Box 82.

IN THE FAIR COMPETITION TRIBUNAL

AT DAR ES SALAAM

TRIBUNAL APPEAL NO. 5 OF 2014

TANGA FRESH LIMITED.......................APPELLANT

VERSUS

FAIR COMPETITION COMMISSION...RESPONDENT

JUDGMENT

The appellant, Tanga Fresh Ltd, is appealing against the decision of the Fair Competition Commission (popularly known by its acronym "FCC"), the respondent herein, made on 29th August, 2014 in Complaint (Consolidated) Dockets No. FCC/Comp.No.1A & IB of 2012.

Admittedly, this is the first merger case to be heard by this Tribunal. In order to appreciate the gist of this matter, we find it necessary to state the historical background giving rise to this appeal, thus we cannot avoid this judgment to be long

On 3rd June, 2011 the respondent conducted an awareness seminar to the stakeholders in Tanga Region on competition law and policy, consumer protection issues and campaign against

counterfeits. During the plenary sessions, the stakeholders informed the respondent that the appellant had acquired its competitors, Morani Dairy Company Ltd and International Food Processors Ltd. The two acquired companies were doing business of collecting raw fresh milk from the farmers and processing dairy products in Tanga Region.

On July, 2011 the respondent initiated an investigation against the appellant for the alleged acquisition of the business assets of International Food Processors Limited and Moran Dairy Company Ltd in contravention of section 11(2) of the Fair Competition Act, 2003 (hereinafter referred to as "the FCA").

On 25th May, 2012 the respondent issued a statement of the case to the appellant for infringement of the provisions of the FCA. After further investigation, the respondent issued provisional findings against the appellant and required the appellant to respond. The appellant submitted its responses to the provisional findings and on 8th November, 2013 the appellant applied for leave to be orally heard by the respondent.

On 6th December, 2013 the respondent scheduled an oral hearing meeting. The appellant appeared before the respondent and was represented by two learned counsel, Mr. Mwita Waissaka and (Rtd) Justice Mkwawa. It was during this oral hearing session, that the appellant admitted that it contravened the provisions of section 11(2) of the FCA, read together with the Fair Competition

(Threshold for Notification of a Merger) Order, 2007 (as amended by G.N. No. 93 of 17th April, 2009) (hereinafter referred to as "the Notification Threshold Order").

On the same day, 6th December, 2013 the appellant, having admitted to have infringed the provisions of the FCA as alleged by the respondent, requested under rule 19(6) and rule 21 of the Fair Competition Commission Procedure Rules, 2013 (hereinafter referred to as "the FCC Procedure Rules) to be granted an opportunity to settle the matter amicably.

On 16th December, 2013 the appellant filed their application for settlement. The respondent granted the application for settlement discussions, and scheduled the settlement discussions to be held on 10th January, 2014 and the appellant confirmed its commitment to attend to the discussions as scheduled. The discussions commenced on 10th January, 2014 as scheduled, and were to proceed on 31st January, 2014.

On 31st January, 2014 the appellant appeared for the continuation of the settlement discussions as schedule but applied for a three (3) months extension of time to allow time for consultation with its shareholders.

On 5th February, 2014 the appellant lodged a formal application for extension of time.

On 7th February, 2014 the respondent invited the appellant for an oral hearing of its application for extension of time and the hearing was scheduled to be held on 11th February, 2014. However, the appellant failed to appear on ground that its legal counsel, Mr. Waissaka, was engaged in a High Court Case (Commercial Division).

On 11th February, 2014 being mindful of the procedural requirements of Rule 25 of the FCC Rules 2013, the respondent reached out to the appellant by phone and informed the appellant that the hearing of the application has been re-scheduled to 12th February, 2014. Even at this time, the appellant failed to enter appearance and, for the reasons known to the appellant, the appellant abandoned the whole settlement process. In lieu thereof, and since then, the appellant resorted into seeking political interventions through the assistance of various political offices including the Parliamentary Committee on Economic Affairs, Industry and Trade, with a view to suspending legally quasi-judicial proceedings conducted by the respondent.

On 29th August, 2014 the respondent made a decision against the appellant finding it to have contravened section 11(1), (2) and (5) of the FCA namely:

(i) Failure to notify a Merger contrary to section 11(2), (5) and (6) of the FCA, 2003 read together with the Notification Threshold Order, and

(ii) Strengthening a position of dominance in the market contrary to section 11(1) and (6) of the FCA, 2003.

In addition, the appellant was ordered to pay an administrative monetary fine amounting to Tanzanian Shillings four hundred and sixty million, nine hundred and forty five thousand only (460,945,000/=) which is equivalent to 5% of the appellant's 2009 annual turnover of Tanzanian Shillings nine billion two hundred eighteen million nine hundred thousand only (9,218,900,000/=) as per its audited accounts for the period ended 31st December, 2009 which was to be paid to the respondent pursuant to rule 29 of the FCC Procedure Rules, 2013.

The appellant being aggrieved by the aforesaid decision appealed before this Tribunal raising six grounds of appeal, namely:

1. The Commission erred in law and fact during the proceedings in failing to afford the appellants opportunity to be properly heard and caused miscarriage of justice to the appellant.

2. The Commission erred in law and fact in holding that, the appellant admitted the offences.

3. The Commission erred in law and fact in holding that, the alleged transactions amounted to a merger.

4. The Commission erred in law and fact in failing to realize that, during the alleged transactions the sellers thereof were no longer in business.

5. The Commission erred in law and fact in convicting the appellants in the absence of any finding and proof of the appellant to have consummated the alleged transactions negligently and intentionally to contravene the law.

6. The Commission erred in law and fact in holding that, the appellant's conducts contravenes the law.

The respondent has resisted the appeal by filing a reply to the memorandum of appeal containing six grounds of objection as follows:

1. That, the contents of paragraph 1 of the appeal are strongly disputed. It is averred that the respondent acted in accordance with the principles of natural justice, including proper hearing and adherence to all other statutory requirements applicable to the Fair Competition Act, as further below:

   (a) That, through a Statement of the Case served upon the appellant in line with rule 12(3) of the FCC Rules of

Procedure, the appellant was well and fully informed of the complaint and the provision of the law alleged to have been infringed.

(b) That, the appellant was thereafter served with Provisional Findings and given an opportunity to respond within 21 days.

(c) That, the appellant responded to the Provisional Findings and applied for, and was granted opportunity to be heard orally.

(d) That, during the oral hearing of the appellant's submissions, the appellant admitted to have infringed the FCA and applied for settlement discussions and later during the discussions the appellant applied for an extension of time (90 days) within which the appellant was to make consultations with its shareholders, TDCU and Primary Societies and the same was accorded by the respondent.

(e) That, before conclusion of the said settlement discussions, the appellant abandoned the process it has initiated and resorted to seeking political interventions instead of abiding with the required and lawful procedures stipulated under the FCC Procedure Rules, 2013.

2. That, the contents of paragraph 2 of the Memorandum of Appeal are strongly disputed. The respondent further states:

    (a) That, on 6th December, 2013 during the oral hearing before the Commission, the Appellant admitted to all four offences as set out in the Provisional Findings served upon the Appellant.

    (b) That, immediately after its admission of the alleged offences, and, by virtue of Rule 21(3) of the Fair Competition Procedure Rules, 2013, the appellant applied for settlement discussion. The appellant's application to that effect was lodged on 16th December, 2013.

