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

COURT OF APPEAL CIVIL APPEAL NO. CACGB-142-16
HIGH COURT CIVIL CASE NO. CAHGB-000037-15

In the matter between:

RABBIT GROUP (PTY) LTD **APPELLANT**

and

COMPETITION AUTHORITY **RESPONDENT**

Attorney Mr M.M. Chilisa (with Ms G.O. Ifezue) for the Appellant

Attorney Mr A.W. Modimo (with Mr T.M. Rasetshwane) for the Respondent

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J U D G M E N T

CORAM: **FOXCROFT J.A.**
HOWIE J.A.
LORD HAMILTON J.A.

LORD HAMILTON J.A.

1. The respondent ("the Authority") is a body established under section 4 of the Competition Act (Cap 46:09) ("the Act") with certain responsibilities in relation to anti-competitive practices in the economy (section 5(1)). On 29 July 2013 the Authority received information (from a person whose identity remains undisclosed) which suggested that there might have been an anti-competitive practice (in relation to bid rigging) between

the appellant ("Rabbit") and another enterprise ("Creative"), with respect to a contract for the supply of infant formula to the Ministry of Health. Such bid rigging, if it had occurred, would have been in contravention of section 25 of the Act.

2. This led the Authority to "start" under section 35 of the Act an investigation into the practice in question with a view, if the investigation justified it, to referring the matter to the Competition Commission ("the Commission"), a body established under section 9 of the Act. The precise date on which that investigation started (or "opened") has not been determined in any court of law and may be controversial.

3. Section 39(2) of the Act provides that "within one year after an investigation is opened" by the Authority, its Executive Secretary shall "refer the matter to the Commission if the Authority determines that a prohibited practice has been established; or, in any other case, issue a notice of non-referral to the complainant, in the prescribed form". As is plain from section 35(1), a "complainant" is a person who has complained

about the alleged practice, not the enterprise or enterprises in respect of which the complaint is made. Subsection 39(4) provides:

> "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."

4. If the matter in question is duly referred to the Commission, it may take various steps with a view to it determining whether or not in its judgment there has been a contravention of section 25. If in due course it determines that there has been, it is open to it to impose certain penalties on the contravening enterprise or enterprises.

5. Various steps were taken by the Authority, including a request, on 6 August 2013, of the Public Procurement and Assets Disposal Board for the release of certain documents and

intimation, on 29 August and 3 September 2013, to Rabbit and to Creative respectively, of its intention to investigate.

6. No agreement was made under section 39(4)(a) between the Authority and any complainant to extend the period under subsection (2). However, an application to extend that period was made by the Authority to the Commission under section 39(4)(b). That application was made, as a matter of urgency, on 27 August 2014. It was accompanied by an affidavit sworn by its then Acting Chief Executive who deponed that "On 26 August 2013 the Competition Authority opened an investigation ... and that the one year period will lapse on 27th August 2014 and the investigative process would not yet be complete". The application was made *ex parte*. (There is no provision for the involvement of others at that stage). On 27 August 2014 the Commission made an Order in the following terms:

> "The Applicant is granted an extension of six (6) months to conclude its investigation in [the Authority] and [Rabbit] and [Creative]."

7. In February 2015, by Notice of Motion filed with the Commission, the Authority referred a complaint to the Commission against Creative and Rabbit in relation to the alleged bid rigging. That Notice was duly served on each of Creative and Rabbit. Both gave notice of opposition to the complaint. In due course Rabbit further gave notice of its intention to raise certain points *in limine*. (It appears that Creative may also have done so in the same or in similar terms; but Creative, though it appeared in the court *a quo*, has not appeared in the present appeal and any such notice it gave is not with the record). Rabbit's points *in limine* were as follows:

> "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 25 August 2014 if one has regard to the fact that on the Authority's version an investigation was opened on 26 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 26 August 2014. The last day on which they could be brought, in terms of the invalid extension, was 25 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."

8. As regards paragraph 3 of the points *in limine*, this court was informed that proceedings had in fact been instituted in the High Court but subsequently stayed there and remained stayed. By Consent Order dated 26 May 2015 the Commission made an Order 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 25 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 26 August 2014 in accordance to section 39(4)(b);

v) whether *in casu* the Competition Commission can declare its order of 26 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 authorised 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."

9. The Commission heard argument from parties and, on 18 August 2015, it made an Order in the following terms:

"[189] We find that the Applicant [the Authority] 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.

