



**IN THE HIGH COURT OF BOTSWANA HELD AT LOBATSE**

**MAHGB-000040-21**

**In the matter between:**

**BOTSWANA MEDICAL AID SOCIETY**

**APPLICANT**

**And**

**COMPETITION AND CONSUMER AUTHORITY**

**RESPONDENT**

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**JUDGMENT**

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**DUBE J.**

1. The applicant, a medical aid service provider, brought this matter for determination of whether the respondent, as a statutory body established by and under the Competition Act ('Act'), has authority over it and whether the said Act may be applied unto it.

2. The applicant, through its notice of motion, seeks the following Orders:

a. An order declaring that the Applicant, a Society established in terms of the Societies Act [Cap 18:01] and governed by the Book of Rules, is exempted from the application of the provisions of the Competition Act no.4/2018;

b. Further and/or alternatively, an order declaring that the provisions of Section 31 of the Competition Act, under which the Respondent seeks to investigate the Applicant, are not applicable to the Applicant.

3. The applicant on the one hand contends that it is a society duly registered in terms of the Societies Act and does not fall within the scope of the Competition Act.

4. Whilst on the other hand it is the submission of the respondent that the applicant, in its activities, conducts itself in a manner that falls within the scope of the said Competition Act.

5. The parties have furnished the court with their comprehensive heads of arguments and this Court is grateful for that. First, a brief factual background will suffice.

### ***Factual Background***

6. The factual background of this case is largely common course, and I am grateful to applicant's summarized version of same which I will use in this judgment.
7. This application was sparked by the respondent's notice of intention to investigate the applicant for various complaints against the applicant received by the respondent, it being alleged, inter alia, that:
  - a) The applicant's refusal to deal with another enterprise in contravention of Section 31 (1) (e) of the Act in that a Complainant lost money for reasons that it would perform all test prescribed by the doctors, and the applicant, under the advice of a company it engaged to verify such tests, would not pay for all of them.

b) Applicant discriminates in price and other trading conditions, in contravention of Section 31 (10 (g) of the Act. It being alleged that applicant introduced a two (2) tariff tier structure which is dependent on whether the license holder of the medical laboratory that conducted the test is a pathologist or non-pathologist. As a result of the two-tier tariff, Pathologist laboratories are paid 100% of the set tariff whilst Non-Pathologist laboratories are paid 75% of the tariff despite the fact that both medical laboratories are in the same category.

c) That there exists an exclusive arrangement between applicant and a medical laboratory known as Diagnofirm, where applicant's managed care patients under Bomaid HIV monitoring are being managed exclusively by Diagnofirm Laboratory being an instruction from applicant to all Doctors countrywide. Complainant alleges that this conduct excludes his business and others in this market who are equally competent, efficient and competitive.

8. In its response to the investigation notice, the applicant stated that the Competition Act does not extend to the society's activities in that in terms of its rules and in practice, the applicant's activities are designed to achieve a non-commercial socio-economic objective.
9. In turn, the respondent responded to the applicant's letter and averred that the applicant was not exempted from the application of the Act stating that in terms of Section 3 (3) (e) of the Competition Act no. 4 of 2018, BOMAID is a participant in the Open Medical Aid Fund market where there are other players, and as such, a participant in economic activities.
10. The respondent insisted on investigating the applicant to the extent that it invited the applicant to submit a written presentation to the respondent within thirty (30) days from the date of issuance of the notice. The applicant was directed to appear at the respondent's premises on 1<sup>st</sup> December 2020 to give evidence.
11. The Applicant was not in agreement and wrote a letter to the respondent stating that it had different views with respect to the interpretation of the Act. Furthermore, that the applicant,

because of the differing interpretation, intended to institute legal proceedings before the High Court to seek a declaratory order as to whether it is exempted from the application of the Act or not.

12. As a result, the applicant requested that the respondent make an undertaking that it would not proceed with the investigations pending the institution and outcome of the Court proceedings.

