



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 77/IR/Nov09

In the matter between:

Directory Solutions CC

Applicant

and

Trudon (Proprietary) Limited

First Respondent

Telkom SA Limited

Second Respondent

Panel : Yasmin Carrim (Presiding Member), Lawrence Reyburn
(Tribunal Member) and Andreas Wessels (Tribunal Member)

Heard on : 26 March 2010

Decided on : 08 April 2010

DECISION AND ORDER

- [1]** In this matter the applicant, Directory Solutions CC, seeks interim relief under Section 49C of the Competition Act, Act no. 89 of 1998, as amended ('the Act') against Trudon (Pty) Ltd, the first respondent and Telkom SA Ltd, the second respondent. The relief sought, in respect of a complaint lodged by the applicant with the Competition Commission ('the Commission') under Section 49B of the Act alleging that the first respondent has committed an abuse of dominance that is prohibited in terms of Section 8 of the Act.

[2] For convenience the parties will be referred to in this document as follows:

[2.1] 'DS' refers to Directory Solutions CC

[2.2] 'Trudon' refers to Trudon (Pty) Ltd

[2.3] 'Telkom' refers to Telkom SA Limited.

History of complaint and relevant statutory provisions

[3] We were informed at the hearing that the complaint, although apparently dated 25 March 2009, was lodged with the Commission on 9 April 2009. This means that the normal period within which it should be dealt with by the Commission will expire on 8 April 2010, namely one year after the date of lodging. By that date, unless an extension is agreed upon by the Commission and DS or ordered by the Tribunal on the basis set out in Section 50(4) of the Act, the Commission must either refer the complaint to the Tribunal, meaning that the complaint will be prosecuted by the Commission before the Tribunal, or the Commission must issue a notice of non-referral indicating that it declines to take the complaint further.

[4] If there is a non-referral, or deemed non-referral by the Commission,¹ DS may itself refer the complaint to the Tribunal in terms of Section 51(1) of the Act and a proceeding will then ensue in which DS will in effect be the prosecutor in litigation before the Tribunal against Trudon and Telkom. If it wishes to take this action, DS must file its independent complaint with the Tribunal not later than 20 days after the date of issue of the notice of non-referral by the Commission. The 20-day period is stipulated in Rule 14 of the rules governing proceedings in the Tribunal.

[5] At the hearing we were informed that if there is a non-referral by the Commission, DS intends to institute its own complaint proceedings before the Tribunal on the basis summarised above.

¹ See Section 50(2).

[6] Section 49C of the Act, referred to in paragraph In this matter the applicant, Directory Solutions CC, seeks interim relief under Section 49C of the Competition Act, Act no. 89 of 1998, as amended ('the Act) against Trudon (Pty) Ltd, the first respondent and Telkom SA Ltd, the second respondent. The relief sought, in respect of a complaint lodged by the applicant with the Competition Commission ('the Commission') under Section 49B of the Act alleging that the first respondent has committed an abuse of dominance that is prohibited in terms of Section 8 of the Act. above, reads as follows:

49C. Interim relief

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

- (4) *An interim interdict in terms of this section may not extend beyond the earlier of the –*
- (a) *conclusion of a hearing into the alleged prohibited practice; or*
 - (b) *date that is six months after the date of issue of the interim order.*
- (5) *If an interim order has been granted, and a hearing into the matter has not been concluded within six months after the date of that order, the Competition Tribunal, on good cause shown, may extend the interim order for a further period not exceeding six months.*
- (6) *Any party to an application may apply to the Competition Appeal Court to review a decision of the Competition Tribunal in terms of this section.*
- (7) *The applicant may appeal to the Competition Appeal Court against a refusal by the Competition Tribunal to grant an interim order in terms of this section.*
- (8) *The respondent may appeal to the Competition Appeal Court in terms of this section against an order of the Competition Tribunal that has a final or irreversible effect.*

[7] Among the statutory provisions governing the Tribunal's consideration of the application are the following:

Rule 26. Initiating interim relief procedures

.....

- (3) *A Notice of Motion in terms of this Rule must –*
- (a) *allege each prohibited practice in respect of which the application is made by specific reference to the relevant section, subsection, paragraph or sub-paragraph of the Act;*
 - (a) *indicate the order sought, and the section of the Act under which that order may be granted;*

(c)

and:

Section 55. Rules of Procedure

.....

(2) *The Tribunal may condone any technical irregularities arising in any of its proceedings.*

Factual background and form of order sought in the notice of motion

[8] Telkom is a listed public company which operates inter alia the national South African fixed line telephone communications network, having been licensed to undertake this business under Section 36 of the Telecommunications Act, 1996. In January 2009 this licence was converted to a licence for an 'electronic communications network service' and an 'electronic communications service' in terms of Section 93 of the Electronic Communications Act, 2005.² The bulk of the lines in Telkom's network are for telephone services, although there are also a substantial number of fax or other telecommunication lines. For convenience, all these lines will be described in the remainder of this document as telephone lines.

