IN THE COMPETITION AND CONSUMER TRIBUNAL OF THE REPUBLIC OF BOTSWANA

HELD AT GABORONE

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

In the matter between:

GABORONE CONTAINER TERMINAL (PTY) LTD	**Applicant**
and	
COMPETITION AND CONSUMER AUTHORITY	**Respondent**

in re:

COMPETITION AND CONSUMER AUTHORITY	**Applicant**
and	
GABORONE CONTAINER TERMINAL (PTY) LTD	**Respondent**

CONSTITUTION OF THE PANEL

Judge Sanji M. Monageng	President
Tendekani E. Malebeswa and Vice-President	Presiding Member
Ruth Basele	Member
Leruo Moremong	Member

FOR THE APPLICANT
Attorney T.O. Gulubane

FOR THE RESPONDENT
Attorney K. Modongo

DECISION

BACKGROUND

[1] This matter was first referred to the Competition Commission (the predecessor to this Tribunal) in November 2018, by the Competition Authority (now the Competition and Consumer Authority and the Respondent in this application). On the 10th December 2018 the Applicant (Gaborone Container Terminal (Pty) Limited) or Gabcon) filed *points in limine*. On the 21st December 2018 Gabcon filed further additional *points in limine*.

[2] The Competition Commission (Commission) dismissed all of Gabcon's point*s in limine* on the 29th May 2019. The Commission then asked the two parties to convene a pre-hearing conference, and set down a hearing for the 29th August 2019. Gabcon then indicated that it wanted to file a supplementary affidavit on the merits, as there was a very important matter which had to be brought to the attention of the Commission. As it was apparent that the Commission would be replaced with the Competition and Consumer Tribunal (the Tribunal), on the 2nd September 2019 the Commission made an order which in part reads:

"In order to avoid concurrent jurisdiction in this matter, and to ensure that all the issues are properly ventilated and addressed, the matter will be placed before the Competition and Consumer Tribunal when it starts its work for a determination on the merits."

[3] After starting its work, and having heard the parties, on the 30th March 2020 the Tribunal issued an order allowing the Applicant "to file a supplementary affidavit to challenge the jurisdiction of the Competition and Consumer Tribunal under section 3 of the Competition Act, to the extent that it applies to statutory monopolies".

[4] Due to the COVID-19 pandemic and the consequent lockdown, the Tribunal heard arguments on the matter on 7th July 2020.

THE PARTIES

[5] The Applicant in this matter is Gaborone Container Terminal (Proprietary) Limited (Gabcon), with company registration number BW 00000 72860. It was incorporated on the 12th December 2006, and re-registered on the 9th September 2019. Gabcon was originally founded on the 18th December 1998 through a joint venture agreement between Botswana Railways Organisation and Transnet Limited of the Republic of South Africa. Both Botswana Railways and Transnet Limited had fifty percent (50%) shareholding in Gabcon at the time.

[6] Upon incorporation in 2006, the shareholding changed, with Botswana Railways holding sixty four percent (64%) of the shares, and Transnet Freight Rail remaining with thirty six percent (36%).

[7] Gabcon was issued with a licence by the former Department of Customs and Excise to carry on the business of a dry port and container depot in 1994. The approval by the Director of Customs and Excise, contained in annexure G1 to Gabcon's opposing affidavit of 7th December 2018 read:

"This application has been approved by the Director of Customs and Excise and the premises herein described, and detailed in the plan submitted, are hereby licenced as a container depot for the storage, packing and unpacking of containers in terms of Section 69(2) of the Customs and Excise Act, and subject to the terms and conditions subscribed to in this application.

Period of validity of licence: (i) - - -

(ii) for an indefinite period."

[8] In the letter dated 29th December 1994 from the Director of Customs and Excise to Gabcon, "c/o Botswana Railways Organisation, Private Bag 00125, Gaborone", titled "Registration of a Container: Gabcon Dry Port", paragraph 5 stated:

"TERMS AND CONDITIONS

(subscribed to by the applicant hereinafter referred to as the 'depot operator')."

[9] Paragraph 5.14 of the conditions is in the following terms:

"DEPOT TO BE OPERATED ON A STRICTLY NON-DISCRIMINATORY BASIS

No discrimination shall be practised against importers or exporters or any class of such importers or exporters of containerised goods or their agents with regard to the services and facilities provided by the depot operator."

[10] At paragraphs 6.25.5, 6.25.6 and 6.25.7 of Gabcon's heads of argument dated the 30th June 2020 it is stated that:

"6.25.5 Botswana Railways, which itself enjoys a statutory monopoly on use of the railway network under *section 13* of the *Botswana Railways Act*, is the Applicant's majority shareholder;

6.25.6 the licence grated to the Applicant was issued in the name of "Botswana Railways Organisation Trading as Gabcon";

6.25.7 the Applicant's business operations are contingent upon and facilitated by the monopolised railways network;".

[10] The Respondent (Competition and Consumer Authority or Authority) is a body corporate established under section 4 of the Competition Act (Act No. 4 of 2018) as a successor to the Competition Authority.

[11] Under section 5 (1) of the Act the Authority

"shall be responsible for the prevention of, and redress for, anti – competitive practices in the economy, and the removal of constraints on the free play of competition in the market."

THE APPLICATION

[12] In pre-trial minutes of the 26th August 2019 between the parties there is a paragraph which reads:

"7. INTERLOCUTORY MOTIONS

The Respondent shall file an application for leave to file a supplementary affidavit or affidavits on or before 30th August 2019. The Applicant is at liberty to oppose the application."

