



# competitiontribunal south africa

## Notice CT 7

### About this Form

This form is issued in terms of the Competition Tribunal Rules, and is to be used for filing an appeal in terms of Tribunal Rule 38.

Please attach to this notice a typed document, which must comply with the requirements of Competition Tribunal Rule 39(3), setting out the grounds for your appeal.

### Contacting the Tribunal

The Competition Tribunal  
Private Bag X29  
Sunnyside  
0132  
Republic of South Africa  
tel: 27 12 394 5300  
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## Notice of Appeal

**Date:** 10-Dec-2014

**To:** The registrar, Competition Tribunal

**From:**

LEKOA FITMENT CENTE

### Concerning:

(Name and Commission file number:)

ALTECH NETSTAR (PTY) LTD  
THE COMPETITION TRIBUNAL  
CAC CASE NO 132/CAC/Dec14  
CT CASE 019190

(Date of Commission decision being appealed:)

20-Nov-2014

Take notice that we appeal from the decision of the Competition Commission, to the Competition Tribunal in terms of the Competition Act :

☐ section 10(2) ☐ section 10(4A)

☐ section 10(5) ☒ Item 8 of Schedule 1

The decision being appealed, the grounds for appeal, and the facts and contentions on which we rely, are set out on the attached sheet.

**Name and Title of person authorised to sign:**

**Authorised Signature:**

**Date:**

10-Dec-2014

For Office Use Only

Tribunal file number

Date Recd

## IN THE COMPETITION APPEAL COURT

**CAC CASE NO. 132/CAC/Dec14**

**In the matter between**

**Appellant**

**LEKOA FITMENT CENTRE**

**And**

**THE COMPETITION TRIBUNAL**

**Respondent**

**ALTECH NETSTAR**

**Respondent**

### FILLING SHEET NOTICE OF APPEAL

TAKE NOTICE THAT Lekoa Fitment Centre is making an application to the Competition Appeals Court for the following order :

1. Dismissing the Competition Tribunal's decision filed on 20 November 2014, to grant the exception application on the basis that

(a) no proof was submitted on the lack of sufficiency for Lekoa Fitment Centre's submissions according to Rule 15 (2) and Rule 18 (1)

(b) on the basis of the grounds of Appeal set out in the attached affidavit

2. Dismissing the Competition Tribunal's dismissal of The Referral as contemplated in section 37 of the Competition Act ("Act")

3. Directing the respondent to issue the Appellant a restraint of trade waiver document

4. Granting the appellant such further relief and/or alternative relief as might be deemed just.

TAKE NOTICE THAT the grounds of appeal are set out below in the affidavit of Gombera Sibanda attached hereto, together with annexures.

Dated at Boksburg on this the 1st December 2014.

GOMBERA SIBANDA  
The Complainant  
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Boksburg North  
Boksburg, 1461

TO:

THE REGISTRAR

Competition Appeals Court Of South Africa

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AND TO:

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AND TO:

WEBBER WENTZEL

Respondent's Attorneys

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## IN THE COMPETITION APPEAL COURT

**CAC CASE NO. 132/CAC/Dec14**

**In the matter between**

**Appellant**

**LEKOA FITMENT CENTRE**

**And**

**THE COMPETITION TRIBUNAL**

**Respondent**

**ALTECH NETSTAR**

**Respondent**

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### NOTICE OF APPEAL

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I, the undersigned,

**GOMBERA SIBANDA**

Do hereby state that:

1. I am adult male a co-member of Lekoa Fitment Centre cc, the Appellant in this matter. I am duly authorised to depose to this affidavit on behalf of Lekoa Fitment Centre where I am responsible for overall operations of the business. The contents of this affidavit are within my personal knowledge. I was personally involved in the original complaint of this matter to the Competition Commission since 16 October 2013
2. The Appellant is Lekoa Fitment Centre ("Lekoa") which was established in 2005 in terms of close corporation Act of South Africa as a juristic person with its physical address at Shop No 1 Model Complex, 47 Galloway st, Meyerton, 1960 and postal address as P O box 5034, Boksburg North, 1461.
3. The respondents are The Competition Tribunal situated at DTI Campus , Mulayo Block C, 77 Meintjies Street , Sunnyside, Pretoria and Altech Netstar (Pty) Ltd ("Netstar") having its principal place of business at Central Park Offices, 16<sup>th</sup> Road, Randjespark Extention 5, Midrand.P.O. Box 2435,Halfway House, 1685

4. The affidavit is deposed to in support of the notice of appeal, CT7 form in terms of section 37 and Rule 38(3) the Competition Act read with rule 16 of the Competition Appeals Court Rules.
5. The facts relating to the merits of the appeal hereby referred are based on the Tribunal records, Netstar's and Lekoa's heads of argument as well as transcripts of the exception hearing.

#### Foreword to the Appeal application affidavit

6. This affidavit is divided into two distinct parts  
Part 1 comprises a founding affidavit filed in support of the notice of Appeal against the Tribunal's decision and order:
  - (1) granting the exception
  - (2) dismissing the Referral
7. Part 2 comprises a replying affidavit to The Tribunal's order and decisions

#### Part 1

[8] The basis of Altech Netstar's ("Netstar") exception application was that Lekoa Fitment centre ("Lekoa") did not disclose the cause of action against the respondent and/or does not comply with Tribunal Rule 15(2), therefore the exception hearing's objective was limited to establishing the existence of relevant cause of action.

[9] In terms of Rule 15 (2) and the amendments in accordance with Rule 18 (1) the exception hearing failed to disclose where and how the cause of action was not met.

[10] In terms of 15 (2) the complaint is complete, clear and not vague when a concise statement of the grounds of complaint is filed supported by material facts or points of law, Netstar has inferred the word AND points of law. In terms of Rule 15 (2) Altech Netstar's

grounds for exception application does not comply with Rule 15 (2) on the basis that, the compliance with law<sup>1</sup> was made obligatory, where the Act sets it as an alternative, in this Netstar was setting up a strategy to rely on legal technicalities against laypersons where it was not necessary.

[11] In terms of Rule 22 (c) (ii) with reference to the Appellant's notice of motion of 16 September 2014, the exception application should have been dismissed forthwith

[12] In terms of Tribunal Rule 16 (5) in their answers Netstar did not specifically deny or admit allegations of facts set out in the Complaint Referral

[12.1] In terms of 22 (c) (iv) The Tribunal did not obtain admission of particular facts or documents.

[13] In terms of Rule 16 (6) Netstar failed to qualify or explain denials of allegations when approached by Lekoa.

In terms of section 72<sup>2</sup> and section 73<sup>3</sup> Netstar's exception application was held under conditions that were a direct contravention of the Act as it was based on false evidence.

[14] In terms of Rule 40 (1)<sup>4</sup> the complainant was not given time to respond to the excipient's heads of arguments.

[15] In terms of Rule 22<sup>5</sup> (c), notwithstanding, the Appellant was not afforded the benefit provisioned for by the Act

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<sup>1</sup> In terms of 15 (2) the complaint is clear and not vague when a concise statement of the grounds of complaint is filed supported by material facts or points of law, Netstar has inferred the word AND points of law.

<sup>2</sup> Section 72 (b) gives false evidence, knowingly or believing it to be false

<sup>3</sup> 73. Failure to comply with Act (1) A person commits an offence who (d) knowingly provides false information to the Commission;

<sup>4</sup> The respondent, in this case Lekoa was served with Netstar heads of argument on eve of hearing

[16] In terms of the impartiality and prejudice contemplated in section 20 (2) (b)<sup>6</sup> and section 32<sup>7</sup>, the Presiding Officer is a former employee of the legal firm representing the excipient's.

[17] As a result of the aforementioned Rules Netstar did not make out a complaint necessary to sustain an exception application, save for a misplaced reliance on interpreting dominance as in a horizontal relationship, whereas the complaints and allegations are based on a vertical relationship.

AND

[18] The Tribunal shifted from the objective of the hearing in such a way that Lekoa was prejudiced in the conduct of its defence.

[19] In the alternative, Lekoa sufficiently addressed the matters raised in the exception application in that the cause of action was demonstrated beyond reasonable doubt as far as the relevant forum had provisioned.

[20] In terms of section 5 (1) there was no justification or defence for having engaged in the conduct, as The Tribunal would appreciate that engagement in the conduct is the offence notwithstanding the effects.

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<sup>5</sup> Rule 22 (c) directive to obtain evidence, technical or formal amendments to correct errors in any document filed in the matter, any pending notices of motion, obtain admissions of particular facts or documents, calling of witnesses, clarifying and simplifying of issues

<sup>6</sup> (2) The Commissioner, each Deputy Commissioner and each member of the staff of the Competition Commission, must not (b) participate in any investigation, hearing or decision concerning a matter in respect of which that person has a direct financial interest or any similar personal interest;

<sup>7</sup> Section 32. Conflicts and disclosure of interest by members of Competition Tribunal (1) A member of the Tribunal may not represent any person before a panel of the Tribunal. (2) If, during a hearing, it appears to a member of the Competition Tribunal that a matter concerns a financial or other interest of that member contemplated in section 20(2) (b), the member must - (a) immediately and fully disclose the fact and nature of that interest to the Chairperson and to the presiding member at that hearing; and (b) withdraw from any further involvement in that hearing.

