IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2018/HP/0803

IN THE MATTER OF: **THE PROTECTION OF FUNDAMENTAL RIGHTS RULES, 1969, STATUTORY INSTRUMENT NO 156 OF 1969**

IN THE MATTER OF: **ARTICLE 28 OF THE CONSTITUTION OF ZAMBIA, THE CONSTITUTION ACT, CHAPTER 1, VOLUME 1 OF THE LAWS OF ZAMBIA**

IN THE MATTER OF: **ARTICLE 16 OF ZAMBIA'S BILL OF RIGHTS ON THE PROTECTION OF PROPERTY IN THE 1996 CONSTITUTION, CHAPTER 1, VOLUME 1 OF THE LAWS OF ZAMBIA**

IN THE MATTER OF: **ARTICLES 7, 8 AND 17 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS**

IN THE MATTER OF: **ARTICLES 3 AND 14 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS**

IN THE MATTER OF: **SECTIONS 46, 47, 49, 82, 86 OF THE COMPETITION AND CONSUMER PROTECTION ACT No 24 OF 2010**

IN THE MATTER OF: **THE DECISION OF THE BOARD OF THE COMPETITION AND CONSUMER COMMISSION DATED 13th JUNE, 2016 IN CAUSE NO CCPC/CON/162/TC**

BETWEEN:

DR PATRICK NKHOMA **PETITIONER**

AND

SOUTHERN CROSS MOTORS LIMITED **1st RESPONDENT**
THE COMPETITION AND CONSUMER PROTECTION COMMISSION **2nd RESPONDENT**
THE ATTORNEY GENERAL **3rd RESPONDENT**

BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 25th DAY OF JUNE, 2020

For the Petitioner : *Mr J Kalokoni, Kalokoni & Co*
For the 1st Respondent : *Ms M Bwalya and Mrs Milambo, Mwenye and Mwitwa Advocates*
For the 2nd Respondent : *Ms M.M. Mulenga, in house Counsel*
For the 3rd Respondent : *Mrs K.N Mundia and Ms D Mulondiwa*

JUDGMENT

CASES REFERRED TO:

1. *Livingstone v Rawyards Coal Co 1880 5, App Cas 25*
2. *Torkington v Magee 1902 KB 427*
3. *Pennyslavania Coal Co v Mahon 260 US 393 415 (1922)*
4. *Robins v National Trust Co 1927 AC 515, 520*
5. *Musingah v Daka 1974 ZR 37*
6. *The Albazero 1977 AC 774*
7. *Penn Central Transport Co v New York City 438 US 124, 1978*
8. *Johnson v Agnew 1980 AC 367*
9. *Wilson Masauso Zulu v Avondale Housing Project Limited 1982 ZR 172*
10. *Philip Mhango v Dorothy Ngulube and ors 1983 ZR 61*
11. *The Attorney-General v DG Mpundu 1984 ZR 6*
12. *In the matter of Section 53 (i) of the Corrupt Practices Act, No. 10 of 1980 and in the matter of Articles 20 (7) and 29 of The Constitution and in the matter between: Thomas Mumba - Applicant and the People - Respondent 1984 ZR 38*
13. *Garden Cottage Food Ltd v Milk Marketing Board 1984 AC 130*
14. *Lucas v South Caroline Coastal Council 505 US 10032 (1992)*
15. *Zambia National Holdings Limited and United National Independence Party (UNIP) v the Attorney-General 1994 SJ 22*
16. *Burton v Egg & Egg Pulp Marketing Board 1996 114 CLR 185*
17. *Industrial Gases Limited v Waraf Transport Limited and Mussah Mogeehaid 1997 SJ 6*
18. *The Attorney-General, Ministry of Works and Supply and Rose Makano v Joseph Emanuel Frazer and Peggy Sikumba Frazer 2001 ZR 81*
19. *Courage v Crehan 2001 ECR 1-66297*
20. *JZ Car Hire Limited (appellant) v Chala Scirocco (1st respondent) Enterprises Limited (2nd respondent) 2002 ZR 112*
21. *Jamas Milling Company Ltd v Imex Ternational (PTY) LTD SCZ No 20 of 2002*
22. *Emmanuel Chisenga v Zambia National Commercial Bank Plc Appeal No 63 of 2003*
23. *Vincentzo Manfredi and others v Lloyd Adrianco Assosicurazion SPA and others 2006 ECR 1-6619*
24. *Lunn Poly Ltd v Liverpool & Lancashire Properties Limited 2006 2 EGLR 29*
25. *Attorney General v Roy Clarke 2008 Vol 1 ZR 38*
26. *Zambia Railways Limited v Pauline S Mundia, Brian Sialumba 2008 Vol 1 ZR 287*
27. *Crooks v Newdigate Properties Limited 2009 EWCA 283 CA*

28. ***PFleiderer AG V Bundeskkarte Ilamt 2011 ECR 1-05161.***
29. ***Espine Hamusonde v Izwe Loans Limited and the Competition and Consumer Protection Commission, Appeal No 2012/CCPCT/010***
30. ***Airtel Networks Zambia Plc v The Competition and Consumer Protection Commission and Macnicious Mwimba 2014/CCPT/015/CON***
31. ***Patrick Dickson Ngulube v Rabson Malipenga 2015 Vol 1 ZR 46***
32. ***Tokyo Vehicles Limited v the Competition and Consumer Protection Commission Appeal No 179/2015 SCZ/8/261/2015***
33. ***Benjamin Mwelwa v The Attorney General SCZ No 9 of 2019***
34. ***George Peter Mwanza and Melvin Beene v the Attorney General SCZ No 19 of 2019***
35. ***Chama Mutambalilo v The Attorney General SCZ No 32 of 2019***

LEGISLATION REFERRED TO:

1. ***The Constitution of Zambia, Chapter 1 of the Laws of Zambia***
2. ***The Competition and Consumer Protection Act No 24 of 2010***
3. ***The Public Finance Management Act No 1 of 2018***

OTHER WORKS REFERRED TO:

1. ***Black's Law Dictionary, 2nd Edition***
2. ***Black's Law Dictionary by Bryan A. Garner, 8th Edition***
3. ***Black's Law Dictionary, 9th edition***
4. ***Halsbury's Laws of England, 4th Edition Reissue, Vol 12(1)***
5. ***McGregor on Damages, 15th Edition***
6. ***McGregor on Damages, Vol 9, Sweet & Maxwell, 2009***
7. ***Marcus Smith & Nico Leslie, The Law of Assignment, 2nd Edition, Oxford, 2013***
8. ***Giorgio Monti, EU Law, an interest on damages for infringements of Competition Law- A Comparative Report, European University Institute, November, 2016***
9. ***Thomas P. Mclish, Akin Gump Strauss, Hauer & Feld LLP Washington DC, Natural Resources Development and the Administrative State: Navigating Federal Agency Regulation and Litigation, February, 2019***

This matter was commenced by way of petition, filed on 23rd April, 2018, and which was amended on 29th January, 2019. The petition shows that in 2008, the petitioner bought a Mercedes Benz car GL500, registration

number DPNI, from Australia at a total cost of US$180, 000, and that it was shipped to Zambia in the same year. The petition further states that in 2010, the petitioner took the vehicle Mercedes Benz vehicle registration number DPN1 to the 1st respondent for service, verily believing that they are professionals in the area of handling Mercedes Benz cars in Zambia.

The petitioner contends that the 1st respondent however embarked upon a trail of systematic destruction of his vehicle arising from the fact that it did not have the professional expertise to service and repair Mercedes Benz cars, thus putting the petitioner at substantial financial loss and personal inconvenience. It is also averred that the petitioner lodged a complaint against the 1st respondent with the 2nd respondent for unfair trading practices, whereupon the 1st respondent's own admission, the 2nd respondent found the 1st respondent guilty of unfair trading practices, and fined it 0.5% of its annual turnover, as administrative penalties, payable to the State.

The petitioner contends that this is because there is no provision for awarding compensation or damages in the Competition and Consumer Commission Act No 24 of 2010, and thus, the petitioner was not awarded anything by the Board of the 2nd Respondent, which adjudicated upon the petitioner's claim. The petitioner claims that the 2nd respondent's taking of the proceeds of the judgment and/or decision rendered in favour of the petitioner, amounts to regulatory expropriation of a citizen's property by the State, without due compensation.

