IN THE FAIR COMPETITION TRIBUNAL

AT DAR ES SALAAM

BEFORE:

RAZIA H. SHEIKH, JUDGE/CHAIRMAN

PROF. JOSEPH M. L. KIRONDE, MEMBER

DR. MALIMA M. P. BUNDARA, MEMBER

CONSOLIDATED TRIBUNAL APPEALS NO. 4 AND 5 OF 2010

TANZANIA BREWERIES LTD...............................APPELLANT

VERSUS

SERENGETI BREWERIES LTD.................1ST RESPONDENT

FAIR COMPETITION COMMISSION.........2ND RESPONDENT

AND

COCA COLA KWANZA...............................INTERVENER

(APPEAL ARISES FROM THE DECISION OF FCC IN COMPLAINT NO. 2 OF 2009 OF 21/05/2010)

Date: 06/12/2012

Coram:

Hon. R.H. Sheikh, J/Chairman

Hon. Prof. J.M.L. Kironde, Member

	Hon. Dr. M.M.P. Bundara, Member
Appellant:	Tanzania Breweries Ltd.
For the Appellant:	Dr. Ringo Tenga, Advocate
	Law Associates Advocates
	Assisted by Mr. Fayaz Bhojani, Advocate.
	FB Attorneys
1st Respondent:	Serengeti Breweries Ltd
For the 1st Respondent:	Eric Ng'maryo, Advocate
2nd Respondent	Fair Competition Commission
	Mr. J. Nyenza, Principal Officer
For the 2nd Respondent:	Absent
	IMMMA Advocates
Intervener:	Coca Cola Kwanza Ltd
For the Intervener:	Mr. Fayaz Bhojani holding brief for Godson Hudson Nyange, Advocate
Tribunal Clerk:	Beda Kyanyari

JUDGEMENT ON GROUND NO. 2 OF THE AMENDED GROUND OF APPEAL

This consolidated appeal arises from Appeals No. 4 & 5 of 2010 filed by Tanzania Breweries Limited (TBL) (appellant) against the

decision of the Fair Competition Commission (FCC) (2nd respondent) in favour of Serengeti Breweries Limited (SBL) (the 1st respondent herein) in Complaint No. 2 of 2009 made on 21/05/2010. The two appeals were consolidated in a ruling of this Tribunal on preliminary points of law read on 18/08/2011. In the decision, FCC made a finding that the appellant, Tanzania Breweries Ltd (TBL), was abusing a dominant position and had thereby committed a serious infringement of sections 8(1) and 10(1) of the Fair Competition Act (FCA) No. 8 of 2003 by entering into branding agreements which had led automatically to serious and important distortions of competition in the beer market in Tanzania.

The appellant and the 1st respondent (SBL) are limited liability companies engaged in the production and supply of beer and other beverages within the United Republic of Tanzania while FCC is a statutory corporate body established under section 62 of the FCA for the purpose of administering the Act and developing and promoting services for enhancing competition in the market and consumer welfare (section 65 of the Act).

The intervener Coca Cola Kwanza Limited in its statement of intervention clearly supports the appeal and has maintained that the branding agreements entered into by TBL are legal and do not in any way distort competition.

At the hearing the appellant was represented by Dr. Ringo Tenga of Law Associates Advocates accompanied by Mr. Fayaz Bojani of FB Attorneys and later by Mr. Mustafa Chandoo, Advocate, while the 1st respondent was represented by Mr. Eric Ng'maryo, Advocate, and the 2nd respondent was represented by Ms Fatma Karume who was assisted by Ms Madina Chenge both of IMMMA Advocates. The intervener was represented by Mr. Godson Nyange, Advocate.

The brief background to this consolidated appeal is that:

On 17/09/2009 Serengeti Breweries Ltd (SBL) the 1st respondent herein lodged a Complaint before the FCC. It claimed that TBL was engaged in unfair trade practices which were restricting/harming competition in the beer industry. The 1st respondent also complained, *inter alia,* that TBL had been removing SBL's signage and posters from retail outlets on a countrywide scale in order to prevent/obstruct the 1st respondent's visibility to the public and that TBL had entered into anti-competitive agreements with retail outlets managers on a countrywide scale for the exclusive branding of TBL's products with a condition/provision for the removal of any existing brand advertisements of its competitor, the 1st respondent. TBL requested FCC to investigate the complaint under the provisions of section 65(2) of the Fair Competition Act (FCA) and give

directions to remedy the situation. TBL on its part cross-complained against SBL that SBL had been using crates and bottles belonging to TBL in the market. Following investigation and hearing of the complaint(s), as regards the cross-complaint FCC found that the arrangements between TBL and SBL on the usage of certain crates and the circulation of Euro bottles were anti-competitive agreements as against each other and therefore unlawful. On SBL's complaint FCC found that (a) the removal of SBL's signage and posters by TBL from retail outlets was restrictive to competition and (b) by entering into the branding agreements TBL had abused its dominant position as the agreements were anti-competitive and likely to prevent/restrict/distort competition. TBL was found to have committed a serious infringement of sections 8(1) and 10(1) of the FCA 2003. In its decision FCC made the following orders, *inter alia*,:

> "i. That pursuant to Sections 60(1) and 78(1)(f) of the Fair Competition Act, 2003, and Rule 41 of the Fair Competition Procedure Rules, 2009, Tanzania Breweries Limited is ordered to pay a fine of 5 percent of its turnover for the year of their latest audited accounts for the offences of entering into anti-competitive branding agreements with outlet owners and removing SBL posters and signage.

ii. That all branding agreements between TBL and the outlets owners are hereby declared null and void.

iii. That pursuant to Section 58(1) and (3) TBL is hereby ordered to immediately refrain from removing its competitor's POS materials at the outlets and entering into anti-competitive branding agreements with outlet owners".

The appellant was aggrieved with the above decision of FCC and filed two appeals which were consolidated on 18/08/2011 as stated hereinbefore in this judgement. In the amended memorandum of appeal filed on 17/12/2010 following the consolidation of the two appeals the appellant has raised ten (10) grounds of appeal basically complaining, *inter alia*, that FCC (the 2nd respondent) had erred in law and in fact in finding that TBL's conduct in relation to its entry into branding agreements with certain outlet owners and/or the alleged removal of POS material of SBL contravened sections 8 and 10 of the FC Act and/or had the object, effect or likely effect of preventing, restricting or distorting competition. In ground 2 TBL challenged the propriety of FCC's constitution when it determined the matter. Ground 2 aforesaid reads as follows:

"The proceedings and the decisions of the FCC are a nullity because the FCC was not properly constituted when it determined the matter".

The two respondents have resisted the consolidated appeal and each filed a reply to the amended memorandum of appeal.

Upon application made on behalf of the appellant, in a ruling read on 15/12/2011, this Tribunal ordered that ground 2 which raises issues of law be heard first as a preliminary issue of law before hearing the appeal on the merits. We accordingly proceeded to hear arguments on ground 2.

