REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION

WINDHOEK

HC-MD-CIV-MOT-GEN- 2020/00180

In the matter between:

NAMIBIA COMPETITION COMMISSION APPLICANT

And

FRANS INDONGO GROUP (PTY) LTD FIRST RESPONDENT
(CITED HEREIN *NOMINEE OFFICIO* AS THE SOLE TRUSTEE OF FRANS INDONGO INVESTMENT TRUST)

BRUKARROS MEAT PROCESSORS (PTY) LTD SECOND RESPONDENT

Neutral Citation: *Namibia Competition Commission v Frans Indongo Group ((Pty) Ltd N. O.* (HC-MD-CIV-MOT-GEN-2020/00180) [2021] NAHCMD 297 (4 June 2021).

CORAM: MASUKU J
Heard: 3 November 2020
Delivered: 4 June 2021

Flynote: Competition Commission Act No. 2 of 2003 ('the Act') – Section 42 - Notifiable mergers – The court cannot in of its own motion, issue pecuniary penalties – pecuniary penalties issued because of the failure to report notifiable mergers to the Commission – amount of pecuniary penalty resides in the discretion of the Court – s. 53 - factors to be taken into account when determining pecuniary penalties discussed.

Summary: The respondents entered into a merger as envisaged in section 42 of the Act. The respondents however, failed to notify the applicant of such merger and thus contravened section 44 of the Act. The respondents appear to have obtained conflicting legal opinions regarding the notifiability of the transaction. It was after the

opinion of a senior counsel, specializing in competition law that the respondents notified the applicant of the merger. The applicant, in terms of section 51, read with section 53 of the Act, approached the court seeking a declarator that the respondents implemented a merger, an issue that became common cause between the parties.

The only question the court had to determine was the appropriate penalty to impose on the respondents for contravening the relevant provisions of the Act. The applicant in its application adopted a methodology that would be of assistance to court when reaching the appropriate pecuniary penalty. The applicant, in pursuance of its methodology, prayed that the court orders the respondents to pay a pecuniary penalty in the amount of N$ 2,733,018.28. The respondents conceded that they were liable to pay a penalty but however did not agree on the amount prayed for by the applicants as alleged to be inappropriate and had no regard to the factual matrix of the matter. The court was tasked with determining the appropriate amount to be paid by the respondent. The court found as follows:

Held: that the applicant by virtue of the Act is required to act when a party has conceded to or has implemented a merger in violation of the Act. When doing so, the applicant has an obligation to opt for the appropriate intervention that is to be placed before the court through the guidance of the Act.

Held that: the powers to impose pecuniary penalties reside solely with the court and this matter is no exception. This is done by considering all appropriate circumstances placed before it.

Held further that: that the court cannot out of its own motion issue an order for pecuniary penalties because of the supervisory and investigative role that the applicant is clothed with in matters of competition. It is the responsibility of the applicant to approach the court for a pecuniary penalty to be imposed.

Held: that the standard regarding pecuniary penalties is twofold and can be regarded as a ‘double appropriateness test’. Firstly, the appropriateness of imposing a pecuniary penalty and secondly, if considered appropriate to impose the penalty, the appropriate penalty to impose in the circumstances.

Held that: in terms of s 53 of the Act, all relevant matters, including the following factors must be taken into account in determining an appropriate pecuniary penalty, namely, the nature, duration, gravity and extent of the contravention; the nature of and extent of the any loss or damaged suffered by any person as a result of the contravention; the behaviour of the undertaking concerned; the market circumstances in which the contravention took place; the level of profit derived therefrom; the degree to which the contravening entity has co-operated with the Commission and the court; and whether the undertaking has previously been found by the court to have engaged in conduct that contravened the Act.

Held further that: the factors listed under section 53 that the court is called upon to consider is not exhaustive.

Held: that the applicant only considered the factors listed in the Act when suggesting the proposed pecuniary penalty and failed to take into account all the other factors that the court considers relevant in this matter.

Held that: should the court follow the approach followed by the applicant blindly, it may lead the court's failure in properly exercising its discretion and imposing its punitive powers appropriately.

Held further that: that the factual matrix does not lean towards an intentional and calculated design by the respondent not to report the merger. The respondent self-reported the merger although after a lengthy period which was substantiated. This carries weight when concluding the amount to be paid.

Held: the respondent co-operated with the applicant and there is no evidence that there was any profit derived from the merger.

Held that: the penalty cannot be arrived at in a scientific manner and the court considering the amounts imposed by South African courts during the years 2003 and 2018 for similar contraventions, ordered the respondents to pay pecuniary penalties in the amount of N$250 000, together with costs. Needless to mention, the

court made a *declarator* in the applicant's favour that the respondents had contravened s 42 of the Act.

ORDER

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1. It is declared that the Respondents contravened the provisions of Section 42 of the Competition Act, No.2 of 2003.
2. The Respondents are ordered, jointly and severally, one paying and the other being absolved, to pay the amount of N$ 250 000 as a pecuniary penalty for the contravention mentioned in paragraph 1 above.
3. The pecuniary penalty is to be paid within thirty (30) days from the date of this judgment.
4. The Respondents are ordered to pay the costs of this application jointly and severally, the one paying and the other being absolved, consequent upon the employment of one instructing and instructed legal practitioner.
5. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] The promulgation of new pieces of legislation brings with it the need for the courts, in exercise of their constitutional power of interpretation of legislation, including the Constitution, to bring their interpretational machinery to bear on any legislative enactment that requires clarity.

[2] This is particularly so, when the protagonists who serve before court at the time, contend for different interpretations to be given to the text of the legislation in question.

[3] Serving before court, in the instant matter, dissected and placed on the court's interpretational table, are certain provision of the Competition Act No. 2 of 2003, ('The Act'), namely, the provisions of s 53 of the Act regarding the court's powers, in appropriate cases, to issue a pecuniary penalty where there has been a violation of the Act in relation to a merger.

[4] The court is required, in this judgment, to issue a judgment giving guidance on what factors are to be taken into account by the court, in assessing what will, at the end of the day, be a penalty that meets the requirements of the provision mentioned above.

The parties

[5] The applicant is the Namibian Competition Commission. It is a juristic person, established in terms of s 4 of the Act. Its place of business is situate at BPI House, Mezzanine Floor, Independence Avenue, Windhoek.

