



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

CAHGB-000069-23

In the matter between:

UNIVERSAL HOUSE (PTY) LIMITED

APPELLANT

and

**COMPETITION AND CONSUMER AUTHORITY
MMEGI INVESTMENT HOLDINGS (PTY) LTD**

**1ST RESPONDENT
2ND RESPONDENT**

In re:

COMPETITION AND CONSUMER AUTHORITY

APPLICANT

and

**UNIVERSAL HOUSE (PTY) LIMITED
MMEGI INVESTMENT HOLDINGS(PTY) LTD**

**1ST RESPONDENT
2ND RESPONDENT**

JUDGMENT

LEBURU J:

1. This is an Appeal and a Cross Appeal filed by the Appellant and the 1st Respondent, from a decision of the Competition and Consumer Tribunal (herein "Tribunal"),

handed down on the 7th November 2023, in terms of which the Tribunal rendered the following order:

- (a) The parties (including the Authority) will collaboratively engage to agree on a divestiture trustee, who shall then be appointed by the Authority;
- (b) Agreement on a divestiture trustee, and its appointment, shall be concluded within two (2) months from the date of this decision;
- (c) In the event that the parties cannot agree on a divestiture trustee, then the Authority alone shall appoint the divestiture trustee;
- (d) As in customary practice, the holder of the shares, being Universal, shall pay the fees of divestiture trustee;
- (e) The parties shall set out the mandate of the divestiture trustee, and provide it with the necessary powers of attorney to carry out its mandate, and in the event that the parties cannot agree on the mandate, then the Authority alone shall set the mandate;

- (f) The divestiture trustee shall sell the 28.73% shares held by Universal in Mmegi Investment at a price that shall be determined by the divestiture trustee;
- (g) The purchaser shall be approved by the Authority, provided that if the divestiture trustee does not receive a response two(2) weeks after seeking such approval, then the Authority shall be deemed to have approved the purchaser;
- (h) The sale of the shares by the divestiture trustee shall be concluded within six (6) months from the date of appointment of the divestiture trustee;
- (i) In the event that a purchaser for shares is not identified within six(6) months period mentioned in subparagraph (h) above, then the divestiture trustee shall submit a full report to the Tribunal;
- (j) The shares shall be sold only by the divestiture trustee, and Universal and Mmegi Investment are restrained from selling, dealing in or in any way disposing of or transferring 28.73 % shares in Mmegi Investment except in the manner specified by the divestiture trustee;

(k) The application for the enforcement of the decision made by the Authority on the 17th February 2017 is dismissed as it is not enforceable;

(l) The valuation of the shares carried out by Grant Thornton cannot form part of the Authority's application before the Tribunal, as the Authority was functus officio, when it commissioned Grant Thornton in 2022 and

(m) There is no order as to costs.

2. The parties to the present matter are Universal House(Pty) Ltd, (herein "Universal House"), which is the Appellant. The 1st Respondent is Competition and Consumer Authority (herein "the Authority"). The 2nd Respondent is Mmegi Investment Holdings (Pty) Ltd (herein "Mmegi Investments").

3. The material facts giving rise to the present appeal are fairly common cause. For the prominence of convenience, completeness, laced with the need to ultimately sharpen the legal issues arising herein into a proper focus, it is pertinent to lay bare the said background.

Factual Background

4. Sometime in 2013, the Appellant bought 28.73% shares in Mmegi Investment. The said acquisition was not notified to the Authority for approval, contrary to section 49 of the Competition Act (CAP 46:09). However, the Authority became privy to the acquisition and on the 17th February 2017, the Authority made a decision not to approve the Appellant's acquisition of the said 28.73% shareholding of the 2nd Respondent. Consequently, the Authority ordered as follows:

4.1 *Given the fact that the transaction had already been implemented, pursuant to section 63(2)(b) of the Competition Act, the Authority directs the parties to dispose of the 28.73% shares already acquired in Mmegi Investment Holdings (Pty) Ltd by Universal House (Pty) Ltd, to an entity or person(s) with no business interests affiliated in any way with the acquiring entity, within 3 months from the decision date”.*

5. The said decision by the Authority did not spell out the price at which the shares were to be disposed of or state how the shares were to be disposed of. Consequent upon

the said decision by the Authority, the Appellant decided to sell its entire shareholding in Mmegi Investment at the price of P16.50 per share. An offer was made to the shareholders of Mmegi Investment to buy the said shares, but none of them took the offer. Several other persons or entities were offered the shares but could not buy them.

