IN THE HIGH COURT OF THE REPUBLIC OF BOTSWANA
HELD AT GABORONE

MAHGB-000874-19

In the matter between:

Methaetsile Leepile	**1st APPLICANT**
Your Friend (Pty) Ltd t/a Gabz FM	**2nd APPLICANT**

and

The Competition Authority	**1st RESPONDENT**
Universal House (Pty) Ltd	**2nd RESPONDENT**
Mmegi Investment Holdings (Pty) Ltd	**3rd RESPONDENT**
Titus Mbuya	**4th RESPONDENT**
Monageng Mogalakwe	**5th RESPONDENT**
Burton Sebongile Mguni	**6th RESPONDENT**
Changu Mannathoko	**7th RESPONDENT**
Vincent Thinah Seretse	**8th RESPONDENT**
Pako Roper Kedisitse	**9th RESPONDENT**
Lebang Mogaetsho Mpotokwane	**10th RESPONDENT**
Botswana Mine Workers Union	**11th RESPONDENT**
Modise Maphanyane	**12th RESPONDENT**
Bojosi Otlhogile	**13th RESPONDENT**

20th December, 2021

Advocate Mr. S. Mokoti for the 1st Applicant
Advocate Mr. M. Garebatho for the 2nd Applicant
Attorney Mr. M. Chilisa for the 1st Respondent
Advocate Mr. S. Kebonang for the 2nd Respondent
Attorney Mr. O. Kambai for the 3rd and 4th Respondents

JUDGMENT

KOMBONI J;

INTRODUCTION

1. This judgment is in respect of two applications which were consolidated in terms of an order made by Mothobi J in case number MAHGB – 000753 – 19 on 5 June 2020. In terms of the order made pursuant to a draft consent order filed by the parties it was ordered that cases number MAHGB 000753 – 19 and MAHGB 000874 – 19 are consolidated and that the said applications shall proceed as one application before myself under case number MAHGB 000874 – 19.

2. The Applicant in case number MAHGB 000874 – 19 shall be referred to as the 1st Applicant and the Applicant in case number MAHGB 000753 – 19 shall be referred to as the 2nd Applicant.

3. In the main, the Applicants seek an order of mandamus against the Competition Authority cited herein as the 1st Respondent. The Applicants seek orders declaring that the 1st Respondent has breached its statutory duties to enforce its decision against the 2nd Respondent and that it be ordered to take the necessary legal steps

to enforce its decision and secure compliance by the 2nd Respondent with such a decision.

4. The 1st Applicant being Methaetsile Leepile is a shareholder in Mmegi Investment Holdings (Pty) Ltd, a registered company with limited liability cited herein as the 3rd Respondent.

5. The 2nd Applicant being Your Friend (Pty) Ltd is a company registered according to the laws Botswana involved in the business of a private radio station called Gabz FM which broadcasts nationally on radio and internationally by live web streaming.

6. The 1st Respondent being The Competition Authority (hereinafter also referred to as the "Authority") is a body established in terms of section 4 of the Competition Act (Cap. 46:09) charged with responsibilities in relation to anti-competitive practices in the economy.

7. The 2nd Respondent being Universal House (Pty) Ltd (hereinafter also referred to as " Universal") is a registered company according to the laws of Botswana, apparently so incorporated for the purposes of acquiring shares in the 3rd Respondent.

8. The 3rd Respondent being Mmegi Investment Holdings (Pty) Ltd (hereinafter also referred to as " Mmegi") is a registered company according to the laws of Botswana involved in the business of publication of newspapers and printing, publishing and distribution of books.

9. The 4th Respondent being Titus Mbuya is a shareholder and Chairman of the 3rd Respondent.

10. The 5th to 13th Respondents are all individuals and entities who hold different quantities of shares in the 3rd Respondent. As they have not been active participants in the litigation I do not need to describe them individually.

