

# **ENFORCEMENT OF COMPETITION LAW AFTER PRIVATISATION**

***A CASE OF THE ZAMBIAN BREWERIES GROUP OF COMPANIES  
PRESENTED BY ZAMBIAN BREWERIES CORPORATE AFFAIRS  
DIRECTOR, AUGUSTINE SEYUBA***

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## **INTRODUCTION**

I AM GOING TO TALK ABOUT THE ZAMBIAN BREWERIES GROUP WHICH COMPRISES ZAMBIAN BREWERIES PLC, NORTHERN BREWERIES PLC, ZAMBIA BOTTLERS AND COPPERBELT BOTTLING COMPANY LIMITED.

IN THE EARLY 1990S GOVERNMENT CONTROLLED OVER 80 PERCENT OF THE ECONOMY. THIS WAS SEEN AS BEING INEFFICIENT AS GOVERNMENT CONTINUOUSLY LOST MONEY PROPPING UP MOST OF THESE COMPANIES THAT WERE LOSS MAKING. IT WAS BELIEVED THAT PRIVATIZATION WOULD ELIMINATE INEFFICIENCIES INHERENT TO STATE-OWNED ENTERPRISES. PRIVATIZATION WAS ALSO SEEN AS A MODE OF ATTRACTING FOREIGN DIRECT INVESTMENT.

ZAMBIAN BREWERIES WAS A STATE OWNED COMPANY WHICH OPERATED TWO PLANTS AT LUSAKA AND NDOLA A DISTANCE OF 320 KMS APART

AT ONE TIME THERE WERE A TOTAL OF 42 STATE OWNED COMPANIES OPERATING IN THE VITAL SECTORS OF THE ZAMBIAN ECONOMY

ON THE OTHER HAND ZAMBIA BOTTLERS AND COPPERBELT BOTTLING COMPANY WERE PRIVATELY RUN.

ZAMBIA BOTTLERS OPERATED IN LUSAKA WHILE COPPERBELT BOTTLING COMPANY OPERATED ON THE COPPERBELT IN KITWE, AGAIN A DISTANCE OF HUNDREDS OF KILOMETRES APART

IN 1992 THE ZAMBIAN PARLIAMENT PASSED THE PRIVATIZATION ACT, WHICH FACILITATED THE SELL OF STATE OWNED ENTERPRISES TO THE PRIVATE SECTOR BOTH LOCAL AND FOREIGN.

TWO YEARS LATER, THE ZAMBIAN PARLIAMENT ENACTED THE COMPETITION AND FAIR TRADING ACT BUT IT WAS NOT UNTIL 1997 THAT THE ZAMBIA COMPETITION COMMISSION WAS ESTABLISHED.

THIS NEW LAW WAS AIMED AT, AMONG OTHER THINGS, ENSURING THAT BUSINESS TRANSACTIONS WERE CONDUCTED IN A FAIR MANNER TO THE BENEFIT OF BOTH BUSINESS AND THE CONSUMER.

IT SHOULD HOWEVER BE NOTED THAT FIVE YEARS OF PRIVATIZATION PASSED WITHOUT A COMPETITION AUTHORITY IN PLACE.

### **PRIVATISATION OF STATE OWNED ENTERPRISES**

THE RATIONALE TO PRIVATISE STATE OWNED ENTERPRISES WAS FOR GOVERNMENT TO EXIT BUSINESS AND LEAVE IT TO THE PRIVATE SECTOR.

A COMMON SAYING AT THE TIME WAS THAT *"GOVERNMENT HAS NO BUSINESS RUNNING BUSINESS"*.

THE NATURE OF MOST STATE ENTERPRISES WAS THAT THEY WERE MONOPOLY UNDERTAKINGS, INITIALLY ENVI SAGED TO TAKE ADVANTAGE OF ECONOMIES OF SCALE AND PASS ON BENEFITS TO BOTH GOVERNMENT (THROUGH DIVIDENDS) AND THE CITIZENS (THROUGH EMPLOYMENT AND PROVISION OF RELIABLE GOODS AND SERVICES).

GENERALLY THESE ENTERPRISES DID NOT REINVEST IN NEW TECHNOLOGY AS YEARS PASSED BY.

CAPACITY CONSTRAINTS WERE EXPERIENCED AND FOCUS SHIFTED TO GENERAL EMPLOYMENT MAINTENANCE AND CREATION THAN ON PROFIT MAKING.

