IN THE COMPETITION AND CONSUMER PROTECTION TRIBUNAL HOLDEN AT LUSAKA

IN THE MATTER OF:	**SECTION 60 OF THE COMPETITION AND CONSUMER PROTECTION ACT NO. 24 OF 2010;**
IN THE MATTER OF:	**SECTION 9(1), 9(2) AND 9(3) OF THE COMPETITION AND CONSUMER PROTECTION ACT NO. 24 OF 2010**
IN THE MATTER OF:	**THE COMPETITION AND CONSUMER PROTECTION (GENERAL) REGULATIONS, 2011, STATUTORY INSTRUMENT NO. 97 OF 2011**
IN THE MATTER OF:	**THE COMPETITION AND CONSUMER PROTECTION (TRIBUNAL) RULES 2012, STATUTORY INSTRUMENT NO. 37 OF 2012**

BETWEEN:

OMNIA FERTILIZER ZAMBIA LIMITED **APPELLANT**

AND

THE COMPETITION AND CONSUMER PROTECTION COMMISSION **RESPONDENT**

APPELLANTS SUBMISSIONS

If it may please this Tribunal, These are the Submissions filed on behalf of the Appellant in this matter.

1. Background

1.1 On 3rd September 2012, an unidentified person lodged a complaint against the Appelllant and Nyiombo Investments Limited (hereinafter called "Nyiombo") with Respondent. The complaint allegedly accused the Appellant and Nyiombo of dividing the fertilizer supply market horizontally.

1.2 On 19th October, 2012, the Respondent executed a dawn raid on the premises of the Appellant and seized numerous documentation and computers from the said

premises. On 8th November, the Respondent delivered a Notice to investigate upon the Appellant. The Notice alerted the Appellant the Respondent was undertaking investigations against the Appellant for possible breach of the provisions of section 9(1)(a)(b) and (c) of the Competition and Consumer Protection Act No 24 of 2010.

1.3 On 26th April 2013, the Respondent handed down a decision wherein it held that;

i) The Appellant be fined 5% of annual turnover in accordance with section 9(3) of the Act

ii) The Appellant be prosecuted in accordance with section 9(2) of the Act

1.4 The Appellant, being dissatisfied with the decision of the Respondent, appealed against the said decision. The record will show that there were intervening matters that saw the suit enter the Supreme Court of Zambia.

1.5 Seventeen grounds of appeal are relied upon by the Appellant. We now address the said grounds in turn. As some of the grounds are interwoven, we propose to argue them together.

2. **Ground one**

2.1 **The Respondent erred in finding that the Appellant participated in the supply of fertilizer under the Farmers Input Supply Program (FISP) as the entity that was engaged in the supply of fertilizer under the FISP was Omnia Small Scale Limited, a totally different entity at law;**

Ground two

2.2 **The Respondent erred in ,therefore, fining the Appellant 5% of its annual turnover in accordance with section 9(3) of the Competition and Consumer protection Act.**

2.3 In the above grounds, it is the Appellant's case that the Respondent pursued a wrong party. The documents before this Tribunal confirm this to be the case.

2.4 The Decision in issue appears from **pages 67 to 81 of the Respondents Record of Proceedings.** Paragraph 1.0 (i) of this Decision, at **page 67 of the Record of Proceedings**, contains what purports to be information and relevant background upon which the said Decision is grounded. The complaint allegedly received by the Respondent, according to this paragraph, was that Nyiombo and the Appellant had been supplying fertilizer under FISP for a decade.

2.5 There are minutes of a meeting between an unknown party and the Executive Director, Chief Analyst and Research Analyst of the Respondent recorded to have

occurred on 3rd September 2012. The minutes appear at **page 3 to 5 of the Respondents Record of proceedings.**

2.6 These minutes show, at page 3, that a competitor of the Appellant going by the name Greenbelt Fertiliser Limited, was apparently the secret complainant. This is evident from paragraph 3.0, at **page 3.** The Tribunal will observe that what was submitted by the said Greenbelt Fertiliser Limited is no different from what is contained in the information and background referred to in paragraph 2.4 above.

