

Consumer Protection Act No.5 of 2018 of the Laws of Zanzibar.

- (c) In Alternative, this Court be pleased to direct that all individuals who have suffered and have been injured by the anti-competitive legal provision be granted legal relief under inherent powers of the Court pending the re-enactment or amendment on respect of the Liquor Act to incorporate a fair legal provision which is logical, reasonable and maintainable.
- (d) Any other relief or order which this Honorable Court may deem just and equitable to grant.

In support of the petition, the petitioner raised 13 grounds challenging the legality and constitutionality of section 33 of the **Liquor Control Act** No. 09 of 2020 (hereinafter LCA).

In brief, the petitioner contends that the **Constitution of Zanzibar** of 1984, as amended from time to time (hereinafter the Constitution), through Section 22(1) (a) and (b), provides for the right of every

individual to participate voluntarily and honestly in a lawful and productive work and observe work discipline and strive to attain the individual and group productive targets desired or set by law as work itself is the source of well-being of the people and the measure of human dignity. In connection to the foregoing, the petitioner raised a claim on the rights of business: individuals to be allowed to do business under fair competition rules. The petitioner's most significant concern is that the LCA denies business individuals the freedom for fair competition and promoting trade and commerce activities. In that regard, it is in their view that the enactment of section 33 (1)(a)(b)(c)(d), (2) and (3) of the LCA offends the Constitution, and it conflicts section 43(1) and (2)(a)(b)(c)(d)(e) of the **Fair Competition and Fair Consumer Protection Act** No.5 of 2018 (hereinafter the FCFCPA).

The respondents opposed the petition in substance through Counter Petitions filed by Ms. Sarah A. Khatau, learned State Attorney for the first respondent and Ms. Maryam Ali, learned State Attorney for the second respondent. They also both initially resisted it by way of preliminary points of objection. However, during the hearing of the matter, the first respondent dropped her points of objection.

Ms. Fatma A. Hassan, learned State Attorney, who prepared and filed written submission for the second respondent, is of the opinion that first, the petition is incompetent as the petitioner has no cause of action against the second respondent, and second, that the petition is barren of fruits.

As a matter of convenience and to save costs and time, I directed the parties to dispose, simultaneously, the points of objection and the petition by way of written submissions. I commend the learned legal practitioners for their industry in the preparation of their submissions. However, I must state that to avoid making this judgement unnecessarily too long, I will not consider and recite every detail of their submissions. Nevertheless, I will concentrate on those relevant points which may resolve the petition.

As practice dictates, I shall begin with the preliminary objections, and if need be, proceed to examine the substance of the petition.

Starting with the first limb of the preliminary point of objection, the essence of the second respondent's first point of law is that the petitioner, in their pleading, failed to show a cause of action against the

second respondent. In her submission, Ms. Hassan, learned State Attorney, claimed that the second respondent is not responsible party to this petition considering that the petition has been brought to challenge the constitutionality of the provisions of the LCA, whereas the second respondent has no legal obligation to enact, amend, or repeal the provisions of the statute. She, therefore, prayed the Court to dismiss the petition.

Through learned counsel Mr. Mwarab, the petitioner opposed the second respondent's submission on the first point of law insisting that, since this is constitutional petition, the rule of the Civil Procedure Decree regarding cause of action is inapplicable. At this point, he sought support from the decision of this Court in **Hassan Korney Kijogoo & Others v Attorney General** (Constitutional Petition 7 of 2021) [2022] TZZNZHC 1 (17 February 2022) Misc. Civil Cause No. 07 of 2021. Nonetheless, Mr Mwarab asserted that it is incorrect to state that there is no cause of action against the second respondent. It is his view that the second respondent is directly involved towards the execution of the provisions of section 33 (1) (2) (a) (b) (c) (d), (2) and (3) of the LCA by their attempt to auction the petitioner's imported containers. He, therefore, insinuated that the petitioner has cause of action against the second

respondent and prayed for the dismissal of the second respondent's points of law.

In her rejoinder, Ms. Hassan took refuge in the persuasive decision from the Constitutional Court of Seychelles in **Karunakaran v Attorney General** [2020] SCCC SC 5, which emphasized the necessity of the presence of the cause of action in a petition of this nature. She further submitted that there is no harm in applying the Civil Procedure Decree in constitutional petitions. In her conclusion, she prays to the Court to overrule(?) the preliminary objection and dismiss the petition for lack of cause of action.

Having gone through the submission of both sides regarding the issue of cause of action, I hasten to entirely agree with Mr. Mwarab that, in principle, the Constitution petition in our jurisdiction is not governed by the rules of the **Civil Procedure Decree**; See, **Hassan Korney Kijogoo** (supra). Notwithstanding the stated position, however, it is my considered view that in any claim by any person regarding the infringement of rights, the cause of action needs to be disclosed. I hold this view based on the provision of section 24 (2) of the Constitution, which provides:

"(2) Mtu yeyote anayedai kuwa sharti lolote katika Sehemu hii ya Sura hii au katika sheria yoyote inayohusu haki yake au wajibu wake limevunjwa, linavunjwa au inaelekea litavunjwa na mtu yoyote Zanzibar, anaweza kufungua shauri katika Mahkama Kuu. Mahkama Kuu itakuwa na uwezo wa kutoa tamko na kuamuru nafuu au fidia kwa mtu yeyote anayehusika"

The above extract can be translated as follows:-

"(2) Any person alleging that any provision in this Part of this Chapter or in any law concerning his right or duty owed to him has been, is being or is likely to be violated by any person anywhere in Zanzibar, may institute proceedings for redress in the High Court. The High Court shall have the power to declare and order compensation to any concerned person."

