Jurisprudential Value of *Tanga Fresh v. Fcc*[1] in the Law of Mergers & Acquisitions in Tanzania

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Abstract

The Fair Competition Act of Tanzania regulates and controls, among others, mergers and acquisitions of business entities. This Act, together with its regulations, establishes a framework which requires proposed mergers and acquisitions amounting to eight hundreds millions Tanzanian shillings or more to be notified to the Fair Competition Commission before being consummated. The notification requirement enables FCC to ascertain the impact of the proposed transaction on effective competition in the market. Any transaction whose effect is to lessen effective competition to the detriment of consumers is likely to be blocked.
FCC has dealt with a number of mergers and acquisitions cases. One of the cases is that of *Tanga Fresh v. FCC*, in which Tanga Fresh merged with its two competitors in Tanga region without first being cleared by the FCC. This is the first merger case to be determined by the Tribunal. The Tribunal delivered a well-reasoned opinion which set important precedents that are very essential in understanding the law on mergers and acquisitions in Tanzania. This article attempts to discuss those precedents in detail. Some of the aspects discussed in this article include definition of the term merger, elaboration on the failing firm doctrine, effects of admissions in inquisitorial proceedings, rules of natural justice, breach of standstill obligation or gun jumping and factors which a competition authority should take into account in mergers and acquisitions analysis.

1. Introduction

The Fair Competition Act of Tanzania[2] regulates and controls, among others, mergers and acquisitions of business entities. The Act intends to avoid situations where mergers and acquisitions of firms create or strengthen positions of dominance in the markets.[3] Uncontrolled mergers and acquisitions may lead to abuse of dominance in markets where dominant firms dictate on the nature, quality and pricing of supplies due to lack of effective competition. This would be contrary to the very object of the Act, which is:

> to enhance the welfare of the people of Tanzania as a whole by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout Tanzania in order to: (a) increase efficiency in the production, distribution and supply of goods and services; (b) promote innovation; (c) maximise the efficient allocation of resources; and (d) protect consumers.

The procedures for regulating mergers and acquisitions are provided for in the Fair Competition Act of 2003, the Fair Competition Commission Procedure Rules[4] and the

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[1] Tribunal Appeal No 5 of 2014, Fair Competition Tribunal, Dar es Salaam.
[2] Act No. 8 of 2003.

[3] S. 11(1) of the Fair Competition Act, No 8 of 2003.
[4] GN No 73 of 2013.

Fair Competition (the Threshold of Notification of Merger) Order.[5] Section 11 of the Fair Competition Act read together with the Fair Competition Commission Rules of Procedure and the Fair Competition (Threshold of Notification of Merger) Order establish what can be termed as notifiable and non-notifiable mergers. A merger must be notified to the Commission if it involves a turnover or assets that are above threshold specified by the Commission.[6] The Threshold Notification Order under its order 2(1) requires any firm to notify the Commission of any intended merger if it has a threshold of or above eight hundred million (800,000,000)[7] Tanzanian shillings. As mentioned above, this control aims at avoiding creation of market dominance which is likely to be easily abused. Ideally, markets ought to have many firms competing with each other in providing for the best to customers. Any form of monopoly is likely to disadvantage consumers. In this regard, Cassey says:

> …Mergers change market structure by reducing the number of independent firms in the market. They also result in the merged entity having a larger market share than each of the two merging firms before the merger. Thus some mergers can result in a dominant firm (where none existed before the merger) or/and it can increase the merged entity's market power. Both can be detrimental to consumers if the merged entity abuses its dominant position or exercises its market power. Merger controls are put in place to prevent such situations from arising….[8]

Similarly, Moritz Lorenz has explained why it is important to have mergers and acquisitions controlled. In his book on competition law, he says:

> …The main aim of merger control is to prevent mergers leading to the creation or reinforcement of a dominant position and thus depriving consumers of benefits resulting from effective competition such as low prices, high-quality products, wide selection of goods and services, and innovation. Mergers may impede effective competition by altering the market structure in such a way that companies on a relevant market are more likely to coordinate and raise their prices. Another detrimental effect to competition may be a reduction of the companies' abilities and/or incentives to compete which may result in higher prices or a lack of innovation. Therefore the most important goal of merger policy is to avoid the creation of a market structure that would significantly facilitate coordination of market behaviour between different market players….[9]

It is within this context that the Fair Competition Commission (FCC) comes in to control mergers and acquisitions. Generally, no merger will be approved if it has a material effect of distorting competition in the market.[10] Since when it started its operation in 2003, the FCC has dealt with several merger and acquisition applications. While some applications were approved, others were not. Some mergers were never notified in accordance with the law. One such case is that of Tanga Fresh which gave rise to the case of *Tanga Fresh v. Fair Competition Commission.*[11] This case is important because it sheds some light on mergers and acquisitions creating jurisprudential lessons. The matter started at the FCC and went up on appeal to the Fair Competition Tribunal whose decision is final.[12]

2. Tanga Fresh v. FCC

[5] Order of 2007 as amended by GN No 93 of 2009.

[6] Section 11(12) of the Fair Competition Act, No 8 of 2003.

[7] Equivalent to 350,000 USD, at exchange rate of 7th April 2017.

