



Competition Authority Relocates



The New CA Offices at the Main Mall

The Competition Authority and the Competition Commission have relocated from Fairgrounds to the Main Mall. From 24th October the Authority has been operating from Plot 28, Matsitama Road, the former BEDIA/BITC headquarters. The contact details for the Authority and the Commission remain the same.

Panel Beaters Challenge Competition Commission Jurisdiction



The Competition Commission on October 30th presided over an application in which four Auto repair shops; Carfill Services, Specialised Panel Beaters, Top Care and Car World Auto Craft Shop challenged the jurisdiction of the Commission to hear matters that concern the Competition Authority.

The application came in the wake of a case that was brought before the Competition Commission by the Authority that the four companies should be charged with price fixing, a practice contrary to the Competition Act. The four companies threw a spanner in the works and brought an application to argue points of law (points in limine) principally to decide the jurisdiction of the Authority.

The Panel Beaters argued that the closeness of the relationship between the Competition Authority and the Competition Commission makes them apprehensive that they might not get a fair hearing and hence they submitted that the Commission should recuse itself from hearing their substantive case on account of this attendant perception.

"Looking at the Commission, can members of the public really think that justice will be done given the closest relationship. The answer should be no," argued Attorney Sadique Kebonang of Kebonang Attorneys who represents the Panel Beaters.

Kebonang and the applicants took issue with the structural arrangement in which the Competition Commission which has a dual role as the administrative body, or the board of the Competition Authority, also sits as the competition tribunal.

He said this does not stand up to the test of fairness. While recognising that parties can appeal once they are unhappy with the process, Kebonang argued that this will not cure a complaint against bias.

"A complaint against bias cannot be cured by an appeal or a review. This is because it goes to the issue of due process. Allegations of bias can only be cured by a recusal," he said.

Representing the Competition Authority was the Authority's Director of Legal and Enforcement, Duncan Morotsi, who argued that the points raised by the applicants were ill-conceived and unmeritorious in that they want the institutions that are charged with the responsibility to implement and enforce the Competition Act to be non-functional.

Morotsi argued that the act has created two institutions with two distinct functions.

"It is clear from the above sections that an organ is being created for the enforcement of the Competition Act of Botswana and that it is a body corporate, again it does not need any decoding to appreciate that another organ charged with adjudication is created by section 9 of the Act. It is not a body corporate but an adjudicating organ which looks very much different from what is created under section 4 of the Act," he said.

He said the managerial issues that link the Authority to the Commission cannot be said to undermine the independence of the Commission. "The Commission unassisted by the Authority sits and hears cases independently" Morotsi said. Judgement is yet to be announced.

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Competition Commission Dismisses Competition Authority Application



The CA Legal Team Led by Mr. Duncan Morotsi at the Ya Raheem Commission Hearing

At its first ever adjudication sitting which was held on 17th September, the Competition Commission dismissed an application made by the Competition Authority to confirm an undertaking between the Authority and Ya Raheem Investment (Pty) Ltd.

The Authority had brought an application requesting that an undertaking (Consent Order) that was made to it by Ya Raheem Investments be made an order of the Commission. Further, the Commission was asked to impose a financial penalty after confirming the Undertaking.

According to the papers filed with the Commission, the application by the CA followed a complaint that was lodged with the Authority by a director of an enterprise known as Super Trading Pty (Ltd).

The nature of the complaint was that Ya Raheem Investments was colluding with one of the directors of Super Trading, Mr. Thirumal Rao Panja, who was alleged to have been providing Ya Raheem Investments with confidential information which it used to bid for Government of Botswana food ration tenders in Gaborone, Kanye, Jwaneng, Letlhakeng, Mochudi, Hukuntsi and Tsabong.

It was alleged that Mr Panja used Super Trading tender prices to prepare bids for Ya Raheem Investments for the same tenders, according to the undertaking statement between the Competition Authority and Ya Raheem Investments.

When presenting his case before the Commission, Mr. Duncan Morotsi, who is the Competition Authority's Director of Legal and Enforcement, said the Authority had established that the conduct of Mr. Panja and Ya Raheem Investments was tantamount to collusion or bid-rigging, conduct which offends

section 25 of the Competition Act, which prohibits horizontal agreements between enterprises. Mr. Morotsi informed the Commission that Ya Raheem Investments admitted that their conduct was in contravention of section 25(c) of the Competition Act, and they voluntarily made an admission by deponing to a settlement agreement.

