COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: IR080Aug23

In the interim relief application between:

Depansum Proprietary Limited t/a dLocal	Applicant
And	
VISA Inc	First Respondent
VISA Sub-Saharan Africa Proprietary Limited	Second Respondent
Nedbank Limited	Third Respondent
The Competition Commission	Fourth Respondent
VISA International Service Association	Fifth Respondent

Panel	:	A Wessels (Presiding Member)
	:	G. Budlender SC (Tribunal Member)
	:	A. Ndoni (Tribunal Member)
Heard on	:	14 December 2023
Order issued on	:	19 February 2024
Reasons issued on	:	8 May 2024

REASONS FOR DECISION

INTRODUCTION

1. The applicant, Depansum Proprietary Limited ("Depansum"), seeks interim relief in terms of section 49C of the Competition Act 89 of 1998 as amended (the "Act"), against Visa Inc, Visa Sub-Saharan Africa Proprietary Limited and Visa International Service Association (collectively referred to as "Visa") on the

basis that Visa is engaged in anti-competitive conduct in breach of sections 8(1)(c), 8(1)(d)(i) and 5(1) of the Act.

2. Depansum is active in South Africa as a financial intermediary, facilitating payments on behalf of international e-commerce companies (merchants) and consumers in South Africa. It has an e-commerce merchant agreement with Nedbank Limited ("Nedbank"), the Third Respondent, in terms of which Nedbank acts as Depansum's local acquiring bank.

3. Depansum seeks an interim order interdicting and restraining Visa from (i) enforcing clause 1.5.1 of its international rules ("Visa Rules") against Nedbank in respect of transactions processed by Nedbank as the acquiring bank for Depansum; (ii) prohibiting Nedbank from processing transactions for Depansum as its acquiring bank; (iii) seeking to induce Nedbank not to process transactions for Depansum as its acquiring bank, on specified grounds. No relief is sought against Nedbank. Nedbank filed an answering affidavit but elected not to participate at the hearing.

4. The Fourth Respondent, the Competition Commission ("Commission") is cited for its interest in this matter, and no relief is sought against it.

5. We decided, after hearing the parties, to grant the interim relief sought by Depansum and issued an order accordingly on 19 February 2024. We issued the following order:

Having heard the parties, the Competition Tribunal issues the following order in terms of section 49C of the Competition Act 89 of 1998, as amended ("the Act"):

1. *The application to join the Fifth Respondent, VISA International Service Association is granted.*
2. *The application to admit the First, Second and Third Respondents' further affidavit is granted.*
3. *For a period of six months from the date of this order, or the conclusion of a hearing into the complaint filed by the Applicants under case number IR080Aug23, whichever is the earlier:*

    3.1. The First, Second and Fifth Respondents ("Visa") are interdicted and restrained from enforcing clause 1.5.1 of the Visa Rules against Nedbank in respect of transactions processed by Nedbank as the acquiring bank for the Applicant;

    3.2. Visa is interdicted and restrained from

    (i) prohibiting Nedbank from processing transactions for the Applicant as its acquiring bank; and/or

    (ii) seeking to induce Nedbank not to process transactions for the Applicant as its acquiring bank on the basis that

    3.2.1. the merchant that is ultimately to receive the payment made pursuant to the transaction is not located in South Africa;

    3.2.2. the "merchant location" for the merchant is incorrectly assigned and/or;

    3.2.3. the processing of the transaction constitutes cross-border acquiring.

4. *For the avoidance of doubt, the interdicts in paragraph 3 and its sub-paragraphs include within their scope, prohibitions on Visa levying fines, threatening termination of Visa's provision of its card network services to Nedbank, or terminating Visa's provision of its card network services to Nedbank.*
5. *There is no order as to costs.*

6. The reasons for our decision are set out below.

BACKGROUND

7. On 30 August 2023, Depansum filed a complaint with the Commission alleging that Visa is engaged in prohibited practices by implementing certain of the Visa Rules and requiring Nedbank to comply with the Visa Rules. The applicant alleges that the Visa Rules contravene the Act.

8. Depansum describes itself as a financial intermediary (local collection agent), authorised in terms of the National Payment Systems Act, that facilitates payments on behalf of international e-commerce companies (merchants) and consumers in emerging economies like South Africa.

9. According to Depansum, its services allow transactions between local consumers (e.g. consumers in South Africa) and international merchants to be processed locally by facilitating payments (via credit or debit card) locally. These transactions are routed through a local entity (itself in South Africa), acting as a collecting agent and assuming responsibility for the transfer of the funds to the international merchant for which it acts as an agent. At present, Depansum provides such services to merchants such as Microsoft, Shein and Amazon.

10. In order to provide its services, Depansum concluded an e-commerce merchant agreement with Nedbank in terms of which Nedbank was appointed as Depansum' s local acquiring bank. This agreement entails that Nedbank acts as the local acquiring bank through which payments from cardholders are collected. Nedbank receives and processes the payment. We note that Nedbank as the local acquiring bank is based in South Africa, as is the cardholder making the transaction.

11. Depansum assumes the responsibility of transferring these payments to the foreign merchants for which it acts as an agent. This is known as the Local Collection Agent Model ("LCA" model). In the LCA model firms such as Depansum create a local 'agent' which connects the merchants with local payment systems and consumers. This local agent connects with a local acquirer (which in the case of Depansum in South Africa is Nedbank) which gives the foreign ecommerce merchant access to the domestic payment system. Under the local payment system the clearing, authorisation and settling of transactions occurs between domestic banks.

12. Visa describes itself as a payment technology group. Its key business is the operation of a "four-party" transaction processing network which facilitates transactions between financial institutions, merchants, and account holders.

13. Simply put, when a customer purchases goods or services from a merchant over the internet, the customer's bank (the issuing bank) will transfer funds via VISA's payment network system to the merchant's bank account via the merchant's acquiring bank. This is known as the Cross-Border model ("CB model"). In these cross-border transactions the merchant is located in a country other than the cardholder.

PRELIMINARY ISSUES

14. Before dealing with the merits of this application, we address two interlocutory applications.

Joinder application

15. Depansum made an application for the joinder of Visa International Service Association as the Fifth Respondent. That application was not opposed by Visa. We decided to grant Depansum's joinder application.

Visa's application to file a further affidavit

16. After pleadings had closed, Visa filed an application for the admission of a further affidavit. In its application, Visa contended that it was necessary for it to file a further affidavit because attached to Depansum's replying affidavit was a supporting affidavit by Peach Payment Services Proprietary Limited ("Peach Payment"), and it was necessary for Visa to address this affidavit.

