IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO 31 OF 2010

(Rugazia, Kaduri, and Juma, JJJ.)

IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA OF 1977, Cap 2 R.E. 2002, ARTICLES 30 (3), (4) and (5)

AND

IN THE MATTER OF THE BASIC RIGHTS AND DUTIES ENFORCEMENT ACT, Cap 3 R.E. 2002, SECTIONS 5, 6, 8 and10 (1)

AND

IN THE MATTER OF THE FAIR COMPETITION ACT NO 8 OF 2003, SECTION 69 (1)

AND

IN THE MATTER OF FAIR COMPETITION (THRESHOLD OF NOTIFICATION OF A MERGER) ORDER 2006

AND

IN THE MATTER OF THE PETITION

BETWEEN

TANZANIA CIGARETTE COMPANY LTD..... PETITIONER

AND

1. THE FAIR COMPETITION COMMISSION.... 1ST RESPONDENT
2. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

JUMA, J:

This judgment arises from a Petition by the Tanzania Cigarette Company, a body corporate governed by the laws of Tanzania and hereinafter referred to as "the Petitioner". The Petitioner is seeking several declaratory orders of this Court revolving around the contention that section 69 (1) of the **Fair Competition Act No. 8 of 2003 (hereinafter referred to as "FCA")** is unconstitutional in so far as this provision denies the Petitioner:

(1) its right to be protected and its rights determined by the courts of law or other state agencies established by or under the law [**Article 13 (3)**],

(2) its right to a fair hearing, and to appeal [**13 (6) (a)**],

(3) its right not to be punished for any act, which at the time of its commission; that act was not an offence under the law [**Article 13 (6) (c)**], and

(4) its right to own property, and to the protection of its property it holds in accordance with the law [**Article 24 (1)**].

This Petition was drawn and filed by Marando, Mnyele & Co. Advocates. Apart from Mr. Marando and Mr. Mnyele, two other learned counsel from South Africa, Mr. Jerome Unterhalter SC and Mr. Jerome Wilson also appeared on behalf of the Petitioner. Mr. Unterhalter and Mr. Jerome had earlier applied and were accorded a special admission by Hon. the Chief Justice of Tanzania to practice as Advocates in Tanzania for the purpose of this Petition. Hon. Chief Justice of Tanzania extended this dispensation under section 39-(2) of the **Advocates Act, [Cap. 341 R.E. 2002]**.

The Petitioner has cited the Fair Competition Commission (hereinafter referred to as "the FCC") as the 1st Respondent and the Honourable Attorney General (hereinafter referred to as "the Attorney General") as the 2nd Respondent. Mr. Nyenza and Dr. Fred Ringo are two learned Counsel who appeared on behalf of the FCC in this Petition. Ms. Mwaipopo and Ms Matiku, the learned Senior State

Attorneys have on various occasions appeared on behalf of the Attorney General.

The FCC is a statutory body that is established under section 62 of the FCA to perform several functions that include to administer and to ensure compliance with the FCA. The Petitioner brought this Petition under Articles 30 (3), (4) and (5) of **Constitution of the United Republic of Tanzania of 1977, Cap 2 R.E. 2002** and sections 5, 6, 8 and 10 (1) the **Basic Rights and Duties Enforcement Act, Cap 3 R.E. 2002**.

Facts leading up to this Petition are discernible from the pleadings and from the written submissions. The Petitioner claims that on or about 12th July, 2005 it received a communication from Iringa Tobacco Company Limited (hereinafter referred to as "ITC") inquiring as to whether the Petitioner would be interested to purchase specified assets belonging to the ITC. According to the Petitioner, the ITC was contemplating to leave its cigarette manufacturing business and offered to sell its assets to the Petitioner. Finally, the ITC agreed to dispose of its assets at the consideration of US$ 3.6 Million. Prior to the execution of its agreement with the ITC, the petitioner claims that

it consulted the Dar es Salaam Stock Exchange (hereinafter referred to as "DSE") who endorsed the transaction. To ensure that the transfer of assets and entire transaction remained within the requirements of the law, the Petitioner sent its legal officer and also engaged a law firm, the Law Associates Advocates, to follow up on the FCC to establish whether the proposed transaction between the Petitioner and the ITC was objectionable under the terms of the FCA. Mr. Vintan Willgis Mbiro, the Director of Legal Affairs of the Petitioner and Mr. Sam Allen Mapande of the Law Associates Advocates were the two learned Advocates who made inquiries, follow-ups and consultations with regulatory bodies.