In terms of the case management of this consolidated appeal, skeleton arguments were filed by the parties on all the grounds of appeal in accordance with an agreed schedule, which arguments were supplemented by oral arguments presented by the respective learned counsel which were limited to ground 2 only.

Ground 2 of the consolidated appeal raises two issues, firstly whether or not the FCC was properly constituted at the time of the determination of the Complaint and secondly if FCC was not properly constituted for any reason whether the proceedings and the decision are a nullity.

In arguing ground 2, besides the record of appeal, the appellant relied on documentary evidence produced in an affidavit of documents of the 2nd respondent's witness (RW1) upon application by learned counsel for the appellant. In the skeleton and oral arguments in support of this ground of appeal learned counsel for the appellant contended that on the evidence of the documents filed by the 1st respondent related to the appointment of the Chairman and the Director General of FCC, at no point during the consideration of the Complaint by FCC or at the time the decision was made, did FCC comprise/compose of five properly appointed members. Learned counsel submitted that Mr. Shimwela, the Chairman of FCC, was appointed as Chairman from 21/11/2005 for a period of four years and that upon the expiry of the initial four year term on 20/11/2009, by letter dated 24/03/2010 (exhibit A2) Mr. Shimwela's appointment was purportedly extended by the Minister of Industry Trade and Marketing as Chairman of FCC for a further fixed term of five years from 23/03/2010 when in fact the Minister had no authority to extend Mr. Shimwela's term or make a re-appointment, and that under section 63(3) of the FCA (the Act) it is the President who is empowered to appoint the Chairman of FCC in accordance with the procedure provided in the Act. The appellants' counsel has basically asserted that the decision is a nullity because:

(a) FCC did not comprise five lawfully appointed members, including a Chairman, as required by section 62(6) of the Act;

(b) Mr. Shimwela's participation in the proceeding by presiding at meetings/the hearings of the Complainant and signing the decision had rendered the decision a nullity as he was not lawfully appointed as the Chairman of the FCC.

(c) The hearings conducted on 23/12/2009, 20-21/01/2010, 26/27/01/2010, 8/9/02/2010, and 4/03/2010 were without the required quorum due to non-compliance with the requirement under section 73(5) of the Act that there must be three members and one of them must be the Chairman or in his absence a Deputy Chairman, since Mr. Shimwela was not validly appointed;

(d) In at least three of the meetings (20/21 January 2010 and 26 January 2010) there were only two lawfully appointed members present.

(e) The position of one non-executive member was vacant from 01/03/2010 by reason of which the decision was

signed by only four members instead of five members as required under rule 33 of the FCC Procedure Rules 2009.

Also relying on the documentary evidence produced by the 1st respondent's affidavit evidence it is also contended that following the expiry of the initial four year term of the first Director General of FCC Mr. Mkocha had on 05/07/2009 there was no lawfully appointed Director General until 04/03/2010 and that as Mr. Mkocha had participated in the proceedings and hearings on 20/11/2009 and 23/12/2009 when he was not validly re-appointed this fact also renders the decision a nullity. The argument presented by learned counsel for the appellant is twofold: (a) as FCC did not comprise five lawfully appointed members (as required by sections 62(6) of the Act) during the hearing of the Complaint and at the time of making the decision because (i) at various stages Mr. Shimwela, Mr. Mkocha and Mr. Ndanu (or a combination of them) were not properly appointed in accordance with the Act, and (ii) as the position of one member was vacant at some stage, FCC was not properly constituted and therefore the decision is a nullity and (b) the participation of the invalidly appointed Chairman and Director-General in the decision making process rendered the decision a nullity.

Learned counsel for the appellant in their oral submissions presented on 07/02/2012 urged this Tribunal to find that there

were serious irregularities in the purported extensions/re-appointments of Mr. Shimwela as Chairman and Mr. Mkocha as Director General and that FCC was as a consequence not properly constituted in compliance with section 62(6) of the Act and that the requirements for a proper quorum under section 73(5) of the Act were not complied with during the time of the determination of SBL's Complaint. It is the argument of learned counsel for the appellant that this non-compliance with the statutory requirement for constitution of FCC and the participation of an irregularly appointed Chairman and Director General during the consideration of the Complaint and the making of the disputed decision had rendered the decision a nullity. It was contended that there is no mechanism for remedying this error/irregularity in the re-appointment of the Chairman and the Director General or any other member for that matter.

Mr. Godson Nyange on behalf of the intervener both in his skeleton and oral submissions made it clear that he was fully supportive of the submissions made by learned counsel for the appellant on ground 2 and reiterated that the decision and orders of FCC are a nullity because at no point during the determination of the Complaint did the membership of FCC comprise five lawfully appointed members as required by the Act.

In response Mr. Eric Ng'maryo learned counsel for the 1st respondent in his skeleton and oral arguments strongly maintained that the appointment of Mr. Shimwela as Chairman was valid and in the absence of proof to the contrary the letters annexed to the affidavit of Justine Nyenza the Head of Enforcement and Acting Director of Compliance of the 2nd respondent filed on 02/11/2011 are sufficient evidence that the Minister was merely passing down the orders of a superior appointing authority, which, by necessary inference, could only mean the President. It is Mr. Ng'maryo's argument that as the quorum of the Commission's meetings is three members under section 73(5) of the FCA, it is immaterial that at some point during the hearing of the Complaint FCC was not fully constituted with five members since there were at all material times during the hearing of the Complaint three members present including the Chairman. He further argued that if FCC was not properly constituted at the time of the hearing of the Complaint then this Tribunal has no jurisdiction to hear this appeal and therefore TBL should have applied for judicial review of the decision. In his oral argument presented on 08/02/2012 Mr. Ng'maryo cautioned this Tribunal, in the event of the annulment of FCC's decision in this matter, of the possible alarming consequences on other past decisions made by FCC in a period of about two years during the period when FCC's constitution was not proper as alleged by the appellant because of the irregular appointment of its members.

He further argued that the cases relied upon by the appellant's counsel, namely (1) **Agnes Severini v Mussa Mdoe** (1989) T.L.R 164 (2) **The Bribery Commissioner v Pedrick Ranasinghe, Supreme Court of Ceylon,** (1965) AC 172 and (3) **Exxon Mobil Cyprus Ltd & Ors v Commission for the Protection of Competition Case no. 1544/09 Supreme Court of Cyprus,** 25 May 2011, even if analogous to the instant situation, are all distinguishable and inapplicable to this appeal due to the difference in the law in this jurisdiction relating to acts and decisions of an illegally or improperly constituted body/tribunal which is the gist of ground 2. It is Mr. Ng'maryo's contention that any irregularities and defects that may have been in the constitution of FCC due to vacancies in the positions of the Chairman/members and in the quorum due to the participation of an improperly appointed Chairman/member are cured under the provisions of the Interpretation of Laws Act Cap.1 R.E 2002 which commenced in 2004, in particular sections 50(2)(b), 51 and 54(a), (b) and (d). In support of his argument he cited as authority the decision of the Court of Appeal of Tanzania in the case of **Ahmed Mabrouk and another v Rafiki Hawa Mohamed Sadik (Court of Appeal, Civil Reference No. 20 of 2005)** (unreported).

