



# COMPETITION BULLETIN

Issue 5 Volume 4 2016



## WORLD COMPETITION DAY 2016 LINKAGES BETWEEN COMPETITION AND INTELLECTUAL PROPERTY



Mr. Duncan Morotsi - CA



Mr. Timothy Moalusi - CIPA



Mr. Lethogonolo Makwinja - COSBOTS

The Competition Authority (CA) on 5th December joined other competition agencies in observing World Competition Day. A panel discussion on the ‘Linkages between Competition and Intellectual Property’ which is the theme for this year, was held at the CA offices in Gaborone, Botswana to celebrate the day. Panelists included

Mr. Duncan Morotsi from the Competition Authority, Mr. Timothy Moalusi from the Companies and Intellectual Property Authority (CIPA) and Mr. Lethogonolo Makwinja from the Copyright Society of Botswana (COSBOTS).

The speakers identified innovation and benefit for consumers as the common thread linking competition and in-

tellectual property. Mr. Moalusi noted that intellectual property (IP) rights and the benefits accrued thereof is an incentive for research and development. “In competitive markets entrepreneurs are forced to innovate and constantly seek ways to come up with new prod-

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The Chairperson of the Competition Commission Dr. Onkemetse Tshosa, Acting CEO Tebelelo Pule, Commissioner Koonyatse Tamasiga and other guests during the World Competition Day celebration

## World Competition Day 2016

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ucts which benefit the consumer” he said. Moalusi reiterated that there are safeguards to ensure that IP rights do not become a hindrance to competition, hence there are public interest provisions in the Industrial Property Act of 2010 which guard against monopolising markets and other abuses by a patent owner.

Section 31 of the Act provides for the use of compulsory licensing for competition. The Minister may without the consent of the patent owner after hearing the patentee or any other interested person, authorise a government agency, other person or body to exploit the patented invention on the payment of adequate remuneration to the patentee.

“This happens where a court or administrative body has determined that the manner of exploitation of the invention by the patentee is anti-competitive or constitutes an abuse of the patent,” Moalusi said. The Minister may revoke the decision if satisfied that the conditions or circumstances that led to the decision have ceased to exist and are likely not to recur.

Section 33 of the Act provides for a compulsory license for failure to

exploit a patent on the grounds that the market for the patent is not being supplied or is not supplied on reasonable terms in Botswana. Section 34 provides for licensing in respect of dependent patents, and this happens where the exploitation of a subsequent patent is dependent upon obtaining a license under an earlier patent.

The CA’s Mr. Morotsi said intellectual property holders cannot innovate if they are not exposed to competition. To that end, Competition Law appreciates the costs involved in generating ideas and producing a product, and thereby appreciates IP rights. “Competition law respects IP holders in the knowledge based economy and it cannot be used to constrain people from doing things that benefit consumers,” he said.

Morotsi noted that the Competition Act does not apply to any agreement to the extent that it relates to the protection, exercise, licensing or assignment of rights under any law governing intellectual property rights. However he was quick to point out that this is not a blanket exclusion of intellectual property from competition law. He noted that section 25 of the Competition act which prohibits

abuse of dominance, equally applies to intellectual property abuses.

“Patent holders are protected but in the exercise of their patent rights they must not harm competition. If you refuse to license a third party to exploit your patent, it is abuse of dominance” he said. Morotsi said it is good that the Industrial Property Act has competition provisions and checks and balances against anti-competitive practices such as abuse of dominance and refusal to deal.

Mr. Makwinja for his part said COSBOTS encourages competition and takes steps to identify the rightful owners of works and reward them for their intellectual property in the form of royalties. This encourages innovation in areas such as music, literature and poetry.

World Competition Day is an annual event where society organisations, consumer and competition agencies celebrate World Competition Day under a chosen theme. This event traces its history to 5th December 1980 when the United Nations General Assembly adopted Resolution 35/63 on the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. The objective was to ensure that restrictive business practices do not impede or affect trade and development in developing countries.

