IN THE FAIR COMPETITION TRIBUNAL

AT DARE S SALAAM

TRIBUNAL APPEAL NO. 9 OF 2016

ANHEUSER – BUSCH INBEV SA/NV............1ST APPELLANT

TANZANIA BREWERIES LTD......................2ND APPELLANT

VERSUS

FAIR COMPETITION COMMISSION................RESPONDENT

JUDGMENT

The Appellants, Anheuser – Busch InBev SA/NV (1st Appellant) and Tanzania Breweries Limited (2nd Appellant) were aggrieved by the decision and orders of the Fair Competition Commission (FCC) who is the Respondent herein, in approving a merger notification relating to the acquisition of indirect control by the 1st Appellant through indirect acquisition of majority shares held by SABMiller PLC Limited & Tanzania Breweries Limited who is also the 2nd Appellant, in Tanzania Distilleries Limited (TDL) "the Target Firm". The reasons for the decision were issued by the FCC on 03/10/2016 whereby the intended merger was prohibited along with an interim compliance order. Subsequently, in November, 2016, the FCC issued a compliance order with divestiture conditions. The Appellants were aggrieved by the

decision and order of the FCC and subsequently preferred this appeal against the whole of the decision and orders of the Respondent on the following grounds, namely:

1. The Commission erred procedurally in continuing to assess the First Appellant's merger application lodged with the Commission on 3rd February 2016 relating to the acquisition by the First Appellant of SABMiller PLC after he Commission no longer had jurisdiction to do so. The Commission's Extension Certificate dated 17th May 2016 extended its review period to 16th June 2016. The Commission's letter dated 15th June 2016 with subject "No Approval" purported to extend the Commission's review period although it had no authority to further investigate the merger after the expiry of the extended review period. The Commission was, therefore, not empowered to further enquire and/or make any decisions in relation to the merger application after its authority ended with the expiry of the statutory time limits set out in Sections 1(3) and 11(4) (a) of the Fair Competition Act, 2003 (the Act/FCA) and in doing so the Commission acted ultra vires the Act.
2. The Commission erred in approving the merger between First Appellant and SABMiller PLC for the near beer and non-alcoholic beverages markets only, and then erred procedurally in directing the merging parties to separately notify First Appellant's acquisition of the Second Appellant's

subsidiaries because, *inter alia*, approval of First Appellant's acquisition of SABMiller Plc should include approval of First Appellant's acquisition of control over the Second Appellant and all the products that produced and/or distributed by Second Appellant (and its subsidiaries) and, in directing the merging parties to file separate applications for each of SABMiller's Tanzanian subsidiaries, the Commission acted *ultra vires* the Act.

3. The Commission erred in finding that AB InBev's proposed acquisition of indirect control of TDL will strengthen the merger firm's position of dominance in the relevant market in that, *inter alia*:-

3.1 The Commission failed to provide a legal basis or grounds for its conclusion that, acting alone, the merged firm would be able to profitably and materially restrain or reduce competition in the relevant market for a significant period of time, and hence enjoy a position of dominance, as required in term of Section 5(6) of the Act; and /or;

3.2 The Commission failed to provide a legal basis or grounds for viewing the profits and assets of First Appellant on a stand-alone basis as being sufficient to satisfy the "profitability" and "materiality" aspects of the definition of dominance set out in Section 5(6)(a) of the Act; and/or;

3.3 The Commission failed to provide a legal basis or grounds for using the average of the estimated market shares across three distinct market segments (namely, locally produced spirits; wines; and ciders) as an indication of the estimated market share of TDL post - merger; and/or;

3.4 Assuming that the merger firm would be dominant in a relevant market (which is not conceded), the Commission failed to provide adequate grounds for its conclusion that the merger would have the effect of strengthening this position of dominance as required in terms of Section 11(1) of the Act.

4. The Commission erred in considering and applying the provisions of Section 9 of the Act in the context of a merger assessment which should be properly considered in terms of Section 11(1) of the Act.

5. The Commission erred in reaching the Decision based on alleged competition effects and concerns which are not specific to the merger between the First Appellant and TDL and which fell outside the remit of the Commission in the context of a merger assessment by assessing alleged concerns or competition effects not attributable to the proposed merger. The Commission's primary concerns related to the alleged anti-competitive effects arising from the pre-existing shareholders' agreement between Distillers

Corporation International Limited ("Distell"), Second Appellant, TDL and the South African Breweries International (Africa) B.V, rather than concerns relating to the merger notified. It was, therefore, beyond the Commission's mandate to base the decision on such concerns.

6. In coming to the decision, the Commission relied entirely on the written representations by Distell Group Limited, without interrogating those submissions or allowing the Appellants a right of response to those submissions; and the Respondent made the decision without regard to further and appropriate economic or legal documentation, evidence and/or analysis. Accordingly, the Commission failed to independently investigate and assess the merger in accordance with Rule 39 read together with Rule 42 of the Fair Competition Commission Procedure Rules, 2013 (FCC Rules).
7. Other than considering the submission of Distell, the Commission failed to conduct an appropriate investigation and assessment as required by the Fair Competition Act, 2003, in circumstances where no documentation, evidence and/or information about that assessment has been forthcoming, and whether the Respondent has not discharged its onus in that regard.
8. The Commission erred by failing to demonstrate any harm to competition in the relevant market that would be likely to

arise by virtue of the merger and by failing to demonstrate that the merger would be likely to:-

8.1 Increase the level of concentration in the market (or otherwise change the structure of the market);

8.2 raise barriers to entry in the relevant market (in fact and on the contrary, the Commission concluded that there are no significant barriers to entry in the relevant market);

8.3 reduce the availability of alternative products in the relevant market; or

8.4 otherwise harm consumers, competition or the economy through sustained price increases, removal of alternative supplies, protection of inefficient operations; excessive profits; prevention of innovation; or restricting growth in the market.

