



**IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA**

Case no.: CR189MAR22/INT123Oct22

In the intervention application between:

<b>GOVCHAT (PTY) LTD</b>	First Applicant
<b>HASHTAG LETSTALK (PTY) LTD</b>	Second Applicant

And

<b>META PLATFORMS INC.</b>	First Respondent
<b>WHATSAPP INC.</b>	Second Respondent
<b>FACEBOOK SOUTH AFRICA (PTY) LTD</b>	Third Respondent
<b>COMPETITION COMMISSION</b>	Fourth Respondent

In respect of the complaint referral between:

<b>COMPETITION COMMISSION OF SOUTH AFRICA</b>	Applicant
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And

<b>META PLATFORMS INC.</b>	First Respondent
<b>WHATSAPP INC.</b>	Second Respondent
<b>FACEBOOK SOUTH AFRICA (PTY) LTD</b>	Third Respondent

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Panel:	A W Wessels (Presiding Member) G Budlender (Tribunal Member) Prof I Valodia (Tribunal Member)
Heard on:	18 April 2023
Date of Last Submission:	2 May 2023
Order issued on:	31 July 2023
Reasons issued on:	12 February 2024

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**REASONS FOR DECISION**

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## Introduction

- [1] This matter relates to an application by GovChat (Pty) Ltd (“GovChat”) and Hashtag Letstalk (Pty) Ltd (“#Letstalk”) (collectively referred to as “the Applicants”) for intervention, in terms of section 53(a)(ii)(bb) of the Competition Act 89 of 1998, as amended (“the Act”), into the Competition Tribunal (“Tribunal”) complaint referral proceedings brought by the Competition Commission (“Commission”) against Meta Platforms Inc., WhatsApp Inc. and Facebook South Africa (Pty) Ltd (collectively referred to as “the Referral Respondents”).
- [2] The Commission’s abovementioned complaint referral consolidates Commission case numbers 2020NV0043 and 2021OCT0019 (hereinafter referred to as “the Referral”).<sup>1</sup>
- [3] The Referral Respondents opposed the Applicants’ intervention application.
- [4] The Commission indicated that it abides the Tribunal’s decision.<sup>2</sup>
- [5] On 31 July 2023, we issued our order granting the Applicants leave to intervene as parties in the Referral, limited to the following scope in term of the merits:
- 5.1 the declaratory relief sought by the Commission against the Referral Respondents in paragraphs 1 and 2 of the Commission’s notice of motion;
  - 5.2 the interdictory relief sought by the Commission in paragraph 4 of the Commission’s notice of motion interdicting the Referral Respondents from ‘*offboarding*’ the Applicants from the WhatsApp Business API and/or WhatsApp Platform; and
  - 5.3 the interdictory relief sought by the Commission in paragraph 5 of the Commission’s notice of motion interdicting the Referral Respondents from implementing and enforcing the ‘*Exclusionary Terms*’ (as defined in the Commission’s founding affidavit in the Referrals).
- (collectively the “Scope of Intervention”)

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<sup>1</sup> Tribunal case number CR189MAR22.

<sup>2</sup> Per notice filed on 18 October 2022.

[6] Subject to the above Scope of Intervention, the Applicants were given the following rights:

- 6.1 attend all pre-hearing conferences;
- 6.2 adduce evidence and, subject to the Referral Respondents' right to object, cross-examine witnesses;
- 6.3 request the Tribunal to direct, summon and or order any person to appear at the hearing, or to produce any book, document, or item for purposes of such hearing;
- 6.4 inspect any books, documents and other items filed by any party, including inspection by the Applicants' legal representatives, subject to appropriate confidentiality undertakings, of any information filed by any party subject to a claim of confidentiality;
- 6.5 participate in any interlocutory proceedings; and
- 6.6 make written and oral submissions.

[7] Our intervention order furthermore stated that:

- 7.1 the Commission shall forthwith provide the Applicants' legal representatives who have signed confidentiality undertakings in favour of the Referral Respondents with access to the confidential version of the Commission's founding affidavit (including annexures) in the Referral, other than to third-party information claimed as confidential. To the extent that any documents contain information claimed as confidential by third parties, the Commission will endeavour to secure the necessary permissions to allow for the third-party confidential information to be released to the Applicant's legal representatives that have signed the requisite confidentiality undertakings; and
- 7.2 the Applicants shall be permitted to approach the Tribunal on the existing papers, duly supplemented as appropriate, seeking the leave of the Tribunal to intervene on any other issues that the Applicants may identify in the confidential version of the Referral as justifying such further intervention.

[8] We made no order as to costs.

[9] Our reasons for granting the intervention follow.

## Background

### *Commission's consolidated complaints*

- [10] On 20 November 2020, GovChat submitted a complaint to the Commission alleging that the Referral Respondents' conduct contravenes sections 8(1)(b), 8(1)(d)(ii) and/or section 8(1)(c) of the Act (the "GovChat Complaint"). On 8 October 2021, the Commissioner initiated a further complaint against the Referral Respondents in terms of section 49B(1) of the Act (the "Commission Complaint"). The Commission investigated the GovChat Complaint and the Commission Complaint concurrently and the complaints were consolidated and referred to the Tribunal on 11 March 2022.

