

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

BETWEEN

INNOVATIVE VENTURES
LIMITED

COMPLAINANT

AND

KASENGO HOLDINGS LIMITED

RESPONDENT

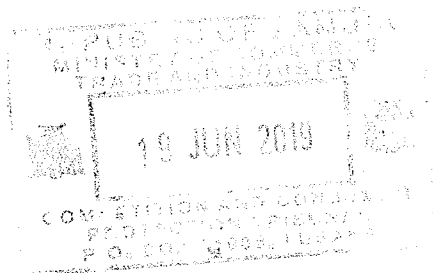
BEFORE:

Commissioner Kelvin. F. Bwalya
Commissioner Chishala Kateka
Commissioner Fred Imasiku
Commissioner Chenga Chisha
Commissioner Aubrey Chibumba
Commissioner Georgina Kasapatu

- Chairman
- Vice Chairman
- Member
- Member
- Member
- 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 September 2016, the Competition and Consumer Protection Commission (the Commission) received a complaint on allegations of restrictive business practices against Kasengo Holdings Limited (the Respondent) from Innovative Ventures Limited (the Complainant) which appear to be a breach of Section 16 (1) and Section 46(1) as read with 45 (c) of the Competition and Consumer Protection Act No 24 of 2010 (the Act).
2. Specifically, the Complainant alleged that on Monday 5th September 2016, employees from Kabwe's Brimas Takeaway, a subsidiary of Kasengo Holdings Limited, used violence, intimidation and threatened to stop the Complainant from conducting their business by illegally and forcibly confiscating Hungry Lion value packs and assorted drinks from their passenger customers on board a ZAMPOST Bus Services bus heading to Ndola, as well as K150.00 cash, two (2) cell phone chargers and a thermal bag belonging to Innovative Ventures Ltd.
3. The Complainant alleged that when they were about to deliver food to their customers, the Respondent's employees entered the bus and started harassing the Complainant's employees. The Complainant alleged that the Respondent's employees confiscated the food purchased on behalf of passengers together with the thermal bag where the passengers' food was packed. The Complainant alleged that the Respondent's employees also grabbed foodstuffs from the passengers who had already received their orders. The Complainant further alleged that the Respondent's employees also confiscated three chargers that were in the bag as well as the money totaling K150.00 which was supposed to be used to purchase the passengers' food.
4. The Complainant alleged that their (Complainant's) employee followed the Respondent's employees into the takeaway and requested for the grabbed items and money to be returned but the Respondent's employees refused to hand over the confiscated items and allegedly told him to stop operating from their premises because he was disturbing their business. The Complainant alleged that the thermal bag and money had not been given back and was still in the custody of the Respondent. It was alleged that this was the second time the Respondent's employees were behaving in such a manner.
5. The Complainant further alleged that they had a meeting with the Respondent's proprietor, Mr. Stanley K. Mwanguku and his Partner. The Complainant alleged that the Respondent informed Innovative Ventures Management that they did not want anyone competing with their takeaway within their premises.

Legal Contravention and Assessment Tests

Legal Contravention

It was submitted that:

6. The said conduct appeared to be a breach of Section 16 (1) as read with Section 16 (3) and Section 46 (1) as read with 45 (c) of the Competition and Consumer Protection Act, No 24 of 2010 (the Act).
7. Section 16(1) of the Act reads, ***“An enterprise shall refrain from any act or conduct if, through abuse or acquisition of a dominant position of market power, the act or conduct limits access to markets or otherwise unduly restrains competition, or has or is likely to have adverse effect on trade or the economy in general.”***
8. Section 16 (3) of the Act reads, ***“An enterprise that contravenes this section is liable to pay the Commission a fine not exceeding ten percent of its annual turnover.”***
9. Section 45 (c) of the Act reads, ***“A trading practice is unfair if it places pressure on consumers by use of harassment or coercion;”***
10. Section 46 (1) of the Act reads, ***“A person or an enterprise shall not practice any unfair trading.”***
11. Section 46 (2) of the Act reads, ***“A person who, or an enterprise which, contravenes subsection (1) is liable to pay the Commission a fine not exceeding ten percent of that person’s or enterprise’s annual turnover or one hundred and fifty thousand penalty units, whichever is higher.”***

Assessment Tests

It was submitted that:

12. To prove whether there were violations of Sections 16(1) and 46(1) as read with 45 (c) of the Act, the following elements had to be established.
13. Section 16(1) of the Act

Consideration of Dominance (Dominance Test) Section 15-

- a. Whether Kasengo Holdings Limited held a dominant position by having thirty percent or more of those goods or services supplied.

Consideration of Abuse of Dominance

- b. Whether there was a conduct

- c. Whether the Respondent's conduct was likely to limit access to markets or unduly restrain competition or have or was likely to have adverse effect on trade or the economy in general.

Unfair Trading

14. To prove whether there had been a violation of Section 46(1) as read with Section 45(c) of the Act, the following elements had to be proved
 - a. Whether Kasengo Holdings Limited is a Person or Enterprise.
 - b. Whether conduct by Kasengo Holdings Limited placed pressure on consumers by use of harassment or coercion and thereby distorted, or was likely to distort, the purchasing decisions of consumers.

Investigations conducted

It was submitted that:

15. The Commission sent a Notice of Investigations (NOI) to the Respondent in order to get submissions concerning the allegations. The Commission further consulted with Kabwe Municipal Council in order to establish how the bus stations were run in the town of Kabwe. The Commission further interviewed the Complainant and some of the passengers that had been affected by the Respondent's alleged conduct.

Findings

The Parties

The Complainant

It was submitted that:

16. Innovative Ventures Limited (the Complainant) has a number of business lines that include courier services and furniture manufacturing. It was submitted that their core business was to deliver any items anywhere their customer assigned them. Their specialty being fast food delivery to bus travelers along the Lusaka - Ndola Route. Innovative Ventures submitted that their pilot project initiative under the Nitumeni line had been running with the Post Bus Services. Innovative Ventures Limited submitted that they were mere agents for the traveler and not fast food outlet competitors. Innovative Ventures Limited submitted that the passengers made orders at the point of departure through a custom designed menu, so that fast food outlets in designated places were advised accordingly with regard to order quantities and expected pick up time.¹

¹ Telephone Interview with Mr Patrick Kabanshi Operations Manager Innovative Ventures held in November 2016

17. Investigations revealed that directors and shareholders of Innovative Ventures Limited include Viviane Inutu Mubita and Patrick Kabanshi. Innovative Ventures Limited were registered as a business in 2011 and are based in Lusaka.²

The Respondent

It was submitted that:

18. The Respondent is Kasengo Holdings Limited. According to PACRA records, Kasengo Holdings is the holding company for Kasengo Transport, Kasengo Butchery, Brimas Snack Pitch Limited. Further inquiries indicate that Brimas Snack Pitch Fast food and Take Away have interlocking directorship among the shareholders that include Brighton Mwanguku, Stanley Kapote Mwanguku, Rose Nampungwe, Mathew Mwanguku, Crimey Nanguka, Emily Nanguka³.