[13] After a pre - hearing conference on the 28th August 2019 the Commission issued an order in the following terms:

"1. The Commission having made a decision on the points in limine that were raised by the Respondent;

2. The parties having failed to reach a settlement on the outstanding issues;

3. As the Respondent sought to apply for leave to file a supplementary affidavit on the merits and it became apparent that there was a likelihood of the Applicant opposing this application;

4. As it is likely that the hearing of the matter will go beyond the end of the month of September 2019;

5. As the Competition and Consumer Tribunal established under the Competition Act of 2018 will start its work on the 1st October 2019 and the Commission will cease to exist;

6. In order to avoid concurrent jurisdiction in this matter, and to ensure that all the issues are properly ventilated and addressed, the matter will be placed before the Competition and Consumer Tribunal when it starts its work for a determination on the merits."

[14] On the 30th March 2020, the Tribunal, after hearing the parties, and in particular considering the Respondent's application " (c)… to file a supplementary affidavit to challenge the jurisdiction of the Competition and Consumer Tribunal, under section 3 of the Competition Act, to the extent that it applies to statutory monopolies,"

The Tribunal allowed the parties to file documents, and for it to hear arguments, if necessary.

[15] In its founding affidavit, Gabcon submitted that the submissions that had been made by its former attorney Mr Ookeditse Maphakwane (now Judge Maphakwane) "had missed the provision in the **Competition Act** which provides that the Act does not apply to enterprises operating on the basis of statutory monopoly in Botswana", and that its current attorney, "following thorough contemplation of the matter", had made that breakthrough.

[16] Further that on the basis of that provision in the Act, the prospects of success for Gabcon were reasonable, and observed that: "18. In the final analysis, I state that the present application is a worthy candidate for the granting of leave, insofar as the contemplated argument is cogent, merited and well founded. In this respect, I aver that, unlike the previous point*s in limine* which exclusively pertained to technical objections, the supplementary points *in limine* sought to be admitted and argued, strike at the very heart of the present proceedings and, as such, are capable of disposing of the entire matter without the need for carrying out a full blown hearing."

[17] In turn, the Authority's view at paragraph 29 of its answering affidavit dated 12th June 2020 was that "The Applicant has a responsibility to fully provide justification as to why the Tribunal should allow for the filing of supplementary affidavits and points *in limine* long after close of pleadings, and to satisfy the Tribunal that they have prospects of success."

[18] The Tribunal heard the parties on the 7th July 2020, and the parties agreed that both the application for leave to file a supplementary affidavit and its merits on the reasonableness of success should be argued together.

THE ISSUES

[19] The issues are:

(a) whether Gabcon should be granted leave to file its supplementary affidavit and associated documents;

(b) if the application for leave succeeds, the Tribunal should find that Gabcon is an enterprise protected by section 3 of the Act.

[20] In order to fully understand the import of paragraph 19 (b) above, and due to their inexorable linkage, the Tribunal allowed the parties to argue both issues simultaneously.

[21] The Tribunal observes that the invocation of section 3 of the Act is a direct challenge to its jurisdiction.

[22] Once jurisdiction is challenged a tribunal has to deal with that matter. In Competition Authority v Creative Business Solutions (Pty) Ltd and Rabbit Group (Pty) Ltd (Case No: CC - CR/01/A/15 I) the Commission wrote at paragraph 131:

"In Marine Inquiries - - - Michael White Q.C. propounds the same view:

"The question of whether a Tribunal has jurisdiction is often challenged at its outset by one or more of the parties called for investigation, where there are significant stakes at issue in the inquiry. A successful challenge can halt the inquiry before it even gets started. In deciding whether a Tribunal has jurisdiction, a distinction is made between jurisdictional or and non-jurisdictional issues - - - Where a challenge is made to an inferior tribunal's jurisdiction or a jurisdictional issue is raised, the tribunal must first decide the issue for itself; - - - and the

matter may be later tested elsewhere. If it refuses to do so, it is wrongfully declining jurisdiction and it will be ordered to decide the issue of jurisdiction."

[23] The Commission further noted at paragraph 134:

"Jurisdiction is a fundamental prerequisite for the Applicant to bring any matter before the Commission, and for the Commission to satisfy itself that, indeed, it has jurisdiction before it can deal with any matter. This becomes even more paramount when jurisdiction itself is challenged."

[24] In the instant matter, the jurisdiction of the Tribunal was not initially challenged, but it was raised only after all the other points *in limine* had been dismissed, hence the application for leave to file supplementary papers.

[25] Gabcon's case before the Tribunal was presented under the following heads:

(a) Law on application for leave;
(b) Law on condonation;
(c) Applicant's reason for delay;
(d) Applicant's prospects of success;
(e) Canons of interpretation;
(f) Applicant operates on the basis of statutory monopoly.

[26] When referring the matter to the Commission, in a founding affidavit deponed to by one Thabiso Mbongwe on the 19th November 2018, the Authority submitted in relevant part that:

"19. The Authority concluded after investigation that GABCON's conduct amounted to abuse of dominant position in contravention of section 30 (1) of the Act in the form of refusal to deal. GABCON has demonstrated that it has market power because it acted independently from its competitors and customers.

EFFECTS OF GABCON'S CONDUCT ON COMPETITION

20. GABCON's conduct shows that it has high market power in the business of hauling containers. The barriers to entry do not only affect the private hauliers but customers too, because they do not have a choice in who provides them with haulage services. GABCON forces and controls the direction of the haulage business.

