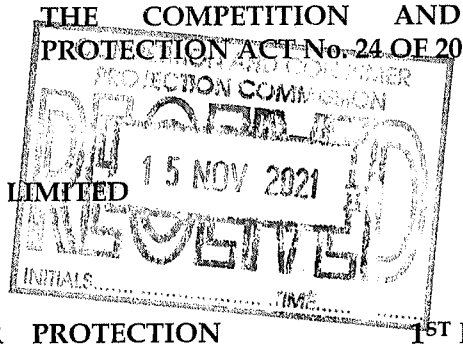
IN THE MATTER OF THE COMPETITION AND CONSUMER PROTECTION TRIBUNAL HOLDEN AT LUSAKA

2016/CCPT/010/COM

IN THE MATTER OF : THE COMPETITION AND CONSUMER PROTECTION ACT No. 24 OF 2010



BETWEEN:

ZAMBIA AIRPORTS CORPORATION LIMITED — APPELLANT

AND

COMPETITION AND CONSUMER PROTECTION COMMISSION — 1ST RESPONDENT

ZAMBIA EXPORT GROWERS ASSOCIATION LIMITED — 2ND RESPONDENT

CORAM: **Mrs. E. C. Chiyenge-Chairperson**
Mrs. M.B. Muzumbwe-Katongo-Vice Chairperson
Mr. BuchisaMwalongo-Member

For the Applicant: Ms. S. Chatora, Legal Counsel, Zambia Airports Corporation Limited
Ms. R. Chansa, Legal Officer, Zambia Airports Corporation Limited

For the 1st Respondent: Mrs. M. M. Mulenga, Manager-Legal and Corporate Affairs, Competition and Consumer Protection Commission
Ms. M. Mtonga, Legal Officer, Competition and Consumer Protection Commission
Ms. S. Mafuta, Legal Officer, Competition and Consumer Protection Commission

For the 2nd Respondent: Mr. S. Chisenga, Messrs Corpus Legal Practitioners
Mrs. M. Namwila-Mwala, Messrs Corpus Legal Practitioners
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JUDGMENT

Legislation referred to:
Competition and Consumer Protection Act, No. 24 of 2010
Competition and Consumer Protection (Tribunal) Rules, Statutory Instrument No. 37 of 2012
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Civil Aviation Act No. 5 of 2016

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MUZUMBWE-KATONGO, Vice Chairperson, delivered the judgment.

Background

1. This is the Tribunal's judgment in the case between Zambia Airports Corporation Limited (hereinafter "ZACL" or "the Appellant" as the context may require) and the Competition and Consumer Protection Commission (hereinafter "the Commission" or the "1st Respondent" as the context may require) and the Zambia Export Growers Association (hereinafter "ZEGA" or the "2nd Respondent" as the context may require).
2. The Tribunal regrets the delay in rendering the judgment, which judgment, in accordance with rule 31(2) of the Competition and Consumer Protection (Tribunal) Rules, 2012 (Statutory Instrument ("S.I.") No. 37 of 2012) is required to be rendered within sixty days after hearing the appeal. The Tribunal notes that the delay was unavoidable on account of the vacation of office of two Tribunal members on account of the end of their respective tenure. The two vacant positions have not yet been filled, and the vacancies have resulted in a great workload for the remaining members of the Tribunal who have had to take over the work of the two members.
3. It suffices to note that the Tribunal thrice sought the renewal of its jurisdiction over the matter and the Parties renewed the Tribunal's jurisdiction, with the

latest renewal having been accorded on 18th November, 2020. It further suffices to note that the Tribunal heard a number of interlocutory applications herein.

4. The Tribunal also notes that the matter was initially heard during the tenure of office of Mr. A.W. Mubanga, SC (former Chairperson of the Tribunal), Mr. C. Kabaghe (formerly Member) and Mr. R. Sombe (formerly Member). However, the hearing was not concluded during their tenure, as the Tribunal's jurisdiction expired and the appeal proceedings were later renewed and the Tribunal finally conducted hearings on 25th August, 2021. During those proceedings, the Tribunal received documents and examined a witness in that behalf brought by the Appellant following a Tribunal order to produce issued pursuant to section 71 (2) of the Competition and Consumer Protection Act No. 24 of 2010 (hereinafter "the Act"). This was so as to enable the Tribunal determine the appeal in light of issues that came to the Tribunal's attention in the course of reviewing the appeal proceedings in preparation for delivery of judgment.

Facts of the Case

5. On 12th August, 2015, and 27th August, 2015, the Commission received a complaint from ZEGA in which ZEGA stated that it was concerned with the manner in which ZACL was treating ZEGA in respect of involvement in the provision of ground handling services at the international airports. It was further alleged that on 19th March, 2015, ZEGA had requested ZACL access to the CUTE network via ZEGA's client office for load control but that the request was denied by ZACL. It was alleged that in order to service its clients that include Emirates Airlines and South African Express, it required access to the CUTE system at the Airport for purposes of determining weight and balancing of aircrafts. It was alleged that currently, ZEGA was accessing the CUTE system through the check-in counters without difficulties (See page 264 of the Record of Proceedings ("ROP")).

6. It was further alleged-

(1) That ZACL had recently sought to impose restrictions on the use of the check-in counters for load control and sought to impose a charge on ZEGA; that in the event that ZEGA failed to pay this charge, it would be unable to service its clients; that paying the charges would substantially raise ZEGA's operational costs resulting in loss making by ZEGA; that the CUTE system is an essential facility at the airport and that it was expected that ZACL would at all times make the same available to all ground handlers as denial of these facilities would amount to ZACL's abuse of dominance; and that ZEGA had offered to pay for the installation of CUTE system in their offices but that ZACL denied the request without substantiating its reasons (See paragraph ("para.") 2, pp. 264-265 of the ROP);

(2) that ZEGA has previously been using 6 check-in counters at the Kenneth Kaunda International Airport ("KKIA") when checking in passengers for Emirates; that from 9th July, 2015, ZACL has been prohibiting ZEGA from using more than 4 counters and that a charge of USD100 per counter per use would apply in the event that ZEGA used more than 4 counters. It was alleged that the use of counters is between the airline and the ground handling company and that any additional charges should be levied on the airline. It was alleged that ZACL was attempting to increase the operational costs on ZEGA who was their competitor (See para. 3, p.265 of the ROP);

(3) that previously, ZACL owned the only water and toilet servicing units at KKIA. It was alleged that ZEGA, in 2012, invested in its own units in order to provide service to its clients, and that the approval of the units by ZACL took months; that once the approval was granted, ZACL denied ZEGA access to the potable water supply and toilet dumping facility at KKIA; that after several delays ZEGA received a letter informing them that each time it collected water, it had to pay K500 and K11, 000 per

month for the use of the dumping facilities; that considering that ZEGA charged K30 per full offering of water and K750 for a complete toilet service, the fees were bound to hinder the operations of ZEGA (See para. 4, p. 265-266 of the ROP);

(4) that ZACL was charging ZEGA a Ramp Access Fee (RAF) of close to USD300 each time it attended to a client airline and that ZEGA had the option of either transferring the cost to the airline or internalising it making ZEGA operations expensive; that potential client airlines had informed ZEGA that the only institution mandated and recognised as a ground handling entity was ZACL. (See para. 5, p. 266 of the ROP);

(5) that in February, 2015, ZEGA was awarded a tender for the provision of ground handling services to member airlines by the African Airline Association ("AFRAA"). It was alleged that the airlines involved were Kenya Airways, Ethiopian Airways and RwandAir; that ZEGA was informed that ZACL had approached them persuading them to change their decision by offering incentives which were not available to ZEGA and advising potential clients that ZEGA was not licensed to carry out ground handling; and that this led to delayed signing of the contracts agreed under the AFRAA award process (See para. 6, page 266 of the ROP);

(6) that ZACL does not handle cargo themselves and that in the event that they were awarded a tender to handle an airline, they subcontracted the cargo element; and that ZACL only give the cargo element to NAC2000 Limited which may be a breach of tender regulations (See para. 7, p. 266 of the ROP); and

(7) that ZACL had awarded KLM a two year contract of ground handling free of charge, a move that amounted to applying dissimilar conditions to equivalent transactions (See para. 8, p. 266 of the ROP);

7. Having considered the allegations, the Commission raised a Notice of Investigations against ZACL dated 25th September, 2015, in which the Commission stated it had received a complaint from ZEGA "*...which appears to be in contravention of Section 16(1) and 16(2) of the Competition and Consumer Protection Act No. 24 of 2010 ('the Act')... that Zambia Airports Corporation Limited has been denying access to the Common Use of Terminal Equipment (CUTE) network for load control management, restricting the use of check in counters and restricting access to water and toilet services...*" The Notice of Investigations further stated that it was alleged that ZACL had *...been threatening customers of ... competitors with withdrawing concessions if they did not acquire ground handling services...*from ZACL and "*...that ZACL was charging its customers prices that were below the cost of providing the particular service (predatory pricing).*"(See para. 9, pp. 266-267 of the ROP).

Investigations Undertaken by the Commission

8. The Commission investigated the matter as set out in the ensuing paragraphs.

Legal Provisions

9. The Commission perceived the conduct to be a violation of section 16(1), read together with section 16(3) of the Act. The relevant provisions of section 16 of the Act provide as follows:

> ***16.*** *(1) An enterprise shall refrain from any act or conduct if, through abuse or acquisition of a dominant position of market power, the act or conduct limits access to markets or otherwise unduly restrains competition, or has or is likely to have adverse effect on trade or the economy in general.*
>
> *(2) For purposes of this Part," abuse of a dominant position" includes –*
>
> *(c) applying dissimilar conditions to equivalent transactions with other trading parties;*
>
> *(3) An enterprise that contravenes this section is liable to pay the Commission a fine not exceeding ten percent of its annual turnover.*

Assessment Tests/Investigations

10. The Commission, in the investigation and assessment of potential violations of the Act undertook a multiple assessment approach to ascertain whether the alleged violations have or are likely to result in any negative effects on the market, to the consumer, fair trade or the economy in general.

11. The Commission carried out interviews with relevant market players, obtained information from industry experts, reports, stakeholders and research studies. The Commission also reviewed a wide array of secondary data from research studies in the sector and information obtained from the parties.

12. Among the interviewees were ZACL and ZEGA.

ZACL Submissions

13. It was submitted that ZACL is empowered to determine, with the approval of the Minister, landing charges, hangar charges, parking charges, other charges and fees for any service rendered by the company to aircraft, passengers and cargo and the public at designated airports; that the said charges and fees are to be published in the *Gazette*; that ZACL may, in relation to special circumstances of any particular case, determine the charges and fees applicable to such case in respect of any services to aircraft, passengers, cargo, and the public. (See para. 16, p.269 of the ROP).

14. It was also submitted that ZACL gets its water which is certified for use on aircrafts from its boreholes and that ZEGA and others obtained their water from a different source; and that ZACL offers its water at a cost recovery fee and, therefore, ZEGA had the option to secure the water from ZACL or not. (See para. 21, p.207 of the ROP).

15. With respect to the toilets complained of, it was submitted that the toilets complained of were aircraft toilet waste disposal facilities; that ZACL maintains these facilities at a cost recovery fee; and that accordingly, the toilets were available to ZEGA at a fee. (See para. 22, p. 270 of the ROP).

16. With respect to threatening to withdraw concessions from Zambezi Airlines, ZACL denied the allegations and submitted that ZACL **did not** offer concessions to any airline for any services [Emphasis ours]; that all airlines regardless of whether they were handled by ZACL or its competitors enjoyed the same benefits and that ZACL did not discriminate; that ZACL collects concession fees from any organisation conducting business within the airport premises; and that organisations conducting ground handling were no exception. (See para. 23, p. 270 of the ROP).

The Relevant Market Definition

17. It was submitted that ground handling services are performed at designated airports at an access fee; that historically, ground handling was provided by the Government which, over the years has delegated its ground handling services to several companies that include ZEGA, NAC2000 and Hill &Delamain; that ZACL is the only entity authorised to own public airport facilities and to manage them; that, therefore, ZACL has no competitors; that airport facilities are used to provide services to airline clients and without those facilities, it would not be possible to provide such services; and that it follows that the relevant product markets are-

    i. The provision of ground handling services; and

    ii. Airport facility and management.

    (See paras. 33-34, pp.273-274 of the ROP)

ZACL Pricing Policy and Trading Practices

18. It was submitted that ZACL's strategic options include cutting prices in retaliation of potential entry and using the same as an entry barrier; and that its ability to offer lower prices to powerful buyers and its size of spend puts it in a position of power against buyers and suppliers. Lower prices are also used as a

defence against the threat of substitutes and the price is used as a source of competition. (See paras. 39-40, pp. 274-275 of the ROP).[1]

Toilet and Water Charges

19. It was noted that in a contract between the Appellant and KLM (a carrier handled by the Appellant) dated 15th May, 2012, to 14th May, 2015, and bearing contract number CW1960221, the rates provided for toilet services were $150 for multiple toilet services with the first hour free and $70 per hour with the first hour free; that these concessions were not offered to Ethiopian Airways and Fastjet whose contracts ended in 2016 and 2017, respectively, and which contracts showed hourly rates for multiple toilet use at $150 and $70 for water services. (See para. 41, p. 275 of the ROP).

20. It was also noted that the rates for use of the dump site by ZEGA were adjusted, by ZACL, to K11, 000 per month which translated (at a spot rate of K5.28 per US$) to $2, 083 per month; that the rates for water supply to ZEGA were adjusted, by ZACL, to K500 which translated (at the same spot rate) to $94.7; that this rate was $24.7 above the $70 that was being charged to other airlines, even though ZEGA used its own equipment and not ZACL equipment; that ZACL charged airline clients for these services per use; that ZACL used its own equipment with respect to those clients, and that the assumption, therefore, was that the rates were cost recovery rates - covering all operational and administrative costs. (See para. 43, p. 276 of the ROP).

Ramp Access Fee

21. With respect to the Ramp Access Fee ("RAF") it was submitted that the RAF is charged in accordance with the weight of an aircraft, that is, the maximum takeoff weight (MTOW); that in 2010 to 2014, the MD11 (an aircraft operated by World Cargo) with a MTOW of 286 tons attracted RAF of $300, while an Airbus A332 and A330 operated by Emirates with a MTOW of 230 tons attracted RAF of

[1]See also the National Airports Corporation, Strategic Plan-2012 to 2017, (Revision 1 issued on 1st March, 2012), p.45

$300 in 2014, and a B763 operated by British Airways with a MTOW of 181 tons also attracted RAF of $300; and that the applicable charges are obviously in a tier system or band with aircraft within a certain weight attracting a similar RAF. (See para. 44, pp. 276-277 of the ROP).

