IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
(HELD AT PRETORIA)

In re point *in limine*:	**Case No: 09/IR/Mar10**
Gogga Tracking Solutions (Pty) Ltd	Applicant
and	
Vodacom Service Provider (Pty) Ltd	Respondent

Panel : Takalani Madima (Presiding Member),
Lawrence Reyburn (Tribunal Member), and
Andreas Wessels (Tribunal Member)

Heard on : 26 April 2010

Order and reasons issued on : 07 June 2010

Order and reasons for decision

Background

[1] The applicant is, at least ostensibly, Gogga Tracking Solutions (Pty) Ltd, which for the sake of brevity will be referred to below as 'GTS'. The respondent is Vodacom Service Provider (Pty) Ltd ('VSP' below).

[2] On 12 March 2010 GTS brought an application before the Tribunal on an urgent basis for interim relief in terms of section 49C of the Competition Act, 1998, as amended ('the Act' below).

[3] The underlying complaint of GTS is an allegation of an abuse of dominance by VSP. In essence it amounts to an allegation that VSP, which supplies wireless telecommunications data or 'bundles' on a bulk or wholesale basis, raised its price to GTS for a megabyte of data in July 2007 from 19c to R1.36. After GTS had protested and held negotiations with VPS, VSP dropped its price to GTS to 86c, and later to 60c per megabyte of data. GTS, which has been a data retailer targeting the market for data packages smaller than 500 megabytes and a customer of VSP since GTS was founded in May 2005, was thereafter unable to make a profit from its operations.

[4] VSP is not only a wholesaler but also a participant in the retail market for data bundles, being vertically integrated at least to this extent, and thus is a competitor of GTS in the retailing of data bundles. GTS complains that it was the victim of a margin squeeze by VSP which extinguished its commercial viability. GTS is continuing to trade, but is financially in a parlous state. It attributes its financial woes to the allegedly abusive conduct of VSP.

[5] To add to the tensions now existing between GTS and VSP, Vodacom Ventures (Pty) Ltd ('VV' below), which is a subsidiary of VSP, is a shareholder in GTS and has been such a shareholder since June or July 2006. Currently it holds 49% of the shares in GTS and has done so since April 2009. It appears that VV took up its shareholding in stages, on occasions when GTS was short of cash and its shareholders were prepared to part with some of the equity in order to raise funds which were in some manner routed to GTS in order to enable it to pay some of its debts.

[6] The remaining shareholding of 51% in GTS is owned by a trust named the Somnium Family Trust ('Somnium' below), which is represented by Mr Eugene Beetge ('Beetge'). He is the sole director of GTS and appears to be the person who manages its affairs with a high degree of autonomy. We do not have details in the application papers of the beneficiaries and trustees of Somnium.

[7] It seems that the relationship between GTS and VV is currently distinctly sour. VV, claims GTS, dances slavishly to the tune of VSP.

[8] The summary given above of the complaint is brief and does no justice to the nuances of a complex history and set of facts and relationships. However, it will serve for the present limited purpose.

[9] VSP denies that there has been an abuse of dominance.

[10] GTS lodged a complaint of an abuse of dominance by VSP with the Competition Commission ('Commission') on 01 February 2010 setting out details of the history of the matter and of the pricing issues which are at the heart of the complaint.

[11] The interim relief application now before the Tribunal seems to have been brought because GTS has accumulated considerable debt to VSP and is running out of funds. In the notice of motion filed on behalf of GTS the relief sought includes interdicts which would prohibit VSP from *inter alia* cutting off the supply of data to any of GTS' customers, interfering with the telecommunications facilities provided by GTS to its customers, and demanding payment from GTS of disputed amounts in GTS's account with VSP.

[12] The notice of motion and founding affidavit, which was attested to by Beetge and was the sole affidavit provided at that stage by GTS, were filed on 12 March 2010. The affidavit comprises18 pages and was accompanied by 29 pages of annexures.

