

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 48/CR/Jun04

In the matter between:

MANDLA-MATLA PUBLISHING (PTY) LTD

Complainant

And

INDEPENDENT NEWSPAPERS (PTY) LTD

Respondent

Panel : D H Lewis (Presiding Member), Y Carrim (Tribunal Member), and M Madlanga (Tribunal Member)
Heard on : 5-7 June 2006, 26-28 July 2006, and 11 September 2006
Decided on : 6 November 2006

Reasons for Decision

Decision

- [1] On 5-7 June 2006, 26-28 July 2006 and 11 September 2006, the Tribunal heard the application brought by Mandla-Matla Publishing (Pty) Ltd against Independent Newspapers (Pty) Ltd. The application is dismissed. The reasons follow.

Background

- [2] This is a complaint brought by Mandla-Matla Publishing (Pty) Ltd (henceforth "MM") against Independent Newspapers (Pty) Ltd ("IN")¹

¹ Independent Newspapers conducts business in in KwaZulu Natal as Independent Newspapers KwaZulu Natal

[3] Before 1 April 1987 the isiZulu language newspaper called *Ilanga* was owned and published by Natal Newspapers (Pty) Ltd, the predecessor in title to the respondent, IN. Natal Newspapers published *Ilanga*, printed it on its presses and distributed it throughout the province of KwaZulu Natal ("KZN").

[4] *Ilanga* was founded in 1903 and for the following century was the only mass circulation isiZulu language newspaper in the country. It is published and distributed twice a week on Monday and Thursday.²

[5] On 15 April, with effect from 1 April 1987, the complainant, MM, purchased the right, title and interest in and to *Ilanga* from Natal Newspapers.³ Also on 15 April 1987 the complainant concluded a service agreement with Natal Newspapers in terms of which Natal Newspapers was to provide certain services to the complainant, with effect from 1 April 1987.⁴ In terms of the service agreement Natal Newspapers was to provide services to Mandla-Matla in relation to *Ilanga* which included:⁵

[5.1] printing;

[5.2] distribution;

[5.3] sale of advertising; and

[5.4] administration of the editorial department

[6] Further, the service agreement contained the following material provisions:

[6.1] all matters of editorial policy would be determined and decided by MM;⁶

[6.2] the agreement would continue for 15 (fifteen) years provided that Natal Newspapers, or its successors in title, would be entitled at any time to terminate the agreement on six months written notice to MM;⁷

² Transcript p310, line 15

³ Sale agreement, joint bundle p2 clauses 3 and 4.

⁴ Service agreement, joint bundle page 16

⁵ Service agreement, joint bundle page 16 clause 3

⁶ Service agreement, joint bundle page 16 clause 4.1

- [6 3] MM would pay Natal Newspapers a service fee of 60% of the annual gross profit of *Ilanga* excluding editorial costs, before taxation and after all costs incurred by Natal Newspapers in its production of *Ilanga*;⁸
- [6 4] during the term of the agreement Natal Newspapers would not publish an isiZulu language newspaper in KZN without the prior consent of MM.⁹
- [7] On 28 July 1998 the parties concluded an amending agreement to alter the 60/40 split in costs to a 50/50 split.¹⁰
- [8] For approximately 15 years Natal Newspapers published and distributed *Ilanga*. The service agreement was due to expire on 31 March 2002. During the currency of the service agreement, the respondent, IN, succeeded to the rights of Natal Newspapers as embodied in the service agreement.
- [9] During the currency of the service agreement with MM, IN utilized, for the purposes of distributing *Ilanga*, a network comprising four categories of distributors. Firstly, there were direct retail outlets or 'agents' to which IN directly distributed newspapers. These included department stores, convenience stores, filling station forecourts and cafes.¹¹ Secondly, IN utilised subscription contractors to service subscribers.¹² Thirdly, IN made use of street contractors who sell to commuters on the streets. Finally, IN made use of a group of independent distributors, dubbed 'country distributors'. The country distributors, whose services are at the heart of the present matter, are described below.
- [10] The term "country distributors" was used by IN to describe the fifteen independent contractors who were contracted to it to distribute its newspapers in areas prescribed in the contracts with IN. The country distributors covered the greater area of KZN, that is, those large areas of the province falling outside

⁷ Service agreement, joint bundle page 17 clause 5.1.

⁸ Service agreement, joint bundle page 20 clause 7.

⁹ Service agreement, joint bundle page 23 clause 12.1

¹⁰ Amending agreement, joint bundle page 30

¹¹ These largely fall into the greater Durban and Pietermaritzburg areas and a few fall within the former African townships of Durban. See page 575 of the transcript.

¹² Currently these are only found in Durban and Pietermaritzburg.

the metropolitan areas of Durban and Pietermaritzburg. The most prominent of these were:

[10.1] Ollason's News Agency based in Stanger and covering the coastal area from Stanger to Gingindlovu and inland from Eshowe to Nongoma including Hlabisa;

[10.2] Umlazi News Agent (owned by Mr Mbatha), covering the Umlazi-Lamontville area and the African townships south of Durban;

[10.3] Central Media Distributors (owned by Mr Smith) based in Empangeni and covering the area north of Gingindlovu to Kosi Bay;

[10.4] JC Delport Distributors (owned by Mr Delport) based in Newcastle and covering the area north of Ladysmith including Dundee, Vryheid and Newcastle; and

[10.5] ZJ Distributors (owned by Mr Zondi) based in Claremont and covering the African townships to the north and west of the greater Durban area.

[11] In ABC region 48, covering the greater Durban area, and in Pietermaritzburg, (area 51) IN used its own staff and employees to distribute *Ilanga* to retail outlets.¹³ In area 48 there were also some independent contractors distributing to street vendors and informal outlets. Note that the densely populated former African townships surrounding Durban fell, for the most part, into ABC region 47 although it seems that some of these 'township' areas (notably those served by Mr. Zondi), fell into area 48. The distributors serving these urban township areas – these being the distribution businesses of Mr Zondi and Mr Mbatha - are also included in the list of 'country distributors'. IN also engaged in some direct distribution into these areas.

¹³ ABC is the Audit Bureau of Circulation which audits newspaper sales. In performing its audit function it divides the country up into a number of regions in which circulation is measured.

- [12] Discussions were held during the course of 2000 between MM and IN concerning the renewal of the service agreement. However, they failed to reach agreement on the conclusion of a new contract.¹⁴
- [13] On 19 November 2000 MM entered into a service agreement with the Natal Witness Printing and Publishing Company (Pty) Ltd ("NW"), a Pietermaritzburg based publisher, to publish and distribute *Ilanga*.¹⁵ NW, which was founded in 1846, is a 50/50 joint venture between Media 24, which is a subsidiary of Naspers, and a family shareholding, which is brought together through a company called Lexshell (Pty) Ltd.¹⁶ NW's flagship title is the *Natal Witness* newspaper.¹⁷
- [14] The material terms of the agreement between MM and NW stipulate that:
- [14.1] the agreement would commence on 1 April 2002;
- [14.2] MM's responsibilities would include the format of the newspaper, the appointment and control of editorial staff and content;
- [14.3] NW would be responsible for printing, advertising and distribution;
- [14.4] the fees payable to NW would be calculated as an agreed percentage of pre-tax profits of MM in relation to the latter's newspaper business during any annual period;
- [14.5] during the currency of the agreement neither party would publish or in any other way control or have an interest in any other newspaper distributed in KZN which might be seen to compete with one of the newspapers listed in the agreement without written approval from the other party. The listed newspapers included *Ilanga*
- [15] At the time of the conclusion of the service agreement NW did not have sufficient capacity to print *Ilanga*. Thus it had to incur capital expenditure in the

¹⁴ IN wanted the agreement to be renewed on the same terms but this was rejected by MM which viewed the terms of this agreement as excessively onerous.

¹⁵ Memorandum of agreement, joint bundle page 43 2 43.

¹⁶ Transcript p282

¹⁷ *Ibid*

amount of R32 million for the purchase and installation of a new printing press, an investment which increased NW's printing capacity some ten-fold.

- [16] NW, like IN, operated its own distribution division. However in much the same way that IN's direct distribution service was centred on Durban, NW's core direct distribution area centred on Pietermaritzburg. It appears that NW relied on IN's network of contracted country distributors to distribute its titles in their respective areas of operation. Mr Delpoit testified that, on being approached to distribute NW's titles, he had sought permission of IN because this was required by his contract with IN:

So, in the real sense of the word, yes, we are independent contractors. We are not Independent Newspaper contractors. We are independent contractors. We've got different clauses in all contracts and people are fully aware of it. If my thoughts don't let go of me, it's 95/96 Natal Witness have contacted us via the Caxton Group, which were doing the local papers, or the Penrose Group at that time, and asked us if we can't look in distributing Witness for them in the area. Obviously it's a small number of papers we are talking about. So they requested us.

