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Recent Application of The Prima Facie Standard of Proof in Interim Relief Applications Before Competition Authorities: A New Wave of Competition Law Jurisprudence?

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Recent Application Of The *Prima Facie* Standard Of Proof In Interim Relief Applications Before Competition Authorities: A New Wave Of Competition Law Jurisprudence?

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Abstract

South Africa is currently experiencing a new surge of interim relief applications that has followed the 2019 Amendment to the Competition Act. The work of this paper is to review the jurisprudence of notable cases handed down since the 2019 Amendment with a particular focus on what is deemed sufficient evidence for the establishment of a prima facie case, the initial hurdle in establishing proof of various South African prohibited practices. In seeking to give content to the requisite threshold to meet a prima facie case this paper looks to the interim relief section of the Act, which had long introduced a prima facie standard of proof by way of amendment in 2000.

Introduction

Interim relief is a temporary measure ordered by the Competition Tribunal ("Tribunal") with a protective and corrective objective, that provides temporary relief pending a decision on the merits. The empowering provision of the Competition Act[2] reads "*At any time, whether or not a hearing has commenced into an alleged prohibited practice, the complainant may apply to the Competition Tribunal for an interim order in respect of the alleged practice*".[3] The Tribunal is empowered to hear an interim relief application on the condition that the applicant has also filed a complaint with the Competition Commission ("Commission").[4] As can be gleaned from the quoted section, interim relief orders can only be granted at the behest of third party complainants. The Competition Act and the Rules for the Conduct of Proceedings in the Competition Tribunal[5] ("Tribunal Rules") do not provide for the Commission to seek interim relief orders.[6] However, the Commission is joined as a respondent in interim relief applications as an interested party given the fact that the proceedings concern a complaint that is before it.

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[2] No 89 of 1998.

[3] Competition Act section 49C(1).

[4] *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.

[5] Published in Government Notice R2 in Government Gazette 22025 of 2001.

[6] However, it remains unclear whether the Commission is able to seek a common law interdict of the Tribunal where the relief sought concerns a matter within the Tribunal's subject matter jurisdiction.

The interim relief hearing takes place before the Tribunal after the filing of sworn affidavits. The timelines for filing in interim relief applications are truncated and provided for by the Tribunal Rules.[7] The procedure for interim relief applications is adversarial; however, the Tribunal Rules do not provide for the hearing of oral testimony during interim relief proceedings.[8] The Competition Act circumscribes the grounds upon which an interim relief order granted by the Tribunal may be appealed or reviewed. Any party to an interim relief application may approach the Competition Appeal Court ("CAC") for the *review* a Tribunal interim relief order.[9] Where interim relief has been refused, the *applicant* may *appeal* the decision to the CAC.[10] The *respondent* in the interim relief application may only *appeal* a Tribunal interim relief order where it can be demonstrated that the order has "*final or irreversible effect*".[11]

The Act provides for interim relief to only be granted for a period of six months and provision is made for an extension of the period whereby "*the Competition Tribunal, on good cause shown, may extend the interim order for a further period not exceeding six months*".[12] Recent case law has provided that a Constitutional interpretation of this section "*does not restrict the meaning of s 49C(5) to only one extension and offers the possibility that a party with a case which shows prima facie that is the subject to anti-competitive conduct … would continue to have access to a court to obtain interim relief*".[13] Though the grant of further extensions is discretionary, no interim relief order may extend beyond the conclusion of a hearing of the underlying complaint detailing the alleged prohibited practice.[14]

Prior to the second amendment of the Competition Act in December 2000, under section 59,[15] there was the consideration of whether an interim order "*is reasonably necessary to prevent the purposes of this Act being frustrated*". In terms of this erstwhile regime the standard of proof applicable in interim relief proceedings was on a balance of probabilities. The amendment which came into effect from February 2001 catered for interim relief proceedings under section 49C of the Competition Act.[16] It dropped the consideration of whether the interim relief was necessary to prevent the frustration of the Competition Act's purpose; and it introduced the provision that "*the standard of proof is the same as the standard of proof in a High Court on a common law application for an interim interdict*". Through this mechanism the standard of proof was altered, requiring an applicant to establish its case on a *prima facie* basis. Thus the current test for the grant of an interim relief order

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[7] Answering Affidavits must be filed within 15 business days after service of the founding affidavit and replying affidavits are to be filed 10 business days thereafter. This is contrasted with the filing timelines for complaint proceedings which is 20 and 15 business days respectively. (Tribunal Rule 27 read with Rules 16 and 17.)

[8] Tribunal Rule 28(2).

[9] Competition Act section 49C(6).

[10] Competition Act section 49C(7).

[11] Competition Act section 49C(8).

[12] Competition Act section 49C(5).

[13] *eMedia Investments Proprietary Limited v Multichoice Proprietary Limited and Others* (248/CAC/JUL23) [2023] ZACAC 4; [2023] 3 CPLR 32 (CAC) (16 August 2023) at para 33

[14] Competition Act section 49C(4).

[15] *(1) At any time, whether or not a hearing has commenced into an alleged prohibited practice, a person referred to in section 44 may apply to the Competition Tribunal for an interim order in respect of that alleged practice, and the Tribunal may grant such an order if-*

(a) there is evidence that a prohibited practice has occurred;

(b) an interim order is reasonably necessary to-

(i) prevent serious, irreparable damage to that person; or

(ii) to prevent the purposes of this Act being frustrated;

(c) the respondent has been given a reasonable opportunity to be heard, having regard to the urgency of the proceedings; and

(d) the balance of convenience favours the granting of the order.

[16] Section 49C inserted by section 15 of Competition Amendment Act No 39 of 2000.

is that it must be reasonable and just to do so; as determined, on a *prima facie* basis, by the cumulative evaluation of the (i) 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.
The rate at which interim relief applications have been granted by the Tribunal has seen a shift. As at September 2023, 32 interim relief applications have been considered by the Tribunal. Between 1999 and 2000, prior to the amendment of the standard of proof for interim relief applications, the Tribunal decided 5 cases, granting 4. This can be contrasted from the number of interim relief applications granted from January 2001 to December 2018, where the Tribunal decided 18 cases and dismissed 16 of these, granting only 2.[17] Based on these statistics it would appear that the change to the standard of proof through the introduction of a *prima facie* case, had the effect of chilling the granting of interim relief.

Since 2019 the Tribunal has heard 9 interim relief applications and granted 5 of them.[18] As the statistics suggest there has been an uptick in interim relief applications brought, and successfully awarded by the Tribunal since 2019. This timing coincides with the introduction of new legal standards promulgated by the Competition Amendment Act[19] ("2019 Amendment"). It may be argued that this amendment is perceived to have softened the burden to be met for a contravention of a prohibited practices, and thereby interim relief applications. For example, one such notable change was the widening of the definition of an exclusionary act. Where prior to the 2019 Amendment exclusionary act meant "*an act that impedes or prevents a firm from entering into, or expanding within, a market*" whereas now exclusionary act includes an act that impedes or prevents a firm from "*participating in*" a market; and participate "*refers to the ability of or opportunity for firms to sustain themselves in the market*".

This paper considers the jurisprudence of the notable cases decided after the 2019 Amendment, with the aim of determining principles regarding the threshold for the meeting of a *prima facie* case.

Case Law Review

The *locus classicus* for the evaluation of a *prima facie* case before the Tribunal is *York Timbers*.[20] *York Timbers* first made the point that what the Competition Act imports from the High Court is the standard of proof and not the common law factors to be considered for the grant of injunctive relief in the civil courts. While the Tribunal acknowledged that determination of the precise threshold for a *prima facie* case is a near impossible task; it imported the approach circumscribed in the cases *Webster v Mitchell*[21] and *Gool*.[22] It laid out the position as follows:

> *"Applying this analysis to our Act means that we 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.*

[17] Mondo Mazwai speech made at 17th Annual Competition Law, Economics & Policy Conference accessed at https://www.youtube.com/watch?v=6mfIQHLj0rc
[18] Mondo Mazwai speech made at 17th Annual Competition Law, Economics & Policy Conference accessed at https://www.youtube.com/watch?v=6mfIQHLj0rc
[19] Competition Amendment Act No. 18 of 2018 published in Government Notice R175 in Government Gazette 42231 of 14 February 2019. The 2019 Amendment was signed into law on 13 February 2019 by President Cyril Ramaphosa.
[20] *York Timbers Ltd and SA Forestry Company Ltd* (15/IR/Feb01) [2001] ZACT 19 (9 May 2001).
[21] 1948(1) SA 1186 (W) at 1189 ("*Webster v Mitchell")*.
[22] *Gool v Minister of Justice and Another* 1955 (2) SA 682 (C) at 688.

