IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 205/2014
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN:

COMPETITION AND CONSUMER PROTECTION COMMISSION **APPELLANT**

AND

OMNIA FERTILIZER ZAMBIA LIMITED **1ST RESPONDENT**
NYIOMBO INVESTMENTS LIMITED **2ND RESPONDENT**

CORAM: MAMBILIMA, CJ, KAOMA AND KAJIMANGA, JJS

On 11th July 2017 and 28th September 2017

For the Appellant: No appearance
For the Respondent: Mr. A. J. Shonga, Jr. SC, Mr. S. Lungu and Mr. M. Ng'ambi, of Shamwana and Company

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JUDGMENT

MAMBILIMA, CJ delivered the Judgment of the Court.

AUTHORITIES REFERRED TO:

1. THE ATTORNEY-GENERAL AND ANOTHER V. LEWANIKA AND OTHERS (1993-1994) ZR 164

2. NDOLA CITY COUNCIL V. CHARLES MWANSA (1994) ZR 128
3. NGOMA AND OTHERS V. LCM COMPANY AND ANOTHER (1999) ZR 22
4. ZAMBIA WILDLIFE AUTHORITY AND OTHERS V. MUTEETA COMMUNITY RESOURCES BOARD DEVELOPMENT CO-OPERATIVE SOCIETY (2009) ZR 159
5. WILSON MASAUSO ZULU V. AVONDALE HOUSING PROJECT LIMITED (1982) ZR 172
6. ZAMBIA DEMOCRATIC CONGRESS V. ATTORNEY GENERAL (2000) ZR 6
7. BUCHMAN V. THE ATTORNEY GENERAL (1993-1994) ZR 131
8. ATTORNEY GENERAL V. K. C. CONFECTIONARY LIMITED (1986) LAW REPORTS OF THE COMMONWEALTH AT PAGE 172
9. SOUTH OF SCOTLAND ELECTRICITY BOARD V. BRITISH CENTRAL ELECTRICITY AUTHORITY V. BRITISH OXYGEN CO. LTD (1956) 3 ALL ER 199
10. INLAND REVENUE COMMISSION V. ROSS AND COUNTER (1948) 1 ALL ER. 616
11. ANDERSON KAMBELA MAZOKA AND OTHERS V LEVY PATRICK MWANAWASA AND OTHERS (2005) ZR 138
12. JCN HOLDINGS LIMITED, POST NEWSPAPERS LIMITED AND MUTEMBO NCHITO V. DEVELOPMENT BANK OF ZAMBIA (2013) ZR 299
13. ARISTOGERASMOS VANGELETOS AND ANOTHER V METRO INVESTMENT LIMITED AND OTHERS, SELECTED JUDGMENT NO 35 OF 2016

LEGISLATION REFERRED TO:

a. COMPETITION AND CONSUMER PROTECTION (TRIBUNAL) RULES, STATUTORY INSTRUMENT NO. 37 OF 2012
b. COMPETITION AND CONSUMER PROTECTION ACT NO. 24 OF 2010
c. COMPETITION AND CONSUMER PROTECTION (GENERAL) REGULATIONS, STATUTORY INSTRUMENT NO. 97 OF 2011
d. RULES OF THE SUPREME COURT, 1999 EDITION (WHITE BOOK)
e. HIGH COURT RULES, CHAPTER 27 OF THE LAWS OF ZAMBIA
f. SUPREME COURT RULES, CHAPTER 25 OF THE LAWS OF ZAMBIA
g. CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016

OTHER AUTHORITIES REFERRED TO-

i. OXFORD COMPACT THESAURUS, 3RD EDITION, (2005)

ii. **BLACK'S LAW DICTIONARY, 10TH EDITION, (2009), THOMSON REUTERS; UNITED STATES OF AMERICA, BRYAN A. GARNER (EDITOR IN CHIEF)**
iii. **HALSBURY'S LAWS OF ENGLAND 4TH EDTION VOLUME 10, PARAGRAPHS 717 AND 745**

This is an appeal from a judgment of the High Court delivered on 4th September 2014. The said Judgment followed an appeal by the Appellant from a decision of the Competition and Consumer Protection Tribunal (hereinafter referred to as "the Tribunal") rendered on 3rd September 2013.

The facts of this case are simple and substantially not in dispute. On 16th October 2012, the Appellant conducted what it referred to as a dawn raid at the 1st Respondent's premises and collected various items. On 6th November 2012, the Appellant issued the 1st Respondent with a Notice of Investigation (hereinafter sometimes referred to as the Notice). We have reproduced the Notice later in this Judgment. It suffices at this point to say that the Notice informed the 1st Respondent that the Appellant had officially commenced investigations against it. The Notice went on to request

the 1st Respondent to respond to that Notice within 14 days of receiving it.

The Notice of Investigation was served on the 1st Respondent on 8th November 2012. The 1st Respondent did not respond to the Notice. Instead, on 22 November 2012, it lodged an appeal to the Tribunal against the Notice and served the Notice of Appeal on the Appellant on 23rd November 2012.

In the meantime, on 23rd April 2013, the Appellant proceeded to render its decision on the investigations it carried out. On 3rd June 2013, the Appellant served a copy of its decision on the 1st Respondent. This prompted the 1st Respondent to make an application to the Tribunal pursuant to rule 19(1) of the **COMPETITION AND CONSUMER PROTECTION (TRIBUNAL) RULES**[a]. In that application, the 1st Respondent contended that the Appellant acted in contravention of the **COMPETITION AND CONSUMER PROTECTION ACT**[b] (hereinafter referred to as "the Act"), when it proceeded to investigate and render its decision in a matter which had been appealed against to the Tribunal. The 1st

Respondent asked the Tribunal to set aside the decision of the Appellant.