[13] An answering affidavit on behalf of VSP was filed on 26 March 2010, after an earlier date provided for in the notice of motion had been extended by agreement between the parties. The deponent to the answering affidavit is Mr Michael Allschwang ('Allschwang'), whose position is that of managing executive of Vodacom Business, a business unit of VSP. It extends to 78 pages, with 252 pages of annexures. There are also three confirmatory affidavits, one being by Mr Livio Corsaro ('Corsaro'), the executive head of VV. One of the assertions of Allschwang that is confirmed by Corsaro is that Allschwang is authorised to make the affidavit on behalf of VSP (see paragraph 1 of Allschwang's affidavit).

[14] Allschwang states that he relies in his affidavit on information provided to him by Corsaro in regard to aspects of GTS's business of which he does not have

personal knowledge (see paragraph 3 of the same affidavit.) Corsaro does not give substantive evidence in his own affidavit about the issues in dispute in the application.

[15] A replying affidavit by Beetge was filed on 20 April 2010. It comprises 59 pages, with 98 pages of annexures.

[16] By the time the hearing took place on 26 April 2010 the record of the case extended to 551 pages.

Proceedings at the hearing

Application for postponement

[17] At the hearing GTS was represented by Advocates Jansen ('Jansen') and Uys. Jansen stated that although another advocate had previously represented GTS, she had received the papers in the case only on 22 April 2010 and had been obliged since then to attempt to master the papers and prepare written heads of argument in advance of the hearing. Regrettably the length and complexity of the papers had made this impossible, and she requested a postponement till 29 April 2010 to enable her to steep herself in the matter and then ensure that written heads of argument were duly produced.

[18] The application for a postponement was opposed by VSP's senior counsel, Mr Van der Linde ('Van der Linde'). He pointed out that the date for the hearing had been known to GTS's attorneys by at least 12 April 2010 and he asserted that there was no justification for a postponement.

[19] Given our decision to strike the instant matter from the Tribunal's roll (see paragraph below), we shall not elaborate any further in these reasons on the application for postponement.

'Short point'

[20] Van der Linde requested the Tribunal to proceed to hear a preliminary 'short point' which in effect was a point *in limine*, and the Tribunal consented to do so after establishing that Jansen was familiar with the issues underlying the point and was prepared to deal with it without further ado.

[21] Since this is an issue with potentially wider ramifications than the case before it, the Tribunal ruled that the parties should submit written argument on the point *in limine*, and deferred to a later date its decision on Jansen's application for a postponement.

[22] Written simultaneous heads have been duly filed, as required by the Tribunal, and have been considered by the Tribunal.

Point *in limine*

[23] The 'short point' was argued orally at the hearing on 26 April 2010. This point entails the following:

[24] VSP contends that Beetge was not authorised to bring the application on behalf of GTS and that it is accordingly an irregular application which should be struck from the roll. The reason for this contention is rooted in a shareholders' agreement that is in force between VV and Somnium and was concluded in November 2006. Beetge is also a party to this agreement. (It will be recalled that Somnium and VV are the only shareholders in GTS.)

[25] The agreement contains a clause which at face value has the effect that GTS may not engage in litigation without the consent of both the current shareholders. (A more comprehensive description of the relevant provisions of the shareholders' agreement is given below.) Accordingly, Van der Linde contended, in view of VV's position as a shareholder in GTS, the consent of VV was essential if Beetge was to obtain authorisation to bring the application. VV had in fact withheld its consent, and was opposed to the bringing of the application. Hence Beetge's action in purporting to file and pursue the application as a representative of GTS and on its behalf had been unauthorised. A document attached to the founding affidavit and purporting to set out authorisation by GTS for the application to be brought by Beetge was accordingly a nullity. The document in question, forming Annexure EB1 to Beetge's founding affidavit, reads as follows:

> *Resolution of the Directors of Gogga Tracking Solutions (Pty) Ltd taken on Thursday 11 March 2010 at Pretoria*
>
> *Decided that:*

Eugene Beetge (ID ...), in his capacity as Director be and hereby is authorised to sign all necessary documents on behalf of the Company in order to institute any legal action and or application on behalf of the Company and/or to oppose and defend any application or action on behalf of the Company.

