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THE COMPETITION AND CONSUMER PROTECTION TRIBUNAL

CAUSE NO. 2021/CCPT/026/COM

IN THE MATTER OF : SECTION 64 OF THE COMPETITION AND CONSUMER PROTECTION ACT No. 24 OF 2010

IN THE MATTER OF: RULE 14 OF THE COMPETITION AND CONSUMER PROTECTION (TRIBUNAL) RULES, STATUTORY INSTRUMENT No. 37 OF 2012

IN THE MATTER OF: THE DECISION BY THE COMPETITION AND CONSUMER PROTECTION COMMISSION DATED 13TH JULY, 2016

BETWEEN

COMPETITION AND CONSUMER PROTECTION COMMISSION — APPLICANT

VERSUS

MPANDE LIMESTONE LIMITED — 1STRESPONDENT

LAFARGE ZAMBIA PLC — 2NDRESPONDENT

DANGOTE CEMENT ZAMBIA LIMITED — 3RDRESPONDENT

CORAM: **Mrs. E. Chiyenge-Chairperson**
Mrs. M.B. Muzumbwe-Katongo-Vice Chairperson
Mr. B. Mwalongo-Member

For the Applicant: Mrs. M.B Mwanza, Director-Legal and Corporate Affairs; Ms. M. Mtonga, Senior Legal Officer, Competition and Consumer Protection Commission; and Ms. S. Mafuta, Legal Officer-Competition and Consumer Protection Commission

For the 1st Respondent: Mr. K.J Chulu; and Ms. M.T Songiso-PH Yangailo& Co.

For the 2nd Respondent: Mr. S. Chisenga; Mrs N. Namwila-Mwala and Ms. M Chileshe - Messrs Corpus Legal Practitioners

For the 3rd Respondent: Mrs. M. Machieleta; and Ms. K. Mutale-TMS Legal Practitioners

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JUDGMENT

Legislation referred to

Constitution of Zambia, Chapter 1 of the Laws of Zambia

Competition and Consumer Protection Act No. 24 of 2010

Cases Referred to

Chief Constable of North Wales Police v Evans (1982) 1 WLR 1155 at 1160; (1982) 3 ALL E R 141

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374

Swadeshi Cotton Mills V. Union of India 1981 AIR 818

Canara Bank V. V K Awasthi Case No.: Appeal (Civil) 2300 of 2005

Zinka v. The Attorney-General (1990-1992) Z.R.73(S.C.)

North Western Co. Ltd. v Energy Regulations Board (2010/HP/786) [2011] ZMHC 76 (3 October 2011)

John Ashikkalis and Tony Ashikkalis v Athanasios Apostolopoulos (1988 - 1989) Z.R. 86 (S.C.),

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MUZUMBWE-KATONGO, Vice Chairperson, delivered the judgment of the Tribunal

Background

1. This is our judgment on an application for a mandatory order made by the Competition and Consumer Protection (hereinafter the "Applicant"), on 31st May, 2021.

Brief Facts

2. The Applicant, on the 31st day of May, 2021, made an application for a mandatory order that-

   i. *Lafarge Zambia Plc, Dangote Cement Zambia Limited and Mpande Limestone Limited revert to pre-cartel prices ranging between USD4.50-USD5 for a period of one year from the date of receipt of the Board Decision pursuant to Section 59(3) (b) of the Act;*
   ii. *Lafarge Zambia Plc, Dangote Cement Zambia Limited and Mpande Limestone Limited submit monthly average ex-works prices and any price adjustments be indexed to the exchange rate and be submitted to the Commission for review pursuant to Section 58(1) of the Act.*

3. The application was made following a Decision made by the Board of the Applicant on 31st March, 2021 wherein the Board found that *Lafarge Zambia Plc, Dangote Cement Zambia Limited and Mpande Limestone Limited* had, in summary, acted contrary to section 9(1)(a) and (b) of the Competition and Consumer Protection Act No. 24 of 2010

(hereinafter "the Act"). The Board, in so finding, made directives (in its Decision) numbered iii and iv whose text is verbatim paragraphs i and ii above.

4. The Applicant filed, before this Tribunal, the Applicant's notice of application for a mandatory order, certificate of urgency, affidavit in support of the application for a mandatory order (sworn by one Joseph Kaumba (Senior Investigator in the employ of the Applicant)) and its skeleton arguments in support of an application for a mandatory order on 31st May, 2021.

5. The 1st Respondent filed an affidavit in opposition and skeleton argument and list of authorities on the 7th of June, 2021. The 2nd Respondent also filed its Affidavit in opposition, including the list of authorities and skeleton on the 7th of June, 2021. The 3rd Respondent filed its affidavit filed in opposition, skeleton arguments and list of authorities on 3rd June, 2021. The Tribunal will make reference to these documents as and when need arises.

6. On the 9th day of June, 2021, this Tribunal heard, orally, Learned Counsel for the respective Parties on the application for a mandatory order. Having not delivered our decision within the sixty days required by rule 31 (2) of the Competition and Consumer Protection (Tribunal) Rules, Statutory Instrument (S.I.) Number 37 of 2012, the parties renewed the proceedings, concluding with the 1st Respondent from whom we heard on 6th September, 2021.

Applicant's Submissions

7. Mrs. M. B. Mwanza, Learned Counsel for the Applicant, submitted that before the Tribunal was an application for a mandatory order which was filed on the 31st of May 2021; that the Applicant had augmented its application with an affidavit in support sworn by one Joseph Kaumba and had further filed skeleton arguments in support thereof; that the Applicant would rely on the documentation filed together with the exhibits in the record of proceedings filed before Tribunal, also filed on 31st May, 2021; and that the reliefs sought were as stated in the application.

1st Respondent's Submissions in Response

8. Learned Counsel for the 1st Respondent stated that the 1st Respondent had filed an affidavit in opposition and skeleton argument and list of authorities on the 7th of June, 2021, which they would rely on with emphasis on paragraphs 21, 23, 24 and 25 of the affidavit in opposition. Learned Counsel further submitted as follows: that the granting of the mandatory order was within the discretion of the Tribunal after an applicant has sufficiently shown that the 1st Respondent failed to comply with a directive without reasonable cause as provided in section 64 (1) of the Competition and Consumer Protection Commission Act; that the Applicant had not shown that the failure on the part of the 1st Respondent was without reasonable cause; and that in the arguments filed on behalf of the 1st Respondent, the 1st Respondent had shown reasonable cause.

9. Learned Counsel for the 1st Respondent further submitted that most importantly, there was a pending appeal before the Tribunal; and that effecting compliance with the directive at this stage, would result in the 1st Respondent suffering irreparable injury that the Applicant will not be able to compensate in the event that the 1st Respondent succeeds in its appeal.

10. Counsel for the 1st Respondent conceded that there was no stay of execution in effect presently; that the appeal did not operate as a stay of execution; that the 1st Respondent was not asking that a stay be granted as insinuated in the arguments filed by the Applicant; and that what was being asked for was that the Tribunal do what is fair and just (considering the appeal before it) and in the interest of the 1st Respondent in circumstances where the law has not provided for a remedy to prevent execution where there is a pending appeal.

2nd Respondent's Submissions in Response

11. Learned Counsel for the 2nd Respondent opposed the application for a mandatory order by the Applicant and in so doing relied on their Affidavit in opposition, including the list of authorities and skeleton arguments both of which were filed on the 7th of June, 2021.

12. Counsel for the 2nd Respondent submitted that the cardinal issue to consider as per the provisions of section 64 of the Act, is that for a mandatory order to be granted, there

must be reasonable cause by the Applicant; that in order to arrive at this reasonable cause the Applicant must accord the Respondent an opportunity to make representations before it; that the 2nd Respondent did make these representations, and that the representations appeared in exhibit "AH1" in the affidavit in opposition of the 2nd Respondent.

13. Learned Counsel further submitted that the Applicant responded to these representations and the response was exhibited as "AHB2" of the 2nd Respondent's affidavit in opposition. Counsel noted that there were 4 representations made by the 2nd Respondent and that the Applicant, in response (Exhibit "AH2"), only addressed two of those presentations; that the failure by the Applicant to fully respond to the representation made by the 2nd Respondent was justifiable reason as to why the mandatory order should not be granted.

14. Counsel argued that section 64(2) of the Act is couched in mandatory terms in that it provides that *"the Commission shall consider any representation an enterprise wishes to make before making an application under subsection 1."* Learned Counsel further argued that the failure by the Applicant to fully consider the representations made by the 2nd Respondent made the application incompetent, and that the same ought to be dismissed.

