THE COMPETITION AND CONSUMER PROTECTION TRIBUNAL

2014/CCPT/ 006

HOLDEN AT LUSAKA

BETWEEN:

**FIRST NATIONAL BANK ZAMBIA LTD** — **1ST APPELLANT**
**AFGRI LEASING SERVICES LTD** — **2ND APPELLANT**

**AND**

**THE COMPETITION AND CONSUMER PROTECTION COMMISSION** — **RESPONDENT**

CORAM: Mr. Aubbie W. Mubanga (Chairperson), Mr. Chance Kabaghe, Mr. Rocky Sombe and Mrs. Eness C. Chiyenge

For the Appellants: Mr. A. Dudhia of Musa Dudhia & Co.
Mrs M. Banda of Musa Dudhia & Co.

For the Respondent: Mrs. M.B. Mwanza -Director Legal & Enforcement, Competition & Consumer Protection Commission

Mrs. M.M. Mulenga - Manager Legal & Enforcement, Competition & Consumer Protection Commission

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# JUDGMENT

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**Legislation referred to:**

1. Competition and Consumer Protection Act, 24 of 2010

2. Interpretations and General Provisions Act, Chapter 2 of the Laws of Zambia

3. Competition and Consumer Protection Regulations, SI 97/2011

4. Botswana Competition Act 2010, Chapter 46: 09 Competition: Subsidiary Legislation, Competition Regulations

**Cases referred to:**

1. Zinka v. The Attorney-General (1990 – 1992) Z.R. 73

2. Sithole v. the State Lotteries Board (1975) ZLR 106

3. Barry Jackson v. Attorney-General (1979) ZLR 167)

4. The Attorney-General, The Movement for Multi-Party Democracy v. Akashambatwa Mbikusita Lewanika & Others SCZ Judgment No. 2 of 1994

5. Seaford Court Estate Led v. Asher [1949] 2 K.B. 431

6. Northman v. Barnett Council (1979) 1 H.L.R. 220

**Other works**

1 "*The cost of regulatory approvals in M&A – 'user pays'*? **by Sam Cottell (September 2012) http://www.claytonutz.com/publications/edition/27_september_2012/20120927**

2. **http://www.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709BG-Competition.AfricaLRVS.pdf B.G. Bowman Gilfillan Africa Group**

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This is an appeal from a decision of the Respondent in which it invoiced the Appellants a notification (or filing) fee in respect of proposed acquisition by the 1st Appellant of a loan book and ancillary rights and securities/collateral to the loan book belonging to the 2nd Appellant at a price of USD34,500,000. The appeal is against the Respondent's refusal to revise the fee, allegedly on account of the statutory provisions for calculation of the fee under the Competition and Consumer Protection Regulations, SI 97/2011 being restrictive.

Briefly, facts not in dispute and relevant to this appeal, as appear in the Record of Proceedings, are that sometime in April 2014, officers of the 1st Appellant and the Respondent (namely, Luyamba Mpamba and Gertrude Musyani, respectively) exchanged some information concerning the proposed transaction between the Appellants and what sort of application to the Respondent the transaction might require. This communication included an email dated 25th February 2014 from Luyamba Mpamba an officer of the Respondent in which she wrote *inter alia*:

*"I have attached the documents requested, for the fees see the SI 97 of 2011. The merger notification fees are determined by calculating 0.1% of the combined Assets and Turnover of the parties to the transaction. You can use the form attached to apply for negative clearance .... In your case it will be important to submit the agreement between the two parties in order to be certain what the transaction is all about and whether it is captured under the CCPA." (Pp. 1 -2)*

On their part, communication from the 1st Appellant's correspondent, one Gertrude Musyani (Legal and Credit Specialist), was emphatic that no merger or acquisition of the Afgri business was anticipated. In her email of even date following which the above quoted email was conveyed to her, she had said:

*"There is no merger/acquisition anticipated and no control/ownership over the Afgri business as Afgri will continue to operate as a going concern following the assignment of the debt to ourselves."(P. 2)*

Later, on 27th February, Gertrude Musyani wrote again, *inter alia* (quoting only what we find relevant to this appeal):

*"As discussed, we are not taking over control of Afgri business .... Equally, there is no merger envisaged as per section 24 of CCPA.*

*With the foregoing, please advise:*

1. ....

2. *What fees will be payable for clearance since there is no merger envisaged. The attachment shows the expected income from the business."(P.1)*

In general, the communication alluded to in the foregoing formed the background to the application dated 3rd April 2014 in which the Appellants, under an application filed by the 2nd Appellant, sought the Respondent's authorization of a horizontal agreement (i.e. under section 14 of the Competition and Consumer Protection Act No. 24 of 2010 (CCP Act)). (Pp. 9 – 15). By letter

dated 15th April 2014, the Respondent informed the Appellants through the 1st Appellant that after careful examination of the proposed transaction, it was of their view that the transaction should be treated as a merger, which required mandatory notification requirements to the Commission for authorization if the combined turnover or assets whichever of the two was higher of the merging parties was higher than K10,000,000. The Respondent enclosed with this letter an invoice for the requisite notification fee in the amount of K1,836,900. (Pp. 20 -22)

The 1st Appellant wrote back to the Respondent through its Advocates, Musa Dudhia & Co., by letter dated 7th May 2014, expressing its dissatisfaction with the method of calculation of the notification fee, which yielded the figure of K1,836,900. The letter addressed the areas of contention as follows (see pp. 23 to 24 of Record of Proceedings):

1. The filing fee was too high considering that the proposed transaction only involved the acquisition of a debtors' book from the 2nd Appellant and not its entire assets.