17. Peach Payment is a technology company that offers online payment platforms that enable secure transactions for businesses and customers in South Africa.[1] Peach Payment concluded a collection agreement with Depansum in terms of which Peach Payment acts as Depansum's agent.[2]

18. In its supporting affidavit, Peach Payment supported Depansum's contention that Depansum's LCA model does not contravene South Africa's exchange regulations because, *inter alia*, Depansum's collecting agent (Peach Payment) applied for and obtained the requisite confirmation of exchange control approval from one of South Africa's major banks.[3] As proof of this, Peach Payment attached the alleged approvals as an annexure to its supporting affidavit.[4]

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[1] Peach Payment's supporting affidavit, paginated page 1023, at paragraph 4.
[2] Peach Payment's supporting affidavit, paginated page 1023, at paragraph 5.
[3] In terms of South Africa's exchange control regulations, the South African Reserve Bank has appointed South Africa's biggest banks as authorised dealers that may grant exchange control approvals.
[4] Annexures JMK3 and JMK5 to Peach Payment's supporting affidavit.

19. In its application for the admission of its further affidavit, Visa contended that Peach Payment's supporting affidavit raised new issues that it could not reasonably have anticipated.

20. Depansum opposed this application on the basis that its replying affidavit did not raise new issues, and Visa could reasonably have anticipated the issues in question because Depansum had replied to allegations in Visa's answering affidavit relating to the unlawfulness of Depansum's LCA model.

21. During argument, Depansum's counsel also challenged the probative value of Visa's further affidavit. She submitted that the deponent, Visa's attorney of record, was not suitably qualified to depose to issues relating to whether Depansum's LCA model contravenes South Africa's exchange control regulations. This was disputed.

22. Depansum further contended that the Tribunal in any event does not have jurisdiction to determine whether Depansum's LCA model results in a breach of the exchange control regulations.

23. After considering the arguments presented at the hearing, we decided to provisionally admit Visa's further affidavit.

24. The Rules for the conduct of proceedings in the Competition Tribunal ("Tribunal Rules") make provision for the filing of only three sets of affidavits, namely the founding, answering and replying affidavits. [5] In instances where parties seek

[5] See Tribunal Rules 14, 15 and 16.

to adopt a procedure or process not expressly catered for in the Tribunal Rules, the Tribunal often refers to the practice and procedure in the High Court.[6]

25. The High Court Uniform Rules also only cater for three sets of affidavits. However, a High Court may in its discretion permit the filing of further affidavits where the consideration of further affidavits will enable the true facts relevant to the issues and dispute to be fully ventilated and adjudicated.

26. However, an explanation for the filing of additional affidavits is required, to ensure that in failing to file that affidavit earlier, the party concerned is not acting *mala fide* and was not remiss.[7] The test is one of justice and equity. It is a question of fairness to both sides as to whether the filing of further affidavits should be permitted. This also requires consideration of whether prejudice will result from permitting the filing of a further affidavit.

27. Visa's explanation for the further affidavit is that it is reasonable and necessary for it to file a further affidavit, because the affidavit of Peach Payment was only provided with Depansum's replying affidavit. Visa contends that Peach Payment raised new issues that Visa had not addressed in its answering affidavit, and that it could not have reasonably anticipated that Peach Payment would raise these issues because it was only in Depansum's replying affidavit that Depansum and Peach Payment made out a case concerning the legality of Depansum's LCA model.

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6 Computicket Proprietary Limited v The Competition Commission Case No: 20/CR/Apr10, at paragraph 21.

7 Computicket Proprietary Limited v The Competition Commission Case No: 20/CR/Apr10, at paragraph 22.

28. In our view, Visa's explanation is reasonable. In its answering affidavit, Visa raised the question of the legality of Depansum's LCA model. Depansum permissibly responded by addressing this in its replying affidavit. Depansum had not previously relied on the role played by Peach Payment, and Peach Payment had not previously filed an affidavit. Visa could not reasonably have anticipated the supporting affidavit or its contents.

29. The legality or otherwise of Depansum's LCA model was addressed by the parties in their papers and argued extensively at the hearing. Visa contends that Depansum's LCA model contravenes South Africa's exchange control regulations. Depansum denies this.

30. In our view, it is in the interests of justice for us to have all the relevant facts before us to allow the issue to be properly ventilated. Visa has explained why it did not address in its answering affidavit the matter traversed in the Peach Payment affidavit, and now addressed in its further affidavit. It does not appear to us that any material prejudice will be caused to Depansum if we admit Visa's further affidavit.

31. In the circumstances, Visa is granted leave to file the further affidavit.

THE VISA RULES

32. Visa has a set of rules which include (i) VISA core Rules;[8] and (ii) VISA Product and Services Rules.[9] Of particular relevance to this dispute are what are known

[8] Visa answering affidavit, paginated page 309, at para 43: these are described as providing minimum requirements to ensure security, soundness, integrity, interoperability, certainty and transparency of the Visa network.
[9] Visa answering affidavit, paginated page 309, at para 44: these are described as rules that relate to the use of specific Visa products or services, and when, where, and by whom they are performed.

as Visa's Restriction on Cross-Border Rules – the "ROCA Rule" (rule 1.5.1.1) - and the Merchant Outlet Location Rule (rule 1.5.1.2). These rules provide as follows:

The ROCA Rule (Visa Rule 1.5.1.1):

"An Acquirer must accept and submit Transactions into Interchange only from Digital Wallet Operators, Merchants, Marketplaces, and Sponsored Merchants within that Acquirer's jurisdiction."

33. In terms of this rule, Visa members may only acquire transactions between Visa cardholders and merchants if such members are located in the same jurisdiction as the merchant in question.[10]

The Merchant Outlet Location Rule (Visa Rule 1.5.1.2)

"An Acquirer must assign the correct location of its Merchant's Merchant Outlet. An Acquirer must not misrepresent or alter, or allow its Merchant, or agent to misrepresent or alter, a Merchant Outlet location.

. . . .

For a Card-Absent Environment Transaction, the Acquirer must assign the country of the Merchant's Principal Place of Business as the Merchant Outlet location. The Acquirer may assign additional Merchant Outlet locations in the country in which all of the following occur:

[10] Visa's founding affidavit, paginated page 297, at paragraph 8.

- The Merchant has a permanent location at which the Merchant's employees or agents conduct the business activity directly related to the provision to the Cardholder of the goods or services purchased in the specific Transaction

- The Merchant assesses sales taxes on the Transaction activity

- The location is the legal jurisdiction, for the Transaction, that governs the contractual relationship between the Merchant and the Cardholder as the purchases or the goods or services."