### *Interim Relief*

- [11] As background to the instant application, we note that GovChat on 14 November 2020 applied to the Tribunal for interim relief in terms of section 49C to prevent the Referral Respondents from 'offboarding' it from the WhatsApp Business API. The Tribunal heard the interim relief application on 13 and 18 January 2021.<sup>3</sup>
- [12] On 11 March 2021, the Tribunal granted an interim order interdicting and restraining the Referral Respondents from offboarding the Applicants from their WhatsApp Business Account or 'WABA'<sup>4</sup> pending the conclusion of a hearing into the Applicants' complaint lodged with the Commission or six months of date of the order, whichever is the earlier. In terms of the Tribunal's order, in addition to the above, the Referral Respondents shall not engage in any conduct that directly or indirectly undermines the Applicants' relationships with its clients for purposes of achieving the same outcome as offboarding the Applicants. Furthermore, the interim order contained the following restrictions: (i) that the Applicants shall not on-board any new clients or users to the WABA; and (ii) in relation to existing clients or users on the WABA, the Applicants shall not launch, expand or sell any new use-cases to these clients.

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<sup>3</sup> Following disputes between the parties and their failure to reach agreement in respect of the arrangement among them for the period between the hearing held on 18 January 2021 and the date on which the Tribunal delivered its decision in the interim relief application, the Tribunal on 21 January 2021, preserving the status quo, ordered *inter alia* that: (i) Govchat and #Letstalk shall not on-board any new clients or users to the WABA; and (ii) in relation to existing clients or users on the WABA, Govchat and #Letstalk shall not launch, adopt or sell any new use-cases.

<sup>4</sup> WhatsApp Business Account #2521776064777765 that Govchat established with InfoBip Africa (Pty) Ltd, a WhatsApp Business Solution Provider, in the name of #Letstalk.

[13] The above interim relief order was later extended to 11 March 2022 (inclusive).<sup>5</sup>

### *The Referral*

[14] The Commission in the Referral alleges *inter alia* that that the Referral Respondents' conduct, described in the referral affidavit as the "Decision to Offboard", during the relevant period July 2020 to date,<sup>6</sup> contravenes section 8(1)(d)(ii) of the Act, alternatively section 8(1)(c) of the Act, and in the further alternative section 8(1)(b) of the Act.

[15] In the Referral the Commission alleges *inter alia* that certain terms and conditions imposed by the Referral Respondents on customers including GovChat (as holders of WhatsApp Business Accounts or WABAs) are exclusionary, and have been selectively enforced by the Referral Respondents in an anti-competitive manner in violation of section 8(1)(b), alternatively section 8(1)(c), and alternatively section 8(1)(d)(ii) of the Act.<sup>7</sup> The Commission refers to specific terms contained in the relevant agreements which govern access to the WhatsApp Business API, which include the "BSP Terms"<sup>8</sup>; the "WA's Business Service Terms"<sup>9</sup>; and the "WA's Solution Terms"<sup>10</sup>. The Commission describes these collectively as "Exclusionary Terms".

[16] To contextualise the scope of intervention that was sought by the Applicants, we indicate below the relevant relief sought by the Commission in the Referral, since the Applicants applied to be permitted to participate in the Tribunal proceedings in relation to certain relief as specified in the Referral.

[17] The Commission in the Referral makes application for an order in *inter alia* the following terms:

1. *"It is declared that the respondents' conduct, described in the referral affidavit as the "Decision to Offboard", during the relevant period July 2020 to date, inclusive of the period in which the conduct subsists subsequent to the referral of this*

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<sup>5</sup> Order dated 11 November 2021.

<sup>6</sup> Inclusive of the period in which the conduct subsists subsequent to the referral of the complaint to the Tribunal.

<sup>7</sup> Record page 13, Founding Affidavit, paragraph 18 read with the Referral at page 39, paragraph 80 and following.

<sup>8</sup> Paragraph 52 and following.

<sup>9</sup> Paragraph 56 and following.

<sup>10</sup> Paragraph 57 and following.

