



BOTSWANA COMMUNICATIONS REGULATORY AUTHORITY

BOCRA RULING NO1 OF 2017

RULING ON THE USE OF FRANKING MACHINES BETWEEN

BOTSWANA POSTAL SERVICES LIMITED (BOTSWANAPOST)

AND

EASIMAIL (PTY) LTD

**Delivered on 17 November 2017 by Mr Tshoganetso Kapaletswe in his
Capacity as the BOCRA Acting Chief Executive**

1.0 Introduction

- 1.1 The matter at hand was lodged with the Botswana Communications Regulatory Authority (hereinafter referred to as BOCRA or the Authority) by EasiMail (Pty) Ltd, hereinafter referred to as EasiMail. The said company raised a number of complaints or rather grievances against Botswana Postal Service Limited, hereinafter referred to as BotswanaPost. It is worthy to mention that BotswanaPost is a duly licensed Commercial Postal Operator operating under licence No CPO 22-16/17 issued on 23 August 2016. BotswanaPost also holds a Public Postal Operator licence, DPO 01-16/17 dated 23 August 2016 issued under Section 57 as read with Section 67 of the Communications Regulatory Authority Act (the CRA Act). On the other hand, EasiMail has not been licensed and therefore it is not a regulated entity. The said company is in the business of supply, service and maintenance of franking machines.
- 1.2 In order to adequately address complaints as raised, the Authority invited both parties for oral submissions and thereafter, each was afforded the opportunity to file written submissions. An inquisitorial role is an inherent aspect of a regulatory authority and that explains why parties were invited to make both oral and written submissions.

2.0 Oral Submissions

- 2.1 BOCRA invited the two parties to a joint oral hearing held at BOCRA Head Office on 21 September 2017. The hearing was chaired by the Acting Chief Executive of BOCRA, Mr Tshoganetso Kapaletswe.

EasiMail Submission

2.2 EasiMail was represented by Ms Ruth Hungwe-Rukarwa in her capacity as the Operations Director in her opening statement, Ms Hungwe-Rukarwa indicated that contrary to the statement made by the BOCRA Acting Chief Executive in his opening remarks, EasiMail had not lodged a formal complaint with BOCRA. She said, rather they had approached BOCRA to seek a platform for the two parties to discuss their differences regarding the supply of franking machines. EasiMail alleged that for a long time BotswanaPost was not cooperating hence its decision to seek intervention by the Authority. Central to the issues at hand is the memorandum of agreement between the parties executed on 28 July 2005. The terms thereof mandated EasiMail to:

- a) collect monies that are dues to BotswanaPost in respect of postage purchased by users of franking machines;
- b) collect annual fees for each deployed franking machine on behalf of BotswanaPost; and
- c) provide remote meter setting for customers.

2.3 According to EasiMail, the agreement referred to was at some point varied following allegations of fraud against EasiMail. The variations thereof, relieved EasiMail from the mandate of collecting fees on behalf of BotswanaPost. However, EasiMail continued to provide other

services as before. It appears the agreement was terminated in August 2013.

2.4 Ms Hungwe-Rukarwa also indicated that from 2013, the relationship between the parties deteriorated. Specifically, she alleged that BotswanaPost was now directly approaching EasiMail's contracted customers with a view to poach such customers and supply them with franking machines. She enquired how BotswanaPost as the licensor of franking machines would also want to supply franking machines and thereby compete with EasiMail. She argued that by so doing, BotswanaPost was now the judge and the jury. The details of the grievance by EasiMail are narrated below.

2.5 EasiMail procures franking machines from Pitney Bowes South Africa (PBSA) and these machines can either be sold to customers outright or leased from EasiMail. Sometime in 2017, EasiMail received information from PBSA indicating that the current generation of franking machines would reach end of life at the end of September 2017, but the company could extend its support for the machines until end of December 2017. On 1 March 2017 EasiMail informed BotswanaPost that it was aware that the current crop of franking machines were reaching obsolescence and proposed a new franking machine for BotswanaPost to quality assure and approve. EasiMail further requested BotswanaPost to advise PBSA to work with them without prejudice and to allow EasiMail to continue servicing their customers.