The Director of Ya Raheem, Ms. Nazneen Mhaisker appeared before the Commission and confirmed the contents of the settlement agreement, and that she understood the consequences. It was this settlement agreement (consent order) that Mr. Morotsi pleaded that it be made an order of court.

Responding to questions posed by Commissioners that there appears to be very little evidence filed in the application, he responded that such was not necessary since the parties have entered into a settlement agreement which dispensed with the production of evidence before the Commission. He further stated that the offence under consideration was a per se one, or a strict liability infringement which does not require the Authority to prove any intention on the part of the respondents to offend the Act.

In its ruling, the Commission said it took a dim view of this stance, and insisted that an applicant stands or falls by its founding affidavit. Presiding Commissioner and Chair of the Commission, Dr. Zein Kebonang, dismissed the application saying the particulars of the offence had not been properly addressed in the documents before the Commission.

He said the Authority had not established the existence of an "agreement not to submit a bid" or agreement on "the price, terms and conditions of the bid submitted". Dr. Kebonang said each party would pay its own cost.



CA and NBFIRA Management at the MoU Signing Ceremony

Competition Authority Signs MoU with NBFIRA

The Competition Authority and the Non-Bank Financial Institutions Regulatory Authority (NBFIRA) have signed a Memorandum of Understanding (MoU) which formalises cooperation between the two institutions.

Speaking at the signing ceremony on 11th September, the Chief Executive Officer of the Competition Authority, Mr. Thula Kaira, said MoUs provide a more transparent and accountable working relationship between institutions, ensuring that cooperation and information exchange do not merely depend on personal relations, but rather long lasting institutionalised systems that outlive incumbent office holders.

He further said MOU's assist the institutions to commit to certain matters that facilitate greater attainment of their mandates as the institutions do not exist as islands, but are part of the same public service delivery system.

Through the MoU, the two institutions pledge to cooperate and share information in specific areas as well investigation of anti-competitive practices that can affect the non-bank financial sector.

Our concerns in the non-banking financial sector will likely be in connection with suspected cartels, abuse of dominance and anti-competitive mergers. We may also at some point carry out a competition study to understand the competition dynamics and their effect on growth of a particular relevant market

falling within the non-bank financial sector” Mr. Kaira said.

For his part, the Chief Executive Officer of NBFIRA, Mr. Oaitse Ramasedi, said the global financial crisis has reinforced the importance of effective dialogue and collaboration between regulators and supervisory authorities.

“Indeed, one of the biggest lessons learnt from the financial crisis has been the need for better regulation of financial institutions. The crisis has also provided an abundance of examples highlighting the importance of risk-based supervision and cooperation between regulatory authorities” Ramasedi said.

He said regulators need to encourage and support transformation and innovation through better regulation instead of looking for avenues of more regulation.

The signing of the MoU with NBFIRA was the third that the Competition Authority has signed with a public oversight institution in Botswana. The first was with the Directorate on Corruption (DCEC) together with the Public Procurement and Asset Disposal Board (PPADB), and the second was with the Civil Aviation Authority of Botswana (CAAB).

The full text of the MoUs can be accessed on the CA website.

Gaborone Hosts Regional Competition Workshops for Commissioners and Judges



Honourable Minister Dikgakgamatso Seretse (third from left) with Participants at the Regional Competition Workshop for Judges

The United Nations Conference on Trade and Development (UNCTAD) in cooperation with the Southern African Development Community (SADC), the German Society for International Cooperation (GIZ), and the Competition Authority, hosted regional competition workshops for Competition Commissioners and Judges in Gaborone from 24th to 27th September.

The training for Judges and Commissioners at the regional level was conducted under UNCTAD's framework of institutional capacity building for effective competition law and policy enforcement. It was one of the recommendations of the Tripartite Peer Review of Competition Law and Policy of Tanzania, Zambia and Zimbabwe which was reinforced during the 12th session of the Inter-Governmental Group of Experts on Competition Law and Policy which was held in Geneva in July 2012.

