IN THE COMPETITION AND CONSUMER PROTECTION TRIBUNAL
HOLDEN AT LUSAKA

2015/CCPT/014/COM

IN THE MATTER OF:	SECTION 60 OF THE COMPETITION AND CONSUMER PROTECTION ACT NO. 24 OF 2010
IN THE MATTER OF:	THE COMPETITION AND CONSUMER PROTECTION (TRIBUNAL) RULES 2012, STATUTORY INSTRUMENT NO. 37 OF 2012
IN THE MATTER OF:	THE DECISION MADE BY THE COMPETITION AND CONSUMER PROTECTION COMMISSION RELATING TO THE PROPOSED MERGER OF 100% ISSUED SHARE CAPITAL OF ZAMBIAN TOWERS LIMITED BY IHS ZAMBIA LIMITED

BETWEEN:

IHS ZAMBIA LIMITED — APPELLANT

AND

COMPETITION AND CONSUMER PROTECTION COMMISSION — RESPONDENT

QUORUM: Mr. Willie A. Mubanga, SC (Chairperson), Mrs. Maria M. Kawimbe (Vice Chairperson, Mr. Chance Kabaghe (Member), Mr. Rocky Sombe (Member) and Mrs. Eness C. Chiyenge (Member)

For Appellant: Musa Dudhia & Company

For Respondent: Mrs. Maureen Mwanza – Director Legal and Corporate Affairs, CCPC

Mrs. M. M. Mulenga – Manager, Legal & Corporate Affairs, CCPC

Mrs. M. C. Kabwela – Legal Officer, CCPC

JUDGMENT

Legislation referred to:

1. The Competition and Consumer Protection Act, No. 24 of 2010 sections 8, 24, 25, 26, 29, 30, 31, 32, 33, 34(1) (b)&(c), 34(2), 35(1)(b), 36, 60 and 75.
2. The Information and Communication Technologies Act, No. 19 of 2009.
3. The Competition and Consumer Protection (Tribunal) Rules, 2012.

Cases referred to:

1. Khalid Mohammed v. Attorney General (1982) ZR 49

The background to this appeal is that IHS Zambia Limited (who we shall continue to refer to in this judgement as "the Appellant"), by an official letter received on 24th April 2015, notified the Competition and Consumer Protection Commission (who we shall continue to refer to in this judgement as "the Respondent") through their legal representatives Musa Dudhia & Company about their intention to acquire 100% of the issued share capital of Zambia Towers Limited (who we shall continue refer to in this judgement as ''TowerCo'') from Airtel Networks Zambia Limited (who we shall continue to refer to in this judgement as ''Airtel'').

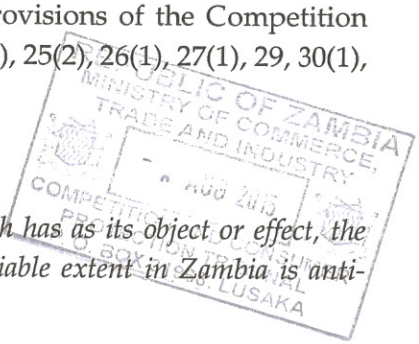
TowerCo is a 100% subsidiary of Airtel. The company was established to manage the tower operations in a ring fenced structure from the rest of Airtel's core business. As a result, it operated as a separate entity, providing tower infrastructure services to Airtel on a non-exclusive basis. At the time of the merger notification to the Respondent the company, TowerCo owned 929 towers that have been erected across Zambia. On the other hand, Airtel is a wholly owned subsidiary of Bharti Airtel Zambia Holdings BV which in turn is wholly owned by Bharti Airtel Limited. The principal activity of Airtel is the provision of cellular radio telecommunication services. Bharti Airtel Limited is a leading global telecommunications company with operations in 20 countries across Asia and Africa. The company has its headquarters based in New Delhi, India and it ranks amongst the top 4 mobile service providers globally in terms of subscribers. Globally, the company had over 305 million customers across its operations at the end of October, 2014.

