HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: No.
(2) OF INTEREST TO OTHER JUDGES: No.
(3) REVISED.

15-06-2018 P.M. Meyer
DATE SIGNATURE

Case no: 215/17

In the matter between:

MARIANNE WAGENER	First Applicant
NORTON ROSE FULBRIGHT SOUTH AFRICA INC.	Second Applicant

and

COMPETITION COMMISSION OF SOUTH AFRICA	First Respondent
MR THEMBINKOSI BONAKELE N.O.	Second Respondent

***Case Summary*: Application for leave to amend notice of motion in terms of r 28(4) of the Uniform Rules by the addition of a further prayer and to file a supplementary founding affidavit in support of such relief. Leave granted.**

JUDGMENT

MEYER J

[1] This is an interlocutory application in which the first applicant, Ms Marianne Wagener, who is a director of Norton Rose Fulbright South Africa Inc. (NRF) and the

head of its competition law team, and the second applicant, NRF, a law firm registered and incorporated under the company laws of this country, seek leave in terms of r 28(4) of the Uniform Rules of Court to amend the notice of motion by the addition of a further prayer and to introduce a supplementary founding affidavit in support of such further relief in a review application which they instituted against the first respondent, the Competition Commission of South Africa (the competition commission), and the second respondent, Mr Thembinkosi Bonakele N.O., in his official capacity as the Commissioner and as such the chief executive officer of the competition commission (the commissioner). Therein they seek to set aside a summons which the commissioner issued against Ms Wagener in terms of s 49A of the Competition Act 89 of 1998 (the Act).

[2] The factual background that gave rise to this interlocutory application is uncontroversial. In July 2016, Wilmar Continental (Pty) Ltd (Wilmar) and Sea Lake Investments (Pty) Ltd (Sea Lake) notified the competition commission of a large merger. NRF, led by Ms Wagener, acted on behalf of Wilmar in the merger proceedings. On 2 December 2016, the competition commission initiated a complaint against Wilmar and seven other entities, including Sea Lake and Africa Sun Oil Refineries (Pty) Ltd (Africa Sun Oil), alleging that they agreed to fix prices and/or trading conditions in contravention of s 4 (1)(b)(i) of the Act. On 8 December 2016, the competition commission conducted a search and seizure operation at the premises of Wilmar and of Africa Sun Oil pursuant to the price fixing complaint. Ms Wagener became aware of the complaint when Wilmar sought her advice on its rights and obligations in relation to the competition commission's search at the time of the raid.

[3] On 15 December 2016, the competition commission addressed a summons to Ms Wagener in terms of s 49A(1) of the Act. The summons is predicated on the allegation that Ms Wagener 'may have seized documents relevant to the investigation by the commission' into the price fixing case during a 'mock dawn raid'. Ms Wagener is said to have conducted the mock dawn raid as a rehearsal for the anticipated dawn raid to assist Africa Sun Oil and Wilmar. She is summoned to (a) produce all information and documents that have a bearing on the competition commission's investigation, but

expressly excluded are information and documents subject to the attorney and client privilege and (b) to appear before the competition commission to provide evidence.

[4] The facts on which the competition commissioner relied are contained in para 4 of Part I of Annexure A to the summons, which reads thus:

'4. It is believed that you are able to furnish information on the subject of the investigation, or have in your possession or control a book, document, or other object that may have a bearing on this investigation. This belief is premised on the following:

4.1 During the search and seizure operation conducted at the premises of Wilmar and Africa Sun Oil on 8 December 2016, it came to the attention of the Commission, that your firm assisted African Sun Oil and Wilmar in conducting a mock dawn raid designed to be a dress rehearsal of the dawn raid by the Commission at which you may have seized documents relevant to the investigation by the Commission.

4.2 It has since come to the attention of the Commission that your firm represents three Respondents in this investigation. The three Respondents you represent are competitors and you may have possession of documents or knowledge emanating from your position pertaining to this investigation.

4.3 Furthermore, you represent the acquiring firm in a merger notified with the Commission, the target firm has alleged collusion in this market, and we believe that you have documents and / or knowledge of facts emanating from the merger pertaining to this investigation.

4.4 For avoidance of any doubt note that the documents required from you by the Commission do not constitute information that is subject to attorney client privilege.'

[5] On 3 January 2017, Ms Wagener and NRF applied to this court to suspend the implementation of the summons (Part A) pending an application to set it aside (Part B). On 6 January 2017, they withdrew Part A of the notice of motion after the competition commission had agreed to suspend the operation of the summons until the finalization of the review application. The final relief sought in terms of Part B of the notice of motion in the review application reads as follows:

'TAKE NOTICE THAT the applicants will apply to this Court, on the papers filed in respect of Part A, as duly amplified by 23 January 2017, on a date to be set by the Registrar for an order on the following terms:

1. Setting aside the summons "MW3";

2. Ordering any respondents opposing Part B to pay the applicants' costs of suit, including any costs reserved in relation to the hearing of Part A on the attorney–and–client scale, the one paying, the other to be absolved; and
3. Granting the applicants further and/or relief.'

