Majid Al Futtaim Hypermarkets Limited v Competition Authority of Kenya & another (Civil Appeal E033 of 2021) [2024] KEHC 5812 (KLR) (Commercial and Tax) (23 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5812 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL E033 OF 2021

A. ONG'INJO, J

MAY 23, 2024

BETWEEN

MAJID AL FUTTAIM HYPERMARKETS LIMITED ..... APPELLANT

AND

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

ORCHADS LIMITED ..... 2ND RESPONDENT

(Being an appeal against the judgment and order of the Competition Tribunal in CT Case No. 006 of 2020, Majid Al Futtaim Hypermarkets Limited v Competition Authority of Kenya and Orchards Limited delivered on 20th April 2021)

JUDGMENT

1. The background to the appeal herein is that the 2nd Respondent was contracted by the Appellant to supply probiotic yoghurt for sale in the Appellant's retail stores, Carrefour. The contract of supply was for the periods between 2015 and 2018.

2. The 2nd Respondent filed a complaint with the Authority complaining of abuse of buyer power in April 2019 in that the Appellant had unilaterally delisted it by blocking its supplier code without notice which left the 2nd Respondent with dead stock; the Appellant required from the 2nd Respondent various rebates including Kshs. 50,000 listing fee, 10% on every second delivery and 1.25% on all annual sales; the Appellant introduced progressive rebates calculated from annual sales/turnover from the 2nd Respondent; the Appellant unilaterally deducted rebates from invoices and failed to account for payments making reconciliations difficult for the 2nd Respondent; returning merchandize nearing expiry dates; refusing to accept new price lists and deliveries at various branches; the Appellant required

the 2nd Respondent to deploy its staff to the Appellant's shops, thereby transferring labour costs from the Appellant to the 2nd Respondent and lastly, the Appellant asked for free samples which it then sold.

3. Once it received the complaint, the Authority conducted investigations and it informed the Appellant of the complaint through a Notice of Investigation on 26th June 2019. At the behest of the Appellant, the Authority allowed the parties some time to negotiate and settle the matter. Following the failed negotiations, the Authority went on with its investigations and its preliminary findings were that there was abuse of buyer power. It then issued a Notice of Proposed Decision. Afterwards, the Authority issued the letter dated 27th September 2019 reminding the Appellant of its right to a fair hearing. On the same date, the parties held a meeting. On 1st October 2019, the Appellant requested for documents relied on by the Authority to arrive at the decision to issue the Notice of Proposed Decision.

4. On October 23, 2019, the Authority clarified that the documentation relied on in issuing the Notice of Proposed Decision, were the documents which had been supplied by the parties.

5. Through its communication of 14th November 2019. The Authority indicated that it would consider the written submissions so far received from the Appellant as final submissions and would assume that the Appellant was not interested in the option of an oral conference if there was no response to that letter. There was no response to the letter and the Authority proceeded in accordance with Section 35 of the Act and made a decision pursuant to Section 36 of the Act. The decision by the Authority was that the Appellant had buyer power and abused this buyer power in relation to the 2nd Respondent as the Appellant's conduct in relation to the 2nd Respondent contravened section 24(2A) of the Act. The Authority found that the Appellant had violated section 24(2A) of the Act by applying and collecting rebates, unilaterally de-listing the 2nd Respondent, transferring commercial risks by returning goods nearing expiry, refusal to accept delivery and transferring costs by requiring the 2nd Respondent to post employees to the Appellant's stores.

6. Aggrieved, the Appellant appealed to the Competition Tribunal (the Tribunal) in accordance with Section 40 of the Act. By a judgment delivered on 20th April 2021, the Competition Tribunal made the following findings: -

    i. That the 1st Respondent had the legal mandate to conduct investigations relating to the buyer power in relation to the 2nd Respondent in any period before 31st December 2019.

    ii. On whether the 1st Respondent acted against the rules of procedure, the principles of natural justice and engaged in procedural impropriety, the Tribunal found that the Appellant was supplied with all the documents that the 1st Respondent relied upon, that the 1st Respondent followed the correct procedure as laid down in part E of the Act, that the Appellant was given adequate notice to rebut the evidence against it and an opportunity to be heard.

    iii. It was found that the documents relied upon to calculate rebates were for the years 2017, 2018 and 2019 and therefore did not rely on documents and statements of account in relation to a period prior to enactment to the buyer power provisions of the Act.

