IN THE CAPITAL MARKETS TRIBUNAL
HOLDEN AT LUSAKA

2021/CMT/A/003

BETWEEN:

ZAMBIA BREWERIES PLC	**1ST APPELLANT**
ANHEUSER-BUSCHI PLC	**2ND APPELLANT**
NATIONAL BREWERIES PLC	**3RD APPELLANT**

AND

SECURITIES AND EXCHANGE COMMISSION	**RESPONDENT**

CORAM:

Mrs. C. N. Tembo	-	Chairperson
Mr. M. Lukwasa	-	Vice Chairperson
Mr. M. Muyawala	-	Member
Mr. B. Kashinga	-	Member

For the Appellants: Mr. R. Peterson appearing with Ms. M. Mbulo, Messrs Chibesakunda and Company

For the Respondent: Mrs. D. Sichone appearing with Ms. D. Mulondiwa and Mr. K. Sakala, In-House Counsel, Securities and Exchange Commission

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J U D G M E N T

CASES REFERRED TO:

1. Shilling Bob Zinka v The Attorney General (1990-1992) ZR 73
2. Polythene Products (z) Limited v Peter Zimba and Joseph Banda (Appeal No. 177 of 2015)
3. Pan African Building Society v Errol Neal Molver (2018/HPC/0413) ZMHC 243
4. The United Policyholders Group and others (Appellants) *v* The Attorney General of Trinidad and Tobago (Respondent) (Trinidad and Tobago) Privy Council Appeal No 0017 of 2015, [2016] UKPC 17
5. Mandalia v Secretary of State for the Home Department [2015] UKSC 59 (14 October 2015) On appeal from [2014] EWCA Civ 2
6. Rashid v. The Secretary of State for the Home Department [2005] Scot CS CSIH 50 (17 June 2005)
7. Coughlan & Ors, R (on the application of) v North & East Devon Health Authority [1999] EWCA Civ 1871 (16 July 1999)
8. Attorney General v Clarke (96 of 2004) [2008] ZMSC 4
9. Miyanda v The High Court (1984) Z.R 62
10. Zambia National Holdings Limited and United National Independence Party (UNIP) v The Attorney General (1994) S.J 22 (S.C)

LEGISLATION REFERRED TO:

1. The Constitution of Zambia, Chapter 1 of the Laws of Zambia
2. The Securities Act, Chapter 354 of the Laws of Zambia
3. The Securities Act No. 41 of 2016 of the Laws of Zambia
4. The High Court Act and Rules
5. The Securities (Takeovers and Mergers) Rules, Statutory Instrument No. 170 of 1993

6. The Securities (Licensing, Fees and Levies) Rules, Statutory Instrument No. 165 of 1993 Statutory Instrument No. 153 of 1995
7. The Securities (Advertisement) Rules, Statutory Instrument No. 166 of 1993
8. The Securities (Conduct of Business) Rules, Statutory Instrument No. 168 of 1993
9. The Securities (Registration of Securities) Rules, Statutory Instrument No. 164 of 1993
10. The Securities (Licensing, Fees and Levies) (Amendment) Rules, Statutory Instrument No. 82 of 2013
11. The Securities (Capital Markets Tribunal) Rules, Statutory Instrument No. 32 of 2021
12. The Acts of Parliament Act, Chapter 3 of the Laws of Zambia
13. The Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia
14. European Union adopted Directive 2004/25/EC of the European Parliament and of the Council of 21st April 2004

OTHER WORKS REFERRED TO:

1. Bryan A. Garner (ed.), Black's Law Dictionary, (8th Edition, West Publishing Co.:1999)
2. Mumba Malila, "Commercial Law in Zambia" (2006) UNZA Press, Lusaka
3. Peter Leyland & Terry Wood, Textbook on Administrative Law (4th Ed, Oxford University Press:2002)
4. Maurice Button (ed.), A Practitioner's Guide to the City Code on Takeovers and Mergers 2006/2007 (City & Financial Publishing: 2006)
5. Pierre Vernimmen *et al* on Corporate Finance: Theory and Practice, (5th Edition, Wiley:2017)
6. Tom Campbell, Legal Validity and Judicial Ethics, Working Paper No. 2002/13 Published for the Centre for Applied Philosophy and Public Ethics (CAPPE)

7. H. L. A. Hart, The Concept of Law, 2nd ed, Oxford, Clarendon Press:1994
8. Ying Wang and Henry Lahr, Takeover Regulation to Protect Shareholders: Wealth Creation or Wealth Destruction (2015)
9. European Union adopted Directive 2004/25/EC of the European Parliament and of the Council of 21st April 2004
10. The Corporate Finance Institute, Mergers & Acquisitions (M&A) - Overview, Types, Integration, and Valuation, available at < https://corporatefinanceinstitute.com/resources/knowledge/deals/mergers-acquisitions-ma/ >
11. The Chartered Financial Analyst, Mergers and Acquisitions, available at < https://www.cfainstitute.org/en/membership/professional-development/refresher-readings/mergers-acquisitions >

INTRODUCTION

This is an Appeal against a decision of the Respondent declining to grant the Appellants a 100% waiver of the authorisation fees payable on the acquisition of at least 35% of voting rights by the 2nd Appellant in both the 1st and 3rd Appellant. This Appeal was instituted pursuant to Section 184 (1) and Section 191(2) of the Securities Act No. 41 of 2016 (The Securities Act, 2016) as read together with Rule 7 of the Securities (Capital Markets Tribunal) Rules, Statutory Instrument No. 32 of 2021 (The CMT Rules) by way of Notice of Appeal and supported by an Affidavit in Support of Notice of Appeal (Affidavit in Support), Skeleton Arguments and List of Authorities filed before the Tribunal on 30th July 2021.

While referring to the Respondent as the Commission, the Appellants advanced the following grounds of Appeal:

1. **THAT** the Commission erred in law and in fact when it did not consider that the applicable Act at the date of the Transaction, that is, the Securities Act Chapter 354 of the laws of Zambia (Cap 354) only, governed how mergers and takeovers would be conducted and did not provide for authorization of mergers and takeovers;

2. **THAT** the Commission erred in law and in fact when it issued the invoice for payment of authorization fees as there was no legal basis for the Commission to request for payment of an authorization fee for the Transaction;

3. **THAT** the Commission erred in law and in fact when it issued the invoice for payment of the authorization fee ostensibly applying the Securities Act, 2016 retrospectively by requesting for payment of an authorization of takeover fee on a Transaction that occurred prior to commencement of the Securities Act, 2016;

4. **THAT** the Commission erred in law and in fact when it included the payment of an authorization fee for mergers and takeovers pursuant to Clause 8(i) of the Third Schedule of the Securities (Licensing, Fees and Levies) (Amendment) Rules, Statutory Instrument No. 82 of 2013 (SI No. 82 of 2013) as the said provision is ultra vires Rule 11 the Securities (Licensing, Fees and Levies) Rules, Statutory Instrument No. 165 of 1993 (SI No. 165 of 1993); and

5. **THAT** the Commission erred in law and in fact when it issued an invoice for authorization fees on the Transaction without considering the fact that it took place outside the jurisdiction and did not require any approval within Zambia.