The particulars of the regulatory expropriation in contravention of Article 16 of the Bill of Rights is stated as follows;

1. *Section 46(1) of the Act imposes on a person or enterprise which contravenes the Act, a fine not exceeding ten percent of that person's or enterprise's annual turn over payable to the Commission instead of paying damages or compensation to the complaining citizen.*

2. *Section 47 of the Act also imposes on the offending person or enterprise, a fine of ten percent of the annual turnover payable to the Commission, instead of paying it to the citizen, who is the victim of unfair trading practice.*

3. *Section 49(1) of the Act does not make any provision for the payment of damages or compensation to a citizen who is supplied with defective goods and services. Instead, only the Commission receives compensation in the form of penalties calculated at ten percent of the enterprise's annual turnover.*

4. *Section 82 creates a civil offence for contravening the Act, punishable by payment of a fine to the Commission without any form of compensation to the injured citizen.*

5. *Section 86 makes it very categorical that a fine payable under the Act shall be a debt payable to the State, and shall be recoverable as a civil debt without making any provision for the payment of compensation or damages to the injured citizen.*

6. *The Act only provides for public enforcement without any provision for private enforcement of breaches of the Act, thus depriving citizens of civil law remedies, such as the payment of damages, compensation and restitution.*

7. *The cited sections of the Act enable the State to acquire the proceeds of the decision rendered in favour of a citizen, in the form of*

administrative penalties, which is tantamount to a direct appropriation of a citizen's property by the State without compensation.

The petition also states that in this case, only the State has benefited from the petitioner's loss, leaving him with no remedy for the substantial losses that he has suffered at the hands of the 1st respondent. The petitioner therefore prays for the following;

1. *A declaration that a citizen of Zambia who lodges a complaint against a person or an enterprise under the provisions of the Competition and Consumer Protection Act No 24 of 2010 (The Act) has personal property rights in the judgment and/or the decision rendered in his favour by the Board of the Competition and Consumer Protection Commission or the Competition and Consumer Protection Tribunal.*

2. *A declaration that the Government's taking of the proceeds of the judgment or decision rendered in favour of a citizen under the Act in the form of administrative penalties at 5% or 10% of the offending person's or enterprise's annual turnover without any provision for civil law remedies such as payment of compensation or damages to the injured citizen is tantamount to regulatory expropriation, taking or confiscation of a citizen's property by the State without compensation, contrary to Article 16 of Zambia's bill of rights, and is in breach of Zambia's international commitments to the protection of property of its citizen's and therefore illegal and unconstitutional.*

3. *A further declaration that the failure by the Act to provide for the enforcement of breaches of the Competition and Consumer Protection*

Act deprives the citizens of Zambia, the right of access to civil law remedies, such as compensation, damages, and equitable remedies contrary to Articles 7 and 8 of the Universal Declaration of Human Rights of 1948 and Articles 3 and 4 of the African Charter on Human and People's Rights, and therefore illegal and inequitable.

4. *An order for restitution to the petitioner of the amounts of money collected by the 2nd respondent from the 1st respondent as administrative penalties.*

5. *A further order for compensation by the 1st respondent to the petitioner for the damage caused to the petitioner's property, and for the inconvenience caused to him as he had to make arrangements for alternative transport.*

6. *Interest and costs.*

The amended affidavit verifying the petition which is deposed to by the petitioner, reiterates that the petitioner bought the Mercedes Benz GL500 at US$180, 000 from Australia in 2008. He adds that when he registered the vehicle, it was given a personalized number plate. That the petitioner took the vehicle for service with the 1st respondent is repeated, as is the assertion that the 1st respondent embarked upon a trail of systematic destruction of the vehicle.

The petitioner states that the 1st respondent gave the vehicle to an incompetent workshop foreman, who had no experience in repairing and maintaining Mercedes Benz cars, thus causing substantial damage to his new vehicle. On the damages done to the car, the petitioner deposes that in 2010, the 1st respondent's foreman damaged the front left door as he was working on the vehicle. Then in 2011, the 1st respondent's foreman

damaged the car cylinder head, as they were working on the car, thus giving rise to oil leaks.

Further, the foreman damaged the power steering pump, while he was working on the car. It is averred that between 28th October, 2013 and 19th March, 2014, the vehicle had to be taken back to the 1st respondent due to complete inactivation of the tyre monitor and power system, due to lack of skill by the workshop foreman. The petitioner further deposes that on 24th March, 2015, the AC compressor was damaged while the 1st respondent was working on the vehicle, and on 10th July, 2015, the 1st respondent's foreman damaged the car's radiator top hose and wind screen washer pipes due to the incompetence of the workshop foreman.

Still on damage to the vehicle, the petitioner states that the power steering failure resulted from the loss of power steering fluid due to the damage caused to the car by the incompetence of the workshop foreman. It is deposed that on 16th September, 2015, the petitioner lodged a complaint with the 1st respondent's management on the damage caused to the power steering pump reservoir causing oil leaks, whereupon the 1st respondent recovered the motor vehicle to repair the damaged pump reservoir.

The petitioner further deposes that the 1st respondent admitted that the works were executed by an incompetent technician under the guidance of another inexperienced workshop foreman, and the 1st respondent apologised to the petitioner for the damage caused to his vehicle. The 1st respondent further informed him that the contract of the incompetent workshop foreman would not be renewed.

It is stated that during the period that the petitioner's vehicle was in and out of the 1st respondent's workshop due to poor workmanship, the petitioner was greatly inconvenienced, as he had to organize alternative transport to move from one point to another. He also deposes that due to the damage caused to his brand new vehicle, the petitioner lodged a complaint with the Competition and Consumer Protection Commission, for unfair trading practice on the part of the 1st respondent.

He adds that the lodging of the complaint against the 1st respondent was also based on the fact that the company admitted during the meetings that the petitioner had with the 1st respondent, that the incompetent mechanic had damaged his vehicle. That during those meetings, the petitioner had shown the 1st respondent that its mechanic had affixed a high pressure power steering pipe with glue, and tightened it with a water clamp, instead of using the right materials, a fact which the petitioner relied upon in lodging the complaint with the 2nd respondent.

The averment is that on 13th June, 2016, the 2nd respondent's Board delivered its decision in his favour, and fined the 1st respondent by way of administrative penalties, calculated at 0.5% of the 1st respondent's annual turnover. Exhibited as 'DPN1' to the affidavit, is a copy of the decision of the Board. It is stated that the decision did not award the petitioner anything as there is no provision for civil law remedies, such as the payment of compensation or damages, in the Competition and Consumer Protection Act No 24 of 2010.

The petitioner further states that he feels aggrieved that as a citizen of Zambia, who suffered loss at the hands of the 1st respondent, the State should benefit from his loss without providing him any remedies, such as the payment of damages or compensation.

That he has been advised by his lawyers that he has personal property rights in the decision, which the Board rendered in his favour, and which the State cannot take away from him without any compensation at all. The petitioner goes on to depose that in his academic career, he has travelled to Australia, the United States of America and the European Union, and that in all these countries, private citizens like himself are allowed by their governments to sue individuals or companies that cause harm to consumers by unfair trading practices, such as those committed by the 1st respondent in this matter.

It is also deposed that the petitioner has been advised by his lawyers that the Government's taking of the proceeds of the decision rendered by the 2nd respondent's Board in his favour in the form of administrative penalties calculated at 5% or 10% of the offending company's annual turnover, amounts to confiscation or expropriation of the petitioner's property by the State, without any form of compensation to him. The averment is further that the 1st respondent appealed against the decision of the 2nd respondent, but withdrew it, as shown on exhibit 'DPN2'.

The petitioner believes that the 1st respondent paid the 2nd respondent penalties in the amount of K50, 000.00, which money should have gone to the petitioner as the person who suffered the loss in this matter. It is deposed that the 2nd respondent has not paid the petitioner anything for the damage caused to his property, and for the inconvenience that was caused to him during the time the 1st respondent was working on his vehicle, and he had to make arrangements for alternative transport.

The petitioner avers that his rights to property given to him by the Bill of Rights and the International Conventions to which Zambia is a signatory have been infringed upon.

The 1st respondent filed an answer on 19th February, 2019. In that answer, the petitioner's assertion that he bought the Mercedes Benz vehicle from Australia in 2008, is said to be within his peculiar knowledge. The 1st respondent admits that the petitioner took his vehicle to it for service in 2010, adding that it provides professional and outstanding service to its customers.

