

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

BETWEEN

The Competition and Consumer  
Protection Commission

COMPLAINANT

AND

Pick N Pay Zambia

RESPONDENTS

BEFORE:

Commissioner Chishala Kateka  
Commissioner Aubrey M Chibumba  
Commissioner Chenga Chisha  
Commissioner Nsangwa Ngwira  
Commissioner Fredrick Imasiku

- Chairperson  
- Member  
- Member  
- Member  
- Member

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DECISION

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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 10<sup>th</sup> March, 2020, the Competition and Consumer Protection Commission ("the Commission") received a complaint from the general public against Pick N Pay Zambia ("the Respondent"). Specifically, it was alleged that the Respondent had labelled certain products, such as their Dale Cheese products, "*Proudly Zambian*", when those products were not manufactured in Zambia. The Commission then initiated its own investigation against the Respondent in order to establish if the Respondent had labelled products that were not manufactured in Zambia with the label, "*Proudly Zambian*". The Commission demanded that the Respondent remove all "*Proudly Zambian*" labels on products that were not manufactured in Zambia.

## **Legal Contravention and Assessment Tests**

### **Legal Contravention**

#### ***It was submitted that:***

1. The alleged conduct appeared to be in contravention of Section 46(1) as read with Section 45(a)(b) and Section 47(a)(v) of the Competition and Consumer Protection Act, No. 24 of 2010 ("the Act").

2. Section 46(1) of the Act states that:

*"A person or an enterprise shall not practice any unfair trading."*

3. Section 46(2) of the Act states that:

*"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."*

4. Section 45(a) of the Act states that:

*"A trading practice is unfair if it misleads consumers thereby distorts, or is likely to distort, the purchasing decisions of consumers."*

5. Section 45(b) of the Act states that:

*"A trading practice is unfair if, it compromises the standard of honesty and good faith which an enterprise can reasonably be expected to meet and thereby distorts, or is likely to distort, the purchasing decisions of consumers."*

6. Section 47(a)(v) of the Act states that:

*"A person who or an enterprise which falsely represents that any goods or services have sponsorship, approval, affiliation, performance characteristics, accessories, uses or benefits that they do not have 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**

***For the purposes of Section 46(1) as read together with Section 45(a), the following assessment tests will be used;***

***It was submitted that:***

7. Whether Pick N Pay Zambia is a “Person” or an “Enterprise”.
8. Whether there was a trading practice.
9. Whether the trading practice misled the consumer thereby distorting the Consumer’s purchasing decision.

***For the purposes of Section 46(1) as read together with Section 45(b), the following assessment tests will be used;***

***It was submitted that:***

10. Whether Pick N Pay Zambia is a “Person” or an “Enterprise”.
11. Whether there was a trading practice.
12. Whether the trading practice compromised the standard of honesty and good faith which an enterprise can reasonably be expected to meet

***The following assessment tests are with regard to Section 47(a)(v) of the Act;***

***It was submitted that:***

13. Whether Pick N Pay Zambia is an “enterprise” or a “person”.
14. Whether Pick N Pay Zambia falsely represented that any goods had a sponsorship, approval, affiliation.

## **Investigations Conducted**

***It was submitted that:***

15. The Commission conducted a mystery shopping exercise at the Respondent’s trading premises on 18<sup>th</sup> March, 2020. The Commission also served a Notice of Investigation (“NoI”) and accompanying letter on the Respondent on 2<sup>nd</sup> April, 2020. On 30<sup>th</sup> April, 2020 the Commission conducted research on the Proudly Zambian Campaign.

## **Findings**

### **The Parties**

#### **The Complainant**

*It was submitted that:*

16. The Complainant is the Commission acting in the interest of the general public in Zambia.<sup>1</sup> Section 55(1) of the Act provides that;

*“the Commission may, at its own initiative or on a complaint made by any person, undertake an investigation if it has reasonable grounds to believe that there is, or there is likely to be, a contravention of any provision of this Act.”*

17. The Commission thus invoked powers given to it by the above-mentioned Provision and undertook an investigation against the Respondent.