Signed at Pretoria on this 11th day of MARCH 2010.

.....
EUGENE BEETGE

[26] Beetge's signature is present on this document.

[27] The 'resolution' does not specifically identify any item of litigation which Beetge is purportedly authorised to institute or defend and may accordingly be criticised as being excessively wide and vague. It does not state that authority for the passing of the resolution has been obtained in terms of the relevant clause of the shareholders' agreement (which is discussed below). It is the only document on which Beetge relies in his founding affidavit (at paragraph 1.2) for his authority to bring the interim relief application. His founding affidavit does not refer at all to the provision in the shareholders' agreement which requires the consent of all shareholders of GTS to the bringing of litigation.

The shareholders' agreement

[28] The shareholders' agreement is found in the papers as Annexure AA.11 to Allschwang's affidavit. It is an agreement between three parties: VV, the Somnium Family Trust, and Beetge. VSP is not a party to it.

[29] At the hearing a suggestion was made by Jansen that the shareholders' agreement was a confidential document and that it had been improper of VSP to attach it to Allschwang's affidavit without any indication of its confidential status and without the consent of the other parties to it. We make no comment on provisions of that agreement not quoted in this decision, but to the extent that they are so quoted we find nothing in them that warrants protection under the Act as confidential information, and we rule accordingly.

[30] Clause 13.1 of the shareholders' agreement provides that for as long as any shareholder owns at least 25% of the issued shares in GTS it will be a 'significant shareholder', and 'material matters' requiring a resolution of shareholders will require the approval of the significant shareholders. It is not disputed that VV is such a significant shareholder.

[31] 'Material matters' are listed in clause 13.3 of the shareholders' agreement, and one of them, set out in clause 13.3.17, is '*the institution of any legal proceedings*.' The term 'legal proceedings' is not defined in the agreement but we consider that it can be taken to include this interim relief application.

[32] In passing it is worth noting that the laying by GTS of a complaint with the Commission (see paragraph above) concerning an alleged abuse of dominance by VSP is not, in our view, the institution of 'legal proceedings' by GTS or at least not the institution of 'legal proceedings' as contemplated in the shareholders' agreement. It is more strictly an administrative action. One of the important factors characterising legal proceedings undertaken by a company is that they often have a costs implication if the court or other body before which they are conducted finds adversely to the company. There is no adverse cost implication in the mere laying of a complaint with the Commission as investigative body.

[33] If the complaint laid by GTS with the Commission is ultimately referred to the Tribunal by the Commission in terms of Section 50(1) of the Act, the Commission will be a litigating party in the proceedings before the Tribunal, but that does not make GTS the party who instituted those legal proceedings. If the complaint of a complainant in the position of GTS is referred to the Tribunal by the Commission, the complainant then may participate in the hearing of the complaint in terms of Section 53(1)(a)(ii)(bb) of the Act if "*in the opinion of the presiding member of the Competition Tribunal, the complainant's interest is not adequately represented by another participant, and then only to the extent required for the complainant's interest to be adequately represented*".

[34] It can safely be assumed that one of the purposes in including litigation ('legal proceedings') in clause 13.3.17 of the shareholders' agreement as a matter requiring the consent of significant shareholders was to ensure that while VSP remained such a significant shareholder, litigation was not to be undertaken by GTS which VV considered to be unwarranted either because of its merits or because of its costs.

(The position where VV finds itself in a conflict of interest is dealt with later in this decision.)

[35] In paragraph 87(4) of his affidavit Allschwang denies that the bringing of the interim relief application was authorised by GTS, stating that there would have to have been a unanimous resolution of the shareholders of GTS to authorise the institution of the application. Further, he states that Corsaro has confirmed that there has been no such resolution and moreover that VV is opposed to the bringing of the application.