After considering the submissions of Counsel from both parties, the Tribunal held that the Appellant acted in contravention of Section 55(11) of the Act when it proceeded to investigate and render its decision when there was an appeal pending before the Tribunal on the same issues. The said Section 55(11) provides that-

> **"55(11) The Commission shall not investigate a matter that is before the Tribunal unless the Tribunal directs otherwise."**

The Appellant was dissatisfied with the decision of the Tribunal and appealed to the lower Court on the following grounds that:-

1. **the Tribunal erred both in law and in fact by finding that on the available evidence before it the Appellant investigated a matter that was before the Tribunal on appeal;**
2. **the Tribunal erred in law and misdirected itself by failing to take into account the evidence filed to support the position that investigations had already taken place by the time the appeal was lodged; and**
3. **the Tribunal erred both in law and in fact by finding that Section 55(11) of the Competition and Consumer Protection Act No. 24 of 2010 operated as a law or lawful order to stop the Appellant from making a determination under the circumstances of this case.**

The lower Court considered the facts of the case, the proceedings before the Tribunal, the judgment of the Tribunal and

the submissions of Counsel and came to the conclusion that the intention of the provisions of Section 55(11) is that any investigation, enquiries and analysis of any sort being undertaken by the Commission against an affected party, should be suspended after an appeal has been lodged before the Tribunal, unless the Tribunal directs otherwise. The Court agreed with the Tribunal that although **'investigation'** and **'decision'** entail different things, they are related and one cannot exist without the other. The Court went on to say that there was no evidence to show that the Appellant had completed investigations by 22nd November 2012, when the appeal was lodged with the Tribunal.

With regard to the argument by the Appellant that it issued the Notice pursuant to Section 55(6) of the Act after it had completed investigations, the Court stated that the Act requires the Notice to be issued for the purpose of affording the person affected an opportunity to be heard. The learned trial Judge stated that Section 55(6) did not imply that the Commission should investigate and condemn a party unheard. She held the view that even where

the Notice is issued under Section 55(6), all the necessary stages in investigating a person or an enterprise and rendering a decision, have to be adhered to.

The lower Court went on to hold that whatever section the Notice was issued under, at the point that the appeal was lodged, everything pertaining to the investigations ought to have been suspended regardless of the stage at which the investigations had reached.

The lower Court agreed with the Tribunal that by the time the Appellant was lodging its grounds of objection to the Appeal before the Tribunal in December 2012, the matter was still at investigation stage. According to the Court, this was clearly admitted by the Appellant in its grounds of objection to the appeal.

Coming to the issue relating to conflict of interest allegations against the Vice-Chairperson of the Tribunal, the lower Court expressed the opinion that the Appellant did not show that the Vice-Chairperson was in a particular situation where her

impartiality in taking part in the Tribunal proceedings might reasonably be questioned.

In conclusion, the lower Court upheld the decision of the Tribunal.

It is against the above decision of the lower Court that the Appellant has now appealed to this Court advancing the following grounds of appeal:

1. **that the learned trial Judge erred in law and in fact when she held that the Appellant had continued to investigate the matter after an appeal had been lodged by the Respondents with the Competition and Consumer Protection Tribunal;**

2. **that the learned trial Judge erred in law and in fact when she held that the Respondents had not been given an opportunity to be heard before the decision of the 13th April, 2014 by the Board of Commissioners for the Competition and Consumer Protection Tribunal;**

3. **that the learned trial Judge erred in law and in fact when she found that the statement made by the Appellant that the matter was still at investigation stage meant that the Appellant had not concluded investigations at the time the Respondents lodged in the appeal before the Competition and Consumer Protection Tribunal;**

4. **that the learned trial Judge erred in law and misdirected herself in fact when she held that the Vice-Chairperson for the Competition and Consumer Protection Tribunal was not conflicted as provided for in the Judicial (Code of Conduct) Act; and**

5. **that the learned trial Judge erred in law and in fact when she joined the 2nd Respondent to the Proceedings when they had not**

been party to the appeal and throughout the proceedings before her.

In support of these grounds of appeal, the learned Counsel for the Appellant filed written heads of argument in which he abandoned the fourth ground. He argued the first and third grounds of appeal together.

Counsel submitted that the whole of Section 55 of the Act is dedicated to investigations and determinations by the Competition and Consumer Protection Commission, the Appellant herein. That Sub-Section 11 of the said section prohibits the Commission from investigating a matter that is before the Tribunal ***'unless the Tribunal otherwise directs.'*** He contended that when the Appellant undertook a dawn raid on the premises of the 1st Respondent on 16th October 2012, they were, in fact, investigating the Respondent's conduct. Counsel referred to Section 9(1)(a),(b) and (c) of the Act which provides as follows:-

"9. (1) A horizontal agreement between enterprises is prohibited *per se*, and void, if the agreement –
(a) fixes, directly or indirectly, a purchase or selling price or any other trading conditions;
(b) divides markets by allocating customers, suppliers or territories, specific types of goods or services;

> **(c) involves bid rigging, unless the person requesting the bid is informed of the terms of the agreement prior to the making of the bid ...."**

He submitted that the horizontal agreements prohibited in Section 9(1)(a),(b) and (c), are concerted and cartelistic in nature. That for this reason, it is critical that any investigation, particularly an investigation like the one undertaken by the Appellant in this matter, where evidence had to be sourced from the very enterprise under investigation is undertaken discreetly.

According to Counsel, the nature of the wrongful acts alleged to have been committed by the Respondents entailed that the investigation had to be conducted under Section 55(6) of the Act, which empowers the Appellant to defer the giving of the Notice of Investigation where it has reason to believe that the giving of notice would prejudice the investigation. He pointed out, however, that the format of the Notice of Investigation prescribed under the **COMPETITION AND CONSUMER PROTECTION (GENERAL) REGULATIONS**[d], does not distinguish between pre-investigation notification and post-investigation notification.

1701

Counsel further submitted that the Appellant gave the Respondents fourteen days within which to respond to the Notice of Investigation as prescribed by law. That at the close of the fourteen days, the Respondents stood predisposed to prosecution under Section 55(5) of the Act, for contravening Section 55(4) of the same Act, because the evidence obtained by the Appellant during the dawn raid was conclusive and remained undisputed by the Respondents since they did not respond to the Notice of Investigation. That for this reason, the Appellant did not misdirect itself by rendering the decision without conducting further investigations.

