

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

BETWEEN

Mr. Dalitso Phiri

COMPLAINANT

AND

Pimping Car Accessories Limited

RESPONDENT

BEFORE:

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

DECISION

1. 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:

2. On 10th March 2023, the Competition and Consumer Protection Commission (“the Commission”) received a complaint from Mr. Dalitso Phiri (“the Complainant”) against Pimping Car Accessories Limited (“the Respondent”). Specifically, the Complainant holder of National Registration Card (NRC) number 37XXXX/XX/1 alleged that on 28th December 2022, he paid the Respondent K10,000.00 to supply and install a windscreen on his motor vehicle. The Complainant alleged that he was informed by the Respondent that they would purchase the windscreen from Durban, South Africa and that it would take between 3 to 5 days for it to reach Zambia. The Complainant alleged that around 9th January 2023, the Respondent contacted him to inform him that the windscreen had arrived but later informed him that what had arrived was the wrong windscreen. The Complainant alleged that the Respondent offered to make some modifications to the windscreen, but

he objected and requested for a refund. The Complainant alleged that despite several follow-ups, the Respondent, had not refunded him. The Complainant therefore demanded for a refund of K10,000.00 from the Respondent being the amount he paid for the windscreen.

Legal Contravention and Assessment Tests

Legal Contravention

It was submitted that:

3. 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”).
4. 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.*”
5. 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.*”
6. 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:

For the purpose of Section 49(5) of the Act, the following assessment tests were used;

7. Whether Pimping Car Accessories Limited as a “person” or an “enterprise” supplied a service to a consumer;
8. Whether reasonable care and skill was exercised in the supply of a particular service; or 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:

9. The Respondent was duly served the Notice of Investigation (NoI) and its accompanying letter on 4th March, 2023.

Findings

The Parties

The Complainant

It was submitted that:

10. The Complainant was Mr. Dalitso Phiri, a resident of Lusaka. 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.*”¹ In view of the above definition, the Complainant was a consumer as envisaged under the Act as he paid the Respondent to supply and install a wind screen on his vehicle, thus the wind screen was for personal use and not for resale.

The Respondent

It was submitted that:

11. The Respondent was Pimping Car Accessories Limited, situated in Lusaka. The Respondent was a registered company with Registration No. 120130113786 with the Patents and Companies Registration Agency (PACRA).² According to the Act, an “enterprise” meant *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, controlled by them.* The Respondent was an enterprise as envisaged under the Act as they were a company that engaged in commercial activities of providing automotive services.

¹ Competition and Consumer Protection Act No. 24 of 2010.

² Patents and Companies Registration Agency (PACRA) search on 9th May, 2023.

Submissions from the Respondent³

It was submitted that:

12. During a meeting at the Commission's Head Office on 24th April 2023, the Respondent through their Director Mr. Andrew Zulu submitted that the Complainant had engaged them to supply a wind screen for his Mercedes Benz of which it was agreed that the screen would be delivered within 8 days. The Respondent submitted that when the screen arrived on 8th January 2023, it had 8 sensors instead of the 10 sensors as required by the Complainant's vehicle and as such they informed the Complainant. The Respondent submitted that their supplier was willing to exchange the wind screen with the correct one, but the Complainant requested for a refund as he decided to purchase a screen elsewhere. The Respondent submitted that they were not able to refund the Complainant as the screen was specifically ordered for the Complainant's vehicle. The Respondent submitted that they had proposed to refund the Complainant in instalments, but the Complainant declined the proposal. The Respondent submitted that they were still willing to refund the Complainant only that business had been slow.

Review of the WhatsApp Correspondence between the Complainant and the Respondent⁴

It was submitted that:

13. A review of the WhatsApp correspondence between the Complainant and the Respondent revealed that on 28th December 2022, the Complainant engaged the Respondent to supply him with a wind screen for his S Class Mercedes Benz.⁵ It was revealed that the Respondent informed the Complainant that the screen would be delivered within a period of 8 days. It was revealed that the Complainant made a payment of K9,400.00 to the Respondent's Airtel mobile money account on 29th December 2022.

Submissions to the Report

It was submitted that:

14. After the Preliminary Report was approved, it was duly served on the Complainant and the Respondent on 24th July 2023 and 4th August 2023, respectively. However, there were no submissions from the Respondent.

³ Meeting with the Respondent's at the Commission's Head Office on 24th April, 2023.

⁴ WhatsApp Correspondence between the Complainant and the Respondent.

⁵ Complainant's Quotation Number 477 dated 28th December, 2023.

Submissions from the Complainant

It was submitted that:

15. In an email dated 31st July 2023, the Complainant submitted that he had received the Commission's Preliminary Report and submitted that the Respondent had on a couple of occasions been given time-frames to settle, of which they chose to ignore. Therefore, the Complainant sought to understand what course of action would be taken by the Commission if the Respondent failed to comply with the 10-day ultimatum issued by the Board.

Commissions Response

It was submitted that:

- The 10 days that was referred to in the Commission's report was after receipt of the Board Decision Report. What was sent to the Respondent was a Preliminary Report. The Final Report would be presented to the Technical Committee of the Board and finally the full Board of which the Board Decision Report would be shared with Complainant and the Respondent.
 - In an event that the Respondent did not comply with the Directives of the Board Decision Report within 10 days of receipt of the Commission's Board Decision, the Commission would apply for a Mandatory Order to the Competition and Consumer Protection Tribunal ("the Tribunal") for the Respondent to comply with Directives after the lapse of the thirty (30) day appeal period provided by the Act.
16. The Complainant submitted that it had been 7 months since the money was paid to the Respondent, therefore, was he not liable for damages as he had to engage a lawyer at some point to handle this case.

