

CASE FILE NUMBER: CONS/06/06/2023/00858/CC

**IN THE MATTER BEFORE THE BOARD
OF THE COMPETITION AND CONSUMER
PROTECTION COMMISSION**

BETWEEN

Ms. Leah Mulenga

COMPLAINANT

AND

Rustic Stone Limited

RESPONDENT

BEFORE:

Commissioner Angela Kafunda	- Chairperson
Commissioner Derrick Sikombe	- Member
Commissioner Stanford Mtamira	- Member
Commissioner Emmanuel M. Mwanakatwe	- Member
Commissioner Sikambala M. Musune	- Member

DECISION

Below is a summary of the facts and findings presented by the Commission to the Board of the Commission following investigations carried out in the above case.

Introduction and Relevant Background

It was submitted that:

1. On 27th July 2023, the Competition and Consumer Protection Commission ("the Commission") received a complaint from Ms. Leah Chimpinde Mulenga ("the Complainant") against Rustic Stone Limited ("the Respondent"). Specifically, the Complainant alleged that in March 2023,

she engaged the Respondent to supply and install a headstone on her late uncle's (Micheal Banda) grave at a total cost of K32,000.00. The Complainant alleged that the payment was made in three instalments with the initial deposit of K27,000.00 being made in March 2023. The Complainant alleged that in July 2023, she visited the Respondent's workshop twice to make the second instalment of K2,000.00 and the final payment of K3,000.00 respectively.

2. The Complainant alleged that she, however, was informed that she needed to pay an additional amount of K4,000.00 as a surcharge constituting an installation and maintenance fee. The Complainant alleged that she visited Leopard's Hill Memorial Park ("LHMP") offices to inquire into the surcharge and maintenance fee demanded by the Respondent and she was advised that the K4,000.00 was supposed to be paid by the Respondent ("installer") as a maintenance fee. The Complainant alleged that in August 2023, she paid the K4,000.00 as demanded by the Respondent as she was scheduled to have the memorial service in mid-August 2023. The Complainant alleged that she found this trading practice to be unfair as she was not informed ("full disclosure") by the Respondent during the inquiry of their service that she needed to pay the above-mentioned maintenance fee. The Complainant demanded for a refund of K4,000.00 paid as a surcharge for installation and maintenance.
3. The Commission noted a disclaimer on the Respondent's Quotation number issued to the Complainant reading, *"Once order placed, no refunds to customer"*.

Legal Contravention and Assessments

Legal Contravention

It was submitted that:

4. Initially the Commission instituted investigations in the matter under Section 46(1) as read to together with Section 45(b); and Section 49(5) of the Competition and Consumer Protection Act, No. 24 of 2010 ("the Act"). However, during the process of investigations, the Commission found that the matter appeared to be bordering on Section 48(1) and Section 53(1) of the Act, hence, this case was analysed under Section 48(1) and Section 53(1) of the Act.

5. The alleged conduct by the Respondent appeared to have breached Section 48(1) and Section 53(1) of the Act.
6. Section 48(1) of the Act states that:
“An owner or occupier of a shop or other trading premises shall not cause to be displayed any sign or notice that purports to disclaim any liability or deny any right that a consumer has under this Act or any other law.”
7. Section 48(2) of the Act states that:
“A person who, or an enterprise which contravenes subsection (1) is liable to the Commission a fine not exceeding ten percent of that person’s or enterprise’s annual turnover.”
8. Section 53(1) of the Act states that:
“In a contract between an enterprise and a consumer, the contract or a term of the contract shall be regarded as unfair if it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”
9. Section 53(2) of the Act states that:
“An unfair contract or an unfair term of a contract between a consumer and an enterprise shall not be binding.”
10. Section 53(3) of the Act states that:
“Notwithstanding subsection (2), a contract shall bind the parties if it is capable of being enforced without the unfair term.”

Assessment Tests

It was submitted that:

For the purposes of Section 48(1) of the Act, the following assessment tests will be used;

11. Whether the Respondent is an “owner” or “occupier” of a shop or other trading premises;
12. Whether a sign or notice was displayed; and,

13. Whether the sign or notice purported to disclaim any liability or deny any right a consumer has under the Act.

For the purposes of Section 53(1) of the Act, the following assessment tests will be used;

It was submitted that:

14. Whether there is a “contract” between an enterprise and a consumer; and,
15. Whether the contract or term of the contract caused a significant imbalance in the parties’ rights and obligations to the detriment of the consumer.

