IN THE FAIR COMPETITION TRIBUNAL

AT DAR ES SALAAM

TRIBUNAL APPEAL NO. 1 OF 2023

CHALINZE CEMENT COMPANY LIMITED.....APPELLANT

VERSUS

FAIR COMPETITION COMMISSION

(FCC).....1ST RESPONDENT

SCANCEM INTERNATIONAL DA .....2ND RESPONDENT

RULING

The Appellant, Chalinze Cement Company Ltd, filed this appeal challenging the decision of the Fair Competition Commission dated 28th day of February, 2023 in the matter of merger Application No. CBC 127/359/144 of 2022.

The facts giving rise to this appeal are that Scancem International DA (the acquiring Firm) on the 22nd December, 2022 notified the Fair Competition Commission (FCC) of their intention to acquire 68.33% of shares of AfriSam Mauritius Investment Holding Limited in Tanga Cement Public Limited Company (TC PLC). Scancem International DA currently operates in Tanzania through its subsidiary known as Tanzania Portland Cement PLC (TPC PLC).

The notification was made pursuant to Section 11(2) of the Fair Competition Act, No 8 of 2003 and Rule 33(1) of the FCC Rules, 2018. On the 23rd December, 2022, FCC issued a notice of complete filling (Form FCC.11) to the Acquiring Firm as per the requirements of Rule 35 (1) (a) of the FCC Rules, 2018. On 11th February, 2023, FCC issued a public notice in the Daily News newspaper that invited parties (both legal and natural) who deemed themselves as having sufficient interest in this merger to raise any concern if any.

Prompted by the public notice as appeared in the Daily News newspaper on Saturday, February 11, 2023, the Appellant herein lodged an objection to the FCC on the ground that the intended merger was likely to harm competition in the cement market in Tanzania and that the intended acquisition by Scancem of 68.33% shares in TC PLC was prohibited by the Fair Competition Tribunal in its decision dated 23rd September, 2022.

On 28th February, 2023 FCC delivered its decision in respect of the objection lodged by the Appellant herein, Chalinze Cement Company Limited. In its decision, FCC dismissed the objection on the ground that (i) the objection raised by Chalinze Cement Company Ltd had no effect on competition as there was no proof to that effect and (ii) a prohibited merger can be reconsidered and decided otherwise if the economic circumstances leading to the prohibition at first place had changed.

Having dismissed the objection, FCC vide Merger Clearance Certificate dated 28th February, 2023, proceeded to approve the acquisition of 68.33% shares in TC PLC by Scancem International DA without any condition.

The Appellant, Chalinze Cement Company Limited, having been aggrieved by the decision and orders of the FCC in respect of the said merger approval dated 28th February 2023 in the matter of Merger Application No CBC. 127/359/144 of 2022, preferred this appeal against the whole decision on the following grounds: -

1. That the 1st Respondent erred in law and in fact in allowing the merger which had previously been prohibited by the Fair Competition Tribunal by its decision dated 23rd September 2023.

2. That the post – merger firm shall negatively impact on fair competition since its share of the cement market exceeds thirty five percent.

3. That the 1st Respondent erred in law and in fact in holding that the Appellant did not substantiate sufficient interest that will be negatively affected by approval of the merger between the 2nd Respondent and Tanga Cement Public Company.

4. That the holding by the 1st Respondent that the Appellant's statement in form FCC.10 that it is a potential new entrant in the cement market is an overstatement because it failed to prove its plans to enter in the market is wrong in law and in fact.

5. That the holding by the 1st Respondent that there is no any empirical assessment or any economic study made by the Appellant and shared to the 1st Respondent to suggest that the proposed merger will likely harm competition in the market is wrong in law and in fact bearing in mind the Merger Analysis Report dated April 2022.

6. That the 1st Respondent erred in holding that the allegation posed by the Appellant that the merger will harm competition is nothing but an unfounded statement that yields nothing of probative value.