15. Counsel also submitted that of the many directives in the decision appealed against, the Applicant had only chosen 2 directives, which directives go to the heart of the operations of the 2nd Respondent; that the details of the representations regarding the 2 directives that are subject of this application were not responded to by the Applicant in Exhibit AH2.

16. In conclusion, Counsel submitted that there was a pending appeal before the Tribunal; that the appeal was against these directives; that if the Tribunal grants the mandatory order, the appeal would be rendered an academic exercise. Counsel prayed that the application be dismissed with costs to the 2nd Respondent.

3rd Respondent's Submissions in Response

17. The 3rd Respondent opposed the application for a mandatory order and relied entirely on their affidavit filed in opposition dated 3rd June, 2021, their skeleton arguments and list of authorities also dated 3rd June, 2021. Learned Counsel for the 3rd Respondent

submitted that the application should not be granted, as there was a pending appeal before the Tribunal against the very directives (that the Applicant sought to enforce) on the ground that the Act does not give the Applicant the power to issue such directives.

18. Counsel submitted that the overriding consideration must always be justice and fairness; that the purpose of the appeal was to ensure the effective administration of justice, so that rights which (which the Tribunal ought to protect) can fairly be determined and enforced; that should a mandatory order be granted this may have the effect of pre-empting the final decision of the appeal; that if the order is granted the 3rd Respondent would suffer irreparable injury which could not be atoned for by damages; and that the Applicant has not shown in any way how it shall be prejudiced if its application is not granted. Counsel prayed that the Tribunal should dismiss the application as it is intended merely to derail the course of justice by rendering the appeal an academic exercise.

Submissions by the Applicant's Counsel in Reply

19. Counsel for the Applicant submitted that they had only received the actual affidavits in opposition and the skeleton arguments the immediately preceding day and that accordingly, they would render their reply verbatim.

20. Focusing on the 2nd Respondent's affidavit in opposition, Counsel submitted that there was a redacted report which was initially sent out to the respective parties spelling out their cases and redacting those of other Respondents contrary to the 2nd Respondent's assertion of prejudice and injustice; that this was done in the spirit of fairness so as to treat all the parties fairly by availing them only the part of the investigation that applied to them; that this *modus operandi* was in fact necessitated by the fact that in responding to the notices of investigation in this matter, the 2nd Respondent tagged most, if not all of their communication as confidential, and that this made it difficult for the Applicant to effectively reflect the 2nd Respondent's communication within the bounds of guideline 5 of the Applicant's Administrative and Procedural Guidelines of 2014. Counsel submitted that all the parties were judicially afforded opportunity to make their representation and to be heard.

21. She further submitted that the Respondents were given sufficient time to make

presentations before the Applicant in line with the requirement at section 64 of the Act; that with particular regard to the 2nd Respondent reference was made to pages 668 and 692 to 695 of the Record of Proceedings which showed a trail of communication to this effect.

22. Learned Counsel for the Applicant further submitted that as regards the argument raised by the Respondent in relation to the Applicant not having met the requirements set out in section 64 of the Act, the wording of section 64 gave the Applicant discretion to apply for a mandatory order in an event an enterprise failed without reasonable cause to comply with the directives of the Board of Commission; that this discretion is anchored on a mandatory condition under section 64(2) of the Act; that the Applicant is obligated to give an enterprise an opportunity to make any representations before an application for a mandatory order is made; and that this is the only requirement that the Applicant is made to follow before making an application for a mandatory order before the Tribunal.

23. Counsel submitted that that being said, pages 662 to 655 for the record of proceedings show a trail of letters written by the Applicant to the Respondents directing them that they comply with directives 3 and 4 of the Board decision dated 31st March, 2021; that the said pages also show letters written by the Respondent to the Applicant stating reasons for not complying with the directive of the Board. She submitted that contrary to the 2nd Respondent's assertion that the Applicant only responded to two of the reasons given by the 2nd Respondent, the contents of the letter written by the Applicant showed that the Applicant did respond to all the reasons given by the 2nd Respondent, the 1st Respondent and the 3rd Respondent; and that in this regard, the Applicant fully complied with the requirements set out under section 64 of the Act.

24. Learned Counsel summarised the reasons advanced by Counsel for the Respondents for refusing the application for a mandatory order as follows:

(1) that, the Respondent has appealed the decision of the Board of Commission dated 31st March, 2021 and the appeal has prospects of success;

(2) that the directive the Applicant wishes to impose will bring financial harm to the Respondent and that the Applicant will not be able to compensate for the loss; and

(3) that the mandatory order if granted will render the Respondent appeal derogatory and an extra academic exercise.

25. In response to first reason, Learned Counsel for the Applicant submitted that an appeal under section 60 of the Act does not prevent the Respondent from conferring the directive given and the reason is simple, and the Respondent are agreed to this, that an appeal under section 60 of the Act does not operate the stay of execution. Counsel cited, in part, the words of the Supreme Court in the case of ***Ndola City Counsel vs Charles Mwansa 1994 Zambia Law Reports page 123*** (quote) "*... it is trite law that an appeal per se from the subordinate court to the high court does not operate as a stay of execution...*".

26. She stated that the pending appeal before the Tribunal cannot be considered by the Applicant as reasonable cause for not complying with the Board directive; and that the mandatory order applied for by the Applicant should, therefore, not be granted by the Tribunal.

27. In reply to the 2nd reason, the Applicant submitted that it was imperative that the Respondent understood that the directives issued by the Board of Commissioners were meant to cure or correct the conduct that was found in the cement market. She further submitted that if left unattended on the ground that the Respondent will suffer financial loss and that the Applicant will not be able to compensate for the loss, the Respondents would continue to benefit from the anti-competitive conduct, whilst consumers continued to pay high prices for the cement as a result of the said conduct by the Respondent. Counsel then posed the question who would mitigate the loss that the consumers would continue to suffer.

28. She submitted that by law, the Tribunal has no jurisdiction to stay the execution of a decision of the Board of Commissioners. In this regard, she cited the case of ***Zambia Revenue Authority vs Fellimart Investment Limited Appeal No. 174/2014 Supreme Court Judgment Number 24 of 2017***. She submitted that in that case, the Supreme Court, in considering whether the Tax Tribunal had the jurisdiction to grant a stay of execution, stated (quote)-

" ... it is clear from the above discussion from the foreign tax law provisions that in jurisdictions where tax appeals Tribunals have power to stay execution, that power has been given expressly in enabling legislation. In our view, the absence of an express provision for the Tribunal in the

instant case to have power to grant an order of stay of execution was not inadvertent. The absence of an express provision for stay of execution simply means Parliament did not intend to clothe the Tribunal with jurisdiction to stop the Appellant from collecting disputed tax in cases where there is an appeal lodged with the Tribunal."

29. She stated that in like manner, Parliament did not intend to stop the Applicant from enforcing its directive in an event an enterprise does not comply with the direction of the Board's decision; that the principle under the Competition and Consumer Protection Act is 'comply now argue later'; and that the second view advanced by the Respondent, could not, therefore, prevent the Applicant from applying for the mandatory order.

30. In response to the third reason advanced by the Respondents, Counsel for the Applicant submitted that what the Respondents were essentially requesting the Tribunal was to allow the Respondent to maintain the *status quo.* She submitted that there was no reason or cause by the Respondent for failing to comply with directive 3 and 4 of the Board decision taken on 31st March, 2021.

31. Ms. Mafuta submitted, with respect to the 2ndRespondent's arguments as contained in the 2nd Respondent's skeleton arguments and in particular, regarding the wording of section 58(7) of the Act that that section was inapplicable as the case at hand was not one for the enforcement of a penalty. She further submitted that the section implied a stay of execution of a penalty as, according to the section, the Applicant could not apply for a mandatory order unless an appeal has been dismissed or there is no appeal before the Tribunal.

32. She submitted that what the Applicant sought to enforce is directive 3 and 4 of the Board decision dated 31st March, 2021, which relates to anti cartelistic conduct that the Applicant established during its investigation against the Respondents; and that accordingly, the applicable provision (as regards the application for the mandatory order to enforce the Board's directive) is section 64 of the Act. A mandatory order in this instance should be granted.