Investigations Conducted

It was submitted that:

16. The Commission duly served the Notice of Investigations and its accompanying letter on the Respondent on 17th August 2023.
17. The Commission reviewed the quotation and receipt issued to the Complainant by the Respondent on 30th August, 2023.

Findings

The Parties

The Complainant

It was submitted that:

18. The Complainant is Ms. Leah Chimpinde Mulenga a resident of Meanwood Ndeke, Lusaka. Section 2 of the Act defines a consumer as, “*any person who purchases or offers to purchase goods or services otherwise than for the purpose of re-sale, but does not include a person who purchases goods or services for the purpose of using the goods or services in the production and manufacture of any other goods for sale, or the provision of another service for remuneration.*”¹ Therefore, the Complainant is a consumer as

¹ Competition and Consumer Protection Act No. 24 of 2010

envisaged under the Act because she purchased a tombstone worth K33,000.00 from the Respondent².

The Respondent

It was submitted that:

19. The Respondent is Rustic Stone Limited whose registered address is House No. 225 Chamba Valley, Maposa Road, Lusaka. The Respondent is a company specialized in tombstone and granite kitchen tops and granite kitchen tables that is registered with Patents and Companies Registration Agency (PACRA) with the registration number 120160006124³. According to Section 2 of the Act, an, “enterprise,” means *a firm, partnership, joint-venture, corporation, company, association and other juridical persons, which engage in commercial activities, and includes their branches, subsidiaries, a affiliates or other entities, directly or indirectly, controlled by them.* Therefore, the Respondent is an enterprise as envisaged under the Act as they are a company that engages in commercial activities of supplying and installing tombstones, granite kitchen tops and granite kitchen tables.

Submissions from the Respondent⁴

It was submitted that:

20. On 29th August 2023, the Respondent through their Legal Advocate Charlotte Chuuma Advocates submitted that it should be taken into consideration that their client (“the Respondent”) was engaged by the Complainant to supply and install a headstone for her uncle’s grave. The Respondent submitted that an invoice was availed to the Complainant in the total sum of K33, 000.00 broken down as follows:

S/N	Product	Amount
1	Slab and Skirting	K15,000.00
2	Headstone 80MM Rustenburg	K10,000.00
3	Picture Color 15*20	K4,000.00

² Receipt No. 2392 dated 5th August 2023

³ PACRA Print Out

⁴ Response letter to the NotI dated 21st August 2023 received on 29th August 2023 from the Respondent

4	Installation	K2,000.00
5	200 Letters for free	K0.00
6	Flower vessels Square one	K2,000.00

21. The Respondent submitted that the said sum of K32,000.00 was accordingly paid by the Complainant, having been given a K1,000.00 discount. The Respondent submitted that the LHMP required mandatory payment of the sum of K4,000.00 surcharge for installation and maintenance of the tombstone which was paid by the deceased's family through the tombstone provider. The Respondent submitted that after payment, the receipt was issued by LHMP for the benefit of the family of the deceased.
22. The Respondent submitted that a copy of the Invoice and Receipt was attached for the Commission's ease of reference. The Respondent submitted that it should be noted that the Invoice No. INV27475 and Receipt Number 29454 were issued in the name of the deceased and not their client. The Respondent submitted that from the quotation provided to the Complainant, no payment was indicated as surcharge or maintenance fee as the same was not within the ambit of their business.
23. The Respondent submitted that they were exclusively engaged in the business of Granite mining, processing and tombstone manufacturing. The Respondent submitted that the K4,000.00 in contention was paid to the benefit of the LHMP pursuant to the contract between the Complainant and the Memorial Park. The Respondent submitted that they were not in breach of the said Sections 45(b), 46(1) and 49(5) of the Competition and Consumer Protection Commission Act of 2010 as they were not privy to the issues between the deceased's family (Complainant) and LHMP.
24. The Respondent submitted that they reiterated that they conducted themselves in a fair and honest manner in dealing with the Complainant having fulfilled their obligations by supplying and installing the headstone as per agreement.

