OUTCOME OF COMPETITION TRIBUNAL HEARING 07082012

(Following is a guideline for journalists. The information can be used but please do not quote Nandi Mokoena or the Tribunal)

Competition Tribunal imposes R449 million penalty on Telkom for 'bullying' its competitors

The Competition Tribunal today imposed a penalty of R449 000 000.00 on Telkom SA Limited for abusing its dominance in the telecommunications market between 1999 and 2004, a period in which Telkom was a monopoly provider of telecommunications facilities. The Tribunal concluded that *Telkom leveraged its upstream monopoly in the facilities market to advantage its own subsidiary in the competitive value added network market...Telkom's conduct caused harm to both competitors and consumers alike and impeded competition and innovation in the dynamic VANS market.* Half of the penalty is to be paid within 6 months of the Tribunal's decision while the balance is payable within 12 months thereafter.

The Competition Commission referred this matter to the Tribunal on 24 February 2004 after it had received a complaint from the South African Vans Association (SAVA) and 20 other internet service providers (ISP's). Telkom challenged this referral on various fronts, including jurisdictional grounds, in the High Court. After five years of litigation the Supreme Court of Appeal, in November 2009, rejected the jurisdictional point and referred the matter back to the Tribunal for a hearing. The Tribunals hearing took place over several days from October 2011 to February 2012 with 12 factual and expert witnesses presenting evidence on behalf of Telkom and the Commission.

In its complaint referral the Commission alleged that Telkom refused to supply essential access facilities to independent value added network service (VANS) providers, induced their customers not to deal with them, charged their customers excessive prices for access services and discriminated in favour of its own customers by giving them a discount on distance related charges which it did not advance to customers of the independent VANS providers. Through this conduct, the Commission alleged, Telkom sought to expand its exclusivity to services over which, in law, it did not enjoy a monopoly. Moreover, through the use of these contractual terms, Telkom sought to bypass the regulator, which was entrusted with enforcement of the Telecommunications Act, in order to obtain for itself the additional protection of private law remedies.

Telkom did not deny that it acted as alleged by the Commission but argued that it was justified in doing so because, by providing certain value added services, the VANS providers were engaged in illegal conduct. Telkom alleged that the VANS operators had adopted a business model that effectively trespassed on Telkom's exclusivity rights as set out in the Telecommunications Act and in its licence. During the hearing Telkom conceded that its illegality defence would fail if the Tribunal were to find that Telkom's interpretation of the regulatory framework – that is the extent of the services over which it had a legal monopoly – was incorrect. Telkom also conceded that the facilities bought by VANS from Telkom amounted to 'essential facilities' as contemplated in the Competition Act.

The Tribunal found that Telkom had indeed refused to supply essential facilities to independent VANS providers and induced their customers not to deal with them, conduct which resulted in a substantial lessening of competition in the VANS market. The Tribunal stated that *instead of competing on the merits, Telkom had devised a strategy claiming that the independent VANS were conducting business illegally. Through this strategy, which involved the freezing of its competitors' networks, Telkom impeded the growth of its competitors and retarded innovation in the market place.* A case in point was Omnilink's customer, the Nedbank Group, which experienced huge inconvenience as a result of the freeze and bandwidth constraints Omnilink faced from Telkom.

On the extent of the services over which Telkom had a legal monopoly, the Tribunal concluded that this issue had been decided against Telkom by both SATRA and ICASA and had never been overturned on the merits. Moreover, evidence showed that Telkom's own regulatory department held the view that Telkom's interpretation of the law was challengeable. Furthermore, Telkom had chosen to respond to the claimed illegal conduct of the VANS providers in a selective and inconsistent way. *While Telkom bullied its downstream competitors into line, it exploited, to its advantage, the very alleged grey area in the regulatory framework by integrating voice and data and bypassing the regulator's requirement of separate accounting for PSTS and VANS services*, the Tribunal stated in its judgment. Accordingly the Tribunal found no merit in Telkom's illegality defence.

The Tribunal concluded that the Commission did not present sufficient evidence to prove excessive pricing or price discrimination, as contemplated in sections 8(a) and 9(1) respectively of the Competition Act.

In calculating the penalty, the Tribunal drew on penalty guidelines set by the Competition Appeal Court in an earlier case involving Southern Pipeline Contractors. In terms of the Competition Act, administrative penalties are paid into the national revenue fund.

The full judgment is available on the Tribunal's website: http://www.comptrib.co.za.

Issued By:
Nandi Mokoena
PR Consultant: Competition Tribunal
Cell: +27 (0) 82 399 1328
E-mail: NandisileM@live.co.za

On Behalf Of:
Lerato Motaung
Registrar: Competition Tribunal
Tel: (012) 394 3355
Cell: +27 (0) 82 556 3221
E-Mail: LeratoM@comptrib.co.za