



## COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: IR119Oct19

In the matter between:

**VEXALL PROPRIETARY LIMITED**

Applicant

And

**BUSINESS CONNEXION PROPRIETARY LIMITED**

First Respondent

**THE COMPETITION COMMISSION**

Second Respondent

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Panel : Yasmin Carrim (Presiding Member)  
: Anton Roskam (Tribunal Member)  
: Halton Cheadle (Tribunal Member)  
Heard on : 3 February 2020  
Order issued on : 12 February 2020  
Reasons issued on : 1 May 2020

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### REASONS FOR DECISION

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#### Introduction

- [1] The Applicant (Vexall) seeks an order for interim relief in terms of section 49C(2)(b) of the Competition Act, 89 of 1998 (the Act) against the First Respondent (BCX) arising from BCX's alleged tying and bundling of its software that is specifically designed for the pharmaceutical retail market with certain specific support services in contravention of sections 8(1)(c) and (d)(i) and (iii) of the Act.
- [2] Vexall is a newly established information technology services provider that has positioned itself to provide support services to retail pharmacies. These services include onsite support, help desk support, information on pharmacy price and

medical aid updates, electronic remittance from various medical aid administrators, networking and consulting services, and various third-party services relating to data collection initiatives as subscribed to by its retail pharmacies.

- [3] BCX is the owner of an information technology software called Unisolv which provides dispensary and point of sale IT for retail pharmacies. It caters for medicine pricing including single-exit pricing (government regulated pricing for pharmaceuticals and dispensing fees), generic substitution of medicines and medical aid reimbursement rules. It charges a once off licence fee for the use of the software and annual or monthly licence fee to update and upgrade it. BCX also provides other functionalities, some of which it states are part of the Unisolv solution such as its data bureau services, electronic remittance services, and support services that are integral to the functioning of the Unisolv software, which includes training. It also provides other IT related services.

## **Background**

- [4] Vexall alleges that BCX's customers have for some time become dissatisfied with certain services rendered by it. In November 2018, BCX commenced retrenching a substantial number of its key employees and offered others severance packages. The effect of this, according to Vexall, led customers to be concerned with the future quality of the value-added services offered by BCX.
- [5] During mid-2019, key BCX employees tendered their resignations to join Vexall. According to BCX, these mass resignations of key BCX employees were orchestrated by its Pharmaceutical Lead Executive, Mr Hendrick Stavast (who is the deponent of the Founding Affidavit on behalf of Vexall). These resignations were further compounded by the erstwhile manager of the Dis-Chem<sup>1</sup> account at BCX, Mr Barry Wright, who also resigned from BCX to join Vexall.
- [6] The result of these circumstances, according to Vexall, created a gap in the market for the creation of a rival company focused on ICT value-added services for retail pharmacies and composed of ex-BCX employees with the deep knowledge of the needs of the pharmaceutical industry. Accordingly, a shelf company belonging to

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<sup>1</sup> Dis-Chem Pharmacies Ltd.

Dis-Chem was used as the vehicle to establish Vexall with Dis-Chem owning [REDACTED] of the company and with [REDACTED] of the board of directors appointed by Dis-Chem.

- [7] On 16 July 2019, Dis-Chem submitted a notice terminating certain specific services performed by BCX effective from 1 September 2019. It listed the services it no longer wished to have performed but specifically stated that it would be continuing to use and pay for the Unisolv software.<sup>2</sup> The services it wished to terminate include both online and on-site support, data services (price and medical aid updates), electronic remittance services, and SAP interface.
- [8] Dis-Chem cited its reasons for termination as a result of “*ongoing uncertainty regarding the future of the product at BCX, and the instability in resources*”. It further indicated that it intended to procure the terminated services from another service provider.
- [9] In response to Dis-Chem’s letter, BCX accepted the termination of its services but stated that Dis-Chem would only be entitled to continue to use the Unisolv software ‘as is’ and that it would no longer be entitled to any future software developments, in particular software developments required to update Unisolv.<sup>3</sup> The alleged legal basis for withholding its development and updating services of the Unisolv software was that all the services offered by BCX was a *‘package and were not offered on a disaggregated basis with portions capable of separate “termination”*’.<sup>4</sup>
- [10] During the same period, numerous BCX customers who were also licencees of the Unisolv software filed termination notices in respect of specific services provided by BCX, excluding the use of, and payment for the Unisolv licence.<sup>5</sup>
- [11] On receiving these termination notices, BCX responded in a broadly similar way, namely accepting the termination of all its services and that, although they were entitled to continue to use the Unisolv software, they would not be entitled to receive *any future software development required to update the software*.<sup>6</sup>

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<sup>2</sup> Letter from Dis-Chem to BCX (dated 16 July 2019) at page 116 of the Record.

<sup>3</sup> Letter from BCX to Dis-Chem (dated 30 August, 2019) at page 117 of the Record.

<sup>4</sup> Correspondence between Dis-Chem, BCX and respective attorneys at pages 119 -124 of the Record.

<sup>5</sup> Annexures FA26 – FA35 of the High Court pleadings. See pages 720 – 730 of the Record.