9. The Commission erred in finding that it "*expects market co-ordination in terms of sharing information and... anti-competitive agreements as a result of this transaction*" and that approval of the merger will assist First Appellant to "*indulge into (sic) coordinated conducts that can harm competition in the relevant market*" because, *inter alia*:-

9.1 these alleged concerns are not merger-specific and should not be brought into a merger assessment; and/or;

9.2 the Commission did not substantiate its claims regarding potential anti-competitive information flows between the Second Appellant and TDL; and/or;

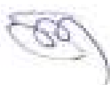
9.3 the Commission failed to provide evidence of its claims regarding coordinated conduct and information sharing; and/or;

9.4 the Commission failed to demonstrate how the alleged coordinated conduct would arise from the merger; or, insofar as the Commission demonstrate that such coordinated conduct would result from the merger (which is not conceded), the Commission failed to demonstrate how such conduct will substantively harm competition in the relevant market; and/or

9.5 the Second Appellant and TDL are not competitor; and/or;

9.6 even if the Second Appellant and TDL were competitors (which is not conceded), they would be excluded from the application of section 9 of the Act by virtue of being part of a single economic entity.

10. The Commission erred in ordering the merging parties to effect divestiture of the Second Appellant's shareholding in TDL. The Second Appellant's shareholding in TDL was acquired validly and in accordance with all prevailing laws at the time of such acquisition and any forced divestiture of that interest would constitute an unjustified appropriation of validly acquired property rights under Tanzanian law and therefore runs contrary to the legal principles established by the Tanzanian legislature when the Act was enacted.



11. The Commission erred in considering written representations made to the Commission by Distell without providing the merging parties with a copy thereof or affording the merging parties an opportunity to respond to such representations, thereby depriving the merging parties of their right to due process and fairness under Tanzanian law.

12. The Commission erred in not taking into consideration the contentions of the merging parties that prohibiting the merger would be likely to have significant negative effects on competition and the public interest, *inter alia*, by undermining incentives for further investment and /or the interests of consumers in Mainland Tanzania.

On the totality of the above grounds of appeal, the Appellants asked the Tribunal for an orders:-

1. Reversing the Decision of the Commission insofar as it prohibits the merger of the First Appellant's acquisition of indirect control of TDL;
2. making any necessary, incidental or consequential orders; and
3. granting the Appellants further and/or alternative relief(s).

The Respondent, Fair Competition Commission, upon being served with amended memorandum of appeal, guided by Rule 19 of the Fair Competition Tribunal Rules, 2012, (Tribunal Rules)

filed a reply to the amended memorandum of appeal disputing the appeal and prayed that this Tribunal affirms the decision of the FCC and dismiss the appeal in its entirety.

It is imperative at this stage, *albeit* in brief, to set forth the facts pertaining to this appeal. The 1st Appellant which is a group of companies dealing with production, marketing, and distribution of beer, non-alcoholic/near beer (i.e., low alcohol by volume or "**ABV**") and soft drinks is a multinational company incorporated in Belgium with its primary listing on the Euronext (Brussels, Belgium) and secondary listing on the **stock exchange**. The 2nd Appellant is incorporated in Tanzania Mainland and is listed on the Dar es Salaam Stock Exchange. She produces, distributes and sells malt beer, non-alcoholic dark malt beverages and alcoholic fruit beverages (AFBs).

On 3rd February, 2016 via Merger Notification No. FCC/M&A/28/2016 the 1st Appellant notified the Respondent of their intention to acquire control of Tanzania Breweries Ltd (TBL) as a result of the acquisition of SABMiller PLC. Before such acquisition, SABMiller PLC was the Majority Shareholder of TBL. Having received the merger notification, the Respondent issued a Notice of Complete Filing (Form FCC. 11) dated 10th February, 2016. On 17th February, 2016, the Respondent notified the 1st Appellant that it had determined that the proposed merger should be examined and thus the proposed merger was prohibited for a

period of 90 days from the date of the said letter, that is, from 17th February, 2016 to 16th May, 2016. The prohibition period was subsequently extended by the Respondent by further 30 days, until 16th June, 2016. On 15th June, 2016 the Respondent wrote a 'no approval letter' with Ref No FCC/M&A/02/2016/12. In this letter, the Respondent stated as follows:-

> *"BE DULY NOTIFIED that the Commission has not issued any approval of your transaction notified on the 3rd February, 2016. As and when fully constituted, the notification will be addressed per the provisions of the Fair Competition Act, 2003."*

On 1st August, 2016, the Respondent wrote another letter with Ref. No. FCC/M&A/01/2010/VI/37 in respect of acquisition of SABMiller PLC Ltd by Anheuser – Busch InBev SA/NW. In this letter the Respondent informed the 1st Appellant that it was reviewing the said merger application as per the provisions of the Fair Competition Act, 2003 (FCA) and FCC Procedure Rules, 2013 (FCC Rules, 2013). The Respondent further informed the 1st Appellant that the submission under consideration was sufficient to allow for the Respondent to analyse the beer market only and required the 1st Appellant to confirm as to whether the submission aimed at obtaining approval for the beer market only.

On 16th August, 2016 through a letter with reference No WBK/3254/16(2), the 1st Appellant responded to the said

Respondent's letter on a 'without prejudice' basis. Essentially, in this letter, the 1st Appellant informed the Respondent that she was objecting the jurisdiction of the Respondent on the ground that the Respondent's authority had already ended with the passage of the statutory time limits set under Section 11(3) and 11(4)(a) of the FCA.

On 19th August 2016, the Respondent wrote another letter with Ref. No. FCC/M&A/02/2016/20 to the 1st Appellant. In this letter, the Respondent put it very clear that although time limit set out under Section 11(3) and 11(4) (a) of the Act had lapsed, the 1st Appellant was still put on notice that there had been no approval by the Respondent in regards to Anheuser - Busch InBev SA/NW/SABMiller transaction in Tanzania as the transaction was at the time of the letter under the Respondent's consideration.

On 31st August, 2016, the Respondent approved a merger with a condition only in respect of near beer and malt based beverages supplied by the 2nd Appellant and directed that all transaction(s)/markets that involved TBL's five subsidiaries (Tanzania Distilleries Ltd, Darbrew, Kibo Breweries, Mountainside and Coca-Cola Kwanza) be notified separately. On 7th September, 2016, the 1st Appellant complied with the Respondent's directives by notifying the Respondent of their intention to indirectly acquire majority shares held by SABMiller PLC Limited and Tanzania Breweries Limited in Tanzania

Distilleries Limited. The Application was numbered FCC/M&A/28/2016.

