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THE COMPETITION AND CONSUMER PROTECTION TRIBUNAL HOLDEN AT LUSAKA

APPEAL No. 2017/CCPT/019/COM

BETWEEN:

RUMPUNS TRADING LIMITED — **APPELLANT**

AND

COMPETITION AND CONSUMER PROTECTION COMMISSION — **RESPONDENT**

CORAM: Mr. Willie A. Mubanga, SC – Chairperson
Mrs. Miyoba B. M. Katongo - Vice Chairperson
Mr. Rocky Sombe - Member
Mrs. Eness C. Chiyenge – Member
Mr. Chance Kabaghe-Member

For the Appellant: Mr. J. Jalasi- Messrs Eric Silwamba, Jalasi and Linyama Legal Practitioners

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

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JUDGMENT

Legislation referred to-

Competition and Consumer Protection Act, No. 24 of 2010
Property Transfer Tax Act, Chapter 340 of the Laws of Zambia
Competition and Consumer Protection (Tribunal) Rules, Statutory Instrument No. 37 of 2012
Movable Property (Security Interest) Act No. 3 of 2016
Competition and Consumer Protection Merger Guidelines, 2015

Cases referred to-

General Nursing Council of Zambia v Ingutu Milambo Mbangweta (2008) ZR 105 (SC)
Anderson Kambela Mazoka and Others v. Levy Patrick Mwanawasa and others (2005) ZR 138 (SC)
Matilda Mutale v. Emmanuel Munaile (2007) ZR 118 (SC)
Dora Siliya & 2 Others v. The Attorney-General and the Electoral Commission of Zambia 2013/HP/1159
Colquhoun v. Brooks (1888) 21 Q.B.D. 52 at 65
Rafferty v Crowley, [1984] ILRM 350
In re Michael G. (1988) 44 Cal. 3d 283, 291 [243 Cal. Rptr. 224, 747 P.2d 1152]
R v Daviault [1994] 3 SCR 63
Rodaro v Royal Bank of Canada 2000 OJ 272 at p.856
Anthony Mwanza v. Kagurusu Farming Enterprises Limited and Kenani Musebo 2008/HP/715
R. v. Nova Scotia Pharmaceutical Society [1992] 2 SCR 606
People v. O'Brien, 96 Cal. I7I, 176, 31 Pac. 45, 47 892
Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984)
Fawaz And Chelelwa v. The People (1995) S.J. (S.C.)
Nkaka Chisanga Puta v. The Attorney-General (1983) Z.R. 114 (S.C.),
Re Kapwepwe and Kaenga (1972) Z.R. 248
State v. Goodenow 65 Me. 30 (1876)
Re Lett, 238 B.R. 167 (1999) Justice
Re American Lodging Inc., 397 BR 906 (2008)
PP v. Teo Poh Leng (1992) 1 SLR 15

Other Works referred to-

"Accounting for Intangible Assets" by Lloyd Austin in "University of Auckland Business Review", Volume 9 No.1, 2007, available at https://www.uabr.auckland.ac.nz/files/articles/Volume13/v13i1-accounting-for-intangible-assets.pdf visited on 20/02/2019 at 12:30 hours

What Is a Full Asset Merger? by Diane Perez, available at https://smallbusiness.chron.com/full-asset-merger-38489.html visited on 19/07/2018 at 15:43 hours

"*Expressio Unius Est Exclusio Alterius*" Clifton Williams (Dean Marquette Law School) Article 1 Marquette Law Review, Vol.15, Issue 4 June 1931

Competitive Effects, Federal Trade Commission, available at https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/competitive-effects visited on 31/01/2019 at 12:00 hours

Mergers and Acquisitions, in West's Encyclopedia of American Law, 2005 The Gale Group, Inc. available at https://www.encyclopedia.com/social-sciences-and-law/eco...r/money-banking-and-investment/acquisitions-and-mergers visited on 31/01/2019 at 11:58 hours

Challenges in the design of a merger control regime for young and small competition authorities, TD/B/C.I/CLP/45, United Nations Conference on Trade and Development, Trade and Development Board, Trade and Development Commission, Intergovernmental Group of Experts on Competition Law and Policy Sixteenth session, Geneva, 5–7 July 2017, Item 3 of the provisional agenda, Work programme, including capacity-building in and technical assistance on competition law and policy,

Statutory Interpretation in the Supreme Court of Canada, available at http://aix1.uottawa.ca/~resulliv/legdr/siinscc.html visited on 29/01/2019 at 16:21 hours

Halsbury's Laws of England, 4th Edition, Volume.44, para.860

The Law Dictionary Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed. Available at https://thelawdictionary.org/de-facto-merger/ visited on 19/07/2018, at 16:06 PM

The Legal Intelligencer, Corporate Successor Liability Expanded Under De Facto Merger Doctrine, 2012, Jeffrey G. Weil

Unwanted Baggage: Asset Acquisition and Successor Liability, Sandra Edelman & Kaleb McNeely, 2016, available at https://thetmca.com/unwanted-baggage-asset-acquisition-and-successor-liability/ visited on 18/06/2018 at 00:36 hours

The Continuity Of The Enterprise Doctrine: Corporate Successorship In United States Law, Phillip Blumberg Florida Journal Of International Law, Volume 10 Spring-Summer 1996 Number 3, The Blumberg Trust.
"Accounting for Intangible Assets" by Lloyd Austin in University of Auckland Business Review, Volume 9 No.1, pp.65-67, available at
https://www.uabr.auckland.ac.nz/files/articles/Volume13/v13i1-accounting-for-intangible-assets.pdf visited on 20/02/2019 at 12:30 hours

International Accounting Standard 38-Intangible Assets, available at https://www.iasplus.com/en/standards/ias/ias38 visited on 20/02/2019 at 14:00 hours

International Accounting Standard 17-Leases, available at https://www.iasplus.com/en/standards/ias/ias17 visited on 20/02/2019 at 14:20

Movable and Immovable-Legal Concept, available at https://www.britannica.com/topic/movable-and-immovable visited on 23/02/2019 at 22:00 hours

Legislative Drafting, G.C. Thornton, 4th Edition, Butterworths, London Dublin Edinburgh, 1996, p.148

Definition of Transaction For The Purpose Of Merger Control Review, Directorate For Financial and Enterprise Affairs Competition Committee, Organisation for Economic Co-operation and Development, Unclassified DAF/COMP(2013)25, 24-Jan-2014, p.11 Available at http://www.oecd.org/daf/competition/Merger-control-review-2013.pdf visited on 16th May, 2019 at 10:28

Bright-Line-Rule Law and Legal Definition, available at https://definitions.uslegal.com/b/bright-line-rule/ visited on 16/05/2019 at 16:20 hours

What is a Physical Asset? Available at https://www.investopedia.com/terms/p/physicalasset.asp visited on 22/02/2019at 14:45 hours

Physical Asset, available at https://www.nasdaq.com/investing/glossary/p/physical-asset visited on 22/02/2019 at 14:48 hours.

Tangible Asset, available at https://www.investopedia.com/terms/t/tangibleasset.asp visited on 23/02/2019

Farlex Financial Dictionary, 2012

Wall Street Words: An A to Z Guide to Investment Terms for Today's Investor by David L. Scott. Copyright 2003 by Houghton Mifflin Company, Houghton Mifflin Company

What are Tangible Assets? Available at https://corporatefinanceinstitute.com/resources/knowledge/accounting/what-are-tangible-assets/ visited on 23/02/2019 at 22:20 hours

Tangible Asset, available at https://www.accountingtools.com/articles/2017/5/15/tangible-asset visited on 23/02/2019 at 22:30 hours

Movable and Immovable-Legal Concept, available at https://www.britannica.com/topic/movable-and-immovable visited on 23/02/2019 at 22:00 hours

Is a Leasehold an Intangible Asset? Available at https://finance.zacks.com/leasehold-intangible-asset-10595.html visited on 20/02/2019 at 15:20 hours

Accounting for Intangible Assets, Lloyd Austin in University of Auckland Business Review, Volume 9 No.1, pp.65-67, Available at https://www.uabr.auckland.ac.nz/files/articles/Volume13/v13i1-accounting-for-intangible-assets.pdf visited on 20/02/2019 at 12:30 hours

Understanding Intangible Assets and Real Estate: A Guide for Real Property Valuation Professionals, p.2, available at https://www.iaao.org/library/2017_Intangibles_web.pdf visited on 01/04/2019 at 17:00 hours

"Leasehold Estate", available at https://uk.practicallaw.thomsonreuters.com/7-381-1197?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1 visited on 20/02/2019 at 18:30 hours

West's Encyclopedia of American Law, 2005, The Gale Group, Inc.

Mergers and Acquisitions, available at https://www.encyclopedia.com/social-sciences-and-law/eco...r/money-banking-and-investment/acquisitions-and-mergers visited on 31/01/2019 at 11:58 am

Competitive Effects, Federal Trade Commission, available at https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/competitive-effects visited on 31/01/2019 at 12:00pm

Merger Control Policy Guidance to Strengthen the Indonesian Competition Framework, 1 March 2, 2018, available at

file:///C:/Users/CTTP/Documents/CCPC/MERGERS/131397-WP-PUBLIC-2018-WBG-Merger-Note-Indonesia.pdf
visited on 16/05/2019 at 10:38 hours

Challenges in the design of a merger control regime for young and small competition authorities, United Nations Conference on Trade and Development, Trade and Development Board, Trade and Development Commission, Intergovernmental Group of Experts on Competition Law and Policy Sixteenth session, Geneva, 5–7 July 2017, Item 3 of the provisional agenda, Work programme, including capacity-building in and technical assistance on competition law and policy, TD/B/C.I/CLP/45

SPEECH/11/561, Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy, Policy Objectives in Merger Control, Fordham Competition Conference,New York, 8 September 2011

Defining "Merger" Transactions for Purposes of Merger Review, available at file:///C:/Users/CTTP/Documents/CCPC/MERGERS/GOOD%20MWG_DefiningMergerTransactions.pdf visited on 16/05/2019

The Role of Guidelines in EU Competition Law, David Bailey Brick Court Chambers King's College London 24 September 2013, available at https://www.kcl.ac.uk/law/research/centres/european/research/bailey-lecture-slides.pdf, visited on 20/05/2019 at 15:07 hours

Independence, Courts and Tribunals Judiciary, available at
https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/independence/ visited on 20/05/2019 at 15:40 hours

Suspensory Effects of Merger Notifications and Gun Jumping - Note by the European Union 27 November 2018, DAF/COMP/WD(2018)95, Directorate For Financial And Enterprise Affairs Competition Committee, Organisation for Economic Co-operation and Development , paragraph 8, available at
https://one.oecd.org/document/DAF/COMP/WD(2018)95/en/pdf visited on 23/05/2019 at 16:15 hours

The Purpose of Substantially Lessening Competition: The Divergence of New Zealand and Australian Law, Paul G Scott* Senior Lecturer, Faculty of Law, Victoria University of Wellington, available at http://www.austlii.edu.au/au/journals/WkoLawRw/2011/9.pdf visited on 28/06/2019 at 09:30 hours

Ignorance and Mistake in Criminal Law, Rollin M. Perkins, 88 U. PA. L. REV. 35 (1939), available at https://scholarship.law.upenn.edu/penn_law_review/vol88/iss1/2 visited on 26/06/2019 at 15:36 hours

Judicial Deference to Administrative Interpretations of Law, The Honorable Antonin Scalia, Duke Law Journal Administrative Law Lecture, delivered at Duke University School of Law, January 24, 1989, by Antonin Scalia, (Associate Justice, United States Supreme Court), p.511, available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3075&context=dlj visited on 28/06/2019 at 17:58 hours

Deference, Stephen Gageler, available at http://www.hcourt.gov.au/assets/publications/speeches/current-justices/gagelerj/Gageler_2015_22_AJ_Admin_L_151.pdf visited on 03/07/2019 at 16:43 hours

Putting Expert Testimony in Its Epistemological Place: What Predictions of Dangerousness in Court Can Teach Us, M. Neil Browne and Ronda R. Harrison-Spoerl. Available at https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1162&context=mulr;Putting visited on 04/07/2019 at 11:00 hours

Objective Mens Rea and Attenuated Subjectivism: Guidance from Justice Charron in R. v. Beatty, Palma Paciocco, S.J.D. candidate, Harvard Law School, available at https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3586&context=scholarly_works visited on 28/06/2019 at 13:38 hours

Definition of "Void or Void ab initio", available at http://www.duhaime.org/LegalDictionary/V/VoidorVoidAbInitio.aspx visited on 9th August, 2019, at 19:01 hours

Definition of "Null and Void" available at https://dictionary.cambridge.org/dictionary/english/null-and-void visited on 9th August, 2019, at 19:31 hours

Beyond a Definition: Understanding the Nature of Void and Voidable Contracts, Jesse A. Schaefer, Campbell Law Review, Volume 33 Issue 1 Fall 2010 Article 6, January 2010 available at

https://scholarship.law.campbell.edu/cgi/viewcontent.cgi?article=1515&context=clr
visited on 9th August at 19:36 hours
Chitty on Contracts, Vol. I, General Principles, 29th Edition, Sweet & Maxwell, London, 2004

Brief Facts of Case

1. The brief facts of the case are that the Competition and Consumer Protection Commission (hereinafter "the Commission" or "the Respondent", as the context may require) initiated investigations into a merger whereunder Prime Time Holdings Limited through its Zambian subsidiary PrimeTime Property Holdings Zambia Limited (hereinafter PrimeTime Zambia) had purchased PwC Office Park in Lusaka from Rumpuns Trading Limited (hereinafter "the Appellant") after the Commission became aware that this transaction was not notified. PwC, a commercial office park was situate at Stand No. 2374, Thabo Mbeki Road, Lusaka and comprised in excess of 4,000 square metres of office space. The purchase price was USD$8.8 million. It was submitted that the Appellant sold PwC Office Park without authorisation, in violation of section 26(1) of the Competition and Consumer Protection Act No. 24 of 2010 (hereinafter "the Act"), read together with sections 26(4) of the Act. It was further submitted that section 26(1) as read together with section 26(4) and section 37 of the Act suggests that the merger regime in Zambia is mandatory for transactions that meet the notification threshold; that mergers that qualify for notification are considered null and void if implemented without authorisation from the Commission, and that to constitute an offence, the implementation of the merger without authorisation must have been done intentionally or negligently.

2. Section 26(1) of the Act provides-

26. (1) 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.

3. Section 26(4) of the Act provides-

(4) A merger that meets the prescribed threshold under subsection (5) and is implemented without the Commission's authorisation is void.

4. Section 37 of the Act provides-

37. An enterprise which intentionally or negligently –

(a) implements a merger that is reviewable by the Commission without the approval of the Commission;

(b) implements a merger that is rejected by the Commission; or

(c) fails to comply with conditions stated in a determination or with undertakings given as a condition of a merger approval;

commits an offence and is liable to a fine not exceeding ten percent of its annual turnover.

5. With respect to whether the transaction amounted to merger transaction, the Commission considered section 24 of the Act which provides-

24. (1) 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.

(2) A merger contemplated in subsection (1) may be achieved in the following circumstances:

(a) where an enterprise purchases shares or leases assets in, or acquires an interest in, any shares or assets belonging to another enterprise;

(b) where an enterprise amalgamates or combines with another enterprise; or

(c) where a joint venture occurs between two or more independent enterprises.

(3) For purposes of subsection (1), a person controls an enterprise if that person –

(a) beneficially owns more than one half of the issued share capital of the enterprise;

(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the enterprise, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that enterprise;

(c) is able to appoint or to veto the appointment of a majority of the directors of the enterprise;

(d) is a holding company and the enterprise is a subsidiary of that company;

(e) *in the case of an enterprise which is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;*

(f) *has the ability to materially influence the policy of the enterprise in a manner comparable to a person who, in ordinary commercial practice, can exercise the element of control referred to in paragraphs (a) to (e); or*

(g) *has the ability to veto strategic decisions of the enterprise such as the appointment of directors, and other strategic decisions which may affect the operations of the enterprise.*

6. The Commission also employed the following assessment tests:

(1) whether the above transaction constituted a merger transaction;

(2) whether the merger transaction met the prescribed threshold for notification with the Commission;

(3) whether there was an application to the Commission for authorisation in a prescribed manner and form; and

whether the notifiable merger was intentionally or negligently implemented without the approval of the Commission.

7. The Commission found that the Appellant and PrimeTime Zambia had entered into the Agreement whereunder the Enterprise (being the Sellers letting enterprise Rumpuns Trading Limited comprising the sellers rights and obligations in terms of the Society Lease, the property, the contracts, the sellers rights and obligations in terms of the lease and the deposits of the tenants together with any interest accrued thereon) were sold as a going concern.

8. From the Audited Financial statements of PrimeTime Zambia Limited as at 31st August, 2016, it was noted that PwC Office Park was the only asset under the company which formed the company's source of revenue. The Commission noted that the leasehold property comprised "PwC office park, subdivision D part of Stand No. 2374, Thabo Mbeki Road, Lusaka, ceded lease agreement from the Agricultural and Commercial Society of Zambia for 50 years from 2004." Paragraphs 10 and 11 on page 161 of the Record of Proceedings refer.

9. The Commission concluded that PrimeTime Zambia Limited acquired an asset from the Appellant which had market presence and turnover as stipulated under paragraph 7 of the Commission's Merger Guidelines, and in this regard had gained control over the assets of the Appellant, resulting in the Appellant losing market presence. The Commission further noted that with the purchase of PwC Office Park, PrimeTime Zambia gained control as stipulated under section 24(3) of the Act. Paragraph 12 on page 161 of the Record of Proceedings refers.

10. The Commission noted that at the time of the transaction, PrimeTime was generating turnover in Zambia through its related company called PrimeTime Property Holdings Limited (PrimeTime Zambia Branch) of K1, 725, 875 while Rumpuns' turnover was about K10, 549, 207, and that Primetime Zambia Branch had total assets amounting to K16, 907, 126 while the total assets of Rumpuns were not provided. From the public domain, however, it was noted that the market value of PwC Office Park, Rumpuns' only asset, was USD$10,000[1] (the Zambian Kwacha equivalent of K96, 804, 630). It was further noted from the combined value of assets that the transaction met the notification threshold. Paragraph 14 on page 162 of the Record of Proceedings refers.

11. The Board of the Commission sought to establish whether Rumpuns had acted intentionally or negligently as the offence of implementing a merger without authorisation requires intent or negligence if the offence is to be established. The Commission considered the various documents submitted by PrimeTime Zambia and the Appellant and established that this was the case. The Board attributed this to negligence on the part of the Appellant as merger control had been in Zambia from 1997 and it was the duty of the parties to be aware of all existing laws that would affect such a transaction and ensure that they conducted their due diligence before the transaction was effected. Paragraph 25 on page 165 of the Record of Proceedings refers.

