

IN THE SUPREME COURT OF ESWATINI
JUDGMENT

Civil Appeal Case No. 31/2019

In the matter between:

SWAZILAND COMPETITION COMMISSION

Appellant

And

SWAZI MTN LTD

Respondent

Neutral citation: *Swaziland Competition Commission vs Swazi MTN LTD*
(31/2019) [2020] SZSC 01 (12th March, 2020)

Coram: **M.C.B. MAPHALALA CJ**
R.J. CLOETE JA
S.B. MAPHALALA JA

Heard: 5th March, 2020.

Delivered: 12th March, 2020.

SUMMARY : *Competition Commission a creature of statute – Accordingly it is bound to act in terms of the powers afforded it in terms of its enabling legislation – Commission found that the transaction was not notifiable in terms of the Competition legislation – As such no notification fee payable – Commission acted beyond its powers and unlawfully in failing to refund the Respondent with the full fee paid in error in respect of a transaction which was not notifiable – The appeal is dismissed with costs – The cross-appeals substantially upheld with costs.*

JUDGMENT

CLOETE – JA

- [1] Both the Appellant and the Respondent filed and served applications for condonation of the late filing of their Heads of Argument and Bundles of Authority and the documentation being in order, both applications were granted with no order as to costs.
- [2] The Respondent owned sixty percent (60%) of the share capital in a company known as E-Top Up (Pty) Ltd, the balance of the shares being owned by the

late businessman Victor Gamedze. The Respondent wished to purchase the balance of the paid up capital in that company from the said Gamedze.

- [3] It would appear that the Respondent's Attorney, Mr. M. Magagula, approached the Executive Director of the Appellant to establish whether the purchase of the said remaining shares fell within the ambit of the provisions of the Competition Act of 2007 in that the transaction would be notifiable and as such would attract the payment of the filing fees envisaged at Section 11 of that Act (depending on which version one looks at, the communication was either formal or informal but whatever format it followed, there is no dispute that there was such a communication).
- [4] Based on the preliminary view of the Executive Director of the Appellant (whether formal or informal) the Respondent lodged the notification documentation with the Appellant and paid the maximum fee provided for in the said Section 11 of the Act in the sum of E600 000.00.
- [5] It is common cause that the documentation and the further particulars requested by the Commission finally reached the Commission and after deliberations and having obtained a legal opinion from a Counsel, the

Commission finally reached a conclusion and apparently issued the conclusion in the following terms as set out in the letter addressed by the Commission to the Respondent's Attorneys dated 23 March, 2015:

1. **The transaction should not have been notified to the Commission because MTN already owned 60% of the equity shares in E-Top Up.**
2. **That the Secretariat should refund the parties in accordance with the advice received from Counsel.**

I say purportedly because the decision was, in terms of Section 31 of the Act, to have been published on the Website of the Commission on the first day of the quarter after the decision had been made but there is no proof in the documentation before me that this was in fact followed.

[6] It is common cause that the Commission, in the same letter of 23 March 2015 stated the following:

7. **Based on the aforementioned, we would like to advise that**
 - i. **This type of transaction is not notifiable**

ii. **We enclose a refund amounting to a third of the filing fee (E200 000.00).**

8. **Please note that refunding notification fees is not a policy of the Commission. This is an exceptional case.**

(my underlining)

[7] The Respondent's Attorney refused to accept the tendered sum and returned the offered payment to the Appellant and it is apparent that the parties entered into various negotiations which were apparently unsuccessful culminating in the Respondent bringing an Application before the High Court during February 2016 for an order in the following terms:

1. **An Order directing the Respondent to pay to the Applicant the sum of E600 000.00 (Six Hundred Thousand Emalangeneni Only) being a payment made by the Applicant to the Respondent as a Notification Fee.**

- 2. Interest on the said sum of E600 000.00 calculated at the rate of 9% per annum from the date of service of this application to date of final payment.**

