GOVERNMENT GAZETTE

OF THE

REPUBLIC OF NAMIBIA

N$6.00 WINDHOEK - 31 December 2019 No. 7090

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NAMIBIAN COMPETITION COMMISSION

No. 529 2019

THE NAMIBIAN COMPETITION COMMISSION // SANTAM NAMIBIA LIMITED AND 7 OTHERS

(CASE NUMBER: 2017JAN0002COMP)
NOTICE OF ACTION TO BE TAKEN UNDER SECTION 38
COMPETITION ACT, 2003
(Section 41, Rule 18(1))

1. The Namibian Competition Commission ("the Commission") on or about 30 January 2017 and 14 March 2018 initiated an investigation against various short-term insurance companies and automotive windscreen retailers. The Commission investigated the matter and on or about 10 July 2018 gave notice of its proposed decision.

2. The Commission gives notice that it intends to take the following action under section 38 of the Competition Act:

2.1 Following the investigation and consideration of all representations, including the written representations made in terms of section 36 and the matters raised at the conference held in accordance with section 37 of the Competition Act, the Commission has decided to institute proceedings in Court against the Respondents for an order:

2.1.1 Declaring that the Respondents have contravened section 23(1) read with section 23(2)(b) and section 23(3)(e) and 23 (3) (f) of the Competition Act;

2.1.2 Ordering the Respondents to cease with the conduct;

2.1.3 Restraining the Respondents from engaging in the conduct in future;

2.1.4 Seeking an appropriate pecuniary penalty against the Respondents in terms of section 53(1)(a) and 53(2) of the Competition Act, taking into account the factors stated in section 53(3) of the Competition Act;

2.1.5 Ordering that the Respondents companies to pay the costs of the proceedings; and

2.1.6 Such further and/or alternative relief as the Court may consider appropriate.

Against:

The following undertakings are listed as the Respondents against which relief will be sought in terms of section 38:

2.2. **Santam Namibia Ltd ("Santam")**, a short-term insurance company with its place of business located at the corner of Robert Mugabe & Lazarett Street, Tenbergen Village, Windhoek, Namibia;

2.3. **Hollard Insurance Company of Namibia Ltd ("Hollard")**, a short-term insurance company with its place of business located at the corner of Jan Jonker & Thorer Streets, Jan Jonker Heights Building, Windhoek, Namibia;

2.4. **Old Mutual Short-Term Insurance Company Ltd ("Old Mutual")**, a short-term insurance company with its place of business located at No. 223 Independence Street, Mutual Tower, Windhoek, Namibia;

2.5. **Momentum Short-Term Insurance Ltd** (**"Momentum")** previously known as **Quanta Insurance Ltd ("Quanta")**, a short-term insurance company with its place of business located at the corner of Feld Street & Jan Jonker Streets, Windhoek, Namibia;

herein jointly referred to as the **"insurance companies"**, and

2.6. **Greg's Motor Spares (Pty) Ltd ("Greg's"),** a company duly registered and incorporated in terms of the laws of the Republic of Namibia, with its principal place of business located at No. 7 Dr Michael De Kock Street, Northern Industrial, Windhoek, Namibia;

2.7. **Perfect Glass CC ("Perfect Glass")**, a company duly registered and incorporated in terms of the laws of the Republic of Namibia, with its principal place of business located at Unit 17, Hyper Motor City, Maxwell Street, Southern Industrial, Windhoek, Namibia;

2.8. **PG Glass Namibia (Pty) Ltd ("PG Glass")**, a company duly registered and incorporated in terms of the laws of the Republic of Namibia, with its principal place of business located at the corner of Tal and Sam Nujoma Drive, Windhoek, Namibia;

and jointly referred to as the **"contracted automotive windscreen retailers" or "contracted (windscreen) retailers".**

2.9. Both the insurance companies and the contracted automotive windscreen retailers will cumulatively be referred to as the **"Respondents"**.

3. The nature of the conduct that is the subject-matter of the action is that:

3.1 As part of their business activities, windscreen retailers provide glass repairing services for vehicles including those insured by insurance companies. Insurance companies on the other hand are involved in, *inter alia*, the defraying of funds for such repairs.