[21] TAKE NOTICE THAT the complaints have been filed on the basis of the fitment centre agreement as contained within the Tribunal records.

Prior to engaging on the specifics of the Appeal, I thought it necessary to provide the Competition Appeal Court with some background.

## **[22] Background**

Netstar ventured into the business of vehicle tracking services since the mid-1990s.

Since its inception Netstar reliably outsourced all its diverse functions of installing, registering, re-registering its products and services to the fitment centres, with which, it concluded exclusive agreements. These fitment centres formulated the national foot print for sales and marketing, as Netstar did not have national technical support, sales and marketing of its own.

[23] The fitment centres were responsible for sales, marketing, installations and servicing of all Netstar clients, the description of which is stated as “The fitment centre operations” which the agreement describes as - the business of installing, registering, reregistering and servicing Altech Netstar products.

[24] Lekoa Fitment Centre was registered in 2005 (2005/155083/23) solely<sup>8</sup> for the business of Altech Netstar as a Black Economic Empowerment initiative (BEE).

With the acquisition of Comtech, Netstar introduced operational changes through which they adapted most of the fitment centres role of sales, marketing and installations, described as the “fitment centre operations”.

[25] The relationship between the parties deteriorated due to the progressive effects of the exclusionary acts and the abuse of Netstar’s market power lessened and/or prevented the Appellant from expanding into the market, consequently, impeding the small and medium-sized enterprises to have an equitable opportunity to participate in the economy.

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<sup>8</sup> Tribunal records page 82 para 30.1.2 Lekoa an exclusive fitment centre



**[26] The Complaint and Referral:**

On 16 October 2013, Lekoa filed a complaint with the Competition Commission ("Commission"), in the prescribed form, alleging that Netstar had engaged in abuse of dominant position through exclusionary acts.

The relief sought by Lekoa was "redress to our losses and alternative approach".

[27] The Commission investigated the complaint as a contravention of section 5 (1) and section 8 (c), against Netstar where unfair pricing, restraint of trade and unfair practices where summed up as abuse of dominance and prohibited practices existed in a vertical relationship, which on 11 June 2014 the Commission issued a Notice of Non-referral in terms of section 50 of the Act.

[28] Based on the Commission's reasons and decision for non referral, Lekoa found Netstar having misled the Commission on the grounds raised as basis for pro-competitive gain and technological efficiency and therefore, Lekoa referred directly to the Tribunal ("Referral") in terms of section 51 of the Act, on 7 July 2014, alleging that Netstar had engaged in exclusionary acts that prevented the profitable enterprise of a small business. Registered on the CT (1) form as per attached Annexure GS 2

[29] Lekoa exercised its right to amend by making these amendments as per attached Annexure GS 4

To which the Appellant on the invitation of the respondent replied in support of the amendments.

**[30] The Exception Hearing**

On 21 October 2014 the Competition Tribunal ("Tribunal") was called on to determine whether an exception raised by the excipient, Altech Netstar ("Netstar"), that a complaint brought against it by Lekoa Fitment Centre ("Lekoa") discloses no cause of action was to succeed. As something of a subsidiary issue they were to required to determine whether certain amendments which Lekoa sought to bring to remedy the allegedly defective complaint referral were validly made in terms of Competition Tribunal Rule 18.

**now turn to the grounds of appeal**

[31] We appeal the decision as there are major discrepancies, inconsistencies and misrepresentation of facts in the reasons provided for decision as listed in paragraphs 8 to 21 above.

Further, The Tribunal erred in that it did not take into account Lekoa's submissions in their reasons and have not taken into account that Lekoa filed its complaint before it was terminated.

Furthermore, The Tribunal erred in admission of Netstar allegations that had not been proven, even when Lekoa had presented evidence to the contrary.

[32] The Appellant met the objective of the exception hearing, disclosing the cause of action, through the adopted amendments, heads of arguments and oral submissions. Netstar's exception application based on lack of clarity for cause of action was merely an attempt to avoid a hearing considering that the case had previously been filed by the Commission, Netstar were fully aware what they were called upon to answer.

[32.1] The Tribunal erred in going beyond the objective of the exception hearing, in seeking to advance what would ordinarily be covered in a hearing.

**[33] Shifting the objectives**

The Tribunal erred in that the grounds of exception dismissal had been met by all parties adopting the amendments; the adoption of the amendments qualified the cause of action. Disclosure or lack thereof on cause of action was the objective of the hearing, which was met, by furthering the dialogue the Tribunal erred in creating a deflection from the objectives.

Netstar cannot claim lack of cause of action when they had admitted to restraint of trade as a contravention of the Act.

It cannot be left to Netstar to determine cause of action when they have openly admitted to the cause of action and the exception application is irrelevant in such circumstances.

### **Exclusivity clauses**

[34] In terms of the fitment centre agreement clause 15, Lekoa was prevented from dealing with any products or services of Netstar's competitors. The agreement was premised on this exclusivity clause and the same clause gave effect to all other secondary clauses in the agreement for Netstar to be dominant in the relationship as the exclusive supplier. The cumulative effect of the multiple restraints, the unfair<sup>9</sup> and abusive practices, had their origins in the exclusive clause, such as manifested by minimum price maintenance, anti-competitive acts of selling and installation work in vertical relationship. The exclusivity clause while in operation was of undetermined duration<sup>10</sup> and was only waived when the matter had been registered with the Tribunal.

The Tribunal erred in that there did not obtain the facts in their chronological order.

The fact that Netstar admitted to the effects of the exclusivity clause<sup>11</sup> in itself dismisses the exception application on the grounds of deficiency of cause of action.

[34.1] Adopting the amendment meant that the exception was summarily dismissed on the basis of the Appellant's amendment which contained a prayer to dismiss the respondent exception application on the basis of failure to answer truth fully as contemplated in section 72 (2) (b) and section 73 (2) (a).

[35] The Tribunal erred fundamentally in permuting Lekoa's submissions to render an outcome in favour of Netstar, the unamended complaint section 2(e) was infused to section 5(1), the unamended<sup>12</sup> relief sought was juxtapose to the amendments. This impressed into

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<sup>9</sup> Tribunal records page 221 para 159 to 161

<sup>10</sup> Fitment centre agreement clause 4.1 and 4.2 90 days probation thereafter indefinite duration

<sup>11</sup> Fitment centre agreement clause 15 Restraint of trade

<sup>12</sup> Tribunal reason and decision page 5 para 19

the argument an implication that the Appellant's relief sought was incompetent and thereby making an attempt to disqualify section 5(1).

[35] Since The Tribunal were called upon to determine whether the referral in its amended form contained the necessary allegations to sustain a complaint referral, paragraphs 11 to 17<sup>13</sup> are irrelevant and will only serve as front runners to an argument that is not addressing what had been set out to be expounded in paragraph 10<sup>14</sup>.

[36] The Tribunal mentions the points of law addressed by the amendments, and seeks to ingrate Lekoa complaint's by focusing on unamended relief sought, in that Lekoa's heads of argument had detailed the qualification of section 5 (1) as constituting a contravention of the Act, in that prohibited practices existed in a vertical relationship.

[37] Moreover, Lekoa prayed for an order with various reliefs sought, The Tribunal focused on the unamended relief sought and omitted the rest of the sought reliefs. During the oral presentations <sup>15</sup>the Appellant stressed that withstanding the amended relief sought, in particular relief 8.7 "granting the complainant such further relief and/or alternative relief as might be deemed just" recognised the power of the Tribunal and subject the prayer to be superseded by the ruling of The Tribunal.

[38] In defence of Netstar position, The Tribunal erred in alleging that "there were clear pro-competitive justification grounds for the exclusive arrangement" without presenting the proof and when the Appellant had clearly invited proof on the basis that the Appellant had evidenced that Netstar did not have pro-competitive reasons for their admitted exclusive agreement.

[39] The Tribunal admitted Netstar's allegation of precluding<sup>16</sup> Lekoa from dealing with competitors' products on the basis of trade secrets , the Appellant has proven that although

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<sup>13</sup> Tribunal reason and decision para 11 to 17

<sup>14</sup> Tribunal reason and decision para 10

<sup>15</sup> Tribunal reason and decision page 45

<sup>16</sup> Tribunal reason and decision para 24

this a good thing to say it did not have merits as Netstar had fitment centres that were installing the competitors products.( The relevant fitment centres will testify)

Netstar did not train any technicians let alone give know how on where to install, that makes the footnote 7 on page 6 of Tribunal decisions incorrect. This further evidenced by the Appellant allegation<sup>17</sup> that returned unchallenged that Netstar did not train anyone neither did they provide any technical data.