11. In his notice of motion the 1st Applicant seeks the following orders against the 1st Respondent:

> "1 It be declared that the Competition Authority ("the Authority"), 1st Respondent herein has failed to take reasonable measures and necessary steps to enforce a decision it made on 17 February 2017 in respect of a merger between Mmegi Holdings (Pty) Ltd as the Target firm and Universal House (Pty) Ltd ("Universal") as the

Acquiring firm;

2. It is declared that the Authority is therefore in breach of its statutory duties and obligations through its failure to take steps to enforce its decision given under the Act (as set out in paragraph 1 above) for more than 2 years against the 2nd Respondent;

3. That the 1st Respondent is ordered to forthwith and in any event no later than 30 days after the granting of this order, to take such steps and do such things as may be necessary:

3.1 to enforce its decision ("the Decision") dated 17 February 2017 made pursuant to section 63(2)(b) of the Competition Act (Cap 46:09) ("the Act");

3.2 to without derogating from the generality of paragraph 3.1 hereof, act on and enforce the provisions of section 64 of the Act in respect of the decision and secure compliance by the 2nd Respondent with the aforesaid decision.

4. That the 1st Respondent be ordered to pay the costs of this application."

12. In its notice of motion, the 2nd Applicant seeks the following orders:

> "1 That the 1st Respondent is hereby ordered and directed to enforce its decision of the 17 February 2017, within 30 days of the making of this order;
>
> alternatively to 1 above
>
> 2. That the 2nd and 3rd Respondents are hereby ordered to dispose of the 28.73% shares already acquired in the 3rd Respondent by the 2nd Respondent, to an entity or person(s) with no business interest in any way affiliated with the 2nd Respondent within 3 months of the making of this order.
>
> 3 Costs of suit"

THE FACTS

13. The facts of this matter are largely common cause and I will state them below.

14. At all material times and in particular prior to 19 March 2013 the 1st Applicant and the 4th Respondent were major shareholders in the 3rd Respondent holding between them in almost equal portions 80% of the shares in the same company.

15. On 19 March 2013 the 1st Applicant and the 4th Respondent sold 15% each of the said shareholding to the 2nd Respondent. The price per share was P8 .75 and the total purchase price for the same shares was P 15 million.

16. In terms of the Competition Act (hereinafter "the Act"), the said sale of shares was to have been brought to the attention of the Authority. None of the parties to the sale notified the Authority of the same transaction which omission went against the relevant provisions of the said Act.

17. In July 2016 the 2nd Applicant got to know about Universal's acquisition of the aforesaid shares in Mmegi and took the view that given Universal's shareholdings in the broadcast media sphere in the country, the effect of the acquisition would substantially prevent or lessen competition in the market.

18. On 7 July 2016 the 1st Applicant through its attorneys addressed a letter to the Authority requesting it to investigate whether the transaction aforesaid of the acquisition of shares by Universal in Mmegi was anti-competitive in terms of the Act.

19. It would appear that arising from the 2nd Applicant's aforesaid letter, the Authority caused Universal and Mmegi to formally notify the Authority about the transaction which notification was done on 23 September 2016.

20. Subsequently the Authority issued a Merger Notice number 39:2016 which notice was a public notification giving details of the acquisition of the shareholding in Mmegi by Universal and seeking stakeholder views for or against the proposed merger which views were to be sent within 10 days from the date of publication of the notice.

21. Sometime in December 2016 the 2nd Applicant received the aforesaid merger notice. Subsequently on 20 December 2016 the 2nd Applicant submitted its objection to the acquisition and merger aforesaid on competition and public policy grounds. The submission is a detailed document amounting to 16 typed pages and annexures numbering 21 pages.

22. On 17 February 2017, the Authority rendered its decision. In a detailed decision numbering 26 pages, the Authority resolved not to approve the acquisition of 28.73% shareholding in Mmegi by Universal on the grounds that both competition and public interest concerns would arise in the market for the provision of commercial radio broadcasting services.