According to the above quoted provision it is essential for a person to establish that their rights have been or are likely to be violated by

another person. This justifies the need for the disclosure of a cause of action in constitutional petition.

The question that needs to be resolved now is whether the petition discloses a cause of action against the second respondent. Mr. Mwarab maintained that cause of action had been disclosed against the second respondent since the second respondent is directly involved in infringements of the petitioner's rights through the execution of the provisions of section 33 (1) (2) (a) (b) (c) (d), (2) and (3) of the LCA by her attempt to auction the petitioner's imported containers.

The respondent did not dispute this fact. Besides, the second respondent, in her submission, affirmed what was claimed by Mr. Mwarab when she stated that the second respondent, in the exercise of their power under section 42 (1) of the **East Africa Customs and Management Act**, displayed the applicant's containers for sale by public auction on 4 January 2023 after the applicant failed to remove its containers within the statutory period. It is of no doubt, therefore, as contended by Mr. Mwarab, that the second respondent is directly involved in this matter, a fact which the petitioner also showed in her petition. For that, I am satisfied that a cause of action has been

disclosed against the second respondent. Thus, the first preliminary point of law has no merit and is dismissed.

The second limb of the second respondent's point of law is that the petition is barren of fruits. It should be noted that the second respondent failed to present her arguments on this point of law. This objection, therefore, has not been proven, hence dismissed.

Next is the substance of the petition. The issue that arises out of this petition are: -

1. Whether section 33 (1)(a)(b)(c)(d), 2 and (3) of LCA contravenes the Constitution of Zanzibar, 1984 as amended.
2. Whether section 33 (1)(a)(b)(c)(d), 2 and (3) of LCA violates section 43 (1) of the FCFCPA.
3. What are the available remedies?

The genesis of the matter started when the petitioner's application for the renewal of liquor importation licence for the year 2022 was rejected by the Zanzibar Liquor Licensing Board on the ground that the new law, the LCA, is already in force and doesn't allow the applicant to renew her

licence. The LCA restricts the number of liquor importers in Zanzibar to three persons only.

According to the Petition, before the petitioner's previous liquor importation licence expired and before they applied for the renewal of the same, which was rejected, the petitioner had ordered merchandise to avoid a delay of products and the risk of inconveniencing their customers. The merchandise was detained on arrival at the Zanzibar Sea Port and later advertised to be auctioned by the second respondent. The petitioner, therefore, is aggrieved and feels that the LCA is arbitrary, that it contravenes the provisions of the Constitution, and that it is inconsistent with the FCFCPA.

As to whether section 33 (1)(a)(b)(c)(d), 2 and (3) of LCA contravenes the Constitution, the arguments of the parties were as follows: Mr. Mwarab, the learned Advocate for the petitioner, contended that the provision of section 33 of the LCA is arbitrary and unconstitutional. He further stated that the Constitution is the mother law of the country and that every legislation enacted by the House of Representatives derives its validity through the Constitution as enunciated in Section 4 of the Constitution. It was Mr. Mwarab's submission that Chapter Three of the

Constitution ascertain the protection of various fundamental rights and individual freedom, which includes equality before the law and non-discrimination, and the right to work as embodied through Section 12 (1)(2)(3)(4)(5) and Section 22 (1)(a)(b) of the Constitution, respectively. Thus, Mr. Mwarab argued that according to Section 12 of the Constitution, all persons are equal before the law. He added that the law should not be made to be discriminatory on grounds such as nationality, tribe, gender, place of origin, political orientation, colour, religion, etc, and that from the contents of section 22 of the Constitution, he maintained that, work is the source of wealth and well-being to all people, and that all persons have a duty to participate in voluntary and productive work.

Regarding LCA's impugned provisions, Mr. Mwarab submitted that the construction of Section 33 (1)(a)(b)(c)(d) and (3) might be summarized as; An import permit is not to be granted to more than three importers; an importer has to be Zanzibari, amongst other requirements; any person beyond the three persons which have been given the import permit or any person who does not have an import permit and is importing liquor commits an offence.

Having laid the above foundation on the Constitution provisions claimed to be offensive and the impugned LCA provisions, Mr Mwarab urged the Court to see whether the impugned LCA provisions offend the Constitution. He started by ascertaining whether the provision in question is discriminatory. He submitted that Section 33 (1) (a) of the LCA grants liquor import permit to Zanzibaris only. He claimed that any other person of any nationality is restricted from being granted such permit. He, therefore, argued that the provision in question clearly offends the Section 12 (5) of the Constitution. He stressed further that Section 33 of the LCA provides for unequal treatment different from that accorded to Zanzibaris. In addition, he contended that Section 33 (1) (a) promotes favouritism, which offends Section 10 (e) of the Constitution. Therefore, he maintained that Section 33 of the LCA is discriminatory and unconstitutional.

Mr. Mwarab argued further that Section 33 (1) of the LCA offends Sections 21 (3) and 22 (1) (a) (b) of the Constitution concerning the right to work by restricting the number of liquor importers to three only. He submitted that they are aware that individual rights are not absolute, but any limitation or restriction of fundamental rights must be lawful and must serve a legitimate purpose. To support his point, he referred the

cases of **Julius Ishengoma Ndyanabo vs Attorney General** [2004] T.L.R 14, **Kukutia Ole Pumbun vs Attorney General & Another** [1993] T.L.R 159, **DPP vs Daudi Pete** [1993] T.L.R 22 and the persuasive authority in **Charles Onyango Obbo vs Attorney General** [2004] UGSC I, and submitted that from the cited authority, for any legislation which is intended to limit the fundamental rights, there are three elements which needs to be considered which, firstly, the limitation objective of the legislature which intended to limit the fundamental rights must be sufficiently important. Secondly, the measures put to limit such rights must not be arbitrary or unfair. Thirdly, the means put in place to limit such rights must be no more than necessary. It was Mr. Mwarab's view that the provision of section 33 of the LCA skipped those three requirements as it does not serve any important objective, it is clearly arbitrary, unreasonable and unfair, and the restrictions are not necessary as there is no necessary reason which can be discerned from the provision of section 33 (1) of the LCA to justify the restriction of the rights. He argued further that LCA did not safeguard arbitrary decisions by the authorities it established as there is no room for a person to object or appeal against liquor importation permit refusal.

