

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO: 6494/2011

NOT REPORTABLE

In the matter between:-

**TRANSUNION AUTO
INFORMATION SOLUTIONS (PTY) LIMITED**

Applicant

and

AUTOBID (PTY) LIMITED

Respondent

JUDGMENT

KISSOON SINGH AJ:

INTRODUCTION:

On 9 June 2011, **TRANSUNION AUTO INFORMATION SOLUTIONS (PTY) LIMITED** (hereinafter referred to as “the Applicant”), instituted these proceedings in this Court, against **AUTOBID (PTY) LIMITED** (hereinafter

referred to as “the Respondent”).

RELIEF CLAIMED:

In this application, the Applicant sought the relief set out, in detail, in paragraphs 1 to 6 of the Notice of Motion. It is unnecessary for me to repeat herein the precise relief claimed. Suffice to say that before me the Applicant sought, in the main, declarations that certain copyrights of the Applicant had been infringed by the Respondent and pursuant to such declarations, final interdictory relief, thereby preventing future infringements of same by the Respondent.

THE HEARINGS:

The matter came before me on 13 September 2011, in consequence of a preferential allocation of dates, by which stage the application itself (apart from Heads of Argument) had grown to some five hundred and twenty six (526) pages, dealing *in extenso* with the complaints of the Applicant and the defences thereto by the Respondent.

At the hearing of the opposed application, the Applicant was represented by **MR. SALMON** and the Respondent was represented by **MR. PAMMENTER SC**, assisted by **MR. STYLIANOU**.

The matter was argued on the merits and save for additional argument on two aspects to which I will allude hereunder, the argument for both sides was completed on that day.

During the course of the hearing, I requested both parties to address me on:-

- a) whether the Court's jurisdiction to determine the matter had been ousted by the provisions of Section 65 (2) of the Competition Act 89 of 1998 (hereinafter referred to as "the Competition Act"); and
- b) in the event of the jurisdiction of the Court not being ousted, whether the Court should, in the exercise of its discretion, given that, inter alia, the Respondent had already instituted proceedings before both the Competition Tribunal and the Competition Commission (being for a established in terms of the Competition Act) decline to deal further with the matter, pending the outcome of either or both of the said proceedings.

In consequence, **MR. SALMON** requested an opportunity to consider the matters raised by me and it was subsequently agreed between Counsel that Supplementary (written) Heads of Argument, dealing only with the abovementioned two aspects I had raised would be delivered to me by 23 September 2011 and, if necessary, argument on only those two aspects would

proceed on a date to be subsequently arranged.

Pursuant thereto, further argument was indeed heard by me on 24 October 2011 and at the conclusion thereof, I granted leave to the parties to supplement such argument in writing, should they desire to do so, by no later than 9:00 a.m on 31 October 2011. As no further Heads of Argument were delivered, I assumed that the parties had elected not to deliver the same and thereby supplement their respective submissions.

In consequence, I prepared a detailed Judgment, in excess of forty one pages, and handed the same over to the Honourable Judge President of this Division, for him to make arrangements for the Judgment to be handed down in the Motion Court on a date to be nominated. Shortly prior to the Judgment being handed down, I received communication from the Applicant's Legal Representatives, who informed me that a new development which they believed would be germane to my decision (of which neither party was aware, as the Judgment had not been handed down) had just come to light and they requested me to intervene and request the Honourable Judge President to direct that the Judgment I had prepared not be handed down. I acceded to such request. Representations were apparently subsequently made to the Honourable Judge President to allow me to entertain an interlocutory application for the introduction of new material and he assented thereto. In consequence, an interlocutory application dealing with new matter was

prepared and the Affidavits therein were complete by 8 December 2011. By arrangement, the application was moved before me on 30 January 2012 and the application was granted. I should mention that communications from both the Applicant's Attorneys and the Respondent's Attorneys disclosed that the Respondent had no objection to such an interlocutory application being pursued, provided that the Respondent was afforded an opportunity of dealing with the new material which was intended to be introduced. Indeed, the Respondent did have such an opportunity. At the hearing of the interlocutory application on 30 January 2012, only the Applicant was represented as, I was informed, the Respondent had elected not to be represented at that hearing. Both parties also indicated to me that it would be unnecessary for further argument to be delivered in respect of the new material and I was requested to consider the same and, if necessary, to modify my Judgment which had been prepared but not handed down, in such manner as I considered appropriate.

I mention the foregoing as the application had initially proceeded before me in September 2011, in consequence of a preferential allocation of dates and the Judgment in this matter is being delivered during March 2012. It will be appreciated that there was no undue delay on my part in this Judgment being prepared and delivered. I will deal with the new matter which was introduced before me at a later stage in this Judgment. It does indeed have a bearing on my decision.

It is obvious that both parties have had a full opportunity of raising such issues as they considered appropriate and making submissions thereon and they have also had a full opportunity to address me.

THE APPLICANT'S BUSINESS:

It emerges from the application papers that the Applicant provides "information", in particular to the retail motor industry in South Africa. Such information pertains to most forms of used motorised vehicles (hereinafter referred to as "vehicles") in this Country and includes valuations of vehicles. This it does through five "Dealers Guides", each of which is published/distributed in printed book format, in electronic format, through a stand alone windows application, through web-based online use and through handheld electronic devices (called PDA's).

From the allegations set out in its founding papers, which are largely unchallenged, it is obvious that the Applicant has been conducting such business under one name or another, for many years. Whilst there are other entities in this Country providing similar information, the Applicant is clearly the dominant entity in this Country providing such information, which it does on a monthly basis.

According to the Applicant's founding papers, there are over sixteen thousand different models of vehicles available in the vehicle market in this Country and every month, approximately sixty thousand vehicles are traded. In consequence, traders, financiers and insurers, amongst others, have a need for updated information relating to the trade and retail values of such vehicles. In the **AUTO DEALERS GUIDE** (a compilation of the Applicant dealing with passenger vehicles of up to and including ten years of age) alone, there are in excess of sixty vehicle brands and more than two thousand two hundred different derivatives.

The Applicant collects and collates raw data arising from the sales of vehicles from approximately one thousand two hundred motor vehicle dealers Country wide (through approximately forty thousand individual dealer return forms), including information such as how many vehicles each dealer bought and sold, the prices paid by the dealers for the vehicles, the costs of reconditioning the vehicles, the prices at which the vehicles were sold and whether such sales were wholesale or retail. Having collected the data, the Applicant then processes the same through its Automated Vehicle Value Adjustment system and derives what it regards as being reliable monthly trade and retail valuations for the vehicles concerned, which it then publishes/distributes only for use by its customers.

Each of the vehicles in its guides has a unique eight digit code and the combination of the eight digits therein represents the make, model and variant of the vehicle concerned, in appropriate order. In order to create such a vehicle code, the Applicant collects information from the manufacturer including various applicable masses, the kilowatt output, the number of doors, the number of wheels and the body style.

No purpose is served, in my view, in setting out further information as to how the Applicant compiles its publications, as considerable detail in connection therewith has been set forth in the founding papers in this matter and the information set forth above suffices to explain how the Applicant prepares its publications.

It is, of course, relevant to note that the work undertaken by the Applicant, in particular in compiling vehicle codes and vehicle valuations, is performed by employees of the Applicant, acting in the course and scope of their respective employment, all of whom are citizens or residents of this Country performing their work whilst such. I note that these employees have all delivered Confirmatory Affidavits in this matter.

In consequence, the Applicant alleges that it is the owner of the copyright in the vehicle codes, the vehicle valuations and in the five dealers guides referred to above. It goes without saying that the information supplied by the

Applicant to its customers, in one or more or all of the forms in which it supplies the same, is clearly of considerable importance to the trade. Persons who wish to have access to any of the formats in which the Applicant supplies information, take out a subscription with the Applicant and pay a fee therefor.

