IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

Appeal Case No.:108/CAC/MAR11

In the appeal between:

PHUTUMA NETWORKS (PTY) LTD Applicant

and

TELKOM SA LTD Respondent

JUDGEMENT: 20 November 2012

MOLEMELA AJA

[1] This is an appeal against an order made by the Competition Tribunal ('the tribunal'). On the 21st January 2010 the appellant lodged a complaint against the respondent with the Competition Commission ('the Commission') in terms of section 8(c) of the Competition Act 89 of 1998 ("the Competition Act"), alleging that the respondent was abusing its dominant position by engaging in anti-competitive conduct in telegraphic/telegram services as well as telex maritime services by arbitrarily awarding business to another company that was not compliant with Black Economic Empowerment (BEE) principles without giving the appellant an opportunity of participating in the tendering process. It thus alleged that respondent had engaged in an exclusionary act that impedes or prevents, inter alia, the appellant from entering into that market, in contravention of section 8(c) of the Competition Act.

[2] The Commission, having found that the appellant's allegations failed to sustain a contravention of the Competition Act, issued a certificate of non-referral as contemplated in section 50(2)(b) of the Act. The

appellant then referred a complaint to Competition Tribunal as contemplated in section 51(1)(b) of the Competition Act,, seeking an order that the respondent "be found guilty of the offence of abusing their market dominance and fined in accordance as a repeat offender with a penalty of 10% of annual turnover...". It needs to be mentioned that no facts were put forward by the appellant to support its allegation that respondent was a "repeat offender".

[3] The respondent raised objections to the appellant's complaint by way of exceptions, firstly on the ground that the appellant's affidavit was vague and embarrassing in that in that it did not list the allegedly material grounds, which would support a complaint of a contravention of section 8(c) of the Act. Secondly it contended that the appellant's founding affidavit did not establish a cause of action in terms of section 8(c) of the Act or otherwise in that it did not (i) delineate a relevant market as contemplated in section 7 of the Act or (ii) establish that the respondent was a dominant firm in such a related market or (iii) establish that the respondent's conduct constituted an exclusionary act.

[4] The Tribunal upheld the respondent's exception that the appellant's affidavit did not disclose a cause of action and dismissed the appellant's complaint with costs. The appellant now appeals against the order made by the Competition Tribunal as contemplated in section 37(1)(b) of the Act.

[5] Although the appellant raised 32 grounds of appeal, the main thrust of those grounds can be summarised as follows: the Tribunal erred in not interpreting the appellant's founding affidavit to the effect that the appellant "abused regulations and obligations at the time of a near monopoly regulated licence as affording the respondent a dominant exclusivity in the telecommunications marketplace"; that the Tribunal erred "in its assumption regarding delineation of the relevant market as the respondent is the de jure holder of certain regulated telecommunications fixed line infra structure as was previously

recognised by the Tribunal in a previous decision where the Tribunal held [the respondent] to be a dominant firm"; that the Tribunal failed to take into account that the appellant's complaint was formulated by laymen and business people and not by lawyers and thus failed to appreciate that the matter was one of imprecise formulation and not of substance; that the Tribunal ought to have held that the appellant's complaint concerned the transgression of the Competition Act and not the failure to award any tender; that the Tribunal erred in concluding that a cause of action under section 8(c) of the Competition Act had not been made out and that no amendment could rectify the matter; that the Tribunal ought to have granted the appellant the opportunity of suitably amending its complaint; that the Tribunal ought to have taken judicial notice of the dominant position of the respondent in the telecommunications and telex markets. Thus the issue is whether the Tribunal correctly upheld the second exception.

The relevant provisions of the Act

[6] The interpretation of Section 8(c) of the Competition Act is integral to the decision of this appeal. This section provides as follows:

> 8. "It is prohibited for a dominant *firm* to –
>
> (a) ...
> (b) ...
> (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."

[7] The term "exclusionary act" is defined in section 1 of the Competition Act as "an act that impedes or prevents a firm entering into, or expanding within, a market."