- complaint to the Tribunal, contravened section 8(1)(d)(ii) of the Act, alternatively section 8(1)(c) of the Act, in the further alternative, section 8(1)(b) of the Act;*
2. *It is declared that the respondents' conduct, described in the referral affidavit as the "Exclusionary Terms", during the relevant period August 2018 to date inclusive of the period in which the conduct subsists subsequent to the referral of this complaint to the Tribunal, contravened, section 8(1)(d)(ii) of the Act alternatively section 8(1)(c) of the Act, in the further alternative, section 8(1)(b) of the Act;*
  3. *An order interdicting and restraining the respondents from engaging in conduct contravening section 8(1)(d)(ii), alternatively 8(1)(c), in the further alternative 8(1)(b) in terms of section 58(1)(a)(i) of the Act;*
  4. *An order interdicting the respondents from offboarding the complainants from the WhatsApp Business API and/or WhatsApp platform in terms of section 58(1)(a)(i) of the Act;*
  5. *An order interdicting the respondents from implementing and enforcing the Exclusionary Terms, defined in the referral affidavit;*
  6. *An order, in terms of section 65(1), declaring that the Exclusionary Terms, defined in the referral affidavit, are void;".<sup>11</sup>*

[18] We shall in these reasons refer to the Commission's above prayers 1 and 2 as the "Declaratory Orders", to the above prayer 4 as the "Offboarding Interdict", and to the above prayer 5 as the "Exclusionary Terms Interdict".

### **Applicants' intervention application**

- [19] On 3 October 2022, the Applicants filed the instant application seeking leave to participate in the Referral proceedings in relation to the following:
- (i) the Offboarding Interdict;<sup>12</sup>
  - (ii) the Exclusionary Terms Interdict;<sup>13</sup> and
  - (iii) any other relevant issue as may be identified by the Applicants following receipt by the Applicants' legal representatives of a non-confidential version of the Commission's founding affidavit (including annexures) in the Referral in

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<sup>11</sup> Referral, pages 3 to 5.

<sup>12</sup> The interdictory relief sought by the Commission in paragraph 4 of the Commission's notice of motion interdicting the Referral Respondents from 'offboarding' the Applicants from the WhatsApp Business API and/or WhatsApp Platform.

<sup>13</sup> The interdictory relief sought by the Commission in paragraph 5 of the Commission's notice of motion interdicting the Referral Respondents from implementing and enforcing the 'Exclusionary Terms'.

accordance with section 53(a)(ii)(bb) of the Act. We note that we have not granted this open-ended request as we found no basis to grant an order that would in effect give the Applicants carte blanche to determine what issues they would be entitled to address in relation to the merits of the complaint. However, our order includes that the Applicants shall be permitted to approach the Tribunal on the existing papers, duly supplemented as appropriate, seeking the leave of the Tribunal to intervene on any other issues that the Applicants may identify in the confidential version of the Referral as justifying such further intervention.

[20] The Applicants further argued that their scope of intervention should include intervention in relation to the Declaratory Orders.

[21] As to procedural rights, the Applicants applied for an order determining that their right to intervene in relation to the issues of scope should include, without limitation, the rights to:

- 21.1 attend all pre-hearing conferences;
- 21.2 adduce evidence and cross-examine witnesses;
- 21.3 request the Tribunal to direct, summon and or order any person to appear at the hearing, or to produce any book, document, or item for purposes of such hearing;
- 21.4 inspect any books, documents, and other items filed by any party, including inspection by the Applicants' legal representatives, subject to appropriate confidentiality undertakings, of any information filed by any party that is subject to a claim of confidentiality;
- 21.5 participate in any interlocutory proceedings; and
- 21.6 make written and oral submissions.

[22] The Applicants further raised the issue of access by their legal representatives to the confidential Referral since their legal advisers at the time of their application had not yet had sight of the confidential Referral, with the result that the legal representatives allegedly did not know or understand the Commission's case fully.<sup>14</sup> Therefore, they

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<sup>14</sup> The Applicants alleged that they have only been furnished with a heavily redacted version of the Referral papers and that the redactions are for the most part at the instance of the Referral Respondents, which assert that the information which has been redacted is confidential to them. The Referral Respondents contended that there is no redacted portion of the Referral that renders the Referral, or any part of the Referral, unintelligible.

argued that there may well be other issues that are not adequately represented by the Commission, but which the Applicants' legal advisers are currently unaware of, by virtue of not having been granted access to the unredacted Referral. They accordingly reserved their rights to make further submissions on any other issues that are not adequately represented by the Commission, and in respect of which the Applicants' intervention is thus required when the Applicants' legal advisors are granted access to the unredacted referral. We have above already dealt with our order in this respect.

[23] By the time of the hearing, the parties had agreed that in circumstances where the Tribunal grants the Applicants intervention, issues of confidentiality should resolve themselves.<sup>15</sup> As Mr Wesley for the Referral Respondents indicated “*Clearly, once the interveners – once any intervenor is admitted into proceedings, then they will be entitled – on at least the Unilever principle – to access to confidential information for purposes of challenger.*”<sup>16</sup> Given our decision to grant the intervention, including access by the Applicants' legal representatives (subject to appropriate confidentiality undertakings) to the confidential Referral, we see no reason to further deal with this issue in the reasons.

[24] On 18 April 2023 the Applicants, at the request of the Tribunal, provided for the Tribunal's consideration a draft intervention order. The Referral Respondents commented on the draft order on 25 April 2023.

### **Legal position**

[25] The relevant provisions under which a person may approach the Tribunal to seek participation in hearings before the Tribunal are contained in Section 53 of the Act, read with Rule 46 of the Rules for the Conduct of Proceedings in the Competition Tribunal (the “Tribunal Rules”).

