



## COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: IR028May19

In the matter between:

<b>AFRICA PEOPLE MOVER (PTY) LTD</b>	Applicant
And	
<b>PASSENGER RAIL AGENCY OF SOUTH AFRICA</b>	First Respondent
<b>AUTOPAX PASSENGER SERVICES SOC LTD</b>	Second Respondent
<b>MINISTER OF TRANSPORT</b>	Third Respondent

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Panel	: Enver Daniels (Presiding Member)
	: Andiswa Ndoni (Tribunal Member)
	: Imraan Valodia (Tribunal Member)
Heard on	: 1 November 2019
Order Issued on	: 8 November 2019
Reasons issued on	: 2 March 2020

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### REASONS FOR DECISION

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#### INTRODUCTION

[1] The Applicant seeks an order for interim relief in terms of section 49C of the Competition Act, 1998 (Act No. 89 of 1998 as amended) ("the Act") in the following terms:

*"...2. That the first respondent be interdicted and restrained from preventing any of the applicant's buses (and those contracted by the applicant as relief buses) from entering Park station and from loading or off-loading passengers at Park Station, Johannesburg and/ or engaging in any practice prohibited under section 8(c) of the Competition Act, including but not limited to engagement in a 'margin squeeze';*

3. *That such interim relief order be effective from the date of issue of the interim relief order until either the conclusion of the hearing into the prohibited practice currently under investigation by the Competition Commission under case number 2017Mar0020; or 6 months after the date of issue of the interim relief order, whichever date is earlier;*
4. *That the costs of this application be paid by the first respondent; and*
5. *Further / alternative relief."*

[2] Section 49C(1) and (2) provides:

- (1) *At any time, whether or not a hearing has commenced into an alleged prohibited practice, the complainant may apply to the Competition Tribunal for an interim order in respect of the alleged practice.*
- (2) *The Competition Tribunal –*
  - (a) *must give the respondent a reasonable opportunity to be heard, having regard to the urgency of the proceedings; and*
  - (b) *may grant an interim order if it is reasonable and just to do so, having regard to the following factors:*
    - (i) *The evidence relating to the alleged prohibited practice;*
    - (ii) *the need to prevent serious or irreparable damage to the applicant; and*
    - (iii) *the balance of convenience.*

[3] According to *Harms*, the requisites for an interim interdict under the common law, are:

[3.1] a *prima facie* right;

[3.2] a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

[3.3] that the balance of convenience favours the granting of an interim interdict; and that the applicant has no other satisfactory remedy.<sup>1</sup>

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<sup>1</sup> D R Harms SC *Civil procedure in the Superior Court* (Service Issue 6, June 2019) page A -45, para A5.7.

- [4] Section 49C takes into account the general principles set out by *Harms*, although he points out that that Constitutional Court appears to approach the matter (of an interdict) differently, when it said the common-law test has been somewhat denuded of its inflexible nature. Unsurprisingly so because the common law is not a par with but subservient to the supreme law that prescribes the interests of justice as the only requirement to be met for the grant of leave to appeal. Unlike before appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under the constitutional interests of justice standard. The overarching role of interests of justice considerations has relativised the final effect of the order or the disposition of the substantial portion of what is pending before the review court, in determining appealability.<sup>2</sup>
- [5] It would appear that in our consideration of this matter we may also have to consider the interests of justice standard.
- [6] For the sake of convenience, the applicant will be referred to as “APM,” the first respondent as “PRASA” and the second respondent as “Autopax.” No relief is sought against Autopax and the third respondent, the Minister of Transport in this interim relief application.
- [7] In their heads of argument, APM state, that in considering the evidence relating to the prohibited practice – exclusionary behaviour under section 8(c) - the Tribunal is called upon to consider:
- [7.1] whether PRASA is dominant, given that section 8 applies only to firms that are dominant in a competitively relevant market;
- [7.2] if so, whether *prima facie* PRASA has engaged in conduct that either impeded or prevented APM from entering into, or expanding within a relevant market; and

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<sup>2</sup> DR Harms SC quoting from *Tshwane City vs Afriforum and Another* 2016 (6) SA 279 (CC) at para 40. See Page A – 45.