2. The 1st Appellant's total asset value according to its Annual Financial Statements for the year ended 30 June 2013, which the Respondent had used in arriving at the filing fee, comprised assets the 1s Appellant acquired as a result of its dealings in different products and services including agricultural financing.

3. The 1st Appellant's request was that the filing fee should be calculated on the basis of assets it generated as a result of providing agricultural financing, drawing the Respondent's attention to page 43 of the Financial Statements.

4. The amount of income the 1st Appellant derived from agriculture during the period under review in the Financial Statements was K210,026,000 and this line of business formed the basis for assessing

the relevant market to be affected by the implementation of transaction, which would yield a filing fee of K210,026.

5. Guidance of the Respondent as to the basis of the calculation of the portion of K393,577 attributable to the 2nd Appellant, as according to their understanding pages 7 and 8 of the 2nd Appellant's Financials (for period ending 30 June 2013) showed interest income and the assets in the period under review as K16,324,000 and K176,789,000 respectively, and 0.1% of these figures would be K16,324 and K176,789 respectively.

6. In the event the Respondent accepted the above proposed calculations, the total filing fee would be K386,815.

In its response, the Respondent by letter dated 28th May 2014 reiterated its position that the transaction should be treated as a merger and went on to assert that, *"In this regard, the parties ... are required to fulfill mandatory notification requirements ... for authorisation if the combined turnover or assets whichever of the two is higher of the merging parties is above K10,000,000. Unfortunately, SI 97 of 2011 does not provide for the Commission to separate markets when determining the fee ...."* (See pp. 25 to 26 of Record of Proceedings)

The letter further explained that the 2nd Appellant's portion of the fee was derived from page 7 of its Financials which indicated that its total assets was K393,577, to which the 1st Appellant's Advocates replied that these were assets of Afgri Corporation Limited, a related entity that was not a party to the transaction under consideration. (See p. 29 of Record of Proceedings) According to the Respondent's invoice for the notification fee issued by the Respondent on 4th July 2014, produced at page 60 of the Appellants' Bundle of Documents, the fee attributable to the 2nd Appellant was revised and assessed on the basis of assets of the 2nd Appellant (as opposed to the group assets) as at 30 June 2013 being

K176,789,000, yielding a fee of K176,719 , bringing the total in respect of the two parties to K1,620,042. This was after the Notice of Appeal had already been filed (on 11th June 2014).

According to the Notice of Appeal (page 153 of the Record of Proceedings) the appeal is against the part of the Respondent's decision which decided that it does not have power to revise the filing fee payable by the Appellants. The grounds of appeal are that:

1. The Respondent erred in its assessment of the portion of the filing fee attributable to the 1st Appellant. The Respondent ought to have exercised its discretion and computed the portion of the filing fee attributable to the 1st Appellant on the basis of the income generated by the 1st Appellant from the relevant market of providing agricultural financing and not income that the 1st Appellant generates from its diverse business; and

2. The Respondent erred when it failed to consider the fact that the nature of the asset which is the subject matter of the proposed transaction is an economic asset and not a real asset thereby warranting the separation of markets when determining the filing fee payable by the Appellants.

The Appellants are seeking the following reliefs:

1. An order that the Respondent revises the filing fee attributable to the 1st Appellant; and

2. An order that the Respondent limits its computation of the filing fee attributable to the 1st Appellant to the relevant business of providing agricultural financing.

3. Costs.

The Appellants filed a Bundle of Documents and at the hearing of the appeal called three witnesses who gave evidence on oath. The first witness (AW1) was Wokonya Ngoma. In summary, his evidence was that he was head of the agri business of the 1st Appellant and had been in its employment for the past two years eight months. His duties were taking care of its agricultural books. He testified that the 1st Appellant was part of a group of four which comprised Rand Merchant bank, First National Bank (FNB), West Bank, and Ash Burton. The Rand Merchant Bank is the investment banking brand. FNB is the retail and commercial banking brand and West Bank is the assert financing brand. Ash Burton is not represented in Zambia. Although the four operated as separate brands outside Zambia, in Zambia they operated under First National Bank Zambia Limited (the 1st Appellant) because the Bank of Zambia could not issue a separate license for each brand. Funds for the purchase transaction were to be provided by Westbank. The financial services of the 1st Appellant were diverse across the four brands. The witness testified that the 1st Appellant started agri lending in 2012 and that the agricultural lending book constituted 14% of the total lending. He referred to page 72 of the Record of Proceedings (Annual Financial Statements for the year ended 2013), at page 101 showing total asset value of K1,443,323,000 and page 114 note 9 showing Loans and advances - Loans and receivables - Sector analysis - where agriculture accounted for K210,026,000.

