
Reasons for Decision and Order

Introduction

- [1] This is an application by the New Reclamation Group (Pty) Ltd (“Reclam”) to set aside, alternatively, to strike out a complaint referral lodged on 25 March 2011 by Mr Gerhardus Johannes Jacobs (“the complainant / Mr Jacobs”) with the Competition Tribunal (“the Tribunal”).
- [2] In his 18 November 2010 complaint referral to the Competition Commission, (“the Commission”) Mr Jacobs had alleged that Reclam had acquired control over Golden Metals which operated as a scrap metal merchant from premises across the road from his business. Mr Jacobs claimed that the purchase or acquisition of Golden Metals enabled Reclam to abuse its dominance and market power in the scrap metal market by manipulating and controlling purchase prices.
- [3] The Commission investigated the complaint under section 8(c) and (d)(i) of the Competition Act, 89 of 1998, as amended, (“the Act”) and found that the allegations failed to sustain a contravention of the aforementioned section of the Act. More specifically the Commission found that Reclam had not acquired control over Golden Metals, but had only occupied the premises previously occupied by Golden Metals by virtue of a lease agreement with the owners of the premises.
- [4] The Commission’s investigations found further that Reclam commenced business at the premises at the end of September / early October 2010 and being new in the area, offered promotional prices. Reclam occupied the rented premises for two months, stopped trading and then vacated the premises in December 2010. The Commission found further that even if the alleged conduct constituted an abuse of dominance, a period of two months would not be sufficient to allow for any exclusionary effect giving rise to a substantial lessening of competition¹. The Commission thereupon issued a certificate of Non-Referral on 24 February 2011².
- [5] The Commission accordingly advised Mr Jacobs to, should he so wish, directly refer his complaint to the Tribunal in terms of section 51(1) of the Act. This Mr Jacobs duly did on 25 March 2011. The relief that he seeks is that (a) *the Tribunal must consider*

¹ . Pleadings Bundle, Annexure “F”, page 22

² . See CT1(2) Form re: Referral of Complaint by Complainant.

*the complaint and refer it back to the Commission for a proper and thorough investigation and to obtain relevant evidence, (b) compensation for financial damages and (c) appropriate order to costs*³. I wish to point out that these proceedings are not about Mr Jacobs' complaint.

Background

- [6] The Applicant is Reclam, a private company incorporated and registered in terms of the Companies Act, No 61 of 1973 with its principal place of business at Reclam Building, 263 Oxford Road, Illovo, Johannesburg. The Applicant is the Respondent in the complaint referral proceedings brought against it by the Respondent in these proceedings. The applicant is represented by Adv D. Unterhalter SC.
- [7] The Respondent is Mr Jacobs, a male person trading as Champs for Scrap with his principal place of business at 41 Brown Road, Newlands, Johannesburg. The Respondent is the Applicant in the complaint referral proceedings referred to above. Mr Jacobs elected to represent himself in these proceedings citing a lack of funds as the reason he did not have a legal representative.
- [8] Mr Jacobs claims to have conducted his business in the Newlands area since 1994 and from his current address since 1999. His competitors in the scrap metal business were the Barkhuizens, a husband and wife team who conducted a similar business known as Golden Metals. The Barkhuizen's business was situated across the road from Mr Jacobs'. There were approximately thirteen other small scrap metal merchants, known as "bucket shops" competing in the same market in the Newlands area.
- [9] On or about the morning of 6 September 2010 Mr Jacobs alleges to have noticed Mrs Barkhuizen arrive at 68 Brown Road, the Golden Metals premises. Shortly thereafter certain persons wearing the Reclam uniform arrived in a Reclam branded mini truck at the Golden Metals premises. They erected a signboard with the name "Reclam Cash for Scrap" which they placed at the entrance of the premises. The signboard displayed the prices Reclam Cash for Scrap would pay for a variety of scrap. With them were three employees of Golden Metals who were also wearing the Reclam uniform. Mrs Barkhuizen left the premises soon thereafter.

³ . CT1 (2) Notice dated 25 March 2011.

