

DCA
RMA
1/6/2020

IN THE COMPETITION AND CONSUMER
PROTECTION TRIBUNAL FOR ZAMBIA
HOLDEN AT LUSAKA

2017/CCPT/020/COM

BETWEEN:

OMNIA FERTILIZER ZAMBIA LIMITED

APPELLANT

AND

THE COMPETITION AND CONSUMER
PROTECTION COMMISSION

RESPONDENT

CORAM: Mr Willie A Mubanga, S.C. (Chairperson), Mrs B M Katongo
(Vice Chairperson), Mrs E C Chiyenge (Member)

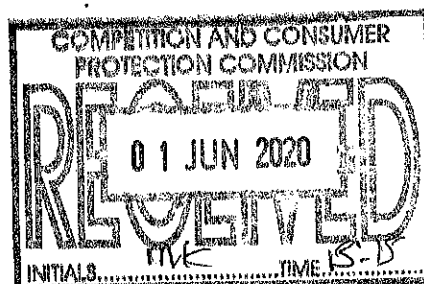
For the Applicant: Mr S.M.J Lungu, SC – Messrs Shamwana & Co.

For the Respondent: Mrs M.B. Mwanza, Director – Legal and Corporate Affairs
Mrs M.M. Muleya, Manager – Legal and Corporate Affairs
and Ms N. Pilula – Legal Officer – Competition and
Consumer Protection Commission.

RULING

Legislation referred to:

- (1) Section 7(5)(b) of the Competition and Consumer Protection Tribunal Act No. 24 of 2010;
- (2) Rule 15(i) of the Competition and Consumer Protection Tribunal Act No. 24 of 2010; and
- (3) Rule 16 of the Competition and Consumer Protection (Tribunal) Rules 2012



- (4) Rule 19 of the Competition and Consumer Protection (Tribunal) Rules, Statutory Instrument No. 37 of 2012.

Cases referred to:

- (1) DPP Vs. Kilbourne (1973) A.C. P.729;
- (2) George Bienga Vs. The People (1978) ZR 32 (HC);
- (3) Tokyo Vehicles Limited Vs. Competition and Consumer Protection Commission SCZ/8/261/2015 Judgment No. 43 of 2014.
- (4) Zambia Airports Vs. CCPC and Zega 2016/CCPT/010/COM

References:

- (5) Words and Phrases Legally Defined, Volume 2: D to J.
- (6) Edward J. Imwinkelviad – Evidentiary Foundations Lexis Law Publishing 4th Edition.
- (7) Paragraph 1368 of Halsbury’s Laws of England Volume 30, 3rd Edition.

BACKGROUND

These proceedings arise out of the Notice of Appeal filed by the Appellant on 27th October, 2017 being wholly dissatisfied with the decision of the Respondent in which the Respondent decided that the Board of Commissioners determined that the Respondents were engaged in a collusion or cartelistic behavior and decided that:

- (1) Omnia be fined 5% annual turnover in accordance with Section 9(3) of the Act and
- (2) Both Omnia and Nyiombo be prosecuted in accordance with S9(7) of the Act.

This matter was commenced at the time our colleagues Messrs Rocky Sombe and Chance Kabaghe were still members of the Tribunal and this was before their mandate expired in May, 2019. However at the time of deliberating of the Ruling they were no longer members of the panel. Therefore, the

3.

two members were not part of the Ruling that is being delivered to day which is a majority Ruling.

This is a Ruling in respect of the Appellants' application filed on 24th August, 2018 pursuant to Rule 19 of the Competition and Consumer Protection (Tribunal) Rules 2012.

Rule 19 of Statutory Instrument No. 37 of 2012 provides as follows:

“(1) Except where these Rules otherwise provide an application for directions of an interlocutory nature in connection with any proceedings shall unless otherwise ordered by the Chairperson, be made to the Secretariat;

(2) An interlocutory application shall be in writing and shall state the title of the proceedings and the grounds upon which the application is made;

(3)-----

(4) Where an interlocutory application is not made with the consent of every party, a copy shall before it is made, be served on every other party and the interlocutory application shall state that this has been done.