Mr. Mwarab further maintained that Section 21 (3) of the Constitution gives rights to every person in Zanzibar to work and to be granted equal opportunity, therefore by restricting the opportunity to secure an import permit to only few importers, leaving other importers stripped of their Constitutional rights, such section of the Constitution is offended by the LCA.

Additionally, Mr. Mwarab contended that section 33 (1) of the LCA violates section 10 (d) of the Constitution, which doesn't allow the concentration of wealth or major means of production in the hands of a few individuals or a certain group.

In concluding this issue, Mr. Mwarab submitted that the provisions of section 33 (1)(a)(b)(c)(d), (2) and (3) of the LCA contravene the provision of section 12 (1)(2)(3)(4)(5) and 22 (1)(a)(b) of the Constitution, its remedy is to declare such provision as unconstitutional which have no legal effect and the declaration of immediate amendment of the same.

As regards the second issue of whether section 33 (1)(a)(b)(c)(d), (2) and (3) of LCA violates section 43 (1) of the FCFCPA, Mr. Mwarab submitted that the trade sector is one of the biggest growing sectors in

Zanzibar which generally increase the revenue of our country through taxes etc. The increase of trade activities and its improvement is mutatis mutandis to trade competition, meaning that trade competition is inevitable and highly encouraged for trade activities to improve. He continued arguing that in realizing that the House of Representatives, on 8 March 2018, enacted the **Fair Competition and Fair Consumer Protection Act** No.5 of 2018 of the Laws of Zanzibar. Mr. Mwarab's focus in FCFCPA is section 43 (1), which restricts all anti-competitive trade practices with the object of prevention, restriction, or distortion of competition. He submitted further that by limiting the number of permits for importation of liquor to only three persons, section 33 (1) of the LCA restricts trade competition, the act which is prohibited by section 43 (1) of the FCFCPA. Also, he stressed that according to section 70 (1)(a) of the FCFCPA, the protection of trade and prohibition of anti-trade practices apply to all persons in all sectors and shall not be read down, excluded or modified by any other legislation. Therefore, he prays that the provisions of section 43 (1) of the FCFCPA to prevail over the provisions of LCA.

As for the issue of remedy, Mr. Mwarab prayed for the orders that; The provision of section 33(1)(a) (b)(c)(d), (2), and (3) of the LCA be

declared unconstitutional, and the court to uphold Section 43 (1) of the FCFCPA. Alternatively, he prayed the court to issue a directive that all individuals who have suffered and have been injured by the anti-competitive legal provision be granted legal relief under the inherent power of the Court pending the re-enactment or amendment on respect of the LCA to incorporate a fair legal provision which is logical and maintainable.

On the other hand, Ms. Khatau, the learned State Attorney for the first respondents, vehemently opposed what the petitioner submitted on all issues. She begins her submission by pointing out the principles developed from the judicial pronouncement concerning the unconstitutionality of the legislation, which she thought would guide the Court in determining this matter. It should be noted that, the petitioner also relied upon this principle in its submission in chief.

Regarding the said principle, she submitted that a piece of legislation or provision in a statute shall be presumed to be Constitutional until the contrary is proved. She claimed that this principle, in other words, is known as the Constitutionality of the Act of the legislature, as held in the case of **Julius Ishengoma Ndyanabo v. Attorney**

General (supra). Secondly, she stated that any legislation that falls within the parameters of Article 30, which is similar to Section 24 of the Zanzibar Constitution, 1984, is constitutionally valid, notwithstanding that it may violate the individual's basic rights. She maintained that the legislation must fit squarely with the provisions of Article 30 in that it could be construed as being wholly for ensuring the interests of defence, public safety and public order. She referred to the **Director of Public Prosecution v. Daud Pete** (supra) to support her stance. Thirdly, she contended that a breach of the Constitution, however, is such a grave and serious affair that it cannot be arrived at by mere inferences, however attractive as such, requires proof beyond a reasonable doubt. Regarding this point, she referred to cases of **REV. Christopher Mtikila v. Attorney General** [1995] TLR 31 and **Centre for Strategic Litigation Limited and Change for Tanzania Limited**, Misc. Civil Cause no 21 of 2019 (HC) DSM (Unreported).