<sup>6</sup> Annexures FA36 – FA41 of the High Court pleadings. See pages 731 – 742 of the Record.

- [12] On 1 October, the attorneys of Vexall wrote to BCX pointing out that certain of Vexall's customers had advised Vexall that BCX would only continue to license the Unisolv software on condition that they procured its value-added services and that this conduct was proscribed by section 8(1) (d)(i);(ii) and (iii), alternatively section 8(1)(c). Vexall required BCX on or before 7 October 2019 to provide a written undertaking that it would, on or before 8 October 2019, inform all Unisolv licensees in writing that procuring value-added services from providers other than BCX will not result in BCX refusing to provide the use of Unisolv and updates to those who have tendered payment for such use.<sup>7</sup>
- [13] On 16 October 2019, BCX lodged an urgent interdict in the South Gauteng High Court against Vexall, Dis-Chem and 46 others (the erstwhile employees of BCX). In its notice of motion, BCX seeks the court to, *inter alia*, (i) interdict Vexall from unlawfully soliciting BCX's customers and utilising BCX's confidential information; (ii) interdict Vexall from employing the 3<sup>rd</sup> to 48<sup>th</sup> respondents at all or in positions in which Vexall provides services in competition with BCX; (iii) interdict Vexall from unlawfully interfering with BCX's contractual relationships with its customers and employees; (iv) interdict all respondents from modifying or adapting BCX's Unisolv software and unlawfully appropriating BCX's intellectual property (IP).<sup>8</sup> As at the date of the hearing on 3 February 2020, the matter had not yet been set down although the relief sought was one of urgency.<sup>9</sup>
- [14] When BCX failed to give the undertaking contained in its attorney's letter dated 1 October 2019, Vexall filed its interim relief application on 18 October 2019 and sought the following relief pending the final determination of the complaint, namely prohibiting BCX from-

*'2.1 inducing customers of Vexall not to deal with it by making the licensing of the Unisolv software (including the right to receive updates, upgrades and new releases of Unisolv) conditional upon those customers also procuring value added services (including hardware and software installation services, onsite support services (including in respect of the use of computers, printers, point of sale devices), remote helpdesk*

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<sup>7</sup> Annexures FA 42 of the High Court pleadings at pages 743 and 744 of the Record.

<sup>8</sup> High Court NOM, at pages 387 and 388 of the Record.

<sup>9</sup>BCX AA para 123.1, at pages 235 – 236 of the Record.

*support, central patient profile hosting service, data bureau services (including the sourcing and compilation of pricing, formulary and medical aid rules updates to ensure that the pharmacies' pricing structures, medical aid rules and medicine selections are accurate and aligned to industry governance requirements), electronic remittance advice services, inventory management services, software integration services (for example, SAP integration for large retail pharmacy groups), hosting and networking services, training, bespoke software development services and consulting services; and*

*2.2 licensing the Unisolv software (including the right to receive updates, upgrades and new releases of Unisolv) on condition that the licensee purchases value-added services from BCX.'*

[15] BCX opposed the market definition proffered by Vexall. On its version, Vexall's delineation of two separate markets is self-serving and artificial. BCX submitted that this is because many of the products that Vexall labels as "value-added services" are integrally intertwined with the specific functionality of the Unisolv software and therefore cannot be offered to customers separately from Unisolv.<sup>10</sup>

[16] BCX's case in so far as the tied services are concerned focused on its data bureau services, electronic remittance advice services, support services updating and upgrading of the Unisolv software and Unisolv-specific training (the disputed 'value-added services'), which Vexall, together with the other services listed in the Notice of Motion called 'value-added services' and BCX called part of its 'Unisolv solution'.

### **Legal Context: Interim Relief**

[17] Section 49C(2)(b) of the Act governs the grant of interim relief in competition complaints concerning prohibited practices. The section states:

*"49C Interim Relief*

*...*

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<sup>10</sup> AA pages 5 and 6 of the Record at para 13.1-13.2.

(2) *The Competition Tribunal -*

...

(b) *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.”*

[18] The determination of what is reasonable and just in applying section 49C(2)(b)(i) namely the evidence relating to the alleged prohibited practice, the Tribunal has followed the jurisprudence of the common law courts in respect of interim relief. That jurisprudence is succinctly set out in *Webster*<sup>11</sup> as follows:

*“The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to 'some doubt'. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.”*<sup>12</sup>

[19] The Tribunal has followed this jurisprudence to fit the requirements of section 49C(2)(i). In *York Timbers*<sup>13</sup> the Tribunal held the following:

*“Applying this analysis to our Act means that we must first establish if there is evidence of a prohibited practice, which is the Act’s analogue of a prima facie right .We do this by taking the facts alleged by the applicant, together*

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<sup>11</sup> *Webster v Mitchell* 1948 (1) SA 1168 (W).

<sup>12</sup> *Webster* at page 1189.

<sup>13</sup> *York Timbers Limited v South African Forestry Company Limited* (15/IR/Feb01) at paras 64 and 65.

