REPUBLIC OF KENYA

IN THE COMPETITION TRIBUNAL

AT NAIROBI

CASE NO. CT/006/2020

MAJID AL FUTTAIM HYPERMARKETS LIMITED .....APPELLANT

AND

COMPETITION AUTHORITY OF KENYA .....1ST RESPONDENT

ORCHARDS LIMITED .....2ND RESPONDENT

JUDGMENT

A. BACKGROUND

1. The Appellant, Majid Al Futtaim Hypermarkets Limited, is a Limited Liability Company incorporated and existing under the laws of the Republic of Kenya and is the owner and operator of the supermarket brand named "Carrefour".

2. The 1st Respondent is a State Corporation established under the Competition Act No 12 (hereinafter referred to as "The Act") of Kenya. It has a wide mandate on matters competition law and policy under the Act. For purposes of this appeal, we shall focus on the Respondent's mandate in relation to Abuse of Buyer Power set out under the Act.

3. The 2nd Respondent is a Limited liability company primarily involved in the dairy processing business. It processes and sells probiotic yoghurts under the brand name "cool fresh".

4. At all material times, the Appellant and the 2nd Respondent were in a Buyer / Supplier relationship, whereby, the 2nd Respondent supplied the Appellant with probiotic yoghurt to be sold at the Appellant's Carrefour stores.

5. The genesis of this Appeal is a Complaint lodged by the 2nd Respondent, with the 1st Respondent, against the Appellant, alleging abuse of buyer power. In its Complaint dated 26th April 2019, the 2nd Respondent set out the following grievances[1] THAT: -

    a. The 2nd Respondent and the Appellant executed successive buyer/supplier contracts between the years 2015 to 2018, for the supply of probiotic yoghurts to Carrefour Supermarket chains. At the end of January 2019, whilst they were negotiating the terms of a prospective contract for 2019, the Appellant unilaterally delisted the 2nd Respondent by blocking the 2nd Respondent's suppliers' code without notice.

    b. As a result, of the delisting, the 2nd Respondent was left with a big stock of packaging materials. These materials had been procured for exclusive use of the Appellant's orders and could not be utilized otherwise.

    c. The 2nd Respondent was required to pay a rebate in the form of a listing fee (support fee) amounting to Kshs. 50,000 for every listing of the products. An additional payment of 7% to 8% would be due where the 2nd Respondent failed to pay.

    d. With respect to new carrefour branches, the 2nd Respondent was required to extend to the Appellant a further rebate of 10% on the 2nd delivery of supplies.

    e. The 2nd Respondent would also pay to the Appellant a further rebate of 1.25% on all annual sales.

    f. In 2018, the Appellant introduced a 'progressive rebate' to be calculated from the annual sales / turnover of the supplier.

    g. The Appellant made deductions of various rebates from invoices issued by the 2nd Respondent.

    h. The 2nd Respondent was not given proper details of payment of invoices by the Appellant making it difficult for the 2nd Respondent to reconcile payments against respective invoices.

[1] Pages 179 to 182 of the Record of Appeal.

i. The rebates were paid by the 2nd Respondent on top of the agreed margins per the price list agreed upon.

j. The Appellant refused to accept a new pricelist from the 2nd Respondent.

k. The Appellant's shops, specifically TRM Branch, on different occasions refused to take full delivery of goods supplied against a Local Purchase Order made by the Appellant.

l. In 2018, the Appellant unjustifiably returned merchandise to the 2nd Respondent on account of the merchandise being near expiry date, thereby transferring a commercial risk it should have borne to the supplier. There was no provision in the contract allowing for this kind of returns and neither had the supplier been prewarned about such action.

m. The Appellant required from the 2nd Respondent deployment of staff in its Carrefour shops thereby transferring a cost it should have borne to the 2nd Respondent.

n. The Appellant engaged in unfair conduct by requiring the 2nd Respondent to provide a fridge on the promise that the Appellant would order supplies from the 2nd Respondent. Seven months later the orders were not forth coming. The 2nd Respondent was thereafter instructed by the Appellant to pick the fridge. This conduct put the 2nd Respondent to loss and

o. Demanding preferential treatment from the 2nd Respondent by requesting for free samples of merchandise which the Appellant proceeded to sell.

6. Following the aforesaid Complaint, the 1st Respondent initiated investigations and issued a Notice of Investigations to the Appellant dated 24th May 2019.[2] The said Notice set out the areas of possible infringement, invited a response thereto and requested the Appellant to furnish it with documents relevant to the investigation.

[2] Page 176 to 177 of the Record of Appeal

7. The Appellant, through a letter dated 3rd June 2019[3] in response to the 1st Respondent's Notice of investigation, sought an extension of the Notice period to enable settlement discussions between the 2nd Respondent and the Appellant. This request was granted by the 1st Respondent vide a letter dated 11th June 2019.[4]

8. The Appellant and the 2nd Respondent attempted negotiations to explore possible settlement as evidenced by the bundle of emails forming part of the record of appeal.[5] These fell through in June 2019, prompting the Appellant to submit a written response to the 1st Respondent's Notice of investigations through a letter dated 24th June 2019.[6]

9. The said response was accompanied by a bundle of evidentiary documents comprising of:

    a. Supply Agreements between the Appellant and 2nd Respondent for years 2016 to 2018,

    b. Return Vouchers for unsold merchandise returned to the 2nd Respondent,

    c. Correspondence between the Appellant and the 1st Respondent on possible settlement of this matter,

    d. a Flier for a 'Buy Kenya Build Kenya' initiative by the Appellant, and

    e. a Statement of Account for the 2nd Respondent for the period September 2015 to March 2019.

10. Following receipt of the Appellant's response to the Notice of investigations, the 1st Respondent conducted an analysis and investigation and issued a Notice of a Proposed Decision to the Appellant dated 23rd August 2019.[7]

11. In that Notice, the 1st Respondent, informed the Appellant that it was its preliminary opinion that:

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[3] Page 178 of the Record of Appeal.

[4] Page 175 of the Record of Appeal.

[5] Pages 184 to 205 of the Record of Appeal.

[6] Page 91 of the Record of Appeal.

[7] Page 153 to 157 of the Record of Appeal

a. The Appellant had Buyer Power in relation to the 2nd Respondent and

b. The Appellant did abuse that power in relation to the 2nd Respondent.[8]

12. More specifically, that the conduct of the Appellant could amount to a violation of Section 24(2A) of the Act. The 1st Respondent went to further outline the proposed remedies available under the Act.

13. The 1st Respondent noted that the Appellant had a right to be afforded a fair hearing in accordance with the Fair Administrative Action Act of 2015 (hereinafter referred to as FAA Act).[9] Pursuant to the provisions of Section 34(2) (c) of the Act, the 1st Respondent invited the Appellant to submit a written representation on the matter and indicate if they (the Appellant) required an opportunity to make oral representations, within fourteen (14) days from the date of the said Notice but in any event not later than 9th September 2019.

14. By a letter dated 9th September 2019,[10] the Appellant, through its Advocates, Messrs Anjarwalla & Khanna, responded to the 1st Respondent's Notice of a Proposed Decision. In that letter, the Appellant took issue with the 1st Respondent as follows:

    a. That there was neither proof that the Appellant possessed buyer power nor proof that it had abused the same

    b. That in reaching its finding, the 1st Respondent failed to follow due process.

    c. The 1st Respondent relied on draft buyer power guidelines which had no force of law.

    d. The 1st Respondent relied on practices from other jurisdictions which, similarly, had no force of law.

    e. The complaint by the 2nd Respondent was aimed at blackmailing the Appellant. Further, the Appellant called upon the 1st Respondent to commence investigation proceedings to that effect against the 2nd Respondent pursuant to provisions of Section 90 of the Act.

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[8] Page 154 of the Record of Appeal

[9] Page 157 of the Record of Appeal.

[10] Pages 158 to 161 of the Record of Appeal

f. The Appellant was a reputable firm serving many customers, providing employment to many Kenyans, and positively impacting the Kenyan economy.

g. The Appellant requested for all the evidence and material that the 1st Respondent had relied upon in making its decision.

h. That the 1st Respondent in reaching its decision, relied on assumptions that were unfounded and incorrect.

15. Vide a letter dated 11th September 2019[11], the 1st Respondent responded to the issues raised by the Appellant as follows:

a. The 1st Respondent reiterated that pursuant to its investigation and analysis, the 1st Respondent had made a preliminary finding that the Appellant had buyer power buyer in relation to the 2nd Respondent. Further, the Appellant had abused that power.

b. While foreign direct investment was critical to the economy it was not an excuse to breach the law.

c. The 1st Respondent was alive to the requirements of a fair administrative action. For that reason, the 1st Respondent was still inviting the Appellant to make written or oral presentations in accordance with the Act.

d. The evidence relied upon by the 1st Respondent in its preliminary report namely, supply agreements, correspondence was materials already in possession of the Appellant.

e. An economic analysis carried out by the 1st Respondent to arrive at this decision was based on the buyer power guidelines already available at the 1st Respondent's website.

f. Though the guidelines relied upon were marked as draft, they were not a draft. In any event they were based on international best practice which was in line with section 3 (g) of the Act.

[11] Pages 162 to 164 of the Record of Appeal

g. The assumption of an implied contract was based on goods ordered and received by the Appellant in January and February 2019.

h. With respect to the alleged blackmail, the 1st Respondent invited the Appellant to make a formal complaint with the 1st Respondent for further action.

i. The 1st Respondent invited the Appellant to raise its issues through a hearing conference for resolution. Further, the 1st Respondent sought clarification whether the Appellant's letter dated 9th September was a written representation.

j. Finally, the 1st Respondent invited the Appellant to comment on the representations not later that 20th September 2019.

16. Through a letter dated 16th September 2019[12], the Appellant, through their Advocates, sought a further extension of 14 days to respond to the 1st Respondent's aforesaid letter. The request was granted by the 1st Respondent vide letter dated 18th September 2019.[13]

17. On 27th September 2019, the Appellant, its Advocates, and the 1st Respondent held a meeting.[14] At the meeting, the 1st Respondent sought clarification on the purpose of the meeting. The Appellant's Advocates stated that the said meeting was fixed to discuss the way forward in the matter. The 1st Respondent clarified that once a Notice of Proposed Decision was issued under the Act, the laid down process had to be adhered to.

18. After the meeting, the 1st Respondent did a letter to the Appellant's Advocate on the same date.[15] The letter sought to clarify that:

a. The Notice of intended Decision dated 23rd August 2019 communicated the preliminary findings of the investigations by the 1st Respondent.

b. The said Notice was to notify the Appellant to avail itself of the opportunity to respond to the allegations and remedies.

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[12] Page 166 of the Record of Appeal.

[13] Page 167 of the Record of Appeal.

[14] See minutes at pages 171 to 174 of the Record of Appeal.

[15] Page 168 of the Record of Appeal

c. The Appellant still had an opportunity to defend itself through oral representations and written submissions.

19. Via a letter dated 1st October 2019[16] , the 1st Respondent forwarded the minutes of the meeting above and the entire set of documentary evidence used by the 1st Respondent to arrive at the Notice of proposed decision.

20. Vide their letter dated 4th October 2019[17], in response to the 1st Respondent's letter dated 1st October 2019, the Appellant raised the following concerns:

    a. The documents shared by the 1st Respondent were miscellaneous and unindexed. There was no nexus between the documents and the preliminary findings of the 1st Respondent.

    b. There was no indication that the statements relied upon by the 1st Respondent, complied with the Evidence Act.

    c. The Authority concluded investigations and reached a preliminary finding without meeting or engaging the Appellant.

    d. Three days was not sufficient for the Appellant to review the evidence and revert to the 1st Respondent.

    e. There was still no evidence submitted to the Appellant to prove that the Appellant had buyer power, had refused to receive goods, had unilaterally delisted the 2nd Respondent, and had applied non-justifiable rebates.

    f. The Appellant requested for evidence in support of the best practice from various jurisdictions which the 1st Respondent had relied upon in arriving at its preliminary finding.

    g. The Appellant requested for the economic Analysis conducted by the 1st Respondent with respect to the Appellant.

[16] Page 170 of the Record of Appeal

[17] Page 259 of the Record of appeal.

h. The investigations of the 1st Respondent did not comply with the Provisions of section 33 and 34 of the Act.

i. The Appellant did not get a fair hearing as it did not participate in the investigations conducted by the 1st Respondent.

j. There were no rules for procedure on how the 1st Respondent intended to conduct the hearing conference under section 35 of the Act.

k. In conclusion the Appellant insinuated that it would not participate further in the proceedings until the foregoing concerns had been addressed.

