

SOUTH AFRICA / JUDGMENT

Apollo Studios (Pty) Ltd and Another v Audatex SA (Pty) Ltd and Another (IR198Mar23) [2023] ZACT 23 (8 May 2023) [2023] ZACT 23

COURT

Competition Tribunal

BEFORE

J Wilson, M Mazwai, L Mncube

CASE / FILE NUMBER

IR198Mar23

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COMPETITION TRIBUNAL OF SOUTH AFRICA Case No.:IR198Mar23 In the interim relief application between: Apollo Studios (Pty) Ltd First Applicant Motomatix (Pty) Ltd Second Applicant And Audatex SA (Pty) Ltd First Respondent The Competition Commission Second Respondent

Panel : J Wilson (Presiding Member) : M Mazwai (Tribunal Member) : L Mncube (Tribunal Member) Heard on : 12 April 2023 Order issued on : 14 April 2023 Reasons issued on : 08 May 2023
REASONS FOR DECISION

INTRODUCTION

- [1] This matter concerns an application for interim relief in terms of section 49C of the Competition Act, 89 of 1998 (the “Act”). The applicants, Apollo Studios (Pty) Ltd (“Apollo”) and Motomatix (Pty) Ltd (“Motomatix”), contend that the termination by the first respondent, Audatex SA (Pty) Ltd (“Audatex”), of the access that Apollo’s “PartSmart” software application (“app”) had to Audatex’s online software platform constitutes a contravention of section 8(1)(d)(ii), alternatively section 8(1)(c), of the Act.[1]
- [2] The applicants accordingly sought an order interdicting Audatex from carrying out its intended “offboarding” of the PartSmart app from the Audatex platform pending the final determination of a complaint filed by the applicants with the Competition Commission (“the Commission”), or a period of six months, whichever occurred first. The substantive relief initially sought by the applicants in their notice of motion was the following:

“2 That the first respondent (“Audatex”) is interdicted and restrained from terminating the access of ‘PartSmart’ (owned and operated by the first applicant) to the “Audatex platform” (as described in the founding affidavit) pending the conclusion of a hearing into the alleged prohibited practices that are the subject of the applicants’ complaint to the second respondent which is attached to the applicants’ founding affidavit marked “FA1”, alternatively six months from the date of this order, whichever occurs first.

3 In the alternative to paragraph 2 above, interdicting and restraining Audatex from terminating the access of PartSmart to the Audatex platform pending the further hearing of the application on a date and in accordance with a timetable to be directed by the Competition Tribunal at which hearing the applicants will seek relief in terms of paragraph 2 above.

4 That the first respondent is ordered to pay the costs of the application; alternatively that any party opposing the relief sought is ordered to pay the costs occasioned by such opposition.”

[3] We decided, after hearing the parties, not to grant the interim relief sought by the applicants and issued an order dismissing the application on 14 April 2023. The reasons for our decision are set out below.

PROCEDURAL BACKGROUND

[4] On 20 March 2023, the applicants submitted a complaint to the Commission in respect of Audatex’s threatened “offboarding” of the PartSmart app from Audatex’s platform with effect from 31 March 2023, and, on 22 March 2023, they filed an application for urgent interim relief with the Tribunal.

[5] The Tribunal convened an urgent pre-hearing on 27 March 2023 to regulate the further process in the application. At the pre-hearing, the Commission stated that it would not participate in the application proceedings and would abide by the Tribunal’s decision. However, Audatex stated that it intended to oppose the application and to file an answering affidavit. Having regard to the dates available to the Tribunal to hear the application, and the time required by the parties to file their answering and replying papers respectively, it was ultimately agreed by the applicants and Audatex, and directed by the Tribunal, that the interim relief application would be heard on 12 April 2023 subject to a without prejudice undertaking by Audatex not to terminate PartSmart’s access to its platform “until midnight on 14 April 2023 or such earlier date and time as the Tribunal issues an order dismissing the application (if applicable)”. Directions were also given for the filing of answering and replying affidavits, and heads of argument, by the parties.

[6] As a result, the “interim interim” alternative relief sought in paragraph 3 of the applicants’ notice of motion fell away, and what remained for determination was the primary relief sought in paragraph 2 of the notice of motion.

[7] Audatex filed an answering affidavit on 4 April and the applicants filed a replying affidavit on 7 April 2023. Thereafter, on 10 April, Audatex filed an application for leave to file a rejoinder affidavit on the grounds that the replying affidavit contained new factual material as well as

allegations of dishonesty that required a response. On 11 April, the applicants filed an application for leave to file a further affidavit of their own, in which they sought to respond to certain allegations in Audatex's rejoinder affidavit, and also tendered confidentiality undertakings in respect of information on the Audatex platform to which they might have access.

- [8] The hearing of the interim relief application proceeded on 12 April 2023. At the commencement of the hearing, the applicants and Audatex indicated that they did not oppose each other's applications for leave to file further affidavits in the proceedings, and those further affidavits were accordingly admitted into evidence before the Tribunal. After hearing the parties, and considering the matter, the Tribunal issued its order dismissing the application on 14 April 2023.
- [9] After the issuance of the Tribunal's order, the applicants directed a request to the Tribunal to provide our reasons as soon as possible because they wish to consider the merits of an appeal. These reasons are accordingly provided on an expedited basis.

RELEVANT FACTUAL BACKGROUND

The parties and their businesses

Apollo and PartSmart

- [10] Apollo is a software development company that was established in 2020. It is the owner of the PartSmart app, which is automotive parts procurement software that was developed in 2018 by the co-founder of Apollo in collaboration with [Name].
- [11] PartSmart automates and facilitates procurement of replacement automotive parts for insurance repairs. It enables insurers and automotive repair companies to obtain competing quotes for, and to place orders, for automotive parts supplied by Original Equipment Manufacturers ("OEMs") and third party parts suppliers.
- [12] PartSmart competes with various other parts procurement software providers, including [Competitor Names]. Audatex also lists [Competitor Names] as competitors of PartSmart.
- [13] At the time of the applicant's complaint and interim relief application, PartSmart was integrated with Audatex's online software platform, as discussed further below. As discussed further below, [Competitor Names] were also integrated with Audatex's platform shortly before Audatex removed PartSmart's access to its platform.
- [14] PartSmart contracts only with insurers, and currently has [Number] customers, namely [Customer Names].

Audatex

- [15] Audatex is a subsidiary of a global group of companies, and has been operating in South Africa since the 1980's.

[16] Audatex owns and operates an online software platform that facilitates electronic vehicle damage estimation and processing of automotive insurance claims. Audatex describes its business model as follows:

“The Audatex offering enables vehicle repairers to generate comprehensive repair estimates, taking account of parts manufacturing prices, part numbers, paint material and labour rates. Once an estimate has been generated, the system facilitates interaction between insurers, claims assessors and vehicle repairers. The system allows insurers, assessors and repairers to interact so as to effectively reach commercial outcomes relating to repairs to be undertaken on a vehicle.”

[17] Audatex’s customers include insurers, repairers and third party service providers, including parts procurement providers such as PartSmart.

[18] It appears from the papers that, where the relevant insurer is an Audatex customer, the vehicle damage claim process is basically the following:

18.1 First, the insured informs its insurer that it requires repair work to be undertaken on its vehicle.

18.2 The insurer dispatches an affiliated assessor to assess the damage to the vehicle. The assessor feeds into the Audatex system the vehicle details, and the areas on the vehicle that are damaged. The Audatex system then produces an estimation report which contains details of the specific parts required and the part identification number of each such part, the estimated cost per part, and the estimated cost for labour and paint.

18.3 That estimation report is then accessible on the Audatex platform to insurers and to third party service providers on the platform,

including parts procurement service providers such as PartSmart and its competitors.

18.4 If the insurer has a contract with a parts procurement software provider that is integrated with the Audatex platform, that provider will then, on the basis of the estimation report, source prices for, and confirm availability of, the parts required, and present those quotes to insurers for their consideration and authorisation, all via the platform.

18.5 The authorised claim instructions are then delivered to an automotive repairer for the repair of the vehicle with the parts, and at the prices, authorised by the insurer.

[19] Audatex states that there are two distinct, albeit related, aspects to its operations. The first aspect, which Audatex refers to as its “core value offering”, is an integrated on-line vehicle damage estimating solution to insurers, repairers and assessors, which generates initial estimates for repairs to vehicles, primarily pursuant to insurance claims. These estimates are generated off the back of an embedded database comprising information identifying all the standard parts in more than 1,300 vehicle models.

- [20] Audatex stresses the proprietary nature of its parts database. Audatex says it has, with significant investment over many years, compiled this database by identifying the parts specific to each vehicle model, their manufacturer details and manufacturer pricing per part. The database has been developed based on information that is available from vehicle manufacturers, industry research and other investments (such as personnel, software development and the like). The database also has to be continuously maintained and updated, and also localised to the conditions of the particular countries in which the Audatex solution is offered.
- [21] The second aspect of Audatex's offering is integrated software which automates certain business processes of, and integrates with, participants in the vehicle repair value chain. This enables insurance companies, accident management companies, vehicle manufacturers, parts procurement service providers and repairers on the Audatex platform to manage the claims and authorisation process in an automated and integrated manner.

Relationship between Audatex and PartSmart

- [22] The applicants contend that a critical feature in the development of PartSmart was its access, via an application programming interface ("API") and user accounts created for PartSmart by Audatex, to the Audatex platform.
- [23] The applicants contend that, if an insurer uses the Audatex platform exclusively (as is overwhelmingly the case) for claims processing, then PartSmart has no other source for this data in real time, meaning that its ability to service its insurer customers and to compete in the market is severely constrained.

Motomatix

- [24] Motomatix was founded in 2022, and is a wholly-owned subsidiary of Apollo. In August 2022, Motomatix was appointed as the exclusive distributor of GT Motive solutions in South Africa. It appears from the press release announcing that appointment that GT Motive is an international supplier of repair data and solutions, and was previously represented in South Africa (since 2017, according to Audatex) by another distributor called Estimatic Management Solutions. It is common cause that the GT Motive platform is a direct competitor to the Audatex platform internationally, and in South Africa.
- [25] It appears that the GT Motive platform has, so far, made limited headway in the market. According to Audatex, the GT Motive platform has only [Number] customers together with certain firms that have vehicle fleets and do their own repairs, such as [Customer Name].
- [26] However, the applicants anticipate that GT Motive will become more competitive under licence to Motomatix. According to the press release referred to above, the agreement between Motomatix and GT Motive involves "a large investment by Motomatix to elevate the data, model coverage and technology to greater levels which will support the growth of the business in the upcoming years". The applicants also state in their founding affidavit that Motomatix now presents a "viable alternative" to the Audatex platform in the South African

market. Audatex's internal strategic documents confirm that it regards GT Motive as a competitive threat in South Africa.