(5)-----”

4.

The application is not before the Secretariat because the Chairperson issued a practice direction that all interlocutory applications should be heard by the Tribunal.

The Application under Rule 19 Supra is that the Respondent produces documents referred to in the Affidavit in Support, and the reasons contained in the Affidavit are shown hereunder.

According to the Affidavit in Support also filed on 24th August, 2018 with the supporting grounds shown in paragraphs 7 to 15 of the affidavit of one Stephen Mbayani Lungu, the following are, among the grounds in the affidavit, namely;

- “(a) That the Respondent may have left out some documents which are of significance to these proceedings.
- (b) That the Respondent in carrying out its investigations that led to the decision against the Appellant raided Appellant’s premises on 19th October, 2012 and with a Search Warrant exhibited as SML 1.
- (c) That the various documents taken by the Respondent were returned either in their original form or as copies to the Appellant on or about 14th November, 2012 and exhibited the copies of Notices of Seizure as SML 2 to 26.
- (d) That a perusal of the Notices shows that more documents than those

5.

included in the Record of Proceedings were relied upon by the Respondent when arriving at its Decision against the Appellant

- (e) That for instance on Page 84 of the Record of Proceedings, the Respondent, in annex 3 alluded to tender documents but those tendered documents have not been produced as part of the Record of Proceedings.
- (f) That the Appellant never had an opportunity of making any submissions to the Respondent over the investigation and as such never had any chance of producing any documents to speak to the manner the Appellant conducted its business in Zambia and also show how it made its decision and produced exhibits marked SML 27 to 33 which are extract Minutes of OMNIA Holdings Board Meeting and Maps of Zambia.
- (g) That in order for the Tribunal to arrive at a proper and just decision the Respondent should produce all the necessary documents seized from the Appellant's premises.
- (h) That all tender documents and associated documents related to the tendering since 2001 seized by the Respondent should be produced by the Respondent.
- (i) And that the Appellant having not been given an opportunity to

6.

submit any form of Response to the Respondent during the investigations be given an opportunity to produce such documents as will inform the Tribunal on the conduct of its business.

The Respondent in its affidavit in Opposition to Summons to produce documents filed on 10th September, 2018 taken out by one Inonge Mulozi a Senior Research Assistant for the Respondent deposes, inter alia, as follows;

- “(i) That she was part of the team that undertook a dawn raid at the Respondent’s premises on or about 19th October, 2012.
- (ii) That during the raid of 19th October, 2012 the Respondent did collect numerous documents from the Appellant and that all documentation relied upon has been exhibited as part of the Record of Proceedings filed before the Tribunal on the 5th June, 2018.
- (iii) That all the documents were duly retrieved to the Appellant in line with Section 7(5)(b) of the Competition and Consumer Protection Tribunal Act.
- (iv) That paragraphs 12 – 16 are denied in that the Appellant was given an opportunity to be heard as is clear from the Notice of Investigation shown at Page 12 of the Record of Proceedings, but they opted not to take up such opportunity and further that all documents now in mention are not in the Respondent’s possession.

7.

- (v) That having been part of the team that investigated this matter, I am of the opinion that the documents now contained in the Record of Proceedings give a fair view of the matter and are adequate in enabling the Tribunal to justly conclude this cause.”

The parties have also relied on Skeleton Arguments in addition to what they have raised in their respective affidavits. The Appellant filed its arguments on 24th December, 2018 and its arguments are summarized as follows;

- (a) According to the Appellant the issue is not whether or not the documents seized were retained by the Respondent or returned but rather if all the documents relied upon by the Respondent in arriving at its decision have been produced in the Record of Proceedings considering the Respondent’s Argument that documents in the exhibit referenced in the investigation has been included in the Record.
- (b) The Appellant’s position is that not all documents relied upon and referenced in the decisions were produced in the Record of Proceedings.
- (c) It was further argued on behalf of the Appellant that not all documentation relied upon and referenced in the decision was produced in the Record of Proceedings and that if the case was indeed centred around the FISP Programme, then in order to have a full picture of the case it would be necessary for all documentation i.e.

