COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no. 37/CR/July10

In the matter between:

PHUTUMA NETWORKS (PROPRIETARY) LIMITED **Applicant**

and

TELKOM SA LIMITED **Respondent**

Panel: **N Manoim (Presiding Member)**

Y Carrim (Tribunal Member)

L Reyburn (Tribunal Member)

Heard on: **11 February 2011**

Order Issued on: **2 March 2011**

EXCEPTION DECISION AND ORDER

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[1] This matter concerns an exception taken by the respondent, Telkom SA Limited ('Telkom') (the applicant in these exception proceedings) to a complaint lodged against it by the applicant, Phutuma Networks (Pty) Ltd ('Phutuma') (the respondent in these exception proceedings), alleging that Telkom has contravened section 8(c) of the Competition Act, No. 89 of 1998 (as amended) ('the Act'). The complaint alleges an abuse of a dominant position, as is explained below, and exhorts the Tribunal to impose an administrative penalty on Telkom of 10% of its turnover in the year of the alleged offence as a 'repeat offender'.

[2] Phutuma lodged its complaint in terms of section 51(1) of the Act on 20 July 2010 after the Competition Commission ('the Commission') had issued a notice of non-referral of a complaint originally lodged by Phutuma with the Commission. Phutuma's original complaint was lodged with the Commission on 21 January 2010 and the non-referral notice, issued in terms of section 50(2) of the Act, was issued on 23 June 2010.

[3] The notice of non-referral effectively opened the way for Phutuma to formulate the complaint in terminology of its own choice and to pursue it on its own initiative before the Tribunal.

[4] Section 8(c) and (d) of the Act are concerned with abuses of dominance and read as follows:

"It is prohibited for a dominant firm to –

...

(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 gains; or

(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act –

(i) requiring or inducing a supplier or customer to not deal with a competitor;

(ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;

(iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;

(iv) selling goods or services below their marginal or average variable cost;

(v) buying-up a scarce supply of intermediate good or resources required by a competitor."

[5] In terms of section 1 of the Act 'exclusionary act' means *an act that impedes or prevents a firm from entering into, or expanding within, a market*.

[6] In its notice on Form CT1(2) referring the matter to the Tribunal, Phutuma, when giving the required 'concise statement of the alleged prohibited practice' referred the Tribunal to the accompanying affidavit of Dr E.G. Scott ('Scott'), and a number of other documents, none of which had been formulated in the first instance for the purposes of this case. We identify them below.

[7] To establish what Phutuma's case is we must therefore look at least primarily at Scott's affidavit. It is dated 20 July 2010 and comprises five paragraphs. We set them out fully below as they appear in the affidavit:

1. *I, the undersigned Dr Edward George Scott ID 4805275008082 an adult professional businessperson representing and on behalf of Phutuma Networks a Company Registered in South Africa under the following registration number 2004/007197/07 with address Suite 2, Santa Rosa, Wapadrand, Pretoria do hereby make an oath and state that:*

2. *TelkomSA abused the regulations and obligations at the time of a near monopoly regulated licence which afforded them a dominant exclusivity in the communications industry marketplace by engaging in an exclusionary act, and appointed Network Telex during 2007 without any formal procurement procedure as prescribed by The Constitution of South Africa, 1996 Section 217 "When an*

organ of state identified in national legislation as nominated under Section 239 of the Constitution of South Africa, 1996, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."

3. *Oral and written evidence has been given to me that TelkomSA appointed and or sub-contracted Network Telex for the Maritime ship to shore Inmarsat telegraphic services also comprising of the "SOLAS" services which is an international agreement governed by the International Maritime Organisation under the auspices of the United Nations in conflict with the prescripts of the Constitution of South Africa, 1996 Section 231 regarding international agreements.*

4. *This appointment of Network Telex is a breach of the Competitions Act Section 8(c) a breach of Section 10 of the BBBEE Act and the framework as set out in the PPPFA Act No 5 of 2000 by excluding disadvantaged citizens and without following procurement procedures awarding work to a non BEE compliant British Company.*

5. *In deviating from the official advertised procurement policy found under www.telkom.co.za and not following the correct sourcing process and internal procurement policy. As well as the BEE commitment undertaken by TelkomSA."*

[8] It is noteworthy that Scott's affidavit says nothing about, *inter alia*, the nature, extent and history of the business activities of Phutuma and Phutuma's technical capabilities, nothing about his position in relation to Phutuma and the authority by which he attests for it, and nothing about the market or markets which he considers to be the relevant market(s) for the purposes of the section 8(c) complaint, and nothing about the business activities and technical capabilities of the company he identifies as Network Telex. No details are given of any decision under the Act adverse to Telkom which would justify its categorisation as a 'repeat offender.' No explanation is given of the relevance of the other documents referred to, and the relevant part or parts of them are not identified.

