COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 016550

In the matter between:

SIMBA CHITANDO **Applicant**

And

MICHAEL FITZGERALD **First Respondent**
RUSSEL MACWILLIAM **Second Respondent**
MICHAEL WRAGGE **Third Respondent**

Case No: 016568

And the matter between:

SIMBA CHITANDO **Applicant**

And

WEBBER WENTZEL **First Respondent**
BOWMAN GILFILLAN **Second Respondent**
SHEPSTONE WYLIE **Third Respondent**
NORTON ROSE **Fourth Respondent**

Panel	:	Norman Manoim (Presiding Member) Andiswa Ndoni (Tribunal Member) Imraan Valodia (Tribunal Member)
Heard on	:	19 August 2013
Order issued on	:	19 September 2013
Reasons issued on	:	19 September 2013

Decision and order

Introduction

[1] Maritime law is considered a specialist area amongst practitioners both at the bar and in the attorneys' profession. As a result a handful of practitioners in both branches of the profession command a major share of the instructions received. A notable feature of the pattern of briefing is the absence of African lawyers, in particular African advocates, as recipients of such instructions. It would appear from the evidence in this case that at least at the Cape Bar no African advocate has been briefed in such matters at the time this application was brought. That this is an unhealthy state of affairs that requires remedial action is self-evident. However this case is about something far more modest.

[2] Given that the Competition Tribunal ("Tribunal") is a creature of statute that must act within the powers conferred upon it by the Competition Act ("Act"), the question we have to decide is whether the social exclusion alleged by the Applicant is to be remedied by the instrument of Competition law.

[3] In this application, which is for interim relief, Simba Chitando (herein referred to as the "Applicant") is an African advocate of Zimbabwean nationality, practising as such at the Cape Town Bar. He holds an L.L.B degree, an L.L.M degree in Commercial Law, with Maritime Law being one of his elected courses. He received exposure to the work of an Advocate in general as well as shipping litigation under the mentorship of the third respondent in the Advocates' case. He was then admitted as an Advocate at the Cape Bar in 2009.[1]

[4] Ordinarily in a prohibited practice case the race or nationality of an applicant would not be relevant factors. In this case they are because the Applicant alleges that these attributes form the rationale for anti-competitive exclusion of persons in his class from briefs in shipping law matters.

[5] The Applicant has brought two separate applications for interim relief. In the first he cites as respondents, namely Michael Fitzgerald SC, Russel

[1] See Applicant's Replying Affidavit in Attorneys' pleadings bundle at page 209-211 respectively.

Macwilliam SC and Michael Wragge SC. All three are prominent advocates at the Cape Town bar and are regarded as experts in the field of shipping law. All three are white males. We will refer to this aspect of the case as the 'Advocates' case.

[6] In the Advocates' case the Applicant alleges that all three respondents have contravened sections 4(1)(a), 4(1)(b)(ii), 5(1) and 8(c) and 8(d)(i) of the Act.

[7] In the second matter, the Applicant cites four law firms as the respondents, namely Norton Rose, Bowman Gilfillan, Webber Wentzel and Shepstone & Wylie. The four firms all have significant shipping law practices that involve representing clients in this area of law, inter alia in the Cape Courts, which entails them briefing from time to time, when appropriate, counsel from the Cape Town Bar. We will refer to this aspect of the case as the 'Attorneys' case. In the Attorneys' case, the Applicant alleges that all four respondents have contravened sections 5(1), 8(c) and 8(d)(i) of the Act.

[8] Although the Applicant had brought the Advocates and Attorneys cases as separate applications, by agreement they were consolidated into one matter. Since then he has settled with two of the respondents Bowman Gilfillan and Webber Wentzel, respectively the second and third respondents. The nature of the settlement was not made known to the Tribunal and hence we need not consider it further. It remains for us to consider his application in respect of the three advocates and two remaining law firms, Shepstone Wylie and Norton Rose.

Relief Sought

[9] The Applicant is requesting that the Tribunal grants an order which will interdict and restrain the respondents in the Advocates' case and the Attorneys' case from racial and xenophobic horizontal, vertical and abuse of dominance restrictive practices, so that the Respondents select juniors with

shipping law background equally without prejudice as to race or nationality, and that the Applicant be included in this pool of junior advocates.[2]

Competition Act

[10] The provision expressly dealing with interim relief applications in the Act is section 49 C. In assessing an interim relief claim, the Tribunal is required to take into account (i) the evidence relating to the alleged prohibited practice, (ii) the need to prevent serious or irreparable harm to the applicant, and (iii) the balance of convenience between the parties. As regards to the type of harm that the applicant must show, it has been held that, the harm must be a competition harm arising out of the contravention of the Act.[3] The standard of proof required of an application proceedings under section 49C is that applicable to interim interdicts in the High Court, namely that the applicant must show *prima facie* proof of entitlement to his or her relief. We shall discuss these two cases below, so as to ascertain whether the applicant is entitled to the relief sought in both cases.