8.

tendered documents and awarded contracts to be produced in the Record of Proceedings.

The Appellant further argued that in fact at Pages 29 to 31 of the Record of Proceedings is annex 3 titled "*Market Allocation as extracted from the tender*" documents, and that the title is followed by tables purportedly showing areas in which tenders were made by the Appellant and Nyiombo Investments Limited. And that despite showing the tables the Respondent has not shown where the information in the tables emanated from which according to the Appellant leaves room for doubt and uncertainty. And in support of its argument the Appellant referred to Page 71 of the Record of Proceedings and in particular Annex 5 being emails between the Appellant and Nyiombo Investigations Limited and further that in its decision the Respondent concluded that the email confirmed, market allocation and that it is worth noting that Annex 5 is preceded by Annex 4 which is a Sale Agreement between the Appellant and Nyiombo Investments and that therefore in arriving at the aforementioned conclusion, the Respondent relied upon documents other than the email because the email does not presuppose any collusion.

It was further argued by the Appellant that the Respondent in its decision also stated that the Appellant and Nyiombo Investments Limited were engaged in price sharing exercises.

The Appellant referred to Page 76 of the Record of Proceedings as follows:

“Further, the difference between their bid prices were very minimal a typical instance of bid rigging. Zone 9 is Western Province. Nyiombo’s price was US\$3,669,047-27 compared to Omnia’s price of US\$3,734,525-00. Therefore Nyiombo won Western Province and supplied it as they have always done. The situation is the same for Zone 3 which is Eastern Province. Nyiombo’s price was US\$15,740,766-08 while Omnia’s price was US\$15,045,888-00 and therefore Omnia won as they have always done in Eastern Province.”

The Appellant argued therefrom that the Respondent in making the above observation and conclusion omitted to show in the Record of Proceedings how they stumbled upon those figures quoted in the quotation at Page 76 earlier referred to. The Appellant further argued that that information can be found in the tender documents but that those had not been produced and submitted and that therefore one may argue that Annex 19 appearing at Page 111 of the Record of Proceeding shows the prices but those prices belong to Nyiombo Investments Limited and not the Appellant.

(d) The Appellant further argued that reference was made to tender documents but that they have not been produced to the detriment of

10.

not only the Appellant but the Tribunal as it will not be able to come up with a concise decision and that in a nutshell the Respondent taking the news that only the relevant evidence that was relied upon was produced in the Record of Proceedings with a position by the Appellant that most of the documents which were seized but not exhibited in the Record of Proceedings are relevant to the facts in issue and in support thereof cited the case of DPP Vs Kilbourne (1973) Ac. Page 729 in which the question of relevance of evidence arose and submitted that all the documents that are relevant to this case should be produced in the Record of Proceedings and that those documents should be produced because not only do they not prejudice either parties but they will also help in painting a complete picture.

(e) That the Respondent in its argument at Page 3 has stated that the tables in Annex 3 show extracts of what was taken from tender documents. In the same breath the Respondent is alleging that it has neither the originals of the tender documents nor copies thereof. The question posed by the Appellant is, where did the Respondent obtain those exhibits if they have no copies or originals of the tender documents?

It was further argued that a perusal of the documents seized and shown as exhibits SML 2 – 26 does not show any such document called Market allocation as extracted from the tender documents.

11.

It was also argued by the Appellant that in their absence it follows that the extracts came from the actual tender documents which have not been produced and that it would therefore be prudent if the Respondent showed the actual documents where these documents were taken from as doing so would not prejudice either party to this action.