21. The 1st Respondent, vide a letter dated 23rd October 2019[18], responded to the issues raised by the Appellant in the Appellant's letter dated 4th October 2019 as follows:

    a. The 1st Respondent clarified that the documents it relied upon were already in the possession of the Appellant. The same having emanated from the Appellant, the Appellant was in a better position to explain the same.

    b. In arriving at its Preliminary finding, the 1st Respondent relied upon the contents of the said documents to discern the nature of the relationship between the Appellant and the 2nd Respondent.

22. The 1st Respondent proceeded to index the documents as requested by the Appellant as follows:

    a. Annex 1 – Communication between the Appellant and the 1st Respondent to show that the Appellant was accorded due process.

    b. Annex 2 – records of payments to 2nd Respondent by the Appellant reflecting deductions for rebates and returned goods.

    c. Annex 3 – Invoices from the 2nd Respondent to the Appellant which when read together with the payments are proof of deductions for rebates and return of deliveries.

    d. Annex 4 – Payment Advices from the Appellant to the 2nd Respondent

[18] Page 264 to 269 of the Record of Appeal

e. Annex 5 – Email communication between the Appellant and the 2nd Respondent showing negotiations to reinstate the supply agreement, communication showing delisting of the 2nd Respondent by the Appellant and emails showing charging of listing fees.

f. Annex 6 – Supply agreements between 2015 and 2018 between the Appellant and the 2nd Respondent. Relevant terms therein providing for deduction of rebates, deployment of staff, promotional fees, registration discounts (listing fees), promotional discounts, thematic discounts, special discounts, and supplier investment.

g. Annex 7 – the Complaint Form lodged by the 2nd Respondent with the 1st Respondent against the Appellant.

23. The 1st Respondent went to further clarify that the above documents are the basis upon which the 1st Respondent determined that:

    a. A Commercial relationship existed between the 2nd Respondent and the Appellant.

    b. The Appellant had buyer power.

    c. Conduct of the Appellant amounted to abuse of buyer power.

    d. 1st Respondent clarified that this conclusion was, nevertheless, only at a preliminary level. It was for this reason that the Appellant had now been invited to submit any evidence that would counteract these preliminary findings. The investigations were still ongoing, and the Appellant still had a chance to counteract the evidence against it.

    e. With respect to admissibility of evidence, the 1st Respondent stated it relied on original documents prepared and submitted by both the Appellant and the 2nd Respondent.

    f. With respect to due process, the 1st Respondent was adamant that it had followed due process. The Appellant was involved as and when required by the Act. Further, that the 1st Respondent had fully complied with the provisions of the Act, the Constitution, and the FAA Act.

g. The 1st Respondent went to further explain the basis of the economic analysis namely:

   i. Section 24A (2B) of the Act

   ii. Buyer Power guidelines under the Act

   iii. Competition Authority of Kenya revised guidelines on relevant market definition

   iv. Supply contracts between the Appellant and the 2nd Respondent

   v. Email communication between the Appellant and the 2nd Respondent.

h. The 1st Respondent proceeded to outline the process as set out in paragraph 34 of the Act and reiterated that would be the guiding law. Further, the rules for conducting the hearing conference were not mandatory.

i. Finally, the 1st Respondent granted the Appellant until 30th October 2019 to confirm whether the written communication received so far constituted final submissions by the Appellant. Or whether the Appellant intended to participate in a hearing conference.

24. In a letter dated 29th October 2019[19] , the Appellant's Advocates requested for at least twenty-one (21) days from the date of their letter to be able to respond to the issues raised by the 1st Respondent.

25. The 1st Respondent through their letters dated 1st November 2019[20] and 4th November 2019[21] declined to grant an extension of twenty-one (21) days. Reasons for the decision were outlined thereunder. Instead, the Appellant was granted a further extension of seven (7) days to 11th November 2019.

[19] Page 270 of the Record of Appeal.

[20] Page 271 to 272 of the Record of Appeal.

[21] Page 273 of the Record of Appeal.

26. The Appellant's Advocates, on 8th November 2019[22] in reply to the 1st Respondent's letter dated 23rd October 2019 raised the following issues:

    a. Reiterated that it was a law-abiding corporate citizen and a key investor who was being unfairly accused.

    b. The 1st Respondent had failed to explain or provide an analysis of the documents it shared with the Appellant.

    c. No reasons had been given to support the findings of the 1st Respondent.

    d. The 1st Respondent did not conduct an impartial and fair hearing and flouted the rules of natural justice.

    e. The 1st Respondent withheld material evidence from the Appellant.

    f. The 1st Respondent relied on undisclosed international best practice which had no force of law in Kenya.

    g. The 1st Respondent refused to give the Appellant the economic analysis which it prepared with respect to the Appellant.

    h. The 1st Respondent relied on false and misguided assumptions.

    i. The 1st Respondent failed to provide rules for procedures for the hearing conference.

    j. The 1st Respondent had demonstrated bias against the Appellant.

    k. The timelines given by the 1st Respondent were inadequate.

27. Vide its letter dated 14th November 2019,[23] the 1st Respondent duly informed the Appellant's Advocates that it considered their letter of 8th November 2019 as a final written submission. Nevertheless, the Appellant was granted 7 days to indicate whether it wanted to participate in a hearing conference.

28. In that letter, the 1st Respondent stated that a hearing conference would:

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[22] Pages 274 to 284 of the Record of Appeal

[23] Page 285 to 286 of the Record of Appeal.

a. Serve as an opportunity for the 1st Respondent to clarify and canvass matters raised by the Appellant in its submissions.

b. Serve as an opportunity for the 1st Respondent to explain considerations considered in arriving at the preliminary finding.

c. The 1st Respondent also informed the Appellant that in the absence of an indication either way on or before 21st November 2019, the 1st Respondent will proceed to make its final decision.

29. The Appellant's Advocates on 21st November 2019[24], in response to the 1st Respondent, indicated that that the Appellant has found it impossible to make an election on how to proceed with the matter. The 1st Respondent had failed comply with procedural and substantive law in the matter. The 1st Respondent had also failed to furnish the Appellant with all necessary information. In the premises, participation in the options presented to them by the 1st Respondent (including attending a hearing conference) would occasion injustice to the Appellant.

30. On 29th November 2019,[25] the Appellant's Advocates wrote to the 1st Respondent again. The said Advocates noted that the 1st Respondent in conducting their investigation, and in reaching a preliminary finding against the Appellant, relied on Draft Guidelines. The said guidelines are replicated in the Competition (Amendment) Bill 2019 which was then before parliament. Consequently, the same had no force of law. On that basis, the Appellant's Advocates demanded that the 1st Respondent quashes the investigation and withdraws its preliminary finding against the Appellant.

31. On 5th February 2020, the 1st Respondent served upon the Appellant its final decision dated 4th February 2020[26].The 1st Respondent made the following orders against the Appellant for contravention of Section 24(2A) of the Act.

    a. All current supply agreements of the Appellant relating to its Carrefour Hypermarkets in Kenya be amended forthwith within sixty (60) days of

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[24] Page 287 to 288 of the Record of Appeal.

[25] Page 289 of the Record of Appeal.

[26] Pages 290 to 299 of the Record of Appeal. Also appearing at pages >>>>

service of the order to expunge all offending provisions, specifically clauses that provide for, lead to or otherwise facilitate abuse of buyer power, including but not limited to the: (a) application of listing fees; (b) application of rebates; (c) requirement on suppliers to post staff to Carrefour Hypermarket stores save in circumstances as shall be approved by the Authority; (d) transfer of commercial risk by return of delivery save in circumstances as shall be approved by the Authority; (e) refusal to accept delivery except in circumstance as shall be approved by the Authority; and (d) unilateral delisting of suppliers.

b. The Appellant cease and desist henceforth from issuing supply agreements containing the terms set out in Order 1 above.

c. The Appellant takes action within thirty (30) days of service of the Decision to remedy the effects of its infringement of section 24(2A) regarding the 2nd Respondent as follows:

    i. A refund rebates deducted from invoices of the 2nd Respondent for the years 2017, 2018 and 2019 amounting to Kenya Shillings Two Hundred and Eighty-Nine Thousand, Four Hundred and Eighty-Two (K.Shs. 289,482), as set out in the Appellant's written statements of accounts for those years; and

    ii. pay to the 2nd Respondent the sum of Kenya Shillings One Hundred and Thirty Thousand, Eight Hundred and Fifty-Six (K.Shs. 130,856) for loss arising from unilateral termination of the supply agreement for the year 2019, being cost of procurement of material for exclusive use for the Appellant's orders.

d. A financial penalty of ten percent (10%) of the Appellant's gross annual turnover in Kenya from its Carrefour Franchise from the sale of Cool Fresh Yoghurts for the year 2018 in the sum of Kenya Shillings One Hundred and Twenty-Four Thousand, Seven Hundred and Sixty-Eight (K.Shs. 124,768), payable within thirty (30) days of service of the Decision.

B. DOCUMENTS AND EVIDENCE

32. The Appellant filed the following documents before the Tribunal:

    a. Notice of Appeal dated 12th February 2020.

    b. Notice of Motion under Certificate of Urgency dated 17th February 2020 and filed on an 18th February 2020, supported by an Affidavit of Hichem Mefaredj sworn on 17th February 2020.

    c. A Record of Appeal filed on 18th February 2020 containing: -

        i. A Memorandum of Appeal dated 17th February 2020.

        ii. A Statement of facts.

        iii. An Affidavit in support of the Appeal sworn by Hichem Mefaredj sworn on 17th February 2020.

    d. Appellant's Supplementary Affidavit sworn by Hichem Mefaredj on 24th November 2020 and filed on 26th November 2020.

    e. Appellants' written Submissions dated 27th November 2020 and filed on an even date.

    f. Appellants' List & Bundle of Authorities dated 27th November 2020 and filed on an even date.

    g. Appellants' Submissions in Reply dated 18th January 2021 together with a list and bundle of Authorities.

33. The 1st Respondent filed the following documents:

    a. Replying affidavit to the Notice of Appeal dated 12th February 2020, Memorandum of Appeal, Certificate of Urgency, Notice of Motion and Supporting Affidavit, Record of Appeal, Statement of facts, Affidavit in support of Appeal together with annexures thereto all dated 17th February 2020 sworn by Wangombe Kariuki filed on 9th February 2020.

    b. 1st Respondent's Submissions dated 29th December 2020 and filed on 6th February 2021.

c. 1st Respondent's List and Bundle of Authorities dated 29th December 2020 and filed on 9th February 2021.

34. The 2nd Respondent did not participate in the proceedings before the Tribunal.

35. By consent of the parties, the Appellant's Notice of Motion was compromised in terms of the consent entered between the Appellant and the 1st Respondent on 27th February 2020. Implementation of 1st Respondent's decision dated 4th February 2020 was stayed pending the determination of this Appeal.

36. On 15th January 2021, this Tribunal gave directions that the Appeal be dispensed by way of written submissions and oral highlighting of the same. Parties highlighted submissions on 9th February 2021.

C. THE APPELLANT'S CASE

37. First, the Appellant denies that it had buyer power. The Appellant contends that there was no evidence adduced by the 1st Respondent to support such a finding.[27] On the contrary, the 1st Respondent relied on non-factual, erroneous and fundamentally flawed factors to arrive at this decision[28] More specifically, the 1st Respondent did not demonstrate that the provisions of Section 24 (2D) of the Act had been satisfied.[29] Indeed there was no evidence to show that the Appellant had obtained more favourable terms from the 2nd Respondent in their commercial relationship.

38. Second, the Appellant denies the practices identified by the 1st Respondent as abuse of buyer power, constituted abuse of buyer power. The Appellant asserts that deployment of supplier staff to supermarkets is ordinary industry practice.[30] Further, the Appellant's refusal to accept merchandise it considered unacceptable was well within its rights under the law of contract.[31]

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[27] Page 32 paragraph 30 of the Record of Appeal.

[28] Page 32, paragraph 31 of the Record of Appeal.

[29] Page 32, paragraph 29 of the Record of Appeal.

[30] Page 33, paragraph 31 (b) of the Record of Appeal.

[31] Page 32, paragraph 31 (a) of the Record of Appeal.