Ms Wagener and NRF filed the supplementary founding affidavit in respect of part B of the review application on 21 January 2017.

[6] In their founding papers in the review application, Ms Wagener and NRF did not challenge the lawfulness of the summons on the basis that it violates the attorney–and–client privilege of their client. Their cause of action is twofold: First, that the commissioner's factual basis for issuing the summons was not objectively reasonable. They deny that they conducted any 'mock dawn raid' at Wilmar or Africa Sun Oil or that they seized any documents relevant to the competition commission's investigation pursuant to any such raids. They also deny that NRF represented three respondents in the competition commission's investigation. According to them they only represent Wilmar. Second, they contend, that the summons is impermissibly broad and void for vagueness. For these reasons, they contend, the summons constitutes an abuse of process.

[7] The answering affidavit in the review application was filed on 1 March 2017. Therein the commissioner states that his belief that Ms Wagener is able to furnish information on the subject of the investigation or has documents in her possession or under her control that may have a bearing on the investigation as set out in the summons, was premised on-

'. . . facts that have been brought to [his] attention and it is open to Ms Wagener to dispute them at the appropriate forum, namely, at an interview with [him] or any person delegated by [him] for purposes of the price fixing investigation, not by launching review proceedings in the high court.'

And also:

'The information upon which the Summons is based must still be tested with the applicants at an interview with [them]. The allegation is that NRF "may have seized documents relevant to the investigation by the Commission". There is no allegation that it in fact did. That is a matter that can be clarified at an interview to which the applicants have been invited but which they are resisting.'

[8] I have mentioned that it is stated in the summons that Ms Wagener is not required to produce documents that are subject to the attorney–and–client privilege. However, in the answering affidavit in the review application, the commissioner states the following:

'In the event that Ms. Wagener seeks to lay a privilege claim on any documents in her possession she is free to do so. She ought to provide a list of such documents nonetheless, and produce such documents to the Tribunal in order to cause such claim to be determined by the Tribunal. It is impermissible for Ms. Wagener unilaterally to assert such claim and withhold documents without such claim being put to the test.'

And the commissioner concludes the answering affidavit by stating thus:

'. . . The commission wants her to produce the list of documents she claims to be protected by attorney and client privilege so that the Commission can debate that with her and NRF and, if there should be no agreement, the Tribunal must decide the issue.'

[9] On 10 April 2017, Ms Wagener and NRF responded by means of their interlocutory application for leave to amend their notice of motion in the review application and to file a supplementary founding affidavit in support of the further relief they seek to introduce. They seek to replace the existing prayers set out in part B of the notice of motion with the following prayers:

'1 The summons annexure "MW3" is set aside.

2. It is declared that the first applicant is not obliged by the summons annexure "MW3";

2.1 to produce any document or information she has obtained from Wilmar since 8 December 2016 for purposes of giving Wilmar legal advice and/or in preparation for contemplated litigation; and

2.2 to provide the respondents or any other party with a list of such documents.

3. Any respondents opposing Part B are ordered jointly and severally to pay the applicants' costs, including any reserved costs of the hearing of Part A, on the attorney and client scale.

4. The applicants are granted further and/or alternative relief.'

The proposed supplementary founding affidavit essentially addresses the question of legal professional privilege and litigation privilege and it spells out the specific grounds of review under the Promotion of Administrative Justice Act, 2000 (PAJA) and the

Constitution, 2006, on which Ms Wagener and NRF rely in seeking a review and setting aside of the summons.

[10] The competition commission and the commissioner oppose the interlocutory application. Their answering affidavit was filed on 5 June 2017, whereafter the replying affidavit of Ms Wagener and of NRF was filed, on 22 June 2017. I should mention that on 13 November 2017, Ms Wagener and NRF also filed their replying affidavit in the review application.

[11] The principles applicable to amendments are trite. In the recent judgment of the Supreme Court of Appeal in *Magnum Simplex v the MEC Provincial Treasury* (556/17) [2018] ZASCA 78 (31 May 2018) para 9, Mathopo JA said the following:

'Against this background I turn to the issue of whether or not the high court had correctly upheld the objection. The principles applicable to this issue have been set out in numerous cases. In *Caxton Ltd and others v Reeva Forman (Pty) Ltd* and another 1990 (3) SA 547 (A) Corbett CJ stated at 565G:

"Although the decision whether to grant or refuse an application to amend a pleading rests in the discretion of the Court, this discretion must be exercised with due regard to certain basic principles."