34. This rule requires the acquirer to assign the correct location of the merchant outlet from which the relevant goods or services are being sold by the merchant in question.[11]

35. These are the Visa Rules that Depansum impugns in its complaint to the Commission.

DEPANSUM'S CASE

36. Depansum contends that Visa is a dominant firm, and is abusing its dominant position in the market to foreclose it as a competitor. Depansum argues that its LCA model offers a competitive payment system that rivals Visa's entrenched payment system. Depansum's case can be summarised as follows:

    36.1. Visa is a dominant firm in the South African market for (i) network services provided by card associations to financial institutions; (ii) international payments made to foreign merchants; and (iii) (the

[11] Visa answering affidavit, paginated page 297, at paragraph 9.

narrower market for) payment services for foreign merchants with respect to Visa cards.

36.2. Depansum and Visa are competitors. Through the levying of fines on Nedbank, Visa seeks to induce Nedbank not to deal with it, so as to foreclose Depansum from the market.

36.3. Visa attempts to foreclose Depansum from the market by levying fines on Nedbank and threatening to levy more fines for Nedbank's alleged breach of the Visa Rules by acting as Depansum's acquiring bank.

36.4. As at the hearing date, Visa has since April 2023 levied fines amounting to USD [redacted] (ZAR [redacted]) on Nedbank for processing transactions through Depansum, using the LCA model, for Amazon, Microsoft and Shein, three foreign merchants; and instructed Nedbank to cease processing these transactions on Depansum's behalf. These fines have since been passed on to Depansum.

36.5. This conduct constitutes exclusionary conduct, in that it will impede Depansum's ability to expand in the market for international payments made to foreign merchants, and will ultimately eliminate Depansum from the market.

36.6. Visa's conduct has the effect of substantially preventing or lessening competition in the market for international payments made to foreign merchants because (i) the LCA model is the only credible alternative in South Africa to Visa's CB model; (ii) Depansum is a leading provider of LCA payment services in South Africa; (iii) if Depansum is

prevented from competing and eliminated from the market, all other (potential) LCA based providers are likely to also be eliminated; and (iv) the CB model has no pro-competitive benefits.

36.7. If Depansum and other (potential) LCA-based providers are eliminated from the market as a result of Visa's conduct, this will lead to consumer harm because in the absence of Depansum, consumers wishing to make international transactions will be forced to do so using the CB model which will (i) increase the costs of transacting internationally for customers in South Africa; (ii) eliminate the potential for customers to use alternative payment methods like EFT in the future; and (iii) discourage foreign merchants from making their goods and services available in South Africa because of the fear of increased transactional costs associated with the CB model, to the detriment of customers in South Africa.

37. In sum, Depansum contends that its LCA model offers a competitive alternative that rivals Visa's entrenched payment system, constitutes a competitive threat to Visa's revenue stream for international card payments, and challenges Visa's stronghold in the facilitation of international e-commerce transactions. It alleges that for this reason, Visa seeks to exclude it from the market through the application and enforcement of the Visa Rules.

VISA'S CASE

38. Visa denies that its conduct contravenes the Act. Visa does not deny that it has levied and continues to levy fines on Nedbank. It contends that it does so because Nedbank, in fulfilling its obligations to Depansum, contravenes the

Visa rules. In terms of the Visa rules, which are contractual in nature, it is entitled to levy fines against Nedbank to deter further non-compliance with its rules.

39. Visa further contends that its conduct is directed at protecting its payment network against Depansum's attempt to free-ride on Visa's payment network system by falsely portraying itself as a local merchant by intermediating payments that cardholders believe they are making directly to foreign merchants, and by diverting these funds away from Visa's payment network for its own commercial gain.

40. Visa asserts that the present dispute was triggered by its detection that Nedbank was acting in contravention of its ROCA and Merchant Outlet Location Rules by acquiring certain international transactions by South African cardholders, and then processing the transactions as though they were domestic transactions.

41. Following this discovery, Visa informed Nedbank of its findings and required Nedbank to rectify its conduct within a month. Nedbank failed to comply. As a consequence, Visa commenced with the imposition of non-compliance assessments (fines) on Nedbank in terms of its rules, so as to deter Nedbank from continuing to fail to comply with the Visa rules.

42. Visa contends that its rules are an important and intrinsic component of its payment network system, because they provide minimum requirements to ensure security, soundness, integrity, interoperability, certainty and transparency of its payment network system. It contends further that Depansum's LCA model introduces a significant risk to Visa cardholders and

its brand because by effectively bypassing the Visa payment system, without the cardholder's knowledge, it compromises the safety and integrity of the Visa payment network system.

43. Further, Visa contends that Depansum's LCA model contravenes South Africa's exchange control regulations. For that reason, too, it cannot be allowed to continue this unlawful conduct through using its payment network system. Visa argues that Depansum's LCA model contravenes South Africa's exchange regulations because what Depanusm does is to bulk payments from South African cardholders, and then remits them offshore in its own name for the ultimate benefit of its foreign merchant clients.

44. According to Visa, this conduct obscures the fact that the true payers of the funds are numerous individual cardholders and not Depansum itself. Through this mechanism, Depansum shields the payments from monitoring and surveillance from an exchange control perspective. Visa is not prepared to permit its payment network system to be associated with what it says is unlawful conduct.

45. On the competition aspects, Visa denies that Depansum has established a *prima facie* case of a prohibited practice. It contends that any firm, whether dominant or not, should have the right to determine how its products and services are used by customers.

46. Visa denies that it competes with Depansum. It contends that unlike other payment network operators, Depansum does not operate a payment network at all. Its LCA model is that of an intermediary that simply collects payments

and passes them over to merchants. This, Visa argues, does not constitute a payment network of the kind operated by it, Mastercard and others.

47. In relation to market definition, Visa accepts that it competes in the payment network services market. However, it denies that it competes in the other two markets as defined by Depansum i.e., the markets for the provision of payment services to merchants, because its (Visa's) customers are not merchants, but issuing banks and acquiring banks that are members of Visa.

LEGAL FRAMEWORK

48. It is necessary briefly to set out the applicable legal framework before considering the issues for determination. The starting point is section 49C, which vests the Tribunal with discretionary power to grant interim orders in certain circumstances, and subsection 49C (2) which in the relevant part reads:

"*The Competition Tribunal may grant an interim order if it is reasonable and just to do so, having regard to the following factors:*

(i) *The evidence relating to the alleged prohibited practice;*

(ii) *The need to prevent serious or irreparable damage to the applicant; and*

(iii) *The balance of convenience*."