23. It would be appropriate to reproduce the relevant portion of the decision of the Authority. The following is stated:

"Decision

74. In light of the above, the Authority, pursuant to the provisions of section 60 of the Competition Act, determined not to approve of the proposed acquisition of 28.73% shareholding in Mmegi Investment Holdings (Pty) Ltd by Universal House (Pty) Ltd; on the grounds that both competition and public interest concerns would arise in the market for the provision of commercial radio broadcasting services. The Authority further took cognizance of the fact that:

i. The acquiring entity will have a foothold in 2 of

the 3 private commercial radio stations and 2 of the 4 commercial radio stations in the country;

ii. The merged entity will acquire a dominant position in the market under consideration, thus altering the landscape of competition in the local market;

iii. The merged entity will substantially lessen competition or restrict trade or the provision of services or endanger the continuity of services in the market under consideration; and

iv. There are a number of public interest concerns arising from the merger such as the negative effect on media diversity and plurality; increased prices; as well as reduced consumer choice, quality service and innovation.

75. Given the fact that the transaction had already been implemented, pursuant to section 63 (2) (b) of the Competition Act; the Authority directs the parties to dispose of the 28.73% shares already acquired in Mmegi Investment Holdings (Pty) Ltd by Universal House (Pty)

Ltd, to an entity or person(s) with no business interests affiliated in any way with the acquiring entity, within 3 months from the decision date.

76. In order for the Authority to properly enforce the above, the merging parties shall adhere to the following procedures:

i. Within 14 business days from the decision date, the merging parties are required to report to the Authority on how the disposal will be done; and

ii. Within 2 months from the decision date, the merging parties are required to provide the Authority with a status update on the progress towards compliance with the decision of the Authority."

24. In March 2017 Universal took the decision to sell its entire shareholding in Mmegi at a price of P 16.50 per share and instructed the company secretary to invite the other shareholders to buy the shares aforesaid within 30 days. None of the shareholders took up the offer.

25. In the meantime the Authority reminded Universal that the disposal of the shares had to be implemented by 17 May 2017 being 3 months after the decision of the Authority aforesaid.

26. On 18 May 2017 Universal reported to the Authority on its efforts to sell the shares to the other shareholders who had not bought and requested for an extension of the deadline to dispose of the shares. Universal identified about 6 entities as potential buyers but apparently there were no takers.

27. On 26 May 2017 the Authority gave Universal an extension of 60 days to sell the shares. The Authority further observed that Universal was selling the shares at a considerably higher purchase price than it had paid and indicated its concern that this could result in the divestiture being frustrated. In its letter the Authority further advised that the transaction between Universal and Mmegi had been nullified by the Authority's ruling and that Universal should not be profiting from the divestiture. The Authority further directed that the disposal of the shares should be done with the aim to restore the conditions of competition existing prior to the merger. Finally the Authority indicated that failure to comply with its decision will result

in the matter being referred to its Legal and Enforcement Department for execution as per section 64 of the Competition Act.

28. On 23 June 2017 the 1st Applicant offered to purchase all Universal's shares in Mmegi at a price of P8.14 per share which offer was to remain open for 30 days from date of circulation to the shareholders. The 1st Applicant subsequently on 5th July withdraw the same offer and replaced it with one which still offered to purchase the same shares at P8 .14 per share but subject to the raising of finance. The 1st Applicant says that Universal did not accept his offer. Universal says it accepted the offer and in this regard it has attached a letter dated 6 July 2017 to Mmegi's Company Secretary. Given that the Applicant's offer was made directly to Universal, it stands to reason that Universal's acceptance should have been addressed directly to the 1st Applicant. The 1st Applicant is therefore correct when he says that his offer was not accepted as there is no evidence to show that the company secretary ever brought the acceptance to the attention of the 1st Applicant.

29. Apparently the 1st Applicant could not see his offer through on account of failure to raise finance. I am not able to make a definite

finding on this point on account of conflicting averments by the parties.

