IN THE HIGH COURT OF BOTSWANA HELD AT GABORONE

CAHGB-000027-15

In the matter between:

Competition Authority — **Appellant**

and

Creative Business Solutions (Pty) Ltd — **1st Respondent**
Rabbit Group (Pty) Ltd — **2nd Respondent**

Gaborone, 15 February, 7 April 2016

Advocate M. M. S. C. Brassey
(with him Mr Attorney A. W. Modimo) for the Appellant

Mr Attorney O. O. Itumeleng for the 1st Respondent

Mr Attorney M. M. Chilisa
(with him Ms Attorney G. O. Efezue and Ms Attorney S. Somolekae for the 2nd Respondent)

J U D G M E N T

KETLOGETSWE J.

INTRODUCTION

1. The appellant in this matter, the Competition Authority is a statutory body corporate created in terms of Section 4 of the

Competition Act [Cap 46:09 of the Laws of Botswana [the Act] and shall hereinafter be referred to as the Authority or appellant.

2. The respondents Creative Business Solutions (Pty) Ltd and Rabbit Group (Pty) Ltd are companies duly incorporated in terms of the Company Laws of Botswana. They are hereinafter referred to as first respondent or second respondent, respectively, or simply as respondents.

3. The appellant is charged with the responsibility, *inter alia*, and for purposes of this judgment, of "prevention of, and redress for, anti competitive practices in the economy...." (Vide s.5 (1) of the Act). The appellant is further charged with the responsibility, among others, of investigating and evaluating any alleged contravention of Part V of the Act (dealing with prohibited practices [Vide paragraph (k) of subsection (2) of s.5 of the Act]; has the power to refer to and prosecute matters it would have investigated, before the Competition Commission. The Commission is established in terms of s. 9(1) of the Act. The Commission is the "tribunal" empowered to adjudicate over matters referred to it by the Authority.

4. The Authority has the power to *mero motu* refer a complaint to the Commission, or to do so on the basis of a complaint lodged with it by a complainant. [Vide s.35 of the Act].

5. The period within which the Authority can validly refer a matter to the Commission for adjudication is prescribed by the Act [S.39 thereof], subject to extension of such time by consent of the parties, or by the Commission on application by the Authority. Where the Authority has not referred a matter it has investigated to the Commission within the stipulated time frame, it can either issue a *notice of non-referral* to the complainant or if it has not issued such a notice of non- referral to the complainant within the stipulated time frame, it shall be considered to have nonetheless issued such a notice [s.39(5) of the Act]. In this latter circumstance the complainant would be entitled to directly lodge a complaint with the Commission just in the same way as if he or she has been issued with a notice of non – referral.

6. In the present case the Commission made a finding that the referral by the Authority of this matter to it for adjudication was brought after the lapse of a period of one year following the opening of an investigation and accordingly that the referral was brought outside

the time frame stipulated by the Act and therefore that the Commission had no jurisdiction to entertain the complaint.

BACKGROUND

7. The background giving rise to this matter is common cause between the parties and can be summarized as follows:

(i) Prior to 23 October 2012 a tender, number PR:8/6/2/11, was floated to which the respondents among other companies not party to this matter, submitted bids to supply units of infant formula.

(ii) On 23 October 2012 the Authority received a "tip off" that the respondents had committed acts of bid rigging and price fixing in contravention of s. 25 of the Act (hereafter prohibited practices).

(iii) On 21 November 2012 the Authority issued or served a notice in terms of s. 35(4) of the Act requiring PPADB to avail certain information concerning the investigation it was conducting in relation to the alleged prohibited business practices of the respondents.

(iv) In June 2013 the Authority applied, *ex parte,* and was granted search warrants by a magistrate to conduct a search at the business premises of the respondents. The searches were conducted on 10 July 2013 as authorized by the search warrants.

(v) On 25 July 2013 the Authority served *post facto* notices of investigation on the respondents concerning the investigation it was conducting following a tip off on 23 October 2012 and for which a notice was served on the Public Procurement and Asset Disposal Board [PPADB] on 21 November 2012.