33. She stated that the 2nd Respondent's argument in its skeleton arguments to the effect that the case of ***Zambia Revenue Authority Vs Felimart Investment Limited*** did not address the power to grant or refuse an application for a mandatory order and that therefore the said case was irrelevant to determine the jurisdiction of the Tribunal *vis a vis* the mandatory order application was unfounded. She submitted that the principle in the

Zambia Revenue Authority vs Felimart Investment Limited case could not be avoided as the failure to grant a mandatory order would essentially imply that the decision of the Applicant dated 31st March, 2021, would be stayed.

34. Learned Counsel for the Applicant submitted that as the Tribunal had agreed with the position of the Supreme Court in the cases of *MTN Zambia Limited vs Competition and Consumer Protection Commission Appeal No. 2018/CCPT/009/CON* and *MTN Zambia Limited vs Competition and Consumer Protection Commission Appeal No. 2018/CCPT/010/CON*, that the Tribunal does not have jurisdiction to grant stays of execution, the principle of *stare decisis* should, in this case, apply.

35. The Applicant, on the basis of the foregoing, prayed that Tribunal should grant its application and issue a mandatory order to compel the Respondents to comply with the directives 3 and 4 of the Board decision within 5 days of receipt of the order.

36. The Tribunal noted that whereas on the one side there was a suggestion that granting the application will actually render the appeal nugatory and an academic exercise, there was, on the other side, an argument that declining to grant the application would in fact amount to granting a stay; that in putting forward their respective arguments, there were still some areas that had not come out clearly; and that Counsel on either side address the Tribunal on what, in their opinion, the purpose of section 64 of the Act was.

37. Learned Counsel for the 2nd Respondent submitted, in part, that they had, from paragraphs 5.3 to 5.10 of their arguments, tried to draw the distinction that this was not an application for a stay from the Board decision, but that this was an application for a mandatory order; that the two are thus, different; that the Act, under section 64, had vested the power to grant or reject an application for a mandatory order in the Tribunal; that section 64 does not entail an automatic grant of mandatory order.

38. Learned Counsel for the Applicant submitted that the primary guide is what is contained in the marginal note; that the marginal note sets out what the section provides for; that the marginal was "Enforcement of directions and undertakings"; that from a reading of the first line, the section sets out to ensure compliance with directions and undertakings where an enterprise that has been found wanting has failed to do so within the guidance given or the time stipulated. Counsel reiterated her position that not granting the application for a mandatory order, was, in principle, granting a stay of

execution.

39. The Tribunal wishes to thank Learned Counsel for their respective arguments and submissions, to which reference will be made as and when necessary.

Consideration of the case

40. The Tribunal has considered the arguments and submissions made by Counsel. The Tribunal notes that the Respondents have opposed the application made by the Commission for a mandatory order on the basis that the Commission did not meet the prerequisites for the filing of a mandatory order. In particular, the 2nd Respondent alleges that the Commission did not consider the representations made by each respective Respondent. The requirement to consider the representations made by the Respondents is contained in section 64(2) of the Act which provides as follows:

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

Subsection (1) of section 64 of the Act provides-

(1) Where the Commission determines that an enterprise 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.

Counsel for the Respondents, particularly the 1st Respondent, have also argued that the Applicant had not shown that the failure (on the part of the 1st Respondent) was without reasonable cause, and that in the arguments filed on behalf of the 1st Respondent, it had shown reasonable cause.

41. In short, the Respondents, in opposing the application for a mandatory order on the ground aforementioned, are contesting the procedural fairness (or procedural justice) of the decision-making process employed by the Applicant. In essence, therefore, the Tribunal, will, in considering the application before it and the arguments advanced in opposition, necessarily be required to review (for procedural fairness or procedural justice) the decision of the Applicant to apply for a mandatory order. This, in the view of the Tribunal, is akin to undertaking some form of judicial review[1] of the decision of the

[1] There are three main grounds of judicial review: illegality, procedural unfairness, and irrationality.
A decision can be overturned on the ground of illegality if the decision-maker did not have the legal power to make that

Applicant to apply for a mandatory order on the ground of procedural impropriety.

42. Such review is implied in sections 64(1) and (2) (cited above) of the Act which provision suggests that a mandatory order cannot be granted where the Applicant did not give an enterprise an opportunity to make representations as to why the mandatory order should not be applied for, or having given an enterprise the opportunity to make representations, the Applicant does not take those representations into consideration. Accordingly, the Tribunal, in determining the application before it, will necessarily have to review the legality of the decision made by Applicant to make an application for a mandatory order.

43. We draw guidance from analogous judicial review case law, seeing that in essence section 64(1) and 64(2) somewhat entail similar approach. In the case of ***Nyampala Safaris (Z) Limited and Others v Zambia Wildlife Authority & Others [2004] Z. R. 49,*** the trial judge stated that the basic principles underlying the process of judicial review were, *inter alia,* as follows:

(a) ...;

(b) *That the purpose of judicial review is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected and that it is not part of the purpose to substitute the opinion of the judiciary or of the individual Judge for that of the Authority constituted by law, to decide the matter in question.*

(c) *That a decision of an inferior Court or public Authority may be quashed, (by an order of certiorari) where:-*

(i) ...; *or*

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decision, for instance because Parliament gave them less discretion than they thought.
A decision can be overturned on the ground of procedural unfairness if the process leading up to the decision was improper. This might, for instance, be because a decision-maker who is supposed to be impartial was biased. Or it might be because a decision-maker who is supposed to give someone the chance to make representations before deciding on their case failed to do so.
A decision can be overturned on the ground of irrationality if it is so unreasonable that no reasonable person, acting reasonably, could have made it. This is a very high bar to get over, and it is rare for the courts to grant judicial review on this basis.
"What is Judicial Review?" by Raphael Hogarth for Institute for Government. Available at
https://www.instituteforgovernment.org.uk/explainers/judicial-review
Visited on 20/08/2021 at 13:13 hours.
Another ground for judicial review is breach of legitimate expectation – when a public body has failed to act in line with an expectation that it has created by its own statements or acts.
See "Judicial Review" available at https://www.pinsentmasons.com/out-law/guides/judicial-review
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(ii) ...;

(iii) *The Authority failed to comply with the rules of natural justice, where these rules apply;*

(iv) ...;

(v) ... .

44. In the case of ***Chief Constable of North Wales Police v Evans (1982) 1 WLR 1155 at 1160; (1982) 3 ALL E R 141***, Lord Hailsham, LC at page 143 stated regarding the purpose of judicial review-

"It is important to remember in every case that the purpose of (the remedy of judicial review) is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question."

45. The Tribunal also notes that the Respondents have alleged that the Applicant failed to establish that the Respondents failed, without reasonable cause, to comply with the decision of the Commission. This requirement is set out in section 64 (1) of the Act which provides-

64. (1) Where the Commission determines that an enterprise 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.

46. Having perused the provision, the Tribunal is of the view that the making of an application for a mandatory order pursuant to subsection (1) requires the Commission, in making the application, to satisfy itself that the failure to comply with the directions in issue was without reasonable cause. The Commission is also required to consider the representations made by an enterprise (in its own defence) for not complying with a direction of the Commission, or an undertaking.

47. In terms of procedural steps that section 64(1) and (2) call for, the Commission, in the opinion of the Tribunal ought to-

(1) firstly, make a decision to apply for a mandatory order to the Tribunal *requiring the enterprise to make good the default within a time specified time;*

(2) thereafter make this decision known to the enterprise, requesting the enterprise to make representations as to why the Commission should (or should not)

proceed with the application[2]. This implies that the enterprise must make representations in its defence, setting forth reasons (reasonable cause) why it has not complied a direction of the Commission, or an undertaking; and

(3) consider the representations made by the enterprise, and on the basis of those representations, determine whether or not the failure to comply is without reasonable cause and, if it is without reasonable cause to proceed with the application for a mandatory order. This suggests that the substance and quality of the representations may likely determine whether or not an enterprise has reasonable cause for failing to comply with the Commission's direction or an undertaking, and thereby inform the decision by the Commission whether or not to proceed with the making of an application for a mandatory order.

48. In the view of the Tribunal, because the decision whether or not to make the application for a mandatory order may likely depend on the substance of the representations made by an enterprise (followed, of course, by proper consideration of those representations), it is of utmost importance that the enterprise be given sufficient time to make its representations. In order to consider the sufficiency, or otherwise, of time for the making of representations, the Tribunal will necessarily consider what procedural fairness or procedural justice stipulates *vis a vis* sufficiency of time. Other related, and inextricably linked, concepts such as the concept of natural justice and procedural impropriety will also be discussed.

What is procedural fairness or procedural justice?