39. Third, the 1st Respondent lacked the legal mandate to institute and carry out investigations on alleged abuse of buyer power under the Act.[32] The power of the 1st Respondent to conduct investigations was introduced into the Act by Competition (Amendment) Act of 2019. This was an amendment to Section 31 of the Act and came into force on 31st December 2019.[33] The investigations herein were commenced in May 2019.[34]

40. Fourth, the Appellant contends that it did not get a fair hearing before the 1st Respondent. The 1st Respondent did not adhere to the rules of natural justice. More specifically, the Appellant contends that the 1st Respondent did not supply the Appellant with the evidence to support the 1st Respondent's key findings.[35] The conduct of the 1st Respondent was in contravention of the provisions of section 4 (3) (g) of the FAA Act.[36]

41. Fifth, the Appellant argues that the 1st Respondent failed to adhere to the laid-out procedure under sections 31 to 36 of the Act.[37] In so doing, the 1st Respondent reached a preliminary finding bereft of the Appellant's input.[38] The 2nd Respondent was accorded ample opportunity to make its case against the Appellant. No corresponding opportunity was provided to the Appellant to rebut the evidence.

42. Sixth, the Appellant argues that the 1st Respondent declined to provide the Appellant with hearing conference rules.[39] The 1st Respondent erred in proposing to carry out the hearing in an informal manner.[40]

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[32] Page 31, paragraph 23 of the Record of Appeal.

[33] Page 31, paragraph 24 of the Record of Appeal.

[34] Page 31, paragraph 22 of the Record of Appeal.

[35] Page 33 to 34, paragraph 34 (a) to (c) of the Record of Appeal.

[36] Page 34 paragraph 35 of the Record of Appeal.

[37] Page 40, paragraph 57 of the Record of Appeal.

[38] Page 40, paragraph 58 of the Record of Appeal.

[39] Page 42 paragraph 66 of the Record of Appeal.

[4040] Page 42 to 43 paragraph 68 and 69 of the Record of Appeal.

43. Seventh, the Appellant states that throughout the investigation, the 1st Respondent required the Appellant to respond within strict and unreasonable timelines. Conversely, the 1st Respondent did promptly respond to the Appellant's queries.[41]

44. Eighth, the Appellant is aggrieved that the 1st Respondent relied on undisclosed and unspecified international best practices.[42] The Appellant also contends that such practices in any event do not have the force of law in Kenya pursuant to the provisions of section 3 of the Judicature Act.[43]

45. Nineth, the Appellant is contesting the validity and legality of the Draft Buyer Power Guidelines which the 1st Respondent relied upon in making its determination.[44] The Appellant argues that the draft guidelines were not legally binding as they had not complied with the provisions of Statutory Instruments Act.[45]

46. Tenth, the Appellant argues that the 1st Respondent erred in law and in fact in making a finding that the Appellant had unilaterally terminated the Supply agreement for the year 2019.[46] By making a finding, that there was presumed contract similar to the preceding ones, the 1st Respondent took away the rights of the parties to freely contract[47].

47. The Appellant states that it entered into a supply agreement with the 2nd Respondent on 12 August 2015 whose term was to run from 1st September 2015 to 31st December 2016. The said Agreement was in respect of the supply of various products by the 2nd Respondent, including probiotic yogurt.

48. According to the Appellant, the terms set out in the 2015 – 2016 supply agreement were negotiated between the Appellant and the 2nd Respondent. Consequently, this agreement was a true representation of their intentions as parties. The supply agreement was subsequently renewed in 2017 (to govern the period 1 January 2017 to 31 December 2017)

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[41] Page 43 paragraph 71 and 72 of the Record of Appeal.

[42] Page 36, paragraph 42 of the Record of Appeal.

[43] Ibid.

[44] Page 37, paragraphs 43 and 44 of the Record of Appeal.

[45] Ibid.

[46] Page 37 of the Record of appeal.

[47] Page 38 to 39 of the Record of appeal.

and thereafter in 2018 (to govern the period 1 January 2018 to 31 December 2018). The terms of the 2017 and 2018 supply agreements were fairly similar to those of the 2015 – 2016 supply agreement save for a few terms which were either renegotiated or introduced by consent of both the Appellant and the 2nd Respondent.

49. The Appellant argues that the supply agreement was not renewed in 2019 as the Appellant and the 2nd Respondent were unable to mutually agree on the terms for renewal. It was therefore illegal for the 1st Respondent to impose a contract when none existed.[48]

50. Eleventh, the Appellant argues that the 1st Respondent lacks the mandate to order the Appellant to amend and delete offending terms in contracts with other suppliers.[49] Privity of contract will not permit the 1st Respondent to make such orders without affording these third parties an opportunity to be heard.[50]

51. Finally, the Appellant also contests the 1st Respondent's order requiring that parties obtain approval from the 1st Respondent before posting merchandisers to the Appellant' shops.[51] The requirement for approval in respect of transfer of commercial risk by return or refusal to take delivery is also contested.[52] According to the Appellant this would cause disruption and havoc to the Appellant's operations.[53] According to the Appellant, the conduct of the 1st Respondent in this regard is unreasonable, absurd and ultra vires.[54]

52. In a nutshell, the Appellant contends that the 1st Respondent's decision is contrary to several statutory provisions including the Competition Act, the Statutory Instruments Act, 2013 (the SIA) and the Fair Administrative Action Act, 2015 (the FAA Act). The 1st Respondent's decision, according to the Appellant violates the Appellant's fundamental constitutional rights to fair administrative action and a fair hearing guaranteed under Articles 47 and 50 (1) of the Constitution, respectively.

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[48] See page 39, Paragraph 54 of the Record of Appeal

[49] Page 41 paragraph 60 of the Record of Appeal.

[50] Page 41 paragraph 61 and 62 of the Record of Appeal.

[51] Page 41 paragraph 63 (a) of the Record of Appeal.

[52] Page 41 paragraph 63 (b) of the Record of Appeal.

[53] Ibid.

[54] Page 41 paragraph 63 of the Record of Appeal.

53. The Appellant sets out the following grounds of Appeal in their Memorandum of Appeal:

1) The 1st Respondent did not have the legal mandate and or authority to conduct the investigation relating to the Appellant's abuse of buyer power in relation to the 2nd Respondent for any period before 31 December 2019.

2) The 1st Respondent erred in fact and in law by finding that the Appellant had buyer power and abused the said buyer power.

3) The 1st Respondent erred in fact and in law by failing to conduct an analysis in relation to buyer power to determine whether the Appellant possessed buyer power, or not.

4) The 1st Respondent erred in law in relying on "draft" buyer power guidelines which do not have the force of law in Kenya; and which were published on the 1st Respondent's website without the Guidelines having gone through public participation, stakeholder engagement or having been subjected to the processes specified in the Statutory Instruments Act, 2013.

5) The 1st Respondent erred in law in analyzing documents and statements of accounts supplied by the 2nd Respondent in relation to a period prior to the enactment of the buyer power provisions in the Competition Act, 2010.

6) The 1st Respondent erred in law and fact by computing damages allegedly due to the 2nd Respondent without providing the evidence or the method used to arrive at the said computation.

7) The 1st Respondent erred in law in issuing a blanket order for amendment of the Appellant's supplier agreements without the said agreements having been the subject of investigation or the Appellant provided with an opportunity to be heard in relation to such a draconian and detrimental order being made against it.

8) The 1st Respondent erred in law by relying on unspecified international best practices from select jurisdictions which do not have the force of law in Kenya; and without disclosing the specifics of the international best practices, how they were applicable in the context of the Competition Act,

2010 and how the said practices were relevant or applicable in analysing the abuse of buyer power in the context of the investigations.

9) The 1st Respondent erred in fact and law by failing to demonstrate with a reasonable degree of specificity how the evidence it had collated during the investigations was relevant and linked to the finding that the Appellant had buyer power and abused the buyer power.

10) The 1st Respondent erred in law in making findings on issues that were neither complaints raised by the 2nd Respondent nor presented to the Appellant during the investigations, thereby amounting to condemning the Appellant unheard.

11) The 1st Respondent erred in fact and law in finding that the Appellant unilaterally terminated the supply agreement for the year 2019 when there was no agreement in existence in 2019.

12) The 1st Respondent erred in fact and in law by disregarding the provisions of Section 31 of the Competition Act, 2010.

13) The 1st Respondent conducted its investigation in a manner that was high-handed, biased, unreasonable, irrational, and absurd; and designed to arrive at the predetermined finding that the Appellant was abusing buyer power.

D. THE 1st RESPONDENT'S CASE

54. In response to the Appellant's claims, the 1st Respondent presented its case in rebuttal. Firstly, the 1st Respondents asserts that it had power at all material times to conduct investigations into the abuse of buyer power. The Competition Amendment Act of 2016, introduced the provisions of buyer power into the Act.[55] These provisions came into force on 1st January 2017.[56]

55. Further, Section 9(1)) (a) of the Act provides that one of the functions of the 1st Respondent shall be to promote and enforce compliance with the Act. Also, Section 9(1)(b) of the Act

[55] Page 2, paragraph 4 and Page 3 Paragraph 8 of Wang'ombe's the Replying Affidavit dated 2nd April 2020.

[56] Ibid.

tasks the 1st Respondent with receiving and investigating complaints from legal or natural persons and consumer bodies.[57]

56. The 1st Respondent also proffers:

    a. the Preamble of the Act in support a finding that the 1st Respondent had power to investigate abuse of buyer power.[58]

        > The purpose of the Act is to "safeguard competition in the national economy...and to provide for powers and functions of the Competition Authority... and for connected purposes..."

    b. Interpretation and General Provisions Act.

        > Where a law confers power on a person to do something, then an interpretation which confers power on that person to carry-out its mandate shall be favoured.[59]

57. The 1st Respondent argues that these provisions read together vest power in the 1st Respondent to investigate complaints and allegations into abuse of buyer power.[60]

58. With respect to the amendments to section 31, in the year 2019, which sought to expressly provide that the 1st Respondent had power to investigate the offence of buyer power, the 1st Respondents states that these amendments were meant to ease or facilitate that which was already in existence.[61]

59. Secondly, the 1st Respondent defends its finding that the Appellant had buyer in relation to the 2nd Respondent. In the course of investigations, the 1st Respondent states that it established that there existed a dependency relationship between the Appellant and the 2nd Respondent.[62]The Appellant was therefore indispensable to the 2nd Respondent. The 2nd

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[57] Page 3 paragraph 10 of Wang'ombe's the Replying Affidavit dated 2nd April 2020.

[58] Page 15 of the Respondnet's submissions.

[59] Page 15, paragraph 54 of the Respondent's submissions.

[60] Page 15, paragraph 56 of the Respondent's submissions.

[61] Page 13, paragraph 44 of the Respondent's submission.

[62] Page 7, paragraph 16 of Wangómbe's Replying affidavit dated 2nd April 2020.

Respondent's products were niche product.[63] Consequently, the Appellant could threaten the 2nd Respondent with alternative sources of supply.[64] Also, the 2nd Respondent did not have viable options to switch to other buyers because of the special nature of the products it supplied.

60. Thirdly, a review of the supply contracts between the Appellant and the 2nd Respondent revealed elements of abuse of buyer power.[65] These included:

    a. Transferring commercial risk meant to be borne by the Appellant to the 2nd Respondent.

    b. Refusal to receive the 2nd Respondent's goods for reasons not attributed to the 2nd Respondent.

    c. De-listing / unilateral termination of a commercial relationship without notice, or subject to an unreasonably short period and without an objectively justified reason.

    d. Application of rebates and listing /registration fees and various invoice deductions branded as discounts; and

    e. Requiring the 2nd Respondent to deploy staff by providing one merchandise per store at the cost of the supplier.

61. Fourthly, the 1st Respondent contends that it followed the procedures laid down in law. Upon establishing that the Appellant had buyer power and had abused the same, the 1st Respondent invited both Appellant and the 2nd Respondent to attempt an amicable settlement pursuant to the provisions of section 38 of the Act.[66] The said negotiations, however, fell through in June 2019.[67] On collapse of the negotiations, it called for and received further documentary evidence from the Appellant.[68]

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[63] Page 8, paragraph 16 (b) of Wangómbe's Replying affidavit dated 2nd April 2020.

[64] Ibid.

[65] Page 9, paragraph 17 of Wangómbe's Replying affidavit dated 2nd April 2020.

[66] Page 11, paragraph 21 of Wangómbe's Replying affidavit dated 2nd April 2020.

[67] Ibid.

[6868] Page 12, paragraph 22 of Wangómbe's Replying affidavit dated 2nd April 2020.