[8] Cassey Lee, **Model competition laws**, p. 40 in Paul Cook, Raul Fabella & Cassey Lee, **Competitive Advantage and Competition Policy in Developing Countries,** Edward Elgar, UK/US, 2007.

[9] Moritz Lorenz, **An Introduction to EU Competition Law**, Cambridge University Press, UK, 2013 at pg. 242.

[10] See Section 11-13 of the Fair Competition Act.

[11] Tribunal Appeal No 5 of 2014, Fair Competition Tribunal.

[12] Section 61(8), *ibid.*

2.1 Factual Background

Tanga Fresh (the appellant), a company that deals with dairy business, was aggrieved by the FCC findings that it had contravened the provisions of the law on merger notification. In 2011 while conducting an awareness program in Tanga region, FCC was informed by stakeholders that the appellant had acquired two companies dealing with dairy products business in Tanga region. These were Morani Dairy Company Limited and International Food Processors Limited (the two companies). These two companies were involved in collecting milk from Tanga farmers and processed dairy products. The effect of this acquisition was to throw the two companies out of the market. After acquiring the two companies the appellant remained the major producer of dairy products in the region.

After getting the information as narrated above, the respondent, FCC, conducted an investigation to satisfy itself whether or not there was contravention of section 11 (2) of the Fair Competition Act on merger notification. After the investigation the respondent formed an opinion that the appellant breached competition rules by failing to notify the Commission on its takeover of the two companies. In 2012 FCC issued a statement of its case to Tanga Fresh, and in 2013 it submitted its provisional findings. It is at this stage that the appellant was invited to respond, which it did and applied for leave for oral hearing as well. At the time of hearing of the matter, the appellant admitted taking over the two companies and asked for a settlement. On the day scheduled for settlement discussions, the appellant applied for extension of time. Since then, it resorted into pursuing political options by seeking assistance from prominent politicians. Finally Tanga Fresh abandoned the case. Even after being reminded by FCC, the appellant did not proceed with the case. Consequently FCC proceeded to make the findings that Tanga Fresh:

(a) Failed to make merger notification as required by section 11 (2), (5) and (6) of the Fair Competition Act together with the Threshold Notification Order
(b) Contravened the provisions of section 11(1) and (6) in that it strengthened a position of dominance in the market.

Based on the above findings, Tanga Fresh was fined to pay 5% of its annual turnover of audited accounts. This was TShs 460,945,000/=[13]derived from the total annual turnover of TShs 9,210,900,000/=[14] of its audited accounts of the year 2009. Tanga Fresh preferred an appeal to the Fair Competition Tribunal against such fine.

2.2 Grounds of Appeal

In its appeal the appellant raised the following grounds of appeal:

(a) That there was contravention of principles of natural justice as the appellant was not given the right to be heard. This, according to Tanga Fresh, caused miscarriage of justice;
(b) That FCC erred in law by holding that the appellant had admitted the offences;
(c) That FCC was wrong in holding that there was merger between the appellant and the two companies;
(d) That FCC erred in law by holding that the two companies were still in business at the time the appellant acquired them;

[13] About 206,000 USD based on exchange rates of 7th April 2017.
[14] About 4,126,000 USD based on exchange rates of 7th April 2017.

(e) That FCC erred in fact and in law by finding that the appellant was in contravention of the law without proof of acting negligently and with intention to contravene the law; and

(f) That the Commission was wrong in holding that the appellant's actions were in contravention of the law.

On the other hand, FCC strongly and successfully opposed the appeal. It advanced six grounds to challenge Tanga Fresh's memorandum of appeal. FCC's grounds, with its very detailed submissions, were aimed at convincing the Tribunal that FCC's findings should not be overturned.

2.3 General findings

After a detailed analysis of submissions made by both parties, the Tribunal was of the unanimous opinion that the appellant had actually contravened the provisions of the Fair Competition legislation on merger notification as claimed by the Commission. The Tribunal was satisfied that the transaction between the appellant and the two companies was a notifiable merger. That being the case the appellant had a duty to make notification of that transaction to the Commission. The appellant did not do so. The penalty imposed by FCC was thus upheld.

In arriving at its decision the Tribunal was assisted by the rich and valuable submissions of counsel.[15] The very well-reasoned opinion of the Tribunal carries jurisprudential value in the following areas, namely, definition of the term merger, elaboration on the failing firm doctrine, effects of admissions in inquisitorial proceedings, rules of natural justice, breach of standstill obligation or gun jumping and factors which a competition authority should take into account in mergers and acquisitions analysis. Each of the areas is discussed below.

3 Jurisprudential value of *Tanga Fresh v. FCC*

3.1 Merger defined

One notable ground of appeal by the appellant was that its transaction with the two companies was not a merger. It maintained that merger, as defined by **Oxford English Dictionary** has the impact of joining two businesses or organisations into one. What it did, in its opinion, was not merger. It was simply acquiring of business premises and equipment.

FCC on the other hand, maintained that the word 'merger' was not a plain English word. It is an economic term which has to be defined and understood in that context. Thus a question as to whether a transaction amounts to a merger or not is determined by the 'control test'. If the appellant would have gained control over the two companies after such acquisition, the transaction would amount to merger.
In deciding this issue, the Tribunal made reference to the definition section of the Act. Under section 2, merger is defined as:

[15] Mr. Mwita Waissaka and Justice John Mkwawa (Retired), for the appellant and Dr. Deo Nangela, for the Commission.