#### **The Respondent**

*It was submitted that:*

18. The Respondent is Pick n Pay Zambia, situated at La Belva Court, Chindo Road, Lusaka. A search with the Patents and Companies Registration Agency (“PACRA”) revealed that the Respondent was a registered company with registration number 120080072718.

19. Section 2 of 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.”<sup>2</sup>

20. Therefore, in line with the above definitions, Pick N Pay Zambia qualifies as an enterprise as it is a company that engages in the retail of fast moving consumer goods which constitutes a commercial activity.

#### **Submissions from the Respondent<sup>3</sup>**

*It was submitted that:*

21. In an email dated 3<sup>rd</sup> April, 2020 the Respondent submitted that they ordered their products from suppliers and that the labelling was done by the suppliers. The Respondent submitted that if a manufacturer imported stock and labelled it “Proudly Zambian”, they would not know until it was brought to their attention.

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<sup>1</sup> CCPV for IV dated 10<sup>th</sup> March, 2020

<sup>2</sup> Competition and Consumer Protection Act No. 24 of 2010

<sup>3</sup> CCPC IV dated 10<sup>th</sup> March, 2020

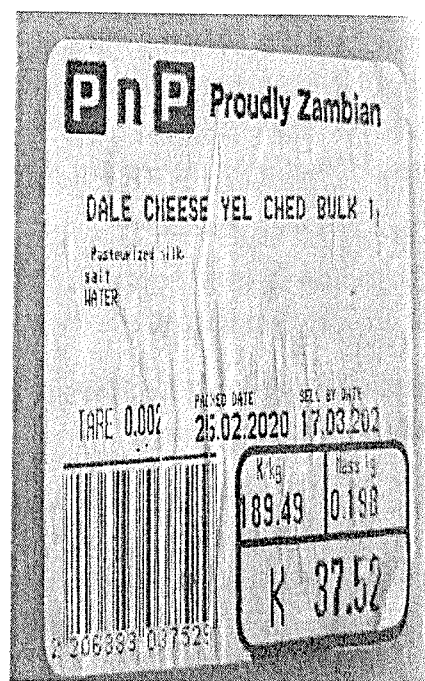
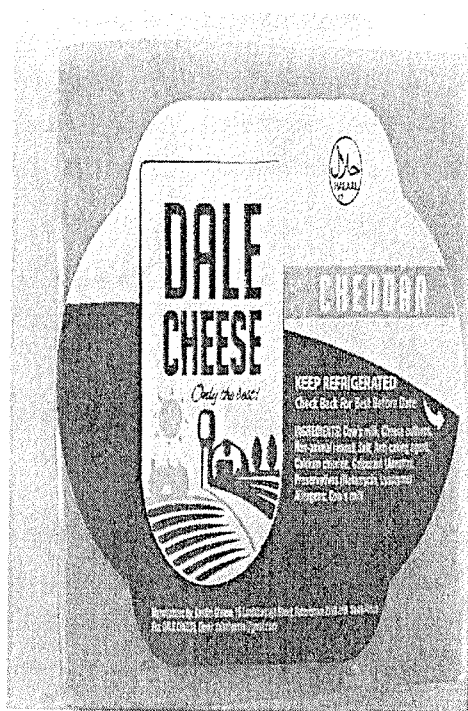
The Respondent submitted that they notified the relevant parties to ensure that only locally made products could be labelled “*Proudly Zambian*”. The Respondent further submitted that they only used the labelling “*Proudly Zambian*” on products that were made at store level. The Respondent submitted that products made at store level were labeled “*Proudly Zambian*” because all the ingredients were sourced locally.

#### **Mystery Shopping Mission <sup>4</sup>**

##### ***It was submitted that:***

22. On 18<sup>th</sup> April, 2020 the Commission went on a mystery shopping mission to ascertain whether the Respondent was labelling foreign manufactured products with the label “*Proudly Zambian*”. The Commission found that the Respondent’s Woodlands outlet had labelled Dale Cheese products with the label “*Proudly Zambian*”. The Commission observed that these cheese products also had an original label that read “*Manufactured by; Bandini Cheese*”. The original label also had an address for the manufacturer that read “*15 Landsborough Street Robertsham 2190 JHB, South Africa*”, a South African Address.