22. It was further submitted that ZEGA was being charged $400 RAF for handling Emirates; that the same was subsequently reduced by ZACL to $300 following a request to that effect by ZEGA; that the reversal of the charge was an indication that either ZEGA was being overcharged or if the $400 was the correct charge, that ZEGA was being undercharged for handling similar aircraft like the MD11, which was unlikely to be the situation; that inconsistencies in rate application did not apply only to ground handling services, water and dump site, but also to ZACL clients as well; and that the rates were published in the *Gazette*. (See paras. 45-46, p. 277 of the ROP).

23. In 2000 and 2005, ZEGA was contracted to handle B737 at RAF of $200 and $300, respectively, whereas in 2000 and 2011, for the same aircraft, in terms of RAF, NAC2000 was contracted at no cost, while Hill &Delamain was contracted at $100.

Threat to Zambezi Airlines

24. ZACL denied having threatened Zambezi Airlines with the withdrawal of concessions from any aircraft; a letter bearing reference No. NACL/MD/ZMA/A/25 from ZACL to Zambezi Airlines communicated to the latter that in the event that Zambezi Airlines was to move from ZACL to another ground handler, their concession would be withdrawn'.

25. The letter read, in part-

> *... Considering that we will no longer be availed financial gain by providing you with ground handling support services, kindly note that all other concessions offered to yourselves will be revoked immediately you communicate the decision to migrate to the other handlers. This so because the concessions were*

premised on the fact that we had this business from yourselves which business we will no longer have. ...

Assessment of Possible Abuse of Dominant Position of Market Power

26. The question whether ZACL is an enterprise and therefore subject to the Act was addressed. It was submitted that section 16 of the Act proscribes abuse of a dominant position; that section 2 of the Act defines "dominant position" as a situation where an enterprise or a group of enterprises possesses such economic strength in a market as to make it possible for it to operate in that market, and to adjust prices or output, without effective constraint from competitors or potential competitors; that the Act further presupposes a situation of dominance by subscribing market shares of supply that is 30% for a single firm and 60% for no more than three firms; that the abuse of dominance of market power must be exercised by an enterprise; and that, therefore, profiling of the alleged violator was important. (See paras. 57-58, p. 282 of the ROP).

27. It was found that ZACL, then National Airports Corporation Limited (NACL), created by an Act of Parliament No. 16 of 1989, was wholly owned by the Government and incorporated under the Companies Act; and that section 3(2) of the Act provides guidance on the treatment of such companies as follows:

> *(2) This Act binds the State insofar as the State or an enterprise owned, wholly or in part, by the State engages in trade or business for the production, supply, or distribution of goods or the provision of any service within a market that is open to participation by other enterprises.*

28. It was also found that as ZACL is a ground handler, it competes, in the ground handling market, with ZEGA, NAC2000 and to a limited extent, with Hill &Delamain; that this market is open to participation by other enterprises who engage in trade for a profit; and that given that ZACL provides the same services and positions itself in the same manner as its competitors, it is therefore, in the market as a trader, and ZACL qualifies as an enterprise. (See para. 61 on p. 283 of the ROP).

Whether ZACL is in a Dominant Position of Market Power

29. It was submitted that in the international airport facility and management market, ZACL is the only operator in Zambia and hence has 100% market share; that given the threshold for presumption of market power for a single firm is 30%, ZACL is, therefore, dominant, and has market power in the international airport facility and management market; that the NACL Strategic Plan (2012-2017) shows that ZACL has an 80% market share in the ground handling market, while ZEGA Limited has 20% market share and NAC2000 has 0%; and that, therefore, ZACL has a 100% share in the "upstream "market and 80% market shares in the "downstream" market.

Whether ZACL was Engaged in a Conduct

30. From the submissions made by ZACL and ZEGA, the Commission observed, *inter alia*, with respect to concessions, the ZACL was categorical in its letter to Zambezi Airlines that in the event that they opted for another ground handler, they would have their concessions withdrawn.

31. With respect to differential charges, it was noted that whereas ZEGA was charged up to $220 per hour for toilet and water services, KLM, as ZACL's clients, were given free service for the first one hour.

32. The Commission also assessed whether the transactions were equivalent which equivalence is required by section 16(2) of the Act. It was noted that while equivalence is not defined, resort, in this regard, was had to American and European standards which stipulate, essentially, that the product sold to different customers must be comparable and the transactions as a whole must be reasonably analogous; that three essential elements must be fulfilled for transactions to be equivalent namely they must be similar in physical appearance or functional use, similar commercial context of the compared transactions and proximity in time; that ramp access charges are based on the weight of the

aircraft and thus it is expected that aircraft of a certain weight category, regardless of the operator, are charged the same fees; and that similarly, the charge for toilet and water use is an hourly charge regardless of single or multiple use. (See paras. 69-71, page 285 of the ROP).

33. It was further found that Airbus A321 operated by Egyptian Air, Boeing 733 by Precision Air and Ethiopian Airline B737, all being in the same weight category were, in 2014, paying ramp access of $250, $1, 000 and $630, respectively, with the lower charge for Egyptian Air being described as an incentive. (See para. 72, page 23 of the ROP); that ZACL does not charge itself for the use of its facilities; that this is anti-competitive as ZACL is expected to have lower costs of service provision than its competitors; that it is further expected that the charges applicable to ZACL should be the same as those applied to ZEGA for an equivalent transaction; that information from ZACL showed that in 2005, ZEGA was contracted to pay $200 for a turnaround ramp access use and to pay $250 if the plane stayed over 24 hours, for planes in the weight category of the B727, B737 and HS748; and that for the same weight category in 2011 and 2012, NAC2000 was contracted at $0 and Hill &Delamain at $100 in 2013. (See paras. 69-71, page 285 of the ROP)

Whether the Conduct by ZACL has or is Likely to Have Adverse Effect on Trade or the Economy in General

34. It was submitted that ZACL operates both in the ground handling service market "downstream" and in the international airport facility and management market "upstream". It provides itself and its competitors in the downstream market facilities and equipment as inputs from the upstream market; that in order to access these facilities, ZACL charges its competitors "access fees" such as ramp access fees which it does not charge itself; that this had the potential of rendering its competitors in the downstream market uncompetitive due to increased cost which by assumption are passed to customers or assimilated resulting in thin margin compared to ZACL; that using control of airport facilities such as water and toilet services, and ownership of the ramps and aprons, ZACL was able to

charge ZEGA $1161.6, charges which are not levied to itself (ZACL) and which are well below what it charges its client airlines. (See paras. 74-75, page 286-287 of the ROP).

35. It was also submitted that the capacity of ZEGA to compete with ZACL in the ground handling service market is thus compromised by the conduct of ZACL; that this not only affects the market competition conditions but manifests itself as increased service charges to airline clients of ZEGA and ultimately to passengers boarding from KKIA; that the differential rates with KLM and Egyptian Airlines receiving superior concessions is not only inappropriate for competition but also results in the promotion of foreign airlines at the expense of regional and domestic ones; that this entails that airlines such as Ethiopian Airlines, on average, incur higher costs to land similar aircraft to KLM or Egyptian Airline; and that this compromises the effectiveness to compete of those airlines that do not receive favourable concessions and this has an effect on trade. (See paras. 76-77, page 287 of the ROP).

36. It was submitted, with respect to potable water, that demand for payment from operators including ZEGA for the use of ZACL's certified water was purely on a cost recovery basis and therefore, justified; that ZACL currently had the only approved facility to supply potable water; that in the view of ZEGA, the source of water that ZACL had was an essential facility and thus, denying access to ZEGA constituted a breach of the Competition regulations; and that the cost of creating an additional source of potable water would constitute a barrier to entry into the market. (See paras. 80-81, page 288 of the ROP).

The Commission's Observations-Potable Water

37. The Commission observed that the Civil Aviation Bill, 2015, makes it mandatory for airport operators like ZACL to shares its facilities; that this was an important provision as ZACL continuously insisted that those that are not willing to pay for water uplift, should have their own borehole; that while ZACL's clients were charged $70 per uplift with clients such as KLM and Egyptian Airlines enjoying

further concessions such as discounts and no charges for the first one hour of access, ZEGA was quoted $94.7, an increase of 35.2% over the regular charge to other airlines ZACL handles. (See paras. 82-83, pp. 287-288 of the ROP).

The Commission's Observations-Toilet Waste Dump Sites

38. ZACL submitted, *inter alia*, that ZEGA had an option to access the toilet dump site at a fee or dispose of waste in Council approved areas, or alternatively construct its own septic tanks for the disposal of waste. ZEGA, in response, submitted that there were no alternative facilities within the airport and constructing an alternative site within the airport would involve additional costs and would require the permission of ZACL as the landlord for the facility; that using the dump site outside the airport premises would entail driving the cart on public roads for which it was not suited and that this would add to the cost of business; that the total figures charged by ZACL to ZEGA were in excess of the total charge to airlines for the entire service; and that therefore, the assertion that ZEGA charged a cost recovery fee was inaccurate. (See paras. 84-85, pp. 289-290 of the ROP).

39. In order to verify that ZEGA's equipment could not be driven on public roads, the Commission visited the ZEGA site; the Commission heard that ZEGA serviced Emirates on a daily basis which meant that ZEGA required access to the dump site on a daily basis; that ZEGA had a waste disposal cart used to collect waste from the plane for onward disposal at the designated dump site; that on the apron, the maximum speed the cart was allowed to drive was 10km per hour and that outside the apron, it was 15km per hour; that at this speed, it was not possible to drive the cart on public roads; that in the event there was need to have waste collected twice from the plane, it would not be possible to dump such waste outside the premises; that there are instances of spillages which required ZEGA to call fire tenders to clean with water, which would be difficult to do on a public road. (See paras. 87 and 113-115, pp. 290-291 of the ROP).

40. The Commission also heard that the waste disposal card had two compartments- the first for ordinary water and the other is for waste collection; that it has a coupling which is attached to the plane for the passage of waste from the plane to the waste collection compartment; that ordinary water would then be pushed into the waste compartment of the plane to clean it; that the dump site had the same design; that disposal was by drive in; once the cart is in position on the dump site, its valves would be opened and waste would flow into the underground waste collection; that after removal of waste, it would be connected to pressurised water to clean it; the pressurised water was part of the dump site facilities and that such a facility would not be available on any Council dump site outside the airport premises.

The Commission's Observations-Ramp Access Fee

41. The Commission noted that the argument *vis a vis* ramp access fees is not whether ZACL charges more or less than ZEGA for ramp access, but that the rates applied by ZACL to different players for the same service sometimes vary and have the effect of distorting competition in the airport service provision market; that although all the information submitted to the Commission indicated that ZEGA was charged $300 for ramp access for the category MD11 and A340 planes and other similar planes, there is a letter indicating a charge of $400 for the handling of Emirates which was later revised to $300; that the $100 difference is significant because of the frequent turnaround of these airplanes and the fact that Emirates is a frequent flier into Zambia; that it is an additional cost on ZEGA and has the potential to affect how it competes with in the market with ZACL. (See paras. 122-123, p. 294 of the ROP).

42. The Commission agreed with ZEGA's submissions that it would be illogical for ZACL to charge itself a ramp access fee as its charge to the Department would be offset by income flowing to it again; that ZACL is vertically integrated in the sense that it is an airport operator and an airport service provider; that it could have been ideal if the unit dealing with airport service provision was registered

as a separate legal entity with its own legal personality; that the current set up is that the airport operator is also the airport service provider and this set up creates competition problems in any sector where it occurs. (See para. 125, page 295 of the ROP).

Board Deliberations

43. The Board of the Commission deliberated on the matter.

Consideration of Relevant Market

44. The Board deliberated that the two relevant markets were the provision of ground handling services at KKIA and the international airport facility and management services.

Consideration of Dominance and Market Power

45. The Board deliberated that based on the findings and analysis, ZACL has 100% market shares in the international airport facility and management services market and controls input into the downstream market in which it equally operates. It therefore has control over the resources it supplies to itself and its competitors and hence has market power which it leverages in the downstream market and that it has the ability to levy charges and dictate the trading conditions in the downstream market.

Consideration of Abuse of Dominance

46. The Board observed that ZACL's ability to provide differential rates to airline clients and ground handlers for equivalent transactions is a violation of section 16(1) and section 16(2)(c) of the Act. Its threats to withdraw concessions from Zambezi Airlines though now dysfunctional and the application of excessive charges to ZEGA for water and the handling of Emirates Airlines constitutes an abuse of dominance as it has an effect on how these enterprises trade and the economy in general. Further, the different rates for ground handling applied to ZACL's airline with concessions given to few such as KLM distorts competition and can be detrimental to the growth of the industry.

Board Decision

47. The Board, on 13th July, 2016, decided that ZACL-

(i) Be fined 3% of its annual turnover for the violation of Section 16(2)(c) as read together with section 16(1) of the Act;

(ii) stands warned and should desist from abusing its dominant position of market power and from issuing threats to operators in the market;

(iii) stands directed to normalise the charges and trading conditions to both client airlines and ZEGA Limited to a manner that does not affect trade or result in discrimination.

48. The Decision was received by ZACL on 18th July, 2016. ZACL being dissatisfied with the Decision appealed against the decision.

Grounds of Appeal

49. The Appellant filed its notice of appeal, its grounds of Appeal and its affidavit verifying facts on appeal against the whole decision of the Competition and Consumer Protection Commission ("affidavit verifying facts on appeal") dated 13th July, 2016 (sworn by one Agness Chaila, Director of Airport Services in the Appellant Company) on 16th August, 2016. The contents of the affidavit verifying facts on appeal mirror, to a great extent, the contents of the grounds of appeal, and will, therefore, not be referred to.

50. The Appellant's grounds of appeal were as follows:

1. The Commission erred in law and in fact when it held that the Appellant has been abusing its dominant position of market power by applying differential rates to Airline Clients and Ground Handlers for similar transactions-
   (i) that in finding that differential pricing was discriminatory, the 1st Respondent failed to appreciate that-
      a. the rates for the Ramp Access Fee chargeable to all Ground Handling players by the Appellant...are the same;
      b. for the Appellant, differential pricing is based on cost considerations which are not necessarily suffered by the 2nd Respondent by virtue of

the 2nd Respondent not being an airport operator. That in fact the Appellant does charge itself Ramp Access Fees which is factored in the high rates charged to the Airlines handled by the Appellant in comparison to the lower rates paid by those airlines handled by the 2nd Respondent.

c. Differential pricing is not discriminatory in the sense that the nature of the industry worldwide and common industry practice dictates that players are allowed to consider various market forces in negotiating prices with airlines. Accordingly ... Ground handling players on the market do not necessarily have fixed pricing with all their clients and customers. Further, factors such as the weight of the Aircraft, the frequency of flights and whether it is a new and unserviced route relating to an airline are also considered in the negotiation process for pricing.

(ii) That particularly, in finding that the Appellant has dominance and market power because of being both an airport operator as well as an airport service provider, the 1st Respondent failed to appreciate that the Ground Handling business has three components being, Passenger Handling, Ramp Handling and Cargo Handling (Warehousing) and that the 2nd Respondent unlike the Appellant and NAC2000, offers Ground Handling services that espouses all three components.