[27] As discussed below, the competitive relationship between Audatex and GT Motive lies at the heart of the dispute between the parties.

Events leading up to Audatex's decision to "offboard" PartSmart

[28] In July 2020 (approximately two years after PartSmart had first integrated with Audatex), Apollo and Audatex concluded an "Audatex SA Reselling (Partner Product) Agreement (the "reseller agreement") for an initial term of three years. In terms of that agreement, Apollo granted Audatex the right to incorporate PartSmart into Audatex's offering to Audatex's customers, and thus to act as a reseller of the PartSmart product on a revenue-sharing basis. Whilst the licence granted to Audatex was non-exclusive, clause 2.4 provided that approval from Audatex was required before PartSmart could be implemented with any short-term insurer in South Africa.

[29] Audatex contends that, pursuant to the reseller agreement, Apollo obtained preferential, and largely unfettered, access to Audatex's system, including aspects of its proprietary parts database, and to pull that information from the system.

[30] In August 2022, Motomatix announced that it had acquired the licence to the GT Motive software in South Africa, and this led to the termination of the reseller agreement by mutual agreement. The termination of the reseller agreement was memorialised in a letter agreement ultimately signed by both Audatex and Apollo dated 11 October 2022. In that letter, it was recorded, inter alia, that:

30.1 The reseller agreement was terminated by mutual agreement with effect from 30 September 2022 (clause 2.1).

30.2 Following termination of the reseller agreement:

30.2.1 Audatex would cease to be a reseller of the PartSmart software (clause 2.2.1).

30.2.2 Apollo and Audatex would enter into a new agreement, effective 1 October 2022, in terms of which Audatex transferred to Apollo all of Audatex's obligations to provide PartSmart to [Number] "legacy clients", namely [Customer Names] (subject to a 12 month exit period insofar as such

substitution could not be effected in relation to any legacy client for any reason) (clauses 2.2.2 to 2.2.4).

30.2.3 Apollo would be entitled to provide PartSmart directly to clients, including short-term insurers (clause 2.2.5).

30.2.4 “Insofar as clients who utilise the PartSmart software already use same in integration with Audatex’s claims estimation software (“the Audatex Software”), or insofar as a client requests integration of PartSmart with the Audatex Software, Audatex shall be entitled (but not obliged) to charge such client an integration fee per claim, or otherwise as Audatex considers appropriate” (clause 2.2.7).

30.2.5 Nothing would preclude Apollo from “permitting integration of PartSmart with any claims estimation software which performs a function similar to that performed by [Audatex]” (clause 2.2.8).

[31] Notwithstanding the terms of this agreement, Audatex’s contends that it only fully appreciated the closeness of the working relationship between Apollo and Motomatix when it received an email from Motomatix on 12 January 2023 seeking certain information relating to Audatex’s parts database. Audatex says that it was immediately alarmed by the apparently close relationship between Apollo and Motomatix, and therefore decided that, as of 31 March 2023, it would no longer grant PartSmart access to the Audatex system.

The applicants’ complaint and Audatex’s response

[32] It is common cause that Audatex’s decision to offboard PartSmart from its platform was a consequence of Apollo’s subsidiary, Motomatix, becoming the exclusive distributor in South Africa of GT Motive, a direct competitor of Audatex. However, the underlying rationale for this move lies at the core of the parties’ dispute before the Tribunal.

[33] The applicants contend that Audatex’s conduct is intended to foreclose PartSmart from competing effectively as a supplier of parts procurement software; and, indirectly, also to impede the ability of Motomatix’s GT Motive system to compete with the Audatex system.

[34] The applicants argue that Audatex is a dominant firm for purposes of section 7 of the Act with a market share of over 80% in “the market for the provision of software for the management and processing of insurance claims in the automotive repair industry”; and that Audatex’s decision to offboard PartSmart from its platform constitutes an abuse of dominance under section 8(1)(d)(ii), alternatively section 8(1)(c), of the Act.

[35] Audatex denies this. It contends that it is simply seeking to prevent a direct competitor, Motomatix, from continuing to have access to proprietary information on its platform through PartSmart, and from using that information to compete unlawfully against Audatex. Audatex alleges that PartSmart does not require access to the Audatex platform to compete effectively with its rivals, and also denies that the offboarding of PartSmart from the Audatex platform will have any negative effect on Motomatix.

[36] We proceed to assess these respective claims under section 49C and the relevant prohibited practice sections of the Act.

THE REQUIREMENTS FOR INTERIM RELIEF: SECTION 49C

[37] The grant of interim relief under the Act is governed by section 49C of the Act. Section 49C(2) (b) states that the Tribunal:

“may grant interim relief 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.”

[38] Section 49C(3) explains that:

“In any proceedings in terms of this section, the standard of proof is the same as the standard of proof in a High Court on a common law application for an interim interdict.”

[39] Following the well-known common law approach set out in Webster and Mitchell[2] as qualified in Gool[3],[4] the Tribunal set out its approach in applying section 49C(2) as follows in York Timbers:[5]

“[W]e 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 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 applicant’s case raise serious doubt or do they constitute mere contradiction or an unconvincing explanation. If they do raise serious doubt the applicant cannot succeed.

As far as the remaining factors in [section 49C(2)] are concerned, viz irreparable damage and the balance of convenience, these are not looked at in isolation or separately but are taken in conjunction with one another when we determine our overall discretion.”

[40] In Natal Wholesale Chemists,[6] the Tribunal pointed out that:

“[I]n terms of Section 49C(2), the Tribunal no longer has to consider whether each of the requirements has been established in isolation,

but rather looks at all the factors listed in Section 49C(2) as a whole to see whether a case for interim relief has been established.

... Section 49C(2) follows the approach at common law as applied by Appellate Division in the case of Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton 1973 (3) 685 (A). The court held that in deciding whether to exercise its discretion to grant interim relief the court should not look at the prerequisites

in isolation but should consider all of them in conjunction with each other. The court went on to state that these prerequisites "... are not individually decisive, but are interrelated, for example, the stronger the applicant's prospects for success the less the need to rely on prejudice to himself. Conversely, the more the element of "some doubt", the greater the need for the other factors to favour him."

[41] Guidance regarding the approach to be adopted in applications for interim relief in terms of section 49C has been provided in the CAC's recent judgments in BCX[7] and eMedia[8].

[42] In BCX, the CAC emphasised that interim relief under the Act has certain features that are distinct from interim relief at common law:

"Two features of the power to grant interim relief have particular salience. First, the prohibited practices in chapter two of the Act are concerned with practices that affect markets, a market or a segment of the market. Unlike disputes in private law which, for the most part, concern the rights enjoyed and duties owed by individuals to one another, prohibited practices in chapter 2 concern the conduct of firms and their effect on competition in the market. Even those practices that are not defined by reference to their effects are nevertheless rendered unlawful by reason of their presumptive harmful effects upon competition. As a result, interim relief granted by the Tribunal has effects upon the state of competition in the market. Second, when the Tribunal grants an interim relief order, it is not a status quo order. The order requires that the respondent firm desist from the prohibited practice (in whole or in part). The purpose of the order is to alter the competitive relationship between firms in the market. If the interim order is to be effective, it is intended to permit of competition taking place in the market that has hitherto not taken place. That may have effects within a market or across markets, and may affect different market participants: customers, competitors and suppliers. When the Tribunal grants an interim order it alters the status quo in the market and is intended to change the way firms compete in the market, with consequences that may well resonate within and between markets.

An interim relief order under the Act does not provide a remedy to permit a person claiming a right to enjoy the exercise of that right until the right is finally determined. Rather, the Tribunal is empowered to regulate how competition in the market is to take place for a six or twelve month period. That is a different competence to that of a court adjudicating a dispute of right; it is a regulatory competence to decide whether the state of competition in the market must endure, notwithstanding the evidence that a prohibited practice is taking place, or whether the Tribunal should order a change.”[9]

[43] The CAC proceeded, in the light of these observations, to explain the approach to be adopted in respect of each of the three factors in section 49C(2) that are relevant to the grant of interim relief:

"The evidence of a prohibited practice, as I have sought to explain, is not concerned with the rights of the applicant but the competitive

position of competitors in the market, judged against the regulatory criteria of the prohibited practices defined in chapter 2 of the Act.

The need to prevent serious or irreparable damage to the applicant posits an enquiry into the effects of the alleged prohibited practice upon the applicant and it is for this reason a party specific enquiry. However, here too the analogue of interim interdicts as an equitable remedy at common law must be approached with care. The common law remedy asks what well-grounded apprehension of irreparable harm will be suffered by the applicant if interim relief is not granted and the applicant succeeds in proving the right, now *prima facie* established. This concerns an interference with an applicant's rights and the harm that may be suffered by an applicant as a result of such interference until the court can finally determine the question of rights. Interim relief under s49C requires an enquiry that is similarly structured, but distinct in a number of respects. The need for intervention is a function of the probability of serious or irreparable damage occurring, if no intervention is ordered by the Tribunal before it can make a final determination as to whether the alleged prohibited practice has taken place. It is the damage to the competitive position of the applicant that the prohibited practice may cause that marks out this enquiry. Other forms of damage to the applicant are not relevant because the Act's purpose is to maintain and promote competition in the market.