Subject to the grounds of Appeal, the Appellants sought the following reliefs:

1. The setting aside of the decision of the Respondent to charge an authorization fee; and
2. Any other reliefs that the Tribunal may deem fit.

THE FACTS

The 1st and 3rd Appellants are publicly traded companies incorporated under the Zambian Company Laws having their registered office at Lusaka. The 2nd Appellant is a publicly traded company headquartered in Belgium and is listed on the New York Stock Exchange, Mexican Stock Exchange, the Euronet Stock Exchange and the Johannesburg Stock Exchange. The Respondent is the regulator of the capital markets in Zambia as established under Cap 354 and continued its existence under the Securities Act, 2016 pursuant to section 7(1) of the Securities Act, 2016.

According to the Affidavit in Support filed before the Tribunal on 30th July 2021, one Deborah Anne Bwalya deposed that at all material times the majority shareholder of the 1st and 3rd Appellants was a company known as SABMiller PLC. SABMiller PLC is a company headquartered in Johannesburg, South Africa and listed on both the London and Johannesburg Stock Exchanges. This is according to print-outs issued by the Patents and Companies Registration Agency (PACRA) dated 25th July 2017 exhibited as 'DAB1' in the Affidavit in Support.

It was further deposed that in November 2015, the 2nd Appellant announced its intention to make an offer to acquire the entire issued, and to be issued share capital of SABMiller PLC. The acquisition (hereinafter referred to as "the Transaction") was to be completed in three stages. In the first stage of the Transaction, SABMiller PLC shares were to be transferred to a Belgian company known as Newco in exchange for the issue of Newco shares to SABMiller PLC shareholders. Newco was a company formed for the purposes of completing the Transaction. Under the second stage of the Transaction, the 2nd Appellant would acquire the shares in Newco from the former SABMiller PLC shareholders. Then in the last and third stage of the Transaction, the 2nd Appellant would merge into Newco. Newco, would then hold all the shares and have sole control of SABMiller PLC.

It was further deposed that the Transaction was completed in 2016, and since October 2016, SABMiller Plc is now a business division of the 2nd Appellant. What is significant for the Appellants is that the Transaction did not involve the exchange of securities in Zambia and was carried out outside Zambia as it was only the shares in SABMiller PLC that were subject to the Transaction.

Accordingly, the shareholders in the 1st and 3rd Appellants did not change post the Transaction. This is according to the print-outs issued by PACRA dated 29th July 2021 exhibited as 'DAB2' and 'DAB3' in the Affidavit in Support. However, notwithstanding that the Transaction was concluded outside Zambia, the Transaction did trigger the requirement for a mandatory offer for purposes of the protection of minority shareholders' interests in the 1st and 3rd Appellants pursuant to Part XVI Rule 56 of the Third Schedule to the Securities (Takeovers and Mergers) Rules, Statutory Instrument No. 170 of 1993 (The Takeovers and Mergers Rules).

According to Pierre Vernimmen *et al* on Corporate Finance: Theory and Practice, 5th Edition, a "mandatory offer" is an offer made by an acquiring company to buy back the shares of all shareholders in a target company (See also Christopher Pearson and Nick Adams, Chapter 4, Mandatory and Voluntary Offers and their Terms in Maurice Button (Ed) A Practitioners Guide to the City Code on Takeovers and Mergers 2005/2006, City and Financial Publishing, page 123).

The requirements for a mandatory offer differ from one jurisdiction to another. However, in most countries, the requirement for a mandatory offer is triggered when an acquiring company passes a certain threshold in terms of shareholding or acquires control of the target company.

In our jurisdiction, the Takeovers and Mergers Rules do not define what a "mandatory offer" is but outline when a mandatory offer would be required in Part XVI Rule 56 of the Third Schedule as follows:

> ***"56. When mandatory offer required***
>
> *Subject to the granting of a waiver by the Commission, if—*
>
> *(a) any person acquires, whether by a series of transactions over a period of time or not, thirty-five percent or more of the voting rights of a company;*
>
> *(b) two or more persons are acting in concert, and they collectively hold less than thirty-five per cent of the voting rights of a company, and any one or more of them acquires voting rights and such acquisition has the effect of increasing their collective holding of voting rights to thirty- five per cent or more of the voting rights of the company;*

(c) any person holds not less than thirty-five per cent, but not more than fifty per cent, of the voting rights of a company and that person acquires additional voting rights and such acquisition has the effect of increasing that person's holding of voting rights of the company by more than five per cent from the lowest percentage holding of that person in the twelve-month period ending on and inclusive of the date of the relevant acquisition; or

(d) two or more persons are acting in concert, and they collectively hold not less than thirty-five per cent, but not more than fifty per cent, of the voting rights of a company, and any one or more of them acquires additional voting rights and such acquisition has the effect of increasing their collective holding of voting rights of the company by more than five per cent from the lowest collective percentage holding of such persons in the twelve-month period ending on and inclusive of the date of the relevant acquisition, that person, or the principal members of the concert group, as the case may be, shall extend offers, on the basis set out in this rule, to the holders of each class of equity share capital of the company, whether the class carries voting rights or not, and also to the holders of any class of voting non-equity share capital in which such person, or persons acting in concert with him, hold shares. Offers for different classes of equity share capital must be comparable and the Commission shall be consulted in advance in such cases."

A counterpart provision in the EU Takeover Directive is found in Rule 9 of the Directive.

By virtue of Part XVI Rule 56 (a) of the Third Schedule of the Takeovers and Mergers Rules, the mandatory offer, in the present case, was triggered because the 2nd Appellant through the Transaction acquired more than 35% of voting rights in the 1st and 3rd Appellants.

Because the Transaction triggered a mandatory offer, on or around the 11th November 2016, the Appellants applied to the Respondent as shown by exhibit marked 'PKC5' in the Affidavit in Opposition to Appeal (Affidavit in Opposition) for a waiver from making a mandatory offer to minority shareholders of the 1st and 3rd Appellants pursuant to Part XVI Rule 56 of the Third Schedule of the Takeovers and Mergers Rules. The Respondent granted the waiver on 16th December 2016 as shown and exhibited by 'DAB5' in the Affidavit in Support. Following which the Respondent requested payment of a waiver fee for the waiver from making a mandatory offer for both the 1st and 3rd Appellants. The Respondent also made an additional request for payment of authorisation fees in accordance with Statutory Instrument No. 82 of 2013 despite the Appellants not applying for authorisation of the Transaction. Then on or about 19th December 2016, the Respondent issued a demand for payment from the 2nd Appellant of authorisation fees pursuant to Statutory Instrument No. 82 of 2013 amounting to K4, 571,763.38 and K888, 615.00 in respect of the 1st and 3rd Appellant respectively. This is according to the exhibit marked 'DAB7' in the Affidavit in Support.

