Jurisdiction Case

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

CASE No: CC-CR/02/A/13
CASE No: CC-CR/03/A/13
CASE No: CC-CR/04/A/13
CASE No: CC-CR/05/A/13

IN THE MATTER BETWEEN:

CARFILL SERVICES (PTY) LTD	1ST APPLICANT
SPECIALISED PANEL BEATERS (PTY) LTD	2ND APPLICANT
TOP CARE (PTY) LTD	3RD APPLICANT
CARWORLD AUTO CRAFT SHOP (PTY) LTD	4TH APPLICANT

and

COMPETITION AUTHORITY	RESPONDENT

in re:

COMPETITION AUTHORITY	APPLICANT

and

CARFILL SERVICES (PTY) LTD	1ST RESPONDENT
SPECIALISED PANEL BEATERS (PTY) LTD	2ND RESPONDENT
TOP CARE (PTY) LTD	3RD RESPONDENT
CARWORLD AUTO CRAFT SHOP (PTY) LTD	4TH RESPONDENT

CONSTITUTION OF PANEL

TENDEKANI E. MALEBESWA	Presiding
GAYLARD KOMBANI	Member
DR JAY SALKIN	Member
BONIFACE G. MPHETLHE	Member

FOR THE APPLICANTS

SADIQUE KEBONANG (with JOAO C. SALBANY & DEMBANAI C. MADEMBO)

FOR THE RESPONDENT

DUNCAN MOROTSI (with TAPIWA MASIE & KESEGO MODONGO)

PLACE AND DATE OF PROCEEDINGS

GABORONE
30TH OCTOBER 2013

DECISION

TENDEKANI E. MALEBESWA

[1]. In September 2013 the Competition Authority (the Respondent in this matter) referred a number of cases it had been investigating for indirectly agreeing and setting prices for repairing automobiles, as well as collusion, to the Competition Commission (the Commission). Such conduct is proscribed by the Competition Act (Cap.46:09) (the Act), and if the Commission finds that such conduct is proven it can impose financial penalties on the transgressors.

[2]. The Applicants and a number of other players in the industry in the cases before the Commission were accused of such conduct. At a previous sitting of the Commission it was agreed by all concerned that since all the cases turned on similar facts they should be consolidated. However, in each case points *in limine* were raised. In particular, the Applicants raised the following points:

(a) that the Competition Authority (the Respondent in this matter) being a body corporate must act and can only act in proceedings of this nature through a resolution of its board of directors;

(b) the Respondent has not referred to or attached any resolution from its board of directors authorising it to institute these proceedings;

(c) the Respondent's governing body is the Competition Commission;

(d) the Competition Commission plays a dual role of being both a board of directors as well as being an adjudicating body, thereby exercising both administrative and judicial functions;

(e) the current proceedings before the Commission are incompetent in so far as the Commission is both a referee and player in the dispute, and therefore the Applicants could not be granted a fair hearing;

(f) at the hearing of the matter the Applicants would ask that the proceedings be stayed pending the establishment of an independent and impartial adjudicating body.

[3]. In view of these points the Commission decided to separate the cases in order to afford the Applicants the opportunity to amplify their objections, and also to allow the Respondent to state its own views as an interested party. The other companies whose cases were also referred to the Commission said they were

not interested in this issue. To this end, the Commission asked both parties to file their heads of argument, and a hearing was scheduled.

[4]. In their heads of argument and in argument before the panel the Applicants maintained that the Commission should recuse itself from hearing their case since:

(a) as a board of directors of the Respondent it cannot sit and adjudicate their case without offending the rule against bias or perceived bias;

(b) the dual role of the Commission makes it difficult for a reasonable person to say justice was not only done but was seen to be done as:

(i) the Commission is involved in the appointment of the Executive Secretary of the Respondent;

(ii) in order to initiate any legal process the Respondent requires a board resolution by the Commission, and if this is not done then such process is incompetent;

(iii) the Commission supervises the running of the Respondent;

(c) in the premises the relationship between the Commission and the Respondent is too close as to create a perception that there would be bias, and the Commission could not be impartial.