Having laid the foundation for the principle of the constitutionality of the legislation, Ms. Khatau moved on to submit the first issue. She argued that the whole enactment of the LCA complies with the Constitution, which empowers the House of Representatives to enact such a law since it has the legitimate aim of safeguarding the public interest and

protecting society's rights and freedom through Section 24 of the Constitution. She maintained that the whole LCA is saved by Section 24 of the Constitution and is not arbitrary but reasonable and proportionate. In her view, the LCA encourages the right to work and competition in trade. That's why there is no limitation in applying for the liquor license, and the issued license of importation is not infinite but keeps on changing based on the requirements of the law. She submitted further that any restrictions and or limitations made under the LCA were in consideration with the available demand of the product in small island like Zanzibar, its limitation to the user, excluding people under 18 years, and to control excessive importation of the liquor to the extent of exceeding the need of the public which may result to society disorder. Ms. Khatau, therefore, argued that there is no violation resulting from the impugned legislation. She also argued that the limitation imposed is reasonable and proportionate to protect the public interest and therefore qualifies the limitation test discussed in **Kukutia Ole Pumbun and Another vs Attorney General and Another** (supra). It was her submission that the enactment of the LCA complies with Section 24 (1) of the Constitution. It was her further view that limiting the number of importers to three does not mean people are denied their right to work as enriched under Section 22(1) (a) and (b) of the Constitution. She

maintained that the limitation imposed by the LCA is for the purpose of controlling the flow of importation of liquor to the extent of exceeding public demand. According to her, three importers are enough in Zanzibar based on the current liquor demand. She contended that the issue would have been different if the petitioner's claims had been that the number of importers was insufficient to satisfy the user's needs.

Regarding petitioner's submission on the unconstitutionality of the provision of Section 33(1)(a)(b)(c)(d), (2) and (3) of the LCA with Section 12 (1), (2), (3), (4) and (5) and Section 10 (e) of the Constitution, she submitted that petitioner did not plead the said facts in its petition. Therefore, she maintained that it was just a statement of facts by the petitioner's counsel from the bar, which cannot be raised during submissions in this Court. To support her position, she cited **Attorney General v Mkongo Building and Civil Works Contractors Limited and Another**, Civil Case No. 81/16 of 2019 (Unreported).

Responding to the petitioner's submission that LCA is arbitrary as it does not provide room for objection or appeal, Ms. Khatau submitted that Section 12 (6)(a) of the Constitution not only provides for the right to

appeal but also provides for another legal remedy, which is judicial review. She further submitted that LCA has laid down procedures for aggrieved persons with the decision of the Board. There is room for appeal to the Minister whose decision is final, but if a person is still aggrieved, the last remedy is to apply to the Court through an extra-judicial mechanism whereby the decision of the Minister can be challenged at the High Court by way of judicial review. She, therefore, emphasized that the LCA has a legitimate purpose and that it is constitutionally made. As regards the cases cited by the petitioner, she argued that they are all distinguishable from the circumstances of this petition. Still, she pointed out that they are supporting the position of the LCA that the right to work is not absolute but subject to the restriction on the basis of safeguarding the public interest and invited the Court to find that the impugned provision is constitutional.

Regarding the second issue, it was Ms. Khatau's submission that the provisions of Section 33 (1)(a)(b)(c)(d), (2), and (3) of the LCA comply with Section 24 (1) of the Constitution, which empowers the House of Representatives to enact such law. She also submitted that the same complies with the provisions of the FCFCPA as the LCA was enacted purposely to control and regulate the importation, warehousing, sale

and delivery consumption of intoxicating beverages for safeguarding the interest of the public at large and not to restrict any business practice as alleged by the petitioner.

She submitted further that Section 43 of the FCFCPA prohibits any agreement, decision or practice with the intent of imposing any restriction on business. Thus, she argued that Section 33 of LCA is neither an agreement, decision, nor practice but rather a law made by the responsible authority by considering the restrictive nature of the liquor, people's demand and the population of Zanzibaris. Ms. Khatau went on to stress that even if they could subject the FCFCPA provision to the impugned LCA provision, still the FCFCPA provision could not derogate from the provision of the LCA. She applied the general principle of law that *lex specialis derogat legi generali*, also referred to as *generalia specialibus non derogant* (the general does not derogate from the specific). She emphasized that it is a generally accepted technique of interpretation and conflict resolution in law that suggests whenever two or more laws deal with the same subject matter are in conflict, priority should be given to the more specific law. It was her view that the LCA and FCFCPA govern the same factual situation with regard to business practice, *to wit*, trade. According to the learned State

Attorney, the FCFCPA is a general law enacted to provide for better provisions and other matters relating to fair competition in trade, while the LCA is a special law enacted purposely and detailed to control and regulate the importation, warehousing, sale and delivery consumption of intoxicating liquors for safeguarding the interest of the public at large. She, therefore, argued that special law has priority over general law for the reason that special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law. Moreover, she submitted that it is a known principle of interpretation concerning conflict of law that whenever the statutes conflict with each other, the latter statute always prevails over the former. To support her submission, she referred to the case of **Julius Ishengoma Francis Ndyanabo** (Supra) when the court observed the following;

"Where a later enactment or a subordinate legislation is so inconsistent with or repugnant to an earlier enactment or subordinate legislation that the two cannot co-exist, then the latter one would affect repeal of the former by implication. "

She maintained that since LCA is the latest legislation, it should prevail for the purpose of achieving a fair decision.

In her conclusion, she submitted that the petition is devoid of merit as the provisions of the LCA were not arbitrarily made and its enactment is in compliance with Section 24(1) of the Constitution. Thus, they beseech this court for dismissal of the petition in its entirety with cost.

The submission and prayers of Ms. Hassan, the learned State Attorney, for the second respondent are almost similar to those submitted and prayed by Ms Khatau. Therefore, I find no pressing need to summarise them herein.

In his rejoinder, Mr. Mwarab, a learned advocate, reiterated what he submitted in chief: that a provision that restricts fundamental rights should not be arbitrary or unreasonable and that restriction must serve a legitimate purpose. In his rejoinder, he dismisses what was advanced by the respondents as the justification that provisions of the LCA seek to limit and control alcohol usage in Zanzibar. He argued that if that is at all the purpose of the limitation, then that purpose is illegitimate. He added that in our laws, no one is prohibited from using alcohol, and

therefore, the intention to limit alcohol consumption is unreasonable and serves no legitimate purpose. He further stressed that the respondents did not clarify how the impugned provision is legitimate under the eyes of the law. He maintained that the impugned provision serves no legitimate purpose and is thus liable to be declared unconstitutional.