[40] The technicians were the people who had the know-how and yet they were no restrictions on their migrating to the competition. Furthermore key direct employees of Netstar with trade and sales secrets joined the competition(Cartrack) with no enforcement.<sup>18</sup>

It therefore remains that the agreement precluded the Appellant from dealing with the competitor for the purposes of restricting the Appellant's ability to enter or expand into the market. With no options and access to alternatives the Appellant was dominated upon and squeezed on pricing and exposed to unfair practices such as forced branding, differential treatment, forced work

Submissions to the facts above were filed with the Tribunal

[41] The Tribunal erred by presenting information that is not available in the records<sup>19</sup> –by alleging that fitment centres in a position similar to that of Lekoa had increased their turnover and margins by selling/installing a host of products and services<sup>20</sup>. The aforementioned increased turnover allegation is not in the records. What is in the records is the fitment centres' collective complaints and minutes of the forum meetings that were never resolved.

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<sup>17</sup> Tribunal records para 131 page 219, para 331 page 229

<sup>18</sup> Tribunal records para 27.3 page 9

<sup>19</sup> Tribunal reason and decision para 24

<sup>20</sup> Tribunal records page 82 para 30.1.1

[42] The Tribunal erred by omitting such crucial information and by inferences propagated Netstar innocence at the same time discrediting the Appellant's cause.

The Tribunal records have minutes<sup>21</sup> paged 389 to 415 testifying on the effects of the exclusive agreements, where the fitment centres through the fitment centre forum had registered complaints on the effects of the exclusionary acts and exclusive agreement which are the same issues raised by Lekoa as in the records.

[43] Netstar alleged that the some fitment centres could undertake other products in addition to Netstar products and also stated that other fitment centre, of which Lekoa was one, could not fit other products as they were exclusive fitment centres to Netstar.<sup>22</sup> The Tribunal in their reasons and decision page 6, paragraph 24, rightly conclude that the Appellant was an "exclusive Netstar agent" but The Tribunal erred in accrediting Netstar with investment in development of Lekoa, as proven by the direction to take notice that Netstar had admitted to Appellant's investment.<sup>23</sup>

[44] The Tribunal advanced Netstar's allegations that the agreement permitted other non conflict products and the fitment centre was able to market and sell profitably with such products – The Tribunal failed to take into account that Netstar had conceded to this allegation as they had not responded to it.<sup>24</sup> In addition The Tribunal failed to take into account the Appellant's submissions<sup>25</sup> in their possession which pointed them to the clauses of the agreement which were applied by the Respondent to control and direct fitment centre business, through which all Netstar requirements preceded and superseded any fitment centre interests, the call centre and quality department had unlimited access to the fitment centre through clause 9.1.1 and 10.2<sup>26</sup>

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<sup>21</sup> Tribunal records fitment centre forum minutes

<sup>22</sup> Tribunal records page 82 para 30.1.2 Classification of fitment centre types

<sup>23</sup> Tribunal records para 35 page 86 and para 162 page 221 Netstar admitted to fitment centre investment

<sup>24</sup> Tribunal Rules 16(5) An allegation of fact set out in the Complaint Referral that is not specifically denied or admitted in an Answer will be deemed to have been admitted.

16 (6) In an answer, the respondent must qualify or explain a denial of an allegation, if necessary in the circumstances.

<sup>25</sup> Tribunal records page 218 para 122

<sup>26</sup> Tribunal records page 19,20 para 9.1.1 and 10.2 Fitment centre agreement

[45] The Tribunal promulgated on Netstar's intellectual property – the Appellant through their submissions has directed The Tribunal to the fact that whatever was available to the Appellant from Netstar was paid for<sup>27</sup>, Netstar went even further on and made the Appellant chargeable<sup>28</sup> for what was of no benefit to the Appellant.

[46] The fact that other fitment centres are installing<sup>29</sup> competitor's products nullifies the need for exclusive arrangements as mentioned earlier.

[47] Further, The Tribunal erred in supporting the "unlawful" nature of the agreement as alleged by Netstar, the Tribunal's implication that the exclusive agreement was not "unlawful" requires that they attend to the Appellant's allegations that there was no<sup>30</sup> pro-competitive gain<sup>31</sup>, only after the respondent has proven to the contrary, can the Tribunal statement be justified, as it is, it's just an allegation by Netstar that The Tribunal is buying into. Lekoa in its submission demonstrated that the fitment centres invested<sup>32</sup> into Netstar business by providing, tools, vehicles, premises, staff development and monetary value in the form of capital and operational expenses.

[48] The Tribunal's assumption of unlawfulness of the agreement did not address the particular requirement of seeking proof of the pro-competitive allegations, as indicated the earlier the respondent, Netstar, gave misleading information to the Commission the same

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<sup>27</sup> Fitment centre agreement clause 6.5/12.1/12.2/12.3 The Appellant paid for all costs

<sup>28</sup> Lekoa heads of argument page 23 para 7.10.9

<sup>29</sup> Lekoa heads of argument page 25 para 7.12.7 Netstar admitted to other fitment centres installing competitor products

<sup>30</sup> Tribunal records page 86 para 35 Respondent admission of Lekoa's investment

<sup>31</sup> Tribunal records page 221 para 155

<sup>32</sup> Lekoa Heads page 22 to 25 para 7.9.0 to para 7.12.7

strategy was applied and yet adapted by The Tribunal without asking for proof from Netstar and in turn submit that proof to Lekoa. In addition it has been proven<sup>33</sup> that the Respondent, Netstar, failed to comply with the Act by submitting knowingly providing false<sup>34</sup> information in contravention of section 73 (2) (a) ,(2)(d)

[49] In addition, The Tribunal erred in justifying Netstar's allegations of investment into Lekoa as by Netstar's own admission they benefited<sup>35</sup> from Lekoa through the enforcing<sup>36</sup> of BEE compliance<sup>37</sup> of the fitment centre. Admittedly gaining points on their BEE ratings.

[50] As an example the Respondent<sup>38</sup> forced<sup>39</sup> the Appellant to brand, the benefits of which were realised by Respondent and the costs were borne by the Appellant whose return on investment was restricted by the exclusionary pricing and practices.

[51] In addition Lekoa trained the technicians, which benefitted Netstar as they simply "poached" the Appellant's staff as and when they wished.

## **[52] Omission of Lekoa's evidence and submissions**

The Tribunal erred in that it did not take into consideration the Appellant's submissions in their reasons and decisions.

The Appellant indicated to the Tribunal that Netstar had misled the Commission<sup>40</sup> in its submissions, the Appellant submitted evidence that was not taken into account. Considering that the Tribunal had largely, taken the trouble to refer to the unamended parts of the

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<sup>33</sup> Tribunal records para 329 page 229

<sup>34</sup> Tribunal records para 54.1.1 page 93

<sup>35</sup> Tribunal Records 27.1 page 80

<sup>36</sup> Tribunal Records page 379

<sup>37</sup> Tribunal Records para 121 page 218

<sup>38</sup> Tribunal records para 35 page 86

<sup>39</sup> Tribunal page 318

<sup>40</sup> Tribunal reason and decision page 21,49



Appellant's submissions, but did not consider the Appellant's material facts against the Respondents allegations which were readily accepted, balance of facts was missing.

[54] The Tribunal perpetuates Netstar argument that Lekoa did not define a market, when Lekoa has alluded to the existence of a vertical relationship and the effects enjoined by the prohibited practices mandated by the agreement.

The maintenance of minimum resale price and the restrictive marketing confirmed Netstar position of super dominance<sup>41</sup>, where a total of over 100 fitment centres were limited to 2.5 % of sales proceeds and where 97.5% of the relevant market was guaranteed for Netstar.

**[55] Unfair pricing**

On the basis of a filed complaint on unfair pricing, The Appellant demonstrated competition in a relevant market where there was contestation for clients on the same products.

Minimum resale price was maintained through application documents that gave visibility to Netstar on all of Lekoa's transactions.

[56] The Respondent supplied the Appellant with wholesale pricing<sup>42</sup> and retail pricing, in the same instance selling at preferable<sup>43</sup> pricing in the same market as the Appellant. It remains therefore that the market is defined<sup>44</sup> and qualified by this action.

The Appellant demonstrated the effect of exclusionary and unfair pricing as a basis of anti-competitive practices, which restricted<sup>45</sup> the growth and development of a small business in the market. By virtue of investing in Netstar through compulsory stock purchases, the Appellant was naturally disposed to market<sup>46</sup> Netstar products.

[57] In addition the Appellant the anti-competitiveness was demonstrated by the Respondent's unfair prices to the market through special upgrades and ongoing specials.

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<sup>41</sup> Tribunal records page 222 para 176

<sup>42</sup> Tribunal records page 170 to page 173

<sup>43</sup> Tribunal records page 393

<sup>44</sup> Tribunal records page 7 para 23

<sup>45</sup> Tribunal records page 221 para 159

<sup>46</sup> Tribunal records page 214 para 58

The aforementioned specials were channelled through the use of Appellant owned stock, which meant that the anti-competitive practise of specials was that the Appellant was unable to sell but reluctantly provide their stock for Netstar's sells. Confining the Appellant to the position of unwilling buyer of goods, as these stocks were only purchased from Netstar at 100% mark up to Netstar.

Furthermore, the anti-competitiveness of the agreement was proven by the Appellant's complaint on introduction of Netstar's internal installers, which meant that Netstar was now competition with Appellant on sales and installations effectively lessening the opportunities for competition in that relevant market.