30. It appears that sometime in August 2017 the Authority took the decision to investigate Universal's failure to comply with the directive on disposal of the shares which investigation is in terms of the Act. There appears to have been a back-and-forth between Universal and the Authority in respect of compliance or lack thereof in respect of the divestiture directive.

31. In the meantime, the 2nd Applicant was not kept informed about the goings on regarding its complaint which led to the decision of the Authority to order divestiture by Universal from its shareholding in Mmegi.

32. By letter dated 2 February 2018 received by the Authority on 5 February 2018 the 2nd Applicant's Attorneys complained that almost a year after the decision of the Authority, the merging parties had not complied with the decision of the Authority and stated that such non-compliance is in breach of the law and prejudices its client. The attorneys demanded that the Authority should take whatever lawful enforcement measures were available to ensure strict compliance

with its decision of 17 February 2017 as lack of enforcement of the decision of the Authority will bring the Authority into disrepute.

33. In its reply to the 2nd Applicant's Attorney's letter which reply is dated 13 February 2018, the Authority took exception to being reminded or commanded to take action in enforcing is decision. It further advised that it is adhering to its internal procedures and that it is conducting an investigation into the non-compliance by the relevant parties in terms of section 64 (1) of the Act and that such investigations are soon to be completed and that after such investigations the Authority will determine the best way to handle the non-compliance with its decision of 17 February 2017. The Authority concluded by stating that any person who is aggrieved by the failure of an enterprise to comply with the decisions of the Authority and suffers harm as a result is free to approach the courts for urgent relief if need be.

34. In the meantime by letter dated 19 February 2018 addressed to Universal, the Authority advised that it was at an advanced stage with its investigation in respect of compliance with its decision and that it intends to engage the services of an independent consultant to ascertain the value of Mmegi's shares and that Universal will bear

the costs thereof. It requested Universal to assist in providing the audited accounts for Mmegi for the period 2012/2013 and 2016/2017. Universal was not happy with this approach by the Authority and questioned its legal basis in its letter to the Authority dated 21 February 2018.

35. The 2nd Applicant did not hear from the Authority for several months and subsequently on 5 September 2018 the 2nd Applicant's attorneys addressed a letter to the Authority reminding the Authority that in its letter of 13 February 2018 it had said that the investigations regarding the non-compliance in respect of its decision would be completed soon and asking for a status in respect of the investigations as a period of more than 6 months had elapsed since the Authority advised on the soon to be completed investigations.

36. The Authority replied the following day on 6 September 2018 advising that the investigations were still ongoing and that it is not in a position to divulge any information at that point. It was stated that when the investigations are completed and determination on how to best handle the non-compliance has been made communication will be made to all interested parties. The Authority

concluded by advising that any person aggrieved by the failure of an enterprise to comply with the decision of the Authority and suffers harm as a result is at liberty to approach the courts for relief.

37. There appears to have been no communication between the Authority and the 2nd Applicant until the 2nd Applicant launched these proceedings on 8 October 2019

38. According to Mmegi in its answering affidavit, valuation of its shares as desired by the Authority which had instructed a consultant to do the said valuation was completed in October 2019. None of the parties has attached the valuation report. I take it however that as there has been no dispute of this averment by any of the parties, it is the correct statement of fact.

39. On the other hand the 1st Applicant through his attorneys by way of letters dated 3 April 2019 and 29 July 2019 demanded that the Authority should implement its decision of 17 February 2017. The 1st Applicant complained that it had been over 2 years since the Authority made the decision and that Universal still remains a shareholder of Mmegi and that the mischief that the decision had sought to deal with remains unresolved. The 1st Applicant called

upon the Authority to invoke the provisions of section 64 of the Act by approaching the High Court in order to require Universal to make good the default within a specified period. The 1st Applicant indicated that should the Authority not act within 7 days from 29 July 2019 he will make an appropriate application to the High Court compelling the Authority to carry out its statutory obligations and will seek costs.

