DLCA
ny/A 15/10

IN THE COMPETITION AND CONSUMER PROTECTION TRIBUNAL

APPEAL NO. 2018/CCPT/006/COM

BETWEEN:

ZAMM IMPORTS LIMITED — 1ST APPELLANT

NEWSTYLE PROPERTY DEVELOPMENT LIMITED — 2ND APPELLANT

AND

COMPETITION AND CONSUMER PROTECTION COMMISSION — RESPONDENT

CORAM: Willie A. Mubanga, SC (Chairperson), Miyoba B. Muzumbwe-Katongo (Vice Chairperson), and Eness C. Chiyenge (Member).

For 1st and 2nd Appellants: Mr. M. Sinkala and Mr. Y. Daka – Messrs. George Kunda and Company, on behalf of Messrs. A D Gray and Partners

For Respondent: Mrs. M. M. Mulenga – Manager, Legal and Corporate Affairs, Competition and Consumer Protection Commission

Ms. M. Mtonga – Senior Legal Officer, Competition and Consumer Protection Commission

Ms. N. Pilula - Legal Officer, Competition and Consumer Protection Commission

---

JUDGMENT

Legislation referred to:

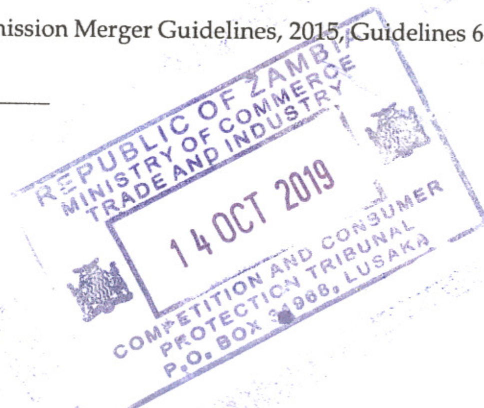
1. The Competition and Consumer Protection Act No. 24 of 2010, sections 24, 26, 27 and 37.
2. The Competition and Consumer Protection (Tribunal) Rules, S.I. No. 37 of 2012, Rules 14, 15, 18, 29 and 31 (1).

Cases referred to:

1. Rumpuns Trading Limited v. Competition and Consumer Protection Commission 2017/CCPT/019/COM.
2. Minister of Home Affairs and Others v. Lee Habasonda suing on his behalf and on behalf of the Southern African Center for the Constructive Resolution of Disputes (2007) ZR 207.
3. Kunda and Others v. The People (1980) ZR 105.
4. Savenda Management Services Limited v. Stanbic Zambia Limited Appeal No. 27 of 2017.
5. First National Bank Zambia Limited and Agri Leasing Services Limited v. The Competition and Consumer Protection Commission 2014/CCPT/006.

Other works referred to:

1. The Competition and Consumer Protection Commission Merger Guidelines, 2015, Guidelines 6 and 7.



INTRODUCTION

1. This judgment is on an appeal by Zamm Imports Limited (the 1st Appellant) and Newstyle Property Development Limited (the 2nd Appellant) from a decision of the Competition and Consumer Protection Commission (the Respondent) rendered on 1st March 2018 (appearing at pages 98 to 114 of the Record of Proceedings of the Respondent filed on 17th May 2018).

BACKGROUND

2. The background to the Respondent's decision are reflected in the documentation at pages 1 to 96 of the Record of Proceedings. Briefly, the background is that on 2nd July 2016, a member of the public lodged a complaint that an enterprise by the name Home Stores had been bought off by ZIMART after only operating for 7 days. By a letter dated 20th July 2016, the Respondent wrote a letter to the 1st Appellant stating that a complaint had been received alleging that the 1st Appellant was involved in a transaction which could be a merger. Specifically, the Respondent stated that it was alleged that the 1st Appellant had bought a "Home Stores" outlet situated along President Avenue in Kitwe. The Respondent went on to inform of the law, namely Part IV of the Competition and Consumer Protection Act (the Act) requiring the Respondent's authorisation of a merger transaction if the combined turnover or assets, whichever is higher, of the merging parties is above K15 million. Further, that without the Respondent's authorisation of a merger, such a transaction was null and void and no rights or obligations imposed on the participating parties shall be legally enforced in Zambia. The Respondent further informed the 1st Appellant that section 37 of the Act makes it an offence for an enterprise to intentionally or negligently implement a merger, with a penalty not exceeding 10% of the annual turnover.

3. The author of the said letter went on to state, *"While I do not wish to recommend to the Board of the Commission that this matter be pursued at the moment, I would like to receive your position on the matter. If on the other hand your transaction is exempt from the notification procedure to this Commission as a result of any other superseding, please let us know about this."* The letter concluded by asking the addressee to state its position including the relevant documents.

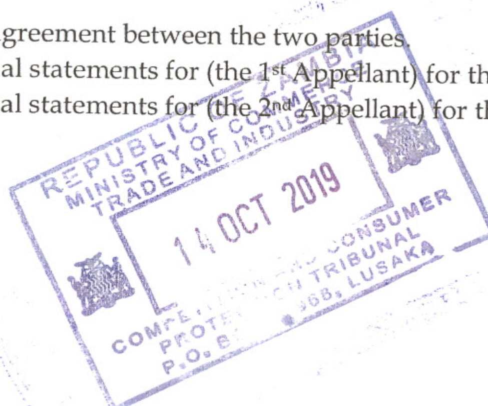
   (See letter at pages 3 to 4 of the Record of Proceedings)

4. In response by letter dated 20th August 2018, written by its lawyers A D Gray and Partners, the 1st Appellant denied having merged with a business entity referred to as "Home Stores" or at all. The 1st Appellant explained that it had merely bought the property situate along President Avenue in Kitwe from the 2nd Appellant, having been previously occupied by "Home Line Stores". Further that it did not have any business dealings with "Home Stores" or "Home Line Stores". The 1st Appellant enclosed copy of the Lands Register, as confirmation of the transaction.

   (See letter with attached Land Register at pages 5 to 9 of the Record of Proceedings)

5. Then by letter dated 16th September 2016 addressed to the 1st Appellant, the Respondent stated that it wanted to establish whether the property purchase transaction between the 2nd Appellant and the 1st Appellant amounted to a merger and to this end requested for documents, namely:

   (a) The Purchase Agreement between the two parties.
   (b) Audited financial statements for (the 1st Appellant) for the last two years.
   (c) Audited financial statements for (the 2nd Appellant) for the last two years.