[9] Since Network Telex appears to be an interested party in the contract which Scott identifies as the target of Phutuma's complaint, it is also surprising that Network Telex was not cited or joined as an interested party in the case.

[10] The other documents lodged with Scott's affidavit comprise the following. (Document numbers and descriptions are as provided by the Tribunal):

Document 2: A letter dated 10 December 2009 from Phutuma to the chairperson of ICASA (the Independent Communications Authority of South Africa, the statutory regulator of the telecommunications industry), requesting ICASA to investigate and rectify an alleged abuse by Telkom of a licence granted by ICASA to Telkom. The alleged abuse identified is the grant by Telkom to Network Telex of rights encompassed by this licence to operate a shore-to-ship maritime radio telex link. This

is essentially the same complaint as is made in paragraph 2 of Scott's affidavit. This letter identifies Scott as an executive director of Phutuma.

Document 3: Extracts from Telkom's official procurement policy document.

Document 4: A description of the SOLAS agreement, which concerns emergency use of any communications media available between official land-based telecommunications authorities and a 'mobile station' or 'mobile earth station' in distress.

Document 5: A description of the Inmarsat satellite communications link between land-based and maritime mobile stations with ground networks of public and private providers of telecommunications services.

Document 6: An undated letter From Phutuma to the Maritime Transport Regulation section of the South African Department of Transport ('the Department of Transport') requesting a copy of Telkom's current licence in terms of the SOLAS convention for certain maritime telecommunications services.

Document 7: A letter dated 10 November 2009 from the Department of Transport to Phutuma, apparently replying to the last-mentioned letter, and explaining that this department administers SOLAS and enclosing a guideline document in this connection. The letter states that the department cannot provide Phutuma with a copy of its contract with Telkom because it is bound by a confidentiality provision in that contract, and that the department is not aware of any licence governing maritime safety information services as the source for the responsibility to provide these services is SOLAS itself.

Document 8: A summary of the scope and purposes of the United National Convention on the Law of the Sea.

Document 9: A covering note of the International Maritime Organisation to a list of the contact details of designated national authorities and international organisations, of which the Department of Transport is one.

Document 10: A document apparently emanating from the International Telecommunications Authority setting out the contact details of Telkom.

Document 11: An undated letter from the South African Department of Trade and Industry to Phutuma replying to a letter of Phutuma dated 14 September 2009 regarding the codes of good practice for broad-based black economic empowerment (BBBEE).

Document 12: An extract from a document of the South African National Treasury setting out a list of 'major public entities.' Telkom's name is on this list.

Document 13: An exchange of what appears to be emails between various parties discussing a report that a private company named Telex Network is "going around telling people that they have been requested/appointed by Telkom to phase out our existing telex network by providing them with a similar solution."

Document 14: A letter dated 27 June 2010 from Phutuma to the Commission following the Commission's decision to issue a notice of non-referral, and containing the following explanation of Phutuma's position:

> *"TelkomSA appointed Network Telex during 2007 without any procurement nor prescribed tender process being published or followed...*
>
> *The matter is currently in process with ICASA regarding infringement of the Electronic Communications Act and regulations governing the appropriate issued licences.*
>
> *We have approached numerous controlling bodies namely NPA, ICASA, JSE, SAICA, IRBA and Parliament with regards (sic) to the various breaches of the law as well as instituted civil proceedings against TelkomSA.*
>
> *None of the aforementioned matters have relation to each other and [we] are not requesting any department to resolve our civil case which is following a route on its own but we sincerely feel that the market dominance over Industry has been abused and therefore our request for your intervention.*
>
> *We appreciate your assistance thus far and as suggested will forward our complaint directly to the Competitions (sic) Tribunal for reconsideration."*

Document 15: A letter from the Commission to Phutuma dated 23 June 2010 explaining that the Commission, after making its investigation of Phutuma's complaint, had decided to refrain from referring it to the Tribunal and summarising the Commission's reasons for the non-referral. (Document 14 is a response to this letter.) The Commission states in this letter its view that Telkom's award of the Network Telex contract was not a matter which the Commission could address and that if it was irregular ICASA rather than the Commission would have jurisdiction over the matter.