The Judges workshop was officially opened on 24th September by the Honourable Minister of Defence, Justice and Security, Dikgakgamatso Seretse. He said Botswana recognises that competition law is a new field in its jurisprudence, and it is prudent to capacitate those who will be responsible for its interpretation and enforcement. "We are here because an English proverb warns us that a cobbler cannot judge above a shoe, you can only be a judge of issues that you properly understand and appreciate", he said.

Honourable Seretse said traditionally courts of law are interpreters of statutes and it is befitting for any government to ensure that its bench is knowledgeable on

all issues that may be brought before it.

Officially opening the Commissioners workshop on 26th September, the Honourable Assistant Minister of Finance and Development Planning, Mr. Vincent Seretse, called for the highest integrity for those involved in adjudication. "As human beings, sometimes you may find yourself involved in the adjudication process with certain pre-conceived ideas about a case and the principle of fair competition may be missed, with grave repercussions not only for your personal and collective integrity, but on the economy as well. It is for this reason that where there is conflict of interest, an adjudicator must declare interest, but not to also influence tacitly or otherwise the outcome of a particular case or matter," the Minister said.

He said it is equally important that adjudicators maintain the confidence of business by maintaining the confidentiality of the classified business matters that come into their knowledge. "As wealth creating agents, businesses need to have trust in their adjudicators. It goes without saying that you are expected to be men and women of integrity, who are above reproach", said Honourable Seretse.

Experts drawn from judicial, academic and competition enforcement backgrounds from Australia, European Union Court of Justice, the United Kingdom, South Africa and UNCTAD conducted the training workshops.

CA Hosts Regional Research Workshop



Director of Competition and Research Analysis Dr. Mokubung Mokubung Directing Proceedings at the Research Workshop



Professor Simon Roberts of the University of Johannesburg Making a Presentation

The Competition Authority hosted a workshop for the African Competition Forum (ACF) on the 23rd and 24th October in Gaborone to discuss the joint research project being undertaken by Botswana, Kenya, Namibia, South Africa, Tanzania and Zambia examining competition issues and market dynamics in the cement, sugar and poultry industries. The workshop which falls within the ACF's programme of work for 2012/13 was a culmination of fieldwork research that was done during the year in all the six countries.

The African Competition Forum was established in March 2011 and its principal objective is to promote the adoption of competition principles in the implementation of national and regional economic principles of African countries, in order to alleviate poverty and enhance inclusive economic growth, development and consumer welfare by fostering competition in markets, and thereby increasing investment, productivity, innovation and entrepreneurship.

Officially opening the workshop, the Chief Executive Officer of the Competition Authority, Mr. Thula Kaira, said with uncompetitive behaviour having become so prominent in African markets, it is vital for African countries to work closely with one another with a view to closing the gap by adopting effective competition principles at a regional level.

Preliminary research results show that the cement market is highly concentrated with few companies dominating the sec-

tor, in all these countries.

The common barriers to entry to the cement sector emerged to be the high set-up/capital costs and inaccessibility to raw materials such as limestone and fly ash. For example, in Botswana the sole appointment or first mover advantage of a company that obtains fly ash from the Morupule Colliery may create a barrier to entry for new entrants; and the limestone in Matsioloje is solely for the cement company in that area. Such issues would need concerted advocacy to negotiate for new entrants that would encourage more competition within the sector.

Regarding the poultry sector, Botswana imports almost all the ingredients of poultry feed involving maize and soya beans. In contrast, South Africa and Zambia do not import such; instead they are net exporters. They are self-sufficient in poultry feed and they export to other countries including Botswana.

Data from the market studies would be compiled into a final report which will be presented at the 2014 annual conference of the International Competition Network in Morocco.

CA Educates Government Ministries on Bid-Rigging

In order to combat bid-rigging in public procurement, the Competition Authority has embarked on a series of training workshops to educate Government Ministries on bid-rigging. The training is targeted at Ministerial Tender Committees (MTCs) and procuring units within the ministries. The first workshop was held on 10th October with participants from the Ministry of Infrastructure, Science and Technology, the Ministry of Transport and Communications and the Ministry of Minerals, Energy and Water Resources.