Finally, the balance of convenience in s49C is a direct borrowing from the common law. It weighs the prejudice the applicant will suffer if the interim interdict is not granted against the prejudice to the respondent if it is granted. This requires an equitable reckoning as to who bears the greater burden of error. If the interim order is granted and no case is ultimately established to prove the alleged prohibited practice, what prejudice will have been suffered by the respondent, and how might that prejudice be mitigated? So too, if the interim order is refused and the prohibited practice is ultimately proven, what prejudice will the applicant suffer in the interim. Here too, the currency of prejudice is reckoned by recourse to the consequences for the competitive positioning of the parties in the market. A respondent that is required to desist from conduct that gives it a legitimate competitive advantage suffers prejudice. An applicant that is required to endure an unlawful competitive disadvantage also suffers prejudice. How to weigh prejudice in the balance is a difficult task. Hence the warranted caution with which the Tribunal and this court have approached the exercise of the power to grant an interim interdict.” [10]

[44] In *eMedia*, the CAC explained that, in considering the three factors listed in section 49C(2), consideration must be given to whether there are “clear, non-speculative and uncontroversial facts” that support the grant of interim relief, and that “whilst there will inevitably be disputes of fact”, that should not prevent the Tribunal from taking a “robust approach” on the evidence before it.[11]

[45] The CAC also added that the basis of the power to grant interim relief must be contextualised within the jurisprudential framework of the Act. The CAC referred in this regard to the preamble to the Act, and to its purposes as set out in section 2.[12] The CAC also referred to the following passages from the Constitutional Court's recent judgment in *Mediclinic*:

“It ought never to be acceptable for any of us, including the corporate citizens of this land, to indulge, talk less of over-indulge, in the unconscionable practice of seeking to record the highest profit margin possible by any means necessary, in wanton disregard for what that would do to the rest of humanity. Neither should the historic exclusion of some from meaningful participation, particularly in the mainstream economy, be normalised. For, this seems to be one of the most stubborn injustices of our past that require a more deliberate, intentional and systematic confrontation appropriately enabled by independent, incorruptible, efficient and effective law enforcement and justice-dispensing institutions.”

and

“Institutions created to breathe life into these critical provisions of the Act must therefore never allow what the Act exists to undo and to do, to somehow elude them in their decision-making process. The equalisation and enhancement of opportunities to enter the mainstream economic space, to stay there and operate in an environment that permits the previously excluded as well as small and medium-sized enterprises to survive, succeed and compete freely or favourably must always be allowed to enjoy their pre-ordained and necessary pre-eminence. The legitimisation through legal sophistry or some right-sounding and yet effectively inhibitive jurisprudential innovations must be vigilantly guarded against and deliberately flushed out of our justice and economic system.”[13]

[46] The CAC proceeded to explain that:

“It follows therefore that these are the guidelines this Court and indeed the Tribunal must follow when applying the provisions of the Competition Act. The approach calls for a transformative constitutional approach and must be consistent with the scheme of the Competition and apply a context-sensitive approach. This is a striking feature that must be considered in this application. Unless this transformative approach is applied even at an interim stage of proceedings, then the historical and insidious unequal distribution of wealth in South Africa will continue.” [14]

[47] We have sought to apply this transformative and context-specific approach in the present matter. However, given the particular facts of this case, we have concluded that there are not “clear, non-speculative and uncontroversial facts” supporting the grant of the interim relief sought by the applicants.

GENERAL LEGAL PRINCIPLES APPLICABLE TO THE INTERPRETATION OF SECTION 8

[48] The applicants limited their case before the Tribunal to an alleged contravention of section 8(1)(d)(ii), alternatively section 8(1)(c), of the Act.

[49] The requirements of these subsections fall to be understood in the context of section 8(1) as a whole, which states, in material part, that it is prohibited for a “dominant” firm to:

“(c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or

(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act –

(i) . . .

(ii) refusing to supply scarce goods or services to a competitor or customer when supplying those goods or services is economically feasible.”

[50] The definition of dominance is of course set out in section 7 of the Act.[15] An “exclusionary act” is defined (in its now expanded form) in section 1(1) of the Act as “an act that impedes or prevents a firm entering into, participating in, or expanding within, a market”. The term “participate” refers, in turn, to “the ability of or opportunity for firms to sustain themselves in the market”.

[51] The Tribunal set out its legal approach to the application of sections 8(1)(c) and 8(1)(d) (then, sections 8(c) and 8(d)) of the Act in SAA,[16] and that approach has since been confirmed and elaborated upon in various cases, including the CAC’s judgments in Comair,[17] Computicket[18] and Uniplate[19]. The relevant principles are therefore now well-established, and it is unnecessary to repeat them all here. For current purposes, it suffices to highlight the following.

[52] First, both section 8(1)(c) and section 8(1)(d) distinguish between an “exclusionary act” (as defined above) and an “anti-competitive effect”. Exclusionary conduct might give rise to an anti-competitive effect, but that effect must be proven in order to establish a violation of those sections.[20] As the CAC explained in Uniplate:

“[T]he exclusionary act of the firm is something separate from the anti-competitive effect of that act. There must be a causal relationship between the exclusionary act and its anti-competitive effect. If the exclusionary act is taken as proof of its effect, the onus resting upon the Commission will not have been discharged. That would be a case based on conduct without regard to consequence, and does not meet the requirements for liability under s 8(d).”[21]

[53] As noted above, the definition of an “exclusionary act” in the Act has now been expanded to include impeding or preventing a firm from “participating in” a market, in the sense of having the ability or opportunity to sustain itself in the market.

[54] In addition, for the reasons explained in Mediclinic and eMedia, the competition authorities must be particularly alive and sensitive to the anti- competitive effects that may be felt in South African markets as a result of exclusionary conduct by dominant firms, especially insofar as it is directed at historically disadvantaged

persons and small- and medium-sized enterprises.

[55] Second, the existence of an “exclusionary act” is assumed in section 8(1)(d)(i) if the conduct referred to in that section is established, whereas that element must be proved by the complainant in section 8(1)(c).[22] We consider further below the specific requirements of section 8(1)(d)(ii) of the Act.

- [56] Third, in section 8(1)(d), the requirement of a substantial anti-competitive effect must be proven by the complainant, and is met either (i) if there is “evidence of actual harm to consumer welfare” or (ii) “if the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals”. [23]
- [57] In Computicket, the CAC emphasised that, in order to establish an “anti- competitive effect” for purposes of section 8(1)(d), it must be shown that the harm in question, “whether in the form of actual or potential harm, strengthens the dominant firm’s position to the extent that competitive rivalry is significantly impeded or is likely to be so impeded by the impugned conduct of the dominant firm.” [24]
- [58] This again is an area where the competition authorities must be alive to the role that smaller firms may play in promoting competition in concentrated markets in South Africa. As the CAC pointed out in Computicket:
- “Rivalry may be diminished because a small firm plays an important role in constraining the dominant firm in a part of the market, whether as to the product or territory. An effect of this kind is not ousted from consideration. And this is so because under the discipline of section 8(d), the effects of the exclusionary conduct (harms and gains) must be weighed to determine ultimately whether there has been an abuse. The aggregative judgment is made in weighing the effects. It is not made by insisting that what can count as a gain or a harm must itself meet some criterion of sufficiency or can only be counted if it is an actual rather than a potential harm or must be a market-wide effect.” [25]*
- [59] In the light of these general principles, we now turn to consider each of the elements required to establish a contravention of section 8(1)(d)(ii) and section 8(1)(c) with reference to the particular facts in this case.

RELEVANT MARKETS AND DOMINANCE

Relevant markets

- [60] In order to succeed under section 8(1)(d)(ii) or section 8(1)(c) of the Act, the applicants must of course first establish that Audatex is a dominant firm (as defined in section 7) in a relevant market.
- [61] In their complaint to the Commission, and in their founding affidavit in their interim relief application, the applicants contended that there is a single broad relevant market in this matter, namely “the market for the provision of software for the management and processing of insurance claims in the automotive repair industry”. The applicants allege further that Audatex, Apollo and Motomatix all provide software and related services to the automotive insurance repair market, and accordingly compete with each other in this broad market.
- [62] In its answering affidavit in the present application, Audatex disputed what it referred to as the conflation of the activities of Audatex and Motomatix, on the one hand, and Apollo on the other. Audatex contends that it competes with Motomatix (but not with Apollo) in the

market for identifying the parts required for particular models of vehicles, estimating the cost to replace those parts and linking insurers, claims assessors and vehicle repairers (which is referred to as the “estimation market”). Audatex alleges that there are also various other players in this market, namely [Competitor Names].

- [63] Audatex contends that Apollo, for its part, competes in a separate market for the provision of parts procurement software products (which Audatex refers to as the “parts procurement market”), together with at least five other players, namely ([Competitor Names]). In their papers, the applicants only list [Competitor Names] as competing providers of parts procurement software.
- [64] In their written and oral argument before the Tribunal, the applicants departed from their previous stance that all the parties compete in a single broad market, and instead adopted the respondents’ stance that Apollo competes in a separate market to Audatex and Motomatix. The applicants refer to the latter market as “the market for electronic vehicle damage estimation and processing of automotive insurance claims”; and to the former market as “the market for value-added services offered to users of the Audatex platform”.
- [65] Based on the evidence before us, it appears, prima facie, that there are indeed two distinct relevant markets in this matter, one in which Apollo participates with (at least) other providers of parts procurement software, and another in which Audatex competes with Motomatix/ GT Motive (and possibly other players) in the provision of estimation and claims processing services. As indicated above, there now seems to be consensus between the parties in this regard. Purely for the sake of convenience at this stage, we will adopt Audatex’s shorthand references to these two markets, namely the “parts procurement market” and the “estimation market”.
- [66] It furthermore appears that these markets are (at least partially) vertically related, to the extent that the provision of parts procurement services takes place on the estimation and claims processing platforms of parties such as Audatex and GT Motive. The extent of the vertical integration between these services is of course closely related to the alleged exclusionary and anti-competitive effects of Audatex’s conduct, and is a matter of dispute between the parties.

Dominance

- [67] Notwithstanding their narrowing of the definition of the relevant market in which Audatex competes, the applicants maintained that Audatex is a dominant firm in the estimation market. They do so primarily on the basis of Audatex’s own claim in its marketing material that it processes over 80% of all insurance claims in South Africa, and has over 1200 repairers as clients.
- [68] Audatex does not dispute these claims. However, it claims that there is no distinct market for insurance repair work since its platform (and the GT Motive platform) is also used by non-insurers (such as vehicle rental companies).

