



BOTSWANA CRIMINALISES CARTELS



Participants from the Botswana Police Service and the Directorate of Public Prosecutions addressed by the Director of Legal and Enforcement Mr. Kesego Modongo on criminalisation of cartels in the new Act on 31st January 2019

The Competition Act of 2018 was passed into law by Parliament on 12th December 2017 and received Presidential assent on 27th March 2018. One of the most substantive changes that have been made in the Act is the criminalisation of cartels, which is provided for under section 26 and section 27(3) of the Competition Act of 2018. Under section 26, any officer or director of an enterprise who contravenes section 25 (on the prohibition of horizontal agreements) commits an offence and is liable to a fine not exceeding P100 000 or to a term of imprisonment not exceeding five years, or to both.

Section 27(3) of the Competition Act of 2018 further says any officer or director of an enterprise who contravenes

this section (on the prohibition of vertical agreements) commits an offence and is liable to a fine not exceeding P50 000.

The Competition Act of 2009 did not provide for the criminalisation of cartels.

As the Competition Authority prepares for the implementation of the new law, it is currently engaging key stakeholders to apprise them on the substantive changes to the Competition Act. Cooperation with public prosecutors and police service is an essential component for the effective enforcement of cartels in jurisdictions that have adopted a criminal enforcement regime against cartels.

To that end, the Authority identified the

Botswana Police Service (BPS) and the Directorate of Public Prosecutions (DPP) as crucial partners to engage in order to discuss the best modalities for cooperation in giving effect to the criminalisation provisions. To this end, the CA hosted a workshop for the BPS and the DPP on 31st January 2019. The objective of the workshop was to create a relationship whereby the three institutions understand each other's mandates and are able to assist each other to achieve their respective objectives. The Authority's Director of Legal and Enforcement, Mr. Kesego Modongo noted that there is need for the Competition Authority, the Police Service and the Public Prosecuting Authority to work closely to ensure that cartelists are prosecuted.

"There is need for a legal framework that enables a seamless collaboration between the Authority, which is mandated to uncover and investigate cartels, the Police; who by law are mandated to investigate criminal transgressions, institute and undertake criminal proceedings against any person in respect of any offence alleged to have been committed by that person, and the office of the DPP, which is by law mandated to institute and undertake criminal proceedings against any person in respect of any offence alleged to have been com-

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mitted by that person,” Modongo said.

When the Competition Act commences, contraventions of sections 25 and 27 by officers and directors of enterprises engaged in cartels will become criminal offences falling within the mandate of the BPS and the DPP. Sections 25 and 27 deal with prohibited horizontal agreements and

prohibited vertical agreements respectively. Furthermore, the Competition Authority has published a Leniency Policy which gives certain immunity to cartel members that self-report their involvement in cartels and cooperate with the Authority to uncover and prosecute members of the

cartel. Once the Competition Act of 2018 commences, there will be need to amend the Leniency Policy.

Therefore the Authority used the workshop to solicit initial views and comments on how this can be done without encroaching on the DPP’s constitutional power to prosecute criminal offences.

COMPETITION LAW AND STATE OWNED ENTERPRISES BOTSWANA’S PERSPECTIVE



Competition law and state-owned enterprises (SOEs) was one of the topics for discussion at the OECD Global Forum on Competition which was held in Paris in November 2018. The OECD, in its background note, says this comes under the background of SOEs operating in key sectors of the economy, often undergoing liberalisation, and the number of SOEs engaging in commercial economic activities competing with private entities.

“Actions, agreements and mergers of SOEs may sometimes harm consumers, causing competition agencies to sometimes investigate their behaviour, and competition authorities have sought to be effective in enforcing competition law against them,” the OECD says.

The roundtable examined the type of conduct that SOEs have engaged in, the rationale for doing so, the key analytical questions that arose in these cases, and the way in which their status and objectives affected those investigations; with the view to drawing out the main challenges of enforcing competition law against SOEs, and ways to address them.