[36] Beetge's response in his replying affidavit to Allschwang's contentions regarding the lack of authorisation is contained in paragraph 55 of the replying affidavit. It reads as follows:

> *"55.1 The deponent, Beetge, on behalf of the Applicant is the only director of the company*.
>
> *55.2 The Applicant identified a major conflict of interest in the following areas:*
>
> *55.2.1 The Respondent never opted to appoint a director with the Applicant; and*
>
> *55.2.2 The Shareholder, Vodacom Ventures, is a sister company of the Respondent; and*
>
> *55.2.3 The directors of Vodacom Ventures serves on the board of directors of the Respondent; and*
>
> *55.2.4 Confidential information are passed on to the Respondent by Ventures, as admitted in the affidavit; and*
>
> *55.2.5 The shareholders did not agree with the Applicants director that legal actions would be necessary as last option; and*
>
> *55.2.6 Vodacom Ventures acted on behalf of the Respondent as Service Provider, and not in the interest in which they own shareholding*
>
> *55.2.7 The Director of the Applicants' responsibility is to protect the interest of the shareholder, in this case, the Respondent and one of the shareholders are the same party*
>
> *55.2.8 The Applicant indicated clearly to all shareholders, with notice its intentions to seek legal advice and its intention to exclude*

the Ventures shareholder from the legal proceedings due to conflict of interest

55.3 I humbly refer the Honourable Tribunal to Annexure R31 hereto."

[37] Annexure R31 is an e-mail dated 17 September 2009 from Beetge to one Tlhabeli Ralebitso at the e-mail address Vodacom.co.za, copied to Corsaro at the same e-mail address. Its first two paragraphs read as follows:

"*I thought it prudent to mail you after our meeting the other day and as expected the fact that you are/were clearly not very happy about the possible action we might have to take with the Competition Commission.*

Please don't misunderstand my intentions with that strategy, I do not want to fight with VSP, or go the legal way, or actually bite the hand feeds us. And I fully realize the fact that we seemingly stand 'bakhand' every 6 months with cashflow. That is 100% correct that we do, but why. The model change of 2 years ago has substantially changed our model and kept us cash negative. We have also never got the agreed time to increase the customer base to survive on a lower margin. And VSP must realize that and take responsibility ... The one party did not perform, and that party was not Gogga."

[38] While this is not a lucid response to Allschwang's contention that the application was brought without authorisation in terms of the shareholders' agreement, it seems clear that Beetge's answer is that GTS did not need such authorisation since VV was no more than an alter ego of VSP and was in a position of conflict between, on the one hand, its responsibilities to GTS as a shareholder in GTS, and on the other hand its responsibilities to VSP and perhaps the wider Vodacom group to protect their interests. Given the conflict, VV was not entitled to insist that a resolution be provided authorising the institution of this application.

[39] That is also the stance taken by Jansen at the hearing to the 'short point.' She maintained that where a conflict of interest arises between shareholders and one contemplates taking legal action which is effectively against the interests of another, a provision in a shareholders' agreement purporting to require unanimity for the institution of the legal proceedings is inapplicable. She therefore maintained that the

Tribunal should ignore the relevant provision of the shareholders' agreement and proceed to deal with the remaining issues in the case.

The Tribunal's approach to the issue of authorisation

[40] The Tribunal's powers are entirely circumscribed by the Constitution, which has been the ultimate source of law in South Africa since it came into force, and the Act.

[41] One of the important roles of the Tribunal as the adjudicative organ in the competition system is to strike down agreements which are unlawful in that they contravene the provisions of the Act. The primary context in which the Tribunal does so is Chapter 2 of the Act, and more specifically Section 4, which deals with horizontal agreements which are the instrumentalities for prohibited practices, and Section 5, which deals with vertical agreements that amount to prohibited practices. An agreement may also play a role *inter alia* in an exclusionary act which the Tribunal may declare to be a prohibited practice in terms of Section 8, which concerns abuses of dominance. The same applies to the price discrimination provisions of Section 9.

