IN THE HIGH COURT FOR ZAMBIA **2014/HPC/0479**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Appellate Jurisdiction)

BETWEEN:

COMPETITION AND CONSUMER PROTECTION COMMISSION **APPELLANT**

AND

DANA OIL CORPORATION LIMITED **RESPONDENT**

BEFORE THE HON. MR JUSTICE JUSTIN CHASHI IN OPEN COURT ON THE 8TH DAY OF MAY, 2015

For the Appellant: *The Director – Legal and Enforcement*
For the Respondents: *T Chali, Messrs H H Ndhlovu and Company*

J U D G M E N T

Legislation referred to:

1. The Competition and Consumer Protection Act, No. 24 of 2010

On the 2nd day of September 2014, the Appellant **Competition and Consumer Protection Commission** filed an appeal against the Judgment of **The Competition and Consumer Protection Tribunal (hereinafter referred to as "The Tribunal)** which was delivered on the 6th day of August 2014.

The record of appeal shows that the Respondent **Dana Oil Corporation Limited** then filed a Cross appeal on the 5th day of September 2014.

The Appellant in their Memorandum of Appeal have advanced **three grounds of appeal.**

The first ground of appeal is that the Tribunal erred in both law and fact by imputing a blanket procedure on how merger compliance affronts under **The Competition and Consumer Protection Act** (hereinafter referred to as **"(The Act")** were to be dealt by the Appellant in blatant disregard to the intention of the legislature.

The Second ground is that the Tribunal erred in law and grossly misdirected itself in fact by finding that **Section 64** of the **Act** was a mandatory Section and further that the invocation thereof was precursory to the invocation of **Section 37** of the Act when in fact not.

The third ground of appeal is that the Tribunal starkly erred both in law and in fact by finding that the Appellant acted ultra vires the Act, as it had no jurisdiction to invoke **Section 37** of the Act without first applying for a Mandatory Order before the Tribunal and consequently rendering the Appellant's decision against the Respondent null and void.

At the hearing of the appeal only Counsel for the Respondent was available. However in view of the fact that all the necessary documents to enable the Court hear and determine both the appeal

and cross appeal were before the Court, I proceeded to hear the matter.

Counsel for the Appellant in the heads of arguments which were filed together with the grounds of appeal started by giving a background as to the facts relating to the matter.

In my view, the facts are not in dispute and in fact they were well received and summarized by the Tribunal. It will therefore not be necessary to recapitulate the same except to state for the avoidance of doubt that there were two mergers which occurred in this matter, which need to be highlighted.

The first one was in 2001 when BP International and Castrol Oil Limited sought authorization from the Appellant to merge and enshrine 100 per centum Castrol rights into the business of BP Zambia. The Appellant authorized the merger on condition that the Castrol lubricants with the exception of marine lubricants shall in Zambia be distributed by an independent distributor other than BP Zambia so as to maintain effective competition in the market. As a result BP Africa vide a Distributor Agreement dated the 4th day of June 2002 appointed the Respondent herein as the sole distributor in Zambia.

The Second merger was when **BP Africa** and **Puma Energy Zambia Limited** made a joint application seeking approval for Puma Energy to acquire 75 per centum interest in BP Zambia from BP Africa in the year 2010.

The Appellant approved the merger between **BP Africa and Puma Energy Zambia Limited** on condition that the Castro distributorship agreement of 2002 involving the Respondent and BP Africa remains in force as previously authorized by the Appellant.

It would then seem from the record that the Appellant in the year 2012 instituted investigations against Puma Energy Zambia Limited and the Respondent herein and concluded that both parties were in breach of **Section 32 (c) of the Act**. (sic)

Albeit, the Appellants in their letter of 17th day of August 2012, meant to say that both parties were in breach of **Section 37 (c) of the Act** as there is no such provision as **Section 32 (c) under the Act**.

Section 37 (c) provides as follows:

> **"an enterprise which intentionally or negligently fails to comply with conditions stated in a determination or with undertaking given as a condition of a merger approval commits an offence and is liable to a fine not exceeding ten percent of its annual turnover".**

The aforestated Section provides for penalties in respect of offences relating to mergers. Therefore the Appellants reference to breach of this Section was inappropriate and not in order.

I would in that respect agree with the Tribunal that **Section 61 of The Act** is the enabling Section. It provides for the mischief, the procedure and the course of action to be taken by the Appellant in mitigating the breach or damage as the need may be where it has determined after an investigation that a merger has or is likely to result in a substantial lessening of Competition within the market.

Section 61 of The Act states in full as follows:

"61 (1) The Commission may where it determines after an investigation that an enterprise is a party to a merger and the creation of a merger has resulted, or is likely to result in a substantial lessening of Competition within a market for goods or services, give the enterprise such directions at it considers necessary, reasonable and practicable to -

(a) Remedy mitigate or prevent the substantial lessening of competition and

(b) Remedy, mitigate or prevent any adverse effects that have resulted from or are likely to result from the substantial lessening of Competition.

(2) The Commission may, in the case of a prospective merger require an enterprise to-

(a) desist from completion or implementation of the merger in sofar as it relates to a market in Zambia,

(b) divest such assets as are specified in a direction within the period so specified in the direction, before the merger can be completed or implemented, or

(c) Adopt or desist from such conduct including conduct in relation to the prices as is specified in a direction as a condition of proceeding with the merger

(3) The Commission may in the case of a completed merger require an enterprise to-

(a) divest itself of such assets as are specified in a direction within the period so specified in the direction or

(b) Adopt, or to desist from such conduct including conduct in relation to prices, as is specified in the direction as a condition of maintaining or proceeding with the merger". (the underlining is mine for emphasis only)

However, it is clear from the Judgment that the Tribunal's woes started with their reference to **Section 64** of the **Act** which states that:

"64 (1) where the Commission determines that an enterprises has failed without reasonable cause, to comply with a direction or undertaking, it may subject to Subsection (2) apply to the Tribunal for a mandatory Order requiring the enterprise to make good the default within a time specified in the Order".

