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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 017616

In the matter between:

ANCHOR ZEDO OUTDOOR CC **Applicant**

And

PASSENGER RAIL AGENCY OF SOUTH AFRICA **Respondent**

Panel : Yasmin Carrim (Presiding Member)
: Andiswa Ndoni (Tribunal Member)
: Mondo Mazwai (Tribunal Member)

Heard on : 13 September 2013
Order issued on : 17 September 2013
Reasons issued on : 20 November 2013

Decision and order

Introduction

[1] The applicant has brought an application for interim relief in terms of section 49(C) of the Competition Act 89 of 1998 ("the Act"). The respondent opposed the application. We dismissed the application on 17 September 2013. Our reasons for dismissing the application follow.

[2] The application concerns a decision by the respondent, an organ of state responsible for passenger rail services in South Africa, to terminate its existing leases with various outdoor advertising businesses in favour of one successful tenderer. The applicant contends that this termination constitutes a restrictive vertical practice as well as an exclusionary act. The respondent does not deny terminating the leases but places in issue the competitive

effects of such termination. In particular, the respondent alleges that the complaints raised by the applicant are of a contractual and administrative law nature and do not raise any competition law issues.

Background

[3] The applicant is Anchor Zedo CC ("Anchor"), a close corporation with its registered offices at 24 Glenmore Crescent, Durban North, Kwazulu Natal, carrying on business in the field of outdoor media advertising. The applicant is a tenant of the respondent, in that the applicant has eight advertising sites, at various points on property owned by the respondent, in the greater area of Durban.

[4] The respondent is the Passenger Rail Agency of South Africa ("Prasa") an organ of state established in accordance with the Legal Succession to the South African Transport Services Act, 1989 ("the Legal Succession Act"), with its principal place of business at Prasa House, 1040 Burnett Street, Hatfield, Pretoria, Gauteng.

[5] In terms of the Legal Succession Act, the respondent is responsible for most passenger rail services in South Africa. It has four branches namely– Metrorail, which operates commuter rail services in urban areas, ShosholozaMeyl, which operates regional and inter-city rail services, Autopax, which operates regional and inter-city coach services and Intersite Property Management (Pty) Ltd ("Intersite") which manages the properties owned by Prasa.

[6] Prasa enjoys an exemption from the provisions of laws that prohibit outdoor advertising. Prasa (and its predecessors) have historically allowed various advertising companies to install advertising structures on its various properties in terms of lease agreements between Prasa and the respective advertising entities. 1 500 structures nationally have been installed on Prasa's properties over time. The rental payable by the outdoor companies was either a fixed

amount or a percentage of the rental revenue received by them from advertisers.

[7] Contractually, the outdoor companies were obliged to provide audited records indicating, *inter alia*, rental amounts due to Prasa. According to Prasa, this was not done, making the financial administration of the leases difficult. Faced with this administrative nightmare, Prasa decided in 2010, to call for tenders to centralise the financial management of advertising activities conducted on its properties.

[8] On or about 19 February 2010, the respondent invited outdoor/advertising/media/technology companies to submit proposals for media advertising and broadcasting services[1]. The respondent received 19 bids in response to the request for proposals[2]. The applicant failed to submit a proposal. The applicant submitted that it was not aware of the request for proposals as it was circulated in *The Star, Sowetan* and *Sunday Times* newspapers, which the applicant claimed, were not widely circulated in the Durban area.

[9] The tender was awarded to Umjanji Media Consortium (**"Umjanji"**), comprising of Provantage (Pty) Ltd, SK Media and Consolidated Future Growth and Investment Foundation.

[10] On or about 28 June 2013, the respondent, through its attorneys, Ramushu Mashile Twala Incorporated, issued a letter to the outdoor contractors, including the applicant, giving notice to remove all structures and/or signage situated on its property, on or before 31 July 2013.

[11] Following this, the applicant initiated complaint proceedings with the Competition Commission on 22 July 2013 under case number 2013Jul0348, alleging that the awarding of the tender to Umjanji constitutes a restrictive

[1]See page 30 of the Transcription; See also annexure MN1 to the respondent's answering affidavit.
[2]See page 4 para 10 of respondent's answering affidavit; See also annexure MN2 to the respondent's answering affidavit.

vertical practice in terms of section 5(1) of the Act, as well as an abuse by the respondent, of its dominant position in the market in terms of section 8 of the Act.

