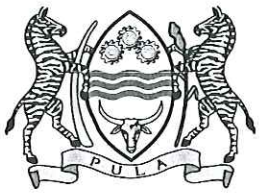

IN THE COURT OF APPEAL OF BOTSWANA HELD AT GABORONE

COURT OF APPEAL CIVIL APPEAL NO: CACGB-254-22
HIGH COURT CASE NO: MAHGB-000040-21

In the matter between:

BOTSWANA MEDICAL AID SOCIETY **APPELLANT**

and

COMPETITION AND CONSUMER AUTHORITY **RESPONDENT**

Attorney Mr M J Tafa with Attorney Mr T Batisani for the Appellant
Attorney Mr J B Akoonyatse with Attorney Ms B Molosiwa for the Respondent

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JUDGMENT

CORAM: LESETEDI JA
WALIA JA
TEBOGO-MARUPING JA

LESETEDI JA:

The parties

1. The appellant ("BOMAID", or simply, "the appellant") is a medical aid fund registered as a society under the Societies Act [Cap: 18:01]. It

brought an application before the High Court seeking an order declaring that it does not fall within the oversight of the respondent and regulation under the Competition Act (Cap: 46:09) (the Act).

2. The respondent is a statutory body established under section 4 of the Act to carry out functions set out under section 5 facilitated under other provisions of the Act. By section 5(1) of the Act, the respondent (herein referred to simply as "the respondent or, "the Authority") is 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. Section 5(2) confers operational and incidental powers on the CCA to enable it to carry out its mandate effectively. These include the responsibility to: a) make rules for, and publicise decisions that increase fair and transparent business practices; b) investigate and evaluate alleged contraventions of Part VI of the Act; c) refer matters it has investigated under the Act to the Tribunal for adjudication; and, d) prosecute before the Tribunal, matters it has referred to the Tribunal under the preceding provision. The Tribunal is an adjudicatory body established under Part XII of the Act.

3. Part VI of the Act sets out several anti-competitive offences and the penalties attached to them. One of the provisions falling under Part VI is section 31 of which sub section (1) reads:

> "Any conduct on the part of one or more enterprises is subject to prohibition by the Authority if, following an investigation by the Authority, the conduct is determined to amount to an abuse of a dominant position in any market, and such conduct shall include
>
> a) ....
>
> e) the refusal to supply or deal with other enterprises, including refusal of access to an essential facility;
>
> g) discriminating in price or other trading conditions; and
>
> ...."
>
> (Emphasis added)

The legal dispute

4. The appellant (BOMAID) contends that its activities are not covered under the Act for two reasons:

   a. that it is not an enterprise as contemplated under the Act and,

   b. that it is exempt from the application of the Act under section 3(3)(e).

5. By section 3(1), the Act applies to all economic activities within Botswana and also extends to the State where it engages in trade or business for production, supply or distribution of goods or any service within any market in Botswana that is open to participation by other enterprises. The reach of the Act is wide and the limited areas of exemptions are listed under section 3(3). The onus consequently lay upon the appellant to show that it is one of the few economic activities exempt from the reach of the Act or that section 31(1) did not apply to its activities.

6. The Act was passed in 2018 as a reenactment with notable amendments, of the 2006 Competition Act. Under section 2, the Act defines an enterprise as meaning:

> "a person or group of persons, whether or not incorporated, that carries on a business for gain or reward in the supply or distribution of goods, or the provision of any service, and includes partnerships and trusts."

7. The highlighted part of the above definition did not exist in the Act prior to the 2018 re-enactment. The significance of that inclusion will be apparent in due course of this judgment.

8. Under the section 3(3) exemptions, of relevance to this case is paragraph (e) which exempts:

> "conduct designed to achieve a non-commercial socio-economic objective."

9. The respondent contends that the appellant is an enterprise within the definition set out under section 2, and or, does not fall within the category of 3(3)(e) as its conduct achieves a commercial objective.

10. The dispute between the parties is, in the above premises, essentially one of the interpretation of the provisions of the Act. In this regard the parties are in agreement.