# Competition Authority Trains Local Authorities on Competition Assessment



Mr. Gideon Nkala addressing the Southern District Council in Kanye, Botswana on 12th December 2016



Honourable Councillors in the Kgalagadi District Council in Hukuntsi during an address by the CA on 14th December 2016

The Competition Authority is continuing to train local authorities on competition assessment so as to empower them to pass competition friendly bye laws and regulations. To that end, the Director of Communications and Advocacy Mr. Gideon Nkala recently addressed Southern District Councillors in Kanye and Kgalagadi District Councillors in Hukuntsi.

Nkala said governments usually come up with laws and policies in order to promote important public policy goals such as job reservation, public health, setting of quotas and adoption of standards.

However, some of the laws and policies even with the best of intentions may contain anti-competitive provisions. The aim of competition

assessment is to remove unnecessary restraints to competition in the marketplace, while still achieving the same policy objectives, bringing substantial benefits to the consumer and a country's economy.

Briefing the Councillors on the Competition Assessment Toolkit compiled by the OECD, Nkala told them to check if a regulation, law or policy; Limits the number or range of suppliers, Limits the ability of suppliers to compete, reduces the incentive of suppliers to compete or limits the choices and information available to customers. The Authority will continue to address Councils on competition assessment in the coming year and also enlighten them on the mandate of the Competition Commission and the Competition Authority.

## Competition Checklist

### Limits the number of suppliers:

- Grants exclusive rights for a supplier to provide goods or services
- Establishes a license, permit or authorisation process as a requirement of operation
- Limits the ability of some types of suppliers to provide a good or service
- Significantly raises cost of entry or exit by a supplier
- Creates a geographical barrier to the ability of companies to supply goods services or labour, or invest capital

### Limits the ability of suppliers to compete:

- Limits sellers' ability to set the prices for goods or services
- Limits freedom of suppliers to advertise or market their goods or services
- Sets standards for product quality that provide an advantage to some suppliers over others or that are above the level that some well-informed customers would choose
- Significantly raises costs of production for some suppliers relative to others (especially by treating incumbents differently from new entrants)

### Reduces the incentive of suppliers to compete:

- Creates a self-regulatory or co-regulatory regime
- Requires or encourages information on supplier outputs, prices, sales or costs to be published
- Exempts the activity of a particular industry or group of suppliers from the operation of general competition law

### Limits the choices and information available to customers:

- Limits the ability of consumers to decide from whom they purchase
- Reduces mobility of customers between suppliers of goods or services by increasing the explicit or implicit costs of changing suppliers
- Fundamentally changes information required by buyers to shop effectively

Source: OECD



Representatives of the merging parties L to R: Mr. Anthony Lee of Transport Holdings, Ms. Tatenda Dumba-Kgomanyane of Armstrongs Attorneys, Mr. Michael Stoneham and Mr. Daniel Mokiri of 4MS

## CA HEARS IMPASSIONED ARGUMENTS FOR AND AGAINST THE PROPOSED ACQUISITION OF 4MS GROUP HOLDINGS BY TRANSPORT HOLDINGS

The Competition Authority held a public hearing on 9th December 2016 on the proposed transaction involving the acquisition of assets and cession of the main contracts belonging to 4MS Group Holdings (Pty) Ltd (4MS) by Transport Holdings Ltd.

Impassioned arguments for and against the proposed transaction were presented at the hearing from representatives of the merging parties, their competitors in the transport industry and other interested parties.

The acquiring enterprise, Transport Holdings (incorporated in Botswana), is owned 80% by Imperial Holding Group (incorporated in South Africa) and the remaining 20% is held by a citizen of Botswana Mr. Anthony Lee, the Managing Director of Transport Holdings. Transport Holdings, together with its subsidiaries are operational in Botswana, South Africa, Mozambique and Namibia.

The target enterprise, 4MS, is a company incorporated in Botswana. It was established in 2004 as a Citizen/Driver Empowerment Scheme by Kgalagadi Breweries Ltd (KBL), and it is in the

haul transport services market with 97% of its business coming from KBL.

Ms. Tatenda Kgomanyane, a representative from Armstrong's Attorneys, on behalf of the acquiring and the target enterprises, cited several factors necessitating the proposed acquisition. These include the recent acquisition of SABMiller by AB InBev which has led to a change in the KBL procurement policies; the transfer of close to 38% of the 4MS business in KBL to Botswana Railways as part of a cost reduction exercise; the loss of business by Transport Holdings at the BCL Mine; and the reduction on import volumes of products from South Africa due to re-opening of the Coca-Cola plant in Botswana.