The witness went on to explain the rationale for the 1st Appellant's interest in acquiring the subject loan book; that agriculture was identified as a strategic area of focus in the Zambian economy and that the 2nd Appellant had a lot of experience in Zambia and had developed a quality portfolio of customers for many years. On its part, the 2nd Appellant would like to improve its books and

diversify its portfolio. He went on to state that the asset in issue was a financial asset as no physical asset would be transferred but book value. He further said initially the parties had not viewed it as a merger and were surprised by the Respondent's decision, first in viewing it as a merger and imposing a filing fee of K1,620,042 and second in that the total assets of the 1st Appellant were considered in assessing the filing fee. He said he expected that the fee should have been based on the K210,026,000 representing the agricultural asset of the 1st Appellant, at 0.1%.

Under cross-examination, the witness said that one of the motives for the 1st Appellant was to invest where it was profitable; that the 2nd Appellant was approached by the 1st Appellants because of the portfolio of quality clients of the former. He added that since government viewed agriculture as important such a transaction should be made affordable.

The second witness (AW2) was Dianiel Gerhigdus Steyon. His evidence was that he was employed by the 2nd Appellant as Chief Financial Officer and his duties entailed management of assets of the company and other normal financial functions of the company. He testified that the 2nd Appellant was established in 2007 for the purpose of providing products to the agricultural sector. He said the company had limited funds available and was looking to expanding its services of lending at lower interest rates to farmers, currently at 10 – 14.5%. He said they realized provision of financing security was a problem for small scale farmers and had developed a product which with funds sourced as a result of the subject transaction would enable them to expand provision of lending to that sector. Under cross-examination, the witness agreed that the interest rates were likely to change with the coming in of the 1st Appellant, and went further to say the fee would be reviewed to make it affordable according to the package they were offering.

The third witness (AW3) was John M. Kasanga. He testified that he was a management consultant who held a Bachelors degree in Development Studies with a double major in psychology and an M Sc. in Industrial Relations, specializing in labour economics. He said he had been invited by the Appellants to come and share on the impact of the proposed transaction. He testified that agriculture was a main stay sector of Zambia that suffered constraints in access to affordable funds particularly for small scale farmers; that only 14% of rural farmers had access to financing and benefited from standard banking products; the transaction was attractive because it provided a unique product that enhanced access to increased number of small scale farmers. He further said the model that the innovation introduced could be copied by other banks, but the question was would the 1st Appellant do it or do it again (buying a loan book) or other banks do it? Would this fee discourage taking on of loan books?

Under cross-examination, AW3 stated that he had been a management consultant for the past twenty-eight years; that he had dealt with mergers since 2003 starting with a COMESA programme, then under the forerunner to the Respondent under the Ministry of Commerce, Trade and Industry; and was involved in the focus group that led to the establishment of the Zambian competition commission. He said while he could not give specifics as to the percentage of rural small scale farmers that would directly benefit from the proposed transaction, he had gained a deeper understanding of constraints faced by small scale farmers through a survey he had carried out every year for the past seven years. He was certain that the transaction would contribute to improving the funding situation of rural small scale farmers.

Counsel for each of the two sides filed arguments and submissions. Counsel for the Appellants further filed arguments in Reply. Both counsel heavily canvassed arguments in support of and against the appeal respectively. They also cited

authorities some of which we shall refer to later in the judgment. We shall deal with each ground separately.

Under the first ground, counsel for the Appellants has argued that the purpose of the Competition and Consumer Protection Act No. 24 of 2010 is to ensure that there is competition, facilitate business and take steps to promote business in a fair way. That the Respondent had not acted in a fair way, had not acted in a way that promotes business and had not acted in accordance with the Act when it calculated the filing fee on the basis of the combined gross assets of the two Appellants and not just the financial assets being transferred. Further, that the Respondent worsened matters by using the 1st Appellant's gross assets generated from its entire and diverse business operations and not its agricultural assets. Counsel further argued that the Respondent erred by extending the provisions of Regulation 8 of the Competition and Consumer Protection Regulations, SI No. 97 of 2011, which provides the formula for determination of the threshold for mergers requiring mandatory notification and the Respondent's authorization, to paragraph 4 of the Second Schedule, which provides the formula for calculating the fee for applications for the required approvals for mergers as prescribed by Regulation 21 of the same Statutory Instrument. He argued that there is no link between Regulation 8 and Regulation 21 or the Second Schedule. Furthermore, that the objective of the approval process is not to "tax" parties entering into a transaction but to ensure that the transaction does not destroy competition.

