**IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA HELD AT GABORONE**

**COURT OF APPEAL CIVIL APPEAL NO. CACGB-082-16**
**(HIGH COURT CIVIL CASE NO: CAHGB-000027-15)**

**In the matter between:**

**COMPETITION AUTHORITY** **APPELLANT**

**AND**

**CREATIVE BUSINESS SOLUTIONS (PTY) LTD** **1ST RESPONDENT**

**RABBIT GROUP (PTY) LTD** **2ND RESPONDENT**

Attorney Mr. A. W. Modimo (with him Mr. T. M. Rasetshwane) for appellant
Attorney Mr. O. O. Itumeleng for 1st respondent
Attorney Mr. M. M. Chilisa for 2nd respondent

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**JUDGMENT**

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**CORAM:** **Lesetedi J. A.**

**Brand J. A.**

**Tau A. J. A**

**BRAND J. A**

1. Appellant, the Competition Authority (the authority), is a statutory body created by the Competition Act [CAP 46:09] of the Laws of Botswana (the Act). In terms of the Act, its mandate is, in the main, to investigate contraventions under the Act and to prosecute those responsible before a tribunal called the Competition Commission (the Commission).

Respondents are two commercial companies, Creative Business Solutions (Pty) Ltd t/a Butter and Bread Foods and Rabbit Group (Pty) Ltd, who were cited as first and second respondents, respectively.

2. On 23 July 2014 the authority started proceedings against respondents before the Commission on the basis that they were guilty of bid rigging and market sharing, both of which constitutes conduct prohibited in terms of section 25 of the Act. As appears from the papers before the Commission, these charges arose from tenders submitted by respondents in response to an invitation by the Ministry of Local Government, for the supply of 7530 metric tonnes of sugar beans.

3. Apart from dealing with the merits of the charges against them, the respondents raised several technical objections on several occasions before the Commission. This appears in more detail from the procedural history of the matter to which I shall presently return. Relevant for introductory purposes, however, is the respondent's final objection which was to the effect that the charges were time-barred by virtue of section 39 (2) of the Act in that they were referred to the Commission more than one year after the investigations by the authority had started. This objection was upheld by the Commission, in consequence of which the charges against the respondents were summarily terminated. The appeal by the authority to the High Court against that decision, was dismissed with costs. The authority then sought leave to launch a further appeal to this court, but it

was held by Kirby J. P. that such leave was unnecessary, firstly because the High Court was in effect sitting as a court of first instance and secondly, because a further appeal of this kind is allowed as of right by section 71 (3) of the Act. In terms of the latter section the appeal is confined, however, to matters of law. This means that this court is bound by the factual findings of the court *a quo*.

4. The issues arising on appeal will be better understood in the light of the following background facts which are essentially common cause. On 23 October 2012 the Authority received information from an undisclosed source that the respondents were guilty of collusion and bid rigging in their tenders for sugar beans. Yet, so the authority alleged, preliminary enquiries did not persuade it at that stage that these charges could be sustained. However, on 21 November 2012 the authority served a notice in terms of section 35 (4) of the Act on the Public Procurement and Asset Disposal Board (PPADB) requiring the PPADB to provide the authority with all documents pertaining to the tenders under investigation.

5. In the light of what it learnt from the documents it obtained from the PPADB, the authority sought and obtained search warrants from a Magistrate in June 2013, to conduct a search at the business premises of the respondents. These search warrants were executed during a dawn raid on 10 July 2013. About two weeks later, on 25 July 2013, the authority served what is referred to as an "Ex Post Notice of Investigation" on the

respondents. As I have indicated by way of introduction, the matter was eventually referred to the Commission two days short of a year after the notice was served, on 23 July 2014.

6. On 10 September 2014, when the matter came before the Commission for the first time, respondents raised a point *in limine,* to the effect that the charges referred to the Commission were not supported by an affidavit as required by the Competition regulations. The point *in limine* was upheld by the Commission who granted the authority leave to bring fresh charges in the proper form within 14 days. Pursuant to this order, the authority filed fresh charges, this time supported by an affidavit, on 2 October 2014. Prior to the next hearing of the Commission, the respondents gave notice of their intention to raise two further points *in limine*. These were, first, that the new charges had been filed outside the 14 days period afforded by the Commission's order of 10 September 2014 and, secondly, that the accompanying affidavit was not in the proper form.