[9] Telkom is enjoined under its licence to publish annual directories in each relevant geographic area of the subscribers to its telephone lines, listing at a minimum their names, and addresses and telephone numbers. In terms of its licence, Telkom may not charge its subscribers for publishing the above mentioned minimum data in light format, but may charge for providing enhanced directory listings and for advertising. In practice Telkom has delegated this

² See par. 37 of Trudon's answering affidavit.

function by contract to Trudon, a private company which is majority-owned by Telkom. Trudon was formerly known as Telkom Directory Services or TDS.

[10] Trudon publishes a number of regional directories.³ These comprise both the 'white pages' which are confined to lists of subscribers and 'yellow pages' which include advertisements.

[11] It is clear from the evidence of both DS and Trudon that the task of assembling correct, complete and up-to-date information about subscribers for inclusion in the various directories is laborious and logistically demanding. The presence of advertisements in the yellow pages and the need to obtain them in good time and in publishable form adds extra complications.

[12] As stated above, for the white pages, entries in light type containing only the minimum prescribed data (the normal type of entry) must be provided free of charge by Telkom to all its subscribers. Trudon makes a charge for so-called enhanced entries, which include (i) entries containing additional data to the said minimum data, for example fax numbers and web addresses; (ii) in bold type; and (iii) entries presented in a typographical block which makes the entry more prominent to readers of the printed directory.

[13] Trudon understandably operates on a schedule of staggered dates by which it establishes for each regional directory an 'opening canvass date', being the date on which Trudon begins to solicit entries from subscribers, and a 'closing date' or 'deadline date' when this activity ceases. After a further period in which we gather that the database for each directory is edited to bring it up to date and problematic entries are finalised, there is a 'publication date' on which the presses begin to roll in order to print the directory.

[14] Trudon claims in its answering affidavit that it uses 'accredited agents' to solicit and assemble advertising entries for its directories, starting for each directory on its pre-established opening canvass date, but also appears to use an internal sales force/ in-house personnel, to some extent.⁴ We do not have precise information about the identity of the accredited agents or the nature and extent of

3 Supra par. 19.

4 See paragraphs 19 and 41 of the Answering Affidavit.

their relationship with Trudon, nor the extent to which Trudon uses its own employees for the task of gathering directory information. In fact Trudon's answering affidavit, made by Mr J.J. Myburgh, its chief financial officer, is decidedly reticent on this topic. However, what is certain is that Trudon's internal sales force/in-house personnel solicit enhanced entries and advertisements from subscribers.⁵ These employees receive a basic salary as well as commission based on sales volumes. They further qualify for bonuses depending on sales achieved.⁶

[15] A feature of Trudon's business that is important to these proceedings is that it publishes its subscribers' entries in its directories and, in the case of subscribers who have opted to insert enhanced entries, it levies its charges in the form of periodical payments which are added to the normal monthly telephone accounts sent to subscribers. Trudon requires no up-front payments from subscribers for the publication of enhanced directory entries, except for those subscribers who submit their entry details via DS.

DS' business and the nature of its dispute with Trudon

[16] DS operates from Port Elizabeth in assembling information for insertion on behalf of its customers into the Telkom directories published by Trudon. The services offered by DS relate to *inter alia*:

[16.1] amending company details and including (new) cell phone numbers in entries;

[16.2] adding details such as email and/or web addresses to entries;

[16.3] changing the type of print of an entry from bold to light, or vice versa;

[16.4] placing of a free light type white pages or yellow pages entry.

[17] According to DS it advises its clients on how to best combine free and cost-effective entries, together with expensive enhanced entries in order to achieve the best layout in the relevant Telkom directory. On the evidence before us, DS

⁵ See page 18 and 54:20-15 of the Transcript.

⁶ Letter to the Tribunal dated 06 April 2010.

charges its customers a flat fee for its services, whether they wish to have free or enhanced Telkom entries. Thus, subscribers who use DS' services to secure the publication of a normal light-type minimum data entry in a directory pay for DS for this service although no charge is made by Trudon for receiving and publishing these entries. Trudon's charges in respect of enhanced entries for these customers constitute a charge additional to that of DS' flat fee.

[18] The principal if not sole member of DS is Ms Roxanne Seymour. It appears that she was also the principal in, if not sole owner of, other entities, whether incorporated or otherwise, which operated the similar or affiliated business at different times in the past.

[19] It appears that currently, after a history of bad blood and repeated clashes with Trudon and its predecessors over DS' business practices, DS now makes a practice of ensuring that all of its customers sign a power of attorney document authorising DS on their behalf to procure the insertion of their entries into the directories published by Trudon. This power of attorney is made available to Trudon when the entry is passed on by DS to it.