6. On the 25th March 2022, the Authority filed an application before the Tribunal, in terms of section 59(3) of the Competition Act and sought an order in the following terms:-

“ 6.1 Directing that the 1st Respondent divest itself of the 28.73 shares it has acquired in the 2nd Respondent to an entity or person(s) with no business interests in or affiliated in any way with the 1st Respondent as previously directed by the Authority’s decision of 17 February 2017.

6.2 Directing that the aforementioned shares shall be sold at the current market value as determined by Grant Thornton report dated 21 January 2022.

*6.3 Directing that the Respondents shall carry out the
aforementioned divestiture within 3 months from
the date of this order;*

*6.4 Directing that the costs of this application be
borne by the Respondents, and*

*6.5 Granting the Applicant such further and /or
alternative relief, as the court may deem fit”.*

7. The Appellant opposed the application and duly filed its Notice of Opposition and an answering affidavit on the 29th March 2022 and 13th April 2022 respectively. The 1st Respondent duly filed its replying Affidavit.
8. On the 7th November 2023, the Tribunal dismissed the Authority's application and made an order referred to in paragraph 1 above. Dissatisfied with the Tribunal's decision, the Appellant filed its Notice of Appeal on the 29th November 2023, whereas the 1st Respondent filed its Notice of Opposition and Notice and Grounds of Cross Appeal on the 26th January 2024. The Appellant then filed its Notice of Opposition to the 1st Respondent's Cross Appeal on the 1st February 2024.

The Appellant's Grounds of Appeal

9. It is the Appellant's case that the Tribunal erred in determining and proceeding to order that:

(i) A divestiture trustee should be appointed to sell Universal House's 28.73% shareholding in Mmegi Investment be restrained from selling, dealing, transferring or disposing of the shares except in accordance with the share disposal process to be carried out by the divestiture trustee, (iii) the Appellant pay the fees of the divestiture trustee and (iv) that there be no order as to costs.

10. It was submitted by the Appellant that in terms of section 59(3) of the Competition Act, the only relief that may be sought by the Authority, and granted by the Tribunal, is an order "requiring the enterprise to make good an alleged default within a time specified in the Order" and further that it is evident from section 59(1) that the default referred to in section 59(3) is a failure by the enterprise, without reasonable excuse, to comply with a direction issued by the Authority. It was contended that it was therefore not competent for the Tribunal to grant any other further and additional relief than an order

directing Universal House to comply with the terms of the Authority's decision. Any further and or additional relief granted would be ultra vires the powers of the Tribunal .

11. The Appellant further submitted that there was no basis in law and in fact for the Tribunal to have made the impugned decision, when regard is hand to the following factors:

11.1 *the relief granted by the Tribunal did not form any part of the Authority's Direction, or any part of the relief sought by the Authority in its application to the Tribunal.*

11.2 *It is common cause between the Appellant and the Authority that, in terms of the Authority's decision, the Appellant is required to dispose of the relevant shares in Mmegi Universal at the market value.*

11.3 *That the Appellant had not failed to comply, without reasonable excuse, with the Authority's Direction.*

12. Given that the Tribunal had dismissed the Authority's application, it is the Appellant's position that it was a successful party before the Tribunal and accordingly, the Tribunal should have ordered the Authority to pay the costs of the application. Consequently, the Appellant prays that the Authority's application for the enforcement of its decision be dismissed and the Authority to bear costs of the said application, including costs of counsel.

The 1st Respondent's Cross Appeal

13. According to the 1st Respondent, the Tribunal erred in dismissing its application for the enforcement of the decision made by it on 17th February 2023, on the basis that such decision was not enforceable. In amplification, the 1st Respondent submitted that its decision complied with section 59 of the Competition Act and further that it had reasonable grounds to believe that the Appellant and the 2nd Respondent had, without reasonable excuse, failed to comply with its direction, after it carried out investigations.
14. The 1st Respondent contended that it carried out the necessary investigations to determine if the Appellant and the 2nd Respondent had complied with its decision

and that consequent upon investigations, it determined that its decision had not been complied with, without reasonable justification, hence its application to have its decision enforced. According to the Authority, its decision or direction was enforceable and therefore the Tribunal erred when it determined that the decision was unenforceable.

15. In terms of section 58(2) of the Competition Act, the 1st Respondent submitted that it complied with the said provision and directed both the Appellant and the 2nd Respondent to sell or dispose of the said shares acquired by the Appellant in the 2nd Respondent. Its decision was specific on how such shares ought to be disposed of (divested).