The following statement by Watermeyer J, as he then was, in *Moolman v Estate Moolman & another* 1927 CPD 27 at 29 has been accepted and followed as reflecting the situation in our law:

'The question of amendment of pleadings has been considered in a number of English cases. See for example: *Tildesley v Harper* (10 Chd 393); *Steward v North Met Tramways Co* (16 QBD 556) and the practical rule adopted seems to be that amendments will always be allowed unless the application to amend is *mala fide* or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading it is sought to amend was filed.'

In *Rosenberg v Bitcom* 1935 WLD 115 at 117 Greenberg J, as he then was, stated:

"Although it has been stated that the granting of the amendment is an indulgence to the party asking for it, it seems to me that at any rate the modern tendency of the Courts lies in favour of an amendment whenever such an amendment *facilitates the proper ventilation of the dispute between the parties*."

In *Zarug v Parvathie NO* 1962 (3) SA 872 (D) at 876C Henochsberg J held:

"An amendment cannot however be had for the mere asking. Some explanation must be offered as to why the amendment is required and if the application for amendment is not timeously made, some reasonably satisfactory account must be given for the delay."

Caney J stated in *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 641A:

"Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show *prima facie* that *he has something deserving of consideration, a triable issue*; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence, where evidence is required, or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable."

And at 639B:

"The mere loss of the opportunity of gaining time is not in law prejudice or injustice. Where there is a real doubt whether or not prejudice or injustice will be caused to the defendant if the amendment is allowed, it should be refused, but it should not be refused merely in order to punish the plaintiff for his neglect."

And at 642H:

"In my judgment, if a litigant has delayed in bringing forward his amendment, this in itself, there being no prejudice to his opponent not remediable in the manner I have indicated, is no ground for refusing the amendment."

[12] The competition commission and the commissioner object to the proposed amendment of the notice of motion in the review application and the filing of the supplementary founding affidavit, essentially on the grounds that this court lacks jurisdiction to adjudicate the review application and thus the interlocutory application as well, and that the interlocutory application lacks a valid foundation. It is to the lack of foundation argument that I first turn. The competition commission and the commissioner argue that Ms Wagener and NRF contend in their interlocutory application that the case advanced by the commissioner for issuing the summons in the answering affidavit in the review application is different from that which he had advanced in the summons that had been issued in terms of s 49A of the Act. There is no factual basis, so they argue, for such contention, which is the only basis for the leave

they seek to amend and to file a supplementary founding affidavit. The interlocutory application, in their submission, should thus be dismissed.

[13] It is indeed so that Ms Wagener and NRF blame the commissioner for having made out a case in the answering affidavit in the review application that is very different from the one made out in the summons. The essence of the accusation is that in the answering affidavit in the review application the commissioner no longer relies on the extraordinary allegation that Ms Wagener removed documents from Wilmar in a mock raid, but information and disclosure of documents are now sought from her, purely because she is Wilmar's attorney. I should mention that the commissioner and the competition commission, in turn, also accuse Ms Wagener that she appears to 'feign ignorance' in respect of the rules of privilege and that the interlocutory application is 'a thinly veiled ruse . . . to introduce facts not previously pleaded'. Even if it is accepted that there is no factual basis for the allegations that the commissioner's case in the answering affidavit in the review application for issuing the summons is different from the basis he advanced in the summons itself, and that no blame can be attributed to him for the failure of Ms Wagener and of NRF to include the prayer for declaratory relief concerning what they contend to be privileged documents and to have dealt with the question of privilege (legal professional privilege and litigation privilege) in their founding affidavit in the review application, leave to amend and leave to file the supplementary founding affidavit should, in my judgment, nevertheless be allowed for the reasons that follow.

[14] This indeed is an unusual case – as contended for by Ms Wagener and NRF - where an attorney representing a client is summoned to give evidence before the competition commission on the subject of an investigation into price fixing by competitors (including the attorney's client) in a particular market and to produce documents in the possession or under the control of the attorney relating to the matter which is being investigated. The summons suggested that the competition commission resorted to such unusual procedure because 'it came to the attention of the commission that [NRF] assisted Africa Sun Oil and Wilmar in conducting a mock dawn raid designed to be a dress rehearsal of the dawn raid by the commission at which [Ms Wagener] may

have seized documents relevant to the investigation by the commission' and because it came to the attention of the commission that NRF represents three respondents which 'are competitors and [Ms Wagener] may have possession of documents or knowledge emanating from [her] position pertaining to this investigation'. It is, therefore, not unreasonable to infer that the commission resorted to the unusual procedure, because the commissioner has reason to believe that Ms Wagener is concealing evidence.

