**REPORTABLE (69)**

**ARISTON HOLDINGS LIMITED**

**V**

**THE COMPETITION AND TARIFF COMMISSION OF ZIMBABWE**

**SUPREME COURT OF ZIMBABWE**
**GWAUNZA DCJ, PATEL JA & MAKONI JA**
**HARARE FEBRUARY 13, 2020 & JUNE 22, 2020**

*Z. Lunga*, for appellant
*T.L Mapuranga*, for respondent

**MAKONI JA:** This is an appeal against a decision of the Administrative Court upholding the penalty imposed on the appellant by the respondent for the non-notification of a merger that it was a party to.



**FACTUAL BACKGROUND**

The appellant is a holding company registered and operating in Zimbabwe whose shares are tradable on the stock market. The respondent is a statutory body which administers the Competition Act [*Chapter 14:28*] ('the Act').

In 2012, a company styled Afrifresh Holdings Limited acquired a controlling interest in the appellant. The transaction which resulted in this development was between Emvest Holdings (Pvt) Ltd, one of the appellant's controlling shareholders and Origin Global Holdings (Pvt) Ltd a subsidiary of Afrifresh Holdings Limited. Emvest Holdings sold its shares in the appellant to Origin Global Holdings (Pvt) through the Zimbabwean Stock

Exchange. The merger had a value exceeding the prescribed threshold and was thus subject to notification to the respondent.

Upon becoming aware of the merger, the respondent notified the appellant of its intention to penalise it for non-notification of the merger. The respondent regarded the transaction as a notifiable merger which the appellant was obliged to notify in terms of s 34A (3) and (4) of the Act. The appellant paid part of the merger notification fee and requested a payment plan for the balance which was approved by the respondent.

However, the appellant failed to adhere to the payment plan following which the respondent expressed its intention to penalise it for failing to give notification of the merger. In response, the appellant took the position that the transaction was not a merger and that it had no legal obligation to notify the respondent of the transaction or to pay any penalty for non-notification. Consequently, the respondent penalised the appellant on the basis that the transaction was a merger and that the appellant was a party to it and was thus obliged to notify the same.



Aggrieved by that decision, the appellant noted an appeal to the court *a quo*.

**SUBMISSIONS IN THE COURT *A QUO***

The appellant argued that the process in which Afrifresh Holdings acquired shares in the appellant did not constitute a merger as defined by the Act since, at the time of the acquisition of its shares, Afrifresh Holdings was not a competitor, customer or supplier relationship with the appellant. However, the appellant abandoned this argument in light of

the decision of the High Court in *Innscor Africa Limited & Anor* v *The Competition and Tariff Commission* HH 486/17.

The appellant further averred that it could not be penalised in respect of a transaction it was not a party to. The appellant highlighted that the transaction that resulted in Afrifresh acquiring the controlling interest in it was concluded by separate parties in an open market deal. Thus it denied being under any legal duty to notify the appellant of the merger.

*Per contra*, the respondent argued that the appellant was a party to the merger with Afrifresh Holdings and had a duty to notify that transaction. It reasoned that the appellant, being the party which relinquished its controlling interest or the party in whose business the controlling interest was acquired, was a party to the merger in the context of s 34A(1) of the Act. It further argued that the appellant was involved in the merger and could not escape the consequent penalty for non-notification.



**THE DETERMINATION OF THE COURT *A QUO***

The court *a quo* dismissed the appellant's appeal on the basis that it lacked merit since, by abandoning its first ground of appeal, the appellant was admitting the existence of a merger. As such, the court reasoned that the appellant could not argue that it did not participate indirectly in the merging of the entities. The court *a quo* highlighted that both assessors in the matter were of the view that the appellant was not a party to the transaction in terms of which Afrifresh Holdings acquired shares in the appellant. As a consequence, it applied the provisions of s 10(1) of the Administrative Court Act [*Chapter 7:01*] which states that where the President and assessors' opinions are divided, the decision of the President of the court prevails.

Aggrieved by the decision of the court *a quo*, the appellant noted an appeal to this Court on the following grounds.

**GROUNDS OF APPEAL**

1. The court *a quo* erred in law and misdirected itself in making a decision contrary to section 10(1) of the Administrative Court Act [*Chapter 7:01*], in (sic) circumstances where the decision to be made was a matter of fact, and where the President did not, or could not have found that the issue was a matter of law.
2. The court *a quo* erred in law and misdirected itself in dismissing the appeal by relying on the High Court decision of *Innscor Africa Limited and Anor versus The Competition and Tariff Commission HH 486/17.*
3. The court *a quo* erred in law and misdirected itself in holding that since the Appellant has abandoned one of its grounds of appeal, it could not have argued then that it was not a party to the transaction.



