competitiontribunal
SOUTH AFRICA

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: IR1360CT22

In the matter between:

NOTHEMBA MLONZI	First Applicant
ECON OIL & ENERGY (PTY) LTD	Second Applicant

and

ESKOM HOLDINGS SOC LIMITED	First Respondent
THE COMPETITION COMMISSION OF SOUTH AFRICA	Second Respondent

Panel:	M Mazwai (Presiding Member) T Ngcukaitobi (Tribunal Member) F Tregenna (Tribunal Member)
Heard on:	29 May 2023
Date of Last Submission:	19 June 2023
Order issued on:	2 August 2023
Reasons issued on:	2 August 2023

REASONS FOR DECISION

INTRODUCTION

1. Since 2003 the Applicant (or Econ Oil & Energy (Pty) Ltd ("Econ Oil")) has supplied Eskom Holdings SOC Limited ("Eskom") (or the First Respondent) with fuel oil. In 2018, Eskom investigated certain allegations of improper and unethical conduct against Econ Oil. It concluded that there was substance to the allegations and terminated the supply agreement which was in place between it and Econ Oil.

2. On 17 August 2022, Eskom informed Econ Oil that it would be de-registered as a supplier to Eskom for a period of ten years. This decision is the subject of this application. Econ Oil applied for interim relief to prohibit Eskom from giving effect to this decision.

3. Ms Nothemba Mlonzi ("Ms Mlonzi"), the First Applicant, is the sole shareholder and director of Econ Oil, the Second Applicant. The Competition Commission ("the Commission") is cited as the Second Respondent, but it played no part in these proceedings.

4. The Applicants ask for three orders:

    4.1. first, a declaratory order that they are a single economic entity or firm as defined in the Competition Act, 89 of 1998 ("the Competition Act");

    4.2. secondly, an interim order interdicting and restraining Eskom from "refusing to deal" with it pending the final determination of a complaint lodged by the Applicants with the Commission on 16 September 2021 under Case No. 2021SEP0034; and

    4.3. thirdly, an order permitting Econ Oil to "participate in Eskom's tenders for the supply of fuel oil to Eskom Power Stations".

5. The application is opposed by Eskom. Section 49C of the Competition Act is the gateway to interim relief pending the outcome of a complaint before the

Commission or a referral before the Competition Tribunal ("Tribunal"). We shall first consider the requirements of this section before setting out the elements of the cause of action.

ANALYSIS OF SECTION 49C OF THE COMPETITION ACT

6. Section 49C(1) of the Competition Act permits an applicant to apply for an interim order before the Tribunal "at any time, whether or not a hearing" into an alleged prohibited practice has commenced.

7. Section 49C(2)(b) of the Competition Act regulates the powers of the Tribunal when evaluating whether or not to grant or refuse an application for interim relief. It gives the Tribunal the discretion to grant an interim order. In the exercise of the discretion the Tribunal must be satisfied that it is "reasonable and just" to grant an interim interdict in a given case.

8. When deciding what is "reasonable and just", the Act sets out a closed list of factors to be considered by the Tribunal. Firstly, there must be *prima facie* evidence relating to the alleged prohibited practice. Secondly, the Tribunal must consider the need to prevent serious or irreparable damage to the Applicant. Thirdly, the balance of convenience must favour the granting of the interim interdict.

9. In terms of section 49C(3) the standard of proof in interim relief proceedings before the Tribunal is the same standard of proof in a High Court applying the common law.

10. The duration of an interim order in terms of Section 49C(4) may not extend beyond the earlier of the conclusion of a hearing into the alleged prohibited practice or a date that is six months after the date of issue of the interim order.

11. Both Applicants have filed complaints against Eskom. Econ Oil's complaint is dated 16 September 2021 and Ms Mlonzi's complaint was signed on 20 October

2022. Accordingly, the Applicants qualify as "*complainants*". The complaints contain a description of the prohibited practice, which reads:

> "*Eskom is abusing its dominance in that it is engaging in exclusionary acts that have anti-competitive effects in the market for the supply of fuel oil*".

12. If established, these allegations would amount to a "prohibited practice". Therefore, the requirements of section 49C(1) would be met.

13. The real debate in this case was whether or not the Applicants have met the requirements of section 49C(2)(b). As noted above, the Tribunal has a discretion to grant an interim interdict if it is reasonable and just to do so. It seems to be contemplated within the structure of section 49C that relief may also be withheld even if the factors listed in section 49C(2)(b)(i) to (iii) are met.

14. A logical way of applying the section is to start by asking whether the three factors listed in section 49C(2)(b) are met. While the requirement to show a *prima facie* case for a prohibited practice is mandatory, the Tribunal has held that the requirements of balance of convenience and serious damage or irreparable harm can be weighed off and balanced against each other.[1]

15. The case of *York Timbers v South African Forestry Company* is the leading authority on how the three factors in section 49C(2) are balanced when applied to the facts of a given case:

> "*64. Applying this analysis to our Act means that we must first establish if there is evidence of a prohibited practice, which is the Act's analogue of a prima facie right. We do this by taking the facts alleged by the applicant, together with the facts alleged by the respondent that the applicant cannot dispute, and consider whether having regard to the*

[1] *York Timbers Limited v/s South African Forestry Company* IR078Feb01.

inherent probabilities, the applicant should on those facts establish the existence of a prohibited practice at the hearing of the complaint referral.
65. If the applicant has succeeded in doing so we then consider the 'doubt' leg of the enquiry. Do the facts set out by the respondent in contradiction of the applicants case raises serious doubt or do they constitute mere contradiction or an unconvincing explanation. If they do raise serious doubt the applicant cannot succeed.

66. As far as ... irreparable damage and the balance of convenience, these are not looked at in isolation or separately but are taken in conjunction with one another when we determine our overall discretion."

16. In *e-Media Investments (Pty) Ltd v Multichoice (Pty) Ltd & Another*[2] Victor J made the following relevant remarks in relation to the functions of the Tribunal when evaluation applications for interim relief:

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

17. In applications for interim relief disputes of fact often arise. But as the Competition Appeal Court ("CAC") noted, the Tribunal should not be unduly

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[2] [2022] ZACAC 9; [2022] 2 CPLR 23 (CAC).

detained by disputed facts to the extent that it cannot fulfil its function to make factual determinations when deciding applications for interim relief. Where appropriate the Tribunal should take a robust view of the evidence. Where an applicant puts forward facts which cannot be seriously disputed at the interim stage, that should facilitate the determination of interim relief. The Tribunal must apply an objective standard to the facts, to facilitate the determination of the matter.