2.7 It becomes apparent that it was Greenbelt Fertiliser limited that complained against the Appellant herein.

2.8 Further the Notice of Investigation, appearing at **page 12 of the Record of The Record of proceedings**, is addressed to the Managing Director of Omnia Fertilizer Zambia Limited, the Appellant. From this document, it is clear that the party given notice of an investigation was the Appellant, Omnia Fertilizer Zambia Limited.

2.9 Following "an investigation" the Respondent published a ***Staff paper on restrictive business practices by Nyiombo Investments Limited and Omnia Fertilizer Zambia Limited.*** This paper is set out on page 15 onwards of the same staff paper. From the caption, it is undeniable that the party being cited was the Appellant, Omnia Fertilizer Zambia Limited.

2.10 On page 17 of the same paper, paragraph 1.1 confirms that the party complained against was Omnia Fertilizer Zambia Limited, the Appellant herein. In fact, throughout the said paper, reference to Omnia, as can be clearly seen from paragraph 1.1, is meant to refer to Omnia Fertilizer Zambia Limited.

2.11 Further yet, the Respondent, in its decision delivered on 26th April 2013, appearing at **page 67 to 81 of the Respondent's Record of Proceedings,** found that Omnia Fertilizer Limited, the Appellant, was a party. This is clear from perusal of paragraph 4.1.1 **at page 69 of the Record of Proceedings.**

2.12 We have gone to great length to show that there cannot be any doubt whatsoever that the party investigated, cited and found guilty was Omnia Fertilizer Zambia Limited, the Appellant herein.

2.13 Yet the evidence gathered by the Respondent and wielded to condemn the Appellant tells a different story. It reveals that the Appellant, Omnia Fertilizer Zambia Limited, was not the party that was involved in the FISP transactions. The documents

show that the party that participated in the FISP was, in fact Omnia Small Scale Limited.

2.14 At paragraph 5.2.3 (iii) of the decision, at **page 74 of the Record of Proceedings**, the Respondent states that, *"there is an express Memorandum of Understanding of 2007 that was retrieved from the computer seized at Nyiombo. The Memorandum of Understanding has expressly stated that the two companies shall cooperate in the distribution of fertilizer in zambia.....The Memorandum of Understanding is attached as annex 1"*

2.15 Scrutiny of *Annex 1* reveals that the said document is, indeed, a Memorandum of Understanding. However, it is not between the Appellant and Nyiombo. The parties to the document are Omnia Small scale Limited and Nyiombo Investment Limited. This document appears to be one of the key documents employed by the Respondent to establish culpability of the Appellant.

2.16 At paragraph 5.2.3 (iv) of the Decision subject of this appeal, at **page 74 of the Record of proceedings**, the Respondent says that, *"...pursuant to the Memorandum of Understanding, the commission seized a signed and sealed document called Addendum No 1 of 2007. This is attached as annex 2. This document further shows that the two firms are colluding."*

2.17 A close look at *Annex 2* illuminates the glaring fact that the Appellant is not a party to the said document. The Addendum is between Omnia Small Scale Limited and Nyiombo Investments Limited.

2.18 Further at paragraph 5.2.3 (v) of the Decision, at page 75 of the Respondent's Record of Proceedings, the Respondent says that, *"the commission also seized a Sale Agreement between the two firms for the supply of fertilizer under the fertilizer support program...see annex 4."*

2.19 We invite this Tribunal to examine *annex 4.* It is beyond refute that the sale agreement appearing as *annex 4* is between a company called Nyiombo investments limited and another called Omnia Small Scale Limited. Nowhere in the agreement does the Appellant appear in any fashion.

2.20 In fact, the trend is the same with respect to other annexes introduced as evidence by the Respondents. They each consistently relate to transactions undertaken by Omnia Small Scale Limited and not the Appellant.