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23. In light of the above, the conduct by GABCON, signals abuse of dominance through refusal to deal. GABCON has refused private hauliers to provide haulage services to their customers through the implementation of a new policy which requires that private hauliers need to obtain a permit in order to access the dry port; not giving truckers sufficient time to respond to the applications. Even after satisfying the requirement of access permits, GABCON still refused to allow private hauliers to load customer containers. New rules keep on being introduced including the 75/25 % rule which means that 75% share of container deliveries are for GABCON before any private haulier can be loaded. Such abuse has an effect on the ease to import products and even for the ease with which new enterprises can enter and secure a place in the haulage market. As a result, this will lead to GABCON's competitors in the downstream market exiting the market due to foreclosure, that is, being excluded and denied access to service customers at the downstream market.

24. The private hauliers do not have an alternative because the GABCON bonded facility near the railway line is the only one in Gaborone. Therefore the only point of arrival for all imports or exports that use the rail is through GABCON in Gaborone, Botswana Railways in Palapye and Botswana Railways in Francistown. However, most customers who order containers are based in Gaborone. In accordance with the Joint Venture Agreement, a letter of intent shows that the building of a new terminal cost approximately P20 million. Therefore there are no other alternative suppliers and setting up such a facility is not possible as the railway line is the property of Botswana Railways.

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RELIEF

28. In the premises the Authority seeks the following relief:

a. An order declaring that GABCON has abused its dominant position in the haulage of containers market;

b. the provisions of section 30 (2) of the Act do not apply to GABCON's conduct and there are no offsetting benefits;

c. GABCON to with immediate effect desist and cease from imposing stringent conditions on the private hauliers access to its facility;

d. GABCON to grant the private hauliers unrestricted access to the essential facility;

e. GABCON to cease and desist from imposing exorbitant fees of any nature on the private hauliers to gain access to its facility;

f. GABCON to desist and cease from coercing the private hauliers' customers to use its hauling services in the downstream market; and

g. Further and/or alternative relief."

[27] Paragraph 18 of the founding affidavit reads in part that:

"GABCON on the other hand does not charge its customers handling fees while customers who use the services of private hauliers are charged."

[28] At paragraphs 7 and 8 of the founding affidavit it is stated:

"7. The respondent is Gaborone Container Terminal (Pty) Ltd "**GABCON"**), an enterprise resulting from a partnership between Botswana Railways Organisation ("**BR**") and Transnet Limited, trading as Spoornet (based in South Africa)

BUSINESS OPERATIONS OF THE RESPONDENT

8. The respondent operates a dry port container terminal along the railway line in Gaborone and is therefore in the business of receiving and handling containers at the upstream market. This service is only carried out within the bonded facility using specialised equipment and it can only be carried out by GABCON. It is also involved in the business of haulage or delivery of containers to the customers' premises in the downstream market where it is subject to competition from private hauliers who also haul containers on behalf of importers."

[29] The Tribunal notes that it is Gabcon's alleged activities in the downstream market which have led to the present case.

[30] When the matter was referred to the Commission in November 2018, Gabcon raised points *in limine*, which were later dismissed. It then sought leave to file a supplementary affidavit, which is the matter now under consideration.

[31] The law on application for leave to file out of time or condonation, as well as advancement of an acceptable reason for delay, and an applicant's prospects of success, is settled. In the present case these issues are so intertwined that it is safe to consider them at the same time.

ANALYSIS OF FACTS AND THE LAW

[32] It is Gabcon's case that its erstwhile lawyer, Mr Ookeditse Maphakwane [now Judge Maphakwane of the High Court of the Republic of Botswana] handled its case when it was referred to the Commission. Gabcon submits that he missed a crucial point in the law (section 3 of the Competition Act) which if successfully argued is dispositive of the matter, as it goes to jurisdiction. It is further submitted that this oversight was only discovered by Gabcon's

current attorneys after they took over Judge Maphakwane's practice in early 2019, and this necessitated the present application.

[32] This point is stated in a number of Gabcon's papers. In its founding affidavit signed by Lesedi Moakofhi (Moakofhi), its Managing Director, on 31st March 2020, it is stated at paragraph 8.3:

"On 10th December 2018, Maphakwane & Partners filed and delivered opposing papers on behalf of the Applicant, therein raising various points of law while also defending the action on the merits".

[34] It is also important to reproduce paragraphs 8.5 to 11 of the founding affidavit in full:

"8.5 Maphakwane & Partners filed and delivered further points *in limine* against the main action on 21st December 2018.

8.6 On the same date, it was communicated to the Applicant that attorney Mr. Ookeditse Maphakwane had been appointed as a Judge of the High Court of the Republic of Botswana and that Maphakwane & Partners was to be incorporated by Khumomotse Law Practice – the Applicant's present attorneys of record;

8.7 On 9th January 2019, the Applicant filed and delivered its notice of opposition to the further points *in limine*;

8.8 Both parties filed their respective heads of argument and the matter was fully ventilated by way of oral argument before the Competition Commission;

8.9 The abovementioned points *in limine* were subsequently dismissed by virtue of the Competition Commission's decision of 28th May 2019.

9. I am advised by the Applicant's attorneys of record and I verily believe the same to be true, that, following the determination of the Applicant's points *in limine*, the natural course of

action was for the matter to proceed to full hearing. In this respect, Attorney Mr Thabiso Gulubane convened a meeting involving key staff members of the Applicant at Khumomotse Law Practice ahead of the pre-hearing conference.

10. I state that, during the aforesaid meeting, Attorney Mr. Gulubane advised that, following thorough contemplation of the matter, it was apparent to him that the erstwhile attorney had missed the provision in the **Competition Act** which provides that the Act does not apply to enterprises operating on the basis of statutory monopoly in Botswana.