THE RESPONDENT'S BUSINESS:

The Respondent has been a customer of the Applicant and has obtained information pertaining to vehicles from it since 2001. Due to sophistication in its business practices, the Respondent has now developed a computer software programme which it sells to its own customers and this software programme assists such customers, considerably, in their purchases and sales of vehicles in the manner set out below. In a nutshell, the Respondent delivers a handheld cellular device to its customer and this is utilised for the taking of a photograph of a vehicle which is sought to be traded by that customer. After including certain relevant details, such as the make, model and colour of the vehicle, the information is transmitted to the Respondent's computer system. The Respondent's computer system (until fairly recently – amplified below) then accesses the Applicant's database online and obtains trade and retail valuations for the vehicle, determined by the Applicant, together with the relevant vehicle code in question and the Respondent's computer system then returns such valuations to the Respondent's customer.

In addition, the Respondent's customer can select colleagues in the industry, to whom the photograph and other relevant information (including the vehicle codes and valuations) is relayed. A recipient thereof is allowed, by use of the Respondent's software, to insert a suggested purchase price at which the vehicle can be purchased by it, which information is relayed by the Respondent's computer system to the original customer. This may then result in a suitable trade of the vehicle concerned.

In simpler terms, a vehicle dealer who is a customer of the Respondent, upon being approached by a member of the public who wishes to sell a vehicle, utilises the Respondent's computer system to obtain valuations and codes of the vehicle determined by the Applicant, to distribute the same to prospective purchasers of that vehicle and to receive an answer as to which of the persons so circulated is prepared to purchase the vehicle and at what price. This enables the Respondent's initial customer to speedily offer a purchase price to the person approaching it for the sale of the vehicle, knowing full well that there is a ready and willing buyer, in turn and with the reasonable confidence that it will thus not be left with a vehicle which it cannot itself resell.

THE APPLICANT'S COMPLAINTS:

It would, I think, be appropriate to summarise the complaints of the Applicant in this matter:

The Respondent is still a customer of the Applicant, albeit only through a subscription for the book guide, the relationship for online access having been terminated by the Applicant in April 2011, in consequence of the Applicant requiring a much higher sum as a subscription for online access than the Respondent is willing to pay. Notwithstanding such termination, the Respondent still accesses the Applicant's data base online and as mentioned above, until recently obtained valuations of various vehicles therefrom. During the course of argument, **MR. PAMMENTER** advised me that the Respondent no longer obtains valuations from the Applicant's data base, online, and that these valuations are obtained by its customers, all of whom are also customers of the Applicant. However, what is clear from Annexures to the papers and indeed is common cause in this application, is that the Respondent still obtains and utilises at least the Applicant's vehicle codes when it deals with its own customers.

Speaking for myself, I harbour doubts about whether the Respondent indeed does not still obtain valuations through the Applicant's online system but, for the purpose of this Judgment, it matters not whether it does so, as in my

understanding the Respondent still checks that the valuations inserted by its customers are the same as those determined by the Applicant. It is also common cause that the Respondent continues to publish information to its customers containing not only the vehicle codes, but also the retail and trade valuations which emanate from the Applicant's data base. This it does in circumstances where it is not a subscriber to the Applicant's online service and more importantly, nor does it have any authority or licence from the Applicant to do so.

The Applicant has accordingly approached this Court alleging that copyright subsists in the works in question (that is to say the Dealer Guides aforesaid, the vehicle codes and the valuations), that it owns such copyright and that the Respondent is reproducing such copyrighted works or important portions thereof without permission. The Applicant complains that the Respondent will not cease such allegedly unlawful conduct unless ordered by the Court to do so and accordingly claims appropriate interdictory relief.

THE COPYRIGHT ACT:

Various sections of the Copyright Act 98 of 1978 (hereinafter referred to as "the Copyright Act") are, in my view, of relevance in this matter. I have considered them and I shall refer to the same, very briefly hereunder.

Section 1 of the Copyright Act defines a “literary work” to include tables and compilations, including tables and compilations of data stored or embodied in a computer or a medium used in conjunction with a computer.

Section 2 of the Copyright Act makes provision that if literary works are original they are eligible for copyright.

Section 3 of the Copyright Act provides that copyright is conferred on every work eligible for copyright of which the author (or in the case of joint authorship, any one of the authors) is at the time of the creation of the work a qualified person, that is to say, is a South African citizen or is domiciled or resident in this Country.

Section 6 of the Copyright Act vests the owner of copyrighted works with the exclusive right to do or to authorise the reproducing of the work in any manner or form.

Section 12 of the Copyright Act provides for certain general exceptions to infringement, in the case of literary works.

Section 21 of the Copyright Act provides, in circumstances where an author makes a work during the course of his employment by another person under a

contract of service, that such other person is the owner of the copyright in the work in question.

Section 22 of the Copyright Act provides for assignments of copyright and licences in respect of copyright.

Section 23 of the Copyright Act deals with various instances of infringement of copyright.

Section 24 of the Copyright Act makes provision for various forms of remedies available to the owner of copyright, for infringement thereof, and this includes interdictory relief.

REQUIREMENTS FOR COPYRIGHT INFRINGEMENT:

In this matter, given that it is common cause that the Respondent has reproduced information in the form of vehicle codes and vehicle valuations which is precisely that which has been compiled and furnished by the Applicant and in which the Applicant claims copyright, the issues insofar as copyright infringements are concerned are: firstly, whether copyright subsists in the Applicant's said information; secondly, whether if such copyright subsists, the Applicant is the owner of that copyright; and thirdly, whether the Respondent has reproduced the said information without the Applicant's

consent.

I now proceed to analyse each of these issues.

DOES COPYRIGHT SUBSIST?

In the matter of,

PAYEN COMPONENTS SA LIMITED v BOVIC CC AND OTHERS
1995 (4) SA 441 (A)

five digit codes produced for the purpose of the identification of certain gaskets were endorsed by the then Appellate Division to constitute literary works eligible for copyright.

During the course of argument, **MR. PAMMENTER** did not take issue with the finding in the **PAYEN COMPONENTS** case (supra) and conceded that the vehicle codes of the Applicant constituted original works which were eligible for copyright. I understood him to make the same concession insofar as the vehicle valuations were concerned, given the manner in which they are compiled.

IS THE APPLICANT THE OWNER OF THE COPYRIGHTED WORKS?

No issue was raised about the authorship of the copyright in the vehicle codes or the vehicle valuations and there was no challenge to ownership of the copyright therein by the Applicant, which is hardly surprising given the Applicant's assertions, which were confirmed under oath by its employees.

IS THERE UNLAWFUL REPRODUCTION OF THE COPYRIGHTED WORKS?

It next falls to be considered whether the Respondent has reproduced the Applicant's copyrighted works without the Applicant's consent. In my view, there is no dispute about this fact on the papers. The Respondent, itself, admits that the Applicant terminated its online access to vehicle codes and valuations and asserts that this prompted the Respondent to institute proceedings before the Competition Commission and before the Competition Tribunal (for an urgent interim order for online access).

I am not, of course, unmindful of the fact that the Respondent is a subscriber to the book form of the Applicant's guide, but that takes the matter no further as it is not that guide from which the Respondent produces vehicle codes and (on its version) confirms the valuations submitted to it by its customers, but from online access to the Applicant's data base.

Further and perhaps more importantly, it is also common cause that the Applicant, as owner of the copyright in question, is in terms of Section 6 of the Copyright Act vested with the exclusive right to do or to authorise reproduction of the said works in any manner or form. It has not given authority or a licence to any person (including the Respondent) to reproduce the same. Indeed, it says that it precludes its customers from disseminating such information as, if that were the position, the Applicant could suffer considerable financial prejudice.

MR. PAMMENTER in opposition to the assertion of unlawful conduct in reproducing the works, submitted:

- a) Insofar as the valuations (which have the Applicant's name prefixed thereto) are concerned, all the Respondent is doing by reproducing the same is pointing out/confirming/asserting to the reader of such information that the valuations are those allocated to the vehicle in question by the Applicant and that such valuations can be found in the Applicant's guides.
- b) Insofar as both the vehicle codes and the valuations are concerned, that the Respondent was merely a conduit, relaying information from one of the Applicant's customers to another of the Applicant's customers – given that the Respondent contends that all its own customers (to whom

it supplies its software programme) are obliged to be customers of the Applicant as well.

