



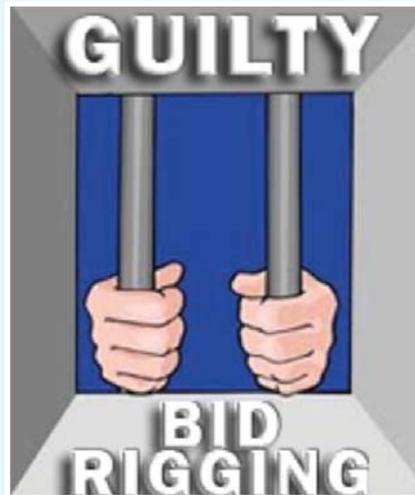
COMBATING BID-RIGGING IN PUBLIC PROCUREMENT

The Competition Act of Botswana defines bid-rigging as a horizontal agreement between enterprises whereby, in response to a request for bids, one of the parties to the agreement agrees not to submit a bid; or the parties to the agreement agree upon the price, terms and conditions of a bid to be submitted. However the Act says an agreement does not amount to bid-rigging where the person requesting the bids is informed of the terms of the agreement before the time a bid is made.

Bid rigging (also known as collusive tendering) is fraud. While the public or the bidding entity thinks bidders are competing against each other, they are in fact conniving and pushing for the highest prices. Tax payers, consumers and Governments therefore end up enduring the economic harm of inflated tender pricing.

Bid-rigging has the potential to cause the greatest harm in public procurement. This is because public procurement is usually a major driver of many economies, and is es-

pecially so in Botswana where Government is a major economic player.



(Source: Foreclosuregate.prosepoint.com)

SIGNS OF BID-RIGGING

Bid-rigging is done in secrecy, and is therefore not easy to detect. However there are some tell-tale signs that procuring entities should look out for that may indicate bid-rigging. The following are signs of possible bid-rigging:

Suspicious Pricing: Prices may be too low or too high to make sense in relation to production costs. Prices may be different from previous similar procurements though unrelated to the prevailing economic conditions, or prices may change when a new bidder who has not bid in the past, submits a bid.

Similarity in Bid Documents: Companies engaged in bid-rigging may work together to prepare a tender document. Look for things like the same wording, the same alterations, the same amounts, the same typos, the same postmarks, the same type of font, the same type of paper in a document.

Suspicious Bidding Patterns: Bid-riggers may devise a scheme that reveals itself as a pattern over time. For example the same bidder may always win tenders of a certain type or size, or in a particular geographic area. A bidder may keep bidding but never win, or another may always win whenever they bid.

Signs that bidders have communicated with each other: There may be indications that a bidder has knowledge of another's pricing, or has non-public information which can only be known by talking to the bidder. It can also be inferred that bidders are communicating if one picks or submits tender documents on behalf of another.

Signs that bidders have an opportunity to communicate with each other: Communication can occur by various means e.g. phone, email, letters or fax. More often face to face meetings are preferred as they leave no trail. Such meetings mostly occur during trade association meetings or other social or professional events.

Signs that there is Relationship after a Bid Announcement: The relationship may be through lucrative sub-contracts, or direct payment to the other bidders.

WHAT TO DO WHEN YOU SUSPECT BID-RIGGING

If you suspect bid-rigging contact the Competition Authority and ask it to investigate the signs detected. Do not inform the bidders or anyone else of your suspicions. It must be noted that finding signs of bid-rigging does not necessarily mean that it is occurring, but it shows that there may be a problem.

(Some material for this article was sourced from the OECD Guidelines for Fighting Bid-Rigging in Public Procurement)

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Media Personnel with CA Staff and Commissioners at the Media Workshop

CA HOSTS MEDIA WORKSHOP ON COMPETITION LAW AND POLICY

The Competition Authority in collaboration with the Press Council of Botswana hosted a Media Workshop on Competition Law and Policy at Mokolodi Conference Centre on 31st July, 2013. The workshop was attended by over 20 participants from Government and private print and electronic media houses.

The workshop was officially opened by the Chairperson of the Technical Committee of the Competition Commission, Mr. Tendekani E. Malebeswa.

