IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CAC CASE NO: 201/CAC/JUN22

In the matter between:

EMEDIA INVESTMENTS PROPRIETARY LIMITED **Appellant**
SOUTH AFRICA

and

MULTICHOICE PROPRIEARY LIMITED **First Respondent**

THE COMPETITION COMMISSION **Second Respondent**

Heard virtually on 8 July 2022 by Victor J, Manoim J and Nuku J

Victor J and Manoim J Concurring

Judgment handed down electronically on 1 August 2022

Summary: Competition Law – Section 8(1)(d)(ii) of the Competition Act. Relief in abuse of dominance cases. Interim or final relief to be contextualised within the jurisprudential and transformative context of the purpose of the Competition Act.

ORDER

1. The appeal is upheld
2. Pending the final determination of the complaint initiated by the applicant the first respondent is interdicted from removing the following channels from the bouquet of channels on DSTv platform of which they formed part of prior to the Tribunal's ruling:

    1.1 eToonz; and
    1.2 eMovies; and
    1.3 eMovies Extra.
    1.4 E.tv Extra

3. The first respondent shall pay the costs of the appellant costs including the cost of two counsel.

JUDGMENT

NUKU, J

Introduction

[1] The appellant, eMedia Investments Proprietary Limited ("*eMedia*") brings this appeal in terms of the provisions of section 49C (7) of the Competition Act[1] ("*the Act*")

[1] 89 of 1998

against a refusal by the Competition Tribunal ("*the Tribunal*") to grant an interim order in terms of section 49C. eMedia was the applicant before the Tribunal and MultiChoice Proprietary Limited ("*MultiChoice*") was the first respondent.

[2] The relief sought by eMedia before the Tribunal was an interim interdict preventing MultiChoice from removing the E.tv Extra, eToonz, eMovies and eMovies Extra channels ("*the eChannels*") from the bouquets of channels on MultiChoice's DStv packages pending the final determination of a complaint initiated by eMedia ("*the complaint*") or for a period of six months, whichever occurred first. In the alternative, eMedia sought an order directing MultiChoice to continue broadcasting the eChannels on the same terms and conditions as they were broadcast prior to 1 April 2022 pending the final determination of the complaint or for a period of six months, whichever occurred first.

[3] eMedia described the conduct that is the subject of the complaint as a unilateral decision by MultiChoice to remove the eChannels from its DStv platform and that such conduct constitutes abuse of dominance in contravention of section 8 (1) (c) and 8 (1) (d) (ii) of the Act.

The parties

[4] eMedia and its subsidiaries are a South African media group with holdings in a variety of broadcasting, content and production businesses. The group operates, inter alia, as:

4.1. a content producer, producing eNCA, a 24-hour news channel and the eNuus bulletin, a daily 30-minute bulletin in Afrikaans;

4.2. a content aggregator or channel provider packaging, among others, eNCA, eTV, eTV Africa, eReality, news, sports, eRewind and the eChannels;

4.3. a free-to-air ("*FTA*") broadcaster, broadcasting (i) the eTV channel (previously by way of analogue terrestrial signal which is in the process of being replaced by digital terrestrial transmission ("*DTT*"); and (ii) the OpenView bouquet of channels by way of direct-to-home satellite television ("*DTH*") which is intended to appeal to the mid- to low- LSM groups in South Africa.

[5] MultiChoice and its affiliated entities also operate at various levels of the broadcasting value chain including:

5.1 providing a subscription DTT service through M-Net,

5.2 providing a subscription DTH service known as DStv, which comprises the following differently-priced packages of channels, namely:

5.2.1 Premium, with 150+ channels at a monthly subscription fee of R799;

5.2.2 Compact Plus, with 135+ channels at a monthly subscription fee of R519;

5.2.3 Compact, with 120+ channels at a monthly subscription fee of R409;

5.2.4 Family, with 90+ channels at a monthly subscription fee of R299;

5.2.5 Access, with 69+ channels at a monthly subscription fee of R99; and

5.2.6 EasyView, with 30+ channels at a monthly subscription fee of R29;

[6] The Competition Commission ("*the Commission*"), a statutory body established in terms of the Act was cited as the second respondent before the Tribunal and this Court but no relief was sought against it.

Factual background

[7] eMedia has, since 2007, supplied certain packaged television channels to MultiChoice which are broadcast by MultiChoice as part of its DStv service. eMedia also supplied content in the form of eNuus bulletin which is broadcast exclusively by MultiChoice also on its DStv service.

[8] On 12 May 2017, eMedia and MultiChoice concluded the Commercial and Master Channel agreement ('*the 2017 agreement*") which would regulate the provision of content and channels by eMedia to MultiChoice for a five-year period which was to come to an end on 31 March 2022. The content and channels that were part of this agreement were ENCA channel, eNuus Bulletin (in respect of which MultiChoice was granted exclusive rights), e.tv Africa channel and the eChannels (in respect of which MultiChoice enjoyed no exclusive rights). MultiChoice paid eMedia a fee for the acquisition of the rights over the content and the channels.

[9] As this matter concerns the rights which were granted to MultiChoice in respect of the eChannels, it is necessary to reproduce that part of the 2017 agreement which deals with the grant of these rights. This is to be found in paragraph 3.3 of the 2017 agreement which reads:

"3.3 Entertainment Channels: Subject to the terms and conditions of this Agreement, EMEDIA hereby grants to MCA the <u>non-exclusive</u> right in South Africa during the term, to:

3.3.1 receive, market and distribute the Entertainment Channels, and licence the reception, distribution and marketing of the Entertainment Channels, by means of: (a) any Pay TV Systems on a linear basis to Subscribers; and any (b) OTT Systems to viewers on a linear basis to any devices, and between devices; and

3.3.2 receive, market and distribute the Channel Programming for the Entertainment Channels, and licence the reception, distribution and marketing of the Channel Programming for the Entertainment Channels on an On Demand basis on any On Demand Service/s to any devices, and between devices,

provided that

(i) any of the foregoing rights are exercised either without charge to the viewer or as part of the subscription fee payable by Subscribers, and…"

[10] It was further recorded in the 2017 agreement that MultiChoice "agrees to include … the Entertainment Channels as part of the package currently known as "DStv Family" for Individual Subscribers on the DStv Bouquet, and as part of all packages of the DStv Bouquet that are on a higher tier that the "DStv Family" package…" The 2017 agreement also recorded that MultiChoice "shall be entitled, but not obliged, to offer the Channels (or any 1 (one) or more of the Channels) in any other bouquets, packages, tiers and/or platforms (including for the avoidance of doubt any DTT platform) offered by MCA and/or its Affiliates in the relevant Territory (or part thereof) for which rights are granted."

[11] Negotiations to conclude a replacement for the 2017 agreement, whose term was nearing the end, commenced during November 2021. During these negotiations MultiChoice made it clear that it was only interested in the acquisition of the rights in respect of the ENCA channel and the eNuus bulletin. MultiChoice offered no

explanation to eMedia to explain why it was no longer interested in the acquisition of rights in respect of the eChannels. Despite being offered the rights in respect of the eChannels for free, MultiChoice maintained its position that it was not interested in acquiring them and in fact this threatened to derail the negotiations in respect of the acquisition of rights in respect of the ENCA channel and the eNuus bulletin. On 25 February 2022, the parties ultimately concluded an agreement in respect of the acquisition of rights in respect of the ENCA channel and eNuus bulletin.

