IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

Case Number: 182/CAC/Mar20

In the matter between:

BUSINESS CONNEXION (PTY) LTD Appellant

and

VEXALL (PTY) LTD First Respondent

THE COMPETITION COMMISSION Second Respondent

Delivered: 15 July 2020

JUDGMENT

UNTERHALTER AJA

Introduction

[1] On 12 February 2020, the Competition Tribunal (" the Tribunal") made an order (" the Order ") prohibiting the Appellant ("BCX") from selling or offering a Unisolve license on condition that a customer purchases value-added services from BCX. The order is framed on the basis that it remains in force for six months from 12 February 2020 or upon the conclusion

of a hearing into the complaint, whichever is the earlier. BCX was ordered to pay the costs. The Order was made at the instance of the Respondent ("Vexall").

[2] BCX appeals the Order to this court. BCX complains that the Tribunal incorrectly granted the Order. In essence, BCX contends that the Tribunal had no proper basis to conclude that BCX engaged upon an unlawful tying arrangement and the Tribunal issued the Order without any regard to anti-competitive effects of the alleged prohibited practice, a necessary requirement in terms of s8(d) of the Competition Act 89 of 1998 (" the Act").

[3] There is a preliminary issue that must be resolved before the merits of the appeal may be considered : is the Order appealable ?

[4] It is to this issue that I turn.

Is the order appealable?

[5] The Tribunal found that the requirements of s49C(2)(b) of the Act had been met and , in consequence, issued the Order.

[6] Section 49C(2)(b) provides that the Tribunal :

> "*may grant an interim order if it is reasonable and just to do so , having regard to the following factors:*
>
> *(i) the evidence relating to the alleged prohibited practice;*
>
> *(ii) the need to prevent serious or irreparable damage to the applicant;*
>
> *(iii) the balance of convenience. "*

[7] Whether an order made by the Tribunal in respect of an application for interim relief is appealable is given asymmetric treatment in s49C. The refusal by the Tribunal to grant interim relief permits the disappointed applicant, as of right, to appeal to this court. (s49C(7)). Where, however, the Tribunal grants an interim order, in terms of s49C(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".*

[8] The parties were, rightly, in agreement on two issues. First, that the right of a respondent to appeal an interim order depended upon the effect of the order rather than its form. Second, that the right may found upon either the final effect of the order or its irreversible effect. The two types of effects are disjunctive.

[9] Beyond this, the parties contended for very different interpretations of s49C(8). Vexall submits that an order is final in effect if it determines an issue so as to render it *res judicata.* An order has an irreversible effect in circumstances where the Tribunal will not be able to adjudicate an issue by way of final relief because the right that is in dispute will have come to an end. BCX submits that the ambit of consideration of irreversibility is much wider. If BCX, in compliance with the Order, is required to amend its contracts with its customers that is irreversible. So too, if compliance with the Order brings about market-wide changes that alter the basis upon which competition takes place, that is an irreversible effect of the Order. These are effects that flow from the Order and hence the Order is irreversible. Vexall, in response, has referred to authorities that decide when an order of the High Court is appealable, and contends that commercial harm to the respondent has never been the basis for deciding that an order is appealable.

[10] There is a long line of cases that has interpreted the statutory language " judgment or order" [1] to decide whether a matter was appealable. The *Zweni*[2] triad for long held sway. A judgment or order was appealable if it had three attributes: it was final in effect and not susceptible of alteration by the court of first instance; it was definitive of the rights of the parties; and had the effect of disposing of a substantial portion of the relief claimed in the main proceedings. This has not avoided some divergence in the courts as to when the grant of an interim interdict pending the outcome of an action may be final in effect, and hence appealable.