2.21 In terms of section 15 of the Companies Act, No. 10 of 2017, a company is deemed to come into existence on the date of incorporation, that is, from the date its name is entered into the register and given a certificate of incorporation by the Registrar of Companies. Accordingly, section 15 of the Companies Act states that:

> ***"15. (1) A certificate of incorporation issued in accordance with section 14 shall be conclusive evidence that—***
>
> ***(a) the requirements of this Act regarding the incorporation of the company have been complied with; and***
>
> ***(b) from the date of registration stated in the certificate, the company is incorporated in accordance with this Act." (Underlining emphasis ours)***

2.22 One of the consequences of incorporation is that an incorporated company, as such, becomes a separate legal entity distinct from its shareholders or members. This is known as the principle of separate corporate personality. This principle was fully established at the end of the nineteenth century in the celebrated case of ***Salomon v Salomon & Co Limited (1897) A.C. 22*** where the court was of the view that a company is, at law, a different person altogether from the subscribers to its memorandum.

2.23 The decision in Salomon v Salomon & Co Limited was confirmed in the case of Associated Chemicals Limited v Hill and Delamain Zambia Limited and Ellis and Co (1998) ZR 9 at 11 where the Supreme Court of Zambia held that upon incorporation, a company becomes a body corporate and thereby, a person distinct from its shareholders or members. The court stated at page 11 that a company is:

> ***".....not, like a partnership or a family, a mere collection or aggregation of individuals. In the eyes of the law it is a person distinct from its members or shareholders, a metaphysical entity or a fiction of law, with legal but no physical existence."***

2.24 As a matter of fact, the above position of the law has now been mirrored in section 16 of the Companies Act, which states that:

> ***"16. A company registered in accordance with this Act, acquires a separate legal status, with the name by which it is registered, and shall continue to exist as a corporate until it is removed from the Register of Companies."***

2.25 More recently, in the case of ***Madison Investment, Property and Advisory Company Limited v Peter Kanyinji – Selected Judgment No. 48 of 2018***, the Supreme Court had this to say at page J31:

"In Adam v. Cape Industries PLC, Slade LJ, in rejecting the approach taken in DHN Food Distributors, was emphatic that the veil should not be pierced merely because there is a group structure. He stated in a passage that Mr. Chiteba referred to in his submissions, as follows:

"...the court is not free to disregard the principle of Salomon v. A Salamon & Co. Ltd merely because it considers that justice so requires our law, for better or worse, recognizes the creation of subsidiary companies which though in one sense the creature of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all rights and liabilities which would normally attach to separate legal entities. There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary the fundamental principle is that each company in a group of companies is a separate legal entity possessed of separate legal rights and liabilities." (emphasis ours).

2.26 The above authorities make it abundantly clear that each company is distinct and may not, under any circumstances, be taken to be another. Thus, no indictment may be attached to the Appellant for dealings allegedly undertaken by a totally separate company. It was wrong for the Respondent to try the Appellant when all the evidence that buoyed its case appeared to relate to Omnia Small Scale Limited.

2.27 We have combed through the documents contained in the Respondent's Record of Proceedings, in search of any link between the Appellant and Omnia Small Scale Limited. We have found none. The Respondent has not produced or offered any evidence at all to support the notion why the Appellant must be held accountable for the transactions allegedly committed by another company.

2.28 It is our argument that the Respondent fell into error when it failed to appreciate elementary rules that govern the existence of companies.

2.29 Further, we argue that the Respondent erred in fining the Appellant 5% of its annual turnover in accordance with section 9(3) of the Competition and Consumer Protection Act No. 24 of 2010 and in directing that the Appellant be prosecuted in accordance with section 9(2) of the Act.

2.30 As shown above, the Appellant did not participate in the Farmer Input Supply Program. It therefore follows that the Respondent not only blamed but fined the wrong party. As we have argued, Omnia Small Scales Limited was the Company that

was allegedly involved in the Farmer Input Supply Program. We therefore submit that the Respondent erred when it fined the Appellant 5% of its annual turnover.

2.31 It is also our submission that the Respondent erred when it directed that the Appellant be prosecuted in accordance with section 9(2) of the Competition and Consumer Protection Act.