[7.3] if so, whether *prima facie* this has rendered anti-competitive results that cannot be excused on any of the recognised grounds.

## **BACKGROUND**

- [8] The founding affidavit was deposed to by the Applicant's Chief Executive Officer, Mr Tumisang Reginald Kgaboesele ("Kgaboesele"), who, we were informed by Ms Engelbrecht, counsel for APM, was formerly the CEO of Prasa Cres.<sup>3</sup> Prasa Cres<sup>4</sup> sells bus tickets and offers bus terminal facilities at major transportation nodes, including Park Station on behalf of PRASA.<sup>5</sup>
- [9] It is appropriate at this stage already to mention that Kgaboesele does not mention in the founding affidavit that he was the CEO of Prasa Cres. Interestingly, Mr Mfanimela Moses Dingiswayo ("Dingiswayo"), PRASA's General Manager: Group Legal Services, deposed to PRASA's answering affidavit and omits to mention Kgaboesele's prior relationship with PRASA, although he must have been aware of it.
- [10] According to Kgaboesele, APM, which is 100% black owned, was established in 2014 and employs 220 employees, operates 30 buses, has 14 sales offices throughout South Africa, had at the time that he deposed to the founding affidavit, transported 1 600 000 passengers and has an average load factor of 82%.
- [11] PRASA, he contends, is an organ of state mandated to deliver rail services in the metropolitan areas of South Africa, intercity long-distance rail and bus services and also to generate an income from the exploitation of its assets, which includes a real estate and property portfolio managed through Prasa Cres.<sup>6</sup>

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<sup>3</sup> Transcript, pg. 100.

<sup>4</sup> Corporate Real Estate Solutions is a division of PRASA and was established in 2010 to manage PRASA's property portfolio. See [www.prasa.com/cres](http://www.prasa.com/cres).

<sup>5</sup> Founding Affidavit, para 19.6.

<sup>6</sup> Founding Affidavit, para 18.

- [12] PRASA, according to him, is a vertically integrated entity and is both a supplier of bus ticket sales and bus terminal facilities to and a competitor, through Autopax, of APM.
- [13] PRASA owns various bus terminals, including Park Station terminal in Johannesburg, which is the largest intermodal facility in South Africa.
- [14] An intermodal facility links different modes of transport such as rail, buses and taxis at a central hub.
- [15] Park Station is used by about 200 000 people daily. It is the second largest railway station in Africa and is an important transport node which connects all provinces in South Africa. The Park Station model which is not replicated anywhere else in the country includes, buses, trains, inter-city coaches, long distance taxis and inner-city metered taxis.
- [16] PRASA charges bus operators a rental for the use of ticket sales office space and a facility fee or a pay as you go fee for each bus entering Park Station, for the purposes of loading and off-loading passengers.
- [17] Autopax which also operates from Park Station operates two bus services, Translux and City-to-City.
- [18] APM has operating licences for 12 routes which include routes from Pretoria to Durban via Johannesburg and routes to Cape Town and other major cities in South Africa.
- [19] One of its operating licences requires it to operate out of Park Station. Whether this requirement was imposed on APM or was included in the licence application by APM itself cannot be determined on the papers. APM has not provided us with details of the licence application itself.
- [20] APM claims that because the operating licence requires it to use Park Station it had to enter into a right of access agreement with Prasa Cres, to use the

facilities against payment of a fee. It concluded such an agreement on 30 November 2016. Kgaboesele claims that APM was forced to agree to paying PRASA a fee of R480 for a period of one hour per load per bus, plus an additional R150 for every fifteen minutes or a portion thereof in excess of every hour spent at the facility.

[21] The agreement was for a period of one year and APM objected to the fee being charged, on the basis that it was prohibitive.

[22] Although the contract was terminated, APM continued to make use of Park Station and is invoiced by PRASA, but the fees are, according to him, not the subject matter of any agreement entered into between PRASA and APM.