    (c) That, the respondent on 18th December, 2013 accorded the appellant an opportunity to settle the complaint and the appellant confirmed to appear for settlement.

    (d) That, in May, 2014, the appellant referred the matter to the Parliamentary Committee for Economic Affairs, Industry and Trade, (PCEAIT), and, when the respondent appeared before the Committee in Dodoma, once again the appellant admitted to have infringed the provisions of the FCA, 2003, and requested for relief.

3. That, the contents of paragraph 3 of the Memorandum of Appeal are strongly disputed. The respondent further states

that on 18th February, 2009 and 31st March, 2009 the appellant acquired the assets of Morani Dairy Company Ltd and International Food Processors Limited respectively, and the two acquisitions were never notified to the respondent hence a violation of the provisions of the FCA, 2003.

4. That, the contents of paragraph 4 of the Appeal are strongly disputed. The respondent further states as hereunder:
   (a) That, the appellant failed to establish or substantiate the claim that the two companies it had acquired were out of business.
   (b) That, even if the appellant's claim was to be true, (a fact that the respondent maintains that it was not), still the appellant's conduct was executed in total disregard of the requirements and procedures laid down by the provisions of the Fair Competition Act, 2003.

5. That, the contents of paragraph 5 of the Memorandum of Appeal are strongly disputed. The respondent avers that it evaluated the available evidence and arrived at a legally justified conclusion that the appellant contravened the law and, hence, was liable for its unlawful conduct.

6. That, the contents of paragraph 6 of the Memorandum of Appeal are strongly disputed. The respondent reiterates what is stated in para 3, 4 and 5 above.

It is worth noting that there is neither list of authorities nor skeleton arguments filed by appellant as required by rule 22 and 28 of the Fair Competition Tribunal Rules, 2012 (hereinafter referred to as "the FCT Rules") respectively. On the other hand, the respondent has filed skeleton arguments and list of authorities containing several decisions, relevant case law, and law to be relied upon in the course of hearing.

In the skeleton arguments, respondent requested this Tribunal to uphold the commission's finding and dismiss the appeal on its entirely on the reasons that:

(i) That respondent acted in accordance with principles of natural justice, including proper hearing and adherence to all other statutory requirements applicable to the Fair Competition Act.

(ii) That, apart from being based on the available evidence, the commission's final decision was also reached at taking into account the appellant's own admissions.

(iii) That the transaction consummated by appellant satisfied the requirement of section 2 and contravened section 11(1) and (6); section 11(2)(5) and (6) of the FCA, read together with the Notification Threshold Order.

(iv) That, notification of a merger is a legal requirement which the appellant ought to have had knowledge of and abide with. The appellant's failure to notify, whether it was negligently or willfully done, invites a liability on its part since ignorance of the law does not offer an excuse.

On the date set for hearing, the appellant's counsel, Mr. Mwita Waissaka and Justice John Mkwawa (rtd) requested the appeal to be argued by way of written submission so as to accord them time to consolidate their arguments. Dr. Nangella, learned counsel for the respondent, objected to the prayer made by the appellant on the reasons that, the respondent is ready to proceed with the hearing on the very day. Dr. Nangella did not tell the Tribunal how the respondent will be prejudiced if the order sought is granted. Consequently, the Tribunal being mindful of Rule 30(3) of the FCT Rules, 2012, granted the appellant's prayer and ordered the appeal to be disposed by way of written submission.

Arguing grounds 1 and 2 together, Mr. Mwita Waissaka and Justice (Rtd) John Mkwawa on behalf of the appellant submitted that on 6th December, 2013 when the matter came before the FCC for pre-trial hearing, all the preliminary filings and submissions had by then, been complied with as provided for by the FCC Procedure Rules, 2013. They contended that the respondent erroneously assumed that the above stated pre-trial hearing was final and hence proceeded to make and state a finding. In the appellant's view, the procedure was contrary to Rule 22(1)(6)(9) of the FCC Procedure Rules which are mandatory.

Learned counsel for the appellant insisted that, the appellant was never provided with the transcript of the oral representations as the law states under rule 22(9) mentioned above. Learned counsel asserted that failure to abide to the rules is crystal clear that the respondent never afforded the appellant with an opportunity of being heard, thus determining the matter without proper analysis of any new or additional evidence as per rule 23(1)(2) and (5) of the FCC Procedure Rules.

It was further submitted that if the pre-trial hearing of 6th December 2013 amounted to hearing, there is no evidence on record that, the appellant admitted the offence. Likewise, when parties held settlement discussions, did not amount to admission.

therefore the alleged transaction was not a merger. It was further stated by the appellant's counsel that by applying the cannons of statutory interpretation, it can be revealed that the respondent did stick to a restrictive approach of interpretation of the law in question, that is, the plain meaning rule of interpretation in defining what a "merger" is. Instead, learned counsel asserted that the respondent ought to have applied the mischief rule in construing the provisions of section 2 of the FCA.

The appellant's counsel maintained that the appellant and the two companies did not enter into a merger at any time. The appellant referred this Tribunal to the record of the appeal at page 22 of the provisional findings whereby the market share table at clause 5.3.2 shows that Morani Dairy Company Ltd and International Food Processors Ltd **were trading up to March 2008 when they sold part of their assets to the appellant**.

As regards ground 4 of the appeal, the appellant submitted in principle that transaction was not merger since the said vendor companies had ceased trading well before the purchase of assets took place. It was further asserted that the respondent erred completely in rejecting the failing defence because the said firms (Moran Dairies Co. Ltd and International Food Processors Ltd) are failed firms and the respondent had never proved whether they are still in existence and carrying on business.

Coming to ground 5 of the appeal, appellant's counsel submitted that the findings of the respondent have not proved any offence or alleged infringement of the law other than relying on the issue of non-notification of a merger. Learned counsel therefore submitted that since there was no merger, the appellant had no obligation to notify the respondent. Furthermore, it was asserted that there was no evidence that the appellant consummated the transaction negligently or intentionally.

On ground 6, it was the submission by the appellant's counsel that the same has already been argued together with ground 5 of the appeal and accordingly the appellant's counsel adopted the reasons therein, and requested the Tribunal to allow the appeal with costs.

In response, Dr. Nagella on behalf of the respondent argued grounds 1 and 2 separately. Dr. Nangela started his submissions on ground 1 of the appeal by first attacking the submissions made by the appellant that when the appellant entered appearance for oral hearing of the case on 6th December, 2013, the appearance before the FCC was for pre-trial hearing and that all the pleadings were complete. Dr. Nangella vehemently submitted that such submissions by the appellant's counsel are without merit, misconceived and legally unfounded for the reasons that the FCA and FCC Procedure Rules, 2013 do not provide for the so called "pre-trial hearing procedure". Instead,

Dr. Nangela asserted, rule 17 of the FCC Procedure Rules states clearly that the respondent will follow an inquisitorial procedure. It was his view that, since grounds 1 and 2 hinged on this point, then ground 1 of the appeal is a total misconception of the FCC Rules of Procedure and therefore should be dismissed.