Describing 4MS as a failing firm, Ms. Kgomanyane indicated that the impact of the aforementioned factors would be catastrophic to 4MS, given that currently KBL accounts for 97% of 4MS' total revenue, with only one year remaining on its current contract. The proposed acquisition, she said, will ensure that 4MS is not liquidated and all creditors are paid off, including banks owed over P14 million for vehicle fi-

nancing.

Kgomanyane informed the audience at the hearing that the transaction is a horizontal merger and as such shall result in a duplication of jobs, of which Transport Holdings will not be able to employ the 40 employees of 4MS due to among other reasons, the recent closure of the BCL Mine where they lost a large contract.

Presenting arguments against the proposed transaction, competitors took issue with why the sale of 4MS, which was established as a Citizen/Driver Empowerment Scheme by KBL was not widely advertised to other interested parties. They also cited the erosion of citizen economic empowerment in favour of foreign firms and the loss of jobs amid Botswana's unemployment crisis.

Representatives of the Botswana Truckers and Allied Workers Union expressed concern about the likely impact on 4MS employees in terms of employment and benefits. The Competition Authority continues with the assessment of the proposed acquisition and will make a determination in due course.

# COMPETITION AUTHORITY LAUNCHES 2015/16 ANNUAL REPORT HIGHLIGHTING SUCCESSES AND CHALLENGES

The Vice Chairperson of the Competition Commission, Ms. Thembisile Phuthego, launched the Competition Authority's 2015/16 Annual Report on 5th December, highlighting the successes and challenges faced by the Authority in the financial year under review.

Outlining some of the successes, Ms. Phuthego said the Authority collaborated with the Directorate on Corruption and Economic Crime, (DCEC) and the Public Procurement and Asset Disposal Board (PPADB) to audit mega national projects to determine if there were procurement irregularities, corruption or anti-competitive conducts. Audited projects included the Thune Dam Construction Project, the Poverty Eradication Programme, two Facilities Management Projects under the Ministry of Health and the procurement of Radiology Equipment at the University of Botswana. The projects were each selected for their importance to the economy and also in consideration of the numerous complaints that had been received by the PPADB on some of the projects. Some of the audits resulted in the procuring divisions and senior management being trained to combat bid-rigging in mega projects.

Regarding investigations, the Authority uncovered bid-rigging in a tender worth over P110 million for the supply of sugar beans to a Government ministry. The case was brought before the Competition Commission which ruled against the Authority. The CA took the case on appeal to the High Court, and it did not succeed at the High Court, and the case is now before the Court of Appeal. In another case involving infant formula milk, the Authority's investigations uncovered a price fixing arrangement to rig a tender. The Commission on a technicality ruled against the Authority, and the Authority appealed to the High Court and succeeded. The respondents in the matter are appealing, and the case is before the Court of Appeal.

Still on successes, the CA conducted a study into the cement industry in Botswana which revealed an exclusive agreement



The Vice Chairperson of the Competition Commission Ms. Thembisile Phuthego Launching the 2015/16 Annual Report

with regard to the supply of fly ash (the main ingredient in the manufacturing of cement) between Botswana Power Corporation and PPC Cement. This practice was stopped through the intervention of the Authority, opening up the market for greater competition.

A total of 33 merger notifications were handled and 29 were finalised; 26 were approved without conditions, three with conditions and none were prohibited. In the period under review, four merger transactions, which were implemented between the period 2012 and 2014, were selected for review to assess their impact in Botswana's economy. The impact realised was achievement of citizen empowerment through active participation in the market, as well as employment creation.

The Authority hosted the International Competition Network (ICN) Agency Effectiveness Workshop in Gaborone, which was the first major international conference that the Authority hosted. Over 120 participants from 25 countries including Competition Law experts attended the



Acting CEO Ms. Tebelelo Pule welcoming guests

workshop. The workshop, other than affording the CA staff invaluable expert training raised the profile of the organisation amongst the world competition community. The CA Hosted an Open day where various stakeholders came to interact with the Authority and to learn about the CA's various offerings, conducted an awareness and perception survey, actively engaged the media and published six newsletters.