[6] The 1st respondent is the Frans Indongo Group (Pty) Ltd, a private company, with limited liability and duly incorporated in terms of the company laws of this Republic. It has been cited in these proceedings *nominee officio* as the sole Trustee of the Frans Indongo Investment Trust, an entity registered in terms of the applicable trust laws. Both the Group and the Trust, have the same place of business, namely, Frans Indongo Gardens, Dr. Frans Indongo Street, Windhoek.

[7] The 2nd respondent, is Brukarros Meat Processors (Pty) Ltd, a private company, duly incorporated and registered in terms of the company laws of this Republic. Its place of business, is situate at Farm Coenbult, Keetmanshoop, Republic of Namibia.

Relief sought

[8] In its notice of motion, the applicant prayed for the following relief:

'1. Declaring that the First and Second Respondents have implemented a merger, as understood by section 42 of the Competition Act, No. 2 of 2003 ("the Act"), in contravention of the Act by failing prior to the merger to obtain the approval of the Applicant as required by Chapter 4 of the Act.
2. Ordering the First Respondent, alternatively the Second Respondent, further alternatively the First and Second Respondents jointly and severally, the one paying the other to be absolved, pay a pecuniary penalty in terms of Section 51, read together with Section 53, of the Act in the amount of N$2,733,018.28, alternatively, such other amount as determined by this Honourable Court.
3. Ordering that the Respondents pay the costs of this Application jointly and severally, the one paying the other to be absolved.
4. Granting further and/or alternative relief.'

Background and the applicant's contentions

[9] It is common cause that the applicant is empowered by the provisions of s 16 of the Act, to administer and enforce the Act. This power, includes the investigation of possible contravention of various provisions of the Act by undertakings and controlling mergers between undertakings. In this connection, the Act empowers the applicant, where mergers have taken place in violation of the relevant provisions, to take lawfully appropriate steps to deal with the said contraventions.

[10] It appears common cause that the 1st respondent in this matter, acquired shares in the 2nd respondent, which amounted to a merger, in terms of the Act.[1] Section 42(1) of the Act defines a merger as 'when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of another undertaking.'

[11] The applicant, in its founding affidavit, deposed to by its Chief Executive Officer, (CEO) and its secretary, Mr. Vitalis Ndalikokule, alleges that said the merger was in contravention of s 44 of the Act. There are certain enforcement measures promulgated in s 51 of the Act, which are however inapplicable to the respondents' respective cases.

[1] Section 42(1) of the Act.

[12] It is further common cause that the respondents accept that the transaction they undertook, was one that was notifiable in terms of s 44 of the Act. In this regard, the respondents were required by law to notify the applicant of the merger. The respondents further accept that they did not notify the applicant of the merger at the time it took place, namely in or about November 2010.

[13] The respondents thus filed documents to the applicant under cover of a letter dated 13 August 2014, notifying the latter of the merger for notification in retrospect and prayed for the Commission to deal with them leniently on account of them having come forward on the contravention on their own volition.[2]

[14] In that event, the applicant has approached this court seeking in the first place, the court to declare that the respondents' merger was in contravention of s 44 of the Act. Additionally, the applicant seeks an order from the court to impose an appropriate pecuniary penalty in respect of each respondent, as envisaged by the Act.

[15] By letter dated 19 August 2014,[3] the applicant acknowledged receipt of the respondents' letter and indicated that it will proceed to consider the merger notification. It further advised the respondents that it would seek an opinion regarding whether it had power to enter into settlement agreements with parties who have acted in contravention of the Act or whether it should apply to this court for appropriate relief in that regard.

[16] In the course of time, the applicant developed a methodology that it would use to compute an appropriate pecuniary penalty. It proposed that the court adopts same to assist in the computation of the appropriate penalty in terms of the Act. It is not necessary, for present purposes, to delve into the particulars of the methodology. This will be considered in the course of the judgment.

[17] The long and short of it, is that the applicant, using its methodology devised, considered the circumstances of this case and recommended to the court, the

[2] Letter from the respondents' legal practitioners at p 00031 of the record.
[3] Page 00034 of the record.

imposition of a fine of N$ 2, 734 090.26, which it argues, consists of 1,19% of the global turnover of the respondents' turnover for the year ending 2014, namely, N$ 17,247,551.00 and N$ 212, 417,851.00. The applicant accordingly seeks an order from this court compelling the respondents to pay the said penalty, or some other penalty that the court may deem fit to impose.

The 1st respondent's contentions

[18] What is the respondents' attitude to this application? It is important to point out that there is no opposition filed by the 2nd respondent in this matter. In this regard, it is fair to say that there is, for all intents and purposes, one respondent, namely the 1st respondent. To this end, I will refer to the 1st respondent as 'the respondent'. Where the need arises for me to mention the 2nd respondent, it will be referred to as such.

[19] Needless to say, the respondent opposes the application and to that end it filed an answering affidavit deposed to Mr. Jacobus Carolus Van Graan, its CEO.

[20] The respondents acknowledged that the merger was undertaken without notification to the applicant. They acknowledged further that the applicant was notified of the merger some 4 years later and that this was in the course of notifying the applicant about a different merger involving the 2nd respondent and another entity, namely, Whiteflower Investments Three (Pty) Ltd.

[21] It is the respondents' case that having been notified after the fact of the merger in question, the applicant, by letter dated 7 October 2014, approved the merger without any conditions as recorded in a Government Gazette.[4]

[22] The respondent contends that the applicant got to know of the merger without its approval when the respondent self-reported that fact to the applicant. This was after the respondent had received an opinion from counsel to the effect that the transaction ought to have been notified to the applicant.

[4] Annexure "VN4" to the respondents' answering affidavit, p 00035 of the record.

[23] It is the respondent's case that previous to counsel's opinion, which it eventually followed, it had received conflicting opinions from legal practitioners. It is the respondent's case it also sought some guidance from the applicant on that very matter. The respondent further notes, for what it is worth, that the applicant, on notification of the merger, approved it unconditionally and recorded that the merger did not raise any competition concerns.

[24] The respondent acknowledges that its failure to notify the applicant of the merger prior to its implementation in 2010 was in violation of the provisions of s 44 of the Act. The respondent further stated that it does accept liability therefor and would accept the imposition of an appropriate penalty. It is the 1st respondent's case however, that the penalty proposed by the applicant is wholly inappropriate, as it does not meet the twin requirements of rationality and proportionality, proper regard being had to the factual matrix and dynamics at play in the matter.