According to pages 5 – 8 in the Board Decision as part of the Supplementary Record of Proceedings, the Appellant is a wholly owned subsidiary of IHS Holding Limited, Africa's leading independent mobile telecommunications infrastructure provider. IHS Holding Limited was founded in Nigeria in 2001 and provides services across the full tower value chain and management services. The company has operations in Zambia, Nigeria, Cameroon, Cote d'Ivoire and Rwanda with a total number of over 20,000 towers in Africa, and is one of the largest and most innovative mobile telecommunications infrastructure providers in Africa and Middle East. In Zambia the company was incorporated on 11th December, 2013 and only commenced operations in April, 2014 following the acquisition of MTN Zambia Limited mobile

towers. The principal activities of the Appellant is the provision of site and tower leasing and tower sharing services to telecommunication service providers and Internet Service Providers (ISPs) in Zambia.

In connection with the proposed merger, we take judicial notice that it is a general trend that globally mobile companies are selling their tower infrastructure in search for growth, shareholder value and better margins. This has seen the emergence of independent tower companies. Towers make the bulk of capital expenditure for mobile telecommunication companies. (See pages 7 – 8 in the Board Decision part of the Supplementary Record of Proceedings).

Upon receiving the notification from the Appellant the Respondent is said to have carried out investigations and assessment to ascertain whether the transaction was likely to prevent, restrict or distort competition to an appreciable extent in the relevant market and or in the economy of Zambia. In doing so the Respondent referred to the following provisions of the Competition and Consumer Protection Act, No. 24 of 2010 that is sections 8, 24(1), 25(2), 26(1), 27(1), 29, 30(1), 30(2)(h) and some portions of section 31.



Section 8 states that:

> *"Any category of agreement, decision or concerted practice which has as its object or effect, the prevention, restriction or distortion of competition to an appreciable extent in Zambia is anti-competitive and prohibited".*

Section 24(1) states that:

> *"For purposes of this Part, a merger occurs where an enterprise, directly or indirectly, acquires or establishes, direct or indirect, control over the whole or part of the business of another enterprise, or when two or more enterprises mutually agree to adopt arrangements for common ownership or control over the whole or part of their respective businesses".*

Section 25(2) states that:

> *"The Commission shall review a merger if—*
> *(a) the merger is subject to prior authorisation in accordance with section twenty-six;*
> *(b) the Commission elects to review the merger in accordance with section twenty-seven".*

Section 26(1) states that:

> *"Parties to a merger transaction that meets the prescribed threshold under subsection (5) shall apply to the Commission for authorisation of the proposed merger in the prescribed manner and form".*

Section 27(1) states that:

> *"Notwithstanding section twenty-six, the Commission may, where it has reasonable grounds to believe that a merger falls below the prescribed threshold, review the merger if—*
>
> *(a) the merger is likely to create a position of dominance in a localised product or geographical market;*
>
> *(b) the merger is likely to contribute to the creation of a dominant position through a series of acquisitions which are not individually subject to prior notification;*
>
> *c) the merger may substantially prevent or lessen competition; or*
>
> *(e) as a result of the merger, there is, or is likely to be, competition and public interest factors which require to be considered".*

Section 29 states that:

> *"The Commission shall, upon receipt of a proposed merger notification, carry out a market assessment of the proposed merger to determine the likely effects of the proposed merger in the relevant market, on trade and the economy in general".*

Section 30(1) states that:

> *"The Commission shall, in considering a proposed merger, assess whether the merger is likely to prevent or substantially lessen competition in a market in Zambia".*

Section 30(2)(h) states that:

> *"Notwithstanding the generality of subsection (1), the Commission shall in considering a proposed merger, take into account the likely and actual factors that affect competition in a defined market, including; the risk that a position of dominance may be abused".*

Section 31 states that:

> *"The Commission may, in considering a proposed merger, take into account any factor which bears upon the public interest in the proposed merger, including—*
>
> *(a) the extent to which the proposed merger is likely to result in a benefit to the public which would outweigh any detriment attributable to a substantial lessening of competition;*
>
> *(b) the extent to which the proposed merger would, or is likely to, promote technical or economic progress and the transfer of skills, or otherwise improve the production or distribution of goods or the provision of services in Zambia;*
>
> *(d) the extent to which the proposed merger shall maintain or promote exports from Zambia or employment in Zambia;*

(e) the extent to which the proposed merger may enhance the competitiveness, or advance or protect the interests, of micro and small business enterprises in Zambia;

(f) the extent to which the proposed merger may affect the ability of national industries to compete in international markets;

(g) socioeconomic factors as may be appropriate; and

(h) any other factor that bears upon the public interest.

Further, the Respondent is said to have taken a multiple assessment approach including collecting third party views on the proposed merger in order to ascertain, whether the merger is likely to have any negative effects on the relevant market, to the consumer, fair trade or the economy in general. Consequently, the Board of the Respondent at its 7th Special Adjudication Meeting held on 17th July, 2015 deliberated the matter and made the following findings:

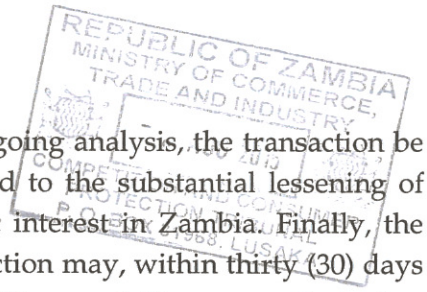
(i) ***Consideration of substantial lessening of competition:*** The Board deliberated that based on findings and analysis, the proposed transaction involving TowerCo and IHS Holdings would lead to the substantial lessening of competition as it involved the removal of a vigorous and only competitor in a market that has high barriers to entry and less dynamic.

(ii) ***Consideration of abuse of dominant position of market power:*** The Board deliberated that IHS Zambia Limited will be dominant with a market share of 70.53% of the mobile tower market post transaction. IHS Zambia Limited is currently abusing their dominance by discriminating and it is highly likely that IHS Zambia Limited will continue to abuse its dominant position due to lessened competition, absence of alternative substitutes for towers, very high barriers to market entry and lack of imports.

(iii) ***Consideration of public interest:*** The Board deliberated that the public will not benefit as the horizontal merger will involve the removal of a vigorous competitor, induce upward pricing pressures and stifle market entry due to the already existing high barriers to entry into the market.

(iv) ***Consideration of third party submissions:*** The Board deliberated that all the parties expressed reservations with the proposed transaction as it would lead to entrenchment of dominance, possible price increases and exclusivity in stalling of the telecommunications market. Further, IHS Zambia Limited failed to convincingly demonstrate how it would not abuse its dominance. It was further noted that IHS Zambia Limited was in fact abusing its dominance by discriminating. It was further deliberated that due to the nature of the industry, Undertakings would not be sufficient to address the substantial lessening of competition and the removal of an effective competitor would harm consumer interest.

Board Decision:



After the deliberations, the Board decided that given the foregoing analysis, the transaction be rejected as it would raise competition concerns that may lead to the substantial lessening of competition, abuse of dominance and the negation of public interest in Zambia. Finally, the Board advised that any party aggrieved with its order or direction may, within thirty (30) days of receiving the order or direction, appeal to the Competition and Consumer Protection Tribunal.

Aggrieved by the Respondent's Board decision, the Appellant filed its appeal before the Tribunal on 30th July, 2015 but which was later withdrawn on 10th August, 2015 pursuant to Rule 25(1)(a) of the Competition and Consumer Protection (Tribunal) Rules, 2012.

However, later within the appeal period the Appellant filed another notice of appeal proffering the following grounds:

1. The Respondent did not consider all the relevant facts and law (including regulations) in its investigations before making its decision and it therefore came to its decision without considering all appropriate evidence and on a view of the facts and assumptions which could not reasonably be entertained.

