IN THE COMPETITION COMMISSION OF THE REPUBLIC OF BOTSWANA

HELD AT GABORONE

CASE NO: CC-CR/01/B/19 I

In the matter between:

GLOBAL HOLDINGS (BOTSWANA) (PROPRIETARY) LIMITED	**1st Applicant**
PST SALES AND DISTRIBUTION (PROPRIETARY) LIMITED	**2nd Applicant**

and

BRITISH AMERICAN TOBACCO (BOTSWANA)(PROPRIETARY) LIMITED	**1st Respondent**
CA SALES & DISTRIBUTION (PROPRIETARY) LIMITED	**2nd Respondent**
THE COMPETITION AUTHORITY	**3rd Respondent**

CONSTITUTION OF THE PANEL

Tendekani E. Malebeswa	Presiding Member
Thembisile T. Phuthego	Member
Dr Selinah Peters	Member
Seipati G. Olweny	Member
Phodiso P. Valashia	Member

FOR THE APPLICANTS
Attorneys Tladi T.E and Tumotumo T. R.

FOR THE 1ST AND 2ND RESPONDENTS
Attorneys Bvindi O., Babuseng I. and Setshegetso K.

FOR THE 3RD RESPONDENT
Attorneys Tseladikae G. and Segopamitlwa K.

DECISION

[1] On the 29th July 2019 Global Holdings (Botswana) (Proprietary) Limited and PST Sales and Distribution (Proprietary) Limited (the Applicants) brought before the Competition Commission (the Commission) an urgent application to interdict and restrain the 1st Respondent and the 2nd Respondent (the Respondents) from implementing any distribution agreement in respect of the goods distributed by the Applicants pursuant to the Distribution Agreement executed between the 1st Applicant and the 1st Respondent on the 3rd December 2013. The 3rd Respondent was cited in a nominal capacity.

[2] The Commission heard the matter on the 30th July 2019.

[3] The 1st Applicant maintained that it had entered into the Distribution Agreement with the 1st Respondent to be in force for a period of two (2) years, and to be renewed automatically thereafter for three further periods of one (1) calendar year unless terminated earlier in accordance with its terms.

[4] The 1st Applicant and 1st Respondent executed a First Addendum to the Distribution Agreement on the 4th December 2018. On the 29th March 2019 the 1st Applicant and the 1st Respondent signed a Second Addendum. Crucially, it provided for a lapse of the Agreement on the 31st July 2019.

[5] By letter dated 2nd July 2019 the 1st Respondent informed the 1st Applicant that the Distribution Agreement would not be automatically renewed upon expiry on the 31st July 2019, and further, that a new distributor would take over on the 1st August 2019.

[6] On the 9th July 2019 the 1st Applicant wrote to the 3rd Respondent stating, amongst others, that:

"We believe that the Competition Authority must urgently intervene in this matter as it rises both competition and public interest concerns. Pending investigations and resolution of this matter by the Competition Authority, we would request for an urgent interim relief to protect existing jobs; third party rights and to ensure that abuse of dominance is not entrenched in the meantime." (sic)

[7] The 3rd Respondent replied on the 22nd July 2019, informing the 1st Applicant that it had "received the complaint and will revert to you once it has established the possible irregularities which could lead to anti-competitive conducts".

[8] In their application the Applicants sought the following orders:

2.1 that the 1st and 2nd Respondent are hereby interdicted and restrained from implementing any distribution agreement in respect of the goods distributed by the Applicants pursuant to the Distribution Agreement executed between the 1st Applicant and the 1st Respondent on the 3rd December 2013;

3. that the prayer under (2.1) above shall operate as an the prayer under paragraph (2.1) above shall operate as an interim order pending the later of the determination of the investigation undertaken by the Competition Authority into possible abuse of dominance by the 1st and 2nd Respondent, or the final determination of this application;

4. Costs of these proceedings in the event of opposition.

[9] The 1st and 2nd Respondents in turn raised *points in limine* as follows:

1. The Competition Commission has no jurisdiction to entertain the dispute or the application brought by the Applicant has the matter is not properly before it. For the Commission to grant interim relief in terms of section 46 of the Competition Act (Chapter 46:09) ("the Act"), a finding by the Competition Authority has to be made that there are reasonable grounds to suspect that an enterprise is engaged in any of the conduct listed in section 46(1) (a) of the Act, and the Authority is yet to complete the investigation, the Commission may give direction where it considers it necessary to prevent irreparable harm, give such directions as it may deem meet under section 46 (1) of the Act.

