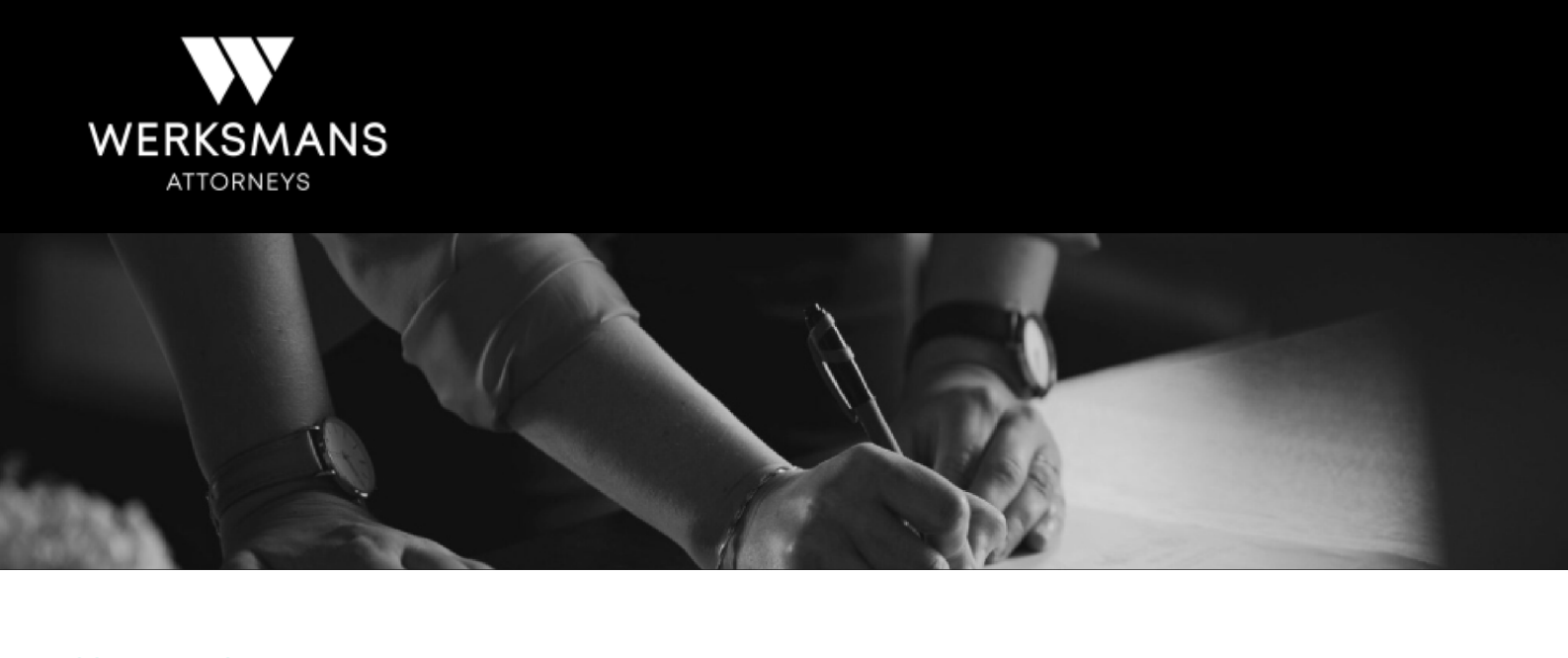




COMPETITION

# Competition Law: Transformation and public interest in abuse of dominance cases

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Recent developments in South African competition law have significantly elevated the role of transformative considerations and public interest objectives. The first crucial development occurred when the Constitutional Court reviewed Mediclinic Southern Africa's proposed acquisition of two private hospitals.<sup>[1]</sup> While public interest considerations have been part of the statutory criteria for mergers since the Competition Act<sup>[2]</sup> was enacted, the Court's strong support for the Act's underlying goals of public interest and transformation<sup>[3]</sup> expanded these considerations to influence all competition law matters beyond merger decisions.

