IN THE FAIR COMPETITION TRIBUNAL

AT DAR ES SALAAM

TRIBUNAL APPLICATION NO. 16 OF 2020

ANHEUSER-BUSCH INBEV SA/NW.....1ST APPLICANT

TANZANIA BREWERIES LTD.....2ND APPLICANT

VERSUS

FAIR COMPETITION

COMMISSION (FCC)..... RESPONDENT

RULING

This is an application for review of part of the decision of this Tribunal dated 6th May, 2020. The application is made under Rule 50 of the Fair Competition Rules, 2012. Before delving into the merits or demerits of the application, it is important to state, *albeit*, the brief historical background of the application.

On 6th September, 2016 the applicants filed a Merger Application for the1st applicant (Anheuser-Busch Inbev SA/NW) to indirectly acquire majority shares held by SABMILLER P/C Limited and Tanzania Breweries Limited (TBL-the 2nd Applicant) in Tanzania Distilleries Limited (TDL). On 3rd October, 2016 the respondent issued Notice of Prohibition (Form FCC 15) and on the same date the respondent issued an order to declare *void*

ab initio Shareholder's Agreement between the Distillers Corporation International Limited (Distell), Tanzania Breweries Limited (TBL), Tanzania Distilleries Limited (TDL) and the South African Breweries International (AFRICA) B.V. dated 31st August, 1999 as amended in 2002. The order required the proposed merging parties (InBev and SABMILLER PLC Ltd and TBL) to divest the entire 65% share in TDL.

On 2nd November, 2018, the applicants filed an application against the respondent (Application No. 13 of 2017) seeking for orders of the Tribunal to compel the Commission to produce all documents relied upon to make decision in Merger Application No. FCC/M&A/02/2016 including; SSNIP Test Findings, Exclusive Agreements and submissions by Distell. On 6th May, 2020 this Tribunal delivered a ruling in respect of Application No. 13 of 2017. The respondent was ordered to supply the applicants with Distell's submission in relation to the merger proceedings after separating the commercially sensitive information. The order was issued subject to compliance with the requirement of rule 53 of G.N. No. 73 of 2013. Further, the Tribunal found that the SNNIP Test used for determination of relevant market in the findings was given to the applicant as reasons for the decision. As such, the Tribunal could not compel the respondent to produce non-existent document. As regards to the so called "exclusive agreements", the Tribunal found that are non-existent. Following the Tribunal ruling, on 9th June, 2020 the applicant preferred this application seeking for orders that:

(a) The respondent to provide any and all documents relied upon by the respondent in coming to the decision, in particular, any and all documents relied upon by the respondent and comprising the FCC study findings referred to in paragraph 6.1.1 of the reasons and described further in footnote 5 to the reasons as "SNNIP Test findings in the research work done during the SBL V. TBL case in 2010" and any and all documents relied upon by the respondent and comprising the exclusive agreements referred to in paragraph 7.0 of the reasons;

(b) The respondent to confirm under oath by affidavit that all documents as prayed for at paragraph (a) have been provided to the applicants or, alternatively, do not currently, and have never existed;

(c) Any necessary, incidental or consequential orders;

(d) The cost to be in the cause;

(e) The applicants to be granted further and or alternative relief.

The main issue that warrants a candid scrutiny is:

"Whether the advanced grounds conform with the legal edifice for review".

The applicants' grounds for review, as can be gathered, in the Memorandum of review are as follows:

1. The Tribunal erred in law by accepting oral submissions by the respondent from the bar, which submissions were contradictory to, not predicated on, nor in any way pleaded in, the counter affidavit of the respondent's Dr. Deo Nangela filed on 8th November, 2017. The submissions of which were relied upon by the Tribunal in its decision and order determining the application to compel the production of any and all documents relied upon by the respondent in coming to its decision in relation to the Merger notification under case FCC/M & A/28/2016/25. This Merger notification was in respect of the acquisition of indirect control by the 1st applicant's then proposed acquisition of SABMiller PLC, which decision was delivered to the applicants on 5th October, 2016 followed by the respondent's written reasons for the decision during October, 2016. In particular, in view of the applicants.

    1.1 The Tribunal should have drawn a negative inference from the contradictory stance of the oral submissions when compared to the contents of the pleadings and correspondence to date; and

    1.2 The Tribunal should have further inferred that the withholding of the information by the respondent is

founded on a recognition by the respondent that the documents would undermine the decision and reasons.

2. In holding that the requested "FCC study findings" as referred to in paragraph 6.1.1 of the reasons and further described in footnote 5 of the reasons as the SNNIP Test findings in the research work done during the SBL V. TBL case in 2010 were 'non-existent' and that the requested 'exclusive agreements' as referred to in paragraph 7.0 of the Reasons were "a general description and not specific documents as misconceived by the applicant" (collectively, the "requested Documents", the Tribunal erred in fact and in law.

   2.1 By not affording a reasonable interpretation to the phrases "FCC Study Findings" "SNNIP Test findings in the research work done during the SBL V. TBL case in 2010" or "exclusive agreements" as referred to in the Reasons.