> An acquisition of shares, a business or other assets, whether inside or outside Tanzania, resulting in the change of control of a business, part of a business or an asset of a business in Tanzania".[16]

Further, the word acquisition is defined in relation to shares or assets to mean "acquisition, either alone or jointly with another person, of any legal or equitable interest in such shares or assets but does not include acquisition by way of charge only".[17]

It should be remembered that Tanga Fresh's main argument was that a mere acquisition of assets and business premises cannot amount to a merger. However, having internalized the above definitions and submissions from parties, the Tribunal found, first, that a merger includes an acquisition. This finding was supported by Recommended Practice for Merger Notification and Review by International Competition Network (ICN).[18] According to ICN a transaction in which a firm acquires assets of another firm is universally recognized as a merger. What the appellant did was to purchase assets that were used by the two companies for production of dairy products. The appellant argued that the assets were few and thus it could not amount into a merger. To that argument the Tribunal was of the view that once such transaction exceeds the gazetted threshold (i.e., 800 million Tanzanian shillings) it amounts to a merger that is notifiable. The transaction between the appellant and the two companies in itself, without including costs of acquired assets exceeded 800 million Tanzanian shillings and therefore this was a notifiable merger. In this regard, the Tribunal, observed:

> …we must say with emphasis that we totally agree with the submission by the respondent's counsel that in Tanzania not all mergers are subject to the notification procedure. It is only those that meet a certain criteria or threshold. So, it doesn't matter as to whether the appellant acquires few assets or whole assets of the company as the appellant tries to allege on the basis of the amount of assets acquired that they were few. Once it is proved on the affirmative that the transaction in question was a merger as defined under section 2 as is the case in this appeal, FCC should be notified…in this appeal, the total combined value of the merger in question is TShs.11,068,422,500/= which is beyond the notification threshold…

Two, a merger is an economic term. The Tribunal also made a very significant finding regarding contextual definition of the term 'merger'. It observed that it was wrong to consider its plain meaning (simply joining two businesses to become one). It should rather be given its economic meaning similar to what is given to other economic terms such as 'competition', 'market' and 'dominant position' within competition law jurisprudence. This, it is submitted, is the correct approach as supported by many other authors and sources. One should not be mistaken to consider the word 'merger' in its plain meaning of joining two or more firms or organisations. It should be economically defined, to include any transaction that results into change of control of ownership. On this point, John Coates says:

> …The concepts "mergers and acquisitions" (M&A) and "restructuring" **are primarily used as business terms, not as legal terms of art**. They are not sharply defined, instead referring to fuzzy sets of similar transactions. As commonly understood by practitioners and used in

[16] Section 2 of the Fair Competition Act No 8 of 2013.
[17] *Ibid.*
[18] International Competition Network, **Recommended Practice for Merger Notification and Review**, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf (accessed on 7th April 2017).

this chapter, the core of M&A is a deliberate **transfer of control and ownership of a business organized in one or more corporations**….[19] (Emphasis supplied)

Thus, mergers would include transactions such as assets and stock purchases.[20] For instance, the author gives an example of a merger that is completed by way of stock purchasing.[21] In that example, AT&T's attempted acquisition of T Mobile from Deutsche Telekom in 2011 by way of stock purchase.[22] Article 2.1 of the agreement between the two parties read:

> Upon the terms and subject to the conditions set forth in this Agreement, at the Closing, Seller will cause Holding to sell, convey, assign, transfer and deliver to Purchaser, free and clear of all Encumbrances, and Purchaser will purchase, acquire and accept from Holding, all of Holding's right, title and interest in and to the Company Shares (including, for the avoidance of doubt, the payment of the Cash Consideration and issuance of the Purchaser Shares to Seller, the "Transaction").[23]

Such transaction, though did not attempt to join two companies into one, was nevertheless considered as a merger since it involved change of control of ownership. It is on this ground that the US Department of Justice moved to block that merger in 2011.[24] The approach of considering change of control in determining a merger is also acceptable and applicable within the European Union. According to the European Union Merger Regulations, a merger will be consummated where:

> … the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, **whether by purchase of securities or assets, by contract or by any other means,** of direct or indirect control of the whole or parts of one or more other undertakings…[25]
> (Emphasis supplied)

3.2 'Failing Firm Doctrine' Explained

In its appeal, the appellant raised failing firm doctrine as its defence for its failure to comply with merger regulations. This doctrine allows a merger to be cleared if the target firm has failed to conduct business and would thus exit the market. It was the appellant's case that the two companies were no longer in operation and thus that merger was justified on grounds of failing firm doctrine. In discussing this doctrine, the Tribunal observed that a party may only rely on it successfully if it proves the following factors, namely:

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[19] John C. Coates IV, **Mergers, Acquisitions and Restructuring: Types, Regulation, and Patterns of Practice,** Discussion Paper No. 78/1, Harvard Law School, July 2014, pg. 2 accessed at https://dash.harvard.edu/bitstream/handle/1/20213003/Coates_781.pdf?sequence=1 (accessed on 7th April 2017).

[20] *Ibid*, pg. 4.

[21] *Ibid, pg. 4.*

[22] *Ibid.*

[23] Stock Purchase Agreement, by and between DEUTSCHE TELEKOM AG and AT&T INC, March 20, 2011, accessed on 7th April 2017 at https://www.sec.gov/Archives/edgar/data/732717/000119312511072458/dex21.htm.