11. Attorney Mr. Gulubane further advised us that, in light of the fact that an opposing affidavit had already been filed by the Applicant's erstwhile attorneys and that the points *in limine* raised on the Applicant's behalf had been dismissed, it was necessary to lodge an application seeking leave from the honourable Tribunal to supplement the papers filed of record in order to clarify the Applicant's status and the consequent effect on the proceedings."

[35] Flowing from the above, the Tribunal is of the view that Gabcon's papers require to be looked at closely. Paragraphs 5.2 to 5.4 of Gabcon's heads of argument read:

"5.2 In the matter instant, the explanation for the delay proferred by Applicant can be summarised thusly:

5.2.1 Having been served with the Respondent's founding papers, on 26th November 2018, the Applicant engaged Attorney Mr Maphakwane (as he then was) on 30th November 2018 (see **para 8.2** of the Applicant's founding affidavit and **para 8.1** of the Applicant's replying affidavit);

5.2.2 Attorney Mr Maphakwane thereafter prepared the Applicant's opposing papers, as filed on 10th and 21st December 2018 (*see paras 8.3 – 8.5* of *the Applicant's founding affidavit* and *paras 8.2. - 8.5. of the Applicant's replying affidavit*);

5.2.3 On 21st December 2018, it was communicated to the Applicant that Attorney Mr Maphakwane had been appointed as a judge of the High Court of the Republic of Botswana and that Maphakwane & Partners was to be incorporated by Khumomotse Law Practice (*see para 8.6. of the Applicant founding affidavit*);

5.2.4 That, following thorough contemplation, it became apparent to the Applicant's present attorneys that the erstwhile attorney had missed the provision in the **Competition Act** which provides that the Act does not apply to enterprises operating on the basis of statutory monopoly in Botswana (*see **para 10** of the Applicant's founding affidavit*); and

5.2.5 That, having been presented with the aforesaid *fait accompli*, the Applicant had no option but to subsequently institute the present proceedings in order to advance its defence (*see **para 10** of the Applicant's founding affidavit*).

5.3 In light of the above, it is humbly submitted that not only is the explanation tendered by the Applicant advanced candidly and in good faith, but the same fully accounts also for the entire period of the delay and is, *ex facie*, reasonable. In this respect, it is further submitted that, on the merits of the explanation tendered, it is immediately apparent that the delay was the result of an unfortunate series of events and was not, in any manner whatsoever, actuated by any disrespect or disregard for the Court, Rules of Court or the Respondent.

5.4 Moreover, it is humbly submitted – particularly in light of the Tribunal's status as a Court of equity – that the Applicant's explanation carries greater weight when it is considered that the delay is not attributable to the Applicant itself, but rather to the Applicant's attorneys or representatives. In this regard, it is further submitted that, in the circumstances, the Tribunal is enjoined to protect the Applicant's right to present its case – as enshrined in **section 72** of the **Competition Act 2018**."

[36] Relevant parts of Gabcon's replying affidavit signed on 2nd July 2020 state:

"8.4. Despite the fact that the power of attorney filed on 10th December 2018 *ex facie* indicates that the Applicant appointed *Messrs* Ofentse Khumomotse and Thabiso Gulubane

as its attorneys of record, the fact of the matter is that the opposing papers and the defence enshrined therein were exclusively prepared by Attorney Mr Maphakwane.

8.5 The above averment is evidenced by the fact that Attorney Mr Maphakwane's signature can be seen on the following documents:

- Filing notice filed 10th December 2018;
- Respondent's notice to raise points in limine filed 10th December 2018;
- Filing notice filed 21st December 2018; and
- Respondent's notice to raise points in limine filed 21st December 2018.

8.6 In respect of the power of attorney filed 10th December 2018, I am advised by the Applicant's attorneys of record that – while they did not prepare the said document - it is their view that *Messrs* Khumomotse and Gulubane were specifically named therein because there was a general expectation that they would continue running **MAPHAKWANE & PARTNERS** after Mr Maphakwane's departure and there was no need to cite the outgoing Maphakwane therein, as he was unlikely to take the matte any further than December 2018.

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10. The contents therefore are denied and it is pleaded that the Respondent is haphazardly making baseless postulations on matters it has no actual knowledge of.

10.1 I state that the fact that Attorney Mr. Maphakwane had been appointed as a Judge and was to leave private practice was only communicated to the Applicant on 21st December 2018. Furthermore, Mr Maphakwane was only formally appointed as a Judge of the High Court of the Republic of Botswana on 7th January 2019.

10.2 I am advised by the Applicant's attorneys of record that Maphakwane & Partners – which existed as a sole proprietorship – was not incorporated by Khumomotse Law Practice until 1st January 2019. This fact is evidenced by the filing of another power of attorney by Khumomotse Law Practice – which is a completely separate entity – on 7th February 2019.

10.3 Further, I aver that, merely for the sake of comparison and contrast, Attorney Mr. Gulubane's signature can be seen on the filing notice and notice of assumption of agency filed on 7th February 2019, while Attorney Mr. Khumomotse's signature can be seen on the filing notice and heads of argument filed on 6th March 2019 – both of which signatures are conspicuously absent from the Applicant's pleadings beforehand.

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12. The contents thereof are denied.

12.1 I aver that the mere fact that Attorney Mr. Gulubane was always part of the Applicant's legal team is not conclusively indicative of any involvement in the preparation of the opposing papers, as the fact remains that the pleadings in question were prepared by Attorney Mr. Maphakwane.