[11] Central to the notion that an order is final in effect, whatever its form, is that the order disposes of a definite portion of the relief claimed and is not susceptible of reconsideration by

[1] S20(1) of the Supreme Court Act 59 of 1959 , since repealed; s16(1) of the Superior Courts Act 10 of 2013 allows that an appeal may, with leave granted, be brought against 'any decision' of a High Court, which has been held to have the same meaning as 'judgment or order'.
[2] *Zweni v Minister of Law and Order* 1993(1) SA 523 (A)

the trial court. That much is clear. What has occasioned a difference of opinion is whether an order is final in effect in circumstances where the trial court will not be able to make a final determination of the right claimed because the right would by then have run out. On one view, the enforcement of the right, in these circumstances, by way of an interdict, though interim in form, is final in effect, and hence appealable. The contrary position is that a right may run its course before it can finally be adjudicated. This is but one of the ways in which an interim order may cause prejudice that cannot be undone, and in this sense, it is final. But that does not render the interim order final in effect or require that the court granting the order should have considered the order as final, thereby rendering the order appealable. This difference was articulated in *Cipla Agrimed*[3], but not resolved.

[12] These matters define a somewhat narrow debate, framed largely by the position articulated in *Zweni.* An altogether wider view is to be found in *Scaw*[4], and the principles there articulated by the Constitutional Court. In *Scaw,* the question was how to interpret s167(6)(b) of the Constitution which permits of an appeal directly to the Constitutional Court, when it is in the interests of justice. The Constitutional Court reviewed the jurisprudence of the Supreme Court of Appeal and considered that the appealability of a "judgment or order" should not be confined to the *Zweni* principles, but should extend to the broader concept of what the interests of justice require. What the interests of justice require will depend upon the particular case. *Scaw* emphasizes that irreparable harm occasioned by the interim order, if leave to appeal is not granted, is an important consideration in determining the interests of justice. This marks a departure from the more parsimonious position of some of the appellate jurisprudence that does not count the prejudice caused by an interim order to be availing in deciding whether the order is appealable.[5]

[13] *Scaw* found that the interim order, which restrained the responsible Ministers from ending certain anti-dumping duties pending a review, was appealable. The interim order was found to be final and caused irreparable harm because it maintained anti-dumping duties that would otherwise have ended. Furthermore, the duties were not refundable and their

[3] *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation* 2018(6) SA 440 (SCA)
[4] *International Trade Administration Commission v Scaw South Africa (Pty) Ltd & Others* 2012(4) SA 618 (CC) See also National Treasuryand others v Opposition to Urban Tolling Alliance and others 2012(6)SA223(CC) at para 25
[5] *Cronshaw & another v Fidelity Guards Holdings (Pty) Ltd* 1996 (3) SA 686 (A)

continuation excluded the imported products from the SACU markets. These consequences were said to be immediate, irreparable, and final.

[14] While it is helpful to have regard to the approach of the courts in deciding when an interim order may be appealable, it must be recognised that these decisions determine this issue under different legislation and in an institutional context that is bounded by the question as to when a court of appeal should reconsider the interim order of a high court. The present case is different. We are asked to decide, in terms of s49C(8) of the Act, when an appeal will lie to this court, upon the grant of an interim order by the Tribunal . This requires an interpretation of this provision , understood in the light of the institutional framework created by the Act and its substantive content.

[15] There are a number of distinctive features of the Act that warrant consideration. First, an appeal to this court concerns the supervisory jurisdiction of an appeal court over the Tribunal, an administrative body, vested with very considerable powers. The appeal does not lie from one court to another. Second, s 49C(6) permits any party to an interim relief application to review the decision of the Tribunal. Since the scope of judicial review is wide, the powers of this court to review an interim relief order of the Tribunal are not insubstantial. Third, the legislature clearly intended to afford the parties to an interim relief application asymmetric rights of appeal. The disappointed applicant may appeal the refusal of the application. This permits the applicant to come before this court as of right to correct errors made by the Tribunal. Not so the respondent against whom an interim order is granted. The right of the respondent to appeal is limited to an order that has an final or irreversible effect. Plainly, there is a need to demarcate when an order has one or other of the effects stipulated, absent which there is no appeal at the instance of a respondent.