> *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 applicants case raises serious doubt or do they constitute mere contradiction or an unconvincing explanation. If they do raise serious doubt the applicant cannot succeed."*[23]

These often quoted passages are the bedrock of the *prima facie* standard of proof analysis. This paper now turns to their application in the post 2019 Amendment era.

Vexall v BCX[24] was the first interim relief order granted by the Tribunal after the imposition of the changes to the legal standards brought about by the 2019 Amendment. The matter was heard a year after the 2019 Amendment was promulgated. Business Connexion ("BCX") appealed the Tribunal's order, granted in Vexall's favour, to the CAC; and the Tribunal's decision was left undisturbed. The CAC's *BCX*[25] judgment has been often quoted for its statements made regarding the context and purposes of interim relief, though the CAC case did not see cause to disturb the Tribunal's findings on the *prima facie* case.

Vexall v BCX: Vexall accused BCX of violating Competition Act sections prohibiting inducement of a supplier or customer not to deal, and tying and bundling. Vexall was a new entrant active as a provider of support services to retail pharmacies. The conduct alleged was BCX's tying of the sale of its Unisolv software designed for the pharmaceutical retail market to the purchase of value-added services ("VAS") i.e. certain specific support services. The Tribunal concluded that the applicant had established a prima facie case by considering what is common cause and what had been placed in doubt.

A key point of contention between Vexall and BCX was market definition. Vexall alleged two distinct product markets – one for retail pharmacy software and another for VAS supplied to pharmacies – which BCX disputed stating that many of the products that Vexall labels as VAS are integrally intertwined with the specific functionality of the Unisolv software and cannot be offered to customers separate from Unisolv. The Tribunal overcome this dispute with a reference to the factual position put up by the parties. Vexall was able to show that the VAS could be offered without any changes to the Unisolv source code; that there were other service providers of the VAS that do not compete in the market for dispensary and point of sale software; and that BCX has historically accepted this distinction in that it has permitted Unisolv-using pharmacies to be able to choose other service providers to provide the VAS.

There was also a dispute about the geographic market being limited to South Africa or whether it should include Botswana and Namibia where BCX was also active. The Tribunal opined that in order to counter Vexall's *prima facie* case on the geographic market it would be incumbent on BCX to demonstrate that those facts would cast "*serious doubt*" upon Vexall's *prima facie* case. Again BCX was not able to do so. Because the very nature of the Unisolv software caters for the unique requirements of a private retail pharmacy as opposed to a public pharmacy, the Tribunal limited the market definition to private pharmacies, to the exclusion of public pharmacies.

The same was found on the case of dominance. Given that it was common cause that 70% of all scripts were being processed using Unisolv software – a serious consideration of market power – and that even on BCX's lower calculated market shares it had failed to rebut the presumption of market power.

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[23] *York Timbers* para 64-65.
[24] *Vexall Proprietary Limited v Business Connexion Proprietary Limited and Another* (IR119Oct19) [2020] ZACT 85 (12 February 2020) ("*Vexall v BCX*").
[25] *Business Connexion (Pty) Ltd v Vexall (Pty) Ltd and Another* (182/CAC/Mar20) [2020] ZACAC 4; [2020] 2 CPLR 490 (CAC) (15 July 2020) ("*BCX*").

There was no factual dispute on the fact that BCX was tying these services. The Tribunal considered whether the tying was integral to the offering of the services and found it common cause that there was a technical difference between the software and the VAS, there were independent service providers providing VAS without providing a software platform, and the doubt cast about there being a substantial number of licensees that had *chosen* to acquire BCX's VAS was not sufficient doubt to refute a *prima facie* case. Though BCX alleged that there were efficiencies resulting in lower prices for consumers brought about by the tying conduct, this was not backed up with pricing evidence. Nor were any details put up to the effect of where and how the efficiencies were obtained.

BCX appealed the Tribunal decision to the CAC on the basis that the competitive Tribunal had erroneously not had regard to anti-competitive effects of the alleged anti- conduct. The CAC could not begin to answer the question given that BCX, the respondent, failed to overcome the initial hurdle imposed by statute[26] demonstrating that the interim order possessed such final and irreversible effects as to warrant it appealable. So ultimately the pronouncements that the CAC makes on effects are a showing of anti-competitive effects *of the interim order* warranting appeal (and not the conduct).

Emedia: The case that followed -*eMedia*[27] - was appealed to the CAC[28] and the Tribunal's refusal to grant the requested relief was overturned on the basis of a failure to evaluate the *prima facie* case and adequately appraise the harm.

This case relates to a dispute between MultiChoice and eMedia regarding the termination of an agreement to carry eMedia's channels on the DStv platform. The issue revolved around whether MultiChoice's actions constituted refusal to supply broadcasting services, leading to allegations of harm to competition and consumer welfare.

In determining the existence of a *prima facie* case the Tribunal assessed: the relevant market and dominance; the refusal to supply is in respect of scarce goods or services; it is economically feasible to supply; and anticompetitive effect. The Tribunal also *prima facie* assessed the conduct in terms of the general prohibition against exclusionary acts. In doing so it considered loss of revenue and profit arguments; loss of channels arguments; the allegation that the timing of the termination with the date of analogue switch-off argument; and consumer harm arguments.

The Tribunal evaluated the allegation of refusal to supply provision of basic satellite television services in effort to properly appraise the relevant product market the Tribunal considered: the relationship between eMedia and MultiChoice, this it did with consideration of each parties' activities, the spate of agreements between the parties, and recent industry trends. For the purpose of this application only, MultiChoice conceded dominance in the market for the provision of basic satellite television services. But that, as argued by MultiChoice and adopted by the Tribunal, did not take the argument any further. This is because eMedia's theories of harm related to the markets for (i) channel supply; (ii) advertising; and (iii) basic satellite television services. Based on the dispute between the parties and eMedia's lack of evidence on the other defined markets – provision of television broadcasting services and provision of broadcasting services to channel providers – the Tribunal confined itself to the provision of basic satellite television services market.

[26] Competition Act section 49C(8).
[27] *eMedia Investment (Pty) Ltd v MultiChoice (Pty) Ltd* (IR194Mar22) [2022] ZACT 67 (31 May 2022).
[28] *Emedia Investments Proprietary Limited South Africa v Multichoice Proprietary Limited and Another* (201/CAC/JUN22) [2022] ZACAC 9 (1 August 2022) ("*eMedia*")

There was disagreement between the parties as to how the refusal was taking place. This was due to the further disagreement between the parties on to the classification of the relationship between them. eMedia stated that "access to the DStv platform" is simply another way of saying "access to broadcasting services provided by Multichoice". Whereas Multichoice argued that the broadcasting service that it offers is the provision of a broadcasting service to the public and not to channel providers such as eMedia. Rather, said Multichoice, it true relationship to eMedia is as a purchaser; in that, Multichoice is purchasing the rights to receive, market and distribute channels as an input into its own product – the DStv packages – which it retails to subscribers according to its licence. The Tribunal found this dispute to be of the character so as to cast serious doubt over eMedia's classification of which was the relevant service being offered.

The Tribunal then looked to the standard fact pattern associated with refusals to supply and found that it related mostly to refusals to supply inputs to firms who are in competition with its own downstream business, i.e., (downstream) competitors; or refusals to supply downstream firms with whom it does not compete, i.e., customers. The Tribunal was not convinced that eMedia had established a refusal in line with these fact patterns because it was more convinced that eMedia is a seller of content to Multichoice. Again the Tribunal kept asserting that without assessment of the market dynamics (from a demand and supply perspective) and the incentives of firms, it could not, even on a *prima facie* basis, find a refusal to supply an input by MultiChoice as contemplated in section 8(1)(d)(ii). Interestingly even in a footnote the Tribunal found that even were it to assume that MultiChoice is a dominant purchaser of channels, monopsony power is not a matter to be decided on an interim relief basis, without the benefit of a full investigation.

The Tribunal also considered the fact that in accordance with the agreement between the parties there was no renewal clause, so eMedia could have no legitimate expectation that the contract would be renewed. So this was not the type of refusal where there is the unilateral termination of an ongoing supply contract. The Tribunal concluded this section with the assertion that on the evidence before it, eMedia had not established a *prima facie* case that there is a refusal to supply a service to it, either as a customer or competitor. Then it found that where serious doubt had been cast on the applicant case as set out in in *York Timbers*, it cannot decide the issues in dispute in interim relief proceedings.