The Petitioner claims that after these consultations with regulatory bodies, the Petitioner had by 17th September 2005 been satisfied that its transaction with the ITC was in accordance with the law and was not notifiable under the FCA. The Petitioner further believed that it was acting within the law because the thresholds for the notification of mergers [the **Fair Competition (Threshold for Notification of a Merger) Order, 2006**] made under section 11 (2) of FCA had not yet been published. This Order was only published in the

Government Gazette on 19th January 2007 and was made to operate retrospectively from 10th March 2006. The Petitioner avers that at the time of its transaction with the ITC, the Commissioners of the FCC were not yet appointed so as to constitute a formal FCC in terms of section 62 (6) of the FCA. The Petitioner insists that by the time these Commissioners of FCC were appointed on 24th November 2005, the Petitioner and the ITC had already concluded their transaction of 17th September 2005. Further, the Petitioner believes that under the circumstances the Petitioner did not breach the FCA since the 2006 notification of mergers order is null and void because it was made to operate retrospectively and infringed the Constitution.

Records show that the Division of Compliance of the FCC prepared a Complaint Number 1 of 2008 against the Petitioner. Dated 24th June 2008, FCC is in this complaint accusing the Petitioner that:

> *"with intention to strengthen their place of dominance, TCC* ***[the Petitioner]*** *knowingly and wilfully acquired assets, brands and existing stock of finished products of ITC and by doing so TCC led to closure of business of the competitor and so strengthened the position*

of dominance in cigarette market contrary to the provisions of the FCA."- **With added emphasis-page 3, paragraph 14 of Complaint No 1 of 2008.**

On 22 July 2008 the Advocate for the Petitioner filed a Reply to Complaint Number 1 of 2008 containing preliminary points of objections. The objecting Petitioner was basically contending that the transaction between the Petitioner and the ITC was not notifiable since no threshold for mergers had been published at the time envisaged by section 11 (2) of the FCA. Even when the thresholds were eventually published, the Petitioner contended that they were made effective only from 10 March 2006. The Petitioner also pointed out to the FCC that the Commissioners of the FCC had not been appointed at the time the transaction between the Petitioner and ITC was negotiated and concluded between July and September of 2005. And in so far as its Constitutional rights were concerned, the Petitioner in its objection pointed out that the exercise of FCC's accusatory and adjudicative powers infringes some of the rights of the Petitioner guaranteed under the Constitution.

The Ruling on the Preliminary Objections was delivered the FCC on 14th January 2010. It was delivered by a Panel made up of Nikubuka P. Shimwela (Chairman), Itika Hilda Mafwenga (Commissioner), Godfrey E. Mkocha (Commissioner) and Geoffrey E. Mariki (Commissioner). In its Ruling, the Panel overruled all the preliminary objections which the Petitioner had raised, and further ordered the hearing of the Complaint No. 1 of 2008 to proceed on merit on a date to be noticed. The Panel explained to the objector (the Petitioner) its right of appeal. On 15th April 2010 the Petitioner filed this Petition.

The Petitioner believes that in making this finding, the FCC made itself a Judge in its own cause thereby infringing Article 13 (6) (a) of the Constitution. According to the Petitioner, its right to fair hearing under article 13 (3) and (6) was further infringed when the FCC invited the Petitioner for a hearing and proceeded to determine the preliminary objections raised by the Petitioner in FCC's favour.

The version narrated in support of the Petitioner was strongly disputed by the FCC and the Attorney General. These two respondents have contended that it is not true as contended by the

Petitioner, that it was the ITC who originated the initiative to transact with the Petitioner. Rather, respondents believe, it was the Petitioner who pressurized the ITC into the transaction and the takeover. The FCC and the Attorney General maintain that Petitioner was obliged to seek prior sanction of the FCC before completing its transaction with the ITC. Respondents are in no doubt that at the time when the Petitioner transacted with ITC, FCC was not only notionally established but was already operational since May 2004 and FCC already had a Director General responsible for day to day operations of the FCC. The Attorney General pointed out that the Commissioners of FCC were appointed on 6th July 2005 which was long before the transaction between ITC and Petitioner was purportedly executed on 17th September 2005. The Attorney General also observed that since FCC as a body corporate and had been in operation since 2004 when the FCA came into operation, the transaction was statutorily notifiable whether the **Fair Competition (Threshold for Notification of a Merger) Order, 2006** was published or not.

On the claim that the transaction between the Petitioner and ITC had received the blessing of the DSE, the Attorney General casts

doubt whether indeed the Petitioner received any regulatory approval from the DSE. Further doubt is cast on the authenticity of exhibit P5 evidencing the approval the Petitioner purportedly obtained from the DSE. The Attorney General contends that there is no proof that this exhibit P5 originated from the DSE.