1.1 The Authority is yet to express any position with regards to the requirements of section 46(1) of the Act. As such, the matter is not properly before the Commission, and it has no jurisdiction to entertain such.

2. The application brought by the Applicants is not urgent; if the matter is urgent, the urgency is purely self- created.

3. The Applicants have not established the requirements for an interim interdict be granted in their favour. In particular, they fail to establish:

3.1 A *prima facie* right for the relief that is sought;

3.2 A well-grounded apprehension of irreparable harm to the applicant if the relief is not granted;

3.3 That there is no adequate alternative remedy to the interdict claimed; and

3.4 That the balance of convenience favours the granting of interim relief.

4. The Applicants have failed to indicate to the Court why they would not be granted redress in due cause.

[10] The 3rd Respondent undertook to abide by the decision of the Commission.

[11] As a jurisdictional point had been raised, it became imperative to hear arguments on that point as it could be dispositive of the whole matter in the event the conclusion was that indeed the Commission had no jurisdiction.

[12] At paragraph 182 in **Competition Authority v Creative Business Solutions (Pty) Ltd (Case No. CC-CR/01/A/ 14 I) (the Sugarbeans case)** the Commission observed:

"The Commission, therefore, being an institution set up to adjudicate competition or anti-trust law matters in the public interest, will not decline to hear a matter unless it is proved that a matter is not property before it. However, in the event that it is shown that it does not have the jurisdiction to deal with a matter, then it will consider that such a matter has been non-referred, in accordance with the law."

[13] The Commission also noted in the **Sugarbeans case** at paragraph 83:

"One of the points raised by the Respondents in the instant case is that the Authority has, in accordance with section 39 of the Act, non-referred. Non-referred means that this Commission has no jurisdiction over this matter. It was observed in Ndlovu v Santam Ltd ((550/2003[2005] ZASCA 41 (13 May 2005)) by the SASCA at paragraph 8:

"The defence raised in the present matter is independent of the appellant's claim. It concerned not the elements of the claim but the competence of the court to determine it – jurisdiction. If the plea as to jurisdiction had been upheld it would have disposed of the matter finally as contemplated in s 83 (b) of the Act." (emphasis added)" (see also paragraphs 126-137 in **Competition Authority v Creative Business Solutions (Pty) Ltd and Rabbit Group (Pty) Ltd (Case No CC-CR/01/A/15 I) (the Infant Formula case).**

[14] As the Respondents had challenged the competence of the Commission to hear the matter and grant an urgent interdict, it became necessary to ask all the parties to address the Commission on the issue of jurisdiction. It then became apparent that, firstly, the interpretation of section 46 of the Act is contentious and, secondly, there is no agreement as

to whether Rule 23 of the Rules for the Conduct of Proceedings of the Competition Commission (October 2012) (the Rules) is consistent with the provisions of section 46 of the Act.

[15] The parties addressed the Commission on the issue of jurisdiction on the 31st July 2019.

[16] Section 46 of the Act reads:

"46 (1) Where the Authority has reasonable grounds to suspect that an enterprise is –

(a) party to an agreement falling within the scope of sections 25 or 26 (1),

(b) party to an agreement which may prove, on investigation, to fall within the scope of section 27(1), or

(c) engaged in conduct which may prove, on investigation, to constitute abuse of dominant positon,

but the Authority has not completed its investigation in the matter, the Commission may where it considers it necessary for the purpose of preventing irreparable damage to a particular person or category of persons, or protecting the public interest, give such directions as it considers appropriate for that purpose.