Without prejudice to the foregoing, respondent's counsel submitted further that, the respondent acted in accordance with the principles of natural justice and with full observation of all procedural tenets of a fair and just decision. Learned counsel asserted that in determining whether the respondent adhered to the principles of procedural fairness or natural justice, one should take into account the context within which cases are dealt with at FCC. To buttress his argument, Dr. Nangela cited the decision of the Supreme Court of Canada in **Knight v. Indian Head School Division No. 19 (1990) 1 SCR 653.**

The respondent's counsel submitted that, the inquisitorial hearing procedure envisaged by the FCC Procedure Rules is a structured hearing process, and in that regard, procedural fairness should be determined by finding out whether the staged process was observed. The respondent asserted that the structured hearing process was fully observed in that the appellant was given full opportunity to be heard. In support of this argument, learned counsel stated that, as a first stage, the appellant was timely

served with a statement of a case which explained and informed the appellant the facts and the provisions of the law which formed the basis of the allegations of infringement and that was in accordance with rule 12(3) of the FCC Procedure Rules.

Learned counsel further stated that, as a second stage, the appellant in accordance with rule 19(3)(4) of the FCC Rules, 2013 was served with Provisional Findings, with facts, legal and economic analyses and reasons for the finding, proposed penalties and the evidence relied upon by the respondent. Furthermore, respondent's counsel stated that in accordance with rule 20(1) of the FCC Rules, the appellant was offered sufficient time to respond to the Provisional Findings including opportunity to controvert the evidence, but the appellant never offered any good evidence to water down or rebut the evidence in support of the provisional findings.

In addition, learned counsel asserted that in accordance with rule 22(1) and 21 read together with rule 19(6) and 22(1) the appellant was offered an opportunity to make oral representations as well as apply for settlement and that as per rule 22(4), the oral hearing was an opportunity offered to the appellant for any clarification of all issues of importance as might have been set out in its written submission in response to the Provisional Findings.

All these processes, Dr. Nangela submitted, were meant to ensure that the appellant was well informed of the allegations against it, the evidence relied upon, the reasons for the proposed findings and appropriately prepares its defence if any, was afforded time to be heard in defence of its case as well as opportunity to settle the matter should the appellant unequivocably admit the allegations. Respondent's counsel referred this Tribunal to the respondent's provisional findings at page 33 where the respondent notified the appellant on the inquisitorial procedure and their rights and obligations as provided for under rule 22 of the FCC Procedure Rules, 2013 and that the respondent was so generous to explain the right over and above than the rights provided under rule 20 and 21 of the FCC Procedure Rules, 2012.

Attacking the submissions by the appellant's counsel that the respondent's failure to abide to the rules was crystal clear that the respondent never afforded the appellant with the opportunity to be heard and thus determining the matter without proper analysis of any new or additional evidence as per rule 23 of the FCC Procedure Rules, Dr. Nangela categorically stated that rule 23 of the FCC Procedure Rules is basically meant for the application by the FCC requiring it to review the oral and written submissions as part of appraising the case. Learned counsel asserted that the review of the provisional findings and analysis

thereof is meant to find out if there is any new or additional evidence that may tilt the balances. Respondent's counsel was very categorical that for this rule to be invoked there must be new evidence. Since no new evidential material was submitted by the appellant in its written response to the Provisional Findings or during the oral hearing, the appellant's reliance on rule 23(1)(2) and (5) is of no assistance at all, learned counsel insisted.

Countering ground 2 of the appeal, the respondent's counsel submitted that the denial by the appellant that it never admitted the offence is unwarranted and the appellant is, by the operation of the doctrine of judicial estoppel, estopped from denouncing its own admission made in the course of a legally constituted quasi-judicial proceeding. The respondent's counsel contended that the doctrine of estoppel will operate against the appellant because, the appellant, having made an admission of the alleged infringements of the FCA during the proceedings through its two legal counsel, the appellant never withdrew its admission and its request for settlement, which settlement application was granted on the basis of the admission of the alleged infringements. The respondent, therefore, invited this Tribunal to adopt the decision of the High Court of Namibia **in Jin Casings & Tyre Supplies CC v Hambabi (I 1522/2008)(2013)NAHCMD 215 (25 July, 2013),** which he stated to be very persuasive, to make a finding

that the appellant is estopped from denying that admitted fact (that is, the admission it entered before the FCC during the oral hearing of the case).

The respondent's counsel submitted that in **Jin Casings case** (supra), the High Court of Namibia quoted with approval the decision of the Court of Appeal of England in **H Clark (Doncaster) Ltd v. Wilkinson 1 (1965) ALL ER 934 at 936** where Lord Denning MR held as follows:

> "An admission made by counsel in the course of proceedings can be withdrawn, unless the circumstances are such as to give rise to an estoppel. If the other party has acted to his prejudice on the faith of it, it may not be withdrawn..."

The respondent's counsel further submitted that, during the oral hearing of the case, counsel for the appellant admitted to the allegations and subsequently applied for settlement of the matter. The admission, therefore, estops the appellant as estoppel had arisen, learned counsel insisted. The respondent's counsel was of the firm opinion that in view of all these, the evidence and the conduct of the appellant speak volumes against the appellant's present denial and submissions on this point.

Resisting ground 3 of the appeal, the respondent's counsel attacked the submission made by the appellant that the transaction which involved the acquisition of the assets of its rival companies (competitors), Morani Dairy Co. Ltd and International Food Processor Ltd., was not a merger but a bonafide and/or a simple ordinary procurement of equipment and business premises.

Learned counsel submitted that it is common knowledge that if the words of a statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. Citing section 2 of the FCA, the respondent's counsel stated that the meaning of the word "merger" is very clear and straight forward and it also includes acquisition. With such clarity as to what amounts to a merger under section 2, the applicability of the mischief rules (as submitted by the appellant's counsel) is unwarranted, learned counsel strongly submitted.

In addition, the respondent's counsel submitted that the FCA is an economic Act, that is, an Act that addresses economic concepts and one with words or concepts that need to be interpreted in their economic sense. Learned counsel further submitted that the purpose of the merger control provisions is to regulate concentration in the market. In this regard, learned

counsel asserted that the appellant has misdirected itself to define the word "merger" as a normal English word, invoking the Oxford Dictionary. In competition law, in order to determine as to whether there is a merger, the competition authority examines the economic integration of the parties and the assets acquired whether they form part of business activity, respondent's counsel insisted.

Furthermore, learned counsel asserted that one of the essential elements which determines whether an acquisition was a merger or not is the issue of control. The respondent's counsel was of the firm view that by acquiring the assets of its competitors, the appellant was in control of the target firms and therefore the transaction amounted to a merger. In support of his argument, learned counsel referred this Tribunal to the decision of the EU Commission in 98/663/EC: Commission Decision of 25th June, 1997 and rule 2 of the FCC Procedure Rules.

Submitting further, Dr. Nangela was emphatic that the acquisition of the two companies by the appellant amounted to a notifiable merger since the value of the assets involved in the transaction alone, even before one considers the value of the assets of the acquiring firm (the appellant), exceeded by far the requirement of the threshold order which stands at Tshs. 800,000,000/= as per the Notification Threshold Order. The respondent's counsel

concluded his submission on ground 3 by inviting this Tribunal to dismiss the same for lack of merit.

Disputing ground 4 of the appeal, the respondent's counsel maintained that the defence of a failing firm raised by the appellant cannot stand. He pointed out that the defence of a failing firm is the declaration and demonstration of the fact that the acquired firms were in such serious economic difficulties that they were forced to terminate their activities and exited the market. The respondent's counsel further pointed out that the law in Tanzania recognizes this defence and sets out the criteria on how an acquiring firm should approach it (the respondent) to its aid when intending to acquire the failing firm. Quoting the provisions of section 13(1)(a) and (c), learned counsel contended that if the appellant is to rely on the defence of a failing firm, then it was duty bound, prior to consummation of the merger transactions, along with filing of its merger clearance under section 11(2), to submit an application under section 13(1)(a) and (c) of the FCA, stating that the merger be cleared since the target firms are failing firms. Dr. Nangela was insisted that no such application was made and the total and negligent disregard of the clear provision of the law should not be used to shield the appellant.

