IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

Case No.: 96/CAC/Apr10

Date delivered:

In the matter between:

TRUDON (PTY) LIMITED Appellant

and

DIRECTORY SOLUTIONS CC First Respondent

TELKOM SA LIMITED Second Respondent

J U D G M E N T

DAMBUZA, AJA:

Comprehensive Reasons

[1] These reasons amplify the Order and reasons already handed down in this appeal. The background to this matter is that the appellant, **TRUDON (PTY) LTD** ("Trudon"), a company whose majority shareholder is the second respondent, **TELKOM SA LIMITED** ("Telkom"), conducts the business of publishing regional telephonic directories in South Africa. Telkom has contracted to the appellant the function of publishing annual directories in each defined geographic area of subscribers to the Telkom telephone line. Telkom operates a fixed line telephone communications network under a licence issued to it, formerly under the Telecommunications Act, Act 103 of

1996 and currently, in terms of section 93 of the Electronic Communications Act, Act 36 of 2005. The licence enjoins Telkom to publish annual telephone directories in each geographic area of subscribers to its telephone lines, listing, in light print, minimum information, being the names, addresses and telephone numbers of subscribers.

[2] In terms of the licence no charge may be levied to subscribers for publishing the minimum information set out above in light print; however, subscribers may be charged for "enhanced" directory listings or advertising entries in which is included information additional to the minimum information; e.g. fax numbers, email and web addresses. Enhanced listings are usually in bold type and are presented in typographical block, which makes them more prominent to readers of telephone directories. The appellant charges its customers approximately R300.00 per annum per enhanced listing entry.

[3] The first respondent, **DIRECTORY SOLUTIONS**, is a Close Corporation which operates from Port Elizabeth. Its business is to assemble information for insertion in Telkom telephone directories published by the appellant. In the course of its business the first respondent amends company details by including new details in the entries already existing in a particular telephone directory and/or changes the type of print of an entry from bold to light and/or vice versa, and submits to the appellant for placing as a free light type white pages or yellow pages entry. As already stated in the judgment of Davis JP, the first respondent charges its own fee (approximately R1,650.00)

over and above the R300.00 payable to the appellant for placement in the telephone directory.

[4] For marketing its enhanced and advertising listing services, the appellant employs internal sales workers to contact existing Telkom subscribers to ascertain whether they wish to purchase enhanced directory listings in the forthcoming editions of the telephone directories in which they are listed. The first respondent then enters into agreements with those customers who wish to do so and the amount payable in respect of each enhanced entry is billed, as periodical payments, in the subscriber's Telkom accounts.

[5] The appellant publishes the Telkom telephone directories annually. Enhanced listing instructions are obtained for each edition (on a cyclical basis). A deadline is published in each edition of the directories, informing customers of the date by when they must submit new or amended entries for inclusion in the next edition of the particular directory. New and/or amended entries can only be accepted up to a particular time (usually up to three months prior to publication), to afford the appellant sufficient time to process instructions and compile and publish the next edition of the relevant telephone directory.

[6] In 2005, the appellant imposed, as a condition in respect of placements by the first respondent in the Telkom telephone directories, that the first respondent or the relevant subscribers who engage the services of the first

respondent, make an upfront payment to the appellant, of the applicable subscription fee for their enhanced entries to be published in the telephone directories and also to lodge with their entries, a power of attorney authorising the first respondent to act on behalf of the subscribers in procuring insertion of their entries for publication. It is the upfront payment condition, albeit four years after its imposition, that caused the first respondent to approach the Competition Commission and the Tribunal. On 25 March 2009 the first respondent lodged a complaint with the Competition Commission alleging that the refusal by the appellant to publish entries of its (the first respondent's) customers/clients (without the upfront payment) was discriminatory, unlawful and in breach of competition laws (Annexure to the complaint form CC1). Thereafter, in November 2009, the first respondent launched an application, seeking interim relief under section 49 C of the Competition Act, Act No. 89 of 1998 ("the Act") in terms of which the appellant would be ordered to publish all entries submitted by the first respondent in the relevant (2010/2011) telephone directories without the upfront payment.

[7] The order granted by the Tribunal is set out in the judgment by Davis JP.[1] In essence, the appellant (and Telkom) were ordered to accept from the first respondent, without the requirement of upfront payment of its charges, all subscriber entries provided by the first respondent in respect of the (then) forthcoming Telkom directories for certain specified geographical areas (South Cape and Karoo, Boland and West Coast, Johannesburg and the East Rand).