This theme of needing more evidence to decide an issue is continued in the Tribunal's reasoning. There were disagreements between the parties on whether basic satellite television services' are a scarce service and the economic feasibility to supply the service. On the first disagreement the Tribunal was persuaded by MultiChoice's argument that there are other substitutes for the service and it is not, as argued by eMedia, scarce on account of its dominance in the market and possession of such a high subscriber base. But the Tribunal again said that deciding issues of the scarcity of a resource is a matter best dealt with by way of in depth investigation with the benefit of oral testimony that can be tested by way of cross examination.

On the issue of economic feasibility, Multichoice's concession that it has spare capacity was taken into account but the Tribunal got stuck on MultiChoice's stated plans to use the space available for an additional channels for its own growth plans in the next five years. This assertion the Tribunal said required testing by way of a full investigation since there was no evidence to contradict it. Given the dispute between eMedia and MultiChoice on the 'service' in question, the exercise of evaluating whether for such a 'service' it would be economically feasible to supply, would best be addressed during an in-depth investigation by the Commission. This is because this issue is intricately linked to the definition of the relevant service and understanding the market dynamics. The Tribunal then did not find it necessary to evaluate the effects of the alleged conduct

because it had found against eMedia, on a prima facie basis, sufficient elements of the prohibited practice.

The Tribunal continued to analyse the conduct in relation to the general catch all for exclusionary conduct. To find evidence of an exclusionary act, the Tribunal analysed the fact patters in line with eMedia's theories of harm.

That the exclusionary conduct resulted in a loss of revenue and profits for eMedia: eMedia's allegation that MultiChoice's decision is motivated by 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 (termed the loss of channels arguments). Multichoice put up multiple arguments motivating why this was not a plausible exclusionary strategy, namely, that it would have nothing to gain when it does not compete in the wholesale channel supply market, such strategy would put it at risk of losing subscribers and revenue, it intends to replace the eMedia channels with other third party channels, and that the evidence is not there to support the assertion that advertising revenue losses would also result in channel losses.

eMedia's last argument on this point was that the offboarding coincided suspiciously with the date of analogue switch-off - an industry development associated with the migration from analogue to digital distribution of content. This Multichoice refutes by saying that it is not supported by the fact that the it was due to legitimate commercial reasons that it chose not to renew the agreement it had with eMedia.

On all of these arguments the Tribunal was unconvinced that eMedia's theories could match up to the requisite test on effects. An anti-competitive effect could manifest itself in two ways. Either there is direct evidence of an adverse effect on consumer welfare; or, there is evidence that the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals. In order to assess, one must compare the actual and likely future situation in the relevant market with the dominant firm's conduct in place, with an appropriate counterfactual – another realistic alternative scenario. The Tribunal found that the nature of the renewal clause created the idea of a counterfactual in which eMedia would have to adapt and adjust in world in which its negotiations with MultiChoice fail. The alleged harm to eMedia's revenues the Tribunal found was insufficient to ground an argument of foreclosure. The Tribunal was just as unconvinced that eMedia's theories of harm would result in harm to the market, as opposed to harm to just eMedia. The Tribunal lamented this dispute between the parties: even on a *prima facie* basis, the evidence on the above factors had been limited; this exercise may better be addressed in the course of an in-depth investigation by the Commission.

On harm to consumers, if MultiChoice where to introduce new and improved channels or content for which there is consumer demand, as it clams it will, then many of eMedia allegations on consumer harm would fall away. Overall the Tribunal thought that evaluating the effect of MultiChoice's decision on consumer welfare requires an evaluation of whether, for consumers, the negative consequences of MultiChoice's decision not to renew the discontinued channels outweigh, over time, the consequences of imposing an obligation to renew or acquire the channels. In this case because of the absence of any *prima facie* evidence, this exercise would best be addressed in the course of an in-depth investigation by the Commission, said the Tribunal.

As mentioned the majority judges in the CAC found in favour of eMedia on interim relief. In doing so, the CAC outlined the proper analysis that should be taken towards interim relief: If a

too rigid approach is adopted by the competition authorities, the very interim relief may soon lose its relevance. Delaying decisions until the main relief is decided may result in irreparable harm.
It said about the evaluation of the fact patters that "*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*".[29] Inevitably, the CAC says, there will be disputes of fact that will arise 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:

> "*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.*"[30]

The *prima facie* nature of the evaluation looks to see "*if there is a prima facie right, even one open to some doubt and a well-grounded apprehension of irreparable harm if the relief is not granted and ultimately granted at final relief stage, then the balance of convenience favours the grant of the relief*".[31] The Tribunal was criticised for instead in considering the evidence on a prima facie level it conflated this aspect with the standards required for the grant of final relief. The CAC viewed rather that there was non-speculative and objective evidence strongly pointing to a *prima facie* right. It further found that in this case there was no immediate threat to Multichoice in the interim.

The undisputed and uncontroversial facts that the Tribunal was said to have overlooked were that It is clear that by excluding the channels in question it is MultiChoice that benefits in the content aggregation provider market. 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. The Tribunal overlooked the question of the necessity to acquire a Top Box to view the eMedia Channels and that it would be a burden for a customer to have both the DSTV decoder and a an eMedia Top Box in circumstances where viewers prefer to watch channels on the same platform. The Tribunal also overlooked 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.

The CAC found that 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 anti-competitive considerations affecting eMedia. In this case there are no other broadcasting services that can be utilised by smaller firms.

The CAC emphasised the principle that a constitutional approach must be taken towards the exercise of discretion to grant interim relief. This must follow the jurisprudential and transformative context of the Competition Act and the Constitution itself. This is relevant because it enjoins adjudicators to consider historic patters of economic exclusion. The CAC also referred to the widened definitions of exclusionary act which was introduced by the 2019 Amendment– this amendment provided that an exclusionary act not only impedes or prevents a firm from "entering into, or expanding within" a market but now includes impediment to a firm from "participating" in a market. In turn participating is defined to mean the ability of or opportunity

[29] *eMedia* para 80.
[30] *eMedia* para 93.
[31] *eMedia* para 95.

for firms to sustain themselves in the market. It is against these wider definitions that MultiChoice's undisputed dominant position must be analysed and this factor should also influence the right approach to the harm or prejudice to eMedia. Ultimately the CAC found that in circumstances where the test for an exclusionary act now includes consideration of the ability for a firm to sustain itself in the market cumulatively, eMedia had, *prima facie,* made out such a case.

On the question of whether there was a service on offer by Multichoice the CAC found that the obligation to broadcast the eMedia's channels was an obligation in terms of a 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 the channels and this distribution amounts to a service as rendered by Multichoice. The most logical conclusion therefore is that MultiChoice is providing a broadcasting service in the basic satellite market. The CAC then assessed precedent on refusals to deal. It is important to ask the question 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.

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 nor can smaller players duplicate the number of channels DSTV has. On effects the CAC boldly asserted that "*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.*"[32]

In conclusion, It was necessary, at the 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. On this basis the CAC found a *prima facie* case to have been made. The next matter followed eMedia but was a matter where the Tribunal entertained the application for interim relief and the CAC, at the behest of the respondents, overturned the Tribunal's interim relief order for reasons relating to the absence of a finding of a *prima facie* case.

The Sekunjalo Group: This matter concerned 36 related applicants referred to as the Sekunjalo Group. The Sekunjalo Group alleged that the nine respondent banks were contravening either sections 4, 8 or 5 of the Competition Act namely the sections dealing with horizontal conduct, abuse of dominance and vertical conduct on the basis that they had either closed the Sekunjalo Group bank accounts, threatened to close the bank accounts or refused to open new bank accounts. The Sekunjalo Group sought relief interdicting the banks from closing the bank accounts, interdicting the banks from unilaterally changing the terms and conditions attached to the bank accounts, or directing those that had closed the bank accounts to reopen them on the same terms.

On the argument of horizontal prohibited practices, the Sekunjalo Group argued that the respondent banks were in a horizontal relationship and that they coordinated their conduct when they terminated or curtailed or refused banking services to the applicants. The timing of and reasons advanced for doing this is said to evidence the banks' coordination. On the abuse of dominance case, the Group alleged that the banks had refused to supply a scarce service to the applicants in circumstances where it was economically feasible to do so. This conduct was alleged to violate the Competition Act's named exclusionary practices and the general prohibition against

[32] *eMedia* para 108.

exclusionary conduct. The alternate argument was that the respondent banks were in a vertical relationship to the Sekunjalo Group companies and the agreement's expressed or implied terms had the effect of substantially preventing or lessening competition in the market because the terms permitted the banks to unilaterally cease providing banking services to the applicants.

