



**IN THE COMPETITION COMMISSION OF THE REPUBLIC OF BOTSWANA HELD AT GABORONE**

**CASE NO: CC-CR/01/A/18 I**

In the matter between:

**COMPETITION AUTHORITY**

**APPLICANT**

and

**GABORONE CONTAINER TERMINAL (PTY) LTD**

**RESPONDENT**

**CONSTITUTION OF THE PANEL**

Dr ONKEMETSE B. TSHOSA  
TENDEKANI E. MALEBESWA  
THEMBISILE T. PHUTHEGO  
Dr SELINAH PETERS  
SEIPATI G. OLWENY  
PHODISO P. VALASHIA

Presiding  
Member  
Member  
Member  
Member  
Member

**FOR THE APPLICANT**

Attorneys MODONGO K. and TSELADIKAE G.

**FOR THE RESPONDENT**

Attorney KHUMOMOTSE O.G and GULUBANE T.O

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## DECISION

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1. This decision relates to points *in limine* that were raised by the Respondent in the referred matter by the Applicant to the Competition Commission (the Commission) against the Respondent on the 26<sup>th</sup> November 2018.
2. The points *in limine* were filed on the 10<sup>th</sup> December 2018 and were as follows:
  - 2.1 That the Applicant's application is legally irregular, fundamentally defective and a nullity, as the same has not been duly sanctioned by any resolution or power of attorney of the Competition Authority (the Authority) authorising the institution of these proceedings;
  - 2.2 That the proceedings are a nullity, as the appointed inspector failed to produce a report of evidence of investigations in terms of section 38 (1) of the Competition Act ( Cap. 46:09) (the Act) and thus no legal basis or evidence exists for referral of the matter to the Commission;
  - 2.3 That the proceedings are legally invalid and improperly referred to the Commission as the Authority failed to afford the Respondent a hearing despite repeated requests in terms of section 39 (1) as read with regulation 14(1) of the Competition Regulations (the Regulations) rendering the proceedings liable to be struck out;
  - 2.4 That the Applicant has failed to capture the particulars of complaints by attaching letters of complaints as reference to the investigations undertaken by the Applicant and thus, the said particulars remain

unknown to the Respondent and as such, rendered the referral wholly extinguishable as the referral was improperly before the Commission.

- 3 The Applicant responded to the Respondent's points *in limine* by incorporating its reply in the Replying Affidavit of Thabiso Mbongwe filed of record on the 19<sup>th</sup> December 2018, instead of filing a notice of opposition to the points *in limine*. Whilst this is not in conformity with the general practice of responding to preliminary objections, we will accept it as sufficient for purposes of replying to the Respondent's preliminary points.
- 4 On the 21<sup>st</sup> December 2018 the Respondent further filed additional points *in limine* against the Applicant's Replying Affidavit as follows:
  - 4.1 That the Replying Affidavit of Thabiso Mbongwe, be declared a nullity of no force or legal effect, as has not been properly commissioned by purported Commissioner of Oaths, as has not identified himself by names as an empowered person contrary to Commissioner of Oaths Act (Cap 05:03), rendering it liable to be struck out with costs.
  - 4.2 That the points of law be upheld with costs on Attorney client scale and it be ordered that the Applicant shall have no reliance on the said Replying Affidavit as struck out.
- 5 On the 9<sup>th</sup> January 2019 the Applicant filed a notice of opposition to the additional points *in limine* against the Respondent's notice to raise points *in limine* on the following grounds:
  - 5.1 The Commissioner of Oaths Act, Cap 05:03 does not prescribe a manner in which an oath has to be administered or what has to appear in the affidavit in so far as attestation is concerned;

- 5.2 For an affidavit to be valid the person administering the oath must be empowered by the Commissioner of Oaths Act and members of the Botswana Police Service of ranks of Sergeant and above are commissioners of oaths for the whole of Botswana. The officer who commissioned the affidavit of Thabiso Mbongwe is a member of the Botswana Police Service and of rank of inspector; and
- 5.3 The inclusion of the name of the Commissioner of Oaths in the affidavit is a best practice procedure not a requirement by law and therefore cannot render the affidavit a nullity.
- 6 Both parties filed Heads of Argument which they relied on during oral submissions.
- 7 The first preliminary issue raised by the Respondent to the referral application is that the application is irregular, fundamentally defective and a nullity since it has not been duly sanctioned by any resolution of the Competition Authority and is susceptible to be struck off. Further, according to the Respondent, there is no power of attorney authorising the institution of proceedings by the inspector, which the Respondent referred to as "lack of mandate".
- 8 The Commission will first deal with the issue of power of attorney authorising the institution of proceedings and depending on how it decides this issue the Commission will proceed to address the issue of a resolution. The requirement of commencing a case with a power of attorney is a practice generally followed in courts of law particularly the higher courts. In fact, this is a legal requirement in these courts. In the High Court, Order 4 Rule 1 of the Rules of the High Court (Cap. 04:02) provides as follows:

"Except as is hereinafter provided, no writ of summons, petition, motion or other originating document in a cause... shall be issued by the Registrar at the instance of an attorney on behalf of a plaintiff, petitioner or applicant, nor shall the Registrar cause appearance to be entered at the instance of an attorney on behalf of a defendant or respondent, unless there has been filed with him a power of attorney to sue or to defend, as the case may be."