[25] It is the respondent's case that the failure to notify the applicant was due to a *bona fide* mistake on its part. It was certainly not the result of a deliberate intention on the respondent' part to avoid its obligations in terms of the law. It is the respondent's case that the methodology and penalty regime proposed by the applicant unduly fetters the court's discretion in arriving at an appropriate penalty in the circumstances of this matter.

[26] As to how the merger in question ended up not being notified, the respondent chronicles the events as follows: Mr. Le Riche's shares in the 2nd respondent were offered for sale in November 2010 and they represented 57.57% of the 2nd respondent's shares. The applicant purchased these shares and the purchase resulted in the 1st respondent having control over the 2nd respondent.

[27] Mr. Pieter Hamman, a legal practitioner engaged by the respondent to advise on the transaction at the time, was of the opinion that it did not raise an issue of notifiability in terms of the Act. In or about 2012, the respondent, in the process of taking advice relating to another proposed merger, was advised of the notifiability of the previous merger.

[28] The respondent then requested a written opinion from Mr. Hamman as to why he held the view that the merger was not notifiable. He rendered an opinion in writing, contending that the merger was not notifiable because the 2nd respondent's core business was the operation of an abattoir, which does not involve manufacturing in the process. As such, he opined, the 2nd respondent was not engaged in the production, supply and distribution of 'goods' as envisaged in the Act.

[29] Faced with the discordant views on the issue, the respondent then sought advice from its present legal practitioners of record. They adopted a position diametrically opposed to that of the erstwhile legal practitioners, namely that the transaction was notifiable. The respondent was accordingly advised to report the transaction even if belatedly.

[30] It is the respondent's position that it decided, upon further consideration of the matter, to instruct its present legal practitioners of record to address correspondence to the applicant on 28 February 2013, on a no-name basis, seeking the applicant's view on whether the said transaction was notifiable in terms of the Act. The applicant refused to comment on the matter in view of the non-disclosure of the parties.

[31] The respondent states that as a result of the conflicting positions on the matter, it was on unsettled waters regarding this matter by August 2013. Further confusion was added by the opinion of Ms. Elize Angula, the respondent's board member and a legal practitioner of this court, who opined that the transaction was not notifiable.

[32] Eventually, the respondent sought and obtained a legal opinion from a competition law practitioner from South Africa. She rendered her opinion on 28 February 2014, to the effect that the transaction was notifiable in terms of the law. She advised the respondent to self-report, which it did as recorded above. This was eventually done, as deposed to by the applicant's CEO as recorded earlier.

[33] The respondent further deposes that on 26 January 2015, the applicant wrote to it suggesting the holding of a meeting between the parties and which the

applicant later cancelled.[5] Thereafter, so contends the respondent, the applicant rested on its laurels and did nothing for a period of three years. It was only in April 2019 that the applicant, for the first time, advised the respondent's legal practitioners that it intended on seeing through the penalty issue. By this time, the respondent had, by virtue of another merger, approved by the applicant, disposed of its interest in the 2nd respondent.

[34] It is the respondent's case that the parties thereafter engaged in settlement negotiations but to no avail. The applicant thereafter filed an application on 29 July 2019, which was withdrawn because the respondent's trustees had not been cited. This resulted in the current application, which the respondent argues, was done late in the day, some 5 years after notification of the merger.

[35] In response to the applicant's founding affidavit, the respondent did not add much to the version that has been canvassed in the preceding paragraphs of this judgment. Like a postage stamp to an envelope, the respondent stuck to the version narrated in the abridged summation above. In this particular regard, a few issues are worth mentioning, however.

[36] The respondent contended that whilst the applicant has a statutory duty to take effective steps to address what it perceived to be contraventions of the Act, it had a duty to act in a manner that is both rational and proportionate to the contravention in question. It was the respondent's contention that a pecuniary penalty is not the only remedy available to the applicant and that the circumstances of each particular case should dictate what a reasonable penalty ought to be, taking into account in the particular case that the respondent had disposed of its interest in the 2nd respondent.

[37] It was the respondent's further contention that whereas the pecuniary penalty may be the only available panacea for the applicant in this matter, the applicant was not perforce obliged to impose an exorbitant penalty, nor a penalty at all. It was the respondent's case that at the end of the day, the matter should be left to the court's discretion, reposed in it by the provisions of the Act, which discretion may be

[5] Para 22 of the answering affidavit, p 00160 and letter marked "VG6", p 00190.

properly exercised by the court not imposing any penalty at all, depending on the circumstances of the case at hand.

[38] Factors, that the respondent argued militate against the imposition of a penalty, let alone a heavy one, are that the applicant took an unduly long time to deal with this matter after becoming aware of the contravention. This inaction, contended the respondent, which is solely attributable to the applicant, should be appropriately weighed in the balancing of the penalty scales.

[39] Regarding the formula devised by the applicant to be utilised in dealing with such contraventions, it was the respondent's case that the applicant seeks the court's imprimatur of its formula, thus defying the very manifest legislative intention, namely, that the determination of an appropriate penalty, must resort in the court's discretion, especially in instances as the one under consideration. To apply the guidelines fashioned by the applicant and which are inflexible, so submitted the respondent, the court's discretion would be seriously compromised, and give way to the applicant's dictates, which is not the legislature's intention.

[40] The respondent further contends that it made the applicant aware of the reasons for the delay in reporting the non-compliance, namely the legal opinion received from Mr Hamman. It further contends that it also sought guidance from the applicant on a no-name basis, which attempt was thwarted by the applicant.

[41] It is the respondent's case that the court, in determining the appropriate penalty, should not lose sight of the fact that the transaction was belatedly approved without any conditions and that no loss or damage was proved to have eventuated as a result of the contravention in question. A factor to also be placed in the equation, the respondent contends, is the delay by the applicant in launching the application in terms of s 51, more than 4 years after the first attempt.

[42] The respondent further contended that the amount of penalties suggested by the applicant had inimical effects in that it would serve to deter errant parties from eventually coming clean on their contraventions. As such, self-reporting would be deterred by the steep penalties suggested by the applicant. The court was implored to follow the South African approach in dealing with these matters, namely being

lenient on first ‘offenders’ as it were because there would have been less clarity regarding the application of the relevant laws at the time.