- [69] In our view, this is not a convincing rebuttal of the applicants' dominance claim. Notwithstanding that Audatex's platform may be used by non- insurers, the estimation and processing of insurance claims is what is relevant in this matter. This lies at the heart of Audatex's business model, and the only customers of third party providers such as Apollo are insurance customers.
- [70] Audatex has also put up no evidence to suggest that GT Motive and the other competitors it has listed in the estimation market are anything like its size in the relevant market. On Audatex's own version, GT Motive currently only has [Number] customers.
- [71] For all the above reasons, we are satisfied that the applicants have made out a prima facie case that Audatex is a dominant firm in the estimation market.

SECTION 8(1)(d)(ii) – REFUSAL TO SUPPLY GOODS OR SERVICES TO A COMPETITOR OR CUSTOMER

- [72] There does not appear to be any dispute that Audatex's conduct evidences a refusal to supply Apollo. Audatex made it clear that it intended to remove PartSmart's access to the Audatex platform with effect from 31 March 2023 (subsequently extended to 14 April 2023 as a result of its undertaking in these proceedings). Rather, Audatex's case before the Tribunal, simply put, is that it is not legally obliged to provide PartSmart with access to its platform.
- [73] In addition, it appears to us, prima facie, that the provision of access to Audatex's platform constitutes a "service" provided by Audatex to Apollo, and that Apollo is a "customer" of Audatex in respect of that service, within the meaning of section 8(1)(d)(ii). The applicants contend that the essential service that Audatex provides to third party software providers such as PartSmart is access to the flow of claims information on the Audatex platform.
- [74] Audatex argues that Apollo is not its "customer" because the arrangement between the parties after the termination of the reseller agreement did not provide for Audatex to provide any specific "services" to Apollo. In our view, however, this attributes an unduly narrow, and uneconomic, meaning to the term "services" in section 8(1)(d)(ii) of the Act. It is common cause that Apollo and Audatex were parties to a commercial arrangement in terms of which Audatex permitted PartSmart to integrate with the Audatex platform and to provide its own procurement services to customers over that platform. It appears from the papers that there are various third party service providers who are party to similar commercial arrangements with Audatex, to the mutual commercial benefit of the Audatex platform and the third party service providers. For all of these third party providers (including PartSmart), Audatex is, in our view, providing a "service" (within the meaning of section 8(1)(b)(ii)) by connecting them with their customers in a real-time platform environment.[26] As the Tribunal noted in GovChat, technologies such as internet platforms are generally regarded as "services" in competition law and industry.[27]
- [75] A separate question is whether Apollo is (also) a "competitor" of Audatex.

As discussed above, the applicants initially claimed that Apollo competed with Audatex and Motomatix in a broad “market for the provision of software for the management and processing of insurance claims in the automotive repair industry”. However, the applicants subsequently accepted that Apollo competes in a distinct parts procurement market with other third party service providers. Audatex stated in its answering affidavit that it does not offer any parts procurement services in competition with PartSmart,[28] and this was not disputed by the applicants. There is also no indication in the parties’ papers that there is any competitive interaction between the activities of Apollo and those of Audatex.

- [76] The applicants argued that Apollo is nevertheless still a “competitor” of Audatex for purposes of section 8(1)(d)(ii) on the grounds that Apollo owns Motomatix, and that Audatex regards them as one entity. However, we think this is a mischaracterisation of Audatex’s position. The concern expressed by Audatex was that Apollo and Motomatix effectively operate as one entity in that they have overlapping employees and there is “no apparent limitation on the sharing of information between them”. In our view, this does not amount to a contention that Apollo competes in the same market as Audatex. The market definitions adopted by all the parties in argument indicate the contrary. The concern expressed by Audatex was, rather, that Apollo was able to share with its subsidiary, Motomatix, proprietary information that it (Apollo) had access to as a part procurement service provider on the Audatex platform. That does not make Apollo a competitor of Audatex. And, in any event, the applicants deny Audatex’s allegations in this regard.
- [77] Of course, it is common cause that Motomatix is a competitor to Audatex, but there is no suggestion that any good or service was supplied (or refused) by Audatex to Motomatix.
- [78] We therefore conclude that the applicants have made out a prima facie case that Apollo is a customer, but not that it is a competitor, of Audatex for purposes of section 8(1)(d)(ii) of the Act.

SECTION 8(1)(d)(ii) – DID AUDATEX PROVIDE A “SCARCE” SERVICE TO APOLLO?

- [79] The Act does not define what is meant by the term “scarce” goods or services in section 8(1)(d)(ii) term. According to the Oxford English Dictionary, the word “scarce” denotes something that is “not abundant” or is available “in deficient quantity” to meet demand. In GovChat, the Tribunal found that the technology app at issue in that matter “cannot be easily duplicated without significant capital investment and therefore can be considered as ‘scarce’ or hard to come by”.[29]
- [80] Audatex relies on the approach to refusal to supply cases in European law, which asks whether the relevant good or service is “objectively necessary” for the complainant to be able to compete effectively. However, caution must be exercised in incorporating tests from other jurisdictions into the particular structure of the South African Act. As we understand it, the European law on refusals to deal does not distinguish, as the South African Act does, between the so-called “essential facility” doctrine (section

- [81] At the same time, however, a good or service cannot be regarded as “scarce” for the purposes of section 8(1)(d)(ii) simply by virtue of the fact that it is provided by a dominant firm. This would conflate the separate requirements of dominance and scarcity in section 8(1)(d)(ii). Dominance relates to the market share and market power of the respondent firm in a particular market. Scarcity relates to an insufficient availability in the market of the relevant services that are being provided by the dominant firm. Even if a firm is dominant in a certain market, that does not necessarily mean that there is an insufficient availability in the market of all the services that it offers. Of course, if the services in question are unique to the dominant firm, or are a specific attribute of its dominance,[30] that may be the case, but that is an matter that has to be established by evidence.
- [82] The applicants make a general claim along these lines in their papers. Relying on GovChat, they suggest that, because Audatex is the platform of choice for insurers, assessors, and repairers, it offers unique access to the flow of claims information from insurers using the Audatex platform, which is not reasonably capable of being replicated.
- [83] In our view, however, there is an important difference between the facts in GovChat and those in the present case. In GovChat, the applicants rendered messaging services, the effectiveness of which was found to be reliant on the network effects created by the WhatsApp platform. In the present case, by contrast, the applicants limited their case to PartSmart’s ability to service its [Number] existing insurance customers, namely [Customer Names]. The dispute between the parties therefore revolved around the extent to which Apollo is dependent on PartSmart’s access to the Audatex platform in order to compete effectively for the business of these [Number] specific customers.
- [84] Therefore, unlike in GovChat, the broader network benefits that may be associated with the Audatex platform are not directly relevant to the case advanced by the applicants in their papers, and such benefits are only potentially indirectly relevant insofar as they might impact on the willingness of insurer customers of Audatex to deal with providers that are not integrated on the Audatex platform. However, as discussed further below, the evidence in this case was that Apollo’s [Number] insurance customers are willing to continue using the PartSmart app notwithstanding its removal from the Audatex platform.
- [85] In relation to the [Number] customers in question, it is not clear from the applicants’ papers precisely what services (and information) they say are uniquely available to PartSmart from Audatex. In argument, the applicants claimed that what PartSmart requires access to is the real-time flow of claims information between insurers, claims assessors and automotive repair agents on the Audatex platform, including the estimation reports and claims data of PartSmart’s [Number] customers. They contended, in essence, that even if PartSmart had access to the claims information of their insurance customers outside the Audatex platform, it would be too cumbersome and unwieldy for them and for their customers to process efficiently.

[86] Audatex contends, however, that the basic functionality of the PartSmart app is the same whether PartSmart receives the claims information it needs from the Audatex platform, from Motomatix's GT Motive platform (referred to below), or from some other system (including the insurer itself). Audatex claims, therefore, that there are various alternatives to the Audatex platform that are available to PartSmart to continue competing effectively for its customers' business:

86.1 First, these insurance companies can simply terminate their customer relationship with Audatex and switch to Motomatix's competing platform, GT Motive.

86.2 Second, Audatex has offered to extract the repair estimation report from the Audatex software, with the full

parts list per estimation and cost estimate, in order for the insurers to pass that information directly on to PartSmart.

86.3 Third, Audatex has offered to assist the relevant insurers to obtain the same estimation information referred to above through an automated process on the insurer's own IT system. Audatex states that this will result in a similar interface as is currently in place, allowing an insurer, in its claims management system, to receive the estimation report prepared by the repairer (using the Audatex software).

[87] As regards the first option, Audatex stated that the GT Motive platform provides the same functionality as the Audatex platform, and that this was demonstrated by the fact that two significant short-term insurers ([Customer Names]) are already using the GT Motive system. In addition, Audatex stated that, on 15 March 2023, one of PartSmart's [Number] insurance customers ([Customer A]) gave notice to terminate its relationship with Audatex after receipt of Audatex's notification that it intended to remove

PartSmart's access to the Audatex platform.

[88] The applicants acknowledge that [Customer A] has terminated its relationship with Audatex and confirm that it is moving to GT Motive. They say, though, that this does not necessarily mean that [Customer A] will continue to use PartSmart, and that it may switch to one of its competitors.

[89] However, this is a purely speculative statement, which is unsupported by any evidence in the record. The applicants' response also does not dispute the alleged functional substitutability of the Audatex and GT Motive systems. In addition, absent any contrary evidence, the fact that [Customer A] has decided to move to the GT Motive platform suggests that it regards the GT Motive system as providing an equivalent offering to that previously provided to it by the Audatex system. And, if [Customer A] is not able to utilise PartSmart effectively on the GT Motive platform for any reason, we would expect the applicants to say so, which they have not done. Given the close relationship between Apollo and Motomatix, this seems unlikely.