[16] It is important also to give consideration to the powers the Act reposes in the Tribunal to grant an order for interim relief. The order that may be sought is " *an interim order in respect of an alleged practice"*[6]. Such an order will ordinarily require the respondent to desist from conduct that is alleged to constitute a prohibited practice. Commonly such an order will

[6] s49C(1)

prohibit conduct. But the order may require conduct, for example an order to remedy a refusal to supply.

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

[18] An interim relief order under the Act does not provide a remedy to permit a person claiming a right to enjoy the exercise of that right until the right is finally determined. Rather, the Tribunal is empowered to regulate how competition in the market is to take place for a six or twelve month period. That is a different competence to that of a court adjudicating a dispute of right; it is a regulatory competence to decide whether the state of competition in the market must endure, notwithstanding the evidence that a prohibited practice is taking place, or whether the Tribunal should order a change.

[19] Section 49C requires that in deciding whether to grant an interim order, the Tribunal must have regard to three factors: the evidence relating to the alleged prohibited practice; the need to prevent serious or irreparable damage to the applicant; and the balance of convenience. Upon examining these factors, the Tribunal may only grant the interim order if it reasonable and just to do so.

[20] The evidence of a prohibited practice, as I have sought to explain, is not concerned with the rights of the applicant but the competitive position of competitors in the market, judged against the regulatory criteria of the prohibited practices defined in chapter 2 of the Act.

[21] The need to prevent serious or irreparable damage to the applicant posits an enquiry into the effects of the alleged prohibited practice upon the applicant and it is for this reason a party specific enquiry. However, here too the analogue of interim interdicts as an equitable remedy at common law must be approached with care. The common law remedy asks what well-grounded apprehension of irreparable harm will be suffered by the applicant if interim relief is not granted and the applicant succeeds in proving the right, now *prima facie* established . This concerns an interference with an applicant's rights and the harm that may be suffered by an applicant as a result of such interference until the court can finally determine the question of rights. Interim relief under s49C requires an enquiry that is similarly structured, but distinct in a number of respects. The need for intervention is a function of the probability of serious or irreparable damage occurring,if no intervention is ordered by the Tribunal before it can make a final determination as to whether the alleged prohibited practice has taken place. It is the damage to the competitive position of the applicant that the prohibited practice may cause that marks out this enquiry. Other forms of damage to the applicant are not relevant because the Act's purpose is to maintain and promote competition in the market.

[22] Finally, the balance of convenience in s49C is a direct borrowing from the common law. It weighs the prejudice the applicant will suffer if the interim interdict is not granted against the prejudice to the respondent if it is granted. This requires an equitable reckoning as to who bears the greater burden of error. If the interim order is granted and no case is ultimately established to prove the alleged prohibited practice, what prejudice will have been suffered by the respondent, and how might that prejudice be mitigated? So too, if the interim order is refused and the prohibited practice is ultimately proven, what prejudice will the applicant suffer in the interim. Here too, the currency of prejudice is reckoned by recourse to the consequences for the competitive positioning of the parties in the market. A respondent that is required to desist from conduct that gives it a legitimate competitive advantage suffers prejudice. An applicant that is required to endure an unlawful competitive disadvantage also suffers prejudice. How to weigh prejudice in the balance is a difficult task. Hence the warranted caution with which the Tribunal and this court have approached the exercise of the power to grant an interim interdict.

[23] The analysis of the power to grant interim relief in s49C and the considerations that must be weighed to determine its exercise assist in the interpretation of the stipulation in s49C(8) that the respondent may appeal an interim order that has a final or irreversible effect.

[24] The correct approach to this interpretative exercise is, in the first place, the recognition that the statutory language is restrictive of the respondent's right to appeal an interim order. The right is neither wholly permissive, as in the case of a disappointed applicant, nor flexible to the degree that the standard of the interests of justice allows. However, a proper understanding of what constitutes a final or irreversible effect must reflect the need to permit this court to correct error when particular failures of justice would otherwise result.

