IN THE FAIR COMPETITION TRIBUNAL

AT DAR ES SALAAM

TRIBUNAL APPEALS CASE NO. 4 OF 2010

TANZANIA BREWARIES LTD.....APPLICANT

VERSUS

SERENGETI BREWRIES LTD.....1ST RESPONDENT

FAIR COMPETITION COMMISSION.....2ND RESPONDENT

COCA COLA KWANZA.....INTERVERNER

RULING

This is an appeal from the decision of the Fair Competition Commission in Complaint No.2 of 2009 made on 21/5/2010.

A Notice of Appeal was filed on 27/5/2010 which specified SERENGETI BREWERIES LIMITED as the respondent and on 25/6/2010 a Memorandum of Appeal was duly lodged in this Tribunal citing SERENGETI BREWERIES LIMITED as the respondent.

On 13/12/2010 upon application made on behalf of the appellant this Tribunal granted leave to add Fair Competition Commission as a respondent in this appeal and accordingly an amended

Memorandum of Appeal was duly lodged in third tribunal on 17/12/2010.

By Notice of preliminary objection the 2nd respondent, FCC has taken objection to the amended Memorandum of Appeal on the following grounds:

1. That the amended Memorandum of appeal is bad in law for non-compliance of the provisions of the Fair Competition Act, No. 8 of 2003, the Fair Competition Commission procedure Rules 2010 and the Fair Competition Tribunal Rules, 2006.

2. That the appeal is sub-judice before this tribunal;

3. That the purported appeal is bad in law for mis-joinder of parties.

4. That the purported order relied on in amending the memorandum of appeal contravenes the principle of natural justice.

On the first ground of appeal Mr. Nyenza learned counsel for the 2nd respondent submitted that the appeal as against the 2nd respondent is incompetent due to failure to file a Notice of Appeal in respect of the 2nd respondent as required in Rule 7(1), (4) and (5) of the FCT Rules, 2006, that in the Notice of Appeal filed on 27/05/2010 and which is annexed to the memorandum of Appeal

the 2nd respondent does not appear as a respondent. Learned Counsel asserted the only notice of appeal lodged in this appeal was the one filed on 27/5/2010 which was not served upon the 2nd respondent citing the decision of Dhow Mercantile & Others. Mr. Nyenza submitted that a Notice of Appeal is a requisite condition of an appeal and that in the absence of a valid Notice of appeal filed and served the appeal has no legs to stand on as against the 2nd respondent, notwithstanding the order by this tribunal granting the appellant leave to join the 2nd respondent in the appeal. Mr. Nyenza asserted that the appellant ought to have sought extension of time to lodge a Notice of Appeal against the 2nd appellant before filing the amended memorandum of Appeal.

On ground 2 learned counsels submitted that this appeal is sub-judice due to the pending before the tribunal of another appeal, Appeal No.5 of 2010, in which the appellant and 2nd respondents are parties. Mr. Nyenza argued that as both this appeal and Appeal No.5 originate from the same decision and given on 21/5/2010 and since the grounds of appeal in the two appeals are the same it was improper to join the respondent in this appeal since the 2nd respondent is already a party in Appeal No.5 of 2010 which originates from the same decision.

As regards ground 3citing the case of Peter Mushi V. Minister for Land Housing and Urban Development. Mr. Nyenza asserted that

the 2nd respondent was wrongly joined to this appeal as it was not a party to the proceeding from which appeal arises.

Ground 4 was abandoned by Mr. Nyenza towards the end of his oral submission.

In response Mr. Ng'maryo learned Counsel for the 1st respondent submitted that the Notice of Appeal was filed with the time required by law, that the institution of Notice of appeal is what initiates the appellate process, and that the 2nd respondent having been joined in a properly initiated appeal and there being already in place a appeal it was not necessary to file a fresh Notice of Appeal to the 2nd respondent or to serve it upon the 2nd respondent.

On ground 2 Mr. Ng'maryo argued that this appeal having been filed before Appeal No.5 of 2010 cannot be said to be sub-judice.

Countering Mr. Nyenza's arguments on ground 3, Mr. Ng'maryo basically submitted that the 2nd respondent was properly joined to this appeal. He argued that as the 2nd respondent was joined in pursuance of an order made by this tribunal the appellant cannot b e faulted.

Dr. Tenga learned Counsel for the appellant on his part, in response to ground 1 of the preliminary grounds of objection submitted that the Dhow Mercantile Case is not applicable, that in the Dhow Mercantile use there was Notice of Appeal in place as

the Notice of Appeal was struck out and thereafter the appellant did not file a fresh Notice of Appeal. He argued that unlike the position in the Dhow Mercantile case in this appeal there is a continuing Notice of Appeal.

