IN THE HIGH COURT OF BOTSWANA HELD AT GABORONE

CAHGB-000037 -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 Attorney Mr T M Rasetshwane for the Appellant
Attorney Mr O O Itumeleng with Attorney Ms K Megano for the 1st Respondent
Attorney Mr M M Chilisa with Attorney Ms G O Ifezue for the 2nd Respondent

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JUDGMENT

WALIA J:

1. This is an appeal against the decision of the Competition Commission given on 18th August 2015, in the appellant's application for extension of the period of investigation of the respondents.

2. The appellant is a statutory body established under section 4 of the Competition Act (Cap 46:09) ("the Act.") Its core function is defined as follows in section 5 (1) of the Act.

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

3. The Competition Commission ("The Commission") is established under section 9 of the Act, defined therein as the governing body of the appellant and its core functions appear as follows in section 9 (2) of the Act:

"(a) Adjudicate matters brought before it by the Athority under this Act; and

(b) Give general policy directions to the authority."

4. The genesis of the appeal is in tender number PR11/1/1/12 awarded to the respondents for the supply of 1 500 000 units of infant formula in 400 gram cans by the government, through the Ministry of Health.

5. It is common cause that the contract resulting from the tender has been fully executed.

6. However, following the completion of the contract, the appellant became aware of certain prohibited collusive practices and decided to open an investigation.

7. On 26th August 2014, the appellant made application to the Commission for an extension to the period of referral to the Commission.

8. On 27th August 2014, the period was extended by six months.

9. On 26th February 2015, the appellant launched an application seeking a number of orders against the respondents as to the rigging of the tender aforesaid and quite severe financial penalties.

10. The application was met immediately with a notice by the 2nd respondent to raise points *in limine* in the following terms:

"1. The proceedings are a nullity as they are founded on an invalid time-extension granted following the expiration of 12 month period laid down for the carrying out of investigations.

1.1 The time extension period was invalid because the last day on which an extension could be lawfully granted was 25th August 2014 if one has regard to the fact that on the Authority's version an investigation was opened on 26th August 2013.

1.2 The time extension granted was also void also by reason of the fact that it breached the rules of natural justice which are implicitly

entrenched by the Competition Act in respect persons under investigation. In particular Section 35 (2) and 39 (1) of the Competition Act.

2. The complaint has not been brought within a 6 month period following the extension purportedly granted on 26th August 2014. The last day on which they could be brought, in terms of the invalid extension, was 25th February 2015.

3. The merit-worthiness or otherwise of the contentions raised in paragraph 1 of this notice will shortly be placed before the High Court for determination, the second respondent accordingly prays that the above proceedings be stayed pending a determination by the High Court."

11. The 1st respondent too, raised points *in limine* in the following terms:

"1. The Complaint Referral is *fatally defective* for the reasons that it was filed woefully out of the *within one year time statutorily stipulated*;

2. That the alleged time extension of investigations on the 26th August 2014 is a legal nullity on the basis that it was *erroneously sought* and *erroneously granted* without Notice to the respondents.

That 1st Respondent gives its Notice of Intention to *rescind* the aforesaid Order once it has all the documents relating thereto or to approach the High Court for review of the aforesaid decision to extend time for investigations without notice to the 1st respondent."

12. The applicant responded to the points *in limine* and a consent order was made on 26th May 2015, in the following terms:

"1. That the points *in limine* to be heard and determined by the Competition Commission in the above matter are as follows:

i) Whether the proceedings are a nullity as they are founded on an invalid time-extension granted following the expiration of 12 months laid down for the carrying out of an investigation in terms of section 39 (2) of the Competition Act (Cap 46:09);

ii) Whether the time extension by the Commission was in itself invalid because the last day on which an extension could be lawfully granted was 25th August 2014 in terms of section 39 (4) (b);

iii) Whether the time extension by the Commission is invalid by reason of the fact that it was in breach of the rules of natural justice as implied from sections 35 (2) and 39 (1);

iv) Whether (at any rate) the complaint has not been brought within 6 months following the extension granted on 26th August 2014 in accordance to section 39 (4) (b);

v) Whether *in casu* the Competition Commission can declare its order of 26th August 2014 a nullity;

vi) Whether the referral is fatally defective for the reason that it was filed woefully out of the within one year time statutorily stipulated in section 39 (2); and

vii) Whether the applicant's deponent is authorized to and competent by reason of her aforesaid position to depose to the said applicant's founding affidavit or to refer the matter to the Commission on behalf of the applicant.

2. That the process of discovery is to be finished by the 3rd June 2015.

3. That the respondents are to file their heads of argument in support of the points *in limine* on or before 15th June 2015.