In consequence, so it was submitted, there was no infringement. The submissions of course, do not take into account the express provisions of Section 6 of the Copyright Act, which vests the Applicant with the exclusive right to do or to authorise the reproducing of the work in any manner or form and the factual position that the Applicant has not so authorised such reproduction of the works by the Respondent.

Even if a case could have been made that the Applicant was aware of the actions of the Respondent in acting as a conduit and that it took no steps to prevent the same, thereby giving rise to an implied authority to do so, it seems clear to me that once the Applicant objected to such conduct and gave notice to the Respondent that it should cease to conduct itself in that fashion and once the Respondent was precluded by the Applicant from having access to its data base, online, any such implied authority (if it existed at all) ceased.

Neither of those submissions thus find favour with me.

I am also not persuaded that any of the general exceptions provided for in Section 12 of the Copyright Act, are applicable in the instant case.

In the circumstances, I must hold that the Respondent has reproduced the Applicant's copyrighted works without the Applicant's consent.

REQUIREMENTS FOR INFRINGEMENT SATISFIED:

In all the circumstances, there is no doubt in my mind that copyright subsists in the Applicant's vehicle codes and in the Applicant's valuations and that the Applicant is the owner of that copyright. I also have no doubt that the Respondent has reproduced the copyrighted works without the Applicant's consent.

I hold accordingly.

The actions of the Respondent in dealing with the vehicle codes and the vehicle valuations thus constitute infringement of such copyright, being contrary to the provisions of Section 23 of the Copyright Act.

INTERDICTIONARY RELIEF:

The requirements for the granting of interdictory relief in South African Law are trite. In the case of a final interdict, an Applicant must prove a clear right; an injury actually committed or reasonably apprehended or an actual or

threatened invasion of that right; and the absence of similar protection by any other ordinary or suitable legal remedy. In the case of an interim interdict, an Applicant must prove a prima facie right even though that right may be open to some doubt; a well grounded apprehension of irreparable harm if the interim relief is not granted; a balance of convenience in its favour; and the lack of another remedy which is adequate in the circumstances.

Section 24 of the Copyright Act makes provisions for interdictory relief to be granted as one of the remedies for infringement.

Regard being had to the facts of this matter found proven and the fact that the Respondent continues to reproduce the Applicant's vehicle codes and valuations and has not suggested that it will refrain from doing so, I am satisfied that in the ordinary course of events, the Applicant would have satisfied the requirements for a final interdict and I would ordinarily have had no hesitation in granting it the interdictory relief it seeks in this matter.

However, the matter is not that simple. There are two other aspects which must be considered. These are the two aspects which I have referred to at an earlier stage in this Judgment and on which I required additional argument. I deal with them hereunder.

OUSTER OF JURISDICTION:

Section 65 (2) of the Competition Act, provides:

“If, in any action in a civil court, a party raises an issue concerning conduct that its prohibited in terms of this Act, that court must not consider that issue on its merits, and –

(a) ...

(b) otherwise, the court must refer that issue to the Tribunal to be considered on its merits, if the court is satisfied that –

(i) the issue has not been raised in a frivolous or vexatious manner; and

(ii) the resolution of that issue is required to determine the final outcome of the action.”

That sub-section, in my view, provides for an ouster of the jurisdiction of this Court if certain requirements, specified in that section, are all extant. These are:

- i) Conduct which is prohibited in terms of the Competition Act must be raised as an issue;
- ii) The issue must not have been raised in a frivolous or vexatious manner;
- iii) Resolution of that issue must be required to determine the final outcome of the action.

If all the aforesaid requirements are met, this Court has no alternative but to refer the issue to the Competition Tribunal to be considered on its merits and it may not consider that issue on its merits. Although a Court is not keen to concede that its jurisdiction is ousted (and indeed there is authority to the effect that a presumption exists against the ouster of the jurisdiction of the High Court) it is so that if there is a statutory ouster of jurisdiction, the High Court cannot entertain the matter any further.

In this regard the High Court, in the matter of -

**SEAGRAM AFRICA (PTY) LIMITED v
STELLENBOSCH FARMERS' WINERY GROUP LIMITED AND OTHERS**
2001 (2) SA 1129 (C),

whilst dealing with the now repealed Section 65 (3) of the Competitions Act, commented (at page 1141 J to page 1142 A of its Judgment) that its view that the Legislature had a clear intention of excluding the jurisdiction of the High Court in certain competition matters, was fortified by the provisions of Section 65 (2) (b) of the Competitions Act, which directed civil courts to refer all issues concerning conduct prohibited in terms of the Competitions Act which might arise during the hearing of a civil matter, to be referred to the Competition Tribunal for consideration. I am in respectful agreement with such comment and am of the view that if all the requirements I have identified above are

present, the jurisdiction of this Court is ousted. As will also be seen later in this Judgment, the Supreme Court of Appeal has also confirmed that Section 65 (2) (b) of the Competition Act provides for an ouster of jurisdiction.

I must then, of necessity, determine whether the aforesaid three requirements are present *in casu*. In doing so, it is relevant for me to record that in the present matter a somewhat unusual situation arose after the Applicant terminated the Respondent's online access to its data base.

Ordinarily, one would have expected an Applicant, in circumstances where a Respondent persisted in refusing to desist from unlawful conduct, to immediately approach the Court for interdictory relief.

However, from the papers in this matter it appears that pursuant to the dispute over pricing between the parties, on 12 April 2011, the Applicant terminated the Respondent's online access and the Respondent's reaction to the foregoing (apart from persisting in its conduct) was to approach the Competition Commission in terms of a complaint based on alleged anti-competitive conduct of the Applicant against it. At the same time it approached the Competition Tribunal for an (urgent) interim order for online access. Both the aforesaid proceedings were launched on 14 April 2011.

The founding papers in the proceedings for the interim relief claimed from the

Competition Tribunal appear as a part of Annexure “MVH11” to the Founding Affidavit of the Applicant in this matter. In the proceedings in the Competition Tribunal the Respondent (as Applicant therein) seeks an interim order that the Applicant (as Respondent therein), pending a determination by the Competition Commission of the allegedly anti-competitive conduct of the Applicant, immediately allow the Respondent online access to its information, known as the Mead’s Valuations (which includes the vehicle codes and valuations that are the subject of this application) and a further order that such online access should be continuous and endure until the complaint lodged at the Competition Commission has been finalised and a ruling in respect of the Applicant’s conduct has been issued.

The Applicant’s Founding Affidavit in this matter (in paragraphs 105 to 108) discloses that various events transpired pursuant to the launching of the proceedings in the Competition Tribunal and with the parties in those proceedings being unable to reach any agreement on an interim basis, a Supplementary Founding Affidavit was delivered by the Applicant on 20 May 2011. Although answering papers in the proceedings before the Competition Tribunal were delivered towards the end of June 2011, the Respondent (as Applicant in those proceedings) did not deliver its replying papers timeously and indeed, as at 13 September 2011 (when the matter was first argued before me) had not yet done so. During the course of the argument on that day, **MR. SALMON** urged me, if I was disinclined to grant interim relief on that

day, to direct the Respondent to deliver its replying papers in the Competition Tribunal proceedings. I declined to do so as such an issue was not one raised on the papers before me and **MR. PAMMENTER**, quite justifiably, indicated that he was not in a position to indicate when the Respondent would be in a position to deliver such papers and why it had not done so in the interim. Suffice to say that by the time the matter resumed before me on 24 October 2011 (almost six weeks after the non-delivery of such replying papers was raised pertinently in argument before me) the Respondent had still not delivered the same, although **MR. PAMMENTER** indicated from the Bar that such papers had been prepared and were in the process of being delivered. I will deal further with this later, as it forms a part of the new material introduced into this application on 30 January 2012.