Regulation 8 (1) provides as follows:

> *"A merger transaction shall require authorization by the Commission where the combined turnover or assets, whichever is higher, in Zambia of the merging parties is at least fifty million fee units in their latest full financial year, for which figures are available."*

Regulation 21 of the same Statutory Instrument states that, *"The fees prescribed in the Second Schedule shall be payable in respect of the matters stated therein."* We reproduce the Second Schedule below for its full contextual effect.

SECOND SCHEDULE
(Regulation 21)

Prescribed Fees

| Item | Fee Units | |
|---|---|---|
| | Application's turnover/assets Applicant's turnover/ units | Upto 100 million fee assets over 100 million fee units |
| 1. Application for authorisation of horizontal/vertical Agreement | 70,000 | 150,000 |
| 2. Application for exemption | | |
| (a) in the case of enterprises | 70,000 | 150,000 |
| (b) in the case of professional associations | 28,000 | 28,000 |
| 3. Application for negative clearance | 70,000 | 150,000 |
| 4. Application for authorisation of proposed merger | 0.1% of turnover/assets, whichever is higher, with a cap of maximum fee of 16,666,667 fee units | |

Counsel argued that Regulation 8 very clearly sets out the threshold for determining a reviewable merger and that the Regulation does not establish the formula or method for calculating the merger filing fee payable, which is set out in the Second Schedule, paragraph 4. In his view, this provision states that it is the applicant's turnover or assets in Zambia which are to be considered for purposes of the filing fee and it does not refer to the *"combined"* turnover or assets of the *"merging"* parties, neither does it state which turnover or assets or the exact turnover or assets which are to be taken into consideration for purposes of calculating the merger filing fee.

It was counsel's argument that having used the words *"combined"* and *"merging parties"* in the definition of the required threshold in Regulation 8, the legislature purposefully intended to omit a requirement to compute the merger filing fees based on the combined turnover or assets, whichever is higher, in Zambia of the *"merging parties"*, that is why the disputed words were not included in the Second Schedule. Citing decisions of the Supreme Court dealing with cases of extension of application of statutory provisions beyond their specified scope (**Anderson Nkambela Mazoka, Lt Gen. Christon Tembo and Godfrey Kenneth Miyanda v. Levy Patrick Mwanawasa, The Electoral Commission of Zambia and the Attorney-General** (2005) Z.R. 136; and **Zinka v. The Attorney-General** 1990 - 1992 Z.R. 73), counsel strongly argued that where words that are used in a statute are left out elsewhere in the same statute it is likely that this is a deliberate omission, that the Respondent was not required by law to use the *"combined"* turnover or assets of the *"merging parties"*, and that by calculating the fee in the manner complained of the Respondent failed to exercise its discretion judicially, the duty to act judicially in the exercise of such discretion being understood to be synonymous with a duty to act fairly (citing among others **Sithole v. the State Lotteries Board** (1975) ZLR 106; and **Barry Jackson v. Attorney-General** (1979) ZLR 167).

It was further canvassed that if the Respondent had acted *"judicially"*, it would have applied paragraph 4 of the Second Schedule as follows:

1. the only affected business are the financial assets being transferred;
2. there is no turnover being transferred because Afgri is not being acquired by FNB;
3. Afgri is going to continue in the same business after the transfer of its financial assets and will continue as before;
4. therefore what is being transferred are assets and the fee should be based on assets;

5. the value of the assets could be US$34.5 million because that is the value of the loan book (it could be less if there is default);

6. therefore the filing fee should be 0.1% of the US$34.5 million.

Counsel for the Appellants argued in the alternative that should the Tribunal be inclined to rely on the combined turnover or assets methodology, then the calculation should be confined in respect of the 1st Appellant to the agricultural lending market in which the activities of the two parties overlap. He canvassed at length that the Respondent ought to have recognised that the 1st Appellant which offers a wide range of services, as licensed under the Banking and Financial Services Act consequentially operates in a "cluster" of markets in Zambia, citing the Australian case of **Westpac Banking Corporation – Proposed acquisition of St George Bank Limited** dealt with by the Australian Competition & Consumer Protection Commission. That according to the content of the merger application form, the 2nd Appellant offered products and services to farmers in Zambia (Folio 10, at page 10 of the Record of proceedings). Hence, according to counsel, there was need to identify the relevant market which is affected by the proposed transaction as the market of agricultural lending. Following this approach, it was argued that the Respondent ought to have exercised its discretion and computed the portion of the filing fee attributable to the 1st Appellant to the turnover/assets generated by it from agricultural lending. Counsel referred the Tribunal to the case of IHS and MTN where the Respondent had used its discretion in calculating the filing fee by using that approach.

The Respondent, on the other hand, strongly contested the appeal and opposed it on the grounds that the Respondent:

1. contrary to the assertion in ground one of the appeal, did not err in its assessment of the portion of for the filing fee to be paid by the Appellants

as the law which was strictly followed clearly provides for the portion of the turnover that is to be used in the calculation of the filing fee; and

2. contrary to ground two of the appeal, did not err by not considering the nature of the asset concerned as there is no legal basis upon which such consideration can be premised.