[12] On 8 March 2022, eMedia's attorneys addressed a letter of demand to MultiChoice in which they recorded that the decision by MultiChoice "to refuse to broadcast eMedia's channels is aimed at preventing eMedia from competing effectively, as a channel provider, with MultiChoice's own channels. Simply put, MultiChoice is leveraging its dominance in the pay television market to prevent competition with its rival channel providers such as eMedia; with the intention of increasing MultiChoice's share of television advertising spend on its own channels and ultimately with the objective of undermining eMedia as an actual or potential competitive constraint to MultiChoice." MultiChoice was urged to reconsider its position regarding the acquisition of the rights in respect of the eChannels. MultiChoice, however, remained steadfast in its position and went further to advise eMedia that it would no longer broadcast the eChannels from 1 April 2022. eMedia thereafter initiated the complaint and at the same time approached the Tribunal on an urgent basis for the relief referred to above.

eMedia's case before the Tribunal

[13] eMedia identified a number of markets in which it alleged MultiChoice to be dominant. These included the market for the provision of basic satellite services where eMedia, through its OpenView, competes with MultiChoice's DStv. eMedia also identified the market of provision of channels which are not premium where it also competes with MultiChoice.

[14] eMedia alleged that the eChannels are amongst the most popular channels on DStv, with two of these four channels (eExtra and eMovies Extra) ranking in the top-ten most popular channels watched on DStv.

[15] eMedia also alleged that the decision by MultiChoice not to acquire the eChannels would result in the degradation of the quality of the DStv service and the fact that MultiChoice was willing to degrade the quality of its offer to customers (by removing popular channels from the DStv platform) and was unable or unwilling to provide any reason for its decision at the time that the decision was taken illustrates the extent of its market power and that it is not constrained either by consumer preference or supplier demands.

[16] eMedia interpreted the decision by MultiChoice not to acquire the eChannels as a foreclosure which was motivated by anti-competitive objectives including a desire to exclude some of the most popular immediate entertainment channels from the DStv platform and thereby undermine eMedia's ability to broadcast and produce rival content in competition with DStv's own content channels. eMedia also accused MultiChoice of harbouring intentions of harming eMedia's existing business, and to ensure that eMedia is unable to grow its basic satellite service (OpenView) such that it could potentially in time become a more competitive constraint on MultiChoice's DStv platform.

[17] The application by was accompanied by an affidavit deposed to by Mr Kaylan Dasgupta ("Mr Dasgupta"), an economist with expertise in competition matters. Mr Dasgupta variously described MultiChoice's DStv as a service or platform that is an indispensable gateway to connecting eMedia's channels to eyeballs and advertisers. The evidence of Mr Dasgupta was also that MultiChoice is dominant as a supplier of Television services as well as a significant content rights owner, content producer and aggregator of its own.

[18] The economic theory advanced by Mr Dasgupta was that MultiChoice, as vertically integrated (producing its own content and providing a distribution platform) may have an incentive to favour its content over rival (eMedia's) content as there are very limited alternatives to the platform provided by MultiChoice. He described the denial of access to a distribution platform as a case of what is commonly known as "customer foreclosure" which may result in potential reduction or prevention of competition in a related market, namely, the market for the supply of channels. Mr Dasgupta also alluded to the fact that MultiChoice may be motivated by the strategic considerations related to protecting its position as a dominant distribution platform.

[19] Mr Dasgupta dealt with the revenue that eMedia generates from advertising associated with the eChannels as well as the losses that would be occasioned by the loss of access to the DStv platform. He concluded that the loss of access to the platform combined with the digital migration will severely impact on eMedia's ability to continue investing in both content and platform.

[20] Mr Dasgupta also dealt with the effect on consumers and concluded that the harm to consumers and the market/s from the conduct by MultiChoice are (a) harm stemming from inability to access eMedia channels on the DStv platform, (b) harm arising from reduction of the quality and variety of channels available to consumers across all platforms as a result of reductions in the quality of content on eMedia's eChannels, and (c) harm to consumers and the market from the diminution of competition between platforms.

[21] eMedia explained that it earns two streams of revenue when providing the eChannels to MultiChoice. The first was a fee that MultiChoice pays as a consideration for the acquisition of rights. The second is the revenue that eMedia earns from advertisers and it is this revenue that is central to eMedia's case.

[22] eMedia's case based on section 8 (1) (d) (ii) of the Act was that MultiChoice was providing a broadcasting service. eMedia described this broadcasting service as MultiChoice allowing it (eMedia) access to the DStv platform and it is this service that enables eMedia to earn advertising revenue.

[23] eMedia explained scarcity of the broadcasting service with reference to number of DStv subscribers, saying that the fact that MultiChoice has almost three times the number of its subscribers makes the service provided by MultiChoice a scarce service. The argument went further that the scarcity was compounded by the fact that this is a highly concentrated market with high barriers of entry and that eMedia was the only competitor of significance.

[24] Lastly, eMedia alleged that it was economically feasible for MultiChoice to provide the service and that the protestations by MultiChoice to the contrary were not supported by any evidence as it would not cost MultiChoice anything to provide the service.

[25] eMedia's case based on section 8 (1) (c) was essentially that the broadcast of eChannels on DStv is attractive to advertisers because of the viewership numbers of DStv. To discontinue broadcasting the eChannels on DStv, so the argument goes, would result in the eChannels generating significantly less revenue, and that in turn would result in less budget for the acquisition of quality content which would in the end result in elimination of eMedia in the market of channel provision. The other consequence of the reduction of the revenue, so argued eMedia, was that it would have less revenue to inject into its OpenView platform to grow it to the extent of being a competitive restraint on MultiChoice. The result, it was argued, was that this is an exclusionary act as it would prevent eMedia from growing within the basic satellite market.

MultiChoice's case before the Tribunal

[26] MultiChoice opposed the application and filed a report prepared by Mr Stephanus Van Niekerk Malherbe ("*Mr Malherbe*") who disputed some of the factual issues underpinning the economic analysis by Mr Dasgupta. Mr Malherbe opined that it was erroneous of eMedia to characterise the refusal by MultiChoice to retain the eChannels in the DStv packages as a refusal to supply. He explained a refusal to supply typically involves an input foreclosure. He referred to The Law of Economics[2] where the authors state that:

> "*it has always been understood that the duty to deal under Article 102 TFEU only applies in vertical situations, that is, where there is an upstream market for the input in question and a downstream market in which that input is essential*."

[27] Mr Malherbe also referred to paragraph 78 of the EC Guidance[3] which describes an anti-competitive refusal to supply as typically arising:

> "*when the dominant undertaking competes on the 'downstream' market with the buyer whom it refuses to supply. The term 'downstream market' is used to refer to the market for which the refused input is needed in order to manufacture a product or provide a service*."

[28] Mr Malherbe pointed to the fact that eMedia's characterisation of its case as a refusal to supply is contradicted by its explanation of the theories of harm it has put forward as 'customer foreclosure'. He concluded by stating that eMedia is not seeking an input ("service") that MultiChoice supplies to eMedia or any other channel or content provider and that MultiChoice does not sell access to its distribution services as an input to third-party channel providers and eMedia does not pay MultiChoice any fee or consideration for access to its distribution platform.

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[2]QC O'Donoghue, R, and Padilla, J, The Law of Economics of Article 102TFEU, Bloomsbury Publishing, p335

[3] European Commission, 2009, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009

[29] Mr Malherbe also dealt with the claim by eMedia that the DStv platform is a scarce service. He stated that there is no economic foundation for the claim the DStv is a scarce service and that eMedia conflates the requirement for scarcity with the separate and antecedent requirement for dominance.

[30] MultiChoice also dealt with its rationale for not renewing the eChannels clause, the extent of its available capacity to carry the eChannels as well as the performance of the eChannels on the DStv service.