- [90] As regards the second option, the applicants contend it would be hugely onerous and cumbersome to process claims data in a manual rather than automated fashion, especially given the ongoing changes that take place in the claims estimation and repair process. They say that attempting to do so would undermine the efficiencies that make PartSmart attractive to insurers, which are currently able to automate the entire assessment, procurement, and repair process via the Audatex platform. Given that none of PartSmart's insurance customers has indicated any interest in this option, we disregard it in our assessment below.
- [91] As regards the third option, the applicants say that this is currently non- functional, technically unworkable, and would in any event render PartSmart's offering inferior to those of its competitors who are still integrated on the Audatex platform. However, Audatex contends, in response, that two of Apollo's customers ([Customers B and C]) have already selected this option, and that Audatex is actively developing alternative solutions with them.
- [92] Audatex notes that a transition to this option "requires investment by Audatex and the insurer's appropriately qualified developers and other technical personnel, which Audatex is in the process of providing". It adds that Audatex has in fact been requested by [Customer B] to make changes to Audatex's own underlying IT system to better facilitate functionality on the [Customer B] system and interface/communication between that system and Audatex.
- [93] Audatex states that, as a consequence, PartSmart will be able to receive the same information regarding repair estimations, and to input into the relevant insurers' system the same parts procurement information, that PartSmart receives and inputs into the Audatex software.
- [94] As regards [Customer B], the applicants attached to their founding affidavit a supporting affidavit from Mr [X], the National Claims Relationship Manager at [Customer B]. In that affidavit, Mr [X] had stated, inter alia, that [Customer B] wished to continue using PartSmart as integrated with the Audatex platform, and that [Customer B] was opposed to the offboarding of PartSmart. He said that moving to alternative parts procurement solutions with the same parts feed that existed between Audatex and PartSmart was not an acceptable solution to [Customer B] because it "totally disregards process impacts, change management as well as integration capabilities built between PartSmart and [Customer B] back-office system to allow full benefit and functionality". As a result, the offboarding of PartSmart would "cause harm to [Customer B], its repairers, suppliers, and policyholders because of higher parts prices, parts procurement costs and hence higher premiums and excesses".
- [95] In response, however, Audatex attached to its answering affidavit an email dated 7 March 2023 from Mr [Y], Head of Claims at [Customer B] Commercial and Personal (and, according to Audatex, Mr [X's] direct manager), in which Mr [Y] stated that he "[Email Contents]". Mr [Y] continued that [Customer B] wished to "[Email Contents]" and therefore that:

"[Email Contents]"

- [96] Audatex states further that Audatex and [Customer B] subsequently had various workshops and engagements and that, as at the date of Audatex's answering affidavit, it was expected that [Customer B]'s "black box solution" would be implemented "within a matter of days". Audatex explained that this solution is a form of middleware hosted by [Customer B] which Audatex interfaces with, and which will in turn provide PartSmart with the information it requires and also enable PartSmart to input its own information, such as parts adjustments, prices, lead times, and the like.
- [97] Audatex adds that [Customer D] is underwritten by [Customer B], and that the above solution will therefore apply equally in respect of [Customer D]. This is not disputed by the applicants.
- [98] In their replying affidavit, the applicants dismiss AudaBridge (the technology being used for the [Customer B] "black box" solution) as old software that is "grossly inferior" to the Audatex platform, with very limited functionality. They state that AudaBridge also involves significant integration costs for insurers, requires multiple manual steps, and does not in fact work. The applicants attach affidavits from Mr Phillippus van Zyl (a Technical Specialist at Apollo) and Mr Jacques van der Merwe (Apollo's Technical Director) stating that the alternative solution being developed by Audatex with [Customer B] is not currently functional. Mr van der Merwe estimates that it will take "until approximately the end of July" to work with [Customer B] to implement the AudaBridge solution.
- [99] The applicants state further that, even then, "PartSmart's functionality will be severely limited meaning that insurers such as [Customers B, C and D] will almost certainly switch from PartSmart to a rival offering that does have access to the Audatex platform such as [Competitor Name]".
- [100] However, Audatex responds in its rejoinder affidavit that the only way for a third party to connect to Audatex is through AudaBridge or AudaConnect. It says that AudaConnect was designed for repairers and parts procurement software providers like Apollo. AudaBridge, on the other hand, was designed for insurers to interface and integrate with the Audatex system. As such, AudaBridge, whilst an older technology, is Audatex's only technology for its interface with insurers, and its functionality has been developed for that purpose.
- [101] Audatex says that Apollo, uniquely, enjoyed access to both the AudaConnect and AudaBridge interfaces by virtue of its historically deep integration with the Audatex system. All other third party providers only have access to the AudaConnect interface.
- [102] It therefore appears that the alternative solution being developed by [Customer B] would involve PartSmart losing the benefits of its historical AudaConnect connection and having to rely instead on the AudaBridge connection between [Customer B] and Audatex's platform.

[103] As regards the difficulties alleged in respect of the black box integration with [Customer B], Audatex states that there are only a few functionalities that still require development, and that [Customer B] and Audatex are currently working to address them.

[104] The position in respect of [Customer C] seems to be broadly similar. Audatex has attached to its answering affidavit correspondence between itself and Mr [Z], the Manager: Special Projects at [Customer C], in late March 2023. In an email dated 29 March 2023, Mr [Z] wrote:

“In view of the tight deadlines, our support teams are currently under considerable pressure to urgently set up the Proxy to communicate

with AudaBridge. While we are doing everything to urgently setup the Proxy, we are cognisant that the parts feed communication ultimately impacts financial decisions within our business and therefore need to ensure that these platforms work as intended.

Furthermore, we have received feedback today indicating that the parts feed communication between Audatex and PartSmart will not terminate on the 31st of March, as previously stated. Instead, an extension has been agreed.

As our representative for Audatex, could you please confirm the accuracy of this information and amend the attached parts feed communication

accordingly if necessary.”

[105] Thereafter, in response to Audatex’s confirmation that it had given an undertaking not to offboard PartSmart until 14 April 2023, Mr [Z] wrote the following on 30 March 2023:

“With the new extension until midnight on 14 April 2023, we will adjust our plans accordingly to ensure quality is maintained. Our teams will continue to work towards setting up the Proxy to communicate with AudaBridge. We plan to continue testing and improving the Proxy until the 6th of April, at which point we will request the PROD Credentials to switch over to the live environment. Could you request that your team prepares the PROD Credentials in anticipation of the 6th.”

[106] According to Audatex, this email indicates that (i) [Customer C] wishes to retain PartSmart as a supplier notwithstanding its removal from the Audatex platform, and (ii) [Customer C] anticipated that it would be able to achieve this by establishing a direct feed between itself and PartSmart by 6 April 2023.

[107] The applicants again say, in their replying affidavit, that the alternative proposed by Audatex in respect of [Customer C] is not in fact functional, and will not be functional by 14 April 2023. They attach in this regard an email from Mr [Z] dated 6 April 2023 in which he objects to Audatex “using” [Customer C] in its answering affidavit without [Customer C’s] consent; states that the extract provided to him by the applicants (it is not clear which one) “creates the impression that Audatex had quoted [Customer C] out of context”; and that [Customer C] will be engaging with Audatex and will decide its next steps based on Audatex’s response. However, the letter does not say anything about the functionality of the solution referred to by Audatex in its answering affidavit.

- [108] What is the Tribunal to make of these various factual disputes at the interim relief stage? Whilst we are unable to make any final determination on them without the benefit of further evidence, it appears to us that the following inferences can be made at the prima facie level. Both [Customer B and Customer C] were concerned about the offboarding of PartSmart from the Audatex platform, and may have preferred to retain the benefits they enjoyed arising from the full integration of PartSmart with the Audatex platform. However, precisely because of the benefits that both systems afford them, both insurers were willing to develop alternative solutions with Audatex and PartSmart rather than dispense with either of them. Furthermore, whilst there appear to be certain technical challenges with the implementation of these alternative solutions, and there is a question whether they are yet fully functional, the available evidence does not suggest that either insurer is likely to move from PartSmart to one of its competitors. On the contrary, the insurers appear to be resolute in finding solutions that involve their ongoing use of PartSmart rather than one of its competitors.
- [109] On the available evidence, therefore, it does not appear to us that PartSmart is likely to lose any of its [Number] customers to competitors as a result of its offboarding from the Audatex platform. [Customer A] has already decided to move to the GT Motive platform (and seems likely to retain PartSmart as its parts procurement service provider in that context) whilst PartSmart's other customers appear likely to continue using it through an alternative solution being developed with Audatex.
- [110] Having regard to this evidence, we do not believe that it can be concluded, on a prima facie basis, that the services that Audatex has ceased to supply to Apollo are "scarce" services within the meaning of section 8(1)(d)(ii) of the Act, or that Apollo's removal from the Audatex platform will "exclude" them from the parts procurement market, even on the expanded definition of that term now contained in the Act.
- [111] If we are incorrect in this conclusion, the above evidence is also relevant to the assessment of anti-competitive effects, irreparable harm and balance of convenience, as discussed further below.

SECTION 8(1)(d)(ii) – ECONOMIC FEASIBILITY

- [112] In terms of section 8(1)(d)(ii), a dominant firm is only required to supply scarce goods to a competitor or customer "when supplying those goods or services is economically feasible".
- [113] Given that Audatex has supplied a fully integrated service to PartSmart for a number of years, there can be no dispute that the provision of that service is economically feasible – save, of course, for the concern now expressed by Audatex regarding access to competitively sensitive information brought about by Apollo's acquisition of Motomatix and the GT Motive distributorship in South Africa. This is the basis upon which Audatex justifies its decision to offboard PartSmart from the Audatex platform.

[114] It is therefore necessary to consider whether PartSmart, as integrated with the Audatex platform, had access to competitively sensitive information of Audatex; and whether Audatex had a reasonable apprehension that such information would come into the hands of Motomatix absent its offboarding.

Audatex's concerns

[115] Audatex contends that PartSmart enjoyed a uniquely deep integration with the Audatex platform, which provided it with unfettered access to Audatex's parts database. Audatex states that this database has been built up over decades by Audatex employees across the world, and contains information relating to 1,349 vehicle models and over 17 million parts. [31] In respect of each model, the database reflects (i) a physical description of each part, (ii) a unique part identification number,

and (iii) the estimated cost of each part. In addition, because new vehicles are constantly being released to the market, Audatex has a team of employees whose sole function is to monitor the market for new vehicles and to update Audatex's parts database so that it remains current and relevant to Audatex's customers.

[116] Audatex adds that its parts database in South Africa has been localised to parts for South African vehicles and local prices, which requires constant investment to remain current. As such, access to the Audatex parts database provides a unique insight into cars on the road in South Africa, per insurer, that are being repaired. Audatex states that this would be of particular benefit to Motomatix in localising GT Motive's database for the South African market.

[117] Audatex argues further that there are important policy justifications behind a firm's entitlement to protect its intellectual property from misuse by competitors. In particular, if free-riding were permitted, the incentive to invest would be drastically diminished.

