**IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA**

**CASE NO: 55/CR/Jul09**
**73/CR/Oct09**
**78/CR/Nov09**

In the matter between:

**TELKOM SA LIMITED** Applicant

and

**THE COMPETITION COMMISSION OF SOUTH AFRICA** First Respondent
**DIMENSION DATA (PTY) LTD t/a INTERNET SOLUTIONS** Second Respondent

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| Panel | : | Norman Manoim (Presiding Member) |
| | : | Yasmin Carrim (Tribunal Member) |
| | : | Takalani Madima (Tribunal Member) |
| Heard on | : | 11 October 2010 |
| Order issued on | : | 4 February 2011 |
| Reasons issued on | : | 4 February 2011 |

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**Reasons for Decision and Order**

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**Introduction**

[1] This is an exception application by Telkom SA Limited ("Telkom") to the Competition Tribunal ("the Tribunal") following complaints concerning

alleged prohibited practices referred to the Competition Commission ("the Commission"). Telkom excepts, on several grounds, to three of these complaint referrals; one brought against it by the Commission, and two by the second respondent Dimension Data (Pty) Ltd trading as Internet Solutions ("IS").

**Background**

[2] On 19 December 2007 IS laid a complaint against Telkom with the Commission. The complaint related to an alleged abuse by Telkom of its dominance in the wholesale access market, and further that Telkom's VPN Supreme Product had been designed to capitalize on Telkom's de facto monopoly in the wholesale access market.

[3] Acting in terms of sections (50)(2)(b) of the Competition Act, Act No.89 of 1998 ("the Act") the Commission issued a "Notice of Non-referral of Complaint" dated 19 June 2009.[1] In terms of this notice The Commission stated that it "*would not refer to the Competition Tribunal the particulars of the complaint listed on the attached sheet, but will refer the remaining particulars of the complaint.*"[2] The particulars of the complaints that The Commission "*would not refer to the Competition Tribunal*" were the following:

1. Exclusionary conduct in the retail broadband (excluding ADSL) Internet market;
2. Excessive pricing of ADSL access lines;
3. Excessive pricing of leased lines under 2Mbps; and
4. Price discrimination.[3]

[4] It is important to note that although the notice of non-referral indicated that "*Some parts of the complaint are to be referred to the Tribunal shortly*", none were referred to the Tribunal by the Commission within the

[1]Annexure A, IS Referral, pages 19-22
[2]IS Referral Bundle, page 19
[3]IS Referral Bundle, page 20

prescribed 20 business days. Instead The Commission was only able to do so some four months later on 26 October 2009.

[5] On 17 July 2009, IS, acting in terms of Section 51(1) of the Act, read with Tribunal Rule 14(1)(b), self-referred its entire complaint to the Tribunal. We will refer to this as IS' first referral.

[6] On 13 August 2009 Telkom lodged an objection to IS' first self-referral on the grounds that "*the Commission has not referred any portion of the complaint to the Tribunal as yet. It is thus not competent in law for a complainant to refer all of the particulars of the complaint to the Tribunal in instances where the Commission has non-referred only certain particulars of complaint and/or before the Commission refers the remaining particulars of complaint.*"[4]

[7] In its objection Telkom also stated that IS would not be entitled to amend its complaint referral after receipt of the Commission's complaint referral if the first referral had not been validly brought.[5]

[8] As already stated above, on 26 October 2009, the Commission referred a consolidated complaint to the Tribunal which included, inter alia, some particulars of IS' first referral. On the same day the Commission issued a further notice of non-referral in relation to IS' complaint on similar terms as those set out in its notice of non-referral issued on 19 June 2009.

[9] On 23 November 2009, IS once again self-referred certain aspects of its complaint to The Tribunal. This we refer to as the second referral. IS made it clear that it sought to refer to the Tribunal those particulars of its complaint not pursued in the Commission's complaint referral. However the second referral still contained particulars contained in the Commission's referral. The Act does not permit a complainant to refer particulars of its complaint that the Commission has referred.

[4] Exception Bundle, paragraph 2.1, page 179
[5] Exception Bundle, para 4, page 180

[10] On 15 March 2010 Telkom launched an exception application against both the Commission's and IS' referrals. The application was supplemented on 29 April 2010. We deal with the exception against IS' referrals first.