- 2.6 BotswanaPost wrote back to EasiMail on 22 March 2017 indicating that it did not have any formal relationship with EasiMail and that they do not have mutual customers.
- 2.7 On 5 May 2017, BotswanaPost wrote to users of franking machines informing them that it now had a direct relationship with PBSA and BotswanaPost would now be providing customers with franking machines as well as maintenance and any after sale services. The machines were said to be replacing the current ones which would be reaching their end of life and customers were urged to acquire new ones before end of September 2017 to enable smooth transition.
- 2.8 On 12 May 2017 EasiMail wrote to its customers informing them that since the current generation of franking machines would be reaching their end of life, EasiMail had secured a new supplier of the latest state of the art franking machines. It indicated that the new brand was Neopost and that it already had experience with the new product through its sister company EasiMail Zimbabwe (Pty) Ltd where it was launched in February 2016.
- 2.9 On the same correspondence, EasiMail indicated that it had already started engagement with BotswanaPost as the licensor, to ensure that the new product is ready when the old franking machines become obsolete. EasiMail pointed out that to the extent that its customers had been given short notice, EasiMail would ensure that they are not compromised and would therefore support the old equipment into early 2018.

2.10 On a different note, EasiMail indicated that it was aware that BotswanaPost had sent notification to EasiMail's contracted customers offering them to trade-in their old equipment for new ones. EasiMail said it was surprising since it (EasiMail) had an understanding with BotswanaPost that the latter would not interfere with the former's contracted customers.

BotswanaPost Submission

2.11 EasiMail's submission was followed by that of BotswanaPost duly represented by Mr Thato Kewakae BotswanaPost confirmed that it had received correspondence from PBSA indicating that the current franking machines would be reaching end of life at the end of September 2017 extendable to end of December 2017. BotswanaPost went on to explain that it was given the mandate to provide Universal Postal Service and therefore EasiMail was merely providing the service as BotswanaPost's agent. BotswanaPost indicated that it has made a strategic decision to take charge of the entire franking value chain as a way of promoting efficiency.

3.0 Clarification by BOCRA

3.1 BOCRA sought clarification from the two parties on the procedure for the licensing of franking machines. In response BotswanaPost indicated that it used to license franking machines prior to the implementation of the CRA Act but it had since stopped. EasiMail

countered the response and indicated that BotswanaPost continued to license franking machines even after the enactment of the CRA Act.

3.2 BOCRA sought clarification from BotswanaPost on what would happen to the EasiMail contracted customers when it takes over franking services. In response BotswanaPost indicated that it would allow the contracts to elapse but cautioned that after December 2017 it might not be possible for them to upload credit on the new machines if the software changes.

3.3 Chairman further enquired whether following the letter that BotswanaPost sent to franking machine customers, the company has been able to contract any new customers, to which BotswanaPost responded in the negative. However, EasiMail interjected and pointed out that BotswanaPost had sold franking machine to Jwaneng Town Council. BotswanaPost rebutted by indicating that it had only signed up the customer but no procurement had been made yet.

3.4 At the end of the meeting BOCRA gave the two parties seven days to make any final written submissions. They were further requested to submit proposals on how best to resolve the matter. The facts coming from the final written submission of both parties were substantially similar to those submitted orally. However, it is only proper for the Authority to quote, verbatim, some of the issues raised by EasiMail as follows:

“3. EasiMail identified weaknesses in the current model which it willingly disclosed to BotswanaPost with the understanding that both

parties would work together to safeguard the integrity of both organisations and customers.”

“5. BotswanaPost proceeded to use information that EasiMail had shared, against it and began to actively engage and pursue EasiMail customers to offer them the service that EasiMail is contractually obliged to render to them”

“6. The actions have caused confusion and destabilised the operations at EasiMail...”

“7. The actions of BotswanaPost are prejudicial as they have used privileged information to try to induce customers to use them.....”

3.5 In its written submission BotswanaPost argued that franking services form part of postal services. It therefore argued that EasiMail was in contravention of Section 57 of the CRA Act which requires any person who provides postal services to have a valid licence issued by the Authority. BotswanaPost further argued that to the extent that EasiMail was operating illegally it follows that its customers were equally illegal.

4.0 Is there a Dispute?

4.1 The CRA Act mandates BOCRA to hear complaints and disputes from consumers and regulated suppliers and resolve these or facilitate their resolution. The CRA Act has not provided a definition for a dispute or a complaint in which case we rely on the literal meaning of the word.