(2) Before giving a direction under this section, the Commission shall –

(a) give written notice to the enterprise or enterprises to whom it proposes to give the direction; and

(b) give the enterprise or each of the enterprises an opportunity to make written or oral representations.

(3) A notice under subsection (2) must indicate the nature of the direction which the Commission is proposing to give and its reasons for wishing to give it.

(3) A direction given under this section has effect while subsection (1) applies, but may be replaced if the circumstances permit by a direction under section 43(1)." (emphasis added)

[17] The relevant part of Rule 23 states:

"(1) An enterprise or person wishing to apply for an interim order in terms of section 46 of the Act must file a notice of motion in Form CCR 1, and supporting affidavits setting out the facts on which the application is based." (emphasis added)

[18] In their papers the Respondents raised three points, viz:

(a) that the Competition Commission did not have jurisdiction since the matter was a purely contractual dispute, and there had been no referral to the Commission by the Authority;

(b) that Acts of Parliament cannot be transgressed by administrative regulations or Rules;

(c) that they were entitled to raise a collateral challenge by pointing out that Rule 23 is *ultra vires* section 46 of the Act, and therefore use the invalidity of Rule 23 as a defence without having to pursue the remedy of review.

[19] For its part, the 3rd Respondent submitted that:

(a) section 46 of the Act empowers the Commission to grant interim relief, but it is not clear at whose instigation that has to be;

(b) it is not clear how the Commission arrives at the point of issuing directions;

(c) Rule 23 permits an enterprise or person who stands to suffer irreparable damage or seeks to protect the public interest to be a proper party to bring an application for interim relief under section 46 subject to the necessary tests and requirements that may have to be proved and demonstrated;

(d) Rule 23 is not inconsistent with section 46 of the Act;

(e) Regulation 15 of the Competition Regulations, 2011 (the Regulations) only confines itself to the notice to be issued to the concerned enterprises in relation to the direction the Commission intends to give;

(f) an application under section 46 of the Act can only be made if the Authority has initiated but not completed an investigation, and in this instance investigations had not commenced, which meant that the Commission could not be seized with the matter;

(g) it was not in a position to advise the Commission with respect to the time it would require to complete the investigations, or how much evidence had been gathered to give it a reasonable suspicion that there had been any abuse of dominance by the 1st and 2nd Respondents;

(h) the application should be dismissed.

[20] It was the position of the 1st and 2nd Applicants that:

(a) Rule 23 referred to a person or an enterprise, and therefore the Commission had jurisdiction;

(b) Rule 23 was valid until the High Court declared it to be inconsistent with section 46 of the Act, and therefore *ultra vires* the Act;

(c) the Rules are not statutory instruments but administrative acts which cannot be *ultra vires* the Act, and that at any rate the Commission was now *functus officio* as far as the Rules were concerned and could not be permitted to pronounce on their validity as they were its own creation;

(d) in terms of section 35 of the Act an investigation had already commenced.

[21] The question of whether the Commission has jurisdiction in this matter clearly turns on the interpretation of section 46 and Rule 23.

Interpretation of section 46

[22] The marginal note at section 46 uses the words "interim relief". Section 46 substantively refers only to "direction" or "directions", even though its import is clear. Rule 23 refers to an "interim order", even though its heading refers to "interim relief". The heading of Rule 25 mentions "Interim Relief Hearings".

[23] Section 9 of the Interpretation Act (Cap. 01:04) provides that marginal notes "are intended for convenience of reference only and do not form part of the enactment".

[24] Section 67 of the Act reads:

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

[25] The history of interim measures or interim relief can be traced back to the decision of the European Court of Justice (ECJ) in the Case 792/79 R **Camera Care Commission** [1980] ECR 119 when the ECJ observed that the European Commission should be able "within the bounds of its supervisory task conferred upon it in competition matters by the Treaty and Regulation No. 17, to take protective measures to the extent to which they might appear indispensable in order to avoid the exercise of the power to make decisions given by Article 3 from becoming ineffectual or even illusory because of the action of certain undertakings."