**Second Respondent's two self-referrals**

[11] At the hearing of the matter the Chairperson requested the parties to isolate the ambit of the dispute and proposed a solution whereby the first referral could stand with those parts that had been referred by the Commission being struck out. Telkom persisted with its objection to the first self-referral but conceded that IS' second referral could be suitably amended so as to exclude those aspects of the complaint that had been referred by the Commission. Counsel for Telkom indicated that they would be happy with such a solution. The matter was then stood down in order for the parties to discuss a mutually acceptable solution.

[12] At the end of the hearing, counsel for Telkom and IS reported that Telkom had made a tender to IS that it withdraw its first referral and amend its second referral. However while the parties had agreed in principle to this, a dispute arose over whether IS needed to apply for condonation for the late filing of the second referral. Counsel for Telkom was reluctant to consent to a condonation of the late filing of the referral without an application being filed.

[13] Given that there was no dispute between the parties as to the withdrawal of the first referral and the filing of an amended second referral, the Chairperson directed that the condonation application be moved and heard there and then.

[14] In seeking condonation IS submitted that at the time it had received the Commission's notice of non –referral it was placed in a difficult position. The clock had started ticking and IS was obliged to file its self-referral

within 20 days. Because IS was not in a position to know precisely the particulars of the Commission's referral (since the Commission had not yet filed it), it filed its first referral simply to ensure that it was in time. Once the Commission issued its second notice of non-referral and filed its complaint with the Tribunal, IS filed its second self-referral within 20 business days. The second referral overlapped to some extent with the Commission's and although IS did not think an amendment was necessary it had agreed to do so.[6] To the extent that the second (amended) referral would be out of time it ought to be condoned. Moreover Telkom would suffer no prejudice if such condonation was granted. In response counsel for Telkom opposed the application but had no submissions to make on the issue of prejudice.

[15] In our view, the Commission, by issuing a letter of non-referral without simultaneously filing its referral with the Tribunal created a great degree of uncertainty about the actual ambit of its referral. While it was clear which aspects the Commission was not going to refer, there was no clarity as to the details of the remaining particulars of its complaint. In such circumstances, a complainant's anxiety in relation to time lines can be understood. Nevertheless a better approach though would have been for IS to file its self-referral after the Commission had filed its referral. If there was any need for IS to seek the Tribunal's condonation at that time it could have simply done so.

[16] Since both parties have reached agreement on the withdrawal of the first referral and the amendment of the second referral to eliminate the overlapping particulars the only issue we have to decide is condonation. Telkom has been unable to point to any prejudice it would suffer as a result of the Tribunal granting IS an opportunity to amend the referral. In fact given that Telkom has not yet filed an answer in this matter, such amendment can hardly cause any prejudice to it. Accordingly the late

[6] It was of the view that the second referral was competent in relation to those aspects not referred by the Commission. Those aspects of the referral that over-lapped with the Commission's referral should simply be ignored.

filing of an amended second referral by second respondent is hereby condoned.

[17] In relation to Telkom's objection to IS' referrals, we make the following order:

1. Second respondent must with immediate effect withdraw its first self-referral;
2. Second respondent must amend its second referral and file the amended referral within 20 business days of date hereof;
3. The late filing of the amended second referral is condoned on condition that it is done within the time period stipulated in paragraph 2 above;
4. Telkom SA Limited must file its answer within 20 business days of the date of filing of the amended referral;
5. Costs to be reserved.

**The Commission's referral**

[18] We turn now to consider Telkom's objections in relation to the Commission's referral. A number of objections were raised by Telkom to the Commission's referral which ranged from a vague and embarrassing exception to the pleadings, to the constitutional validity of the provisions of the Act. For convenience sake we have adopted the categorization utilized by the Commission's counsel and have arranged our reasons into three broad sections or categories. We deal first with Telkom's objections to the excessive pricing complaint, then with the margin squeeze case and thereafter the issue of the two types of relief sought by the Commission.

[19] Telkom's objection that the Commission's referral was time-barred because it had not obtained the necessary extensions from the complainants had no basis whatsoever and was eventually abandoned by Telkom.