49. Section 49C (3) of the Act deals with the required standard of proof and states that:

"*In any proceedings in terms of this section, the standard of proof required is the same as the standard of proof in a High Court on a common law application for an interim relief*."

RELEVANT MARKETS AND DOMINANCE

50. As noted above, Depansum alleges that Visa's conduct contravenes sections 8(1)(c), 8(1)(d)(i) and 5(1) of the Act. In order to succeed in interim relief under section 8(1)(c) and 8(1)(d)(i), Depansum must establish that Visa *prima facie* is a dominant firm (as defined in section 7) in the relevant market(s).

51. Section 8(1)(d) lists specific types of exclusionary acts which a dominant firm is prohibited from engaging in unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act(s).

52. Section 8(1)(c) provides that it is prohibited for a dominant firm to engage in an exclusionary act other than those listed in subparagraph (d) if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain.

53. An exclusionary act is defined as *"an act that impedes or prevents a firm from entering into, participating in or expanding within a market".*

54. In both sections 8(1)(d)(i) and 8(1)(c), the requirement of a substantial anti-competitive effect is met either (i) if there is evidence of actual harm to consumer welfare; or (ii) if the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals.

55. Under section 8(1)(d), once the elements of section 8(1)(d) are satisfied the onus shifts to the respondent to demonstrate that the effects are outweighed by pro-competitive gains. However, under section 8(1)(c) an applicant or

complainant must show the elements of the exclusionary conduct as well as the effects.

56. The Tribunal's approach to section 8(1)(c) and 8(1)(d) is set out in *South African Airways*[12], in which it stated:

> *132. In summary, we find that the Act sets out the following approach to exclusionary practices. In the first place we examine whether the conduct in question is exclusionary in nature. In terms of section 8 (c) that would be the conduct that fits the definition in the Act for what constitutes an exclusionary act. In terms of 8(d) it is conduct that meets the definitions set out in the sub-paragraphs of that section. If the conduct meets the requirements of the definition, we then enquire whether the exclusionary act has an anti-competitive effect. This question will be answered in the affirmative if there is (i) evidence of actual harm to consumer welfare or (ii) if the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals. This latter conclusion is partly factual and partly based on reasonable inferences drawn from proven facts. If the answer to that question is yes, we conclude that the conduct will have an anti-competitive effect. Whichever species of anti-competitive effect we have, consumer welfare or likely foreclosure, we have evidence of a quantitative nature and hence we can return to the scale with a concept capable of being measured against the alleged efficiency gain"*

[12] The Competition Commission v South African Airways (Pty) Ltd Case number: 18/CR/Mar01, at paras 132 – 136.

133. Thus far the onus of proof in terms of both sections is on the complainant. Here the treatment of the onus in the two sections now diverges.

134. In terms of 8(c) we then consider whether the anticompetitive effect outweighs any efficiency justification for the conduct. If it does we can find that there has been an abuse of dominance. Here again the onus is on the complainant.

135. In terms of 8(d) the burden of proof now shifts to the respondent who must prove that the efficiency justifications outweighs the anticompetitive effect. If the respondent does not, then the conduct will be found to be an abuse.

136. It is now appropriate to answer our prior questions. An anticompetitive effect is something different to an exclusionary act. This does not make the reference to an exclusionary act somehow superfluous. It firstly signals that we are analysing an exclusionary as opposed to an exploitative abuse. Because we know we are dealing with an exclusionary as opposed to an exploitative abuse, it helps guide our analysis of the alleged anti-competitive effects of the conduct. More importantly, because some forms of exclusionary act.

57. Depansum defines three markets within which it alleges Visa is dominant:

57.1. The market for card network services provided to financial institutions in South Africa.

57.2. The market for payments made to foreign merchants.

57.3. A narrower market than in 2 above for payments made to foreign merchants using Visa cards.

58. Depansum contends that Visa is dominant in these markets primarily on the basis that more than half of the payment cards (debit or credit) issued in South Africa are Visa cards. It estimates Visa's market share in the card network services market to be in the region of [redacted]%.

59. Depansum further contends that no bank in South Africa can operate effectively without a relationship with Visa as a card network provider. This is for the reasons that (i) given the prevalence of Visa cards in South Africa, banks that wish to function as acquiring banks (i.e. capable of receiving funds), such as Nedbank in this case, must be able to accept and process Visa card transactions; and (ii) banks in South Africa only have two alternatives for cards that they can issue to their customers, being Visa and Mastercard. Although some banks will issue both of these types of cards, those banks that choose Visa cannot easily, or indeed practically, migrate to Mastercard (and vice-versa) because doing so would require that the bank re-issue every active card issued to their customers.

60. Depansum alleges that Visa wields what it describes as untrammelled market power over acquiring and issuing banks. Depansum contends that Visa's market power is founded on, *inter alia*:

60.1. Visa's highly recognised and trusted brand with wide acceptance.

60.2. Visa's large customer base transaction volumes that allow it to benefit from economies of scale, providing pricing advantages over new entrants.

60.3. Network effects whereby the greater number of cardholders use Visa cards, and the more merchants accept Visa cards, the more attractive Visa becomes, thereby reinforcing incumbency advantages.

60.4. Visa's rules that allow it to govern and regulate how participants within its payment network behave in the market.

60.5. High switching costs for banks and customers that deter banks and customers from switching payment networks (e.g. Visa to Mastercard or *vice versa*).

61. Depansum also contends that Visa's market power is demonstrated by its ability to impose its rules on its customers without any negotiation.

62. As indicated above, in addition to the market for card network services, Depansum defines two other relevant markets for the provision of payment services to foreign merchants supplying goods or services to customers in South Africa, (i) a market which considers all card networks systems that are available to foreign merchants; and (ii) a (narrower) market limited to the Visa card network system. It argues that the latter narrower market is the most appropriate market of the two because the prevalence of Visa cards in circulation means that merchants (including foreign merchants) that offer products and services to South African customers must be able to accept Visa cards if they are to offer goods and services to customers in South Africa. They

argue however that Visa is a dominant provider of payment services to foreign merchants selling goods or services to South Africans, irrespective of which of the two market definitions is adopted, the broader or the narrower market.

63. Visa accepts that it is dominant in the South African payment network services market.[13] However, it denies that Depansum has made out a sufficient case that Visa enjoys any market power in that market. This is primarily because Visa argues that it faces effective competition in this market from other players such as Master Card, American Express and Union Pay and other domestic card scheme and payment solutions.[14] In addition, Visa argues that its customers are financial institutions such as banks which have significant countervailing power.