- [10] During the course of that morning the Reclam people, according to Mr Jacobs, conducted business from the premises, that is, from 68 Brown Road, and were offering substantially higher rates than what Champs Cash for Scrap and other scrap metal dealerships offered within the Newlands area⁴.
- [11] Upon contacting Mrs Barkhuizen, Mr Jacobs was informed that Golden Metals had been sold to Reclam. This surprised Mr Jacobs as Mrs Barkhuizen had told him in the past of approaches from Reclam but that she would never sell her business to them as they were not offering her an acceptable price for it. Mr Jacobs was also not aware that notice of "*this immediate merger or acquisition*" was given to the Commission, or notice published in accordance with the provisions of section 34 of the Insolvency Act, No 24 of 1936, as amended⁵". He was of the view that "*this immediate merger or acquisition*" should have been reported to the Commission as well as published in terms of the Insolvency Act. According to Mr Jacobs, this was necessary because the transaction would result in an overlap of activities of the merging parties with respect to sourcing of scrap metal in the Newlands area.
- [12] Mr Jacobs' further concern was that the merged entity would be able to exercise market power in the downstream market of the bucket shop, and would be in a strong position to foreclose downstream rivals, Champs Cash for Scrap in particular and thus lessen competition as the competitors would be unable to match what Reclam was offering to scrap sellers.
- [13] In a letter dated 18 October 2010 Mr Jacobs' attorneys informed Reclam, *inter alia* that "*According to facts at our client's disposal, your business activities at No 68 Brown Road, Newlands, Johannesburg, constitute, inter alia, a prohibited practice as contemplated in terms of the provisions of the Competition Act, Act No 89 of 1998 (as amended) and, moreover, a contravention of the order made by the Competition Tribunal on 7 May 2008 under Case No.37/CR/Apr08*"⁶. In response Reclam stated that they were neither in contravention of any of the provisions of the Act nor order of the Tribunal, and invited Mr Jacobs' attorneys to discuss any aspect thereof should they so wish⁷.
- [14] A meeting was indeed held between Mr Stefan van den Berg who represented Mr Jacobs, Mr Howard Frank, Mr Neil Davies and Mr Graham Wolf who represented

⁴ . Jacobs' Founding Affidavit, page 5

⁵ . Jacobs' Founding Affidavit, page 6

⁶ . Jacobs' Founding Affidavit, Annexure A, page 15

⁷ . Jacobs' Founding Affidavit, Annexure B, page 16

Reclam. Not much was achieved. Reclam's position was that they were not guilty of any wrongdoing and that they could open their business anywhere they desired.

- [15] According to Mr Jacobs, Reclam's "*intermediate merger or acquisition with Golden Metals, coupled with its abuse of dominance, manipulation or control of prices on the purchasing of scrap metal made possible by their Market Power, was adversely affecting my business. I could not and cannot possibly compete with the Respondent (whom is regarded as a wholesaler in the market), who is offering wholesale prices for buying scrap metal from sellers*⁸".
- [16] Mr Jacobs further complains that Reclam has the largest collection network in Sub-Saharan Africa and the market power to control prices in the market and to exclude competition, and that since their arrival at Golden Metals, his business has suffered substantially.
- [17] On 29 November 2010 Mr Jacobs made an application to the Tribunal for urgent interim relief against Reclam, under case number 74/IR/Nov10. On the same day Reclam's attorneys wrote to Mr Jacobs and reiterated that Reclam was not in contravention of the Act or the terms of the consent order. In the same letter, the attorneys stated further that "*our client has for commercial reasons, unrelated to the allegations set out in the complaint and interim relief proceedings, decided to cease doing business from the premises situated at No 68 Brown Road, Newlands, Johannesburg with effect from close of business on 30 November 2010*⁹".
- [18] As already stated above the Commission issued a certificate of Non-Referral and advised Mr Jacobs to refer the complaint to the Tribunal himself. Mr Jacobs was not satisfied that the Commission had investigated his complaint against Reclam properly, hence his 25 March 2011 self complaint referral to the Tribunal...

The relief that Mr Jacobs seeks

- [19] In his founding affidavit Mr Jacobs seeks the Tribunal to (a) consider his complaint and (b) refer it back to the Commission for a proper and thorough investigation and to obtain the relevant evidence against Reclam.
- [20] Mr Jacobs states further in the affidavit that in the event that the Tribunal does not refer his complaint back to the Commission, and is of the view that there is enough evidence that Reclam contravened the Act and the consent order, then the Tribunal

⁸ . Jacobs Founding Affidavit, page 7

⁹ . Jacobs Founding Affidavit, Annexure F, page 20

must find (a) that Reclam's actions are anti-competitive and should take the necessary steps to (b) make an appropriate compensation order against Reclam for the financial damages suffered by himself during the three months of "*promotional*" period, and order Reclam to (c) desist from similar conduct in the future elsewhere in the Republic. Lastly Reclam must be ordered to (d) pay appropriate costs in this regard.