[12] Subsequent to the complaint proceedings being launched, the applicant received a further letter on 25 July 2013 from Maraj Attorneys purporting to represent the respondent. In terms of this letter the applicant was advised to remove all structures and/or signage situated on the respondent's property, on or before 31 August 2013.

[13] In the light of the aforesaid letters the applicant approached the Tribunal on 23 August 2013, seeking an order for interim relief in terms of section 49(C) of the Act. A pre-hearing was held on 30 August 2013, and the hearing on 13 September 2013.

Relief Sought

[14] The applicant seeks an order from the Tribunal:

14.1. interdicting and restraining the respondent from taking any further steps to remove and or dissemble and/or break any structures and/or signage belonging to the applicant, which structures are situated on property belonging to the respondent;

14.2 directing the respondent to permit the applicant and or its representatives access to all the applicant's sites situated on the respondents property, in order to carry out maintenance work on the structures and/or signage including the removal and flighting of posters whenever necessary;

14.3 that the relief sought in paragraphs 14.1 and 14.2 above operate and/or remain in force pending the finalisation of the complaint proceedings before the Competition Commission;

14.4 that the relief sought in paragraphs 14.1 and 14.2 above remain in force for a period of six months after the date of the granting of the interim relief order.[3]

Competition Act

[15] In assessing a claim for interim relief brought under section 49(C), the Tribunal is required to take into account:

(i) the evidence relating to the alleged prohibited practice;
(ii) the need to prevent serious or irreparable harm to the applicant; and
(iii) the balance of convenience between the parties.

[16] The above factors are not looked at in isolation or separately but are taken together in conjunction with one another in the exercise of our discretion.[4]

[17] With regard to the type of harm that the applicant must show, it has been held that the harm must be a competition harm arising out of a contravention of the Act.[5] The standard of proof required in application proceedings under section 49C is that applicable to interim interdicts in the High Court, namely that the applicant must show *prima facie* proof of entitlement to the relief sought. We shall now deal with each of the applicant's allegations in turn.

Section 5(1)

[18] Section 5(1) of the Act prohibits an agreement between parties in a vertical relationship if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive gain resulting from that agreement outweighs the anti-competitive effect.

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[3] In terms of section 49C(4) an interim order may not extend beyond the earlier of the – (a) conclusion of a hearing into the alleged prohibited practice; or (b) a date that is six months after the date of issue of the interim order.
[4] York Timbers v South African Forestry Company Limited, case no.: 15/IR/Feb01 at paragraph 66.
[5] Nyobo Moses Malefo& Others v Street Pole Ads (SA) (Pty) Ltd, Case No: 35/IR/May05 at para 35 page 12.

[19] The applicant in its papers submits that the respondent's decision to go out to tender for outdoor advertising services and concluding an agreement with Umjanji, which decision ultimately resulted in the termination of the occupation rights enjoyed by the applicant and others, contravenes section 5(1) of the Act.

[20] The applicant further alleges that Prasa has engaged in prohibited practices, by *inter alia*, failing to advise the applicant that it, and no longer Intersite was the landlord; failing to timeously advise outdoor companies of the tender; inviting tenders without taking into account that the structures/signage on its properties belonged to the respective outdoor advertising companies and not itself; demanding the removal of all signs and structures on Prasa's property which would place the applicant in breach of its contractual obligations with its clients; and awarding the tender to a consortium that failed to attend a compulsory briefing on the tender and which was not registered with CIPC, which then proceeded to sub-contract aspects of the tender to an entity whose credentials were questionable.

[21] In order to sustain a case under section 5(1), the applicant must make out a case that there is an agreement in place between the respondent and Umjanji, who are in a vertical relationship, which has the effect of substantially preventing or lessening competition in a market. It is common cause that there is a vertical agreement in place between the respondent and Umjanji which was concluded after a tender process, in terms of which Umjanji was declared the successful tenderer.