Advocates' case

Section 4(1)(a) and Section 4(1)(b) (ii)

[11] Section 4(1)(a) of the Act prohibits an agreement or concerted practice by firm or decisions by an association of firms in a horizontal relationship which have the effect of substantially preventing or lessening competition in a market, unless it can be proved that there are technological efficiency or other pro-competitive gains resulting from the practice which outweighs the anti-competitive effect.

[12] Section 4(1)(b)(ii) prohibits an agreement or concerted practice by firm or decisions by an association of firms in a horizontal relationship or concerted practice by association in a horizontal relationship if it involves dividing markets by allocating customers, suppliers, territories or specific types of goods or services.

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[2] See Applicant's Heads of Argument at para 4 page3.
[3] Nyobo Moses Malefo & Others v Street Pole Ads (SA) (Pty) Ltd, Case No: 35/IR/May05 at para 35 page 12.

[13] The Applicant in his papers submits that there is an agreement amongst the Respondents in the Advocates' case to keep the pool of advocates that compete for shipping law briefs small by choosing only among a privileged class of juniors of the same race and descent as the Respondents and excluding juniors that do not fit this class. The Respondents he submits are white, and of British descent, and so are the juniors that they brief.[4]

[14] The Applicant further submits that the Respondents have an agreement, or practice amongst themselves to substantially exclude and lessen competition by selecting a small group of junior advocates at the Cape Bar, namely Roy Gordon, Daryl Cooke, James McKenzie and Pieter Van Eeden("Favoured Juniors").[5] He submits further that that there is no technical, efficiency, or other pro-competitive gain that justifies the Respondents' inclusion of others and exclusion of himself.

[15] The Respondents denied any existence of an agreement amongst them and submitted that the Applicant has no factual basis for this allegation.

[16] That the advocates in this case are in a horizontal relationship is not in dispute.

[17] In order to sustain a case under section 4(1), the Applicant must make out a case that there is an agreement or concerted practice in place between the advocates.

[18] An agreement arises from the actions of and discussions among parties directed at arriving at an arrangement that will bind them either contractually or by virtue of moral suasion or commercial interest. It may be a contract which is legally binding, or an arrangement or understanding that is not, but which parties regard as binding upon them. The definition of an agreement extends the concept beyond a contractual arrangement. However, what it requires is still a form of arrangement that the parties regard as binding upon

[4] See Applicant's founding affidavit in the Advocates' pleadings bundle at para 21 page 11.
[5] Ibid at para 23 page 12.

themselves and the other parties to the agreement.[6] To prove existence of an agreement the Applicant alleges that he has seen the Respondents socialise together at the Maritime Law Association ("MLA") functions, and other bar events, and openly discuss the juniors they prefer working with. He alleges further that Respondents have a long working history in shipping law. They are in and out of each other's offices. This he submits gave him the impression that there is a horizontal relationship that one could reasonably infer that there is an understanding among them.[7]

[19] The Applicant further alleges that the Respondents allocate briefs in the market to competitors in the market for shipping law work with whom they are most comfortable with regardless of qualifications. He submits that by virtue of the Respondents' relationship over the years, they entered into an arrangement to divide the market for shipping law briefs in Cape Town for members of the Bar of a specific racial demographic profile. This he submits amounts to dividing the market.[8]

[20] The allegations made by the Applicant to prove that an agreement exists to satisfy the requirements of both Section 4(1)(a) and (b) fall short of the standard to be met. Our decision is that the applicant has not made out a case for an existence of an agreement or a concerted practice even by way of inference. As regards to s4(1)(b) even if it were accepted that the Respondents had the capacity to allocate work to certain juniors, which the Respondents deny, the vertical allocation of work from a senior colleague to a junior one, would not fall within the definition of agreements aimed at allocating markets between competitors. In the absence of an agreement, there is no need to deal with the question of adverse effect on the competition.

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[6] Netstar (Pty) Ltd & Others v Competition Commission & Ano [2011]1 CPLR 45 (CAC) at para 25 page 15.
[7] See Applicant's founding affidavit in the Advocates' pleadings bundle at para 32 page13.
[8] Ibid at para 48 page 17.