On 5th October, 2016, the Respondent issued a merger prohibition Certificate in respect of merger notification between Anheuser - Busch InBev SA/NW and Tanzania Distilleries Ltd through SABMiller PLC & Tanzania Breweries Limited. The Respondent on the same day further issued a Compliance Order under Section 58(1), (3) and (4) of the FCA and ordered the proposed merging parties namely Anheuser - Busch InBev SA/NW, SABMiller PLC and Tanzania Breweries Ltd to effect divestiture of the entire 65% shareholding of Tanzania Breweries Ltd (TBL) in Tanzania Distilleries Ltd (TDL) within twelve months. The Respondent further declared the shareholding of Tanzania Distiller Ltd under the shareholding agreement entered between Distillers Corporation International Ltd (TDL) and the South African Breweries International (Africa) B.V executed on 31st August, 1999 as *void ab initio* for contravening provisions of Section 9(1)(a) and (b) of the FCA. The Respondent proceeded to issue an interim compliance order to maintain *status quo* in respect of the 65% shares held by Tanzania Breweries Ltd in Tanzania Distilleries Ltd followed by the final order and divestiture conditions dated 2nd November, 2016.

Aggrieved by the decision and the said Orders of the Respondent dated 3rd October, 2016 and delivered on 5th October, 2016, and

the final Compliance Order and Divestiture Conditions dated 2nd November, 2016, the Appellants preferred this appeal to this Tribunal.

When the matter was called on for hearing, the Tribunal acceded to the parties' proposal to have the appeal disposed of by way of written submissions. Pursuant thereto, both parties filed their submissions per sequence given by the Tribunal. We are grateful to counsel for both parties for their compliance to the order and their subsequent well-reasoned arguments. Both Appellants were represented by Dr. Wilbert B. Kapinga, learned Advocate while the Respondent had the services of Ms Magdalena Utouh, Principal State Attorney.

In his submissions to support the appeal, Dr. Kapinga consolidated Grounds (1 & 2), (4, 5, & 9), (3, 6, 7, 8, 9 & 11) and (10 &12) and came out with four (4) new grounds respectively, aiming at addressing four crucial issues namely (i) the Respondent's jurisdiction (ii) legal framework applicable to a Section 9 investigation (iii) the legal framework applicable to a Section 11 investigation and (iv) the competency of the Respondent to issue an order of divestiture. His submissions were therefore focused on the new consolidated four grounds.

On the totality of the grounds, the Appellant prayed that the Tribunal grant the following orders:-

(a) Reversing the decision

(b) Making any necessary, incidental or consequential orders; and

(c) Granting the Appellants further and/or alternative relief(s).

Starting with the first consolidated ground on the Respondent's jurisdiction, Dr. Kapinga argued that the Respondent erred procedurally in continuing to assess the notification when the Respondent no longer had jurisdiction to do so. According to him, the Respondent's extension certificate dated 17th May, 2016 extended its review period to 16th June, 2016 and, therefore, the Respondent had no authority to further investigate the transaction after the expiry of the extended prohibition period. He submitted that by making enquiry and/or decisions in relation to the notification (including the TDL acquisition) after its authority had ended with the expiry of the statutory time limits set out in Sections 11(3) and 11(4)(a) of the FCA, the Respondent acted *ultra vires* the Act as she was *functus officio* in this regard. He further submitted that, according to Section 11(3) of the FCA, where the Respondent determines that a merger notified to it should be examined, the initial prohibition period is extended for a further ninety (90) days or such further period as the Commission determines under sub – section 11(4), unless the Commission earlier determined that the merger should not be prohibited. The extension of 90 days under Section 11(3) is preceded by initial 14 days of notification of a proposed merger under Section 11(5) of the FCA. In his view, following the

extension of the initial prohibition period by ninety (90) days, in terms of Section 11(3), the Respondent is only empowered to(i) further extend the initial prohibition period in line with Section 11(4); or (ii) determine earlier that the merger should be prohibited. He pointed out that in terms of Rule 36(4) read together with Rule 36(5), in extending the period under Section 11(3) in line with Section 11(4), the Respondent 'shall' issue a copy of the extension certificate on Form FCC 14 to the Schedule.

The learned Counsel submitted further that in terms of the Interpretation of Laws Act, where the word 'shall' is used in conferring a function, such word is interpreted to mean that the function so conferred must be performed. In support of his submission, Dr. Kapinga cited the case of **Godfrey Kimbe v. Peter Ngonyani, Civil Appeal No. 41 of 2014, Court of Appeal of Tanzania at Dar es salaam (Unreported)**, where the Court of Appeal held that it is elementary that, by virtual of the provisions of Section 53(2) of the Interpretation of Laws Act, Cap 1 of the Revised Edition, 2002, whenever the word 'shall' is used in a provision, it means that the provision is imperative. He further cited the case of **Africarriers Limited v. Shirika la Usafiri Dar es Salaam Limited & Another, Commercial Case No. 50 of 2019, High Court of Tanzania (Commercial Division) (Unreported)** whereby Hon. Fikirini, J., (as she then was) citing the case of **Salumu Ndikongeje V. Republic, Criminal Appeal No . 238 of 2004,** held that, not every use of

the word 'shall' means that it is mandatory but it depends on the circumstances. He further cited the case of **Bubble Pac (Pty) Ltd v. The Competition Commission of South Africa, CTSA CASE No. 63/AM/Mayoo** as a persuasive authority to this Tribunal. In the cited case, the Competition Tribunal of South Africa, while considering whether the review period for an 'intermediate' merger was validly extended by the Competition Commission of South Africa, had the following to say, thus:-

> *"... The Commission cannot escape the problem that the act of extension must take place within the thirty – day time period. On this point the language of the Act is clear and unambiguous. It is common cause that the second and third certificates were issued only after thirty – day period had expired. In our view, they are for this reason invalid and since the prohibition was issued during the currency of the third extension period, it was issued at a time that no valid extension was in force and is therefore a nullity."*