[26] Section 53 deals with the “*right to participate in hearing*” and provides:

*“The following persons may participate in a hearing, in person or through a representative, and may put questions to witnesses and inspect any books, documents or items presented at the hearing:*

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<sup>15</sup> Transcript pages 58, 83, 101 and 133.

<sup>16</sup> Transcript page 83.



(a) *If the hearing is in terms of Part C-*

(i) *the Commissioner, or any person appointed by the Commissioner;*

(ii) *the complainant, if-*

(aa) *the complainant referred the complaint to the Competition Tribunal;*

*or*

(bb) *in the opinion of the presiding member of the Competition Tribunal, the complainant's interest is not adequately represented by another participant, and then only to the extent required for the complainant's interest to be adequately represented;*

(iii) *the respondent; and*

(iv) *any other person who has a material interest in the hearing, unless, in the opinion of the presiding member of the Competition Tribunal, that interest is adequately represented by another participant, but only to the extent required for the complainant's interest to be adequately represented;"*

[27] Tribunal Rule 46(1) is a general rule which applies to intervention applications in all proceedings before the Tribunal. In terms of Tribunal Rule 46(1) "*... any person who has a material interest in the relevant matter may apply to intervene in the Tribunal proceedings ...*".

[28] Tribunal Rule 46(2)(b) provides that "*... a member of the Tribunal assigned by the Chairperson must either –*

(a) *make an order allowing the applicant to intervene, subject to any limitations –*

(i) *necessary to ensure that the proceedings will be orderly and expeditious; or*

(ii) *on the matters with respect to which the person may participate, or the form of their participation; or*

(b) *deny the application, if the member concludes that the interests of the person are not within the scope of the Act, or are already represented by another participant in the proceeding."*

[29] It is trite that the Tribunal has the discretion to grant a party leave to participate in its proceedings. The Competition Appeal Court ("CAC") in *Anglo SA Capital v IDC* explained that the "*granting of leave to a party to participate is discretionary*"; that such discretion "*must be exercised judiciously or according to rules of reason and justice*";

and that “*the Tribunal has a wide discretion, albeit, to be exercised in a judicial manner*”.<sup>17</sup>

[30] Further of relevance is that the proceedings in the Tribunal are inquisitorial.<sup>18</sup> An inquisitorial Tribunal’s purpose is to seek the ‘complete truth’ as opposed to an adversarial Tribunal’s seeking of the ‘procedural truth’ between the versions of two or more contending parties. Sachs J has described this quality in *S v Baloyi* (Minister of Justice and Another Intervening) 2000(2) SA 425 (CC), paragraph [31]: “*It also requires that they be inquisitorial, that is that they place the judicial officer in an active role to get at the truth*”.<sup>19</sup>

### Issues for determination

[31] As indicated above, Govchat is the complainant in this matter (and the Commissioner also initiated a complaint). In *Anglo American Corporation Medical Scheme*,<sup>20</sup> this Tribunal held that, in order for an application to satisfy the requirement of interest in Tribunal Rule 46(1), it would be sufficient for an applicant to allege that it was the complainant whose complaint had formed the basis or part of the basis for the complaint referral since a complainant is assumed to have the necessary interest in such proceedings.<sup>21</sup> The Referral Respondents did not dispute that the Applicants have an interest in the outcome of their complaint and a material interest in the Referral - the gravamen of their opposition to the intervention application was that the Applicants’ interest allegedly is already adequately represented by the Commission. Counsel for the Referral Respondents confirmed: “... we do not dispute that the complainant has an interest, that is no part of our case. Our sole case is that the Act has two components: that what the complainants have to establish to intervene is that that interest is not adequately protected, and it's only at that level that we resist this application.”<sup>22</sup> (our emphasis)

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<sup>17</sup> *Anglo South Africa Capital Proprietary Limited and Others v Industrial Development Corporation of South Africa and Another* [2003] 1 CPLR 10 (CAC) at page 22.

<sup>18</sup> Section 52(2)(b) of the Act. The Tribunal may conduct its hearings informally or in an inquisitorial manner.

<sup>19</sup> See Tribunal Handbook 2021 (Version 2: 2020/2021), page 107, at paragraph 4.

<sup>20</sup> *The Competition Commission of South Africa and Anglo American Medical Scheme and Engen Medical Fund And United South African Pharmacies and Members of United South African Pharmacies and further Respondents* – 4/CR/Jan02.

<sup>21</sup> *Ibid* at page 4.

<sup>22</sup> Transcript page 106.

## **Applicants' submissions on why their interests are not adequately represented by the Commission**

[32] The Applicants argue that they do not seek to 'usurp' the Commission's prosecutorial function, or to run a 'parallel' complaint process - they seek the Tribunal's leave to participate in the Referral in relation to the relief sought by the Commission since their interests are not adequately represented by the Commission in relation to the interdictory, as well as to the declaratory relief.

