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Winning a battle, but losing the war? Interim relief granted……

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On 25 March 2021, the Competition Tribunal ("the Tribunal") granted interim relief in favour of GovChat Proprietary Limited ("GovChat") and Hashtag Letstalk Proprietary Limited ("Hashtag Letstalk") against WhatsApp Inc. ("WhatsApp") and Facebook Inc. ("Facebook") thereby interdicting the removal of GovChat's WhatsApp Business Account ("WABA") pending the outcome of GovChat's complaint against WhatsApp to the Competition Commission ("the Commission") or for a six month period (whichever occurs first) ("interim period").

The interim relief order provides that for the duration of the interim period, WhatsApp and Facebook must not remove the WABA from the WhatsApp platform or do anything to undermine GovChat's relationships with its clients that would have the same effect as removing GovChat. Furthermore, the interim order also provides that GovChat may not add any new clients or users to the WABA and must not launch, adopt or sell any new use-cases to existing users.

The origins of the order emanate from Facebook's threat to "*off-board*" the WABA of GovChat from the WhatsApp Business API[1] – thereby immediately extinguishing GovChat's ability to render services to government and citizens during the Covid-19 pandemic in South Africa, and effectively forcing GovChat out of business. The GovChat platform was conceptualised and developed as a way for South Africans to engage with government directly in an attempt to ensure that, amongst others, their rights, including access to adequate health care and social security, are protected.

It was this threat of off-boarding which caused GovChat to launch the interim relief application in terms of section 49C of the Competition Act 89 of 1998 ("the Act") to maintain the status quo by temporarily restraining Facebook and WhatsApp from terminating GovChat's access to the WABA.

The core of the arguments put forward by WhatsApp was that it has the right and ability to enforce contractual terms that govern the use of its paid business messaging platform – the WhatsApp business API. As such, where a user of the WhatsApp business API breaches those terms, WhatsApp is at liberty to remove such user.

As with the current case, WhatsApp alleges that GovChat and Hashtag Letstalk are blatantly breaching the terms of use in pursuit of narrow commercial interests and seek interim relief from the Tribunal permitting them to continue doing so. Also, that GovChat seeks to justify this relief on purported competition law grounds, but the dispute between the parties is simply a commercial one which does not raise any legitimate competition law considerations. As such, the dispute is before the wrong forum.

In motivating why GovChat's WABA should not be removed, GovChat argued that such "*off-boarding*" will end GovChat's ability to render services to the government and citizens. As a result, GovChat will be forced to exit the market having spent in excess of R50 million developing the technology behind the GovChat platform.

As stated above, the Tribunal granted interim relief in favour of GovChat wherein it concluded that GovChat satisfied the elements for interim relief, namely that GovChat demonstrated a *prima facie* right to interim relief, market dominance,

irreparable harm and balance of convenience. This, in effect, can be seen as a temporary win for GovChat as WhatsApp is prohibited from removing GovChat's WABA for the subsistence of the interim period.

Considering the above there are two crux issues at hand, the matter is either contractual or competition law in nature.

In the first instance, WhatsApp and GovChat agreed on contractual terms that govern the use of the paid messaging platform. If GovChat breaches those terms, WhatsApp can remove GovChat from using the platform. As such, this matter has nothing to do with competition law. The dispute is purely contractual in nature.

In the second instance, WhatsApp's proposed (and threatened) conduct of off-boarding the GovChat platform and thereby foreclosing GovChat from the market may pose competition concerns such as, *inter alia*, engaging in an exclusionary act in terms of section 8(1)(c) of the Act.

The final battle awaits.

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[1] API stands for application programming interface.



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