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

In the Matter between

Case No: CC-CR/02/A/13

COMPETITION AUTHORITY	**APPLICANT**
and	
HI PRO SALES (PTY) LTD t/a DIRANG MOTORS	**1ST RESPONDENT**
SPECIALISED PANEL BEATERS (PTY) LTD	**2ND RESPONDENT**

and

Case No: CC-CR/05/A/13

COMPETITION AUTHORITY	**APPLICANT**
And	
CAR WORLD AUTO CRAFT SHOP (PTY) LTD	**1ST RESPONDENT**
AUTO TRONICS (PTY) LTD	**2ND RESPONDENT**

DECISION

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1. This matter came to the Commission for a pre-trial hearing or case management conference on the 13th of August 2014.

2. It is generally accepted that the purpose of pre-trial hearings or case management conferences is to determine, among other things, (a) issues in dispute, (b) possibilities of obtaining admissions of facts and documents to avoid unnecessary proof, (c) settlement of pleadings, (d) the number of expert witnesses each party intends to call and (e) prospects of a settlement.

3. In addition to the above considerations, a Court or Tribunal or Commission is expected, at this stage, to determine whether there is a contestable case between the parties. As part of the adjudication function, a Commission, in exercising its quasi-judicial functions, is expected to take steps to find out what the issues dividing the litigants are and to require the parties to make these clear.

4. Determining whether there is a contestable case necessarily requires the Commission or Tribunal to apply itself to issues of law and fact even at this preliminary stage of the litigation process; for no Commission or Tribunal should sit idly by and have its time wasted. The Commission is, therefore, entitled to shape the pre-trial conference to ensure that parties do not abuse the judicial process by unnecessarily putting others through the agony of a trial.

5. It was for the above reason that the Commission enquired from the parties whether the matter in dispute was properly before it, given the provisions of section 39 (2), (4) and (5) of the Competition Act (Cap. 46:09). These provisions require that referrals to the Commission must be done within one year of investigations having been opened, unless the period of investigations has been extended either by agreement between the Competition Authority and the complainant or by an order of the Commission upon a proper application having been made before it.

6. In **Hi Pro Sales (Pty) Ltd**, the Applicant, through its Director of Research, Dr. Mokubung, deposed in its Founding Affidavit as follows:

At Paragraph 11 of the Founding Affidavit

"This referral is made pursuant to the **investigations initiated by the Authority on the 22nd (of) February 2012**, following suspicions regarding the conduct of the panel beating companies...."

7. At paragraph 21 of the same Affidavit, Dr. Mokubung continues as follows :

"The Authority **decided not to issue notices** *(emphasis added)* on intention to investigate to the panel beating companies as this would prejudice the exercise of its power to enter and search the premises of companies."

8. In the **Carworld** case, Mr. Bagopi, also an employee of the Applicant, makes the following averments in his Founding Affidavit:

Paragraph 19 of the Founding Affidavit

"On the **29th of June 2012** at around 1050 hours, my colleague, Ms. Goitseone Modungwa, and I, as part of the **process of the Applicant's investigations,** took a vehicle registration B 123 ASN to the 1st Respondent's premises....."

9. The investigations of the 29th of June 2012, followed preliminary enquiries undertaken by the Applicant on the 22nd of February 2012 (see paragraph 9 of Mr. Bagopi's Founding Affidavit).

10. It is important at this point to note the difference in approach by the Applicant in dealing with its investigations in these cases:

10.1 In Hi Pro Case, investigations were initiated on the 22nd of February 2012;

10.2 No notice of investigation was issued to Hi Pro Sales;

10.3 On the other hand, in the Carworld case, investigations commenced only on the 29th of June 2012, following the initial enquiries of February 2012; and

10.4 Although not stated in Mr. Bagopi's papers, it would appear that no notice of investigation, at least as at the 29th of June 2012, had been given to Carworld. No explanation has been provided why Carworld was not informed of the investigations or why it was necessary to dispense with the giving of notice.

