IN THE FAIR COMPETITION TRIBUNAL
AT DAR ES SALAAM

CONSOLIDATED APPEALS NO. 6, 10 AND 12 OF 2022

APPEAL NO. 6/2022

CHALINZE COMPANY LIMITED ....APPELANT

VERSUS

FAIR COMPETITION COMMISSION ....1ST RESPONDENT

SCANCEM INTERNATIONAL DA.............................2ND RESPONDENT

APPEAL NO. 10/2022

SCANCEM INTERNATIONAL DA .... APPELANT

VERSUS

FAIR COMPETITION COMMISSION .... RESPONDENT

APPEAL NO. 12/2022

TANZANIA CONSUMERADVOCACYSOCIETY ...... APPELANT

VERSUS

FAIR COMPETITION COMMISSION .... 1ST RESPONDENT

SCANCEM INTERNATIONAL DA............................2ND RESPONDENT

JUDGMENT

Pursuant to the provisions of Section 11(2) of the Fair Competition Act, No. 8 of 2003 ("FCA"); on the 02nd November, 2021, Scancem International DA ("SID") notified the Fair Competition Commission ("FCC") of their intention to to acquire 68.33% of the shares which a company named AfriSamMauiritius Investment Holdings Limited possess in Tanga Cement Public Limited Company ("the target firm"). By virtue of the procedures laid down under Rule

35(1)(a), 36(3) of the FCC Rules, 2018 ("FCC Rules") the FCC analysed the merger application and eventually on the 06th April, 2022, pursuant to Rule 24(1) of the FCC Rules, the FCC approved the intended merger. However, the approval of the merger was not absolute. It was done under the provisions of Rule 42(13)(b) of the FCC Rules whereby the following conditions were set:

i. That within 10 days of issuance of the merger clearance certificate and prior to the completion of proposed transaction, the acquiring firm shall issue a written binding undertaking to the member of FCC that:
   a. It shall not shut down the target firm without prior notice and / or approval of the commission.
   b. The acquiring firm shall continue to produce and promote Simba Cement brand of Tanga Cement Plc.
   c. The acquiring firm within five years from the date of approval of the merger shall not operate the target firm in a reduced operation and that capacity utilization of acquiring and target firm severally or jointly, shall, at least be maintained above pre-merger capacity utilization level.
   d. It shall, within 30 days from the date of approval of the merger application, demonstrate how and at what percentage does cost savings resulting from the transfer of technology and efficiency brought by the merger shall be passed onto the final consumer in terms of ex-factory price reduction.
   e. Acquiring firm shall comprehensively submit a plan of payment of the existing debt of a target firm at a time frame that is shorter than the timeframe in the absence of the merger application. The plan shall demonstrate the timeframe expected for the Target firm to turn into a profit making entity.

ii. That within 10 days of issuance of a merger clearance certificate and prior to the completion of the proposed transaction, the Acquiring firm shall issue a written binding undertaking to FCC that:

a) It shall not lay off any existing employees of the Target firm as a result of this conditional approval of the merger and it shall honour or at least maintain a status quo of the existing employees' contract for the coming five years. The said undertaking shall be submitted to the Commission within 30 days from the date of issuance of the merger clearance certificate and prior to the completion of the proposed transaction.

b) The terms and conditions of the Collective Bargaining Agreement (if any) between employees and management of the Target firm in the pre-merger scenario of the target firm shall at minimum continue in the post-merger firm.

iii. That, this instant notification before the Commission DOES NOT COVER the proposed transaction by Scancem International DA acquisition of indirect control of CDEAL by virtue of acquiring 68.3% shares in Tanga Cement Plc.

a) That, the potential transaction mentioned under paragraph (iii) hereinabove should be dealt with separately, singly, severally, and independent of Acquiring firm to acquire 68.3% shares in Tanga Cement Plc.

b) The envisaged transaction in paragraph (iii) (a) hereinabove shall be notified to FCC within 30 days from the date of THIS DECISION and issuance of the Merger Clearance Certificate in relation to the proposed transaction by Scancem International DA to acquire 68.3% of shares in Tanga Cement Plc.

iv. That, the acquiring firm (Scancem International DA) in the post-merger scenario, SHALL neither appoint the same director nor Management to run the affairs of both Tanga Cement Plc and Tanzania Portland Cement Plc.

v. That, the acquiring firm shall, within 30 days from the date of issuance of the Merger Clearance Certificate and prior to the completion of the proposed transaction, shall file a Written Binding Undertaking to FCC that Mivumoni Biofarm Limited will be liquidated and struck off the registry of companies and file evidence to that effect within Seven days to the FCC.

The approval of the said merger did not amuse several categories of stakeholders in the market. To start with, the acquiring firm, SID was not at all amused with the conditions that accompanied the merger approval, their desire before us is to have some of these conditions removed with some conditions reviewed and re-adjusted as will be discussed in due course and some conditions were to the satisfaction of SID. On the other hand, one of the competitors trading in the name of Chalinze Cement ("Chalinze") was also aggrieved, and so were the consumers who approached this Tribunal in the style of Tanzania Consumer Advocacy Society ("TCAS").

For an expeditious and more convenient disposal of the matter, by consent of parties, the three appeals were consolidated to which in disposal thereof, the following five issues were framed for determination by the tribunal:

1. Whether appeals by Chalinze Cement and Tanzania Consumer Advocacy Society are competent and have met the threshold test under section 61(3) of the FCA.
2. Whether the decision of the FCC was proper in law and facts.
3. Whether the decision of the FCC considered relevant economic aspects/factors in approving the merger application with conditions.

4. Whether some of the conditions in the merger approval decision are tenable under the laws of Tanzania.
5. Whether some of the conditions in the merger approval decision are economically viable.

Issue No. 1 is an issue of law while the remaining issues No. 2-5 are issues which require both economic and legal analysis. We shall therefore start with issue No. 1, whether appeals by Chalinze and TCAS are competent and have met the threshold test under section 61(3) of the FCA. In his submissions to support the first issue, Mr. Vitalis, learned Counsel who represented the SID, being the one who raised the issue, made the submissions in Chief.

At the onset of his submissions, Mr. Vitalis pointed out that they are challenging the competence of the appeals lodged by Chalinze and TCAS under 61(3) of the FCA, read together with Rule 3 of the Fair Competition Tribunal Rules, 2012 ("FCT Rules") which gives the right to appeal to this tribunal. He then submitted that such right is not absolute, pointing to the key words in the Section which are *"Pecuniary"* and *"Material"* grievance arising from the decision of the FCC which are the key conditions to approach this tribunal to challenge the decision of the FCC. His argument was that the purpose of those two conjunctive conditions is to lock out busy bodies who frustrate merger applications or approvals.

He continued to submit that the test for appealing is quite higher as the law doesn't just require a person to show sufficient interest in the decision, it requires more than that. He pointed out that the law requires pecuniary and material grievance, emphasizing that it is not interest that is required, but rather a grievance. Relating to the records of the appeal lodged by the two stakeholders, he argued that there is nothing on the record showing their pecuniary and material grievance in the merger decision made by FCC. Further that in their submissions, they have not even raised what pecuniary or

material grievance they have. He also argued that even the existence of the two entities is not on record, there is no proof that they legally exist or whether they are foreign entities coming to this country to frustrate the merger approval by FCC, or who they are.