16. The 1st Respondent, in its Cross Appeal, prays to have the Tribunal's decision to dismiss its application be substituted with the following order, namely:

“the application by the Authority for the enforcement of its decision of the 17th February 2017 succeeds and the Universal House shall divest itself of the 28.73% shares held in Mmegi Investments within 1 month of this decision, through its efforts”.

17. It was submitted that whatever judgment that the Tribunal issues, same must have the effect of requiring the enterprise (in *casu* the Appellant), to make good its default. The 2nd Respondent urged the court to interpret section 59(3) of the Act in a manner that will facilitate the purpose of the Competition Act.
18. On the basis of its submissions, the Authority prays for the dismissal of the substantive appeal with costs and that its Cross Appeal be upheld.

The Regulatory Framework

19. The Competition Act (CAP 46:09) is the cornerstone and lodestar of competition issues. The Act provides for the establishment of the Competition and Consumer Authority and then delineates and donates a panoply of powers to the Authority. The Act also establishes the Competition and Consumer Tribunal as an adjudication forum on issues relating to alleged breaches of the Act.
20. In terms of section 5 of the Act, the Authority is 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. As part of its core mandate, the Authority regulates the merging of enterprises and has powers to investigate and evaluate any alleged breach of the Act. Upon completion of investigations, the Authority has powers to refer matters it has investigated to the Tribunal for adjudication and enforcement.

21. The Board of Directors of the Authority provide the necessary suzerainty and control over the Authority.
22. It is also part of the mandate of the Authority to issue directions to regulated entities. If such directions are not complied with, without a reasonable excuse, the Authority may exercise its investigative powers. In terms of section 41(3) of the Act, in the event of non-compliance with a directive issued by the Authority, without reasonable excuse, the Authority may apply to the Tribunal for an order requiring the non-compliant enterprise to make good the default within the time specific in the order.
23. Section 45 of the Act regulates mergers and acquisitions. Section 48 gives the Authority approval powers for mergers and acquisitions. Section 49 enjoins regulated

enterprises to pre-notify the Authority of a proposed merger.

24. Sections 58(2)(3) and 59 of the Act are fundamentally pertinent to the present appeal. For purposes of completeness, I reproduce them hereunder as follows:

58 (2) Where the Authority determines, on investigation, that a merger is being or has been implemented in contravention of the provision of this Part, it may give direction to the enterprise or enterprises involved :-

(a) Not to complete or implement the merger;

(b) To sell or dispose of in any other specified manner any shares, interest or other assets it has acquired pursuant to the merger.

(c) To terminate any agreement or provisions of an agreement to which the merger was subject, or

(d) To take such further measures as may be necessary to restore the conditions of competition existing prior to the merger.

(3) Any person or enterprise that implements a merger without –

(a) First notifying the Authority, or

(b) Receipt of approval from the Authority in terms of section 48(a), shall be liable to a fine not exceeding ten per cent of the consideration or the combined turnover of the parties involved in the merger.

59.(1) Where the Authority has reasonable grounds to believe that an enterprise has, without reasonable excuse, failed to comply with a direction issued by the Authority under this Part, the Authority may exercise in respect of this matter the powers of investigation provided for in Part VIII in respect of similar matters falling within Part VI.

(2) Where the Authority proposes to determine that a failure of compliance in terms of subsection (1) has occurred, it shall give notice of its intention to investigate to the enterprise concerned and

consider any representations the enterprise wishes to make.

(3) The Authority may then apply to the Tribunal for an order requiring the enterprise to make good the default within a time specified in the order.

(4). The order may provide for all the costs of, or incidental to, the application for the order, to be borne by the enterprise in default.

25. Once the Tribunal has adjudicated upon a matter brought before it by the Authority, any enterprise aggrieved by the decision of the Tribunal has a right of appeal to the High Court, per section 83 of the Act, hence the present appeal before me.

The Tribunal's Powers

26. The present Appeal and Cross appeal spectacularly deal with the powers of the Tribunal, as distilled from the Act. As a creature of a statute, it is trite that the Tribunal only has powers and jurisdiction as granted thereto by the organic statute. It does not have inherent jurisdiction and thus cannot act outside the confines of its statutory

powers. In the case of **Attorney General v Tymon Katlholo** CACGB-198-22, it was held that a creature of a statute has got no power other than those expressly conferred by a statute. See also, in this context, the case of **Hitecon (Pty) Ltd v Attorney General and 2 Others** – UAHGB-000096-24 and **Road Accident Appeal Tribunal and Others v Gouws and Another** 2018(3) ZASCA 413(SCA).