(vi) On 23 July 2014 the Authority referred a complaint to the Commission, for adjudication, complaining that the respondents had committed the prohibited acts of bid rigging and market allocation by fixing their mutual bid prices and ostensibly dividing the market into two halves between themselves.

(vii) The referral to the Commission was well after the expiration of the one year period, at the very minimum following the receipt of the "tip off" or at the very maximum, following the s.35(4) notice given to the PPADP.

(viii) On 10 September 2014 the matter served before the Commission for a pre-trial hearing or conference. The respondents had raised a *point in limine* to the effect that the affidavit filed in support of the complaint in terms of Rule 12(2) of the rules of the Commission, was not properly commissioned and therefore that there was no valid complaint before the Commission for adjudication. The *point in limine* was upheld and the matter was struck out with the Authority granted leave to reinstate the same complaint within 14 days from 10 September 2014.

[Rule 12 subrule (2) of the rules of the Commission referred to above provides as follows:

"A complaint referral must be accompanied by an affidavit setting out in numbered paragraphs-

(a) A concise statement of the grounds of the complaint; and

(b) *The material facts or the points of law relevant to the complaint and relied on by the Authority or complainant, as the case may be*].

(ix) Pursuant to the order of the Commission that the Authority could reinstate its complaint against the respondents, it re-filed it with the Commission on 2 October 2014.

(x) The respondents, at a hearing on 3 December 2014 raised a point *in limine* that the Authority's re-filed or resubmitted complaint was brought after the lapse of 14 days contrary to the directions of the Commission in its order of 10 September 2014. That point *in limine* was dismissed by the Commission and the parties directed to file their papers. The second respondent had also raised another *point in limine*, that the referral was time-barred as it had been filed

outside the period of one year following the opening of an investigation by the Authority. The record does not show that the Commission dealt with and decided this point either way.

(xi) At a subsequent hearing on 13 March 2015 the respondents raised yet another set of points of law or a special plea, the most relevant for purposes of this judgment being that the complaint by the Authority was brought after the lapse of one year following the opening of an investigation and that the Commission did not, on that basis, have jurisdiction to entertain the matter. The hearing on the points of law was scheduled for 30 March 2015.

(xii) In its judgment, delivered on 12 May 2015, the Commission held that there has been a non-referral of the complaint by the Authority or that the referral was done after the lapse of a period of one year following the opening of an investigation and accordingly that, on that basis, it had no jurisdiction to entertain the complaint.

8. The above decision of the Commission is now the subject of this appeal, by the Authority.

THE APPEAL

9. The appellant has appealed on grounds which can be summarized as follows:

1. That the Commission erred in holding that the Authority's investigation opened or commenced at the time it issued and served a notice on PADB in terms of s. 35(4) in November 2012 on the following basis:

i. The investigation could not be deemed to have been opened prior to the written *post facto* notice issued to the respondents.

ii. The operative date should be held to be 23 July 2013 when the Authority served the respondents with its *post facto* notice (given in terms of S. 35(1) of the Act).

2. The Commission misdirected itself and erred in holding that there has been a non-referral and therefore that it did not have jurisdiction when it had itself granted the appellant "leave" to reinstate the complaint for adjudication, it being argued that:

    i. The Commission having granted the appellant leave to reinstate the matter, and having dealt with some of the points of law, including the issue whether or not the Authority had reinstated the matter within 14 days in terms of its order of 10 September 2014, it was *functus officio* to decide the issue of jurisdiction.

    ii. It was further argued that the respondents having subjected (which I understand to mean "submitted") themselves to the jurisdiction of the Commission they were estopped from raising the issue of jurisdiction, or put differently, they had waived their right to raise the issue of jurisdiction of the Commission.

    iii. It was argued further on behalf of the appellant that the respondents not having raised the issue of jurisdiction of the Commission at the first hearing of September 2014, and at the second hearing of October 2014, they had waived their right, or they were estopped from raising the issue at that subsequent hearing.

3. The Commission erred in the application of the principles of law and the findings of fact in general as its decision is neither supported by law nor the common cause facts.