iv. The Tribunal also found that the 1st Respondent did not err by basing its law on the Buyer Power Guidelines made under part (iii) of the Act and International Best Practices from other jurisdictions.

v. On whether the Appellant had buyer power and whether it abused that power, the Tribunal found that the Appellant had buyer power in relation to the 2nd Respondent and that further the Appellant abused the said buyer power.

vi. The Tribunal also found that the consent of the other suppliers was immaterial in the face of violation under the Act and it is the mandate of the 1st Respondent to promote and enforce compliance with the Act. That there can never be consent to an illegality.

vii. The Tribunal agreed with the Appellant that it is a biased right under the Law of Contract to refuse to take delivery of goods which do not conform with the contract.

viii. The decision of the 1st Respondent requiring prior approval before deployment of merchandisers to the Appellant's stores was set aside.

ix. The decision to pay the 2nd Respondent the sum of Kshs. 130,856/- for loss arising from unilateral termination of the supply agreement for the year 2019 was also set aside.

x. The decision of the 1st Respondent for refund of rebates deducted from the invoices of the 2nd Respondent for the years 2017, 2018 and 2019 in the sum of Kshs. 289,482/- was upheld and the same was to be paid within 30 days.

xi. The decision of the 1st Respondent for the payment of financial penalty of 10% of the Appellant's gross turnover in Kenya from its Carrefour franchise from the sale of Cool Fresh Yogurt for the year 2018 in the sum of Kshs. 124,768/- was upheld by the Tribunal and the same was to be paid within 30 days of the date of judgment.

7. The Appellant was aggrieved by the judgment of the Tribunal and it instituted the appeal herein through a Memorandum of Appeal dated 27th April 2021 against the 1st Respondent (the Competition Authority hereinafter referred to as the Authority) and the 2nd Respondent, on the following grounds: -

1. The Competition Tribunal erred in holding that the Authority gave the Appellant a fair hearing and followed the laid down procedure while conducting investigations and rendering a decision on the 2nd Respondent's complaint and should have determined, inter alia, that:

(a) the Authority did not follow the requirements of Articles 47 and 50(1) of *the Constitution*, the *Fair Administrative Action Act*, Section 34 of the *Competition Act*, and principles of natural justice;

(b) the Authority did not allow the appellant an opportunity to call witnesses, to challenge the 1st and 2nd Respondents' evidence and to cross-examine the 2nd Respondent's witnesses and any other witnesses whose testimony was relied upon by the Authority in violation of the *Fair Administrative Action Act*;

(c) the Authority did not supply the Appellant with all the evidence and documents relied upon by the Authority in arriving at its decision; and

(d) the Authority did not disclose to the Appellant the evidence and basis of the proposed and final award for damages that it made against the Appellant.

2. The Competition Tribunal erred in law in determining that the Buyer Power Guidelines are not statutory instruments and that the Authority was entitled to use the draft guidelines in its determination of the 2nd Respondent's complaint. The Competition Tribunal should have determined that:

   (a) There was no legal basis for the Authority to apply the draft Buyer Power Guidelines which were not binding in draft form.

   (b) The Buyer Power Guidelines are invalid for failure to conform with the requirements of issuing statutory instruments under the *Statutory Instruments Act*, 2013.

3. The Competition Tribunal erred in upholding the unreasonable decision of the Authority requiring the appellant to amend all its supplier agreements, despite finding that 'buyer power' would not arise in contracts with parties of equal or greater bargaining power. The Tribunal should have made the following findings on which basis it should have set aside the Authority's decision:

   (a) The Authority did not give the other over 700 suppliers of the appellant notice of the intended decision which affects them and an opportunity to make representations thereon, in violation of Section 34 of the *Competition Act*, the *Fair Administrative Action Act*, and principles of natural justice.

   (b) Each of the supplier agreements was negotiated with the individual supplier and there was therefore no basis for the Authority to interfere with them without any complaints from the parties to the agreements.

   (c) Only the supplier agreement between the Appellant and the 2nd Respondent was before the Authority and a decision could only be made on what was the subject of the complaint.

   (d) The decision of the Authority was in violation of the principles of freedom of contract and privity of contract.

   (e) There was no basis for a conclusion that the Appellant has buyer power in relation to all its suppliers and that such buyer power, if any, had been abused. The order affecting all of the Appellant's supplier agreements was therefore unfounded, irrational and absurd.

