



# GOVERNMENT GAZETTE

## OF THE

# REPUBLIC OF NAMIBIA

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WINDHOEK - 21 February 2024

No. 8313

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## General Notice

### NAMIBIAN COMPETITION COMMISSION

No. 88

2024

NOTICE OF ACTION TO BE TAKEN UNDER SECTION 38 OF THE COMPETITION ACT, 2003: FISH REAPER HENTIES BAY // KINGFISHER SOUTH AFRICA & COMPANY, ADRENALIN IMPORTERS & DISTRIBUTORS, CYRIL CARO (PTY) LTD AND LEON TACKLE SHOP, HENTIES BAY  
CASE NO: 2020JUN0005COMP

Competition Act, 2003 (Act No. 2 of 2003)  
(Section 41, Rule 18(1))

1. The Namibian Competition Commission (“the Commission”) has on **18 January 2022** resolved to initiate an investigation against Kingfisher South Africa & Company and Others in terms of section 33 of the Competition Act, 2003 (Act No. 2 of 2003) (“the Act”). The Commission investigated the matter and gave notice of its proposed decision on 16 December 2022.
2. **The Commission gives notice that it intends to take the following action under section 38 of the Competition Act:**

Following the investigation and consideration of all representations, including the written representations made in terms of section 36 and section 38 of the Competition Act, the Commission has decided to institute proceedings in Court against the Respondents for an order:

- 2.1 Declaring that the Respondents have contravened section 23(1) read with section 23(2)(b) and section 23(3)(e) of the Competition Act;
- 2.2 Ordering the Respondents to cease with the conduct;
- 2.3 Restraining the Respondents from engaging in the conduct in future;
- 2.4 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;
- 2.5 Ordering that the Respondents pay the costs of the proceedings; and
- 2.6 Such further and/or alternative relief as the Court may consider appropriate.

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

- 2.7 **Kingfisher South Africa & Company (“Kingfisher”)**, a fishing products supplier registered in terms of the relevant laws of the Republic of South Africa with several branches throughout South Africa, with its principal place of business indicated as 53 Hunter Street Durban 4001, South Africa.
- 2.8 **Adrenalin Importers & Distributors (“Adrenalin”)**, a fishing products supplier registered in terms of the relevant laws of the Republic of South Africa with its principal place of business at 36c Icon Business Park, Fourie Street, Brackenfell, Western Cape, 7560, South Africa.
- 2.9 **Atlantic Tours CC T/A Leon’s Tackle Shop (“Leon’s”)**, a fishing products retailer registered in terms of the laws of the Republic of Namibia, with its principal place of business situated at Benguela 421 SPAR Complex, Henties Bay, Namibia.
- 2.10 **Cyril Caro Pty Ltd**, a fishing tackle and equipment distributor registered in terms of relevant laws of the Republic of South Africa with its principal place of business at 323 Lower Main Road, Observatory, Western Cape, 7925, South Africa.

The parties are jointly referred to as the “**Respondents**”.

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

- 3.1 Kingfisher and Adrenalin were approached by the Complainant to supply the Complainant with fishing/angling products. Kingfisher indicated that it cannot supply two or more businesses in the same town and within close proximity of one another. Both Kingfisher and Adrenalin indicated that they were already supplying Leon’s Tackle Shop and as such could not supply the Complainant who happens to operate in the same complex as Leon’s Tackle Shop.
- 3.2 The Complainant submitted further allegations against another supplier, Cyril Caro. Cyril Caro initially supplied products as per the Complainant’s order and then it ceased supplying following an alleged confrontation by Leon’s Tackle Shop. The

Complainant further submitted that the owner of Leon's Tackle Shop has represented to Cyril Caro that it has the biggest customer base of "fishing tackle products", and as such it can block the Complainant from accessing suppliers such as Cyril Caro. The Complainant submitted that this behaviour by Leon's Tackle Shop has a negative effect on the Complainant's business as it has lost relationships with suppliers and therefore cannot compete.