12. On the 29th day of August, 2017, the Board of the Commission decided that (quote)-

(i) *Rumpuns Trading Limited pays K80, 000 for implementing a merger without authorisation from the Commission pursuant to section 37 of the Act.*

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[1] Press announcement by PrimeTime as at 4th May, 2016, on which day the Kwacha-Dollar exchange rate according to Bank of Zambia was 9.680463.

(ii) *PrimeTime Zambia and Rumpuns through to notify the merger within 30 days from the date of receipt of the Board Decision subject to payment of the above fines pursuant to section 26 of the Act.*

13. The Decision of the Board was communicated to the Appellant on 8th September, 2017, and on 28th September, 2017, the Appellant filed its Notice of Appeal and set out the following grounds of appeal (quote):

(1) *That the transaction between the Appellant and Prime Time Property Holdings Limited was a contract for transfer of land rights and this was sold pursuant to the provisions of the Law Association of Zambia General Conditions of Sale 1997 and, as such, the said transaction did not amount to a merger envisaged under section 24 of the Competition and Consumer Protection Act No. 24 of 2010;*

(2) *That the Appellant paid the Property Transfer Tax on the transaction pursuant to section 4(1) of the Property Transfer Tax Act, Chapter 340, Volume 19 of the Laws of Zambia which only applies to the transfer of land rights;*

(3) *That the transaction by the Appellant for the transfer of land can not in any way result into a distortion of the market as envisaged under the provisions of the Competition and Consumer Protection Act No. 24 of 2010 to the extent that the decision by the Respondent to state as follows[sic]:*

"It is clear from the above observations that Prime Time Zambia acquired an asset from Rumpuns which asset had market presence and turnover as stipulated under paragraph 7 of the Commission merger guidelines. In this regard, Prime Time Zambia gained control over the assets of Rumpuns resulting in Rumpuns lost market presence. It was noted that with the purchase of PwC office park, Prime Time Zambia gained control as stipulated under section 24(3) of the Act."

(4) *That the acquisition of land rights in land does not qualify to be defined as an asset under section 24 of the Competition and Consumer Protection Act No. 24 of 2010 as assets refer to movable property and immovable property.*

14. The Appellant seeks the following reliefs:

(1) *an Order to quash the decision of the Board of Commissioners dated the 29th day of August, 2017 that the Appellant implemented a merger without authorisation from the Respondent;*

(2) *an Order to quash the decision of the Board of the Commissioners insofar as it purports to impose a penalty on the Appellant in the sum of K80, 000.00; and*

(3) *an Order for costs.*

15. The Respondent filed its Notice of Grounds in Opposition to Appeal on 25th October, 2017. In its Notice the Respondent averred with respect to-

(1) Ground 1-that the sale of land between the Appellant and Prime Time Property Holdings amounted to a merger as envisaged under section 24(2) of the Competition and Consumer Protection Act No. 24 of 2010 (the Act);

(2) Ground 2-that the payment of Property Transfer Tax under Chapter 340 of the Laws of Zambia does not preclude the Act from applying to the transaction;

(3) Ground 3-that the transaction could distort the market and is contrary to section 24 of the Act; and

(4) Ground 4-that the Board of Commissioners was on firm ground when it determined that the Appellant's transaction was a merger in that what the Appellant sold were assets as defined under section 2 of the Act.

16. The Respondent's prayer is (quote)-

(1) *that the Appeal be dismissed with costs;*

(2) *that the decision of the Board of Commissioners dated 29th August, 2017 be upheld; and*

(3) *for any other relief that the Tribunal deems fit.*

17. The Appellant and the Respondent filed their Heads of Argument on 21st December, 2017, and 5th January, 2018, respectively. In view of the length of time it has taken to deliver the judgment (on account of a number of factors, such as the technical nature of the subject matters of the appeal and the limited number of days that the members sit, being, by virtue of section 67(1) of the Act, part-time, this Tribunal renewed the hearing of the appeal on 12th August, 2019. The contents of the Appellant's and the Respondent's respective Heads of Argument will be referred to as and when necessary.

18. The Tribunal is indebted to Learned Counsel for the Parties for their respective Heads of Argument.

Preliminary Remarks

19. The Tribunal wishes to note that this is a majority decision, albeit that two of its members who were present during the hearing of this case, and at the technical meetings at which this case was discussed, are no longer members of this Tribunal as their term of office expired. The Parties will note, accordingly, that the names of the said members constitute part of the Coram herein. The Tribunal further wishes to bring it to the attention of the Parties that on account of the fact that the Tribunal is part-time (by virtue of section 67(1) of the Act) and taking into account the limited number of days each month allocated to the Tribunal for the hearing of cases (being, on average, five days) and the number of cases that the Tribunal has to hear in the course of those days, the Tribunal has structured its monthly schedule to include, in addition to the hearing of cases, one technical meeting at which all cases are discussed and the draft rulings or judgments arising therefrom, generated. This entails, with respect to this case, that from its conclusion in July last year, that the Tribunal has had not more than twelve days to draft and discuss the judgment herein. The Tribunal considered it prudent to bring this information to the fore so as to explain to the Parties the perceived delay in the delivery of the judgment herein.

The Tribunal further notes that the issues which form the basis of this Appeal are either technical or require statutory interpretation, and for this reason, in addressing this Appeal, the Tribunal considered it prudent to address, *inter alia*, the nature of mergers, in general, and specifically in terms of our Act, the reasons that parties implement mergers and the essence of merger control. This, in the thinking of the Tribunal, will provide context to the thought process (reasoning) employed by the Tribunal in arriving at its conclusions. The Parties will find, accordingly, that this judgment is somewhat lengthy.

Consideration of Appeal

20. In considering this Appeal, the Tribunal had occasion to consider the Record of Proceedings. The Tribunal notes, therefrom, the following:

(1) the Appellant (or the "Lessee" as the context may require) is engaged in property development and earns rental income (See page 73 of the Record of Proceedings);

(2) the Appellant and the Agricultural and Commercial Society of Zambia (the "Lessor") entered into a Lease Agreement on the 20th day of April, 2004, (pp. 140-156 of the Record of Proceedings refer) in respect of all that portion of Stand 2374 Lusaka in extent 30, 000 square metres, more or less;

(3) the Lease was for a period of fifty years (See clause 3 on page 144 of the Record of Proceedings);

(4) the Lessee intended to develop the premises at its own cost for the purpose of erecting certain buildings and works designed for use as Commercial offices (See recital 2., on page 141 of the Record of Proceedings);

(5) the Lease Agreement permitted the Lessee to develop the said premises (See clause 5.1 at page 144 of the Record of Proceedings);

(6) the Lease required the Lessee to pay to the Lessor a fixed gross rental of $1 per square meter (See clause 6.3 at page 145 of the Record of Proceedings);

(7) the Lessor was responsible, under the lease, to pay ground rent to the Ministry of Lands (See clause 6.7 at page 145 of the Record of Proceedings);

(8) ownership of the property remained with the Lessor. This is implicit from clause 10 of the Lease (See page 146 of the Record of Proceedings) which provides that in the event that the Lessor intended to sell the property, the Lessee had the first right of refusal. "Property" is defined in clause 2 at page 144 of the Record of Proceedings as "*...the Premises and the buildings erected thereon...;*" In addition, there is no recorded sale of the property by the Lessor to the Lessee;

(9) clause 12.2 of the Lease entitled the Lessee to sublet the property in whole or in part and in so doing, the Lessee was to specify to the Lessor full details of the proposed sub-lease, the property which is to be sublet and all rental or other consideration which the Lessee proposed to charge the sub-lessee (See page 147 of the Record of Proceedings);

(10) the property was to be used as commercial offices (See clause 14.1 of the Lease, at page 147 of the Record of Proceedings);

(11) in a letter from Corpus Legal Practitioners (who acted as Legal counsel for Prime Time Property Holdings (Mauritius) to the Respondent dated 27

July, 2017, and referenced COMP/6310/15/1 (starting at page 95 of the Record of Proceedings) Corpus stated, *inter alia*-

(a) the acquisition of the lease over PWC office Park resulted in the dissolution of Rumpuns as a going concern.[2] However, in a letter from Messrs Eric Silwamba, Jalasi & Linyama (advocates for the Appellant) dated 18th July, 2017, Learned Counsel advised as follows (quote):
We wish to advise that our client is still a going concern and has never been subjected to dissolution or winding up. (See page 62 of the Record of Proceedings at lines 14 and 15). In this regard, Learned Counsel for the Appellant submitted the Appellant's annual report and financial statements for the year ended 28th February, 2015 (that is documentation in respect of a year that ended two years ante the Respondent's letter of 12th July, 2017) (Page 62 of the Record refers). No evidence of dissolution or winding up of the Appellant was submitted to the Tribunal; and

(b) because of the resulting acquisition of an entire Zambian entity, the transaction constitutes a merger. Prime Time Zambia had no turnover whereas Prime Time Zambia Branch had a turnover of ZMW1, 451, 706.86 at the time of the transaction. The turnover of Rumpuns at the time of the transaction was ZMW10, 549, 207 whereas the PwC Property was purchased for value at US$8.8 Million. [Sic] This means the notification threshold was met on account of the value of the PwC Property alone which made the transaction a notifiable merger under the Act.[3];

(12) the transaction was part of the execution of PrimeTime's strategy to continue growing the property portfolio (See page 5 of the Record of Proceedings, line 20); and

(13) the Appellant's Annual Report and Financial Statements at page 78 of the Record of Proceedings indicate that Rumpuns' land and buildings were valued at ZMW37, 038, 940 in 2014 and 2015.

20. This Tribunal notes that while the Appellant advanced four grounds of appeal, these were argued as one ground of appeal.

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[2] Record of Proceedings, p. 96, paragraph 2.4.2

[3] Ibid, p.97, paragraph 3.2.2

21. This Tribunal will endeavour as much as is practicably possible to consider the grounds of appeal separately, and in so doing will assess which arguments by Learned Counsel for either Party fall under the purview of each respective ground of appeal.

Ground 1

22. The Appellant in Ground 1 of the Appeal averred that "***the transaction between the Appellant and Prime Time Property Holdings Limited was a contract for transfer of land rights and this was sold pursuant to the provisions of the Law Association of Zambia General Conditions of Sale 1997 and, as such, the said transaction did not amount to a merger envisaged under section 24 of the Competition and Consumer Protection Act No. 24 of 2010***".

Appellant's Heads of Argument

23. The Appellant submitted, in its Heads of Argument, in this regard-

(1) That (quote) "*if one unpacks the wording of Section 24, two characteristics stand out for a transaction to qualify to be a merger:*

a) 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

b) when two or more enterprises mutually agree to adopt arrangements for common ownership or control over the whole or part of their respective businesses."

(Page 4 of the Appellant's Heads of Argument refers);

(2) that the Appellant owned a building called PwC House under a long term lease from the ACSZ which the Appellant (quote) "*then sold to Prime Time outrightly without retaining any residual interest. The Appellant did NOT SALEA* [sic] *BUSINESS OR AN ENTERPRISE. We submit with all due respect that the sale of BUILDING in so far as (a) above does not qualify to be called a merger...*" (Page 4 of the Appellant's Heads of Argument refers)

The "(a)" referred to by the Appellant in the foregoing quotation reads-

a) 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;...* (Page 4 of the Appellant's Heads of Argument refers)

(3) that the instructive words in Section 24 are (quote) "the ACQUISITION OR GAINING CONTROL OF AN ENTERPRISE, the sale of building is not the sale of an enterprise"; and

(4) that (quote) *"similarly under (b) Section 24 refers to two or more enterprises mutually agree to adopt arrangements for common ownership or control over the whole or part of their respective businesses. Again the emphasis is on two or more enterprises making arrangements to gain common ownership or control with respect to their businesses. In the transaction between Appellant no business was sold, what was sold was the building. Again under (b) the transaction fails the definition of merger in (b);*

24. The Appellant referred to guidelines 3 and 7 of the Respondent's Merger Guidelines in which it is stated, *inter alia,* by authors Richard Whish and David Bailey, authors of the book 'Competition Law', Seventh Edition who defined merger as follows:

The True meaning of merger involves two separate undertakings merging entirely into a new entity: a high profile example of this was the fusion in 1996 of Ciba-Giegy and Sandoz to form the major pharmaceutical and chemical company Novartis[4] *a further example in 2000 was the creation of GlaxoSmithKline as a result of the merger between Glaxo Wellcome and Smith Kline Beecham*[5] ***however it is important to understand that the term merger as used in competition policy includes a far broader range of corporate transactions that [sic] mergers of this kind.*** *...under the EUMA the question is whether A will acquire 'the possibility of exercising decisive influence' over B. the* [sic] *acquisition of assets-for example for a well-known brand name can amount to a merger...In each case the essential question is whether previously independent businesses have all come under common control with the consequence that, in the future, the market will function less competitively than it did prior to the merger.*[6] [Emphasis ours] Pages 5 to 6 of the Appellant's Heads of Argument refer.

[4] Case M737, decision of 17th July 1996, OJ 1997 L 201/1

[5] Case M1846, decision of May 2000

[6] Oxford Competition Law, Seventh Edition by Richard Whish and David Bailey 2011, p.809 & 810

25. The Appellant submitted that Whish and Bailey, in their book referred to in paragraph 24, raise, at page 919, two essential elements that should be satisfied for a transaction to be called a merger, and that these are-

(1) *Whether two previously independent businesses have become one or have come under common control; and*

(2) *Whether these two independent businesses having become one will result in the market functioning less competitively than it did prior to the merger.*

26. The Appellant also submitted that Whish and Bailey consider a merger to have occurred where two or more enterprises cease to be distinct, and that the two authors go further to state that the question whether the activities transferred constitute an enterprise is one of substance, not form, taking into account all the circumstances of the case. (Page 7 of the Appellant's Heads of Argument refers)

27. The Appellant cited, in this regard, section 26 of the UK Enterprise Act which sets out circumstances under which an enterprise ceases to be distinct.

28. The Appellant further argued that the Respondent misapprehended the Act with respect to the extension of acquisition of assets as being a merger. The Appellant submitted that the issue of assets only becomes applicable when two ENTERPRISES are merging or becoming one and those assets become the subject of joint control or ownership.

29. The Appellant quoted a letter at page 61 [sic] of the Record in which it submitted that it was still a going concern and was never the subject of dissolution or winding up.

30. The Appellant submitted that-

(1) because the Appellant and Prime Time did not become one post transaction, the sale of the PwC Park had failed to meet the first pre-condition in order for the transaction to become a merger, and further, that there was no intention to merge, or control or acquire sole or joint ownership of PwC Park, or to exercise decisive or material influence. (Page 8 of the Appellant's Heads of Argument refers);

(2) even if the two enterprises (the Appellant and Prime Time) ceased to exist, the Respondent would have to demonstrate that the asset had come under common ownership or control, and that a review of page 26 of the Record

of Proceedings reveals that the Appellant is not listed as a shareholder in Prime Time-confirming that that the sale of PwC Park did not result in the two entities becoming one. (Page 9 of the Appellant's Heads of Argument refers);

(3) the control or joint ownership test for a merger therefore fails and puts the transaction outside the ambit of a merger in section 24(1) (Page 9 of the Appellant's Heads of Argument refers);

(4) control as defined in section 24(3) of the Act is non-existent as there is no residue control that the Appellant remains with in PwC Park post the transaction (Page 10 of the Appellant's Heads of Argument refers).

Guideline 6 of the Respondent's Merger Guidelines, 2015, provides in part-

6. ...a merger may also be consummated without one enterprise necessarily acquiring formal control over another but through the acquisition of part of the business assets of another enterprise...[7]

Guideline 7 provides that *"The Commission will consider a merger to have been created when one enterprise buys or leases the assets belonging to another, if such assets have a market presence, or a market turnover which can clearly be attributed to them and the control now exercised over them has changed the competitive situation in the relevant market"*.[8]

(5) the second test of a merger is whether a transaction will result in less competition, and, in this regard, cited Regulation 24 of the Council of the European Union (EC) No. 139/2004 which provides, with respect to the primary policy of competition law as follows (quote):

In order to ensure a system of undistorted competition in the common market, in furtherance of a policy conducted in accordance with the principle of an open market economy with free competition, this Regulation must permit the effective control of all concentrations from the point of view of their effect on competition in the community. Accordingly, Regulation (EEC) No. 4064/89 established the principle that a concentration with a Community dimension which creates or strengthens a dominant position as a result of which effective competition in the common market or in a substantial part of it would be significantly impeded

[7] Page 8 of the Guidelines

[8] Pages 10-11 of the Merger Guidelines, 2015

should be declared incompatible with the common market;... (Page 10 of the Appellant's Heads of Argument refers);

(6) the transaction in question was a once off transaction and creates no form of dominance in the market and/or distortion of competition at any level in the real estate market (Page 11 of the Appellant's Heads of Argument refers);

(7) the Commission failed to conduct a proper investigation as to whether the transaction would impact the market, because the Board of the Commission repeated the assessment tests used by its technical committee, and in this regard referred to pages 82, 83 and 159 of the Record of Proceedings (Page 11 of the Appellant's Heads of Argument refers);

(8) The Respondent's (quote) "*Merger guidelines are not a source of law but a mere guideline that sets out the Respondent's understanding of the Act...that the interpretation of merger under paragraph 3 and 7 of the merger guidelines should not be taken in the literal sense that the Respondent has applied but for this honourable Tribunal to apply its own interpretation based on the proper interpretation of the Act*"(Page 3 of the Respondent's Heads of Arguments refers);

(9) the onus of proving a merger rests with the Respondent and that the mere citing of section 24 of the Act by the Respondent cannot be grounds for determination of whether or not the actions by the Appellant constitute a merger. The Respondent must apply further tests applied in the determination of a merger and the question whether or not there is direct or indirect acquisition or control of the business or common ownership, and most importantly is it likely to distort the market by creating dominance (Page 13 of the Appellant's Heads of Argument refers);

(10) despite being advised that the Appellant's business continued to exist and was not liquidated the Respondent ignored that evidence and insisted that the transaction was a merger and implied that the Appellant's business was completely taken over by Prime Time (Page 14 of the Appellant's Heads of Argument refers); and

(11) there was no evidence on record to show that the transaction is likely to distort the market (Page 14 of the Appellant's Heads of Argument refers).