- 4.2 According to Oxford Concise Dictionary (10th Edition, completely revised) a Complaint is an act or the action of complaining or a reason for dissatisfaction. The same dictionary defines a dispute as an argument about something.
- 4.3 While EasiMail argues that it has not formally lodged a complaint with BOCRA, its submission bears all the hallmarks of a complaint as it is not happy with the conduct of BotswanaPost. It is also true that BotswanaPost and EasiMail are at odds on the issue of franking machines and EasiMail believes that it is wrong for BotswanaPost to license and play in the same market as its licensees. BotswanaPost on the other hand is of the view that EasiMail is not licensed as a postal operator and therefore it should not be providing franking services in the first place. According to submissions before the Authority, the two parties have had a long-standing impasse hence the decision by EasiMail to approach BOCRA for intervention.
- 4.4 In addition to a consultative function, a regulatory function and advisory function, BOCRA is vested with quasi-judicial powers to settle disputes. As alluded to above, there is a dispute between BotswanaPost and EasiMail. In its oral submission, EasiMail alleged among others that BotswanaPost has used privileged information disclosed by the former to the advantage of the latter. EasiMail has also accused BotswanaPost of causing confusion to its customers thereby destabilising its operations. We acknowledge that the two parties have had a long-standing impasse following termination of the agreement dated 28 July 2005. However, BOCRA must have

jurisdiction in order to entertain such dispute and make a pronouncement in relation thereof.

4.5 Section 6 (2) (m) of the CRA Act empowers the Authority to hear complaints/disputes from consumers and regulated suppliers and resolve these or facilitate their resolution. This is corroborated by Section 78(1) of the same Act which provides that the Authority shall resolve any dispute that is referred to it and which arises between:

- (a) regulated suppliers which concerns the provision of any regulated goods or service; or
- (b) a consumer or user of any regulated service and the regulated supplier.

4.6 On the basis of the above, the Authority will only have jurisdiction in a case where parties herein are regulated suppliers and dispute therein relates to provision of a regulated good or service. The Authority will also have jurisdiction in a case where either of the parties is a regulated supplier and the other is a consumer.

4.7 BotswanaPost is a regulated supplier while EasiMail is not a regulated supplier. Therefore section 78 (1) (a) falls off. On the other hand, section 78 (1) (b) will only apply in the event EasiMail is considered to be a consumer. The word "consumer" is commonly defined as any person to whom or to which any commodity or service is offered or made available. Consumer has also been defined as any person who

buys any goods or service for a consideration which has been paid or promised or partly paid. Commercial Postal Operator Licence has not defined consumer but has rather defined customer and clause 1.2.5 thereof provides that a “Customer” means any person, who has entered into an agreement with the Licensee, or any Service Provider of the Licensee, for the provision of any of the Licensed Services”

4.8 All the above definitions cover every person who pays a consideration as the price or cost of goods and services. In the present case, it is conclusive that EasiMail is in the business of supply, service and maintenance of franking machines and guided by the business operations of EasiMail together with the nature of the relationship which existed between EasiMail and BotswanaPost, we are unable to treat or consider EasiMail as a consumer or a user of a regulated service.

4.9 With regard to issues as summarised in paragraph 3.4 above, the Authority is being asked to assume jurisdiction on a matter which may well have nothing to do with its mandate and of which the Authority can give no effective implementation after the Ruling is granted. Any party who seeks a remedy against another party must demonstrate that it has right against the other which can be enforced by the Authority. Specific to issues raised in paragraph 3.4 above, there is nothing to show that EasiMail have a right against the BotswanaPost which can be enforced by BOCRA. **Therefore BOCRA lacks jurisdiction in respect to the components of the dispute as summarised in**

paragraph 3.4 above. Therefore no pronouncement is made in relation to such components of the dispute.

4.10 The above notwithstanding, the Authority will herein consider additional issues as follows:

- a) Whether EasiMail is operating a regulated service and thus in need of a postal licence;
- b) Whether the franking machines are to be type approved in accordance with Section 85 of the CRA Act;
- c) Whether BotswanaPost can play in the market like any other supplier of franking machines.

5.0 Do Franking Services Constitute Postal Services?

5.1 Section 57 of the CRA Act provides that no person shall provide a postal service, unless he has been granted a valid licence to do so. Even in cases where an alleged illegal operator has not been reported to the Authority, BOCRA has power to act *suo motto* once discovered that there are reasonable grounds which shows that Section 57 of the CRA Act has been contravened. In such a situation, the Authority is entitled to assume jurisdiction and carry out an investigation. Therefore BOCRA has jurisdiction to consider whether EasiMail is executing activities of a postal operator and therefore in need of a licence.