- 3.3 The Commission has found that it does not have sufficient evidence to establish an agreement or a concerted practice amongst Kingfisher, Adrenalin and Cyril Caro, pertaining to refusal to supply the Complainant whether direct or indirectly.
- 3.4 However, the Commission has found that Kingfisher, Adrenalin and Cyril Caro have respectively engaged in an agreement or a concerted practice with Leon's Tackle Shop for refusal to supply the Complainant.
- 3.5 The Commission's finding is informed by the following:
  - 3.5.1 The Complainant submitted that he was made aware that Leon's Tackle Shop had approached all the suppliers and told them not to supply Henties Fish Reaper as Leon's Tackle Shop had been their customer for more than 6 years and that Leon's Tackle Shop would close its account if the suppliers supplied the Complainant.
  - 3.5.2 The Complainant further submitted that Cyril Caro confirmed that it was approached by Leon Krause not to supply the Complainant and if so, Leon's Tackle Shop would stop placing orders with Cyril Caro.
  - 3.5.3 A witness informed the Commission that, Leon's Tackle shop had approached that witness twice to stop supplying Leon's Tackle Shop's competitors. The first occasion related to Visserman Paradys the predecessor to the Complainant's business. The Second occasion related to the Complainant's business as a competitor of Leon's tackle Shop. The witness further submitted that he had informed the Complainant to approach Cyril Caro as a potential supplier, which the Complainant did and further informed Cyril Caro that the Complainant would be contacting them for supply.
  - 3.5.4 The Complainant informed the witness sometime later that, Cyril Caro did not supply the Complainant with all the products ordered, after which the witness took it upon himself to enquire as to why that was the case. Upon which one of the owners of Cyril Caro informed him that Leon's Tackle Shop had phoned Cyril Caro and instructed Cyril Caro that if it supply the Complainant with the relevant products, Leon's Tackle Shop will stop buying from them thus corroborating the Complainant's version.
  - 3.5.5 Regarding, Kingfisher and Adrenalin, it is common cause that the primary reason for the refusal of Kingfisher and Adrenalin to supply the Complainant, is based on the reason that they already supply Leon's Tackle Shop which is in close proximity with the Complainant's business as confirmed in their respective submissions during the investigation.
  - 3.5.6 It is therefore the Commission's position that independent undertakings with unique business models are unlikely to be engaged in a similar conduct concerning their relationship with a single party (Leon's), unless there is common denominator between them, which in this case is Leon's Tackle Shop. Both Kingfisher and Adrenalin have cited the same reasons, in refusing

to supply the Complainant, namely that they there are already supplying the Leon's Tackle Shop.

- 3.5.7 Kingfisher during the investigation had submitted that Leon's Tackle Shop's sustainability will be threatened as it invested resources to grow and promote Kingfisher's brands in the interest of consumers, if the Complainant is also supplied by Kingfisher. Leon's Tackle Shop on the other hand submitted that its business will not be adversely affected, if any of its competitors are supplied with goods that it sells, which submission was reiterated again in response to the proposed decision.
- 3.5.8 The two parties in this regard have given contradicting evidence, and further, Kingfisher's submission with regards to the sustainability of Leon's Tackle Shop is an inference that is not sustained by any evidence, and further dispelled by Leon's Tackle Shop's own admission that its business will not be adversely affected.
- 3.5.9 During investigation and post the proposed decision, Adrenalin's refusal was underpinned by fear of price wars, an assumption that was not sustained by any evidence. It is unreasonable to assume on the part of the Complainant that once it is supplied by Adrenalin it will enter into price wars with the Leon's Tackle Shop. It would be a valid reason, if the assumed conduct did in fact materialise which in this case did not happen as the Complainant was never supplied in the first place. In the event that the Complainant was supplied and price wars ensued, Adrenalin could remedy the situation by exercising its right of ceasing to supply due to price wars.
- 3.5.10 Regardless, the alleged conduct is confined to the relevant market as defined, thus the argument of price wars cannot be sustained on the basis that the Complainant and Leon's Tackle Shop conduct business within the same complex and will thus be engaged in price wars. This is so because, the two parties could engage in the same assumed conduct by Adrenalin, even if the two parties trade in different complexes for as long as they are competitors in the same market, which they are. A relevant market refers to the "area of competition that is relevant to the issue under investigation" thus signifying relevance to the alleged abuse and resultantly, Adrenalin's refusal to supply the Complainant on that basis is unjustified.
- 3.5.11 The Commission is satisfied that Leon's Tackle Shop has an established motive of precluding suppliers from supplying the Complainant, which is consistent with conduct of the Respondent's in this matter. Furthermore, it is common cause that Leon's Tackle Shop has had direct contact with all the Respondent suppliers in this matter who are all refusing to supply the Complainant for reasons advanced earlier which all relate to Leon's Tackle Shop.
- 3.5.12 The Commission is thus of the informed view that there exist vertical agreements or concerted practices between the Respondent suppliers and Leon's Tackle Shop befitting the definition as provided for by the Act or to the very least, there exists concerted practices between the Respondent suppliers and Leon's Tackle Shop.
- 3.6 Pursuant the Commission's proposed decision, the parties advanced various arguments in response thereto as follows:

### **LEON'S TACKLE SHOP**

- 3.6.1 Leon's Tackle Shop principally argued that there is no evidence that suggests that the refusal by Kingfisher and Adrenalin to supply the Complainant is informed by their influence and further that there is also no evidence that suggests that Leon's Tackle Shop intimated that it would cease placing orders with Cyril Caro if they supplied the Complainant.
- 3.6.2 The Commission is in possession of refusal to supply emails from Adrenalin and Kingfisher which were addressed to the Complainant, with the main reason being that the two Respondents respectively (Kingfisher and Adrenalin) are already supplying Leon's Tackle Shop. The Commission is of the view that this is not a valid justification as there is no harm on the part of the two suppliers to supply other retailers in addition to Leon's Tackle Shop and further signalling to an understanding between each supplier with Leon's Tackle Shop not to supply the Complainant.

### **ADRENALIN**

- 3.6.3 Adrenalin principally argued that the refusal to supply the Complainant was also because the Complainant's shop layout did not comply with their requirements and further that the Complainant only made one request for supply and no further communication was received from the Complainant after the refusal to supply.
- 3.6.4 Similarly, the Commission is in possession of refusal to supply from Adrenalin, which cited that the reason for such refusal was because they were already supplying Leon's Tackle Shop in the same complex. No further reasons were advanced at the time this was communicated to the Complainant. Thus, the issue of shop layout is not a requirement that was communicated to the Complainant at the at time supply was sought from Adrenalin, this only surfaced subsequent to the Commission's proposed decision.
- 3.6.5 Adrenalin further submitted that, the Complainant opened a new shop in Swakopmund under a different trading name, and a credit application form was sent to that entity, however no response was given to Adrenalin. It is important to note that this was not done when the Complainant sought supply for Fishreaper, this is consistent and supports the finding that Adrenalin was only going to supply Fishreaper if it traded elsewhere, but the SPAR complex, where Leon's Tackle Shop is trading.

### **KINGFISHER**

- 3.6.6 Kingfisher argued that its decision not to supply the Complainant was not grounded on any endeavour to exclude competition but rather, was grounded on objectively justifiable reasons and where Leon's Tackle Shop meets consumer expectations and complies with Kingfisher's business imperatives.
- 3.6.7 The Commission considered this to mean that, in order for a client to be supplied by Kingfisher, such a client needs to meet consumer expectations and comply with the Kingfisher's business imperatives. Be that as it may, such courtesy was not afforded to the Complainant.

- 3.6.8 Kingfisher's refusal to supply cited that, regardless of whether a client met their business requirements, Kingfisher still reserved its right not to supply, should the new business be in close distance to an existing loyal customer of theirs.
- 3.6.9 Kingfisher further did not indicate to the Complainant the requirements they had to meet before supply.
- 3.6.10 Kingfisher further submitted that it does not have a definitive set of factors by reference to which it decides to supply outlets and makes such determinations on a case-by-case basis depending on the circumstances in particular geographies.
- 3.6.11 Furthermore, Kingfisher indicated that they remain ready and willing to resolve disputes with the Complainant, in line with ordinary business practices and the invited the Complainant to present a business proposal to Kingfisher focusing on its ability to address and meet customer expectations and to undertake appropriate investments in this regard - such as to provide the level of service that customers expect.
- 3.7 Based on the grounds set out further down below, the Commission has not been persuaded by the above claims.