4. The court *a quo* erred and misdirected itself in law and in fact in finding that the Appellant was party to the transaction when in fact and in law it was not, and in dismissing the appeal on this and the aforementioned grounds.

**SUBMISSIONS IN THIS COURT**

Before the appellant addressed this court, Mr *Mapuranga* for the respondent raised a preliminary point that the appeal was improperly before the court having been served on the appellant outside the time frame stipulated by the order granting condonation. Consequently, counsel for the appellant, Mr *Lunga* sought condonation for the late service of the notice of appeal, which we granted.

On the merits, Mr *Lunga* initially argued that the question of whether or not the appellant was a party to the merger was a question of fact. Since the assessors had taken the position that the appellant was not a party to the merger, their decision ought to have been the

decision of the court in terms of s 10 of the Administrative Court Act [*Chapter 10:28*]. Upon engagement with the court, Mr *Lunga* conceded, properly so, that the question of whether or not the appellant was a party to the merger, in the circumstances of this, was one of law, after which he confined his argument to the issue of whether or not the appellant was a party to a merger as defined by the Act.

The concession was properly made given that it is common cause that the appellant was not directly involved in the transaction that resulted in the merger. A determination of who had the legal obligation in the circumstances necessitates a finding of whether the appellant is a party as defined in terms of the Act. The court *a quo* needed to determine who constituted the various parties to the merger. This called on it to interpret the relevant provisions of the Act, thereby constituting a question of law.



Mr *Lunga* submitted that s 2 of the Competition Act ought to be interpreted narrowly to mean that parties to a merger are the parties who engage in the transaction which results in a merger. He further highlighted the difficulty associated with a broad categorisation of parties to a merger, envisaging a scenario in which the party in whom the controlling interest is acquired is not aware that a merger has been formed. Mr *Lunga*, however, admitted that the appellant had a share register and would have known of the change in its shareholding.

In rebuttal, Mr *Mapuranga* submitted that the appellant was a party to a merger as it was the entity in whose business a controlling interest was acquired. He insisted that the determinant factor is the change in shareholding control as opposed to the immediate parties to the transaction. He further argued that the appellant was encompassed in the definition of a

merger and, as such, was a party to a merger. To buttress his point, Mr *Mapuranga* drew the court's attention to the South African Competition Act 89 of 1998, which classifies the several parties to a merger.

That Act provides that "a party to a merger is an acquiring firm or target firm," the former being the entity which establishes a controlling interest in another (Afrifresh) and the latter, the party in whose business the controlling interest is acquired (the appellant). In conclusion, he argued that the penalty imposed on the appellant was proper in the circumstances as the appellant was obliged to notify the respondent of the transaction.

**ISSUE FOR DETERMINATION**

The sole issue for consideration is whether the appellant falls within the classification of the possible parties to a merger envisaged by s 2 of the Act. Put differently, whether the entity in which a controlling interest is acquired can be described as a party, even if it took no part in the transaction which resulted in the merger. If the answer is in the affirmative, the obligation to notify the respondent attaches in terms of s 34A (1), as does the consequent penalty for non-notification.



**THE LAW**

S 13A (1) of the South African Competition Act No. 89 of 1998, which is strikingly similar to our section 34A, provides:

> **"13A. Notification and implementation of other mergers**
>
> (1) A party to an intermediate or a large merger must notify the Competition Commission of that merger in the prescribed manner and form"

Section 59 (1)(d)(i) and (iv) of the Act provides as follows:

"(1) The Competition Tribunal may impose an administrative penalty only-
(d) if the parties to a merger have-
(i) failed to give notice of the merger as required by Chapter 3;
(iv) proceeded to implement the merger without the approval of the Competition Commission or Competition Tribunal, as required by this Act."