[42] Agreements which underpin prohibited practices are not *ipso facto* void but must be declared void by the Tribunal. This is made clear by Section 65(1) of the Act, which states that:

> "*Nothing in this Act renders void a provision of an agreement that, in terms of this Act, is prohibited or may be declared void, unless the Competition Tribunal or Competition Appeal Court declares that provision to be void.*"

[43] If the conclusion and implementation of an agreement alone constitutes a prohibited practice the agreement or relevant provision(s) thereof may be prohibited in terms of an order made by the Tribunal under one of the sections mentioned above declaring the relevant conduct to be prohibited. The agreement or relevant provision(s) thereof is then void and the fact that it has been rendered void will be clear from the Tribunal's order or decision.

[44] However, there are other situations in which an agreement may be struck down. To find the Tribunal's powers in this regard one must turn to Section 58(1) of the Act, which reads as follows:

> *"(1) In addition to its other powers in terms of this Act, the Competition Tribunal may -*
>
> *(a) Make an appropriate order in relation to a prohibited practice, including:*
>
> *(i) interdicting any prohibited practice;*
>
> (ii) *ordering a party to supply or distribute goods or services to another party on terms reasonably required to end a prohibited practice;*
>
> (iii) *imposing an administrative penalty..... with or without the addition of any other order in terms of this section;*
>
> (iv) *ordering divestiture.....;*
>
> (v) *declaring conduct of a firm to be a prohibited practice in terms of this Act.....;*
>
> *(vi) declaring the whole or any part of an agreement to be void;*
>
> (vii) *ordering access to an essential facility on terms reasonably required;*
>
> (b) *confirm a consent agreement ..... as an order of the Tribunal; or*
>
> (c) *..... condone, on good cause shown, any non-compliance of –*
>
> (i) *the Competition Commission or Competition Tribunal rules; or*
>
> (ii) *a time limit set out in this Act."*

[45] It is significant that the power mentioned in Section 58(1)(a)(vi) to declare an agreement or part thereof void is not a power in the abstract but is constrained by

being a power 'in relation to a prohibited practice.' This means that it is not open to the Tribunal to declare an agreement or part thereof to be void unless the agreement or relevant provision(s) thereof is an integral element of the prohibited practice. Often there will be little more than the conclusion of an agreement and its implementation to constitute the prohibited practice, and it then in most cases will be struck down by an order under one of the sections mentioned above (i.e. Sections 4, 5, 8 and 9). But it is conceivable that an agreement or part thereof may have a secondary or ancillary role in the broader scheme of a prohibited practice. An example of the latter would be an agreement between parties who engage in a prohibited practice to conceal or destroy evidence of the practice, or an agreement which seeks to extinguish a firm's rights of access to the fora in which competition disputes are resolved.

[46] It should be borne in mind in this connection that the Act, although doing so in a circuitous manner, makes the Tribunal the only institution in South Africa empowered to rule at first instance upon prohibited conduct. This is the effect of Section 65(2) of the Act, which states:

> *"If, in any action in a civil court, a party raises an issue concerning conduct that is prohibited in terms of this Act, that court must not consider that issue on its merits, and –*
>
> (a) *if the issue raised is one in respect of which the Competition Tribunal or Competition Appeal Court has made an order, the court must apply the determination of the Tribunal or the Competition Appeal Court to the issue; or*
>
> (b) *otherwise, the court must refer the 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."*

[47] It is also important to bear in mind that the Constitution itself does not condone agreements or any other measures which curtail the rights of citizens to

obtain redress for wrongs. Section 34 of the Constitution is pertinent in this regard. It reads:

> "*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum*."

[48] In a case where, as at present, the authority of a party to bring a case to the Tribunal is challenged, the Tribunal must in fairness to all participants investigate the challenge and in doing so must apply the law that is decisive of the presence or absence of authorisation. If the position regarding authorisation is governed by an agreement that is valid and in force, that agreement must be considered and applied, in much the same way as the articles of association of a company or the founding deed of a trust will be considered and applied to determine who is authorised to represent the company or the trust in instituting or defending legal proceedings before the Tribunal. But the proviso that the agreement must be valid is an important one.