6. Responding to the Respondent's said letter by letter dated 5th October written by its lawyers, the 1st Appellant reiterated that the transaction was purely that of property acquisition of S/D No. 1 of S/D 'F' of Farm No. 1615 and S/D 'H' of Farm No. 1591, both situated in Kitwe, and not of a merger of entities per subsections (1) and (2) of section 24 of the Act. The 1st Appellant went on to elaborate that in its view property acquisition does not fall within the definition of 'merger' as the 1st Appellant had not directly or indirectly acquired or established direct or indirect control over the whole or part of the business of the vendor (the 2nd Appellant) either by way of the subject property acquisition or at all. Further, that the two entities had not mutually agreed to adopt arrangements for common ownership or control over the whole or part of their respective businesses.

7. The 1st Appellant's letter further stated that the 1st Appellant's purchase of the subject property did not translate into purchase of shares, amalgamation, combination or joinder of enterprises; and neither had the 1st Appellant entered into joint venture with (the 2nd Appellant) or at all. Further, that the 2nd Appellant was a going concern in which the 1st Appellant had no vested interest and had no control, direct or indirect. That, that being the case, the 1st Appellant was not privy to the information pertaining to the 2nd Appellant. The 1st Appellant expressing *"shock at the Respondent's insistence that the transaction ... was a merger ... and not that of property acquisition"*, invited the Respondent to conduct a search at the Patents and Companies Registration Agency (PACRA) to establish the status as to the ownership and control of the two entities.

   (See correspondence at pages 10 to 12 of the Record of Proceedings)

8. By letter dated 27th October 2016 addressed to the 1st Appellant's lawyers by the Respondent, the latter informed that, having reviewed the information submitted, the subject transaction was a merger. However, that the Respondent did not wish to investigate the matter further as it did not appear that the transaction triggered merger notification pursuant to section 26 of the Act read together with Statutory Instrument No. 97 of 2011 (meaning that it may not have met the threshold). Further, that should information come to hand suggesting that the transaction could be a notifiable merger, the parties would be required to notify.

9. In another letter dated 9th November 2016 addressed to the 1st Appellant's lawyers, the Respondent referred to its earlier letter of 27th October 2016 wherein it had informed that having reviewed the information submitted it established that the subject transaction was a merger, but did not appear to be notifiable. The Respondent stated that it was now in possession of new information suggesting that the transaction could be a notifiable merger pursuant to section 26 of the Act. The Respondent asked the 1st Appellant to avail:

   (a) The Purchase Agreement between the two parties.
   (b) Audited financial statements for (the 1st Appellant) for the last two years.

10. By letter of even date as that addressed to the 1st Appellant's lawyers, the Respondent wrote to (the 2nd Appellant) through Nisco Group of Companies, stating that it had become aware that sometime in 2015 the 2nd Appellant was involved in a transaction that could be a merger; specifically, that the 2nd Appellant sold some property in Kitwe. The Respondent went on to inform of the law, namely Part IV of the Act requiring the Respondent's authorisation of a merger transaction if the combined turnover or assets, whichever is higher, of the merging parties is above K15 million. Further, that without the Respondent's authorisation of a merger, such a transaction was null and void and no rights or obligations imposed on the participating parties shall be legally enforced in Zambia. The Respondent further informed the 2nd Appellant that section 37 of the Act makes it an offence for an enterprise to

intentionally or negligently implement a merger, with a penalty not exceeding 10% of the annual turnover.

11. The author of the letter repeated the same intimation as that made to the 1st Appellant and outlined in paragraph 3 above that he did not wish to recommend to the Board that this matter be pursued at the moment, but that he would like to receive the 2nd Appellant's position on the matter. The Respondent asked for the following, among others:

    (a) (2nd Appellant's) position on the matter.
    (b) What property was sold exactly.
    (c) The description of the property that was sold.
    (d) The use of the property prior and after the sale.
    (e) The value of the property.
    (f) Latest audited financial statements for (the 2nd Appellant) and all of its subsidiaries and affiliates for the last two years.

12. By letter dated 18th November 2016, the Respondent wrote to the two Appellant's' lawyers, stating that (the Appellants) "may wish to know that" (the Respondent) was mandated by the Act to request any person to assist with investigations and further that the addressee "may wish to know that" the two letters to their clients dated 16th September and 9th November 2016 respectively were official notice issued pursuant to section 55 (4) of the Act.[1] Citing subsection (4) of section 55 of the Act, the author made a statement similar to earlier ones he had made, *"While I do not wish to recommend to the Board that you be cited for breach of section 55 (4) and be liable for prosecution, I am requesting for a meeting with you .... At the said meeting, you shall also be required to furnish the Commission with the following:*

    (a) The Purchase Agreement.
    (b) Audited financial statements for Zamm Imports Limited for the last two years."

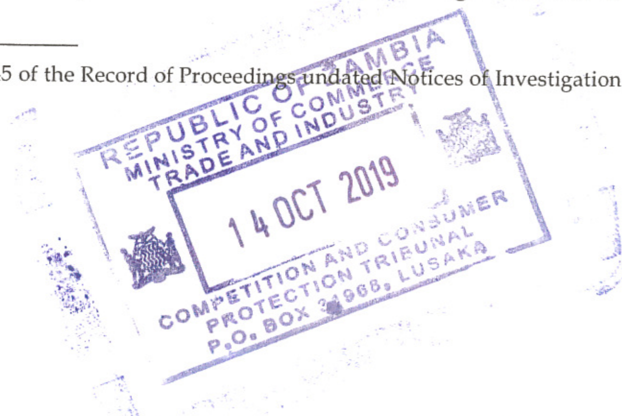
13. By letter of even date written to (the Appellants' lawyers) in the same terms, the Respondent indicated that at the meeting the following information was to be provided, among others:

    (a) Give your position on the matter.
    (b) The description of the property sold.
    (c) The description of the property that was sold.
    (d) The use of the property prior and after the sale.
    (e) The value of the property.
    (f) Latest audited financial statements for (the 2nd Appellant) and all of its subsidiaries and affiliates for the last two years.

14. The Appellants' lawyers by letter of 29th November 2016 replied. The lawyers denied that the subject transaction was a merger but purely that of property acquisition; that the transaction was not by any stretch of imagination a merger of entities as provided for in section 24 (1) and (2) of the Act. Further, that the transaction was well outside the spirit and ambit of section 24 of the Act

15. Further that, in the lawyers' view, the transaction did not in the slightest, either directly or indirectly, amount to it having given up control over all or part of the business to the purchaser either by way of sale of its shares, acquisition or at all, and that neither had the 2nd Appellant entered into a joint venture with Inos Holdings Limited, or at all. The lawyers

[1] There are at pages 44 and 45 of the Record of Proceedings undated Notices of Investigation.



invited the Respondent to conduct a search at the PACRA in order to establish the ownership and control of the two entities.