[1] See judgment by Davis JP at 5.

[8] At the appeal hearing the appellant and the first respondent were the only parties before us, Telkom having noted no opposition to the appeal.

[9] As set out in the judgment by Davis JP,[2] on appeal we had to consider the appealability of the order of the Tribunal, in view of it having been an interim order. If the order was appealable we would then consider the merits of the appeal.

Appealability of the Order

[10] Section 37(1)(b)(ii) of the Act provides that this Court may consider an appeal arising from the Competition Tribunal in respect of:

(i) any of its final decisions other than a consent order made in terms of Section 63; or

(ii) any of its interim interlocutory decisions that may, in terms of this Act, be taken on appeal.[3]

[11] Further, section 49C(8) of the Act provides that:

[2] See judgment by Davis JP at 7.

[3] Section 61(1) of the Act provides that:

> "A person affected by a decision of the Competition Tribunal may appeal against, or apply to the Competition Appeal Court to review, that decision in accordance with the Rules of the Competition Appeal Court if, in terms of section 37, the Court has jurisdiction to consider that appeal or review that matter."

> "The respondent may appeal to the Competition Appeal Court in terms of this section against any order of the Competition Tribunal that has a final or irreversible effect." (My emphasis)

[12] As to whether the interim order of the Tribunal was final or irreversible in effect,[4] the contention by the appellant was that, insofar as it related to the telephone directories due to be published during 2010, the order was final in effect. *Mr Wilson*, who appeared on behalf of the appellant submitted that as the contractual relationship between the appellant and the subscribers (relating to publication of enhanced entries) consists of annual agreements in respect of each telephone directory publication, and there being only one publication of telephone directories in each year, the order of the Tribunal was final in effect, as it related to a particular publication, the 2010 publication. On the other hand, the submission by *Mr Beyleveld* who appeared on behalf of the first respondent, that the interim order was not final in effect, was based on the seemingly limited duration of six months, for which the order would be operative and the fact that the order was an interim order. His submission was essentially that it is in the nature of interim relief to be final for the period during which it is valid. However this did not mean, so the argument went, that the order in question was final in effect as it was susceptible to alteration by the Tribunal upon the hearing of the main complaint.[5] *Mr Beyleveld* referred, by way of analogy, to interim orders relating to lease agreements, submitting that such order often suspend obligations of parties in respect of

[4] See judgment by Davis JP at 7.

[5] See also judgment by Davis JP at 8.

such agreements and such suspension is final for the period during which the interim order would be valid.

[13] We found *Mr Beyleveld's* submission unpersuasive. It has been held that[6] a convenient test in considering whether a judgment or order is appealable is to enquire whether the final word on the matter has been spoken; in other words, whether the order made is reparable at the final stage by the Court *a quo*.[7] One of the attributes of a "judgment or order" is that it should have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. Not all applications for interim interdict are mere procedural steps in the main proceedings (in this case the main complaint lodged with the Competition Commission).[8]

[14] Further to the views expressed in the judgment by Davis JP[9] the answer to the question whether the interim order in question is final and irreversible in effect also lies in the wording of the order itself. The order directs the appellant and Telkom to accept from the respondent, without the requirement of an upfront payment *"all subscriber entries provided by Directory Solutions (first respondent) for the NEXT Telkom telephone directories to be published for the regions…".* (My emphasis). On its own wording the order is limited to a specific set of publications which will not be

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[6] **SA Motor Industry Employers Association v SA Bank of Athens** 1980 (3) SA 91A at 96.

[7] LAWSA at 359; **Blaaubosch Diamonds Ltd v Union Government (Minister of Finance)** 1915 AD 599 at 601.

[8] **Knox D'Arcy Ltd and Others v Jamieson and Others** 1996 (4) SA 348 (A).

[9] See pp 9 – 10 of the judgment by Davis JP.

published in the future. Although there was no express concession in this regard from *Mr Beyleveld,* I did not get the impression that the submission relating to once off publication of each set of telephone directories was disputed. Whilst this is, by no means, a pronouncement on the merits of the pending complaint (lodged with the Competition Commission), any order made in respect thereof will not be determinative of the issues raised in the application for interim relief in respect of the 2010/2011 publication of the telephone directories. It is in this regard that the interim order under consideration differs from those that relate to lease agreements.