*with the facts alleged by the respondent that the applicant cannot dispute, and consider whether having regard to the inherent probabilities, the applicant should on those facts establish the existence of a prohibited practice at the hearing of the complaint referral.”*

*“If the applicant has succeeded in doing so we then consider the “doubt’ leg of the enquiry. Do the facts set out by the respondent in contradiction of the applicants case raises serious doubt or do they constitute mere contradiction or an unconvincing explanation. If they do raise serious doubt the applicant cannot succeed.”*

- [20] Once having established whether the applicant has a *prima facie* right to interim relief, the Tribunal must take into account the other two factors, namely irreparable harm and balance of convenience, but it must do so holistically, with each balanced against each other.<sup>14</sup> The requirements are therefore balanced against each other and it is possible that interim relief will be granted even where the applicant's case on one of these requirements is not strong.

### **Legal Context: Prohibited conduct**

- [21] Although Vexall initially alleged that BCX committed exclusionary acts under section 8(1)(c) of the Act and acts inducing a customer dealing with a competitor under section 8(1)(d)(i), the main thrust of its case was a contravention of section 8(1)(d)(iii). In any event the same set of facts would serve to support either case.
- [22] Section 8(1)(d)(iii) of the Act prohibits the selling of goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract or the forcing of a buyer to accept a condition unrelated to the object of a contract.
- [23] The condition may take the form of an express written contract, but it may also be established by the dominant firm’s refusal to supply the tying product unless the tied product is also purchased.<sup>15</sup>

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<sup>14</sup> *Natal Wholesale Chemists (Pty) Ltd and Astra Pharmaceuticals (Pty) Ltd* 98/IR/Dec00; *York Timbers* at para 13; *Anchor Zedo Outdoor CC v Passenger Rail Agency of South Africa* (017616) at para 16.

<sup>15</sup> Sutherland and Kemp *Competition Law in South Africa* (Lexis Nexis: Durban) section 7.14.13 ‘Selling goods or services on condition that the buyer purchase separate goods or services unrelated to the object of the contract’.

[24] In essence, tying entails a dominant supplier making it a pre-condition that the sale of an unrelated, non-dominant product is tied to the sale of the dominant product.<sup>16</sup> In this way, customers are effectively forced to purchase products that they do not want or that they could source from elsewhere at better prices, terms of payment etc.<sup>17</sup> The effect is that suppliers in the non-dominant product market are unable to compete fairly in that market and it raises barriers to entry and so worsens the performance of the market for the tying product.

[25] In EU law, Article 102 of the Treaty of the Functioning of the European Community provides some guidance in determining whether tying and bundling has occurred:

- “- *Is the accused firm dominant?*
- *Has the dominant firm tied two distinct products?*
- *Was the customer coerced to purchase both the tying and the tied products?*
- *Is the tie capable of some anti-competitive foreclosure effect?*
- *Is there an objective justification for the tie?”<sup>18</sup>*

[26] Apart from establishing the relevant market and dominance of the accused firm, the key inquiry is whether the goods or services in question are in fact separate and unrelated to the object of the contract. In other words, the goods or services should be unrelated to the contract pursuant to which the tying product is sold.<sup>19</sup> In order to determine whether a good or service is unrelated, the EU case law provides some guidance as to the considerations to bear in mind:

- The commercial usage of the products and the natural link between them.<sup>20</sup>
- The presence of distinct separate markets for the products.<sup>21</sup>
- Customer demand. In the absence of independent demand for the allegedly tied product, there can be no question of separate products and no abuse tying.<sup>22</sup>

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<sup>16</sup> See also article 82(d) in the Treaty Establishing the European Community (EC Treaty).

<sup>17</sup> Neuhoﬀ *et al* *A Practical Guide to the South African Competition Act* (Lexis Nexis: Durban) at page 121.

<sup>18</sup> R Whish and D Bailey *Competition Law* 9 ed (Oxford University Press: New York) at page 708.

<sup>19</sup> Sutherland and Kemp *Competition Law* section at para 7.14.13.

<sup>20</sup> *Tetra Pak International SA v Commission* (Case C 33/94P) Court of Justice, [1996] ECR I-5951, [1997] 4 CMLR 662.

<sup>21</sup> *Eurofix- Bauco v Hilti* OJ [1988] L 65/19.

<sup>22</sup> *Microsoft Corp v Commission* (Case T-201/04) General Court, [2007] 5 CMLR 11.



- Complementary products can constitute separate products. It is possible for customers to obtain both products however from different sources.<sup>23</sup>
- A condition that the conclusion of the contract is made subject to acceptance of supplementary obligations.<sup>24</sup>

### **What Vexall has to establish in order to get relief**

[27] In order to establish a contravention of section 8(1)(c), (d)(i) and (iii) of the Act Vexall has to show that -

- (a) BCX is a dominant firm;
- (b) BCX is selling its Unisolv software service on condition that its customers purchase its other support services, which have been narrowed down to the four disputed value-added services;
- (c) BCX's disputed value-added services are unrelated to the object of its licensing of its Unisolv software service.