16. By another follow up letter dated 2nd December 2016, the 2nd Appellant referring to the Respondent's letter of 9th November 2016, requested for the new information now in the Respondent's possession referred to in the said letter (on the basis of which the Respondent had concluded that the subject transaction was a merger).

(See pages 13 to 33 of the Record of Proceedings)

17. By two letters dated 27th January 2017, the Appellants' lawyers responded to the Respondents' two letters of 18th November 2016, providing a copy of the Sale Agreement and stating that their understanding of the functions of (the Respondent), per section 5 of Act, was that there must be proper and credible information in the possession of (the Respondent) triggering an investigation and suggesting the need to invoke section 55 of the Act. Further, that their clients felt they were being harassed.

(See pages 34 to 40 of the Record of Proceedings)

18. By letter dated 9th October 2017 addressed to the Appellants' lawyers, the Respondent said the Respondent had on *"21st August, 2017 instituted investigations against yourselves on allegations of implementing a merger without authorisation contrary to section 26 as read together with section 37"* of the Act. The Respondent's management enclosed its findings for comments before presentation to the Board. **(See pages 42 and 46 to 62 of the Record of Proceedings)**

19. The key findings were that:

    (a) The Respondent established that (the 1st Appellant) is a company involved in the retail business specifically the sale of household furniture and electricals.

    (b) The parties submitted that the 2nd Appellant is a property development and investment company. The Respondent established that the 2nd Appellant is a real estate company whose business is to build show rooms, flats, offices and warehouses with different amenities and facilities, citing a website source. Its core mandate is to develop villas and commercial property in different parts of the country. Further, that the 2nd Appellant is a subsidiary of Nisco Group of Companies established in 1992. That Nisco has a diversified portfolio including manufacturing, import/export and property development.

20. The Respondent, in its findings, outlined the Appellants' respective responses, the gist of which we have already stated. It was further stated that on 2nd October 2017 the 2nd Appellant submitted its audited financial statements through its lawyers, but the 1st Appellant did not submit its audited financial statements (for which the lawyers in their comments on these findings by letter dated 10th November 2018, at pages 63 to 79 of the Record of Proceedings, specifically page 78, proffered an explanation that the statements were not available at the time the Respondent requested for them).

21. The Respondent then in its assessment of legal issues cited provisions of the Act, notably sections:

    (a) 24 (1) which reads, *"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."*

(b) Section 25 (1) which states that a merger is subject to the provisions of this Part if it is reviewable by the Commission; and (2) which provides that "*the Commission shall review a merger if-*

(i) *the merger is subject to authorisation in accordance with section twenty-six; or*
(ii) *the Commission elects or reviews the merger in accordance with Section twenty-seven.*"

(c) Section 26 which provides, "*Parties to a merger transaction that meet the prescribed thresholds under subsection (5) shall apply to the Commission for authorisation of the proposed merger in the prescribed manner and form.*"

(d) Section 27 (1) (a) which states, "*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 the merger is likely to create a position of dominance in a localised product or geographical market.*" And subsection (2) which provides, "*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.*"

(e) Section 37 which provides that an enterprise which intentionally or negligently implements a merger that is reviewable by the Commission is liable to a fine not exceeding ten percent of its annual turnover.

22. The findings further state that the following assessment tests were used:

(a) Whether the transaction constituted a merger transaction;
(b) Whether the transaction met the notification threshold requirements with (the Respondent);

(c) Whether there was notification to the (Respondent) for the authorisation.

(d) Whether the merger was intentionally or negligently implemented without the approval of the (Respondent).

23. The Respondent's findings on the test whether the transaction constituted a merger cited section 24 (1) of the Act. The findings further stated that in terms of subsection (2) (c) of the Act, a merger can be established where two or more independent enterprises form a joint venture and that a merger occurs in ways provided under subsection (2) of the Act. The Respondent then referred to the Board's earlier decision in the case involving acquisition of assets of Kakushi Farm Limited and Dathan Farm Limited by Silverlands Agricultural Services Limited wherein the Board concluded that the acquisition of assets for commercial use amounted to a merger. The findings also referred to the Contract of Sale wherein it was stated inter alia that "*the vendor will sell and the purchaser will purchase the property at the price of K11,000,000 upon accompanying terms and conditions ....*"

24. On the test whether the transaction was a notifiable merger, the findings stated that though the audited financial statements of (the 1st Appellant) were not available, the assets of (the 2nd Appellant) exceeding K15 million in 2015, the transaction met the threshold.

25. Further, the findings stated, on the question whether the transaction was notified, that the parties involved had not done so even when directed to do so by (the Respondent). On the question whether the alleged merger was implemented intentionally or negligently, the findings, quoting Black's Law Dictionary, defined 'intent' as "*the state of mind accompanying an act, especially a forbidden act ....*" Further, by the same Dictionary, defined 'negligence' as

"the failure to exercise the standard of care that a reasonable prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm ...." Further, that intention is defined as *"the willingness to bring about something planned or foreseen; the state of being set to do something."* The findings concluded on this test by stating that the parties intentionally or negligently implemented a merger without authorisation.

26. The Appellants' lawyers submitted comments on the findings, some of which are reflected in the finalised findings on record (see pages 63 to 79 of the Record of Proceedings). The findings concluded with recommendations to the Technical Committee of the Board in the terms outlined in the final decision of the Board, namely:

    (a) (the 1st Appellant) should pay K80,000 for implementing a notifiable merger without authorisation from the (Respondent).

    (b) (the 2nd Appellant should pay K80,000 for implementing a notifiable merger without authorisation from the (Respondent).

    (c) The parties should notify the merger within 30 days from the date of receipt of the Board Decision subject to payment of the above fines.

27. The Board of Commissioners in its decision highlighted the same findings as submitted by management to its Technical Committee, outlined above, and concluded as per the Committee's recommendations.