[20] Trudon clearly considers that DS, if not other firms with a similar business model, are unnecessary and hinder its relationships with its customers, at least to the extent that they create confusion among Trudon's subscribers about the identity of the firm with which they are dealing. Thus, Trudon complains in its answering affidavit that customers of DS 'invariably' labour under the misapprehension that when dealing with DS the fees they pay include the charges of Trudon, and that the only way in which DS can secure revenue is to 'mislead' its customers into believing that it is essential for them to use DS' services⁷. DS, we were told, currently charges R1,650 as a flat fee to a customer who engages its services to secure the publication of an entry in a directory published by Trudon, when this fee is often higher than Trudon's charges for publishing the entry (which is in any case levied in monthly instalments for all subscribers except those who submit their details through DS.)

⁷ See paragraphs 20 and 22 of the Answering Affidavit.

[21] For some time, and in fact from a period which appears to date back to 2005, Trudon has furthermore refused to accept subscribers' entries from DS unless they were accompanied both by a power of attorney and by an upfront payment of the full amount of Trudon's charges for the insertion of an enhanced entry into its directories. Moreover, Trudon insists upon receiving, with the payment and details of the entries required, a document reconciling the payment of every subscriber to the total amount submitted by DS by way of the upfront payments.

[22] Trudon reasons that by requiring up-front payment of its charges from DS' customers, those customers will clearly understand that there is a difference between the amounts that they are paying Trudon and DS, so that the source of the confusion which Trudon claims to have plagued it is removed.

[23] DS resents the imposition of these requirements, which it says are discriminatory in two aspects. First, DS is discriminated against since other alleged independent agents, i.e. agents other than Trudon accredited agents, are not placed under the same requirement of upfront payment of Trudon's charges for the publication of directory entries. Second, DS's customers are discriminated against since they are forced to make premature payments which increase their effective costs and adversely affect their cash flow. DS further contends that this alleged discriminatory practice induces its customers to rather deal with Trudon directly than make use of its services. DS also avers that the fact that it has to act as a collection agent of Trudon's charges without due compensation increases its administrative costs and therefore raises its costs as rival to Trudon in the solicitation of entries (see market definition below). Emanating from Trudon, which it claims is not only dominant in South Africa in the publication of telephone directories but has a monopoly over the publication of the official directories, DS asserts that Trudon's requirements represent an abuse of dominance which is prohibited under Section 8 of the Act.

[24] DS' prayers in its notice of motion are as follows:

1. That the First Respondent be ordered to publish all entries submitted by the Applicant to First Respondent on behalf of the Applicant's customers in the applicable telephone directories of the Second Respondent, with immediate effect,

pending the outcome of the complainant lodged by the Applicant against the First and Second Respondent under reference 2009APR4384.

2. That the First Respondent be prohibited from demanding payment upfront from the Applicant's customers as a prerequisite for publication of their entries on the basis that First Respondent contravenes Section 8 of the Competition Act 89 of 1988.
3. That the First Respondent be ordered to bill the amounts due and payable to them for the publication of the entries of the Applicant's customers, on the Telkom telephone accounts of the Applicant's customers pending the outcome of the complaint lodged by Applicant against First and Second Respondent under reference number 2009APR4384.
4. There are also prayers in the customary form for costs and alternative relief.

[25] Trudon's legal representative complained at the hearing that the nature of DS's complaint was obscure and its application hence defective since there was only 'vague' reference in DS' papers to the invoked section of the Act (i.e. Section 8), and a complete absence of any reference to the sub-section of Section 8 relied upon by DS. While it is correct that there is no such reference to the applicable sub-section, we consider that an attentive reader of DS' papers will reasonably and with no appreciable difficulty conclude that the relevant sub-sections of Section 8 relevant to the nature of the alleged conduct include 8(c) and 8(d)(i) and 8(d)(ii).

[25.1] Section 8 reads as follows:

Abuse of dominance prohibited

It is prohibited for a dominant firm to -

- (a) *charge an excessive price to the detriment of consumers;*

- (b) *refuse to give a competitor access to an essential facility when it is economically feasible to do so;*
- (c) *engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or*
- (d) *engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act –*
 - i. *requiring or inducing a supplier or customer to not deal with a competitor;*
 - ii. *refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;*
 - iii. *selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;*
 - iv. *selling goods or services below their marginal or average variable cost; or*
 - v. *buying-up a scarce supply of intermediate goods or resources required by a competitor.*

[26] An ‘exclusionary act’ is defined in Section 1 of the Act as meaning ‘an act that impedes or prevents a firm from entering into, or expanding within, a market.’

[27] While it would have been proper for DS to identify the relevant sub-section of Section 8 of the Act on which it relies, in its notice of application for interim relief rather than in its replying affidavit as it has done in this case, we consider that the omission is relatively unimportant in this context and to the extent necessary we condone the omission under the Tribunal’s powers in terms of Section 55(2) of the Act, cited above in paragraph The applicant may appeal to the Competition Appeal Court against a refusal by the Competition Tribunal to grant an interim order in terms of this section.