40. On 15 November 2019, the 1st Applicant launched an application which is now the subject matter of this judgment and has been consolidated as already stated above with the 2nd Applicant's application.

41. I need to state that in my summation of the facts of this matter, I have only concentrated on those facts that are relevant to the main issues for decision. I note that the 1st Applicant and Universal have included in the affidavits certain facts that are not necessarily relevant to the issues at hand. I have therefore not included those facts herein.

42. Universal and Mmegi vehemently oppose the application. They have also raised points of law. The Authority, although it says it only

opposes the application as regards the issue of costs and that it will abide by the court's decision on the merits, it has filed an answering affidavits which are in essence an opposition to the applications.

THE ISSUES

43. The main issues identified by the parties for the decision of the court were stated in the proposed final pre-trial order filed on 23 November 2020. They are as follows:

    (a) Whether or not the 1st Respondent has taken steps to enforce is decision

    (b) Whether or not the 2nd Applicant has *locus standi* to Institute the present proceedings

    (c) Whether or not there was impossibility of performance in complying with the ruling of the 1st Respondent dated 17 February 2017

44. I choose to first deal with the issue regarding the 2nd Applicant's *locus standi.*

Whether or not they 2nd Applicant has *locus standi* to institute the present proceedings

45. This issue has been raised by both Universal and Mmegi.

In their notice to raise points of law the Respondents state that they are shareholders and members of the board of the 2nd Applicant and that there was no properly convened meeting of the Board of Directors of the 2nd Applicant on 27 September 2019 which passed a resolution to institute the present application.

46. It is stated therefore that there being no proper authorization to bring the application by the 2nd Applicant the application must be dismissed for lack of authority.

47. The resolution filed by the 2nd Applicant states that it is a resolution of the Board of the Directors of the 2nd Applicant passed at Gaborone on 27 September, 2019.

48. It shows that it was resolved that the 2nd Applicant institutes the proceedings against the Respondents for orders that are stated therein which now are the subject matter of these proceedings. The resolution further states that Mr. Edward Waditso Komanyane in his capacity as director is authorized to sign all documents and instruct

attorneys and advocates for the full attainment of the object of the resolution. The resolution is signed by the Chairperson. On the face of it the resolution looks regular.

49. The main heads of argument in respect of this point of law on *locus standi* were filed by Mmegi. Universal relies on the same heads.

50. In the heads of argument the applicable legal principles regarding authorization of legal proceedings by boards of companies are stated. Reliance is also placed on the Companies Act and case law regarding the entitlement of members and directors of a company to receive written notices of meetings and the business to be transacted at the same meetings. I fully agree with the said legal principles and I do not need to reproduce them herein.

51. In the heads of argument, it is stated that Mmegi is a shareholder of the 2nd Applicant and sits on its Board and was not present at any meeting held on 27 September, 2019. It is further stated that no notice of any such meeting was delivered to Mmegi and consequently Mmegi was not aware of the discussions to be held to resolve to institute the legal proceedings. The heads further stated that the said meeting is therefore a nullity. Universal, it would

appear, also relies on the same line of argument.

52. It will be noted that the basis of the challenge of the legal standing of the 2nd Applicant is made out in the notice and heads of argument.

53. I have looked at the answering affidavits for both Mmegi and Universal and there is nowhere in the same affidavits that the points raised in the heads of argument and the notice to raise points of law are stated. I also note that the 2nd Applicant has not stated anything in its heads of argument in response to the issue of locus standi.

54. One would have expected the Respondents to state under oath that the procedure to call board meetings of the 2nd Applicant was not followed and further state under oath that they were not invited to the same meeting of the Board and further that as a result they were not in attendance to make their contribution and that their rights in terms of the law were violated. They should also have said something about the resolution filed of record and its authenticity or lack thereof under oath. This would have afforded the 2nd Applicant an opportunity to address the same issue in his replying

affidavit.