So, we went to Independent and asked, being basically our biggest contractor at that time, the Independent Group, obviously being from KZN, they had a clause in their contracts that we had to get permission from them. Basically they came to us, being fully aware that we are doing the Johannesburg papers in KZN. Now we are approached by a KZN company to do KZN papers. We approach Independent, which didn't have a problem, because obviously there were also some scale economies for them involved. So they came through¹⁸

- [17] At the time of concluding the new service agreement with NW, MM did not inform IN that it would not be renewing their agreement. In fact it only communicated its decision not to renew their service agreement to IN in a letter dated 8 October 2001, that is, some eleven months after concluding the new agreement with NW and six months before the expiry of the service agreement

¹⁸ Transcript pp 65-6

with IN which was due to terminate on 31 March 2002.¹⁹ Both MM and NW were intent on ensuring – and understandably so – that IN should not get wind, at too early a stage, of the new agreement. MM was anxious to ensure that IN's service levels did not deteriorate in the remaining period of the agreement.²⁰ NW did not want knowledge of its massive investment in new printing capacity brought to the attention of its competitors before it was ready to deploy these assets.²¹

[18] Once IN had been informed by MM that their service agreement was not to be extended, a series of transitional arrangements was agreed upon between them. A task team comprising senior employees of both companies was formed to oversee the transition of the functions in question from IN to NW. The first meeting of the task team was on 15 November 2001. At that meeting, Mr Christianson, an MM executive member, requested certain information from IN on behalf of MM. This information included:

[18.1] Guide date statistics for the previous 12 months and records going forward to 31 March 2002;

[18.2] A listing of all Agents, giving physical and postal addresses, telephone, and fax numbers; and

[18.3] Details of commissions paid both to the retail agents and contractors.

[19] It appears that IN remained intent upon salvaging some of the lucrative distribution business that it was set to lose as a result of the termination of the non-renewal of its agreement with MM. Accordingly at the meeting of 15 November 2001 IN raised with MM the possibility of future co-operation on distribution. IN subsequently made an offer to MM to provide a distribution service in respect of ABC regions 47 and 48 (which cover the greater Durban

¹⁹ Letter by Mr Konigkramer to Mr King, dated 8 October 2001, joint bundle page 44

²⁰ See page 313 of the transcript and page 43 2.9 of the joint bundle.

²¹ See page 362 line 4-23 – page 363 line 1-7 of the transcript, 26 July 2006.

Metropolitan area including the former African townships)²² This offer was ultimately rejected by MM on 24 January 2002.²³

- [20] On 29 November 2001 IN informed MM that it had rejected its request to provide the information listed above. IN claimed that it was acting on legal advice to the effect that it was not obliged to provide MM with all the information that it had requested. IN proposed what it referred to as an “amicable conclusion” which would enable it to share information on circulation history as well as a list of agents’ names and addresses but only on condition that IN and MM concluded a suitable distribution agreement – apparently referring to ABC districts 47 and 48 - in respect of *Ilanga*. IN stated that it was not, under any circumstances, prepared to give details of commissions paid to retail agents and contractors and it was not prepared to give any of the advertising information other than a list of advertisers that had advertised in *Ilanga* over the past twelve months.
- [21] IN proceeded to instruct its staff to ensure that all material relating to advertising and promotions of *Ilanga* was securely stored away since it was proprietary information.²⁴ The staff was expected to sign the instructions as a gesture of acceptance.
- [22] In its letter dated 8 February 2002 IN made it clear to MM that no information would be forthcoming since it had turned down IN’s offer to distribute *Ilanga* in areas 47 and 48.²⁵
- [23] When it became clear that the information requested would not be forthcoming, MM responded by initiating arbitration proceedings on 11 February 2002. The arbitration took place in the middle of April and the arbitration award was delivered on 30 April 2002 and was in favour of MM.²⁶ IN partially complied with the arbitration award by furnishing some of the information that had been

²² Letter from Mr Maclaine to Mr Christianson dated 27 November 2001, joint bundle pages 59.1-59.2

²³ Letter from Mr King to Mr Konigkramer dated 8 February 2002, joint bundle page 79.

²⁴ See letter from Mr Taylor to Ms De Klerk dated 3 December 2001, joint bundle page 66.

²⁵ Letter from Mr King to Mr Konigkramer dated 8 February 2002 (wrongly dated 2001), joint bundle page 79.

²⁶ The arbitration award is on page 162 of the joint bundle.

requested. Subsequent correspondence between IN and MM resulted in further information being provided.²⁷

[24] After expiry of the service agreement with MM, IN launched its own publication called *Isolezwe* that was intended to be a direct competitor to *Ilanga*. The initial intention was for *Isolezwe* to be launched on the 1st April 2002, the date from which respondent would no longer be publishing or distributing *Ilanga*. However the launch was ultimately delayed by one week.

[25] Recall that the agreements in force between IN and the country distributors provided that the latter required IN's permission to distribute non-IN publications. This is illustrated in JC Delport's contract with the respondent in which it is stated that:

*The Wholesaler shall not be entitled, within the Territory to distribute any publications other than those delivered to it by Natal Newspapers in terms hereof, without Natal Newspapers prior written consent which consent shall not be unreasonably withheld in respect of publications which do not compete with those distributed by Natal Newspapers.*²⁸

[26] In October 2001 IN held a meeting with the country distributors. The meeting was chaired by Mr Lorne MacLaine, IN's Circulation Director. He informed the country distributors that from the beginning of April 2002 IN would no longer be distributing *Ilanga*. He also told them that the IN was considering launching its own isiZulu language title in direct competition with *Ilanga*. A second meeting was held with the country distributors in January 2002 at which Mr. MacLaine confirmed that IN was indeed to launch its own isiZulu language title, to be named *Isolezwe*, at the beginning of April 2002. The intended launch was timed to coincide with the termination date of the contract between IN and MM. Mr. MacLaine also informed the country distributors that distributors of *Isolezwe* would not be permitted to continue distributing *Ilanga*.

[27] On 5 March 2002 IN wrote letters to the country distributors confirming its requirement that no distributor under contract to IN was permitted to provide

²⁷ There is a series of letters on pages 169, 170, 175, 176, 177, 178, and 179 of the joint bundle.

²⁸ Agreement between Natal Newspapers and JC Delport Distributors CC, Exhibit 2 p1

distribution services to *Ilanga*. It also advised the country distributors that it would only be launching *Isolezwe* in the second week of April. It tendered a cheque to each of the distributors in lieu of distribution fees lost in respect of this week. The cheques were of differing amounts determined largely by the proportion of each distributors' income earned from the distribution of *Ilanga* and that would be forfeited as a result of the exclusivity agreement. The country distributors were asked to accept the cheques together with the terms and conditions specified in the letter. They were requested to sign the letter and return it to the respondent.

- [28] The clause in the letter of 5 March 2002 which prohibited the country distributors from distributing a 'direct competitor' of *Isolezwe* read:

"No Independent Newspaper's contractor will be permitted to provide any services for a direct competitor of Isolezwe after 1 April, 2002.

No Independent Newspapers' contractor may launch, sponsor, underwrite or assist any contractor distributing for a competitor of Isolezwe after 1st April 2002. (This exclusion is to discourage any contractor from considering setting-up a parallel distribution network to be operated by a friend or a family member)." (sic)

- [29] This clause was directed primarily at *Ilanga*. In fact the country distributors continued to distribute other titles not published by IN and which are in competition with some of its other titles. For example, Mr Delport and other distributors distributed *The Witness* and *The Mercury*, which are direct competitors.²⁹

Submission of complaint

- [30] On 13 February 2003 MM filed its first complaint with the Commission. This complaint was based on IN's refusal to furnish certain information to MM. The Commission declined to prosecute this complaint and issued a notice of 'non-referral' in its notice dated 13 May 2003.

²⁹ See pages 717, 783, 784 and 785 of the Transcript

[31] Upon receiving the non-referral notice from the Commission, MM wrote to the Commission alleging further anti-competitive behaviour. The Commission advised MM to file a fresh CC1 complaint with the Commission. MM then filed its second complaint on 24 July 2003. The new complaint incorporated both of what have come to be referred to as the information complaint and the exclusivity complaint. The Commission again non-referred the matter in its notice dated 25 May 2004.

[32] MM then referred the complaint to the Tribunal on 25 June 2004.

The complaint

[33] The complainant's case is based on two causes of action. The first complaint was based on the refusal by IN to furnish certain information to MM during the period December 2001 to April 2002. This is what is referred to as "the information complaint". The second complaint is based on IN's refusal to permit the country distributors to distribute a direct competitor of *Isolezwe*, effectively *Ilanga*. This is what is referred to as "the exclusivity complaint".