4. The Competition Tribunal erred in law in holding that as of April 2019 the Authority had power to investigate complaints into abuse of buyer power and should have determined that the Authority did not have such power or authority at any time prior to 31st December 2019.

5. The Competition Tribunal erred in fact and in law in holding that the Appellant had buyer power in relation to the 2nd Respondent and abused that buyer power and should have instead held that there was no basis for the Authority's finding that the appellant had buyer power in relation to the 2nd Respondent.

6. The Competition Tribunal erred in failing to make a determination that the Authority improperly and unprocedurally analysed and relied on documents and statements of accounts relating to a period before the Authority had power to investigate abuse of buyer power and before there were relevant buyer power provisions in the *Competition Act*. The Competition Tribunal consequently erred in upholding the decision of the Authority for the refund of rebates.

7. The Competition Tribunal erred in not holding and should have held that volume rebates are a widely accepted practice in the retail industry and do not stifle competition.

8. The Competition Tribunal misunderstood the Appellant's submissions with regard to the Authority's reliance on International Best Practices and consequently erred in determining that it could not entertain the ground of appeal. The Competition Tribunal should have determined that:

   (a) Despite the appellant making an express request therefore, the Authority did not supply the Appellant with the documentation containing the best practices from Japan and Australia that was referred to in the Authority's notice of proposed decision and this impeded the Appellant's ability to effectively respond.

   (b) The Authority misconstrued the best practices in Japan and Australia. For instance, volume rebates are presumptively lawful in Japan yet the Appellant was punished by the Authority for applying volume rebates on the basis of alleged international best practice in Japan.

9. The Competition Tribunal erred in upholding the decision of the Authority in respect of the orders requiring amendment of all the Appellant's supplier agreements; refund of rebates deducted from the 2nd Respondent's invoices in the sum of Kshs. 289,482; and payment of financial penalty in the sum of Kshs. 124,768. The Competition Tribunal should have allowed the Appellant's appeal in its entirety and set aside the entire decision of the Authority.

10. The Competition Tribunal erred in not awarding costs of the appeal to the Appellant.

8. The Appellant prays that the appeal be allowed with costs of the appeal and costs of the proceedings before the Tribunal and that the judgment and decision of the Tribunal dated 20th April 2021 be set aside and the order made thereunder be substituted with an order allowing the Appellant's appeal in terms of the prayers in the Memorandum of Appeal dated 17th February 2020 filed before the Tribunal on 18th February 2020.

9. The appeal was canvassed by way of written submissions dated 31st May 2022 and 8th July 2022 for the Appellant and 1st Respondent respectively.

Analysis and Determination

10. This court has considered the Record of Appeal and the parties' respective submissions and authorities. I take cognizance that this is an appeal from the Competition Tribunal pursuant to Section 49 (2) of the *Competition Act*, Cap 504 of the Laws of Kenya. The Court's mandate on a second appeal is limited to questions of law only and not matters of fact, it is limited to context and to considering whether the conclusions of the Tribunal were based on any evidence on

record or so perverse that no reasonable Tribunal would have arrived at them. See John Munuve Mati v Returning Officer Mwingi North Constituency, Independent Electoral & Boundaries Commission & Paul Musyimi Nzengu (2018) eKLR.

11. The issues for determination are: -

    1. Whether the Authority gave the Appellant a fair hearing and followed the laid down procedure.

    2. Whether the Authority was entitled to use the Buyer Power Guidelines in its determination of the 2nd Respondent's complaint.

    3. Whether the Appellant ought to amend all its supplier agreements, despite the finding that "buyer power" would not arise in contracts with parties of equal or greater bargaining power.

    4. Whether the Authority had power to investigate complaints into abuse of buyer power prior to 31st December 2019.

    5. Whether the Appellant had buyer power in relation to the 2nd Respondent and abused that buyer power.

    6. Whether the Authority could order the refund of rebates based on documents and statements of accounts relating to a period before the Authority had power to investigate abuse of buyer power and before there were relevant buyer power provisions in the *Competition Act*.

    7. Whether volume rebates are a widely accepted practice in the retail industry and do not stifle competition.

12. On the first issue, the Appellant contended that the Authority failed to accord it a right to fair hearing and fair administrative action. The Authority failed to provide the Appellant with the evidence and documents relied on, including the documents regarding the best practice from Japan and Australia, despite request. Instead, the Authority wrote back on 9th September 2019, and asked the Appellant to identify what would qualify as best practice. Thereafter, the parties held a meeting on 27th September 2019 following which the Authority sent the Appellant's advocates documents purportedly relied on at arriving at its notice of proposed decision.