The Respondent asked the Tribunal to rule that the appeal was a gross misdirection; that the computation of the filing fee as found by the Respondent was within the law; and that the proposed curtail of statutory provisions as relate to the filing fee by the Appellants was unlawful. The Respondent urged the Tribunal to dismiss the appeal on both grounds with costs.

Counsel for the Respondent argued that the Respondent upon considering the proposed transaction in the terms of Regulation 8 (referred to above) found that it was a merger subject to its authorisation and that the applicable fee is provided for under paragraph 4 of the Second Schedule to the Regulations (already referred to). Further, that while it is true that Regulation 8 gives guidance on what mergers need authorisation of the Respondent, it is these same mergers that are captured as requiring authorisation under Regulation 8 that Regulation 21 applies to and that the Second Schedule, particularly paragraph 4, speaks to Regulation 21 and Regulation 8. Counsel argued that although paragraph 4 of the Second Schedule is not specific about the need to combine the turnover of the merging enterprises, the correlation of the paragraph to Regulation 8 dictates that a combined turnover/assets of the merging enterprises be used. Counsel went further to argue that the wording of the paragraph, *"application for authorisation of proposed merger"*, leaves no room for wondering as to what calculation of the fee ought to apply; it is to the turnover or assets of the proposed merger, the combination of the merging enterprises; that the Appellants' argument that the fee be apportioned to the affected (relevant) market was misplaced, citing the case of **Bhavnager University v. Palitana Sugar**

**Mills Pvt Ltd** where it was held that, *"according to the fundamental principles of construction, the Statute should be read as a whole, then chapter by chapter, section by section and then word by word"*. Counsel was of the view that had the Appellants approached the statutory provisions this way the matter would have been settled on their payment of the assessed fee of K1,620,026 to the Treasury on 14th July 2014.

Counsel for the Respondent went on to argue that the Tribunal would be usurping legislative powers if it proceeded as prayed by the Appellants. Counsel put forward the position that the Respondent had miscalculated the filing fee in the case of IHS and MTN referred to by counsel for the Appellants; therefore, that did not constitute a norm upon which precedent can be built. Counsel referred to rectification made by the Respondent as shown in its internal memo exhibited at page 8 of the Record of Proceedings. Counsel went further to state that consistently this was the method the Respondent used; that this was not the first case involving financial assets dealt with in the same manner by the Respondent, citing a merger involving CETZAM. She submitted that though informative, none of the cases cited by the Appellant, including the case of **Westpac Banking Corporation – Proposed acquisition of St George Bank Limited,** answered to the issue at hand. In her view, these cases did not fit into the provisions of the Zambian law as regards the calculation of merger fees. In conclusion, it was counsel's position that the Respondent did not err in its assessment of the filing fee as it strictly followed the law which clearly provides for the portion of the turnover that is to be used.

Counsel for the Appellants replied mostly by reiterating or augmenting arguments advanced earlier, which we find unnecessary to repeat.

We have given serious consideration to the issues raised in ground one of the appeal, the documentary and oral evidence tendered and both counsel's arguments as well as relevant authorities. In our view, the questions to be

resolved hinge primarily on interpretation of statutory provisions. Logically, therefore, we must begin with principles of interpretation of statutes.

It is an established principle, which our courts have repeatedly pronounced, that where the language of a statutory provision is plain and unambiguous, the provision must ordinarily be construed according to its plain meaning and no words shall be added, altered or modified unless it is plainly necessary to do so to prevent a provision from being unintelligible, absurd, unreasonable, unworkable or totally irreconcilable with the rest of the statute. This principle was reviewed and applied by the Supreme Court in the case of The **Attorney-General, The Movement for Multi-Party Democracy v. Akashambatwa Mbikusita Lewanika & Others**. The Supreme Court concluded thus:

> *"… we have studied the judgment of the case below and we find it is sound and correct by applying the literal interpretation. However, it is clear from the Shartz and Northman cases that the present trend is to move away from the rule of literal interpretation to 'purposive approach' in order to promote the general legislative purpose underlying the provision. …. It follows, therefore, that whenever the strict interpretation of a statute gives rise to unreasonable and unjust situation, it is our view that judges can and should use their good common sense to remedy it – that is by reading in it if necessary – so as to do what parliament would have done had they had the situation in mind. We, therefore, propose to remedy the situation in this case by reading in the necessary words so as to make the constitutional provision fair and undiscriminatory. …."*

In arriving at the said holding, the Supreme Court extensively reviewed case law, *inter alia* the words of Lord Denning in the case of **Seaford Court Estate Led v. Asher**.