64. Furthermore, Visa denies that it competes with Depansum in any relevant market. Visa contends that Depansum does not operate in the market for the provision of payment network services to issuers and acquirers. Rather, Depansum merely operates as a collection agency on behalf of merchants, a market in which Visa contends that it does not compete.

65. In relation to the market for payments made to foreign merchants and the market for payments made to foreign merchants using Visa cards, Visa contends that it simply does not compete in those markets. Rather, it is Depansum that competes in those markets because unlike Visa, Depansum's customers in those markets are merchants, while its customers are issuers and acquirers. Further, Visa contends that merchants only benefit from the Visa

[13] Visa answering affidavit, page 355 at paragraph 185.
[14] RBB report, page 407 at paragraph 94 – 97.

payment network by virtue of being firms to which Visa members agreed to provide acquiring services. In our view, this argument is not convincing.

66. The Constitutional Court in *Mediclinic*[15] and the CAC in *eMedia*[16] remind us to apply a context-sensitive approach when applying the Act. Of importance in this matter is that Visa is active in a transaction processing network in which it has a significant position in South Africa.[17]

67. The three product/services markets defined by Depansum appears to us *prima facie* to be plausible relevant markets with Depansum conceding for purposes of the current application that it meets the statutory threshold for dominance in relation to the South African payment network services market.

68. The context of this matter, based on the evidence before us, is that foreign merchants have two options to receive payment: this can be through either Depansum's LCA model, or through Visa's CB model. In our opinion, these two models *prima facie* ultimately have the same intended purpose i.e., to ensure that cardholders are able to make payments and merchants are able receive such payments.

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[15] Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another (CCT 31/20) [2021] ZACC 35; 2022 (5) BCLR 532 (CC); 2022 (4) SA 323 (CC); [2023] 1 CPLR 2 (CC); [2022] HIPR 200 (CC) (15 October 2021).

[16] Emedia Investments Proprietary Limited South Africa v Multichoice Proprietary Limited and Another (201/CAC/JUN22) [2022] ZACAC 9; [2022] 2 CPLR 23 (CAC) (1 August 2022).

[17] RBB Economics, the economic consultancy for Visa, describes payment network services as a two-sided platform. On the one hand, there is the issuance side, where issuers (generally banks) and cardholders interact. On the other hand, on the acquisition side, acquirers, merchants, and payment facilitators interact. In this sense, card brands (for example, Visa, MasterCard, and Union Pay) provide payment networks that directly connect both issuers and acquirers, facilitating transactions between them (RBB Economics Report, paras 42 and 43). When the cardholder uses their card to make a purchase, the transaction is registered in the card brand's network (e.g., Visa's network). This causes a payment to flow from the issuance side of the payment chain to the acquisition side (RBB Economics Report, para 50).

69. As indicated above, Visa operates in a network. Even if one assumes that Visa does not contract directly with merchants, Visa charges fees to both the acquiring and issuing banks (which together facilitate payments made to foreign merchants) for the card network services that it provides to them, which fees are recovered from the merchants by the merchant's bank (the acquiring bank) and from the customers by the customer's bank (the issuing bank). Depansum generates revenue directly from the merchants, whereas Visa does so indirectly, but one cannot ignore that *prima facie* there exists a level of competitive interaction between Visa and Depansum through their respective models.

70. In other words, while the models may have a different mechanism for how payments are taken from cardholders, and for how such payments ultimately reach merchants, what cannot be gainsaid is the fact that models are intended to achieve the purpose described in the previous paragraph.

71. We conclude on the basis of the evidence before us, that, *prima facie,* Depansum and Visa compete through their respective models.

72. It is trite law that in order for a firm to transgress the dominance provisions of the Act it must be a dominant firm. Section 7 provides for three possibilities for a firm to be regarded as dominant. The first two depend on market shares – (i) the firm must have at least 45% of the market; or (ii) at least 35% of the market, unless the firm can show that it does not have market power, and the third, section 7(c), says a firm may be considered dominant if "*it holds less than 35% of that market, but has market* power".

73. Visa accepts for purposes of the current application that it meets the statutory threshold for dominance in relation to the South African payment network services market (as does MasterCard).[18] Visa confirms that it operates a card network that is similar in size to that operated by MasterCard in South Africa, with both operators having a share of issued cards of approximately [redacted]%.[19] That in our view suffices for a *prima facie* finding that Visa is dominant in the South African payment network services market. Visa has not put up any convincing evidence indicating as it alleges that it is effectively constrained by other players in this market or in relation to South African banks allegedly having countervailing power. We furthermore, based on the evidence before us, *prima facie* accept Depansum's submissions regarding the prevalence of Visa cards in South Africa and that no bank in South Africa (and Nedbank in this instance) can operate without a relationship with Visa as a card network provider given the prevalence of Visa cards in South Africa.

74. At interim relief stage, we are required to establish whether a *prima facie* case has been made out. It is not appropriate for us to attempt to make a definitive determination as to the merits of the applicant's case. That is a matter to be determined in due course. And the Competition Appeal Court has held in *eMedia*[20] that a robust approach must be taken to the evidence presented in proceedings for interim relief.

[18] First and Second Respondent's Heads of Argument, para 118.
[19] RBB report, para 95.
[20] Emedia Investments Proprietary Limited South Africa v Multichoice Proprietary Limited and Another (201/CAC/JUN22) [2022] ZACAC 9; [2022] 2 CPLR 23 (CAC)

75. *In this regard, we bear in mind that this is an application for an interim interdict. To the extent that there are disputes of fact, we ought to follow the approach articulated in the Gool case:*

> *"The accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed."*[21]

Requirement or inducement of a customer to not deal with a competitor

76. Section 8(1)(d)(i) prohibits a dominant firm from requiring or inducing a supplier or customer not to deal with a competitor unless the dominant firm can show that technological, efficiency or other pro-competitive gains outweigh the anti-competitive effects of the conduct.

77. For Visa's enforcement of its rules to be considered an exclusionary act under section 8(1)(d)(i), Depansum must establish that (i) Visa's conduct induced Nedbank not to deal with Depansum; and (ii) Visa and Depansum compete through their respective models.

78. Visa contends that it is entitled to levy fines on Nedbank for non-compliance with the Visa Rules. It denies that this conduct is anti-competitive. It bases this

[21] Simon NO v Air Operations of Europe AB and others 1999 (1) SA 217 (SCA) at 228.

denial on, *inter alia*, the proposition that the dominant firm (in this case Visa) and the competitor (in this case Depansum) must have a common customer that the dominant firm (Visa) has required or induced not to deal with its competitor.