62. Upon, completion of the investigation, the 1st Respondent a Notice of Proposed Decision to the Appellant in accordance with section 34 of the Act.[69] This notice comprised preliminary findings of the 1st Respondent.[70]

63. In fulfillment of the requirements of Article 47 of the Constitution, Section 4 of the FAA Act and the provisions of the Act, the 1st Respondent duly informed the Appellant of its rights under section 34 (2) (c) (i). Through the Notice of Proposed decision, and a subsequent letter dated 27th September 2019 from the 1st Respondent, the Appellant was given an opportunity to make oral representations and submit written submissions to the Appellant in response to the preliminary finding.[71]

64. Contrary to the Appellant's allegations, the 1st Respondent contends that the Appellant was not only furnished with a comprehensive detail of the information and evidence used by the 1st Respondent to arrive at its preliminary findings but was also advised of the implication of each finding.[72]

65. It is the 1st Respondent's contention that, the 1st Appellant, despite being granted several opportunities, to advance its defence or disprove the facts presented to it, as prescribed under section 35 of the Act, the Appellant neglected to do so.[73]

66. Fifthly, the 1st Respondent clarified that the Buyer Power Guidelines were erroneously indicated as 'Draft' in the 1st Respondent's website.[74] The erroneous reference to 'Draft' on the website did not take away their validity.[75] In any event, the said guidelines were not inconsistent with provisions of the Act.[76]

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[69] Page 12, paragraph 23 of Wangómbe's Replying affidavit dated 2nd April 2020.

[70] Ibid.

[71] Page 13, paragraph 24 and 25 of Wangómbe's Replying affidavit dated 2nd April 2020.

[72] Page 13, paragraph 26 of Wangómbe's Replying affidavit dated 2nd April 2020.

[73] Page 13, paragraph 27 and 28 of Wangómbe's Replying affidavit dated 2nd April 2020.

[74] Page 12, paragraph 29 of Wangómbe's Replying affidavit dated 2nd April 2020.

[75] Ibid.

[76] Page 30, paragraph 100, Respondent's submissions.

67. The guidelines provide a reference point for stakeholders. They are not legally binding.[77] The offer consistency and predictability with a view to enhancing transparency in the 1st Respondent's operations.[78]

68. Further, these particular guidelines, fall under the provisions of 8(2) of the Act as opposed to those under Section 93 of the Act which are considered Statutory Instruments.[79]

69. Sixthly, On the Appellant's argument that the 1st Respondent relied on unspecified international best practices from select jurisdictions which do not have the force of law in Kenya, and without disclosing the specifics of the said international best practices, the 1st Respondent contends that one of the objects of the Competition Act under Sections 3(a), (e) and (g) is to bring National competition law, policy and practice in line with international best practices. [80] The Act provides an avenue for the 1st Respondent to give life to this section and to establish what qualifies as best practice in the various areas of enforcement.

70. In any event, the Appellant was granted an opportunity to identify and present alternative ideal jurisdictions/best practices for consideration by the 1st Respondent, but the Appellant failed and/or refused to use that opportunity.[81]

71. Seventh, the 1st Respondent denies that it analysed documents and statements of accounts, supplied by the 2nd Respondent, in relation to a period prior to the enactment of the buyer power provisions of the Act. The 1st Respondent states that it confined itself to conduct occurring in the period 2017, 2018 and 2019. In any event the Appellant has not demonstrated how the 1st Respondent focused on analysis of conduct occurring in 2015 and 2016.

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[77] Page 31, paragraph 101 of the Respondent's submissions.

[78] Page 31 paragraph 104 of the Respondent's submissions.

[79] Page 32, paragraph 107 of the Respondent's Submissions.

[80] Page 14, paragraph 30 of Wangómbe's Affidavit dated 2nd April, 2020.

[81] Page 14, paragraph 31 of Wangómbe's Affidavit dated 2nd April, 2020.

72. Eighth, the 1st Respondent states that it was right to order the Appellant to amend all its contracts with other suppliers who were not part of the investigation. The doctrines of freedom and privity of contract do not entitle parties to agree to terms proscribed by law.[82]

73. Further, section 36 of the Act empowers the 1st Respondent to declare conduct which infringes the prohibitions in Section A, B or C of the Part. To restrain continued engaging in the conduct and direct action to be taken to remedy or reverse the infringement.[83]

74. Finally, the 1st Respondent insists that in issuing the orders on assessment of damages, the 1st Respondent was strictly guided by section 36 (d) of the Act and the Fining and Settlement Guidelines.[84]

E. ISSUES FOR CONSIDERATION

75. An overview of the Appellant's case reveals that the Appellant is challenging the mandate of the 1st Respondent in conducting investigations into buyer power abuse prior to 31st December 2019. The Appellant also challenges the procedure employed by the 1st Respondent in arriving at its decision of 4th February 2020. Finally, the Appellant posits that the 1st Respondent's orders reflect bias, are unreasonable, irrational, and absurd.

76. The Appellant's grounds of appeal are akin to those in a Judicial Review application and several Constitutional and administrative law issues have emerged. This Appeal lies to the Tribunal pursuant to the provisions of Section 40 of the Act.

77. As the Tribunal previously observed In Telkom case[85]

> *A look at the jurisdiction and powers of this Tribunal under the Competition Act, 2010 reveals that the powers donated are appellate in nature and the remedies to which it can grant defined. Whether Parliament intended to give the Tribunal judicial review powers is doubtful as the same is exercised as supervisory powers by the High Court. ....Section 7 of the Fair Administrative Action Act (FAAA) empowers Tribunals to review administrative action or decisions subject to the written law regarding the exercise of jurisdiction of the Tribunal. Section 7 of the*

[82] Page 37, paragraph 129 of the Respondent's submissions.

[83] Page 37 Paragraph 130 of the Respondent's submissions.

[84] Page 18 paragraph 40 of Wan'gombe's Replying affidavit dated 2nd April 2020.

[85] Telcom Kenya Limited & another v Competition Authority of Kenya [2020] eKLR

FAAA above therefore creates a two-tier approach to the effect that the statute establishing and governing the jurisdiction of the Tribunal must accommodate the powers contemplated under section 7...A look at the jurisdiction and powers of this Tribunal under the Competition Act, 2010 reveals that the powers donated are appellate in nature and the remedies to which it can grant defined

78. We are, however, mindful, as an appellate tribunal, that appeals against exercises of discretion and questions of law tend to be indistinguishable many a times from judicial review claims.[86] This is because, they are both directed to re-examine the same exercise of power by administrative decision makers.[87] Consequently, the distinction is at times equivalent to "serving a fruitless task of categorisation for categorisation's sake". [88] This is not to say that this distinction is without meaning, but rather to recognise this overlap and be mindful not to exceed our jurisdiction.

79. We have also considered that the Appellants are not seeking the prerogative writs of judicial review which are the preserve of the Court.

80. Further, this Tribunal is conscious that it is called upon to uphold, defend and protect the Constitution (Article 3 (1), protection of the bill of rights in interpretation (Article 20 (4), and the values and principles under Article 10, Article 20 and 47 (1) of the Constitution.

81. We are also guided by the Court of Appeal decision in the case of **Republic v National Environmental Management Authority [2011] eKLR** where the Court of Appeal stated that the availability of a statutory mechanism should be explored before judicial review issues are considered. The Court of Appeal more particularly held that:-

> "*On the remaining issues we think they must be looked at in the light of our finding, in agreement with the trial Judge, that the Appellant ought to have appealed to the Tribunal rather than coming to the High Court for orders of judicial review. So that whether he ought to have been heard before the stop order was made and the other remaining issues really fell by the wayside once the conclusion was reached that the appeal process was a much more efficacious and quicker way of resolving those issues than the process of judicial review.*" *(Emphasis* ours)

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[86] Rodriguez Ferrere, "The Functional Convergence of Appeal and Judicial Review", (2016), The New Zealand Law Review, 157 at p. 159 available at https://ourarchive.otago.ac.nz/handle/10523/8824 as at 25th March 2021.

[87] Ibid, pp 160 -162.

[88] Ibid, p.177.

82. Similarly, The High Court in **Republic v Kenya Revenue Authority Ex Parte Style Industries Limited** dismissed a Judicial Review application before it as the dispute resolution mechanism established under the Tax Appeals Tribunal was competent to resolve the issues raised in the matter before it. The court in the said case held that:-

> *"...The next question is whether the dispute resolution mechanism established under the Act is competent to resolve the issues raised in this application. The jurisdiction of the Tribunal is expressly provided under the act. A reading of the act shows that the Tribunal is clothed with jurisdiction to determine the dispute. 49. In view of my analysis and the determination of the issues discussed above, it is my conclusion that the applicant ought to have exhausted the available mechanism before approaching this court. This case offends section 9 (2) of the FAA Act."*

83. In the premises we find that the Competition Act, 2010 as read together with the Constitution of Kenya empowers this Tribunal to determine all issues raised by the Appellant in this matter.

84. From the foregoing the Tribunal frames the following issues for determination:

I. Whether the 1st Respondent had power or authority to investigate the conduct of the Appellant for Abuse of Buyer Power for any period prior to 31st December 2019. (**Ground No 1 of the Appeal).**

II. Whether the 1st Respondent acted against the rules of procedure, principles of natural justice and engaged in procedural impropriety. (**Grounds No, 6, 10, 12 and 13 of the Appeal)**. This issue is subdivided as follows:

   a. Whether the Appellant was supplied with and/or informed of all evidence, documents and processes relied upon by the 1st Respondent in arriving at its decision.

   b. Whether the 1st Respondent, in computing damages due to the 2nd Respondent provided the evidence or the method used to arrive at the said computation.

   c. Whether the Respondent conducted itself with disregard to laid down procedure and whether the Appellant was granted a fair hearing.

III. Whether the 1st Respondent relied on documents and statements of accounts in relation to a period prior to the enactment of the buyer power provisions of the Act **(Ground no 5 of the Appeal)**.

IV. Whether the 1st Respondent erred in fact and in law by relying on the Buyer Power Guidelines **(Ground no 4 of the Appeal).**

V. Whether the 1st Respondent erred in fact and in law by relying on International Best Practices from other jurisdictions **(Ground no 8 of the Appeal)**.

VI. Whether the Appellant had buyer power and if yes if they abuse that power (Ground no **2, 3, 9 and 11 of the Appeal**).

VII. Whether the 1st Respondent's Orders were unreasonable and absurd with respect to: **(Ground No 7 and 13 of the Appeal)**

a. the Blanket Order for the amendment of all offending clauses in all the Appellants' supplier Agreements
b. the requirement for prior approval from the 1st Respondent on posting of staff by suppliers to the Appellant's shops.
c. the requirement for prior approval from the 1st Respondent on rejecting delivery of goods by the Appellant from supplier

VIII. Who bears the cost of this Appeal?

85. This Tribunal draws its jurisdiction from Part VII of the Competition Act, 2010, which part establishes the Tribunal and provides for its powers, and Rule 9 of the Competition Tribunal (Procedure) Rules 2017.

86. The Tribunal understands the potential impact its decisions with respect to the growth of our economy which depends on a competitive market and enforcement of the law.

87. We shall now proceed to consider each of the issues framed above bearing in mind the pleadings filed before the Tribunal by the parties, documentary evidence, the parties' written submissions, authorities cited and other relevant law.

F. ANALYSIS AND DETERMINATION

I. WHETHER THE 1ST RESPONDENT HAD POWER TO INVESTIGATE THE CONDUCT OF THE APPELLANT FOR ABUSE OF BUYER POWER FOR ANY PERIOD PRIOR TO 31ST DECEMBER 2019.

88. This issue must by its very nature be determined as a preliminary point. Without the legal power to investigate into complaints of abuse of buyer power, everything the 1st Respondent did with respect to this matter, would be of no legal effect. Consequently, this Tribunal would have no business addressing the subsequent matters.

89. The Appellant made this point clear in citing the following authorities:

Republic v Anti-Counterfeit Agency Exparte Caroline Mangala t/a Hair Works Saloon [2019] eKLR, the court held:

> *Public bodies, no matter how well intentioned, may, only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned seizure to be allowed to stand, it must be demonstrated that it is grounded on law. As such, the Respondents' actions must conform to the doctrine of legality. Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle, which, is inextricably linked to the rule of law.*

South African case of **AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another** where the court held as follows:

> '*the doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised.... Public power... can be validly exercised only if it is clearly sourced in law'...*" [89]

Republic v Fazul Mahamed & 3 others Ex-Parte Okiya Omtatah Okoiti [2018] eKLR, the High Court held:

> *It has by now become axiomatic that the doctrine or principle of legality is an aspect of the Rule of Law itself, which governs the exercise of all public power, as opposed to the narrow realm of administrative action only...The fundamental idea expressed by the doctrine is that the exercise of public power is only legitimate when lawful. A body exercising public power has to act within the powers lawfully conferred upon it...*" [90]

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[89] Page 3 of the Appellant's Submissions.

[90] Ibid.

