REPUBLIC OF KENYA

IN THE COMPETITION TRIBUNAL

AT NAIROBI

CASE NO. CT/005/2020

TELKOM KENYA LIMITED ..... 1ST APPELLANT

AIRTEL NETWORKS KENYA LIMITED .....2ND APPELLANT

AND

COMPETITION AUTHORITY OF KENYA .....RESPONDENT

JUDGMENT

A. BACKGROUND

1. The 1st Appellant, Telkom Kenya Limited is a Limited Liability Company which was established as a telecommunications operator in April 1999, providing mobile telecommunications connectivity and a variety of telecom and other services. The 1st Appellant is licensed by the Communications Authority of Kenya "CAK" to provide mobile telecommunications services and a variety of telecom and other services under various licenses, with the Government of Kenya having a 40% Shareholding in the Company.

2. The 2nd Appellant, Airtel Networks Kenya Limited, is a private Limited Liability Company incorporated in Kenya, providing mobile telecommunications connectivity and a variety of telecom and other services. The 1st Appellant is licensed by the Communications Authority of Kenya "CAK" to provide mobile telecommunications services and a variety of telecom and other services under various licenses. The 2nd Appellant has been operating in Kenya's telecommunications sector since 1999.

3. The Respondent is a State Corporation established under the Competition Act No 12 (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 to control mergers through approvals of proposed mergers with or without conditions as set out under the Competition Act, CAP 504.

4. The genesis of this Review Application is a Notice of Merger Determination dated *13th October 2019 "the Determination"* attaching certain conditions imposed by the Respondent in regard to a proposed merger between the Appellants contained in the 1st Appellant's *Merger Notification Form dated 9th May 2019.*

5. The Appellants had in the said Merger Notification sought the Respondent's approval of the proposed merger in line with the Respondent's Mandate under the ***Competition Act, No. 12 of 2010,*** wherein the 2nd Appellant sought to acquire the mobile operations, enterprise and Carrier services business of the 1st Appellant.

6. On *25th October 2019*, the Appellants and the Respondent held a meeting at the Respondent's offices to discuss the conditions proposed to be imposed on the merged entity upon the approval of the proposed transaction.

7. According to the Respondent's *Notice of Merger Determination dated 31st October 2019*, the Respondent approved the proposed merger with the following conditions:-

   i. *The merged entity shall not sell or transfer the following Operating and Frequency Spectrum Licenses within the remaining duration of the licences;*

      Operating Licenses

      a. *Network Facility Provider –Tier 1-License No. TL/NFP/T1/00001*

      b. *Applications Service Provider – License No. TL/ASP/00001*

      c. *Content Service Provider License No TL/CSP/00001*

d. *International Systems and Services Provider – License No. TL/ULF/IGS/00001*

e. *Submarine Cable Landing- License No. TL/SCR/00003*

Frequency Spectrum Licenses

a. *800MHZ- License No. FL/0008*

b. *900MHZ- License No. FL/0009*

c. *1800MHZ- License No. FL/001/002*

d. *2100MHZ- License No. FL/001/002*

ii. *Upon expiry of the term of the merged entities' operating license, the spectrum in the 900 MHZ and 1800 MHZ acquired from Telkom shall revert back to the Government of Kenya (GoK);*

iii. *The merged entity, or part of it, is restricted from entering into any form of sale agreement within the next five years. However, in the event of any indication of a failing firm within the period, the Communications Authority shall conduct a forensic cost of the merged entity;*

iv. *The merged entity shall honor all the existing contractual terms with the Government of Kenya entities;*

v. *The merged entity shall only access the 4,204 kms of the fibre managed by Telkom on behalf of the GoK at the current market rates and no preferential rates shall be accorded to them unless as provided for in existing contracts;*

vi. *The merged entity shall not enjoy any preferential access to use capacity on the 4,204 kms of fibre managed by Telkom on behalf of Gok;*

vii. *The merged entity shall ensure that at least three hundred and forty nine (349) of the six hundred and seventy four (674) employees of the target are retained as follows:*

a) *120 employees by the merged entity for a period of two (2) years from the date of the implementation of the merger;*

b) *114 employees by Telkom Kenya Limited for a period of two years from the date of the implementation of the merger; and*

c) *115 employees to be absorbed by the network partners of the merged entity; and*

viii. *The merged entity to annually furnish the Authority with a detailed report on the compliance with the above conditions.*

8. According to a letter dated *19th November 2019* from the Advocates of the Appellants, the Appellants expressed dissatisfaction with the Respondent's Notice of Merger determination dated *31st October 2019* arguing that they needed to discuss the proposed conditions with their principals before reverting to the Authority on the same.

9. In the aforesaid letter from the Appellants' Advocates, the Appellants indicated that they were agreeable to conditions 4 and 8 (subject to the period for condition 8 being defined), and that the parties had a number of concerns in relation to conditions *1, 2, 3, 5, 6 and 7* as contained in the Respondent's *Notice of Merger determination dated 31st October 2019*, which concerns the Appellants raised in the said letter.

10. On *4th December 2019*, the Respondent gave reasons behind the determination of *31st December 2019*, and vide a letter dated *9th December 2019*, the Appellants raised reservations on the conditions imposed by the Respondent and requested that the Respondent's Notice of Determination *dated 31st October 2019* not be published in the Kenya Gazette, on the Respondent's website or in any other media.

11. Vide a letter dated *16th December 2019;* the Respondent informed the Appellans that the Authority became *functus officio* in respect to the matter once the merger was approved.

12. The Respondent eventually gazetted the Notice of Determination dated *31st October 2019* on *13th December 2020.*

13. Aggrieved by the aforesaid decision, the Appellants filed the Notice of Motion herein seeking the following ORDERS:-

1. *Condition 1 in relation to the sale or transfer of operating and frequency licenses imposed by the Competition Authority of Kenya in its Notice of Determination of the Appellants' proposed transaction gazetted on 13th December, 2019 be reviewed and set aside in its entirety.*

2. *Condition 2 in relation to reversion of Telkom Kenya's Spectrum in 900 MHZ and 1800MHZ to the Government of Kenya at the expiry of the term imposed by the Competition Authority of Kenya imposed in its Notice of Determination of the Appellants' proposed transaction gazetted on 13th December, 2019 be reviewed and set aside in its entirety.*

3. *Condition 3 in relation to banning the entry into any form of Sale Agreement within five (5) years imposed by the Competition Authority of Kenya in its Notice of Determination of the Appellants' proposed transaction gazetted on 13th December, 2019 be reviewed and set aside in its entirety.*

4. *Condition 5 and 6 preventing commercial negotiations with Government in relation to access of fibre managed by the 1st Appellant imposed by the Competition Authority of Kenya in its Notice of Determination of the Appellants' proposed transaction gazetted on 13th December, 2019 be reviewed and set aside in their entirety.*

5. *Condition 7 imposed by the Competition Authority of Kenya in its Notice of Determination of the Appellants' proposed transaction gazetted on 13th December, 2019 in relation to the retention period of employees of the target be reviewed and amended from two (2) years to twelve (12) months.*

6. *Condition 8 imposed by the Competition Authority of Kenya in its notice of merger determination dated 31st October, 2019 be reviewed and amended to limit the time period for provision of annual reports to two (2) years from the date of approval; and*

7. *Costs of this application be provided in any event.*

B. DOCUMENTS AND EVIDENCE

14. The Appellants filed the following documents before the Tribunal for consideration by the Tribunal in deciding this Review Application:-

i. *Notice of Motion dated 10th January 2020 and filed before this Tribunal on an even date, supported by an Affidavit of Clare Ruto for the 1st Appellant, and an Affidavit of Joy Nyaga for the 2nd Appellant both sworn on 10th January 2020.*
ii. *Supplementary Affidavit sworn on 4th March 2020 and filed on an even date.*
iii. *1st and 2nd Appellants' written Submissions dated 13th March 2020 and filed on an even date.*
iv. *1st and 2nd Appellants' List & Bundle of Authorities dated 13th March 2020 and filed on an even date.*
v. *1st and 2nd Appellants' Supplementary Submissions dated 2nd April 2020.*

15. The Respondent filed the following documents:

i. *Notice of Motion under Certificate of Urgency dated 7th February 2020 and filed before this Tribunal on 13th February 2020.*
ii. *Replying affidavit sworn by Boniface Makongo on 20th January 2020 and filed on 21st January 2020.*
iii. *Supplementary affidavit sworn by Boniface Makongo on 9th March 2020 and filed on 10th March 2020.*

iv. Respondent's Submissions dated 27th March 2020.

16. On *15th January 2020* when the matter came before the Tribunal, the Tribunal gave directions that the Application for Review will be gazzeted in terms of *Section 48(2) of the Competition Act No 12 of 2010.*

17. By consent of the parties, the Respondent's Notice of Motion was compromised and the Appellants undertook not to breach the conditions imposed by the Respondent in the *Notice of Determination dated 31st October 2019,* even as they proceeded with the approved merger, pending the hearing and determination of the Review Application herein.

18. The Review Application was gazetted on *31st January 2020* in accordance with *Section 48 (2) of the Competition Act,* and on *5th March 2020*, the Tribunal gave directions on the hearing of the Review Application.

19. Given the strict timelines provided under *Section 48 (3) of the Competition Act, 2010* for the determination of a Review Application such as the one before us, this Tribunal, and the parties' request that they wished to highlight their written submissions due to the technical nature and general importance of the matter in regard to the impact on the economy, this Tribunal agreed to hear the parties in open court on *22nd April 2019.* All the Ministry of Health Measures required to be observed due to the Covid 19 pandemic were observed.

C. THE APPELLANT'S CASE

20. The Appellants' argue that during the meeting of *25th October 2019* between the Appellants and the Respondent, the Appellants did object to the proposed conditions as they deemed the conditions problematic and that the conditions would render the proposed merger untenable in an environment with a dominant market leader. The Appellants further argue that during the aforesaid meeting, they

requested the Respondent for time to consult their appropriate decision makers and legal advisers on the proposed conditions.

21. The Appellants further contend that the Respondent, on the same date sent revised proposed conditions which to the Appellants, were "cosmetically" altered and did not change underlying problems identified by the Appellants. The Appellants case is that despite their request for time to consult, the Respondent issued a *Notice of Merger Determination on 31st October 2019* attaching the conditions that the Respondent had proposed during the meeting of *25th October 2019*.

22. The Appellants contend that the conduct of the Respondent reeks of high-handedness, bias and a predetermined mindset geared towards rendering the merger untenable. The Appellants argue that despite their request for time to consult and consideration of their reservations, the Respondent proceeded to gazette their Notice of *Determination dated 31st October 2019* on *13th December 2019*, and no written reasons were given for the decision contained in the Notice of Determination dated *31st October 2019*. It is the Appellants' case that the Respondent did not follow the procedure it had set for coming up with the conditions as stipulated by the Merger Guidelines which they argue the Respondent relied on when coming up with the conditions.