[8] Rule 15(2) of the Rules for the Conduct of proceedings in the Tribunal ("the Competition Tribunal Rules") requires that a Complaint Referral must be supported by an affidavit setting out both "a concise statement

on the grounds of the complaint" and "the material facts or the points of law relevant to the complaint and relied upon by the complainant".

[9] It is the respondent's case that such material facts were lacking, consequently resulting in the Appellant's complaint failing to disclose a cause of action.

[10] In the case of **Mc Kenzie v Farmers' Co-operative Meat Industries Ltd** 1922 AD 16 at 22, the phrase cause of action" was defined as follows: "…every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

[11] Considering the appellant's reliance on section 8(c) of the Competition Act, it stands to reason that the appellant thus had to show that (a) the respondent is a dominant firm, (b) that it is engaged in an act that impeded or prevents a firm from entering into or expanding within a market, (c) that this had an anti-competitive effect and (d) that it outweighed its technological efficiency or other pro-competitive gain. Contending that the appellant had failed to comply with these requirements, the respondent, in its answering affidavit, raised a point *in limine*, excepting to the allegations contained in the founding affidavit on two grounds: firstly, that the founding affidavit is vague and embarrassing and secondly, that the founding affidavit does not establish a cause of action in terms of section 8(c) of the Competition Act or otherwise insofar as it failed (i) to delineate a relevant market; (ii) to establish that the respondent constitutes a dominant market for the purposes of section 7 of the Competition Act; (iii) that the alleged impugned act constituted an exclusionary act in that it had the effect of impeding or preventing the appellant from entering into or expanding within the delineated relevant market. As noted, the second ground was upheld by the Competition Tribunal.

The appellant's case

[12] It is appropriate, at this stage, to consider the averments made by the appellant in support of its complaint. The appellant's founding affidavit, deposed by Dr Edward George Scott ("Scott"), consisted of only five paragraphs in which the respondent's alleged contravention of section 8(c) of the Competition Act was couched as follows:

> "Telkom SA abused the regulations and obligations at the time of a near monopoly regulated license which afforded them a dominant exclusivity in the communications industry marketplace by engaging in an exclusionary act, and appointing Network Telex during 2007 without any formal procurement procedure as prescribed [by section 217 of the Constitution of South Africa, 1996, [which provides that "when an organ of state identified in national legislation as nominated under Section 239 of the Constitution of South Africa, 1996, contracts for goods or services, it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.
>
> Oral and written evidence has been given to me that Telkom SA appointed and or sub-contracted Network Telex for the Maritime ship to shore Inmarsat telegraphic services also comprising of the "SOLAS' services which is an International agreement governed by the International Maritime Organization under the auspices of the United Nations in conflict with the prescripts of [section 231] the Constitution of South Africa, 1996 regarding International agreements.
>
> This appointment of Network Telex is a breach of the Competitions Act [sic] Section 8(c), breach of section 10 of BBBEE Act and the framework as set out in the PPPFA Act No 5 of 2000 by excluding previously disadvantaged citizens and without following procurement procedures awarding work to a non BE compliant British Company.
>
> In deviating from the official advertised procurement policy … and not following the correct sourcing process and internal procurement policy as well the BEE commitment undertaken by Telkom SA."

[13] The respondent argues that the appellant's founding affidavit does not pass muster against the provisions of Rule 15(2) of the Competition Tribunal Rules, hence the respondent's filing of an exception. The respondent further argues that the Tribunal followed a lenient approach

as it also considered the replying and supplementary affidavit with a view to determining whether a cause of action under section 8(c) of the Competition Act had been made, notwithstanding that the appellant was required to make out its case in its founding papers.

[14] Regard was also paid by the Tribunal to a letter addressed by the Appellant to the Commission on 27 June 2010 in which it purported to clarify the complaint that it lodged with the Commission as follows:

"Telkom SA appointed Network Telex during 2007 without any procurement nor prescribed tender process being published or followed." The appellant also recorded in the same letter that it had approached various bodies to pursue its complaints against the respondent, "namely NPA, ICASA, JSE, SAICA, IRBA and Parliament" in addition to instituting civil proceedings against the Respondent.