In her arguments Ms Karume on her part contended that the letters relied upon by the appellant's counsel do not state that the

Chairman was appointed by the Minister and that these letters on their own, do not prove that the appointment of Mr. Shimwela was not made by the President. In respect of the appointment of the Director General, Ms Karume was emphatic that his re-appointment was in accordance with section 63(8) of FCA. She submitted that throughout the hearing of the Complaint there were at all material times three constant members of the Commission present, the Chairman (Mr. Shimwela) and two Commissioners, and that this was sufficient compliance with the quorum requirement of three members of the Commission in section 73(5) of FCA. It is Ms Karume's argument that TBL's contention that the Commission required five lawfully members inorder for it to be constituted is irrelevant as the quorum is made up of only three members. She added that the appointment of Mr. Mkocha as the Director General was a mere technicality which had no impact on the proceedings and that even if he was not lawfully appointed, the Commission still had the quorum required by law to conduct its business and to hear the Complaint. She submitted that the word "shall" in section 63(3) of FCA does not impose a personal duty on the President to appoint a Chairman and that section 63(3) cannot override the constitutional right of delegation of Presidential powers under Article 37(3) of the Constitution of the United Republic of Tanzania, and that, therefore, it cannot be assumed that there was no delegation of powers to the Minister to make the re-

appointment of Mr. Shimwela and therefore the letters of appointments tendered as exhibits and relied upon by the appellant are not proof that the appointments were improperly made. Ms Karume asserted that the appellant had failed to prove any impropriety in the manner in which Mr. Shimwela was re-appointed. In addition, clearly supportive of Mr. Ng'maryo's arguments on the applicability of the provisions of the Interpretation of Laws Act, Ms Karume argued that even if there were any defects, they are of no consequence as section 54 of the Interpretation of Laws Act cures the impracticable nature of FCA and makes it more compatible with human nature/failings. Ms Karume seems to be of the view that section 54 aforesaid was intended by the Legislature to be a rejection of the technical, mechanical and academic interpretation of our laws.

By way of rejoinder, Dr. Tenga on behalf of the appellant submitted that section 54 does not apply in this case to cure the impropriety in the constitution of FCC in view of the express provisions of section 2 (2) of the Interpretation of Laws Act Cap.1 and section 96(1) of FCA, (FCA being the primary legislation in this case) to the extent that it is inconsistent with section 96(1) aforesaid and further that the general provisions of Cap.1 cannot override the express provisions of FCA. Dr. Tenga argued that at the time of the commencement of FCA in June 2004 the Legislature was aware of the provisions of Cap.1 which was

passed in 1996 and therefore by virtue of section 96(1) of FCA the provisions of Cap.1 cannot apply to read down, exclude or modify the provisions of the FCA 2003 which commenced in May 2004. He was emphatic that in particular, section 54, which is clearly contrary to section 96(1) of FCA, cannot cure the defects in the re-appointment of the Chairman and other members resulting from non-compliance with the mandatory provisions of FCA (sections 62(6),(7), 63(3) and 73(4)(5)) or the impropriety in the quorum of the meetings of FCC which were all presided over by a Chairman who was not re-appointed in accordance with the legal requirements. In response to the argument that finding the decision a nullity may lead to chaos and undesirable effects on past decisions of FCC, Dr. Tenga submitted that such a finding will not affect FCC's decisions which were not appealed from in time and that any such appeal would in any case be time barred by now.

In relation to the applicability of Article 37(8) of the Constitution Mr. Bhojani contended that FCC had failed to produce any documentary evidence to show that the President had delegated in writing to the Minister the function of re-appointing Mr. Shimwela as FCC's Chairman. He added that the purported extensions of Mr. Shimwela's initial term as Chairman or re-appointment were also not in compliance with the law as they were not consecutive with the first term as required under section

63(8) of the Act and was therefore not in accordance with the term fixed in the initial appointment as required in section 63(7) in that there is a gap between the date of the expiry of his term, that is 21/11/2009, and the date of the extension of his term.

On 10/02/2012 upon conclusion of the oral submissions by learned counsel we deemed it necessary to take additional evidence and in the exercise of our discretion under Rule 30(1)(b) and (c) of the FCT Rules 2006 we *suo motu* called as witnesses (1) Ms Joyce Mapunjo, Permanent Secretary, Ministry of Industry and Trade and (2) Dr. Geoffrey Mariki, former Member and Director General of FCC. At the hearing held on 25/09/2012 Ms Joyce Mapunjo (TW1) testified that upon the expiry of Mr. Shimwela's term as Chairman of FCC on 21/11/2009 his term was extended by the Minister for Industry Trade and Marketing administratively, first by a letter dated 6/12/2009 (for three months) and then by a letter dated 20/02/2010 for a further period of one month. In her evidence, the Permanent Secretary made it clear that these extensions were granted by the Minister. She also testified that there was no communication with the President about the extensions, during the period of the first three month extension, and that by letter dated 29/02/2012 (exhibit A27) Mr. Shimwela was appointed as Chairman effective from 23/03/2010. She further testified that the Minister was aware that the power to appoint the Chairman of the FCC was

vested in the President. She stated that FCC had notified the Ministry about the expiry of Mr. Shimwela's initial term as Chairman after the expiry of that term (exhibit T2) which is the reason for the delay in the re-appointment of Mr. Shimwela in accordance with procedure provided by law. She explained that the four month period of extension was an "administrative arrangement" which was intended to keep FCC operational pending the re-appointment of Mr. Shimwela by the President as there were pending matters before FCC. TW1 testified that the mistakes that were made in the re-appointment of Mr. Shimwela as Chairman were later corrected by the letters dated 29/02/2012 and 5/02/2012 (Exhibits T27 and T1). In her evidence TW1 clearly admitted that despite these letters there was a four month period between 21/11/2009 and 23/03/2010 during which the position of Chairman of FCC remained vacant and that to date that period has not been covered by subsequent letters which regularized the re-appointment of Mr. Shimwela as Chairman of FCC (exhibits A27 and T1.

Dr. Geoffrey Mariki (TW2) testified that he was the Director General of FCC from 01/03/2010 to 30/06/2012. In his testimony he stated that within a week of his receiving the letter of 24/03/2010, a member of staff at the FCC pointed out to him that the President and not the Minister is the appointing authority of the Chairman. According to Dr. Mariki thereupon he went to

see the Permanent Secretary and the Minister in early April 2010 and brought to their notice this irregularity and the need to rectify the error, and that subsequently he made several follow-ups of the issue with the Permanent Secretary. Dr. Mariki also testified that between 20/11/2009 and 21/05/2010 eight meetings took place relating to the Complaint including one meeting in which the decision appealed from in this appeal was made.