In his welcome remarks, he said many businesses and Batswana are aware of the presence of the Competition Commission and the Competition Authority, and that is largely attributable to the supportive role that the media has rendered to the two bodies.

“In the short space that the Competition Commission and the Authority have been set up; competition, fair competition, mergers, dominant firms are some of the words that have been added to our everyday public discourse thanks to the informing role played by the media”, he said.

Mr. Malebeswa said the Commission and the Authority do not expect the media to merely disseminate news about competition, but to review and critically analyse some of the interventions competition agencies make, particularly in view of the benefits to business and the economy. He said the workshop was meant to capacitate the media on competition law and policy and enable them to perform the critical analysis.

For his part, the Chief Executive officer of the Competition Authority, Mr. Thula Kaira, said since the media and competition enforcement institutions both serve the same master, being the public, they are fellow watchdogs.

“The public expectation from both the media and us is reliability of the information we disseminate, which includes contextually correct reporting of investigations and decisions made”, he said.

The CEO said while competition law is a mirror of good business practices, it is also a law that if not properly enforced or implemented, can have grave consequences on the freedom of enterprise, wealth creation and distribution in an economy, as well as long lasting personal consequences for the creators of wealth in the economy. “From our side any statement against any person, no matter how serious, is considered to be an allegation until we carry our own investigation”.

Mr. Kaira said because certain allegations may adversely affect the competitive advantage of a business and its reputation, the Competition Authority always strives to create a balance between disclosure of information and transparency on one hand, and disclosure of information and protection of the rights of business and individuals on the other hand.

The workshop was officially closed by the Chairperson of the Press Council of Botswana, Mr. Tshireletso Motlogelwa, who is also editor of Mmegi newspaper. In his remarks, Mr. Motlogelwa thanked the Authority for organising the workshop. He said the workshop provided a good platform for the Commission and the Authority to closely interact with the media.

He further said such workshops should be held regularly since the media industry suffers high staff turnover which undermines institutional capacity.

Commissioner Wankie Wankie Retires from the Competition Commission

A founding member of the Competition Commission, Mr. Wankie Wankie, has retired from the Competition Commission. His tenure ended in June 2013 after serving in the Commission since 2010. Mr. Wankie sat down for an interview with the Botswana Competition Bulletin:

You are one of the founding members of the Competition Commission. What was it like to be appointed to the Commission when there were so many people who would have wanted to serve in the same position?

It was an honour for me to serve the country as a Competition Commissioner. I have for a long time been involved with consumer issues, first at a grass root level as a consumer activist, having founded an organisation called Botswana Consumer Centre for Research, Advocacy and Orientation, which is now an affiliate of Consumers International. Secondly, I was appointed to the Board of Botswana Bureau of Standards as a council member, and therefore had an opportunity to influence government policy on issues pertaining to consumer protection.

As you may be aware, one of the objectives of standards is to protect consumers through the setting and enforcement of relevant standards aimed at the supply of goods and services, in an environment that takes into account issues of safety, quality and sustainability.

The Competition Commission provided an opportunity for me to continue, in a small way, to advocate for consumer protection, albeit slightly differently now, as we were dealing with issues as to whether consumer issues could be effectively dealt within the rubric of competition law and policy. My background as a trained lawyer also helped, as I was able to adequately appreciate and comprehend the complex legal and economic issues inherent in any competition law policy framework much more quickly.



Commissioner Wankie B. Wankie

Have you always had an interest in Competition Law? If you did when did it develop?

I have always believed that the idea of a perfect market is a utopian concept and an unattainable dream in the absence of measures to ensure that firms behave ethically. My fascination with the workings of the markets was awakened in 1995 when I was doing my LLM at the University of Sheffield in the UK. One of the courses that I did was consumer law. I started then, to have an avid interest in competition

law and consumer protection. Competition and consumer protection law will always impact on each other. That is why in other countries, competition law and consumer protection law are consolidated in one Act.

The Competition Commission and the Authority are now established. What did it take to set up these two bodies?