With regards to the second issue, Mr. Mwarab rejoined further that any habit which restricts competition in trade is prohibited whether or not it was listed in section 43 (2)(a)(b)(c)(d)(e) of the FCFCPA. He added that any anti-competitive matter not listed in section 43 (2) is also prohibited under subsection 1 of section 43.

After having gone through the submission of the Counsels from both sides, I concur with the arguments from both sides regarding the principles of constitutional interpretation, and I am fully subscribed to all authorities cited to support their submission on the said principles. Further, it is instructive that the petitioner has the onus of establishing that legislation is unconstitutional. Having established that the legislation is unconstitutional, then the burden shifts to the respondent to show that the impugned legislation is saved under Section 24 (1) of the Constitution. See; **Legal and Human Rights Centre (LHRC) &**

Others vs Attorney General (Misc. Civil Cause 77 of 2005) [2006]
TZHC 66 (30 June 2006).

Now, I will conveniently begin resolving the second issue, which is whether section 33 (1)(a)(b)(c)(d), (2) and (3) of LCA violates section 43 (1) of the FCFCPA. In this issue, the petitioner opined that section 33 of the LCA violates section 43 (1) of the FCFCPA, therefore commended that through section 70 (1) (a) of the FCFCPA, the provision of FCFCPA should prevail over that of LCA.

On the other hand, the respondents believed there is a conflict of law in LCA and FCFCPA, claiming that FCFCPA is a general law and LCA is a specific law. Therefore, they relied on the principle that *lex specialis derogat legi generali* and stressed that when there is a conflict between two laws, priority should be given to the specific law. They also argued that LCA should prevail over FCFCPA since the former was enacted after the latter.

The respondents' submissions placed this Court to query first whether section 33 (1)(a)(b)(c)(d), (2), and (3) of LCA conflicts with section 43 (1) of FCFCPA.

However, before I embark on that task, it is enlightening to state that both LCA and FCFCPA are special laws. The LCA controls and regulates the importation, warehousing, sale, and delivery consumption of liquors and other similar matters. In contrast, FCFCPA was enacted to promote and protect effective competition in trade and commerce, protect consumers from unfair and misleading market conduct, and provide for other similar matters. Thus, wherever the question of fair competition arises, the FCFCPA becomes a specific law for that purpose. Similarly, wherever the question of controlling liquor arises, LCA is the specific law in that area. Thus, with great respect to Ms. Khatau, it was not correct to say that FCFCPA is a general law, and the principle the learned State Attorney relied on cannot apply in this matter.

My observation above of the provisions of section 33 of the LCA and 43 of the FCFCPA shows no conflict between the mentioned provisions. As argued by the Counsel for the parties, it is correct that section 33 (1) of LCA restricts the importation of liquor in Zanzibar to only three importers. The said provision provides as follows: -

"33.-(1) An import permit shall be granted to not more than three importers subject to the following criteria, the importer:

- (a) is a Zanzibari;*
- (b) is a taxpayer;*
- (c) has a warehouse; and*
- (d) has a motor vehicle for delivery of such liquor."*

Again, as argued by the parties, though in differing views, section 43 (1) of the FCFCPA prohibits all anti-competitive trade practices. Section 43 (1) of the FCFCPA provides: -

"43.-(1) Any agreement, decisions or practices which have an object of prevention, restriction or distortion of competition are declared as anti-competitive trade practices and are hereby prohibited."

Looking at the above provisions of LCA and FCFCPA, it is clear that they are referring to different matters and are not in conflict with each other. Literally, as argued by Ms. Khatau, section 43 (1) of the FCFCPA

prohibits agreements, decisions or practices that restrict competition in trade practices. However, notwithstanding the above, I find it necessary to clarify that, as Mr. Mwarab rightly submitted, the FCFCPA restricts all kinds of anti-competitive trade practices, including anti-competitive trade practices allowed, expressly or impliedly, by the legislations such as LCA. In restricting anti-competitive trade, which may be permitted by the legislation, the FCFCPA under section 70 (1) (a) explicitly provides that provisions of the FCFCPA apply to all persons in all sectors of the economy, and it shall not be read down, excluded or modified by any other legislations. Section 70 (1) (a) provides as follows: -

"70.-(1) Subject to this Section, this Act applies to all persons in all sectors of the economy and shall not be read down, excluded or modified:

(a) by any other Act except to the extent that the Act is passed after the commencement of this Act and expressly excludes or modifies this Act;"

It is also informative to emphasize that the FCFCPA provisions on anti-competitive trade practices implement fundamental objectives and

directive principles and policies of the Revolutionary Government of Zanzibar, which are provided under Chapter Two of the Constitution. These fundamental objectives and principles serve different fields, *to wit*, politics, economics, social, health, education and culture. It is important to note that Chapter Two of the Constitution is part of the Constitution, though according to Section 10A, this part is non-justiciable. Despite that, however, all organs of the Revolutionary Government of Zanzibar (executive, house of representative and judiciary) must observe and apply all provisions of this part of the Constitution. In this regard, the former Chief Justice of Tanzania, Justice Barnabas Samatta, once emphasized on the role of the judiciary in observing Fundamental Objectives and Directive Principles of the State Policy provided under Part II of the **Constitution of the United Republic of Tanzania** of 1977, in his speech delivered at the opening of the second semester on Jurisprudence of Equality Project in Tanzania on 19th June 2001, that: -

"..... the Constitution of the United Republic of Tanzania of 1977 recognizes and incorporates Bills of Rights under Articles 12 - 29. Moreover, under Part II of the Constitution, which embodies the Fundamental

Objectives and Directive Principles of State Policy, one of the objects of the Constitution under Article 9 is to facilitate the building of the United Republic as a nation of equal and free individuals enjoying freedom, justice, fraternity and concord. Indeed, the state authority and all its agencies are obliged to direct their policies and programmes towards ensuring, among other things, "that human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights" (Article 9(f)). The Judiciary cannot escape this obligation that is clearly stipulated by the law of the land".

