COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no. : IR095Oct21

In the *interim relief application* between:

Makarenge Electrical Industries (Pty) Ltd t/a Wilec	Applicant
and	
Allbro (Pty) Ltd	First Respondent
Competition Commission of South Africa	Second Respondent

Panel:	Mondo Mazwai
	Andiswa Ndoni
	Liberty Mncube
Heard on:	28 January 2022
Order issued on:	03 February 2022
Reasons issued on:	29 April 2022

REASONS FOR DECISION

Introduction

1. In this matter the applicant, Makarenge Electrical Industries (Pty) Ltd t/a “Wilec”, seeks interim relief, in terms of section 49C of the Competition Act No 89 of 1998, as amended ("the Act") against the first respondent, Allbro (Pty) Ltd (“Allbro”), on the basis that Allbro is engaging in anti-competitive conduct in the market for the provision of transformer bushings as prohibited by sections 8(1)(d)(i) and/or 8(1)(c) of the Act.

2. Wilec seeks an order preventing Allbro from inducing customers not to deal with Wilec’s customers, in terms of section 8(1)(d)(i) of the Act, in the market for the provision of transformer bushings. In alternative, Wilec seeks an order preventing Allbro from engaging in an exclusionary act, in terms of section 8(1)(c) of the Act, in the market for the provision of transformer bushings, pending the determination of a complaint submitted by Wilec to the Competition Commission (“the Commission”) or for a period of six months, whichever occurs first. Wilec has lodged a complaint with the Commission for investigation.

3. The Commission is cited as the second respondent for its interest in the matter.[1] Wilec does not seek any relief against the Commission.

Relevant factual background

4. Transformer bushings transmit electrical power into or out of a transformer. They are a necessary component in the manufacture of transformers, and a transformer cannot fulfil its purpose unless fitted with a transformer bushing. The purpose of a transformer (in which transformer bushings are a component)

[1]See *Schering (Pty) Ltd v New United Pharmaceutical Distributors (Pty) Ltd* (11/CAC/Aug01) at p8–9 and *Norvatis SA (Pty) Ltd v New United Pharmaceutical Distributors (Pty) Ltd* (1) [20012002] CPLR 74 (CAC) (07/CAC/Dec00) read with *American Soda Ash Corporation and Another v Competition Commission of South Africa and Others* (12/CAC/DEC01) [2002] ZACAC 5 (24 October 2002) at para 4 which confirm that the lodging of a complaint with the Commission is a jurisdictional prerequisite for the consideration of an application for interim relief.

is to transfer electrical power from one circuit to another without any variation in the frequency.

5. Transformer bushings are sold to customers, like Eskom Holdings SOC Ltd ("Eskom"), which is the largest purchaser of transformers, accounting for at least 80% of the transformer purchases nationally, making Eskom the largest indirect purchaser of transformer bushings.[2]

6. Wilec is a private, 100% black-owned, South African firm that supplies transformer bushings. It employs more than 380 individuals with two manufacturing plants in Gauteng and branches in Middleburg, Cape Town and Durban. It was established in 2018, when a broad-based black economic empowerment ("B-BBEE') entity Makarenge Electrical Industries (Pty) Ltd ("MEI"), purchased the transformer bushings business from Actom (Pty) Ltd ("Actom") a long established transformer manufacturer that would, through its "Wilec" division, internally source transformer bushings.[3] Actom sold the transformer bushings business to MEI, a B-BBEE entity majority owned by Mr Nene Mathebula, a professional electrical engineer, as it considered the transformer bushings market to no longer be its core business. Actom announced in press reports its intention to continue to support Wilec's business, maintain the existing supplier relationships as before; and, by doing so, assist in the government policy to encourage the development and advancement of black industrialists.

7. Allbro is a private South African company that has been operational for over 40 years. Aside from transformer bushings, Allbro also supplies other transformer input products in which it is the sole supplier for some.

[2] Eskom does not purchase transformer bushings directly from transformer bushings suppliers, instead its transformer contractors would be awarded tenders to supply transformers who would then procure transformer bushings (Actom (Pty) Ltd 'Supporting Affidavit' (6 October) trial bundle at p 415 para 5).
[3] Wilec, while part of the Actom group of companies, did supply transformer bushings to third parties but these volumes were minimal (Actom Supporting Affidavit at p416 para 10).

8. Both Wilec and Allbro are in the market for the supply of transformer bushings and are two of only three competitors in this market: Wilec, Allbro and Ukusa Industrial Products (Pty) Ltd ("Ukusa").

9. Allbro was for a long time the only supplier of transformer bushings in South Africa.[4] Ukusa entered the market for transformer bushings in the second half of 2017.[5] As stated earlier, Wilec was previously part of the Actom group of companies and since the sale of this business division in 2018 to MEI, Wilec became a new entrant to the market for the provision of transformer bushings.

10. The transformer bushings market is concentrated and is characterized by high barriers to entry:

    10.1. Eskom is the largest buyer of transformers. It is important for transformer bushings suppliers that they are certified to supply transformer manufacturers who, in turn, supply Eskom. However, before Eskom will purchase a transformer containing a company's transformer bushings that company must be certified by Eskom and the certification process can take up to 18 months.

    10.2. Several component parts required in the manufacture of transformer bushings are only available overseas and are thus subject to long lead times before they reach South Africa.

    10.3. Suppliers of component parts will only supply transformer bushings manufacturers with components if they purchase significant volumes.

11. The next level in the supply chain includes the market for the manufacture, supply and repair of transformers. The major participants in the market for the

[4] Actom Supporting Affidavit at p415 para 9.
[5] Though Ukusa was present in the market from 2015, it only began supplying transformer bushings to various transformer contractors once Eskom had issued the necessary certification following testing (Ukusa Industrial Products (Pty) Ltd 'Confirmatory Affidavit' (31 October 2021) trial bundle at p 634 para 5).

manufacture of transformers are Actom and Revive Electrical Transformers (Pty) Ltd ("Revive").

12. At the third and final level in the supply chain, the largest participant is Eskom which is responsible for buying about 80% of all transformers sold in South Africa.[6]

Wilec's case

13. Wilec alleges that Allbro has embarked upon a strategy of threatening customers that, if they buy products from its competitors (Ukusa and Wilec), the customers will be met with civil litigation by Allbro and will be guilty of a criminal offence. The basis of Allbro's threat is that its competitors are allegedly guilty of infringing Allbro's intellectual property rights and that customers that buy from its competitors are also guilty of an intellectual property infringement.[7]

14. Wilec disputes Allbro's intellectual property claim – both that Allbro has any such rights in the first place and that those rights are being infringed – and Wilec points out that these rights are to date untested.[8]

15. Wilec alleges that Allbro's conduct induces customers not to deal with Allbro's competitors, including Wilec. Without customers being able to acquire from Allbro's competitors, Allbro has anti-competitively secured for itself a monopoly position.

16. Wilec alleges that Allbro's inducement strategy provides that customers must procure transformer bushings from Allbro or face litigation (civil and criminal). It alleges that the risk of being cut off from the 34 other products in respect of which Allbro is allegedly the monopoly supplier is a threat sufficient to induce

[6] Makarenge Electrical Industries (Pty) Ltd t/a Wilec 'Founding Affidavit' (14 October 2021) trial bundle at p10 para 19.
[7] See Annexure "FA11" Copy of Letter from Spoor and Fisher to Actom dated 6 April 2018 (trial bundle at p605).
[8] Founding Affidavit at p20-21 para 54.

customers not to deal with Allbro's competitors. Wilec puts up facts in support of this with reference to Allbro's behavior in relation to it and Ukusa (in this regard Wilec's application includes a confirmatory affidavit by Ukusa) are as follows:

16.1. On 23 June 2020, Allbro launched proceedings against Wilec in the North Gauteng High Court alleging a breach of copyright seeking an order that Wilec deliver all its infringing transformer bushings to Allbro and cease supplying any transformer bushings that are subject to copyright. Allbro also seeks that an inquiry be directed to ascertain the damages or reasonable royalty fee as a result of Wilec's alleged infringement of Allbro's copyright. However to date, Allbro has not taken any steps to have the copyright dispute heard in the High Court.