Additional skeleton arguments were filed by the respective learned counsel subsequent to the taking of the evidence of TW1 and TW2. In the appellant's skeleton arguments learned counsel reiterated their contention that FCC was improperly constituted during the consideration of the Complaint and therefore the decision is a nullity. In the skeleton arguments aforesaid it is submitted, *inter alia*, that the evidence of TW1 and TW2 and the documentary evidence relating to the appointment of Mr. Shimwela after the expiry of the initial term (exhibits A1 – A25, which were annexed to Mr. Nyenza's affidavit, exhibits 26 and 27 annexed to Mr. Mariki's affidavit and exhibits 28, T1 and T2) clearly show that from 21/11/2009 to 22/03/2010 there was no lawfully appointed Chairman because the purported extensions of Mr. Shimwela's initial term were not in accordance with the FCA and that from 05/07/2009 to 01/03/2010 there was no lawfully appointed Director General within which period FCC held eight out

of the nine hearings. Learned counsel for the appellant reiterated their argument that as FCC did not during the hearing of the Complaint and the determination thereof comprise five lawfully appointed members (as required by section 62(6) of the Act) FCC was not properly constituted/composed and therefore the decision is a nullity and secondly that the participation of the invalidly appointed Chairman and the Director General at the hearing and determination of the Complaint had rendered the decision a nullity. Responding to the oral arguments by the respondents' counsel on the possibility of correcting any defects in the appointments of members of a board or commission learned counsel for the appellant submitted that none of the sections cited including section 54 of the Interpretation of Laws Act 1996 providing for the curing of a vacancy in the membership of a body and/or certain defects in the appointment of a person as a member do not apply in the instant case in the light of sections 2(2) of the Interpretation of Laws Act and section 96(1) of the FCA read together which, they argued, if correctly interpreted mean that the mandatory provisions for the appointment of the Chairman and members in section 63(3) and (4) of FCA cannot be excluded, read down or modified by any Act passed before the commencement of the FCA. It was further argued that the appointment by the President of Mr. Shimwela as the FCC Chairman as evidenced by the letter dated 29/02/2012 cannot have retrospective effect, that giving retrospective effect

to the appointment of Mr. Shimwela as Chairman would prejudice the appellant's right including its right to have the Complaint heard by a properly constituted FCC and would be Inconsistent with the Rule of Law and the Principles of Natural Justice. In support of this argument the appellant's counsel relied on, *inter alia*, sections 17 and 37(2) of the Interpretation of Laws Act Cap 1. Citing, *inter alia*, the cases of (1) **Agnes Severini v Mussa Mdoe** (1989) T.L.R 164 and (2) **Exxon Mobil Cyprus Ltd v Commission for the Protection of Competition** Case No. 1544/09, learned counsel for the appellant urged this Tribunal to find the decision a nullity on the ground that FCC was not properly constituted at the time of the determination of the Complaint. Learned counsel also asserted that a finding by this Tribunal that the decision is a nullity will not result in any widespread impact as suggested by learned counsel for their respondents in their oral submissions.

In the Intervener's skeleton submission on the evidence given by TW1 and TW2 Mr. Godson Nyange again was fully supportive of the skeleton arguments filed by learned counsel for the appellant.

Mr. Ng'maryo learned counsel for the 1st respondent in his skeleton arguments filed on behalf of the 1st respondent as regards the evidence of TW1 and TW2, while clearly conceding that there were errors in the appointment of Mr. Shimwela as

Chairman, submitted that the errors or omissions in the aforesaid appointment were lawfully and completely corrected by the letter of 29/02/2012 (exhibit A27) under the provisions of section 51 of the Interpretations of Laws Act Cap.1 R.E 2002. Mr. Ng'maryo has conceded that there was a gap in the appointment of Mr. Shimwela as Chairman of FCC covering the period between 21/09/2009 to 22/03/2010 during which period Mr. Shimwela purported to act as Chairman of FCC. It is his view, however, that notwithstanding such gap or defect in his appointment as Chairman, the acts of Mr. Shimwela are fully saved and validated by the provisions of section 48(1)(c) and (3) of the Interpretation of Laws Act. In the alternative Mr. Ng'maryo argued that should the Tribunal find that the FCC was unlawfully or improperly constituted and therefore the proceeding irregular and the decision a nullity the 1st respondent should not be condemned to costs as it is not responsible for the irregular appointments of FCC members and has already suffered enormous costs in pursuing the Complaint before FCC and in resisting this appeal.

Ms Karume learned counsel for the 2nd respondent in her skeleton arguments, on her part, submitted that (a) the evidence of TW1 and TW2 confirmed that upon expiry of Mr. Shimwela's first term his term was extended for a period of three months, thereafter by another period of one month by letters dated 16/12/2009 and 20/02/2010 respectively in order to ensure that FCC continued to

function, and (b) the evidence of TW2 also confirmed that Mr. Shimwela was re-appointed retrospectively by the letter dated 29/02/2012. While clearly conceding that Mr. Shimwela's appointment as Chairman of FCC between 23/11/2009 and 22/03/2010 was defective as the extension of Mr. Shimwela's appointment was made by the Minister and not the President as required by the FCA, Ms Karume asserted that the defects/errors in the appointment of the Chairman and members are curable under section 54(b) of the Interpretation of Laws Act and therefore any defect in the appointment of a member of FCC does not affect the powers of FCC or make a decision made by FCC null and void. Ms Karume was emphatic that the case law presented to the Tribunal by the Appellant is of no import to the present case and is entirely distinguishable from the present case because it relates to jurisdictions which do not have a law similar to our section 54 of the Interpretation of Laws Act.

In order to appreciate the matters at issue in ground 2 of this appeal we have deemed it necessary to reproduce the relevant statutory provisions.

Section 3 of FC Act No. 8 of 2003 provides:

Section 3- The object of this Act is to enhance the welfare of the people of Tanzania as a whole by promoting and protecting effective competition in markets and preventing

unfair and misleading market conduct throughout Tanzania in order to:

(a) Increase efficiency in the production, distribution and supply of goods and services;

(b) Promote innovation;

(c) Maximize the efficient allocation of resources; and

(d) Protect t consumers.

Section 62(1)(3)(6)(7) and (8) of the FC Act No. 8 of 2003 provides:

Section 62(1)- There is hereby established a Commission to be known as the Fair Competition Commission.

(3) The Commission shall be a body corporate with perpetual succession and subject to this Act, shall-

(a) be capable of suing and being sued in its corporate name;

(b) Be capable of acquiring, holding and disposing of real and personal property;

(c) Have power to exercise and perform the powers and functions conferred on it by or under this Act;

(d) Have power to do and suffer all such other acts and things a body corporate may by law do and suffer.