It was also submitted on behalf of the respondent that there is no evidence that the two companies have ceased to exist. "A company is born when it is incorporated and it dies when it is wound up. No winding up proceedings have ever been conducted in respect of the two companies whose assets the appellant acquired. More to say, the two agreements entered between the target companies were in the names of the companies, meaning that they had never ceased to exist as alleged. Since the two companies existed in business, the law (the FCA) ought to have been followed to the letter", learned counsel forcefully contended.

Counsel for the respondent further submitted that the respondent was right to reject or disregard the appellant's defence. He maintained that in order to succeed in relying on this principle the appellant ought to have proved to satisfaction of the respondent of the following conditions:

(i) That the failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking.

(ii) There is no less anti-competitive alternative than the merger.

(iii) In the absence of the merger, the assets of the failing company would inevitably exit the market.

Cementing his submissions on this point, learned counsel invited this Tribunal to consider the decision in **Citizen Publishing Co. V. United States, 394 U.S. 131 (1969) at page 137-138** in which the court gave guidance for the claims that the company is on the brink of collapse:

> "the failing company doctrine plainly cannot be applied in a merger or in any other case unless it is established that the company that acquires the failing company or brings it under dominion is the only available purchaser"

It was further submitted that, from the appellant's submissions and evidence collected during investigation, the appellant has not shown that it was the only saviour to the dying companies and, that there was no any alternative buyer. "This confirms the respondent's submission that the whole transactions were ill-motivated and concluded intentionally to eliminate its competitors in collection of raw fresh milk from the farmers", insisted respondent's counsel.

Challenging ground 5 of the appeal, counsel for the respondent asserted that, the appellant has submitted that there was no evidence that it consummated the transactions negligently or intentionally. Learned counsel pointed out that the appellant was either negligence or conducted the infringements intentionally because of the two main reasons.

The first reason advanced by the learned counsel is that the appellant is a legal entity registered under the Companies Act, Cap 212. As a good corporate citizen, a registered company like the appellant is expected to abide with all legal and regulatory requirements when discharging its business conduct. Learned counsel further stated that the FCA was enacted in 2003 and came into force on 12th May 2004 through Government Notice No 150 published on 14th May, 2004 and that the Notification Threshold Order was promulgated in 2006. Dr. Nangela was very categorical that as indicated in the respondent's decision, a finding was made to the effect that the assets of the two competitors of the appellant were acquired in total disregard of the requirements and procedures laid down by the provisions of the FCA. This, learned counsel said, signifies a highest degree of negligence since the company of the caliber of the Appellant ought to have respected the applicable laws that regulate business in Tanzania.

The second reason advanced by the respondent's counsel is that the two transactions were executed in a span of one month (February and March) and that the Asset Purchase Agreements were drafted by a lawyer who proceeded to witness the agreement. If it was not negligence on the part of the appellant, or a blatant and intentional acquisition intended to monopolize the market, one would have expected that the appellant and the lawyer it engaged to draft the agreements

would have first and foremost conducted a regulatory compliance due diligence exercise. Doing so would have brought to the attention of the appellant the fact that the two transactions needed approval or clearance of the FCC and one would then say that the appellant acted carefully and responsibly. Since the appellant failed to do so, the appellant was grossly negligent or acted intentionally with a motive to eliminate its competitors in the business of collecting raw fresh milk from the farmers and monopolize the market. No other theory to the contrary can be deduced in this respect", learned counsel strongly submitted.

The respondent concluded its submissions on ground 5 by insisting that since the transactions were merger as defined under section 2 of the FCA and were subject to notification as required by Section 11(2) of the FCA and the Notification Threshold Order, its execution without observing the regulatory requirements manifested the ill- motive/intent and negligence on the part of the appellant.

Objecting to ground 6 of the appeal, the respondent asserted that, since the transactions amounted to notifiable mergers, (as submitted in Ground 3 above), and since there was no justification from the appellant as to why it did not notify the respondent as required by section 11 (2) or why the appellant did not apply for exemption under section 13 of the FCA, there is

no justification of legality of the appellant's conduct in the absence of a notification clearance certificate from the respondent or an exemption order given by the respondent under Section 13 of the FCA. Dr. Nangela therefore submitted that ground 6 of the appeal is baseless with no merit and accordingly ought to be dismissed as well.

Learned counsel concluded his admissions in reply by asking this Tribunal to uphold the decision of the respondent and dismiss the entire appeal with costs. By way of a rejoinder, counsel for the applicant basically submitted by emphasizing and reiterating his submissions in chief in support of the appeal and prayed that the appeal be allowed with costs.

We have carefully considered the submissions and arguments advanced by the contending learned counsel in this matter in the context of statutory framework reproduced herein below together with case law. We deem necessary to re-visit the law related to merger in Tanzania in particular Fair Competition Act, act No. 8 of 2003

Sections 2, 11(1)(2)(5) and (6), 13(1)(a) and (c) of the FCA provides as follows:

> "Section 2 - Merger means an **acquisition of shares, a business or other assets,** whether inside or outside Tanzania, **resulting in the change of control of a**

business, part of a business or an asset of a business in Tanzania".

- Acquisition **in relation to** shares or **assets means acquisition, either alone** or jointly with another person , of any legal or equitable interest in such shares or **assets** but does not include acquisition by way of charge only

Section 11(1) - A merger is prohibited if it creates or strengthens a position of dominance in a market

(2) - A merger is notifiable under this section **if it involves turnover or assets above threshold amounts the Commission shall specify from time to time by Order,** in the Gazette, calculated in the manner prescribed in the Order.

(5) - Without limiting the operation of sub-section (1), **a person shall not give effect to a notifiable merger unless it has, at least 14 days before doing so, filed with the Commission a notification of the proposed merger supplying such information as the Commission may by Order require to be included in such notification.**

(6) - Any person who intentionally or negligently acts in contravention of the provisions of this section, commits an offence under this Act".

13(I) - The Commission may, ***upon the application of a party to a merger***, grant an exemption for that merger, either unconditionally or subject to such conditions as the Commission sees fit, if the Commission is satisfied in all the circumstances that paragraph (a) and either paragraph (b) or (c) applies:

(a) **the merger is likely to create or strengthen a position of dominance in a market;**

(b) ....

(c) in the case of a merger resulting in the change of control of a business, **the business faces actual or imminent financial failure and the merger offers the least anti-competitive alternative use of the assets of the business.** (Emphasis by the Tribunal).

Order 2 of the Notification Threshold Order provides as follows:

2 –(1) It is hereby specified that the threshold for notification of a merger is **Tanzania Shillings Eight Hundred Million only (Tshs. 800,000,000/=).**

(2) The calculation of the threshold shall be based on **the combined market value of assets of the merging firms.** (Emphasize by the Tribunal).