Mr. Vitalis submitted further that the law makes the appeal very strict because there are consequences that follow the outcome of the appeal. In case the appeals by Chalinzé and TCAS are dismissed, he questioned as to how will the respondents recover their costs because the legal existence of the two is unknown. He then argued that assuming, for the sake of argument, that the two entities Chalinze and TCAS have met the conditions under Section 61(3) of the FCA, still there is another test which they have to meet, the common test of sufficient interest which is minor to the pecuniary and material grievance. According to him, this sufficient interest test is provided under Rule 31(1)(b) of the FCT Rules, arguing that again, there is no material on the record of appeal filed by Chalinze and TCAS that proves their sufficient interest in the decision.

He submitted further that it is clear from the record of appeal that FCC published the public notice inviting all members of the public to come up and assist the FCC in its merger decision. That the record is clear, none of the two,Chalinzeor TCAS appeared, questioning why they decided not to appear, a question he argued does not get the answer from the record or submissions and it is too late to give the answers now. In conclusion, he submitted that the appeals by Chalinze and TCAS are incompetent because the two appellants have failed to meet the threshold test and they have failed to establish their legal existence, a failure which makes them dangerous appellants to entertain. He therefore prayed for this Tribunal to dismiss the appeal by Chalinze and TCAS with costs pointing out that in case they are not found due to the doubt in their existence, they will go for their lawyers.

In reply, Mr. Lutema, learned Counsel representing Chalinze and TCAS submitted that Mr. Vitalis seems to confuse between pecuniary and material grievance on the one hand and pecuniary and material loss on the other end. On Mr. Vitalis' argument that one has to show with data and materials that there is a pecuniary and material loss, his reply was that the position of the law is not as such. His argument was that the law requires one to show pecuniary and material grievance and not loss and in that, you don't have to come with any statistics. He then pointed out that the definition of grievance in the dictionary is a real or imagined cause for complaint or unfair treatment, a feeling of resentment over something believed to be wrong or unfair.

Coming back to the merger at hand, pointing to the merger analysis report by the second respondent FCC ("the Report"), Mr.Lutema came up with a scenario that when a merger is approved, one gets hold of the report and one sees that the dominance of the merging firms is at 47.26% which is above the allowed 35% threshold. That at page 42 of the report, it shows that the merged firms, acting alone in the post-merger scenario can materially and profitably restrain or reduce competition in the relevant market. Further that they can also, through coordinated conduct, indulge in a manner in which can raise or fix prices. He then pointed at page 45 of the report where it is recorded that considering the metric that had been applied by the FCC, which he argued to be a prohibited transaction. In all fairness, went on Mr. Lutema, those issues can, as far as Chalinze and TCAS are concerned, raise a real or imagined cause for complaint(grievance) hence a sufficient enough material grievance. At this point, he concluded that the objection by SID is misplaced and ought to be over-ruled.

On the argument that TCAS doesn't have pecuniary and material grievance or sufficient interest, Mr. Lutema's reply was that Rule 49(c)(v) of FCC Rules allows a consumer to have sufficient interest. That the consumer is to be

treated as a distinguished person because the intended merger is on a product that will be used by the consumer hence the consumer is supposed to be involved in the merger. He argued that instead of raising an objection against the TCAS and labeling it as entity which doesn't have sufficient interest, Mr. Vitalis should understand that the FCC had a duty to distinguish the TCAS as a party who had interest in the merger application, an interest provided for under the law.

Mr. Lutema then took us to page 11 of the report where the Commission invited several entities/stakeholders but none of them was a consumer association. He reiterated his argument that the law distinguishes consumer associations under Rule 49(c)(v) as an entity with sufficient interest and that the law says *"for the purposes of the right to be heard"*.Further that Mr. Vitaliscame with a sword to cut the Appeals No. 6 and 12 but that sword will cut SID and FCC in omitting to call the consumer and give their right to be heard. He argued that the hearing was against the principle of *audialterampartem* (hear the other party) which is emphasized under Rule 49 and the provision is coached in mandatory terms.

On the issue of existence of Chalinze, His reply was that the issue is not born out in the pleadings as it doesn't feature anywhere in the replies filed against Appeals No. 6 & 12 and it was not raised in the issues, it came while making submissions on material and pecuniary grievances without prior notice. That because it was not raised, it was not supported by the pleadings hence a relief not founded by the pleadings cannot be granted by the Court because parties are bound by their pleadings. That justice is not a matter of hide and seek, if Mr. Vitalis wanted proof of existence, they could have asked or using other methods like discovery and Chalinze would have brought those documents. There were no rejoinder submissions from Mr. Vitalis.

Having considered the submissions of the parties and deliberated on them, our findings will begin by reproducing the relevant provisions of the law that Mr. Vitalis based his arguments on, Section 61(3) of the FCA, read together with Rule 3 of the FCT Rules. Starting with the Principal Act, the Section 61(3) of the FCA provides:

> *"**Any person that has a pecuniary and material grievance arising from a decision of the Commission** other than a decision referred to in sub-section (1) may appeal to the Tribunal for review of the decision within 28 days after the notification or publication of the decision".*

Indeed, as argued by Mr. Vitalis, an appellant before this Tribunal must have on his/her part, a pecuniary or material grievance arising from the decision of FCC. What is the basis of the issue is what constitutes a material and pecuniary grievance mentioned in the law. Unfortunately, Mr. Vitalis did not avail us with any definition or meaning of a material and pecuniary grievance, his argument was only based on the fact that law doesn't just require a person to show sufficient interest in the decision, it requires pecuniary and material grievance, emphasizing that it is not interest that is required, but rather a grievance. He also argued that there is nothing on the record showing their pecuniary and material grievance in the merger decision made by FCC. We then posed to ask ourselves whether the law requires that person to narrate his pecuniary or material grievance on the memorandum of appeal, we are convinced that this is not the intention of the law because had it rather been, it would have explicitly stated so. We then moved to the provisions of the other law cited, the provisions of Rule 3 of the FCT Rules which provides:

> *"A person who is aggrieved by decision or appealable orders of the Commission or Regulatory body may appeal to the tribunal"*

In looking for the answer as to whether the appellant must state the material or pecuniary grievance of the decision, we have also looked at the definition and form upon which a memorandum of appeal should take. Section 2 of the Rules defines a memorandum of appeal as a document prescribed under Rule 11 of the Rules and the Rule 11 sets a form and contents upon which a memorandum of appeal should take. The Rule 11 provides:

1. *An appeal or cross-appeal shall be instituted within twenty-one days of the date when the notice of appeal or cross-appeal was lodged.*
2. *In computing the twenty-one days prescribed in sub-rule (1), the period of time from which the appellant requests in writing for copies of proceedings and decision of the Commission or Regulatory Body to the date the appellant obtains such copies, shall be excluded;*
   Provided that the exclusion of the period of time shall not take effect unless the appellant submits to the Tribunal, a copy of the letter requesting for such documents when lodging the notice of appeal.
3. *An appeal shall be instituted by lodging with the Tribunal-*
   (a) five copies of the memorandum of appeal or cross-appeal for the use of the Tribunal and for each party in the appeal;
   (b) Five copies of record of appeal or cross-appeal for the use of the Tribunal and for each party in the appeal; and
   (c) Security for costs where applicable.
4. *A memorandum of appeal or cross-appeal shall be substantially in the FORM D specified in the Second Schedule to these Rules.*
5. *The memorandum of appeal or cross-appeal, consecutively numbered specifying the points alleged to have been wrongly decided;*
   (a) set out concisely and under distinct heads, without arguments or narrative-
   ii. grounds of appeal or cross-appeal, consecutively numbered specifying the points alleged to have been wrongly decided;

iii. nature of the order sought from the Tribunal; and

(b) be signed and dated by either the appellant in person, his advocate, legal representative or duly authorized officer.