7. The next hearing of the Commission took place on 3 December 2014. The heads of argument filed on behalf of 2nd respondent on that occasion introduced yet another procedural objection, not foreshadowed in its prior notice of its intent to raise points *in limine*, in the following way:

> *"For what it is worth, it is clear ex facie the [authority's] papers that its claim does not enjoy any prospects of success whatsoever. This*

*is because the complainant is clearly time – barred in terms of section 39 (2) ....."*

*8.* At the hearing on 3 December 2014 the Commission dismissed the two points in limine raised by the prior notice, but afforded the respondents the opportunity to file affidavits in answer to the merits of the charges brought against them. Significantly for present purposes, the Commission did not decide the further objection which was raised *en passant* in 2nd respondent's heads of argument to the effect that the charges were time-barred by section 39 (2) of the Act.

*8.* In the respondents' affidavits filed on the merits the time-bar objection was squarely raised by both respondents and the authority responded to in reply. At the subsequently hearing of the Commission on 13 March 2015 the point was properly thrashed out in argument. As we now know, on that occasion the objection was upheld by the Commission and the appeal against that order to the High Court proved to be unsuccessful. Hence the present appeal.

9. The first contention raised on behalf of the authority on appeal is that both the Commission and the High Court had erred in finding that the charges were time-barred by virtue of section 39 (2) (a), in that its investigation into the matter started on 25 July 2013, which was less than one year before the referral on 23 July 2014. The second contention raised by the authority,

in the alternative to the first, was that, in any event, the provisions of section 39 (2) (a) find no application in this matter at all. Both these issues turn, in the main, on a proper interpretation of sections 35 and 39 of the Act. In the circumstances I propose to consider these two contentions first, before I turn to the authority's second contention which raises procedural issues unrelated to the provision of the Act.

WHEN DID THE INVESTIGATIONS START?

10. The authority's contention is that the investigations started on 25 July 2013 when it served the Ex Post Notice of Investigation on the respondents. The respondents' contention, on the other hand, is that the investigation already started on 21 November 2012 when the Authority obtained information from the PPADB by invoking the provision of section 35 (4) of the Act or, at the latest, in June 2013 when the authority sought and obtained search warrants to search the business premises of the respondents.

11. Determination of this dispute thus arising revolves largely around an interpretation of the provisions of section 35 and 39 (2) of the Act. Section 35 appears under the heading of "Investigation of horizontal and vertical agreements." In relevant part it reads as follows:

> *"35 (1) The Authority may, either on its own initiative or upon receipt of information or a complaint from any person, start an investigation*

*into any practice where the Authority has reasonable grounds to suspect that -*

*(a) The practice in question -*

*(i) may constitutes an infringement of sections 25 and 26 (1) and .....*

*(2) Where the Authority decides to conduct an investigation, the Authority shall as soon as practicable, give written notice of the proposed investigation to every enterprise which is suspected to be a party to the practice to be investigated and shall in the notice ...*

*(3) Where the Authority considers that to give notice under subsection (2) would materially prejudice the exercises of its power to enter and search any premises in terms of section 36, it may defer the giving of notice until after those powers have been exercised.*

*(4) For purposes of an investigation under this section, the Authority may, by notice in writing served on any person considered by the Authority to be relevant to the investigation require that person –*

*(a) to provide the Authority with any information pertaining to any matter specified in the notice which the Authority considers relevant to the investigation..."*

12. Other sections pertinent for present purposes, I believe, are sections 36 and section 39 (2). Section 36 deals with warrants authorising an inspector to enter and search the premises of an enterprise under suspicion which are to be issued at the behest of the authority. In this context section 36 (2) (b) allows the authorized inspector to *"search any person on the premises if there are reasonable grounds for believing that the person has possession of any documents or article that has a bearing on the investigation."* Section 39 (2) which contains the time-bar under consideration, is in these terms:

*"Within one year after an investigation is opened by the Authority, the Executive Secretary shall –*

(a) *subject to subsection (3) refer the matter to the Commission if the Authority decides that a prohibited practice has been established.*

(b) ..."

13. This brings us to the question as to when, on the application of these statutory provisions to the facts of the case, the investigation by the

authority had started the clock ticking for purposes of calculating the time-bar in terms of section 39 (2). The short answer to this question, I think, is that in the light of these statutory provisions, the proposition by the authority that it only started its investigation when it issued the Ex Post Notice to Investigate, cannot be sustained. First of all, I say this because section 35 (3) allows the authority, in express terms, to start an investigation, by exercising its search and seizure powers, under section 36, before it had issued a notice in terms of subsection (2). The answer on behalf of the authority, that a search warrant may be issued before an investigation has started, flies in the face of section 36 (2) (b) in that it raises the question: how can a search be made for documents "bearing on the investigation" if there is no investigation and if there may never be one?