[20] Before turning to the details of each category, it would be useful for us to set out the approach taken by this Tribunal to applications of this sort. We have previously stated that notwithstanding the absence of an express provision in our rules, we are willing to consider exception applications when appropriate. In previous exception cases we have indicated that despite this willingness our approach to applications of this sort needed to take into account the *sui generis* nature of our proceedings. While our proceedings are adversarial in nature we also enjoy inquisitorial powers. We are neither a civil court nor a criminal court. However we are required to conduct our proceedings fairly and informally.[7] When considering objections to the Commission's referral we are required to bear in mind that a referral is not a pleading in the sense of a civil or criminal case. Hence we should not read the Commission's averments piece meal but consider them as a whole.[8] While fairness is the standard that guides us we are not precluded from taking guidance from the High Court.

[21] Telkom's objections however are not merely targeted at the Commission's pleadings but raise points of law and assert statutory interpretations.

[22] Harms in his commentary on rule 23 of the Uniform Rules of the High Court summarises the approach taken by courts to exceptions.[9] Two aspects of this approach are appropriate to consider in relation to the present matter. Firstly, exceptions to pleadings can contribute to expedition in the legal process, because if successful they could avoid the leading of unnecessary evidence. However the bar is set high; if an exception does not result in a curtailment of proceedings then the exception may as well be argued at the end of the case.[10] Secondly,

[7] See *Rooibos Ltd v Competition Commission* 129/CR/Dec08 (Exception Application), , *Competition Commission and Anglo American Medical Scheme et al v United Pharmacies et al*, Case No: 04/CR/Jan02 and *National Association of Pharmaceutical Wholesalers et al v Glaxo Wellcome et al* 45/CR/Jul01

[8] This too would the approach taken by the High Court. See *Harms* at B-164

[9] Harms "Civil Procedure in the Supreme Court" Butterworths 2010

[10] *Harms* B-165

exceptions are generally not the appropriate procedure to settle questions of interpretation.

***Excessive Price Case***

[23] Telkom's first objection to the Commission's Excessive Price Complaint[11] was that the Commission sought to rely on the same facts cumulatively as opposed to alternatively, to sustain the excessive price complaint and the margin squeeze complaint. Telkom's objections were apparently based on the criminal law rule against splitting of charges and Tribunal rule 15(3). In raising the objection Telkom hones in on paragraph 74 and the second sentence of paragraph 70 of the referral, and submits that this style of pleading contravenes rule 15(3).

[24] Tribunal Rule 15 deals with the form of a complaint referral. Rule 15(3) simply provides that a complaint referral may allege alternative prohibited practices based on the same facts. The rule does not address the question of whether the same facts could result in contraventions of more than one section of the Act. The Commission argues that it is permissible for it to rely on the same facts to support different contraventions of the Act. For example it is conceivable that a margin squeeze case which involves the charging of a high price by a dominant firm for an essential input to a downstream rival could also be an excessive price.

[25] We do not need to decide the point of law as to whether the Commission can rely on the same facts for cumulative as opposed to alternative charges now. We have not been called upon to decide this issue before and it would be better to do so at the end of a matter with the benefit of a full record than on exception. Even if Telkom were correct it has failed to persuade us that deciding the issue now would curtail the hearing.

[11] Set out in paras 68-74 (in relation to HBNLs) and 75-79 (in relation to IPLCs) of the referral

[26] But Telkom has not even succeeded in showing that the Commission relies on the same set of facts cumulatively to sustain the two charges. The excessive price case is in relation to lines with speeds above 2mbps (in excess of 2mbps) while the margin squeeze case relates to lines with speeds up to 2mbps.

[27] Paragraph 70 of the Commission's referral simply states :

> *"On the strength of the comparisons and facts summarized below the Commission alleges that Telkom's wholesale prices for high bandwidth national leased lines [HBNLs] (ie lines with speeds above 2 mbps) are excessive within the meaning of the Act..."*

[28] The subsequent paragraphs 71 to to 78 then set out the facts upon which the Commission relies for its excessive price case for both HBNLs and IPLCs.[12]

[29] The relevant parts of paragraph 74 of the referral states:

> *"The excessive prices charged by Telkom affect the prices which ISPs charge their customers. Given the ...there is no doubt that these high prices detrimentally affect consumers and hinder economic development in South Africa. The excessive prices charged by Telkom ...in conjunction with the* ***margin squeeze discussed below****, also had an exclusionary effect on Telkom's rivals in markets of IP VPN services....This had an additional detrimental effect on consumers."*

[30] The first sentence of paragraph 74 is concerned with the effects of the excessive price on consumers. The second discusses the effects of this together with the effects of the margin squeeze case on rivals. No facts are raised or relied upon in this paragraph. All that the Commission

[12] High Bandwidth National Leased Lines and International IP Leased Lines

deals with in this paragraph are its conclusion about the effects of the excessive price and margin squeeze.