3.2 The Commission's investigation, the submissions received and evidence uncovered indicates that the Respondents, being undertakings in a vertical relationship within the meaning of the Competition Act concluded exclusive agreements which afford the contracted automotive windscreen retailers preferential rights, sole distribution rights and or the waiving of excess fees. In addition, some of the agreements provide(d) for a rebate system which allow(s)/ed the insurance companies to receive rebates in return for having particular proportions of their business referred to the concerned windscreen retailers within a particular time period:

3.3 The Respondents have denied engaging in the conduct and have raised the following primary defenses; That:

3.3.1 the market has not been properly defined and should include windscreens supplied to non-insured vehicles;

3.3.2 the insurance companies and the contracted automotive windscreen retailers are not in a vertical relationship with each other, *i.e.* that the insurance companies are not customers of the contracted automotive windscreen retailers and that the contracted automotive windscreen retailers are not suppliers of the insurance companies;

3.3.3 there is no exclusivity in favour of the contracted automotive windscreen retailers and that the sole distributorship status, preferred supplier status, waiving of excess and or rebate provisions do not amount to exclusivity;

3.3.4 the agreements between the insurance companies and the contracted automotive windscreen retailers are due to the better price offerings by the contracted automotive windscreen retailers;

3.3.5 the agreements do not have an anti-competitive effect and that the Commission must provide proof of anti-competitive effects in order to make a finding that the Respondents have contravened section 23 of the Competition Act; and

3.3.6 the insurance companies have not applied dissimilar conditions to equivalent transactions as envisaged in terms of the Competition Act.

3.4 Based on the grounds set out further down below, the Commission has not been persuaded by the above claims.

3.5 The Commission's investigation has in fact found that:

3.5.1 **The market has been correctly defined**

3.5.1.1 The unique commercial conditions that form the subject-matter of the Commission's investigation are only present in terms of the

agreements between the insurance companies and the contracted automotive windscreen retailers, *i.e.* the alleged lower prices that are alleged to be the basis of the agreements between the Respondents, the preferred supplier status and the waiving of excess, etc;

3.5.1.2 There is no demand-side substitutability in that an insured party/ the policyholder would only opt to have their windscreens supplied at a windscreen retailer in respect of which the insurance company would be willing to defray the costs at less adverse terms than if the policyholder was to approach a random windscreen retailer. A policyholder thus faces unique competitive constraints that are only taking place as far the supply of windscreens to insured vehicles is concerned; and

3.5.1.3 In the broader market (considering both insured and non-insured windscreen customers), even though a larger portion of revenue comes from non-insured customers, contracted windscreen retailers account for the bulk of the revenue generated therein.

3.6.2 **The market is indeed vertical in nature:**

3.6.2.1 Despite the arguments by some of the Respondents, the evidence shows that insurance companies clearly considered the windscreen retailers to be suppliers. The windscreen retailers also recognise the supplier-customer relationship that exists with the insurance companies.

3.6.2.2 In amplification of this, the insurance companies at the very least act as agents or middlemen between their policyholders and the windscreen retailers. The insurance companies are not passive bystanders in the relationship with windscreen retailers. Windscreen retailers and insurance companies therefore each play a critical role in the value chain relating to the supply of windscreens and related services; and

3.6.2.3 It is further worth pointing out that the specific wording of section 23(2) of the Competition Act is broad enough to include a prohibition of anti-competitive conduct regardless of whether the relationship that exists between the parties is vertical in nature or not.

3.6.3 **The agreements are anti-competitive**

3.6.3.1 The agreements facilitate exclusivity in favour of the contracted automotive windscreen retailers.

3.6.3.2 Some of the Respondents themselves also conceded that the agreements had the object of:

3.6.3.2.1 incentivising policyholders to procure windscreens from the contracted automotive windscreen retailers;

3.6.3.2.2 Steering policyholders to the contracted automotive windscreen retailers; and

3.6.3.2.3 Creating a stream of business from the insurance companies to the contracted automotive windscreen retailers.

3.6.3.3 The above-mentioned favouring of the contracted windscreen retailers over the non-contracted retailers is aggravated by the fact that the practice was implemented regardless of the policyholder's preference or whether the price of the contracted windscreen retailer was the cheapest.

3.6.4 **The agreements have an anti-competitive <u>effect</u>**

3.6.4.1 The agreements have the anti-competitive effect of favouring the contracted windscreen retailers over the non-contracted automotive windscreen retailers. Prior to the conclusion of the agreements, there appeared to be a more or less equal distribution between the all windscreen retailers. However, after the conclusion of the agreements, the was noticeable increase in the share of business allocated to contracted automotive windscreen retailers over non-contracted automotive windscreen retailers.

3.6.4.2 The anti-competitive effect of the agreements is exacerbated by the fact that, contrary to the assertions of some of the Respondents, the prices of the contracted windscreen retailers are not necessarily lower than those of the non-contracted automotive windscreen retailers. Neither the insurance companies nor the contracted automotive windscreen retailers were able to prove any superiority in the prices of the contracted windscreen retailers. Furthermore, the Commission's price assessment shows that the prices of the contracted windscreen retailers were not necessarily superior (more competitive) to those of non-contracted automotive windscreen retailers. The agreements therefore have the effect of increasing the costs of both the insurance companies and their policyholders.