[34] MM contended that the exclusivity clauses constitute a prohibited restrictive vertical practice as contemplated by section 5(1) of the Act, in that it is an agreement between parties in a vertical relationship that has the effect of substantially preventing or lessening competition in a market. Section 5(1) of the Act states that:

An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive gain resulting from that agreement outweighs that effect.

[35] MM further contended that the conduct was a prohibited abuse of dominance as contemplated by section 8(d)(i) of the Act. Section 8(d)(i) states that:

It is prohibited for a dominant firm to engage in the following exclusionary act. ... 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.

- [36] With regards to the information complaint MM alleged that the refusal by IN to furnish it with certain information amounted to an abuse of dominance by a dominant firm and is prohibited by section 8(c) of the Act which reads:

It is prohibited for a dominant firm to ... engage in an exclusionary act, other than an act listed in section 8(d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain.

- [37] An 'exclusionary act' is defined in Section 1(1)(x) of the Act which reads that:

'exclusionary act' means an act that impedes or prevents a firm entering into, or expanding within a market.

The relief sought

- [38] MM seeks an order declaring the exclusive terms in the agreement between IN and independent distributors to be void, and to be declared a prohibited practice in terms of the Act for the purposes of section 65 of the Act. Secondly, MM seeks an order declaring IN's refusal to furnish certain information a prohibited practice in terms of the Act for purposes of section 65 of the Act. In addition to these orders MM is asking for an order as to costs

- [39] Section 65 of the Act provides that a party who has suffered damages arising from conduct prohibited in terms of the Act can only commence action for damages in the civil court if the Tribunal has declared the conduct to constitute an infringement of the Act. If the party commences civil action for damages based on a breach of the Act, the civil courts can refer the matter to the Tribunal to determine if there was in fact a breach of the Act. It seems the complainant intends to institute civil action for damages and so has asked the Tribunal to declare the above conduct a prohibited practice in terms of the Act.

Competition Analysis

- [40] It is as well to recount, even at the risk of some repetition, the essential facts and allegations.
- [41] This is a complaint brought by the publisher of a single newspaper title, namely, Mandla Matla (MM), the owner of *Ilanga*, an isiZulu language newspaper, the vast bulk of whose large market is in the province of Kwazulu Natal (KZN). MM owns none of the assets required to print and distribute a mass circulation newspaper and so it is obliged to enter into a contract with a service provider possessed of the requisite assets and skills
- [42] The complaint is directed at the alleged conduct of Independent Newspapers (IN), a major national newspaper group, which owns a number of newspaper titles prominent in the province of KZN (and in the rest of the country) but none, it appears, that, at the time of the filing of the complaint, competed head-to-head with *Ilanga*. IN – or rather its various predecessors in title – had previously owned the *Ilanga* title which it sold to MM in 1987. At the time of the sale MM and IN concluded an agreement in which IN retained contractual responsibility for the printing and distribution of *Ilanga*. Pertinently, the terms of this agreement prevented IN from publishing another isiZulu language newspaper.
- [43] The complaint originates in MM's decision to move the highly lucrative contract for the printing and distribution of *Ilanga* from IN to the Natal Witness (NW) group. NW is also a significant publishing group based in KZN (it is, in fact, jointly controlled by Media 24, one of the country's largest publishing groups). NW produces a major newspaper title (the *Natal Witness*) circulating in KZN, a title which competes, to a certain extent, with an IN title (the *Mercury*), although it too does not own a title that competes directly with *Ilanga*
- [44] Because MM's decision to move the contract to print and distribute *Ilanga* from IN to NW released IN from the contractual restraint that prevented it from publishing a newspaper in the same market segment as *Ilanga*, a veritable windstorm of competition was unleashed in the KZN newspaper market with the launch, immediately upon termination of the printing and distribution contract, of IN's isiZulu language title, *Isolezwe*

[45] A mere five years later, the upshot of this outbreak of competition is a market segment – that is the market segment for isiZulu language newspapers – in which IN's new title, *Isolezwe*, is the largest participant, and in which the venerable 100 year old *Ilanga*, though still a very significant presence, is the smaller of the two newspapers competing for the custom of isiZulu language newspaper readers. In the period January to June 2002, *Ilanga* had a weekly circulation of 191 634 and a market share of 58%, whereas *Isolezwe* had a weekly circulation of 137 375 and a market share of 42%. In the period July to December 2005 *Ilanga* had a weekly circulation of 221 960 and a market share of 34%. *Isolezwe* had a weekly circulation of 431 160 and a market share of 66%.³⁰ *Ilanga* was published only on Monday and Thursday whereas *Isolezwe* was published from Monday to Friday. Note that this means that although *Isolezwe*'s weekly sales volumes are significantly larger than *Ilanga*'s, the latter's daily average sales are still quite significantly higher than those of their rival.

[46] MM contends that IN could not have achieved this without the expedient of denying *Ilanga*, or, more accurately, NW, *Ilanga*'s newly contracted printer and distributor, access to the market for the distribution of newspapers in key areas of the province. MM alleges that this foreclosure of the distribution market was achieved, firstly, by a contract entered into between IN and several independent distributors which forbade the group of distributors from distributing *Ilanga* on pain of forgoing the right to distribute IN titles (henceforth, the 'exclusivity complaint') and, secondly, in denying MM, or, more accurately, NW, access to certain information that would have enabled NW to establish its own distribution network (henceforth, the 'information complaint').³¹ In the words of MM's counsel:

The complainant's case is that the respondent abused its market dominance with the purpose of inflicting harm on the complainant and

³⁰ See pleadings bundle page 59 where these figures are extracted from Audit Bureau of Circulations of Southern Africa (ABC).

³¹ We stress that contractual and operational responsibility for distributing *Ilanga* lay with NW and not with MM. The access to the independent distributors and/or the information that is requested would effectively go to NW rather than MM. As elaborated below, the evidence suggests that this clearly accounts for some of IN's resistance to the demands for access and information.

*in order to ease the process of growing the respondent's new product, Isolezwe.*³²

And again:

*'Although the conduct complained of has been, and continues to be, identified and analysed as two distinct types of conduct, both were directed to and had the same impact, i.e. to substantially prejudice the complainant in its efforts to distribute Ilanga.'*³³

- [47] Note the intimate connection between the exclusivity complaint and the information complaint. In the words of MM's counsel:

Moreover, and as will be seen, each type of conduct was as effectively prejudicial as it turned out to be because of the other conduct; that is to say, if there had been no exclusivity imposed on the distributors the information would not have been needed as badly as it was and vice versa. There is accordingly some artificiality in analysing the conduct separately, and this must be borne in mind in what follows.

*With regard to the information complaint, had it not been for the respondent's complete dominance of the relevant distribution market the information would not have been so important to the complainant (it could have accessed the distribution market without it) and there would not have been any appreciable value to the respondent in denying information to the complainant. That is what makes the information complaint the proper subject of a competition complaint.*³⁴

- [48] In fact, as already noted, the complaint first surfaced before the Commission as an information complaint in its entirety. When the Commission declined to prosecute this complaint, a second complaint, the exclusivity complaint, was filed. When this too was 'non-referred' by the Commission, MM elected to bring both complaints directly to the Tribunal and it is now before us as a complaint with two separate but, as is conceded by the complainant, intimately related

³² Complainant's Heads of Argument para 2

³³ *ibid* para 4

³⁴ *ibid* paras 4 and 5 our emphasis

causes of action, namely, the exclusive dealing element and the denial of information element, with the former conduct, the exclusivity complaint, clearly in the foreground.

[49] We agree with IN's counsel that these are properly considered as alternative causes of action. We will follow the path taken in both parties' heads of argument and focus our competition analysis on the exclusivity complaint – which is alleged to contravene Sections 5(1) and 8(d)(i) of the Act - and then consider the information complaint (which is alleged to contravene Section 8(c)), to the extent that any additional issues are raised by separate consideration of this latter cause of action.

[50] IN's counsel has sought to make something of the intimate connection between the two causes of action and of its transformation from a complaint initially based on the alleged withholding of information, to one in which the exclusivity complaint is clearly fore-grounded. It is suggested that there is some 'clutching at straws' in the belated discovery, in the 'after-thought' that brought the exclusivity complaint to centre stage. MM's counsel is, of course, quite correct in asserting that, even if the filing of the exclusivity complaint was belated, even if it only occurred to the complainant after the Commission's rejection of the information complaint, this has no bearing on the legitimacy of the exclusivity complaint. It is properly before us and is entitled to be examined and decided on its own merits.