[5]. For its part, the Respondent argued that:

(a) whilst the Respondent investigates and prosecutes cases before the Commission, the Commission only sits as an adjudicator in this regard and these functions have been clearly and adequately separated in the Act;

(b) this model is being successfully employed in other jurisdictions in the Southern African Development Community (SADC) (for example in Mauritius, Namibia, Seychelles, Tanzania and Zimbabwe), as well as in the Common Market of Eastern and Southern Africa (COMESA));

(c) the Executive Secretary of the Respondent or any of its officers does not sit on the Commission or any of its panels when they exercise their adjudicatory functions;

(d) the main question asked in most jurisdictions is whether decisions of a tribunal or administrative body are subject to review or appeal, and if they are reviewable or appealable then they satisfy the test of due process whilst if they are not they violate due process. The Respondent submitted that since the Competition Act in its Part XI provides for review by or appeal to the High Court from decisions of the Commission then due process is satisfied.

[6]. It is apposite that we refer to the Act at this point and reproduce some of its provisions that are germane to this case. The Competition Authority is established by section 4 as a body corporate whose Executive Secretary shall be subject "to the general supervision of the Commission (s 6(2))". In terms of section 5 (2) the Authority shall "(o) refer matters it has investigated under this Act to the Commission for adjudication; (p) prosecute before the Commission, matters referred to the Commission under paragraph (o)" and section 39(2) in part states that "[w]ithin 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".

[7]. Section 9 of the Act provides as follows:

"(1) There is established a body to be known as the Competition Commission, which shall be the governing body of the Authority, and shall be responsible for the direction of the affairs of the Authority.
(2) Notwithstanding the generality of subsection (1), the Commission shall –

(a) adjudicate on matters brought before it by the Authority under this Act; and
(b) give general policy direction to the Authority."

[8]. Under section 39, upon referral of a case to it by the Competition Authority the Commission may decline to hold a hearing if it is of the view that the information before it does not justify a hearing, but if it determines that a hearing is justified it shall so inform the enterprises concerned and any other interested third party, and any "hearing shall be governed by and conducted in accordance with the procedural rules published by the Commission under section 79(1)." (s 40(4))

[9]. Section 40(2) states that in such instance "[t]he Commission shall decide whether to-

(a) hold individual hearings with each of the enterprises, and other interested third parties, separately, or to hold a single hearing attended by all the enterprises involved and interested third parties; and

(b) hold such hearings –

(i) in public, or

(ii) where the Commission considers that there is a need to protect commercially confidential information, in restricted session."

[10]. Section 43(7) provides that a financial penalty imposed by the Commission shall be paid into the Consolidated Fund. Part XI sets out the appeal process, which involves the High Court where a party is aggrieved by a decision of the Commission.

[11]. There are different considerations that countries evaluate when they set up their competition law agencies. In adverting to this, the International Competition Network (ICN) – an international body made up of national competition agencies from all over the world – in its report Competition and the Judiciary 2nd Phase – Case studies has said:

"Even where adjudication is done by the competition authority itself or by specialised competition tribunals, the judicial system functions as an appeal body, which pays more attention to procedural matters than to the substance of the cases. Moreover, they usually take a long time, often several years, to resolve a case. Under such circumstances competition law enforcement runs a great risk of running out of steam and jeopardising its credibility and sustainability. This is at the same time an argument for young competition agencies not to get involved in sophisticated rule – of – reason cases at early stages of competition policy development." (p.35)

It continues, and we quote extensively from it:

"There is a wide variety of institutional frameworks in which competition authorities operate. Apparently, the institutional framework is mainly relevant for competition law enforcement and much less so for competition advocacy. Still a brief discussion of the basic models seems to be in order.

Perhaps the most important distinction to be made is between settings in which the authority has both investigative and adjudicative powers and settings in which these powers are separated. The former case is called the integrated model, in the latter case we speak about the bifurcated model.

In the integrated model the investigation of violations of the competition law and the adjudication of competition cases is combined in one single agency solely responsible for competition law enforcement. For reasons of accountability the decisions of such integrated agencies are usually subject to appeal before the judicial system, i.e. the judiciary functions as an appeal body. In the integrated model private right of action is usually limited.

