

**REPORTABLE (91)**

**COMPETITION    TARIFF    COMMISSION**  
**v**  
**(1) ASHRAM INVESTMENTS (PRIVATE) LIMITED    (2) PROFEEDS**  
**(PRIVATE) LIMITED    (3) PRODUTRADE (PRIVATE) LIMITED**  
**(4) INNSCOR AFRICA LIMITED**

**SUPREME COURT OF ZIMBABWE**  
**UCHENA JA, MATHONSI JA & CHATUKUTA JA**  
**HARARE: 5 FEBRUARY 2024 & 3 OCTOBER 2024**

*T. L Mapuranga* for the appellant

*T. Magwaliba* for the respondents

**UCHENA JA:**

[1] This is an appeal against the decision of the Administrative Court (court *a quo*) in which it set aside the appellant's decision and allowed a merger of the respondents holding that the merger was not contrary to the public interest and interfering with the penalty which had been imposed on the respondents by the appellant.

**BACKGROUND FACTS**

[2] The appellant is the Competition Tariff Commission (CTC), a regulator of business competition in Zimbabwe. It was constituted in terms of s 5 of the Competition Act [Chapter 14:28] (the Act). The first respondent is Ashram Investments (Private) Limited, (Ashram) a company which specializes in only investing in other firms in Zimbabwe. It is not a trading company. The second respondent is Profeeds (Private) Limited, (Profeeds) a

company registered in terms of the laws of Zimbabwe which is in the business of manufacturing and sale of stock feeds. The third respondent is Produtrade (Private) Limited, (Produtrade) a property holding company registered in terms of the laws of Zimbabwe. It was incorporated to hold a factory which it is leasing out to Profeeds. Profeeds manufactures its stock feeds from Produtrade's factory. The fourth respondent is Innscor Africa Limited (Innskor) a company registered in terms of the laws of Zimbabwe. It wholly owns Ashram.

- [3] The respondents formed a merger in May 2015. The respondents ought to have notified the appellant of their merger within 30 days of the merger. The respondents notified the appellant of the merger in February 2019 after their new legal practitioner since December 2017 had advised them to do so. On 5 November 2013 the respondents had notified the appellant of their earlier merger. That merger involved Ashram's acquisition of a 59% shareholding in both Profeeds and Produtrade. They sought the appellant's permission for the merger.
- [4] The appellant examined the merger. On 28 October 2014 it prohibited the merger on the basis that it was contrary to the public interest as the merging of Profeeds and Ashram which is wholly owned by Innscor which has shares in National Foods and Irvines was likely to give Profeeds and National Foods monopoly in the stock feeds industry.
- [5] Subsequent to the appellant's refusal to grant the merger the respondents agreed to form another merger in which the first respondent had a 49% shareholding in both Profeeds and Produtrade. This is the merger the respondents did not notify the appellant about until it was advised to do so by their new legal practitioners. The advice was given after the engagement

of the new legal practitioner in December 2017, but the respondents only notified the appellant of the merger in February 2019.

- [6] After further communication and submission of further documents the appellant in terms of s 31 (5) of the Act, advised the respondents that it intended to prohibit the merger and order Ashram to divest from Profeeds. It also advised the respondents that it intended to impose a penalty of ZWL \$ 40 591 483-40 on Innscor through whose annual returns Profeed's returns were being declared.
- [7] The respondents through their lawyers, made detailed submissions against the proposed decision to the appellant.
- [8] On considering the belated notification together with the respondent's submissions, the appellant held that the merger was not in the public interest and was likely to create a monopoly by the respondents in the stock feeds industry. It prohibited the merger and ordered Ashram to divest its interest in Profeeds and imposed a monetary penalty in the sum of ZWL\$40 591 483-40 on Innscor.
- [9] Aggrieved by the decision of the appellant, the respondents noted an appeal to the court *a quo*. The respondents averred that the appellant erred in finding that the transactions between them constituted a notifiable merger as defined in terms of s 2 of the Act. They argued that the appellant erred in finding that the transaction was contrary to the public interest. They argued that the transaction was not contrary to the public interest as it boosted

the economic fabric of the nation. The respondents further stated that the imposition of a monetary penalty was inappropriate in the circumstances of their case.

