



CA REJECTS CHOPPIES - PAYLESS APPLICATION

The Competition Authority has rejected an application for a buying group exemption from Choppies Distribution Centre and Payless Supermarket. The applicants are enterprises trading in the Fast Moving Consumer Goods (FMCG) and this makes them direct competitors. However, in terms of the Competition Act, competitors can apply for an exemption where there are off-setting public benefits that outweigh the anti-competitive effects of an undertaking they seek to engage in. The thrust of the application was that the envisaged buying group would enable better purchasing power which would translate into lower prices, better quality products and therefore availing benefits to consumers and employees.

In a press statement, the Authority says prior to the current application, the applicants had launched a similar application in 2014, which while it was rejected, the applicants were given some time to wind-up the buying group agreement, and for a period of more than three years the buying group has been active.

During the life of the buying group exemption (which continues even now) Payless's performance reportedly

improved, stabilised financially and increased its staff complement. It is the contention of the applicants in the current application that if Payless is not granted the buying group exemption it would suffer devastating harm possibly resulting in liquidation.

When fortifying their case in the current application, the parties or the two stores maintain that the buying group arrangement is the main cause of Payless's improved performance and stability due to the combined leverage of the two stores economies of scale when buying; stabilised cash flow; ability to rebrand and refurbish its stores; and ability to retain employees, but also created an additional 250 more jobs since the last exemption (when the weaning-off period was granted), increasing its staff complement from 400 to 650. As a consequence Choppies and Payless are now applying for an exemption to run for a three year period.

In considering an exemption application, the Authority is directed by section 32(1) of the Act on the assessment criteria of exemptions, which provides that, "Where the Authority finds, on investigation that an agreement other

than a horizontal agreement or vertical agreement prohibited by section 25 and section 26 (1) respectively prevents or substantially lessens competition, the Authority may, subject to section 34, grant an exemption from the prohibition if it can be reasonably expected that there will be offsetting benefits for the public directly attributable to the agreement. Considering this application, the Authority turned out very adverse findings proving a dire case of substantial lessening of competition in the considered market. After a careful competition assessment, the Authority established that:

- There is no competition between Choppies and Payless, the duo had monthly promotions wherein they had the same goods on promotion at identical or similar prices and the pamphlets were an exact replica of each other.

- The two stores had alleged that Choppies would not benefit from the arrangement. It however emerged that Choppies was benefiting, particularly given the quantity of Choppies in-house brands found in Payless stores. Payless did not have any in-house brands, but

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Choppies and Payless flyers with identical goods and prices

instead sold a variety of Choppies goods in large volumes.

•Further, the Authority finds that the granting of an exemption to the applicants would be in effect granting Choppies and Payless the leeway to engage in price fixing and distortion of competition.

The two stores hinged their application around the assertion that the agreement would yield public benefits that would off-set competition concerns. However, on closer examination of the alleged public benefits claims, it is clear that these are not supported by any documentary evidence. The Parties failed to prove that Payless' financial stability in the last three years was solely based on

it being a member of the Buying Group.

With regard to employment, it is worth noting that initially when the application was made, the two stores claimed that Payless had been able to retain the same number of staff and even increased its staff complement. Upon scrutiny, this claim was found to be untrue. Whilst the parties allege that profits have remained low because of some projects Payless had undertaken to revamp its brand, such as refurbishing its stores and rebranding, there are no documents to support these plans and cost thereof.

The parties have mostly made unsubstantiated allegations in support of their application without any concrete evidence. The application is therefore

rejected on the basis that there is no evidence that proves that the agreement has any off-setting benefits for the public directly attributable to it in the form of maintenance of lower prices, higher quality or greater choice for consumers, as provided under section 32(1) (a) of the Act, because Choppies and Payless sell the same goods at similar prices especially during the month-end promotion period: Further, the parties or the two stores have failed to prove that the agreement has any off-setting benefits in the form of maintenance or promotion of employment in Botswana as stated under section 32(1) (d) of the Act, instead, the information shows that Payless has reduced its employees, and the parties tried to mislead and provided false information to the Authority, the statement says. The Authority therefore directs the parties to dissolve the agreement because it has no substantial economic benefits for the public. The Parties are granted a period of three (3) months, from receipt of this determination, to have dissolved the agreement and in addition to, at the expiry of the three months period report to the Authority that they indeed dissolved the agreement.

The parties or the two stores have been informed of their right to appeal this determination of the Authority to the High Court, in the event they feel aggrieved.

