

IN THE COMPETITION COMMISSION HELD AT GABORONE

Case No: CC-Misca.App/01/13

In the matter between

COMPETITION AUTHORITY

APPLICANT

and

YA RAHEEM INVESTMENTS (PTY) LTD

RESPONDENT

CONSTITUTION OF THE COURT

Dr Zein Kebonang	Chairperson of the Competition Commission
Mr Gaylard Kombani	Commissioner
Dr Jay S. Salkin	Commissioner
Ms Tiny Kgatlwane	Commissioner
Mr Boniface Mphetlhe	Commissioner

APPEARANCES

Mr Duncan Morotsi and Mrs Gosupamang Daisy Tapiwa Masie (Applicant's Attorneys)

Ms Nazneen Mhaiker (Director Ya Raheem Investments (Pty Ltd)) for the Respondent

PLACE AND DATE OF PROCEEDINGS

GABORONE

17TH SEPTEMBER 2013

RULING

DR ZEIN KEBONANG

1. On the 17th September 2013, the Competition Tribunal dismissed the application by Applicant for a confirmation of an undertaking between the Applicant and Ya Raheem Investment (Pty) Ltd. The Tribunal now sets out its reasons as follows.
2. The Applicant brought its application by way of a notice of motion. The notice of motion was accompanied by an affidavit signed by one Gosupamang Daisy Tapiwa Masie.
3. The founding affidavit is reproduced hereunder:

"1. *I the undersigned,*

GOSUPAMANG DAISY TAPIWA MASIE

2. *do hereby make oath and state that:*

2.2 *The allegations contained herein are within my personal knowledge and belief, unless otherwise indicated and are to the best of my knowledge both true and correct.*

2.3 *I am an adult female of full legal capacity resident in Gaborone at Plot 6855, Broadhurst, Gaborone.*

2.4 *I am the Legal and Enforcement Manager of the Competition Authority (Applicant herein) and I am entitled to depose to this affidavit by virtue of the following:*

2.4.1 I received the initial complaint made to the Authority in respect of the alleged contravention of Section 25(c) by Ya Raheem Investments (Pty) Ltd (Respondent herein);

2.4.2 I was the inspector assigned to the investigation of the case and led the team of inspectors that conducted the search of the business premises of the Respondent; and

2.4.3 I am fully acquainted with all the facts relating to the investigation of this case.

- 3. The Applicant is a body corporate established in terms of the Competition Act (Cap 46:09). The primary role and responsibility of the Applicant is the prevention of, and redress for anti-competitive practices in the economy as well as the removal of constraints on the free play of competition in the market.*
- 4. In terms of the Competition Act, the Applicant can investigate any enterprise which is alleged to have engaged, engaging or about to engage in anti-competitive practices. The said investigations can be commenced by the Applicant either on its own initiative or upon receipt of information or on receiving a complaint from any person.*
- 5. The Respondent is a private company duly incorporated and registered in accordance with the company laws of the Republic of Botswana with its principal place of business at Plot 17546 Broadhurst, Gaborone.*
- 6. Subsequent to the Applicant's investigations, on 29th November 2012, at the instance of the Respondent, a meeting was held at which settlement discussions were commenced. During these discussions, the Respondent offered an undertaking in terms of section 47 of the Act and admitted having entered into an agreement with Mr. Thirumal Panja, a Director of Super Trading (Pty) Ltd, its competitor, for him to pass valuable information to it and assist it with preparing bids for the Government of*

Botswana Food Rations Tender No. 8/3/4/2011-2013. This was done in contravention of section 25(c) of the Competition Act.

7. *After engaging in discussions on the appropriate terms of the undertaking, on 11th December 2011 the parties eventually reached consensus and on 10th January 2013 an Undertaking was concluded. The Undertaking is attached hereto marked Annexure "A".*
8. *Accordingly, the Applicant prays that the Commission endorses the Undertaking as a Consent Order and respectfully makes a pronouncement on paragraphs 5 and 6 which should also be made part of the Consent Order.*

.....
DEPONENT

**THUS SIGNED AND SWORN TO BEFORE ME AT
GABORONE THIS OF 2013 AT
..... AM/PM. THE DEPONENT ACKNOWLEDGING THE
CONTENTS OF THIS AFFIDAVIT AS TRUE AND ACCURATE
AND CONSIDERING THEM BINDING ON HER CONSCIENCE.**

.....
COMMISSIONER OF OATHS"

4. According to the Affidavit filed by the Applicant, the Respondent "admitted having entered into an agreement with Mr Thirumal Panja, a Director of Super Trading (Pty) Ltd, its competitor, for him to pass valuable information to it and assist it with preparing bids for the Government of Botswana Food Rations Tender No 8/3/4/2011-2013.