[24] Edward Wyatt, **U.S. Moves to Block Merger Between AT&T and T-Mobile**, New York Times, August 31st. 2011 also available at http://www.nytimes.com/2011/09/01/technology/us-moves-to-block-merger-between-att-and-t-mobile.html.(accessed on 7th April 2017). See also James Steward, **Antitrust Suit Is Simple Calculus,** New York Times, September 9th, 2011 also available at http://www.nytimes.com/2011/09/10/business/att-and-t-mobile-merger-is-a-textbook-case.html .(accessed 7th April 2017).

[25] The Council of European Union, The Official Journal of European Union, **COUNCIL REGULATION (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)**, 2004, Article 3(2). See also Moritz Lorenz, **An Introduction to EU COMPETITION LAW**, Cambridge University Press, UK, 2013 at pg. 245.

(a) That the failing firm would in the near future be forced out of the market because of financial difficulties if it is not taken over by another undertaking,

(b) That there is no less anti-competitive option other than the proposed merger and

(c) In the absence of merger the assets of the failing company would inevitably exit the market.[26]

The doctrine of failing firm is therefore a concept that offers for a lesser evil. With it, authorities will be prepared to clear a merger in an attempt to save the assets of the failing firm from complete exit from the market. On this point Joshua R. Wueller says:

> …when a company is on the verge of collapse and the "bankruptcy [attorney] is sharpening her scythe, readying herself for the role of the Grim Reaper," the firm may have no choice but "to merge, acquire or be acquired, or choose to sell loss-making divisions in order to enhance the firm's viability and profitability." The failing firm doctrine is a narrowly tailored defense for these sorts of companies that are facing antitrust scrutiny from courts and federal regulatory agencies…[27]

Thus, if there is a buyer other than the acquiring company willing to buy without having to compromise competition regulations, such merger will not be cleared. Thus, according to *Citizen Publishing Co. v. United States*[28] the doctrine would fail unless it is proved that the company acquiring the failing company was the only purchaser. At page 138, the US Supreme Court observed:

> …The failing company doctrine plainly cannot be applied in a merger or in any other case unless it is established that the company that acquires the failing company or brings it under dominion is the only available purchaser. For if another person or group could be interested, a unit in the competitive system would be preserved and not lost to monopoly power…[29]

USA has been very clear and consistent in controlling mergers that would lessen competition in its markets. Section 7 of the Clayton Act clearly provides:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly…[30]

The failing firm doctrine, however, comes as a defence to provisions like section 7 of the Clayton Act. *International Shoe v. FTI*[31] illustrates this position. In 1921, International Shoe acquired all stocks of W. H. McElwain Company. Both companies were involved in shoe making business. The effect of this transaction was to make International Shoe to own W.H, McElwain Company, hence, purportedly lessening competition between them. The reason behind this acquisition was bad economic

[26] See detailed discussion of these elements in Ignatious Nzero, **Interpretation and Application of the Failing Firm Doctrine in Merger Regulation in South Africa and The US: A Comparative Analysis**, *2014 (77) THRHR.*

[27] Joshua R. Wueller, **Mergers of Majors: Applying the Failing Firm Doctrine in the Recorded Music Industry**, *7 Brook. J. Corp. Fin. & Com. L. 589 (2013*, pg. 590.

[28] 394 U.S. 131 (1969).

[29] Ibid, pg.138.

[30] §7 Clayton Act, 15 U.S.C. § 18.

[31] 280 U.S. 291 (1930).

situation McElwain was facing. McElwain had reached a point that it could no longer pay its debts; nor was it able to deliver its orders. It was under these circumstances that the doctrine of the failing firm came into play. US Supreme Court held that such defence justified the merger and was not in violation of section 7 of Claytons Act. At page 302 of the judgement,[32] it noted that:

> …In the light of the case thus disclosed of a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure, with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (there being no other prospective purchaser) not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public, and does not substantially lessen competition or restrain commerce within the intent of the Clayton Act. To regard such a transaction as a violation of law, as this court suggested in *United States v. U.S. Steel Corp.,* would seem a distempered view of purchase and result.…

The above words, according to Blum, have become the hallmark for the doctrine.[33] Thus, if the ultimate goal of the acquiring firm is not to lessen competition but to save the failing firm from exiting the market, the doctrine applies. It is also important to note that there has to be proof that there is no likelihood of the failing firm's survival.[34]

In the Fair Competition Act of Tanzania, failing firm is recognized as an exception to which merger may be cleared, its effects on competition notwithstanding. Section 13(1) of the Act reads as follows:

> The Commission may, upon the application of a party to a merger, grant an exemption for that merger, either unconditionally or subject to such conditions as the Commission sees fit, if the Commission is satisfied in all the circumstances that paragraph (a) and either paragraph (b) or (c) applies.

Paragraph (a) reads"…the merger is likely to create or strengthen a position of dominance in a market"[35] while paragraph (c) provides that "…in the case of a merger resulting in the change of control of a business, the business faces actual or imminent financial failure and the merger offers the least anti-competitive alternative use of the assets of the business".[36]

Thus, from the Act, the doctrine applies if:

(a) Such merger is likely to create or strengthen dominant position in the market;
(b) That such merger does result to the change of control of business;
(c) That the business [targeted firm] faces actual or imminent danger;
(d) The merger offers the least anti-competitive alternative use of the assets of the business; and
(e) In the absence of merger, the assets of the failing company would inevitably exit the market.