2.32 Section 9(2) is structured in the following terms:

> ***"9(2) A person who contravenes subsection (1) commits an offence and is liable, upon conviction, to a fine not exceeding five hundred thousand penalty units or to imprisonment for a period not exceeding five years, or to both."***

2.33 It is our submission that the Respondent erred when it made the directive to prosecute the Appellant because perusal of the Record of Proceedings reveals that the investigations carried out by the Respondent did not include anything that showed that the Appellant had committed a criminal offence to warrant prosecution.

2.34 We are cognizant of the fact that this Tribunal has in the past held that it has no jurisdiction to hear matters where the Respondent has ordered the prosecution of a party, but it is our submission that even before any consideration can be made on whether a party should be prosecuted or not, there has to be some semblance of evidence that reveal that a criminal offence could have been committed.

2.35 The documents introduced by the Respondent in its Record of Proceedings relate to investigations on aspects of business transactions between two companies. There is nothing in those documents that show any criminality. Further as we have argued above, the Appellant was not involved in the Farmer Input Supply Program that was the source of the investigations and as such it was wrong for the Respondent to have directed that it be prosecuted.

2.36 It is our belief that upon the above two grounds alone, this Appeal should succeed. On the chance that this Tribunal finds otherwise, we present further arguments in support of our Appeal.

3. **Ground six**

3.1 **The Respondent erred in basing its findings on certain conduct which allegedly contravened the Act that occurred prior to the commencement of the Act**

3.2 It is the Appellant's case that the Respondent erred when it found that the Appellant had contravened the provisions of section 9 of the Competition and Consumer Protection Act No. 24 of 2010.

3.3 The **Record of Proceedings** dated 5th June 2018, filed by the Respondent before this Tribunal should ideally contain evidence to support the Respondent's Decision, subject of this Appeal.

3.4 The Respondent relied on the provisions of the Competition and Consumer Protection Act No. 24 of 2010 in conducting its investigations and subsequently in arriving at its decision against the Appellant. The investigations against the Appellant commenced in 2012 when the Respondent received a complaint from an anonymous person who submitted that the Farmer Input Supply Program was Government's second largest expenditure besides Petroleum.

3.5 The person further submitted that Nyiombo Investments Limited(Nyiombo) and Omnia Fertilizer Zambia Limited(Omnia) had been supplying fertilizer under the Farmer Input Support Program for the past 10 years. He further submitted that there were serval issues regarding the tendering and eventual award of the contracts by the Zambia Public Procurement Authority that were in contravention of the Competition and Consumer Protection Act. He alleged that Nyiombo and Omnia were engaged into dividing the market horizontally.

3.6 The Respondent then started investigations that culminated in a search warrant being issued against the Appellant on or about 18th October 2012. The said warrant stated in part that:

> ***" INONGE MULOZI of the COMPETITION & CONSUMER PROTECTION COMMISSION, being duly sworn, complains that OMNIA FERTILISER ZAMBIA LIMITED together with other known parties in the period 2007 to 2012, are reasonably suspected to have participated of facilitated conditions resulting in allocation of markets and bid rigging in the tender of fertilizer contracts and the supply of fertilizer to the Government of the Republic of Zambia contrary to section 9(1)(b) and (c) of the Competition and Consumer Protection Act No. 24 of 2010.."***

3.7 It is clear that *annex 1,* allegedly seized by the Respondents during its search on the Appellant's premises, is not signed by any party. The unexecuted Memorandum of Understanding was allegedly drawn up in 2007. The Respondent applied the

provisions of section 9 of the Competition and Consumer Protection Act No 24 of 2010 and held that the Appellant had breached competition laws in Zambia.

3.8 The Competition and Consumer Protection Act, No. 24 of 2010 only became operational on 26th August 2010. Before that date, section 9 had no legal effect whatsoever and placed no obligations on the Appellant. The reason is simply because this law was not in existence. The question begging an answer is whether it was correct for the Respondent to use new law and apply it to events that occurred well before the law came into being.

