REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2017/00061

In the matter between:

NAMIBIAN COMPETITION COMMISSION **APPLICANT**

and

NAMIB MILLS (PTY) LTD **FIRST RESPONDENT**

BOKOMO NAMIBIA (PTY) LTD **SECOND RESPONDENT**

Neutral Citation: *Namibian Competition Commission v Namib Mills (PTY) Ltd* (HC-MD-CIV-MOT-GEN-2017/00061) [2019] NAHCMD 255 (23 July 2019)

Coram: Masuku J

Heard on: 2 July 2018

Delivered on: 23 July 2019

Flynote: Interpretation of Statutes – Namibian Competition Commission Act – s 26 – Interpretation thereof – "Per se", by "Object" or "Presumptive" basis – The Effects-based approach – Wording in s 26 to be given its ordinary meaning and to be interpreted per se.

Summary: The sole issue for determination before this court is the legal question; whether the relevant provisions of the Namibian Competition Act on which the applicant

relies should be interpreted; (i) to apply on a “per se”, by “object” or “presumptive” basis with the consequence that the applicant is not required to allege and prove that clause 19.1 of the first respondent’s loan agreements had an anticompetitive effect in order to be unlawful under s 26 (1) of the Act; or (ii) as requiring an effects based assessment, whereby clause 19.1 of the bakery loan agreements must be shown to have had an anticompetitive effect in order to be unlawful.

Held: In interpreting any statute, the ordinary meaning of the words is regarded as the primary index to the intention with which the statute was made. When the words of a statute are clear and unambiguous, courts are required to give them their ordinary, grammatical meaning save of course in instances where doing so would lead to a glaring absurdity.

Held further that: Section 26 embodies a prohibition of an abuse of dominance which does not require an analysis of the effect of the conduct on competition in the relevant market.

Held that: s 26 of the Namibian Competition Commission Act falls within the “per se” rule approach of competition law in that it allows courts to presume that certain types of conduct have anticompetitive effects without engaging in a detailed analysis to ascertain whether the conduct in fact had such an effect and should be prohibited as opposed to an effects-based approach which involves a detailed inquiry into the harm to competition flowing from a particular business practice and then balancing it against any pro-competitive benefits that may result.

Court accordingly finding that s 26 of the Act to be interpreted on a “per se”, by “object” or “presumptive” basis with costs.

ORDER

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1. Section 26 of the Namibian Competition Commission Act 2 of 2003 must be interpreted to apply on a “per se”, “by object” or “presumptive” basis, with the consequence that the Namibian Competition Commission is not required to allege and prove that clause 19 (1) of the Namib Mills’ loan agreements had an anti-competitive effect in order to be unlawful under s 26 (1) of the Act.

2. The first respondent is ordered to pay the costs of the applicant consequent upon the employment of two instructed and one instructing counsel.

JUDGMENT

Masuku, J

Introduction

[1] This is an application brought by the applicant in terms of s 38 of the Competition Commission Act "the Act"[1], the provisions of which are thus: ' After consideration of any written representations made in terms of section 36(2)(c)(i) and of any matters raised at a conference held in accordance with section 37, the Commission may institute proceedings in the Court against the undertaking or undertakings concerned for an order - (a) declaring the conduct which is the subject matter of the Commission's investigation, to constitute an infringement of the Part I or the Part II prohibition; (b) restraining the undertaking or undertakings from engaging in that conduct; (c) directing any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or the effects thereof; (d) imposing a pecuniary penalty; or (e) granting any other appropriate relief.'

[2] The applicant, after conducting an investigation under the Act, approached this court seeking an order in the following terms:

'Declaring that the First Respondent has contravened section 26(1), read with sections 26(2)(b) band 26(2)(d) of the Competition Act; 2 Restraining the First Respondent from engaging in the conduct of compelling bakeries to only deal (buy their wheten flour) with / from the First Respondent to the exclusion of rivals; 3 Directing the First Respondent to remove clause 19 from all bakery loan and debt acknowledgement agreements it has concluded with bakeries; 4 Directing the First Respondent to notify, by way of notice or circular, all affected bakeries with which it has concluded bakery loan and debt acknowledgement agreements that

[1] Act No. 2 of 2003.

clause 19 of the agreements is null and void and that the bakeries are no longer obliged to only purchase wheaten flour from the First Respondent and further that the bakeries can exercise their choice as from whom to buy their wheaten flour from; 5 Directing the First Respondent to pay an appropriate pecuniary penalty in the amount of N$51.26 million in terms of sections 53(1)(a) and 53(2) of the Competition Act; 6 Directing the First Respondent to pay the costs of the proceedings; and 7 Granting such further and/or alternative relief as the Court may consider appropriate.'

The Parties

[3] The applicant is the Namibian Competition Commission, a juristic person established in terms of s 4 of the Act with its principle office located at 269 Independence Avenue, BPI House, Mezzanine Floor, Windhoek.

[4] The first respondent is Namib Mills (Pty) Ltd, a company duly incorporated in Namibia, with its registered office or principle office at Dortmund Street, Northern Industrial Area, Windhoek.