[51] And yet there *is* an inference to be drawn from the sequencing of the complaints. IN and NW are not only publishers and printers of newspaper titles, some of which are in direct, albeit muted, competition. They are also established *distributors* of newspapers and other printed matter. We have not been told much about their general distribution businesses although we do know that their respective distribution strengths are IN's network in the greater Durban area and NW's distribution network in the greater Pietermaritzburg area through which they distribute, inter alia, their notionally competing flagship titles, respectively the IN's *Mercury* and the NW's *Witness*³⁵. We also know of IN – and we presume the same is true of NW – that the distribution business is

³⁵ We use '*notionally competing*' advisedly because although the *Witness* has a limited presence in Durban and the *Mercury* in Pietermaritzburg and both have some presence in greater KZN beyond both cities, it is clear that in their respective core metropolitan markets competition between the titles remains limited at best.

a discreet profit centre, the services of which are available for hire to newspaper and magazine titles outside of IN and NW stables.³⁶

[52] There is evidence to suggest that this initially surfaced as an *information* complaint because NW, which, with the winning of the contract to distribute *Ilanga* with its large Durban readership base, had gained the material basis for spreading the reach of its *distribution* business into Durban, the very heartland of IN's distribution business. Moreover, this would not only have enabled the NW's distribution business to compete with IN's distribution business in Durban, but it would have enabled NW's *Witness* title to compete more effectively in Durban with IN's *Mercury*. Certainly we glean from the evidence of Mr. Graham King, at the time the CEO of IN's Natal operation, to the arbitration hearing into the withholding of information that this is what IN apprehended and it is a perfectly reasonable apprehension.³⁷

[53] Now as a body charged with defending and promoting competitive market structures, we undoubtedly welcome competition between what had been two geographically separated distribution businesses, just as we welcome the prospect of enhanced competition between the *Mercury* and the *Witness*. Indeed in our view one of several manifestly positive outcomes of MM's decision to sever ties with IN in favour of a contract with NW is that it has ultimately compelled NW to establish a distribution network in Durban. But it is quite one thing to welcome competition and another to agree that competition must be nurtured by a business – in this case IN – handing over critical competitive information developed over many years and with much investment of time and money to a rival distribution business and the owner of a major competing newspaper title.³⁸ There is indeed a manifestly *anti-competitive* claim that is advanced here – why would any business invest in a distribution network, particularly one that was making these distribution services available

³⁶ Transcript page 681

³⁷ See arbitration transcript at page 281 of the record of these proceedings:

Adv. Pammenter: Part of your concern about giving that information is because ...that these agents don't only sell the *Ilanga*, they sell other newspapers.

Mr. King: Correct

³⁸ See arbitration transcript at pp 281-7 of the record of these proceedings. King's insistence that his group had over the very many years of its existence built up a distribution system, in which information was a critical competitive asset, one that to some extent was of particular pertinence to the circulation of a particular publication but which was also a critical component of the competitive advantage underpinning a successful newspaper distribution in general, is, despite the apparent scepticism of the arbitrator, perfectly persuasive

for sale in the market, if it reasonably apprehended that it would be obliged to hand over the critical asset that is information to a rival supplier of distribution services? Such claims are not unknown in competition law but to be successfully prosecuted it would have to be established that the distribution asset in question was an '*essential facility*' defined in our Act as '*an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers*'.³⁹ This is a considerable hurdle, one which was clearly contemplated by the complainant but which it ultimately elected to steer well clear of.⁴⁰

- [54] In short IN appears to have apprehended that NW intended using its newly acquired distribution contract with MM as a beachhead for the easy establishment of a rival distribution network in Durban. It is a reasonable apprehension and one rendered all the more plausible by the initial foregrounding of the information complaint rather than the exclusivity complaint. That is, it is reasonable to infer that NW was not so much interested in gaining access to IN's Durban distribution network as it was in easing the establishment of its own Durban distribution network by gaining access to IN's distribution information through the expedient of hanging on to the coattails of the MM complaint. We infer further that it was when IN (reasonably, in our view, despite the finding of the arbitrator) refused to hand over this critical competitive information, that it occurred to NW and MM that, absent the information, NW's ability to effectively distribute *Ilanga* in the Durban African townships and the country areas of KZN – the areas operated by the country distributors – was in jeopardy, and hence that it required the next best thing, viz, access to IN's established network of distributors. It is, in fact, precisely by withholding the information and then denying access to the distributors themselves that IN forced NW to set up its own competing distribution network, in our view one of the most positive outcomes of this entire saga.

³⁹ Competition Act Section 1(1)(viii)

⁴⁰ Note the European case of *Oscar Bronner* where a fledgling Austrian title attempted to gain access to the *national* distribution network of a rival newspaper group by invoking the essential facilities doctrine. Suffice to say that in this instance the complainant's claims were roundly and, in our view, persuasively rejected by the European courts. *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and Others* (Case C-7/97)

[55] But let us return to our narrative in order to identify the competition theory underlying the complaint.

[56] In the passages from the complainant's heads of argument cited above there is one clear indication of the competition theory posited when counsel argues that it is '*respondent's complete dominance of the relevant distribution market*' that made the acquisition of the information in dispute so essential. The implicit theory here is that through its '*complete dominance of the relevant distribution market*' the respondent was able to leverage market power from the *distribution market*, which it allegedly dominated, in order either to extend or acquire market power in the *newspaper market* by denying rival newspapers access to – 'foreclosing' in competition lexicon – all available distribution facilities.

[57] Now it is clear that while IN (as with NW) actually *owned* a significant distribution business, the use of this internal IN facility and these assets is not in contention here.⁴¹ In contention are the services of a group of independent distributors who, though contracted to IN, had, in addition to their task as distributors of IN titles, regularly distributed newspapers and magazines that did not emanate from IN's stable of titles, including *Ilanga* when its distribution was the responsibility of IN. Recall that their contracts with IN incorporated a 'moonlighting' clause which required the distributors to seek permission of IN were they to distribute a non-IN publication. It appears that this permission had, hitherto, been regularly given. Hence certain of these distributors were distributing both the *Witness* and the *Mercury* as well as other competing titles⁴²

[58] The independent distributors – who IN refers to as 'country distributors' – included established distributors serving the rural areas and small towns of

⁴¹ Were it to be placed in contention, the complainant would have been obliged to rely on the difficult essential facilities doctrine. This was effectively conceded by MM's counsel. See transcript p950 at lines 13-23

⁴² Mr Le Roux, the Managing Director of NW, testified:

"I'd met, on a couple of occasions, with the management of Independent in Durban and there certainly was a mindset that actual distribution of product is not what is the core of your business. The core of your business is producing newspapers and producing the content that goes with those newspapers, and there had been discussions that perhaps we should look at ways of working together to try and reduce the costs of distribution to both parties. And with those kind of discussions behind and we were travelling, and using Delpont who was carrying both the Mercury and the Witness on the same vehicle every day and had been doing that for several years" (Transcript p287)

KZN as well as two distributors responsible for large swathes of the vast, formerly African townships of Durban. These latter were obviously particularly important conduits for the distribution of an isiZulu language newspaper. Certain of these country distributors were also, it appears, responsible for servicing the street vending networks in Durban itself.

- [59] The evidence suggests that the distribution task taken on by IN itself in Durban's city and suburbs (or by NW in the city and suburban areas of Pietermaritzburg) is distinguished from the task undertaken by the 'country distributors' by the fact that the former essentially involves distribution to well-established, stable retail outlets. The task of the country distributors, on the other hand, involves a significant degree of distribution through many small, often informal or semi-formal, retail outlets.⁴³ This appears to involve a degree of local knowledge regarding, for example, actual knowledge of the retail outlets whose ownership and location may change quite frequently and their reliability from a payment point of view.
- [60] A question that immediately arises is *'how was IN able to persuade the country distributors to deal exclusively with it and thereby potentially forego additional income earning opportunities by taking on the distribution of other, even directly competing publications?'*

⁴³ Of course in their areas of operation the country distributors also distributed through many of the same formal outlets – the large department and convenience stores, cafes, garage forecourt stores, etc – served by IN and NW in their city and suburban bases. This is why there is a substantive distinction between two types of retail outlets serviced by the country distributors: on the one hand, those retail outlets to whom the country distributors distributed but in respect of which the 'publishing' function (this seems to encompass the business of deciding on the numbers of newspapers to be left at the retail outlet, the payment arrangements, etc) was carried out by IN itself; and, on the other hand, the smaller, often less formal outlets in respect of whom the country distributors assumed the 'publishing' function. That is, in respect of these latter, the number of newspapers that the country distributors took from IN was based on their own knowledge of what their retail outlets could sell. The country distributors took a 'bulk' supply from IN and broke down this bulk based upon their own 'publishing' data which they were responsible for generating. Hence this is referred to as the 'bulk distribution' business. It appears that IN did not have detailed knowledge of this 'break-bulk' publishing data, because, it seems, the 'publishing' task in respect of their bulk distribution was truly entrusted to their experienced country distributors. Hence when, following the arbitration decision, the information in IN's possession was handed over to MM/NW, its utility to NW, for the purpose of building a new distribution network, was limited and thus necessitated a demand to get access to the bulk distributors themselves, the effective possessors of the information in question. Hence the exclusivity complaint assumed a first order importance with the information complaint substantially relegated to the background.