18. How should the three factors in section 49C(2) be understood? In *Business Connexion (Pty) Ltd v Vexall (Pty) Ltd & Another*[3] Unterhalter J delivered an authoritative exposition of the law, holding, that in respect to each of the elements for the granting of interim relief:

18.1. the "evidence of a prohibited practice" is concerned with "the competitive position of competitors in the market, judged against the regulatory criteria of the prohibited practice defined in Chapter 2 of the Act"[4];

18.2. the requirement for the need to prevent serious or irreparable damage is "a party specific enquiry". Yet analogies with interim interdicts at common law should be approached with care. Section 49C while similarly structured to the requirement of irreparable harm under the common law is distinct. Its primary focus is to prevent a damage "to the competitive position of the applicant". Other forms of damage to the applicant are not relevant because the purpose of the Act is to maintain and promote competition in the market[5]; and

18.3. as far as the requirement of balance of convenience is concerned, the Tribunal must weigh the prejudice the applicant will suffer if the interim interdict is not granted against the prejudice to the Respondent if it is granted. But one again must not reduce this into a party specific enquiry.

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[3] [2020] 2 CPLR 490 (CAC).
[4] *Business Connexion* at para 20.
[5] *Business Connexion* at para 21.

Instead, "the currency of prejudice is reckoned by recourse to the consequences for the competitive position of the parties in the market".[6]

19. Once the three factors in section 49C(2) have been assessed, the Tribunal will ask the over-riding question, whether it is reasonable and just to grant interim relief. If not, the application should be refused. If yes, the relief may be granted. We commence with the first statutory requirement, namely the evidence of a prohibited practice.

EVIDENCE OF A PROHIBITED PRACTICE

20. The cause of action of the Applicants is based on section 8(1)(c) of the Competition Act. That section provides:

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

21. Since the prohibition applies to a "dominant" firm, it is necessary to refer to section 7. In terms of this section, a firm is dominant in a market if:

20.1 it has at least 45% of that market;

20.2 it has at least 35%, but less than 45% of that market, unless it can show that it does not have market power); or

20.3 it has less than 35% of that market but has market power.

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[6] *Business Connexion* at para 22.

22. In order to assess dominance, there must be a delineation of the relevant market, as discussed below.

The relevant market

23. The relationship between the Second Applicant and Eskom is a supplier, customer relationship. They do not relate as competitors. The submission of the Applicants is that a decision by Eskom to de-register it as a supplier is an abuse of dominance.

24. But dominant in which market? The market as defined by the Applicants "*is the market for the purchase of fuel oil for use at Eskom power stations*". The Applicants say that fuel oil is delivered to Eskom power stations by special tankers. It is sourced from refiners who are situated in KwaZulu-Natal, Free State and Gauteng. It is then delivered to Eskom power stations, situated in Mpumalanga, Free State and Limpopo.

25. The Applicants say that Eskom is a monopsony buyer of fuel oil. Eskom has approximately 95% of the fuel oil procurement market in South Africa and 100% of the fuel oil procurement market for Eskom power stations.

26. The Applicants divide the Eskom fuel oil market into supply of Grade 1 fuel oil to Eskom power stations; supply of Grade 2 fuel oil to Eskom power stations; and supply of Grade 3 fuel oil (heavy fuel oil) to Eskom power stations.

27. Grade 1 fuel oil is manufactured by Sasol and supplied to Eskom for use at three of its coal fired power stations, Arnot, Kriel and Duvha. Grade 2 fuel oil is manufactured by Sasol and used at Hendrina coal fired power station. Grade 3, the category relevant in this case, is used at ten coal fired power stations and manufactured by several oil manufacturers.

28. Eskom confirms the three categories of fuel oil alleged by the Applicants. It notes that Grade 3 fuel oil is used at twelve out of its sixteen coal fired power stations.

29. Eskom points out that from Econ Oil's website there are other applications of Grade 1 and Grade 2 fuel oil, outside of Eskom. These include "*any other plant with large boilers*". Since fuel oil cannot be used in other applications for environmental reasons, it is processed to remove the sulphur content.

30. In respect to heavy fuel oil, Eskom refers to the website of Sasol which states that heavy fuel oil is a popular price in the industry, empowering mines, boilers, ports and manufacturing plants. Further references are made to "*final product applications*" such as being the source of fuel by vessels and three ignition sources in power plants. Eskom concludes that fuel oil has multiple uses, including power merchant ships and for industrial steam and hot water boilers.

31. In oral argument Mr Trengove SC, who appeared on behalf of Eskom together with Mr Mbikiwa, criticised the market definition advanced by the Applicants as comprising "*mere assertions*" without any substantive content. The Panel debated with him whether the problem we face is not one of speculation on both sides. His retort was that we should consider closely the case made by the Applicants as any deficiencies in the Respondent's case do not cure the problems of the Applicant's case. We accept this as a general statement. But Mr Ngalwana SC, who appeared together with Mr Monareng for the Applicants, is correct in his submission that properly construed, the Applicants are not relying on assertions without fact. They have made specific allegations of fact about Eskom's position in the market for procurement of fuel oil. In those circumstances, to prevail, Eskom should produce facts which cast serious doubt at the version of the Applicants.

32. The Act says that we must apply the common law standard. The common law is set out in the judgment of *Webster v Mitchell*[7] where it is stated:

> "*In the grant of a temporary interdict, apart from prejudice involved, the first question for the Court in my view is whether, if interim protection is given, the applicant could ever obtain the rights he seeks to protect.*

[7] 1948 (1) SA 1186 (W) at 1189.

Prima facie that has to be shown. The use of the phrase 'prima facie established though open to some doubt' indicates I think that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach to consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicants could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to 'some doubt.'"

33. The judgment in *Gool v Minister of Justice & Another*[8] sought to qualify the statement in *Webster v Mitchell*. It was stated in that case:

> "*With the greatest respect, I am of the opinion that the criterion prescribed in this statement for the first branch of the inquiry thus outlined is somewhat too favourably expressed towards the applicant for an interdict. In my view the criterion on an applicant's own averred or admitted facts is: should (not could) the applicant on those facts obtain final relief at the trial. Subject to that qualification I respectfully agree that the approach outlined in Webster v Mitchell, supra, is the correct approach for ordinary interdict applications*".[9]

34. The Applicants have averred that heavy fuel oil is primarily used at Eskom's coal fired power stations. They have also alleged that Eskom has approximately 95% of the fuel oil procurement in South Africa. Eskom's Answering Affidavit is tendentious in this respect. It asks speculative questions of the allegations of the Applicants, but never seriously engages with them, either by positively denying

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[8] 1955 (2) SA 682 (C).

[9] *Gool* at paras 688 D-E.

them or advancing an alternative factual version. So, if Eskom did not buy 95% of all fuel oil in South Africa as alleged by the Applicants, it would have been easy to say so. And if Eskom was not the primary consumer of fuel oil in South Africa it would have said so. What the Tribunal must pay attention to is whether serious doubt has been cast on the case of the Applicants. Eskom has, in effect left the averments of the Applicants on market definition unchallenged. Yes, it is true that Eskom has sought to show that there are further questions the Applicants should have asked to improve its market definition. But that cannot detract from the fact that the Applicant's market definition has not been seriously challenged.