Approach to statutory interpretation

11. It is now accepted as settled that the process of interpretation is an exercise to ascertain the meaning of a statute or words therein. The

proper approach is to consider the text of the provision in issue within the context of relevant statute(s) having regard to the purpose or mischief which the legislation was intended to address. Even where the language of the provision standing alone appears on its face clear, it must still be considered within the context of the whole statute and its purpose. Clarity of the language is not discerned from a piecemeal reading of a provision in isolation but in the context of the whole statute having regard to its object. A piecemeal reading may result in an interpretation of a provision outside the statutory context and lose sight of the legislative intent. The exercise is essentially objective and unitary. See, *Botswana Land Board and Local Authorities Workers' Union and Others v Botswana Public Employees Union and Others* [2016] 1 BLR 434 (CA). The respondent has also cited a recent decision of this Court in *Permanent Secretary, Ministry of Land Management, Water and Sanitation Services and another v Letsweletse Keoraletse,* Court of Appeal CACGB-125-23 (delivered on 23 February 2024) where at para 19 it was stated:

"In my view, it is of fundamental importance that I must give the words used in the Act a reasonable interpretation with reference to the subject matter and the public object that the legislative authority had in view. A statute or a provision thereof should not be construed so as to defeat the clear intention of parliament."

See also *Chika v The Attorney General* [2012] 1 BLR 1042 (CA); *R v Secretary of State for Environment, Transport and Regions, Ex parte Spath Holme Ltd* [2001] AC 349.

Factual background to the dispute

12. Because the facts upon which the dispute arose are relevant to give a full picture of the parties' contestations, it is essential to set out briefly the background to the dispute. In 2020, the appellant received communication from the Authority informing it of a number of complaints raised against it on: a) allegations of acts of anti-competiveness through refusal to deal with another enterprise, b) discrimination in price and other trading conditions and, c) exclusive dealings. These, the respondent informed the appellant, were conducts which if established constituted a contravention of section 31(1) of the Act. The communication informed the appellant of the respondent's

intention to investigate it on the said allegations. In response, the appellant argued that the Act did not apply to it because it was, a) not an enterprise within the contemplation of the Act and, b) its activities were exempted from the reach of the Act by section 3(3)(e) of the Act. On those grounds, it refused to subject itself to the enquiry process. The communication was followed by a formal notice under regulation 12(2) of the Act to investigate the alleged acts of conduct. The notice was served on the appellant on the 12th of October 2020. It set out in detail the allegations against the appellant and the provisions infringed by such conduct. The notice called upon the appellant to submit its written representations in relation to matters under investigation, within 30 days of date of the notice. The notice also called upon the appellant to appear at the Authority's premises on the 1st day of December 2020 to give evidence on the alleged infringements. The appellant was also required to produce within 30 days specified information including whether or not the appellant is regulated by the Non-Bank Financial Institutions Regulatory Authority (NBFIRA). This investigative procedure is provided for by section 36 of the Act.

13. BOMAID's response thereto was short. It reiterated its contention that the Act did not apply to it as it was not an enterprise and was exempt from the application of the Act. It declined to be involved in the investigation process by the Authority and demanded that the Authority undertake not to progress the investigation further pending the outcome of the High Court proceedings which it intended to institute asserting its exemption from the application of the Act. That application was subsequently brought and it is the adverse decision of the High Court therein that has resulted in this appeal. Neither was the appellant forthcoming to the respondent on the NBFIRA question. That angle has neither been pursued in the High Court or before us in any substantive way. We shall therefore assume for purposes of this appeal that the application of Non-Bank Financial Institutions Regulatory Authority Act has no bearing on issues for determination herein.

Appellant's contentions

14. BOMAID contends in its founding papers that it was not an enterprise within the meaning given under section 2 of the Act because it is not carrying on its business for gain or reward and, secondly, it is exempted under section 3(3)(e) in that it is a nonprofit making society registered

under the Societies Act; that as a nonprofit making society it was not carrying out its activities for reward or gain because the subscriptions it received from its members for medical aid cover were used to defray the medical costs incurred by its membership and claimable under the respective medical cover policies.