(f) The Appellant in its arguments has referred to the Principle of Secondary evidence, this is, in the face of the Respondent's argument in respect of exhibit in Annex 3 amounting to Secondary evidence and that in fact "secondary evidence means inferior or substitutionary evidence, which itself indicates the existing of more original source of information".

The Appellant's view of physical definition of Secondary or substitutionary evidence is that this is evidence, not the main one or the original one, but simply acting in the place of some other evidence and further state that the existence of Secondary evidence indicating the existence of a more original/superior source of information. The Appellant's argument is therefore that this information came from another source and this other source is the tender documents and that if therefore the exhibits (Annex 3 Market Allocation as exhibited from the tender documents) came from another original source the next issue is whether the Secondary evidence is admissible in the circumstances.

(g) The Appellant further argues on the principle of best evidence rule which demands that the contents of a document must, in the absence of a legal exercise be proved by primary and not by secondary or substitutionary evidence. The Appellant in its Submissions further questioned as to why the original documents were not produced in the Record of Proceedings notwithstanding the principles laid down in the case of George Bienga Vs The People (1978) ZR 32 (HC) in which it was held that:

“(i) the Secondary evidence of the original document is admissible provided it can be established that the original is lost or can not be produced. Secondary evidence, they argued, may either be in the form of a copy of the original or by oral evidence.

(ii) When the original document is in the possession of a stranger, the proper source of the party desiring to prove the contents of the document is to serve the stranger with a witness Summons to produce the original.

(iii) Before Secondary evidence of a lost document can be admitted, the Court must be satisfied that the document cannot be found and an adequate search has been made”.

13.

In support of the holding of the Court in the Bienga Case it is the Appellant's Submission that in applying the principles in that Case, and also that the Respondent having admitted that the documents maybe in the possession of the Appellant, it can make an application to have the Appellant produce the evidentiary documents pertinent to this matter.

And that therefore, as submitted by the Appellant, the Respondent ought to have requested the documents from the Appellant in order to satisfy the best evidence Rule: It is the Appellant's position therefore that it would be important to have the actual original documents.

The Appellant also refers to Rule 16 of the Competition and Consumer Protection (Tribunal) Rules 2012 which was cited by the Respondent and deals with the production of documents in the possession of the other party upon notice to that party. It was further argued that contrary to what is submitted by the Respondent this matter has nothing to do with hearing new evidence on appeal but everything to do with production of documents. And finally it is the Appellant's prayer that the Tribunal allows the Appellant to file the necessary documents as the only way a fairer and clearer picture will be presented to the Tribunal for its consideration, as the tribunal has been denied the opportunity to have documents before it for consideration.

It is the Appellant's further argument that as no fresh evidence is being sought by the Appellant to be brought before the tribunal, the documents that were seized by the Respondent and not included in the Record of Proceedings, should be allowed to be produced as further documents before the Tribunal and that this has been necessitated by the Respondent's acknowledgement that it does not have the documents. These were in Summary the Plaintiff's arguments in support of its application.

The Respondent did on the 3rd December, 2018 file its Skeleton arguments in Opposition to Summons to produce documents.

The following are the Respondent's arguments:

- (a) That as in paragraph 7 of the Respondent's Affidavit in Opposition to Summons to produce documents, all documents relating to this case were returned to the Appellant after the completion of the investigations by the Respondent in accordance with the provisions of Section 7(5)(b) of The Competition and Consumer Protection Act No. 24 of 2010 to the effect that an Inspector who removed any document or article from any premises under paragraph (a) of subsection 4 shall (b) return the document or article as soon as practicable after achieving the purpose for which it was removed.