(a) The 1st Respondent failed to appreciate that the Appellant only operates Passenger Handling and Ramp Handling whilst NAC2000 only offers Ramp Handling and Cargo Handling services. With regard to ... Ground Handling Services at ... Kenneth Kaunda International Airport, the 2nd Respondent therefore has more dominance because the 2nd Respondent is able to adjust price or output, without effective constraint from competitors such as the Appellant and NAC2000.

(b) The 1st Respondent failed to appreciate that as provider of Passenger Handling, Ramp Handling and Cargo Handling services, the 2nd Respondent is in a more advantageous position and therefore able to generate more income as it is able to charge on Cargo Handling both at point of entry and departure of Cargo. Whilst on the other hand, the Appellant is only able to charge for Passenger Handling at the point of departure only. That this clearly places the 2nd Respondent and not the Appellant in a dominant position in relation to the provision of Ground Handling Services at the airport in question.

(iii) That the 1st Respondent erred in its observation that the Appellant does not charge itself Ramp Access fee and that it would be illogical for it to charge itself Ramp Access Fee as the Appellant's charge to the department would be offset from the income flowing to it again.

(a) Particularly, the 1st Respondent failed to appreciate that the service despite being offered by an Airport operator, Ground Handling is a component of the Appellant's business that attracts both losses and profits from its own activities and as such, any purported subsidising still represents adverse effects for the Appellant.

(b) Further, the 1st Respondent also failed to appreciate that the Appellant being an airport operator incurs astronomical costs with regard to the servicing and maintenance of the Ramp, among others, that it does not in turn pass on to the other Ground Handling players at the Kenneth Kaunda International Airport.

2. The Commission erred in fact when it found that the Appellant has been issuing threats to other operators of the market.

(a) Particularly, the 1st Respondent failed to appreciate that market forces and cost implications are factors that determine how the Appellant enters into conseccions [SIC] with its clients.

(b) *Further that among the factors that have a bearing on pricing is the volume of business that a client brings.*

3. The Commission further misdirected itself in law and fact when it consequently imposed a fine of 3% of the Appellant's annual turnover for the said violation of section 16(2)(c) and 16(1) of the Act. By imposing an excessive 3% as the baseline, the 1st Respondent failed to take into consideration the guiding principles on fines, especially that the Appellant has not in the past been found in breach of competition laws and that it further co-operated with the investigation at all stages.

51. The Appellant seeks the following reliefs:

i. That the said Decision be varied and dismissed on a finding by the Tribunal that the Commission erred in law and in fact when it held that the Appellant has been abusing its dominant position of market power by applying differential rates to Airline Clients and Ground Handlers for similar transactions.

ii. The said Decision be varied and dismissed on a finding that the Commission erred in fact when it found that the Appellant has been issuing threats to operators of the market.

iii. That the said Decision be varied and dismissed in a finding that the Commission misdirected itself in law and fact when it consequently imposed a fine of 3% of the Appellant's annual turnover for the said violation of section 16(2)(c) and 16(1) of the Act.

1st Respondent's Arguments

52. The 1st Respondent filed its affidavit in opposition to the Appellant's affidavit verifying facts on appeal on 26th September, 2016. The affidavit was sworn by one Parret Muteto, Chief Investigator, CCPC, and the case officer in the matter at hand. The facts deposed to in the affidavit mirror the contents of his testimony before this Tribunal and will, therefore, not be referred to.

53. The 1st Respondent opposed the whole appeal on the following grounds (quote):

1. *Contrary to the Appellant's assertions in ground one, the Board did not err in law and in fact when it found that the Appellant was abusing its dominant position of market power by applying differential rates to Airline clients and Ground Handlers for similar transactions as all evidence availed to the 1st Respondent established this fact.*
2. *Contrary to the Appellant's assertions in ground two, the 1st Respondent established that the Appellant having 100% market shares in the International Airport facility and Management services and controls the inputs into the downstream market in which it equally operates, is in a position to control resources it supplies to itself and its competitors, hence having market power which it leverages in the downstream and has the ability to levy charges and dictate the trading conditions in the downstream market.*
3. *Contrary to the Appellant's assertions in ground three, the Board of Commissioners was on terra firma in directing that the Appellant be fined 3% of the annual turnover for violation of Section 16(2)(c) and Section 16(1) the Act* [Sic], *because the conduct of the Appellant offended the cited provisions.*

54. The 1st Respondent's seeks the following reliefs:
    i. The Appeal herein be dismissed with costs.
    ii. The decision of the Board of Commissioners dated 13th July, 2016 be upheld.
    iii. Any other reliefs that the Tribunal deems fit.

Proceedings before the Tribunal

55. The Appellant called two (2) witnesses.

Agness Chaila, Appellant's First Witness ("AW1")

56. The Appellant called, as its first witness, Agness Chaila, the Director of Airport Services of ZACL.

Examination in Chief of AW1

57. AW1 testified that ZACL offers three kinds of services, one of them being ground handling services (hereinafter "GHS") which the 2nd Respondent is also offering; that GHS could be broken down further into three namely, passenger handling,

ramp handling and cargo handling; that ZACL was offering only two of the services namely passenger and ramp handling, whereas the 2nd Respondent was offering all three.

58. She stated, with respect to ramp handling, that when an aircraft lands, there are services that have to be provided within an agreed period of time with the Airlines-usually 30 minutes to an hour; and that in order to provide this service, one needs human resource and equipment such as high loaders, passenger steps and tractors.

59. AW1 also stated that a ramp handling fee was charged to everybody that is accessing and conducting business on the ramp; that ramp access handling services include loading and offloading of cargo, loading and offloading of passenger baggage and embarkation and disembarkation of passengers, loading and offloading of catering for the aircraft, cleaning of the aircraft and ensuring that the aircraft is okay for the purposes of handling business on the ramp; and that all of these service put together, are provided to an aircraft or operator within the stipulated or agreed time to allow for it to and depart for its next destination.

60. Mrs. Chaila also stated that an airport operator has the responsibility to maintain the ramp which is the work area where the ground handlers operate and that to this effect, a ramp fee is charged.

61. With respect to pricing, the witness stated that ZACL's pricing is set and charged to all ground handlers without differentiation; that the charge is based on the size of the aircraft; that the weight of aircraft are grouped and the charge for each category indicated ; and that the highest charge is USD$300.

62. With respect to the nature of ZACL's pricing, AW1 stated that as a ground handler, and a participator in using the ramp ZACL gets charged the ramp fee by the airport operator and that the fee was exactly the same as that charged to the other operators.

63. AW1, in setting out the factors that ZACL takes into account when determining ZACL's pricing, testified that the ramp fee is not different; that there is, however, a ground handling fee that is charged by all ground handlers; and that in arriving at the fee, various factors are considered such as-

(a) the cost of providing the service to the airline (which will differ from airline to airline because there is a glossary of services that the airline will request for and recommended practices and services that an airline may demand with respect to ground handling);

(b) the frequency that the airline is going to be operating at the airport (how many times you are going to be handling them) ;

(c) the weight of the aircraft; and

(d) the route that the aircraft will be operating on - are they operating on a route that is already serviced or are they starting a new route altogether?; and that when there was no existing route, the airline would have to bear a lot of costs in terms of marketing and strategy to grow their passenger base.

63. She further stated that when a client is starting up a new route, there is no activity on that route and the client does not expect to find passengers already grown or a developed market; that it is expected that the uplift of passengers will have to be grown; that the airline will have bear a lot of the cost to establish clientele and established structures; that as ground handlers, ZACL's interest was, in the short term, to share the cost with the Airport so that that clientele and structures are established and in the long term, ZACL will have sustainable business success.

64. The witness was referred to Appendix B of the Notice to Produce (a contract between ZEGA and Emirates) and in particular to pages 4 and 11. The witness testified that ZACL's highest ramp fee was $300; that the fee was charged to the ground handler, who in turn charged it to the airline; and that ZEGA is not expected to mark up this cost but to charge it directly to the client.

65. The witness, when referred to Exhibit "AC2" of her affidavit, testified that whereas ZACL charged its Client Ethiopian Airlines a fixed fee of $1, 600 (including a ramp access fee of $300), ZEGA charged Emirates, for the same aircraft type $1,100. She stated that this showed that there is flexibility in determining fees depending on the factors alluded to above and that despite the flexibility, ZACL actually charges more than the ZEGA, indicative of the fact that a ramp access fee was being charged to the ground handling unit; that it was not illogical for ZACL to charge itself ramp access; and that in paying itself the ramp fee, there was no actual movement of money (i.e. no movement of money from one division of ZACL to another).

66. The witness further testified that Ethiopian Airlines was given an incentive by ZACL compared to Precision Airline because Ethiopian Airlines had more frequent flights, and Egypt Air was given an incentive to help it grow the route when it started flying between Cairo and Lusaka - a totally new route; and that this did not extend to the ramp fee.

67. With respect to the alleged threat to Zambezi Airlines, the Witness testified that ZACL was the ground handler for Zambezi Airlines and that incentives were asked for and offered on the basis of this relationship; that Zambezi Airlines sought to move their services to another ground handler; and that on this basis, it became practically impossible to continue to offer the incentives to an airline that was no longer using ZACL's ground handling services. This, AW1, stated was communicated to Zambezi Airlines and is what was perceived to be a threat.

Cross Examination of AW1

68. In cross examination, AW1 confirmed that the issues in the Notice of Investigation issued by the 1st Respondent were as follows: denial of access to the CUTE network for load control; restriction of use of check-in counters and restriction of access to water and toilet services; threatening customers of competitors if they did not acquire ZACL's ground handling services; and

charging customers prices that were below the cost of providing the particular services.

69. She maintained that all ground handlers at the four national airports were charged the same ramp access fee; that ZACL, NAC2000 and ZEGA are competitors; that as per the Agreement dated 1st June, 2011, between ZACL and NAC2000 contained in Exhibit "PM2" to the Affidavit of one Parret Muteto (the Investigating Officer herein) dated 28th September, 2016, ZACL granted NAC one hundred percent discount with respect to ramp use for two consecutive years. When referred to page 148 of the Record of Proceedings, AW1 testified that ZEGA did not enjoy any such discount, despite NAC2000 and ZEGA being competitors.

70. AW1 was referred to page 30 of the Record of Proceedings, and in particular to paragraph (d) which she read out. She confirmed that ZACL had, effective 1st October, 2012, agreed to reduce ZEGA's ramp access fee from $400 to $300.

71. AW1 was then referred to page 13 of the Record of Proceedings and asked to read paragraph 2. She confirmed that according to the letter, since ZACL would no longer be availed financial gain by providing Zambezi Airlines with ground handling support services, ZACL would revoke the other concessions offered to Zambezi Airlines immediately Zambezi Airlines communicated its decision to migrate to other handlers; and that other handlers meant ZACL's competitors.

72. AW1 confirmed that the purpose of the ramp access fee is to enable ZACL pay for wear and tear of the ramp; that wear and tear is part of the operations of the airport; and that ramp access is essential for any ground handling company.

73. AW1 further confirmed that without the existence of KKIA, the ground handling companies would not be in existence; and that ZACL is both a competitor of the ground handling companies and an owner of an essential facility. She further testified that there does not exist a separate company with the same name or a different name that the Appellant has incorporated to undertake the GHS.

74. The witness testified that airlines and ground handlers are in two different markets; that in Zambia, airlines do not provide ground handling services to themselves; and that NAC2000, ZEGA and ZACL belong to the same market as they all provide ground handling services.

75. Mrs. Chaila also testified with respect to the CUTE system, that it is an IT solution used for passenger and baggage management and that it is an essential standard industry facility to be used for the safety of any airline; that it is a system that can be procured from various vendors on the market; and that an airline can actually operate without the system - it just enhances safety and accountability.

76. She also stated that while there are 12 check in counters, ZEGA uses up to 8; that ZEGA had to come to the counters to access the system; that that there was a restriction on the use of the CUTE system which ranges from 2 to 3 hours depending on the airline, and that the restriction was put in place in consideration of the other players on the market, so that anybody can sit and use the system at allocated times and not beyond.

77. The witness was referred to page 11 of the Record of Proceedings which contained a letter dated 9th July, 2015, from ZACL to ZEGA and in particular to the 4th paragraph in which ZACL informed ZEGA that going forward, it would be availed counters for use per flight as follows: first/business class/priority/membership-one counter and Economy Class three counters. AW1 nonetheless stood by her testimony that ZEGA was permitted to use up to 8 counters.

78. When asked to justify why ZEGA was paying a ramp access fee of $400 while other ground handlers were being charged $300, AW1 stated ZACL was in the process of revising its fees upwards and thought it prudent to quote ZEGA that charge as ZACL waited to increase the charge; and that ZACL was about to give notice to the rest of the Airlines that ZEGA was handling, but that this was never communicated to ZEGA.

79. AW1, when asked to whom concessions were offered between ground handlers and airlines, testified that these were offered to airlines that ZACL handles as the concessions are on ground handling fees; and that concessions are offered by ZACL, in its capacity as a ground handler, to all airlines irrespective of who handles them.

80. With respect to the dump or waste disposal site, the witness testified that ZACL has a dump or disposal site that is used to dispose of aircraft waste; that the site was not a costly undertaking, and was deigned to receive aircraft effluent and have it treated to prevent contamination of the environment. The witness was referred to page 210-211 of the Record of Proceedings and asked to read paragraph 2 headed "Charges on toilet waste dump site". The paragraph provided, in summary that ZACL maintained the toilet dump site at great cost, and that any airport operator, particularly ground handlers have the option to either access the facility at a fee or dispose of waste in council approved areas, or construct their own septic tanks; and ZACL has clients who dispose of waste in their own septic tanks.

81. AW1 testified that it charged ZEGA ZMW11. 000 per month; that ZEGA used its own equipment for waste disposal; that there was no charge paid, for waste disposal, by ZACL as a ground handler to ZACL, as an airport operator; and that the dump site belonged to ZACL as a ground handler.

Re-examination of AW1

82. In re-examination, the witness testified, *inter alia,* that ZACL was approached by Zambezi Airlines to request a discount on ramp fees in respect of NAC2000 as they (Zambezi Airlines) were in a financial crisis; that the discount sought was given to NAC2000; and that the discount was offered to NAC2000 for one client only, while ramp fees were paid in respect of NAC2000's other clients.

83. AW1 confirmed, with respect to the letter to Zambezi Airlines, at page 13 of the Record of Proceedings; that the basis of the discount offered to Zambezi Airlines was that ZACL was their ground handler; and that as they were contemplating

moving their business to another ground handler, there was no basis or relationship in that line of business for ZACL to offer them a discount.

84. Mrs. Chaila also testified that as airport operator, ZACL pays for wear and tear caused by ground handling; that ZACL, as airport operator, maintains the ramp and incurs costs which its competitors do not incur; that as a ground handler, ZACL paid a ramp fee to ZACL as Airport operator; that ZACL factors the ramp fee in the flat rate which is charged to its airline clients; and that this ground handling charge includes a ramp fee.