The bifurcated model is very heterogeneous. On one hand competition authorities in charge of investigating anticompetitive conduct and mergers may bring competition cases before the courts of the judicial system for adjudication. Usually there is a parallel right of action by private parties doing their own investigation and bringing their case directly before court. In that model competition authorities are mostly free to choose their cases and to turn their back on cases of minor importance which can properly be dealt with by private action. In many other settings competition authorities have the obligation of investigating all the complaints filed, which may limit their freedom to direct competition policy and may lead to an allocation of scarce investigation resources to relatively unimportant competition cases.

On the other hand, adjudication may be concentrated in a specialised competition tribunal belonging to the judicial system. The rationale for such a setting is that the adjudication of competition cases requires expertise usually not held by judges adjudicating civil and criminal matters at the same time. In some jurisdictions this model has been adopted as a reasonable compromise between the lack of expertise of the judicial system in competition matters and what some may see as the all too great concentration of power in fully integrated competition authorities.

It should be noticed that the choice of a proper institutional setting taking into account the special characteristics of the country at stake (strength of the institutions, competition culture, etc.) is of crucial importance for competition law enforcement." (p.38)
(http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf)

[12]. The issue of a suitable model for competition law enforcement is one that commentators have wrestled with internationally. Gavil, Kovacic and Baker in Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy (2008 Thomson/West) have said at page 1024:

"A country also might create alternative paths for adjudicating competition policy disputes. Rather than channel the adjudication of matters solely through national courts of general jurisdiction, for example, the United States vests some antitrust investigative and adjudicatory functions in a specialised administrative tribunal (the Federal Trade Commission), which was created by statute in 1914."

[13]. Closer to home, Brassey, Campbell, Legh, Simkins, Unterhalter and Wilson in Competition Law (Juta Law 2002) at page 291 have commented:

"Two characteristics of the regulatory structure provided for in the Act [South African Competition Act] deserve mention. First, there is a clear distinction (at least in theory) between the investigative and the adjudicative aspects of the complaint process. This may be contrasted with the position in the European Community, where a single body, the European Commission, and indeed one set of officials, is responsible for all aspects of a competition law complaint, from the initial investigation to the final decision – making process. In the words of one commentator, the European Commission is 'involved in all stages of investigation as police, prosecutor, judge and jury'.

Secondly, all the institutions of regulation are specialist bodies created by statute. The determination of all competition law issues arising under the Act (apart from the awarding of civil damages) lies in the hands of purpose – built institutions. This differs from the situation in the European Community, Canada and the United States, where review and/or appeal of competition law matters ultimately lies to the civil and/or criminal courts."

[14]. Gavil et al have further observed:

> "Compared to common law nations, civil law systems rely more upon elaborate statutory statements of the duties of affected parties and gives judges less power to interpret statutes. The typical enforcement mechanism in civil law systems is the expert administrative commission, which exercises its authority subject to highly deferential review by the nation's courts. The EU competition system features a hybrid of civil law and common law approaches. The EU competition statute is comparatively detailed and entrusts enforcement to a directorate of the European Commission, but the EU's judicial tribunals – the Court of First Instance and the Court of Justice – have played an increasingly significant role in defining the competition statute's meaning." (p.58)

[15]. Evidently, Botswana's model is close to that of the European Commission; but the difference being that the Competition Act seeks to set up two distinct agencies, one with investigative powers and the other vested with adjudicatory functions. The question that arises is whether, given their operational proximity, due process can be assured, and if sufficient safeguards are in place in this respect.

[16]. In *Caperton v A.T. Massey Coal Co.* 556 U.S. – (2009) the Supreme Court of the United States (SCOTUS) said that "[i]t is axiomatic that "[a] fair trial in a fair tribunal is a basic requirement of due process"" and that "[j]ust as no man is allowed to be a judge in his own cause, similar fears of bias can arise when – without the consent of the other parties – a man chooses the judge in his own cause."

[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).

[18]. The Applicants in the present case have said "the Commission which also acts as a Board of Directors of the Respondent cannot sit and adjudicate on the present dispute without offending the rule against bias or perceived bias. For this reason, the applicants request that all commissioners recuse themselves from hearing this matter", and that "the relationship between the commission and the respondent is too close as to create a perception that there would be bias". (sic) (emphasis as in original) With regard to the point that the Commission, as a creature of statute, should recuse itself we are not competent to comment on that issue.