- 5.2 In its final written submission, BotswanaPost argued that EasiMail is in contravention of Section 57 of the CRA Act as it is providing postal services without a valid licence issued by the Authority. In terms of Section 2 of the CRA Act, Postal Service is defined as “all the services related to the process of collection, transport, sorting and delivery of postal items and includes courier services” while franking machine “means a machine for making impressions on postal articles to denote payment of postage and includes any meter and any franking or date stamping die used in connection with postal franking”.
- 5.3 The franking service allows entities to process their letters in-house as it is a convenient alternative to buying and affixing postage by hand. By making an impression on a postal article the customer indicates that postage has been paid and therefore franking is a substitute for purchasing of a stamp. What is critical to note is that the issuing of stamps and the receipt of revenue for stamps remain with BotswanaPost. (Refer to Section 71 of the CRA Act which provides that the issuance of postal stamps is exclusively reserved for BotswanaPost. This is corroborated by Acts of the UPU wherein it is clear that only postal administrators shall issue postage stamps attesting payment of postage). On that basis, the supplier of franking machines does not provide any of the services listed in the definition for postal service. It is therefore incorrect to argue that sale of franking machines constitutes provision of postal service. The analogy of terminal equipment and airtime vouchers in the telecommunications industry is relevant in the present scenario. Suppliers of cellphone handsets and airtime vouchers cannot be said to be providing

telecommunications services. They are simply providing support services to the licensed service providers which promotes efficiency and sector growth. **BOCRA therefore holds that the supply of franking machines does not form part of postal services.**

6.0 Is there a legal requirement to type approve franking machines

6.1 Section 85 of the CRA Act prohibits anyone to supply or use postal or broadcasting equipment unless it has been type approved by BOCRA. It has already been indicated that BOCRA has power to act *suo motto* once discovered that there are reasonable grounds which shows that any of the provisions of the CRA Act has been contravened. Section 8(11)(a) has gone further to empower the Authority to seize any postal equipment under a control of a person in contravention of the CRA Act. Therefore in every case where there are allegations for failure to type approve, BOCRA has jurisdiction to address such allegations.

6.2 We note that the CRA Act has only defined broadcasting and telecommunications equipment. Borrowing from other jurisdictions, a postal equipment includes any appliance or apparatus used to support services of a licensed postal operator. As indicated earlier on, the meter stamp generated by a franking machine serves as proof of payment and eliminates the need for adhesive stamps. Such equipment is considered a postal equipment and therefore must be type approved to meet technical specifications adopted by the Authority. BOCRA has a duty to provide an official confirmation that a

manufactured franking machine which is intended to be supplied to third parties meets required specifications.

6.3 Having established that franking machine is a postal equipment **BOCRA holds that all franking machines must be type approved before they can be used in Botswana.**

7.0 Can BotswanaPost Play in the Market Like Any Other Supplier of Franking Machines?

7.1 To the extent that franking machines are supplied by various manufacturers, it is important to consider whether there is any benefit in limiting the number of players in this market. Economic theory provides that competitive markets are normally more efficient than monopoly markets or any market with restricted entry. The Authority may want to restrict entry to a market if it is of the view that such a policy position would be in public interest or if there are some limited resources that the Authority needs to allocate for suppliers to fully participate in such a market. In the case of franking machines, the Authority does not find any justifiable reasons for restricting the number of players in this market. **BOCRA holds that any legally registered supplier of franking machines or their agent whose products meet the set type approval standards may provide such machines in Botswana. All machines destined for the Botswana market should conform to the ISO 5138-7:1986 or its equivalent.**

8.0 Level Playing Field and Service Standards

- 8.1 It is important for BOCRA to ensure that there is a level playing field in the provision of franking services and hence the need to introduce service level standards. A Service Level Agreement (SLA) is a contract entered into between a service provider and the end user that defines the level of service expected from the service provider. An SLA is premised on the basis of transparency, open access and non-discrimination. Therefore conditions relating to, among others, uploading of credit to the franking machines and remote meter settings should be uniform across all. Since the SLA is output based, we are unable to find a direct nexus between BotswanaPost and suppliers of franking machines that warrants an SLA between the two parties. However, such position will vary in a case where BotswanaPost directly uploads credit into the account of the supplier. In a case where the supplier merely leases or sells the franking machines and the end-user is responsible for sourcing credit from BotswanaPost, it will only be proper for an SLA to be signed by BotswanaPost and the end user.
- 8.2 BotswanaPost must not show undue preference to, or exercise unfair discrimination against, any user regarding the usage of a franking machine. Accordingly, BotswanaPost must file an SLA to be signed with end-users for approval by BOCRA and such must be based on the principles of transparency, open access and non-discrimination. The agreement must clearly reflect, among others, the turnaround times for the various services as well as the rights and obligations of the contracting parties. This is to ensure that customers are given the same terms and conditions regardless of the supplier used. **BOCRA**

directs that BotswanaPost must come up with a Service Level Agreement to be signed with all end-users of franking machines. The Service Level Agreement should be filed with BOCRA by 30 November 2017.

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