Subsequently, by a letter dated 11th April 2016 exhibited as 'DAB8' in the Affidavit in Support, the Appellants queried the legal basis and quantum of the authorisation fees on the ground that Cap 354 which was in force at the time of the Transaction did not allude directly to the Respondent's role in authorising take-overs and mergers, and did not contain express provisions regarding Transactions conducted outside the jurisdiction. In that regard, the Appellants requested the Respondent to reconsider the imposition of the authorisation fees. In response to the request by the Appellants, the Respondent by a letter dated 5th June 2017 and exhibited as 'DAB9' in the Affidavit in Support, informed the Appellants that the Respondent approved a waiver of 60% of the total authorisation

fees payable. In that regard, the Respondent demanded payment of the authorisation fees less 60% in 14 days. The Appellants being dissatisfied with the decision of the Respondent launched this Appeal after the Registrar of the Tribunal gave effect to the parties' Consent Order for leave to Appeal out of time on 19th July 2021.

The grounds upon which this Appeal was instituted and the reliefs sought by the Appellants are restated at page 5 and 6 of this Judgment.

THE LEGAL ISSUES

From the facts, three notable issues are not in dispute. Firstly, that the majority shareholder of the 1st Appellant and the 3rd Appellants is a South African company SABMiller PLC which owns 54.12% and 43.4% shareholding and voting rights in the 1st and the 3rd Appellant companies respectively. The 1st and 3rd Appellants are local brewing and beverage companies. Secondly, that there was a Transaction in which SABMiller PLC's shares were transferred to a Belgian company known as Newco in exchange for the issue of Newco shares to SABMiller PLC shareholders. Furthermore, that the 2nd Appellant acquired the shares in Newco from the former SABMiller PLC shareholders and merged into Newco and Newco now holds all the shares and has sole control of SABMiller PLC as majority shareholder in the 1st and 3rd Appellants.

Additionally, it is not in dispute that the Transaction in this case did trigger a mandatory offer pursuant to Part XVI Rule 56 of the Third Schedule to the Takeover and Mergers Rules for purposes of the protection of minority shareholder interests. Following which the 1st and 3rd Appellants applied for a waiver from making a mandatory offer to the minority shareholders of the 1st and 3rd Appellants in accordance with the Part XVI Rule 56 of the Third Schedule to the Take over and Mergers Rules. The Respondent granted

the waiver and demanded a payment of waiver fees amounting to One Hundred and Fifty Thousand Kwacha (K150,000.00) each for both the 1st and 3rd Respondents respectively. The Appellants confirmed in paragraph 12 of the Appellants Affidavit in Support of the Notice of the Appeal filed on 30th July, 2021 that these waiver fees from making a mandatory offer were paid by the Appellants.

Accordingly, what we have identified as issues that are in dispute relate to the following:

1. Does the jurisdiction of the Tribunal include determining the validity of the Third Schedule to Statutory Instrument No. 82 of 2013?
2. Which Securities Act was applicable at the time of the Transaction?
3. Was the Transaction subject to regulatory oversight and approval by the Respondent?
4. Did the acquisition of SABMiller PLC by the 2nd Appellant result into the takeover of the 1st and 3rd Appellant?
5. Whether the Respondent had lawful authority to charge the 2nd Appellant an authorisation fee?
6. Did the Respondent have a legal obligation to inform the Appellants about the existence of prescribed fees?

It was our considered view that these identified legal issues must be answered to resolve and determine the dispute between the parties. Before we examine the legal issues, we wish to restate each party's position.

THE APPELLANTS' CASE

The Appellants' only witness hereinafter referred to as 'AW1' reluctantly testified that SABMiller PLC, a company registered on the London and Johannesburg Stock

Exchanges, with its head office in Johannesburg South Africa, was a majority shareholder of the 1st and 3rd Appellants prior to the acquisition of its shares by the 2nd Appellant. 'AW1' further testified that in November 2015, the 2nd Appellant announced its intention to make an offer to acquire the issued, and to be issued share capital of SABMiller PLC. The acquisition was to be conducted through a three-stage process as follows:

(i) the SABMiller PLC shares were to be transferred to Newco, a Belgian company formed for the purpose of completing the acquisition, in exchange for the issue of Newco shares to SABMiller PLC shareholders;

(ii) the 2nd Appellant would then acquire the shares in Newco from the former SABMiller PLC shareholders; and

(iii) the 2nd Appellant would finally merge into Newco, so that, Newco would hold all the shares and have sole control of SABMiller PLC.

'AW1' testified that the Transaction was finalized in October 2016 and did not involve the exchange of any securities in Zambia. 'AW1' went on to testify that she was advised by the Appellants' external legal counsel that the Transaction triggered the requirement for a mandatory offer for the purpose of the protection of the minority shareholders' interest in the 1st and 3rd Appellants. Following the trigger of the mandatory offer, on or about 11th November 2016 an application was submitted by the Appellants to the Respondent for a waiver from making the mandatory offer to the shareholders of the 1st and 3rd Appellants pursuant to the Third Schedule of the Takeover and Mergers Rules. Subsequent to the submission of the application, the Respondent granted the waiver and requested for payment of a waiver fee under SI No. 32 of 2013.

'AW1' further testified that in addition to the request for payment of the waiver fee, on or about 19 December 2016, the Respondent demanded payment of an authorisation fee pursuant to SI No. 32 of 2013 to the 2nd Appellant without any supporting documents explaining how the authorisation fee was arrived at. The Appellants applied to the Respondent for a 100% waiver of the authorisation fee and in response to the application, the Respondent informed the Appellants on 5th June 2017, that the Board of the Respondent only granted a 60% waiver on the authorization fee demanded by the Respondent. The Respondent further demanded that the Appellants pay the 40% of authorization fee within 14 days. The Appellants are not agreeable with decision to only grant a 60% waiver on the authorization fee, since they were of the view that the Respondent had no lawful ground by which to levy the fee and the Transaction took place outside the jurisdiction between entities incorporated outside the jurisdiction.