11. Our records show that the present cases were referred to the Commission on the 13th of September 2013. Section 39 (2) of the Competition Act requires that the Competition Authority must within one year of it opening an investigation refer the matter to the Commission if it determines that a prohibited practice has been established.

12. Where no referral is made within one year of the initiation of investigations, a non-referral notice must then be issued to the complainant, unless the Authority and the complainant have agreed to extend the period; or where such period has been extended by the Commission before the end of the one year period.

13. Mr. Morotsi, the Learned Counsel for the Applicant, argued that an investigation does not commence until a notice has been issued to the party being investigated. Although he cited no case law, Mr. Morotsi referred the Commission to the provisions of section 35 of the Competition Act in support of his proposition.

14. Although the Act does not provide any guidelines in terms of when an investigation can be deemed to have commenced, what is clear is that on a proper construction of section 35, commencement of investigations is a matter entirely to the discretion of the Authority and such discretion is not dependent on whether notice has been given or not. No hard and fast criteria can therefore be laid down to determine when an investigation commences. Each case will have to be determined according to its peculiar circumstances.

15. Different words are used in the Competition Act to describe the initiation of investigations. Section 35(1) uses the word "start", while section 38(1) employs "commence". In section 39(2) the word "open" is preferred. The Longman Dictionary of Contemporary English defines "start" as "to begin"; "commence" as to "to begin;start"; and "open" as "to (cause to) start". In other sections, for example section 35 (5), the word "conduct" is used. Needless to say, whichever way one looks at these different sections, the thread that runs through is that when each of these words is used that is when the investigation process is initiated. Therefore a single word could have been used consistently in the drafting of the Act to describe the initiation of investigations in all relevant parts of the Act.

16. Under section 35 (1), investigations may begin either based on third party information or can be self-initiated by the Authority. Section 35 (1) does not require that notice be given to a person being investigated. In other words, it does not make the commencement of investigations conditional on notice being given.

16.1 The requirement for notice appears however under section 35 (2). The Authority is enjoined where it decides to conduct an investigation, to give written notice as soon as practical of its proposed investigation to every enterprise which is suspected to be a party to the practice to be investigated and shall, in the notice — (*a*) indicate the subject matter and the purpose of the investigation; and (*b*) invite the enterprise concerned to submit to the Authority any representation which the enterprise may wish to make to the Authority in connection with the matter to be investigated, within such period as the Authority shall specify in the notice.

16.2 In our view, the notice requirement under section 35 (2) is not meant to validate the investigation process, but rather to give the parties under investigation an opportunity to make representations to the Authority or to anticipate the case against them and, where necessary, to prepare their defence. This is a constitutionally protected imperative. In *The Attorney*

General and Wasim Ahmed (Court of Appeal Civil Appeal No. 42/2002) the Court of Appeal ruled that:

> "It is not the function of the prosecution to obtain a conviction by any means fair or foul. It is not their function to conduct proceedings in such a way that the accused is ambushed and kept in the dark about critical issues until the last possible moment, whereby his ability to prepare a proper defence is severely hampered. It is not their function to conceal from the defence evidence in their possession which might be of assistance to the defence. It is the duty of the prosecution to lay before the court all the evidence which is relevant to the issue, whether favourable to the prosecution or favourable to the defence. It is also their duty to comply with the provisions of the Constitution which entitle an accused person to a fair hearing and adequate facilities for the preparation of his defence. If the prosecution do anything which contravenes these provisions, they will be acting in dereliction of duty."

16.3 The notice requirement under section 35 (2) is not in our view a pre-requisite to the Authority's right to commence investigations. That notice is not a requirement to commencing investigations is more evident when regard is had to the provisions of section 35 (3), which dispenses with the need to give notice if doing so shall be prejudicial to the investigations.

16.4 Section 35 (3) is in consonance with regulation 11 (2) of the Competition Regulations (2011), which provides that, "notwithstanding sub-regulation (1), the Authority may carry out an investigation **without giving notice of its intention to investigate,** where it considers that to give notice would materially prejudice its investigation" (emphasis provided). Thus, both by regulation and law, no notice is required to commence an investigation.