49. Procedural fairness or procedural justice emanates from the Common Law Concept of natural justice. Natural Justice is an important concept in administrative law. The principles of natural justice of fundamental rules of procedure are the preliminary basis of a good administrative set up of any country. [3] In the words of Justice Krishna Iyer-

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[2] The Tribunal notes that the law does not stipulate the time within which an enterprise must revert to the Commission with its representations. It is, however, trite in Administrative Law that sufficient time must be accorded to ensure that meaningful and well informed representations are made.

[3] Principle of Natural Justice and its Legal Implications, Available at https://www.cusb.ac.in/images/cusb-files/2020/el/law/PRINCIPLE%20OF%20NATURAL%20JUSTICE_6th%20Sem.pdf
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Natural justice is a pervasive fact of secular law where a spiritual touch enlivens legislation, legislation and adjudication to make fairness a creed of life. It has many colour and shades, many forms and shapes.1 It is no doubt, a procedural requirement but it ensures a strong safeguard against any Judicial or administrative; order or action, adversely affecting the substantive rights of the individuals.[4]

50. Different jurists have described natural justice in different ways. Some refer to it as "*the unwritten law (jus non scriptum) or the law of reason*", while others describe it as "*a great humanising principle intended to invest law with fairness to secure justice and to prevent miscarriage of justice.*"[5]

51. The term natural justice signifies basic principles of justice, which are made available to every litigant during trial. These principles are adapted to the circumstances of all cases, and apply to decisions of all governmental agencies, tribunals and judgments of all courts.[6] Natural justice is now the essence of any judicial system.[7]

52. In ***Swadeshi Cotton Mills V. Union of India 1981 AIR 81***8, it was observed that Natural justice is a branch of public law and is a formidable weapon which can be wielded to secure justice to the citizen.[8] Also, in ***Canara Bank V. V K Awasthi Case No.: Appeal (Civil) 2300 of 2005*** , the Supreme Court of India observed that principles of natural justice are those rules which have been laid down by courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights; and that these rules are intended to prevent such authority from doing injustice.[9]

53. Natural Justice is a concept of Common Law and it is the counterpart of the American concept of 'procedural due process'. Natural Justice represents higher procedural

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[4] Principle of Natural Justice and its Legal Implications, Available at https://www.cusb.ac.in/images/cusb-files/2020/el/law/PRINCIPLE%20OF%20NATURAL%20JUSTICE_6th%20Sem.pdf
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[5] *Ibid*

[6] *Ibid*

[7] Principle of Natural Justice and its Legal Implications, Available at https://www.cusb.ac.in/images/cusb-files/2020/el/law/PRINCIPLE%20OF%20NATURAL%20JUSTICE_6th%20Sem.pdf
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[8] *Ibid*

[9] *Ibid*

principles developed by judges which every administrative agency must follow in taking any decision adversely affecting the rights of a private individual[10].

54. ***In Zinka v. The Attorney-General (1990-1992) Z.R.73(S.C.),*** *(hereinafter "the Zinka Case")*, the Court stated (quote)-

The principles of natural justice must be observed by courts, tribunals, arbitrators and all persons and bodies having the duty to act judicially, except where their application is excluded expressly or by necessary implication. (See Halsbury's Laws of England, 4th ed., para. 64; and S.A. de Smith's Judicial Review of Administrative Action, 3rd ed.). In order to establish that a duty to act judicially applies to the performance of a particular function, it is now unnecessary to show that the function is analytically of a judicial character or that it involves the determination of a lis inter partes; however, a presumption that natural justice must be observed will arise more readily where there is an express duty to decide only after conducting a hearing or inquiry or where a decision entails the determination of disputed questions of law and fact. Prima facie, moreover, a duty to act judicially will arrive in the exercise of a power to deprive a person of his livelihood; or of his legal status where that status is not merely terminable at pleasure; or to deprive a person of liberty or property rights or any other legitimate interests or expectations or to impose a penalty.

55. Procedural justice is the idea of fairness in the processes surrounding the resolution of disputes. Procedural justice is connected to natural justice or to the concepts of due process (United States of America terminology), and fundamental justice (Canadian terminology). It is concerned with the fairness and the transparency of the processes by which decisions are made.

56. Procedural justice deals with the perception of fairness regarding outcomes. It is concerned with the extent to which an individual perceives that a decision has been fairly made. Procedural justice is best examined by assessing the formal procedures employed in the making of decisions. A fair procedure is one that affords those who are affected by a decision an opportunity to participate in the making of the decision, i.e. hearing all parties to a matter prior to rendering a decision constitutes one step which must be taken in order that a process may then be characterised as procedurally fair.

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[10] Introduction to Law, p.78,, Available at https://nios.ac.in/media/documents/SrSec338New/338_Introduction_To_Law_Eng/338_Introduction_To_Law_Eng_L6.pdf Visited on 09/09/2021 at 19:41 hours

57. The learned authors of De Smith's Judicial Review, observe, in paragraph 6 - 001, at page 317, that-

an important concern of procedural justice is to provide the opportunity for individuals to participate in decisions by public authorities that affect them. Another is to promote the quality, accuracy, and rationality of the decision making process. Both concerns aim at enhancing the legitimacy of the process, whilst at the same time improving the quality of decisions made by public authorities.

58. The same authors state, in paragraph 6 - 002, at page 317, that, *"Procedural justice deals with issues such as the requirement to consult, to hear representations, to hold hearings, and to give reasons. Thus procedure justice addresses the nature of those consultations, representations, and hearings, so as to ensure that they are appropriate in the circumstances, meaningful, and that they assist, and do not hinder the administrative process."*

59. English law imposes minimum standards of procedural fairness. Procedural fairness, as a concept, is founded upon the principle of natural justice. It (procedural fairness) is characterised by twin pillars namely "the rule against bias" and "the right to be heard".[11] The right to be given reasons for a decision is also an integral element of procedural fairness.[12] We are concerned, in the case before us, with the right to be heard, as the right to have sufficient time to prepare one's defence falls within the purview of the right to be heard.

The right to be heard

60. The right to a fair hearing requires that individuals should not be penalised by decisions that affect, *inter alia*, their rights or interests, unless they have been given prior notice of the case made against them, a fair opportunity to answer it, and the opportunity to present their own case. In the ***Zinka Case***, the Court stated, regarding the right to be heard-

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[11] Judicial Review, Available at https://www.ashurst.com/en/news-and-insights/legal-updates/judicial-review/ Visited on 01/09/2021 at 14:53 hours

[12] Judicial Review (*supra*)

"...that no man shall be condemned unheard, that is, parties shall be given adequate notice and opportunity to be heard (audi alteram partem). As was quaintly stated by an eighteenth-century judge, Foretescue, J., in R. v Chancellor of the University of Cambridge [8] at page 567:

'Even God himself did not pass sentence on Adam before he was called upon to make his defence."

61. This principle (i.e. the right to be heard) dates back several centuries, has been applied in various circumstances, and is recognised as one of the tenets of the English justice system.[13] Under that system, it is considered one of the fundamental requirements of adjudication that, whenever the interest of a person is affected by a judicial or administrative decision, that person must be accorded the opportunity to know and to understand the allegations made against them, and to make representations to the decision-maker in response to those allegations.[14]

62. The very fact that a decision affects an individual's rights or interests is sufficient to subject the decision to the procedures required by natural justice. The procedural requirements may be set out in statute, statutory instrument, guidelines (whether statutory or non-statutory) or a procedure which the decision maker has, for itself, established.[15] Such procedures are intended, not only to guarantee that the decision maker takes into account all relevant considerations, but also to ensure procedural fairness for those affected by the decision it is required to make.

63. Where a procedure is laid out for the making of decisions by a decision maker, the decision maker will be required to follow the procedures prescribed for making its decisions. The expression "procedural fairness" usually refers to these requirements that are used to ensure that the principles of natural justice are upheld. Procedural fairness is required in any context or sphere wherein the power of the government or other authority may be brought to bear against an individual or group.[16]

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[13] The Fundamental Principles of Natural Justice in Administrative Law, Muhammad Zubair, Sadia Khattak, Journal of Applied Environmental and Biological Sciences, 2014, pp. 68-72, at p.70 . Available at https://www.textroad.com/pdf/JAEBS/J.%20Appl.%20Environ.%20Biol.%20Sci.,%204(9)68-72,%202014.pdf Visited on 09/09/2021 at 20:43 hours.