23. The Appellants further contend that the Respondent's Merger Guidelines have no basis in law as the same have not gone through the statutory process under the *Statutory Instruments Act,* and the Respondent has no rational basis for relying on them in imposing the impugned conditions. The Appellants relied on *Section 46 of the Competition Act* and *Article 47 of the Constitution, 2010* in support of their contention that the Respondent did not follow proper procedure in coming up with the conditions, and therefore were in violation of the rules of natural justice. The Appellants in this regard relied on *Articles 47 and 50 (1) of the Constitution 2010* and the *Fair Administrative Act, 2015*, the case of ***Geothermal Development***

Company Limited –Vs Attorney General & 3 others (2013) Eklr, and the Court of Appeal case of ***Onyango Oloo vs Attorney General (1986-1989) EA 456.***

24. The Appellants contend that Condition 1 threatens and violates the merged entity's right to property guaranteed under *Article 40 of the Constitution, 2010*. They argue that they purchased the operating and spectrum licenses on Application to the Communications Authority of Kenya after each of the Appellants paid USD 55Million to utilize the licenses for a period of 15 years with a right to a renewal for a further 10 years. The contention of the Appellants is that Condition 1 imposes a ban on the Appellants' constitutional right to property as the merged entity cannot transfer the Licenses during the term of the Licenses. The Appellants relied on the case of ***SDV Transami Kenya Limited & 19 Others vs the Attorney General & 2 others (2016) Eklr.*** They further argue that the sale and transfer of licenses is governed by the Communications Authority as provided under the ***Kenya Information and Communications Act, 1998.***

25. On Condition 2, the Appellants contend that the condition purports to take away the merged entity's legal right to the Spectrum licenses by imposing the condition that upon expiry of the term of the merged entities' operating license, the spectrum in the 900MHZ and 1800MHZ acquired from Telkom shall revert back to the Government.

26. The Appellants argue that it is unfair for the Respondent to impose divesture on account of non- availability of spectrum, as the Communications Authority has currently allocated 2x50MHZ to the current operators leaving 225MHZ available for allocation. The Appellants argue that the Respondent has not imposed a condition of divesture against Safaricom, which would have similar more spectrum allocation in the 900MHZ band post-merger. This, the Appellants argue is discriminatory and in violation of *Article 27 (1) of the Constitution 2010*. The Appellants further argue that the role to assign and recover spectrum lies with the Communications Authority and rely on the case of ***Kenya Human Rights***

Commission vs Communications Authority of Kenya & 4 Others (2018) Eklr and ***Daniel Ingida Aluvaala & Another – Vs – Council of Legal Eduation & Anor (2017) EKLR*** where the court held that a statutory body can only perform functions vested to it by law.

27. In regard to Condition 3, it is the Appellants contention that the Respondent's condition banning entry into any form of sale agreement is problematic as it is not specific, therefore unreasonable. The Appellants have referred to *Regulation 10(1) of the Kenya Information and Communications Act Licensing and Quality of Service Regulations, 2010, Regulation 5(3) of the KICA Radio Communications and Frequency Spectrum Regulations 2010* and *Sections 42 and 43 of KICA* which generally provide that a license granted under the Act cannot be transferred or assigned without the written consent of the Communications Authority. The Appellants argue that the Respondent has not given any logical explanation as to what concerns it is addressing by imposing the condition and how a sale within five years of the merger would affect competition within the telecommunications market.

28. On the imposition of audit fees upon the Appellants, the Appellants contend that the Respondent has no power to require an audit to be conducted or dictate how should pay for it, and that the case of a failing firm is a fact dependent and ought to be assessed independently if the situation arise.

29. On Conditions 5 & 6, the Appellants argue that the conditions seek to inhibit the merged entities' right to negotiate prices with the Government for access to fibre, and the conditions, the Appellants argue are meant to ensure that the Appellants are not able to compete with the dorminant player in the market, Safaricom. They further argue that no similar conditions have been imposed on Safaricom and are therefore biased and unnecessary.

30. Condition 7 on retention of employees by the merged entity is also contested by the Appellants by arguing that the Respondent has not provided any justifiable reasons

as to why it has chosen to lock the employees for two years purportedly on public interest considerations. The Appellants argue that the two year retention period is unreasonable as it does not factor the circumstances that would lead to a voluntary exit or termination of an employee following the laid down procedures under the Employment Act.

31. On Condition 8, it is the Appellants' contention is that the blanket provision of annual reports in regard to the conditions for an indefinite period is unreasonable. The Appellants argue that it would be unreasonable to compel the Appellants to provide compliance with conditions that the Appellants are contesting for being unreasonable.

32. The Appellants case is therefore that the conditions imposed by the Respondent do not address any substantive competition issues in the Kenyan telecommunications market and that they are meant to weaken the merged entity while at the same time cementing the dominance of Safaricom.

33. In their Supplementary Submissions filed before this Tribunal on *2nd April 2020,* the Appellants argue that the Respondent's Supplementary Affidavit sworn on *9th March 2020* was filed out of time, and the introduction of the new materials in the said Affidavit is prejudicial to them.

34. The Appellants argue that the purported minutes of the meeting between the Appellants and the Respondent held at the Respondent's offices on *25 October 2019* submitted as annexure BM1C of the Respondent's Supplementary Affidavit do not provide an accurate account of the proceedings of the meeting as the same were never shared with the Appellants following the meeting to which they supposedly relate nor did the Appellants know of their existence until the Respondent sought to introduce them in these proceedings by annexing them to the Respondent's Supplementary Affidavit. The Appellants urge the Tribunal not to rely on the said minutes.

35. The Appellants, in their Supplementary Submissions filed before the Tribunal on *2nd April 2020* raise issue with the alleged filing of the Respondent's Supplementary Affidavit out of time, and objects to reference to the contents of the said Supplementary Affidavit sworn on *9th March 2020* by Boniface Makongo and filed before this Honourable Tribunal on *10th March 2020.* The Appellants filed their Supplementary Submissions on *2nd April 2020.*

D. THE RESPONDENT'S CASE

36. The Respondent argues that upon receipt of the merger notification, it commenced analysis of the merger in accordance with *Part IV of the Competition Act, No. 12 of 2010,* and was further guided by the *Consolidated Guidelines on the substantive Assessment of Mergers.*

37. The Respondent further argues that in reviewing the Merger Application, the Respondent worked in consultation with the Communications Authority of Kenya, and further consulted the National Treasury and Planning, market players, stakeholders and held several meetings with a view of coming up with a balanced and informed assessment of the Merger. The Respondent states that it further entered into an MOU with the Communications Authority to address competition and consumer protection concerns in the telecommunications sector.

38. The Respondent further contends that the Appellants were also actively engaged and consulted throughout the review process through several meetings and correspondence via email and letters.

39. The Respondent argues that upon the Appellants requesting for a meeting with the Respondent, the parties had a meeting on *25th October 2019* giving rise to revised conditions of an even date. The Respondent further argues that due to the Appellants' failure to revert on the said conditions, the Respondent's Board being constrained by statutory time limits ratified the conditions and informed the Appellants of the same. The Appellants request for the Respondent not to publish

the Determination vide Kenya Gazette was not granted as once the Board issues a Notice of Determination, it becomes *functus officio,* and therefore proceeded to gazette the Notice of Determination in line with *Section 46(6) (i) of the Competition Act, 2010.*

40. In regard to imposition of the conditions, the Respondent argues that it is a competent government body and acted within its powers pursuant to *Section 9 of the Act*, and the Appellants were given time to inform the said conditions during the meeting of *25th October 2019.*

41. On Condition 1, the Respondent contends that it was imposed after the submission by the Appellants that they merged to avoid being forced to wind up as they were making losses in their business, and due to the Appellants' confirmation that spectrum is not affected by the number of subscribers utilizing the material, the parties' most probable interest was to hoard the spectrum with the aim of selling it to potential entrants into the telecommunications market. The Respondent argues that this condition was imposed on the apprehension that should the merged entity attempt to sell their spectrum or license after the merger, the market would certainly be exposed to a monopoly situation and of a dorminant player, Safaricom PLC and this would go against the object of competition law and the core of national competition law, policy and practice.

42. The Respondent further argues that the operating frequencies are licenses and are not the Appellants' property. The Respondent contends that the licenses are reversible to the issuing authority upon lapse of time. The Respondent relied on the case of ***Kenya Human Rights vs Communications Authority of Kenya 7 4 others (2018) EKlr*** that a Constitutional right and freedom is permissible under certain circumstances.

43. On Condition 2, the Respondent argues that the said condition imposes a divesture of spectrum in the national market for spectrum. The Respondent argues that

during the analysis of the merger and in consultation with the industry regulator and on its own motion, studied the entry and exit of industry players in the telecommunications industry and found that there are prohibitive barriers to entry in the telecommunications industry in Kenya due to the exhaustion of the 900MHZ and 1800MHZ by the current industry payers. The Respondent argues that the merged entity holds a substantial percentage of the 900MHZ and 1800MHZ bandwidth which will inhibit entry into the telecommunications market.

44. The Respondent further argues that as informed by the Communications Authority, Safaricom PLC, despite having a bigger market share compared to the two Appellants individually, it holds the same frequency allocation as has been allocate to each of the Appellants. The Respondent has relied on a *Joint Committee Report dated 25th July 2019* where the Communications Authority has clarified on the Spectrum Licenses held by each of the three players. The Respondent therefore argues that the condition does not prejudice the Appellants in any way and it is meant to promote competition by having the licenses revert back to the regulator in order to create availability for entry and access into the market by other players.

45. The Respondent relied on the merger between *Engen In Holdings (Mauritius) by Vivo Energy* where the Respondent gave similar conditions in acquisition of 100% shares in Engen. They further relied on *T-Mobile Austria Acquisition of Tele Ring M.3916 (2006)* where the European Commission granted conditional clearance under *Article 82) of the EC Merger Regulation* to the acquisition by T-Mobile Austria of the Austrian mobile phone operator, and the acquisition of Orange Austria by Hutchison 3G Austria M. 6497 (2012).

46. In regard to Condition 3, the Respondent contends that the condition was imposed in as far as selling of the merged entity is concerned as it may lead to a monopoly, and is meant to protect consumers from being exposed to the risk of having a monopoly in the market. The Respondent contends that it is alive to the possibility that the merged entity might fail hence the provision for a failing business, and in

consultation with the Communications Commission, established that the cost of the forensic audit on the failing concern would be borne by the firm itself.

47. On condition 5, the Respondent argues that the 1st Appellant has been contracted by the GoK to manage on its behalf 4,204km fibre optic cable which it relies on for communication Once the merger is finalized, the GoK will no longer have a controlling stake in the merged entity, and it is only fair then that the merged entity competes competitively for the access, maintenance and use of the Government's 4,204km fibre optic cable. The Respondent relies on *Article 227 of the Constitution 2010* in this regard.