13. On 4th October 2019, the deadline given to respond, the Appellants wrote back and complained that the documents provided by the Authority were not indexed and none of them pointed to the relevant parts of the proposed decision. The Appellant sought clarification on how the documents related to the investigations as it could not link them to the conclusions on the notice of proposed decision. Under the impression that there was a report or written findings, the Appellant also sought the report of the economic analysis but the Authority informed it that there was none as it was only a process. The Appellant faulted the Authority for being dismissive in its letter of 23rd October 2019 and gave it only 7 days to respond. On 29th October 2019, the Appellant raised concerns about the unreasonably short timeline of 7 days and sought a 21-day extension but the Authority declined to grant the extension.

14. The Appellant relied on Peters v Sunday Post Limited (1958) 424 to argue that this Court has reason to interfere with the Tribunal's decision. The Appellant also relied on Section 4(3) of the *Fair Administrative Action Act* on the requirement that an administrator provides prior and adequate notice of the nature and reasons for the proposed administrative action and an

opportunity to be heard and to make representations. The Notice of Proposed Decision dated 23rd August 2019 was inadequate as it did not meet the requirements of Section 4(3) (a) of the *Fair Administrative Action Act*.

15. The record shows that the Authority issued the Appellant with a Notice of Investigation on 26th June 2019 containing full detail of the complaint, relevant provisions of the law and a requirement to respond to the same and provide supporting documents. The Authority then did comprehensive investigations which led to its preliminary findings that there was abuse of power. Thereafter, it issued the appellant with a Notice of Proposed Decision pursuant to Section 34 of the Act and the notice contained the proposed reliefs, invited the Appellant to defend themselves through written submissions, requested the Appellant to indicate whether they would like an opportunity to defend themselves through oral representations and informed the Appellant of its right to invoke the provisions of Section 38 of the Act and negotiate a settlement with the Authority. Through its letter dated 27th September 2019, the Authority reminded the Appellant of its right to fair hearing. The parties held a meeting on 27th September 2019 following which the Authority sent the Appellant's advocates documents.

16. By a letter dated 1st October 2019, the Appellant requested for documents relied on by the Authority to arrive at the decision to issue the Notice of Proposed Decision. In response, the Authority clarified that it relied on documents furnished by the parties. Despite being prompted to participate by offering its position, the Appellant delayed leading to the communication by the Authority of 14th November 2019 to the effect that if there was no response by the Appellant, only the submissions already received would be considered and the opportunity to make oral representations lost. There was no response and the Authority issued its decision pursuant to section 36 of the Act. Consequently, this court finds no merit in the contention that the Appellant was not afforded an opportunity to be heard and to make oral representations.

17. Moving on to the contention that the Authority did not allow the Appellant an opportunity to call witnesses to challenge the 1st and 2nd Respondents' evidence. The Appellant took the view that an informal hearing was not appropriate in the circumstances of its case because there was a probability of it facing penal sanctions and its officers being jailed as set out in the notice of proposed decision. It relied on Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (Suiting Division) Limited (2016) eKLR for the proposition that the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 25 (c) of *the Constitution*. The Authority interpreted Section 35 (3) of the *Competition Act* narrowly.

18. The Authority asserted that it followed the procedures set down under the Act. This is evidenced by the letters of 1st and 23rd October 2019 providing the relevant documents to the Appellant and explaining in detail the documents provided upon a request from the Appellant. It explained to the Appellant that the economic analysis referred to the process of interrogating the documents provided by the parties as well as the best practices as espoused in the disclosed international best practices and the Act. The economic analysis was not a document that could be shared with the Appellant, it was a process. However, the resultant document from the analysis, which was the notice of proposed action, was shared with the Appellant.