[118] The applicants do not dispute the legitimacy of a justification of this sort, but they contend that it is a contrived one in this case. The applicants advance two contentions in this regard. The first is that PartSmart did not have access to competitively-sensitive information on the Audatex platform; and the second is that Audatex's claim was raised for the first time in its answering affidavit, and is inconsistent with its previous course of conduct. We deal with each of these contentions in turn.

PartSmart's access to confidential information

[119] The applicants contend that the parts database is not proprietary to Audatex because it is a listing of information supplied by the various vehicle manufacturers. Audatex's response is that, whilst it is correct that each manufacturer owns the vehicle information that it supplies to Audatex, Audatex's proprietary rights arise from, and relate to, the fact that it consolidates each manufacturer's information into a single database and updates it on an ongoing basis.

- [120] Audatex states that, while much of the underlying information can be sourced from the various OEMs, that would be a hugely time-consuming and costly exercise, which would require significant investment by a competitor. The access that Motomatix enjoyed to the Audatex platform through PartSmart would allow it to compile (or improve) its own parts database based on recreating Audatex's parts database, extracting the information from Audatex's estimation reports and inputting that into a competing database, based on the research and investment already performed by Audatex.
- [121] Apollo's Technical Director, Mr van der Merwe, states that Apollo's integration with Audatex does not allow it to access or download Audatex's parts database, or the source code that underpins the workflows and processes of the platform. He says that the only information that Audatex makes available to PartSmart is the estimation reports (setting out parts required and estimates on part, labour and paint) that the platform generates.
- [122] However, Audatex's response is that this is precisely the problem. Through the uniquely deep integration that PartSmart enjoyed with the Audatex platform (which gave it access to both the AudaBridge and AudaConnect interfaces), Apollo had access in real-time, and on an ongoing basis, to thousands of Audatex's estimation reports, to all amendments to those reports over time, and to the workflow associated with them. Audatex says that each estimation report contains information drawn directly from Audatex's parts database, including parts prices, parts names, parts descriptions, VIN numbers and parts number, and markup and guide numbers. It says that Motomatix (through Apollo) could simply copy this information and paste it into its own competing parts database to develop and improve it.
- [123] Audatex says that Apollo was also able to identify the manner in which Audatex parts are classified or categorised within the Audatex platform, by reference to the vehicle model in question. Audatex says that it would not share its classification data for its parts with a competitor, as this would enable the competitor to better identify parts within the database, source details regarding those parts within in the local market, and replicate the database.
- [124] There is some support in the record for Audatex's contention that, pursuant to the reseller agreement, Apollo obtained a degree of integration with Audatex's system that was significantly deeper than that afforded to other third party service providers, including PartSmart's competitors. As noted above, the termination of the reseller agreement was memorialised in a letter agreement ultimately signed by both Audatex and Apollo dated 11 October 2022. The final signed version of that agreement is attached to Audatex's answering affidavit. However, an earlier version of the agreement, which was dated 7 October 2022 and signed by Apollo (albeit not by Audatex), was relied on by the applicants in their founding affidavit. That version of the agreement contained the following provisions:

124.1 "the depth of each integration between PartSmart and the Audatex Software is extensive in that it may be characterised as being two-way integration" (clause 2.2.8.1);

124.2

“whilst the Audatex Software is from time to time integrated with parts pricing software other than PartSmart, such integrations may be characterised as one-way integrations” (clause 2.2.8.2);

124.3 “in light of the foregoing, and with a view to maintaining the unique functionality afforded to clients by way of the Audatex/ PartSmart integration, Apollo agrees that for as long as PartSmart remains the only parts pricing software with which Audatex effects a two-way integration, Apollo shall make payment to Audatex of a flat monthly fee, the

amount of which shall be negotiated and set out in the New Agreement” (clause 2.2.9); and

124.4 “nothing shall preclude Audatex from enabling one-way integration between the Audatex Software and any parts pricing software other than PartSmart” (clause 2.2.10).

[125] Whilst these provisions were (for reasons that were not explained) deleted from the final letter agreement signed by the parties, their inclusion in a draft signed by Apollo prima facie supports Audatex’s claim that PartSmart did enjoy a uniquely deep level of integration with the Audatex platform.

[126] The applicants argue that the same information provided to PartSmart by Audatex is also provided to other providers who have been retained on the Audatex platform, including its rivals [Competitor Names]. However, it is not evident whether the deeper level of integration enjoyed by PartSmart provided it with greater access to confidential information than these other service providers. And, of course, unlike PartSmart, those other providers are not associated with a direct competitor of Audatex.

Audatex’s previous course of conduct

[127] The applicants argue that another indicator of the contrived nature of Audatex’s confidentiality concern is that it was raised for the first time in Audatex’s answering affidavit. They say that Audatex knew about the relationship between Apollo and Motomatix, and the fact that Motomatix has acquired a licence to GT Motive, as far back as August 2022; and that Audatex had various discussions during September and October 2022 about their future commercial relationship precisely because Motomatix had acquired a licence to GT Motive. The applicants say that Audatex did not, in any of those exchanges, raise any concern about Apollo or Motomatix having access to Audatex’s confidential information by virtue of PartSmart’s access to the Audatex platform.

[128] The applicants rely in particular in this regard on the terms of the letter agreement between the parties dated 11 October 2022. As set out above, it was recorded in that letter that, following termination of the reseller agreement with effect from 30 September

2022, Apollo and Audatex would enter into a new agreement, effective 1 October 2022, in terms of which Audatex transferred to Apollo all of Audatex’s obligations to provide PartSmart to PartSmart’s [Number] customers. Clause 2.2.7 then provided that:

“Insofar as clients who utilise the PartSmart software already use same in integration with Audatex’s claims estimation software (“the Audatex Software”), or insofar as a client requests integration of PartSmart with the Audatex Software, Audatex shall be entitled (but not obliged) to charge such client an integration fee per claim, or otherwise as Audatex considers appropriate”.

- [129] The applicants contend, with reference to this clause, that it was expressly stated and confirmed by Audatex’s representatives that, despite the termination of the reseller agreement, PartSmart’s customers would continue to be able to use PartSmart, without interruption and, by implication, that PartSmart would continue to have access to the Audatex platform via the PartSmart-Audatex integration.
- [130] Audatex says in response that, while it was aware in August-September 2023 that there was a connection between Apollo and Motomatix (including that Mr Moodley was involved in both companies), it was not aware at the time that Motomatix was a wholly-owned subsidiary of Apollo; of the level of integration between these two firms; or that employees of Apollo who Audatex had shared technical details with over many years (including Mr Van der Merwe) would similarly be involved in technical aspects of the GT Motive product.
- [131] Audatex says it only became aware of all of these facts after it received an email request from Motomatix itself on 16 January 2023 for information from Audatex’s parts database. In that email, one Phil Van Zyl, from a Motomatix email address, requested Audatex to provide an “updated Glass Identification Listing”. Mr Van Zyl followed up on that email on 16 January 2023 and then, on 24 January 2023, the same request was subsequently sent to Audatex from [Customer B]. The same Mr Van Zyl is referred to in the applicants’ replying affidavit as a Technical Specialist employed by Apollo.
- [132] Audatex claims that this information, if provided, would entail a file containing the make, model, guide number and part price of the series of products in question. It says that even Apollo was only supposed to receive the parts details for an actual completed repair estimation, rather than underlying database information; and that there was no basis whatsoever for Motomatix, a direct competitor, to seek this information.
- [133] Audatex says that it was immediately alarmed by the apparently close relationship between Apollo and Motomatix, and therefore decided that, as of 31 March 2023, it would no longer grant Apollo access to the Audatex system.
- [134] The applicants’ response to this is that the glass listing was requested to update PartSmart’s [Customer B] and [Customer C] integration so that, when an estimation report listed replacement glass products, the prices would be set to nil, requiring repairers and suppliers to quote for replacement. They say that [Customer B] and [Customer C] had requested this because they regarded the default glass pricing supplied by the parts manufacturers as uncompetitive.

- [135] However, this response does not explain why the relevant information was ostensibly being sought by Motomatix, not Apollo. Nor does it suggest that Audatex was, or should have been, aware that the information was not being sought for the benefit of Motomatix.
- [136] Of course, the fact that Motomatix was requesting this information by email suggests that it was not readily attainable by Apollo from the Audatex platform. However, it nevertheless seems reasonable to us that Audatex would have been concerned that Motomatix – a direct competitor and subsidiary of its customer Apollo – was requesting proprietary database information from Audatex, especially given that the same Mr Van Zyl is also a Technical Specialist in the employ of Apollo.
- [137] It therefore appears to us, prima facie, that Audatex had a legitimate concern about the risk of its proprietary information being disclosed by Apollo to Motomatix, Audatex's direct competitor.
- [138] There is also no explanation, on the applicants' version, of why, if Audatex was aware in August/September 2022 of all the links between Apollo and Motomatix/ GT Motive that it refers to, it waited until February 2023 to decide to offboard PartSmart.
- [139] In the circumstances, we do not believe that there is a sufficient basis for us to reject, at this stage of the proceedings, the explanation provided by Audatex for its decision to offboard PartSmart.
- [140] The applicants did not dispute that the need to protect proprietary information would constitute a legitimate basis, in terms of section 8(1)(d)(ii), for a dominant firm not to supply services to a customer.
- [141] For the above reasons, we do not believe that the applicants have made out a prima facie case that it was economically feasible for Audatex to continue supplying Apollo services on the integrated basis that it previously enjoyed, given the risk it reasonably apprehended that PartSmart would use its access to the Audatex platform to appropriate confidential information for the benefit of Audatex's direct competitor in South Africa, GT Motive.
- [142] There is a separate question is whether it was necessary, in order to protect Audatex's confidential information, to offboard PartSmart entirely from the Audatex platform, or whether that could have been achieved by affording PartSmart a lesser form of access to the platform at the time. However, this issue was not canvassed on the papers, or advanced in argument by the applicants, and we therefore do not have any basis to find that a less extreme form of relief was available to Audatex when it decided to offboard PartSmart.