14. It is true that section 35 (3) is formulated as an exception to section 35 (2). But the point is that this is the very exception which the Authority relied on because it suspected, so it said, that if they were given notice in advance, the respondents would conceal or destroy material evidence. In effect the authority therefore, admits that it started the investigation in this case before it served the notice to investigate in terms of section 35 (2) by relying on the exception in terms of section 35 (3). This is also borne out by the express terms of the Ex Post Notice itself. Apart from the fact that it is called an Ex Post Notice – which literally means a notice after the event – it indicates in parenthesis that it pertains to an "(investigation conducted prior to the issue of notice)." This can only mean that the investigation had

started prior to the issue of notice when, pursuant to the provisions of section 35 (3), the authority had exercised its powers under section 36. That is when it sought and obtained a warrant in terms of the latter section, to search the business premises of the respondent, in June 2013.

15. Moreover and in any event, I do not believe the court *a quo* can be faulted in its finding that the clock started ticking on 21 November 2012 when the authority invoked its powers under section 35 (4) by demanding information from the PPADB. In terms of that section the authority was only entitled to demand information which it considered to be relevant to the investigation. The reference to "the investigation"- as opposed to "the intended investigation" or even "an investigation" raises the obvious question – what investigation? To my mind the only sensible answer can be – the existing investigation, the investigation in progress; the one that has already started. It follows that, in my view, the authority's first objection to the judgment of the court *a quo* must therefore fail.

DOES SECTION 39 (2) FIND APPLICATION AT ALL?

16. The authority's further contention was that, in any event, the provision in section 39 (2) finds to application at all to the facts of this case. Broadly stated, the reason it advanced for saying so, was that the whole of section 39, including subsection (2), applies only to an investigation resulting from a complaint by a complainant and not to an investigation started by the

authority or its own initiative upon information received from a source other than a complainant. The respondent's first answer to this contention was that the investigation and the referral in this case resulted, as a fact, from a complaint by a complainant. It follows so respondent's argument went that the authority's contention under consideration is of no consequence in this case. I do not believe, however, that this answer by the respondent can be entertained. The court *a quo* held that, as a matter of fact, the matter involves an investigation started by the authority on its own initiative on information received from an informant. By virtue of section 71 (3) of the Act this court is bound by that factual finding.

17. The argument by the authority as to why section 39 does not apply to a case such as this one, where it started the investigation on its own initiative, can only be properly understood with reference to the provisions of section 39 itself. Hence it unfortunately requires a rather lengthy quotation of those provisions that I would otherwise have preferred to avoid. They read in relevant part:

> *"39 (1) The authority may at any time following the opening of an investigation ... convene a hearing at which the Commission shall hear the views of any person they consider to have a relevant interest in the case.*

*(2) Within one year after an investigation is opened by the authority, the Executive Secretary shall –*

*(a) subject to subsection (3), refer the matter to the Commission if the Authority determines that a prohibited practice has been established; or*

*(b) in any other case, issue a notice of non-referral to the complainant, in the prescribed form.*

*(3) When the Authority refers a matter to the Commission, the Authority –*

*(a) may refer all the particulars of the complaint as submitted by the complainant; or*

*(b) may refer only some of the particulars of the complaint as submitted by the complainant; or*

*(c) add particulars to the complaint as submitted by the complainant; and*

*(d) in respect of any particulars of the complainant not referred to the Commission, shall issue a notice of non-referral referred to under subsection (2) (b).*

*(4) In a particular case –*

*(a) the Authority and the complainant may agree to extend the period under subsection (2); or,*

*(b) on application by the Authority made before the end of the period referred to under subsection (2), the Commission may extend that period.*

*(5) Where the Authority has not referred a complaint to the Commission, or issued a notice of non-referral within the stipulated time or the extended period referred to under subsection (4), the Authority shall be considered to have issued a notice of non-referral.*

*(6) where the Authority issues a notice of non-referral in response to a complaint, the complainant may refer the complaint directly to the Commission, subject to its rules of procedure.*

*(7) A referral to the Commission, whether by the Authority or by a complainant, shall be in the prescribed form.*