The Authority took part in five major social responsibility initiatives which included donating toiletries, clothing and roofing materials. In terms of challenges, Ms. Phuthego cited the limited funding that the CA receives from government which is way below the Authority's budget, and affects the implementation of planned projects. Other challenges include an inadequate staff complement and late submission of data by external parties. This is more prevalent in the retail sector in which a lot of companies are headquartered in South Africa, and their information clearance procedures take long.

# COMPETITION AUTHORITY DONATES TO TSHANE PRISON

The Competition Authority, through the Department of Communications and Advocacy, 14th December donated bars of soap, tooth paste, tooth brushes and lotions to inmates at the Tshane Prison situated 12 kilometres East of Hukuntsi in the Kgalagadi South Constituency. The donations were handed to a team of senior prison officials led by Superintendent Relatlhanye who received the donations on behalf of the inmates.

At a short handover over ceremony which was done at the Tshane Prison Recreation Hall, where the 81 inmates attended, Superintendent Relatlhanye welcomed the Competition Authority team comprising the Director of Communications and Advocacy Gideon Nkala, Mr. Modimoosi Matebesu and Mr. Otlathusa Seforo. He said the Tshane Prison does not regularly receive guests from outside particularly those coming to donate.

“We are very delighted that you thought about us. Toiletry is one of the major needs here and I can assure you that the gifts you brought will fulfil an urgent need,” Superintendent Relatlhanye said. He indicated that Tshane Prison accommodates between 70 and

90 prisoners but currently it holds 81 inmates. Some prisoners come from as far as Maun, Francistown and Bobonong. He further said because the Tshane Prison is located almost at the south west tip of Botswana it makes it difficult for some families from far flung parts of Botswana to visit their relatives at the facility and as result donations, visits and motivational talks from organisations such as the Competition Authority go a long way in meeting the physical and emotional needs of the inmates.

For his part, Nkala said the Competition Authority sees donations to outside organisations as connecting with the wider public especially where there is human need. The donation to Tshane Prison, he said, served to demonstrate the Authority’s staff commitment, affection and love to inmates at Tshane Prison. He said this is the first time that the Authority has assisted a prison facility and expressed hope that this relationship would not be a once-off event.

When motivating the inmates, Nkala said the gift was mainly to demonstrate godly love and to show inmates that the Authority is an integral part of the Botswana community.

“We care and still love you even though you have been kept away from society and your loved ones for varying periods,” he said.

Drawing from the Bible, in the book of Genesis, he said Joseph who was a type and shadow of Jesus Christ ended up in prison but when he was in prison he never gave up his dream nor surrendered to despondency of prison life. In fact, he said, prison moulded and shaped him such that when he left prison he became a Prime Minister.

Nkala implored the inmates never to allow their time in prison to be the end of their life journeys or to bury their dream, instead he implored them to use their prison experience to purify their character and relaunch themselves into their God given destinies and dreams.

Giving a vote of thanks, an inmate (who cannot be named under prison regulations) thanked the Authority for the gesture of goodwill and said it will make their life in prison bearable. At the end of the short ceremony there was an opportunity to sing songs of praise and pray for the prisoners and to hug and press flesh as a demonstration of God’s love and fellowship.



Mr. Modimoosi Matebesu and Mr. Gideon Nkala with Tshane Prison Officers who received the donation

# AFRICAN MARKETS HAMPERED BY RESTRICTIVE GOVERNMENT POLICIES AND BUSINESS PRACTICES

**M**arkets in many African countries are restricted by business practices that undermine competitive dynamics, and by government actions that create barriers to healthy competition. According to the World Bank Report entitled *Breaking Down Barriers: Unlocking Africa's Potential Through Vigorous Competition Policy*; economies are still marked by government actions - such as policies, regulations, procedures, programs, and commercial decisions - that reinforce dominance by restricting the number of firms or limiting private investment, increase business risks and facilitate agreements among competitors, discriminate against certain competitors or affect competitive neutrality.