[190] Therefore, there has been a non-referral.

[191] There is no order as to costs.

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

10. Against that decision the Authority appealed to the High Court under section 70(1) of the Act which provides:

> "An enterprise or person aggrieved by any decision of the Commission may appeal to the High Court against that decision."

Before this court it was accepted by both parties that the Authority was a "person aggrieved" within the meaning of that subsection.

11. The High Court entertained the appeal, which was argued before Walia J. It ultimately allowed it. Put broadly, the basis of its decision was that the Commission, having on 27 August 2014 granted a six month extension (see para 6 above), was

then *functus officio* and, accordingly, could not revisit that decision by its determination of 18 August 2015. Consequently, the High Court held that the point *in limine* which the Commission had sustained was unsound. Walia J. then remitted the matter back to the Commission for hearing on the merits of the complaint.

12. Against that disposal Rabbit has appealed to this court. In that connection I should observe that section 71(3) provides:

> "An appeal against [the High Court's] judgment may be made to the Court of Appeal, but only –
>
> (a) on a point of law arising from the judgment of [the High Court] ..."

13. It will be recalled that the Commission did not deal with the point *in limine* taken in paragraph 2 of Rabbit's Notice, though it was addressed on that point. Likewise, the High Court did not deal with it although, we were advised, it also had been addressed on it. In this court the point was addressed by Rabbit as an alternative argument to its main argument; but it is convenient to deal with it at this stage.

14. Under section 71(3) an appeal lies to this court against a judgment of the High Court only "on a point of law arising from the judgment [of the High Court]." It was not suggested before us that, Walia J. having been addressed on this point but not having in his judgment dealt with it, it was not a point of law "arising from the judgment". This court proceeds, for the purposes of this appeal, on the basis that the point, if it is simply a point of law, is properly before it.

15. It is undisputed that, when the Authority on 27 August 2014 made its application to the Commission for an extension of time, that application was accompanied by an affidavit sworn by its responsible officer which included the statement that it had opened its investigation on 26 August 2013. The Commission, in granting an extension of six months, did not, in its Order, expressly state when that extension period began; nor, consequentially, when it would end. However, identification of the end of that period is critical to answering the question whether, when the Authority in February 2015

referred the complaint to the Commission, that referral was out of time and, accordingly, invalid. The date in February when the referral was made is not in dispute. Mr Modimo for the Authority accepted in argument that the referral was made on 26 February 2015; and this is confirmed by the Commission's date stamp on the relative form, which is included in the record.

16. Mr Chilisa for Rabbit submitted that, the Commission's Order of 27 August not having on its face identified the starting point of the extension period granted, it was necessary in construing it to have regard to the context in which it was granted and, in particular, to the date which the deponent had identified as that on which the Authority had opened its investigation. That was stated to have been 26 August 2013. Thus the Order made was to be taken as having granted an extension commencing immediately after the expiry of one year from that date. Mr Modimo, on the other hand, submitted that the

extension was to be taken to have commenced on the date of the Order, namely 27 August 2014.

17. It is now undisputed that the mode of calculating time provided for by section 41 of the Interpretation Act (Cap 01:04) is applicable for present purposes. It provides that a month means a calendar month and that "it is to be reckoned from the date on which it is to begin to the date in the next month numerically corresponding, less one ...". Examples are given, including that a month beginning on 15 January ends on 14 February. A year is to be calculated as 12 months.

18. So, if the eighteen months (the initial year and an extension of six months) are to be calculated from 26 August 2013, that period expired on 25 February 2015. If the six months extension is to be calculated from 27 August 2014, that period expired on 26 February 2015. The referral was filed on 26 February 2015. If the relative period expired on that date (that

is, on the last moment of that date) it was filed timeously. If it expired on 25 February, the referral was out of time.

19. It will be recalled that in the affidavit accompanying the application for the extension the deponent not only swore that the Authority had opened its investigation on 26 August 2013 but also that the one year period "will lapse on 27th August 2014". If the former statement was correct, the latter statement was incorrect. If the investigation was opened on 26 August 2013, the one year period, on the statutory basis, expired on 25, not 27, August 2014.

20. In view of the possible significance, for the purposes of interpreting the Commission's written grant of the period of extension, of the statement by the deponent that "the period of investigation of this case will lapse on 27th August 2014" (a point which had not been explored at the oral hearing), the court invited the parties to make submissions in writing to it on

that point. This they duly did and the court has taken into account these submissions.