### *Interdictory relief*

[33] In their founding affidavit the Applicants allege that the Referral Respondents will seek to argue that they should be permitted to (i) offboard parties (such as GovChat) from the WhatsApp Business API; and (ii) limit GovChat's use cases in future. The Applicants contend further that, if a contravention is found, the terms on which an interdict may be granted is likely to become a highly contested issue before the Tribunal. GovChat in its founding affidavit raises that the interdictory relief '*is likely to be highly contested by the Referral Respondents*'; that the '*[t]he Referral Respondents will likely contend that the Tribunal should not exercise its discretion to interdict all, or at very least certain of, the Exclusionary Terms identified by the Commission*'; and that '*[t]he specific impact of the Exclusionary Terms on individual participants in the OTT Applications Market will thus feature prominently*' at the Tribunal hearing.<sup>23</sup>

[34] They contend that the Offboarding Interdict bears directly on their business(es) and that without an interdict preventing the Referral Respondents from offboarding the Applicants, the Referral Respondents will proceed to offboard them. They allege that they will ultimately be forced to exit the relevant market in which they operate.

[35] The Applicants submit that they are able to present evidence and argument on how the relief which may ultimately be granted in relation to paragraphs 4 and 5 of the Commission's notice of motion, bears on how they operate their businesses in the affected market(s). They explain that if the Commission establishes that the Referral Respondents have invoked the various terms and conditions which govern the Applicants' use of the WhatsApp Business API, then it will be contested as to which of those Exclusionary Terms (as defined in the Commission's referral affidavit) may or

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<sup>23</sup> Record: page 18, Founding Affidavit, paragraph 25.4.

may not be applied (as well as how any such terms may be applied) in the future.<sup>24</sup> Referring to the interim relief proceedings, they indicate that the Referral Respondents argued for counter restraints<sup>25</sup> and note that they by order of the Tribunal in the interim relief proceedings,<sup>26</sup> were prevented (at the Referral Respondents' instance) from developing any new "use cases" on the WhatsApp Business API pending the outcome of the Referral, and that such a restriction may well feature in any contestation around the terms of the Offboarding Interdict. They further argue that the Tribunal will necessarily have to consider the scope of any interdict (in light of the previously granted interdict in the interim relief case that prevents GovChat from introducing new use cases via the WhatsApp Business API) and whether to attach similar conditions or exclusions to any final interdictory relief granted (if a contravention is established).<sup>27</sup> They also argue that the Commission's role is self-evidently not to advocate for terms of access specific to GovChat and that only GovChat can adequately represent its own interests in this regard.

[36] The Applicants further contend that irrespective of whether they ultimately motivate for slightly different or additional relief to that sought by the Commission, it is important for them to participate in the hearing to advance arguments as to why the interdictory relief which may be granted (if a contravention is found) should not prevent Govchat from developing and launching new product offerings via the WhatsApp Business API. They say that only GovChat can adequately represent this interest because only GovChat (not the Commission) can speak to its intended future use of the WhatsApp Business API and make submissions to the Tribunal about the appropriate terms (if any) regulating such future use.

[37] They also argue that they are uniquely placed to present evidence and argument to the Tribunal on any allegation by the Referral Respondents that the Exclusionary Terms must be enforced in order to protect the privacy of users.

[38] Finally, they argue that they have a specific interest in having the complaint proceedings finalised in the shortest possible time because of the negative impact on their businesses of uncertainty about GovChat's continued access to the WhatsApp

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<sup>24</sup> Record: pages 58 to 59, paragraphs 32 to 36.

<sup>25</sup> Transcript page 113.

<sup>26</sup> Case no. IR165Nov20.

<sup>27</sup> Transcript page 22.

Business API; and second, because the Tribunal's interim interdict prevents GovChat from launching any new product offerings via the WhatsApp Business API.<sup>28</sup>

*Declaratory relief*

[39] The Applicants contend that it is undisputed that the Referral Respondents would want to curtail any interdict relating to any Exclusionary Terms, or declaratory relief relating to that.<sup>29</sup> They argue that the declaratory and the interdictory relief are interlinked.<sup>30</sup> Mr Farlam, for the Applicants, argued that one cannot get final interdictory relief unless one can show a clear right, and one cannot show that unless one can show that the Referral Respondents have infringed the Act: "*So it's almost a necessary precursor for the interdictory relief that there is a finding that there is infringement of the act and that that's likely to continue because otherwise there would be no basis for the interdict, so the two are intertwined.*"<sup>31</sup>