This was done in contravention of section 25 (c) of the Competition Act”.

5. The alleged agreement between the Respondent and Mr Thirumal Panja was not attached in the Applicant's founding papers.
6. The Government Food Ration Tender document was also not attached to the Applicant's papers.
7. According to the Applicant, it was unnecessary to attach or produce either the Agreement or the Tender Documents as the Respondent had already admitted to wrong-doing. It was this view that left the Tribunal astounded because it was being asked to blindly accept and act on the averments made by the Applicant.
8. It is a well-established principle in motion proceedings that the Applicant stands or falls by its founding affidavit. As stated in the South African case of *Faber v Nazerion (2012/42735) [2013] ZAGP JHC 65*, this rule is also “based on the procedural requirement of the motion proceedings which requires that the applicant should set out the cause of action in both the notice of motion and the supporting affidavit. The notice of motion and the founding affidavit form part of both the pleadings and the evidence. The basic requirement is also that the relief sought has to be found in the evidence supported by the facts set out in the founding affidavit”.
9. We must pause here to register our concern regarding the approach adopted by the Applicant in this matter. The Applicant's founding papers as deposed to by **Gosupamang Daisy Tapiwa**

Masie were to put it mildly unintelligent and badly drafted. The papers provided no evidential or material information to found a cause of action. The so-called undertaking was simply a report that did little to cure the defects in the main application.

10. The Applicant should in future be mindful of the great responsibility bestowed on it by the Act. It must take such responsibilities seriously and must ensure that it brings properly founded cases before the Tribunal. Anything short will be a travesty.
11. Apart from the defective papers, according to the Applicant, the agreement to pass valuable information to the Respondent was not a breach of Mr Panja's fiduciary duties but rather breach of section 25 (c) of the Competition Act.
12. Section 25 (c) of the Competition Act provides as follows, "an **enterprise** shall not enter into a horizontal agreement with **another enterprise** to the extent that such agreement involves any of the following practices... **bid rigging**, except where the person requesting the bids or tenders is informed of the terms of the agreement before the time that the bids or tenders are made" (emphasis provided).
13. Asked whether Mr Panja was an enterprise for purposes of section 25 of the Act, the Applicant submitted that he was and referred the Tribunal to section 2 of the Act.

14. Section 2 defines an enterprise to mean "a person or group of persons whether or not incorporated, that carries on a business for gain or reward in the production, supply or distribution of goods or the provision of any service".
15. The Applicant contended that the provisions of section 2 were met because there was an exchange of information for payment. What the Applicant could not explain, however, was whether the exchange of information amounted to the carrying on of a business, production, supply or distribution of goods as provided for in section 2. The Applicant was guilty of selective reading.
16. To further argue its case, Applicant submitted that the Respondent colluded with Mr Panja in preparation of its bid(s). On a careful reading of the facts, the argument by the Applicant of collusion was misplaced.
17. Generally, collusion is an agreement between two or more parties to limit open competition by deceiving, misleading or defrauding others. The agreement is between and/or among firms or individuals to divide a market, set prices, limit production or limit opportunities.
18. In economics for instance, collusion takes place within an industry when rival companies cooperate for their mutual benefit, at the expense or to the detriment of the other party on the other side of the market or transaction. The basic idea, of course, is that firms collude to increase the prices they charge consumers, and the consumers cannot do much, if anything, about it, because there are no better

priced alternatives available to them. This benefits the colluding firms at the cost of efficiency, resulting in a lower level of social welfare.