[5] The second respondent is Bokomo Namibia (Pty) Ltd, a company duly incorporated in Namibia, with its registered office or principle place of business at Plot 10, Brakwater, Windhoek. The second respondent is cited merely for the interest it has in the application and no relief is sought against it.

Background

[6] First respondent has concluded various bakery loan agreements with bakeries around Namibia for the purchase of bakery equipment. The agreement required these bakeries to only purchase wheaten flour from the first respondent and in the event that they purchased the wheaten flour from any other supplier including the second respondent, the applicant was entitled to require full settlement of the loan or to repossess the bakery equipment.

[7] Clause 19 of the bakery loan agreement provides as follows:

'This agreement is subject to the following suspensive conditions being fulfilled at all times: 19.1. That the debtor may only purchase wheat flour, premixes and ready-mix products from the creditor. If this is not the case, the creditor can ask for full settlement of the loan within 7 days or the bakery equipment can be collected by the creditor.'

[8] The applicant contends that clause 19 as aforementioned is exclusionary in its nature or purpose in that it compels the affected bakeries to only buy their wheaten from the first respondent to the exclusion of its rivals.

[9] According to the applicant, the insertion of clause 19 in the bakery loan agreements amounts to an abuse of dominance as contemplated in s 26 (1) read with s 26 (2) (b) of the Act in that it limits or restricts market access. It further contends that the clause also infringes s 26 (1) read with s 26 (2) (d) of the Act which prohibits making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature have no connection with the subject matter of the contracts.

[10] The aforementioned assertion is of course disputed by the first respondent who instead, contends that s 26 of the Act should not be read in isolation but must be read together with s 23 of the same Act. Its contention is based on the premise that the loan agreements in question are vertical agreements, that is, concluded between a supplier and its customer and not between competitors. The s 23 vertical agreements include exclusivity provisions and will only be contravened when there is an anti-competitive effect in such a vertical agreement.

[11] It is the first respondent's further contention that dominance of a firm is not prohibited and that a dominant firm may conclude a vertical agreement with exclusivity provisions. According to the first respondent, such an agreement could contravene s 23 if it lessens competition and conversely would not offend it if it did not lessen competition.

[12] It is also the first respondent's case that once it is recognised that a dominant firm is as entitled as any other firm to conclude a vertical agreement with exclusivity provisions if it passes the s 23 test, that the relationship between sections 23 and 26 becomes important. According to the first respondent, s 26 regulates when dominance may not be abused and this does not mean that the s 23 test for a valid vertical agreement disappears and that a charge of abuse of dominance requires proof of an anti-competitive effect.

[13] For purposes of this judgment and dealt with immediately below, the parties have agreed that the sole issue for determination is a legal one as was outlined in their joint case management report as follows:

> 'The preliminary question of law which the parties jointly wish to have separated and be determined first is whether the relevant provisions of the Act on which the applicant relies should be interpreted; (i) to apply on a "per se", by "object" or "presumptive" basis with the consequence that the applicant is not required to allege and prove that clause 19.1 of the first respondent's loan agreements had an anticompetitive effect in order to be unlawful under s 26 (1) of the Act; or (ii) as requiring an effects based assessment, whereby clause 19.1 of the bakery loan agreements must be shown to have had an anticompetitive effect in order to be unlawful….'

The Per Se Rule

[14] The per se rule emanates from the evaluation of anti-competitive business practices in US antitrust law. It relates to conduct, in the form of either an agreement or a practice by an undertaking that is conclusively presumed to be anti-competitive and illegal merely by its nature.

[15] This rule allows courts to presume that certain types of conduct have anticompetitive effects without engaging in a detailed analysis to ascertain whether the conduct in fact had such an effect and should be prohibited. The per se rule is absolute

and creates an irrebuttable presumption of illegality and, as a result, firms may not raise any defence to their alleged anti-competitive practices.

The Effects Based Approach

[16] The effects based approach involves a detailed inquiry into the harm to competition flowing from a particular business practice and then balancing it against any pro-competitive benefits that may result. It first identifies whether the agreement or conduct substantially prevents, restricts, lessens or reduces competition.

[17] When dealing with this approach, the pro-competitive effects must be proven to outweigh the anti-competitive effects and if at the end of the inquiry it is shown that the agreement or practice produces efficiencies or technological gains which outweigh the anti-competitive effect, the agreement or practice will be found to be lawful.

Interpretation of Statutes in Namibia

[18] In interpreting any statute, the ordinary meaning of the words is regarded as the primary index to the intention with which the statute was made. When the words of a statute are clear and unambiguous, courts are required to give them their ordinary, grammatical meaning save of course in instances where doing so would lead to a glaring absurdity.

[19] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), the court said that where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to a glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity.

[20] The approach in the Endumeni case was endorsed by the Supreme Court in *Namibian Association of Medical Aid Funds and Others v Namibian Competition Commission and Another* (SA 18/2016) [2017] NASC 27 (19 July 2017) as follows:

'[39] This court in *Total Namibia v OBM Engineering and Petroleum Distributors* [2] recently referred to the approach to be followed in the construction of text and cited the lucid articulation by Wallis JA of the approach to interpretation in South Africa in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[3].

''Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used.''

[21] The court went on to state further that: '[40] In the *Total* matter, this court also referred to the approach in England[4] and concluded:[5]

'What is clear is that the courts in both the United Kingdom and in South Africa have accepted that the context in which a document is drafted is relevant to its construction in all circumstances, not only when the language of the contract appears ambiguous. That approach is consistent with our common-sense understanding that the meaning of words is, to a significant extent, determined by the context in which they are uttered. In my view, Namibian courts should also approach the question of construction on the basis that context is always relevant, regardless of whether the language is ambiguous or not.'

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[2] 2015 (3) NR 733 (SC) at para 18.
[3] 2012 (4) SA 593 (SCA) at para 18.
[4] As set out by Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912 – 913.
[5] *Total* para 19.

[41] To paraphrase what was stated by this court in *Total*,[6] the approach to interpretation would entail assessing the meaning of the words used within their statutory context, as well against the broader purpose of the Act.

[42] The context in this matter is the Act and its purpose. That is set out in s 2 of the Act. Its purpose is to promote and safeguard competition in Namibia in order to *inter alia* provide consumers with competitive prices and product choices. The protection of the consumer from prejudicial anti-competitive conduct is of paramount importance. Section 23 prohibits restrictive practices which have as their object the prevention or lessening of competition. It is against this statutory backdrop that the meaning to be given to undertaking in the definitions section is to be ascertained.'

Sections 23 and 26 of the Namibian Competition Commission Act

[22] Section 23 (1) provides the following:

'(1) Agreements between undertakings, decisions by associations of undertakings or concerted practices by undertakings which have as their object or effect the prevention or substantial lessening of competition in trade in any goods or services in Namibia, or a part of Namibia, are prohibited, unless they are exempt in accordance with the provisions of Part III of this Chapter.'

[23] The provisions of s 26 are the following:

'(1) Any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market in Namibia, or a part of Namibia, is prohibited. (2) Without prejudice to the generality of subsection (1), abuse of a dominant position includes - (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting or restricting production, market outlets or market access, investment, technical development or technological progress; (c) applying dissimilar conditions to equivalent transactions with other trading parties; and Act No. 2, 2003 COMPETITION ACT, 2003 (d) making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject-matter of the contracts.'

[6] At para 24.

[24] It is at this juncture, condign to ask the question; according to which criteria should an agreement or conduct, between undertakings be deemed restrictive of competition? I answer the question in the paragraphs below.

[25] When regard is had to the plain and grammatical wording of both sections 26 and 23 respectively, it can without a doubt not be disputed that s 26 outlines conduct which is considered as dominant and, conduct which, as a consequence, is prohibited by the section. Section 26 embodies a prohibition of an abuse of dominance which does not require an analysis of the effect of the conduct on competition in the relevant market.

[26] Similarly, the wording in s 23 does not require any special form of interpretation, it is evident that the agreement or decision will require proof that its object or effect will be that of preventing or substantially lessening competition in trade in any goods or services.

[27] It is apparent from a reading of the two approaches or rules as aforementioned that, s 26 falls within the “per se” rule and accordingly, s 23 falls within the effect-based rule or approach.

[28] Words may be modified or varied where their import is obscured or doubtful. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see an absurdity or manifest injustice from an adherence to their literal meaning or simply because we are in pursuit of a desired outcome.

[29] This well-established principle was endorsed in *Bhyat v Commissioner for Immigration* 1932 AD 125 as follows: ‘The words of a statute should never, in interpretation, be added to or subtracted from without almost a necessity.’

[30] In the present instance, the words of the legislature in both sections 23 and 26 is clear and unambiguous and this court finds no reason to depart therefrom.

Conclusion

[31] It is for the foregoing reasons that this court is inclined to make a finding that s 26 of the Act should be interpreted based on the “per se” rule and as a result, find in favour of the applicant.

Costs

[32] There is no reason why the court should depart from the ordinary rule that costs will follow the event, such costs to include the costs of two instructed and one instructing counsel.

Order

[33] In the premises, the court makes the following order:

1. Section 26 of the Namibian Competition Commission Act 2 of 2003 must be interpreted to apply on a “per se”, “by object” or “presumptive” basis, with the consequence that the Namibian Competition commission is not required to allege and prove that clause 19 (1) of the Namib Mills’ loan agreements had an anti-competitive effect in order to be unlawful under s 26 (1) of the Act.

2. The first respondent is ordered to pay the costs of the applicant consequent upon the employment of two instructed and one instructing counsel.

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T.S Masuku

Judge

APPEARANCES:

APPLICANT:	R. Bhana SC (with him Mr. Gotz and Mr. Kauta)
Instructed by:	Dr Weder Kauta & Hoveka, Windhoek.
First Respondent:	M. Van der Nest SC (with him, D. Obbes)
Instructed by:	Theunissen, Louw & Partners, Windhoek.