[143] Two proposals were raised by the applicants at the hearing. First, the applicants tendered various undertakings on behalf of Apollo and Motomatix, and their respective employees, not to share or use, for the benefit of Motomatix, any confidential information that was accessible to PartSmart on the Audatex platform. Second, the applicants applied to amend their notice of motion to reformulate the relief they sought in paragraph 2 of their notice of motion as follows:

“That the first respondent (“Audatex”) is interdicted and restrained from terminating the access of ‘PartSmart’

(owned and operated by the first applicant) to the “Audatex platform” (as described in the founding affidavit), via its existing AudaConnect accounts: i) [Partsmart Account], ii) [Partsmart Account], iii) [Partsmart Account], iv) [Partsmart Account] and v) [Partsmart Account], and its existing AudaBridge account: vi) [Partsmart Account], with their existing functionality and operability alternatively functionality and operability no less effective or favourable than provided from time to time to any rival of the first applicant (with any changes in functionality or operability being on reasonable notice to the first applicant), pending the conclusion of a hearing into the alleged prohibited practices that are the subject of the applicants’ complaint to the second respondent which is attached to the applicants’ founding affidavit marked “FA1”, alternatively six months from the date of this order, whichever occurs first, and subject to the undertakings and indemnity tendered in the applicants’ affidavit dated 11 April 2023.”

[144] However, given that both of these proposals were made at such a late stage, Audatex did not have an opportunity to respond to them. Audatex also correctly pointed out that it would have no means to monitor compliance with the undertakings. As regards the revised relief, the applicants confirmed in argument that the effect of the proposed amendment would not be to limit in any material way the current access that PartSmart enjoys to the Audatex platform, but simply to specify it in more detail. The revised relief therefore would not have taken the matter any further. In addition, Audatex disputed that certain of the account information contained in the revised relief was inaccurate. For all these reasons, we decided to decline the application to amend.

SECTION 8(1)(d)(ii) – ANTI-COMPETITIVE EFFECTS

[145] As discussed above, it is necessary under both section 8(1)(d)(ii) and section 8(1)(c) to demonstrate that the impugned conduct has an anti- competitive effect even if it meets the other requirements of those sections.

[146] In their papers, the applicants contended that the offboarding of PartSmart would have anti-competitive effects relating to both Apollo and Motomatix. However, in their heads of argument, and in their oral argument, the applicants pressed only the former. We will therefore deal primarily with the market in which PartSmart operates, but will also make some brief comments in relation to Motomatix.

The parts procurement market

- [147] As discussed above, the applicants' position at the hearing – consistent with Audatex's position and with our prima facie findings – was that PartSmart competes in a market for the provision of parts procurement services together with other parts procurement service providers such as [Competitor Names] (but not with Audatex).
- [148] We have assessed whether there is prima facie evidence that the offboarding of PartSmart will impact on its ability to compete for the [Number] customers on which the applicants' application is based, and we have found that there is insufficient evidence for such a finding.
- [149] The applicants make a passing allegation in their founding affidavit that Audatex informed a potential customer of PartSmart, [Customer Name], that it should "reconsider" dealing with Apollo because PartSmart's integration to the Audatex system would shortly be disabled. However, the applicants do not disclose whether or not PartSmart in fact subsequently acquired [Customer Name] as a customer, and for what

reasons.

- [150] Audatex furthermore denies that has promoted any parts procurement provider over another because it has no incentive to do so. It says that it has simply indicated, to insurers who enquire, which parts procurement service providers are integrated with its platform and which are not.
- [151] Insofar as other potential insurance customers are concerned, there is no evidence at all in the papers regarding the extent to which they would be willing to deal with PartSmart if it is not integrated with the Audatex platform.
- [152] However, even if Audatex's conduct were to have an exclusionary effect on PartSmart, the applicants must still show that such conduct has an anti- competitive effect in the parts procurement market.
- [153] We note that the applicants' theory of harm in this regard is not a typical case of vertical leveraging or foreclosure, because they do not dispute, and do not adduce any evidence to controvert, Audatex's contention that it is not an actual or potential competitor in the parts procurement market, and accordingly has no obvious incentive to foreclose competition in that market. The applicants also do not advance the standard theory of harm that Audatex's conduct is creating, protecting or extending any market power for Audatex in the parts procurement market. The standard test for anti-competitive effects referred to in Computicket (would the dominant firm's conduct "strengthen [its] position to the extent that competitive rivalry is significantly impeded or is likely to be so impeded"?) [32] is therefore not applicable to the applicants' theory of harm.[33]

- [154] In these circumstances, the applicants' theory of harm must be that Audatex is, by its conduct, "incidentally" causing anti-competitive effects in the parts procurement market, even though it is not itself an actual or potential competitor in that market, and despite the absence of any theory or evidence as to how Audatex will derive any benefit in the parts procurement market from its conduct.
- [155] Assuming that such a theory of harm is available under section 8(1) of the Act (which it is not necessary or appropriate for us to determine in this application),[34] the absence of any obvious incentive to foreclose is still a significant factor in assessing the likelihood of anti-competitive effects in the relevant market.
- [156] This is particularly so where Audatex has provided what we have prima facie found to be a legitimate reason for its conduct, namely the protection of its confidential information from a direct competitor.
- [157] In addition, the applicants have not adduced any evidence regarding the nature and dynamics of competition in the parts procurement market. Even if Audatex's conduct did have an exclusionary impact on PartSmart, the available evidence is that there are, on the applicants' version, at least three other significant competitors in the market ([Competitor Names]) and Audatex also refers to [Competitor Names]. We know nothing about the competitive strengths and weaknesses of PartSmart relative to these different players or, in particular, what the exclusion of PartSmart would have on the market power of these other players.
- [158] We also note in this regard that, following the termination of the reseller agreement between Apollo and Audatex, Audatex integrated three of PartSmart's rivals ([Competitor Names]) onto its platform. The fact that these players were regarded as significant competitors prior to their onboarding by Audatex raises further questions about the importance to suppliers in the parts procurement market of being integrated on the Audatex platform. Furthermore, there are now three alternatives to PartSmart on the Audatex platform, whereas previously PartSmart enjoyed an exclusive competitive advantage in this regard.
- [159] Finally, we have had regard to the applicants' allegations, supported by Mr [X] of [Customer B], that the offboarding of PartSmart would cause prejudice to insurers and to policyholders. However, those assertions are all made in conclusory terms, and no explanation has been provided as to how the alleged anti-competitive effect would come about in the circumstances referred to above. We also note that Mr [X]'s affidavit does not make any reference to the development of the "black box" solution referred to in Mr [Y]'s email of 7 March 2023 and elaborated upon in Audatex's answering affidavit.
- [160] In the circumstances, we do not believe we have a sufficient evidential basis to make a prima facie finding that Audatex's conduct would result in an anti-competitive effect in the parts procurement market.

[161] We come to this conclusion cognisant of the requirement to bring a transformative and context-specific approach to abuse of dominance complaints such as those at issue in this case. In this case, however, the theory of harm advanced by the applicants is (as explained above) not a typical one of leveraging, and, after careful consideration, we have come to the conclusion that the available evidence is insufficient to reach a prima facie finding of anti-competitive effects in the parts procurement market, or that the transformative objectives of the Act would be undermined if interim relief is not granted.

The estimation market

[162] Insofar as the estimation market is concerned, a theory of horizontal foreclosure is available to the applicants. In addition, the evidence suggests that Motomatix/ GT Motive may be a potentially significant entrant into the South African estimation

market, and an increasingly competitive threat to Audatex's incumbent position going forward. However, this foreclosure theory

has not been pursued with any vigour by the applicants. This is perhaps because there is a complete dearth of any evidence as to how harm to PartSmart in the parts procurement market would, indirectly, result in harm to the competitive position of Motomatix in the estimation market.

[163] Two arguments are hinted at in the applicants' papers. The first is that PartSmart's insurance customers are unlikely to use PartSmart's offering even if integrated via the GT Motive platform if their recent experience of using PartSmart is that it is no longer operable. The second is that harm to PartSmart will inhibit the ability of Apollo to invest in the GT Motive platform through Motomatix.

[164] However, the applicants do not provide any evidence in support of the first argument, and it is inconsistent with the conduct of PartSmart's [Number] customers, as discussed above. The applicants also do not explain why GT Motive would not be able to integrate with other providers of parts procurement services such as [Competitor Names] if it so wishes.

[165] As regards the latter argument, the applicants raised this for the first time in their replying agreement, and again only in conclusory terms. They provided no evidence regarding the growth plans or funding requirements of Motomatix; the extent to which Motomatix is reliant

on Apollo for those requirements; or the percentage contribution of PartSmart to the revenues of Apollo. The applicants do not state whether Apollo has any businesses other than PartSmart, or who the shareholders of Apollo are. All that is stated is that Apollo and Motomatix are South African owned, and are Level 4 B-BBEE contributors.[35]

- [166] Audatex also alleges that there are various other players in the South African market, namely [Competitor Names]. We again do not know anything about the offerings of these players, or the nature and extent of their competitive relationship with Audatex and GT Motive.
- [167] Having regard to the above, we find that the applicants have not made out a prima facie case of anti-competitive effects in either the parts procurement market or the estimation market under section 8(d)(ii) of the Act.
- [168] In the light of this finding, we do not need to consider whether Audatex has made out an efficiency defence for its conduct. We note, however, that Audatex's concerns regarding the protection of its proprietary information may be cognisable as such a defence if we are incorrect in assessing it under the heading of economic feasibility in relation to section 8(1)(d)(ii) of the Act.
- [169] For all the reasons set out above, we conclude that the applicants have not established a prima facie contravention of section 8(1)(d)(ii) of the Act.

SECTION 8(1)(c) OF THE ACT

- [170] The above findings are also dispositive, in our view, of the applicants' alternative claim under section 8(1)(c) of the Act. We do not believe that the applicants have made out a prima facie case that Audatex's conduct is exclusionary (i.e., that it will impede or prevent PartSmart from participating in, or expanding within, the parts procurement market), or that it has had an anti-competitive effect in the parts procurement market or in the estimation market.
- [171] A difficult question is where, in the assessment of section 8(1)(c), it is most appropriate to locate the consideration of Audatex's justification relating to the protection of confidential information. However, the applicants did not dispute that, if this justification is made out, it would be cognisable under section 8(1)(c) as it is under section 8(1)(d)(ii) of the Act. It is therefore unnecessary, and inappropriate in the context of the current application, to make any further determination in this regard.