Submissions from Parties

Submissions by the Complainant⁴

Mr Patrick Kabanshi

It was submitted that:

19. Submissions from Innovative Ventures Limited through their Operations Manager Mr. Patrick Kabanshi were related to the services rendered by the Complainant under the Nitumeni Brand and establishing the parameters of their operations.
20. It was submitted that Innovative Ventures were in the business of general supply with different product and service lines and Nitumeni Errand and Courier Services was one of the different product and service lines. It was stated that one of the Directors and Shareholders of Innovative Ventures was his wife but the Nitumeni Errand and Courier Services involved a number of other Individuals who contributed to the success of the pilot project.
21. Mr. Kabanshi stated that the company had developed a software application which had menus from the various brand meals, which included Debonairs, Steers, Hungry Lion and Subway. Mr Kabanshi stated that passengers made orders for the type of food that they would like to have during the journey and once the bus arrived in Kabwe, the passengers that had ordered the food were then given their respective

² PACRA Printout obtained on 9th November 2016

³ PACRA Printout obtained on 9th November 2016

⁴ Telephone Interviews with Mr Patrick Kabanshi Operations Manager Innovative Ventures Ltd held on November 2016

orders. Mr. Kabanshi stated that Nitumeni was one of the product brands under the Innovative Ventures which provided errand and courier services to members of the public that needed to move various items such as documents, foodstuffs and other commodities. Mr. Kabanshi submitted that the customer could make payment at any point using any platform they felt comfortable with and this could be cash, visa or mobile money. He stated that the Company was in the process of developing the software application so that the passengers themselves could make the orders on their own without the assistance of Nitumeni employees.

22. Mr. Kabanshi submitted that currently Innovative Ventures were the only company offering such a service which involved purchasing food on behalf of passengers travelling along the Lusaka - Ndola route with the pick-up point being Kabwe. However they did conduct other line services such as the delivery of goods purchased in Lusaka and delivered to outlying areas of the country. Currently Innovative Ventures under the Nitumeni brand had different service points that included Chingola, Kitwe, Ndola and Lusaka. Mr. Kabanshi submitted that Kabwe was mostly a pick up point for food for passengers that had made the orders for food. Mr Kabanshi further stated that a bus stopped at Kabwe as the town was considered a mid-point on a Lusaka to Ndola Journey and it was at this point that buses stopped for considerably long time for passengers to use the conveniences, buy refreshments and food.
23. Mr Kabanshi submitted that the people that had harassed his employees and passengers were employees of Brimas. He reported that one of his employees from Nitumeni had identified them as being from Brimas takeaway. Mr Kabanshi stated that this was the second time the employees from Brimas were behaving in such a manner.

Submissions from Mwaba Luonde

It was submitted that:

24. Mr Mwaba Luonde reported that he worked for Innovative Ventures under the Nitumeni Brand where they made orders for food for passengers travelling on the Lusaka Ndola route that used the Post Bus. Mr. Luonde submitted that he together with his colleague purchased and delivered their food according to the orders received from Lusaka. Mr Luonde stated that when he and his colleague were about to deliver food to their customers, employees from Brimas Take Away entered the bus and started harassing him and his colleague. Mr Luonde submitted that the employees from Brimas confiscated the food purchased on behalf of passengers together with the thermos bag where he and his colleague had packed the passengers' food. Mr Luonde stated that the employees from Brimas also grabbed foodstuffs from the passengers who had already received their orders.

25. Mr. Luonde further stated that the employees from Brimas also confiscated three chargers that were in the bag as well as the money totaling K150.00 which they were supposed to use to purchase the passengers' food.
26. Mr. Luonde submitted that the incident took place after he had boarded the bus and wanted to distribute the food to passengers that had made orders for food. Mr. Luonde stated that the employees from Brimas boarded the bus and started pushing him around and further grabbed food away from him. Mr. Luonde submitted that he followed the employees from Brimas into the takeaway and requested for the grabbed items and money to be returned. Mr. Luonde submitted that the employees from Brimas refused to hand over the confiscated items and further told him to stop operating from their premises because he was disturbing their business.
27. Mr. Luonde stated that the thermos bag and money had not been given back and was still in the custody of Brimas Takeaway. Mr Luonde stated that the people that had grabbed the food and other items were employees of Brimas Takeaway because he has seen them work from the takeaway itself.

Submissions from the Respondent⁵

It was submitted that:

28. Kasengo Holdings responded to the Notice of Investigation through their Lawyers E.M. Mukuka and Company in a letter dated 17th October 2016. In their response to the Notice, the Respondent submitted that they were surprised that the Commission appeared to support a practice where people went to an individual's property or business premises to display and sell goods without the permission of the owner of the premises. The Respondent submitted that they viewed such action as trespass and this should have been viewed as anti-competitive by the Commission.
29. The Respondent submitted that they were of the view that it was wrong for the Commission to support such vending and further stated that they were ready to defend their client from the Commission's actions. The Respondent further submitted that the Commission appeared to always accept complaints on face value without proper investigations and this was likely to lead to an improper finding.
30. In a telephone conversation with the Respondent Lawyers, they submitted that they were not sure who owned the takeaway but that Council was responsible for overseeing bus station operations in Kabwe. The Respondent's lawyers however stated that the premises around Brimas were the buses operated from, was owned by the Respondent.

⁵ Letter from E.M. Mukuka & Co Regarding Allegations of Restrictive Business Practices against Kasengo Holdings dated 17th October 2016

When asked if the buses that operated around the premises paid any levy, the Respondent's lawyers stated that they were not aware of such a practice. When asked how the Respondent thought the Complainant was trespassing, the Respondent's Lawyers stated that the Complainant was actually selling food on the Respondent's premises without the owner's permission while the owner also sold food on same premises.⁶

31. In a letter dated 8th June 2017, the Respondent submitted that No one had a right to order goods and go to sell at the shop or premises of another businessman. The Respondent submitted that they did not think that the Zambian Legislature could pass a law which could work like that. The Respondent submitted that in the instant case, this was what the Complainant in this matter did. The Respondent further submitted that the Complainant bought foodstuffs from hungry Lion and went to Brimas premises which were built by the Respondent at their own individual expense.
32. The Respondent further submitted that they had asked the Commission to serve on them any process the Commission wished to take out so that the Respondent could come and meet whosoever was the Complainant. The Respondent in addition submitted that they also indicated that should the Commission take a bullish approach, they would subject the Commission to judicial review apart from taking up issues with the relevant Ministries.⁷

Submissions from Kabwe Municipal Council⁸

It was submitted that:

33. Kabwe Municipal Council submitted that they were not operating any bus station in Kabwe. Kabwe Municipal Council further stated that they were in the process of constructing a bus station. The Council further submitted that the running of all bus stations in Kabwe was governed by the Markets and Bus Stations Act No. 7 of 2007. Kabwe Municipal Council submitted that Kabwe Town currently had 4 bus stations which were privately owned and these were listed below:

Name of operator	Name of bus stations	Levy collected
1. C. Vwalika	Vwalika	Yes
2. Stanley Mwanguku	Brimas	Yes

⁵ Telephone Conversation with Mr Emmanuel Mukuka of E.M. Mukuka and Company held on 26th October 2016 15:40

⁷ Letter from E.M. Mukuka & Co Regarding Allegations of Restrictive Business Practices against Kasengo Holdings dated 8th June 2017

⁸ Letter from Kabwe Municipal Council to the Commission dated 7th November 2016

3. Tutwa Ngulube	Sonnet	No
4. Bus and Taxis Drivers Association of Zambia	Bus and Taxis Driver s Association of Zambia	Yes

Further Submissions from Kabwe Municipal Council⁹

It was submitted that:

34. The Commission did write to the Kabwe Municipal Council on the 3rd September 2018, requesting for the Council to provide the Commission with lease and licensing agreements and any other documentation that would guide the Commission in analysing the case it was currently handling.
35. The Council responded to the Commission in a letter dated 19th October 2018 and submitted that *“the Council had not yet issued any lease or license agreements to any to any private bus operators to ascertain a bearing on competition and consumer protection.”* The Council further stated that *“they would inform the Commission as soon as they finalised any agreements with operators.”*
36. The Council submitted that the Markets and Bus Stations Act No 7 of 2007, regulated the running of run bus stations. The Council submitted that the said Act further provided the provisions for the operation of private bus stations through Private Public Partnerships (PPPs). The Council submitted that currently all bus stations in Kabwe were privately owned but where governed by the Markets and Bus Stations Act. The Council further submitted that there were no formal contracts with the operators of these stations and that the Council was in the process of drafting MoUs with regards to the operations of these bus stations.

Submissions from Passengers¹⁰

Ms. Princess Maina

It was submitted that:

37. Ms Maina stated that on 5th September 2016, she was travelling to Ndola from Lusaka using the Post Bus. Ms Maina stated that a lady wearing a shirt with the words Nitumeni printed on her shirt approached her in Lusaka and offered their service to her. Ms Maina stated that the same lady managed to convince her to order food through the Nitumeni service and was informed that she would receive her order when she arrived in

⁹ Letter from Kabwe Municipal Council to the Commission dated 19th October 2018

¹⁰ Telephone conversations with Passengers held on 17th November 2016 which included Mwaba Luonde, Princess Maina, Emmah Gondwe, and Rabecca Bwalya

Kabwe. Ms Maina stated that upon reaching Kabwe a lady and gentleman identified themselves and requested for the people that had ordered food from Lusaka before departure.

38. Ms Maina stated that when the two people were giving out the food, some people that appeared to be from the restaurant where the bus had stopped came into the bus and started harassing the two people and also grabbed some packs of food from the passengers. Ms Maina stated that the people that were harassing the two people delivering food then grabbed the bag they were carrying and also dragged the two people away from the bus and took them to the restaurant. Ms Maina stated that after they had waited for a while the people from Nitumeni came into the bus and apologised for the incident and informed that passengers that they had been instructed not to deliver food at that premises because their actions were disturbing the takeaway business. Ms Maina stated that she could not identify the people as employees of Brimas but merely assumed that they were employees of Brimas because after they harassed the people they went into the restaurant with the two employees from Nitumeni.

Ms. Emmah Gondwe

It was submitted that:

39. Ms. Gondwe submitted that while in Lusaka, she had ordered food from people who said the food would be ready when they reached Kabwe. Ms Gondwe stated that, -as they reached Kabwe two people came and started delivering food to the passengers that had ordered food from Lusaka. Ms Gondwe stated that later on as the two people were delivering food some men came into the bus and there was some commotion. Ms Gondwe submitted that the men also grabbed the food that had been given to the passengers. Ms Gondwe stated that later on the employees who were delivering the food came and explained that the people were upset because the passengers had already ordered their food from Lusaka and were not buying from their takeaway.

Ms. Rebecca Bwalya

It was submitted that:

40. Ms Bwalya stated that she had ordered chicken and chips from Hungry Lion through Nitumeni in Lusaka and was informed that the order would be given to her in Kabwe. Ms Bwalya stated that she did not get her food because it had been confiscated by some people who said that the delivery people were spoiling the takeaway business at the bus stop. Ms Bwalya stated that the people that confiscated the foodstuffs told the passengers that they should buy and get the food from Lusaka if they were not going to buy food from their premises.

Submissions to the Commission Report from Kasengo Holdings¹¹

It was submitted that:

41. Kasengo Holdings Limited made their submissions on the Report through their legal representatives E.M. Mukuka and Company.
42. E.M. Mukuka and Company submitted that their earlier argument from their letter dated 17th October 2016 still stood even in what the Commission called findings. It was submitted that the findings of the Report did not even appear to be aligned with the Act.
43. It was submitted that the section that the Report quoted did not give authority to any person to go and trade on a private premise in the same goods that the owner of the premises dealt in. It was further submitted that Kasengo Holdings Limited was of the view that if the Commission wanted to help or protect Mr. Patrick Kabanshi's business, the best way to do it would be to help him secure his own premises. E.M. Mukuka and Company submitted that Mr. Kabanshi was free to secure his own premises without any issue from anyone and this would not purport to have a right to sell foodstuffs on their client's premises.
44. E.M. Mukuka and Company submitted that they had not seen any relevance in the lengthy Report that the Commission had served their client to the complaint. It was submitted that the ideas that the Report propounded were not applicable to the matter. It was further submitted that their client was not concerned with the relationship that the Council had with other business places. It was reported that all that their client was concerned with was that they comply with what the Local Authority wanted and if others did not comply then their client could not be affected by such non-compliance.
45. It was submitted that the issues of dominance that were raised in the Report did not appear to have any relationship with what was alleged against Kasengo Holdings Limited.
46. E.M. Mukuka and Company submitted that they did not understand how the Report came to the conclusion that Mr. Kabanshi is practicing good business practices and their client who owns the place and pays all dues to the Council, is practicing bad business practices.

It was submitted that if the Commission's desire was to raise the business profile for Mr. Kabanshi for reasons best known to the Commission then this should be done through other ways that did not involve their client.

Market Definition

¹¹ Letter dated 8th May 2018 from E.M. Mukuka and Company

It was submitted that:

47. Market definition is a tool used to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining the market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings behavior and of preventing them from behaving independently of effective competitive pressure.

The Relevant Product Market

It was submitted that:

48. According to the European Commission Notice on the definition of the relevant product market is defined as follows: *"A relevant product market comprises all those products and/ or services which are regarded as interchangeable or substitutable by the consumer by reason of the product characteristics, their prices and their intended use"*¹².
49. Furthermore, according to section 7(1) of the Competition and Consumer Protection Regulations (Regulations), 2011 the Commission shall in determining the relevant product market as reasonably as possible identify-
- a. *The peculiar appearance, use, price-range, quality characteristics, uniqueness and any other feature or characteristic of the product that sufficiently distinguishes it from other products;*
 - b. *Whether targeted consumers consider the product to be different in terms of inter alia, benefits, taste or usage, to the extent that it affects purchase decisions;*
 - c. *Whether in the event of shortage, lack of availability, a price increase or any other constraining factor, another product could be used or substituted by the consumers for the same use;*
 - d. *Whether competitors have failed or are likely to fail to supply a similar product*

6. United Brands Company and united Brands Continental BV v Commission of the Europe Communities. Case 27/76 European Courts Report 1978, p 00207.