13. On the 26<sup>th</sup> November 2020, the respondent made an undertaking that they shall not be proceeding with the investigation as scheduled on the 1<sup>st</sup> December 2020 pending the outcome of the court application.

14. On the 21<sup>st</sup> January 2021, the applicant filed these proceedings.

15. The respondent opposes the application.

### ***Issues for Determination***

16. The relevant issues for determination as ably summarized by the respondent on its heads of argument are:
  - a) whether or not the applicant is exempted from the reach of the Competition Act.
  - b) In the alternative, if the court finds that there is no exemption, then the Court must find that the applicant is not an "enterprise" as defined under Section 2 of the Act, with the result that Section 31 of the Act, under which the respondent seeks to investigate the conduct of the applicant, is not applicable to the applicant.
  
17. The applicant contends that it is exempted from the jurisdiction of the respondent, while the respondent argues to the contrary. The respondent's position on the alternative relief is that the applicant is an "enterprise" as defined under section 2 of the Act and therefore that Section 31 of the Act applies to the applicant.

## THE LAW

18. It is undisputed that this matter turns on the interpretation of certain provisions of the Competition Act, specifically Sections 2, 3 and 31 of the Act. It is, therefore, necessary to first set out what the provisions provide.
19. Section 2 as amended provides thus: enterprise "means 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".
20. Section 3 (3) (e) provides thus: the Act shall not apply to "conduct designed to achieve a non-commercial socio-economic objective".
21. Section 31 (1) essentially provides for investigation of any conduct on the part of one or more enterprises that amounts to abuse of dominant position in the market. The section lists examples of conduct that is said to amount to abuse of dominant position.



22. The rules of statutory interpretation have, over the time, been applied and developed in this jurisdiction. It is important to explain that the said rules are applied on a case-by-case basis and thus, adjustments to such may be made where the court deems it necessary.
23. The Court of Appeal in *Tshosa v. Attorney-General* [2017] 2 B.L.R. 272 per Kirby JP, as he then was, held that in adopting an interpretation of a statutory provision such reading should not lead to an awkward result.
24. It is common cause that the courts will commonly interpret a statutory provision in its plain, ordinary, and grammatical sense, however, where such strict interpretation leads to ambiguity the courts may adopt a more relaxed approach.
25. The primary objective of courts in the interpretation of statutes and written documents is to determine the intention of the legislator or author. See *Molefe v. Attorney-General and Anor.* [1994] B.L.R. 301.

26. The court of appeal in *Mapini v. Commissioner of Police and Anor.* [2017] 1 B.L.R. 17 held that in order to determine the intention of the legislator the courts ought to adopt an approach which would render the provision(s) effective for its intended purpose.

27. I agree with submissions made by both parties on the aspect of statutory interpretation. I believe that the provisions relevant in this matter require a broad interpretation, as reading them in their plain ordinary manner may result in the effective purpose of the provisions and the Act as a whole. I will, therefore, accordingly require aid from foreign and local authorities for the purpose of making an equitable decision.

28. The first determination the court ought to make is the purpose of the legislation, being the Competition Act. The preamble of the statute provides guidance as to the goal the Act intends to achieve it states that the Act is to provide for the establishment of the Competition and Consumer Authority and its mandate.

29. Section 5 (1) provides 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." The Act is intended on enabling the establishment of an authoritative body which will regulate fair business practices amongst enterprises. The courts accept that the Act is intended on preventing a monopoly-like character by certain businesses in their respective industries.

30. The applicant contends that the respondent, who is the authoritative body established by the Act, is not empowered to conduct an enquiry into the applicants conduct on the basis that the applicant does not fall within the scope of bodies or groups which the respondent has authority over, however the respondent pleads the contrary.

31. In its pleadings the respondent argues that the applicant is an enterprise which carries business for gain or reward in the provision of any services.