HARM AND BALANCE OF CONVENIENCE

- [172] The Tribunal has previously stated that it would be reluctant to grant interim relief in circumstances where a prohibited practice has not been made out on a prima facie basis. [36] It any event follows from what we have said above that we do not believe that the refusal of interim relief in this case will result in serious or irreparable harm to the competitive position of PartSmart or Motomatix, or that the balance of convenience warrants the grant of interim relief.
- [173] As discussed above, we are required to consider whether there are "clear, non-speculative and uncontroversial facts" that are relevant to the assessment of these factors, and to take a "robust approach" on the evidence before us.[37]

[174] The “serious or irreparable damage” that is relevant to the enquiry under section 49C is damage to the competitive position of the applicant. Likewise, the prejudice relevant to the assessment of the balance of convenience is prejudice to the respective competitive positions of the parties in the relevant market(s).[38]

[175] We do not believe that the applicants have made out a case that the offboarding of PartSmart from the Audatex platform will cause serious or irreparable damage either to Apollo or to Motomatix.

[176] As regards Apollo, the evidence suggests that all [Number] of PartSmart’s existing customers are likely to remain so, either on the Motomatix platform or by way of the alternative solutions

being developed by the relevant insurers and Audatex. The fact that the alternative solutions have involved development cost on the part of the insurers, and that certain technical difficulties are still being addressed, does not represent harm to the competitive position of Apollo. The evidence does not suggest that these challenges have dissuaded PartSmart’s customers from continuing to use it – quite the contrary.

[177] The applicants also have not made out any case that Apollo’s ability to compete for new customers will be seriously or irreparably damaged by its removal from the Audatex platform. The applicants did not put up any evidence that they have in fact lost, or will lose, any potential customers if they are not integrated on the Audatex platform. It is also relevant in this regard that both parties regard [Competitor Names] as effective competitors in the parts procurement market notwithstanding that they have only recently been onboarded onto the Audatex platform.

[178] As regards Motomatix, the applicants do not make out any case that its competitive position in the estimation market will be seriously or irreparably harmed by the offboarding of PartSmart. The only arguments advanced by the applicants on this score are that customers might be dissuaded from using PartSmart on the GT Motive platform, and that less revenue will be available from Apollo to fund the growth of the GT Motive platform in South Africa.

[179] However, the available evidence is inconsistent with the former argument, and the applicants do not explain why GT Motive would not be able to integrate with other providers of parts procurement services such as [Competitor Names] if it so wishes. As regards the latter argument, the applicants raised this for the first time in their replying agreement, and again only in conclusory terms. The applicants did not put up any evidence regarding the impact that the offboarding of PartSmart is likely to have on the revenues of Apollo, or regarding the knock-on effect, if any, that would have on the growth plans of GT Motive. This is to be contrasted with eMedia, where the applicants put up considerable evidence on the direct revenue impact of the exclusionary conduct in that case, and on the indirect effect that would have on the ability of the applicant’s platform to compete with that of the dominant firm.

- [180] The absence of evidence of serious or irreparable damage to Apollo or Motomatix is also relevant to our assessment of the balance of convenience. On the other side of the scale is what we have found to be prima facie credible evidence that, if PartSmart retains access to the Audatex platform, that may be used to appropriate confidential information of Audatex for the benefit of Motomatix's competing GT Motive platform. Any such springboarding would clearly be detrimental to Audatex's competitive position in the estimation market for the reasons explained by Audatex.
- [181] As noted above, the applicants tendered various undertakings at the hearing on behalf of Apollo and Motomatix not to share or use, for the benefit of Motomatix, any confidential information that was accessible to PartSmart on the Audatex platform. However, as Audatex pointed out, it would have no means to monitor and enforce compliance with these undertakings.
- [182] The applicants also applied at the hearing to amend their relief in the manner discussed in paragraph 143 above. However, the applicants confirmed in argument that the effect of the proposed amendment would not be to limit in any material way the current access that PartSmart enjoys to the Audatex platform, but simply to specify it in more detail. The revised relief therefore would not have taken the matter any further.
- [183] We have also considered the position of insurers and end-customers in our assessment of the balance of convenience. As discussed above, the evidence suggests that PartSmart's insurer customers may have preferred for it to remain integrated with the Audatex platform. However, [Customer A] has already moved to the GT Motive platform, whilst [Customer B] and [Customer C] are already far advanced in developing alternative solutions with Audatex that will allow them to retain the benefits of both Audatex and PartSmart in their claims processing operations. In the circumstances, it does not appear to us that the grant of interim relief at this stage will prevent material prejudice to such insurers or end-customers. There is no non-speculative evidence that the alternatives in question will result in end- customers paying higher insurance premiums or otherwise being prejudiced as a result of the offboarding of PartSmart.
- [184] In all the circumstances, we do not believe that the considerations of irreparable or serious harm and balance of convenience, weighed with the weak evidence of a prohibited practice by Audatex, warrant the grant of the interim relief sought by the applicants in this application.

ORDER

- [185] For the above reasons, we dismissed the applicants' application for interim relief.
- [186] We did not make any order for the payment of any costs. We do not believe we have any power to order costs in interim relief proceedings such as these, nor would we regard it as appropriate to do so in this case given that the applicants' complaint is, in our view, bona fide, not frivolous, and its merits have yet to be finally determined.[39]

Date: 08 May 2023

Presiding Member Mr Jerome Wilson

Concurring: Ms Mondo Mazwai and Professor Liberty Mncube

Tribunal case managers: Matshidiso Tseki and Sinethemba Mbeki

For the Applicant: Adv

Robin Pearse SC and Adv Luke Kelly

Instructed by Dingley Marshall Lewin Attorneys.

For the First Respondent: Adv Alfred Cockrell SC and Adv Shannon Quinn instructed by Werksmans Attorneys. For the Second Respondent: Ms Betty Mkatshwa

- [1] The applicants also alleged contraventions of various other sections of the Act, but persisted at the hearing only in their complaints under sections 8(1)(d)(ii) and section 8(1)(c) of the Act.
- [2] Webster v Mitchell 1948 (1) SA 1168 (W) at 1189.
- [3] Gool v Minister of Justice and Another 1955 (2) SA 682 (C) at 688E-F.
- [4] This approach was recently confirmed by the Constitutional Court in Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and others (Case No. CCT44/22), 23 December 2022, at paras 247-248 and 253.
- [5] York Timbers Ltd v SA Forestry Company Ltd (15/IR/Feb01) [2001] ZACT 19 (9 May 2001) at paras 64-66.
- [6] Natal Wholesale Chemists v Astra Pharmaceuticals and others [2001] ZACT 7 (12 March 2001) at para 34.
- [7] Business Connexion (Pty) Ltd v Vexall (Pty) Ltd and Another (182/CAC/Mar20)
- [2020] ZACAC 4 (15 July 2020).
- [8] eMedia Investments (Pty) Ltd v Multichoice (Pty) Ltd and another (201/CAC/JUN22) [2022] ZACAC 9; [2022] 2 CPLR 23 (CAC) (1 August 2022).
- [9] BCX, supra, at paras 17-18.
- [10] BCX, supra, at paras 20-22.
- [11] eMedia, supra, at paras 80-81.
- [12] eMedia, supra, at paras 82-83.

- [13] Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and another (CCT 31/20) [2021] ZACC 35 (15 October 2021) at paras 3 and 7, quoted in eMedia, supra, at para 87.
- [14] eMedia, supra, at para 84.
- [15] Section 7 states that “A firm is dominant in a market if (a) it has at least 45% of that market; (b) it has at least 35%, but less than 45%, of that 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”. “Market power” is defined in section 1(1) as “the power of a firm to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers”.
- [16] Competition Commission and South African Airways (Pty) Ltd (18/CR/Mar01) [2005] ZACT 50; [2020] 2 CPLR 821 (CT) (28 July 2005), at paras 132-137.
- [17] South African Airways (Pty) Ltd v Comair Ltd and Another (92/CAC/MAR10)
- [2011] ZACAC 3; 2012 (1) SA 20 (CAC) (11 April 2011).
- [18] Computicket (Pty) Ltd v Competition Commission of South Africa (170/CAC/Feb19)
- [2019] ZACAC 4 (23 October 2019).
- [19] Uniplate Group (Pty) Ltd v The Competition Commission of South Africa (176/CAC/Jul19) [2020] ZACAC 10 (25 February 2020).
- [20] SAA, supra, at paras 136-137; Computicket, supra, at paras 17 and 25-26.
- [21] Uniplate, supra, at para 23.
- [22] SAA, supra, at para 132; Computicket, supra, at para 16.
- [23] SAA, supra, at para 132; Comair, supra, at para 112; and Computicket, supra, at paras 18-19.
- [24] Computicket, supra, at para 36. See also paras 29-33.
- [25] Computicket, supra, at para 31.
- [26] See eMedia, supra, at paras 111-113.
- [27] GovChat (Pty) Ltd and another v Facebook Inc. and others (Case No. IR165Nov20), 11 March 2021, para 108.
- [28] Prior to Audatex’s conclusion of the reseller agreement with Apollo, it offered a parts procurement solution called Global InPart. However, Audatex explained that this product is no longer in the market locally and that it no longer has a product that competes with PartSmart in South Africa.
- [29] GovChat, supra, at para 113 (quoted with approval in eMedia, supra, at para 114). 8(1)(b)) and a refusal to supply “scarce” goods or resources (section 8(1)(d)(ii)).

- [30] See GovChat, *supra*, at paras 109-110; eMedia, *supra*, at para 114.
- [31] Audatex says that the average vehicle is made up of more than 10,000 parts.
- [32] Computicket, *supra*, at para 36.
- [33] See also Bulb Man, *supra*, at paras 52-56.
- [34] The recent inclusion of the words “or customer” in section 8(1)(d)(ii) is consistent with such an interpretation. However, it may arguably still be necessary to show that the refusal to supply a customer protects or extends the market power of the dominant firm.
- [35] This is to be contrasted with eMedia, where the applicants provided considerable evidence in support of a similar theory of harm.
- [36] See Replication Technology Group (Pty) Ltd v Gallo Africa Ltd (Case No. 92/OR/Sep07) at para 29 (and the cases cited in fn 7).
- [37] eMedia, *supra*, at paras 80-81
- [38] BCX, *supra*, at paras 21-22.
- [39] BCX, *supra*, para 54.

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