- e. *The geographical location within Zambia in which the bulk of sales or supply of the product takes place;*
 - f. *The historical consumer behavior, if any related to the product;*
 - g. *The uniqueness of the production process of the product and the ease with which a different production process can be altered to produce the product.*
50. The Commission in investigating this complaint has noted that the two parties involved in the investigation have different products and services and therefore serve different markets. However, the market intersect at a point where the Complainant takes advantage of the traveling public to purchase food on behalf of the passengers and deliver the purchased food to the passengers. It is at this point where competition may be affected by the conduct. Therefore, two relevant markets will be defined and identified.

The peculiar appearance, use, price-range, quality characteristics, uniqueness and any other feature or characteristic of the product that sufficiently distinguishes it from other products

Provision of Bus Station Services

51. The peculiar appearance, use, price-range, quality characteristics, uniqueness and any other feature or characteristic of a bus station service that sufficiently distinguishes it from other bus stations will highly depend on the reliability of the buses that use the bus station. Other attributes that will distinguish a bus station from other stations is the facilities such as clean toilets, takeaways and shops that are available for the passengers use.

Delivery of Food to Passengers

52. The peculiar appearance, use, price-range, quality characteristics, uniqueness of the service offered by the Complainant that sufficiently distinguishes it from other services lies in the methods applied when ordering the food, timely and correct delivery of food stuffs at the requested point, ordered by the passenger at the point and time of departure. The service relies on a passenger in Lusaka making an order for food through a custom designed menu, so that the fast food outlets in designated places are advised accordingly with regard to quantities and expected pick up time and receiving the said goods at an agreed place. The peculiarity and uniqueness of the services is entrenched in the timeliness at which the customer receives their desired foods and eliminates any potential uncertainty and anxiety a passenger may likely face when they go and make an order for food by themselves by being left by the bus as they wait for their foods to be prepared. In terms of price range, the Complainant charged a fee of Five Kwacha (K5.00) per delivery of food which would appear to be reasonable for such a service.

53. The service offered by Innovative Ventures is not complicated and does not require a lot of resources in investments. The service however relies on communication between employees that take the orders and those that purchase the meals for the customers. Therefore the communication will have to be timely and accurate in order to get the correct orders for the customers. The nature of investments will therefore be in training of people that take the orders at the point of departure and those that purchase the food at a given point. Therefore the possibility of entry of another firm may not be difficult provided there is coordination and communication between the people that take the orders at departure and the people that purchase and deliver the food at the various given points.

Whether targeted consumers consider the product to be different in terms of inter alia, benefits, taste or usage, to the extent that it affects purchase decisions;

Provision of Bus Station Services

54. Targeted consumers for bus stations, in this case are bus operators who drive long distance passenger buses and consider bus station services to be different in terms of among other benefits, tastes and usage which entail the availability of peripheral services for the passengers such as food outlets convenience services as well as security. Bus operators will also consider the variety of destinations that the bus stop offers and how easy they can attract passengers heading to various destinations to their respective buses. Bus operators will also target passengers that have made an impromptu journey to a given destination and target the destination which is most likely to have the most passengers traveling for an emergency. These passengers may prefer to use a bus station where buses do not waste time and are in transit. However, passengers transiting through Kabwe do not have a choice to select which bus station to use. The choice of station is determined by the driver of the bus and this is in relation with the agreement the bus operator has with the owner of the station. Choice on which bus station to use is limited to passengers whose journey is starting in Kabwe.

Delivery of Food to Passengers

55. Targeted consumers for services offered by Innovative Ventures consider the service to be different in terms of usage that they are willing to pay an extra delivery charge to purchase their desired meals as they travel to their destinations. The Passengers do not have to face the inconvenience of rushing to a food outlet and waiting for the food to be prepared. This is because the passenger purchases the food from Lusaka before departure. The targeted consumers are saved from the uncertainty of the bus leaving them due to delayed food preparation by the outlets and therefore are willing to pay for the delivery of the food they want to eat during their journey. The targeted consumers therefore consider the

service to be different in terms of benefits and usage, to the extent that it affects their purchase decisions. Passengers have a choice to either use the service provided by Innovative Ventures. They can choose to purchase food using Innovative Ventures or not.

Whether in the event of shortage, lack of availability, a price increase or any other constraining factor, another product could be used or substituted by the consumers for the same use;

Provision of Bus Station Services

56. In the event of a shortage, lack of availability, price increase or any other constraining factor, there are several bus stations that could be used for the same purposes in Kabwe. Currently Kabwe town has 4 privately owned bus stations. The number of bus stations will increase to five (5) as the Kabwe Municipal Council is in the process of constructing another bus station.

Delivery of Food to Passengers

57. The service offered by Innovative Ventures is a unique service in that passengers make orders for their meals at the point of departure in Lusaka and receive their meals when the bus arrives at a certain point or station. Without the service, the customer or passenger is compelled to walk to the desired food outlet and make a purchase of the food on their own and wait for that food to be prepared and walk back to board the bus and continue with the journey. In this regard, in the event of a shortage, lack of availability, a price increase or any other constraining factor, another service cannot be substituted by the consumers for the same use.

Whether competitors have failed or are likely to fail to supply similar products.

Provision of Bus Station Services

58. Competitors for bus station services are not likely to fail to offer similar services to passengers and the traveling public. This is because there are several other bus stations available where potential passengers can go to in order to embark on their respective journeys. However, choice for passengers transiting through Kabwe will be limited to the bus operators' decision as to which bus stop to use. In addition the Kabwe Municipal Council is in the process of constructing a bus station that will provide station services to the traveling public and to bus services that pass through or come to Kabwe.

Delivery of Food to Passengers

59. Currently Innovative Ventures are the only company offering such a service therefore competitors are likely to fail to supply a similar product but will eventually supply the product in the long run once a gap is identified.

The Geographic location within Zambia in which bulk of sales takes place.

60. The geographical location where the sales and services are offered are in two different places. The point of first contact with the customer is at the point of departure in Lusaka while the passenger receives their order in Kabwe. However the conduct took place in Kabwe where the Respondent had prevented the Complainant from operating their business. The Complainant currently offers their service to passengers using the Post Bus Service on the Lusaka Ndola route. In addition the Respondent's bus station is in Kabwe.

Historic behaviour of the consumer if any in relation to the product.