3.6.5 Proof of anti-competitive effect is not a requirement to sustain a charge of having violated section 23 of the Competition Act

3.6.5.1 The agreements are anti-competitive, notwithstanding a rule of reason analysis. The agreements were clearly anti-competitive by object. There is therefore no need to have regard to any effects. In any event, the evidence has also clearly demonstrated that the agreements had an anti-competitive effect.

3.6.6 The Respondents have therefore also failed to provide a justification for the differing treatment between the contracted and non-contracted automotive windscreen retailers.

3.6.7 No exemption has been sought in terms of Part III of the Competition Act in this matter.

3.6.8 The conduct of the Respondents therefore amounts to a limiting of market access or outlets and the applying of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage in contravention of section 23(1) read with sections 23(2)(b) and 23(3)(e) and 23(3)(f) of the Competition Act.

4. Notwithstanding the above, the Commission records that it is willing to engage with the Respondents with the object of settling the matter in terms of section 40 of the Competition Act and to avoid proceedings in terms of section 38 of the Competition Act.

P. CARLSON
CHAIRPERSON
NAMIBIAN COMPETITION COMMISSION

NAMIBIAN COMPETITION COMMISSION

No. 530 2019

SOUTH AFRICAN AIRLINK (PTY) LTD // AIR NAMIBIA (PTY) LTD
(CASE NUMBER: 2016JULY0007COMP)
NOTICE OF ACTION TO BE TAKEN UNDER SECTION 38
COMPETITION ACT, 2003
(Section 41, Rule 18(1))

1. The Namibian Competition Commission ("the Commission") upon receipt of a complaint by SA Airlink (Pty) Ltd initiated an investigation against Air Namibia (Pty) Ltd ("the Respondent") on 25th October 2016, the Commission resolved to proceed with the investigation despite Airlink's withdrawal of its complaint on 20th February 2018. The Commission duly investigated the matter and on or about 21st September 2018 gave a notice of its proposed decision.

2. The Commission gives notice that it intends to take the following action under section 38 of the Competition Act:

2.1 Following the investigation and consideration of all representations, including the written representations made in terms of section 36 and the matters raised at the conference held in accordance with section 37 of the Competition Act, the Commission has decided to institute proceedings in Court against the Respondent for an order:

2.1.1 declaring that the Respondent has contravened section 26(1) and or section 26(1) read with section 26(2)(a) of the Competition Act;

2.1.2 restraining the Respondent from engaging in the conduct in question (*i.e*. interdicting the Respondent from abusing its dominance by participating or engaging in any predatory pricing conduct that infringes the Competition Act);

2.1.3 seeking an appropriate pecuniary penalty against the Respondent in terms of section 53(1)(a) and 53(2) of the Competition Act, taking into account the factors stated in section 53(3) of the Competition Act;

2.1.4 ordering the Respondent to pay the costs of the proceedings; and

2.1.5 granting any other relief as may be appropriate.

Against:

2.2 Air Namibia (Pty) Ltd, a proprietary limited liability company incorporated in accordance with the laws of the Republic of Namibia and having its principal place of business at No. 27 – 29 Dr W. Külz Street Windhoek, Namibia.

3. The nature of the conduct that is the subject-matter of the action is:

3.1 The Respondent operates scheduled domestic, regional and international passenger and cargo services, including scheduled passenger flights on the Windhoek – Cape Town route ("the route").

3.2 The Commission's investigation, the submissions received, and the evidence uncovered indicates that the Respondent:

3.2.1 is dominant on the route in terms of both aircraft capacity and the number of passengers flown; and

3.2.2 has abused its dominance through profit sacrifice by pricing at a per flight and at a per passenger level below its costs on both an average avoidable cost (AAC) and average variable cost (AVC) criteria ("the conduct").

3.2.3 The Respondent has engaged in the conduct since the entry of SA Airlink on the route in October 2014.

3.3 The Respondent has denied engaging in the conduct and has raised the following primary defenses; that:

3.3.1 it (the Respondent) has not engaged in profit sacrifice and did not price below its costs;

3.3.2 the reduction of the Respondent's prices after SA Airlink's entry was a normal competitive response and part of its promotional strategy;

3.3.3 the Commission has misclassified the Respondent's costs. In particular, the Respondent regards certain aircraft related costs (disputed costs) as fixed costs and seeks to exclude such costs for purposes of conducting a price-cost assessment. The Respondent accordingly claims that its operations on the route are profitable if the aforementioned disputed costs are excluded from the price-cost assessment;

3.3.4 recoupment is a requirement to sustain a charge of predatory pricing.