3.3 Effects of Admission in FCC Inquisitorial Proceedings

[32] International Shoe Co. v. FTC 280 U.S. 291 (1930).
[33] Marc P Blum, "The Failing Company Doctrine"**, 16 B.C.L. Rev. 75 (1974) pg. 81.**
[34] See details in Organisation For Economic Co-Operation And Development (OECD), **Policy Roundtables: Failing Firm Defence**, Paris, 1995 .
[35] Section 13 (1) (a), Fair Competition Act No 8 of 2003.
[36] Section 13 (1) (c), *Ibid.*

Normal courts deal with admissions every day. Section 19 of Evidence Act of Tanzania defines it as:

> a statement, oral, electronic or documentary, which suggests any inference as to a fact in issue or relevant fact and which is made by any of the persons and in the circumstances hereinafter mentioned.[37]

Sarkar defines it as concession or voluntary acknowledgment made by a party or someone identified with him in legal interest of the existence of certain facts which are in issue or relevant to an issue or in the case.[38] It is generally an admission of certain facts or truths. Generally, when a certain fact has been admitted by a party to a case, there will be no need of further proof. This is also true for judicial admissions.[39] No further proof is required when a party to a case has made admission during judicial proceedings.[40] This is provided for in section 60 of the Evidence Act which reads:

> No fact need be proved in any civil proceeding which the parties thereto or their agents agree to admit at the hearing or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings: Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

Proceedings in the Fair Competition Tribunal are governed by the Fair Competition Act and the Fair Competition Tribunal Rules of 2012.[41] These laws do not explicitly deal with admissions. However, in the *Tanga Fresh* case the Tribunal in its reasoning explained the issue of admissions.

It was the appellant's contention that the respondent, FCC, wrongly concluded that it had admitted to have committed the offence. It argued that at no particular time did it admit to have contravened the provisions of the law. However, the Tribunal found out that the appellant had already accepted the Commission's provisional findings. This was so because it had opted for settlement and took efforts to find political intervention at least to lessen the penalty it would have suffered.[42] According to the Tribunal the appellant had made an admission which it could not take back.

The effect of the Tribunal's finding is that the rule stopping a party from recanting its admission is applicable within the FCC and Tribunal's proceedings as well. A party will not be allowed to refute what it has already admitted in the proceedings of the Commission or Tribunal. This is even more important when a party had already made a settlement[43] option with the Commission. It may not take back its proposition as it

[37] Section 19 of Evidence Act of Tanzania, 1967 as amended by Section 43 of Electronic Transactions Act 2015, Act No 13 0f 2015

[38] Sarkar, S.K., and Ejaz Ahmad, (1999), **Law of Evidence**, Vol I, 14th edtn, Ashoka Law House, New Delhi pg. 261

[39] Admission or acknowledgements of certain facts during judicial proceedings.

[40] William J Giacomo, Admissions: "What They Are and How They Can Impact Litigation", **Peace Law Review, Vol 32, Issue 2 spring 2012.**

[41] GN No 219 of 2012

[42] See Tribunals reasoning from page 30-41.

[43] Settlement is one of the options of resolving the dispute within FCC. If a party is in breach of competition rules, it is given an option for settlement. This enable the party and FCC to discuss the penalty to be suffered, and most likely it will be lesser than what the party would have paid but for that settlement. See Rules 19(6) and 21 of Fair Competition Commission Procedure Rules of 2013, GN No 73 of 2013. See Also Goodluck Temu, "Reflections on Enforcement of Fair Competition Rules in Tanzania", **Eastern Africa Law Review, Issue No 2, Volume 41, December 2014, pg. 105.**

would be prevented by the principle of estoppel unless such an admission was of such a nature that the other party had not acted upon it.[44]

3.4 Rules of Natural Justice: Right to be heard explained

What constitutes rules of natural justice has so far not been exhaustively explained. In *Abbott v. Sullivan*[45] Sir Raymond Evershed MR noted that **"**the principles of natural justice are easy to proclaim, but their precise extent is far less easy to define".[46]

However, Parker, J., in *R v. Manchester Legal Aid Committee Ex parte R A Brand & Co Ltd*[47] quoting words of Roche, J., observed:

> It is sufficient to say that whereas it is sometimes contended that the principles of natural justice are vague and difficult to ascertain, fortunately the principles of British justice have been authoritatively laid down; and they at all events extend to the assertion of this principle, that where judicial functions, or quasi-judicial functions, have to be exercised by a court or by a board, or any body of persons, it is necessary and essential in the words of LORD LOREBURN in *Board of Education v. Rice*, which have already been cited, **that they must always give a fair opportunity to those who are parties in the controversy to correct or to contradict any relevant statement prejudicial to their view. In other words those principles of British justice proceed upon the basis that both sides have a right to be heard**.[48] (Emphasis supplied)

According to Wade & Forsyth, broadly, natural justice means the natural sense of what is right and wrong.[49] It has been technically equated with fairness.[50] In administrative law, rules of natural justice are basically two, namely, that a man may not be a judge in his own cause and that a man's defence must always be fairly heard.[51] These are commonly referred to as the rule against bias and the right to be heard, respectively.