10. Mr Brassey, learned Counsel for the appellant, has presented a two – pronged argument in this appeal. Firstly, he argued that the respondents were estopped from raising the issue of

jurisdiction at the hearing of March 2015. Secondly, he argued that the computation of the period of one year was a question of fact which the Commission could not resolve without resorting to oral evidence as there was a dispute of fact between the parties as to when exactly the Authority opened or commenced its investigation against the respondents. This is because, according to Mr Brassey, the respondents' position is that the investigation against them was opened on 12 November 2012 whilst the appellant's position is that the investigation was opened or commenced on 25 July 2013 when the respondents were served with the appellant's written *post facto* notice.

11. Mr Brassey has further argued that in any event the period of one year is not an extinctive prescription period, nor is it for the benefit of the entity circumstanced as the respondents, who is an "accused", to use his nomenclature.

12. Both Mr Chilisa and Mr Itumeleng, learned counsel for the first and second respondents respectively, argued that the operative date is November 2012 for purposes of reckoning when the clock started ticking towards the lapse of the one year period referred to in s.39 of the Act. They have further argued that issue estoppel does not arise in this case because the

issue of jurisdiction was raised at the appropriate stage after the complaint was re-instated. According to counsel, at the first hearing the issue did not arise as there was no valid complaint referred to the Commission, owing to the Authority's failure to file a valid affidavit in support of its complaint. In relation to the second hearing which dealt with an alleged non-compliance with the 14 day period within which to file the complaint afresh by the Authority, counsel's submission was that the respondents never waived their rights to raise the issue of non-compliance with s.39 on timelines and further that, it being a question of jurisdiction in terms of statute, it could not be waived. It was argued further by counsel for the respondents that as at 4 December 2014 the pleadings did not relate to the issue of s.39 and accordingly that the Commission never had to deal with that issue until on March 2015 when it was raised in the respondents' pleadings. In a nutshell, they argued that the requirements of issue estoppel have not been satisfied.

DETERMINATION

13. The starting point is when did the Authority "open" or commence its investigation? This is a question of both fact and of law in so far as s.39 of the Act is concerned.

14. To the extent material, and for purposes of this judgment, the relevant portions of s. 39 of the Act provide as follows:

> "39(1) *The Authority may at any time following the opening of an investigation, and shall, if any party under investigation so requests, 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) *(not relevant)*
>
> (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."*

15. According to the founding affidavit of one Goitseone Modungwa, filed in support of the appellant's complaint before the Commission, the Authority received a complaint on 23 October

2012 from a source it has since decided not to disclose. Preliminary investigations led to the respondents among other entities, being investigated in relation to Tender No. PR:8/6/2/11 (1) floated by the Ministry of Local Government through its Food Relief Services Division.

16. At Pargraphs 12, 13, 14, 15, 16, 17, 18 and 20 of the founding affidavit, Modungwa states as follows:

> "12. *After receiving the information a docket was opened under file no. CARAC/WOO7/2012 Vol. I Preliminary enquiries commenced immediately.* ***I note that in terms of s. 39 of the Act, the Executive Secretary of the Authority is required within one year after the investigation is opened to refer the matter of complaint to the Commission*** *if in the opinion of the Authority a prohibited practice has been established. This requirement has been satisfied.* [underlining mine].
>
> *(xiii) Procedurally, after receiving a complaint, the Authority will conduct a preliminary assessment of the allegation to establish whether a prima facie case of prohibited conduct can be sustained. Where the Authority has reasonable grounds for suspecting that an enterprise has engaged in a horizontal agreement prohibited in terms of s. 25 of the Act, it will open an investigation by giving written notice in accordance with s. 35(2) of the Act. In the present matter, the initial preliminary assessment revealed that there was no adequate information to found an investigation. As such, the investigation was not opened immediately after receiving the complaint referred to above.*
>
> *(xiv) However, on 21 November 2012, notice in writing in terms of s. 35(4) of the Act to Public Procurement and Asset Disposal Board (PPADB), for the attention of the Chief Executive Officer Ms Bridget P. John, requiring*

PPADB to produce to the Authority with any document pertaining to the Tender in question.