17. However, greater scrutiny has to be brought to bear on regulation 11. Regulation 11(1) reads: "Where the Authority decides to conduct an investigation, *it shall*

give notice to investigate as set out in Form D of the Schedule to every enterprise which is suspected to be a party to the practice being investigated or any person considered by the Authority to be relevant to the investigation *seven days before starting the investigation.*" (emphasis added). Evidently, therefore, there is a formal process that has to be followed, and if followed will show exactly when an investigation was initiated.

18. On the other hand, regulation 11(3) states:

"Where the Authority carries out an investigation without giving notice, it may issue an *ex post* notice of investigation as set out in Form E as set out in the Schedule."

In carrying out an investigation without notice this should be seen as an exception to the general rule encapsulated in both section 35 (2) of the Act and regulation 11(1). This is an exception meant to simply preserve the integrity of the investigation, not to hide the initiation of the investigation process itself. As such, at all times the Authority should have a record of when the investigation was initiated. Even then, the Authority *may* issue Form E. It is our view that in all circumstances as relevant either Form D or Form E should be issued as appropriate, as it would assist all parties concerned to determine when an investigation was initiated. Such form as has been issued by the Authority should be a part of the documents submitted to the Commission (or its successor as the case may be) and the other parties when a referral is made.

19. Different jurisdictions use different approaches to determine when investigations have been initiated. In the *ECN Working Group Cooperation Issues and Due Process: Decision – Making Powers Report* (October 2012) (http://ec.europa.eu/competition/ecn/decision_making_powers_report_en.pdf) it is reported that:

"Like Article 2 of Regulation 773/2004, the authorities in e.g. **BE,CY,ES,FR,HU,IT,IE,LV,LT,PL,PT,RO** and **SI**, *adopt a formal decision to initiate proceedings.*"(emphasis in original) It is further stated that "[s]imilarly, in **LV**, they are informed as soon as the first formal investigative activity is

performed...*as that is the moment when the parties to the case can claim that their procedural rights be fully respected.*" (emphasis added)(The abbreviations refer to Belgium, Cyprus, France, Hungary, Italy, Republic of Ireland, Latvia, Poland, Portugal, Romania and Slovenia respectively).

20. It is therefore imperative that all parties involved should know exactly when an investigation was initiated so that the rights of all parties concerned are respected and protected.

21. By the Authority's own admission, the investigations were commenced in February 2012 and June 2012, respectively. There is no ambiguity in the Affidavits filed by the Applicant as to when they started their investigations. The Commission, therefore, accepts that the investigations commenced on the dates the Authority says they commenced. That being so, the clock started ticking in February and June 2012, respectively, with the terminal point being reached in the subsequent 12 months for each investigation.

22. Referrals to the Commission should, therefore, have been made prior to February 2013 and June 2013, respectively. This is so in light of the provisions of section 39 (2), which require that "within one year after an investigation is opened by the Authority, the Executive Secretary **shall** — (*a*) subject to subsection (3), refer the matter to the Commission if the Authority determines that a prohibited practice has been established; or (*b*) in any other case, issue a notice of non-referral to the complainant, in the prescribed form." (emphasis provided).

23. In terms of section 45 of the Interpretation Act (Cap.01:04), the word "shall" is peremptory. It is for this reason that we considered that the cases were not properly before the Commission, having been referred to the Commission after the prescribed period. In Kuhne and Nagel (Pty) Ltd v Elias and another 1979 (1) SA 131 (T) at 133, the following passage from Boshoff AJP is instructive:

    "*The use of the word "shall" and the word "moet" in the Afrikaans version is a strong indication, in the absence of considerations pointing to another conclusion, that the Legislature is issuing a statutory command and intends*

disobedience to be visited with nullity." *See also* Sutter v Scheepers *1932 AD 165 at 173.*

24. Investigations by their nature are conducted with the view to prosecute, that is, to determine (a) whether a person or entity should be charged with an offence, or (b) whether a person or entity charged with an offence is guilty. Enquiries on the other hand are normally part of an information gathering process and are not conducted with prosecution as the main objective. Some interval of time may therefore pass between the making of an enquiry and the decision to investigate. The time that passes between an enquiry and an investigation period does not start the investigation clock.