He went on submitting that a clear investigative timetable is in line with well – established international competition law principle. He then noted that Tanzania was a member of the International Competition Network (ICN). Arguing that the ICN's Guiding Principles for merger notification and Review Procedure, 2018 recognize that when the review of merger transactions should be conducted, any resulting enforcement decision should

be made within a reasonable and determinable timeframe. The learned Counsel cited a litany of authorities on the doctrine of *utra vires* including the **Commissioner General (TRA) V. Mohamed Al – Salim and Another, Civil Appeal No . 80 of 2018, Court of Appeal of Tanzania at Dar es Salaam (Unreported), Legal and Human Rights Centre and 2 Others V. The Minister for Information, Culture and Sports and 2 Others, Misc Civil Cause No. 25 of 2018, High Court of Tanzania at Mtwara (Unreported), Affordable Medicines Trust and Others V. Minister of Health and Another,[2005] ZA CC 3, (South Africa**) and **McFoy v. United Africa Ltd [1962] AC 152.** In all these authorities, it was held that the doctrine of **ultra vires** is to the effect that an authority can exercise only such power as it is conferred on it by law. An action is *ultra vires* if it is in conflict with the Parent Act, is made without following the mandatory procedure prescribed by the Parent Act or goes beyond the scope of authority conferred on the delegate and that the effect of *ultra vires* is to render any purported act a nullity and with no any legal consequences.

In concluding this part, Dr. Kapinga submitted that the Respondent's authority to review the notification (including the TDL acquisition), as contemplated under the Act, ceased on 16th June, 2016 following the lapse of the extend prohibition period by operation of law. He hence argued that the notification (including the TDL Acquisition) should be regarded as approved from 16th

June, 2016. According to Dr. Kapinga, the Respondent had no requisite authority to continue reviewing the transaction, including taking any decision in respect of the TDL acquisition following the lapse of the extended prohibition period nor direct the 1st Appellant to submit a separate merger notification in relation to the TDL acquisition.

Responding on the first consolidated ground of appeal, the Respondent submitted that the issues of the Respondent's jurisdiction raised by the Appellants were misguided. According to her, the decision of the Respondent which is appealed against (dated 3rd October, 2016) was within the statutory time as provided under Section 11(3) of the Act and Rule 36(3) of the Fair Competition Commission Procedure Rules, 2013 (the Rules). The provisions states:-

> *"if, within 14 days after receipt of a notification of a merger under sub-section (2), the Commission determines that the proposed merger should be examined, the merger shall be prohibited for a period of 90 days thereafter or such further period as the Commission determines under sub-section (4), unless the Commission earlier determines the merger should not be prohibited.*
>
> *36(3) The proposed merger shall be examined for a period of ninety days."*

She then submitted that the merger application in question was brought before the Respondent on 6th September, 2016. The Respondent issued its decision with regards to such merger on 3rd October, 2016, which was within twenty - seven (27) days. She maintained that it was an erroneous view to hold that the Respondent determined the said merger outside the statutory time of ninety days (90) set by Rule 36(3) of the Fair Competition Commission Procedure Rules, 2013. She further argued that the Appellants have appealed against the decision of the Respondent dated 3rd October, 2016 and therefore, they should not bring on board arguments contesting issues of jurisdiction that are based on the decision of the Respondent dated 31st August, 2016 which was not appealed against or if it was, then it is time-barred.

In further response to consolidated ground 1, the respondent argued that the FCC had a duty to assess notifiable mergers of subsidiaries as they might be in different relevant markets which call for separate analysis with regards to each subsidiary. If the mergers were assessed in omnibus, she argued further, the mergers might create dominance in one segment of the market and defeat the whole purpose of establishment of the Respondent and the law which intends to promote and protect effective competition in trade and commerce. That, the first Appellant entered directly in TBL and indirectly into TDL, therefore, since TBL and TDL were different firms, the acquiring firm, depending on the market it is involved in, might change market dynamics

which TBL and TDL were involved in, hence, the need to notify separately was inevitable.

In their rejoinder, the Appellants reiterated that the TDL acquisition was separately notified to the Respondent with a view to cooperating with the Respondent and not because the Appellants considered that the Respondent was entitled in law to receive such notification. The Appellants argued that although they notified the TDL acquisition to the Respondent as per the Respondent's directives, they did so while reserving all their legal rights to object to the jurisdiction of the Respondent to further enquire and/or make any decision on the notification which included the TDL acquisition, after the Respondent's authority ended with the passage of the statutory time limits set under Section 11 of the Act. In their view, the Respondent did not have jurisdiction to call for and separately review TDL acquisition and issue the decision.

Having dispassionately considered rival arguments of the parties, we find this ground devoid of merit for the reasons we shall elaborate. We are inclined to agree with the Respondent that this is not the right forum to address issues arising from Merger Application No. FCC/M&A/28/2016. Merger Application No FCC/M&A/02/2016 which was filed on 3rd February, 2016 was approved on 31st August, 2016 with a condition that all transactions(s)/markets that involved TBL's five subsidiaries,

namely Tanzania Distilleries Ltd, Darbrew, Kibo Breweries, Mountainside and Coca Cola Kwanza, must be notified separately. The Appellants never appealed against this decision and instead on 6th September, 2016, acting in accordance with the Respondent's condition, the 1st Appellant notified the Respondent of their intention to indirectly acquire majority shares held by SABMiller PLC Limited & Tanzania Breweries Limited (TBL) in Tanzania Distilleries Limited (TDL). The Application was numbered FCC/M&A/28/2016. Having conducted analysis of the intended merger, on 3rd October, 2016, the Respondent issued a merger Prohibition Certificate and an interim order followed by the final order on 2nd November, 2016. The Order of the Respondent dated 3rd October, 2016 was to the effect that the Appellants should divest their shares in TDL and declared a shareholders' agreement between Distell, TBL, TDL, and the South African Breweries International (Africa) B.V. dated 31st August, 1999 as *void ab initio*.