(6) The Commission shall be constituted by five members as follows:

(a) A Chairman, who shall be a non-executive appointed by the President;

(b) Three non-executive members appointed by the Minister,

(c) The Director General.

(7) There shall be a Director General of the Commission, who shall be appointed by the Minister, from amongst a list of names submitted by the Nomination Committee, to serve on such terms and conditions as may be set out in the letter of his appointment or as may from time to time be determined by the Commission with the approval of the Minister.

(8) A person appointed as a Director-General under this section shall have the functions and qualifications set out in the Second Schedule to this Act.

Section 63(3)(7)(8) and (11) of FC Act No. 8/2003 provides;

Section 63(3)- The President shall appoint the Chairman of the Commission from candidates nominated by the Nomination Committee.

(7)- The first Chairman and members of the Commission shall be appointed for the following fixed terms:

(a) Chairman – four years;

(b) Director-General-four years;

(c) One member – three years;

(d) Two members – five years.

(8)- Members shall be eligible for reappointment for one further consecutive term but shall not be eligible for re-appointment thereafter.

(11)- Members may resign by giving written notice of resignation to the Minister.

Section 64(1) of FC Act No. 8 of 2003 provides:

Section 64(1)- The President may, acting upon an advice given by the Minister remove a member, including the Chairman, from office at any time if-

(a) The member is declared bankrupt, takes the benefit of any law for the relief of insolvent

debtors or assigns the member's remuneration for the benefit of creditors;

(b) The members is convicted of a criminal offence;

(c) If the member is required by section 66 to resign;

(d) The President decides that member is incapable of carrying out the member's duties because of ill health or physical or mental impairment;

(e) The member fails to attend at least two thirds of all meetings of the Commission in any period of twelve consecutive months; or

(f) The member has committed a material breach of a code of conduct to which the Commission is subject or a material breach of the Provisions of this Act.

Section 65(1) of FC Act No. 8 of 2003 provides:

Section 65(1)-The Commission shall administer this Act and develop and promote Policies for enhancing competition and consumer welfare.

Section 73(1)(2)(3)(4)(5) and (6) of FC Act No. 8 of 2003 provides:

Section 73(1)- The Commission shall hold meetings not less than six times in any period of twelve months and the interval between successive meetings shall not on any occasion exceed two months.

(2) The Director-General shall convene meetings of the Commission as directed by the Chairman or if requested in writing by at least half of the members.

(3)- Subject to the provisions of sub-sections (1) and (2), the Chairman may convene meetings of the Commission, after consultation with the members, at such times and places as he sees fit.

(4)- The Chairman shall preside at meetings of the Commission and the members may appoint from amongst themselves a Deputy Chairman to preside at meetings in his absence.

(5)- A quorum will be three members including the Chairman or a Deputy Chairman.

(6)- All questions shall be decided by a majority of votes of the members present and voting and,

in the event of an equality of votes, the presiding member shall have a deliberative and a casting vote.

Sections 2(2), 17, 37(2), 48(1)(2)(3)(4)(5), 50(1)(2), 51, 53(1), 54, 96(1) and 97 of the Interpretation of Laws Act No.4 of 1996 provide:

Section 2(2)- The provisions of this Act shall apply to, and in relation to, every written law, and every public document whether the law or public document was enacted, passed, made or issued before or after the commencement of this Act, unless in relation to a particular written law or document-

(a) Express provision to the contrary in the case of an Act, the intent and object of the Act or something in the subject of context of the Act is inconsistent with such application; or is made in an Act;

(b) In the case of subsidiary legislation, the intent and object of the Act under which that subsidiary legislation is made is inconsistent with such application; and

(c) In the case of subsidiary legislation, the intent and object of the Act under which that

subsidiary legislations made is inconsistent with such application.

Section 17- A power to fix a day on which an Act shall come into operation does not include power to fix-

(a) a day prior to the day on which the proclamation fixing the day is published in the Gazette; or

(b) different days for different provisions of that Act, unless express provision is made in that behalf.

Section 37(2)- Subsidiary legislation shall not be expressed to come into operation on a day before the day of publication in any case where, if the subsidiary legislation so came into operation-

(a) The rights of a person (other than the Government or an institution of the Government) existing immediately before the day of publication would be affected in a manner prejudicial to that person; or

(b) Liabilities would be imposed on any person (other than the Government or an institution of the Government) in respect of anything done or omitted to be done before the day of publication,

And if any provision is made in contravention of this subsection, that provision shall be void.

Section 48(1)- Where a written law confers a power or imposes a duty upon a person to make an appointment to an office or position, including an acting appointment, the person having such power or duty shall also have the power-

(a) To remove or suspend a person so appointed to an office of position, and to re-appoint or reinstate, any person appointed in exercise of such power or duty;

(b) Where a person so appointed to an office or position is suspended or unable, or expected to become unable, for any other cause to perform the functions of such office or position, to appoint a person to act temporarily in place of the person to appointed during the period of suspension or inability, but a person shall not be appointed to so act temporarily unless he is eligible and qualified to be appointed to the office or position; and

(c) To specify the period for which any person appointed in exercise of such a power or duty shall hold his appointment.

(2) For the purposes of paragraph (b) of subsection (1), "cause" includes-

(a) illness

(b) temporary absence from the United Republic; and

(c) conflict of interest

(3) The validity of anything done by a person purporting to act under an appointment made under paragraph (c) of subsection (1) shall not be called in question on the ground that the occasion for his appointment had not arisen or had ceased.

(4) Where a written law confers a power or imposes a duty upon a person to make an appointment to an office or position and that power of duty is exercisable only upon the nomination or recommendation, or is subject to the approval, concurrence, or consent of some other person, then the powers conferred by paragraphs (a) to (c) of subsection (1) shall only be exercisable upon such nomination or recommendation or subject to such approval concurrence, or consent.

(5) Nothing in this section affects the tenure of office or position of any person under the express provisions of any written law.

Section 50(1)- Where a written law confers or imposes a function upon a body or number of persons consisting of not less than three persons, the function may be performed by a majority of those persons.

(2) Where a written law establishes a board, commission, committee, council or other similar body consisting of 3 or more members (in this section called an "association")-

(a) at a meeting of the association, a number of members of the association equal to-

(i) at least one-half of the number of members provided for by the written law, if that number is a fixed number; and

(ii) if the number of members provided for by the written law is not a fixed number but is within a range having a maximum or minimum, at least one-half of the number of members in office if that

number is within the range, constitutes a quorum; and

(b) an act or thing done by a majority of the members of the association present at a meeting, if the members present constitute a quorum, shall be deemed to have been done by the association.

Section 51- Where a written law confers a power or imposes a duty upon a person to do any act or thing of an administrative or executive character or to make any appointment, the power or duty may be exercised or performed as often as is necessary to correct any error or omission in any previous purported exercise or performance of the power or duty, notwithstanding that the power or duty is not in general capable of being exercised or performed from time to time.

