

**IN THE FAIR COMPETITION TRIBUNAL  
AT DAR ES SALAAM**



**BEFORE:**

**RAZIA H. SHEIKH, JUDGE/CHAIRMAN  
PROF. JOSEPH M. L. KIRONDE, MEMBER  
DR. MALIMA M. P. BUNDARA, MEMBER**

**CONSOLIDATED TRIBUNAL APPEALS NO. 4 AND 5 OF 2010**

**TANZANIA BREWERIES LTD.....APPELLANT**

**VERSUS**

**SERENGETI BREWERIES LTD.....1<sup>ST</sup> RESPONDENT**

**FAIR COMPETITION COMMISSION.....2<sup>ND</sup> RESPONDENT**

**AND**

**COCA COLA KWANZA.....INTERVENER**

**RULING**

This consolidated appeal arises from the decision of the Fair Competition Commission (FCC) in Complaint No.2 of 2009 made

on 21/5/2010. The two appeals were consolidated in a ruling of this Tribunal on points of law read on 18/08/2011.

Upon application made on behalf of the appellant soon after the case management hearings, in a ruling read on 24/10/2011, we had ordered the 2<sup>nd</sup> respondent to produce under oath at the following hearing of this consolidated appeal documents relating to the constitution of FCC at the time of the hearing and determination of the complaint by FCC and in particular the letters of appointment of all members of FCC made in 2005 and thereafter. We had further ordered the 2<sup>nd</sup> respondent to file in the Tribunal an affidavit of the documents to be produced and certified copies thereof on or before 2/11/2011. An affidavit sworn by Mr. Justine Nyenza, the acting Director of Compliance of FCC, was duly filed on 2/11/2011. Paragraph 6 of the affidavit reads as follows:

"That I have attached hereto all the documents relating to the appointments of the Commissioners of the 2<sup>nd</sup> Respondent, which have been availed to me by Mr. Michael D. Shilla, who also informed me which information I verily believe to be true, are the only documents on the said subject in the possession/custody of the 2<sup>nd</sup> Respondent."

On 9/11/2011 when this matter came up for hearing for purposes of ascertaining whether the order for disclosure had been

complied with by the 2<sup>nd</sup> respondent, Mr. Bhojani learned counsel for the appellant submitted that the documents disclosed were adequate for purposes of providing documentary proof as regards the constitution of FCC at the time of the determination of the complaint by FCC and for purposes of arguing ground 2 of the memorandum of appeal to the effect that the proceedings and decisions of FCC are a nullity as FCC was not properly constituted when it determined the matter. Immediately thereafter Mr. Bhojani made an oral application for the following two orders:-

- (a) An order that ground 2 of the appellant's memorandum of appeal be heard and determined by the Tribunal first before proceeding with the rest of the grounds of appeal on the ground that it raises the question of FCC's jurisdiction at the time of the determination of the complaint.
- (b) An amendment of the consent orders made by this Tribunal during the case management hearing held on 13 and 14/9/2011.

Citing Order 14 Rule 2 of the Civil Procedure Code 1966, Cap. 33 R.E. 2002, which according to Mr. Bhojani, though not binding is of persuasive authority on this Tribunal, Mr. Bhojani submitted that where issues of law and of fact arise in a case and where a case may be disposed of on the issues of law only, such issues of

law shall be and should determined first without enquiring into the issues of fact. Mr. Bhojani argued that as ground 2 is an issue of law if it is disposed of first and if the Tribunal were to find in favour of the appellant the entire appeal may be disposed of on this issue of law.

It is Mr. Bhojani's further contention that if ground 2 is heard first it may lead to a significant saving of time and costs and the appeal may be disposed of in not more than two days whereas the hearing of the entire appeal will take about 20 full days according to the consent orders recorded during the case management hearings. Learned counsel was emphatic that it is clear from the documents that there were irregularities in the constitution of FCC at the time of hearing the complaint and therefore hearing ground 2 will shorten the time taken in determining this proceeding which would in turn be consistent with Rule 28(2) of the Fair Competition Tribunal Rules 2006 (FCT Rules) requiring this Tribunal to ensure just and economic handling of proceedings.

