

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

BETWEEN

Ms. Linda Muwowo

COMPLAINANT

AND

Steelhub Hardware Limited

RESPONDENT

BEFORE:

Commissioner Stanford Mtamira

- Chairperson

Commissioner Angela Kafunda

- Member

Commissioner Emmanuel M. Mwanakatwe

- Member

Commissioner Sikambala M. Musune

- Member

Commissioner Derrick Sikombe

- 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 15th August 2023, the Competition and Consumer Protection Commission (“the Commission”) through its Lusaka office received a complaint from Ms. Linda Muwowo (“the Complainant”) against Steelhub Hardware Limited (“the Respondent”). Specifically, the Complainant alleged that she purchased a 10,000 litres water tank from the Respondent worth K12,100.00. The Complainant alleged that she paid for the tank in two instalments of K10,000.00 on 27th July 2023 and K2,100.00 on 4th August 2023 but only the first payment was receipted (receipt no. 1361 and tax invoice no. 2060). The Complainant alleged that she agreed with the Respondent that she would collect the tank in the morning of 4th August 2023 after the Respondent confirmed the tank’s availability at their premises. The Complainant alleged that when her driver went to the Respondent’s premises the tank was not given to the driver and the staff informed her that the tank was not available. The Complainant alleged that she was inconvenienced because she had

hired transport to transport the tank to her premises in Situmbeko area and a crane was also hired on site for the installation. The Complainant alleged that she had made several attempts to call Mr. Angel Mwashu, the Respondent's Director, and when he answered, he informed her that they would deliver the tank to her premises in Situmbeko area in the afternoon of 4th August 2023 and that he would contact her again at 14:30 hours. The Complainant alleged that at 14:00 hours, she called Mr. Mwashu but he informed her that he was in a meeting. The Complainant alleged that she then contacted the Commission and that when the Commission contacted Mr. Mwashu, he submitted that the tank would be delivered on Saturday, 5th August 2023, but to no avail. The Complainant wanted the Respondent to give her a full refund, immediately.

Legal Contravention and Assessment Tests

Legal Contravention

It was submitted that:

2. The alleged conduct appeared to be in contravention of Section 49(5) of the Competition and Consumer Protection Act No. 24 of 2010 ("the Act").
3. Section 49(5) of the Act stated that: "*A person or an enterprise shall supply a service to a consumer with reasonable care and skill or within a reasonable time or, if a specific time was agreed, within a reasonable period around the agreed time.*"
4. Section 49(6) of the Act stated that: "*A person who, or an enterprise which, contravenes subsection (5) is liable to pay the Commission a fine not exceeding ten percent of that person's or enterprise's annual turnover*".
5. Section 49(7) of the Act stated that: "*In addition to the penalty stipulated under subsection (6), the person or the enterprise shall—*
 - a. *within seven days of the provision of the service concerned, refund to the consumer the price paid for the service; or*
 - b. *if practicable and if the consumer so chooses, perform the service again to a reasonable standard.*"

Assessment Tests

It was submitted that:

To prove violation of Section 49(5), the following elements were proved;

6. Whether Steelhub Hardware Limited was a "person" or an "enterprise";
7. Whether Ms. Linda Muwowo was a "consumer";
8. Whether Steelhub Hardware Limited supplied a particular service to Ms. Linda Muwowo; and

9. Whether Steelhub Hardware Limited supplied a particular service to Ms. Linda Muwowo within a reasonable time or, if a specific time was agreed, within a reasonable period around the agreed time.

Investigations Conducted

It was submitted that:

10. A Notice of Investigation and an accompanying letter outlining particulars of the complaint was duly served on the Respondent on 19th September 2023. As part of the investigations, the Commission reviewed the Complainant's receipt number 1361 dated 27th July 2023 and tax invoice number 2060 dated 27th July 2023.

Findings

The Parties

The Complainant

It was submitted that:

11. The Complainant was Ms. Linda Muwowo of Lusaka District.¹ Section 2 of the Act defined 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.*"² The Complainant was a consumer pursuant to Section 2 of the Act because she paid K12,100.00 in two instalments of K10,000.00 on 27th July 2023 and K2,100.00 on 4th August 2023 to the Respondent, to purchase a 10,000litres water tank for her personal benefit and not for resale.³

The Respondent

It was submitted that:

12. The Respondent was Steelhub Hardware Limited, a company whose core business was the provision of retail hardware goods. Verification of whether the Respondent was registered with the Patents and Companies Registration Agency (PACRA) revealed that the Respondent was a registered business (120200000829). The Respondent's registered address was Plot No. 021, Off Tokyo Way, Libala Water Works, Lusaka, Lusaka Province, Zambia. Section 2 of the Act defined an enterprise as "*a firm, partnership, joint-venture, corporation, company, association and other juridical persons, which engage in commercial activities, and includes their branches, subsidiaries, affiliates or other entities, directly or indirectly,*

¹ CCPC Form IV dated 15th August 2023

² Competition and Consumer Protection Act No. 24 of 2010

³ CCPC Form IV dated 15th August 2023

controlled by them.” The Respondent qualified as an enterprise because they were a company engaged in commercial activities.