SAHAM-SANLAM ACQUISITION APPROVED WITH CONDITIONS



SAHAM Assurance



The Competition Authority has approved with conditions the acquisition of the entire issued share capital in Saham S.A. by Sanlam Emerging Markets (Ireland) Limited (SEMIL). In its decision announced on 26th September 2018, the Authority determined to authorise the proposed transaction in the market for the provision of reinsurance services to short-term insurers, given the fact that: the proposed transaction is not likely to result in substantial lessening of competition, due to the competition

constraints such as import competition, low barriers to entry and countervailing power, that exist in the market under consideration; the merger would not result in the merged entity attaining any dominant position in the market under consideration. In addition, the presence of other local and global reinsurers, will impose competitive constraints on the merged entity; and that no negative public interests have been identified in the merger.

Pursuant to the provisions of section 60 of the Competition Act, the

Authority approved the proposed merger, with the commitment that the merged entity shall ensure that for a period of three years commencing from the approval date, there are no retrenchments of any employee associated with the merger. SEMIL must also inform the Authority of any retrenchments at Continental Botswana at the same time that SEMIL would be required to provide a written notice of the intention to retrench to the Commissioner of Labour and Social

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AFRICAN COMPETITION FORUM TACKLES CONTINENTAL COMPETITION CHALLENGES

Member agencies of the African Competition Forum, (ACF) have been called upon to purposefully and proactively pursue case-related cooperation in competition regulation and policy. The call was made by ACF Chairperson Hardin Ratshisusu on 11th October when opening the forum's 2018 Biennial Conference in Marrakech, Morocco. Ratshisusu, who is also deputy chair of the Competition Commission of South Africa, said there have been, and continues to be multiple cross-border investigations that emanate in one jurisdiction relating to particular products or services by particular firms that will inevitably be exported across the globe, including Africa. He cited investigations into shipping liners, collusion over car parts, forex market manipulation, pharmaceuticals; and recent mega-mergers in agro-chemicals which raised similar competition concerns across jurisdictions.

"We need to work more in concert in tackling cross-border cartels, unilateral anti-competitive conduct and mergers, as our case-focused cooperation has been less than optimal; a lack of cooperation in competition enforcement is a result of many things, including capacity constraints as well as information asymmetry," Ratshisusu said. The ACF Chairperson said cross-border anti-competitive conduct commonly involves large multi-nationals and more often than not, the first enforcement actions against these firms begin where these firms are headquartered. "This invariably means that some countries are left behind in the starting blocks and have to rely on those competition agencies who have initiated investigations first for information on those investigations. Without deliberate case-related cooperation within the ACF this serious enforcement vacuum relating to cross-border anticompetitive conduct will persist."

However, the ACF Chair bemoaned the challenges in cross-border cooperation. "I am acutely aware that the



ACF Chairperson Hardin Ratshisusu opening the 2018 Biennial Conference in Marrakech, Morocco

ability of competition authorities to effectively tackle these anti-competitive practices and investigate complex cross-border mergers is often constrained by inadequate resources and, in some cases, the absence of enabling institutions. It is important that our countries recognise the need to strengthen competition authorities as they form the backbone of effective competition enforcement."

Touching on successes, Ratshisusu said over the past two years, the ACF has made considerable strides in all three work-streams of the ACF, namely; facilitating integration, capacity building and advocacy. In the past two years it hosted six capacity-building workshops on topics such as cartel investigative skills, merger review, the preparation and execution of dawn raids, and agency effectiveness.

In total, 134 case handlers participated in these workshops, all of whom greatly benefited from the knowledge shared. Other successes included publication of a book on cross-country ACF studies which draws insights on the nature of competitive rivalry and the power and interests of large firms in four key sectors in southern and East Africa. This achievement was followed by cross-country research in a further five sectors, namely; telecommunications, cement, construction, fertiliser and liquefied pe-

troleum gas; and the sector studies are at an advanced stage. Ratshisusu said the ACF has also continued to invest in its relationships with strategic partners such as the ICN, UNCTAD, OECD, BRICS, and the World Bank, and has become an authoritative voice for young and developing agencies globally. The World Bank has committed to conducting a study on Institutional Design for Agency Effectiveness in partnership with the ACF over the next two years, Ratshisusu said.

Meanwhile, at the conference, the ACF elected a new Steering Committee. South Africa was elected Chairperson, while Tunisia and Mauritius were elected Vice Chairperson respectively. The new Steering Committee comprises of Algeria, Botswana, eSwatini, Kenya, Mauritius, Senegal, South Africa, The Gambia, Tanzania, Tunisia and Morocco. The ACF, which is a network of African national and multi-national competition authorities currently has 36 members, including five regional competition authorities. It aims to promote the adoption of competition principles in the implementation of national and regional economic policies of African countries, in order to alleviate poverty and enhance inclusive economic growth and consumer welfare through fostering competition in markets, increased investment, productivity, innovation and entrepreneurship.