Mr. Bhojani submitted that if the appellant is unsuccessful on ground 2, the Tribunal may hear arguments on the remaining 9 grounds and that this would not add material delay or costs to the proceedings. In his support he cited the United Kingdom (U.K) case of **Bettercare Group Limited v The Director General of Fair Trading, Competition Appeals Tribunal Case**

**No. 1006/2/01** and a **Cyprus** case of **Exxon Mobil Cyprus Limited and Others v. Commission for the Protection of Competition, Supreme Court of Cyprus cases Nos. 1544/09, 1545/2009, 1596/2009, 1601/2009**. The U.K. Competition Appeals Tribunal and Cyprus Supreme Court respectively, at the hearing of the respective appeals, were asked and agreed to hear legal issues raised in the appeals aforesaid in advance of the main appeals.

Mr. Bhojani accordingly prayed that the order made on 13/09/2011 for filing skeleton arguments be amended such that the skeleton arguments to be filed by the parties be limited to ground 2 only.

Dr. Ringo Tenga, learned counsel who had accompanied Mr. Bhojani at the hearing as counsel for the appellant, in turn, sought an amendment of the orders made on 13/09/2011 and reiterated that the documents produced by the second respondent have disclosed information which has given rise to a point of law which goes to the jurisdiction of FCC, in particular, its ability to hear the complaint. He asserted that based on the disclosures the appeal may be disposed of upon determination of ground 2 only without having to proceed with the rest of the grounds of the appeal. He thereupon sought an amendment of the consent order on the filing of skeleton arguments so that

ground 2 is argued first in the sequence set in the schedule for filing skeleton arguments.

Mr. Ng'maryo learned counsel for the 1<sup>st</sup> respondent strongly objected to the prayer for leave to argue ground 2 earlier than the rest of the 9 grounds of appeal simply on the basis of new documents discovered from the 2<sup>nd</sup> respondent. His objection was based on the ground that the documents disclosed have neither been admitted as evidence nor subjected to cross-examination and re-examination. He asserted that for this reason these documents may not be acted upon by the Tribunal in making a decision.

He further submitted that the cases from other jurisdictions cited by counsel for the appellant as well as Order XIV rule 2 of the Civil Procedure Code are inapplicable as they relate to legal issues, issues in the nature of preliminary points of law, which are totally distinguishable from grounds of appeal such as are before this Tribunal. It is Mr. Ng'maryo's argument that since in ground 2 the appellant is challenging the constitution of FCC, it cannot be disposed of as a point of law and that being a substantive ground of appeal it must be examined in-depth, and relevant evidence be taken before a decision is reached in the form of a judgment on the ground. Mr. Ng'maryo was emphatic that once a judgment is made on this ground the Tribunal cannot re-open the appeal and

hear the other grounds of appeal as the Tribunal will by that time have become functus officio.

Clearly disagreeing with Mr. Bhojani's argument that ground 2 will dispose of the appeal, Mr. Ng'maryo submitted that all grounds of appeal are of the same importance and arguing ground 2 will in no way save the Tribunal time and money. It is his view that Dr. Tenga's proposal for amendment of the scheduling order for filing skeleton arguments would result in a duplication of the scheduling process agreed upon on 13/9/2011. He asserted that the proposal to hear ground 2 and to file skeleton arguments on ground 2 first would mean that the appeal would be heard twice, which would be incongruent to the submission that arguing ground 2 earlier and separately from the rest of the grounds of appeal will save costs and time since the appellant's counsel cannot and had no right to prejudge that the outcome of ground 2 will be in its favour.

On her part Ms Karume learned counsel for the 2<sup>nd</sup> respondent too strongly objected to the oral application for determination of ground 2 first before considering the other grounds and for amendment of the schedule for filing the skeleton arguments. She submitted that ground 2 is not a pure ground of law since the appellant's counsel had to seek discovery of documents which were in the possession of the 2<sup>nd</sup> respondent and are now seeking to rely on the said documents which are documents that were not

presented before FCC and are not on the record of appeal. Learned counsel was of the view that as the documents disclosed are not case law the appellant cannot rely upon them and the Tribunal cannot act on them or take judicial notice thereof unless and until they are tendered as evidence by a witness and admitted as evidence under the provisions of rule 30 1(b) of the FCT Rules. Ms Karume was also emphatic that the cases cited by Mr. Bhojani are wholly distinguishable, since they involved issues which were entirely legal in nature. Citing the famous case of Mukisa Biscuits Manufacturers Co. Ltd V. West Distributors Ltd (1969) E.A. 696 Ms Karume asserted that as ground 2 requires the bringing of evidence before its determination it cannot be said to be or dealt with as a pure point of law.