Rules 2, 12(1)(3), 19(3)(4)(6), 20(1), 22(1)(4)(6)(9) and 23(1)(2)(5) of the FCC Procedure Rules provide as follows:

"Rule 2 - Acquiring firm means-

(a) that, as a result in any transaction done in circumstances set out in a merger as defined under section 2 of the Act, would ***acquire or establish direct or indirect control over the whole or part of the business of another firm;***

(b) that has ***direct or indirect control over the whole or part of the business of a firm*** *contemplated in paragraph (a)".*

"Target firm means a firm-

(a) the whole or part of whose business would be ***directly or indirectly controlled by an acquiring firm*** *as a result of a transaction in any circumstances set out in a merger as defined under section 2 of the Act;*

(b) that, as a result of a transaction in any circumstances set out in a merger as defined under section 2 of the Act, ***would directly or indirectly transfer direct or indirect control of the whole or part of, its business to an acquiring firm****; or*

(c) the whole or part of whose business is ***directly or indirectly controlled*** *by a firm contemplated in (a) or (b)."*

Rule 12(1) - Where the Investigation Department is of the opinion that here is a case to answer, the Investigation Department shall refer the matter to the Director of Compliance.

(3) - Subject to sub-rule (1), the main parties **shall be provided with a statement of the case setting out the facts of the case and the relevant provisions of the law alleged to have been contravened.**

Rule 19(3) – The Commission shall, where it takes the view that an infringement has been committed or is likely to be committed, **make provisional findings and issue such findings with reasons thereof to the respondent requiring the respondent to make written representation within a specified period.**

(4) – The provisional findings specified under sub-rule (3) shall set out-

(a) the facts, legal and economic assessment that constitutes a finding of an infringement.

(b) any action and reasons which the Commission proposes to take, including imposition of a financial penalties or issuance of directives to refrain from the continuity of an infringement.

(6) – The respondents may apply for settlement discussions in the manner prescribed under rule 21.

Rule 20(1) – A recipient of the provisional findings **shall have the right to make a response in writing.**

Rule 22(1) – A recipient of provisional findings shall, during oral representation, and upon application not later than 14 days after the prescribed date of submission of written representation, **have a right to make oral representations on matters in the provisional findings.**

(4) – Oral representations shall be used by the recipient of provisional findings as an **opportunity to highlight issues of particular importance to their case, which have been set out in the written submissions.**

(6) – As a general rule, any matter raised during oral representation stage shall be limited to matters

already submitted to the Commission in accordance with sub-rule (2)(b).

(9) – A transcript of the oral representations meeting shall be provided to the respondent for the purpose of confirming its accuracy and identification of any confidential information.

Rule 23(1) – The Commission **shall consider all written and oral representations to appraise the case as set out in the provisional findings and to assess whether the conclusions reached in the provisional findings continue to be supported by the evidence and facts.**

(2) – Any new evidence obtained during determination shall, **where it supports the provisional findings, and which is intended to be relied upon in establishing the commission of an infringement, be communicated to the provisional finding recipient and the Commission shall afford the recipient an opportunity to respond to the new evidence.**

(5) – The Commission shall, after considering the provisional or supplementary provisional findings, **make a final finding which will form the basis of Commission's decision".** (Emphasis by the Tribunal).

Before we proceed with our decision, we would first like to appreciate counsels for their well researched submissions and the able manner in which they presented their arguments.

Starting with ground 1 of the appeal, the key issue before this Tribunal is whether the respondent failed to act in accordance with the principles of natural justice and procedural fairness, in particular failed to attend the appellant opportunity to be properly heard, hence occasioning a miscarriage of justice. It was a submission by the appellant's counsel that the appellant was not afforded with an opportunity to be heard as there was no proper hearing. With much respect, we find it extremely difficult to agree with that submission. Sincerely, to this Tribunal, the appellant was given a fair hearing, in the context of the FCC Procedure Rules. As correctly submitted by the respondent's counsel, the processes enunciated in the FCC Procedure Rules were meant to ensure that the appellant was well informed of the allegations against it, the evidence relied upon, the reasons for proposed findings, and, appropriately prepares the defence if any, is afforded time to be heard in defence of its case as well as opportunity to settle the matter should be unequivocally admit the allegations. To this Tribunal, these processes fully satisfy the requirement of procedural fairness, as enunciated in the FCC Procedure Rules. Looking at the respondent's provisional findings at page 33, the appellant was explained in details what was supposed to be done and we hereby quote:

"The Commission wishes to reiterate here that, although it adopts an inquisitorial approach in the course of handling complaints before it, Rule 20 of the FCC Rules **2013, requires the recipient of the provision findings to make written response to the Commission**. Take further note that **pursuant to Rule 22 of the FCC Rules 2013, the recipient of Provisional Findings**, if it so wishes, may apply to the Commission for oral representation.

Pursuant to Rule 19(3), the respondent is hereby notified to file, if it so wishes in terms of rule 20(1) of the FCC Rules of Procedure 2013, a written submission in reply to these provisional findings within 21 days from the date of service of this 'provisional findings'. Should it so require, the respondent can within 14 days after the prescribed date of submission of written representations, make an application to the Commissions, for an oral audience. The Commission also wish to reiterate that under rule 19(6) and 21 of the FCC Rules 2013 there is a room for settlement between the parties involved in a complaint if they so wish".

To this Tribunal, fair hearing was full given to the appellant, in accordance with the FCC Procedure Rules being a structured or

staged hearing process as far as this particular matter is concerned. Fair hearing must be limited to the rules of the particular platform. FCC being an inquisitorial body, has its own procedural rules. In the whole world, every administrative body is the master of its own procedure and need not assume the trapping of a court as it was held by the Supreme Court of Canada in the case of **Knight v. Indian Head School Division** (supra) which we find to be very persuasive. Here the requirements of procedural fairness were satisfied. Every opportunity in terms of FCC Procedure Rules was given to the appellant who had to say what it (appellant) wanted to say in terms of FCC Procedure Rules as clearly proved by the quoted part of the respondent's provisional findings.

We have also noted that part of appellant's complaints is based on rule 23 of the FCC Procedure Rules, 2013. We share the same view as submitted by the respondent's counsel that basically rule 23 is meant for the application by the FCC requiring it to review the oral and written submissions as part of appraising the case. The review of the provisional findings and analysis thereof is meant to find out if there is any new or additional evidence that may tilt the balances. In order for this rule to be invoked, there must be new evidence. We are therefore of the firm view that since no new evidential material was submitted by the appellant in its written response to the provisional findings or during the

oral hearing, the appellant's reliance on rule 23(1)(2) and (5) is of no assistance.

In our view, the respondent went over and above to explain the rights of the appellant than the rights provided for under rule 20 and 21 of the FCC Procedure Rules. The appellant was given all the rights and procedure. The appellant failure to utilize the same cannot be heard complaining. Thus, ground 1 of the appeal is dismissed for lack of merit.

As regards ground 2 of the appeal, the main issue before us is **whether the respondent erred in law and fact in holding that the appellant admitted the offence**. It was submitted on behalf of the appellant that in making its findings, the respondent erroneously stated that the appellant admitted the offence. Without wasting a lot of time on this ground, we must hurriedly say that the settlement discussion, in the context of the case, was a process that followed the appellant's admission to the allegations leveled against it. Otherwise, the process under the FCC Procedure Rules cannot be set in motion unless a party so conceded to the allegations against it and opts to settle the matter instead of dragging it to its fullest stage of issuing final findings.