48. On condition 6, the Respondent argues that it was imposed on the premise that if the merged entity was accorded preferential access to use capacity on the Government's fibre, the same will result to unfair competition since other competitors are not accorded the same.

49. On condition 7, the Respondent contends that under *Section 46(2) of the Act,* the Respondent has the mandate to ascertain that the merger should not cause unconscionable loss of employment, and that the Appellants have acknowledged that employment ought to be protected in the merger. The Respondent further contends that the period of two years imposed was and the number of employees stated was totally based on the circumstances at hand.

E. ISSUES FOR CONSIDERATION

50. From the onset we note that the Appellants are challenging the mandate of the Respondent in imposing certain conditions impugned and the procedure, legality, fairness and reasons behind its actions. On the mandate, the Appellants' grounds pit the statutory mandate of the Respondent and that of the Communications Authority of Kenya (CA) with regard to spectrum licencing and control in the telecommunications sector.

51. This is in effect not a challenge to the merit of the decision of the Respondent but to a large extent the procedural fairness and fidelity of the Respondent in discharging its functions. All the grounds for challenging the conditions imposed are akin to those in a Judicial Review application. The decision of the Respondent is therefore being challenged on the grounds that it is *ultra vires*, unreasonable, illogical, absurd and illegal. Several Constitutional questions and allegations of infringement of fundamental rights and freedoms are also raised.

52. In approaching this Tribunal, the Appellants have invoked *Section 48(1) of the Competition Act, 2010, Section 7 of the Fair Administrative Action Act*, 2015 and *Rule 13 of the Competition Tribunal (Procedure) Rules, 2017* as a basis for this Review Application. We note that *Section 7 of the Fair Administrative Action Act (FAAA)* gives Tribunals the power to review administrative action or decision subject to the written law regarding the exercise of jurisdiction of the Tribunal. *Section 7 of the FAAA* above thereof 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.

53. 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. The use of the term 'review' should therefore not be construed to mean 'Judicial Review'. This Tribunal is, however, mindful 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.*

54. We are 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)

55. In light of the above and considering that the Appellants are not seeking the prerogative writs of judicial review albeit floating grounds for the same, it leaves no doubt on the Appellants' prayers. This Tribunal is limited to reviewing the merits of the decision of the Respondent and not the procedure of making the same. That in mind, having carefully examined the pleadings of the parties and their submissions, this Tribunal frames the following issues for determination:-

i. *Whether Conditions 1 and 2 infringes on the Appellants' right to property and made ultra vires of the Respondent's Statutory Mandate;*

ii. *Whether Condition 3 is vague and inimical to competition by limiting the Merged entity's normal operation as a going concern;*

iii. *Whether condition 5 and 6 are discriminatory on the 1st Appellant by hindering the merged entity from enjoying any preferential access;*

iv. *Whether Condition 7 requiring retention period of employees of the target for two years is justified in light of the prevailing circumstances;*

v. *Whether Condition 8 is vague by failing to stipulate the time limit for furnishing of detailed reports; and*

vi. *Who bears the cost of this Application?*

F. ANALYSIS AND DETERMINATION

56. This Tribunal draws its jurisdiction for review of a merger determination from *Section 48 of the Competition Act, No 12 of 2010*. The Tribunal, by Notice in the Kenya Gazette *(Gazette No 768)* of *31st January 2020,* did give notice of the instant Application for review, and invited interested parties to make submissions to the Tribunal as required under the Act. After the lapse of the thirty (30) days given in the said notice, no interested party made any submissions to the Tribunal and as such the Tribunal gave directions on the hearing of the Application. Parties highlighted their submissions on *22nd April 2020.*

57. It is incumbent on the tribunal to understand the potential impact of the decision it makes with respect to competition in the telecommunication industry in the country and protection of the consumers of the telecommunication services.

58. As a preliminary issue, the Appellants, in their Supplementary Submissions filed before the Tribunal on *2nd April 2020* raise issue with the alleged filing of the Respondent's Supplementary Affidavit out of time, and object to reference to the contents of the said Supplementary Affidavit sworn on *9th March 2020* by Boniface Makongo and filed before this Honourable Tribunal on *10th March 2020.* The Appellants filed their Supplementary Submissions on *2nd April 2020.* We will not delve much into this issue but on *5th March 2020,* this Tribunal did give directions on the hearing of the instant Review Application. The Respondent was directed to file its Supplementary Affidavit introducing certain documents that had been omitted in its Replying Affidavit on or before *9th March 2020.* The said Supplementary Affidavit was filed a day later, on *10th March 2020.* The Appellants filed their Supplementary Submissions for purposes of addressing the

issues in the Respondent's Supplementary Affidavit on *2nd April 2020.* It is our considered view that the filing of the Respondent's Supplementary Affidavit a day later does not cause any prejudice to the Appellants who took their time to respond to the issues by filing their Supplementary Submissions on *2nd April 2020.* In the interest of justice and considering *Article 159 of the Constitution, 2010,* and the importance of the matter before us, we shall consider all the documents filed before this Tribunal by both parties.

59. On the allegations by the Appellants in their Supplementary Submissions that the minutes of *25th October 2019* annexed to the Respondent's Supplementary Affidavit do not provide an accurate account of the proceedings of the meeting. The Appellants have not filed any Affidavit annexing a set of minutes that they consider a true account of the proceedings of the meeting of *25th October 2019.* The allegations raised by the Appellants are grave allegations which boarder on perjury and cannot be presented through submissions. In this regard see the case of ***Emmanuel Kuria Gathoni V Commissioner of Police & Another*** *(2012)eKLR where Nambuye J.A stated:-*

> *"....The plaintiff has sought to rely on the set of documents which were classified, exchanged between the relevant mentioned authorities to show that there was no basis for prosecution. To counter this, the defendant has not argued that the said documents were never exchanged by the named relevant authorities. All that the defendant has tended to assert to counter them is that they are classified and evidence will be required to clarify them. This argument does not hold on two fronts namely, being documents, the best way to deny their authenticity should have been through affidavits sourced from their alleged originators to deny their authenticity. This was not done and for this reason they stand as documents. Upon being accepted as such they became protected by the provisions governing proof of documents namely section 64-79 of the evidence Act to the effect that the document itself is proof of its content and no oral evidence can be tendered to controvert it. It means that the defendants assertion that the contents of the alleged classified documents*

need to be interrogated through evidence does not hold and the calling of the makers of the said documents other than for purposes of tendering them in evidence for purposes of production as exhibit and not for purposes of oral evidence to controvert the alleged contents is unnecessary."

60. Having dealt with the preliminary issues above, we now consider the substantive issues raised in the Appellants' Notice of Motion dated *10th January 2020.*

61. The Respondent draws its mandate from the ***Competition Act, No. 12 of 2010,*** and ***Section 3 of the Act*** provides as follows:-

> *"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".*

62. This Tribunal in determining this matter, will then have to establish whether each of the eight conditions imposed by the Respondent are aimed at the following:-

i. *Enhancing the welfare of the people of Kenya;*
ii. *Promoting and protecting effective competition in markets; and specifically the telecommunications industry;*
iii. *Preventing unfair and misleading conduct throughout Kenya.*

63. Having considered the pleadings, the evidence on record, the parties' submissions the Tribunal finds as follows:

64. The Appellants have begun by impugning the procedure taken by the Respondent in approving the merger as infringing on their right to fair administrative action under *Article 47 of the Constitution, Section 4(1) of the Fair Administrative Action Act, 2015* and *Section 46 of the Competition Act, 2010.* As earlier stated, the Appellants submit that the decision reached by the Respondent in

conditionally approving the merger is *void ab initio* for failure to accord the Appellants a right to be heard and present their case against the proposed adverse administrative decisions alluded to in the meeting held on *25th October, 2019*.

65. This is a grave allegation by the Appellants that goes to the root of the matter. To buttress their case on the voidability of the Respondent's decision, the Appellants cite the case of ***Geothermal Development Company Limited v Attorney General and 3 others [2013] eKLR*** whereby the High Court sitting at Nairobi held that notice is a matter of procedural fairness and an important component of Natural Justice. The crux of this precedent relied on by the Appellant was what amounts to proper notice consistent with *Article 47 (1) of the Constitution.* Our reading of the case poses a two-tier approach to arriving at what amounts to reasonable notice and fair administrative action. Fair administrative action requires *notice and information to a person in instances where an adverse administrative decision is to be taken* and on the second part, *an opportunity to present his response*. What constitutes adequate notice and information is to be assessed taking into account the circumstances of each case. ***(See, Geothermal Development Company Limited v Attorney General and 3 others (Supra)***.

66. The first part is quite straightforward. The same can be deduced from the pleadings. From the Appellants' own admission, the meeting held on *25th October, 2019* offered a notice that the Respondent intended to approve the merger with several conditions attached. Upon receiving that notice, they voiced their displeasure and the Respondent indulged them. The Appellants also admit that after the Respondent received their protest it sent the amended conditions for their consideration on the same date although the Appellants contend that the same was done "cosmetically". That however, does not negate the fact that there was adequate notice of the impending administrative decision. The Respondent herein discharged the first obligation being to communicate to the Appellants of the impending administrative decision being that it minded to approve the merger

with several conditions which they had notice of and had an opportunity to interrogate save that they needed to discuss at their Administrative levels.

67. Having found that the Appellants by their own admission had adequate notice of the impending administrative decision, takes us to the second limb which is somewhat problematic i.e. *whether the Appellants were given adequate opportunity to present their case*. The Appellants have cited the case of ***Onyango v Attorney General [1986-1989] EA 456*** on the right to be granted a chance to present ones case on an impeding administrative decision. It is not in dispute that after being notified of the impending administrative decision, the Appellants requested for time to respond and present their case. What is not coming out from the pleadings is whether there was an agreed time frame because it goes without saying that the same cannot be indefinite.

68. The Appellants further decry that notwithstanding their concerns on the conditions imposed, the Respondent without reference proceeded to publish the determination six (6) days later. The Respondent's contention is that its Board having sat, it was *functus officio* and thus the only remedy was a challenge before this Tribunal. However, from the record, we find that by a letter dated *19th November, 2019* as set out in *paragraph 8 in the grounds in support of the review before this Tribunal,* the Appellants admit that they wrote the letter to the Respondent challenging the conditions and requesting for the conditions to be revised. The Appellants further admit that the said letter dated *19th December, 2019* received a reply from the Respondent as contained in a letter dated *4th December, 2019*. The Appellants however discredit the letter as being "incoherent and vague". It is therefore the admission of the Appellants that they were granted the opportunity to present their case and a letter to that effect detailing their case is on record.

69. What therefore arises from the facts is whether the Appellants were given adequate time under the circumstances to present their case. To determine what adequate time in the circumstances of this case is, it would be prudent to look at the statutory timelines availing to the Respondent.