Counsel also referred us to the meaning of the word "decision" in the **OXFORD COMPACT THESAURUS, 3RD EDITION, (2005)**[i], in which the authors have defined that word to mean-

> **"resolution, conclusion, settlement, commitment, resolve, adjudication, determination, verdict, finding, ruling, recommendation, pronouncement, order, findings and result."**

He was alluding to the views of the Tribunal on pages 60-61 of the record of appeal which, after considering the various definitions

ascribed to the words 'investigation' and 'decision' stated, among others, that:-

> **"The two words therefore are related and it is often difficult to distinguish them although the meaning is different."**

He submitted that going by this meaning of the word "decision" in the Oxford dictionary, it is clear that at the point of rendering the decision, the Appellant was doing something totally different from investigating. That the Court below, therefore, erred to have upheld the Tribunal's position that 'investigation' and 'decision' be taken to mean the same. According to Counsel, Section 55(11) of the Act, which deals with 'investigations', cannot be extended to include determinations or decisions. To buttress his argument, Counsel referred to our decision in the case of **THE ATTORNEY-GENERAL AND ANOTHER V. LEWANIKA AND OTHERS**[1], where we stated that-

> **"If the words of the statute are precise and unambiguous, then no more can be necessary than to expand on those words in their ordinary and natural sense. Whenever a strict interpretation of a statute gives rise to an absurdity and unjust situation, the judges can and should use their good sense to remedy it by reading words in it, if necessary, so as to do what Parliament would have done had they had the situation in mind".**

He argued that in the context of section 55 (11) of the Act, no absurdity arises from the strict interpretation of that provision, for there to be a need for further elaboration as to the true intention of the Legislature.

Counsel contended that in the circumstances of this case, what the Respondents should have done was to apply for a stay of execution of the decision of the Appellant, since the Respondents' appeal fell outside the ambit of Section 55(11) of the Act and it could not operate as a stay of execution as provided under **Order 59, rule 13** of the **RULES OF THE SUPREME COURT, 1999 EDITION (WHITE BOOK)**[e], which states that-

> **"13(1) Except so far as the Court below or the Court of Appeal or a single judge may otherwise direct-**
> **(a) An appeal shall not operate as a stay of execution or of proceedings under the decision of the Court below..."**

It was Counsel's further submission that for the Court to give an Order for stay of execution, the party seeking that relief must specifically plead for it, as was held in the case of **NDOLA CITY COUNCIL V. CHARLES MWANSA**[2], where we also stated, among others, that the Court's decision in this regard is discretionary.

1704

On the issue as to whether the matter was still at investigation stage when the 1st Respondent lodged its appeal with the Tribunal, Counsel maintained that at that point, the Appellant had concluded its investigations.

Coming to the second ground of appeal, the kernel of Counsel's submissions was that the Appellant gave the 1st Respondent a Notice of Investigation and requested it to respond to the Notice within fourteen days. That the learned trial Judge therefore, erred when she found that the Respondents were not given an opportunity to be heard.

On the fifth ground of appeal, Counsel submitted that the learned trial Judge erred in law and in fact, when she joined the 2nd Respondent to the proceedings at the point of delivering her judgment when it had not been a party to the appeal and throughout the proceedings. That while it is trite law that the Court has jurisdiction to order both non-joinder and misjoinder of parties under **Order 14 Rule 5 (1)** of the **HIGH COURT RULES**[1], case law has shown that where a party has sufficient interest in a cause,

they may apply to be joined even where judgment has already been rendered. Counsel also referred us to the case of **ZAMBIA WILDLIFE AUTHORITY AND OTHERS V. MUTEETA COMMUNITY RESOURCES BOARD DEVELOPMENT CO-OPERATIVE SOCIETY**[4], where it was stated that a party intending to join a case must state if they are opposing, supporting or coming as friends of the Court. He argued that since the 2nd Respondent had indicated its desire to be joined to the proceedings to oppose the appeal, the Court ought to have formally given an order for non-joinder, so as to enable the parties conclusively deal with all the issues surrounding the case. According to Counsel, a search on the court record showed that there was no such order. He, therefore, argued that the joining of the 2nd Respondent by the learned trial Judge was irregular as it was not made in conformity with the legal provisions.

In response to the submissions on behalf of the Appellant, the learned Counsel for the 1st Respondent filed written heads of argument on 29th June 2017. In the said heads of argument,

Counsel indicated that he would only respond to the first second and third grounds of appeal but not the fifth ground, because it was directed to the 2nd Respondent.

On the first ground of appeal, Counsel argued that none of the grounds of appeal filed by the Appellant had challenged the finding by the lower Court that there is a link between the process of investigation and the decision making process. That since there is no dispute that the process of investigation is linked to the process of rendering the decision, the decision should not have been rendered once the appeal had been lodged before the Tribunal, except with the permission of the Tribunal. Counsel stressed the fact that an inquiry into whether the Appellant continued to investigate the matter whilst the appeal was pending before the Tribunal, is unnecessary because the learned trial Judge already found that Section 55(11) of the Act did not allow the Appellant to legally continue to render a decision whilst the appeal was pending before the Tribunal, without first obtaining the permission of the Tribunal. In Counsel's view, since the Appellant has not lodged an

appeal against the learned trial Judge's finding that there is a connection between the process of investigation and the decision making process, that omission condemns both grounds one and three to failure.

Counsel submitted in the alternative, that the finding by the learned trial Judge, that the Appellant could not have concluded its investigations by the 22nd November 2012, was a finding of fact which this Court can only interfere with on limited grounds. To support his submission, Counsel relied on, among others, the case of **WILSON MASAUSO ZULU V. AVONDALE HOUSING PROJECT LIMITED**[5], where we said that-

> **"The appellate Court will only reverse findings of fact made by a trial Court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts."**

Counsel contended that the Appellant has not established that the finding of fact which they seek to assail was perverse, made in the absence of any relevant evidence, or based on a misapprehension of facts. In Counsel's opinion, there was sufficient

evidence to support the finding of fact made by the learned trial Judge.