[61] The decision by many of those independent distributors who were prepared to forego income from the distribution of Ilanga was dictated by individual commercial considerations. In this case, at first blush the appropriate competitive response by NW or anyone else who desired to overcome the exclusive dealing element in the distribution contracts was simply to offer the distributors a premium over IN's offer. There is no evidence to suggest that NW attempted to gain access to the independent distributors by offering them a more attractive distribution contract than that on offer by IN

[62] MM's likely rejoinder to the above answer is: *'we cannot pay a premium large enough to compensate for the income that the distributors would forego by deserting IN because the distributors would lose the right to distribute the entire IN stable of publications in exchange for our single publication or much smaller stable of publications.'*

[63] Implicit in the latter answer is a second competition theory that differs subtly from the one sketched above, that is, from the theory that holds that dominance in the distribution market was leveraged into the newspaper market. This second theory holds implicitly that it is the IN group's dominance over the market for the purchase of newspaper and magazine distribution services, a dominance that must naturally derive from its dominance over the market for the sale of newspapers and magazines in the relevant geography, that is leveraged in order to achieve domination over the distribution market. This theory, though explicitly acknowledged, is never fully developed by MM although it has been placed on the table. There is also some evidence of its operation in practice. For example, Mr. Delport's articulated fear that by foregoing IN he would be sacrificing his 'seven day income' in exchange for something less attractive is suggestive of IN's power as a purchaser of distribution services and, by logical extension, its power in the market for the sale of newspapers and magazines.⁴⁴

⁴⁴Mr Delport justified his decision to remain with IN when he said *"Basically it was economical based. I had a team that had to be paid, drivers, I had an infrastructure that I needed to be financed and it basically comes down to that. Yes although I would like to go with Ilanga I have to go where money was at that stage and to supply my people and provide my people with jobs"* (See page 61 line 22- page 62 line 2 of the transcript). Mr Delport also stated that *"I think, as I said earlier, its economical decision that was taken at that point as a 7 day operation where you are stepping into a 2-day operation for many people and therefore it was basically economical to say we've got a 7-day income from Independent and should we go with Ilanga, we only go 2 days?"* (See page 94 line 11-15 of the transcript)

[64] However we should say at once that there are elements of this latter theory that are highly questionable. The theory that IN leveraged dominance from the newspaper publishing market into the distribution market posits that because the IN group of newspapers is allegedly dominant in respect of *all* newspaper sales in the province, it follows that it is the dominant purchaser of *all* newspaper distribution services in the province, and hence that it is able to exercise buyer power in the market for newspaper distribution services through its provincial domination of newspaper sales. However this fails to take account of the essential fact that newspaper distribution services are neither offered nor demanded on a province-wide basis. Hence the question of buyer power in a particular distribution area would have to be determined by the composition of newspaper sales in that area and cannot simply be inferred from sales at a provincial level.⁴⁵

[65] For example, if Mr. Zondi earns the lion's share of his income in his relatively confined, but densely populated, region from the distribution of *Ilanga* – and the evidence is that this is indeed overwhelmingly so⁴⁶ – then, in respect of this distribution area, the market power that adheres to the publisher *qua* purchaser of newspaper distribution services belonged to MM rather than IN, regardless of IN's superior market position in the province as a whole. Not to belabour the point, Mr. Zondi had relatively little to fear from exclusion by IN. In fact all that he had to fear was the prospect that *Isolezwe* may ultimately usurp the position of dominance enjoyed by *Ilanga* in his region. His behaviour bears out his dilemma which he attempted to resolve by hedging his bets, a strategic choice that involved no small degree of deceit: he accepted IN's terms and cashed the compensatory cheque tendered and then carried on clandestinely distributing *Ilanga*.⁴⁷

⁴⁵ This much is conceded by NW's managing director, Mr. Le Roux, in the following exchange with the Tribunal:

Chairperson: . . . But in the areas in which *Ilanga* was important and certainly 47 and 48 were clearly those, and I'm not sure, but I think the evidence is that even in Delport's area *Ilanga* was a big, big seller. In those areas, is the dominant paper not in fact *Ilanga*? Is this little Mandla Matla not really the dominant group in those areas, in the areas in which *Ilanga* is important? Because over the whole of Natal, yes, Independent Newspapers may be the biggest shot in town, but in Umlazi and Kwamashu they are not. It's *Ilanga* that's the important title.

Mr. Le Roux: Mr. Chairman, the way you are defining that, if you use just Umlazi and obviously KwaMashu, you are correct. (Transcript p355-6)

⁴⁶ Mr Zondi testified that the circulation of *Ilanga* contributed 85% of his income. See page 104 line 22 of the transcript.

⁴⁷ See page 115 line 3-23 of the transcript

[66] As for Delport, while we do not know precisely the division of his revenue as between *Ilanga* and the IN stable of publications,⁴⁸ it appears that he was rather more vulnerable to IN's power as a purchaser of distribution services, hence his stated anxiety about losing his 'seven day' source of revenue. Again one can reasonably hypothesise that his vast, relatively under-populated area of operation suggests a large number of small but heterogeneous customers and a relatively large investment in physical assets in order to operate it. Under these circumstances there is unlikely to be a single title large enough to amortise his investment and so he would be more likely to be in thrall to the group with the largest spread of titles and customers. Our point is that this theory of competition cannot be tested at the level of the province – it has rather to be tested in each contested distribution area.

[67] The two theories posited and outlined above are not mutually exclusive. That is to say it is entirely possible to construct a theory that is consistent with IN possessing market power in *both* the newspaper distribution market and the market for the publication of magazines and newspapers, where its dominance in Market A is leveraged to protect and extend its dominance in Market B *and* vice versa. Although there is little clarity on the definitions of the relevant markets, in particular the newspaper publishing market, it appears that MM does indeed contend that IN is dominant in both the newspaper distribution market and the newspaper publishing market. It appears, however, that the principal theory that is advanced by the complainant charges that the respondent has abused its dominance in the distribution market – a dominance that is represented by IN's ability to induce or compel the independent distributors to enter into exclusive dealing arrangements with it – in order to protect and extend the position of *Isolezwe* at the expense of *Ilanga*.⁴⁹ That is, dominance in distribution services is leveraged to achieve or extend market power in the newspaper market, implicitly in the market for isiZulu language newspapers. This theory clearly underpins the complainant's claim of a contravention by IN of Sections 5(1) and, particularly, Section 8(d)(i)

⁴⁸ Delport did testify stated that *Ilanga* did not constitute a majority of his income. He estimated that it contributed less than 15% of his income. Transcript page 94 line 20 – 95 line 7

⁴⁹ See complainant's heads of argument para 68: '*The conduct complained of was exerted in the distribution market, and it was felt by the complainant in that market*'. Strictly speaking it should rather read that the dominance leveraged by the respondent in the *distribution* market was felt by the complainant in the *newspaper* market

[68] The parties agree that in order to sustain a claim under Section 5(1), it must be established that:

[68.1] the parties are in a vertical relationship

[68.2] they have entered into an agreement

[68.3] the agreement has the effect of substantially preventing or lessening competition.

[69] If these three elements are established, the respondent is, in its defence, entitled to seek to establish the existence of pro-competitive gain flowing from that agreement sufficient to outweigh its anti-competitive consequences.

[70] Although expressed in terms slightly different from those used here, both parties concur with this characterization of the elements of Section 5(1).

[71] However, the parties' understanding of the elements of the Section 8, abuse of dominance complaints exhibits an important divergence in the interpretation of the Act.

[72] In respect of Section 8(d)(i), the MM's counsel argues that the essential elements that must be proved are

[72.1] that the respondent was a dominant firm within a relevant market; and

[72.2] that the exclusionary conduct was an act by the respondent requiring or inducing a supplier or customer to not deal with a competitor.