35. The Tribunal must consider the relevant market, which is the market in which the abuse of dominance is alleged. Since this is a case about buyer power, the market is where Eskom operates. Thus, the Tribunal accepts for purposes of deciding the present application the following propositions:

35.1. Eskom is the primary consumer of fuel oil in South Africa;

35.2. Eskom consumes 95% of all available fuel oil in South Africa; and

35.3. The relevant market is for the procurement of fuel oil.

Eskom as a monopsony

36. As Eskom is responsible for 95% of fuel oil procurement in South Africa, it is plainly a monopsonic buyer of fuel oil. Monopsonic power is the mirror image of monopoly power. Sometimes referred to as "*buyer power*", monopsonic power is defined by the Organisation for Economic Co-Operation and Development ("OECD") as follows:

> "*A buyer has market power if the buyer can force sellers to reduce price below the level that would emerge in a competitive market*".

37. Buyer power therefore arises "*if the buyer's side of the market is sufficiently concentrated that buyers recognise that they are 'price makers'*." In this scenario buyers understand that if they withhold demand and purchase less, the price will fall, or if they increase their purchases the price will rise.[10]

38. Competition law is thus concerned with monopsonic power, as with monopoly power, because it enables the buyer to exercise market power to the detriment of competition in a market. Eskom has approximately 95% of the fuel oil procurement in South Africa and therefore dominant in terms of section 7 of the Competition Act. This shows the ability of Eskom to compel sellers to price below levels which would emerge in a competitive market. The question is then whether the requirements of section 8(1)(c) are met, on a *prima facie* basis. We consider this question next.

Abuse of dominance

39. Section 8(1)(c) of the Competition Act prohibits a dominant firm from engaging in an exclusionary act "if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain". An exclusionary act is defined as "an act that impedes or prevents a firm from entering into, participating in or expanding within a market".

40. The Applicants allege that they have been impeded or prevented by the conduct of Eskom from entering into, participating or expanding within the market for the supply of fuel oil to Eskom, a dominant buyer of fuel oil. Eskom makes three arguments in opposing the claims of the Applicants. First, it states that bearing in mind the impropriety with which Econ Oil is accused, it is not possible to regard the conduct of Eskom as exclusionary. Secondly, Eskom asserts that since Econ Oil claims on its website that it has multiple customers in automotive, mining, tyre, milling and other industries, it cannot argue that it has been prevented from

[10] OECD Policy Round Tables: "Monopsony and Buyer Power" (2008) page 26. Accessible at https://www.oecd.org/daf/competition/44445750.pdf.

entering, participating or expanding within a market. Thirdly, Eskom states that the decision in any event is based on justifiable grounds.

41. It is common cause that Eskom has de-registered Econ Oil as a supplier for a period of ten years. On what has been established, Eskom buys 95% of available fuel oil in South Africa.

42. It is to be noted that the amendment in section 1(h) of the Competition Act defines "participate" as referring to the ability of or opportunity for firms to sustain themselves in the market. In our view, it is conceivable that, if Econ Oil is unable to supply a substantial customer such as Eskom, which consumes 95% of fuel oil, it would not be able to sustain itself in the market.

43. It has been established that Ms Mlonzi has been excluded as a supplier to Eskom. But the question before the Tribunal is whether this exclusion is *prima facie* evidence of a prohibited practice i.e. an exclusionary act, as defined, which has anti-competitive effects, which cannot be justified on the legally recognised grounds.[11]

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[11] See: *Competition Commission of South Africa v Uniplate Group (Pty) Ltd* (CR188Nov15) [2019] ZACT 61; *Apollo Studios (Pty) Ltd and another v Audatex SA (Pty) Ltd and another* IR198Mar23. In *Mercantile Bank and others v Mohamed Iqbal Surve* CAC Case No: 206/CAC/Oct22/ the Competition Appeal Court held:

> *"[38] The problem with the Tribunals' approach is that the case falls at the first hurdle. Even under section 4(1)(a) which unlike 4(1)(b) does not itemise specific anticompetitive practices, there needs to be some theory of harm. The subsection refers to the concerted practice having an anticompetitive effect. Making this conclusion based on parallel conduct in a concentrated market does not amount to an explanation of why the conduct is anticompetitive. What the Tribunal did was to conflate an outcome – exclusion from the market – with an anticompetitive effect. While exclusion may be the result of an anticompetitive practice it does not suffice to use it as a substitute for analysing whether, as a fact, there has been an anticompetitive practice; particularly where the Sekunjalo Group did not allege that any of the banks had a direct or indirect interest in any relevant market that was in issue."*

44. In *Computicket (Pty) Ltd v Competition Commission of South Africa*[12], a case which concerned exclusionary conduct under the then section 8(d)(i) of the Act the CAC held as follows:

> "*The act is exclusionary if it falls within the conduct described in section 8(d)(i). That is, however, not the end of the enquiry. The Commission must still show that the conduct has an anti-competitive effect. If that has been established, the onus shifts to the respondent, Computicket in this case, to justify the anti-competitive effect on efficiency grounds. The Tribunal was therefore correct in its finding, that the prohibition contained in the second generation exclusive agreements that inventory providers may not utilise the services of a competitor without Computicket's written consent for the duration of the contract fell within the definition set out in section 8(d)(i). That finding entails no per se prohibition because the Commission must show the anti- competitive effects of the exclusionary conduct.*"[13]

45. Unlike the previous section 8(1)(d)(i) which specifies the exclusionary acts that are regarded as anticompetitive, section 8(1)(c) has a more general application to what may be considered an exclusionary conduct. Therefore, in order to determine whether the exclusion of Mlonzi as a supplier to Eskom is a contravention of the Act, we must first consider whether there are any anti-competitive effects arising from the exclusion of Mlonzi.

Anti-competitive effects

46. In *e-Media*, the CAC noted that it was "clear that by excluding the channels in question *it is MultiChoice that benefits from the content aggregation provider market.*"[14]

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[12] (170/CAC/Feb19) [2019] ZACAC 4 (23 October 2019).

[13] *Computicket* at para 17.
[14] *e-Media* at para 98, italics added.

47. *e-Media* was of course a case about the exclusion of a competitor who was in the same market as the dominant firm. The same principle also features in cases of exclusionary conduct affecting suppliers who participate in different markets to that of a dominant firm. In *Bulb Man (SA) (Pty Ltd v Hadeco (Pty) Ltd*[15] the Tribunal held that an arbitrary refusal to deal by a monopolist cannot be unlawful unless it extends, preserves or creates or threatens to create significant market power in some markets, which could be either the primary market in which the monopoly firm sells or a vertically related or even collateral market. Harm to an applicant alone does not suffice.