[15] When the application was launched (before the Tribunal), the closing dates for submission of entries in respect of all but six of the directories (as per region) had already passed. Closing dates in respect of the six remaining regions were in January and March 2010 and the directories would be published from July to October 2010. The application and the order of the Tribunal dated 8 April 2010 was clearly directed at these publications. (In the founding affidavit it is stated that it might still be possible to submit entries with regards to these (six) remaining directories where, although the closing date had passed, the directories had not yet been printed or where printing had not yet commenced.)

[16] By the expiry of the six month period during which the order would be operative,[10] the closing dates for submission of entries for the publications to which the interim order related would have passed and the telephone

[10] See terms of the order at p 5 of the judgment by Davis JP

directories would have been published.[11] Once the Tribunal made the order in respect of the 2010/11 publication, the issues (relating to upfront payment) became *res judicata*; the rights of the parties relating to the upfront payment in respect thereof were finally determined and the Tribunal could not at a later stage consider and pronounce thereon, so as to reverse the effect of its order.

[17] It was these considerations that persuaded us to conclude that the interim order was final in effect and therefore appealable.

The merits

[18] As stated in the judgment by Davis JP, the founding papers fall far short of making out a *prima facie* case for the relief sought. Section 49(C)(1) of the Act provides that:

> "(1) At any time, whether or not a hearing has commenced into an alleged prohibited practice, the complainant may apply to the Competition Tribunal for an interim order in respect of the alleged practice.
>
> (2) The Competition Tribunal-
>
> *(a)* must give the respondent a reasonable opportunity to be heard, having regard to the urgency of the proceedings; and
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> *(b)* may grant an interim order if it is reasonable and just to do so, having regard to the following factors:
>
> (i) The evidence relating to the alleged prohibited practice;

[11] Section 49(C)(4)(b) of the Act.

(ii) the need to prevent serious or irreparable damage to the applicant; and

(iii) the balance of convenience." (emphasis supplied)

[19] It is clear from the wording of Section 49(C) (1) (*"an interim order in respect of the alleged practices"*) that for an interim order to be granted conduct constituting a prohibited practice has to be proved. The appellant's case on appeal was that the first respondent's had not made out any case for the relief it sought before the Tribunal. We were of the same view.

[20] Nowhere in the founding affidavit that served before the Tribunal does Roberta Seymour set out details of the conduct on the part of the appellant constituting a prohibited practice. The most that appears in the founding papers are allegations in Annexure "A" to the complaint which is annexed to the founding affidavit, in which Seymour alleges that:

"29. Telkom is a dominant firm as defined in terms of Section 7 of the Competition Act, 89 of 1998.

30. TDS is partly owned by Telkom and is accordingly classified as a dominant firm.

31. The refusal to allow the Complainant to publish lawful entries of customers in the telephone directory, which is a facility open to everyone in the Republic of South Africa is an abuse of a dominant position and prohibited in terms of Section 8 of the Act. Such conduct is also exclusionary and for that reason is unlawful and should be stopped.

[21] But in essence, and as the appellant contended before the Tribunal the only basis for the relief sought by the first respondent is the averment, in the notice of motion, that the appellant had contravened section 8 of the Act.

[22] Section 8 of the Act provides that:

> "It is prohibited for a dominant *firm* to –
>
> (a) charge an *excessive* price to the detriment of consumers;
>
> (b) refuse to give a competitor access to an *essential facility* when it is economically feasible to do so;
>
> (c) engage in an *exclusionary act*, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or
>
> (d) engage in any of the following *exclusionary acts*, unless the *firm* concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act –
>
> (i) requiring or inducing a supplier or customer to not deal with a competitor;
>
> (ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;
>
> (iii) selling *goods or services* on condition that the buyer purchases separate *goods or services* unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;
>
> (iv) selling *goods or services* below their marginal or average variable cost; or
>
> (v) buying-up a scarce supply of intermediate goods or resources required by a competitor."

[23] The Tribunal found that the appellant's conduct constituted a prohibited practice in contravention of section 8 of the Act and that considerations of

irreparable harm and the balance of convenience favoured the granting of the interim order sought.

[24] It further found that ,although no reference is made in the first respondent's papers as to the specific sub-sections of Section 8 of the Act on which the first respondent relied, *"an attentive reader of DS' (the first respondent's) papers will reasonably and with no appreciable difficulty conclude that the relevant subsections of section 8 relevant to the nature of the alleged conduct include 8(c) and 8(d) (i) and 8(d) (ii)"*. The Tribunal held further that whilst it would have been proper for the first respondent to identify the particular subsection in section 8 of the Act on which it relied, the omission was *"relatively unimportant in the context"*, and, to the extent necessary, the Tribunal condoned the omission.