[19]. However, regarding the recusal of members of the Commission, reference should be made to a passage by Howie JA in *Gaetsaloe v Debswana Diamond Co. (Pty) Ltd* 2010 (1) BLR 132 (CA). Having reviewed the test on recusal as stated on by the South African Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) he said: "The formulation of that conclusion is significant. The apprehension had to be one which the reasonable person *would* entertain and the apprehension was that the judicial officer *would* be biased. I mention this because counsel relied on *S v Roberts* 1999 (4) SA 915 (SCA) at 924 E, where the relevant apprehension was formulated as being that the judicial officer *might* be biased." In oral argument before the panel the Applicants pointed out that they had a problem with the structure of the competition agencies and not the members of the Commission in their personal capacities acting as such, which leads to the conclusion that they *might* be biased because of this structure. The Applicants also urged us to consider the *Ali Khan and others v The State* 1968 BLR 4 case in which the District

Commissioner (in Ghanzi acting as a judicial officer) where it was found that he should have recused himself as there was a likelihood of bias since he also administered the legislation under which the accused were charged. Critically, at page 7 Maisels ACJ said that "[i]n the overwhelming majority of cases that come before him as Magistrate there can be no question of a position similar to the present arising which in a not too far fetched sense he would on the face of it appear to be witness, prosecutor, and judge". Such facts do not come close to the ones under consideration in this case.

[20]. The Applicants have placed reliance on the Jamaican case of *Jamaica Stock Exchange and the Fair Trading Commission*. The case was considered by the Supreme Court of Jamaica. The Fair Competition Act set up a Fair Trading Commission which was endowed with powers to investigate and adjudicate. The appellant complained about this infusion of powers as they defeated the rules of natural justice. The Supreme Court agreed with the appellant, with Forte P. observing that "[t]his in my view is unsatisfactory, as it merges the judicial function into the investigative function. To compound it, the FCA except in Section 10, makes no general provision for the delegation of the investigative functions of the Commission to the staff or other agencies to be administered independently of the Commission." He also observed: "As the FCA stands, and without any regulations, the power rests in the Commission to investigate and adjudicate." Crucially, he found that the Commission could, in certain circumstances, arrive at conclusions without providing concerned persons the opportunity to be heard and he said:

"The fact, that the Commission in the same action is as it were, investigating and adjudicating, would be, given the specific provisions of the FCA, a clear breach of the rules of natural justice. The power given to the Commission to arrive at a conclusion without orally hearing persons who may be affected by its decisions, could result in a decision being made by the Commission without those affected parties having an opportunity to testify personally or call witnesses whose testimony may place another view on the investigations." (sic)

In the result, the Supreme Court found the above to be in breach of the rules of natural justice.

[21]. As shown at paragraph 15 above, the Jamaican example is different from the Botswana situation as the Competition Act sets up two institutions, with one performing the investigative functions and the other performing adjudicatory functions. The Commission is, however, not competent to comment on the suitability of this set-up. Suffice to say that the Competition Authority has its own staff and investigators who in no way overlap with the functions of the Commission, except where they may appear on behalf of the Competition Authority before the Commission when it exercises its adjudicative function.

[22]. In *Withrow v Larkin* 421 U.S. 35 (1975) the SCOTUS discussed denial of due process at length. In that case the State Examining Board regulating physicians in the State of Wisconsin launched a closed investigative hearing against the respondent, who then appealed to the District Court on the basis that the statutes founding the State Examining Board and empowering it to prohibit various acts of professional misconduct by physicians were unconstitutional. The Board was also going to hold a hearing. It informed the respondent that the hearing would be closed to the public but he and his attorney could attend, although they could not cross – examine witnesses.

[23]. Even though in its judgment the SCOTUS referred to the U.S. Administrative Procedure Act we quote extensively from its decision. At pages 46 – 47 it said:

"Concededly, a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 349 U.S. 136 (1955). This applies to administrative agencies which adjudicate as well as to courts. *Gibson v Berryhill*, 411 U.S. 564, 411 U.S. 579 (1973). Not only is a biased decisionmaker constitutionally unacceptable, but "our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, *supra* at 349 U.S. 136; *cf. Tumey v. Ohio*, 273 U.S. 510, 273 U.S 532 (1927). In pursuit of this end, various situations have been identified in which

experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome, and in which he has been the target of personal abuse or criticism from the party before him.