48. The Applicants place considerable reliance on the *e-Media* decision. It must be recalled that in that case the dominant firm, Multichoice, had initially argued that its rationale for refusing e-Media access to its platform for certain channels was based on capacity constraints. As the CAC noted, when the matter was argued on appeal that justification had been abandoned.[16] The "*important issue*" for the CAC was whether the dominant firm was able to justify its decision on objectively rational grounds: "[o]nce there is an anti-competitive effect and *no justification for it*, then the exclusionary aspect has to be carefully balanced."[17]

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[15] [2006] ZACT 86.

[16] The Court recorded the following at para 98:

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

[17] *e-Media* at para 108, italics added.

49. Indeed, this must be so. Not every exclusionary act which is not outweighed by technological, efficiency or other pro-competitive gains, amounts to an abuse of dominance. An adverse impact on a complainant is not the only consideration. This means that to get to the "*abuse*" part, especially in cases of the exclusion of a rival, the Tribunal should at least answer the question: is the exclusionary act likely to improve the market position of the dominant firm? Since these are interim relief proceedings this question does not need to be answered on a definitive basis, but only *prima facie*.

50. In *casu* much as there is evidence of commercial harm alleged by the Applicants, competition law requires evidence of a likelihood of harm to competition: "The enquiry as to whether exclusionary conduct is anti-competitive yields a positive answer if 'there is (i) evidence of actual harm to consumer welfare or (ii) if the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals.'"[18]

51. This analysis need not change because the case is about buyer power. The Applicants could acquit themselves of this evidentiary burden by showing – on a *prima facie* basis – how the market power of Eskom would improve in a manner that would be harmful to competition. This is a requirement set out in *e-Media*: "The exclusionary conduct can at least at this interim stage be interpretated as MultiChoice exercising its market power."[19] Alternatively, the Applicants could show competition harm to a related market which arises as a consequence of the dominant firm's abuse of its dominance. The point is that whatever species of competition harm is alleged, some evidence must at least be produced.

52. The problem we face here is that the Applicants' papers do not make out a case to show Eskom's abuse of dominance in a manner which preserves Eskom's market power or in a manner which adversely impacts competition in an adjacent or related market.

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[18] *Computicket* at para 18.
[19] *e-Media* at para 98.

53. In the circumstances, our view is that the Applicants have not demonstrated any anti-competitive effects from Eskom's exclusion of Econ Oil as a supplier to Eskom. Even if we were to find that there are anti-competitive effects (which have not been proven), section 8(1)(c) requires us to weigh up any anti-competitive effects of the exclusionary act, and assess whether these are outweighed by the pro-competitive or technological, or other efficiencies arising from the act.

54. Eskom, being a dominant firm has special obligations to its competitors and suppliers. Section 8 of the Competition Act encapsulates these. As a general rule Eskom is under a duty to afford equal treatment to its suppliers and not to engage in arbitrary discrimination. Eskom is also under an express legislative duty not to abuse its dominance.

55. The question whether or not Eskom's conduct in this case amounts to an abuse of dominance must also be answered by reference to whether it can be justified on objectively rational grounds. Where a dominant firm engages in exclusionary conduct which is harmful to competition, it is required by competition law to provide objectively rational grounds for the exclusionary act. It is not up to the dominant firm to decide whether its own reasons are objectively rational. This is within the domain of the Tribunal. The firm selects its reasons (if it has any) for the exclusion. But whether or not the reasons so pleaded are justifiable is up to the Tribunal to decide. We consider this next.

Technological, efficiency or pro-competitive gains: the justification

56. We need first to locate Eskom within the constitutional and legislative setting. Eskom is an organ of state as defined in section 239 of the Constitution. Section 7(2) of the Constitution casts special obligations on it to "respect, protect, promote and fulfil the rights in the Bill of Rights". In the modern state that duty entails "a duty to create efficient anti-corruption mechanisms."[20] Undoubtedly, corruption and maladministration in state affairs constitute two of the greatest

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[20] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para 177.

scourges which inhibit South Africa's developmental objectives and its ability to meet the demands contained in the Constitution.[21] Competition law cannot be oblivious to this reality.

57. Eskom is not only entitled but is required by law to combat internal corruption and other acts of malfeasance when it becomes aware of them. *Khumalo and*

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[21] See: *Glenister* at paras 172-173 where the following appears:

> "172. Expectedly, our courts too have warned of the pernicious threat corruption poses to our collective enterprise to entrench a just and democratic society. In *S v Shaik and Others*, this Court warned that corruption is "antithetical to the founding values of our constitutional order." Similarly, in *South African Association of Personal Injury Lawyers v Heath and Others*, this Court held that—
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> > "[c]orruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to *human dignity, the achievement of equality and the advancement of human rights and freedoms*. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State." (Emphasis added.)
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> 173. In *S v Shaik and Others*, the Supreme Court of Appeal pointed out that—
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> > "[t]he seriousness of the offence of corruption cannot be overemphasised. It offends against the rule of law and the principles of good governance. It lowers the moral tone of a nation and *negatively affects development and the promotion of human rights*. As a country we have travelled a long and tortuous road to achieve democracy. Corruption threatens our constitutional order. We must make every effort to ensure that corruption with its putrefying effects is halted. Courts must send out an unequivocal message that corruption will not be tolerated and that punishment will be appropriately severe."

Another v Member of the Executive Council for Education: KwaZulu Natal[22] underscores the duty specially entrusted on public functionaries thus:

> *"[36] Public functionaries, as the arms of the state, are further vested with the responsibility, in terms of section 7(2) of the Constitution, to 'respect, protect, promote and fulfil the rights in the Bill of Rights.' As bearers of this duty, and in performing their functions in the public interest, public functionaries must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it. This is the responsibility carried by those in the public sector as part of the privilege of serving the citizenry who invest their trust and taxes in the public administration."*

58. We can then consider the question: why did Eskom de-register Econ Oil as a supplier? There are two reasons advanced by Eskom why it de-registered Econ Oil. The first is that it refused to co-operate with an investigation into allegations of overcharging fand the second is that Econ Oil was involved in improper and unethical business practices, *inter alia*, influencing Eskom's procurement processes.

59. Econ Oil submits that it has been unfairly targeted for discriminatory reasons. It points out that it is a black female owned supplier to Eskom. In support of the allegation of discriminatory treatment, Econ Oil has alleged that there were other similarly situated suppliers which were not de-registered.

60. We are unable to find that Econ Oil's submissions are the reasons for its de-registration. We say this on account of the following facts which appear from the papers. The first reason is the failure to co-operate with an investigation launched by Eskom.