Respondent's Heads of Argument

31. The Respondent submitted, with respect to this ground, that-

(1) the Tribunal (quote) *"have a literal interpretation of the law so as to give it the effect that was intended by the Legislature."*(Page 3 of the Respondent's Heads of Argument refers);

(2) section 24(2) of the Act provides that a merger is contemplated in section 24(1) in the following circumstances:

(a) where an enterprise purchases shares or leases assets in, or acquires an interest in, any shares or assets belonging to another enterprise;

(b) where an enterprise amalgamates or combines with another enterprise; or

(c) where a joint venture occurs between two or more independent enterprises.

(Page 3 of the Respondent's Heads of Argument refers);

(3) a merger is achieved once a transaction meets the conditions under section 24(2) of the Act (Page 3 of the Respondent's Heads of Argument refers);

(4) "asset" is defined in section 2 of the Act as-
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". (Page 3 of the Respondent's Heads of Argument refers)

(5) the definition of asset encompasses both movable and immovable property, shares and rights inclusive (Page 3 of the Respondent's Heads of Argument refers);

(6) Black's Law Dictionary 8th Edition defines movable property as *"property that can be moved or displaced, such as personal goods; a tangible or intangible thing in which an interest constitutes personal property"*;

(7) the same Dictionary defines immovable property as *"property that cannot be moved; an object so firmely* [sic] *attached to the land that it is regarded as part of the land"*. This shows that the Appellant did sell an asset or assets which culminated into a merger. (Page 3 of the Respondent's Heads of Argument refers);

(8) pages 105-156 of the Record of Proceedings which sets out the Contract between the Appellant and Prime Time sets out what the Appellant sold (Page 3 of the Respondent's Heads of Argument refers);

(9) in particular clause 2 of the Contract states that *"the Seller hereby sells to the Purchaser, which hereby purchases the Enterprise as a going concern upon the terms and conditions set out herein"* (Page 4 of the Respondent's Heads of Argument refers);

(10) "Enterprise" is defined as *"the Seller's letting enterprise known as Rumpuns Trading comprising the sellers rights and obligations in terms of the Society Lease, the property, the contracts, the seller's rights and obligations in terms of the leases and the deposits of the tenants together with any interest accrued thereon"* (Page 4 of the Respondent's Heads of Argument refers);

(11) "Property" *means PWC Office Park, part of Stand No. 2374, Thabo Mbeki Road, Lusaka, as contained in the Society Lease"*(Page 4 of the Respondent's Heads of Argument refers);

(12) "Society Lease" *means the Lease issued by the Agricultural and Commercial Society of Zambia to Rumpuns Trading Limited dated 20th April, 2004"* (Page 4 of the Respondent's Heads of Argument refers);

(13) there was also a press announcement made on 4th May, 2016, by PrimeTime which announced that PrimeTime had entered into a sale agreement to purchase PwC Office Park and that title was to pass on in February, 2016, and rentals would accrue to PrimeTime commencing 1st March, 2016. (Page 4 of the Respondent's Heads of Argument refers);

(14) the Audited Financial Statements of Prime Time Zambia as at 31st August, 2016, set out on pages 64-80 of the Record of Proceedings show that the company acquired one property during the year being PwC Office Park, part of Stand No. 2374, Thabo Mbeki Road, Lusaka. (Page 4 of the Respondent's Heads of Argument refers);

(15) the Appellant *also sold the property which constituted the PwC Office Park, the contracts, constituting the agreements signed between the seller and third parties, the Seller's rights and obligations in terms of Leases (existing lease agreements between the Seller and the tenants of the property) which fell under the definition of assets as stipulated under section 2 of the Act."*. (Page 5 of the Respondent's Heads of Argument refers);

(16) that the sale of such assets constituted a merger which was achieved when PrimeTime acquired an interest in the assets belonging to the Appellant, because PWC Office Park was the business of Rumpuns which by virtue of its sale, entailed that Prime Time gained control of the business of Rumpuns in line with the law. It therefore goes without saying that Prime Time did gain control of the business of Rumpuns (Page 5 of the Respondent's Heads of Argument refers);

(17) PrimeTime did admit, in a letter set out at pages 95-103 of the Record of Proceedings that the transaction was notifiable (Page 5 of the Respondent's Heads of Argument refers); and

(18) once a transaction meets the conditions stipulated under section 24 of the Act, the next step is to assess whether the merger notification threshold contemplated under section 26 of the Act and provided for under regulation 8 of SI No. 97 of 2011 is met. If such a transaction falls within the provisions, it must be notified with the Respondent. It is only upon notification of a transaction that it can be determined as to what the effects on the market may be (Page 7 of the Respondent's Heads of Argument refers).

Consideration of Ground 1

32. The Tribunal wishes to sincerely thank the Parties for their respective submissions on this ground of appeal.

33. The Tribunal has considered the arguments made by Learned Counsel for the respective Parties. The Tribunal notes that the issues raised with respect to Ground 1 are either technical or require statutory interpretation.

What are mergers in general?

34. The Tribunal found that the determination that something is a merger transaction can mean different things in different merger review regimes, depending on various factors such as, but not limited to, varying statutory definitions accorded to merger transactions, and on whether notifications of merger transactions are mandatory or voluntary, and on whether - in merger review regimes with mandatory notification systems - jurisdiction to review and duty to notify are two separate concepts (so that certain reviewable merger transactions are not subject to mandatory notification and waiting periods) or are identical[9].

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[9] Definition of Transaction For The Purpose Of Merger Control Review, Directorate For Financial and Enterprise Affairs Competition Committee, Organisation for Economic Co-operation and Development, Unclassified DAF/COMP(2013)25, 24-Jan-2014, p.11
Available at http://www.oecd.org/daf/competition/Merger-control-review-2013.pdf
Visited on 16th May, 2019 at 10:28
This document comprises proceedings in the original languages of a Roundtable on the Definition of Transaction for the Purpose of Merger Control Review held by the Competition Committee (Working Party No. 3 on Co-operation and Enforcement) in June 2013. It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience. This compilation is one of a series of publications entitled "Competition Policy Roundtables.

35. The Tribunal also found that it is indisputable that a sound definition of a merger transaction should-

(1) target the right types of transactions, i.e., those that lead to structural, more durable changes in the market place and could ultimately jeopardise the policy goals of a competition law regime;

(2) avoid capturing too many transactions that typically pose no competition law risks or are more appropriately controlled by different instruments in a competition regime's tool box; and

(3) use as much as possible bright line[10] tests based on objective, clear and transparent criteria to establish whether a transaction is subject to review.

36. The Tribunal further found that there is no single solution to achieving an optimal balance of the goals in sub-paragraphs (1) to (3) of paragraph 35 above because additional factors that are specific to each merger review regime will influence what constitutes the best solution, including notification thresholds, initial information requirements, speed of review, assumptions about the potential competitive harm of certain types of transactions, and the effectiveness of alternative enforcement instruments. This means, therefore, that despite the development of internationally recognised best practices for the merger review process, definitions of a merger transaction differ substantially.[11]

37. The Tribunal also established that the definition of merger transaction, is a highly technical subject[12], and that definitions of what constitutes a "merger transaction" can be based either on "objective," numerical criteria, or on more "economic" criteria that seek to align the definition of a merger transaction more closely with the changes in the relationship between parties that could lead to competition concerns.[13] The Tribunal noted that each approach has its own advantages and shortcomings. Both approaches are commonly used in merger review regimes, and some merger review regimes use a combination of the two approaches.[14]

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[10] A bright-line rule or bright-line test is a clear, simple, and objective standard which can be applied to judge a situation. In other words, it is a judicial rule that helps to resolve ambiguous issues by setting a basic standard that clarifies the ambiguity and establishes a simple response. The purpose of a bright-line rule is to produce predictable and consistent results in its application. Bright-line rules are usually standards established by courts in legal precedent or by legislatures in statutory provisions. See Bright-Line-Rule Law and Legal Definition, available at https://definitions.uslegal.com/b/bright-line-rule/ visited on 16/05/2019 at 16:20 hours

[11] Definition of Transaction For The Purpose Of Merger Control Review, *Supra*, p.11

[12] *Ibid*

[13] *Ibid*

[14] Ibid, p.6

38. In terms of the objective approach to the definition of a "merger transaction", the Tribunal found that this typically relies on percentage thresholds for share acquisitions, such as the acquisition of a 50% interest or of a 25% interest in the target. Objective criteria make the system more predictable and transparent. However, because of their predictability and transparency, parties to a merger may structure their transactions "around" the thresholds to avoid notification and review.[15]

39. The Tribunal found with respect to "economic" criteria that these are more directly aligned with the mechanism through which a transaction might harm competition, by focusing on whether a transaction will enable an entity to acquire the ability to exercise some form of influence over a previously independent entity. Different legal systems define different levels of intensity of influence, such as "decisive influence," "significant influence," "material influence," or "competitively significant influence." These definitions capture the reason for possible competitive concerns more directly than objective criteria and therefore "target" more effectively potentially problematic transactions. They also make it more difficult to "game the system"[16] or manipulate it to the Parties' benefit. At the same time, though, they require more case specific interpretation, and can, consequently, create uncertainty and make the process less transparent.[17] Guidelines by competition authorities, informal guidance, and consistent decision making are, to some extent, helpful for the purpose of addressing potential problems in this respect.[18]

40. The Tribunal also found that some countries use objective criteria and economic criteria side-by side so that, for example, acquisitions of a 30% interest or 50% interest in another firm; of "control" over another firm; of a significant competitive influence over another firm; and of all or substantial parts of the assets of another firm, are all considered merger transactions. Each of these thresholds can be independently applied to determine whether a transaction is

[15] *Ibid*
[16] *Ibid*
[17] *Ibid*
[18] Definition of Transaction For The Purpose Of Merger Control Review, *Supra*, p.6

considered a merger transaction.[19] Zambia appears to use a combined approach as is evident from sections 24(2)(a) and 24(3)(a) of the Act.

41. Given the fact that there is no universal or "one size fits all" definition of a merger transaction, this Tribunal holds the considered view that in order to properly address this Ground of Appeal, the cardinal question to be considered is this-"*In terms of our legislation, was there a merger between Rumpuns and Prime Time following the purchase, by Prime Time, of the interest over PwC Office Park, part of Stand No. 2374, Thabo Mbeki Road, from Rumpuns (being leasehold title over PwC Office Park)?*"

Mergers under the Act

42. Our Parliament, in whom the legislative authority of the Republic is vested by virtue of Article 62(2) of the Constitution of the Republic of Zambia, sets out the definition of mergers in section 24 of the Act. Section 24(1) of the Act provides that *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.*

43. Subsection (2) provides that a merger contemplated in subsection (1) may be achieved in three circumstances namely-

(a) where an enterprise purchases shares or leases assets in, or acquires an interest in, any shares or assets belonging to another enterprise;

(b) where an enterprise amalgamates or combines with another enterprise; or

(c) where a joint venture occurs between two or more independent enterprises.

The Tribunal notes that Parliament has accorded 'merger' a broader meaning than the word would have in common usage. This, in legislative drafting is referred to as extending definitions. An extending definition stipulates for the defined term a meaning that in some respect goes beyond the meaning or meanings conveyed in common usage by the term.[20] In the opinion of the Tribunal, the definition of "merger" in our Act is an extending definition, in the sense that, section 24(2)(a) of the Act extends far beyond the traditional perception of what constitutes a merger as it suggests that a mere lease or acquisition of the assets or interest in the assets of another enterprise could give

[19] *Ibid*

[20] G.C. Thornton, Legislative Drafting, 4th Edition, Butterworths, London Dublin Edinburgh, 1996, p.146

rise to a merger[21]. The selling entity and the purchasing entity need not purpose to merge (as in the common usage of the word "merger") for the lease or acquisition of those assets or an interest therein to be triggered. That is to say, an intention to merge (as in the common usage of the word) need not precede (i.e. is not the condition precedent), or form the basis upon which, a party to the intended merger leases or acquires the assets or an interest in the assets of the other enterprise.

To buttress this fact, one need only consider guidelines 6 and 7 of the Respondent's Merger Guidelines, 2015, which provide, respectively-

6. *...a merger may also be consummated without one enterprise necessarily acquiring formal control over another but through the acquisition of part of the business assets of another enterprise...*[22]

7. *The Commission will consider a merger to have been created when one enterprise buys or leases the assets belonging to another, if such assets have a market presence, or a market turnover which can clearly be attributed to them and the control now exercised over them has changed the competitive situation in the relevant market".*[23]

That said, this Tribunal is of the considered view that the definition of merger in Zambia does not derive its tenor from the definition of merger by Whish and Bailey or from the UK Enterprises Act but from the Competition and Consumer Protection Act as enacted by the Parliament of Zambia on 16th August, 2010.

44. Subsection (3) stipulates that for purposes of subsection (1), a person controls an enterprise if that person—

(a) *beneficially owns more than one half of the issued share capital of the enterprise;*

(b) *is entitled to vote a majority of the votes that may be cast at a general meeting of the enterprise, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that enterprise;*

(c) *is able to appoint or to veto the appointment of a majority of the directors of the enterprise;*

(d) *is a holding company and the enterprise is a subsidiary of that company;*

(e) *in the case of an enterprise which is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;*

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[21] This is to be read together with section 24(1) and 24(3) to establish the existence or otherwise of a merger

[22] Page 8 of the Guidelines

[23] Pages 10-11 of the Merger Guidelines, 2015

(f) *has the ability to materially influence the policy of the enterprise in a manner comparable to a person who, in ordinary commercial practice, can exercise the element of control referred to in paragraphs (a) to (e); or*

(g) *has the ability to veto strategic decisions of the enterprise such as the appointment of directors, and other strategic decisions which may affect the operations of the enterprise.*

45. Based on the facts presented before the Tribunal, it is not in dispute that a land right over PwC Office Park passed from the Appellant to Prime Time. In fact, a perusal of the Record of Proceedings shows that the PwC Property was purchased for value at US$8.8 Million (See page 97 of the Record of Proceedings).

46. The question then to be resolved by this Tribunal is whether or not the passing, by way of sale, of this property from the Appellant to Prime Time constituted a merger. Inextricably linked to this question is what appears to be the crux of this Ground of Appeal-Is a land right such as that transferred by the Appellant to Prime Time an asset? The Tribunal finds the answer to this question critical as it will determine whether or not there was a merger in terms of section 24 of our Act. The Tribunal will thus respond to the latter question before pronouncing itself as to whether or not there was a merger between the Appellant and Prime Time in terms of our Act. In responding to the latter question, the Tribunal will also address the Appellant's assertion in Ground 4 of the Appeal that *"the acquisition of land rights in land does not qualify to be defined as an asset under section 24 of the Competition and Consumer Protection Act No. 24 of 2010 as assets refer to movable property and immovable property".*

<u>What is an "asset"?</u>

47. The Tribunal notes that the Appellant did not make any submissions regarding why land rights cannot be defined as an asset. The Respondent's submissions in this regard are set out in paragraphs 31(4) to 31(15) above.

48. The Tribunal further notes that section 2 of the Act defines assets as follows:

" assets " 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;.

49. The Tribunal also notes that while the definition makes reference to "physical assets" these assets are not defined in the Act. It thus behoved the Tribunal to consider the meaning of the phrase. The Tribunal found that physical assets are defined as-

(1) *tangible assets and can be seen and touched, with a very identifiable physical presence. Examples of such physical assets include land, buildings, machinery, plant, tools, equipment, vehicles, gold, silver, or any other form of tangible economic resource.*[24];

(2) *an item of economic, commercial or exchange value that has a material existence. Physical assets are also known as tangible assets. For most businesses, physical assets usually refer to properties, equipment, and inventory. Physical assets are the opposite of intangible assets, which include such things as brand names, patents, trademarks, leases, computer programs, customer lists, franchise agreements, domain names or trade secrets.*[25]; or

(3) *actual property such as precious metals or real estate. Also called real or tangible assets.*[26]

50. To gain a clearer understanding of the import of physical assets, the Tribunal considered the meaning of tangible assets. The Tribunal found the following definitions of tangible asset:

(1) *a tangible asset is an asset that has a physical form. Tangible assets include both fixed assets, such as machinery, buildings and land, and current assets, such as inventory.*[27] *Tangible assets are physical items of value which are used to generate revenue for a company.*[28];

(2) in accounting, a tangible asset is defined as *"any asset that can be seen and touched. It includes things that can be reproduced, such as widgets ... and things that cannot be reproduced such as land upon which the widget factory is built..."*[29];

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[24] https://universe.bits-pilani.ac.in/uploads/Financial%20markets%20-%20reading%20assignment.pdf Visited on 22/02/2019 at 14:43

[25] *What is a Physical Asset?* available at https://www.investopedia.com/terms/p/physicalasset.asp visited on 22/02/2019at 14:45 hours.

[26] "Physical Asset" available at https://www.nasdaq.com/investing/glossary/p/physical-asset visited on 22/02/2019 at 14:48 hours.

[27] "Tangible Asset" available at https://www.investopedia.com/terms/t/tangibleasset.asp visited on 23/02/2019

[28] *Ibid*

[29] Farlex Financial Dictionary, 2012

(3) *an asset such as a building or piece of equipment that has physical properties. Also called hard asset*[30]*;*

(4) *tangible assets are assets with a physical form and that hold value. Examples include property, plant, and equipment. Tangible assets are seen or felt and can be destroyed by fire, natural disaster, or an accident. They come in physical form, which means they can be seen, felt, or touched; are depreciated over a period of time; possess a scrap or residual value; can be used as collateral to obtain loans; and are used in the daily operations of the business*[31]; and

(5) *a tangible asset is physical property - it can be touched. The term is most commonly associated with fixed assets, such as machinery, vehicles, and buildings. It is not used to describe shorter-term assets, such as inventory, since these items are intended for sale or conversion to cash. Tangible assets comprise the key competitive advantage of some organizations, especially if they use the assets efficiently to produce sales.*[32]

51. Tangible assets are defined in our Laws in section 2 of the Movable Property (Security Interest) Act No. 3 of 2016 as follows:

" tangible assets " means every form of movable property, including inventory, equipment, consumer goods, accession, negotiable instruments, negotiable documents and money...

52. The Tribunal also considered what constitutes movable and immovable in terms of property. The Encyclopaedia Britannica defines "movable and immovable" as *"... the basic division of things subject to ownership. In general, the distinction rests on ordinary conceptions of physical mobility: immovables would be such things as land or buildings, which are thought to be stationary in space; movables would be such things as cattle or personal belongings, which can either move themselves or be moved in space..."*[33]

53. From the foregoing, it is evident that, physical assets means tangible assets and includes property which is either movable or immovable.