The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Very similar claims have been squarely rejected in prior decisions of this Court."

[24]. At pages 51 – 52, the SCOTUS continued:

"That is not to say that there is nothing to the argument that those who have investigated should not then adjudicate. The issue is substantial, it is not new, and legislators and others concerned with the operations of administrative agencies have given much attention to whether and to what extent distinctive administrative functions should be performed by the same persons. No single answer has been reached. Indeed, the growth, variety, and complexity of the administrative processes have made any one solution highly unlikely. Within the Federal Government itself, Congress has addressed the issue in several different ways, providing for varying degrees of separation from complete separation of functions to virtually none at all. ... For the generality of agencies, Congress has been content with ... the Administrative Procedure Act. .... which provides that no employee engaged in investigating or prosecuting may also participate or advise in the adjudicating function, but which also expressly

exempts from this prohibition "the agency or a member or members of the body comprising the agency." ... It is not surprising, therefore, to find that "[t]he case law, both federal and state, generally rejects the idea that the combination [of] judging [and] investigating functions is a denial of due process. ..." ... Similarly, our cases, although they reflect the substance of the problem, offer no support for the bald proposition applied in this case by the District Court that agency members who participate in an investigation are disqualified from adjudicating. The incredible variety of administrative mechanisms in this country will not yield to any single organizing principle."

[25]. The passage quoted at paragraph 11 above presented the proposition that the integrated model, provided sufficient safeguards with respect to due process are available, is a workable model. This is underscored by the SCOTUS in the case above. It is thus a model that mature systems have found efficient and acceptable. Certainly this is not what is found in the Competition Act. The Act has merged the integrated and the bifurcated models. If the integrated model can be used in the mature systems, then there should be value in Botswana for the hybrid system that she has adopted.

[26]. It is, therefore, our view that:

(a) the Competition Commission is established by section 9 of the Act, with the mandate that "the Commission shall adjudicate on matters brought before it by the Authority under this Act". (emphasis added) As a creature of statute, the Commission has a peremptory duty to adjudicate cases brought before it by the Authority or any other complainant in terms of section 39 of the Act. Therefore, absent a clear disqualifying factor with regard to a member of the Commission, some members of the Commission or all the members of the Commission, the Commission has to hear cases referred to it. In the present case no such disqualifying factor has been shown; and the Applicants, in their oral presentation, confirmed that there is no such disqualifying factor on the part of the members of the Commission in their individual capacities. The law has

set up the Commission as the only authority to decide on matters that require adjudication at the first instance under the Act, and there is no alternative to it. Therefore, if it does not sit no cases investigated by the Competition Authority or brought by complainants will be heard and this will defeat the purpose of the Act. This point was very well captured by the SCOTUS in the case of *FTC v Cement Institute* 333 U.S. 683 (1984) at pages 700 and 701 when it said:

"Marquette introduced numerous exhibits intended to support its charges. In the main, those exhibits were copies of the Commission's reports made to Congress or to the President, as required by --- the Trade Commission Act ---. These reports, as well as the testimony given by members of the Commission before the congressional committees, make it clear that, long before the filing of the complaint, the members of the Commission at that time, or at least some of them, were of the opinion that the operation of the multiple basing point system, as they had studied it, was the equivalent of a price fixing restraint of trade in violation of the Sherman Act. We therefore decide this contention, as did the Circuit Court of Appeals, on the assumption that such an opinion had been formed by the entire membership of the Commission as a result of its prior official investigations. But we also agree with that court's holding that this belief did not disqualify the Commission.

In the first place, the fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices. Here, in contrast to the Commission's investigations, members of the cement industry were legally authorised participants in the hearing. They produced evidence -- volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities.