[10] *Per contra*, the appellant maintained that there was a notifiable merger between the respondents. It stated that, the merger is contrary to the public interest and that the penalty was warranted since the respondents failed to notify it of the merger within the prescribed period and only did so 3 years 9 months after its consummation.

[11] The court *a quo* found that there was a notifiable merger between the respondents as defined under s 2 of the Act. It found that after the merger, Profeed's shops increased from 19 to 40 because of Innscor's influence in its business, which enabled it to access loans and other services at concessional rates. The court *a quo* ruled that after the merger in 2015, Ashram owned 49% shares in Profeeds and 49% shares in Protrade. It found that Ashram acquired direct interest in the businesses of Profeeds and Protrade while Innscor acquired indirect interest and influence in Profeeds through its 100% ownership of Ashram. It further noted that when the respondents notified the appellant of their merger in 2019, Profeeds was operating profitably.

[12] It ruled that Ashram acquired a controlling interest in Profeeds and Protrade.

[13] The court *a quo* found that when the appellant made its decision, it did not invite the respondents to make representations. It also found that the evidence on record, established that there were at least 20 other players in the stock-feeds market whereas previously only Profeeds and National Foods were the dominant ones. It found that the merger had a

pro-competitive effect which is in the public interest as opposed to the appellant's finding that the merger is against the public interest. Regarding the issue of imposing a monetary penalty, the court *a quo* ruled that the respondents contravened s 34 (A) (3) (a) of the Act. It ruled that the penalty imposed on Innscor was irregular because Innscor also comprises of innocent companies. The court *a quo* found that a penalty of a caution and discharge was appropriate. It held that competition law exists to promote the welfare of the citizens. The court *a quo* therefore allowed the appeal in part thereby allowing the respondent's merger and cautioning and discharging the respondents.

[14] Aggrieved by the decision of the court *a quo*, the appellant noted the present appeal on the following grounds:

### **GROUND OF APPEAL**

[15] The court *a quo* erred and misdirected itself by –

- (1) Setting aside the Appellant's findings of fact and its findings on the applicable principles of competition law without holding that such findings were grossly unreasonable or irrational.
- (2) Failing to find that the merger of the appellants was contrary to the public interest as it resulted in the fourth respondent having overwhelming control and concentrated market power over the stock feed market as well as the whole livestock produce industry by virtue of the merger under consideration being approved.
- (3) Giving undue weight to matters arising after the respondents had consummated the merger without notifying the appellant thereby allowing the respondents to obtain maximum benefit from their unlawful conduct.

- (4) Failing to take into consideration the fact that the respondents previously notified the appellant of this merger and they were prohibited by the appellant from consummating it, thereby warranting a penalty and a prohibition when the merger was subsequently consummated without the appellant's approval.
- (5) Holding that the "preceding financial year" for the purposes of calculating the penalty in terms of s 34 A (A) of the Act was the year preceding the merger instead of the year preceding the notification of the merger.
- (6) Applying only one factor to determine the appropriate penalty when it was supposed to consider all seven (7) factors as dictated by s 34A (5) of the Act thereby giving a less deterrent, and ineffective penalty. (sic)
- (7) Directing that the fourth respondent's revenue affected by the merger had to be isolated and the penalty had to be calculated on that revenue alone when this is not required by the provisions of the Act.

### **RELIEF SOUGHT**

[16] Take further notice that consequent upon the grounds of appeal, the appellant seeks the following relief:

1. That the appeal succeeds with costs.
2. That paras 2 and 3 of the disposition in the judgment of the court *a quo* be set aside in their entirety.
3. That the portion of para 1 of the disposition of the judgment of the court *a quo* which allowed the respondent's appeal in part be set aside.
4. That the remaining portion of para 1 of the disposition of the judgment of the court *a quo* is amended to read as stipulated in the substitution order below.
5. That the judgment of the court *a quo* is substituted with an order that –
  - “1. The appeal is dismissed.
  2. The appellants shall pay the respondent's costs” (sic)

## **SUBMISSIONS BEFORE THIS COURT**

### **ON THE PRELIMINARY ISSUE**

[17] Mr *Magwaliba* counsel for the respondents raised a preliminary issue to the effect that the appellant's grounds of appeal numbers 1, 3 and 6 are not concise and are vague and embarrassing. Counsel submitted that the offending grounds ought to be struck out with costs.