Officially opening the workshop, the CEO of the Competition Authority Mr. Thula Kaira said there should be cause for alarm where there is no independent bidding process. He noted that sometimes tender manipulation starts at the tender design stage. 'If a tender design leads to single sourcing the whole process becomes academic and does not benefit Government and the public interest', he said. The CA chief said procurement officials often hide behind laws and procedures, and reiterated that laws are not cast in stone, and must be reviewed if they do not serve the public interest.

The Director of Legal and Enforcement Mr. Duncan Morotsi briefed the participants on the principles of competition law and how to detect and prevent bid-rigging in Government tenders. He implored the participants to do their best to safeguard public funds and right wrongs that have been done in the past. "When you deal with tenders you may not be holding the key to the safe but the stroke of your pen, or what you say at a tender evaluation meeting can cost the Government millions of Pula", he said.

Mr. Morotsi further called on the participants to follow interna-

tional standards on procurement which require procuring entities to: know the product they are requesting by conducting market studies; know the competitors who supply a product, and know the retail price of the product they want to procure. He encouraged ministries to spend money on understanding a product they want to procure and its costs, rather than losing great sums of money in the long run due to factors like overpricing and being supplied bogus products.

An official of the Public Procurement and Asset Disposal Board (PPADB) Mr. Onthusitse Motsomi enlightened participants on the preparation of tender documents to facilitate fair competition; and urged them to use the PPAB's Standardised Bidding Package. He cautioned procuring entities against branding when they develop their specifications as this narrows competition. "Do not be too specific to fit one particular product", Mr. Motsomi said.

Participants were also given a briefing on how corruption can manifest itself in the tendering process by an official of the Directorate on Corruption and Economic Crime (DCEC).

In his presentation, Mr. Kenneth Petros said forms of corruption in the procurement process include falsified needs and studies, splitting of contracts, reduced publicity for tenders, restricted call for tenders and inappropriate changes to tender specifications. Mr. Petros also cited conflict of interest, where a person fails to disclose direct or indirect interest, and then partakes in decision making about a particular tender. A total of four workshops for ministries were slated for October and November 2013.



Participants from Various Government Ministries at a Bid-Rigging Workshop on 10th October

MERGER CASES SEPTEMBER-OCTOBER

SYNOPSIS OF THE CASES	DECISION
<p>1. Proposed Merger Between Ngami Motors (Pty) Ltd T/A Ngami Toyota And Halfway Service Station (Pty) Ltd</p> <p>The proposed transaction involved Halfway Service Station acquiring 100% shares in Ngami Toyota. The target enterprise, Ngami Toyota, is a Toyota franchise company in the motor trading industry in Maun, Botswana. Its services include: the sale of new vehicles; sale of used vehicles; sale of motor parts; as well as a service centre.</p> <p>On the other hand, the acquiring enterprise, Halfway Service Station, does not operate any businesses in Botswana but it is also in the motor trading industry in South Africa.</p>	<p>Approved with conditions that:</p> <p>(a) The merged entity should look for citizen partner(s) to purchase some shares in the merged entity; and</p> <p>(b) The merged entity should revert to the Competition Authority within 12 months, with a status report regarding the progress made in securing citizen partner(s).</p>
<p>2. Acquisition of 50.1% Interest in Kwena Rocla (Pty) Ltd by Newshelf 1261 (Pty) Ltd</p> <p>Kwena Rocla is a private company incorporated under the Laws of Botswana and forms part of the business within the construction products division of Murray & Roberts Limited. The Kwena Rocla business is active throughout Botswana.</p> <p>Newshelf 1261 (Pty) Ltd is a newly established private company incorporated under the Laws of South Africa with its majority shareholders being Capitalworks (with no operations in Botswana) and FirstRand Group (which is active in the banking sector in Botswana, through First National Bank Holdings Botswana Limited).</p>	<p>Approved unconditionally</p> 
<p>3. Acquisition Of 100% Issued Share Capital in Barloworld Logistics Botswana by Barloword Transport Solutions</p> <p>The proposed transaction was in terms of Barloworld Logistics Africa selling its entire shareholding in Barloworld Logistics Botswana to Barloworld Transport Solutions (Proprietary) Limited. Following the proposed acquisition, Barloworld Logistics Botswana would become a subsidiary of Barloworld Transport Solutions.</p> <p>Barloworld Logistics Botswana is incorporated in Botswana and only operates in the cement transportation market. Barloword Transport Solutions currently does not provide any regular transport services in, into or from Botswana and is a subsidiary (50%) of Barloworld Logistics Africa. Barloworld Logistics Africa is not incorporated in Botswana and operates in Botswana through Barloworld Logistics Botswana.</p>	<p>Approved unconditionally</p> 
<p>4. Acquisition of all Diamond and Polishing Assets of H&A Cutting Works Botswana (Pty) Ltd by Signet Direct Diamond Sourcing Botswana (SDDS) (Pty) Ltd</p> <p>The proposed transaction was in terms of SDDS Botswana (Pty) Ltd acquiring substantially the entire diamond cutting and polishing assets of H&A Cutting Works Botswana (Pty) Ltd. SDDS Botswana is a newly established company incorporated under the Laws of Botswana. SDDS holding company is controlled by Signet Jewellers Limited, a company registered in Bermuda. H&A Cutting Works Botswana is a company incorporated under the Laws of Botswana and operating in Botswana in the business of cutting, polishing and sale of polished diamonds.</p>	<p>Approved with the conditions that:</p> <p>(a) SDDS Botswana takes over all the Botswana citizen employees that are currently employed by H&A Cutting Works Botswana; and</p> <p>(b) SDDS Botswana takes over all the statutory and contractual liabilities of each transferring employee including any outstanding leave, gratuities and pension.</p>