[25] The clearest case would be a decision by the Tribunal deciding upon interim relief that is final in the sense contended for by Vexall, that is to say, when the Tribunal decides an issue with finality in the sense that it is rendered *res judicata.* Varieties of this meaning of final in effect, as I have observed, are captured by the formulation that the Tribunal has finally disposed of a substantial portion of the relief sought or the circumstance where an interim order has an immediate effect that will not be reconsidered on the same facts in the main proceedings[7].

[26] It is difficult to see how these meanings can lie at the heart of what the legislature had in mind in the formulation that an order has a final effect. Section 49C permits a complainant to seek an interim order. Mostly, but not invariably, it is not the complainant that is the party seeking a final remedy. It is the Competition Commission (" the Commission") that makes the referral, decides what is to be referred and the relief that is to be sought. The application for interim relief may be made before or after the Commission has decided whether to make a referral, and if it has, on what basis. A Tribunal that sought to make a final determination as to some part of the relief that the Commission or the complainant might seek upon referral or was seeking by way of a referral ,would not just be acting incautiously, but almost certainly *ultra vires.*

[27] In proceedings before the High Court for an interim order, the outcomes are more variable. The High Court is frequently confronted with the question as to whether a clear right or a *prima facie* right, though open to doubt, has been established or there is a question of law

[7] *Metlika Trading Limited and Others v Commissioner, South African Revenue Service* 2005 (3) SA 1 (SCA) at para 24

that the court chooses to decide. Sometimes the interim relief granted by the court is wider than the final relief that is to be sought at trial. And sometimes the interim relief rests upon facts never to be revisited. These are circumstances that may make the resulting order of the High Court final in effect, and this reflect the capacious equitable remedial powers that are reposed in the High Court.

[28] That however is not the position of the Tribunal hearing an interim relief application. The Tribunal is an administrative functionary. It has no inherent powers. Its power to grant interim relief derives from s49C. It is not at large to make equitable orders. The constraints on its powers are evident.

[29] It is therefore an implausible interpretation of the language of s49C(8) that it was intended to provide for an appeal only in circumstances where the Tribunal granted an interim order that is *ultra vires* its powers. That is the purpose of s49C(6) which recognises the right to review a decision of the Tribunal to grant interim relief. Thus, a Tribunal that purported by way of interim relief to make a final decision, when the Tribunal was required to do so only upon a referral, would be issuing an order final in effect, and as such the order would be appealable. But the more obvious remedy would be the review of an *ultra vires* decision.

[30] What further meaning is then to be given to the language of an order that has a final effect? It deals centrally with the circumstance in which the alleged prohibited practice that is made subject to an interim order will not finally be determined by the Tribunal before the prohibited practice comes to an end. This can occur, for example, because an exclusivity agreement or some other restraint will expire. Although, as the *Cipla Agrimed* case reveals, there remains controversy as to this species of finality, given the regulatory subject matter of the Act, there are good reasons to recognize that an interim order made by the Tribunal in these circumstances is final in effect.

[31] I have observed that interim orders granted in terms of the Act are not generally *status quo* orders. Such orders require that a prohibited practice, existing or threatened, ceases or is in some measure materially altered. If a respondent is required to endure the constraint of an interim order, albeit for six months, without the prospect of a hearing to show that it has not engaged upon the prohibited practice, an injustice results. The respondent is deprived of an opportunity to correct any error that the Tribunal may have made. An interim order is a justified

intervention on the basis that there is a need to prevent serious or irreparable damage to the applicant. That justification is coupled with the recognition that the order may be made in error, by reason, not least, of the limited evidence known to the Tribunal. We tolerate the risk of error because the Tribunal will finally decide the matter at a hearing in due course, and the respondent will have an opportunity to put its case and correct any error that was made. Where that will not occur, an injustice is done to a respondent, and a right to appeal to this court restores what justice requires: the opportunity to correct an error that would otherwise never be made the subject of reconsideration.