[58] The anti-competitive nature of unfair pricing was defined<sup>47</sup> in sub-paragraph 23.1, 23.2, 23.3, 23.4

The Respondents ability to determine<sup>48</sup> pricing structures was not only proof of dominance but anti-competitive in that it was exclusionary, in that both expenses of stock purchase and were dictated by the Respondent.

[59] TAKE NOTICE THAT all clients cash or rental were paying a premium monthly for recovery and other services rendered by Netstar, this meant that all clients were Netstar's and therefore needed to be protected from the independent pricing of the fitment centre that would affect uniformity of the product and services of Netstar. This was the cause of fixed pricing and margin squeeze of the Appellant.

[60]The Appellant made submissions on Netstar's market power which had restricted<sup>49</sup> the fitment centres to the alleged 2.5%, the figure of 2.5 % is unproven and is meant only to infer a sense of not "required to market" in pursuit of discrediting the existence of a market. However, as stated before, the marketing was not limited, but the ability of the fitment centre to draw business was limited through pricing arrangements as clients were poised to go for preferable premiums.

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<sup>47</sup> Tribunal records page 7

<sup>48</sup> Tribunal records page 16 para 6.6 and para 6.7 restricted the Appellant to set payment structures, regardless of work labour and expenses

<sup>49</sup> Tribunal Records page 73 para 11

**[61] Dominance**

TAKE NOTICE THAT Netstar did not disagree on their dominance but argued that it was mutual in that both parties were signatories of the agreement.

The Appellant demonstrated the existence of dominance in the vertical relationship between the parties:

- (a) by the effects of the exclusionary acts
- (b) the agreements in vertical relationship was prohibited for the reasons of inherent dominance
- (c) Netstar's admission of dominance on the basis of mutuality in both parties being signatories of the agreement
- (d) Netstar's justification for exclusive agreement on alleged pro-competitive grounds
- (e) Lekoa was not the only fitment centre affected, rather the exclusionary acts affected all the fitment centres as evidenced by the forum minutes contained in the records.
- (f) No pro-competitive gain - Netstar did not invest in fitment centre business

It therefore remains that dominance was present in that relevant market, hence the application of section 5(1) which prohibits the very practice that existed between the Appellant and the Respondent.

**[62] Restraint of trade**

As an example of Lekoa's relief sought, Netstar has rescinded on the restraint of trade, only after Lekoa had filed a complaint on the effects of the exclusive agreement.

Restraint of trade as an exclusive clause had its effects in the currency of the agreement; the rescindment of restraint of trade after termination of contract is of no benefit.

Netstar admitted on the restrictiveness of the exclusive agreement by rescinding the relief sought by Lekoa.

Rescinding the restraint of trade on the currently operating 100 fitment centre will definitely improve the opportunities for the fitment centre's to grow and participate in the market.

[63] Since Lekoa filed their complaint on 16 October 2013 and indicated the effects of the exclusive clauses, (which are the restrictive and principal part of the agreement), with a view to find relief for such effects, Lekoa holds the view that the trade restraint was the core exclusive clause through which all the all other restrictive practices were permeated and exclusiveness of the whole agreement.

[64] The fact that Netstar admitted to rescindment of the key exclusive clause meant that Netstar had admitted to contravention of prohibited practices, the Tribunal chose rather to let Netstar have its way regardless of Netstar's admission of clear violation and contravention of the Act.

Had been the relief(restraint of trade) been granted to Lekoa prior to termination on 8 January 2014, Lekoa would have been in a position to expand in the market as it would bargain it's position with any tracking company, and would have had the option to choose when and who to do work for.

[65] During the exception hearing Lekoa opposed the application on the basis of possession of facts and evidence demonstrating that the independence of the fitment centres was restricted through the exclusive clauses such as the restraint of trade which restricted the fitment centre to deal with the competitor's products

#### **[66] Impartiality**

The Presiding Officer is a former employee of the Netstar's legal representative<sup>50</sup>.

On presumption that all parties<sup>51</sup> were aware of this fact except Lekoa who only discovered this after the exception hearing, the process was flawed and the decision is biased.

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<sup>50</sup> Ms Carrim completed her articles at law firm Webber Wentzel.

<sup>51</sup> Section 31 (6)

[67] Conclusion

Lekoa were given the applicant's heads of arguments on the eve of the exception hearing.

Lekoa was prejudiced in their attempt to put up a fair response.

The agreement in all its form is in current use affecting more than 100 fitment centres, which are of the same opinion as Lekoa fitment centre upholding the exception application is a perpetuation of the contravention of Competition law.

[68] Considering the facts presented by Lekoa, the effects, duration of the complaints and Netstar unqualified response to the charges it is unfair for the Tribunal to uphold the exception on the reasons they have supplied.

[69] Lekoa felt it was unfair to be advised of the set down date by Netstar's legal representative and thereafter to be given no time to address the excipient's heads of argument, Netstar heads of argument were sent at 16:47 on 20 October 2014 when the set down was at 10:00am 21 October 2014. Lekoa was left with the option of oral defence, which is also taken out of context, as the audio records will prove, pursuant of the interests of the excipient.

[70] Lekoa did not have ample time to address Netstar heads of arguments adequately, seeing that the reasons for decision are based only on Netstar's heads; this proves that indeed Lekoa was prejudiced in their ability to respond to The Tribunal's reference documents, which are Netstar's heads.

Netstar heads were submitted same day as Lekoa but there is little or any meaningful reference made to any of Lekoa's submission, where such reference is made it is made in support of Netstar.

[71] In view of the projected tendency to accept untested allegations and deliberately obscure Lekoa's contribution while exaggerating on Netstar's, Lekoa would like to register the objections to the involvement of the Presiding Member, Ms Yasmin Carrim, who, as per information supplied on the Tribunal's website is a former employee of Webber Wetzel, the respondent's legal representative.

The Tribunal went beyond the scope of the exception hearing in that they delved into other matters that favoured Netstar, instead of determining the validity of the amendments and the existence of the alleged cause of action.

The Tribunal treated Lekoa submissions as of no substance by failing to recognise them even when presented with evidence.

[72] The Tribunal did not take Netstar to account for admitted or denied evidence put before them, nor did they factor in any of Netstar's denials, admissions and misrepresentations

The proceedings and records of the hearing is not reflected in the reasons submitted by The Tribunal, after consideration of the events of 21 October 2014, one is left with only one conclusion that something took place after the exception, to sway the outcome of the exception hearing in the excipient's favour. Lekoa therefore seeks an appeal as we feel we were prejudiced in the exception hearing.

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## PART 2 APPELLANT'S ANSWERING AFFIDAVIT

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### **[73] Response to the Reasons paragraphs**

**[74] Paragraph 1** The Tribunal states that they were called upon

- (i) to determine whether an exception raised by the excipient, Altech Netstar ("Netstar"), that a complaint brought against it by Lekoa Fitment centre ("Lekoa") discloses no cause of action was to succeed and
- (ii) were required to determine whether certain amendments which Lekoa sought to bring to remedy the allegedly defective complaint referral were validly made in terms of rule 18

[75] It was the responsibility of the Tribunal to determine whether Lekoa's submissions sufficiently disclosed cause of action.

The cause of action emanated from the fitment centre agreement, of which all parties have access to, in that copies of the same were submitted. It is on the basis that all parties are acquainted with the contents of the fitment centre agreement, where all Lekoa's complaints, cause of action are derived from the exclusive clauses therein. Lekoa indicated that their heads of arguments demonstrated the effects of the exclusive clauses in the agreement, the cause of action, through elaboration of the facts and applicable law, Chapter 1 section 2 (e), Chapter 2 section 5(1), Chapter 2 section 8 (c), 8 (d) and Chapter 2 section 9 of The Competition Act.<sup>52</sup>

[76] Furthermore Lekoa expounded their cause of action as a continuation to the outcome of the Competition Commission's ("Commission") decision, whose reasons were put forward by Lekoa as falling short as a result of misleading submissions from Netstar.

[77] The effects of the agreement were also elaborated to during the presentation of the cause of action facts. Netstar did not contest the demonstrated cause of action.

In our view the Tribunal did not consider the inputs and lack of inputs thereof from both parties in as far as determining whether the complaint brought by Lekoa had successfully disclosed the cause of action. Since this was the main agenda and no attention had been paid to it, Lekoa has cause for concern for this development and strategy.

[78] The matter of cause of action degenerated into a dispute escalating into legal technicalities and interpretation of definitions on markets and dominance, whose veracity where untested.

It therefore remains that Netstar's attempt in support of their exception application was inadmissible for lack of material facts and/or alternatively, Lekoa indicated their objections to Netstar's allegations of market and dominance, the submissions of which were not considered.

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<sup>52</sup> Lekoa heads of argument pages 12 - 26

[79] The issue of existence of a relevant market was demonstrated by Lekoa as the fact that Netstar had market power in its area of operation. In that the agreement enforced Lekoa, an exclusive<sup>53</sup> fitment centre<sup>54</sup>,

(i) not to quote for pricing<sup>55</sup>, This exclusive clause formed the basis of unfair pricing and unpaid work

(ii) to rent<sup>56</sup> tools<sup>57</sup> only from Netstar, This clause reclaimed fitment fee payments even when there were no payments at all.