US Federal Trade Commission Visits Competition Authority

A high powered delegation from the United States Federal Trade Commission paid a courtesy call on the Competition Authority on 16th September 2013. The two person team comprised Deputy Director Chuck Harwood and Deon Woods Bell, of the Office of International Affairs. During the visit the team addressed the Competition Authority staff on some ethical issues that often confront competition agencies.

Drawing from his extensive experience as a competition and consumer protection practitioner, Mr. Harwood talked about ethical issues ranging from conflict of interest, financial interest, spouse interest, gifts and other types of payments and in-

ducements.

He stated that when considering ethics and conduct of a professional, it is perception that matters more than reality and as such he called upon the Competition Authority staff to ensure that their actions and conduct are beyond reproach even when viewed through the prism of perception.

When talking about gifts and other inducements, he said where there are no thresholds of what gift should be acceptable, it is important that certain commitments and undertakings be cleared against the ethics charter or ethics commission to eliminate doubt.



Mr. Kaira with Mr. Chuck Harwood and Ms. Deon Woods Bell of the US Federal Trade Commission

Competition Law: Exclusivity in the Spotlight

In South Africa, the legal battle between Shoprite and Massmart (through its Game stores) regarding Shoprite's exclusive rights to sell certain products in the Cape Gate Shopping Centre will place the spotlight on legal issues which are relevant to developers, landlords, retailers and consumers alike.

Whether Game's intended introduction of liquor and food lines into its Cape Gate store will infringe Shoprite's exclusivity rights, and whether Game will ultimately be precluded by the landlord (Hyprop) from selling these lines, will, in part, depend on the unique facts of the case. However, the issues relating to exclusivity provisions in favour of supermarket chains in shopping malls are more general, and the case is likely to be an important indicator of the way that such clauses will be approached in future. The South African Competition Commission has for some time expressed its discomfort with exclusivity agreements entered into between landlords and supermarkets, and has conveyed its desire to remove or exclude "exclusivity from long term lease agreements".

To this end, the Commission and the Competition Tribunal have imposed conditions on property mergers which involved shopping malls where exclusivity agreements existed with "anchor tenants". The conditions imposed to date have been soft to the extent that the landlord was required to negotiate with the tenants in whose favour the exclusivity agreements operate, with a view to removing such clauses. There were, however, no consequences or sanctions in the event that such negotiations failed. Not surprisingly, such conditions have had limited success in removing exclusivity clauses from existing agreements.