[21] The above is the sum total of Mr Jacobs' complaint against Reclam. This is the complaint that the Commission declined to refer to the Tribunal. This is the complaint that the Tribunal would be required to entertain as a self referral once set down. This is the complaint referral against which Reclam has launched the instant proceedings *in limine* to have the said complaint struck out, alternatively set aside.

Reclam's application

[22] In its notice of motion Reclam seeks the following relief

1. setting aside the Respondent's complaint referral dated 25 March 2011, alternatively striking out –
 - 1.1. all or any of the facts pleaded in respect of the alleged merger between the applicant and Golden Metals, in particular those facts pleaded in paragraphs 9, 13 and 22.1 to 22.3 of the respondent's founding affidavit;
 - 1.2. all or any of the facts pleaded in respect of the alleged breach of the Consent Order under Tribunal case number 37/CR/Apr08, in particular those facts pleaded in paragraphs 17 and 23 of the respondent's founding affidavit;
 - 1.3. any and all facts pleaded in support of the applicant's alleged contravention of sections 8(c) and 8 (d)(i) of the Competition Act No 89 of 1998;
 - 1.4. the relief sought in the respondent's form CT1(2) and paragraph 23 of the respondent's founding affidavit in respect of –
 - 1.4.1 the referral of the complaint back to the Competition Commission for reinvestigation;
 - 1.4.2 the declaration that the applicant's conduct is anti-competitive
 - 1.4.3 the interlocutory relief to prevent the applicant "from similar [alleged] conduct in the future elsewhere in the Republic"; and

1.4.4 the compensation for financial damages allegedly suffered by the respondent

2. directing that the respondent pay the costs of this application; and

3. granting the applicant further and/or alternative relief.

[23] Reclam's attack on Mr Jacobs' complaint referral is that it is objectionable and/or excipiable on the basis that it is (a) vague and embarrassing and/or (b) does not disclose a cause of action and/or (c) that the relief sought is jurisdictionally incompetent¹⁰.

[24] In paragraphs 9, 13 and 22.1 to 22.3 of his founding affidavit Mr Jacobs alleges that the purchase of the Barkhuizen's business by Reclam resulted in an intermediate merger between Reclam and Golden Metals, and that Reclam never notified the Commission of the intermediate merger.

[25] In its submission before the Tribunal Reclam stated that section 49B of the Act envisages the referral of a complaint to the Tribunal, either by the Commission or by a complainant in respect of a prohibited practice. A prohibited practice is defined as a practice prohibited in terms of chapter 2 of the Act¹¹. Intermediate mergers notifications to the Commission are governed by a separate chapter of the Act¹². Reclam submitted further that the complaint procedure is not the appropriate procedure in which to complain to the competition authorities of an alleged merger that has been implemented without the requisite approval. Mr Unterhalter submitted that it is for this reason that the Tribunal does not have the jurisdiction to entertain the allegations. (my emphasis)

[26] Reclam further stated that Mr Jacobs does not allege sufficient facts in his founding affidavit to establish that an intermediate merger took place between Reclam and Golden Metals. This paucity of sufficient facts renders the allegations vague and embarrassing and do not sustain a cause of action. Mr Unterhalter submitted that paragraphs 9, 13 and 22.1 to 22.3 of the respondent's complaint referral be struck out for the above stated reasons.

Breach of the Tribunal's consent order.

¹⁰ . Davies Founding Affidavit, page 9

¹¹ . Section 1(xxiv) of Act No.89 of 1998

¹² . Chapter 3 and in particular sections 11, 12, 12A, 13A, 13B, 14 and 15-18 of the Act.

- [27] With regard to the allegations relating to breach of the consent order, Reclam submitted that section 49B of the Act does not envisage a complaint to the competition authorities of a breach of a consent order made by the Tribunal. It was again submitted that the Tribunal lacked the jurisdiction to entertain these allegations. Further that Mr Jacobs lacked the *locus standi* to litigate with regard to the consent order because he was not a complainant or informant in respect of the complaints which gave rise to the consent order, and therefore not a party affected thereby.
- [28] Mr Unterhalter submitted that paragraphs 17 and 23 of Mr Jacobs founding affidavit do not allege sufficient facts to establish that Reclam breached the consent order. These allegation are accordingly vague and embarrassing and do not sustain a cause of action and should accordingly be struck out, it was submitted.
- [29] Reclam submitted further that the relief sought by Mr Jacobs in the CT1 (2) form and in his founding affidavit that the Tribunal should refer the matter back to the Commission for re-investigation is not competent as the Tribunal lacks jurisdiction to do so. The same applies to the request for an order regarding compensation of alleged financial damages. Such an order was beyond the jurisdiction of the Tribunal¹³, so it was submitted.
- [30] Reclam submitted that a further relief sought by Mr Jacobs¹⁴ where he asks the Tribunal to declare that the applicant's conduct is uncompetitive and for "*an appropriate order to prevent [the applicant] from similar conduct in the future elsewhere in the Republic*" has not been set out in the CT1(2) form. This relief has therefore not been set out in the complaint referral. Mr Unterhalter submitted that it is for that reason that paragraph 23 should be struck out.