- (b) The Respondent further argues that all the documents that were taken from the Appellant's premises were returned to them after the Completion of the Respondent's investigations. And that for reference purposes the Respondent either made copies or took extracts of the various documentation used in investigation and that to that effect all documentation, to the extent referenced in the investigation has been included in the Record of Proceedings and that for example Page 84 shows extracts of what was taken from tender documents and that the Respondent neither has the original tender documents nor copies of the same and that what the Respondent relied on were the extracts from the tender documents that are clearly outlined on Page 84 of the Record of Proceedings.
- (c) It was the Respondent's further argument that the extracts and copies referred to would effectively aid the Tribunal to justly conclude the matter as same is tangible secondary evidence as was held in the Case of George Bienga Supra in which the three requirements were enunciated as also discussed in the Appellant's Submissions.
- (d) It was also argued by the Respondent that the George Bienga Case holds that primary evidence carries more weight than Secondary evidence. But that in the event that primary evidence is unavailable the party introducing Secondary evidence has that burden of proving the conditions laid down in the Bienga Case. And that going by the

principles in that Case the extracts of the original tender documents meets the necessary requirements for admitting secondary evidence, in that the original document can not be found or may still be in the Appellants possession. In support of that argument the Respondent cited the learned author Edward J. Imwinkelvied, “**Evidentiary Foundations**”, 4th Edition, Lexis Law Publishing, to the effect that generally common law requires that the proponent of evidence prove the evidence authentically as a condition to the admission of evidence.....

It was further submitted that to that effect the Respondent may call witnesses that can prove the authenticity of that document on the basis of the principle referred to.

- (e) The Respondent in aid of its argument cited the case of Tokyo Vehicles Limited Vs CCPC SCZ/8/261/2015 Judgment No. 43 of 2014, inter alia, that as regards standard of proof, the Respondent not being a Court is not bound to employ a standard expected in Criminal Matters when all it does is making its investigatory findings, is to perform an administrative function and submitted that it is of the belief that the evidence submitted in the Record is sufficient for the Tribunal to determine the cause.

The Respondent's further argument is that parties are not limited to relying on documents that are in the Record of Proceedings as Rule 16 of the Tribunal Rules provides that a party may at any time during the hearing give to the other party notice to produce any document to which the appeal relates, which is in possession of that party, or the Appellant may supply a tender document as there is a strong likelihood of it having it in its possession.

It was the Respondent's further argument that, a tender document is a document of the party that tenders to participate in a transaction and that therefore this is a document that the Appellant must have in its possession and which they can produce without facing any objection from the Respondent and would only object if the Appellant were applying to produce documents that were not before the Respondent at the time of investigation as this would amount to adducing new evidence in contravention of the holding in *Zambia Airports, Vs CCPC and ZEGA 2016/CCPT/010/COM*.

- (f) It is the Respondent's further submission that the documents that are in the Record of Proceedings were what the Respondent took into consideration when rendering the Board Decision which is the subject of this appeal. And that furthermore the Appellants have submitted that the Respondent should produce all the necessary documents

seized from the Appellant's premises in order for the Tribunal to arrive at a proper decision, this is not withstanding that the Respondent returned all the seized documents to the Appellant. The Respondent's position therefore is that all necessary documents to support this cause have been accordingly submitted as evidence before the Tribunal in form of the Record.

(g) The Respondent's further argument is that the Appellant cannot argue that they were not given an opportunity to respond and produce relevant documents required by the Respondent during the period of investigation as the Record of Proceedings will show that the Appellant did not respond to the notice of investigation dated 6th November, 2012 of which they duly acknowledged as shown on Page 13 of the Record. In aid of that proposition the Respondent referred to paragraph 1368 of Halsbury's Laws of England Volume 30, 3rd Edition in which it is pronounced that all persons exercising judicial or quasi judicial functions must have due regard to the dictates of natural justice. These require that the parties to the proceedings shall be duly notified when and where they may be heard and shall then be given full opportunity of stating their views.....”

It was further argued by the Respondent that the Appellant had an opportunity to be heard but which opportunity they decided to

forego by failing to respond to the notice of investigation dated 6th November, 2012 as they had 14 days within which to respond.