3.4 Based on the grounds set out further down below, the Commission has not been persuaded by the above claims.

3.5 The Commission's investigation has in fact found that:

3.5.1 The Respondent has been pricing below its costs

3.5.1.1 Prior to the entry of SA Airlink onto the route, there was a correlation between the increases in the Respondent's costs and the increases in prices charged by the Respondent. However, subsequent to the entry of SA Airlink into the market the Respondent's costs appeared to bear no relation to its costs.

3.5.1.2 Similarly, before SA Airlink's entry, the Respondent's average fares increased on a Year-on-Year ("YOY") basis. However, following SA Airlink's entry, the Respondent's average fares declined on a YOY basis. The Respondent therefore seems to be engaged in profit-sacrifice.

3.5.1.3 Contrary to the arguments advanced by the Respondent, there has been no misclassification of costs by the Commission. International precedence and the Respondent's own internal policies and practices indicate that the disputed costs are relevant for conducting a price-cost test and should therefore be included.

3.5.2 No objective justification for the conduct

3.5.2.1 There is no objective justification for the conduct that should serve to exclude the Respondent from liability for having contravened the Act. The Respondent's below cost pricing cannot be regarded as being promotional pricing. It is furthermore inconceivable that pricing below cost for a period of 6 years (since 2014) can in any way be construed as a promotional strategy.

3.5.2.2 The Respondent's pricing is instead indicative of an entity that is unjustifiably interested in undercutting the prices of its rivals (SA Airlink). Competition jurisprudence is clear that a dominant entity such as the Respondent has the duty to charge in a manner that is reflective of its costs. Pricing below costs by a dominant entity is regarded as predatory in nature. The Respondent's lack of incentive to generate profits admittedly as a result of subsidies, increases its likelihood of engaging in predatory pricing conduct.

3.5.3 Recoupment in not a requirement

3.5.3.1 Recoupment is also not a requirement in terms of our law. Even though recoupment is a requirement to sustain a charge of predatory pricing in some jurisdictions, no similar requirement exists in Namibia.

3.5.3.2 Nonetheless, the Respondent's conduct is adverse to competition even in the absence of recoupment. The pricing of the Respondent below its costs is abusive regardless of whether there has been any recoupment or even an exit of any rival airlines from the route. The Respondent's conduct, in particular, the artificially deflated airline ticket prices results in consumers moving resources/ capital from other more efficiently produced products or services. In addition, the Respondent's conduct has stifled innovation and decreased consumer choice that may have arisen from increased competition that was hampered by the Respondent's sustained abusive pricing conduct. Furthermore, there is a need to protect consumers from inflated or excessive prices that will result from an attempt to recover profits lost during predation. The Respondent has also constrained the ability of its rivals to enter or adequately expand on the route.

3.5.3.3 The Respondent's receipt of government subsidies makes recoupment an even less relevant consideration since the expectation of subsidies to fund the significant operating costs of the Respondent isolates the Respondent from the impact of its predatory conduct and enables the Respondent to continue operating based on decreasing average fares (yields) to unprofitable levels and continue operating with losses irrespective of demand or its competitors. Subsidies therefore enable the continued loss-

making operations to be sustained, which otherwise would not be possible in a commercial enterprise, reliant on the normal financial discipline of the markets.

3.6 Predation is a per se prohibition

3.6.1 An abuse of dominance is inherently harmful to competition. Hence, the express plain wording of section 26 of the Competition Act prohibits abusive conduct, including predatory pricing. In amplification of the aforementioned, our Courts have affirmed the view that section 26 of the Act must be interpreted to apply on a *per se*, by object or presumptive basis, with the consequence that the Commission is not required to allege and prove that the conduct had an anti-competitive effect in order to be unlawful. Therefore, the moment a dominant undertaking engages in anti-competitive conduct such as predatory pricing, there is no need to show anti-competitive effects in order for liability for a contravention of the Act to arise.

3.6.2 In any event, as demonstrated above, even though proof of anti-competitive effect is not a requirement in terms of the Act, the Respondent's conduct has been shown to be anti-competitive on both a *per se* and effects basis

3.7 The Commission therefore finds that the pricing conduct of the Respondent is abusive and predatory in nature as envisaged in terms of section 26(1) and or section 26(1) read with section 26(2)(a) of the Competition Act.

4. Notwithstanding the above, the Commission records that it is willing to engage with the Respondent with the object of settling the matter in terms of section 40 of the Competition Act and to avoid proceedings in terms of section 38 of the Competition Act.

P. CARLSON
CHAIRPERSON
NAMIBIAN COMPETITION COMMISSION