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[30]*Wall Street Words: An A to Z Guide to Investment Terms for Today's Investor* by David L. Scott. Copyright © 2003 by Houghton Mifflin Company. Published by Houghton Mifflin Company

[31]*What are Tangible Assets*? Available at https://corporatefinanceinstitute.com/resources/knowledge/accounting/what-are-tangible-assets/ visited on 23/02/2019 at 22:20 hours.

[32] "Tangible Asset" available at https://www.accountingtools.com/articles/2017/5/15/tangible-asset visited on 23/02/2019 at 22:30 hours.

[33] "Movable and Immovable-Legal Concept" available at https://www.britannica.com/topic/movable-and-immovable visited on 23/02/2019 at 22:00 hours

54. The Tribunal further considered the meaning of intangible assets as referred to in the definition of "assets" in the Act.

55. The Tribunal further notes that while the Act does not define immovable property, the Movable Property (Security Interest) Act No. 3 of 2016 sheds some light as to the meaning of this phrase. In that Act, immovable property is defined as follows:

" immovable property " means land or other property that cannot be moved and includes an object so firmly attached to the land that it is regarded as part of the land;

56. The Movable Property (Security Interest) Act defines an " intangible asset " as including "*movable property, a financial contract, incorporeal rights, excluding goods, documents of title, securities, money and negotiable instruments*" and "movable property" to include "*goods, intangibles, securities, money, negotiable instruments and negotiable documents*". That Act defines " tangible assets" as "*every form of movable property, including inventory, equipment, consumer goods, accession, negotiable instruments, negotiable documents and money*".

57. The Tribunal takes note of the fact that the Competition and Consumer Protection Act does not define "intangible assets" but refers to them as including "*goodwill, intellectual property rights and knowhow*". It is the considered view of the Tribunal that the use by the drafters of the word "including" is intended to accord, to "intangible assets" a meaning broader than that set out in the Act. This view is in keeping with the principles of drafting definitions set out by renowned author G.C. Thornton who states, at page 148 of his book entitled "Legislative Drafting" that 'includes' is appropriate where the expression of the stipulated meaning is incomplete and part only of the intended meaning is expressed.[34] Accordingly, the Tribunal took it upon itself to consider the nature and broader scope or purview of intangible assets.

58. The Tribunal found that intangible assets are defined as follows:

(1) *Intangible assets do not have any physical characteristics or substance, and they have useful lives of more than one year. Intangible assets provide businesses that possess them with rights, privileges and advantages that offer the future benefit of increasing the firm's earning power. Intangible assets include copyrights and trademarks which help brand companies, providing market power as well as patents, which often result from significant investment in research and*

[34] G.C. Thornton, Legislative Drafting, 4th Edition, Butterworths, London Dublin Edinburgh, 1996, p.148

development. These assets also include royalty streams, software, licenses, franchise arrangements, goodwill and leaseholds[35]*;*

(2) *an intangible asset is a claim to future benefits that does not have a physical or financial embodiment." Common examples include patents, copyright agreements, brands, research and development expenditure, and franchise* [36]*;*

(3) *Intangible property has no physical substance. The Dictionary of Real Estate Appraisal defines intangible property as Nonphysical assets, including but not limited to franchises, trademarks, patents, copyrights, goodwill, equities, securities, and contracts as distinguished from physical assets such as facilities and equipment (Appraisal Institute 2015).* [37] *These assets derive their value from the rights inherent in their ownership. They are considered intangible because they cannot be seen or touched, yet they have the potential to possess value. The first step in addressing intangible value is to determine whether something is in fact an intangible asset. The courts (In the Matter of the Appeal of Colorado Interstate Gas Co. 2003; Hardage Hotels, LLC v. Lisa Pope 2007), real estate texts (Reilly and Schweihs 1999, 5), financial accounting standards (FASB 2016, paragraph 20, section 20), state laws (Montana Secretary of State 2015), and industry articles (Wood 1999, 8) have attempted to define intangible assets by identifying specific attributes. Identifying these attributes can assist the assessor in determining whether something intangible rises to the level of an asset. Based on these sources, a four-part test can be used to help determine the existence of an intangible asset, as follows:*

1. *An intangible asset should be identifiable.*
2. *An intangible asset should have evidence of legal ownership, that is, documents that substantiate rights.*
3. *An intangible asset should be capable of being separate and divisible from the real estate.*

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[35] *Is a Leasehold an Intangible Asset?* Available at https://finance.zacks.com/leasehold-intangible-asset-10595.html visited on 20/02/2019 at 15:20 hours *Ibid*

[36] "Accounting for Intangible Assets" by Lloyd Austin in University of Auckland Business Review, Volume 9 No.1, pp.65-67, Available at https://www.uabr.auckland.ac.nz/files/articles/Volume13/v13i1-accounting-for-intangible-assets.pdf
visited on 20/02/2019 at 12:30 hours

[37] Understanding Intangible Assets and Real Estate: A Guide for Real Property Valuation Professional, p.2, available at https://www.iaao.org/library/2017_Intangibles_web.pdf
Visited on 01/04/2019 at 17:00 hours
This guide was developed by the IAAO Special Committee on Intangibles for informational purposes only and does not necessarily represent a policy position of IAAO. This guide is not a Technical Standard and was developed for the benefit of assessment professionals. This guide was approved for distribution by the IAAO Executive Board on November 12, 2016

4. *An intangible asset should be legally transferrable*[38]*; and*

(4) the International Accounting Standard 38 (IAS 38) entitled "Accounting for Intangible Assets" provides that an intangible asset is *"an identifiable non-monetary asset without physical substance. Identifiable means that the asset is either separable, that is, it can be sold apart from the firm's other assets or it arises from contractual or other legal rights. These essential criteria of intangibles are additional to those applicable to other types of assets, namely that there must be probable future economic benefits which are attributable to the asset which will flow through to the firm and the cost of the asset can be measured reliably."*[39] IAS 38 provides that intangibles can be obtained by the firm in a number of ways such as by separate purchase, by self-creation, that is internally generated by the firm, by an exchange of assets, as part of a business combination or can arise from a government grant.[40] The Tribunal also found that "an intangible asset is an identifiable, non-monetary item without physical substance, which is within the control of the entity and is capable of generating future economic benefits for the entity."[41]

59. The Tribunal notes that there are many documents that evidence ownership of intangible assets, such as contracts, licenses, franchise agreements, management agreements, and leases.[42] If an intangible asset does not have legal documentation evidencing its legal ownership, then it probably is not an intangible asset. This test is somewhat related to the first test (being identifiable) with respect to intangible assets stipulated in the Dictionary of Real Estate Appraisal. However, without legal ownership, even an identified intangible does not rise to the level of an asset. An intangible asset should also be capable of being separate and divisible from the real property.

60. The Tribunal further notes that the Appellant has submitted that it did not sell assets within the meaning of the Act but rather sold its land rights. The question therefore to be determined is whether a land right such as that transferred by the Appellant to Prime Time is an asset within the meaning of the Act. In order to answer this question, it is imperative to discuss the nature of the land rights held by the Appellant over the land.

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[38] Understanding Intangible Assets and Real Estate, *supra*

[39] "Accounting for Intangible Assets" *supra*, pp.65-67.

[40] *Ibid*

[41] IAS 38 though not binding on most countries until at least 2005, provides guidance on the nature, and treatment, of intangibles.

[42] Understanding Intangible Assets and Real Estate: A Guide for Real Property Valuation Professional, *Supra*, p.3

Nature of Land Rights Held by the Appellant over Stand 2374, Thabo Mbeki Road

61. The Tribunal, in order to establish the nature of the rights held by the Appellant over Stand 2374, Thabo Mbeki Road, considered the Lease entered into by the Appellant and the ACSZ. The Tribunal found from that Lease that-

(1) the Lease Agreement permitted the Lessee to develop the said premises (See clause 5.1 at page 144 of the Record of Proceedings);

(2) the Lease required the Lessee to pay to the Lessor a fixed gross rental of $1 per square meter (See clause 6.3 at page 145 of the Record of Proceedings);

(3) the Lease Agreement permitted the Lessee (the Appellant) to develop the said premises (See clause 5.1 at page 144 of the Record of Proceedings);

(4) the Lessor was responsible, under the lease, to pay ground rent to the Ministry of Lands (See clause 6.7 at page 145 of the Record of Proceedings);

(5) ownership of the property (i.e. "*...the Premises and the buildings erected thereon;*" (See clause 2 at page 144 of the Record of Proceedings) remained with the Lessor. This is implicit from clause 10 of the Lease (See page 146 of the Record of Proceedings) which provides that in the event that the Lessor intended to sell the property, the Lessee had the first right of refusal. Applying the categorisations of property as either tangible or intangible, the Tribunal is of the view that the property in terms of the Lease constitutes tangible property. Accordingly, ownership of the tangible remained with the Lessor;

(6) there is no recorded sale of the property by the Lessor to the Lessee;

(7) clause 12.2 of the Lease entitled the Lessee to sublet the property in whole or in part and in so doing, the Lessee was to specify to the Lessor full details of the proposed sub-lease, the property which is to be sublet and all rental or other consideration which the lessee proposed to charge the sub-lessee (See page 147 of the Record of Proceedings). This clause implies that the Lessee could charge and receive rentals from the Property sublet, i.e. the Lessee had the right to charge and collect rentals with respect to Stand 2374; and

(8) the Lease was for a period of fifty years (See clause 3 on page 144 of the Record of Proceedings).

62. On the basis of the foregoing, it is evident that the Appellant held a land right over Stand 2374 which land right permitted the Appellant to sub-let Stand 2374 (in whole or in part) and to receive rentals therefrom.

63. The next question to be determined by the Tribunal is what kind of land right permits a Lessee to sub-let the property in respect of which the land right is held and to receive rentals therefrom? This question is addressed below.

<u>What kind of land right permits a Lessee to sublet the property in respect of which the land right is held and to receive rentals therefrom?</u>

64. The Tribunal considered the foregoing question and found that the land right which permits a Lessee to sublet the property in respect of which the land right is held and to receive rentals therefrom is known as a Leasehold right.

65. The Tribunal considered the nature of leasehold rights and found as follows:

(1) a leasehold gives the tenant the right to exclusively possess and use real property for a fixed time period. (In the case at hand, the period was fifty years) The landlord gives up this right for that time period, retaining the title or deed to the property but few other rights. (In the present case, the ACSZ retained title as is implicit from clause 10 of the Lease Agreement). This long-term exclusivity makes the leasehold an asset. Since the leasehold serves as a contractually provided interest, not the actual building, it is an intangible asset[43];

(2) the actual structure or property that a business uses or built does not constitute a leasehold or leasehold improvement; the interest in that structure or property does. The property or land owner conveys that interest by written documentation through a written lease agreement. Although the actual property is a physical asset, the leasehold is only an interest, and therefore it is not a physical asset. A company has the contractual right to use the property for its long-term future benefit. Therefore, a leasehold meets the specifications of an intangible asset[44];

(3) a leasehold is the right to use a property that the leaseholder does not own for a specified, extended period of time for a specified price. A written, long-term lease contract that the leaseholder possesses typically outlines the terms and conveys these rights. A leasehold also often refers to real property improvements made or property built by one entity on land

[43] Understanding Intangible Assets and Real Estate, *supra*
[44] *Ibid*

owned by another. This type of leasehold is called a "leasehold improvement." As with a regular leasehold, the Lessor i.e. the owner of the building, holds a long-term lease on the land on which the improvement sits[45];

(4) a leasehold is to be contrasted with or distinguished from rent whereunder the parties are referred to as Landlord and Tenant, the Tenant uses the rental property for a limited period (short term) and fixed consideration in consideration of the payment of rent (as opposed to lease rentals); and

(5) a leasehold differs from a regular rent agreement in that it gives the tenant (lessee or sub-lessee) the right to exclusively possess and use real property for a fixed time period. The landlord gives up this right for that time period, retaining the title or deed to the property but few other rights.[46]

66. Based on the foregoing and the definition of intangible assets at paragraph 49, it is the considered view of the Tribunal that a Leasehold right can safely be categorised as an intangible asset, and thus falls within the purview of the Act. Having established that the Appellant held a leasehold right (as opposed to a property right) over PwC Office Park and that a leasehold right is an intangible asset, the Tribunal **finds, therefore, that Ground 4 of the Appellant's appeal in which the Appellant avers that the acquisition of land rights in land does not qualify to be defined as an asset under section 24 of the Competition and Consumer Protection Act No. 24 of 2010 as assets refer to movable property and immovable property fails.**

67. The finding, by this Tribunal, that a leasehold right is an intangible asset entails that the Appellant transferred, for value, its leasehold right (an intangible asset) to Prime Time. This finding further entails that in terms of section 24(2) a circumstance existed which could give rise to, or potentially result in, a merger-this circumstance being that Prime Time purchased an intangible asset which

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[45] Is a Leasehold an Intangible Asset?
Available at
https://finance.zacks.com/leasehold-intangible-asset-10595.html
visited on 20/02/2019 at 15:20 hours

[46] *Ibid*. See also *"Leasehold Estate"*, available at
https://uk.practicallaw.thomsonreuters.com/7-381-1197?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1 visited on 20/02/2019 at 18:30 hours

belonged to Rumpuns (the Appellant). A further perusal of the Act discloses that the fact that there was a purchase, in itself, does not amount to a merger, but that there must be, *inter alia*, direct or indirect control, by one enterprise, over the business of another enterprise. This is evident from section 24(1) which provides, in part, that "*... 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.*"

68. Having established that an asset sale, in itself, does not amount to a merger unless *an enterprise, directly or indirectly, acquires or establishes, direct or indirect, control over the whole or part of the business of another enterprise,* the next question to be determined is "Did Prime Time, following the purchase of the Appellant's assets, *directly or indirectly, acquire or establish, direct or indirect, control over the whole or part of the business* of Rumpuns? In order to properly respond to this question the concept of control ought to be considered. This concept is considered below.

What is control?

69. Control is defined in section 24(3) of the Act as follows:

(3) For purposes of subsection (1), a person controls an enterprise if that person

(a) beneficially owns more than one half of the issued share capital of the enterprise;

(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the enterprise, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that enterprise;

(c) is able to appoint or to veto the appointment of a majority of the directors of the enterprise;

(d) is a holding company and the enterprise is a subsidiary of that company;

(e) in the case of an enterprise which is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;

(f) has the ability to materially influence the policy of the enterprise in a manner comparable to a person who, in ordinary commercial practice, can exercise the element of control referred to in paragraphs (a) to (e); or

(g) has the ability to veto strategic decisions of the enterprise such as the appointment of directors, and other strategic decisions which may affect the operations of the enterprise.

70. A critical analysis of the provision reveals that the control contemplated in section 24(3) relates to issued share capital, the appointment or disappointment of a majority of the directors of the enterprise, influence in terms of voting, influence over policy of an enterprise and influence over strategic decisions of an enterprise. The provision does not govern control with respect to assets purchased from another enterprise (within the context of section 24(2)(a)). In fact, throughout the Act, control within the context of section 24(2)(a) is not defined. That is to say, the Act does not stipulate what minimum percentage of the total assets or what category or type of assets (e.g. strategic assets) must be sold or purchased to constitute a merger. This presents an anomaly or a *lacuna* which begs the questions, "What was the intention of the legislators (i.e. Parliament)?" "Did Parliament, by enacting a definition of control that is limited to the instances set out in section 24(3) of the Act, intend to exclude instances of control that are not set out explicitly in that section or the Act?" That is to say, "did Parliament, in crafting a definition of control (which omits control of assets) intend the list to be exhaustive and thus, to be interpreted in accordance with the purview of the *expressio unius est exclusio alterius* canon of interpretation which provides that "*that the expression of one thing is the exclusion of the other?*[47]" "Did Parliament intendthat that provision of the Act be interpreted literally?" All of these questions are addressed below.

What was the intention of the legislators?
Did Parliament, by enacting a definition of control that is limited to the instances set out in section 24(3) of the Act, intend to exclude instances of control that are not set out explicitly-in that section or the Act?
Did Parliament intend the omission with respect to the control of assets to fall within the purview of the *expressio unius est exclusio alterius* canon of interpretation which provides that "*that the expression of one thing is the exclusion of the other?*"
Should section 24(3) of the Act be interpreted literally for the purpose of establishing Parliament's intention regarding the concept of control *vis a vis* mergers?

71. 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.

[47] See ***Rodaro v Royal Bank of Canada 2000 OJ 272*** at p.856

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.

72. However, as has already been stated it is evident upon applying the literal rule of interpretation of section 24(3) of the Act that there is a lacuna in the definition of "control" to the extent that while section 24(2) contemplates a merger where, *inter alia*, "an enterprise purchases shares or leases assets in, or acquires an interest in, any shares or assets belonging to another enterprise..." and that in terms of section 24(1) of the Act, "*... 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*", the definition set out in section 24(3) does not govern control of assets purchased from another enterprise.

73. In order to establish Parliament's overall intention as regards merger control and thereby determine the sufficiency or otherwise of the concept of control (i.e. whether or not the concept of control should be accorded a limited (literal) interpretation or an extended interpretation (with extension premised on Parliament's intention)) this Tribunal, based on the strength of the foregoing cases (i.e. the ***General Nursing Council of Zambia***, ***Anderson Kambela Mazoka*** and ***Matilda Mutale*** cases) considered why entities merge, the effect of mergers on competition, why control of mergers is pertinent and the public policy behind the control of mergers (i.e. the mischief which merger control intends to cure), the Act, the Merger Guidelines, 2015, the principles of law governing mergers

and acquisitions, in general, and the role of the Commission *vis a vis* the control of mergers.

The Tribunal also took judicial note of the case of ***Dora Siliya & 2 Others v. The Attorney-General and the Electoral Commission of Zambia 2013/HP/1159*** in which the Court stated that *"... statutory provisions are to be considered in consonance of the whole and the intention of the legislature. Where there are apparent grey areas, the court may read into the same certain provisions in order to arrive at the just interpretation or intention of the legislature. However, the reading in should not go against what is the generally apparent intention in terms of what is clearly provided."*

Why do Entities Merge?

74. The Tribunal found that there are many reasons why companies merge. These include the following:
    (1) using a merger as a basis to entering a market - i.e. domestic market or even an export market;
    (2) to expand the business portfolio - i.e. product range;
    (3) achieving a net addition to the entity's stock of assets;
    (4) to enjoy efficiencies;
    (5) to eliminate competition;
    (6) to become dominant; and
    (7) to obtain research and development process, facilities and future products (Intellectual property rights).

In order to gain greater understanding of Parliament's intention, the Tribunal also considered the effect of mergers on competition.