#### **THE INTERIM RELIEF APPLICATION**

[23] The issue we are dealing with in this matter is clearly a commercial dispute and this is evidenced by various statements which Kgaboesele makes in the founding affidavit. In paragraphs 78 to 80, he states:

*"78. APM contends that these fees that are being levied adversely affect the ability of APM to render a comprehensive service, in that it is unable to pass on these costs to passengers, who are largely in the lower LSM Group.*

*79. APM is, and remains willing to pay a reasonable fee for access to Park Station, on the basis that the fee is charged equitably, and that Autopax is subjected to the same terms and conditions of access – including that Autopax is required to make payment on terms no more favourable than those demanded of APM and/or that APM is not refused access to Park Station for non-payment or late payment in circumstances where Autopax and/or other operators are not similarly refused access on the basis of non-payment or late payment. This includes that PRASA ought not to provide Autopax with the money that it requires to make payment for access to Park Station.*

80. *In light of the dispute about the level of the fees being charged by PRASA, and in the absence of an agreement regulating the fee, APM has refrained from making payments to PRASA. APM does not resist payment of a reasonable fee, but the current fee is not at a reasonable level. I attach a copy of a letter...in which APM made a formal offer to PRASA that it would pay a symbolic fee pending the finalisation of the Commission's complaint, which offer was rejected. The offer is marked **TRK10A**, and the response is marked **TRK10B**."*

[24] While Kgaboesele complains about the fees at Park Station, APM appears to be a serial non-payer of its fees in respect of the facilities owned by PRASA in other parts of the country which APM uses.

[25] According to PRASA's answering affidavit, APM's liability under the access agreement, mainly made up of outstanding payments or arrears for access fees to Park Station, amounted to R9 317 370.00 as at 31 May 2019.<sup>7</sup>

[26] Annexure AA1,<sup>8</sup> attached to the Answering Affidavit summarises the APM's arrears as follows:

Station	Lease start	Lease end	Rental per month	Balance @ 31 May 2019
King Williamstown	01/08/2016	31/07/2021	4 708,88	85 370,22
Queenstown	01/04/2016	31/03/2021	4 539,92	92 363,13
Cape Town	01/09/2015	31/08/2020	24 341,33	64 2838,64
Durban	01/11/2016	31/10/2017	17 875,00	-
Durban	01/11/2016	31/10/2017	6 000,00	-
Durban	01/11/2016	31/10/2017	12 000,00	553 099,85
Pretoria	01/12/2014	30/11/2015	28 683,05	506 682,20
East London	01/04/2016	31/03/2021	8 233,92	154 858,80
Johannesburg	01/06/2015	31/05/2016	-	8 882 109,33
Johannesburg	01/01/2017	31/12/2017	26 619,95	435 260,96
Port Elizabeth	01/08/2016	31/07/2021	4 651,41	105 639,28
Germiston	01/11/2015	31/10/2017	7 564,00	111 028,16
			<b>145 213,46</b>	<b>11 569 250,57</b>

[27] The figures suggest that wherever APM operates, there are commercial and contractual issues between APM and PRASA.

[28] In response to Dingiswayo's contention that APM's arrears stood at R9 317 370.00, Kgaboesele merely says in his reply that the correct amount is

<sup>7</sup> Answering Affidavit, para 14.

<sup>8</sup> Record, pg 274. Figures supplied therein.

R8 882 109,33, which is the amount listed in column 9 of the table above, without providing any details whatsoever of the amounts paid by him.<sup>9</sup>

[29] Dingiswayo also mentions that shortly after the access agreement was signed on 30 November 2016, APM materially and continually breached the agreement by failing and/or refusing to pay the access fee.<sup>10</sup>

[30] Kgaboesele's response to this is interesting and reads as follows:

*"The contents of this paragraph are denied. APM met all the obligations of the access agreement from September 2015 to December 2016. During that period APM paid PRASA an amount of R2,7 million. A further payment of R170 000 was made in February 2017. However, in March 2017, APM filed a complaint with the Commission and was no longer prepared to pay PRASA the exorbitant fees. APM's financial viability was also affected by Autopax's continuous disruption and interference in APM's bus operations which resulted in APM being forced to abandon certain routes."*<sup>11</sup>

[31] The statement lends credence to Dingiswayo's assertion that shortly after the agreement was concluded on 30 November 2016, APM defaulted in its payments.