7. That the 1st Respondent erred in law and in fact in holding that the decision of the Fair Competition Tribunal that quashed and set aside the 1st Respondent's decision regarding the said merger is neither an indefinite bar for the 2nd Respondent from bringing a fresh application of its intention nor estoppels for the 1st Respondent from discharging its

vested mandate of ascertaining whether the instant proposed merger is likely to have effects on the competition.

8. That the 1st Respondent erred in law and in fact in holding that the prohibition by the Fair Competition Tribunal was not and can never be indefinite and an unlimited prohibition of subsequent intended merger between the merging firms.

9. That the 1st Respondent erred in law and in fact in dismissing the Appellant's objections on the reasons that the objections raised had no material effect on the competition.

10. That the panel constituted by the 1st Respondent in allowing the merger between the 2nd Respondent and Tanga Cement Public Limited Company was not properly constituted and it occasioned failure of natural justice as it acted contrary to Rule 49(c)(v) of the Fair competition Rules, 2018.

11. That the decision of the 1st Respondent dated 28th February 2023 is otherwise faulty and wrong in law and in fact for want of practical possibility bearing in mind that all processes began seven days after 11th February, 2023 and all reports and decisions were finalized by 28th February, 2023.

On the totality of the above grounds of appeal the Appellant asked the Tribunal for orders that: -

(a) The appeal be allowed with costs.

(b) A declaration that the decision of the Commission dated 28th February 2023 in Merger Application number CBC. 127/359/144 of 2022 contravenes the Fair Competition Act, Act No 8 of 2003 hence illegal and unenforceable.

(c) The decision of the Commission dated 28th February 2023 in Merger Application Number CBC. 127/359/144 of 2022 be reversed, quashed or set aside, as the case may be.

(d) The decision of the 1st Respondent dated 28th February, 2023 is a nullity since it contravened the prohibition by the Fair Competition Tribunal contained in its decision dated 23rd September 2023.

Both Respondents, upon being served with the memorandum of appeal, guided by Rule 19 of the Fair Competition Tribunal Rules, 2012 (Tribunal Rules), filed a reply to the memorandum of appeal disputing the appeal and prayed that this Tribunal dismiss the appeal in its entirety with costs.

When the matter was called on for hearing, the Counsel for the 2nd Respondent raised a preliminary objection on a point of law to the effect that this appeal was incompetent on the ground that the Appellant was a non-existing entity and had been struck off from the Companies' Register hence dissolved and incompetent to file this appeal. The Tribunal acceded to the parties' proposal to have both the preliminary objection and the appeal disposed of by way of written submissions. Pursuant thereto, both parties filed their submissions per schedule given by the Tribunal. We are grateful to the Counsels for both parties for their compliance with the order and their subsequent well – reasoned arguments.

The Appellant was advocated by Mr. James A. Bwana and Ms. Dora S. Mallaba, Learned Advocates while the 1st Respondent had the services of Dr. Boniphace Luhende, Solicitor General and the 2nd Respondent enjoyed the services of Mr. Timon Vitalis and Dr. Fayaz Bhojani, Learned Advocates.

Although the parties have lodged written submissions on both the preliminary objection and the appeal, it is the practice of this Tribunal where a notice of preliminary objection is raised, to determine the preliminary objection before going into the merits of the appeal.

Submitting in support of the preliminary objection, Counsel for the 2nd Respondent stated that the Appellant was struck off from the Companies' Register vide a notice published in the Government

Gazette ISSN 0856 – 0323 (Gazette) dated 3rd March, 2023, which made it a non-existent entity. According to them, this striking off from the Register under the Companies Act Cap 212 R.E. 2002 (Companies Act) took place before the Appellant lodged its Notice of Appeal on 14th April, 2023 and also before the Appellant lodged this Appeal on 6th June 2023. They argued that the Appellant had no legal status when it lodged both its Notice of Appeal, and subsequently its appeal, making this appeal incompetent.