3.9 It is a cardinal principle of construction in Zambia that every statute is prima facie prospective unless it is expressly, or by necessary implication, made to apply retrospectively. This was the view taken by High Court Judge, Honourable Mr. Justice A. M. Wood, as he then was, in the case of ***Celtel Zambia Limited (T/A Zain Zambia) v Zambia Revenue Authority (2011) ZR Vol. 2 at 11***, where he stated that:

> ***"For a law to be retrospective, the wording of the retrospective effect must be clear. There is no such clarity in Act No. 2 of 2009. The submission by the respondent that the Court should generally hold that Act No. 2 of 2009, had retrospective effect is untenable since it does not state so with sufficient clarity in any of the sections."***

3.10 This position was also taken by the Supreme Court in the case of ***ZCCM Investments Holdings v Cordwell Sichimwi – Appeal No. 172/2014*** where it stated that:

> ***"We agree that the Court below misdirected itself by applying provisions of Section 26B of the EMPLOYMENT (AMENDMENT) ACT NO. 15 OF 1997; retrospectively to a redundancy that occurred in 1993. In the case of ZAMBIA CONSOLIDATED COPPER MINES V JACKSON MUNYIKA SIAME AND 33 OTHERS, we stated that there is always a presumption that legislation is not intended to operate retrospectively but prospectively."***

3.11 The above provisions of law make it unquestionably clear that laws should have prospective application, unless clearly stated in the law. The Competition and Consumer Protection Act No. 24 of 2010, and all provisions contained in it, cannot have retrospective effect. No person or party can be held liable for acts committed prior to the Act coming into effect.

3.12 To sum up, it is our position that documents like annex 4 which was an alleged Sales Agreement between the Appellant and Nyiombo of 2006; annex 5 which was an email dated 24/2/2010; annex 7 an email dated 7/4/2010,;annex 8 email dated 2/5/2010; annex 9 email dated 1/2/2010; annex 10 email dated 10/3/2010; annex 25 email dated 26/6/2010 and annex 19 a bid by Nyiombo dated 24/4/2009, all formed the basis upon which the Respondent held that the Appellant had been involved in market sharing and bid rigging contrary to the provisions of section 9 of the Competition and Consumer Protection Act No 24. 2010. These documents all pre-date the coming into effect of Act No. 24 of 2010. Consequently, we submit that the Respondent was at fault when it applied the provisions of section 9 of the Competition and Consumer Protection Act in relation to the said documents.

3.13 We would expect this Tribunal to find that the finding by the Respondent was grossly erroneous.

4 Ground five

4.1 The Respondent erred when it arrived at its decision without hearing from the Appellant

4.2 For reasons that are difficult to fathom, it appears that the Respondent was in a hurry to find the Appellant culpable. The sequence of events on the Tribunal's record support an argument that the Respondent did not take interview the Appellant.

4.3 The Complaint was allegedly received on 3rd September 2012, as suggested by paragraph 1.0 on **page 67 of the Record of Proceedings**. There is evidence that the Respondent interviewed the "secret" complainant on the same 3rd September 2012. **Page 3 of the Record of Proceedings** confirms this.

4.4 Slightly over two months later, the Respondent sent the Appellant a Notice informing it that investigations had been initiated against it. This may be discerned from **page 12 of the Record of Proceedings.**

4.5 It is startling that even before hearing from the Appellant, the Respondent prepared a "staff paper" wherein it concluded that the Appellant had breached the law. The staff paper is at **page 15 of the Record of Proceedings**. At the bottom of the first page, the document is dated November 2012.

4.6 Further, the Appellant commenced these proceedings shortly after the Notice of Investigation was served on it. Whilst the proceedings were ongoing, the Respondent proceeded to render the determination appearing from **page 67 to 81 of the Record**

of Proceedings. The Appellant had not been heard. The Respondent had not taken in any evidence or interviewed the Appellant.

4.7 It is the Appellant's case that this omission affects the decision taken by the Respondent. According to Section 55(3) of the Competition and Consumer Protection Act, the Respondent is duty bound to give written notice to a person it is investigating. This section obligates the Respondent to give notice as soon as practicable upon opening an investigation.