Mr. Nyange learned counsel for the intervener, in his submission, made it clear that he was fully supportive of the position taken by learned counsel for the appellant and the application made on behalf of the appellant for an order that ground 2 be heard first and for amendment of the scheduling order for filing the skeleton arguments.

By way of rejoinder Dr. Tenga submitted that the documents relating to the constitution of FCC are in fact evidence brought by an affidavit sworn by Mr. Nyenza and that learned counsel for the appellant being satisfied with the documents have opted not to cross-examine Mr. Nyenza as allowed under rule 30(2) of the FCT



Rules. Dr. Tenga reiterated that the documents disclose facts which raise serious issues of law as to whether FCC was seized with the jurisdiction to determine the complaint from which this appeal arises and therefore ground 2 being nothing but a point of law must be addressed and disposed of before considering the rest of the grounds of appeal.

We have carefully considered the respective arguments on the oral application made by learned counsel for the appellant. Indeed annexed to Mr. Nyenza's affidavit are letters/documents relating to the appointment of Commissioners of the 2<sup>nd</sup> respondent. These annexures being part of the affidavit are nothing but additional documentary evidence allowed under rule 30(2) of the FCT Rules which empowers this Tribunal to take additional evidence orally or by affidavit and therefore need no further order for admitting them as evidence. As a matter of fact Mr. Nyenza is for purposes of this appeal the first witness for the appellant and we shall refer to him as AW1. Indeed even had we not ordered the 2<sup>nd</sup> respondent to file an affidavit of the documents disclosed this Tribunal could have in its discretion under the provisions of section 61(2) of the Fair Competition Act 2003 and rule 30(1)(2) of the FCT Rules taken additional evidence before allowing the parties to argue ground 2. If this Tribunal deems it necessary for the disposal of ground 2 it may still order the bringing of additional evidence before determination of this ground. However for the avoidance of

doubt since the documents have not been marked as exhibits in Mr. Nyenza's affidavit, as they should rightly have been, the documents which are referred to in paragraph 6 of Mr. Nyenza's affidavit which are:

1. Letter from FCC Ref. No. CAB.54/79/01/43 dated 29/03/2010;
2. Letter from Wizara ya Viwanda, Biashara na Masoko Ref. No. CFA 536/624/01 dated 14/03/2010;
3. Letter from FCC Ref. No. AB 54/79/01/39 dated 23/02/2010;
4. Letter from Wizara ya Viwanda, Biashara na Masoko Ref. No. CFA 536/624/01 dated 20/02/2010;
5. Letter from Ministry of Industry and Trade Ref. No. CFA.536/624/01/04 dated 22/12/2010;
6. Letter from Ministry of Industry and Trade Ref. No. CFA.536/624/01/04 dated 16/12/2010;
7. Letter from Ministry of Industry and Trade Ref. No. CFA.536/624/01/04 dated 22/12/2010;
8. Letter from Ministry of Industry and Trade Ref. No. CGA.46/624/01 dated 25/11/2005;
9. Letter from Itika-Hilda Mafwenga dated 6/12/2005;
10. Letter from Ministry of Industry and Trade Ref. No. CFA.536/624/01/98 dated 20/12/2005;
11. Letter from Ministry of Industry and Trade Ref. No. CGA.46/624/01 dated 25/11/2005;
12. Letter from Ministry of Industry and Trade Ref. No. CGA.46/624/01 dated 25/11/2005;