32. The respondent further argues that the applicant's activities suggest that it conducts itself in a manner which falls under the purview of section 2 and 3 (3) (e) of the Act.
33. Furthermore, the respondent argues that the applicant falls within the purview of an enterprise as provided for under the provisions of section 2 of the Act.
34. The section defines an enterprise as "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".
35. It is trite for the interest of this matter to understand what the words "carries on a business for gain or reward" were intended to mean. The applicant contends that the society was created to enable its members access to health care benefits which would ordinarily be expensive to acquire where such a structure was not available. It contends that the society does not conduct itself in a manner intended for profit. I will deal with this aspect later in this judgment.

36. I return to the determination of the words “carries on a business for gain or reward”. Roper A.C.J, as he then was, determined the carrying of a business as more than an isolated transaction, that the term “carries on” refers to the repetition or a series of acts, see *Wessels and Anor. v. Regina 1964-1970 BLR 35 (HC)*. It is clear that in the present circumstance, the applicant is a continued service provider offering several types of schemes to different members.

37. I now turn to the determination of the wording “for gain or reward” *The Dictionary of Legal Words and Phrases, Second Edition, Volume 4, June 2018* states that, in the context of the South African Motor Vehicle Insurance Act, which defines “reward”, I find relevance in the present matter to be that: a) a reward must be *quid pro quo* for the conveyance and not for something else; b) the reward is the return or recompense made to or received by a person for some service or merit; c) there need not be approximate quality between the payment and the service rendered; and d) the reward need not necessarily consist of money.

38. In light of the relevant Statute *in casu*, for the purposes of defining the word “reward”, it is my understanding that the word would allude to some type of compensation for the delivery or provision of services rendered.
39. With respect to defining the word ‘gain’, *The Dictionary of Legal Words and Phrases, Second Edition, Volume 2, June 2018*, defines it in the following manner: ‘as a benefit received in carrying out a scheme of profit making’. In consideration of the Competition Act it is sufficient to state that the word ‘gain’ refers to the receiving of a benefit in carrying out a profit-making scheme, profit can be regarded as an income received by a person or group of persons after costs or charges have been removed.
40. I now turn to the application of such terms to the matter before this court. The applicant contends that it is a society registered under the Societies Act and does not fall within the scope of ‘an enterprise’ in respect of Section 2 of the Competition Act.
41. The Act defines ‘an enterprise’ as an individual or a group whether incorporated or not that carries business for gain or reward’. It does not matter how the body or group is registered

or incorporated, what is relevant is whether such a body conducts its business for the purpose of receiving some type of gain or reward after providing goods or services. See, *Namibian Association of Medical Aid Funds and Others. v. Namibian Competition Commission and Anor. case no: SA 18/2016.*

42. Parliament intended to ensure that any type of business or individual which made some type of significant gain or reward to be included within the scope of the term 'enterprise'. In this aspect, I am of the belief that Section 3(3) (e) and 2 of the Act coincide for the sole purpose of ensuring that the Act shall apply to businesses or individuals, who for the purpose of gaining a financial or social benefit or, are socially or economically rewarded for a service provided or goods distributed.

43. In the present circumstance the applicant provides a service to the public being medical aid schemes. The public becomes a member of the scheme upon the payment of a subscription fee which is paid by such a member ordinarily monthly and in return such a member receives security in respect of medical

benefits which such individual would possibly not afford had they not joined the society. The service provided is in the form of medical benefits received by the member and the reward or gain is in aspect of the monies paid for the subscription fee, the applicant receives a benefit of a commercial and or socially economic nature.

44. The respondent in its answering affidavit briefly touched on the topic of the Act's application under Section 3 (1). The provision states that: "Except as otherwise provided in this Act, this Act applies to all the economic activities within, or having effect within, Botswana." I am satisfied that the applicant being a service provider falls within the scope of the application of the Competition Act considering the type of activities it conducts in the service provision realm. A subscription fee is paid by the member, and in return, the member receives healthcare benefits.

45. With respect to the submissions made by both parties regarding section 3 (3) (e) of the Act, I take note of both parties having referred this court to a foreign authority and statute of Namibia, see: NMAF v. NCC case no: SA 18/2016 (supra).