The Applicant in these proceedings only instituted this application on 9 June 2011. That is almost two months after the Respondent had instituted its proceedings in the Competition Commission and the Competition Tribunal. The allegedly anti competitive conduct of the Applicant has thus not been raised for the first time in this application, as a reaction to the Applicant's complaints, but has been raised by the Respondent long before this application was launched.

During the course of argument in this matter, **MR. SALMON** urged me to hold that:-

- a) a determination of whether copyright subsists and whether it has been infringed is a matter falling within the exclusive jurisdiction of a High Court and not the Competition Tribunal or the Competition Commission and no issue prohibited by the Competitions Act has been raised in the papers before me, in that the complaint in both those fora relate to whether the Applicant's conduct is anti-competitive or not and not to whether copyright subsists or has been infringed;
- b) the Respondent has furthermore not set forth sufficient evidence in its papers to justify a conclusion by this Court that an issue is being raised by the Respondent which concerns conduct which is prohibited in terms of the Competition Act;
- c) in any event, the Respondent, by its dilatory conduct in not delivering its replying papers and proceeding expeditiously before the Competition Tribunal, is acting frivolously and consequently if it is held that the Respondent has raised an issue pertaining to conduct allegedly prohibited in terms of the Competition Act, such has been raised in a frivolous or vexatious manner in this Court. Further, the issues of anti competitive conduct which have been raised, upon proper scrutiny, have no merit at all and thus have for

that reason been raised frivolously or vexatiously in this Court.

For one or more or all of the foregoing reasons, **MR. SALMON** submitted, I should find that all three requisites for an ouster of jurisdiction are not present. I should thus not hold, he submitted, that there has been an ouster of jurisdiction and I should proceed to grant final interdictory relief.

I shall (as I am obliged to) deal with the foregoing submissions of **MR. SALMON** hereunder, although I do not necessarily examine them *seriatim*.

I accept that a finding on whether copyright subsists and whether there have been copyright infringements are matters that must be determined by this Court, as a perusal of the relevant sections of the Competition Act discloses that such are not matters capable of being considered in terms thereof.

I was referred, in particular, to the un-reported Judgment of the Supreme Court of Appeal in the matter of –

**PLATINUM HOLDINGS (PTY) LIMITED AND OTHERS v
VICTORIA AND ALFRED WATERFRONT (PTY) LIMITED AND ANOTHER**
SCA Case Number 428/2003
Judgment dated 28 May 2004

by **MR. SALMON**, as authority for the proposition that no order of the

Competition Tribunal was required to determine the final outcome of these proceedings in the light of the relief claimed, which he submitted could only be determined by the High Court. It is, of course, noteworthy that the Supreme Court of Appeal in the said Judgment affirmed the ouster of jurisdiction provided for in terms of Section 65 (2) (b) of the Competition Act, provided the prescribed requisites are present. In paragraph 16 of that Judgment, the Supreme Court of Appeal stated that the prohibition against the consideration of the merits of a competition issue did not mean that no consideration to the issue could be given at all by a Court. It simply meant that the Court may not attempt to resolve that issue. It also stated that the question of whether the competition issue was frivolous or vexatious was a matter for decision by the Court and not for the Competition Tribunal. I am mindful of those directions from the Supreme Court of Appeal and take them into account in my determination of the matter before me.

In dealing with whether the issue has been raised frivolously or vexatiously before me (or even before the Competition Tribunal) I am also mindful of the content of paragraph 26 of the said Judgment of the Supreme Court of Appeal, where that Court held that one who conducts a hopeless case acts frivolously. One of the crisp questions for decision before me then is whether in my view the Respondent has a hopeless case before the Competition Tribunal.

That the Respondent occupies a dominant position in this particular industry in South Africa, I do not believe can be challenged. Such must be the inescapable conclusion from a proper reading of the Applicant's papers in this matter and this is supplemented by allegations made in the Affidavits by the Respondent before the Competition Tribunal. Thus, for example, in the Respondent's Supplementary Founding Affidavit (as Applicant) in the Competition Tribunal proceedings, the dominance of the Applicant is dealt with in paragraph 2 (page 340 and page 341 of these papers) as well as in paragraph 3.2 (at page 342 of these papers) and in paragraph 4 (at page 342 and page 343 of these papers). In paragraph 92.1 (at page 265 of these papers) the Respondent in its Answering Affidavit in these proceedings, makes out the case that one of the Applicant's large clients obtains information from the Applicant at a cost of R10 000.00 per month and that another client of the Applicant, who apparently uses the information far less, pays approximately R4 000.00 per month for the same information. The Applicant requires the Respondent to pay an amount of approximately R40 000.00 per month which, in the tenor of its allegations, the Respondent claims to be unreasonable and to cause prejudice and which the Respondent also says is an endeavour to prevent the Respondent from entering the market as a competitor and furnishing similar information to that which the Applicant furnishes - a stated intention of the Respondent for the future. In the Respondent's Supplementary Founding Affidavit (as Applicant) in the Competition Tribunal proceedings, the Respondent makes out a similar case

in paragraph 11 (at page 350 of these papers), albeit the figures utilised therein are different.

In paragraphs 64 and 65 (at pages 310 to 312 of these papers) of the founding papers of the Respondent (as Applicant) in the proceedings before the Competition Tribunal, the Respondent sets out various aspects of the Applicant's conduct which it alleges is contrary to the provisions of the Competitions Act. Included therein is an assertion in sub-paragraph 65.2.5 (at page 312 of these papers) that the Applicant, being a dominant firm, is abusing its position as a dominant firm to refuse to give a competitor access to an essential facility when it is economically feasible to do so. Reliance is placed on the provisions of Section 7 and Section 8 of the Competition Act.

As mentioned, **MR. SALMON** urged me to hold that the papers before me were deficient in setting out particularity of the conduct which was allegedly in contravention of the provisions of the Competition Act. Despite such urging, I cannot make such a finding. Both parties annexed copies of the papers in the proceedings before the Competition Tribunal to their papers in this matter and I must, perforce, have regard thereto. There is, in my view just sufficient particularity set out in those papers (as supplemented by what is alleged in the papers before me) to refuse to conclude that the Respondent has merely relied upon a recitation of various sections of the Competition Act for its allegations of unlawful conduct prohibited by that Act. What is clear from all

the papers is that the Respondent alleges that the Applicant is a dominant firm; that it previously supplied information to it at a much lower price than it is now demanding; that the Respondent is prepared to pay a higher sum than it was previously paying but not anywhere as high as that demanded by the Applicant; that the Applicant provides other customers with such information at a much lower charge than it is requiring from the Respondent; that in consequence of the refusal by the Respondent to pay the amount demanded by the Applicant, the Applicant has cut off its online access to its data base. That, in my view, although somewhat lacking in detail, is just enough to show that the complaint had been raised with sufficient particularity for it to have been considered on its merits by the Competition Tribunal. As that information is before me through a combination of the allegations made in the Affidavits in this matter and the Annexures thereto (which include the papers before the Competition Tribunal) I hold that whilst it would have been preferable for additional information to have been set out, sufficient particularity has in fact been set out in the papers before me and that the issue had thus not, for that reason, been raised frivolously or vexatiously before me. Of course, in so holding I make no finding that the Respondent's assertions which I have set out above are correct.

Subject to what I state below and until the new material was introduced, whilst the Respondent might have been dilatory in the proceedings before the Competition Tribunal (which conduct is to be deprecated), I did not consider

that such dilatory conduct in those other proceedings warranted me holding that the Respondent was pursuing such proceedings with a lack of seriousness. If what **MR. PAMMENTER** stated from the Bar on 24 October 2011 was correct, the long outstanding Replying Affidavit ought to have been delivered and the matter could have proceeded in that forum.

Nor did I initially consider such dilatory conduct as being indicative of an intention of raising the allegedly anti competitive conduct of the Applicant in these proceedings in a manner lacking seriousness from which I could have drawn the conclusion that it was being raised frivolously or vexatiously. The more so as such was raised by the Respondent (in the Competition Tribunal) long before these proceedings commenced and the Respondent seemed intent on pursuing same.