What are the Effects of Mergers on Competition?

75. The Tribunal found that-
    (1) when companies decide to merge, they may, in fact, alter the market structure of the sector (s) in which they operate. The merger may enhance or reduce competition. It is also possible that a merger may not change the levels of competition in the sector. For instance, in a horizontal merger, in which one firm acquires another firm that produces and sells an identical or similar product in the same geographic area and thereby eliminates competition between the two firms[48];

[48] West's Encyclopedia of American Law, 2005 The Gale Group, Inc.
Mergers and Acquisitions, available at
https://www.encyclopedia.com/social-sciences-and-law/eco...r/money-banking-and-investment/acquisitions-and-mergers

(2) mergers may also create the opportunity for a unilateral anticompetitive effect. This type of harm is most obvious in the case of a merger to monopoly – when the merging entities constitute the only competitors in a market. In addition, vertical mergers present competitive problems. Vertical mergers take two basic forms: forward integration, by which a firm buys a customer, and backward integration, by which a firm acquires a supplier. Replacing market exchanges with internal transfers can offer at least two major benefits. First, the vertical merger internalises all transactions between a manufacturer and its supplier or dealer, thus converting a potentially adversarial relationship into something more like a partnership.[49] For example, a vertical merger can make it difficult for competitors to gain access to an important component product or to an important channel of distribution. This problem occurs when the merged firm gains the ability and incentive to limit its rivals' access to key inputs or outlets[50];

(3) vertical integration by merger does not reduce the total number of economic entities operating at one level of the market, but it might change patterns of industry behavior. Whether a forward or backward integration, the newly acquired firm may decide to deal only with the acquiring firm, thereby altering competition among the acquiring firm's suppliers, customers, or competitors. Suppliers may lose a market for their goods, retail outlets may be deprived of supplies; or competitors may find that both supplies and outlets are blocked.[51] These possibilities raise the concern that vertical integration will foreclose competitors by limiting their access to sources of supply or to customers.[52] Vertical mergers also may be anticompetitive because their entrenched market power may impede new businesses from entering the market;[53]

(4) in a case where an entity seeks to enter a market, a merger between an entity that already exists in the market and the potential entrant can

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[49] West's Encyclopedia of American Law, *Supra*

[50] Competitive Effects, Federal Trade Commission, available at https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/competitive-effects Visited on 31/01/2019 at 12:00pm

[51] *Ibid*

[52] *Ibid*

[53] Competitive Effects, Federal Trade Commission, *Supra*

prevent the actual increased competition that would result from the undertaking's entry and possibly lead to higher prices[54];

(5) the unification of the merging entities' operations might create substantial market power and might enable the merged entity to raise prices by reducing output unilaterally[55].;

(6) by increasing concentration in the relevant market, the transaction might strengthen the ability of the market's remaining participants to coordinate their pricing and output decisions. The fear is not that the entities will engage in secret collaboration but that the reduction in the number of industry members will enhance tacit coordination of behavior[56];

(7) conglomerate mergers, however, may lessen future competition by eliminating the possibility that the acquiring firm would have entered the acquired firm's market independently[57]; and

(8) a conglomerate merger also may convert a large firm into a dominant one with a decisive competitive advantage, or otherwise make it difficult for other companies to enter the market. This type of merger may also reduce the number of smaller firms and may increase the merged firm's political power, thereby impairing the social and political goals of retaining independent decision-making centers, guaranteeing small business opportunities, and preserving democratic processes.[58]

76. The Tribunal also found that in terms of the Act, the effects, both positive and negative, of mergers are set out in sections 29, 30 and 31 of the Act, albeit by implication. The Tribunal found therefrom that mergers may-

(1) create negative effects in the relevant market, on trade and the economy in general;

(2) prevent or substantially lessen competition in a market;

(3) create or strengthen barriers to market entry;

(4) negatively affect existing effective and vigorous competitors;

(5) save a failing firm;

(6) affect the dynamic characteristics of the market including growth, innovation, pricing and other inherent market characteristics;

(7) cause a position of dominance to be abused;

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[54] *Ibid*

[55] West's Encyclopedia of American Law, *Supra*

[56] *Ibid*

[57] *Ibid*

[58] *Ibid*

(8) 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;

(9) enhance the competitiveness, or advance or protect the interests, of micro and small business enterprises in Zambia; and

(10) affect the ability of national industries to compete in international markets.

77. The Tribunal also considered why merger control is essential. This aspect is addressed below.

Why Merger Control?

78. The Tribunal considered the general policy behind merger control and found that while mergers, amalgamations, acquisitions and other similar transactions are generally good for competition and consumers, and that mergers allow firms to reduce costs and realise efficiencies that can drive investment and innovation and ultimately reduce prices for consumers, mergers inherently lead to consolidation of assets, and may lead to the elimination of competitors and changes to market structure.[59] Consequently, some mergers may significantly harm competition, harm consumers or trigger other competition policy issues. The purpose of merger control is to prevent them occurring, or to mitigate or prevent the harm that may result if they are allowed.[60] Specifically, the Tribunal found that-

(1) merger control is one of the main pillars of a competition system, whose aim is to preserve the competitive structure of markets despite takeover operations or mergers;[61]

(2) merger control legislation is essential for defining the transactions that will be subject to control by competition authorities. The underlying idea is to capture all transactions that transform formerly independent market players into a single player and thereby alter the structure of a market,

[59] Merger Control Policy Guidance To Strengthen The Indonesian Competition Framework, 1 March 2, 2018
Available at file:///C:/Users/CTTP/Documents/CCPC/MERGERS/131397-WP-PUBLIC-2018-WBG-Merger-Note-Indonesia.pdf
Visited on 16/05/2019 at 10:38 hours

[60] *Ibid*

[61] Challenges in the design of a merger control regime for young and small competition authorities
United Nations Conference on Trade and Development Trade and Development Board, Trade and Development Commission, Intergovernmental Group of Experts on Competition Law and Policy Sixteenth session, Geneva, 5–7 July 2017, Item 3 of the provisional agenda, Work programme, including capacity-building in and technical assistance on competition law and policy, TD/B/C.I/CLP/45

possibly to the detriment of competition. With regard to the definition of mergers, the law should be specific and detailed, to allow for a clear identification of the operations to be caught by the system;[62]

(3) merger control laws should establish systems that have as their objective a prompt and efficient control of mergers that guarantees legal security and does not constitute an unjustified brake on economic expansion and the growth of companies;[63]

(4) merger control is a vital tool for public authorities to create the best possible conditions for firms to do business and to help the economy grow;[64]

(5) merger control is necessary to examine the extent to which mergers may allow the development of new technologies or eliminate competition between rival technologies and result in entrenching the dominance of a player;

(6) merger control is necessary to examine whether the merger would yield monopoly control to the merged entity;

(7) merger control is necessary to examine if a merger will promote trade restraints and monopolisation; and

(8) merger control is necessary to identify those transactions that are "suitable" for merger review, i.e., transactions that result in a more durable combination of previously independent assets and have a reasonable likelihood of outcomes that conflict with the policy goals of a competition law regime.

79. The Tribunal found that in terms of our Act-

(1) the public policy can simply be stated as found in the title of the Act itself "*Competition and Consumer Protection*", and in the long title of the Act which provides that the objects of the Act are to, *inter alia, "safeguard and promote competition"*; and

(2) sections 30 and 31 of the Act set out why merger control is essential or the policy behind merger control. The reasons include the assessment of-

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[62] *Ibid*

[63] *Ibid*

[64] Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy, Policy Objectives in Merger Control, was the on;y
/11/561, Fordham Competition Conference
New York, 8 September 2011

(a) whether or not there is a risk that a position of dominance may be abused;

(b) 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;

(c) 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; and

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

80. The Tribunal also considered what the essence is of assessing, by way of merger review, the lease or purchase, by one enterprise, of the assets of another enterprise. This, it did, to determine whether or not Parliament intended the concept of control to extend to the assets subject to an acquisition contemplated in section 24(2)(a) of the Act. This is addressed below.

What is the essence of assessing, by way of merger review, the lease or purchase, by <u>one enterprise, of the assets of another enterprise?</u>

81. The Tribunal found that the acquisition of the assets of an enterprise is a more direct way (in comparison to the acquisition of shares) to bring about durable, structural changes in the market place.[65] The Tribunal further found that the acquisition by one enterprise of the assets of another may affect how assets are used in the competitive process, and therefore are generally considered merger transactions.[66]

82. The Tribunal also noted that complexities may arise when the acquired assets constitute less than the entire assets of an entity firm or of a line of business. In those cases, many merger review regimes require a determination of whether the acquired assets are sufficiently material to potentially have adverse competitive

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[65] Definition of Transaction For The Purpose Of Merger Control Review, *Supra*, p.8

[66] *Ibid*

effects in order to determine whether or not the acquisition is considered a merger transaction.[67]

83. In the Tribunal's view the question as to whether or not the acquired assets are sufficiently material is, essentially, one of fact and can only be determined on a case by case basis. It is probably for this reason that participants to a roundtable on the Definition of Transaction for the Purpose of Merger Control Review held by the Competition Committee (Working Party No. 3 on Co-operation and Enforcement) in June 2013 (under the auspices of the Organisation for Economic Co-operation and Development)[68] (OECD) confirmed that most jurisdictions apply a flexible approach to the question of whether acquisitions of limited assets constitute a merger transaction and engage in a broader examination of all relevant circumstances to determine whether the acquired assets are substantial enough to bring about structural changes on the market. The roundtable also noted that several jurisdictions require that the acquired assets must represent at least "part of an undertaking," which means that there must be a transfer in control over assets with a market presence that generates clearly attributable revenues, while others adopt a wider approach and consider that the acquisition of any asset that plays an essential role in trading activities, attracts customers, or has an impact on the competitive process could be considered a merger transaction.[69] In all these cases, the focus is on whether the acquired asset is likely to impact the acquirer's position in the market place.[70]

84. The Tribunal further established that with respect to acquisitions of assets, the main definitional issue - in contrast to share acquisitions - relates not to "control" or "ability to influence", but to whether the acquired assets have sufficient competitive significance so as to give rise to an appreciable economic concentration in the marketplace. This notion is often captured by reference to whether the assets comprise an "enterprise" or business activity to which turnover may be attributed.[71]

85. As the determination is one of fact, and must, as such, be undertaken on a case by case basis, it is not possible to conceive every possible scenario whereunder

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[67] *Ibid*

[68] For the proceedings refer to link provided under "Definition of Transaction For The Purpose Of Merger Control Review, *supra*

[69] Definition of Transaction For The Purpose Of Merger Control Review, *supra*, p.8

[70] *Ibid*

[71] Defining "Merger" Transactions for Purposes of Merger Review, available at file:///C:/Users/CTTP/Documents/CCPC/MERGERS/GOOD%20MWG_DefiningMergerTransactions.pdf visited on 16/05/2019

an acquisition of asset constitutes a merger.[72] The Tribunal notes, in this regard, that the use of inquiries into whether an acquired asset is capable of affecting the purchaser's competitive position when deciding whether an acquisition of assets constitutes a merger is helpful, i.e. employing a pragmatic approach when deciding whether an acquisition of assets constitutes a merger is useful. The use of more flexible standards appears to enable a competition authority to use some very preliminary assessment of likely competitive effects of a transaction to determine whether a transaction qualifies or should qualify as a merger transaction.[73] The Tribunal notes that the participants to the roundtable referred to in preceding paragraphs confirmed that these more flexible standards can better target potentially problematic transactions but also create difficult questions in individual cases. This, in the opinion of the Tribunal, is because some degree of consistency and certainty is foregone by this approach (i.e. the flexible or pragmatic approach). Nonetheless, it suffices to note in this regard that guidelines, informal guidance, and consistent and transparent decision making can ensure that the definition of what constitutes a merger transaction remains predictable in practice.[74]

86. The Tribunal further notes that section 84(1) of the Act empowers the Respondent to make such guidelines as are necessary for the better carrying out of the provisions of the Act. Guidelines issued by the Commission under the Act shall bind all persons regulated under the Act[75].

87. Given the effect that the purchase, by one entity, of the assets of another has on competition, and given also the public policy behind competition and consumer protection, in general, and merger control, specifically, the Tribunal asked itself, "would it be prudent to assume that Parliament intended to limit the definition of control to the scenarios set out in section 24(3) of the Act? Should section 24(3) be accorded literal interpretation?" The Tribunal also asked itself what the effect of limiting control to the scenarios specified in section 24(3) would be. These questions are addressed below.

Did Parliament intend to limit the definition of control to the scenarios set out in section 24(3) of the Act? i.e. Should section 24(3) be accorded literal interpretation? What would be the effect of limiting control to the scenarios specified in section <u>24(3)?</u>

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[72] Definition of Transaction For The Purpose Of Merger Control Review, *Supra*, p.9

[73] *Ibid*

[74] *ibid*

[75] Section 84 of the Act

88. The Tribunal considered the foregoing questions, and in the Tribunal's view, the best way to respond to these questions would be to first address the last question, that is, what would be the effect of limiting control to the scenarios specified in section 24(3)?

89. In addressing this question, the Tribunal considered the reasons entities merge (see paragraph 74 (above)) and found that if the concept of control was accorded a literal interpretation (i.e. an interpretation which excludes control over acquired assets) this would result in a weak safeguard against anti-competitive mergers. This is because only control established by the purchase of shares would fall within the purview of the Act and, thus, trigger the merger review mandate of the Respondent. Entities would thus be able to "game the system"[76] or manipulate it to their benefit to do or accomplish any one of the following:

    (1) a procuring entity could purchase a selling entity's assets, and rather than receive cash for the purchase, the selling entity could opt to receive, as payment for the assets, shares in the procuring entity (i.e. an asset for share transaction). Depending on the extent of the shares received by the seller, a situation of control contemplated in section 24(3) could be created. The Parties to that transaction could, for purposes of eluding review by the Respondent, then collude to fraudulently style, categorise or disguise that asset for share transaction as a mere transaction for the sale of assets. Styled, categorised or disguised in this manner, the sale would not fall within the purview of section 24(3) as there would be no control in terms of section 24(3) of the Act;

    (2) an entity could artificially split the intended acquisition of another entity into several asset deals, and thereby, ultimately, gain control of the assets of the other entity, and thereby satisfy section 24(2)(a) of the Act but not section 24(3) of the Act. The transaction would thus escape the Respondent's radar; and

    (3) an entity operating in a particular market could strategically make numerous, significant one-off asset acquisitions from its competitors in that particular market (and thereby reduce or eliminate competition, increase its net asset value and become dominant). To give this scenario practical context (by way of example) in the real estate sector, Prime Time, an entity in the real estate market could purchase part, or the entire, real estate or leasehold in Trinity Park, F&R Office Suites and Prudential

[76] Definition of Transaction For The Purpose Of Merger Control Review, *Supra*, p.9

House (in Mass Media), Pangaea Office Park (along Great East Road), Blue House, opposite Mulungushi International Conference Centre, Sunshare Tower (on Katima Mulilo Road), Shreeji House (along Addis Ababa Drive), Elunda 2 and Elunda 3 (both on Chikwa Road) and thereby reduce or eliminate any competition presented by the sellers of those assets, increase its net asset value and become dominant. In guideline 46 of the Respondent's Merger Guidelines 2015, the Respondent provides with respect to such a transaction that "*Unilateral effects may arise in horizontal markets where the merger involves two competing enterprises and removes the rivalry between them. In the cases of both homogeneous and differentiated product markets, if the main competitive constraints premerger was the other party to a merger, in removing this constraint, may make it profitable for the merged entity to raise prices unilaterally.*"

In the foregoing scenario, if the concept of control is accorded a literal interpretation, this would mean that even if these numerous significant one-off acquisitions of assets satisfy section 24(2)(a) of the Act, "control of an enterprise" as contemplated in section 24(3) of the Act cannot be established as the facts surrounding the transaction would not satisfy any of the concepts of control set out in that subsection. The transaction would thus escape review in terms of the Act. None of the foregoing transactions would disclose "control of an enterprise" in terms of the scenarios set out in section 24(3) of the Act, and as such would fall outside the purview of that subsection. In effect, numerous otherwise obviously reviewable merger transactions would thus escape review by the Respondent.

90. In the view of the Tribunal, this effect would be absurd as it would, no doubt, constitute a flagrant departure from Parliament's intention to control mergers. i.e. a literal or '*Expressio unius exclusio alterius*' interpretation of section 24(3) would result in an absurdity.

91. In the Court of Appeal in the old English case of ***Colquhoun v. Brooks (1888) 21 Q.B.D. 52 at 65*** Lopes, L.J. said, "*The maxim 'Expressio unius exclusio alterius' has been pressed upon us. I agree, with what is said in the Court below ... about this maxim. It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The exclusion is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice.*"

In ***Rafferty v Crowley, [1984] ILRM 350*** an Irish case which concerned the definition of "prior mortgage" in section 80 of the Building Societies Act, 1976, Murphy J found that a literal interpretation of the provision at issue in the case did not give rise to a pointless absurdity, and applied the dicta of Lord Reid in ***Luke v The Inland Revenue Commissioners [1963] AC 557*** that a teleological or purposive approach would be applicable where: *"To apply the words literally is to defeat the obvious intention of the legislation and to produce a wholly unreasonable result."* The Tribunal also takes note of the case of ***In re Michael G. (1988) 44 Cal. 3d 283, 291 [243 Cal. Rptr. 224, 747 P.2d 1152]*** (a Californian case) in which the Supreme Court noted regarding the Latin rule of statutory construction *"expressio unius est exclusio alterius"*: *"This rule, of course, is inapplicable where its operation would contradict a discernible ... legislative intent."*

92. Considering-

(1) the absurdity that arises on account of applying the literal or '*Expressio unius exclusio alterius*' rule in construing section 24(3) of the Act;

(2) the cases of ***Colquhoun v. Brooks, Rafferty v Crowley*** and ***In re Michael G.*** *(supra)*;

(3) the case of ***Matilda Mutale v. Emmanuel Munaile (2007) ZR 118 (SC)*** in which it was held, as regards the construction of Acts of Parliament that, *inter alia "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...*; and

(4) the policy behind merger control;

the Tribunal finds that a literal interpretation of section 24(3) is not tenable as to apply a literal or ***'Expressio unius exclusio alterius' interpretation of section 24(3) would produce an absurd effect, in flagrant contradiction of Parliament's intention to control mergers created, or contemplated, under section 24(2)(a) of the Act.***

In the view of the Tribunal this finding begs the question what should be done to remedy the malady or lacuna?

What should be done to remedy the malady or lacuna?