The 1st respondent denies the assertion that it embarked on a trail of systematic destruction of the petitioner's motor vehicle, as it did not have the requisite professional expertise to service and repair the vehicle, which resulted in the petitioner incurring substantial financial loss and personal inconvenience. It's defence is that it provided outstanding service to the petitioner dating back to June, 2010. That this is in exception to the one incident where the petitioner's vehicle was recovered after a power steering failure resulting from loss of power steering fluid.

It is the 1st respondent's defence that it was established that the power steering oil reservoir was damaged whilst the vehicle was in the custody of the 1st respondent for previous service. Further, that there was an attempt by the Technician under the guidance of the Workshop Foreman to repair the pump reservoir, which failed. The 1st respondent states that the damage to the pump reservoir was not reported to the Workshop Manager or senior management, and unfortunately, the vehicle was released to the petitioner in that state.

It is also stated that the damage should have been communicated to management at the 1st respondent, so that the said damage could have been rectified, but the Workshop Foreman and the Technician released the vehicle to the petitioner, and concealed the damage from management of the 1st respondent. The 1st respondent denies that it

deliberately damaged the petitioner's vehicle, stating that it upholds the highest standards in the provision of services to its customers.

In this regard, the 1st respondent states that as communicated to the 2nd respondent in its letter dated 1st December, 2015, the 1st respondent promptly took all the necessary steps to rectify the damage caused to the vehicle, including preparation of a report on the service history of the vehicle, which it provided to the 2nd respondent. Further, the 1st respondent promptly replaced the power steering reservoir with a new one at its' cost, and accordingly terminated the services of the Technician and the Foreman who worked on the vehicle.

The 1st respondent agrees that the petitioner lodged a complaint with the 2nd respondent against it for unfair trading practices. It also agrees that it admitted the allegations in the complaint, and upon being found guilty, it was ordered to pay a fine of 0.5% of its annual turnover as administrative penalties, payable to the State. The 1st respondent adds that the 2nd respondent also found that it promptly repaired the vehicle, and replaced the part that was damaged with a new one, and that the vehicle was given back to the petitioner, who received it on 28th January, 2016.

The 1st respondent states that it paid the fine to the 2nd respondent as directed, and it therefore complied with the decision given by the 2nd respondent. The allegations with regard to there being no provision for awarding compensation or damages in the Competition and Consumer Protection Act No 24 of 2010, and the petitioner therefore not being awarded anything by the Board of the 2nd respondent which adjudicated on the petitioner's complaint, is said to be within the petitioner's peculiar knowledge. The same goes with regard to the assertion that the 2nd

respondent's taking over of the proceeds of the judgment/and or decision rendered in favour of the petitioner amounts to regulatory expropriation of a citizen's property by the State without due compensation.

As regards the particulars of regulatory expropriation in contravention of Article 16 of the Constitution that are alleged, the 1st respondent states that the essence of the Competition and Consumer Protection Act No 24 of 2010 is to regulate and enforce competition and consumer law. It therefore prays that;

1. *It is not indebted to the petitioner in any way as it promptly repaired the vehicle back to its' prior state, and the vehicle was given back to the petitioner within three (3) days.*
2. *The petitioner is not entitled to compensation for the damage and/or loss as the vehicle was promptly repaired and returned to the petitioner in good time.*
3. *The matter be dismissed as there is no cause of action against the 1st respondent.*
4. *The matter be dismissed as it lacks merit and is frivolous and vexatious.*
5. *The petitioner be ordered to pay the costs of the suit.*

The affidavit in opposition to the affidavit verifying the amended petition, which is deposed to by Antony Voorhout, the Managing Director of the 1st respondent, reiterates that the averments regarding when the petitioner bought the motor vehicle from Australia are within his peculiar knowledge. As regards the petitioner's assertions that he took the vehicle to the 1st respondent for service in 2010, it is stated that the said vehicle

was first taken to the 1st respondent for service B on 24th June, 2010, and that service was carried out as requested by the petitioner.

It is stated that service B included oil and filter change, air filter change, dust filter change, fuel filter replacement, fluid level check and replacement if necessary, tyre pressure check, tyre rotation, wheel balancing and alignment, a diagnosis test of fundamentals on the electrical system, battery test, climate control system functional test, and general inspection of and replacement of brakes if necessary. It is also deposed that the 1st respondent at the petitioner's request, attended to the repair to the left door of the vehicle.

Exhibited as 'AV1' to the affidavit is a copy of the invoice that was issued for the service, as well as the repairs to the left door, which was paid for. The deponent states that he verily believes that neither the 1st respondent nor its' foreman damaged the left door of the petitioner's vehicle. That the repair to the said door and the service was carried out in a professional manner, as per the 1st respondent's professional standards, to the satisfaction of the petitioner.

It is averred that contrary to the petitioner's allegations that the 1st respondent embarked on systematic destruction of the petitioner's vehicle due to an incompetent workshop foreman who had no experience in repairing Mercedes Benz vehicles, resulting in damage to the left front door of the petitioner's vehicle, the service of the vehicle and the repair to the left front door of the vehicle was done to the satisfaction of the petitioner, who had no complaints in relation to the same.

The 1st defendant denies having caused the other damage to the vehicle as deposed to by the petitioner, stating that the petitioner will be put

strict proof thereof at the trial. The 1st respondent denies that it admitted that the works were executed by an incompetent technician under the guidance of another inexperienced workshop foreman, and that it apologized to the petitioner for the damage done to the petitioner's vehicle. Its' position is that competent staff attended to the petitioner's vehicle.

The 1st respondent further denies that the petitioner was put to great inconvenience during the period that his vehicle was in the 1st respondent's garage, and that he had to make alternative transport arrangements during that period. It is stated that the petitioner took the vehicle to the 1st respondent on several occasions for different types of repair works and service, which the petitioner requested, and were not as a result of the 1st respondent's negligence, as alleged by the petitioner.

The deponent goes further to depose on the service history of the petitioner's vehicle with the 1st respondent as follows;

a) That on 15th July, 2010 at a mileage of 28, 103 kilometres, the petitioner took in the vehicle for a D service which was requested by the petitioner. The petitioner also requested for a quotation to replace the windscreen as well as the CD loader which had stopped functioning. Exhibit 'AV2' is a copy of the invoice for the service and repair works. The windscreen and CD loader were fitted, at the petitioner's request.

   That at no time did the 1st respondent's foreman damage the motor vehicle's cylinder head and power steering pump as alleged by the petitioner.

b) On 24th August, 2011, at a mileage of 29, 297 kilometres, the petitioner on his own accord, unrelated to the 1st respondent's works on the vehicle, took the vehicle to the 1st respondent for a service measure, which was carried out on the vehicle to replace the plug at the rear of the cylinder head, which was allowing an oil leak on the vehicle. Exhibited as 'AV3' is an invoice for the repair works which were done at the petitioner's cost.

c) Then on 20th June, 2012, at a mileage of 39, 962 kilometres, and at the instance of the petitioner, B service was carried out on invoice number 10J11089, exhibited as 'AV4 to the affidavit.

d) On August 10th, 2012, at a mileage of 33, 638 kilometres, whilst the petitioner was at the 1st respondent's premises, where he was checking on another vehicle, the vehicle developed a fault that was attributed to the power steering pump, which fault was in no way due to the 1st respondent's fault. The petitioner submitted a warranty claim with the 1st respondent, in order that the 1st respondent could attend to the fault on the power steering pump.

However, the claim was rejected by the 1st respondent, as the warranty period had expired at the time the fault occurred. 'AV5' is a copy of the invoice for the repair works that were done to the fault with the power steering pump. Therefore, it is not true that the 1st respondent's foreman damaged the power steering pump when the vehicle was taken into the 1st respondent for repairs and service previously. The fault occurred when the petitioner was within the 1st respondent's premises, after the petitioner had driven the vehicle himself when he went to look at another vehicle that he had taken in for service.

e) On 28th October, 2013, at a mileage of 38, 547 kilometres, the petitioner took in the vehicle for B service, and during that service, the 1st respondent attended to faulty brakes, malfunction of the boot lock, and reactivated a flat tyre. Exhibit 'AV6' is a copy of the invoice for the service and repair works. The vehicle was taken back to the 1st respondent by the petitioner due to incompetent activation of the tyre monitor and power steering system by an incompetent foreman, when in fact the complaints arose when the vehicle was in the custody of the petitioner himself.