Republic v Cabinet Secretary, Ministry of Agricultures, Livestock & Fisheries; Cabinet Secretary, Ministry of Industry, Trade & Co-operatives (Interested Party) Tanners Association of Kenya (Suing through its Chairman Robert Njoka Ex Parte Applicant [2019] eKLR, the High Court held as follows on the exercise of administrative power:

> *The most basic rules of administrative law are first that decision makers may exercise only those powers, which are conferred on them by law... This fundamental principle generally requires that the exercise of powers of administrators and statutory bodies must strictly comply with the law both substantively and procedurally. It follows, therefore, that the legality of an administrative decision can be judicially challenged on grounds that the administrative decision does not comply with the basic requirements of legality...*
>
> *A decision is illegal if it: - (a) contravenes or exceeds the terms of the power which authorizes the making of the decision; (b) pursues an objective other than that for which the power to make the decision was conferred; (c) is not authorized by any power; (d) contravenes or fails to implement a public duty."* [91]

90. The Tribunal has scrutinized the rival arguments presented before it by both the Appellant and the 1st Respondent. The determination of this issue revolves around unpacking the intention of Parliament in introducing Section 31 (1) (c) of the Act in 2019.

91. In 2016, the Act was amended by the introduction of Sections 24 (2A), (2B) (2C) and 2 (D). These provisions marked the debut of the concept of buyer power and abuse of buyer power into the Act.

92. In 2016, Section 31 of the Act which deals with the investigations by the 1st Respondent read as follows:

> *31.* **Investigation by Authority**
>
> (1) The Authority may, on its own initiative or upon receipt of information or complaint from any person or Government agency or Ministry, carry out an investigation into any conduct or proposed conduct which is alleged to constitute or may constitute an infringement of—
>
> (a) prohibitions relating to restrictive trade practices; or
>
> (b) prohibitions relating to abuse of dominance.
>
> (2) If the Authority, having received from any person a complain or a request to investigate an alleged infringement referred to in

[91] Page 2 of the Appellant's Submissions.

subsection (1), decides no to conduct an investigation, the Authority shall inform that person in writing of the reasons for its decision.

93. In 2019, section 31 was amended to introduce paragraph 31 (1) (c) to now read as follows:

> 31. **Investigation by Authority**
>
> (1) The Authority may, on its own initiative or upon receipt of information or complaint from any person or Government agency or Ministry, carry out an investigation into any conduct or proposed conduct which is alleged to constitute or may constitute an infringement of—
>
> (a) prohibitions relating to restrictive trade practices; or
>
> (b) prohibitions relating to abuse of dominance.
>
> (c) prohibitions relating to abuse of buyer power
>
> (2) If the Authority, having received from any person a complaint or a request to investigate an alleged infringement referred to in subsection (1), decides not to conduct an investigation, the Authority shall inform that person in writing of the reasons for its decision.

94. The Appellant argues that prior to the enactment of Section 31(1) (c) of the Act, the Respondent had no power to investigate into abuse of buyer power. Consequently, all its actions in this respect, prior to 31st December 2019, are of no legal effect.

95. The 1st Respondent invites the Tribunal to look at the Act as a whole. The 1st Respondent draws our attention to the Preamble of the Act, Sections 9 (1) (a) and (b) of the Act as well as Section 48 of the Interpretation and General Provisions Act.

96. Both Parties have invited the Tribunal to peruse the Hansard with a view of discerning the intention of Parliament when it enacted Section 31 (1) (c) of the Act in 2019.

97. The question which this Tribunal must now answer is <u>whether the 1st Respondent was for the first time empowered by Parliament to investigate complaints into abuse of buyer power by section 31(1) (c) of the Act on 31st December 2019?</u>

98. The Provisions of buyer power were introduced into the Act in 2016. Section 24(2A) of the Competition (Amendment)Act 2016, created the offence of conduct amounting to abuse of buyer power. Section 24(B) establishes the three factors the 1st Respondent must consider in establishing buyer power. Section 24(2B) thereof sets out the penalty for non-compliance with Section 24(3).

99. The 1st Respondent commenced its investigations in this matter in April 2019. As of April 2019, the provisions on buyer power were in place. We are persuaded by the 1st Respondent that it could not have been the intention of Parliament to introduce an offence and not empower the 1st Respondent to enforce the provisions relating to that offence. In this respect, we are guided by the provisions of section 48 of the Interpretation and General Provisions Act:

> *Where a written law confers power upon a person to do or to enforce the doing of an act or thing, all powers shall be deemed to be also conferred as are necessary to enable the person to do or to enforce the doing of the act or thing.*

100. **In Mea Limited vs Competition Authority & Another (2016)eKLR**, the Court observed:

> *"...decisions and determinations by administrative bodies as well as tribunals ordinarily commence with an investigation whether preliminary or substantive. An investigation essentially helps to determine whether a wrong has been committed. It is a critical step in any administrative, judicial or even quasi -judicial proceedings which may lead to prosecution..."* [92]

101. We agree with the 1st Respondent that specific sections of the Act should not be read in isolation from other provisions of the Act. Indeed, one must look at the forest and not the tree.

102. In the case of **Adrian Kamotho Njenga v Kenya School of Law [2017] eKLR**, where the court, in relying on a decision of the Supreme Court of India, observed, "in interpreting statutes, it is also a requirement that the court looks at both the text and context in order to ascertain the true legislative intent".

103. **In Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd., 1987 SCR (2) 1 the Supreme Court of India** stated:

> *"Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important... A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases, and words may take colour and appear different than when the statute is looked at without the glasses provided by*

[92] Page 14, paragraph 51 of the 1st Respondent's Submissions.

the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase, and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place, and everything is in its place."93

104. Section 3 of the Act provides:

The object of this Act is to enhance the welfare of the people of Kenya by promoting and protecting effective competition in markets and preventing unfair and misleading conduct throughout Kenya".

105. Section 9(1) (a) & (b) of the Competition Act provide:

The functions of the Authority shall be...

(a to promote and enforce compliance with the Act

(b) receive and investigate complaints from legal or natural persons and consumer bodies"

106. We do not agree with the Appellant that the 1st Respondent had no legal mandate to conduct investigations relating to the Appellant's abuse of buyer power in relation to the 2nd Respondent for any period before 31st December 2019.

107. It is our considered opinion that, as of April 2019, Sections 24 (2) (A), (2) (B) (2D) and (3), as read together with Section 3, 9 (1) (a) and (b) of the Act, and Section 31 of the Act and Section 48 of the of the Interpretation and General Provisions Act, the 1st Respondent had power to investigate complaints into abuse of buyer power.

108. <u>So, what was the intention of Parliament in introducing Section 31 (1) (c) of the Act in 2019?</u> The National Assembly Hansard of Tuesday, 19th November 2019, which is a record of the proceedings of Parliament on the day the bill was discussed, at paragraph 2 of page 49 thereof states :

"...Currently, Section 31 of the Act does not expressly include buyer power. It is open to interpretation in a manner that precludes the Authority from enforcing its mandate on abuse of buyer power. Such an interpretation would negate the very

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purpose of the provisions of buyer power, hence the need for an express provision).[94]

109. Our understanding of the proceedings, in Parliament, on that day, is that section 31 (1) (c) was introduced, not to confer investigative power on the 1st Respondent for the first time, but to affirm that it existed and to preclude an interpretation that would assume otherwise.

110. We, therefore, find that the 1st Respondent's had power to conduct investigations into abuse of buyer power in April 2019.

II. WHETHER THE 1ST RESPONDENT ACTED AGAINST THE RULES OF PROCEDURE, PRINCIPLES OF NATURAL JUSTICE AND ENGAGED IN PROCEDURAL IMPROPRIETY

111. The Appellant, in its grounds 6,10,12 and 13 of the Memorandum of Appeal impugns the process, propriety and scope of the investigations and proceedings leading to the 1st Respondent's decision of 4th February 2020.

112. In addressing these concerns, the Tribunal will seek to answer the following questions:

a. **Whether the Appellant was supplied with and/or informed of all evidence, documents and processes relied upon by the 1st Respondent in arriving at its decision.**

113. It is the Appellant's case that it was not provided with documents and evidence upon which the 1st Respondent relied upon when making its decision. The Appellant cites the following authorities:

Republic -vs- Capital Markets Authority & Another Ex Parte Jonathan Irungu Ciano whereby the High Court held:

> *that the law places the onus on an administrative body to furnish the person against whom allegations are made with information, materials, and evidence to be relied upon in making the decision or taking administrative action.*

[94] Page 10 of the Appellant's List and Bundle of Authorities.

114. The aforesaid authorities buttress the legal requirement that an administrative body, such as the 1st Respondent, has an obligation to furnish a party subject to proceedings before it with information, materials, and evidence to be relied on.

115. The Appellant states that it consistently requested for the documents relied upon by the 1st Respondent in arriving at its decision. The Appellant also requested for evidence to support the findings of the 1st Respondent. It is the Appellant's case that the 1st Respondent refused to accede to these requests.[95]

116. We have looked at the evidence before us and more particularly at 1st Respondent's letters dated 11th September 2019[96] 1st October 2019[97] 23rd October, 2019[98]and 1st November 2019.[99]

117. We are satisfied that the 1st Respondent did in fact supply the Appellant with the documents and evidence the 1st Respondent relied upon when making its decision..

118. A complaint which kept recurring from the Appellant was that it was not supplied with the "Market Analysis" which the 1st Respondent relied upon in its determination. Our perusal of parties' documents reveals to us that the "analysis" which the 1st Respondent kept referring to was not a document but rather a process. The outcome of that process was the decision.

119. More particularly we looked at paragraph 27 of the decision page 294(a) of the Record of Appeal. Our understanding of the phrase "investigation and market analysis" was more of a process and not a document. Similarly, paragraph 12 at page 292(a) of the Record of Appeal, "Analysis and investigation by the Authority towards section 34 of the Act..."

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[95] Page 33 to 36 of the Record of Appeal.

[96] Page 162 of the Record of Appeal

[97] Page 170 of the Record of Appeal

[98] Page 264 of the Record of Appeal,

[99] Page 271 of the Record of Appeal

120. So that the economic analysis is the "how" the 1st Respondent arrived at its decision after considering the evidence and the law. It is the inference drawn from the negotiations of the parties, the supply agreements, invoices, and all other documents presented by the Appellant and the 2nd Respondent.

b. Whether the 1st Respondent, in computing damages due to the 2nd Respondent provided the evidence or the method used to arrive at the said computation.

121. We have perused the Decision of the of the 1st Respondent and are convinced that the basis upon which the computation of damages was arrived at is clear. The Appellant has not disputed or offered a different basis for calculating the damages. The Appellant simply states that the basis and method have not been disclosed.

122. The 1st Respondent has clearly stated that it relied on statements of accounts, invoices supplied by the Appellant and the 2nd Respondent.[100] From these it was able to determine the rebates that were deducted by the Appellant from the 2nd Respondent's payments.[101]

123. With respect to the claim for damages for packaging materials commissioned for use by the 2nd Respondent exclusively for the Appellant, the 1st Respondent relied on Section 36(c) of the Act.[102] The 1st Respondent ordered damages of Kshs 130,855 in this respect.[103] The basis on how it arrived at that figure is stated as being the top up amount for the year 2019 and purchased in 2018.[104]

124. With respect to the penalty of Kshs 124,768, the 1st Respondent relied on Section 36(d) of the Act.[105] In view of the foregoing we must answer this question in the affirmative and state that it is our finding that the 1st Respondent, did disclose the evidence and basis of the award for damages.

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[100] Page 297, paragraph 38 of the Record of Appeal.

[101] Ibid.

[102] Page 297, paragraph 39

[103] Page 297, paragraph 40.

[104] Ibid.

[105] Page 298, paragraph 42 of the Record of appeal.

c. Whether the Respondent conducted itself with disregard to laid down procedure and whether the Appellant was granted a fair hearing.

125. We now proceed to consider whether the 1st Respondent, in conducting the subject investigation and rendering its final decision dated 4th February 2020 complied with the laid down procedure under Sections 31 to 38 of the Act. Further, whether the Appellant was given a fair hearing pursuant to the Constitution and the FAA Act.

126. The proceedings in this matter commenced with the lodging of the Complaint on 26th April 2019 by the 2nd Respondent and culminated with the 1st Respondent rendering its final decision dated 4th February 2020.

127. Upon receipt of the Complaint the 1st Respondent duly notified the Appellant of the Complaint on 24th May 2019 pursuant to the provisions of 31 of the Act. The 1st Respondent also requested the Appellant for documents, evidence, and records to assist the 1st Respondent in accordance with Section 31 of the Act.

128. The 1st Respondent accorded the Appellant, and the 2nd Respondent were accorded an opportunity to attempt an amicable settlement, pursuant to the provisions of section 38 of the Act.