2. The Respondent acted unreasonably in that it erroneously appears to have based its decision on primarily one issue namely that the Appellant was purportedly discriminating in price in favour of MTN Zambia Limited.

3. The Respondent made numerous incorrect assumptions some of which were not even about the Appellant which resulted in its decision being in breach of the rules of natural justice.

4. The Respondent fell into error in its consideration and determination of the public benefit and detriment tests.

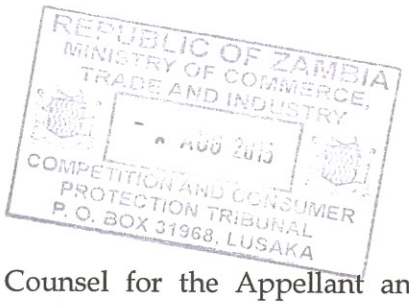
5. The Respondent fell into error by it not properly taking into account the regulatory role of ZICTA in this whole transaction and this has defeated the purpose of ZICTA as a regulator.

6. The Respondent exceeded its statutory authority by not following the ZICTA guidelines and recommendations with respect to the transaction.

7. The Respondent erred in fact and in law when it refused to accept the Undertakings offered by the Appellant and instead concluded that Undertakings from the Appellant would not be sufficient to address any effects of a purported lessening of competition as a result of the transaction.

Further, in the Notice of Appeal, the Appellant sought the following reliefs:

1. An order that the transaction be authorised.
2. Costs.
3. Any other relief that the Tribunal may see fit.



At the hearing held on Monday, 17th August, 2015 both Counsel for the Appellant and Respondent opted not to call witnesses and to submit further documentary evidence. They opted to rely on the Record of Proceedings in Cause 2015/CCPT/014/COM which in their view contained the necessary background of the appeal. In addition to oral arguments both Counsel undertook to file written submissions before the Tribunal. We observe that the gist of the oral arguments of the Appellant are largely produced in the filed submissions and we shall therefore make reference to them in the Judgment. We also wish to point out that Counsel for the Respondent assured us that a supplementary Record of Proceedings would be filed on the same date and but was only filed on the 19th August, 2015.

At the hearing of 17th August, 2015 Counsel for the Respondent did not challenge the Appellant's oral arguments save to expunge the seemingly new argument that had been raised by the Appellant on the diversion ratio.

By a letter dated 20th August, 2015, Counsel for the Respondent advised the Tribunal Secretariat to urge the Tribunal to go ahead with the determination of the case. We are grateful to Counsel for the Appellant for his submissions filed on 19th August, 2015.

We will begin by agreeing with Counsel for the Appellant that ground one of the appeal is general enough to cover the issue of the diversion ratio, which he raised in his oral submissions. We therefore have no reason to expunge the arguments that were advanced by Counsel for the Appellant.

It is trite law that an Appellant will not automatically succeed where there is no challenge mounted by a Respondent. We are guided by the case of **Khalid Mohammed v. Attorney General (1982) ZR 49,** where Ngulube, D.C.J as he then was, held as follows:

> *"An unqualified proposition that a plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A plaintiff must prove his and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgement. I would not accept a proposition that even if a plaintiff's case has collapsed of its inanition or for some reason or other, judgment should nevertheless be given to him on the ground that the defence set up by the opponent has also collapsed".*

We shall now proceed to deal with grounds 1, 3 and 7 of the appeal, which in our view are related and should be considered together. We shall then proceed to deal with grounds 5 and 6 jointly, followed by grounds 2 and 4 which will be considered separately. We are mindful that some grounds of appeal overlap and will be dealt with as and when need arises.

Grounds 1, 3 and 7

Our understanding of the Appellant's arguments in ground 1, 3 and 7 are as follows:

(a) Whether all the relevant facts and law were considered including regulations in its investigations before making its decision?

(b) Whether the Respondent's view of the facts and assumptions could not reasonably be entertained?

