COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 80/IR/Aug05

In the application for interim relief:

Nqobion Arts Business Enterprise CC	**Applicant**
and	
The Business Place Joburg	**First Respondent**
BeEntrepreneuring	**Second Respondent**

Decision

Introduction

1. The applicant, Nqobion Arts Business Enterprise ("Nqobion"), has brought an application for interim relief against the first and second respondents in respect of an intellectual property claim, the Arts Tuesday trademark, which it alleges is being used by respondents to abuse their dominant market position thereby contravening sections 8(b), 8(c), 8(d). It also alleges that respondents are contravening sections 4(a) and 5(1) of the Competition Act based on certain agreements entered into between respondents.

2. The application is denied for the reasons set out below.

Background

3. The applicant, Nqobion, was represented by a layperson, Nqobile Mgiba, who is its owner and CEO. Nqobion is a black owned business that renders services such as artist management, mentorship and marketing of art products for the tourism market to upcoming artists.

4. The respondents are The Business Place Joburg (TBP) ("first respondent") and BeEntrepreneuring ("second respondent"). First respondent is an association not for gain incorporated in terms of section 21 of the Companies Act 61 of 1973. It was established in 2002, in

partnership by the Technikon SA, the City of Johannesburg and Investec Bank Ltd, with a view to assist artists and entrepreneurs in the creative industries in starting their own businesses. Consultations, which are offered free of charge, focus mostly on industry related workshops, marketing and support services while at the same time offering a network to interact within. It initially operated under the name Open for Business at The Business Place, but was subsequently changed to The Business Place Joburg.

5. The second respondent, BeEntrepreneuring, was contracted by first Respondent during April 2005 to run the "Arts Tuesday" programme on behalf of The Business Place Joburg after Mr Ngiba, had left the employment of The Business Place Joburg.

6. According to Ngiba, first respondent appointed the applicant in June 2004 as a service provider to provide the Arts Tuesday Programme. The programme was also promoted in the press as one of a list of free services offered at The Business Place, and specifically by "Nqobion".[1]

7. First respondent disagrees saying that Mr Ngiba, and not the applicant, was employed by it as a volunteer to offer business advice and services to upcoming artists and assisted The Business Place Joburg with marketing and general advice. In August 2004 first respondent entered into a full time employment contract of one year with the Ngiba to provide these same services on behalf of first respondent- his official job title was Entrepreneurship Apprentice. It was only subsequent to entering into the employment contract that these services, developed in conjunction with The Business Place Joburg, became known as "Arts Tuesday". Five months later, on 24 January 2004, applicant resigned from first respondent's employment to pursue other opportunities.

8. At some time either after the applicant terminated its contract with first respondent, or Ngiba had terminated his employment with it, the first respondent secured the services of second respondent, a development consultancy firm known as Bentrepreneuring, to continue with the Arts Tuesday programme on behalf of first respondent.

9. It is this dispute over whether Ngiba's employment related to the Arts Tuesday project or whether the applicant was providing this as a service outside of Ngiba's employment responsibilities that has led to a dispute over the Arts Tuesday trademark.

10. The applicant claims that it owns the Arts Tuesday trademark, which the respondents are apparently now using illegally and in contravention of the Competition Act. The first respondent contends that it owns the rights as

[1] See Annexure QQ7 to the replying affidavit.

Ngiba was working on this project for them as an employee not an outside contractor. This is not a dispute we need to resolve for reasons that appear later.

Relief sought

11. This matter was brought to the Tribunal as an application for interim relief in terms of section 49C of the Competition Act.

12. Section 49C(1) state that:

> *At any time, whether or not a hearing has commenced into an alleged prohibited practice, the complainant may apply to the Competition Tribunal for an interim order in respect of the alleged practice.*

13. Section 49C thus limits the circumstances in which the Tribunal may grant interim relief to cases where a formal complaint has been filed, either with the Competition Commission or the Tribunal in case of a non-referral, and is being investigated by the Commission or pending a Tribunal hearing.

14. At the commencement of the proceedings the chairperson of the Tribunal panel brought to the Applicant's attention certain procedural problems with the application. The first related to the issue of whether the Tribunal had jurisdiction to grant an order for interim relief given the fact that subsequent to the application being filed, the Competition Commission had made a decision not to refer the matter to the Tribunal for determination. The Applicant indicated that he had received the Commission's notice in this regard, dated 7 September 2005. The Commission's reasons for non-referral were that the matter "mainly relates to possible infringement(s) of intellectual property rights and delictual claims, falling outside the jurisdiction of the Commission".