Coming to the second ground of appeal, Counsel raised quite an interesting argument. He contended that the Appellant's heads of argument did not identify the relevant portion of the Judgment appealed against, which formed the basis of that ground of appeal. To support his contention, he referred us to a portion of the lower Court's judgment, appearing on page 45-46 of the record, in which the Judge stated as follows:-

> **"From the forgoing, I find that the Appellant could not have concluded their investigations by the 22nd November 2012 when the Respondents lodged their appeal. Also, the Appellant's investigations ought to have included an inquiry into the Respondent's response on the allegations. That notwithstanding, even assuming that the Appellant had concluded their investigations into the matter the fact that the Respondents had not been heard on the notice to investigate and more especially that the Respondents had lodged an appeal, the Appellant ought not to have proceeded to render its decision on the matter. By doing so, the Appellant was endeavouring to supersede the appeal hearing.** (emphasis by Counsel)

To use Counsel's own words ***"....we suspect that it is the underlined text from the extract above that forms the Appellant's gravamen."***

1709

According to Counsel, the lower Court, in this extract, confirmed that the Appellant could not have concluded its investigations by 22nd November, 2012. In Counsel's opinion the words that the Appellants were relying on as the basis for the second ground of appeal, were offered by the Judge on the clear assumption that the Appellant had, for argument's sake, concluded its investigations into the matter. Counsel further argued that the second ground of appeal appears to have been predicated upon the success of the Appellant's first and third grounds of appeal. He submitted that if the two grounds fail, the effect will be that this Court will be agreeing with the finding of the Court below that the Appellant had not concluded its investigations as at the date when the Respondent launched its appeal to the Tribunal. He thus urged us not to dwell on the second ground of appeal if we dismiss the first and third grounds. On the other hand, Counsel submitted that if the first and third grounds of appeal succeed, his argument, in the alternative, is that what the lower Court was saying was that the Appellant ought not to have proceeded to render its decision for

two reasons; firstly, on account that the Respondents were not heard, and, secondly because the Respondents had already lodged an appeal to the Tribunal.

Counsel submitted that for the decision of the lower Court to be overturned, both reasons employed by the Court must be successfully impeached. That the Appellant has not shown this Court that the Judge in the Court below was wrong in finding that the Appellant should not have proceeded to render a ruling on the basis that the Respondent had lodged an appeal. That, therefore, that part of the finding must remain untouched. Counsel contended that there being no challenge to that part of the lower Court's Judgment, the argument as to whether this ground has merit will be no more than an academic exercise because even if the Appellant succeeds in ground two, the decision of the Court below will still stand because of the unchallenged second reason for the lower Court's finding; that the Appellant ought not to have proceeded to render its decision. To support these submissions, Counsel cited

our decision in the case of **ZAMBIA DEMOCRATIC CONGRESS V. ATTORNEY GENERAL**[6], where we said that-

> **"As a matter of practice, this Court disapproves being engaged in academic exercises..."**

With regard to the third ground of appeal, Counsel submitted that his understanding of the submissions by the Appellant in support of the third ground of appeal, was that the Court below erred in finding that the statement made by the Appellant in paragraphs 2 and 3 of the Notice of Grounds of Opposition to the Appeal filed before the Tribunal, amounted to an admission that investigations were still on-going as at 6th December 2012. Counsel submitted that the finding by the learned trial Judge in this regard was not a finding of law but purely a finding of fact. That the Appellant did not establish any basis upon which the said finding of fact could be interfered with.

Counsel went on to submit that even assuming that the third ground of appeal was capable of being entertained by this Court, the statements contained in paragraphs 2 and 3 of the Appellant's Notice of Grounds of Opposition to Appeal were correctly interpreted

by the lower Court. Counsel went on to submit that according to what the Appellant stated in the said paragraphs, as at 6th December, 2012, the matter was merely at investigation stage.

The 2nd Respondent did not file any heads of argument.

When the appeal came up for hearing before us on 11th July 2017, we asked Counsel for the 1st Respondent to address us on the issue as to whether one can, under Section 60 of the Act, appeal against the issuance of a Notice of Investigation. After belabouring the point, Counsel applied for an adjournment in order to file supplementary heads of argument to address us on the legal issue that we had raised. We adjourned the matter for judgment but granted Counsel leave to file supplementary heads of argument within 14 days and the same were filed on 25th July, 2017.

In the meantime, the learned Counsel for the Appellant, who was not in attendance at the hearing of the appeal, wrote to request, and was furnished with the verbatim record of the proceedings of 11th July 2017. Upon perusal of the proceedings, he also filed submissions on the legal issues that the Court raised

on 25th July 2017. We have taken the Appellant's submissions into account in this judgment in the spirit of Article 118(2)(e) of **THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT**[h] which states that ***'justice should be administered without undue regard to procedural technicalities..."*** In view of the decision that we shall make, we need to hear both sides.

In their supplementary heads of argument, Counsel for the 1st Respondent, contended that the legal issues raised by this Court were novel in the sense that they did not arise both before the Tribunal and the lower Court; and, that they did not form part of the grounds of appeal set forth by the Appellant in its Memorandum of Appeal. Counsel submitted that it is a well settled principle of law that on appeal, a party cannot raise an issue which was not raised in the lower Court. For this argument, Counsel referred us to, among other authorities, the case of **BUCHMAN V THE ATTORNEY GENERAL**[7], where this Court held that-

> **"A matter not raised in the lower Court cannot be raised in a higher Court as a ground of appeal."**

Counsel, however, conceded that this position does not apply to points of law not raised in the lower Court. To buttress his argument, he cited, among others, the decision of the Court of Appeal of Trinidad and Tobago, in the case of **ATTORNEY GENERAL V. K. C. CONFECTIONARY LIMITED**[8] in which it held that:-

> **"On appeal, a point of law not argued in the Court below could be taken subject to certain limitations, namely, that the Court of Appeal was satisfied that it was expedient in the interest of justice to entertain the new plea, that it could do so without injustice to the other party and that the evidence on record was sufficient to enable the Court to dispose of the point raised without having to decide questions of fact."**