COMPETITION POLICY SUPPORTS ACHIEVEMENT OF THE SUSTAINABLE DEVELOPMENT GOALS



Botswana recognises Competition Policy as an important tool that, when applied in tandem with appropriate industrial and trade policies, will realise the objectives of the Sustainable Development Goals, (SDGs), particularly Goal 9 on Industry, Innovation and infrastructure. The Minister of Investment, Trade and Industry, Hon. Bogolo Kenewendo, says this is because at times the anticipated growth in employment, productivity and other efficiencies are not realised because of harmful anti-competitive conducts such as bid-rigging and collusive tendering, market allocation, price fixing and predatory pricing that are prevalent in the market.

Addressing the 2018 session of the Inter-Governmental Group of Experts (IGE) on Competition Law and Policy in Geneva in July, the minister said empirical evidence has shown that bid-rigging can increase the costs of goods and services by up to 20% or more, and that

that these costs rise by 35% to 55% in the developing world as revealed in a collaborative research paper conducted by the OECD and the World Bank.

“Critically, the achievement of decent work and economic growth (SDG 8), supports an enabling business environment that in turn encourages enterprise development and entrepreneurship. The establishment of a competition framework recognises that the lack of competitive rivalry may result in dominant firms seeking to maintain or obtain monopoly rents, which go against the principle of sustainable and inclusive growth. Through their enforcement and advocacy arms, competition agencies have been able to facilitate the lifting of barriers to entry in priority sectors, thereby opening markets for SMEs participation, creating employment and reducing poverty in accordance with SDG’s 8 and 1 respectively.” She further noted that the lifting of barriers to entry also has multiplier effects that give consumers a choice as a result of new entrants.

Hon. Kenewendo said the SDGs join the global community to direct collective efforts towards ending poverty, protecting the planet and ensuring that all people enjoy peace and prosperity.

“I am pleased to inform you that my Government has fully embraced the 2030 Agenda for Sustainable Develop

ment and its Sustainable Development Goals and infused them into our development frameworks, including our Vision 2036 strategy (which extends from 2017-2036) and the National Development Plan (NDP)¹¹ (2017-2023). The spirit of the Agenda finds expression in the theme of our NDP 11, which is: “Inclusive Growth for the Realisation of Sustainable Employment Creation and Poverty Eradication”.

The minister further told the IGE that unfair business practices typically affect Small and Medium Enterprises (SMEs) in a disproportionate manner. “The reality is that, in developing economies, Small and Medium Enterprises (SMEs) constitute the bulk of businesses and these are a catalyst to inclusive growth and sustainable development. Competition Law therefore, should vigorously find a way to comprehensively deal with matters of abuse of bargaining and buying power in order to ensure the proliferation and sustainability of SMEs,” she implored.

The minister stressed the importance of regional and international cooperation in competition enforcement, noting that no country could ever achieve an enabling and supportive environment for the growth of industry on its own. “It is therefore imperative that relationships with agencies such UNCTAD, The OECD, ICN, ACF, SADC and other like-minded agencies should be nurtured.

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Security, in terms of section 25 of the Employment Act of 1982, as amended.

In order for the Authority to effectively monitor compliance with the commitment, the Authority directed SEMIL to inform it of; the intended retrenchments, the reasons for the retrenchments, the number and categories of employees affected; and the expected date of the retrenchments.

Furthermore, SEMIL will one month after the implementation of the merger, and annually (and for a period of three years thereafter) within one month of the finalisation of Continental Botswana’s Annual Financial Statements, submit to the Authority a report indicating a list of all Continental Botswana’s customers in Botswana for the preceding financial year

and the gross written premium generated from each customer in that financial year. In each report subsequent to the first report, if there is a significant change in the gross written premium generated from any customer, SEMIL will explain the reasons for this change in the report.

This report is to be verified by Continental Botswana’s independent auditors.

The acquiring enterprise, SEMIL, is an enterprise incorporated in accordance with the Laws of the Republic of Ireland. SEMIL is wholly owned and controlled by SAN JV (RF) Proprietary Limited, a company incorporated in accordance with the Laws of the Republic of South Africa. SAN JV is in turn controlled by Sanlam Emerging Markets Pty Ltd, a South African company. Sanlam is a public

undertaking with listings on the Johannesburg and the Namibian stock exchanges.