55. In my view, a factual basis for points in *limine* or points of law which rely on the said factual basis must be stated in the affidavits and not merely in the notice to raise such points of law and heads of argument. In motion proceedings, the affidavits constitute the evidence on the basis of which the Court makes its decision.

56. It was up to the Respondents to fully ventilate their points of law and state the facts they rely upon in their affidavits. This they failed to do. This was very critical in view of the fact that the decision of the Authority was based on a complaint made to the Authority by the 2nd Applicant as already stated above and the institution of this application is a continuation of the same complaint.

57. I therefore find that even though the relevant legal principles regarding this point have been ably stated by the Respondents, there is no factual basis that the Respondents have laid out in support of the same point of law. It therefore stands to be dismissed

Whether or not the 1st Respondent has taken steps to enforce its decision

58. This is another issue that the parties have stated for the decision of

this Court. I have already reproduced in full the decision made by the Authority regarding the complaint which was brought by the 2nd Applicant for none compliance with the legal requirement of the Competition Act in respect of the transaction in question. The Applicants having taken the view that the Authority has failed to enforce its decision now seek an order compelling the Authority to perform its duty in terms of the Competition Act. In particular they want the Authority to apply Section 64 of the Act which deals with enforcement of directions made by the Authority. Section 64 reads as follows:

> *"61 (1) Where the Authority has reasonable grounds to believe that an enterprise has, without reasonable excuse, failed to comply with a direction issued by the Authority under this part, the Authority may exercise in respect of this matter the powers of investigation provided for it in part vii in respect of matters falling within part v.*
>
> *61 (2) Where the Authority proposes to determine*

that a failure of compliance in the terms of Subsection 1 has occurred, it must give the notice of its intention to the enterprise concerned and consider any representation the enterprises wishes to make.

64 (3) *The Authority may then apply to the Court for an order requiring the enterprise to make good default within a time specified in the order.*

64 (4) *The order may provide for all of the costs of, or incidental to, the application for the order, to be borne by the enterprise in default".*

59. The Applicants are of the view that the Authority has unduly delayed in enforcing its decision. In particular the Applicants take the view as at the time they filed the application the Authority should have invoked Section 64 (3) which gives the authority the right to apply to this court for an order requiring the enterprise to make good the default within a time specified in the order.

60. The Applicants state that as at the time the applications were filed a period in excess of 2 years had expired after the 3 months that had been stated by the Authority for the enterprises in question to have complied with the order for divestiture.

61. In the main what the Applicants are seeking is the remedy of mandamus which remedy entails the enforcement of the performance of Public duty by Public authorities where such authorities have refused or delayed in excising powers conferred on them by the law. This covers situations where there has been a long delay in making a decision without adequate explanation. (See Nasha v Attorney General & Another 2001 (1) BLR259 (CA); Petson v The Attorney General 2008 (2) BLR 66 (HC)).

62. The Applicants have narrated the delays that they accuse the authority for. The Authority, Mmegi and Universal have opposed the application and in the main take the view that there has not been any delay. Universal takes the view that it has done all in its powers to comply with the directive for divestiture but has failed because of the absence of buyers for the shares. The Authority when faced with the demand to take the necessary action has replied the same by advising that it was still investigating the

noncompliance and once the same has been concluded it will communicate with the relevant parties. The tone of the correspondence from the Authority to the 2nd Applicant was rather combative and unyielding.

63. In its answering affidavit filed on 8 February 2020 in answer to the 1st Applicant' s founding affidavit the Authority states at paragraph 16 thereof that when it became aware of the non-compliance it instituted and commenced investigations into the non-compliance which investigations have only recently been completed

64. In the same affidavit at paragraph 39.1 the Authority states that it would only refer the matter of non-compliance to the High Court upon completion of its investigation into the reason for failure to comply with its directive. It further states that the investigations are ongoing and are yet to be completed. It would be seen immediately that paragraph 16 and 39.1 are contradictory in that paragraph 16 states that the investigations into the non-compliance have been recently completed while paragraph 39.1 states that the investigations are ongoing and are yet to be completed.