16.2. The litigation against Wilec was launched shortly after Actom announced the sale of its transformer bushings business to Wilec and its intention to continue procuring from Wilec (now owned by MEI). In a press release dated February 2019 Actom said "*ACTOM will continue to support Wilec in future, with existing supplier relationships between Wilec and various other ACTOM divisions and business units continuing as before*".[9]

16.3. Allbro's intellectual property proceedings against Wilec form part of a broader strategy; Allbro has brought almost identical proceedings against Ukusa.

16.4. Soon after Ukusa achieved authorisation for its transformer bushings, Allbro wrote to Eskom informing it of a copyright dispute between Ukusa and Allbro in relation to transformer bushings that Ukusa had obtained certification for, requesting that Eskom review and/or withdraw the certification. In response to which Ukusa wrote to Eskom to dispute the claims.

[9] Annexure "FA2" Copy of Wilec Press Release (trial bundle at p59).

16.5. On or around 6 February 2018, Allbro wrote to Ukusa demanding an undertaking that Ukusa cease and desist from selling transformer bushings which (Allbro alleged) contained copyright which was said to be proprietary to Allbro. Allbro asserted that unless Ukusa gave that undertaking, Allbro would apply for an urgent interdict against Ukusa. Ukusa disputed Allbro's claim, refused to provide Allbro with any undertaking, and invited Allbro to bring the threatened urgent interdict application.

16.6. On 5 June 2018, Allbro instituted High Court proceedings against Ukusa contending that Ukusa was guilty of breaching Allbro's intellectual property rights. Allbro has been dilatory in prosecuting the matter, in that three years after instituting those proceedings against Ukusa, and just as the trial was set to commence, on 29 March 2021, Allbro brought an application to amend its pleadings. Allbro has also allegedly failed to apply for a court date despite the matter being ripe for hearing.

16.7. Allbro also had Ukusa's offices raided and Ukusa's CEO, Eric Gander, arrested on the (unfounded) basis that Ukusa was selling counterfeit goods in contravention of the Counterfeit Goods Act No 37 of 1997. Ukusa made representations to the Specialised Commercial Crimes Court and successfully demonstrated, contrary to Allbro's contentions, that the Ukusa transformer bushings were not counterfeit goods at all. The Commercial Crimes Court agreed with Ukusa and declined to prosecute.

16.8. Wilec incorporates reference to Ukusa's affidavit which says similar tactics were employed, in 2002, against Galbro Engineering (Pty) Ltd ("Galbro") – a company which has since exited the market.

16.9. Allbro by way of correspondence in April 2018 threatened to pursue an interdict against Actom for violating Allbro copyright by reproducing and/or adapting Allbro products, requiring Actom to cease the trade of Ukusa transformer bushings and to deliver all offending transformer

bushings, and to disclose its sales figures of transformer bushings. Actom terminated its relationship with Ukusa thereafter.

16.10. Wilec alleges that these threats include the risk of a refusal to supply customers in adjacent markets in which Allbro is a monopoly supplier. For example, Allbro is the sole supplier of temperature gauges – a critical input for the manufacture of transformers.

17. Wilec ultimately argues that the above demonstrates that Allbro has improperly secured for itself a monopoly position in the market by (i) bringing intellectual property proceedings against its competitors, and (ii) using its own unconvincing, untested allegations in those proceedings to threaten customers to not deal with its competitors, leaving customers with no choice but to procure from Allbro.

18. According to Wilec, this strategy has been effective; customers have been induced not to deal with Allbro's competitors and has created substantial foreclosure within the market. In addition, Allbro's conduct has harmed consumer welfare. Allbro's products are more expensive than those of its competitors.[10] Furthermore, Wilec alleges that Allbro's transformer bushings are known to experience corrosion problems resulting in poorer quality for the consumer. In this regard, it relies on a letter by Eskom, in which Eskom's senior manager for procurement and supply chain complains of corrosion problems and poor quality.[11]

Allbro's case

19. Allbro argues that it is not preventing anyone from manufacturing and selling transformer bushings. It is simply attempting to protect its intellectual property

[10] Founding Affidavit at p26 para 75.2 and Allbro (Pty) Ltd 'Answering Affidavit' at p791 para 127.5.

[11] Simphiwe Mbonambi expresses concern that the new "*Allbro MV bushing that is being supplied by some transformer OEMs … will experience bi-metallic corrosion in high corrosion areas, potentially resulting in bushing failures*" (Annexure "FA1" Wilec's Competition Commission Complaint trial bundle p54 para 83 referencing its Annexure R at trial bundle p379 and 754).

and justifiably prevent others from cloning its transformer bushings in a manner which infringes its intellectual property rights.

20. Allbro's transformer bushings have, as their underlying designs, very specific technical drawings and product specifications. However, there is no registration procedure for copyright. Allbro's drawings form the basis of Allbro's copyright which it is enforcing against Wilec (and Ukusa) in the infringement proceedings instituted against them in the High Court. In addition to its claim on copyright infringement, Allbro accuses Wilec of counterfeiting, passing off and unlawful competition.

21. Allbro argues that the Competition Tribunal ("the Tribunal") has no jurisdiction to make an assessment on the strength of Allbro's intellectual property rights. Absent such a determination, the Tribunal cannot suspend those rights and prohibit Allbro from exercising the rights afforded to it by statute. Only the High Court has jurisdiction to make orders deciding upon whether a party has intellectual property rights, whether they are being infringed, and whether those rights should be suspended.

22. Allbro clarified during the hearing that its case is not that the Tribunal lacks jurisdiction to grant interdictory relief. Rather it is that the effect of the relief sought in these proceedings is one which suspends the rights afforded to Allbro by statute, when those very rights are the subject of pending proceedings before the High Court, which can make an assessment and determination of those rights and under circumstances when the Tribunal has no jurisdiction to assess the Allbro's rights of copyright.

23. Allbro argues that the evidence advanced by Wilec is unavailing in that the only evidence Allbro refers to in the founding affidavit in support of its complaint in terms of section 8(1)(d), is evidence pertaining to Ukusa. Where there are allegations of scare tactics being employed against Ukusa's customers, the evidence produced does not demonstrate that. Rather, the correspondences provided contain a letter of demand addressed to Ukusa and Ukusa's response thereto. Even if such "threatened urgent application" was employed this would

not amount to inducement but rather Allbro's exercise of its lawful entitlements to issue letters of demand, threatening applications or otherwise, in the protection of its intellectual property rights.

24. Insofar as Wilec is concerned, Allbro argues, it has not written any letter to customers about Wilec. The only letter of demand issued, Allbro admits, was to Actom in respect of Allbro's proceedings instituted against Ukusa. This letter was written to Actom as a customer informing Actom of the alleged copyright breach by Ukusa. There is simply no evidence that Allbro "induced" Actom not to purchase transformer bushings from Wilec. Simply put, Allbro's letter to Ukusa was meant to provide "guilty knowledge" of the Copyright Act[12] and its conduct of infringement since in terms of the Copyright Act, provision is made for "indirect" or "secondary" infringement,[13] whereby copyright can be infringed by any party who, without licence, sells, lets, trades (through offer, sale, distribution or hire) any article if they knew the making of the article constituted a copyright infringement.

25. Allbro denies that the proceedings relating to Wilec have been "drawn out" as alleged by Wilec. Those proceedings were only instituted in 2020, with Wilec only filing its discovery affidavit barely three months before these proceedings were launched. In respect of both the Ukusa and Wilec proceedings, Allbro alleges that nothing prevents Ukusa or Wilec approaching the High Court for a date for the hearing of the copyright dispute. This is despite Allbro being dominus litis the High Court proceedings.

26. On alleged foreclosure, Allbro argues that where customers are choosing not to purchase from Allbro's competitors this is them exercising choice.