(see Alec J. Burnside and Adam Kidane: Interim Measures: An overview of EU and national case law – Concurrences Antitrust Publications & Events, e- Competitions).

[26] The elements for a successful application under section 46 of the Act are buttressed by regulation 15 of the Competition Regulations. The relevant parts of section 46 read as follows:

"46(1) Where the Authority has reasonable grounds to suspect that an enterprise is -

(a) - - -

(b) - - -

(c) - --

but the Authority has not completed its investigation into the matter, the Commission may where it considers it necessary for the purpose of preventing irreparable damage to a particular person or category of persons, or protecting the public interest, give such directions as it considers appropriate for that purpose." (emphasis added)

[27] A clear reading of section 46(1) provides the following elements:

(a) the Authority should have reasonable grounds for suspicion and those should be shared with the Commission;

(b) the Authority should have commenced but not completed its investigation, or should be contemplating the commencement of an investigation;

(c) a direction by the Commission should be to prevent irreparable damage to a particular person or category of persons, or to protect the public interest.

[28] Regulation 15 states:

"The Commission shall give written notice to the concerned enterprise to whom it proposes to give a direction before giving a direction under section 46 of the Act –

(a) indicating the specific prohibited practice which is being investigated or likely to be investigated;

(b) showing evidence of the irreparable damage suffered or likely to be suffered as a result of the practice; and

(c) inviting the enterprise or each of the enterprises to make written or oral representations they may wish to make to the Commission within 14 days from the date of receipt of the notice."

[29] While section 46 places the burden on the Authority to demonstrate the presence of the necessary elements, Regulation 15 provides the threshold the Commission has to meet when inviting an enterprise or enterprises being confronted with a direction. The aspects of the threshold are that the Commission should:

(a) indicate the specific prohibited practice under investigation;

(b) show evidence of the irreparable damage the complainant would suffer from.

[30] Section 46 and regulation 15 have to be read together and not in isolation. It is only when all these elements are present that a successful application can be launched, since interim measures are a heavy burden for businesses.

[31] The issue of reckoning the commencement of investigations was settled by the Court of Appeal in **Competition Authority v Creative Business Solutions (Pty) Ltd and Rabbit Group (Pty) Ltd** (Court of Appeal Civil Appeal No. CACGB -082-16) See also **Rabbit Group (Pty) Ltd v Competition Authority** (Court of Appeal Civil Appeal No. CACGB – 142-16) **(the Rabbit case)).**

[32] The Authority, the 3rd Respondent *in casu*, initially informed the Commission that it would abide by the decision of the Commission. The Authority only got involved when the Commission invited it to submit its views on the issue of jurisdiction. As a result, the Commission did not have the benefit of whether:

(a) the Authority had any reasonable grounds to suspect that the 1st Respondent was engaging in conduct that should be impugned;

(b) the Authority had commenced investigations;

(c) irreparable damage would be occasioned to the 1st Applicant; and

(d) the specific prohibited practice; as well as

(e) the evidence of such irreparable damage.

[33] In its submission the Authority indicated that it had not commenced investigations, and that on the basis of this point alone the application should fail as the Commission did not have jurisdiction.

[34] As no evidence of irreparable damage was presented and specific prohibited practice shown absent any investigation, we were left only with the bald assertion of the Applicants that there would be possible abuse of dominance by the 1st and 2nd Respondents. In its letter to the Authority, recited at paragraph 6 above, the 1st Applicant requested the Authority to grant urgent interim relief "[p]ending an investigation and resolution of this matter by the Competition Authority". The 1st Applicant wanted interim relief even before an investigation was commenced, and this is the attitude it maintained even as it applied to the Commission.