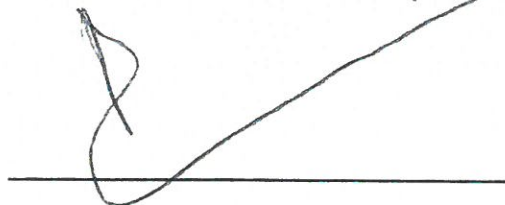
19. Bid rigging, as a form of collusion on the other hand, is a kind of fraud in which there is the appearance of several rival parties presenting their bids for a contract or tender, but the rival parties have already decided which of their group will submit the lowest bid and win the tender. This form of collusion is illegal in most countries. It is a form of price fixing and market allocation, often practiced where contracts are determined by a call for bids. Bid rigging almost always results in economic harm to the agency which is seeking the bids, and to the public, who ultimately bear the costs as taxpayers or consumers. It is for that reason that it is illegal.
20. There are a variety of common bid rigging practices, including, inter alia: bid suppression (where some of the colluders agree not to submit a bid so that another colluder can win the contract: complementary bidding or cover bidding or courtesy bidding (where some of the bidders agree to submit bids that are intended not to be successful, so that another conspirator can win the contract); bid rotation (where the bidders take turns being the designated successful bidder); or phantom bids (which are false bids taken by an auctioneer for the purpose of tricking a legitimate bidder into bidding more than he would have bid otherwise).
21. Bid rigging typically is intended to enable the "winning" party to obtain contracts at uncompetitive prices (i.e., at higher prices if they are sellers, or lower prices if they are buyers). The other parties to the collusion are compensated in various ways, for example, by cash

payments, or by being designated to be the "winning" bidder on other contracts, or by an arrangement where some parts of the successful bidder's contract will be subcontracted to them. In this way, they "share the spoils" among themselves.

22. The Applicant did not disclose in their founding Affidavit evidence establishing bid rigging. Section 2 of the Act defines bid rigging as "a horizontal agreement between enterprises whereby in response to a request for bids (a) one of the parties to the agreement agrees not to submit a bid or (b) the parties to the agreement agree upon the price, terms and conditions of a bid to be submitted".
23. The Applicant has not established the existence of an "agreement not to submit a bid" or agreement on "the price, terms and conditions of the bid submitted". It is important to note that Mr Panja could not be said to have been a person or an enterprise as envisaged by section 25 of the Competition Act. He was neither a proprietor in the sense of carrying on business for himself or a shareholder in the enterprise carrying any business.
24. What should be clear from the above is that in the instant case there was no evidence of collusion and/or bid-rigging. Mr Panja was not acting as a rival firm and he was not colluding with the Respondent to raise the price or change the conditions of the tender to the detriment of the government issuing the tender. We do not have the Respondent colluding or conspiring with the other competitor – Super Trading – who was not in a relationship with the Respondent; at least according to the evidence presented by the Applicant and the evidence led during the hearing.

25. The evidence led and what we have is unethical and unprofessional behaviour by Mr. Panja, conspiring with the Respondent, to the detriment of the relevant competitor in the market, Super Trading. But, on the evidence presented, this conspiracy, as unethical as it was, was not to the detriment of the government or to society, who ended up enjoying lower prices for what they got to consume from the Respondent, compared to what they would have paid if Super Trading had won the tender.
26. That the Respondent confessed to something they did not really commit, for whatever reasons, whether because they were misinformed by the Competition Authority or intimidated by the Legal Officers of the Competition Authority, does not make what they did a violation of the Competition Act 2009, for which a settlement and/or penalty as prescribed by the Act would be the appropriate remedy.
27. Taken to its extreme, the Applicant's argument that Respondent was bid-rigging would imply that anytime any enterprise got some inside information on a competitor's business strategy or pricing that would enable the enterprise to set a lower price that would allow it to win a tender or contract, there would be a violation of the competition law. We do not believe that is what the Competition Act and policy is or was intended to achieve.
28. It is for all of the above reasons that on the 17th September 2013, the Tribunal dismissed the Applicant's case.

Delivered on the 20th September 2013.



Dr Zein Kebonang
Chairperson

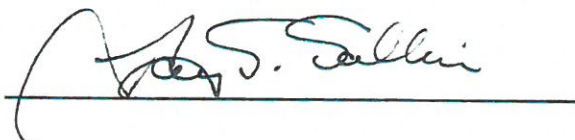


I agree



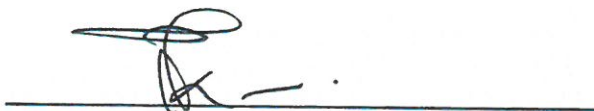
Commissioner Mr Gaylard Kombani

I agree



Commissioner Dr Jay S. Salkin

I agree



Commissioner Ms Tiny Kgatlwane

I agree



Commissioner Mr Boniface Mphetlhe