[22] Beyond alleging the existence of the vertical agreement, the applicant has however, advanced little or no evidence to show how the respondent's conduct results in a prevention or lessening of competition in any market. The applicant simply relies upon the allegations summarised in paragraph 20 above as evidence of a contravention of section 5(1). These allegations point to contract law and/or administrative law issues, rather than competition law contraventions.

[23] The allegations may well be true. However, these matters fall outside the ambit of the Act and must be adjudicated in the appropriate forum which has the necessary jurisdiction to deal with them. Nor could the applicant point to any particular provision of the agreement (indeed this agreement was not put up in the papers) between the respondent and Umjanji, which in the applicant's view, has the effect of lessening competition in an identified market.

[24] The central basis of the applicant's argument seems to be that the mere act of appointing one consortium to manage the outdoor advertising activities on Prasa's properties was in itself anti-competitive as it resulted in only one entity out of 150 billboard companies being allowed to have billboards on the respondent's rail reserve. In support of this, the applicant relies on the preamble of the Act which states the objectives of the Act to be, among others, to open the economy to greater ownership by a greater number of South Africans. This objective, according to the applicant, has been defeated by awarding the tender to one consortium. But again no case was made by the applicant as to why the respondent is obliged in law, to appoint more than one consortium or entity.

[25] Of significance from a competition law point of view, is that Prasa appointed Umjanji on the strength of a tender process embarked upon in terms of its procurement policies and in line with section 217 of the Constitution of South Africa. The applicant did not participate in that tender process. We understand that this tender process is the subject of pending litigation, brought by Primedia (Pty) Ltd against the respondent, in the South Gauteng High Court. The applicant is not a party to those proceedings.

[26] As indicated above, it is beyond the scope of the Act and thus the powers of this Tribunal, which is mandated to exercise its functions in accordance thereto, to rule upon the legitimacy and fairness of the tender process which brought about the agreement between the respondent and Umjanji. What this Tribunal can be drawn on though, is that the existence of a tender process points to the fact that the awarding of the tender, and by implication, the

conclusion of the agreement between the respondent and Umjanji, was, by its very nature, competitive.

[27] While the notion of competition presupposes numerous competitors in a market, it does not follow that a reduction in the number of competitors necessarily leads to a lessening or prevention of competition. What must be shown by the applicant is that the terms of the tender, and not the granting of it to Umanji to the exclusion of the applicant, somehow resulted in a lessening of competition in the outdoor advertising market as a whole. This has not been shown.

[28] It may well be that following Prasa's termination of leases; outdoor advertising companies have to find new ways or avenues of doing business. It may even be that these new ways are harder than what the market is accustomed to, but it does not follow that competition will be lessened.

[29] We conclude that the allegations made by the Applicant, to prove that an agreement in contravention of section 5(1) exists, fall short of even the less exacting standard of proof to be met for interim relief purposes. Our decision is that the applicant has not made out a case for the existence of an agreement which prevents or lessens competition in the outdoor advertising market, being the market in which the applicant operates. In the absence of any evidence of an adverse effect on competition, there is no need to deal with the question of any technological, efficiency or other pro-competitive gain resulting from the agreement between the respondent and Umjanji.

Section 8 – Abuse of Dominance

[30] Section 8(c) prohibits a dominant firm from engaging in an exclusionary act, if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain.

[31] The prohibition against the abuse of a dominant position does not apply to all firms. A firm must be dominant in a market for the prohibition to find application.

[32] To prevail under section 8(c), the applicant must show that Prasa is dominant in a particular market; that Prasa has engaged in an exclusionary act; and that there are no technological or efficiency gains that outweigh the anti-competitive effects of Prasa's alleged exclusionary act.

[33] It follows then that if dominance is not established, that would spell the end of the enquiry under section 8(c) of the Act. It also goes without saying that dominance has to be established in the context of a market. Therefore prior to a finding of dominance, the relevant market must be defined.