[73] If these elements are proved, avers MM's counsel, it is then open to IN to show that the anti-competitive effects of that act are outweighed by its technological, efficiency or other pro-competitive gain.⁵⁰

[74] In respect of Section 8(c) (the basis alleged for the information complaint), MM's counsel contends that the essential elements to be proved are

⁵⁰ Complainant's heads of argument para 37

[74.1] dominance; and

[74.2] that the refusal by the respondent to furnish to the complainant the relevant information had the effect of preventing the complainant and/or The Natal Witness from entering into or expanding within a market (i.e. it was an 'exclusionary act'); and

[74.3] that the anti-competitive effect of the act outweighs its technological, efficiency or other pro-competitive gain.⁵¹

[75] IN's counsel however submits that even if it were assumed that each of the elements listed above were proved *'they do not make out a case of "anti-competitive effect"'*.⁵² Relying on our decision in *South African Airways*⁵³, IN's counsel sets out *'the proper approach to this requirement'* in his replying heads of argument.⁵⁴

[76] The written submissions of MM's counsel avoids all mention of the necessity, or otherwise, to prove anti-competitive effect. However he has dealt with this issue in his closing oral submission where he, too, relies on *South African Airways* in support of his contention that Section 8 does *not* require a showing of 'anti-competitive effect'. He insists that once the existence of an 'exclusionary act' is established, anti-competitive consequences are *assumed* to flow from that act. He relies on the following passage of the *South African Airways* judgment:

What this excursion into the case law and commentary suggests is that there is respectable authority for the notion that exclusionary practices should not require evidence of actual competitive harm for a finding of abuse. The finding is still possible if there is evidence that the exclusionary practices, substantial or significant or expressed differently, have the potential to foreclose the market to competition. If it is substantial or significant, it may be inferred that it creates,

⁵¹ *ibid* para 38

⁵² Respondent's heads of argument para 44.

⁵³ *Competition Commission v SAA (Pty) Ltd* [2005] CPLR 303 (CT)

⁵⁴ Respondent's replying heads of argument paras. 26ff.

*enhances or preserves the market power or the dominant firm. If it does the latter, it will be assumed to have an anti-competitive effect.*⁵⁵

- [77] However the paragraph cited does not support MM's contention. This passage outlines what, in the words of IN's counsel already cited, is the 'proper approach' to measuring 'anti-competitive effect'. *South African Airways* holds that the anti-competitive effect of exclusionary conduct may be proven by evidence of 'actual competitive harm' or by evidence of market foreclosure. However, as the final sentence of the paragraph cited above confirms, all this is to the end of meeting the requirement to *prove* 'anti-competitive effect' – it cannot simply be assumed to flow from the existence of exclusionary conduct. This is put to rest by the following passage from *South African Airways* which is worth quoting at some length:

One approach is to say that if the act is exclusionary, it is deemed to have an anti-competitive effect. On this approach the only issue that remains to be decided is the balancing of the efficiency justification against this deemed anti-competitive effect.

The problem with this approach is that it can lead to the outlawing of conduct that has no anti-competitive effect. The definition of an exclusionary act is very broad indeed. Discussing not dissimilar language, Areeda and Hovenkamp, in their treatise have this to say:

*"In defining undesirable conduct, we are concerned mainly with exclusionary behaviour, that which prevents actual or potential rivals from competing or impairs their opportunities to do so effectively. But this term and the root idea are also too broad, for they embrace all competitive behaviour. All successful competitive moves tend to exclude, particularly in oligopoly markets".*⁵⁶

The same observation by the authors can be made in respect of our Act's definition of an exclusionary act. The term is not a useful filter for

⁵⁵ *Competition Commission v SAA(Pty)Ltd* Para cited at transcript p850 lines 1-10 our emphasis

⁵⁶ See Antitrust Law, Areeda and Hovenkamp Volume 3, paragraph 651b

determining whether conduct is competitive or anti-competitive; both can sensibly be included in the definition. If, however, we do not regard the notion of anti-competitive effect, referred to in both paragraphs (c) and (d), as inferentially linked to an exclusionary act, this danger can sensibly be averted. It means that the notion of what is anti-competitive is something different to an exclusionary act.

At a purely textual level they appear to be notionally different. If they were congruent notions, then the legislature need not have troubled itself with introducing the language anti-competitive effect into the paragraphs, but would instead have referred to exclusionary effects. We suggest that there is a difference between an exclusionary act as defined and the inference that it has an anti-competitive effect. Without some notion of what the anti-competitive effect is it would be impossible to perform the weighing with the efficiency justification that both (c) and (d) require. In order to perform a weighing of the anti-competitive effect on the one side of the scale to the efficiency gain we need to have some notion of its quantitative effect. But the definition of an exclusionary act is descriptive of a conduct's 'type', not its 'gravity or extent'. Thus by way of example the refusal to supply one customer with a de minimus market share and the refusal to supply a substantial number of customers, representing a large proportion of the rest of the market are both exclusionary acts in terms of d(ii), but they have very different competitive consequences.

*For this reason the Act requires a finding both in terms of paragraphs (c) and (d) that the complainant not only establishes that there has been an exclusionary act, but also that it has an anti-competitive effect*⁵⁷

- [78] We note that not all of the conduct described in Section 8 requires the showing of an 'anti-competitive effect'. Section 8 describes two 'per se' abuses. These are Section 8(a) which prohibits the charging of an 'excessive price', and Section 8(b) which prohibits a refusal to give a competitor access to an 'essential facility'. In respect of these two sections there is manifestly no

⁵⁷ SAA paras 107-111 our emphasis

requirement to prove an anti-competitive effect – as with Section 4(1)(b) (the prohibition of horizontal price fixing, market allocation and bid rigging), the offences described in 8(a) and 8(b) are presumed to embody anti-competitive consequences. We note however that the elements of each of these Section 8 *per se* offences – excessive price and essential facility – are defined in the Act and the hurdles that the complainant is required to cross in order to prove that the elements of the impugned conduct conform to those defined in the Act are considerable. However section 8(c) and 8(d) require that both the elements of the exclusionary act *and* its alleged anti-competitive effect are proved in order to undertake the balancing required by the pro-competitive defence that is permitted in respect of these exclusionary acts but which is not provided for in respect of the conduct described in Sections 8(a) and 8(b).

- [79] Notwithstanding MM's denial of the necessity to prove anti-competitive effect, it has made some attempt to show that there is indeed an anti-competitive effect resulting from the IN's alleged exclusionary conduct. We have examined the evidence for this and found it to be wanting and we will detail these efforts and explain the reasoning for our finding.
- [80] Anti-trust scholars, Gellhorn, Kovacic and Calkins, have distilled numerous decisions of US courts and scholarly writings into a three-part test for evaluating the reasonableness of exclusive dealing arrangements.⁵⁸ The first is the extent of market foreclosure. The second is the duration of exclusive agreements. The third is the height of entry barriers into the affected market.
- [81] The high water mark of MM's claim regarding the *extent* of foreclosure is that the information withheld and the exclusive dealing arrangements implicated 26% of *Ilanga's* market. We note that this figure represents 26% of the sales of *isiZulu language* newspapers of which *Ilanga*, immediately prior to the launch of *Isolezwe*, enjoyed a share of 100%.

The effect of the exclusive dealing was that the complainant was immediately excluded from accessing retail outlets to which 26% of its papers had been delivered; these were retailers that did not even appear on the IN's agents list that was supplied to the respondent a

⁵⁸ Ernest Gellhorn, William E. Kovacic, Stephen Calkins – *Antitrust Law and Economics in a Nutshell* (Thomson West)

*week after the arbitration award. That is a very substantial foreclosure*⁵⁹

- [82] If however the relevant newspaper market is broadened to include *all English language* newspapers available in KZN – and this would be consistent with MM's own contention - the proportion of the market implicated by the exclusive dealing arrangement (that is, the extent of the foreclosure) shrinks significantly.
- [83] However let us accept, for the sake of this argument, that the relevant market is indeed that for isiZulu language newspapers, an assumption which strongly favours MM's contention regarding the extent of foreclosure while, ironically, conflicting with its own contention regarding the actual relevant market for newspaper publishing.⁶⁰ While a foreclosure effective over 26% of a market would normally be grounds for concern, it is our view that this significantly exaggerates the reach of the foreclosure claimed here. It cannot be that the new distribution service which NW was in the process of establishing (and which, as we shall see below, was immediately operational) was ignorant of the whereabouts of *all* of the agents through whom this 26% of *Ilanga* sales was retailed. Indeed it is quite conceivable that the NW distributors had knowledge of access to retail agents who were not known to the IN distributors. Recall too that Mr. Zondi and Mr. Mbatha, despite having accepted the exclusive dealing arrangement required by IN and having cashed the compensatory cheques issued to them, continued distributing *Ilanga*, in their areas of operation.
- [84] In summary then even assuming – in MM's favour in this instance – that the relevant market is that for isiZulu language newspapers and hence that the share of the market from which *Ilanga* was allegedly excluded equates to the share of the total market that was foreclosed, there are strong reasons for

⁵⁹ Complainants heads of argument para 50

⁶⁰ MM requires a newspaper publishing market that is as *broad* as possible in order to support its contention that IN is dominant in that market and so support the theory that IN had leveraged a dominant position in the publishing market in order to achieve or extend dominance in the distribution market. If the newspaper publishing market is the market for all English and isiZulu language newspapers published or, even wider, sold in the province of KZN then it is possible that IN, with its extensive portfolio of titles, may emerge as dominant within the meaning of Section 7. However, if the relevant market for newspaper publishing is the market for isiZulu language newspapers (the empirical basis for the complainant's contention that 26% of the market was foreclosed), then at the time that the alleged anti-competitive conduct is said to have taken place, MM's title, *Ilanga*, was not merely dominant but was an out and out monopolist.

doubting that the actual foreclosure achieved was anything near as large as 26%.