12.2 I further aver that, at the end of the day, the issues raised by the present application stand to be determined by the Tribunal." (underlining added)

[37] The power of attorney signed by Lesedi Moakofhi on the 6th December 2018 reads in parts germane to this matter:

"I, the undersigned,

LESEDI MOAKOFHI (in my capacity as the Managing Director of Gabcon (Pty) Ltd) do hereby nominate and appoint

OFENTSE KHUMOMOTSE and/or THABISO GULUBANE OF MAPHAKWANE & PARTNERS

Or any of the professional assistants with power of substitution, to be my true and lawful Attorneys and Agents for and in my names, place and stead to appear before the Honourable Court or wherever else may be necessary and then and there as my act and deed;

(a) To defend legal proceedings in case No CC – CR /01/A 18 I before the Competition Commission of the Republic of Botswana and seek its dismissal as is without merit
- - -" (underling added)

[38] Taken together, Gabcon's papers show that:

(a) the first power of attorney issued by Lesedi Moakofhi on 6th December 2018 appointed Ofentse Khumomotse and Thabiso Gulubane as its attorneys, belonging to Maphakwane & Partners;

(b) Gabcon has claimed that it did not know of Mr Maphakwane's appointment as a judge until the 21st December 2018. This then begs the question as to why he was not nominated as Gabcon's attorney on the 6th December 2018;

(c) in its replying affidavit Gabcon submits that only Messrs Khumomotse and Gulubane were nominated "because there was a general expectation that they would continue running MAPHAKWANE & PARTNERS after Mr Maphakwane's departure and there was no need to cite the outgoing Maphakwane therein."

Therefore, as early as the 6th December 2018, Messrs Khumomotse and Gulubane, and Moakofhi, knew that Maphakwane was leaving and that the two attorneys would take the matter forward. Mr Gulubane informed the Tribunal that although the power of attorney nominated him he had not familiarised himself with all the documents, which the Tribunal finds hard to believe;

(d) Khumomotse Law Practice shares the same physical and postal addresses as the former Maphakwane & Partners, which indicates that the relationship between the two is a very strong one;

(e) Gabcon made Mr Maphakwane's involvement in this matter central to its application in ways that cast him in negative light. The Authority strongly submitted that in the

circumstances Gabcon should have procured and filed a confirmatory affidavit from Mr Maphakwane on matters that concern him. It is our view that an affidavit from Mr Maphakwane would have been of huge assistance to the Tribunal;

(f) Khumomotse Law Practice filed a notice of assumption of agency and a second power of attorney on the 7th February 2019. It then had full control of this matter, and both Messrs Khumomotse and Gulubane at different times appeared before the Commission. However, they never sought to amend their papers to add the point about section 3 of the Act which, in their submission, would have disposed of the entire matter. Instead, Moakofhi states in her founding affidavit of 31st March 2020 at paragraphs 9, 10 and 11 that:

"9. I am advised by the Applicant's attorneys of record, and verily believe the same to be true, that, following the determination of the Applicant's points *in limine*, the natural course of action was for the matter to proceed to full hearing. In this respect, Attorney Mr. Thabiso Gulubane convened a meeting involving key staff of the Applicant at Khumomotse Law Practice ahead of the pre-hearing conference.

10. I state that, during the aforesaid meeting, Attorney Mr. Gulubane advised us that, following thorough contemplation of the matter, it was apparent to him that the erstwhile attorney had missed the provision in the ***Competition Act*** which provides that the Act does not apply to enterprises operating on the basis of statutory monopoly in Botswana.

11. Attorney Mr. Gulubane further advised us that, in light of the fact that an opposing affidavit had already been filed by the Applicant's erstwhile attorneys, and the points *in limine* raised on the Applicant's behalf had been dismissed, it was necessary to lodge an application seeking leave from the honourable Tribunal to supplement the papers filed of record, in order to clarify the Applicant's status and the consequent effect on the proceedings."

[39] In view of the above, the Tribunal is of the opinion that it is only the adverse decision of the Commission on the first points *in limine* that led to deep contemplation, and not the mere

fact that Mr Maphakwane had not raised the section 3 point. The prospect of a full hearing is what led to this jurisdictional challenge, and the Tribunal had to listen to the parties.

[40] The Authority's attorney urged us to dismiss Gabcon's application as it had failed to advance any explanation for its delay in raising the section 3 point, and that, in the event, it had no prospects of success.

[41] Gabcon's attorney submitted that the Tribunal should consider rule 35(3) of the Rules for the Conduct of Proceedings of the Competition Commission (the Rules) and condone the delay. Rule 35 (3) provides:

"The Commission may condone any technical irregularities arising from the proceedings."

[42] Marumo, J in Morapedi v The State 2003 (2) BLR 64 (HC) affirmed the rule on condonation in this manner:

"The position of the law regarding condonation of breach of the Rules of the High Court - - - was articulated in the following words by the Court of Appeal in State v Elias Moagi 1974 (1) B.L.R. 37 CA at p. 39:

'Condonation of a breach of the Rules of Court is granted not as a right but as an indulgence. When condonation is sought, it is important for the Applicant to show that he acted expeditiously when he discovered his delay and to advance an acceptable explanation of such delay. When this is not forthcoming, condonation should only be granted if the prospects of success on appeal are strong.'

The circumstances of the appellant fall to be tested against the principles set out in this passage."