(xv) In response the notice PPADB produced the following documents to the applicant:-

a. The Invitation to Tender titled A TENDER FOR THE MANUFACTURE AND SUPPLY OF 7530 METRIC TONNES SUGAR BEANS FOR THE GOVERNMENT OF BOTSWANA REFERENCE NO: 8/6/2/11 dated May 2012;

b. Tender submission by Bread and Butter Foods submitted by Mosupi Mosomosomo on 12 July 2012, marked tender document No: (10);

c. Tender submission by Rabbit Group (Pty) Ltd submitted by Rabbie Ratshosa on 12 July 2012, marked tender documents NO: (11);

d. Record of Bid Opening – Single Envelope dated 12 July 2012;

e. Letter from Department of Local Government Finance & Procurement Services to PPADB dated 14 September 2012 requesting adjudication of the Tender together with the Evaluation Report dated 6 September 2014;

f. The Tender Adjudication Summary prepared by Motsomi Onthusite and dated Monday 17 September 2012; and

g. Recommendation for Award of tender and Approval of Award of Tender dated 28 September 2012.

16 *On perusing the said documentation, especially the tender documents submitted by some of the tenderers, I established that there were reasonable grounds of suspicion that there was collusion between some of the tenderers to rig the tender. The documents provided by PPADB showed that 16 enterprises submitted tenders for the project and that the tender awarded was split between the 1st and 2nd respondents even though all the tenderers had each tendered to the entire project.*

17. *As a result, the applicant then focused the attention on how the two respondents had won the tender. In June 2014, search warrants were sought and obtained from the magistrate court in Gaborone for purposes of conducting a search at the business premises of the suspected bidders.*

18. *This procedure was adopted because there were reasonable grounds for suspecting that the respondents may not cooperate; that if given advance notice of the intention to investigate them, they might conceal or even destroy material evidence, thus compromising our ability to conduct a thorough investigation on the matter. Armed with search warrants, we mounted a dawn raid at the premises of the respondents, including those of Oseg Group (Pty) Ltd and Oseg Capital as they too were suspected collaborators in the crime, at the time. The four offices were raided simultaneously on 10 July 2013.*

19. *(not relevant)*

20. *After the search aforesaid was concluded, an investigation was opened against the 1st and 2nd respondents on 25 July 2013 as there was prima facie evidence of collusion and they were both issued with Expost Notice of Intention to Investigate in terms of s. 35(2) and (3) of the Act."*

17 Section 35 (4) of the Act provides as follows:

"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, in a statement signed by

(i) that person

(ii) In the case of a body corporate, a director or member or other competent officer, employee, or agent of the body

corporate, within the time and in the manner specified in the notice;

(b) to produce to the Authority, or to a person specified in the notice to act on the Authority's behalf, any document or article as specified in the notice, which relates to any matter which the Authority considers relevant to the investigation;

(c) to appear before the Authority or before a person specified in the notice to act on the Authority's behalf, at a time and place specified in the notice, to give evidence or to produce any document or article specified in the notice."

18 Sections 36(2),(b), (f) and (h) of the Act, in terms of which search warrants were applied for, and issued against the respondents, among other entities, provide as follows:

"(2) *Subject to subsection (3), an inspector appointed and authorized in writing by the Authority, may at any time during normal business hours-*

(a) *(not relevant)*

(b) *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;*

(c) *(not relevant)*

(d) *(not relevant)*

(e) *(not relevant)*

(f) *take extracts from, or make copies of, any book or the document found on the premises that has a bearing on the investigation;*

(g) *(not relevant).*

(h) *attach and, if necessary, remove from the premises for examination and safeguarding, any document or article that has a bearing on the investigation."*

19. The contention of the respondents on the one hand is that the investigation against them was opened in November 2012. The appellant on the other hand argues that the investigation was "opened" or commenced at the time when the respondents were given their written *ex post facto* notice of investigation on 25 July 2013. This, it should be noted was done well after the docket in relation to the respondent was opened in November 2012 and a written request simultaneously issued to the PPADB to avail information pertaining to the tender then under investigation.