70. *Section 44 of the Competition Act* provides that a determination shall be made within *sixty (60) days of receiving the merger notification or further information (if required)* or within *thirty (30) days after a hearing conference is convened.* Provisions for extension are accordingly made under *Section 44 (2) of the Act.* It is the consensus of the parties that the merger notification was submitted and received on *9th May, 2019*. From that date, the sixty days began running. This time may, however, not be definite since some information was exchanged and time began running only after the last exchange. The Appellants however, through the Affidavit of Clare Ruto admit that documents appearing at pages 70 – 132 of the Supporting Affidavit were what was requested and supplied. A keen examination of the above stated documents shows that the last correspondence was made on *20th August, 2019*. Sixty (60) days began running from then *(as per Section 44 (1) (b).* From our arithmetic calculation the sixty (60) days fell due on *19th October, 2019*. This however is not conclusive, the time taken by the Appellants is indicative.

71. Since we cannot discern any time limit agreed upon for the submission of the Appellants grievances the period between *25th October, 2019* when the Appellants learnt of the impeding determination to the time the decision was published in the Kenya Gazette on *13th December, 2019* afforded the Appellants ample time to challenge the procedural fairness or fidelity of the Respondent through appropriate channels. Even if the *25th October, 2019* meeting were to be taken as a hearing conference in terms of *Section 44 (1) (c*), thirty (30) days fell due on *24th November, 2019*.

72. It is trite law that in according a party a fair hearing in line with the principles of fair administrative action, adequate time and opportunity must be accorded to present one case in light of the prevailing circumstances. From our analysis above, the time the Appellants had was adequate to challenge procedural and administrative fidelity of the Respondent. Raising the issue at this stage can only be construed as an afterthought. ***(See, Halsbury's Laws of England/Judicial Review (Volume 61A (2018)/2).***

73. 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 as follows:-

> *"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."*
>
> *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 in 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..... The right to be afforded an opportunity of being heard must have to be distinguished from the necessity to have an oral hearing especially in disciplinary matters. 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".

74. 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."

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

"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.***"

76. From the above cases, the position held is that whatever form of proceedings adopted by the authority, it must meet the minimum irreducible elements of fairness. In this case, it is clear that there was correspondence and meetings between the Appellants and the Respondent between *9th May 2019 and 13th December 2019* in regard to the proposed merger.

77. In that regard therefore noting the time limits that the Respondent has and noting that the Appellants had adequate notice and an opportunity to respond, its claim on infringement of its right to fair administrative action therefore does not arise. This Tribunal therefore proceeds to determine the matter on its merits as hereunder.

78. ***Condition 1 and 2*** which provides that upon the expiry of the merged entities' operating licence, the spectrum in the 900MHZ and 1800MHZ acquired from Telkom shall revert back to the Government of Kenya (GoK) and that the Appellants are barred from selling the stated licences and spectrums during the pendency of their respective licence period has been challenged on infringing on the right to property. To begin with, telecommunication spectrum is a finite resource. Each country has only a finite range of frequencies. (**See, *Bernard Murage v Fineserve Africa Limited & 3 others* [2015] eKLR**).

79. From time immemorial, or at least after the discovery of electromagnetic and wireless transmission, there has always been a debate about public and private ownership of electromagnetic spectrum. With the benefit of precedent therefore, there is no doubt that a licence be it an operating licence or a spectrum licence is a critical asset in the telecommunication industry. There is no doubt that the same consists property used by the Appellants and other telecommunication service providers in service production. (**See, *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* [2018] eKLR, *Bernard Murage v Fineserve Africa Limited & 3 others* [2015] eKLR**).

80. The Appellants have further referred the Tribunal to the provisions of ***Section 2 of the Interpretation of General Provisions Act, Cap. 2***. To add to that, ***the Constitution of Kenya, 2010*** under ***Article 40 and 260*** provide for the holding by any person of any property of any description. The underlying qualifier is the issue of exclusivity and the enforceability of a property right. The Appellants have demonstrated these qualifiers which attach to property. From an economic point of view, the spectrum is an asset and a factor of production in the telecommunication industry. It is a resource and can be traded pursuant to the terms which the licencee has from the Communications Authority of Kenya. This is further complemented by the capital intensive nature of the undertaking in obtaining the limited licence in spectrum slots and the need to recoup investments.

81. This Tribunal is further guided by the constitutional decree contained in *Article 19 (3) (b), Article 20, Article 24* and *Article 256 of the Constitution of Kenya, 2010* to the effect that where no legitimate reason has been shown to fetter the limitation of a right, then this Tribunal is bound to give effect to the widest possible and generous interpretation. Indeed the case of ***SDV Transami Kenya Limited and 19 others v Attorney General and another*** **[2016] eKLR** is instructive. We must therefore, from the onset dismiss the Respondent's contention that a spectrum does not constitute a property.

82. A simple look at the historical foundation and legal intricacies surrounding the management and licencing of spectrum with the competing public trust doctrine and private property doctrine on licencing and management, the Respondent's argument is a non-starter, it is impotent from the word go and consequently falls by the wayside. In that regard the Tribunal considers a spectrum licence as property with attendant property rights as provided under written law. (**See, *Communications Commission of Kenya and 5 Others v. Royal Media Services and 5 others*** **[2014] eKLR** ***Supreme Court Petition Nos. 14, 14A, 14B and 14C of 2014).***

83. With that in mind, the general model is that since the electromagnetic is a critical and scarce resource, world nations have formed the International Telecommunication Union (ITU) that allocates radio frequencies to states to minimise conflict and interruption through the undertaking of states. The States thereon, through the national regulatory and licencing bodies retail the same within their territories by way of licences. In Kenya, such a body is *prima facie* the Communications Authority of Kenya (CA). The spectrum being a finite resource has as a result of the market forces of demand and supply become a rarity forcing the prices of such licences on an upward trend. That notwithstanding, frequencies are not depleted as they can always be generated. However, the licencing and allocation of these frequencies for purposes of order and to prevent interference is what is finite. This scarcity and therefore the limited number of licences is a barrier to new entrants into the telecommunications market.

84. The Communications Authority of Kenya is at the Apex of spectrum management, licencing and allocation in Kenya. The management and control of radio frequencies/ electromagnetic spectrum is also a function that falls under the ambit of the Respondent i.e. Competition Authority of Kenya especially when it relates to consumer welfare and protection in competition law matters under the *Competition Act*, 2010.

85. With regard to this case, the Tribunal takes Judicial Notice that the allocation and licencing of Frequency Spectrum and Operating Licences which we have noted is a scarce resource involves planning for purposes of harmony which informs the attendant conditions issued with the licence. There are international obligations and restrictions regarding spectrum use allocated to a specific country. These obligations and restrictions are monitored, imposed and governed by the Communications Authority of Kenya, some of them are chiselled into the licence held by licencees.

86. Condition 1 imposed by the Respondent therefore constitutes an alteration of the terms and conditions issued to the 1st Appellant by the Communications Authority of Kenya which contains provisions on management of the licence, expiry and renewal. **(See, *Kenya Information and Communications (Radio Communications and Frequency Spectrum) Regulations*, 2010 enacted pursuant to Section 36 of the *Kenya Information Communications Act*, 1999)**

87. The Tribunal notes that the Appellants wrote to the Respondents *vide* a letter dated *19th November, 2019* stating that there were already adequate measures to ensure that there are measures to safeguard the telecommunications sector. They submitted that there can be no transfer or assignment of a licence granted by the Communications Authority of Kenya without its written consent. They also submit that the terms of the licence require that a licencee notifies the Communication Authority of Kenya of any change in structure of ownership among others, thirty (30) days prior to the intended change. It is therefore the Appellants' feeling that conditions 1 and 2 are superfluous since they are already catered for under the terms of the *Competition Act,* the *Kenya Information and Communication Act,* and the terms of the licence. The aforesaid has the effect of pre-empting the Appellants' businesses instead of leaving the same to market forces and the same be determined in light of the prevailing circumstances of the time since they, at all times will be monitored by the Respondent and the Communications Authority of Kenya.

88. The Appellants also argue that there is no justification for providing that the 900MHZ and 1800MHZ reverts back to the government at the expiry of the licence considering that there is a total bandwidth of 25MHZ in the 1800MHZ which is currently unassigned. Furthermore, the Appellants submit that there are mechanisms within the disposal of the Communications Authority of Kenya to recall and recover the spectrum should another operator express the need in entering the market.

89. In that regard, the Appellants give the example of recovery by the Communication Authority, which as a regulator has in the past exercised the power in recovering the spectrum in the 900MHZ band from licencees when Essar Telecom Kenya Limited and France Telecom wanted to enter the Kenyan Market.

90. The Respondent in response to the foregoing contentions argues that there are high barriers to entry and exit into the market and that the 900MHZ and 1800MHZ are key for any new entrant to compete meaningfully. The Respondent however does not answer the Appellants' contention that should need arise, there are procedures for divesture of the licence from the Appellants by the Communications Authority of Kenya.

91. The mandate of regulating the telecommunications sector is a statutory function of the Communications Authority of Kenya. The regulations on competition guiding the Authority (CA) i.e. ***Kenya Information and Communication (Fair Competition and Equality of Treatment) Regulations,* 2010** provide for cooperation with other agencies which have concurrent jurisdiction on competition matters.

92. It is on the aegis of cooperation among the agencies that the Communications Authority of Kenya (CA) and the Competition Authority of Kenya (CAK) signed a *Memorandum of Understanding (MOU) dated 6th May, 2015*. The MOU is annexed to the Respondent's Replying Affidavit dated *20th January, 2020* as *annexure "RM – 02.* The MOU and the ensuing cooperation does not however in any way mean that the two agencies are abdicating their statutory mandates as stipulated in their establishing statutes. The Communications Authority of Kenya is the primary regulator in the telecommunications sector. Competition Authority on the other hand has the broad role of regulating the market to ensure fair competition in all sectors of the economy. The underlying difference between these two agencies is that the Communications Authority is a sector specific

regulator whilst the Respondent is a market wide superintendent in competition matters.

93. It therefore flows that the Communications Authority in telecommunication matters is better equipped with the market and technical knowledge within the competition sector. ***(See, Patricia Kameri – Mbote el al, 'Spectrum Management and Regulation in Kenya: Engendering Inclusive Access to Technology and Information' (2016) International Environmental Law Research Centre).***

94. When the 1st Appellant therefore acquired its respective licence from the Communication Authority with the attendant terms and conditions for a definite period of time, it was entitled to plan for the resource within the bounds of the licence and utilise the same. It is common knowledge that a radio spectrum is at the heart of any telecommunication service provider. The definite terms and conditions in the licence therefore offer sufficient insulation and gives right to a legitimate expectation that the licence will not be interfered with provided that the licencee adheres to the laid down terms and conditions.