[32] Kgaboesele says that a payment of R170 000 was made in February 2017 but fails to provide any details whatsoever. We can only speculate as to what the payment was for. Was it in respect of either arrears or in partial payment to settle all the outstanding balances due to PRASA or was it a payment towards something else? We'll never know, because Kgaboesele has failed to take us into his confidence. What we do know is that from March 2017, APM failed to make any payments and that lends credence to Dingiswayo's assertion regarding APM's default. APM has also not provided us with information relating to its arrears at any of the other PRASA facilities which it uses throughout the country and has not even attempted to explain how those arrears arose.

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<sup>9</sup> Replying Affidavit, para 17.

<sup>10</sup> Answering Affidavit, para 10 and 13.

<sup>11</sup> Replying Affidavit, para 72.



[33] Kgaboesele's indignation about the "exorbitant fees" must be taken with a little bit more than a pinch of salt. In response to questions from the Tribunal, Ms Engelbrecht correctly informed us that:

*"On affordability of paying the outstanding amount, so the amount that is currently outstanding, my instructions are they cannot afford at this point, to pay that entire amount. The offer still stands to pay R100 per entry, which my client bases on his experience formally (sic) as the CEO of PRASA Cres. He says he knows what it costs them and what it costs Autopax.*

*So, he says R100 per entry is what is offered, and also, they will be able to make arrangements to make payment of an amount of more or less R2 million. In other words, as the R100 is now more or less a fifth of the amount charged, the payment offer of about R2 million in respect of the outstanding access fees for now is again about one-fifth of the outstanding amount. So that is the instruction that I have. That is what they are – that they would be able to make arrangements in respect of, is about R2 to pay not – they could not pay the full amount now. Those are the instructions. But we will put that on a letter, if that is suitable, and then send it to the Tribunal."*<sup>12</sup>

[34] What is important is that Kgaboesele was the former CEO of Prasa Cres, the very arm of PRASA which rented space to bus operators and sold tickets. He would be expected to know what it costs PRASA and what it costs Autopax, by virtue of his position as CEO. That would have meant that at the time of concluding the agreement with PRASA, he did so with his eyes wide open, mindful, by his own admission, made from the Bar, of the costs involved.

[35] We must also guard against the Competition Tribunal being used for ulterior motives by parties who want to avoid their contractual obligations to third parties and necessarily have to carefully analyse and consider each matter referred to us, in order to discern whether a competition issue, falling within the competence of the Tribunal arises. In this context the question arises as to whether the interests of justice would be served by granting APM an interim

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<sup>12</sup> Transcript, pgs. 100 -101.

interdict under circumstances where it has simply refused to pay PRASA anything. This is not an issue we need to concern ourselves with in this matter.

[36] In *Siyakhuphuka*,<sup>13</sup> the Competition Appeal Court stated that:

*“The mere referral of a complaint triggers the exercise of the Tribunal’s adjudicative powers and the Tribunal is obliged to conduct a hearing into the matter with the object of determining whether a prohibited practice has indeed occurred.”*<sup>14</sup>

[37] This accords with section 27(1)(a) of the Act which reads as follows:

*“(1) The Competition Tribunal may –  
(a) Adjudicate on any conduct prohibited in terms of Chapter 2, to determine whether prohibited conduct has occurred...”*

[38] The Applicant does clothe his commercial dispute in competition parlance. Although that may mean that they are, in truth, not competition issues, we are still required to enquire into the matter even though we are mindful of the commercial nature of the dispute.

[39] The competition issues raised by APM are, *inter alia*, according to APM, the following:

*“PRASA is dominant in the ownership and operation of commercial bus terminal facilities in Johannesburg. PRASA’s wholly owned subsidiary Autopax directly competes with APM;*

*The Park Station terminal facility is an essential facility used by the majority of long-distance bus operators, including APM and Autopax;*

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<sup>13</sup> *Siyakhuphuka Investment Holdings (Pty) Ltd v Transnet SOC and another* (158/CAC/Nov17).

<sup>14</sup> *Siyakhuphuka* para 37.