[18] Mr *Mapuranga* counsel for the appellant submitted that the grounds of appeal are clear as they inform the court of what is being challenged. He objected to the respondent being awarded costs on the preliminary issue arguing that the appeal is still pending before the court.

[19] After hearing the parties' submissions on the preliminary issue the court ordered that ground of appeal number 1 be struck out. With regards grounds of appeal 3 and 6, the court ruled that though they were not elegantly formulated they could be related to.

### **ON THE MERITS**

[20] Mr *Mapuranga* argued that after the merger, the market share shows scary figures which indicates that Innscor's share in the market had risen to 57% when the next biggest competitor's share was 11%. He submitted that the merger had intergrated Profeeds and National Foods which were the second biggest and biggest producers of stock feeds. He further submitted that the merger had resulted in Profeeds and National Foods having concentrated power and control of the stock feeds industry. He further submitted that the merger created a monopoly and is contrary to public interest. Counsel submitted that too

much control in one entity is contrary to public interest. He submitted that the respondents' merger having been consummated without notification for three years and nine months, violated the provisions of the Act. He further submitted that the court *a quo* erred when it interfered with the penalty imposed by the appellant on the basis of only one of the factors provided in s 34A (5) of the Act. He concluded his submissions by stating that the court *a quo* erred when it interfered with the penalty imposed by the appellant without considering all of the seven factors provided in s 34A (5) of the Act. On the meaning of "the year preceding" he submitted that in terms of s 34A (4) it means the year preceding the imposition of the penalty. In conclusion he prayed that the appeal be allowed with costs.

[21] *Per contra*, Mr *Magwaliba* submitted that before the court *a quo*, the appellant had to lead evidence which it failed to do. He submitted that appellant should have led evidence because an appeal in the Administrative Court is an appeal in a wide sense. He further submitted that the court *a quo* correctly interfered with the decision of the appellant that the merger was contrary to the public interest because it pointed out the benefits the merger gave to consumers such as the introduction by Profecds of the training of farmers. On the interference with the penalty imposed by the appellant he, without disputing that the court *a quo* relied on only one of the factors provided by s 34A (5) of the Act, submitted that the phrase "the year preceding" refers to the year preceding the merger and not the year preceding the imposition of the penalty. He, further submitted that the court *a quo* did not only consider the benefits of the merger to the respondents as it also considered its benefits to consumers of the respondent's products. He therefore submitted that the merger was not contrary to the public interest. In conclusion he prayed that the appeal be dismissed with costs.



## ISSUES FOR DETERMINATION

[22] The following issues arise for determination by this Court:

1. Whether or not the court *a quo* erred in finding that the merger was not contrary to the public interest.
2. Whether or not the court *a quo* erred in holding that the monetary penalty was not justified.

## APPLICATION OF THE LAW TO THE FACTS

**Whether or not the court *a quo* erred in finding that the merger was not contrary to the public interest.**

[23] It was submitted by the appellant's counsel that the court *a quo* considered public interest in the wrong context as it mainly considered it in the context of economic benefit to the merging parties and not in terms of competition law and policy. On the other hand the respondents are of the view that the court *a quo* correctly found that the merger was not against the public interest.

[24] The Competition and Tariff Commission (the appellant) is a statutory body established under the Act. The preamble to the Act reads as follows:

**“An ACT to promote and maintain competition in the economy of Zimbabwe; to establish a Competition and Tariff Commission and to provide for its functions; to provide for the prevention and control of restrictive practices, the regulation of mergers, the prevention and control of monopoly situations and the prohibition of unfair trade practices; and to provide for matters connected with or incidental to the foregoing.”** (Emphasis added)

It is apparent from the provisions of the Act's preamble as read with s 5 of the Act that the appellant is the lawful regulator and implementer of the objectives mentioned in the preamble.