Document 16: The Commission's notice of non-referral.

[11] It appears to the Tribunal that the quoted statement from Document 14 expresses the nub of Phutuma's complaint against Telkom.

[12] In an answering affidavit dated 18 August 2010 on behalf of Telkom, Mr George Candiotes, who occupies the position in Telkom of Executive: Wholesale and Competition Law ('Candiotes') set out a two-part exception raised *in limine* by Telkom to Phutuma's complaint. First, he contended, Scott's affidavit was vague and embarrassing in that it did not list the allegedly material grounds which would support a complaint of contravention of section 8(c) of the Act. Second, he contended, the application did not establish a cause of action under section 8(c) or any other provision of the Act in that it did not:

1) delineate a 'relevant market as contemplated in section 7 of the Act;
2) establish that Telkom was a dominant firm in such a 'relevant market';

3) establish that Telkom's conduct constituted an 'exclusionary act' which had the effect of impeding or preventing Phutuma from entering or expanding within such a 'relevant market'.

[13] In view of the conclusions the Tribunal has reached about the matter it is only necessary to deal with the second part of the exception which deals with the fact that no cause of action has been made out.

[14] Candiotes proceeded in his affidavit to set out Telkom's version of the history of the contract it awarded to the company named Network Telex. Candiotes affidavit is lengthy and detailed, but in very brief terms Candiotes stated that the Department of Transport was obliged in terms of its international obligations as the relevant national authority under SOLAS to provide maritime telex services to enable vessels in distress to maintain communications with land-based providers of communications services. To fulfil this obligation the Department of Transport had contracted with Telkom, as it was entitled to do, for the provision of land-to-sea telex services on its behalf. Telkom in turn had contracted with Network Telex in 2007, as it was entitled to do, to render those services. At one stage Telkom contemplated going out to tender in order to find a contractor to render the relevant services but had finally merely appointed Network Telex. The contract was in financial terms a small one and in a period of upwards of three years the value of the services provided by Network Telex was less than R20,000.[1]

[15] Candiotes' affidavit was confirmed by an affidavit of Mr Dirk Cornelissen, who is the Manager: Network Centre Operations in Telkom.

[16] Phutuma proceeded to file a replying affidavit by Scott dated 8 September 2010. It is headed 'Applicants Answering Affidavit.' In it Scott denies that that the objections *in limine* are valid and asserts that *"The matter was clearly defined and attachments were given to the .... Respondent so the Respondent is clearly knowledgeable of the facts surrounding the matter."* He proceeds to set out in some detail the history of a contract entered into by Telkom with Network Telex, and a description of Telkom's exclusive rights in regard to certain telecommunication services under an ICASA licence and in terms of its contract with the Department of Transport.

[17] We do not find in Scott's replying affidavit a direct response to Telkom's assertion that for the purposes of the complaint before the Tribunal, concerned with the particular circumstances of proceedings under section 8(c) of the Act, there is no delineation of a relevant market and no cause of action is made out. Instead, Scott sets out a history of Telkom's former statutory monopoly in certain sections of the telecommunications industry including dominance in the fixed line sector, and a series of accusations that this market power has been abused. At most we can conclude from this exposition that Phutuma's attitude is that whatever the relevant market may be, Telkom is dominant in it.

[1] See paragraph 35 of Candiotes supplementary affidavit dated 29 November 2010.

[18] Scott's answering affidavit runs to 18 pages and includes 26 pages of annexures. They include documents which make it clear that he has also instituted proceedings in the North Gauteng Division of the High Court over a complaint which also appears to turn on the award by Telkom to Network Telex of a contract to render shore-to-ship telex services to the Department of Transport.