### **Is BCX a dominant firm?**

[28] In order to determine whether BCX is a dominant firm it is necessary first to determine the market in which it functions and then whether it is dominant in that market.

#### *Market definition*

[29] In its Founding Affidavit, Vexall alleges that there are two distinct product markets. The one is the market for the provision of retail pharmacy software ('pharmaceutical dispensary and point of sale software market') in which BCX's Unisolv software is offered. This involves keeping the software updated and upgraded from time to time particularly to changes to the software to accommodate regulatory changes and to cater for real-time medical aid and claiming charges. As a further example, the new requirements introduced by the Protection of Personal Information Act will have to be incorporated into the software.

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<sup>23</sup> *Microsoft Corp v Commission.*

<sup>24</sup> *Microsoft Corp v Commission.*

[30] The other market is for the provision of value-added services supplied to pharmacies but which Vexall alleges are not related to the object of the licencing of Unisolv software. These value-added services are central to the dispute of the contested market definitions.

[31] BCX attacks Vexall's definition of the market in three respects: firstly, its characterisation of the product or service market; secondly that it has unduly restricted the geographic market to the Republic of South Africa; and finally, that it has unduly restricted the pharmaceutical market to private pharmacies and excluded public pharmacies.

#### *Characterisation of the product markets*

[32] The first deals with whether there is one product market, which includes all value-added services, or there are two distinct markets: one for the provision of retail pharmacy software and another - the disputed market for the provision of value-added services to retail pharmacies. The characterisation of the market is central not only for the purpose of determining dominance but also for determining whether these value-added services necessarily have to be tied to the contract to purchase the Unisolv software.

[33] In support of this distinction, Vexall alleges that-

- (a) the disputed value-added services do not involve any changes to the source code which need to be made to update, upgrade or issue a new release of the software.<sup>25</sup> While the disputed value-added services may involve changes to the settings for the software product and the inputting of data into the software, those changes are not integral to the Unisolv software service itself. Vexall uses the following example to illustrate the difference:

*'For example a change of price for a particular medicine that is loaded into the Unisolv software one simply changes the price data (an input into the software) associated with the medicine. There is no change to the underlying source code, which arises as a result. The same applies where a new generic product is launched or purchased for the first time*

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<sup>25</sup> FA para 60 at page 22 of the Record.

*by the pharmacy in question. A user (or third-party ICT services provider) can again just enter the new product into the text box provided for this information in the Unisolv software.*<sup>26</sup>

- (b) there are other service providers of these value-added services that do not compete in the market for dispensary and point of sale software in which Unisolv competes; and
- (c) BCX has historically accepted this distinction because it has permitted pharmacies that have licensed the use of the Unisolv service to choose other service providers to provide these value-added services in preference to those offered by BCX.

[34] There are no indisputable facts alleged by BCX that affect the factual determination of the product or service definition of the market for the purposes of this stage of the analysis.

[35] BCX does not contest that there are a range of support services which could be provided by Vexall and other competitors<sup>27</sup>. In respect of one of the disputed value-added services, namely training, BCX shifted from its original position in its answering affidavit at para 37, when during his submission, Mr Gotz (on behalf of BCX) stated that:

*“But in the grand scheme of things, that is as far as it goes. We are not saying that if a customer, for example, employs a new member of staff who is not trained in use of Unisolv, BCX has not said, and has never said that Vexall cannot train that individual in the use of Unisolv, or that anybody else cannot provide that training.”*<sup>28</sup>

[36] However, BCX persisted with the position that the provision of certain Data Bureau Services, electronic reconciliation services, support services and Unisolv specific training are core to the functionality of Unisolv and could therefore not be provided separately or by other service providers.

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<sup>26</sup> FA para 61 at page 23 of the Record

<sup>27</sup> AA paras 36.1, 38, 39 and 40 of the Record.

<sup>28</sup> Transcript pg. 107 line 15 -19.

[37] It is no longer in dispute that, whatever the boundaries may be of the services integrally related to the Unisolv software, a market has been established in respect of retail pharmacy software and a market for other pharmaceutical IT value-added services.

[38] Accordingly, Vexall establishes a *prima facie* case at this stage of the analysis that there are two markets: one for the retail pharmacy software and another for a range of IT support services to retail pharmacies.

*The geographic market.*

[39] BCX claims that because it operates in Botswana and Namibia the market definition ought to include both countries. There is no dispute that BCX operates in Botswana and Namibia. But there are two reasons as to why BCX's extended geographic market definition does not cast serious doubt on Vexall's allegation that the geographic market is limited to South Africa:

(a) BCX fails to demonstrate that there are any software providers offering software outside South Africa that are competitors to Unisolv in South Africa – a necessary issue for geographic market definition.<sup>29</sup>

(b) BCX fails to state the extent of its operations and its market share in those countries and the extent to which their inclusion would affect the determination of its dominance in an extended geographic market.

[40] In order to counter Vexall's *prima facie* case that the geographic market is limited to South Africa, it is incumbent on BCX to demonstrate those facts that would throw serious doubt on Vexall's *prima facie* case. It has not.