The appellant having been given the opportunity to be heard, and having admitted the offences and applied for settlement, applicability of Rule 22(9) of the FCC Procedure Rules, in our view, becomes redundant. Moreover, when the appellant was summoned to make oral submissions regarding his application for extension of time for further settlement discussion, as shown in the Tab 4 & 5 of the respondent skeleton argument. The appellant abandoned the process and never appeared before the respondent to argue its case or proceed with the settlement process, as can be proved by chronological of events:

(i) On 16th December, 2013 the appellant filed their application for settlement. The respondent granted the application for settlement discussions, and scheduled the settlement discussion to be held on 10th January, 2014 and the appellant confirmed its commitment to attend to the discussions as scheduled. The discussions commenced on 10th January, 2014 (scheduled), and were to proceed on 31st January, 2014.

(ii) On 31st January, 2014 the appellant appeared for the continuation of the settlement discussions as scheduled but applied for a three (3) months extension of time to allow time for consultation with its shareholders.

(iii) On 5th February, 2014 the appellant lodged a formal application for extension of time.

(iv) On 7th February, 2014 the respondent invite the appellant for an oral hearing of its application or extension of time and the hearing was scheduled to be held on 11th February, 2014. However, the appellant failed to appear on ground that its Legal Counsel, Mr. Waissaka was engaged in a High Court Case (Commercial Division).

(v) On 11th February, 2014 being mindful of the procedural requirements if Rule 25 of the FCC Rules, 2013, the respondent reached out to the appellant by phone and informed the appellant that the hearing of the application has been re-scheduled to 12th February, 2014.

Indeed, it is apparent from the record that the appellant requested for an adjournment when the matter was set for settlement. The appellant's counsel never appeared despite the appellant being reminded. In our view, this amounted to leaving the matter in the hands of the respondent. It is clear from the records that the appellant admitted to the offence and the mercy it was seeking through the political channel was a form of mitigation of the impending penalty which was to be imposed by the respondent as it is evident from a letter with Ref. No. FA.536/619/01 dated 3rd July, 2014 in Tab 6 attached to the

respondent's reply to the memorandum of appeal. Consequently, we find that ground 2 also lacks merit and it is hereby dismissed.

Coming to ground 3 of the appeal, the issue is whether the alleged transactions amounted to a merger and if so, whether such a merger was notifiable to the respondent. Counsel for the appellant submitted that the acquisition of the two companies did not amount to a merger but a bonafide purchase and/or a simple ordinary procurement of equipment and business premises. The appellant's counsel invited this Tribunal to apply the mischief rule to define what a merger is under section 2 of the FCA. With due respect, we cannot accede to that submission. We share the same view as submitted by the respondent's counsel that if the words of a statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense.

The meaning of the word "merger" under section 2 of the FCA is clear and straight forward. It provides that a **"merger"** means **an acquisition of shares, a business or other assets, inside or outside Tanzania, resulting in the change of control of a business, part of a business or an asset of a business in Tanzania." Thus, merger includes acquisition**. Section 2 also defines what amounts to acquisition. It provides that "acquisition" in relation to shares or assets means **acquisition,**

either alone or jointly with another person, of any legal or equitable interest in such shares or assets but does not include acquisition by way of charge only. With such clarity as to what amounts to a merger under section 2, we are of the well considered opinion that the applicability of the Mischief Rule is unwarranted.

We also agree with submission by the respondent's counsel that, the FCA is an economic Act, *that is*, an Act that addresses economic concepts and one with words or concepts that need to be interpreted in their economic sense. We are guided, for instance, by provisions of section 2 of the FCA which provides that the words **competition, market** and **dominant position** in the **market are economic concept and should be interpreted accordingly**. We should point out that the purpose of the **merger control provisions** is to **regulate concentration in the market** (refer to section 11 (1) of the FCA). As correctly pointed out by the respondent's counsel, the appellant has misdirected itself to define the word merger as normal English word, by invoking the Oxford Dictionary. In competition law in order to determine as to whether there is a merger, the competition authority examines the **economic integration of the parties and the assets acquired whether they form part of business activities.**

The view that a merger definition will include the acquisition of assets is also supported by the International Competition Network (ICN) which is an international organization dedicated to promote competition globally. According to guidelines issued by ICN on **"Recommended Practices for Merger Notification and Review** Procedure", transactions in which the purchaser acquires all or substantially all of the seller's business assets are almost universally viewed as qualifying transaction for merger review purposes.

According to the final findings of the respondent, the appellant and two acquired companies were collecting raw fresh milk from the farmers. In order to operate this kind of economic activity a party is required to have storage facilities (warehouse) and cold machines (because of characteristics of the product of its perishability). It is not in dispute and is a fact admitted by the appellant, that it acquired machines of the two companies. The acquired assets were the assets of **economic entities to which market turnover was attributed, hence the transactions squarely fall within the definition of a merger as defined under section 2 of the FCA.**

We must say with emphasis that we totally agree with the submissions by the respondent's counsel that in Tanzania, not all mergers are subject to the notification procedure. **It is only**

those that meet a certain criteria or threshold. So, it doesn't matter as to whether the appellant acquires few assets or whole assets of the company as the appellant tries to allege on the basis of the amount of assets acquired that they were few. Once it is proved on the affirmative that the transaction in question was a merger as defined under section 2, as is the case in this appeal, FCC should be notified. As correctly submitted by the respondent that according to Section 11(2) of the FCA, a merger is notifiable under this section if it involves turnover or assets above threshold amounts, the respondent, shall specify from time to time by Order, in the Gazette, calculated in the manner prescribed in the Order. This section should be read together with the Notification Threshold Order.

The Notification Threshold Order provides that a merger is notifiable if it involves a combined turnover or assets above Tshs. 800 million. Thus, by virtue of this provision and the Notification Threshold Order, whether the assets acquired were few, if they are combined with those of the acquiring firm and exceeds the threshold (Tshs. 800,000,000) the acquiring firm (in this appeal, the appellant) is required (and here was required) to notify the respondent (FCC), failure of which results into a breach punishable under the law. **In this appeal, the total combined value of the merger in question is Tshs.**

11,068,422,500.00 which is far beyond the Notification Threshold Order. We also find it interesting to note that the assets involved in the transaction alone, even before one considers the value of the assets of the acquiring firm (the appellant) exceeds by far the requirement of the Notification Threshold Order, and thus, the transaction ought to have been notified.

We therefore find that the two transactions amounted to a merger as defined under section 2 of the FCA and a kind of merger that ought to be notified as per the requirement of Section 11(2) of the FCA, read together with the Notification Threshold Order.

As we have already stated above, the act of the appellant acquiring the assets of Morani Dairy Company Ltd and International Food Processors Limited amounted to a pure merger as defined by section 2 of the FCA, 2003. The issue complained of is contravention of the FCA, 2003. Merger being defined by section 2 of the FCA, we cannot sincerely go against that section. There is no ambiguity in the section. As correctly admitted by the appellant that they acquired the assets of the **two companies, that clearly amounts to a pure merger and nothing else**. Thus, in the circumstances we find that ground three lacks merit, it is dismissed.

As for ground 4 of the appeal, the issue to be determined by this Tribunal is whether **at the time of acquiring the assets of the two companies, the same were no longer in business.** The appellant raised a defence of a failing firm to justify the acquisition of the two companies. Without much ado, it is our view that this ground of appeal must fail for the following reasons.

First, there is no any evidence on record to prove that the two acquired companies ceased to exist by the time they were acquired as alleged by the appellant. Secondly, if at all the acquired firms were facing imminent failure, then the appellant ought to have, prior to the consummation of the merger transaction, applied for merger clearance under section 11(2) along with an application under section 13(1) (a) and (c) stating that the merger be cleared since the target firms are failing firms, something which the appellant never did.