Provision of Bus Station Services

61. Passenger transportation in Kabwe has always depended on privately owned bus stations and Kabwe currently does not have a publicly owned bus station. Therefore, the traveling public have always relied on these private bus stations which are regulated by the Local authority and in this case, the Kabwe Municipal Council under the Markets and Buses Stations Act No 7 of 2007.
62. Consumers have always been inclined to walk to a given food outlet, order their food and wait for it to be prepared during the time a bus stops for passengers convenience. Further, passengers have also been inclined to purchase food from the food outlets surrounding the bus stop. The service by Innovative Ventures has therefore introduced a certainty of a passenger having the desired brand meal without panicking whether the bus will depart the bus stop without them.

The uniqueness of the production process of the product and the ease with which a different production process can be altered to produce the product.

Provision of Bus Station Services

63. Uniqueness in constructing a bus station will rely on what facilities will be deemed to be beneficial to the traveling public which would make the owners of the bus stop create other economic activities such as the selling of foodstuffs to traveling passengers offering of convenience services to transiting passengers and any other business related to transportation of people and goods.

64. The uniqueness of the production process of the service and the ease with which a different production process can be altered to produce the service lies in its dependability in terms of timely delivery and getting the correct orders for the passengers. The provision of the services will require access to food menus from various brand food outlets communication equipment such as cellphones and people that will take orders and those that will make the purchases of the food on behalf of the passengers. There is no other way the service can be provided unless the food outlets themselves provide those services.

The Product Market

It was submitted that:

65. From the analysis given it is concluded that the product markets identified in the market definition are two fold, these are; the provision of bus station services to long distance buses on the Lusaka - Ndola route; and the delivery of food to passengers using the post bus services.

The Geographical Market

It was submitted that:

66. From the market analysis given above it is concluded that the geographical market is Kabwe.

The Conduct

It was submitted that:

67. The conduct under investigation is the prevention of competition by Kasengo Holdings by effectively preventing Nitumeni Errand and Courier Services from delivering foodstuffs to passengers using the Post Bus services along the Lusaka-Ndola route, a conduct which appears to be in breach of Sections 16 (1) and 46(1) as read with 45 (c) of the Act.

Relevant Findings

It was submitted that:

68. Investigations revealed that on 5th September 2016, employees from Brimas Take Away did enter Post Bus passenger carrier and grabbed food items from passengers that had purchased food from other outlets using Nitumeni Couriers Services. It was revealed that the area where the incident took place was an area owned by Kasengo Holdings. Investigations further revealed that Nitumeni Courier Services was a mere agent for passengers and was not in the business of selling fast foods.

69. Further investigations revealed that the premises in question belonged to Kasengo Holdings and they had applied to the Municipality for a license to run a private bus stop as Kabwe did not have a public operated bus station in operation.

Competition Analysis

Consideration of Dominance (Dominance test – Section 15)

Whether Kasengo holds a dominant position by having thirty percent or more of those goods or services supplied or acquired.

It was submitted that:

70. According to Section 2 of the Act *“Dominant position” means a situation where an enterprise or a group of enterprises possesses such economic strength in a market as to make it possible for it to operate in that market, and to adjust prices or output, without effective constraint from competitors or potential competitors;* In addition, Section 15 of the Act states that, *“A dominant position exists in relation to the supply of goods or services in Zambia, if thirty percent or more of those goods or services are supplied or acquired by one enterprise; or sixty percent or more of those goods or services are supplied or acquired by not more than three enterprises.”*¹³ In light of the unique market that has been defined in terms of the provision of bus station services, the Commission will further have to ascertain both Dominance and Market Power.

Determination of Dominance

It was submitted that:

71. The Dominance test is used to determine whether a firm occupies a dominant position or not in a relevant market and assessing the degree of dominance exercised by the firm (s) within the market. Where a firm acts, to a large and or sustainable extent, as though it had no competitors, such a firm would be rightly referred to as a “dominant” undertaking, regardless of its market share.
72. During investigations in Kabwe where the parties operate from, the Commission conducted a survey to determine how many buses passed through the bus stations, this would in return determine the foot traffic and demonstrate to what extent the Respondent was dominant. The survey involved making a tally of all the buses that used the various bus stations in Kabwe over a period of one week. The survey revealed that Brimas Bus Station under Kasengo Holdings was dominant in the

¹³ Competition and Consumer Protection Act No 24 of 2010

provision of bus station services to passengers as well as buses that used their facilities. According to the survey conducted, Brimas Bus Station received about 55% more transiting buses through Kabwe than any other bus stations in Kabwe. Most of the bus stations received fewer buses in comparison to Brimas Bus station. This therefore concludes that Brimas Bus Station under Kasengo Holdings holds a dominant position in the provision of bus station services as they command about 55% of the transit traffic that passes through Kabwe. This is higher than the 30% threshold required in Section 15 of the Act which determines dominance.

73. In addition, according to the survey conducted in Kabwe during the month of December 2017, Brimas Bus Station commanded about 55% of the transiting buses passing through Kabwe coming from Lusaka, Copperbelt, Northern, Luapula, North Western and Muchinga Provinces while Sonnet Bus Station attracted about 25% of buses transiting through Kabwe and Vwalika generated about 21% of buses.

Table 1: Market shares for Market Players in the Relevant Market¹⁴

Firm	Market Share %
Brimas Bus Station	55%
Sonnet Bus Station	24%
Vwalika	21%
Total	100%

Consideration of Market Power

It was submitted that:

74. In assessing Market power, Competition Authorities take into account if and to what extent an undertaking encounters constraints on its ability to behave independently. A number of factors need to be considered in assessing dominance or establishing the degree of market power that an undertaking possesses. According to the Competition and Consumer Protection Policy of 2009, the competition authority shall undertake research studies and using appropriate analytical tools to identify abuse of dominance and make informed decisions.
75. However, it is worth noting that market shares are not the sole issue in determining whether a firm has dominance. *Ex hypothesis* market shares cannot indicate the competitive pressure exerted by firms not yet operating on the market but with the capacity to enter it. It is necessary,

¹⁴ Survey conducted by the Commission during the Month of December 2017 to determine How much traffic passed through each bus station

therefore, to consider various other "factors indicating dominance" which help to establish an undertaking's position on the market.

76. Market power refers to the ability of a firm (or group of firms) to raise and maintain price above the level that would prevail under competition. Further, market power is measured by the ability of a firm to reduce output and raise prices above the competitive level specifically, above the marginal cost for a sustained period of time and to make a profit by doing so. An undertaking with market power might also have the ability and incentive to harm the process of competition in other ways; for example, by weakening existing competition, raising entry barriers or slowing innovation¹⁵.

77. To assess whether the Respondent behaved independently of its competitors, customers or suppliers, the following assessments are carried out:

- i. *Barriers to entry*
- ii. *Import Competition*
- iii. *Countervailing Power*
- iv. *Internal Industry Rivalry*
- v. *Substitutability*

Barriers to Entry

It was submitted that:

78. Barriers to entry are obstacles on the way of potential new entrants to enter the market and compete with the incumbents. The difficulties of entering a market can shelter the incumbents against new entrants. The higher the barriers to entry, the more power in the hand of the incumbents in the relevant market. Some of the barriers to entry associated with entry into the provision of bus stop services may include access to finance, acquisition of suitable space for building peripheral facilities as well as getting a license from the local authority to run a bus station as a statutory requirement.