93. Applying the Supreme Court's judgment in the ***Matilda Mutale*** case (*supra*) to remedy the malady, the Tribunal must read words into section 24(3) that would

give effect to what the Tribunal perceives to have been Parliament's intention with regard to control of assets (in the context of section 24 of the Act), with a view to stipulating what constitutes control in terms of the lease or acquisition, by one enterprise, of the assets of another enterprise.

94. In this regard, the Tribunal considered the Respondent's Merger Guidelines, 2015, which *"give practical advice and guidance on the application of the relevant procedures and assessment methods set out in the Act and in the Regulations..." (See the* Preamble to the Merger Guidelines, 2015).

95. The Tribunal finds, from a perusal of the Merger Guidelines, 2015, and in particular Guideline 7, that that Guideline appears to give effect to what the Tribunal believes was Parliament's intention regarding control of assets (in the context of section 24 of the Act).

96. That Guideline provides that *"... a person controls an enterprise if that person leases assets in, or acquires an interest in, any assets belonging to another enterprise, and the assets or interest in the assets have presence, or a market turnover which can clearly be attributed to them and the management, or power now exercised over them has changed the competitive situation in the relevant market."*

97. The Tribunal also finds that on account of that fact that an assessment of the extent to which the management or power exercised over assets purchased in terms of section 24(2)(a) of the Act has caused a change in the competitive situation in the relevant market is one of fact and must be undertaken on a case by case basis, words should be read into section 24 that are consistent with the Respondent's power to make guidelines that are necessary to effectively undertake an assessment of the competitive situation in the relevant market.

98. The Tribunal notes that the Merger Guidelines, 2015, would in fact suffice in this respect. The Tribunal takes judicial note, in particular, of the following provisions of the Preamble to the Merger Guidelines, 2015:

> *The purpose of these Guidelines for merger regulation is to give practical advice and guidance on the application of the relevant procedures and assessment methods set out in the Act and in the Regulations.*
>
> *These Guidelines shall bind all persons regulated under the Act in so far as they are not inimical to the Act.*
>
> *The Guidelines reflect the Commission's procedures and analytical approach at the time of publication and may be revised periodically in the light of fresh legislation, legal precedent, evolving insight and best practice.*

Section 84(1) of the Competition and Consumer Protection Act, No 24 of 2010 (the Act), read together with the Competition and Consumer Protection (General) Regulations (Statutory Instrument No.97 of 2011) ("the Regulations"), mandates the Competition and Consumer Protection Commission (The Commission) to issue Guidelines on how it conducts its activities.

99. The Tribunal notes with respect to the Merger Guidelines, 2015, that the Appellant has submitted that the Respondent's *"Merger guidelines are not a source of law but a mere guideline that sets out the Respondent's understanding of the Act...that the interpretation of merger under paragraph 3 and 7 of the merger guidelines should not be taken in the literal sense that the Respondent has applied but for this honourable Tribunal to apply its own interpretation based on the proper interpretation of the Act".* (Page 3 of the Respondent's Heads of Arguments refers).

100. The Tribunal has considered this argument and notes the following:
   (1) guidelines are essential for, among others-
      (a) ensuring transparency of the manner in which an institution conducts its business;
      (b) enhancing accountability of an institution;
      (c) clarifying the law;
      (d) providing legal certainty;
      (e) enhancing consistency of enforcement; and
      (f) creating legitimate expectations on the part of those regulated by the guidelines.[77]
   (2) that guidelines are rules of practice, not rules of law and that they can be legally binding, as is the case with guidelines issued under section 84;
   (3) that section 84(3) provides that the *"...guidelines issued by the Commission under this Act shall bind all persons regulated under this Act;* and
   (4) the Preamble to the Merger Guidelines, 2015.

101. On the basis of the foregoing, the Tribunal is of the considered view that it is not, in any respect, fettered by the Merger Guidelines, 2015, in exercising its independent appellate mandate. Rather, the Tribunal must, in keeping with its

[77] The Role of Guidelines in EU Competition Law, David Bailey Brick Court Chambers King's College London 24 September 2013
Available at https://www.kcl.ac.uk/law/research/centres/european/research/bailey-lecture-slides.pdf
Visited on 20/05/2019 at 15:07hours

appellate mandate and in upholding the principles of independence and impartiality that characterise a body such as this Tribunal, employ, in an appeal that hinges around statutory interpretation, traditional tools of statutory interpretation, including analysis of legislative and other relevant material, legislative history, and various appropriate and relevant canons of construction to arrive at what it regards as the best or a just interpretation of the statute-that interpretation being in consonance with Parliament's intention. This "independent decision-making" role must be undertaken by the Tribunal just as it would in all cases before it. That notwithstanding, the Tribunal is of the view that, in its decision-making, it may defer to the Respondent's interpretation of the Act.

Deference

102. The standard dictionary definition of deference includes two alternative meanings. One meaning is respectful regard for the judgment or opinion of another.[78] Another meaning is respectful acknowledgment of the authority of another.[79] Neither meaning equates deference to servility[80] (i.e. yielding as if one is a slave or is bound) or an abdication of duty.[81] An example of a court exhibiting the first form of deference to the Executive or Legislative arm of Government is where the court, having decided that its own judgment or opinion on a particular subject matter is what will have operative effect, nonetheless gives weight to a legislative or executive judgment or opinion on that subject matter in forming the court's judgment or opinion.[82] With respect to the second form of deference, the court would decide that the judgment of the Executive or Legislative arm of Government on a particular matter would have operative effect, either unconditionally or subject to a condition such as that the Executive or Legislative judgment or opinion must be made in good faith or must be reasonable. The latter form of deference is, in the United States of America,

[78] *Deference*, Stephen Gageler, p. 152. Available at http://www.hcourt.gov.au/assets/publications/speeches/current-justices/gagelerj/Gageler_2015_22_AJ_Admin_L_151.pdf
Visited on 03/07/2019 at 16:43 hours. Stephen Gageler is a Justice of the High Court of Australia. This is an edited version of the paper presented to the New South Wales Bar Association as the inaugural Spigelman Public Law Oration, 17 November, 2014

[79] *Ibid*

[80] *Ibid*

[81] *Ibid*

[82] *Ibid*

referred to as the Chevron Deference[83], having been pronounced by the court in the case of ***Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984)***.

103. In the opinion of this Tribunal, our courts, from time to time, defer to the opinions of the Executive or Legislative arms of Government. One example of instances where our courts have exhibited the first form of deference, is where the courts, defer to the testimony of an expert witness. In the case of ***Fawaz And Chelelwa v. The People (1995) S.J. (S.C.)*** the Supreme Court held, *inter alia*, that- *"When dealing with the evidence of an expert witness a court should always bear in mind that the opinion of an expert is his own opinion only, and **it is the duty of the court to come to its own conclusion based on the findings of the expert witness**. As we said in Chuba v The People (1), the opinion of a handwriting expert must not be substituted for the judgment of the court. It can only be used as a guide, albeit a very strong guide, to the court in arriving at its own conclusion on the evidence before it. The same thing applies to the opinion of other expert witnesses. The purpose of expert evidence in establishing negligence in the realm of diagnosis and treatment is not necessarily to pit one professional opinion against another, but to guide the Court. At the end of the day, the Court still has to make its own conclusion based on all the evidence before it. When considering the evidence, the Court is entitled to draw inferences based on the facts and circumstances surrounding the case."* [Emphasis ours] In other words, when the court allows testimony under the criterion of "acceptance" it is according deference to the determination of the experts themselves about which testimony is appropriate.[84]

104. The Tribunal notes in terms of the second form of deference that the courts will defer to the opinion or judgment of the Executive arm of Government in cases of national security. For instance, in the case of ***Nkaka Chisanga Puta v. The Attorney-General (1983) Z.R. 114 (S.C.),*** the Supreme Court citied Baron, J.P., who had this to say in ***Re Kapwepwe and Kaenga (1972) Z.R. 248***[85]: *We wish to reiterate what we said in Re: Kapwepwe and Kaenga, (5), at page 263, namely, that -*

"It is not open to the courts to debate whether it is reasonable for there to be in existence a declaration under section 29 (now Article 30 of the Constitution)."

[83] *Ibid*, p. 153

[84] *Putting Expert Testimony in Its Epistemological Place: What Predictions of Dangerousness in Court Can Teach Us*, M. Neil Browne and Ronda R. Harrison-Spoerl. p.1138. Available at https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1162&context=mulr;Putting Visited on 04/07/2019 at 11:00 hours

[85] At p. 263

The Court further stated *"This is a matter purely for the president in power to decide, subject only to the powers of Parliament under Article 30 (2)."*

In the case of ***Re Kapwepwe and Kaenga*** (*supra*), Baron, J.P., as he then was, referring to the machinery of detention or restriction without trial, cited the Learned author Jain, on Indian Constitutional Law who said-

". . . by its very nature the subject of preventive detention implies detention on the judgment of an executive authority. It would be very difficult to lay down objective rules of conduct, failure to conform to which should lead to detention. As the very term implies, detention in such cases is effected with a view to prevent the person concerned from acting prejudicially to certain objects which the legislation providing for such detention has in view. Nor would it be practicable to indicate or enumerate in advance what acts or classes of acts would be regarded as prejudicial. The responsibility for the security of the State and the maintenance of public order is on the executive and it must therefore be left free to exercise the power of preventive detention whenever it thinks the occasion demands it."[86]

105. The Tribunal notes that while it has not come across a case in which our courts have had to defer to the interpretation accorded by administrative agencies with respect to ambiguities or lacunae presented in the laws within their purview, the following two-pronged approach set out in the ***Chevron Case*** (*supra*) is helpful in determining how the courts should treat such interpretation. In that case, in which was announced the principle that the courts will accept an agency's reasonable interpretation of the ambiguous terms of a statute that the agency administers, Justice Stevens for a unanimous Court adopted an analytical approach that deals with the problem of judicial deference to agency interpretations of law in two steps as follows:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. [87]

The Court went further to state that where an affirmative response to the first inquiry had failed, there was need to move to step two being that-

[86] At p. 260

[87] Judicial Deference to Administrative Interpretations of Law, The Honourable Antonin Scalia, Duke Law Journal Administrative Law Lecture, delivered at Duke University School of Law, January 24, 1989, by Antonin Scalia, (Associate Justice, United States Supreme Court), p.511 Available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3075&context=dlj visited on 28/06/2019 at 17:58 hours

If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[88]

106. On the face of it, judicial deference to statutory interpretation by administrative agencies appears incompatible with the function bestowed on the Judiciary to interpret the law. The late Honourable Antonin Scalia, an Associate Justice (as he then was) of the United States Supreme Court in 1989 stated that the theoretical justification for allowing reasonable administrative interpretations to govern is that the expertise of the agencies in question, their intense familiarity with the history and purposes of the legislation at issue, their practical knowledge of what will best effectuate those purposes.[89] In other words, they are more likely than the courts to reach the correct result.[90]

107. While the Court's decision in the ***Chevron Case*** (*supra*) is not binding on the Tribunal, the Tribunal considers the two pronged approach (to determine when to defer to agency interpretations of law[91]) set out in the ***Chevron case*** (*supra*) helpful in determining the import of the Respondent's interpretation with regard to the control of assets. The Tribunal, applying Chevron's two-pronged approach to this case, is persuaded that because the Act has a lacuna in so far as control of assets in terms of section 24 of the Act is concerned, the Tribunal may defer to the Merger Guidelines, 2015, to ascertain whether the Respondent's administrative interpretation of control *vis a vis* assets is in consonance or harmony with Parliament's intention, and if so, to adopt that interpretation. This, the Tribunal notes, does not suggest in any way that the Tribunal is abdicating its independent appellate jurisdiction, being servile, insinuating that the Respondent is the primary interpreter of the Act (which function is the preserve of the courts) or aggrandising the power of the executive arm of Government (in this case, the Respondent) at the expense of the legislative or judicial arms of Government. Rather, the Tribunal adopts the Respondent's interpretation, not because it is bound to do so, but because the Respondent's interpretation is a permissible construction of section 24 of the Act and is in consonance with Parliament's perceived intention regarding control of mergers.

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88 *Ibid*, p.512
89 Judicial Deference to Administrative Interpretations of Law, p.514
90 *Ibid*
91 In this case, deference to the Respondent's interpretation of control

108. Further, the Tribunal having considered mergers and their anti-competitive effects, the essence of merger control and Parliament's intention with respect to merger control in general and in the context of the acquisition of assets, and having also considered the Merger Guidelines, 2015, the Tribunal is of the view that the Merger Guidelines, 2015, are, by and large expressed in terms that are in consonance with what the Tribunal perceives to be Parliament's intention to control mergers, and finds no reason why it should not adopt the Respondent's interpretation of mergers as set out in the Merger Guidelines, 2015.

109. The Tribunal also considered the Appellant's submission to the effect that-

(1) the Commission failed to conduct a proper investigation as to whether the transaction would impact the market, because the Board of the Commission repeated the assessment tests used by its technical committee, and in this regard referred to pages 82, 83 and 159 of the Record of Proceedings (Page 11 of the Appellant's Heads of Argument refers); and

(2) the onus of proving a merger rests with the Respondent and that the mere citing of section 24 of the Act by the Respondent cannot be grounds for determination of whether or not the actions by the Appellant constitute a merger. The Respondent must apply further tests applied in the determination of a merger and the question whether or not there is direct or indirect acquisition or control of the business or common ownership, and most importantly is it likely to distort the market by creating dominance (Page 13 of the Appellant's Heads of Argument refers).

110. The Tribunal notes that while the Appellant referred to a repetition of assessment tests, it did not indicate in clear terms, what was irksome about the repetition of the tests. The Tribunal can only surmise that this may be because the Appellant expected the Respondent to apply further tests applied in the determination of a merger (Page 13 of the Appellant's Heads of Argument refers). Beyond this supposition, the Tribunal will not unduly burden itself with the task of deciphering what irked the Appellant.

111. With respect to merger notification, the Tribunal finds from a perusal of the Act the following:

(1) Section 26 of the Act provides that-

26. (1) 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.

(2) The Commission may, upon receipt of an application under subsection (1), approve or reject the application.

(3) The Commission shall, where it rejects an application under subsection (2), inform the applicant accordingly and give the reasons therefor.

(4) A merger that meets the prescribed threshold under subsection (5) and is implemented without the Commission's authorisation is void.

(5) The Minister may, by statutory instrument, on the recommendation of the Commission, prescribe the threshold to be applied for the purposes of subsection (1).

...

The thresholds referred to in section 26(5) are set out in the *Competition and Consumer Protection (General) Regulations (Statutory Instrument No.97 of 2011).*

(2) Section 27 of the Act provides-

27. (1) 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;

(d) the merger is concluded outside Zambia and has consequences in Zambia that require further consideration; 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.

(2) The Commission may, where it determines that a merger is reviewable by the Commission under subsection (1), request any party to the merger to submit to it any information on the transaction for its verification.

(3) The Commission may, within seven days of receiving and verifying the information under subsection (2), request the parties to the merger to apply to the

Commission for authorisation of the merger in accordance with section twenty-six.

(3) Section 28 provides-

28. (1) Any party to a merger transaction seeking clarification as to whether the proposed merger requires the authorisation of the Commission under section twenty-six or is subject to review by the Commission under section twenty-seven, may apply to the Commission for negative clearance in the prescribed manner and form upon payment of the prescribed fee.

(2) Negative clearance, if given, does not commit the Commission if new information becomes available showing that such clearance is not appropriate.

112. With respect to the investigation of mergers, the Tribunal found, from a perusal of the Merger Guidelines, 2015 that Guidelines 33, 34, 35 and 36 provide as follows:

33. The Commission begins its investigation immediately full notification has been completed. It completes its assessment and issues its determination on the case within 90 calendar days from the date of the application for authorisation of the proposed merger. The period can be extended if the Parties have failed to provide information the Commission considers essential for the completion of the investigation. This extension will be equivalent to the time period the information was delayed. The Commission can also extend the 90 day period for up to a further 30 calendar days as provided under section 32 of the Act.

34. If the Commission fails to meet the overall 90-days deadline – and the investigation has not been extended – the merger is deemed to have been approved.

35. A Phase 1 assessment is conducted by the Commission's management during the first 35 calendar days of an investigation. If this shows that it is less than likely that the merger will harm competition and that no further evidence is likely to be uncovered to revise this finding, the Sub-Technical Committee of the Board (TC) will "fast-track" clearance of the merger application. If the TC makes a decision to approve the merger, it will seek delegated authority from the full Board of Commissioners through a "Round Robin" written communication to issue a final Authorisation. In the event that a TC phase 1 clearance decision is rejected by the full Board, the application proceeds to phase 2.

36. The TCs decisions on Phase 1 investigations may be based on such factors as market concentration figures, the type of products in the market, the ease of market entry or efficiencies arising from the merger among other things.

113. The Tribunal also notes that the Respondent is required to undertake a market assessment, competition assessment and public interest assessment in terms of sections 29, 30 and 31 of the Act. Those sections provide as follows:

29. 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. [Emphasis ours]

30. (1) 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.

(2) 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-

(a) the levels of concentration of players in the relevant market;
(b) the creation or strengthening of barriers to market entry;
(c) the level of imports in the relevant market;
(d) the extent to which there is countervailing buyer or supplier power in the relevant market;
(e) the availability of substitute products in the relevant market;
(f) the likelihood of the merger removing from the market an existing effective and vigorous competitor;
(g) the dynamic characteristics of the market including growth, innovation, pricing and other inherent market characteristics; and
(h) the risk that a position of dominance may be abused.