6. The record of appeal or cross-appeal shall contain pleadings, proceedings and the decision appealed against."

Looking at the provisions of the law, there is nowhere where the law requires the appellant to narrate his pecuniary or material grievance of the decision of the Commissions hence the argument is without basis.

Since our competition laws are not rich in precedent in this area, we have resorted to the experience from other jurisdictions, particularly the European Commission. Starting with Chalinze as a competitor, the Commission has adopted a practice of considering a legitimate interest where the parties are operating in the relevant market or where the conduct complained of is liable to directly and adversely affect their interests. The Commission also accepts that a legitimate interest can be claimed by competitors whose interests have allegedly been damaged by the behaviour complained of. To that end, we have borrowed a persuasive decision of the European Competition Commission In the joined Cases **T-133/95 and T-204/95, between International Express Carriers Conference (IECC) v Commission of the European Communities, [1998] ECR II-3645**, paras 79-83, it was held that the Commission has powers not to pursue the complaint of an association of undertakings in case the members therein were not involved in the type of business transactions complained of.

As for this case, it is undisputed that Chalinze is involved in the business that these appeals are addressing hence suffices to say that they have pecuniary and material grievances. The case would have been different if the appellant in Appeal No. 6 (Chalinze) was not involved in the relevant market subject of the merger in question.

In the case of TCAS, the Court of First Instance has, in the case of Case **T-37/92, Bureau Européen des Unions des Consommateurs (BEUC) v Commission of the European Communities, [1994] ECR II-285**, affirmed that Consumer associations can equally lodge complaints with the Commission. The Commission moreover held the view that individual consumers whose economic interests are directly and adversely affected insofar as they are the buyers of goods or services that are the object of an infringement can be in a position to show a legitimate interest (see also the case of **IV/D-2/34.466, Greek Ferries, OJ L 109/24 of 27 April 1999,** para 1) where the Commission has also accepted as complaint from an individual consumer in its Decision of 09thDecember, 1998.

In all those cases, a complaint from both consumer associations and competitors were entertained and determined. On that same basis, we find that the appellants in the name of Chalinze and TCAS are competent to be heard before this Tribunal.

Having so decided the first issue in favor of Chalinze and TCAS, we shall now move to the remaining four issues. In determination of these issues, pursuant to Section 61(5)&(7)of the FCA, we shall re-analyse the records to look at how competition and efficiency are likely to be affected by a merger in the context of consumer protection which is the ultimate goal of the FCA. In doing so, we shall rely on the records availed to us which reflects the data available at the time of the merger analysis at the FCC with regard to the documentary and witness evidence availed at the time. We shall also do an analysis on the effect of the merger in the context of ex-post-merger effect on the market. Issues No. 2 and 3 will be addressed first because they go to the root of whether the decision to approve the merger was justifiable. Thereafter, we shall then look at whether the conditions set therein are tenable in both the legal and economic perspective.

Starting with the second and third issues, both issues question the validity of the decision of FCC both in law and facts and whether it considered relevant economic aspects/factors in approving the merger application with conditions. Our initial consideration is that from the records of the appeals before us and arguments of parties, it is undisputed that any merger within the requirement of Section 11 of the FCA, including the one at hand, can be prohibited or granted in accordance with the FCA and FCC Rules. Looking at the arguments raised by the parties, what we have gathered in is that this merger is a prohibited merger under the FCA, but was only granted with conditions because of what the FCC alleged to be exemptions attributed to some benefits accrued to it under the aforementioned laws. It is for us to see whether what the FCC considered in approving what would otherwise be a prohibited merger, is valid in the economic aspect relating to the purpose of its establishment, promotion of competition and protection of consumer.

We have clustered our analysis and determination of the issues on some identified relevant crucial points which form the basis which the decision was lying on, the key economic factors considered in the analysis which are installed capacity and sales volume.

The first point we have considered is that of using installed capacity instead of Sales Volume as a metric to determine the market shares of the merging firm post-merger. It was Mr. Lutema's submission that the merger approval took into account irrelevant, extraneous and inapplicable matters. He pointed the Tribunal to page 48 of the report, where the FCC used installed capacity as a metric for estimating market shares in the relevant market. He strongly argued that this was an irrelevant, extraneous and inapplicable consideration because at page 24 of the report, the FCC said it was not proper to apply installed capacity as the metric for determining market shares because it was not the most insightful metric or yardstick. He further pointed out several

reasons for not using installed capacity including that the installed capacity could not capture potential competition and at page 25 the report, the FCC had ruled that applying installed capacity would go against the provisions of Section 5(5) of the FCA. The reasons there being that if you use installed capacity, you cannot include the people who are not players in the local market, while Section 5(5) of FCA requires that in order to determine market dominance you have to consider imports as well.

He then argued that the decision used a yardstick which had been dis-applied by the FCC and which is contrary to Section 5(5) of the FCA because the metric that was used to determine dominance was sales volume and not installed capacity. Further that the conclusions which were arrived at from page 1-45 of the report are clear that the transaction is a prohibited transaction under Section 11(1) and Section 5(6) was founded on sales volumes and not installed capacity, expressing his concern as to why the FCC decided to dis-apply a criteria or metric throughout the analysis and now acrobatically used a metric dis-applied to approve the merger.

In reply, Mr. Bhojani submitted that in the report, FCC looked at each and every angle and then make an informed merger decision in the given market, while keeping in mind the markets and consumers. It has looked at all factors and metrics including different mechanisms of calculating market share. He pointed out that there are different ways of calculating market shares, but in all times you have to look at the economics of the economy that you are in to contextualize it. He argued that there is no one fit for all modes that apply here and that what FCC has done is to look at the market shares using sales volume, and installed capacity. He did not deny the fact that another way of analyzing markets is by looking at market shares based on revenues, but he was quick to defend the metric used by FCC by arguing that what FCC has done is to look at everything.

Pointing at page 45 of the report, Mr. Bhojan submitted that this is where the FCC, after considering all factors, made conclusions and definition of markets and it is at this stage where it has imported the definition of markets. That the FCC capitalizing on the definition of market and the potential suppliers who are entering the markets, concluding that the merging firm market share will be below 35%. He concluded that based on that share, the FCC satisfied itself that Section 5(6)(b) of the FCA will not be contravened. Further that based on the definition of markets, it concludes that FCA 5(6)(a) will not be contravened.

Making reply submissions on behalf of the FCC, Mr. Nyoni started by taking the Tribunal to the definition of Competition, market and dominant position in a market under Section 2 of the FCA which reads:

> *"Competition" "market" and "dominant position in a market" are economic concepts and, subject to the provisions of this Act, shall be interpreted accordingly."*

He then submitted that while making a merger analysis, there is no single concept in reaching into a conclusion and once you make analysis with regard to them, you come up with a concept that you may make an analysis and from that analysis you conclude that this is the metric that should be taken in calculating the market share. Referring to Section 5(5) of the FCA he submitted there are other relevant matters to be considered including the economic factors. He argued that in the analysis three metrics were used to conclude whether the merger should be allowed or with conditions, sales volume, installed capacity and revenues. That with regard to sales the FCC considered volumes and revenues including other investment which also come into the account of the entity.