The challenge for the Commissioners was that we were dealing with a new entity and a new policy framework. This therefore meant that none of us had experience in establishing an en-

Commissioner Wankie Wankie Retires

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tity like the Competition Authority as none had been involved in such a task before.

The issue was compounded by the fact that there was no CEO to guide the process, the Government having left the recruitment of the CEO to the Competition Commission. We were lucky however, because UNCTAD provided the necessary expertise to facilitate the process of setting up the Competition Authority. The Ministry of Trade and Industry (MTI) also helped by seconding staff to the Competition Commission to serve as a Secretariat for the Commission.

Once the Competition Commission was in place we engaged consultants to help craft an appropriate organisational structure, which we then submitted to MTI for approval. The approval of the structure was the necessary trigger for a fast track recruitment drive to start. The Competition Commission was involved in the recruitment of senior management staff who were later delegated to recruit the rest of the staff of the Competition Authority. This was by no means an easy task as all the Commissioners were part time.

What has been your experience as a founding member of the Competition Commission?

My view is that regulatory entities like the Competition Commission should have a higher degree of financial and managerial autonomy to be able to discharge their mandates without any political influence. Government should realise and appreciate the important dual role of the Competition Commission as a board of directors responsible for policy formulation for the guidance of the Competition Authority, and as a quasi-judicial body responsible for the adjudication of competition cases.

This recognition should translate into setting up an appropriate remuneration structure to be able to adequately compensate the Commissioners for their time and expertise to avoid pos-

sible regulatory capture. Adequate resources should also be adequately expended to ensure that Commissioners are adequately trained to effectively discharge their mandate. It would be wrong for the Government to concentrate on the Authority at the expense of the Commission.

Regulatory capture and incompetence on the part of the Competition Commission, which may result from inadequate training and remuneration, would inevitably result in its loss of credibility and efficacy. My view is that more can be done to create an effective, credible and robust Competition Commission in Botswana.

I have a sense that the Government is not doing enough to strategically position the Competition Commission within the broader axis of the regional economies. Adequately capacitating the Competition Commission and hence placing it at the epicentre of the competition law enforcement in the region will be smart move if you consider the interdependence of the regional economies, and our greater dependence on the larger South African economy.

There are some who believe that competition agencies demand total autonomy in order to discharge their mandate. Using your experience what would be your considered view?

Totally independent institutions have the propensity to become uncontrollable, unaccountable monsters. I think the mischief can be cured by enhanced independence, not total independence. The cure lies in coming up with an appropriate governance structure that provides for a greater autonomy as opposed to total autonomy.

During your tenure the Competition Commission did not have a lot of opportunities to preside over competition cases, what would you say to someone who doubts the capability of the Commission to preside over cases?

It is true that there were no opportu-

nities for adjudication of competition cases by the Competition Commission during my tenure. It is equally true that as a result, Competition Commissioners lost out on valuable experience they would have gained from dealing with cases.

The problem is three pronged: firstly, the economy of our country is relatively small to generate many competition cases. Secondly, most of the cases dealt with mergers and acquisitions, which are not cases that the Competition Commission would ordinarily adjudicate unless they have been referred to the Commission by the High Court or by the Competition Authority. Thirdly, in other cases involving abuse of dominance for example, the Competition Commission depended on the results and determinations by the Competition Authority that abuse of dominance was occurring in the market for the Commission to act.

What are your thoughts on Botswana's competition law and policy frameworks?

I think one cannot make an informed judgement on the competition law and policy at this juncture as it is too early for that. However, speaking generally, I think we are on the right track. There are of course bound to be teething problems during this early stage of implementation.

There may be problems of operational paralysis and lethargy, particularly on the part of the Competition Commission, emanating from the way the two institutions are structured. However, this will only become manifest when the Competition Commission begins to adjudicate cases. Statutory monopolies and protectionist Government policies may pose problems of implementation going forward.

Do you have any regrets in your walk with the Competition movement in Botswana?

I have no regrets at all with my association with competition law movement in Botswana. I stand ready to offer my time and experience again in future should I be required to contribute to the process of building a robust and credible competition law and its implementing structures.