[15] It was argued on behalf of the respondent that not only did the appellant fail to adduce any facts to substantiate the necessary contentions to sustain a section 8(c) contravention of the Competition Act, but even bald allegations in relation to the pre-requisites of such a claim were conspicuously absent, .For example, even a bare allegation that the respondent's alleged exclusionary act had an anti-competitive effect that "outweighs its technological, efficiency or other pro-competitive gain" was not made.

[16] It is trite that in considering whether an exception should be upheld, a court approaches the impugned pleading or affidavit with generosity. Thus, it has been said that the excipient bears "the duty" of persuading the Court that "upon every interpretation which the particulars of claim [or founding affidavit] ... can reasonably bear, no cause of action is disclosed." See **Lewis v Oneanate (Pty) Ltd** 1992(4) SA 811 (A) at 817F-G.

[17] An analysis of the appellant's founding affidavit demonstrates that the appellant concerned itself with breaches of acts (agreements and policies) other than those contained in Competition Act. Specifically, it alleges contraventions of the BBBEE Act, 53 of 2003; "the framework" of the PPPFA Act No 5 of 2000, a deviation from Telkom's alleged "official advertised procurement policy ... [its] sourcing process and internal procurement policy] ... [and Telkom's] BEE commitment..."; the formal procurement procedure prescribed by section 217 of the Constitution of South Africa, 1996 (which states: 'When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent , competitive and cost effective'); as well as the prescripts of section 213 of the Constitution of South Africa, 1996, regarding International Agreements, particularly SOLAS services, "an International agreement governed by the International Maritime Organization under the auspices of the United Nations..." Manifestly, these allegations do not fall within the Tribunal's sphere of authority. It is not clear how the mere appointment of Network Telex on a month to month basis without any formal procurement procedure can be considered to be an act that impedes or prevents the appellant from entering into or expanding within a market.

[18] The respondent correctly captured a "generous reading" of the appellant's case as being that "(i) the respondent "appointed and or sub-contracted Network Telex for the Maritime ship to shore Inmarsat telegraphic services also comprising of the "SOLAS' services"; and (ii) that such appointment [or subcontracting] constitutes an abuse by respondent of its dominance "in the communications industry marketplace by engaging in an exclusionary act". There are no material facts substantiating the appellant's dominance in the telegraphic services and as such this reading clearly does not disclose a cause of action.

Evaluation

[19] Given the evidence, placed between the Tribunal and this Court, the crucial question becomes: what is the appellant's competition-related complaint? It is unreasonable to expect this court to take judicial notice of a 'non-existent fact' as the appellant failed to delineate a specific market. For example, the respondent may be dominant in the fixed-line services market but not dominant at all in the cellular-phone market. Absent the relevant material facts, it would be unreasonable, without more, to assume that the respondent's dominance in a specific sector translates into its general dominance in the "communications industry market-place". Indeed, even if the appellant's mere say-so, absent any material facts, were to be accepted, no case has been made out that appointing/subcontracting Network Telex for the ship to shore telegraphic services: (i) impeded or prevented the appellant or any firm from entering into or expanding within any market (be it the "communications industry marketplace" or any other market"); and (ii) had an anticompetitive effect; and (iii) that the said anticompetitive effect outweighs its technological efficiency or other pro-competitive gain. It is impossible to ascertain from the founding affidavit in what way Telkom's appointment of Network Telex constitutes a contravention section 8(c) of the Competition Act.

[20] It is not even clear from the replying affidavit as to the defined market into which entry is alleged to have been impeded or prevented nor what the alleged anti-competitive effect (as compared with any gain) in the relevant (but undefined) market is. Scott's replying affidavit failed to provide a direct response to the respondent's assertion that for the purposes of the complaint before the Tribunal, which was supposed to be concerned with the particular circumstances of proceedings under section 8(c) of the Competition Act, there was no delineation of the relevant market.