18. The first leg of the authority's argument relied on the wording of section 39 as a whole. It started out with a reference to subsection 2 (b), 3 and 4 (a). These subsections, so the argument went, can only apply where the investigation resulted from a complaint. Starting out from this premise, it was then argued that it can be assumed that, as a matter of logic, the legislature would deal in one section with one thing as opposed to switching in the same section from one thing to the other. Although I find substantial merit in the logic underlying this line of reasoning, my problem lies with a comparison between the wording of sections 39 (1) and 2 (a), on the one hand, and section 35 (1) on the other. In the latter section the phrase "start of an investigation" - which I understand to mean the same as "opening an investigation" - pertinently refers to two situations (a) where it results from the authority acting on its own initiative; and (b) the authority reacts to a complaint. No distinction is drawn between the two. On the contrary, they are pertinently lumped together. Subsections 39 (1) and 2 (a) again refers to the opening of an investigation. On the face of it that investigation must be the same one that the authority started in terms of subsection 35 (1), which includes an investigation on its own initiative. The argument relied on by the authority requires an assumption that the legislature intended to change the meaning of the concept "start or open an investigation" between section 35 (1) and section 39 (1) and (2) (a), i.e.

that the investigation started in the former is not the same as the one proceeding in the latter. That assumption would however fly in the face of the presumption that the legislature intends that the same meaning should be given to the same words in the same legislation.

19. For the second leg of its argument the Authority relied on a comparison between the wording of section 39, on the one hand, and section 50 of the South African Competition Act 89 of 1998, on the other. The provisions of the latter section are fully set out in *Competition Commission v Yara (SA) (Pty) Ltd 2013 (6) SA 404 (SA) para 10 (the Yara case).* For purposes of the comparison it must of course be borne in mind that in the South African legislation the counterpart of the authority is called "the Competition Commission" while the "Commission" in the context of the Act is referred to in South Africa as "the Competition Tribunal".

20. Section 50 (1) and (2) of the South African act read as follows:

> *"(1) At any time after initiating a complaint, the Competition Commission may refer the complaint to the Competition Tribunal.*
>
> *(2) Within one year after a complaint was submitted to it, the Commission must:*

*(a) subject to subsection (3) refer the complaint to the Competition Tribunal if it determines that a prohibited practice has been established; or*

*(b) in any other case, issue a notice of non-referral to the complainant in the prescribed form".*

21. The wording of sub-sections 50 (3) to (5) of the South African Act, so it was pointed out on behalf of the Authority, mirrors that of subsections 39 (3) to (5) of the Act in virtually exact terms while subsections 39 (6) and (7) have their equivalent in section 51 (1) and (2) of its South African counterpart. The irresistible inference from this exact correspondence, so the Authority argued, is that the Botswana legislature intended to adopt the Souch African model lock, stock and barrel, together with the meaning that has been attributed to their legislation by the South African Courts.

22. Starting out from this premise, the Authority then relied on the judgment of the South African Supreme Court of Appeal in the *Yara* case, where it was held (in paras 14 and 18) that the time bar in section 50 (2) applies only to matters deriving from a complaint submitted by a complainant and not to those initiated by the Commission itself. In the light of the exact similarities with the South African legislation, so the argument by the authority concluded, this court should adopt the reasoning in the *Yara* case.

23. The remarkable correspondence between the provisions of the Act referred to and those of its South African counterpart cannot be denied. The question is whether this correspondence justifies the inference contended for by the authority, namely, that the legislature of this country intended a lock stock and barrel transplant of the South African position.

24. Consideration of this question clearly requires that regard must be had not only to the similarities, but also to the differences between the two enactments involved. The most significant aspect of these differences is to be found in section 49 B (2) of the South African Act (also quoted in para 10 of the *Yara* case) which draws a clear and express distinction between an investigation started by the Commission on its own initiative, on the one hand, and an investigation started in consequence of a complaint submitted by the complainant, on the other. That clear distinction is not to be found in the Act. On the contrary, as I have said earlier, section 35 (1) of the Act draws no distinction between investigations resulting from these two sources, but lump them together as part and parcel of the same concept. And as I have also indicated, it is that very association of the two causes in section 35 (1) which militates, in my view, against a differentiation between the two in section 39 (1) and (2) (a) of the Act.