[25] My view is that the Tribunal misdirected itself in simply brushing aside the first respondent's failure to set out a coherent case of abuse of dominance in its founding papers, as an unimportant omission. The appellant and Telkom had to answer to the case made out by the first respondent in its founding papers and the first and crucial aspect of the enquiry into whether it was reasonable to grant the order sought was whether, on the prescribed test, a case of a prohibited conduct had been established.

[26] The High Court standard of proof stipulated in Section 49C (3) of the Act for interim relief requires that an applicant in motion proceedings must set out, in the founding affidavit, the necessary allegations on which he or she

relies as he or she will not generally be allowed to supplement the affidavit by adducing supporting facts in a replying affidavit.[12] This is particularly so where, as in this case, the allegations made by the applicant in the replying affidavit were known to him or her when the founding affidavit was made. In the replying papers it is stated that the first respondent relied on sections 8(b), (c), (d) (i) and (d) (ii) of the Act. The appellant contends, correctly in my view, that the absence in the first respondent's founding affidavit, of specific averments under section 8, particularly subsection 8(b) and 8(d)(i) or (ii) deprived it of opportunity to address those requirements in the answering affidavit.

[27] To make out a case of conduct prohibited under Section 8(b) of the Act, the first respondent had to demonstrate that the applicant was a *dominant* firm which had refused to give a *competitor* access to an *essential facility when it was economically feasible to do so.* A definition of a dominant firm appears in Section 7 of the Act. The inquiry into whether an entity is a dominant firm includes identification of the relevant market in which it is involved; its market share within that market and whether it possesses the relevant market power.[13] The manner in which dominance must be proved under section 7 depends on the market share enjoyed by the firm alleged to be dominant.

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[12] Erasmus; Superior Court Practice; at B1-39.
[13] Sutherland & Kemp; *supra;* at 7–15. The presumptions contained in section 7 of the Act are critical to this determination.

[28] None of the necessary averments and factual allegations under Section 8(b) of the Act are made in the first respondent's papers which served before the Tribunal. Similarly none of the essential averments and facts relating thereto under subsections 8(d) (i) and 8(d) (ii) of the Act are made in the application. There is no evidence from which one can conclude that the appellant had *induced customers not to deal with the first respondent.* In fact there is no evidence that customers stopped dealing with the first respondent as a result of the demand for upfront payment. There is no evidence that the appellant was refusing to supply scarce goods to the first respondent *although supplying such goods was economically feasible.* The respondent also had to place before the Tribunal evidence that the appellant, being its (the first respondent's) competitor in the relevant market was engaged in conduct constituting *an exclusionary act* as defined in section 1 of the Act.

[29] To establish a contravention of section 8(c) of the Act, once again the first respondent had to demonstrate that the appellant is a dominant firm whose conduct constituted an *exclusionary act* as defined in section 1 of the Act, and that such conduct had *an anti-competitive effect* which *outweighed the appellant's technological efficiency or other pro-competitive gain.*

[30] In the founding affidavit, Seymour merely refers to the complaint lodged by the first respondent with the Competition Commission, the request by the Competition Commission subsequent to the filing of the complaint, that she provides proof that the appellant had caused harm to consumers, a letter written to the Commission by her attorneys in which it is mentioned that a

certain Mrs Lezelle Paterson who had conducted a business similar to the first respondent's had to close her business as a result of refusal by the appellant to publish entries of subscribers submitted by Mrs Paterson.[14] She also refers to a High Court order, per Jansen J, in a related matter between the parties in which is expressed the view that the conduct of the appellant was grossly unfair, and the publication dates of the 2010/2011 telephone directories and the urgency emanating therefrom.

[31] The Tribunal set out correctly, the following as the approach it would follow in considering the application:[15]

> "[W]e must first establish if there is evidence of a prohibited practice, which is the Act's analogue of a *prima facie* right. We do this by taking the facts alleged by the applicant, together with the facts alleged by the respondent that the applicant cannot dispute, and consider whether having regard to the inherent probabilities, the applicant should on those facts establish the existence of a prohibited practice at the hearing of the complaint referral.
>
> If the applicant has succeeded in doing so we then consider the 'doubt' leg of the enquiry. Do the facts set out by the respondent in contradiction of the applicant's case raise serious doubt or do they constitute mere contradiction or an unconvincing explanation. If they do raise serious doubt the applicant cannot succeed."