27. Allbro argues that consumer choice has not been harmed in that there are customers that continue to purchase from Allbro absent "inducement". Furthermore, Allbro's charging of higher prices alone is not sufficient to prove negative competitive effects. Allbro denies that it is selling a defective product

[12] Act No 98 of 1978.
[13] Section 23(2) of the Copyright Act.

as alleged by Wilec. It explains that the alleged complaint by Eskom regarding defective and poor quality products relate to a portion of the product that Allbro does not manufacture and which has since been resolved.

28. Lastly Allbro argues that there is a pro-competitive gain related to its protection of its intellectual property rights. Preventing Allbro from exercising the rights afforded to it by way of legislation will result in an anti-competitive environment, with the infringing and unlawful trade in infringing transformer bushings and the suspension of rights afforded to proprietors by statute.

29. Allbro sought the dismissal of Wilec's interim relief application.

Jurisdictional arguments

30. Allbro raised a defence regarding the Tribunal's jurisdiction to provide the requested relief. According to Allbro, the Tribunal has no jurisdiction over Allbro's intellectual property rights and since the Tribunal cannot make such a determination, it cannot suspend those rights and prohibit Allbro from exercising the rights afforded to it by statute. The effect of the relief that Wilec seeks against Allbro in these proceedings, if granted, will result in a situation where Allbro is unable to issue letters of demands, institute litigation or otherwise take steps in the protection of those rights, for as long as the interim interdict remains in place.

31. Wilec characterises the question before the Tribunal as a balancing act between Allbro's intellectual property rights and conduct which purportedly violates the Competition Act. That, says Allbro, is not correct as there is no balancing act in this factual scenario. It is not a question of competing rights in the Copyright Act and Competition Act, or which right should find preference.

32. In the hearing Allbro clarified its jurisdictional argument stating that it does not assert that the Tribunal has no jurisdiction to grant interdictory relief, however, the Tribunal cannot grant such relief if that requires –

"*balanc[ing] two competing rights and you can't consider two competing rights when you are not in a position or have no jurisdiction to consider one of those rights. That's the point we made because the Act, the legislature has given us access to tort. It has given us remedies. No-one has attacked those remedies. No-one has attacked the constitutionality of the Copyright Act*."[14]

33. Allbro argued that, had the legislature intended a repeal of the Copyright Act by the Competition Act, it would have done so expressly. This is because, the repeal of a law is neither presumed nor favoured.[15] Therefore, unless specifically stated, a later statute does not repeal an earlier statute. Neither the Competition Act nor the Constitution which were enacted after the Copyright Act, have trumped intellectual property rights protected in that Act.

34. As a whole, we understand Allbro's claims as follows (i) that this matter cannot properly be determined without pronouncing upon the merits of Allbro's intellectual property case, and (ii) since the Tribunal lacks jurisdiction to make such determination, the Tribunal lacks jurisdiction to provide the relief sought. To do so would be to impinge on Allbro's intellectual property rights which are protected by the Copyright Act and Constitution.

35. These arguments require us to pronounce upfront on jurisdiction.

36. It is clear, reading section 3(1) of the Act that the Act applies to all economic activity within, or having an effect within, South Africa. This section provides:

> *(1) This Act applies to all economic activity within, or having an effect within, the Republic, except—*
>
> *(a) collective bargaining within the meaning of section 23 of the Constitution, and the Labour Relations Act, 1995 (Act No. 66 of 1995);*

[14] Tribunal Transcript of Proceedings IR095Oct21 (28 January 2022) at p48.
[15] Transcript at p37.

(b) a collective agreement, as defined in section 213 of the Labour Relations Act, 1995; and

. . . [16]

(e) concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose.

37. Mr Ngcukaitobi, counsel for Wilec, correctly pointed out that there are two types of exclusions from the application of the general provision of section 3(1) which applies to all economic activity within, or having an effect within, the Republic – one is statutory and the other discretionary.

38. The statutory exclusions under section 3(1), as set out above, do not relate to intellectual property.[17] However, the exclusion located under section 10, contains express reference to intellectual property rights: providing that a firm may apply to the Commission to be exempted from chapter 2 of the Act (chapter 2 deals with prohibited practices), which may be granted at the Commission's discretion. The exemption must relate to an agreement or practice, or category of agreements or practices that involve the exercise of intellectual property rights.[18]

39. It is thus clear from a reading of the above provisions, that the Act applies to intellectual property rights unless an exemption permitting the exercise of intellectual property for an agreement, practice or category of agreements has been applied for and granted by the Commission.

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[16] Paras (c) and (d) deleted by section 2(a) of Act No. 39 of 2000.

[17] As quoted above, these exclusions provide for collective bargaining and collective agreements provided for by labour legislation as well as concerted conduct designed to achieve a non-commercial, socio-economic purpose.

[18] Section 10, in relevant part, reads:

"(4) A firm may apply to the Competition Commission to exempt from the application of this Chapter an agreement or practice, or category of agreements or practices, that relates to the exercise of intellectual property rights, including a right acquired or protected in terms of the Performers' Protection Act, 1967 (Act No. 11 of 1967), the Plant Breeders' Rights Act, 1976 (Act No. 15 of 1976), the Patents Act, 1978 (Act No. 57 of 1978), the Copyright Act, 1978 (Act No. 98 of 1978), the Trade Marks Act, 1993 (Act No. 194 of 1993), and the Designs Act, 1993 (Act No. 195 of 1993).

(4A) Upon receiving an application in terms of subsection (4), the Competition Commission may grant an exemption for a specified term."

40. Mr Michau, counsel for Allbro, contended that despite the legislature knowing when it drafted the Competition Act that intellectual property rights create monopolies, it did not provide for the Act to trump various intellectual property rights acquired for example in terms of the Patents Act or Copyright Act. Consequently, as we understand his argument, the exercise of intellectual property by enforcing one's copyright cannot contravene the Act.

41. However, in our view, these arguments are not supported by a plain reading of the Act as we have set out. First, the Act applies to all economic activity, unless there is an exclusion (statutory or discretionary). The relevant exclusion applicable to intellectual property is the (discretionary) exemption provision in section 10(4). Mr Michau conceded that this subsection did not apply in the circumstances.[19] This is because the copyright claim by Allbro does not constitute an agreement or practice which has been exempted from the applicability of chapter 2 in terms of section 10(4A).

42. Secondly, a claim of an intellectual property right is not a trump card against the regulation of competition in the public interest. As the Competition Appeal Court ("CAC") held in *BCX*: "*The evidence of a prohibited practice is not concerned with the rights of the applicant but the competitive position of competitors in the market, judged against the regulatory criteria of the prohibited practices defined in chapter 2 of the Act*".[20] While Allbro may enjoy a copyright which it is entitled to protect, its right under the Copyright Act is not a trump card dispensing with the application of the Act.

43. Our remit in exercising jurisdiction under section 49C is to determine whether an alleged prohibited practice has occurred. It is not to pronounce on the validity of copyright which falls to be determined by the High Court. Indeed section 65(2) provides that if, in any action in a civil court a party raises an issue concerning conduct that is prohibited in terms of the Act, the court must not consider the conduct on the merits. Rather, if the conduct is one in which the Tribunal or the CAC has made a determination, the court must apply that

[19] Transcript at p35-42.
[20] *Business Connexion (Pty) Ltd v Vexall (Pty) Ltd and Another* (182/CAC/Mar20) [2020] ZACAC 4 (15 July 2020) ("*BCX*") at para 20.

determination. If no such determination has been made, the court may refer the matter to the Tribunal to consider its merits.

44. These provisions of the Act make it clear that the regulatory competence to determine whether a prohibited practice has occurred falls squarely within our jurisdiction, regardless of whether the defence by a respondent involves the exercise of a right under another legislation.