Further to the above, the order dated 2nd November, 2016 contained the manner upon which the divestiture should be implemented. It is the Respondent's decision and orders dated 3rd October, 2016 and delivered on 05th October, 2016 and the final compliance Order and divestiture conditions dated 2nd November, 2016 which prompted the Appellants to lodge a notice of appeal in this Tribunal on 28th October, 2016. The notice of appeal is very clear that it is an appeal from the decision and

orders of the Fair Competition Commission dated 3rd October, 2016 and delivered on 5th October, 2016 in merger notification between Anheuser – Busch InBev SA/NV ("AB1") and Tanzania Distilleries Limited in respect of AB1's acquisition of SABMiller PLC. The notice further states that the Appellants preferred this appeal having been dissatisfied with the decision and orders of the FCC (Respondent) given at Dar es Salaam on the 3rd day of October, 2016. Hence the appellants' argument that the FCC had no jurisdiction to entertain the merger, is but time barred.

Without prejudice to the above position which we have, just for the sake of argument and for the interest of development of competition jurisprudence, we shall address in passing the allegation that the Commission erred in approving the merger between First Appellant and SABMiller PLC for the near beer and non-alcoholic beverages markets only, and then erred procedurally in directing the merging parties to separately notify First Appellant's acquisition of the Second Appellant's subsidiaries. Their argument was *inter alia* that approval of First Appellant's acquisition of SABMiller PLC should include approval of First Appellant's acquisition of control over the Second Appellant and all the products that produced and/or distributed by Second Appellant (and its subsidiaries) and, in directing the merging parties to file separate applications for each of SABMiller's Tanzanian subsidiaries, the Commission acted ultra vires the Act. We have gone through the decision of the FCC and we see no

reason to fault it because to start with, Section 2 of the FCA defines merger to mean 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. The catching words in this part are ***the change of control of a business, part of a business or assets of a business***. The gist which the FCC was relying on is that by acquiring shares in SABMiller who has direct control on the 2nd Appellant, automatically there will be a change of control of the business in the subsidiaries of SABMiller in TBL which includes TDL. This means the transaction that was in question would result in change of control of a business hence a merger under the ambit of the FCA. As a result, since the combined assets of the merging firms exceeded the threshold set by law, then the notification of the change of control of the subsidiary companies is inevitable. Therefore, even if the ground was filed on time, it would not have nullified the order that the Appellants should also notify the merger on the subsidiaries of the **SABMiller** in TBL as the result of the merger had the effect of change of control of a business.

Having said the above, we now make a conclusive finding on the first ground of appeal and hold that the Appellants, having complied with the orders of the Respondent dated 31st August, 2016 waived their right to appeal and are time barred in bringing the issue at this stage. The argument by the Appellants that they

notified the TDL acquisition to the Respondent while reserving all their legal rights to object to the jurisdiction of the Respondent is not founded in law. The Appellants could only challenge the Respondent's decision and orders dated 31st August, 2016 by lodging with the Tribunal a notice of appeal as per Rule 9(1) of the Tribunal Rules within the time of appeal prescribed by the law. Indeed, as day follows night, the consolidated ground No. 1 is dismissed.

Submitting on the new consolidated second ground that revolves around the legal framework applicable to Section 9 investigations, Dr. Kapinga submitted that the Respondent erred in considering applying the provisions of Section 9 in the context of a merger assessment which should be properly considered in terms of Section 11(1) of the Act. He submitted that the Respondent erred in reaching the decision based on competition effects and concerns which were not specific to the TDL acquisition, and which fell outside the remit of the Respondent in the context of a merger assessment by assessing the concerns or competition effects not attributable to the proposed merger.

He further submitted that the Respondent was supposed to deal with concerns relating to the transaction and/or TDL acquisition rather than concerns relating to anticompetitive effects arising from the pre-existing shareholders agreement between Distillers Corporation International Limited (an affiliate of Distell) the

second Appellant, TDL and the South African Breweries International (Africa) B.V. (a subsidiary of SAB at the time). In his view, the Respondent was required to employ a merger - specific analytical framework, i.e. having regard to only those matters that arise from the notified merger when assessing the merger. He further submitted that the pre-existing shareholders' agreement pre-dated the transaction (including the TDL acquisition) as it was entered into by the shareholders of TDL in 1999 long before the Act and the operations of the Respondent came into being. He further submitted that the Respondent took issue with the Pre–existing direct shareholding arrangement of TDL for contravening Section 9 of the Act while in fact the pre-existing shareholding arrangement was unaffected by the transaction including the TDL acquisition. He maintained that by taking into account matters that were not merger-specific, the Respondent erred in law.

Dr. Kapinga vehemently and passionately argued that the Respondent cannot carry out a Section 9 investigation in the disguise of a Section 11 investigation. He argued that the Respondent did not, as required by Section 69 of the Act read with Rule 10(1) of the FCC Rules, initiate a complaint against TBL or TDL in respect of an alleged contravention of Section 9 by virtue of TBL's majority shareholding (and corresponding shareholders rights in TDL). He further submitted that in line with the principle of natural justice and due process, the

Respondent cannot rely on factors competently assessed under Section 9 in the context of a merger assessment occurring under Section 11 without affording the Appellant right to be heard. In his view, by carrying out a Section 9 investigation without following the appropriate procedures under the Act and the Rules, and given the fact that the decision was based on anti – competitive concerns arising under Section 9, the Respondent erred in law for the purposes of Section 61(4) (b) and 61(4)(c) of the FCA and the applicable procedures and requirements applicable to the Respondent.

Responding on the second consolidated ground of appeal, the Respondent submitted that the issue on the Shareholders' Agreement in question was raised and determined by this Tribunal in Tribunal Appeal No. 19 of 2017 (Distell Group Limited v. FCC). She hence argued that same issue should not be raised again. According to her, in Appeal No. 19 of 2017, this Honourable Tribunal, in determining the very same Shareholder's Agreement, it was of the stand that the Respondent correctly dealt with the Shareholders' Agreement. She supported her argument by citing Rule 24(2) of the FCC Rules, 2013 which states:-

> *"24(2) the Commission shall make a decision whether there has been, or is likely to be, a breach of the Act arising from:-*

(a) A proposed agreement;

(b) An existing agreement;

(c) A proposed merger;

(d) An existing merger;

(e) An alleged misuse of market power."