[49] In the present case there is evidence that the shareholders' agreement was concluded and is in force. Beetge signed it on behalf of Somnium and in his personal capacity. After his authority to bring the application had been challenged by Allschwang's answering affidavit, he did not disavow the agreement but on our reading of paragraph 55 of his replying affidavit, cited above, has raised the defence that the relevant provision is inapplicable because VV is subject to a conflict of interest.

[50] GTS's position may well deserve some sympathy if the shareholders' agreement is not merely a mechanism for regulating in an orderly way the relationships of Somnium and VV as co-shareholders in GTS, which is what a shareholders' agreement will normally attempt to do, but was designed and implemented by VV and companies associated by shareholding with VV as a mechanism to frustrate GTS's rights of access to the Tribunal or other organs of the competition system. If this is happening at the level of VV in its relationship with GTS in conjunction with the alleged margin squeeze of GTS by VV's parent or associated company, VSP, of which Beetge complains, then there might be grounds for the Tribunal to impugn clause 13.3.7 of the shareholders' agreement.

[51] The difficulty faced by GTS in this connection is that nowhere in the papers filed on its behalf in the case are such averments made and nowhere is evidence given to support the notion. Apart from Beetge's response in paragraph 55 of his replying affidavit, cited above, his affidavits are silent about the shareholders' agreement and its workings and effects. This omission cannot be made good at this stage, when the exchange of affidavits has been completed and the case has proceeded to a hearing. It would be entirely unfair on VSP to have to deal with an argument along these lines based on evidence that is not before the Tribunal, raising issues which were nowhere stated in the record of the case.

[52] A further nail in the coffin of the application before us is the failure by GTS to cite VV as a party to the application and to enable the Tribunal to have the benefit of evidence from VV in regard to the shareholders' agreement and its implementation and VV's response to the argument that the agreement should be impugned as being an element of the abuse of dominance of which GTS complains. Corsaro and Allschwang are ad idem on the averments made in Allschwang's affidavit, but it is possible that their approach to the case might have been different if the role of clause 13.3.17 of the shareholders' agreement as an element of the abuse of dominance of which Beetge complains had been an issue placed in contention in the founding papers. Who knows if they might not then have chosen to attest separately, or differently, since the interests of VV and VSP might then not be entirely aligned on the central issues, or they might have chosen to present further or different facts in their affidavits. However, it is not the task of the Tribunal to speculate about these and similar possibilities.

[53] Somnium should also have been cited if the shareholders' agreement was to be attacked, at least if Somnium is anything more than a legal transmogrification of Beetge.

[54] GTS's written heads of argument on the 'short point' raise the question whether VV has an obligation to act in the interests of GTS in view of VV's status as a shareholder in GTS and in view of provisions in the shareholders' agreement pertinent to their relationship. In clause 27.1.1 of the shareholders' agreement it is stated that:

> "*the relationship between them shall be governed by the principles of good faith as such principles are understood in the context of a partnership.*"

[55] The argument proceeds that VV, which chose not to have a director on the board of GTS although the agreement makes provision for it to have a nominee director, should necessarily have supported the sole director, Beetge, in bringing the application to the Tribunal since he had support from VV in occupying the sole directorship. We do not see this contention as correct. The fact that VV supported Beetge's appointment as the sole director does not mean that VV had to agree with or support every action taken by Beetge in running the company, specifically actions related to the 'material matters' cited in the shareholders' agreement requiring a resolution from both the shareholders in GTS.

[56] In VSP's written heads of argument reliance is placed on the following extract from the decision of the Competition Court of Appeal in the case of Mike's Kitchen and others v Astral Foods Ltd and another [2004] 1 CPLR 40 (CAC):

> "*The only power that the Tribunal has to 'void' contracts is derived from section 58(1(a)(vi) of the Act, which permits the Tribunal to make an order in relation to a prohibited practice, including 'declaring the whole or any part of an agreement to be void'. The Tribunal can thus only 'void' a contract if it relates to a practice prohibited in terms of Chapter 2 of the Act..... A contract that does not offend the Act (and more particularly Chapter 2 thereof) is beyond the scope of the Tribunal to terminate.*"

[57] We agree that this decision of the Competition Appeal Court correctly points out the limit of the Tribunal's powers to void agreements or parts thereof. It follows that if an agreement is shown to govern a relationship falling for consideration by the Tribunal and the agreement is not attacked as being a part of a prohibited practice, the Tribunal must apply the agreement as it stands to the facts before it. In the present case the only attack made on clause 13.3.17 of the shareholders' agreement was based on an alleged conflict of interest and not on any averment that it represents a part of the alleged abuse of dominance by VSP. Accordingly VSP had no reason to mount any defence to the latter notion, and VSP's evidence was formulated accordingly.

