# IN THE HIGH COURT OF TANZANIA

# (COMMERCIAL DIVISION)

# AT DAR ES SALAAM

## MISC. CIVIL APPLICATION NO. 188 OF 2017

## IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION

## AND

## IN THE MATTER OF FAIR COMPETITION ACT, NO. 8 OF 2003

## IN THE MATTER OF THE DECISION OF THE FAIR COMPETITION COMMISSION DATED 15th DECEMBER, 2016 IN RESPECT OF FCC, COMPLAINT DOCKET NO. FCC/COMP4 OF 2013

## BETWEEN

**TANGA CEMENT PUBLIC LIMITED COMPANY ..... APPLICANT**
**(PREVIOULSY NAMED TANGA CEMENT COMPANY LTD)**

**Versus**

**THE FAIR COMPETITION COMMISSION ..... RESPONDENT**

## RULING

*Date of the Last Order: 14/07/2017* *Date of the Ruling 04/08/2017*

**SEHEL, J.**

This is a ruling on preliminary objections raised by respondent against applicant's application for leave to apply for Orders of Certiorari and Prohibition against the Fair Competition Commission's decisions dated 15th December, 2016. The objections raised are:

1. The application is misconceived and abuse of court process; and
2. The application is incompetent and misconceived in that it is being pursued without first exhausting the available remedies.

The facts very briefly and so far as they are relevant are that sometime in 2010 Fair Competition Commission (FCC) conducted a study to assess the competitiveness of cement market in Tanzania. In the course of collecting information, FCC noted that on 23rd August, 2006 Afrisam Consortium (Pty) Ltd of South Africa acquired 85% shares in Afrisan (Pty) Ltd, a subsidiary of Cemasco B.V and wholly owned subsidiary of Holeim Group of Switzerland. It was further noted that Cemasco held 54.35% in Altur Investments (Pty) Ltd, a wholly owned company of Holeim (Pty) Ltd, and which wholly

owned Holeim Mauritius Investment Holding (Pty) which in turn owned the applicant by 62.5% shares. The transaction took place in South Africa. Thus FCC initiated a complaint and investigation in respect of the acquisition of the Holeim Group shares. In its decision, FCC found the applicant liable for failure to notify a Merger contrary to Section 11 (2), (5) and (6) of the Fair Competition Act, 2003 read together with the Fair Competition (Threshold for Notification of a Merger) Order, 2007 as amended by GN No. 93 of 17th April, 2009. It thus ordered the applicant to pay a fine amounting to Tshs. 4,689,221,300/=.

Following the said order, the applicant, according to the filed affidavits of Peter Christiaan De Jager and Fatma Karume belatedly received a copy of FCC's decision as such an application for extension of time within which to file notice of appeal was lodged at Fair Competition Tribunal (FCT) by the applicant.

The applicant also has approached this Court by lodging an application for judicial review on 22nd June, 2017 with a reason as alleged at Paragraphs 12 and 13 of Fatma Karume's affidavit that

FCT is not fully constituted as such the applicant does not have an alternative or efficacious remedy open to it.

The applicant's application is made under Section 17 (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act Cap. 310 and Rule 5 (1), (2), (3) and (6) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 (hereinafter referred to as "the Rules").

In terms of Rule 5 (6) of the Rules I made an order that the respondent be served with the application. Respondent was served on 30th June, 2017 was granted leave to file its counter affidavit. It was ordered that the respondent to file its counter affidavit on or before 6th July, 2017 and reply to counter affidavit to be filed on or before 10th July, 2017. The respondent dully filed its counter affidavit but belatedly served upon the applicant. The applicant was served on 11th July, 2017 on the date when the matter came for orders. Thus, applicant was granted another date for lodging its reply which was duly lodged on 13th July, 2017. Following such sequence of events,

the application could not be determined within fourteen as stipulated by Rule 5 (4) of the Rules.

The preliminary objection was heard orally on 14th July, 2017 where at the hearing Vincent Tangoh, Principal State Attorney who was accompanied by Selina Mloge advocate appeared to represent the respondent. Learned Principal State Attorney begun his submission by submitting first on the second preliminary objection. He said FCC's decision was made on 15th December, 2016 and the applicant had a right and was required by law under Section 61 of the Fair Competition Act to appeal to FCT. He contended that since there is local remedy provided for under the Fair Competition Act then the applicant is not supposed to come to this Court seeking for prerogative orders. It was his considered opinion that the applicant's failure to seek redress from the local remedies goes to the root of the jurisdiction of this Court on the power of judicial review. He contended the jurisdiction of dealing with aggrieved decision issued by FCC is vested to the Tribunal and not to the High Court. He reasoned that the Chairman of the FCT is also a High Court judge

thus bringing the matter which should have been determined by the High Court judge to another High Court judge of a different forum it is highly misconceived. He emphasized that the applicant should have preferred the appeal in the forum recognized by the Fair Competition Act. He also argued that the application is premature before this Court in support of his submission he referred this Court to the case of **Abadiah Selehe Vs Dodoma Wine Company Limited** [1990] TL.R 113 where it was held an order of mandamus is discretionary and the Court will refuse if there is another convenient and feasible remedy within the reach of the applicant. The learned State Attorney invited this Court to use the same spirit because mandamus and certiorari are both prerogative orders. With these submissions, he prayed for the application to be strike out with costs.