The report says this is shown by the Economist Intelligence Unit indicators on factors that increase operational risks, but also in the analysis of cement, fertilizer, and telecommunications sectors in some African countries. When firms agree to fix prices, empirical evidence reveals that consumers pay 49 percent more on average, and 80 percent more when cartels are stronger. With regard to policy barriers to competition, trade and foreign investment policies in Africa are more restrictive of competition than those in other regions. Business risks generated by price controls, vested interests, and favouritism are also higher.

Africa has much to gain by encouraging open and competitive markets, particularly as a means to spur sustainable economic growth. Reducing regulatory restrictiveness in professional services would, other things being equal, boost growth in value added in industries that use professional services intensively by between 0.16–0.42 and percentage points of GDP growth for a sample of nine African countries. The impact would be even bigger if fundamental reforms were implemented in other



Maize is one of the products affected by cartels in Africa

services sectors with higher spill-over across the economy, such as electricity, telecommunications, and transport, notes the report.

Cartels are the most harmful anti-competitive practice, but anti-cartel enforcement remains relatively weak in Africa. In 2013/14, 42 horizontal agreement cases were completed by nine authorities; and out of those, half were investigated by the Competition Commission of South Africa. Products that have been found to be affected by cartels in Africa include fertilizers, food (including wheat, maize, and bread), pharmaceuticals, construction materials (including cement), and construction services.

Maize is one of the products affected by cartels in Africa

Despite their harm, fines allowed and imposed for cartels in Africa are not high enough to deter their formation. On average, fines are only 9 percent of excess profits compared to 26 percent in the European Union. The report says practical implementation of key anti-cartel en-

forcement tools needs to be strengthened as well. At least 16 competition authorities have search and seizure powers, but few have carried out raids. Moreover, at least seven countries have a leniency program that allows a cartel member to confess its involvement in a cartel and fully cooperate with the resulting investigation in exchange for reduced sanctions. But to date, leniency applications have only been received in South Africa and Mauritius.

However it is not all doom and gloom. The report says there has been important progress in the enactment of competition policy frameworks in Africa. The number of jurisdictions with competition laws grew from 13 in 2000 (12 countries and one regional bloc) to 32 in 2015 (27 countries and five regional blocs). Importantly, competition authorities are now implementing these laws in 25 jurisdictions (including two regional blocs).

Source: *Breaking Down Barriers: Unlocking Africa's Potential Through Vigorous Competition Policy*

## Tshepo Wadipeba

**BCB: Tell us about yourself.**

**Tshepo:** I am, first and foremost, a mother and a wife who truly believes in herself and her potential and continuously strives for excellence in all aspects of her life. I am also a Human Resource Professional with extensive experience in the field of Human Capital Management, having worked in different sectors such as the private sector, parastatals, the public service, and non-governmental organisations. With regards to my academic qualifications, I hold a Bachelor's Degree in Social Sciences obtained from the University of Botswana in 2003, an Executive Human Resource Programme obtained from the University of Stellenbosch Business School in 2014 and finally a Certificate in Finance for Non-Financial Managers. In addition to that, I have been certified as a Senior HR Professional through the Society of Human Resource Management. I have also participated in numerous short term courses such as Corporate Governance, Fraud and Risk Management, Competency Based Recruitment and Leadership Development Programme (Investment in Excellence).

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

**Tshepo:** I was particularly excited by the opportunity to be part of a founding team that would at that time be responsible for establishing the Competition Authority from scratch to a well-functioning organisation.

**BCB: Tell us about your experiences as one of the first staff members who set up the Authority from scratch and the contributions you made as HR Manager.**

**Tshepo:** It was a truly challenging yet exciting and enriching experience. You can imagine joining an organisation and you don't even have an office nor a desk to work on. The founding team had to ensure that there is an office building, furniture, IT infrastructure, vehicles etc. Parallel to that, we had to immediately develop operational policies and processes and at the same time recruit a highly skilled workforce. In addition to the above activities which we all participated in, I as the HR Manager, successfully set up the Human Resource Unit and developed and implemented a number of HR Policies and Processes such as the Talent Acquisition Guidelines, the General Terms and Conditions of Service, Training and Development Policy etc. which were all approved by the Human Resource Committee and the Competition Commission. I was also the Project Manager for the development of the very first Competition Authority 5 year Strategic Plan which is currently being implemented.