Section 5(1)

[21] Section 5(1) of the Act provides that an agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other competitive gain resulting from that agreement outweighs that effect.

[22] Regarding this allegation the Applicant submits that the Respondents have prohibited vertical relationships with the partners of the major shipping law firms in Cape Town. The relationship, he alleges, is used to create vertical restraints to prevent Africans like him, from accessing the shipping briefs in the market.[9]

[23] The Applicant further alleges that this vertical relationship described above has been used by the respondents to unlawfully restrict the market by creating an exclusive club of lawyers (attorneys and advocates) that work on shipping law briefs.[10] In addition to this, the Applicant submits that during his mentorship under the third respondent, the third respondent had the pick of the juniors he wanted to work with him. The partners in the big law firms and other attorneys, looked to the third respondent to decide, who was on the list of juniors to be briefed and who was not.[11] Thus the Applicant submits that if the third respondent wanted to help him break in the industry he could have done so.

[24] However, the third respondent denies that he ever offered to "break the Applicant into the industry", and further submits that all he did was to merely introduce the Applicant to fellow members of the profession and members of MLA.[12]

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[9] See Applicant's founding affidavit in the Advocates' pleadings bundle at para 47 page 17.
[10] Ibid
[11] Ibid at para 55 page 18.
[12] See Respondents' answering affidavit in the Advocates' pleadings bundle at para 127.2 – 127.3 page 78.

[25] The third respondent denies having any power to exclude any advocate in the alleged product market of the Applicant, being the Shipping Law industry.[13]

[26] The Applicant's allegation of the third respondent's power in the industry is based on his submission that the third respondent was the Chairman of MLA in 2012, Deputy Chair in 2011 and that the major firms are represented at the MLA. Thus his position at MLA gives him a unique vertical relationship with these firms that other Advocates, like him (Applicant) do not have.[14] The Applicant's allegation of an existence of a vertical relationship is further supported by his submission of an incident, whereby an unnamed African person who works at one of the law firms cited as Respondents in the current case, told him that these firms have a list. The respondents are on top of the list and the juniors the respondents endorse follow on the list. This to him suggests a vertical relationship between the respondents and the law firms.[15]

[27] Again the Respondents deny any existence of such list, and further submit that because the person is unnamed, they do not wish to comment any further.[16]

[28] Finally, the Applicant submits in his replying affidavit of the Advocates' case, that the alleged vertical relationship could exclude groups such as Africans and foreigners when prejudiced silks are involved. [17]

[29] Again, we conclude that the Applicant has failed to submit evidence of the existence of an agreement and has rather based the existence of an agreement from his own inferences. The applicant has not adduced evidence to show existence of an arrangement that the parties regard as binding upon themselves and the other parties to the agreement.

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[13] Ibid at para 128.4
14 See Applicant's founding affidavit in the Advocates' pleadings bundle at para 57 page 18-19.
15 Ibid at para 58 page 19.
16 See Respondents' answering affidavit in the Advocates' pleadings bundle at para 129.1-129.2 page 79.
17 See Applicant's replying affidavit in the Advocates' pleadings bundle at para10.3 page 141.

Abuse of Dominance

[30] Section 8(c) prohibits a dominant firm to engage in an exclusionary act if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive, gain or

[31] Section 8(d)(i) prohibits a dominant firm from requiring or inducing a supplier or customer to not deal with a competitor, unless the firm concerned can show technological, efficiency or other pro-competitive, gains which outweigh the anti-competitive effect of its act.

[32] The prohibition against the abuse of dominant position does not apply to all firms. A firm must be dominant in a market for a prohibition to find application.

[33] With regards to the abuse of dominance allegations, the Applicant submits that the Respondents are dominant individuals in the market for shipping law briefs in Cape Town. They have abused their dominance, to his detriment, by engaging in exclusionary acts generally, and more specifically, including law firms that practise shipping law not to deal with him.[18]

[34] The Respondents deny that they are dominant and have submitted in their papers that in as much as they do receive shipping briefs, the briefs they receive are only a few of such shipping briefs.[19]Respondents deny that they have abused their dominance and submit that they cannot be held to have abused that which they don't have.

[35] The Applicant goes further to submit that it is common knowledge in the shipping industry that the Respondents have market power, such evidence he submits, can easily be procured by an investigation in the briefing patterns of the major law firms that practise shipping law.[20] At the hearing the Applicant submitted that:

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[18] See Applicant's founding affidavit in the Advocates' pleadings bundle at para 61 page 20.
19 See Respondents' answering affidavit in the Advocates' pleadings bundle at para 133 page 80.
[20]See Applicant's founding affidavit in the Advocates' pleadings bundle at para 65 page 20.