(2) The Commission shall consider any representations wishes to make before an application under Subsection (1).

(3) The Tribunal may provide in the Order that all the costs of or incidental to the application shall be borne by the enterprise in default". (the underlining is mine for emphasis only)

It was as a result of the aforestated reference that the Tribunal made a finding of law that the Appellants decision against the Respondent is null and void for lack of jurisdiction. This is what the Tribunal had to say on page 184 of the Record of appeal (page 14 of its Judgment) after considering Section 37 (c), 61 and 64 of the Act:

> **"In Other words, it is obligatory for the Appellant to make an application before this Tribunal for a Mandatory Order requiring it to make good the default within a time specified by the Tribunal. In our view, the Respondent cannot rush to invoke the provisions of Section 37 of the Act, without having regard to the course of action available to it in Section 61 and 64 of The Act".**
>
> ***Accordingly, we find that Section 37 which provides for sanctions or punishment in respect of any enterprise, which intentionally or negligently inter alia fails to comply with conditions in a determination or with***

undertakings given is at the tail end of remedies that are available to the Respondent and may not be invoked before Section 61 and 64 of The Act.

We are therefore of the view that in the absence of an application to this Tribunal by the Respondent for a Mandatory Order requiring the Appellant to make good the default within a time specified, the Respondents decision against the Appellant is null and void for lack of jurisdiction since there was no jurisdiction on the part of the Respondent to exercise such power, such purported exercise renders the fine against the Appellant null and void".

The use of the word "**may**" in both **Sections 61** and **64** of the **Act** as opposed to the word **"shall"** does not by any means impose a mandatory duty on the Appellant to adopt both **Sections 61** and **64** of the **Act**.

In other words both Sections stand on the same footing and the Appellant has discretion to exercise, to either follow the provisions of **Section 61**, as they did or follows those of **Section 64** of the **Act** depending on the status of the enterprise being investigated.

Although in some cases Courts have held the word **"may"** to be synonymous with the words **shall** or **must** in an effort to effectuate legislative intent, what we have before us is an Act which does not use the words interchangeably. Where the legislators have intended

to place a duty or Mandatory sense under the Act, the word **"shall"** has been used and the Courts are typically bound to uphold that especially when a negative word, **"such as not"** or **"no"** precedes **"shall".**

In that respect I totally agree with the Appellant that they were not under a mandatory duty to invoke **Section 64** of the **Act** before imposing a fine under **Section 37** of the **Act**.

As earlier alluded to, they had a choice between **Section 61** and **64** and cannot therefore be faultered for using **Section 61** depending on the status of the enterprise being investigated.

Having said this far, I am sanguined that all the three grounds of the appeal by the Appellant have been resolved as they are interrelated. The sum total being that the Tribunal erred in law in arriving at the decision following their interpretation of **Section 37, 61** and **64** of the **Act** that it is obligatory for the Appellant to make an application before the Tribunal for a Mandatory Order and that their default in doing so makes the Appellants decision to fine the Respondent null and void for lack of jurisdiction.

However, I need to go further here and make an observation. As underlined in my reproduction of Section 61 in particular **Subsection (1),** the Appellant may only invoke the provisions of **Section 61** and **37** of the **Act** where it has determined after an investigation that an enterprise is a party to a merger. It is clear as earlier highlighted that the Respondent was not a party to any of

the two mergers, but was merely an appointed sole distributor of the Castro lubricants.

It is perhaps here where the Appellant should have prudently exercised its discretion and invoked **Section 64** of the **Act** which did not require an enterprise as a prequisite to be a party to a merger and obtained a mandatory Order from the **Tribunal**.

As the matter stands, the Appellant having invoked **Section 61** of the **Act** had no power to determine the matter and fine the Respondent **0.1 per centum** of its annual turnover as it was not a party to any of the two merger.

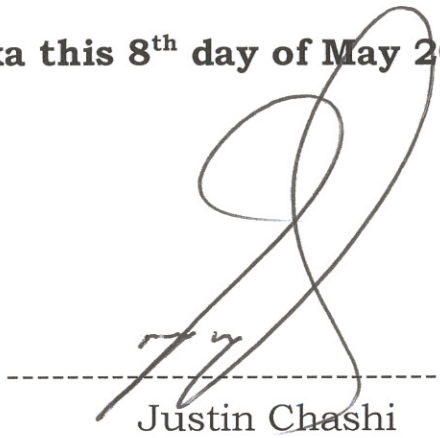
Let me now turn to the cross appeal by the Respondent. I do not intend to spend time on the cross appeal as it is not a cross appeal per se. At the end of the day, all the Respondent is seeking from this Court is an Order or direction as to where the Respondent must procure or source its Castro lubricants from.

All the Respondent need to do, is have recourse to the Distributorship Agreement of 4th June 2002 between **BP Africa Limited** and **Danatech Investments Limited** and there lies the answer.

In view of the nature of the appeal and issues of novelty having been raised in this matter I will order that each party bears its own costs.

Leave to appeal to either party is hereby granted.

Delivered at Lusaka this 8th day of May 2015.



Justin Chashi
HIGH COURT JUDGE