[43] It was the respondent’s further case that the fact that the legislature did not prescribe numerical values to the factors to be taken into account in determining the appropriate penalty, was indicative of the intention to leave the determination of the appropriate penalty entirely in the hands of the court. The factors suggested by the applicant, it was contended, fettered the court’s discretion. As such, the respondent expressed its objection to the criteria proposed by the applicant as proper for the court to adopt in the determination of the appropriate penalty in the instant case.

Applicant’s reply

[44] It would be a fair summation that the applicant stuck to its guns in the maintaining its stance adopted in the founding affidavit. It poured scorn on the contentions by the respondent, both factual and legal, which the latter urged should have a bearing on the appropriate penalty.

[45] In particular, the applicant took the position that as the regulator, and thus custodian, so to speak of competition issues, the court should defer to its opinions as it has expertise in the field. This, contended the applicant, is without prejudice to the court exercising its overall discretion regarding an appropriate penalty.

[46] The applicant maintained that it’s criteria, as suggested, is objective, fair and capable of consistent application. Furthermore, the criteria were both rational and proportionate and took into account all the relevant factors that should colour the exercise of the discretion at the end of the day. The applicant further denied that its approach is out of kilter with the approach in South Africa. It contended that it took account the developments in South Africa but also drew from the experiences of the European Commission in the field.

[47] The applicant objected to the direct application of the South African guidelines in Namibia. This, the applicant contended, would result in detracting from the deterrence intended by our legislature. Trenchant criticism in this regard was laid regarding the employment of the filing fee as a basis for the penalty, as

suggested by the respondent as a reasonable penalty. The applicant submitted that this would trivialise the transgression and would encourage parties to persist in contraventions as an acceptable way of doing business in Namibia, leading to disproportionate fines.

[48] It stated that even in countries where fines for such contraventions were initially low, they were eventually hiked to underscore the importance of adhering to the legal prescripts. It also took the view that the guidelines it suggested were geared to achieve greater transparency and fairness in each case such that in an appropriate case, no fine would be imposed.

The *declarator*

[49] It is worth remembering that in terms of prayer 1 of the notice of motion, the applicant prays for the granting of a *declarator* in its favour, namely, that the either or both of the respondents implemented a merger in contravention of the provisions of s 42 of the Act by failing to obtain the applicant's approval prior to the said merger.

[50] From what is stated above, as the position of the parties, especially the respondent, which opposed the relief sought, it is clear that the respondent does not deny that it, together with the 2nd respondent, entered into a merger in contravention of s 42. This is so because they did not obtain the approval of the applicant before implementing the merger.

[51] In the premises, there is no dispute whatsoever that the respondents contravened the provisions of s 42 of the Act. In the circumstances, there can be no basis for the court to withhold the *declarator*. I accordingly declare that the respondents, namely Frans Indongo (Pty) Ltd and Brukarros Meat Processors (Pty) Ltd, in implementing a merger in or about November 2010, did so in violation of the provisions of s 42 of the Act.

[52] The court having found that the respondents violated the provisions of s 42, which is common cause, the next question, which is a vexed one, is the amount of the pecuniary penalty that must visited on the respondents for the contravention.

From the rendition of the parties' positions in this matter, it is plain that although the respondent admits its liability to be punished with a pecuniary penalty, it objects to the amount prayed for by the applicant in prayer 2 of the notice of motion, namely, N$2,733,018.28.

[53] The court is now confronted with determining the amount of pecuniary penalty fit to be visited on the respondent. The applicant proposes the amount in question to be issues by the court as a pecuniary penalty, or some other amount that the court may, in its wisdom deem meet. It is to that issue that the judgment turns.

Pecuniary penalty

[54] The provision dealing with penalties for the contravention of s 42 is to be found in s 51 of the Act, headed, 'Merger implemented in contravention of this Chapter. It provides the following:

> 'If a merger is being, or has been, implemented in contravention of the provisions of this Chapter, the Commission may make application to the Court for –
>
> (a) an interdict restraining the parties involved from implementing the merger;
> (b) an order directing any party to the merger to sell or dispose of in any other specified manner, any shares, interest or other assets it has acquired pursuant to the merger;
> (c) declaring void any agreement or provision of an agreement to which the merger was subject;
> (d) the imposition of a pecuniary penalty.'

[55] It is plain, from the reading the above provision that the applicant is granted the right to approach this court for appropriate relief in any given case. As to what relief the applicant may seek, appears to be largely dependent on the nature and timing of the contravention. For instance, if the contravention is on-going, the applicant is entitled in terms of the said provision, to approach the court and seek an interdict.

[56] In a case such as the present, where the contravention took place more than a decade ago, and as the applicant gave *ex post facto* approval of the merger in question, the applicant has contented itself with seeking the imposition of a pecuniary penalty to record that contraventions of this nature are not allowed to proceed without consequence, it would seem.

[57] What is important to point out at this juncture, is that in terms of the Act, the applicant is not given the power to impose a penalty in the light of a contravention by a party, even if the party admits a contravention. It has to approach the court once it is of the view or it has been accepted by a guilty party, that a contravention of the relevant provisions has taken place. This is what the applicant has done in the instant case.

[58] Having said this, it does not appear impermissible for the applicant to engage a contravener, with a view, at the end of the day, to agreeing to a certain penalty, which may ultimately be placed before this court for endorsement. The latter would obviously take place if the court is satisfied that the agreed pecuniary penalty is accurately reflective of the nature and seriousness of the contravention in question, taking into account the factors stipulated in s 53 of the Act. It would seem that the parties failed to find common ground regarding the appropriate penalty in this matter, hence the approach to this court.

[59] Section 53, headed ‘Pecuniary penalties’, is the one that deals with pecuniary penalties. It provides that:

> ‘53(1) The court may impose a pecuniary penalty –
>
> (a) for contravention of the Part I or the Part II prohibition;
>
> *(b)* for contravention of, or no-compliance with, a condition attached to an exemption granted under Part III of Chapter 3;
>
> *(c)* for contravention of, or non-compliance with an order of the Court;
>
> *(d)* for the implementation of a merger to which Chapter 4 is applicable –
>
> (i) without the approval of the Commission as required by that Chapter; or
>
> *(ii)* in contravention of a decision of the Commission prohibiting the merger under that Chapter; or

(iii) in manner contrary to a condition under which approval for the merger was given by the Commission under that Chapter.

(2) A pecuniary penalty may be imposed under the subsection (1) for any amount which the Court considered appropriate, but not exceeding 10% of the global turnover of the undertaking during its preceding financial year.