(Source: <http://www.golegal.co.za/business/competition-law-exclusivity-spotlight>)

COMPETITION AUTHORITY IN PICTURES

Competition Commission Hearings



1



2



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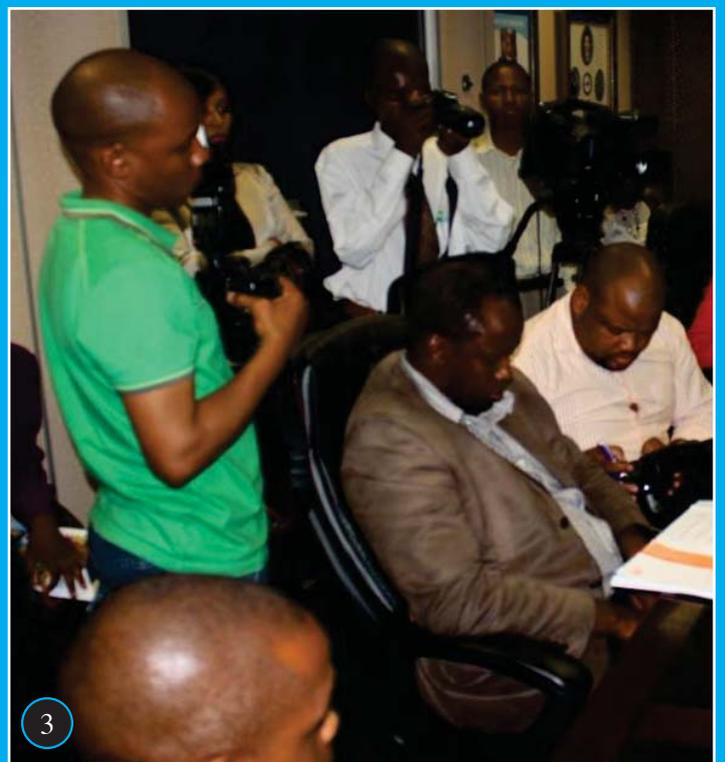


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Captions

1. Competition Commissioners Dr. Jay Salkin, Mr. Gaylard Kombani, Dr. Zein Kebonang, Ms. Tiny Kgatlwane and Mr. Boniface Mphetlhe at the Ya Raheem Hearing on 17th September 2. CA Legal Team (from Left to Right) Ms. Tapiwa Masie, Mr. Duncan Morotsi and Mr. Kesego Modongo 3. The Director of Ya Raheem Ms. Nazneen Mhaisker being interviewed by Mmegi Reporter Brian Benza 4. CA CEO Mr. Kaira Conversing with a Private Attorney Mr. Bongsi Radipati

Competition Authority Signs Memorandum of Understanding with NBFIRA



Captions

1 & 2 The CEOs of NBFIRA and CA exchanging the Signed MoUs 3. Journalists at the Signing Ceremony

CA HOSTS BID-RIGGING WORKSHOPS FOR GOVERNMENT MINISTRIES



Captions

1. Director of Legal and Enforcement Mr. Duncan Morotsi Addressing Participants 2. Mr. Kenneth Petros of the Directorate on Corruption and Economic Crime Addressing Participants on Corruption 3, 4, 5: Participants from the Minerals, Energy and Water Resources ; Infrastructure, Science and Technology; Transport and Communications Ministries

Gaborone Hosts Regional Competition Workshops for Commissioners and Judges



Captions

1. Honourable Minister of Defence, Justice and Security Dikgakgamatso Seretse Officially Opening the Judges Workshop
2. Honourable Assistant Minister of Finance and Development Planning Mr. Vincent Seretse Officially Opening the Commissioners Workshop
3. UNCTAD Official Ms. Elizabeth Gaichuri Addressed the Regional Workshops
4. Competition Commissioners Dr. Jay Salkin and Mr. Tendekani Malebeswa at the Commissioners Workshop
5. Senior Trade Economist Mr Paul Baker

US Federal Trade Commission Visits the Competition Authority



Captions

1. Mr. Chuck Harwood and Ms. Deon Woods Bell of the US Federal Trade Commission with Mr. Kaira 2. Mr. Kaira chats with Mr. Chuck Harwood 3. CA's Ms. Pono Semane and Ms. Woods Bell 4. Ms. Polly Lukas of the Department of Trade and Consumer Affairs Chatting with CA's Ms. Tshepo Wadipeba

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Visit the Competition Authority website www.competitionauthority.co.bw where you can download the Competition Act 2009, Competition Regulations 2011, the National Competition Policy 2005 and other documents.