THE RESPONDENT'S CASE

The Respondent's only witness hereinafter referred to as 'RW1' testified that the ordinary shares of the 1st and 3rd Appellants are registered by the Respondent as securities and listed on the Lusaka Securities Exchange Plc (LuSE) for trading by the general public. Prior to October 2016, SABMiller PLC was the parent company of the 1st and 3rd Appellants and had an indirect shareholding of 54.12% and 43.4% in the 1st and 3rd Appellants respectively. Sometime in December 2015, the Advocates for the Appellants, Musa Dudhia & Co. made a presentation to the Respondent's Market Transactions Committee (MTC) on what would happen on the acquisition of SABMiller PLC by the 2nd Appellant and informed the Respondent that the Transaction would affect the corporate structures of the 1st and 3rd Appellants.

'RW1' testified that on 26th April 2016, Musa Dudhia & Co. made an application to the the MTC on behalf of the 2nd Appellant for a provisional ruling on whether a waiver from making a mandatory offer to the remaining shareholders of the 1st and 3rd Appellants could be granted before the acquisition of SABMiller PLC by the 2nd Appellant occurred. The MTC considered the request and made a ruling that the waiver could not be granted to the 2nd Appellant because the law stipulated that a mandatory offer was only triggered when 35% of voting rights of an Issuer had been acquired. Since the 2nd Appellant had not yet acquired the voting rights or the shares, the mandatory offer had not yet been triggered and hence a waiver of the mandatory offer could not be granted. On 11th October 2016, Musa Dudhia & Co. notified the Respondent that the takeover of SABMiller PLC by the 2nd Appellant had been completed and an application for a mandatory waiver was made on 11th November 2016. The MTC considered the application at a meeting held on 12th December 2016 and a recommendation was made to the Board of the Respondent for the approval of the grant of the waiver to make a mandatory offer to the 1st and 3rd Appellants' minority shareholders. The Board of the Respondent approved this recommendation and the decision to grant the waiver was communicated to Musa Dudhia & Co. in a letter dated 16th December 2016.

'RW1' further testified that the Respondent dispatched fee notes for the grant of the waiver fee and the takeover authorisation fee to the 2nd Appellant through its representatives, Stockbrokers Zambia Limited. When the 2nd Appellant received the fee notes, they disputed the basis for the levy of a takeover authorisation fee because the takeover of SABMiller PLC by the 2nd Appellant did not take place in Zambia. By letters dated 6fr February 2017, 1st March 2017 and 18th April 2017, the Respondent explained the legal basis and rationale for the imposition of the takeover authorization fee. However,

the 2nd Appellant requested for a waiver or withdraw of the authorization fees. On 23rd February 2017, an application was made by Musa Dudhia & Co. on behalf of the 2nd Appellant, requesting a formal waiver challenging the legality of the takeover authorisation fees.

'RW1' testified that according to Clause 8 (i) of the Third schedule to SI No. 82 of 2013, the takeover authorisation fee is mandatory, however, the Respondent has the discretion to waive any fees if it deems fit. The Respondent resolved to grant a 60% waiver of the takeover authorisation fee. The decision of the Respondent was communicated to the 2nd Appellant by a letter dated 5th June 2017.

'RW1' stated that the rationale for the levy of the takeover authorization fee in this Transaction was as a result of the change in control in the 1st and 3rd Appellants when the 2nd Appellant acquired the issued share capital of SABMiller PLC in Europe. According to 'RW1,' the place at which the Transaction occurred is immaterial. As long as there is ultimate change in beneficial ownership or control of a company whose securities are registered with the Respondent, then the Respondent has a right to investigate and monitor that Transaction in accordance with the Takeover and Mergers Rules and also levy a takeover authorization fee in accordance with SI No. 82 of 2013.

'RW1' also testified that the 2nd Appellant tacitly acknowledged that it had taken over SABMiller PLC's controlling interests in the 1st and 3rd Appellants when it applied to the Respondent for a waiver from making a mandatory offer. Therefore, the Respondent had a right to levy a takeover authorisation fee. Furthermore, the Takeover and Mergers Rules explicitly state that all circumstances are not expressly covered by the said Rules. In that regard, when interpreting and applying the Takeover and Mergers Rules, the spirit

as well as the letters of the Rules must be observed. The chain principle of takeovers which looks at the effect of the takeover and not the form was applied to show that effective control of the 1st and 3rd Appellants had been divested to the 2nd Appellant. Although, no securities changed hands in Zambia, the ultimate beneficial ownership of the 1st and 3rd Appellants exchanged hands when the 2nd Appellant acquired SABMiller PLC.

Additionally, the 2nd Appellant acquired the power to alter the corporate governance structures of the 1st and 3rd Appellants and influence the implementation of their strategic policy decisions. The 2nd Appellant also restructured the Board of Directors of both the 1st and 3rd Appellants as the country director for Zambia had to resign from the 1st and 3rd Appellants' Boards, and was relocated to West Africa as part of a restructure of the 2nd Appellant group. 'RW1' testified that the 2nd Appellant also has significant control over operational decisions at the 1st and 3rd Appellants. This is illustrated by the fact that the 1st Appellant now produces alcohol brands such as Stella Artois and Budweiser which are beer brands whose patent is owned by the 2nd Appellant. The foregoing according to 'RW1' confirmed that the 2nd Appellant has effectively taken over the 1st and 3rd Appellants by acquiring SABMiller PLC's controlling stake in the 1st and 3rd Appellants.

'RW1' also testified that since the effects of the Transaction effected in Europe were felt in Zambia, the Respondent had a duty to investigate, monitor and authorize the elements of the Transaction that affect the Zambian capital markets. Furthermore, the takeover authorisation fee was calculated based on the value of the takeover transaction in Zambia.

OUR FINDINGS

To begin with it is our considered view that administrative law is a branch of law that is concerned with the operation and control of the power of administrative authorities such as boards, agencies, tribunals, public corporations and commissions with an emphasis of their functions as opposed on their structure. (See Peter Leyland & Terry Wood, Textbook on Administrative Law (4th Ed, Oxford University Press:2002), pp.1-2) Furthermore, administrative law relates to two types of law relating to rules and regulations on the one hand and administrative decisions on the other. Both are made by government agencies or commissions such as the Respondent, that derive their authority from the relevant applicable law of the country. Even though administrative law may be administered by public bodies it is not uncommon for this branch of law to delve in legal fields that are civil, private or commercial in nature as is the case in the field of the securities market.

