

IN THE HIGH COURT FOR ZAMBIA

HP/ A/36/2013

HOLDEN AT LUSAKA

(CRIMINAL JURISDICTION)

BETWEEN

MERCURY EXPRESS LOGISTICS LIMITED

MARK JOHN FODEN

CHARLES NKANDU

AND

THE PEOPLE

CORAM : Honorable Justice Mr. Mubanga M. Kondolo, SC

MARSHALL : Naomi Banda

For the Appellants : Mr. Chanda & Mr. Chizu of Chanda Chizu & Associates

For the People : Mr. Bako – Senior State Advocate

J U D G M E N T

AUTHORITIES

LEGISLATION

1. The Penal Code
2. The Constitution, Cap 1 of the Laws of Zambia
3. Section 12 of the South African Competition Act
4. Competition and Fair Trading Act, Chapter 417, Laws of Zambia
5. Competition and Consumer Protection Act No. 24 of 2010, Laws of Zambia
6. United Nations Conference on trade and Development Manual on Formulation and Application of Competition Law, 2004

7. Criminal Law, Article by Hans-Heinrich Jescheck and Jerry Norton, www.britannica.com/topic/criminal-law

CASES

1. The Matter Of The Zambia Competition Commission 2010/HP/656 (unreported)

This is an Appeal from the Subordinate Court of the First Class at Lusaka where the Appellants were convicted of the offence of **effecting a merger, acquisition or take over in the absence of authority from the Commission contrary to section 8(1) as read with section 8(2) of the Competition and Fair Trading Act, Chapter 417 of the Laws of Zambia** and sentenced to pay a fine of K8,000 and in default to suffer 9 months simple imprisonment.

The brief facts of this case were that the 1st Appellant, Mercury Express Logistics, a courier company had illegally merged with Global Flight Zambia Limited, another courier company owned by the third Appellant. The 2nd Appellant is the managing director of the 1st Appellant Company. The allegation arises from the fact that the 1st Appellant employed the 3rd Appellant as its employee and took occupation of the premises where the 3rd Appellant used to operate Global Flight Zambia Limited.

The Zambia Competition Commission, the government authority that regulates mergers informed the Appellants that they had engaged into an illegal merger. The Appellants defied the Commission and argued that they had not merged and this resulted in their prosecution and subsequent conviction which is now the subject of this appeal.

The Appellants appealed against both conviction and the sentence and advanced four grounds of the appeal;

1. *That the learned trial Magistrate erred in law by convicting the Appellants of the offence which was not defined by statute;*

2. *That the learned trial Magistrate erred in law and fact by convicting the Appellants on a merger which had not legally been effected;*
3. *That the learned trial Magistrate misdirected himself by considering the employment of 3rd Appellant by the 1st Appellant to be a merger;*
4. *The learned trial Magistrate erred in law by allowing the public prosecutor continuing with the prosecution despite there being clear evidence of conflict of interest thereby resulting into the process becoming a mistrial of trial.*

When the matter came up for hearing the parties indicated to the court that they would rely on their written submissions.

Ground One

Under this ground learned counsel for the Appellants argued that the charge the Appellants faced included the word “acquisition” which was not provided for in the section under which they were charged meaning that they had been charged with a nonexistent offence.

They argued in the alternative that, what constitutes “a merger or takeover of independent enterprises” is a question of law and must therefore be properly defined, more especially because the law had criminalized it. They argued that the court had no discretion to define crimes; they had to be defined by statute and in this particular case the Act did not define what constituted “a merger or takeover of independent enterprises”. In support of this they cited Article 18 (8) of the Constitution¹ which states as follows:

“18 (8) A person shall not be convicted of a criminal offence unless that offence is defined and the penalty prescribed in written law.

Provided that nothing in this clause shall prevent a court of record from punishing any person for contempt of itself notwithstanding that the act or

¹ *The Constitution, Chapter 1, Laws of Zambia*

omission constituting the contempt is not defined in a written law and the penalty therefore is not so prescribed."