Requirements for DS to obtain interim relief

[28] The formal requirements under the Act for DS to obtain interim relief are set out above. The inter-action of the provisions of Section 49C has been explained by the Competition Court of Appeal ('the CAC') in the case of *National Association of Pharmaceutical Wholesalers and others v. Glaxo Wellcome (Pty) Ltd and others*⁸ and other cases in the CAC and the Tribunal.⁹

[29] Essentially DS must satisfy the Tribunal that it is '*reasonable and just*' that it be granted interim relief in regard to evidence which is cogent in regard to the existence of a prohibited practice, the danger of serious or irreparable harm to DS, and the balance of convenience between the parties. The Tribunal must approach its task with caution in order to ensure that relief is not granted lightly or on the basis of a flimsy claim that there has been a contravention of the Act or that the circumstances do not warrant interim relief even if the evidence of the existence of a contravention, taken alone, is cogent. The application of discretion is therefore paramount.

[30] A passage from the above-cited *York Timber* case is worth citing at this point in considering the weight of evidence required before the existence of a contravention of the Act is conceded. This should be compared to the approach adopted in High Court proceedings in regard to proof of the prima facie infringement of a legal right:

"(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 application should on those facts establish the existence of a prohibited practice at the hearing of the complaint referral.

⁸ Case no. CAC 29/CAC/Jul03.

⁹ See e.g. *York Timbers Ltd v. SA Forestry Company Ltd(1)* [2001-2002] CPLR 408 (CT) and *Nedschroef Johannesburg (Pty) Ltd v. Teamcor Ltd and others*, Case no. 95/IR/Oct05.

*“If the applicant has succeeded in doing so we must then consider the ‘doubt’ leg of the enquiry. Do the facts set out by the respondent in contradiction of the applicant’s case raise serious doubt or do they constitute mere contradiction or an unconvincing explanation. If they do raise serious doubt the applicant cannot succeed.”*¹⁰

[31] The individual elements remaining in the equation, namely the questions of the nature and extent of harm to the applicant and the balance of convenience between the respective interests of the parties, must be taken not in isolation but as a matter of assigning weight to each, with the overall result being the determinative factor.

Salient evidence of the parties

[32] Fortunately for the resolution of this matter, the essential facts regarding the conduct of DS and Trudon are not seriously in dispute. There is, however, a head-to-head dispute about motives and business ethics and an equally strenuous contest about the nature and scope of the relevant product markets.

[33] A superficial reading of the answering evidence of Trudon suggests that the matter is riddled with difficulties and conflict. However, at the bedrock, Trudon concedes that it currently acts as DS has alleged it to act in refusing to accept enhanced directory entries submitted by DS unless they are accompanied by upfront payment of the amount charged by Trudon for the publication of those entries on behalf of customers. This happens despite the fact that DS supplies an executed power of attorney from the subscriber authorising DS to act on its behalf in having the entry published. Trudon simultaneously requires DS to supply a document which allows Trudon to reconcile subscribers’ individual payments with the total amount paid by DS for batches of entries submitted to Trudon. Subscribers who deal directly with Trudon or through Trudon’s accredited agencies have their entries accepted without quibble and their payments are spread over a number of months and are billed in the subscriber’s normal monthly account for its telephone usage.

¹⁰ Paragraph 64 and 65 of *York Timbers Ltd v. SA Forestry Company Ltd*(1) [2001-2002] CPLR 408 (CT).

[34] Trudon attempts to justify this differential treatment of subscribers who use the services of DS by asserting that its conduct is commercially reasonable in view of the fact that it receives many irate messages from customers alleging that they were duped by DS into thinking that DS' charges for its services include Telkom's charges for the insertion of the relevant entry when in fact they represent only DS' fee for its services.

[35] Underlying this approach of Trudon, and hinted at, if not fully spelt out in the papers and in argument at the hearing, is a belief harboured by Trudon that DS is a parasitic entity which reads Trudon's directories in order to ascertain the particulars of its subscribers and then, bombards them with faxed messages calling upon them to hand over the particulars of their directory entries in order that DS may efficiently organise those entries. This, Trudon contends, misleads customers who wrathfully look at a later stage to Trudon to rescue them from the underhand practices of DS.

[36] There is a long history of strife between DS and earlier corporate manifestations of Ms Seymour on the one hand and on the other hand Trudon and its predecessors as the publisher of the national telephone directories. For present purposes the historical aspect of those disputes is irrelevant except to the extent that Trudon appears to rely on the ill-will and suspicion they generated as a basis for asserting that it is acting reasonably in imposing the requirements mentioned above on directory entries submitted through the agency of DS.