21. In construing the meaning and effect of the Commission's grant of an extension of six months (the starting date of which was not specified in the grant), it is necessary to take into account such information as was before the Commission at the time when it made that grant. It has subsequently emerged that there is a difference of view as to when exactly the Authority opened its investigation. But the Commission did not, at the date of its grant, know that such a difference might emerge nor what was in fact the correct answer to the question of the opening date. On the face of its application the Authority stated that the period of investigation would lapse on 27 August 2014 and that it was approaching the Commission "for relief as sought in the Draft Order". The Draft Order, though it sought an extension of 6 months, did not specify from what date such extension would run; nor did the Order as granted. The natural implication is that what was sought, and was

granted, was an extension from (the last moment of) 27 August, being the time when, according to the application, the (one year) period of investigation would "lapse". This happened to be the day on which the Order was granted, but that is not determinative for the purposes of the relevant interpretation.

22. Accordingly, even if the order of extension which it made was unlawful (because the Authority's application for it was out of time), that order granted an extension which expired at the last moment of 27 February. A referral made in the course of that day was in time. Rabbit's "alternative argument" must for these reasons fail. It is accordingly necessary to address the main argument for Rabbit.

23. In the court *a quo* there were, in the end, two principal issues to be addressed. The first was, in substance, a contention by the Authority that the one year period within which application by it for an extension of time had to be made under section

39(4)(b) applied where there was a complainant but not where the Authority had, as in the present instance, initiated the investigation solely at his own initiative. Walia J. rejected that contention and his conclusion on that matter has not been challenged in this appeal.

24. The second issue was, in substance, whether the Commission had erred in law in holding that it was entitled itself to revisit (and hold as unlawful) its earlier decision of 27 August 2014 granting the extension of time, the later decision having been made at a time when its power to grant an extension of time had already expired. Walia J. held that the Commission was not at liberty to review its earlier decision. He accordingly allowed the appeal and remitted the matter to the Commission for it to proceed with the referral. Against that order Rabbit has appealed to this court.

25. Before Walia J. and before this court there was much discussion of the doctrine of *functus officio*, when it applied and what were the exceptions to its application. That doctrine is a

well-established concept in the law of Botswana, as it is in other jurisdictions. It has been applied in this jurisdiction, principally but not exclusively, in relation to certain decisions made by courts of law. In **VANDECASTEELE AND ANOTHER v AGS CONSTRUCTION [2010] 3 BLR 498** this court, applying the doctrine, held that, once a court had pronounced a final judgment or order in a matter, it was *functus officio* and could not correct, alter or supplement that judgment or order. In doing so it followed the Full Bench decision in **MONNANYANA v THE STATE [2002] 1 BLR 72**. In **VANDECASTEELE** the decision in question was a decision made in the High Court sitting on civil business where the court, having dismissed the plaintiff's claim, subsequently reinstated it. This court held that the High Court, being in these circumstances *functus officio*, was not entitled to do so. In **MONNANYANA** (a criminal case) the appellant had been convicted in a magistrate's court of store-breaking and theft and sentenced to a term of imprisonment. He appealed unsuccessfully against conviction to the High Court and then

further appealed to the Court of Appeal. That further appeal was also dismissed. He was not legally represented at that appeal. He subsequently wrote to the Registrar requesting the reinstatement of his appeal on certain matters, maintaining among other things, that, for certain reasons, his trial and subsequent conviction in the magistrate's court was a nullity. The Court of Appeal held that the court, having dismissed the appeal, was *functus officio* and could not re-open it.

26. The doctrine has been applied in this jurisdiction more widely than with respect to decisions of courts of law. In **TSOGANG INVESTMENTS v PHOENIX INVESTMENTS [1989] BLR 512** Lawrence Ag. J. in review proceedings applied the doctrine in relation to a decision of the Minister of Commerce and Industry. The Minister, having considered an appeal from a decision of Gaborone Town Council refusing to grant a trading licence, dismissed that appeal. Thereafter, the Minister, having received certain further representations from the applicant for the licence, after reconsideration, reversed his earlier decision

on the ground that in making it he had made a mistake in law. Lawrence Ag. J. held that, the Minister having earlier dismissed the appeal, he was *functus officio* and could not reconsider it; his later decision was accordingly a nullity.