46. In support of it citing the Competition Act of Namibia as being *in pari materia* with our own Act, the applicant places reliance on the case of *Rannatshe v. The State* [1991] B.L.R. 300 per *Aguda J.A.* as he then was, who held that “A court has no business to call in aid the decision of courts of any other jurisdiction except where the statute of the other jurisdiction is *in pari materia* with the provisions of our statute which calls for interpretation and can only do so where there is no binding interpretation of the provision by our courts”. The submission brought by the applicant is one I agree with as an ‘aid’, however, it is trite to make a consideration on the judgment delivered by the Namibian Supreme Court in this aspect.
47. In fact, in that case, the Namibia Association of Medical Aid Funds and all its members, had approached the High Court for an order declaring that the applicants do not fall within the jurisdiction of the Namibia Competition Commission. The application was dismissed by the High Court, but the decision was reversed on appeal by the Supreme Court
48. The Namibian Supreme Court held that the Funds in that matter did not carry on their businesses for the purpose of

gain or reward, but that the funds served a social purpose, and that the funds used the principles of social solidarity amongst its members.

49. The relevant issue in the matter before the Namibian court was whether the NAMAFA and its members' conduct had a non-commercial or socio-economic goal. This led to the court finding that the funds carried their businesses in the contrary of such an issue and held that the Funds applied the principles of social solidarity. The court stated that the funds' purpose was to improve access to health care.

50. I do not agree with the findings of the Supreme Court of Namibia, respectfully. The court relied on European authorities in reliance to their application. The court failed to consider certain aspects of said principles. The claim that private funds were aimed at improving access to health care and on the same breath connecting same with the principle of social solidarity is one that is unsatisfactory. The court did not make sufficient application to principles of social security.

51. This court would be greatly mistaken if it failed to address the fact that governments are responsible for making policies and

recommendations for the purpose of ensuring access to health care on an affordable structure. I find it to be untrue that the objectives of the said funds are based on principles of social solidarity. These funds regulate their own tariffs. Joining such a fund is optional, and a member's ability to access health care benefits is determined by the scheme they subscribe to. Failing to make subscription payments may result in the member's exclusion from such benefits.

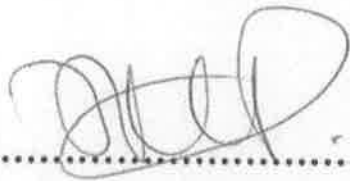
52. I cannot accept the application of social solidarity by the Namibian Supreme Court to be one that is satisfactory. I am of the belief that the applicant in the present circumstance carries a business which is of a commercial nature, it regulates its own tariffs, and the scheme is not compulsory and provides several types of schemes in accordance with subscriptions effected by the member. The aspect of social solidarity is a matter of national policy.

53. With respect to the submissions made in regard to Section 31 of the Competition Act, the applicant has been regarded as an enterprise, therefore, section 31, as alluded above, shall apply accordingly to the applicant.

54. The matter before this Court is of a significant nature and falls to be one of importance in this jurisdiction. Medical aid societies and or funds are/ or have been self-regulated and it is trite to ensure that there is an independent body which shall be able to regulate the conduct of the said bodies.
55. The claim that the applicant cannot be regarded as a business making a commercial benefit is of an untrue nature. There is no satisfactory evidence placed before me which supports this claim; hence this aspect having played a huge role in my determination of the matter.
56. After my assessment of the evidence and the law, it is my conclusion that the principles of social solidarity do not coincide with the rules and submissions made by the applicant to essentially regard it as a body that does not carry-on business for the purpose of gain or reward, and that its goal is one of a commercial and socially-economic nature.
57. In the results, I make the following Order:
- a) The application be and is hereby dismissed.

b) The applicant shall pay the costs of the matter on a normal scale.

**DELIVERED IN OPEN COURT AT LOBATSE ON THIS 4<sup>TH</sup> DAY  
OF NOVEMBER 2022**



A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a dotted line.

**J. DUBE**

**[JUDGE]**