First reason – failure to co-operate

61. Econ Oil has been a supplier of fuel oil to Eskom since 2003. In 2016 McKinsey concluded that Econ Oil may have overcharged Eskom to the sum of

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[22] (2014) 35 *ILJ* 613 (CC) at paras 35-37.

approximately R379,886,593,00 during the period 1 April 2012 to 1 March 2016 for the supply of Grade 3 fuel oil, which was the only grade of fuel oil McKinsey ran calculations on.

62. According to McKinsey, Econ Oil had tendered at a price that was approximately 10% cheaper than FFS (Pty) Ltd, which was its competitor and as a consequence was contracted to supply 80% of Eskom's fuel oil business. Over time Econ Oil's price advantage had diminished to such an extent that it became significantly more expensive than FFS. Eskom alleges that this suggested that Econ Oil had priced low in order to win the tender only to increase its prices substantially thereafter.

63. In December 2020 Eskom appointed the law firm, Bowmans, which also came to the conclusion that Econ Oil had overcharged Eskom for all grades of fuel oil. The calculation by Bowmans showed an overcharge in excess of R1,2 billion. Eskom has instituted arbitration proceedings for the repayment of the overcharged amounts.[23]

64. Now, what happened was that during the investigation into the alleged over-charging by Econ Oil, Bowmans required access to all invoices issued by Econ Oil to Eskom as well as the underlying documentation. This was not forthcoming. The Chief Executive Officer of Eskom, Mr Andre de Ruyter in fact sought the information himself, but this request was not complied with by Econ Oil.

65. Econ Oil had stated that it had compiled about 100 files which had been ordered chronologically. But the problem is that it did not supply Eskom with these files, but only submitted three files, which contained documentation in respect of a small percentage of the information that was required. Econ Oil tendered to provide the balance of the documents, but never did so.

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[23] These amounts are disputed by Econ Oil.

66. Econ Oil has contended that Eskom requested some documents which it already had under its possession. But in our analysis of the correspondence, what Eskom was asking for are documents within the exclusive preserve of Econ Oil. Eskom was trying to answer the question of how Econ Oil came to the prices that were charged. Only Econ Oil could have supplied that information, but it did not, at least until the discovery proceedings at the private arbitration between the parties.

67. Econ Oil asked for clarity as to what misrepresentation they were accused of, sought a copy of Eskom's Supplier Integrity Pact, and disputed that the Supplier Integrity Pact was binding in respect of the 2012 agreement concluded with Eskom.

68. Econ Oil's position also appears in a letter to Eskom of 17 August 2020, which noted that Econ Oil "shall not be granting you an unqualified access to our records/documents (which in any event you have in your possession) but should the need arise, you should specify the name and nature of the documents required and we shall oblige".

69. Eskom states that by 17 August 2020 it had already provided a list of categories of documents required. On 23 October 2020 Eskom again addressed a letter to Econ Oil requesting the same documentation.

70. On 9 November 2020 Econ Oil's attorneys responded to Eskom stating that they would only furnish the documentation after being given a reason for the specific documentation requested. Eskom was described as "arrogant" for requesting documentation without explaining why it needed such documentation.

71. The Replying Affidavit does not meaningfully engage with the allegation of the refusal to co-operate. The Applicants allege that when they received the letter of 20 July 2020 from Mr de Ruyter, the First Applicant was not aware that it was a request for information on behalf of Bowmans. It is unclear how any knowledge that this was a request for information on behalf of Bowmans would have impacted the obligation on the supplier to comply with the request for information.

Similarly, Econ Oil's decision to seek legal advice does not address the issue of the alleged refusal to supply the documents and information sought.

72. By 19 November 2020 the documents had still not been provided. Instead, Econ Oil wrote a further letter to Eskom recording that Eskom had failed to inform it of the basis for the allegations.

73. Eskom's conclusion that there had been a failure to comply with the investigation is well-founded. The refusal to co-operate must also be seen in light of what was in fact being investigated, namely the allegations of over-charging an organ of state in the amount of R1,2 billion.[24]

74. The parties are before arbitration on whether in fact there was over-charging. Before us, however, the limited issue is about a refusal to co-operate with an investigation lawfully initiated by an organ of state. When we consider the duties of Eskom under the Constitution, they were entitled to ask for information where they had evidence of alleged impropriety. Econ Oil had no justifiable basis to withhold information from Eskom, when they must have been aware that the investigation was being conducted in the interests of the public. We cannot find that Eskom was not justified in regarding the conduct of the Applicants as constituting a refusal to co-operate in breach of the provisions of the Supplier Integrity Pact.

Second reason: improper conduct

75. The second reason provided by Eskom relates to the conduct of the First Applicant. She is accused by Eskom of improper and unethical attempts at influencing Eskom employees to breach their employment contracts and to

[24]There has now been a disclosure of the documents that were sought during the investigation. That happened in the course of private arbitration proceedings where the First and Second Applicants discovered the relevant documents.

influence the procurement systems in ways that promoted the interests of Econ Oil.

76. The source of this information is the report of an investigation conducted by Bowmans between August 2018 and January 2019. That report uncovered evidence of an improper relationship between Econ Oil and an employee of Eskom, Ms Noluthando Patricia Marah, who was employed as the Senior Manager: Business Enablement. The report of Bowmans contained the following findings:

76.1. Bowmans uncovered evidence of a potentially improper relationship between Ms Marah and Econ Oil. It was established that Ms Marah had requested and obtained sponsorships from the Applicants;

76.2. Bowmans received information that Ms Marah may have improperly interfered in Eskom's procurement processes on behalf of Econ Oil and to promote Econ Oil interests;

76.3. Mr Boiketlo Mashila, who was Eskom's procurement manager, had informed Bowmans that whenever he took issue with Econ Oil, Ms Marah would either attempt to resolve the issue or reprimand him;

76.4. Ms Mlonzi contacted Mr Mashila after office hours on 28 June 2017 during the final negotiations stage of the closed tender process for the period 1 July 2017 to 30 June 2018. Ms Mlonzi requested Mr Mashila to provide her with the prices of Econ Oil's competitor (FFS) in an apparent attempt to be able to address her prices accordingly;

76.5. On 30 June 2017 the contract awards for the following year were made. Econ Oil lost five power stations to FFS;

76.6. Ms Mlonzi called Mr Mashila on Sunday, 2 July 2017 and requested him to change the five power stations allocated to FFA to Econ Oil. Mr Mashila informed her that this was not possible;

76.7. During the period December 2003 to November 2018 Eskom had paid Econ Oil in excess of R15 billion; and

76.8. According to Eskom's payment system report payments that exceeded the contract value amounted to R540 million.

77. Bowmans delivered a further report on 12 October 2020. In that report they made the following additional findings:

77.1. Ms Marah was instrumental in assisting Econ Oil to become an Eskom supplier, including by facilitating the then Minister of Public Enterprises Malusi Gigaba to attend the opening of Econ Oil's branding plant at Marble Hall.