27. In terms of section 59(1) cited above, where the Authority has reasonable grounds to believe that an enterprise has, without reasonable excuse, failed to comply with the direction issued by the Authority, the Authority may exercise its powers of investigation. The investigation is then done under the aegis of section 59(2), once it has been determined by the Authority that there has been non-compliance with its direction, but also that such non-compliance was without reasonable excuse.
28. Once the Authority concludes that non-compliance with its direction is without reasonable excuse, it gives notice of its intention to investigate to the enterprise concerned and shall then consider any representations made by the enterprise. Once the said subsections are met, then section 59(3) of the Act may be invoked to trigger the

Tribunal's enforcement jurisdiction and powers. The aforementioned section provides that the Authority may apply to the Tribunal for an order requiring the enterprise to make good the default, within a time specified by the Tribunal, in the enforcement order. More importantly, the default contemplated by section 59(3) is the failure to comply with the specific direction previously issued by the Authority. This is what led to the present appeal.

29. The pertinent issue that arises is whether the Tribunal erred in ordering the following:-

29.1 a divestiture trustee should be appointed to sell Appellant 28.73% shareholding in the 2nd Respondent.

29.2 both the Appellant and 2nd Respondent be restrained from selling, dealing in, transferring or disposing of such shareholding except in accordance with the share disposal process to be carried out by the divestiture trustee.

29.3 that the Appellant should pay the fees of the divestiture trustee, and

29.4 not granting any order as to costs.

30. For purposes of adjudicating this appeal, an interpretive journey on the powers of the Tribunal shall henceforth be traversed.

31. Whenever a court is called upon to interpret a legal document, the ascertainment or meaning thereof is derived and congregated from the triple synthesis of text, context and the purpose (intention) of the legal document or instrument under scrutiny. This proposition was highlighted in the case of **Attorney General v Tymon Motlhasedi Katlholo** Case No: CACGB-198-22, (delivered on 28 June 2024) wherein Lesetedi J.A said;

*“ 42. To answer this question requires an interpretive exercise in the meaning and import of section 3. It is trite that the object and principle of statutory interpretation is to give effect to the object or purpose of legislation being interpreted...” The approach in this jurisdiction is no different as expressed for instance, in **Botswana Power Corporation v Botswana Power Corporation Workers Union & Another** [2019] 2 BLR 183 (CA) at 198 and the*

authorities cited therein. The interpretive exercise is a unitary one which is recently pithily put by the South African Supreme Court in **City of Tshwana Metropolitan Municipality and Others v Copperleaf Country Estate (Pty)Ltd and Another** [2024] ZASCA 69, *“is guided by the trial of language, context and purpose, understood in relation to each other, with the aim of reaching a sensible, salient undertaking of the words under scrutiny.”*

32. The meaning of words, is to be found not so much in a strict etymological propriety of language. The question is one of construction and the ultimate resort must be determined upon the actual words used, read not in vacuo but as occurring in the entire legal document under scrutiny. Put differently, the court is enjoined to interrogate the scheme of the legal document as a harmonious whole, so as to determine whether it was intended that the particular word or phrase to be interpreted should have limited or extended meaning, when read with other provisions of the legal document.

33. In terms of section 26 of the Interpretation Act(CAP 01:04), every enactment is deemed remedial in nature and for the public good and shall receive such fair and

liberal construction, as will best attain its object according to its true intent and spirit. Section 27 of the Interpretation Act posits that an interpretation which would render an enactment ineffective shall be disregarded in favour of an interpretation which will enable it to have effect.

34. Section 15(2) of the Interpretation Act is also useful to the present discourse. It provides as follows:

“15(2) Where an enactment confers a power, or imposes a duty, to do any act or thing, all such powers shall be deemed to be also given as are reasonably necessary to enable, or require, that act or thing to be done or are incidental to the doing thereof”

35. The lingering question worthy of scrutiny is whether the Tribunal went beyond the remit of its powers, as granted by the Competition Act.

36. The key phraseology is found in section 59(3) of the Act. It is couched as follows:

“(3) The Authority may then apply to the Tribunal for an order requiring the enterprise to make good the default within a time specified in the order.”

37. What does “... to make good the default” mean or entail?

In my view, it means to do as directed or ordered. In other words, the Tribunal, as an enforcement arm of the competition rules, has been granted powers to ensure compliance with the direction given to a defaulting enterprise by the Authority.