- 3. Costs of suit on the scale between attorney and client;**

[8] The said application was backed by an extensive founding affidavit, the Appellant filed an opposing affidavit and the Respondent filed a replying affidavit culminating in the matter being heard before the High Court on 3 May 2019. On 10 May 2019 the Court *a quo*, per M. Dlamini J, made the following Order:

[74] In the final analysis, I enter the following orders:

[74.1] Applicant's application succeeds;

[74.2] Respondent is ordered to;

[74.2.1] refund the applicant the sum of E600 000.00;

[74.2.2] pay the applicant interest at the rate of 9% *per*

annum a tempore morae calculated from a period of three months as (sic) litigation period to date of final payment on the sum of E400 000.00;

[74.4] Each party to bear its own costs.

[9] On 23 May 2019 the Appellant lodged an appeal in the following terms:

- 1. The Court *a quo* erred in fact and in law in holding that it was Appellant's Secretariat that made a decision to refund the Respondent part of the notification fee;**
- 2. The Court *a quo* erred in law and in fact in holding that the Secretariat of the Appellant in the exercise of its investigative power is not a separate entity as the Board;**
- 3. The Court *a quo* in fact and in law in holding that the Appellant did not suffer any prejudice by Respondent's failure to follow Section 40**

of the Competition Act, by failing to appeal the decision of the Board of the Appellant;

- 4. The Court *a quo* erred in holding that the Board of Appellant was *functus officio* on the decision to withhold part of the notification fee;**
- 5. The Court *a quo* erred in holding that the Court had original jurisdiction to hear the Respondent's Application, which in fact was not an original matter but was one which was heard and was still pending before the Board of the Appellant as the Board still had to determine the amount or quantum of the refund as the Appellant's Secretarial and the Respondent had failed to agree on the quantum of the refund;**
- 6. The Court *a quo* erred in holding the Respondent's application under the circumstances wherein the Court agreed with all the arguments of the Appellant against the Application that served before the Court.**

[10] The Respondent in turn lodged a cross-appeal on the following grounds:

- 1. The Court *a quo* erred and misdirected itself by failing to award interest on the sum of E600 000.00, having found that the Respondent was entitled to a refund of the sum E600 000.00 paid as a notification fee to the Appellant.**
- 2. The Court *a quo* erred and misdirected itself by awarding interest on the sum of E400 000.00 calculated after three months from date of institution of the proceedings**
- 3. The Court *a quo* erred in finding that the Respondent should have accepted payment of the sum of E200 000.00 and demanded the balance.**
- 4. The Court *a quo* erred and misdirected itself by not ordering the costs following the event having found that it was unjust for the applicant to withhold payment of the sum of E600 000.00 paid as notification fee.**
- 5. The Court erred and misdirected itself by refusing to grant costs on the ground that the Respondent ought to have noted an appeal in terms of Section 40.**

- 6. The Court *a quo* erred by not awarding costs to the Respondent on the grounds that the Respondent displayed conduct which requires censure.**
- 7. The Court *a quo* erred by failing to exercise its discretion on the question of costs judicially.**

[11] Both parties filed Heads of Argument and Bundles of Authority. The main thrust of the argument of the Appellant was that the Court *a quo* did not have jurisdiction to hear the matter because the provisions of Section 40 of the Act had not been followed by the Respondent, the other grounds of appeal being incidental. On the other hand the argument for the Respondent was that the said Section 40 did not apply and that the Respondent was entitled to a full refund of the fee paid in error as there was no legal basis for the Appellant to retain same or refund same in part only.

[12] Before dealing with the relevant issues, I deem it necessary to quote *verbatim* the provisions of the Act which are pertinent to this matter. These are:

Interpretation

2. In this Act, unless the context otherwise requires –
- “Commission” means the Competition Commission established in terms of section 6;

Establishment of the Commission.

6. There is established a body to be known as the Swaziland Commission which shall be a body corporate with perpetual succession and capable of suing and being sued in its corporate name, and with power, subject to this Act, to do or perform all such acts and things as a body corporate may, by law, do or perform.

Independence of the Commission.