*Images below: Products Purchased on Mystery Shopping.*



<sup>4</sup> Complainant's Pay slips January to December, 2019



### Relevant Findings

*It was submitted that:*

23. The Commission found that the Respondent's Woodlands outlet had labelled Dale Cheese products with the label "Proudly Zambian". The Commission observed that these cheese products also had an original label that read "Manufactured by; Bandini Cheese". The original label also had an address for the manufacturer that read "15 Landsborough Street Robertsham 2190 JHB, South Africa"<sup>5</sup>.
24. The Commission found that the Respondent had denied having labelled any foreign manufactured products with the label "Proudly Zambian"<sup>6</sup>.
25. The Commission found that the label "Proudly Zambian" indicated to consumers that products with the said label were endorsed, approved and or affiliated to the Proudly Zambian Campaign the Proudly Zambian Campaign ("PZC") which is spearheaded by the Zambia Association of Manufacturers ("ZAM") to promote locally manufactured products.<sup>7</sup>

<sup>5</sup> Mystery shopping mission conducted on 18<sup>th</sup> April, 2020

<sup>6</sup> Email from the Respondent dated 3<sup>rd</sup> April, 2020.

<sup>7</sup> <http://zam.co.zm/>

## **Previous cases involving the Respondent**

### ***It was submitted that:***

26. A review of the case file for the Respondent revealed that there was no case against the Respondent on Section 46(1) as read with Section 45(a)(b) and Section 47(a)(v) of the Act.

## **Analysis of Conduct**

### ***It was submitted that:***

27. In analyzing possible violation of Section 46(1) as read together with 45(a) of the Act, the following assessment tests are used;

### **Whether Pick n Pay Zambia is a “Person” or “Enterprise”;**

#### ***It was submitted that:***

28. Refer to paragraph 19 to 21 of the report.

### **Whether there was a trading practice;**

#### ***It was submitted that:***

29. According to Section 2 of the Act, service is defined as “includes the sale of goods, where the goods are sold in conjunction with the rendering of a service;” The Commission carried out a mystery shopping mission on 18<sup>th</sup> April, 2020 and purchased one Dale Cheese Cheddar and one Dale Cheese Danish Feta pack. Therefore, there was a trading practice as evidenced by invoice number 12762361.
30. **Whether the trading Practice misled the Consumer and thereby distorted the Consumer’s purchasing decision.**

#### ***It was submitted that:***

31. A conduct is misleading if it gives someone the wrong idea or impression about something.<sup>8</sup>
32. In the case at hand the Commission established that the Respondent was selling Dale cheese products that were manufactured in South Africa and labelling them “Proudly Zambian” implying that they were manufactured in Zambia when they

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<sup>8</sup> Amy Hackney Blackwell (2008) Essential Law Dictionary.

were not. This conduct implied to consumers that the products were manufactured in Zambia and therefore was misleading.

33. In analyzing possible violation of Section 46(1) as read together with 45(b) of the Act, the following assessment tests are used;

**Whether Pick n Pay Zambia is a “Person” or “Enterprise”;**

***It was submitted that:***

34. Refer to paragraph 19 to 21 of the report.

**Whether there was a trading practice; (Whether conduct was during trading);**

***It was submitted that:***

35. Refer to paragraph 30.

**Whether the trading practice compromised the standard of honesty and good faith which an enterprise is reasonably expected to meet and thereby distorted or was likely to distort the consumers purchasing decision.**

***It was submitted that:***

36. Honesty is a sincere intention to deal fairly with others<sup>9</sup>. On the other hand, the Black’s Law dictionary defines ‘good faith’ as “*a state of mind consisting of honesty, faithfulness to one’s duty or obligation and observance of reasonable commercial standards of fair dealing in a given trade or business*”<sup>10</sup>.
37. In the case at hand it is worth noting that for an enterprise of a corporate stature such as that of the Respondent, the standard of honesty and good faith they are expected to meet is very high. This is due to the fact that Consumers reasonably rely on them for accurate information about the products they sell and considering that they are one of the three market leaders in this market their information will have a considerable reach.
38. In the case at hand the Commission established that the Respondent was selling Dale cheese products that were manufactured in South Africa and labelling them “*Proudly Zambian*” implying that they were manufactured in Zambia when they were not. This conduct thereby compromised the high standard of honesty and good faith that the Respondent was reasonably expected to meet as the goods