[32] This reasoning must be understood in light of the structure of the Act as to the prosecution of complaints. An interim relief application may be made by a complainant, whether or not a hearing has commenced in respect of an alleged prohibited practice. This means that the application may be made while the Commission is investigating a complaint, after the Commission has referred a complaint to the Tribunal, or, failing a Commission referral, the complainant has done so. If the complaint is referred, then, even if the prohibited practice comes to an end before the Tribunal can decide the matter, the prohibited practice will nevertheless, in most circumstances, be finally determined by the Tribunal because either the Commission will seek a declaration that the conduct of a firm constituted a prohibited practice and an administrative penalty should be paid, or the complainant will seek remedies, not least a declarator, as a precursor to a claim for civil damages. If this occurs, the respondent will have the opportunity to persuade the Tribunal that it did not engage in the alleged prohibited practice. If the respondent is successful, then apart from avoiding the imposition of any further remedies, the respondent will be in a position to show that it suffered the consequences of an interim order when , on a determination of all the facts, no order was warranted.

[33] This has important implications for damages that a respondent will be able to claim from a complainant that has benefited from an interim order, where the complainant has been required to make a tender of a cause of action for damages at the time that the interim order is granted. Such a tender, though so often neither made nor required, should usually be a necessary part of any interim order that issues from the Tribunal, because it prevents a

complainant from securing an interim order without bearing the cost, in the event that the complainant is not ultimately vindicated.[8]

[34] Thus, although it will often be the case that the Tribunal does determine finally whether a prohibited practice has taken place, this is not invariably so. The complainant may secure an interim order and the Commission then decides not to refer the matter. The complainant may then do so, but is not required to do so. If the complainant does not (it may consider the expense is not warranted in respect of a prohibited practice that has ended or will soon do so), then the Tribunal will not finally determine the matter. In these circumstances, the interim order is final in effect. The interim order may be appealed to this court so as to decide whether the respondent should suffer the interim order until the alleged prohibited practice ends. So too, the interim order may be appealed even if the order has lapsed , in circumstances where the applicant has been required to tender a cause of action for damages. The effect of the decision of this court would then determine whether the respondent would be able to pursue any claim for damages against the complainant.

[35] On this account, the right to appeal an interim order that has a final effect is a narrow but important safeguard of the rights of a respondent, which would otherwise have an interim order imposed upon it, without recourse to persuade the Tribunal that its final determination should be to dismiss the referral. That renders an interim order final in effect.

An irreversible effect.

[36] s49C(8) gives the respondent a right of appeal against an order that has a final or irreversible effect. What effects may be said to be irreversible? Vexall submits that it is not mere commercial prejudice to the respondent that is relevant since that would render almost every interim interdict appealable and that was clearly not parliament's intention. There is force in this submission. However, an irreversible effect should not be understood to mean an effect that either determines an issue in the ultimate adjudication before the Tribunal or an issue that will never be determined in such adjudication. That is so because these meanings fall within the concept of an effect that is final. And, as I have explained, it is principally the second of

[8] See *Hix Networking Technologies CC v System Publishers (Pty) Ltd & Another* 1997 (1) SA 391 (SCA) at 403D-F

these two meanings that is of application under the Act because the first is likely to disciplined under this court's review jurisdiction.

[37] What then is the terrain of irreversible effects that would render an interim order appealable ? The interim relief jurisdiction of the Tribunal is engaged in cases where there is evidence that the respondent's conduct amounts to a prohibited practice and there is a need to prevent the applicant from suffering serious or irreparable damage, the balance of convenience then being a further consideration. The serious or irreparable damage to the applicant contemplated in s49C(2)(b)(ii) is damage to the competitive position of the applicant in the market. The damage is irreparable if there is a likelihood that , before the applicant will be able to secure final relief, the applicant will exit the market or will otherwise suffer material damage to its competitive position in the market of a kind that it will not readily regain.