[31] The margin squeeze case "referred to below" can be found in paras 80 onwards. The margin squeeze case concerns Telkom's conduct and pricing in relation to Diginet lines (these are lines with a capacity of up to 2mbps as opposed to those in excess of 2 mbps) and ADSL internet access. In the first instance the product that is the subject of the margin squeeze complaint is different from that in the excessive price case. Second, it is Telkom's differential pricing in relation to these products to different customers (not a comparison between cost and price) is examined to conclude a margin squeeze case. The facts relied upon by the Commission are clearly different in the two cases. Accordingly Telkom's objection has no merit.

[32] Telkom's second objection, is that the excessive price charge under section 8(a) relies on the same set of facts to sustain a charge of constructive refusal to give access to an essential facility under section 8(b) and hence again amounts to a splitting of charges as there should have been brought in the alternative and not cumulatively. But as we have discussed if an exception does not result in a curtailment of proceedings or settle a substantive question of law, it ought not to be granted. Where however the same evidence has to be led the granting of an exception will not take the matter further. In this particular instance again, whether or not the pleadings are cumulative or not will not lead to a curtailment of the proceedings. In this situation the Commission will still have to lead the same evidence and Telkom would still have to rebut that. Nothing can be gained by granting this application at this stage.

[33] Telkom's third objection namely that the Commission's failure to allege economic value for purposes of the section 8(a) complaint renders the pleading excipiable is also without merit. In paragraph 69 of the referral the Commission states that the term excessive price means a price which bears no reasonable relation to the economic value of that good or

service as defined in section 1 of the Act and then states in para 70 that Telkom's wholesale prices are excessive within the meaning of the Act.[13] If as Mr Rogers speculated Telkom sought to have economic value quantified in rand terms then the objection is still without merit. The Commission has not only pleaded the essential averments of section 8(a) but has gone further. The Commission has relied upon Telkom's actual costs for purposes of calculating economic value and has compared this to its prices. In doing this exercise, the Commission adjusted the costs upwards by allowing a 15% return on capital (which is in excess of Telkom's quoted figures) and set out its comparisons in three tables in annexure 6 to the referral. Whether or not the Commission's calculations are accurate or whether its approach in evaluating excessive prices is the correct one is a matter for evidence and not to be decided on exception. It is sufficient for *purposes of pleading* that Telkom knows the case against it. The Commission has clearly set this out in paras 71-78 of the referral and annexure 6.

[34] Telkom's fourth objection, raised in its founding affidavit but not pursued at the hearing, states that the Commission ought to have articulated a rule by reference to which Telkom might have known whether its pricing was excessive and the Commission's failure to do so rendered the pleadings excipiable. In our view this is more in the nature of a defence then a ground of objection. Neither the Act nor section 8(a) requires the Commission to articulate such a rule. If Telkom however wishes to argue in mitigation at the hearing that the provisions of section 8(a) provide no guidance to firms as to when their pricing decisions resulted in contravention of the Act it is at liberty to do so.

[35] The fifth and sixth objections - suffer from a similar defect in that they require statutory interpretation. In the fifth objection Telkom asserts that knowledge of illegality is an essential element of a s8(a) contravention and the pleadings are excipiable because the Commission has failed to plead any mental element on Telkom's part The sixth objection states

[13] See also para 76 which refers to excessive prices in the IPLC market.

that section 8(a) is unconstitutional because it is excessively vague. Section 59 would also be unconstitutional if *mens rea* was not a requirement.