Can I then have held that the proceedings before the Competition Tribunal were hopeless, with the result that the Respondent had to be found to have been acting frivolously or vexatiously?

MR. PAMMENTER during the course of argument (whilst not abandoning any assertions that other sections of the Competition Act have been breached by the Applicant) submitted that in terms of Section 8 (b) of the Competition Act it is prohibited for a dominant firm (which the Applicant clearly is) to refuse to give a competitor access to an essential facility when it is economically

feasible to do so. I cannot accept such submission. In the first place, there is insufficient information before me to hold that the Applicant's publications are the only means of obtaining the information utilised by the Respondent thereby rendering them an essential facility required by the Respondent to conduct its business. On the contrary, it appears from the papers that there are other entities which provide similar information. Further, I do not believe that the Respondent is a competitor of the Applicant. It is true that it avows that it intends to disseminate similar information in the future, but that simply means that it is intending to be a competitor in the future and in my view the provisions of Section 8 (b) of the Competition Act refer to a current competitor.

However, **MR. PAMMENTER** also referred to the prohibition contained in Section 8 (a) of the Competition Act, where a dominant firm is prohibited from charging an excessive price to the detriment of consumers. In this regard, I was referred to the prices which the Applicant charges other customers and the price it is demanding from the Respondent (which I have alluded to at an earlier stage in this Judgment). *Prima facie* there does appear to be something to be said for that submission. To demand approximately R40 000.00 (or R32 000.00 as the case might be, depending on which Affidavit one has regard to) seems excessive when other customers are alleged to be charged a much lower sum. That must obviously be to the detriment of consumers. One of such consumers would be the Respondent itself. Other consumers would, in my view, be customers of the Respondent

who would be prejudiced. Common sense dictates that if the Respondent is to pay an inflated price, it will be obliged to pass on such increase to its customers, in turn. Whether there is in fact an excessive price being charged is a matter I believe the Competition Tribunal would have been enjoined to investigate and rule upon. Section 8 of the Competition Act falls under Chapter 2 of that Act and in terms of Section 27 of the Competition Act, the Competition Tribunal has the power to adjudicate on any conduct prohibited in terms of Chapter 2, to determine whether prohibited conduct has occurred and if so, to impose any remedy provided for in terms of the Competition Act.

All things being considered, I find that the foregoing is an issue which has just been sufficiently raised before me and that it concerns conduct that is prohibited in terms of the Competition Act. There may be other such issues but it is unnecessary for me to make any findings thereon.

I must now determine whether the resolution of the abovementioned issue is required to determine the final outcome of the proceedings before me. During the course of argument on 24 October 2011, **MR. SALMON** handed up a suggested draft order which provides in paragraphs 1 and 3 for declarations that the Respondent has infringed the Applicant's copyright as contemplated by Sections 23 (1) and 23 (2) of the Copyright Act (respectively) and which provides for interdicts in paragraphs 2 and 4 thereof. In paragraph 5 of that suggested draft order, a referral to an enquiry to determine damages or a

royalty is provided for and in paragraph 6, costs of the proceedings are provided for.

In support of the claim for the interdictory relief, **MR. SALMON** urged me to consider granting interdicts in which provision could be made for the interdicts to fall away in consequence of any ruling by the Competition Tribunal (or the Competition Commission) in favour of the Respondent. There would be no infringement from that time onwards so the argument went, and any order which I made would not be affected by such a ruling or rulings as the interdict would only prohibit infringement and if the Competition Commission or the Competition Tribunal ruled in favour of the Respondent, it was obvious that from that time onwards the Respondent could continue its conduct without any infringement as envisaged by Section 23 of the Copyright Act. I was tempted to grant such interdictory relief. It had a certain allure to it.

However, even though it might have been more relevant at the level of a discretion which should guide the granting of interdictory relief, I had to consider the submission of **MR. PAMMENTER** that one should not assume that the Competition Commission or the Competition Tribunal (as the case might be) could not issue a ruling in favour of the Respondent with retrospective effect, that is to say from a date earlier than the ruling was actually made, which could be as far back as the date that the proceedings were launched before those fora, being 14 April 2011. **MR. PAMMENTER**

also submitted that one should be mindful of the fact that an interdict issued by this Court might result in a conflict if the Competition Tribunal were to grant relief claimed from it by the Respondent in the urgent proceedings before the Competition Tribunal. What, he questioned, would be the position if I permanently interdicted the Respondent from infringing the Applicant's copyright and the Competition Tribunal granted an order giving access of the Applicant's information to the Respondent to enable it to continue its business, pending a final determination by the Competition Commission?

Then again and more pertinent to a finding on this leg of the argument, if the Competition Tribunal held that Section 8 (a) of the Competition Act had been contravened in that the Applicant, as a dominant firm, had charged an excessive price to the detriment of consumers, could a final interdict have been granted by this Court? Was a resolution of that issue not required to determine the final outcome of these proceedings? That is to say whether a final interdict should be granted? I thought it was.

In my view, the granting of a final interdict (which is what the Applicant seeks in these proceedings) would have been the final outcome of these proceedings.

Until the introduction of the new material, I believed it was essential for the Competition Tribunal to have made a ruling on whether such conduct was

prohibited by the Competition Act, before a final interdict was granted. It seemed obvious to me that if the Competition Tribunal ruled that such conduct had indeed taken place, a final interdict could not be granted.

The advent of the Competition Act, in my view, provides additional defences, in circumstances such as that prevailing in the matter before me, to those contained in the Copyright Act, provided all the requirements for same are present. Each case must, of course, be considered on its own merits to ascertain whether such defences are available to a person wishing to adopt the same and findings such as I make and opinions I hold in this matter are obviously not of general application.

I pause to mention that during the course of argument I enquired from **MR. SALMON** whether I could consider granting temporary or interim interdicts and he submitted in response to my enquiry that he did not believe I could do so, as, if all the requirements for an ouster of jurisdiction were present neither interim or final interdicts could be granted. On reflection, I believe he is correct.

THE INTERLOCUTORY APPLICATION TO INTRODUCE NEW MATERIAL:

As has already been alluded to, the Applicant brought an interlocutory application to submit new material, which was granted. In essence, the new

material which the Applicant sought to place before the Court can be summarised as follows:

- a) When the matter was first argued before me, it was raised during the course of argument (and it caused me some concern) that the Replying Affidavit of the Respondent (as Applicant) in the Competition Tribunal proceedings for urgent interim relief, had not been delivered. During October 2011, when the matter was heard again, I was specifically informed by the Respondent's Counsel that the Replying Affidavit, although not yet delivered, was in the process of being delivered as it was with DHL (a courier business) and was expected to be served shortly.
- b) At that time, the Respondent's Counsel had received direct instructions from the Respondent's Attorney (who was present at the hearing) and the matter was a pertinent issue which went directly to the root of whether the Respondent was pursuing these proceedings frivolously or vexatiously.
- c) Unbeknown to the Applicant, but known to the Respondent's Attorney, a notice of non-referral dated 19 September 2011, from the Competition Commission, had been served on the Respondent's Attorney. This meant that the initial complaint by the

Respondent to the Competition Commission, was no longer pending at a stage when I was told that the Replying Affidavit in the Competition Tribunal proceedings had been prepared and was shortly to be delivered.

- d) Regard being had to the relief claimed in the Competition Tribunal Interdictory proceedings, such proceedings, of necessity, fell away as the relief claimed in those interdictory proceedings was pending a decision of the Competition Commission complaint. As there was no longer a Competition Commission complaint, it followed that the interdictory proceedings would also fall away.
- e) The information given to me by the Respondent's Counsel, was false and was intended to mislead the Court.
- f) The Respondent had not taken proper steps, timeously, to "appeal" the non-referral decision by the Competition Commission to the Competition Tribunal and was barred from doing so, the time period for such an "appeal" as prescribed by Section 51 (1) of the Competition Act, read with Competition Tribunal Rule 14 (1) (b) having expired.
- g) No steps have been taken by the Respondent to apply for condonation for the late delivery of an "appeal" against the non-

referral decision by the Competition Commission and no such “appeal” or application for condonation was pending.