[35] **In York Timbers Limited v South African Forestry Company Limited (Case Number 15/IR.Feb01)** the South African Competition Tribunal noted at paragraph 66:

"As far as the remaining factors in 49C (3) are concerned viz irreparable damage and the balance of convenience, these are not looked at in isolation or separately but are taken in conjunction with one another when we determine our overall discretion."

[36] In section 46 the discretion is given to the Commission by the words "give such directions as it considers appropriate for that purpose". The Commission therefore has the discretion

to grant or refuse the interim relief, but only after it has considered all the elements in section 46 and regulation 15.

[37] In our view, the Authority is a critical cog in this whole process as it has to place vital information before the Commission. In fact in this matter the Authority has not commenced an investigation.

[38] The South African Competition Tribunal further observed in **York v South African Forestry Company** at paragraph 101:

"Note that Section 49C (2) requires that, when determining whether it would be 'reasonable and just' to grant an order for interim relief, we should have regard to three factors, viz evidence relating to the alleged restrictive practice, the need to prevent serious or irreparable damage, and the balance of convenience. We have dwelt on the evidence relating to the alleged restrictive practice and found none. While we are not told how to balance, how to 'have regard' to, the three factors specified in Section 49C of the Act we would regardless of the prospect of damage or of the balance of convenience, be hard pressed to grant interim relief in the absence of evidence of a restrictive practice."

[39] The agreement between the 1st Applicant and the 1st Respondent, taken as a whole, lapsed on the 31st July 2019 due to effluxion of time. Prior to that the 1st Respondent and 2nd Respondent entered into an agreement to replace the one between the 1st Respondent and the 1st Applicant. It is this new agreement which the Applicants allege will result in the abuse of dominance, without showing:

(a) dominance in any form;

(b) how this dominance, if any, will be abused;

(c) what irreparable damage will be suffered after a contract has lapsed due to effluxion of time, except for the normal after-effects when a contract comes to an end.

[40] Therefore, there is no danger of the decisions of either the Commission or the Authority, at a later date, in the words of the ECJ in the **Camera Care** case, "becoming ineffectual or even illusory".

[41] Once the Authority commences its investigation it will determine whether the 1st Respondent and the 2nd Respondent are dominant, and if so, whether they are abusing their dominance. If they are abusing their dominance this will be addressed in accordance with the Act.

[42] At paragraph 98 in **York v South African Forestry Company** the South African Competition Tribunal offers this view:

"Again this confirms our impression that what we have here is a raging commercial dispute in which contractual relations are, at best, unsettled, and in which personal relations are highly fraught. SAFCOL's recent actions may well constitute an unlawful attack on its contractual relations with York and the attack may well be designed to secure commercial advantage for

SAFCOL. There is even the possibility that its actions are purely vindictive and personal designed simply to punish York and its leading personnel for their resistance to SAFCOL's attempts to raise the price of its products and impose less favourable contractual terms on its long standing customers. If this is so York may well have other remedies at its disposal. However, it is wholly possible to act in this way and to remain, nevertheless, within the parameters of the Competition Act just as it is possible to abide faithfully by the terms of a contract and yet transgress the same statute."

[43] Jean – Yves Art in Interim Relief in EU Competition Law: A Matter of Relevance (Italian Antitrust Review, No. 1 (2015) remarked:

"Interim measures are warranted where there is a risk of serious and irreparable damage to competition, that is, damage to competition which could no longer be remedied by the decision adopted by the Commission upon the conclusion of the proceedings." (emphasis added)

[44]It is of critical importance to bear in mind that competition law enforcement is about ensuring and protecting competition, and not competitors. Edward T.Swaine illustrated this in "Competition, Not Competitors," Nor Canards: Ways of Criticizing the Commission (U.Pa J. Int'l Econ.L) (2002)) by saying:

"The *Brown Shoe* aphorism that "antitrust laws were passed for the protection of competition, not competitors'" speaks, potentially, not just to the goals of enforcement policy, but also to the means for its enforcement. Read as a procedural or institutional edict,

it suggested not only that antitrust should not be enforced on *behalf* of competitors but also that it should not be enforced at their *behest.*"

[45] **Brown Shoe** refers to **Brown Shoe Co. v United States, 370 U.S 294 (1962),** which was quoted in **Brooke Group Ltd v Brown & Williamson Tobacco Corp. 506 U.S 209 (1993).** Timothy J. Muris underscored the same point in The FTC and the Law of Monopolization (Antitrust Law Journal, Vol. 67, No. 3, 2000):

"Although the case law is hardly a model of clarity, one point that is settled is that injury to competitors by itself is not a sufficient basis to assume injury to competition."