[40] The Applicants also argue that they have an interest in a finding of declaratory relief since, if there is a finding of a contravention, it is their intent to seek recompense from the Referral Respondents in civil proceedings for their anti-competitive conduct. They argue that when complainants have indicated that they want to pursue damages, it is axiomatic that they have an interest that is different from the Commission<sup>32</sup> and relying on the Tribunal's decision in *Comair*<sup>33</sup> they argue that the fact that GovChat intends to institute civil proceedings against the Referral Respondents for damages arising from any finding of anti-competitive conduct - on its own - constitutes a sufficient and self-standing basis to grant a complainant leave to intervene in complaint proceedings in terms of section 53(a)(ii)(bb) of the Act.<sup>34</sup> They furthermore argue that the framing of any declaratory order(s) by the Tribunal is decisive for the ambit of any subsequent damages case and their concern is that the declaratory aspect ultimately may be watered down and become meaningless.<sup>35</sup> They point to the declaratory relief in the Referral relating to various sections of the Act and contend that as far as the

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<sup>28</sup> Record pages 23 to 24, Founding Affidavit, paragraphs 32 to 35 read with Record pages 59 and 60, Answering Affidavit, paragraphs 37 to 40.

<sup>29</sup> Transcript page 33.

<sup>30</sup> Transcript page 17.

<sup>31</sup> Transcript pages 114 and 115.

<sup>32</sup> Transcript page 12.

<sup>33</sup> *Comair Limited v Competition Commission & another; In re: Competition Commission v South African Airways (Pty) Ltd* (83/CR/Oct04) [2005] ZACT 20 (6 April 2005).

<sup>34</sup> *Comair* at para 31.

<sup>35</sup> Transcript pages 111 and 112.

Commission is concerned, it may suffice for it to get a finding of a contravention under one of those provisions, or only one of the declaratory prayers, whereas the Applicants are concerned with the Exclusionary Terms being anti-competitive or irrational or arbitrary, and used selectively against the Applicants.<sup>36</sup> They aver that a declaratory order which may be enough for an administrative penalty (from the Commission's perspective) may well not be sufficient for their intended damages claim.<sup>37</sup> They say that they are concerned that, given the Commission's different focus as a regulator, it might focus on, or settle for, relief that ultimately does not assist the Applicants – more particularly in the context of potential settlement discussions between the Commission and the Referral Respondents. As to whether this issue was raised in their application, they indicated that in their papers they gave the Referral Respondents notice of the substantive undergirding of this argument, that they intend to pursue civil damages – nullifying any allegations of substantive unfairness.<sup>38</sup>

- [41] They also argue that the declaratory relief as foreshadowed in their affidavits in this matter is complementary to their intention to intervene in respect of the interdictory relief.<sup>39</sup>

#### **The Referral Respondents' submissions**

- [42] The Referral Respondents argue that the Applicants have not satisfied the requirements for participation set out in section 53(a)(ii)(bb) of the Act, for which reason the intervention application ought to be dismissed.
- [43] They oppose the application on the basis that the Applicants have not established a right to any of the relief sought by them. They further argue that the Applicants do not provide a clear explanation as to what their specific commercial interests are, let alone explain why the Commission cannot adequately represent those interests. To the contrary, insofar as these interests require that evidence be put before the Tribunal, a representative of the Applicants could simply give evidence as a Commission witness.
- [44] They argue that the Commission is in an adequate position to make submissions about the impact of the conduct sought to be interdicted, including in relation to the

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<sup>36</sup> Transcript pages 14 to 18.

<sup>37</sup> Transcript page 16.

<sup>38</sup> Transcript pages 107 to 111.

<sup>39</sup> Transcript page 115.

Applicants. Even if the Tribunal was to assume that there are specific arguments that apply to the Applicants, there is clearly no basis on which the Tribunal can conclude that such arguments will not adequately be advanced by the Commission.

[45] Furthermore, they argue that even if, hypothetically, this Tribunal was to conclude that the Applicants have established some interest in the interdictory relief sought by the Commission that is not adequately protected by the Commission, the appropriate extent of their intervention would only be in relation to the assessment of that relief, which would occur only after a determination on the merits in favour of the Commission has been made. They say that the only basis on which the applicants could justify being permitted to intervene in the proceedings generally to account for an (assumed) vested interest in the interdictory relief sought, is if issues of remedy cannot easily be distinguished from the merits.<sup>40</sup>

[46] In relation to interdictory relief, the Referral Respondents argue that the Applicants have not made out any case at all in their affidavits justifying the grant of the “new” relief sought in paragraph 2.1 of the Applicants’ draft order. They also submit that the fact that a party intends to put in a civil claim is not a ground for intervention and that the *Comair* case does not assist the Applicants in this matter since *Comair* does not say if you have a civil claim, then you can intervene but says if you have a different remedy you might intervene.<sup>41</sup>

[47] They further contend that it could never be appropriate to grant the Applicants the broad rights of participation in the proceedings generally that they seek in the application since that might well expose the Referral Respondents to an unfair double prosecution, which would undermine their rights to a reasonable and procedurally fair hearing and subvert the architecture of the Act. They argue that a dual prosecution carries with it the inherent potential for serious prejudice to a respondent that arise from duplication, including the respondent’s witnesses being subjected to double cross-examination on the same issues.

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<sup>40</sup> Referral Respondents’ Heads of Argument, paragraph 24.