Abuse of dominance allegations.

- [31] With regard to the abuse of dominance allegations Reclam submitted that Mr Jacobs' founding affidavit did not allege sufficient facts to sustain an exclusionary act complaint as contemplated in section 8(c) and 8(d)(i) of the Act. This because the founding affidavit does not comply with Tribunal Rule 15(2).
- [32] Rule 15(2) provides, *inter alia* that a complaint referral must be supported by an affidavit setting out a concise statement of the grounds of the complaint and the

¹³ . Davies Founding Affidavit, paragraphs 27-28, page 15

¹⁴ . This is set out in paragraph 23 of Jacobs', founding affidavit

material facts or the points of law relevant to the complaint and relied on by the Commission or complainant, as the case may be.

[33] Reclam submitted that Mr Jacobs did not allege the requisite material facts that are necessary to sustain an allegation of an abuse of dominance, namely and *inter alia*, the relevant market. In his founding affidavit Mr Jacobs refers to “*the Newlands scrap metal market*” and “*the downstream market of the Bucket Shops*”. Reclam submitted that it was not clear which market Jacobs relied on or what the respective markets entailed. The founding affidavit also did not allege any market shares and/or players in order to establish Reclam’s dominance or market power as alleged. The founding affidavit further did not state facts in order to establish that Reclam’s alleged conduct constituted an exclusionary act as contemplated in section 8(c) of the Act, or any facts to establish that Reclam induced customers not to deal with Mr Jacobs as contemplated in section 8(d)(i) of the Act.

[34] Mr Unterhalter submitted that the founding affidavit was vague and embarrassing and lacked averments necessary to sustain a cause of action.

[35] Section 8(c) of the Act provides that:

It is prohibited for a dominant firm to –

(c) *engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological efficiency or other pro-competitive gain.*

[36] For a claim to be sustainable in terms of section 8(c) of the Act, the complainant or applicant must prove that the respondent(s) is a dominant firm in a particular relevant market. A dominant firm is described in the Act as being dominant if

(a) *It has at least 45% of that market*

(b) *It has at least 35%, but less than 45% of that market, unless it can show that it does not have market power; or*

(c) *It has less than 35% of that market, but has market power¹⁵.*

[37] Section 8(d)(i) provides that it is prohibited for a dominant firm to –

¹⁵ . Section 7 of Act 89 of 1998.

(d) *Engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act -*

- (i) *Requiring or inducing a supplier or customer to not deal with a competitor.*

[38] It does not seem that Mr Jacobs has been able to demonstrate in his papers the satisfactory compliance with the requisites of sections 7 and 8 of the Act.

The orders that the Tribunal may competently grant.

[39] Section 58(1) of the Act provides for the orders that the Tribunal may make -

“...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, in terms of section 59, with or without the addition of any other order in terms of this section;
 - (iv) Ordering divestiture, subject to section 60
 - (v) Declaring conduct of a firm to be a prohibited practice in terms of this Act, for the purposes of section 65;
 - (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 in terms of section 49D as an order of the Tribunal;
or
- (c) Subject to sections 13(6) and 14(2), 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”.

Is the Tribunal competent to grant the kind of relief sought by Mr Jacobs?