The Counsel for the 2nd Respondent further submitted that the notice published in the Gazette to strike the Appellant off from the Companies' Register was published under Section 400A (3) of the Companies Act as amended by the Written Laws (Misc. Amendments) Act No. 19 of 2019 hence the Tribunal is entitled, under Section 59(1)(a) of the Evidence Act [Cap.6 R.E 2002] to take judicial notice of a statutory notice having the force of law in any part of the United Republic.

They contended that the notice that struck out the Appellant off the Companies' Register on 3rd March, 2023 and published under Section 400A (3) of the Companies' Act as amended by Written Laws (Misc. Amendments) Act No. 19 of 2019, qualifies to be a notice having force of law which the Tribunal can take judicial notice under section 59 (1)(1) of the Evidence Act without requiring any proof. They further contended that the objection regarding non-existence of the Appellant due to the striking out of the

Appellant off the Companies' Register is a pure point of law because it is founded on the statutory notice published in the Gazette.

The learned Counsel further submitted that in view of Section 400(3) of the Companies Act, once a notice striking a company off the Companies' Register is published in the Gazette, the company is dissolved. That is to say, it ceases to have existence as a legal person. Black's Law Dictionary defines the term dissolution as **'termination of corporation's legal existence.'**

In support of their position, the learned Counsel cited the case of **Tanzania Parking System Limited v. Patrick Mrope and 4 Others, Civil Application No. 121 of 2004** in which the Court of Appeal of the United Republic of Tanzania had this to say on the implication of striking out a company off the Companies' Register, thus: -

> *"At the hearing of the application it transpired that the applicant company was struck off the register vide General Notice No. 314 dated 23/4/2004 and published on 7/5/2004.....* ***.... once a notice is published in the gazette the relevant company is dissolved.*** *However, liability, if any, does not end with the dissolution of the company. Liability, if any, continues and may be enforced against a director, managing officer and member of the company as if the company had not been dissolved....*

....In the instant matter, there is no dispute that Tanzania Parking System Ltd. has been dissolved. Once that was done its legal personality also ceased....

... In the light of the law, as borne out by the above provision, it will follow that the logical thing to do in the circumstances will be to strike out the application because the applicant no longer exists.....'

The learned Counsel further cited the case of **Change Tanzania Limited v. BRELA, Misc Commercial Case no 27 of 2019**, in which the High Court of Tanzania (Commercial Division) after making reference to various other case laws, had the following to state on page 13, thus: -

"...The petitioner was automatically deregistered from the Register by operation of the law after failing to comply. The petitioner ***cannot therefore sue through non-existing incorporated name...***"

It was the learned Counsel's contention that there was no flicker of doubt that the Appellant, Chalinze Cement Company Limited, ceased to exist as a legal person from 3rd March, 2023 when the notice striking it off from the Companies' Register was published in the Gazette. According to them, after striking off the Appellant from the Companies' Register, only the liabilities of the Appellant

still survived. The rights of the Appellant such as the right to appeal against the decision of the FCC under Section 61(1) of the Fair Competition Act died with the striking off, from the Register, of the Appellant.

By way of conclusion, the learned Counsel for the 2nd Respondent submitted that based on the binding decisions of the Court of Appeal of Tanzania, the one and only consistent position is that a company struck out of the Companies' Register is effectively dissolved and: -

(a) no longer in existence as a legal entity.

(b) does not have any legal capacity whatsoever.

(c) cannot sue or bring legal proceedings as it is non-existent

Responding to the submissions in support of the preliminary objection, the learned Counsel for the Appellant did not dispute the fact that the Appellant was struck off from the Companies' Register. However, they are of the view that the removal of the Appellant from the Register of Companies cannot be allowed to nullify proceedings that commenced before that 3rd March, 2023 when the company was deregistered.