15. It attached to its founding affidavit, a copy of its Book of Rules revised as at October 2004. The provisions of that book were generally incorporated into the founding affidavit with a few highlights. These were that BOMAID was formed by a number of constituent bodies. Its financial inflow is from the contributions of those members as well as their subscribing employees and individual members joining, each of whom become a member of the appellant. It is from these subscriptions that the claiming member's medical costs are defrayed. Under the Book of Rules, the general business of the appellant is run under the control and supervision of a Board of Trustees; a) four of whom are nominated by the member companies; b) two are nominated at an annual general meeting of the BOMAID; c) three independent members appointed by the other six members and; d) an ex officio member. By rule 21(1) of the Book of Rules the Board is given wide ancillary powers including the

power to purchase movable and immovable property for the appellant and to invest its surplus capital. In terms of the Book of Rules the appellant does not declare any profits and upon its dissolution the surplus is not distributed to the members. The appellant contends that subscribing members do not also make any profit from the appellant as they are only entitled to defrayment of a portion of medical expenses already incurred.

Respondent's contentions

16. The respondent's contention is that prior to the 2018 amendment, the definition of 'enterprise' did not include any reference to partnerships and trusts. At the time, medical aid funds, most of whom were registered as trusts, refused to be regulated under the Act arguing that they being trusts, were not covered under the definition of an enterprise as well as not carrying on business for gain or reward. It was in the light of that argument, so argues the respondent that the Act was amended to include partnerships and trusts so as to bring medical aid funds under the control of the Act.

17. It is not being disputed that since the re-enactment of the Act in 2018 some medical aid funds registered as trusts now accept the regulatory jurisdiction of the Authority.

18. The Authority argues that looking at the intended objective, the inclusion of partnerships and trusts under the definition of 'enterprise' cannot result in an absurd situation where some medical aid funds, but not others, fall under the control of the Act despite them being in the same type of business.

19. As to the exemption under section 3(3)(e) of the Act, the Authority argues that notwithstanding BOMAID's protestation, the real conduct of the appellant's business shows that it is not performing a socio-economic nonprofit undertaking but operates on a commercial basis in that:

    a. the appellant conducts its business on the basis of the contributions made by members the cover of each member being determined on the contributions it makes and not on purely philanthropic socio-economic considerations;

b. the appellant also carries on business for reward by investing in undisputably commercial activities which are also key role players in the competitive health service industry. Two examples of such investments are given. The first is the appellant's majority shareholding in for-profit subsidiaries called South View (Pty) Ltd and Alpha Access (Pty) Ltd in which it holds 100 percent shareholding. The second is the appellant's shareholding in a total of 93 percent shares in MRI Botswana Limited. That company is an undisputable major player in the health service industry, providing integrated health services and related health care solutions through different business units such as emergency medical services provision with a network of skilled paramedics, emergency medical professionals and ambulance services (ground and air ambulance); on-site healthcare management solutions customized to a client's occupational health needs; a training academy providing a variety of emergency medical and healthcare services training; a chain of pharmacies providing a range of medicines; and, a network of clinics offering integrated healthcare services.

20. The Authority also argues that some of anti-competitive complaints raised against BOMAID, for instance that it refuses to permit some service providers access to providing health care for its members notwithstanding that such service providers are qualified and produce

competitive quality health care services, are indicative of commercial practices not driven by social considerations.

21. To these allegations the appellant does not deny investing in shareholding in the mentioned companies save to contend, in respect of MRI, that such shareholding is not direct. As regards unfair competitive practices these remain undisputed in the light of the appellant's argument that the Act is not applicable to it. On the face of it therefore, it can also be accepted that it is undisputed that the appellant is allegedly, directly or indirectly, involved in commercial non socio-economic activities of which the Authority has received complaints warranting investigation and of which the appellant is alleged to engage in monopolistic business practices tending to close out some participants in the market from competing for the provision of services to the consumers of the services market, its members.

22. In reply BOMAID reiterates, on the amendments to the definition that because the appellant is neither a partnership nor a trust but a society, its position was not affected by the amendment and that it still remains beyond the reach of the Act.