13. Letter from Ministry of Industry and Trade Ref. No. CFA.536/624/01/97 dated 20/12/2005;
  14. Letter from Ministry of Industry and Trade Ref. No. CGA.46/624/01 dated 21/09/2005;
  15. Letter from Ministry of Industry and Trade Ref. No. CGA.46/624/01 dated 20/05/2009;
  16. Letter from Dr. Geoffrey Mariki dated 29/5/2009;
  17. Letter from Ministry of Industry and Trade Ref. No. CGA.46/624/01 dated 25/11/2005;
  18. Letter from Ministry of Industry and Trade Ref. No. CFA.536/624/01/99 dated 20/12/2005;
  19. Letter from Ministry of Industry and Trade Ref. No. CFA.536/624/01 dated 4/03/2009;
  20. Letter from Ministry of Industry and Trade Ref. No. CFA.536/624/01 dated 4/03/2008;
  21. Letter from Ministry of Industry and Trade Ref. No. CFA.536/624/01/14 dated 05/03/2010;
  22. Letter from FCC Ref. No. FCC/PF.1.01/45 dated 06/01/2010
  23. Letter from Godfrey Enock Mkocho;
  24. Letter from Ministry of Industry, Trade and Marketing Ref. No. MIT-PCF.329/135 dated 15/07/2009
- are hereby marked exhibit **A1 collectively**.

Indeed it is not disputed that on 13/09/2011 during the case management conference a consent order giving a schedule for filing written skeleton arguments/submissions of the parties in

respect of the consolidated appeal was recorded. In a ruling read on 14/09/2011 the parties were granted leave to call additional evidence under Rule 30 of the FCT Rules and upon application by the appellant's counsel the 2<sup>nd</sup> respondent was ordered to disclose documentary proof on the constitution of FCC at the time of the hearing and determination of the complaint by FCC. The documents having been produced in Mr. Nyenza's affidavit they are part of Mr. Nyenza's affidavit evidence. We therefore cannot accede to Ms Karume's arguments and Mr. Ng'maryo's assertions that the documents are not evidence. It is therefore our view that all factual matters disclosed in the documents which have been marked exhibit A1 are evidence and may be relied upon by learned counsel for the appellants to argue their preliminary objection on whether or not FCC was properly constituted at the material time. In our view the case of Mukisa Biscuits cited by Ms Karume is inapplicable since in the instant case the evidence relied upon to argue the issue of law is already on record. The appellant's counsels as well as counsel for the intervener have made it clear that they have no intention of cross examining the deponent, Mr. Nyenza. While Mr. Ng'maryo is at liberty to cross examine the witness as provided under rule 30 (2) of the Rules he cannot be heard to say that the documents disclosed in Mr. Nyenza's affidavit are not evidence.

Now ground 2 of the grounds in the memorandum of the appeal reads as follows:

**2. The proceedings and the decision of the FCC are a nullity because the FCC was not properly constituted when it determined the matter.**

Without further ado we will say that this ground raises issues of law as to the competence of FCC when it determined the matter and the corollary is that FCC lacked the jurisdiction to determine the matter at that time. If we were to decide that FCC was not properly constituted for any reason, then the proceedings and decision would undoubtedly be a nullity and therefore it would be not necessary to determine the appeal on the merits as to whether the appellant had contravened the competition law, *inter alia*. Order XIV rule 2 of the Civil Procedure Code 1966 Cap.33 R.E 2002 cited by learned counsel for the appellant reads as follows:

"2. Where issues both of law and of fact arise in the same suit, and the court is of the opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined."

While it is true that the Civil Procedure Code 1966 does not apply to proceedings in this Tribunal, we can seek inspiration and guidance from it, as we have already done a number of times,

where there is a *lacuna* or gap in our Rules. (see also the Court of Appeal of Tanzania case of Lalago Cotton Ginnery and Oil Mills Company Limited v. The Loans and Advances Realization Trust (LART) Civil Application No. 80 of 2001 (DSM)) in which the Court of Appeal sought guidance from the Civil Procedure Code to fill in a gap in the Court of Appeal Rules). We are therefore in entire agreement with learned counsel for the appellant that since ground 2 raises issues of law it would be appropriate to hear it first as a preliminary point, before hearing the rest of the grounds of appeal. It may indeed save costs and time since if we were to decide that FCC was not properly constituted and had no jurisdiction to hear the complaint then clearly FCC's decision which is the subject of this appeal would be a nullity and there would be no need to determine the appeal on merit.