[19] A considerable amount of detail is contained in Scott's replying affidavit which is not present in his founding affidavit of 20 July 2010. Predictably, therefore, Telkom chose to file a supplementary affidavit, dated 29 November 2010 in which Candiotes traversed Scott's replying affidavit and provided a yet more detailed explanation of the background to the Network Telex contract. Candiotes also asserted in this affidavit that the new matter in Scott's replying affidavit should be struck out as impermissible, but as a precaution he proceeded to respond to the replying affidavit in full.

[20] Not to be outdone, apparently, Phutuma filed a supplementary replying affidavit by Scott dated 7 February 2011, extending over 13 pages and including annexures extending over no fewer than 381 pages. No application for leave to file an affidavit at that late stage was made by Phutuma, nor an application for condonation of its filing.

[21] At the hearing on 11 February 2011 Telkom's counsel, Mr Maenetje contended that despite the mass of material now making up the record there was still no clarity about the market which Phutuma considered should be the relevant market for the purposes of the case but, whatever the position was in that regard, Telkom was not obliged by any consideration of competition law to adopt an open tender procedure in regard to its recruitment of a contracting party in the form of Network Telex to provide the telex services for which Telkom had contracted with the Department of Transport. If there had been irregularities in the awarding of that contract, they concerned matters outside the proper ambit of the competition authorities in terms of the Act, and would properly form the subject of a complaint under administrative law or possibly constitutional law.

[22] Phutuma's counsel, Mr Geach, contended that there was no substance in the complaint that a relevant market had not been defined since it was clear that Telkom operated in the telecommunications market and also in the market for telex services and either of them, in the alternative, would be the relevant market. On being pressed he asserted that it was irrelevant which of these markets was in issue since Telkom was dominant in both.

[23] We consider that the crucial assertion of Phutuma, expressed by MrGeach in exchanges with the Tribunal at the hearing, is that Telkom, once established to have dominance in a market, must of necessity when appointing suppliers or sub-contractors go out to competitive tender and furthermore must follow tender procedures which comply with statutory obligations applicable to public entities, and hence must comply with public procurement legislation and must give preference to tenderers with appropriate black economic empowerment credentials. We gather that Phutuma considers that these requirements stem from or are associated with Telkom's status as a licensed telecommunications operator with market power or an exclusive contractor to the Department of Transport. The implication is that if such a

competitive process is not followed, an 'exclusionary act' as contemplated in section 8(c) is necessarily committed, and it is superfluous to undertake the weighing-up enjoined in that sub-section between the anti-competitive effect of that act and any gains it brings by way of technological, efficiency or other pro-competitive benefits.

[24] Mr. Geach cited no authority for this proposition and we consider it to be entirely incorrect. The Act is so constructed that public entities enjoy neither preference nor prejudice by virtue of their official status when their actions are considered in terms of the Act. A firm in the private sector operating with no public licence and no privileged position in terms of any legislation or international conventions will be judged by the same criteria as an organ of the state. This is clear from Section 3 of the Act, headed "Application of the Act," which commences with the statement in sub-section (1) that "The Act applies to all economic activity within, or having an effect within, the Republic." The only exceptions to this are, first, collective bargaining within the meaning of section 23 of the Constitution; second, under the Labour Relations Act, a collective agreement as defined in section 213 of that Act; and third, concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose. None of these exceptions is applicable here.[2]

[25] It is irrelevant for the purposes of the case whether or not Telkom is a public entity in terms of the criteria applicable under legislation other than the Act: its conduct must for the purposes of this case be judged purely in terms of the Act.

[26] It should be borne in mind that the Tribunal has no inherent powers or status, unlike the courts of South Africa. Its functions and powers are to be sought only in its founding statute, which is the Act. It is of course also subject to the Constitution, and is to that extent bound by the provisions of section 217 of the Constitution which states that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

[27] Accordingly the Tribunal has no power to consider or rule upon the constitutionality of Telkom's conduct or the validity in terms of administrative law of contracts into which it enters. The Tribunal can concern itself only with matters confined within the ambit or 'four corners' of the Competition Act.