That the said taking back of the vehicle to the 1st respondent due to incomplete activation of tyre monitor and power system was once on 28th October, 2013, and not over a period of time, as alleged by the petitioner.

f) On 19th March, 2014 at a mileage of 39, 860 kilometres, and contrary to the petitioner's assertions, the vehicle was recovered by the 1st respondent from the Lusaka Golf Club area after a power steering fault occurred, which was caused by a foreign particle that damaged the idler pulley and scored the pulley on the water pump, as a result of which the belt drive was dislodged. The petitioner sourced the drive belt, idler pulley and water pump from Australia, which was replaced by the 1st respondent.

The 1st respondent invoiced the petitioner for a new battery which was fitted in the vehicle during the period that the vehicle was in the 1st respondent's possession for the repair works referred to above, as shown on exhibit 'AV7'. The air conditioning compressor was not damaged whilst the vehicle was in the custody of the 1st respondent as alleged by the petitioner, but the fault with the air

conditioning compressor was established by the 1st respondent when the vehicle was taken in by the petitioner for A service on 24th March, 2015.

An A service involves engine oil and filter change, air filter check and replacement if necessary, dusty filter check and replacement if necessary, fluid level check and correction, tyre pressure check, fundamentals on electrical systems (diagnosis tester) and general inspection on the brakes and suspension. Among the repair works carried out was assessment of the damage to dash board, inspection of shocks, check for air conditioning malfunction and resetting of a flat tyre.

That check established that the air conditioning compressor was faulty, and the 1st respondent issued a quotation to that effect. The 1st respondent also invoiced the petitioner for the repair works as evidenced on exhibits 'AV8' and 'AV9'. Contrary to the assertions by the petitioner, the 1st respondent's foreman did not damage the vehicle's radiator top hose and windscreen washer pipes. The vehicle was taken into the 1st respondent at a mileage of 46, 017 kilometres on 11th July, 2015, to attend to an engine check light.

That upon close inspection of the vehicle, the 1st respondent established that there was a damaged battery positive cable, a damaged radiator top, as well as damaged windscreen washer pipes, which had been damaged by rodents. The 1st respondent ordered the required parts for the repair works, including the air conditioning compressor, and therefore, the 1st respondent's foreman did not damage the vehicle's radiator top hose and

windscreen washer pipes as alleged, but the damage occurred whilst the vehicle was in the petitioner's possession.

g) At a mileage of 46, 140 kilometres, the vehicle was recovered after a power steering failure system resulting from loss of power steering fluid. It was established that the power steering oil reservoir had been damaged whilst the vehicle had been taken to the 1st respondent for previous service. The 1st respondent also established that there was an attempt by the technician under the guidance of the workshop foreman to repair the pump reservoir, which failed.

The damage was not reported to the 1st respondent's management, and had that been done, the damage would have been rectified immediately. However, the workshop foreman and the technician released the vehicle to the petitioner in that state, without informing the management at the 1st respondent. The 1st respondent did not deliberately damage the petitioner's vehicle, and it upholds the highest standards in the provision of services to its customers.

The 1st respondent as indicated in its letter to the 2nd respondent dated 1st December, 2015, promptly took all the necessary steps to rectify the damage that was caused to the vehicle, including preparation of a report on the service history of the vehicle that it provided to the 2nd respondent, as shown on exhibit 'AV10'. It promptly replaced the power steering reservoir with a new one, at its' cost, and terminated the services of the workshop foreman and the technician.

The 1st respondent dealt with the petitioner's grievances expediently and efficiently in its commitment to upholding the highest workmanship standards, which it is well known for, after the incident was reported to it.

The deponent avers that the 1st respondent admits that on 16th September, 2015, the petitioner lodged a complaint with it over the damage that was caused to the power steering pump reservoir that resulted in oil leaks, and that it recovered the vehicle, and repaired it. It is stated that the 1st respondent apologised to the petitioner for the damage caused to his vehicle, and it immediately remedied the damage caused, and terminated the contracts of the technician and the workshop foreman.

The deponent avers that the 1st respondent informed the petitioner that it would provide him with an alternative vehicle for use, as seen on exhibit 'AV11', the letter dated 19th November, 2015. However, as the vehicle was repaired within three (3) days, and prior to the alternative vehicle being sourced, the 1st respondent did not provide the petitioner with an alternative vehicle. The assertion that the 1st respondent damaged the petitioner's brand new vehicle is denied.

The 1st respondent's position is that the vehicle was taken to it on several occasions at the petitioner's behest, for several faults, as outlined above. The averments with regard to the petitioner having lodged a complaint with the 2nd respondent as a result of the damage that was caused to his vehicle, which the 1st respondent admitted during the meetings that he held with it, is said to be within the petitioner's peculiar knowledge.

The same goes with regard to the averment that the Board of the 2nd respondent rendered its decision on 13th June, 2016 in which the 1st respondent was fined administrative penalties at 0.5% of its annual turnover.

The assertion that the petitioner was not awarded anything by the Board of the 2nd respondent in its' decision, as there is no provision in the Competition and Consumer Protection Act No 24 of 2010 for civil law remedies, such as compensation or damages, is equally said to be within the petitioner's peculiar knowledge. The 1st respondent denies that the petitioner is aggrieved as a citizen of Zambia who suffered loss at its' hands, that the State should benefit from his loss, without providing him with any compensation.

The claim that the petitioner has personal property rights in the decision of the Board of the 2nd respondent is said to be within the petitioner's peculiar knowledge. The same goes as regards the assertions that the jurisdictions that the petitioner has named, where he has travelled to, have provisions that allow citizens to sue individuals or companies that cause harm to consumers, by unfair trading practices, such as those committed by the 1st respondent.

It is deposed that the 1st respondent is not liable to pay the petitioner for the damage that he alleges was caused to his vehicle, and for the inconvenience caused during the period that his vehicle was with the 1st respondent, and he had to make alternative transport arrangements. The averment is that following the lodging of the complaint with the 1st respondent by the petitioner, the 1st respondent responded to the complaint, as shown on exhibit 'AV12'.

The 2nd respondent filed an answer on 1st February, 2019. In that answer, the 2nd respondent like the 1st respondent states that the assertions with regard to when the petitioner bought the vehicle from Australia is said to be with the petitioner's peculiar knowledge. The 2nd respondent however agrees that the petitioner took the said vehicle to the 1st respondent for service in 2010. It denies that the 1st respondent embarked on a systematic destruction of the petitioner's vehicle.

The 2nd respondent states that its' Board found that the 1st respondent failed to exercise reasonable care and skill when repairing the petitioner's vehicle. That this was attributed to the 1st respondent's technician affixing the high pressure steering pipe with glue, and tightening it with a water camp. The 2nd respondent admits that the petitioner lodged a complaint with it against the 1st respondent, and that it rendered a decision in which the 1st respondent was fined 0.5% of its annual turnover as administrative penalties, payable to the State.

The 2nd respondent states that it has no jurisdiction to award compensation, as the same can be obtained through the courts of law. That on this account, the Board of the 2nd respondent directed the petitioner to sue the 1st respondent for compensation before the courts of law. The 2nd respondent denies that it took over the proceeds of the judgment and/or decision that was rendered in favour of the petitioner, stating that the decision was not rendered in favour of the petitioner, but that of the State, and that the same does not amount to regulatory expropriation of citizen's property by the State without due compensation.

In response to the particulars of regulatory expropriation in contravention of Article 16 of the Constitution that are alleged with

regard to Sections 46(1), 47, 49(1) and 82 of the Competition and Consumer Act No 24 of 2010, the 2nd respondent states that the said provisions impose a fine of not more than ten (10) percent of a person or an enterprises annual turnover, payable to the 2nd respondent. Further, this is derived from the core functions of the 2nd respondent, as stipulated in Section 5 of the Act.

It is stated that as rightly stated by the petitioner, Section 86 of the Act is categorical that a fine payable under the Act shall be a debt that is payable to the State, and is recoverable as a civil debt without making provision for compensation or damages to the injured citizen. The 2nd respondent's position is that this is because the essence of the Act is to regulate and enforce competition and consumer protection law, which falls under the umbrella of public enforcement.