Counsel Fatma Karume, representing the applicant responded to the submission that this Court has inherent jurisdiction as enshrined under Article 30 of the Constitution of the United Republic of Tanzania and Section 2 (3) of the Judicature and Application of Laws Act, Cap.1 which jurisdiction, she argued, cannot be taken

away. To cement her submission, she adopted the position stated in the case of **Muntu and Others Vs Kyambogo University** [2008] 1 EA pg 236 where it set out that judicial review is a constitutional right and the High Court is vested with the jurisdiction by the Constitution as such it cannot be derogated. She further contended that the supervisory power of the High Court is inherent as held in the case of **Felix Mselle Vs. Minister for Labour and Youth and Three Others** [2002] T.L.R pg 437. Counsel Karume acknowledged the position set in **Abadiah's** case (Supra).

She added that the reason why the applicant has come before this Court is that there is a remedy in law but there is no forum as the tenure of the Tribunal members expired and no appointment have been made so far. She also pointed to this Court that in her affidavit she clearly stated so at Paragraphs 12 and 13 that FCT is not fully composed as such applicant does not have an alternative remedy or efficacious remedy. It was her view that though the remedy exists but it is an empty shell. She thus prayed for the preliminary objection to be dismissed with costs.

In rejoinder, Tangoh insisted that the application is misconceived since the expiry of the Tribunal members' tenures does not translate that there is no forum. He argued the forum is there as a Registrar is there and he did receive their application of extension of time.

From these submissions, both counsels acknowledged that Section 61 of the Fair Competition Act provides for an avenue of appeal against FCC's decision. They are also in agreement that the tenure of Tribunal members expired and no appointment is yet made to fill the vacant positions. It is from the expiry of the Tribunal members' tenure that made the applicant to approach this Court arguing that though there is an avenue the said avenue is not efficacious. This argument is highly disputed by respondent. So this court is invited to determine it.

The position of the law ruling over our legal system to date in respect of prerogative orders is that prerogative orders will not be issued where an applicant has within reach another convenient and feasible remedy (See **Abadiah's** case (Supra)). This position of the

law was first stated in ***Re: An application by the Attorney General of Tanganyika***, (1958) EA 482 where the Supreme Court of Kenya said, the prerogative jurisdiction of the Court cannot be invoked so long as statutory remedy by way of appeal is available. It was then followed by Justice Ramadhan, JA (as then he was) in ***Sanai Murumbe versus M. Chacha*** [1990] T.L.R. 54 where he said prerogative orders are available to quash the proceedings and decisions of a subordinate court or tribunal or a public authority where, among others, there is no right of appeal. This Court in ***BP (Tanzania) Ltd v. Tanzania Revenue Authority*** Miscellaneous Civil Application No.99 of 1991 (Unreported) by Chipeta, J. (as he then was) also clearly pronounced that before prerogative orders can be issued the petitioner must have exhausted all the alternative remedies available to him.

In the instant case, we have been told by way of affidavit that the applicant before coming to this Court did lodge an application for an extension of time within which to file an appeal against the decision of FCC which application is still pending at FCT. Section 61

of the Fair Competition Act, provides for mechanisms of appeal against pecuniary and material grievance arising from a decision of FCC. It follows then that the applicant has a right of appeal which right he has already pursued by lodging an application for extension of time and it is awaiting for a hearing date.

We also have information and it is not disputed that the said application was admitted by FCT registrar. As such it was neither returned nor rejected to be registered at FCT. It was registered as "Application No. 3 of 2017" and proceedings are still pending at FCT.

From these facts one can deduce that the applicant has not only another remedy by way of appeal but also such remedy provided is convenient, adequate, feasible and within reach that is why the applicant has accessed it without any hindrance by lodging its application for extension of time within which to file an appeal. I am not convinced with the argument that there is no alternative remedy or efficacious forum. The fact that the tenure of Tribunal's members expired and to date no appointment is made to fill the vacancy does not entitled applicant to come and seek for judicial

review. After all, the forum which is claimed to be in vacuum, as I said, was accessed and proceedings are still pending at FCT. So the remedy is there. In the end, I find merit on the objection raised and I proceed to uphold it.

Since this sole objection suffices to dispose the whole application, I see no need of determining the other preliminary objection. Accordingly, the application for leave to apply for orders of certiorari and prohibition is hereby strike out for the reason that applicant has within reach another convenient and feasible remedy. Respondents shall have their costs. It is so ordered.

DATED at Dar es Salaam this 4th day of August, 2017.

B.M.A Sehel

JUDGE

4th day of August, 2017.