*Should a bus operator be denied access to the Park Station terminal, it would undermine the viability of that bus operator as the Park Station terminal is a crucial point of ticket sales and passenger loading and off-loading;*

*PRASA'S conduct in refusing to give APM access to the Park Station terminal facility which is an essential facility constitutes an abuse of dominance in contravention of section 8(b) of the Act. In terms of section 8(b) of the Act, it is prohibited for a dominant firm to abuse its dominance by refusing to give a competitor access to an essential facility when it is commercially feasible to do so;*

*PRASA's (sic) is charging APM excessive fees for its use of the Park Station facility, the cost of which is prohibitive and undermines the viability of APM's current ticketing price. Furthermore, Autopax does not pay PRASA the fees due for use of the Park Station terminal facility. Accordingly, APM alleges that this conduct of PRASA is an abuse of its dominant position in the market and amounts to exclusionary conduct in contravention of section 8(c) of the Act; and*

*APM also suspects that PRASA is engaging in price discrimination in contravention of section 9(1) of the Act."<sup>15</sup>*

[40] Despite detailing all the competition issues upon which it relies, APM states that “[W]hilst the complaint expressly relates to sections 8(b), 8(c) and 9(1) of the Competition Act, for the purposes of this application for interim relief, APM is relying only on the provisions of section 8(c) only, which it believes is sufficient to satisfy the criteria for interim relief, as set out in section 49C of the Competition Act. This must not in any way be interpreted as APM abandoning its complaint against PRASA in respect of sections 8(b) and 9(1) of the Competition Act”.<sup>16</sup>

[41] PRASA responds to this statement by APM by confining itself to defending only the allegations of the contravention of section 8(c).<sup>17</sup>

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<sup>15</sup> These are contained in the Founding Affidavit, paras 45.1 – 45.6.

<sup>16</sup> Founding Affidavit, para 50.

<sup>17</sup> Answering Affidavit, para 69.

- [42] Because APM made the election to confine itself to the provisions of section 8(c), we need only consider that section and the allegation made by APM that PRASA is dominant in the ownership and operation of commercial bus terminal facilities in Johannesburg.
- [43] Section 8(c) prohibits a dominant firm from engaging in an exclusionary act<sup>18</sup> if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive, gain.
- [44] However, the onus is on the party alleging the abuse to establish dominance.
- [45] In SAA, we stated that “... as this case concerns an alleged abuse of dominance, it is trite law that the Commission needs to establish that SAA is dominant in respect of some market for the conduct alleged to be abusive to be unlawful”.<sup>19</sup> We also mentioned that “in most abuse cases only one potential market is implicated and the relevant market debate turns on whether it has been defined with sufficient precision with respect to potential substitutes”.<sup>20</sup>
- [46] There is on the papers a dispute between the parties about whether PRASA is dominant in the market identified and the relevant the geographical market.
- [47] However, APM must establish that PRASA is dominant in the market.
- [48] The parties only agree that the relevant product market in which Park Station operates is the narrower market for the provision of bus terminal facilities to bus operators.<sup>21</sup> They appear to disagree on almost everything else which is relevant to the proceedings.
- [49] According to APM, the relevant geographic market is the Johannesburg CBD. Park Station is the only intermodal terminal facility and is the only long-distance intercity bus terminal facility in Johannesburg. Therefore, the relevant geographic market may be defined as the area in which Park Station is situated.

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<sup>18</sup> An 'exclusionary act' means an act that impedes or prevents a *firm* from entering into, or expanding within, a market.

<sup>19</sup> *Competition Commission and South African Airways (Pty) Ltd (18/CR/Mar01)* para 33.

<sup>20</sup> *Ibid.*

<sup>21</sup> Founding Affidavit, para 54 and Answering Affidavit, para 75.