(c) Whether the incorrect assumptions were made about the Appellant by the Respondent in its decision in breach of the rules of natural justice?

(d) Whether the Respondent erred in fact and law when it refused to accept the Undertaking offered by the Appellant and instead concluded that the Undertakings could not be sufficient to address any effects of a purported lessening of competition as a result of the transaction?

From the outset, we accept that the statutory provisions as contained in the Competition and Consumer Protection Act were followed. However, we have to address ourselves to the question whether the statutory provisions were properly applied to the facts taking into account the evidence before us.

We note that the Appellant only entered the relevant market through an acquisition of MTN Zambia Limited towers comprising 30.53% market shares sometime in 2014. Our observation is that there are currently four (4) players in the relevant market comprising TowerCo (39%), IHS Zambia Limited (32%), Zamtel (21%), and ZICTA (8%) based on the number of towers constructed, so far. Consequently, post-merger the number of market players may reduce from four (4) to three (3) and this will translate into an oligopoly market structure and not a monopoly one. It is our view that the proposed merger will therefore not result into the removal of an effective and vigorous competitor because the Appellant is already enjoying dominance.

Our understanding of the provision referring to "removal of an effective and vigorous competitor" is that it should only arise in a situation where a large and possibly a dominant firm seeks to acquire a much smaller firm which is providing vigorous and effective competition in the market.

In addition, when considering as to whether a proposed merger is likely to result into the removal of an effective and vigorous competitor in the relevant market, it should be established that the intention of such an acquisition by a dominant or large firm is to eliminate this irritating source of competition which may pose a threat to its long-term profit prospects. However, in this case, it is our view that the Respondent has failed to establish or demonstrate that indeed the intention by the Appellant is to eliminate an irritating source of competition in the meaning of the provisions under this Act.

Further, it is sufficient that both TowerCo and the Appellant are already dominant players in the market as prescribed in the Competition and Consumer Protection Act, No. 24 of 2010. More specifically, section 15(a) states that:

> *"A dominant position exists in relation to the supply of goods or services in Zambia, if—thirty (30) percent or more of those goods or services are supplied or acquired by one enterprise".*

It is our view that despite the two firms being dominant as defined under the Act, we observe that the Appellant has relatively a lower market share compared to the target firm TowerCo. In other words, it cannot be concluded that TowerCo qualifies to be termed as vigorous competitor in the relevant market. On the basis of the foregoing, we refuse to accept the conclusions made by the Respondent that the merger will lessen competition in the market.

It has not escaped our attention that the Appellant and TowerCo are both dominant going by the definition of dominance under section 15(a) of the Act. Again it is not in dispute that the Appellant will maintain its dominance and even further entrench it to approximately 70.24% market share as a result of this proposed merger. We wish to state the fact that a firm which is dominant and or has acquired dominance in the relevant market is in itself not a violation of any provision under the Act.

In the Competition and Consumer Protection Act, No. 24 of 2010 the provision of the abuse of dominant position is provided in section 16(2) as follows:

"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 or technological 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".*

In this case, we have noted that the Respondent heavily relied on this provision to reject the proposed merger. We however note that the Appellant has given Undertakings to remedy any possible competition concerns that may arise as a result of the proposed merger. We therefore wish to state that we have not found in the Record of Proceedings where it is mentioned that the Appellant was investigated and or is being investigated by the Respondent in any matter

related to the Act. Consequently, we do not accept the Respondent's decision to reject the proposed merger based on the alleged conduct of abuse of dominant position which has never been investigated nor determined by the Respondent.

Ground 2

Whether the Respondent acted unreasonably in allegedly erroneously appearing to base its decision on primarily one issue namely that the Appellant was purportedly discriminating in price in favour of MTN Zambia Limited?

We have found no evidence to suggest that dissimilar pricing conditions were applied to MTN Zambia Limited as that transaction was done under separate approval and consideration when the merger between MTN Zambia (towers section) and the Appellant was concluded for the old MTN Zambia towers. We have also noted that MTN Zambia now pays the same rates as others for the new towers on the market. (See page 13 in the Board Decision part of the Supplementary Record of Proceedings).