79. Currently, the barriers to entry in the setup of an intercity bus station would be access to suitable space as the area may require to hold several large buses at a given time so that the area does not get crowded and therefore making travelling unbearable for the traveler. Further, in order for one to run a bus station, they need to apply for a bus station license as required under the Markets and Bus Stations Act No. 7 of 2007. These fees are low. It can therefore be stated that running a private bus station in Kabwe has low barriers to entry.

¹⁵ Competition and Consumer Protection Policy 2009: Ministry of Commerce Trade and Industry; GRZ

Import Competition

It was submitted that:

80. Import competition is an important part of competition in a domestic economy that has a high market concentration. As such the Competition authority considers import competition to be a positive aspect in competition cases determination. In this aspect, the Commission will consider the evolution of imports into the relevant market and to some extent, determine what effect the imports have had, and further, if the imports were significant and capable of offering countervailing effects in the relevant market in the preceding years. In order to ascertain whether Imports are most likely to provide an effective and direct competitive constraint, the Commission will consider the existence of among other things: the existence of imports distributed by independent enterprises of the merging parties, no barriers to the quantity of independent imports rapidly increasing, imported product is a strong substitute in all respects, and the import parity price is close to the domestic price.
81. It has been established that the market for the provision of bus station services does not encounter any import competition as all bus station services can be described as immovable services. Therefore, import competition does not exist in the relevant markets due to the nature of the service. Further, the absence of import competition raises the likelihood of the Respondent to act independently of its competitors.

Countervailing Power

It was submitted that:

82. Countervailing power is the power that may be available to a trader (buyer or seller) to create or reveal effective competitive constraints faced by its counter parties (buyers or sellers), in particular through the possibility of self-supply and/ or of sponsoring the entry of a new competitor. The ability of a firm to charge high prices depends on the degree of concentration of the buyers. A firm is clearly free to exert market power if it faces one or few strong buyers. Countervailing power is the ability of balancing off the market power of one group by that of another group¹⁶. In this case, the Respondent's customers which include bus drivers as well as passengers do not have countervailing power as they are not able to influence the Respondent in anyway this is because the Respondent does not directly sale their products and services to bus drivers but to passengers passing through Kabwe. In addition passengers in transit do not have a choice on which station to use. The use of station will always depend on the driver's decision which in turn also depends

¹⁶ <http://www.businessdictionary.com/definition/countervailing-power.html#ixzz3ZSY6vSY4>

on the nature of agreement that exists between the owners of the bus station and the drivers or owners of the buses. Therefore the customers of the station do not have countervailing power against the Respondent.

Industry Rivalry

It was submitted that:

83. Industry Rivalry refers to the extent to which firms within an industry put pressure on one another and limit each other's profit potential. If rivalry is fierce, competitors are trying to steal profit and market share from one another¹⁷. Internal industry rivalry may occur through price or non-price competition. Non-price competition is likely to drive the internal rivalry in the relevant market. Currently, the industry rivalry that exists in the market for the provision of bus station services can be described by various factors that include availability of convenience facilities such as toilets, restaurants and takeaways where travellers can easily get refreshments and food as well as security for passengers.
84. Further, space where the buses park could be an aspect that enhances rivalry in such an industry. This is because there is no crowding of buses at the station and this also enhances security for both the passengers and potential passengers. Currently the Respondent can be described to have a competitive edge in terms of industrial rivalry as they have convenience facilities available for passengers at their premises, a take away where passengers can purchase food and refreshments, as well as a large area where buses can park and not over crowd the area. In addition, the area is strategically located and advantageous for buses travelling from Lusaka to the Copperbelt as the buses do not need to meander through the Kabwe CBD but drive straight to the bus station.

Substitutability

It was submitted that:

85. The availability of substitute's gives an effective discipline to a firm with market power not to abuse its power as such abuse would trigger a switch to a substitute product. Currently there are Four (4) bus stations in Kabwe which are all privately owned. These include;
- a. Vwalika
 - b. Brimas
 - c. Sonnet and
 - d. Bus Drivers Association of Zambia

86. This means bus operators carrying passengers have a choice to choose which bus station they would prefer to use. However, passenger choice would be influenced largely by the price of a bus ticket to a desired destination and how early or urgent the passenger needs to travel and how quickly they can get on a bus and start off. The Respondent's bus station can be described as the most preferred as buses that stop there are usually in transit and usually stop at that bus station for a period of 10 to 15 minutes for passengers to use conveniences, refresh and purchase food and refreshments. Bus operators are also able to stop at other stations which offer similar services and amenities. However, bus operators prefer to stop at the Respondent's bus station because of among other things ease of access, readily available potential passengers.

87. From the foregoing, it can be inferred that the Respondent has some degree of market power in the market for bus station services in Kabwe because of its unique position, preference by bus drivers and passengers alike it does not face any import competition and the Respondent's customers do not wield any countervailing power towards the Respondent.

The Presence of Conduct

It was submitted that:

88. Abuse exists through a conduct; unilateral or collective. The Oxford Dictionary defines "conduct" as, "the manner in which a person behaves, especially in a particular place or situation."

89. It has become clear from the jurisprudence of the European Court of Justice (ECJ) and the Court of First Instance (CFI) and from the decisional practice of the Commission that it is not necessary for dominance, the abuse and the effects of the abuse all to be in the same market. The ECJ in the case of **British Gypsum v Commission**, held that "in special circumstances" there could be an abuse of a dominant position "where conduct on a market distinct from the dominated market produces effects on that distinct market". British Gypsum was dominant in plasterboard, but not dominant in the neighbouring plaster market. Among its abuses, British Gypsum gave priority treatment to customers for plaster who remained loyal to it in relation to plasterboard.¹⁸

90. In the case at hand, it was revealed that the Complainant acted as an agent who purchased food from various food outlets using a custom designed menu for passengers that were traveling along the Lusaka – Ndola route using ZAMPOST's Post Bus Services. After the food orders were made, the passengers would then collect their food from the agreed pick up point. One point at which the Post Bus stopped for refreshments

¹⁸ Postgraduate Diploma, Masters in EC Competition Law 2007/08 Module One, pg. 42, King's College London

and other activities was the bus stop area which also houses Kabwe's Brimas Snack Pitch, a food outlet owned by the Respondent. It is at this point that passengers that had ordered their food using the Complainant's services received their food.