In describing the competition harm, the Sekunjalo Group argued that the effect of the closing of the bank accounts would deny the applicants access to banking and payment services which ultimately would lead to their seizure to trade and a reduction in effective competition in the various markets in which the Sekunjalo Group entities were active. This, it was alleged, would have the effect of reversing some of the transformational goals contained in the Competition Act.

On the other hand, the respondent banks contended that this case was about their right to be able to govern the accounts lodged with them and manage significant reputational risks. All of the banks justified their conduct with reference to the reputational risk that associating with the Sekunjalo Group posed because of allegations of malfeasance and impropriety that had been uncovered against the Sekunjalo Group through the Mpati Commission that had been established to uncover corruption. The banks also alleged that they acted independently of one another and each bank separately reached the conclusion that the Sekunjalo Group companies posed reputational risk. These banks also relied on Supreme Court of Appeal case precedent which entitled banks to unilaterally cancel a contract between them and their customers for reasons including reputational risk. The banks also pointed to their obligations in terms of South African law to manage financial crime risk requiring the implementation of sound risk management processes procedures and controls.

The Mpati Commission of Inquiry, appointed by the president of the Republic of South Africa in March 2020, published a comprehensive report. The Mpati Commission inquired into the proprietary and lawfulness of the Public Investment Corporation ("PIC")'s transacting with three of the Sekunjalo Group companies. After evaluation of the evidence, the Mpati Commission concluded that one of the group companies was implicated in malfeasance and there had been impropriety of the PIC processes and practices as well as gross negligence by the PIC's CEO and CFO. Other controversies surrounding some of the Sekunjalo Group companies related to financial statement audits that had failed to have been filed; the severing of ties with the Sekunjalo Group by other consulting and legal firms; the Johannesburg Stock Exchange ("JSE")'s fining of one of the Sekunjalo Group companies for errors in its interim results; and one news-agency-running Sekunjalo Group company had been accused of accepting payments from the State Security Agency ("SSA") in exchange for publishing positive news against a former South African president and the SSA. The respondent banks alleged that all of these contraventions were taken into account when coming to the decision to dissociate from the Sekunjalo Group.

On the other hand, the Sekunjalo Group argued that the Mpati Commission was set up to investigate and impropriety in relation to the PIC and not itself. Rather there had been no conclusive findings against the Sekunjalo Group companies, further investigation was recommended in respect of the investments by the PIC with these companies. Furthermore, the respondent banks continued to associate with the PIC – the company that had been found culpable – so if the arguments about reputational risk was real then these banks would have terminated the bank accounts of the PIC. The respondent banks had not identified a single irregular or illegal transaction relating to money laundering by any of the Sekunjalo Group companies. Lastly, the Sekunjalo Group argued that the banks do not apply the strict principle of reputational risk equally. The banks continue to associate and contract with at least 20 other companies involved in at least R200 billion worth of corruption such as the likes of Steinhoff, EOH, Tongaat, ABB, Glencore and many others.

Turning to the legal test, the Tribunal[33] framed the way in which it was going to consider the *prima facie* case with reference to precedent that emphasised the importance of considering a *prima facie* case alongside the other requirements for interim relief; namely, serious, apparent and irreparable harm, and a balance of convenience. The fact that these factors need to be considered together means that a *prima facie* case that is open to some doubt could potentially be saved by issues relating to harm or balance of convenience. Ultimately, the test requires that the three factors be weighed against each other for a determination of what is reasonable and just.

Then the Tribunal referred back to *York Timbers* with the import that a successful applicant need only establish a *prima facie* case as opposed to a case that is won on a balance of probabilities. The Tribunal understood that there had been an evolution of the test for interim relief through the *BCX* CAC case precedent read alongside *eMedia*.

The portion of *BCX* relied upon related to the assertion that interim relief is concerned with the state of competition in the market and that an interim relief order is not merely a *status quo* order. The purpose of an interim relief order is to alter the competitive relationship between firms and the market with the effect that such an order, when granted, alters the *status quo* in the market with the intention that the way firms compete will be changed. This will may have ultimate consequences that resonate within and between markets. The CAC in *BCX* emphasised the fact that interim relief has a regulatory competence as opposed to the kind of competence of a court adjudicating a dispute of right. This regulatory competence says something about whether the state of competition in the market should endure notwithstanding and the alleged prohibited practices or whether the Tribunal order should change that.

The Tribunal turned to the precedent of the CAC in *eMedia* to emphasise the transformatory goals of the Competition Act. Excessive concentrations of ownership and control and unjust restrictions on the full and free participation in the economy by all South Africans are the historic economic realities that the Competition Act aims to address. What the CAC in *eMedia* advocates for is a transformative constitutional approach that must be sensitive to the scheme and purpose of the Competition Act. A context sensitive approach should be applied and to underscore this point the Tribunal considered the dictates of the Constitutional Court in the *Mediclinic*[34] case.
The Constitutional Court held the following in its discussion of how and what competition in the South African context aims to reform.

> *"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 11normalised. 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.*
> …
> *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*

[33] *Surve and Others v Nedbank Ltd and Others* (IR153Dec21) [2022] ZACT 34 (16 September 2022) ("*Surve*").
[34] *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* (CCT 31/20) [2021] ZACC 35 (15 October 2021) ("Mediclinic").

> *jurisprudential innovations must be vigilantly guarded against and deliberately flushed out of our justice and economic system.*"[35]

The Tribunal returned to *eMedia* and the type of assessment that the CAC stated must be done when it comes to interim relief applications. This assessment is a summary one, done at only a *prima facie* level. It considers the evidence in relation to the alleged prohibitive practice and importantly—

> "*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*".[36]

In understanding the totality of the jurisprudence and how it had evolved, the Tribunal summarised it, saying that there must be a constitutional and transformative approach to interim relief applications. In instances where there is a *prima facie* right or a *prima facie* establishment of a prohibitive practice, done with reference to clear and non-speculative evidence, even in the circumstances where the establishment of that right is open to some doubt, but there is well grounded apprehension of harm; it is in those instances that the Tribunal must find favour and grant the interim relief application.

The Tribunal then turned to the evidence present for the substantiation of contraventions in terms of the various sections of the Competition Act. The Tribunal found that the conduct did not amount to any cartel behaviour as there was no *prima facie* evidence to show that the closure of the bank accounts would affect price quality or quantity – the elements of a trading condition.

The Tribunal then went on to consider whether there was evidence of a concerted practice under the rule of reason provision dealing with horizontal prohibited practices under section 4(1)(a). Here the Tribunal found that there was a concerted practice relating to a group boycott which was evidence by the closure of the accounts, the timing of the these decisions, the similarity of the reasons given, and the membership of all the banks in the Banking Association of South Africa. Where the banks had claimed reputational risk as their justification of the conduct, the Tribunal dismissed this argument finding it inadequate because the application of the principle of reputational risk was not applied equally to all firms. The Tribunal found favour with the argument that this concerted practice may lead to vertical exclusion or the foreclosure of firms downstream and harm to competition by hindering the ability of small firms or black-owned firms to participate in markets.

The next thing that the Tribunal considered was whether there was *prima facie* evidence that the concerted practice of the respondent banks had the effect of substantially lessening competition. This the Tribunal interpreted as a requirement to prove on a *prima facie* level evidence of exclusionary vertical foreclosure or consumer harm. The Tribunal found that the behaviour of the banks did, on a *prima facie* basis, have the effect of impeding or preventing the group companies from participating in or expanding within their markets. This harm could not be justified by the banks' efficiency argument of preservation of their reputation; because, as mentioned above, the Tribunal was not convinced by this argument because the undisputed evidence before it demonstrated that the respondent banks had a selective approach to closing reputationally risky banks accounts. In light of this the Tribunal found in favour of the group under the section 4(1)(a).

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[35] *Mediclinic* paras 3 and 7.
[36] *Surve* para 81 quoting *eMedia* para 93.

The Tribunal then assessed the abuse of dominance claims. Under dominance, the Tribunal relied on the fact that the banks had market power as demonstrated by their unilateral conduct in closing the bank accounts; in addition to market circumstances: such as the fact that the banks are market participants in a market with extremely high barriers to entry, the banking sector is an oligopolist market, the customers of the respondent banks don't have the bargaining power to undermine the banks' exercises of market power. The Tribunal also took recourse to the Commission's 2008 banking inquiry report wherein it was found that each of the four big banks possess appreciable market power despite none of them possessing a market share significantly above 30% in each product category. This market inquiry also found that the switching costs and information asymmetry created a significant degree of captivity by the banks. This all contributed to the banks having an appreciable degree of market power over their customers. Despite the dated nature of the findings in the Commission's market inquiry report, the Tribunal found that the banks had done nothing to refute what was put up in the market inquiry report. Though argument had also been advanced that the banks were collectively dominant, the Tribunal didn't consider this and rather was assuaged by the Sekunjalo Group's argument that each that the banks possessed market power.