Counsel also cited an extract from **HALSBURY'S LAWS OF ENGLAND, 4TH EDITION, VOLUME 10**[g], where the learned authors have said that:-

> **"Jurisdiction as to points of law. The House of Lords has a duty to determine what ought to be done in the subject matter of an appeal. It therefore has a discretion to allow arguments on points of law which were abandoned or not raised in the Court below but is averse to doing so unless a refusal would result in injustice."**

To further buttress his point, Counsel referred us to a number of cases, among which was the case of **SOUTH OF SCOTLAND ELECTRICITY BOARD V. BRITISH CENTRAL ELECTRICITY**

AUTHORITY V. BRITISH OXYGEN CO. LTD[9], where the House of Lords said the following:-

> **"This House sometimes entertains a question which has not been argued in the Courts below when justice requires that it should do so, because there is no other means at hand by which the question could be brought to judicial determination. In Stonehaven Magistartes vs. Kincardineshire County Council (4) (1940 S.C (H.L) 56, it even entertained and decided on a point which had been expressly abandoned in the Court below."**

While Counsel agreed that this Court has the discretion to delve into and consider points of law not raised in lower Courts, they were, however, of the view that the said discretion may not be exercised unless refusal to entertain the new point of law would occasion an injustice on the party raising it. They added that the new point of law must be one that arises from the main issues that were decided upon by the lower Court in the judgment or decision appealed against. In this respect, Counsel invited us to accept the reasoning of the Court in the case of **INLAND REVENUE COMMISSION V. ROSS AND COUNTER**[10], where it said that-

> **"It is not open to a party on appeal to raise a point of law which was not taken or argued before the commissioners and cannot be brought within any questions of law on which the opinion of the Court is asked in the stated case."**

Counsel contended that this appeal does not arise from the main issues before the Tribunal, but from an interlocutory ruling in which the Tribunal ruled that once a matter is brought before it on appeal, the Appellant cannot continue to investigate it, unless it obtains the leave of the Tribunal. He relied on, among others, the case of the **KC CONFECTIONARY LIMITED**[8] referred to above. He submitted that in that case, the Court of Appeal accepted to deal with a new legal issue because the said issue related to the subject matter of the appeal.

According to Counsel, had the Tribunal in this case made a decision on the main matter before it; and decided on the rights of the parties in relation to the main issues; he could not have contested the exercise of discretion by this Court to entertain the new points of law. Counsel went on to submit that in deciding whether to exercise its discretion, this Court must consider whether the Appellant would suffer any injustice if the issue in question is not dealt with by this Court. In Counsel's opinion, the Appellant would not suffer any injustice because it did not appear before this

Court to prosecute their appeal. He contended that because of the non appearance of the Appellant at the hearing of this appeal, the fate of this appeal should have been dismissal. That, therefore, there can be no injustice occasioned to the Appellant, if the Court refuses to take the point of law when the appeal itself ought to have been dismissed owing to the non-attendance of the Appellant. In support of these arguments, Counsel referred us to Rule 7 (10) of the **SUPREME COURT RULES**[h], which provides that:-

> **"71. (10) Subject to the provisions of rule 69, if on any day fixed for hearing of an appeal-**
> **(a) the appellant does not appear in person or by practitioner, the appeal may be dismissed;**
> **(b) the appellant appears, and any respondent fails to appear either in person or by practitioner, the appeal shall proceed in the absence of such respondent unless the court for any sufficient reason sees fit to adjourn the hearing;**
> **(c) no party appears either in person or by practitioner, the appeal may be adjourned, struck out or dismissed."**

In Counsel's view, in the circumstances of this case, injustice will be inflicted on the 1st Respondent if this Court considers the new legal issues. Counsel submitted that if this Court allowed the appeal on the new legal points, the effect would be that the time provided for in Section 60 of the Act for the 1st Respondent to challenge the decision of the Appellant, would have elapsed. That

this would deny the 1st Respondent the right to assert its legal rights.

We hasten to say that we dealt with the issue concerning the absence of the Appellant at the hearing of the appeal. Clearly Rule 71(10)(a) of the Supreme Court Rules gives this Court discretionwhether or not the appeal should be dismissed. We decided to proceed since we had the heads of argument by the Appellant.

Counsel went on to submit that this Court exercises appellate jurisdiction. That if this Court hears the issue of the status of the Notice of Investigation, it will be determining a matter which is still pending before the Tribunal. That instead of exercising appellate jurisdiction, this Court will be drawn into exercising original jurisdiction and determine an issue it can only entertain on appeal.

To reinforce the above arguments, Counsel referred us to Article 125 of the **CONSTITUTION OF ZAMBIA (AMENDMENT) ACT**[i], which states that-

> **"125. (1) Subject to Article 128, the Supreme Court is the final Court of appeal.**
> **(2) The Supreme Court has-**

(a) appellate jurisdiction to hear appeals from the Court of Appeal; and
(b) jurisdiction conferred on it by other laws."

Counsel also referred us to Section 7 of the **SUPREME COURT OF ZAMBIA ACT**[h], which provides that-

"7. The Court shall have jurisdiction to hear and determine appeals in Civil and Criminal matters as provided in this Act and such other appellate or original jurisdiction as may be conferred upon it by or under the Constitution or any other law."

Counsel submitted that this Court should allow the Tribunal to perform its statutory mandate as set out in Section 68 of the Act which provides that-

"68. The functions of the Tribunal are to –
(a) hear any appeal made to it under this Act; and
(b) perform such other functions as are assigned to it under this Act or any other law."

According to Counsel, Section 68 (a) of the Act acknowledges that an appeal to the Tribunal may be made at any stage. In Counsel's view, that provision does not envisage that only final decisions of the Appellant may be taken to the Tribunal. Counsel contended that an appeal to the Tribunal may be made even before investigations are complete. That if the intention of Parliament was

that only final decisions of the Appellant could be appealed against, Section 55(11) of the Act would have stated so.