[38] This conception of what constitutes irreparable damage to the applicant derives from the purpose of the Act. The Act seeks to foster competition. It is not there to buffer firms from the consequences of competition on the merits, much less to secure or enhance their commercial prospects. If that is so for the applicant, a like conception of irreversible effect is apposite when considering what effects are relevant to an assessment of the respondent's position that would be considered irreversible for the purpose of vesting a right in the respondent to appeal an interim order. That is to say, an interim order has an irreversible effect if is it is likely to cause the respondent to exit the market or to cause the respondent to suffer material damage to its competitive position in the market that it will not be able to restore upon the lapsing of the order or the dismissal of a referral concerning the prohibited practice that is the subject of the interim order.

[39] An interim order may only be made in respect of the alleged prohibited practice. The order will either require the respondent to desist from the practice or restrict aspects of the practice. That is relief intended to prevent or ameliorate the damage of which the applicant complains. There is no linear relationship that determines that a competitive gain made by the applicant as a result of the interim order brings about an equal and opposite loss of competitive positioning for the respondent. However, the grant of an interim order will often have the effect that the respondent loses an advantage that it enjoyed in the market. Whether that is an advantage to which the respondent is entitled , reflective of competition on the merits, or whether it is an advantage enjoyed by reason of a prohibited practice to which the respondent

has no entitlement, is an issue that will only be finally determined when (and if) the Tribunal decides the matter at a hearing in due course. But if the respondent can make a showing that the interim order has the effect that the respondent's competitive position is materially diminished in the market or that there is a loss of some aspect of effective competition within or between markets, then these are relevant effects for the purpose of considering whether the respondent enjoys a right of appeal. What signifies is that the interim order will materially diminish the competitive positioning of the respondent in the market, when it may turn out that the competitive advantage lost by the imposition of the order is a wholly legitimate advantage. In an enactment concerned to preserve and promote competition this provides a justified basis upon which a respondent may seek the reconsideration of the interim relief by this court.

[40] Such a showing however will not suffice to establish the right. The relevant effects must be irreversible. This means that the respondent will be unlikely to restore its competitive advantage in the market, even if the Tribunal were, in due course, to vindicate the respondent and dismiss the referral. What is irreversible on this interpretation of s49C(8) is not a detriment suffered by the respondent in the interim period during which the order holds, but rather what is lost to the respondent by way of competitive advantage that will not likely be regained, on the assumption that the respondent was to prevail before the Tribunal when the referral is finally decided. The same conclusion as to irreversibility is reached if what is lost to the respondent by way of competitive advantage over the life of the order will not likely be regained, on the assumption that the complaint is never referred to the Tribunal.

[41] In sum, therefore, an interim order has a final or irreversible effect in the following circumstances:

(a) The interim order is rendered final in effect because the prohibited practice and the relief to which it gives rise will not be considered by the Tribunal because no referral is likely to be made or the Tribunal purports to decide an issue with finality by way of interim relief that it would be required to decide on a referral to it. This second variety of finality will likely constitute an *ultra vires* decision that is reviewable, but it may be also be appealed .

(b) The interim order has an irreversible effect where it materially disadvantages the competitive position of the respondent in the market and the disadvantage is not

likely to be undone should the respondent prevail before the Tribunal upon the hearing of the referral or should the referral never occur.

May BCX Appeal ?

[42] I turn then to consider whether BCX has made out a case that the interim relief granted against it by the Tribunal meets the requirement that the order has a final or irreversible effect.

[43] BCX, in its answering affidavit in the interim relief application, has contested the basis upon which Vexall contends that BCX has abused its dominant position and engaged in unlawful tying arrangements. BCX's defence is very fully set out. In sum, BCX says that Vexall has unlawfully appropriated its intellectual property and used it as a springboard to compete with BCX; that the only services in issue form part of the product offered by BCX in the upstream market and hence there is no tying; and, furthermore, in the market for value added services, Vexall is not materially constrained, and so no case can be made out for anti-competitive effects.