MERGER DECISIONS BY THE COMPETITION AUTHORITY JULY TO AUGUST 2013

The Competition Authority made the following Merger Decisions in July and August 2013:

❑ Acquisition Of 40% Issued Share Capital in Master Farmer Feeds (Proprietary) Limited By Ross Africa Limited Held By Associated Investment Development Corporation (AIDC).

The Competition Authority authorised the proposed transaction on grounds that there were no substantial competition concerns that would arise in the poultry industry on account of the acquisition of 40% issued share capital in Master Farmer Feeds by Ross Africa held by AIDC, given the fact that:

- The proposed transaction was not likely to result in substantial lessening of competition, nor endanger the continuity of the service, due to the transaction being an acquisition of additional shares by the majority shareholder; and

- Though the pre and post-merger market shares of Master Farmer Feeds in the frozen processed chicken and livestock feeds markets stood at 41% and 50% respectively, and above the dominance threshold of 25%, the continued existence of competitive constraints that would remain in the relevant markets would ensure that rivalry continued to discipline the commercial behaviour of the merged entity.

- The Authority also considered that the fact that the proposed acquisition gave rise to public interest concerns under section 59(2)(f) of the Competition Act. The targeted shares were owned by a citizen in Master Feeds through AIDC, and would now be taken over by a non-citizen owned enterprise.

Considering the public interest concerns, and pursuant to the provisions of section 55 of the Act, the Authority approved the acquisition of 40% issued share capital in Master Farmer Feeds by Ross Africa Limited with the conditions that:

- Ross Africa and Master Farmer Feeds should look for a citizen partner(s) to purchase some if not all the shares previously held by AIDC; and

- Ross Africa and Master Farmer Feeds should revert to the Competition Authority within 12 months with a status report regarding the progress made in securing a citizen partner.

❑ Acquisition of Majority Shares In Aurecon Africa Ownership Trust (Aurecon Africa) By Aurecon Australia Limited (Aurecon Australia)

The proposed transaction was authorised as the merger assessment showed that there were no substantial competition concerns that would arise in the engineering related consultancy services market, on account of the acquisition of majority shares in Aurecon Africa by Aurecon Australia, given the fact that:

- The proposed transaction was not likely to result in substantial lessening of competition, nor endanger the continuity of the service, due to the absence of geographical overlap in the activities of the merging parties;

- The merged entity did not possess any market dominance, and consequently no threat of abuse of dominant market power was anticipated, post transaction implementation, as defined under section 2 of the Competition Act; and

- No significant negative effect on the public interest in Botswana was identified, in relation to the provisions of section 59 (2).

❑ Merger between Smei Projects (Pty) Ltd, Investec Bank Limited, KDI Mining Solutions (Pty) Ltd and Management of Smei Projects (Pty) Ltd

The Authority authorised the proposed transaction on grounds that there were no substantial competition concerns that arose in the steel fabrication for use in the mining industry in Botswana, given the fact that:

- The proposed transaction was not likely to result in substantial lessening of competition, nor endanger the continuity of service, due to the absence of geographical overlap between the activities of the merging parties in Botswana;

- The implementation of the proposed merger was not expected to result in SMEI Botswana acquiring a dominant position or enhancing any dominant position, since the transaction was not expected to affect the current market structure; and

- No significant negative effect on public interest in Botswana was identified, in relation to the provisions of section 59 (2) of the Act. Rather, it was envisaged that the merger would bring about job creation in the event that the merged entity expands its business in Botswana, in light of the growth opportunities identified by the merging parties.



(Source: en.wikipedia.org)

MERGER DECISIONS BY THE COMPETITION AUTHORITY JULY TO AUGUST 2013

Acquisition of the Entire Issued Share Capital of Lonrho Plc (Lansmore Masa Square Hotel) By FS Africa Limited

The Authority unconditionally approved the proposed merger because the analysis of the facts showed that there were no substantial competition concerns that arose in the hotel facilities market in Botswana, given the fact that:

- The proposed transaction was not likely to result in substantial lessening of competition, nor endanger the continuity of service, due to the absence of geographical overlap between the activities of the merging parties in Botswana;
- The merged entity did not possess any market dominance and consequently no threat of abuse of dominant market position was anticipated, as defined under section 2 of the Competition Act; and
- No significant negative effect on the public interest in Botswana was identified, in relation to the provisions of section 59 (2) of the Act.