> *"Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise,*

*and, even, if it were, it is not possible to provide for them in terms free from all ambiguity. The English Language is not an instrument of mathematical precision.*

*Our literature would be much the poorer if it were. This is where the draftsman of Acts or parliament have often been unfairly criticised. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsman have not provided for this or that, or have been guilty of some other ambiguity. It would certainly save the judges trouble if Acts of parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears, a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of parliament, and he must do this not only from the language of the statute but also from the consideration of the social conditions which gave rise to it, and the mischief which it was passed to remedy, and then he must supplement the written word so as to given 'force and life' to the intention of the legislature. That was clearly laid down by the resolution of the judges in HEYDONS CASE and it is the safest guide today. Good practical advice on the subject was given about the same time by plowmen - put into homely metaphor it is this: A judge should ask himself the question: If the makers of the Act had themselves come across this truck in the texture then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases."*

Another notable case that was cited by the Supreme Court in the aforesaid case was **Northman v. Barnett Council**. In this case, men and women teachers were entitled, under their contracts, to continue in employment until the age of 65. A lady of 61 was dismissed. She claimed compensation for unfair dismissal. The Employment Appeal Tribunal held that, if she had been a man, she would have been entitled: but as she was a woman she was not. They said they were bound

by the literal meaning of the words. Lord Denning summarized their view point and commented:

*"The Employment Appeal Tribunal realized this was most unjust, but felt could do nothing about it. I will give their words: "The instant case provides as glaring an example of discrimination against a woman on grounds of her sex as there could possibly be. The facts of this case point to a startling anomaly". Yet they thought the judges had their hands tied by the words of the statute. They said;*

*"Clearly someone has a duty to do something about this absurd and unjust situation. It may well be however, that there is nothing we can do about it. We are bound to apply provisions of an Act of parliament however absurd, out of date and unfair they may appear to be. The duty of making or altering the law is the function of parliament and is not as many mistaken persons seem to imagine, the privileges of the judges or the judicial tribunal."*

Lord Denning continued:

*"I have read that passage at large because I wish to repudiate it. It sounds like a voice from the past. I heard many such words 25 years ago. It is the voice of the strict constructionist. It is the voice of those who go by the letter. It is the voice of those who adopt the strict literal and grammatical construction of the words, heedless of the consequences. Faced with glaring injustice, the judges are, it is said impotent, incapable and sterile. Not so with us in this court. The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the "purposive approach. "In all cases now the interpretation of statutes we adopt such a construction as will "promote the general legislative purpose" underlying the provision. It is no longer necessary for the judges to wring their hands and say: "There is nothing we can do about it."*

*Whenever strict interpretation of a statute gives rise to an absurdity and unjust situation, the judges can and should use their good sense to remedy it - by reading words in, if necessary - so as to do what parliament would have done, had they had the situation in mind."*

In line with the principles of interpretation of statutes, we agree with counsel for the Appellants on the need to guard against importing into provisions of a statute words from another provision of the statute, because the omission could well be intentional. However, this safeguard must be balanced with the wisdom of purposive statutory interpretation, as presented in the foregoing authorities. It is clear that in appropriate cases, it is permissible to deviate from literal statutory interpretation in order and to the extent necessary to remedy an ambiguity, absurdity or unjust situation.

In the present case, while it is clear that Regulation 8 was intended to define the threshold for mergers requiring the Respondent's approval, i.e. by providing a formula involving the combined turnover or assets of the merging parties, paragraph 4 of the Second Schedule (cited above) which prescribes the application fees for a proposed merger, as provided by Regulation 21, does not include the words "*the combined*" and "*the merging parties*". Before we proceed to deal with the implications of these omissions, we find it necessary to address some preliminary problem in the wording of the Second Schedule. The subheadings of the two columns under "Fee Units" are jumbled up and literally unintelligible, which we believe is due to an editorial or typographical error. Also, they refer to "*Application's turnover/assets*" and "*Applicant's turnover/ assets*" respectively. We find it useful to point out that these provisions are unintelligible, as that may tend to affect the interpretation of paragraph 4. We have no hesitation in concluding that in order to give meaningful effect to the

provision, the subheadings of the two columns under "Fee Units" should be re-aligned.

We have also concluded, upon examination of the Act and the SI in question, that there is no doubt that the reference to "*Application's*" turnover/assets is ambiguous or unintelligible as to its meaning, and that no such terminology has been used in the Act or elsewhere in the SI. Therefore, the word ought to be understood as "*Applicant's turnover/assets*". We are in agreement with the position of the Appellants that the reference is to "*Applicant's turnover/assets, whichever is higher ...*", though the two sides are in disagreement as to whether "*Applicant's*" entails "*the combined*" turnover/assets "*of the merging parties*". We shall come back to this point of contention.

Merger

In view of the aforesaid modifications, the Schedule should read as appears below.