4. That the applicant is to file its reply on or before 22nd June 2015.

5. That the hearing to determine the points *in limine* be held on 2nd July 2015 at the Competition Commission Offices at 0900 hours."

13. The stage was then set for the filing of comprehensive heads of argument and in a 132 page judgment, the Commission made the following orders:

"a) We find that the applicant had no jurisdiction to file an application with the Commission on the 26th August 2014 as the one year period for investigation had lapsed on the 25th August 2014. Consequently, the Commission also had no jurisdiction to hear the application and extend the period of investigation.

b) Therefore, there has been a non-referral.

c) There is no order as to costs.

d) A party aggrieved by this decision may appeal within fourteen (14) days."

14. These are the orders appealed against. The grounds of appeal are quite extensive and are recited hereunder:

"**GROUNDS OF APPEAL**

1. The Competition Commission of Botswana has erred and misdirected itself in the following respects:

1.1 The Commission has erred in its analysis relating to computation of time within which an investigation may be carried out and the time for referral.

1.2 The Commission has erred and wrongly applied the principles of the doctrine of *functus officio*.

1.3 The commission has misdirected itself in holding as it did that there has been a non-referral and that the Commission has no jurisdiction to hear the matter when it had itself granted the appellant an extension of time which the appellant complied with.

The Commission having granted the appellant an extension of time had itself no authority to reverse that decision by a subsequent decision that it has no jurisdiction to hear the matter. In so far as that issue is concerned the Commission is in law *functus officio* and cannot itself alter its earlier decision.

1.4 The Commission erred by holding that the appellant raised new points at the hearing, in law a party is not expected to plead the law; provisions of the law may be relied upon without pleading them.

1.5 The commission has erred in the application of the principles of law and the findings of fact in general. The decision of the Commission is neither supported by law or by the common cause facts.

2. **Relief sought from the High Court**

2.1 The appellant shall, at the hearing of the appeal pray for an order upholding the appeal and that costs be paid by the respondents.

2.2 The appellant shall, at the hearing of the appeal pray for an order directing that the matter is remitted back to the Commission for hearing on the merits of the complaint.

2.3 The appellant shall ask for such further and/or alternative relief as the High Court may deem appropriate to make."

15. The issues for determination are articulated as follows by the respondents in their heads of argument:

"i) When does an investigation commence in terms of the Competition Act?

ii) When did investigations against the respondents commence?

iii) When an extension should have been sought and granted in terms of the Act and whether the Commission's grant of extension of the 26th August 2014 was lawful?

iv) Whether there is a requirement that the respondents ought to have been cited and served with the application for extension of time and the effect thereof on the application and the relief granted?

v) Whether the Commission is precluded by the *functus officio* principle from re-considering the prescriptive validity of the complaint because of its grant of extension of the 26th August 2014?

vi) Whether the Commission's finding of the 26th August 2014 interrupted the one year prescriptive period for referring a complaint to the Commission?"

16. It will be seen that the grounds of appeal and the issues for determination call for consideration of a huge number of matters.

17. However, the scope of the enquiry before me has been narrowed considerably by the appellant in its heads of argument and address before the court calling for determination of two issues only. First, that the Commission was *functus officio* and second, whether the referral to the Commission was time barred in terms of the Act.

18. At this stage, it is apposite to make reference to another matter between the same parties, relating to the award of a tender PR8/6/2/11, before Ketlogetswe J.

19. The hearing of this appeal was delayed pending conclusion of that matter and at the hearing, it was agreed that in the event of this court agreeing with Ketlogetswe J, then *cadit quaestio* in regard to his findings.

20. In that case too, the appellant had appealed against the decision of the Commission, setting aside the referral on account of it having been made after the lapse of one year following the opening of the investigation and therefore the Commission lacking the jurisdiction to adjudicate.

21. Dealing first with the appellant's argument that the referral in this case was not time barred, the appellant says, in essence, that in computing the relevant period, a distinction must be made between an investigation conducted at the instance of a private complainant and at the instance of the authority itself.

22. It then develops the argument, submitting, basing its contention largely on South African precedent, that the one year period applies only to an investigation at the instance of a complainant.

23. It says in paragraph 54 of its heads of argument:

"The referral was not at the instance of a private party so as to bring it within the ambit of Section 39 (2) of the Act. We therefore submit that resultantly the one year period is not applicable. Because the one year period is for the benefit of the complainant (to enable them to prosecute in the event of a non-referral), where there is no complainant the one year duration is irrelevant."

24. I see two difficulties with this proposition. The clear, unambiguous language of sections 35 and 39 (2) of the Act do not, in my view, permit the interpretation advanced by the appellant.

25. Section 35 provides:

"(1) The Authority may, either on its own initiative or upon receipt or information or a complaint from any person, start an investigation into any practice where the Authority has reasonable grounds to suspect that ....."