- h) Although a Replying Affidavit in the interdictory proceedings before the Competition Tribunal had been delivered, together with an application for condonation for the late delivery thereof, such could not, in effect, take the matter any further as the proceedings before the Competition Tribunal would fall away if there was no decision by the Competition Tribunal on an “appeal” against the non-referral decision of the Competition Commission.

The Applicant submitted further that in consequence of the foregoing and whilst not detracting from its original submission that there was no competition issue before me in any event, even if there was such an issue, the decision not to refer the matter to the Competition Tribunal by the Competition Commission and the absence of an “appeal” against such a decision put an end to any concerns I might have about there being a completion issue which had to be referred for decision by the Competition Tribunal. Although it may not have been expressly so stated, it is obvious that a further alternative contended for was that the proceedings before the Competition Tribunal were, in the circumstances, hopeless and thus frivolous and consequently the raising of the same before me in the prevailing circumstances was likewise

frivolous.

The Respondent, of course, opposed the foregoing submissions. In a nutshell, the Respondent asserted that its previous Attorney, had never communicated to it the decision of non-referral by the Competition Commission. The Respondent added that given the vigour with which it has pursued the opposition to the interdictory relief claimed before me and given the voluminous documents filed in the proceedings before both the Competition Commission and the Competition Tribunal, it had every intention of pursuing appropriate relief before the Competition Tribunal and that it was not conducting itself frivolously or vexatiously. It submitted further that even though it might itself not have referred the decision of non-referral to the Competition Tribunal, that did not preclude me from doing so if I was satisfied that there was a competition issue which required to be determined by the Competition Tribunal and that indeed, in terms of the Competition Act, I was obliged to do so.

I will now deal with how the introduction of the new material plays a role in the final decision I have come to in these proceedings. Before doing so, it is important for me to record that whilst it might be that I was furnished with false information by the Respondent's Counsel at the hearing in October 2011 (it is common cause that as at that date no Replying Affidavit in the Competition Tribunal proceedings had even been prepared, let alone signed) I do not hold

that against **MR. PAMMENTER** in anyway whatever. Indeed, the integrity of **MR. PAMMENTER** is without question. I myself overheard **MR. PAMMENTER** requesting instructions from the Respondent's then Attorney and I overheard the direct instruction given by the Respondent's then Attorney to **MR. PAMMENTER**, which was in turn conveyed to me. In those circumstances, no blame whatsoever attaches to **MR. PAMMENTER** and the mere fact that he was an unfortunate conduit of false information must not be held against his integrity in anyway whatever.

It is now necessary for me to indicate that had the new material referred to above not been placed before me, I would have refused the interdictory relief requested by the Applicant and I would have referred the matter to the Competition Tribunal as I was of the view that there was a competition issue which had to be decided by the Competition Tribunal before any interdictory relief was pursued. The Judgment I had prepared was along those lines.

Has the position now changed? I have carefully considered the impact of the new material introduced in this application on the Judgment I had previously prepared. My views are as follows:

- a) The fact that the Competition Commission considered there to be no complaint worthy of being referred to the Competition Tribunal and issued a notice of non-referral does not impact on my view as to

whether there was a competition issue. The members of the Competition Commission were, entitled to make their own decision on the aspects which they perceived as being placed before them and this Court is entitled to make its own. It is noteworthy that in terms of Section 65 (2) of the Competition Act, if the Court comes to the conclusion that there should be a referral of a competition issue prohibited in terms of the Act, such an issue must be referred to the Competition Tribunal to be considered. It is not to be referred to the Competition Commission. In terms of the Competition Act, the Competition Commission is a body of lower status than the Competition Tribunal which is entitled to deal with appeals from decisions of the Competition Commission.

- b) Accordingly, the fact that the Competition Commission found no merit in the complaint to it does not affect the position that I believe that conduct prohibited in terms of the Competition Act has been perpetrated and that is an issue which in terms of Section 65 (2) falls to be referred to the Competition Tribunal for decision provided I am satisfied that the issue has not been raised in a frivolous or vexatious manner and the resolution of that issue is required to determine the final outcome of the proceedings before me.
- c) I disagree with many of the submissions and assertions made by the

Applicant in the interlocutory proceedings which relate to an absence of entitlement on the part of the Respondent to pursue proceedings before the Competition Tribunal, because the time period prescribed by Section 51 (1) of the Competition Act read with Rule 14 (1) (b) of the Rules for Conduct of Proceedings in the Competition Tribunal (“the Rules”) (twenty business days after notice of non-referral by the Commission has been issued to a complainant) has expired.

d) Whilst it is true that the complainant (in this case the Respondent) had twenty business days after the notice of non-referral was issued to refer the matter to the Competition Tribunal it is not forever barred from doing so when it is in default. The time period of twenty business days is provided for in terms of the Rules. Rule 54 (1) of the Rules specifically provides for a party to apply to the Competition Tribunal for condonation for the late filing of a document, or to request an extension or reduction of the time for filing of a document, by the filing of a request in form CT6. The Respondent is obviously aware of such provision having itself utilised the same to seek condonation for the late delivery of its Replying Affidavit (Annexure “LGM8” to the Answering Affidavit in the interlocutory proceedings deposed to by **Ms L.G. MARTIN** refers).

e) In terms of Rule 54 (2) of the Rules, once a request for condonation is received the Registrar of the Competition Tribunal must set the matter

down for hearing at the earliest convenient date after consulting the parties. No doubt, at the hearing, the merits of the application for condonation must be canvassed and adjudicated upon by the Competition Tribunal.

f) Having made findings already alluded to in this Judgment, namely that in my view an issue concerning conduct that is prohibited in terms of the Competition Act has been raised, I am precluded from considering that issue on its merits and such an issue must be referred to the Competition Tribunal for consideration on its merits given that the resolution of that issue, in my view, is required to determine the final outcome of the action.

g) It remains only for me to revisit the proviso set out in Section 65 (2) (b) (i), namely, whether the issue has been raised in a frivolous or vexatious manner. I thus turn my attention to this aspect as it is now, in my view the central point around which my decision hinges:

i) I have referred, at an earlier stage of this Judgment, to paragraph 26 of the Judgment of the Supreme Court of Appeal in the **PLATINUM HOLDINGS** case. It was stated there that one who conducts a hopeless case acts frivolously. Until the introduction of the new material, I was

of the view that the Respondent in the present matter was not acting frivolously (or vexatiously).

- (ii) There are a number of factors which appear from the interlocutory application, which have to be analysed by me in order that I can determine whether my view has changed. I deal with them hereunder, in no particular order.
- iii) Whilst it is so that I remarked upon the fact that the proceedings in the Competition Commission and Competition Tribunal (respectively) had been instituted before this application for an interdict and thus the raising of the issues herein was not a “knee-jerk” reaction to the bringing of these proceedings, so to speak, the issue I must also concentrate on is whether the Respondent (as Applicant in the Competition Tribunal) has any prospect of succeeding in those proceedings, as matters presently stand.
- iv) On the papers before me I cannot find, as a fact, that the Respondent’s erstwhile Attorney had communicated the decision of non-referral by the Competition Commission to the Respondent. In the founding papers in the interlocutory application, the Applicant’s Deponent repeatedly made assertions to the effect that the then Attorney of the Respondent must have