- [40] The Tribunal is an administrative body with powers to make certain orders. This power however does not extend beyond what is expressly set out in an empowering statute, in this case, the Act. These powers of the Tribunal are provided for in section 58(1) of the Act.
- [41] The first relief sought by Mr Jacobs set out in the CT1(2) form is an order for the Tribunal to consider the complaint and refer this complaint back to the Commission for a proper and thorough investigation and to obtain relevant evidence. Mr Jacobs in his submission stated that “*When I said refer something back to the Commission, it is not for a re-investigation, but for the Commission to go and get certain information, which they are capable of. They’ve got the rights to search and seizure. They can do things which I as a private person can’t do...*”¹⁶
- [42] I have not considered Mr Jacobs’ complaint referral because that is not what the instant proceedings are about. I considered Mr Jacobs’ case on the merits. The instant proceedings relate only to the points *in limine* raised by the applicant. It is those points *in limine* that I am concerned with. Even if I had considered the merits of Mr Jacobs complaint referral in these proceedings, I still would not have been in a position to grant him the relief he seeks because the Tribunal does not have the power to refer an abuse of dominance complaint back to the Commission as requested. I take my cue from the provisions of section 58(1) with regard to the orders that the Tribunal can make. Referral of the complaint back to the Commission for re-investigation or getting certain information in this regard, is not one of them.
- [43] Mr Unterhalter in his submission stated that not only is the Tribunal not empowered to refer the complaint back to the Commission, the Commission itself is *functus officio* in that it has already made a decision regarding Mr Jacobs’ complaint, and can therefore not self-correct its earlier decision.
- [44] Mr Jacobs’ alternative relief that he seeks is that in the event that the Tribunal does not refer his complaint back to the Commission, and *is of the view that there is enough evidence that Reclam contravened the Act and the consent order*, then the Tribunal must find (a) that Reclam’s actions are anti-competitive and should take the necessary steps to (b) make an appropriate compensation order against Reclam for the financial damages suffered by himself during the three months of “*promotional*”

¹⁶ . Record page 36, line 18.

period, and order Reclam to (c) desist from similar conduct in the future elsewhere in the Republic. Lastly Reclam must be ordered to (d) pay appropriate costs in this regard. (my emphasis)

- [45] I am again not inclined to grant Mr Jacobs the above relief because I hold no view *that there is enough evidence that Reclam contravened the Act and consent order* because the Tribunal has not heard any evidence in this regard. As already stated above, these proceedings are not about the merits of Mr Jacobs' complaint referral. In any event, Mr Jacobs conceded that "*The case for the abuse of dominance – maybe my case was not stated clearly with facts of exactly what 45% is, how many billion around it is to say okay 45% is 450 000 from a billion¹⁷ I am sure there is a case of dominance to be made out¹⁸. Mr Jacobs submitted that he wanted to be afforded a further opportunity to amend or fix¹⁹ his complaint referral ...*"so that the dispute between me and The Reclamation Group could be properly ventilated in getting to the core of the problem²⁰".
- [46] On being questioned whether he had an answer to the application by Reclam, and whether he conceded all the points made *in limine*, Mr Jacobs stated that he did not concede to all the points *in limine* save for the one on the merger and on the consent order²¹. He submitted that the other points were for evidence.
- [47] The problem with Mr Jacobs' argument is that for him to be allowed to lead evidence at the Tribunal, he needs to first ensure that his complaint referral is properly before the Tribunal. He submitted that he was busy "*penal-beating this to get my complaint ready to be before the Tribunal²²*". This therefore suggests that Mr Jacobs agrees with the proposition that his complaint referral is not properly before the Tribunal in its current form²³.
- [48] I am inclined to agree with Mr Unterhalter that the points he has raised *in limine* should be upheld. Mr Jacobs has submitted that he required a further opportunity to amend or supplement his complaint referral. This would be his second request to so amend or supplement. This request on its own is an admission by Mr Jacobs that he

¹⁷ . Record page 36, line 8

¹⁸ . Record page 38, line 1

¹⁹ . Record page 38, line 14

²⁰ . Record page 39, line 9

²¹ . Record page 41, line 6 – 8 and page 42, line 11

²² . Record page 41, line 14

²³ . Record page 43, line 7

has not made out a proper case that is ripe to be heard by the Tribunal at this stage. As pleaded currently, Reclam does not have a case to answer.

Costs.