20. The Commission held, on the basis of the above facts, that the investigation in relation to the respondents was opened in November 2012 and that that was when the clock started ticking towards the expiration of the one year period within which the Authority could validly refer the case to the Commission for adjudication or failing such referral within one year, it would be considered that a notice of non-referral has been issued.

21. Mr Brassey has argued that the period of one year after an investigation has been opened is not for the benefit of the

"accused", as he put it. The accused here should be understood to be referring to an entity circumstanced as the respondents.

According to him the time limit is for the benefit of a complainant and therefore that the accused entity cannot plead the expiration of that period as having had the effect of extinguishing the right of the Authority to prosecute a complaint before the Commission. For this proposition, this Court has been referred to the case of *Competition Commission v. Yara (SA) (Pty) Ltd and Others 2013(4) SA 302 (SCA)*, to which I will refer later in this judgment. I have great sympathy for the position postulated by the appellant, but I hold a different view.

22. I think the application of s.39(2)(a) as read with s.39(4) of the Act should be understood with reference, additionally, to the provisions of s.39(5) of the Act. The provisions of the Act, or the Act itself should be read together or as a whole. I think this is a basic and trite cannon of statutory interpretation for which there is no need for recitation of judicial authorities.

23. As rightly pointed out by counsel for both sides, there are two scenarios pertaining to an investigation of a prohibited practice in terms of the Act. These are: (1) A case where there is a complainant and another, (2) where the Authority, of its own motion, and after having received information initiates or opens an investigation. The present case, it is common cause between

the parties, is the latter scenario. I will however, and for purposes of a clearer understanding of the conclusion I have come to on the

issue of when the clock started ticking, consider the matter first on the basis of a hypothetical complainant. The way I see it is that if the source of the complaint which triggered an investigation in this matter was a known complainant, who would be entitled to demand that his or her complaint be referred to the Commission for adjudication, the clock for him or her would have started ticking on 23 October 2012 at the very earliest, when he or she lodged a complaint with the Authority, or at the very latest, on 21 November 2012 when the Authority issued and served a s.35(4) notice on PPADB. For such a complainant, it would have been important to take note of the relevant time period for purposes of determining when they would be entitled to assert that a notice of "non-referral" (a default notice) has been "issued" by the Authority in terms of the deeming provisions of 39(5) of the Act. I do not think such a complainant would be heard to say any other starting point of enquiry, in the circumstances of this case is applicable to his or her complaint, other than the 23rd October 2012 or, at the very maximum, the 21st November 2012. If such a complainant would not themselves have referred the matter, directly to the Commission within the one year period reckoned,

generously, from 21 November 2012 their right to be heard by the Commission would be extinguished by effluxion of time. I think the appellant agrees that that is so. 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 s.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 s.39(1)(a) would become a matter for determination by the Authority and not the Commission.

24. In my view when the Authority should be adjudged to have "opened" an investigation must always remain a matter for objective assessment and determination on the basis of the facts and circumstances of each case. Where the facts are very clear, and capable of objective assessment as in the present case, a court should be able to make a determination as to when the Authority "opened" or commenced its investigation. In this case, I am satisfied, and accept the Commission's finding that the investigation into the alleged prohibited practice of the respondents by the Authority was opened on 21 November 2012 and that the

clock started ticking from that date towards the expiration of the one year period within which the Authority could validly place its complaint before the Commission for adjudication, barring any extension of the period in terms of s.39(4)(b) of the Act.

25. What is also clear to me, and that which the Commission found, is that the appellant never at any stage applied for an extension of time in terms of s. 39(4) (b) of the Act. It was suggested, on behalf of the appellant, that by its order of 10 September 2014, the Commission extended the period by 14 days and that it was accordingly precluded from "revisiting" the issue on the basis of the *funtus officio* principle. I did not understand Mr Brassey to be actively pursuing this point, and I think rightly so, with respect. I think it is quite evident from the record in this matter that on 10 September 2014 the Commission was not seized with, and did not deal with and decide, the issue whether the referral was or was not time-barred. Even if it could be argued that the Commission's order granting the appellant leave to reinstitute the referral, if it was so minded, had the effect of extending the period under consideration such an argument would do violence to the clear provisions of s. 39(4)(b) which allows such an extension of time, on application by the Authority to be made before the end of the period of one year [Vide s. 39(4)(b)]. The Commission could therefore not have "extended" a period that had elapsed by effluxion of time.