We would, however, like to point out that even if the appellant were to apply for a merger clearance, for it to succeed in relying on the principle of the failing firm, the appellant ought to have proved to the respondent of the following conditions:

(i) That the failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking.

(ii) That there is no less anti-competitive alternative than the merger, and

(iii) That in the absence of the merger, the assets of the failing company would inevitably exit the market.

We would also like to emphasize that the above principles have been embodied in section 13 of the FCA which require a party to a merger to apply to the respondent where the merger creates or strengthens a position of dominance in the relevant market and show that **the business faces actual or imminent financial failure and the merger offers the least anti-competitive alternative use of the assets of the business**. The point to note is that if the two **acquired companies had stopped doing business as alleged**, the appellant was supposed to apply to the respondent showing that the assets **would exit the market and the appellant offered a least anti-competitive alternative use of the assets of the business.**

Turning to ground 5, the main issue is whether the alleged infringements of the FCA were committed negligently or intentionally. What can be gathered from the submissions and arguments advanced by both parties together with the record of appeal, we are of the view that the manner in which the two transactions were carried out proves negligence on the part of the

appellant and not ill-motive. We hold so because the assets of the two companies were acquired in disregard of the requirements and procedures laid down by the provisions of the FCA. One would have expected that in carrying out the transaction, the appellant would have first conducted a regulatory compliance due diligence exercise which would have then brought to the attention of the appellant the fact that the two transactions needed approval or clearance of the respondent for one to be in a position to say that the appellant acted carefully and responsibly. Since this was not done, it is obvious that the appellant was grossly negligent. In view thereof, this ground of appeal fails as well.

With regard to ground 6, which is the last ground of this appeal, we must say that we find it extremely difficult to agree with the appellant's submission on this ground. As we have already held in our decision, the transaction not only amounted to a merger but also a merger notifiable to the respondent. Since there is no justification from the appellant as to why it did not notify the respondent as required by section 11(2) or why the appellant did not apply for exemption under section 13 of the FCA, it is therefore our firm view that there is no justification of legality of the appellant's conduct in the absence of a notification clearance certificate from the respondent or an exemption order given by the respondent under section 13 of the FCA.

Since this is the first merger case, we find it extremely important to say one or two things before we conclude our judgment. It is undisputable that the merger in question has been in operation since 2009 without the respondent being notified by the appellant as required by the law. We would like to ask ourself: Are there any other remedial measures, apart from imposition of a fine, that can be taken by the respondent? Does the respondent still have powers to review the said merger? We find the answers to these two questions to be in the affirmative. Notification of a merger, we would say, is a **standstill obligation under our law.** The validity of a transaction carried out in contravention of the standstill obligation is, as a general rule, **dependent on clearance or approval by the Fair Competition Commission**. The respondent retains the power to review such mergers/concentrations. Where a merger is implemented in violation of the standstill obligation (as the merger in question) (the so called "gun-jumping"), the Competition Authority should take **measures** with a view to **ensuring that any negative impact on effective competition in the market arising from the implemented transaction are allayed to the extent possible** and in any event are not **protracted** or **rather prolonged.**

We would also like to point out that where a merged has been implemented in contravention of the standstill obligation and a decision has not yet been taken, the respondent may take interim measures appropriate to restore or maintain conditions of effective competition for instance, the respondent ensures that voting rights in the company over which control has been acquired are not exercised until the respondent's decision has been taken. In situations where a merger has already been implemented and the respondent find the merger in question to be ant-competitive, the respondent may require the parties concerned to dissolve the merger, in particular through the dissolution of the merger or the disposal of all shares or assets acquired so as to restore the situations prevailing prior to the implementation of the merger. In circumstances where restoration of the situation prevailing before the implementation of the merger is not possible through the dissolution of the merger, the respondent may take any other measure appropriate to achieve such restoration as far as possible. The respondent may order any other appropriate measure to ensure that the parties concerned dissolve the merger or take other restorative measures.

In addition, we are also of the view that the Fair Competition Commission/respondent can also clear an originally ant-competitive merger which has already been implemented (as the present one) subject to commitments submitted by the parties.

Where accepting such commitments, the respondent has to ensure that the modification to the transaction which was implemented in violation of the standstill obligation is such as to ensure that effective competition is restored and that competitive problems arising from the implemented transaction are not protracted. The respondent will apply the same considerations as to the design of remedies as in the case of non-consummated mergers.

Furthermore, we would like to emphasize that irrespective of the outcome of the competitive assessment of the implemented merger, that violation of the standstill obligation (non-notification of a merger) constitutes a serious breach of the FCA which attracts imposition of fines. Indeed, the FCC/respondent has discretion to impose fines on the parties (of up to 10% of the aggregate turn-over of the undertaking concerned) if they fail to notify a merger prior to its implementation or if they otherwise breach the standstill obligation by implementing the merger prior to it having been cleared by the FCC. This position of the law is also the same as in the European Union. In case **T-332/09 Electrabel V. Commission,** the EU's General Court confirmed the decision of EU Commission to impose fines for non-notification of a merger. In that case, the European Commission imposed a fine of EUR 20 million on Electrabel, as electricity producer and retailer belonging Suez Group (now GDF Suez) for acquiring control of Campagnie Nationale du Rhone (CNR), another

electricity producer, prior to having notified and received approval of the merger under the EU Merger Regulation. Similarly, the European Commission had imposed fines for non-notification of a merger in other two cases, case **IV/M.920- Samsung/AST and case IV/M.969-A.P. Mollar** both of which were confirmed by the EU's General Court.

Equally important, we would also like to point out that in most jurisdictions, the core purpose of merger review is to protect competition; so that mergers do not harm consumers. Most mergers do not harm competition. Indeed, some may be pro-competitive because they benefit consumers by lowering costs (through the achievement of efficiencies such as economies of scale) and/or increasing innovation. Many others are competitively neutral, for example because post-merger competition will remain and continue to discipline the merged firm and its rivals.

However, in some situations, mergers can have an anti-competitive effect on the market, enhancing the market power of the merging parties and thus harming consumers. Several theories of consumer (or competitive) harm have been developed within the context of mergers. Unilateral effects and co-ordinated effects theories are the two mainstream theories of competitive harm. These theories envisage various ways in which a merger

may result in consumer harm (for example, higher prices and/or a lower output, quality, variety or innovation)

A central question in merger assessment is how the relevance of economic theories should be evaluated in the practical application of competition law and rules. It therefore follows that assessing the relevance of a theory to the actual transaction is critical because with the selected assumptions, it is possible to build a theoretical model to support any view. It is therefore important that any model used to assess the likely competitive effects of a merger fits the industry to which it applies. In our view, this implies that competition authority needs to conduct substantial factual analysis in support of its assessment. This is the position also adopted by International Competition Network in "ICN Investigative Techniques Handbook for Merger Review".

We would also say it is implicit that the basic merger analysis relies on understanding the effects that a merger may have or the expected state of competition in a market. A central concept of any competition test is therefore a comparison of competition with and without the merger. The competitive situation without the merger is what is sometimes referred to as "the counter factual".

In most cases, the best starting point for the counter factual would be the prevailing conditions of competition, that is, the

conditions of competition in order to reflect, as accurately as possible, the nature of rivalry without the merger.