Moreover, Marquette's position, if sustained, would to a large extent defeat the congressional purposes which prompted passage of the Trade Commission Act. Had the entire membership of the Commission disqualified in the proceedings against these respondents, this complaint could not have been acted upon by the Commission or by any other government agency. Congress has provided for no such contingency. It has not directed that the Commission disqualify itself under any circumstances, has not provided for substitute commissioners should any of its members disqualify, and has not authorised any other government agency to hold hearings, make findings, and issue cease and desist orders in proceedings against unfair trade practices." (sic);

(b) the Competition Act has set up two agencies – the Competition Commission and the Competition Authority. Their roles and functions are clearly delineated in the Act, with the Competition Authority authorised to carry out investigations while the Commission is tasked with adjudication;

(c) no member of the Competition Authority is involved when the Commission performs its adjudicatory functions, except appearing before it as complainants or prosecutors alongside defendants and their counsel. The Commission is served by its own Registrar. Conversely, the Commission is not involved in the initiation of investigations and the earliest opportunity (if at all) it may learn of an investigation is when the Executive Secretary of the Competition Authority, under section 39 of the Act, applies to it for an extension of time for its investigation;

(d) the test laid down by the Court of Appeal in *Gaetsaloe v Debswana Diamond Company*, that "[t]he apprehension had to be one which the reasonable person would entertain and the apprehension was that the judicial officer would be biased" has not be satisfied, particularly in light of available case law in analogical circumstances;

(e) the financial penalties the Commission may impose on defendants under the Act are paid into the Consolidated Fund of the Government and do not form part of the finances of the Commission or the Competition Authority, and therefore do not influence the disposition or judgement of members of the Commission;

(f) in instances where a financial penalty levied by the Commission has not been paid within a specified time and no appeal has been made, the Commission may, in terms of section 43 of the Act, apply to the High Court for an enforcement order. This buttresses the observation of due process, as the High Court cannot endorse an order if it is not satisfied with it, and, secondly, confirms the supervisory powers of the High Court over the Commission, thus confirming the rule of law;

(g) under section 39 of the Act the Competition Authority may commence investigations (on its own without the knowledge or involvement of the Commission or any other party), or a complaint may be submitted to it by a complainant in a manner analogous to that of the police service. Once a complaint has been submitted in this manner then the Competition Authority takes over and investigates the matter before referring it to the Commission, if this is warranted. This is fortified by section 5 of the Act, where it is provided that the Competition Authority "shall –

(o) refer matters it has investigated under this Act to the Commission for adjudication;
(p) prosecute before the Commission, matters referred to the Commission under paragraph (o)". (emphasis added);

(h) the interest of the Competition Authority in the present case and appearing as a respondent is due to the fact that the Commission is the only forum created by the Act before or to which, in terms of sections 5, 9 and 39, it has to bring its cases after investigation or refer them for their speedy and efficient disposal;

(i) in the event that the Commission determines that there should be a hearing in any matter, the Commission shall inform all parties (including third parties) of such hearing, its venue, date and time. It shall also set out the matters to be considered at the hearing, which shall be in public, unless there is a need to protect commercially confidential information, in which case it shall sit in private. The concerned parties may be represented by counsel of their choice as is the case in the current matter, and present their side of the story, and if there are witnesses, cross-examine such witnesses. These are all ingredients which satisfy the requirements of natural justice and due process;

(j) any party aggrieved by a decision of the Commission may appeal to the High Court in its supervisory capacity over the Commission, and also as being a necessary component of due process as the High Court may reach any number of conclusions on appeal, including remitting the matter to the Commission; revoking, increasing or reducing a financial penalty; giving a direction of its own in substitution for that of the Commission; or making any other decision as it sees fit;

(k) the current structure which created two agencies ostensibly sharing resources from the same pool was adopted following comparisons with international best practice peculiar to competition agencies and found to be suitable for Botswana's current circumstances. It is essentially a hybrid between an integrated model, which is used by the European Commission and the Fair Competition Commission in Tanzania, where the competition agencies are at once both investigators and adjudicators with appeals to the General Court and the Fair Competition Tribunal respectively; and the bifurcated model found in some countries such as South Africa;

(l) it is not within the competence of the Commission to take a view as to whether the current structuring of the competition agencies is the best or not, or in the words of the SCOTUS in *Withrow v Larkin*, if there is "any single organizing principle", or whether it is adequate or even constitutional.

[27]. On the basis of all the legal principles and authorities reviewed in this decision (some contained in cases we considered *suo motu)*, we find no ground for the Commission to recuse itself from this matter.

[28]. The parties are hereby informed of their right to appeal this decision to the High Court within four (4) weeks of its delivery, if they feel aggrieved.

Ruling read in a public session on this 13th day of November, 2013.

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