[Emphasis ours]

31. 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;

(c) *the saving of a failing firm;*

(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.*

[Emphasis ours]

114. A critical examination of the three provisions reveals that the provisions speak to assessments to be undertaken following notification - that is to say, at the time when the merger still bears "proposed merger status". This is evident from the use, in those provisions, of the words, *"The Commission shall, upon receipt of a proposed merger notification"* and *"in considering a proposed merger"*. The Tribunal also notes that the assessments that the Appellant alleges were not undertaken are dependent on information received from a party or the parties to a proposed merger on notification of the proposed merger, and to that extent, are assessments of fact. This view is buttressed by section 29 of the Act which begins with the words *"The Commission shall, upon receipt of a proposed merger notification"*. This view is buttressed yet further by section 32(1) of the Act which provides-

32. (1) The Commission shall complete its assessment of a proposed merger and issue its determination within a period of ninety days from the date of the application for authorisation of the proposed merger, unless a party to the proposed merger fails to provide the Commission, during the period of assessment, information that is required for the completion of the assessment. [Emphasis ours]

115. The Tribunal also found that pre-merger notification is vital because it ensures that certain proposed mergers are brought to the Commission's attention. This safeguards the Respondent's ability to investigate certain mergers and to prevent harm to competition from occurring before the Respondent has examined the merger and reached a decision regarding the merger. If enterprises were allowed to implement certain mergers before the Respondent reviews them, the mergers' anti-competitive effects may materialise before the Respondent has a chance to prohibit the mergers or approve them subject to directions. In addition, the requirement for certain proposed mergers to obtain authorisation prior to

implementation avoids creating a situation where the Respondent would have to separate assets that have already been combined on account of the mergers. Such separation measures, sometimes referred to as "unscrambling the eggs", are often very difficult or impossible to implement.[92] In addition, when a reviewable merger is implemented without the authorisation of the Respondent, this makes it difficult for effective remedies to be put in place. For instance, by implementing the merger before clearance, the acquirer can obtain business secrets, strategic information, human resource, assets or customers from the target's businesses. If the Respondent, in exercise of its powers under section 61(3)(a) of the Act, in the case of a prospective merger, gives a direction requiring an enterprise to divest such assets as are specified in the direction within the period specified in the direction, the competitive potential of the enterprise may be affected. In addition, our law provides, under section 37, for a significant penalty of up to 10% of the turnover of the enterprises concerned for offences relating to mergers, which penalty enterprises may wish to avoid altogether by abiding by pre-merger notification.

116. On the basis of the foregoing, the Tribunal is thus constrained to understand how the Appellant expected the Respondent to undertake the assessment that comes with notification of a proposed merger as if the Appellant had notified the Respondent about the proposed merger under section 26 of the Act, when the objective of the by the Respondent was to establish a failure by the Appellant to seek authorisation for the merger (contrary to sections 26(4) and 37 of the Act) i.e. The Tribunal is constrained to understand how the Appellant expected the Respondent to undertake pre-merger tests post merger (or after the fact). In any event, the Tribunal notes that post merger assessments under the Act are only prescribed, in section 27, for mergers that fall below the prescribed threshold. That threshold currently stands at combined assets or turnover, whichever is higher, of at least fifty million fee units in their latest financial year, for which figures are available. (See regulation 8(1) of the Competition and Consumer Protection (General) Regulations, 2011).

[92] Suspensory Effects of Merger Notifications and Gun Jumping - Note by the European Union 27 November 2018, DAF/COMP/WD(2018)95, Directorate For Financial And Enterprise Affairs Competition Committee, Organisation for Economic Co-operation and Development, paragraph 8. Available at https://one.oecd.org/document/DAF/COMP/WD(2018)95/en/pdf visited on 23/05/2019 at 16:15 hours (This document reproduces a written contribution from the European Union submitted for Item 5 of the 130th OECD Competition committee meeting on 27-28 November 2018)

117. The Tribunal thus finds that the four assessment tests that were undertaken by the Respondent for the purpose of establishing a violation of sections 26(4) and 37 of the Act were sufficient as they were intended to establish whether or not the sale of PwC Office Park transaction constituted a merger transaction; if so, whether the merger transaction met the prescribed threshold for notification with the Commission; whether there was an application to the Commission for authorisation in a prescribed manner and form; and whether the notifiable merger was intentionally or negligently implemented without the approval of the Commission.

118. The Tribunal thus agrees with the arguments set forth by the Respondent in this regard, that *"once a transaction meets the conditions stipulated under section 24 of the Act, the next step is to assess whether the merger notification threshold contemplated under section 26 of the Act and provided for under regulation 8 of SI No. 97 of 2011 is met. If such a transaction falls within the provisions, it must be notified with the Respondent. It is only upon notification of a transaction that it can be determined as to what the effects on the market maybe"* [Sic].

<u>Overall Findings of the Tribunal with Respect to Ground 1</u>

119. Overall and in summary, the Tribunal finds with respect to Ground 1 as follows:

(1) the Appellant owned a leasehold right over Stand 2374 as opposed to ownership of the buildings, and that consequently, what was sold, by the Appellant, to Prime Time was the leasehold right and not the building, contrary to the arguments made by Learned Counsel for the Appellant;

(2) a leasehold right over land is an intangible asset in terms of section 2 of the Act and on this basis, **<u>Ground 4 of the Appeal fails</u>**;

(3) the Tribunal agrees with the Respondent's findings that PwC Office Park was the Appellant's only asset, with the qualification that the Appellant held the leasehold right and not the tangible right over the property. The Tribunal notes that this finding (i.e. that of PwC Office Park being Rumpuns' only property), was not disputed by the Appellant. This has assessment implications in terms of Guideline 7 of the Respondent's Merger Guidelines, 2015;

(4) the Tribunal agrees with the Respondent's submissions that that the sale of such assets constituted a merger which was achieved when PrimeTime acquired an interest in the assets belonging to the Appellant, because PWC Office Park was the business of Rumpuns which by virtue of its sale,

entailed that Prime Time gained control of the business of Rumpuns in line with the law. It therefore goes without saying that Prime Time did gain control of the business of Rumpuns;

(5) our Act does not require that there be a sale of an entire enterprise for a merger to exist as erroneously suggested by Learned Counsel for the Appellant in the following arguments:

That the instructive words in Section 24 are not only the ACQUISITION OR GAINING CONTROL OF AN ENTERPRISE, but also part thereof...... the sale of building is not the sale of an enterprise.

This is because Section 24(1) of the Act requires, *inter alia,* direct or indirect, control over the whole <u>or part</u> of the business of another enterprise. [Emphasis ours]. Further, section 24(2) (a) provides that *"A merger contemplated in subsection (1) may be achieved ... where an enterprise purchases shares or leases assets in, or acquires an interest in, <u>any shares or assets</u> belonging to another enterprise."* [Emphasis ours];

(6) the issue of common ownership under section 24(2)(b) of the Act does not apply to this transaction as the transaction falls within the purview of section 24(2)(a) of the Act contrary to the suggestion by Learned Counsel for the Appellant when Counsel argued that *"similarly under (b) Section 24 refers to two or more enterprises mutually agree to adopt arrangements for common ownership or control over the whole or part of their respective businesses. Again the emphasis is on two or more enterprises making arrangements to gain common ownership or control with respect to their businesses. In the transaction between Appellant no business was sold, what was sold was the building. Again under (b) the transaction fails the definition of merger in (b);*

(7) The Republic of Zambia is not bound by the essential elements espoused by Whish and Bailey as determining the creation of a merger or by section 26 of the UK Enterprise Act (or indeed any other section of that Act) which sets out circumstances under which an enterprise ceases to be distinct as the legislative authority of the Republic of Zambiais vested in and exercised by Parliament in accordance with Article 62(2) of the Constitution of Republic of Zambia. In fact, the Tribunal is inclined to align itself with the view held by Whish and Bailey (as cited by the Appellant) to the effect that <u>*it is important to understand that the term merger as used in competition policy includes a far broader range of corporate transactions that [sic] mergers of this kind*</u>. *"This kind"* meaning mergers in the

ordinary usage of the word. That said, this Tribunal finds that the definition of merger as set out in our law does not derive its tenor from the definition of merger by Whish and Bailey or from the UK Enterprises Act;

(8) our Act does not stipulate that the issue of assets only becomes applicable when two enterprises are merging or becoming one and those assets become the subject of joint control or ownership i.e. in terms of our law, it is not necessary for enterprises to first hold the intention to merge prior to the issue of assets becoming applicable;

(9) the fact that the Appellant is still a going concern and was never the subject of dissolution or winding up is immaterial as our law does not require, with respect to the purchase of assets, that the selling enterprise should dissolve or wind up following the sale of its assets. Rather the Tribunal has established that what is essential with respect to the acquisition of assets is the effect that the acquired assets will have on competition in the relevant market;

(10) the fact that the Appellant and Prime Time did not become one post transaction and further, that there was no intention to merge, or to control or acquire sole or joint ownership of PwC Park, or to exercise decisive or material influence as argued by the Appellant is immaterial for the reasons stated in paragraph 43 (above);

(11) the Appellant's argument that even if the two enterprises (i.e. the Appellant and Prime Time) ceased to exist, the Respondent would have to demonstrate that the asset had come under common ownership or control, and that page 26 of the Record of Proceedings reveals that the Appellant is not listed as a shareholder in Prime Time-confirming that that the sale of PwC Park did not result in the two entities becoming one, is immaterial as the Act does not require the selling and purchasing enterprises to come under common ownership;

(12) the control test does not fail as suggested by Learned Counsel for the Appellant. What fails is the literal interpretation of section 24(3), which interpretation gives rise to an absurdity. Accordingly, control is to be interpreted in a manner that is in consonance with Parliament's intention (Purposive approach to the interpretation of statutes) and the words set out in Guideline 7 of the Merger Guidelines, 2015, are, for this purpose instructive. Accordingly, control by Prime Time Zambia over PwC Office Park existed within Parliament's intention;

(13) the Tribunal agrees with the Respondent that *once a transaction meets the conditions stipulated under section 24 of the Act, the next step is to assess whether the merger notification threshold contemplated under section 26 of the Act and provided for under regulation 8 of SI No. 97 of 2011 is met. If such a transaction falls within the provisions, it must be notified with the Respondent. It is only upon notification of a transaction that it can be determined as to what the effects on the market may be".* The Tribunal finds that pre-merger tests which include the substantial lessening of competition test and the distortion of market tests are thus irrelevant for establishing a violation of section 37 of the Act;

(14) the assessment tests were sufficient for establishing a violation of section 37 of the Act, as they were intended to establish whether or not the sale of the leasehold title over PwC Office Park transaction constituted a merger transaction; if so, whether the merger transaction met the prescribed threshold for notification with the Commission; whether there was an application to the Commission for authorisation in the prescribed manner and form; and whether the notifiable merger was intentionally or negligently implemented without the approval of the Commission. Thus, the Appellant's argument that the Respondent must apply further tests applied in the determination of a merger and the question whether or not there is direct or indirect acquisition or control of the business or common ownership, and most importantly if it is likely to distort the market by creating dominance is not tenable;

(15) the submission by Learned Counsel for the Appellant that the transaction was a one-off transaction that did not create any form of dominance in the market and/or distortion of competition at any level in the real estate market is irrelevant as the transaction albeit one-off was not authorised by the Respondent;

(16) the fact that the Appellant's business continued to exist and was not liquidated is irrelevant as our law does not require, with respect to the acquisition of assets contemplated in section 24(2)(b) that the selling and buying enterprise become one enterprise post the sale and purchase of assets; and

(17) there was a merger in terms of section 24(1) of the Act read with section 24(2)(a) of our Act. Accordingly, the Respondent did not misapprehend the Act with respect to the extension of acquisition of assets as being a merger as argued by Learned Counsel for the Appellant.

120. **On the basis of the foregoing Ground 1 of the Appeal fails.**

Ground 2

121. The Appellant averred in Ground 2 that *"The Appellant paid the Property Transfer Tax on the transaction pursuant to section 4(1) of the Property Transfer Tax Act, Chapter 340, Volume 19 of the Laws of Zambia which only applies to the transfer of land rights."*

Appellant's Heads of Argument

122. The Appellant submitted that-

(1) there was no intention to merge the two companies, or to take control of the other, and it can in no way be shown that the purchase of PwC Office Park can lead to sole control of the Appellant in turn creating a dominant position and distorting the market. (Page 17 of the Appellant's Heads of Argument refers); and

(2) further proof of this can be shown by the payment of property transfer tax by the Appellant after the sale of PwC Office Park, showing that this was not in any way intended to be a merger but a sale of a building. (Page 17 of the Appellant's Heads of Argument refers).

Respondent's Heads of Argument

123. The Respondent argued that-

(1) the application of the Property Transfer Tax Act (PTT Act) does not preclude the application of the Competition and Consumer Protection Act in so far as it relates to conduct that is stipulated under the Act (Page 5 of the Respondent's Heads of Argument refers);

(2) that the transaction in question was a sale of assets which is covered under section 24 of the Act and should have been notified with the Respondent prior to its implementation (Page 5 of the Respondent's Heads of Argument refers);

(3) section 4(1) of the PTT Act provides that whenever property is transferred a property transfer tax shall be charged upon , and collected from, the person transferring the property; that the provision does not discriminate between movable and immovable property, and that this provision thus

covered assets within the meaning of section 2 of the Act (Page 5 of the Respondent's Heads of Argument refers); and

(4) the payment, by the Appellant, of property transfer tax confirmed that assets were sold (Page 5 of the Respondent's Heads of Argument refers).

Consideration of Ground 2

124. The Tribunal considered the arguments of Learned Counsel for the Parties. The Tribunal also considered section 4 of the Property Transfer Tax Act, Chapter 340 of the Laws of Zambia (hereinafter the PTT Act) and found as follows:

4. (1) Whenever any property is transferred, there shall be charged upon, and collected from, the person transferring such property a property transfer tax in accordance with the provisions of this Act.

125. Section 2 of the PTT Act provides as follows:

"land" includes any building, structure or other improvement thereon;

"person" includes a partnership;

"property" means-

(a) any land in the Republic;

(b) any share issued by a company incorporated in the Republic.

126. Section 2 of the PTT Act defines "transfer" as follows:

"transfer-

(a) in relation to land, excludes-

(i) letting or sub-letting;

(ii) leasing, under-leasing or sub-leasing, for a period of less than five years;

(b) in relation to a share, excludes the allocation of the same by the company to the member in whose name it is first registered.

127. On the basis of the foregoing and having established that the Appellant had a leasehold right over PwC Office Park and that the lease was one for approximately thirty-eight years (i.e. fifty years less the twelve years that Rumpuns had already held the leasehold right) the Tribunal finds that the transaction qualified to be one within the purview of transfers of property envisaged in section 4 of the PTT Act.

128. In addition, following careful consideration of the Act, the Tribunal finds that the legislators envisaged that merger law, might, by its very nature, trigger the application of other laws. This is manifest from section 36 of the Act which provides-

36. An approval of a merger by the Commission under this Part shall not relieve an enterprise from complying with any other applicable laws.

129. This entails that had the Appellant made an application, under the Act, for authorisation to implement a merger, and the Respondent had subsequently given approval, that approval would not have absolved the Appellant from complying with the PTT Act or with any other applicable laws. The Tribunal thus agrees with the Respondent that the application of the PTT Act does not preclude the application of the Competition and Consumer Protection Act in so far as it relates to conduct that is stipulated under the Competition and Consumer Protection Act.

130. Consequently, the fact that PTT was paid is not, in itself, indicative of the absence of a merger. Rather, the determination of the existence, or otherwise, of a merger is dependent on the law and an assessment of the facts of each case.

131. **On the basis of the foregoing, the Tribunal finds that Ground 2 of the Appeal must fail.**

Ground 3

132. The Appellant averred in Ground 3 that **"the transaction by the Appellant for the transfer of land can not in any way result into a distortion of the market as envisaged under the provisions of the Competition and Consumer Protection Act No. 24 of 2010 to the extent that the decision by the Respondent to states follows** [Sic]:

> *"It is clear from the above observations that Prime Time Zambia acquired an asset 'from Rumpuns which asset had market presence and turnover as stipulated under paragraph 7 of the Commission merger guidelines. In this regard, Prime Time Zambia gained control over the assets of Rumpuns resulting in Rumpuns lost market presence. It was noted that with the purchase of PwC office park, Prime Time Zambia gained control as stipulated under section 24(3) of the Act."*

133. The Tribunal notes from the outset that it is not clear what the import of this ground of appeal was but will nonetheless endeavour to address it.

Appellant's Heads of Argument

134. Learned Counsel for the Appellant argued that the Respondent has not provided any results of their investigation to prove that the transaction may in any way distort the market (Page 15 of the Appellant's Heads of Argument refers).

Respondent's Heads of Argument

135. Learned Counsel for the Respondent argued as follows:

(1) there is evidence that the Appellant sold an asset to Prime Time which had market presence and turnover as PwC Office Park had market presence in the market for lettable office space (Page 7 of the Respondent's Heads of Argument refers);

(2) by the Appellant selling such assets including leases and contracts, they lost their market presence in the market for lettable office space (Pages 7 and 8 of the Respondent's Heads of Argument refers); and

(3) it is only upon notification of a transaction with the Respondent that it can be determined as to what the effects on the market may be. The Respondent is guided under sections 29, 30 and 31 (Page 7 of the Respondent's Heads of Argument refers).

Consideration of Ground 3

136. The Tribunal considered the foregoing arguments. With respect to the Appellant's submissions to the effect that the Respondent has not provided any results of their investigation to prove that the transaction may in any way distort the market, the Tribunal wishes to reiterate its earlier finding to the effect that pre-merger tests which include the substantial lessening of competition test and the distortion of market tests, *inter alia*, are irrelevant for establishing a violation of sections 26(4) and 37 of the Act, and that these tests are dependent on information received from a party or the parties to a proposed merger on notification of the proposed merger, and to that extent, are assessments of fact.

137. The Tribunal also wishes to reiterate its findings to the effect that-

(1) what was sold, by the Appellant, to Prime Time was the leasehold right and that a leasehold right over land is an asset in terms of section 2 of the Act; and

(2) control by Prime Time Zambia over PwC Office Park existed within Parliament's intention, in that, with the purchase of the leasehold right (being an intangible asset) over PwC office park, Prime Time Zambia gained control as stipulated under section 24(3) of the Act.

The Tribunal also wishes to state that by the Appellant selling such its intangible assets lost their market presence in the market for lettable office space and it is only upon notification of a transaction with the Respondent that it can be determined as to what the effects on the market may be.

138. **<u>On the basis of the foregoing, Ground 3 of the Appeal Fails.</u>**

<u>Overall findings of the Tribunal with respect to the Grounds of Appeal</u>

139. **<u>Overall, the Tribunal finds that Grounds 1 to 4 of the Appeal have failed and are, therefore, dismissed.</u>**

Consideration of the existence, on the part of the Appellant, of intent and negligence <u>in terms of section 37 of the Act</u>

140. Having established that there was a merger implemented, it now behoves the Tribunal to deliberate on the existence, or otherwise, of one or both of the ingredients of the offence set out in section 37 of the Act, which ingredients if proved would confirm the Appellant's liability to pay the fine of K80, 000 as stipulated in paragraph 26(i) of the decision of the Board of the Respondent.