95. This argument is contained in the Appellants' letter to the Respondent dated *19th November, 2019* to the effect that pursuant to the terms of the licence, the 1st Appellant has a pre-emptive right to renew the licences for a further period of fifteen (15) years subject to satisfying the conditions laid down by the regulator i.e. the Communications Authority of Kenya. It therefore submits that the determination whether the merged entity is to retain the 900MHZ and 1800MHZ should be reached in accordance with the provisions of the Telkom NFP Licence which require a formal review to be conducted by the Communications Authority of Kenya with respect to the same in the normal course of the prescribed process of renewal.

96. The Appellants submit that they paid a consideration of USD 55 Million each for grant of the licence based on the right contained in the licence and the expectation

that the term would be renewed for a further fifteen (15) years after the initial expiry. The above arguments contextualize the Appellants' right of legitimate expectation and the need to leverage the same in realising their complementary synergies as a ground for submitting the merger to the Respondent for Approval.

97. The Respondent in its pleadings states that the reason for imposing such a divesture is grounded on the fact that the same are exhausted and are key for entry of any new layer. Throughout its argument we have not found a rebuttal to the contention by the Appellants that there exist mechanisms by the Regulator, the Communications Authority to recover the licence. Further, in its Replying Affidavit, the Respondent attaches minutes of meetings held between its officers and representatives of Safaricom PLC annexed as "*RM – 04 (a) and (b)* in which it was noted that after the merger, the Appellants would have a combined spectrum of 77.5 MHZ compared to Safaricom's 57.5MHZ and therefore Safaricom submitted that it would not be able to provide quality services like before due to the imbalance between the number of subscribers and the allocated spectrum.

98. As submitted by the Appellants to the Respondent, the reason for the merger is to leverage on their complementary synergies and resources. From Safaricom PLC's contention to the Respondent, we can clearly see the import of the merger by the Appellants to compete against the market leader Safaricom PLC. The Appellants plead with the Tribunal that if the conditions are allowed to stand then the head start sought to be realised by the merger will be long gone before it is realised and the Appellant companies will fade into economic oblivion.

99. The Appellants further submit that at the time of applying for the licence, they had the expectation that the same would be renewed pursuant to the terms of the licence to justify the investment. To analyse the Appellants' right of legitimate expectation, a case in point to demonstrate the right of legitimate expectation is

the case of ***Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi*** **[2007] eKLR** where the Court held that:

> *"...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way... Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised."*
> (Emphasis ours)

100. To reiterate, the Appellants have submitted that the impetus behind the merger was to benefit from their mutual synergies. Better put, the parties sought to benefit from their market strengths and complement their strengths and weaknesses where need be. Such strengths and assets to be enjoyed by the merger include the radio spectrums and operating licences in order to effectively compete against a market leader i.e. Safaricom PLC.

101. So far, from the pleadings, there is no indication by the Respondent that the merger will in any way affect the terms of the licence granted to the 1st Appellant. In absence of that indication, the Respondent fails to satisfy the requirement that *"Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest*

to justify a departure from what has been previously promised" in order to fetter the Appellant's legitimate expectation

102. To complement the Kenyan Authorities, the case of ***Council of Civil Service Union v. Minister for Civil Service*** **[1985] 1 A.C.374** (at pages 408-409) is instructive. Lord Diplock held that for legitimate expectation to arise, the contested decision must have the effect of depriving one some benefit or advantage, which he had been permitted in the past by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to enjoy, or he has received assurances from the decision- maker that it will not be withdrawn without giving him an opportunity to advance reasons for non-withdrawal.

103. As succinctly captured under paragraph 4.11 of the Appellants' Written Submissions, the consolidation of the Appellants' operations and leveraging on complementary synergies is to them an opportunity that would give them a chance at competing in the market.

104. The role of the Respondent therefore is to give effect to the said intention provided the same does not negatively affect competition. This, therefore, means that the burden of proof shifts to the Respondent to demonstrate that the merger negatively affects competition thus informing its decision to impose the conditions impugned herein.

105. The Respondent in imposing condition 1 has stated that the same is to ensure that the merged entity does not sell the spectrum allocation. It has not denied the contention, that, the same cannot be sold without the written consent of the Communications Authority of Kenya and pursuant to the terms of the licence. The Respondent has not given any evidence of plausible theory to back its speculation that the market will be at a threat of being turned into a monopoly if condition 1

and 2 are not imposed. It has further steered clear of the Appellants' argument that there are adequate safeguards to cushion such an eventuality.

106. The Respondent also argues that the 900MHZ and 1800MHZ bands which ordinarily carry voice and SMS and which form the substratum of the business of any telecommunication company and without which new entrants cannot access the Kenyan market, have all been exhausted by the current industry players. Therefore, as single entities, both Appellants have the 900MHZ and 1800MHZ bands allowing them to provide both voice and SMS roll out services to their customers. Therefore, the merged entity will jointly hold a substantial percentage of the 900MHZ and 1800MHZ bandwidth which would further inhibit entry in the telecommunications sector by consolidating the most crucial asset in the market to a single player.

107. The Respondent also holds the view that that despite Safaricom PLC, the other market player, having a bigger market share compared to the two Appellants individually, it holds the same frequency allocation as has been allocated to each of the Appellants. Therefore, the merged entity will hold a greater frequency allocation and since there is no other frequency available in the market for allocation, the merged entity will be holding the other three-quarter frequency allocation in the market.

108. The Appellants however view the spectrum concentration as a strength that they seek to leverage with the merger while the Respondent found that in the public interest and promotion of fair competition in the industry, that the licences for 900MHZ and 1800MHZ revert back to the regulator in order to create availability for entry and access into the market by other players, hence promoting fair competition. In support of their case, the Respondent has cited the case of ***T-Mobile Austria Acquisition of Tele Ring M. 3916 (2006)***, where the European Commission granted conditional clearance under *Article 8(2) of the EC Merger*

Regulations to the acquisition by T-Mobile Austria of the Austrian mobile phone operator. The merger was approved subject to divesting of its spectrum.

109. The above case is however unique considering the effect of the merger. Tele Ring M. was considered a market maverick known to give its consumers the most competitive prices. Therefore, the merger in its original form had the effect of taking out the market maverick and denying consumers competitive rates. Tele Ring had exerted considerable pressure on the two leading market players i.e. Mobilkom and T-Mobile. Further, the merger in its original form would have catapulted T-Mobile Austria to a market leader in Austria and the concentration would effectively impede competition. Such is not the case before this Tribunal. There is no indication that there will be unwarranted concentration to justify the divesture. The divesture of T-Mobile was for the spectrum to be utilised by other operators with lower market share compared to T-Mobile.

110. In the current case, no immediate use of the 900MHZ and 1800MHZ spectrum has been shown. The Respondent also cites the case of ***Orange Austria by Hutchison 3G Austria M.*6497 (2012)**, where a merger was approved subject to the divestment of frequencies and a commitment to offer low wholesale access fees to mobile virtual network operators (MVNOs) with the aim of reducing entry barriers for potential new entrants and encourage competition at the retail level.

111. The above case is equally distinguishable from the circumstances before this Tribunal. The Commission was concerned about the lessening of competition when one of the four telecommunication service providers is subsumed. Hutchison 3G (H3G) therefore offered to divest certain radio spectrum and related rights and to provide wholesale access to its network in order to facilitate entry players into the market.

112. In the ***Orange Austria by Hutchison 3G Austria M.*** case, there was a new market entrant (MNO) in need of the licence. In fact as an *orbiter* at *paragraph 526 of the*

decision, the Competition Commission held that, *"[i]f no new entrant acquires the Auction Spectrum and the Divestment Spectrum, there will be no further obligation on H3G to divest spectrum and the Divestment Spectrum licence will remain with H3G."* This orbiter is what we find applying to the Kenyan case. There is no apparent new market entrant clearly discernible from the pleadings. Without an apparent new market entrant, the Respondent cannot be heard to say that the continued holding of the 900MHZ and 1800MHZ by the merged entity is a barrier to entry of a new player. In short, it has not shown sufficient ground to fetter the Appellants legitimate expectation.

113. As has been pleaded and indeed we have noted from the provisions of the *Kenya Information and Communication Act*, the regulator has the requisite mandate and the machinery for divesting the said licences for the new entrant (if need be). The condition therefore is more inclined to infringe on the Appellants' right of legitimate expectation and property rather than for the sake of a new market entrant (which is currently non-existent) **(See, *Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi* [2007] eKLR**.

114. The Appellants lament that due to the unassailable market lead of Safaricom PLC, the Appellants cannot meaningfully compete thus the decision to leverage on their collective strength. There is no doubt that Safaricom PLC is a dominant market player in the telecommunications industry. A look at the pleadings before the Tribunal, and the argument by the parties point to exactly that conclusion.

115. The Appellants argue that they are minority market players by revenue as evinced at paragraph 4.10 of their submissions. They make reference to the Respondent's Replying Affidavit annexure "**RM – 03(a)**" being an overview of the communications service providers market. The overview is jointly authored by the two regulators i.e. the Competition Authority of Kenya and the Communications Authority of Kenya. As per the document, Safaricom PLC is

leading by market share by revenues at 88.97%; market share by subscriptions at 62.40%; and market share by voice tariff at 59.92%.

116. The *Competition Act,* 2010 provides at *Section 4 (3) (b)* that "*a person has a dominant position in the market if the person provides or otherwise controls not less than one-half of the services that are rendered in Kenya or any substantial part thereof.*" A 'person' in this context is taken under ***Article 250 of the Constitution*** to mean a Company, Association or other body of persons whether incorporated or unincorporated.

117. Guided by the *Competition Act* and the pleadings of the parties before the Tribunal, we infer that Safaricom PLC is a dominant market player. At page 49 and 50 of the Supporting Affidavit to the Notice of Motion Application herein, the Appellants state that:-

> *"Based on the current structure of the telecommunications sector in Kenya, in which the market share is largely skewed towards one operator, it is no longer viable for Telkom and Airtel to continue operating independently as they will continue expending their resources without making any profits or returns to shareholders, both currently and in the foreseeable future. In addition, Equitel and the MVNO currently operating in Kenya is entirely dependent on Airtel. If Airtel ceases to operate, Equitel will no longer be able to operate in Kenya.*

118. The Appellants therefore submit that the merger will assist them stay afloat considering the predicament stipulated above, and that they should be allowed to merge in order to benefit and compete meaningfully by making profits and serving the customer better. In that regard, they submitted to the Respondent that:-

> *"Airtel and Telkom would also have the opportunity to break even and make profits under the combined entity. If they do not implement the proposed transaction, it is likely that they will continue making losses which could inevitably end in the failure of both operators. Failure would*

have far-reaching implications on Kenya's economy including denying customers and innovative products, rendering many of their current employees jobless, disrupting the businesses of suppliers, vendors and agents and even denying the government of taxes. It would also have massive impact on the country and more particularly on the information and communications technology sector in terms of attracting further future foreign and local investment."