7. Subject to the provisions of this Act the Commission shall be independent of control of any person, including but not limited to any statutory body, Government or any other entity, in the discharge of its functions.

Functions of the Commission.

11. (1) The Commission shall monitor, regulate, control and prevent acts or behavior which are likely to adversely affect competition in the country.
- (2) Without limiting the generality of subsection (1), the Commission shall perform the following functions –
- (c) take such actions as it considers necessary or expedient to regulate the creation of a merger or to prevent or redress the abuse of a dominant position by any enterprise;
 - (d) provide persons, engaged in business, with information regarding their rights and duties under this Act;
 - (l) do all such acts and things as are necessary, incidental or conducive to the better carrying out of its functions under this Act.

Power of the Commission.

13. (1) For the purposes of carrying out its functions under this Act, the Commission shall have power to –

- (a) summon and examine witnesses;
- (b) call for and examine documents;
- (c) administer oaths;
- (d) require that any document submitted to the Commission be verified by affidavit; and
- (e) adjourn any investigation from time to time.

SECRETARIAT

Secretariat of the Commission.

18. The Secretariat of the Commission shall be made up of the Executive Director and other employees of the Commission as may be appointed under this Act and the

Secretariat shall be the investigative arm of the Commission.

Executive Director.

- 19. (1) The Commission shall appoint, on such terms and conditions as it may determine, an Executive Director of the Commission who shall be the chief executive officer of the Commission and shall, in addition, perform such duties as the Commission shall assign to the office and ensure the effective administration and implementation of this Act.**
- (2) Without derogation from the generality of the responsibilities and duties of the Executive Director conferred under subsection (1), the Executive Director shall be responsible for the day-to-day administration of the Commission.**
- (3) The Executive Director or such other officer of the Commission as the Executive Director may designate, shall attend meetings of the Commission and of any**

committee of the Commission and may address such meetings, but shall not vote on any matter.

Other employees.

20. (1) The Commission may appoint, on such terms and conditions as it may determine, such other employees, subordinate to the Executive Director, as it considers necessary for the performance of its functions and to assist the Executive Director in discharging the Executive Director's duties and responsibilities.
- (2) The Commission may delegate to the Executive Director the appointment of employees of such junior ranks as the Commission shall specify.

Appeals

40. The Commission shall have power to issue orders or directives it deems necessary to secure compliance with this Act or its decision and any person aggrieved by a decision of the Commission made under this Act or under

any regulations made hereunder may, within thirty days after the date on which a notice of that decision is served on that person, appeal to the Court.

In terms of the regulations promulgated under the Act.

Fees and threshold.

11. (1) **The Commission shall not charge a fee to any person lodging a complaint on any matter for investigation under the Act.**

- (2) **Fees are payable to the Commission for the notification of a merger or acquisition, for an exemption application and for the provision of an advisory opinion.**

- (3) **The Commission shall charge an advisory opinion fee of E3,500.**

- (4) The filing fees for a merger shall be charged on the value of the combined annual turnover or assets of the merging enterprises.**

- (8) The fee charged for all other mergers is 0.1% (zero point one percent) of the combined annual turnover or assets whichever is greater.**

- (9) The amount charged for notification of a merger shall not exceed the amount of E600 000 for any single merger notified.**

(my underlining)

[13] Accordingly, on a plain interpretation of the said Act and Regulations one can only make the following deductions:

1. The Commission is an entity established by its own enabling legislation and being a creature of statute, it can only operate in all respects in terms of the said legislation.

2. The Executive Director is nothing more or less than an employee together with the rest of the employees of the Commission with no special powers other than those afforded the position in terms of the Act and being enjoined to perform such duties as may be assigned to the office by the Commission. I emphasise duties which should not be confused with autonomous powers.