15. The applicant did not refer the complaint directly to the Competition Tribunal after the Commission issued a non-referral but persisted with the papers filed in its interim relief application

16. The Respondents were not aware of the notice of non-referral, but indicated that the relief would only be competent in circumstances where the complainant had sought to refer the matter itself so that the complaint was still alive. The existence of a valid complaint is a prior jurisdictional fact in an application for interim relief. Where the Commission has decided not to refer a complaint this prior jurisdictional fact ceases and can only be revived by a direct referral of a complaint by the complainant.

17. In light of this it was put to Mr Ngiba that the applicant was entitled to refer the complaint directly to the Tribunal in terms of section 51(1) of the Competition Act,[2] which states that:

> *If the Competition Commission issues a notice of non-referral in response to a complaint, the complainant may refer the complaint directly to the Competition Tribunal, subject to its rules of procedure.*

18. Mr Ngiba submitted that he was aware of the applicant's right to bring a complaint in terms of section 51(1), but that the Tribunal could exercise its discretion (in the interests of convenience and in order to avoid further costs), to convert the current proceedings into a section 51(1) application on the existing papers. He referred to the ruling in Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T), in support of the submission, and argued that he would tender oral evidence in support of his application for condonation.

19. The respondents indicated that they would oppose the application for condonation since the application would be out of time and the applicant would have to show good cause as to why it should be condoned. It was pointed out that condonation is frequently not granted where an applicant's prospects of ultimate success are poor and insofar as the Tribunal did choose to exercise discretion to grant final relief, the prospects of success did not, in the respondents opinion, favour the applicant.

20. While the Tribunal could dismiss this application on the grounds of lack of jurisdiction alone, the Tribunal has sought to understand the basis of the applicant's complaint because Mr Ngiba is a layperson and has represented the applicant in these proceedings. Hence we do not make any finding in respect of the applicant's argument that the Tribunal has the discretion to convert the current proceedings into a section 51(1) proceeding. Nor do we consider it necessary to express a view on whether there is a proper application for condonation before us. Rather we have chosen to consider the prospects of success of applicant's case.

21. It is apparent from the papers that the applicant's case, to a large extent, has been made out in reply. On a reading of the papers before us and applicant's submissions at the hearing, it appears that the applicant's competition complaint is along the following lines: the applicant alleges that the respondents are engaged in the illegal use of its intellectual

[2] In terms of Tribunal Rule 14(1)(b) the Applicant would have had to make the complaint in the prescribed form referred to in section 51(1) and the Rules. The referral would have to have been brought within 20 days after the issue of the Commission's notice of non-referral.

property in the rendering of services at the Business Place. The illegal use of applicant's intellectual property by the first respondent, which has now concluded an agreement with the second respondent to provide a similar service to that formerly provided by the applicant, confers market power onto first respondent, or the first and second respondents together, and amounts to an abuse of dominance or some other species of prohibited practice. It is on this basis that the applicant, at the hearing, sought default judgement against second respondent, which did not file any papers in the proceedings.

22. However in this matter there is no evidence of price competition ever being present. This is because the service was and is being offered at no cost to the consumer by both the applicant and the second respondent. Competition law *inter alia* is concerned about protecting the interests of consumers and ultimately delivering, directly or indirectly, certain benefits to them such as lower prices by, for example, proscribing minimum resale price maintenance or preventing dominant firms of abusing their position *vis-à-vis* smaller competitors. In this case consumers are not worse off as a result of the respondents' actions since the service is offered for free. Although a commercial dispute may be present we are of the opinion that it is an intellectual property concern and not a competition issue.

23. In light of this we accordingly find that there are no reasonable prospects of success as the applicant has failed to prove the existence of a prohibited practice under any provision of the Act. Since there are no reasonable grounds for success for the applicant to have the filing of its interim relief application converted into an application for final relief in terms of section 51 of the Act, the application is not granted. We find further that we no longer have jurisdiction to grant the applicant interim relief.

Order

24. The application is dismissed.

Costs

25. No order is made as to costs.

22 March 2006

U Bhoola **Date**

Concurring: N. Manoim and Y. Carrim