[36] The requirement of *mens rea* as an element has been rejected by this Tribunal and confirmed by the CAC.[14] In any event such an objection, even if Telkom wishes to re-visit the Tribunal's and CAC approach is more in the nature of a defence. One of the important principles of exceptions in the High Court is that if successful, the exception will put an end to an action or curtail the evidence to be led. Questions of statutory interpretation or challenges of constitutional validity ought not to be decided on exception but rather after evidence has been led simply because there is always the possibility that the Commission could be unsuccessful in its prosecution of a respondent. Moreover none of these objections by Telkom would have the effect of curtailing proceedings conferring no advantage or expedition to the conduct of proceedings in this matter.

***Objections to margin squeeze case***

[37] We turn to consider Telkom's objections to the margin squeeze case.

[38] The Commission alleges that Telkom's pricing to first tier ISPs amounts to exclusionary conduct in contravention of section 8(c). Telkom's conduct also amounts to a constructive refusal to supply first tier ISPS with an essential facility (s8(b)) and violates s8(d)(iii) because Telkom supplies stand alone (as opposed to bundled with its own IP network services) Diginet access at a higher price.

[39] Telkom's first, second and third objections to the margin squeeze case are in the same vein as those raised in relation to the excessive pricing

[14] See *Competition Commission v Federal Mogul Aftermarket Southern Africa and Others* [2003] 2 CPLR 464 (CT) paras 81-89. Also CAC judgement upholding the Tribunal's approach, and *Harmony Gold Mining Co Ltd and Another v Mittal Steel SA* [2007] 2 CPLR 271 paras 36-44 and *Patensie Sitrus v Competition Commission* 16/CAC/Apr02 ( pgs 29 -30) that the concept of abuse of dominance is an objective one.

case. Telkom objects to the case on the basis that the Commission relies impermissibly on the same facts cumulatively to support causes of action under sections 8(b), 8(c), and 8(d)(iii) and that this has led to an inherent contradiction. The Commission avers that it is conceivable that the same facts can support more than one provision of the Act. However we see that as a question of fact Telkom has failed to show that the charges relate to the same set of facts because the allegations pertain to *different* customers of Telkom. The constructive refusal to supply under s8(b) is a refusal to supply to *first-tier ISPs* and the bundling condition in violation of s8(d)(iii) relates to *both ISPs* and *Telkom's retail customers.* The objection is thus misconceived. Even if this was not the case, as we have stated above, nothing can be gained by deciding this matter now since the issue of cumulative or alternative pleadings will not lead to any curtailment of the proceedings. The same evidence will have to be led by the Commission to prove the three variants of its margin squeeze case. The first three objections accordingly fail.

[40] Telkom's fourth objection in relation to the margin squeeze is that it is now settled law that a margin squeeze case must be pleaded under section 8(c) and to plead these complaints under section 8(b) or 8(d)(iii) is irregular. Telkom relies on the decision in *Competition Commission v Senwes*[15] to support this argument. Both the Tribunal and the CAC held that margin squeeze as a form of exclusionary conduct in that case could be located in section 8(c) but neither of those decisions held that margin squeeze effects could not fall under other provisions of section 8.[16] A margin squeeze is an economic conclusion based on a set of facts. However the factual matrix that informs a margin squeeze conclusion may differ and hence may not categorically fall under one sub-section of section 8 rather than another. Industries differ and a margin squeeze strategy for example in telecommunications will contain different elements to one in retail stores. A constructive refusal to supply or anti-competitive bundling could ultimately lead to a margin squeeze of

[15] *Competition Commission v Senwes Ltd,* Tribunal Case No: 110/CR/Dec06 and *Senwes Ltd v The Competition Commission of South Africa* [2009] 2 CPLR 304 (CACA)
[16] The Commission's section 8(d)(i) case failed because the facts could not sustain it.

competitors. In any event the objection, if it were granted would take the matter no further. It would not lead to a curtailment of the proceedings or remove a cause of action. The same evidence would have to be led by the Commission to prove the different elements of Telkom's alleged exclusionary conduct and Telkom's objection can be argued at the end of the hearing.

[41] Telkom's fifth objection is that knowledge of illegality is an essential element of the section 8(b) and 8(d)(iii) provisions and the Commission's failure to allege this is objectionable. As we have discussed previously such an objection takes the matter no further and is better dealt with at the end of the case rather than at this stage.