Giving Botswana’s perspective on competition law and SOE’s, the Competition Authority’s Director of Legal and Enforcement, Mr. Kesego Modongo, told the roundtable that application of the Competition Law is to all economic activity in Botswana, and the ‘State’ will only be held accountable or be regulated for competition issues to the extent

that it engages in trade, in any market that is open for participation by other enterprises. Express exclusion from competition regulation is on enterprises operating on the basis of statutory monopoly. Modongo said definitional clauses and architecture of the Competition Act has created two sets of SOEs being market participants with competitors; and those not regarded as market participants purely for public policy objectives. “The interventions of the Authority will vary significantly due to this legal framework of qualified immunity to state enterprises, and absolute immunity to statutory monopolies,” he said.

SOE’s that are engaged in commercial activities meet thresholds of the law are market participants and compete in a defined market. Modongo cited a case in the bonded cargo market involving a joint venture between Botswana Railways and Transnet t/a Spoornet, which allegedly engaged in unilateral conduct; foreclosing truck and haulier companies in the downstream market.

On the other hand, statutory monopolies are exempt from competition law because they do not meet thresholds of the law, are not market participants and have no competitors in a defined market. “But their conduct invariably places barriers and distorts and skews competition. Analytically their conduct cannot be addressed by provisions of the Act and this poses challenges in terms of fully redressing the perceived distortion of competition, and the plethora of legal hurdles if an attempt is made to fully prosecute their conduct,” observed Modongo.

For statutory monopoly cases, he cited the case of the Botswana Power Corporation’s (BPC) coal fired electricity generating plant at Morupule Mine. The plant exclusively sold its fly-ash by-product to Pretoria Portland Cement as an essential input for cement and brick



manufacturing. This decision of the SOE skewed competition, and created a barrier to other customers. Modongo said the Authority intervened by engaging the SOE which changed its strategy and resulted in local companies Botsino Portland Cement, and Matsiloje Portland Cement obtaining the fly ash and resuming their operations, and Lobatse Clay Works was also able to continue with its brick manufacturing as a result of the intervention.

Another case was the BPC’s tender for Electrical Works and Consulting which was skewed towards one company.

Although BPC was not a market participant, the decision it made played a big role in influencing competition in the relevant market. Modongo told participants that “analytically, and with reference to the law, there was a challenge to place the conduct within the confines of the enabling legislation for purposes of prosecution.”

Therefore, the Competition Authority engaged BPC on the overall holistic approach of removing this barrier, and as a result, BPC changed its strategy and reformulated its tender.

In another case involving a SOE, Botswana Meat Commission decided to sell its tallow by-product, (a raw material used in the manufacturing of soap) exclusively to one company push-

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ing some players out of the market.

“The Authority engaged the SOE instead of prosecuting to the full extent of the law,” he said.

On the way forward, Modongo said

future actions may encompass re-evaluation of the exceptions, lifting the express and total immunity availed to statutory monopolies through amendment of the Act, alignment of definitions to avoid creating

enforcement gaps; and a behavioural test instead of structural test to accommodate the ever changing landscape of market competition.

CA TO HOLD COMPETITION SYMPOSIUM



File pic: Participants at a competition conference hosted by the CA

The Competition Authority will on Wednesday 10th April 2019 host a national Competition Symposium which will be held in Gaborone at a venue to be confirmed. The aim of the symposium is to highlight issues of competition and how competition can assist in making critical socio-economic transformations. The theme of the Symposium is “An Integrated Business and Competi-

tion”. Key topics for discussion at the symposium will be ‘Vertical Integration’ and ‘State Owned Enterprises,’ SOEs.

Commenting on the symposium, the Director of Communications and Advocacy, Mr. Gideon Nkala, had this to say: “this theme is relevant as it compels us to look into the realities of our day, where more and more businesses are integrating new services and products along the

value chain. This has caused a number of disruptions in the way trade has been conducted. While some enterprises have become profitable, others have found the going tough and have exited the market. Is the vertical integration shrinking the size of the market or making it more competitive and accessible to more players?”

Nkala said the discussion on state enterprises will examine how SOEs serve or hinder consumer welfare. “It is our conviction that when these issues are discussed within the context of a competitive economy, a major milestone will be attained towards building a robust competitive environment in our markets,” he said.

The symposium will draw participants from the business community including SMME’s and various players in the supply chain, research institutions, labour unions, SOEs, regulatory agencies and other stakeholders.