NOTICE OF APPEAL

28. The Appellants in their Notice of Appeal filed on 26th April 2018 appealed against the whole Decision of the Respondent which decided as already outlined above. The grounds of appeal were as follows:

    1. That the purported decision of the (Respondent) was no decision at all as it lacked the fundamental requirements of an appealable decision i.e. the *ratio decidendi*.
    2. That the (Respondent) erred in law and fact when it found that (the 1st Appellant) and (the 2nd Appellant) implemented a merger without authorisation.
    3. That the (Respondent) erred in law and fact when it found that (the 1st Appellant) and (the 2nd Appellant) should pay a sum of K80,000 each for implementing a notifiable merger without authorisation.
    4. That (the Respondent) erred in law and fact when it ordered the parties to notify the merger within 30 days from the date of receipt of the (Respondent's) decision.

29. The Appellant sought the following reliefs:

    1. That the Decision of the (Respondent) given on 1st March 2018 be quashed.
    2. Costs.
    3. Any other reliefs the Tribunal may deem fit.

30. The Respondent on the other hand in its Grounds in Opposition of Appeal stated that:

1. Contrary to the Appellants' assertions in Ground one, the Decision of the (Respondent) meets all the fundamental requirements of a decision, such as *ratio decidendi* and it is an appealable decision as evidenced by this appeal.
2. The (Respondent) did not err in law and fact when they found that the Appellants implemented a merger without authorisation.
3. That the (Respondent) did not err in law and fact when it fined the Appellants K80,000 each for implementing a merger without authorisation.
4. The (Respondent) was on firm ground both in law and in fact when it ordered the Appellants to notify the merger within 30 days from the date of receipt of the decision as the said merger was void.

TRIBUNAL'S HEARINGS, ANALYSIS, FINDINGS AND DECISION

31. We heard the parties to the appeal on 18th May and 4th July 2018, at which sittings the parties indicated that they were not bringing any witnesses but would instead file Heads of Arguments. We gave the parties directions for filing of their respective arguments, to be completed by 20th July 2018. We reserved judgment. Counsel for the Appellants filed Heads of Argument as well as submissions in reply to Heads of Argument filed by counsel for the Respondent. We are grateful to counsel for their arguments and submissions and we shall refer to them as we see necessary.

32. Before we embark on our consideration of the appeal, we must mention that, unfortunately, due to the inadequate number of days for our sittings, coupled with the workload and the subsequent expiry of the terms of office of two of our colleagues, we were unable to prepare and deliver the judgment within the 60 days required by Rule 31 (2) of the Competition and Consumer Protection (Tribunal) Rules, S.I. No. 37 of 2012 (the Tribunal Rules). This is most unfortunate but beyond our control. We do not believe that failure to fulfil the said Rule renders a decision of the Tribunal void for want of jurisdiction, as this time limitation has not been imposed in the Act but in procedural rules. The rules are merely regulatory or directory and should not result in a situation that, in our view, was not intended by the enabling Act. However, to avoid unnecessary appeals on the ground of non-compliance with the Rule, we decided to rehear the appeal. At the appeal proceedings held for this purpose on 15th August 2019, the parties requested that the rehearing of the appeal proceeds on the basis of the arguments and submissions already on the record. We have proceeded accordingly.

33. We consider the first and second grounds of appeal to be the decisive factor as to whether the other two grounds of appeal will require consideration. We therefore proceed with consideration of the two grounds of appeal together, namely:

    (1) That the purported decision of the (Respondent) was no decision at all as it lacked the fundamental requirements of an appealable decision i.e. the *ratio decidendi*.

    (2) That the (Respondent) erred in law and fact when it found that (the 1st Appellant) and (the 2nd Appellant) implemented a merger without authorisation.

34. While counsel for both sides have dwelt on section 24 (1) and (2) of the Act, we believe that in order to come to a meaningful conclusion as to whether or not the subject transaction constituted a merger, it is important to consider the whole section, that is, including subsection (3). Section 24 of the Act reads:

REPUBLIC OF ZAMBIA
MINISTRY OF COMMERCE
TRADE AND INDUSTRY
14 OCT 2019
COMPETITION AND CONSUMER
PROTECTION TRIBUNAL
P.O. BOX [illegible]988, LUSAKA

"(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 and 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 enterprises.

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

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

(b) is entitled to vote a majority of the votes 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 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."

35. In the case of **Rumpuns Trading Limited v. Competition and Consumer Protection Commission** 2017/CCPT/019/COM (the Rumpuns case), we had occasion to extensively review jurisprudence relating to the concept of merger and how that may be interpreted in terms of section 24 of the Act and in relation to purchase of assets. We intend to reproduce a good portion of our judgment in that case for a sound appreciation of the issues raised in these two grounds of appeal, namely; what constitutes a merger in terms of section 24 of the Act and whether there is *ratio decidendi* in the Respondent's decision subject of this appeal. We had the following to say, in the Rumpuns judgment:

"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*

REPUBLIC OF ZAMBIA
MINISTRY OF COMMERCE
TRADE AND INDUSTRY
14 OCT 2019
COMPETITION AND CONSUMER
PROTECTION TRIBUNAL
P.O. BOX 968, LUSAKA

are two separate concepts (so that certain reviewable merger transactions are not subject to mandatory notification and waiting periods) or are identical[2].

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*[3] *tests based on objective, clear and transparent criteria to establish whether a transaction is subject to review.*

36. ....

37. ....

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.*[4]

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"*[5] *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.*[6] *Guidelines by competition authorities, informal guidance, and consistent*

[2] 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."

[3] 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

[4] *Ibid*

[5] *Ibid*

[6] *Ibid*

decision making are, to some extent, helpful for the purpose of addressing potential problems in this respect.[7]

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 considered a merger transaction.*[8] *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.[9] *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 rise to a merger*[10]. *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*

[7] Definition of Transaction For The Purpose Of Merger Control Review, *Supra*, p.6
[8] *Ibid*
[9] G.C. Thornton, Legislative Drafting, 4th Edition, Butterworths, London Dublin Edinburgh, 1996, p.146
[10] This is to be read together with section 24(1) and 24(3) to establish the existence or otherwise of a merger

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...*[11]
>
> *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".*[12]

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;*
    - *(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.*

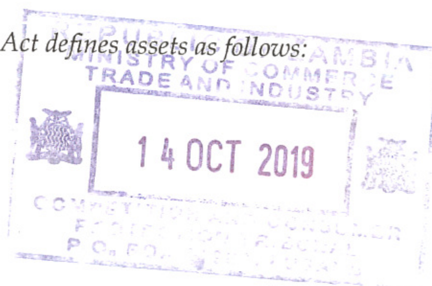
45. *Based on the facts presented before the Tribunal, it is not in dispute that a land right over PwC Office Park passed from the Appellant to Prime Time. In fact, a perusal of the Record of Proceedings shows that the PwC Property was purchased for value at US$8.8 Million (See page 97 of the Record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

46. ....