The Tribunal then found with the approval that there had been a refusal to supply a customer and that banking and payment services were indeed a scarce resource. Even though the banks advanced argument that their services were not scarce on account of the fact that there were many other payment options available for the Sekunjalo Group companies; the Tribunal was unconvinced because the Sekunjalo Group's evidence was that they approached other banks and had been denied banking services. On whether it was economically feasible for the banks to provide the scarce resource to the Sekunjalo Group, the Tribunal considered the argument of one of the smaller banks, Sasfin, that it didn't have the capacity to service the applicants. In light of the fact that Sasfin had already had bank accounts with three of the Sekunjalo Group firms the Tribunal dismissed this argument. The other respondent banks did not put up evidence on the economic feasibility of providing banking services. For these reasons taken together the Tribunal found in favour of the Sekunjalo Group companies that it was economically feasible for each respondent bank to supply the scarce banking services.

The Tribunal evaluated effects as well and it quoted from the section in *eMedia* which stated that South Africa has long espoused inclusiveness as a competition law value.[37] It was the exclusion of historically disadvantaged firms, in the form of these Sekunjalo Group companies, that the Tribunal found that a *prima facie* case of foreclosure and anticompetitive effects had been established. Again the Tribunal assessed the reputational risk argument and looked unfavourably on the selective approach taken by the banks in applying this principle. It also commented on the fact that the self-regulation of these banks illustrates a manifest conflict of interest by the banks. In light of these assessments, the Tribunal found contraventions of the Competition Act's provision under refusal to supply as well as the general exclusionary conduct section of the Competition Act.

The Tribunal also found one of the banks, Nedbank, to have be in violation of the portion of the Competition Act that contravenes tying and bundling because Nedbank had demanded that the applicants dispose of their shareholding in one of the particular Sekunjalo Group firms – Premier Fishing – in order for Nedbank to continue providing banking services to the other group companies. Nedbank's defence of this conduct was the reputational risk argument and (as stated above) the Tribunal did not find this argument persuasive.

[37] *Surve* para 197 quoting *eMedia* para 86.

The Tribunal had also been called to determine whether the conduct amounted to an alleged vertical prohibited practice; but, on this, the Tribunal found that there was insufficient evidence for it to come to a conclusion on the *prima facie* assessment.

The remainder of the case assesses the harm and the balance of convenience. It is worth noting that, in this case, the arguments demonstrating harm to the Sekunjalo Group companies was seen to be substantial particularly in light of the Sekunjalo Group companies role of being black-empowered firms, and the consequence of being unbanked in a modern economy. The respondent banks were said to have not sufficiently argued against these points. The fact that the Sekunjalo Group companies also employed a lot of people who particularly came from poor black communities was seen as persuasive under the harm inquiry. The applicants had advanced evidence of their trying to find and not succeeding to find economic alternatives and this served to also persuaded the Tribunal on harm. Ultimately, the Tribunal was convinced of a substantive level of harm to the applicant as a historically disadvantaged firm being unable to sustain itself in the market; considered alongside the transformative and context dependent approach in which the Competition Act should be applied to find that it was reasonable and just to grant the interim relief requested.

Three of the banks appealed the Tribunals finding[38] and the Tribunals grant of interim relief against these banks was reversed. The main reason therefore was the CAC's disagreement that a *prima facie* case had been established. On this issue, the CAC found that the Tribunal had not sufficiently heeded its own cautionary statement which was that there can be difficulty was coming to a conclusion of a concerted practice in oligopoly markets: "*oligopoly behaviour does not establish a concerted practice unless, given the nature of the market, the behaviour of the firms concerned cannot be explained other than by concerted behaviour*".[39]

The CAC found that there was insufficient evidence to show that the banks coordinated with one another in refusing to deal. The timing of the closing of the bank accounts had to be weighed against the fact that each bank took a different approach to the closure of the bank accounts: where some banks summarily closed these accounts, other banks had not yet made a decision and first conducted an inquiry, or in another case simply decided not to open new bank accounts for other Sekunjalo Group companies. Even if there had been a "follow my leader" approach by the banks, the CAC did not find it sufficient to establish a concerted practice. Finding that, at best, it is conscious parallelism and not parallel behaviour.

The CAC's most fatal attack to the Tribunal's reasoning was the fact that the Tribunal did not identify what the objects of the concertation was. The CAC found that the Tribunal simply hadn't duly identified the theory of harm. The Tribunal was criticised for conflating an outcome with an effect that is by conflating the exclusion from the market with evidence of an anti-competitive effect. Exclusion cannot be used, according to the CAC, to establish an anti-competitive practice even though it might be its effect. The CAC said that what was amiss was one of the reasons why a practice may be anti-competitive. Typically these reasons include higher prices, reduced supply, inferior service or quality, or lack of innovation. The refusal to offer services may be anti-competitive but it has to be linked to some other theory of harm; for example, raising a rivals costs or attempting to exclude it from a market in which the refusing firm competes with the refused firm. It was seen as legitimate theory of harm to allege that horizontal coordination could result in vertical effects however it was never alleged that any of the respondent banks competes in the

[38] *Mercantile Bank, A division of Capitec Bank Limited and Others v Surve and Others* (206/CAC/Oct22 ; 208/CAC/Oct22 ; 209/CAC/Oct22 ; 210/CAC/Oct22 ; IR153Dec21) [2023] ZACAC 2 (17 June 2023) ("*Mercantile")*.
[39] *Mercantile* para 30 quoting *Surve* para 131.

markets in which the effects of exclusion would be felt. It was thus not clear why the banks would want to coordinate to achieve an anti-competitive outcome against the Sekunjalo Group's various entities in unrelated markets. The CAC pronounced "*the party alleging must make out a case of why parallelism create some form of competitive harm even if it be only on a prima facie basis for the purposes of interim interdict*".

On the finding of dominance, the CAC admonished the Tribunal for considering dominance in the banking sector as a whole as opposed to making an assessment of whether each of the banks possessed market power. Switching costs as evidence of the banks' market power was said to have been an irrelevant consideration for dominance because the conduct alleged relates to a refusal to deal as opposed to being a case where a dominant firm leverages its market power over customers because of their reluctance to switch. Any comparisons made between the abuse of dominance case sustained in *eMedia* as against this case were viewed as inapposite. The important distinction in this case was that the dominant firm did not compete in the markets where the effect of the refusal to deal was being experienced (whereas in *eMedia*, Multichoice competed with eMedia in the broadcasting market and the market for the production of channels). The CAC also found that there was insufficient analysis of how the removal of banking services would lead to the exclusion of the Sekunjalo Group companies from their markets or why their removal would lead to an anti-competitive effects on the market in general. There was just insufficient analysis done to consider the specific impact of each of the banks decisions.

In totality, the CAC found that a theory of harm had not been made out as against each bank where abuse of dominance requires an analysis of the effects of the unilateral actions of each dominant firm. On this basis the CAC said that no *prima facie* case had been made out on abuse of dominance and with respect of any of the appealing banks. Where there were no theories of harm adequately substantiated the Tribunal inappropriately compensated for this in two ways. First was undue reliance on the fact that only a *prima facie* case should be made; and the second was its cumulative view of the factors which require consideration for interim relief with the view that a weakness in the *prima facie* case could be overcome by arguments on harm. Here the Tribunal was chastised for seeing a *prima facie* case open to some doubt; whereas the CAC was of the view that there had been no showing of a *prima facie* case: "*Even in a case requiring only prima facie evidence the complainant has to place some facts before the decision maker to pass muster*".[40]

The CAC ultimately found that there had been no prima facie case made out under section 4(1)(a) or section 8(1)(c) or 8(1)(d)(ii). The next case deals with allegations of exploitative conduct as opposed to exclusionary conduct. It also went on appeal but on the narrow question of the Commission's jurisdiction to investigate a complaint of excessive pricing in the price-regulated gas industry.

Sasol Gas: In accordance with the prescripts of the regulator for natural gas, the National Energy Regulator of South Africa ("NERSA"), Sasol signalled the intention to increase its prices for gas. Prior to the announced increase Sasol had charged R68.39/GJ of gas and Sasol wanted to increase its price to a charge of R133.34/GJ of gas, a price which fell short of the maximum gas price recommended by NERSA at a value of R273.43/GJ of gas. Sasol informed its customers of the pending increase for the coming 2023 financial year – and there was outcry – with the effect that Sasol publicly indicated that it was likely to approve a maximum price in the region of R100/GJ of gas for FY2023. Egoli Gas and IGUA-SA (an association of gas users) filed complaints with the Commission alleging that Sasol had engaged in various contraventions of the Competition Act, including excessive pricing.