Counsel for the Appellant further argued that the trial magistrate accepted that the term merger was not defined in the repealed Act under which the Appellants were convicted. Despite this, he decided to rely on foreign law, specifically **section 12 of the South African Competition Act**² and fell into grave error.

The Respondent on the other hand submitted that even though the term merger was not defined under the repealed law, the commission could still identify and regulate mergers. He drew the courts attention to an unreported case³ in which the Commission called upon the High court to interpret the term 'merger' and this is what E. M. Hamaundu J, as he then was, had to say:

*"the Commission is empowered by the Act, to implement the provisions therein. In doing so, the Commission may interpret any term in the Act according to its understanding of that term, using the expertise available to it...."*⁴

Counsel for the Respondents further argued that the Glossary of Industrial Organisation Economics and Competition law (OECD) was an authority in competition law and it defined the term takeover in the following manner;

"the acquisition of control of one company by another or occasionally by an individual or group of investors."

The State further submitted that according to **United Nations Conference on trade and Development Manual on Formulation and Application of Competition Law**⁵, transactions that may relate to a merger may include the following:

² section 12 of the South African Competition Act

³ The Matter Of The Zambia Competition Commission 2010/HP/656 (unreported)

⁴ Ibid

⁵ United Nations Conference on trade and Development Manual on Formulation and Application of Competition Law, 2004

- *The acquisition of majority shareholding in a target business;*
- *The acquisition of minority shareholding which gives effective control of the target business;*
- *The acquisition of assets of a target business which then ceases to operate;*
- *The establishment of a joint venture by two or more firms with products which overlap;*
- *The appointment of interlocking directors to the boards of two businesses which were previously independent of one another.*

The Respondent contended that the overriding point was to consider whether the conduct in question had the effect of eliminating independence between competitors through any of the means listed above.

It was further contended that referring to decided cases from the Commonwealth, publications and international best practice guidelines in interpreting the terms merger and takeover did not in any way violate the Constitution of Zambia.

The Respondent opined that the trial magistrate was on firm ground when he convicted the Appellants for a merger which had not been legally effected as the merger had not been authorized as required by law. The Respondent then referred to **section 8(2) of the Repealed Act**⁶ which provided as follows:

"No merger or takeover made in contravention of subsection (1) shall have any legal effect and no rights or obligations imposed on the participating parties by any agreement in respect of the merger or takeover shall be legally enforceable."

⁶ *Competition and Fair Trading Act, Chapter 417, Laws of Zambia*

Learned counsel for the Appellant replied by reiterating the assertion that the offence of merger was not defined in **the repealed Act**⁷ and that in terms of **Article 18(8) of the Constitution**⁸ no conviction could follow from an offence not defined by law.

It was further submitted that in the case cited by the Respondents, Hamaundu J, was commenting on the powers given to the commission to implement the provisions of the Act and not on the definition of the term "merger". The Appellants further opined that the learned trial magistrate was not merely swayed or persuaded by the South African authority he cited but actually purported to insert **section 12 of the South African Competition Act**⁹ into the repealed law and defined the offence instead of proceeding in terms of **Article 18(8) of the Constitution**¹⁰.

I have considered the arguments of the parties and shall begin by addressing the assertion that the offence of merger was not defined in the repealed Act and convicting a person for that offence was repugnant to **Article 18 (8) of the Constitution**¹¹. For ease of reference I'll repeat what the Article says;

18. (8) *"A person shall not be convicted of a criminal offence unless that offence is defined and the penalty prescribed in written law.
Provided that nothing in this clause shall prevent a court of record from punishing any person for contempt of itself notwithstanding that the act or omission constituting the contempt is not defined in a written law and the penalty therefore is not so prescribed."*

The Appellants are facing criminal prosecution. Crimes are acts that attract legal punishment but they differ from other offences which also attract legal punishment in that only crimes include punishment which can involve loss of liberty through incarceration.