In addition to avoid abuse of powers by administrative bodies, these public bodies are expected to conform to the basic principles of legality, reasonableness (rationality) and procedural fairness. The principle of legality is concerned with keeping decision making of administrative bodies such as the Respondent within their legal bounds and limits. As per *Attorney General v Clarke (96 of 2004) [2008] ZMSC 4* a supreme court case, a decision is deemed to be illegal if: (a) it contravenes or exceeds the terms of power which authorizes the making of the decision; or (b) it pursues an objective other than for which the power to make the decision was conferred. While the principle of procedural fairness is concerned with ensuring that those affected by an act or decision of a public body are given an opportunity to be heard as decided in *Shilling Bob Zinka v The Attorney General (1990-1992) ZR 73.* We will not belabour on the issue of procedural fairness because the

opportunity to be heard is in operation in the case *in casu* as this matter is before this Tribunal. Lastly, the principle of reasonableness is concerned with ensuring that public bodies, having taken into account all relevant facts and considerations of a particular case, do not make irrational decisions (see *Attorney General v Clarke (96 of 2004) [2008] ZMSC 4*). Because the law is clear on the powers of the Respondent under the Securities Act we shall focus on determining the legality of the decisions made by the Respondent in this case that have been disputed.

We will now move on to consider the issue of jurisdiction raised by the Respondents on page 7 and 27 of their submissions.

Jurisdiction of the Tribunal

As regards the issue whether the jurisdiction of the Tribunal includes determining the validity of the Third Schedule to the Licencing, Fees and Levies Rules, the Appellants, in arguing this issue, submitted that Paragraph 8(i) of the Third Schedule to the Licencing, Fees, and Levies Rules does not give the Respondent the power to charge an authorisation fee. It simply lists an authorisation fee amount without creating the underlying statutory right to charge the authorisation fee. Therefore, the Respondent was wrong to invoke a power it does not have under the law.

The Appellants further submitted that the Third Schedule to the Licencing, Fees and Levies Rules is delegated legislation, therefore, it should not be contrary to or beyond the enabling statute. The Appellants argued that on the authority of Section 20(4) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia, a Statutory Instrument which is inconsistent with a provision of an Act, Applied Act or Ordinance is void to the extent of its inconsistency.

In response, the Respondents submitted that while Section 20(4) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia stipulates that a Statutory Instrument that is inconsistent with an Act is void to the extent of the inconsistency, the said provision does not outline the process and procedure by which a Statutory Instrument may be voided. The Respondent further submitted that the practice and procedure developed by the Courts of Law in Zambia is that a Statutory Instrument can only be void by a declaration made by the Constitutional Court pursuant to Articles 67 and 128(3)(a) of the Constitution, or the High Court in exercise of its supervisory jurisdiction over the delegated functions of public bodies as provided for under Article 134(b) of the Constitution as read with Order 53 of the Rules of the Supreme Court of England 1999 Edition. On the authority of Section 184(3) of the Securities Act which stipulates the jurisdiction of this Tribunal, the Respondent submitted that this Tribunal has no jurisdiction to either take cognizance of arguments or submission on the validity of delegated legislation nor does it have the jurisdiction to review the validity of a Statutory Instrument. As authority, the following cases, where cited for our consideration:

1. *Zambia National Holdings Limited and Another v The Attorney General* where the Supreme Court held that *"the High Court is the creation of statute, and its jurisdiction is statutory".*
2. *Miyanda v The High Court* where the High Court stated that:

> *"The term "jurisdiction" should first be understood. In the one sense, it is the authority which a court has to decide matters that are litigated before it; in another sense, it is the authority which a court has to take cognisance of matters presented in a formal way for its decision. The limits of authority of each of the courts in Zambia are stated in the appropriate legislation. Such*

limits may relate to the kind and nature of the actions and matters of which the particular court has cognisance or to the area over which the jurisdiction extends, or both".

3. *Codron v Machintyre and Shaw* where Tredgold, CJ., at page 40 stated that:

"It is important to bear in mind the distinction between the right to relief and the procedure by which such relief is obtained. The former is a matter of substantive law, the latter of adjective or procedural law".

We maintain the position in the case of *Miyanda v The High Court (1984) Z.R 62* cited with approval by the Supreme Court in the case of *Zambia National Holdings Limited and United National Independence Party (UNIP) v The Attorney General (1994) S.J 22 (S.C)*, that the term jurisdiction means as follows:

"The term 'jurisdiction' should first be understood. In the one sense, it is the authority which a court has to decide matters that are litigated before it; in another sense, it is the authority which a court has to take cognisance of matters presented in a formal way for its decision. The limits of authority of each of the courts in Zambia are stated in the appropriate legislation [underlined for our emphasis]. *Such limits may relate to the kind and nature of the actions and matters of which the particular court has cognisance or to the area over which the jurisdiction extends, or both".*

The various aspects of the term "jurisdiction" referred to in the above quotation point to the fact that the Tribunal cannot exercise authority which is not in accordance with its enabling legislation. The Tribunal is a creation of statute particularly, the Securities Act of 2016 and the scope of its jurisdiction is defined by the said Securities Act of 2016.

Therefore, the Tribunal would be acting ultra-vires by exercising jurisdiction which it is not clothed with under its enabling law.

Section 184 (3) of the Securities Act of 2016 as the enabling law sets out the Tribunal's jurisdiction as follows –

> "*The Tribunal shall have jurisdiction to hear and determine –*
>
> *(a) appeals from decisions of the Commission, or a person exercising the functions or powers of the Commission;*
>
> *(b) proceedings relating to misconduct in the securities market; and*
>
> *(c) such other matters as may be specified in, or prescribed in terms of this Act or any other written law*"

However, we also recognise that in exercising our jurisdiction under Section 184 (3) of the Securities Act of 2016 we have, as an adjudicative body, an indispensable and inherent function related to the enforcement of securities norms pertaining to the interpretation of the law as it relates to the securities market. This inherent function of interpretation requires adjudicative bodies to authoritatively construe legislation. This entails that we must on many occasions determine the legal meaning, application, validity and implications of the law as required in order to decide a case before us in the process of adjudication. We are alive to the fact that the function of interpretation must be in accordance with the trite principle of the constitutional separation of powers.

Furthermore from an inherent jurisdictional perspective, the term 'valid' at law according to the Black's Law Dictionary at page 1586 is defined as 'legally sufficient or binding' and legal validity which is grounded in legal reasoning is actually a ubiquitous concept in

contemporary private and public law that comes into to play, according to Campbell, in the analysis to determine the authoritative criteria in identifying applicable law in terms of what is law and what is 'not the law' particularly in the adjudicative process. (See Tom Campbell, Legal Validity and Judicial Ethics, Working Paper No. 2002/13 Published for the Centre for Applied Philosophy and Public Ethics (CAPPE)) This is why for Hart the concept of validity in law is what adjudicators use to judge what is actually law as distinguished from what is aspired or desired to be law. (See H. L. A. Hart, The Concept of Law, 2nd ed, Oxford, Clarendon Press:1994). It follows that in our considered view that determining the validity of a law including statutory instruments is within the inherent jurisdiction of an adjudicative body.

Which is the Applicable Securities Act to the 'Transaction'.

The Appellants submitted that the applicable law at the time of the 'Transaction' was the Securities Act, Chapter 354 of the Laws of Zambia. Notably, the Respondent did not challenge this submission.