The Respondent's further Submission is that the documentation that the Appellant is seeking to be produced before the Tribunal is documentation that had been considered by the Respondent at investigation stage but is no longer in the Respondent's possession which if the Appellant had in its possession it would have formed part of the Record.

It is therefore the Respondent's alternative position that should this Tribunal find otherwise on the sufficiency of the Record then the Appellant may be ordered to avail the said documentation to the Respondent for the purposes of producing a Supplementary Record.

It was also argued by the Respondent in conclusion that it can be clearly seen that the documents that have been relied upon by the Respondent are what was acquired during the dawn raid conducted on 14th November, 2012 and these are part of the Record.

We are greatly indebted to the parties for their spirited arguments as contained in their respective Skeleton arguments.

This application is premised on Rule 19 of the Tribunal Rules 2012 and is essentially applying to this tribunal that the Respondent produces documents outlined in the Affidavit in Support.

In the Appellant's Affidavit in Support of its application the following grounds are stated:

- (a) That upon perusal of the Record of Proceedings it is revealed therein that the Respondent may have left out some documents which are of significance to these proceedings. In response to this ground the Respondent argues that while the Respondent did collect numerous documentation from the Appellant during the dawn raid the documentation upon which they relied was copied and has been exhibited as part of the Record of Proceedings filed before this tribunal on 5th June, 2018. The Respondent further deposes that all other documents were duly returned to the Appellant in line with Section 7(5)(b) of Act No. 24 of 2010. In support of this assertion the Respondent places reliance on Page 67 (with bottom Page number 13) of the Record of Proceedings which is titled "Return of the documents and other items seized from OMNIA Fertilizer Zambia Limited, received by one Vincent Mkuyambi described as General Manager of OMNIA Small Scale Limited as stated in the Rubber Stamp".

(b) The second deposition in the Appellant's Affidavit is that the Respondent in carrying out its investigations that led to the decision against the Appellant raided the Appellant's premises on 19th October, 2012 and with a Search Warrant took numerous documents to assist them with the said investigations and that the numerous documents taken by the Respondent were returned either in their original form or as copies to the Appellant on or about 14th November, 2012 as "SML 2 – 26 copies of Notice of Seizure.

The Respondent's response in respect thereof appears to have been the same as one referred to in paragraph 8 of its affidavit in which the contents in paragraphs 7 to 11 of the Appellant's affidavit are admitted save for the fact that the documentation relied upon was to the extent of that reliance, copied and has been exhibited as part of the Record of Proceedings.

(c) In paragraph 10 of its affidavit the Appellant deposes that a perusal of the Notice of Seizure shows that more documents than those included in the Record of Proceedings were relied upon by the Respondent when arriving at its decision against the Appellant and that for instance on Page 84 of the Record of Proceedings the Respondent in Annex 3 allude to tender documents but those tender documents have not been produced as part of the Record of Proceedings.

The Respondent's response to this argument appears to be the same one used in collectively responding to paragraphs 7 to 11 of the Appellant's affidavit, namely, that the documentation has been exhibited as part of the Record of Proceedings.

(d) The Appellant deposes in paragraph 12 of its affidavit that it has never had an opportunity of making submissions to the Respondent over the investigations and as such never had any chance of producing any documents to speak to the manner the Appellant conducted its business in Zambia and also show how it made its decision and produces exhibits 27 to 33 which are, according to Appellant extract Minutes of OMNIA Holdings Board Meeting and Maps of Zambia.

In response to this deposition by the Appellant the Respondent deposes that the contents of paragraphs 12 to 16 are denied in the sense that the Appellant was given an opportunity to be heard, and as is clear from the Notice of Investigation shown at Page 12 of the Record of Proceedings they opted not to take up such opportunity and further that all documents being mentioned by the Appellant are not in the Respondent's possession. In support of that argument the Respondent has produced a document at Page 65 (top) or Page 12 (both) of the Record.