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<sup>9</sup> <http://legal-dictionary.thefreedictionary.com/good+faith> retrieved on 27<sup>th</sup> December, 2018

<sup>10</sup> Black’s Law dictionary, eight edition, page 713.



were actually manufactured in South Africa.

39. In analyzing the case for possible violation of Section 47(a)(v) of the Act, the following assessment tests are used:

**Whether there is a person or enterprise;**

***It was submitted that:***

40. Refer to paragraph 9 of the report.

**Whether Pick N Pay Zambia falsely represented that any goods had Sponsorship, Approval or Affiliation.**

***It was submitted that:***

41. False representations or misrepresentation is “*any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts*”.<sup>11</sup> In this case the Commission found that the Respondent had labelled their Dale Cheese products with the label, “*Proudly Zambian*” and put these products on display. This indicated to consumers that sought to purchase these products that the products were locally manufactured. This also indicated to consumers that these products were endorsed by, approved by and or affiliated to the Proudly Zambian Campaign (“PZC”) which was spearheaded by the Zambia Association of Manufacturers (“ZAM”) to promote locally manufactured products. However, it was found by the Commission that the Dale cheese products in question were actually manufactured in South Africa. The Respondent therefore misrepresented to consumers that these products were sponsored, approved or affiliated to the PZC and thus violated Section 47(a)(v).

**Submissions to the Report<sup>12</sup>**

***It was submitted that:***

42. In a letter dated 12<sup>th</sup> June, 2020 the Respondent made the following submissions to the report;

*“We would like to make reference to the above captioned matter and further to which we wish to advise that we have been retained by Pick N Pay to act for them in this matter. Kindly there note our interest. In this connection your letter to them dated*

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<sup>11</sup> Black’s Law Dictionary 4<sup>th</sup> Ed. Rev., p1152

<sup>12</sup> Letter from the Respondent dated 12<sup>th</sup> June, 2020

*5<sup>th</sup> June, 2020 together with its enclosures has been forwarded to us with instructions to which we now do.*

*We notice that the commission carried out an investigation whose findings alleges that our client has practiced unfair trading contrary to the Provisions of the Competition and Consumer Protection Act no. 24 of 2010. We disagree.*

*The contents of your report bearing case No. CCPC/CON/1032/32 alleges that our client has misled its consumers by labelling products not manufactured in Zambia as proudly Zambian products.*

*Our clients instructs us that Pick N Pay has never labeled any products not manufactured in Zambia as Proudly Zambian products. In our very humble view, the findings of your office are wrong. We have had a careful perusal of the report prepared by your office and that the findings on page 6 of your report reveal that Pick N Pay did not label Dale Cheese as proudly Zambian but instead stuck a price tag on the product with the product with the words, 'P n P proudly Zambian'. It is surely not in contention that Pick N Pay Zambia Limited is a Zambian company as evidenced by your own Report. The said words simply mean that it is Pick and Pay that is proudly Zambian and not the product itself. Our position is clearly supported by Section 50 of the Competition and Consumer Protection Act No. 24 of 2010 which clearly prescribes what amounts to labelling a product. We Encourage your office to pay a visit to this section.*

*We contend therefore that the evidence on page six of the Report in question does not amount to labelling of a product under the said section 50. For ease of reference, we have taken the liberty to reproduce the section below; 'A product that is sold in Zambia shall have a label to clearly indicate the product name, the ingredients used in the product, the date of manufacture and expiry of the product, the manufacturer's name, the physical location of the manufacturer, the telephone number and any other contact detail of the manufacturer.'*