With regard to whether a party can appeal against the issuance of a Notice of Investigation, Counsel submitted that this question too did not arise in the lower Court and no injustice would be occasioned to the Appellant if this Court does not adjudicate on it. In the alternative, Counsel asked this Court to give the words in Section 60 of the Act their ordinary meanings. In this regard, Counsel referred us to, among other cases, our decision in the case of **ANDERSON KAMBELA MAZOKA AND OTHERS V. LEVY PATRICK MWANAWASA AND OTHERS**[11], where we said that-

> **"It is trite law that the primary rule of interpretation is that words should be given their ordinary grammatical and natural meaning. It is only if there is ambiguity in the natural meaning of the words and intention cannot be ascertained from the words used by the legislature that recourse can be made to other principles of interpretation."**

Counsel argued that the purport of Section 60 is to allow a person or an enterprise that is aggrieved with any order or direction given by the Appellant, in relation to investigations and determinations, to appeal to the Tribunal. Counsel referred us to

definitions of the words "order" and "direction" contained in **BLACK'S LAW DICTIONARY**[ii]. In Counsel's view, in its Notice of Investigation, the Appellant directed or guided the 1st Respondent to respond to the allegations levelled against it within 14 days. Counsel submitted that Section 60 of the Act lawfully permits the Tribunal to determine questions on any direction issued by the Appellant provided they relate to part VIII of the Act.

In reply to Counsel for the 1st Respondent's supplementary heads of argument, Counsel for the Appellant filed written heads of argument on 25th July, 2017. Counsel started by giving a brief background to the enactment of the Act and went on to refer this Court to the objectives of the Act as set out in the preamble to the Act. Counsel submitted that the parameters of the objectives of the Act are as outlined in Section 5. That in conducting the dawn raid against the Respondents on the 19th of October, 2012, the Appellant was simply carrying out the mandate conferred upon it by Parliament, through the enactment of the Act, and in particular under Section 5(c) of the Act.

On whether a person or an enterprise can appeal to the Tribunal against the issuance of a Notice of Investigation, Counsel contended that the order or direction anticipated by Section 60 of the Act was one that flowed from the Appellant's performance of one or more of its functions under Section 5 of the Act. He submitted that the Notice of Investigation was merely a communication of the institution of an investigation. That the Appellant had not made any determination of the matter. In Counsel's view, the Appellant can only make an order or direction, capable of being appealed against, after the conclusion of investigations as provided by Section 55(10) of the Act. Section 55(10) states that:-

> **"The Commission shall, at the conclusion of an investigation under this section, publish a report of the inquiry and its conclusions in such a manner and form as it considers appropriate."**

Counsel argued that the Appellant did not make any order or direction by issuing the Notice of Investigation. In his view, the appeal by the 1st Respondent to the Tribunal was, therefore, premature. Counsel stated that the 1st Respondent could only have properly appealed to the Tribunal after it received the Appellant's decision of 26th of April, 2013.

With regard to the question of what constitutes an order or direction under the Act, Counsel referred us to the definitions of the two terms in **BLACK'S LAW DICTIONARY[ii].** That the said Dictionary defines the word 'notice' as **"a written or printed announcement ...."** Counsel then argued that there can be no appeal against the making of an announcement to a party under investigation, informing them that an investigation has been commenced against them. He submitted that since the Appellant did not make any order or direction in the Notice, the appeal by the 1st Respondent to the Tribunal was incompetent and must accordingly be set aside.

We have carefully considered the evidence on record, the submissions of Counsel and the judgment appealed against

The learned Counsel for the Appellant argued the first and third grounds of appeal together.

It is clear that the decision of the Tribunal and that of the Court below, were anchored on Section 55(11) of the Act. This Section provides that-

"55(11) The Commission shall not investigate a matter that is before the Tribunal unless the Tribunal directs otherwise."

It is not in dispute that Section 55(11) of the Act does not allow the Appellant to conduct investigations into a matter that is before the Tribunal.

In our view, the starting point in this case is to ascertain the originating process which moved the Tribunal. The document on pages 167 to 170 of the record of appeal shows that the 1st Respondent moved the Tribunal by way of an 'appeal.' It is headed "Notice of Appeal" and starts by stating:-

"TAKE NOTICE that Omnia Fertiliser Zambia Limited of Plot 397a//1/c, Makeni Road, off Kafue Road, P.O. Box 39100, Lusaka being wholly dissatisfied with the decision of the Executive Director in the 1st Respondent, the Competition and Consumer Protection Commission of 4th Floor, Main Post Office, Cairo Road, Lusaka, on the 6th day of November 2012, intends to appeal to the Competition and Consumer Protection Tribunal against the whole decision which decided:-

> **TAKE NOTE that the Competition and Consumer Protection Commission has officially commenced investigation against you on the following allegation:-**
>
> **That your company working in collaboration with Nyiombo Investment Zambia Limited is alleged to be engaged in allocation of markets, bid rigging and sharing price information in supplying fertiliser under the Farmer Input Support Program. I wish to inform you that the alleged conduct is anti-competitive and in contravention of Section 9(1)(a)(b) and (c) of the Competition and Consumer Protection Act No. 24 of 2010.**

You are hereby requested to respond to this Notice within 14 fourteen days of receipt thereof." (emphasis ours)

The 'Notice' which is referred to in this document is on page 172 of the record of appeal. It was issued by the Executive Director on 6th November 2012. The grounds of appeal outlined in the Notice of Appeal, appearing on pages 167 to 169 of the record, broadly attack the constitutionality of the investigations, and of Section 55(4) and (5) of the Act. The reliefs sought include declarations that the Notice of Investigation and the Search Warrant were, illegal and void ab initio.

In essence, the appeal by the 1st Respondent was against the issuance of a Notice of Investigation against it. The question that ought to have been resolved both at the Tribunal and in the Court below, therefore, was whether one can appeal against the mere issuance of a Notice of Investigation under the Act. Inevitably, the follow up questions would be:- "at what stage of the Appellant's investigation process can an aggrieved person or enterprise take the matter to the Tribunal? Can an aggrieved person or enterprise go to the Tribunal and invoke Section 55(11) of the Act just on receipt of

the Notice and before the Appellant even concludes its investigations? Did the Tribunal in this case have jurisdiction to deal with the appeal by the 1st Respondent against the Notice of Investigation?"