The *Mediclinic* judgment is critical, as South Africa's highest court emphasized that the Competition Act must be interpreted and applied in a manner that promotes the Bill of Rights and gives effect to the Competition Act's socio-economic transformation and public interest objectives. This judicial emphasis provides essential context for understanding how the Competition Tribunal has applied these considerations in recent interim relief decisions. We consider the 2024 *eMedia v MultiChoice*<sup>[4]</sup> decision and contrast it with the decision in *Apollo Studios v Audatex*,<sup>[5]</sup> with a focus on the respondents' respective intellectual property ("IP") related justifications for their conduct, in light of the role that transformation and public interest considerations may play in this regard.<sup>[6]</sup>

## The Cases in Brief

Both the *eMedia* and *Apollo* cases involved allegations of abuse of dominance where an alleged dominant firm's conduct entailed not making available IP and the services derived from that IP and similar investments.<sup>[7]</sup>

In *eMedia*, the dispute centred on restrictive clauses in sports sub-licensing agreements preventing SABC from broadcasting content on eMedia's Openview service. eMedia contended that this was an anti-competitive abuse of MultiChoice's market position. The Tribunal granted interim relief, ordering MultiChoice to lift the restrictions, emphasising the public interest in broad access to sports events of national interest and the need to support the growth of a black-owned, medium-sized competitor.

In *Apollo*, Apollo and its subsidiary, Motomatix, contested Audatex's termination of Apollo's access to Audatex's online claims processing software. Apollo claimed this was an unlawful refusal to supply a scarce service. The Tribunal dismissed the interim relief application, noting the lack of clear, non-speculative evidence of competitive harm to Apollo or its end-customers.

## Contrasting Approaches to Intellectual Property

Both MultiChoice and Audatex presented arguments relating to protecting their investments and proprietary assets:

- MultiChoice argued that the restrictions were essential to safeguard its substantial investment in exclusive sports broadcasting rights, contending that eMedia had not made similar investments and sought to "free-ride" on MultiChoice's investments.
- Audatex justified its termination of Apollo's access to protect its proprietary software information, since Apollo had established a wholly-owned subsidiary which was a direct competitor.<sup>[8]</sup>

The Tribunal's treatment of these IP-related defences varied. In *eMedia*, despite acknowledging MultiChoice's investment, the Tribunal did not give weight to MultiChoice's justifications that exclusivity was required to protect that investment. Conversely, in *Apollo*, the Tribunal accepted Audatex's concerns about protecting its proprietary software, information and services from a direct competitor.

The key differentiator in outcomes appears to be the Tribunal's assessment of public interest and transformative impact.

- In *eMedia*, the Tribunal placed significant and explicit weight on the public interest and transformative considerations. It found *prima facie* public harm related to denying a substantial number of SABC viewers on Openview access to sports events of national interest and a negative impact on eMedia's ability to grow as a black-owned, medium-sized competitor. These factors were central to its assessment of MultiChoice's investment justifications and free-riding concerns but also played a significant role in the Tribunal's findings regarding likely harm and its decision on the balance of convenience.
- In *Apollo*, the Tribunal found "no non-speculative evidence" that the termination of access would result in competitive harm to Apollo or end-customers paying higher premiums or otherwise being prejudiced. It also accepted Audatex's justification for its conduct based on its IP and investment justifications and concerns regarding free-riding. The potential for Audatex's competitor to gain access to IP and proprietary information compromised Audatex's IP and investment. The need for competition law to have regard for the ability of a black-owned SME competitor to compete did not feature as strongly – or was not accepted – by the Tribunal as being *prima facie* evident in the *Apollo* context.

## Legal standard for compulsory dealing

The focus of this article is on the IP-related commercial justifications. However, to appreciate the implications of the role of transformation and other public interest factors in abuse of dominance cases, it is useful to briefly address the standard requirements for an abuse of dominance allegation involving a refusal to deal with a competitor. South African competition law is influenced by competition law principles applicable in the European Community. The European decision in *Bronner*<sup>[9]</sup> set out a high threshold, requiring (i) the product or service to which access was sought must be indispensable to the competitor's ability to compete, (ii) the refusal eliminates effective competition, and (iii) there is no objective justification for the refusal. These principles were further developed in *Microsoft*,<sup>[10]</sup> where compulsory licensing was imposed due to the lack of a legitimate business rationale for the refusal.

## Balancing effects-based analysis

Since different outcomes are possible depending on whether, or to what extent, transformation and other public interest considerations apply, there is a tension in how to apply these considerations within the framework of traditional competition analysis of abuse of dominance cases. The Tribunal's approach in *eMedia* did not clearly differentiate between public interest and competition issues nor, if it considered them to overlap, how to approach the overall effects-based analysis.<sup>[11]</sup> This introduces uncertainty in decision-making, potentially undermining predictability. Dominant firms may find themselves without a clear legal framework for assessing when exclusivity, investment protection, or content rights will be respected versus when they will be subordinated to public interest goals.

## Implications for businesses

The application of transformative and public interest considerations to abuse of dominance cases raises implications for businesses.