He went on submitting that by revenues as differentiated from sales, as reported in financial statement of the firm, it connotes possibility where

there could be non-cement revenues and that is where the argument was why it could not be used as a metric. According to Section 5(5) of the FCA by economic concept they looked at the economic and market circumstances prevailing in the contemporary at the time of choosing the metric to be used along with other circumstances at the time, with an expostulation of what will happen in the future and what needs to be attained in the future. That they chose a metric that will fit under the circumstances.

Mr. Nyoni also submitted that with the three metrics, sales, installed capacity and revenue, the Commission was not bound by any of the choices as to which would be strictly used and was not strict on to the extent that if it is above 35%, then it should not be allowed. He concluded that the two metrics met the test, sales and installed capacity and with sales, the metric was found to be above the threshold of 35% under Section 5(6)(b) (table 10 of the report) which meant that merging the two entities, with the sales, you find that Tanzania Portland Cement has 42.7% market share. However, he argued, with the installed capacity, the market share went down to 31.5% and it is striking the balance that the installed capacity was taken on board. The purpose of using installed capacity was that of attaining multiple objectives including protecting competition and consumer and promotes the Foreign Directing Investment. Looking at those metric, they argued, the sales metric could not have attained the purpose because the market share was already above the threshold. He then pointed out that in FCC analysis, they were making sure that dominance will not be in place and that at page 31 of the report, in Table 7, is where they have dominance. That in determining the geographical market, sales volume was used as a metric to see who is dominating where, in terms of geographical markets.

On our part, we have deliberated on the grounds for the approval of the merger and came with the findings that will soon be apparent. To begin with, we shall reproduce the relevant laws that the arguments herein were based on. Starting with Section 5(4)&(5) which defines markets, it provides:

(4) "Market" means a market in Tanzania or a part of Tanzania and refers to the range of reasonable possibilities for substitution in supply or demand between particular kinds of goods or services and between suppliers or acquirers, or potential suppliers or acquirers, of those goods or services.

(5) In defining markets, assessing effects on competition or determining whether a person has a dominant position in a market, the following matters, in addition to other relevant matters, shall be taken into account: competition from imported goods and services supplied by persons not resident or carrying on business in Tanzania; and

(b) the economic circumstances of the relevant market including the market shares of persons supplying or acquiring goods or services in the market, the ability of those persons to expand their market shares and the potential for new entry into the market.

(6) A person has a dominant position in a market if both (a) and (b) apply:

(a) acting alone, the person can profitably and materially restrain or reduce competition in that market for a significant period of time; and

(b) the person's share of the relevant market exceeds 35 per cent.

Having so considered the relevant provisions of the law, we shall now look at the report to see whether the decision to use installed capacity as a metric for merger approval was proper. Despite the mischief that was exposed by Mr. Lutema which we shall also consider, we will start with the very definition of the relevant market pursuant to the cited Section 5(5)

of the FCA. The Section is clear (with catch phrase of the word "shall" connoting mandatory requirement) that in defining markets, assessing effects on competition or determining a dominant position in a market, in addition to other relevant matters, the FCC shall take into account ***competition from imported goods and services*** supplied by persons not resident or carrying on business in Tanzania. Therefore, in analysing the position of dominance in the market, competition from imported goods cannot be ignored. It has to be tagged along the comparative analysis of how a person is dominant in the market. The important question to consider is how can the imported goods be related to goods locally produced for the purpose of assessment of market dominance? This can only be assessed by taking the volume of sales of both the local goods and imported ones in order to conclude what the relevant market share of the firms will be because many a times, competition from importation can be more threatening than local goods if government intervention is minimal. In the merger analysis, we have thoroughly re-analysed all the factors that were considered by the FCC. We have noted at page 14 of the report, the FCC, while analysing the industry and market specifically demand analysis observed at clause 6.2:

> *"The ambitious government large scale (strategic) projects,* ***coupled with retail consumers (individual) need for construction is putting demand for cement and construction material at increasingly upward trend and stable outlook in the foreseeable future.***
>
> *While the* ***sector is characterized by stable and increasing demand, the supply (national wide sales) in the market is made only by top six largest cement makers of varying capacities and having national coverage.*** *There are* ***seven other small companies*** *that are operating parochially, which together,* ***constitute***

only less than 7% of the entire players capacity in the market. *Of these small companies* ***two of them are dormant, and/or have stopped production for various reasons****. It is obvious that, these companies that operate regionally* ***cannot at best compete with those six large companies*** *that have nationwide network." (Emphasis is ours)*

At this point, the report has touched major and crucial issues which the FCC should have born in mind throughout their report. The first one is the fact that the relevant market is characterized by stable and increasing demand and the fact that the supply of the product (nationwide sales) in the market is made only by top six largest cement manufacturers. Therefore, one would expect that sales should have been the best metric to be used in determination of dominance.

Further to the above, from page 22 of the report, FCC pointed showed how it opposed the merging firm's assertions that capacity metric is the most insightful. There are several issues that were raised by the merging firms and not supported by FCC analysis. For instance, at page 22, the merging firms argued that in the context of the Tanzanian cement market, market shares on the basis of capacity are likely to be most insightful than shares based on other metrics such as sales volumes or revenues for reasons that properly constructed market shares should reflect the competitive constraints that different firms are able to exert over one another. The firms argued that where capacity and capacity constraints are not a relevant feature of the market, market shares calculated on the basis of sales volumes may be informative. The firms however, argued that in respect of markets where capacity and capacity constraints are a relevant feature, the calculation is not relevant. The argument was further that a firm may account for a relatively large share of current sales, but if it is unable to expand production then it is unable to exert

an effective competitive constraint on its rivals because if these rivals seek to raise their prices there is no risk of them losing sales to the firm in question, because it is already producing at its full capacity. On their part, the FCC held a different position where they perfectly made these findings:

> *"FCC position on the above assertion is different based on the fact that, existence of excess capacities in the market may act as deterrence to credible entrants into such market and restrains effective competition in the market. More so, in the market where there is high likelihood of coordinated conducts and/or effects such as in cement, which may lead to non-responsiveness of the players at times of voluntary response to increase prices, and/or reduction of production. Under such circumstances, in the Tanzanian context, the argument by the merging firms on competitive constrains inherently borne in excess capacities weakens and collapse given the trends on the capacity utilization overtime shown in Figure 5 hereunder."*

We have further noted at page 26 of the report, having considered all arguments advanced by the merging firms, FCC made conclusive findings that the best metric to be used was sales volume. For the purpose of clarity, we shall reproduce the relevant findings of the report. The first line of argument was as such:

> *"It is against this background that, in the context of the Tanzanian cement market, FCC has calculated the market shares based on sales volumes as this metric best takes care of the shortfalls that were observed to encumber the other two metric as it discussed above. The reasons for using sales volume data are the following:*
>
> *(i) FCC is of the opinion that, capacity and capacity constraints are not a relevant feature of the cement market. However, extent of used capacity which can be better captured in the data for sales volume is more informative in assessment of*

competition and competitive constrains of each player in the market. This is consistent with merging firms submission implied in first bullet of paragraph 55 of the RBB Economics report.