These are the legal issues that we put across to the learned Counsel for the 1st Respondent at the hearing of the appeal. Counsel conceded that since the issues in question are legal, this Court has the discretion to deal with them even though they were not raised both before the Tribunal and the lower Court. They have, however, submitted that this Court should not exercise that discretion, to deal with the legal issues raised, because refusal to deal with them will not occasion any injustice to the Appellant, more so that the Appellant never appeared at the hearing of the appeal. Counsel has further submitted that this Court can only exercise its discretion to consider the said legal issues if they arose from the main matter that is still pending before the Tribunal and not from a decision of the Tribunal on an interlocutory issue.

We have carefully studied the supplementary arguments by Counsel for the 1st Respondent. It is our firm view that this Court cannot ignore legal issues that touch directly on the jurisdiction of the Tribunal. This Court must satisfy itself as to whether the Tribunal has jurisdiction to deal with an appeal against an investigation that is still pending, before we can even decide on the merits of the appeal by the Appellant to this Court. In other words, we have to be satisfied that the Tribunal had jurisdiction to make the decision that was appealed against to the lower Court. In terms of Section 25 (1)(a) of the Supreme Court of Zambia Act, Chapter 25 of the Laws of Zambia, this Court has power, on the hearing of an appeal in a civil matter, to confirm, vary, amend or set aside the judgment appealed from or give such judgment as the case may require.

It is trite law that where a matter is wrongly before a Court and, in our view, this includes a Tribunal, that Court or Tribunal has no jurisdiction to make any lawful order or grant any remedy. This was the conclusion we came to when we decided the case of

JCN HOLDINGS LIMITED, POST NEWSPAPERS LIMITED AND MUTEMBO NCHITO V DEVELOPMENT BANK OF ZAMBIA[12]. In that case, we specifically said the following:-

> **"It is clear from the Chikuta and New Plast Industries Cases that if a Court has no jurisdiction to hear and determine a matter, it cannot make any lawful orders or grant any remedies sought by a party to that matter."**

We again dealt with the issue of jurisdiction in the case of **ARISTOGERASIMOS VANGELETOS AND ANOTHER V METRO INVESTMENT LIMITED AND OTHERS[13].** In that case, we accepted that the Appellant did not challenge the High Court Judge's jurisdiction when the matter came up before him. We also considered the general rule that an issue that has not been raised in the Court below cannot be raised on appeal. However, we held that the question of jurisdiction can be raised on appeal notwithstanding the fact that it was not raised in the Court below. We went on to refer to **HALISBURY'S LAWS OF ENGLAND, 4TH EDITION, VOLUME 10 PARAGRAPH 717** where the learned authors state that:

> **"It is the duty of an Appellate Court to entertain a plea as to jurisdiction at any stage, even if the point was not raised in the Court below."**

We went further to state as follows at pages J54 - J55:-

> **"This authority clearly places an obligation upon us to allow a plea of want of jurisdiction to be raised, even where, as in this case, the issue was not raised in the Court below. The rationale for this lies in the consequence of the court exercising jurisdiction which it does not possess. Halsybury's at paragraph 715 states, in this regard, that where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.**
>
> **It can be discerned from the foregoing position of the law, that the absence of jurisdiction nullifies whatever decision follows from such proceedings This is the position because, the power of this Court (like that of any other court created by the Constitution) to adjudicate upon matters in terms of Articles 118 and 119 of the Constitution of Zambia Act is vested in it by the people of Zambia to be exercised justly in accordance with the Constitution and any other laws. The exercise of such power, in the absence of jurisdiction, amounts to an abrogation of the confidence reposed in the courts by the people and a contravention of the Constitution and other laws There is, therefore, need to cure such a defect at any adjudicative level and on appeal, whether or not it was an issue in the Court below."**

The question that inevitably falls to be decided in this case, therefore, is whether the Tribunal had jurisdiction to entertain the appeal by the 1st Respondent against the Notice of Investigation."

Now, appeals under the Act are governed by Section 60 of the Act. That section provides that-

> **"A person who, or an enterprise which, is aggrieved with an order or direction of the Commission under this Part may, within thirty days**

of receiving the order or direction, appeal to the Tribunal." (Emphasis ours)

It is evident from Part VIII of the Act that it is only Section 60 that an aggrieved person or enterprise can use to invoke the appellate jurisdiction of the Tribunal; more so when one considers the provisions of Section 68 of the Act, which outlines the functions of the Tribunal. It is unmistakable from Section 68 that apart from what is provided for in paragraph (b) of that section, a matter can only be taken to the Tribunal through an appeal. The said Section 68 states as follows:-

"68. The functions of the Tribunal are to –
(a) hear any appeal made to it under this Act; and
(b) perform such other functions as are assigned to it under this Act or any other law." (Emphasis ours)

The other functions referred to in paragraph (b) of Section 68 relate to applications that the Act allows Appellants to make to the Tribunal under circumstances that have been specifically stated in the Act.

A cursory scrutiny of the Notice of Appeal filed by the 1st Respondent before the Tribunal, in fact shows that the 1st Respondent lodged its appeal pursuant to Section 60 of the Act. As

stated above, that Notice of Appeal reveals that the 1st Respondent was appealing to the Tribunal because it was dissatisfied with the Notice of Investigation issued by the Appellant on 6th November, 2012. Now, does a Notice of Investigation issued under the Act constitute an "order" or a "direction" as envisaged by Section 60 of the Act? This is the question that ought to have exercised the mind of the Tribunal and that of the lower Court. It goes to the very root and jurisdiction of the Tribunal.