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

**3.8.1 Effect or Object to lessen or prevent competition and limiting market access:**

- 3.8.1.1 An anti-competitive effect is observed when there is actual harm to consumer welfare or if its effect is significant in foreclosing the market to rivals. The refusal of the Respondents to supply the Complainant with fishing products (rods, reels, hooks, peripheral lines etc.) which make up 95% of the total product portfolio, has adverse effects on the Complainant. The Respondents' conduct is therefore limiting the ability of the Complainant to access and grow in the relevant market.
- 3.8.1.2 Alternative suppliers will not be a viable option for the Complainant as, the prices that the Complainant would have to pay for sourcing from these suppliers is higher than that of the two Respondents and doing so will leave the Complainant in a disadvantaged position, having to compete with Leon's Tackle Shop.
- 3.8.1.3 This still adversely affects the Complainant's ability to compete as the Complainant will end up having to price its products higher than those of Leon's Tackle Shop to break even. Furthermore, brand orientated customers will place the Complainant at a disadvantage, if the Complainant is unable to stock the brands supplied by the Respondent suppliers.
- 3.8.1.4 Section 23(1) read with section 23(2) and 23(3)(e) of the Act prohibits agreements that have as their object or effect the limiting of market outlets or access. The limiting or restricting market outlets or access usually occurs when a firm refuses to deal with another firm and if the refusal to deal has an effect on the ability of the refused firm to compete in the downstream market.



- 3.8.1.5 The anti-competitive allegations levelled against the Respondents are specifically directed at the restriction of products required by the Complainant for its operations.
- 3.8.1.6 The consequence of the Respondents' conduct is that the Complainant cannot carry out its retailing business effectively. This is therefore limiting the Complainant's access to the market and thus reduces competition in the downstream sphere of the market.
- 3.8.1.7 In addition, there are adverse effects that go beyond the Complainant and felt by the Consumers. Currently, there exists only Leon's as the main supplier of relevant products to consumers in the relevant market. Consumers do not benefit from the results of competition that can be introduced by the Complainant being able to source and distribute similar products to Leon's Tackle shop.
- 3.8.1.8 With increased competition, consumers will be able to have product choice in terms of which shop to purchase from. Given the fact that the products involved are homogenous, this choice that consumers will have will come in the form of price differentiation. Retailers knowing that consumer choice will be influenced by prices, they would engage in a price war with the aim of capturing the market. As such, consumers benefit from competitive prices.
- 3.8.1.9 It is therefore apparent that the agreements referred to above, have the object or effect of lessening competition in the relevant market and thus amounts to limiting the Complainant's access to the market as contemplated in terms of section 23(1) read with sections 23(2)(b) and 23(3)(e) of the Act.

**3.8.2 Whether there is an objective justification for Kingfisher and Adrenalin's refusal.**

- 3.8.2.1 The reasons advanced by the Respondents during the investigation and in response to the proposed decision and subsequent process, thereafter, sought to give context to the refusals and further expanded the requirements that the Complainant ought to have met. The reason for refusal to supply the Complainant was that the two Respondents (Kingfisher and Adrenalin) are already supplying Leon's Tackle Shop.
- 3.8.2.2 The Commission is thus of the view that this is not a valid justification as there is no harm on the part of the two suppliers to supply other retailers in addition to Leon's Tackle Shop.
- 3.8.2.3 Furthermore, the context provided by the Respondents intimated, extra requirements such as compliance with shop layout requirements, submission of business proposal, assessment of creditworthiness which were not communicated to the Complainant at the time of the request for supply. Resultantly the Complainant could not satisfy same without knowledge of what is required.
- 3.9.2.4 The conduct of the Respondents therefore, respectively in relation to Leon's Tackle Shop, amount to agreements or concerted practices in contravention of section 23(1) read with section 23(2)(b) and 23(3)(e) of the Competition Act.

- 3.9 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.

**A. P. ITHINDI**  
**CHAIRPERSON**  
**NAMIBIAN COMPETITION COMMISSION**

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