The Respondent submitted further that the cross directorship between TBL and TDL establishes a fertile area for sharing sensitive information between the two companies which are competitors, pointing to page 25 of the reasons for the decision where the Commission considered the fact that there real exists cross directorship between TDL and TBL. She concluded that the arguments posed by the Appellants at this stage that TBL and TDL were not competitors, was a mere afterthought.

In their rejoinder, the Appellants maintained that the Respondent did not carry out a thorough analysis of the intended merger before making the decision that was subject of this appeal. It was further submitted that the Appellants' contention in respect of the pre-existing shareholders agreement between Distillers Corporation International Limited (an affiliate of Distell) the second Appellant, TDL and the South African Breweries International (Africa) B.V. (a subsidiary of SAB at the time) was distinguishable from that legal issue addressed by this Tribunal in Appeal No. 19 of 2017 (the Distell Appeal). The Appellants

further submitted that in this appeal, they do not dispute that the Respondent was entitled to consider and make a decision in respect of the pre-existing shareholder's agreement. However, what they were disputing was that such consideration and any related decision in line with the Act and well established international competition law principles and practice, was not merger specific and, therefore, the Respondent was not entitled to consider the pre-existing shareholders' Agreement in the context of its review of the separate merger notification in respect of the TDL acquisition and without complying to the procedure applicable to a Section 9 investigation before issuing a decision in relation to the pre-existing shareholders' Agreement.

On our part, this second ground should not detain us much. We have considered the submissions of the parties and at the onset we do agree with the Respondent that the issue of validity of the agreement was dealt with by this Tribunal in Appeal No. 19/2017. As pointed out by the Respondent, on page 19 of the Judgment we held that:-

> *"Therefore, this Tribunal hereby agrees with the learned Counsel for the Respondent that the said agreement was correctly dealt with under the Fair Competition Act, 2003 as provided under section 100(1) of the FCA, 2003 and the Commission was justified under Rule 24(2) of the Fair Competition Rules, 2013 to make such declaration. The*

argument that the said agreement was saved by Section 100(1) of the Fair Competition Act, 2003 cannot hold water because once it was dealt with under the Act and declared void ab Initio, it ceases to be valid as was done with shareholders agreement"

We did not end there, we went further to hold:-

"In this Appeal, the Commission in the course of dealing with this merger application, the disputed agreement cropped up and the Commission could not leave it while obviously is in contravention of Section 9 of the Fair Competition Act, 2003. As already held, the issue of its validity was raised and the Appellant replied to it and even suggested an amendment. Amendment is not envisaged under the law but the remedy was for the appellant to apply to the Commission for the contract to be dealt with as an exception or be exempted which he did not do. Failure to make an application for exemption under Section 12 and 14 of the Fair Competition Act, 2003 and bring it to the attention of the Commission is like a person with unlicensed gun going to the police post and tell them that I own a gun but I got it while it was not an offence to own a gun and tell them I want to keep it. The Appellant is the one to blame himself for raising the issue of the agreement without reading the law and wanted it to be spared while in conflict

with the law. On that note, the arguments by Mr. Nyika on this ground are found wanting and far from convincing this Tribunal otherwise. This ground for reasons stated above has to fail as well in its entirety."

That being the case, since we confirmed the FCC decision nullifying the agreement, we cannot proceed now to determine the same matter in this subsequent appeal as we are now *functus officio*. This ground is therefore dismissed.

We now move to the new consolidated third ground in relation to the legal framework applicable to a Section 11 investigation, whereby Dr. Kapinga argued that the Respondent erred in finding that the TDL acquisition would strengthen the merger firm's position of dominance in the relevant market. The Learned Counsel complained that the Respondent failed to independently investigate and assess the TDL acquisition in accordance with Rule 39 read together with Rule 42 of the Rules by failing to conduct an appropriate investigation and assessment as required by the Act. He pointed out that in the circumstances where no documentation, evidence and/or information about that assessment had been forthcoming and where the Respondent had not discharged its onus in that regard, the Respondent erred by failing to demonstrate any harm to competition in any relevant market that would be likely to arise by virtue of the TDL acquisition or merger.

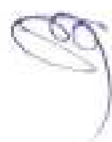
He further submitted that the Respondent erred in considering written representations made to the Respondent by Distell without providing the merging parties with a copy thereof or affording the merging parties an opportunity to respond to such representations thereby depriving the merging parties of their right to due process and fairness under Tanzania law.

In reply to the third consolidated ground, the Respondent invited the Tribunal to peruse Table 2 available at page 35 of the Reasons for the Decision. She then submitted that the Respondent had demonstrated several ways to calculate concentration of the relevant market and all proved to be beyond the statutory threshold of a market share of 35% which marks one limb of proving dominance. According to her, the average market share of the three products (cider, wine and spirits) by way of arithmetic mean it came down to 56% and weighted average of 63%. Apart from such market share calculation, on Table 2 and 3 at page 32 and 33 of the Reasons for the Decision, the Respondent had demonstrated profitability and materiality of the merging firms. Considering such materiality and profitability of the merging firms, the Respondent concluded that acting alone the merging firms will have power to restrain competition for considerable period. The Respondent further argued that the Respondent had well demonstrated that the merging parties would create dominance in line with Section 5(6) of the Act.

The Respondent submitted further that the Appellants were provided with ample opportunity to address all issues with regards to the merger as well as the Shareholder's Agreement as the hearing involved the parties to the merger. According to her, the arguments posed by Distell were heard during the hearing as may be observed on the transcript of the hearing. Further that some of the issues regarding the contents of the Shareholders Agreement were discussed during the hearing. She specifically pointed to the issue of cross directorship which was determined on paragraph 46 of the Transcript of Oral Presentation Meeting Conducted on 22nd September, 2016 ("the Transcript"). The Responded submitted further that TBL admitted that there were directors of TBL who sat in the Board of their subsidiaries.

In rejoinder, the Appellants reiterated that the Respondent did not establish that the TDL acquisition would give rise to the creation or strengthening of a dominant position in a market in order to prohibit the TDL acquisition as required by the Act. The Appellants insisted that the order for divestiture was unjustifiable as it would likely involve significant inefficiencies and would be to the detriment of competition and the public interest in Tanzania.