4.8 It is accepted that Section 55(6) permits the Respondent to defer giving of notice where it has reasonable grounds to believe that the giving of the written notice may materially prejudice its investigations. However, it is the Appellants position that this section places an obligation on the Respondent to, at the very least, consider and record a decision to defer giving notice. The record before this Tribunal shows no trace of such evidence.

4.9 The Respondent, therefore, was in breach of Section 55(3) in that it deliberately waited until after it had taken a decision on the matter to alert the Appellant of an investigation opened against the Appellant. The net result, of course, is that the Appellant was not heard prior to the decision being taken.

4.9 Still on this point, it would have been different were the Respondent to have merely conducted investigations and not reached a decision. The staff paper at page 15 of the Record of Proceedings goes well beyond an investigation. It conveys a firm decision taken pursuant to the investigations. This, again, shows that the Appellant was not heard.

4.10 Even assuming that the failure to timeously issue a Notice of Investigation is a non- issue, Section 55(8) compels the Respondent to invite comments from interested parties in the matter under investigation. This section presupposes that views will be taken in before a decision is made. It is our position that the purpose of this law was to ensure that the Respondent hears the other side before taking a decision. The Respondent breached this provision as it failed to record views from the Appellant before making a decision.

4.11 In ***Shilling Bob Zinka v. The Attorney General (1990-1992) ZR 73 (SC),*** the Court took the view that:

> ***"The principles of natural justice - an English law legacy - are implicit in the concept of fair adjudication. These principles are substantive principles and are two-fold,***

namely, that no man shall be a judge in his own cause, that is, an adjudicator shall be disinterested and unbiased (nemo judex in causa sua): and that no man shall be condemned unheard, that is, parties shall be given adequate notice and opportunity to be heard (audi alteram partem)."

4.12 It is the Appellants case that the actions of the Respondent did not respect the law and did not respect the age old requirement for a person to be heard. No matter what had transpired after giving of the Notice of Investigation, the Respondent should have ensured that no decision was taken before having heard the Appellant.

5. GROUND THREE, FOUR, SEVEN, EIGHT AND THIRTEEN

5.1 The Respondent erred in finding that the appellant engaged in collusion or cartelistic behaviour in contravention of the Competition and Consumer Protection Act No. 24 of 2010

5.2 The Respondent erred in failing to properly investigate the matter

5.3 The Respondent erred in grossly misapprehending the facts relevant to this matter, in relying on inaccurate and extraneous evidence and in ignoring crucial facts in the matter

5.4 The Respondent erred in relying on a report marred with manifest errors, including without limitation in relation to whether the Appellant and Nyiombo Investments Limited (hereinafter called Nyiombo) were competitors in the relevant geographical markets and whatg the proper economic and legal test to evaluate this is.

5.5 The Respondent erred in finding that the Sale Agreement between the Appellant and Nyiombo confirms that the Appellant and Nyiombo were engaged in Market Allocation

5.6 The sum total of our arguments in relation to the above grounds is that there is an obligation on the Respondent to properly investigate a matter before placing liability upon a party. Further, the Appellant argues that the Respondent took into account extraneous matters in investigating the complaint. It is the Appellant's case that the Respondent failed to carry out a proper investigation and that such failure should invalidate the decision taken by the Respondent.

5.7 Annex 22 contains extracts from the Post newspaper. The article had a considerable bearing on the decision taken by the Respondent. There is no evidence to show steps taken by the Respondent to verify the information in the newspapers. This Tribunal surely cannot allow the Respondent to make a case with the aid of cuttings from news papers which are, at best, unverified and hearsay evidence.