85. With respect to the CUTE system, AW1 testified that only ZACL has its own CUTE system as the CUTE system is a common user platform which accommodates every stakeholder that is involved in passenger handling and cargo.

Jonathan Kyriaco Lewis-Appellant's Second Witness ("AW2")

86. The Appellant's second witness was Jonathan Kyriaco Lewis ("AW2"), the Managing Director of NAC2000.

Examination in Chief of AW2

87. Mr. Lewis testified that volume is taken into account when pricing for ground handling services and this would mean a lower fee for higher volume; that if the frequency of a flight is high then the volume is high-it has the same impact as volume on pricing.

88. With respect to concessions, AW2 testified that concessions to clients handled by NAC2000 are offered based on volume, aircraft type and services required and that these determined ground handling pricing.

89. AW2 stated with regard to ramp fees that the NAC2000 viewed the ramp access fee as an impediment to private commercial business at the airport; that it had raised this issue with the CCPC in writing and that there was no strong guidance and so it incorporated the ramp access fee into its business model; that when the complaint was raised, NAC2000's concern was that the ramp access fee was not universally applied to all ground handlers.

90. Mr. Lewis testified that NAC2000 had received one exemption relating to one airline-Zambezi Airlines; that the exemption was negotiated by the Airline and ZACL so the fees were not passed on to NAC2000 as ground handler; that he was not privy to any other airline handled by NAC2000 that had been given such a discount.

91. AW2 further testified that NAC2000 does not have any passenger handling contracts with any of the scheduled airlines operating in Zambia, but that it handled passengers on an *ad hoc* basis (this he said, was in the case of chartered operations that were not scheduled); that when passengers were handled, NAC2000 only provides toilet services which do not require uplift of water from ZACL boreholes; and that NAC2000 mostly handles aircraft that do not carry passengers, and, therefore, do not require water, but that when water was required, NAC2000 provided mineral water.

92. Mr. Lewis stated that NAC2000 had handled numerous operations on an *ad hoc* basis for which they were given access to check in counters and that NAC2000 had not had any issues with accessibility.

Cross Examination of AW2 by the 1st Respondent

93. AW2 was referred to Exhibit "PM2 (H)" (to the affidavit deposed to by one Parret Muteto on 28th September) which exhibit was a ground handling contract dated 1st June, 2011, between ZACL and NAC2000. AW2 testified that according to the contract, Zambezi Airline was exempt from paying the ramp access fee for two years.

Cross Examination of AW2 by the 2nd Respondent

94. In cross examination by the 2nd Respondent, the witness testified that he was not aware of a similar exemption (i.e. an exemption from the payment of ramp access fees) that had been given to any ground handling company.

Re-Examination of AW2

95. In re-examination, AW2 reiterated that in the ten years of his tenure as Managing director of NAC2000, NAC2000 had only received one exemption in relation to paying ramp access fee and this was in relation to Zambezi Airlines.

The Appellant closed its case.

Parret Muteto-1st Respondent's Witness ("RW1")

96. The 1st Respondent called one witness, Mr. Parret Muteto, who was, at the material time, Chief Investigator with the Mergers and Monopolies Department of the 1st Respondent.

Examination in Chief of RW1

97. RW1 testified that sometime in August 2015, the 1st Respondent received a complaint against ZACL from ZEGA through ZEGA's lawyers; that the complaint related to the use of the CUTE system, use of check in counters, the issuance of threats to airlines, use of potable water and the dump site and the ramp access fee; that the allegations involved discrimination by ZACL; and that ZACL sought to lure clients from ZEGA.

98. RW1 testified that investigations were duly undertaken, and a Notice of Investigations ("NOI") was sent to ZACL with a request that ZACL submits certain documentation; that ZACL responded to the NOI and submitted, *inter alia*, its strategic plans for 2012, 2017, board packs, board minutes and correspondence between ZACL and ZEGA and with NAC2000; and that the 1st Respondent had a meeting with NAC2000 and further, undertook a site visit to the ZEGA premises.

99. The information was analysed, and in that analysis, the first issue was the determination of the relevant market. RW1 stated that in any competition case, there is need to define the relevant market and that in this case, the relevant market comprised the product market and the geographical market; that in this case, the product was the service that was offered, namely ground handling; that the competitors in this market were ZEGA, Hill &Delamain, NAC2000 and

ZACL; that there was a second market in which ZACL operated and this, RW1 identified as the airport facility management market. RW1 testified that from the submitted strategic plans, it was observed that the bulk of the services occurred at KKIA and that KKIA thus constituted the geographical market.

100. RW1 testified that the next consideration was whether ZACL had a dominant position of market share and that in the airport facility market, because ZACL was the only entity that was, by law, mandated to manage airport facilities at all designated airports, it had no competitor and thus held 100% market share.

101. The witness was referred to pages 64 to 71 of the Record of Proceedings, and in particular to paragraph 2.2.4 at page 71. RW1 stated that the diagram therein relates to the downstream market of the second relevant market to which ZACL is vertically connected; that the diagram showed that ZACL had 80% share, while ZEGA had 20% and Hill &Delamain and NAC2000 had 0%; that a downstream market is a market that relies on inputs from another market; that in this particular case, ZACL owned the aprons, dump site and customers rely on those facilities as inputs to their business; and that therefore, the vertical connection in this case is that ZACL is both the owner of the facilities and supplies itself, in the downstream market in which it operates the same facilities. He stated that in accordance with section 15 of the Act, where the level of supply or acquisition is 30% or more, then that entity is regarded as holding a dominant position of market power; that the Appellant was dominant in the upstream market (that is the airport facilities market) and in the downstream market (that is, the ground handling market); and by the definition set out in section 2 of the Act, they had market power.

102. RW1 also testified that the 1st Respondent proceeded to determine whether the Appellant had abused its dominant position; that RW1 found that with respect to the access to the CUTE System, the justification made by the Appellant was sufficient, and accordingly, the issue was not pursued by the 1st Respondent; that with respect to the restricted use of check in counters (from 6 to 4), considering

that the total number of counter was 12 out of which ZEGA was permitted the use of 4 (being 33% of the counters), the number was reasonable, and also considering the justification for the restriction, being the escalating costs to SITA from whom the system was procured), it was found that ZACL did not abuse its dominant power.

103. With respect to the allegation surrounding ramp access fees wherein it was alleged that ZACL did not charge itself ramp access fees, RW1 testified that ZACL had charged ZEGA a ramp access fee of $400 for handling the Emirates airline; that investigations had shown that RAF is based on the weight of an aircraft and that there were bands (categorising weight per band); that aircrafts with weight in certain bands were grouped together; that the highest charge was $300. He further testified that work order cards were produced in the Affidavit verifying facts on appeal sworn by AW1; that Exhibit "AC1" of that Affidavit showed tax invoices for NAC2000 for aircraft type B763 of tonnage 185 and ramp charge of $300 for this weight category; and that the charge for this weight was consistently $300, but that the charge for this weight category for Emirates (handled by ZEGA) was $400.

104. The witness was referred to pages 19 to 20 of the Record of Proceedings, and in particular to paragraph (d) on page 20. The witness testified that the paragraph communicated the reduction, by ZACL, of the ramp fee (following ZEGA's request), from $400 to $300 and the need to sign an agreement to that effect; that charging ZEGA a ramp fee of $400 while NAC2000 was charged $300 was discriminatory in the sense that either ZEGA was being overcharged for handling Emirates or, if $400 was the correct charge, then the other airlines and ground handlers charged $300 were being undercharged. When referred to Table 2 on page 179 of the Record of Proceedings, RW1 testified that the Table showed that in 2005, for aircraft type B737 ZEGA was charged, for use of the ramp, $300, and $350 for beyond 24 hours; and that on page 180, the same Table showed that

for the same category of aircraft, NAC2000 was contracted to pay zero, which amounted to discrimination.

105. RW1 stated further that NAC2000 was billed zero for the first two years, then for the third year it was billed $300; that this "zero charge" was in respect of an aircraft for Zambezi Airlines handled by NAC2000; that the discrimination is even exhibited in AW1's affidavit, specifically for Aircraft type B737 which is in the $200 category and $250 beyond 24 hours as some of the invoices in the affidavit show that one aircraft was charged $300; and that ZACL did not charge itself a ramp access fee as there was no evidence to prove that it did.

106. RW1 also testified that the Commission considered this to be discriminatory and an abuse of dominant position of market power.

107. With respect to potable water, the witness testified that potable water is sourced from ZACL's boreholes; that according to ZACL, the water is certified and is given to clients at a cost recovery fee; that various contracts showed that the charge per uplift was $70; that ZEGA had received correspondence to the effect that the rates for the uplift had been raised to K500 per uplift (being $94 at the conversion rate then of K5.28 to $1); that compared to $70, $94 was high; and that as ZACL had insisted that the service was offered on a cost recovery basis, either ZEGA was overcharged or the $70 charged to other airlines was an undercharge and that either way, this was discriminatory.

108. With respect to the toilets, RW1 testified that the charge for use of the dump site were K11, 000 for ZEGA; that a spot rate of K5.28 to $1, this translated to $2, 083; that when divided by 30 (on the assumption that the dump site was accessed on a daily basis) the figure amounted to way less than the $150 a day that was being charged to airlines entailing that ZEGA was being undercharged and other airlines overcharged; and that this was discriminatory and an abuse of dominant market power.

109. RW1 also testified that the different pricing extended to Egypt Air and KLM and that Egypt Air was contracted to pay half the fare for potable water and the toilet

translating to $35 for water and $75 for the toilets, instead of $70 and $150, respectively; that KLM was contracted to pay zero for the first one hour and the normal charge thereafter. When referred to Table 2 on page 178 of the Record of Proceedings, RW1 testified that the Table shows two sets of aircraft and the applicable charges with respect to potable water and toilets. He stated that for aircraft type B707 for the year 2014, with respect to Egypt Air, the charge for toilet use was $75, whilst Ethiopian Airlines paid $150; that with respect to potable water services, Egypt Air paid $35, whilst Ethiopian paid $70; that since these are cost recovery fees it meant that Egypt Air was being charged below the cost or in the alternative, if Egypt Air contracted to pay charges reflective of recovery costs, then the charges paid by Ethiopian Airlines were twice above the cost recovery fee; and that since the charges are cost recovery fees, ZACL was, in essence, exercising predation, i.e. charging below cost.

110. RW1 testified that ZACL's response that ZEGA was at liberty to source water from Lusaka Water and Sewerage Company was unreasonable because the water supplied by ZACL was said to be certified. Also unreasonable was ZACL's response that ZEGA was at liberty to use Council designated waste points to dispose of waste from the aircraft if ZEGA did not wish to pay the fee; that this was unreasonable for two reasons. Firstly, the Emirates aircraft has a turn around time of 45 minutes, therefore, going to Chunga dump site was not going to be possible if the aircraft required multiple disposal. Secondly, the type of cart used for disposal of waste was designated to drive at 10km/hr within the airport and 15km/hr outside the airport.

Cross Examination of RW1

111. In cross examination, RW1 testified that he did not interrogate any recommended practices with the realm of international civil aviation; that there were parts of the report that analysed factors that were relevant to pricing in the aviation industry; and that the factor taken into consideration in ramp charges was the take-off weight of the aircraft.

112. The witness, in agreeing with the letter at page 15 of the Record of Proceedings, testified that new routes and adding of new frequencies by airlines were factors that influenced the award of discounts to airlines, by ground handlers; that the Appellant was not the only ground handler offering discounts; and that he did not interrogate the pricing policies of other ground handlers.

113. With respect to water pricing, the witness testified that he did not compare the quantities of water uplifted by ZEGA and ZACL and that if the quantities were different, then it would be natural for the pricing to be different.

114. With respect to the ground handling agreement between the Appellant and Zambezi Airlines to which RW1 set out at page 184 of the Record of Proceedings and to which RW1 was referred, RW1 agreed that it would be natural to terminate all other terms in the Agreement. RW1 maintained that the Appellant had threatened Zambezi Airlines.

Re-Examination of RW1

115. RW1, in re-examination testified that recommended practices within the realm of international civil aviation were not interrogated because the 1st Respondent enforces the Act and that Act makes certain conduct prohibited; that when the allegations were considered, the finding was that there was a violation of the law which is applicable in Zambia.

116. RW1 also testified that the factor considered in the ramp charges was the weight; that there are many services that are offered in the particular industry-- services such as car parking, air navigation services, ground handling, and within ground handling - passenger handling, ramp handling and cargo service, and that the pricing of each one of these is different; that some depend on the frequency of the airline, whether the route is new; that in this case, the allegations were with regard to one particular aspect of the service namely ramp access; that from the evidence obtained by the 1st Respondent, the pricing of ramp was based on weight and in the highest category, the applicable fee was $300; and that the letter at page 15 of the Record of Proceedings showed that there was a possibility

of some services in the aviation industry where such factors as frequency are considered and from the various contracts considered during investigations, passenger handling was such a service but not subject of the investigation by the Commission.

117. With respect to discounts on ground handling services, RW1 stated that it was his testimony in cross examination that discounts in ground handling services were only offered by the Appellant; that the reason for his response was that ground handling is vast—there is passenger handling, ramp handling and cargo handling and that it is possible that some services (that the 1st Respondent did not consider as they were not part of the investigations) were subject to discounts.

118. RW1 testified that ZACL's Strategic Plan contained a policy or statement with regard to how they were going to use price as a tool for competition; that this intention was exhibited in the industry with regard to water and toilet services, where despite stating that the pricing was cost based and meant to recover the cost, some airlines were given the first hour free of charge. When questioned why the 1st Respondent did not interrogate the pricing policies of other ground handlers aside from ZACL, RW1 referred to section 16 of the Act which prohibits abuse of dominance and explained that only dominant companies are subject to that provision; and that the conduct of other players, including their pricing strategies, were not considered as they were not dominant in the market.

119. RW1 also testified that documents received from ZACL stated that water was priced per uplift and not per litre; that therefore, the 1st Respondent did not look at the volumes because the pricing was not based on volumes but per uplift; and that if the quantities were different and the pricing was per litre, then it would be different.

120. When asked why he had maintained, in cross examination, that the Appellant had threatened Zambezi Airlines, RW1 explained that the Appellant is both a ground handler and a national airport facility operator and in such a position,

the expectation is that concessions accorded to one airline should be extended to all airlines; that if the concessions were given to only one airline, then that airline has an advantage over the others; therefore, that informing Zambezi Airlines that they will withdraw the concessions meant that Zambezi Airlines will lose the benefits and become uncompetitive and that the alternative ground handlers in the market would not be accessed by Zambezi Airlines for fear of losing the benefits which would put them at a competitive disadvantage; this meant that business from Zambezi Airlines would not be available or accessed by other ground handlers and that is the basis that the 1st Respondent considered to be the threat.