[25] Section 5 of the Act provides for the functions of the Competition and Tariff Commission as follows:

“5 (1) Subject to this Act, the functions of the Commission shall be—

- (a) **to encourage and promote competition in all sectors of the economy; and**
- (b) **to reduce barriers to entry into any sector of the economy or to any form of economic activity; and**
- (c) **to investigate, discourage and prevent restrictive practices; and**
- (d) **to study trends towards increased economic concentration, with a view to the investigation of monopoly situations and the prevention of such situations, where they are contrary to the public interest; and**
- (e) to advise the Minister in regard to—
  - (i) all aspects of economic competition, including entrepreneurial activities carried on by institutions direct or indirectly controlled by the State; and
  - (ii) the formulation, co-ordination, implementation and administration of Government policy in regard to economic competition; and
- (f) to provide information to interested persons on current policy with regard to restrictive practices, acquisitions and monopoly situations, to serve as guidelines for the benefit of those persons; and
- (g) subject to Part IVB, to undertake investigations and make reports to the Minister relating to tariff charges, unfair trade practices and the provision of assistance or protection to local industry; and
- (h) to monitor prices, costs, and profits in any industry or business that the Minister directs the Commission to monitor, and to report its findings to the Minister; and
  - (i) to perform any other functions that may be conferred or imposed on it by this Act or any other enactment.
  - (ii) For the better exercise of its functions, the Commission shall have power to do or cause to be done, either by itself or through its agents, all or any of the things set out in the Second Schedule, either absolutely or conditionally and either solely or jointly with others.

- (iii) Subject to this Act, in the lawful exercise of its functions under this Act the Commission shall not be subject to the direction or control of any other person or authority.” (Emphasis added)

[26] A reading of the preamble and s 5 of the Act, establishes that the intention of the legislature was to establish a specialised body to regulate competition by companies and firms in Zimbabwe. Further, it was the intention of the legislature to establish a Commission to prevent and control restrictive practices for example mergers which would monopolize sectors of the economy. It is therefore the responsibility of the appellant to decide which practices are harmful or not under competition law.

[27] In terms of s 28 of the Act, the appellant has the power to investigate restrictive practices, mergers and monopoly situations. Since the appellant is a specialised body which was created to regulate practices which are harmful to trade, its decisions should not be lightly interfered with without fully taking into consideration the law which it has to comply with in determining issues placed before it. Care must be taken to avoid defeating the reason for its creation.

[28] In the present case, the court *a quo* held that the merger of the respondents was not contrary to public policy. In terms of s 2 of the Act, a merger is defined as follows:

“Merger” means 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);

[29] It is not in dispute that the respondents, formed and consummated a merger without notifying the appellant. However it is the contention of the appellant that the merger was contrary to the public interest while the respondents submitted that it is in the public interest. Section 32 (4) of the Act which provides for when the appellant can find a merger to be contrary to the public interest reads as follows:

“(4) For the purposes of section *thirty-one*, the Commission shall regard a merger as contrary to the public interest if the Commission is satisfied that the merger—

- (a) has lessened substantially or is likely to lessen substantially the degree of competition in Zimbabwe or any substantial part of Zimbabwe; or
- (b) has resulted or is likely to result in a monopoly situation which is or will be contrary to the public interest.”

[30] The use of the words “is likely to lessen substantially the degree of competition” in s 32 (4) (a) and “is likely to result in a monopoly situation which is or will be contrary to the public interest” in s 32 (4) (b) indicates that the Commission should not only look into the current effects of the merger or those of the near future. It should consider these and also look into the likely effects of the merger in the long-term. It should not adopt a simplistic approach to the assessment of the long-term effects of a merger but should be guided by the reasonable likelihood of such events occurring.