(ii) Other jurisdiction globally has also assessed market share estimates based on sales volume on account that the sales market shares indicate the extent to which suppliers actually compete in the relevant markets. In the case of HeidelbergCement and SchwenkZement v.Commisssionit was held that, while capacity shares indicate the extent to which the suppliers could compete in the relevant markets, the sales market shares indicate the extent to which suppliers actually compete in the relevant markets. Market shares have been calculated on a volume basis rather than on a revenue basis due to the better availability of volume data.

(iii) ***FCC has made an informed choice to proceed with market share analysis based on the sales volume having considered the prevailing market conditions and competitive dynamics projections*** *informed by a time series analysis of players conducts overtime with respect to capacity utilization and sales volume." (Emphasis is ours)*

Up until this point, we agree with FCC that in analysing the relevant market, the best metric to be used was sales metric. This is because as opposed to the installed capacity metric which only indicates the extent to which the firms could compete in the relevant market, the sales volume (market shares) give the actual picture on the extent to which firms actually compete in the relevant markets (See also the decision in the cited **Case No. M.7878 – Heidelberg Cement/Schwenk/Cemex Hungary/Cemex Croatia** dated 05th April, 2017). Therefore, based on

the above, the installed capacity is a poor metric for determining the market dominance as it fails to capture the installed capacity of cement industries outside the country where Tanzania is likely to import from. Even at page 43 of the report, FCC indicates that the cement industrial average capacity utilization is not expected to change from 49%. We shall therefore base our re-analysis of the merger by using **Sales Volume as a metric.**

With the above in mind, in our deliberations, we looked at Table No. 10 at page 47 of the report, which shows the post-merger scenario that the merging entities will possess post-merger. The figure shown there is 47.26% of the market shares in terms of sale volumes, which is far above the 35% threshold as set in by the law, hence contravening FCA 5(6)(b). Surprisingly, on last paragraph at page 42 of the report, FCC conceded that the relevant market is oligopolistic and concentrated, as containing 4 biggest rival players who are controlling around 78% of the total sales volume. Now merging the two big players in the relevant will result into a market concentration.

We also looked at page 22 of the report where FCC noted that Section 5 of the FCA directs the use of imports in determination of market share which dictates the use of sales data as opposed to neither production volume nor installed capacity. At Table 7 found on page 28 of the report, FCC indicated that the sales volume of the merger, using FCC own collected data, will be 52.11%, which is also far above the threshold of 35% market share. Again, at page 31 of the report, Table 7A indicates that the merged firms will control the market shares in the 5 major geographical market zones including Northern zone (92%); Lake zone (77.5%); Coastal zone (60.6%) and Central zone (49%), with an exception of the Southern zone which is dominated by the Dangote

Cement. This is a clear scenario of strengthened market dominance contrary to Section 5(6)(b) of the FCA. At page 32, the report concluded that the proposed merger transaction will have adverse competition effects due to changes in the market structure and concentration.

We have deliberated on the above findings of sales volume metric and found it far above the threshold of 35% contrary to the law as per FCA 5(6). We have also noted that the post-merger effect will be an increased concentration by reducing number of players in the market. Having so made the observation, we expected that for an entity like the FCC with specialization in competition, they should have considered the relevant issues observed on the creation of dominance in the context of consumer protection because after all, they are the segment of the Government bestowed with the trust to protect consumer. With respect, we wish to remind the FCC that in case they have missed the provisions of Section 3 of the FCA, which explains the objectives of their establishing law. We find it important that we remind FCC of the objective of the Act and their subsequent role in implementing the FCA. Section 3 of the FCA provides:

> "***The object of this Act is to enhance the welfare of the people of Tanzania as a whole*** *by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout Tanzania in order to:*
>
> *(a) Increase efficiency in the production, distribution and supply of goods and services;*
>
> *(b) Promote innovation;*
>
> *(c) Maximise the efficient allocation of resources; and*
>
> *(d) Protect consumers.*

If we may take a moment to elaborate on this objective, the primary goal of the FCA is to protect the welfare of the people of Tanzania. FCC being

the custodian of the implementation of the FCA, should always bear in mind that the ultimate goal of their purpose and well-being is the welfare of the people of Tanzania. How they do so is by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct. If the FCC discharges its duty as required, the expected result is increased efficiency in the production, distribution and supply of goods and services, innovation will be promoted and efficient allocation of resources will be maximized. The ultimate goal in all these combined is to protect the consumer which will automatically enhance their welfare. The reason why we took time to elaborate on the objects of the FCA is because we have noted with concern that the Merger analysis report did not consider the aspect of consumer protection. Instead, as submitted by FCC while supporting their position, they were more titled on the promotion of Foreign Direct Investment (FDI). We have no issues with promotion of FDI because it will also yield some benefits to the consumer. However, our concern is on the fact that the consumer was totally left out while the law talks more of consumer and it has not (the FCA) at any place mentioned the FDI. Therefore, while considering the FDI, the welfare of the people of Tanzania would have been of paramount importance.

Our concern on how the consumer was left out was also moved by an argument raised by Mr. Lutema, that when the FCC suo moto called the stakeholders, the consumer was never considered. We then looked at page 11 of the report where at clause 5.2 it reads *"Identification of Relevant Stakeholders"*. The preamble to the said identification was that:

> *"Following non response from the Public, FCC identified and invited stakeholders that were considered relevant to the proposed transaction to a hearing session conducted on the 8th February, 2022. The invited stakeholders were consulted to provide opinion on the proposed transaction."*

The preamble indicates that the FCC had discretion to choose which stakeholder they wish to invite but to our dismay, the consumer was never considered despite the ultimate objective of the FCA to protect the welfare of the people of Tanzania by protecting the consumer. The stakeholders which were chosen by FCC included Ministry of Investment, Industry and Trade (MIIT), Tanzania Investment Centre (TIC), Tanzania Revenue Authority (TRA), National Social Security Fund (NSSF), Dangote Cement Limited, Mbeya Cement Company Limited, Maweni Limestone Limited, Lake Cement Company Limited and the Confederation of Tanzania Industries. No consumer was invited hence the purpose of the FCA under Section 3 was not considered.

All the above observations of the absence of the welfare of the consumer in the whole scenario and after all the observed increased market dominance post-merger approval, and after considering the fact that SID declared in their report as well as in his submission (Mr. Bhojan) that they could not guarantee any increased volume of production post the merger. He emphasized that the merged firm will neither increase sales volume nor tap the economies of scale that could be attributed to expanded production, hence not likely to reduce price of cement in the given market. In considering these relevant facts, at least we expected the FCC to have conducted a benefit-harm analysis to see if, despite all the observed indicators of creation of market dominance, the benefit to the consumer in approving the merger would outweigh the harm in competition. Again, that was not done we hasten to say that in this analysis, the welfare of the consumer was totally left out despite the fact the product market in question comprises of a homogenous product with no close substitutes.