[40] *Mercantile* para 66.

Leaving aside the jurisdictional challenge that Sasol raised in response to the Commission's investigation and issue of summons in relation to the Complaints against Sasol; the Tribunal was asked to decide whether it would award interim relief to the complainants.

In outlining its approach to the test of finding a *prima facie* case the Tribunal[41] took to heart the ratio of the CAC in *eMedia* and stated that "*in proceedings for interim relief the Tribunal is effectively obliged to take a somewhat robust attitude to the evidence and the submissions*".[42] This is because full examination and determination of the merits will not be undertaken at the interim relief stage where there is no opportunity for the giving and testing of oral evidence but rather it will take place at the hearing at which final relief is sought.

The Tribunal then went back to the requirements for an interim interdict. When pronouncing on the element of the establishment of a *prima facie* case, it said that the *prima facie* right may be open to some doubt. The Tribunal recognized the complainants' right not to be subjected to excessive pricing particularly in circumstances where there is no effective competition as is the case in this market – given Sasol's monopoly position.

On the papers there was an extensive dispute between the parties' experts as to how a determination of excessive pricing should be made in this case. In order to avoid going beyond the limits of its jurisdiction, the Tribunal said that it's not for it to determine whether Sasol's interpretation of NERSA's maximum pricing decision is correct. However, the Tribunal took cognisance of the fact that the NERSA's methodology was based on international benchmarks which was deemed inappropriate for South Africa's present economic circumstances. The expert for IGUA-SA contended that what would be appropriate in the present circumstances was a cost-based methodology for the calculation of the competitive price – against which measure excessive pricing contraventions are determined. On the other hand, Sasol contended that a cost-based methodology is not appropriate because that's not how gas prices are determined in any competitive market in the world. The Tribunal elided making a decision on this dispute stating that the appropriate benchmark for a competitive gas price in South Africa in terms of the Competition Act can only be determined on the basis of factual and expert evidence during consideration of the merits during trial stage. However, the Tribunal recalled that it had to take a robust approach in deciding whether there's a *prima facie* case of excessive pricing. It went back to the principles relating to the to how facts should be evaluated when trying to determine a *prima facie* case. The approach, said the Tribunal, is to take the facts set out by the applicant together with any facts set out by the respondent, which the applicant cannot dispute, and consider whether, having regard to the inherent probabilities, the applicant should, on those facts, obtain final relief. Then the facts put up in contradiction by the respondent should be considered. Where serious doubt is thrown upon the applicant's case, the interim relief application should not succeed.[43] In the Tribunal's view, the complainants had done enough to establish this, on a *prima facie* basis.

In its determining whether the excessive price was to the detriment of consumers and customers; in other words the testing of the competition effects of this conduct, the Tribunal did very little to interrogate this and concluded that an excessive price is by its nature ordinarily to the detriment of customers or consumers.

Rounding up the test, the Tribunal considered whether there was an a well-grounded apprehension of serious or irreparable harm or damage. On this point, the complainants put up substantial

[41] *Industrial Gas Users Association of Southern Africa v Sasol Gas (Proprietary) Limited and Others* (IR095AUG22) [2023] ZACT 55 (12 May 2023) ("*Sasol Gas*").
[42] Sasol Gas para 63.
[43] *Sasol Gas* para 84 citing *Webster v Mitchell* at 1189.

evidence of harm as a result of the increase. It was also while considering this leg of the test that the Tribunal returned to the robust approach with which interim relief proceedings need to be adjudicated; and it said a "*business-like approach*" should be taken to the matters. On the balance of convenience, it was clarified that this test is not simply a matter of weighing the convenience of each of the litigating parties but rather – and here the Tribunal looked to what the CAC found in *BCX* – it requires that interim relief proceedings relating to prohibited practices in the Competition Act concern the conduct of firms and their effect on competition in the market. As a result, interim relief proceedings concern themselves with the facts regarding the state of competition in the market. Thus, Sasol's customers were also considered when weighing up the balance of convenience and it was found that this balance favoured the granting of interim relief.

Sasol took the Tribunal's decision on appeal[44] contending that the Commission's decisions to investigate the complaints and issue summons for information were irrational because the Commission did not enjoy jurisdiction over the conduct, namely issues relating to the pricing of gas. Ultimately, the CAC did not pronounce on the findings relating to the establishment of a *prima facie* case, rather it pronounced on the Commission's jurisdiction to investigate excessive pricing matters in this context and it dismissed the appeal founding that the Commission did have the requisite jurisdiction.

The last two cases, though decided before *eMedia*, are considered because the applicants were able to successfully convince the Tribunal of the existence of a *prima facie* case in the digital industry, *GovChat*,[45] and in a case involving intellectual property rights, *Wilec*.[46] Though appeal was noted in the *Wilec* case, it was ultimately withdrawn and the Tribunal's decision remains undisturbed.

GovChat: Govchat alleged that WhatsApp was engaged in anti-competitive conduct in South Africa's market for government messaging services by threatening to offboard GovChat from the WhatsApp platform. WhatsApp required Govchat to cease servicing multiple government departments using their WhatsApp business account ("WABA") and in doing so applied their business terms inconsistently among WABA users. WhatsApp was accused of contravening sections 8(1)(b), 8(1)(c), and 8(1)(d)(ii) of the Act, with the focus during the hearing being on section 8(1)(d)(ii) and/or 8(1)(c). The test for the establishment of a *prima facie* case was the same test as was referred to in *York Timbers*.

Material to the consideration of whether there was a sustainable *prima facie* case against WhatsApp is the fact that section 8(1)(d)(ii) – the refusal to supply scarce goods – was extended by amendment to include a refusal to supply scarce goods to competitors, and as added *or customers*. It was found that the crucial elements to be established were dominance on the part of WhatsApp, and that the conduct complained of had exclusionary effects.

Where WhatsApp tried to argue for a wider market definition that includes short message service ("SMS"), multimedia messaging service ("MMS") and unstructured supplementary service data ("USSD") services, the Tribunal went on to delineate a market for over the top ("OTT") messaging applications based on the technical and functional differences between internet-based apps (such as WeChat, Facebook Messenger and Snapchat) and other messaging platforms (SMS, MMS and USSD). The Tribunal was also convinced of the existence of a narrower market for government

[44] *Sasol Gas (Pty) Ltd v Competition Commission of South Africa and Others* (212/CAC/Apr 23) [2024] ZACAC 2 (5 March 2024).
[45] *Govchat Proprietary Limited and Another v Facebook Inc and others* (IR165Nov20) [2021] ZACT 111 (11 November 2021) ("*Govchat*").
[46] *Makarenge Electrical Industries (Pty) Ltd t/a Wilec v Albro (Pty) Ltd and Another* (IR095Oct21) [2022] ZACT 18 (29 April 2022) ("*Wilec*").

messaging services over OTT applications, the market in which Govchat was active. Another relevant market Govchat identified that was accepted by the Tribunal was the South African mobile payments market for government departments over WhatsApp (OTT) in which the parties are potential competitors.

Regarding the potential merit of any theory of harm, WhatsApp argued that the parties are in a vertical, not a horizontal relationship. However, the Tribunal did not see this as an impediment for the establishment of a *prima facie* case given that Govchat being a WhatsApp customer does not mean that the vertical relationship would remove them from the ambit of the new section 8(1)(d)(ii) which includes both customers and competitors. Nor does it mean that WhatsApp is not able to leverage its dominance in the upstream, OTT applications market into a downstream or adjacent, government services market. The Tribunal found that there was a competitor and customer relationship between the parties. The good/service in question – access to the WhatsApp platform – was viewed as unique for its level of market penetration and unique to Govchat in that Govchat had invested millions in developing its own software to be interoperable with the WhatsApp platform. These factors elevated WhatsApp to a scarce good/service. WhatsApp had not suggested that it was not economically feasible to supply the good/service.