Submissions from the Respondent

It was submitted that:

13. There were no submissions from the Respondent despite having acknowledged receipt of the Notice of Investigation that was duly served on them on 19th September 2023. Non-response to the Notice of Investigation constitutes a violation of Section 55(5) as read together with Section 55(4) (a) of the Act.

14. Section 55(4)(a) of the Act read that:

“For the purpose of an investigation under this section, the Commission may, by notice in writing served on any person, require that person to furnish to the Commission, in a statement signed by that person or, in the case of a body corporate, by a director or member or other competent officer, employee or agent of the body corporate, within the time and in the manner specified in the notice, any information pertaining to any matter specified in the notice which the Commission considers relevant to the investigation.”

15. Section 55(5) of the Act read:

“A person who, or an enterprise which, contravenes subsection (4) commits an offence and is liable, upon conviction, to a fine not exceeding one hundred thousand penalty units or to imprisonment for a period not exceeding one year, or to both.”

Review of the Complainant’s Tax Invoice Number 2060 and Receipt Number 1361⁴

It was submitted that:

16. A review of the Complainant’s tax invoice number 2060 and receipt number 1361 dated 27th July 2023, showed that the Complainant paid the Respondent K10,000.00 for a 10,000litres water tank. The invoice and receipt showed that there was a balance of K2,100.00 as the total price for the tank in question was K12,100.00.

Further Submissions from the Complainant

It was submitted that:

17. On 18th September 2023, the Complainant submitted that the Respondent had only refunded her K5,000.00 out of the total of K12,100.00 that she paid them.

⁴ Tax Invoice number 2060 and Receipt number 1361 dated 27th July 2023

The Complainant submitted that K10,000.00 was receipted but the rest K2,100.00 was not receipted by the Respondent when she paid it. ⁵

18. On 7th November 2023, the Complainant submitted that the Respondent had refunded a further K2,500.00 with no indication of when the balance of K4,600.00 was to be refunded. The Complainant submitted that the refund was made through the Police and not directly to her.⁶

Submissions to the Preliminary Report

It was submitted that:

19. The preliminary report was served on the Complainant and on the Respondent on 27th November 2023 and 28th November 2023, respectively. The Respondent did not make any submissions.

Submissions from the Complainant

It was submitted that:

20. In a letter dated 8th January 2024, the Complainant submitted that the Respondent had refunded an additional K2,500.00 leaving a balance of K2,100.00.⁷

Relevant Findings

It was submitted that:

21. The Commission established that on 27th July 2023, the Complainant paid K10,000.00 to the Respondent out of the total of K12,100.00 to purchase a 10,000litres water tank.⁸
22. The Commission noted that the Complainant paid the Respondent the K2,100.00 balance on 4th August 2023 when she went to collect the tank from the Respondent's premises, however, the amount was not receipted.⁹
23. The Commission established that the Respondent did not supply the tank in question at the agreed time and proceeded to refund the Complainant at total of K10,000.00 through the police in Lusaka as of 8th January 2024.¹⁰
24. The Commission established that the Respondent owed the Complainant

⁵ Telephone conversation with the Complainant on 18th September 2023

⁶ Telephone conversation with the Complainant on 7th November 2023

⁷ Letter from the Complainant dated 8th January 2024

⁸ Tax Invoice number 2060 and Receipt number 1361 dated 27th July 2023

⁹ CCPC Form IV dated 15th August 2023

¹⁰ Letter from the Complainant dated 8th January 2024

K2,100.00 as of 8th January 2024.

Previous cases Involving the Respondent

It was submitted that:

20. A review of the case file for the Respondent revealed that there was one case against the Respondent by Mr. Mwenda Machima in which the Respondent was found to have breached Section 49(5) of the Act and was fined 0.55% at the 65th Board Meeting held on 19th October 2023.