25. Moreover, the trigger in section 39 (2) (a) is the opening of the investigation which I regard as the same opening of the same investigation referred in section 39 (1) and in section 35 (1). By contrast, section 50 (2) (a) of the

South African legislation provides that the one year period starts to run when "a complaint is submitted." In terms of South African legislation there can therefore be no doubt that the time bar in section 50 (2) (a) can only apply when a complaint had been submitted. Conversely stated it cannot apply where the Commission had started the investigation on its own initiative.

26. The obvious differences between the two enactments therefore has a direct bearing on the issue whether a distinction is to be drawn between investigations which result from complaint by complainants and those which do not. In the South African legislation the answer is patently clear. But the legislature of this country chose to avoid the very wording of the South African statute which gives rise to that clear answer. The irresistible inference is, in my view that it did not want to adopt the South African model on this very aspect.

27. Stated somewhat differently, while it is clear that the Botswana legislature intended to adopt the South African model in most respects it did not intend to do so lock stock and barrel as suggested by the attorney for the authority. Where it intended to follow the South African model, it used the exact same wording. But where it intended to deviate from it, it used different wording. Logic dictates that a difference in wording must therefore be regarded as an indication of intent to deviate from the South African model. On the very issue of our concern, namely, whether the time bar in section 39 (2) (a)

applies to investigations arising from complaints by complainants only, which is the South African model, the legislature pertinently deviated from the wording of the South African statute on more than one occasion. As I see it, this can only mean that it did not want to incorporate that model. Moreover, deviation from that model can only mean that the legislature intended that the time bar should apply to investigations resulting from whatever source. I can think of no third alternative.

28. In my view, the ultimate conclusion to drawn from all this is that, while in South Africa the time bar is imposed exclusively in the interest of the complainant, the Botswana legislature intended that it should apply in the interest of the public as well. This conclusion, i.e. that the time bar in section 39 (2) is devised in the public interest, is in accordance with the judgment of this court in *Rabbit Group (Pty) Ltd v. Competition Authority CACGB-142-16* (delivered on 2 February 2017) (the *Rabbit* case) at 21, where public interest was in fact held to be the primary concern of the section.

FUNCTUS OFFICIO AND RES IUDICATA

29. This brings me to the further contentions by the authority which are of a procedural nature. In this regard the authority relied in particular on the procedural remedies that find expression in the Latin maxims *functus officio*

and *res iudicata* and with regard to the latter, on its modern day guise referred to as "issue estoppel."

30. As the factual basis for its reliance on the principle of *functus officio,* the authority relied on the decision by the Commission on 10 September 2014, which allowed the authority to file a proper referral, supported by affidavit within 14 days. In terms of section 39 (4), so the authority pointed out, the Commission could only extend the one year period within that period itself. By giving the 14 day extension, so argument concluded, the Commission must therefore have decided, at least by implication, that the one year period had not yet expired. In consequence, so the authority argued, the Commission was *functus officio* with regard to that issue. It had no power, at its own hand to reverse its own earlier decision by deciding that the one year period had in fact expired. As the legal basis for this line of argument, the authority sought to rely on the decision of this court in the *Rabbit* case.

31. In accordance with well-established authority, an essential element for reliance on the *functus officio* principle is that the previous decision must have been final; if not the doctrine does not apply (see e.g *Vandecasteele v. AGS Construction (Pty) Ltd 2010 (3) BLR 498 (CA)).* That much was expressly recognized in the *Rabbit* case (p.17). What therefore lies at the heart of the judgment in that case is the conclusion by this court that the Commission had finally decided, on a previous occasion, that the one year

period had not lapsed and that in consequence it was not entitled to revisit that final decision. That conclusion was reached in circumstances where, on the previous occasion, an extension was expressly sought and granted by the Commission. By contrast the court *a quo* held in this case that, as a matter of fact, the Commission "did not by its order of 10 September 2014 even purport to extend the period in terms of section 39 (4) of the Act." In terms of section 71 (3) we are bound by that factual finding. In any event, it is clear to me that on 10 September 2014, the Commission never intended to decide either finally or otherwise – whether or not the one year period had in fact expired. Nor did purport to do so. The simple truth is that on that occasion the point was never raised. Hence I believe the court *a quo* was right in finding that *the functus officio* argument could not be maintained.

32. For its reliance on the concept of issue estoppel, the authority referred to the fact that the time bar defence had been raised in the heads of argument, on behalf of 2nd respondent on 3 December 2014. According to the authority's argument the point was then dismissed by the Commission, at least by implication. I do not believe however that the implication contended for can be sustained. As I understand the position, the Commission pertinently refrained from deciding the point, because 2nd respondent had failed to raise it in its "notice of points in limine" and did so only for the first time in its heads of argument.