SCHOOLS URGED TO STICK TO UNIFORM GUIDELINES

South Africa’s Competition Commission has urged schools to adhere to the school uniform guidelines aimed at curbing anti-competitive behaviour at schools. In a statement it said this is aimed at making sure that schools are compliant with the Competition Act but, most importantly, school uniform becomes reasonable and affordable.

The Commission’s investigation into anti-competitive behaviour at schools was concluded early last year. The probe established that a number of schools still had exclusive contracts with one supplier which didn’t go through a competitive and transparent bidding process.

“Given the number of schools and other considerations, it was felt that schools must focus on the primary function, which is to educate. The Commission was reluctant to drag these schools through protracted litigation



process and distract them from their main function,” the statement said.

The Commission said it engaged all stakeholders including private schools, suppliers, governing bodies, and the government and an agreement was made on the implementation of school uniform guidelines issued by the government which include the following:

- School uniform should be as generic as possible such that it is obtainable from as many suppliers as possible.

- Exclusivity should be limited to items that the schools regards as necessary to obtain from pre- selected suppliers e.g. badges.

- Schools should follow a competitive bidding process when appointing suppliers.

- Schools should appoint more than one supplier in order to give parents more options.

- The concluded agreements should be of limited duration.

“Subsequently, the Commission signed an MOU with FEDSAS, a federation of school governing bodies, which is aimed at educating and encouraging schools to comply with the guidelines,” the statement said.

Source: South African Competition Commission

Goitsemodimo Tseladikae



Manager for Legal and Enforcement – Goitsemodimo Tseladikae

BCB: Tell us about yourself!

Goitsemodimo: My name is Goitsemodimo Tseladikae. I am a lawyer by profession, I hold a Bachelor of Laws Degree from the University of Botswana and a Diploma in Economics for Competition Law from King's College London. I am currently studying towards a Masters in Business Administration (Law) with the University of London. I am the Manager for Legal and Enforcement at the Competition Authority. I am an avid reader and currently on a mission to discover and read books by African authors and female black authors from all over the world.

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

Goitsemodimo: I have no specific reason

really except at the time I felt it was time for a change and growth. The need for change has brought me here and I believe it came at the most opportune time.

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

Goitsemodimo: I am part of the Department of Legal and Enforcement and we offer legal services to the Authority, which includes legal advice on both administrative matters and the interpretation of the Competition Act. We are also responsible for the prosecution of competition cases at the Competition Commission or any other courts within Botswana for the enforcement of the Competition Act.

BCB: What did you do before joining the CA?

Goitsemodimo: Before joining CA I worked for Legal Aid Botswana (LAB), a parastatal mandated with providing legal services and access to justice for indigent Botswana. I litigated on behalf of the LAB clients on a wide range of matters such as commercial, civil, employment and family law at the Magistrate Court, High Court, Industrial Court and the Court of Appeal.

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

Goitsemodimo: My experience at the Competition Authority has been very positive. I believe Competition Law is a very interesting and engaging field. I have therefore been on a learning and explorative journey with regard to competition law concepts.

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

Goitsemodimo: I would have to say the exposure I have received at the Competition Authority has been the best thing that has happened to me. Exposure in terms of the learning opportunities I have been afforded, and exposure in terms of the networking I have been afforded through numerous and eye-opening competition law conferences and other events.

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

Goitsemodimo: I would take with me the memories of how CA strives to show its Goitsemodimos that it cares, simple but heart-warming small tokens on Valentine's Day for example. My favourite will always be from December 2018 when we found gifts at our respective office doors with personalised messages and Christmas carols blasting throughout the office.

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

Goitsemodimo: May I just say watch the space? So watch the space, I know I am destined for great things!

BCB: Is there any wisdom you wish to share?

Goitsemodimo: Know your worth and believe in yourself.

PICTORIAL



The Director of Legal and Enforcement Mr. Kesego Modongo and the Chief Executive Officer Ms. Tebelelo Pule at the OECD Round Table in Paris in November 2018



Participants at a Panel discussion at the South African Competition Commission in November 2018



Dr. Senate Tanyala presenting to CA Staff during World Aids Day 2018



CA Staff during World Aids Day Commemoration in December 2018

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