(e) The Appellant deposes in paragraphs 13 and 14 thereof that in order for this Tribunal to arrive at a proper and just decision the Respondent

should provide all the necessary documents seized from the Appellant's premises. The Appellant further deposes in paragraph 14 that all tender documents and associated documents relating to tenders on 2001 seized by the Respondent should be produced by the Respondent.

In response thereto the Respondent maintains that the documents now contained in the Record of Proceedings give a fair view of the matter and are adequate in enabling the Tribunal to justly conclude the cause herein.

Rule 16 of the Tribunal Rules provides as follows:

“(1) A party may at any time during the hearing give to the other party notice to produce any document to which the appeal relates which is in possession of that party”.

“(2) A party to the proceedings shall on request, produce to the Secretariat any document or other information which the Tribunal may require and which is in the power of that party to produce and shall afford to every party to the proceedings an opportunity to inspect those documents or copies of the documents and to make copies of the documents”.

“(3) A notice to produce any document shall be in form III set out in the Schedule”.

Our understanding of Rule 16 of the Tribunal Rules is that a party may give to the other party notice to produce any document which is in the possession of that party.

In other words notice can only be given in relation to a document in respect of a documents which is in the other party's possession. Rule 16(2) provides, inter alia, that a party to the proceedings is obliged on request to produce to the Secretariat any document or other information which the Tribunal may require and which is in the power of that party to produce....” (underlining ours)

In our considered view the intention of legislation appears to be that one can only issue notice to another party if such document is in the possession of that other party and not otherwise.

The Appellant's use of the words, for example that the Respondent may have left out some documents, which are of significance to those proceedings is not inspiring enough in that the Appellant itself is not in the first place sure that what it is asking for is in the other party's possession. We agree with the Respondent's explanation that its inability to produce those documents lies in the fact that the Respondent did collect numerous documents during the dawn raid. The Respondent further deposed that all

other documents were duly returned to the Appellant in line with Section 7(5)(b) of Act No. 24 of 2010. In support of this argument the Respondent refers this Tribunal to Page 67 (top page) and Page 13 (bottom page) of the Record. That document is titled "*Return of the documents and other items seized from OMNIA Fertilizer Zambia Limited received by one Vincent Mkuyambi the General Manager*" and as Rubber Stamped on that same page (underlining ours).

The Appellant has not disputed that the documents in question were served on it by way of return.

We are in agreement with the Respondent's argument that these documents relied upon were copied and have been extracted as part of the Record of Proceedings.

Thirdly the Appellant's argument in paragraph 10 of its Affidavit that a perusal of the Notice of Seizure shows that more documents than those included on the Record of Proceedings were relied upon by the Respondent. The Appellant has failed to meet the test provided in Rule 16 that the other party against whom notice is issued were in possession of the demanded document. We dismiss the Appellant's arguments that it has never had an opportunity of making submissions to the Respondent over the investigations and as such never had any chance of producing any document to speak to the manner the Appellant conducted its business in Zambia and

show how it made the decision and in that regard exhibited exhibits 27 to 33 in the Record of Appeal. We are in agreement with the Respondent that the Appellant was served with a Notice of Investigation which appears on Page 66 (top page) on Page 12 (bottom page) dated 6th November, 2012 which is acknowledged as having been received on 8th November, 2012 by the Appellant and duly stamped and, in accordance with the Notice to Investigate, the Appellant was requested to respond within 14 days) of the 8th November, 2012 when it was acknowledged by the Appellant but did not exercise its right to respond.

We are of the view that the Appellant cannot after failure to exercise its right of response to the Respondent turn round and dispute that they were given an opportunity to respond at investigation stage. We dismiss this argument as well.

Clearly there is no evidence to demonstrate as to what documents were seized as opposed to those that were left out. Even the document on Page 64 (top Page) or Page 11 (bottom page) of the Record of Proceedings does not show any list relating to what was returned by the Respondent to the Appellant. What is only indicated is that the documents were signed for on 8th November, 2012 but no list of such documents was attached or exhibited.