26. Section 39 (2) provides:

"(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."

27. I can see nothing in this language which draws or can be interpreted to make a distinction contended for by the appellant. It would lead to absurd and completely undesirable results if the Authority were to be permitted to make a reference at any time, at its own convenience.

28. The second difficulty is that, even if the appellant's contention were to be accepted, then, on its own version, the information precipitating its action came from a whistleblower, obviously a complainant, albeit an anonymous one.

29. This issue was argued at length before Ketlogetswe J and he found, at paragraph 23 of the unreported judgment:

> "..... It would seem the appellant wishes to argue, with some measure of ingenuity, that where the complainant and the prosecutor, lumped in one, is the Authority, it is up to the Authority to tell us when in its subjective view, it should be taken to have "opened" an investigation. I do not think Section

39 of the Act should be read to invite of such an approach. It would, in my view bring about uncertainty and absurdity in that compliance with the mandatory provisions of Section 39 (1) (a) would become a matter for determination by the Authority and not the Commission."

30. I express my entire agreement with Ketlogetswe J's views.

31. The result is that in my view, this argument must fail. It must fail also on the basis that my agreement with Ketlogetswe J renders the issue *cadit quaestio*.

32. *Functus officio* was not a live issue before Ketlogetswe J but was the subject of extensive attention in the judgment of the Commission. Although the Commission supported its decision with an impressive case law reference and its efforts are to lauded, I can say with due deference that the pith of its decision on the matter was that the decision to reverse the decision granting extension was not a final decision and hence capable of being revisited or reversed.

33. This in fact is also the pith of the respondents' argument, while the appellant argues that it was a final decision and incapable of reversal, both at common law and in terms of the section 67 of the Act.

34. To deal meaningfully with the issue, it is necessary to start at the beginning. It is common cause that the decision granting the extension was made on 27th August 2014, but was reversed by judgment of the commission on 18th August 2015.

35. Section 39 (4) of the Act deals with extension of the period prescribed by section 39 (2) referred to in paragraph 26 above:

"In a particular case,

(a) The Authority and the complainant may agree to extend the period under sub section (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."

36. It is common cause that the extension was granted on 27th August 2014. Before the Commission, debate centered on whether or not the one year period when the matter came before the Commission, had expired. The Commission found that it had and hence, its ultimate finding that it did not have the jurisdiction to grant an extension and resultantly revoking it.

37. The debate before me is not about computation of time or about the appellant's conflicting statements on when the investigation was opened. It is about whether or not the Commission was at large to reverse its original decision, right or wrong.

38. I have been favoured with well-researched, comprehensive heads of argument on the subject. My attention has been drawn to numerous cases, local and foreign, on the principles of *functus officio*.

39. The *locus classicus*, of course, is VANDECATEELE AND ANOTHER V AGS CONSTRUCTION (PTY) LTD 2010 (3) BLR 498. With due deference to the eminent jurists brought to my attention, I must say that Vandecateele provides, in Botswana, all the guidance anyone could possibly need on the subject of *functus officio*.

40. I quote the court's statement on the subject in extenso, on page 500 F-H:

"....The general principles of law governing this matter were not in dispute. A number of authorities were relied on by Counsel on both sides. It is not necessary to refer to them all. It is sufficient for present purposes to refer to **Monnanyana v The State (2002) 1 (BLR) 72, CA** (full Bench). In his judgment in that case Tebbutt AJP conducted a wide-ranging review of the authorities as to when a court was *functus officio*. At page 78 he said this:

"The general principle, now well established both in South Africa as well as in Botswana, is that once a court has duly pronounced a final judgment or order it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes functus officio; its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter as ceased ***(see Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 at 306 F-G and the cases therein cited; Tlhalefang v The State (1999) BLR 555, CA; Mminakgomo and Others v The State (1998) BLR 395, CA).***

In the firestone case, supra, the court stated that there were four exceptions to the general principle and that the court may correct, alter or supplement its judgment or order (i) In respect of necessary or consequential matters of costs or interest on a judgment debt which the court overlooked or inadvertently omitted to grant; (ii) In order to clarify it if its meaning is obscure, ambiguous or uncertain provided it does not alter the "sense or substance" of the judgment or order; (iii) To correct a clerical, arithmetic or other error in expressing the judgment or order but not altering its sense or substance; (iv) Making an appropriate order for costs which had not been argued, the question of costs depending on the court's decision on the merits of the case."

41. The cases referred to above deal specifically with decisions made by courts. The decision here was made by a statutory body performing *quasi-judicial* functions. It is axiomatic that the *functus officio* principles apply equally to such bodies and to persons performing *quasi-judicial* functions.