What is an "asset"?

47. ....

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



[11] Page 8 of the Guidelines

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

" 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.[13];

    (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.[14]; or

    (3) actual property such as precious metals or real estate. Also called real or tangible assets.[15]

50. ....

51. ....

52. ....

53. ....

54. ....

55. ....

56. ....

57. ....

58. ....

59. ....

60. ....

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

61. ....

62. ....

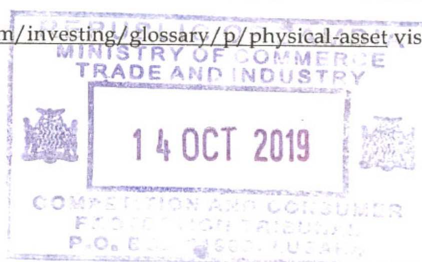
63. ....

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?

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

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

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



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. ....

66. ....

67. ....

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.*

<u>What is control?</u>

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?[16]*" "Did Parliament intend that that provision of the Act be interpreted literally?" All of these questions are addressed below.*

....

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.

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*

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

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?

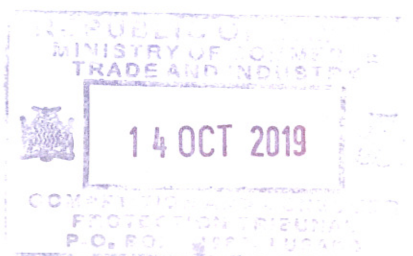
74. *The Tribunal found that there are many reasons why companies merge. These include the following:*
   (1) *using a merger as a basis to entering a market – i.e. domestic market or even an export market;*
   (2) *to expand the business portfolio - i.e. product range;*
   (3) *achieving a net addition 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*[17]*;*
   (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*

[17] 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



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.[18] *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*[19]*;*

(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.*[20] *These possibilities raise the concern that vertical integration will foreclose competitors by limiting their access to sources of supply or to customers.*[21] *Vertical mergers also may be anticompetitive because their entrenched market power may impede new businesses from entering the market;*[22]

(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 prevent the actual increased competition that would result from the undertaking's entry and possibly lead to higher prices*[23]*;*

(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*[24]*.;*

(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*[25]*;*

(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*[26]*; 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.*[27]

---

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

[19] 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

[20] *Ibid*

[21] *Ibid*

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

[23] *Ibid*

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

[25] *Ibid*

[26] *Ibid*

[27] *Ibid*

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;*
(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.*[28] *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.*[29] *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;*[30]
(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, 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;*[31]
(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;*[32]

---

[28] 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

[29] *Ibid*

[30] 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

[31] *Ibid*

[32] *Ibid*

(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;*[33]

(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-*

(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*

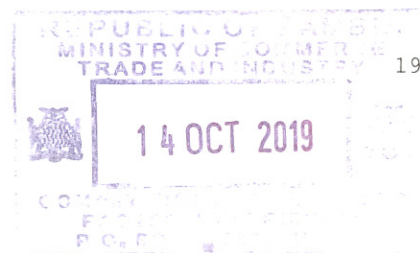
(f) *the extent to which the proposed merger may affect the ability of national industries to compete in international markets.*

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*

[33] 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


MINISTRY OF ... TRADE AND ...
14 OCT 2019

market place.[34] *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.*[35]

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 effects in order to determine whether or not the acquisition is considered a merger transaction.*[36]

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)*[37] *(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.*[38] *In all these cases, the focus is on whether the acquired asset is likely to impact the acquirer's position in the market place.*[39]

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.*[40]

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 an acquisition of asset constitutes a merger.*[41] *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*

---

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

[35] *Ibid*

[36] *Ibid*

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

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

[39] *Ibid*

[40] 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

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

transaction qualifies or should qualify as a merger transaction.[42] *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.*[43]

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*[44].

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 24(3)?

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"*[45] *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;*

[42] *Ibid*
[43] *ibid*
[44] Section 84 of the Act
[45] Definition of Transaction For The Purpose Of Merger Control Review, *Supra*, p.9

(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 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."*

36. Given the above analysis of the concept of merger in relation to section 24 of the Act, and the acquisition by an enterprise from another of assets, we hold that acquisitions of physical assets can constitute a merger, depending on the circumstances of a particular case. Further, if such a merger meets the threshold prescribed by section 26 of the Act, or if the merger does not meet the threshold but is determined by the (Respondent) to be a merger requiring its authorisation pursuant to section 27, then the parties to the merger are required to file for the (Respondent's) authorisation.

37. However, in our view, in order for acquisition of assets to be a merger in terms of section 24 of the Act, the transaction should be found to raise competition concerns in a relevant market or public interest concerns. This is achieved by applying the regulatory tools of the (the Respondent), for example what we have identified as the Respondent's Merger Guidelines of 2015, more specifically Guidelines 6 and 7, which state-

> 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 *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.*

38. Even though acquisition of assets may not result in formal direct or indirect control over the business of the enterprise whose assets have been acquired, control though not discernible on the face of it, may nonetheless result (per Guideline 6) giving rise to changes in the competition scenario in a relevant market (Per Guideline 7). As we have already demonstrated, whole or substantial business interest of an enterprise may be eliminated from the market or reduced tacitly through asset acquisition (e.g. of strategic asset such as infrastructure). For this reason, such an asset acquisition may attract the regulator's interest and enquiry or even investigation, as the regulator may see fit.

39. Per Guideline 7, a merger can arise from an asset acquisition transaction where "*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.*" In the Rumpuns case, where both parties were trading in the estate market and they respectively sold and purchased leasehold rights, which incidentally constituted the whole of the vendor's business product at the time, we agreed with the Respondent's finding that the transaction was not simply purchase of land, but constituted a merger in terms of section 24 of the Act. This was so even though arguably the vendor remained on the register of companies as a going concern after selling its leasehold rights. As shown in the lengthy text we have quoted from our judgment in that appeal, in determining that the transaction constituted a merger in terms section 24, we used the purposive approach to interpretation of statutes. We concluded that in view of the objectives of the statute, the legislature could not have intended to exclude sale of assets from the definition of "control" in subsection (3).

REPUBLIC OF ZAMBIA
MINISTRY OF COMMERCE
TRADE AND INDUSTRY
14 OCT 2019
COMPETITION AND CONSUMER
PROTECTION TRIBUNAL
P.O. BOX

Excluding sale of assets from the definition of "control" would seriously undermine objectives of the Act, resulting in an absurdity.