[85] What of the *duration* of the foreclosure? NW's distribution manager, Ms. Naidoo, testified that sales of Ilanga started to stabilise as early as the first month after her network assumed responsibility for distribution, an outcome that she attributed to the hard work she and her team had put into setting up the network from the time – some two months before April 2002 – when it became clear that the information that NW/MM demanded was not going to be forthcoming, information, which, in any event, was made available immediately after the arbitrator's decision was handed down.⁶¹ Ms. Naidoo also conceded that sales started to steady up into the 90 000's after the first month. Mr Christianson stated that it took them three to four months to re-establish the street vending operations in the greater Durban area alone (excluding the areas for which Mr Mbatha and Mr Zondi were responsible).⁶² Mr Le Roux, NW's managing director, testified that the network was up and running a few months after arbitration.⁶³ The duration of the foreclosure – such as it is – can properly be described as minimal.

[86] And what of the extent of *barriers to entry*? The rapidity with which NW managed to get its own distribution facility up and running is, in itself, thoroughly persuasive evidence of very low barriers to entry indeed. If more is needed then surely the evidence and assessment of the distributors themselves disposes of any possible doubt on this score.

Adv. Stewart: Now we know that when Isolezwe was launched in April 2002 you were not allowed by Independent Newspapers to distribute Ilanga. In those circumstances, as you see it, what could the Natal Witness or Mandla Matla do in your area to distribute Ilanga? What options were open to them?

Mr. Delport: In my specific area honestly is to get a different distributor or start-up distributor to do deliveries in our area.

⁶¹ See transcript page 389 line 20; page 396 line 13-24; and page 413-414. Note that because IN did not possess the detailed information that they required it did not, when actually provided, prove to be as useful as MW had hoped.

⁶² See transcript page 192 line 9-16.

⁶³ See transcript page 349-350.

Adv. Stewart: And is that something... or let me put it like this. What would need to be done to do that, to start up a new distributor? What are the challenges?

Mr. Delport: Depending on what you are going to distribute, it's basically a vehicle. If it's larger, you are going to need some office space and personnel to do the distribution and create the infrastructure.⁶⁴

[87] And further:

Adv. McNally: And would you accept as I think you have accepted, that's its not particularly difficult to set up a an alternative distributor provided its still economical to do so:

Mr. Delport: Well to be quite honest, we experienced a lot where people are coming in to compete in our market. So it is fairly, I must admit on that point to say yes, it is possible for them to set up a...

[88] Mr. Zondi effectively concurs with Delport's assessment:

Adv. McNally: Mr. Zondi just so I understand the role that play as a distributor. Is it correct that you know the area that you work in?

Mr. Zondi: Very well.

Adv. McNally: And you for that reason, get to know the retail outlets that you can place a newspaper at?

Mr. Zondi: Yes

Adv. McNally: And what else do you have that makes you a useful distributor, apart from your knowledge of the area, what do you need to be a distributor?

Mr. Zondi: It's hard work, that's all.

Adv. McNally: So anyone who knows the area and is prepared to work hard, they can do the job?

Mr. Zondi: Exactly.⁶⁵

⁶⁴ Transcript page 57

⁶⁵ Transcript pp 113-4 Zondi later clarified that his business comprised 4 drivers, 4 assistant drivers, 6 street vendors, one administrator and 4 vehicles (Transcript page 124)

- [89] Mr. Maclaine testified that just prior to the launch of *Isolezwe* IN was obliged to terminate the services of its principal distribution contractor in KwaMashu⁶⁶ IN itself took over the distribution in this area and was able to get the service up and running within 2 weeks⁶⁷
- [90] However we would go further than this and say that the establishment of NW's distribution facility was so rapid that it constitutes evidence of the operation of *supply-side substitutability*. We do not know the precise character and composition of NW's new distribution facility in Durban itself or in the areas of IN's country distributors⁶⁸. However, to set up an effective distribution network within, at most, a few months supports the contention – advanced by IN's expert witness – that the requisite skills and assets needed for the distribution of newspapers in the areas in question *already existed in the market*. They were not deployed for purpose of distributing newspapers for the simple reason that IN gave its country distributors exclusivity within their distribution areas and that, until the launch of *Isolezwe*, it also gave them permission to distribute non-IN titles. Hence there was no effective demand for the services of additional newspaper distribution services. But once, with the launch of *Isolezwe*, this situation no longer pertained, the assets required for establishing an alternative distribution network were easily found, either from within NW's existing portfolio of skills and assets or from others who were performing closely related functions. The evidence is that in one of the most important areas affected by IN's exclusive dealing requirement, namely the large area of Mr. Delport, NW's new distributor of *Ilanga* and presumably other NW titles is Baldwin's Distributors, an established distributor of pamphlets and other advertising material in the area in question.⁶⁹ The evidence is that this service was operational from *Ilanga's* first issue in April.⁷⁰
- [91] It is our finding then that MM has clearly failed to establish anti-competitive effect. IN has nevertheless attempted to pre-empt a finding that its conduct is anti-competitive by asserting a pro-competitive defence. Mr. Maclaine avers

⁶⁶ This does not refer to Mr. Zondi who handled part, but not all, of KwaMashu

⁶⁷ Transcript page 582.

⁶⁸ In respect of Mr. Zondi's distribution area, it seems that IN is distributing *Isolezwe* through its internal distribution division. Zondi is distributing *Ilanga* and all other NW publications and, he testifies, earning more than he would have earned had he elected to accept IN's demands to distribute its publications exclusively. (Transcript pages 122-3)

⁶⁹ Transcript page 93

⁷⁰ Transcript Page 80

that its insistence that the distributors of *Isolezwe* not also distribute *Ilanga* was designed to ensure that they focused their energies and resources on getting this new title into the market.

- [92] MM has identified particular and general inconsistencies in this argument. In particular it points out that, despite the stated importance of exclusive focus by its distributors, IN attempted to secure a distribution contract for *Ilanga* in areas 47 and 48 even when it had already decided to launch *Isolezwe*. Mr. Maclaine's attempts to cast this as the efforts of the distribution center to salvage part of what had been a valuable contract, an attempt whose success he partly feared because of the difficulties that it portended for the distribution function, are not entirely persuasive.
- [93] On the other hand, we note that NW had indicated that it had no intention of using one of IN's country distributors, namely Mr. Smith who was responsible for a large swathe of northern Natal '*because Mr. Smith is a former employee of Independent Newspapers and was regarded by us as being too close to Independent Newspapers*'.⁷¹ Clearly then there were circumstances in which NW itself believed that joint distribution would compromise the competitiveness of its titles which is precisely the basis upon which IN demanded an exclusive dealing arrangement with its distributors.
- [94] In general, MM insists that joint distribution of competing titles is a common phenomenon in the newspaper distribution market. While this is true, we are persuaded that this is because the market is characterized by competition between mature titles, several of them more than a century old. In any event, the fact that joint distribution occurs frequently does not, in and of itself, establish that it is compatible with robust competition – that is, competition in the newspaper market may well be compromised by the practice of joint distribution of competing titles. But more important we are persuaded by the argument that the launch of a new title against a direct competitor of some 100 years standing demands extra-ordinary measures – that joint distribution is the norm in the mature segments of the market does not constitute a justification for extending it to the extra-ordinary event that is the launch of a new title. This was conceded by Mr. Le Roux, the managing director of NW:

⁷¹ See Witness Statement of Mr. Le Roux cited in transcript at page 353

Chairperson: ... Would it not be reasonable on [IN's] part to apprehend that if they were bringing out a competitor, that indeed the distributors who have for so long relied on *Ilanga*, from whom so much of their income is derived, too would favour *Ilanga* over this new competitor? Was there not a reasonable apprehension on their part that if they were going to reasonably penetrate this market, they could not do it through a distribution network that was so dependent upon and accustomed to distributing *Ilanga* already? I mean is that not a reasonable apprehension in your view as a sort of newspaper manager?