119. An analysis of the forgoing grounds, show that the objective behind the merger of the Appellants is to enhance competition and provide more competitive markets by leveraging on their complementary synergies. The merger is instrumental for the Appellants to meaningfully compete with a market leader who from the data submitted mirrored against the terms of the *Competition Act* is a dominant market player.

120. It therefore falls upon the Respondent to disprove the Appellants' position. In this case the Respondent has merely stated that the merger would have the effect of converting the market from an oligopoly to a duopoly. The hypothesis however does not address the Appellants' intention to remain competitive in the market and meaningfully compete against a dominant market leader.

121. The Supreme Court of the United States in the case of ***Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993)** recognised that the import of the Sherman Act (an anti-trust legislation) was *"not to protect businesses from the working of the market; it is to protect the public from the failure of the market"* and thus leaving out the market competitors to square it out in service delivery *"promotes the consumer interests that the Sherman Act aims to foster."*

122. Competition law in that regard therefore recognises that in the course of competition, injury may be occasioned to a competitor therefore cementing the role of competition law as was equally stated by the Supreme Court of the United

states in the case of ***Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*** **(1977)** that anti-trust laws "*were enacted for 'the protection of competition, not competitors.*"

123. In the case before this Tribunal, the Appellants are decrying injury in the market facing a dominant leader and from its submissions, without approval of the merger both entities will face collapse in the most horrendous manner. Consequently, the market will be dominated by a single market player contrary to the import of competition law.

124. On the other hand as earlier alluded, Safaricom PLC submitted to the Respondent that it will be disadvantaged when the Appellants merge their spectrum base and therefore it will not be able to offer quality services like before. This argument in light of the above cases does not hold its ground. The Appellants are leveraging on their complementary synergies and consequently become competitive against Safaricom PLC. That is the essence of competition. Safaricom PLC as the market leader will have to face a more competitive opponent in the form of a merged entity. The unequal spectrum base is an injury in the course of competition that it has to come to terms with. (**See, *Spectrum Sports, Inc. v. McQuillan & Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.***)

125. However, to distinguish the Appellants' injury of being driven out of the market, the Supreme Court of the United States later in the case of ***Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*** **(1993)** recognised that there is need to look at the effect of injury to a competitor on the market. In this case while considering a predatory pricing claim aimed at driving a competitor out of the market. It held that even where facts "*indicate that below-cost pricing could likely produce its intended effect on the target, there is still the further question whether it would likely injure competition in the relevant market.*"

126. The facts of this case show that there is a legitimate concern by the Appellants on the long term health of competition law in Kenya's telecommunications sector. It

therefore falls upon the Respondent as a competition watchdog to ensure that the Appellants' collapse is not eminent thus turning the Kenyan telecommunications sector into a monopoly. That is the import of the Respondents mandate, to protect competition.

127. The crux of this Review Application is that the Respondent has stifled competition by imposing the impugned conditions on the Appellants' merger. It flows therefore that by imposing the obligation that the 900MHZ and the 1900MHZ reverts back to the government without granting the Appellants the right to battle for its renewal as per the terms of the licence it holds would mean that the complementary synergies would be short lived considering that the same expires in four years while it is submitted that the merged entity needs two years to break even.

128. It is trite law that the purpose of competition law is to protect and nurture competition and not to shield the competitors. This was provided for in the ***United States Supreme Court case*** of ***Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*** which held that the antitrust laws "*were enacted for the protection of 'competition, not competitors'.*" The Tribunal notes that the Appellants have submitted that there are mechanisms that the market regulator (Communication Authority of Kenya) can utilise in recovering the 900MHZ and 1800MHZ spectrum in case a new entrant comes up. This preposition is not disputed by the Respondent. Further, we have shown that the licences and spectrum are adequately governed by the terms of the licence. In any event, the regulator (CA) under Section 39 of the *Kenya Information Communications Act,* 1998 can divest the 900MHZ and the 1800MHZ if a new entrant comes into the market.

129. The Respondent states that the Appellants may have the probable interest of hoarding the spectrum in order to sell to new entrants in the market. This argument is flawed because even if that were the case, the transfer or the sale would not happen without the written consent of the Communications Authority

of Kenya or with the knowledge of the Respondent who will then intervene. In light that the Appellants have indicated that they seek to benefit from the merger to compete against a leading market player, there is no evidence of the Respondent's speculation and in any event, there are adequate rail guards to cushion against such an eventuality.

130. There exists a right of legitimate expectation as pleaded by the Appellants on renewal of the licence and adherence to the term. We have also found that the Communications Authority of Kenya is in a better position to analyse the terms of the licence and it would be improper for the Respondent to abrogate that right by pre-empting the terms of the licence including the right of renewal.

131. That being the case, the only logical conclusion is that the licences be governed by the subsisting terms of the licence which shall be reviewed by the Communications Authority of Kenya and by the Respondent if need be at the time the licence falls due for renewal. The Respondent has failed to support the rationale for its condition.

132. On Condition 1, the fact that the Appellants are not in a position to sell the operating licences and the spectrum allocation without the express written consent of the Communications Authority of Kenya is sufficient. Furthermore, since the Respondent and the Communications Authority of Kenya have a memorandum of understanding on evaluating such transactions, condition 1 is not only superfluous but pre-mature.

133. On condition 2, even though the Respondent has submitted that the 900MHZ and 1800MHZ spectrum is a critical resource for a new market entrant, a fact that is not disputed by the Appellants. There is, however, no indication that a new entrant is in the offing. Therefore the reliance on the case of ***Orange Austria by Hutchison 3G Austria M.*** (Supra) for reasons stated at paragraph 526 that *"[i]f no new entrant acquires the Auction Spectrum and the Divestment Spectrum,*

there will be no further obligation on H3G to divest spectrum and the Divestment Spectrum licence will remain with H3G" and the need to safeguard the Appellants right of legitimate expectation as discussed herein. It is therefore evident that there is no impediment on the side of the regulator from recovering the 900MHZ and 1800MHZ spectrum should a new market entrant emerge. In the meantime, the Respondent has not shown sufficient ground to depart from the terms and conditions imposed by the market regulator i.e. the Communications Authority of Kenya.

134. It is therefore the Tribunals finding that the imposition of condition 1 and 2 is improper and is reviewed and replaced with the condition that the licences shall be held in accordance with the terms of the licence granted by the Communications Authority of Kenya.

135. On *Condition 3 in relation to banning the entry into any form of sale agreement within five (5) years imposed by the Competition Authority of Kenya in its Notice of Determination of the Appellants proposed transaction gazetted on 13th December 2019,* the Respondent argues that this horizontal merger will create a duopoly thereby raising the barrier for entry by another party. The Respondent is apprehensive that should the merged entity sell its business to the other current player in the market this would create a monopoly. The Respondent is also apprehensive that if the merged entity should fail, a monopoly would also be created. It is for this reason that the Respondent imposed the conditions on the Appellants prohibiting them from selling the merged entity and exposing consumers to the risk of a monopoly in the industry.

136. The Appellants in rejoinder argue that this condition is what will lead to the creation of a monopoly. The Appellants argue that if they are restricted from selling their shares to raise capital, they will in the long run shrivel and exit the

137. The Appellants further argue that the condition is a blanket policy and thus prejudicial to it as a going concern. The Appellants contend that the blanket moratorium on entering into any form of sale agreement deters investments and limits the merged entity's ability to attract capital in a capital intensive industry and hinders it from otherwise dealing with the assets of the company or its business. The Appellants expound that the condition in its form curtails the merged entity from selling or attracting capital through the sale of its shares and to enter into sale agreements in their ordinary course of business or to bring on board new investors. The term 'any form of sale agreement' is broad and wide as submitted by the Appellants. It is open to wide and arbitrary interpretation. The Appellants further submit that the condition is in itself anti-competitive thus curtailing the ability of the merged entity to grow and be competitive in the market.

138. The Respondent has in the Replying Affidavit clarified that the sale agreement it intended to prohibit the Appellants from selling the merged entity , since as per the Appellants submissions, they are merging to realise the synergies that would come with the merger.

139. On the second limb that in the case of an indication of a failing firm a forensic audit be undertaken by the Authority at the expense of the merged entity. The Appellants submit that the Respondent by imposing the condition is predicting or otherwise foreshadowing the merged entity's doom. The Respondent on the other hand contends that in the past, it has borne the cost of forensic audit for failing firms and the same has been costly to it. Therefore, the import of the condition is ensuring that the cost is not passed to the already burdened tax payer.

140. A reading of the condition leaves no doubt that it prohibits all forms of sale and transactions in relation to the merger. Without the Respondent's clarification contained in the Relying Affidavit, there is no interpretation to the contrary.

Clarity is a key facet when making a law, regulation or a condition that limit the exercise of a certain right of prohibiting a party from doing something. In a constitutional democracy such as ours, there is a great need to foster clarity in limiting certain rights and freedoms. The same should be easily discernible and definite in their application.

141. To underscore the value of clarity in a constitutional democracy, the United States Supreme Court majority decision in the case of ***United States v. Davis*, 588 U. S. (2019)** held that: -

> *"In our constitutional order, a vague law is no law at all. Only the people's elected representatives in Congress have the power to write new federal criminal laws. And when Congress exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them. Vague laws transgress both of those constitutional requirements. They hand off the legislature's responsibility for defining criminal behaviour to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct. When Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again."*

142. The Tribunal is alive to the fact that the case before us is not a legislation by a legislative organ but rather a decision by an administrative body. It is however not lost that the underlying philosophy is similar, the need for clarity in limitations to rights or certain acts as the case may be. This condition is less contentious. What is lacking is merely clarity on the scope of the condition.

143. The Respondent is of the opinion that the merged entity should be accorded adequate opportunity to grow and be prohibited from selling the merged entity for a period of five years. The Appellants on the other hand have submitted that they need two years to break even.

144. The role of this Tribunal is therefore to clarify the intention of the Respondent since as admitted by the Appellants, its sole goal is to realise the complementary synergies of the merger. There is no indication that they intend to sell the merged entity. As much as the Respondent's precaution is reasonable, the same is superfluous considering that the sale as contemplated by the Respondent would be a takeover which in any event cannot happen without the consent of the Respondent. Nonetheless, the Appellants will not be prejudiced if the Tribunal maintains the condition subject to qualifying that such restriction is only in relation to the sale of the merged entity.

145. Since the Appellants are at liberty to float and sell shares of the merged entity to attract capital or in the normal course of business, there is need to elaborate certain restrictions to foster competition. Therefore, in case the merged entity floats and sells its shares, it shall not sell a substantial share to a market competitor holding more that forty per centum (40%) of the market share. This is to avoid the possibility of buyout making the sector a monopoly.