The essence of having rules of natural justice is to maintain procedural fairness. There are certain procedures to be observed before someone's rights or liabilities are determined. Each man needs to be treated fairly in relation to his case. All and every procedure adopted by any judicial and quasi-judicial body must aim at furthering justice. This may never be achieved in the absence of observing rules on natural justice. As it was held in *Spackman v. Plumstead District Board of Works*,[52] a decision made in contravention of these rules is not a decision at all.[53] Stressing on the importance of these rules, Bradley, Ewing and Knight held:

> …The aim of the procedure rules is to protect the fairness and openness of the inquiry process: the rules are enforceable in the courts, and the requirement to observe them exists alongside duties at common law derived from the principle of natural justice. If a particular inquiry is not governed by statutory rules of procedure, there is in any event a duty to observe common law rules of natural justice or fairness.[54]

[44] H Clark (Doncaster) Ltd v Wilkinson, 1 1965 ALL ER 934 at pg. 936
[45] [1952] All ER 225.
[46] Ibid pg. 229.
[47] [1952]1All ER 480.
[48] *Ibid*, pg. 486.
[49] H.W.R. Wade and C.F. Forsyth, **Administrative Law**, 10th Edition, Oxford University Press, Oxford, London, 2009 at pg. 371.
[50] *Ibid.*
[51] *Ibid.*
[52] (1885) 10 App Cas 229.
[53] Ibid, pg. 240.
[54] A W Bradley, K D Ewing and C J S Knight**, Constitutional and Administrative Law**, 16th Edition, Pearson Education Limited, Edinburg, United Kingdom, 2015, pg. 609.

These rules are also enshrined in the Constitution of the United Republic of Tanzania. They are contained in the famous Article 13[55] which generally provides for equality before the law. Of relevance is Article 13(6) (a) which provides for right to be heard. The Article provides that:

> when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned.[56]

It is on these grounds that the appellant, Tanga Fresh, alleged that it was not given the right to a fair trial.

The basis of the appellant's case was that it was not provided with a transcript of oral presentation as directed by rule 22(9) of the FCC Rules of Procedure.[57] The roots of rule 22(9) can be traced from rules 16 to 20.[58] Essentially, when the Commission has formed an opinion that there is breach or likelihood of breach of competition rules, it issues a preliminary finding to the accused/respondent.[59] The respondent has a right to make his reply in writing.[60] There is also an opportunity for settlement as provided for by rule 21.[61] According to rule 22, the respondent may file an application to make oral representation on the preliminary findings. However, this can only be done after he has filed his written response.[62]The purpose is to give the respondent further opportunity to orally defend its case before the Commission. It is after this oral hearing that its transcript may be given to the respondent to confirm its accuracy and identification of any confidential information. Since it was not provided with this transcript, the appellant said its right to be heard was infringed. Accordingly, the appellant said, this would have affected the Commission's determination of any new evidence as per rule 23.

In its finding, the Tribunal did not agree with the appellant. It was of the firm opinion that the appellant was fully given right to be heard. Essentially, the Tribunal maintained that FCC, being an inquisitorial body, has its own rules of procedure. Thus, procedural fairness is checked against adherence to such rules and not otherwise. It noted at page 37:

> …Fair hearing must be limited to the rules of particular platform. FCC being an inquisitorial body, has its own procedural rules. In the whole world, every administrative body is the master of its own procedure and need not assume the trapping of a court as it was held by the Supreme Court of Canada in the case of *Knight v Indian Head School Division*[63]…Here the requirements of procedural fairness were satisfied. Every opportunity in terms of FCC Procedure Rules was given to the appellant who had to say what it (appellant) wanted to say in terms of FCC Procedure Rules as clearly proved by the quoted part of the respondent's provisional findings.[64]

The essence of this finding is to provide qualifications upon which procedural fairness rules are applicable within FCC. In an adversarial system, each party must be given

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[55] The Constitution of the United Republic of Tanzania of 1977, 2005 Edition.
[56] Article 13(6) (a), *Ibid.*
[57] GN No 73 of 2013.
[58] *Ibid.*
[59] Rule 19(3), *Ibid.*
[60] Rule 20, *ibid.*
[61] GN No 73 of 2013.
[62] Rule 22(1), *Ibid.*
[63] 1 S.C.R. 653
[64] Page 37 of *Tanga Fresh v FCC decision*.

opportunity to be heard. Failure to observe that provides a fertile ground for appeal. However, in an inquisitorial system where the procedures are structured or staged, rules of natural justice are observed as provided by the institution's guiding rules of procedure.

Accordingly, there is fair hearing within FCC, if the following rules are observed. First**,** rule 12(3) requires parties to be provided with statement of a case stating facts of the case and relevant provision. This is done after the Director of Compliance has been satisfied that the alleged behaviour harms or is likely to harm competition. Second, the respondent must be given provisional findings in accordance with rules 19(3) & (4). This enables the respondent to know the findings of the Commission and marshal its defence. Third, the respondent will be given an opportunity to respond, in writing and later on orally in accordance with rules 21 & 22.
The importance of these procedures is well explained by the Tribunal on page 35 of the decision where it observes:

> …the processes enunciated in the FCC Procedure Rules were meant to ensure that the appellant was well informed of the allegations against it, the evidence relied upon, the reasons for proposed findings, and, appropriately prepare the defence if any, is afforded time to be heard in defence of its case as well as opportunity to settle the matter should be [sic] unequivocally admit the allegations. To this Tribunal, these processes fully satisfy the requirement of procedural fairness, as enunciated in the FCC Procedure Rules…'[65]

With these rules which are well structured within the FCC Procedure Rules, the respondent is given an opportunity to make and defend it case. Right to be heard may not exactly follow the structure common to adversarial hearing. Suffice is to give the respondent an opportunity to say what ought to be said.