79. Visa contends that Nedbank is not a common customer of Depansum and Visa. To the contrary, it contends, while Nedbank is Visa's customer, it is a supplier to Depansum, and there can therefore be no such inducement.

80. In our view, this interpretation is contrary to the explicit wording of the provision. Section 8 (1)(d)(i) prohibits a dominant firm from *"requiring or inducing a supplier or customer to not deal with a competitor".* The wording of the provision does not suggest that for the purposes of section 8(1)(d)(i), the competitors in question must have a mutual customer. The use of the word "or" is decisive in this regard.

81. Further, Visa denies that it has induced Nedbank not to deal with Depansum. It contends that all that it requires is that Nedbank must comply with the Visa Rules. In our view, this argument is formalistic, and ignores the consequences of what Visa requires Nedbank to do (and not do).

82. Even if one accepts that it is not Visa's intention to induce Nedbank not to deal with Depansum, one cannot simply ignore the potential or actual effect of Visa's conduct – and particularly in the context of a *prima facie* competitive relationship between Depansum and Visa through their respective models. If Visa's conduct has the anti-competitive effect that Nedbank ultimately decides to no longer deal with Depansum because of Visa's conduct, that cannot be ignored. As indicated above, context matters, and to ignore the consequences of Visa's

conduct would be unrealistic and artificial, and inconsistent with the purposes of the Act.

83. In its founding affidavit, Depansum alleges that Visa has threatened to terminate its agreement with Nedbank if it continues to process transactions for foreign merchants routed through Depansum's LCA model.[22] Visa's answering affidavit offers no more than a "catch all" bare denial in this respect. Visa has not seriously engaged this allegation, either by denying and refuting the allegation, or by advancing an alternative factual version. If Visa did not threaten to terminate its relationship with Nedbank unless Nedbank complied with its demands, it would have been easy for it to say so. Nedbank has not cast any serious doubt on this allegation, which must be accepted.

84. Depansum states that Nedbank attempted to appeal Visa's decision to levy fines on Nedbank. The appeal was unsuccessful. Depansum alleges that as a consequence, on 18 August 2023 Nedbank wrote to Depansum advising it that the appeal was unsuccessful, and that Nedbank would have to put remedial actions in place to rectify the alleged breaches of the Visa Rules. As a consequence, Nedbank requested Depansum to propose a remedial plan that complies with the Visa Rules, failing which Nedbank will have to stop processing any transactions.[23]

85. Depansum contends that in effect, this requires Depansum to revise its entire business model in order to be able to continue doing business with Nedbank.

[22] Depansum's founding affidavit, paginated page 18, paragraph 39.
[23] Depansum's founding affidavit, paginated page 20, at paragraph 46 – 47.

86. In our view, Visa's conduct *prima facie* seeks to induce Nedbank not to deal with Depansum. Nedbank's letter of 18 August 2023 to Depansum is a consequence of Visa levying fines on Nedbank and threating to terminate its agreement with Nedbank. The result is that Nedbank is induced or required not to do business with Depansum.

87. In *Computicket* the Competition Appeal Court held that *"the judgement required by section 8(d) will be responsive to the ultimate consideration as to whether the dominant firm has engaged in exclusionary conduct that has in some non-trivial way diminished the competitive constraints to which it would otherwise have been subject*

"… the harm must be shown to exist, whether in the form of actual or potential harm, strengthens the dominant firm's position to the extent that competitive rivalry is significantly impeded or is likely to be so impeded by the impugned conduct of the dominant firm."

88. It cannot be gainsaid that Nedbank has made clear that it can no longer sustain its relationship with Depansum at the risk of jeopardizing its relationship with Visa. On a conspectus of the facts, Visa's conduct has induced Nedbank to not deal with Depansum. To put the matter at its lowest, Visa's conduct has induced Nedbank to decide, and to give notice to Depansum, that it will not continue to do business with Depansum in the manner which has previously prevailed. As we have noted above, Depansum contends that this means that in order to continue doing business with Nedbank, it would (at the behest of its competitor, Visa) have to change its entire business model, in a manner that would prejudice it and potential similar service providers – and benefit Visa.

89. Has Visa's conduct in some non-trivial way diminished the competitive constraints to which it would otherwise have been subject? *Prima facie*, this appears to be the case. We have concluded that *prima facie*, there is a competitive relationship between Depansum and Visa through their respective models. Depansum's LCA model *prima facie* presents itself as an alternative to the conventional CB model. If this were not the case, large merchants such as Amazon, Shein and Microsoft would not have taken up Depansum's LCA model. This suggests *prima facie* that Depansum's LCA model puts a competitive constrain on Visa's CB model.

90. We next have to consider whether Depansum has demonstrated actual or potential harm.

Harm to consumer welfare and competition

91. Depansum contends that cardholders transacting under the CB model are often subjected to higher cardholder fees because international transactions are usually subject to international commission and/or currency conversion fees. Several local banks charge these international transaction fees.[24] When the merchant makes use of the local collection agent (LCA) model, that fee is no longer incurred by the end consumer, because the card transaction is a local transaction and the payment is made in the local currency, meaning that the fee is not demanded. International commission and/or currency conversion fees can vary according to the issuing bank of the cardholder, but the fees are most

[24] Depansum submits that the major banks including First National Bank, Standard Bank, ABSA, Discovery, Nedbank, Investec, African Bank and Time Bank demand this fee for an international conversion. Capitec does not.

commonly set at around 2%. There is therefore a direct and immediate saving to South African end consumers if this charge is not incurred.[25]

92. Genesis, the economic consultancy for Depansum, calculated that assuming that the imposition of Visa's rule results in Shein, Amazon Prime video and Microsoft reverting to the CB model for Visa card transactions, the application of a 2% fee would result in additional costs to consumers amounting to approximately R[redacted] per annum. Assuming that the rule is imposed uniformly on all foreign merchants to which dLocal provides services (causing all such merchants to revert to the CB model for Visa card transactions), the cost to consumers based on a 2% fee would amount to approximately R[redacted] per annum.[26]

93. Depansum argues that under its LCA model, this fee is avoidable because transacting under the LCA model processes the transaction as a local transaction.

94. Depansum further contends that transacting under the CB model subjects the cardholder to international exchange rates. In the LCA model, Depansum states, cardholders are always charged in rands, and are therefore insulated from fluctuations in the exchange rate. Depansum therefore argues that South African consumers will suffer harm if it is in effect prevented from operating the LCA model.

95. Depansum also submits that consumers in South Africa bear no risk at all on the international leg of the transaction under the LCA model. Once the

[25] Transcript pages 54 to 56.
[26] Genesis Analytics Report, para 82.

customer's funds arrive in Depansum's account in South Africa, the customer has settled the amount due to the merchant. The risk on the international leg of the transaction vests exclusively in Depansum and the merchant.