[31] MultiChoice explained that it is routine for broadcasters, including eMedia, to review the commercial desirability of channels on a regular basis so as to discontinue channels that no longer serve their objective. It explained that based on its business model of offering tiered DStv packages, it strives to offer its subscribers the variety they seek at price points which are attractive and affordable and achieving the right mix in the DStv packages is an ongoing imperative. It also explained that as a subscription service, DStv must provide channels which are differentiated from other offerings and content in which subscribers and potential subscribers will see value for their money and in this regard content that is available across multiple channels in the DStv packages or available for free on other services does not enhance the DStv's value proposition.

[32] MultiChoice also explained that the eChannels, although some of them had consistently ranked in the top ten in terms of overall DStv viewership, the channels have not performed well in the DStv packages for which they were intended and this resulted in MultiChoice having to make them available on DStv packages in lower tiers.

Tribunal's findings

[33] The Tribunal described its approach to interim relief through the prism of three principles which it considered sacrosanct. Firstly, firms are entitled to decide with whom they wish to do business and that the terms of their business dealings must be

unfettered but subject to competition law and more specifically it acknowledged that it is necessary to be mindful of the dominance factor. Secondly, it also considered that the Tribunal was not concerned with the rights of the applicant but the effect of competition in the market. Thirdly, the Tribunal referred to the dictum in *Mediclinic* where it was necessary to make sure small and medium sized enterprises survive and succeed. Reliance was also placed on the dicta in *York Timbers* where it considered the correct approach to be that where facts set out contradiction of the applicant's case, the question is whether they raise serious doubt or are they mere contradictions or an unconvincing explanation. [4]

[34] Basically the Tribunal felt constrained without the input of a full scale enquiry together with the disputes of fact arising from the different versions put up by eMedia and MultiChoice, it could not grant the relief because a prima facie case had not been made out by eMedia. Consequently, it could not conclude that MultiChoice's conduct constituted a prohibited practice.

[35] Section 7 of the Competition Act defines a dominant firm in a market if it has at least 45% share. In this case MultiChoice enjoys a 72 % dominance. The Tribunal after undertaking an analysis of MultiChoice's conduct, could not find that despite MultiChoice's dominance there was prima facie evidence relating to the alleged prohibited practice.

[36] The Tribunal also considered MultiChoice's refusal to supply what eMedia describes as scarce goods or services. eMedia argued that MultiChoice 's conduct in fact amounted to an actual refusal to supply. It considered MultiChoice's argument that it only acquired the right to receive, market and distribute channels as an input into its own DSTV package which it retails to subscribers whilst eMedia describes this as a

[4] *York Timbers Ltd v SA Forestry Ltd* (09/CAC/May01) [2001] ZACAC 3; [2001-2002] CPLR 94 (CAC) (18 September 2001) paras 64-65

purchase of eMedia's channels. The Tribunal also considered the Must Carry Regulations required by ICASA. The Tribunal also expressed concern that whilst recognising the application was at an interim relief stage, its inability to definitively establish the relevant market was particularly debilitating and it thus felt constrained in the circumstances.

[37] The Tribunal also considered the economic theories of refusal to supply and analysed the fact patterns. It accepted that it was a vertical refusal to supply. The Tribunal also took into account eMedia's case that MultiChoice's refusal to supply is akin to a situation where a vertically integrated firm is dominant in an upstream market in the field of basic satellite services. The Tribunal however rejected eMedia's contention that the effect of the refusal to supply had an anti-competitive effect as it found MultiChoice had partially renewed the contract in respect of ENuus and eNCA. The Tribunal also accepted MultiChoice's case that it buys content then integrates it into its own system and sells it to its subscribers. The Tribunal rejected eMedia's assertion that MultiChoice's non-renewal of the contract to purchase eMedia's contract is a refusal to supply an input. It found therefore that without an assessment of market dynamics from a demand supply perspective it could not even on a prima facie basis find that MultiChoice has contravened s 8(1)(d)(ii)

[38] The Tribunal also assessed the various fact patterns and found that eMedia had not prima facie established a horizontal refusal to supply. A further fact pattern related to the termination of the existing supply arrangement. It noted that the 2017 agreement did not contain a renewal clause and therefore eMedia could not have had an expectation to renew.

[39] The Tribunal rejected eMedia's contention that DStv is a distribution platform meaning a broadcasting service through which its channel content can reach consumers. The tribunal rejected eMedia's assertion that MultiChoice by refusing it access inhibits competition.

[40] The Tribunal found that eMedia had not established a prima facie refusal by MultiChoice to supply a service to it. Nor does it find that MultiChoice supplies scarce goods or services. It noted that eMedia and MultiChoice disagreed on whether the basic satellite service was a scarce service. The Tribunal whilst analysing whether the service was scarce stated that it was a fact specific analysis as it raised difficulties on deciding about customer preferences. This had to be dealt with in an in-depth investigation. It also found that there was insufficient evidence that basic satellite television services are scarce. It also regarded as unpersuasive eMedia's economic feasibility assertion that it would cost MultiChoice nothing to run the channels on its DStv platform and that argument the foreclosed channels were among top viewed channel on the DStv platform. Although the Tribunal accepted that MultiChoice had capacity it still could not find that it was a service and that it is a scarce service.

[41] The Tribunal also considered the anticompetitive effect of a dominant firm engaging in exclusionary conduct act by refusing to supply scarce goods or services. It found that unless it can show that the anticompetitive effect of that exclusionary act outweighs its efficiency or procompetitive gain, it could not make an interim order. It rejected eMedia's contention that MultiChoice by refusing to renew, to acquire and distribute channels on the DStv platform was motivated by anticompetitive objectives. It found that because eMedia has not made out a prima facie case on services and scarcity it was not necessary to evaluate efficiencies.

[42] It considered the loss of revenue argument. It rejected eMedia's complaint that MultiChoice's intention was to harm eMedia's' existing business and that eMedia could not grow its satellite service and reduced its ability to put money back into the business thus preventing eMedia from becoming a competitor. It accepted MultiChoice's argument that mere loss of revenue was not indicative of anti-competitive conduct.

[43] The Tribunal also accepted MultiChoice's argument that OpenView was growing so it can also sell to Starsat and its own DTT and OTT services. It found that the channels in point were not dependent on a DStv package. It found that there was

dispute about whether the loss of eMovies and eToonz would affect DStv's audience. MultiChoice argues that abuse of dominance cannot be found where a loss of competition arises out of facts unrelated to the conduct of the dominant firm.

[44] It found that there was no consumer harm by consumers not being able to access eMedia channels on DStv platform. The Tribunal found that prima facie the non-renewal of the foreclosed channels did not have an anti-competitive effect. Reliance was placed on Computicket.[5] The assessment of anti-competitive effects requires comparison of an actual and future likely situation in the relevant market and compare to an appropriate counterfactual. In the absence of a renewal clause eMedia must adapt and adjust in a counterfactual world in which negotiations with MultiChoice fail.

[45] The Tribunal could not decide in interim proceedings that the loss of revenue for eMedia would result in harm to competition in the market rather than financial harm to itself. The Tribunal found that in interim proceedings the loss of revenue could not be decided as being anti-competitive. It could not find that the foreclosure of the channels was anticompetitive and best addressed in an in-depth investigation

[46] On the question of irreparable harm, the Tribunal relied on the principle in *Business Connexion* which looks to the damage to the competitive position that marks out the enquiry and not the individual. [6] It also relied on *Normandien Farms* that at no point is the existence of eMedia threatened by the conduct. It found that there would be commercial harm to eMedia but could not determine whether the harm has a significant effect on competition without an enquiry. It found that in *Gallo Africa* all the factors must be considered. [7]

[5] Computicket (Pty) Ltd v Competition Commission of South Africa (170/CAC/Feb19 [20100 ZACAC 4 para 18

[6] *Business Connexion (Pty) Ltd. v Vexall (Pty) Ltd. and another*, Case Number: 182/CAC/Mar20

[7] *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited and Others* (CCT195/19) [2020] ZACC 5; 2020 (6) BCLR 748 (CC); 2020 (4) SA 409 (CC) (24 March 2020)

[47] On the question of Balance of Convenience, the Tribunal rejected the submission by eMedia that it did not matter that eMedia would provide the channels without charge, that there was no loss of opportunity cost because MultiChoice broadcast could continue to broadcast many channels without constraint and that there was no harm to its competitive position. It also rejected the tender of payment of damages as a reason to grant interim relief.