SUCH A SITUATION COULD NOT BE SUSTAINABLE AND BY 1990, THESE PILLARS OF THE ZAMBIAN ECONOMY FOR 17 YEARS WERE FINANCIALLY CRIPPLED, WITH A HIGHLY DEMORALIZED WORKFORCE.

WITH POLITICALLY APPOINTED AND INCLINED CHIEF EXECUTIVES, PRUDENT BUSINESS MANAGEMENT SKILLS WERE NOT PURSUED AND PRODUCT PRICE AND DISTRIBUTION SYSTEMS WERE COMPROMISED AND INFLUENCED BY POLITICAL DIRECTIVES.

## **PRIVATISATION OF COMPANIES UNDER THE ZAMBIAN BREWERIES GROUP**

AT THE TIME OF PRIVATIZATION THERE WAS SOME RECOGNITION NOT TO MERELY SWITCH FROM A STATE MONOPOLY TO A PRIVATE MONOPOLY.

EVEN THOUGH THE COMPETITION AUTHORITY WAS NOT IN PLACE EFFORTS WERE MADE TO CREATE SOME COMPETITION IN THE MARKET.

IN THE BEVERAGES SECTOR OF CLEAR BEER, THE STATE OWNED COMPANY, ZAMBIAN BREWERIES, WAS UNBUNDLED WITH THE PLANT IN LUSAKA SOLD SEPARATELY FROM THE NDOLA PLANT.

THE NDOLA PLANT WHICH LATER BECAME TO BE KNOWN AS NORTHERN BREWERIES WAS SOLD TO LONRHO ZAMBIA LIMITED AS THE MAJOR SHAREHOLDER WHILE THE LUSAKA PLANT WAS SOLD TO SOUTH AFRICAN BREWERIES AND ANGLO AMERICAN CORPORATION AS MAJOR SHAREHOLDERS WITH A COMBINED STAKE OF 90%

THE REMAINING 10 % WAS HELD IN TRUST TO BE OFFERED TO ZAMBIANS VIA THE LUSAKA STOCK EXCHANGE

THE PRIVATIZED LUSAKA PLANT BEGAN TO OPERATE AS ZAMBIAN BREWERIES PLC IN 1994. IN LATER YEARS, WITH LONRHO CITING FINANCIAL PROBLEMS, NORTHERN BREWERIES WAS SOLD TO THE CENTRAL AFRICAN HOLDINGS, A MEMBER OF THE MADHVANI GROUP OF UGANDA.

IN THE OPAQUE BEER SECTOR, WHICH WAS ALSO CONTROLLED BY THE GOVERNMENT, NATIONAL BREWERIES WITH OPERATIONS IN ALMOST ALL THE NINE PROVINCIAL CENTRES, WAS ALSO SOLD TO LONRHO ZAMBIA.

WHEN LONRHO TOOK OVER, IT REALISED THAT ONLY THE LUSAKA AND KITWE PLANTS NEEDED LITTLE ATTENTION. THE REST OF THE PLANTS WERE ACTUALLY NEGLECTED AND DILAPIDATED.

NATIONAL BREWERIES HAD NOT FACED ANY COMPETITION UNTIL 1995, WHEN CENTRAL BREWERIES ENTERED THE MARKET.

LIKE NORTHERN BREWERIES, NATIONAL BREWERIES WAS A FAILING FIRM WITH CASH FLOW PROBLEMS.

WITH LOW PRODUCTION AND LITTLE PROSPECT OF LONRHO INJECTING NEW CAPITAL, NATIONAL BREWERIES WAS FLOATED FOR SALE.

AT PRIVATIZATION, ZAMBIA BOTTLERS WAS SOLD TO THE COCA-COLA COMPANY (TCCC) AND TJC HOLDINGS OF SOUTH AFRICA, WHO OWNED 49% AND 51% SHARES RESPECTIVELY IN BOTH ZAMBIA BOTTLERS AND COPPERBELT BOTTLING COMPANY.

IN 2001, THE SHAREHOLDERS INDICATED THEY WANTED TO EXIT FROM THE ZAMBIAN MARKET. TCCC, AS THE FRANCHISE HOLDER, DID NOT WANT TO REMAIN IN THE DOWNSTREAM BUSINESS, WHILE TJC HOLDINGS CONSIDERED DIVESTING THEIR ZAMBIAN INVESTMENT.