Article 9 of the Constitution of the United of Tanzania has almost similar objectives to those provided for under Section 10 of the Constitution.

Relevant to the matter at hand is Section 10 (d) of the Constitution, which is the Constitutional economic objective that prevents market dominance to a few individuals. Section 10 (d) provides that it is the responsibility of the Revolutionary Government of Zanzibar to ensure that the economy is planned and promoted in a balanced and integrated

manner and that economic activities are not conducted in a manner capable of resulting in the concentration of wealth or the significant means of production in the hands of a few individuals or a particular group.

The rationale of the above Constitutional economic objectives is that a freely functioning efficient market economy, composed of many business participants, each of which has limited market power, will not permit monopoly profits to be earned. Consequently, prices to final consumers will be lower at competitive prices, and the supply of the products will be in a wider range. Therefore, the Constitution and FCFCPA make it illegal for businesses to act together in a way that limits competition or hinders other businesses from entering the market. It is my finding, therefore, that any legislation which has provisions that are inconsistent with the provision of the FCFCPA will not only lack a force of law but will also contravene section 10 (d) of the Constitution. Thus, Section 33 (1) of the LCA does not have the force of law for being inconsistent with Section 70 (1) (a) of FCFCPA. Similarly, it offends Section 10 (d) of the Constitution. This issue is, therefore, answered in the affirmative.

Now, back to the first issue of whether section 33 (1)(a)(b)(c)(d), (2) and (3) of LCA contravenes the Constitution of Zanzibar, 1984 as amended. In resolving this issue, two major questions will be determined; first is whether Section 33 (1) (a) is discriminatory by restricting the importation permit to Zanzibaris only, and second is whether by restricting liquor importers to three, Section 33 of the LCA violates Sections 21 (3), 22 (1), and 10 (e) of the Constitution.

The petitioner claimed that several provisions of the Constitution had been violated by Section 33 (1)(a)(b)(c)(d), (2) and (3) of LCA. The Constitutional provisions that the petitioner alleged that the LCA has contravened are Section 12 (1) (2) (3) (4) and (5).

Subsections 1 and 2 of section 12 provide for equality before the law and prohibit legislation from making any discriminatory provision in itself or in its effect.

It was Mr. Mwarab's submission that according to Section 12 of the Constitution, all persons are equal before the law and that the law should not be made to be discriminatory on grounds such as nationality, tribe, gender, place of origin, political orientation, colour, religion, etc. It was his view, therefore, that by restricting the import permit to

Zanzibaris only, section 33 (1) (a) of the LCA offends Section 12 (5) of the Constitution for being discriminatory by providing unequal treatment to subjects who are not Zanzibaris. It was his further view that Section 33 of LCA promotes favouritism and hence offends Section 10 (e) of the Constitution.

Ms. Khatau was of the view that the petitioner did not plead regarding the violation of Section 12 of the Constitution. Therefore, she urged the Court not to consider the petitioner's submission.

I will commence with the Learned State Attorney's assertion that what was argued by the petitioner regarding the violation of section 12 was not pleaded. With respect to the learned State Attorney, I disagree with her contention. The petitioner, in paragraph 4.5 of the petition, challenged the Constitutionality of Section 33 of the LCA. It also pleaded in paragraph 4.3 regarding the protection of fundamental rights and the duty of the Court in interpreting those rights. Among the fundamental rights provided under our Constitution is provided under section 12. Therefore, what was argued by the petitioner was pleaded in its petition.

The question I am prepared to resolve at this juncture is whether Section 33 (1) (a) is discriminatory by restricting the importation permit to Zanzibaris only.

Is Section 33 (1) of LCA discriminatory? The expression "discrimination" (Kubagua) is defined in Section 12 (5) of the Constitution as follows:

"(5) Katika kifungu hiki neno "kubagua" maana yake ni kutimiza haja kwa watu mbali mbali kwa kutegemea utaiifa wao, kabila, jinsia, ulemavu, pahala walipotokea, muelekeo wao kisiasa, rangi au dini ambapo watu wa aina fulani wanaonekana kuwa ni dhaifu na duni au wawekewe vikwazo na pingamizi ambavyo wale watu wa aina nyingine hawawekeani au wanapewa fursa au faida ambayo hawapewi watu wa aina nyingine.

Isipokuwa kwamba neno "kubagua" halitafafanuliwa kwa namna ambayo itazuia Serikali kuchukua hatua za makusudi zenye lengo la kurekebisha matatizo mahsusii katika jamii"

Section 12 (5) can be translated as follows: -

"(5) For the purposes of this Section, the expression "discrimination" means to satisfy the needs, rights or other requirements of different persons based on their nationality, tribe, gender, place of origin, political opinion, colour, religion or station in life such that specific categories of people are regarded as weak or inferior and are subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or the prescribed necessary qualifications.

Except that the word "discrimination" shall not be construed in such a way as to restrain the Government from taking necessary measures with the aim of rectifying peculiar problem in the society."