The Tribunal considered the various means by which WhatsApp refused to supply Govchat and this conduct took place as discrimination by WhatsApp against Govchat in various substantiated ways: there were many Independent Service Vendors (ISV's) that also service multiple clients on one WABA and yet these ISV's have been offered an amnesty whereas Govchat had been threatened with offboarding; WhatsApp's own BSPs were permitted to render services to government departments over one WABA; and that there were at least two entities providing services to government departments that did not have their own WABA. Govchat successfully provided examples of such discriminatory treatment that WhatsApp did not refute. The Tribunal also unfavourably viewed the fact that WhatsApp had made direct approaches to Govchat's customers to the exclusion of Govchat. This conduct was not denied while WhatsApp put forward its own BSPs as being authorised to render services on the WhatsApp platform. The Tribunal interpreted this behaviour as the selective application of WhatsApp's terms and conditions against Govchat, demonstrating a willingness to deviate from its rules in favour of its own BSPs. This taken together with the direct approach to the Govchat's customers demonstrated, at least on a *prima facie* basis, that WhatsApp sought to foreclose Govchat from the market.

On anti-competitive effects, the Tribunal pronounced that a refusal to supply is a rule of reason prohibition and the anti-competitive effects can be established by harm to consumer welfare evidenced by facts and inferences from proven facts. The foreclosing effects must also be substantial. The Tribunal noted anti-competitive effects taking recourse to the theoretical harms that a constructive refusal to supply can have on sectors where the accuracy and currency of data are critical, where even a slight delay or degradation in quality in the provision of telecommunications infrastructure could amount to a constructive or effective refusal. WhatsApp's relationship with BSPs downstream was seen as vertical relationships analogous to that of a vertically integrated firm. WhatsApp had also not put up any pro-competitive or efficiency gains associated with offboarding Govchat and this meant that the effects were weighed in Govchat's favour. The Tribunal found that a *prima facie* case of an effective refusal to deal was evidenced and the requirements of section 8(1)(d)(ii) were met.

Wilec: This case concerns Allbro, a dominant firm in the transformer bushings market, being accused of engaging in exclusionary acts inducing customers not to deal with its competitor Wilec, another producer of transformer bushings. Wilec claimed that Allbro's inducement strategy involved threatening customers with litigation (civil and criminal) if they did not procure

transformer bushings from Allbro, leveraging the risk of being cut off from other products where Allbro is allegedly the monopoly supplier. Allbro defended its actions as protecting its intellectual property rights. In addition to its claim on copyright infringement, Allbro accused Wilec of counterfeiting, passing off and unlawful competition.

Wilec disputed Allbro's intellectual property claim – both that Allbro had any such rights in the first place and that those rights were being infringed – and Wilec pointed out that these rights were to date untested. It is important to note that the copyright claim that Allbro was untested for the reason that copyright is not registered in South Africa, it automatically vests and is only proven once tested before a High Court. Wilec put up various historic examples of Allbro's conduct to ultimately argue that Allbro had 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. According to Wilec, this strategy had been effective as customers had been induced not to deal with Allbro's competitors. This created substantial foreclosure within the market, with the exit of a prior firm Galbro from the market. In addition, Willec alleged that Allbro's conduct had harmed consumer welfare in that Allbro's products are more expensive than those of its competitors and are allegedly of poorer quality (as evidenced by an letter from Eskom (the largest transformer purchaser) which Eskom's complains of corrosion problems and poor quality). Ultimately the effects of the conduct would be to foreclose Wilec depriving the market of rivalry, competitive prices, choice, and the opportunity to precure from the only black-owned firm in the market.

Allbro challenged the jurisdiction of the Tribunal to make pronouncements on the strength of Allbro's intellectual property rights and its ability to grant the requested interim relief.

Further Allbro contested the case on inducement, as Wilec's evidence all related to Allbro's conduct in relation to another competitor in the market, Ukusa, that had deposed to an affidavit in support of Wilec's application. Allbro provided that there was simply no evidence of it inducing customers not to supply Wilec. On foreclosure, Allbro argued that where customers are choosing not to purchase from Allbro's competitors this is them exercising choice. Allbro argued that consumer choice has not been harmed in that there were customers that continue to purchase from Allbro absent "inducement". Furthermore, Allbro's charging of higher prices alone was not sufficient to prove negative competitive effects. Allbro denied that it was selling a defective product as alleged. Lastly Allbro argued that there was a pro-competitive gain related to its protection of its intellectual property rights.

The tribunal then found that to meet the *prima facie* case the requirement of substantial anti-competitive effect is required: "*the requirement of a substantial anticompetitive 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*".[47] On a *prima facie* basis, Wilec was therefore required to satisfy the critical elements of the section namely that Allbro is a dominant firm and that the conduct complained of had exclusionary effects.

There was no dispute as to the affected market, nor Allbro's dominance in the market. Thus the main dispute concerned whether there was inducement of a customer not to deal. The crucial factual allegation tipping the scale on inducement was the affidavit of one of Wilec's customers, Actom. Actom provided that Allbro's 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

[47] *Wilec* para 64.

intellectual property claim against Wilec. Actom made the decision to no longer procure bushings from Wilec or Ukusa until the intellectual property litigation was resolved for fear of litigation against it (Actom). Allbro had initiated action against Wilec for copyright infringement but was accused of not progressing the cases. The Tribunal concluded that Wilec had *prima facie* established that Allbro's conduct was sufficient to induce Actom to not deal with both Ukusa and Wilec in contravention of section 8(1)(d)(i), alternatively that Allbro's conduct constitutes a general exclusionary act under section 8(1)(c) of the Act.

The Tribunal then assessed effects. On a *prima facie* case, the Tribunal said that the case Wilec had to meet was 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.[48]

Quoting case law, the Tribunal found that the extent of the effects need not 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*".[49] It is not necessary to show that the competitors have exited the market, all that is required is a showing of the likelihood of the conduct resulting in preventing or lessening competition which includes impeding of competition.[50] This understanding was also tempered by the introduction through the amendment of the widened definition of exclusionary acts, which expanded the definition of exclusionary acts to include the opportunity of firms to have an equitable opportunity to "*participate*" in the economy, which definition includes the ability of firms to sustain themselves in the market.

The factors deemed relevant to meet the effects test was Allbro's near monopoly position in the market, where 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. The nature of the transformer bushings market which is characterised by high barriers to entry. The sequence of events detailing how Allbro wrote to Ukusa customers and then instituted litigation against Ukusa, which was followed by Wilec's entry and then Allbro instituting proceedings against Wilec has meant that Wilec has not been able to effectively participate or expand in the market due to the pending litigation by Allbro. Looking at the value chain and the extent to which Allbro has captured the market through exclusive relationship with transformer manufacturer, Revive, which company had won the tender for the majority supply of transformers to Eskom; was another factor which *prima facie* demonstrated effects. The position of customers and Actom's stated case that 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. The Tribunal also considered Allbro's market position relative to its competitors where customers stated under oath that they would welcome more competition in the market and that Wilec had established itself as a supplier that met the industry requirements and provided cheaper transformer bushings. The last factor considered under effects, was the evidence of possible 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. While there was a dispute behind the reasons explaining Galbro's exit, on the evidence before the Tribunal, Wilec, a competitor, was marginalised as a result of the conduct. Substantial foreclosure effects were established on this basis.

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[48] *Wilec* para 88.
[49] *Wilec* quoting *SAA(2) Nationwide Airlines (Pty) Ltd & Comair Limited v South African Airways (Pty) Ltd* (80/CR/SEPT06) [2010] ZACT 13 (17 February 2010) at para 184.
[50] *Wilec* quoting *Telkom Competition Commission v Telkom SA Limited* (case number 11/CRFeb04) at para 99.

The Tribunal also considered possible consumer harm. Wilec argued that Allbro's products are more expensive and consumers have no real choice. In response, Allbro submitted, that price alone – absent a comprehensive analysis – is not sufficient to show consumer harm. The Tribunal dismissed this argument as an inappropriate reliance on a principle from case law which really stated that high prices absent a counterfactual analysis is insufficient basis to establish consumer harm. The Tribunal did a counterfactual assessment and found that there was *prima facie* evidence that with competition offered by Wilec, prices would be lower (and indeed were lower as Wilec alleged). However, said the Tribunal, a conclusive determination of consumer harm could only be made after a full investigation.

The Tribunal also assessed Allbro's procompetitive allegations, whose efficiency defence was the protection of its intellectual property rights. However, no evidence was put up to establish this, for example, Allbro had 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. In conclusion, the Tribunal found that Wilec had established a *prima facie* case of prohibited conduct on the part of Allbro; in that Allbro's threatened enforcement of alleged (and yet to be established) intellectual property rights amounted to an exclusionary act of requiring or inducing a customer to not deal with a competitor.