### **COMPETITION VIS-À-VIS ZAMBIAN BREWERIES**

WHILE IT IS RECOGNISED THAT THE PRINCIPAL OBJECTIVE OF COMPETITION LAW SHOULD BE TO MAINTAIN AND ENCOURAGE COMPETITION AS A VEHICLE TO PROMOTE ECONOMIC EFFICIENCY AND MAXIMISE CONSUMER WELFARE, THE FOCAL POINT OF COMPETITION LAW SHOULD BE THE ACTUAL AND/OR POTENTIAL BUSINESS CONDUCT OF FIRMS IN A GIVEN MARKET AND NOT ON THE ABSOLUTE OR RELATIVE SIZE OF FIRMS.

THIS REQUIRES THAT INSTEAD OF PENALISING LARGE FIRMS SIZE OR INDUSTRY CONCENTRATION, COMPETITION AUTHORITIES SHOULD ASSESS WHETHER A FIRM (OR GROUPS OF FIRMS) CAN EXERCISE "MARKET POWER", I.E. ENGAGE IN BUSINESS PRACTICES, WHICH SUBSTANTIALLY LESSEN OR PREVENT COMPETITION.

THIS IS POSSIBLE ONLY WHEN EXISTING OR POTENTIAL COMPETITION IS INSUFFICIENT TO CONTAIN SUCH BEHAVIOUR THAT RESTRICTS NEW ENTRY AND COMPETITION.

THE COMPETITION AND FAIR TRADING ACT CAP 417 OF 1994 OF THE LAWS OF ZAMBIA ADDRESSES SUCH CONDUCT UNDER SECTION 7 OF THE ACT.

AGAINST THIS BACKDROP, THE COMMISSION AUTHORIZED THESE TAKEOVERS WITH CONDITIONS OR UNDERTAKINGS. ZAMBIAN BREWERIES HAS A COMPLIANCE PROGRAMME AND AN OFFICER AT OPERATING BOARD LEVEL WAS APPOINTED TO ENFORCE THE PROGRAMME AND CONSTANTLY LIAISE WITH THE COMMISSION.

THE RATIONALE FOR THE UNDERTAKINGS WAS TO ENSURE THAT THESE COMPANIES CONTINUE OPERATING, AND ALSO CONTAIN THE LIKELIHOOD OF ABUSE OF MARKET DOMINANCE.

WITH SOME EXCEPTIONS, THERE IS NO ASSUMPTION UNDER THE ACT THAT A PARTICULAR TYPE OF ACTION OR A PARTICULAR SITUATION, WHICH REDUCES COMPETITION, IS WRONG IN ITSELF AND THE ASSESSMENT OF THE DEGREE OF COMPETITION IN A MARKET MUST BE SENSITIVE TO THE FACT THAT MARKETS ARE NOT STATIC.

THE ACT PROVIDES FOR CASE-BY-CASE EXAMINATION AND ONLY WHEN THE MATTER IS FOUND TO BE OR IS LIKELY TO HAVE THE EFFECT OF LESSENING COMPETITION SUBSTANTIALLY IN ZAMBIA CAN IT BE PROHIBITED.

WHEN EVALUATING TRANSACTIONS RELATED TO MY GROUP OF COMPANIES, THE COMMISSION WAS NOT ONLY RESTRICTED TO COMPETITION ISSUES, BUT WAS ALSO AWARE OF OTHER SOCIO-ECONOMIC CONDITIONS PREVAILING IN THE COUNTRY.

THE COMMISSION DID NOT UNDERMINE THE OBJECTIVES OF THE ACT, OF ECONOMY GROWTH THROUGH EFFICIENT AND INNOVATIVE PRACTICES IN THE MARKET, BY PLAYERS IN THE MARKET.

## **THE TAKEOVER OF NORTHERN BREWERIES**

IN DECEMBER 1998, THE BOARD OF COMMISSIONERS DELIBERATED WHETHER TO LET NORTHERN BREWERIES BE LIQUIDATED AGAINST THE OPTION TO LET ZAMBIAN BREWERIES ACQUIRE OWNERSHIP AND CONTROL OF THE ENTERPRISE. THE BOARD OF COMMISSIONERS OPTED FOR THE LATTER.