27. Lawrence Ag. J, under reference to an observation made by Schreiner JA in **PRETORIA NORTH TOWN COUNCIL v A.I. ELECTRIC ICE CREAM FACTORY 1953 (3) SA 1 (AD)**, said at p.522:

> "... the important matter is to examine the statute and the powers given to the Minister. No power is given by the statute to the Minister to correct, vary or otherwise deal with the decision which is wrong in law; indeed, the words "the decision of the Minister shall be *final*" in section 44 reinforce that conclusion."

Lawrence Ag. J. then referred to **R v AGRICULTURAL LAND TRIBUNAL (SOUTH EASTERN AREA); EX PARTE HOOKER [1951] 2 All ER 801** (a decision of the English Divisional Court) and to certain South African authorities, including **MINISTER OF AGRICULTURAL ECONOMICS AND MARKETING v VIRGINIA CHEESE AND FOOD CO (1941)**

(PTY) LTD 1961 (4) SA 415 (T). In all the authorities referred to, the tribunal or other decision-making body was held to have been acting in a quasi-judicial capacity, so that the doctrine of *functus officio* applied to it in the same, or in much the same, way as it applied to judicial bodies. In the English case the great difference between a court and a tribunal (in that case the Land Tribunal) was emphasised (p.804 A-B).

28. In the present case it may be relevant to examine in what character the Commission is acting when it extends, or purports to extend, the one year period. For that purpose it is necessary to consider the terms of the Act. Under section 9(1) the Commission is established as "the governing body of the Authority and shall be responsible for the direction of the affairs of the Authority". Section 9(2) provides:

> "Notwithstanding the generality of subsection (1), the Commission shall –
>
> (a) adjudicate on matters brought before it by the Authority under this Act; and
>
> (b) give general policy direction to the Authority."

Where a referral has been made by the Executive Secretary of the Authority to the Commission under section 39(2) and the Commission is then addressing a question whether a prohibited practice has been established, the Commission will, at least ordinarily, be acting in a quasi-judicial capacity. It will require in its decision-making to act in a judge-like manner, not least because at that stage, regard must be had to the interests of enterprises whose actions have been called in question. By contrast, where an application has been made to it by the Authority under section 39(4)(b) for an extension of time, such an application is made *ex parte*, any enterprises whose affairs are under consideration by the Authority having no right at that stage to appear before, or make representations to, the Commission. That, as I read the statute, is because the one year investigative period referred to in section 39(2) is devised in the public interest (and possibly also in the interests of any complainant). It is to ensure, in the public interest, that such investigations do not drag on indefinitely. Likewise, the disposal of any application for an extension under section

39(4)(b) is to be addressed in the public interest. The Commission, in deciding whether or not to grant any such application and, if so, in what terms, must no doubt act fairly towards the Authority. But it is not seized, as it would be following a referral, with acting in a quasi-judicial capacity in a dispute between rival parties. Under section 39(4)(b) it may be acting more in a regulatory or administrative capacity. So, in relation to any exercise under section 39(4)(b), the same considerations do not necessarily apply as they would following a referral under section 39(2).

29. Under section 39(4)(b) the time within which the Commission, on the application of the Authority, may extend the one year period is specifically limited. It may do so only when any application is made to it before the end of that period; it cannot do so once the period has expired. There is nothing in the Act which expressly empowers the Commission to do anything in relation to any extension after the one year period has expired. In particular, there is no express provision which empowers it,

after the year has expired, to revisit or alter at its own hand any extension it has granted, whether that extension was lawful or otherwise. Nor, in my view, is such a power to be implied in the statute. That does not mean that, if the Commission acts unlawfully in relation to an application for extension of time, its doing so is necessarily immune from challenge. If a person with a legitimate interest is aggrieved by any unlawful extension purportedly granted, that person may resort to a court of law for redress. But it does mean, in my view, that the Commission has no power, at its own hand, to revisit, reverse or otherwise pronounce upon its earlier decision. That decision stands pending its being set aside by a court of law (**OUDEKRAAL ESTATES (PTY) LTD v CITY OF CAPE TOWN 2004 (6) SA 222 (SCA)** – see also **MABUTHO v MULALE [2013] 1 BLR 659 at p.664 G**).

30. In ordinary circumstances the author of a purely administrative act may alter or repeal it if he is subsequently convinced of the invalidity of that act. But, that will be so because such a

person has a continuing capacity in relation to the subject matter. By contrast, in the present case the Commission's capacity in relation to any extension of time expired when the one year period expired – whether the Commission was acting in a quasi-judicial or in a regulatory/administrative capacity.