[44] These will be important issues for the Tribunal to consider when (and if) the matter is referred to it for final relief. The scope of the present enquiry is altogether narrower. The interim order granted by the Tribunal prevents BCX from selling or offering a Unisolve license on condition that a customer purchases value-added services from BCX, where value-added services are defined to exclude software support services. The interim order runs from 12 February 2020 and remains in force for six months. We were informed by counsel that Vexall has made an application to the Tribunal to extend the interim order for a further six months in terms of s49C(5) of the Act. That may take place on good cause shown, and the Tribunal has yet to decide this application.

[45] I observe that the showing of good cause is not a modest burden. Nor would the Tribunal be justified in approaching the question of extension on the simple basis that if there are no changed circumstances, the interim order should stand. Orders of this kind may have a significant impact upon the state of competition in the relevant markets. The imposition of the interim order will offer some evidence as to what impact the order has had upon competition. This must be carefully considered. So too, given the significance of orders of this kind and the risk of error, the Tribunal should consider whether on all the evidence before it, the further

extension of the order is justified. That consideration should not exclude an open-minded approach as to whether the original grant of the interim order was warranted, not to undo what has been done, but rather to recognise that if an error was made it should not be perpetuated. The Tribunal must also consider, as it failed to do, whether Vexall should be required to tender a cause of action for any damages BCX may suffer should the prohibited practice , ultimately, not be established.

[46] That said, the issue remains, in the first place, whether the interim order has a final effect. BCX does not set out a basis for this, save in one respect. There is nothing to indicate that the tying arrangements that are at the centre of the dispute between the parties will run out and not be capable of consideration by the Tribunal upon a referral by the Commission or Vexall. Nor is there anything to indicate that the decision of the Tribunal granting interim relief has been determined with finality so as to render its decision upon a referral either otiose, redundant or moot. The interim order that prohibits BCX from selling or offering a Unisolve license on condition that a customer purchases value-added services is not an order that has a final effect.

[47] The one order of the Tribunal that is final in effect is its order that BCX pay the costs of Vexall's application for interim relief. It is final in effect because the order is neither framed on the basis that costs will be determined as part of the decision on the referral, nor in accordance with the outcome of the referral. BCX submits that the Tribunal enjoyed no power to make this order and we should set it aside on appeal. I will return to this issue.

[48] Does the interim order have an irreversible effect upon BCX? BCX contends that the Order is appealable , and thus raises the issue of irreversibility The burden of BCX's argument was that Vexall had failed to make out a case for an interim interdict and the Tribunal fell into error in holding otherwise. But what is salient, in deciding upon appealability, is the effect of the order upon BCX's competitive position in the market and whether the interim order is likely to cause material competitive harm to BCX that is irreversible. In dealing with irreversibility ,BCX submitted that the interim order granted by the Tribunal had an immediate effect. That is so. It prohibited BCX from imposing a condition to purchase value-added services upon the sale or offering of a Unisolv license. Counsel for BCX emphasized that this has required BCX to change its agreements with customers and prospective customers. That is no doubt disadvantageous to BCX and may result in customers acquiring value-added services from

BCX's competitors, including Vexall. But that does not show that the loss of competitive advantage is irreversible. That requires some evidence that when the interim order ends or if BCX is ultimately vindicated by the Tribunal, BCX is not likely to be able to restore the competitive disadvantage that it has lost. That is not what BCX contended before this court.

[49] In its answering affidavit, BCX does state that the conduct of Vexall is resulting in BCX haemorrhaging staff, clients and intellectual property that, if allowed to continue unabated, will bring the viability of the division of BCX, in which the Unisolv business is housed, into question. The deponent says this:

> " *In fact, there is a likihood that BCX will be forced to exit as a competitor in the market if Vexall were allowed to proceed apace."*

[50] This claim however is not supported by specific evidence that makes some showing as to why the competitive advantage that is lost by the contractual term that is prohibited by the interim order will not be likely to be restored should BCX be vindicated in due course or when the interim order ends. Something more needs to be said than to assert that the competitive harm to BCX may render its business unviable. Without evidence as to what irreversible competitive effects the interim order is likely to bring about, it is not possible to conclude that BCX may appeal the interim order on the basis that it has an irreversible effect.In particular, what is missing is a factual justification as to why , upon the lapse of the interim order or BCX's ultimate vindication , BCX will not be able to restore its competitive position in the market.