There was no valid period of time, in my judgment capable of being extended. So, even if it could be held, in favour of the appellant that the Order of 10 September 2014, which struck out the first referral on account of non compliance with rule 12 sub-rule (2) of the rules of the Commission interrupted "prescription" it could reasonably not have had that effect because by then the right of the Authority to prosecute the complaint before the Commission was water under the bridge. In the case of *Macfoy v. United Africa Co. Ltd [1961] 3 ALL ER 1169 at pp.1172 I – 1173A* of the report Lord Denning stated the following:

> *"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is* founded on it is *also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim is a nullity."*

(Incidentally, this dictum of Lord Denning was cited by Mr Chilisa, on behalf of the second respondent in his heads of argument on the same issue before the Commission at the second hearing). I am of the view that, in any event, the Commission did not by its order of 10 September 2014 even purport to extend the period in terms of s. 39(4) of the Act as suggested by the appellant. Such a suggestion in my view would do violence to the meaning and effect to be attached to the said order. This conclusion should, I think,

bring me to the stage where I should consider the appellant's second leg of its argument, that is, issue estoppel.

26. The appellant's submission in relation to issue estoppel is that the respondents did not raise the issue of jurisdiction based on s. 39(1) of the Act at the first and second hearings. The argument is further that the respondents raised their points *in limine* piece-meal, besides not having raised the issue of jurisdiction at the first and second hearings. It is also suggested that the Commission impliedly decided the issue against the respondents at the second hearing.

27. I have already dealt with the issue that was before the Commission at the first hearing. It related to the failure to file an affidavit in support of its referral in terms of rule 12 (2) of the rules of the Commission. There is no appeal against that decision.

28. At the second hearing the first respondent raised the preliminary point that the referral by the Authority was reinstated outside the 14 day period ordered by the Commission. The second respondent also raised the same point of law as a preliminary point, as well as the point of jurisdiction based on the issue of the referral having been reinstated or put before the Commission after the expiration of

one year. It argued in its written heads of argument that the referral was time-barred. There is no indication that the

Commission ever dealt with this latter declinatory objection raised by the second respondent at the time. In fact, the record shows that the issue was never dealt with. The question therefore is whether issue estoppel and/or waiver or *res judicata* apply in this matter.

29. RES JUDICATA/ISSUE ESTOPPEL AND/ OR WAIVER

In the case of *Bafokeng Tribe v. Impala Platinum Ltd 1999(3) SA 517 (B) at p. 566 D – G* Friedman JP held as follows:

> *"A court must have regard to the object of the exceptio res judicata that it was introduced with the endeavour of putting a limit to needless litigation and in order to prevent the recapitulation of the same thing in dispute in diverse actions... This principle must be carefully delineated and demarcated in order to prevent hardship and actual injustice to parties. The doctrine of issue estoppel has the following requirement: (a) where a court in a final judgment on a cause has determined an issue involved in the cause of action in a certain way (b) if the same issue is again involved and the right to reclaim depends on that issue, the determination in (a) may be advanced as an estoppel in a later action between the same parties, even if the later action is founded on dissimilar cause of action, issue estoppel is a rule of res judicata..."*
>
> See also the case of *Smith v. Parritt and Others 2008 (6) SA 303 (SCA)* (referred to by Mr Brassey in his written heads of argument as well as during argument); *Stolz v. Pretoria North Town Council 1953(3) SA 884 (TPD)*.