Mr. Le Roux: It is. It is Mr. Chairman. It is reasonable.⁷²

- [95] Nor do the available data suggest that even MM, much less competition itself, suffered unduly in consequence of *Isolezwe*'s entry. Developments in the newspaper market suggest that MM had, for long, been content with living the 'quiet life' of a monopolist. We say this because clearly the success of *Isolezwe* in a remarkably short space of time is attributable not to the destruction of *Ilanga*, to what would have amounted to the replacement of one monopolist with another, through the foreclosure of the system of distribution. *Isolezwe*'s arrival appears rather to have tapped into a rich vein of unsatisfied demand as is manifest in the truly startling expansion of the market for isiZulu language newspapers.⁷³ In the period between January to June of 2002, the period when *Isolezwe* was introduced, the weekly circulation figures for isiZulu language newspapers was 329 009. In the period July to December of 2003, the weekly circulation figures for Zulu language newspapers had grown to 472 959. By the end of 2005 (the period between July to December) the weekly circulation figures for Zulu language newspapers had climbed to a high of 652 850.⁷⁴ Indeed it is reasonable to conclude that *Ilanga* and MM actually benefited from the arrival of competition in the shape of *Isolezwe*. This is

⁷² Transcript p355

⁷³ It appears that this development is not confined to the isiZulu language segment of the market. Mr. Maclaine avers: '... the best thing that has happened to this industry is Media 24 launching the *Daily Sun*, *Die Son* in Cape Town also from Naspers and ourselves doing *Isolezwe*. It's opened up a whole new category from a previously docile, static, not doing anything market. And there is great vitality. Again it's the wrong word to say the bottom end. That's not what I mean, but the lower priced end of the market. There is enormous vitality and things are happening' (transcript page 634)

⁷⁴ See pleadings bundle page 59 where these figures are extracted from Audit Bureau of Circulations of Southern Africa (ABC).

evidenced by the strong assertion of Mr. Konigkramer, MM's managing director, that MM's profitability has shown a marked improvement as a result of moving its printing and distribution contract from IN to NW ⁷⁵

[96] In any event, in our view the narrowly based pro-competitive arguments for which IN contends are trivial when set alongside the manifestly pro-competitive chain of events triggered by MM's decision to refuse to accept what it viewed as IN's onerous contract terms in favour of a better deal from an alternative service provider. The exclusive dealing arrangement with the country distributors may not have had a large role to play in these pro-competitive outcomes – but to the extent that it has, it is to be lauded for its contribution to what is, from a competition perspective, an outcome far preferable to that which has prevailed for the last very many years.

[97] Note the chronology of events beginning with MM's decision not to renew the printing and distribution contract with IN in favour of a contract with NW. This gives an indication of the manifestly *pro-competitive* outcomes that flowed from this decision. Consider the following:

[97.1] MM, dissatisfied with the service provided – and, particularly, the price charged - by IN, approached NW, a firm competing with IN in the publishing, printing and distribution of newspapers in KZN province, with a proposal that it assume responsibility for the printing and distribution of *Ilanga*;

[97.2] NW, by agreeing to take on the printing of *Ilanga*, was obliged to make a considerable investment in new printing capacity, capacity which would not only release MM from its dependence on IN but which would compete in the general printing market in KZN and probably further afield;

⁷⁵ In Mr. Konigkramer's own words: "Let me just sum it up and say that we had done an analysis and we believe that we would be better off financially, much better off financially than we were under Independent". (Transcript Page 312 line 5-9). We understand that this is partly a consequence of entering into a more favourable arrangement with NW but part of MM's current success is clearly due to expanded sales within a dynamic and growing market

[97.3] By agreeing to take on the distribution of *Ilanga*, NW recognised that it would have to complement its strong distribution network in greater Pietermaritzburg with distribution capacity in other areas in which *Ilanga* had a significant presence, including greater Durban but also covering country areas and small towns in other parts of KZN. This naturally portended the establishment of a rival distribution network covering parts of the province where newspaper distribution appears to have been dominated by IN, these being the city and suburbs of Durban itself where IN utilised its own staff and assets for distribution purposes, and the previously African townships of Durban and the country areas of KZN where IN relied on a contracted network of independent distributors;

[97.4] MM, by electing to move its printing and distribution contract from IN to NW, effectively freed IN to introduce a rival to the only isiZulu language newspaper then in existence. While it is true that this market sharing restraint simply moved from IN to NW, there is no evidence that NW had, in the fifteen years in which IN was effectively shut out of this market segment, contemplated producing its own isiZulu language publication whereas IN, freed from its restraint, did immediately enter the market with *Isolezwe*. The data suggest strongly that this not only established a rival to a monopoly of some 100 years' standing, but it massively expanded the size of the market for isiZulu language newspapers.

[98] In summary then, we have, thanks to MM's decision to terminate its contract with IN, a significantly more competitive printing market with the 10 fold expansion of one player, NW; we have, in NW's construction of a network to parallel IN's Durban and 'country areas' network, intensified rivalry in the distribution market; and we have, thanks to the entry of *Isolezwe*, significantly enhanced competition in the market for isiZulu language newspapers. By the single decision to move the contract for the printing and distribution of *Ilanga* from IN to NW, MM has effectively animated a significant improvement in the competitive structure of three important markets, namely the markets for newspaper printing, distribution and publishing.

[99] Our finding then is that MM complainant has failed to make out a critical component of a claim under Sections 5, 8(c) or 8(d), namely, that the conduct generated an anti-competitive effect. Given MM's failure to establish anti-

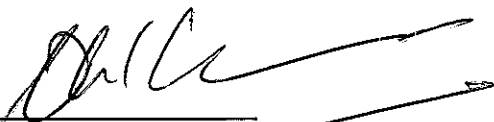
competitive effects arising from the conduct complained of, IN is not obliged to put up a pro-competitive defence. It has nevertheless elected to do so. While the narrowly based defence that it has chosen – namely, that the exigencies of entering a market against a long-standing monopolistic provider of a newspaper, a product to which consumers could reasonably be assumed to have a strong degree of attachment, required the exclusive focus – is not particularly persuasive, the respondent cannot be faulted for taking this precaution which, on balance, probably contributed little to the core competitive strategies it employed these being a well resourced and well executed marketing campaign and the launch of a fresh, more contemporary product offered to consumers. The success of *Isolezwe* was clearly abetted by MM's striking hubris which appeared to dictate its failure to respond with any apparent urgency to the launch of a competitor.⁷⁶ However, in addition to the narrow pro-competitive defences asserted by the respondent is to be added the manifestly improved competitive structure in at least three markets. It would be a travesty for a body mandated to uphold competition to impugn conduct which has made a contribution, albeit probably small, to an outcome that deserves high praise rather than opprobrium. Be that as it may, the respondent is only obliged to invoke pro-competitive defences in order to counter the complainant's successful assertion of anti-competitive effect and this it has failed to do

[100] The failure to show anti-competitive effect is sufficient ground for the dismissal of the complaint

⁷⁶ MM's witnesses were deeply offended by the allegation of 'managerial slack' that was levelled at them by IN's expert witness. In fact the evidence is that MM's (and NW's) response to the impending launch of *Isolezwe* was remarkably complacent and by no means only in the area of distribution. Pressed on this Mr Konigkramer insisted that "*But secondly Ilanga, as you well know, is founded by a very eminent South African Dr John Dube and its an extremely powerful brand. Its got great brand loyalty, so from our perspective what we would have done and which we did do is simply to make sure that we produced a good newspaper, which would supply information needs of people and that is how we would grow circulation...*" (page 310 line 14-20 of the transcript). There can surely be no clearer illustration of the complacency to which monopoly gives rise. This is made all the more remarkable when one considers the commercial damage to IN that was caused by MM's refusal to renew the printing and distribution contract. In the course of the arbitration Mr. King revealed that the contract with MM constituted approximately one-fifth of IN's profitability in KZN (transcript page 642). This was clearly known to MM and, we presume, NW. When Mr Konigkramer proposed to MM's board that it support moving the contract from IN to NW he suggested that the move would jeopardise IN's commercial viability in KZN. See Transcript p313 and joint bundle p 43.2.9. Surely under these circumstances a robust response from IN must have been expected. And yet MM (and NW) apparently preferred to conduct business as usual relying on the longevity of *Ilanga's* brand and the continuation of cosy, co-operative arrangements that appear to characterise 'competition' between mature newspaper titles.

Order

[101] The application is dismissed. The complainant is ordered to pay the costs of the respondent including the costs of two legal representatives



D H Lewis

Presiding Member

Y Carrim and M Madlanga concur in the judgment of D H Lewis.

Tribunal Researcher: R Kariga

For the complainant: Adv. Steward instructed by Bigby Woodhead Attorneys

For the respondent: Adv McNally instructed by Cliffe Dekker Attorneys