3.5 Breach of Standstill Obligation/Gun Jumping in merger regulations

Standstill obligation and gun jumping are two interrelated concepts in merger regulations. Standstill obligation requires parties not to consume any notifiable transaction unless it has been cleared by the relevant competition authorities or the deadline for such clearance has passed (*de facto* clearance).[66] In the European Union, such an obligation is found in Article 7(1) of European Union Merger Regulations.[67] In Tanzania, such an obligation is enshrined in section 11(1) & (3) of the Fair Competition Act of 2003.[68] Standstill obligation enables the responsible competition authority to carefully examine the transaction in question. It will conduct a study to see its impact on effective competition and consumers' welfare, and form an opinion whether such transaction (merger) should be cleared or not. Breach of the standstill obligation may have far fetching impact on competition in the markets. This is the reason why competition authorities act sternly when such a breach is recorded.

On the other hand, an act of business firms of consummating merger transactions without first being cleared by competition authority is known as gun jumping. It may include actual completion of a merger transaction or taking of actual steps towards

[65] Page 35, *Ibid.*
[66] Rastko Petaković, **The Merger Control Review**, Sixth Edition, Law Business Research, 2015 accessed at https://www.karanovic-nikolic.com/knviews/Pages/2015/09/09/The-Merger-Control-Review---Serbia-Chapter.aspx on 19th April 2017.
[67] COUNCIL REGULATION (EC) No 139/2004, Official Journal of the European Union, L 24/1.
[68] Act No 8 of 2003.

such transaction.[69] It also includes any prohibited practices, such as price fixing or market allocations between companies that are contemplating merger.[70] In their article, Slaughter and May observe:

> …It should be noted that gun-jumping does not arise simply when two parties complete a transaction before it has been approved by the Commission. It can arise if steps are taken prior to formal completion. Where the Commission has jurisdiction over a transaction, the parties should observe the "standstill" restrictions which prevent them from closing. In these circumstances, the parties to the transaction should be careful not to take steps which might be regarded as implementing the transaction…[71]

Breaching the standstill obligation or gun jumping has always attracted serious consequences. Two recent cases decided by the European Commission are briefly discussed to illustrate the two concepts. The first is *Marine Harvest/Morpol case*.[72] Marine Harvest ASA is a Norwegian company listed on Oslo and New York Stock Exchanges. It produces farmed salmon and white halibut and offers a wide range of value added products of various seafood species to different parts of Europe, Asia and America. It had acquired shares from Morpol ASA, a Norwegian producer and processor of salmon. Morpol produces farmed salmon and offers a broad range of value added salmon products, such as smoked, marinated, fresh and frozen salmon products. It carries out salmon farming and primary processing activities. In effect, Marine Harvest had merged with its competitor in the same market (horizontal merger) by acquiring 48.5% of its shares. The European Commission considered this a violation of notification requirement as required by Article 4(1) of EU Merger Regulations[73] and violation of standstill obligation as required by regulation 7(1) of the same Regulations.[74] For these two offences, it was fined 10,000,000[75] Euros for each offence.

The second case, similar to Marine Harvest, is *Electrabel / Compagnie Nationale Du Rhone (CNR).*[76] Here, Electrabel, a Belgium electrical company acquired shares in CNR, an electricity company in France. CNR was a competitor of Electrabel. Electrabel acquired 49.97% of CNR shares and 47.92% of CNR voting rights. The impact of this transaction was to give Electrabel controlling powers over CNR. This was done without notification to and clearance by the competition authority. As a result, Electrable was fined 20 million[77] Euros for contravening provisions of regulations 4(1) and 7(1) of the European Union Merger Regulations.[78]
In Tanzania, in the Tanga Fresh the Tribunal considered and decided the measures which a competition authority can take in case a merger has been consummated in contravention of standstill obligations or in case of gun jumping.

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[69] Slaughter and May, **Gun-jumping and the EU Merger Regulation,** EU Competition & Regulatory Newsletter: Legal and policy developments at the EU level, Issue 16, 15 – 21 April 2011, accessed https://www.slaughterandmay.com/media/1535967/eu-competition-and-regulatory-newsletter-15-apr-21-apr-2011.pdf on 19th April 2017.
[70] James R. Modrall and Stefano Ciullo, "Gun-Jumping and EU Merger Control", [2003] **E.C.L.R,** 424**.**
[71] *Ibid*, pg. 2.
[72] Case No COMP/M.7184.
[73] COUNCIL REGULATION (EC) No 139/2004, Official Journal of the European Union, L 24/1.
[74] *Ibid.*
[75] About 24 billion Tanzanian shillings.
[76] Case No COMP/M.4994.
[77] About 48 billion Tanzanian shillings.
[78] COUNCIL REGULATION (EC) No 139/2004, Official Journal of the European Union, L 24/1.