A party to a merger is defined in s 1(1) (xvii) of that Act as 'an acquiring firm or a target firm', which entities are jointly obliged to notify the Commission of a proposed merger. An acquiring firm as defined in s (1)(i) is:

"... a firm –

(a) that, as a result of a transaction in any circumstances set out in section 12, would directly or indirectly acquire, or establish direct or indirect control over, the whole or part of the business of another firm;
(b) that has direct or indirect control over the whole or part of the business of a
firm contemplated in paragraph (a); or
(c) the whole or part of whose business is directly or indirectly controlled by a firm contemplated in paragraph (a) or (b)"



A target firm is described in s 1 (1) (xxxiii) as:

"(xxxiii) 'target firm' means a firm –

(a) the whole or part of whose business would be directly or indirectly controlled by an acquiring firm as a result of a transaction in any circumstances set out in section 12;
(b) that, as a result of a transaction in any circumstances set out in section 12, would directly or indirectly transfer direct or indirect control of the whole or part of, its business to an acquiring firm; or
(c) the whole or part of whose business is directly or indirectly controlled by a firm contemplated in paragraph (a) or (b);"

Applying these provisions to the present case would mean that the appellant and Afrifresh are the merging parties, the appellant being the target firm, in whose business a controlling interest is established, and Afrifresh Holdings as the acquiring firm, which establishes control over the appellant's business. The obligation to notify rests upon the merging parties.

Similarly, the Common Market for Eastern and Southern Africa (COMESA) Merger Assessment Guidelines, 2014, state:

> "merging party" means any acquiring undertaking or target undertaking
>
> "party" means any merging party, if a merger has been implemented, any merged undertaking

However, our Act does not define who can be a party to a merger, thus this has to be construed from the description of a merger. Section 2 of the Act defines a merger as:

> "the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person whether that controlling interest is achieved as a result of—
> (a) the purchase or lease of the shares or assets of a competitor, supplier, customer or other person;
> (b) the amalgamation or combination with a competitor, supplier, customer or other person; or
> (c) any means other than as specified in paragraph (a) or (b)"



The obligation to notify a merger and the consequence of non-notification is provided for in s 34A which states as follows:

> **"34A Notification of Proposed Merger**
> (1) A party to a notifiable merger shall notify the Commission in writing of the proposed merger within thirty days of—
> (a) the conclusion of the merger agreement between the merging parties; or
> (b) the acquisition by anyone of the parties to that merger of a controlling interest in another.
> (2) …
> (3) The Commissioner may impose a penalty if the parties to a merger—
> (a) fail to give notice of the merger as required by subsection (1);
> (b) proceed to implement the merger without the approval of the Commission as required by subsection (2)."

Neither s 2 nor 34(A) state in specific terms which among the merging parties is obliged to notify the respondent of an intended or concluded merger transaction**.**

From the definition of a merger in s 2 of the Act, it is evident that one of the ways through which a merger comes into existence is where a party directly or indirectly acquires a controlling interest in a business of another through the purchase of shares, as *in casu*. Given its ordinary grammatical meaning, two broad categories of the parties to a merger emerge from the aforementioned definition of a merger. There is the party which establishes a controlling interest in the business of another and the 'other party' in whose business that interest is established. On the facts of the case, Afrifresh befits the former description whilst the appellant suits the latter. The participation in the merging of the entity in whose business a controlling interest is acquired need not be active or direct, it can be passive as was in the appellant's case.



Whilst the transaction upon which the penalty was imposed was initially between Emvest Holdings and Origin Global, the appellant was a party to the merger to the extent that it is the "other person" in whom Afrifresh Holdings acquired a controlling interest. It equally had an obligation to notify the respondent of that transaction.

The interpretation I have taken accords well with the approach taken by this Court in *Innscor Africa Limited & Anor v Competition and Tariff Commission* SC 52/18, where the court, in defining a merger as defined in s 2 and its various classifications, had this to say regarding the importance of merger regulation, at pages 6, 8 and 12 of the judgment:

> "Mergers may cause the elimination of effective competition, thereby creating dominant companies that have the capacity and potential of engaging in anti-competitive practices detrimental to consumer welfare, such as price increases and poor service delivery.
>
> For the reason that all mergers recognised under competition law have the potential to negatively affect competition in the market, special laws have been designed to regulate mergers.

"What determines the applicability of the definition of 'merger' for purposes of the Act is the existence of a controlling interest by one or more persons in the whole or part of the business of another person. The definition is inclusive. In other words, the definition was deliberately widened to include all types of mergers. Without the words 'or other person', the definition of 'merger' would have been exhaustive as it would apply only to businesses or undertakings falling within each of the categories specifically stated. The word 'other' describes a person who would not belong to any of the categories of persons specifically mentioned.