121. Finally, RW1 stated that it was logical for the Appellant to recover maintenance costs of the ramp from airlines as facilities at the airport such as the ramp, check in counters, car park and aviation systems and equipment went through depreciation wear and tear and that it was logical that there must be some recovery. The 1st Respondent closed its case.

Thabani Dube-2nd Respondent's Witness ("RW2")

122. The 2ndRespondent called, as its witness, Thabani Dube the Managing Director of ZEGA Limited.

Examination in Chief of RW2

123. RW2 testified that ZEGA was in the same business as the Appellant and that they were competitors in the ground handling business; that the Appellant was also the regulator; that the 2nd Respondent uses the Appellant's infrastructure to conduct its business; that without the infrastructure the 2nd Respondent would not be able to conduct its business; that the 2nd Respondent needed the infrastructure for access for passengers; that ZEGA's staff needed check in counters for the passengers; that with respect to the ramp, ZEGA equipment needed to go round the aircraft to load and off load people; and that a ramp fee was paid for each access.

124. RW2 also testified that compared to other ground handlers, the 2nd Respondent was, at the material time, paying more ramp access fees to the Appellant for aircraft Boeing 737; that the 2nd Respondent was paying $300, Hill &Delamain-$100 and NAC2000 never paid anything.

Cross Examination of RW2

125. RW2 was referred to page 4 of the Notice to Produce. He stated that column 3 of Table 1 showed ZEGA's charges for ground handling services; that the frequency of flights had an influence on the pricing of ground handling services; and that from the tables, the application of differential rates for ground handling services was not only done by the Appellant.

126. RW2 confirmed that discounts were received by Egypt Air and KLM. When referred to page 11 of the Notice to Produce—a ground handling contract between the 2nd Respondent and Emirates—and in particular to paragraph 1.1.2 at year 3, the witness testified that the maximum charge by ZEGA was $800 and the second turnaround was $400-that the total per day was $1, 200; and that the $1, 200 was much lower than the $1, 600 charge by ZACL.

Re-Examination of RW2

127. In re-examination RW2 testified, in relation to paragraph 16 of his Affidavit in opposition, that the differential pricing was on two fronts -- there was pricing between the ground handlers to the airline, and pricing for ramp access between ZACL to ZEGA; that pricing between the ground handler and the airline was not an issue; that discriminatory pricing, by the Appellant, in respect of the ramp access fee was the issue; that airlines handled by ZACL with whom ZEGA was competing in the same business, were not subjected to the same ramp access fee; and that unlike NAC2000, the 2nd Respondent as a ground handler had never been given a discount by the Appellant. The 2nd Respondent then closed its case.

Submissions by the Parties

128. Learned Counsel for the Parties filed their respective submissions as follows:

(1) The Appellant, on the 28th of February, 2019;

(2) The 1stRespondnet on 22nd March, 2019; and

(3) The 2nd Respondent on 21st March, 2019.

129. The Tribunal wishes to thank Learned Counsel for their submissions. Reference to the submissions will be made as and when necessary.

Consideration of the Case

130. The Tribunal proceeded to consider the matter. The Tribunal, *inter alia*, sought renewal of the appeal on three occasions, which was done.

Appellant's Submissions

131. Counsel for the Appellant submitted, among others, that "*...ground handling was provided by the Government which, over the years has delegated its ground handling services to several companies that include ZEGA, NAC2000 and Hill &Delamain; ...*" (See paras. 33-34, pp.273-274 of the ROP); and that the instruments of delegation were not provided.

132. Accordingly, the Tribunal, on 10th December, 2020, issued an Order to Produce in which it requested the Appellant and the 2nd Respondent to produce the following documents to establish the terms and conditions of the delegation, by the Appellant, of its ground handling function to the 2nd Respondent, NAC 2000 and Hill &Delamain (quote)-

(i) The instruments of delegation (which may include but are not limited to Agency and Contractual Agreements;

(ii) The Aviation Act No. 10 of 1954 prior to its amendment by Act No. 16 of 1989; and

(iii) Any other documents that set out the relationship between Zambia Airports and 2nd Respondent, NAC 2000 and Hill Delamain.

133. The Order to Produce also stated that the Tribunal would schedule a sitting at which the witness or witnesses producing the documents would be examined on oath.

134. In the view of the Tribunal, the matter could not be determined without first addressing the issue of delegation, as the circumstances of the delegation spoke to the cardinal question of whether or not there existed competition, in the first place, and ultimately, to the question of whether or not the Tribunal had jurisdiction to hear the matter.

135. In compliance with the Order to Produce, the Appellant, on 23rd December, 2020, filed its bundle of documents prepared pursuant to the Order to Produce. The 2nd Respondent did not file any documents.

136. Following the production, by the Appellant, of its bundle of documents prepared pursuant to the Order to Produce, the Tribunal, on 25th August, 2021, held a sitting at which it heard a witness, Josiah Chinyama Mvula, who was called by the Appellant to produce documents it had filed following the Order to produce issued by the Tribunal.

137. This was after the Tribunal clarified with the 2nd Respondent that the 2nd Respondent was agreeable to the Tribunal proceeding with the hearing of the case as per the record and on the basis of the evidence tendered in the course of the proceedings; and to hearing any witnesses who would adduce evidence pursuant to the Tribunal's Order to Produce, and thereafter, rendering the judgment.

Josiah Chinyama Mvula-Appellant's Third Witness(AW3)

138. AW3, aged 44, of 2418 M Ibex Hill, Lusaka, is the Appellant's Planning & Business Development Manager.

Examination in Chief of AW3

139. AW3 testified that he is has been the Appellant's employee for the last 21 years; that his purpose for appearing before the Tribunal was to produce the bundle of documents filed by the Appellant following the Tribunal's Order to Produce; and that the bundle of documents contained several documents (including contracts, letters, memoranda of understanding and the Aviation Act, Chapter 740). The witness then identified the bundle of documents by the date on which it was

filed. He then indicated that he sought that it be submitted to the Tribunal as evidence.

140. The witness testified that the Appellant had entered written contracts with ground handlers at the airport to provide some service to airlines and that these contracts set out what is to be performed by either party. When referred to pages 39 to 49 of the Bundle of Documents, he stated that the said pages contained Cap. 740 of the laws of Zambia (dated 1st July 1954); and that the said Act is silent as regards to delegation of authority by Zambia Airports (National Airports at the time) to ground handlers.

141. The witness further testified that that the repealed Cap. 444 specified the duties of the National Airports Corporation Limited (as it then was) to perform functions at airports; that those functions included the provision of aircraft services; that Cap. 444 did not provide any delegatory authority to ground handlers; and that nonetheless, the Appellant permitted other handlers to perform tasks where the Appellant did not have facilities to perform those services.

142. When asked what regulated the relationships between the Appellant and the ground handlers, the witness stated that the relationships were defined by written and fully signed agreements. The witness was then referred to pages 1 to 4, and 5 to 7 of the Bundle of Documents, which pages the witness stated contained agreements between the 2nd Respondent and the National Airports Corporation Limited (as it then was) now styled Zambia Airports Corporation Limited for operations in Lusaka (at Lusaka International Airport (now Kenneth Kaunda International Airport)) and Ndola, respectively. The witness was, thereafter, referred to various pages of the Bundle of Documents to which he spoke.

Cross Examination of AW3 by the 2nd Respondent

143. In cross examination, the witness testified that the National Airports Corporation (now Zambia Airports Corporation Limited) was the entity that had direct contracts with the airlines with respect to which subcontracts had been entered.

Re-examination of AW3

144. There was no re-examination of the witness.

Questions/Clarifications by Tribunal

145. The Tribunal sought further clarification from AW3 on the Appellant's functions and the issue of delegation. Accordingly, the Tribunal posed some questions to the witness.

146. The Tribunal referred the witness to section 25(b) of the Aviation Act Cap 444 (which law was in force at the time of the alleged commission of the violation of the Act). The section provides-

> *25. On and after 11th September 1989 there shall be transferred to, and vested in, the Company-*
>
> *(a)* ...;
>
> *(b)* *subject to any conditions which may be imposed by the Minister, those functions which prior to the commencement of this Part were functions exercised by the Government in relation to designated airports;* ...
>
> *(c)* ...

147. The Tribunal sought to establish under which section of Cap 444 ground handling, as a function, fell. The witness responded, *inter alia*, that ground handling as a service is part of a number of services that are offered to an aircraft; and that all services offered to an aircraft in the Act have been generally referred to as aircraft services.

148. The Tribunal then asked the witness which particular section of the permits for delegation for ground handling. The witness testified that there are some functions that National Airports Corporation could not deliver because it did not

own or operate those facilities, such as warehousing; that when handling cargo, one needed to have or operate warehouses where that cargo could be sorted, screened and cargo manifests drawn; that because the Corporation did not operate those functions it became necessary to subcontract companies that offered those services; and that as such, delegation or subcontracting was necessary. Counsel for the Appellant then identified section 26 as encompassing the functions of the Appellant.

149. When asked what the authority for delegation was, the witness testified that the Aviation Act did not specifically confer authority to delegate services; and that based on need for the services to be provided, the Appellant did engage other providers to go ahead and provide services as they were necessary for aircrafts when they landed at an airport.

150. The Tribunal sought to establish the existence of principal--agent agreements between Appellant and either Hill &Delamain, NAC2000 or ZEGA (in which it was specifically stated that any of the three entities was an agent of the Appellant). The witness responded that the Appellant held the main contract and subcontracted agents to carry out functions of cargo handling on the Appellant's behalf; that they have a principal and agent relationship with those companies they engage; and that the Appellant had also allowed companies to provide services on the Appellant's premises, where the Appellant was not the principal holder of the contract but the companies had gone ahead and provided services to the aircraft, on condition that the companies pay a concession for using the Appellant's space or operating on the Appellant's premises.

151. The Tribunal then asked the witness if the three entities (Hill &Delamain, NAC2000 and ZEGA) worked wholly for the Appellant's benefit, carrying out wholly the instructions of the Appellant (as the "principal") or the three entities assumed the financial risks associated with the provision of ground handling services on their own. The witness responded that there were two scenarios of contracts; that the first scenario is where the Appellant was the principal and it

subcontracted the companies to provide a service on the Appellant's behalf this is on one part; that the second scenario was where the companies assumed the risks, including the financial risks attached to the provision of those services; and that in the second scenario, the Appellant did not take up any risk, there was no principal and agent relationship, and the entities were merely allowed to conduct business as long as they paid a concession for conducting business on the Appellant's premises.

152. Finally, the Tribunal enquired from the Appellant which of the two scenarios applied to the appeal. The witness stated that with respect to the 2nd Respondent, the second scenario was applicable; and that the 2nd Respondent conducted their business on the appellant's premises and paid a concession or rental.

153. The Tribunal issued the following orders of directions to the Appellant and the 2nd Respondent (the 1st Respondent having opted to rely on its submissions already on record): that the Appellant files its supplementary submission within 10 days; that Secretariat serve the supplementary submissions on the 2nd Respondent within 3 days of the filing of the submissions; that upon service on the 2nd Respondent, the 2nd Respondent files their submission within 10 days; that Secretariat will serve, on the Appellant, the submissions from 2nd Respondent within 3 days following their filing; and that in the event that reply is necessary, the Appellant, upon being served, will be entitled to a reply within 7 days.

Appellant's Supplementary Submissions

154. The Appellant filed its supplementary submissions on 2nd September, 2021.The Appellant submitted as follows:

(1) That the mandate of the Tribunal was extended 3 times by the parties prior to the issuance of the Order to Produce dated 10th December, 2021;

(2) That pursuant to section 71(1)(a) of the Act, the Appellant and the 2nd Respondent were ordered, by the Tribunal, to produce certain documents;

(3) That the Appellant, pursuant to the Order to Produce, filed its Bundle of Documents on 23rd December, 2020;

(4) That the Bundle of Documents contained documents which show the contractual relationship between the Appellant and the 2nd Respondent, Hill &Delamain and NAC2000;

(5) That trial under the Order to Produce was conducted on 25th August, 2021, and that testimony was given, under oath, on the Appellant's behalf by one Josiah Mvula, the Appellant's Planning and Business Development Manager;

(6) That the law in force at the relevant time of the subject matter of this action was the repealed Aviation Act Chapter 444 of the Laws of Zambia;

(7) That sections 25 and 26 of the Aviation Act, Cap. 444 provides-

25. *On and after 11th September 1989 there shall be transferred to, and vested in, the Company-*

(a) designated airports;

(b) subject to any conditions which may be imposed by the Minister, those functions which prior to the commencement of this Part were functions exercised by the Government in relation to designated airports; and

(c) all property, rights, liabilities and obligations which immediately before the appointed date were property, rights, liabilities and obligations of the Government relating to designated airports.

26. *(1) The functions of the Company shall be-*

(a) functions referred to in paragraph (b) of section twenty-five;

(b) subject to the direction of the Minister, to provide air traffic control service throughout the Republic;

(c) to provide aircraft services at designated airports;

(d) to provide fire and rescue services at designated airports and if directed by the Minister provide fire and rescue services at other

airports;

(e) to provide and maintain navigational and telecommunications aids throughout the Republic;

(f) to provide security at designated airports; and

(g) to provide terminal facilities for passengers and cargo at designated airports.

(2) In performing the functions set out in subsection (1) the Company may-

(a) plan, develop, construct and maintain runways taxiways, aprons, terminal and ancillary buildings;

(b) arrange for postal, money exchange, insurance and telephone, facilities for the use of passengers and other persons at designated airports;

(c) regulate and control the movements of vehicles and the entry and exit of passengers at designated airports; and

(d) do all acts and things as may be necessary or incidental for the performance of its functions under this Part.

(8) The Aviation Act did not give the Appellant the authority to delegate its ground handling function to other players;

(9) It recognised only the Appellant as being a provider of ground handling services following the transfer of the functions from government to the Appellant under section 25(b);

(10) That the Appellant is further authorised under section 26(c) to provide aircraft services at designated airports and that these aircraft services referred to in the Act include ground handling services;

(11) That the Appellant was unable to meet the demand in the market as it did not have all the required facilities to provide ground handling services at all levels;

(12) Due to this gap in its service delivery, the Appellant sought to engage other players in the ground handling business;

(13) That the other players would either-

(a) Enter into ground handling contracts directly with the airlines; or

(b) Enter into a sub-contract with the Appellant, wherein the Appellant would subcontract a portion of the ground handling service to another player;

(14) That section 5 of the Statutory Functions Act Chapter 4 of the Laws of Zambia provides-

> *5. (1) No person may delegate a statutory function with which he is vested unless he is expressly so authorised by the Act by or under which such function was conferred or imposed:*
>
> *Provided that the President, the Vice-President, a Minister, the Secretary to the Cabinet, the Attorney-General or a Deputy Minister may, subject only to section six, by writing under his hand, delegate to any other person any statutory function with which he is vested.*

155. Counsel for the Appellant cited an article entitled "The Notion of Competition, potential completion and restriction in the case law: an excerpt" in which the author stated at p.2 that *"in certain circumstances, competition may not be altered by virtue of the practice, if for instance, they* [sic] *are legal barriers to entry that preclude market entry. A case involving intellectual property rights is* ***Case T-198/98 Micro Leader v. Commission of European Communities"***. Learned Counsel for the Appellant also cited the same author who said, *"It may be the case, for instance, that the question of whether a firm can enter a market is a de facto consequence of a combination of several pieces of legislation. This was the, in essence* [sic] *the finding in* ***Case T-360/09 E.ONRuhrgas AG and E. ON AG v Commission****, where the General Court (GC) concluded that the regulatory framework afforded, for a certain period, a*

defacto monopoly in one of the geographic areas covered by the agreement. As a result, the practice was deemed not to amount to an infringement during that period."