The learned Counsel for the Appellant complained that the removal of the Appellant from the Register of companies was done without prior notice to the Appellant and without affording the Appellant the constitutional right to be heard. They further submitted that

the Appellant had taken steps to challenge the deregistration of the Appellant by serving the Attorney General with a ninety–day notice on 31st May, 2023 as required under Section 6(2) of the Government Proceedings Act (CAP 5 R.E. 2019).

According to the learned Counsel for the Appellant, the proper cause of action is to stay the determination of the preliminary objection pending final and conclusive determination of the action that would be filed by the Appellant after expiry of the notice served to the Attorney General. While urging the Tribunal to stay the determination of the preliminary objection, the learned Counsel seem to suggest that the Tribunal can proceed to hear and determine the appeal on merit.

In their rejoinder, the Counsel for the 2nd Respondent maintained that the notice of appeal that initiated these proceedings was lodged on 14th April, 2023 and the Appeal on 6th June, 2023 while the Appellant was deregistered on 3rd March, 2023. They further argued that since the deregistration was effected before lodging of the notice of appeal and the appeal, the Appellant was not competent to file those documents in this Tribunal.

They further submitted that once a company is deregistered, its appeal or application abets. It was further submitted that the Tribunal had no jurisdiction to decide on the matter in which the Appellant was struck off from the Companies Register.

The learned Counsel for the 2nd Respondent faulted the proposal by the Appellant for stay of the preliminary objection pending determination of the Appellant's intended Petition. In their view, since the Appellant is a non–existing entity, there is nothing to stay pending the determination of the intended petition. They added that the preliminary objection cannot be stayed while the appeal is heard as a preliminary objection should be determined prior to the determination of the merits of the appeal. The learned Counsel for the 2nd Respondent reiterated their prayer that the preliminary objection be upheld and the appeal be dismissed with costs.

Having summarized the respective rival arguments by the parties in respect of the preliminary objection, it is obvious there is no dispute that the Appellant was struck off from the Companies' Register vide a General Notice published on 3rd March, 2023 in the Government Gazette ISSN 0856 – 0323.

The notice was issued under Section 400A (3) of the Companies Act. Both parties are in agreement that while the Appellant was struck off from the Companies' Register on 3rd March, 2023, the notice that initiated this appeal was lodged on 14th April, 2023 and the Appeal was lodged on 6th June, 2023.

Before we go further, we would like to point out that this Tribunal was established under Section 83(1) of the Fair Competition Act. According to Section 83(6), the Tribunal Chairperson and two other members shall constitute the Tribunal. When enacting the Act,

Parliament contemplated a situation where members of the Tribunal could have divergent opinion in the process of decision making. By enacting Section 85(7), it is without doubt that the intention of Parliament was that in the event there is disagreement by the members including the Chairperson on what the outcome of the appeal or application should be, then the majority decision would be deemed to be the decision of the Tribunal. Indeed, the dissenting member shall write and deliver the dissenting decision.

Although the Chairperson and the two other members constituting the Tribunal are in agreement that, undoubtedly, the Appellant was struck off from the Companies' Register, there was no unanimous decision on the fate of the pending appeal.

It follows, therefore, the majority decision represents the decisions of two assigned Members of the Tribunal namely Dr. Godwill G. Wanga, and Dr. Onesmo M. Kyauke, while the dissenting decision represents the decision of the Chairperson, Hon. Judge Salma M. Maghimbi.

Majority Decision

An incorporated company according to our legal jurisprudence is an artificial person with separate existence and the law recognizes it as a juristic person separate and distinct from its members. This new personality emerges from the moment of its incorporation. It is similar to a natural person in many respects. Like a human being, a company has parents (promoters), birth (registration by relevant

authority), rights and duties quite distinct from its members and death (i,e. winding up, deregistration, etc.). Definitely, since a company does not have a physical existence, it acts through its agents.

According to Section 15 (2) of the Companies Act, 2002, the effect of incorporation of a company is that the company shall be a body corporate capable of exercising all the functions of an incorporated company. Indeed, the company should be considered as a legal personality immediately quite separate and distinct from its members.

