for businesses and customers.

Whilst the Guidelines are not binding, they seem to stipulate a set of "rules" that will apply to Original Equipment Manufacturers (OEMs), Service Providers (i.e. those who service and maintain motor vehicles); Dealers; (i.e. OEM appointed franchises or subsidiaries); Insurers; and Independent Service Providers or ISPs (i.e. those service providers not appointed by an Insurer or OEM). It is however, yet to be seen how market participants will respond to these Guidelines.

Firstly, the Guidelines aim to create choices for consumers when selecting a Service Provider to carry out in-warranty services and repairs. In terms of the Guidelines, OEMs and Insurers must approve any Service Provider who applies to the OEM/Insurer for the right to carry out any in-warranty repairs if that Service Provider meets the OEM's/Insurer's standards and specifications. Further, the Dealers and Service Providers approved by OEMs/Insurers must not be prohibited from carrying out work for other OEMs/Insurers. OEMs must also inform customers that they can conduct in-warranty services at ISPs, but the OEMs are not obligated to pay for in-warranty services at ISPs.

The draft Guidelines may thus see the rise of Dealerships and Service Providers who offer sales of and service, maintenance and repairs to multiple different brands and who can carry out repairs for many different Insurers.

In respect of Spare Parts (i.e. replacement parts for worn, defective or damaged components of a motor vehicle), OEMs and Dealers must allow customers to fit Spare Parts which are not manufactured by the OEM (so called "non-original Spare Parts") in instances where the warranty on that specific part has expired. In such situations, the use of non-original Spare Parts may not void the warranty on other parts in the vehicle which are still under warranty. OEMs and Approved Dealers must also make original Spare Parts available to other Service Providers and ISPs (unless those items are related to the vehicle's security systems) and OEMs cannot restrict the ability of Service Providers to resell Spare Parts. This will require OEMs and Service Providers to closely examine their existing supply agreements to ensure that there is no exclusivity provision and will require OEMs and Service Providers to enter into new supply agreements with other ISPs.

The Guidelines also restrict the "bundling" of value-added products (such as maintenance plans, service plans and extended warranties) with the sale of new motor vehicles. This means that when purchasing a new motor vehicle, a consumer can opt not to take out a maintenance plan or can opt to purchase any maintenance plan or value-added products from another Service Provider, without voiding the warranty on the vehicle. Consumers must also be allowed to select the duration of a value-added

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These provisions will require Dealers to ensure that all the necessary information is disclosed to the consumer.

product and must be free to purchase such products at any time after the purchase of a motor vehicle. Therefore, someone purchasing a vehicle may elect to only purchase a maintenance plan a year after purchasing the vehicle. This may result in many new providers of maintenance and service plans entering the market.

The Guidelines also provide that Dealers will be required to set out separately the costs of the motor vehicle from the cost of each separate value-added product as well as the information regarding the service and maintenance for that motor vehicle. In addition, the Dealers must disclose their sales commissions with the OEMs and other third parties. These provisions will require Dealers to ensure that all the necessary information is disclosed to the consumer.

Finally, OEMs are required to make available to ISPs the OEM technical information (excluding security related information) relating to the OEM's motor vehicles on the same terms offered to its approved Service Providers. This information must include amongst other things, technical manuals, diagrams, diagnostic codes, software, handbooks and equipment. This extends to proprietary information which the OEM must disclose to the ISP. In such instances, the OEM can, however. impose confidentiality requirements on the ISP. Furthermore, the OEM and Dealer must provide product specific training and training on the methods used to service and maintain the OEM's motor vehicle, to the ISP's employees who have requested such training. These obligations may be perceived to be quite onerous on OEMs and Dealers.

These Guidelines remain in draft format and the public has been invited to submit comments to the Commission before 16 March 2020.

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