Review of the Complainant's Quotation⁵

It was submitted that:

⁵ Review of the quotation issued to the Complainant by Respondent on 19th August 2023

25. A review of Quotation No. 2577 issued by the Respondent to the Complainant on 19th August 2023, revealed that the Complainant engaged the Respondent to install a tombstone at a sum of K32,000.00 as shown below. A further review of Quotation No. 2577 revealed that the quotation issued to the Complainant by the Respondent had a notice under clause number 4 stating that, "Once Order Placed, No Refunds to Customer"⁶



RUSTIC STONE LIMITED

Granite Mining, Processing Specialist

Tombstone, Granite Slab Manufacture

Cellphone: +260972713750

Quote ID: 2577 Account: Cash Sale ZMK Sales Person: Sakala Piero

Customer: MADAM LEAH MULENGA Cellphone: 0975497298 Email:

Installation: True Address: LHMP Remark: M 765

Issue Date: 8/19/2023 Handover 11/1/2022 Liability: 0 Months

Quotation

ID	Products	Qty	Rate	Amount
12789	SLAB AND SKIRTINGS	1	15000	15000.00
12790	HEADSTONE 80MM RUSTENBURG	1	10000	10000.00
12791	PICTURE COLOUR 15*20	1	4000	4000.00
12792	INSTALLATION	1	2000	2000.00
12793	200 LETTERS FOR FREE	1	0	0.00
12794	FLOWER VESSEL SQUARE ONES	2	1000	2000.00

Note:

1. Quote Only Valid for 7 days.
2. 50% Down payment Required.
3. 100% Payment Required Before Delivery.
4. Once Order Placed, No Refunds to Customer.
5. 5 Years Liability to All Headstone and Coverslab Is 60mm or Above. There Is No Liability to 30mm Thick Coverslab.

Net: 33000.00

VAT: 0.00

Sub-Total: 33000.00

Discount: 1000.00

Amount: 32000.00

Signature: _____

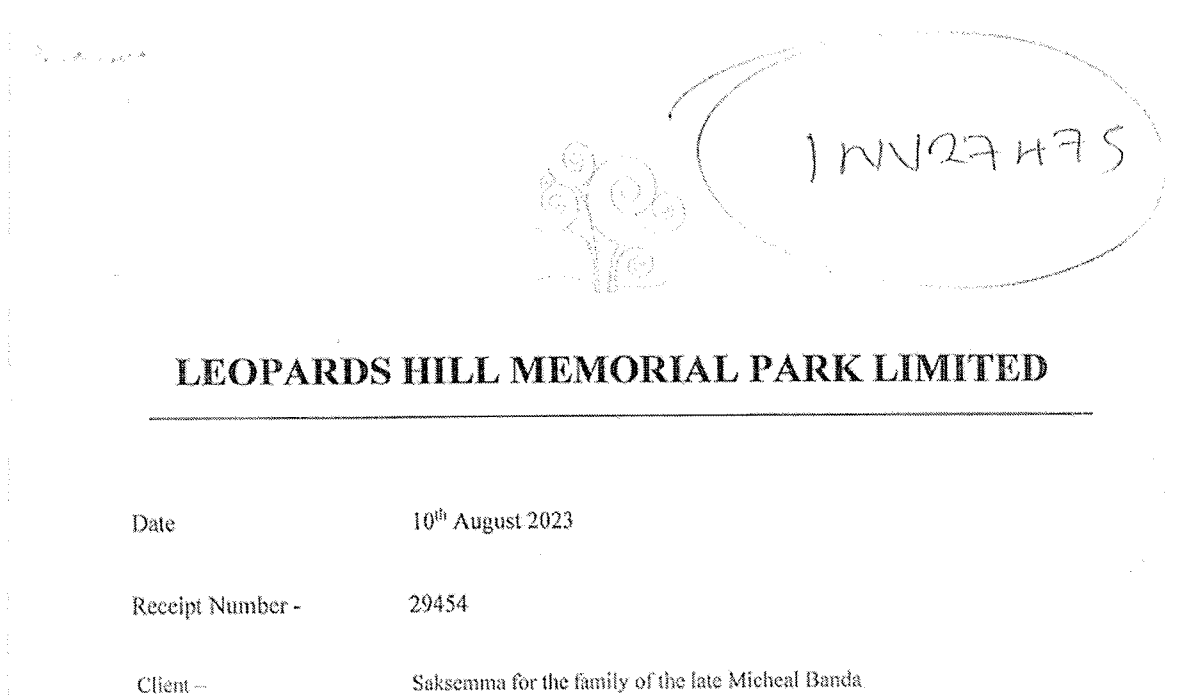
Sales Person: Sakala Piero

⁶ The Respondent's receipt number 8220 dated 20/10/2022 issued to the Complainant

Review of Invoice No. 27475 issued by Leopard Hill Memorial Park Limited.