An incorporated company has implied powers to do acts necessary in carrying out its business such as appointing agents and engaging employees, and instituting, defending and compromising legal proceedings. (See Pennington's Company Law, 15th Edition, London, Butterworth's by Robert Pennington quoted with approval in **Simba Papers Converters Limited v. Packaging & Stationery Manufacturers Ltd & Another, Civil Appeal No 280 of 2017 (2023) TZCA 17273 – at P:19).**

What we gather from the above is that although a company has powers to sue in its own name, it should authorize the filing of an action or defending legal proceedings against it.

Section 400(3) provides that legal effect of striking off a company from the Companies Register is that it would be dissolved. In other words, once a company is struck off from the Register, its legal

existence ceases. We fully subscribe to the position held in several authorities cited by the learned Counsel for the 2nd Respondent on the legal effect of striking off a company from the Companies Register. It was held in those authorities that once a company is struck off from the Companies' Register, it is automatically dissolved. And when that is done, the company's legal personality also ceases.

We ask ourselves, if the Appellant was struck off from the Companies' Register on 3rd March, 2023, who instructed MSL Attorneys to lodge a notice of appeal on 14th April, 2023? Again, who instructed MSL Attorneys and Bwana Attorneys to lodge this appeal on 6th June, 2023? It is obvious that the notice of appeal and this appeal were lodged without mandate.

As Mruma J. rightly held in **Singida Sisal Products & General Supply v. Rofal General Trading Limited, Commercial Review No 17 of 2017, High Court of Tanzania (Commercial Division),** a non-juristic person has no legs to stand, no hands to prosecute, no eyes to see and no mouth to speak either on her own or on behalf of any other person before any court of law. We should add that a non-juristic person is incapable of giving instructions to an advocate to represent her in court.

The learned Counsel for the Appellant while admitting that the Appellant was struck off from the Companies Register before lodging the notice of appeal and the record of appeal suggested

that the proper cause of action is to stay the determination of the preliminary objection pending the final and conclusive determination of the action that would be filed by the Appellant after the expiry of the notice that was served to the Attorney General. The learned Counsel also suggested that the Tribunal can proceed to hear and determine the appeal on merit.

With the greatest respect, we are of the settled view that the instant appeal is incompetent as it was lodged by a non-juristic person. In such circumstances, the prayer for stay of the determination of the preliminary objection would not hold.

In the event, and for the foregoing reasons, the preliminary objection raised is sustained. We respectfully find and hold the purported appeal to be incompetent for being lodged by a non-existing entity and we accordingly strike it out with costs. In addition, since the Appellant is nowhere to be found as it does no longer exist, the costs would be borne jointly and severally by the two law firms representing the purported Appellant.

It is so ordered.

DATED and DELIVERED at Dar es Salaam this 6th day of July, 2023.

Dr. Godwill G. Wanga – Member

Dr. Onesmo M. Kyauke – Member

Judgment delivered this 6th day of July, 2023 in the presence of Dora Mallaba and Abbriaty Kivea, learned Advocates for the Appellant, Daniel Nyakiha, Magdalena Utouh, Josephat Mkizungo, learned State Attorneys for the 1st Respondent and Timon Vitalis and William Mangena, learned Advocates for the 2nd Respondent.