It is clear from this title that, among other things, the Act aims to promote and maintain competition in the economy by regulating anti-competitive mergers. Merger regulation is at the core of competition law and in the spirit of regulating anti-competitive mergers, the Legislature enacted the current wide definition which covers all mergers which must be notified to the respondent." (Emphasis added)

In *Competition and Tariff Commission v Iwayafrica Zimbabwe (Private) Limited* SC 58/19, in dealing with the matter before it, the court stated what ought to be established in determining the existence of a merger. It mentioned thus, at page 5, paras 19 and 22:



"[19]...for a court to grant absolution from the instance in a suit in which a merger under the Act is alleged, it must therefore be satisfied that there is no evidence before it showing that the respondent acquired or established an interest in the business of another which interest enables it to control the assets or activities of that other.

[22] For instance, the court a quo found that the respondent and Africa Online did not fish from the same point. This was an unnecessary finding to make. In the suit a quo, it was not necessary for the appellant to aver and prove that the respondent and Africa Online were not in competition for the same market. This is because a merger in terms of the Competition Act can be established between any persons who may not be in any recognised relationship. It was therefore not necessary that the appellant lead evidence to show that the respondent and Africa shared the same market as this is not a requirement of the law." [Own emphasis]

The cited authorities are agreed that what determines a merger is the establishment of a controlling interest by one or more persons in the whole or part of the business of another person. Such acquisition of control may be through various processes and between persons who may not be in any recognised relationship. If the determinant factor in

ascertaining the existence of a merger is acquisition of a controlling interest, the entity being divested of that interest is clearly a party to the merger.

It is apposite to look at the substance rather than the form of the transaction as was reiterated by the Competition Appeal Court of South Africa in *Gold Fields Limited v Harmony Gold Mining Company Limited and Another* [2005] ZACAC 1; [2005] 1 CPLR 74 (CAC), where it held:

> *"There is considerable authority for the proposition that our law examines the substance of the transaction and 'will not be deceived by the form of the transaction: it will render aside the veil in which the transaction is wrapped and examine its true nature and substance'* ***Kilburn v Estate Kilburn*** ***1931 AD 501*** *and 507.* ***In Dadoo Ltd and Others v Krugersdorp Municipal Council*** ***1920 AD 530*** *and* ***547 Innes CJ*** *stated*
>
> > '[the] rule is merely a branch of fundamental doctrine the law regards the substance rather than the form of things – the doctrine common, one would think, to every system of jurisprudence and conveniently expressed in the maxim **plus valet quod agitur quam quod simulate concipitur'.** This approach followed an earlier judgment of **Innes J** (as he then was) in **Zandburg v Van Zyl** **1910 AD 302** at 309 in which he said: 'The Court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention. If the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstances, that the same object might have been obtained in another way will not necessarily make the arrangement other than it purports to be. The enquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down.'"



It follows that there is a need to look beyond the parties to the transaction and ascertain the substance and true nature of the transaction. The appellant is a party to the merger as the resultant entity in whose business the controlling interest was established by another.

Consequently, once it is established that a merger was formed without prior notification, the party divested of that control is equally liable to notify the respondent if that merger exceeds the prescribed thresholds. Pre-notification affords the respondent, as the

competition and merger regulating authority, to ascertain whether the merger will have a detrimental impact on competition.

Before concluding, I wish to observe that there might be need for our Act to be amended to include the definition of 'a party to a merger' as was done in the South African Act through The Competition Second Amendment Act, 2000. This would bring clarity to the issue and might obviate the need for parties to engage in litigation such as the present one.

**DISPOSITION**

In light of the foregoing, the appellant cannot be absolved from the obligation to notify the respondent simply because it was not an active party to the transaction that resulted in it being divested of its shares. As earlier highlighted, the appellant fits into the description of the parties to a merger envisaged by s 2 of the Act and therefore should have notified the respondent of the merger. In any event, the appellant cannot argue that it was unaware of the transaction as its share register would reflect the alteration in its shareholding structure. The merger was a potentially anti-competitive event which was subject to notification to the respondent by the appellant in terms of s 34A. The court *a quo*'s decision is insurmountable.



As regards costs there is no reason to depart from the general rule that costs follow the cause.

In the result, I make the following order:

"The appeal be and is hereby dismissed with costs."

**GWAUNZA DCJ** I agree.

**PATEL JA** I agree.

*Lunga Attorneys*, appellant's legal practitioners.

*Chihambakwe, Mutizwa & Partners*, respondent's legal practitioners