On the other hand if we were to decide that FCC was competent and properly constituted to hear the complaint and the decision was valid and that the appeal should proceed, then we, in our discretion, may proceed to hear the rest of the grounds of appeal. This was the position taken in the **UK Bettercare Group Limited** case cited in this appeal on behalf of the appellant. While it is true that the point of law raised in the **Bettercare case** was whether there was an appealable decision and is therefore distinguishable to some extent it is our view that both are issues of law and therefore like the issue of law raised in the **Bettercare case** ground 2 deserves to be given prior attention

which would result in a more expeditious and economical handling of the proceeding as required in rule 28(2) of the FCT Rules. It would indeed be absurd to hear the appeal on merit and only to find out in the end after determining ground 2 that the decision of FCC was a nullity due to the incompetence and/or lack of jurisdiction of FCC when it determined the complaint.

Even of more relevance is the **Cyprus case of Exxon Mobil Cyprus Limited** cited on behalf of the appellant in which case prior to the hearing of the merits of the appeals, the applicants applied for leave to argue preliminary points of law the outcome of which could have a material effect on the continuation or otherwise of the appeals. The first issue was whether the Commission for the Protection of Competition (the competition authority) was lawfully composed and/or structured at all material times. In this case the Supreme Court of Cyprus held that it was feasible to examine the legality of the appointment of the Chairman of the Commission for the Protection of Competition who had participated in taking the disputed decision and proceeded to examine the issue as a preliminary point. While admittedly these foreign authorities are not binding on this Tribunal we find them very persuasive and will have no hesitation in applying them in this appeal. It is our view therefore that as ground 2 raises issues of law it is appropriate and feasible to hear it as a preliminary point/issue before hearing the appeal on the

merits. Ground 2 will accordingly be heard first as a preliminary issue of law.

On the other hand we do not find it necessary to amend the schedule for filing the skeleton arguments made on 13/09/2011. Indeed in the event after hearing ground 2 we were to decide to hear the appeal on the rest of the grounds then there would be no need for filing another set of skeleton arguments and the hearing of the appeal can proceed without much delay. Indeed we cannot agree with Mr. Ng'maryo's argument that this Tribunal will become functus officio once ground 2 is determined. While it is true that the Tribunal will become functus officio in respect of ground 2 should it be decided first, the mere disposal of ground 2 will not affect the Tribunal's jurisdiction or make it functus officio in respect of the rest of the grounds of the appeal. In the event the schedule for filing the skeleton arguments made on 13/09/2011 will remain undisturbed.

Last but not least we wish to express our dissatisfaction with the manner in which the documents disclosed in Mr. Nyenza's affidavit were attached to the affidavit without numbering them for identification purposes. It is elementary that documents annexed to affidavits are nothing but documentary evidence and should therefore have been numbered and marked as exhibits. Indeed had this been done some of the arguments raised by counsel in their submissions might have been avoided. The



respective learned counsels are ordered to henceforth adhere to procedure.

It is so ordered.

Costs in the cause.

Dated this 15<sup>th</sup> day of December 2011.



**Judge R. H. Sheikh – Chairman**



**Prof. J.M.L. Kironde – Member**



**Dr. M.M P. Bundara – Member**

Ruling read this 15/12/2011 in the presence of Mr. Fayaz Bhojani, Advocate for the Appellant also holding brief for Dr. Ringo Tenga, Advocate for the Appellant, Mr. Eric Ng'maryo Advocate for the 1<sup>st</sup> Respondent, Mr. Godson Nyange, Advocate for the intervener,

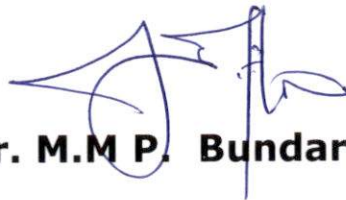
and in the presence of Ms Madina Chenge, Advocate for the 2<sup>nd</sup> Respondent, and Beda Kyanyari Tribunal Clerk.



**Judge R. H. Sheikh – Chairman**



**Prof. J.M.L. Kironde – Member**



**Dr. M.M P. Bundara – Member**

**15/12/2011**