3. Neither the Act nor the Regulations set out any procedure or tariff for the recovery of any fees by either the Commission or the employees in respect of any work done (except for a specifically mentioned fee of E3500.00 which the Commission shall be entitled to charge for an advisory opinion). The Executive Director and all other employees, in the absence of any provision to the contrary in either the Act or the Regulations, are salaried employees who carry out any investigative functions assigned to them by the Commission and as such there is no question at all that they are entitled to charge any fees for work done in a normal course of their employment by the Commission.

4. The Act, together with the Regulations, make it absolutely clear that a notification fee is only payable if the transaction concerned is notifiable at

law. There is no provision for payment of any sum in respect of a transaction which is not notifiable except as specifically set out that it is entitled to charge a specific fee for an advisory opinion.

[14] Since, in my view, the main ground argued by Mr. Manzini on behalf of the Appellant was the jurisdiction of the Court *a quo* to entertain the matter, I deem it appropriate to deal with that ground in some detail. In that regard I do believe that what is instructive and very relevant to this whole issue is the content of the affidavit signed by the Executive Director at paragraph 12 thereof which reads: “.....**the Board of Commissioners directed that the Secretariat should seek legal opinion on whether the transaction was notifiable or not. The opinion received stated that the transaction was not notifiable. When requesting the opinion the Secretariat requested counsel to give direction about the issue of the notification fee. Counsel advised that given the fact that the Commission had incurred costs only part of the fee should be returned.”**

(my underlining)

[15] From this it is surely clear that;

1. The Commissioners directed the Secretariat to seek only a legal opinion whether the transaction was notifiable or not and nothing else. In other words go and get an opinion as to whether the transaction is notifiable.
2. Indeed it is clear that the opinion of Counsel was that the transaction was not notifiable and that, with respect, should have been the end of the matter.
3. However without having been instructed to do so (from the clear wording of the provisions of the affidavit), the Secretariat apparently on a frolic of its own, requested Counsel to give direction as opposed to an opinion about the issue of the fee. What is instructive is that Counsel was apparently not asked for a legal opinion relating to the fee but merely to give direction.
4. It is a pity that the legal opinion of Counsel is not before the Court because we would then have been able to see on what legal grounds Counsel allegedly advised that only part of the fee should be returned because the Commission had incurred costs. There is no indication of any nature what purported costs were allegedly incurred, and as such it is inconceivable that the advice given by Counsel was based on any legal principle or

provided for in the Act or Regulations. In addition there is no indication before us of the actual direction given by Counsel relating to the retention of a portion of the fee and on whether it was his/her advice that only one third of the amount paid in error should be refunded.

5. Since the opinion of Counsel, correct in my view as regards the actual transaction, was that the transaction was not notifiable, the Commission acted in accordance with its obligations in terms of the Act and Regulations in making a final decision to the effect that the transaction was not notifiable.

6. As indicated, that should have been the end of the matter but the Commission purportedly (for the reasons I mentioned previously), went further relating to the issue of withholding a portion of the fee which had been paid in error. Based on the affidavit of the Executive Director, all that the Commission sought was an opinion as to whether the transaction was notifiable or not and having obtained that opinion it should have abided by the opinion in that regard only and not have entered the fray relating to the withholding of a part of the fee paid in error as, in my view, once it had made a decision that the transaction was not notifiable, it was

indeed *functus officio* and as such overreached itself in making a finding which has no basis at law in terms of its enabling legislation to which it is bound.

7. Since the Act and Regulations are clear that a fee is only payable in respect of a transaction which is notifiable and that the Commission indeed found that this was the case at law, the decision was clearly in favour of the Respondent and as such why in the world would the Respondent lodge an appeal in terms of Section 40 against a decision made in its favour.

8. For the clear reasons set out above that the Commission correctly found that the transaction was not notifiable and in the absence of any legal right of the Commission to be paid a fee in respect of a matter which was not notifiable, it is impossible to understand that the main thrust of the argument of the Appellant was that since the Respondent had not availed itself of an appeal against an unlawful decision to withhold part of a fee paid in error, that this Court and indeed the Court *a quo* had no jurisdiction to hear the matter and on that ground alone this appeal must fail dismally.