Analysis of Conduct

It was submitted that:

25. ***In analyzing the case for possible violation of Section 49(5) of the Act, the following assessment tests are used:***

Whether Steelhub Hardware Limited was a “person” or an “enterprise”;

It was submitted that:

26. The Respondent was an enterprise pursuant to Section 2 of the Act. Refer to paragraph 13 above.

Whether Ms. Linda Muwowo was a “consumer”;

It was submitted that:

27. The Complainant was a consumer pursuant to Section 2 of the Act. Refer to paragraph 12 above.

Whether Steel Hub Hardware Limited supplied a particular service to Ms. Linda Muwowo;

It was submitted that:

28. According to Section 2(b) of the Act, the term ‘supply’ included, “*in relation to services, the provision by way of sale, grant or conferment of the services.*” Further, Section 2(b) of the Act defined service as “*includes the sale of goods, where the goods are sold in conjunction with the rendering of a service.*”¹¹ The Commission established that the Complainant paid the Respondent a total of K12,100.00 in two instalments of K10,000.00 on 27th July 2023 and K2,100.00 on 4th August 2023¹² for the purchase of a 10,000litres water tank. The Commission established that the initial agreement was for the Complainant to collect the said tank on 4th August 2023 in the morning, however, the Respondent failed to supply the tank at the time of collection. Later, the parties agreed for the Respondent to deliver the

¹¹ Competition and Consumer Protection Act No. 24 of 2010

¹² CCPC Form IV dated 15th August 2023

tank to the Complainant's premises in Situmbeko area in the afternoon of 4th August 2023 and later on 5th August 2023.¹³ The Respondent, therefore, in addition to the supply of the tank, was also engaged to supply delivery services to the Complainant.

Whether Steel Hub Hardware Limited supplied a service to Ms. Linda Muwowo within a reasonable time;

It was submitted that:

29. In the Competition and Consumer Protection Tribunal case of ***Southern Cross Motors Limited V Competition and Consumer Protection Commission (APPEAL NO. 2013/CCPT/002/CON)***, the Tribunal held that:

"Section 49(5) of the Act states that where a specific time is agreed the service must be performed within a reasonable period around that time. The concept of reasonableness is quite a nebulous concept in common law. The general rule is that performance of a contract must be precise and exact. That is, a party performing an obligation under a contract must perform that obligation exactly within the time frame set by the contract and exactly to the standard required by the contract. Sometimes the standard may be strict for instance in the case of statutory implied terms of quality in contracts for the sale and supply of goods. Whether the alleged performance satisfies this criterion is a question to be answered by construing the contract so as to see what the parties meant by performance and then applying the ascertained facts to that construction, to see whether that which has been done corresponds to that which was promised. The Act however requires the Tribunal to ascertain what was reasonable in the circumstances. In deciding what was reasonable in the circumstances we are guided by the Uniform Commercial Code in the Commonwealth of the United States of America. Number 1-205 of the Uniform Commercial Code provides direction on what is a reasonable time; it states:

- (a) "Whether a time for taking an action is required by the Uniform Commercial Code is reasonable depends on the nature, purpose, and circumstance of the action.*
- (b) An action is taken reasonably if it is taken at or within the time agreed or, if no time is agreed within a reasonable time."*

30. In the matter at hand, the nature of the transaction was such that the Complainant was to collect the tank from the Respondent's premises in the morning of 4th August 2023, however, at the time of collection the Respondent failed to supply the tank. The Commission established that it was later agreed that the Respondent would deliver the tank to the Complainant's premises in Situmbeko area in the afternoon of 4th August 2023 and that the Respondent further committed to delivering on 5th August 2023 when the delivery on 4th

¹³ Ibid

August 2023 failed. However, the Commission established that the Respondent failed to deliver the tank to the Complainant's premises on both instances despite being paid in full. The Commission established that the Respondent's conduct resulted in the Complainant incurring sunken costs as the transportation and installation services she had acquired from another source in anticipation of the delivery of the tank were not utilised.

31. Therefore, based on the above findings, the Commission concluded that the delay by the Respondent to deliver the water tank at the agreed time is unreasonable and contrary to the nature of the transaction. Therefore, the Commission determined that the Respondent violated Section 49(5) of the Act. The Commission, however, noted that the Respondent had refunded the Complainant a total of K10,000.00 as of 8th January 2024.

32. The following analysis was with regards to Section 55(4) of the Act:

Whether Steel Hub Hardware Limited furnished the Commission, in a statement signed by a director or member or other competent officer, employee or agent of the body corporate, within the time and in the manner specified in the notice, any information pertaining to any matter specified in the notice which the Commission considers relevant to the investigation.

It was submitted that:

33. A Notice of Investigation was served on the Respondent on 19th September 2023. The Respondent acknowledged receipt of the letter on 19th September 2023, but did not avail the Commission with any response to the Notice of Investigation.

34. The Competition and Consumer Protection Tribunal, in the case of ***MTN Zambia Limited Vs the Competition and Consumer Protection Commission (2013)*** held that: "*the Appellant's failure to respond to the NoI issued by the Commission was a serious dereliction of duty on the part of the Appellant and could be construed to mean a lack of defence on their part*". The Tribunal cited **Order 18 rule 13 of the Rules of the Supreme Court (White Book) 1999 Edition** which provides that;

"Any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 14 operates as a denial of it."