<sup>41</sup> Transcript pages 74 to 78.

## Our assessment

- [48] Relevant to our assessment is that the Commission not only seeks declaratory orders as regards the Referral Respondents' alleged contraventions of the Act,<sup>42</sup> but also asks the Tribunal to exercise a discretion to grant interdictory relief if any contravention is found. This requested interdictory relief includes (i) interdicting the Referral Respondents from 'offboarding' the complainants from the WhatsApp Business API and/or WhatsApp platform in terms of section 58(1)(a)(i) of the Act; and (ii) interdicting the Referral Respondents from implementing and enforcing the Exclusionary Terms, defined in the referral affidavit.
- [49] We note that the Tribunal determines its own proceedings and we are of the view that the main hearing in this matter must deal with the merits of the alleged contraventions of the Act as well as with potential remedies if (a) contravention(s) is/are found, since it would not be practical and efficient in a restrictive practice matter of this nature to separate the merits and potential remedies.<sup>43</sup> This means that depending on whether or not the Referral Respondents ultimately are found to have contravened any section(s) the Act, the Tribunal will in due course have to exercise a discretion as to any remedies, including (potentially) appropriate terms of any interdict(s).
- [50] Regarding the Offboarding Interdict and the Exclusionary Terms Interdict, the Commission will ask the Tribunal to exercise its discretion to interdict the Referral Respondents from 'offboarding' the complainants and furthermore from enforcing various terms and conditions which regulate GovChat's use of the WhatsApp Business API. Therefore, hypothetically, the submissions on potential remedies may, for example, include issues such as the period for which to interdict the Referral Respondents from offboarding third parties and, if so, on what terms, or put differently, which of the various relevant terms will be covered by a potential interdict.
- [51] We are of the view that the relief sought by the Commission – being declaratory and interdictory relief concerning the Referral Respondents' potential offboarding of GovChat and other potential market participants from the WhatsApp Business API, and the potential enforcement of various terms and conditions contained in the terms

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<sup>42</sup> The Commission refers to three sections of the Act: section 8(1)(d)(ii), alternatively section 8(1)(c), in the further alternative section 8(1)(b) of the Act.

<sup>43</sup> Also see Transcript page 103.



of use governing the WhatsApp Business API – impacts directly on GovChat's interests.

[52] We accept that, in the event that a contravention of any relevant section of the Act is found, the issues to be considered could include the nature and extent of any interdict relating to the enforcement of the Referral Respondents' terms and conditions of access to the WhatsApp Business API. We note that in the interim relief proceedings the Referral Respondents argued for restricting the Applicants from pursuing any other customers or expanding to provide any other use cases. As the Applicants explained: "... *what we say is, basically what those interdicts are going to do, are they going to shape and determine the participation of the applicants on the WhatsApp platform going forward, and we have a very material and unique interest in ensuring that those interdicts are appropriate to enable us to function properly*".<sup>44</sup> The Applicants in our view have an interest in the terms and conditions which regulate its current as well as its future access to the WhatsApp Business API and will be able to represent their own interests in this regard which may not be aligned to those of the Commission.

[53] In principle - in the case of a contravention - any interdictory relief should be both effective and enforceable to address any anti-competitive concerns and therefore the Tribunal would want to ensure that any potential interdictory aims are not subverted. Considerations in the assessment of the competition issues in the Referral may include issues such as whether or not customers (including GovChat) are prevented from effectively participating in the markets in which they are active and can not only maintain their current product/service offerings but also whether they will be able to grow and expand their business offerings in the relevant market(s). The Applicants will be well placed to deal with the appropriateness of any potential relief (if granted) including whether the relief potentially is under- or over-expansive, them being customers of the Referral Respondents, and given their knowledge of and experience in the affected market(s) in which they operate. Mr Farlam, for the Applicants, explained in this regard what the Applicants could add to the Tribunal proceedings if allowed to intervene: "... *the effect that certain terms might have on an industry participant such as the applicants, what particular terms are problematic, what particular terms have been applied selectively, what the consequence of that would be for the applicants' operations? And then also, importantly, in relation to the qualifier, ... so in terms of they can't off-board us, but what can they do to effectively nullify us,*

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<sup>44</sup> Transcript page 21.