38. In the exercise of its powers under section 59(3) thereof, the Tribunal is not empowered to exercise any discretion outside of what it is contained in the direction issued by the Authority. If the Tribunal steps out of the set parameters, its decision will be ultra vires its statutory powers.

39. The Tribunal, as a creature of a statute, has no power, be it discretionary or inherent, to exercise power outside the remit and parameters of the Act. In terms of section 59(3) of the Act, the only relief that may be sought by the Authority, and granted by the Tribunal, is one “ requiring the enterprise to make good an alleged default within the time specified in the order”.

40. It is evident from section 59(1) that the default required in section 59(3) is a failure by an enterprise, without reasonable excuse, to comply with a direction issued by the Authority.

41. In my judgment, it was therefore not competent for the Tribunal to go beyond its powers, as delegated thereto by section 59, to grant additional and further relief, other than one directing the Appellant to comply with the terms of the Authority's direction. The Authority, it is common cause, had directed the Appellant to "dispose of the 28.73% shares already acquired...to an entity or person with no business interests affiliated in any way with the acquiring entity, within 3 months from the decision date". Notwithstanding such clear and specific direction, the Tribunal granted additional reliefs which did not form part of the direction made by the Authority and ordered the appointment of a divestiture trustee and ordered the Appellant to pay the fees for the divestiture trustee.

42. On that basis, the Tribunal did not have power, under section 59 (3), to order the said further and additional orders it decreed. This is so because the additional or

further relief granted by the Tribunal did not form part of the Authority's Direction issued on the 17th February 2017 or any part of the relief sought by the Authority in its application to the Tribunal.

43. It is also common cause that such additional reliefs granted by the Tribunal were made without having given the Appellant a hearing on such points before or decision was made in that respect. Simply put, the said additional reliefs made by the Tribunal were made by the Tribunal, out of its own volition or suo sponte. The undesirability of a Tribunal to raise an issue suo sponte, without giving a party an opportunity to address and speak to same is an affront to the hallowed dictates of natural justice, the principle termed the audi alterem partem. In this connection, see **Nthite v Kahiya and Another** [2014] 1 BLR 97 (CA), **Tawana Landboard v Ker and Downey** [2000] 2 BLR 183 (CA) and **Moshapa v Kgosi** [2000] 2 BLR 90 (CA).

1st Respondent's Cross Appeal

44. The 1st Respondent is dissatisfied with the Tribunal's order to the effect that the Authority (1st Respondent) had

failed to make out a case for the enforcement of the decision made by it on the 17th February 2017.

45. The issue therefore is whether the 1st Respondent failed to prove, on a balance of probabilities, that the Appellant's failure to comply with its direction was without reasonable excuse.

46. In my view, the Tribunal was correct to determine that the 1st Respondent had failed to prove that the alleged non-compliance by the Appellant, with its direction, was without reasonable excuse. This is so because evidence was led by the Appellant justifying the failure to comply. Credible evidence was placed before the 1st Respondent and the Tribunal that the Appellant's failure to comply was the fact that there were no willing buyers found, to buy the shares. Such sought buyers were Botswana Mine Workers Union College, Lesedi Interiors, ED Lights, Winchester Properties and Mogobe_Inc (Pty) Ltd.

47. Despite its reasonable efforts to comply with the directive and get buyers for the shares, no buyer came on board. The failure thereof by the Appellant to comply with the Authority's direction was with reasonable excuse.

48. On the enforceability of the Authority's direction, in my view, such direction is enforceable and remains in force or extant and thus its merits enforcement, in terms of the Competition Act.

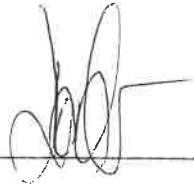
49. On that basis, the decision by the Tribunal that the Authority's direction is unenforceable is without lawful basis.

CONCLUSION

50. The appeal by the Appellant and the cross appeal ought to succeed and the decision of the Tribunal is replaced with the following orders:

- (a) The decision by the Tribunal in terms of which additional orders were granted, over and above to what the Authority had directed, is set aside.
- (b) The enforcement of the Authority's direction is referred back to the Authority and the Tribunal for enforcement in terms of the Competition Act .
- (c) As both Appellants enjoyed some success, there shall be no order as to costs.

**DELIVERED IN OPEN COURT AT GABORONE ON THE
12TH DAY OF DECEMBER 2024.**

A handwritten signature in black ink, appearing to be 'M. Leburu', is written over a horizontal line.

M.LEBURU

[JUDGE]