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<sup>29</sup> See para 29 of European Commission Notice on the definition of relevant market for the purposes of the Community competition law, Official Journal of European Communities (97/C C 372-3).

*Institutional public pharmacies*

- [41] BCX claims that the pharmaceutical dispensing and point of sale software market (retail pharmacy software market) ought to include institutional public pharmacies because they too require a software solution.<sup>30</sup>
- [42] The principal reason why the failure to include public pharmacies does not throw serious doubt on Vexall's definition of the market is that the very nature of the Unisolv software caters for the unique requirements of a private retail pharmacy as opposed to a public pharmacy. That is clear from the needs of private pharmacies that the Unisolv software or solution addresses in respect of single exit pricing, substitution of generics, drug formularies, medical aid rules, approval, invoices and payment reconciliation,<sup>31</sup> and its support services, including the disputed value-added services. Indeed BCX itself refers to Unisolve as a 'pharmacy retail solution' in its advertisements.

*Conclusion*

- [43] It follows that BCX fails to cast any serious doubt on Vexall's *prima facie* definition of the retail pharmacy dispensing and point of sale market.

**Is BCX dominant in the market for provision of the retail pharmacy software (pharmacy dispensary and point of sale software market)?**

- [44] Section 7 of the Act states that-

*"A firm is dominant in the market if –*

- (a) It has at least 45% of the market;*
- (b) It has at least 35%, but less than 45%, of the market, unless it can show that it does not have market power, or*
- (c) It has less than 35% of that market but has market power."*

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<sup>30</sup> AA at page 250 of the Record at para 144.2.

<sup>31</sup> FA at page 15 of the Record at paras 37 to 48 not put in dispute in BCX's ad seriatim response in AA paragraphs 183 to 184.

[45] Vexall alleges that BCX is a dominant firm with significant market power in the retail pharmacy (pharmacy dispensary and point of sale) software market. In support of its assertions, it alleges that-

- (a) Unisolv is licensed to approximately 1 600 pharmacies (an estimated 65% of all pharmacies in South Africa);
- (b) seventy percent of scripts filed in South Africa are by pharmacists using Unisolv;<sup>32</sup>
- (c) the other providers of similar pharmacy software only have approximately a relatively small share of the market;<sup>33</sup> and
- (d) it is the standard dispensary and retail pharmacy software so much so that it is taught to pharmacy students at South African Universities.<sup>34</sup>

[46] BCX contests that it is a dominant firm in the pharmaceutical dispensing and point of sale on the grounds-

- (a) that its own claim to a market share of 65% of the South African market is outdated;
- (b) contests the number of retail pharmacies in South Africa and accordingly its percentage share of the market; and
- (c) that the market share would be considerably less if the market definition included Botswana and Namibia and public pharmacies.

[47] Although there is a dispute of fact as to the exact number of retail pharmacies in the market, BCX fails to throw serious doubt on Vexall's allegations that it is dominant in the market for the following reasons:

- (a) Its own calculations of its share of the South African market is ██████████<sup>35</sup> and it fails to demonstrate that it has no market power;
- (b) the market does not *prima facie* include the public pharmacies but even if it did, on its own calculations its share of the South African market is ██████████<sup>36</sup> and it fails to demonstrate that it has no market power;

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<sup>32</sup> FA at para 49 on page 19 of the Record which is not contested by BCX – see AA at para 184 on page 269.

<sup>33</sup> RA at para 37 on page 2149-50 of the Record

<sup>34</sup> FA at para 50.3 on page 19 of the Record which is not contested by BCX in its AA.

<sup>35</sup> AA at para 144 on page 249 of the Record.

<sup>36</sup> AA 250 at para 144.2 on page 250 of the Record.

- (c) the market does not *prima facie* include retail pharmacies in Botswana and Namibia and its calculations based on the inclusion of those pharmacies are not substantiated nor do they have any weight; and
- (d) it is common cause that 70% of all scripts are processed using Unisolv software and that is a strong indicator of market power.

[48] Accordingly, at this stage of the analysis Vexall has established a *prima facie* case that BCX is a dominant firm in the retail pharmacy dispensary and point of sale software market for the purposes of section 7 and accordingly for the purposes of section 8 of the Act.

**Is BCX selling its Unisolv licence on condition that its customers purchase the disputed value-added services?**

[49] Vexall alleges that BCX is tying the provision of its Unisolv software to the disputed value-added services provided by BCX. In support of this allegation it states-

- (a) BCX has given notice to Vexall's customers that BCX will only continue to provide the essential updates, upgrades and new releases to its Unisolv software on condition that they also procure the disputed value-added services from BCX;<sup>37</sup>
- (b) in response to an allegation made in a letter from Dis-Chem's attorneys that BCX was unlawfully tying the provision of its Unisolv software to its value-added services, BCX's attorneys stated '*the services rendered by BCX to Dis-Chem were offered as a package, and were not offered on a disaggregated basis, with portions capable of separate "termination".... BCX has no obligation to provide a disaggregated licence services component to Dis-Chem*';<sup>38</sup>
- (c) in response to letters from over [REDACTED] BCX customers cancelling BCX's value-added services, BCX stated that '*By your termination of the support and maintenance services associated with the Unisolv software solution, we confirm that you are no longer entitled to receive support and maintenance services from BCX including any software maintenance, price and product file updates, medical aid file updates, ERA support services, all remote or onsite technical support services and any other form of consulting*'.<sup>39</sup>

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<sup>37</sup> FA at paragraph 21 on page 10 of the Record

<sup>38</sup> CDH letter to Bowmans dated 20 September 2019 at page 124 of the Record

<sup>39</sup> BCX letter dated 2 October 2019 at page 126 of the Record.