[43] The above principles were expanded by Tebutt JP in Attorney – General v Manica Freight Services (Botswana) (Pty) Ltd 2005 (1) BLR 35 (CA):

"Condonation of a breach of the Rules of Court is granted not as of right but as an indulgence. It is accordingly necessary for an applicant for such condonation to show not merely that he has strong prospects of success on appeal but to give good reasons why he should receive such indulgence, i.e. that he acted expeditiously when he discovered his delay and advance an acceptable explanation for the delay (see **State v Elias Moagi 1974 BLR 337 at 39**; **Solomon v Attorney General *supra at 666 D*)**. There are, however, other factors which the court, in considering such an application, is obliged to take into account. These are conveniently referred to and collected in **Herbstein and Van Vinsen: The Civil Practice of the Supreme Court of South Africa 4th Edition p. 897 – 8**. While applying to applications in South Africa, they are the same principles which are applicable in our law (see **C.F Industries (Pty) Ltd v Attorney General of Botswana 1997 BLR 657**). Those factors include not only the degree of non-compliance, the explanation for it, the prospects of success and the importance of the case but also the respondent's interest in the finality of his judgment, the question of prejudice to him, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.

In **Melane v Santam Insurance Co. Ltd. 1962(4) SA 531 (A) at 532 C-D**, Holmes JA said he following:

" 'Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked.'"

It is essentially a matter of fairness to both sides."

[44] There is therefore an objective assessment of a number of factors, which in turn inform the discretion to be exercised. In the present matter, the Authority made a referral to the

Commission on the 26th November 2018. Gabcon raised a number of points *in limine*, which were dismissed by the Commission. The present attorneys for Gabcon, who were always part of its legal team, then raised the present points *in limine*, pleading lack of jurisdiction on the part of the Tribunal, which then compelled the Tribunal to hear the parties. But there are other factors to consider, such as fairness to both parties, finality in the administration of justice, and of prejudice to the Authority, as well as a prospects of success in the case made out by Gabcon. The prospects of success require a further evaluation of Gabcon's case on the merits.

[45] Dealing with the last point in Attorney-General v Manica Freight Services Tebutt JP ventured:

"It is, of course, unnecessary and beyond the scope of what is required for a proper adjudication of this application for me to go fully into the merits of the dispute between the parties. I must, however, be satisfied, particularly when I have found that no good and satisfactory reasons for not complying with the Rules and for the delay in lodging the notice of appeal have been given, that there are prima facie reasonable prospects of success on appeal."

[46] In the same vein, since this application is essentially a challenge to the Tribunal's jurisdiction to consider the referral, it was imperative for it to appreciate the merits of the case.

[47] Gabcon submitted that it is co-owned by the Botswana Railways Organisation (Botswana Railways), a statutory body established by section 3 of the Botswana Railways Act (Cap.70:01) to operate railway services.

Additionally, Gabcon maintained that it was granted a statutory monopoly through an exclusive licence under the Customs and Excise Act (Cap 50:01). We take note of the fact that these have now been separated into the Customs Act (No. 33 of 2018) and the Excise Duty Act (Act No. 34 of 2018).

[48] Gabcon is now a private company, known as Gaborone Container Terminal (Pty) Ltd, whose core operations include receiving, handling, storage and grounding of goods, equipment hire, rental of containers, sale of second hand containers and consolidation of cargo.

[49] In 2017 Gabcon embarked on a new strategy, whereby it reserved twenty five percent (25%) of its daily cartage business to private hauliers as a contribution to citizen economic empowerment. The remaining seventy five percent (75%) was reserved for Gabcon.

[50] The complaint of the Authority, which is the basis of its referral,

"is based on [the] complaint it received from a group of private hauliers and its conclusions after conducting investigations on the conduct of the respondent that the respondent contravened the provisions of section 30(1) of the Act, by engaging in the conduct amounting to abuse of dominance through refusal to deal."

[51] This is the charge against which Gabcon has raised a number of points *in limine*, including the current one initially challenging the jurisdiction of the Commission, and consequently that of the Tribunal.

[52] It is the assertion of the Authority that Gabcon operates at two levels, "the container depot in the upstream market and container haulage in the downstream market".

[53] In the respondent's [Authority] answering affidavit of the 12th June 2020 it amplifies its accusation at paragraph 23:

"I have been advised by my attorneys of record that the Applicant does not qualify as an enterprise under section 3(3) (b) of the Competition Act of 2018. The Applicant's existence does not emanate from any statute and no statute specifically outlines its activities. The Applicant's exclusive license allows them to carry on business of a container depot where it provides receiving, storage and unpacking of containers in the upstream market. Possession of an exclusive license does not give one the status of a statutory monopoly. The Applicant is

also involved in the business of haulage or delivery of containers to customers' premises in the downstream market where it is subject to competition from private haulers who also haul containers on behalf of importers. This is where the Applicant's anticompetitive practices complained of in the main application lie and has nothing to do with the Applicant's exclusive license whatsoever. The Applicant's dealings in the downstream market amount to an economic activity and as such, subject to the provisions of the Competition Act."

[54] It is worth noting that although the parties refer to an "exclusive licence", the licence itself issued by the Department of Customs and Excise on the 29th December 1994 to Botswana Railways Organisation trading as Gabcon is simply a Container Depot Licence whose "application has been approved by the Director of Customs and Excise and the premises herein described, and detailed in the plan submitted, are hereby licenced as a container depot for the storage, package and unpacking of containers in terms of Section 69(2) of the Customs and Excise Act, and subject to the terms and conditions subscribed to in this application."

[55] Nowhere is there reference to an exclusive licence.

[56] Section 5 (1) of the Act states that:

"The Authority shall be responsible for the prevention of, and redress for, anti – competitive practices in the economy, and the removal of constraints on the free play of competition in the market."

[57] This is a very broad and deep mandate of extraordinary reach and authority. It even brings within its purview activities of the State. Section 3(2) reads:

"This Act binds the State to the extent that the State engages in trade or business for the production, supply or distribution of goods or provision of any service within any market in Botswana that is open to participation by other enterprises." (emphasis added)

[58] Gabcon, in its heads of argument dated 30th June 2020 states at paragraph 6.8:

"In view of the plain and unambiguous language of **section 2** *supra,* it is humbly submitted that the Applicant – being an incorporated company which trades as a container depot by virtue of an exclusive licence granted by the Government of Botswana – undoubtedly qualifies as an enterprise under the Act."