[51] It will be recalled that the legislature did not intend to permit every respondent to appeal the imposition of an interim order. The right to appeal requires that the interim order has a final or irreversible effect. The legislature thereby sought to ensure that a particular kind of injustice was avoided. That is an injustice that would arise if the Tribunal made an interim order when it should not have, and the Tribunal either determined issues with finality or granted an order that is likely to have irreversible effects upon the competitive position of the respondent. The corollary of this is that the legislature was willing to countenance the respondent enduring harm, both competitive and pecuniary, over the life of an interim order, in the absence of the interim order having a final or irreversible effect, even if the Tribunal may have granted the interim order in error.

[52] Accordingly, I find that the interim order of the Tribunal is not appealable, save in respect of the order for costs. And it is to this aspect of the matter that I finally turn.

The costs order

[53] The Tribunal ordered BCX to pay Vexall's costs as part of the order it granted in terms of s49C. It is final and is not made subject to reconsideration. The costs order has a final effect, as s49C(8) stipulates. This marks out a difference between this statutory provision and the holding in *Zweni* which requires that the order must dispose of a substantial part of the relief claimed. A costs order , without more, does not satisfy the test in *Zweni.* It does satisfy the requirement of a final effect. The costs order is accordingly appealable.

[54] BCX submits that the Tribunal had no power to make the costs order that it did. This is so because s57(1) of the Act provides that each party participating in a hearing must bear its own costs, subject to s57(2) and the Tribunal's rules of procedure. Section 57(2) vests the Tribunal with no competence to make a costs order against an unsuccessful respondent in interim relief proceedings because Vexall has not referred a complaint to the Tribunal in terms of s51(1). Rule 58(1) of the Tribunal rules has been interpreted restrictively by the Constitutional Court so as not to confer a power to order costs outside of the scheme of the Act.[9] It follows that the Tribunal made a costs order against BCX in error. That is so also because the Tribunal did not provide any reasons as to why the costs should be ordered in interim relief proceedings when the final word has yet to be pronounced on the merits of Vexall's complaint. Even if the Tribunal enjoyed the competence to make the order that it did, absent special circumstances, it should not have done so.

Conclusion

[55] It follows that BCX's appeal must be dismissed in respect of the order made by the Tribunal on 12 February 2020, save in respect of paragraph 4 of the order as to costs. BCX appeal succeeds on the question of the costs awarded against it by the Tribunal.

[99] *Competition Commission of South Africa v Pioneer Hi-Bred International Inc & others* 2014 (2) SA 480 (CC) para 39

[56] As to the costs of this appeal, Vexall has been successful, save in respect of the Tribunal's order as to costs. In my estimation, it would be an equitable reflection of that success if BCX were to be liable for 80% of Vexall's costs on appeal.

In the result, the following order is made:

(i) The appeal is dismissed, save in respect of paragraph 4 of the Tribunal order, in respect of which the appeal is upheld.

(ii) Paragraph 4 of the Tribunal order is set aside.

(iii) The first respondent is ordered to pay 80% of the Appellant's costs on appeal.

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David Unterhalter

Acting Judge of Appeal

Davis JP and Vally JA concurred in the judgment of Unterhalter AJA

APPEARANCES

For the appellant: AGotz (SC) , LSisilana and S Quinn

Instructed by: Cliffe Dekker Hofmeyer Inc.

For the respondent: GD Marriot

Instructed by: DLA Piper SOUTH Africa (RF) Inc.

Heard on: 26 June 2020

Judgment delivered on: 15 July 2020