First, the authority may take any measures that are likely to mitigate any possible negative impact caused by such merger. In the Tribunal's own words:

> …where a merger is implemented in violation of standstill obligation (as the merger in question) (the so called "gun jumping"), the Competition Authority should take measures with a view to ensuring that any negative impact on effective competition in the market arising from the implemented transactions are allayed to the extent possible and in any event are not protracted or rather prolonged…[79]

Second, in a situation where there is a violation of standstill obligation, but no decision has been taken the competition authority may take interim measures in addressing that merger. Such may include any decision to restore or maintain conditions that continue to promote competition until when such authority has made its decisions. For instance, the authority may require the acquiring firm not to exercise its voting powers pending its decision. Another interim measure may be in the form of restricting the acquiring business to maintain *status quo,* i.e., the situation before merger.[80]

Third, if a merger has already been implemented and it appears to be anti-competitive, the authority has powers to order restructuring with a view of promoting effective competition. Such restructuring may include merger dissolution, disposal of shares, disposal of assets etc.[81]

Fourth, the authority may still clear a merger that did violate standstill obligations subject to agreed commitments submitted by parties.[82] This option appears to be an alternative where merger dissolution becomes impractical. Such commitments may include any measures aimed at maintaining effective competition. Thus, they may include agreement against price fixing, commodity hoarding, quality compromise etc. All these are done to ensure that a consumer does not have to suffer as a result of that merger.

3.6 Factors to be Considered by Competition Authorities in Merger and Acquisition Analysis

Though merger and acquisition analysis not in issue, the Tribunal at pages 52-56, discussed factors that may have to be considered by the competition authority in merger analysis. These factors will assist the authority to reach a decision as to whether such merger should be allowed or not. The Tribunal elaborated such factors to include:

One, the likelihood of the impacts of such merger on consumers. A competition authority is likely to block a merger which is likely to harm consumers. The Tribunal notes that the aim of merger review is to protect competition so that mergers do not harm consumers. In other words, a merger is more likely to be cleared if it is not going to harm consumers through lessening of competition in markets.

Two, the competition authority would consider the impact of such merger on the state of competition. Competition authorities will also study to find out to what extent is the proposed merger likely to lessen competition. The higher the chances of lessening

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[79] Tanga Fresh v. FCC, pgs. 49-50.

[80] *Ibid*, pg. 50.

[81] *Ibid.*

[82] *Ibid*, pg. 50-51.

competition the lower the possibility of approval by the authorities. In its own words again, the Tribunal observes:

> …we would also say it is implicit that the basic merger analysis relies on understanding the effects that a merger may have or the expected state of competition in a market. A central concept of any competition test is therefore a comparison of competition with and without the merger. The competitive situation without the merger is what is sometimes referred to as the "counter factual.[83]

Three, the competition authority would take into account the form of merger under consideration. Mergers are basically of two types, namely, horizontal mergers and non-horizontal mergers. A horizontal merger involves firms that are competitive in the same level of production or distribution of goods or services in the same relevant market. On the other hand, a non-horizontal merger includes vertical mergers - involving firms that operate at different but complementing levels (e.g., manufacturer and distributer) and conglomerate mergers involving firms operating in different markets without any vertical relationship (e.g., A transporting company acquiring a supermarket).

According to the Tribunal, while non-horizontal mergers are likely to be cleared easily, horizontal mergers are not. This is so because there is a chance that non-horizontal mergers may increase efficiency in competition. On the contrary, horizontal mergers are more likely to lessen competition [by creating monopolies], thus their chance of approval is low. On this point the Tribunal said:

> …horizontal mergers are normally formed simply to dominate the market and thus be able to reap the advantages of monopoly power. The monopolist would buy its competitor in order to lessen competition. When operating alone, the monopolist may not do research for enhanced efficiency, may also wish to cut down the level of production to create scarcity and ultimately increasing price. Monopoly price is unreasonably high which is detrimental to the household income and the consumer welfare in general. This explains why horizontal mergers are always put under strict scrutiny by competition authorities before they are approved.[84]

4. Conclusion

Being the first merger case to have been decided by the Tribunal, Tanga Fresh has turned out to be a significant decision on the law of mergers and acquisitions in Tanzania. It has set out precedents on some key issues relating to mergers and acquisitions. Through this case, the operation of FCC as the quasi-judicial body at first instance, and later on as a party to a proceeding (at appellate level) has been put into practice. Suffice is to say that with this decision, important rules as discussed in this paper have been set that are fundamental to operation of law on mergers and acquisitions in Tanzania. One such rule use of the inquisitorial approach. The Tribunal discussed with approval the inquisitorial operational nature of FCC. This is uncommon to many quasi-judicial bodies which have been moulded in the adversarial system. To the largest extent, FCC conducts investigation, hears the accused and finally makes a decision. Through all this, FCC maintains an inquisitorial approach. The proceedings may only take adversarial system at an appellate stage where FCC appears as a party (either as an appellant or respondent). At any rate, a detailed examination and analysis of this approach is necessary. This, however, is not the objective of this article. It is enough to note that the Tribunal approved this approach

[83] *Ibid*, Pg. 53
[84] *Ibid*, pg. 54

as long as FCC observes its own rules of procedure which give the accused an opportunity to make and defend its case.