Regarding the claim that section 69 (1) of the FCA has combined and concentrated on the FCC, both accusatory and adjudicative powers in respect of the same complaint, the FCC replied that within the FCC, the accusatory and adjudicative powers are exercised separately and the exercise of these powers under section 69 (1) of the FCA does not contravene Article 13 (6) of the Constitution. The FCC pointed out that its findings in Complaint Number 1 of 2008 and the punishment it proposed, were not final and conclusive decision of the FCC. Responding to the claim that it lacks impartiality and independence, the FCC stated that the forum in which the complaints are initiated is impartial, independent and does not involve single individual or single department within the FCC which both initiates and decides the complaints.

Like the FCC, the Attorney General also disputes the contention that the exercise of the power of the FCC under section 69 (1) of the FCA infringes Article 13 (6) (a) of the Constitution on the reason that such powers include both accusatory and adjudicative powers in respect of the same complaint. The Attorney General further disputes the contention that exercise of the power of FCC under section 69 (1) of the FCA infringes Article 13 (6) (a) of the Constitution requiring the separation of accusatory and adjudicative powers.

As we have suggested above, the Petitioner would like this Court to grant the following declarations:

(a) That section 69 (1) of the FCA is unconstitutional.

(b) That the initiation of the Complaint by the FCC before itself, the subsequent prosecution of the same, the determination of the preliminary objection and the intended hearing of the complaint is unconstitutional.

(c) That the FCC has no jurisdiction to determine Complaints initiated by itself infringes Article 13 (3) of the Constitution.

(d) That the retrospective application of the **Fair Competition (Threshold for Notification of a Merger) Order of 2006** contravenes Article 13 (6) (c).

(e) That the conduct of the FCC insofar as it intends to deprive the Petitioner of its proprietary rights, contravenes Article 24 (1) of the Constitution.

(f) That the Petitioner is not punishable by fine or by any other sanction under the FCA since it did not breach any provision of this Act.

(g) That the ongoing prosecution or proceedings against the Petitioner by the FCC based as it is on an impugned transaction is unconstitutional.

(h) That the FCC pays and refund all the costs incurred by the Petitioner, including costs for local and foreign counsel engaged to prosecute this petition.

Paragraph 3 of the petition with its eleven (11) sub-paragraphs contains the material part of the grounds upon which the Petitioner now seeks redress from this court. Looked at closely, the eleven (11) sub-paragraphs may be conveniently summarized to disclose two

major areas of grievance. Firstly, the Petitioner is aggrieved by the way the FCC exercised its statutory powers under section 69 of the FCA. Subsection (1) of section 69 allows the Commission to initiate a complaint against an alleged prohibited practice, and at the same time it also allows any person under subsection (2) to submit to the Commission a complaint against an alleged prohibited practice. By concentrating both the accusatory and adjudication powers on the Commission, the Petitioner believes that section 69 (1) creates a situation in which it is the Commission that investigates an alleged prohibited practice, then prepares and files a Complaint before itself, prosecutes the Complaint before itself and goes on to adjudicate over the same Complaint. This, according to the Petitioner infringes the Petitioner's fundamental right to a fair hearing provided under Article 13 (6) (a) of the Constitution. Apart from infringing the principles of fair hearing, the Petitioner further believes that by initiating a Complaint and proceeding to hear and adjudicate it, the Commission became partial and unqualified to determine the Complaint within the meaning provided by Article 13 (3) of the Constitution.

The second area of grievance relates to the allegation that the Petitioner is being punished for an act which was neither an offence nor illegal when it was committed. In this second area of grievance, the Petitioner is not satisfied with the Complaint No. 1 of 2008 which the FCC filed against the Petitioner accusing the Petitioner of failing to notify a transaction thereby contravening section 11 (2) of the FCA read together with the **Fair Competition (Threshold for Notification of a Merger) Order of 2006**. In so far as the 2006 Order on threshold for notification of a merger was made to apply retroactively, the Petitioner believes that it contravenes Article 13 (6) (c) of the Constitution.

Paragraph 4 of the petition identifies specific provisions of the Constitution which the Petitioner believes have been infringed with respect to its rights. The Petitioner believes that its right to be protected and the right to have its rights determined by courts or agencies established by or under the law has been violated. The Petitioner also in paragraph 4 of its petition claims that the FCC has infringed its right to a fair hearing guaranteed under Article 13 (6) (a). Similarly, the Petitioner in paragraph 4 of its petition identifies its

right not to be punished for an act which at the time of its occurrence was not an offence. This, according to the Petitioner infringes its right that is guaranteed by Article 13 (6) (c) of the Constitution. The Petitioner in paragraph 4 of the petition also believes that its right to own property as guaranteed under Article 24 has also been infringed by the FCC.

On behalf of the Petitioner, Marando, Mnyele & Co. Advocates, and David Unterhalter SC and Jerome Wilson filed the written submissions on 29 August 2011. For the respondents, the Attorney General's Chambers filed replying written submissions on 30th September 2011.