We also examined the rationale behind why the FCC would have approved the merger, we assumed, for the sake of argument, that the target firm

would be a failing firm. However, at page 6 of the report, the reflection of performance of the target firm is quite different as the FCC observed:

> *"The Merging firms have estimated that, a relatively smaller proportion of Target firm's total domestic sales are made through distributors (37.7% in 2020), **with the bulk of Target firm's sales being made directly to retailers (62.3% in 2020).** Since 2018, **Target firm's total domestic sale made directly to retailers has increased by 30.4 percentage points,** whilst its **sales to distributors have decreased by 2.2 percentage points.** The Merging firms estimated that, approximately 35% - 40% of Target firm's sales are made on delivery basis and the remainder is sold on an ex-works basis."*

So, what does the above analysis tell us, it tells us that the target firm is far from being a failing firm. It is an up and running business and the share purchase in question is just a normal business transaction. Therefore the parameters within which FCC used to make its decision would have been stricter and more consumers oriented by considering the position of the consumer in the post-merger scenario. This would be best achieved by doing a benefit-harm analysis to see how, despite all the observed indicators of creation of market dominance and a projected harm to competition, the benefits to the consumer outweigh the harm to competition.

We also take this opportunity to point out the inconsistencies and contradictions in the Economic Data in the report. For instance at page 35 of the report, FCC relied on the huge installed capacity of Dangote Cement Limited as a factor that will make the merging firms lack the incentive to reduce production or increase cement price. This was a contradiction to their own position at page 25 of the report where the FCC observed that *"use of installed capacity in Tanzanian market ought to have passed the*

test of ability" of the merging firms to rapidly expand production in response to a price increase or to reduce/ cut output by other players in the relevant market. The FCC observed that the merging firms could not have that ability to expand production in response to a price increase or reduction of production by others.

Further at page 36 of the same report, FCC noted that Dangote Cement and Huaxing Cement would be able to comfortably serve the entire domestic sales of the merging parties with the cumulative spare capacity estimate that they possess. However, at the same page, FCC admitted that the spare capacity estimate that Dangote and Huaxin possess is an exaggeration and overestimation as usually, all firms could not be able to produce at installed or nameplate capacity. FCC also noted that industrial average capacity utilization usually stands at 49%, far below the installed capacity. Despite all these, FCC still went ahead and made their decision based on the metric named full installed capacity, a conclusion which contradicts the findings of the FCC because they admitted that no firm can operate at full installed capacity.

In conclusion therefore, we make a finding that the approval of the merger did not consider the relevant economic factors hence the final findings were not in accordance with the legal and economic factors hence contrary to the Section 11 of the FCA. We would have proceeded to make our conclusive findings at this point but as indicated earlier, the SID also had her own appeal in which they were challenging the conditions that were attributed to the merger approval as the approval was not absolute. This takes us to the 4th and5^{th} issues framed.

The issues were mainly raised by SID opposing the conditions that approval of the merger was subject to. We have deliberated on each condition as argued by Mr. Bhojan. The analysis looked to expound, based on the hearing and

other documents laid before this Tribunal, whether some of the conditions in the merger decision are tenable under the Laws and whether such conditions are economically viable. In our analysis, each of the five conditions as advanced in paragraph 5 of the FCCs' Merger Clearance Certificate, FCC.18 of 6th April 2022 was considered in order to build the opinion on the basis of which this Honourable Tribunal will determine the validity of the decision. The approval of the merger was subject to the following conditions:

i. That within 10 days of issuance of the merger clearance certificate and prior to the completion of proposed transaction, the acquiring firm shall issue a written binding undertaking to the member of FCC that:
    a. It shall not shut down the target firm without prior notice and / or approval of the commission.
    b. The acquiring firm shall continue to produce and promote Simba Cement brand of Tanga Cement Plc.
    c. The acquiring firm within five years from the date of approval of the merger shall not operate the target firm in a reduced operation and that capacity utilization of acquiring and target firm severally or jointly, shall, at least be maintained above pre-merger capacity utilization level.
    d. It shall, within 30 days from the date of approval of the merger application, demonstrate how and at what percentage does cost savings resulting from the transfer of technology and efficiency brought by the merger shall be passed onto the final consumer in terms of ex-factory price reduction.
    e. Acquiring firm shall comprehensively submit a plan of payment of the existing debt of a target firm at a time frame that is shorter than the timeframe in the absence of the merger application. The plan shall demonstrate the timeframe expected for the Target firm to turn into a profit-making entity.

ii. That within 10 days of issuance of a merger clearance certificate and prior to the completion of the proposed transaction, the Acquiring firm shall issue a written binding undertaking to FCC that:

   a. It shall not lay off any existing employees of the Target firm as a result of this conditional approval of the merger and it shall honour or at least maintain a status quo of the existing employees' contract for the coming five years. The said undertaking shall be submitted to the Commission within 30 days from the date of issuance of the merger clearance certificate and prior to the completion of the proposed transaction.

   b. The terms and conditions of the Collective Bargaining Agreement (if any) between employees and management of the Target firm in the pre-merger scenario of the target firm shall at minimum continue in the post-merger firm.

iii. That, this instant notification before the Commission DOES NOT COVER the proposed transaction by Scancem International DA acquisition of indirect control of CDEAL by virtue of acquiring 68.3% shares in Tanga Cement Plc.

   a) That, the potential transaction mentioned under paragraph (iii) hereinabove should be dealt with separately, singly, severally, and independent of Acquiring firm to acquire 68.3% shares in Tanga Cement Plc.

   b) The envisaged transaction in paragraph (iii) (a) hereinabove shall be notified to FCC within 30 days from the date of THIS DECISION and issuance of the Merger Clearance Certificate in relation to the proposed transaction by Scancem International DA to acquire 68.3% of shares in Tanga Cement Plc.

iv. That, the acquiring firm (Scancem International DA) in the post-merger scenario, SHALL neither appoint the same director nor Management to run the affairs of both Tanga Cement Plc and Tanzania Portland Cement Plc.

v. That, the acquiring firm shall, within 30 days from the date of issuance of the Merger Clearance Certificate and prior to the completion of the proposed transaction, shall file a Written Binding Undertaking to FCC that Mivumoni Biofarm Limited will be liquidated and struck off the registry of companies and file evidence to that effect within Seven days to the FCC.

We shall determine the conditions that were opposed by SID and see whether the disputed Conditions are legally tenable and Economically Viable. In doing so, we have taken note that FCC maintained that they do not intend to remove or vary any of the conditions.

We shall determine the conditions that were opposed by SID and see whether the disputed Conditions are legally tenable and Economically Viable. In doing so, we have taken note that FCC maintained that they did not advance any counter argument, Mr. Nyoni only maintained that FCC does not intend to remove or vary any of the conditions. The first opposed condition was condition (i) (a) which prohibited SID to shut down the target firm without prior notice and/or approval of the FCC. While presenting his argument Mr. Bhojan was of the firm view that the intention is not to shut down the Target firm but rather to increase its production and that the amendment sought by SID on this condition was that of allowing shutdown to allow for regular maintenance and recommended that this condition be modified to read as follows:

"It shall not shut down the Target firm without prior notice and /or approval of the Commission, save for any shutdowns which are

premised on routine maintenance or caused by unforeseen major adverse events."