The starting point is that the primary legislation regulating the securities market in Zambia prior to the enactment of the Securities Act No.41 of 2016 was the Securities Act Chapter 354 of the Laws of Zambia. The Securities Act Chapter 354 of the Laws of Zambia was repealed in 2016 the year the 'Transaction' was completed. Therefore, it is important to determine which law was applicable to the 'Transaction.' Bearing in mind that the 'Transaction' was begun in 2015 and was concluded in October, 2016 as confirmed by 'AW1' and paragraph 4 of the Appellants' Submissions filed on 24th January 2022, we are guided by Section 3 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia which defines the term 'commencement.'

Section 3 of the Interpretation and General Provisions Act, defines 'commencement' as –

> *"used in or with reference to any written law, means the date on which the same came or comes into operation."*

The actual commencement date is further elaborated upon in Section 10(1) of the Acts of Parliament Act, Chapter 3 of the Laws of Zambia which provides that –

> *"Subject to the provisions of this section, the commencement of an Act shall be such date as is provided in or under the Act, or where no date is so provided, the date of its publication as notified in the Gazette."*

A review of the Securities Act No.41 of 2016 reveals that after the repeal of Cap 354 (the old Securities Act), Act No. 41 of 2016 was assented to by the president on 19th December, 2016 and published in the Gazette on 27th December, 2016. Meaning the commencement date of the Securities Act No. 41 was 27th December, 2016. It follows that for the 'Transaction' which was concluded in October 2016 the applicable Securities Act was Cap 354 as the 'Transaction' was concluded before the new Securities Act came into force.

It is also important to note that Section 15 of the Interpretation and General Provisions Act, provides that –

> *"where any Act, Applied Act or Ordinance or part thereof is repealed, any statutory instrument issued under or made in virtue thereof shall remain in force, so far as it is not inconsistent with the repealing written law, until it has been repealed by a*

statutory instrument issued or made under the provisions of such repealing written law, and shall be deemed for all purposes to have been made thereunder."

The above provision means that all statutory instruments issued under Cap 354 are, unless repealed, in force and deemed as though the statutory instruments were issued under the new Securities Act of 2016. It follows that all statutory instruments such as the: (a) Securities (Takeovers and Mergers) Rules, Statutory Instrument No. 170 of 1993; Securities (Licensing, Fees and Levies) Rules, Statutory Instrument No. 165 of 1993 (b) Securities (Licensing, Fees and Levies) Rules, Statutory Instrument No. 153 of 1995 (c) Securities (Advertisement) Rules, Statutory Instrument No. 166 of 1993; (d) Securities (Conduct of Business) Rules, Statutory Instrument No. 168 of 1993; (e) Securities (Registration of Securities) Rules, Statutory Instrument No. 164 of 1993; and (f) Securities (Licencing, Fees and Levies) (Amendment) Rules, Statutory Instrument No. 82 of 2013 issued under Cap 354 remain in force until they are repealed. It would therefore be erroneous to argue as, the Appellants have, that the application of provisions of the regulations promulgated under Cap 354 after its repeal would amount to applying Cap 354 retrospectively.

As regards the 'Transaction': Was there a Takeover and Was the Respondent's demand for an Authorization fee Illegal?

The Securities Act, Cap 354 did not define the term takeover but the principal provision that regulated takeovers under Cap 354 was Section 39 which provided under subsection (1) that –

"A person shall not make or pursue an offer in respect of a takeover or a substantial acquisition of the securities of any company except in accordance with the

conditions prescribed by the rules made under the Act." (Underline for our emphasis).

Signifying that rules were promulgated under Cap 354, to prescribe how takeovers would be conducted. Firstly, it is trite that a person at law and as referred to under Section 39(1) of Cap 354 can be a natural person or legal persons such as companies registered and recognised under the Companies Act in force in the country at the material time.

Furthermore, subsection 2 of Section 39 of Cap 354 amplifies the meaning of the term 'substantial acquisition' by providing that the term means –

"*acquisition of at least twenty per cent of the issued securities of the company concerned.*"

In this case the companies concerned relate to the 1st and 3rd Appellants in which the 2nd Appellant has control of a company SABMiller PLC which owns 54.12% and 43.4% shareholding and voting rights in the 1st and the 3rd Appellant companies respectively and which shareholding is way above the 20% threshold prescribed under Section 39(2). It follows that the 'Transaction' is captured under Section 39 as subject to oversight by the Respondent.

Rule 4 of the Takeovers and Mergers Rules provides for the application of the said Takeovers and Mergers Rules as follows:

"4. Application

(1) These Rules shall apply to all takeover and merger transactions affecting public companies.

(2) All persons engaged in takeover or merger transactions shall observe the general principles set out in the Second Schedule hereto and shall comply with the provisions of the Third Schedule hereto."

Similarly to Rule 4(1), Rule 9(1) of the First Schedule to the Takeovers and Mergers Rules provides as follows:

"These Rules apply to takeovers and mergers affecting public companies in Zambia."

The requirement for oversight and regulation cannot be over emphasized in the securities market. Even literature shows that oversight and regulation of takeovers is recognised around the world as critical in order to prevent unfair practices in the conduct of takeover offers in order to protect investors at the micro level and for the efficient working of the capital markets at a macro level of the local economy. (Ying Wang and Henry Lahr, Takeover Regulation to Protect Shareholders: Wealth Creation or Wealth Destruction (2015, p.2)) Furthermore, unregulated markets for corporate control can increase the cost of capital for firms by allowing inefficient transfers of control and thus fail to establish allocative efficiency. (Ying Wang and Henry Lahr, Takeover Regulation to Protect Shareholders: Wealth Creation or Wealth Destruction (2015, p.2)) For this reason many jurisdictions including the United States of America have rather strict takeover regulations. Also, the European Union adopted Directive 2004/25/EC of the European Parliament and of the Council of 21st April 2004 that all EU member states are expected to implement at national level. In the United Kingdom the Takeover panel established in 1968 administers the City Code on Takeovers and Mergers and was also responsible for implementing the EU Takeover Directive. It is our considered view that if developed

countries are protective of their markets it would be delinquent for Zambia as an emerging market to overlook this need for or the existence of regulation and oversight of takeovers.

Going back to the 'Transaction' and addressing whether there was a takeover it is our considered view that the 'Transaction' needs to be considered as constituting two parts. The first part involved the sale and acquisition of shares in SABMiller PLC. Which sale would be subject to local registration requirements if the sale and acquisition entailed the local transfer or exchange of securities (shares). However, it was only the shares in SABMiller that were the subject of the 'Transaction.' Accordingly, we agree with the Appellants that there was no need for local registration of securities nor was there any need for payment of any registration fees as would be envisioned under Part V of Cap 354 and the Securities (Registration of Securities) Rules, Statutory Instrument No. 164 of 1993 because the transfer or exchange of securities in SABMiller PLC whose headquarters is in Johannesburg, South Africa occurred outside the Zambian jurisdiction as the SABMiller securities are not listed in Zambia but are listed on the London and Johannesburg Stock Exchanges as per paragraph 6 of the Appellants Affidavit in Support in Support of its Notice of Appeal.