45. For the avoidance of doubt our finding on jurisdiction is based on a textual reading of the Act. We further make the observation by the CAC that the protection of private rights, as asserted by Allbro, are secondary to the regulatory function of protecting competitive markets in the public interest. Put differently, our jurisdiction is founded on section 3(1) of the Act which applies to all economic activity, and which calls for private commercial interests, where appropriate, to also fall under the scrutiny of competition regulation and ultimately the Constitution.

46. We point out that intellectual property laws (including copyright law) and competition law share a common purpose - the purpose of promoting innovation and enhancing consumer welfare. Intellectual property laws provide incentives for innovation and its dissemination and commercialization by establishing enforceable property rights for the creators of new and useful products, more efficient processes, and original works of expression.

47. In the absence of intellectual property rights, imitators could more rapidly exploit the efforts of innovators and investors without providing compensation. Rapid imitation would reduce the commercial value of innovation and erode incentives to invest, ultimately to the detriment of consumers. Competition law promotes innovation and consumer welfare by prohibiting certain actions that may harm competition with respect to either existing or new ways of serving consumers. In other words, competition law also promotes innovation and

consumer welfare by prohibiting exclusionary practices that harm dynamic competition.[21]

48. In today's dynamic and technology-driven markets, gaining an advantage in the realm of ideas is an important step toward competitive success. Competing firms in dynamic markets must work-out for themselves the ways they will use ideas to improve their competitive positions in such markets. Firms in such markets will try to gain advantage over their rivals by dipping into various sources of ideas. They may also draw, in part, on material originated by others, and/or in-house creativity.

49. A competitor who uses elements originated by others, may be or may not be, vulnerable to an intellectual property claim. And where a competitor uses elements originated in-house, it may or may not, gain or be in a position to gain, proprietary control of those elements. Because competitors are prospecting a range of sources and processing what they find in search of a competitive advantage, and because intellectual property laws may serve either as a weapon or shield, it is not surprising that both proprietary claims to intellectual output and conflicting claims that such material are already owned by others or are for example in the public domain, are important parts of firm strategies.

50. This exposition of the interface between competition law and intellectual property law indicates that the exercise of intellectual property rights is thus neither particularly free from scrutiny under competition law, nor particularly suspect under competition law. It all depends on the conduct in question and some firm strategies involving intellectual property may be competition law vulnerable.

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[21] *Pioneer Hi-bred International Inc and Another v Competition Commission and Another* [2012] ZACAC 3 at para 40:

> *"The modern view holds that both intellectual property policy and merger policy seek to promote consumer welfare by creating an economic environment in which innovative activities are stimulated by both competition and the promise of returns to successful innovation."*

51. Allbro is correct in pointing out that the Tribunal lacks jurisdiction to pronounce upon the merits of Allbro's intellectual property claim.[22] However, under the interim relief regime, the Tribunal is empowered to regulate how competition in the market is to take place for specified period pending the outcome of an investigation by the Commission, provided the requirements of section 49C are met.

52. For the reasons above, we conclude that the exercise of intellectual property rights is not immune to regulatory oversight under competition law, and may constitute a contravention of competition law, if all the elements otherwise necessary to establish a competition law prohibited practice are proved.

Legal framework: interim relief applications

53. The Tribunal's approach in adjudicating interim relief applications is set out in section 49C(2)(b) of the Act, which reads:

> "*Interim Relief*
> *The Competition Tribunal … 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."*

54. It is not our function, in interim relief proceedings, to arrive at a definitive finding of a contravention. A successful applicant is only required to make out *a prima facie* case, not to establish its case on a balance of probabilities. In this way interim relief applications under section 49C are analogous to interim interdict

[22] To note that in addition to copyright infringement, the basis of Allbro's claims include alleged violations of counterfeiting, passing off and unlawful competition. These claims too would be outside of the Tribunal's jurisdiction to consider; see, for example, *Nqobion Arts Business Enterprise CC and Business Place Joburg & BeEntrepreneuring* [2006] ZACT 24 (22 March 2006).

applications in the High Court, where applicants seek relief pending the determination of some other dispute.[23] In this instance the applicants seek interim relief pending the outcome of the Commission's investigation into their complaint.

55. Our approach to applications for interim relief was set out in *York Timbers* as follows:

> *"[W]e must first establish if there is evidence of a prohibited practice, which is the Act's analogue of a prima facie right. We do this by taking the facts alleged by the applicant, together with the facts alleged by the respondent that the applicant cannot dispute, and consider whether having regard to the inherent probabilities, the applicant should on those facts establish the existence of a prohibited practice at the hearing of the complaint referral.*
>
> *If the applicant has succeeded in doing so we then consider the "doubt' leg of the enquiry. Do the facts set out by the respondent in contradiction of the applicant's case raise serious doubt or do they constitute mere contradiction or an unconvincing explanation. If they do raise serious doubt the applicant cannot succeed"*[24]

56. Once a *prima facie* right has been established, we are required to determine if the applicant will suffer irreparable harm absent interim relief and the balance of convenience between the parties. As held in *Gallo Africa* in weighing up the requirements in section 49C one factor may be stronger than the other.[25] Thus, we must consider the three factors as a whole and determine whether it is just and reasonable to grant the relief sought.[26]

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[23] We note the Competition Appeal Court ("**CAC**")'s caution in *BCX* that this comparison to a High Court interim interdict should not be taken too far (at para 21).

[24] *York Timbers Limited v South African Forestry Company Limited* (15/IR/Feb01) [2001] ZACT 19 (9 May 2001) ("*York Timbers"*) at paras 64-5.

[25] *Replication Technology Group (Pty) Ltd v Gallo Africa Limited* (92/IR/Sep07) [2007] ZACT 99 (10 December 2007) ("*Gallo Africa*") at para 17.

[26] See also, *National Association of Pharmaceutical Wholesalers and 8 Others v Glaxo Wellcome (Pty) Ltd* (29/CAC/JUL03) ("*Glaxo 2003*") at para 8; *Natal Wholesale Chemists (Pty) Ltd and Astra*

57. The CAC in *BCX* points out that prohibited practices in chapter two of the Act are concerned with practices that affect markets, a market or a segment of the market. Specifically, Unterhalter AJA states that:

> *"Unlike disputes in private law which, for the most part, concern the rights enjoyed and duties owed by individuals to one another, prohibited practices in chapter 2 concern the conduct of firms and their effect on competition in the market. Even those practices that are not defined by reference to their effects are nevertheless rendered unlawful by reason of their presumptive harmful effects upon competition. As a result, interim relief granted by the Tribunal has effects upon the state of competition in the market. Second, when the Tribunal grants an interim relief order, it is not a status quo order. The order requires that the respondent firm desist from the prohibited practice (in whole or in part). The purpose of the order is to alter the competitive relationship between firms in the market. If the interim order is to be effective, it is intended to permit of competition taking place in the market that has hitherto not taken place. That may have effects within a market or across markets, and may affect different market participants: customers, competitors and suppliers. When the Tribunal grants an interim order it alters the status quo in the market and is intended to change the way firms compete in the market, with consequences that may well resonate within and between markets."*[27]

58. The CAC in *BCX* emphasizes that the Tribunal is empowered to regulate how competition in the market is to take place for specified period when it states that:

> *"An interim relief order under the Act does not provide a remedy to permit a person claiming a right to enjoy the exercise of that right until*

Pharmaceuticals (Pty) Ltd (98/IR/Dec00) [2001–2002] CPLR 363 (CT) at para 34; and *York Timbers* at para 13.

[27] *BCX* at para 17.

the right is finally determined. Rather, the Tribunal is empowered to regulate how competition in the market is to take place for a six or twelve month period. That is a different competence to that of a court adjudicating a dispute of right; it is a regulatory competence to decide whether the state of competition in the market must endure, notwithstanding the evidence that a prohibited practice is taking place, or whether the Tribunal should order a change."[28]

59. Wilec's case is that the Tribunal must regulate, in the interim, how competition in the market should take place for a period because it believes that Allbro's conduct amounts to a prohibited practice that is altering the state of competition.