Further, that citizens still have the avenue of private law to claim compensation, damages and restitution. The 2nd respondent denies that the sections complained of enable the State to acquire proceeds of the decision rendered in favour of a citizen in the form of administrative penalties, which is tantamount to direct expropriation of a citizen's property by the State without compensation.

In this regard, the 2nd respondent states that the proceeds of the decisions rendered are in favour of the State, and the same does not amount to regulatory expropriation of citizen's property by the State without due compensation. The 2nd respondent also denies that in this case, only the State has benefited from the petitioner's loss leaving him with no remedy, for the substantial loss that he has suffered at the hands of the 1st respondent, stating that the petitioner was directed by

the Board of the 2nd respondent to pursue compensation through the courts of law.

The 2nd respondent prays as follows;

i. *For a declaration that the citizens of Zambia who lodge a complaint against a person or an enterprise under the provisions of the Competition and Consumer Protection Act No 24 of 2010 do not have personal property rights in the decisions rendered by the Board of the 2nd respondent or the Competition and Consumer Protection Tribunal.*

ii. *For a declaration that the Government's taking of the proceeds of the decision/judgment in relation to the fine of not more than ten (10) percent of the person or an enterprise's annual turnover without civil law remedies does not amount to regulatory expropriation, and as such, is not in breach of Article 16 of the Zambian Bill of Rights, and the international commitments to the protection of property of its citizens, and is therefore legal and lawful.*

iii. *For a declaration that the Competition and Consumer Protection Act No 24 of 2010 cannot provide for civil law remedies such as compensation, damages and equitable remedies, as the same have been provided for under private law.*

iv. *An order that the petitioner is not entitled to any amounts of money collected by the 2nd respondent from the 1st respondent as administrative penalties.*

v. *A declaration that the petition be dismissed as it lacks merit, and is frivolous and vexatious.*

vi. Any other relief that the court may deem fit.

vii. *Costs.*

In the affidavit in opposition to the affidavit verifying the amended petition, which is deposed to Joseph Mutale, an investigator in the employ of the 2nd respondent, the 2nd respondent reiterates that the facts alleging when the petitioner bought the vehicle are within his peculiar knowledge.

As regards the averment regarding the petitioner having taken to the 1st respondent for service, and that the 1st respondent embarked on a systematic destruction of the said vehicle, as it gave the vehicle to an incompetent workshop foreman, who had no experience in repairing and maintaining Mercedes Benz vehicles, resulting in substantial damage to the petitioner's new vehicle, it is stated that the 2nd respondent found that the 1st respondent did not exercise reasonable care and skill when repairing the petitioner's vehicle.

The same goes with regard to the allegations that the 1st respondent's foreman damaged the front left door of the vehicle as he repaired it, and the said foreman also damaged the car's cylinder head as the vehicle was being repaired, resulting in oil leaks. It is also the same averment in relation to the assertion that the foreman damaged the power steering pump while he was working on the vehicle.

The 2nd respondent also maintains the position with regard to the petitioner's allegations that between 28th October, 2013 and 19th March, 2014, the vehicle had to be taken back to the 1st respondent due to incompetent inactivation of the tyre monitor and power steering system due to the lack of skill by the workshop foreman. It is further the 2nd

respondent's position with regard to the allegation that on 24th March, 2015, the AC compressor was damaged as the 1st respondent worked on the vehicle, and that on 10th July, 2015, the 1st respondent's foreman damaged the car's radiator top hose and windscreen washer pipes, due to incompetence.

The 2nd respondent maintains the position as regards the assertion that the power steering failure resulted from loss of the power steering fluid, due to the damage caused to the car by the incompetence of the workshop foreman. The 2nd respondent states that the 1st respondent admitted during the investigations that it's technician who was working under the instruction of the workshop foreman repaired the leak to the power steering reservoir using an adhesive compound, which was not the correct procedure.

Further, the 1st respondent during the investigations, stated that the correct procedure was for the petitioner to be advised that the power steering reservoir tank needed to be replaced and fitted before the vehicle could be released to the petitioner. The 2nd respondent agrees that the petitioner lodged a complaint with the 1st respondent over the damage caused to the power steering reservoir tank, and that the 1st respondent recovered the vehicle in order that it could repair it.

The 2nd respondent further agrees that the 1st respondent admitted that the works were executed by an incompetent technician under the guidance of another inexperienced workshop foreman, and that the 1st respondent apologised to the petitioner for the damage that was caused to his vehicle. The 2nd respondent further states that during the investigations, it was established that the 1st respondent failed to provide the petitioner with a relief vehicle within reasonable time, despite the 1st

respondent having informed the petitioner that it would provide him with a relief vehicle within a few days.

The 2nd respondent admits that the petitioner lodged a complaint with it against the 1st respondent as a result of the damage that was caused to his vehicle. The 2nd respondent however states that the assertions that the said complaint was also on the basis that the 1st respondent admitted during meetings that the damage to the plaintiff's vehicle was due to the 1st respondent's incompetent mechanic, is within the petitioner's peculiar knowledge.

It is also stated that while the petitioner in his petition states that he had shown the 1st respondent that their mechanic affixed the high pressure power steering pipe with glue, and tightened with a water camp, instead of using the right materials, the 2nd respondent states that the petitioner did not mention this in the complaint form.

The 2nd respondent denies the assertion that the decision of the 2nd respondent's Board was in favour of the petitioner, but it agrees that the petitioner was not awarded anything, as there is no provision for civil law remedies, such as the payment of compensation or damages, in the Competition and Consumer Protection Act. It is also the 2nd respondent's averment that while the petitioner is aggrieved as he suffered loss at the hands of the 1st respondent, it is the reason why it directed the petitioner to sue the 1st respondent for compensation.

The 2nd respondent denies the petitioner's claim that he has personal property rights in the decision that the Board of the 2nd respondent made, stating that the decision was not in favour of the petitioner, but in the State's favour. It is stated that the averment that other states that

the petitioner has listed, allow citizens to sue individuals or companies that cause harm to them by unfair trading practices is within the petitioner's peculiar knowledge.

The 2nd respondent denies that the Government's taking over of the proceeds of the decision that was rendered in his favour in the form of administrative penalties amounts to expropriation or confiscation of his property by the State, without due compensation. It is the 2nd respondent's position that the decision of the 2nd respondent's board was rendered in favour of the State, and not the petitioner.

The 2nd respondent confirms that the 1st respondent initially appealed against the decision of its Board, but that the appeal was later withdrawn, and it paid the fine. The 2nd respondent however denies that the administrative fine of K50, 000.00 that was paid to it is payable to the petitioner for the loss that he suffered, as the same is only payable to the State for violation of the Act.

It is stated that the petitioner was directed to sue the 1st respondent before the courts of law for compensation, as a result of the failure by the 1st respondent to provide a relief vehicle to him, during the time that it was repairing the petitioner's vehicle. The 2nd respondent denies having infringed on the petitioner's rights as enshrined in the Bill of Rights, and the international conventions to which Zambia is a signatory. It contends that the petitioner has a right to sue the 1st respondent for compensation through private law.

The 3rd respondent filed an answer on 14th September, 2018. The gist of that answer is that the assertions by the petitioner as to when he bought the vehicle and he took it for service with the 1st respondent, and the

damage occasioned to the vehicle, are within his peculiar knowledge. The 3rd respondent agrees that the petitioner lodged a complaint against the 1st respondent with regard to his vehicle with the 2nd respondent.

The 3rd respondent further agrees that the Board of the 2nd respondent fined the 1st respondent 0.5% of its annual turnover, after it admitted the petitioner's complaint. The 3rd respondent however denies that there has been regulatory expropriation of the petitioner's property by the decision of the 2nd respondent's Board, that directed payment of the administrative penalties that was paid to the 3rd respondent.

It states that the said administrative penalty did not belong to the petitioner, and expropriation entails infringement of one's right to property, which is not the position in this case. The 3rd respondent denies that the petitioner has been left with no remedy, as only the State has benefited from his loss, as the petitioner can sue in the courts of law as advised by the Board of the 2nd respondent.

In the affidavit in opposition to the affidavit verifying the amended petition, which is deposed to by Kaumbu Ndulo Mundia, a Senior State Advocate in the Attorney General's chambers, it is averred that the decision made by the Board of the 2nd respondent to fine the 1st respondent by way of administrative penalties is provided for under the law relating to competition and consumer protection.