91. When the Respondent and their employees saw the Complainant delivering food to the customers the Respondent made a decision to disrupt the Complainant from delivering food that the passengers had purchased through the Complainant. The Complainant's customers stated that they saw the Respondent's employees enter the bus and began grabbing foodstuffs and other items from passengers that had purchased food through the Complainant's services. Therefore, the Respondent had made a resolution to grab the foodstuffs from passengers that were travelling from Lusaka to Ndola using the Post Bus after coming to the conclusion that the Complainant was competing with their food outlet situated at the bus stop. Actions are akin to conduct. Hence the actions of the Respondent amount to a conduct. Therefore, the Respondent's employees engaged in conduct in which they acted in a manner that prevented competition through the use of harassment as it prevented the Complainant from conducting their business.
92. The Respondent may argue that they may be dominant in the market for the provision of bus station services which may have as a sub-service the provision of foods, but the conduct happened in the market for the delivery of food to passengers. The Respondent may argue also argue that the two markets are different. While their argument is true it should be considered that these two markets are interrelated. Their interrelation is embedded in that fact that the two markets are dependent on each other. The Complainant who operates in the market for the provision of services for the delivery of food to passengers depends on the travelling public; these passengers use the Respondent's bus station as a refreshment point. Therefore, the two markets intersect at the point of service delivery for the Complainant. In essence the effect of the Respondent's dominance in the provision of bus station services market, creates market power in the delivery of food to passengers market.

Whether the conduct limits access to markets or unduly restrains competition or have or is likely to have adverse effect on trade or the economy in general.

It was submitted that:

93. In their response to the Notice of Investigation, the Respondent stated that the Complainant was selling food on their premises without permission and were further trespassing. However, investigations revealed that the Complainant's main business is not the selling of fast

foods as compared to one of the Respondent's line of business. The Complainant's business is to offer errand and courier services. The Commission's Investigations revealed that the Complainant was merely an agent of the passenger and was instructed by the passenger to purchase the desired food on the passenger's behalf and have it delivered to the passenger at the bus stop at an agreed time for a given fee. In terms of trespassing, the Complainant was merely delivering the food to the passengers at the bus stop. The Commission's investigations revealed that the Complainant merely delivered the food packages to the passengers on the bus and the food was consumed on the bus and not on the Respondent's premises.

94. The conduct by the Respondent's employees is likely to limit access to a market as the Complainant's business relies on having access to passengers who are traveling between cities via Kabwe. By using such tactics to compel the Complainant's employees to stop offering their services to passengers, the Complainant's employees stopped operating and eventually stopped offering the services to the passengers as they feared for their safety and wellbeing. The conduct by the Respondent's employees also compelled the passengers not to use the Complainant's services as the passengers feared for their safety as well as having their food confiscated. The conduct by the Respondent therefore limited access to the Complainant's market for the delivery of food to passengers as the Complainant has been prevented from conducting their operations which depended on buses stopping in Kabwe and passengers collecting their respective foodstuffs.
95. Although the conduct by the Respondent limited access to the market for the Complainant, there are other alternatives for the Complainant. The Complainant can make arrangements to change bus stations as they deliver food to the passengers. Such an activity only requires communication between the Complainant and bus operators in order to make the alternative change and have the foodstuffs delivered to the respective customers. In addition, the Complainant can make further arrangements to have the bus stop at a given point and have the food delivered before the bus actually makes planned stop at the station. This way also provides for a peaceful delivery of food to the respective customers. Currently, Kabwe has another bus station (Sonnet Bus Station) where the Complainant can have the passengers' food delivered. The Complainant can explore the possibilities of having food delivered at that station. Therefore, with the presence of an alternative place to stop, the Complainant can continue providing their service to their customers without interference from the Respondent or other parties. The Complainant may continue to have access to their market.
96. Although, there are alternatives as to how the Complainant can have access to their customers, it should also be noted that making two stops at a given point is also likely to make the bus service inefficient. This is because, the Complainant's employees will have to board the bus and

individually deliver food to those passengers that had made orders and to ensure that the right orders are delivered, such an activity is likely to take a considerable amount of time to the detriment of efficiency in the bus service. In addition, once the bus service switches to another bus station, it is likely that operators of the other bus station may also behave in a similar manner and limit access to the market for the Complainant as they also offer similar services as the Respondent.

97. Therefore, even if they are alternatives for the Complainant, those alternatives are not guaranteed. In addition the alternatives are also likely to result in inefficiencies in the bus service as the bus operators will have to stop twice in order to accommodate the Complainant to conduct their business. The Conduct by the Respondent therefore limits the Complainant's access to the market.

Analysis in relation to Unfair Trading

Whether Kasengo Holdings is a Person or Enterprise

It was submitted that:

98. The Act defines 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 of other entities, directly or indirectly, controlled by them."¹⁹ The Respondent is an enterprise as they are the holding company of Brimas Snack Pitch Limited. According to PACRA records, Kasengo Holdings is the holding company for Kasengo Transport, Kasengo Butchery, Brimas Snack Pitch Limited. Further inquiries indicate that Brimas Snack Pitch Fast food and Take Away have interlocking directorship among the shareholders that include Brighton Mwanguku, Stanley Kapote Mwanguku, Rose Nampungwe, Mathew Mwanguku, Crimey Nanguka Emily Nanguka²⁰.

Whether conduct by Kasengo Holdings places pressure on consumers by use of harassment or coercion and thereby distorts, or is likely to distort, the purchasing decisions of consumers.

It was submitted that:

99. Harassment is generally defined as aggressive pressure or intimidation. Coercion is the action or practice of persuading someone to do something by using force or threats. The Oxford English Dictionary define both coercion and harassment as "Persuade (an unwilling person) to do something by using force or threats or the action or practice of

¹⁹ Competition & Consumer Protection Act No 24 of 2010

²⁰ PACRA Printout obtained on 9th November 2016

persuading someone to do something by using force or threats: Aggressive pressure or intimidation".²¹

100. In the case at hand, it was revealed that the Complainant acted as an agent for the passengers that purchased food from various food outlets using a custom designed menu for passengers that were traveling along the Lusaka - Ndola route using ZAMPOST's Post Bus Services. After the food orders are made, the passengers would then collect their food from the agreed pick up point. The pick-up point at which the Post Bus stopped for refreshments and other activities was the bus station area which also houses Kabwe's Brimas Snack Pitch, a food outlet owned by the Respondent. It is at this point that passengers that had ordered their food using the Complainant's services received their food.
101. The Respondent and their employees noticed the Complainant delivering food to the customers. The Respondent then made a decision to disrupt the Complainant from delivering food that the passengers had purchased through the Complainant. The Respondent instructed their employees from Brimas to grab foodstuffs and other items from passengers that had purchased food through the Complainant's services. This was done through the use of force and intimidation of the passengers.
102. After the incident happened, it cannot be confirmed whether passengers were coerced to purchase food from the Respondent's outlet. This is because the Complainant's employees were concerned with retrieving the items that had been confiscated by the Respondent's employees. In addition, none of the passengers that had their food confiscated purchased food from the Respondent's outlet as they were waiting for their food to be returned to them. Therefore it cannot be ascertained whether the Respondent coerced passengers into purchasing food from the Respondent's outlet and therefore distorted the purchasing decisions of the passengers.
103. However, it can be confirmed that passengers were harassed by the Respondent's employees from purchasing food from other outlets that were delivered to them. Therefore, the consumers were prevented from purchasing food from their desired outlets. Despite there being no information that passengers purchased any food from the Respondent's restaurant, the intimidation used by the Respondents representatives was tantamount to harassment and hence distorted the purchasing decisions of consumers.