*neuter us, and that is a very important issue ... we would want to speak to, and that's really what only we can speak to. So yes, you can remain on the platform, but you can remain on the platform doing what you were doing three years ago, and we would need to explain with evidence why that would be completely unhelpful for our business, and ... also how certain terms are being used discriminatory ... we've got particular expertise in relation to that, in relation to a particularly complex area, and we can speak with personal knowledge and make sure that the interdicts are meaningful in respect of the industry participant that is most immediately affected ..."*<sup>45</sup>

[54] Furthermore, if a contravention is found, in relation to the Exclusionary Terms and what the contentious terms ultimately may be, the Applicants explained why their interests are not adequately represented by the Commission and that they would provide the perspective of a market participant to the assessment of the relevant issues "... *It is a very vague case at the moment, and it may therefore be that the clauses that they [the Commission] say are problematic, or are being problematically enforced or being enforced with a motive, an ulterior motive to try and get ... potential competitors off the platform or to prevent them from operating properly are not the ones that are, well not all of the ones that are actually going to be a problem and they're going to leave some out*"; and "... *we cannot at this stage be confident that our interests are going to be protected, because we don't know what the terms are. We don't know what terms they're [the Commission] going to cover by the interdict*".<sup>46</sup>

[55] We conclude that it will be valuable for the Tribunal to hear from an actual market participant to better understand the Exclusionary Terms and their potential implications in practice on firms competing in the affected market(s), and to assess which Exclusionary Terms may be relevant and to what extent. We agree with the Applicants' contention that while the Commission will be able to lead evidence and make submissions generally about the impact of the alleged Exclusionary Terms, the Applicants will be able to speak to their intended future use of the WhatsApp Business API, make submissions to the Tribunal about the appropriate terms (if any) regulating such future use, and can explain how the Exclusionary Terms will likely impact it and potentially other participants in the affected market(s).

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<sup>45</sup> Transcript pages 48 and 49.

<sup>46</sup> Transcript pages 50 and 51.

- [56] Given the above, we conclude that – in the event that a contravention is found - any interdictory relief may have a bearing on GovChat's future ability to utilise the WhatsApp Business API, and the terms of such future use, and that its interests in this regard will not be adequately represented by the Commission.
- [57] In relation to declaratory relief, there clearly is a nexus between the declaratory and interdictory relief contended for in the Referral. Given that the Applicants have in our view adequately demonstrated that their interests will not be adequately represented by the Commission or any other party to the proceedings in relation to the interdictory relief and given that the interdictory and the declaratory relief are clearly interlinked, we in our discretion also granted the intervention in relation to the declaratory relief. The Applicants are well placed to bring the perspective of an actual market participant being directly affected by the alleged conduct that the Commission seeks declaratory relief for.
- [58] We note the Applicants' expressed interest in pursuing civil damages in due course, although we do not regard the potential future pursuit of civil damages on its own a sufficient and self-standing basis to grant a complainant leave to intervene in complaint proceedings. If that were the case, then any complainant in a restrictive practice matter referred by the Commission would have to be allowed to intervene, since any complainant potentially could have an interest in pursuing civil damages.
- [59] More relevant to us in the present case, which appears to be fairly novel and involves conduct in the electronic communications sphere, where changing technologies, innovations and the ability to grow and expand in this environment may be relevant issues to consider in the assessment of the merits of the Referral, and given the alleged various complex Exclusionary Terms that the Referral Respondents allegedly implement and enforce, the insights that a market participant (and a customer of the Referral Respondents) may bring to the Tribunal proceedings will assist the Tribunal in its truth-seeking function in relation to any potential declaratory as well as (should a contravention be found) any interdictory relief, and the effectiveness and monitoring thereof.
- [60] Therefore we conclude that this is not a case where the Commission will not represent the Applicants interest in the manner which the Applicants would prefer (which would

not provide a basis for intervention),<sup>47</sup> but rather one where the Applicants have made out a sufficient case that their interest will not be adequately represented by the Commission or any other party to the proceedings and furthermore that their participation in the proceedings will likely assist the Tribunal in its truth-seeking function. This application thus aligns with the principle espoused in *Comair* that “*Whilst an intervention by a complainant could result in a slight protraction of the hearings which may not always be in the public interest, the Act requires the Tribunal to encourage ventilation of all the issues and to give particular attention to a complainant’s interests. In the circumstances the Tribunal is required to err on the side of caution when considering a complainant’s interests.*”<sup>48</sup>

[61] As regards the Referral Respondents’ apprehensions about a double prosecution, this can be managed by way of process since the Tribunal determines its own proceedings including appropriate procedures to be followed at the hearing to ensure that the hearing runs efficiently and that there is no duplication of evidence or cross-examination.

[62] Furthermore, as indicated above, the Commission abides the Tribunal’s decision.

[63] For all the above reasons, we granted the intervention.

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**Mr A W Wessels**

**12 February 2024**

**Date**

**Prof Imraan Valodia and Adv Geoff Budlender SC concurring.**

Tribunal case managers: Mpumelelo Tshabalala and Theodora Michaletos

For the Applicants: Adv Paul Farlam SC assisted by Adv Luke Kelly instructed by Shawn van der Meulen and Daryl Dingley of Webber Wentzel Attorneys

For the second to third respondents: Adv Mark Wesley SC instructed by Claire Reidy and Derek Lötter of Bowmans Attorneys

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<sup>47</sup> See *South African Local Government Association and another v Competition Commission and others* [2013] 2 CPLR 585 (CT) at [25].

<sup>48</sup> *Comair* at paragraph 33.

For the fourth respondent:

Luke Rennie and Candice Slump for the  
Commission