[36] *"The term silk in itself attaches a form of dominance". They are very much dominant just by being silks and more dominant by being the silks that are known in the market place as the top silks. That is what makes them dominant*".[21]

[37] In support of the section 8(d)(i) contravention the Applicant submits that the Respondents, by choosing to deal with white juniors to the exclusion of African lawyers with sufficient qualifications, have deliberately induced law firms practising shipping law not to deal with African Advocates.

[38] To this the Respondents also deny the Applicant's allegations of abuse of dominance in contravention of S8(d)(i).[22]

[39] For the Applicant to establish an abuse of dominance, he must first establish that each Respondent is dominant. In order to do that he must identify the relevant market. Without a definition of the market there is no way to measure a firm's ability to lessen or destroy competition.

[40] The Applicant has not attempted to engage in a proper market definition exercise or to provide evidence to the Tribunal why he defines the market as the "market for shipping law briefs". He has not told us how big he considers the relevant market to be, what percentage of that market he considers the Respondents to have or what facts and circumstances warrant the conclusion that the Respondents enjoy market power within the defined market.

[41] The Respondents submitted that there is no market for "shipping law briefs" and that shipping law is but one area of the law in which all advocates compete with each other for work.

[42] As to the geographical extent of the market, the Respondents submitted that counsel who practice in other areas of the country, notably KwaZulu Natal,

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[21] See Transcript of hearing at page 31.
[22] See Respondents' answering affidavit in the Advocates' pleadings bundle at para 137 page 81.

are briefed in "shipping matters" heard in Cape Town.[23] They argue further that the instructing attorneys are spread throughout South Africa and so called shipping matters emanate from attorneys practising in KwaZulu Natal, Eastern Cape, Gauteng and Namibia as well as Cape Town.

[43] They submit that the relevant market for purposes of this application must be taken to be the market for the provision of legal services by advocates in the Republic of South Africa.

[44] In our previous decision we have held that where the Tribunal is not presented with a persuasive view of the relevant market, or if there is a failure to properly identify the relevant market, it is not possible to make a finding of dominance, a necessary precursor to proving a claim under section 8 of the Act.[24]

[45] We are therefore unable to make a finding that each of the Respondents are dominant, let alone that they abused their dominance.

[46] In the absence of evidence to prove dominance by the Respondents there is no need to deal with the question of inducement of customers and resultant exclusion of the Applicant.

The Attorneys' case

Section 5(1)

[47] The Applicant submits that the Respondents[25] in the Attorneys' case, by virtue of the vertical relationship between them and the silks in the Advocates' case are contravening the Act.

[48] The Applicant submits in his founding affidavit that the best evidence to prove that there is a vertical relationship between the Respondents, and the elite group of white advocates, is the briefing patterns they have with advocates at

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[23] Ibid at para 31 page 41.

[24] Cancun Trading no 24 CC and Others v Seven-Eleven Corporation South Africa (Pty) Ltd Case No: 18/IR/Dec99, at para 32 page 8.

[25] Please note: any reference made to Respondents under the heading Attorneys' case refers to the four law firms cited as respondents at para 7 above.

the Cape Bar. One of the attorneys who work for the Respondents told him that they (Attorneys) have a policy to brief Advocates on a special list of white advocates endorsed by the advocates cited as Respondents in the Advocates' case.[26]However, the alleged attorney and law firm is not named by the Applicant.

[49] The Respondents are alleged to have a "longstanding understanding" with the advocates by which they exclude the Applicant from shipping law briefs.

[50] For the Applicant to succeed in this case, he is required to allege an agreement between the Respondents and the three advocates, the effect of which is significantly to prevent or lessen competition in a market. There is no evidence of the terms of an express agreement, nor can any evidence from which one could infer the existence of such an agreement is implied.

[51] The Applicant has made no allegation that supports the conclusion that there is in existence an agreement.

Abuse of Dominance

[52] With regards to the abuse of dominance allegation, the Applicant alleges that the Respondents are dominant in the market to sell shipping law services to shipping insurance companies, and other companies involved in the shipping industry. He goes on to further submit that they have abused their dominance by specifically refusing to deal with him, whilst dealing with his competitors instead and as such this has devastated his practice.[27]

[53] The Respondents all deny being dominant in the alleged product market of the Applicant.