77.2. The same day Ms Marah requested a contribution of R10 000,00 to an organisation called "*Women in Dialogue*", which Econ Oil duly paid.

77.3. Econ Oil invited Ms Marah to an African National Congress fundraising gala dinner and paid for various Eskom officials, namely Mr Matshela Koko, Mr Dan Morokane and Ms Marah to attend the gala dinner and to sit at a table together with Econ Oil representatives. The prices for a table accommodating seven people ranged from R150 000 to R700 000,00.

77.4. Ms Marah requested donations from Ms Mlonzi towards the 2014 National Election Campaigns of the ANC and Econ Oil paid R100 000,00 into the requested bank account.

77.5. During the 2012 to 2017 contract period Ms Mlonzi attempted to obtain contract extensions without a procurement process being followed, which was supported by Ms Marah.

77.6. In March 2017 an employee of Eskom, Mr Ntuthuko Zulu raised a concern about the over-charging of Econ Oil in light of the findings of

McKinsey and sought to obtain and reconcile Econ Oil's invoices. Ms Mlonzi requested Eskom to remove Mr Zulu from the project, which in fact happened. Mr Zulu and Mr Mashila met with Ms Mlonzi in order to obtain clarity on Econ Oil's pricing data and in order to understand the nature and extent of any over-charging. Ms Mlonzi refused to provide her pricing data. She proposed that Econ Oil would provide a discount to Eskom's power stations but in return Eskom should undertake not to order from alternative suppliers and that Mr Zulu should be removed from managing the Econ Oil contract.

78. In June 2017 Eskom initiated a closed tender process in which Econ Oil and FFS were the only bidders. Mr Mashila alleged that there were further attempts by Ms Mlonzi to influence and interfere in Eskom's procurement process. One of these was a request by Ms Mlonzi to be provided with the prices of FFS, the direct competitor of Econ Oil which had offered to supply fuel oil to Eskom. When the allocation of Econ Oil's power stations was reduced, Ms Mlonzi requested Mr Mashila to change the award of the contract in Econ Oil's favour.

79. According to Bowmans, the pricing information of FFS was in fact sent to Ms Mlonzi from a private e-mail of Ms Marah in July 2017. In 2018 Ms Marah also asked Mr Leslie Barker to change the technical specifications of a tender in a manner that would favour Econ Oil.

80. Before us the approach of the Applicants to these allegations has been one of confession and avoidance. For instance, she has denied that she received the e-mail of July 2017 which contained pricing information of Econ Oil's competitor, FFS. The problem is that an actual copy of the e-mail together with a personal e-mail address of the First Applicant has been attached to the Answering Affidavit. The matter is not meaningfully engaged in reply.

81. Despite denying knowledge of the e-mail, the First Applicant states that it would have in any event been perfectly legitimate for her to receive confidential pricing information because the tender process had run its course and that the sharing of such information would have served the interests of transparency in State

procurement. She has admitted contacting Ms Marah and Mr Mashila and making the request for the removal of Mr Zulu from the project. She has attempted to justify the contact with the employees of Eskom at crucial stages when procurement decisions affecting her company were being taken, and she has also admitted to making payments to entities and causes linked to Ms Marah. In these circumstances, it is not possible to conclude that Eskom was not justified in taking the view that it had to take steps to protect its interests from the conduct of its suppliers.

82. There is more. Notwithstanding the contents of the report of Bowmans of January 2019 Econ Oil was invited by Eskom to a closed tender process for the procurement of fuel oil under Bid Corp 4786. This process resulted in an award of contracts to Econ Oil to the value of approximately R8 billion. As subsequently held by the High Court the process was riddled with grave irregularities. There was no technical evaluation of the bids. The bids that were received by Eskom were incomparable. There was no meaningful financial evaluation or financial comparison. After Eskom had completed the price preference scoring process it entered into negotiations with the bidders, ignoring the competitive tender process which it had undertaken.

83. This process also sought to benefit Econ Oil. Initially the price preference evaluation resulted in Sasol and British Petroleum South Africa being allocated all the power stations except for Hendrina which was allocated to Econ Oil. Econ Oil was allocated a Grade 2 fuel oil power station. The procurement team of Eskom then sought a mandate to negotiate after the tender with the suppliers.

84. These negotiations resulted in a re-allocation of power stations for the benefit of Econ Oil. Econ Oil had initially been allocated one power station to the value of approximately R800 million. After the direct negotiations Econ Oil was allocated eleven power stations to the value of approximately R8 billion. With the changes in management of Eskom, it was ultimately decided to challenge the decision to allocate the awards to Econ Oil.

85. An application to the High Court for the review and setting aside of the award was launched in October 2020. In its judgment on 29 June 2021 the High Court reviewed and set aside the award. The application for leave to appeal to the Supreme Court of Appeal was dismissed.

86. Given the above, we cannot find that Eskom was not justified in deregistering Econ Oil as a supplier for its alleged involvement in improper and unethical business practices.

The procedure followed in the decision to de-register Econ Oil

87. The process of the de-registration is regulated by Eskom's Supplier Integrity Pact. It requires suppliers to maintain an unimpeachable standard of integrity in all their business and personal dealings. Furthermore, suppliers must take reasonable measures necessary to prevent all dishonest, unfair, fraudulent, corrupt, and illegal practices during any stage of the Eskom procurement process including the execution of contracts and contract modifications. Suppliers must ensure that they are familiar with all publicly available Eskom policies, procedures and codes that impact the supply chain process. They must not abuse the trust placed in them by Eskom employees or misuse opportunities arising in the course of their interaction with Eskom for personal gain.

88. Where the Supplier Integrity Pact is violated, Eskom is entitled to implement the supplier re-consideration and suspension processes. There is a committee at Eskom known as the Supplier Reconsideration Committee (SRC). It is entitled to de-register or mark for deletion a supplier following an investigation or proof of misconduct. Ms Mlonzi in fact signed the Supplier Integrity Pact and is bound by its provisions.

89. It seems that Eskom followed this process in the termination. The SRC met on 26 November 2020 to consider the allegations against Econ Oil. Allegations were sent to Econ Oil on 9 December 2020. Econ Oil was informed that its status as a supplier was under review in light of the corrupt relationship which was

alleged between the First Applicant and Ms Marah and the refusal to comply with the audit requests.

90. On 22 January 2021 Econ Oil's attorneys addressed a further letter to Eskom stating that Econ Oil was not able to meaningfully respond to the charges without certain information. This information sought does not appear to have been relevant to the allegations against Econ Oil.