(3) In determining the appropriate penalty, the court must have regard to all relevant matters concerning the contravention, including –

(a) the nature, duration, gravity and extent thereof;

(b) the nature and extent of any loss or damage suffered by any person as a result thereof;

(c) the behaviour of the any undertaking involved;

(d) the market circumstances in which it took place;

(e) the level of profit derived therefrom;

(f) the degree to which the undertaking involved has co-operated with the Commission and the Court; and

(g) whether the undertaking has previously been found by the Court to have engaged in conduct in contravention of this Act.

4. An order imposing a pecuniary penalty, including a pecuniary penalty arising from a consent agreement confirmed as an order of the Court in accordance with section 40. Has the effect of, and may be executed as if it were a civil judgment granted by the Court in favour of the Government of the Republic of Namibia.

5. A pecuniary penalty payable in terms of this Act must be paid into the State Revenue Fund.'

[60] It is important that I make certain preliminary observations about the above provisions. In the first place, it must be stated that reference to 'the Court' in the Act, refers to this court. This is plain from s 1 of the Act containing the definitions. Second, from the provisions of s 51, the applicant appears to be under a duty to take action where it appears to or is conceded, as in this case, that a party has implemented a merger in violation of the Act.

[61] It does not appear that it was the intention of the legislature to allow violators of the Act relating to implementation of mergers to go scot-free. It would indeed be an unusual situation for the legislature to place a regulatory body which discovers

some violations but has a free hand to look the other way and not bring the culprits to book so that they may get their just dessert prescribed in terms of the law.

[62] Third, it appears that the applicant has been reposed with a discretion as to which powers it may invoke the jurisdiction of this court. This would be largely dictated by the nature of the contravention. That the applicant can opt for the most appropriate intervention by the court is evident from the use of the word ‘may’ in the opening sentence of s 51. In this regard, the applicant, faced with facts that bring a matter within the province of the section, should decide which of the four scenarios best fit the case at hand.

[63] Fourth, and moving to s 53 quoted above, powers to impose pecuniary penalties, as observed above, reside solely with the court. This power may be exercised by the court in cases where there has been a contravention of one type or the other of the provisions that appear in subsection (1) of s 53. In particular, there is no doubt that the instant case is one that falls squarely within the provisions of s 53(1)(d)(i) as it relates to a contravention regarding the implementation of a merger without the applicant’s approval.

[64] It is also clear that the court has a wide latitude in imposing a pecuniary penalty. This penalty is obviously in monetary terms, which the court should consider appropriate regard had to the nature and circumstances attendant to the matter before it. It becomes clear from the use of the word ‘appropriate’ that the amount of the penalty must be individualised and answer to the particular facts and circumstances of the matter at hand.

[65] Like in criminal matters, where a fine is to be imposed for a crime found to have been committed, it must take into account the peculiar circumstances of the case. In this regard, it is very difficult to find a set of circumstances that meet those of another in every respect. It is accordingly important for the court in meting an appropriate penalty, to take into account the peculiar facts of the matter and then impose a penalty that fits the nature of the contravention, the person of the contravener and meet the objects of the Act in setting out the contraventions in the Act.

[66] In meting out a pecuniary penalty, the court is afforded a wide latitude. That notwithstanding, the legislature has imposed a maximum amount that may not be exceeded, whatever the circumstances. In s 53(2), the legislature imposed a ceiling amount, namely, not more than 10% of the global turnover of the undertaking concerned. This must be based on its financial statements for the previous financial year.

[67] It is plain, when one has regard to s 53(3) that the court is enjoined, in arriving at an appropriate penalty, to take into account all relevant matters. In this regard, as in many legal scenarios, relevance is a flexible concept that defies precise meaning. It depends mostly on the facts of the case and the wisdom, experience and sagacity of the trier of fact.

[68] Speaking about relevance, it has been stated that it is a matter of reason and common sense.[6] Schreiner JA, dealing with relevance, stated the following in *R v Matthews*[7] that it is 'based upon blend of logic and experience lying outside the law.' It is a matter of degree, delineating from factors that are intimately connected to the enquiry at hand and those that may be regarded as too remote to have any influence.

[69] The legislature, in its wisdom, tabulated matters or factors that may have a bearing on the determination of the appropriate penalty. These factors are listed in s 53(3). What is important to note, is that the legislature used the word 'including', signifying that the matters or factors listed do not constitute a *numerus claussus* of factors beyond which nothing may be added. There may, in a case, be factors that have a bearing on the issue of relevance but which do not appear on the list parliament provided.

[70] Having taken a conducted tour of the relevant provisions of the Act, that bear on the question of the determination of an appropriate penalty, it is now opportune that a brief summary is made of the contentions of the protagonists regarding the factors that are relevant to this case and which the court should take into account in the determination of the appropriate penalty to the matter at hand.

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[6] Hoffman, *The South African Law of Evidence*, Butterworths, 1970, p17.

[7] *R v Matthews* 1960 (1) SA 752 AD, p758.

The applicant's contentions on the appropriate pecuniary penalty

[71] Placing reliance on some authorities, it is the applicant's case that the contravention of the Act by the respondent is a serious matter and that the court should express this by imposing a sanction that has a sufficiently deterrent effect.[8] In this regard, a symbolic penalty should be shied away from as an appropriately stiff penalty would not only serve to punish the respondent as a contravener of the law but would also serve as a warning to like-minded entities not to travel on the course of contravening s 42, whatever the gains might be considered to be reaped thereby.

[72] It was the applicant's further case that the issuance of a penalty that is inordinately low, would serve to bring the provisions of the objects of the Act into disrepute and would be contrary to public policy.[9] In the words of the European Commission, where an agreement was reached by the parties regarding the pecuniary penalty, the court must ensure that 'the agreement is a rational one, whether it meets the objectives set out above and is not shockingly inappropriate that it will bring the Competition authorities into disrepute.'

[73] The court was further referred to a case of *Competition Commission v Tiso Consortium.*[10] In that case, the Competition Tribunal of South Africa, in dealing with a consent order, and in impressing on the need for employing an appropriate sanction, compared the contravention of which the respondent is guilty in this matter, to jumping red robot and that 'An appropriate sanction in these circumstances should ensure that the fine for jumping the gun significantly diminishes the spoils of the prize.'

[74] It was the applicant's case that as the specialist regulator in the field, it had devised a formula that may prove useful to the court in the determination of an appropriate penalty. The applicant was quick to point out that by devising the

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[8] Case No. COMP/M.4994 – *Electrabel / Compagnie Nationale Du Rhon*, p39, para 226.