- Compulsory dealing with a competitor may no longer be an exceptional remedy:** The *eMedia* case indicates a shift where commercial justifications, including the protection of IP and other investments, may receive less recognition. This is in contrast to economic and competition law principles, which have recognised that protecting IP and investments incentivises firms to innovate and invest, and that compulsory dealing with competitors would diminish incentives to innovate and invest.<sup>[12]</sup>
- Public interest is now a decisive factor:** The evidentiary burden on the applicant to provide "non-speculative evidence" of competitive harm (in the traditional sense) will be heavily influenced by the potential impact on the public interest and transformative objectives. Arguably, the burden is lower as the Tribunal is more likely to intervene, potentially overriding commercial or IP-based justifications, where conduct by a dominant firm may have a negative impact on consumer access to assets or services of public value or where it hinders access to the economy by black-owned or small and medium-sized firms.

Businesses, particularly those with a substantial market presence, should proactively consider how their strategies align with the Constitutional Court's and Tribunal's interpretation of the Competition Act's transformative goals. Conduct that supports these goals may be viewed more favourably, while conduct with the potential to hinder them is likely to face significant scrutiny. Firms with significant market presence wishing to protect their IP, investments and similar proprietary assets from competitors need to be aware that public interest objectives may override or limit what would otherwise seem to be objectively justifiable, commercial reasons. eMedia indicates that this may particularly be the case where such firms' products can be considered to be of public value or "national interest",<sup>[13]</sup> or where its competitors are small or medium-sized and/or black-owned competitors.

However, until the Tribunal and Competition Appeal Court provide clear guidance, the way in which these considerations must be assessed within, and consistent with, the competition law framework will be subject to some uncertainty. While the constitutional imperative of transformation is non-negotiable, its integration into competition law must be balanced with the need for clear, principled tests that provide guidance to firms and legal predictability in enforcement.

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

[2] Act No 98 of 1998

[3] The Court thereof, among other things, the statements in the preamble of the Competition Act that “*The people of South Africa recognise –*

- [t]hat... apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices and unjust restrictions on full and free participation in the economy by all South Africans; and*
- [t]hat efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development will benefit all South Africans”.*

*in order to “provide all South Africans equal opportunity to participate fairly in the national economy” and “regulate the transfer of economic ownership in keeping with the public interest”*”(Court’s emphasis)

[4] *eMedia Investments Proprietary Limited and another v MultiChoice SA Holdings Proprietary Limited and others* (IR107Oct23; SUP160Dec23) [2024] ZACT 40 (15 April 2024)

[5] *Apollo Studios (Pty) Ltd and Motomatix (Pty) Ltd v Audatex SA (Pty) Ltd and the Competition Commission* (IR198Mar23) [2023] ZACT 23 (8 May 2023)

[6] It bears noting that the *eMedia* decision deals with several complex factual and legal issues, such as market definition, dominance, the scope and meaning of provisions in the Competition Act that prohibit certain conduct by dominant firms. These various matters are beyond the scope of this article, which focuses on investment and IP-related justifications.

[7] In *eMedia*, the Tribunal stated that it did not consider the case as a refusal to supply. This may not be correct, but the Tribunal in any event noted that the considerations were the same as a refusal to supply case.

[8] The respondents in both cases also challenged whether their conduct gave rise to competitive harm, which issues are outside the scope of this article.

[9] *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG and Others*, Case No C-7/97, ECJ (26 November 1998), ECR I-7791 (“*Bronner*”).

[10] *Microsoft Corp. v Commission of the European Communities*, Case No T-201/04, CFI (17 September 2007), ECR II-3601

[11] For example, the Tribunal appears to have accepted potential harm to a public value (access to sports of national interest) and the potential to hamper the growth of a competitor (eMedia) as a proxy for sufficient harm to competition to warrant interim relief, with no effects-based interrogation of market-wide exclusionary effects, short-versus long-term consumer impact, implications on future investment or any of the Bronner considerations, such as whether access to sports content is indispensable for eMedia to compete. The Tribunal recognised that eMedia had grown and expanded its market share but the Tribunal briefly stated, without discussion, that eMedia may have been able to grow its market share more if it had access to the sports content.

[12] See, for example, the European Union’s draft *Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings*, para 96 and 97. While the strict content of the seminal *Bronner* case in the EU have been watered down in subsequent EU cases (which it is not necessary to address for the purpose of this article), generally, dominant firms retain the freedom to choose their trading partners and competition law intervenes in such decisions only in exceptional cases.

[13] *eMedia*, paras 67 and 68



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