[54] The Applicant also submits that the Respondents have an arrangement to use their dominance, to work with a small group of advocates, within MLA and the

26 See Applicant's founding affidavit in the Attorneys' pleadings bundle at para 33, page 13.
27 See Applicant's founding affidavit in the Attorneys' pleadings bundle at para 41 page 15.

Bar, who belong to a particular demographic and exclude others like him. He submits the reason for this to be due to the Respondents' aim of maintaining the *status quo* of racial subjugation and economic dominance by white advocates in the lucrative market of the legal practice.[28]

[55] Similar to the Advocates' case, the Applicant has not attempted to engage in a proper market definition exercise. He has simply asserted without any supporting evidence that the Respondents are "dominant in the market to sell shipping law services to shipping insurance companies and other companies involved in the shipping industry.[29] At the hearing, the Applicant submitted:

[56] *"The firms are dominant by their own market power. They have tremendous market power. It is hard to prove, because I don't have the details of exactly how much money Norton Rose makes or has or is worth to say that they are dominant or what section of the market they command."*[30]

[57] In the absence of evidence to substantiate dominance we are unable to make a finding that the Respondents are dominant let alone abused their dominance.

[58] The Applicant further alleges that "the cited firms have abused their dominance in the market by inducing their clients, the primary consumer of legal services, not to deal with me, but instead to deal exclusively with my competition, the superior race and nationality".[31]

[59] Although we have indicated that we are unable to make a finding of dominance, a prerequisite to a finding of abuse, there is yet a further weakness in the Applicant's case even if he had crossed this hurdle. We point out that section 8 (d) (i) prohibits a dominant firm from requiring or inducing a

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28 See Applicant's founding affidavit in the Attorneys' pleadings bundle at para 44 page 16.
29 Ibid at para 11 page 9.
30 See Transcript of hearing at page 30.
31 See Applicant's founding affidavit in the Attorneys' pleadings bundle at para 47 page 17.

supplier or customer to not deal with a competitor. The Respondents submit that if on his own case the Applicant is not a competitor of the Respondents, then the conduct of which he complains of, which is denied, is not prohibited by section 8(d)(i). This is because the Applicant is a potential supplier to the law firms and not a competitor.

Balance of Convenience

[60] As submitted above, the Applicant has failed to establish a prima facie right, as a result thereof the balance of convince does not favour him.

Irreparable Harm

[61] The Applicant has failed to prove that he will suffer irreparable harm if the interim relief he seeks is not granted. This is supported by his submission that he has managed to keep his practise abreast for three years despite having received no shipping law briefs.[32] The Applicant further submitted that:

[62] *"I can confidently say that during my years at the Cape Bar I have been fortunate enough to work on high profile briefs led by some of South Africa's most prominent silks*".[33]

Conclusion

[63] For all the above reasons, we conclude that in both cases the Applicant has not made out a case for the contravention of the Act on which he relies. He has not come close to satisfying the requirements of making a case out in competition law and therefore his application for interim relief is dismissed.

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[32]See Applicant's replying affidavit in the Attorneys' pleadings bundle at para 27-32 at pages 211-212.
[33] Ibid at para 8 page 205.

[64] As we indicated in our introduction, the skewed briefing patterns are an issue that require remedial action. Unfortunately it is not an issue that can be remedied through the Act. During the hearing, the Applicant was asked whether he had considered taking the issues of social exclusion, which are real issues, to the Equality Courts. In our view the Applicant stands a better chance in the Equality Court which has jurisdiction over such issues.

Costs

[65] Normally in an interim relief application costs ordinarily follow the outcome of the case, thus the Applicant is liable for all the Respondents' costs on the party and party scale. Given that this was not a case of any complexity there is no reason for any respondents to have employed more than one counsel.

ORDER

1. The applications in case number 016550 and case number 016568 are dismissed.

2. The applicant is liable to pay the costs of the first to third respondents in case number 016550 and the third to fourth respondents in case number 016568 on a party and party scale but limited to the costs of one counsel.

ANDISWA NDONI

19 September 2013
Date

Norman Manoim and Imraan Valodia concurring.

Tribunal Researcher:	Caroline Sserufusa
For the Applicant:	Simba Chitando on his behalf
For the Advocates:	Advocate Brassey SC instructed by Cliffe Dekker Hofmeyr Inc.
For the 3rd Respondent:	Advocate Alfred Cockerel SC instructed by Shepstone & Wylie
For the 4th Respondent:	Advocate Lwandile Sisilana instructed by Cliffe Dekker Hofmeyr Inc.