Then there was the second part of the 'Transaction' which is in contention and relates to whether there was a takeover. We accordingly have to ask the question in relation to the 'Transaction' was there a takeover? To understand if there was a takeover, it is important to appreciate what a takeover is. The Black's Law Dictionary defines a takeover as "the acquisition of ownership or control of a corporation and ... is typically accomplished by a purchase of shares, assets, a tender offer or a merger" (underline ours for emphasis)

According the Corporate Finance Institute a takeover may be direct or indirect. A direct take-over of a Company refers to a person or a group of persons or a company whereby a person or group of persons or another company acquires securities of another company (normally referred to as the target company) thereby assuming control of the target company. A direct takeover would be achieved by the acquisition of securities in the target company. See the Corporate Finance Institute, Mergers & Acquisitions (M&A) - Overview, Types, Integration, and Valuation. See also the Chartered Financial Analyst, Mergers and Acquisitions.

In contrast, an indirect takeover refers to another company, a person or a group of people acquiring control of another company by acquiring securities of a holding company or parent company of a target company that results in the parent or controlling company obtaining voting rights and other rights that would demonstrate control of the subsidiary or target company lower down the chain. In other words, by acquiring the parent company, the subsidiaries to the parent company are then acquired indirectly. See the Corporate Finance Institute, Mergers & Acquisitions (M&A) - Overview, Types, Integration, and Valuation. See also the Chartered Financial Analyst, Mergers and Acquisitions.

Furthermore, according to Corporate Finance Institute the following are the differences between a direct takeover and an indirect takeover. In a direct takeover, the acquirer directly buys the shares of the acquired target company, whereas in an indirect take over, the acquirer does not buy the shares of the target company directly but buys the shares of a parent or holding company of the target company. The acquirer obtains control of the target company though the parent or holding company.

Notably, both Cap 354 (the old Securities Act) and Act No. 41 of 2016 do not distinguish indirect takeovers from direct takeovers but the law in both appear to prioritise the issue of takeovers from an angle of control acquired in the target company. In Section 39 by referring to a takeover that leads to the acquirer obtaining control of the target company or obtaining substantial acquisition in the target company by acquiring a threshold of at least 20% shareholding in the target company. The emphasis on obtaining control in the target company continues in the regulations made under Cap 354 particularly the Securities (Takeovers and Mergers) Rules Statutory Instrument No. 170 of 1993 issued under Section 39 of Cap 354 from the definition of the terms 'acquisition of voting rights' and 'control' in the Regulation 2 the interpretation regulation. The term 'control' is defined as being 'deemed to mean a holding, or aggregate holding, of thirty-five percent or more of the voting rights of a company, even if it appears to give *de facto* control.' Meaning existing in fact and not necessarily by legal right (Black's Law Dictionary at p.448).

It is important to note that the law does not make a distinction between a direct or indirect takeovers. In our considered view the law will apply to all takeovers whether it involves a direct or indirect takeover.

Considering that the Appellants have shown that there was a Transaction in which SABMiller PLC's shares were transferred to a Belgian company known as Newco in exchange for the issue of Newco shares to SABMiller PLC shareholders. Furthermore, that the 2nd Appellant acquired the shares in Newco from the former SABMiller PLC shareholders and merged into Newco and Newco now holds all the shares and has sole control of SABMiller PLC which is still majority shareholder in the 1st and 3rd Appellants. We find that there was a takeover albeit an indirect one. Accordingly, in accordance with the Regulation 4(1) of the Securities (Takeovers and Mergers) Rules the takeover under

the second part of the Transaction required that the Appellants comply with the general principles set out in the Second and Third Schedules to Securities (Takeovers and Mergers) Rules.

It follows that since there was a takeover, the takeover was subject to oversight in Zambia authorization and payment of the corresponding fee as prescribed under Section 78 of Cap 354 and the rules. The applicable rules would be the Securities (Licensing, fees and levies) Rules Statutory Instrument No. 165 of 1993 and as amended in 2013 by the Securities (Licensing, Fees and Levies) (Amendment) Rules Statutory Instrument No. 82 of 2013. Rule 11 of the Securities (Licensing, fees and levies) Rules Statutory Instrument No. 165 of 1993 provides for fees and levies by stating that:

> *"the fees prescribed in the Third Schedule shall be payable to the Commission, with respect to –*
>
> *(a) the grant and renewal of licences;*
>
> *(b) the registration of securities under Part V of the Act; and*
>
> *(c) the authorisation of collective investment schemes under Part X of the Act"*

The Third Schedule before amendment in 2013 provided for paragraph 9 which listed fees payable under the heading 'Registration of Securities' for (a) Securities issued before the commencement of the Act and (b) securities issued pursuant to a prospectus in connection with a public officer. In 2013 this list was repealed under Regulation 2, of the Securities (Licensing, Fees and Levies) (Amendment) Rules Statutory Instrument No. 82 of 2013 (hereinafter referred to as the 2013 regulations) and pursuant to Regulation1, of the 2013 regulations were to be read as one with statutory instrument No.165 of 1993. The new expanded list of the 2013 regulations then provided under paragraph 8 a new

heading that read 'Registration of securities and other matters.' Under this new heading of paragraph 8 the expanded list included subparagraph (i) with the item authorisation of takeover or merger transaction with the corresponding fee unit amounting to 0.25% of the value of the transaction. One may argue that Rule 11 as read with the new subparagraph (i) of the new Third Schedule of the 2013 regulations is not as prescriptive in terms of detail when compared for example with subparagraph (j) of paragraph 8 of the new Third Schedule of 2013 regulations which provides for the law in terms of the fees payable for grant of waiver under Rule 56 of the Securities (Takeovers and Mergers) Rules a provision upon which the Appellants honoured a request for payment of a waiver from the Respondent as per paragraph 12 of the Appellants Affidavit in Support of the Notice of the Appeal filed on 30th July, 2021. What cannot be ignored, though lacking in detail, is the existence in the law of subparagraph (i) of paragraph 8 of the new Third Schedule of the 2013 regulations. The provision exits to serve a purpose. We are further guided that the Interpretation and General Provisions Act, Chapter 2 gives guidance that the term 'written law' in Section 3 includes statutory instruments.