Dr. Godwill G. Wanga – Member

Dr. Onesmo M. Kyauke – Member

06/07/2023

IN THE FAIR COMPETITION TRIBUNAL
AT DAR ES SALAAM

TRIBUNAL APPEAL NUMBER 1 OF 2023

BETWEEN

CHALINZE CEMENT COMPANY LIMITED .....APPELLANT

AND

FAIR COMPETITION COMMISSIO.....1ST TRESPONDENT

SCANCEM INTERNATIONAL DA ..... 2ND RESPONDENT

DISSENTING JUDGMENT

In this judgment, I have differed in opinion with the other two members of the Tribunal after we unanimously found that the appellant herein was undisputedly struck off from the Companies' Register vide a notice published in the Government Gazette No. ISSN 0856 – 0323 dated 03rd March, 2023 which made it a non-existent entity. Having so found that the appellant is a non-existing entity and has no locus standi to lodge the current appeal, that is when we parted in opinion on the fate of the appeal. On my part, I am of the firm view that while we are still seized with the records of this appeal, it is just that we should not proceed to strike out the appeal so that we can proceed to determine the crucial issue that was admitted by the 1st respondent which goes to the root of her jurisdiction to entertain the impugned decision herein. This position was not accepted by the two members of the Tribunal namely Dr.

Onesmo Kyauke and Dr. Goodwill Wanga. They were of the opinion that since an objection has been sustained, we cannot do any other thing to the appeal but to proceed to strike it out.

On my part, the reason why I did not proceed to strike out the appeal is that **one;** the Tribunal is still seized with the records of the FCC as they are already within the knowledge and ambit of the FCT and **two;** which is main basis for our proceeding to make the determination that will follow, we have noted from the submissions of the first respondent, the FCC, an issue which touches the jurisdiction and hence the validity of the decision made by her on the 28th February, 2023. It is not the first time that the courts, having found that an appeal is incompetent before them, proceeded to determine matters which would call for their attention regardless of the competence of the appeal. In the case of **Shaban Fundi vs Leonard Clement (Civil Appeal No. 38 of 2011) [2017] TZCA 243 (29 August 2017)** the court of Appeal made the following observation:

> *"Next for consideration is Mr. Ngudungi's prayer to the effect that we should exercise the revisional powers bestowed upon us with a view to rectifying the allegedly grave illegalities in the proceedings and consequent decision of the High Court. We understood Mr. Ngudungi to mean that we should refrain from striking out the appeal and, in its stead, we should revise the proceedings of the High Court to cure the alleged*

mischief in the proceedings of the High Court. Indeed, Mr. Ngudungi's prayer is not novel. We have exercised such powers before. However, we find it worthwhile to point out at this stage that such course has been resorted to by the Court very sparingly, particularly in public interest cases. One such case that immediately comes to our mind is Chama cha Walimu Tanzania v. the Attorney General, Civil Application No. 151 of 2008 (unreported). In that case, we found the application before us incompetent but we could not proceed to strike it out. Instead, we exercised the revisional powers of the Court to rectify the incompetent proceedings of the High Court (Labour Division). Other cases in which we exercised such powers include Director of Public Prosecutions v. Elizabeth Michael Kimemeta @ Lulu, Criminal Application No. 6 of 2012, Dainess Muhagama v. Togolani Mbuso, Civil Appeal No. 15 of 2013, Tanzania Heart Institute v. The Board of Trustees of NSSF, Civil Application No. 109 of 2008 and Mkuki James Kiruma v. R., Criminal Appeal No. 163 of 2012 (all unreported). In all those case, ***having ruled that the appeals or applications were incompetent we did not follow the ordinary procedure of striking out the same, but proceeded to exercise our revisional jurisdiction to rectify the shortcoming in the proceedings and decision of the lower court.***

Although in the cited case above the court did not proceed to determine the appeal, I am subscribing to the principle cited in the above quote which allows a court to hesitate in striking out the appeal in order to rectify what would otherwise be grave illegalities in the proceedings and the decision of the first respondent. (see the cases of **Mkuki James Kiruma v Republic, Criminal Appeal No. 163 of 2012** and **DPP Vs. Elizabeth Michael Kimemeta @ Lulu, Criminal Appeal No. 06/2012** (both unreported). The reasons why I have held so are obvious, while the 2nd respondent is the one who raised the objection against the appellant, the objection had nothing to with the 1st respondent. Secondly, despite having knowledge of the existence of the objection, the 1st respondent, in consideration of the fact that the issue of jurisdiction can be raised at any time, has supported the appeal on the three grounds which touch her jurisdiction to determine the matter as shall be discussed hereunder.