Dr. Tenga asserted that an appeal is commenced by filing a notice of appeal and instituted by the lodging of a memorandum and Record of Appeal, that once an appeal is instituted the consequence proceedings including the joinder of parties including intervenes are controlled by the tribunal. Dr. Tenga submitted that while at the commencement of an appeal it is a requirement to name the respondent in the Notice of Appeal, there is no provision in our rules requiring the filing of an amended or fresh Notice of Appeal when joining subsequent respondents/intervenes who were not mentioned as respondents in the Notice of Appeal before instituting the appeal.

In response to ground No.2 Dr. Tenga while not disputing that the 2nd appeals arise from the source decision was clearly supportive of Mr. Ng'maryo's view that the sub-judice argument is inapplicable in the instant matter since this appeal was filed earlier than Appeal No.5 of 2010 in which the 2nd respondent is the respondent.

As regards ground 3 Dr. Tenga distinguishing the Mushi case cited by Mr. Nyenza submitted asserted that FCC is not a Court, that the proceedings before FCC was not a trial, that it was a

investigation which resulted in FCC condemning the appellant. He asserted that the Peter Mushi case is irrelevant and inapplicable to this appeal.

He added that the preliminary objections are frivolous and argued that as the 2nd respondent was represented in this appeal before this tribunal when the issue of joinder of FCC was argued they ought to have addressed the tribunal on the issue under rule 75(4) – (6) of the FCC Rules.

Mr. Nyange learned Counsel for the Intervener Coca Cola fully associated with the submissions by Mr. Ng'maryo and Dr. Tenga on the preliminary grounds of objection raised by the 2nd respondent.

We have carefully considered the arguments advanced by the respective learned counsel for and against the grounds of objection.

At the outset we deem it necessary to put on record that Dr. Tenga in his submission on ground 2 and Mr. Nyenza in his rejoinder had also argued the issue of the propriety and necessity of impleading.

FCC as a party in an appeal from its own decision and in their arguments both learned counsel relied on, inter alia, rules 7(5) of the FCT Rules and Rules 75(4), (5) and (6) of the FCC Rules G.N. No. 254 of 2010.

However, it is our considered opinion that these arguments are in relevant as far as ground No. 2 of the preliminary objections is concerned and we will accordingly for the time being disregard the arguments advanced by respective learned counsel on whether or not it is pro-0per to join FCC as a party/respondent in an appeal emanating from its own decision.

It is not disputed that the Notice of Appeal filed on 27/12/2010 was lodged within the time prescribed in the rules, and that in the Notice only the 1st respondent was named as a respondent. Nor is it disputed that the second respondent was added later upon an order made by this tribunal for joining the 2nd respondent herein as a respondent.

Upon carefully consideration of the respective arguments we agree entirely with Mr. Ng'maryo and Dr. Tenga that as the Notice of Appeal which init8iated the instant appeal was filed within time, and as the time the 2nd respondent was joined as a respondent there was already in place a properly lodged appeal there was no requirement to filed a fresh notice or amended notice of appeal naming the 2nd respondent as a respondent or to serve the notice aforesaid to the 2nd respondent. The requirement to name the respondent in the Notice of Appeal provided in rule 7(3) (b) of the FCT Rules is only applicable at the commencement of an appeal.

There is no such requirement where a party is made a party upon an order made nor is there in the FCT Rules any rule requiring the filing of an amended/fresh notice of appeal when subsequent respondents who were not named as respondents in the Notice of Appeal initiating the Appeal process.

We agree entirely with Dr. Tenga that the Dhow Mercantile (E.A) Ltd case cited by Mr. Nyenza is clearly distinguishable and inapplicable as in that case there was no notice of appeal in place as the upon the appeal in question being struck the notice of appeal also was struck out. In this case there is no dispute that there is still a notice of appeal in existence which form the basis of this appeal and all the necessary documents prescribed in rule7 of the FCT Rules for commencement of an appeal are still undoubtedly in place.

As regards ground 2 we will say without further ado that the argument that this appeal is sub-judice is inapplicable to the instant appeal since this appeal was filed earlier than Appeal No.5 of 2010 in which the 2nd respondent is the sole respondent. Upon careful deliberation on this matter since it is not disputed that these 2 appeals arise from the same decision made by the 2nd respondent it is our finding that it will be prudent and convenient to hear these two proceedings together.

In the exercise of this tribunal's discretion under rule 20 of the Rules we accordingly order that these two appeals No.4 and 5 of 2010 be and are hereby consolidated.

On misjoinder of the 2nd respondent as a party to this appeal, since this ground of objection has been argued more fully in appeal No.5 of 2010 (in which as stated earlier both the appellant and the 2nd respondent are parties) and the two appeals having been now consolidated, we will consider and determine this ground of objection in our ruling on the preliminary objections raised in Appeal No.5 of 2010.

In the event grounds No.1 and 2 are hereby overruled. The ruling on ground 3 is hereby reserved and will be determined in our ruling on the grounds of preliminary objection raised in Appeal No.5 of 2010, which include a ground of objection similar/identical to ground No.3 herein.

Signed

Judge R. Sheikh – Chairman

Signed

Mr. Ali Juma – Member

Signed

Mr. Felix Kibodya – Member