It was submitted that:

26. A review of receipt No. 29454 dated 10th August 2023, in the name of the Complainant's uncle ("late Micheal Banda"), revealed that there was a payment amount of K4,000.00 paid to LHMP as a surcharge for the installation site AH14.19.1 as shown below:



LEOPARDS HILL MEMORIAL PARK LIMITED

Date	10 th August 2023
Receipt Number -	29454
Client -	Saksemma for the family of the late Micheal Banda

Receipt

Payment Reference: Bank Transfer-FNB

Amount in words: Four thousand kwacha only

Description	Total ZMW
Being payment for surcharge for an Installation site(AH14.19.1)	4,000.00



Received by:.....*[Signature]*.....*[Signature]*.....*[Signature]*

Previous Cases involving the Respondent

It was submitted that:

27. A review of the Respondent's file revealed that there was no previous case in which the Respondent was found to have breached Section 48 (1) and Section 53(1) of the Act.

Submissions to the Commission's Preliminary Report

It was submitted that:

28. After the Preliminary report was approved, it was duly served on the Respondent on 20th March 2024 for them to make their submissions to it, if any. The Preliminary report was also sent to the Complainant on 2nd April 2024 via her email address following her failure to physically collect the report when contacted via phone on 6th March 2024. There were no submissions received from both parties.

Relevant Findings

It was submitted that:

29. The Commission found that the Complainant had engaged the Respondent to supply and install a headstone for her uncle's grave at a total cost of K32,000.00.⁷
30. The Commission found that when the Complainant went to make the final payment to the Respondent on 10th July 2023, she was informed that she needed to pay an amount of K4,000.00 as a surcharge for installation and maintenance fee.⁸
31. The Commission found that on 6th August 2023, the Complainant paid K4,000.00 as a surcharge for installation and maintenance to LHMP⁹.
32. The Commission found that the quotation No. 2577 issued by the Respondent to the Complainant did not include the K4,000.00 surcharge for the installation site AH14.19.1 and maintenance.¹⁰
33. The Commission found that the quotation No. 2577 issued to the Complainant by the Respondent had a notice under clause number 4 stating that *"Once Order Placed, No Refunds to Customer"*¹¹.
34. The Commission found that LHMP offered two options for which the said fees could be paid the first option being, paying directly to LHMP, who would then issue a receipt that the customer would then present to their selected installer as proof of payment of the fee and the second option being, paying the installation fee to the installer, who would then pay LHMP¹².
35. The Commission also found that the installation fee imposed by LHMP on the installer was still going to be borne by the consumer and they either paid it directly to LHMP or through the installer¹³.

⁷ Quotation No. 2577 issued to the Complainant by the Respondent dated 19th August 2023

⁸ Form IV dated 27th July 2023

⁹ Receipt No. 29454 dated 10th August 2023 issued by LHMP

¹⁰ Quotation No. 2577 issued to the Complainant by the Respondent dated 19th August 2023

¹¹ Quotation No. 2577 issued to the Complainant by the Respondent dated 19th August 2023

¹² Case between Competition and Consumer Protection Commission and Leopards Hill Memorial Park Case No. CONS/09/11/2021/00798

¹³ Case between Competition and Consumer Protection Commission and Leopards Hill Memorial Park Case No. CONS/09/11/2021/00798

Analysis of Conduct

It was submitted that:

36. In analysing the case for possible violation of Section 48(1) of the Act, the following assessment tests were used:

Whether the Respondent was an “owner” or “occupier” of a shop or other trading premises;

It was submitted that:

37. Black’s Law dictionary defines an owner, “as one who has the right to possess, use, and convey something; a person in whom one or more interests are vested”¹⁴. The Black’s law dictionary defines an occupant, as “one who has possessory rights in, or control over, certain property or premises”¹⁵. Furthermore, a shop in Black’s Law Dictionary is defined in part as “a building in which goods and merchandise are sold at retail”¹⁶. In this case, the Respondent owned a shop located at Water Falls Mall, along Great East Road in Lusaka through which they supplied and installed tombstones, granite kitchen tops and granite kitchen tables. As such, the Respondent was an owner of a trading premise.