156. It was further submitted that while the Appellant's ground handling function is recognised in sections 25 and 26 of the Aviation Act, in light of section 5 of the Statutory Functions Act, the ground handling function cannot be delegated minus express authority to delegate under the law; that the obligation to perform ground handling services solely deposed on the Appellant; that in light of the article referred to above, where a law is in place that restricts the entry into the ground handling market, there can be no infringement of competition law; that the monopoly created by the Aviation Act whereunder the Appellant was the only ground handler was legal; and that, therefore, it follows that there could not have been competition at the relevant time in the ground handling market for the Appellant to be found wanting for any infringement.

157. Counsel finally submitted that the law clearly recognised only the Appellant as an airport service provider and a ground handler at the relevant time; that on account of its inability to meet the needs of the industry, it allowed other players to enter the market; and that, however, as the other players are not legally recognised as players, they could not be recognised by law for their claim of anti-competition when they were not recognised by statute as players in the ground handling market.

2nd Respondent's Supplementary Submissions

158. The 2nd Respondent, in its submissions, focused, *inter alia* on the abuse of dominance, by the Appellant, contrary to section 16 of the Act.

Consideration of case

159. The Tribunal wishes to thank Learned Counsel for their spirited arguments and submissions to which the Tribunal will make reference as and when necessary.

160. The Tribunal has considered the evidence on record and has established the following cardinal fact – that the Appellant was, at the material time, a statutory or legal monopoly. This fact, as will be shown, is cardinal, because it determines

whether or not the Act applies to the case before us, and ultimately, whether or not this Tribunal has jurisdiction to hear and determine this case. We will now consider what a statutory or legal monopoly is.

What is a statutory monopoly?

161. A statutory monopoly is defined in section 2 of the Act as follows:

" statutory monopoly " means a commercial undertaking or an activity conducted by an entity, whether or not owned wholly or partly by the State, on the basis of statutory provisions that preclude other entities from conducting the same activity;

162. A statutory monopoly is also referred to as a legal monopoly. A legal monopoly is one which is created on account of the law which created the monopoly (or any other law) either prohibiting altogether or severely limiting, competition.

Legal Monopoly

163. Some governments will, in respect of certain products, erect barriers to entry by prohibiting or limiting competition. These products may include, but are not limited to telecommunications, postal services, electricity, water provision and garbage collection.[2] Most legal monopolies are considered utilities, i.e. products that are essential for everyday life or that are socially beneficial to have.[3] As a consequence, some governments allow producers to become regulated monopolies so as to ensure that an appropriate amount of these products is provided to consumers.[4]

164. A legal monopoly is one that arises when a government deems that permitting a single enterprise to be the sole provider of a service or a product would be in the best interests of citizens.[5] In a legal monopoly, a government is able to regulate

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[2]Promoting Innovation, available athttps://courses.lumenlearning.com/wmopen-microeconomics/chapter/how-monopolies-form-barriers-to-entry/
visited on 19/10/2021 at 22:27 hours.
[3]Promoting Innovation, *supra*
[4]*Ibid*
[5] Legal Monopoly, Available at
https://corporatefinanceinstitute.com/resources/knowledge/economics/legal-monopoly/
Visited on 08/11/2021 at 09:52 hours
08/11/2021

prices and provide the population with wide access to goods and services, oversee the operations of the legal monopoly and shift the monopoly to act in the best interests of consumers.[6]

165. A legal monopoly can either be independently run and government regulated, or both government-run and government regulated. A legal monopoly is also known as a "statutory monopoly."[7]

Forms of government created legal monopoly

166. A government created legal monopoly can either take the form of a government-granted monopoly[8] or a government monopoly. We are concerned with the latter.

Government monopoly

167. In a government monopoly, the holder of the monopoly is formally the government itself and the group of people who make business decisions is an agency under the government's direct authority. This the Tribunal finds to be the case in respect of ZACL to the extent that it is 100% owned by the Government.[9]

168. Further, in a government monopoly, an enterprise under the direct authority of the government itself holds the monopoly, and the monopoly is sustained by the enforcement of laws and regulations that ban competition or reserve exclusive control over factors that relate to production to the government.[10] That is to say,

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[6] *Ibid*

[7] Legal Monopoly by Will Kenton, Available at https://www.investopedia.com/terms/l/legalmonopoly.asp Visited on 08/11/2021 at 09:56 hours

[8] In a government-granted monopoly, on the other hand, the monopoly is enforced through the law, but the holder of the monopoly is formally a private firm, which makes its own business decisions.

[9] Workshop on the Development of National Performance Framework For Air Navigation Systems (Nairobi, 6-10 December 2010) Zambia, Available at https://www.icao.int/ESAF/Documents/meetings/2010/wdnpf_ans/docs/presentations/zambia.pdf Visited on 08/11/2021 at 00:06 hours.

[10] Barriers to Entry: Reasons for Monopolies to Exist https://courses.lumenlearning.com/boundless-economics/chapter/barriers-to-entry-reasons-for-monopolies-to-exist/ Visited on 08/11/2021 at 10:02 hours

in a monopoly created by government, competition is kept out of the market through laws, regulations, and other mechanisms of government enforcement.[11]

History of Government Monopolies in Zambia

169. Historically, world over, government monopolies on a range of public utilities, have been common.[12]In Zambia, in particular, shortly after independence (in 1964), Zambia embarked on a program of national development planning—the Transitional Development Plan—preceding the First National Development Plan of 1966–71.[13] A major switch in the structure of the country's economy came with the Mulungushi Reforms of April 1968, in which the United National Independence Party (UNIP) government declared its intention to acquire an equity holding (usually 51 percent or more) in a number of key foreign-owned firms, to be controlled by the Industrial Development Corporation (INDECO)[14], and the Matero Reforms of 1969.

170. Following these Reforms, the Zambian government nationalised key enterprises.[15] Thus, over the decades that followed, the State owned business entities in all industrial and services sectors of the country's economy, including agriculture, airline and bus services, hotels and tourism, milling, mining, the timber industry, and utilities such as the supply of water and electricity. By 1980, more than 80 percent of the economy was operated by the Government.[16] Essentially, UNIP's socialist policies barred both local and foreign private investors from medium and large-scale commercial and industrial sectors of the

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[11] Barriers to Entry: Reasons for Monopolies to Exist, *supra*

[12] *Ibid*

[13] "Zambia" in Encyclopedia Britannica, by Roberts, Andrew D. , Williams, Geoffrey J. and Hobson, Richard Hamilton. Available at https://www.britannica.com/place/Zambia/Religion#ref480883
Visited on 10/11/2021 at 11:00 hours

[14] *Ibid*

[15] State Enterprise and Privatisation In Zambia 1968 - 1998. By John Robert Craig. Available at https://etheses.whiterose.ac.uk/461/1/uk_bl_ethos_341205.pdf
Visited on 08/11/2021 at 00:31 hours

[16] Privatization of Public Enterprises in Zambia: An Evaluation of the Policies, Procedures and Experiences by Caleb M. Fundanga and Andrew Mwaba, African Development Bank Economic Research Papers No 35. Available at https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/00157604-FR-ERP-35.PDF
Visited on 07/11/2021 at 23:57 hours

country's economy from the mid-1960s to 1991.[17] In so doing, state corporations were not subject to competition, resulting in monopolies.[18]

171. What was wrong with this Strategy? Like elsewhere, Zambian state owned enterprises failed to perform for a variety of reasons including: the application of inappropriate technology; total dependence on processing of imported raw materials; inexperienced management; misappropriation of resources by officials appointed by governments to run them; and operation in monopolistic environments with no competition.[19] The implication of this was that these enterprises were typically inefficient, which affected their financial viability, in turn requiring the government to subsidise their operations.[20] The Government, consequently, found itself in huge debt.

172. Subsequently, the World Bank and the International Monetary Fund pushed for the Government to divest its parastatals as a condition for debt relief and further funding.[21] The initiative found support within the National Assembly, and a Special Parliamentary Select Committee, which sat in July 1990, supported the direction of Government policy, emphasising, *inter alia*, the subjecting of enterprises to competition.[22]

173. On 4th July, 1992, the Parliament of Zambia enacted the Privatisation Act No. 21 of 1992 (Chapter 386 of the Laws of Zambia). The Privatisation Act established

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[17]The Privatisation of State-Owned Assets Explained *By HenryKyambalesa* https://www.lusakatimes.com/2021/08/08/the-privatisation-of-state-owned-assets-explained/ 08/11/2021 at 10:38 hours

[18]Control in the Parastatal Sector in Zambia, by Ben Turokhttp://saipar.org/wp-content/uploads/2013/10/CHP_10_Law_in_Zambia.pdf Visited on 07/11/2021 at 23:45 hours

[19] Privatization of Public Enterprises in Zambia: An Evaluation of the Policies, Procedures and Experiences, *supra*

[20]*Ibid*

[21]Privatisation of State Owned Enterprises in Zambia: Winners and Losers Royd Malisase* Department of Political and Administrative Studies, University of Zambia, Lusaka, Zambia, in *World Journal of Social Sciences and Humanities, 2021, Vol. 7, No. 1, 10-17.* Available at http://pubs.sciepub.com/wjssh/7/1/2 visited on 07/11/2021 at 22:10 hours

[22] State Enterprise and Privatisation In Zambia 1968 – 1998, by John Robert Craig. Available at https://etheses.whiterose.ac.uk/461/1/uk_bl_ethos_341205.pdf Visited on 08/11/2021 at 00:31 hours

the Zambia Privatisation Agency with a board mandated to undertake the privatisation process.[23]And so was introduced privatisation.

174. The Government outlined its ultimate eventual goal as selling majority or outright ownership of all State enterprises except public utilities and other strategic industries.[24]

Introduction of competition following privatisation

175. Following privatisation, in many of the utility industries arrangements have been undertaken to ensure that competition is introduced where possible.[25] This, however, at the time of the complaint herein, was not the case with respect to the Appellant. This is evident from a perusal of the Aviation Act, Cap. 444.

Competition in National Airports Corporation Limited (NACL)/ZACL

176. The Appellant, at the time of its establishment, named the National Airports Corporation Limited (NACL), is a parastatal company which was established in 1989 through an amendment (by virtue of (*Act No.* 16 *of* 1989) to the Aviation Act (See section 25 of the Act, read together with section 24 of the Act) and registered under the Companies Act, Chapter 388 of the Laws of Zambia.

177. The Corporation was established to develop, maintain and manage the four designated international airports, namely Lusaka, Ndola, Livingstone and Mfuwe and provide air navigation services throughout Zambia. The functions of the Corporation are set out in section 26 of the Act. (Refer to paragraph 154 of this judgment). The Corporation was thus designated the operator of the four airports. An airport operator is defined as, "*A natural or legal person authorized to manage or operate an airport.*[26]

Authority of ZACL to delegate its functions under the Aviation Act, Cap.444

178. A perusal of the Act shows there is no other entity authorised, by law to operate the four airports or to provide airport services. In addition, the Act does not

[23] *Ibid*
[24] *Ibid*
[25] *Ibid*
[26] "Airport operator" definition, Available at https://www.lawinsider.com/dictionary/airport-operator visited on11/11/2021 at 15:27 hours

permit the Corporation to designate another entity as an airport operator or a ground handler. Put in other words, that the Corporation does not have the power to delegate its functions to any other entity. The Aviation Act, in this regard, is to be distinguished from the current Civil Aviation Act No. 5 of 2016[27] which, in sections 99 and 100(3), suggest the authority to delegate the Appellant's ground handling function. The sections provide, respectively, as follows:

99. *The Authority may limit the number of airport services providers authorised to provide the following categories of airport services at an airport:*

(a) passenger and baggage handling;

(b) ramp handling;

(c) ground handling of aircraft, cargo and mail whether incoming, outgoing or being transferred between the terminal building and the aircraft; and

(d) such other services as the Authority may determine.

(3) Airport services provided, in accordance with subsection (1), may be performed by at least two self-service providers selected on the basis of relevance, objectivity, transparency and non-discrimination, for the following categories of airport services:

(a) ground handling of baggage;

(b) ground handling of aircrafts on the apron;

(c) supply of fuel and lubricants; and

(d) ground handling of cargo and mail, whether incoming,outgoing or transfer between the cargo terminal and the aircraft.

179. The Tribunal opines that the question of authority to delegate is imperative in view of section 5 of the Statutory Functions Act (enacted in 1970), Chapter 4 of our Statute Book, which section proscribes any delegation of a function without express authorisation in that regard. The section provides -

[27]The Civil Aviation Act, 2016 was assented to on 5th April, 2016, ten months after the complaint herein.

5. (1) No person may delegate a statutory function with which he is vested unless he is expressly so authorised by the Act by or under which such function was conferred or imposed:

180. That section only permits delegation, in writing, by the President, the Vice-President, a Minister, the Secretary to the Cabinet, the Attorney-General or a Deputy Minister, subject to section six of the Statutory Functions Act, which section limits the nature of the functions that are delegable.

181. On the basis of the foregoing, the Tribunal is of the view that there was, at the material time, only one player existing on the relevant market and that this player was the Appellant. Any delegation purportedly undertaken by the Appellant was, therefore, without any lawful authority, i.e. illegal. On the basis of this illegality, the perception or illusion that there existed, on the market other players cannot find any legal justification. In the view of the Tribunal, the 2nd Respondent thus, laboured under the erroneous perception that it was player on the market. As a consequence, the Tribunal holds that there was, in fact, no competition.

Does the Competition and Consumer Protection Act apply to the Appellant?