9. Interestingly, in the letter of 23 March 2015 it is stated that it is not the policy of the Commission to refund fees. There is no indication anywhere how and when such alleged policy came into being and whether it was lawful or not in any event. In addition, if there was such a policy lawfully adopted, why would it be necessary to seek direction from Counsel in that regard.

[16] Insofar as the Court *a quo* made a finding in that regard which is contrary to this Judgment, I respectfully disagree with those provisions of the Judgment concerned. Having found that the Court *a quo* clearly had the necessary jurisdiction to hear the matter, I do not believe that it would serve any purpose in debating the other grounds of appeal raised by the Appellant as they really have no bearing on the final outcome of this matter. I agree with the Judgment of the Court *a quo* that it heard and decided on the substantive issues before it, technicalities aside.

[17] The Respondent argued that the Commission was enjoined to act in terms of the rights and obligations afforded it in terms of the Act and Regulations and as such that the Appellant's actions in withholding the fee paid in error by the Respondent were unlawful and as such that the Appellant was enriched at the

expense of the Respondent. I agree with these contentions and refer to the following decisions in support thereof, both of which I fully agree with and buttresses my view that the Commission acted beyond the bounds of its lawful rights to direct that the Respondent was to receive only a portion of the fee paid in error in respect of a transaction which was not notifiable and as such did not attract any fee.

[18] In **Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and others 1999 (4) SA 788**, a full bench decision was that **“It is well established that delegated powers must be exercised within the limits of authorities that was conferred. If not, the purported exercise of the power is unlawful and the Court is quite entitled to set it aside** as it would set aside the unlawful act of any other functionary who has acted outside the powers conferred upon him by the legislature”.

[19] In **Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 at 708**, **Chaskalson P** writing for the Constitutional Court stated the principle as follows:

“It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement”.

(my underlining)

[20] Dealing with the cross appeal, I need to observe the following:

1. With respect, having found correctly that there was a full refund due to the Respondent, the Court *a quo* should have awarded interest on the full sum of E600 000.00.
2. With respect, I cannot agree with the finding of the Court *a quo* that interest should only have been calculated on the sum of E400 000.00 because the Respondent should have accepted the offered payment of E200 000.00 from the Appellant and should then have sought to recover the balance. This is not what happens in such transactions because there would be a danger in the Appellant arguing that the Respondent had accepted the sum of E200 000.00 in full settlement of all claims. In my view the Respondent

acted properly and understandably in rejecting the offered settlement payment.

3. I can also, with respect, find no reason why the interest should not have been calculated from the date of institution of proceedings on 16 February 2016.

4. As regards costs in the Court *a quo*, I cannot find a reason to interfere with the finding of the Court *a quo* as the learned Judge dealt with the matter extensively and clearly had good reason to find as she did that each party should pay their own costs in that Court.

5. However, given the spurious grounds of appeal raised by the Appellant and having been successful in both the appeal and the greater part of the cross-appeal, I believe that it is fair and equitable that the costs of the appeal and the cross-appeal should follow the successful party.

[21] For the reasons set out above the appeal of the Appellant is dismissed and the counter appeal partially succeeds as set out below, the judgment of this Court is as follows:

1. The Appellant's appeal is dismissed.

2. The Judgment of the Court *a quo* is set aside and substituted with the following:
 - 2.1 The Appellant is ordered to refund the Respondent in the sum of E600 000.00 together with interest thereon at the rate of 9% per annum calculated from 16th February 2016 to date of final payment;

 - 2.2 Each party to bear its own costs

3. The costs of the appeal and the cross-appeal before this Court are awarded to the Respondent.




R. J. CLOETE
JUSTICE OF APPEAL

I agree


M.C.B. MAPHALALA
CHIEF JUSTICE

I agree


S.B. MAPHALALA
JUSTICE OF APPEAL

For the Appellants: N. MANZINI FROM C.J. LITTLER ATTORNEYS.

For the Respondent: M. MAGAGULA FROM MAGAGULA & HLOPHE
ATTORNEYS.