[14] *Ibid*

[15] Decision Making by Public Bodies: How to Avoid Legal Challenge by Martin Scott, Available at https://www.fieldfisher.com/en/insights/decision-making-by-public-bodies-how-to-avoid-legal-challenge#rationalandevidencebased Visited on 02/09/2021 at 00:57 hours

[16] Natural justice and procedural fairness at OBSI, Available at https://www.obsi.ca/en/how-we-

64. Departure from an established prescribed procedure in itself can give rise to a successful legal challenge, by way of judicial review, even if no unfairness results. Failure to follow prescribed procedures is what is referred to as procedural impropriety. Lord Diplock, in the case of ***Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374***, stated, in this regard:

"... susceptibility to judicial review under this head [procedural impropriety] covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice"[17]

65. By way of example, procedural fairness entails-the right to be informed in advance of the case against a person– i.e. the factual basis on which the decision-maker may act; the right to a reasonable time within which to prepare a response; the right to be heard (which hearing may either be oral or in writing); the right to cross-examine persons who may have made prejudicial statements (concerning the affected person) to the decision-maker; the right to legal representation; and the right to reasons for the decision. Irrespective of the nature of the body making the decision whether that is judicial, quasi-judicial or administrative, the essence is that a person should be treated fairly.[18]

66. Having discussed what constitutes procedural fairness and what procedural justice entails, and the related concept of natural justice, it is imperative to discuss the aspect of sufficiency of time for a person to prepare their defence. This is discussed below.

Sufficiency of time for the preparation of one's defence

67. One writer states that while it is necessary for a public body charged with authority to make decisions to follow prescribed procedure, doing so does not necessarily render its procedure fair. For example, where notice has been properly served on an affected person and that person indicates an intention to serve written representations outside the prescribed timescale, fairness may require that the body adjourn to allow the person to do

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work/resources/Documents/Principles-of-Natural-Justice-in-Ombudsmanship.pdf
Visited on 09/09/2021 at 16:14 hours.

[17] At p. 411A-B

[18] The Fundamental Principles of Natural Justice in Administrative Law, *supra*

so even though an express rule setting out the requirements of service would permit the public body to proceed if representations have not been received within the specified timescale.[19]

68. Another writer states concerning adequate time to prepare a defence, albeit in the field of Criminal Law, that-

It is not only the right to a not-too-speedy trial that is involved here. This right is also linked to the time to prepare oneself, and the quality of such preparation[20].

69. The writer further states-

The right to be prepared for one's case is thus an important component of the composite right to meaningful and informed participation. The purpose of this right is to ensure "equality of arms" The "equality of arms" principle represents those procedural mechanisms with which the vast inequality in power between the state and the accused is sought to be addressed[21].

70. The writer also states that the right to be prepared for one's trial forms part of the rules of natural justice; that rules include the *audi alteram partem* principle; that *if the audi alteram partem principle is to have any meaning ... the trial court should forbid unreasonably hasty pleas and/or trials...*[22]

71. He states that the right to be prepared is a fundamental principle of a fair trial.[23] He adds that if the accused requires more time to prepare the accused's defence, a postponement is justified[24]; that *failure to grant a postponement for a reasonable period constitutes a gross irregularity resulting in ...not having had a fair trial.*[25] The writer posits an interesting analysis, that " *...in the context of postponement of the trial, that the delicate balance between*

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[19] Decision Making by Public Bodies: How to Avoid Legal Challenge by Martin Scott, Available at https://www.fieldfisher.com/en/insights/decision-making-by-public-bodies-how-to-avoid-legal-challenge#rationalandevidencebased
Visited on 02/09/2021 at 00:57 hours

[20] The Right to be Prepared for One's Trial, Available at https://uir.unisa.ac.za/bitstream/handle/10500/1840/07chapter7.pdf
Visited on 09/09/2021 at 11:30 hours, p.1

[21] *Ibid*, p.2

[22] *Ibid*

[23] *Ibid*, p.3

[24] *Ibid*

[25] *Ibid*, p.4

this right and the right to a speedy trial becomes obvious. Thus, the right to be prepared for one's trial should take precedence over the right to a speedy trial."[26]

72. The writer states right against an unduly hasty trial, is a well-recognised common law principle of a fair trial[27] and cites the case of ***S v Yantolo*** where the court held-
"It is a commendable principle that justice should be done without unnecessary delay, but it is more important that a person accused of a serious crime carrying a heavy sentence or of any crime carrying a sentence, should not be placed in a position where he may be unable to assess and weigh his position, the gravity of the offence against him, the nature of the facts with which he is faced and the consequences of a plea of guilty."

73. Our Constitution, Chapter 1 of the Laws of Zambia, in Article 18(2)(c) provides for the adequacy of time for the preparation of one's defence, albeit also in the context of criminal offences, as follows:

> *(2) Every person who is charged with a criminal offence-*
> *(c) shall be given adequate time and facilities for the preparation of his defence;. . . .*

74. While the foregoing excerpts apply to fair trial within the purview of Criminal Law, the principles enunciated apply to procedural justice or procedural fairness in civil and administrative law matters and to the decisions of administrative and domestic tribunals and of any authority exercising an administrative power that affects a person's status, rights, or liabilities, so much so that any decision reached in contravention of natural justice is void as *ultra vires*. [28]

75. Sufficiency of time to prepare one's defence falls within the purview of the right to be heard. Sufficiency of time to prepare one's defence is linked to the right to notice, which is the starting point of any hearing. One writer posits that unless a person knows the formulation of subjects and issues involved in the case, the person cannot defend themselves; that it is not enough that the notice in a case be given, but it must be adequate also.[29] He states further that *"sufficient time should also be given to comply with the*

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[26] *Ibid*
[27] *Ibid*, p.5
[28] Definition of "natural justice" Available at https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100225319 Visited on 09/09/2021 at 16:18
[29] *Ibid*

requirement of notice.[30] Another writer states, *"Giving a person the substance of the case to be answered will provide only minimal procedural benefit if that occurs only a short time before the actual decision is to be made."* [31]

76. In the ***Canara Bank Case*** *supra* it was stated regarding the sufficiency of time, *"Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of... such reasonable opportunity, the order becomes wholly vitiated."*

77. Having addressed the notion of sufficiency of time to prepare one's case as it relates to the right to be heard, it is imperative to discuss whether or not the Commission accorded the Respondents sufficient time to make their respective representations, which representations may be made under section 64(2) of the Act. This question is imperative because the response thereto is inextricably linked to the procedural steps to be taken by the Commission (outlined in paragraph 47 above (deduced from section 64 of the Act)) in formulating a decision whether or not to apply for a mandatory order. That is to say, the answer to this question will determine, ultimately, whether or not the Applicant followed proper procedure in arriving at its decision to apply for a mandatory order.

Did the Applicant accord the Respondents sufficient time to make representations?

78. The Applicant, in its Skeleton arguments in support of its application, submits that-on 30th March, 2021, in a case in relation to sections 8 and 9 of the Act, which case involved the Respondents, the Applicant's Board of Commissioners, *inter alia,* issued directives with which the Respondents were dissatisfied; that the Respondents appealed to this Tribunal; that the Respondents were expected to begin to comply with the directives on 10th May, 2021, as indicated in letters to the Respondents dated 11th May, 2021; that the Respondents did not implement the Directives, and this prompted the Applicant to write to them reminding them to implement the decision; that in response, the Respondents refused to implement the Directives on the premise that they had already appealed to this Tribunal; and that the 3rd Respondent intimated that they were already in compliance when in fact, they were not.

79. The Applicant further stated that they wrote another letter to the Respondents dated 13th

[30] Introduction to Law, *supra*, p.83
[31] Fundamental Principles of Natural Justice in Administrative Law, *Supra*, p.71

May, 2021, informing them that it was the Applicant's intention to apply for a Mandatory Order in the event that the Respondent's did not implement the directives; the letter further requested the Respondents to give reasons why the Applicant should not proceed to apply for a Mandatory Order; that the Respondents' respective responses are contained in their letters dated 13th May, 2021, 18th May, 2021, and 17th May, 2021; and that being cognisant of the fact that the reasons advanced by the Respondents are not supported by law, the Applicant had proceeded to make the application.

80. The Applicant cited section 64(1) and (2) of the Act and stated that the provision allows the Applicant, when it has considered representations made by an enterprise and determines that the enterprises has failed, without reasonable cause, to comply with the directives of the Board, to apply, to this Tribunal, for a Mandatory Order; that the essence of a Mandatory Order is to compel the enterprise to comply with the directives and or undertakings; that the mere fact that the Respondents had appealed the decision of the Board of Commissioners does not preclude the Respondents from implementing the directions given therein.