182. The Tribunal is of the view that the Act does not apply to the Appellant. This view is premised on sections 3(2) of the Act which provides as follows:

> *(2) This Act binds the State insofar as the State or an enterprise owned, wholly or in part, by the State engages in trade or business for the production, supply, or distribution of goods or the provision of any service within a market that is open to participation by other enterprises.*(Emphasis ours)

183. Section 3(2) is very clear as it implies that where the State or an enterprise owned, wholly or in part, by the State engages in trade or business for the production, supply, or distribution of goods or the provision of any service within a market that is NOT open to participation by other enterprises, the State will not be bound by the Act. [Emphasis ours]. The fact that the market is not open to participation by other enterprises is evident from a perusal of the

Aviation Act, and the glaring absence of provisions expressly or impliedly permitting competition or participation, as it were, by other enterprises. We therefore, do not agree with the finding by the 1st Respondent (in justifying the application of the Act to the Appellant on the basis of section 3(2) of the Act) that *"...as ZACL is a ground handler, it competes, in the ground handling market, with ZEGA, NAC2000 and to a limited extent, with Hill & Delamain; that this market is open to participation by other enterprises who engage in trade for a profit;..."*

184. The Tribunal also considered whether the Appellant was caught up by section 3(3)(e)(i) or (ii) of the Act i.e. did the Appellant engage in any conduct (set out in section 3(3)(e) (i) or (ii) of the Act)) that would trigger, in respect of ZACL, the application of the Act? This is in view of the fact that while section 3(3)(e) provides that the Act does not apply to the business of any enterprise exercising a statutory monopoly which precludes the entry of another enterprise into the relevant market in Zambia, this exclusion is only applicable insofar as the enterprise does not enter into an agreement that has the purpose of restricting competition, or does not engage in conduct which, in itself or in conjunction with another enterprise, amounts to abuse of a dominant position.

185. Section 3(3)(e)(i) and (ii) provide-

> *(3) This Act shall not apply to—*
>
> *(a)* ...
>
> *(b)* ....
>
> *(c)* ....
>
> *(d)* ....
>
> *(e) the business of any enterprise exercising a statutory monopoly which precludes the entry of another enterprise into the relevant market in Zambia:*
>
> *Provided that—*

(i) the enterprise does not enter into an agreement that has the purpose of restricting competition;

(ii) the conduct of the enterprise does not, in itself or in conjunction with another enterprise, amount to an abuse of a dominant position; or

(iii) the enterprise, if it wishes to enter into a merger transaction, is in compliance with the provisions of this Act relating to mergers.

Did the Appellant enter into an agreement that has the purpose of restricting competition?

186. A careful study of section 3(3)(i) reveals that a literal interpretation of the provision results in an absurdity. This is because the *chapeau* suggests from the onset that the Act will not apply to the business of any enterprise exercising a statutory monopoly which precludes the entry of another enterprise into the relevant market in Zambia, i.e. the section recognises that an enterprise may be the only player in the market, as the applicable law may preclude other players or potential players. The law itself will thus restrict competition and form a barrier to the entry, on a market, of other players. Now, in the view of the Tribunal, if the *chapeau* (interpreted literally), is read together with paragraph (i) of the proviso, it would read as follows:

(3) This Act shall not apply to—

(e) the business of any a statutory monopoly protected by law from competition in the relevant market in Zambia:

Provided that—

(i) the enterprise does not enter into an agreement that has the purpose of restricting competition;...

187. The Tribunal is of the view that a literal interpretation of section is problematic as it suggests, *inter alia,* that an enterprise in respect of which competition, in the relevant market, is restricted by law, can enter into an agreement that restricts competition, in the same relevant market.

188. This implication is problematic as it raises the following questions:

(1) If an enterprise in respect of which competition, in the relevant market, is restricted can enter into an agreement that restricts competition, in the same relevant market, from whence would the other party (player) to the restrictive agreement come, if the law proscribes competition, in a relevant market and hence other players, in the same relevant market?

(2) Can an enterprise enter into an agreement to restrict competition which competition has already been restricted by law? i.e Can an enterprise enter into an agreement to oust that which, by law, has already been ousted?

189. In the case of ***Rumpuns Trading Limited v. The Competition and Consumer Protection Commission, Appeal No. 2017/CCPT/019/COM*** in which this Tribunal was faced, *inter alia,* with the question of the interpretation of section 24(3) of the Act, we stated that (quote)-

The general rule on interpretation of statutory provisions is laid down in the case of ***General Nursing Council of Zambia v Ingutu Milambo Mbangweta (2008) ZR 105 (SC)*** *as follows:*

... the primary rule of interpretation of statutes is that enactments must be construed according to the plain and ordinary meaning of the words used, unless such construction would lead to some unreasonable result, or be inconsistent with, or contrary to the declared or implied intention of the framers of the law, in which case the grammatical sense of the words may be extended or modified.

In the case of ***Anderson Kambela Mazoka and Others v. Levy Patrick Mwanawasa and others (2005) ZR 138 (SC)*** *it was stated by our Supreme Court that-*

It is trite law that the primary rule of interpretation is that words should be given their ordinary grammatical and natural meaning. It is only if there is ambiguity in the natural meaning of the words and the intention cannot be ascertained from the words used by the legislature, that recourse can be had to the other principles of interpretation.

Further, in the case of ***Matilda Mutale v. Emmanuel Munaile (2007) ZR 118 (SC)*** *it was held, as regards the construction of Acts of Parliament that-*
...they must be construed according to the words expressed in the Acts themselves. If the words of a statute are precise and unambiguous, then no more can be necessary than to expound on those words in the ordinary and natural sense. Whenever a strict interpretation of a statute gives rise to an absurdity and unjust situation, judges can and should use their good sense to remedy it by reading words in it, if necessary so as to do what Parliament would have done had they had the situation in mind.

190. In the opinion of the Tribunal, on account of the questions arising on account of the literal interpretation of the provision, the said provision cannot be interpreted literally as such interpretation may arrive at an unreasonable result. In the view of the Tribunal the only logical interpretation of the provision is that it (section 3(3)(e)(i)) must be construed to apply to instances where an enterprise as a statutory monopoly (or dominant player) brings its economic strength to bear on another market and, on that market, enters into a restrictive agreement. In other words, the provision can only properly apply to restrictive agreements that are linked to the relevant market i.e. the restrictive agreements envisaged in section 3(3)(e)(i) are vertical agreements as opposed to horizontal agreements.

191. This Tribunal dealt with the issues of linked markets in the case of ***MRI Seed Zambia Limited, Tombwe Processing Limited and Precision Farming Holdings Limited V. Amiran Zambia Limited, ATS Agro Chemicals Limited and The Competition and Consumer Protection Commission Appeal No. 2017/CCPT/001/CON, Appeal No. 2017/CCPT/002/CON and Appeal No. 2017/CCPT/003/CON***

192. In that case we stated (quote)

> 113. *In particular, we recognise that there may be interplay in competition dynamics between linked markets; where factors in another market may have a bearing on questions of dominance, abuse of conduct or market power. In other words, an enterprise may enjoy dominance in a relevant market or may be held to be abusive of its dominance or market power not because of factors exclusively located in that market. Factors in another related or linked market may have a bearing. For example, in the case EU of British* ***Gypsum v. Commission****, cited by the 3rd Respondent in its final report at 278, paragraph 205 and in the actual decision at page 407, paragraph 206 Record of Proceedings, the ECJ held that "In special circumstances, there could be an abuse of dominant position where conduct on a market distinct from the dominated market produces effects on that distinct market. As stated by the 3rd Respondent, British Gypsum was in plasterboard, but not dominant in the neighbouring plaster market. In the circumstances of this case, we see that it was prudent to focus on both markets in the investigation and assessment, that is, (a)* ***"Sale of tobacco agrochemicals by agrochemical suppliers to commercial contracted tobacco farmers"*** *and (b)* ***"buying of tobacco through contract farming schemes"*** *as relevant markets in view of their relationship in the tobacco industry.*

193. In view of the foregoing, the Tribunal has used its good sense, in view of the context of the *chapeau* to interpret the proviso in section 3 (3) (e) (i) as relating to a "restrictive agreement in a linked market".

194. Having interpreted section 3(3)(e)(i), the question to be answered remains, "Did the Appellant enter into an agreement that has the purpose of restricting competition in another market?"

Did the Appellant enter into an agreement that has the purpose of restricting competition in another market as envisaged in section 3(3)(e)(i)?

195. A perusal of the record and the witness testimony does not reveal any evidence to this effect. For this reason, the Tribunal is of the firm view that the Act, by virtue of section 3(3)(e)(i), is precluded from application to the Appellant.

196. The next question to be determined arises from section 3(3)(e)(ii) of the Act. The question reads as follows: *Did the conduct of the Appellant, in itself or in conjunction with another enterprise, amount to an abuse of a dominant position?* The response to this question is imperative as it will determine whether or not the Act applies *in casu*. The question is addressed in the ensuing paragraphs.

Did the conduct of the Appellant, in itself or in conjunction with another enterprise, amount to an abuse of a dominant position?

197. In order to establish whether or not the conduct of the Appellant amounted to an abuse of a dominant position, it is necessary to first establish what constitutes a dominant position. It is necessary, thereafter, to establish what amounts to an abuse of dominance and to assess, thereafter, if the action(s) amounting to abuse of dominance caused the anti-competitive effects set out in section 16(1) of the Act.

Is the Appellant in a dominant position of market power?

198. According to the ROP, it was submitted that in the international airport facility and management market, ZACL is the only operator in Zambia and hence has 100% market share; that given the threshold for presumption of market power for a single firm is 30%, ZACL is, therefore, dominant, and has market power in the international airport facility and management market; that the NACL Strategic Plan (2012-2017) shows that ZACL has an 80% market share in the ground handling market, while ZEGA Limited has 20% market share and NAC2000 has 0%; and that, therefore, ZACL has a 100% share in the "upstream "market and 80% market shares in the "downstream" market.

199. AW3 testified that ground handling as a function falls under the purview of aircraft services, and Counsel for the Appellant, in this regard, referred the Tribunal to section 26 of the Aviation Act, Cap. 444, wherein the provision of aircraft services is set out as a function of the Appellant. On account of the finding by the Tribunal that the ground handling and airport operator functions of the Appellant are non-delegable on account of the provisions of the law, the Tribunal finds that the Appellant, by law, has a 100% market share in the ground handling market as it is the only ground handler. This is contrary to the stipulation contained in the Appellant's Strategic Plan (2012-2017). Having established that the Appellant was in a dominant position, it is necessary to determine what constitutes an abuse of dominance.

What is abuse of dominant position?

200. The Act defines abuse of dominant position as follows:

> ***16.*** *(1) An enterprise shall refrain from any act or conduct if, through abuse or acquisition of a dominant position of market power, the act or conduct limits access to markets or otherwise unduly restrains competition, or has or is likely to have adverse effect on trade or the economy in general.*
>
> *(2) For purposes of this Part, " abuse of a dominant position " includes –*
>
> *(a) imposing, directly or indirectly, unfair purchase or selling prices or other unfair trading conditions;*
>
> *(b) limiting or restricting production, market outlets or market access, investment, technical development ortechnological progress in a manner that affects competition;*
>
> *(c) applying dissimilar conditions to equivalent transactions with other trading parties;*
>
> *(d) making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or*

according to commercial usage have no connection with the subject matter of the contracts;

(e) denying any person access to an essential facility;

(f) charging an excessive price to the detriment of consumers; or

(g) selling goods below their marginal or variable cost.

201. The Board of the 1st Respondent found, *inter alia*, that the Appellant violated section 16(2)(c) as read together with section 16(1) of the Act. The question to be answered by the Tribunal is this, "Did the Appellant in fact violate section 16(2)(c) as read with section 16(1)?"

202. Determining this question is important as it will establish whether the Act will apply to the Appellant pursuant to section 3(3)(e)(ii), read together with section 16(1) and 16(2) of the Act (i.e. whether the Act will apply to the Appellant by virtue of the Appellant abusing its dominant position (and in particular, by, engaging in discriminatory pricing contrary to section 16(2)(c)).

Did the Appellant violate section 16(2)(c) of the Act as read together with section 16(1)?

203. As is evident from a perusal of section 16(1) of the Act, that section proscribes the abuse of a dominant position.

204. Section 16(2)(c), in particular, in defining "abuse of a dominant provision" states (quote)-

(2) For purposes of this Part, "abuse of a dominant position" includes –

(c) applying dissimilar conditions to equivalent transactions with other trading parties;...

The Tribunal notes that the Act does not define trading parties.

205. The Tribunal is of the view that it is important to establish who a trading party is in order to determine the precise identity of the victim of the abuse, in terms of the provision. That is to say, it is important to determine who "trading parties" are (in terms of section 16(2)(c)) in order to establish if, in the case before us,

those trading parties were subjected to dissimilar conditions for equivalent transactions.

206. From research undertaken by the Tribunal, a trader is a person whose business is buying and selling or barter: such as a merchant[28]. A trader is also defined as a person whose job is to trade in goods or stocks.[29]In terms of our Act, therefore, a trading party can safely be interpreted to mean an enterprise's competitors, customers and consumers.

207. Having categorised a trading party as being a competitor, customer or a consumer, the question to be asked is did the Appellant apply dissimilar conditions to equivalent transactions with other trading parties, i.e. Did the Appellant apply dissimilar conditions to equivalent transactions with other competitors, customers and consumers?

Did the Appellant apply dissimilar conditions to equivalent transactions with other trading parties, i.e. Did the Appellant apply dissimilar conditions to equivalent transactions with other competitors, customers and consumers?

(1) Did the Appellant apply dissimilar conditions to equivalent transactions with other competitors?

208. The response to this question is simple. As the Appellant did not, by law, have, at the material time, any competitors, it was not possible for it to have applied dissimilar conditions to equivalent transactions with other trading parties (i.e. its competitors). Any competitors were, at best, illusory.

(2) Did the Appellant apply dissimilar conditions to equivalent transactions with other trading parties, i.e. Did the Appellant apply dissimilar conditions to equivalent transactions with its customers?

209. Ethiopian Airlines Ent., Egypt Air and Precision Air were, at the material time, being handled by the Appellant. They were, therefore, the Appellant's

[28]Definition of trader, Available at https://www.merriam-webster.com/dictionary/trader
Visited on 11/11/2021 at 13:20 hours
[29]Definition of trader, Available at https://www.collinsdictionary.com/dictionary/english/trader
Visited on 11/11/2021 at 13:20 hours

customers. Their respective relationships were governed by Standard Ground Handling Agreements as follows:

(1) Ethiopian Airlines Ent. (See contract on pp.122-131 of the ROP (Contract valid from April 1, 2010 to 31st March, 2015));

(2) Egypt Air (p.118-121 ROP (Contract valid from 01 January, 2011, to 31st December, 2014); and

(3) Precision Air (p.114-118 of the ROP (May, 2012 to April, 2015)) were handled by the Appellant.

210. They were, thus, trading parties in terms of the Act. Consequently, it is imperative for the Tribunal to establish if the Appellant charged these trading parties differently for the equivalent transactions. This determination is important as it will establish whether the Act will apply to the Appellant pursuant to section 3(3)(e)(ii), read together with section 16(1) and 16(2) of the Act (i.e. whether the Act will apply to the Appellant by virtue of the Appellant abusing its dominant position (and in particular, by, engaging in discriminatory pricing contrary to section 16(2)(c)).