Acquisition of 65% Issued Share Capital in TS Chickens (Pty) Ltd T/A Moleps Poultry By One of the Existing Shareholders

The transaction was authorised on grounds that there were no substantial competition concerns that would arise in the market for frozen processed chicken meat on account of the acquisition of 65% issued shares in TS Chicken held by Mr. Gerald J. Saunders, given the fact that:-

- The proposed transaction was not likely to result in substantial lessening of competition, nor endanger the continuity of service, due to the transaction being an acquisition of additional shares by an existing shareholder;
- The merged entity did not possess any market dominance and consequently no threat of abuse of dominant market position was anticipated, as defined under section 2 of the Act read together with Regulation 4 of the Competition Regulations; and
- No significant negative effect on the public interest in Botswana was identified.

Pursuant to the provisions of section 55 of the Competition Act, the Authority approved the acquisition with the condition that:

- In view of the pre-merger relation between TS Chickens and Bobbsies Chickens, the two enterprises shall not be expected to enter into any horizontal or collusive agreements without prior notification to the Competition Authority.

Acquisition of 67% Issued Shares In Stockbrokers Botswana Limited (SBB) By Tsodilo Financial Services (Pty) Ltd, Leading to 100% Shareholding.

The Authority noted that the transaction was implemented in contravention of section 55 of the Competition Act. However, the Authority did not apply section 63(2) of the Act and determined to authorise the proposed transaction on the grounds that there were no substantial competition concerns that would arise in the stockbroking market in Botswana, on account of the acquisition because:

- The proposed transaction was not likely to result in substantial lessening of competition, nor endanger the continuity of the service, due to the transaction being an acquisition of additional shares by an existing shareholder;
- The merged entity did not possess any market dominance and consequently no threat of abuse of dominant market power was anticipated, post transaction implementation; and
- No significant negative effect on the public interest in Botswana was identified.



(Source: prosaamy.com)



Competition Commission Urges Shake-Up Of Accountancy Market

Britain's largest companies should put their accounting business up for tender every five years, the Competition Commission has said, as part of an investigation into the dominance of the big four accountancy groups.

It said FTSE 350 companies should be forced into considering a range of firms because the task of auditing accounts is too important to be left undisturbed for more than five years. It added that current rules are too focused on satisfying management rather than shareholder needs. The proposal was part of the commission's provisional findings into competition in the audit market, which is dominated by Deloitte, EY, KPMG and Pricewaterhouse Coopers.

The Chairman of the commission's audit market investigation group, Laura Carstensen, said; "More frequent tendering will ensure that companies make regular and well informed assessments of whether their incumbent auditor is competitive and will open up more opportunities for other firms to compete. A more dynamic, contestable market will reduce the dangers that come with overfamiliarity and long, unchallenged tenures."

The commission also concluded that companies should not be allowed to include clauses in documents that require the hiring of an auditor drawn from the ranks of the big four only. However, it stopped short of proposing that companies should be forced to switch auditors. "We do not see a competition problem with audit firms retaining business if they do a good job – but they will have to demonstrate this on a regular basis," said Carstensen.

The commission suggested that shareholders should be able to vote on whether audit committee reports in company annual reports contained sufficient information. It also indicated that the regulator, the Financial Reporting Council, could be handed greater responsibility over the accounting sector. A final report from the Commission is due by 20 October. (Source: guardian.co.uk)