96. Visa however contends that Depansum ignores the costs associated with remitting funds offshore.[27] In addition, it contends that Depansum ignores what it calls the "non-price benefits" of using Visa's payment network, such as security, dispute resolution etc. There is no doubt room for argument (and potential evidence) as to the extent and significance of those benefits to South African consumers. There is however no evidence before us of its monetary value. What is however clear is that in the LCA model, cardholders are not charged the fees to which we have referred above. Preventing this benefit *prima facie* causes harm to consumers.

97. As indicated above, the customers of Depansum are well-known large international merchants such as Microsoft, Shein and Amazon. Thousands of South African consumers buy from these merchants through the LCA model. There is no evidence before us of these customers complaining about any non-price benefits being lost or security risks being associated with the LCA model.

98. As to consumers being shielded by the LCA model from fluctuations in exchange rates, Visa accuses Depansum of being speculative. Visa does not offer any alternative facts or propositions. It accuses Depansum of failing to provide evidence in support of its proposition. It is a well-known reality that the rand has, over an extended period, depreciated against South Africa's major trading partners. It would seem idle to ignore that reality. In any event,

[27] Visa's answering affidavit, page 62, at paragraph 172 – 173.

consumers might well prefer to be able to buy at what is for them a known fixed price (the rand price, being in the currency in which they make payment), rather than being subjected to currency rate fluctuations.

99. As an additional submission on harm to consumer welfare, Depansum contends that while theoretically consumers transacting on the LCA model could migrate to a different payment network, for example Mastercard, this is unlikely because of the costs associated with potential switching.

100. As to harm to competition: Depansum contends that should Visa continue to enforce the Visa Rules, this will prevent Nedbank from supplying its services to Depansum, with the likely result that Depansum is foreclosed from the market. This will also likely result in other (potential) LCA based payment models being foreclosed from the market.

101. In *Computicket*,[28] the presence of smaller players in a market was recognised. The Court stated that *"Rivalry may be diminished because a small firm plays an important role in constraining the dominant firm in a part of the market, whether as to the product or territory. An effect of this kind is not ousted from consideration".* There is a growing prominence of global digital platforms and foreign e-commerce merchants. We note that a current relatively small player providing services to these merchants may be a significant (future) threat to the incumbent(s) in markets such as these where new models appear to be developing.

[28] At paragraph 31.

102. In relation to harm to itself, Depansum states that Visa card transactions account for at least [redacted]% of the transaction value of its operations in South Africa. This translates into [redacted] transactions a month. This would mean that [redacted]% percent of Depansum's business would be severely affected if Visa were to continue to levy fines and to prevent Nedbank from acting as Depansum's acquiring bank. According to Depansum, this would translate into its losing at least [redacted]% of its revenue, with an estimated monetary value of approximately [redacted] a month.[29] Further, Depansum states that at present, Visa's conduct relates to three of its five merchants in South Africa, and that if Visa continues to levy fines, the conduct may well extend to the remaining two merchants.

103. Depansum states that this will have catastrophic effects for it. It contends that in the wake of the growing prominence of global digital platforms and foreign e-commerce merchants, the exclusion of market players such as it is an important issue to be taken into consideration.

104. We conclude that *prima facie,* Visa's conduct has (to put the matter at its lowest) the effect of impeding Depansum's ability to grow in the market and compete with Visa through its LCA model. We furthermore cannot overlook that this potentially may affect other LCA-type models from entering and competing in the relevant markets in the future.

[29] Based on the average monthly transaction value facilitated by dLocal over the last 5 months for Visa card transactions relating to Amazon Prime video, Shein and Microsoft.

Pro-competitive gains

105. If Visa's conduct is anti-competitive, we have to consider whether the identified anti-competitive effects are outweighed by pro-competitive gains.

106. Depansum contends that there are no pro-competitive gains arising from Visa's conduct. It asserts that Visa's stated concerns relating to fraudulent activities, money laundering etc are purely speculative. It states that its parent company, dLocal, is registered in the Cayman Islands and is a publicly listed entity on NASDAQ. It raises this to demonstrate that it has no incentive to flaunt regulatory obligations that bind it by virtue of its being a listed entity on NASDAQ. And it says this to demonstrate that whatever security concerns Visa raises concerning its payment system are unfounded.

107. While we recognise Visa's desire to protect its payment network system, its security concerns *prima facie* do not outweigh the competition concerns to which we have referred.

Contravention of section 5

108. Depansum alleges that Visa's conduct also contravenes section 5(1) of the Act. Section 5(1) prohibits agreements between firms in a vertical relationship that have the effect of substantially lessening or preventing competition in a market, unless a party to the agreement can prove that there are technological, efficiency or pro-competitive gains resulting from that agreement that outweigh the agreement's anti-competitive effect.

109. A "vertical relationship" is defined in section 1(1) of the Act as "the relationship between a firm and its suppliers, its customers or both".

110. It is common cause that Visa and Nedbank are in a vertical relationship. Visa provides services directly to issuers and acquirers (Nedbank, in this case) and Nedbank provides acquiring services to Depansum. To make out its section 5(1) case, Depansum relies on the same grounds as those asserted under its section 8 claim to allege a contravention of section 5(1). Similarly, Visa relies on the arguments it raised in relation to the section 8 claim to contradict any allegation of a contravention of section 5(1).

111. For the reasons already set out in relation to the section 8 case, we find that *prima facie*, Visa has contravened section 5(1) of the Act. *Prima facie* there is a vertical agreement that has the effect of substantially preventing or lessening competition, and as explained above, Visa has not provided convincing evidence of technological, efficiency or pro-competitive gains that outweigh the anti-competitive effect.

ALLEGED BREACH OF THE EXCHANGE CONTROL REGULATIONS

112. Visa contends that Depansum's LCA model results in a breach of the exchange control regulations, and that for this reason, the Tribunal should not grant the interdict which is sought. Depansum denies that this is the case, and asserts that in any event, it is not part of the function of the Tribunal to pronounce on and enforce the exchange control regulations.

113. The Tribunal is asked to grant an interdict, the effect of which will be to enable Depansum to continue to operate its LCA model. In our view, the Tribunal will not easily (if at all) make an order which would result in a clear breach of a statutory provision. The fact that the focus of the work of the Tribunal is on implementation of the Act cannot mean that it should close its eyes to clear

evidence, if it exists, of other statutory provisions being breached if it makes a particular order.