Conclusion

[58] We conclude that effect must be given at this stage to the shareholders' agreement as it stands regarding the issue of authorisation to bring an interim relief application as GTS.

[59] The Tribunal cannot speculate about what might have happened if Beetge in his notice of motion and supporting evidence had raised the existence and implementation of clause 13.3.7 of the shareholders' agreement as an element in a strategy by VSP and VV or related companies in the Vodacom group to abuse dominance. On the completed papers in the case it is not a part of his complaint.

Cautions

[60] The following cautions are added to this conclusion:

[60.1] The first is that shareholders should not perceive this decision as a source of encouragement to draft and implement shareholders' agreements in such a manner that their effect is to impede or prevent access by firms with co-shareholders to the competition authorities if disputes arise about competition issues. Those provisions would be ill-fated and the consequences to the relevant shareholders if they are unmasked would be highly unwelcome to them.

[60.2] The second is that nothing in this decision should be taken as expressing a view on the merits or demerits of the interim relief application of GTS or the complaint lodged by GTS with the Commission. The decision to strike the application off the Tribunal's roll reflects this position (see paragraph below).

Order

[61] In the circumstances, the Tribunal makes the following order:

1. The matter is struck from the Tribunal's roll.

2. No decision is made regarding the application for postponement.

3. No order is made as to costs.

Costs

[62] Competition law must be prosecuted with fairness but also with expedition. Expedition is particularly called for in interim relief cases where the Act requires us to have regard to "*the urgency of the proceedings*". Unfortunately the hearing of the merits of many restrictive practice and abuse of dominance related cases is significantly delayed because of all manner of conceivable technical points taken by respondents in the Tribunal and the Competition Appeal Court ('CAC').[1] This inevitably delays these cases from being brought to finality. This is also the approach taken by the respondent, VSP, in the instant interim relief case.

[63] The Tribunal is acutely aware that from its perspective the legitimate commercial interests of parties are not the only consideration at stake but ultimately the interests and welfare of all South African consumers are at issue. The preamble of the Act and its stated purposes make it abundantly clear that one of its primary purposes is "*to provide consumers with competitive prices and product choices*". Another primary purpose is to ensure that small and medium-sized enterprises, such as the applicant, GTS, in the instant interim relief case, "*have an equitable opportunity to participate in the economy*". These and other objectives of the Act are inhibited by the laborious litigation of technical points. We have a discretion in terms of the Act to award costs because as an administrative tribunal which deals with cases which have an impact not only on the parties to the dispute, but potentially also consumers it is not always in the public interest to award costs against the unsuccessful party. Where, as in this case, the respondent has succeeded on a technical point, and not on the merits, we do not think it appropriate to award it costs.

_____ **07 June 2010**

Lawrence Reyburn Date

Takalani Madima and Andreas Wessels concurring.

[1] See, for example, the comments of the Honourable Justice Davis JP in regard to technical arguments in the application for leave to appeal in the High Court of South Africa (Cape of Good Hope Provincial Division) in the matter between *Clover Industries (Pty) Ltd and Others v Competition Commission and Others* and *Clover Industries (Pty) Ltd and Another v Lewis NO* (79/CAC/JUL08 [2008].

Tribunal Researcher	:	I Selaledi
For the Applicant	:	Adv MM Jansen SC and L Uys instructed by Hartzenberg Inc
For the Respondent	:	Adv WHG Van der Linde SC and FA Snyckers instructed by Cliffe Dekker Hofmeyr Inc