Further, that the decision of the Board of the 2nd respondent not to pay the petitioner any compensation was within the law, as the enabling legislation does not give the Board of the 2nd respondent authority to order such compensation. It is averred that the petitioner has a remedy

available, as he can sue for compensation through the courts of law, as advised by the Board of the 2nd respondent.

At the trial, the petitioner testified and he did not call any witnesses. The 1st respondent called two (2) witnesses, while the 2nd respondent called one (1) witness and the 3rd respondent did not call any witnesses.

In his testimony, the petitioner told the court that the 1st respondent used to service his brand new vehicle, Mercedes Benz GL500, in a dealership for Mercedes Benz cars. He testified that initially, the 1st respondent just did routine service to the vehicle, but after sometime, the vehicle developed problems, the major one being the failure of the air conditioning system. Still in his testimony, the petitioner stated that he repaired the air conditioning system of the vehicle through the 1st respondent after he acquired units from Australia.

It was stated that before the failure of the air conditioning system, the petitioner had gone to the 1st respondent to check on his wife's Mercedes Benz vehicle, and as he left the garage, the power steering failed. He thus left the vehicle at the garage, as it could not be driven without the power steering. He bought the spare parts for the power steering and took them to the 1st respondent so that the power steering could be repaired. The petitioner's testimony was further that, from there, the vehicle started functioning properly, and he drove it back home.

The next day, he went to Intercontinental Hotel to pick up some laundry, and as he drove out of the hotel, he heard a loud hissing sound coming from the front of his vehicle, and he failed to control the vehicle, as it had lost the entire power steering system. The petitioner told the court that

he managed to drive the vehicle to his house, although he struggled, and upon arrival, he immediately called the 1st respondent.

However, the next day, he travelled out, and the 1st respondent could not pick up his vehicle, and the vehicle was only collected on his return. He stated that he followed the vehicle to the garage, and there, the senior mechanic pointed out to him that the failure of the power steering was caused by their mechanic who had broken the power steering outlet while he was fixing the air conditioning unit. He was further informed that the mechanic had used bostik to attach the power steering back to the tongue. The mechanic had also used a low pressure water pipe clamp to clamp back the nasal of the hydraulic pipe of the power steering pipe, rudimentally.

It was stated that this resulted in the increase of probability of death to the user of the vehicle. The petitioner continued testifying, stating that as an aircraft engineer, he was horrified at what had been done, as hydraulics, water pipes and bostik cannot be mixed in a high powered power steering hydraulic system, and that major aircraft disasters had been caused by hydraulic system failure.

Still in his testimony, the petitioner told the court that he had a meeting with the 1st respondent's General Manager, who confessed that their mechanic did not tell anyone at the 1st respondent about the rudimentary fixing of the power steering after he had damaged it. He told the 1st respondent that he would give them the vehicle, as it was damaged, and they should get him a new one. That is how the 1st respondent wrote a letter to him, which is at page 136 of the petitioner's bundle of pleadings, in which they apologised, and assured him that they would fix the power steering system.

The 1st respondent had further informed him that they would give him another vehicle as they fixed his vehicle, but they did not do so. In the letter, the 1st respondent acknowledged that the power steering was damaged whilst the vehicle was in its possession for previous repair, and that the damage was not brought to the 1st respondent's attention. The 1st respondent had also indicated that the control protocol had not been followed, and the affected staff were disciplined.

The petitioner further testified that he lodged a complaint with the Competition and Consumer Protection Commission, the 2nd respondent herein. In the meantime, the 1st respondent asked him to pick up the vehicle in order to avoid further damage to it, as the matter was being handled by the 2nd respondent. He stated that the 1st respondent was found wanting in unfair trading practices by the 2nd respondent, as they had another case for which they had been warned, but had not been charged for.

The petitioner's evidence was that the 2nd respondent found in his favour, as seen from the decision which is at page 12 of the petitioner's bundle of pleadings. He added that the State was not a party to the proceedings, and the 1st respondent was fined 0.5% of its' annual turnover, as a second violator. It was also the petitioner's testimony that when he lodged the complaint with the 2nd respondent, he expected that the 1st respondent would be fined heavily, and that he would be adequately compensated.

He stated that he expected to be compensated not only for the time that the car was being repaired, but also for the probabilities that he would not be before this court telling his tale, looking at the nature of the GL500 power steering total failure, as his property was damaged by the

1st respondent. However, he was not compensated for the damage, and the Board of the 2nd respondent directed that he seeks compensation for the damage to the vehicle from the courts, which he stated, entailed spending more money.

Further in his testimony, the petitioner stated that the State has benefited from his loss, as he had not been compensated. He also stated that his property rights under the Bill of Rights have been affected, as he spent money to buy the vehicle, and he is the person that was injured by the 1st respondent. He added that the Board of the 2nd respondent could not award him any compensation, because, as far as they are concerned, there is no provision for such under the Act.

The petitioner went on to state that his loss was continuous, as he still has to find a mechanic from Germany to fix his vehicle. In terms of what he would like the court to do for him, the petitioner stated that he would like to compensated for bad trade practice. He also told the court that he would like the court to direct the 1st respondent to compensate him instead of him running around the courts. The petitioner further sought to be compensated for the 1st respondent's promise to provide him with another vehicle while they repaired his.

It was further his prayer that he be compensated for the deliberate damage that was caused to his vehicle, and that had he been on the highway, he could have endangered the lives of other road users. The petitioner valued his Mercedes Benz GL500 at 180, 000 Australian dollars in 2005, and that when shipping of US$10, 000 and duty of US$15, 000.00 was added, the value was more.

When cross examined by Counsel for the 1st respondent, Ms Mwape Bwalya, the petitioner reiterated that he bought the vehicle at 180, 000 Australian dollars in 2005. He agreed that he did not have proof to that effect before court. He also reiterated that he paid an estimated US$15, 000 as duty for the vehicle, and US$10, 000 to ship it to Zambia. The petitioner also agreed that he had no evidence before the court to show that he bought the vehicle from Mercedes Benz dealership.

His testimony was that immediately the vehicle was brought to Zambia, he took it for service, and he stated that when a vehicle travels on a ship, it is normal to change the oil. The petitioner stated that the vehicle travelled on a ship from Australia, and that it was not driven. He agreed that he had no proof in his bundle of documents for the first service.

When referred to the invoice for service of the vehicle at page 30 of the petitioner's bundle of pleadings, the petitioner agreed that it is dated 14th July, 2011. He further agreed that the letter at page 9 of the said bundle of documents that the 1st respondent wrote to him is dated 18th September, 2015. He however did not agree that the 1st respondent first dealt with his vehicle in June, 2010. The petitioner agreed that the 1st respondent repaired the air conditioner for the vehicle after it failed.

Further, that while the mechanic was fixing the air conditioner, he damaged the power steering system. He told the court that the first time the power steering had a problem, he was at the 1st respondent, and he stated that he bought a new power steering unit which the 1st respondent fit. He agreed that the letter at page 9 of his bundle of documents shows that the power steering pump was repaired on 20th June, 2012. The petitioner's testimony was that when the vehicle

developed a power steering fault, he had left it at the 1st respondent so that it could be repaired.

That when the second fault to the power steering occurred, he drove the vehicle home, although he did so with difficulty. He could not recall how long the 1st respondent took to repair the vehicle after that fault, as he went out, and it was only repaired on his return. The petitioner testified that it may have been on 19th September, 2015, nineteen (19) months, after the fault occurred. When referred to the email from himself to Robert of the 1st respondent (RW1), at the bottom of page 29 of his bundle of documents, the petitioner agreed that it is dated 17th September, 2015.

Further, that at the top of that page, is an email dated 21st September, 2015 from RW1 to himself, which is dated five (5) days after the incident. The petitioner could not recall having responded to that email. He agreed that when he was called and informed that the vehicle was ready for collection, he did not allow the 1st respondent to deliver it. The petitioner also agreed that page 28 of his bundle of documents is an email that was written by RW1, which is dated 2nd October, 2015, asking him when the vehicle could be delivered, after it had been re-assessed.