91. By 26 January 2021 there was no response from Econ Oil. They were then given until 1 February 2021 to respond to the allegations. It was made clear that the matter was urgent. Econ Oil still failed to respond to the charges. They made a request for further information on 29 January 2021. Eskom responded on 2 February 2021 making it clear that there was sufficient information given to Econ Oil.

92. Econ Oil failed to make its representations timeously. A high court interdict which it brought was not persisted with. It was then given additional time to make its representations. By 16 February 2021 no representations were made. There were further protestations of unfair treatment. Eskom decided to act. An urgent application which was brought was struck from the roll. Finally the representations were made on 24 February 2021. A provisional decision was made by Eskom and additional representations were sought from Econ Oil, which were only submitted on 9 September 2021. A final decision was made on 16 August 2022.

Findings on justification

93. In *Bulb Man* the Tribunal held:

> *"[56] We can look at the anti-competitive effect from another perspective. Why is the dominant firm refusing to deal? As the authorities show, even dominant firms are entitled to refuse to deal. However, if the dominant firm lacked a proper explanation for its conduct, this might shift the*

probabilities in favour of the applicant. 'Faul and Nickpay observe in relation to European jurisprudence that: A refusal to deal by a dominant undertaking will not be considered an abuse under Article 82 of the EC Treaty if it is objectively justified. This will be the case if the refusal can be justified on business grounds other than the intention to eliminate a competitor from the market.'"

94. In the light of the above facts, it is not possible to conclude that there is no "proper explanation" for Eskom's conduct or that the reasons it has provided lack objective rationality or justification. We also cannot find that the decision to de-register Econ Oil was motivated by a desire to entrench Eskom's dominant position or to enable it to leverage its market power at the expense of Econ Oil.

95. The Tribunal holds that the decision of Eskom was justified. This means that the Applicants have not established, prima facie, that there is an abuse of dominance in terms of section 8(1)(c) of the Competition Act.

UNFAIR DISCRIMINATION

96. The Tribunal should also consider the submissions of the Applicants that they have been discriminated against by Eskom on the grounds of race and gender. In support of the allegations of discrimination the Applicants refer to Eskom's 2021 Integrated Annual Report which lists Econ Oil as the only supplier that was, at that stage, subject to the threat of de-registration. The Applicants complain that this is inconsistent and discriminatory. The comparators which have been used by the Applicants to show the inconsistency and discrimination are the following:

96.1. Deloitte Consulting (Pty) Ltd for allegedly benefitting from a contract which was awarded irregularly;

96.2. PWC South Africa for allegedly receiving unlawful payments through a risk-based contract intended to realise savings on capital projects;

96.3. Impulse International (Pty) Ltd which was investigated by the Special Investigating Unit (SIU) and the National Prosecuting Authority (NPA);

96.4. ABB South Africa which made a voluntary disclosure in respect of over-payments relating to the Kusile Project;

96.5. Tubular Construction and its Chief Executive Officer Mr Antonio Trindade;

96.6. Group Five and its former Chief Executive Officer Mr Michael Thomas who is alleged to have been charged with fraud and corruption;

96.7. Glencore which entered a guilty plea in the United States of America for foreign bribery and market manipulation.

97. Yet despite this, so the Applicants contend, these firms continue to do business with Eskom.

98. Eskom states that it is pursuing multiple investigations into suppliers, employees as well as former Eskom Board members and executives. Some of these have been referred to the SIU and the South African Police Service. Eskom adds that the penalty to be imposed on a particular supplier depends on the facts of each case and the response of that supplier to the charge of misconduct.

99. In the specific instance, for instance of ABB, Eskom shows that the firm made a voluntary disclosure and has subsequently made a repayment to Eskom in the amount of R1,56 billion. Eskom does not specifically respond to the allegations of misconduct against Impulse, Deloitte, PWC, Tubular, Group Five and Glencore. Nor does it explain how it applied its policies in respect of the identification of the firms to be subject to a review.

100. The problem with this however, is that the Tribunal is required to determine if there is *evidence* of a prohibited practice. It is the Applicants who must set out the evidence of a prohibited practice. It is not enough to make generic conclusory

statements, not supported by actual facts, and then to ask the Tribunal to deduce from such statements evidence of a prohibitive practice. Since the Applicants' case is in part based on discrimination, they are required to provide the facts to show the similarities between their case and the comparators they have chosen. They have failed to do so. As a result, we are unable to make any meaningful comparison between the case of the Applicants and the other examples referred to in the founding papers.

101. This issue ought to rest here. The discrimination claims have been found to be speculative.

REMAINING ELEMENTS OF INTERIM RELIEF

The need to prevent serious or irreparable harm

102. The CAC[25] has noted that the requirement to prove the need to prevent serious or irreparable harm is a party specific enquiry. However, unlike interim interdicts at common law, it is the damage to the competitive position of the Applicants that the prohibited practice may cause that is relevant. There may be other forms of damage, but they are not relevant because the purpose of the Act is to maintain and promote competition in the market.
103. We repeat that this is a case about monopsonic power. Eskom is a buyer of products supplied by Econ Oil. We have accepted the Applicants' definition of the market as comprising the market for the procurement of fuel oil in South Africa. In that market Eskom is responsible for approximately 95% of procurement. Econ Oil says that it stands to suffer irreparable harm if the decision comes into operation.

104. Although Econ Oil refers to "State work" in general, this case is concerned with Eskom. The Tribunal is not considering whether or not the de-registration decision would be applied across the board in relation to State work. Econ Oil

[25] *Business Connexion* at para 21.

says that if it ultimately succeeds in its abuse of dominance proceedings against Eskom, by the time that decision is reached it would likely have exited the market. The prospects of its return would be very slender. It also suggests that its much larger and better capitalised competitors would quickly fill the gap left by Econ Oil's forced exit. The net result would be that the important contribution made by its presence as a black female owned supplier would be lost.

105. Eskom says that Econ Oil's website suggests that it has a diverse product and service offering which is not limited to fuel oil and a diverse customer group that is not limited to Eskom but includes customers in the automotive, mining, tyre, milling and other industrial sectors. Eskom also points out that Econ Oil unduly delayed before instituting these proceedings, having waited for a period of more than 18 months.

106. The Tribunal's function is to consider whether or not there is a need to prevent serious or irreparable harm to the Applicants. Had the Applicants established a *prima facie* case, it seems plain that there would have been a need to prevent serious or irreparable harm to the Applicants. The evidence suggests that Eskom is the only realistic large-scale consumer of the products supplied by Econ Oil. There is no evidence showing the type of product and volumes supplied by Econ Oil to other customers. There was in fact no evidence as to who these "other" customers might possibly be. A realistic view is that Econ Oil is primarily dependant on Eskom as its main customer. If that relationship is terminated, there will in all probability be no other significant customers of its fuel oil products. The consequences, contemplated by Econ Oil, of an exit do not appear to be as speculative as suggested by Eskom. It appears indeed that would be a need to prevent serious or irreparable harm. It is not necessary to reach definitive findings in this regard given our conclusion that no *prima facie* evidence of a prohibited practice has been established.