Did the Appellant implement the merger intentionally or negligently in the context <u>of section 37 of the Act?</u>

141. The Tribunal notes section 37 of the Act which provides as follows:

*37. An enterprise which **<u>intentionally or negligently</u>** –*

(a) implements a merger that is reviewable by the Commission without the approval of the Commission;

(b) implements a merger that is rejected by the Commission; or

(c) fails to comply with conditions stated in a determination or with undertakings given as a condition of a merger approval;

commits an offence and is liable to a fine not exceeding ten percent of its annual turnover. [Emphasis ours]

142. The Tribunal notes that the words "intentionally" and "negligently" as used in the foregoing provision connote, respectively, subjective *mens rea* (guilty mind) and a form of *mens rea* akin to objective *mens rea*. In terms of objective *mens rea* one need not intend to commit a wrongful act, but that act need only fall below

objective standards of behaviour, i.e. a wrongful act that falls below objective standards of behaviour will, without regard to the offender's subjective mental state at the time of the commission of that act, be punished. Negligent acts would fall in this category.[93] The concepts of intention and negligence are addressed in turn below.

Intention

143. The Tribunal notes that the word "intentionally" as used in the foregoing provision connotes subjective *mens rea* (guilty mind). In terms of subjective *mens rea* one must intend to commit a wrongful act, i.e. a wrongful act must be accompanied by an overt mental state such as intent or recklessness.[94] The Tribunal further notes that intention to do an act signifies *mens rea*, a mental state in which one deliberately violates the law. In the case of ***R v Daviault [1994] 3 SCR 63***[95], it was held that *mens rea* is "a particular state of mind such as the intent to cause, or some foresight of, the results of the act or the state of affairs." In ***R. v. Nova Scotia Pharmaceutical Society [1992] 2 SCR 606***[96], the Court held that "... *mens rea focuses on the mental state of the accused and requires proof of a positive state of mind such as intent, recklessness or wilful blindness.* Negligence, on the other hand, measures the conduct of the accused on the basis of an objective standard, irrespective of the accused's subjective mental state.

144. The Tribunal notes that evidence of one's state of mind is difficult to assess, especially if that person has not shown any manifestation or overt evidence of the person's state of mind. Accordingly, courts will, thus, often have to infer subjective purpose[97] i.e. where the gist of the offense is in the intent, there must be also some act in the direction of such intent. On the basis of the foregoing, it behoved the Tribunal to peruse the Record of Proceedings to establish evidence of intention.

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[93] *Objective Mens Rea and Attenuated Subjectivism: Guidance from Justice Charron in R. v. Beatty*, Palma Paciocco, S.J.D. candidate, Harvard Law School, p.80 available at https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3586&context=scholarly_works visited on 28/06/2019 at 13:38

[94] *Ibid*

[95] At paragraph 74

[96] Available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/901/index.do?site_preference=mobile visited on 28th June, 2019, at 10:05

[97] The Purpose of Substantially Lessening Competition: The Divergence of New Zealand and Australian Law By Paul G Scott* Senior Lecturer, Faculty of Law, Victoria University of Wellington. Available at http://www.austlii.edu.au/au/journals/WkoLawRw/2011/9.pdf visited on 28th June, 2019, at 09:30 hours

145. The Tribunal found from the Record that there was a press announcement made on 4th May, 2016, by PrimeTime which announced that PrimeTime had entered into a sale agreement to purchase PwC Office Park and that title was to pass on in February, 2016, and rentals would accrue to PrimeTime commencing 1st March, 2016. Further, at page 98 of the Record, Prime Time's lawyers wrote to the Respondent stating, inter alia, that Prime Time actually "...issued press statements advising of the transactions prior to their implementation...Further, circulars relating to the transactions were published on the PrimeTime website...At all material times therefore, PrimeTime Took steps to ensure transparency in the conduct of its business affairs in Zambia, and particularly in relation to the transactions under consideration. "

146. The Tribunal is of the view that had it been the Parties purpose to intentionally implement a merger without authorisation from the Commission, the Parties to the merger would have taken steps to conceal the sale of the leasehold title. The Tribunal is of the view that the Appellant would, as such, not have permitted Prime Time to make announcements publicising the sale of the leasehold title. Rather, sometime during the transaction, the Appellant would have requested Prime Time to bear the utmost confidentiality regarding the transaction.

147. The Tribunal thus finds, on account of the Parties' transparency that there cannot be attributed, to the Appellant, intention to implement a merger in violation of section 37 of the Act.

148. The Tribunal then considered the possibility of the Appellant having negligently implemented a merger in violation of section 37 of the Act.

Negligence

149. The Tribunal notes that the word "negligently" as used in section 37 of the Act connotes objective *mens rea*. In terms of objective *mens rea* one need not intend to commit a wrongful act, but that act need only fall below objective standards of behaviour, i.e. a wrongful act that falls below objective standards of behaviour will, without regard to the offender's subjective mental state at the time of the commission of that act, be punished. Negligent acts would fall in this category.[98]

150. In the case of ***Anthony Mwanza v. Kagurusu Farming Enterprises Limited and Kenani Musebo 2008/HP/715*** at page J15 Hon. Mr. Justice Dr. P. Matibini, SC stated, regarding negligence-

[98] *Objective Mens Rea and Attenuated Subjectivism: Guidance from Justice Charron in R. v. Beatty (Supra)*, p. 81

In an early case of Blyth v Birmingham Waterworks Company [1856] 11 Ex 781 Alderson, B, defined negligence at page 784 in the following terms:

"Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

The learned author of Charlesworth and Percy on Negligence *(London, Sweet and Maxwell, 2010) observes in paragraph 1-01, at page 3, that in forensic speech the term negligence can have three meanings:*

1. *In referring to a state of mind when it is distinguished in particular from intention;*
2. *In describing conduct of a careless type; and*
3. *As a breach of a duty to take care imposed by either common law or statute.*

In some circumstances, the three meanings can overlap. The learned author also observes quite poignantly in paragraph 1-06, at page 4, that:

"...careless conduct does not necessarily give rise to breach of a duty of care, the defining characteristic of the tort of negligence. The extent of a duty of care and the standard of care required in performance of that duty are both relevant in considering whether, on any given facts, conduct which can be characterised as careless is actionable in law..."

151. In ***R. v. Nova Scotia Pharmaceutical Society*** (*supra*) the Court, distinguishing *mens rea* from negligence held that while *mens rea focuses on the mental state of the accused and requires proof of, inter alia, intent, "... Negligence... measures the conduct of the accused on the basis of an objective standard, irrespective of the accused's subjective mental state."* In ***PP v Teo Poh Leng [1992] 1 SLR 15*** (a case in the High Court of Singapore) Rubin JC (as he then was) referred to ***Nidamarti Nagabhushana*** where Holloway J stated:

Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that if he had he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection.

152. From the foregoing, negligence consists of falling below the standard of the ordinary reasonable person. The Tribunal also found that the test undertaken to establish negligence is objective and is based on the hypothetical person and that it involves a person either doing something the reasonable person would not do, or not doing something the reasonable person would do. It does not matter that the person was unaware that something of dire consequences would result. What matters is that the reasonable person would have recognised the risk and taken steps to avoid it. In the view of the Tribunal, the civic duty of circumspection that

the reasonable person would have been required to undertake in the case at hand would be to do the necessary due diligence in respect of the transaction at hand. This, the lawyers of Prime Time have stated, on page 98, at paragraph 3.3.2 was not done as the parties did not seek "...due guidance from local counsel who were instructed to review the transaction."

153. The Tribunal notes that the Respondent submitted that the law on mergers has been in existence from 2010 and that the Merger Guidelines have been in existence since 2015 and that the Appellant ought to have known about the law, and that in failing to establish what the law was, the Appellant was negligent. i. e. ignorance of the law excuses no man (*"ignorantia legis neminem excusat"*).

154. The Tribunal found that this maxim presumes that everyone knows the law. The Tribunal also found that considerations of public policy or public necessity form the premise of this maxim, and that the welfare of society and the safety of the state have been felt to necessitate this maxim *"in order practically to administer justice among men."*[99] In the case of ***People v. O'Brien, 96 Cal. I7I, 176, 31 Pac. 45, 47 892,*** (a Californian case) the Court stated, *"If a person accused of crime could shield himself behind the defense that he was ignorant of the law which he violated, immunity from punishment would in most cases result. . . . The plea would be universally made, and would lead to interminable questions incapable of solution."*[100]

155. Accordingly, applying this postulate or presumption in terms of *mens rea, one* who, *knowing the law,* brings about, by intention or negligence, the result which the law was intended to prevent will, without a doubt, have a socially blameworthy state of mind (in the absence of exculpating circumstances, such as compulsion)[101].

156. The Tribunal further found that the two pillars which support the maxim are that recognition of ignorance of law as a defense would, firstly, present to the jury "questions incapable of solution" and secondly, encourage ignorance where knowledge is socially desirable.[102] The Tribunal established that both of these pillars are swept away where, *inter alia,* a question arises as to the proper

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[99] *Ibid*, pp.40-41

[100] *Ibid*, p. 41

[101] *Ignorance and Mistake in Criminal Law*, Rollin M. Perkins , 88 U. PA. L. REV. 35 (1939), p.39
Available at https://scholarship.law.upenn.edu/penn_law_review/vol88/iss1/2 visited on 26/06/201 at 15:36 hours
(Rollin M. Perkins A. B., 1910, University of Kansas; J. D., 1912, Stanford University; S. J. D., 1916, Harvard University; Professor of Law at University of Iowa; author of CASES ON CRIMINAL PROCEDURE (3d ed. 1929) ; IOWA CRIMINAL JUSTICE (1932) ; *A Rationale of Mens Rea,* 52 HARV. L. Ray. 905 (1939) ; contributor to other legal periodicals)

[102] *Ibid, p.44*

interpretation of the law[103] and that it is one thing to require a citizen to regulate his or her conduct according to the provisions of a statute the meaning of which is clear or has been judicially determined, and quite another matter to require each person to predict, at the person's peril, the exact meaning which will be assigned by the court to an enactment which is ambiguous or obscure.[104] If the meaning of a statute is not clear, and has not been judicially determined, one who has acted "in good faith" should not be held guilty of crime if his conduct would have been proper had the statute meant what he "reasonably believed" it to mean, even if the court should decide later that the proper construction is otherwise. In the case of the ***State v. Goodenow 65 Me. 30 (1876),*** the Court stated with respect to the presumption that everyone knows the law that *"the law, which the respondents are conclusively presumed to have known, as applicable to their case, is well settled and free from all obscurity or doubt."*

157. The Tribunal then considered the question, had local counsel reviewed the transaction in the context of the Competition and Consumer Protection Act, would local counsel have established that there was a merger on account of the sale of the leasehold title over PwC Office park? The Tribunal hastens to find in the negative on the basis of our findings above to the effect that there is a lacuna in the Act regarding the aspect of control *vis a vis* the sale or lease of part or the whole of the assets of an enterprise (in terms of section 24(1) read together with section 24(2)(a) and section 24(3)). That being the case, the Tribunal is of the view that consultation, with counsel, may not have provided clear legal guidance as to the existence, or otherwise, of a merger, on account of the fact that the law is obscure. Accordingly, the Appellant cannot be presumed to have known the law.

158. On the basis of the foregoing, the Tribunal finds that while there was a merger implemented by the Appellant, the Appellant did not implement the merger either intentionally or negligently in violation of the law, and accordingly finds that the Commission erred in fining the Appellant. The Tribunal further finds that notwithstanding the absence of negligence or intention in terms of section 37 of the Act, the merger being a reviewable merger was implemented without the authorisation of the Respondent and thus in contravention of the law.

Tribunal's power where merger is implemented in contravention of the Law

159. The Tribunal notes that section 73(1) of the Act confers upon it the power, where a merger is implemented in contravention of the Act, to-

[103] *Ibid*

[104] *Ignorance and Mistake in Criminal Law*, Rollin M. Perkins, *supra*, p.45

(a) *order a party to the merger to sell any shares, interest or other assets it has acquired pursuant to the merger; or*

(b) *declare void any provision of an agreement to which the merger was subject.*

160. The Tribunal further notes that as per section 73(2) of the Act , the Tribunal may, in addition to or in lieu of making an order under subsection (1), direct any firm, or any other person, to sell any shares, interest or assets of the firm if the prohibited practice –

(a) *cannot adequately be remedied in terms of another provision of this Act; or*

(b) *is substantially conduct by that firm previously found by the Tribunal to have been a prohibited practice.*

161. The Tribunal notes that because of the magnitude, in terms of effect, that such orders or directions may have on the Parties to the merger, it is pertinent that prior to the exercise of this function the Tribunal is furnished with all relevant information to enable it to arrive at orders or directions that are just, necessary and appropriate in the circumstances. Further, it is the view of this Tribunal that the Respondent ought to have addressed its mind to the possibility that the invocation of the powers of the Tribunal under section 73 of the Act could arise by way of appeal or an application by the Respondent. In that regard, the Respondent should have gathered all information as is relevant for the making of such orders or directions as are envisaged under section 73. In addition, to ensure due process (or for good measure), the Respondent having gathered that information, should have then accorded the Appellant an opportunity to make its representations on the effects of making those orders or directions. Regrettably, the Respondent did not explore this avenue and the Tribunal has, as such, not been availed this information. On this basis the Tribunal is constrained to exercise its power under section 73 of the Act. To exercise this power in the absence of relevant information would be, at best, to render the manner and approach employed by the Tribunal arbitrary.

162. The foregoing having been said, the Tribunal notes section 26 of the Act which provides, in subsections (1), (4) and (5) as follows:

> ***26.*** *(1) 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.*
>
> ...
>
> ...

(4) <u>*A merger that meets the prescribed threshold under subsection (5) and is implemented without the Commission's authorisation is void.*</u> [Emphasis ours]

(5) The Minister may, by statutory instrument, on the recommendation of the Commission, prescribe the threshold to be applied for the purposes of subsection (1).

The Tribunal further notes that paragraph 14 on page 162 of the Record of Proceedings stipulates that the transaction met the threshold prescribed, by the Minister, pursuant to section 26(5).

163. The Tribunal finds that the threshold, having been met, the parties to the merger transaction were, in complying with section 26(1) of the Act, required to apply to the Commission for authorisation of the proposed merger. This, we note, was not done, rendering the transaction (as per section 26(4) of the Act), void.

164. The Tribunal considered what the term "void" means and found that void is "*a purported legal status ... that is taken to have never been valid or enforceable from the start, from the moment of its purported existence.*"[105] According to the Cambridge Dictionary, an agreement or contract that is null and void is one that has no legal effect and is considered, therefore, as if it did not exist.[106]

<u>***In Re Lett, 238 B.R. 167 (1999)***</u> Justice Jerry Venters wrote, "*...By definition, something that is void is ineffectual, nugatory, and of no effect, and nothing can be done to cure it. The term void can only be properly applied to those transactions that are of no effect whatsoever, mere nullities, and therefore incapable of confirmation or ratification.*"[107]

<u>***In Re American Lodging Inc., 397 BR 906 (2008),***</u> Justice Robert Grant of the United States Bankruptcy Court noted that "*An act which is completely void, or void ab initio, has no validity and can be challenged by anyone at any time.*"[108] The Tribunal also found that in ordinary usage, the word "void" means a lack of existence, a nullity.[109] The Tribunal also found that "void" is a very powerful word, which

[105] *Definition of "Void or Void ab initio"*, available at http://www.duhaime.org/LegalDictionary/V/VoidorVoidAbInitio.aspx visited on 9th August, 2019, at 19:01 hours

[106] *Definition of "Null and Void"* available at https://dictionary.cambridge.org/dictionary/english/null-and-void visited on 9th August, 2019, at 19:31 hours

[107] *Ibid*

[108] *Ibid*

[109] *Beyond a Definition: Understanding the Nature of Void and Voidable Contracts*, Jesse A. Schaefer, Campbell Law Review, Volume 33 Issue 1 Fall 2010 Article 6, January 2010, p.3, available at https://scholarship.law.campbell.edu/cgi/viewcontent.cgi?article=1515&context=clr visited on 9th August at 19:36 hours

contemplates an absolute[110], and leaves so little room for nuance[111] Mathew Bacon, an influential eighteenth century legal commentator stated that a thing "... *is void which was done against Law at the very time of the doing it, and no person is bound by such an act...*"[112]

In relation to contracts, the authors of Chitty on Contracts define void and have said (quote) "... *properly speaking a void contract should produce no legal effects whatsoever...But it is by no means true that all contracts termed "void" by the law necessarily produce this effect.*"[113]

165. The Tribunal finds that this case is not a black and white case. In fact, it is recognised that the unenforceability or otherwise of void contracts is a complex area of the law. The authors of Chitty on Contracts state that at certain times, "*the enforcement of contractual claims is ... against public policy. The effects of public policy differ considerably depending on the circumstances... The diversity of the fields with which public policy is concerned, and of the circumstances in which a contractual claim may be affected by it, combine to make this branch of the law of contract inevitably complex- a complexity which has been aggravated by lack of systemisation and by the confusing terminology which has often been adopted.*"[114]

The authors further suggest that much difficulty would be avoided if, whenever a plea of illegality or public policy arises, the test were applied - does public policy requires that in the circumstances which have occurred relief which would otherwise have been available should be refused?

166. The question of voidance and unenforceability to be determined in the present case is compounded by the fact that the law in question (being section 24 of the Act), has a lacuna which we have filled in by way of purposive interpretation. Thus, as we have determined, the Appellant could not be said to have negligently or intentionally contravened the law. It is in this vein that in addressing the question whether in the circumstances of the case the parties affected by the transaction should be subjected to the effects of the transaction being a nullity, ineffectual, nugatory, and of no legal effect *et cetera*, not only do

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[110] *Ibid*
[111] *Ibid*
[112] *Ibid*
[113] *Chitty on Contracts, Vol. I, General Principles*, 29th Edition, Sweet & Maxwell, London, 2004, paragraph 1-070
[114] Ibid, paragraph 16-001

we find that the parties are innocent of dishonesty or fraudulent conduct, but also we recognise that the nature of the transaction is such that there would be subsequent related transactions and parties that would be adversely affected.

167. In conclusion we find that the proper construction of section 26(4) would entail unenforceability only in circumstances where the parties involved implement a merger transaction that clearly falls within the explicit definition of section 24, i.e. transactions to which the lacuna does not apply.

168. Having said this, we also determine that the Commission should, in the circumstances of this case, exercise its powers under section 5(l) of the Act and require the parties involved to file a notification for authorisation of the merger transaction.

169. ***The Appeal is dismissed***. In the circumstances of this appeal, we order that each party shall bear its own costs.

170. Any party aggrieved by this decision may appeal to the High Court within thirty days of this judgment.

Dated at **Lusaka** this **21st day of August, 2019.**

Mr. W. A. Mubanga, SC
(Chairperson)

Mrs. M.B. Muzumbwe-Katongo | **Mrs E. Chiyenge**