[34] We have previously held, regarding the requirement to show dominance, that this Tribunal must be satisfied that the respondent is either dominant in a market in which the alleged abuse is perpetrated or that the effect of the abuse is experienced in a related market, one either upstream or downstream of the market in which the alleged perpetrator of the abuse is dominant.[5]

[35] The applicant submits that the respondent is dominant in the market for outdoor advertising in that it is the landlord of 374 railway stations and has abused its dominance by awarding a tender to one entity to manage all the outdoor activities on its properties, which has the effect of restricting competition.

[36] Save to state that the respondent is the owner of 374 railway stations, 42000 hectares of land, and 1500 billboards all situated along the rail reserve,[6] the applicant has not told us how big it considers the relevant market to be, what percentage of that market it considers the respondent to have, or what facts and circumstances warrant the conclusion that the respondent enjoys market power, within the defined market.

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[5]See York Timbers Limited and SAFCOL, case no.:15/IR/Feb01.
[6]See applicant's heads of argument, paragraph 34.

[37] The respondent denies that it is dominant. It accepts that it is a large property owner because of its vast railway infrastructure. [7] The respondent submits that the market for outdoor advertising is not limited only to its rail reserve sites but also includes private landowners, the municipality and other municipal land in the vicinity of its railway infrastructure, upon which the applicant can continue its business. The respondent lists significant players in the outdoor advertising market such as Continental Outdoor Media (Pty) Ltd, Primedia Outdoor (Pty) Ltd and Outdoor Network (Pty) Ltd. It concludes that it is not dominant in this market.

[38] Furthermore, the respondent contends for a broad market for media advertising in South Africa, with outdoor advertising a category of that broad market.[8] According to the respondent, the other media forms are television, radio, print media and the internet. The respondent, relying on the AC Nielsen Report[9], contends that the outdoor advertising market can be subdivided further into the following: activations; airports; billboards; commuter promotions; electronic; premise signage; retail street furniture; stadia promotions; transit media; and walls and murals.

[39] The applicant, in its replying affidavit, persists in its bald allegation that the respondent is dominant without putting forward any evidence regarding the relevant market or engaging with that put up by the respondent. Regarding the alternatives outside the respondent's rail reserve, such as private, municipal or other land along the rail reserve, as contended for by the respondent, the applicant merely submits that it is difficult to put up billboards in proximity to the respondent's rail reserve because the vast majority of the property running along the rail reserve, or in proximity of the rail reserve, is on municipal property.

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[7]See respondent's supplementary affidavit, paragraph 39.
[8]See respondent's supplementary answering affidavit pages11-17 including Annexure "MN2" attached thereto.
[9]The report is for the period May 2008 to 2013.

[40] The applicant submits further that even if the land does not belong to the municipality, municipal approvals have to be obtained to erect billboards. This is not the case with erecting billboards on the respondent's land. The applicant further states that the Ethekwini Municipality is extremely strict in granting approval for the erection of billboards.

[41] Regarding the other alternative forms of media advertising put forward by the respondent, the applicant merely states that the respondent is not an expert in media advertising but does not take the point further[10].

[42] We have held previously that where the Tribunal is not presented with a persuasive view of the relevant market, or if there is a failure to properly identify the relevant market, it is not possible to make a finding of dominance, which is a necessary precursor to proving a claim under section 8 of the Act.[11]

[43] In this particular case, other than making assertions of dominance, the applicant has failed to provide us with any evidence regarding the relevant market. The applicant has not discharged the onus on it, as applicant, to define the market, nor has it engaged with the evidence and market definition put up by the respondent in answer. On this basis alone the application must fail.

[44] We have nevertheless sought to assess whether the respondent could be dominant in some market which it is abusing, or if the abuse is experienced in a related market as we are enjoined to do under section 8. On this approach, two markets become relevant. The first is the (upstream) market for the ownership of property on which billboards can be erected for advertising purposes. The second is the (downstream) market for outdoor advertising.

[45] Regardless of which market is considered, the outcome is the same for the applicant.

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[10]See applicant's replying affidavit, paragraphs 116 and 126.2

[11]Cancun Trading no 24 CC and Others v Seven-Eleven Corporation South Africa (Pty) Ltd Case No: 18/IR/Dec99, at para 32 page 8.