THE TRANSACTION INVOLVED THE ACQUISITION OF 100% SHARES OF NORTHERN BREWERIES (1995) PLC BY ZAMBIAN BREWERIES. THE COMPANIES WERE TO REMAIN SEPARATE BUT WOULD BE UNDER THE CONTROL OF THE SHAREHOLDERS OF ZAMBIAN BREWERIES.

A CONDITIONAL APPROVAL WAS GRANTED AND ZAMBIAN BREWERIES GAVE UNDERTAKINGS TO THE COMMISSION NOT TO ENGAGE IN ANTI-COMPETITIVE PRACTICES, WHICH COULD HAVE THE EFFECT OF FORECLOSING THE RELEVANT MARKET FOR CLEAR BEER, AND TO GUARD AGAINST ABUSE OF DORMINANCE.

IT WAS NOT COMMERCIALY VIABLE TO CONTINUE THE OPERATIONS OF NORTHERN BREWERIES AS A SEPARATE UNIT. IF NOT SOLD, THE COMPANY WAS DESTINED FOR CLOSURE WITH A LOSS OF ABOUT 454 JOBS. CLOSURE OF THE COMPANY ALSO MEANT THAT CREDITORS WERE UNLIKELY TO BE PAID.

IN 1996 THE COMPANY SUFFERED A LOSS OF K1, 033 BILLION AND THE LOSSES ROSE TO K3, 194 BILLION IN 1997 AND REACHED K6.685 BILLION IN 1998. THE COMPANY WAS KEPT AFLOAT BY THE MADHVANI GROUP FUNDING.

IN THE ABSENCE OF THIS SUPPORT THE COMPANY WOULD HAVE CLOSED DOWN. IN 1997/1998 NORTHERN BREWERIES ONLY MANAGED SALES OF K3.2 BILLION AS AGAINST K9.7 BILLION FOR THE SAME PERIOD THE PREVIOUS YEAR, A DECLINE OF ABOUT 67%.

THE ASSESSMENT OF THE TAKEOVER REVEALED THAT THE OVERALL EFFECT COULD NOT STRENGTHEN ZAMBIAN BREWERIES DOMINANT POSITION IN THE CLEAR BEER MARKET.

GIVEN THE REASONS ADVANCED BY THE PARTIES TO THE TAKEOVER, I.E. "FAILING COMPANY DEFENSE", THE COMMISSION WAS COMPELLED TO ASSESS THE ECONOMIC SITUATION FURTHER, HAVING REGARD TO THE OBJECTIVES OF THE ACT.

### **THE TAKEOVER OF NATIONAL BREWERIES**

WHEN THE NOTIFICATION TO TAKEOVER AN AILING NATIONAL BREWERIES WAS LODGED, THE COMMISSION AUTHORIZED SOUTH AFRICAN BREWERIES/ZAMBIAN BREWERIES TO TAKEOVER NATIONAL BREWERIES. THE FIRST OPTION AVAILABLE TO THE COMMISSION WAS TO REJECT THE ACQUISITION, WHILE THE SECOND WAS TO AUTHORISE IT.

YOU COULD SAY REJECTION COULD IDEALLY HAVE BEEN THE BEST OPTION IF THERE WAS A VIABLE AND EFFECTIVE ENTRANT TO RUN THE MASSIVE BREWERY INFRASTRUCTURE THAT WAS UNDER NATIONAL BREWERIES.

WHILE MANY LOCAL ENTREPRENEURS WERE CALLING FOR THE SALE OF THE PLANT TO THEM, THEY DID NOT HAVE THE CAPITAL TO RESUSCITATE THE OPERATIONS OF NATIONAL BREWERIES, WHICH WAS THEN LISTED ON THE LUSAKA STOCK EXCHANGE AND ITS SHARE PRICE NEEDED A POSITIVE REINFORCEMENT.

AUTHORISATION ON THE OTHER HAND, THOUGH "ANTI-COMPETITIVE", APPEARED TO HAVE GREATER PUBLIC BENEFITS THAN THE DETRIMENT TO COMPETITION.

NATIONAL BREWERIES REQUIRED THE CAPITAL TO RESUSCITATE ITS OPERATIONS, AS WELL AS ISSUES OF CONTINUED AND INCREASED EMPLOYMENT, TAX TO THE TREASURY, INTRODUCTION OF INTERNATIONAL STANDARDS IN THE OPAQUE BEER PRODUCTION AND MARKETING SYSTEMS IN ZAMBIA AS WELL AS THE IMPROVED QUALITY ASSURANCE THAT COMES WITH MULTINATIONAL COMPETENCE.