Importance of the Process of Discovery:

In Words and Phrases legally defined Volume 2: D to J “the term

'discovery' is used to describe the process by which the parties to a Civil cause or matter are enabled to obtain within certain defined limits, full information of the existence and the contents of all relevant documents relating to the matters in question between them."

The process of discovery of documents operates generally in three successive stages namely,

- (1) "The disclosure in writing by one party to the other of all the documents which he has or has had in his possession, custody or power relating to matters in question in the proceedings;
- (2) The inspection of the documents disclosed other than those for which privilege from or other objection to production is properly claimed or raised; and
- (3) The production of the documents disclosed either for inspection by the opposite side or to the Court....."

What is clear from the definition of the term 'discovery' is that those documents have to be in possession of the one who is being requested to provide or make them available to the other and also that such documents ought to have been in one's custody or power and that is why in Court matters the process of 'discovery' is very pertinent, there is also a requirement for inspection of the documents disclosed subject to privileges

and the production of the documents disclosed either for inspection by the opposite side of the Court before trial. This is in a Civil matter between parties.

However, in the matter before us which relates to investigations under S55 of the Act, while the rules that have been cited under 'discovery' do not strictly obtain in this situation at least there can be a semblance of it if the parties were more organized accountable and orderly by discovering each other's documents which relates to the proceedings in issue. In our view the Appellant and Respondent should have developed a common list of the documents that were obtained from the Appellant by the Respondent and equally done a list of the returned documents and exchanged an agreed list. Curiously what was endorsed were the following words, "received by", "name", "National Registration Card", "Position, General Manager". But the main content in respect of what document was returned, and what other items seized from the Appellant were not tabulated or specified.

There is on Page 68 (top) of the Record of Proceedings on Page 14 (bottom) a letter from the Respondent to the Appellant dated 14th November, 2012 in which the Respondent stated as follows:

"The Commission has since returned either in their original form or copies thereof all the documents and other items that were seized from your offices during that exercise for which you are acknowledge receipt". (underlining ours)

“Kindly find attached the seizure form and the documentation on which your representatives signed acknowledging receipt”.

Having received this letter, there was no reaction from the Appellant as to whether they were disputing the return to them of the documents in original form or copies.

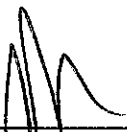
We are of the view that the Respondent having stated in its letter to the Appellant dated 14th November, 2012 that they had returned either in original form or copies all the documents, there was clearly no document in the Respondent’s possession to be subjected to notice under Rule 16 to persuade us to grant the order prayed for by the Appellant.

The Appellant has raised a related issue as to the admissibility of Secondary evidence. The Appellant has raised the issue because of the extracts of the original tender documents referred to by the Respondent in its decision and reflected in the Respondent’s Record of Proceedings. The Respondent on the other hand has argued that the extracts meet the necessary requirements for admitting Secondary evidence, in that the original document can not be found or may still be in the Appellant’s possession. The Tribunal has discretion under Rule 15(i) of its Rules to “receive”, as evidence, any statement, document, information or other matter that may assist it to deal effectively with the appeal whether or not the evidence would be admissible in a Court of law.

However, should the authenticity of the extracts of the original tender documents be in question then the parties could by consent (*since this relates to documents that were subject to the investigative process and the Respondent's decision*) file an application to produce original document(s) from which the extracts were made. We note that the Respondent is open to production of a Supplementary Record of Proceedings. Similarly should we in the course of hearing the appeal find a Supplementary Record of Proceedings necessary we shall order the parties accordingly.

In consequence the application is dismissed with costs in the appeal.

Dated the 28th day of May 2020



Mr W A Mubanga, SC.
CHAIRPERSON



Mrs B M Katongo
VICE CHAIRPERSON



Mrs E C Chiyenge
MEMBER