Whether a sign or notice was displayed;

It was submitted that:

38. In the case of **ZAMM Imports Limited vs. the Competition and Consumer Protection Commission, 2014/CCPT/008/CON**, the Competition and Consumer Protection Tribunal (“the Tribunal”) defined the word “display” as to notify, inform or send a message to one who is a customer or consumer publicly or privately. The Tribunal further stated that the word “display” can also be stretched to displaying on a consumer’s or customer’s receipt. To that extent “display” cannot only be restricted to the public, on a wall, billboard, notice board or public place but also on a receipt...”¹⁷

¹⁴ Black’s Law Dictionary eighth edition 2004

¹⁵ Black’s Law Dictionary eighth edition 2004

¹⁶ Black’s Law Dictionary (1968), 4th Edition, Henry Campbell Black, West Publishing Co. p. 1547

¹⁷ Ibid

39. In line with the above case, the display of a notice can either be on the wall, at the till or printed on a receipt, invoice or any other document related to a transaction between a consumer and an owner or occupier of a shop or any other trading premises. In this regard, it was established that the notice "*Once order placed, No refunds to Customer*" stated on the Respondent's Quotation amounted to display of a notice.

Whether the sign or notice purported to disclaim any liability or deny any right a consumer has under the Act; and

It was submitted that:

40. In establishing this question, the ***Zamm Imports case*** further highlights how disclaimers are considered under the Act. It was held by the Tribunal that; "*disclaimers were treated as strict liability cases in line with Section 48(1) of the Act.*"¹⁸
41. In the case cited above, the Tribunal ruled that by displaying a disclaimer, ZAMM IMPORTS violated Section 48(1) of the Act. The Tribunal stated that Section 48(1) fell into the category of the term strict liability meaning that the Respondent violated the Act by displaying a sign or notice purporting to disclaim liability.
42. In the case at hand, the Commission established that the words stated on the Respondent's Quotation, "*Once order placed, No refunds to Customer*" dated 5th August, 2023 denied consumers the right to a refund or to an exchange after 48 hours, which they had under the Act. This notice implied that once customers had placed an order but the Respondent was unable to deliver the order or had made an error on the product delivered no redress in terms of a refund would be given to the customer. Such a statement gives the Respondent leeway to act negligently thereby also allowing them to disclaim liability for loss or damage that may occur to the consumers' goods/products after the order is made. However, the Act entitles consumers to redress such as a refund or replacement in events where they are not supplied a service or a product. The Act also allows for redress in the form of damages and losses in accordance with Section 52 of the Act. In this regard, the Respondent displayed a disclaimer and was thus in violation of Section 48(1) of the Act.

¹⁸ Zamm Imports Limited Vs the Commission 2014/CCPT/008/CON

43. In analysing the case for possible violation of Section 53(1) of the Act, the following assessment tests were used:

Whether the Complainant is a “Consumer”;

It was submitted that:

44. Refer to paragraph 18 of the Report.

Whether there is a “contract” or “term of contract” between an “enterprise” and a “consumer”;

It was submitted that:

45. According to Black’s Law Dictionary, a contract is defined as “*An agreement, upon sufficient consideration, to do or not to do a particular thing.*”¹⁹ It should be noted that the formation of a contract generally requires an offer, acceptance, consideration, and a mutual intent to be bound. In the case under consideration, the Commission established that the Complainant and the Respondent had entered into a contract when the Complainant engaged the Respondent to supply and install the headstone for a total cost of K32,000.00, and the Respondent accepted the offer as evidenced by quotation No. 2577 issued by the Respondent to the Complainant on 19th August 2023. Further, the price and the scope of the service, which included the supply and installation of the headstone could be referred to as the term of contract.

Whether the term of the contract caused a significant imbalance in the parties’ rights and obligations to the detriment of the Consumer

It was submitted that:

46. Imbalance means “*a lack of a fair or correct balance between two things, which results in problems or unfairness*”²⁰. For the courts to determine whether a term or terms of a contract are unfair, the courts will consider two things; firstly, if the term has been incorporated into the contract, secondly if the clause covers the loss in question.²¹