[48] The Tribunal accepted MultiChoice's argument that interim relief would amount to an extreme intrusion in their commercial autonomy and their freedom of expression in terms of s16 of the Constitution and s 25 not to be deprived of its property. It also accepted that the tender of damages was meaningless as damages cannot be quantified. The Tribunal also found it could not interfere at this stage as without the benefit of a full investigation it could not find that the state of competition would be altered by the foreclosure of the channels. The Tribunal considered its role to be that of preventing damage to competition as a whole and not to a single competitor such as eMedia.

Issues

[49] Whether the Tribunal correctly refused the interim application brought by eMedia on the basis that it has failed to establish the requirements for interim relief as provided for in section 49C (2) of the Competition Act.

[50] Whether eMedia has made out a prima facie case of a prohibited practice and irreparable harm and met the requirements of section 49C (2) of the Act.

The applicable legal framework

[51] It is necessary to briefly set out the applicable legal framework before considering the issues for determination. The starting point is section 49C which vests the Tribunal with discretionary power to grant interim orders in certain circumstances and subsection 49C (2) which in the relevant part reads:

"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."

Section 49C (3) of the Act deals with the required standard of proof and states that

> "In any proceedings in terms of this section, the standard of proof required is the same as the standard of proof in a High Court on a common law application for an interim relief."

[52] This requires the Tribunal firstly, to take the facts alleged by the applicant, together with the facts alleged by the respondent that the applicant cannot dispute, and to consider whether having regard to the inherent probabilities, the applicant should on those facts establish the existence of a prohibited practice at a hearing into the complaint referral and secondly to consider the 'doubt' leg of the enquiry, by asking whether the facts set out by the respondent in contradiction of the applicant's case raise serious doubt. If they do raise serious doubt, the applicant cannot succeed.[8]

[53] The prohibited practice relied upon by eMedia is the abuse of dominance, by MultiChoice, as contemplated in section 8 (1) (d) (ii) of the Act and in the alternative as contemplated in section 8 (1) (c) of the Act.

Section 8 (1) (c) of the Act provides:

> "It is prohibited of a dominant firm to engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain."

[8] *York Timbers Ltd v SA Forestry Company Ltd* (2001-2002) [CT]

'Exclusionary act' is defined in the Act to mean "an act that impedes or prevents a firm from entering into, participating in or expanding within a market."

[54] Section 8 (1) (d) (ii) of the Act reads:

> "It is prohibited of a dominant firm to engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act- (ii) refusing to supply scarce goods or services to a competitor or customer when supplying those goods or services is economically feasible."

[55] This Court, in *Computicket*[9] explained that when dealing with prohibited practices, it is necessary to first establish whether the conduct in question is exclusive in nature and that if the prohibited conduct in question relates to section 8 (1) (c), such conduct must be assessed in line with the definition of an exclusionary act. It went further to explain that where the conduct in question falls under section 8 (1) (d), such conduct does not fall to be assessed in line with the general definition of an exclusionary act but in line with the requirements set out in the relevant subsection. Thus, where an act meets the requirements as set out in any of the subsections, it is exclusionary.

[56] Thus, in so far as eMedia relies on the provisions of s 8 (1) (c) of the Act, eMedia is required to present evidence which establishes on a *prima facie* basis that the conduct by MultiChoice is exclusionary in nature has anti-competitive effects that outweigh technological, efficiency or other pro-competitive gain.

[57] Insofar as eMedia relies on the provisions of section 8 (1) (d) (ii) of the Act, eMedia is required to present evidence which establishes on a *prima facie* basis that MultiChoice has refused to supply scarce goods or services to it (eMedia) either

[9] *Computicket (Pty) Ltd v Competition Commission of South Africa* 170/CAC/Feb 19 at para [16]

competitor or customer when supplying those goods or services is economically feasible.

[58] When applying the provisions of the Act dealing with the abuse of dominant position it is necessary to define the market as this illuminates the primary competitive drivers that operate in a given case and the first step in the process entails the consideration of the stage of supply relevant to the inquiry sometimes referred to as the functional dimension of the market.[10] From there on one defines the product dimension and lastly, the geographic dimension with the objective of identifying the competitors of the firm concerned that are capable of constraining the firm's behavior and preventing it from behaving independently of competitive pressure.[11]

Evaluation

The Relevant Markets and Dominance

[59] The markets most relevant to this appeal are the channel providers and the basic satellite markets. In the value chain, the channel providers are upstream and provide the channels as an input to firms in television broadcasting, which in this application is the broadcasting in the basic satellite market. Thus, the firms in the basic satellite market are downstream, in the sense that they require an input from the channel providers. In this sense the channel providers are the suppliers of channels.

[60] Arising from the same commercial relationship is an opportunity for a channel provider to earn revenue from advertising that is associated with the channel so provided and it is in this sense that eMedia alleges that MultiChoice is a supplier of television broadcasting services and more specifically in the basic satellite market. The geographic market relevant to this appeal is South Africa.

[10] Kelly, Principles of Competition Law in South Africa, 2016 at p27

[11] Whish, Competition Law 9th ed at p27

[61] The next step is to establish dominance or market power. In this instance, MultiChoice conceded its dominance in the basic satellite market for the purposes of this application, and it is MultiChoice's dominance in this market that is alleged to give rise to the prohibited conduct.

The underlying economic theory underpinning the application

[62] As stated above, Mr Malherbe questioned eMedia's characterisation of its case as a 'refusal to supply'. Mr Dasgupta's response was that he is not a lawyer and as such he is not familiar with any economic literature that makes the distinctions that Malherbe seeks to make. Mr Dasgupta maintained adamantly that MultiChoice, in deciding to whether or not to carry the eChannels and agreeing commercial terms, including compensation, for the carriage of the eChannels, is engaging in economic exchange with eMedia and that MultiChoice can be viewed as either acting as a purchaser of the eChannels or as a distribution platform of eMedia through which the eChannels reach the customers and ultimately advertisers. Mr Dasgupta also alluded to the fact that issues of dominance and potential foreclosure by firms which act as purchasers or distributors are well-recognised in competition economics and in this regard he referred to an article by Shapiro[12] and example 5 of the United States Department of Justice and Federal Trade Commission (2020), Vertical Merger Guidelines ("*the US Guidelines*").

[63] In the article, Shapiro deals with a situation where a distributor of various products decides to acquire one of the manufacturers. The concern then by the competition authorities would be that the said distributer may be inclined to prefer the products manufactured by its own manufacturer. The factual setting, however, is completely different to this matter and it is not clear how the article assists eMedia's case. The scenario in the article by Shapiro is a distributor acquiring an upstream manufacturer whereas in the present case it is a firm in the downstream market deciding not to acquire an input. Example 5 of the US Guidelines is also about exactly the same scenario of a distributor acquiring a manufacture of one of the products it distributes. In

[12] Shapiro, Carl (2021), "Vertical Mergers and Input foreclosure: Lessons from AT&T/Time Warner Case", Review of Industrial Organization, Volume 59, pp 303-341

any event, Shapiro also makes the point that the theory of harm he proposes in his paper was rejected by the by both the District Court and the Appeals Court.