The petitioner told the court that he did not collect the vehicle as he had demanded that he be given a new one, as the 1st respondent had modified his vehicle outside the Mercedes Benz specifications. He however had no proof of the said modifications. The petitioner still in cross examination agreed that when he drove the vehicle from Intercontinental Hotel, it did not kill him. His evidence was that the 2nd respondent verbally told him that he should collect the vehicle to avoid further damage to it.

Still in cross examination, the petitioner testified that he collected the vehicle from the 1st respondent on 20th January, 2016, and he agreed that the vehicle had not given him problems with the power steering since he collected it, and that he drives it. He also told the court that he brings a mechanic from Germany every two (2) months to routinely check the vehicle. The petitioner clarified that the said mechanic comes into the country at his own cost, as he repairs other vehicles apart from his, although the petitioner pays him for the service to his vehicle.

Further in cross examination, the petitioner testified that under the worldwide Mercedes Benz system, a Mercedes Benz vehicle should be taken to Mercedes Benz dealership under warranty. He agreed that in 2010, the warranty for his vehicle had expired, and that this was reflected in the letter that the 1st respondent wrote to him, which is at page 9 of his bundle of documents.

The petitioner also testified that the 1st respondent told him that it would provide him with a relief vehicle while it repaired his vehicle. He stated that the vehicle took five (5) days to be repaired, and he sought relief for that. He could not quantify the damages claimed, but stated that he should be compensated instead of the government getting the money. The petitioner agreed that the 1st respondent caused a problem, and that they fixed it, and they were fined 0.5% of their annual turnover by the Board of the 2nd respondent.

In cross examination by Ms Marian Mwalimu on behalf of the 2nd respondent, the petitioner stated that what he meant by stating that he had property rights in the decision of the Board of the 2nd respondent, was that the property is the vehicle. He agreed that the State and the 2nd respondent did not take away his vehicle. His position was however that

he had property rights in the decision, as he took the complaint to the 2nd respondent.

He added that he owns the car that enabled the 2nd respondent to get the K50, 000.00. The petitioner agreed that the 0.5% paid by the 1st respondent was administrative penalties, and that it was not his money, as far as the law is concerned. The petitioner further agreed that from that, his property had not been expropriated, and that compensation is repair for injury done. That based on that, the administrative penalty could not amount to compensation, and therefore, the 2nd respondent was not compensated.

Still in cross examination, the petitioner agreed that the 2nd respondent enforces the law on unfair trading practice on behalf of the State. He agreed that the decision of the Board of the 2nd respondent did not prevent him from seeking civil law remedies before the courts of law. He however stated that he instituted these proceedings to seek compensation from the 1st respondent based on the decision of the Board of the 2nd respondent.

The petitioner when cross examined by Counsel for the 3rd respondent testified that he was hearing about administrative penalties for the first time. He stated that the essence of a penalty is to protect citizens from the failure to obey the rules, and that penalties go to the State as a way of enforcing compliance. He agreed that a victim has no property rights in penalties.

In re-examination, the petitioner stated that his loss gave rise to the administrative penalties. He also testified that the State was not a party to the decision made by the Board of the 2nd respondent. The petitioner

also stated that the Board of the 2nd respondent found that the 1st respondent had damaged his vehicle, but that he should pursue compensation for the same before the courts of law. Therefore, the decision of the Board of the 2nd respondent gave him the right to seek legal redress.

He reiterated that the property rights are in the decision of the Board of the 2nd respondent, as the vehicle is his. However, the Board of the 2nd respondent could not compensate him as the Act does not permit. He also stated that the 1st respondent modified the power steering by the rudimentary placement of bostik on the pump, and clamping the car. That this resulted in the vehicle no longer being driven according to the Mercedes Benz specifications.

The petitioner stated that he bought the spares for the second repair, while the 1st respondent fixed the last repairs after it bought the parts. He also told the court that he had spent money suing before the High Court, and he sought compensation for the same, as well as for the inconvenience of bringing the suit. Further, he had been inconvenienced for the days that he did not have a vehicle, as he only picked it up after two (2) months. That marked the close of the petitioner's case.

The first witness called by the 1st respondent was Robert Okite Omara, the Workshop Manager for the 1st respondent. RW1 testified that the petitioner had been a customer of the 1st respondent, having first taken his vehicle, a Mercedes Benz GL500, registration number DPN1, there in June, 2010, for service. He testified that it had accumulated some kilometres, although he could not recall how many, and therefore, it could not be called as a new vehicle.

He referred to page 1 of the 1st respondent's bundle of documents as the service report for the vehicle. RW1 testified that no registration date for the vehicle was indicated on the document, which is dated 24th June, 2010. He further testified that the work requested was service B, which entails replacement of the engine oil, replacement of the engine and oil filters, checking the vehicle, wheel alignment and balancing and a final control.

RW1 stated that after the works were carried out, an invoice dated 29th October, 2010, which is at page 4 of the 1st respondent's bundle of documents, was issued, in which there was a request for repair works by the petitioner, for a damaged left hand door of the vehicle. RW1 identified page 6 of the 1st respondent's bundle of documents as an invoice for the service that was done to the petitioner's vehicle, dated 15th July, 2010, stating that on that invoice, the 1st respondent had quoted repairs for the windscreen and the CD that was not working properly, after the petitioner requested.

He went on to further testify that the service was done, but the repair works were not, and that the repairs to the front windscreen, the CD loader, bumper joint cover, and the screw for the fan belt were later done, as shown on the invoice at page 10 of the 1st respondent's bundle of documents, dated 24th August, 2011. Then at page 13 of the 1st respondent's bundle of documents, dated 20th June, 2012, was an invoice that was issued for service to the vehicle that the petitioner requested.

RW1 added that the length of service depends on what an inspection of a vehicle reveals. He also testified that the petitioner visited the 1st respondent to check on another vehicle that was being worked on, and

while he drove out of the premises, the power steering failed. RW1 explained that a power steering enables the steering wheel to be turned with ease. That when the 1st respondent investigated the failure of the power steering, it was established that it was due to a defective power steering pump, and the power steering pump had ceased to work on its own.

He further testified that the petitioner attempted to claim for the power steering pump under the warranty provision for the vehicle, but this was rejected by the manufacturer of Mercedes Benz Germany, as the vehicle had exceeded the warranty limitation period, which is two (2) years from the date of registration of the vehicle. RW1 stated that when the petitioner was advised about the rejection of the warranty claim, and they did not have the pump in supply, the petitioner opted to supply it himself.

The testimony was that the pump was supplied and fixed in August, 2012, as seen from the invoice at page 17 of the 1st respondent's bundle of documents, dated 10th August, 2012. On other works done to the petitioner's vehicle, RW1 testified that at page 18 of the 1st respondent's bundle of documents was an invoice dated 20th October, 2013, which was for service B. During that service, there was rectification of the noise that was coming from the brakes, the defective door lock, the boot, tyre pressure warning, restarting of a flat tyre, and checking and securing of the front windscreen.

Further, at page 23 of the said bundle of documents was an invoice dated 19th March, 2014, the request being to carry out a vehicle check, to rectify the steering stiff, and supply of a battery. RW1's evidence was further that the vehicle was recovered from the Lusaka Golf Club, and it

was taken to the 1st respondent, who sent a tow truck to carry the vehicle from the site. Upon inspection of the vehicle, it was discovered that the drive belt, which is used to drive the power steering pump and the other parts of the engine, had been dislodged from position.

Further, that there were foreign objects in between the pulleys, which are driven by the belts, in the engine area. The 1st respondent established that the foreign objects had caused damage to the pulley, and the water pulley, thereby causing the water pulley to be dislodged. RW1's evidence was that once the belt is dislodged from position, the power steering pump cannot be driven, and it is rendered in operational.

He also referred to page 27 of the 1st respondent's bundle of documents, testifying that it was a work request for service A dated 24th March, 2015, under which the dash board cover was checked and secured, resetting of the mirror folding made with a key was done, the shocks were checked, as well as the air conditioning system, and there was resetting of the run flat message.RW1 testified that a report was made that the AC was not working due to a defective AC compressor.

He told the court that the 1st respondent ordered an AC compressor, and whilst the mechanic was fixing the vehicle, he accidentally caused damage to the power steering oil reservoir. The mechanic reported the damage to the workshop foreman, who opted to repair the said power steering oil reservoir, instead of informing management, and in turn, the petitioner. RW1 testified that the vehicle was released to the petitioner who drove it for some time, but it eventually experienced power steering failure on 16th September, 2015.