## **THE TAKEOVER OF ZAMBIA BOTTLERS**

IN THIS TRANSACTION, BOTH ZAMBIA BOTTLERS AND ZAMBIAN BREWERIES WERE DORMINAT PLAYERS IN THEIR RESPECTIVE RELEVANT MARKETS.

THE PARTIES TO THIS TRANSACTION WERE SEEKING ECONOMIC EFFICIENCY, WHICH COULD RESULT IN LOWER PRODUCTION AND DISTRIBUTION COSTS, WHICH IN TURN WOULD ENABLE THE BOTTLER TO LOWER PRICES TO CUSTOMERS.

ZAMBIAN BREWERIES CONSIDERED THAT THE TRANSACTION PROVIDED A GREAT OPPORTUNITY TO EXPAND THE BREADTH AND QUALITY OF THEIR DISTRIBUTION, LEADING TO BETTER FACILITIES FOR TRAINING AND MORE EFFECTIVE UTILISATION OF LABOUR - AN IMPORTANT CONSIDERATION IN A COUNTRY WITH LARGE RESOURCES OF BOTH SKILLED AND UNSKILLED LABOUR.

THE TRANSACTION WAS ALSO TO PROVIDE FOR GREATER CREDIT WORTHINESS OF A LARGE ENTERPRISE, INCREASING ITS ABILITY TO OBTAIN CAPITAL, BEING BETTER EQUIPPED FOR FOREIGN COMPETITION IN THE DOMESTIC AS WELL AS FOREIGN MARKETS.

THE RELEVANT MARKETS IN WHICH THE PARTIES OPERATE ARE DIFFICULT TO ENTER AND SUSTAIN THE BUSINESS PURELY ON ACCOUNT OF THE ALREADY SATURATED MARKETS AS SEEN AGAINST THE ECONOMIC DOLDRUMS THE COUNTRY HAS BEEN GOING THROUGH AND ALSO THE MERE REALITY OF INCREASED POVERTY AMONGST THE CITIZENRY.

THESE FACTS ARE ENOUGH TO PUT OFF NEW ENTRY AS HIGH SELLING PRICES ARE NOT OBTAINING IN THE MARKETS AND THE INCUMBENT FIRMS ARE HARD PRESSED TO KEEP PRICES LOW.

## **COMPETITION MEASURES IN THE ZAMBIAN BREWERIES GROUP**

THE ZAMBIA COMPETITION COMMISSION IS COGNISANT OF THE ECONOMIC POWER IN THE ZAMBIAN BREWERIES GROUP .

THE ZAMBIA COMPETITION COMMISSION HAS THEREFORE DEMANDED UNDERTAKINGS REGARDING THE MARKET BEHAVIOUR OF THE GROUP.

AS I SAID EARLIER ON, THE UNDERTAKINGS RECEIVED FROM A MARKET PLAYER SUCH AS THE ZAMBIAN BREWERIES GROUP ARE A COMMITMENT TO THE MEASURES IT WILL ADOPT TO ENSURE THAT IT COMPLIES WITH OR DOES NOT BREACH THE PROVISIONS OF THE COMPETITION AND FAIR TRADING ACT.

### **THE PREVAILING SITUATION UNDER THE ZAMBIAN BREWERIES GROUP**

THE ZAMBIA COMPETITION COMMISSION IS CONTINUALLY MONITORING OUR BEHAVIOUR TO ENSURE THAT THE GROUP'S POSITION IN THE MARKET DOES NOT LIMIT ACCESS TO MARKETS OR OTHERWISE UNDULY RESTRAIN COMPETITION, OR LEAD TO ADVERSE EFFECTS ON TRADE OR THE ECONOMY IN GENERAL.

COMPETITION CONCERNS AND OTHER RELATED PUBLIC INTERESTS ARE HANDLED IN THE MOST PROFESSIONAL AND TRANSPARENT MANNER, IN THE INTERESTS OF BOTH THE BUSINESS AND THE CONSUMER.

AS A COMPANY WE ARE HAPPY WITH THE WAY WE HANDLE COMPETITION LAW AND POLICY ENFORCEMENT IN ZAMBIA AND WILLING TO SHARE OUR EXPERIENCES WITH OTHERS.

I THANK YOU FOR YOUR ATTENTION.