Legal context: Section 8 of the Act

60. In its founding affidavit Wilec explains that it primarily relies on a finding of a contravention of section 8(1)(d)(i) and, in the alternative, a finding of a contravention of section 8(1)(c).[29]

61. Section 8(1)(d) lists specific types of exclusionary acts in the sub-sections which a dominant firm is prohibited from engaging in unless the firm concerned can show technological, efficiency or other pro-competitive gains ("pro-competitive gains") that outweigh the anti-competitive effect of its act.

62. Under section 8(1)(d)(i), a dominant firm may not engage in the exclusionary act of requiring or inducing a supplier or customer to not deal with a competitor, unless the dominant firm can show that the anticompetitive effect of that exclusionary act outweighs its technological, efficiency or pro-competitive gain.

63. Section 8(1)(c) provides that it is prohibited for a dominant firm to engage in an exclusionary act – other than a type of "named" exclusionary act listed in

[28] *BCX* at para 18.
[29] Founding Affidavit at p22 para 62.

subparagraph (d) – if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain. An exclusionary act is defined as "*an act that impedes or prevents a firm from entering into, participating in or expanding within, a market".*[30]

64. In both section 8(1)(d)(i) and 8(1)(c), the requirement of a substantial anti-competitive effect is met either (i) if there is "*evidence of actual harm to consumer welfare*" or (ii) *"if the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals".*

65. Under section 8(1)(d), once the elements of section 8(1)(d) are satisfied the onus shifts to the respondent to demonstrate that the effects are outweighed by pro-competitive gains. However, under section 8(1)(c) an applicant or complainant must show the elements of the exclusionary conduct as well as the effects.

66. Wilec is therefore required to satisfy the critical elements of the section on a *prima facie* basis namely that Allbro is a dominant firm and that the conduct complained of has exclusionary effects. In terms of 8(1)(d)(i) the onus shifts to Allbro to show that the pro-competitive gains outweigh the anti-competitive effects of the act. In terms of 8(1)(c) Wilec has the onus of showing this.

Is there evidence relating to the alleged prohibited practice?

Relevant Market and Dominance

67. An assessment of a firm's dominance is usually done with reference to the market within which it functions.[31] Wilec and Allbro agree that the relevant

[30] Section 1(1) of the Act.

[31] See the definition of market power in section 1(1) of the Act and the CAC's recent decision in *Babelegi Workwear And Industrial Supplies CC v The Competition Commission of South Africa* (186/CAC/JUN20) [2020] ZACAC 7 (18 November 2020).

market is the market for the supply of transformer bushings.[32] We thus accept this to be the relevant market for purposes of our decision.

68. Section 7 of the Act provides that:

> "*A firm is dominant in a market 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 power".*

69. Wilec contends that Allbro enjoys about 90% market share in the market for the supply of transformer bushings[33] while Actom estimates Allbro's market share to be about 70%.[34]

70. It is common cause that Allbro's market share substantially exceeds 45% in the relevant market. Allbro has not disputed this. In fact, Allbro has admitted that it is dominant in the market for the supply of transformer bushings.[35]

71. We also note that aside from transformer bushings, Allbro supplies 34 other inputs for transformer manufacturers, some of which Allbro is alleged to be the only supplier. Allbro has not disputed this.[36]

72. We now turn to consider the remaining elements of section 8(1)(d)(i) and/or 8(1)(c).

[32] Founding Affidavit at p8-11 paras 13-20 and Answering Affidavit at p765 para 43.
[33] Founding Affidavit at p11 para 24.
[34] Actom Supporting Affidavit at p415 para 4.
[35] Answering Affidavit at p 765 para 43.
[36] Answering Affidavit p789 para 126 read with Allbro (Pty) Ltd 'Heads of Argument' (17 January 2022) at para 94.2.

Requirement or inducement of a customer to not deal with a competitor

73. As indicated, section 8(1)(d)(i) provides that it is prohibited for a dominant firm to engage in the exclusionary act of requiring or inducing a supplier or customer to not deal with a competitor.

74. Allbro has instituted High Court proceedings against Wilec alleging that Wilec has infringed Allbro's copyright in respect of its transformer bushings.[37]

75. Allbro has brought identical proceedings against Ukusa, alleging that Ukusa has infringed Allbro's copyright in respect of its transformer bushings.[38]

76. Allbro's attorneys wrote to Eskom on 2 February 2018 under cover of an email titled "*Copyright infringement by Ukusa*". Recall that Eskom is the largest indirect customer of transformer bushings. In the letter, Allbro states that it had come to its attention that Eskom had issued test certificates in relation to Ukusa's transformer bushings and the purpose of this letter was to "*inform [Eskom] of a dispute which our client has declared with Ukusa*". The letter then set out alleged similarities in the recently authorised Ukusa transformer bushings and drawings and Allbro's "work product", stating at the end of the letter that Eskom's "*approval process … and the test certificates issued in respect of Ukusa's bushings are tainted and at the very least subject to review, if not withdrawal*". The letter also sought feedback from Eskom about how it intended to deal with Ukusa's conduct.[39]

77. Allbro's letter to Eskom came to Ukusa's attention, who responded by informing Eskom of its view that Allbro's allegations were unfounded and that it was unnecessary to take any action to investigate the matter as sought by Allbro.[40]

[37] Founding Affidavit p14 para 36.
[38] Founding Affidavit p15 para 40.
[39] Annexure "CA1" to Ukusa's Confirmatory Affidavit at p283-4.
[40] Ukusa Confirmatory Affidavit p638 para 13.

78. On 6 April 2018, Allbro wrote to Actom, asserting that by purchasing transformer bushings from Ukusa, it is guilty of a criminal offence and demanded that Actom desist from purchasing Ukusa's transformer bushings in future, failing which Allbro will institute proceedings against Actom.[41]

79. Allbro has not written to Actom (as it did in respect of Ukusa's transformer bushings) threatening Actom against purchasing transformer bushings from Wilec. However, in his affidavit, Mr Alan Buchholtz, the CEO of Actom explains that the threat to Actom regarding Ukusa led Actom not to purchase transformer bushings from Wilec since Actom had become aware that Allbro had raised the same intellectual property claim against Wilec.

80. Mr Buchholtz says the following:

> "*Actom never had the opportunity to procure bushings from MEI as agreed because, in or around 2018 Allbro commenced a strategy in order to, inter alia, induce Actom not to deal with its competitors (i.e. MEI and Ukusa). This included, inter alia threatening Actom with civil and criminal proceedings if it continued to procure bushings from Ukusa. These threats are made by Allbro on the ostensible basis that Allbro enjoys intellectual property rights over the products in question. … Actom understands that Allbro has pursued a similar claim against MEI for alleged intellectual property infringements in respect of bushings supplied by MEI. Actom made the decision to no longer procure bushings from MEI or Ukusa until the IP litigation is resolved based on the contents of this letter for fear of litigation against ACTOM."*[42] (our emphasis)

81. We note that in both the litigated cases against Ukusa and Wilec, it remains disputed whether Allbro's transformer bushings designs are copyright protected; and whether such copyright has been infringed. Wilec argues that Allbro has been dilatory by not bringing these matters to hearing in the High

[41] Annexure "FA11" Copy of Letter from Spoor and Fisher to Actom dated 6 April 2018 trial bundle at p605.
[42] Actom Supporting Affidavit at p416, 418-9 paras 12 and 15.

Court. In the case of Ukusa it has been three years and in Wilec's case, it has been since 2020. As matters stand, the dispute relating to Allbro's alleged copyright is still pending.

82. Allbro's defence is that it is merely enforcing an intellectual property right and customers such as Actom have taken independent decisions not to purchase offending transformer bushings from its competitors.

83. Allbro claims that there is no evidence either directly or indirectly from which the Tribunal can even remotely draw an inference that Allbro threatened customers with litigation simply because they purchase transformer bushings from an Allbro competitor. Further, Allbro denied that it has threatened customers with litigation if they purchase transformer bushings from its competitors; and that, to date, the only letter of demand issued to a customer has been to Actom (which at the time was not yet a client of Wilec).