[31] In view of the provisions of s 32 (4) the appellant made investigations and was satisfied that the merger is likely to lessen substantially the degree of competition and that the merger is also likely to result in a monopoly situation which is contrary to the public interest. It gave detailed reasons for its findings to the respondents in its final determination after receiving

the respondents' submissions on why it should not act as specified in its notice, issued in terms of s 31 (5) of the Act which provides as follows:

“Before making an order under this section, the Commission shall ensure that every person affected thereby is informed of the broad terms of the order it proposes to make and is given an adequate opportunity to make representations in the matter:

Provided that, if the proposed order will apply to persons generally or if, in the Commission's opinion, it is impractical to notify its terms to all the persons to whom it will apply, the Commission shall cause the broad terms of the proposed order to be published in the *Gazette* and in such other manner as the Commission considers will bring it to the attention of the persons to whom it will apply.”

The fact that the appellant gave the respondents notice in terms of s 31 (5) of the Act, establishes that the court *a quo* erred when it held that the appellant prohibited the merger and fined the respondents without giving them an opportunity to be heard. It is also apparent on the record that the appellant gave detailed reasons for all aspects of its orders including the penalty it imposed on Inncor.

[32] The appellant also relied on the case of *Inncor Africa Ltd & Anor v Competition and Tariff*

*Commission* 2018 (2) ZLR 236 (S) at p 240 C-G where MALABA CJ said:

“Competition in any marketplace for the production or supply of goods or services is necessary for achieving economic growth and development. Competition policy is formulated to encourage, improve and protect the competition process for the benefit of consumers **through monitoring and regulating business conduct that is actually or potentially anti-competitive and capable of depriving consumers of the benefits associated with a competitive market.**

One of the forms of business conduct which competition policy seeks to monitor and regulate is corporate merger. Corporate mergers are an important tool for effecting corporate restructuring transactions that are necessary for enhancing general efficiency in the market and ensuring business survival especially in harsh economic environments. **However, corporate mergers can sometimes be harmful or potentially harmful to the competitive structure of the market, thereby negating the gains of competition. An effective merger regulatory framework is necessary for the achievement and maintenance of the balance between the promotion of**

**beneficial corporate restructuring transactions on one hand and protection of the competitive process on the other.**

There are three types of mergers recognized under competition law - vertical, horizontal and conglomerate. Vertical mergers are those mergers that take place between two related companies as in the case of a customer merging with its supplier. Horizontal mergers are those that take place between companies that are in direct competition with each other. Conglomerate mergers are those between two or more firms that engage in unrelated business activities with different customer bases. Such entities are not competitors and do not have a customer and supplier relationship.

**All the three types of mergers are potentially harmful to competition notwithstanding the fact that conglomerates are not entered into by competitors, suppliers and customers. 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.”** (Emphasis added)

[33] The fact that all mergers have the potential to harm competition and that consideration of mergers is not just on what happened but also on what potentially can happen means that every merger must be carefully assessed against all the applicable laws before it can be held to be in the public interest.

[34] In the present case, the court *a quo* did not focus on what potentially can happen, that is,, the long-term effects. In its judgment, it, found that from the period that the respondents merged up to the time the respondents notified the appellant of the merger, twenty other companies which specialise in stock feed were formed, unlike previously when only 2 companies were dominating the stock feeds industry. It also found that employment was also created by the merger and that there was economic gain to the merging companies.

[35] The court *a quo* concentrated on the short-term effects of the merger without taking into consideration the reasonable potential long-term effects of the merger. During the hearing Mr *Magwaliba* conceded that long-term effects must be taken into consideration.

[36] The court *a quo* failed to consider the potential harmful effects of the respondents' merger. It therefore did not make its decision in terms of all the applicable factors in assessing a merger. It, in particular, did not consider the potential creation of a monopoly situation by allowing the merger of Profeeds and National Foods which are the second biggest and biggest manufacturers and suppliers of stock feeds. The coming together of the two companies which previously were competitors, under Innscor created a dominant unit which can reasonably become a monopoly in the stock feeds industry. The involvement of Innscor which the appellant in its, reasons for prohibiting the merger and imposing a monetary penalty said has a record of contravening competition laws and has exhibited monopolistic tendencies, was not assessed nor commented on by the court *a quo*.