33. The concept of issue estoppel is recognized as a modern day extension of the *res iudicata* rule (see e.g *Smith v. Porritt 2008 (6) SA 303 (SCA)* para 10). In consequence it can only succeed if the issue had been finally decided between the same parties (see e.g. *Standard Bank v. Isaac 1999 (1) BLR 453 (CA); Barclays Bank Limited v. Beauty Thaga case No. CACGB-124-15,* delivered on 27 April 2017 (para 17). On the application of these principles it is clear to me that the issue had not been decided at all, let alone finally, on 3 December 2014. It was considered and decided by the Commission for the first time in March 2015. That means that the authority's reliance on issue estoppel must also fail.

34. Finally, the authority relied on the further mutation of the concept *of res iudicata* which appears from the following formulation in *Henderson v. Henderson [1843 – 1860] All E. R. 378 at 381 – 382:*

> *"In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted*

*part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at that time."*

35. In *Janse Van Rensburg NO. v. Steenkamp 2010 (1) SA 649 (SCA)* paras 27 – 30 the Supreme Court of Appeal decided that the *Henderson* principle – also known as the "once and for all rule" - will only find application in the South African context if the conduct of the party against whom it is raised can be said to have reached the level of an abuse. When the rule is relied upon, the question will therefore be in every case, whether on the facts and circumstances of that case, the party against whom it is raised is guilty of an abuse of the process of court. On this approach the once and for all rule will therefore be applied sparingly and only in exceptional cases. To my way of thinking we may adopt the same approach in the courts of Botswana, since the concept of abuse of process is not foreign to this jurisdiction.

36. To my mind an abuse connotes misuse or improper use; a use of court process with an ulterior motive; the equivalent of vexatious litigation. Thus understood, it cannot apply to every situation where a litigant relies on a cause of action or a defence which he could have raised before. In any event, as I see it, the rule cannot prevent a litigant from raising a point of

law which he notionally could have raised at an earlier stage during the same process of litigation. That, after all, would be in direct conflict with the principle that, even where a point of law had been expressly abandoned, it can later be revived on appeal.

37. The underlying reason for the principle appears from the following dictum by the Full Court in *Alexkor Ltd v. The Richtersveld Community 2004 (5) SA 460 (cc)* at para 43:

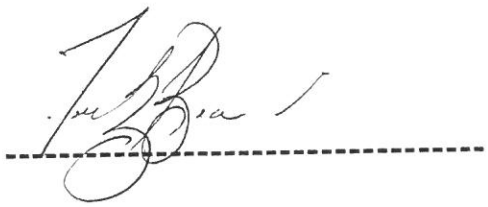
> *"(43) The applicable rule is that enunciated in Paddock Motors (Pty) Ltd v. Igesund 1976 (3) SA 16 (A) at 23D – 24 G. In that case, the Appellate Division held that a litigant who had expressly abandoned a legal contention in a court below was entitled to revive the contention on appeal ... To prevent the appeal court from considering a legal contention abandoned in a court below might prevent it from performing its duty. This could lead to an intolerable situation, if the appeal court were bound by a mistake of law on the part of a litigant. The result would be a confirmation of what is clearly wrong."*

38. As I see it, the same reasoning finds application in the situation which arose in this case, where the respondents could notionally have raised the point of law they sought to rely upon at earlier stages during the same proceedings. To prevent them from doing so could result in the court being

compelled to decide the case on a legal basis which it knows to be clearly wrong. It goes without saying that a situation of that kind would be intolerable. The same principle applies in my view to other points of law which may non-suit a litigant for instance, lack of *locus standi*. It follows that in my view the reliance by the authority on the once and for all rule, must also fail.

39. In the result, the appeal is dismissed with costs.

**DELIVERED IN OPEN COURT AT GABORONE ON THIS 27TH DAY OF JULY 2017.**



**F. D. J. BRAND**

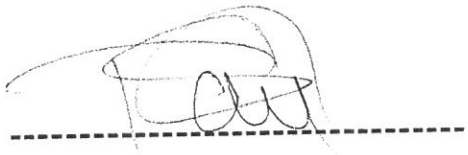
**JUSTICE OF APPEAL**

**I AGREE:**

**I. B. K. LESETEDI**

**JUSTICE OF APPEAL**

**I AGREE:**



**T. TAU**

**ACTING JUSTICE OF APPEAL**