The appeal

23. Although a number of grounds against the decision of the High Court have been raised in support of this appeal, the questions for determination on appeal are in essence those that were placed before the High Court and so are the arguments advanced by each of the parties.

NAMAF case

24. Both before the High Court and in this Court the appellant has placed reliance in support of its case on a decision of the Supreme Court of Namibia in *Namibian Association of Medical Aid Funds and Others v Namibia Competition Commission and Another,* Case No. SA 16/2016 in which that court, reversing a decision of the High Court in Namibia, formulated the question on whether an entity was an enterprise by focusing on whether it carried on business for 'gain' or 'reward'. The Supreme Court reasoned:

> "The critical question is whether medical aid funds are businesses carried on for 'gain' or 'reward' with regard to the provision of services. Since competition law is in a broad sense, intended for the protection of the consumer, the object it pursues is that those who for gain or reward

provide goods and services in a defined market consisting of competitors do not engage in cartel conduct or in other manners proscribed by the Act. Not only must competitors be encouraged to compete, they must be prevented from colluding to maximize profit or secure market dominance with the object or effect of lessening competition. The issue confronting us is whether medical aid funds fit that paradigm."

25. On the above framing of the issue the court held that:

"They are non-profit-making and have elements of the social solidarity principle, as already outlined. Even though gain would appear to be a wider concept than profit, their social solidarity nature within this statutory context further means that the funds are not businesses which are carried on for gain or reward for the purpose of the definition of undertaking contained in the Act. They therefore do not constitute 'undertakings' within the meaning of the Act. It follows that the Commission does not have jurisdiction over them for the purpose of s 2 of the Act." (Underlining added)

26. It is to be noted in passing that the Namibian Act uses the term 'undertaking' instead of 'enterprise' in its definition of conduct which falls under the regulation of their equivalent to the Competition Act. The above passages make it evident that the question of whether a fund is

an enterprise and whether it is exempted as conduct designed to a non-commercial socio-economic objective are interlinked.

27. In its reasoning, the Supreme Court had regard to several European decisions. But it recognised that the statutory landscape pertaining to medical aid in European countries was compulsory and heavily regulated to provide a proper social cover without linking the cover to the earnings of the subscribing members.

28. In its conclusion, the Supreme Court held in favour of the appellants in that case. The appellants who had taken the Namibian Competition Commission to court were, the Namibian Association of the Medical Aid Funds (NAMAF) alongside a number of individual Medical Aid Funds which were its members. Unlike in this jurisdiction where there is no statutory framework or body established to deal peculiarly with the regulation of medical aid funds resulting with funds acting in a largely self-regulated fashion, in Namibia they are regulated under statute and took the Competition Commission to court on a common platform. Not here where the appellant has, on a matter that ought to be common to

other medical aid funds has taken a position which, if successful may result in an absurd situation where a particular regulatory law may be perceived to apply to some but not all medical aid funds despite all carrying on the same type of business. South Africa also has a medical aid fund or scheme regulatory body. See, *Genesis Medical Aid Scheme v Registrar of Medical Schemes & Another* [2017] ZACC 16. The time may well have long arrived for this country to also establish a statutory regulatory body to primarily create coherence and protection of the consumer.

29. BOMAID has strongly argued that the Court should follow the reasoning and the conclusions in the NAMAF case.

30. As urged on this Court by the respondent, before deciding whether or not to apply the decision of the Namibian Supreme Court, this Court has to be satisfied that the background context of the Namibian legislative landscape and of this jurisdiction are the same or broadly similar. This Court cannot just slavishly follow the decisions of other jurisdictions no matter how persuasive. See *President of Botswana and Another v Law Society of Botswana and Another* [2018] 1 BLR 478 (CA).