[28] It is self-evident that, for conduct to be prohibited in terms of section 8 of the Act, all the criteria laid down in the Act in respect of that provision must be complied with. This requires as a pre-condition the delineation of a relevant market and an allegation, with substantiation, that an accused firm is dominant in that market; that it has abused

[2] There is also a quasi-exception, set out in section 3(1A) of the Act, which states that "In so far as this Act applies to an industry, or sector of an industry, that it subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of the Act, this Act must be construed as establishing concurrent jurisdiction in respect of that conduct." From the facts stated by Telkom and not contradicted by Phutuma it is clear that Telkom was acting in terms of its contract with the Department of Transport when it engaged Telex Network to provide telex services fulfilling the requirements of SOLAS, and the fact that Telkom was a licensee of ICASA was not directly relevant to that contract. The Department of Transport does not have jurisdiction in respect of any matters provided for in Chapter 2 or 3 of the Act and hence there is no question of concurrent jurisdiction in this case.

its dominance; and what the nature of the abuse is. Where the complainant has more than one relevant market in mind, or submits that there are alternative relevant markets, this must be expressly stated in its complaint in order that the respondent can understand the limits of the allegations against it and can prepare and properly define in its pleadings its defence to the complaint.

[29] Nor is any case made out that there has been an abuse of dominance. A dominant firm is not obliged to put services to it out for tender. The Tribunal therefore agrees with Telkom's assertion that if the act complained of does not amount to a contravention of the Act then the complaint is fatally defective; this is in fact no more than common sense.

[30] Normally in exception proceedings an exception that is upheld leads to an order that the party whose pleading is the subject of the exception must amend its pleading in order to rectify the defect which gives rise to the exception.[3] In some cases, however, and this is such a case, no amendment can rectify the matter. Phutuma has not omitted or misstated a necessary fact: it has on the contrary advanced as the crux of its case a proposition which is erroneous in law, namely that a firm in a dominant position which chooses to sub-contract an activity falling within its dominance is obliged to do so in a manner which amounts to public tender and which is subject to all the prescriptions applicable to public tenders. Despite the filing by Phutuma of a replying affidavit containing new material and a supplementary replying affidavit of considerable length, the position remains that no cause of action under section 8(c) has been made out, and in the circumstances stated by Phutuma we cannot see how a cause of action under that section could ever be made out.

[31] As a result, we find that we must uphold the objection and Phutuma's entire case must fail.

[32] We should add that this case provides an object lesson for litigants, when considering allegations of abuse of dominance in terms of section 8 of the Act, to observe the discipline of formulating a complaint within the framework of a properly defined market having both a product and a geographical dimension, and identifying conduct which is properly to be adjudicated in terms of the Act and not under other laws of the land and which falls properly within one or more of the categories of prohibited conduct encompassed by section 8.

[33] This process requires both a marshalling of the essential facts and the sifting of these facts to assess their significance in terms of the requirements of section 8. Phutuma's papers, despite their prolixity, show no evidence that this process was effectively carried out.

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[3] For cases where an exception was upheld and an opportunity given to amend a pleading, See Tribunal exception decision in *BMW South Africa (Pty) Ltd v Fourier Holdings* Case No. 97/CR/Sep08; Tribunal amendment application decision in *Competition Commission v South African Airways (Pty) Ltd* Case No. 18/CR/Mar01; T*elkom SA Limited and the Competition Commission of South Africa and Another* Case No: 55/CR/Jul09, 73/CR/Oct09, 78/CR/Nov09. For a case where an exception was upheld but the case dismissed, See *AEC Electronics (Pty) Ltd and The Department of Minerals and Energy* Case No. 48/CR/Jun09.

[34] If Phutuma has any justifiable grievance at all against Telkom it appears that it should be pursued on the basis of a breach of a branch of the law unrelated to competition law. The papers in the record suggest that there have already been forays by Phutuma into ICASA's complaint procedures and into High Court proceedings.

[35] Accordingly we order that the exception to Phutuma's complaint is upheld and that Phutuma's complaint is dismissed.

[36] The Tribunal does not normally grant costs against a litigant which loses a case as a result of the success of a preliminary or technical objection. However, in this case the objection goes to the root of the case and it is clear that the complaint has no substance and should not have been brought. Accordingly, Phutuma is ordered to pay Telkom's costs, including the cost of its counsel.

_____ **02/03/2011**

L Reyburn DATE

N Manoim and Y Carrim concurring

Tribunal Researcher	:Londiwe Senona
For the Applicant (Telkom SA)	:Adv. H. Maenetje instructed by Edward Nathan Sonnenbergs
For the Respondent (Phutuma)	:Adv. B.P. Geach instructed by GP Venter Attorneys