[59] In its judgment in Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited (CCT 123/19) [2020] ZACC 14) handed down on 24th June 2020 the Constitutional Court of South Africa noted at paragraph 18:

"The potential inability of the Commission to investigate and prosecute prohibited practices and cartel behaviour has far – reaching consequences, as it also impacts on the civil and criminal remedies available under the Competition Act."

[60] Reference in the above passage to Competition Act is to the Competition Act of South Africa; and the Competition Commission in South Africa has equivalent status to the Competition and Consumer Authority in Botswana.

[61] Section 3(3) (b) of the Act reads:

"This Act shall not apply to –

…

(b) enterprises operating on the basis of statutory monopoly in Botswana;…".

[62] By way of contrast, the Interpretation Act (Cap. 01:04) defines " statutory instrument" as "any proclamation, regulation, rule, rule of court, order, bye-law or other instrument made, directly or indirectly under any enactment and having legislative effect." (emphasis added)

Botswana Railways, established by section 3 of a statute, the Botswana Railways Act (Cap. 70:01), is a statutory monopoly. Its operations are governed directly by the statute that created it. The *Longman Dictionary of Contemporary English* defines "statutory" as "fixed or

controlled by statute". In other words, the grant of power in the instance of Botswana Railways is located only within its statute, the Botswana Railways Act. Therefore, it is a statutory monopoly to the extent that it only deals with the provision of the services exclusively reserved for it in its founding statute.

[63] On the other hand, Gabcon was licenced, the licence - giver being empowered by the Customs and Excise Act. It can, in a loose sense, be described as a subsidiary of Botswana Railways. It is not a creature of statute. The *Longman Dictionary of Contemporary English* defines "licence" as "an official paper, card, etc., showing that permission has been given to do something, usu. in return for a fixed payment" or "permission given, esp. officially, to do something".

[64] After the payment of P2000.00 in 1994 Gabcon was "licenced as a container depot for the storage, packing and unpacking of containers in terms of Section 69 (2) of the Customs and Excise Act."

[65] In the Zambian legislation (The Competition and Consumer Protection Act, 2010 [No. 24 of 2010]) "statutory monopoly" is defined to mean "a commercial undertaking or an activity conducted by an entity, whether or not owned wholly or partly by the State , on the basis of statutory provisions that preclude other entities from conducting the same activity". (emphasis added)

[66] A statutory monopoly is created by statutory provisions excluding other enterprises from conducting or performing the reserved activities. Gabcon is neither created by statute nor are any of its activities reserved solely to it by statute. It is a private company constituted under the Companies Act (Cap: 42:01).

[67] Importantly, section 3(3) (e) of the Competition and Consumer Protection Act of Zambia states:

"This Act shall not apply to –

…

(e) the business of any enterprise exercising a statutory monopoly which precludes the entry of another enterprise into the relevant market in Zambia:

Provided that –

(i) the enterprise does not enter into an agreement that has the purpose of restricting competition;

(ii) the conduct of the enterprise does not, in itself or in conjunction with another enterprise, amount to an abuse of a dominant position;…".

[68] In other words, the protection of a statutory monopoly in Zambia is not absolute if it engages in anti-competitive conduct.

[69] In OECD Policy Roundtables: State Owned Enterprises and the Principles of Competitive Neutrality (2009) (DAF/COMP (2009) 37), it is said at paragraph 2.6, page 44:

"Commercial activity by non-corporatised government – related entities in competition with the private sector is often enough to make those entities "undertakings" or otherwise subject them to competition law jurisdiction."

[70] Most of the competition law principles in our Act are inspired by the European Commission legislation and decisions, and judgments of its Court of First Instance (CFI) and the European Court of Justice (ECJ). In this respect it has built jurisprudence which guides newer adherents to the competition or antitrust regime. The court, in Klaus Hofner and Fritz Elser v Macrotron GmbH (Case C – 41/90), in a judgment delivered on 23 April 1991 said at paragraph 21:

"It must be observed, in the context of competition law, first that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the

legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity."

[71] An "undertaking" in European Union competition law is the equivalent of the defined term "enterprise" in our Act. In essence, therefore, whether an enterprise is exempt from the clutches of the Act or not is not a judgment made at face value, but follows a rigorous inquiry involving competition law principles including market definition (relevant product market and relevant geographic market, and, where necessary, the relevant temporal market). Each enterprise, even if it claims to be a statutory monopoly, must be subjected to this inquiry to distil its core, statutory services from ancillary services.

[72] In GT Link A/S v De Danske Statsbaner (DSB) (Case C – 242/95) in a judgment of 17th July 1997 the court framed its question at paragraph 28 in this manner:

"28. By these two questions, which it is appropriate to consider together, the national court is asking in substance whether the fact that public undertaking occupying a dominant position, and which owns and operates a commercial port, levies port duties such as those at issue in the main proceedings, or waives those charges on its own ferry services and reciprocally on those of some of its commercial partners, is capable of constituting an abuse of that dominant position contrary to Article 86 of the Treaty."

[73] In answering the question the court concluded at paragraphs 38 to 41:

38. "Second, it should be noted that, according to Article 86(a) and (c), an abuse of a dominant position may consist of directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions or applying dissimilar conditions to equivalent transactions with other trading parties thereby placing them at competitive disadvantage.