Whether the NAMAF case is of persuasive force in the present matter

31. To the extent that the NAMAF case is being relied upon by BOMAID in an effort to persuade the court: a) that BOMAID is not an enterprise, it not running a business for gain or reward; and, b) that BOMAID is engaged in conduct designed to achieve a non-commercial socio-economic objective, the Court ought to have regard to the legislative framework upon which that decision drew its succour. NAMAF had regard to the jurisprudence of the European Court on the subject matter. The major observations NAMAF drew from the case law thereon were that:

    a. the purpose of the medical aid fund and its characteristics as determined by the Medical Aid Fund Act of Namibia accorded with the social solidarity principle emphasized by the European Court of Justice (ECJ) as a crucial factor in determining whether an entity is an undertaking for the purpose of the provisions in the European Treaty regulating competition;

    b. under the European Treaty, medical aid insurance or funding is compulsory, it being legislated for and regulated by statute. Under that regulation, medical insurance is compulsory except for the recipients of an invalidity pension and retired insured

members with very modest means being exempted from payment of contributions; though the contributions are proportional to the contributor's income, the benefits are identical to all those who receive them; that set up constituted a social solidarity. The solidarity was held to entail the redistribution of income between those who are better off and those who, having regard to their resources and state of health would be deprived of the necessary social cover, there being no direct link between the contributions paid and the benefits granted.

c. The system of compulsory contribution was indispensable for the principle of solidarity and financial equilibrium of those medical aid funds;

d. The rates of contributions and benefits were set by the state;

e. Profit was expressly excluded and any surplus was retained in the reserves of the fund;

f. An element of competition between the funds was introduced by statute to encourage funds to operate in accordance with the principles of sound business management.

32. It was the above factors that were determinant in the European case law holding that the medical aid funds were not running that business as a commercial activity for gain or reward but fulfilled an exclusively social security function. The court in NAMAF observed the above but noted that although medical aid scheme cover was not compulsory in Namibia, the following factors were at play in deciding whether or not the Competition Act applied to the Fund. These were that:

a. Funds are required by law to be registered by Registrar under and regulated by the Medical Aid Fund Act (MAF), an Act of Parliament;

b. The purpose of the MAF is not only for control to be exercised over funds but also, under the long title of the Act, promote funds because of the useful societal function they perform;

c. The Registrar is precluded from registering a fund unless satisfied that its establishment will be in the public interest;

d. The MAF defines a Fund as a business carrying on a scheme with the object of providing financial assistance to members in defraying expenditure incurred for medical services;

e. A fund is precluded from carrying on any business other than that of a fund;

f. The MAF precludes a profit motive or any portion of a surplus realized by a fund from being distributed to a member or any other person;

g. Fund members are precluded from receiving more than what is paid for any medical services, they being 'merely reimbursed for the whole or a portion of the payments they make for medical services.' Thus, there is no gain or reward for members in the running and operation of funds.

33. NAMAF held that although membership of a fund was not statutorily obligatory in Namibia and though gain would appear to be a wider concept than profit, the 'social solidarity' nature within this statutory context further means that funds are not businesses which are carried on for gain or reward for the purpose of the definition of undertaking under the Act. They therefore do not constitute "undertakings" within the meaning of the Act. NAMAF concluded that for those reasons the funds were excluded from the application of the Competition Act and that the Commission did not have jurisdiction over them.

Salient differences between NAMAF and the present case

34. There are evidently significant distinguishing features between the present case and NAMAF.

35. Firstly, in Namibia unlike Botswana, medical aid funds are regulated by statute. The limitations to the functions and conduct of funds as well as safeguarding social security interest in provision of medical aid services provided by statute in Namibia are not found in Botswana. For instance, BOMAID's Book of Rules sets out its objective to be to raise funds by subscriptions and donations in order to make provision for the granting of assistance to members thereof in defraying expenditure incurred by them in connection with the rendering to them and to dependents of such members of services they are entitled to under specified rules. But in fact, its conduct includes buying shares in for profit businesses some of which provide health care services raising the real prospect of competition, even if indirectly, with some of the service providers expected to deal with it. This it does seemingly under the wide incidental powers conferred on its Board by rule 20. It also becomes unclear whether its key source of income is from its investments or

members' subscriptions and how those investments affect the primary objective.

