

Competition Law

ALERT

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IN THIS ISSUE

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The matter of *Standard Bank of South Africa Limited v Competition Commission of South Africa* (165/CAC/Mar18) [2023] ZACAC 1, has a long history:

- **April 2016:** The Commission initiated a complaint against 11 multinational banks for alleged price fixing in respect of trading of the USD/ZAR currency pair.
- **February 2017:** The complaint was referred, ultimately against 18 respondents, including SBSA.
- **March 2017:** SBSA requested the record of investigation from the Commission in terms of Rule 15(1) of the Commission Rules.
- **November 2017:** When the Commission did not produce the record, SBSA applied to the Competition Tribunal (Tribunal) to order production of the record (Rule 15 application).
- **May 2017:** SBSA excepted to the referral on a number of grounds, including that the Commission had failed to plead facts to support the necessary conclusion that the conduct occurred, or had a continuing effect, within the three-year period prior to the initiation of the complaint.
- **March 2018:** SBSA launched a review application in the CAC on the same or similar grounds to those raised in SBSA's exception.
- **April 2018:** The Commission brought the counter application which is the subject of this article. It sought a permanent stay of the review proceedings (which was abandoned), alternatively a temporary stay pending the finalisation of Rule 15 application and the exception application brought by SBSA in the Tribunal.



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- **February 2020:** The Rule 15 application was finalised in the Constitutional Court, which ruled that, where an accused firm seeks the production of the record, the Tribunal rules should apply. In this regard, the court held that the Tribunal rules allow for the production of the record through the process of discovery after the close of pleadings. ([Read our alert on this finding.](#))

The issue to be determined by the CAC was whether the Commission had satisfied the requirements for an order for a stay of the review proceedings. The CAC noted that should the review proceedings not be stayed, the Uniform Rules of Court would require the Commission to produce its record of decision, which would likely be the same as the record of investigation dealt with in Rule 15 of the Commission Rules.

On the basis that SBSA's grounds of review go to the heart of its defence in the complaint referral before the Tribunal, the CAC considered that production of the record would enable SBSA to access documents it had sought but failed to obtain through its Rule 15 application and prior to answering the allegations of the Commission in the complaint referral. The court found that this was unfair to the Commission (by circumventing the Tribunal Rules relating to discovery) and could place SBSA in an advantageous position *vis a vis* other litigants in Tribunal proceedings.

The CAC therefore ordered the review proceedings be stayed pending the completion of the discovery process in the referral proceedings before the Tribunal.

The CAC decision is premised on the assumption that SBSA's only interest in reviewing the Commission's referral decision was to access the

Commission's record. To that end, the CAC decision has shut another door to respondents in referral proceedings being able to access any further information from the Commission than what is contained in the complaint referral, even when the respondent contends that the referral contains insufficient information to enable it to understand the case against it.

Regardless of motivation behind SBSA's application, the CAC decision may severely limit the ability of respondents in complaint referrals to review the Commission's conduct. A review is often premised on the allegation that the regulator's conduct is unlawful and to pend such application until the very process that is impugned as unlaw proceeds, arguably limits the right to just administrative action.

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