[42] Telkom's sixth objection is three-fold – namely that the Commission's pleaded facts do not disclose an actual refusal to give ISPs access to lines, that a constructive refusal is not encompassed within 8(b) and that the facts alleged do not disclose that the lines are an "essential facility". As to the interpretation of section 8(b), nothing is gained by the objection being granted now because it would not result in any curtailment of proceedings. Telkom can argue at the end of the case whether or not section 8(b) encompasses a constructive refusal or not. The remaining objections are equally unfounded. In paragraphs 20-38 of its referral the Commission painstakingly provides a description of the infrastructure and technology to demonstrate the importance of the various lines leased by Telkom to its rivals and customers. The Commission traverses the regulatory history of Telkom's products and in particular that pertaining to the leasing of facilities from Telkom or any other person. The regulatory history of leased lines – where at first only Telkom could as a legislative and thereafter de facto monopoly supply these to VANS and ISPS – speaks to the significance of these lines. In the subsequent paragraphs the Commission sets out Telkom's pricing behavior in relation to these lines. In paragraph 118 the Commission draws together its various allegation and alleges that –

*"Such conduct also constitutes a constructive refusal by Telkom to supply first-tier ISPs with access lines (Diginet and ADSL) and transmission lines. Such lines are an essential facility as contemplated in section 8(b) – the said lines cannot reasonably be duplicated and without access to the lines the ISPs cannot provide IP network services to resellers...."*

[43] We are satisfied that the Commission has pleaded sufficient facts in its referral to support a *prima facie* case that the lines are an essential facility. Moreover the Commission does not allege an *actual* refusal to supply - its case is one of *constructive* refusal to supply. Hence it does not need to allege any facts to support a case it does not advance. We have already expressed ourselves on the issue of the interpretation of section 8(b) and that it is appropriate for this issue to be argued at the end of the hearing.

[44] Telkom's seventh objection falls away because the Commission does not pursue with its section 8(d)(ii) case.

[45] The eighth objection concerns the interpretation and ambit of section 8(d)(iii). The ninth objection again raises the issue of *mens rea* and that s59 would be unconstitutional if it does not require *mens rea*. We have expressed ourselves on these types of objections. Apart for the fact that this Tribunal does not have the competence to decide on the constitutionality or otherwise of s59, nothing is gained by deciding on these objections now because they would not lead to a curtailment of proceedings. These points of law can be argued at the end of the case.

***Objection to Remedies***

[46] This leaves us to consider Telkom's objections to the issue of remedies. In its Notice of Motion the Commission seeks several forms of relief. Telkom objects to the prayer for an interdict on the basis that there is no allegation that the conduct is still ongoing. It also objects to the Commission's prayer that Telkom be required to submit pricing data and information on an annual basis in order to assess compliance.

[47] In general the ambit of the Commission's or the Tribunal's powers in relation to remedies is not a matter to be decided on exception simply because the question raised here is not an issue of pleadings but one of competence. The objection if granted now would not lead to any curtailment of the proceedings. The same evidence would have to be led and the competence of the Tribunal or the appropriateness or otherwise of a remedy can be argued at the end of the case.

**Conclusion**

[48] In summary we find that Telkom's objections to the Commission's pleadings are without merit. Where the objections were in the nature of exceptions to the pleadings, we find that these have been either misconceived or are without substance. In relation to its objections in relation to our competence, issues of statutory interpretation, justifications/defences and other points of law we find it inappropriate to decide these prior to the hearing of the case. None of them will lead to a curtailment of the proceedings and no unfairness will be visited upon Telkom if it argued these at the end of the matter.

[49] We grant the following order in relation to the objections against First Respondent's referral:

a. The application is dismissed; and
b. There is no order as to costs.

4/02/2011

**Y Carrim** **Date**

**N Manoim and T Madima concurring**

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| Tribunal Researcher: | Rietsie Badenhorst |
| For the Applicant: | AR Bhana SC assisted by RM Pearse and L Sisana, instructed by Mothle Jooma Sabdia Inc |
| For the Commission: | O Rogers SC assisted by NH Maenetje, instructed by Gildenhuys Lessing Malatji Inc |
| For the Second Respondent: | A Gotz instructed by Eversheds Attorneys |