[64] There is also another difficulty with Mr Dasgupta's basis on which he asserts that MultiChoice can be viewed as a distributor in that he makes reference to, among others, "*agreeing commercial terms including compensation*" which would seem to suggest that MultiChoice was being paid compensation for broadcasting the channels whereas that was not the case. To the contrary it was, in fact, eMedia who was getting paid for selling the rights to broadcast the eChannels. At a conceptual level, this then presents some difficulty because the case presented by Mr Dasgupta, appears to be that of a proper distributer, whose business is to distribute.

[65] The other criticism of Mr Dasgupta's economic analysis relates to the to the contradiction in explaining 'a refusal to supply' case with the customer foreclosure theory of harm. There is no doubt that this matter is not about input foreclosure and Mr Dasgupta does not and cannot dispute. In trying to deal with this criticism, he resorts to the use of a very similar theory in recent cases in South Africa and United States in relation to Facebook's decisions to deny some rival access to its APIs.

[66] The Tribunal found for various reasons that eMedia had failed to establish a *prima facie* case of a refusal to supply. This finding was largely based on the assessment by the Tribunal that in the relationship between eMedia and MultiChoice, eMedia was the supply of the eChannels and MultiChoice was not a distribution platform, at least in the traditional sense. Whilst there might be something to be said about how the Tribunal applied the test to establish a *prima facie* case, I cannot fault the outcome as I come to the same conclusion even on the proper application of the test.

[67] MultiChoice, through its DStv offering provides eMedia with a platform, and I use the term platform loosely, where the eChannels are broadcast. Because of the sheer number of subscribers to DStv, the channels being broadcasts are likely to reach large numbers of viewers, a fact which makes them attractive to advertisers as the advertisers

are also chasing the large numbers of viewers. This in turn results in the channel provider earning revenue from the advertisers. So it can be accepted that *prima facie*, the DStv service is a distribution platform.

[68] What casts serious doubt into the above *prima facie* case is the fact that MultiChoice is not in the business of making its DStv service to channel providers and the fact that it does become available is an incidence of MultiChoice having acquired an input (the channels) which, includes as part of the package, an opportunity for a channel provider to earn revenue from advertising. The result would be that to grant an interdict would be akin to imposing a duty on MultiChoice to acquire the eChannels and this makes it doubtful to characterise the case as that of a refusal to supply.

[69] The issue of scarcity is also subject to a serious doubt. In this regard it must be remembered that the scarcity was not pleaded in relation to the capacity of eMedia to carry more channels but in relation to the fact that MultiChoice has a large number of viewers and is attractive to advertisers.

[70] eMedia has its own platform, OpenView, and in fact the eChannels are being broadcast on this platform. In this regard, the point made by Mr Malherbe about conflating scarcity and the subscribers has some merit. The eChannels have always been broadcast on eMedia and will continue to be so broadcast. This is one platform that the eChannels have to connect with the eyeballs and so the advertisers. DStv was thus an additional platform and in these circumstances it cannot be said that it is a scarce service.

[71] Although MultiChoice equivocated in relation to economic feasibility to continue to broadcast the eChannels, this was nothing more than what counsel for eMedia referred to as a ‘makeweight’. MultiChoice has the capacity to broadcast the eChannels but in my view the doubt as to whether this is a refusal to supply case coupled with the fact that eMedia has its own distribution platform, makes it unnecessary to deal with this aspect. In my view, the Tribunal adopted a correct approach when it awarded no costs to MultiChoice, despite it having been successful.

[72] The doubt about eMedia's case being a refusal to supply case has implications also for eMedia's case under section 8 (1) (c) of the Act. This is because if it doubtful that MultiChoice is the supplier in its relationship with eMedia, and is more of an acquirer of rights to the channels, the question is whether the act of not acquiring can be described as an exclusionary act. Whilst not purchasing a product has implications for the seller of the said product, I am of the view that this is not an issue that the competition policy is concerned with. It also appears that this is not what eMedia's case is about.

[73] As I understand it, eMedia's case under section 8 (1) (c) of the Act is based on the effects of the revenue that it would have generated but for the discontinuation of the eChannels. This, the Tribunal found to be no more than a financial loss which would result in harm to eMedia but not necessarily to the competitive position of the competitors in the market. In arriving at this conclusion, the Tribunal took into account the judgment of this Court in BCX[13] and I cannot fault its reasoning.

Irreparable harm and balance of convenience

[74] The fact that a serious doubt has been cast in eMedia's case also has some relevance in considering the irreparable harm as well as the balance of convenience. As already stated the Tribunal found that the harm that eMedia was able to demonstrate was financial harm which did not translate to competitive harm and in my view this is not the sort of harm which calls for an intervention before final determination of the complaint.

Application to adduce new evidence on appeal

[75] MultiChoice applied to adduce further evidence on appeal and the application was refused. The application was to introduce the latest audited financial statements of eMedia, the purpose being to deal with the quantification of the loss alleged by eMedia.

[13] Business Connexion (Pty) Ltd. v Vexall (Pty) Ltd. and another, Case Number: 182/CAC/Mar20

Given the conceptual difficulties which are the basis of which I would have dismissed the appeal, the evidence sought to be adduced by MultiChoice did not meet the threshold requirement for the admission of evidence on appeal and would also have been irrelevant.

Criticism of the Tribunal's approach

[76] eMedia, has criticised the Tribunal's approach to the matter as being at odds with the Constitutional imperatives as well as the Act. In my view such criticism is unwarranted in that the Tribunal was confronted with a case that was presented as a refusal to supply but which was explained by a customer foreclosure theory of harm and in the circumstances it had to approach the matter with great care. This is certainly a matter that has the potential to extend the obligation by a dominant firm beyond the usual realm of a duty to supply as I explain above that one of the inventible consequences of granting an interdict in these circumstances is to impose a duty on MultiChoice to acquire the eChannels. eMedia must have realised this quandary and this might explain why it would offer the eChannels to MultiChoice for free. Had it not been for offering the eChannels to MultiChoice for free, eMedia would have had more difficulties in advancing a case of a 'refusal to supply'. In fairness to the Tribunal, the matter presents novel issues in respect of which the Tribunal had no ready precedent. This is also clear from the evidence presented by the economists.

Conclusion

[77] In my view the Tribunal correctly refused the interim application brought by eMedia on the basis that it has failed to establish the requirements for interim relief as provided for in section 49C (2) of the Competition Act. For all the reasons above, I would have dismissed the appeal with costs.

Victor J (Manoim J concurring)

[78] I have had the pleasure of reading the judgment of my brother Nuku J, the first judgment. I am in agreement with the facts set out by him and the description of the Tribunals findings but cannot agree with the reasoning and the outcome. In addition

the new evidence for admission was refused on the basis that it did not reach the requisite threshold.

Competition jurisprudence and the proper approach to interpretation of section 49 C (2) of the Competition Act

[79] This appeal raises the application of the principles when granting or refusing interim relief in competition law. The proper approach to interim relief in the case of dominance comes into sharp focus in this case. Central to our commercial era are companies trading in fast moving, dynamic and global markets. Competition law must be sufficiently agile to meet the needs of our fast paced economy when considering interim orders. If a too rigid approach is adopted by the competition authorities, the very interim relief may soon lose its relevance. Currently this is about a basic satellite platform, but with the rapid development of digital technology this may soon become dated hence the need to appreciate and understand the commercial exigencies and urgency when interim relief is sought. Delaying decisions until the main relief is decided may result in irreparable harm. For example, the relief in the main case may be appealed and this can take several years to reach the Constitutional Court. Meantime if there is irreparable harm it will continue unabated.