Section 53(1)- Where in a written law the word "may" is used in conferring a power, such word shall be interpreted to imply that the power so conferred may be exercised or not, at discretion.

(2) Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed.

Section 54- Where a board, tribunal, commission, committee, council or other similar body, whether corporate or unincorporated, is established under a written law, the powers of such a body shall not be affected by-

(a) any vacancy in the membership of the body;

(b) any defect afterwards discovered in the appointment or qualification of a person purporting to be a member of the body or the deputy member;

(c) a minor irregularity in the convening or conduct of a meeting of the body; or

(d) the presence or participation at a meeting of a person not entitled to be present or participate.

Section 96(1)- Subject only to this section, this Act applies to all persons in all sectors of the economy and shall not be read down, excluded or modified-

(a) By any other Act except to the extent that the Act is passed after the commencement of

this Act and expressly excludes or modifies this Act; or

(b) By any subsidiary legislation whether or not such subsidiary legislation purports to exclude or modify this Act.

Section 97- The functions and powers of the Minister are:

(a) to appoint members of the Commission other than the Chairman as provided for under section 63;

Rules 32(1), 33(1) of the Fair Competition Commission Procedure Rules reads as follow:

Rule 32(1)- The Decision of the Commission shall be made in a properly convened and constituted meeting of the Commission through a majority of votes of the members present and, in the event of an equality of votes, the presiding member shall have a deliberative and a casting vote.

Rule 33(1)- Every decision made pursuant to Rule 32 shall be composed of the following-

(a) The introductory part;

(b) The date and the place of the meeting;

(c) The issues considered;

(d) The opinions, arguments, and prayers of the parties;

(e) Any other circumstances related to the case;

(f) The legal requirements for the Commission to reach at the decision;

(g) The finding of the Commission including sanctions, remedies or any other directive considered as necessary;

(h) Dissenting opinion, if any; and

(i) The date of implementing the order

(2) ......

(3)..........

(4) Every decision of the Commission shall be signed and dated by all members.

We have carefully evaluated the affidavit evidence of Mr. Justine Nyenza and the documents relating to the re-appointment of the Chairman and Commissioners/members of the 2nd respondent (exhibits A1-A25) including the letters which were tendered later (exhibits 26, 27, 28 and T1 & T2) and read the respective arguments advanced by learned counsel in the context of the relevant statutory framework reproduced herein.

As stated earlier ground 2 of the appeal raises two issues. Firstly, whether or not the FCC was properly constituted at the

time of the determination of the Complaint and secondly if FCC was not properly constituted for any reason, whether the proceedings and the decision are a nullity. In terms of the respective arguments presented by learned counsel we are of the view that there are several other issues at the moment. The first issue is whether the quorum requirement for FCC meetings was complied with during the consideration of the Complaint. Secondly, whether the defects in the appointments of the Chairman and Director General rendered the meetings improper and the decision a nullity. Thirdly, whether sections 48, 50, 51, 53 and 54 of the Interpretation of the Laws Act are applicable to this appeal and if so whether the alleged defects in the re-appointments of the members and the constitution of FCC are cured by the aforesaid provisions of the Interpretation of Laws Act and fourthly what are the consequences of finding the decision a nullity, if at all.

It is on the evidence that upon the expiry of Mr. Shirnwela's first term as Chairman on 20/11/2009 his term was extended by the Minister first for three months, thereafter for a month and subsequent to that by letters of 24/03/2010 (exhibit A2) he was re-appointed by the Minister as Chairman, and by letters dated 29/02/2012 (exhibit 27) and 05/03/2012 (exhibit T1) his term was extended for four years from 23/03/2010 to 22/03/2014. Ms Karume's argument that the letters relied upon by the appellant

do not state that the Chairman was appointed by the Minister is without substance since for one, the words "........Waziri wa Viwanda Biashara na Masoko..........amekubali Bw. N. Shimwela kuteuliwa kuwa Mwenyekiti wa Tume ya Ushindani (FCC)........." in the letter dated 24/03/2010 (exhibit 2) expressly indicate that the Minister was approving the appointment in his own capacity. Surely the Minister cannot "approve" an appointment made by the President. It is only the letter dated 5/03/2012 (exhibit T1) from the President's Office, Public Service Management (Utumishi) which states that the President had in the exercise of his power under section 63(3) of FCA approved the re-appointment of Mr. Shimwela as Chairman of FCC from 23/03/2010 to 22/03/2014. From the affidavit evidence of Mr. Justine Nyenza and Dr. Mariki including the documentary evidence (exhibits A1-25 and exhibits 26 – 28) and the undisputed evidence of TW1 (including exhibits T1 and T2) and TW2 there is no shadow of doubt in our minds that the re-appointments/extensions of the term of Mr. Shimwela as Chairman by the Minister were not made in compliance with the applicable provisions of the FCA (section 63(3)) and therefore were not valid. Indeed learned counsel for the respondents, in the course of their submissions, clearly conceded that the re-appointment of Mr. Shimwela was initially not properly made. Similarly there is no dispute that upon the expiry of Mr. Mkocha's term as the Director General of the Commission there was no

valid re-appointment of a Director General of FCC from 05/07/2009 until at least 01/03/2010, during which time FCC held eight out of the nine hearings in respect of the Complaint, as the requirements of sections 62(7), and section 63(4)(7)(8) were not complied with. It is evident and indeed it is not disputed that FCC did not comprise five lawfully appointed members (as required under section 62(6) of the Act) during the hearing of the Complaint and at the time the decision was made. Does this mean that FCC was not properly constituted because the number of members was below the five provided in section 62(6)? Our answer is in the negative. In our view the provisions of section 62(6) of FCA are not absolute or without exception in the light of the provisions of section 63(7) providing for the staggering of the members' terms, section 63(11) providing for resignation of a member by notice and section 64(1) which provides for the removal of a member including the Chairman from office at any time. Section 62(6) read together with sections 63(7)(11) and 64(1) envisage and contemplate the possibility of the occurrence of a vacancy in the membership of the Commission (FCC) without affecting the ability of FCC to carry on its functions (subject to e.g the provisions of section 73(4) and(5) requiring a quorum for meetings of the Commission). If section 62(6) is given a strict interpretation, as urged by the appellant's counsel, each time the number of the members falls below five for various reasons or any reason (including if the Chairman or a member dies) the