42. There is abundant authority for the proposition. In TSOGANG INVESTMENTS (PTY) LTD V PHOENIX INVESTMENTS (PTY) LTD, 1989 BLR 512 the court was dealing with the statutory powers of a Government Minister. In that case, the Minister had made a decision on an appeal but reconsidered it thereafter. The court adopting the relevant statements in ***Minister of Agricultural Economics and Marketing v Virginia Cheese and food Co. (1941)(Pty) Ltd (1961) (4) SA 415***, said at page 523 C:

> *"…. It was held in that case, once a judicial or quasi-judicial decision has been given, the* ***court or officer*** *giving it is in respect of the matter functus officio." (My emphasis)*

43. The reason for my belabouring the point is that the *functus officio* principles are applicable to decisions made by persons or bodies performing *quasi-judicial* functions. It is not in dispute that the Commission performs such functions. It follows, in my view, that the decisions of such bodies must be accorded the sanctity inherent in decisions of courts.

44. Tsogang (supra) is also authority for this proposition. The court said at page 517 – A:

> *"I may state that at the hearing Mr Martin Howritz S C, who appeared for the Minister abandoned the contention that the first decision of the Minister was a decision which was null and void and which had no force or effect. It is clear the mere fact that a decision is arrived at on a wrong view of law, cannot entitle the Minister to disregard such decision or to treat it as pro non scripto…."*

45. The facts of this case and Tsogang are uncannily similar. In that case too, the decision maker had regarded a previous decision as devoid of legal force and had proceeded to "reconsider" it.

46. In this case, I do not understand the respondents to be saying that the principle is wrong. They are saying rather that the *functus officio* principles apply only to final decisions and that the decision made by the Commission was not final.

47. A visit to their heads of argument will make their stance clear. In its supplementary heads of argument, the second respondent says:

> "17.2 Even assuming the principle applied, it is not an absolute principle and has the following exceptions.

17.2.1 It does not apply to interlocutory decisions but applies only to final decisions.

17.2.2 It does not apply to decisions made without jurisdiction."

48. 17.2.1 is easy to deal with. I agree with the respondents that *functus officio* does not apply to decisions falling within the ambit of the exceptions referred to in Vandecateele (Supra). I will deal with 17.2.2 later in the judgment.

49. I must consider, first, whether or not the decision in question was a final decision. The respondents argue that it was a preliminary step towards the referral sought to be instituted.

50. This argument must be considered in the context of the issue placed before the Commission.

51. The issue placed before the Commission was application for its authorization to make a referral out of time. At that stage, the referral was not a live issue. The Commission was seized with an Ex-parte application, with no other participant.

In allowing the application the Commission, in my view, made the decision on what was placed before it. It was therefore a final decision.

52. I now turn to paragraph 17.2.2 of the second respondent's supplementary heads of argument. It says that *functus officio* does not apply to decisions made without jurisdiction.

53. It is a trite principle of law that decisions made by courts or bodies exercising q*uasi-judicial* functions must be obeyed, nor can they be jettisoned without ceremony by the decision maker.

54. In MOSES MOETI MABUTHO V DINGAAN MULALE CACGB-000009-13 (unreported) the Court of Appeal said in paragraphs 24 and 25:

> *"The ratio of the* ***OUDEKRAAL*** *case is that until an invalid administrative act is set aside by the court in review proceedings, it exists in fact, and has legal consequences which cannot be overlooked."*

55. It is, indeed, this principle that the court in Tsogang (supra) was espousing in the statement in paragraph 44 above.

56. There is another, perhaps more compelling reason why the Commission was not at liberty to review its own decision. Section 67 of the Act provides:

"Except as otherwise provided for in this part, a decision or determination made by the Commission or direction given by the Commission is binding unless appealed to the High Court."

57. The language of this section is unambiguous. It makes no distinction whatsoever between a final or interlocutory decision. It is of application to every and any decision of the Commission.

58. This provides another reason why the respondents' argument on *functus officio* cannot succeed.

59. It is a matter of some regret that the applicability of this section was not placed in issue before the Commission by either party. If it had, I have no doubt that the Commission may well have come to a different conclusion.

60. The result of all this is that the appeal must succeed. It is therefore ordered that the appeal is allowed and the matter remitted back to the Commission for hearing on the merits of the complaint.

61. On costs, although the appellant seeks costs in its notice of appeal, no argument has been advanced before me on costs, either by the appellant or the respondents.

62. In its judgment the commission had made no order as to costs. There were good reasons for that.

63. It is ordered that each party pay its own costs of the appeal.

DELIVERED IN OPEN COURT AT GABORONE ON 23rd DAY OF June 2016

Walia

WALIA L S
JUDGE

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Appellant's Attorneys

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1st Respondents Attorneys

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