[80] In applying the three principles in s 49C(2) cognisance must be taken of whether clear, non-speculative and uncontroversial facts have been presented by an applicant from which it could be reasonably and logically inferred, on a balance of probabilities, that the alleged irreparable harm would occur. In considering the balance of convenience at the interim stage, the Tribunal has to consider "which of the two parties will suffer the greater harm from the granting or refusal of interim relief, pending a decision on the merits. If there is clear and non-speculative evidence regarding the general extent of the harm that one party would suffer if the relief requested is not granted, then the interim relief ought to be granted.

[81] In this regard there will inevitably be disputes of fact but that does not prevent the Tribunal from taking a robust approach nor is it necessary to await the outcome of an investigation in due course. The finality of an investigation is perhaps best utilised when considering final relief. In this case expert reports were filed; facts were placed before the Tribunal which could not seriously be disputed and at this interim stage, this should have facilitated the determination of interim relief. The application of an objective standard to the facts should facilitate an obviously fair decision.

[82] The basis of the power to grant interim relief must also be contextualised within the jurisprudential framework of Competition Act. The preamble to the Competition Act in relevant part defines:

> "the aim and object of competition law. It recognises that apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans. That the economy must be open to greater ownership by a greater number of South Africans."

[83] The purpose of the Competition Act is defined as promoting and maintaining competition in order-

> "(a) to promote the efficiency, adaptability and development of the economy;
> (b) to provide consumers with competitive prices and product choices;
> …
> (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
>
> (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons."

[84] It follows therefore that these are the guidelines this Court and indeed the Tribunal must follow when applying the provisions of the Competition Act. The approach calls for a transformative constitutional approach and must be consistent with the scheme of the Competition and apply a context-sensitive approach. This is a striking

feature that must be considered in this application. Unless this transformative approach is applied even at an interim stage of proceedings, then the historical and insidious unequal distribution of wealth in South Africa will continue. Guidance can be gleaned on the proper jurisprudential application of the Competition Act by following the dictum by Jafta J in *Matatiele* where he explained the principles of constitutional interpretation which involves a combination of a textual approach and a structural approach.

> "Any construction of a provision in a constitution must be consistent with the structure or scheme of the Constitution. This provides the context within which a provision in the Constitution must be construed.' [14]

[85] It follows therefore that in granting or refusing interim relief or indeed any relief the jurisprudential and transformative context of the Competition Act must be considered. Professor Fox draws attention to the dictum of Moseneke J in *Minister of Finance v Van Heerden*, where he states that the achievement of equality goes to the bedrock of our constitutional architecture. It informs all law and against which all law must be tested for constitutional consonance.[15] When interpreting any legislation, and when developing the common law or customary law, every court, tribunal, or forum must promote the spirit, purport, and objects of the Bill of Rights.

[86] eMedia correctly submits that a scrutiny of the reasons given by the Tribunal at this interim stage shows its failure to pay sufficient attention to the context and purpose of the Competition Act. Particularly when it is evident that there are high levels of economic concentration in this basic satellite platform which can easily result in economic exclusion. MultiChoice's market share in the markets defined in the founding affidavit (including in the premium and basic satellite markets) provide clear evidence of the excessive concentration of ownership which prevail in the broadcasting industry.

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[14] *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2007 (6) SA 477 (CC) (2007 (1) BCLR 47; [2006] ZACC 12) paras 36 – 37, which read:

[15] *Minister of Finance and Other v Van Heerden* (CCT 63/03) [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) ; [2004] 12 BLLR 1181 (CC) (29 July 2004), paras 22-25.

This point is highlighted in the 2019 article by Professor Eleanor M Fox titled, "*SOUTH AFRICA, COMPETITION LAW AND EQUALITY Restoring Equity by Antitrust in a Land where Markets were Brutally Skewed".* The abstract to the article provides s follows:

> "In South Africa, the question is not whether to incorporate "equality" into the competition law, but how. In view of the history of heinous exclusion of all black South Africans, South Africa has long recognized inclusiveness as a competition law value. Recent amendments seek to further the equality goal. This essay argues that, within a significant space, the goals of an equitable and efficient competition law overlap. Maximizing this space requires a greater appreciation of exclusionary conduct and its harmful effects. The author next singles out the amendments that contemplate "transformation" obligations on parties to some big mergers and contracts who are seeking clearance or exemption. She highlights the special challenges to transparency, predictability, equal opportunity, and rule of law. She argues that with hard work (which is being done) the system can be administrable, with due process, and likely to engage the creative talents of the left-out majority[16]"

[87] In the recent case of *Mediclinic*, the Constitutional Court set out in very clear terms the approach to competition jurisprudence as follows:

> "[3] It ought never to be acceptable for any of us, including the corporate citizens of this land, to indulge, talk less of over-indulge, in the unconscionable practice of seeking to record the highest profit margin possible by any means necessary, in wanton disregard for what that would do to the rest of humanity. Neither should the historic exclusion of some from meaningful participation, particularly in the mainstream economy, be normalised. For, this seems to be one of the most stubborn injustices of our past that require a more deliberate, intentional and systematic confrontation appropriately enabled by independent, incorruptible, efficient and effective law enforcement and justice-dispensing institutions."

[16] Fox, Eleanor, *"South Africa, Competition Law and Equality. Restoring Equity by Antitrust in a Land where Markets were Brutally Skewed"* page 1. First published in CPI Antitrust Chronicle, Fall 2019 (Vol. 3, No. 1)

> "[7] Institutions created to breathe life into these critical provisions of the Act must therefore never allow what the Act exists to undo and to do, to somehow elude them in their decision-making process. The equalisation and enhancement of opportunities to enter the mainstream economic space, to stay there and operate in an environment that permits the previously excluded as well as small and medium-sized enterprises to survive, succeed and compete freely or favourably must always be allowed to enjoy their pre-ordained and necessary pre-eminence. The legitimisation through legal sophistry or some right-sounding and yet effectively inhibitive jurisprudential innovations must be vigilantly guarded against and deliberately flushed out of our justice and economic system."[17]

eMedia's case on dominance and interim relief

[88] eMedia essentially complains that Multichoice is abusing its undisputed and overwhelming dominant position. eMedia asserts that the conduct contravenes section 8(1)(d)(ii), alternatively section 8(1)(c) of the Competition Act.

[89] In relevant parts 8(1) of the Competition Act provides that it is prohibited for a dominant firm to:

> (c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or
>
> (d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act—
>
> (i) …;
>
> (ii) refusing to supply scarce goods or services to a competitor or customer when supplying those goods or services is economically feasible;

[17] *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* (CCT 31/20) [2021] ZACC 35 (15 October 2021) ("Mediclinic"). at paras 3 and 7

…

[90] An amendment to the Competition Act in 2018 introduced various definitions making them wider and ensuring closer consistency with the transformative goals of the Competition Act. The word "exclusionary act" is defined in s 1(c) to mean an act that impedes or prevents a firm from entering into, participating in or expanding within a market. [18] A further amendment in section 1(h) of the Act defined "participate" as referring to the ability of or opportunity for firms to sustain themselves in the market. An amendment to the words "prohibited practice" means a practice prohibited in terms of Chapter 2;[19]

[91] It is against these wider definitions that MultiChoice's undisputed dominant position must be analysed. eMedia submits that by refusing to renew the commercial relationship that has been in existence for 15 years results in an anti- competition effect. It is recognised worldwide that interim measures can accelerate competition procedures and ensure efficacy in competition law. The uncontroversial facts in this case point toward interim stage relief being granted to preserve an existing situation and to temporarily safeguard a situation where interests are at risk. [20]

[92] In South Africa s 49 C (2) of the Competition Act provides in relevant part as follows:

> (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;

[18] (Definition of "exclusionary act" substituted by section 1(c) of Act 18 of 2018)

[19] (Definition of "prohibited practice" substituted by section 1(j) of Act 18 of 2018)

[20] Interim Measures in Competition Law – Curse or blessing Marcel Meinhardt Simon Suslu Interim measures in competition law 1 December 2021 Kluwer Competition Law Blog

(ii) the need to prevent serious or irreparable damage to the applicant; and

(iii)the balance of convenience.