ability of the Commission to function would come to a standstill until such time that the positions/vacancies are filled, which would be undesirable and impracticable, needless to say. In our view section 62(6) was only intended to provide a legal institutional framework as to how the Commission would be formed/setup/established and gives the organizational structure of FCC. It is elementary that the interpretation given to a statute and in this case section 62(6) of the FCA must be one that is consistent with logic so as to avoid irrational or absurd results. It is our view that the Legislature did not intend the ability of FCC to operate to cease each time that there is a vacant post, that is each time the number of the members falls below the 5 provided in section 62(6) of the Act. It is implicit in sections 63(11) and 64 of the Act that the number is bound to fall due to either resignation/removal. Then there is the question as to what happens if a member or the Chairman dies and the number falls below the required number. As stated earlier section 62(6) is clearly not absolute or without exception. It would indeed be absurd to interpret section 62(6) strictly in view of the express provisions of sections 63(11) and 64 of the Act. That would undoubtedly have the undesirable and unrealistic effect of putting all functions of FCC at a standstill each time the number of members falls below 5 members for some reason such as the death of a member. In our view the correct and logical interpretation that must be given and that logic demands that

sections 62(6) and 63(11) and 64 of the Act be read together and interpreted to mean that a vacancy or a fall in the number of members is inevitable at sometime or the other. Therefore, it is our view that the logical interpretation of section 62(6) and section 63(11) and 64 read together is that the number of members shall be 5 save, where there is a vacancy, it shall not affect the functions of FCC or its ability to operate subject to the specific quorum requirements for meetings. In other words the existence of a vacant post in the membership of the Commission does not affect the lawful composition thereof and its ability to function and operate.

Indeed this interpretation is supported in the Cyprus case of **Exxon Mobil Cyprus Ltd** relied upon by the appellant in which the Supreme Court of Cyprus when considering this issue, stated, *inter alia,* "The possible vacant post of the Chairman or of another member of the Commission does not affect the lawful composition thereof and the fulfillment of the competencies, powers and duties thereof."

With respect we therefore cannot accede to the argument by learned counsel for the appellant as regards the constitution of FCC. In our view despite the vacancies/and gap that had existed due to the improper re-appointments of the Chairman and Director General at the material times, FCC cannot be said to

have been improperly constituted during the determination of the Complaint and therefore the decision cannot be said to be a nullity for this reason. The contention by the appellant that Rule 33(4) of the FCC Rules requiring every decision of the Commission to be signed by all members of necessity, in our view, must mean all members present in a properly convened meeting of the Commission (see also rule 32(1) of the FCC Rules). For this reason we cannot accede to the argument by learned counsel for the appellant on this point about the requirement for the decision to be signed by all members of the FCC. However FCC's ability to operate despite the vacancy does not mean that the Chairman has the ability to participate in the meetings of the Commission if his appointment is not in accordance with the Law (see the **Exxon Mobil Cyprus Case**).

However as seen above it not disputed that Mr. Shimwela continued to act as Chairman of FCC from 21/11/2009 to 22/03/2010 during which period eight hearings were conducted in respect of the Complaint and he evidently participated in the taking of the disputed decision. In the circumstances we agree entirely with the appellant's counsel that as Mr. Shimwela presided at meetings of the Commission and participated during the time when his appointment was not in compliance with the law, the hearing proceeded without a quorum contrary to sections

73(4) and (5) of FCA rendering the proceeding and decision a nullity.

The respondents' counsel argued that the errors in the re-appointment of the Chairman are curable under sections 48, 50, 51, 52 and 54 of the Interpretation of Laws Act. While we agree with learned counsel for the respondents that the Interpretation of Laws Act is applicable to FCA it is our view that under the provisions of section 2(2)(a) of the Interpretation of Laws Act (Cap.1) read together with section 96(1)(a) of FCA it is only applicable to the extent that it is not inconsistent with the provisions of the FCA. Section 96(1)(a) expressly provides that the Act (FCA) shall not be **read down, excluded or modified** (emphasis by Tribunal) by any other Act except to the extent that the Act is passed after the commencement of this Act/FCA and expressly excludes or modifies the FCA. In addition section 2(2)(a) and (b) of the Interpretation of Laws Act provide that the Act applies to all Acts "*unless in relation to a particular written law or document (a) express provision to the contrary is made in an Act, and (b) in the case of an Act, the intent and object of the Act or something in the subject or context of the Act is inconsistent with such application*". (Italics by Tribunal). The Interpretation of Laws Act was passed in 1996 before the commencement of FCA and is therefore clearly inapplicable to the extent that it is inconsistent with, modifies, reads down or

excludes the provisions of FCA. In our view the Legislature did not intend to render insignificant the provisions of the FCA and in particular, in this instance, the requirements for the appointment of the Chairman or members of the Commission and therefore it would be inconsistent with that intention to apply the cited sections of the Interpretation of Laws Act to waive/disregard the requirements in section 63(3) in order to cure the defects complained about. In our interpretation sections 48, 50, 51, 52 and 54 clearly read down/exclude/modify the provisions of at least sections 63(3), 62(7) and 73(4) and (5) of FCA. In our opinion if the defects/errors in the re-appointments and the quorum of the meetings are cured or disregarded by applying the aforesaid provisions of the Interpretation of Laws Act relied upon by the respondents that would surely be tantamount to giving less weight to the FCA or reading down/excluding/modifying the FCA contrary to the express provisions of sections 96(1)(a) thereof and 2(2)(a) and (b) of Cap.1. In our judgment sections 48, 50, 51, 52 and 54 being inconsistent with the FCA cannot be applied to cure the defects/errors in the re-appointments of the Chairman and other members.

Even if section 54(b) of the Interpretation of Laws Act - was applicable, it won't be of assistance to the respondents. Section 54(b) reads as follows: "S. 54(b) Any defect afterwards

discovered in the appointment or qualification of a person purporting to be a member of the body or deputy member". The crux of the matter here is "defect discovered by who and under which circumstances".

In our opinion three scenarios can be identified. **First,** the matter is discovered either by the appointing Authority in the course of normal business. **Second,** the matter is discovered after receiving complaints from persons either within or outside the entity in question, whether in writing or otherwise. **And third,** the matter is discovered during litigation in a tribunal or court of law.

In the current appeal, FCC discovered that its Chairman was not legally appointed after it upheld a complaint regarding abuse of its dominant position in the beer market filed by the 1st respondent against the applicant. As a result of the said complaint, the appellant was found guilty and penalized. TBL appealed against the orders on the ground that the FCC Chairman was not properly appointed when presiding over the matter.

Having discovered the irregularity, FCC requested the appointing Authority to take corrective measures. Consequently by letter dated 05/03/2012 the FCC Chairman was officially re-appointed

with effect from 23/3/2010 to 22/03/2014. However, this appointment excluded the period from 21/11/2009 to 22/03/2010 in which the Chairman presided over meetings when his re-appointment was not in accordance with the law. During cross-examination, the witnesses TW1 and TW2 admitted that during the period from 21/11/2009 to 22/03/2010 the FCC Chairman was not legally appointed and hence the position was vacant. The two witnesses could not give reasons as to why the period was not covered by the appointing authority's letter of 05/03/2012 (exhibit T1) which was intended to cure the irregularities in the re-appointment of the FCC Chairman. Learned counsel for the 1st and 2nd respondents want this Tribunal to decide that this defect is cured by section 54(b) of the Interpretation of Laws Act, Cap. 1 R.E 2002.

