

**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.....1<sup>ST</sup> RESPONDENT**

**FAIR COMPETITION COMMISSION.....2<sup>ND</sup> RESPONDENT**

**AND**

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

14/9/2011

Coram: Hon. R.H. Sheikh, J/Chairman  
Prof. J.M.L. Kironde, Member  
Dr. M.M.P. Bundara, Member

Appellant: Tanzania Breweries Ltd

For Appellant: Dr. Riingo Tenga assisted by Mr. Fayaz  
Bhojani Advocate, Law Associates  
(Advocates) & FB Attorneys

1<sup>st</sup> Respondent: Serengeti Breweries Ltd

For 1<sup>st</sup> Respondent: Mr. Eric Ng'maryo, Advocate  
Eric Ng'maryo Advocates

2<sup>nd</sup> Respondent: Fair Competition Commission

For 2<sup>nd</sup> Respondent: Ms Fatma Karume, Advocate assisted by Mr.  
Ndanu, Director of Compliance.

Intervener: Coca cola Kwanza Ltd

For the Intervener: Mr. Godson Nyange, Advocate

T/C: Beda Kyanyari

## **RULING**

On 13/09/2011 during the case management conference of these two consolidated appeals, while addressing the Tribunal on his proposals on how the hearing of the appeal should proceed and/or be dealt with. Dr. Tenga learned counsel for the appellant submitted that he intended to adduce additional evidence under rule 30(1)(b) and (c) of the Fair Competition Rules 2006 (FCT Rules) by calling about 6 witnesses, one being an expert witness in Economics and Competition Law, in support of ground 7 of the grounds of appeal and 5 other witnesses to testify on factual

matters. He accordingly sought leave to adduce additional evidence under rule 30(1)(b) and (c) of the FCT Rules. He also sought an order for disclosure of documents in the possession of the 2<sup>nd</sup> respondent which, according to Dr. Tenga, are supportive of ground 3 of the amended memorandum of appeal which challenges the propriety of the constitution of the Fair Competition Commission, the 2<sup>nd</sup> respondent (FCC) at the time of the determination of the dispute from which this appeal emanates. In particular he is seeking an order to require the 2<sup>nd</sup> respondent to produce documentary evidence relating to the appointments of the members of FCC to establish that FCC was properly constituted at the time the complaint was heard and the decision appealed from herein was made by FCC.

Towards the end of his submission Dr. Tenga asserted that under S.61(2) of the Fair Competition Act, 2003 this Tribunal is empowered while dealing with an appeal to rehear a complaint and under rule 28(2) of the FCT Rules required to comply with the principles of natural justice.

Mr. Ng'maryo learned counsel for the 1<sup>st</sup> respondent while in principle not opposing Dr. Tenga's application for calling additional evidence went further and urged for a rehearing of the matter by this Tribunal. He submitted that the principle of fairness would demand that the respondents too be allowed to call additional evidence, if they so wish. He argued however that



as the calling of additional evidence may lead to contradictions and inconsistencies with and the watering down of the evidence recorded before FCC the hearing of this consolidated appeal ought to proceed by way of a rehearing of the complaint as provided under section 61(2) of the Fair Competition Act. In support of his arguments Mr. Ng'maryo cited section 61(7)(a) of the Act which, according to Mr. Ng'maryo, empowers this Tribunal on appeal to perform all the functions and exercise all the powers of FCC including hearing a complaint afresh.

Ms Karume on her part made it clear that while she had no objection to the calling of additional evidence she could not agree to Dr. Tenga's application for orders of disclosure. She submitted, *inter alia*, that the application for disclosure of documents was vexatious and nothing but a fishing expedition intended to discredit and embarrass FCC. She also objected to the proposal for the appeal being dealt with by way of a rehearing of the complaint filed before FCC strongly advocated by Mr. Ng'maryo. In addition she took issue to Dr. Tenga's application for leave to call an expert witness on competition law while at the same time making it clear that she had no objection to the calling of an expert witness in the economics field.