84. However, in our view, Actom's letter is categorically clear that its reason for not purchasing from Wilec and Ukusa is the fear of litigation by Allbro against it.

85. Regarding the allegation that Allbro has been dilatory in bringing the cases to hearing (as it has now secured itself a monopoly position by claiming copyright), Allbro says the proceedings relating to Wilec cannot be described as "drawn out".[43] Allbro argues that either way, all evidence pertaining to Allbro allegedly "delaying" the High Court proceedings against Ukusa is irrelevant. Both Wilec and Ukusa, argues Allbro, have a plethora of legal mechanisms they can implement to ameliorate this alleged prejudice.[44] In fact, the very relief Wilec seeks in these proceedings is that which could have been sought in the High Court. While neither party have taken steps to advance those proceedings, the effect of this conduct is that Wilec cannot participate effectively in the market. Our view is that Wilec has *prima facie* established that Allbro's conduct was sufficient to induce Actom to not deal with <u>both</u> Ukusa and

Wilec in contravention of section 8(1)(d)(i), alternatively that Allbro's conduct constitutes an exclusionary act under section 8(1)(c) of the Act.

86. Next, we consider whether the inducement had any exclusionary effects.

87. The exclusionary effect alleged by Wilec is foreclosure.

Anticompetitive effects

Has Wilec been foreclosed from the market?

88. The question of whether Allbro's conduct has anti-competitive (foreclosure) effects requires us to consider whether there is *prima facie* evidence that illustrates that Allbro's conduct is substantial or significant in terms of its effect in foreclosing the market to rivals. Alternatively, to consider whether there is *prima facie* evidence of actual harm to consumers.

89. In *SAA(2)*, the Tribunal also made it clear that, in order to establish a (likely or actual) anti-competitive effect, it is not necessary to show that the conduct "*completely foreclosed rivals from entering or accessing a market*"; it is sufficient to show that the conduct "*prevents or impedes a firm from expanding in the market*".[45]

90. Similarly, in *Telkom*, the Tribunal stated that:

> *"In order to show harm for purposes of section 8[1](d)(i) it is not necessary to show that competitors must first exit a market or even that they lost market share before harm. All that is required to be shown is that Telkom's conduct was likely to result in preventing or lessening competition which would include the impeding of competition."*[46]

[45] *Nationwide Airlines (Pty) Ltd & Comair Limited v South African Airways (Pty) Ltd* (80/CR/SEPT06) [2010] ZACT 13 (17 February 2010) at para 184.
[46] *Competition Commission v Telkom SA Limited* (case number 11/CRFeb04) at para 99.

91. These provisions of the Act, sections 8(1)(d)(i) and 8(1)(c) must be seen in light of the Competition Amendment Act, 2019 which has expanded the purpose of the Act to, *inter alia*, "*ensure that small and medium -sized enterprises have an equitable opportunity to participate in the economy*".

92. On substantial foreclosure, Wilec in its founding affidavit states unequivocally that "*it is being foreclosed from a substantial portion of the market as the majority of customers are not willing to procure products from Wilec while Allbro's threats of litigation persist.*"[47]

93. We also note the evidence of Mr Buchholtz. Mr Buchholtz explains that Actom always intended on maintaining its supply relationship with Wilec, but it decided not to do so until the intellectual property right disputes with Ukusa and Wilec were resolved. Actom had itself been self-supplying transformer bushings and sold this business to MEI and seemingly had no reason to not purchase from Wilec.

94. Several factors were relevant to our substantial foreclosure assessment.

95. One factor we considered is Allbro's position in the relevant market. According to Wilec, Allbro has a near monopoly position in the relevant market. Allbro, itself, admitted to its dominant position. It is trite that, with a dominant position there is a higher likelihood that conduct that creates or entrenches the dominant position leads to anti-competitive foreclosure. As we indicate below, Wilec cannot access the largest indirect customer for transformer bushings, Eskom, due to Allbro inducing customers to not deal with its competitors.

96. Secondly, we considered the nature of the relevant market. The transformer bushings market is characterized by high barriers to entry. Wilec argued that the barriers to entry include, the time it takes a transformer bushing company to become certified by Eskom (approximately 18 months) and economies of scale in that several suppliers of component parts will only supply transformer bushings manufacturers with components if they purchase significant volumes

[47] Founding Affidavit p28 para 85.

– this point was not disputed by Allbro. In assessing whether entry is likely to be timely the appropriate time period depends on the characteristics and dynamics of a market. Economies of scale mean that competitors are less likely to enter, participate or expand in the market if the dominant firm forecloses a significant part of the relevant market.

97. On the evidence before us, Ukusa entered the market when it obtained certification in June 2017; in February 2018 Allbro had written to Eskom; in April 2018 it had written to Actom and in June 2018, it had instituted High Court proceedings against Ukusa over the alleged intellectual property violations. Wilec entered the market in 2018 on the firm commitment of Actom, one of the two largest customers for transformer bushings (the other being Revive) that it would support the entry of Wilec; and by June 2020 Allbro had started litigating against Wilec. Wilec has not been able to effectively participate or expand in the market due to the pending litigation by Allbro.

98. Third, we considered the proportion of the relevant market that is covered by Allbro's conduct. We understand that there are only two other competitors to Allbro in the manufacture of transformer bushings, Wilec and Ukusa, (the three upstream transformer bushings manufacturers nationally). The two largest customers downstream are Actom and Revive (who manufacture transformers using transformer bushings) which they supply to Eskom further downstream. Eskom accounts for approximately 80% of the demand (as calculated by value) for transformers nationally.

99. In 2018, Eskom issued a tender for the supply of transformers. This tender related to approximately 80% of Eskom's transformer requirements and would be for a five-year period. Revive was awarded 80% of this tender, while Actom was awarded 17% and the remaining 3% split between two other firms.[48] Revive is therefore the largest supplier of transformers to Eskom.

100. The undisputed evidence before us, is that neither Actom nor Revive procure transformer bushings from Wilec. They procure transformer bushings from

[48] Founding Affidavit at p13 para 28.3.

Allbro. Wilec states that Revive sources its transformer bushings exclusively from Allbro, however it has been unable to ascertain whether Revive purchases exclusively from Allbro as a result of an exclusivity arrangement or by way of inducement strategy. The relationship between Allbro and Revive is part of Wilec's complaint to the Commission. On balance, it appears that it may be the case that a higher percentage of total sales in the relevant market is affected by the conduct. This increases the likely foreclosure effect.

101. On the papers before us, Wilec sought to establish this from Revive. It wrote a letter to the CEO of Revive in which Wilec sought to understand Revive's reasons for not purchasing from it; and whether this could be attributed to Allbro also threating Revive with litigation and damages claims. Revive's response was over the top and unresponsive to the core question:

> "*Your letter … has just damaged the cordial relationship that I thought that our two companies cherished! What is also crazy is that you stoop so low to make defamatory baseless accusations which I reserve my rights to take further actions on. May I suggest that you offer a personal apology and retract your letter by close of business on Friday, 20 Friday 2021 (sic), whereafter we can engage your frustrations in a more amicable way*."

102. As indicated earlier, access to Eskom is mainly through two potential customers - Revive and Actom. Actom is closed to Wilec on account of Allbro's conduct. Revive is also closed to Wilec. Revive's non-response to why it does not purchase from Wilec is surprising. However, the fact is Wilec is foreclosed from the market for the supply of transformer bushings as it cannot supply a substantial customer base in Revive - the largest transformer manufacturer.[49]

103. Another factor we considered important is the position of customers. On Actom, the picture is clearer. Allbro's threat that Actom would be pursued with litigation if it purchased from Ukusa, combined with Allbro's parallel litigation against Wilec, was sufficient to induce Actom not to deal with both Ukusa and Wilec.

[49] Annexure "FA1" Wilec Statement of Complaint trial bundle p34 para 6.