[37] Monopolistic tendencies must be carefully assessed because they may initially appear favorable, but in the long run, they may, when the monopolists get to a point where the market has no other option but to buy their goods, turn around and control even the economy of a country by producing highly priced goods or substandard goods sold at high prices. They may also destroy small business in the future. In this case the court *a quo* should have carefully considered the fact that Innscor retained a controlling interest in both Profeeds and National Foods, companies which both specialise in manufacturing and selling stock feeds. Innscor also has a controlling interest in Irvines Zimbabwe (Private) Ltd a major customer of both Profeeds and National Foods. An analysis of Innscor's conduct shows that it desires

to wholly control the stock feeds market which is not permissible. A reading of the record shows that there is evidence to the effect that Innscor previously applied for the merger, which the appellant refused to grant. It, after making inconsequential adjustments, consummated a merger with the same companies Profeeds and Protrade without notifying the appellant of the merger on the flimsy argument that shareholdings below 50% are not notifiable despite the clear provisions of s 34 (1) and (2) of the Act which provides as follows:

“34 (1) The Minister shall, in consultation with the Commission, prescribe—

- (a) a threshold of combined annual turnover or assets in Zimbabwe, either in general or in relation to specific industries, at or above which this Part will apply with regard to mergers;
- (b) a method for the calculation of annual turnover and assets.

(2) **For the purposes of this Part—**

**“notifiable merger” means a merger or proposed merger with a value at or above the threshold prescribed in terms of subs (1).**

**“non-notifiable merger” means a merger or proposed merger with a value below the threshold prescribed in terms of subsection (1).”**  
(Emphasis added)

[38] It is clear that the fact that a merger is or is not notifiable does not depend on the level of percentage of shareholding in the acquired company but on a threshold set by the Minister in terms of s 34 (1) of the Act. In the case of Innscor (*supra*) at p 238D in laying down the back ground of that case the court said:

“Sometime in 2015 the first appellant acquired a controlling interest in the second appellant. In terms of s 34 of the Act, as read with the Competition (Notifiable Merger Thresholds) Regulations 2002 (SI 195 of 2002) (“the Regulations”), all mergers in terms of the Act with a value above the threshold value of US\$1.2 million had to be notified to the respondent. The appellants’ conglomerate had a value above the prescribed threshold. **The appellants took the view that their union was not**



**notifiable in terms of the Act as read with the Regulations because it was a conglomerate.”** (Emphasis added)

Innskor therefore knew since January 2018, when the *Innskor (supra)* case was heard, that notifications of mergers are determined by the value set by the Minister in terms of s 34 of the Act as read with Notifiable Merger Thresholds Regulations 2002 (SI 195 of 2002), but in this case continued to deliberately avoid notifying the appellant of the merger till February 2019, on the basis that mergers in which the acquisition of shares below 50% are not notifiable. Infact, Innskor had, as stated in the appellant’s reasons for prohibiting the merger and imposing the penalty in 2013, been ordered to pay a penalty of US\$ 2 500 for acquiring a controlling interest in National Foods of 36% of its share- holding without notifying the appellant. This means from 2013 onwards Innskor had become aware that acquiring a shareholding below 50% does not absolve one from the duty to notify the appellant of the merger. It is apparent Innskor in this case merely sought to have its way in spite of its knowledge of the correct procedure as provided by the law.

[39] It is on record that, Innskor has on two occasions, contravened competition law by failing to notify the appellant of a merger within thirty days. This proves that Innskor can, not where it suits it avoid complying with competition law. This fact should have guided the court *a quo* in determining whether or not a merger in which it was a participant was in the public interest. It is highly unlikely that a merger in which one of the participants has demonstrated a propensity to disregard competition law can be trusted to the extent of being allowed to create a merger which is subject to its control which will not create monopolistic situations and other anti- competition

situations in the long-term. Failure to take this into consideration is a serious misdirection on the part of the court *a quo*.

[40] The issue of controlling monopolies dates back as far as 1911. In the case of *Standard Oil Company of New Jersey v United States* 221 US 1 (1911), the appellant a major oil conglomerate violated the Sherman Anti-trust Act through anti-competitive actions of forming a monopoly. The Supreme Court of the United States of America, ordered that the appellant be geographically split as a measure to control competition.