The Tribunal observed that this condition (i)(a) was legally and operationally tenable as it only required that the Commission be notified before any shutdown as part of the FCC to monitor the post-merger operations of the Target firm. The condition did not in any way prohibit shutdown provided the same is communicated by notice to the FCC and FCC satisfies itself on the merits of the notice. On these grounds, the Tribunal did not see any difficulties or complexities on the part of the Acquiring firm to comply with this condition. The other opposed Condition was condition (i) (b) which requires the acquiring firm to continue production and promotion of Simba Cement brand of Tanga Cement Plc. Mr. Bhojan's moved the tribunal to remove the condition on the ground that Twiga Cement (Tanzania Portland Cement Plc) has invested billions of shillings in its logo, identity and quality. That as a result, the intention of the Acquiring firm is to produce the Twiga cement brand in the facilities of the Target firm and in that tone, replace the Simba brand of the Target firm, Tanga Cement Plc. He extended his argument by saying that if the Simba brand is removed from the market, as the Acquiring firm intends to do, this will not affect the market as currently there are more than 10 other cement brands in the Tanzanian market.

On our part, we noted the strength of Simba Cement Brand manufactured by the Target firm and its importance in leveling the competition in the cement industry referring to the facts discussed in the Report, where it was held that despite the fact that there are more than eight cement brands in the Tanzanian market, only four brands are strong and these four brands accounts for over 78% of the market share based on sales volume (page 42). In that respect, merging Simba Brand into Twiga Brand leaves out only three major brands in the market something which amounts to creating or strengthening

the position of dominance of the three brands in the relevant market. On the basis of this, the Tribunal determines that the continuation of Simba Brand is still important to level out concerns related to creation or strengthening of the position of dominance in cement market in Tanzania in the post-merger scenario.

The other opposed condition was Condition (i) (c) whereby the FCC required the acquiring firm, within five years from the date of approval of the merger, not to operate the target firm in a reduced operation and that capacity utilization of acquiring and target firm severally or jointly, shall, at least be maintained above pre-merger capacity utilization level. Mr. Bhojan moved the tribunal to amend the condition to read as follows:

"The Acquiring firm within five years from the date of approval of the merger shall use its best efforts not to operate the Target firm in a reduced operation and that capacity utilization of Acquiring and Target firm severally and /or jointly shall and using its best efforts, be at least maintained above the pre-merger capacity utilization level."

The Tribunal examined this condition and the presentations made by Advocate Bhojan, the reply by FCC and contents in other submitted documents and the Merger Analysis Report. Whereas this condition sets a metric measure of the joint performance of the Acquiring and Target firms in the post-merger scenario, in its presentation, SID failed to adequately clarify its position and commitment on it. By simply saying "using best efforts" leaves out room for multiple excuses that it can make if its performance for example falls below the joint performance of the two firms in the pre-merger scenario. The Tribunal observed that increasing operations and capacity utilization above the pre-merger scenario is one of the key and significant economic reasons for approval of the proposed merger.

Condition (i) (d) was that the target firm should demonstrate how and at what percentage does cost savings resulting from the transfer of technology and efficiency brought by the merger shall be passed onto the final consumer in terms of ex-factory price reduction, within 30 days from the date of approval of the merger application. In his submissions, Mr. Bhojan pleaded for the removal of this condition asserting that many external factors are responsible for the final price and that the price reduction cannot be guaranteed including the fact the Acquiring firm is required to make a large investment to revamp the Target firm's operations.

This argument, on the face of it, looks like consumers in the cement industry may not, in any respect, benefit from the merger through direct reliefs of cement prices. However indirect benefits through a balanced competition and probably through quality of cement or through Corporate Social Responsibility (CSR) support, benefits may accrue to consumers indirectly. We based on balanced assessment to determine the complexity involved in consistently keeping ex-factory cement price in the post-merger scenario below those in the pre-merger period notwithstanding the cost saving advantages from technology transfer and efficiency of production and or operation. With the merger plan of SID emphasizing more efficiency, they should be able to achieve cost saving which will result in price decrease.

Condition (ii) which comprised of parts (a) and (b) required that within 10 days of issuance of a merger clearance certificate and prior to the completion of the proposed transaction, the acquiring firm shall issue a written binding undertaking to FCC that it shall not lay off any existing employees of the Target firm as a result of this conditional approval of the merger and it shall honor or at least maintain a status quo of the existing employees' contract for the coming five years. The said undertaking shall be submitted to the Commission within 30 days from the date of issuance of the merger clearance

certificate and prior to the completion of the proposed transaction. As for condition (ii) (b), SID was to maintain that the terms and conditions of the collective bargaining Agreement (if any) between employees and management of the Target firm in the pre-merger scenario of the target firm shall at minimum continue in the post-merger firm.

Mr. Bhojan was not in dispute of this condition (ii) and its parts (a) and (b) but rather pleaded for addition of a new part, part (c) which he proposed that it reads as hereunder:

"the aforementioned will not include (i) Redundancy and/or voluntary separation arrangements, (ii) voluntary early retirement packages, (iii) unreasonable refusal to be re-deployed in accordance with the provisions Tanzania Labour legislations and the Company's Collective Bargaining Agreements (CBA), (iv) resignation or retirement in the ordinary course of business, (v) retrenchments lawfully effected for operational requirements and (vi) terminations in the ordinary course of business including but not limited to dismissal as a result of misconduct and poor performance."

In our determination of this condition and the requested addition of part (ii) (c), we took into consideration the fact that "Employment and Labour Relation Matters" are provided for in a separate Act of the Laws of the United Republic of Tanzania (URT).

Condition (iv) that, the acquiring firm (Scancem International DA) in the post-merger scenario, SHALL neither appoint the same director nor Management to run the affairs of both Tanga Cement Plc and Tanzania Portland Cement Plc. This condition was strongly argued by Mr. Bhojan who presented the position of the Acquiring firm as that of merging the management roles of the Acquiring and Target firms at Board and Management levels arguing on the basis of increasing efficiency of operations and benefiting from the synergies of the

merger and based on the fact that the Acquiring firm and the Target firm will not be competitors in the post-merger scenario.

Having considered the relevance of the of the issues presented and the fact that by acquiring 68.3% shares in the Target firm, the Acquiring firm will become the new owner of the Tanga Cement Plc with ability to control and direct the operational, financial and administrative affairs of the Target firm, the Tribunal observed that the "owner and controller" will be in the position to forge and implement decision and directives whether the Target firm maintains a separate Board and Management or not and in that respect rendering the whole of Condition (iv) difficult to use as a tools to control the type and level of involvement of the Acquiring firm in the decision making process of the Target firm.

Condition (v) that, the acquiring firm shall, within 30 days from the date of issuance of the Merger Clearance Certificate and prior to the completion of the proposed transaction, shall file a Written Binding Undertaking to FCC that Mivumoni Biofarm Limited will be liquidated and struck off the registry of companies and file evidence to that effect within Seven days to the FCC. In this condition Mr. Bhojan only asked for number of days to be changed from 30 days to 120 days to liquidate the company which we found to be fair.
In his presentation, Mr .Bhojan submitted that they were in agreement with conditions (i) (e) and (iii). However; they moved the tribunal to analyse conditions (i) (a), (i) (c), and (v) to be modified /amended; conditions (i) (b), (i) (d), and (iv) to be wholly removed and lastly condition (ii) to be expanded to include a new condition to be referred to as (ii) (c).

In the report, we gathered that the position of FCC proposed merger has some precipitation of competition concerns, and hence that, the conditions were crafted to cure those competition concerns, the concerns were aired out at pages 48, 49 and 50 of the report. It was further explained by FCC that the

conditions were also meant to address the trio objectives of the nation of protecting consumers, protecting competition and attracting Foreign Direct Investment (FDI) as a way of growing national economy. FCC also invoked the consideration of S. 5(5) of the FCA saying that in reaching their decision due consideration of other relevant matters including FDI were factored in.