On behalf of the intervener Dr. Tenga, holding brief for Mr. Nyange learned counsel for the intervener, submitted that the

intervener was in full support of the position taken by Dr. Tenga in his submissions on the proposals and prayers.

We must confess that these mostly heated arguments by learned counsel came as a surprise to us since at the beginning of the case management conference Dr. Tenga had submitted that he was going to present to us five proposals for the management of this proceeding – three of which (including the issues of taking additional evidence, calling expert witnesses and disclosures of documents), according to Dr. Tenga, had been agreed upon by the parties prior to the case management session, and there was no comment/objection made by any other learned counsel on Dr. Tenga's aforesaid opening submission.

Be it as it may be, we have in the face of these contentious exchanges considered the respective arguments presented by learned counsel for and against Dr. Tenga's proposals and prayers.

Clearly there is no objection to the prayer for leave to call additional evidence save that Ms Karume strongly resisted the calling of an expert witness on competition law. Leave is accordingly granted for the calling of additional evidence by the parties under rule 30(1)(b) and (c) of the FCT Rules. However we are in entire agreement with Ms Karume that under sections 58 and 59 of the Evidence Act Cap 6 R.E. 2002 our courts and tribunals are required to take judicial notice of our laws and we



do not see how an expert witness on competition law or even comparative competition law can assist this Tribunal since such assistance is what learned counsel for the respective parties are expected to provide to this Tribunal. More importantly under section 47(1) of the Evidence Act it is clearly provided that an expert witness is required only when the court has to form an opinion upon a point of foreign law, or science or art, etc. which is not the case in the present appeal. In this appeal we are required to apply our domestic laws in particular the Fair Competition Act and other rules relevant to this appeal.

It is our view therefore that calling an expert witness on competition law or even comparative competition would be improper and is in fact unnecessary since the parties are ably represented by advocates. Needless to say this does not bar learned counsel on both sides from addressing the Tribunal on competition law obtaining in other jurisdictions and comparative competition law in order to advance their client's causes, or assisting the Tribunal by referring to foreign authorities and case law on competition law, considering that our jurisprudence on competition is relatively less developed.

Regarding the issue of a rehearing, while it seems to us that a rehearing of the matter is possible under section 61(2) and (7) of the Fair Competition Act, in the light of the volume of evidence already adduced before FCC we do not think that it is

either desirable or prudent to rehear the matter. In the circumstances of this case we are of the considered view that taking additional evidence would suffice and would enable the parties to bring such evidence as may be deemed reasonably necessary to support their positions and to assist the Tribunal in reaching an informed and just decision.

On the application for orders of disclosure we are of the strong view that whether FCC was properly constituted or not at the time of the determination of the dispute by FCC is a material and relevant factor in the context of ground 2 of the amended memorandum of appeal and section 61(4)(c) and (d) of the Fair Competition Act. While it is true that our rules do not provide for disclosure of documents and discovery, since the documents sought to be disclosed/produced are in the possession of the 2<sup>nd</sup> respondent (FCC) we are of the view that it is both proper and in the interest of justice that the order sought be granted. We are also satisfied that rule 28(2) of the FCT Rules permits the granting of the order in the interest of natural justice.

In the event, in the exercise of our discretion under rule 28(2) of the FCT Rules we hereby order the 2<sup>nd</sup> respondent to disclose and produce at the next hearing of this appeal documentary proof of the constitution of the FCC at the time of the hearing and determination of the complaint by FCC.

It is so ordered.

**Signed**

**Judge R. H. Sheikh – Chairman**

**Signed**

**Prof. J.M.L. Kironde – Member**

**Signed**

**Dr. M.M P. Bundara – Member**

**14/9/2011**

Ruling read this 14/09/2011 in the presence of the above.

Signed

**Judge R. H. Sheikh – Chairman**

Signed

**Prof. J.M.L. Kironde – Member**

Signed

**Dr. M.M P. Bundara – Member**

**14/9/2011**



I certify that this is a true copy of the Ruling.

**Registrar**

**26/9/2011**