While the said section (section 54(b) of Cap.1) is silent on the applicable scenario, learned counsel for the 1st and 2nd respondents want the Tribunal to believe that all three scenarios presented above are applicable. In other words, the counsel for the respondents want the Tribunal to agree that during the proceedings in this appeal, it has been discovered that the position of Chairman of FCC in the period between 21/11/2009 to 22/03/2010 was vacant and that this discovery is cured by section 54(b) of the Interpretation of Laws Act. We find this argument not at all persuasive.

After careful consideration of this matter, we are of the view that section 54 of the Interpretation of Laws Act was not meant to cure discoveries of irregularities argued and agreed upon during proceedings in a tribunal or court of law. In our opinion, if this was the case, then there would be no need of having laws with specific procedures for order, rule of law and good governance.

In our view since Mr. Shimwela's re-appointment was not in accordance with the law then the decision in question in the taking of which he participated was likewise unlawful. Having held, as we have, that the meetings of FCC held during the determination of the Complaint were not lawful meetings for lack of a proper quorum the decision in the Complaint was *ipso facto* invalid and therefore a nullity. The decision of FCC in Complaint No. 2 of 2009 is accordingly hereby quashed.

Learned counsel for the two respondents have drawn this Tribunal's attention to the possible alarming and undesirable consequences of finding the decision of FCC in the Complaint a nullity, on the ground that such a decision might result in the nullification of all decisions made by FCC during the past two years or so covering the period when there was no validly appointed Chairman. We admit that this is a matter which deserves serious concern and consideration. Fortunately the

issue and effect of an annulment of such a decision is not without precedent having been decided in a number of previous cases. In the case of **Israel Misezero @ Minani v Republic, Criminal Appeal NO. 117 of 2006, the** Court of Appeal of Tanzania (Mwanza) (unreported), when considering the effect of nullifying the decision appealed from, cited with approval decisions from other jurisdictions, invoked the **doctrine of prospective annulment** and stated as follows:

> "Meanwhile the legal position is that: there is no preliminary hearing at the High Court. However, as this has erroneously been done for many years we do not want now to cause chaos. So, we have decided to invoke the **doctrine of prospective annulment**, that is, our decision to annul the holding of preliminary hearing at High Court shall not have retrospective effect. **The East African Court of Justice**, citing a number of decisions of other courts, invoked that doctrine in **Calist Andrew Mwatela and Two Others v. East African Community**, Application No. 1 of 2005, in the following terms at p.13 of the typed written script:
>
> *In the circumstances we find that the establishment of the Sectoral Council I was inconsistent with the provisions of Article 14(3)(i).*

However, since the purported Sectoral Council has been in place from 2001 and by now has, undoubtedly made a number of decisions, which would be unwise to disturb, we are of the considered opinion that this is a proper case to apply the doctrine of prospective annulment. We order that our decision to annul the Sectoral Council shall not have retrospective effect.

We think that the doctrine of prospective annulment which has been applied in various jurisdictions, is good law and practice. See the Court of Justice for European Community in ***Defrenne vs. Sabena*** *(1981) All E.R 122; US Court of Appeals 5th Circuit in* ***Linkletter vs. Walker Warden*** *381 US (1965) 618; and the Supreme Court of India in* ***Golak Nath vs. The State of Punjuab*** *(1967) AIR 1643.* (Italics by Tribunal)

Thus in those session cases where preliminary hearings have been conducted this annulment shall not affect them. However, from the date of this judgment there shall be no preliminary hearings in the High Court until s.192 of the Act has been accordingly amended by the

Before we conclude we would like to make some general observations on the submissions of the respondents' counsel regarding the proper course to take in the event the decision is found to be invalid because of the improper constitution of the FCC or lack of quorum. Mr. Ng'maryo has argued that in such an event this Tribunal has no jurisdiction to entertain this appeal and the appellant ought to have applied for judicial review in the High Court of Tanzania. With great respect we do not share that view. Needless to say this Tribunal has been specially set up to hear appeals from decisions of FCC and regulatory bodies (section 61 of the Fair Competition Act). The lack of jurisdiction and/or impropriety of the constitution of FCC/lack of a quorum of a meeting and/or a complaint that there was an error in law may without doubt be grounds for lodging an appeal before this Tribunal from a decision of FCC (section 61(4)). We also cannot accede to Ms Karume's contention that authorities from other jurisdictions are not applicable. It is an undeniable fact that our courts and tribunals have often relied on authorities from other jurisdictions, where found persuasive, whenever it was deemed necessary.

In the event we are satisfied that ground 2 has merit and it is hereby allowed. The decision contested is nullified. In view of our conclusion in this respect we shall not consider/examine the remaining grounds of appeal/issues on merit as to whether the

Attorney General whether by means of *erratum* or through Miscellaneous Amendment Act.

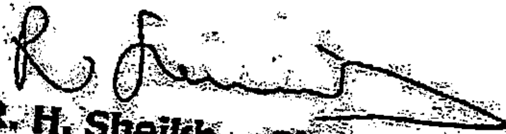
For the avoidance of doubt, for those proceedings which are currently being heard and have not been concluded shall not be affected by the annulment if preliminary hearings have been conducted by the time this judgment is delivered. ...."

In the face of this Court of Appeal decision (and other highly persuasive authorities cited therein) this Tribunal will have no hesitation in applying the **doctrine of prospective annulment** and we accordingly hereby invoke the **doctrine of prospective annulment** and hold that all matters/complaints decided by FCC in the past, before this judgement/decision, without there being the necessary/required quorum due to a defect/impropriety in the appointment/re-appointment of the Chairman/member, shall not be affected by this decision or annulment. For the avoidance of doubt even all those complaints before FCC which are currently being heard and have not been concluded shall not be affected by the annulment even if the hearing thereof commenced during the time when FCC had no quorum due to the presence/participation of an invalidly appointed/re-appointed Chairman/member.

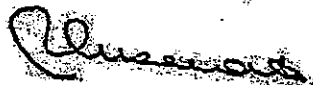
2nd respondent had erred in finding that the appellant had abused its dominant position, *inter alia*,.

On costs Mr. Ng'maryo urged this Tribunal not to grant costs in the event ground 2 succeeds as SBL was not to blame for the errors in the appointment of members of FCC. We have taken this request into consideration and hereby order that each party will bear its own costs.

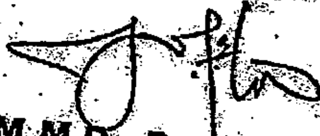
Dated this 6th day of December, 2012.



Judge R. H. Sheikh – Chairman



Prof. J.M.L. Kironde – Member



Dr. M.M P. Bundara – Member

Judgement delivered this 6/12/2012 in the presence of the above.

Judge R. H. Sheikh – Chairman

Prof. J.M.L. Kironde – Member

Dr. M.M P. Bundara – Member