Back to merits of the appeal, in their submissions to support the appeal, the 1st respondent informed the Tribunal that they support the appeal basing on the 1st, 7th and 8th grounds of appeal. The first ground of appeal is that the 1st Respondent erred in law and in fact in allowing the merger, which had previously been prohibited by the Fair Competition Tribunal by a decision, dated 23rd September 2022, the seventh ground of appeal is that that the 1st Respondent erred in law and in fact in holding that the decision of the Fair Competition Tribunal that quashed and set aside the 1st Respondent's decision

regarding the merger is neither an indefinite bar for the 2nd Respondent from bringing a fresh application of its intention nor estoppel for the 1st Respondent from discharging its vested mandate of ascertaining whether the instant proposed merger is likely to have effects on the competition. The eighth ground of appeal is that that the 1st Respondent erred in law and in fact in holding that the prohibition by the Fair Competition Tribunal was not and can never be indefinite and an unlimited prohibition of subsequent intended mergers between the merging firms.

As stated earlier, a fact which was not disputed by any member of of the Tribunal, the appellant herein is an incompetent party to have brought this appeal for being non-existent. Therefore, my determination of the grounds of appeal will not take on board their submissions in support of the appeal; neither the reply by the 2nd respondent because in principle, the reply was addressing a non-existing party. My determination will mainly base on the reply submissions by the 1st respondent who conceded to grounds challenging the validity of the decision of the 1st respondent dated 28th February, 2023.

In her submissions in support of the appeal, submissions which were drawn and filed by Dr. S. Luhende, the Solicitor General, the 1st respondent elaborated that the three grounds are based on the allegation that the Merger Application No. **CBC.127/359/144** submitted by the 2nd respondent in December, 2022 is ipso facto

the same as the Merger Application No. **CBC.127/359/136** that was approved by the 1st respondent on 06th April, 2022 and prohibited by the Tribunal on 23rd September, 2022. He also submitted that the current merger is inevitably and unescapably res-judicata of the previous merger that was prohibited by this Tribunal. It was the Solicitor General's conclusive submission that they did not resist the appeal basing on those three grounds as they suffice to dispose the appeal.

Having considered the submissions of the 1st respondent, I must reiterate with emphasis that the observations of the Solicitor General are the reason why I found the grounds No. 1, 7 and 8 of appeal as touching the jurisdiction of the 1st respondent in approving the subsequent merger in February, 2023. The underlying reasons are obvious, as it will soon be apparent, the basis that was used by the 1st respondent in usurping jurisdiction to determine the subsequent merger was absurd, ultra vires and lacked any legal basis.

It is pertinent to note that the decision of the Tribunal dated 23rd September, 2022 in the previous merger emanated from the merger application that came from the 1st respondent herself. It was the first respondent that conducted an investigation and came up with some detailed report on how the intended merger was likely to have negative effects on competition. Having been satisfied of the likely harm to competition and the economy if the merger was approved,

the 1st respondent approved the merger with some detailed conditions. Dissatisfied with those conditions, the 2nd respondent lodged an appeal to this Tribunal on the ground that the conditions were not tenable. Having so analysed the appeal along with the other appeals as mentioned by the 1st respondent above, the Tribunal found that if the merger is to be approved without conditions, then the likely harm to the consumer outweighs the benefit to them if the merger is approved and hence the merger was prohibited.

Thereafter, on what the 1st respondent alleged to be some change in the market structure, against the principles of res judicata or respect to the decision of a higher authority (the Tribunal), three months after the merger was prohibited, in December, 2022, the advocates for the 2nd respondent thought it right that they should lodge yet another application at the same first respondent. According to the merger analysis report, the basis of the 1st respondent to proceed with the analysis was the fact that the market circumstances have changed. The question is whether the market structure of such a defined market could make some significant changes in such a short period of time to have called for a fresh application.