- [49] Mr Unterhalter submitted that Mr Jacobs has brought an unwinnable case before the Tribunal without the benefit of legal representation. A case without any merit. Mr Jacobs was requested to withdraw it by the Respondent but he did not²⁴. Mr Unterhalter submitted further that if the Respondent succeeded, they should be awarded costs²⁵ for the reasons stated above.
- [50] I find that Mr Jacobs is not, contrary to what he claims, litigating in the public interest. He is litigating in his own interest. Mr Unterhalter submitted that it is the Commission that litigates in the public interest. The Commission in this matter has provided its views on the merits of this case and communicated them to Mr Jacobs. Mr Jacobs ignored the Commission's views and insisted on self referring a defective complaint to the Tribunal.
- [51] Mr Jacobs submitted that no cost order be made against him, and if costs were to be considered, these should be costs in the cause or in his words "*costs in the matter as it is running*"²⁶. I do not agree.
- [52] The Tribunal has in the past considered the issue of the awarding of costs against litigants such as in the instant proceedings. I have considered the concerns for fairness and in particular the fact that Mr Jacobs is not schooled in the law and has a rudimentary grasp of the law governing competition.
- [53] I have also taken into account the fact that Mr Jacobs has compelled the respondent to appear before the Tribunal to answer to spurious allegations. I find it not acceptable and in bad taste for a litigant to compel another litigant to come to the Tribunal when that litigant has a weak or no case at all. The respondent litigant is compelled to appear before the Tribunal to answer whatever is thrown at it. Failure to so appear could result in a default order against such respondent.
- [54] It does not avail Mr Jacobs that he is not schooled in the law of competition when the applicant argued that Mr Jacobs' pleadings are excipiable. It should equally not avail Mr Jacobs that the applicant's legal representative has more knowledge than him on

²⁴ . Record page 34, line 4

²⁵ . Record page 44, line 20

²⁶ . Record page 43, line 17

the law in this regard. It should further not avail Mr Jacobs that the applicant has lots of money to appoint good counsel to fight their case. I find no merit in such arguments. Mr Jacobs took the risk when he launched these proceedings with the Tribunal, and in all fairness to Reclam, Mr Jacobs should pay the costs, because his matter has been defeated.

Order.

[55] In the circumstances I make the following order:

- (1) Paragraphs 9, 13 and 22.1 to 22.3 of the respondent's founding affidavit of the complaint referral against the applicant to the Competition Tribunal on or about 25 March 2011 are struck out on the grounds that they are excipiable and do not sustain a cause of action;
- (2) Paragraphs 17 and 23 of the respondent's founding affidavit of the complaint referral are struck out on the grounds that they are excipiable and do not sustain a cause of action;
- (3) Any and all pleaded facts in support of the applicant's alleged contravention of sections 8(c) and 8(d)(i) of the Competition Act No 89 of 1998 are struck out on the grounds that they are excipiable and do not sustain a cause of action;
- (4) The relief sought by respondent with regard to the referral of the complaint back to the Competition Commission for re-investigation is struck out;
- (5) The declaration that the applicant's conduct is anti-competitive is struck out;
- (6) The interdictory relief to prevent the applicant "*from similar [alleged] conduct in the future elsewhere in the Republic*" is struck out;
- (7) The relief sought with regard to the compensation for financial damages allegedly suffered by the respondent is struck out; and
- (8) Respondent to pay applicant's costs on a party and party scale.

Takalani Madima

31 August 2011
DATE

Andiswa Ndoni and Andreas Wessels concurring:

- [1] As per **Ndoni** and **Wessels**, we concur with the decision, but for the sake of clarity and further guidance to Mr Jacobs we add the following:
- [2] In regard to paragraph 42 of the reasons we point out that the Tribunal has inquisitorial powers in terms of the Act and therefore in certain circumstances can request additional information from the Commission. However, this is not relevant in this particular case since the Commission, after investigating the matter, has issued a certificate of non-referral and has provided reasons for its decision to the complainant, Mr Jacobs.
- [3] In regard to the interdictory relief sought by Mr Jacobs we point out that he has conceded that the alleged abuse of dominance conduct complained of has in fact stopped. There is therefore no ongoing threat of harm in this case and the issue is moot.
- [4] In regard to the issue of financial damages allegedly suffered by Mr Jacobs, the Tribunal does not have the jurisdiction under the Act to grant compensatory orders of damages. In terms of section 65 of the Act, read with section 58(1)(v), Mr Jacobs would have to approach a civil court to claim financial damages.
- [5] We urge Mr Jacobs to seek legal and economic advice, *pro bono* if possible, in regard to his case. In order for Reclam to have contravened section 8 of the Act, it would have to be found that it is a dominant firm in the relevant market(s) in question. Furthermore, since it is common cause between the parties that the alleged abuse of dominance conduct had a total duration of less than three months it would have to be shown that the conduct in question - despite its limited duration - had an anti-competitive effect.

Andiswa Ndoni and Andreas Wessels

05 September 2011
DATE

Tribunal Researcher:

Mr T Ngilande

For the Applicant:

Adv D Unterhalter SC

Instructed by Werksmans

For the Respondent:

Mr H Jacobs (on his own)