81. The Applicant also submitted that the appeal does not prevent the Applicant from making this application before the Tribunal to enforce the directives (iii) to (iv) of the Board decision; that the matter before the Tribunal is one of public interest; that it is not surprising that it was the drafter's intention not to provide for an express provision for stay of execution of the Applicant's decisions; that this was to prevent any anti-competitive conduct or unfair trade practice from continuing on the market on the premise that an enterprise had appealed the decision of the Applicant to the Tribunal; that the Respondents have not given the Applicant any reasonable cause as to why they have failed to comply with the Board directives; and that an appeal before the Tribunal does not absolve the Respondents of the legal obligation to comply with the directives of the Board.

82. We have considered the evidence on record and found that the Applicant wrote (verbatim) to each Respondent on 11th May, 2021 as follows (only relevant excerpts have been quoted):

11th May 2021

...

Dear Messrs,

RE: IMPLEMENTATION OF BOARD DIRECTIVES ON ALLEGATIONS OF RESTRICTIVE BUSINESS PRACTICES IN THE CEMENT SECTOR

...

The Competition and Consumer Protection Commission (the "Commission") served your client with a Decision of the Board of Commissioner (the "Board") on allegations of restrictive business practices in the cement sector on 8th April, 2021.

The Board gave directives to your client and among them was the reverting to pre-cartel prices for 32.5 type of cement ranging between US$4.50-US$5.00. The Commission has noted that the Board Directive to revise prices as indicated above has not been effected by your client within the 30 days period stipulated in the Board Decision as at 10th May 2021.

Further note that the Commission has noted your client's appeal before the ..."Tribunal"...However, it is the Commission's considered view that the Tribunal does not have the power or jurisdiction to grant a stay of execution of a decision of the Board and further does not have the implied power or jurisdiction to grant a stay of execution of a decision of the Board pending appeal. The Tribunal duly guided the above position in its ruling in Appeal no. ***2018/CCPT/001/COM*** *in the case* ***LAFARGE ZAMBIA PLC VS. COMPETITION AND CONSUMER PROTECTION COMMISSION*** *dated 26th February 2019 holden at Lusaka. As such we expect you to adhere to the Board Decision during the appeal process.*

...

Chilufya Sampa
Executive Director

(See pages 662 to 667 of the Record of Proceedings).

83. Subsequently, the Commission, on 13th May, 2021, wrote (verbatim) to the Respondents (only relevant excerpts have been quoted):

13th May 2021

...

Dear Messrs,

RE: IMPLEMENTATION OF BOARD DIRECTIVES ON ALLEGATIONS OF RESTRICTIVE BUSINESS PRACTICES IN THE CEMENT SECTOR

Reference is made to the above captioned matter and our letter to yourselves dated 11th May 2021.

The ...Commission...has noted the contents of your client's letter and their refusal to comply with the Directives of the Board...issued on 30th March 2021. In this regard, the Commission will be left with no choice but to invoke Section 64 of ... the Act... for enforcement of the directives through a mandatory order.

On this premise, you are therefore required to make representations on behalf of your client to the Commission on or before Tuesday 18th May 2021 as to why the mandatory order application should not be made before the ...Tribunal... to compel your client to comply with the Directives of the Board.

...

Chilufya Sampa
Executive Director

(See pages 669-674 of the Record of Proceedings).

84. All of the Respondents received their respective letters on even date.

85. Counsel for the 1st Respondent replied to the Commission's letter of 13th May, 2021, on 17th May, 2021 as follows (only relevant excerpts have been reproduced):

Our Ref: M486-2020/PHY

17th May, 2021

...

Dear Sir,

RE: IMPLEMENTATION OF BOARD DIRECTIVES ON ALLEGATIONS OF RESTRICTIVE BUSINESS PRACTICES IN THE CEMENT SECTOR-MPANDE LIMESTONE LIMITED VS THE COMPETITION AND CONSUMER PROTECTION COMMISSION

Reference is made to the above and to your letter dated 13th May, 2021 the contents of which were duly noted.

We would like to bring to your attention that the time frame in which the CCPC has instructed our Client to respond to the aforementioned letter is too short. While we understand that the CCPC intends to be efficient in the manner in which it operates, considerations such as the fact that our Client is a big company and acts through its directors and that decisions relating to issues of this nature cannot be adequately addressed in a period of two(2) working days should be taken into account.

Our Client requires sufficient time to effectively consult internally and thereafter, revert to us with its full instructions. In addition, we are currently still working on rotation basis, for the purpose of averting the spread of the COVID-19 virus. Due to the above factors, it is our view that for an appropriate response to be rendered to your request, a period of at least ten (10) working days would have been sufficient.

We, therefore, kindly request for an extension of time, for a further 8 working days from the date of this letter, within which to address the contents of your letter... so that we are able to advise our Client and obtain full instructions thereafter.

...

Yours faithfully
P.H. Yangailo & Co.

(See pages 682-683 of the ROP).

86. On the same day, the Commission refused this application. The refusal was contained in a letter (referenced CCPC/RBP/191) from the Commission to Counsel for the 1st Respondent. The Commission further required the 1st Respondent to make representations on behalf of its client by 18th May, 2021.

(See page 684, ROP).

87. On 14th May, 2021, Counsel for the 2nd Respondent replied to the Commission as follows (only relevant excerpts of the letter have been reproduced):

Our ref: LITI/1021538/20/1

14 May 2021

Urgent

...

Dear Sir,

Implementation of Board Directives on allegations of restrictive business practices in the cement sector

...

In order to have adequate time to make representations in support of our Client's petition, our Client has instructed us to request from the Commission for a 14-day extension within which to respond.

...

Yours faithfully

Corpus Legal Practitioners

(See page 677 of the ROP).

88. The request for an extension was denied by the Applicant in a letter to Corpus Legal Practitioners dated 17th May, 2021. Corpus was thus required to make representations on behalf of its client by 18th May, 2021. (See the Commission's letter to Corpus at p. 681 of the ROP).

89. Counsel for the 3rd Respondent replied to the Commission's letter of 13th May, 2021, on

17th May, 2021. Counsel wrote (only relevant excerpts have been reproduced)-

Our ref: TMS/LIT/DAN.CAP/MKM/05/2021

17th May, 2021

...

Dear Sir,

RE: IMPLEMENTATION OF BOARD DIRECTIVES ON ALLEGATIONS OF RESTRICTIVE BUSINESS PRACTICES IN THE CEMENT SECTOR

Reference is made to the above and to your letter dated 13th May, 2021. Kindly find below our response as follows:

1) *We advise that the Client's ex-works cement price exclusive of VAT for 32.5 type cement is* ***USD4.89 per bag****. Accordingly, the Client is within the prescribed range of* ***USD4.50*** *to* ***USD5.00****) as per the Board's directives.*
2) *Further, in accordance with the directive for the Client to submit its monthly e-works cement price, we have enclosed herewith the ex-works cement price as at 14th May, 2021 for your consideration.*
3) ...
4) *...the Client shall proceed to furnish the Commission with an undertaking that its staff shall not engage in any anti-competitive behavior or facilitate and/or participate in any anti-competitive conduct including the exchange of information.*

In light of the above, we advise that the Client is compliant with the Board's directives. As such, it is our considered view that a mandatory order is not warranted.

...

Yours faithfully
TMS Legal Practitioners

Lynda Mataka (Ms.)
(See pp. 678-680 of the ROP).

90. The 3rd Respondent indicated that the ex-works price for a 32.5N bag of cement (including VAT) would be USD5.67 (See p. 680 of the ROP).

91. On 19th May, 2021, by way of a letter bearing reference No. CCPC/RBP/191, the Commission responded to the letter from the 3rd Respondent's advocates disputing compliance on the premise that the pre-cartel *ex-works* price (for a 32.5N bag of Dangote cement) to which the 3rd Respondent should have reverted is USD 4.54, VAT inclusive; and that having looked at the *ex-works* prices attached to the 3rd Respondent's letter, the 3rd Respondent had not complied with the Board Directive, especially as the quoted price was exclusive of VAT. (See page 687 of the ROP). The 3rd Respondent did not request an extension of time.

92. Having brought to the fore the evidence surrounding the sufficiency (or otherwise) of the time allotted for the making of representations, it is important to consider whether or not the Applicant accorded the Respondents sufficient time to make their respective representations.

Did the Applicant accord the Respondents sufficient time to make their respective representations?