The Attorney General has in his written submissions urged us to first determine two preliminary issues, which according to the Attorney General, bears on the question whether this Court has jurisdiction to entertain this Petition. First preliminary jurisdictional issue is whether the Petitioner, as a body corporate has the status/standing to claim protection of rights through the avenue of **Basic Rights and Duties Enforcement Act**. The Petitioner in the introductory paragraphs 1.2 to 1.5 of its written submissions believes

that corporate entities like the Petitioner is, are "persons" within the meaning ascribed by both the **Basic Rights and Duties Enforcement Act** and the definition of a "person" under section 4 of the **Interpretation of Laws Act, Cap. 1 R.E. 2002**.

The second preliminary jurisdictional issue according to the Attorney General is whether the Petitioner ought to have exhausted available remedies before filing this Petition under the **Basic Rights and Duties Enforcement Act.** On the exhaustion of the remedies available under the FCA, the Attorney General submitted that Complaint No. 1 of 2008 against the Petitioner is still pending and no final decision has been made out of that complaint. Further, the Attorney General submitted that instead of coming to this Court by way of the **Basic Rights and Duties Enforcement Act**, the Petitioner should have first resorted to sections 61 (3) and (4) of the FCA which provides an avenue to appeal to the Fair Competition Tribunal against the decisions of FCC. The relevant provisions state:

> *Section 61 (3)- Any person that has a pecuniary and material grievance arising from a decision of the Commission other than a decision referred to in sub-section (1) may appeal to the Tribunal for review of the decision*

within 28 days after the notification or publication of the decision.

The Attorney General contends that the Petitioner, who has expressed an opinion that the FCC has no jurisdiction to determine Complain Number 1 of 2008 should have waited until the matter was finally determined by the FCC and exercise its right of appeal to the Fair Competition Tribunal (hereinafter referred to as "FCT") established under Part XI of the FCA. The Attorney General submitted that section 61 (4) (d) of the FCA identifies grounds of appeal which the Petitioner should have employed to lodge its appeal to the FCT. Amongst the grounds include one contesting jurisdiction of FCC which reads:-

61 (4) - The grounds for an appeal under sub-section (3) shall be that:

(a)....
(b)...
(c)...
(d) the Commission did not have power to make the determination.

The Attorney General also submitted that the duty on the Petitioner to first exhaust other available remedies is underscored by section 8 (2) of the **Basic Rights and Duties Enforcement Act.**

According to the Attorney General, the language of this provision is categorical that the High Court shall not exercise its powers under this section if it is satisfied that there are adequate means available to the Petitioner under any other law, for redressing the contravention that is alleged in the petition. Section 8 (2) in addition to the requirement to exhaust other available remedies, also prohibits the High Court from exercising its powers under the **Basic Rights and Duties Enforcement Act** if it is satisfied that the petition is merely frivolous or vexatious. It is the contention of the Attorney General that the Petitioner should have sought first redress under the FCA instead of petitioning this Court under the **Basic Rights and Duties Enforcement Act**.

From the foregoing submissions of the learned Counsel on preliminary jurisdictional issues, we are of the considered opinion that we should first determine the jurisdictional issue regarding the availability of adequate means of redress before we move on to decide other grounds of this petition. This preliminary issue of availability of means of redress also concerns the question whether, having subjected itself to the jurisdiction of the **FCA** when the Petitioner replied to the

Complaint Number 1 of 2008, the Petitioner can abandon the procedures prescribed under FCA to seek remedies available under the **Basic Rights and Duties Enforcement Act**. We must point out here that the Petitioner did not offer submissions to explain why it did not pursue the Complaint Number 1 of 2008 through the Fair Competition Commission (FCC) and subsequent appeal to the Fair Competition Tribunal (FCT) as is provided under the **Fair Competition Act, 2003**.

In our determination of the preliminary albeit jurisdictional issue, we shall continue to seek guiding principles from the decisions of High Court and those of the Court of Appeal of Tanzania, which have interpreted the provisions of the Constitution. For example, it is now settled law that until the contrary is proved, a piece of legislation or a provision in a statute shall be presumed to be constitutional. The Court of Appeal in **Julius Ndyanabo vs. Attorney General [2004] TLR 14**, regarded it as a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative not inoperative. We have noted that the Petitioner is asking this court to declare to be unconstitutional

the provisions of section 69 (1) of FCA on the reason that it infringes the Petitioner's right to fair hearing, right of appeal and right not to be punished for an act that was not an offence when it was committed.