114. The affidavit of Peach Payment states that it applied to one of the four major banks in South Africa, which is an Authorised Dealer ("AD") of the South African Reserve Bank ("SARB"), for exchange control approval for the transactions which it facilitates for Shein through the LCA model. It provided the AD bank with detailed documentation with regard to how the LCA model functions. The AD bank responded in some detail. In essence it approved the Master Services Agreement and the Agent Agreement between Peach Payment and dLocal LLP in the United Kingdom, subject to certain conditions. Depansum is a subsidiary of dLocal LLP, which is a key element in the LCA model. The AD bank therefore approved the transfer of funds abroad in terms of the Agent Agreement.

115. Visa argued with some force, by reference to various elements of the exchange control regulations, that this approval could not validly have been granted. Depansum disputed this.

116. In our view, this is not a case in which we can find that there is a clear breach of the exchange control regulations; and neither is it altogether clear what the legal consequence in this Tribunal would be if an AD, carrying out a function under the exchange control regulations, granted "approval" considered to be in breach of those regulations. Could the Tribunal ignore or override such approval? This may depend in part on the precise juristic nature of the function performed by an AD in this regard. There was some inconclusive debate on this matter before us. As we see it, there are at least two different ways of understanding this:

116.1. It may be that AD's are authorised by the exchange control regulations to give permission for proposed transactions, in accordance with the stipulations of those regulations. On this view, the AD exercises a discretion conferred upon it by the SARB. If it exercises its discretion in favour of the entity making application to it, it will carry out the transaction.

116.2. Alternatively, it may be that AD's are authorised only to verify that a proposed transaction falls within what the Minister of Finance and the SARB have authorised in the exchange control regulations. On this view, the AD exercises no discretion to grant or withhold approval. It merely verifies that the proposed transaction falls within what is authorised by the Minister of Finance and the SARB, and accordingly carries out the transaction.

117. In our view, it is not appropriate for us to attempt to determine these disputed issues.

118. We note that Visa has alterative remedies open to it in this regard. It may directly approach the SARB for a ruling, and there may be other remedies open to it. We also note that Visa, as at the hearing date, has not utilised the remedy of reporting the alleged conduct to the SARB despite it having levied significant fines on Nedbank for its involvement in conduct that it alleges is in breach of South Africa's exchange control regulations.

119. We conclude that Visa has not presented clear evidence that the LCA model is in breach of the exchange control regulations. Under the circumstances, we conclude that it is not appropriate for us to attempt to determine the disputed exchange control issues between the parties.

PROCEEDINGS IN OTHER JURISDICTIONS

120. Depansum states that it has brought identical proceedings against Visa and Mastercard in certain other jurisdictions.[30] It alleges that it was successful in at least four of those jurisdictions.

121. However, Depansum was unable to provide us with the applicable statutes, judgements, orders and reasons in those cases. We do not know anything about those matters. Under those circumstances, we cannot place any reliance on what has happened in those jurisdictions, except to note that there has been related litigation in those jurisdictions. That does not assist in any way in the determination of the issues before us.

IRREPARABLE HARM AND BALANCE OF CONVENIENCE

122. Depansum contends that the harm to it is irreparable because it has no alternative remedy available to it. It contends that a damages claim is not available to it because it will never be able to prove how many transactions it would have processed under its LCA model, nor will it be able to show the extent to which its business would have grown and acquired other foreign merchant clients, absent Visa's conduct.

123. Depansum further argues that a loss of the LCA model as a viable alternative to Visa's CB model implies the loss of the pro-competitive effects of the LCA model, which include (i) increased offer of goods and services in the South African market; (ii) lower prices owing to the use of the LCA model; (iii) lower

[30] Chile, Colombia, Dominican Republic, Argentina, Paraguay and Panama.

rates and commissions involved with local transactions; and (iv) reach and penetration into emerging markets such as South Africa by foreign merchants.

124. Depansum contends that Visa stands to suffer very little harm, as it only stands to lose the fees and charges it would otherwise have gained through foreign transactions that would have been carried out under the CB model.

125. Visa denies that Depansum suffered the kind of harm contemplated by section 49C. It argues that financial harm does not suffice to establish harm for the purposes of section 49C. It contends that Depansum must demonstrate that if interim relief is not granted, its ability to remain as a viable competitor within the market will be seriously or irreparably threatened.

126. The latter is precisely what Depansum has alleged, and Visa has not been able to make any effective answer to this. Depansum has demonstrated that if Visa continues with its conduct, approximately [redacted]% of its business is in jeopardy. Should this materialise, its competitive position *prima facie* will be severely compromised. It appears to us *prima facie* that without the ability to transfer funds from South African customers to foreign merchants using the LCA model, Depansum's business will be significantly affected, resulting in a loss of current and future competition between the models in question.

127. Furthermore, as found above, there *prima facie* is consumer harm in this case.

BALANCE OF CONVENIENCE

128. Depansum contends that the balance of convenience favours it. It does so on the basis that its business will come to an immediate end if Nedbank stops

processing payments on its behalf. It contends that Visa will suffer no harm from the grant of the relief.

129. Visa denies that Depansum has demonstrated that there will be a harm to its competitive position in any relevant market. It contends that it has demonstrated that the grant of the relief sought by Depansum would cause serious risk both to the integrity of Visa's payment network and to the Visa brand in South Africa.

130. No evidence has been presented to us which shows that Visa has to date suffered any actual harm that flows from the concerns it raises about the LCA model. There is no evidence that the present situation will change materially if interim relief is granted. On the other hand, Depansum has *prima facie* demonstrated that without interim relief, at least [redacted]% of its operations in South Africa will be in jeopardy. In our opinion, this outweighs Visa's speculative concerns about the safety of its payment network as a result of Depansum's LCA model.

131. We find that the balance of convenience favours the Depansum.

132. For all of the reasons, we granted interim relief on 19 February 2024.

Signed by:Geoff Budlender
Signed at:2024-05-08 15:46:28 +02:00
Reason:Witnessing Geoff Budlender

Geoff Budlender

8 May 2024

Adv Geoff Budlender SC **Date**

Concurring: Mr Andreas Wessels and Ms Andiswa Ndoni

Tribunal Case Manager: Ofentse Motshudi and Princess Ka-Siboto

For the Applicant:	Adv G. Engelbrecht SC, Adv G. Marriot and Adv N. Mahlangu Instructed by Adams and Adams Attorneys
For Visa:	Adv Jonathan Blou SC, Adv Jerome Wilson SC and Adv Tsakani Marolen Instructed by Bowmans
For Nedbank:	Mr. Robert Wilson of Webber Wentzel