39. The Court has ruled that 'unfair prices', for the purposes of Article 86(a), means prices which are excessive because they have no reasonable relation to the economic value of the service supplied (see, to that effect ***United Brands***, paragraph 250).

40. - - -

41. The fact that a public undertaking which owns and operates a commercial port waives those duties on its own ferry services and reciprocally on those of some of its trading partners is likewise capable of constituting an abuse, in so far as with regard to the public undertaking's other trading partners it involves application of dissimilar conditions to equivalent transactions, within the meaning of Article 86(c)."

[74] Addressing another question in Centre Belge d' etudes de marche – Telemarketing (CBEM) SA v Compagnie luxembourgeoise de telediffusion SA & Ano. (Case 311/84) in its judgment of 3rd October 1985 the court noted at paragraph 19:

"19. The second question asks whether an undertaking holding a dominant position on a particular market, by reserving to itself or to an undertaking belonging to the same group, to the exclusion of any other undertaking, an ancillary activity which could be carried out by another undertaking as part of its activities on a neighbouring but separate market, abuses its dominant position within the meaning of Article 86."

[75] The court provided its answer at paragraphs 25 to 27:

"25. In order to answer the national court's second question, reference must first made to the aforesaid judgment of 6th March 1974 (*Commercial Solvents*), in which the Court held that an undertaking which holds a dominant position on a market in raw materials and which, with the object of reserving those materials for its own production of derivatives, refuses to supply a customer who also produces those derivatives, with the possibility of eliminating all competition from that customer, is abusing its dominant position within the meaning of Article 86.

26. That ruling also applies to the case of an undertaking holding a dominant position on the market in a service which is indispensable for the activities of another undertaking on another market. - - - If, further, that refusal is not justified by technical or commercial requirements relating to the nature of the television, but is intended to reserve to the agent any

telemarketing operation broadcast by the said station, with the possibility of eliminating all competition from another undertaking, such conduct amounts to an abuse prohibited by Article 86, provided that the other conditions of that article are satisfied.

27. It must therefore be held in answer to the second question that an abuse within the meaning of Article 86 is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking."

[76] In Italian Republic v Commission of European Communities (Case 41/83) in its judgment of the 20th March 1985 the court eloquently stated the principle at paragraph 22 in these words:

"It is apparent from the documents before the Court that, whilst BT has a statutory monopoly, subject to certain exceptions with regard to the management of telecommunication networks and to making them available to users, it holds no monopoly over the provision of ancillary services such as the retransmission of messages on behalf of third parties."

[77] In the result:

a) Gabcon is not a statutory monopoly as it is not created by statute, with its core mandate defined in the statute, and it is therefore not protected by section 3(3) (b) of the Competition Act;

b) even if Gabcon, just like Botswana Railways, had been created by statute, it would have to be subjected to a rigorous test to see whether the condemned conduct falls within its core statutorily mandated services and not in ancillary services;

c) the Authority has to demonstrate whether Gabcon is dominant in both the upstream and downstream markets, or in either of them, and if it is, whether it is abusing its dominant position. This can only be done at the full hearing of the referral.

[78] Therefore, the Tribunal has jurisdiction to hear the referral.

[79] The attorney for Gabcon urged the Tribunal to avoid finding fault with Gabcon, as any mistakes and faults committed lie squarely on the shoulders of its attorneys. In Attorney – General v Manica Freight Services (Botswana) Pty) Ltd Tebbutt JP held that:

"While it may be said that the sins of the attorney should not be visited on the client, the degree of culpability of the former may have reached such a level as to deny the client relief (see Thlobelo Kehiloe (2) 1932 OPD 24; Ramosu v Metsi Drilling Company (Pty) Ltd [2002] 1 B.L.R. 85 (CA). In my view this is the case in casu."

Tebbutt JP further observed:

"Mr Chamme has submitted that it is a well – known principle that the object of courts is to decide the rights of the parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. That submission may be correct, as far as it goes (I express no view on it), but it is the rights of both parties to which the court must look and not only one of them. As I have said, it is in essence a case of fairness to both sides and I would not be fair to the respondent were I to grant this application."

[80] The Tribunal is of the view ,therefore, that the rights and interests of all parties involved have to be finely balanced at all times.

COSTS

[81] In Setaelo v Etube Engineering (Pty) Ltd [2012] 2 BLR 379(HC) Mothobi, J noted:

"In civil matters the courts have a broad discretionary power to decide who will pay the parties' litigation costs (including attorneys and advocates' fees and other disbursements) after judgment has been given."

[82] Khampepe J and Theron J, writing for the majority in the Constitutional Court of South Africa in Public Protector v South African Reserve Bank [2019] ZACC 29, enunciated the same principle at paragraph 144:

"An important principle in this appeal is that courts exercise a true discretion in relation to costs orders. A true discretion exists where the lower court has a number of equally permissible options available to it. An appeal court will not lightly interfere with the exercise of a true discretion."

[83] Given the *sui generis* nature of competition law proceedings in the Commission and consequently in the Tribunal, as well as the novelty of the practice of competition (antitrust) law in this jurisdiction, the Commission was reluctant to award costs except in the most egregious circumstances. However, this did not mean that it could not, and that its successor should not, in appropriate circumstances, award costs.

ORDER

[84] Gabcon's application is dismissed in its entirety.

[83] Gabcon is ordered to pay the costs of the Authority in this application.

Decision read in public session in Gaborone on this_____ day of September 2020.

_____
Tendekani E. Malebeswa
(Presiding Member and Vice-President)

I agree

Judge Sanji M. Monageng
(President)

I agree

Ruth Basele
(Member)

I agree

Leruo Moremong
(Member)