[9] *Netcare Hospital Group (Pty) Ltd and Another v Manoim NO and Others* (CAC 75/CAC/Apr08) [2008] ZACAC 1 (27 October 2008) para 29.

[10] *Competition Commission v Tiso Consortium* (82/FN/Oct04) [2004] ZACT 68 (21October 2004), p4 para 11.

formula and weighing all the relevant factors in the scales, and coming up with the figure constituting the penalty in this case, it must not be construed to be usurping the court's powers. It is the applicant's case that it realised that this being a specialist field, the court may benefit from the formula, whilst retaining the power to tinker, so to speak, with the amount suggested.

[75] It is the applicant's case that in coming to the amount of N$2 733 018.28, which represents 1.19% of the respondents' turnover, it took into account the factors prescribed by the Act. It argued that the percentage it proposes be imposed, is by no means an oppressive punitive measure, considered as it should, with the 10% of the global turnover of the undertaking the previous financial year that the legislature set as the ceiling in s 53(2) of the Act.

[76] In sum, the applicant prayed that the court imposes the amount contained in the notice of motion, or adjust it upwards, as it seems fit. This, the applicant claims will drive the message home to companies in Namibia to follow the law. The applicant implored the court to consider adversely to the respondent that it had delayed in reporting the merger and had dilly-dallied even after obtaining legal advice that the merger was notifiable. Further, it cheekily approached the applicant on a no-name basis, reflecting lack of *bona fides* in a sense.

The respondent's case

[77] As would be expected, the respondent adopted a position diametrically opposed to that of the applicant. For starters, the respondent cries foul. It accuses the applicant of usurping the punitive powers that the legislature recorded should reside solely within the court's bosom. There is thus no room, so contends the respondent, for the applicant to advocate for a formula that influences the exercise by the court of its powers imbued by the legislation in question.

[78] It is the respondent's further case that the applicant has not properly considered all the relevant facts in its formulation of the factors that can be taken into account in arriving at an appropriate penalty. It is the respondent's contention that when one has regard to the formula adopted by the applicant, it considers only those factors mentioned in the legislation, forgetting that the factors mentioned in

the legislation are by no means the law of the Medes and the Persians in that other relevant factors not mentioned in the legislation may be considered and given weight in either enhancing or reducing the penalty.

[79] The respondent submitted that the formulaic approach that the applicant used to arrive at the figure mentioned in the notice of motion has been the subject of criticism in other jurisdictions such as South Africa, where bodies in the applicant's position had resorted to such measures. In this regard, the respondent referred to academic writers who also threw their weight and criticised the formulaic approach adopted by the applicant. They argued that 'adding or subtracting specific fractions of a firm's turnover to account for the various factors, failed to distinguish sufficiently between the vast range of seriousness of prohibited practices'.[11]

[80] It was the respondent's case that the court should follow the approach in other jurisdictions, such as South Africa and Europe, where although the contravention in question is serious, it is not regarded as serious as those relating to prohibited practices, e.g. cartel conduct and abuse dominance, which are regarded as higher in magnitude than failure to notify of a merger.

[81] The respondent contends further that there is only one provision that deals with penalties in this jurisdiction, as is the case in South Africa, as well. That does not mean that all penalty calculations ought to be dealt with in the same vein, resulting in all contraventions, regardless of their nature, being regarded as egregious and liable to attract a severe penalty. An individualised assessment, dependant on the relevant facts and applicable factors, is required, so submitted the respondent.

[82] The respondent also noted that in the instant case, it is common cause that the applicant did not detect the contravention on its own. It was made alive to it some years later and only after the respondent made a clean breast of the contravention. In this regard, the respondent implored the court to part ways with the applicant's call for stiff penalties in cases such as the present. The deleterious effect might be that companies, which have contravened s 42, might, because of

[11] Sutherland, *Competition Law of South Africa,* at12.4.2.

the wrath that potentially awaits them, decide to withhold the fact of contravention for fear of the reprisals that come even with self-reporting.

[83] I have captured what are essentially the main submissions by the parties regarding the question of the quantum to be imposed as an appropriate penalty. It is not possible to or appropriate in the circumstances, to recount all the submissions made by the parties. I have essentially captured those that I am of the considered view, are pertinent. I now proceed, as I must, to deal with the law applicable, on a journey towards determining the appropriate penalty in the instant case.

Determination

[84] I should start by acknowledging as has been done many times, that sentencing, which is what this case is primarily about, is a 'lonely and onerous task'.[12] The parties' legal practitioners have made their submissions and the task at hand now lies entirely in the hands of the court, steadied to the necessary extent, by relevant facts attendant to the matter and by submissions made on behalf of the parties. The court is now expected to, taking into account the relevant factors, what it considers an appropriate pecuniary penalty in the instant matter.

[85] Before doing so, there are a few matters that I feel obliged to comment on and they emanate first from the provisions of the Act that deal with the penalty as quoted earlier in the judgment. First, it must be mentioned that when one reads the provisions of s 53(1), it becomes plain that they are couched in permissive terms. This is exemplified by the employment of the word 'may', occurring in subsection (1), namely, that the court, on application by the applicant 'may impose a pecuniary penalty'.

[86] I am of the considered view that the nomenclature employed points to the conclusion that the court is not obliged, in every case, to impose a penalty. This is so, notwithstanding the fact that the applicant may have made an application for an imposition in the light of a contravention. In this regard, it occurs to me that the first

[12] Hogarth, *Sentencing as a Human Process,* (1971) University of Toronto, p. 5, (Cited in *Stockdale and Devlin on Sentencing,* 1978, p8.

question the court has to answer, on application by the Commission, is whether that case constitutes a proper case for the imposition of a pecuniary penalty.

[87] Having said this, I must add that it would be very difficult to conceive circumstances in which there would have been a contravention of the Act, but the court, notwithstanding an application for the imposition of the penalty, would find it inappropriate to impose a penalty. That one cannot readily conceive such facts does not mean they may not exist in the future. The court accordingly has the power, in an appropriate case not to order an imposition. Alternatively, it may impose a very low penalty in a symbolic sense.