Mr.Nyoni told the Tribunal that the conditions in the Merger Clearance Certificate were made in pursuant to Rule 42(13)(b) of the FCC Rules and that FCC observed reasonable contemplation of competition concerns arising from the approval of the proposed merger such as closure of the Target firm, reduction of production, high prices of cement post-acquisition and high levels of debt. Concluding on their position, FCC submitted that they were not ready to give any concessions to the variation of the conditions issued in their decision as prayed by Scancem International DA and instead they prayed for all conditions in their decision to be upheld as they appear in the Merger Clearance Certificate issued.

On his part, Mr. Lutema emphasized that the tag of war between FCC and SID on conditions attached to the merger approval shows that there are issues that lack common consensus between the two which is contrary to the law. On our part, having deliberated on the conditions as set above, save for the grant of 120 days for liquidation of Mivumoni Farm, we have seen no justification to have varied the conditions of the FCC. However, our concern is that if the SID is of an open view that they do not support the conditions and that they will not be able to proceed with the merger with the conditions set therein, then it is conclusive that the conditions set therein were not tenable and would not be implemented by SID. The conditions are therefore impracticable and un-implementable; as good as they do not exist.

At this point, we stopped and ask ourselves, given the circumstances and the projected post-merger risks, if exemption would have been the best option.

We were not detained much by this option because both the report and the records of appeal were explicit that SID did not wish to apply for an exemption. Therefore, we cannot uphold the merger decision with a set of conditions which not only have we found to be un-implementable and obnoxiously illogical, they are also objectively rejected as "*conditiones sine quibusnon*" by the Acquiring firm (SID).

Before we make our final verdict, we have deliberated on some general observations which we find important to express. FCC, being a custodian of promotion and protection of competition authority in the country, failed to clearly give evidence on the existence of the relevant economic benefits of the merger to the welfare of the people of Tanzania. Such a failure rendered its merger decision illogical. We also noted with concern, FCC's move to act suo moto by using a metric that it had all along expressed to dis-apply. This act did not appeal to the evidence and facts which were tabled before it including their own data which they decided not to use. This is contrary to the independent set of substantive law (FCA and FCC Rules) which are the fundamental set of legislations binding the FCC in deciding the fate of an intended merger and its effects to the economy.

We have further noted with concern FCC's failure to engage the consumers who are presumed by law and precedents to have sufficient interest in merger decisions. The omission resulted to an unfair procedure which left the consumer unheard. Given the observed intentions of the merging firms in the post-merger scenario, the employees of the target firm were also entitled to an audience during the analysis. We find all these concerns, if continued, will lead to injustice to the welfare of the people of Tanzania and defeat the object of FCA. In future FCC should consider the consistent application of the competition law of the country because it is the consumer who will suffer the

most from the consequences of the post-merger scenario concerns as the ones aired in the FCC report.

The Tribunal is aware of the substantive and procedural law (FCA and FCC Rules) that protect and foster competition and competitive environment in the economy. In the spirit of the FCA, an effective merger decision is of paramount importance. The merged firms should not be allowed to impair competition and consumer's welfare in the relevant market. We are alive of the fact that market dominance is not undesirable per se, but its abuse creates competition concerns and this is what we gathered in the report as explained above. We were settled that the approved merger decision, even with conditions, will also not restrain abuse of market dominance including undesirable practices such as production of undesirably small quantities of cement and provision of inadequate motivation for innovation, influence of bad behavior in upstream and downstream activities of other cement manufacturers in this market economy. The merged firm is likely to have ability to increase their cement prices without suffering any decrease in their sales volume and revenues, hence extinguish existence of the price competition in the cement market in Tanzania, contrary to the substantive spirit and provisions of the FCA.

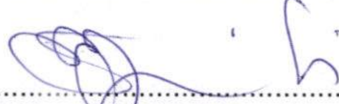
According to the report and the records of appeal, the merged firm is likely to organize into a large-scale cement manufacturing trust with interlocking directorship and market power with ability to undertake coordinated conducts to undermine price mechanism in the cement industry in the economy, a situation which will infringe the substantive law of competition and affect consumers rights. If this merger decision was to be upheld, it should have among other economic benefits, ensure to promote welfare-enhancing effects and interest of the cement consumers in Tanzania, however, that is not what we gathered from the records.

Having made the above deliberations, observations and findings, it is our conclusion that the intended merger in question will create a position of dominance in the market. The merging firms are intending to kill a brand (Simba Cement) without consideration of its equity, value and performance in the cement market. They also intend to have a single Board of Directors in management of the merging firms in the post-merger scenarios (interlocking of directorship). There is likelihood of restraint of competition by post-merger firms given the fact the product market of the relevant merger is geographically articulated hence the consumer choice would be restrained and the merging firms may restrain competition even by price fixing or output restrictions. This, coupled with the fact that the combined market shares of the merging firms, on the basis of the sales volume metric, will exceed 35% (with the 47.26% using SID data and 52.11% using FCC data), the intended merger fails the test set under Section 5(6)(b) of the FCA. The conclusion is that post-merger firms, acting alone, will materially and profitably be able to restrain competition for a significant period of time, failing the test under Section 5(6)(a) of the FCA.

SID has also expressed its intention, not to benefit the consumer but to expand its own business. There is neither guarantee of increased production nor any benefit to the consumer that was mentioned by the merging firms or the FCC. We have seriously taken note of the fact that in most of its analysis report, the FCC was of the view that the merger will create a position of market dominance with no guarantee of increased market efficiency or benefit to consumer and yet proceeded to grant the merger with conditions. It is our conclusion hence that the decision to approve the merger with conditions was founded on a wrong conclusion by using a metric that the FCC all along dis-applied, a metric which the we also find to be misleading and improper, the installed capacity metric. The proper metric of cement sales volumes should have been used to determine the market share of the merging firms in the

relevant market. By this proper metric, the analysis shows creation of position of dominance by the merging firms in the post-merger scenario; hence a prohibited merger as it contravenes Section 11(1) of the FCA. Consequently the decision of the FCC to approve the merger with conditions is hereby quashed and set aside. Pursuant to the provisions of Section 11(1) of the FCA, having quashed and set aside the decision of FCC, the Tribunal prohibits the merger between Scancem International DA and Tanga Cement. Given the nature of what we have deliberated, each party shall bear its own costs.

Dated at **Dar-es-salaam** this 23rd September, 2022.



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Hon.Judge Salma M. Maghimbi - Chairperson

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Dr. Godwill G. Wanga - Member

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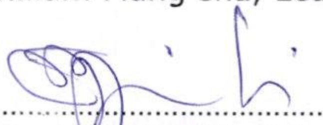
Eng. Boniface G. Nyamo-Hanga - Member

Judgment delivered this 23rd day of September, 2022 in the presence of Ms. Narindwa Sekimanya, State Attorney and Ms. Magdalena Utouh, Principal State Attorney for Fair Competition Commission; Ms. Subira Omary, Learned Advocate for Chalinze Cement Company Limited and Tanzania Consumer Advocacy Society; and Mr. William Mang'ena, Learned Advocate for Scancem International DA.



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Hon.Judge Salma M. Maghimbi - Chairperson

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Dr. Godwill G. Wanga - Member

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Eng. Boniface G. Nyamo-Hanga - Member