[21] For the purposes of contesting the exception, the appellant was required to show that it disclosed the relevant market and the factual basis for the allegation that the respondent is dominant in that market. This it did not do. (See **Sappi Fine Papers (Pty) Ltd v Competition Commission** [2001-2002] CPLR 486 (CT). Instead, Scott set out a history of the respondent's former statutory monopoly in certain sections of the telecommunications industry including dominance in the fixed-line sector, and a series of accusations that this market power has been abused. Importantly, the four requirements mentioned in paragraph 6 above have not been satisfied. This court is therefore satisfied that the respondent has discharged the "duty" of showing that the appellant's complaint disclosed no cause of action. It follows that the Tribunal thus correctly upheld the second leg of the respondent's exception.

An opportunity to amend

[22] In so far as it has been argued that the Tribunal ought to have granted the appellant an opportunity of amending its papers, it is necessary to establish whether any purpose would be served by granting the appellant such an opportunity. In deciding this aspect, it is necessary to consider the following: Even accepting (as the Tribunal did), the appellant's contention that the respondent is dominant in such a market, the fact of the matter is that no sustainable contravention of section 8(c) is made out.

[23] In this connection the appellant's replying affidavit and the exchange between the appellant's counsel and the Tribunal are quite illuminating. In its replying affidavit, the Appellant stated that "...the crux of this matter is the anti competitive way [Telkom] appointed Network Telex by an exclusionary act without allowing any other institution to bid for the service is a violation and contravention of the Competition Act ... The purpose of the Act is to promote and maintain competition in the Republic in order (c) to promote employment and advance the social and economic welfare of South Africans (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of previously disadvantage persons therefore the relevance of both the BBBEE and

PPPFA Acts and the contravention of [Telkom] to both these Acts as well as the Abuse of a dominant position which the Respondent had enjoyed the fruits of benefits of its monopolistic position and market dominance within the ITC sector…."[Telkom] admits only submitting a formal request for quotation to Network Telex thereby performing an exclusionary act to the detriment of the prescripts of the Competitions Act ...The appointment of Network Telex without the correct procedures displays the anti competitive behaviour of the Respondents..."

[24] In its heads of argument before the Tribunal, the appellant's complaint was summarized as follows:

> "The Complainant's complaint is that the Respondent is abusing its dominant position by engaging in anti-competitive conduct in telegraphic/telegram services as well as telex maritime services by arbitrarily awarding the business to Networks Telex, a non BEE company ... The complainant alleges that the Respondent accordingly contravened sections 8(c) of the Act."

[25] In oral argument before the Tribunal, the appellant's counsel stated as follows:

> "CHAIRPERSON: So your complaint is that once a dominant firm chooses to sub-contract that service, it must have a competitive tender?
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> ADV GEACH: Well we say that's the purpose of this Act, is to promote competition and that excludes competition.
>
> CHAIRPERSON: So it's not excluded ... it's not a contravention if it does it itself, as soon as it decides to get somebody else involved, then it must have a tender and then it must ... it's got to be a competitive tender.
>
> ADV GEACH: And Telkom appreciated that, because it put out a tender. And the bigger picture here is the complainant responded to the tender and introduced Network Telex to Telkom as a foreign subcontracting firm as part of our bid. And Telkom then went and cut us out and dealt directly on an arbitrary basis with Network Telex. That's the background to this complaint.
>
> CHAIRPERSON: What I'm trying to explore is the obligation to have a competitive tender, something that arises from Competition Law or from

> Administrative Law, be it whatever source ... where do we find authority that has a Competition Law obligation on a dominant firm?
>
> ADV GEACH: Well we say, once you're a dominant firm in a market and you want to contract with somebody to do the work on your behalf, then your obligation is to do it in a competitive way. You can't act in a way that excludes us from participating, entering into the market on an arbitrary fashion, which is what they've done here.
>
> MS CARRIM: So assuming that Telkom had gone out on a competitive tender process and had awarded the work to somebody else, another third party, would you still have a complaint?
>
> ADV GEACH: No. If it had done it in a competitive basis, in an open, transparent way, we could not have had a complaint, no.
>
> MS CARRIM: Yes, it gave the work to Network Telex in an arbitrary fashion and excluded us in a non-competitive way.
>
> CHAIRPERSON: And what's the anti-competitive effect as a result of that?
>
> ADV GEACH: Well, we are blocked from the market. The market is now closed to us...". (my underlining for emphasis).