[37] This attitude of Trudon persists although it is clear from DS' replying affidavit that it has in recent times, and it seems in response to a case brought by Trudon or its predecessor against DS and Ms Seymour in the Transvaal Provincial Division of the High Court ('the TPD') for passing off and related infringements of rights, changed its business practices and clarified to its customers in express terms that DS is not affiliated in any way with Trudon and that DS charges its customer for its services over and above what they will be required to pay Trudon for publishing their enhanced directory entry. Trudon cites in its answering affidavit an order of the TPD issued on 15 October 2003 in which DS and Ms Seymour (then Ms Kellerman) were required to refrain inter alia from passing off their business as being that of TDS or being connected to or associated with TDS. DS insists that it has complied fully with that order and continues to do so, and

has attached to its replying affidavit as Annexure RA4¹¹ a copy of a circular to its customers¹² in which it is pointed out that this letter states expressly that Trudon's charges are independent and will be determined by Trudon before publication of the entry, whereas DS' charges are separate and are required up-front.

[38] On the question of the relevant product market for the purposes of assessing DS' complaint there is no direct discussion in DS' papers. However, DS refers to Trudon's position as being the only official publisher of the national telephone directories on behalf of Telkom, which clearly marks out Trudon as a holder of monopoly power in regard to those publications. While DS concedes that it does not publish any directories it clearly regards itself as a competitor of Trudon for the solicitation and orderly collection of (correct) minimum data and enhanced entries for those directories.

[39] Trudon, on the other hand, contends that because DS publishes no directories it is not a competitor in the official directory market. In any case Trudon states that there are other publishers of telephone directories and that this means that the relevant market is broader and includes any form of directory containing details of telephone subscribers. Trudon submits that even in this broader market DS is not a participant since it does not publish directories.

[40] However, certain salient factors distinguish the official Telkom directories as published by Trudon from other private directories. In a 2009 notice to its customers, Trudon itself states that while other directories are available, "*most do not enjoy the high usage and proven acceptance that Yellow Pages has*". Furthermore, no private business directory is compelled to give a customer a free entry in its directory as Trudon is legally obliged to do in regard to minimum data light print entries. Each customer whose entry appears in the Telkom directory is also entitled to a free copy of the directory which is delivered to it free of charge. Trudon is also entitled to recover its fees by debiting each customer's Telkom telephone account whereas no private directory has the right to use Telkom as its collecting agent.

¹¹ at p. 261 of the record.

¹² see paragraph 15.2 of the replying affidavit.

[41] Trudon contends further that there is a second relevant market, being the national market for advertising services, in which both Trudon and DS compete since they solicit orders for the placement of entries in directories, being or amounting to advertisements.

[42] We consider that the latter contention falls immediately upon scrutiny. DS does not solicit or compile or collect advertisements for insertion in telephone directories. It asserts firmly that its business is confined to the collection of entries that are light-type or enhanced insertions in either or both of the white and the yellow page telephone directories published by Trudon. It does not act at all for customers who wish to insert advertisements in the yellow pages. Trudon has submitted no evidence in denial of these assertions. At the hearing its legal representative argued that the broad market for advertising services in which both Trudon and DS participated included such advertisements as hoardings at airports. We find this most implausible from a substitutability perspective.

[43] What we do find plausible is that for the purposes of competition economics there is a relevant national market for the publication of official telephone directories (i.e. those which comprehensively list all telephone subscribers and which all telephone subscribers are entitled to receive on the basis of their subscription). This is the market in which Trudon is active and in which it has a dominant position - in fact in which it is a licensed monopolist. The barriers to entry into this market are therefore not of an economic nature - they stem from regulation which establishes special rights, i.e. a licence to and indeed the obligation to publish official telephone directories.

[44] Since no other party has the right to publish these official telephone directories, Trudon fulfils a so-called "gate-keeper"¹³ function in respect of all subscriber entries in the official Telkom directories; it could simply bar the access of any competitor in the upstream market (see below) to submitting subscriber entries for publication. This role of Trudon is of paramount importance in assessing the relationship between Trudon and DS (or any other independent agent who

¹³ A gate-keeper role is played by a company possessing *inter alia* a certain right (for example a licence), infra-structure, technology or know-how allowing it to exert a significant degree of control in respect of the access to a given market.

wishes to have entries published in the official directories on behalf of customers) and thus of the competition dynamics in this case.

[45] One of the essential activities for the publication of these official directories is the solicitation and collection, in an orderly fashion, of subscriber entries for insertion in the Telkom telephone directories. The latter activities are upstream to the above-mentioned market for the publication of official telephone directories. Both Trudon and DS are active in this area. As stated above, it is not clear from the evidence placed by Trudon before us to what extent these activities are performed by Trudon's in-house staff or by Trudon accredited agents. The existence of Trudon accredited agents is however an undisputed fact. A further undisputed fact is that a very large number of customers seemingly are willing to pay DS a fee for the services that it renders. This is indicative of the existence of a plausible separate relevant product market for the solicitation of entries for publication in the official telephone directories and associated services.¹⁴ Trudon and DS are direct competitors in such a market. If this proposition is correct, as we believe would be the likely finding if the dispute between DS and the respondents proceeds to a full complaint hearing, then there is a sufficient basis for considering DS to be a competitor of Trudon and Telkom for the purposes of this matter.