It is worth noting that the analysis of merger also depends on the form of the merger under consideration. Mergers can either be horizontal or non-horizontal. **A merger is said to be horizontal when firms that are competitive** at the same level of production and/or distribution of a good or service, that is, in the same relevant market combine or integrate. For example, Oil Company which already owns a chain of petrol stations takes over another petrol station or a competitive chain of petrol stations. Horizontal mergers are the most common type of merger where competition issues arise. This is so because horizontal mergers are normally formed simply to dominate the market and thus be able to reap the advantages of monopoly power. The monopolist would buy its competitor in order to lessen competition. When operating alone, the monopolist may not do research for enhanced efficiency, may also wish to cut down the level of production to create scarcity and ultimately increasing price. Monopoly price is unreasonably high which is detrimental to the household income and the consumer welfare in general. This explains why horizontal mergers are always put under strict scrutiny by competition authorities before they are approved.

Non-horizontal mergers are basically in two forms, that is, vertical and conglomerate. A merger is said to be vertical when

the firms that operate at different but complementing levels in the chain of production (for example, manufacturing and an upstream market for an input) and/or distribution (for example, manufacturing and downstream market for re-sale to retailers) of the same final product combine. In purely vertical mergers, there is no direct loss in competition as in horizontal merger because the parties' products did not compete in the same relevant market. As such, there is no change in the level of concentration in either the relevant market. **Vertical mergers have significant** potential to create efficiencies largely because the upstream and downstream products or services complement each other. However, vertical mergers may sometimes give rise to competition concerns. In general, vertical merger concerns are likely to arise only if market power already exists in one or more markets along the supply chain.

Conglomerate mergers involve firms that operate in different markets, without a vertical relationship. They may be product extension mergers, that is, mergers between firms that produce different but related products or pure conglomerate mergers, that is, mergers between firms operating in entirely different markets (for instance, a passenger transport company acquiring a super market). Unlike horizontal mergers, conglomerate mergers do not entail the loss of direct competition between the merging firms in the same relevant market. Conglomerate mergers are potential for efficiency gains when the products of the companies

involved are complementing to each other. Therefore, conglomerate mergers normally do not harm consumers. However, in rare cases, such mergers may raise competition concerns of foreclosure, or possibly facilitating collusion and this is particularly in related or neighboring markets.

In view of the above observation, we are of the well considered opinion that the two transactions undertaken by the appellant (Tanga Fresh Ltd) to acquire business assets of Moran Dairy Co. Ltd and International Food Processors Ltd competing in the same relevant market amounts **to a horizontal merger**, the product market being raw fresh milk and the geographical market being Tanga region.

The data collected by the respondent indicates that in accordance with section 5(6) (b) of the FCA the appellant is at the dominant position as it controls more than 35% of the market. Going by that, it clearly shows that it is true that this is an indication that by acquiring the assets of the two firms, the appellant has **strengthened its dominant position and may give or lessen competition or restrain the market for a significant period of time**.

We have noted with curiosity the manner in which the respondent has provided a detailed analysis of the merger in question and synopsis of the events pertaining to this appeal. However, this Tribunal would like to emphasize on the following few things.

That it is an undisputable fact that based on economic theory the mergers have positive or negative effects in the economy. Under positive side, among other things, mergers are expected to contribute to greater efficiency in the production or distribution of goods and services in the market and the economy at large. On the other hand, mergers may result in abuse of market power and reduce competition and become detrimental to consumers and the economy at large. Fundamentally, this is the essence as to why mergers ought to be notified to the FCC prior to consummation for proper scrutiny, authorization and guidance if any. In some cases, some of the mergers after scrutiny are completely not allowed due to detrimental effect to the relevant market and economy.

Moreover, in our view, when mergers are analyzed, the tools of analysis should be applied together with consideration on the country policy needs. The Sustainable Industries Development Policy **(SIDP)** (1996-2020) emphasizes that the industrial sector is still relatively small in terms of various indicators. For example, during the time of its inception i.e. in 1996, it indicated that for a span of ten years, the sector's annual average contribution to GDP was around 8.0%; and the statistics of budget speech for financial year 2014/2015 issued by the Minister for Industry and Trade in May 2014, show that since 2006 up to 2013 the sector's annual contribution to GDP was increasingby less than 1% which is yet a relatively low growth rate.

One of the goals of the Sustainable Industries Development Policy is contribution to human development and creation of employment opportunities. Among the strategies to support this national goal is such that the industrial sector will implement industrial development of agro-allied industries like food, textiles, building materials, leather and leather product industries. Raw fresh milk fall under food industries hence, contributes to the achievement of the outlined national goal in the SIDP. Another aspiration of the Sustainable Industries Development Policy is contribution to economic transformation for achieving sustainable economic growth. In this aspiration the major goal is to promote sustainable productive base which maximizes the growth and sustainability of economic growth.

Competition policy addresses the problem of abuse of dominance, anti-competitive agreements and market imperfection arising from monopolistic behaviour. Its objectives are well reflected in the FCA, which are to enhance the welfare of the people of Tanzania as a whole by promoting and protecting effective competition in markets; and to prevent unfair and misleading market conduct throughout Tanzania. This is in order to increase efficiency in production, distribution and supply of goods and services; promote innovation; maximize the efficient allocation of resources; and protect consumers. It is important to consider the two mentioned policies when evaluating mergers that fall under industrial sector such as the one in this appeal.

It is the view of this Tribunal that given the country's industrial policy needs which are well reflected in the Sustainable Industries Development Policy – SIDP (1996-2020) and Competition Policy (2003), this merger would result to contribution to greater efficiency in the production or distribution of raw fresh milk in Tanga region had it followed legal procedures prescribed in the FCA. It is likely that when considering the industrial policy needs this merger would have been evaluated in accordance with Section 13(1)(b) of the FCA had the appellant applied for clearance and satisfied the conditions of a failing firm defence.

Moreover, rule 17 of the Fair Competition Tribunal Rules 2012, (hereinafter referred to as "the FCT Rules") states that "a person who has sufficient interest in the outcome of the appeal may, within seven days of the publication of the notice, file an application to the Tribunal to intervene in the proceedings." Pursuant to this rule, the Tribunal issued a public notice in respect of this appeal on 1st October 2014, and waited for seven days. Apparently, even up to now, there has been no intervention proceedings instituted in respect of this matter, meaning that there was no any person or firm who or which had sufficient interest in the outcome of this appeal. The application of Rule 17 was also a market test by the Tribunal to try to learn as to whether the formed merger has been causing harm to the players and consumers in the relevant market. However, the Tribunal was satisfied that there has not been any.

Notwithstanding what we have said above, consummation of this merger in question prior to it having being notified to the respondent has violated procedures laid down in the FCA. We have also noted that the merger in question has been in operation since its inception in 2009. Therefore, the appellant has earned a reasonable amount of profit from the combined business and in any case would be in a position to observe financial obligations resulting from the legal consequences thereof.

In the premises, we dismiss the entire appeal and accordingly uphold the decision of the respondent and the fine imposed thereat. The appellant is condemned to pay costs of this appeal.

It is so ordered.

Judge Z.G. Muruke – Chairman

Mrs. Nakazael L. Tenga – Member

Mr. Onesmo L. Kyauke – Member

29/04/2015

Judgment delivered this 29th day of April, 2015 in the presence of Mr. Mwita Waissaka for the appellant, Dr. Deo Nangela for the respondent and Mr. Beda Kyanyari Tribunal Clerk.

Judge Z.G. Muruke – Chairman

Mrs. Nakazael L. Tenga – Member

Mr. Onesmo L. Kyauke – Member

29/04/2015