- (d) on 1 October the attorneys for Vexall sought an undertaking from BCX *'that it will, on or before 8 October 2019 inform all its Unisolv licensees in writing that procuring Value-Added Services from providers other than BCX will not result in BCX refusing to provide the Unisolv software licence to such licensees who have tendered payment for the Unisolv software licence'*,<sup>40</sup>
- (e) there is no dispute that BCX now ties its sale of its Unisolv software to those support services it contends are part of its 'integrated solution' namely the Data Bureau Services, the Electronic Remittance Services, and those specialist software support services relating to the upgrade and repair of the Unisolv software.<sup>41</sup> Indeed it states that it has taken 'the commercial decision to couple that software with certain services aimed at optimising the Unisolv product solution'.<sup>42</sup>

[50] Accordingly, it is clear that BCX is now tying the purchase of its Unisolv licence with the purchase of its disputed value-added services and accordingly Vexall has prima facie established this leg of its case.

**Are BCX's disputed value-added services unrelated to the object of its licensing of its Unisolv software service for the purposes of section 8(1)(d)(iii)?**

- [51] Whether a disputed value-added service is related or not is determined by a number of factors:
- (a) Whether the software is technically distinguishable from that served by the disputed value-added services;
  - (b) whether there are firms that provide the disputed value-added services to retail pharmacies that do not sell a pharmaceutical retail software product such as Unisolv;
  - (c) whether historically, BCX allowed pharmacies to select which of the disputed value-added services it wished to procure; and
  - (d) whether a substantial number of Unisolv licensees have chosen to acquire the disputed value-added services from third party sources.

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<sup>40</sup> DLA letter to BCX dated 1 October at page 129 of the Record.

<sup>41</sup> AA at paragraph 13.1. on page 179 of the Record

<sup>42</sup> AA at paragraph 13.4 on page 181 of the Record.



*Technical difference*

- [52] In its Founding Affidavit,<sup>43</sup> Vexall asserts that there is a technical distinction between ‘changes to the source code, which have to be made to update, upgrade or issue a new release of the software’ and ‘changes to settings for the software and/or the inputting of data (information) into the software’. It proceeds to explain that a person that inputs data into the text boxes provided by the software does not reproduce or adapt the software’s source code and does not infringe the copyright in the software. Importantly, it goes on to state that ‘[t]his means that a customer is entitled to change the settings of the licensed software or input data into it. The customer may also choose to retain an independent ICT services provider to do so’. The distinction is admitted by BCX.<sup>44</sup>
- [53] The distinction is that, in the former, the support services involve changes to the source code, whereas in the latter, change of settings or the input of data does not involve or adapt the source code or infringe the copyright in the software. Vexall gives the example that to change the price for a particular medicine that is loaded onto the Unisolv software, the pharmacist or a person providing support services to the pharmacist would simply change the medicine price data (an input into the software) or manually inputting medical aid claims and payments. There would be no change to the underlying source code.
- [54] In so far as the Data Bureau Services are concerned, these services are provided by employees who monitor changes to medicine prices, medical aid formularies and rules and medicine selection options and then enter the new data into the pharmacy’s dispensary and other software modules data sets to remain current. In other words, it is a service that monitors data and inputs new data into the software without affecting that software or requiring the use of its source code.<sup>45</sup>
- [55] In so far as the Electronic Remittance Services are concerned, these services involve a time-consuming book-keeping exercise including receiving remittance files from multiple medical aid administrators, organizing and loading these into a

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<sup>43</sup> FA at paragraph 60 on page 22 of the Record.

<sup>44</sup> AA at para 190 on page 272 of the Record.

<sup>45</sup> FA at paragraph 63.1 on page 23 of the Record; AA at para 23 on page 188 of the Record and RA at para 44 on page 2152 of the Record.

central data repository and delivery platform and supporting the movement of the data files from the repository to the pharmacy. It enables the delivery of electronic payment from various medical aids as claimed by the pharmacies on behalf of members. The electronic remittance is imported into the Unisolv data set in order to manage medical aid debt and cash flow.<sup>46</sup> It, too, is a service that collects data and inputs that data into the software without affecting the software or requiring the use of the source code. A pharmacist too could input this data itself<sup>47</sup> or hire a third-party provider to do so for it.