[41] In a case involving *Akzo Nobel N.V, Kansai Plascon Africa Ltd and Kansai Plascon East Africa Proprietary Ltd* Case Number IM147Nov22, the Common Market for Eastern & Southern Africa (COMESA) prohibited the proposed merger of companies which are in the market of manufacturing and supply of decorative coating or paint. Akzo Nobel N.V was set to acquire 83.3% of the issued share capital of Kansai Plascon Africa Ltd and 100% of the issued share capital of Kansai Plascon East Africa Proprietary Ltd. The COMESA Competition Commission, identified several competition concerns arising from the proposed merger. More specifically, it found that the merger would result in a combination of two strong paint brands that is Dulux and Plascon and that there was no effective competition present which would pose a real ability to counter the undue market power and unilateral conduct arising therefrom. The Commission ruled that the commitments proffered by the merging companies would not sufficiently remedy the decrease in competition in the market. It prohibited the merger in Eswatini, Zambia and Zimbabwe.

[42] In the present case, the court *a quo* ought to have upheld the prohibition of the merger taking into consideration the merging of Profeeds and National Foods which resulted in the concentration of industrial power in the two biggest companies in the stock feed industry. There are striking similarities between this case and the *Akzo* case.

[43] Too much control of a market by one entity shows that the merger is contrary to the public interest. This should have been taken into consideration by the court *a quo*.

[44] In view of this Court's observations and the authorities cited, it is apparent that public interest should be distinguished from private interest. It means that competition has to be in the interest of the public and should not only benefit the merging companies. Therefore, the court *a quo* erred in allowing the merger. The decision of the court *a quo* ought to be set aside as it failed to take into consideration long-term effects of the proposed merger thereby incorrectly holding that the merger was not contrary to the public interest.

**Whether or not the court *a quo* erred in holding that the monetary penalty was not justified.**

[45] In determining the issue of penalty the court *a quo* reasoned as follows:

“The appellants have been co-operative with the respondent. An examination of the notification of the merger shows that there has been no harm to Zimbabwe's economy. Instead companies which were ailing are now thriving and expanding their operations. Sufficient time has passed for one to observe that the merger, though not notified to the respondent, has actually been beneficial to society. It was in the public interest.

In those circumstances, a minimal penalty such as a caution and discharge appears to suffice. The penalty imposed in this case is harsh and not called for in the case of subsidiaries of the fourth appellant who are not part of the first appellant.

The third ground of appeal is accordingly upheld with the modification spelt out in this judgment.”

The court *a quo* considered three factors which it should have considered in terms of s 34A (5) of the Act namely paragraphs (b), (e) and (f); para (b) being, on any loss or damage

suffered as a result of the contravention; para, (e) being, on the level of profit derived from the contravention; and para (f), being on the degree to which the parties have co-operated with the Commission. It did not comment on nor analyse paras (a), (c), (d) and (g) of s 34A (5) of the Act.

[46] The appellant takes issue with the decision of the court *a quo* wherein it interfered with the monetary penalty that was imposed on Innscor. The appellant is of the view that the court imposed a none-deterrent and ineffective penalty. Section 34A of the Act provides as follows

“34 A (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 any one of the parties to that merger of a controlling interest in another.

(2) Notification in terms of subs (1) shall be made in such form and manner as may be prescribed and shall be accompanied by the prescribed fee, if any, and such information and particulars as may be prescribed or as the Commission may reasonably require.

- (3) The Commission may impose a penalty if the parties to a merger—
  - (a) fail to give notice of the merger as required by subs (1);
  - (b) proceed to implement the merger without the approval of the Commission as required by subs (2).

(4) A penalty imposed in terms of subs (3) may not exceed ten *per centum* of either or both of the merging parties’ annual turnover in Zimbabwe as reflected in the accounts of any party concerned for the preceding financial year.

(5) When determining an appropriate penalty, the Commission shall consider the following factors—

- (a) the nature, duration, gravity and extent of the contravention; and
- (b) any loss or damage suffered as a result of the contravention; and
- (c) the behaviour of the parties concerned; and

- (d) the market circumstances in which the contravention took place; and
- (e) the level of profit derived from the contravention; and
- (f) the degree to which the parties have co-operated with the Commission ;  
and
- (g) whether the parties have previously been found in contravention of this Act”.