[26] The crucial assertion of the appellant as expressed by Mr Geach, who again appeared on behalf of appellant, in exchanges with the Tribunal at the hearing, and re-iterated during the appeal hearing, is that the respondent, once it is established that it has dominance in a market must of necessity when appointing suppliers or sub-contractors proceed by way of a competitive tender and furthermore must follow tender procedures which comply with statutory obligations applicable to public entities. Thus it must comply with public procurement legislation and must give preference to tenderers with appropriate black economic empowerment credentials. According to Mr Geach these requirements stem from the respondent's status as a licensed telecommunications operator with market power or an exclusive contractor to the Department of Transport, as well as from the Constitution and the

fairness requirement in the preamble to the Competition Act. The implication is that if such a competitive process is not followed by the respondent which is operating in a regulated industry, then an 'exclusionary act' as contemplated in section 8(c) of the Competition Act has necessarily been committed.

[27] This approach is untenable, as it renders superfluous the weighing-up enjoined in that sub-section between the anti-competitive effect of the impugned act and any gains may bring by way of technological, efficiency or other pro-competitive gains. Mr Geach could not furnish this court with any authority that supports this proposition. That is unsurprising. This proposition is clearly untenable in that the alleged breach of section 8(c) of the Competition Act only comes into play only when the respondent awards the rendering of a specific service to a sub-contractor, not when the respondent renders it.

[28] It is clear from the extracts of the exchange at the Tribunal that, regardless of what the relevant market is accepted to be, the appellant's case is simply untenable when assessed in terms of the Competition Act. Significantly, of the 23 grounds of complaint articulated by the Appellant in its Notice of Appeal, not a single ground challenges the finding by the Tribunal that, as a matter of law, appellant's complaint in terms of section 8(c) of the Competition Act is fundamentally and irretrievably flawed.

[29] Section 3 of the Competition Act, headed 'Application of the Act,' states that the Act applies to all economic activity within, or having an effect within, the Republic." Respondent is correct in its contention that the Competition Act is so constructed that public entities enjoy neither preference nor prejudice by virtue of their official status when their actions are considered in terms of the Act. A firm in the private sector operating with no public license and no privileged position in terms of any legislation or international conventions will be judged by the same

criteria as an organ of state. None of the provisions of the Competition Act make any distinction between these entities. For the purposes of this case it is irrelevant whether the respondent is a public entity in terms of the criteria applicable under legislation other than the Competition Act. What is crucial is that its conduct must, for the purposes of this case, be judged purely in terms of the Competition Act.

[30] Given the appellant's submissions, it deserves mention that the Tribunal is a creature of statute and, unlike the High Court, has no inherent powers of status. Its functions and powers are to be sought only in the founding statute, the Competition Act. While the appellant's correctly pointed out that the respondent is bound by the provisions of section 217 of the Constitution of South Africa, 1996, to which reference has already been made, the Tribunal has no power to consider or rule upon the constitutionality of the respondent's conduct or the validity in terms of administrative law of contracts into which it enters beyond the powers granted to it under the Competition Act. Thus, if an act which is subject of the complaint does not fall within the provisions of the Act, the complaint is fatally defective.

[31] For all these reasons, the appellant's pursuit of a complaint against the Respondent in terms of the Competition Act was misplaced. No further amendment of the appellant's papers could turn what may be an administrative law case into a competition law case. Consequently, it serves no purpose to allow for the appellant's papers to be amended. The Tribunal correctly dismissed the appellant's case.

[32] The respondent argued that costs be ordered on a punitive scale as the appeal was frivolous and vexatious. Notwithstanding the shortcomings of the appellant's case, this court is not persuaded that the pursuit of the appeal was frivolous and vexatious. Although the costs must follow the result, a punitive cost-order is unwarranted. In the circumstances, the following order is made:

[33] Order:

The appeal is dismissed with costs.

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M.B. MOLEMELA, AJA

I agree.

_____

D DAVIS, JP

I agree.

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SWAIN, AJA