From the wording of Section 12 (5) of the Constitution, it is clear that non-Zanzibaris are discriminated under Section 33 (1) (a) of the LCA as

they are not afforded an opportunity to import liquor similar to Zanzibaris. It goes without saying, therefore, that the impugned provision of LCA is violative of Section 12 (1) (2), which provides that:-

"12. (1) Watu wote ni sawa mbele ya sheria, na wanayo haki, bila ya ubaguzi wowote, kulindwa na kupata haki sawa mbele ya sheria.

(2) Hakuna sheria itakayokuwa na kifungu chochote ambacho ni cha ubaguzi wa moja kwa moja au kwa taathira yake"

The above quoted provision can be translated that: -

"12.(1) All persons are equal before the law and entitled to protection and equality before the law without any discrimination.

(2) No law shall make any provision that is discriminatory either of itself or in its effect."

It is worth stating that the right under Section 12 of the Constitution is free from claw-back clauses; hence, it is an absolute right, and its

construction adopted some words contained in Article 7 of **the Universal Declaration of Human Rights of 1948** which provides that: -

"All are equal before the law and entitled without any discrimination to equal protection of the law..."

Moreover, the learned State Attorneys did not state which problems are peculiar to the society that the Government or Legislators sought to rectify by subjecting non-Zanzibaris to such restriction. Thus, Section 24 (1) of the Constitution does not save the impugned provision.

It is my considered finding, therefore, that Section 33 (1) (a) is discriminatory; it discriminates categories of people who are not Zanzibari in doing business of importing liquor on the island. Therefore, inequality is in effect in Section 33 (1) (a), and it is a violation of Section 12 (1) (2) of the Constitution.

Other Constitutional provisions alleged to be contravened are sections 21 (3) and 22 (1) (a) & (b) on the right to work, and section 10 (e) regarding favouritism. Thus, a query that needs to be resolved is

whether restricting liquor importers to three, Section 33 (1) of the LCA, violates Section 22 (1) and 10 (e) of the Constitution.

Mr. Mwarab maintained section 33 (1) of the LCA does not serve any objective. According to him, the impugned provision is arbitrary, unreasonable and unfair, and the restrictions imposed are not necessary and are unjustifiable. He also maintained that since Section 21 (3) of the Constitution gives rights to every person in Zanzibar to work and to be granted equal opportunity, restricting the opportunity to secure an import permit to only a few importers, leaving other importers without such Constitutional rights, the impugned provision offended the Constitution. It was his concern, as well, that the impugned provision violates section 10 (e) of the Constitution, which does not allow favouritism to a few individuals or a certain group.

Ms. Khatau & Ms. Hassan, on their side, maintained that the impugned provision is in compliance with the Constitution. They believe the enactment safeguards the public interest and protects society's rights and freedoms through Section 24 of the Constitution.

I have carefully considered the arguments of the parties. In my view, both Section 21 (3) and Section 22 (1) of the Constitution also provide for absolute rights and duties contrary to what the learned State Attorneys asserted. Both Constitutional provisions have no claw-back clauses as provided hereunder: -

Section 21 (3) of the Constitution provides as follows:

"(3) Kila Mzanzibari anayo haki ya kufanya kazi na anastahili fursa na haki sawa, kwa masharti ya usawa ya kushika nafasi yoyote ya kazi na shughuli yoyote iliyoko chini ya mamlaka ya Zanzibar"

The above provision can be translated as follows: -

"(3) Every Zanzibari has the right to work and is entitled to equal opportunity and right on equal terms to hold any office or discharge any function under the state authority of Zanzibar".

And Section 22 (1) (a) & (b) provides that:

"22 (1) Kazi pekee ndiyo huzaa utajiri wa mali katika jamii, ndio chimbuko la ustawi wa wananchi na kipimo cha utu, kila mtu ana wajibu wa:

- (a) kushiriki kwa kujituma kwa uaminifu
katika kazi halali na ya uzalishaji mali;
na*
- (b) kutimiza nidhamu ya kazi na kujitahidi
kufikia malengo ya uzalishaji ya binafsi
na ya pamoja yanayotakiwa au
yaliyowekwa na sheria"*

Which can be translated as follows: -

*"22.(1) Work alone creates material wealth in society,
and is the source of the well-being of the
people and the measure of human dignity,
every person has the duty to:*

- (a) participate voluntarily and honestly in
lawful and productive work; and*
- (b) observe work discipline and strive to attain
the individual and group productive
targets desired or set by law".*

The right to work is among the fundamental rights under the Constitution. This right need protection as it is linked to the right to life

provided under Section 13 of the Constitution since individuals and society need to work for survival. This is also what the Holy Scripture, under the authorship assigned to Paul the Apostle, tells us in 2 Thessalonians 3:10, that; "... *if man will not work, he shall not eat...*" It is in this context I am persuaded by the authorities cited by the High Court of Tanzania in **George M. Kilindu vs C.R.D.B. (1996) LTD & another** (Misc. Civil Cause No. 37 of 1998) [2000] TZHC 41 (7 June 2000) of the Indian Case of **Delhi Transport Corporation vs DTC Mazdoor Congress** AIR 1991 SC 101 when its Apex Court observed that: -

"The right to life includes, the right to livelihood.

The right to livelihood, therefore, cannot hang on to the fancies, of individuals in authority. The employment is not a bounty from them, nor can its survival be at their mercy. Income is the foundation of many fundamental rights, and when work is the sole source of income, the right to work becomes as much fundamental. Fundamental rights can ill-afford to be consigned to the limbo of undefined premises and uncertain applications. That will be mockery of them."