- 9 A similar provision appears in the Rules of the Court of Appeal for instituting or defending actions at the Court of Appeal. However, there is no equivalent clause in the Rules for the Conduct of Proceedings of the Competition Commission (Competition Commission Rules). This means that if we go strictly by the Competition Commission Rules, they do not specifically require the Authority to file a power of attorney to institute or defend proceedings.
- 10 It is worth noting that in terms of Rule 35 (1)(b) of the Competition Commission Rules, if a question arises as to the practice or the procedure to be followed in cases not provided for by these Rules, the Chairperson or assigned Member may have regard to the Rules of the High Court. As stated above, the Rules of the High Court require that no summons, petition, motion or originating document in a cause shall be issued by an attorney on behalf of a litigant unless the power of attorney has been filed with the court. It means that applying the Rules of the High Court as mandated by Rule 35 (1)(b) of the Competition Commission Rules the Respondent should have filed the power of attorney together with the referral of the matter to the Commission failing which the referral would be a nullity.
- 11 However, the very Rules of the High Court do not render or rather make non-compliance with the Rules automatically void or a nullity. Order 5 Rule 1 thereof stipulates that:

"subject to rule 2, non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render proceedings void unless the judge so directs, but the proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with, in such manner and such terms as the judge may think fit."

It is within the discretion of the presiding judge to decide whether or not the proceedings are void.

12 It is important to note that the same Order 5 of the Rules of the High Court, Rule 3 (3) provides that:

"No such application shall be brought unless 10 court days' notice has been given to the offending party to remove the cause of complaint and he has failed to do so".

Thus before an application on a preliminary objection is filed with the court, the party which has not complied with process of court should be given an opportunity to remedy the defect. If that party fails, then a preliminary objection may be filed.

13 When Order 5 of the Rules of the High Court is read in its totality, it does not only give the judge the discretion to declare the proceedings void. It also provides an opportunity for the litigant who did not comply with the rules of practice of court to cure the technical defect. This ensures that the case is heard expeditiously. As Justice Tafa eloquently observed in **Baska v Landscape Decorators Botswana Pty (Ltd) and Another 2012 (2) BLR 416 (HC) at pages 419-20:**

"However, I am concerned that the points in *limine* were raised without resort first to Order 5 rule 3 (3)... To my view, Order 5 rule 3 is there to ensure that litigants do not protract litigation at extra costs, without first affording one another an opportunity to cure a technical defect. Any party to litigation who when given an opportunity to cure a defect before formal application is made to strike out his pleadings fails to seize the opportunity does so at his own peril and shall be prepared to pay cost of ensuing applications to strike out."

- 14 In our view, this is a proper case in which the Respondent should have given the Applicant notice to cure the defect of not securing the power of attorney, or even if not a power of attorney strictly, some authority to institute the proceedings, if it is necessary to do so. This is a defect of a technical nature that could easily be remedied and if being called upon to cure it the Applicant then refused, it would have to bear the costs. However, the Applicant was not called upon to cure the defect and failure to secure a power of attorney cannot render the referral application a nullity. The same applies to the issue of failure to get a resolution from the Competition Authority.
- 15 It should be pointed out that even apart from the High Court Rules, the preamble to Competition Commission Rules provides, *inter alia*, that the Commission is not enjoined to follow any formalised rules of procedure, but may condone any technical irregularities in any of its proceedings. In our view, the preliminary point advanced by the Respondent that the proceedings should be declared defective and therefore a nullity is a formalised procedure that is not even required by the Competition Commission Rules and is an irregularity that we can and do condone.
- 16 Moreover, the Applicant is a creature of statute enjoined to "investigate and evaluate alleged contraventions of Part V" (section 5(2)(k)); "refer matters if

has investigated under this Act to the Commission for adjudication" (section 5(2)(o); and "prosecute before the Commission, matters referred to the Commission under paragraph (d)" (section 5(2)(p)).