Conclusion

South African competition law has undergone significant changes to its legal standards with the promulgation of the 2019 Amendment. The 2019 Amendment did this in multiple ways: it, under the price discrimination section, lessened the test on effects changing a requirement to prove effects (which had evolved from jurisprudence) to a requirement to show that the conduct "*is likely to have the effect*" of substantially preventing or lessening competition. Under the prescripts on buyer power and market enquiries, the very test for liability was changed – the substantial prevention or lessening of competition test was amended to a test of unfairness, for buyer power, and to a test of adverse effect upon competition, in market enquiries. Another powerful change to the legal standards was the introduction of a *prima facie* case. The *prima facie* case has been introduced under the prescripts on excessive pricing, buyer power and price discrimination whereby the Commission or a private complainant need only demonstrate a *prima facie* case whereafter the evidentiary burden shifts to the respondent to refute the case. In effort to gain insight into the threshold of when adjudicators will be convinced that there has been sufficient evidence provided to demonstrate a *prima facie* case; consideration was taken of the application of this principle in the context of interim relief applications.

First and foremost, what the above review of recent case law on the *prima facie* test reveals is that the demonstration of a *prima facie* case is about an approach to evidence (as opposed to an approach to the law). The test for a *prima facie* finding is largely a factual one namely, that to find a case on a *prima facie* basis there must be an evaluation of the alleged facts and evidence.

On balance, it appears that an evaluation of a *prima facie* case must include an evaluation of effects or a showing of some effects to the same *prima facie* standard. This can be contrasted against the approach taken in *Vexall v BCX* where effects were not assessed. The two interim relief cases that the Tribunal dismissed post 2019 Amendment (that this paper does not summarise) were both

dismissed on a lack of showing, in *Mlonzi,*[51] or evidencing, in *Apollo*,[52] effects. However, when showing effects on a *prima facie* basis, the Tribunal should take heed of the level of evidence required for this step, which is a lighter touch than what is required in full blown trials. As the CAC in eMedia found: "*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*" (emphasis added).[53]

The extent to which the prescripts on a *prima facie* case in the interim relief context may be applied to the other sections of the Competition Act may be limited. In the interim relief context, a conclusion on a *prima facie* basis requires consideration of the evidence by looking to the facts alleged by the applicant, together with, any undisputed facts set out by the respondent, and the inherent probabilities of the case. Whereas the other sections of the Competition Act call for the establishment of a *prima facie* case *prior* to the consideration of the respondent's case. Said differently, these other sections require the existence of a *prima facie* case for the evidentiary burden to shift; this is unlike the interim relief context where an appraisal of both sides' view on the facts is taken into account to establish a *prima facie* case.

There are other reasons why the *prima facie* case as applied in interim relief applications may not be applicable to the other sections of the Competition Act calling for a *prima facie* case. In interim relief applications relief can be secured purely on the basis of a *prima facie* case, whereas for the other sections the ultimate conviction cannot be secured on a *prima facie* basis – the legal onus must still be discharged on a balance of probabilities. Furthermore, in the interim relief context the Tribunal Rules circumscribes the evidence to the papers where no oral evidence may be led. This is contrasted against the other sections of the Competition Act where a *prima facie* case is called for (as the initial standard of proof) but provision is made for the hearing of oral evidence.

What then is the import of the *prima facie* case for these other sections of the Competition Act? Its main (possibly, sole) benefit may be to reduce the number of interlocutory applications entertained prior to when the respondent is called upon to answer. Where respondents, particularly in the cartel context, have engaged in a Stalingrad method of litigation,[54] launching interlocutory challenges – like the attack to pleadings that they do not disclose a cause of action or are vague and embarrassing – that at times may be best addressed by the respondent in answer and evaluated during the trial, after discovery has taken place, there is the exposition of oral evidence, and the merits of the matter are being considered. The introduction of a *prima facie* standard to the provisions on excessive pricing, buyer power and price discrimination may lead to a more expedient consideration of the merits of these cases than has historically been the case.

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[51] *Mlonzi and Another v Eskom Holdings Soc Limited and Another* (IR1360CT22) [2023] ZACT 61 (2 August 2023).

[52] *Apollo Studios (Pty) Ltd and Another v Audatex SA (Pty) Ltd and Another* (IR198Mar23) [2023] ZACT 23 (8 May 2023).

[53] *eMedia* para 108.

[54] *Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Waco Africa (Pty) Limited and Others* (CCT158/18; CCT179/18; CT218/18) [2020] ZACC 2 (20 February 2020) para [128]

> "*It must further be underscored that the complaint and, by extension, the litigation procedure employed by the competition authorities, have been subjected to protracted legal challenges. Recognising this, the Competition Appeal Court in Senwes likened the acts of attempting to avoid and evade responsibility to the "Stalingrad" method of litigation. This was further echoed by the Supreme Court of Appeal in Woodlands Dairy, where it stated that "a veritable forest of interlocutory paper is generated in order to prevent cartel disputes from being determined on their merits". A legion of cases is not adjudicated on the merits due to these prolonged procedural challenges. The prolonged challenges are made possible due to the extensive resources often available to respondents in competition matters and the secretive, at times almost untraceable, nature of the prohibited practices that the Competition Act aims to regulate*."

Item	Case Name	Tribunal Case Number	Outcome	Act Section
2020				
1.	Vexall And Business Connexion	IR119Oct19	Granted – 2020-02-12 Taken on appeal, appeal dismissed, Tribunal findings on prima facie case undisturbed	Section 8(1)(d)(iii): selling of goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract or the forcing of a buyer to accept a condition unrelated to the object of a contract Section 8(1)(d)(i): requiring or inducing a supplier or customer to not deal with a competitor Section 8(1)(c): general prohibition against engaging in an exclusionary act
2021				
2.	GovChat And Facebook and Whatsapp	IR165Nov20	Granted – 2021-01-21	Section 8(1)(d)(ii): refusing to supply scarce goods or services to a competitor or customer when supplying those goods or services is economically feasible Section 8(1)(c): general prohibition against engaging in an exclusionary act
2022				
3.	Makarenge Electrical Industries And Allbro	IR095Oct21	Granted – 2022-02-03 Taken on appeal, appeal withdrawn, Tribunal findings on prima facie case undisturbed	Section 8(1)(d)(i): requiring or inducing a supplier or customer to not deal with a competitor Section 8(1)(c): general prohibition against engaging in an exclusionary act
4.	eMedia Investments And Multichoice and CC	IR194Mar22	Dismissed – 2022-05-31	section 8(1)(d)(ii): refusing to supply scarce goods or services to a competitor or customer

Item	Case Name	Tribunal Case Number	Outcome	Act Section
			Taken on appeal, appeal granted, Tribunal findings on prima facie case overturned	when supplying those goods or services is economically feasible. Section 8(1)(c): general prohibition against engaging in an exclusionary act
5.	The Sekunjalo Group And Banks	IR153Dec21	Granted – 2022-09-16 Taken on appeal, appeal granted, Tribunal findings on prima facie case overturned	Section 4(1)(a): rule of reason prohibition against restrictive horizontal practices Section 4(1)(b): per se prohibition against restrictive horizontal practices (cartel behaviour) Section 8(1)(d)(ii): refusing to supply scarce goods or services to a competitor or customer when supplying those goods or services is economically feasible. Section 8(1)(c): general prohibition against engaging in an exclusionary act Section 8(1)(d)(iii): selling of goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract or the forcing of a buyer to accept a condition unrelated to the object of a contract. Section 5(1): prohibition against restrictive vertical practices
2023				
6.	Apollo Studios And Audatex SA	IR198Mar23	Dismissed – 023-04-14	Section 8(1)(d)(ii): refusing to supply scarce goods or services to a competitor or customer

Item	Case Name	Tribunal Case Number	Outcome	Act Section
				when supplying those goods or services is economically feasible. Section 8(1)(c): general prohibition against engaging in an exclusionary act
7. `	Industrial Gas Users And Sasol Gas and Others	IR095Aug22	Granted - 2023-05-12 Taken on appeal, dismissed (on jurisdiction argument), Tribunal findings on prima facie case undisturbed	Section 8(1)(a): prohibition against excessive pricing to the detriment of consumers or customers
8.	Nothemba Mlonzi And Eskom Holdings	IR136Oct22	Dismissed - 2023-08-02	Section 8(1)(c): general prohibition against engaging in an exclusionary act
9.	Ntapo Pilane David Kwakwa And CC and Others	IR057Jul23	Partly Granted - 2023-10-27 Pending Reasons	Information not available.
2024				
10.	Depansum And Visa Inc and Others	IR080Aug23	Granted - 2024-02-19 Pending Reasons	Section 8(1)(d)(i): requiring or inducing a supplier or customer to not deal with a competitor