35. Considering the above cited case, the Respondent's failure to respond to the NoI issued by the Commission is a serious dereliction of duty on the part of the Respondent and could be construed to mean a lack of defence on the part of the Respondent.

Board Deliberation

36. Having considered the facts, evidence and submissions in this case, the Board resolves that the Respondent did engage in unfair trading practices and hence did violate Section 49(5) of the Act.

Board Determination


37. The facts and evidence of this case have shown that the Respondent was in violation of Section 49(5) of the Act.

Board Directives

38. The Board hereby directs that:
- i. The Respondent, as a repeat offender, is fined 0.605% of their annual turnover for violation of Section 49(5) of the Act in accordance with Section 49(6) of the Act and the applicable cap in line with the Commission's Guidelines for Administration of Fines, 2019, (**Refer to Appendix 1**);
 - ii. The Respondent refunds the Complainant the balance of K2,100.00 within ten (10) days of receipt of the Board Decision and in accordance with Section 5(d) of the Act; and
 - iii. The Respondent is ordered to submit their annual books of accounts for the year 2022 to the Commission for calculation of the actual fine within thirty (30) days of receipt of the Board Decision 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 6th February 2024.



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Chairperson
Competition and Consumer Protection Commission

Appendix 1-Calculation of Fine

The Calculation of the recommended fine was determined as follows-

- The Competition and Consumer Protection Commission Guidelines for Administration of Fines, 2019 sets a base of 0.5% for offences relating to Part VII of the Act with the following caps;***

Offence	Starting Fine	Maximum Fine in Kwacha
Unfair trading practice	0.5% of turnover	1. K1,000 for turnover upto K50,000
False or misleading representation		2. K10,000 for turnover above K50,000 upto K250,000
Price Display		3. K40,000 for turnover above 250,000 upto K500,000
Supply of defective and unsuitable goods and services		4. K70,000 for turnover aboveK1,500,000
Section 49 except for Section 49(1)		5. K150,000 for turnover above K1,500,000 upto K3,000,000
		6. K200,000 for turnover above K3,000,000 upto K5,000,000
		7. K500,000 for turnover above K5,000,000
Display of Disclaimer	0.5% of turnover	K30,000

- The Competition and Consumer Protection Guidelines for Administration of Fines 2019, further provides for additions as follows:**

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- i. *Prevalence of the offence, i.e. whether the conduct is widespread, and the application of a sanction is likely to have a wide deterrent effect;*

The Commission has received complaints of non-supply of goods within reasonable time in the retail sector before and application of the fine will deter others;

- ii. *Whether the offender has been the subject of previous enforcement action by the Commission;*

The Respondent has been a subject of enforcement action by the Commission before for engaging in such conduct.

- iii. *Whether the offender has demonstrated a resistance to conciliation;*

The Respondent has shown resistance to conciliation. Therefore, the Commission has observed that the total fine sums up to 0.605% being the total applicable fine for the violation of Section 49(5) of the Act. The fine was calculated as follows-

$$=0.55 + 0.55(0.1)$$

$$=0.55 + 0.055$$

$$=0.605\%$$

Annexure 1

RECEIVED
19 SEP 2023
RENWICK MUDENDA
d

Monday 11th September 2023

CONS/16/08/2023/01196/KSM/RM

The Managing Director
Steel Hub Hardware Limited
Along Tokyo Way, Libala Water Works
Opposite New Zesco Sub-Station
Lusaka

Dear Sir/Madam,

RE: ALLEGATIONS OF UNFAIR TRADING PRACTICES AGAINST STEEL HUB HARDWARE LIMITED BY MS. LINDA MUWOWO OF LUSAKA DISTRICT

Reference is made to the above subject matter and to the attached Notice of Investigation dated 11th September 2023 informing you that Steel Hub Hardware Limited ("the Respondent") may have engaged in conduct which appears to be in breach of Section 49(5) of the Competition and Consumer Protection Act No. 24 of 2010 ("the Act"). Specifically, Ms. Linda Muwowo ("the Complainant") alleges that she purchased a 10,000-litre water tank from the Respondent worth K12,100.00. The Complainant alleges that she paid for the tank in two instalments of K10,000.00 on 27th July 2023 and K2,100.00 on 4th August 2023 but only the first payment was received (receipt no. 1361 and tax invoice no. 2060). The Complainant alleges that she agreed with the Respondent that she would collect the tank on 4th August 2023, but when she went to the Respondent's premises the tank was not given to her. The Complainant alleges that she has since made several follow ups, but the Respondent has not redressed her to date. The Complainant alleges that the Respondent even promised to deliver the tank to her premises in Situmbeko but to no avail. The Complainant now wants the Respondent to give her a full refund, immediately.

I wish to advise you that the Competition and Consumer Protection Commission ("the Commission") is mandated under the Act to ensure that there is fair trading between traders and consumers in all market segments in Zambia. I