17 In the exercise of these investigatory and prosecutorial functions the Applicant does not require any further enabling act in the nature of a power of attorney or resolution, as these are already embedded in the statutory provisions. Powers of attorney or resolutions in this instance could only be sought from the Commission, to which the matter would then thereafter be referred for adjudication. This would be very untidy, and would conflate the prosecutorial and adjudicatory roles of the two institutions. The Commission affirmed this position in **Carfill Services (Pty) Ltd and Others v Competition Authority (CC – CR/02/A/13)**. It would also fetter the prosecutorial discretion of the Applicant. As the Supreme Court of Appeal of South Africa said in **National Director of Public Prosecutions v Zuma (573/08) [2009] ZASCA 1** at paragraph 28:

"Nevertheless, an Attorney – General is required by convention to make prosecutorial decisions without regard to political considerations and may not subject his discretionary authority to that of government. He is also not responsible to government to justify the exercise of his discretion because this political office has judicial attributes."

18 Similarly, the prosecutorial discretion and independence of the Applicant cannot be interfered with through the use of powers of attorney and resolutions. The issue of independence was also underscored, again, by the Supreme Court of Appeal of South Africa in **The Competition Commission of South Africa v Telkom SA Limited and Another (623/2008) [2009] ZASCA 155**. When referring to the Competition Commission of South Africa (which performs functions that are similar to those of the Applicant), stated at paragraph 11:



"The Commission must exercise its functions in terms of the Act (s 19(1)(c)). The Commission is independent and subject only to the Constitution and the law (s 20 (1)(a)). It must be impartial and perform its functions without fear, favour and prejudice (s 20 (1)(b)). Its functions include the investigation and evaluation of alleged contraventions of Chapter 2 (s 21(1)(c), the referral of complaints to the Tribunal and appearances before the Tribunal (s 21 (1)(g) and 53(a))." (emphasis added).

19 The Respondent further contended that it was not afforded a hearing by the Applicant before the matter was referred to the Commission. In addressing this point in **Competition Authority v Creative Business Solutions (Pty) Ltd and Another** (CC-CR/01/A15 I) (Infant Formula case) the Commission stated at paragraph 68:

"As we have already said above, the rights of those who are subject of an investigation are asserted at the point of referral, or if this leads to a hearing, then during the hearing itself. To do otherwise would dangerously tilt the balance between the public interest and the private interest inexorably in favour of the private interest."

20 At paragraph 72 the Commission summed up this view when it observed:

"This review demonstrates that no rights of hearing can be claimed by those subject to an investigation under the Act."

21 A similar, robust, conclusion was arrived at by the Supreme Court of Appeal of South Africa in **Competition Commission v Yara (South Africa) (Pty) Ltd and Others (784/12) [2013] ZASCA 107** when Brand JA, writing for the Court, noted at paragraph 24:

"What these statements of *Novartis* make plain is that the purpose of the initiating complaint is to trigger an investigation which might eventually lead to a referral. It is merely a preliminary step of a process that does not affect the respondent's rights. Conversely stated, the purpose of an initiating complaint, and the investigation that follows upon it, is not to offer the suspect firm an opportunity to put its case. The Commission is not even required to give notice of the complaint and its investigation to the suspect. Least of all is the Commission required to engage with the suspect on the question whether its suspicions are justified. The principles of administrative justice are observed in the referral and the hearing before the Tribunal. That is when the suspect firm becomes entitled to put its side of the case."

22 In South Africa the Tribunal is equivalent to the Commission when exercising its adjudicatory function, and the principles of administrative justice incorporate the *audi alteram partem* rule.

23 We therefore find that there is no merit in the Respondent's argument that it should have been given a hearing before this matter was referred to the Commission.

24 The other argument that was advanced by the Respondent was that the Applicant's affidavit contained hearsay evidence. Given the *sui generis* nature of the Commission's proceedings it is accepted practice to admit such evidence. Wallis AJA, writing for the Competition Appeal Court of South Africa, observed at paragraph 14 in **Loungefoam (Pty) Ltd and Others v The Competition Commission of South Africa (CAC Case No.102/CAC/Jun10)**:

"There is no legal prohibition against an affidavit containing hearsay evidence. In certain circumstances and before certain tribunals such

evidence is inadmissible, but that does not mean that an affidavit in support of a referral to the Tribunal cannot contain hearsay evidence. It may be convenient for the Commission to cause the affidavit to be deposed to by the investigator who investigated the complaint. That is likely to be a sensible course, as the investigator will have the relevant facts and documents at her or his fingertips. However, it is inevitable in these circumstances that the affidavit will largely be an affidavit of information and belief rather than direct evidence. That is immaterial bearing in mind the practice of the Tribunal to conduct a hearing at which witnesses with direct knowledge of the facts testify under oath and are cross – examined.”