65. In its answering affidavit filed on 13 November 2019 in response to

the 2nd Applicant's founding affidavit the Authority states at paragraph 16 that following non-compliance by the entity in question it instituted an investigation into the non-compliance which investigations have only recently been completed. At paragraph 19 it states that without a proper investigation and inquiry into the reasons for non-compliance it would have been pre-mature for it to have approached the High Court to bring about compliance.

66. At paragraph 26.1 the Authority states that it has only recently completed its investigation following the failure of the entities in question to comply with the Authority's directive and that the Authority has now determined that there is no justification for continued non-compliance by the said parties.

67. A reading of the Authority's position is that its last important investigation before taking action was the valuation of Mmegi's shares. According to Mmegi, the valuation of the shares was completed in October 2019.

68. What is emerging from the Authority's affidavits is that no specific time frames are given. The Authority is content with saying that investigations are ongoing or that they have been recently

completed without giving any specific dates. In my view, the Authority has inordinately delayed in applying Section 64 (3) of the Act even after it was placed in a position to do so following its investigations.

69. Although as at September 2019 when its answering affidavit to the 2nd Applicant's founding affidavit was sworn to and in which affidavit it states that it had determined that there is no justification for Mmegi and Universal not to comply with its directive, still there is no indication as to what enforcement would be taken and when it will be taken.

70. Even at the time that the heads of argument were filed in April and May 2021 the Authority did not indicate as to when it will implement or take measures to enforce its decision despite the fact that it had completed its investigations and determined that there was no justification for non-compliance.

71. I therefore come to the conclusion that the Authority has failed to take steps to enforce its decision. I therefore conclude that this is a proper case where an order compelling the Athority to enforce its decision will be appropriate. The Authority is clearly guilty of delay

and temporizing in implementing its duties in terms of the law as stated in the Act.

Whether or not there was impossibility of performance in complying with the ruling of the 1st Respondent dated 17 February, 2017

72. This issue essentially speaks to the position taken by Universal and Mmegi to the effect that it was impossible to comply with the directive because despite efforts to sell the shares there were no takers. It is also common cause that the offer by the 1st Applicant to purchase the shares was unsuccessful.

73. The Authority took the view that Universal had over priced its shares and this frustrated the directive for divestiture. As a result, the Authority appointed Grant Thornton Capital Advisers (Pty) Ltd to value the shares.

74. Although such valuation was completed in October 2019, the Authority has not revealed its contents.

75. In my view, the issue of impossibility to perform in order to comply with the Authority's directive of 17 February, 2017 is not an issue for this court, at least in the context of this application.

76. I have already stated above that the Authority in its affidavit stated that it has come to the conclusion that according to its investigation, the failure to comply with its directive was not justified.

77. If this court is to make a finding regarding whether there was an impossibility of performance in complying with the Authority's directive of 17 February 2017, this will be an improper decision as it will interfere with the Authority's mandate in terms of the Act. Such a decision would serve to prejudge any enforcement measures including the enforcement which is required by the orders sought by the Applicants which in the main require the Authority to apply to the court for an order requiring the enterprises in question to make good the default.

78. In my view, the question of impossibility of performance would possibly properly arise under an application by the Authority in terms of Section 64 (3) of the Act to enforce its directive for divestiture in Mmegi shares by Universal.

78 I therefore decline to make any finding in respect of the issue as whether or not there was impossibility of performance in complying with the ruling of the Authority dated 17 February, 2017

Additional Issues

79. Universal has through its heads of argument argued that the 1st Applicant comes to court with dirty hands and therefore his application should not be entertained by this court.

80. The argument which is based on the in *pari delicto* rule is that the 1st Applicant sold his shares to Universal, was paid in full, but failed to notify the Authority about the acquisition of his shares and that he would not have informed the Authority had it not been for the complaint mounted by the 2nd Applicant, he is therefore coming to court with dirty hands. This point is raised for the first time in the heads of argument. It was never canvassed in the affidavits and this is improper.