30. As to the issue of waiver, Mr Brassey has referred this Court to the case of *Van Aswegen v. Van Aswegen 2006 (5) SA 221 (SE)* *where at p. 247 E – F* Kroon J stated that :

> *"A waiver may be express or implied. There is, however, a strong presumption against waiver. The onus is on the party asserting waiver to prove it. Although the normal civil standard of proof on a balance of probabilities is applicable, the onus is a stringent one and is not easily discharged, and clear proof of waiver is required, especially of a tacit, as opposed to an express, waiver. The clear proof must demonstrate that the person alleged to have waived his or her rights fully knew what those rights were and decided to abandon same."*

31. In the present case, it is clear to me that the Commission never dealt with the issue of its jurisdiction in relation to s. 39 of the Act. It was never a live issue before it at the first hearing. At the second hearing, the second respondent raised it in its written heads of argument, but the Commission never made any decision on it. So in my mind the issue of *res judicata* or waiver or issue estoppel cannot avail the appellant in the circumstances of this case and its appeal on the grounds of *res judicata,* waiver and issue estoppel must fail. There is no evidence on record either express or implied that the respondents ever waived their right to plead that the appellant's referral of the complaint to the Commission was time – barred. At least in relation to the second respondent, no such conclusive inference can be drawn on a balance of probabilities.

PRESCRIPTION/JURISDICTION

32. Section 39 (2) (a) as read with ss. 39 (4) (b) and 39(5) of the Act leave me in no doubt that a referral of a complaint by the Authority to the Commission for adjudication must be done within one year (subject to extension of that period within one year). Failure to do so will render the complaint to have been not so referred (non – referral notice). I am satisfied that what the legislature intended by the above provisions was that if the Authority or a complainant was desirous of referring a complaint to the Commission for adjudication, such a party had to do so within one year following the opening of an investigation. If no such referral is made (in the circumstances of this case, by the appellant) the Authority shall be considered, or deemed to have issued a notice of non-referral. In the particular circumstances of this case the appellant had ample time to apply for extension of time, but it did not exercise that option. Where a right to institute action, or register a complaint with a quasi judicial body is conferred by statute, and the same statute also prescribes a period within which such a right can be exercised, failure to act within the stipulated time frame will render the right extinct and undress the quasi judicial body or court of the jurisdiction to deal with the complaint except where the statute gives the tribunal or court some discretion to condone non- compliance. The case in

point, for example is Order 61 of the rules of the High Court [on Reviews).

See also; *Mmolawa v. Lobatse Clay Works [1996] BLR1 (IC).*

33. It was argued, very strongly, by Mr Brassey that the stipulated period of one year in terms of s.39(1) as read with ss.39(4)(b) s.39(5) and of the Act is not for the benefit of the accused entity and therefore that the said sections are not for purposes of extinctive prescription in relation to the Authority's right to refer a complaint to the Commission for a adjudication. The case of *Yara, supra,* was cited as authority for that proposition.

34. The *Yara* case dealt with provisions of the Competition Act of South Africa (South African Act) with more or less similar provisions as our s.39 of the Act. The distinguishing aspect of the South African legislation is that it draws a distinction between a referral by its Competition Commission (our Competition Authority) to its Competition Tribunal (our Competition Commission) of a complaint by a complainant as opposed to that initiated by the Competition Commission itself *ex mero motu.* The relevant provisions of the South African Act (as

dealt with in the *Yara* case are s.49 B, s.50 and s.51. They read as follows:

"49B *Initiating complaint*

(1) *The Commissioner may initiate a complaint against an alleged prohibited practice.*

(2) *Any person may-*

(a) Submit information concerning an alleged prohibited practice to the Competition Commission, in any manner or form; or

(b) Submit a complaint against an alleged prohibited practice on the Competition Commission in the prescribed form.

(3) *Upon initiating or receiving a complaint in terms of this section, the Commissioner must direct an inspector to investigate the complaint as quickly as practicable.*

(4) ...

50 Outcome of complaint

(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 Commissioner must-*

(a) Subject to subsection (3), refer 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.

(3) *When the Competition Commission refers a complaint to the Competition Tribunal in terms of subsection (2)(a), it:*

(a) may –

(i) refer all the particulars of the complaint as submitted by the complainant;

(ii) refer only some of the particulars of the complaint as submitted by the compliance; or

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

(b) must issue a notice of non-referral as contemplated in subsection (2)(b) in respect of any particulars of the complaint not referred to the Competitions Tribunal.