⁷ Ibid 6

⁸ The constitution, Chapter 1, Laws of Zambia

⁹ section 12 of the South African Competition Act

¹⁰ Ibid 7

¹¹ Ibid 7

It is important that criminal offences are defined very clearly and the reasons for this include the following;

1. *To provide would be offenders with clear and fair warning of what is prohibited and the consequences of violating that law.*
2. *To delimit the parameters of the exercise of discretion by law enforcement officers to prevent arbitrary or oppressive treatment of persons suspected, accused, or convicted of offences*

The rationale is that an offender should not wait for authorities to decide what is, or, is not an offence; the law should clearly specify what amounts to a crime in any particular case. Where determination of what constitutes a crime is left to the interpretation of public authorities the risk of abuse of that authority is a clear and present danger.

The Appellants were charged under **section 8(1) of the repealed Competition and Fair Trading Act¹²**, which reads as follows:-

8. *(1) Any persons who, in the absence of authority from the Commission, whether as a principal or agent and whether by himself or his agent, participates in effecting*
 - (a) a merger between two or more independent enterprises engaged in manufacturing or distributing substantially similar goods or providing substantially similar services;*
 - (b) a takeover of one or more such enterprises by another enterprise, or by a person who controls another such enterprise;*

shall be guilty of an offence and shall be liable, upon conviction, to a fine not exceeding ten thousand penalty units or imprisonment not exceeding five years or to both.

¹² Section 8(1), *Competition and Fair Trading Act, Chapter 417, Laws of Zambia*

I note that the term “merger” was used in other parts of the Act but was not defined at all. Competition law is a highly technical branch of law relatively new in Zambia and still developing. This is evidenced by the repeal of the **Competition and Fair Trading Act**¹³, a very basic Act which had only 17 sections. It was replaced by the **Competition and Consumer Protection Act**¹⁴ No. 24 of 2010 comprised of 88 sections and by comparison infinitely more detailed and comprehensive than its predecessor.

Section 24 of the new Act demonstrates the highly technical meaning of the term “merger” and provides a comprehensive definition of the term.

In its **Policy Roundtables Paper, 2013, entitled, Definition of Transaction for the purpose of Merger Control Review**, the OECD said as follows in its Overview and Executive summary respectively;

“Overview

This topic was suggested as a follow-up discussion to the Competition Committee Report to the OECD Council on the experiences of member countries under the 2005 OECD Recommendation on Merger Review.

The 2015 Recommendation provides that merger regimes jurisdictional thresholds should be based on clear and objective criteria. It provides however no guidance as to the concept of a “merger transaction”. Significant differences exist among jurisdictions in this regard. (underlining mine)

Executive Summary

The definition of a merger transaction plays an important role in a well-functioning merger review regime that seek to be effective, efficient, and transparent. While notification thresholds are used to identify transactions that have a sufficiently material nexus to a given jurisdiction, the definition of a

¹³ *Competition and Fair Trading Act, Chapter 417, Laws of Zambia*

¹⁴ *Competition and Consumer Protection Act No. 24 of 2010, Laws of Zambia*

merger transaction seeks to identify those transactions that are "suitable" for review, i.e. transactions that result in a more durable combination of previously independent assets and have a reasonable likelihood of outcomes that conflict with the policy goals of a competition law regime."

The foregoing makes it abundantly clear that from a competition law perspective, the definition of a "merger" or "merger transaction" is quite different from its use in common parlance. Hans-Heinrich Jescheck, in his article entitled **Criminal Law**¹⁵ said the following:

"..... the principle of legality directs that the criminal statutes be interpreted strictly and that they not be applied by analogical extension. If a criminal statute is ambiguous in its meaning or application, it is often given a narrow interpretation favorable to the accused"

As earlier shown, learned counsel for the prosecution cited a **matter presented by the Zambia Competition Commission and heard by Hamaundu J**¹⁶, as he then was. The state quoted an excerpt from his judgment which, in their view, gave the Commission the power to determine what did or did not amount to a merger. The Commission was the only party to the Application which was made under **Order 5 Rule 4 RSC**¹⁷ and entitled as follows;

"An application for the interpretation of the meaning of "merger" "takeover" and "acquisition" within the context of the competition and Fair Trading Act, CAP 417 of the Laws of Zambia".