While the position regarding Revive is less clear - indeed, Revive's answer does little to assist Wilec to understand why this vital route to market is closed to it. In this case, Actom's evidence is that its plan was to procure from Wilec, but it was denied this opportunity because of Allbro's conduct. Actom seemingly provides us with an example of a customer who is more likely to respond to the offers from competitors and may represent an alternative means of supplying the market for a new entrant.

104. Fourth, we considered the market position of Allbro relative to the position of its competitors. We were specifically interested in the importance of competitors for the maintenance of effective competition. On balance, the evidence suggested that, for example, Actom would welcome more competition in the transformer bushings market and would like to procure transformer bushings from Wilec. Wilec's transformer bushings are cheaper than Allbro's transformer bushings and meet Eskom's technical specifications. It seems to us that it may be that Wilec is a close competitor to Allbro and has built a reputation that its transformer bushings are cheaper than Allbro's transformer bushings.

105. The last factor we considered important is the possible evidence of actual foreclosure. According to Wilec and Ukusa, similar tactics were employed against Galbro – a company which has since exited the market. Allbro's version is that correspondence between Allbro and Galbro has no bearing on these proceedings. Galbro undertook to comply with Allbro's demands and in any event correspondence between Allbro and Galbro does not constitute inducement.[50] While there is a dispute behind the reasons explaining Galbro's exit, on the evidence before us Wilec is marginalised as a result of the conduct.

106. Our assessment of the above factors was relative to a simple absence of the conduct in question counterfactual.

[50] Answering Affidavit p768 paras 55-58

107. Our view is that given the available evidence before us, taken as a whole, Wilec has established a *prima facie* case of substantial foreclosure.

Is there consumer harm?

108. Wilec argues that Allbro's products are more expensive and consumers have no real choice.

109. In response, Allbro submits, relying on *Uniplate*,[51] that price alone – absent a comprehensive analysis – is not sufficient to show consumer harm. *Uniplate* was an exclusive contracts case and the dicta it provided was that observing high prices alone (without a counterfactual analysis) is not sufficient to evidence anti-competitive effect. Our approach to evaluating actual consumer harm, requires us to consider a relevant counterfactual. In this case, to consider *prima facie* evidence of what would have happened in the relevant market absent Allbro's conduct. For example, whether absent Allbro's conduct, we would expect that there would be more competition, prices would be lower, and consumers would have a greater choice. We note that Allbro's transformer bushings are more expensive, most probably, as a result of reduced competition. Whereas Wilec's transformer bushings are cheaper, Allbro's conduct induces customers not to deal with Wilec. Furthermore, Actom and ArmCoil Afrika (Pty) Ltd ("ArmCoil")[52] state that with greater competition, they would like to see a greater choice of product and source of the product.[53]

110. On consumer harm, our view is that there is *prima facie* evidence that with competition offered by Wilec prices would be lower (and indeed are lower as Wilec alleges), however a conclusive determination of consumer harm can only be made after a full investigation.

[51] *Uniplate Group (Pty) Ltd v Competition Commission of South Africa* [2020] 1 CPLR 136 (CAC).
[52] ArmCoil is a small player in the market for the manufacture of transformers (ArmCoil Afrika (Pty) Ltd 'Supporting Affidavit' trial bundle at p76 para 4).
[53] ArmCoil Supporting Affidavit at p421.

Efficiencies or pro-competitive gains

111. Exclusionary conduct may escape the prohibition of section 8(1)(d)(i) in case the dominant firm can show pro-competitive gains that outweigh the anti-competitive effect of its conduct. As indicated, under section 8(1)(d)(i) once evidence of a prohibited practice has been established on a *prima facie* basis, the onus shifts to Allbro to show the pro-competitive gains or efficiencies of its conduct, which must outweigh the anti-competitive effects of its conduct.

112. Allbro's efficiency defence is that it is protecting its intellectual property rights.[54]

113. Allbro has stated that its enforcement of the alleged intellectual property right is efficiency justified because it relates to its copyright but it has not put any *prima facie* evidence in support of how such enforcement of its alleged intellectual property rights might be pro-competitive from a competition law perspective. For example, Allbro has not provided any evidence detailing how the litigation was protecting investments (including, evidence of the nature and magnitude of the investments) into the research and development that produced the intellectual property.

114. In our view, Wilec has, *prima facie*, demonstrated that Allbro's conduct has anti-competitive effects that are not justified by technological, efficiency or pro-competitive gains under section 8(1)(d)(i) - Allbro has not discharged this onus, alternatively under 8(1)(c).

Conclusion on prohibited conduct

115. In conclusion, we find that Wilec has established a *prima facie* case of prohibited conduct on the part of Allbro; in that Allbro's enforcement of alleged (and yet to be established) intellectual property rights amounts to an exclusionary act of requiring or inducing a customer to not deal with a

[54] Allbro Heads of Argument at para 78.

competitor. Wilec has *prima facie* satisfied the requirements of section 8(1)(d)(i).

116. Our assessment above, while done in the context of section 8(1)(d)(i) would also be relevant for purposes of section 8(1)(c). Wilec has thus also made out a *prima facie* case of exclusionary conduct and anti-competitive effects as required in section 8(1)(c).

117. Allbro on the other hand has not provided any evidence of pro-competitive gains to off-set the prima facie anti-competitive effects.

Irreparable harm, balance of convenience

118. In *Nedschroef*[55] the Tribunal observed that section 49C starts off by making the threshold requirement that the granting of the order is "'*reasonable and just' and then requires that the Tribunal has regard to the constituent factors which must again be balanced and weighed through the prism of what is "reasonable and just*".[56]

119. Now that a *prima facie* case has been established, the Act dictates a consideration of the need to prevent "*serious or irreparable damage*", and "*the balance of convenience*".

120. Section 49C therefore confers a discretion on the Tribunal to grant interim relief having regard to what is reasonable and just in the circumstances. This exercise should be done holistically, with each consideration balanced against each other in that "*it is possible that interim relief will be granted even where the applicant's case on one of these requirements is not strong*".[57]

[55] *Nedschroef Johannesburg (Pty) Ltd v Teamcor Ltd and Others* (95/IR/Oct05) [2006] ZACT 7 (1 February 2006).
[56] *Nedschroef* at para 24.
[57] *BCX* at para 20 read with *Gallo Africa* at para 17.

121. In *National Pharmaceutical Wholesalers*, the Tribunal interpreted serious or irreparable damage to mean *"that the evidence must demonstrate that, on the face of it, absent the grant of interim relief, the ability of the applicants to remain viable competitors in the market is seriously or irreparably threatened."*[58]

122. The CAC in *BCX* stated as follows on the serious or irreparable damage evaluation:

> *"The need for intervention is a function of the probability of serious or irreparable damage occurring if no intervention is ordered by the Tribunal before it can make a final determination as to whether the alleged prohibited practice has taken place. It is the damage to the competitive position of the applicant that the prohibited practice may cause that marks out this enquiry. Other forms of damage to the applicant are not relevant because the Act's purpose is to maintain and promote competition in the market*".[59] (our emphasis)

123. The harm Wilec alleges it will experience is related to the foreclosure issue addressed above. If Wilec is foreclosed by Allbro's conduct, Wilec cannot get its products to market and cannot participate as a viable competitor in the transformer bushings market. There is a real possibility that Wilec will exit the market. Apart from the fact that Wilec's exit would deprive the market of some rivalry, competitive prices and choice in what is already an overly concentrated market (comprising of Allbro, Ukusa and Wilec), it would deprive the market of the only black-owned firm in the market – a factor that the Act calls us to consider. This is not, says Wilec, asking the Tribunal to take pity on it as a less efficient firm in need of a handout: customers have confirmed that they would like to see a competitive market place as Wilec's products accord with the relevant industry specifications and are cheaper than Allbro's.

[58] *National Pharmaceutical Wholesalers v Glaxo Wellcome (Pty) Ltd* (68/IR/JUN00) at 147.
[59] *BCX* at para 21.