(iii) not deal with Netstar's competitors<sup>58</sup>, Lekoa was responsible for operational overheads which benefited Netstar, for the purposes of carrying out the 'fitment centre operations' which did not benefit Lekoa. Netstar had exclusivity to Lekoa resources, which they did not pay for.

(iv) to make use only of Netstar price maintenance documents,

(v) to employ staff only approved by Netstar,

(vi) exclusive right of to terms of fitment centre staff employment

(vii) exclusive rights to determine quality<sup>59</sup>

(viii) exclusive rights to access to fitment centre premises and operations, exclusive access to fitment centre resources,

(ix) to purchase products only from Netstar,

(x) Lekoa to sell the same product at prices determined by Netstar,

(xi) to compete with Netstar for clients when Netstar had better price offerings to the client.

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<sup>53</sup> Tribunal noted the classification of Lekoa as exclusive Netstar agent

<sup>54</sup> Tribunal records page 82 para30.1.2 Netstar's classification of Lekoa

<sup>55</sup> Fitment centre agreement clause 6.6 Lekoa was prevented from seeking costs to work done.

<sup>56</sup> Tribunal records page 5 para 20.2

<sup>57</sup> Fitment centre agreement clause 6.2 and clause 8.1.4 these tools were of no benefit to fitment centre as they were for programming Netstar products, which could have been programmed by Netstar prior to purchase and delivery

<sup>58</sup> Fitment centre agreement clause 15.1

<sup>59</sup> Fitment Centre agreement clause 5.1 Netstar did set standards



This is a summary of a contravention of sections 2 (e), 5 (1), 8 (c), 8 (d) and 9 (1)

[80] Netstar required the fitment centres to sell<sup>60</sup> and market the products; Lekoa demonstrated to the Tribunal that Netstar went into competition with its hundred fitment centres that formed the national fitment centre network. Furthermore Netstar went into competition with its fitment centres to install, register, re-register and service Altech Netstar Products.

[81] Lekoa indicated to the Tribunal the fitment centre forum minutes and the meetings held in consultation with Netstar on the harmful effects of the agreement and the fact that Lekoa had informed Netstar that it will consider external arbitration to their cause.

[82] By adopting all Lekoa's amendments Netstar had inadvertently admitted that the complaint legally expressed the cause of action, the perpetuation of the argument further on was not the objective of the exception hearing.

[83] Furthermore, the adoption of the amendments by all parties necessitated that the Tribunal was directed to take notice of the notice of motion<sup>61</sup> for the dismissal of Netstar's exception application on the basis of contravention of section 72 and section 73.

[84] Alternatively by accepting the amendments of 16 September 2014 which sought a dismissal of the exception hearing, The Tribunal should have dismissed the exception application forthwith, as Netstar was not compelled to accept the 16 September 2014 but did so on free will.

[85] The matter of Netstar's integrity<sup>62</sup> was raised by Lekoa as the basis of dismissing the exception on the grounds of confirmed lies and misrepresentation and moreover this was

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<sup>60</sup> Fitment centre agreement schedule 1 a minimum of 40 fitments was compulsory

<sup>61</sup> Rule 22 (c) (ii) addressing of any pending notices of motion

<sup>62</sup> Lekoa fitment heads of argument page 7 para 3.8 to para 3.8.13

Lekoa reasons for seeking a fair hearing were Netstar would be accountable for evidence to all submissions made.

[86] The above demonstrates that the exception hearing was flawed as Lekoa's inputs were ignored.

The Tribunal was informed that all Netstar submissions were misleading and Lekoa justified the need to dismiss the exception application and proceed to a hearing where both parties would have had the opportunity to prove and/or amplify on their disputed submissions.

The Tribunal did not address the objectives of the exception hearing in that they failed to address the agendas as applied for.

[87] Paragraph 2

The relationship of Netstar and Lekoa fitment centre has been briefly described in paragraph 23 above. Where Lekoa was an exclusive BEE fitment centre which was contracted to carry out "fitment centre operations"

**[88] Paragraph 3** The Tribunal summaries the mandate of the fitment centre agreement as follows:

Lekoa would perform the "installing, registering, re-registering and servicing of Altech Netstar Products" to a particular standard; and  
Netstar would pay Lekoa a predetermined fee for each time it performed the "installing, registering, re-registering and servicing of Altech Netstar Products"

[89] The Tribunal did not take into account facts(evidence) submitted by Lekoa fitment centre that Netstar only paid<sup>63</sup> for "installing" , which was a once-off<sup>64</sup> fee and that Lekoa's

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<sup>63</sup> Tribunal records page 85 para 32 Netstar admitted

<sup>64</sup> Tribunal records page 4 para 14

complaint was raising issues on none payment for registering, re-registering and servicing of Altech Netstar's products.<sup>65</sup>

[90] The agreement was harmful to the small business in none payment for exercises that were responsible for high operational costs, the losses premised on these practices constituted a practice that defeated the purpose of the Act, hence the emphasis on section 2(e) demonstrated through sections 5 (1), 8(c), 8(d) and 9 (1)

[91] The enforcement of the fitment centre agreement resulted in extending beyond the "installing, registering, re-registering and servicing of Altech Netstar products" as Netstar compelled the fitment centres to sell and market their products. Both Netstar and the fitment centres were in competition for the "installing, registering, re-registering and servicing of Altech Netstar business as well as the sales and marketing.

[92] In the course of the exception hearing, there arose a question of legal representation for Lekoa behind the scenes, Lekoa was given an opportunity to define the market in layman terms and did so, which was not contested by Netstar

**[95] Paragraph 4** The Tribunal states that the relationship between the parties reached breaking point during the course of 2013, resulting from alleged non compliance by Lekoa with certain technical and other performance standards provided for in the agreement. Lekoa, on the hand other hand, alleges its grievances stems from monies owed to it. The contractual relationship ended in early 2014 when Netstar terminated for alleged material breach by Lekoa.

[96] Lekoa is failing to understand why The Tribunal find it necessary to mention paragraph 4, as it is not correct and far from the facts of the case.

Lekoa submitted to The Tribunal proof by dates, that several meetings had taken place to try and resolve disputes between the parties, prior to 2013. Lekoa submitted proof that the fitment centre forum was opened for the reasons of addressing the agreement that was the

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<sup>65</sup> Tribunal records page 4 para 18 Netstar did not pay for registering, re-registering and servicing of Altech Netstar's products.

root causes of all problems and that these problems persisted until Lekoa filed its complaint on 16 October 2013.

[96] Furthermore, Lekoa presented evidence that they enquired on the role of the Competition Authorities as early as 2012 by way of emails.

[97] Moreover the breaking point can only be that when Lekoa filed the complaints to The Tribunal, Netstar responded by terminating the agreement as proven to The Tribunal in Netstar's communications to its legal team.<sup>66</sup>

[98] TAKE NOTICE THAT only Lekoa's notifications were served by Netstar's legal team as from 19 November 2013 in preparation of the quality allegations as a counter charge against Lekoa for filing complaints with the Commission. Thereafter quality issues, even as perpetuated by the Tribunal have been a red herring to divert attention from the complaints.

Tribunal repeats the same technique this time accusing Lekoa of making long drawn justifications for deficiency.

It therefore remains that Lekoa was terminated for filing a complaints with the Commission.

#### [99] Unfair practices

Lekoa listed a host of the exclusionary and restrictive practices and their effects as the reasons for filing a complaint, through the submitted proof in the form of the forum minutes, most of the complaints were common to all fitment centres.

[100] For example ,The fitment centre forum's main concern was that Netstar was going into competition with its fitment centres by employing internal installers, this and not monies owed to Lekoa was the basis of Lekoa's complaints, unfair practices in a vertical relationship through the agreement amongst others

**[101] Paragraph 5** The Tribunal states that , on 16 June 2013, Lekoa filed a complaint with the Competition Commission("Commission"), in the prescribed form and sought relief of among others rescinding of the termination of the contract.

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<sup>66</sup> Tribunal records page 116 Netstar received complaints for Commission on 29 October 2013 and initiated charges against Mr Sibanda on 30 October 2013

[102] When one considers the reasons put forward by the Tribunal in paragraph 4 and 5, even cursorily; it becomes immediately evident that certain aspects thereof, particularly in respect of termination in paragraph 4 and relief sought in paragraph 5, are inherently contradictory. TAKE NOTICE THAT Lekoa filed their complaint on 16 October 2013 and not 16 June 2013 as alleged by The Tribunal.

TAKE FURTHER NOTICE Lekoa was terminated on 8 January 2014 and therefore Lekoa could not have filed a relief for rescinding of termination before they were terminated.

The Tribunal having adapted Netstar arguments and supporting them failed to separate on facts as they occurred.

[103] Paragraph 5 demonstrates that the Tribunal erred in that they did not put any effort to establish the merits and facts of the complaints, investigations and reasons for non-referral put forward by the Commission, instead, in the bid to legitimise Netstar's heads of argument, The Tribunal adapted Netstar heads of arguments as can be demonstrated in the comparisons of Netstar's heads paragraph 38, Reasons paragraph 32, heads 42 reasons 33.