notified the Respondent of the Notice of Non-Referral by the Competition Commission. In the Answering Affidavit of the Respondent, the Deponent **Ms MARTIN**, being a director of the Respondent (although not the sole director, as from paragraph 15 of her said Affidavit there is mention of another director) states that she was never informed by the erstwhile Attorney about the Notice of Non-Referral. Whilst it is true that she denies that the Respondent was aware of that non-referral, she sets forth no information whatever as to what enquiries she made with other directors or shareholders of the Respondent, or indeed with other personnel of the Respondent, to determine whether the erstwhile Attorney had notified anybody connected with the Respondent about the notice of non-referral. She does not even go so far as to indicate that a search of communications between the erstwhile Attorney's offices and the Respondent's offices discloses no such communications. At a later stage in her Affidavit, she states that she was not aware of what the former Attorney was doing but, once again, does not indicate that responsible persons connected with the Respondent were not so aware. In my view, the Applicant rightly criticises this approach in its Replying Affidavit. Further, **Ms MARTIN** sets forth no information whatever as to the steps taken by the Respondent (or herself for that matter) to ascertain what had happened about the

proceedings in the Competition Commission and the Competition Tribunal. One would have expected someone from the Respondent to have made enquiries of the Attorney, given that the matter is obviously of crucial importance to the Respondent and given that it was pursuing urgent relief in the Competition Tribunal since April 2011. Whilst some allowance can be made for the fact that these proceedings intervened, I do not believe that there is any excuse which can be proffered as to why no diligent enquiries were pursued with the Respondent's erstwhile Attorneys and if they were, why **Ms MARTIN** failed to disclose the same in the Answering Affidavit in the interlocutory proceedings. The overall impression gained is that the Respondent was quite content to allow the proceedings in the Competition fora to continue as they were, without pressing for a resolution thereof, with the inescapable conclusion that it sought to benefit from delaying a decision on issues as between itself and the Respondent. However, although dissatisfied in the respects I have mentioned, I would not have changed my views on this issue alone.

- v) What is clear is that by early November 2011, after the former Attorney had apparently absconded, the current Attorney of the Respondent took charge of the matter. The current Attorney

apparently prepared the Replying Affidavit in the Competition Tribunal matter and the appropriate application for condonation thereof. What I do not understand is what purpose the preparation of and the delivery of the Replying Affidavit in the Competition Tribunal proceeding serves in the absence of the non-referral decision by the Competition Commission being appealed to the Competition Tribunal. It is clear from the relief claimed in the Notice of Motion in the proceedings for urgent relief in the Competition Tribunal (page 142 of these proceedings before me refers) that the order sought is to immediately allow online access and it is to endure until the complaint lodged at the Competition Commission has been finalised and a ruling in respect of the conduct complained of has been issued. I have already mentioned at an earlier stage in this Judgment that the Rules provide for condonation and there is no reason why the twenty business day period for the “appeal” to the Competition Tribunal has not been the subject of an application for condonation. As was correctly pointed out in the Applicant’s Replying Affidavit in the interlocutory proceedings, the substratum for the urgent interdictory proceedings in the Competition Tribunal has fallen away.

- vi) That being so, in my view, the application for condonation and the

delivery of the Replying Affidavit in the urgent proceedings in the Competition Tribunal cannot avail the Respondent. Even if the Competition Tribunal were to grant it condonation and accept the Replying Affidavit, what will be the outcome thereof. No urgent relief can be granted in my view. It would, of course, have been different if there was an application for condonation for a late referral to the Competition Tribunal of the decision by the Competition Commission.

- vii) I am well aware that the separate proceedings in the Competition Tribunal (and the Competition Commission for that matter) are extraneous to these proceedings and have no bearing upon my decision. I am perfectly entitled, independently thereof, to refer the matter to the Competition Tribunal if in my view the requirements of Section 65 (2) of the Competition Act are met. Whether the Respondent is in default in either of those proceedings does not preclude me from referring the matter to the Competition Tribunal if I find that the Respondent is not litigating frivolously.
- viii) Unfortunately for the Respondent I can no longer continue to believe that it is not proceeding frivolously before me. The position which has now unfolded is that the complaint of the

Respondent to the Competition Commission has been rejected. The Respondent has not timeously “appealed” that decision by referring the same to the Competition Tribunal. The Respondent has not sought condonation for not timeously referring that decision to the Competition Tribunal. The Respondent has been considerably out of time in delivering a Replying Affidavit in its Competition Tribunal proceedings and although it has sought condonation for such late delivery, I do not believe that there will be any success in the same given that the substratum for those proceedings have now fallen away (in the absence of any application for condonation).

- ix) That being so, there is a direct impact on the proceedings before me in my view. It is the very same issue which the Respondent has sought to be adjudicated upon in the competition fora, which is before me. That too, not in specific terms, but in the general terms in just sufficient particularity to which I have referred at an earlier stage in this Judgment. Even so, I would have been prepared to find that the issue was not being pursued frivolously before me if I was satisfied that the Respondent had taken all appropriate steps to have its complaint properly and seriously ventilated before the appropriate competition authority. This it has clearly not done. There comes a stage when the Court has to say

that a litigant can only place so much of blame on its Legal Representatives and avoid the consequences of negligence. Beyond that, it takes the risk of the negligence of the Legal Representatives it chooses. I believe this is one of such cases. Whilst it might be that the Respondent can complain bitterly about the conduct of its former Attorney, it now has the services of a different Attorney and it has had the services of both Senior and Junior Counsel to advise it. If it is not pursuing the relief which it wanted adjudicated upon properly and seriously and in my view now has a hopeless case for interim relief in the Competition Tribunal (the substratum for such relief has now fallen away) without any request for the Competition Tribunal to make a new determination about the rejection of the complaint to the Competition Commission, how can I come to the conclusion that it is not raising the same issue before me in a frivolous fashion? How can it be that the Respondent does not wish to pursue relief in its own right yet expects me to come to its assistance by deciding that it has not been frivolous in the way it is conducting itself and to refer the matter to the Competition Tribunal. It should have done so itself and if it had, I would no doubt have been persuaded that it was serious in its submissions in this Court and that it wished seriously to pursue remedies available to it. By 30 January 2012 – the day when I last entertained this matter -

(some three months after it became aware of the wrongdoings against it by its former Attorney and almost two months after issues of condonation had been raised in the interlocutory application) no application for condonation had been made to the Competition Tribunal relating to the rejection of the complaint by the Competition Commission. Such an application was essential yet not pursued.

- x) For the foregoing reasons, at least, I must come to the reluctant conclusion that the Respondent is conducting the litigation before me in a frivolous manner, making submissions that my jurisdiction is ousted in consequence of a prohibited practice in terms of the Competition Act, when it has not pursued that very prohibited practice it complains of in the appropriate fora although it instituted proceedings in such fora at an earlier stage. I cannot hold that it is serious in its submissions before me on this aspect.

The end result of my foregoing deliberations is that I do not believe that my jurisdiction has been ousted by the provisions of Section 65 (2) of the Competition Act.

DISCRETION:

In view of my findings as set out in this Judgment, I do not believe that there is any need for me to deal in any detail with the issue of discretion. In the circumstances prevailing, the Applicant is now, in my view, entitled to interdictory relief and any discretion not to grant interdictory relief cannot be exercised in favour of the Respondent.

EXPEDITED HEARING IN THE COMPETITION TRIBUNAL:

At this point, I pause to record, perhaps gratuitously, some observations I have made when perusing the provisions of the Competition Act and the Rules. I do so because of the repeated assertions of the Applicant that proceedings in the Competition Tribunal would take a lengthy period of time and would thus occasion undue prejudice. Needless to say I do not agree with those assertions. Further, these observations might be of some assistance to the Respondent if it wishes to continue to pursue relief before the Competition Tribunal, given the order I now intend to grant in the matter. If it successfully pursues relief in the Competition Tribunal it may be assisted in overcoming the restraints I intend to place upon it.