Apart from the principle of constitutionality of Acts of Parliament, we think, law in Tanzania is also the settled on the principle that litigants should first exhaust other lawfully available remedies under statutory or case law, before they can seek remedies under the **Basic Rights and Duties Enforcement Act**. This principle of resorting to lawfully available remedies before seeking basic rights remedies complements the principle of constitutionality of Acts of Parliament. The duty to exhaust other lawfully available remedies before resorting to basic rights and duties remedies is borne out from our reading of sections 4 and 8 (2) of **Basic Rights and Duties Enforcement Act**. Section 4 of the **Basic Rights and Duties Enforcement Act** in essence restates the position of law that is also articulated under subsection (2) of section 8. We think that these provisions exhort litigants to first exhaust other lawfully available remedies before seeking remedies under the **Basic Rights and Duties Enforcement Act**.

Section 8 (1) of the **Basic Rights and Duties Enforcement Act,** read together with section 4, gives this court original jurisdiction to hear and determine any application made by any person who alleges that any of the provisions of sections 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him. The relevant section 8 provides:

> *8.-(1) The High Court shall have and may exercise original jurisdiction-*
> *(a)-to hear and determine any application made by any person in pursuance of section 4;*
> *(b)- to determine any question arising in the course of the trial of any case which is referred to it in pursuance of section 6, and may make such orders and give directions as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions of sections 12 to 29 of the constitution, to the protection of which the person concerned is entitled.*
>
> *8-(2) The High Court shall not exercise its powers under this section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law, or that the application is merely frivolous or vexatious.*

In our interpretation, subsection (2) of section 8 suggests that recourse to provisions of the **Basic Rights and Duties Enforcement Act** is not to be resorted to where there are other adequate means of

redress available to a potential petitioner. Subsection (2) of section 8 of the **Basic Rights and Duties Enforcement Act** provides that the jurisdiction of High Court is not to be exercised if the High Court is satisfied that adequate means of redress are or have been available to the person concerned under any other law, or that the application is merely frivolous or vexatious. In fact, this interpretation of section 8 of the **Basic Rights and Duties Enforcement Act** gives effect to the presumption of constitutionality of statutory provisions. This means that the reliefs and remedies available under the **Fair Competition Act, 2003** are as constitutional as reliefs and remedies that are available under the **Basic Rights and Duties Enforcement Act.**

Section 4 of the **Basic Rights and Duties Enforcement Act** underscores what subsection (2) of section 8 by providing:

> *"4. - If any person alleges that any of the provisions of sections 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him, he may,* ***without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress. [Emphasis provided]***

For purposes of this petition before us, the words **"without prejudice to any other action with respect to the same matter that**

is lawfully available" in above-cited section 4 of the **Basic Rights and Duties Enforcement Act** imply that the Petitioner should have exhausted the forum of being heard in **Complaint Number 1 of 2008,** and thereafter exhaust an appeal to the Fair Competition Tribunal under section 61 of the **Fair Competition Act, 2003**. These forums are lawfully available to the Petitioner and the Petitioner should have taken them up before resort to the forums under the **Basic Rights and Duties Enforcement Act**.

The words **"without prejudice to any other action with respect to the same matter that is lawfully available"** appearing in subsection (2) of section 8 were exhaustively discussed in a persuasive decision of the Privy Council decision in **Jaroo *vs.* Attorney General of Trinidad & Tobago [2002] UKPC 5** by a Panel of five Law Lords- (Lord Hope of Craighead, Lord Browne-Wilkinson, Lord Scott of Foscote, Sir Christopher Slade and Sir Andrew Leggatt).

The case of **Jaroo *vs.* Attorney General of Trinidad & Tobago (supra)** provided the Privy Council with an occasion to determine whether a litigant can bring his case by way of a constitutional motion to the High Court where his vehicle was unlawfully impounded by the

police. In October 1987 a motor car which the appellant had recently purchased in good faith was suspected by the licensing authorities of being a stolen vehicle. On their instructions he took the motor car to the police so that they could examine it and conduct such inquiries into its theft as they thought appropriate. After the Police had failed to return his vehicle, he took his case by way of a constitutional motion to the High Court. He was unsuccessful, as the vehicle had still not been returned to him. Fourteen years later, a dispute which ought to have been resolved much earlier was subject of an appeal as of right to the Judicial Committee of the Privy Council.