SECOND SCHEDULE
(Regulation 21)

Prescribed Fees

| Item | Fee Units | |
|---|---|---|
| | Applicant's turnover/assets Up to 100 million fee units | Applicant's turnover/assets over 100 million fee units |
| 1. Application for authorisation of horizontal/vertical Agreement | 70,000 | 150,000 |
| 2. Application for exemption | | |
| (a) in the case of enterprises | 70,000 | 150,000 |
| (b) in the case of professional associations | 28,000 | 28,000 |
| 3. Application for negative clearance | 70,000 | 150,000 |
| 4. Application for authorisation of proposed merger | 0.1% of turnover/assets, whichever is higher, with a cap of maximum fee of 16,666,667 fee units | |

We now come back to the question whether or not the reference to *"Applicant's"* in the subheadings of the columns under "Fee Units" (as it relates to paragraph 4) entails *"the combined"* turnover/assets *"of the merging parties"*. In our view, the reference to *"Applicant's"* can be a reference to one or both or all of the merging parties' turnover/assets, depending on the nature of the proposed transaction. This is because in the absence of specific reference to *"the combined"* turnover/assets *"of the merging parties"*, which is what is provided in Regulation 8, the expression *"Applicant's"* includes both the singular and the plural. (See section 4 (3) of the **Interpretation and General Provisions Act, chapter 2 of the Laws of Zambia** which reads, *"Words and expressions in a written law in the singular include the plural and words and expressions in the plural include the singular."*

Furthermore, section 20 (2) of the same Act provides that, *"Terms and expressions used in a statutory instrument shall have the same meaning as in the written law under which the instrument was made."* In this connection, reference to *"Applicant's turnover/assets"* here cannot exclude the plural because section 26 (1) of the Act states that, *"Parties to a merger transaction that meets the prescribed threshold ... shall apply to the Commission for authorization of the proposed merger in the prescribed manner and form."* It follows, therefore, that each of the parties to a merger transaction is an applicant, even though the prescribed procedure and form do not require that both or all the applicants, as the case may be, jointly or severally file the application.

Accordingly, in paragraph 4 of the Schedule, on application for authorization of a proposed merger, the reference to *"Applicant's turnover/assets"* can either be to an *"Applicant's turnover/assets"* or *"Applicants' turnover/assets"*. The singular or the plural rendering shall apply depending on the nature of the transaction. In this regard, we agree with the Appellants' argument that the words *"the combined"* and *"the merging parties"* should not be imported into the paragraph.

We are alive to the definition of "turnover" in the SI. Regulation 2 reads (quoting the relevant parts), *"In these Regulations, unless the context otherwise requires, 'turnover' has the meaning assigned to it in the Act."* Section 2 (1) of the Act reads (quoting the relevant parts), *"In this Act, unless the context otherwise requires, 'turnover' means the latest gross sales of an enterprise.* Therefore, context is a key determinant in the light of possible permutations presented by the framework of mergers dealt with by the Act and, therefore, in the calculation of filing fees pursuant to paragraph 4 of the Second Schedule to SI 97/2011. Restricting the meaning of this definition to the gross of the whole business of an enterprise when it could well relate to the gross sales of a specific business or product of an enterprise may result in an absurdity, unreasonable or unjust situation.

The same reasoning would apply to the determination of relevant assets. The term *"assets"* is defined thus by section 2 (1) of the Act, *"... unless the context otherwise requires, 'asset' in relation to an enterprise includes physical assets, businesses, shares and other financial securities, brands and intangible assets including goodwill, intellectual property rights and knowhow"*.

We also wish to address the question whether the turnover or assets to be considered when assessing a filing fee are those in Zambia. In particular, we note that mergers taking place outside the country but impacting the Zambian economy may in certain circumstances, pursuant to section 27 of the Competition and Consumer Protection Act, require authorization under section 26. The Schedule does not specify whether the turnover or assets are those in Zambia. It may be argued on account of reasonableness or fairness that it is only the turnover or assets in Zambia to be considered, even though an applicant or applicants may be trading or own assets outside Zambia. This appears to be the position taken by the Respondent. The Appellants are also of the view that it is the turnover or assets in Zambia. Again here, in our view, the Respondent is

within its power to so determine provided such decision is objective and justifiable.

In light of the foregoing, we are persuaded that it is neither proper nor desirable, especially in the light of the various unforeseeable situations the Respondent may be faced with in processing applications for mergers, to import restrictive terms into paragraph 4 of the Second Schedule. Such imported restrictions may render the application fee absurd, unreasonable, or unjust.

One implication of our interpretation of the provision in question is that in assessing the filing fee, for instance where the parties have merged all their businesses, the turnover or assets to be taken into account may be the turnover or assets of each or both or all the merging parties, as the Respondent will deem appropriate based on objective, fair and just criteria. On the other hand, in an example where only a particular asset or business is being sold or "merged", while the parties retain the rest of their respective business portfolios, it may be absurd, unjust or unfair to calculate the filing fee on the basis of the whole of the combined applicants' businesses' turnover or assets. The capping of 16,666,667 fee units would relate to the total fee charged on a merger transaction, i.e. not to exceed the amount represented by the maximum fee units.

