THE FAIR TRADING COMMISSION

BEFORE THE BOARD OF COMMISSIONERS

IN THE MATTER of the Consumer Protection Act, 2010;

THE FAIR TRADING COMMISSION
VS.
FEROX ABATTOIR (PTY) LTD
(Rep herein by Mrs. Martha Morin, Mr. Neville Adeline and Mr. France Bonte, Attorney-At-Law)

Case No: FCA39

Complainant – Mr. Jean Mellie
Respondent – Ferox Abattoir (Pty) Ltd

QUORUM:
Mr. Victor Pool – Chairperson
Mrs. Jenna Thelermont – Commissioner
Mr. Philippe Chong-Seng – Commissioner

For the Complainant
Mrs. Chantale Grange – Legal Advisor (FTC)
Mrs. Cosette Moustache – Analyst (FTC)
Mr. Jean Mellie – Complainant

For the Respondent
Mrs. Martha Morin – Respondent
Mr. Neville Adeline – Respondent
Mr. France Bonte – Attorney-At-Law

RULING

[1]The Fair Trading Commission is empowered by Section 33 and 34 of the Fair Competition Act, 2009 to receive and investigate complaints. Consequently, on the 10th of September, 2013 the Commission received a complaint from one Mr. Jean Mellie (See Exhibit 2), a local farmer (See Exhibit 3) and now the complainant herein against Ferox Abattoir (Pty) Ltd, a company incorporated on the 6th of November, 2012 and now the respondent herein. The complaint was to the effect that the complainant was refused the supply of broiler chicks at the hatchery facility when he

came to buy some chicks to rear due an outstanding bill owed by the complainant to the abattoir facility (See Exhibit 1). At this juncture we would like to make the point that both facilities i.e. the abattoir and the hatchery is owned and managed by the same person being the respondent herein (See Exhibits 4, 5 & 6).

[2]A formal investigation was launched to shed some light on the alleged complaint. The respondent was informed of the complaint via a letter from dated 20th September, 2013 (See Exhibit 7). It is record through a telephone call documented by the Commission that the complainant had indeed been categorically refused the supply of broiler chicks following the strict instruction of Ms. Martha Morin, one of the lessees of the hatchery facility, to Mr. Barra, the Manager of the said facility (See Exhibit 8). Further investigation yielded the fact that Mr. Neville Adeline, another lessee of the hatchery facility, also held a permit for the rearing of 50,000 briolers hence qualifying him at the time not only as the provider of an essential service in the rearing of broilers but as well as a competitor or potential competitor to the complainant (See Exhibit 9)

[3]During a meeting held with both the respondent and the complainant on the 12th of September, 2013 the respondent maintained her stance to not provide the complainant with broiler chicks (See Exhibit 10). Another meeting was set for the 16th of October, 2013 as an attempt to negotiate the matter at hand. The respondent did not attend. The complainant claimed that he had suffered loss of revenue due to the non-realisation of two potential broiler cycles and had to cease the broiler farming business which caused a decrease in his farming business earnings as a whole (See Exhibit 12). Being unable to mediate the matter further the Commission deemed it necessary for a case against Ferox Abattoir (Pty) Ltd (Hatchery Facility) to be brought before the Board of Commissioners for determination.

[4]A formal hearing was held on Wednesday 6th of August, 2014. Both parties were present and duly represented. Mrs. Cosette Moustache presented the Commission's case on behalf of the complainant Mr. Jean Mellie. In addition to relaying the facts of the case Mrs. Moustache also offered arguments based on research done by the Commission in determining whether the respondent was infringing the Fair Competition Act, 2009 in terms of being in 'a dominant position' pursuant to Section 7(2) of the Act of which states as follows:-

> *"7(2) For the purposes of this Act, an enterprise or enterprises together hold a dominant position or a joint dominance in a market if that enterprise or enterprises together occupy such a position of economic strength as will enable them to operate in the market independently without*

effective competition from their clients, competitors or potential competitors."

[5]Mrs. Moustache also made reference to the Essential Facility Doctrine which refers to the situation where a dominant firm has control over an asset to which access is essential for competitors to compete on a downstream market. Such facilities are essential in that, by nature, they cannot be replicated in an economically viable manner. The hold of such facility is obligated to give access to that facility if there is a risk of he competitors being eliminated from the downstream market without such access. The need for such an obligation is to ensure competition in the downstream market. During its investigation the Commission determined that the hatchery was an essential facility as there are no viable substitutes for the essential input being the supply of broiler chicks.

[6]It was consequently concluded that the respondent was in contravention of Section 7(1) of the Fair Competition Act, 2009 which provides that *"Subject to subsection (4), any conduct on the part of one or more enterprise or enterprises which amounts to an abuse of a dominant position in the market is prohibited if it may adversely or unfairly affect trade within Seychelles"*, as well as Section 7(3)(b) of the same Act which states that *"Conduct may, in particular constitute such n abuse if it consists in preventing or deterring any enterprise from engaging in a competitive conduct in that or any other market."* The Commission argued that given the respondent is the sole provider of broiler chicks in the country the respondent is considered the dominant service provider and hence refusing to supply broiler chicks to the complainant which is an essential input in broiler farming activities the respondent is deemed to have abused and was still abusing its dominant position.

[7]In conclusion Mrs. Moustache prayed that the Board of Commissioners considers the evidence put forward and find the respondent to be in contravention of Section 7(3) of the Fair Competition Act, 2009. To direct the respondent to cease this abusive conduct pursuant to Section 41(1)(b) of the same Act and also to apply an appropriate financial penalty as stipulated under Section 46 of the Act as well as an order for compensation to the complainant for loss of earnings.