81. In my view although there is a case to be made about the 1st Applicant's conduct and his motive in filing this application which smacks of opportunism, I do not find that this would be a proper case to apply the in *pari delicto* rule.

82. Given the purpose of the Competition Act which is at the centre of this litigation which purpose is to regulate competition in the

economy and matters incidental thereto, it would be against Public policy at least in the context of this case to non-suit the 1st Applicant.

83. I will therefore dismiss the contention that the 1st Applicant should be barred from moving the application.

84. There are other points that have been raised by the parties. However I find that they are not necessary to be dealt with in the context of the issues before me which in the main are to deal with the enforcement of a decision made by a public body following that body's publication of the public notice for intervention and submissions against the proposed merger of the enterprises in question.

Conclusion

85. On the basis of the facts that I have narrated above in detail, as well as my findings on the issues which findings are underpinned by the facts and the law, I find that the Applicants have made out a case of the orders they seek.

86. As regards the issue of costs, I find that although the Authority has said that it will abide by the decision of this court and has not filed heads of argument on the merits but has said that it opposes any

costs order, based on the findings I have made above, particularly that there was unreasonable delay to enforce its decision, necessitating this application, the Authority cannot escape paying costs. The 1st Applicant in his draft order seeks costs against the 1st and 2nd Respondents only whilst the 2nd Applicant seeks costs against the 1st , 2nd and 3rd Respondents. I will go along with their wishes.

87. I was minded to deny the 1st Applicant costs in this matter in view of the fact that he is also to blame in that after selling his shares he failed to notify the Authority contrary to the law. I am however reluctant to do so purely for the reason that he has not been given the opportunity to address me regarding the proposed adverse decision on the issue of costs.

CONCLUSION

The following order is therefore made

1. It is declared that the Competition Authority *("The Authority")*, 1st Respondent herein has failed to take reasonable measures and necessary steps to enforce a decision it made on 17 February 2017 in respect of a merger between Mmegi

Investment Holdings (Pty) Ltd as the target firm and Universal House (Pty) Ltd as the acquiring firm;

2. It is declared that the Authority is therefore in breach of its statutory duties and obligations through its failure to take steps to enforce its decision given under the Act (as set out in paragraph 1 above) for more than 2 years against the 2nd Respondent;

3. The 1st Respondent is ordered forthwith and in any event not later 30 days after the granting of this order to take such steps and do such things as maybe necessary:

3.1 to enforce its decision *("The decision")* dated 17 February, 2017 made pursuant to Section 63 (2) (b) of the Competition Act (Cap.46:09);

3.2 to without derogating from the generality of paragraph 3.1 hereof, act on and enforce the provisions of Section 64 of the Act in respect of the decision and secure compliance by the 2nd Respondent with the aforesaid decision;

4. The 1st and 2nd Respondents, jointly and severally, one paying the others to be absolved are ordered to pay the 1st Applicant's costs of the consolidated applications;

5. The 1st , 2nd and 3rd Respondents, jointly and severally, one paying the others to be absolved are ordered to pay the 2nd Applicant's costs of the consolidated applications.

DELIVERED IN THE ABSENCE OF THE PARTIES AT GABORONE THIS 20th DAY OF DECEMBER, 2021, THE PARTIES HAVING BEEN TELEPHONICALLY INFORMED TO COLLECT THE JUDGMENT FROM CHAMBERS.

G. G. KOMBONI
JUDGE

Chiband aMakgalemele & Co	-	*1st Applicant Attorneys*
Lore Morapedi Attorneys	-	*2nd Applicant Attorneys*
Collins Chilisa Consultants,	-	*1st Respondent Attorneys*
Kanjabanga & Associates	-	*2nd Respondent Attorneys*
Kambai Attorneys	-	*3rd and 4th Respondents Attorneys*