Much as I appreciate the possibility that the market forces may have changed, but given the short period of time within which a subsequent merger application was filed, I am not convinced that

the change would not have been cured by moving the Tribunal to review its decision as opposed to filing a fresh application. My concern is both on the act of the Counsels for the 2nd respondent, and more shocking with the conduct of the 1st respondent who is bestowed with the responsibility to oversee competition in the economy for the benefit of the consumer, to have usurped powers of this Tribunal in review, by proceeding to determine what was already prohibited by this Tribunal. That decision, as so admitted by the Solicitor General was res judicata of the previous decision of the FCC which was eventually varied and prohibited by the Tribunal.
I must emphasize that the act or conduct of the two respondents did not send a good message to the public nor potential investors who would have been interested in coming to invest in our country because the act of opening a fresh application of what was recently prohibited diminished the presence of the rule of law in our country. If a Tribunal headed by a High Court Judge makes a valid decision and another institution, which is not superior to the Tribunal and falling within the same law and aware of the decision, usurp powers it did not have and make a decision against the orders of a higher authority, it is a bad image to the prevalence of the rule of law in our country and the business environment at large.

I am of the strong view that and positive that the reason why many investors eye our country as a safe haven for investment is the prevalence of the high level of the rule of law, respect of the law as well as a fair treatment and equality before the law. That aspect

should not be compromised by any means at the expense of satisfying one investor because the negative effect may be farfetched and have more adverse effects than what one would anticipate while chasing his client's interest.

Having made the above observations and findings on what was conceded by the 1st respondent, it is my conclusive finding that the decision of the 1st respondent dated 28th February, 2023 was res judicata of its previous decision dated 6th April, 2022 and set aside by this Tribunal on 23rd September, 2022.

For the reasons stated above, I hereby proceed to nullify the decision of the first respondent in the subsequent merger dated 28/02/2023. I have however considered a lot of issues before I came up with the conclusive remarks that will be elaborated. I have considered the hard fact as to what has led to the nullified decision. Indeed, it is not a fault of the 2nd respondent as a legal person, but rather what we may rightly term as a mislead from their legal representative and the subsequent usurpation of powers by the first respondent. I have also considered the fact that this Tribunal has issued a restraining order restraining the 2nd respondent and other Government institutions to consummate the subsequent merger, an injunction which by striking out this appeal would still be valid hence leaving the 2nd respondent hanging with uncertainty while his interest to purchase shares in Tanga Cement is unquenched. Then I asked myself whether I should let the 2nd respondent, who has

been hanging in the corridors since the year 2022; and given the fact that there is the alleged market force changes, should still be hanging without determination of their fate. The answer is no, it will not be unfair to the 2nd respondent because as an investor, she deserved a fair treatment by the law.

For those reasons stated above, having nullified the decision of the 1st respondent in the subsequent merger, I find it wise and just that I leave the parties at liberty, if they so wish, to move the Tribunal under Rule 50(1) of the Fair Competition Tribunal Rules, 2012 to review our decision in the previous merger dated 23rd September, 2022 based on the alleged changes in the market structure of the relevant market. The review (if any) may be lodged in this Tribunal within thirty days from the date of this judgment. Given the nature of what I have deliberated and the reasons in concluding this appeal, I find it just that each party bear their own costs.

DATED at Dar es Salaam this 6th day of July, 2023.

Hon. Judge Salma M. Maghimbi
Chairperson

Judgment delivered this 6th day of July, 2023 in the presence of Dora Mallaba and Abbriaty Kivea, Advocates for the Appellant, Daniel Nyakiha, Magdalena Otouh, Josephat Mkizungo, State

Attorneys for the 1st Respondent and Timon Vitalis and William Mangena, Advocates for the 2nd Respondent.

Hon. Judge Salma M. Maghimbi

Chairperson

6/7/ 2023