Thus, the wording of the Second Schedule lends itself to calculations of the filing fee based on different merger scenarios and surrounding facts. We recall the words of Lord Denning in the case of **Seaford Court Estate Led v. Asher** (cited above) that, *"Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even, if it were, it is not possible to provide for them in terms free from all ambiguity. The English Language is not an instrument of mathematical precision."*

Since we find no reason to determine otherwise, we conclude that the omission of the terms "*the combined*" and "*the merging parties*" (which the Respondent

imported into paragraph 4 of the Second Schedule in its assessment of the fee in question) may well be deliberate so as not to unduly fetter the Respondent in the exercise of its power. In arriving at this decision, we also bear in mind the objective of the approval process for mergers. The objective of the approval process is not in dispute; it is to facilitate regulation of mergers so as to promote economic growth by safeguarding competition. The process is not intended to stifle mergers by levying prohibitive fees on applicants. The filing fee is an administrative fee aimed at minimizing the financial burden on the taxpayers in funding the expenses of the regulator.

In reaching our conclusion, we have also looked at some other jurisdictions through internet sources. For example, the Competition Regulations made under the Botswana Competition Act 2010 state in Part V, Regulation 16 dealing with 'Notification of Merger' in definitive terms that, "*(2) Notice shall be accompanied by a merger fee of 0.01 percent of the merging enterprises' combined turnover or assets in Botswana, whichever is higher.*" We have noted that the language of this provision leaves no room for the Regulator to define the basis of the calculations. We also note that the percentage is 0.01 as opposed to the Zambian case where 0.1 percent applies.

In the case of Namibia, the notification fee is in bands based on the combined values of the merging parties, with the lowest being N$1,500 (the equivalent of K646.50) and the highest being N$500,000 (the equivalent of K215,517) (at NAD2.32 = K1) . Tanzania applies a similar formula, yielding TZS25,000,000 (an equivalent of K83,797) as the minimum and TZS100million (equivalent of K335,188) as the maximum filing fee (TZS298.34 = ZMW1). Some countries, like Madagascar and Mauritius, do not charge a filing fee for mergers.
**(http://www.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709BG-Competition.AfricaLRVS.pdf** B.G. Bowman Gilfillan Africa Group)

In Australia, formal notifications are charged a fixed fee of AUD25,000 (K138,500) (K5.54 = AUD1), while in the UK if the turnover of the combined merged entity will exceed £120million (K1,226,400,000) then a fixed fee of £160,000 (K1,635,200) is charged (K10.22 = £1). In the USA, a notification fee of US$280,000 (K1,775,200) applies if the size of the transaction is greater than US$682million (K4,323,880,000) (K6.34 = US$1).
**(http://www.claytonutz.com/publications/edition/27_september_2012/20120927** *"The cost of regulatory approvals in M&A – 'user pays'*? by Sam Cottell (September 2012))

According to the Competition Commission of South Africa website, as of April 2009, the notification fee is in fixed amounts applicable to categories of mergers classified according to sizes of the merging enterprises by turnover as follows (K0.57 = R1):

| Type of merger | Notification fee (R) | Equivalent in Kwacha |
|---|---|---|
| Small merger | Nil | Nil |
| Intermediate merger | 100,000 | 57,000 |
| Large merger | 350,000 | 199,000 |

In general, we have observed that, though formulae and their factors vary, the notification fees are within reasonable levels relative to the type or size of merger and economy of the respective country.

Furthermore, it has not escaped our attention that the Respondent has demonstrated that the interpretation we have given to the Second Schedule of SI 97/2011 is feasible. This has been illustrated in the Respondent's calculation of the filing fee in the IHS and MTN case. Subsequently, the Respondent decided that this was not the correct approach in the light of the statutory provisions,

which according to its understanding, did not permit such an approach. We are of the view that, contrary to its belief that its hands are tied by the statutory provision, the Second Schedule gives the Respondent enough room to decide different merger transactions on their own merits in terms of what turnover/assets and whose turnover/assets among the applicants the calculation of the filing fee should be based. We, therefore, agree with counsel for the Appellants that in carrying out its duty in this respect, the Respondent has a discretion to exercise. By "discretion'" is not meant arbitrariness or subjectivity but arriving at decisions objectively, fairly and justifiably as the facts of the case demand. The Respondent may even find it necessary or useful to develop guidelines or criteria to assist it in carrying out this duty.

Therefore, the first ground of appeal succeeds to the extent that the Respondent erred in its assessment of the portion of the filing fee attributable to the 1st Appellant, that is, on the basis that the formula provided by SI 97/2011 required the assessment to be made on the combined turnover or assets whichever is higher of the merging parties. However, while we agree with the Appellants that the Respondent ought to have exercised its discretion in computing the fee applicable to the 1st Appellant, as already explained, we are unable to go further and determine how the Respondent ought to have computed the fee. The Respondent has not had the opportunity of assessing the fee in the light of our interpretation of the relevant provision of SI 97/2011. Therefore, we have not heard the Respondent on the merits as it were. For this same reason, the second ground of appeal fails.

Having decided as we have, we wish to mention that a lot of the information presented before us by way of evidence and arguments would perhaps be more appropriately presented to the Respondent in the first instance, to assist it in its consideration of the application and the applicable notification fee. Just to comment on the Appellants' claim that they were surprised that the Respondent