It was observed that the appellant's case for the return of his vehicle was capable of being dealt with relatively simply in the ordinary courts in Trinidad & Tobago by means of processes which were available to him under the common law. Appellant's plea for return of his vehicle had been complicated by the fact that he chose to apply instead by way of an originating motion under section 14 of the **Constitution of the Republic of Trinidad & Tobago 1976** to the High Court. The question whether it was appropriate for him to assert his constitutional rights in a case of this kind was at the heart of his

appeal to the Judicial Committee of the Privy Council. The Privy Council applied the provisions of section 14 (1) of the **Constitution of the Republic of Trinidad & Tobago of 1st August 1976** which provides,

> *14.-(1) - For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him,* ***then without prejudice to any other action with respect to the same matter which is lawfully available,*** *that person may apply to the High Court for redress by way of originating motion.* **[Emphasis provided]**

The words ***"without prejudice to any other action with respect to the same matter which is lawfully available,"*** in section 14 (1) of the **Constitution of Trinidad and Tobago** are in *pari materia* with the words ***"without prejudice to any other action with respect to the same matter that is lawfully available,"***- under section 4 of the **Basic Rights and Duties Enforcement Act**. Interpretation of these words by the Privy Council in the case of **Jaroo *vs.* Attorney General of Trinidad & Tobago (supra)** is of immense persuasive value to our own understanding of the significance of these

words in section 4 of the **Basic Rights and Duties Enforcement Act** of Tanzania. In paragraph 29 of its decision, the Privy Council stated:

> *Nevertheless, it has been made clear more than once by their Lordships' Board that* ***the right to apply to the High Court which section 14(1) of the Constitution provides should be exercised only in exceptional circumstances where there is a parallel remedy****. In* ***Harrikissoon v Attorney General of Trinidad & Tobago*** *[1980] AC 265, 268, Lord Diplock said with reference to the provisions in the Trinidad & Tobago (Constitution) Order in Council 1962:-*
>
> > *The notion that* ***whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious.*** *The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but* ***its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action****. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the*

> *purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.*

From the persuasive decision of the Privy Council in **Jaroo vs. Attorney General of Trinidad and Tobago (supra)**, we can deduce as a principle of law that the right to apply to the High Court under **Basic Rights and Duties Enforcement Act** should not be granted in Tanzania where the law has already prescribed a statutory remedy. This principle is in line with the presumption of constitutionality of all the Acts of Parliament and the obligation law has imposed on courts to not only take judicial notice of Acts of Parliament but to also adopt an interpretation that gives effect to the statutory provisions. This Court therefore presumes that both the **FCA, 2003** and the **Basic Rights and Duties Enforcement Act** are constitutional and this Court is obliged to give effect to all their respective provisions. And as long as the provisions of the **FCA, 2003** and the **Basic Rights and Duties Enforcement Act** are clear, this Court is similarly obliged to give plain and ordinary meaning of the words used in the two Acts.

From the totality of sections 4 and 8 (2) of the **Basic Rights and Duties Enforcement Act**, two questions require our initial determination in this petition. First is whether the Petitioner had other adequate statutory means to redress its claims other than through the remedies available under the **Basic Rights and Duties Enforcement Act**. The second question is whether, having subjected itself to statutory procedures for dealing with the Fair Competition Commission's Complaint **Number 1 of 2008**, the Petitioner can opt for procedures and remedies under the **Basic Rights and Duties Enforcement Act.**

It is common ground that **PART XI** of FCA titled as "Appeals to the Fair Competition Tribunal" provides the Petitioner with a remedy of appeals to the Fair Competition Tribunal against the decisions or acts of the Fair Competition Commission. Section 61 in Part XI of the **Fair Competition Act, 2003** states:

> *61.-(l) Any person that has a pecuniary and material grievance arising Appeals from a decision of the Commission:*
>
> *(a) to grant or refuse to grant an exemption under section 12 or of the 13;*
>
> *(b) to make or not to make a compliance order under section 58; or*

(c) to make or not to make a compensatory order under section 59,

may appeal to the Tribunal for review of the decision within 28 days after notification or publication of the decision.

(2) An appeal under sub-section (1) shall be by way of a rehearing.

(3) Any person that has a pecuniary and material grievance arising from a decision of the Commission other than a decision referred to in sub-section (1) may appeal to the Tribunal for review of the decision within 28 days after the notification or publication of the decision.

(4) The grounds for an appeal under sub-section (3) shall be that:

(a) the decision made was not based on evidence produced;

(b) there was an error in law;

(c) the procedures and other statutory requirements applicable to the Commission were not complied with and non-compliance materially affected the determination;

(d) the Commission did not have power to make the determination.

(5) On an appeal under this section the Tribunal shall make a determination affirming, setting aside or varying the decision of the Commission or it may direct the Commission to reconsider the matter or specified parts of the matter to which the appeal relates.

(6) In reconsidering a matter referred back to it under sub-section (5), the Commission shall have

regard to the Tribunal's reasons for giving the direction.

(7) For the purposes of an appeal under this section, the Tribunal:

(a) may perform all the functions and exercise all the powers of the Commission; and

(b) may make such orders as to the payment of any person's costs of the review as it deems appropriate.

(8) The decisions of the Tribunal on appeals under this section shall be final.