The Sanlam Group provides among other things long-term (life) insurance; short-term (non-life) insurance; credit and banking facilities; reinsurance; investment management; and other financial services in various emerging markets in Africa, India and South-East Asia.

The target enterprise, Saham Group (headquartered in the Kingdom of Morocco), is a Pan-African group with diversified business activities. The Saham Group provides insurance, through its Insurance Division, in 26 countries across Africa and the Middle East, with a large range of services such as insurance, assistance, consumer credit and third-party administration business services.

Ridwell Moremi



Manager Mergers and Monopolies - Mr. Ridwell Moremi

BCB: Tell us about yourself!

Ridwell: Most people call me "Riti". I am currently a Manager within the Department of Mergers and Monopolies. I have over 20 years' experience working in various organisations especially in the private sector.

BCB: Why did you apply for a position at the CA?

Ridwell: Like anybody else, we need challenges and growth every day. I did not have a job at the time when I saw the CA's advertisement in the media, after my contract with Debswana Pension Fund ended, and therefore I tried my luck.

BCB: What are your duties and responsibilities at the CA?

Ridwell: Implementation of merger regulations, guidelines and tools for the assessment of mergers as defined in the Competition Act. I investigate, evaluate and assess mergers and acquisitions notified with the Authority. These also include monitoring of approved mergers through a compliance and monitoring exercise, as well as merger impact assessment to see if the parties have complied with the conditions imposed, and also to see how our decisions have made an impact in our economy.

BCB: What did you do before joining the CA?

Ridwell: I came back from the USA in the year 2009 where I was studying and working, and I joined Debswana Pension Fund for a two year contract after which I got employed by the CA. Before that, I had worked at Botswana Insurance Fund Management as a Fund Accountant, Botswana Breweries as Quality Controller, as well as Alpla and Scholastics in the US.

BCB: What are your experiences at the Authority so far?

Ridwell: This is the first time working in a government type of organisation (parastatal), and things are very different with a lot of protocol. Besides that, CA exposed me to competition law, a field where I learn a new thing every day, and I am always busy since we work under very strict timelines. The good thing about it is that we get to meet a lot of different people as we do our investigations, and this is enjoyable.

BCB: What is the best thing that has happened to you at the CA?

Ridwell: Working with skilled people like Magdeline Gabaraane and Innocent Molalapata, I have learnt a lot from them. Competition law is an area that needs different industry skills and we were able to work together

as a team to meet timelines.

BCB: What do you find most challenging about the CA?

Ridwell: Timelines! There was a time when I had five transactions running concurrently. This was towards the Christmas holidays and with only two analysts in the department. By the grace of God, we managed. I also realised that planning is a good thing. However, you don't rest much as you are always thinking of the clock. I wish there could be readily available and reliable information that we can use when assessing mergers. This is the biggest challenge.

BCB: If you were to leave the CA now what special memories would you take with you?

Ridwell: The transaction between Transport Holdings (Pty) Ltd and 4MS Group, which was rejected. This transaction saved citizen empowerment in terms of ownership and employment. But what was exciting is the way we handled its investigation. Also, I will never forget the dominance case involving Molapo Crossing.

BCB: Where do you see yourself five years from now?

Ridwell: As a director within this organisation.

BCB: Is there any wisdom you wish to share?

Ridwell: Growing as a footballer, just like someone in the military or army, discipline is the key. Some people think I am impatient, but that is not the case. I just want things to be done the way they are supposed to be. I did all my tertiary education in the USA and worked there. Whenever you are given instructions or someone asks for help from you, and you say yes, I expect you to do exactly that, or come back and say, I am not able to help. We are not supposed to be told twice and expect to be reminded unnecessarily.

PICTORIAL



How can we help you? A visitor at the CA stall at the 2018 Consumer Fair



A nation without culture is a lost nation. CA staff displaying their rich Setswana culture in dress and artefacts during CA culture day on 28th September 2018



Its time for aerobics; CA staff sweating it out during Wellness Week 10th to 13th October 2018



Who has the moves? Is it the pink or green team?

HOW TO CONTACT US



Editorial Team

GIDEON NKALA: gideon.nkala@competitionauthority.co.bw

GLADYS RAMADI: gladys.ramadi@competitionauthority.co.bw

KELEBOGILE NGWENYA: kelebogile.ngwenya@competitionauthority.co.bw

MODIMOOSI MATEBESU: modimoosi.matebesu@competitionauthority.co.bw

Phone: +267 3934278

Fax: +267 3121013

Postal: Private Bag 00101, Gaborone

Facebook: Competition Authority Botswana

Twitter: @CompetitionBots

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