[104] Paragraph 6 The Commission investigated the complaint and on 11 June 2014 issued a Notice of Non-referral in terms of section 50 of the Act, on the basis of "reasons provided by Netstar for concluding exclusive agreements with its fitment centres" attached hereto as Annexure GS 2.

The reasons of which Lekoa disputes as untested and misleading.

[105] Paragraph 7 The Tribunal states that Lekoa referred the matter because they were dissatisfied with the Commission's decision not to refer.

Lekoa as a complainant was never asked by the Commission to weigh in on Netstar response, The Commission accepted Netstar response without seeking verification on any of it. Lekoa has proven in its heads of argument that Netstar's submission to the Commission was misleading.

[106] Paragraph 8 The Tribunal alleges that Lekoa amended its CT 1 form in an effort to cure the alleged "defects". The Tribunal is aware that such curing as provisioned for in

Competition law<sup>67</sup>. The purposive Act of section 2(e) and the prohibitory acts in chapter 2 conclusively form the basis of our filing the complaint to the Tribunal and our testimony through the nominated platforms are cause of action, as already proven in our submissions

Paragraph 9 Netstar accepted the amendments

[107] Paragraph 10 The Tribunal was called upon to determine whether the referral in its amended form contained the necessary allegations to sustain a complaint referral.

Paragraph 10 has been addressed in paragraph [35] above, where it was demonstrated that The Tribunal did not take into account the amendments in drawing their reasons.

Furthermore, when Netstar addressed the unamended relief sought, The Tribunal did not only follow suit in Netstar footsteps but exaggerated on the points raised by Netstar, for example the amendments had been accepted by all parties, the reasons were supposedly concluded after the exception hearing which had adopted the amendments and yet The Tribunal still referred to the unamended relief sought because Netstar had mentioned it in paragraph 35 of their heads of argument, the heads of which had been altered by acceptance of the amendments

[107.1] Paragraphs 11 to 17 are front runners to an argument that is not addressing what had been set out to be expounded in paragraph 10, in that it has not taken into account the amendments.

Furthermore the Tribunal is undermining the relevance of section 2(e) by seeking to imply that Lekoa misapplied its significance, when Lekoa in its amendments made it clear that section 2(e) is not a prohibitory practice.

[107.1] The relevance of Section 2(e) should never be undermined by any party, moreso by the Tribunal in light of the facts that the exclusivity clauses, integrated<sup>68</sup> the small business

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<sup>67</sup> Rule 18 (1) provisions for amendments

<sup>68</sup> Tribunal records page 222 para 164 The fitment centre was the income generator

into Netstar and were made economical dependants, who could not realise a return on investment<sup>69</sup> due the aforementioned<sup>70</sup> effects of the agreement.<sup>71</sup> It is as a direct result of the agreement, inclusive of the exclusivity clauses, in its entirety, within a vertical relationship that Netstar exercised its dominance.<sup>72</sup>

[108] Par graph 18 Section 5(1) at its simplest prohibits an agreement between firms in a vertical relationship if it has the effect of substantially and adversely affecting competition in a defined market.

The effects of the agreement which lessened and or prevented substantial competition were filed by Lekoa. Section 5(1) has been covered since all the effects which were put forward by Lekoa were showing the lessening of competition and growth. Take Notice that unfair pricing and unpaid works were a result of the exclusive clause in the agreement where the Fitment Centre was not allowed to quote as described above. The last part of the 5(1) clearly states that .....“unless a party to the agreement can prove that any technological, efficiency or pro-competitive, gain resulting from that agreement outweighs that agreement.” In Lekoa’s founding affidavit we vehemently refused the allegations that were submitted by Netstar to Competition Commission and to the Tribunal. Lekoa even said could invite witnesses to dismiss these submissions or Netstar was supposed to provide proof of whatever form of technological efficiency or pro-competitive gain they offered to the Fitment Centre.

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<sup>69</sup> Lekoa heads of argument page 27 para 8.5 Through clause 9.1.1 and 10.2 of the agreement Netstar claimed all monies paid to Lekoa

<sup>70</sup> Paragraph [79] above

<sup>71</sup> Tribunal records page 4 para 16 and para 19

<sup>72</sup> Tribunal records page 4 para 9

[109] In Paragraph 19 The Tribunal alleges that the relief sought by Lekoa was incompetent.

Paragraph 19 is addressing the unamended relief sought. The relief sought was addressed by the amendments as illustrated by Annexure GS 3 and The Tribunal did not apply the amendments in their reasons. The rescindment of termination was no longer a relief sought for.

[110] As demonstrated in paragraph [108] above, the agreement contravened the section 5 (1) of the Act, hence, it was supposed to be declared a vertical anti-competitive agreement. Furthermore if the agreement was prohibited, the Tribunal is expected to exercise its authority to grant the complainant such further relief and/or alternative relief as might be deemed just.

The Tribunal had options to explore all of Lekoa's sought relief and yet opted on the rescindment of termination that was long invalidated by the amendments.

[111] As an example of Lekoa's relief sought, Netstar has rescinded on the restraint of trade, only after Lekoa had filed a complaint on the effects of the exclusive agreement. This typical change does not imply that the relief sought in this regard was expecting the Tribunal to draft a new contract and impose it on Netstar but rather that the Tribunal was approached by Lekoa to remedy that which was defective according to the Act. In the same way that Netstar admitted to the contraventions premised on the restraint of trade the same is applicable to the exclusive clauses raised in paragraph [79]

[112] Paragraph 20 The Tribunal enquired on Mr Sibanda's understanding of the relief sought.

Mr Sibanda confirmed that he understood clearly he further pointed out to the amendments; this was in reference to the relief sought in the amendments.



[113] Paragraph 21 The Tribunal states that “Notwithstanding the inherent difficulty in the relief sought by Lekoa”

The Tribunal’s follow up of paragraph 20, addressed above in [112], describing the relief sought as “inherent difficulty” is an exaggeration, considering that as explained above this was an inference of old amendments into the new referral founded on Chapter 1 section 2 (e), Chapter 2 section 5(1), Chapter 2 section 8 (c), 8 (d) and Chapter 2 section 9

Furthermore, the Tribunal alleges that they “sought to enquire whether the alleged vertical arrangement between Lekoa and Altech warranted cause for concern”,

Lekoa responded by summarising it’s submitted papers and pointing out to consideration of their heads of argument.

The exception hearing did not accommodate a full enquiry to substantiate whether the vertical arrangement between Lekoa and Netstar warranted cause for concern but rather a dialogue ensued between the Tribunal and Lekoa, in which Lekoa responded duly.

But as stated by The Tribunal in paragraph 10 above The Tribunal was “ultimately called on to determine was whether the referral as amended, contained the necessary allegations to sustain a complaint referral”, the amendments were admitted by all parties but the Tribunal focused on the unamended relief that had been argued in Netstar heads of arguments that were concluded before the amendments had been addresses and accepted by all parties.

**[114] Paragraph 22** *The Tribunal states that , Lekoa alleges the terms of agreement “imposed” upon it by Netstar prevented it from dealing with any products or services of Netstar’s competitors . This , so it is argued, contravened section 2(e) ... it is undoubtedly not the appropriate test to employ when determining whether a particular agreement runs afoul of a specific provision of the Act.*

[115] Netstar founding affidavit<sup>73</sup> attests to prevention of Lekoa from dealing with competitor products. The effect of this clause, restraint of trade, prevented Lekoa, a small business from expanding into the market, this is the direct contravention of section 5 (1) in

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<sup>73</sup> Tribunal records page 80 para 27.2

that the effects prevented the small business from entering into the market by dealing any products or services of Netstar's competitors.

With the fitment centres as a collective, restricted to 2.5% of market. By dealing with the competitor's products and services Lekoa would have had an opportunity to increase their sales from the 2.5%<sup>74</sup>; this would have translated into growth of a small business. Therefore the clause impeded<sup>75</sup> growth as illustrated in paragraph [60] above.

**[116] Paragraph 23** *The Tribunal alleges that Lekoa 'could in no way refer The Tribunal to some lessening of competition in any relevant market, let alone in its area of operation'*

In Lekoa's interaction with The Tribunal, Lekoa gave an example on the effect of the practice of unfair pricing<sup>76</sup> and explained that Netstar and Lekoa were competing for clients. In paragraph 25, The Tribunal admits to having read Lekoa's heads although that particular paragraph the heads of arguments were quoted in bad light

[117] However, The Tribunal having consulted with Lekoa's heads, they should have noted that paragraph's 2.4 and 2.5 of Lekoa's heads of argument describe the market in which, in a vertical relationship the supplier's, (Netstar's) agreements rendered the downstream activities of its competitors, Lekoa, unprofitable, while the supplier, Netstar, supplies its own operations at a preferential rate.

This is further demonstrated in detail by means of calculations and examples in Lekoa's heads of argument, in paragraphs 7.4 up to paragraph 7.7.12 page 15 to page 20<sup>77</sup>

Lekoa illustrated by way of charts, the effect of the clauses that restricted them from claiming payment for work done by means of graphs and charts<sup>78</sup>

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<sup>74</sup> Tribunal records page 87 para 38. 1 "....this is evidenced in the independent fitment centre sales comprising only approximately 2.5% of the Netstar's total device sales.