It seems to us that once a person has begun to pursue remedies under the above cited FCA, that person must ensure that the forums for redress under this FCA have been exhausted. One cannot jump from statutory remedies under the FCA onto the remedies available under the **Basic Rights and Duties Enforcement Act**. It is our further opinion that where a Petitioner had an adequate means of statutory redress but opted to file a constitutional petition, the resulting petition falls under the rubric of frivolous or vexatious petitions under subsection (2) of section 8 of the **Basic Rights and Duties Enforcement Act**.

It is common ground that **Complaint Number 1 of 2008** is still pending before the FCC. With the decision on **Complaint No. 1 of**

2008 still pending at FCC, it would not be open to the Petitioner to by-pass the Fair Competition Tribunal envisaged by Part XI of FCA and file a Petition under the **Basic Rights and Duties Enforcement Act**. It seems to us that it cannot have been the intention of the **Constitution of United Republic of Tanzania**, the **Basic Rights and Duties Enforcement Act**, and **FCA, 2003** to allow litigants to jump from one statutory forum for redress to another statutory forum for redress. We are of the settled opinion that while the remedy pursuant to the **Basic Rights and Duties Enforcement Act** is theoretically available, it cannot be considered to be an effective remedy in a situation where the present Petitioner had subjected itself to the procedures under FCA before abandoning it in favour of the forum under the **Basic Rights and Duties Enforcement Act**.

Apart from the persuasive decision of the Privy Council in **Jaroo *vs.* Attorney General of Trinidad & Tobago (supra)**, the position we have taken that the Petitioner should have first exhausted the remedies available under the FCA is supported by several decisions of this Court and at least one of the Court of Appeal of Tanzania.

Msumi, JK, Chipeta, J and Kyando, J. (as they then were) in the case of **Federation of Mines Associations of Tanzania and 2 Others vs. MS Africa Gem Resources AFGEM and 7 Others Misc Civil Case No 23 of 2001** determined a matter where the petitioners sought several declaratory reliefs under the **Basic Rights and Duties Enforcement Act** against the respondents which included a prayer for an order for exhumation of dead bodies of small-scale miners allegedly buried alive in various pits dug at Merelani mines. Msumi JK (as he then was) observed that all the declaratory reliefs and damages prayed in the petition should have been sought by way of ordinary suit. Further, the petitioners in their paragraphs 11, 14, 15 and 16 of their petition had alleged criminal offences ranging from simple assault, corruption, economic sabotage and murder. Instead of filing their complaints to police to set in motion criminal trials under the **Penal Code** and the **Criminal Procedure Act**, the petitioner filed a petition under the **Basic Rights and Duties Act.** Msumi, JK stated on page 5: *"..... This does not, however, mean that a party in a human right case can disregard compliance of legal requirement with impunity. The mentioned liberal approach is not applicable if it renders a provision of law nugatory....."*

In other words, existence of **Basic Rights and Duties Act** should not be allowed to make other statutory remedies nugatory. That petition was found incompetent and was struck out with costs.

Recently, High Court had yet another occasion in the **Miscellaneous Civil Cause No 34 of 2011 (Jane Chabruma and Minister for Labour and Employment and Hon. Attorney General)** where **Juma, Mwakipesile, and Munisi, JJJ** dealt with a preliminary point of objection that had contended that subsection (2) of section 8 of the **Basic Rights and Duties Enforcement Act** disqualifies the automatic right to file a constitutional petition to High Court where the Petitioner had a statutory right to appeal to the Court of Appeal provided for by section 57 of the **Labour Institutions Act, 2004 Act No. 7 of 2004**. This Court sustained the objection observing that the petitioner **Jane Chabruma (supra)** had adequate means of redress through an opportunity to appeal to the Court of Appeal against the decision of the High Court Labour Division in accordance with the provisions of section 57 of the **Labour Institutions Act, 2004**.

There is also a binding precedent of the Court of Appeal of Tanzania in **Athumani Kungubaya & 482 Others vs. 1. Presidential Parastatal Sector Reform Commission 2. Tanzania Telecommunications Civil Appeal No. 56 of 2007 (Lubuva, J.A., Msoffe, J.A., and Mbarouk, J.A.).** This decision confirms our legal proposition that where there is a statutory provision providing for right to be heard and a right to appeal, a party cannot come to this court through the **Basic Rights and Duties Enforcement Act** and complain that his constitutional rights to be heard and his right to appeal have been infringed. He should first pursue and exhaust his statutory rights to be heard and of appeal.