Analysis of the Respondent's Response to the Report

It was submitted that:

²¹ <http://www.oxforddictionaries.com/definition>

104. Contrary to the Respondent's submission, the Commission is only concerned with the competition concerns raised from the incident. Elements or laws of trespass are not covered under the Act and therefore, the allegations and analysis covered in the report addressed competition issues only as this falls under the ambit of the Act and the mandate of the Commission.
105. Contrary to the Respondent's submission regarding the issue of dominance raised in the Report, the Dominance test was used to determine whether Brimas Bus Station occupied a dominant position or not in the relevant market in order to assess whether they were likely to abuse their dominant position in the market. In this case, the Commission conducted a week long survey that tallied the number of buses that passed through the various stations in Kabwe. Based on the Commission's week long survey to determine how many buses passed through the bus stations, it was determined that Brimas Bus Station under Kasengo Holdings was dominant in the provision of bus station services to passengers as well as buses that used their facilities. In accordance with paragraph 63 and 64 of the Report, the Brimas Bus Station received about 55% more transiting buses through Kabwe than any other bus stations in Kabwe. This determining factor exceeded the 30% threshold under Section 15 to establish dominance in the relevant market. Hence, it was concluded that Brimas Bus Station under Kasengo Holdings held a dominant position in the provision of bus stations services in Kabwe.
106. Contrary to the Respondent's submission, the Respondent abused their dominance through the conduct of limiting access to the market, which in this case was the bus station. In accordance with paragraph 84 of the Report, as an agent acting on behalf of fast food franchises as a delivery service, the Complainant's business relies heavily on having access to passengers who are traveling between cities via Kabwe. The conduct by the Respondent's employees towards the Complainant's employees to prevent the Complainant from offering their services to passengers and carrying out their agency duties led to them to stop offering their services to the passengers as they feared for their safety and wellbeing. The conduct by the Respondent's employees also compelled the passengers not to use the Complainant's services as the passengers feared for their safety as well as having their food confiscated. The conduct by the Respondent therefore limited access to the Complainant's market for the delivery of food to passengers as the Complainant has been prevented from conducting their operations which depended on buses stopping in Kabwe and passengers collecting their respective foodstuffs. This would be considered an abuse of dominance on the Respondent's part as their conduct has resulted in the limiting of access to a market for the Complainant.
107. Respondent submitted that the Complainant was selling food to the passengers on the Respondent's premises. However, this was not the

case as the Complainant only provided a delivery service as the Complainant is not in the market for the provision of fast foods to travelers. The food is purchased by passengers in Lusaka. The Complainant's business model is the delivery of food to passengers using the post bus services on the Lusaka- Ndola route. What transpires is that before departure, a passenger makes an order for their preferred fast food and pays for the food in Lusaka. When the bus reaches Kabwe, the Complainant thereafter has the food delivered immediately the passengers arrive in Kabwe by the Complainant's employees. The Complainant therefore only delivers food to passengers and does not sell the food as reported by the Respondent. It should therefore be noted that the transaction takes place in Lusaka and the service is executed in Kabwe.

Board Deliberations

The Relevant Product Market

108. The Board of Commissioners deliberated that the product markets identified in the market definition are two fold, these are the provision of bus station services to passengers that used Postbus Services on the Lusaka - Ndola route and the delivery of food to passengers using the post bus services in Kabwe.

Determination of Dominance

109. The Board observed that the Respondent is dominant in their market as they hold about 55% of the market share in the relevant Market. This is 25% more than the stated 30% market share threshold stated under Section 15 of the Act.

Whether there is Market Power

110. The Board of Commissioners observed that the Respondent has some degree of market power over in the market for bus station services in Kabwe because of its unique position, preference by bus drivers and passengers alike it does not face any import competition and their customers do not wield any level of countervailing power towards them in the provision of their services.

Whether there is a conduct

111. The Board of Commissioners deliberated that when the Respondent and their employees saw the Complainant delivering food to the customers the Respondent made a decision to disrupt the Complainant from delivering food that the passengers had purchased through the Complainant. The Respondent decided to instruct its employees from Brimas to grab foodstuffs and other items from passengers that had purchased food through the Complainant's services. Therefore the

Respondent had made a resolution to grab the foodstuffs from passengers that were travelling from Lusaka to Ndola using the Post Bus after coming to the conclusion that the Complainant was competing with their food outlet situated at the bus stop. Hence the actions of the Respondent amount to conduct.

Whether the Conduct is Likely to Limit Access to Markets or Unduly Restrains Competition or Have or is Likely to Have Adverse Effect on Trade or the Economy in General.

112. The Board of Commissioners deliberated that the conduct by the Respondent's employees is likely to limit access to a market as the Complainant's business relies on having access to passengers who are traveling between cities via Kabwe at the bus station. By using force, coercion and intimidation to compel the Complainant's employees to stop offering their services to passengers, the Complainant's employees stopped operating and eventually stopped offering the services to the passengers. Although there are alternatives for the Complainant, those alternatives are not guaranteed. In addition the alternatives are also likely to result in inefficiencies in the bus service as the bus operators will have to stop twice in order to accommodate the Complainant conduct their business. The Conduct by the Respondent therefore limits access to the market for the Complainant.

Whether Kasengo Holdings is a Person or Enterprise

113. The Board of Commissioners deliberated that the Respondent is an enterprise as they are the holding company of Brimas Snack Pitch Limited. According to PACRA records, Kasengo Holdings is the holding company for Kasengo Transport, Kasengo Butchery, Brimas Snack Pitch Limited.

Whether conduct by Kasengo Holdings places pressure on consumers by use of harassment or coercion and thereby distorts, or is likely to distort, the purchasing decisions of consumers.

114. The Board of Commissioners deliberated that passengers were harassed by the Respondents actions to grab their food. Despite there being no information that passengers purchased any food from the Respondent's restaurant, the intimidation used by the Respondents representatives was tantamount to harassment and hence was likely to distort the purchasing decisions of consumers.

Board Decision

115. Having considered the facts of the case, the Board of Commissioners decided that:

- i. The Respondent issues refunds amounting to Three hundred and Thirty Kwacha (K330) to all passengers that were affected by the conduct;
- ii. The Complainant should report to the police for the theft of the thermal bag and money amounting to K150.
- iii. The Respondent be fined 1% of their total annual turnover for violating Section 16 (1) of the Act.
- iv. The Respondent be fined 0.5% of their total annual turnover for violating Section 46 (1) as read together with Section 45 (c) of the Act.
- v. The Commission Liaise with the Ministry of Local Government and highlight concerns of entering into PPPs without formal documentation in accordance with Section 5 (g) of the Act.

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

Dated 22nd May, 2019



**Chairperson
Competition and Consumer Protection Commission**

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