[46] The rivalry between Trudon and DS is evident from the long history of dispute between them over rights to have entries inserted in the official telephone directories, and the fact that the population of telephone subscribers, amounting to a substantial part of the public at large, contains sufficient customers for DS to have a viable business. The number involved are not quantified with any precision in the papers, but figures of the order of tens of thousands of entries per month were mentioned to the Tribunal, or hundreds of thousands of entries in the case of some directories or groups of directories. In any event there is clear evidence of de facto competition in the business of soliciting and assembling entries for publication in the official telephone directories.

[47] It was mentioned at the hearing that Trudon has offered to make DS an accredited agency which conduct business in the advertising sphere, which

¹⁴ For example the sending of "proofs" of entries to customers for approval before submitting same to Trudon for publication.

would presumably entitle DS to earn income based on the volume of business it attracted in this role. DS has however declined the invitation on the basis that it was not an advertising agency and that it only conducted business in soliciting entries (normal or enhanced) for the official telephone directories published by the respondents.

[48] Trudon rejects this notion, asserting inter alia that it loses nothing by the success of DS in collecting and forwarding entries for insertion into the official telephone directories. How, Trudon reasons, could a competitor in a real market not lose if a competitor, which is what DS contends itself to be, succeeds in its business? Equally, how could it be competing with DS if by rejecting business represented by DS's proffered entries without compliance with Trudon's requirements for advance payment and the submission of a reconciliation statement Trudon loses revenue?

[49] The paradox is in our view only apparent and not real. Trudon may have other motives than the maximisation of its direct income. It may be seeking to shield its accredited agencies or its internal sales force against the competition to their businesses which DS represents. Or it may have a perverse motive simply to destroy an entity which on some level represents unwelcome and intrusive competition for the attention of telephone subscribers over whom it considers itself to have some form of all-encompassing hold. We do not think we have heard a full and frank account of the motives for Trudon's policy of opposition to the activities of DS. It is in any case plausible that since DS can only flourish on the back of inefficiency or intransigence on the part of Trudon in its treatment of subscribers to Telkom's telephone services, DS will naturally be seen by Trudon or some of Trudon's personnel as a mortal enemy.

[50] The answer to the question whether Trudon has made a showing of technological, efficiency or other pro-competitive gains as an outweighing justification for engaging in conduct with an exclusionary effect appears to us to be in the negative. Trudon has made no attempt in its submissions to quantify any technological, efficiency or other pro-competitive gains flowing from its relevant conduct. The only benefit that Trudon appears to consider it achieves by rejecting entries submitted by DS if they are not accompanied by upfront payments from the relevant subscribers, is a diminution in the number of complaints it receives from subscribers about the alleged deceit of DC in

obtaining payment for its services when the subscribers believe that the payments made have included the charges of Trudon for carrying their entries in its directories. This does not seem to us to offer prospects that in a full complaint enquiry Trudon will prevail on this question. In any event the subscribers who made such complaints may well have done so in the era preceding DS's adoption of its current standard letter to its customers seeking their business, which makes it clear that the fee they pay to DS does not cover Trudon's services: we find no clarity in the answering evidence on the question of whether such complaints have been received in this more recent era. The relevant customers are not without their own remedies if they have in reality been misled, and can pursue those remedies on their own account in the courts and if necessary in dispute resolution fora under consumer protection legislation. It is not open to a dominant firm to take drastic action with exclusionary effects against a lesser competitor for perceived infringements by this competitor of the rights of third parties merely on the grounds that the third parties are customers of the dominant firm. There is no place in the antitrust system for such a Don Quixote. Furthermore, it is entirely conceivable that the very actions of Trudon that allegedly are aimed at the protection of its customers, in fact also adversely affect them. We accept that a requirement of a certain group of subscribers for the upfront payment of Trudon's annual charges for the publication of enhanced directory entries, without an appropriate discount offered in return, adversely impact the cash flow of these subscribers, including potentially thousands of small businesses. There simply is no evidentiary basis on which to conclude that Trudon's upfront payment requirement of the group of customers who submit their required directory entries through DS is in the best interest of these customers.

[51] We are however not called upon in these proceedings to take these questions to the point of finality. It is sufficient for us to conclude, as we do, that there is a degree of competition between Trudon and DS which may make it possible for DS's complaint to be successfully prosecuted in a full complaint proceeding before the Tribunal, in which the relevant economic and factual issues, including the ultimate effect on customers will be thoroughly ventilated.