- [50] According to PRASA, numerous other firms provide bus terminal services in both the Johannesburg CBD as well as in the broader Johannesburg market, which consists of the Johannesburg CBD and places such as Germiston and Soweto.
- [51] There would appear to be only two legally operated bus terminals, viz., Park Station and Fleet Africa Cross Border Bus Rank. PRASA maintains that the bus terminals in Germiston and Soweto compete or potentially compete with Park Station and Fleet Africa Cross Border Bus Rank.
- [52] PRASA also states that there are numerous other bus terminals, such as Power House, in the Johannesburg CBD which also compete with the two legal ones. These, according to PRASA, might not have been demarcated by the City of Johannesburg but they operate with the knowledge and sanction of the City of Johannesburg. PRASA argues, therefore, that even if APM were denied access to Park Station it can use other bus terminals in the Johannesburg CBD and elsewhere. PRASA goes much further than this and, in fact, argues that even if it is found that PRASA has engaged in margin squeeze by increasing APM's costs, this is unlikely to have a substantial lessening or prevention of competition, because APM can use the other terminals.
- [53] PRASA admits that Park Station is the largest bus terminal in the Johannesburg CBD and the broader Johannesburg area, but denies that that is indicative of PRASA having a market share of at least 45% or the ability to exercise market power. The other bus terminals compete with Park Station as many commuters use those terminals, even though some of them operate informally.
- [54] In respect of the Johannesburg CBD, PRASA denies that Park Station is either dominant or that APM has established PRASA's dominance on any credible basis.
- [55] PRASA takes issue with APM's description of the relevant geographic market being the Johannesburg CBD, as it is overly restrictive.
- [56] PRASA points out that APM operates nationally from Park Station and various other places such as Soweto and Germiston and does not need the use of Park

Station for all services originating or ending in Johannesburg. Based on these and other facts, PRASA, which did not conduct a detailed economic or market analysis in delineating the relevant market, states that it would be wrong to conclude that the relevant market is as narrow as the Johannesburg CBD.

- [57] It will suffice to say that APM responds to PRASA's allegations by submitting simply that PRASA is dominant in the provision of bus terminal services in the Johannesburg CBD and surrounds and to minimise Park Station's dominance, has sought to rely on an extremely broad market. APM also refers to PRASA's own acknowledgement that it did not conduct a detailed economic or market analysis, but it is evident from the papers that APM had itself not undertaken those analyses. If it had, it would have provided us with the details.
- [58] In the absence of credible economic and market information on the geographic market, and details of the other bus termini, we are unable to make a determination on that market. If we attempted to do so, we would be speculating.
- [59] APM does not, on the papers, have an automatic right to use Park Station. It may only do so, if it concludes an agreement regulating its use of Park Station. This is made clear in the Answering Affidavit.<sup>22</sup> This is so, despite PRASA performing a public function as an organ of state in terms of legislation.<sup>23</sup> On any other interpretation, every bus operator would have the right to simply use Park Station without having to enter into an agreement with PRASA. The rule of law must prevail at all times. PRASA is also obliged in terms of section 23(2) of the legislation to generate income from the exploitation of the assets acquired by it. PRASA must enter into agreements on commercially accepted terms. The users must pay and PRASA must ensure that they do.
- [60] The parties acknowledge that the written agreement ended on 30 November 2017. PRASA, however, allowed APM to continue to use the bus terminals at

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<sup>22</sup> Paras 10, 11, 12, 16, 17 and 18.

<sup>23</sup> The applicable legislation is the Legal Succession to the Transport Services Act, 1989 (Act No 9 of 1989)(as amended).

Park Station. The parties, according to PRASA, conducted themselves in accordance with the terms of the access agreement.

- [61] APM seems to acknowledge that the agreement had come to an end but suggests that the access fees charged by PRASA are not the subject matter of any agreement entered into between PRASA and APM. This argument is untenable as APM's whole case centres around the access fee charged by PRASA when the original agreement was concluded which, according to APM, is excessive and amounts to margin squeeze which makes the APM business unaffordable and unsustainable. It would also appear to us that APM accepts that the access fee was due in terms of the agreement which ended and that APM's continued use of Park Station was subject to APM paying the access fee stipulated in the original agreement, unless the parties could reach a new agreement on a different access fee, which they were not able to do. In the absence of a new agreement, APM is obliged to pay the access fee originally agreed upon.
- [62] In respect of the margin squeeze denials by PRASA, APM states that the access fee of R480 per bus entry into Park Station reduces APM's gross margin from 18% to 10% making it unaffordable and unsustainable for APM to operate in the market.
- [63] According to APM, Park Station accounts for 38% of APM's revenue and the average fare from that station was R298 in 2018.<sup>24</sup> On APM's own version, the cost of two tickets at R298 per ticket would more than cover the access fee of R480, yet APM says that that access fee makes its business unaffordable and unsustainable. In the absence of detailed economic and financial information, we are unable to determine that the access fee makes the APM business unaffordable and unsustainable and cannot, in the absence of information, simply accept APM's word.