- [56] There are no indisputable facts alleged by BCX that affect the factual determination that there is a technical distinction between the two markets: one for the retail pharmacy software (i.e. updates, upgrades, new releases of the software) and those support services that change the settings for the software and the inputting of data into the software such as the disputed value-added services.
- [57] BCX, on the other hand, alleges that its disputed value-added services are part of an integrated pharmaceutical solution and accordingly related to the object of its Unisolv licencing contract. It alleges in this respect that the services are integrated as part of a single solution in a number of respects: the role that its data bases play in the functionality of the 'solution; the role that its intellectual property plays in providing those services; and reputation. It admits, though, that there is a technical difference between the two and accordingly fails to place any doubt on Vexall's allegations in respect of this leg of the analysis.

### *Conduct of firms*

- [58] Vexall alleges that historically some pharmacies have not utilised the disputed value-added services and in support of that allegation provided a spread sheet of pharmacies that have Unisolv software but have not procured data bureau services from BCX.<sup>48</sup> It also alleges that there are independent service providers that have provided these disputed value-added services to pharmacies that license Unisolv software.<sup>49</sup>

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<sup>46</sup> FA at para 63.2 on page 23 of the Record; AA at para 33 on page 194 of the Record; and RA at paras 56 to 57 on page 2155 of the Record.

<sup>47</sup> That a pharmacist could itself input this data is clear from RA at para 56 on page 2155 of the Record which BCX admits – see the First Respondent's Further Affidavit at para 36.2 on page 2412 of the Record.

<sup>48</sup> FA para 64.1 and V7C on pages 25 and 80 of the Record respectively.

<sup>49</sup> FA para 64.2 on page 26 of the Record.

- [59] In response to BCX's denial that its disputed value-added services have been historically provided by third parties,<sup>50</sup> Vexall alleges that the most significant software competitor that BCX itself identifies<sup>51</sup>, namely Computassist, does not provide data bureau services (although it does provide electronic reconciliation services).<sup>52</sup> It alleges that another of its identified competitors, namely EasyRx, uses another data bureau service to provide data for its software.<sup>53</sup> It also alleges that there are independent electronic reconciliation service providers that do not offer a software solution and that one of them, namely ICW describes its 're-con tool caters for all major pharmacy proprietary software and remittance advices from all medical aids'.<sup>54</sup>
- [60] It is common cause that there are third party suppliers that produce data files that contain similar information to that gathered and collated by BCX in its data bureau service, such as Medikredit, Mediscor and Mediprax, but do not offer dispensary and point of sale software.<sup>55</sup>
- [61] It follows that Vexall establishes a *prima facie* case on the basis of these allegations and what is common cause at this stage of the analysis.
- [62] In response to Vexall's allegation that there are independent electronic reconciliation service providers that do not offer a software solution and that one of them, namely ICW describes its 're-con tool caters for all major pharmacy proprietary software and remittance advices from all medical aids'<sup>56</sup>, BCX alleges the ICW is complementary to and not substitutable for the electronic reconciliation services offered by BCX.
- [63] It is difficult to determine the probabilities of the two versions concerning the existence of independent electronic reconciliation service providers on the papers and accordingly BCX does throw some doubt on Vexall's allegations in respect of

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<sup>50</sup> AA at para 132 on page 243 of the Record.

<sup>51</sup> AA at para 146 on page 251 of the Record.

<sup>52</sup> RA at para 48 on page 2153 of the Record.

<sup>53</sup> RA at para 48 on page 2153 of the Record.

<sup>54</sup> RA at para 60 and RA8 on pages 2156 and 2220 respectively. See also the concession by BXC's concession at pages 96 to 100 of the Transcript of the hearing.

<sup>55</sup> AA at para 30 on page 192 of the Record and RA at para 51 at page 2154 of the Record. Also see the concession by BXC's legal representative at pages 99 to 193 of the Transcript of the hearing.

<sup>56</sup> RA at para 60 and RA8 on pages 2156 and 2220 respectively.

these providers, but it fails to throw serious doubt on the allegations that there are independent service providers that do not themselves provide a software platform, particularly since it is common cause that in so far as data bureau services are concerned that there are independent service providers that provide these services without providing the software platform.

### *BCX's own conduct*

[64] Vexall alleges that BCX has historically allowed pharmacies that license its Unisolv software not to purchase its data bureau or electronic remittance services and that it has historically invoiced its services separately.<sup>57</sup> It also alleges that historically BCX has invoiced separately for its support services including its disputed value-added services.<sup>58</sup>

[65] Although BCX asserts that its disputed value-added services have not been historically provided by third parties,<sup>59</sup> it does not specifically respond to the annexure 7C attached to Vexall's Founding Affidavit that records that a number of Unisolv licensees have historically chosen not to procure data bureau services. It also does not dispute that there a substantial number of pharmacies that have chosen not to purchase its electronic remittance services because they enter the data themselves.<sup>60</sup> Accordingly, BCX fails to throw serious doubt on the allegation that it allowed pharmacies historically to choose whether or not to purchase any or all of the disputed value-added services.