In any case if there had been any violation under that particular transaction we would have expected that it would been subject of enforcement proceedings as provided for by section 64 of the Act which requires the Respondent to apply to the Tribunal for a mandatory order against the defaulting party and further requires that the Respondent should consider any representation an enterprise wishes to make before making an application for a mandatory order. In the circumstance therefore we are of the view that arriving at the conclusion that the Appellant has the propensity to violate the Undertakings based on an allegation without due process of law giving an opportunity to the other parties to be heard is contrary to the principles of natural justice.

Ground 4

Whether the Respondent fell into error in its consideration in its determination of the public benefit and detriment tests?

In our view the fact that a firm is dominant and or acquires dominance is not sufficient to conclude that such a firm will have high propensity to unilaterally increase prices. It is not totally correct to reject a merger on that basis which may result into depriving the much needed investment in the industry and the economy in general. What is required is the need to strengthen the enforcement of the relevant pieces of legislation and sector regulatory collaboration. In this connection, we find that ZICTA was on firm ground when it recommended that the optimum manner of monitoring the proposed merger in casu would be through the Undertakings that have been given by the Appellant and enforcing those Undertakings.

Grounds 5 and 6

(a) Whether the Respondent fell into error by it not properly taking into account the regulatory role of ZICTA in this whole transaction and thereby defeating the purpose of ZICTA as a regulator?

(b) Whether the Respondent exceeded its statutory authority by not following the ZICTA guidelines and recommendations with respect to the transaction?

We recognise the overall regulatory authority of the Respondent with respect to mergers across all sectors of the economy. It follows therefore that the Respondent is not bound to accept the guidelines and recommendations that ZICTA may have provided. We however find that it would have been useful for the Respondent to recognise the regulatory role of ZICTA in the post-merger period. We say this considering the fact that ZICTA has the necessary technical expertise, and through its licensing regime can further regulate and control the conduct of the Appellant, so as to ensure that the Appellant does not abuse its dominant position. In any event, we are of the view that there are several sanctions in the legislative framework of the sector institutions including that of the Respondent which can track transgressions, if at all by the Appellant and to ultimately institute measures to remedy such transgressions.

All in all, the Appellant has succeeded in grounds one, three and seven as well as in two, four, five and six.

We have looked at the Undertakings and are of the view that they are sufficient to remedy any potential abuse by the Appellant in the future. However, we Order that the Undertakings should include a clause regarding annual review of the Undertakings so as to ensure effective compliance of the obligations therein by the Appellant.

It has not escaped our attention that the issues that were raised by the Respondent in the proposed merger are intertwined with the Undertakings presented by the Appellant on how it would remedy perceived abuse in the future.

Having taken into account the arguments of both parties we hereby Order that the merger be and is hereby Authorised and that the Undertakings which we Order to be annually reviewed will serve the purpose of remedying any and possible abuses by the Appellant.

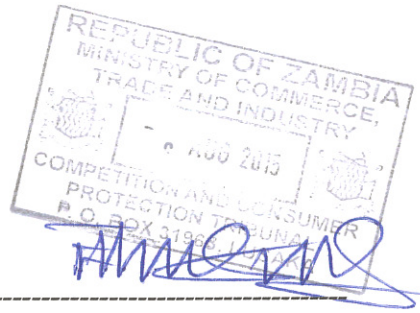
Since this is a matter of public interest we Order that each party bears its own costs.

A person aggrieved with this Judgment may appeal to the High Court within **thirty (30) days** of the date of this Judgment.

Delivered at **LUSAKA** this 25th day of August 2015.

Willie A. Mubanga, SC
Chairperson

Maria M. Kawimbe
Vice Chairpeson



Chance Kabaghe
Member

Rocky Sombe
Member

Eness C. Chiyenge
Member