19. The Authority submitted that the documents shared by the Appellant and the 2nd Respondent proved that the Appellant refused to receive goods supplied by the 2nd Respondent. The Authority submitted that the notice of proposed decision was not a decision within the

meaning of the Fair Administrative Actions Act but a proposal for a decision as provided under Section 34 of the Act. It disputed the contention that the Appellant was not afforded adequate notice of sanctions likely to be imposed. As per Section 34(2), the notice stated the reasons for the Authority's proposed decision, set out details of the relief that the Authority may consider to impose and informed the Appellant that it could in relation to the Authority's proposed decision, submit written representations and indicate whether it required an opportunity to make oral representations to the Authority

20. The Authority posited that the Appellant conflated the notice with the final determination at Section 36 of the Act. The authority asserted that it gave the Appellant ample time from the 24th May 2019 to the 11th November 2019 to give its response; that it afforded the Appellant an opportunity to present oral submissions at a hearing and cross examine issue but it declined, insisting that the Authority presents formal rules of how the oral hearing would be presented.

21. The authority argued that Section 35(3) of the Act provides in mandatory language that proceedings at a conference shall be carried out in as informal a manner as the subject matter may permit; that all matters investigated by the Authority have possible penal consequences; that the fact that there are possible penal consequences in the Appellant's case does not make the matter involving the Appellant unique to merit preparation of formal rules; that the nature of administrative action herein did not require calling and cross-examination of witnesses;

22. In the Court of Appeal decision in Judicial Service Commission v Mbalu Mutava & Another (2015) eKLR, cited in the authority's submissions it was held that: -

> "Unless the empowering law provides otherwise, the decision whether or not to summon witnesses and the decision to allow or not allow the cross-examination of witnesses, is at the sole discretion of the investigating body. Indeed, the technical rules of evidence with the attendant right to cross-examination do not form part of the natural justice rules or in this case, part of fair administrative action."

23. Hence, this court upholds the Tribunal's finding that the Authority had dutifully followed the procedure as laid down in the Act. The first ground therefore fails.

Whether the Authority was entitled to use the Buyer Power Guidelines in its determination of the 2nd Respondent's complaint.

24. The Appellant submitted that the Buyer Power Guidelines could not have formed the basis of the Authority's decision as they were illegal. It contended that the Guidelines are statutory instruments as defined in Section 2 of the *Statutory Instruments Act* and they were adopted in a manner inconsistent with *the Constitution*, the *Interpretation and General Provisions Act*, the *Statutory Instruments Act* and the *Competition Act*. The Buyer Power Guidelines did not follow the procedure set out in the *Statutory Instruments Act* and in particular Section 13 which requires the statutory instrument to be scrutinised by a Committee on 'Delegated Legislation of the National Assembly to confirm that the guidelines were in accordance with *the Constitution*. It relied on the Supreme Court decision in British American Tobacco PLC v Cabinet Secretary for the Ministry of Health and others (2019) eKLR on the guiding principles of public participation to argue that Authority failed to inter alia, consult stakeholders and failed to table the guidelines before Parliament for approval and they were not gazetted in the Kenya Gazette.

25. The Tribunal erred by finding that the Buyer Power Guidelines were a 'policy document' and 'operation manual' made pursuant to Section 8(2) of the *Competition Act* and by concluding that only the Rules made under Section 93 of the Act were statutory instruments.

26. The authority submitted that through its communication of 11th September 2019, it clarified that the reference of the Guidelines as a draft was in error and that the Guidelines had been approved; that the Guidelines are not statutory instruments but a policy document, a manual and was not a legally binding document. Reference was made to other jurisdictions where Guidelines and policy documents are used in the enforcement of competition law.

27. On this issue, this court is inclined to find that the Tribunal was correct in finding that the Buyer Power Guidelines are not statutory instruments and are purely executive aimed at guiding the Authority in the implementation of the Competition law. In Republic v Attorney General; Law Society of Kenya (Interested Party); Ex-parte: Francis Andrew Moriasi (2019) eKLR, the Court observed that: -

> " ...not all the guidelines, orders, or directions given by the Respondent are legislative in character and therefore statutory instruments. There may be guidelines and directions that are purely executive in character, in the sense that their objectives are solely administrative in guiding implementation of standards in laws and policies..." See also Okiya Omtatah Okoiti v Energy & Petroleum Regulatory Authority; Pacific Aviation Management & Consulting Company Limited (Interested Party) (2021) eKLR.

28. Accordingly, the ground fails.

Whether the Tribunal erred in upholding the Authority's decision to amend all supplier agreements.