### *Conclusion*

[66] Taking into account that it is common cause that there is a technical difference between the software and the disputed value-added services and that there are some independent service providers that provide data bureau services without the provision of a software platform, the doubt as to whether there is a substantial number of licensees that have chosen to acquire the disputed value-added

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<sup>57</sup> AA para 64.3 on page 26 of the Record.

<sup>58</sup> FA at para 64.3 on page 26 of the Record.

<sup>59</sup> AA at para 132 on page 243 of the Record.

<sup>60</sup> RA at para 56 on page 2155 and not contested the 1<sup>st</sup> Respondent's Further Affidavit at para 36.2 on page 2411-2 of the Record.

services does not throw sufficient doubt on the *prima facie* case advanced by Vexall.

[67] BCX alleged that certain efficiencies were obtained by selling the value-added services as a bundle with the license. For instance, BCX submitted that if it stopped selling the Unisolv solution as a package, it would be costly for them to support, maintain and develop the software.<sup>61</sup> BCX alleged that this would likely cause an increase in the price of Unisolv to the detriment of consumers (pharmacies). What we glean from this claim is that selling a packaged product will enable BCX to subsidise the “tied good” with profits from “tying” the value-added services, which is likely to result in lower prices. However, no pricing or other data/information was put up to verify that assertion by BCX. Further, no details as to where and how the efficiencies were obtained nor was any pricing information provided.

[68] Accordingly, Vexall establishes a *prima facie* case that the disputed value-added services are unrelated to the object of the licensing of the Unisolv software taking into account what is common cause, what has been placed in doubt and the balance of probabilities.

### **Has Vexall established a *prima facie* case**

[69] We find that Vexhall has established a *prima facie* case that BCX has contravened section 8(1)(d)(iii) of the Act in that on the balance of probabilities it has established that-

- (a) BCX is a dominant firm;
- (b) BCX is selling its Unisolv software service on condition that its customers purchase its disputed value-added support services; and
- (c) the disputed value-added support services are unrelated to the object of its licensing of its Unisolv software service.

[70] It is not necessary for a finding that BCX has contravened section 8(1)(c) or (d)(i) because the main thrust of Vexall’s application concerned a contravention of section 8(1)(d)(iii) and the motivation for the cancellation of the annual or monthly

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<sup>61</sup> AA at para 156.3.

licences to upgrade and update the Unisolv software is very much in dispute at the High Court litigation demonstrates.

### **Irreparable harm and balance of convenience**

[71] Having established a *prima facie* case, Vexall must still demonstrate that it will suffer irreparable harm and that the balance of convenience favours an order in its favour but in a holistic and balanced way.

#### *Irreparable harm*

[72] Vexall alleges that BCX's impugned conduct will deter customers from dealing with it as a service provider of the disputed value-added services and will accordingly make it suffer irreparable harm.

[73] It is abundantly clear from Dis-Chem's retreat from its cancellation of BCX's disputed value-added services and its agreement later to retain those services after the threat not to provide its upgrade and repair services to the software, that smaller pharmacies that have or wish to contract with Vexall to provide those services will be forced by BCX to submit to the same regime in order to avoid the software from becoming outdated. This will mean that those pharmacies will cancel their contracts or not enter into any contracts with Vexall to provide those services.

[74] The fact that Vexall might survive because it has Dis-Chem's backing and that it can provide support services other than the disputed value-added services, does not mean that it may not suffer irreparable harm in the interim. If for six months<sup>62</sup> it cannot provide the disputed value-added services, Vexall will suffer loss of custom and the associated consequences of loss of income and the loss of skilled and experienced personnel to service that custom.

#### *Balance of convenience*

[75] The balance of convenience favours Vexall because it will suffer some irreparable harm for the reasons outlined above while BCX has a number of ways of mitigating the impact of no longer bundling the disputed value-added services such as

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<sup>62</sup> The period contemplated in section 49C(5) of the Act.

increasing its price for its Unisolv software and discounting that price for the pharmacies that wish to purchase its support services including its disputed value-added services.

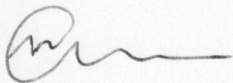
### **Application to stay**

[76] BCX applied to have the interim application stayed pending resolution of its High Court litigation against Vexall. For the same reasons that we have not taken the alleged unlawfulness of Vexall's conduct into account, the High Court litigation does not trench on the principal issues being determined by this tribunal namely whether BCX is a dominant firm and whether it has engaged in prohibited conduct, which are not issues that the High Court will have to determine. The application to stay proceedings is therefore denied.

### **Conclusion**

[77] Taking into account that Vexall has established a prima facie case of prohibited conduct, that it may suffer some irreparable harm in the interim and that the balance of convenience favours it, the requirements of section 49C(2)(b) have been met.

[78] Accordingly, we granted the interim relief in favour of Vexall as set out in our order of 12 February 2020.



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**Halton Cheadle**

**29 April 2020**

### **Anton Roskam and Yasmin Carrim concurring**

Tribunal Case Managers: Ndumiso Ndlovu and Kgothatso Kgobe

For the Applicant: G Marriott instructed by DLA Piper

For the First Respondent: A Gotz & S Quinn instructed by Cliffe Dekker Hofmeyr