36. Secondly, there is no principle of social solidarity in the character described in the European jurisprudence. Medical aid cover in Botswana is not only voluntary, the contributions and the benefits in respect of each member are related. A member's benefits are not philanthropic or benevolent nor defined by statute to provide an across the spectrum standard medical aid cover. A member with a low-level medical aid cover can only have his or her medical expenses defrayed within the limitation of that policy and nothing more. It is a form of medical insurance. The only element of solidarity will be that those whose benefits are not used within a given year will have their subscriptions subsidising those whose claims within a given year exceeded their subscriptions.

37. For the above reasons this Court has to look elsewhere for aid in its interpretation of the relevant provisions of the Competition Act.

38. The often-cited passage in *Botswana Land Boards and Local Authorities Workers' Union and Others v Botswana Public Employees Union and*

Others at p 448, supra, summates that in ascertaining the meaning of any document, the starting point is to give consideration to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known by those responsible for its production. In *Fundstrust (Pty) Ltd (in Liquidation) v Van Deventer* 1997 (1) SA 710 (A), it was held that as a general rule every word or expression must be given its ordinary meaning and, in this regard, lexical research is useful and at times indispensable. A word of caution was however given that occasionally, it is not. There may be cases where the ordinary meaning is inconsistent with the context and stated objective of the Act.

39. The key interpretive exercise is to find the ordinary meaning of the words 'gain' or 'reward' in the definition of 'enterprise' rendered by the Act. The primary source is the dictionary meaning. The Shorter Oxford English Dictionary defines 'gain', inter alia, as "increase of possessions; resources, or advantages; an increase of this; profit, improvement; spec. the acquisition of wealth. (Opp. Loss) ... an increase in amount, magnitude, or degree". In similar but shorter vein, Black's Law

Dictionary, 9th Edition defines 'gain' to mean "an increase in amount, degree, or value. From the above, 'gain' has a much wider meaning of increase in degree or value than profit. See NAMAF, supra. That plain meaning is taken without too minute or hypocritical consideration of its term but in its ordinary daily parlance. *Mitchells Plain Town Centre Merchants Association v McLeod and Another* [1996] ZASCA 67; 1996 (4) SA 159 (SCA); [1996] 3 All SA 297 (A). BOMAID may not have been carrying its business for profit but it is clear that it intended to grow itself as a market player in the provision of medical aid funding and from the complaints made to the Authority, to decide who, among the health service providers to give business, and whom to close out without consideration of quality of service to its members. This constitutes gain in that not only does it contribute to the growth of the resources, value and consequently wealth of the fund, if the complaints are established, such conduct runs afoul of section 31 of the Act as it inhibits the spirit of competition. This is also consistent with the objectives of the Act. Added to that is its direct and indirect investment by way of shareholding in services provided by market players, it is using its advantageous position to indirectly compete for that market segment of

provision of health services with those who are already health service providers of its members, and who look to it for the market. Unchecked this conduct may lead to service providers being sidelined to a monopolistic empire where the members are not even able to access their chosen service providers while quality and price of service play a peripheral role. These, without regulation. With this finding, it is unnecessary to consider the meaning and import of the word 'reward' in the definition of 'enterprise'.

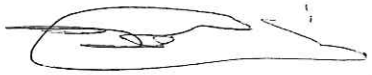
40. As earlier indicated in this judgment, BOMAID is not involved in a conduct that can be characterized as designed to achieve a non-commercial socio-economic objective. Its business is not born out of non-commercial socio-economic considerations. Profit-making may not be its primary objective but its activities are market related and fall nowhere within the criteria upon which the cases relied upon by the appellant are based. BOMAID has therefore also failed to show that it falls within the exemption contained under section 3(3)(a) of the Act. In the premises the appeal cannot succeed.

Conclusion

41. It is therefore ordered that:

The appeal is dismissed with costs.

DELIVERED IN OPEN COURT AT GABORONE ON THE 19TH DAY OF APRIL 2024.



I B K LESETEDI
JUSTICE OF APPEAL

I AGREE: **L S WALIA**
JUSTICE OF APPEAL

I AGREE: **G L TEBOGO-MARUPING**
JUSTICE OF APPEAL