   2.2 By failing to appreciate the various correspondence exchanged between the applicants and the respondent between 18th September, 2017 and 1st November, 2017, which correspondence was annexed as WBK2, WBK3 and WBK4 to the affidavit deposed to by the applicants' Advocate, Dr. Wilbert Basilius Kapinga, and filed on 2nd November, 2017, in particular annexture WBK4, wherein in the

respondent's Dr. Allan Syril Mlulla did not deny the existence of the Requested Documents but rather specifically recognized the existence of the Requested Documents and in that regard, stated that "the document is archaic and we have had staff turnover and relocation as challenges in locating the appropriate file as quick. Your indulgence as we continue to search".

2.3 By failing to appreciate the contents of paragraph 7 of the respondent's affidavit, where the respondent specifically recognized the existence of the requested Documents and, in that regard, stated that "the contents of paragraph 8 of the Affidavit of Wilbert Basilius Kapinga are partly admitted to the extent that **the respondent relied upon the mentioned documents to analyse and make a decision to prohibit a merger.** The respondent averred further that to **get hold of the document,** the applicant needs to apply and pay the requisite fees and the applicant had not paid the fees **to obtain the said documents**….(Emphasis added), being an admission by the respondent to relying on, and by logical extension the existence of, the requested documents to analyze and make the Decision, and being evidence under oath, which is in stark contrast to the never before pleaded oral submissions; and

2.4 By failing to appreciate paragraphs 9, 13 and 14 of the respondent's affidavit, wherein the respondent did not deny the existence of the requested documents but rather stated that "to obtain the said document is not an automatic right; the applicants need to apply and pay the requisite fees thereof" being a clear and unequivocal recognition of the existence of the documents sought.

With the aforesaid grounds, the Tribunal is being tasked to address two issues to wit:

1. Whether the Tribunal erred in law and as a matter of procedure by accepting oral submissions made by the respondent from the bar, without notice and which submissions were not, at any stage pleaded by the respondent or supported by evidence, at the hearing ("the oral submissions").
2. Whether the Tribunal erred in fact and in law in holding that the document/s referred to in the Reasons as (i) the "FCC Study Findings" and the "SNNIP Test Findings in the research work done during the SBL V. TBL case in 2010" were "non-existent" and (ii) the "exclusive agreements" were a "a general description and not specific documents as misconceived by the applicant".

Before answering the above two issues, the Tribunal will consider the main legal issue on whether the applicants' grounds conform with the legal edifice for review.

Both parties are not in dispute that the Court or Tribunal may review its decision if the following grounds exists:

(a) The decision was based on a manifest error on the fact of the record resulting in the miscarriage of justice; or
(b) A party was wrongly deprived of an opportunity to be heard; or
(c) The Court's decision is a nullity; or
(d) The Court had no jurisdiction to entertain the case; or
(e) The judgement was procured illegally, or by fraud or perjury.

The above five grounds for review were stated, in among other cases, the case of **Juma MzeeV. Republic, Criminal Application No. 88/07 of 2019 CAT at Mtwara** (unreported), **Karim Kiara V. Republic, Criminal Application No. 04/2007** (unreported), **Chandrakhant Joshibhai Patel V. Republic (2004) TLR, 218, Muyodi V. Industrial and Commercial Development Corporation & Another (2006) IEA 243, Halmashauriya Kijiji cha Vilima Vitatu& Another V. UdaghwengaBayay & 16 Others, Civil Application No. 16 of 2013 CAT at Arusha** (unreported), **Justus Tihairwa V. Chief Executive Officer, TTCL, Civil Application No. 131/01 of 2019 CAT at DSM** (unreported) **Mirumbe Elias @ Mwita V. Republic, Criminal Application No. 4 of 2015, CAT at Mwanza** (unreported), **Airtel Tanzania Ltd V. Tanzania Communications Regulatory Authority, Appeal No. 13 of 2018 Fair Competition Tribunal** (unreported).

Indeed, the admissible grounds for review as captured under Order XLII Rule 1(1)(b) of the Civil Procedure Code, Cap.33 (R.E. 2019) are:

1. Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge;
2. The new and important matter or evidence could not be produced by him at the time when the decree was passed or order made;
3. On account of some mistake or error apparent on the face of record;
4. For any other sufficient reason.

We may add that, if there are omissions to rule on a claim, such omission may constitute a good ground for review.

At the hearing, as far as the 1st and 2nd elements are concerned, Dr. Kapinga told the Tribunal that there are new and important matter to warrant review. However, Dr.Kapinga admitted that WBK2, WBK3 and WBK4 existed before the ruling. As such there was no proof for discovery of new and important matter as required under Order XLII Rule 4(b) of CPC R.E. 2019. As properly replied by respondent, the applicant failed to provide any new discovery for this Tribunal to review its decision.

On the 3rd element, whether the decision was based on a manifest error on the face of record resulting in the miscarriage of justice. The applicants were of general view that the

Tribunal acted in error for accepting oral submissions from the Bar, the submissions which were contradictory, neither predicated nor pleaded.