129. When the amicable negotiations failed, the 1st Respondent conducted and concluded its investigations based on documents it had received from both parties. The 1st Respondent thereafter issued a Notice of a proposed decision to the Appellant in accordance with section 34 of the Act.

130. Section 34 further sets out the steps required of the 1st Respondent following conclusion of investigations. Section 34 of the Act on "Proposed decision of the Authority" provides:

> *"If upon conclusion of an investigation, the Authority proposes to make a decision that-*
>
> > *A prohibition or prohibitions under Section A of this part have been infringed; or*
> >
> > *A prohibition or prohibitions under Section B of this part have been infringed; or*
> >
> > *A prohibition or prohibitions under Section C of this part have been infringed,*

It shall give written notice of its proposed decision to each undertaking which may be affected by that decision.

131. The said Notice duly notified the Appellant of the findings of the 1st Respondent and the orders it intended to make against the Appellant. The Notice called for evidence in rebuttal through written representations pursuant to section 34 (2) of the Act. The Appellant was also notified of its right to a hearing conference pursuant to section 35 of the Act.

132. The Appellant insisted that it could not participate in the proceedings as the 1st Respondent had not provided it with all the evidence. Further, that the rules and procedure for the hearing conference had not been disclosed. The Appellant was also apprehensive that, according to the Notice of the Proposed Decision, a determination had already been reached without the Appellant's participation.

133. We have reviewed the procedure laid down at paragraph 34 and 35 of the Act, and we are of the opinion that the 1st Respondent acted according to the laid down procedure. The Appellant is only invited to bring evidence in rebuttal through written representations and conference hearing only upon issuance of a proposed decision.

134. We note that the 1st Respondent explained to the Appellant that the Proposed decision was not a final decision but a preliminary finding which the Appellant could rebut. Our understanding of this process is akin to the criminal justice case where the prosecution lays out its case and the Court must determine if the accused has a case to answer. The Court in ruling that an accused has a case to answer does not mean that the accused is guilty. It simply means that there is enough evidence against them, and the accused is required to mount a defence.

135. During the meeting of 27th September 2019 with the Appellant's Advocates, the 1st Respondent, informed the Appellants that the hearing would be informal as provided under Section 35(3) of the Act. The Appellants were duly informed that there were no formal rules of procedure.

136. In the High Court case of **Republic v National Police Service Commission Exparte Daniel Chacha Chacha [2016] eKLR**, the Court extensively discussed the issue of natural justice and referred to many authorities in that regard. The Court observed, "A recent articulation of the elements of procedural fairness in the administrative law context was

provided by the **Supreme Court in Baker v. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6** where it was held:

> *"The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions."*

137. The Court further emphasized that procedural fairness is flexible and entirely dependent on context. In order to determine the degree of procedural fairness owed in a given case, the court set out five factors to be considered:

> (1) The nature of the decision being made and the process followed in making it; (2) The nature of the statutory scheme and the term of the statute pursuant to which the body operates;
>
> (3) The importance of the decision to the affected person;
>
> (4) The presence of any legitimate expectations; and
>
> (5) The choice of procedure made by the decision-maker.....

140. The right to be afforded an opportunity to be heard is to be distinguished from the necessity to have an oral hearing. The procedure in such matters is aptly dealt with by Michael Fordham in Judicial Review Handbook, 4th Edn. at page 1007 as follows:

> *"procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case".*

138. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** the Court of appeal delivered itself as follows:

> *"There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed."*

139. In **Russel vs. Duke of Norfork [1949] 1 All ER at 118**, the Court expressed itself as follows:

> *"There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth.*

Accordingly, I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case."

140. Fair administrative action requires that a person against whom adverse administrative decision is to be taken, gets fair notice, information, and an opportunity to present his response.

141. In this matter, the Appellant appears not to have availed itself of all the opportunities at its disposal The Appellant stated that it would not participate in the proceedings as it was not provided with evidence against it. Further, that the 1st Respondent lacked the mandate to institute the proceedings. Also, that the correct procedure had not been followed and there were no laid down procedures for a hearing. And finally, that the 1st Respondent was biased.

142. We have , hereinabove, determined that the Appellant was supplied with all the documents that the 1st Respondent relied upon. We have also determined that the 1st Respondent followed the correct procedure as laid down in part E of the Act. We find that process does not require formal rules for it to achieve the threshold of natural justice. The Appellant was given adequate notice to rebut the evidence against it. The Appellant was also given an opportunity to be heard.

III. WHETHER THE 1ST RESPONDENT RELIED ON DOCUMENTS AND STATEMENTS OF ACCOUNTS IN RELATION TO A PERIOD PRIOR TO THE ENACTMENT OF THE BUYER POWER PROVISIONS OF THE ACT (GROUND NO 5 OF THE APPEAL)

143. The Appellant alleges that the 1st Respondent in its investigations relied on documents relating to a period prior to the enactment of the buyer power provisions in the Act.[106] However, the Appellant did not expound on this argument substantively.

144. Nevertheless, we have perused the Decision of the 1st Respondent and the documents supplied by the parties. The Buyer power provisions were introduced in the Act by Competition Amendment Act no 49 of 2016. The commencement date was 13th January 2017.

[106] Page 5, paragraph 5 of the Record of appeal.

145. The 1st Respondent in its final decision dated 4th February 2020, lists the evidentiary documents that were furnished to it by the Appellant vide letter dated 26th June 2019.[107] The said evidentiary documents furnished include Supply Agreements between the Appellant and the 2nd Respondent for the years 2016 to 2018[108] and Statements of Account for the 2nd Respondent for the period 2015 to March 2019.[109]

146. In the calculation of rebates to be refunded to the 2nd Respondent the 1st Respondent cited documents dated between 13th May 2016 and 31st March 2019.[110] In the determination of the loss arising from cost of procurement materials for exclusive use for the Appellant, the 1st Respondent cited on documents relating to November 2016 and July 2018.[111] In determination of the penalty the 1st Respondent relied on the Appellant's turnover, with respect to the sale of the 2nd Respondent's merchandise, for the year 2018.[112]

147. With respect to the calculation of rebates, we note that the 1st Respondent considered documents predating 13th January 2017.[113] We have also looked at exhibit "WK16 a" annexed to the Replying Affidavit of one Wangómbe Kariuki and note that the same includes documents dated 2016. However, in its orders the 1st Respondent only ordered a refund of rebates for the years 2017, 2018 and 2019.[114]

IV. WHETHER THE 1ST RESPONDENT ERRED IN FACT AND IN LAW BY BASING ITS DECISION ON THE BUYER POWER GUIDELINES.

148. The 1st Respondent in its decision dated 4th February 2020, states that its analysis and investigation pursuant Section 34, was guided by:

a. Section 24(2B) and (2D) of the Act

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[107] Page 292(a) paragraph 11 and page 294 paragraph 25 of the Record of Appeal.

[108] Page 294 Paragraph 25 (a).

[109] Page 294 Paragraph 25(e).

[110] Page 297, paragraph 38 and page 299 paragraph 43 (iii) (a).

[111] See page 297, paragraph 40 (b) and page 299 paragraph 43 (iii) (b)

[112] See page 298 paragraph 42 and page 299 paragraph 43 (iv).

[113] See page 297, paragraph 38

[114] Page 299 paragraph 44 iii a.

b. The Authority's Buyer Power Guidelines, and

c. Best International Practice drawn from precedents in comparable jurisdiction.[115]

149. We have looked at the rival arguments of the Appellant and 1st Respondent hereinabove. The main contention of the Appellant is that the said guidelines were not valid, as they did not comply with SIA. The main response of the 1st Respondent is that the guidelines are not a statutory instrument and therefore not subject to the SIA.

150. The resolution of this issue will largely be determined by studying the Buyer Power Guidelines made under Part III of the Act.[116] In summary, the said Guidelines first define buyer power, types of buyer power and abuse of buyer power.[117] Secondly, they highlight the factors considered and procedure employed by the 1st Respondent in determining buyer power.[118] Thirdly, they define abuse of buyer power and highlight conduct which may amount to abuse of buyer power.[119] Finally it highlights the consequences of abuse of buyer power as provided for under Section 24(3) of the Act.[120]

151. A perusal of these guidelines reveals that they are a policy document setting out standards in operations. They are basically the 1st Respondent's operation manual, aimed at ensuring consistency and uniformity, with respect to investigating and determining buyer power, and abuse of the same. They are also a source of information and education to the public in this regard. In the premises we are more inclined to agree with the 1st Respondent that they were created under the provisions of Section 8(2) and not Section 93 of the Act.

152. The distinction between these two classifications is aptly captured by Migai Akech in this excerpt:

> .... A distinction is drawn between formal rules and informal rules. On the one hand formal rules are binding legal rules such as delegated legislation- made by a minister

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[115] Page 292 (a), paragraph 12 of the Record of Appeal.

[116] Page 326 to 336 of the 1st Respondent's List and Bundle of Documents.

[117] Page 331 of the 1st Respondent's List and Bundle of Documents.

[118] Page 332 of the 1st Respondent's List and Bundle of Documents.

[119] Page 334 of the 1st Respondent's List and Bundle of Documents.

[120] Page 335 of the 1st Respondent's List and Bundle of Documents.

> or administrative body under statutory authority (in the exercise of prerogative powers). On the other hand, informal rules are non-binding rules made without express statutory authority as part of administrative powers. The general approach... is that formal rulemaking is subject to certain procedures while informal rule making is not...[121]

153. In the circumstances, it is our considered opinion that the Buyer Power Guidelines are not Statutory instruments and do not require to go through the Parliament as required by the SIA. It is important to note that informal rules and norms do many times influence the formal rules. So that what sets out as a policy, may eventually crystallize into statute.

154. We have looked at The High Court case of Tanner's Association relied upon by the Appellant. We find the same to be distinguishable and inapplicable in this case as the Buyer Power Guidelines are not legislation or statutory instruments.

V. WHETHER THE 1ST RESPONDENT ERRED INFACT AND IN LAW BY RELYING ON INTERNATIONAL BEST PRACTICES FROM OTHER JURISDICTIONS

155. The 1st Respondent in its decision dated 4th February 2020, states that its analysis and investigation pursuant Section 34, was guided by:

a. Section 24(2B) and (2D) of the Act

b. The Authority's Buyer Power Guidelines, and

c. Best International Practice drawn from precedents in comparable jurisdiction[122]

156. The Appellant argues that the 1st Respondent erred by relying on Best International practice in making its decision.[123] The 1st Respondent asserts, that one of the objects of the Act, is to bring national competition law, policy, and practice in line with international best practice.[124] Further, International Best Practice can only be discerned from comparable

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[121] Migai Akech, "The Significance of Procedures", Administrative Law, Strathmore University Press, (2016) p. 76

[122] Page 292 (a), paragraph 12 of the Record of Appeal.

[123] See paragraph 43 herein.

[124] Section 3 (g) of the Act.

jurisdictions. By studying how jurisdictions with similar provisions of law, have applied the same in execution of their mandate under their respective regimes.

157. Although international best practice is not a source of law in Kenya, we find that Kenyan Courts and administrative bodies consider decisions and practice from other jurisdictions in their decision making. Decisions from other jurisdictions do not have the force of law but are persuasive especially where local decisions and practice is not available.

158. This Tribunal notes that the Appellant is also relying on foreign decisions and practice. More specifically, we refer to items No 8 to 10 of the Appellant's list of authorities. The Appellant also refers to the Japanese Superior Bargaining Position Guidelines[125] and The Australian Competition and Consumer Commission Guidelines on Misuse of Market Power[126], amongst others. The Appellant is blowing hot and cold. Relying on foreign decisions, and practice from other jurisdictions when it suits them, and decrying application of the same by the 1st Respondent.

159. The Appellant is approbating and reprobating. **In Evans -Vs- Bartlam (1937) 2 All Er 649 at page 652** where Lord Russel of Killowen said:

> *"The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct, as where a man, having accepted a benefit given him by a judgment cannot allege the invalidity of the judgment which conferred the benefit."*[127]

160. Similarly, this Tribunal finds that it cannot entertain this ground of appeal by the Appellant as one cannot in the same breath argue for something when it suits them, and against it when is does not.

VI. WHETHER THE APPELLANT HAD BUYER POWER AND IF SO WHETHER IT ABUSED THAT POWER

161. The 1st Respondent states in its Notice of Proposed Decision that it assessed the Appellant had buyer power, in relation to the 2nd Respondent, based on the provisions of Section 24 (2B) and (2D), the Buyer Power Guidelines and international best practice.

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[125] See page 9, paragraph 56 of the Appellant's submissions.

[126] See page 6, paragraph 39 of the Appellant's submissions.