The application was supported by an affidavit sworn by the Commissions Director-Legal & Enforcement. The relevant parts of the affidavit read as follows;

7. *That there has been uncertainty in the past with regard to the interpretation of the terms sited in the ex-parte originating notice to which this affidavit is in support.*

¹⁵ *Criminal Law*, Article by Hans-Heinrich Jescheck and Jerry Norton, www.britannica.com/topic/criminal-law

¹⁶ *The Matter Of The Zambia Competition Commission 2010/HP/656 (unreported)*

¹⁷ *Order 5 Rule 4, The Supreme Court Practice (White Book), 1999 Edition*

8. *That in some instances parties to such transactions have argued that they do not need authority to consummate them as they do not fall within the realm of the transactions that the commission is mandated to control.*
9. *That the uncertainty persists to date and that this uncertainty negates the Commission's full implementation of the law as regards the control of market concentrations.*

The application was accompanied by detailed skeleton arguments explaining what amounted to mergers, takeovers and acquisitions. Several authorities and examples of definitions utilized by other jurisdictions and international bodies were provided. The court however declined to give efficacy to any definition and directed that since the term was not defined in the Act the Commission should interpret it according to its expertise until a party was aggrieved and decided to enforce his rights under section 15 of the Act and appeal to the High Court.

I have decided to reproduce the judgment arising from that application and it reads as follows:

"This is an ex parte application for the interpretation of the following terms; "Merger" "acquisition" and "Takeover" in the Competition and Fair Trading Act, Chapter 417 of the laws of Zambia.

I must state that I have difficulties regarding the propriety of this action. No dispute has been disclosed between the Zambia Competition Commission and any person or body that may have been affected by a decision of the Commission. The Commission is empowered by the Act, to implement the provisions therein. In so doing, the Commission may interpret any term in the Act according to its understanding of that term, using the expertise available to it. There is no provision in that Act for the Commission to refer any issue or term to the High Court for determination or interpretation. There is provision, however, under Section 15 of the Act for any person aggrieved by a decision of the Commission to appeal to the High Court. This means, therefore, that the Commission may make decisions according to how it understands the provisions of the Act. If a person

becomes aggrieved by any of those decisions, such person will appeal to the High Court. It is then that the court will define such terms as “merger”, “acquisition” and “takeover” in the context of that dispute.

Therefore, this application is not appropriate and is dismissed. There is no order as to costs.”

The learned judge very clearly avoided defining any of the subject terms.

The affidavit sworn by the Commission in support of the matter before Hamaundu, J confirmed that the business community constantly challenged the commission regarding the definition of “merger” and attested as follows; *“uncertainty persists to date and that this uncertainty negates the Commissions full implementation of the law as regards the control of market concentrations”*.

I hold the view that in the context of competition law, it is quite clear that the term “merger” has a broad meaning and its use varies between jurisdictions. Where a panel of distinct activities are criminalized and grouped under an otherwise generic term, it is cardinal that each of those activities is defined as constituting that offence.

The repealed **Competition and Fair Trading Act**¹⁸ was a work in progress. The omission to define the term “merger” offended **Article 18 (8) of the Constitution**¹⁹ which in essence rendered the prescribed penalties against the so called “mergers” unenforceable.

However, as noted, this deficiency has been resolved by **section 24 of the Competition and Consumer Protection Act.**²⁰

¹⁸ *Competition and Consumer Protection Act No. 24 of 2010, Laws of Zambia*

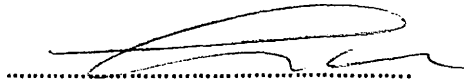
¹⁹ *The Constitution, Chapter 1, Laws of Zambia*

²⁰ *Competition and Consumer Protection Act No. 24 of 2010, Laws of Zambia*

Having arrived at this conclusion I find it unnecessary to consider the remaining grounds of appeal and the arguments in support of them.

The Appeal is allowed and the conviction and sentence of the lower court are quashed.

Dated at Lusaka this 2nd day of September, 2015.

A handwritten signature in black ink, consisting of several fluid, overlapping strokes, positioned above a horizontal dotted line.

Mubanga Kondolo, SC
Judge