[8]The nub of the defence case according to Mr. Bonte, Counsel for the respondent is that it is a simple matter of debt owed. The respondent is not denying the fact that Mr. Mellie was indeed refused the supply of broilers chicks when he approached the hatchery to purchase the same, we have Ms. Morin on record who was outspoken to this effect. Mr. Bonte argued that the abattoir and the hatchery forms part of one company which is Ferox Abattoir (Pty) Ltd. Hence the company being one entity the

debt owed by the complainant is attributable to both the hatchery and the abattoir, expressing "tell your client to pay his debt then we will sell him chicks". As such denial of services by the hatchery for debts owed at the abattoir should be maintained and if that is allowed then the breach of section 7(3)(b) of the Fair Competition Act, 2009 should fall.

[9]The Board of Commissioners deliberated lengthily on the matter and has considered evidence brought by both parties. The Board finds this argument from the respondent to be repulsive both in law and in morals. We shall briefly state some examples how such an argument in a democratic and constitutionally progressive country as ours should not be entertained. Suppose a customer goes to Seychelles Trade Company supermarket and buy groceries and the cheque bounces. Weeks later the same person goes to Seychelles Trade Company (same company) but the division that sells wood and offers cash for some items of wood, can Seychelles Trade Company (wood division) refuse to take the customer's money and inform that person that unless money owed at STC supermarket is paid he or she will not be allowed to purchase wood items? Likewise, suppose a person has a loan with Barcleys Bank for a car. If the person fails to pay the loan, can Barcleys Bank touch the person's salary if the salary is not part of the contract for the loan of the car? The answer to both examples given above is a 'no'. The only recourse and forum for a matter of debt owed is for a judgment debt to the Courts of the land and no other alternative can be allowed as such other alternatives is only steps leading to anarchy, the strong overpowering the weak and as in this case the dominant exercising their position of dominance over the subordinate and this is not the democratic moral or constitutional way. Consequently, the arguments advanced by Counsel for the respondent falls.

[10]Furthermore, the Board also perused Section 7(4) of the Fair Competition Act, 2009 which provides as follows;

> *"7(4). An enterprise is not to be treated as abusing a dominant position —*
>
> *(a) if it is shown that its behaviour was exclusively directed to improving the production or distribution of goods or promoting technical or economic progress, and consumers were allowed a fair share of the resulting benefit;*
>
> *(b) if the effect or likely effect of its behaviour in a market is the result of its superior competitive performance; or*

(c) by reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design or trademark except where the Commission is satisfied that the exercise of those rights —

(i) has the effect of lessening competition substantially in a market; and

(ii) impedes the transfer and dissemination of technology."

[11]The above section gives instances of which practice of abuse of a dominant position may be allowed even if the results would in effect substantially lessen competition in a market and it should be noted that debt owed is not one of those instances of which an enterprise can use to lessen competition in any form. And we will go further and add that even if debt owed was listed under section 7(4) as a defence to conduct of which resulted in abuse of a dominant position then this provision would be constitutionally suspect and challenged.

[12] After such deliberations the only matter remains before the Board to be considered is to decide if the statement of breach as per Section 7(3)(b) of the Fair Competition Act, 2009 has been proven. In this regard extensive documentation and thorough analysis of economics and the law of competition was submitted by competent officers of the Fair Trading Commission goes beyond any doubt to prove their case and we see no objections to find the respondent to be in contravention of Section 7(3)(b) of the Fair Competition Act, 2009. **This Board shall make a direction under section 41(1)(b) of the same Act; that Ferox Abattoir (Pty) Ltd with immediate effect of this ruling upon a demand registered by Mr. Mellie or any registered farmer with a license to rear chickens for monetary consideration for a request to buy chicks at the hatchery facility to make available the desired number of chicks requested.**

[13]With regards to Mr. Mellie's claim for loss of revenue due to the non-realisation of two potential cycles of broiler chickens which would have produced an approximate net profit in the sum of SR. 48, 700 for each cycle (See Exhibit 12), **the Board of Commissioners shall award the complainant, Mr. Mellie the sum of SR.20, 000 only in damages for loss of profit from one cycle of rearing broiler chickens only** and not two cycles due to the remoteness of attributing the loss of other cycles to the respondent. In any instances he should mitigate his loss and take reasonable steps to immediately remedy the wrongs by approaching the proper forum. **The above payment is to be made to the offices of the Fair Trading Commission not later than sixty (60) days from the date of this ruling.**

[14]The Board of Commissioners finds it imperative to state that Section 53 of the Fair Competition Act, 2009 provides that;

> *53. A person who refuses or fails to comply with a final direction, order or undertaking of the Commission or order or direction of the Tribunal commits an offence and is liable on conviction –*
> *(a) where the person is an individual, to a fine not exceeding 100, 000 rupees or to imprisonment for a term not exceeding 2 years, or to both; or*
> *(b) where the person is a person other than an individual to fine not exceeding 400, 000 rupees."*

[15]The parties are free to appeal against this ruling to the Appeal Tribunal *(See Section 44 of the Fair Trading Commission Act, 2009 and Section 77(1) of the Consumer Protection Act, 2010).* We so order.

Pronounced by us on this 7th day of October, 2014.

Mr. Victor Pool
Chairperson

Mr. Philippe Chong-Seng
Commissioner

Mrs. Jenna Thelermont
Commissioner