[127]

Section 24 (2B) provides:

In determining buyer power, the Authority shall take into consideration –

a) the nature and determination of contract terms;

b) the payment requested for access infrastructure; and

c) the price paid to suppliers.

Section 24 (2D) provides:

For purposes of this section, "buyer power" means the influence exerted by an undertaking or group of undertakings in the position of a purchaser of a product or service to obtain from a supplier more favorable terms, or to impose a long-term opportunity cost including harm or withheld benefit which, if carried out, would significantly be disproportionate to any resulting long-term cost to the undertaking or group of undertakings.

162. The 1st Respondent states that it conducted an analysis and determined that the Appellant had buyer Power, with respect to the 2nd Respondent, based on the following:

a. The Appellant was indispensable to the 2nd Respondent. Prior to the collapse of Nakumatt, the 2nd Respondent supplied 40% of its merchandise to Nakumatt. The Appellant took over 5 out of the 7 upmarket outlets of the Nakumatt.

b. The 2nd Respondent's products were niche. Premium products likely to be bought by well-to-do customers in the upmarket malls. Appellant was in a position to threaten or resort to alternative sources.[128]

163. The Appellant denies that it had buyer power. It faults the findings of the 1st Respondent.

a. the 40% supply to Nakumatt is not clear whether this figure comprised of Nakumatt branches in Nairobi or all branches around the country. The Appellant in any event only occupied 4 out of the 7 Nakumatt branches and these were taken up between November 2017 and December 2018.

b. The Appellant is not the only retailer in these upmarket malls and points out to the presence of Tuskys, Chandarana, Game, Naivas and Shoprite in the malls.

164. Our reading of Sections 24 (2B) and (2D) reveals that a determination of buyer power, goes hand in hand with a determination of the existence of abuse of buyer power. So that, in

[128] Page 7 of affidavit sworn by Wangombe Kariuki on 02-04-2020.

determining whether an entity has buyer power, one would have to look for offending conduct in the contract terms, payments requested for access infrastructure and in the price paid to its suppliers. In other words, the influence or power of the buyer becomes evident when the buyer engages in the offending conduct.

165. It is important to note that the Act, does not list components of buyer power. It defines buyer power by its effects[129], it directs on the where and how to look for buyer power.[130] For instance, "look in the contract" and "look at the terms of the contract, look at the price". The effect of these provisions is that we find ourselves looking at the terms of the contract to reveal if there's buyer power. By engaging in conduct which amounts to abuse of buyer power, proves there's buyer power.

166. The next logical step is to determine whether the Appellant engaged in conduct amounting to abuse of buyer power.

167. Prior to 31st December 2019, the Act did not enumerate conduct amounting to abuse of buyer power. To determine whether the Appellant's conduct amounted to abuse of buyer power the 1st Respondent relied upon the Buyer Power guidelines and international best practice from other jurisdictions.

168. In its Notice of proposed decision dated 23rd August 2019,[131] and affirmed in its final decision of 4th February 2020[132] the 1st Respondent found that the Appellant had abused buyer power by:

a. Transferring commercial risk meant to be borne by the Appellant to the 2nd Respondent.

b. Refusal to receive the 2nd Respondent's goods for reasons not attributed to the 2nd Respondent.

c. De-listing / unilateral termination of a commercial relationship without notice, or subject to an unreasonably short period and without an objectively justified reason.

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[129] Section 24 (2D) of the Act

[130] Section 24 (2B) of the Act.

[131] Page 153 of the Record of Appeal

[132] Page 291 of the Record of Appeal.

d. Application of rebates and listing /registration fees and various invoice deductions branded as discounts; and

e. Requiring the 2nd Respondent to deploy staff by providing one merchandise per store at the cost of the supplier.[133]

a. Transfer of Commercial Risk

169. The Appellant does not deny that it returned goods with a near expiry date. Rather it argues that return of goods with a near expiry date was a term agreed under the contract and is a normal business practice.

170. The Appellant argues that **The Japan Fair Trade Commission** in the Designation of Specific Unfair Trade Practices by Large-Scale Retailers Relating to the Trade with Suppliers has held that return of goods by a large-scale retailer who has purchased the goods amounts to abuse of superior bargaining power except where:

(a) the reason for the return is attributable to the supplier and the return is within a reasonable period and is of limited quantity; or

(b) the return is in accordance with the fixed conditions based on an agreement with the supplier at the time of purchasing the goods and the practice is a normal trade practice in the wholesale trade.[134]

171. During the hearing, the Appellant clarified that the purchase orders were made by the Appellant. We find that the return of unsold merchandise on account of near expiry date cannot be attributed to the 2nd Respondent. The Appellant took the risk by making the orders and it should also bear the risk of expiry arising from overstocking. Even though it was a term agreed under the contract, such conduct was on the face of it unconscionable and could only be imposed by a Party in a superior bargaining position. In the premises, we find that the Appellant's conduct in this regard constituted an abuse of buyer power.

b. Refusal to receive goods.

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[133] Page 154, part B and page 298 paragraph 43 of the Record of Appeal and

[134] Page 8, Paragraph 49 of the Appellant's Submissions.

172. The Appellant contends that it had the right to refuse to receive goods which did not comply with its specifications or were defective. However, the Appellant did not prove that any of the goods that it refused to take delivery of did not comply with its specifications. The evidence before the Tribunal was that the 2nd Respondent delivered goods according to the Appellant's LPO, but the Appellant refused to take delivery. In this regard we find that the Appellant's conduct in refusing to take delivery of goods delivered in accordance with its LPO amounted to abuse of buyer power.

c. Application of rebates and listing fees

173. The Appellant does not deny that it deducted rebates from the 2nd Respondent's invoices. It maintains that this was a normal business practice. The Appellant further argues:

In Michelin v Commission, EU:T: 2003:250,

The court stated that:

> "It follows that a rebate system in which the rate of the discount increases according to the volume purchased will not infringe Article 82 EC unless the criteria and rules for granting the rebate reveal that the system is not based on an economically justified countervailing advantage but tends, following the example of a loyalty and target rebate, to prevent customers from obtaining their supplies from competitors.[135]

Further,

> "In determining whether a quantity rebate system is abusive, it will therefore be necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, the rebates tend to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition.[136]

174. In **Australian Competition and Consumer Commission in Australian Competition and Consumer Commission Guidelines on Misuse of Market Power (ACCC Guidelines)** The ACCC Guidelines provide at paragraph 3.1.1 that:

> "Businesses are generally free to set their own sales promotions, including rebates. Rebates usually do not harm competition. In many cases, including where the firm

[135] Page 6, paragraph 37 of the Appellant's Submissions.

[136] Page 6, paragraph 38 of the Appellant's Submission.

offering a rebate has substantial market power, rebates are an example of the benefits of the competitive process, incentivizing retailers to promote the supplier's products and reducing the overall price customers pay for goods and services."[137]

175. **The Japanese Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act (Japanese Superior Bargaining Position Guidelines) (paragraph (b)** at page 29) provide as follows:

> "On the other hand, [1] in the case where a request to carry out transactions at a lower consideration or a higher consideration on the ground(s) that in the case where the request is found to be a just reflection on a difference in the trade terms, such as when goods are purchased at a lower price than usual for the purpose of purchasing a larger volume than usual (i.e., a volume discount) for conducting discount sales, etc., such act would not unjustly impose a disadvantage on the transacting party in light of normal business practices, and therefore does not cause a problem as abuse of superior bargaining position." [138]

176. We have looked at the Michelin case and note that a rebate will not be considered to be aninfringement especially where criteria of its application reveals that the system is based on an economically justified countervailing advantage. There is no evidence that the Appellant demonstrated this aspect of the rebates it applied against the 1st Respondent.

177. With respect to the loyalty rebates under the Australian guidelines above, the same are considered not harmful to competition where the firm offering the rebate has substantial market power.[139] In the case before us it is quite the opposite.

178. With respect to rebates under the Japanese Guidelines on volume discounts, we note that the provisions relied upon by the Appellant were not fulfilled. For instance, the Appellant did not show that there was a competitor intending to carry out the transactions at the prices it imposed on the 2nd Respondent.

179. It is our considered view, that the Appellant did not show and has not shown that the rebates applied in this case were freely and mutually agreed by the parties. What was clear is that

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[137] Page 6, paragraph 39 of the Appellant's submissions.

[138] Page 6, paragraph 40 of the Appellant's submissions.

[139] Page 213, paragraph 3.11 of the Appellant's List and Bundle of Documents.

the rebates imposed a disadvantage on the 2nd Respondent who responded by proposing to increase the retail prices and amending the supply agreement with the Appellant.

180. The attempt by the 2nd Respondent to increase the prices was thwarted by the Appellant. The attempt to renegotiate the terms resulted in the Appellant declining to renew the annual supply contract between the parties. We have considered:

Australian Competition and Consumer Commission – Vs- Coles Supermarket Australia PTY Ltd & Another, held that-

> "...requiring Austech to make an agreement to pay an ongoing rebate to it or GHPL, and making threats of commercial consequences to it if it did not, namely that Coles....would provide certain ranging information requested by Austech but only after Austech agreed to pay the ongoing rebate ; and would cease giving assistance to Austech from Cole's replenishers, and refusing to take into account the reasons given to Coles by Austech why the rebate would not have the benefit to it that Coles claimed,...engaged in conduct that was in all circumstances unconscionable in contravention of S. 22 as it then stood of sch 2 to the Act(Australian Consumer Law).[140]

181. From the email correspondence before us, the 2nd Respondent decried the way the Appellant was imposing terms on it in a complaint to the Association of Kenyan Suppliers. In the email of 18th February 2019, the 2nd Respondent's states , "All Carrefour wants is everything to go their way, yet they claim we are partners...".

182. We have considered the rival arguments of the parties, the law and the and the conduct of the Appellant during the negotiations leading up to the termination of the 2019 supply contract, and we do not find any evidence of a countervailing advantage for the imposition of a progressive rebate or quantity rebate. In the premises we find that the Appellant abused its power in this regard.

d. **Delisting and Unilateral termination of the supply agreement**

183. Delisting/ unilaterally terminating the supply agreement with the 2nd Respondent as seen in the email correspondence between the Appellant and 2nd Respondent over rebates where the Appellant refused to renegotiate the issue of rebates.

[140] Page 327a to 328 of the 1st Respondent's List and Bundle of Documents.

184. The last written contract between the Appellant and the 2nd Respondent is the contract dated 15/10/2017 and ran from 01/01/2018 to 31/12/2018.[141] The previous contract is dated 27/10/2016 and ran from 01/01/2017 to 31/12/2017.[142]

185. The 1st Respondent's case is that the though there was no written contract between the 2nd Respondent and the Appellant, the parties in the month of January and February 2019 continued to trade.[143]Consequently, an implied contract was created between the 2nd Respondent and the Appellant, and the Appellant could not therefore unilaterally delist the 2nd Respondent without breaching the implied contract.[144]

186. From the correspondence between the parties, it appears that the Appellant and the 2nd Respondent were still negotiating the terms of the 2019 contract in January and February 2019.[145] Sometime mid-January, the Appellant delisted the 2nd Respondent, and the 2nd Respondent could not supply its merchandise to the Appellant's shop at TRM Mall.[146]

187. It is not clear from the evidence on record when the 2nd Respondent was delisted by the Appellant. It would appear it was delisted in mid-January 2019 on one hand but continued to supply merchandise in February 2019.

188. We agree with the 1st Respondent that, in the absence of a written contract, a contract can be implied by conduct of the parties. Where a written contract expires, it is critical that neither party continues to perform any obligations if they intend that the contract truly expires. Further, where parties continue to perform their obligations, after expiry of a written contract, it is important that neither of them abruptly ceases to perform these obligations without notice to the other party.

189. In this case, however, the concept of offer and acceptance, in the months of January and February, was not clearly articulated before us. The Respondents did not supply us with satisfactory documents to conclusively prove that there was an offer and acceptance in the

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[141] Page 75 of the Record of Appeal.

[142] Page 59 of the Record of Appeal.

[143] Page 32, Paragraph 109 and 110 of the Respondent's submissions.

[144] Ibid.

[145] Pages 200 to 203 of the Record of Appeal.

[146] Page 200 of the Record of Appeal.

months of January and February. Further, there was no clear evidence on when the Appellant unilaterally terminated the contract.

190. The 1st Respondent also awarded damages to the 2nd Respondent in the sum of Kshs 130,856 for unilateral termination being cost of procurement of material for exclusive use for the Appellant.