[52] On the first question before us in terms of Section 49C, concerning the nature of DS's complaint, we accordingly conclude that there is a sufficient basis for us to

proceed to examine the remaining criteria, being those of the harm suffered by DS and the balance of convenience between the parties.

[53] As to the issue of the harm to DS, Trudon has set out in its answering affidavit the relevant opening canvass dates and closing dates of all the 19 directories under consideration. Trudon has claimed confidentiality in respect to this material but to the extent that any of it is disclosed in this decision and its associated order we reject the claim to confidentiality. The details of these dates and the identities of the relevant directories are contained in a table set out in paragraph 84 of the answering affidavit.¹⁵

[54] From this table it is clear that the closing dates for the entries in three directories, namely those for the South Cape and Karoo, the Boland and West Coast, and the East Rand, are in the future, being either June or July 2010. Their publication dates are some months further in the future, being August or September 2010. The directories for the Johannesburg region (no doubt the biggest which Trudon publishes) has a closing date of April 2010 and a publication date of August 2010. Those for the West Rand, no doubt also sizeable directories, are March 2010 and June 2010 respectively.

[55] The other national directories have closing dates that pre-date the hearing, with hearing dates that had either passed or were imminent. In some cases, however, their publication dates are as late as December 2010.

[56] If interim relief along the lines sought by DS is not granted by the Tribunal and DS does not bow to Trudon's requirements for upfront payments from subscribers, it is clear that DS will be unable to meet its customers' needs for the most speedy possible insertion of their required entries into the appropriate directories. It can be assumed that DS will lose this part of the revenue it would have generated if Trudon accepted these entries and Telkom proceeded to collect the dues for them by levying monthly payments in its telephone accounts, as is the respondents' norm. Moreover, given the above-mentioned imminent directory publication deadlines it is plausible subscriber entries solicited by DS would not be published in the forthcoming Telkom directories if the solicited

¹⁵ Page160-161 of the record.

entries in question are not accepted for publication.¹⁶ In this regard it is noted that DS submitted that it averages approximately ten thousand new business clients per month whose entries do not appear in the current Telkom directories. We therefore anticipate that the exclusion of these entries in the forthcoming Telkom directories could have a potentially detrimental effect on a large number of (small and other) businesses.

[57] As stated above, the numbers of subscribers involved have not been quantified, but if the numbers are substantial, as Trudon itself asserts, being of the order of tens of thousands per month collected by DS or being hundreds of thousands in the case of some entries, the loss of revenue to DS and its difficulties in making refunds to dissatisfied customers will be more than significant.

[58] On the issue of the balance of convenience, the weighing of the interests of the parties appears to us to favour DS. If interim relief along the line sought by DS is not granted, DS will lose the revenue discussed above and face contractual and reputational difficulties with dissatisfied customers. This amounts to a considerable disruption of its business and a considerable financial setback. On the other hand, if the relief is granted Trudon will lose no business or revenue, and will be able to levy its normal charges through the mechanism of having them included in Telkom's monthly charges to subscribers. Trudon will lose the benefit of having upfront cash in its bank account as pre-funding of these payments of subscribers, but that does not appear to us to outweigh the harm to DS described above. Trudon seems to lose nothing else under any financial heading. On the level of customer relationships it would seem to us that Trudon gains since it will be seen by subscribers to be obeying their wishes by having their mandates to DS duly executed by DS and honoured by Trudon. On this reasoning there is no doubt that the balance of convenience favours DS.

[59] Trudon asserts in its answering affidavit that it is not open to the Tribunal to grant interim relief to DS on the basis sought because this would violate an order granted in the Transvaal Provincial Division of the High Court on 15 October 2003 in the case referred to above.¹⁷

16 If an entry is not listed in the forthcoming edition, this can only be rectified in the next annual edition.

17 This allegation is made in paragraph 85.3 of the answering affidavit at p. 38 of the record.

[60] In that case the respondents were DS and Ms Seymour, then known as Ms Kellerman. The order in question reads:

“[The respondents are hereby] ordered, jointly and severally, not to interfere with the contractual relationship between applicant [TDS] and its customers by, inter alia, influencing and/or persuading and/or attempting to influence or persuade any of the applicant’s customers to breach the terms of their agreements with the applicant.”

[61] We were told that the term of Trudon’s contracts with subscribers for enhanced entries and advertisements in Telkom’s directories was a period of two years.

[62] DS’ answer to this assertion is that DS does not approach customers of Trudon with an approach which in any way breaches or impinges on their existing agreements with Trudon. DS merely seeks business with the subscriber for a period following the end of the two-year contract with Trudon.