25 We therefore reject the argument advanced by the Respondent.

26 The Respondent also raised the point that the jurat in both the Applicant’s founding and replying affidavits did not show the name and rank of the commissioner of oaths. In the view of the Respondent this was fatal to the Applicant’s case. The Respondent’s attorney referred us to the case of **Charles v Botswana National Front and Another 2009 (2) BLR 36 (HC)**. In that case Nganunu CJ, when advertng to the provisions of the Commissioners of Oaths Act said:

“With regard to police officers the Act has appointed that only police officers of the rank of sergeant and above are commissioners of oaths. Those below that rank cannot validly commission an affidavit. It is now trite law in our jurisdiction, that for an affidavit to be valid for use in proceedings before courts such affidavit should not only be sworn to by the deponent, but it must also be sworn to and be commissioned before a commissioner of oaths. The fact that the person commissioning is a commissioner of oaths must clearly be demonstrated on the affidavit; and where this is by virtue

of rank as in the police force, the rank of that officer should appear on the affidavit. If the position of the commissioner of oaths is not clearly demonstrated on the document that affidavit will not pass for use in our courts. In the present case the affidavit is commissioned by a person who appears as a member of the force but his rank is not shown. It is therefore impossible for the court, to determine whether the person who purported to commission the affidavit was in fact a commissioner of oaths. The risk of failure to demonstrate this fact falls on the applicant who wishes to use such affidavit in court. I am of the view that since this affidavit is not demonstrated to have been sworn before a commissioner of oaths it cannot be accepted for use in this application and therefore the entire application is struck off simply on that procedural ground."(emphasis added).

27 In *casu* the commissioner of oaths is a member of the Botswana Police Service, whose name is T. Kanokang, and wrote out his or her rank (office held) as "S/I". This clearly shows that it is an abbreviation of a designated rank in the Botswana Police Service, which can be determined. A Botswana Police Service stamp has also been impressed.

28 Dealing with a similar case in **Giddie v Botswana Building Society and Another 2006 (2) BLR 48 (HC)**, Phumaphi J noted:

"The only point raised by counsel for the respondent in limine is that the name of the commissioner of oaths was not clearly written. Order 13 rule 4 does not state specifically that the commissioner's name should be written legibly. What it does provide for is that whoever commissions an affidavit must be someone empowered under the Commissioners of Oaths Act.

The facts before me are that whoever signed an affidavit as commissioner of oaths held the position of assistant superintendent in the Botswana Police Service. The Commissioners of Oaths Act recognises every person of the rank of sergeant and above in the Botswana Police Service to be an ex officio commissioner of oaths for the whole of Botswana. As the position of assistant superintendent in the Botswana Police Service is superior to that of sergeant, there can be no doubt that whichever assistant superintendent signed as commissioner of oaths, is duly empowered in terms of the Commissioners of Oaths Act. In the circumstances I find that the affidavit was properly commissioned.

In any event, even if I were persuaded that there was an irregularity, it is of such a technical nature that this court would condone it.

Vide *Makhura v Dintwe and Others* (Misc 142/2000), unreported at page 8 where Horn J said:

"With regard to the fourth point in limine, Mr Kebonang pointed out that the supporting affidavit of Mr Madimabe, although it purported to have been commissioned by a Commissioner of Oaths at the Community Service Centre at Molepolole of the Botswana Police, did not indicate the name and rank of the policeman concerned. This is a valid point but in my view, it is one which is entirely technical and I hereby condone this defect in the papers."

29 In ***Carfill Services (Pty)Ltd and Others v Competition Authority*** the Commission observed at paragraph 17:

"Kirby J (as he then was) in *Kgatleng Land Board v Linchwe* 2009 (2) BLR 293 HC at page 298 cautioned tribunals in this manner: "In my judgment it is the duty of the land tribunal to keep matters before it as simple and as non -technical as possible, notwithstanding the right of lawyers to appear

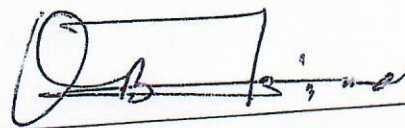
before it. As a tribunal performing a quasi-judicial (and sometimes judicial) role, it should observe the principles of natural justice to ensure that proceedings before it are fairly conducted, but it should adopt a robust approach to ensure the achievement of its main objective, which is to provide expeditious and fair hearings of appeals brought before it." This statement applies with equal force to the Competition Commission, and its main ingredient is that the rules of natural justice should be observed at all times, including the duty to act fairly and without bias (actual or perceived)."

30 In the result, the challenge by the Respondent against the affidavit commissioned by a member of the Botswana Police Service cannot be sustained.

31 On the basis of the foregoing the points in *limine* raised by the Respondent, and its application, are dismissed.

32 There shall be no order as to costs.

Decision read in public session in Gaborone on this 28<sup>th</sup> day of May 2019.



Dr Onkemetse B. Tshosa  
(Presiding)



Thembisile T. Phuthego  
(Member)

I agree: 

Dr Selinah Peters  
(Member)

I agree: 

Seipati G. Olweny  
(Member)

I agree: 

Phodiso P. Valashia  
(Member)

I agree: 

Tendekani E. Malebeswa  
(Member)

I agree: 