We are of the firm view that the above Notice of Investigation cannot be said to have been an 'order' or 'direction' given by the Appellant. An "order" has been defined in **BLACK'S LAW DICTIONARY**[ii] as follows:

> **"1. A command, direction, or instruction. 2. A written direction or command delivered by a government official, esp. a court or judge.**
> - **The word generally embraces final decrees as well as interlocutory directions or commands."**

Clearly, the Notice of Investigation was not an order because that Notice simply informed the 1st Respondent that the Appellant had officially instituted investigations against it and requested it to respond to the Notice. The Respondents chose not to respond to

the Notice and instead appealed. Similarly, we are of the view that the Notice of Investigation cannot be said to be a 'direction' within the context of Section 60. **BLACK'S LAW DICTIONARY**[i] defines direction as **"An order; an instruction on how to proceed...."** Such a 'direction', once given has to be complied with. There is no option to disobey. The word "direction" is not defined in the Act, but it would appear that the context in which it is used in Section 60 of the Act refers to directions that are specifically provided for under Sections 58, 59, 61 and 62 of the Act. The said sections empower the Appellant to give certain directions to a person or an enterprise. Section 58 empowers the Appellant to give directions relating to restrictive agreements; Section 59 empowers the Appellant to give directions relating to distortion, prevention or restriction of competition; Section 61 empowers the Appellant to, among others, remedy, mitigate or prevent substantial lessening of competition; and Section 62 allows the Appellant to grant interim measures. It is those kind of directions which, in our view, are appealable to the Tribunal under Section 60 of the Act.

On the basis of the foregoing, we hold that the Notice of Investigation was neither an order nor a direction in the context of Section 60 of the Act. It was, therefore, premature for the 1st Respondent to appeal to the Tribunal against the issuance of the Notice. In fact, as can be seen from the wording of the Notice of Investigation, apart from notifying the 1st Respondent about the investigations, it was intended to give it an opportunity to provide explanations to rebut the allegations against it. If the 1st Respondent had provided satisfactory explanations, it is possible that the allegations could have been allayed and the investigations could have been closed. Any other interpretation of Section 60 would defeat the very purpose for which the Commission was created; to be a watchdog of fair trading practices. In fact, any other interpretation would have the effect of thwarting or derailing the Commission's very mandate.

We do not think that it was the intention of Parliament, when it enacted Section 55(11) of the Act, to enable a person or an enterprise, to use an appeal to the Tribunal to thwart or halt

investigations properly instituted under the Act. In this case, all that the Appellant did was to inform the Respondent of the institution of investigations and to request it to respond to the allegations in the Notice. As we have stated above, if we hold that investigations by the Appellant can be halted, pursuant to Section 55(11) of the Act at any stage of the investigations, we would be frustrating the very purpose for which the Appellant was established by the Legislature, namely, to **'safeguard and promote competition; and protect consumers against unfair trade practices'.** It is our considered opinion, therefore, that Section 55(11) of the Act only becomes operative when an appeal has been properly taken to the Tribunal pursuant to Section 60 of the Act. Accordingly, we hold that the Tribunal did not have jurisdiction to entertain the 1st Respondent's appeal against the Notice of Investigation because the said Notice was neither an order nor a direction. Applying our decision in the cases of **JCN HOLDINGS LIMITED**[12] and **ARISTOGERASIMOS VANGELATOS**[13] we hold that the purported appeal to the Tribunal against the Notice of

Investigation was a nullity from inception. It follows, therefore, that the Appellant acted within the provisions of the Act, when it proceeded to render its decision on 26th April, 2013.

With regard to the second ground of appeal, Counsel for the Appellant has argued that the lower Court misdirected itself when it held that the Appellant did not give the Respondents an opportunity to be heard before it made its decision of 26th April, 2013.

It is clear from the Notice of Investigation that the Appellant requested the 1st Respondent to respond to that Notice within fourteen days of the Notice. The fact that the 1st Respondent elected not to respond to the Notice cannot be construed to mean that it was not accorded an opportunity to make representations on the allegations. We, therefore, find merit in the second ground of appeal. The Court below, therefore, erred when it held that the Respondents had not been given an opportunity to be heard.

On the fifth ground of appeal, Counsel for the Appellant has submitted that the learned trial Judge erred when she joined the 2nd Respondent to the proceedings. Counsel has contended that

since the 2nd Respondent indicated its desire to be joined to the proceedings, the lower Court ought to have formally made an order for non-joinder. That, in the absence of the said order, the 2nd Respondent was irregularly joined to the proceedings.

We have indeed noticed from the record of appeal, that the 2nd Respondent was not a party to the proceedings before the Tribunal. In the proceedings before the lower Court, the only time that the 2nd Respondent was mentioned was on 29th January, 2014 when Counsel for the Appellant indicated that she had received an application from the 2nd Respondent to join the proceedings. Counsel for the Appellant further indicated that she did not wish to oppose that application. However, there is no evidence of the said application on the record of appeal. It is thus not clear whether the learned trial Judge decided on the matter and allowed the 2nd Respondent to join the proceedings. In addition, in her judgment, the learned trial Judge did not say anything as to whether the 2nd Respondent was joined to the proceedings, although the 2nd Respondent's name appears on the caption of the judgment of the

lower Court. When asked by this Court, Counsel for the 1st Respondent admitted that the 2nd Respondent was not joined as a party. On this premise, we are of the view that the 2nd Respondent was not properly joined to these proceedings. We find merit in the fifth ground of appeal.

On the totality of the issues in this appeal, we find merit in the appeal and we allow it. The judgment of the Court below is set aside. It follows that the decision of the Tribunal also falls away.

According to Section 60 of the Act, an appeal against an order or direction of the Tribunal must be made within 30 days. The decision of the Appellant in this case was made on 26th April 2013 and by that date, this matter had already been taken to the Tribunal. Taking into account the appellate process from the tribunal, it can safely be stated that these proceedings have only been concluded today. We, therefore, direct that the 30 day period given in Section 60 within which to appeal should start running from today.

The 1st Respondent is therefore at liberty to appeal against the Appellant's decision of 26th April 2013 within 30 days from today.

Costs shall be for the Appellant to be taxed in default of agreement.

I.C. Mambilima
CHIEF JUSTICE

R.M.C. Kaoma
SUPREME COURT JUDGE

C. Kajimanga
SUPREME COURT JUDGE