146. On the concept of the 'failing firm', it is important first to contextualise what constitutes the 'failing firm doctrine' in the present circumstances. This doctrine can be deduced from the South African (Competition Tribunal) case of ***ISCOR Limited and Saldanha Steel (Pty) Ltd (67/LM/Dec01) [2002] ZACT 17 (4 April 2002)*** at paragraph 77 and 78 where it was stated that:-

> *"The jurisprudence of competition law recognises what has become known as the "failing firm defence" to sanitise a merger that might otherwise raise competition concerns. The defence first emerged in US law when in a 1930 decision, International Shoe v FTC 27 the Supreme Court recognised that the acquisition of a "failing firm" did not violate section 7 of the Clayton Act."*

147. In Australia, the Merger Guidelines (paragraph 5.134-5 of the Guidelines) indicate that the Australian Consumer and Competition Commission (the 'ACCC') will recognise the failing firm notion provided that the following conditions are satisfied:

> *"Briefly, the Commission [the ACCC] will need to be convinced that the firm cannot be successfully re-organised and there is no other viable buyer for the business, and no likelihood of such a buyer emerging, such that the firm's resources are likely to exit the market absent the merger and so cease to represent an actual or potential constraint on the market. If the target firm is considered to be failing, the Commission will consider the likely effect of the acquisition on competition compared to the effect of the target's assets exiting the market. Under the latter circumstances, the distribution of the target's customer base among the remaining market participants would be determined by market forces, whereas an acquisition would tend to deliver those customers to the acquiring firm. If the competitive strength of the remaining participants is evenly matched, the level of competition in the market may be better served by allowing the firm to fail. However, the loss of capacity will tend to reduce competitive pressures in the market. Depending on the effect of the acquisition on the relative strength of remaining participants, retaining the failed firm's capacity in the market may still be pro-competitive."*

148. With the above conception of the doctrine in mind and its application in other jurisdictions, we fail to understand the Respondent's conception. The doctrine applies as a defence to an otherwise anti-competitive merger. Its application post-merger is what is not coming out of the Respondent's case. **(See, generally, *Tiger Brands Ltd / Ashton Canning Company (Pty) Ltd / Newco and Langeberg Foods International Ashton Canning Company (Pty) Ltd (46/LM/May05)* [2005] ZACT 82 (23 November 2005).**

149. The Respondent therefore has failed to satisfy the Tribunal the rationale of the 'failing firm' doctrine post-merger. Accordingly, the same fails and is accordingly

reviewed and set aside. Condition 3 is therefore reviewed and varied to the extent that the Appellants shall not sell the merged entity or its business for the next five years. Further, in the case of the sale of its shares, it shall not offer for sale more than forty per centum (40%) of its shares to a competitor holding more than forty per centum (40%) of the market share. For avoidance of doubt the merged entity will be at liberty to enter into commercial agreements necessary for the running of its affairs as a going concern. Thereafter, upon expiry of five years of implementing, the merged entity shall be at liberty to proceed as it wishes without restrictions.

150. With respect to *Condition 4 on the merged entity honoring all the existing contractual terms with government entities,* the same is not contested and we shall leave it at that.

151. On *Condition 5 and 6 on preventing commercial negotiations with Government in relation to access of fibre managed by the 1st Appellant imposed by the Competition Authority of Kenya in its Notice of Determination of the Appellants' proposed transaction gazetted on 13th December 2019,* the Appellants argue that these conditions seek to inhibit the merged entities' right to negotiate prices with the Government for access to fibre. Further, the Appellants contend that the conditions are meant to ensure that the Appellants are not able to compete with the dominant player in the market, and that no similar conditions have been imposed on any other player in the market. The Appellants argue that these conditions are therefore biased and unnecessary.

152. The Respondent on the other hand contends that the 1st Appellant has been contracted by the Government to manage on its behalf 4,204km fibre optic cable which it relies on for communication. Once the merger is finalized, the government will no longer have a controlling stake in the merged entity. It is only fair then that the merged entity competes competitively for the access, maintenance and use of the Government's 4,204km fibre optic cable. The

Respondent further argues that ***Condition 6*** was imposed on the premise that if the merged entity was accorded preferential access to use capacity on the Government's fibre, the same will result to unfair competition since other competitors are not accorded the same privilege.

153. The Appellants on the other hand argue that this condition is meant to ensure that dominant player's position is entrenched. The Appellants challenge also the condition on the ground that presently, they do not manage the resource on behalf of the government but rather the Government of Kenya is now managing and selling the fibre capacity directly.

154. The Respondents submits that the Government of Kenya currently holds a 40% share in the 1st Appellant and therefore able to utilise the government fibre unhindered. The Respondent is of the opinion that in a bid to ensure fair competition among the players, the merged entity should be exposed to the same conditions as those seeking to access government fibre because allowing the merged entity a preferential treatment would in effect lower its costs of operations and increase their profits unfairly vis a vis other market players. The Respondent further contends that the Appellants in their own admission, the merged entity seeks to have unhindered access to more that it is currently utilising and the same is likely to be free of charge. It also contends that the Government of Kenya is set to loose revenue because it was not consulted. It also feels that once the merger is finalised, the Government of Kenya would no longer have a controlling stake in the merged entity as it does with the 1st Appellant.

155. The Respondent however in its submissions qualifies the condition by saying that in as far as the merged entity should not be allowed any preferential treatment, the same shall not extend to privileges existing under subsisting contracts.

156. The Respondent fronts ***Article 227 (1) of the Constitution of Kenya, 2010*** which provide that *when a State organ or any other public entity contracts for goods or*

services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. Thus to allow the merged entity to continue enjoying preferential rates will not only amount to unfair benefit but expose the Government to procuring services in a system that is not fair or competitive.

157. The Appellants argue that the condition curtails its opportunity to grow and is discriminatory as it does not touch on other competitors.

158. We wish to note that differentiation is not discriminatory *per se*. Furthermore, the hallmark of fairness contemplates and requires some level of differentiation to achieve fairness. A case in point is the case of ***Mohammed Abduba Dida v Debate Media Limited & another*** **[2018] eKLR** where the Court of Appeal stated that:-

> *"...provisions or rules that create differences amongst affected persons do not of necessity give rise to the unequal or discriminatory treatment prohibited by Article 27, unless it can be demonstrated that such selection or differentiation is unreasonable or arbitrary and created for an illegitimate or surreptitious purpose. And the second is that, whether or not there has been a violation of the Constitution should be determined by applying a three stage enquiry to the circumstances of each case. The three stage enquiries are; firstly, whether the differentiation created by the provision or rules has a rational or logical connection to a legitimate purpose; if so, a violation of Article 27 will not have been established. If not, a second enquiry would be undertaken to determine whether the differentiation gives rise to unfair discrimination. If it does not, there is no violation of the constitution. But if the selection or differentiation gives rise to unfair discrimination, then the third enquiry would be necessary to determine whether it can be justified within the limitation provisions of the constitution." (Emphasis ours).*

159. It is therefore incumbent upon the Appellants to demonstrate that such differentiation is *unreasonable or arbitrary and created for an illegitimate or surreptitious purpose* for it to be said to be discriminatory. From the pleadings of the parties, it is denied by the 1st Appellant that it manages the fibre optic cable on behalf of the government. It contends that the condition fetters that hallowed principle of freedom to contract and thus making it unable to compete against a market leader.

160. The Respondent seems to suggest that the 1st Appellant currently has a competitive advantage over other market players by virtue of its position. The 1st Appellant however denies the same by stating that currently; the Government of Kenya is now managing and selling fibre optic capacity directly. From the record, we do not have any other (independent) evidence to back up either of the rival arguments. That notwithstanding, we note that the goal of the merger (which is admitted by both parties) is for the merged entity to benefit from the complementary synergies of the merger. Each of the Appellants therefore pools each of its strengths and cancels out their weaknesses.

161. The question that therefore organically arises is whether the Respondent can take away the 1st Appellant's advantage and curtail it from depositing the same in the pool i.e. merged entity. We think not. What therefore avails itself before this Tribunal for determination is whether the Condition can be construed to be hampering the merged entity's right to negotiate its terms of contract. The Market is a dynamic and interesting phenomenon. There are no set figures, the cost keeps fluctuating at the whims of market forces such as supply and demand among others be they legitimate or illegitimate. Taking into account therefore the nature of a market, we note that it is impossible to curtail the right of a party to negotiate by deploying its competitive advantage or its muscle in whatever form.

162. The Concept of freedom of contract is a cardinal concept of the law of contract and only in limited circumstances can it be interfered. A case in point to illustrate

this is the case of ***George M Musindi & 2 others v Small Enterprises Finance co. Ltd*** **[2007] eKLR** where the High Court observed that: -

> *"I have, as observed above noted that the superman intended to have been "invented" in the 20th and 21st centuries, with gifted mature reason and governed by enlightened self interest to manage transactions on the basis of unfettered freedom of contract was not and has yet been invented and cannot be invented because men and women are created. It follows therefore that the principle of freedom of contract without an underlying commercial morality is like a train whose brakes are slowly failing with each mile covered, it has inbuilt in it seeds of self-destruction. This explains the great interventions in many jurisdictions by the Legislature to rein in the freedom – e.g. Business Premises Rent law, Rent Restriction Laws, Laws on housing and mortgages and policies underpinning Housing laws, etc."*

163. Competition and anti-trust law is not in such a category that employs price controls. Indeed such an approach suggesting price control is manifestly antithetical to competition. We have no compunction whatsoever holding that the Respondents condition 5 and 6 in no way fetter the Appellants ability or right to negotiate and renegotiate in terms of the hallowed freedom of contract.

164. In relation to the Appellants contention that condition 5 and 6 are discriminatory, we have noted that the Appellants have to demonstrate that the conditions are *unreasonable or arbitrary and created for an illegitimate or surreptitious purpose.* We find that the Respondent's reason for the imposition albeit contested is not discriminatory since the 1st Appellant is at a perceived advantageous position to access government fibre optic. We find the perceived ground is not unreasonable, arbitrary or created for an illegitimate or surreptitious purpose but rather giving all the market players an equal footing. Whether in reality that is the case in an open market is doubtful.

165. The Tribunal, therefore, to give effect to the above finding qualifies Condition 5 and 6 by adding that: Condition 5 and 6 shall not be construed that, the merged entity is not at liberty to negotiate with the Government of Kenya over the use of the fibre optic cable. The merged entity shall therefore be at liberty to negotiate in open market terms and conditions for the use of the Government of Kenya fibre optic cable.