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<sup>24</sup>Founding Affidavit, Annexure TRK 11.

- [64] In respect of the margin squeeze allegation, too, we have not been provided with detailed financial and economic information to enable us to evaluate the allegations of margin squeeze made by APM.
- [65] Apart from the fact that Autopax appears to have run into financial difficulties, we do not know what impact the access fees have on the large number of other bus operators which use Park Station. We cannot, therefore, evaluate even the little bits of information which APM has provided against the experiences of the other bus operators.
- [66] In *Chitando*<sup>25</sup> we noted that the prohibition against the abuse of a dominant position does not apply to all firms. A firm must be dominant in a market for a prohibition to find application.
- [67] We also stated that to establish an abuse of dominance, the applicant must first establish that each respondent is dominant. In order to do that the applicant must identify the relevant market. Without a definition of the market there is no way to measure a firm's ability to lessen or prevent competition.<sup>26</sup>
- [68] In *Chitando*, the applicant had not attempted to engage in a proper market definition exercise and had not provided evidence to support his definition of the market as the market for shipping law briefs. He could not provide details of the size of the relevant market, what percentage of that market he considers the respondents to have or what facts and circumstances warrant the conclusion that the respondents enjoy market power within the defined market.<sup>27</sup>
- [69] We have followed a similar approach in relation to APM's application. There is a dispute about the relevant geographic market, PRASA's alleged dominance in the market and the margin squeeze alleged by APM. We are simply not able to determine these issues without detailed economic and financial information, as pointed out above.

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<sup>25</sup> *Chitando v Fitzgerald and others; Chitando v Webber Wentzel and others* (IR008Apr13) para 32.

<sup>26</sup> *Chitando* para 39.

<sup>27</sup> *Chitando* para 40.



- [70] This is an application for interim relief. We need to consider the evidence, in this case, to establish whether there is a *prima facie* case, before we can deal with the other elements of the requirements for interim relief in terms of section 49C of the Act.
- [71] A *prima facie* right is, according to *Harms*, “*prima facie proof of facts that establish the existence of a right in terms of substantive law*”.<sup>28</sup>
- [72] APM has provided us with a great deal of information which is not determinative proof of an *exclusionary act*. For the sake of clarity, we need to point out that in the light of the dispute on the facts, the information provided does not present *prima facie* proof of either dominance on the part of PRASA, or the relevant market or margin squeeze.
- [73] APM does complain that Autopax, which is in financial difficulties, is also in arrears with its access fees in respect of Park Station. This is a fact acknowledged by PRASA which states that steps are being taken to ensure that the arrears are paid by Autopax. APM does not dispute this and we have to accept PRASA’s statement in this regard. Nothing, therefore, turns on this aspect of APM’s complaint as it does not demonstrate less equitable treatment of APM.
- [74] For these reasons, the Applicant’s application for interim relief must fail.

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<sup>28</sup> DR Harms SC. Page A – 46.

**ORDER**

[75] Our decision is reflected in our order, issued on 8 November 2019, in that:

1. The Applicant's application for interim relief under case number IR028May19 is hereby is dismissed with costs including costs of two counsel, on the attorney client scale;



**Mr Enver Daniels**

**2 March 2020**

**Date**

**Ms Andiswa Ndoni and Prof. Imraan Valodia concurring**

Tribunal Case Manager : Ndumiso Ndlovu

For the Applicant : MJ Engelbrecht instructed by Thomson Wilks

For the First and Second Respondent : T Marolen instructed by Ngeno and Mteto Inc.