Having considered the arguments of the parties, we begin with the conclusion made by the FCC that there are high preponderances of probabilities that direct acquisition of control by the 1st Appellant in TDL shall strengthen the position of



dominance in the relevant market. The decision was inclined to the perpetuity in the importation, production, marketing and distribution of spirits (locally produced), wines and alcoholic fruit beverages (ciders) in Tanzania hence the transaction will strengthen the position of dominance in the market.

On our part, we have looked at the scenario from a different angle. While the FCC is concerned of the internal affairs, conducts and conflicts that may arise between the two shareholders of the relevant market (INBEV AND DISTELL) regarding marketing their imported cider products, we find that the relevance of the analysis would have had a greater meaning if some issues were in existence. **First** of all, the shareholding structure between TBL through SABMiller PLC (65%) and Distell (35%) within the target firm has been in existence since 1999 and a subsequent acquisition in 2002. At all this time, no competition concern was raised by the Commission either *suo moto* or by motion of any party as per the requirements of Section 63 of the FCA. We interpret the meaning of this to be that, with the shareholding remaining the same, the two shareholders were existing in the relevant market without any competition concerns.

Secondly, we have considered the type of change of control of the business that will be in existence in the post-merger scenario *viz a viz* the possibility of creation of any market concentration

that will change the market structure of the relevant market in Mainland Tanzania. We have taken this consideration in line with the object of the FCA envisaged under Section 3 which is to enhance the welfare of the people of Tanzania as a whole by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct. From that object, it is obvious that competition creates conducive environment by keeping markets effectively competitive and as a result, consumers will benefit from a wider choice of goods and services at competitive prices. From that point of view, our main focus was based on whether the intended change of control would, in any way, have an effect on the relevant market as defined by the FCA. In our strong view, the only change of control of a business that will take place is the indirect change of control of one of the shareholders within the Target Firm, something which will not affect the relevant market as a whole to raise any competition concern.

The co-existence of the two shareholders will remain the same as before. It should be borne in mind that by having the shareholding structure remain the same in the post-merger scenario does not in all cases mean that the merger should be approved; but the analysis should be based on a case to case analysis. Our main concern in this case is whether the decision of FCC was based on protecting competition as per the object of the Act or mainly based on protection of a competitor. As we shall

soon elaborate, we have based our decision on the reasoning of the FCC as a whole and have related it to the fact that the existing shareholding structure will remain the same.

To begin with, as the FCC held in its decision while approving the merger between the 1st and 2nd Appellants, no competition concerns were raised and consequently, the merger was approved. We then asked ourselves if, having found that the merger between the two Appellants will not raise any competition concerns, and it is the same 2nd Appellant who has control of TDL, whether it was proper for the FCC to lift corporate veil and start assessing the existing relationships between the two shareholders within TDL and make a finding that it may strengthen the position of dominance. This would have been relevant if the FCC had established that the acquiring firm (the 1st Appellant) had similar business like the one in the target firm, within Mainland Tanzania which position would have resulted in creation of a position of dominance in the relevant market. As we have observed, at page 23 of its reasons for the decision of October, 2016, the FCC observed:

> *"Based on the information submitted by the Applicant regarding the relevant market and Alcoholic Fruit Beverages (Ciders) segment in particular, there are overlaps and market substitutability between Savanna supplied by Distell and Redds supplied by TBL but both*

distributed by TDL. The fact that the two brands are in the same product market from two distinct companies to wit TBL and Distell, demonstrates that they are in competition so is TBL and Distell."

We appreciate and subscribe to this finding, however, this situation has been in existence since the year 2002 when Distell acquired an addition of 10% to make 35% stake in TDL leaving TBL with 65%. The issue remains whether the indirect control of TDL by the 1st Appellant would change any of the existing market structure as opposed to shareholders concern. The FCC further found that there will be potential for anti-competitive information flow between TDL and TBL which would give TBL an unfair advantage over TDL. Again, we find this observation to be more focused on protecting a competitor rather than competition in the market and since there was no finding by the FCC that there will be market concentration, we find that the decision should have justified as to how, the indirect change of control of a business, would affect competition triggered by the existing shareholders who have sustained in the market for some significant number of years.

We have also looked at the provisions of Section 5(5) of the FCA and for the clarity of what we are about to elaborate, the Section is reproduced:

"In defining markets, assessing effects on competition or determining whether a person has a dominant position in a market, the following matters, in addition to other relevant matters, shall be taken into account:

(a) competition from imported goods and services supplied by persons not resident or carrying on business in Tanzania; and

(b) ***the economic circumstances*** *of the relevant market* ***including the market shares*** *of persons supplying or acquiring goods or services in the market,* ***the ability of those persons to expand their market shares*** *and* ***the potential for new entry into the market.*** *(Emphasis is ours)*

As assessed by the FCC, the two shareholders are in competition with each other within their umbrella of TDL. This crucial issue is covered under the decision to nullify the shareholders agreement, a part of the decision which we have upheld having considered the possible platform for price fixing. However, in defining competition for the sake of divestiture, we shall look at the Target Firm as a whole and the possibility of the Acquiring Firm to increase the position of dominance by an increase in market concentration of which on our part, as we have elaborated above, we see none. We further disagree with the FCC's finding that on high preponderance of probabilities that Distell's concern on the

potential for anticompetitive information flow between TDL and the 2nd respondent in the post merger scenario is with merits, as we have pointed out earlier, we find this finding of the FCC to be protecting a competitor rather than competition, having no complaints from a pre-merger scenario. Our view could have been different if it was established that the market as it is and the pre-merger shareholding structure of the two firms was anti-competitive, but not just by basing on a complaint by a shareholder. From the above findings, it is our conclusion that the intended merger is not in contravention of Section 11 of the FCA. We, therefore, allow the third ground of appeal.