5.8 Annex 1 is an unexecuted agreement. This agreement anchored the Respondents findings in relation to collusion by the parties. At paragraph 5.2.3 of the Decision, at **page 74 of the Record of Proceedings**, the Respondent acknowledges that the document is unsigned. The Respondent justifies its use by saying that, *"one would argue that the memorandum of understanding in issue was not signed and hence cannot be used as evidence. This is not tenable for cartels. For cartels what is important to establish is the intention and consensus ad idem. The agreement does not need to be signed to fall within the dominion of section 9(1) of the Act."*

5.9 This mindset, with respect, is disturbing and surprising. An unsigned document does not cease to be unsigned when dealing with alleged cartelistic behaviour. The effects of an unsigned document remain the same no matter the context in issue. There are many reasons for this. The most cardinal, perhaps, is that until signed, the document is no more than words that cannot be attributed to anyone, let alone in a manner that places legal liability. The rules of evidence simply cannot be abandoned in the fashion proposed by the Respondent.

5.10 Further, the Respondent implies that what is necessary is showing intent. **Section 9(1)** cannot be reconciled with this suggestion. **Section 9(1)** prohibits horizontal agreements. This section does not create liability on the basis of intent. It places liability only when there is actually an agreement in place. There is no evidence before this Tribunal to suggest that such an agreement was actually in place.

5.11 The Decision shows that the Respondent did not possess any current evidence at all supporting a breach of the law by the Appellant. We invite this Tribunal to take time to digest the Decision. We are certain that the Tribunal will take the point that it is based on suppositions, conjecture, and conclusions unsupported by tangible and admissible evidence.

5.12 Anenx 4 contains a sale agreement between Nyiombo and Omnia Small Scale limited. The Respondent rested on this document to show that the Appellant was

involved in Market Allocation of fertilizer. This is evident from paragraph 5.2.3(v) at **page 74 of the Record of Proceedings**.

5.13 Annex 4 is not helpful at all in proving the existence of market allocation. We invite this tribunal to read the said annexure. The document is no more than a sale agreement for fertilizer. The document appearing between the cover page and the body of the agreement has been inserted in the document by the Respondent and is not a part of the document. Read carefully, the sale agreement conveys nothing more than an agreement to buy and sell a product.

5.14 The suggestion, in paragraph 5.2.3(v) at **page 74 of the Record of Proceedings**, that this document makes Omnia a middle player and increases the fee structure for government is unsubstantiated and not supported by any evidence. The Respondent could not possibly have been correct to rely on such wide and unsupported statements to justify culpability of the Appellant. We are pains to see how annex 4 is evidence of market allocation by the Appellant.

6. GROUND TEN AND ELEVEN

6.1 The Respondent erred in failing to distinguish between the per se offences in section 9(1) of the Act and agreements that have the effect of preventing, distorting or restricting competition or substantially lessening competition in a market for any goods or services in Zambia, as contemplated by section 8 of the Act

6.2 The Respondent erred in finding that the conduct engaged in by the Appellant constituted "Per Se " offences in terms of section 9(1) of the Act

6.3 According to ***Blacks Law Dictionary 10th edition, Thomas Reuters 2009, by Bryan A Garner*** Per Se is defined at page 1323, Per se is defined as standing alone, without reference to additional facts. The phrase denotes that something is being considered alone, not with other collected things.

6.4 In paragraph 5.2.4 of the Decision, at **page 76 of the Record of Proceedings**, the Respondent concludes that the conduct of the Appellant is captured under section 9 of the Competition and Consumer Protection Act. The Respondent further suggests that once such conduct is proved there is no justification. This is set out in paragraph 5.2.4(i).

6.5 Our reading of section 9(1) of the Competition and Consumer Protection Act is that there is a variety of Horizontal agreements that are prohibited per se. In fact, the Act

provides that an agreement is prohibited per se if the agreement fixes a purchase or selling price or other trading conditions; or divides markets by allocating customers or territories.

6.6 Hence, in order for the Appellant to be said to have offended section 9(1), the above would need to be proved by the Respondent. It is the Appellant's case that the Respondent has not proved the existence of any of the requirements set out in section 9(1) of the Act. The Record of Proceedings does not contain any evidence to show that the Appellant engaged in price fixing, set trading conditions or that it divided the market by allocating customers to territories.