Balance of convenience

107. The balance of convenience concerns the weighing of the prejudice to be suffered by the Applicants if the interim interdict is not granted as against the prejudice to the Respondent if the application is successful. In *Business Connexion*[26] the question was formulated as follows: If the application succeeds but the complaint is later dismissed, what prejudice will be suffered by the respondent and how could this be remedied? That question is contrasted with another: If the application is dismissed and the complaint succeeds, what prejudice will be suffered by the applicant and how could this be remedied?

108. We have considered the prejudice to be suffered by the Applicants. Their ability to compete in the market will be severely constrained by the loss of Eskom as a customer. But this must be balanced with the prejudice suffered by Eskom. Eskom is a public entity. As a public entity it has constitutional and legal obligations in the way it engages with its suppliers. It has concluded that the Applicants have engaged in unethical, improper and possibly corrupt practices in relation to procurement and relationship with Eskom's employees. It has produced the evidence in support of its conclusions. It has also been supported by external investigations and findings. These allegations have not been credibly denied by the Applicants. In fact, in some instances the allegations have been confirmed. It is plain that the Applicants did not co-operate with the investigation initiated by Eskom. It is also established that the Applicants sought to interfere with the procurement process by making direct contacts with several officials at Eskom. It is also established that payments were made by the Applicants for the benefit of employees of Eskom or causes associated with them.

109. Judging the balance of convenience in those circumstances requires the Tribunal to take the burden we could impose on Eskom as an organ of State into account. We are unable to hold in circumstances such as the present, where a strong justification is given as to why an organ of State refuses to engages with a

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[26] At para 22.

supplier, that the balance of convenience nevertheless justifies the continuation of that relationship.

110. We therefore conclude that the balance of convenience does not favour the granting of the interim interdict.

111. That means the application fails in respect of two of the three mandatory requirements (prima facie evidence of a prohibited practice and balance of convenience) for an interim interdict. In these circumstances the Tribunal cannot hold that it is reasonable and just to grant the application.

SINGLE ECONOMIC ENTITY

112. The Applicants ask for an order that they should be declared as a single economic entity for the purposes of this application. For the purposes of this case, it is not necessary to make that declaration. The First Applicant is a complainant in her own right. Eskom has de-registered both Applicants. Although when the case began, a decision on whether or not the First Applicant would be de-registered was awaited, we were informed in oral argument that the decision has indeed been taken. The de-registration decision is based on the same reasons as those applicable in respect of the Second Applicant. Thus, both Applicants have standing to bring this application jointly or separately.

113. A finding that they are a single economic entity is a superfluous finding with no practical consequences. In fact, Eskom has not disputed the standing of the First Applicant to bring a separate case alongside the Second Applicant.

114. We have concluded that the application should fail because no cause of action is established. We consider the further arguments raised in the heads of argument and persisted with in oral argument.

SECTION 49C INTERIM RELIEF AGAINST ADMINISTRATIVE DECISIONS

115. We now consider Eskom's argument that the decision to de-register Econ Oil is an administrative decision[27], in terms of section 1 of the Promotion of Administrative Justice Act 3 of 2000. We would have preferred not to express a view on this issue at this stage, but since it has been pressed in both written and oral argument, we should deal with it.

116. Eskom says that its decision is binding until set aside, relying on the principle first established in the judgment of the Supreme Court of Appeal in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[28]. That principle is encapsulated in this passage:

> *"[26] For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view it was not.*

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[27] Subject to certain exclusions, PAJA defines and administrative act as follows:

"administrative action" means any decision taken, or any failure to take a decision, by—

(a) an organ of state, when—

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect".

[28] [2004] 3 All SA 1 (SCA).

Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognized that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."

117. It is not clear how this principle is relevant at all.

117.1 Firstly, the Tribunal is not being called upon by the Applicant to express an opinion on whether or not Eskom has made a decision under PAJA. Nor have we been called upon to review any administrative decision under PAJA. In any event we have no power to review administrative decisions under PAJA.[29]

117.2 Secondly, the Tribunal's power to grant interim relief is expressly conferred by section 49C of the Competition Act, unlike what transpired in the *Group Five* judgment where the power of judicial review of administrative decisions under PAJA or the principle of legality could not be sourced in legislation.

117.3 Thirdly, in terms of section 3(1) the Competition Act "*applies to all economic activity within, or having an effect within, the Republic*". Plainly, a decision of the State which constitutes an economic activity within the Republic is subject to regulation by the Act. Section 49C does not contemplate the exclusion of administrative decisions if they constitute economic activity within the Republic or have an effect in the Republic.

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[29] See: *Competition Commission of South Africa v Group Five Construction Ltd* [2023] 1 CPLR 1 (CC).

117.4 Fourthly, the mere fact that an administrative decision is binding until set aside does not mean that interim relief cannot be granted to suspend its operation, until a final determination is made. The fact that we have no jurisdiction to review an administrative decision does not mean we have no power, in terms of section 49C of the Competition Act to grant interim relief if the Act applies to the decision in terms of section 3 of the Competition Act.

117.5 Fifthly, section 81 of the Competition Act makes it clear that the Competition Act binds the State.

118 We hold that to make exclusions for certain decisions taken by organs of State where they meet the requirements of section 3 would sterilize the Act and undermine its objects and effectiveness. As such, the Tribunal has the power to grant interim relief under section 49C in respect of decisions of an administrative nature, if such decisions are covered by section 3 of the Act.

CONCLUSION

119 We conclude that the Applicants have not made out a case for interim relief. The application stands to be dismissed.

120 There remains a final comment to make. During the argument it was debated with Eskom's counsel whether or not there was a specific reason to impose a period of ten years, rather than for instance, five years. No specific reason could be given. This is an issue we considered, but we ultimately elected not to express a view on it as the Notice of Motion does not attack the period of ten years as being disproportionate. Nor have we been addressed on whether an alternative order would have been appropriate.

121 In the circumstances, we should dismiss the application.

ORDER

[1] The application is dismissed.

[2] There is no order as to costs.

Mr Tembeka Ngcukaitobi

2 August 2023
Date

Ms Mondo Mazwai and Professor Fiona Tregenna concurring

Tribunal Case Managers:	Theodora Michaletos and Kameel Pancham
For the Applicant	Adv Vuyani Ngalwana SC assisted Adv Katlego Monareng instructed by Thea Kilian of Stan Fanaroff and Associates
For the First Respondent	Maya Swart for the Commission
For the Second Respondent	Adv Wim Trengove SC assisted Adv Michael Mbikiwa instructed by Derek Lotter and Richard Bryce Bowmans