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Ms. Tshepo Wadipeba-Human Resources Manager

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

**Tshepo:** As the Human Resource Manager of the CA, I provide strategic guidance on human capital issues mainly; talent management, HR Policies, talent acquisition, employee engagement, succession planning, change management, organisational development, employee relations and employee health and wellness.

**BCB: What did you do before joining the CA?**

**Tshepo:** I was the Human Resource Manager for Botswana-Upenn Partnership, a non-profit organisation which is a collaboration between the Botswana Government, the University of Pennsylvania and the University of Botswana aimed at capacity building and research in the management of HIV/AIDS in Botswana. At BUP, I was responsible for providing guidance and support on human resource management issues by integrating the HR Strategy into the BUP planning process, emphasising human resource activities that support broad organisational goals, and building a strong relationship between HR and management to ensure that management of the employees contributes to the accomplishment of BUP strategic objectives.

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

**Tshepo:** I have experienced immense professional and personal growth during the past five years in

the Competition Authority. It has provided me with a platform to showcase my talents and at the same time learn and grow as an HR Professional. Through a number of HR interventions such as the Leadership Development Programme, the Employee Engagement Plan, Corporate Wellness Programme, Team-building Retreats etc., I have managed to assist the Authority to improve employee engagement and productivity, maintain a very impressive staff turnover rate for the past five years, and ultimately improve the overall organisational effectiveness.

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

**Tshepo:** I have quite a number of special things that I can mention, but the one that stands out most was receiving an award for "Best Motivator of the Year" for two consecutive years, in 2012 and 2013. As a woman and an HR Professional, one of my goals is to inspire, encourage and motivate people around me so that they can realise their potential both professionally and personally, and I was happy to see that I have somehow managed to achieve that.

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

**Tshepo:** As you know, most HR strategies and initiatives require adequate funds for successful execution and impact. The past few years have been a bit challenging in terms of availability of funding to implement most HR initiatives. However, we did not allow that financial challenge to be an impediment as we still managed to achieve the strategic objectives that we had set for ourselves through cost-saving and non-monetary interventions which has assisted us to maintain high levels of employee engagement, staff retention and organisational performance.

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

**Tshepo:** It would have to be being a member of the founding team that established and resourced the Authority from its infancy stage in 2011 to a high performance organisation that it is today. That experience has indeed been one of the highlights of my career thus far.

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

**Tshepo:** I aspire for a fulfilling professional life and personal life, in which I am able to continuously make a positive impact in my organisation and also make a positive difference in my personal life and the lives of people around. Five years down the line I see myself in a highly accountable and respectable position, taking up challenging projects and making good decisions that would have positive influence on the organisation and the community at large.

**BCB: Is there any wisdom you wish to share?**

**Tshepo:** What I can share is that a successful career and successful life is largely dependent on the choices you make as an individual. I therefore advise the young and upcoming professionals to always choose hard work, consistency, humility, perseverance, gratitude, professionalism and good ethical conduct!!! As one writer has said, "We are who we choose to be."

# COMPETITION AUTHORITY IN PICTURES

## Public Hearing on Acquisition of 4Ms by Transport Holdings



### Captions

1. Mr. Seabelo Tlhaselo of Seabelo Transport (Pty) Ltd expressing his views on the proposed transaction 2. Mr. Stoheham of 4MS answering questions from reporters 3. A representative of the Botswana Truckers Association Workers Union Mr. Kgomotso Panye 4. **Front row:** Directors from 4MS Mr. Cassius Mothudi and Mr. Mbakiso Matshambane **Back row:** Mr. Johan de Kock Managing Director of KBL and Mr. Hunter Modongo of 4MS



# WORLD AIDS DAY 2016



## Captions

1. The Director of Mergers and Monopolies Ms. Magdeline Gabaraane welcoming staff and guests at the World AIDS Day commemoration 2. Guest speaker Pastor Mmoloki Mogokgwane giving the inspirational message for the day 3. Staff of the Competition Authority and Pastor Mogokgwane

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