[93] This really means that the Tribunal must make a summary assessment before granting the interim relief. This assessment is only at a prima face level. It must consider the evidence as to the alleged practice. There is usually no time to delve too deeply in serious or irreparable harm but at the very least it must be assessed in the context of whether there is a prima facie right at the interim level. As long as there is clear and non-speculative evidence about possible anti-competitive effects, then serious consideration must be given to the grant of the relief. In addition, the proper consideration of the balance of convenience applied to the facts also provides further checks and balances to ensure an equitable result.

[94] Unterhalter J in *Business Connexion* explained that the power to grant interim relief "has effects upon the state of competition in the market."[21] Although the facts in that case were different, it remains necessary at this interim stage of the proceedings to consider the non-speculative evidence on the state of competition at least at a prima facie level.

Evaluation of the Tribunal's findings

[95] The Tribunal whilst identifying the correct competition principles erred in applying them to the facts in this case. It also failed to take into account the context of the Competition Act requirement at this stage. The jurisprudential and transformative principles apply both at interim relief stage and at final relief stage. Section 49C (3) of the Competition Act equates the standard of proof as the same standard as in High Court common law interim relief. The principles are trite. If there is a prima facie right, even one open to some doubt and a well-grounded apprehension of irreparable harm if the

[21] *Business Connexion (Pty) Ltd v Vexall (Pty) Ltd and Another* (182/CAC/Mar20) [2020] ZACAC 4 (15 July 2020)

relief is not granted and ultimately granted at final relief stage, then the balance of convenience favours the grant of the relief. The Tribunal instead in considering the prima facie right conflated this aspect with the grant of final relief. The non-speculative and objective evidence strongly pointed to a prima facie right. In applying the prima facie right in cases of dominance an objective test quickly reveals the dynamics at play. Here there was no immediate threat or prejudice to MultiChoice in the interim.

[96] The Tribunal failed to properly consider the extent of the prejudice and harm to eMedia. The balance between competition harm and commercial harm to eMedia in the interim requires an objective approach. Competition jurisprudence requires an approach that looks beyond the entitlement of a dominant firm to decide with whom they wish to do business and that the terms of their business dealings must be unfettered. This is where the Tribunal erred.

[97] This is not a case where a court must apply deference to a specialised body such as the Tribunal when applying the provisions of S49(3). It requires an application of the facts to the law. Despite the more recent approach to judicial deference the relevant Body must still apply the principles correctly to the facts. It did not do so in this case.

[98] It overlooked several undisputed and uncontroversial facts that were presented by eMedia. MultiChoice and eMedia had been competitors in the upstream market. It is clear that by excluding the channels in question it is MultiChoice that benefits from the content aggregation provider market. It is undisputed that MultiChoice has been a dominant firm in the market for decades and that its dominance will not change in the near future. This fact does satisfy the first enquiry into an abuse of dominance case. The exclusionary conduct can at least at this interim stage be interpretated as MultiChoice exercising its market power. It is also undisputed that MultiChoice does not have capacity constraints and can easily carry the foreclosed channels. Cognisance is taken of the incorrectly claim in its answering affidavit but it wisely conceded that there were no capacity constraints in argument.

[99] It is also clear that the Must Carry Regulations do not affect Multichoice's capacity at this stage. On the other hand, it cannot be disputed that eMedia's OpenView ability to grow is significantly constrained by its platform size and cannot grow by adding channels. The Tribunal did not balance the nature of the prejudice if final relief were to be granted in due course. In this regard the balance of convenience clearly favoured eMedia. The Tribunal also failed to take into account that at this stage it is only through the Multichoice platform that a channel can gain access to sufficient customers. Multichoice could not provide a plausible explanation as to why a channel that is performing well should be removed bearing in mind that the eChannels were in the top 10 on its platform. It is an objective fact that OpenView has one transponder and its capacity is severely constrained.

[100] Multichoice claims that the eMedia channels do not drive subscriptions and it wants to enhance its own channels. Somehow at a completely speculative level MultiChoice claims that if the channels can be viewed free of charge on OpenView, this distracts from its business imperatives. MultiChoice does not say how this can be prejudicial to it in the interim. The Tribunals overlooks the question of the necessity to acquire a Top Box to view the eMedia Channels and this is a burden for a customer to have both the DSTV decoder and a Top Box. MultiChoice has not dealt with this aspect when insisting that an eMedia product does not accord with its imperatives. In any event MultiChoice does not explain what these strategic imperatives are and this in the face of Mr Hamburg admitting that eChannels have some appeal among viewers in the lower DSTv packages

[101] The Tribunal failed to take into account that viewers prefer to watch channels on the same platform. The assertion by MultiChoice wanting to focus on local channels is incorrect as EMovies and Extra are locally curated channels which include some programmes being dubbed into Afrikaans. Multichoice claims to want to empower black owned business in South Africa but excludes eMedia despite it being a majority black-owned business. MultiChoice claims that eMedia can distribute its channels to

its OTT service and EVOD but does to deal with why streaming services are a viable alternative to the DSTv broadcasting platform.

[102] MultiChoice in its well-entrenched dominant position loses sight of the fact that its position will remain entrenched. It does not have to preserve this position at the expense of a black-owned, medium-sized competitor like eMedia that was just gaining traction in the basic satellite market.

[103] MultiChoice's abrupt step, in cutting off an important source of eMedia's ability to benefit from its advertising revenue, on a platform such as MultiChoice results not only in a commercial blow to it but leads to other anticompetitive considerations affecting eMedia. This is not a case of cross subsidisation by a dominant firm. In this case there are no other broadcasting services that can be utilised by smaller firms. By excluding eMedia from the broadcasting platform amounts to exclusionary conduct at this stage. This is particularly noteworthy in the context of a long and profitable relationship. Multichoice has not shown that eMedia has resulted in financial loss to it.

[104] At this stage eMedia is unable to self-provide sufficient satellite broadcasting capacity in order to compete in any meaningful way with Multichoice. In the short term a further consideration is the fact that the setbox is an added barrier to expansion for eMedia. eMedia's contention that switching is unlikely because consumers who already have a Multichoice set top box will be averse to making the outlay for a new one at additional expense for the sake of viewing the foreclosed channels. If the test for an exclusionary act now includes consideration of the ability for a firm to sustain itself in the market these facts show that prima facie eMedia has made out such a case.

[105] The Tribunal did not balance eMedia's estimated losses against MultiChoice's future intention to try other channels in place of the foreclosed channels. The success of MultiChoice's intention remains untested. The Tribunal also failed to take into account that the analogue switch off will favour a move by viewers to move to MultiChoice and eMedia will lose out when this happens.

[106] Multichoice's overwhelming dominant position and the lack of realistic alternatives means there is a limitation on broadcasting services available to channel and content providers.

[107] From an assessment of the statistics it cannot be seen at this stage that inclusion of the foreclosed channels can be detrimental to MultiChoice's growth strategy. The foreclosed channels are successful and are at no cost to MultiChoice and thus cannot be prejudicial. eMedia contends that by foreclosing eMedia's channels it is trying to undermine competition. Considered within the context of the absence of serious prejudice to MultiChoice, this submission does gain traction in considering the anti-competitive effect.