¹⁹ Black’s law Dictionary, 4th Edition, p394

²⁰ Longman Dictionary of Contemporary English, Page 810

²¹ Olley vs Marlborough Court Ltd (1949) retrieved from

<https://www.open.edu/openlearn/ocw/mod/oucontent/view.php?id=25556&printable=1>

47. In considering if the unfair term or terms have been incorporated into the contract, the general rule is that the term must be brought to the attention of the contracting party before or at the time the contract was made. However, if the term was not brought to their attention, it cannot be said that they had accepted the term and therefore the term will not be part of the agreement between the parties. In *Olley V. Marlborough Court* (1949 CA), *the claimant booked in at the reception desk of a hotel and only, subsequently, on entering her room, did she discover behind the door a notice which claimed to exclude the hotel's liability for guests' property. The Court of Appeal held that the notice was not incorporated in the contract, since it was not displayed at a spot visible to the claimant before she made the contract.*
48. In the case at hand, the Commission established that the term of contract to the effect that the Complainant needed to pay a surcharge to the Respondent for the installation and maintenance of the tombstone imposed an extra cost on the Complainant, that was not disclosed or agreed upon at the time of the contract formation and therefore could not be incorporated in the contract. This is because it was not brought to the attention of the Complainant when contracting, therefore, it could not be taken as the Complainant had accepted the terms of the contract to form an agreement and be bound by it. The Commission established that based on this, the Respondent had no basis to deny the Complainant a refund as they were unaware of the surcharge before or upon entering the contract.
49. Furthermore, making reference to a **Case between the Competition and Consumer Protection Commission and Leopards Hill Memorial Park Case No. CONS/09/11/2021/00798** in which the Commission found that the Respondent was well aware of this charge because minutes from a meeting that was held on 10th November 2021 between LHMP and installers in which the Respondent was present revealed that, in that meeting, there was a submission of a suggestion that *"if installers were not happy with the 20% commission fee for unregistered installers and 10% commission fee for registered installers, then LHMP would introduce standardized fees depending on the location where the installation was taking place"*, of which LHMP implemented the standard fees in January 2022. Therefore, it was negligence on the part of the Respondent not to have included these fees and their negligence should in no way affect the Complainant.

50. Making further reference to the cited case above the Commission established through submissions from a customer of LHMP that, LHMP offered two options in which the said installation fee could be paid. The first option was to pay directly to LHMP, who would then issue a receipt that the customer would then present to their selected installer as proof of payment of the fee. The second option was to pay the installation fee to the installer, who would then pay LHMP. In light of the two payment options, it was concluded by the Commission that the Complainant picked the first option and paid this fee directly to LHMP. The Commission established that the conduct by the Respondent caused a significant imbalance in the Complainant's rights and obligations to her detriment. Therefore, the Commission established that the Respondent was in violation of Section 53(1) of the Act due to their inability to fully disclose the surcharge fee during the formation of the agreement and hence could not be enforced against the Complainant.

Board Deliberation

51. Having considered the facts, evidence and submissions in this case, the Board resolves that the Respondent did engage in unfair trading practices in relation to Section 48(1) as they displayed a disclaimer and Section 53(1) of the Act as they failed to disclose the surcharge fee during the formation of the agreement with the Complainant, hence violated Section 48(1) and Section 53(1) of the Act.

Board Determination

52. The facts and evidence of this case have shown that the Respondent did engage in unfair trading practices in relation to displaying a disclaimer and having an unfair contract term, hence violated Section 48(1) and Section 53(1) of the Act.


Board Directives

53. The Board hereby directs that;
- i. The Respondent is fined 0.5% of their 2022 annual turnover with the applicable cap of K30,000.00 for breach of Section 48(1) of the Act in accordance with Section 48(2) of the Act and the Commission's Guidelines for Administration of Fines 2019;

- ii. The Respondent submits their audited annual books of accounts for 2022 to the Commission for calculation of the actual fines within thirty (30) days of receipt of the Board Decision in accordance with Section 5(d) of the Act;
- iii. The Respondent should draft terms of the contract applicable to their services and submit them to the Commission for review within 30 days of receipt of the Board Decision in line with Section 5(d) of the Act; and
- iv. The surcharge of K4,000.00 was an unfair contract term in breach of Section 53(1) and therefore it was not binding on the Complainant in accordance with Section 53(2) of the Act.
- v. The Respondent refunds the Complainant the surcharge of K4,000.00 within ten (10) days of receipt of the Board Decisions in accordance with Section 5(d) of the Act.

Note: Any party aggrieved with this order or directive may, within thirty (30) days of receiving the order to direction, appeal to the Competition and Consumer Protection Tribunal.

Dated this 13th June, 2023


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Chairman

Competition and Consumer Protection Commission