166. With regard to ***Condition 7 in relation to the retention period of employees of the target for two years,*** the Appellants contend that the time should be reduced to twelve (12) months instead of the two (2) years imposed by the Respondent. The Appellants have argued that Condition 7 is discriminatory hence unconstitutional as according to the Appellant, the CBA/ NIC merger and the acquisition of certain assets of Top Steel Kenya Limited by Abysinnia Iron and Steel Limited, the Respondent imposed a 12-month restrictive condition. The Respondent annexed to their Replying Affidavit a copy of the Notice of Board Determination of the proposed Merger between Commercial Bank of Africa Limited and NIC Group PLC and the one for the proposed acquisition of a controlling stake in Almasi Beverages Limited by Coca-Cola Sabco (East Africa) Limited where in the former merger, the Respondent imposed a period of 12 months and in the latter acquisition, the Respondent imposed a period of three (3) years.

167. The Respondent has argued that the condition on retention of employees is determined on a case to case basis. The Respondent contends that the specialized nature of the employment of the 1st Appellant and the fact that there would only be two telecommunication companies in the country is what informed their decision. The Appellants had also submitted to the Respondent that they would require two years to break even. In the Appellants' letters to the Respondent dated *28th June 2019* an 30th July 2019 contained in the Respondent's Supplementary Affidavit, the Appellants seem to have put in place elaborate plans to ensure job losses are minimized.

168. In determining the impact of a merger on employment, it is important to consider and judge each case in light of its circumstances. Guidance to this can be drawn in the South African case of ***Harmony Gold Mining Company Limited and Gold Fields Limited (reasons)*** **(93/LM/Nov04) [2005] ZACT 29 (18 May 2005)** where the Competition Tribunal observed that the effect of a merger on employment is to be determined and evaluated on a case by case basis. In Kenya, a similar case was alluded by the high court at paragraph 77 in the case of ***Evans Aseto & another v National Bank of Kenya (NBK) & another; Central Bank of Kenya & another (Interested Parties)*** **[2019] eKLR** where it was observed that without particulars, a court cannot evaluate the effect of the merger.

169. The circumstances of this case demand that we look at the market structure of the telecommunications sector. The contention by the Appellants that the condition is discriminatory does not hold its ground as we have found that in such matters concerning employment and mergers (competition law) each case is to be considered under its unique circumstances. Therefore, unless the Appellants can demonstrate that such differentiation is *unreasonable or arbitrary and created for an illegitimate or surreptitious purpose* then the differentiation cannot be said to be discriminatory. (**See, *Mohammed Abduba Dida v Debate Media Limited & another*** (Supra).

170. The ability of the employees who have lost their jobs to get employment is critical in a merger for any competition watch dog. The South African Competition Tribunal in the case of ***Tiger Brands Ltd / Ashton Canning Company (Pty) Ltd / Newco and Langeberg Foods International Ashton Canning Company (Pty) Ltd (46/LM/May05) [2005] ZACT 82 (23 November 2005)*** held at paragraph 143 of its judgement that

> "[g]*iven that this large number of workers will, post-merger, have their employment possibilities seriously reduced and that they are not likely to gain employment elsewhere, we find that the merger will have a substantially negative effect on employment and hence the public interest."*

171. In that regard, the Tribunal agreed with the Competition Commission that there was need to put in place certain safeguards to ameliorate the negative effects of the merger on employment and to that effect stated at paragraph 151 that:-

> *"We have therefore imposed a condition that builds on the foundations of both the drafts of the merging parties and the Commission. We have limited the class of persons to former employees. We have also limited this further by excluding management employees who will be more able to find re-employment. We have however extended the period of moratorium on retrenchments and the ceiling on the reduction of seasonal employees for a period of three years after this order. Note that the limitations that we have placed are not ones that we have contrived for they are what the parties state will be the likely employment effects of the merger. Nor does this limitation affect non-merger specific retrenchments or employment reductions."*

172. In the case before us we note that the telecommunications market in Kenya post the merger will only have two market players i.e. the merged entity and Safaricom PLC. Therefore the contention by the Respondent that it will take considerable time for the market to re-adjust itself in order to absorb the employees back to the market. We therefore find the Appellants' contention that similar conditions were not employed to other merges not convincing because each merger has to be determined in taking into account the unique market dynamics and conditions in the sector. Such differentiation is not discriminatory and fails to fulfil the requirements laid down by the Court of Appeal in the case of ***Mohammed Abduba Dida v Debate Media Limited & another*** (Supra).

173. We agree with the Respondent that the comparisons made by the Appellants are incomparable. We find that indeed the public interest in the matter demands that the employees so identified be retained for a longer period of time. The Appellants have submitted that it would take two (2) years for the merged entity to breakeven. Therefore considering that post approval of the merger, there will

only be two market players, and that it will take by projection two years for the Appellants' merged entity to break even, it therefore means that for the next two years the telecommunication market will be highly constrained, the sector will not be at a good position to take up the employees who lose their jobs. It is only after two years that the merged entity will have broken even and at a competitive position that the telecommunication industry will be able to absorb the skilled labour unique to the sector. We therefore do not find any plausible ground or reason to interfere in the decision of the Respondent with regard to condition 7.

174. On ***Condition 8 in regard to furnishing of detailed annual reports on the compliance with the above conditions:*** The condition is challenged on a single ground i.e. that the Respondent has not specified a time limit on the requirement to provide annual reports and it is an unjustified imposition of a condition to provide indefinite annual reports on compliance of conditions most of which are contested. The Respondent in response states that the two (2) years proposed by the Appellants may be impracticable from an enforcement point of view. It submits that since the conditions are time bound, it would be imperative that the reports are made in time. The Respondent's response from both the Replying Affidavit and its submissions, do not answer the Appellants' contention.

175. The Appellants' concern is the indefinite time imposed by the Respondent. The bone of contention herein is straight forward, the Appellants do not contend that they should not submit the reports but rather that there should be a time frame for furnishing detailed reports.

176. From the conditions as reviewed by the Tribunal, most of the conditions are limited to the first two years of the merger. Save for condition 3 which restricts the Appellants from selling the merged entity limited to within five (5) years of consummating the merger, the other conditions are limited to two years or less.

177. We have reiterated at condition 3 the need for clarity in imposing a condition or obligation on a party for exercise of administrative decisions. We note that condition 8 as imposed by the Respondent is indefinite and indeterminate. This is undesirable and this Tribunal is called upon to remedy the anomaly. ***(See, United States v. Davis, 588 U. S. (2019).***

178. Having come to a conclusion that condition 3 is just out of abundance of caution since the sale of the merged entity would likely constitute a takeover, the same cannot happen without the approval of the Respondent as the competition watchdog. This leaves the Tribunal with a reasonable and a fair timeframe of two years.

179. In light of the forgoing analysis, condition 8 is hereby reviewed to the extent that this Tribunal imposes a time limit of two (2) years. Therefore the merged entity shall for the first two years *of effecting the merger*, furnish annually the Authority with a detailed report on compliance of the conditions as modified, varied or affirmed by this Tribunal.

180. Lastly on costs, only the Appellants have prayed for provision of the same. Costs are the discretion of this Tribunal as provided for under *Rule 40 of the Competition Tribunal (Procedure) Rules, 2017.* The outcome of this case has been that the Appellants have been partially successful and therefore in the circumstances we are inclined to order that each party bears its own costs.

181. For the above reasons, we find considerable merit in this Application for Review. The Appellants have shown that there is reason to interfere in conditions 1, 2, 3, 5, 6 and 8 imposed by the Respondent. On the other hand, the Respondent has successfully defended its imposition of condition 8 in its entirety and conditions 3, 5, 6 and 8 subject to the clarifications and modifications imposed by the Tribunal. Consequently the orders are as hereunder.

ORDERS

182. That crystallising from the above analysis and determination of the issues in contention, the orders of this Tribunal with regard to the conditions imposed by the Respondent for the Appellants Merger *vide* its decision gazetted as Gazette Notice CXXI No. 171 (Gazette Notice No. 11825) dated *13th December, 2020* are as follows:-

(i) *Condition 1 is hereby reviewed and varied to the effect that: the merged entity shall hold the following Operating and Frequency Spectrum Licences in accordance with the terms and conditions imposed by the Regulator (Communications Commission of Kenya) at the time of issuing the licence including the pre-emptive right of renewal;*

Operating Licences

1. *Network Facility Provider – Tier 1 – Licence No. TL/NFP/T1/00001*
2. *Applications Service Provider – Licence No. TL/ASP/00001*
3. *Content Service Provider – Licence No. TL/CSP/00001*
4. *International Systems and Service Provider – Licence No. TL/ULF/IGS/00001*
5. *Submarine Cable Landing – Licence No. TL/SCR/00003*

Frequency Spectrum Licences

1. *800MHZ – Licence No. FL/0008*
2. *900MHZ – Licence No. FL/0009*
3. *1800MHZ – Licence No. FL/0009*
4. *2100MHZ – Licence No. FL/001/002*

(ii) *Condition 2 is hereby reviewed and varied to the effect that the merged entities' operating and spectrum licence, the spectrum in the 900MHZ and 1800MHZ acquired from Telkom shall be held by the merged entity in accordance with the terms and conditions imposed by the regulator (Communications Authority of Kenya) including the pre-emptive right of renewal;*

(iii) *Condition 3 is reviewed and varied to the effect that the merged entity shall not sell the merged business/enterprise for a period of five (5) years but can enter into agreements (including sale agreements and sale of shares) in the ordinary course of business provided that where shares of the merged entity are sold, the same shall be limited to not more than forty per centum (40%), further, the merged entity shall not sell a substantial portion of its share to a market competitor holding more than forty per centum (40%) of the market share;*

(iv) *Condition 5 and 6 are hereby affirmed save to state the condition does not curtail the concept of freedom of contract between the merged entity and the Government of Kenya, therefore, the merged entity is at liberty to negotiate with the Government of Kenya on use of the fibre;*

(v) *Condition 7 is hereby affirmed;*

(vi) *Condition 8 is hereby reviewed and varied to the extent that the merged entity shall for the first two years of effecting the merger, annually furnish the Competition Authority of Kenya with a detailed report on the compliance of the conditions as varied, modified or affirmed by this Tribunal.*

(vii) *In the present circumstances and taking into account the outcome of this Appeal, each party to bear its own costs.*

183. In compliance with the provisions of *Section of 48 (4) (a) (ii) of the Competition Act, No. 12 of 2010* on review of the decision of the Authority by the Tribunal, this determination having been issued to the Competition Authority of Kenya and the Appellants in line with the provisions of Section 48 (4) (i) of the Act, the Tribunal

further orders that this determination be published by way of notice in the Kenya Gazette.

183. Orders accordingly.

DATED at **NAIROBI** this 24th day of April 2020

DELIVERED at **NAIROBI** this 4TH day of MAY 2020

STEPHEN KIPKENDA
CHAIRPERSON

DR. DESTAINGS NYONGESA
MEMBER

KIMANI MUHORO
MEMBER

VALENTINE MWENDE
MEMBER

REBECCA MOGIRE
MEMBER

I certify that this is a true copy of the original

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