191. We have looked at the dates of the invoices used in support of these damages and the latest is dated 6th July 2018.[147] According to the 1st Respondent this was to top up material for use in 2019.[148] In our view there is no correlation between costs incurred in June 2018 in anticipation of a contract in 2019. On the contrary, the conduct of the parties had been that contracts for a certain year were signed in October of the preceding year.[149] If the top up had been made in 2019 pursuant to the conduct of the Appellant in 2019, then the damages would be acceptable. If the top up had been done in 2018 after execution of the 2019 contract it would similarly be acceptable. However, in the present case, the 2nd Respondent incurred costs in 2018 for the year 2019 with no promise of a contract in 2019.

e. Deployment of Merchandisers to Appellant's stores.

192. The 1st Respondent posits that requirement by the Appellant to have the 2nd Respondent post staff members to the Appellant's shop is a transfer of cost from the Appellant to the 1st Respondent.[150] According to the 1st Respondent, this was an onerous term of the contract. No further expansion on how this was onerous was provided by the 1st Respondent. The Replying affidavit sworn by Wangómbe Kariuki is conspicuously silent on the matter.

193. The Appellant cites the Japanese Superior Bargaining Position Guidelines:

> In some cases, a manufacturer or a wholesaler, upon the request of a retailer such as a department store or a supermarket, dispatches employees, etc. for selling, etc. goods manufactured or supplied by the said manufacturer or wholesaler. Such dispatch of employees, etc. could be advantageous at times, such as allowing the manufacturer or wholesaler to directly ascertain the trend of consumer needs or allowing the retailer to supplement a lack of knowledge about the goods. When employees, etc. are dispatched by the

[147] Page 297 paragraph 40.a of the Record of appeal.

[148] Page 298, paragraph 40.a of the Record of Appeal.

[149] Pages 59 and 75 of the Record of Appeal.

[150] Page 27, paragraph 88 of the 1st Respondent's submissions.

> free will of the transacting party within the scope of the direct benefit to be acquired by such dispatch, the request for such dispatch would not unjustly impose a disadvantage on the transacting party in light of normal business practices, and therefore does not cause a problem as abuse of superior bargaining position. The same applies when a entrepreneur has made an agreement (Note 14) regarding the conditions for the dispatch of employees, etc. in advance with the transacting party, and pays the expenses normally required for such dispatch..."[151]

194. Where it is clear that the terms and conditions of the dispatch are clear and the costs of the dispatch can be calculated in advance then a countervailing disadvantage will not arise.[152]

195. We have looked at the sample supply agreement between the Appellant and the 2nd Respondent and we find that the terms of posting the staff were clear.[153] We have also considered the letters from different suppliers being exhibit HM-2 attached to Hichem Mefaredj's Affidavit dated 24th November 2020. In view of the foregoing, we do not find that the request so post merchandisers at the Appellant's outlets constituted abuse of buyer power.

196. Based on the foregoing, this Tribunal finds that the Appellant had buyer power with relation to the 2nd Respondent. Further, the Appellant abused this buyer power. This is seen in:

a. the standard agreements which it was not prepared to renegotiate with the 2nd Appellant.

b. The onerous terms in contracts in form of rebates and listing fees, transfer of commercial risk.

c. refusal to take delivery of goods delivered as per the LPO.

d. the ease with which the Appellant declined to renew the 2nd Respondent's contract; and

e. the apparent distress of the 2nd Respondent (from the emails) when the Appellant refused to renew the 2nd Respondent's supply contract in 2019.

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[151] Page 236, paragraph B, of the Appellants list and bundle of documents.

[152] Page 237, Paragraph (2) of the Appellant's List and Bundle of documents.

[153] Page 83, paragraph 11, of the Record of Appeal.

197. In conclusion, by virtue of the evidence before this Tribunal, including but not limited to the Complaint made by the 2nd Respondent, the documents submitted to the 1st Respondent by the 2nd Respondent and the Appellant, the submissions made by the Appellant to the 1st Respondent, the correspondence between the Appellant and the 2nd Respondent, , the provisions of the Competition Act, 2010, and the process adopted by the 1st Respondent in investigating, making its preliminary and final finding, we are of the considered view that the 1st Respondent's finding, that the Appellant abused buyer power was based in evidence and the law.

VII. WHETHER THE 1ST RESPONDENT'S ORDERS WERE UNREASONABLE AND ABSURD WITH RESPECT TO:

a. **the Blanket Order for the amendment of all offending clauses in all the Appellants' supplier Agreements.**

198. In its decision the 1st Respondent ordered:

> All current supply agreements of the appellant relating to its Carrefour Hypermarkets in Kenya be amended forthwith within sixty (60) days of service of the order to expunge all offending provisions, specifically clauses that provide for, lead to or otherwise facilitate abuse of buyer power, including but not limited to the: (a) application of listing fees; (b) application of rebates; (c) requirement on suppliers to post staff to Carrefour Hypermarket stores save in circumstances as shall be approved by the 1st respondent; (d) transfer of commercial risk by return of delivery save in circumstances as shall be approved by the 1st respondent; (e) refusal to accept delivery except in circumstance as shall be approved by the Authority; and (d) unilateral delisting of suppliers."[154]

199. The Appellant is aggrieved by this order on the grounds that it is unjustifiable to direct the amendment of contracts with 700 suppliers without first assessing the relevant circumstances of the specific agreements. Further, that the other suppliers have not complained, and the 1st Respondent should in any event allow the Appellant to make representations on each of the Agreements before the amendments.

200. It is the considered opinion of the Tribunal that the consent of the other suppliers is immaterial. A violation under the Act cannot be excused on grounds of consent. The mandate of the 1st Respondent is to promote and enforce compliance with Act.[155] If there is

[154] Page 298, paragraph 43 i of the Record of Appeal.

[155] Section 9 (1) (a) of the Act.

conduct constituting a violation of the Act, the Authority is within its mandate to rectify the same. There is no consent to an illegality.

201. The Appellant argues that some contracts are with dominant suppliers and they should be considered separately. We note that the orders of the 1st Respondent relate to contracts with "offending provisions", and clauses which lead or facilitate abuse of buyer power". It is our understanding that contracts with parties of equal or greater bargaining power were not contemplated in these Orders as "Buyer Power" would not arise. Consequently, such contracts would not offend the provisions of the Act or the orders of the 1st Respondent.

b. the requirement for prior approval from the 1st Respondent before rejecting delivery of goods from suppliers.

202. The Appellant argues that it receives more than 700 deliveries a day across its branches. It would be impractical to seek the 1st Respondent's approval prior to rejecting every delivery it considers defective. The 1st Respondent seeks to approve every rejection of a delivery. The refusal to take delivery of goods is a buyer's right under the law of contract. This Tribunal appreciates that there are deliveries which will conform with the contract and others which will not. This being a commercial contract, it is best to leave that for the parties to assess. In any event, after the 2019 amendments to the Act, refusal to accept goods which is not justified is an offence under the Act.[156]

Conclusion

203. In the end, this Tribunal finds that the 1st Respondent had power and authority to investigate into abuses of Buyer power prior to 31st December 2019.

204. The Appellant herein was accorded a fair trial. The Appellant was provided with information upon which the 1st Respondent relied upon to make its decision. The Appellant was afforded an opportunity to present its case. The 1st Respondent conducted the investigations and subsequent proceedings in accordance with the procedures laid down in law. The 1st Respondent relied on relevant documents in its investigation and decision. Further, the formula used in calculation of the damages and penalty were disclosed.

[156] Section 24A Rule 5(c).

205. The 1st Respondent did not err in relying upon the Buyer Power Guidelines and International Best Practice.

206. The Appellant had buyer power in relation to the 2nd Respondent. The Appellant abused that power through the application of rebates, the refusal to accept delivery of goods delivered in accordance with LPO specifications and in transfer of Commercial risk.

207. There was no proof that the Appellant unilaterally terminated a 2019 supply agreement with the 2nd Respondent. There was no proof that Appellant influenced the 2nd respondent's decision in incurring the cost of material to be used for the Appellant's orders.

208. There was no proof that in requiring the posting of merchandising staff to its shops the Appellant had abused buyer power.

209. The blanket amendment of supply agreements is justifiable and necessary to bring these agreements within the requirements of the law. In any event, this is now inevitable pursuant to the 2019 Amendments to the Act at Section 24A (5).

210. With respect to requiring approval from the 1st Respondent before rejecting deliveries, we find this is not necessary and would be cumbersome. The conduct of the parties should be guided by the law of contract in this regard. That notwithstanding, this conduct is already contemplated by the recent amendments to the Act, namely Section 24A (5) (c) and any aggrieved party should be free to resort to the same.

G. ORDERS.

211. In a claim for

I. A declaration that the 1st Respondent did not have any legal power of authority to conduct an investigation into abuse of buyer power for any period prior to 31 December 2019.

II. The 1st Respondent's process of conducting investigations violated the provisions of Section 31 of the Competition Act, 2010.

III. The 1st Respondent's investigation into the complaints raised by the 2nd Respondent was unlawful, null and void for failing to follow due process and adhere to the constitutional edicts of fair administrative action and a fair hearing as guaranteed under Articles 47 and 50 (1) of the Constitution of Kenya, 2010.

IV. The 1st Respondent's decision contained in its letter of 4 February 2020 be set aside.

V. The Respondents to bear the costs of this appeal.

213. It is hereby Ordered and/or Declared

1. Prayers number I, II and III are hereby dismissed.
2. Prayer number IV partially succeeds, and the 1st Respondent's decision dated 4th February 2020 is hereby modified as follows:

    i. The Appellant shall amend all current supply agreements relating to its Carrefour Hypermarkets in Kenya within the next thrity (30) days hereof with a view to expunging all offending provisions, specifically clauses that provide for, lead to or otherwise facilitate abuse of buyer power, including but not limited to the:

        a) application of listing fees,

        b) application of rebates,

        c) transfer of commercial risk to the supplier, and

        d) unilateral delisting of suppliers·

    ii. The requirement for the 1st Respondent's prior approval before rejecting delivery of goods by the Appellant from suppliers is hereby set aside.

    iii. The requirement for the 1st Respondent's prior approval before deployment of merchandisers to the Appellant's stores is hereby set aside.

    iv. The Order to pay to the 2nd Respondent the sum of Kenya Shillings One Hundred and Thirty Thousand, Eight Hundred and Fifty-Six (K.Shs. 130,856) for loss arising from unilateral termination of the supply agreement for the year 2019, being cost of procurement of material for exclusive use for the Appellant's orders is hereby set aside.

3. The Order for the refund of rebates deducted from invoices of the 2nd Respondent for the years 2017, 2018 and 2019 amounting to Kenya Shillings Two Hundred and Eighty-Nine Thousand, Four Hundred and Eighty-Two (K.Shs. 289,482), as set out in the Appellant's written statements of accounts for those years is hereby upheld and the same is to be paid within the next 30 days hereof.

4. The Order for the payment of financial penalty of ten percent (10%) of the Appellant's gross annual turnover in Kenya from its Carrefour Franchise from the sale of Cool Fresh Yoghurts for the year 2018 in the sum of Kenya Shillings One Hundred and Twenty-Four Thousand, Seven Hundred and Sixty-Eight (K.Shs. 124,768) is upheld the same to be paid within the next 30 days hereof.

5. Each Party shall bear its own costs.

DATED at NAIROBI this ....20th....day of....April....2021

DELIVERED at NAIROBI this ....20th....day of....April....2021

DANIEL OGOLA
CHAIRPERSON

DR. DESTAINGS NYONGESA
MEMBER

VALENTINE MWENDE
MEMBER

REBECCA MOGIRE
MEMBER

I certify that this is a true copy of the original

SECRETARY/CEO

COMPETITION TRIBUNAL

3. The Order for the refund of rebates deducted from invoices of the 2nd Respondent for the years 2017, 2018 and 2019 amounting to Kenya Shillings Two Hundred and Eighty-Nine Thousand, Four Hundred and Eighty-Two (K.Shs. 289,482), as set out in the Appellant's written statements of accounts for those years is hereby upheld and the same is to be paid within the next 30 days hereof.

4. The Order for the payment of financial penalty of ten percent (10%) of the Appellant's gross annual turnover in Kenya from its Carrefour Franchise from the sale of Cool Fresh Yoghurts for the year 2018 in the sum of Kenya Shillings One Hundred and Twenty-Four Thousand, Seven Hundred and Sixty-Eight (K.Shs. 124,768) is upheld the same to be paid within the next 30 days hereof.

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DANIEL OGOLA
CHAIRPERSON

DR. DESTAINGS NYONGESA
MEMBER

VALENTINE MWENDE
MEMBER

REBECCA MOGIRE
MEMBER

I certify that this is a true copy of the original

SECRETARY/CEO

COMPETITION TRIBUNAL

20th APRIL 2021.

COMPETITION TRIBUNAL
P. O. Box 30041-00100,
NAIROBI