[47] In terms of s 34A (3) parties which fail to notify the appellant of a merger within thirty days, are liable to a penalty. Parties are also liable to a penalty for consummating a merger without the approval of the Commission. In this case these two factors should have been taken into consideration in determining the respondents’ penalty as they are guilty of both not notifying within thirty days and consummating the merger without the appellant’s approval. Not taking these factors into consideration and giving them due weight, will encourage the respondents and others to disregard the law. The fact that the respondents are guilty of contravening both s 34A (3) (a) and (b) aggravates their contravention of the law as provided in para (c) of s 34A (5).

[48] In terms of subs (5) of s 34A, seven factors should be taken into consideration. The section provides that “When **determining an appropriate penalty, the Commission all consider the following factors.**” The use of the word “shall” and the conjunctive “and” after each subparagraph indicates that each factor should be taken into consideration. Each of the seven factors was discussed by the appellant in the reasons for its decision. It is common cause that the court *a quo* did not take all of the seven factors into consideration. This is a failure to consider a factor which the law requires it to consider and is a serious misdirection which justifies interference with the penalty it imposed on Innscor. The seven factors were enacted to enable the appellant or the court *a quo* to properly and adequately assess the appropriate penalty.

[49] It took the respondents more than 3 years and 9 months to notify the appellant of the merger which it had already consummated. This, in terms of s 34A (5) (a), demonstrates the nature, duration, gravity and extent of the contravention of the law by the respondents. It is apparent that during the 3 years and 9 months the respondents, were acting in defiance of the law. This is demonstrated by the fact that since 2018 as exposed by the *Innskor* judgment (*supra*) and Innskor's contravention of competition law in 2013, in respect of its failure to notify the appellant of its acquisition of 36% of National Foods' shares, means it' was aware that acquisitions of shares below 50% are notifiable. It was further aware that notification of a merger was regulated by s 34 of the Act as read with SI 195 of 2002. S.I 195 of 2002 was however subsequently repealed and substituted by other Regulations, the current one being S.I 126 of 2020 which sets out the current threshold for notifiable mergers. The respondents made a lot of profits as was established by the number of stock feeds shops, Profeeds was able to establish in the country which increased from 19 to 40. This satisfies the requirements of s 34A (5) (c) on the level of profit derived from the contravention. It is also on record that, Innskor has contravened competition laws before. This, in terms of s 34A (5) (g), is aggravating as this conviction increases to three, Innskor's contraventions of competition laws. It shows its persistence in disregarding competition laws. It is this court's view that the monetary penalty was justifiable. An amount of approximately \$ 40 000 000-00 ZWL was not excessive considering the amounts of profit the merger generated and the fact that Innskor had shown a propensity towards contravening competition laws. The court *a quo* warned and cautioned the respondents without taking into consideration all the seven factors provided in s 34A (5) of the Act and the circumstances in which the respondents contravened the law.

[50] The court *a quo* did not correctly assess the facts of the case before it. It relied on the conduct of the respondents' operations during the 3 years and 9 months before they notified the appellant of the merger, finding that the merger was in the public interest. It did not realise that the period was too short to indicate what could potentially happen in the long-term. It also did not realise that the respondents, being conscious of the fact that they were operating without notifying the appellant of their merger and in contravention of the law, had to, during that period, deliberately and or deceptively, do things which were meant to show them in good light.

**DISPOSITION**

[51] It is apparent from this Court's observations that the appeal should be allowed. There is no reason why costs should not follow the result.

In the result it is ordered as follows:

- “1. The appeal succeeds with costs.
2. The judgment of the court *a quo* is set aside and is substituted with the following:  
“The appeal be and is hereby dismissed with costs.”

**MATHONSI JA** : I agree

**CHATUKUTA JA** : I agree

*Chihambakwe, Mutizwa & Partners*, appellant's legal practitioners.

*Dube, Manikai & Hwacha*, respondent's legal practitioners.