31. Mr Chilisa placed some reliance on section 16 of the Interpretation Act (Cap 01:04) which provides:

> "Where an enactment confers a power to make an instrument, pass a resolution or give a decision, the power includes power, exercisable in like manner, to amend or revoke the instrument, resolution or direction."

But section 39(4) of the Competition Act does not confer a power to make an instrument or to pass a resolution or, in my view, to give a decision within the meaning of section 16 of the Interpretation Act; it confers a power (itself) to extend a period. In any event, the power to revoke is exercisable "in like manner" to that in which the relevant power was earlier exercisable. The power to extend the period was exercisable only where an application to extend it had been made before

the end of the one year period. A revocation in furtherance of section 16 could only be made on an application likewise made before the end of that period. No such application was made nor, in the circumstances, could have been made.

32. So, regard being had to the statutory provisions I hold that, whether in purportedly extending the period on 27 August 2014 the Commission was acting in a quasi-judicial or in an administrative capacity, it had no power after the year had expired at its own hand to reverse that decision or to rule that it had no jurisdiction to make it. On that ground Rabbit's main argument cannot succeed and Walia J's order to remit the matter back to the Commission to proceed with the referral must, subject to paragraph 34 below, be given effect. However, regard being had to paragraph 34, Walia J's order will require to be varied as set out in paragraph 36.

33. Before parting with this aspect of this appeal I would make one further comment. After the close of the hearing Mr Chilisa

made available to the court copies of various authorities, including authorities from elsewhere in the Commonwealth. Among these was the decision of the High Court of Australia in **MINISTER FOR IMMIGRATION AND CULTURAL AFFAIRS v BHARDWAJ (2002) 209 CLR 597**, in which there is discussion of many other cases, including the decision of the Supreme Court of Canada in **CHANDLER v ALBERTA ASSOCIATION OF ARCHITECTS [1989] 2 SCR 848**. As Kirby J. points out at para 101 of **BHARDWAJ**, the debate about the invalidity of administrative decisions made in breach of statutory requirements (or otherwise fundamentally flawed) "presents one of the most vexing puzzles of public law". This appeal is not the occasion on which to attempt to offer a solution to that puzzle. Suffice it to say that in **BHARDWAJ** (a highly sympathetic case in which an immigration tribunal first cancelled a student visa, having through its own administrative error failed to give the student a hearing, and thereafter, having realised its mistake, held a new hearing and revoked the cancellation) the Chief Justice of Australia (Gleeson CJ) made it

plain that the question whether a statutory tribunal has the capacity to reopen the matter (or is *functus officio*) turns upon a proper interpretation of the statute in question. That is the approach which I have endeavoured to take in this case. The present invalidity in the grant of the extension (if there was such an invalidity) does not, as cases such as **BHARDWAJ** do, cry out on grounds of fundamental justice for the desirability of the statutory body itself revisiting its decision.

34. Although the Commission had no power to make its order of 18 August 2015, that does not necessarily mean that Rabbit has no remedy. If Rabbit were in a court of law to establish, after a full examination of the whole relevant circumstances, that the Board's decision of 27 August 2014 was *ultra vires*, that court might be able to afford it redress. I express no opinion as to whether a court would, or should, do so.

35. As to costs, the court *a quo* made no order as to costs in respect of the appeal to it. I see no sufficient reason for

interfering with that order. Rabbit has been successful in its appeal to this court but only to the extent of securing a procedural variation of the judgment of the court *a quo*. Each party should bear its own costs in respect of that appeal also.

36. The order of the court is accordingly:

(1) The appeal is allowed but only to the extent that the order of the court *a quo* is varied to the following effect, namely, that the appeal to it from the Commission is allowed, the orders in paragraph 189 and 190 of the Commission's decision dated 18 August 2015 are set aside and the matter remitted to the Commission to proceed with the referral, but subject always to the present appellant's right to seek a stay of the referral pending resolution of any separate proceedings in the High Court for an order declaring the extension order invalid and for associated relief;

(2) Each party is to bear its own costs in the court *a quo* and in this court.

DELIVERED IN OPEN COURT AT GABORONE THIS 2ND DAY OF FEBRUARY 2017.

LORD HAMILTON
JUSTICE OF APPEAL

I AGREE

J.G. FOXCROFT
JUSTICE OF APPEAL

I AGREE

C.T. HOWIE
JUSTICE OF APPEAL