[15] It is clear from a reading of the founding affidavit in the review application that Ms Wagener and NRF focused on refuting those factual allegations against them. It was furthermore, in my view, not unreasonable for Ms Wagener to accept that the question of privilege was not an issue until the answering affidavit of the competition commission and the commissioner was filed. The summons did not put the issue of privilege in dispute as it expressly excluded privileged documents from those Ms Wagener must produce. However, a reading of the answering affidavit makes it plain that the commissioner requires Ms Wagener to produce to the commission also documents that are protected from disclosure by the legal professional privilege and the litigation privilege or at least a list of such documents in respect of which the privilege is asserted, for the commission, she and NRF then to debate whether or not the documents are indeed so protected, and in the event of disagreement, for the Tribunal to decide the issue. Ms Wagener and NRF, on the other hand, contend that producing privileged documents to the competition commission and to the tribunal would breach her obligation of privilege owed to their client, Wilmar, and providing a list of the documents would, in the circumstances of this case, also breach the privilege as that would disclose the trend of advice to Wilmar and the structure of the case she is preparing.

[16] It is this dispute relating to privilege that has arisen once the answering affidavit had been filed, which is sought to be addressed in the proposed amendment and supplementary affidavit. The original notice of motion only seeks an order that the court set aside the summons. The proposed amended notice of motion also seeks the court to declare that Ms Wagener is not obliged by the summons (in the event that the review court finds that it is lawful) to produce certain categories of documents or a list of such

documents over which privilege is claimed. Ms Wagener and NRF have shown prima facie that the question of privilege is deserving of consideration.

[17] I am in all the circumstances satisfied that the interlocutory application is not *mala fide.* It is a bona fide attempt on the part of Ms Wagener and NRF to align their founding papers with the real issues in the review application. The proposed amendment and the supplementary founding affidavit will facilitate the proper ventilation of the disputes between the parties. The proposed amendment can also cause no conceivable injustice to the competition commission or to the commissioner. It includes an order to the effect that the competition commission and the commissioner may file answering affidavits to the amended part B in accordance with the rules applicable to answering affidavits. When they do so, 'the parties shall be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed'. Furthermore, the proposed amendment is not aimed at causing delay. Ms Wagener and NRF urged the competition commission and the commissioner to finalise their affidavits before this hearing so that this court could determine the interlocutory and review applications together, but they refused to accede to the request.

[18] I now turn to the contention of the competition commission and the commissioner that this court lacks jurisdiction to adjudicate the review application and this interlocutory application, because, so it is contended, s 27(1) and s 62 of the Act confer exclusive jurisdiction on the tribunal and the competition appeal court in the review of any decision of the competition commission. The question of lack of jurisdiction, however, is not relevant to this court's determination of this interlocutory application. The question is squarely raised in the review application and it is for the court hearing that application to determine whether it lacks jurisdiction or not. This application is merely interlocutory to the review application, which is a pending proceeding in this court, and this court has jurisdiction to regulate pending proceedings before it. It is also not without significance that the competition commission and the commissioner also brought an interlocutory application to strike out certain paragraphs in the supplementary founding affidavit in the review application. The parties agreed that the striking out application should follow the fate of the interlocutory application brought by Ms Wagener and NRF.

[19] In the result the following order is made:

1. The applicants are granted leave:

1.1 to amend their notice of motion in the review application by replacing the prayers in Part B with the prayers in the amended Part B, annexure 'X' to the notice of motion herein; and

1.2 to file the affidavit, which is attached to the notice of motion herein, as a supplementary founding affidavit in the review application.

2. The respondents may file supplementary answering affidavits to the supplementary founding affidavit and the amended Part B of the notice of motion in the review application in accordance with the rules applicable to answering affidavits.

3. The costs of the application for leave to amend the notice of motion in the review application and to file a supplementary founding affidavit, including the costs of two counsel, are to be paid by the respondents, jointly and severally the one paying the other to be absolved.

3. The application to strike out is dismissed with costs, which costs are to be paid by the respondents, jointly and severally the one paying the other to be absolved, including those of two counsel.

P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:	5 June 2018
Date of judgment:	15 June 2018
Applicants' Counsel:	Adv Wim Trengove SC (assisted by Adv Carol Steinberg)
Instructed by:	Norton Rose Fulbrigh South Africa Inc. C/o Macintosh Cross and Farquharson, Arcadia, Pretoria
Respondents' Counsel:	Adv Vuyani Ngalwana SC (assisted by Adv Nobuntu Mbelle)
Instructed by:	Ndzabandzaba Attorneys Inc. C/o Hattingh & Ndzabandzaba, Centurion