40. Counsel for the Appellant has argued at length that the Respondent's decision was no decision at all as the Respondent merely recited the law and the Appellants' arguments before reaching its conclusion. Counsel cited the case of **Minister of Home Affairs and Others v. Lee Habasonda** suing on his behalf and on behalf of the Southern African Center for the Constructive Resolution of Disputes (2007) ZR 207, at page 213, where the Court said in part:

   "…. What appeared to be a long judgment was, in essence, not a judgment at all, but a verbatim reproduction and reciting of the pleadings and arguments and only a half paragraph judgment is that there was no judgment in the trial and the appellant was deprived of the opportunity of arguing an appeal."

   And at pages 213-214, where the Court said in part:

   "A judgment which only consists of verbatim reproduction and recitals is no judgment. …. In other words, a court must reveal its mind to the evidence before it and not just accept any decided case"

41. Counsel further cited the case of **Kunda and Others v. The People** (1980) ZR 105 where the Supreme Court held, *"The result of such brevity is that there is no judgment on the trial within-a trial and the Appellants are deprived of their opportunity to appeal against it."* Counsel also cited the Supreme Court holding in the case of **Savenda Management Services Limited v. Stanbic Zambia Limited** Appeal No. 27 of 2017, where the Court referring to a book by Dr Dato Syed Ahmed Idid entitled "Writing of Judgment", held (at pages 150-151):

   "The decision must show the parties that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or reason and logic. ……The opinions of the parties in the case should not be copied verbatim and adapted to the judgment of the Court. … A judge should tower above the parties and counsel by applying some level of judicial reasoning …."

42. As for ground two, counsel for the Appellants, quoting section 24 (1) and (2), argued in essence that the parties did not merge and that control did not change as the parties did not form a joint venture nor did either take over control of the other party but remained separate entities, that is, going concerns with no arrangement for joint ownership or control.

43. Counsel for the Respondent in response argued that the Board provided reasoning in paragraph 54 at page 113 of the Record of Proceedings (which we have quoted in paragraph 51 below) and where the Board reasoned that the transaction was a notifiable merger as it involved change of control, met the notification threshold and had local nexus. Further, that the decision went further to state that the facts and findings had been considered by the Board and hence its directives. That the facts and findings included the Lands Registry and Contract of Sale.

44. As for the second ground of appeal, counsel for the Respondent, citing Guideline 7 of the Merger Guidelines 2015, argued that the 1st Appellant acquired the property from the 2nd Appellant. That the property is situated in an affluent area of Kitwe, while the 1st Appellant primarily operates from Ndola. Therefore, this property did have the effect of changing the competitive situation in Kitwe. The Respondent also referred to the case of **First National Bank Zambia Limited and Agri Leasing Services Limited v. The Competition and Consumer Protection Commission** 2014/CCPT/006 (**First National Bank and Agri Leasing**

case), wherein the bank had purchased a loan book and ancillary rights from the other party and the case came on appeal on a question of calculation of the filing fee, the parties having filed for merger authorisation.

45. In reply, counsel for the Appellants reiterated the same points which we do not intend to reproduce.

46. In the Rumpuns case, we reasoned that both parties operated in the same (relevant) market, the asset in issue had market presence or turnover clearly attributable to it and, having passed from one competitor to another in the relevant market, the control exercised over the asset changed the competitive situation in that market. In the present case, counsel for the Respondent has argued, citing Guideline 7 of the Merger Guidelines 2015, that the 1st Appellant acquired the property from the 2nd Appellant. That the property is situated in an affluent area of Kitwe, while the 1st Appellant primarily operates from Ndola. That, therefore, this property did have the effect of changing the competitive situation in Kitwe. We have not seen a finding to the effect that prior to the property being sold, the 2nd Appellant was leasing it and after purchasing it, the 1st Appellant continued leasing the property. If there had been such a finding, then it might have been arguable that the 1st Appellant though it did not disclose the fact was actually engaged in property leasing business, hence operating in the relevant market where the subject property was a business product that changed hands from one competitor to another.

47. In the case of **First National Bank and Agri Leasing** cited by counsel, both parties were engaged in granting agricultural loans. The loan book and ancillary rights which were changing hands from one competitor to another were business products in that relevant market. In the appeal before us, the Respondent in its findings, at page 100 of the Record of Proceedings, paragraphs 5 and 6, stated that:

    5. The Commission established that Zamm Imports Limited is a company involved in the retail business specifically the sale of household furniture and electricals.

    6. .... The Commission established that Newstyle Property Development Limited is a real estate company whose business is to build showrooms, flats, offices and warehouses with different amenities and facilities. Its core mandate is to develop villas and commercial property in different parts of the country with a view if easing Zambia's growing demand for affordable and high quality accommodation. It is a subsidiary of Nisco Group of Companies which was established in 1992. Nisco Group of Companies has diversified portfolio including manufacturing, import/export and property development.[46]

48. The Respondent, having so established the core businesses of the two parties, simply outlined sections of the Act, namely; sections 24 (1), 25 (1), 26 (1), 27 (1) (a), and 37 of the Act, as well as Regulation 8 (1) of the Competition and Consumer Protection (General) Regulations S.I. 97 of 2011. In its analysis of the tests, the Respondent simply quoted or referred to requirements of the Act and the Regulation with respect to mergers, threshold for purposes of notification of a merger, and requirement for authorisation pursuant to sections 26 and 27 of the Act. The Respondent also outlined at length the correspondence between itself and the two parties respectively and the latter's submissions and further submissions (further submissions being the comments on the management findings that were earlier availed them before finalisation). The Respondent also referred to provisions of its Merger Guidelines of 2015 in the background to its decision. We have already quoted the provisions of the Act,

[46] The Respondent disclosed the source of the information as internet websites.

and the relevant provisions of the Merger Guidelines of 2015. We have also earlier quoted substantially the correspondence between the parties to this appeal. Hence, we do not intend to repeat these. (See pages 99 to 108 of the Record of Proceedings)

49. Suffice it to state that we do not see anywhere in the Respondent's decision a persuasive basis for its conclusion that the transaction in question falls within section 24 of the Act and is therefore a merger. Our reading of the Respondent's decision suggests that it based its decision on its earlier decision regarding the acquisition of Kalulushi Farm Limited and Dathan Farm Limited by Sylverlands Agricultural Services Limited. It is stated in paragraph 34 at page 108 of the Record of Proceedings, "*... it was concluded that the acquisition of assets for commercial use amounted to a notifiable merger.*" The facts or circumstances of that particular decision and how they relate to the case before us were not provided or discussed at all. In fact, we note that this decision is not in the public domain for its access by the Tribunal or any interested party to be presumed.