25. In *Competition Law* (Brassey et al) (2002) the issue of reckoning the time for investigations was dealt with at length at pages 306 to 307 as follows:

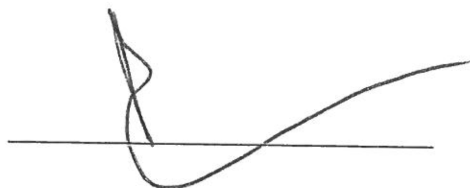
"At any time after initiating a complaint, the Commission may refer the complaint to the Tribunal. With regard to complaints submitted to it, the Commission must within one year, either, if it determines that a prohibited practice has been established, refer the complaint to the Tribunal. Or otherwise issue a notice of non-referral to the complainant. If the Commission has not referred the complaint to the Tribunal or issued a notice of non-referral within the relevant time-period, the Commission is deemed to have issued a notice of non-referral at the end of that period.

The one-year time-period may be extended by agreement with the complainant or on application to the Tribunal. It may not, however, be extended after the one-year period has elapsed. This is dramatically illustrated by the facts in *SAD Holdings Ltd & another v Competition Commission & others.* There the respondents in a complaint accepted (under the old Act) by the Commission on 13 January 2000 applied to the High Court for an order declaring that the Act did not apply to the conduct in question. The High Court ruled in favour of the respondents on 15 March 2000. The Commission thereafter suspended its investigation of the complaint on grounds of lack of jurisdiction. The complainants then appealed the High

Court ruling to the Supreme Court of Appeal (SCA). The SCA upheld the appeal on 29 September 2000, ruling that the High Court had erred in holding that the Act did not apply to the respondents' conduct. The Commission considered that the SCA's ruling had 'reinstated its jurisdiction' and immediately recommenced its investigation. The Commission referred the complaint against the respondents to the Tribunal on 17 July 2001. In response to the respondent's argument that the complaint referred to fell outside the one-year time period provided for in s 50 of the Act, the Commission argued that this was not so if the period during which its jurisdiction had been 'suspended' was excluded. While expressing sympathy with the Commission's argument, the Tribunal found it had no discretion to extend the one-year limit after its lapse. The Tribunal accordingly ruled that the Commission had no jurisdiction to refer the complaint and that it must be deemed to have issued a notice of non-referral to the complainants."

26. In the instant cases, there was no explanation as to why the cases were being referred to the Commission outside the stipulated periods stated in section 39 of the Competition Act. To have proceeded to allocate trial dates and even hear the cases would have been to go against the clear provisions of section 39 and, in our view, that would have been tantamount to condoning an illegality. It is, indeed, a settled principle of law that an illegality supercedes everything else raised by the parties, including in the instant cases. It was for this reason that we accepted the Authority's humility in withdrawing the cases before the Commission. We consider that the Authority issued a notice of non-referral in these cases.

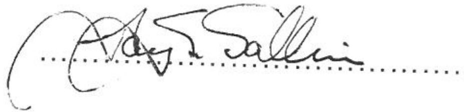
Delivered in Gaborone on the ...11th...Day of September 2014.



Dr. Zein Kebonang

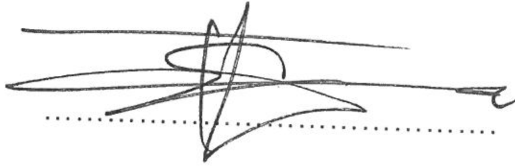
Chairperson

I AGREE



Dr. Jay S. Salkin

I AGREE



Mr. Tendekani E. Malebeswa

I AGREE

Mr. Gaylard. Kombani

I AGREE

Dr. Selinah Peters