29. The Appellant submitted that the Tribunal erred in upholding the Authority's decision to amend all supplier agreements because only the supplier agreement between the appellant and the 2nd Respondent was before the Authority. The Tribunal contradicted its own finding that contracts with parties of equal or greater bargaining power would not be covered by the Authority's order. It argued that a decision could only be made on what was the subject of the complaint as the Tribunal was not in a position to determine whether the other suppliers now affected by its decision were of equal or lesser bargaining power than the Appellant. It was again contended that the decision would impact its suppliers without them being heard contrary to the rules of natural justice and their right to fair administrative action. The Appellant submitted that the Tribunal ratified the Authority's breach of Section 34(2) (c) of the *Competition Act* which provides that the Authority must inform each undertaking which may be affected by its decision. The Appellant also submitted that the Authority's decision went against the parties' freedom to contract and principle courts should not rewrite contracts for parties.

30. The Authority submitted that pursuant to Section 36 (b) and (c) of the Act, it had power to direct the correction of the Appellant's actions that were found to be of abuse of buyer power. It also submitted that these actions were found within its standard form supplier agreements, hence it was empowered to direct the Respondent to remove the abuse of buyer power provisions in the standard form contracts with its suppliers. It further submitted that its decision was in rem and not in personam.

31. Section 36 (b) and (c) of the *Competition Act* provide that the Authority has power to: -

(b) restrain the undertaking or undertakings from engaging in conduct contrary to the Act; and

(c) direct any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or the effects thereof.

32. The dispute that was before the Authority was lodged by the 2nd Respondent and related to the agreement between the 2nd Respondent and the Appellant in which it was complained that the Appellant abused its buyer power by unilaterally transferring commercial risks meant to be borne by it to the 2nd Respondent, refusing to receive the 2nd Respondent's good for reasons not attributed to the 2nd Respondent, unilaterally terminating the commercial relationship without notice or subject to unreasonably short notice and without an objectively justified reason.

33. Article 47 (1) of *the Constitution* provides: -

Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

34. Article 50 (1) of *the Constitution* provides: -

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

35. Section 4 (3) (a) of the Fair Administrative Actions Act provides: -

Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision: -

a. prior and adequate notice of the nature and reasons for the proposed administrative action;

36. Inasmuch as the Competition Authority had the mandate under Section 36 (b) and (c) of the *Competition Act* to restrain the undertaking or undertakings from engaging in conduct contrary to the Act and direct any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or the effects thereof, it equally had the duty to ensure compliance with the Constitutional and statutory provisions related to fair hearing.

37. There is no evidence to show that the Appellant had prior and adequate notice that the 1st Respondent intended to make a decision that was related to the contracts between the Appellant and other suppliers other than the 2nd Respondent. Particulars of the suppliers and the terms and conditions of the contract between them and the Appellant were not specified during the trial or even during the appeal at the Tribunal. The 1st Respondent's decision was therefore taken without regard to the rights of the Appellant as to notice of what it was being accused about and who were its accusers. The 1st Respondent ought to have joined the nearly 700 suppliers to the Appellant to the cause at its inception to effectually and completely settle all the questions involved in the cause as the outcome affected their interests and the Appellant and those suppliers were legally entitled to an opportunity to defend and prosecute the alleged complaints.

38. It was erroneous for the Tribunal to find that there were violations of statute when the contracts of the other suppliers were not before it and the said suppliers did not make

presentations as to whether or not they had been aggrieved by the contracts entered between them and the Appellant.

39. It is the finding of this court that the 1st Respondent erred in law in seeking to amend contracts of parties that were not before it and without prior notice to the Appellant that it intended to make a decision affecting its other suppliers without joining them as parties to the cause.

Whether the Authority had power to investigate complaints into abuse of buyer power prior to 31st December 2019.

40. According to the Appellant, the Tribunal erred in holding that as of April 2019 the Authority had power to investigate complaints into abuse of buyer power simply because the *Competition Act* contained provisions of buyer power. It contended that the Authority improperly and procedurally analysed and relied on documents and statements of account from 2019 to 2019. It faulted the Tribunal for upholding the Authority's decision. It again faulted the Tribunal for relying on section 48 of the *Interpretation and General Provisions Act* which has no relevance to the issue in dispute as there was no power conferred on the Authority to investigate instances of abuse of buyer power as at April 2019. It contended that the Tribunal's reasoning that it could not have been the intention of parliament to introduce an offence and not empower the Authority to enforce the provisions relating to that offence is without legal basis. It relied on the Samuel K. Macharia case to argue that the Authority could not arrogate to itself jurisdiction exceeding that conferred by law. The amendments to the Act were necessary to give the Authority power to investigate instances of abuse of power. The Authority went against the general of against retrospective application of the law espoused in the S. K. Macharia case.