<sup>75</sup> Tribunal records page 221 para 159

<sup>76</sup> Tribunal transcript page 29

<sup>77</sup> Lekoa heads of argument page 15 to 20

<sup>78</sup> Tribunal records page 272 to page 274

The Tribunal has chosen to ignore Lekoa's input and have largely exaggerated Netstar's contribution.

Lekoa received Netstar heads of argument on the eve of the exception hearing, which prejudiced Lekoa on their preparations, although Lekoa submitted their heads of argument on the same day as Netstar, Lekoa heads of arguments have not been considered.

The reasons are actually based on fault lines as they based on one line of argument, defending Netstar admitting allegations that have not been tested.

[118] Paragraph 24 The Tribunal states that "Netstar explained that the agreement was an exclusive arrangement, which was not per se unlawful under the Competition Act"

It is not what one party alleges but what the Act dictates, based on the Competition Act; Lekoa in its heads of argument page 12 demonstrated the relevant laws pertaining to their complaint

As an example

5 (1) An *agreement* between parties in a *vertical relationship* is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the *agreement* can prove that any technological, efficiency or other pro-competitive, gain resulting from that *agreement* outweighs that effect.

8 (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 –

Section 5(1) is very clear as admitted to by The Tribunal in paragraph 18 above.

Through the agreement Netstar was

the Exclusive supplier

Exclusive rights to pricing

Exclusive rights to pronounce on quality (in that there was no quality referencing standard, anyone appointed by Netstar would determine quality on their behalf)

[119] The Act<sup>79</sup> states that Netstar, in this case, must prove that there was pro-competitive benefits, and Lekoa must prove that there was no pro-competitive gain<sup>80</sup>, which Lekoa has maintained from their first affidavit<sup>81</sup> that there was no pro-competitive gain for the exclusive agreement.

Therefore, since Netstar did not provide proof of the said pro-competitive gain and seeing that The Tribunal had already reached a conclusion, how was this possible without proof from Netstar?

[120] The Tribunal's implication that the exclusive agreement was not "unlawful" requires that they attend to the Complaint's allegations that there was no pro-competitive gain, only after Netstar has proven to the contrary, can the Tribunal statement be justified, as it is, it's just an allegation by Netstar that The Tribunal is buying into. Lekoa in its submission demonstrated that the fitment centres invested<sup>82</sup> into Netstar business by providing, tools, vehicles, premises, staff in the form of capital and operational expenses.

[121] The Tribunal's assumption of unlawfulness of the agreement did not address the requirement for proof to any allegations of technology, efficiency or pro-competitive gain, as indicated earlier that this was the strategy applied by Netstar to the Commission and yet adapted by The Tribunal without asking for proof from Netstar and in turn submit that proof to Lekoa.

[122] The Tribunal states that there were "clear pro-competitive justification grounds for the exclusive arrangement."

There could not have been "clear" pro competitive grounds where no proof had been submitted, as Netstar did not present any proof, Lekoa opposed the exception application

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<sup>79</sup> 5 (1) .....unless a party to the *agreement* can prove that any technological, efficiency or other pro-competitive, gain resulting from that *agreement* outweighs that effect.

<sup>80</sup> Records para 25.3 page 8

<sup>81</sup> Records para 17 page 4

<sup>82</sup> Lekoa Heads para 7.9.0 to para 7.12.7 pages 22 to 25

on the basis of possessing proof that Netstar did not invest in any way that Lekoa or any other fitment centre benefited<sup>83</sup>

[123] Netstar have been proven to have misled the Commission and Netstar has submitted misleading information to the Tribunal, which has been pointed out to the Tribunal, even though it was available for them to see, on this basis proof should have been demanded before admitting any of Netstar allegations, failure of which the exception should have been dismissed.

The Tribunal again is taking Netstar's side unjustifiably, passing allegations for facts by stating that Netstar had "invested in the development of Lekoa as an exclusive Netstar agent." When Netstar admitted<sup>84</sup> to Lekoa's capital and operational investments.

[124] The Tribunal's unjustified defence and exaggeration on behalf of Netstar is very apparent once more, Netstar agreed to Lekoa's investment and therefore cannot at the same time suggest that they invested in Lekoa's development, Netstar admittedly benefited<sup>85</sup> from Lekoa through the enforcing<sup>86</sup> of BEE compliance<sup>87</sup> of the fitment centre.

[125] The Tribunal alleges that, "however Lekoa was never concerned about the exclusivity clauses prior to the hearing"

The basis of Lekoa filing a complaint was that the exclusivity clauses affected the small business to expand into the market, the summed effect of which is premised on section 2(e), the means and process was through the listed prohibited practices of sections 5(1), 8(c), 8(d) and 9(1) and through Annexures demonstrated that the fitment centre was controlled and directed by Netstar<sup>88</sup> The multiple effect of the exclusivity clause was

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<sup>83</sup> Lekoa heads of arguments page 22 up to page 26 para 7.9.1.1 to 7.14.2

<sup>84</sup> Records para 35 page 86

<sup>85</sup> Records 27.2 page 80

<sup>86</sup> Records page 379

<sup>87</sup> Records para 121 page 218

<sup>88</sup> Tribunal records page 214 para 56 and 215 para 62

apparent in that while it was anti-competitive<sup>89</sup> and precluded Lekoa from dealing with competitor products it confined Lekoa to carry out unpaid work due to high volumes of repairs caused unreliable products and system.<sup>90</sup>

Lekoa has addressed this point in paragraph [79]

Moreover, the harm by exclusivity clauses has been documented in Lekoa's communications as in the paginated bundle and heads of argument.

The Tribunal did not pay attention to Paginated Records para. 16 to para 24 page 4 to page 7. 36 page 213 and Paginate Records page 523 as these submissions are all recorded in the founding affidavit as causing harm, whose effect was lessening and preventing competition in Netstar's area of operation with its fitment centres.

The effects such as forced branding<sup>91</sup> have created a dialogue<sup>92</sup> that is very apparent to all parties<sup>93</sup> and yet this forced<sup>94</sup> marketing escaped The Tribunal even when they had evidence that the fitment centres were forced to market and sell Netstar products

The exclusive clauses are one and the same thing with the agreement; the agreement without the exclusive clauses will not have given Netstar the dominance factor. The Tribunal did not consider Lekoa's heads of argument on the exclusivity factor of pricing, as it is demonstrated on page 16 to 20 of Lekoa's heads of argument.

The Tribunal did not consider the submissions by Lekoa that the exclusive<sup>95</sup> pricing was unfair<sup>96</sup> as it was exclusionary<sup>97</sup> and restrictive.

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<sup>89</sup> Annexure LK 12 The fitment centre forum issues an attempt to address the exclusivity clauses.

<sup>90</sup> Annexure LK 10 system unreliability resulting in formation of fitment centre forum

<sup>91</sup> Records para. 20.11 page 6

<sup>92</sup> Records para. 47 page 90

<sup>93</sup> Records page 316 to page 331

<sup>94</sup> Records page 503

<sup>95</sup> Lekoa heads para. 7.6.4

<sup>96</sup> Records para.23 page 7

<sup>97</sup> Lekoa heads para.7.4 page 15

It has been proven that Lekoa was an exclusive fitment centre for Netstar operations only and was not able to diversify on area of operation due to Netstar enforcement of the exclusivity rights.

Fitment centre was forced to work pursuant of the agreement clauses 10.2 and 9.1.1; this again has been proven to the Tribunal.

[126] TAKE NOTICE THAT Lekoa raised the harmful effects of exclusive clauses in the agreement and Netstar admitted to the harm and rescinded the restraint of trade<sup>98</sup>

[127] Lekoa fails to understand the effort by The Tribunal to distance themselves from admitting Lekoa's submissions. In their notification for set down date the Tribunal advised both parties to prepare heads of argument as they might be required. In view of this Lekoa prepared their heads, when heads were requested Lekoa observed that Netstar submitted their heads of argument, Lekoa followed suit, as an obligation to the set down notification. Netstar introduced new issues in their heads of argument but The Tribunal is not asking questions. Our heads of argument was not the first time to oppose the exception application; Lekoa opposed the exception application from the first day it was submitted, on the basis of possessing evidence on the effects of the fitment centre agreement within the vertical relationship.

[128] TAKE NOTICE THAT The Tribunal has noticed the lengthy record of correspondence evidencing the origin of Lekoa's complaint and The Tribunal has also come to the conclusion that Lekoa's complaint has been about defending itself against allegations of deficient service. In all this The Tribunal was biased and failed to see the source of the allegations from which the allegations are originating. It cannot be correct that The Tribunal has update not conceded to the fact that Lekoa filed a complaint before they were terminated. The quality allegations are a decoy and attempts to destroy evidence of anti-competitive practices. The Tribunal is assisting Netstar to avoid addressing the basis of the complaints, through the decoy of termination and quality allegations.