*It is our client's position and our legal view that the price tag that was inserted on the product did not label the product as being manufactured in Zambia, neither did the product mislead the consumer that the manufacturer is in fact Zambian and located in Zambia. The price tag did not even go so far as to suggest that that the manufacturer's contacts are Zambian numbers. If anything the product in question actually provided the information required by Section 50 aforesaid namely the correct name and details of the manufacturer and the correct physical and email addresses of the manufacturer as being located in South Africa. What even more important to the resolution of the investigation is the fact that the sticker in question did not hide the information disclosing the true manufacturer and their location in*

*accordance with the law. The details required to be displayed by law are clearly visible on the product. We therefore find it totally surprising that your office could, under the circumstances, find that our client is engaged in misleading consumers about the manufacturers of the product either as concluded by your investigations or at all.*

*We therefore communicate our client's position that your conclusions are totally wrong at law and we believe that the Board shall agree with our conclusions. For the record, we hold very firm instructions to defend our client's position to the highest court in the land should that become necessary as your conclusions have a huge negative impact on the goodwill of our client's business in this country."*

### **Board Deliberation**

43. Having considered the facts, evidence and submissions in this case the Board resolves that the Respondent made a false representation, that the Dale Cheese Products were sponsored, approved or affiliated to the PZC and thus violated Section 46(1) as read with Section 45(a)(b) and Section 47(a)(v) of the Act.

### **Board Determination**

44. The facts and evidence of this case have shown that the Respondent did engage in unfair trading practices as relates to the compromise of the standard of honesty and good faith which an enterprise can reasonably be expected to meet, hence is in violation of Section 46(1) as read with Section 45(b) of the Act. The facts and evidence of this case have also shown that the Respondent did engage in unfair trading practices as relates to false representation that any goods or services have sponsorship, approval, affiliation, that they do not have and hence is in violation of Section 47(a)(v) of the Act.

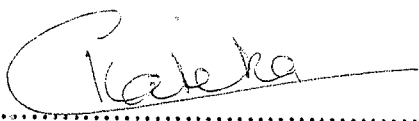
### **Board Directive**

45. The Board hereby directs that;
- i. The Respondent remove all "Proudly Zambian" labels from products that are not locally manufactured within ten (10) days of receipt of the Board Decision in accordance with Section 5(d) of the Act.
  - ii. The Respondent is fined 0.5% of their annual turnover with the applicable cap in line with the Commission's Guidelines for Issuance of Fines (*See Appendix 1 for details*) for breach of Section 46(1) as read with Section 45(a)(b) and 47(a)(v) of the Act in accordance with Section 47(a)(v) of the Act.

- iii. The Respondent submits their latest annual books of accounts to the Commission for calculation of the actual fine within thirty (30) days of receipt of the Board Decision.

*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 28<sup>th</sup> August, 2020



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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 Act No. 24 of 2010: 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	
False or misleading representation		• K1,000 for turnover upto K50,000
Price Display		• K10,000 for turnover above K50,000 upto K250,000
Supply of defective and unsuitable goods and services		• K40,000 for turnover above 250,000 upto K500,000
Section 49) except for Section 49(1)		• K70,000 for turnover above K1,500,000
		• K150,000 for turnover above K1,500,000 upto K3,000,000
		• K200,000 for turnover above K3,000,000 upto K5,000,000
		• K500,000 for turnover above K5,000,000

Display of Disclaimer	0.5% of turnover	K30,000
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(b) The Competition and Consumer Protection Act No. 24 of 2010: Guidelines for Administration of Fines 2019, further provides for additions as follows-

- (i) The starting point of a financial fine will be a fine of not less than 0.5% of annual turnover for first time offenders.
- (ii) (The starting point of a financial fine for a repeat offender will be the previous fine charged by the Commission.
- (iii) Thereafter, the Commission will be adding a 10% of the fine determined in step one above for each aggravating factor

(c) ***Whether the Respondent is a repeat offender under Section 47(a)(iv);***

The Commission's review of the case file for Pick N Pay shows that the Respondent is a first time offender of this Provision of the Act. As such the fine is calculated as follows:

(d) Starting with baseline fine of 0.5%.

= 0.5%