Commission's Response

It was submitted that:

- Matters relating to ordering of damages are a preserve of the Courts of Law as they related to compensation which was outside the ambit of the Act. The Commission only ensured that consumers got their redress for a product or service that had been paid for, and this redress can be in the form of a refund, replacement or resupply of a service.

Relevant Findings

It was submitted that:

17. The Commission established that on 28th December 2022, the Complainant paid the Respondent K9,400.00 to supply and install a windscreen on his motor vehicle.⁶
18. The Commission established that the Respondent informed the Complainant that the screen would be delivered within a period of 8 days.
19. The Commission established that when the screen arrived, it had 8 sensors instead of the 10 sensors as required for the Complainant's vehicle.
20. The Commission established that at the Respondent had not redressed the Complainant.⁷

Previous cases involving the Respondent

It was submitted that:

21. A review of the Respondent's case file revealed that there was no case against the Respondent in which they had been found to have violated Section 49(5) of the Act.

Analysis of Conduct

It was submitted that:

22. In analysing the case for possible violation of Section 49(5) of the Act, the following assessment tests were used:

Whether the Respondent was a "person" or an "enterprise";

It was submitted that:

23. The Respondent was an enterprise. Refer to paragraph 11 above.

Whether the Respondent supplied a particular service to a consumer;

It was submitted that:

⁶ Meeting with the Respondent's at the Commission's Head Office on 24th April, 2023.

⁷ Meeting with the Respondent's at the Commission's Head Office on 24th April, 2023.

24. The Act defined service as, “includes the sale of goods, where the goods are sold in conjunction with the rendering of a service;” From the submissions received and Commission’s findings, there was evidence that the Complainant engaged the Respondent to provide an automotive service of supplying and installation of a wind screen on his vehicle.

Whether the Respondent supplied a particular service to the Complainant with reasonable care and skill; and if a specific time was agreed, within a reasonable period around the agreed time.

It was submitted that:

25. According to Black’s Law Dictionary⁸ reasonable care is defined as, “a test of liability for negligence, the degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under similar circumstances”. The dictionary further defined reasonable skill as, “the skill ordinarily possessed and used by persons engaged in a particular business”. In the case at hand, reasonable care and skill was translated to whether the Respondent supplied the Complainant with a screen compatible with this vehicle.
26. The Black’s Law Dictionary also defined reasonable time as, “the time needed to do what a contract requires to be done based on subjective circumstances”.⁹ In the case at hand, reasonable time translated to whether the Respondent would have supplied the Complainant his screen within the time that was agreed or within a reasonable period around the agreed time.
27. In the case under review, it was established that on 28th December 2022, the Complainant engaged the Respondent to supply and install a wind screen for his S Class Mercedes Benz and paid K9,400.00. However, when the screen arrived, it was not compatible with the Complainant’s vehicle as the screen that came had 8 sensors instead of the 10 sensors required for the Complainant’s vehicle. Additionally, the Respondent had informed the Complainant that they would provide their service to the Complainant within a period of 8 days which they failed to do, as it was to take another 8 days for the correct screen to be delivered and fitted on the Complainant’s vehicle, thereby doubling the period which was agreed upon for the service to be provided. In light of the above, the Commission established that the Respondent did not supply the Complainant a service with reasonable care and skill, or within a reasonable period around the agreed time, hence violated Section 49(5) of the Act.

⁸ Black’s Laws Dictionary, 8th Ed, 2004.

⁹ Blacks Law Dictionary 8th Edition

Board Deliberation

28. Having considered the facts, evidence and submissions in this case, the Board resolves that the Respondent did not supply the Complainant a service with reasonable care and skill, or within a reasonable period around the agreed time, hence violated Section 49(5) of the Act.

Board Determination

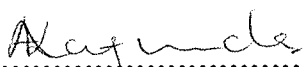
29. The facts and evidence of this case have shown that the Respondent did violate Section 49(5) of the Act.

Board Directive

30. The Board hereby directs that;
- i. The Respondent refunds the Complainant K9,400.00 within 10 days of receipt of the Board Decision in accordance with the Section 5(d) of the Act;
 - ii. The Respondent is fined 0.5% of their annual turnover for breach of Section 49(5) in accordance with Section 49(6) of the Act and the Commission's Guidelines for Administration of Fines 2019 (see appendix for details); and
 - iii. The Respondent is ordered to submit their latest annual books of accounts to the Commission for calculation of the actual fine within 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 this order or directive, appeal to the Competition and Consumer Protection Tribunal.

Dated this 19th October 2023


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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-

- (a) The Competition and Consumer Protection Guidelines on Fines – September 2019 sets a base of 0.5% for offences relating to Section 49(5) of the Act with the following caps;

Range (Turnover)	Cap
Below K50,000.00	K1,000.00
K50,000.00 – K250,000.00	K30,000.00
K250,000.00 – K500,000.00	K40,000.00
K500,000.00 – K1,500,000.00	K70,000.00
K1,500,000.00 – K3,000,000.00	K150,000.00
K3,000,000 – K5,000,000.00	K200,000.00
Above K5,000,000.00	K500,000.00

- (b) The Competition and Consumer Protection Guidelines on Fines – September, 2019 further provides for additions as follows-

- (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 supply of unsuitable services by traders hence an application of a sanction will be a deterrent:

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

The Respondent has not been a subject of previous enforcement action by the Commission before for engaging in such conduct. Thus, no additional fine should be added because this is the first time the Respondent is being fined.

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

The Respondent has not shown resistance to conciliation. It is thus recommended that no further additional fine be imposed.

- (c) *Therefore, the Commission has observed that the total fine sums up to*
0.005 or 0.5%.