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<sup>98</sup> Fitment centre agreement clauses 15.1 to 15.3 Lekoa not allowed to deal with competitor products

[129] Paragraph 26 The Tribunal alleges that “the exclusivity clause has become irrelevant” The reasons in paragraph 26 could not have been presented by a mediator, especially in this case that all parties are fully aware that the complaint was filed on 16 October 2013(not 16 June 2013 as suggested in paragraph 5 of the decision and reasons), the contract was terminated on 8 January 2014.

[129.1] The termination was not part of the initial complaint but was in addition Lekoa’s filing on the effects of the exclusive clause post termination.

Furthermore The Tribunal is aware<sup>99</sup> of the period and time frames for one to lodge complaints after practise ceased. Reasons based upon such an approach is not admissible, moreso when the Tribunal has been informed<sup>100</sup> that this harmful practice although admitted and promised to be waived, is still in practice and affecting other fitment centres<sup>101</sup>. The Tribunal has allowed Netstar to waiver it only for one out more than 100 fitment centres.

Unfair for The Tribunal to continually make reference and affirm quality of service that has not been proven, the fact that this is matter for them to repeatedly consider confirms it’s subject to a hearing and therefore dismissal of the exception application. The logic applied in this paragraph, in the absence of and outside of a formal hearing, is unfair.

[130] Paragraph 27 a relevant market has been demonstrated, proof of such marketing exists, in that prior to the introduction of Tracker and other tracking companies a vehicle tracking market existed. Netstar as the pioneer of this market operated within this market without other tracking companies. Netstar operated in this market with its fitment centres that is why Lekoa states that a market existed and Netstar was in competition with its fitment centres in that market and area of its operations. This market is relevant to both parties area of operation.

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<sup>99</sup> In terms of section 67 a complaint in respect this prohibited practice it is within three years.

<sup>100</sup> Lekoa heads of argument page 27 para 8.3

<sup>101</sup> Tribunal records page 231 para 369 100 fitment centres precluded from dealing with competitor products



[131] Paragraph 28 The Tribunal alleges that Lekoa's response on market definition was unsatisfactory.

Lekoa explained that this market still exists even though Lekoa was terminated as the same agreement is still affected to more than 100 fitment centres. Lekoa case is not an isolated incident and cannot therefore burden upon the reasons supplied by the Tribunal. The Tribunal was informed of the fact that Lekoa is not the only fitment centre and the same agreement is currently in force, regardless of the waiver awarded to Lekoa, the same exclusivity clauses are still in force.

[132] Paragraph 29 the recordings of the exception hearing can prove what Mr Sibanda said

[133] Paragraph 30 The Tribunal is using untested and unproven allegations submitted by Netstar without hesitation, these statistics are based on Netstar whose integrity on submissions has been proven as misleading. Lekoa prayed for a hearing to prove these statistics to be false.

[134] Paragraph 31 The Tribunal has registered sympathy to Lekoa for the difficulties and investment.

The effects based test is admittedly noted by the Tribunal and it is only by an opportunity through a hearing that dominance can be proven, as evidence and witnesses play a pivotal role in such a matter that cannot be conclusively addressed in an exception hearing.

Lekoa has proven in all its documentation the effect of the vertical arrangement, that it substantially lessened and prevented competition through Netstar unfair pricing, unfair practices and abuse of dominance.

[135] Paragraph 32 The Tribunal alleges that Lekoa is making contractual disputes.

This is a clear adaptation of Netstar argument, however, this argument is the other side of Lekoa's complaint that the agreement which they refer to as the contract is the root cause of the complaint, this is both an admission and a denial of section 5(1) the difference is that The Tribunal, just like Netstar are instructing us to address our matter in a civil court, Lekoa is simply stating that the agreement/contract was prohibited in a vertical relationship.

[136] The contract, that is the agreement ,is one and the same with its exclusivity clauses, which had the effect of substantially lessening and preventing completion as demonstrated by Lekoa through its amendments, affidavits and heads of argument is what The Tribunal is directing us to refer to a civil forum.

[137] The exclusive clauses had their effects in the currency of the agreement post termination.

The Tribunal were informed that the exclusivity clauses<sup>102</sup> used to justify the outcome for termination, still affects the operating fitment centre, The Tribunal has to bear in consideration that this complaint although lodged by Lekoa affects other 100 fitment centre as evidenced by the fitment centre Forum minutes.

Although some fitment centres have not come forward they are victims of the same agreement.

[138] Paragraph 33 Tribunal alleges that Mr Sibanda failed to prove relevant market, I am sure the audio records are available. It is unfair that Netstar's allegations are taken as gospel truth and Lekoa's submissions are ignored. Netstar lied on all their submissions and did not submit a single proof or facts but simply relied on points of law, The Tribunal bases its arguments trying to find conflict in Lekoa's submissions where it does not exist. In paragraph 33 The Tribunal once again conflicts it's facts on the amendments, the amendment were accepted by all parties and yet The Tribunal demonstrates that they did not have the amendments in mind for their reasons and decisions.

[139] Paragraph 34 The Tribunal alleges that Lekoa did not adequately lay a foundation for competition law case.

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<sup>102</sup> Fitment centre agreement clauses 9.1.1 and 10.2 No convectional quality standards, Netstar reserved to determine on quality

The Tribunal did not apply the amendments in their reasons and decisions. Lekoa heads of arguments have not been admitted at all, even though they were submitted on the same day as Netstar and even though Lekoa prayed for their consideration.<sup>103</sup>

The Tribunal as mentioned above, did not apply the amendment in the build up to their reasons but rather used the unamended especially the relief sought. The introduction of the unamended part of the complaint and the introduction of the amendments as substitution in conclusion infuses an unfair logic and consequently reasons that are not based on the developments of the case.

#### [140] Conclusion

Lekoa were given the applicant's heads of arguments on the eve of the exception hearing. Lekoa was prejudiced in their attempt to put up a fair response.

The agreement in all its form is in current use affecting more than 100 fitment centres, which are of the same opinion as Lekoa fitment centre, upholding the exception application is a perpetuation of the contravention of Competition law.

Considering the facts presented by Lekoa, the effects, duration of the complaints and Netstar unqualified response to the charges it is unfair for the Tribunal to uphold the exception on the reasons they have supplied.

Lekoa felt it was unfair to be advised of the set down date by Netstar's legal representative and thereafter to be given no time to attend Netstar heads of argument which were sent at 16:47 on 20 October 2014 when the set down was at 10:00am 21 October 2014. Lekoa was left with the option of oral defence, which is also taken out of context, as the audio records will prove, pursuant of the interests of the excipient.

Lekoa did not have ample time to address Netstar heads of arguments adequately, seeing that the reasons for decision are based only on Netstar's heads; this proves the unfairness and that indeed Lekoa was prejudiced in their ability to respond to The Tribunal's reference documents, which are Netstar's heads.

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<sup>103</sup> Netstar heads were acknowledged by the Tribunal page 1 "...Mr Mooki we received your Heads of Argument last night, thank you."

Netstar heads were submitted same day as Lekoa but there is little or any meaningful reference made to any of Lekoa's submission, where such reference is made it is made in support of Netstar.

In view of the projected tendency to accept untested allegations and deliberately obscure Lekoa's contribution while exaggerating on Netstar's, Lekoa would like to register the objections to the involvement of the Presiding Member, Ms Yasmin Carrim, who, as per information supplied on the Tribunal's website is a former employee of Webber Wetzel, the respondent's legal representative.

The Tribunal went beyond the scope of the exception hearing in that they delved into other matters that favoured Netstar, instead of determining the validity of the amendments and the existence of the alleged cause of action.

The Tribunal treated Lekoa's submissions as of no substance by failing to recognise them even when presented with evidence.

The Tribunal did not take Netstar to account for denied evidence put before them, nor did they factor in any of Netstar's denials, admissions and misrepresentations

The proceedings and records of the hearing is not reflected in the reasons submitted by The Tribunal, after consideration of the events of 21 October 2014, one is left with only one conclusion that something took place after the exception, to sway the outcome of the exception hearing in the excipient's favour. Lekoa therefore seeks an appeal as we feel we were prejudiced in the exception hearing.

In the matter between

LEKOA FITMENT CENTRE

Complainant

And

ALTECH NETSTAR (PTY) LTD

Respondent

**WHEREFORE** the complainant seeks an order in the terms set out in the Notice of Motion to which this affidavit is attached.

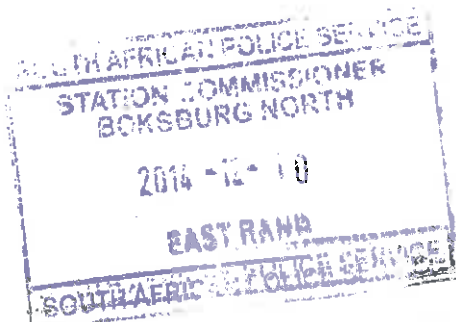


GOMBERA SIBANDA

I hereby certify that the deponent declares the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct, that this affidavit was signed and sworn to before me at

B/Burs North Saps

On this 10 day of December 2014



Shabalele (2014) 70616598

COMMISSIONER OF OATHS

Full Names: Shabalele Dubois

Capacity: Constable 15

Address: 37 Fourth St

B/Burs North