In terms of Section 58 of the Competition Act, amongst other powers it may have in terms of the Competition Act, the Competition Tribunal may make an

appropriate order in relation to a prohibited practice including interdicting such prohibited practice and ordering a party to supply or distribute goods or services to another party on terms reasonably required to end a prohibited practice. In terms of Rule 28 (3) of the Rules which deals with hearings for interim relief, the Competition Tribunal, in urgent circumstances, may on good cause shown, shorten any time period or dispense with any formalities provided for. In terms of Rule 28 (1) of the Rules, the provisions of Rule 22 of the Rules, read with any change required by context is made applicable to pre-hearing procedures in an interim relief application and in terms of Rule 22 (1) (c), an assigned member of the Competition Tribunal may, at a pre-hearing conference, give directions in respect of, inter alia, a date, time and schedule for the hearing. That being so, there appears to me to be no impediment in the path of a party in seeking to obtain a pre-hearing conference in proceedings already instituted in the Competition Tribunal and to make representations for a hearing of an application therein as a matter of urgency (and in the present matter, more particularly in the light of my findings that the Applicant's copyright has been infringed). The more so if condonation for the late filing of the "appeal" concerning the rejection of the complaint by the Competition Commission is requested in terms of Rule 54. Of course I cannot opine on how the Competition Tribunal will deal with the matter and even if it does not grant interim relief, the Respondent might still be successful in its complaint in the main which will then ameliorate the position it now finds itself in.

Had I referred the matter to the Competition Tribunal, there would thereafter have been no impediment, either, in my view, to the Applicant speedily approaching this Court, on these papers supplemented insofar as might have been necessary, or in another application (given how voluminous this application already is and that much of what is stated in these papers would have become irrelevant – suggesting to me that a fresh application would have been preferable), for suitable interdictory relief and a referral for an enquiry for a determination of damages or of a royalty to be paid and other appropriate relief, should the Competition Tribunal not have found in favour of the Respondent. In granting such interdictory relief at that stage, this Court would have been applying the determination of the Competition Tribunal, in accordance with the provisions of Section 65 (2) (a) of the Competition Act.

CONCLUSION:

In the light of my findings in this matter, I propose to grant suitable declarations concerning infringements of the Applicant's copyright by the Respondent which in my view have caused prejudice to the Applicant. I do so as I am of the view that these are not matters in which the Competition Tribunal (or the Competition Commission) has any jurisdiction and the provisions of Section 65 (2) (b) of the Competition Act do not apply to same. Such declarations can only extend to 30 January 2012, being the date on

which this matter was last before this Court. I do not know what has happened since that time but it is clear that such unlawful conduct continued until at least that date. I also intend to afford to the Applicant the opportunity to claim damages or a royalty for the period 31 January 2012 to the date of the handing down of this order, from which date the Respondent will be interdicted from infringing the Applicant's copyright, assuming it can prove that such infringements occurred during that period.

I also intend to grant appropriate interdictory relief to the Applicant. Such interdicts will extend beyond the declarations as to infringement of copyright and where the interdictory relief does so, it is on the basis that I believe the Respondent requires to be restrained in possibly pursuing unlawful conduct as against the Applicant in relation to other publications of the Applicant even though the Respondent has not necessarily been proven at this point in time to have infringed such copyrights. I believe that the conduct of the Respondent has been demonstrated to be such that there is a reasonable apprehension on the part of the Applicant that such unlawful conduct may be pursued at a later stage. Should the Respondent not be so restrained and it then conducts itself unlawfully in respect of the Applicant's copyrights, the inevitable result will be another voluminous application for interdictory relief in this Court. On the other hand, if the Respondent has no intention of conducting itself unlawfully in those respects, the granting of the interdictory relief cannot affect it.

I also intend to grant appropriate relief insofar as a referral on the question of damages, or a royalty, to be paid is concerned and directions in respect of pleadings in that regard and finally an appropriate order for costs, which will include the costs of the application for the introduction of the new material as it is a portion of that new material which has changed the outcome of this decision. In so doing I must remark that I did not find the tenor of the Applicant's Founding and Replying Affidavits in the interlocutory application to be in good taste and the Applicant should take heed of this remark as a Court does not take kindly to being given a lecture by litigants before it. Notwithstanding, I do not intend to deprive the Applicant of its costs in that application.

In formulating the declarations which I intend to make and the other relief which I intend to grant, I have taken into account the wording of the suggested draft order handed in to me by **MR. SALMON** on 24 October 2011.

ORDER:

In the result I make the following order:

It is declared that the Respondent has, as contemplated by the provisions of Section 23 (1), read with Section 6 of the Copyright Act 98 of 1978, infringed the Applicant's copyright from 12 April 2011, by, without a licence from the Applicant, reproducing portions of the **TRANSUNION AUTO DEALERS GUIDE**, comprising vehicle codes and vehicle valuations, such being literary works, the copyright in which is owned by the Applicant, and that it has also from 12 April 2011, infringed the Applicant's copyright in the aforesaid literary works, as contemplated by the provisions of Section 23 (2), read with Section 6 of the Copyright Act 98 of 1978, in that it, without a licence from the Applicant, distributed for the purposes of trade, to the prejudice of the Applicant, certain information reports containing the aforementioned vehicle codes and vehicle valuations, such having been incorporated and published by the Applicant in each publication of the **TRANSUNION AUTO DEALERS GUIDE** from 12 April 2011 to 30 January 2012.

5.

An interdict is granted restraining the Respondent from, without the Applicant's licence (whether such licence is the result of a ruling or a directive of the Competition Tribunal which might take place in the future, or otherwise) in any way reproducing the vehicle codes and vehicle valuations (or substantial parts thereof) incorporated and/or published in each publication of:-

- 4.5. the **TRANSUNION AUTO-DEALERS GUIDE;**
- 4.5. the **TRANSUNION COMMERCIAL VEHICLE DEALERS GUIDE;**
- 4.5. the **TRANSUNION CAR AND COMMERCIAL OVER TEN YEARS OLD GUIDE;**
- 4.5. the **TRANSUNION MOTOR CYCLE DEALERS GUIDE;**
- 4.5. the **TRANSUNION AGRICULTURAL MACHINERY DEALERS GUIDE.**

5.

An interdict is granted restraining the Respondent from, without the Applicant's licence (whether such licence is the result of a ruling or a directive of the Competition Tribunal which might take place in the future, or otherwise) selling, by way of trade offering or exposing for sale, or distributing for the purposes of trade, the vehicle codes and/or vehicle valuations (or substantial parts thereof) incorporated and/or published in each publication of:-

- 4.5. the **TRANSUNION AUTO-DEALERS GUIDE;**

4.5. the **TRANSUNION COMMERCIAL VEHICLE DEALERS GUIDE**;

4.5. the **TRANSUNION CAR AND COMMERCIAL OVER TEN YEARS OLD GUIDE**;

4.5. the **TRANSUNION MOTOR CYCLE DEALERS GUIDE**;

4.5. the **TRANSUNION AGRICULTURAL MACHINERY DEALERS GUIDE**.

5.

The question of damages, or a royalty, to be paid to the Applicant as a result of the Respondent's infringements referred to in paragraph 1 above is referred to an enquiry as contemplated by Section 24 (1B) of the Copyright Act, 1978 and in this regard:-

4.5. the Applicant's notice of motion in these proceedings dated 7 June 2011 shall serve as a summons in the aforesaid enquiry;

4.5. the Respondent's notice of intention to oppose dated 21 June 2011 shall serve as a notice to defend in such enquiry;

- 4.5. the Applicant is directed to deliver its declaration in the aforesaid enquiry, within twenty days of the date on which this order is handed down and failing such delivery, this paragraph of this order shall no longer apply;
- 4.5. the Applicant shall be entitled to pursue a claim for damages, or a royalty, for the period 31 January 2012 to the date of the handing down of this order, in the said declaration, but in so doing it shall be required to prove infringements of its copyrights by the Respondent during that period;
- 4.5. in the event of the Applicant delivering its aforesaid envisaged declaration, the Uniform Rules of this Court relating to action proceedings shall thenceforth apply to the enquiry proceedings.

5.

The Respondent is hereby directed to pay the Applicant's costs to date, such costs to include those costs consequent upon the employment by the Applicant of two Counsel where such occurred and such costs are also to include the costs occasioned by the interlocutory application to submit further evidence which was instituted by the notice dated 22 November 2011.

14 March 2012

A.K. KISSOON SINGH AJ

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