6.7 In the absence of such evidence, the Appellant cannot correctly be said to have contravened the provisions of section 9(1) of the Act. We are mindful that the Record of Proceedings must contain documents which, when considered by the Tribunal should confirm that the action taken by the Respondent was justified. The documents put before this Tribunal do nothing to support the Decision appealed against.

7. **Ground 16**

7.1 **The Respondent erred in directing the Appellant to pay a fine of 5% of its annual turnover without, inter alia, evaluating the relevant turnover which should form the basis for the fine and by failing to take into account various mitigating factors, including the nature, duration and extent of the alleged contravention of the Act and the Market circumstances in which the alleged contravention took place.**

7.2 It is the Appellant's case that the Respondent was wrong to find the Appellant liable for breach of provisions of the Competition and Consumer Protection Act. The Appellant will argue, in the alternative, that if the Respondent was correct, then the fine imposed was erroneous and should be set aside.

7.3 In the present case, the Respondent's Board mposed a fine of 5% of the Appellant's annual turnover for violation of section 9(1) of the Competition and Consumer Protection Act. Upon consideration of the decision of the Respondent's Board, it is unclear as to how they arrived at a fine of 5% of annual turnover. There is no evidence at all supporting the notion that any reflective process took place prior to the imposition of a fine.

7.4 For determining the amount of penalty, we turn to the ***Competition and Consumer Protection Commission Guidelines on Issuance of Fines 2014*** for guidance.

7.5 In particular, **guideline 5(i)** states that:

"(i) The Act empowers the Commission to impose administrative penalties including fines up to a maximum of ten per cent of turnover for specific violations."

7.6 Further, guideline 5(vi) provides as follows:

"(vi) A financial penalty imposed by the Commission under the Act will be calculated taking into consideration the following:

(a) the turnover of the enterprise in Zambia in the last business/financial year

(b)Adjustments to reflect other relevant factors such as aggravating or mitigating factors (an upward adjustment for aggravating factors and a downward adjustment for mitigating factors)

(c)A maximum of 10% of the turnover of the enterprise in Zambia in the last business/financial year"

7.7 From the above, the Guidelines require that mitigating factors be taken into account when calculating what fine to impose. The Guidelines, however, go further to specify what mitigating factors are.

7.8 **Guideline** 7 states in part that:

"7. Aggravating and Mitigating Factors

(i) In assessing the amount of financial penalty to be imposed, the Commission will consider the following aggravating and mitigating factors.

....

(iii) Mitigating factors include:

(a) role of the enterprise, for example, that the enterprise was acting under duress or pressure;

(b) the alleged offender has not been the subject of previous enforcement action on similar conduct;

(c) the alleged offender is willing to accept lesser enforcement options e.g. give undertakings, enter into consent agreement;

(d) the alleged offender has cooperated with the Commission in providing information and evidence which enables the enforcement process to be concluded more effectively and/ or speedily;"

(e) termination of the violation as soon as the Commission intervenes."

(f) Offence/s committed by the offender as a result of a genuine and/or innocent mistake."

7.9 It is the Appellant' case that the above guidelines were ignored by the Respondent. This revelation invalidates the decision to impose upon the Appellant a fine of 5%. This, in turn, renders the fine liable to be set aside by this Tribunal.

8. CONCLUSION

8.1 Laws are enacted for a purpose. They exist for a reason. They are meant to give notice to a party that certain actions are illegal and will attract sanction. It is our prayer that this Tribunal will give effect to the laws that govern competition in this country.

8.2 It is our prayer that this Tribunal will frown upon the retroactive application of laws by the Respondent.

8.3 It is our prayer that this Tribunal will check the power wielded by the Respondent so as to ensure that that power is only unleashed well within the law and guidelines set up to ensure fair play.

8.4 It is our prayer that this Tribunal will give effect to the laws that protect the sanctity of a limited company and not permit the alleged wrongs of one company to be paid for by another totally separate legal entity.

8.4 We ask this Tribunal to allow this appeal and set aside the decision against the Appellant with costs to the Appellant.

DATED THIS DAY OF 2021

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To:

THE RESPONDENT AND ITS ADVOCATES
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The Competition and consumer Protection Commission
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