124. In addition to this, Allbro's conduct has ramifications not only for Wilec and, consequently, for competition and therefore consumers, but also for the public purse. It is common cause that Allbro's transformer bushings are more expensive than those of Wilec and that Eskom is the largest indirect customer of transformer bushings. Allbro's exclusionary conduct, if permitted to continue, will deny Eskom (indirectly, the single largest transformer bushings customer) the opportunity to procure from a technically superior, cost-effective and efficient black-owned firm.[60] The harm to the public purse, competitive rivalry and to transformation is obvious, says Wilec.

125. On the other hand, Allbro, as a starting point, denies that there has been a prohibited practice which means that there has been no irreparable harm. Rather, Wilec could engage any number of legal remedies to ameliorate any alleged harm. It could approach the Judge President in the High Court action against it for the allocation of a case manager or preferential trial date. It could seek a declarator in respect of Allbro's intellectual property rights; or it could seek interim relief from the High Court pending the outcome of the High Court trial.

126. The CAC in *BCX* clarified the balance of convenience consideration:

> *"[T]he balance of convenience in s49C is a direct borrowing from the common law. It weighs the prejudice the applicant will suffer if the interim interdict is not granted against the prejudice to the respondent if it is granted. This requires an equitable reckoning as to who bears the greater burden of error. If the interim order is granted and no case is ultimately established to prove the alleged prohibited practice, what prejudice will have been suffered by the respondent, and how might that prejudice be mitigated? So too, if the interim order is refused and the prohibited practice is ultimately proven, what prejudice will the applicant suffer in the interim. Here too, the currency of prejudice is reckoned by*

[60] Wilec argues that Section 217 of the Constitution requires that when an organ of state contracts for goods or services, it must do so in accordance with principles of fairness, equitability, transparency, competitiveness and cost-effectiveness. Eskom is an organ of state. Allbro's conduct also poses real difficulties for Eskom in respect of its procurement obligations.

recourse to the consequences for the competitive positioning of the parties in the market. A respondent that is required to desist from conduct that gives it a legitimate competitive advantage suffers prejudice. An applicant that is required to endure an unlawful competitive disadvantage also suffers prejudice. How to weigh prejudice in the balance is a difficult task."[61] (our emphasis)

127. This is the task we undertake to do now.

128. Allbro argues that, as to the balance of convenience, the granting of the requested relief would deprive Allbro its statutory rights, an unlawful state of affairs. Allbro cannot be expected not to vindicate its rights in law and allow the violation of its intellectual property. Copyright infringement is also a crime in certain instances, so the granting of the relief would permit the commission of a crime. For the Tribunal to suspend Allbro's intellectual property rights without a determination of their merit – which the Tribunal has no jurisdiction to do – would be wholly improper. There are various mechanisms that are available to Wilec in the High Court, says Allbro. It is not powerless and can address the alleged harm it is suffering in a forum that is better placed to assess the competing rights. The limited duration of the interdict, says Allbro does not take the matter further. The principle remains: the negation of Allbro's rights to protect its intellectual property where the strength of those rights are untested is untenable. Wilec's foreclosure arguments are untested and there is no evidence regarding the financial position to motivate such allegations. Further any potential customer relationships with Revive, for instance, Wilec managed to ruin on its own.

129. Furthermore, Allbro argues that because Wilec's actual or potential customers are any traders in the market, Allbro would not be able to pursue a single other competitor or trader who infringes its copyright while the Tribunal interdict remains in place. Whereby any success that Allbro would attain in the High Court regarding its intellectual property would include remedies against Wilec

[61] *BCX* at para 22.

alone. There are also consequential damages that Allbro stands to suffer as a result of allowing Wilec to continue trading in its intellectual property; including the permission of secondary infringement by those that traded with Wilec in violation of Allbro's rights. Whether Wilec has ceased trading in the transformer bushings that are the subject of the High Court proceedings is irrelevant.

130. Where does the burden of error lie? Where the interim relief is granted, Allbro, for a period of six months, would not be able to threaten or induce Wilec's customers not to deal with it. This does not amount to a complete nullification of Allbro's intellectual property rights. The relief granted does not mean that Allbro is prevented from moving its action in the High Court, as *dominus litis*, to enforce its rights. Further, any vindication obtained in the High Court would include a pronouncement on the copyright, which could be used to forewarn any other competitors that are believed to be in violation.

131. We also believe Allbro is wrong in stating that it is irrelevant that it has discontinued trade in transformer bushings subject to the High Court action – this, for the purposes of being able to assess the balance of convenience or any potential prejudice to the parties – is wholly relevant. It is relevant to the adjudication of a Tribunal which plays a role in regulating markets, where competition and consumer welfare are crucial factors to the assessment. Even where we assume in Allbro's favour that its intellectual property rights are wholly valid, this case would present the situation of a dominant firm, that is no longer trading in the product subject to the intellectual property, not seeking to reap any financial benefits from the possession of that right and inducing customers not to deal with its rivals. The policy justification for the exclusivity permitted in terms of intellectual property is to allow an innovator to recoup the costs of its investment (leaving aside the fact that Allbro purchased this intellectual property by way of cession and did not, it appears, expend the research and development costs to create this product). Allbro is not even doing that. This speaks to, at least, a *prima facie* case of a conspiracy to harass competitors as part of a framework of a plan to eliminate competition. This cannot be countenanced.

132. Were the interim relief to be denied, Wilec would suffer. Wilec has shown a *prima facie* case in respect of the enormity of the market that is denied to Wilec where Actom is prevented from dealing with it. Loss of Actom, as a promised customer, means that access to Eskom, the nation's largest indirect purchaser of transformer bushings, is foreclosed - given that Allbro is allegedly already in an exclusive agreement with Revive the possessor of 80% of Eskom's business.

133. We also have Actom's affidavit indicating that they would suffer, where they were deprived of the chance to deal with Wilec, a cheaper provider; that customers have indicated they would prefer to trade with Wilec, with its lower prices and compliance with Eskom's standards.

134. The CAC said "*[a] respondent that is required to desist from conduct that gives it a legitimate competitive advantage suffers prejudice. An applicant that is required to endure an unlawful competitive disadvantage also suffers prejudice*."[62] Here Allbro wants to protect a "*competitive advantage*" that it has no intention of using in the market, this is balanced against Wilec that would, without the interdict, be forced to endure unlawful competitive disadvantage to the point of likely foreclosure which would surely be to the detriment of customers, the spread of ownership and the public purse.

135. We cannot conceive of any real prejudice that Allbro will suffer during the period of our order, pending the outcome of the Commission's investigation. We find that the balance of convenience strongly favours Wilec.

Costs

136. Both parties sought costs against each other. Section 57(1) provides that each party participating in a hearing must bear its own costs, section 57(2) provides the Tribunal with power to award costs against an unsuccessful party in a

[62] *BCX* at para 22.

complaint referral. Since this is an interim relief, we have decided not to grant costs in line with the CAC's finding in *BCX*.[63]

Conclusion

137. Taking into account that Wilec has established a *prima facie* case of the prohibited conduct, that it may suffer some irreparable harm in the interim and that the balance of convenience favours it, the requirements of section 49C(2)(b) have been met.

138. We granted the interim relief in favour of Wilec as set out in our order of 3 February 2022. Since the relief is interim, we have ordered in line with the CAC decision in *BCX* that the costs of this application be reserved pending the final determination of the matter by the Tribunal in due course.

Signed by:Liberty Mncube
Signed at:2022-04-29 18:07:50 +02:00
Reason:I approve this document

Ms Mondo Mazwai | **Professor Liberty Mncube**

Ms Andiswa Ndoni concurring.

29 April 2022

Date

Tribunal case managers: Mpumelelo Tshabalala

For the Applicant: Adv Tembeka Ngcukaitobi SC and Adv Shannon Quinn instructed by Primerio Law Incorporated

[63] *BCX* at para 33.

For the First Respondent:	Adv Reinard Michau SC and Adv Lisha Harilal instructed by Spoor and Fisher
For the Second Respondent:	Simphiwe Gumede