(4) *In a particular case –*

(a) The Competition Commission and the complaint may agree extend the period allowed in subsection (2); or

(b) on application by the Competition Commission made before the end of the period contemplated in paragraph (a), the Competition Tribunal may extend that period.

(5) *If the Competition Commission has not referred a complaint to the Competition Tribunal, or issued a notice of non-referral, within the time contemplated in subsection (2) of the extended period contemplated in subsection (4), the Commission must be regarded as having issued a notice of non-referral on the expiry of the relevant period.*

51. Referral to Competition Tribunal

(1) If the Competition Commission issues a notice of non-referral in response to a complaint, the complainant may refer the complaint directly to the Competition Tribunal, subject to its rules of procedure.

(2) A referral to the Competition Tribunal, whether by the Competition Commission in terms of section 50(1), or by a complainant in terms of subsection (1), must be in the prescribed form."

34. In referring to s.50(2) of the South African Act, which is almost in *pari materia* with our s. 39(2) of the Act, Brand JA at page 310 A – C of the report in the *Yara* case, supra, stated as follows:

> *"In this case, the Commission referred a complaint against Clover and Others to the Tribunal. Clover and its co-respondents objected to the referral on the basis that it derived from a complaint submitted to the Commission by a*
>
> *dairy farmer, Mrs Malherbe, in terms of section 49 B (2) (b); that the time period of one year provided for in section 50(2) had elapsed since Mrs Malherbe had submitted a complaint; and that a referral of her complaint was thus time barred by the section. The Commission's response was a denial that it acted in terms of section 50(2). The complaint referred, so it contended, did not derive from a complaint submitted by Mrs Malherbe; it was a complaint initiated by the Commission in terms of section 49 B (1) on information provided to it by Mrs Malherbe in terms of Section 49 B (2) (a); in consequence the referral was in terms of section 50(1) which, unlike section 50(2), contains no time bar."*

35. At page 316 h-j Brand JA makes further reference to the effect that s.50 (2) of the South African Competition Act (the equivalent of our s. 39(2)) contains a time bar to the right of the Authority to make a referral in relation to a complaint submitted by a complainant.

36. Our Act, in terms of s. 39(1) as read with ss 39(2), 39(4)(b) and 39(5) does not make a distinction between a referral arising out of a complaint by a complainant and a complaint initiated by the Authority, of its own motion, from information it may have received from whatever source.

37. The key words in s.39 of the Act are, in my view, "**following the opening of an investigation**" (s.39(1) of the Act) and "**after an investigation is opened by the Authority**" [s.39(2) of the Act]. They give a clear indication as to when the clock should start ticking. In my view the words, "The Authority **may at any time**" contained at the opening of s.39(1) of the Act, refer to "any time" within the one year referred to at s.39(2) of the Act, and should be read as being subject to the right of "**any party under investigation**" requesting of the Authority to convene a hearing before the Commission instantly. In this latter scenario, the Authority has no latitude to decide when to cause the Commission to convene, it should do so as expeditiously as the party under investigation requests. However, in the other situations referred to in s.39, the Authority or complainant, as the case may be, must, following the opening of an investigation, refer the matter to the Commission, if at all, within one year.

CONCLUSION

38. The conclusion I have come to is that this appeal is liable to be dismissed.

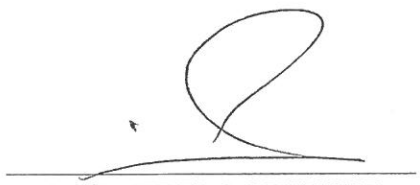
39. On costs, I think costs should follow success.

40. The order I make is therefore the following:

1. The appeal is dismissed.

2. The appellant is ordered to pay the respondents' costs of this appeal.

DELIVERED IN OPEN COURT AT GABORONE ON THE 7TH DAY OF APRIL 2016.



G. G. KETLOGETSWE
[JUDGE]