Anti-competitive effect.

[108] The Tribunal accepted Multichoice's submission that the foreclosure of the channels has a non-trivial anti-competitive effect. Anti-competitive effects do not have to be significant or substantial. Once there is an anti-competitive effect and no justification for it, then the exclusionary aspect has to be carefully balanced. Revenue loss to eMedia means it cannot invest and grow its OpenView platform and thereby improve its competitive constraint on Multichoice. It also results in it not being able to buy additional satellite capacity and to subsidise the cost on other services

[109] In assessing the anti-competitive effects on MultiChoice's counterfactual exercise there are no clear realistic alternatives for eMedia. The channel rankings on the DSTv platform right up to December 2021 provided from the Niels TAMS shows a good ranking for the eChannels MultiChoice is excluding eMedia's channels that have attraction to its subscribers. eMedia argues that the counterfactual put up by MultiChoice is based on a misreading of what it actually said. eMedia posited a position where it <u>may</u> close two channels eMovies and Extra whilst MultiChoice based its counterfactual that eMedia <u>would definitely</u> close those channels MultiChoice by foreclosing eChannels, eMedia has no way to mitigate its loss. Its revenue on that

section of its business is extinguished and eMedia is deprived source of revenue thereby containing its expansion. Looking to other sources of funding and raising money also costs money. In any event currently the satellite broadcasting platform is dominated by DSTv and in the short term that technical situation will not change.

Is what MultiChoice supplied a service and a scarce service?

[110] In essence therefore the question to be determined at this interim stage is the effect of a foreclosure by an overwhelmingly dominant firm. Section 8(1)(d)(ii) prohibits a dominant firm from refusing to supply scarce goods or services. The Tribunal upheld Multichoice's assertion that it is not in the business of supplying distribution or broadcasting services via its DSTv packages. MultiChoice claim to deal with eMedia as a channel provider and as a purchaser of its content. It claimed not to provide broadcasting services to eMedia. It argues therefore that it cannot be forced to a acquire the right to broadcast content and does not in return have a duty to supply broadcasting services.

[111] eMedia submits that at the core of Multichoice's business is it broadcasting licence that enables it to supply broadcasting services to customers and suppliers alike. It is providing a distribution platform. It would be illogical to purchase content and not choose to broadcast the content. This would obviously prejudice the providers who wish to benefit from the advertising revenue to cover the cost of packaging the channels. This was acknowledged by Genesis, MultiChoice's expert. eMedia argued that it would not offer the channels at no cost if there would be no advertising revenue spin off.

[112] The obligation to broadcast the eMedia's channels was an <u>obligation</u> in terms of the 2017 agreement. The agreement itself properly construed required MultiChoice to use the channels and not to pack them away. The only way MultiChoice can comply with the 2017 agreement is to distribute them and this distribution amounts to a service as rendered by Multichoice.

[113] Mr Dasgupta the expert on behalf of eMedia described this as an economic exchange with eMedia whereby the content reaches the consumer. In providing a "mechanism" by which the content reaches the consumer, a service is the mostly accurate and logical description. In our view MultiChoice has the platform and is providing a service by distributing the channels. Channel providers do not have another firm that can supply the service nor can it self-supply the services of distributing the channels at this stage. The most logical conclusion therefore is that MultiChoice is providing a broadcasting service in the basic satellite market.

[114] In the absence broadcasting facilities other than the OpenView service that has capacity limitations, having one transponder, the distributions facilities to channel providers is scarce as asserted by eMedia. The Tribunal in *Govchat* in fact found in that case when considering whether a good was scarce in terms of s 8(1)(d)(ii) the following fact was taken into account: "the services cannot be easily duplicated without significant capital investment and therefore can be considered as scarce". [22]

[115] It also follows from the above analysis that MultiChoice is engaged in an exclusionary act in refusing to allow eMedia's channels to be broadcasted on its platform and therefor this provides a further ground to uphold the appeal. The Tribunal in *Bulb Man* stated the legal position in applying s 8(1)(d)(ii) to a refusal to deal situation. This is the important issue to be determined in this case since it cannot MultiChoice has not been able to objectively justify its stance.

> "[55] The crucial question here is: does the respondent's refusal to deal advantage its alleged market power? In *York Timbers Ltd v SA Forestry Company Ltd*, we cited the following page from Areeda and Hovenkamp's treatise, which we suggest is apposite:
>
> "An arbitrary refusal to deal by a monopolist cannot be unlawful unless it extends, preserves or creates, or threatens to create significant market power in some market, which could be either the primary market in which the monopoly firms sells or a vertically related or even collateral market. Refusals that do not accomplish at least one of these results do not violate section 2 (of

[22] GovChat & others v WhatsApp and others Case no.: IR165Nov20 para 12

the Sherman Act), no matter how much they might harm the person or class of persons declined service. Nor are such refusals an 'abuse' of monopoly power in the sense of using power in one market as 'leverage' to increase one's advantage in another market."

[56] We can look at the anti-competitive effect from another perspective. Why is the dominant firm refusing to deal? As the authorities show, even dominant firms are entitled to refuse to deal. However, if the dominant firm lacked a proper explanation for its conduct, this might shift the probabilities in favour of the applicant. " Faul and Nickpay observe in relation to European jurisprudence that: A refusal to deal by a dominant undertaking will not be considered an abuse under Article 82 of the EC Treaty if it is objectively justified. This will be the case if the refusal can be justified on business grounds other than the intention to eliminate a competitor from the market." [23]

Conclusion

[116] eMedia correctly submits that the approach by the Tribunal, in allowing MultiChoice to shut down some of its channels leads to a result which the Competition Act seeks to guard against. It is necessary at this interim stage for the Tribunal to take into account the spectre of a dominant firm acting in a manner which can cause irreparable harm to a smaller firm and in particular where it is clear that eMedia and indeed even smaller firms such as StarSat cannot access sufficient satellite space. The access to subscribers which DSTV provides to channel providers such as eMedia plainly cannot be duplicated, thereby making it scarce. It is uncontroversial at this stage that satellite capacity is scarce because eMedia cannot or even the smaller players cannot duplicate the number of channels DSTV has. The ex post facto reasons presented by MultiChoice were unpersuasive at this interim stage and point in the direction of a dominant firm warding off external competition. MultiChoice engaged in an exclusionary act and could not demonstrate any technological efficiency or other pro-competitive gain which outweighed the anti-competitive effect of its conduct.

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[23] The Bulb Man (SA) (Pty) Ltd and Hadeco (Pty) Ltd (81/IR/Apr06) [2006] ZACT 86 (28 November 2006) paras 55 and 56

[117] It follows therefore that eMedia only has to make out a prima facie case and it has succeeded in doing so.

For these reasons, the appeal must be upheld.

ORDER

1. The appeal is upheld
2. Pending the final determination of the complaint initiated by the applicant the first respondent is interdicted from removing the following channels from the bouquet of channels on DSTv platform of which they formed part of prior to the Tribunal's ruling:

    2.1 eToonz; and
    2.2 eMovies; and
    2.3 eMovies Extra.
    2.4 E.tv Extra

3. The first respondent shall pay the costs of the appellant costs including the cost of two counsel.

M Victor
Judge of Appeal
Competition Appeal Court
of South Africa

concur

pp Judge N Manoim

N Manoim
Judge of Appeal
Competition Appeal Court
Of South Africa

dissent

pp Nuku J

L Nuku
Acting Judge of Appeal
Competition Appeal Court
of South Africa

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