Did the Appellant abuse its dominant position (in particular, by engaging in differential pricing to equivalent transactions with its customers contrary to section 16(2)(c) of the Act)?

211. As has been stated above, the Appellant handled Ethiopian Airlines Ent., Egypt Air and Precision and that the relationship between the Appellant and these airlines was governed by the contracts referred to above. The Tribunal, accordingly, perused those contracts for the purpose of establishing discriminatory pricing. The Tribunal found the following:

(1) Ethiopian Airlines Ent. (April 1, 2010 to 31st March, 2015)

For Aircraft B737, B757, B767, B777 and B787, the full ground handling fee increased from $630, $788, $1,035 to $1, 600, respectively, (See p. 124 of the ROP) over the 4 year duration of the Contract.

This is for Representation, Accommodation, Supervision, Passenger Services, Ramp Services, Load Control, Communications, Flight operations, Cargo and Mail Services, Support services (between terminal building (including freight village) and aircraft and security.

(2) Egypt Air (01 January, 2011, to 31st December, 2014)

(a) For Aircraft B737, the rate payable increased (on account of a discount which reduced by 75% to 0%) from $250 in 2011, to $1, 000 in 2014; and

(b) For Aircraft B777, the rate payable increased (on account of a discount which reduced by 75% to 0%) from $450 in 2011, to $1, 800 in 2014.

These charges are for Representation, Accommodation, Supervision, Passenger Services, Ramp Services, Load Control, Communications, Flight operations, Cargo and Mail Services, Support services (between terminal building (including freight village) and aircraft and security.

(c) Precision Air (May, 2012 to April, 2015))

For Aircraft Type 733, the charge payable was $800 in year 1 and $1, 000 in year 2.

This is for Representation, Accommodation, Supervision, Passenger Services, Ramp Services, Load Control, Communications, Flight operations, Cargo and Mail Services, Support services (between terminal building (including freight village) and aircraft, security.

212. The Tribunal notes the disparity in the pricing of the charges to airlines for similar transactions. For instance in the year 2014, for aircraft B737, Ethiopian Airlines paid $630, while EgyptAir paid $1,000. The Appellant whether intentionally or by implication, admitted that it does engage in price discrimination, but that this was customary in the industry worldwide. The

Tribunal draws this conclusion from the Appellant's Ground of Appeal 1(i)(c) which provides (quote)-

1. *The Commission erred in law and in fact when it held that the Appellant has been abusing its dominant position of market power by applying differential rates to Airline Clients and Ground Handlers for similar transactions-*
   (i) that in finding that differential pricing was discriminatory, the 1st Respondent failed to appreciate that-
      iii. Differential pricing is not discriminatory in the sense that the nature of the industry worldwide and common industry practice dictates that players are allowed to consider various market forces in negotiating prices with airlines. Accordingly ...Ground handling players on the market do not necessarily have fixed pricing with all their clients and customers. Further, factors such as the weight of the Aircraft, the frequency of flights and whether it is a new and unserviced route relating to an airline are also considered in the negotiation process for pricing.

Did the abuse of dominance cause any of the anti-competitive effects set out in section 16(1) of the Act?

213. When one considers section 16 of the Act, it is apparent that section 16(1) and 16(2) cannot be read disjunctively. In the rendering of section 16(1), an abuse of dominance must be one that (quote) "*limits access to markets or otherwise unduly restrains competition, or has or is likely to have adverse effect on trade or the economy in general*". That is to say, limitations to access to markets, undue restraints to competition, or adverse effects (whether actual or likely) on trade or the economy in general must arise from any one or more of the abuses of dominance set out in section 16(2). Accordingly, in the case before us, the finding of the Board of the Commission contained in paragraph 129(i) of the Board decision, simply means that the differential pricing applied by the Appellant to the airlines for which it was a ground handler limited access to markets or otherwise unduly restrain competition, or had or was likely to have an adverse effect on trade or the economy in general.

214. This foregoing entails that there must be causation (usually by reference to an appropriate counterfactual). It is not enough for the 1st Respondent to presume the anti-competitive effects set out in section 16(1). In ***Case C-457/10 AstraZeneca ECLI:EU:C:2012:770, paragraph 199,*** a European Union case, the Court stated (quote) *"a presumption of a causal link . . . is incompatible with the principle that doubt must operate to the advantage of the addressee of the decision finding the infringement."*

215. The expectation is, therefore, that the Commission must conduct a fully-fledged effects analysis, which proves that the abuse does any one or more of the following:

(1) limits access to markets or causes undue restrains to competition--the dominant enterprise's abuse of dominance must hamper or eliminate a competitor's access to markets, i.e. the abusive conduct must create barriers to independent competition[30];

(2) causes actual adverse effects on trade or the economy in general--Actual adverse effects suggest that the adverse effects must exist, and that they must be caused by the abuse. The effects must actually be observable. Causation must, therefore be proved. Proving causation requires comparing prevailing competitive conditions with an appropriate counterfactual where the conduct does not occur[31]; and

(3) is likely to cause adverse effects--the anticompetitive effects must be reasonably likely[32]. If conduct has been ongoing for some time without

[30] Case T-201/04 *Microsoft* ECLI:EU:T:2007:289 (*Microsoft*), paragraph 1088) cited in The Dominance and Monopolies Review: European Union by Thomas Graf and Henry Mostyn*Cleary Gottlieb Steen & Hamilton LLP*21 June 2021
Available at https://thelawreviews.co.uk/title/the-dominance-and-monopolies-review/european-union
visited on 10/11/2021 at 20:44 hours
[31]The Dominance and Monopolies Review: European Union, *supra*
[32]Case T-201/04 *Microsoft* ECLI:EU:T:2007:289 (*Microsoft*), paragraph 1089

observable anticompetitive effects, that suggests the conduct is not likely to cause anticompetitive effects in the first place.[33]

216. From a perusal of the evidence on record, even though the Board of the Tribunal found the Appellant guilty of violating section 16(2)(c) of the Act as read together with section 16(1), there is nothing on record to evidence how the dissimilar conditions (differential pricing in particular) imposed by the Appellant on its airline customers resulted in *limited* access to markets or unduly restrained competition, or even in any actual or likely adverse effect on trade or the economy in general.

217. One would expect the 1st Respondent (as the investigator) to have presented, in the Board decision, any and all evidence which showed, not only differential pricing, but how that differential pricing caused any or all of effects mentioned in section 16(1) of the Act. The Tribunal would, for example, have appreciated evidence adduced by Ethiopian Airline Ent. and EgyptAir showing how the different ground handling rates, for eample, unduly restrained competition.

218. In the view of the Tribunal, as there is insufficient evidence on record to show an abuse of a dominant position on the part of the Appellant in terms of section 16(1), paragraph (ii) of the proviso to section 3(3)(e) cannot be triggered. Consequently, the Act cannot, by virtue of section 3(3)(e)(ii) be said to apply to the Appellant.

219. We also thought it prudent to comment on each aspect the complaint that led to the investigation and decision subject of the Appeal. Reference, in this regard is made to pp. 264-266 of the ROP. We note that the 2ndRespondent lodged the following complaint(s):

(1) That ZACL had recently sought to impose restrictions on the use of the check-in counters for load control and sought to impose a charge on

[33]Case T-70/15 *Trajektna luka* ECLI:EU:T:2016:592, paragraph 24, cited in The Dominance and Monopolies Review: European Union, *supra*

ZEGA; that in the event that ZEGA failed to pay this charge, it would be unable to service its clients; that paying the charges would substantially raise ZEGA's operational costs resulting in loss making by ZEGA; that the CUTE system is an essential facility at the airport and that it was expected that ZACL would at all times make the same available to all ground handlers as denial of these facilities would amount to ZACL's abuse of dominance; and that ZEGA had offered to pay for the installation of CUTE system in their offices but that ZACL denied the request without substantiating its reasons (See paragraph ("para.") 2, pp. 264-265 of the ROP)

The Tribunal, in response, is of the view that even if the CUTE system is an essential facility, ZEGA was not even supposed to access to that system; that the system was, exclusively, for the Appellant; and the 2nd Respondent was labouring under the false perception that there was competition;

(2) that ZEGA has previously been using 6 check-in counters at the Kenneth Kaunda International Airport ("KKIA") when checking in passengers for Emirates; that from 9th July, 2015, ZEGA has been prohibiting ZACL from using more than 4 counters and that a charge of USD100 per counter per use would apply in the event that ZEGA used more than 4 counters. It was alleged that the use of counters is between the airline and the ground handling company and that any additional charges should be levied on the airline. It was alleged that ZACL was attempting to increase the operational costs on ZEGA who was their competitor (See para. 3, p.265 of the ROP).

Again the Tribunal states, the check in counters should not even have been accessed by the 2nd Respondent, in the first place, as the 2nd Respondent was not, by law, a ground handler;

(3) that previously, ZACL owned the only water and toilet servicing units at KKIA. It was alleged that ZEGA, in 2012, invested in its own units in order to provide service to its clients, and that the approval of the units by ZACL took months; that once the approval was granted, ZACL denied ZEGA access to the potable water supply and toilet dumping facility at KKIA; that after several delays ZEGA received a letter informing them that each time it collected water, it had to pay K500 and K11, 000 per month for the use of the dumping facilities; that considering that ZEGA charged K30 per full offering of water and K750 for a complete toilet service, the fees were bound to hinder the operations of ZEGA (See para. 4, p. 265-266 of the ROP)

The Tribunal is of the view that this complaint is premised on the erroneous supposition that ZEGA was a ground handler;

(4) that ZACL was charging ZEGA excessive charges for water.

The Tribunal is of the view that this too, is a complaint that arises on account of the erroneous supposition of ZEGA that it was a ground handler;

(5) that ZACL was charging ZEGA a Ramp Access Fee (RAF) of close to USD300 each time it attended to a client airline and that ZEGA had the option of either transferring the cost to the airline or internalising it making ZEGA operations expensive; that potential client airlines had informed ZEGA that the only institution mandated and recognised as a ground handling entity was ZACL. That this implied that ZEGA had no right to undertake ground handling. (See para. 5, p. 266 of the ROP).

The Tribunal's comment is that ZACL was, by virtue of the law in operation then, the only institution mandated to undertake ground handling services. By law, therefore, ZEGA should not even have been on the ramp (as a ground handler);

(6) that in February, 2015, ZEGA was awarded a tender for the provision of ground handling services to member airlines by the African Airline Association ("AFRAA"). It was alleged that the airlines involved were Kenya Airways, Ethiopian Airways and RwandAir; that ZEGA was informed that ZACL had approached them persuading them to change their decision by offering incentives which were not available to ZEGA and advising potential clients that ZEGA was not licensed to carry out ground handling; and that this led to delayed signing of the contracts agreed under the AFRAA award process (See para. 6, page 266 of the ROP).

The view of the Tribunal is that this tender amounted to an illegal tender (in the sense that it purported to tender that which, by the law in force then, could not be tendered) and it cannot, therefore, be sustained--more so if the consequent Agreement contained activities that were to be executed in Zambia. This is because in terms of the laws of Zambia, in force at the material time, there was only one ground handler namely ZACL. ZEGA could not, by any means, be legally licensed to carry out ground handling;

(7) that ZACL does not handle cargo themselves and that in the event that they were awarded a tender to handle an airline, they subcontracted the cargo element; and that ZACL only give the cargo element to NAC2000 Limited which may be a breach of tender regulations (See para. 7, p. 266 of the ROP)

The Tribunal is of the view that this is a non issue, as the Appellant should not even have engaged NAC 2000 or any other party in a cargo handling contract, as this function was the preserve of the Appellant; and

(8) that ZACL had awarded KLM a two year contract of ground handling free of charge, a move that amounted to applying dissimilar conditions to equivalent transactions (See para. 8, p. 266 of the ROP).

In the view of the Tribunal, this too, is a non issue as the only ground handler by law, was the Appellant.

220. The Tribunal also thought to comment on the threat by ZACL, to Zambezi Airlines, to withdraw concessions if Zambezi Airlines in the event that Zambezi Airlines was to move from ZACL to another ground handler. We find that the threat was neither here nor there as legally, there was only one ground handler.

221. In summary, we find as follows:

(1) The Appellant was a statutory monopoly created under the Aviation Act Cap. 444 of the Laws of Zambia;

(2) The Appellant, by virtue of section 26 of the Aviation Act, was the sole airport operator and ground handler;

(3) Section 5 of the Statutory Functions Act, Cap. 4 proscribes delegation of functions unless expressly authorised by the Act by or under which such function was conferred or imposed;

(4) The Aviation Act Cap. 444 did not permit the delegation, by the Appellant, of its functions as airport operator or ground handler;

(5) Section 5 of the Statutory Functions Act, Cap. 4 proscribes delegation of functions unless expressly authorised by the Act by or under which such function was conferred or imposed;

(6) The delegation, by the Appellant, of its ground handling function to the 2nd Respondent, NAC2000 and Hill & Delamain was illegal, and, therefore, any competition between the Appellant, the 2nd Respondent, NAC2000 and Hill & Delamain was illusory;

(7) Section 3(2) of the Competition and Consumer Protection Act precludes the application of the Act to a statutory monopoly owned, wholly or in part, by the State which engages in trade or business for the production, supply, or distribution of goods or the provision of any service within a market that is open to participation by other enterprises;

(8) By law, the relevant market was not open to participation by other enterprises;

(9) Section 3(3)(e)(i) and (ii) precludes the application of the Act *to the business of any enterprise exercising a statutory monopoly which precludes the entry of another enterprise into the relevant market in Zambia: Provided that the enterprise does not enter into an agreement that has the purpose of restricting competition; or the conduct of the enterprise does not, in itself or in conjunction with another enterprise, amount to an abuse of a dominant position;*

(10) The 1st Respondent has not shown that *ZACL (exercising a statutory monopoly) which precludes the entry of another enterprise into the relevant market in Zambia,* in exercising its business entered *into an agreement that has the purpose of restricting competition; or in exercising its business engaged in conduct which, in itself or in conjunction with another enterprise, amounted to an abuse of a dominant position;*

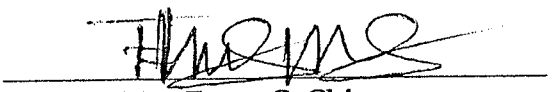
(11) The 1st Respondent thus failed to show how the Act applied to the Appellant;

(12) As the Act does not apply to the Appellant, **the Tribunal has no jurisdiction to hear the Appeal.**

222. In view of the misconstruction of the law, as it then existed, and the erroneous perception that there was a lawful delegation of powers by the Appellant, which in effect created competitors and consequently, competition, each party shall bear its own costs.

223. Any party aggrieved by this decision may appeal within thirty days of this judgment

224. Dated at **Lusaka** this **12th day of November, 2021.**



Mrs. Eness C. Chiyenge
(Chairperson)

Mrs. Miyoba B. Muzumbwe-Katongo
(Vice Chairperson)

Mr. Buchisa Mwalongo
(Member)