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[14] (She states, however, that she was informed by the Commission that Mrs Paterson had advised the Commission that she had closed her business for personal reasons.)

[15] This is the approach followed by the Tribunal in **York Timbers Ltd v SA Forestry Company Ltd** (1) [2001–2002] CPLR 408 (CT); see also Section 49(C)3 of the Act *(supra)*.

[32] On this approach the Tribunal had to consider the evidence in the papers before it, rather than requiring (as it did) the appellant to produce further evidence. And I agree with the submission in the appellant's Heads of Argument that, even on the additional evidence (and the first respondents replying affidavit), no case was made before the Tribunal for the order granted.

[33] As to whether the first respondent made out a case under section 8(c) of the Act, the finding by the Tribunal that the relevant markets in which the appellant operated are: (i) the market for publication of official telephone directories; and (ii) the market for solicitation of entries for publication in the telephone directories and associated services; is not supported by any evidence in the first respondent's founding papers. Only in the reply does the first respondent's attempt to re-enforce its case by, amongst others, stating that the relevant market in which the appellant is dominant is that of securing advertisements for placement in the official telephone directories. The finding by the Tribunal is based on its view that, unlike the appellant, other directory publishers are not required to give customers free entries in their directories and free copies of such directories and cannot use Telkom as their (revenue) collecting agent. Apart from the fact that it was improper for the first respondent to try and make out its case only in the replying papers, there is no allegation in the first respondent's papers that other telephone directories do not offer free listings. The first respondent only alleges that the appellant is the only publisher of an "official" telephone directory in the country. As

submitted on behalf of the appellant, such an allegation is not a feature that defines a market.

[34] The finding of a second relevant market (for solicitation of entries for publication in the "official" telephone directories and associated services) seems to be based on the word "official" or the fact that the appellant, through Telkom is the only agent operating under the licence referred to in paragraph 1 of this judgment. I agree with the submission on behalf of the appellant that this is a "misconceived" market.

[35] As the appellant contends, the sales and marketing function is simply one of the many activities that are part of its advertising services and that it competes, in respect of such services, in the broader advertising services market wherein each competitor is entitled to structure its internal functions as it sees fit. In this regard *Mr Wilson* referred to the following finding by the Tribunal in **National Association of Pharmaceutical Wholesalers v Glaxo Wellcome (Pty) Ltd and others**:[16]

> "Even if the manufacturers had elected to perform all the distribution functions in-house, that is, through a fully vertically integrated distribution division, this would not make them competitors in the distribution market any more than performing security functions in-house would make them participants in the security services market. There is no iron law that says that the manufacturing process begins and ends at pre-ordained points, much less that it is illegitimate from a competition perspective for the manufacturer to engage in any activity beyond those points. The products belong to the manufacturers and our starting point is that they are entitled to distribute it to

[16] [2003] 1 CPLR 93 (CT) at para 53.

> their various customers as they see fit, just as they are entitled to secure their premises as they see fit."

[36] There is no evidence in the first respondent's papers that the marketing aspect of the wider advertising services in which the appellant is involved, constitutes a distinct market in which the appellant and the first respondent compete. There is also no evidence to justify a conclusion that the appellant's telephone directories are so specialized and unique to constitute a distinct advertising media, separate from others.

[37] Even if the first respondent had proved a relevant market, there is no evidence in the first respondent's papers on which justifying a conclusion that the demand by the appellant for an upfront payment has an uncompetitive effect or extends or entrenches the appellant's position in that market. It is trite that, by its nature, all competition is exclusionary. The important question is to distinguish between well functioning competition and malfunctioning competition. It is in this regard that the Act requires a weighing of the anti-competitive effect of an act against its technological, efficiency and other competitive gains.

> "Rivals frequently lose custom or profits, and even go out of business, as a result of another firms actions in the cut and thrust of a healthy competition: such losses often result in the elimination of competitive deadwood and do not generally warrant state intervention."[17]

[17] **Sutherland and Kemp** at 7-48.

[38] It is generally threatened harm to consumer's welfare that warrants intervention. The first respondent's application makes out no case of such threat to consumer welfare.

[39] The abovementioned may not be exhaustive of the aspects in which the first respondent's case fell short of the requirements for an interim order under Section 49(C) of the Act. But we were satisfied that for these reasons alone the Tribunal erred in granting the interim order. I therefore consider it unnecessary to deal with the requirements of serious or irreparable harm and balance of inconvenience.

DAVIS JP and MAILULA JA AGREED

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DAMBUZA AJA