The Court of Tanzania also cited with approval, in the same case, the decision of the Supreme Court of the United States in **Barsky vs Board of Regents** (1954) 347 US 442 when Douglas, J. observed that: -

"The right to work, I had assumed was the most precious liberty that a man possesses. Man has indeed, as much right to work, as he has to live, to be free, to own property.... To work means to eat. It also means to live. For many, it would be better to work in jail than to stay idle on the calves".

Mwalusanya, J in **A. A Sisy and 35 Others vs. Principle Secretary, Ministry of Finance and Others**, Civil Case No. 5 of 1994, High Court of Tanzania (Unreported) had this to say regarding the right to work: -

"Indeed the right to work is the most precious liberty that man possesses. It is the most precious liberty because it sustains and enable a man to live and the right to life is a precious freedom. And mind you "life means something more than mere animal existence and

the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed..”

For my part, I’m fully subscribed to the above decisions, which will be my guidance in determining this issue.

The right to work conceptually includes freedom of business, and therefore, the Constitution should protect those who choose to do business in the context of sections 13, 21 (3), and Section 22 (1) of the Constitution. At this juncture, I am inspired by the commentary in the book by Helen Kijo-Bisimba and Chris Maina Peter titled **Justice and Rule of Law in Tanzania: Selected Judgements and Writings of Justice James L. Mwalusanya and Commentaries**. On page 154, the learned authors commented as follows: -

"Freedom of business is linked to both the right to life on the one hand and the right to property on the other. At the same time, there is discernible relationship between this freedom and the right to work.

As indicated above

In relation to freedom of business, this provision of the Constitution should be interpreted in the context of Article 14 of the same Constitution which provides for the right of every person to get the means of subsistence from the society. It means that those who have opted to go on business as a means of subsistence should be accorded protection like everybody else without discrimination”.

Apparently, Section 33 of LCA restricts the number of people who want to exercise their right and freedom to do business in liquor importation. It allows only three people to exercise that right. It is palpably clear, from what I have demonstrated herein earlier, that the impugned provision contravenes Sections 13, 21 (3) and 22 (1) of the Constitution.

Based on the above finding, the following question is whether the impugned provision is saved by Section 24 of the Constitution and hence justifiable. The respondent's views are positive on that. They argued that restriction was made to control the excessive importation of liquor that exceeded the needs of the public.

Respondent's argument presumed that by restricting liquor importers, there would be no excessive importation of liquor in Zanzibar. Their line of argument raises a thoughtful question, such as: -

- i. Is there excessive liquor importation in Zanzibar that is beyond the market demand?
- ii. Does the law impose any restriction against the three licenced importers on the quantity of liquor to be imported, be it weekly, monthly or annually, to control such excessive importation?

The respondents did not address the Court on those questions; they just argued without exhibiting any data showing the real situation before the enactment of the impugned provision, for instance, the demand of the market *vis-a-vis* the importation; to what extent the importation exceeded the demand; if there was an excess in liquor importation, how such excess affects the society etc. Furthermore, the LCA did not contain any provision that limits the quantity of liquor to Zanzibar; that is to say, for the three licenced importers, the sky is the limit; they can import any quantity of liquor they can, regardless of the market demand.

On the strength of what I have discussed above, I would have, with most tremendous respect to the learned State Attorneys, to disagree with their submission that the restriction in the impugned provision was made to control the excessive importation of liquor. So, based on the authorities in **Kukutia Ole Pumbun** (supra) and **Julius Ishengoma Francis Ndyanabo** (Supra) cited by the parties, Section 33 (1) of the LCA did not pass the constitutionality test, the restriction made is unjustifiable, it does not have any legitimate purpose hence it is not saved under Section 24 (1) of the Constitution.

It is my conclusion, based on the afore-demonstrated reason, that Section 33 (1) of **Liquor Act** No. 9 of 2020 is inoperative, that is to say, it does not have a force of law since its enactment for being inconsistent with Section 70 (1) of the **Fair Competition and Consumer Protection Act** No. 5 of 2018, and the **Constitution of Zanzibar, 1984** as amended. It will therefore have to be struck down.

To this end, I allow the petition. Consequently, in terms of Section 25A (1) (b) of the Constitution, I declare and order that: -

1. Section 33 (1) (a) of **the Liquor Act** No. 9 of 2020 to the extent that it restricts liquor import permits to three importers is a contravention of and *ultra vires* the provision of section 43 (1) of the **Fair Competition and Consumer Protection Act** No. 5 of 2018 which prohibits restrictive business practices and hence in terms of section 70 (1) (a) of the latter, is a nullity in law.
2. Section 33 (1) (a) of **the Liquor Act** No. 9 of 2020 is unconstitutional and, void *ab initio*, for being violative of Sections 12 (1) (2), 13 (1), 21 (3) and 22 (1) of **the Constitution of Zanzibar**, 1984 as amended.
3. The refusal of the petitioner's licence for liquor importation, which was the source of the present litigation, was illegal, *ultra vires*, null and void.
4. The Registrar of the High Court to hand over sale proceeds from the petitioner's containers deposited in the Court's account by the Court Broker.

5. Petitioner's containers attached by the order of this Court, which are yet to be sold by the Court Broker to be handed over to the petitioner.

6. Petitioner to pay Zanzibar Liquor Control Board import licence fees for the year 2022 for the imported containers.

Given the nature of the matter, I make no order regarding costs.

Dated at Tunguu, Zanzibar this 04th day of April, 2024.

A handwritten signature in black ink, appearing to read 'G. J. Kazi', written over a circular stamp or seal.

G. J. KAZI
JUDGE
04/04/2024