[46] If the market is defined as outdoor advertising, the respondent is not dominant and cannot be held to be in contravention of section 8(c). As already indicated, the respondent has provided supporting evidence to that effect, which the applicant has not meaningfully engaged with. Indeed the applicant itself confirmed at the hearing that the respondent was not a competitor in the outdoor advertising market[12].

[47] We therefore cannot find an abuse of dominance by the respondent in this market.

[48] Turning then to the upstream market for land ownership as it specifically relates to Prasa, we have assumed dominance by Prasa, by virtue of its ownership of railway infrastructure, which enjoys an exemption from laws requiring municipal approval for outdoor advertising[13]. On this approach, we have considered whether Prasa has abused its dominance as owner of the railway infrastructure, the effects of which are experienced in a related market (being outdoor advertising in this instance).

[49] The applicant submits that the respondent has engaged in an exclusionary act in that the entire tender process, from its inception, was designed to be an exclusionary act and an abuse of the respondent's dominant position as owner of the rail reserve upon which the applicant and other outdoor advertising businesses advertise.

[50] An exclusionary act is defined as "*an act that impedes or prevents a firm from entering into, or expanding within, a market*".

[51] In essence the reasons advanced by the applicant in support of the alleged section 8(c) contravention are the same as those advanced in support of the

[12]See transcript at page 19, lines 6 – 15, and page 7 lines 9 - 12
[13]It is doubtful that a market definition comprising Prasa's land only would be sustainable, however for interim relief purposes we assume such a market.

section 5(1) allegation, summarised in 20 above[14]. We have already found that those allegations do not raise any competition concerns, nor do they support a finding that the act of granting a tender to Umjanji in itself, impedes or prevents the applicant from entering into or expanding within the market for outdoor advertising. Hence we cannot find an abuse of dominance in this market as well.

[52] In the absence of evidence to prove dominance or an abuse thereof, there is no need for us to deal with the question of whether there are technological, efficiency or other pro-competitive gains which outweigh the alleged anti-competitive effects of the agreement.

Balance of Convenience

[53] The applicant has failed to establish a prima facie right, as a result thereof the balance of convenience does not favour it. As already indicated, the termination of the applicant's lease by the respondent does not constitute a contravention of the Act. The subsequent agreement between the respondent and Umjanji came into being as a result of a tender process and the validity of this tender process is being challenged in the South Gauteng High Court. That challenge falls outside the scope of our mandate.

Irreparable Harm

[54] The applicant submits that it will suffer irreparable harm should the interim order not be granted, as it will have to remove its structures from the respondent's property. If it emerges successful in the investigation by the Commission, the applicant argues, it will have to re-install signage/structures at considerable cost.

[55] As the applicant has failed to establish a contravention of the Act, we have no basis to find in favour of the applicant in this regard. We are not persuaded

[14]See also applicant's heads of argument paragraph 36.

that any damages the applicant may suffer would be irrecoverable. In any event there appear to be alternatives to the respondent's rail reserve, as suggested by the respondent. Other than to point out to the difficulties surrounding these alternatives, the applicant has not told us why the alternatives should be disregarded.

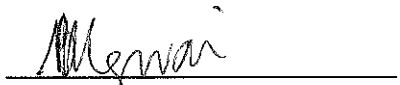
[56] We conclude therefore that the cancellation of the lease between the applicant and the respondent and the subsequent contractual relationship between the respondent and Umjanji do not substantially prevent or lessen competition, nor do they constitute acts which impede or prevent the applicant from entering or expanding within the market.

Conclusion

[57] For the above reasons, we conclude that the applicant has not made out a case for interim relief. The application is dismissed.

Costs

[58] Costs ordinarily follow the outcome of a case, thus the applicant is liable for the respondent's costs on a party-and-party scale, including the costs of one counsel.



Mondo Mazwai

20 November 2013
Date

Yasmin Carrim and Andiswa Ndoni concurring.

Tribunal Researcher	:	Derrick Bowles
For the Applicant	:	Adv Singh instructed by Attorneys Omar &Jazbhay
For the Respondent	:	Advocate Makola instructed by Ramushu Mashile Twala Inc.