COMPETITION AUTHORITY IN PICTURES

CA ENGAGES THE MEDIA ON COMPETITION LAW AND POLICY

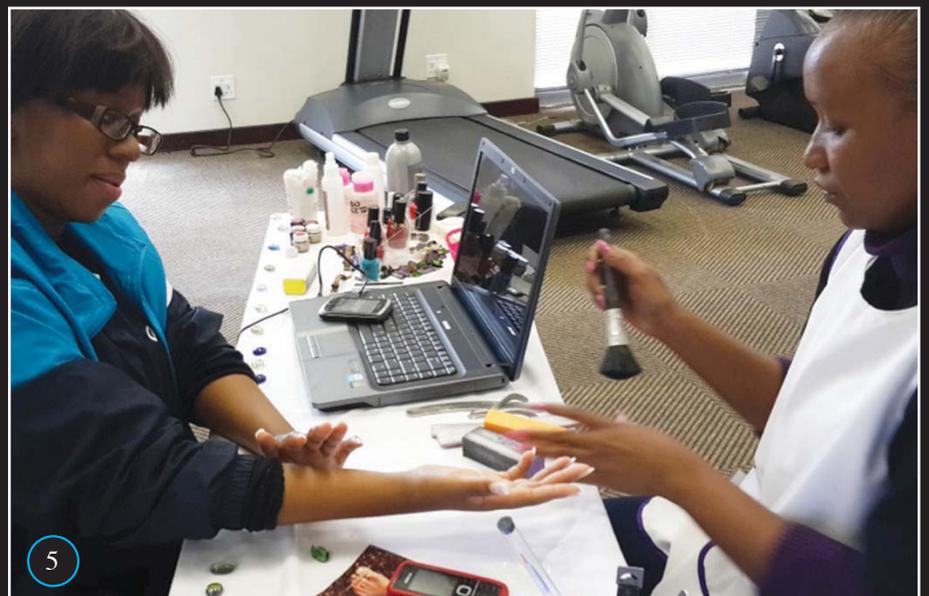


Captions

1. Competition Commissioner Tendekani Malebeswa Officially Opening the Media Workshop 2. Chairperson of the Press Council Of Botswana Mr. Tshireletso Motlogelwa Closing the Workshop 3. Sunday Standard's Ruth Kedikilwe Asking a Question 4. MISA Botswana Staffer Desiree Rankhuna at the Workshop 5. Journalists From Various Media Houses

A WELL AND SOUND MIND AT WORK - CA HOLDS SECOND WELLNESS DAY

The Competition Authority held its second Staff Wellness Day on the 2nd of August at Cresta Lodge in Gaborone with the theme, “A Well and Sound Mind at Work”. The objective of the day was to educate employees on the importance of adopting a healthy lifestyle for themselves and their families. Service providers were on hand to educate staff on different aspects of staff wellness and work-life balance. Staff members were taken through activities such as aerobics, tug of war, soccer competition, motivational speaking and massages. Staff also underwent health checks for conditions such as cholesterol, hypertension and diabetes. It was hard work, joy and sweat!

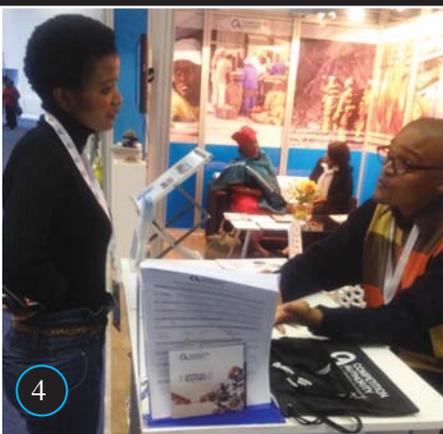


Captions

1. Staff Playing Football 2. The Zumba Workout 3 & 4. Service Providers who Conducted Health Checks During the Day 5. Bianca Gets a Manicure

Competition Authority at the 2013 Consumer Fair

The Competition Authority participated at the Botswana Consumer Fair which was held on 22nd to 28th July at the Fairgrounds in Gaborone. The theme for the Fair was “Shop. Discover. Explore.” The Authority took advantage of the fair to disseminate information to the public, business persons and other stakeholders on the mandate of the Competition Authority, its activities and the benefits of fair Competition.



Captions

1. Consumer Fair Judges With Kelebogile
2. Katumelo Briefs Students who Visited the CA Stall
3. Othutse Briefs a Visitor on the Competition Act
4. Norman Speaks to a Visitor at the CA Stall
5. A Visitor from Lesotho who Passed by the CA Stall Chats with Kelebogile

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