93. It suffices to note from the outset that what constitutes sufficient time has been discussed in paragraphs 67 to 76 of this Judgment. For ease of reference, the Tribunal will, in the ensuing paragraphs, highlight cardinal aspects underlying the notion of sufficiency of time as discussed in those paragraphs. They are as follows:

(1) following the prescribed procedure does not necessarily render a decision maker's procedure fair, as fairness may require that the decision maker adjourn (at the instance of a person) to allow the person to do make representations outside the stipulated time even though an express rule would permit the decision maker to proceed if representations have not been received within the specified timescale;

(2) in the context of postponement of the trial, that the delicate balance between this right and the right to a speedy trial becomes obvious. Thus, the right to be prepared for one's trial should take precedence over the right to a speedy trial."[32]

(3) the right to be prepared is a fundamental principle of a fair trial;

(4) adequate time to prepare one's case is linked to the quality of such preparation;

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[32] *Ibid*

(5) the right to be prepared for one's case is an important component of the composite right to meaningful and informed participation;

(6) the right to be prepared for one's trial forms part of the rules of natural justice;

(7) that the rules of natural justice include the *audi alteram partem* principle;

(8) that if the *audi alteram partem* principle is to have any meaning, the trial court should forbid unreasonably hasty pleas and/or trials;

(9) it is not enough that the notice in a case be given, but it must be adequate also;

(10) sufficient time should also be given to comply with the requirement of notice;

(11) giving a person the substance of the case to be answered will provide only minimal procedural benefit if that occurs only a short time before the actual decision is to be made; and

(12) that failure to grant a postponement for a reasonable period constitutes a gross irregularity resulting in not having had a fair trial.

94. Having highlighted the foregoing, it suffices to reiterate that natural justice (from whence flow the right to be heard and the interlinked principles of the right to a fair trial and the right to be prepared for one's case) is intended to provide minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting a person's rights; and that the rules of natural justice are intended to prevent such authority from doing injustice.

95. In view of the foregoing, can it be said that the Applicant gave the Respondents sufficient time to make their representations? In responding to the foregoing question, the Tribunal considered the evidence on record.

96. According to the evidence, the Applicant wrote the Respondents on 13th May, 2021, requesting that they make their representations as to why a mandatory order requiring the Respondents to comply with the directives of the Board of Commission should not be applied for. The directives subject of the mandatory order were directives (iii) and (iv) which required, respectively, that the Respondents-

(iii) ...revert to pre-cartel prices ranging between USD4.50-USD5 for a period of one year from the date of receipt of the Board Decision pursuant to Section 59(3) (b) of the Act;

(iv) *...submit monthly average ex-works prices and any price adjustments be indexed to the exchange rate and be submitted to the Commission for review pursuant to Section 58(1) of the Act.*

97. The Respondents representations were to be made by 18th May, 2021.

98. The 1st and 2nd Respondents sought an extension of time to enable sufficient time to consult their Clients. The contents of their respective letters have been detailed in paragraphs 85 and 87 of this Judgment. That notwithstanding, a summary of the contents of their respective letters is herein below set out for ease of reference.

99. Counsel for the 1st Respondent, in their letter in this respect stated that the time (2 working days) for responding to the Applicant's letter was too short. Noting the CCPC's efficiency in terms of its operations, Counsel stated that its Client is a big company that acts through its directors and that decisions relating to issues of this nature could not be adequately addressed in the given period. Counsel stated that more time was needed for its Client to effectively consult internally and thereafter, revert to Counsel with its full instructions. Counsel also cited the fact that Counsel was currently still working on rotation basis, to avert the spread of the COVID-19 virus, and that in view of the foregoing factors, for an appropriate response to be rendered, a period of at least ten (10) working days would have been sufficient. This was followed by a request for an extension of time, for a further 8 working days from the date of Counsel's letter, within which to address the contents of the Applicant's letter, advise their Client and obtain full instructions thereafter. The Applicant refused this request.

100. Counsel for the 2nd Respondent stated, in its letter to the Applicant, that in order to have adequate time to make representations in support of their Client's petition, their Client had instructed Counsel to request from the Commission for a 14-day extension within which to respond. The Applicant denied this request.

101. The Tribunal also considered the nature of the directions subject of the mandatory order application and notes that the same may have a substantial financial impact on the operations of the Respondents. By way of example, the 2nd Respondent stated in its list of authorities and skeleton arguments in opposition to the application for a mandatory order-

3.26 *The nature of the directives is such that they shall have a very substantial financial*

impact on the 2nd Respondent's profit and loss...implementing the Board Decision as directed by the Applicant will immediately result in the closure of the Ndola plant...lead to an excess of 300 employees being declared redundant---result in a loss of hard currency inflow to the country as the Ndola plant is largely an export-based plant.

3.27 *...the 2nd Respondent is an export hub for the entire sub-Saharan Africa and exports 50 Million United States Dollars worth of material...45.4% of the 2nd Respondent's volumes are exported, therefore the loss of those markets will be devastating to the 2nd Respondent's business which may not recover for years.*

102. The Tribunal, further notes, on account of the possible serious financial implications that the mandatory order may have on the profit and loss of the Respondents, and, consequently, on their operations, this was a proper case for the granting of sufficient time to the Respondents to undertake meaningful consultations and thereafter, make informed representations.

103. The Tribunal also notes that in practice, decision making with respect to matters pertaining to finances or that affect the financial operations of a company may necessarily require consultation with the company's board of directors. Such consultation requires sufficient time.

104. The Tribunal considered the time accorded by the Applicant to the Respondents for the making of their respective representations. The Tribunal notes that the 13th of May, 2021, the day on which the Applicant wrote the Respondents, was a Thursday. The 18th day of May, 2021, occurred the following week on a Tuesday. This entailed two (2) working days for the Respondents to make their representations. The Tribunal notes that while the law does not stipulate the time within which an enterprise must revert to the Commission with its representations, it is trite in Administrative Law and for the purpose of ensuring natural justice that sufficient time must be accorded to ensure that meaningful and well informed representations are made.

105. The Tribunal is of the view that as section 64(2) allows for the making of representations, by a party, in opposition to the making of an application for a mandatory order, and the same requires (in mandatory terms) the Applicant to consider any representations made, it follows that the representations must not only be informed, but must be of sufficient quality to possibly steer the Commission's thinking in favour of the party making the representation. A corollary right is, therefore, implied - that is, the right to sufficient

time to enable the affected party make informed representations. This right cannot be glossed over, nor can it be overemphasised as it is an inherent aspect of the right to be heard. Two days, in the view of the Tribunal, cannot constitute sufficient time for the undertaking of proper consultations, especially within the context of a company, and for the making, thereafter, of informed representations.

106. As sufficient time was not granted to enable the Respondents to make informed representations, we find that they were not accorded a meaningful opportunity to put up their case in opposition to the Commission's imminent application for a mandatory order. In the view of the Tribunal, this is contrary to procedural fairness and the right to be heard, as a principle of natural justice.

107. The next question to be determined is whether or not the denial of an extension of time amounted to procedural impropriety.

Did the denial of an extension of time amount to procedural impropriety on the part of the Applicant?

108. From the Affidavits in Opposition and the Skeleton Arguments filed by the respective Respondents, it appears to be the common position that the Applicant did not meet the prerequisites for the filing of a mandatory order, i.e. the Applicant did not fulfil the procedural requirements, pertaining to the application for a mandatory order, as stipulated in the Act. The Respondents thus allege procedural impropriety on the part of the Applicant.[33] However, with respect, specifically to the insufficiency of time, the 2nd Respondent contended as follows:

> 4.4 *As the record will show, the 2nd Respondent was only given two(2) working days to show cause as to why an application order should not be made. According to the case of* **Matthews vs. Eldridge, 424 US 319, 333 (1976)** *it was held that:*
>
> > "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. If the decision-maker has not heard the testimony or read the evidence, then the opportunity to be heard is not meaningful."

[33] See-paragraph 24 of the 1st Respondent's Affidavit in opposition; paragraphs 3.7, 4.1, 4.2 and 4.4 of the 2nd Respondent's List of Authorities and Skeleton Arguments in Opposition to an Application for a Mandatory Order; and the 3rd Respondent's affidavit in opposition.

(See the 2nd Respondent's List of Authorities and Skeleton Arguments in Opposition to an Application for a Mandatory Order).

109. What, however, constitutes procedural impropriety? This concept is addressed below.

What is Procedural Impropriety?