[88] I must add that it does not appear, from the wording of the provision that the court, whatever the circumstances may be, may take the bull by the horns and act of its own motion and call upon a party to show cause why it should not be ordered to pay a pecuniary penalty. This is so because of the central, supervisory and investigative role that the applicant plays in matters of competition. As such, it is the applicant that is the only entity empowered by law to approach the court when it forms the view that there has been a contravention of the applicable provisions. If there be any whistle-blowers regarding any contraventions of the Act, they should report to the applicant.

[89] Furthermore, if the court comes to the view that there is need to impose a pecuniary penalty for a contravention, the next question is what is the appropriate penalty? This question is answered by the provisions of s 53(3), which tabulate some of the considerations that the court may take into account in determining at the end of the day, what the appropriate penalty should be.

[90] As may have been apparent from what has been stated earlier, the legislature was no prescriptive regarding all the relevant factors that the court may take into account in determining the appropriate penalty. This, accordingly, gives the court the right to consider and place in the mix some mitigating or aggravating circumstances that may be relevant to the determination of the appropriate pecuniary penalty, even if these are not listed in s 35(3). The issue of relevance that I referred to earlier, comes to life at this particular juncture.

[91] It would, in conclusion on this aspect, appear to me that Parliament set a standard regarding pecuniary penalties that may be regarded as a 'double appropriateness test' to be applied by the court. First relating to the appropriateness, if any, of imposing a pecuniary penalty and secondly, if it is considered appropriate to impose a penalty, the appropriate penalty to impose.

[92] In meting an appropriate penalty, the court should do so in full appreciation of all the attendant relevant facts of the matter. These would include the nature of the contravention, the person of the contravener and the interests of the society, as expressed in the objects of the promulgation of the legislation in question.

Formulaic approach by the applicant

[93] At this juncture, I turn to deal with the formulaic approach that the applicant proposed as a guide to assist the court in the determination of the appropriate penalty. As recorded above, this approach came for trenchant criticism from the respondent. I should say that some of the criticism is justified in my view.

[94] In the first place, it is clear, when one has due regard for the applicant's approach, that the amount it sought to persuade the court to issue, as a pecuniary penalty takes into account only those factors that are listed in s 53(3). In this regard, there is no proper account of other factors that the court may consider relevant as there are in the instant case.

[95] To this extent, the assistance sought to be rendered to the court is limited and if blindly followed, may lead the court to the untenable situation where it may inadvertently close it eyes to factors that are relevant but have escaped the attention of the applicant because they are not listed. Alternatively, the applicant, because of it's position and interests, may not place them in the equation either at all or give insufficient weight to them. The result would be that the court may, in those circumstances, fail to properly exercise discretion in imposing its punitive powers appropriately.

[96] It is also important to mention, whilst still on this subject, to recall that the legislature reposed the pecuniary powers in the courts alone. The legislation does

not, as far as I could read it, create a niche for the applicant to prescribe or suggest what the penalty should be. The court should accordingly guard against abdication of its legislative remit, and allow other bodies, which are party to the proceedings, to hold sway in the determination.

[97] I say this quite cognisant that the applicant submitted that it, as the regulator is not in any way seeking to wrestle from the court the powers of determination of the appropriate penalty. It argued that it being *custom morum* in the field, so to speak, it should be given a level of deference by the court regarding its opinion on an appropriate pecuniary penalty.

[98] My mind is not made up about the level, if any, that the applicant should be allowed to influence the penalty by devising formulae geared to assist the court. Cases were cited in other jurisdictions where bodies in the place of the applicant may and do assist in the enquiry. There is no doubting that the applicant probably has the arsenal in its armoury to assist the court, because of it is a specialised body, flooded with expertise in relevant fields.

[99] I am of the considered view that if the argument advanced is that the applicant seeks to assist the court in the eventual determination of the appropriate penalty, why does the applicant not come forward to the court well in advance and have the court express its views regarding the proposed formula? In the instant case, the court saw the formula for the first time in argument. It would be of some assistance for the court to, in advance, have its own views regarding the proposed formula for the penalty.

[100] What causes spasms of disquiet within me and which the court should always be wary of is the fact that although the applicant is the regulator and has expertise, what cannot be discounted is the fact that it has an interest in the determination of the penalty. That this is indeed the case, can be seen from the submissions, both written and oral, made on its behalf. It made a clarion call for retribution and deterrence.

[101] The applicant does not feature in the proceedings as an *amicus curiae.* It is a fully-fledged protagonist that approaches the court for a particular outcome. In this

case, it came with a figure that it tried to justify to the court as being appropriate. Courts should, in these circumstances, be wary of deferring to parties who have a clear and substantial interest in the outcome sought from the court.

[102] Although the situation may differ slightly, there is some similarity between the applicant and the prosecution in a criminal matter. The applicant, like a prosecutor would do, placed the factors to be taken into account in the determination of the appropriate penalty. It would be extremely unsettling, if not totally out of order for a court, in a criminal matter, to be advised that it should defer to the views of the prosecution regarding a penalty to be imposed on an accused person. Where does that leave the other protagonist, namely, the defence in this equation?

[103] I am of the considered view that besides the criticism that the applicant tailored its assessment on a formula based on the factors mentioned in the Act, there are other considerations that it did not properly take into account. In this regard, it cannot be denied that competition law is a relatively new field in Namibia and was not one well traversed at the time when the merger was due to be notified in 2010.

[104] This, in my view, resulted in the many differing opinions that were offered to the respondent by its legal practitioners and this is common cause. There does not appear to have been an intentional and calculated design by the respondent not to report the merger. This, in my view, is a weighty consideration. Of course, the way may be much clearer now with the body of case law that is slowly building up in this jurisdiction.

[105] It is a fact that the applicant got to know about the contravention as a result of the respondent self-reporting. The time that it took to eventually self-report, although lengthy, must be viewed from the prism of the divergent legal opinions rendered to the respondent over time. It has not been shown that the time it took to report had anything to do with a desire on the part of the respondent to perpetuate deviant activity knowingly.

[106] I consider the fact that although the applicant was not advised previously of the merger in terms of the law, once so advised, it did its investigation and found

that the merger had left no competition concerns in its wake. As result, the merger was unconditionally approved by the applicant. This bodes well for the respondent in the circumstances.

[107] I am of the considered view, guided by case law from other jurisdictions, that it is important, in imposing penalties for contravention of certain provisions of the Act, to consider that not all contraventions have the same level of blameworthiness. This court, in *Namibian Association of Medical Aid Funds v Namibian Competition Commission*[13] recognised and correctly so, that 'failure to notify and prior implementation cases involve different considerations from cartel and abuse dominance contraventions'. I agree.