50. Furthermore, in paragraphs 35, 36 and 37 of its decision, the Respondent in its findings reasoned:

    35. The transaction between Zamm Imports and Newstyle Property Development satisfied section 24 (2) (a) as it involved the sale of assets of one business to another and as such there was a change of control as evidenced from the Lands Register submitted by the parties.

    36. Furthermore, the contract of sale read in part:

    "An agreement BETWEEN ZAMM IMPORTS LIMITED of Ndola in the Republic of Zambia (hereinafter called the "Vendor") of the one part and NEWSTYLE PROPERTY DEVELOPMENT LIMITED (hereinafter called the Purchaser) of the other part WHEREBY IT IS AGREED that the vendor will sell and the purchaser will purchase the property referred to in the accompanying particulars at the price of K11,000,000(hereinafter called the "Vendor") upon accompanying terms and conditions and the vendor and the purchaser do on their respective terms agree to complete the said purchase on the said terms(hereinafter called the "Vendor") and conditions"

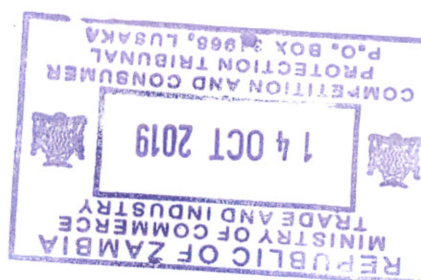
    37. Therefore, the transaction the transaction is a merger as defined by section 24 (1) of the Act.

51. The Board, following its findings, concluded in paragraphs 54 and 55 at page 113:

    54. The Board deliberated that the Act requires that parties that meet merger thresholds and have local nexus notify their transaction. The purpose of the merger regime is for the Commission to assess mergers and ensure that mergers that are consummated do not harm competition in the economy or raise public interest concerns.

    55. The Board deliberated that the transaction between Newstyle Property Development Limited and Zamm Imports Limited was notifiable merger as it involved change of control, met the notification threshold and had local nexus. The Board further deliberated that the transaction was implemented negligently by the merging parties. As such the parties violated Section 37 (a) of the Act. Further, as stipulated under section 26 (4) of the Act, the transaction is void.

52. In short, the Respondent has not offered a convincing explanation as to how a transaction involving sale of assets in the circumstances of the appeal before us could be captured by subsection (3) of section 24 which defines the control envisaged in subsection (1). This is in



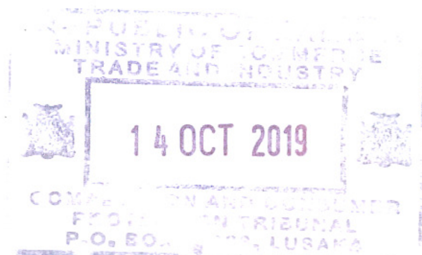
light of the fact that if the literal meaning rule of interpretation of statutes is applied, such a transaction would fall outside the scope of the section. The Respondent did not offer any justification for the validity of the Merger Guidelines in issue as on the plain reading of subsection (3), the Guidelines would run contrary to section 24. The reasoning by the Respondent is simply that any sale of commercial property, or of any property for that matter, constitutes a merger in the terms of section 24 if the assets are sold by one business to another. This would mean that if, for argument's sake, Barclays Bank sold a building to Shoprite Checkers the transaction would be a merger. This reasoning is a misdirection and we outrightly reject it. As we have already said, for a transaction to constitute a merger, it has to meet set criteria, per section 24 of the Act (interpreted purposively, if necessary, as we did in the Rumpuns case) and, read together with the Merger Guidelines 2015, where necessary.

53. Concerning the first ground of appeal, our position is that the Respondent misdirected itself in its reasoning. Black's Law Dictionary defines "*ratio decidendi*" as "a Latin phrase that means the reason for a decision". The misdirection does not mean that there was no *ratio decidendi* at all. The Respondent's decision did not lack the fundamental requirements of a decision that is appealable to the Tribunal, as alleged by the Appellants. To the contrary, the faulty reasoning of the Respondent rendered the decision easy to appeal on the ground of the Respondent's misdirection that the transaction constituted a merger because ownership, and hence control, of the commercial property in issue changed from the 2nd Appellant to the 1st Appellant. In any case, even if the Respondent's decision had lacked *ratio decidendi*, that in itself could have been a ground of appeal as this Tribunal, unlike an appellate court, has jurisdiction under the Tribunal Rules to hear the parties' evidence and make findings of fact or law. In the case of **Italian School of Lusaka v. Sajiv Nair and Competition and Consumer Protection Commission** 2016/CCPT/017/CON, we had the following to say concerning the distinction between an appellate court and this Tribunal, in paragraph 98 ant page 28 of our judgment:

> *"The question whether the findings and verdict were erroneous can only be conclusively determined upon an evaluation of matters that weighed or ought to have weighed or ought not to have weighed the 1st Respondent in its determination of the case. This is particularly in light of the Tribunal's mandate to hear all the parties' evidence, including its discretion to receive additional evidence as is necessary to enable the Tribunal dispose of the appeal justly (Rules 14, 15, 18 and 29 of the Competition and Consumer Protection (Tribunal) Rules, S.I. 37 of 2012).* [47] *The distinction between the jurisdiction of courts and appellate tribunals was restated by the Supreme Court in its decision in the case of* ***Attorney-General v Phiri*** *(1988 – 1989) ZR 121; that it is not the function of the Court to interpose itself as an appellate tribunal within the domestic disciplinary procedures to review what others have done; and that the duty of the Court is to examine if there was the necessary disciplinary power, and if it was exercised in due form. The Tribunal is enjoined by law to address itself to the totality of what is before it."*

54. Rules 14, 15, 18, 29 and 31 (1) of the Tribunal Rules read as follows:

[47] In our Ruling on an application for leave to produce documents on appeal in the case of **MRI Seed Zambia Limited, Tombwe Processing Limited and Precision Faming Holdings Limited v. Amiran Zambia Limited, ATS Agrochemicals Limited and Competition and Consumer Protection Commission**, Appeal Nos. 2017/CCPT/001/COM, 2017/CCPT/002/COM, and 2017/CCPT/003/COM, we held that the Tribunal may allow a party to adduce evidence though it was not before the Competition and Consumer Protection Commission if it is additional or further information relating to issues in the appeal as is necessary to enable the Tribunal dispose of it justly.