[46] The above are the reasons why we dismissed the application by the Applicants for lack of jurisdiction by the Commission.

Interpretation of Rule 23

[47] The Applicants contended that:

(a) the Rules are not a statutory instrument;

(b) the Rules were promulgated by the Commission as an administrative decision, and the Commission can therefore not declare Rule 23 to be *ultra vires* the Act, and at any rate the Commission is now *functus officio*;

(c) alternatively, that Rule 23 is not inconsistent with the Act.

[48] The 3rd Respondent was of the view that section 46 of the Act and Rule 23 were in harmony, as any party that was likely to suffer irreparable damage as a result of an impugned practice under section 46 may invoke Rule 23, or simply do so to safeguard the public interest.

[49] The Respondents maintained that the Rules are subsidiary legislation, in which case they are inconsistent with both the Act and the Statutory Instruments Act (Cap. 01:05).

[50] The point raised by the 3rd Respondent dovetails with one of the points raised by the Applicants, and therefore can be treated as the same point. The only difference between those parties here, and which is a crucial difference, was that the 3rd Respondent submitted that Rule 23 can only be triggered if there is an ongoing investigation.

[51] The Applicants argued that section 2 of the Statutory Instruments Act requires a statutory instrument to have "legislative effect", and that such effect can only be acquired by an instrument that satisfied the requirements of section 3 of that Act, viz, that such instrument should have been published in the Government Gazette and assigned a serial number. Therefore, since the Rules did not go through this process they are not a statutory instrument. In the event, they cannot be *ultra vires* the Act.

[52]The Applicants further argued that the promulgation of the Rules was an administrative decision by the Commission, and the Commission could not declare its own decision to be *ultra vires* the Act; and at any rate the Commission was *functus officio* with respect to that decision. On this point the Applicants sought to rely on **Oudekraal Estates (Pty) Ltd v City of**

Cape Town 2004 (6) SA 222 (SCA), which was also considered in the **Rabbit case**, where the Court of Appeal held that such "decision stands pending its being set aside by a court of law". (paragraph 29)

[53] In the alternative, the Applicants submitted that Rule 23 is not inconsistent with the Act, as it merely maps the path to be followed in implementing section 46. In that sense, Rule 23 merely unpacks section 46.

[54] For their part the Respondents submitted that the Rules were a statutory instrument, and therefore to the extent that Rule 23 is inconsistent with section 46 it is *ultra vires* the Act and the Statutory Instruments Act, in which case the Commission had no jurisdiction to hear the application. They cited the **Botswana Motor Vehicle Insurance Fund v Marobela 1999(1) BLR 21 (CA)** case as authority for their proposition. In that case regulations were declared *ultra vires* the Motor Vehicle Insurance Fund Act (Cap. 69:02). However, the Applicants pointed out that in that case the regulations were a statutory instrument, whereas *in casu* the Rules were merely an administrative decision.

[55] As we have already found that we have no jurisdiction on the basis of our reading of section 46 of the Act and regulation 15 only, and dismissed the application, it is not necessary for us to make a decision on the status of Rule 23.

[56] There is no order as to costs.

Decision read in public session in Gaborone on this 15th day of August 2019.

Tendekani L. Malebeswa
(Presiding Member)

I agree

Mrs Thembisile T. Phuthego
(Member)

I agree

Dr Selinah Peters
(Member)

I agree

Mrs Seipati G. Olweny
(Member)

I agree

Mr Phodiso P. Valashia
(Member)