110. In the case of ***North Western Co. Ltd. v Energy Regulations Board (2010/HP/786) [2011] ZMHC 76 (3 October 2011),*** the Court stated-

*Under "*procedural impropriety*" the goal of achieving or securing procedural fairness towards the person who will be affected by the administrative decision is underscored. In keeping with this aim, the Courts ensure that administrative decisions, or actions conform with the procedural rules that are expressly laid down in the statute, or instrument by which the jurisdiction of the administrative body, or public official is conferred. The learned authors of De Smith's Judicial Review, observe in paragraph 6 – 001, at page 317, as follows: an important concern of procedural justice is to provide the opportunity for individuals to participate in decisions by public authorities that affect them. Another is to promote the quality, accuracy, and rationality of the decision making process. Both concerns aim at enhancing the legitimacy of the process, whilst at the same time improving the quality of decisions made by public authorities.*

The learned authors of De Smith's Judicial Review, go on to state in paragraph 6 – 002, at page 317, that: procedural fairness has to be contrasted with substantive justice. The general objective of substantive justice is to ensure that the decisions of public authorities are within the scope of the powers conferred on those authorities. Thus, substantive justice ensures that these powers are not exceeded. Conversely, procedural justice aims to provide individuals with a fair opportunity to influence the outcome of a decision, and so ensure the decision's integrity. Procedure justice deals with issues such as the requirement to consult, to hear representations, to hold hearings, and to give reasons. Thus procedure justice addresses the nature of those consultations, representations, and hearings, so as to ensure that they are appropriate in the circumstances, meaningful, and that they assist, and do not hinder the administrative process.

111. From the excerpts (drawn from the ***North Western Co. Ltd. Case*** above), the Tribunal formulated (by way of adaptation), and answered, the following questions:

(1) *Did the Commission secure procedural fairness towards the Respondents who would be affected by the Commission's decision?*

(2) *Did the Commission have due regard to the fact that procedural justice is to provide an opportunity for the Respondents to participate in the decision to make the application for mandatory order?*

(3) *Did the Commission have due regard to the fact that procedural justice is to provide an opportunity for the Respondents to participate in the decision to make the application for mandatory order?*

112. The foregoing questions are answered below.

Did the Commission secure procedural fairness towards the Respondents who would be affected by the Commission's decision?

113. In the view of the Tribunal, only to the extent that they permitted the making of representations. The Tribunal opines that the law, by requiring the Commission to hear any representations made pursuant to section 64(2), recognises procedural fairness as an important principle of just decision making *vis a vis* applications for mandatory orders. That is to say, section 64(2) of the Act, while procedural, sets out a very cardinal aspect of procedure that must be given due consideration as it provides for procedural justice. By permitting the Respondents' representations, the Commission set in motion the wheels of procedural fairness. However, no sooner had the wheels start turning than their motion was halted. That is to say, the Commission embarked on a journey of procedural fairness which they, soon thereafter, compromised, by promoting haste over meaningful participation by the Respondents.

Did the Commission have due regard to the fact that procedural justice is to provide an opportunity for the Respondents to participate in the decision to make the application for mandatory order?

114. In the view of the Tribunal, the Commission had due regard to procedure, but not to procedural fairness. Regard to procedure is evident from the fact that they wrote to the Respondents seeking their representations prior to the making of the application for a mandatory order. However, as has been above stated, the opportunity accorded to an affected party to participate in the making of decisions that affect them must be meaningful in order to permit meaningful participation. That is to say, in the case before us, sufficiency of time is cardinal to the making of representations that are informed and of good quality. The Tribunal thus holds the view that there was minimal

procedural benefit accorded to the Respondents. This amounted to a disregard for procedural fairness.

Did the Commission consider that procedural justice is intended to promote the quality, accuracy, and rationality of the decision making process of the Commission vis a vis the applications for mandatory orders?

115. The simple answer is no! As the Commission did not accord the Respondents sufficient time to make their representations, both the procedure and quality of the decision making process and the representations was compromised. It would appear, on the face of it, that the Commission was overly concerned with the brevity of the process, and in so concerning itself, sacrificed quality for brevity - resulting in a hasty disposal of the case, rather than a proper application of the *audi alteram partem* principle.

116. As sufficient time was not granted, by the Commission, to the Respondents, to enable the Respondents to make informed representations, we find that they (the Respondents) were not accorded a meaningful opportunity to put up their case in opposition to the Commission's imminent application for a mandatory order. That is to say, the Commission did not grant the Respondents sufficient time to make quality representations, or to participate in the decision making process (set out in section 64 of the Act) in a meaningful and informed manner. In the view of the Tribunal, this is contrary to procedural fairness and the right to be heard, as a principle of natural justice.

117. This failure, as such, amounted to procedural impropriety on the part of the Applicant in the sense that while, on the face of it, procedure appears to have been followed, the manner in which it was followed was inherently flawed, thereby obliterating all propriety. In the view of the Tribunal, the Commission appears to have been preoccupied with fulfilling the letter of the law as opposed to its spirit. In other words, the Commission tainted the legitimacy of the process when it fulfilled the procedure as a matter of course, or a mere formality, at the expense of the proper application of the Respondents right to be heard and procedural justice.

118. That said, the Tribunal is constrained to grant the order sought by the Applicant, as the Commission's decision to apply for a mandatory order cannot, in view of procedural impropriety, be said to be a decision at all. Our view is fortified by the case of ***General Medical Council v Spackman (1943) A.C. 627*** wherein Lord Wright said at page 644, *"If the principles of natural justice are violated in respect of any decision, it is indeed immaterial*

whether the same decision would have been arrived at in the absence of departure from the essential principles of justice. The decision must be declared to be no decision."

119. The Tribunal is further duty bound to correct this injustice and ensure that that the Respondents are accorded a meaningful opportunity to put up their respective cases. Our view is fortified by the case of ***John Ashikkalis and Tony Ashikkalis v Athanasios Apostolopoulos (1988 - 1989) Z.R. 86 (S.C.),*** in which Gardner, J.S., as he then was, stated, *"In his judgment the learned trial commissioner referred to the case Mwambazi - Morester Farms Limited (1). In that case this Court maintained the principle that where there is a procedural default on the part of one of the parties in the case, that default can be remedied by the Court and is better remedied to enable cases to be tried and for justice to be done."*

120. Further, we draw guidance from Order 53 of the Rules of the Supreme Court, 1999 edition, and in particular, Order 53/14/19 stipulates that the concern of judicial review is the decision making process itself. Should the Applicant be desirous of revisiting the making of a fresh application for a mandatory order, the Applicant must properly and meaningfully follow the procedure by law stipulated. This includes (but is not limited to) according the Respondents a meaningful opportunity (including sufficient time) to make their respective representations, and demonstrating that all the representations that may be made by the Respondents have been considered.

121. If for some reason, the Applicant does not find it necessary to consider each representation specifically, it should, at the very least, demonstrate that all the representations have been considered in substance.

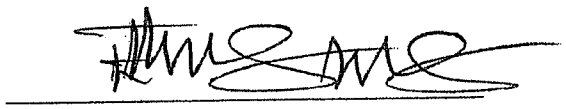
122. This is not to say that the Respondents cannot, in the interim, go back and ensure their compliance with the decision of the Board of the Applicant.

123. The Tribunal will not delve into a discussion of the other matters raised by the Parties in view of its finding of procedural impropriety, as such discussion is rendered redundant on account of this finding.

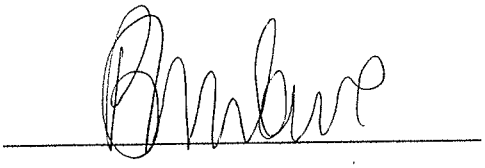
124. In consequence, the application fails totally. In view of the fact that the Applicant did give some regard to procedure, albeit in a flawed manner, each party shall bear its own costs.

125. Any aggrieved party may appeal this judgment within thirty days.

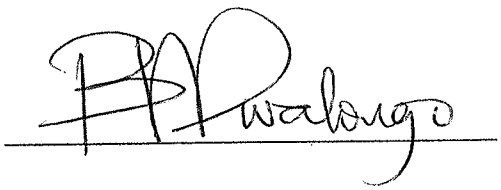
Dated at Lusaka this 25th day of September, 2021.



Mrs. Eness C. Chiyenge (Chairperson)



Mrs. Miyoba B. Muzumbwe-Katongo (Vice Chairperson)



Mr. Buchisa K. Mwalongo (Member)