14. *At the hearing-*

(a) the appellant or applicant shall present the evidence on which the appeal or application is based, as the case may be;

(b) the respondent shall adduce evidence to rebut the evidence of the appellant or applicant;

(c) the appellant or applicant may address the Tribunal by way of reply to the respondent's evidence;

(d) the appellant or applicant and the respondent may call a witness to adduce evidence; and

(e) both parties may, at the conclusion of the hearing, present oral or written submissions to the Tribunal.

15. (1) The Tribunal may receive, as evidence, any statement, document, information or other matter that may assist it to deal effectively with an appeal, whether or not the evidence would be admissible in a court of law.

(2) The Tribunal may take judicial notice of any fact.

(3) Evidence before the Tribunal may be given orally or, if the parties to the proceedings consent or the Chairperson of the Tribunal so orders, by affidavit.

(4) The Tribunal may, at any stage of the proceedings, make an order requiring the personal attendance of any deponent for examination and cross examination.

18. The Tribunal may, during the hearing, receive such additional information relating to the appeal or application as it may consider necessary to enable it dispose of a matter.

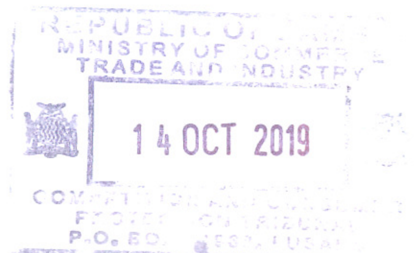
29. The Tribunal shall observe the principles of natural justice and shall hear all the evidence tendered and representations made by, or on behalf of, the parties or application.

31.(1) A decision of the Tribunal shall be in writing and shall contain the following:
(a) the finding of the Tribunal on each issue of fact or law raised in the proceedings; and
(b) the reason for the Tribunal's findings.

55. We do expect the Respondent, as an investigative and adjudicative body, to effectively conduct its investigations and render a reasoned decision based on proper findings of fact and the law. However, this being an administrative body, not a judicial body, we do not share the view that the standard of writing its decisions should rise to the same level as that expected of a judgment rendered by a court.

56. Therefore, the Appellants fail on the first but succeed on the second ground of appeal. The other two grounds of appeal automatically fall away. In passing, however, we advise counsel to read our judgment in the Rumpuns case in which we also addressed the question whether the parties to the merger intentionally or negligently implemented the merger (at pages 73 to 77). Of essence, although we determined that the transaction constituted a merger, we nonetheless concluded that the parties had not implemented it intentionally or negligently.

57. Having decided the appeal, we find it necessary to comment on the conduct of the Appellants and the Respondent in the proceedings before the Respondent. We do not have jurisdiction, and it is not our intention, to give directions as to how investigations by the Respondent should be conducted. Nonetheless, this appeal arising from such investigations, we see it fit to make some observations on matters of public interest.



58. We note that the Respondent in its investigation appear to have solely depended on information supplied by the Appellants. Most of the information, though repeatedly requested for by the Responded, was not made available by the Appellants. Notably, the Appellants did not disclose the use of the property in question prior to and after the sale. The 1st Appellant also did not submit its latest audited financial statements for the last two years. Counsel only proffered an explanation for not submitting the financial statements when commenting on the initial findings. The tenor of counsel's correspondence was clearly that they had the perception that the Appellants were being harassed. They were therefore unwilling to cooperate.

59. It is important for a person to provide information requested for by the (Respondent), in line with provisions of section 55 of the Act. That is unless such information is protected by law (subsection (9) of the same section), or due to some other lawful reason, in which case that person should say so. It ought to be understood, especially by counsel, that it is in the public interest that the Respondent is not impeded from executing its mandate by refusing to provide information requested by it.

60. We also observe on the other hand that the manner in which the Respondent handles its requests for information is important. We have, for instance, observed that in some of its requests for information from the Appellants, the Respondent wrote:

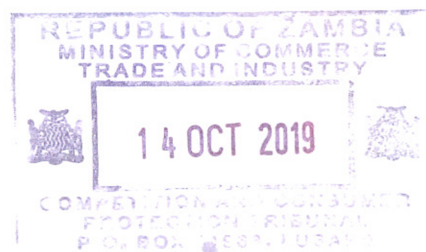
    "While I do not wish to recommend to the Board of the Commission that this matter be pursued at the moment, I would like to receive your position on the matter. If on the other hand your transaction is exempt from the notification procedure to this Commission as a result of any other superseding, please let us know about this."; and

    "While I do not wish to recommend to the Board that you be cited for breach of section 55 (4) and be liable for prosecution, I am requesting for a meeting with you .... At the said meeting, you shall also be required to furnish the Commission with ...."

61. While these statements may have been well intended as a means of motivating the persons requested to provide the information, they are capable of being understood differently, this being so especially that the letters are written in personal terms, thus "**I do not wish** ....". The Respondent has the law at its disposal for compelling a person to provide information or to enable the Respondent otherwise access such information (e.g. through search warrants under section 7 of the Act or by conducting searches/inquiries at other public institutions).

62. Investigations into suspected merger transactions may sometimes be a delicate and complex affair requiring the use of various lawful means at the Respondent's disposal, as appropriate, including prosecution for refusal to provide information which would also serve as a deterrent. The Respondent will most certainly find itself falling short in its investigative work, if it depends solely on the good will of persons requested to provide information.

63. We also find that, curiously, the Respondent did not inquire into or mention the anomaly that the description of the parties in the Contract of Sale that was submitted by counsel for the Appellants transposed the parties (the 1st Appellant and 2nd Appellant) as vendor and purchaser. And there was no explanation given nor mention made in the Respondent's decision subject of the appeal. The Respondent also does not seem to have taken steps to establish the use of the property in issue prior to and after its sale. There is also no indication on the record as to whether the Respondent conducted any search at PACRA to establish any direct or indirect relationships between the parties and their disclosed areas of business activity. In short, the investigative work left a lot of issues hanging.

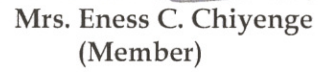


64. In conclusion, the appeal succeeds. However, in light of the conduct of the parties in the investigative process, each party shall bear its own costs.

Delivered at Lusaka this 10th day of October 2019.

Mr. Willie A. Mubanga, SC
(Chairperson)

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



Mrs. Eness C. Chiyenge
(Member)