In reply, the respondent through counsel Dr. Allan Cyril Mlula and Josephat Mkizungo asserted, *inter alia,* that the applicants have not pointed out an error apparent on the face of record as expected under Order XLII Rule 1(1)(b) of the Civil Procedure Code (*supra*).

The respondent submitted that its oral submissions in respect of Application No. 13 of 2017 were predicated to and not contradictory rather supported and amplified in both the respondent's reply affidavit and the skeleton arguments in opposition of the application. Thus, the applicants wrongly equated the respondent's searching on the purported documents "SNNIP Test findings and exclusive agreements" to admission of their existence contrary to the evidence apparent on the face of records as shown in paragraph 8 of the respondent's affidavit in reply which reads:

> *"that the contents of paragraph 9, 9.1 and 9.2 of the affidavit of Wilbert Basilius Kapinga are noted. The respondent avers further that, SNNIP Test was important to determine the relevant market which comprises the product and geographical market and unilateral effect in the post-merger scenario".*

As aptly responded, the oral submissions on SNNIP Test findings was amplification of what was deponed in the reply

affidavit. There was no admission by the respondent on the existence of the purported document.

As quoted by the respondent, the Court in the case of **Attilio V. Mbowe 1969 HCD No. 284** observed:

> *Review would involve correction of an error which was either apparent on the face of the record or had become clear because of the subsequently discovered circumstances. The principle underlying a review is that the Court would not have acted as it had if all the circumstances had been known.*

Again, the applicants have not pointed which point is an error apparent on the face of record. If the applicants think that there was a misinterpretation of facts on the existence of the SNNIP Test findings and exclusive agreements, such point alone (if at all existed), of which it is not, has never been a ground for review. In the case of **Tanzania Transcontinental Co. Ltd V. Design Partnership Ltd, Civil Application No. 7 of 1996,** the Court observed:

> *The Court will not readily extend the list of circumstances for review, the idea being that the Court's power of review ought to be exercised sparingly and only in the most deserving cases, bearing in mind the demand of public policy for finality of litigation and for certainty of the law as declared by the highest Court of the land.*

Next is the element whether the applicants have adduced any other sufficient reason. The applicants largely attached the

decision of this Tribunal in holding that the requested FCC study findings as a non-existent document. In a way, the applicants argued their application indirectly, an act which is not acceptable in application for review. In the cited case of **Paul Mhozya V. The Attorney General of the United Republic of Tanzania, Application No. 14 of 2018 East African Court of Justice, at page 20,** the Court held:

> *A review proceeding cannot be equated with the original hearing of the case. The purpose of the review jurisdiction is not to provide a back door by which unsuccessful litigants can seek to re-argue their cases.*

The Tribunal in its ruling made itself clear from page 5-6 of its decision when it observed:

> *Further, the applicant does not dispute that they were supplied with the assessment report as hailed under Rule 42(3) and 42(14)(b) of G.N. No. 73 of 2013. On that note, the Tribunal finds there is a misconception on the part of the applicant that every study or research work must be in a document. The SNNIP Test was used for determination of relevant market which is the findings. The same was given to the applicant as reasons for the decision. The Tribunal, therefore, cannot compel the respondent to produce the document that does not exist.*

In reply to this application, the respondent submitted, among others, that by its very nature, the Assessment Report is a synthesis of many pieces of information processed into

knowledge of both economic and legal forming the economic and legal arguments as statutorily required under Rule 42(3)(a) of the Fair Competition Commission Procedure Rules of 2013.

The Tribunal need not repeat its findings. The core reason is that there was no any kind of error on the part of the Tribunal in interpreting SNNIP Test finding and exclusive agreement as non-existent documents. Further, the applicants have failed to adduce any other sufficient reason.

There is a point raised by the applicants in respect of a reply to the applicants' memorandum of review. The Tribunal do subscribe to the applicant's submission that Rule 50(1) of the FCT Rules does not contemplate or even permit a reply to be filed to the memorandum of review. Once the memorandum of review is filed, the next step is an *interpartes* hearing. However, that does not prejudice the applicant. Needless, the advanced grounds for review do not conform with the legal edifice for review, as enshrined under Order XLII Rule 1(1)(b) of the Civil Procedure Code (*supra*).

It is therefore, our conclusion that the application before the Tribunal is an appeal in disguise. Consequently, the application is dismissed with costs for lack of merits.

It is so ordered.

Dated at Dar es Salaam this 27th day of July, 2020.

Hon. Judge Stephen M. Magoiga – Chairman

Hon. Yose J. Mlyambina – Member

Hon. Butamo K. Phillip – Member

Ruling delivered this 4th day of August, 2020 in the presence of Ms. Pepita Samwel, Advocate for the Applicants, Selina Mloge and Josephat Mkizungo, Advocates for the Respondent.

Hon. Judge Stephen M. Magoiga – Chairman

Hon. Yose J. Mlyambina – Member

04/08/2020