41. In order to determine whether the Appellant had buyer power, the Authority and Tribunal should have considered the provisions of section 24(2B) of the *Competition Act*, 2010 (before it was amended by the Competition (Amendment) Act 2019). The factors that should have guided the Authority were the nature and determination of contract terms, the payment requested for access infrastructure and the price paid to suppliers. The Authority did not provide any evidence to demonstrate that the elements of buyer power set out in section 24(2B) and 24(2D) were exhibited by the Appellant in relation to the 2nd Respondent. The Retail Market Sector Inquiry Report which was produced later, was published in 2017 and not related to the investigations conducted in 2019 as a result of this specific complaint. The Appellant faulted the Tribunal's holding that one establishes whether an entity has buyer power by determining whether buyer power has been abused, claiming is absurd.

42. On this issue, I am inclined to agree with the Authority's submission that the offence of abuse of power had been established by the Act and that the Authority had power to investigate a complaint on allegation of contravention. The Appellant's contentions were based on the fact that the amendment of the Act of 31st December 2019, introduced Section 31 (c), which provides that: -

> " 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;

(b) prohibitions relating to abuse of dominance; or

(c) prohibitions relating to abuse of buyer power."

43. However, even before the amendment, the offence of abuse of buyer power had been established and Section 31(1)(a) of the Act, mandated the Authority to investigate prohibitions relating to restrictive trade practices, which include abuse of power. Hence, nothing prevented the Authority from investigating the complaints of abuse of buyer power as at April 2019, before the amendment of 31st December 2019. As such, the Appellant's contentions to the contrary cannot hold. For these reasons, this court finds that the Tribunal was correct in holding that as of April 2019 the Authority had power to investigate complaints into abuse of buyer power.

Whether volume rebates are a widely accepted practice in the retail industry and do not stifle competition.

44. The Appellant submitted that rebates are a normal business practice in the market unless there is no economic justification for them. Hence, the Tribunal erred in failing to hold that volume rebates are a widely accepted practice in the retail industry and do not stifle competition. It relied on Michelin v Commission, EU:T:2003:250, The Australian Competition and Consumer Commission Guidelines on Misuse of Market Power and the Japanese Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act.

45. On return of goods, the Appellant submitted that in finding that it was not permitted to return goods on the premise that they were false or defective; that the Tribunal failed to consider clause 6 and 7 of Annex B of the Supplier Agreements which contemplated return of goods that were near the expiry date; that the return of goods near expiry date was not as a result of the 2nd Respondent's actions.

46. The Appellant asserted that it had a right to reject goods on delivery if unacceptable and that it was not a contractual requirement to furnish proof of false or defective goods. It faulted the tribunal for finding that there was no proof that the goods did not comply, highlighting the Tribunal's acknowledgment that the refusal to take delivery of goods is a buyer's right under contract law. It further contended that the Tribunal's finding did not conform to the provisions listed in 24(2B) of the *Competition Act* on what is to be considered when determining abuse of buyer power.

47. The Authority found that guided by international best practices, volume rebates, return of goods nearing expiry dates and rejection of goods that were unacceptable on delivery as conditions for accessing the Appellant's shelved amounted to abuse of buyer power. It submitted that the Appellant was aware of the international best practices and even put in submissions on them. It also submitted that aside from international best practices, the conduct still amounted to abuse of buyer power under Section 24(2A), (2B), (2C) and (2D) of the Act.

48. From my reading of the provisions, this court is led to conclude that the conduct by the Appellant amounted to abuse of buyer power. The court therefore finds that the Tribunal was correct in declining to set aside the Authority's decision on the Appellant's abuse of buyer power.

49. In conclusion, this court upholds the decision of the Tribunal save that the decision to amend all supplier agreements between the Appellant and its other suppliers is set aside as there were no parties to the cause and there were no pleadings affecting them before the Authority to warrant a decision being made in relation to their contracts. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 23RD DAY OF MAY 2024

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Esther - Court Assistant

Mr. Kiragu Kimani & Ms. Sirawa Advocates for the Appellant

Mr. Wakwaya Advocate for the 1st Respondent

No appearance for the 2nd Respondent

HON. LADY JUSTICE A. ONG'INJO

JUDGE

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