We are also of the view that players in the market need to be alive to the fact that the securities law itself pre-empts that sometimes it might be difficult to anticipate every possible situation that may arise in offers as shown in Rule 1 (1) of the Second Schedule of the Securities (Takeovers and Mergers) Rules, Statutory Instrument No. 170 of 1993. Perhaps, this is why Rule 10 (3) of the Takeovers and Mergers Rules allows for consultation and dialogues with the Respondent as follows:

> *" 10. The Commission*
>
> *(3) It is available for consultation and to give rulings on all matters before or during takeovers and mergers, as the case may be."*

We make a note of this because we have not found any record from documents submitted before us where the Appellants approached the Respondent to consult or seek a ruling from the Respondent on the meaning or applicability of subparagraph (i) of paragraph 8 of the Third Schedule of the 2013 regulations before the 'Transaction' was concluded.

We accordingly, find that the 'Transaction' involved a takeover that was subject to the oversight of the Respondent because the takeover of SABMiller PLC that has a majority stake and control in two Zambian Companies namely the 1st and 3rd Appellants in this case. We further find that the Respondent request for payment of an authorisation fee with respect to the takeover was lawful.

Was there a Legitimate Expectation for the Appellants not pay the Authorisation Fee?

It is our considered view that the issue of legitimate expectation not pay an authorization fee does not apply in this case for two reasons. The first being that the principle of legitimate expectation as it has evolved under common law is based on an assumption that where a public body states in very clear unambiguous terms and without qualification that it will or will not do something, a person who reasonably relied on such a statement would be entitled to enforce the statement. (See the following Supreme court cases from the UK: *The United Policyholders Group and others (Appellants) v The Attorney General of Trinidad and Tobago (Respondent) (Trinidad and Tobago) Privy Council Appeal No 0017 of 2015, [2016] UKPC 17; Mandalia v Secretary of State for the Home Department [2015] UKSC 59 (14 October 2015) On appeal from: [2014] EWCA Civ 2; Rashid v. The Secretary Of State For The Home Department [2005] ScotCS CSIH_50 (17 June 2005);*

and Coughlan & Ors, R (on the application of) v North & East Devon Health Authority [1999] EWCA Civ 1871 (16 July 1999).

Clearly, we have found no such statement as having been made by the Respondent regarding the authorization fees to the Appellants or the public for any legitimate expectation to arise. At law an assumption is defined as 'A fact or statement taken for granted.' (Black's Law Dictionary, p.134). Secondly, the principle would only apply if the law was silent on the issue. As shown above the law as regards subparagraph (i) of paragraph 8 of the new Third Schedule of the 2013 regulations though not entirely prescriptive, exists and as law must be obeyed.

To consolidate our position, we will also rely on the principle of 'Caveat emptor' or 'buyer beware' which holds that purchasers buy at their own risk (Black's Law Dictionary, p.236). Caveat emptor is also a core legal principle to be considered by buyers when deciding whether or not to buy or invest in businesses including businesses listed on stock exchanges. This is because the legal principle fundamentally places the onus on the buyer to completely investigate the risks and liabilities involved in a transaction before entering into any legally binding agreement.

The process of investigation in an acquisition is known as due diligence which is to be undertaken for the transaction by a buyer, the buyer's advocates (legal representative) and other professionals such as their accountants. Due diligence is defined as 'A prospective buyer or brokers investigation and analysis of a target company ...or newly issued security' (Black's Law Dictionary, p.488). Notably an exhaustive due diligence investigation usually covers, *inter alia*, the following areas. A legal, tax, financial and business or commercial due diligence which was expected to have been conducted for

this Transaction in issue. For purposes of this transaction the focus is the legal due diligence which is conducted to determine, *inter alia*, the regulatory licences, fees payable and approvals that are required. Including the determination of whether and when these have been obtained and the corresponding fees prescribed for obtaining such approvals.

Accordingly, the implications of obtaining the regulatory approvals have under law cost implications as prescribed by law in the form of fees and a proper due diligence would have identified all possible fees payable in respect to the 'Transaction.' It is our considered view that the onus of conducting the legal due diligence in this case was squarely on the Appellants on their own or through their various and respective advisors such as legal representatives. A failure to conduct an exhaustive due diligence and to comply with the expected standard that results in an omission, lack of awareness of the existence of a statutory obligation or the failure to adhere to that statutory obligation may result in negligence and the consequences of such failure or blameworthiness of such failure rests on the defaulting party in this case the Appellants and are precluded from pleading ignorance. We also recognize that the law permitted the Respondent to grant waivers or reductions in fees payable under Cap 354 and the various regulations promulgated under the Act. Accordingly, it is our considered view that the Respondent was within its rights to grant waivers including discounts to the benefit of the Appellants.

However, we find that there was no legitimate expectation for the Appellant not pay the Authorization fee.

Did the Respondent have a legal obligation to inform the Appellants about the existence of prescribed fees?

The principle of caveat emptor is further strengthened by the principle at law that ignorance of the law is no defence. A principle that finds statutory expression in Section 7 of the Penal Code, Cap 87 of the Law of Zambia which provides that "*ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence unless knowledge of the law by the offender is expressly declared to be an element of the offence.*" Additionally, we are guided by the settled position of courts in the Zambian jurisdiction that 'that ignorance of Zambian laws and rules of procedure is no defence' as determined by the Supreme Court in Polythene Products (Z) limited V Peter Zimba Joshua Banda CZ Appeal No. 177 (2015).

Furthermore, by implication the Respondent had no corresponding obligation to inform the Appellants of the statutory obligation because Laws in Zambia are treated as publicly available and judicially noticed pursuant to Section 6(1) of the Interpretation and General Provisions Act, Cap 2 of the Laws of Zambia. We do however, recognize that to take a very strict approach to the application of the principle that ignorance of the law is no defence can create a deterrent environment where there is poor transparency of information to the detriment of the securities market in the country. We therefore, encourage the Respondent to be proactive in creating a conducive investment environment that promotes transparency of industry information available in the public domain. Further, players in the market are urged to take advantage of the provisions in the law such as Rules 10(3) 11 and 12 of the First Schedule of the Securities (Takeover and Mergers) Rules, Statutory Instrument No. 170 of 1993 that encourage constant consultation and dialogue with the Respondent as regulator during the conduct of securities transactions.

CONCLUSION

Subject to our findings we hereby determine and hold as follows:

That the applicable law to the 'Transaction' was the Securities Act, Cap 354 of the Laws of Zambia. That the Respondent did not err in fact or law when it issued authorization fees to the Appellants in relation to the 'Transaction' because there was a takeover of the SABMiller PLC a company that ultimately holds majority shareholding in two Zambian companies the 1st and 3rd Appellants respectively.

Each party shall bear their own legal costs.

Dated at Lusaka this 11th day of March 2022

Chairperson

Vice Chairperson

Member

Member