[63] This may well be a sufficient answer to Trudon’s allegation of a violation of the court order. In any case, even if DS’s approaches meant that customers of Trudon were influenced by DS to seek an amendment or consent to, or termination of, their agreements with Trudon, this does not appear to us to amount in normal circumstances to inducing a *breach* of the agreement, which is what the order appears to prohibit. Countless agreements are amended or terminated as a matter of routine at the initiative of one of the parties, whether or not represented by a person appointed under a power of attorney, without giving rise to any allegation that this conduct amounts to a breach of the agreement.

Conclusions reached by the Tribunal

[64] We conclude that DS should succeed in obtaining interim relief against Trudon and Telkom in view of the fact that DS has satisfied the requirements of Section 49C of the Act.

[65] The relief which should be granted is in our view somewhat different from that set out in DS’ prayers in the notice of motion, the differences stemming chiefly

from the fact that some of the directories in which it sought to place entries without upfront payments of Trudon's charges are now in print or will shortly be printed, and also in view of the fact that it is not certain at this point that a complaint corresponding to that lodged by DS with the Commission will be referred to the Tribunal whether by the Commission or on the initiative of DS itself.

[66] We do not have a formal notice of opposition to this application by Telkom and we have proceeded on the basis that it is opposed by Telkom on the same basis as by Trudon. Both respondents were represented by the same legal representatives at the hearing. Telkom effectively controls Trudon, with its majority shareholding of 64.9%. In these circumstances we have deemed it fitting to frame our orders below on the basis that they will be effective against Trudon and Telkom jointly and severally.

[67] We have not in this document described other than in passing the legal tussles which have been waged by DS or Trudon (or its predecessors) in various fora for many years before the lodging of DS' complaint with the Commission on 9 April 2009. Substantial space was devoted to these tussles in the affidavits filed by the parties in this matter following DS' founding affidavit. Although a systematic account of them may be of interest to the Tribunal in fully fledged complaint proceedings in due course, their influence on this matter at the interim stage seems to us too attenuated to make it necessary to describe or analyse them, particularly as the interests of brevity and speed are at stake.

[68] In terms of Section 49C(2)(b) of the Competition Act, 1998 ("the Act") we grant the relief below.

Order

[69] The First and Second Respondents, Trudon (Proprietary) Limited ("Trudon") and Telkom SA Limited ("Telkom") are ordered jointly and severally to accept from the Applicant, Directory Solutions CC ("Directory Solutions"), without a requirement for the upfront payment of Trudon's charges by or on behalf of Telkom customers (subscribers) who make use of the services of both Trudon and Directory Solutions:

[69.1] all subscriber entries provided by Directory Solutions for the next Telkom telephone directories to be published for the regions of the:

[69.1.1] South Cape and Karoo.

[69.1.2] Boland and West Coast.

[69.1.3] Johannesburg, and

[69.1.4] the East Rand.

[70] The order provided for in paragraph The First and Second Respondents, Trudon (Proprietary) Limited (“Trudon”) and Telkom SA Limited (“Telkom”) are ordered jointly and severally to accept from the Applicant, Directory Solutions CC (“Directory Solutions”), without a requirement for the upfront payment of Trudon’s charges by or on behalf of Telkom customers (subscribers) who make use of the services of both Trudon and Directory Solutions: above will remain in force until a date six months after the date of this order, or if earlier, the date on which complaint proceedings in the Tribunal corresponding to the complaint lodged by the Directory Solutions with the Competition Commission on 9 April 2009 are concluded, whether those proceedings are referred to the Tribunal by the Competition Commission in terms of Section 50(1) of the Act or are referred to it by the Applicant in terms of Section 51(1) of the Act.

[71] The order provided for in paragraph The First and Second Respondents, Trudon (Proprietary) Limited (“Trudon”) and Telkom SA Limited (“Telkom”) are ordered jointly and severally to accept from the Applicant, Directory Solutions CC (“Directory Solutions”), without a requirement for the upfront payment of Trudon’s charges by or on behalf of Telkom customers (subscribers) who make use of the services of both Trudon and Directory Solutions: above will lapse if the Competition Commission fails to refer a complaint to the Tribunal in terms of Section 50(1) of the Act, read with Section 50(4), based on the complaint lodged by the Applicant with the Competition Commission on 9 April 2009, or if the Competition Commission issues or is deemed to have issued a notice of non-referral in respect of the complaint of the Applicant so lodged with it and the Applicant fails to refer a corresponding

complaint to the Tribunal in terms of Section 51(1) of the Act within 20 business days after the date of the notice of non-referral by the Competition Commission.

[72] First respondent is required to pay the Applicant's costs, including the cost of counsel, for this interim relief application.

8 April 2010

Yasmin Carrim

Date

Concurring: Lawrence Reyburn and Andreas Wessels

Researchers : Thandi Lamprecht and Romeo Kariga

For the Applicant : Adv Beyleveld SC instructed by Goldberg & Victor Inc.

For the Respondents: Adv Preis SC with Adv Wilson instructed by Adams

Adams