The case of **Athumani Kungubaya (supra)** was an appeal against a decision of the High Court constituted of three Judges. Facts were that upon the retrenchment of Athumani Kungubaya and other appellants, a dispute arose over the payment of the retrenchment benefits. As the appellants were not satisfied, the matter was referred to the Commissioner for Labour who in turn referred the same to the Industrial Court for inquiry. The result of the inquiry was that the second respondent, Tanzania Telecommunications Company Limited,

the employer of the appellants, was ordered to reinstate some of the appellants and also to pay retrenchment benefits to the other appellants. Respondents were not satisfied with the decision of the Industrial Court of Tanzania on inquiry and they filed for a revision. In terms of the provisions of Section 27 of the **Industrial Court Act 1967** as amended by **Act No. 2 of 1993**, the revision proceedings were heard by the Industrial Court of Tanzania presided by the Chairman sitting with two Deputy Chairmen. The Industrial Court allowed the revision and stopped the payment of the retrenchment benefits to some of the appellants who had not been paid following the decision in the inquiry. From the decision of the Industrial Court, the matter was taken on appeal to the High Court.

When the appeal in the High Court was called on for hearing, the respondents raised a preliminary objection. The ground of objection was to the effect that the High Court has no jurisdiction to hear the appeal from the Industrial Court. The reason advanced was that there was no specific provision in the **Industrial Court Act 1967 (as amended at the time)**. In the absence of such specific provision in that Act establishing the Industrial Court, it was submitted that no appeal

from the Industrial Court could be entertained even by invoking the provisions of Article 13 (6) (a) of the **Constitution of the United Republic of Tanzania, 1977**. The High Court sustained the preliminary objection resulting in the appeal being struck out. Aggrieved, Athumani Kungubaya and 482 others went to the Court of Appeal to contest the decision of the High Court that had sustained the preliminary objection that had contended that that no appeal from the Industrial Court could be entertained even by invoking the provisions of Article 13 (6) (a) of the Constitution.

It was conceded at the Court of Appeal, that at the time when the appeal was instituted in the High Court against the decision of the Industrial Court on revision proceedings, there was no specific provision in the **Industrial Court Act 1967** providing for an appeal such as the instant one from the Industrial Court to the High Court. Despite conceding, it was still strongly contended that since right of appeal is entrenched in the constitution, therefore the appeal could still be entertained under the provisions of Article 13 (6) (a) of the Constitution. The Court of Appeal was therefore called upon to decide whether in that situation an appeal would lie to the High Court by

invoking Article 13 (6) (a) of the Constitution. The Court of Appeal noted:

> *"...It is also common knowledge that appeals in any judicial system are as it were, creatures of specific statutes. In the relevant statutes the right of appeal would be provided and the applicable procedure in instituting the appeal would also be spelt out. In the instant case, as already indicated, the Industrial Court Act, 1967 prior to the amending Act did not provide for appeals to the High Court. It would therefore follow that there was no bridge, so to speak, upon which the appeal to the High Court could be processed."*-**page 7**

The Court of Appeal in **Athumani Kungubaya & 482 Others (supra)** underscore the need to exhaust all available statutory avenues for appeal before seeking the right of appeal guaranteed under Article 13 (6) (a) of the Constitution. On this the Court of Appeal stated:

> *"....it is at once clear to us that the Constitution provides and guarantees the individual right of appeal and being heard fully. The further question arises as to how the right to appeal can be achieved in this case which is the central issue in this appeal. In our view, the answer is not far to seek. As seen from the first part of sub-article 6 (a),* ***the right to a full and fair hearing as well as the right to appeal would be ensured by an appropriate procedural machinery put in place by the State Authority****. This, understandably, would be by way of appropriate legislation. In this case, the*

appropriate legislation would be the Industrial Court Act, 1967. - ***pages 8 and 9, emphasis added.***"

Applying the foregoing principle laid down by the Court of Appeal, it seems to us that, the FCA, 2003 has appropriate procedural machinery under section 61 providing the right to a hearing as well as the right to appeal. We can state without hesitation that where statutory provision is already in place to provide for a right of appeal, then that right of appeal should be pursued. Therefore, the Petitioner should not claim that its rights to be heard and its right of appeal that is guaranteed under Article 13 (6) (a) of the Constitution has been infringed if in fact it is the Petitioner who had opted out of the available statutory right to be heard in Complaint No. 1 of 2008 and its potential right of appeal under section 61 of FCA.

We are satisfied that the parties to this petition should first exhaust the opportunity to be heard under Complaint No. 1 of 2008 and to lodge subsequent appeal as provided for under the FCA. The Petitioner having elected not to seize up the statutory avenue to be heard, the question of having been denied the opportunity to be heard does not arise.

This Petition is incompetent and is dismissed with costs.

P. A. RUGAZIA,
JUDGE
28th September, 2012

L. K. N. KADURI
JUDGE
28th September, 2012

I.H. JUMA,
JUDGE
28th September, 2012