Going to the new consolidated fourth ground which is based on the competency of the Respondent to issue an order of divestment, Dr. Kapinga submitted that the Respondent erred in ordering the merging parties to effect divestiture of the Second Appellant's Shareholding in TDL. His submission was based on the ground that the 2nd Appellant's shareholding in TDL was acquired validly and in accordance with all prevailing laws at the time of such acquisition. He further submitted that any forced divestiture of that interest would constitute an unjustified appropriation of validly acquired property rights under the Tanzania laws and, therefore, runs contrary to the legal principles established by the Tanzania legislature when the Act was enacted. In his view, the Respondent erred in not taking into consideration the contentions of the merging parties that

prohibiting the TDL acquisition would be likely to have significant negative effects on competition and the public interest. He maintained that although Rule 42(13) of the Competition Rules, 2018 empowers the Respondent, after completing a merger investigation and consideration of a merger to (a) approve the merger, or (b) approve the merger subject to conditions or (c) declare the merger prohibited, the Respondent is required to act lawfully, and in line with the rule of law and such decision is required to be rational, reasonable and procedurally fair. According to him, the decision to order divestiture was not rational as divestment should be a remedy of last resort and it would be highly unusual and inappropriate for any competition authority to impose a remedy as drastic as divestiture in circumstances where there is no clear evidence of harm to competition as a result of a merger as is in this case. He further submitted that according to the European Commission's Notice on Remedies Acceptable under Council Regulation (EC) No. 139/2004 and under European Commission Regulation (EC) No. 802/2004, it is the responsibility of the Commission to show that a concentration would significantly impede competition.

In supporting his position, Dr. Kapinga cited the decision in **Re An Application by Bukoba Gymkhana Club (1963) EA 478 (HCT)** where Judge Reide citing with approval the decision in **Associate Provincial Picture Houses Ltd V. Wednesbury**

Corporation (1947) 2 All E.R. 680 where the court had the following to say:-

> *"...the court is entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to take into account, or, conversely has refused to take into account or neglected to take into account matters which it ought to take into account."*

Regarding procedural fairness, the Learned Counsel for the Appellant submitted that the principles of natural justice require the Respondent to comply with the processes under law when carrying out its functions. In this regard, in circumstances where the Respondent alleges contravention of the Act as is in this case, the Respondent is entitled, as a matter of due process, to know the case that they are required to answer for and to be given an adequate opportunity to respond. He further submitted that the Appellant was not afforded adequate opportunity to respond to the allegations against it relating to contravention of the Act.

In concluding this part, Dr. Kapinga submitted that the Respondent acted unlawfully and *ultra vires* the Act in ordering the divestiture of the Second Appellant's Shareholding in TDL for the purposes of Section 61(1) (b) and Section 61 (4)(d). In his view, the decision was unlawful, irrational, unreasonable and procedurally unfair.

Responding on consolidated ground No. 4, the Respondent submitted that upon discovery that the merger created a position of dominance, the only practical solution was to delineate the acquiring firm(s) (AB InBev & TBL) which intended to enter the target firm (TDL). In her view, the only way, considering the shareholding structure of the merging firms, was to order divestiture. She submitted further that since the spirit of the Act was to promote and protect competition, in one way, by correcting markets, the Respondent was to first; order divestiture; and penalize the parties to the Shareholders' Agreement to pay between five to ten percent of their annual turnover as the agreement contravened section 9 of the FCA. She further submitted that the priority between the two was correction of the market and there was no any other way to undo the dominance created by such merger apart from divestiture.

On our part, having so deliberated and having had a thorough look at compliance order dated 2nd November 2016, whereby FCC directed the parties namely AB INBEV, SABMiller, and TBL to effect divestiture of the entire TBL shares (65%) in TDL within twelve (12) months from the date of issuance of the compliance order and having further considered our above findings, we find that the order was unfair. Looking at the Compliance Order, it also restricted DISTELL from enforcement or application of presumptive right of first refusal against TBL, SABMiller or ABINBEV provided for in the Memorandum and Articles of

Association (MEMART) of TDL. We are of a view that such a directive lacks evidence as to the extent to which the 65% shareholding of TBL in TDL harms competition or infringes consumers in the relevant market. What we picked from the reasons of the decision is that the 65% shareholding of TBL in TDL has paved the way for introduction of the REDDS and 35% shareholding of DISTELL brought SAVANNAH in the relevant market and hence improved competition and consumers choices. There is also admission by the FCC of a possible introduction of new products which will expand consumer choices in the relevant market. As we observed earlier, the decision is more inclined in protecting a competitor rather than competition. It is therefore our conclusive finding that the FCC compliance order on divestiture defeats the provisions of FCA 3(a)(b)(c)(d) that aims to enhance welfare of the people of Tanzania as a whole by promoting and protecting effective competition in markets. We, therefore, allow this ground of appeal and set aside the divesture order issued by the FCC.

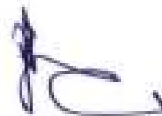
In conclusion, this appeal is partly allowed to the extent explained. For the sake of clarity of compliance, we make the following orders:

1. As held in our decision in Appeal No. 19/2017, the Shareholders agreement between TBL and Distell remains a nullity.

2. The FCC order directing the Second Appellant's divesture of its shares in the target firm TDL is set aside.
3. The merger between the Anheuser-Busch InBev SA/NV and TDL is hereby approved without conditions, pursuant to Rule 42(13)(a) of the FCC Procedural Rules, 2013. However, this approval shall not be a bar to the FCC post the merger, to conduct any investigation on any observed anti-competitive conducts or any other prohibited conduct of the merging firms in the relevant market.
4. Given the length of time that the appeal has been pending, and the fact that it was the Appellants who were attempting negotiations with the Respondent, further fact that the appeal is partly allowed, we find it just that each party bear their costs to this appeal.

Hon. Judge Salma M. Maghimbi – Chairperson

Dr. Godwil G. Wanga – Member



Dr. Onesmo M. Kyauke – Member

24/01/2023

Judgment delivered this 24th day of January, 2023 in the presence of Ms. Bertha Mwarija, Learned Advocate for the Appellants and Ms. Tecla Kitosi State Attorney for the Respondent.

Hon. Judge Salma M. Maghimbi – Chairperson

Dr. Godwil G. Wanga – Member

Dr. Onesmo M. Kyauke – Member

24/01/2023