[108] It is also important to follow precedents regarding penalties, especially from other jurisdictions with a longer experience and application of this field of the law, with a pinch of salt. This is because where the law has long been in operation, for instance in Europe and South Africa, one may find that the penalties imposed may be high today. A survey of the past may well show that they were low at the beginning but were increased over time as a result of the incidences of contravention. In this regard, Namibia should travel her own road in a gradual fashion and not fast-forward her actions in order to keep up with the neighbours and other distant households, no matter how attractive that may seem.

[109] The call by the applicant for highly deterrent penalties may not be appropriate when we deal with a case like the present, which is the first of its kind and not one dealing with cartel conduct or other similar but serious transgression. This is especially so when I consider that there are many extenuating factors needing to be properly weaved into the equation in this matter.

[110] Deterrence is normally applied where there appears to be a high level of recidivism or where the penalties imposed do not appear to have the desired effect of stemming the escalating tide of contravention. I should in this wise also mention that there is no evidence that the respondent has previously been found to have

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[13] *Namibian Association of Medical Aid Funds v Namibian Competition Commission* (A 348/2014) [2016] NAHCMD 80 (17 March 2016).

contravened s 42. It is a first offender and this fact must be given weighty consideration.

[111] Having said this, the court should not be understood to be downplaying the contravention of the provisions of s 42 as not being serious. The contravention is serious in its own right but on the facts of this case, as discussed above, it should not be dealt with in harshest terms as the other species of contraventions that are deliberate, calculated and have had debilitating consequences to the industries or the consumers concerned.

[112] It is in my view a matter of consideration that this is a matter that could be referred to court connected mediation for the determination of the appropriate penalty in the first instance. I say so cognisant of the special skills available under court-connected mediation to deal with specialised cases. The case would then be referred back to the court if there is no settlement achieved for the court to exercise its powers and issue an appropriate penalty.

[113] In *Competition Commission v Pioneer Foods (Pty) Ltd*[14] the following lapidary remarks were made in matters such as the present. Although dealing with the South African Act, the remarks are nonetheless poignant even in this jurisdiction, when it comes to assessing the appropriate penalty. The Tribunal said:

> 'In other words, the purpose of section 59(3) is to provide guidelines to the Tribunal when it exercises its discretion in terms of section 59(2). The Tribunal must look to see whether there are aggravating and mitigating factors, and assessing those with the view to striking a balance between deterrence and over-enforcement. These factors must be weighed in relation to each other and must be assessed in the specific circumstances of ach case and in the context of the nature of the contravention. The provisions of section 59(3) do not require this Tribunal to create a formula by which administrative penalties are to be imposed, nor do they seek to fetter the discretion of the Tribunal. Whilst we must look at all the factors in section 59(3) we are not required to approach these mechanistically. Rather, we are required to apply our minds and adjudicate factors present in a case in relation to each other. This does not mean that every factor will be present in each case or that the same factors will bear the same weight in relation to each other in every case . . . Each case must be assessed on its own merits.'

[14] *Competition Commission v Pioneer Foods (Pty) Ltd* [2010] JOL 255542 (CT).

[114] I have taken into account the fact that the failure to report merger in this case was not deliberate. It was as a result of the conflicting legal opinions on the notifiability of the transaction. The criticism levelled against the respondent that it approached the applicant on a no-name basis, does not, in my view, necessarily reflect an element of bad faith. It appears that the reason for the approach, under cover, as it appears to be, was to get an authoritative opinion as a step towards eventually reporting the merger, which the respondent did ultimately.

[115] I also consider that the respondent was the one that reported the transaction itself, which should serve to render its contravention less detestable. It should also be borne in mind that the transaction is not one that involves cartel conduct or exclusionary behaviour. It is also worth noting that the Commission found that there was no loss sustained and it approved the merger subsequently.

[116] It appears plain that the respondent did co-operate with the applicant in this matter. Furthermore, there is no evidence of any profit derived by the respondent from the merger. It is also worth considering that the respondent has not previously been found to have contravened the Act, this being its first brush with the law as it were. There was also some delay of about three years on the part of the applicant with moving the matter forward. It appears the applicant was itself not assured of the manner of dealing with this matter.

[117] I have taken into account the pecuniary fines that have been imposed in South Africa between the years 2003 and 2018 for this type of contravention.[15] It would seem that the fines imposed or set by agreement, in that country, ranged between R75 000 and R500 000, where the was *bona fides* in the failure to report the mergers concerned. I consider that South Africa is a bigger economy that Namibia and I will take that into account in imposing an appropriate penalty in this case.

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[15] See for instance *SA Competition Tribunal v Edgars Consolidated Stores Limited and Another* Case No: 95/FN/Dec 02; *SA Competition Commission of South Africa v The Standard Bank of South Africa Limited* Case No. FTN 228 Feb 16; *Competition Commission v Structa Technology and Others* [2003] 1 CPLR 167 (CT); *Competition Commission v Oracle Corporation* [2005] 2 CPLR 410; *Competition Commission v Tiso Consortium* 2 CPLR 426 (CT).

[118] Taking all the above considerations into account, I come to the considered view the penalty cannot be arrived at in a scientific manner, considering that the applicant's approach did not properly take into account all the factors that weighed in the respondent's favour. A penalty that represents double the filing fee, namely N$125 000, would, in my considered view be apposite in the peculiar circumstances of this case.

Order

[119] In the premises, I am of the considered view that the following is the order that should follow in the instant case:

1. It is declared that the Respondents contravened the provisions of Section 42 of the Competition Act, No.2 of 2003.
2. The Respondents are ordered, jointly and severally, one paying and the other being absolved, to pay the amount of N$250 000 as a pecuniary penalty for the contravention mentioned in paragraph 1 above.
3. The pecuniary penalty is to be paid within thirty (30) days from the date of this judgment.
4. The Respondents are ordered to pay the costs of this application jointly and severally, the one paying and the other being absolved, consequent upon the employment of one instructing and instructed legal practitioner.
5. The matter is removed from the roll and is regarded as finalised.

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T.S. Masuku

Judge

APPEARANCES:

APPLICANTS:	R. Bhana, SC
Instructed by:	Kangueehi & Kavendjii Inc.
RESPONDENTS:	M. Engelbrecht
Instructed by:	Engling, Stritter & Partners