The evidence was that vehicle was recovered from Intercontinental Hotel area, and the petitioner was informed that the cause of the power steering failure was due to the damaged power steering oil reservoir. The 1st respondent ordered a new one, and it was fit onto the vehicle, and the vehicle was thereafter tested, and certified road worthy, within three (3) days. Thereafter, the petitioner was informed, and in this regard, RW1 referred to the email dated 17th September, 2015, at the bottom of 29 of the petitioner's bundle of documents, in which the petitioner had asked him for a comprehensive report over the vehicle.

That at the top of that email, was an email dated 21st September, 2015, in which RW1 had apologised to the petitioner for the delay in delivering the relief vehicle, but stated that they had fixed the petitioner's vehicle, and had tested it, and certified it fit. He told the court that they had challenges providing a relief vehicle to the petitioner that was fully licenced, certified road worthy, and had insurance.

RW1 further testified that they fit a new power steering oil reservoir, which had more life than the damaged one. He concluded his testimony by stating that vehicles have mechanical steering that enable the steering to turn. That with a power steering, the turning is made easier, and that when there is power steering failure, the vehicle can still move, and it cannot kill anyone.

When cross examined by the Counsel for the petitioner, RW1 agreed that the matter was before the 2nd respondent, and that RW1 and the petitioner appeared before the 2nd respondent. He further agreed that the 2nd respondent rendered the decision which is at page 12 of the petitioner's bundle of pleadings. RW1 also agreed that from that

document, the petitioner was the complainant, and the 1st respondent was the respondent.

RW1 still in cross examination agreed that paragraph 21, at page 17 of the petitioner's pleadings, states that the 2nd respondent found that the power steering oil reservoir tank was damaged when the petitioner's vehicle was in the 1st respondent's care, whilst being repaired. He stated that the 1st respondent had problems finding a relief vehicle for the petitioner. Further, that the 1st respondent was found liable for unfair trading practices, and it was fined 0.5% of its' annual turnover. RW1 agreed that the petitioner was referred to the courts of law to claim compensation.

He also testified that the petitioner reported three (3) incidents of failure of the power steering, with first being when he went to check on his wife's vehicle, which was at the 1st respondent, and he was driving out of the 1st respondent's premises. RW1 denied that the failure was as a result of fluid draining out of the power steering, stating that it was due to pump failure. He testified that the second incident was in March, 2014, when the petitioner was by the Golf Club on the road, and the 1st respondent recovered the vehicle in a van.

He however denied that the vehicle was recovered as it could not be driven, but that it was because the 1st respondent wanted to thoroughly establish the cause of the failure. He added that there was power system failure, although the vehicle could be driven, but with difficulty. Continuing in cross examination, RW1 stated that their investigations established that the drive belt that drives the power steering pump and the other engine parts had been dislodged, as there was a foreign object, being a bone and some animal fur.

He stated that the evidence to that effect or a report stating so was not before court. It was also his testimony that the petitioner took his own spare parts, which he said were from Australia, and that the petitioner incurred expenses in providing it.

RW1 further in cross examination testified that there were nineteen (19) months between the first power steering failure and the next. He agreed that between 2012 and 2013, the 1st respondent serviced the petitioner's vehicle. He told the court that the third power steering failure occurred on 16th September, 2015, after the 1st respondent had worked on the vehicle in March and August, 2015. RW1 agreed that at page 31 of the 1st respondent's bundle of documents was a tax invoice issued for the petitioner's vehicle on 26th August, 2015, and that less than a month later, there was power steering system failure.

RW1 further agreed that in August, 2015, the 1st respondent had worked on the air conditioning for the petitioner's vehicle and during that repair, the technician damaged the power steering oil reservoir. He however maintained that the technician reported the damage to the workshop foreman, but who did not in turn report to management or the petitioner.

Still in cross examination, RW1 agreed that in the report dated 19th November, 2015, that was given to the petitioner, which is at page 36 of the 1st respondent's bundle of documents, the 1st respondent's management admitted that the technician caused damage to the petitioner's vehicle, and released the said vehicle to the petitioner without informing him of the damage.

RW1 also agreed that the staff at the 1st respondent did not follow the quality control protocol, and that the 1st respondent agreed that the

power steering fluid had drained out, rendering the power steering in operative. He however testified that if a driver is driving at 120 kilometres per hour, and the fluid drains out of the power steering, the effect is not immediate on the driver, due to the dynamics in the power steering system, adding that it may not be dangerous to the driver.

He clarified that at high speed, the failure of power steering will not have an effect, as the power steering is designed to help one turn the vehicle, which one does not do at that speed. RW1 reiterated that the power steering failure resulted from loss of power steering fluid. He agreed that it was not the first incident involving the 1st respondent's foreman, who was his subordinate. RW1 rated the foreman as not competent, and that he was negligent, and that is why steps were taken to dismiss him.

He told the court that when the petitioner took the vehicle to the 1st respondent in 2010, it was not on warranty, which is for two (2) years, from the date of first registration. It was his testimony that the 1st respondent looked at the warranty in 2012, after the first power steering failure. He however agreed that only new cars come with warranties.

RW1 was not cross examined by Counsel for the 2nd and 3rd respondents.

RW2 was Anthony Peter Voorhout, the General Manager for the 1st respondent. In his evidence, he confirmed that the petitioner was a customer of the 1st respondent, the 1st respondent having serviced his vehicles. RW2 told the court that he first met the petitioner on 16th September, 2015 over a problem that had been detected with the petitioner's vehicle, which was rectified after three (3) days.

He confirmed that one of their mechanics had damaged the steering pump reservoir for the petitioner's vehicle, and his testimony was that

they ordered one from Damier Germany, which manufactures Mercedes Benz vehicles, as well as spare parts, and it was put on a flight. RW2 also testified that after the vehicle was fixed, the 1st respondent communicated with the petitioner via email and on phone, to go and collect his vehicle, but he did not do so.

He added that when the petitioner eventually agreed to collect the vehicle, the 1st respondent delivered it to his home, some months later, and the petitioner signed a delivery note for the vehicle. RW2 still in his testimony stated that the petitioner lodged a complaint against the 1st respondent with Damier Germany, and as per procedure, Damier Germany on receiving the complaint, sent it back to the 1st respondent. RW2 as general manager for the 1st respondent explained how they had rectified the problem with the petitioner's vehicle, by replacing the part within three (3) days.

Further, that in order to prevent similar problems, they had disciplined the foreman and the technician, and Damier Germany was satisfied. RW2 identified page 36 of the 1st respondent's bundle of documents as the report that the 1st respondent gave the petitioner, after he requested for it, when they met on 16th September, 2015. His testimony was that they had indicated in that report, that the 1st respondent was not responsible for the first two (2) power steering failures, as the first one involved failure of the original pump, and the second was caused by an object, while the vehicle was being driven.

As regards the 3rd incident of the power steering failure, RW2 testified that they found themselves before the 2nd respondent. He told the court that after they received the complaint, they wrote to the 2nd respondent explaining what had happened, and attached documentation. Page 38 of

the 1st respondent's bundle of documents was identified as the letter that RW2 had written in response to complaint that was lodged with the 2nd respondent. He also testified that the 1st respondent did not appear before the 2nd respondent, but they were availed the decision after the complaint was heard.

He stated that the 1st respondent was found guilty, and it was fined as a second offender. RW2 explained that the first incident was some years prior to that, and he stated that he appealed, as he believed that the fine was unfair, as so many vehicles had been serviced by the 1st respondent in between the complaints. On appeal, the fine was reduced to 0.5% of the 1st respondent's annual turnover, and it was paid.

RW2 further in his testimony stated that when the 1st respondent's management met the petitioner on 16th September, 2015, it had told the petitioner that he would be provided with a relief vehicle. However, the said vehicle was not provided as it had issues with road tax and insurance, and the petitioner's vehicle was repaired within three (3) days. Thus, the relief vehicle was no longer required. RW2 concluded his testimony by stating that the 1st respondent was liable to repair the vehicle after the damage was caused, and they so repaired it.

When cross examined by Counsel for the petitioner, RW2 testified that the 1st respondent imported the spare part from Germany, and that it came into the country within three (3) days. He explained that when he met the petitioner that afternoon, he had also instructed the 1st defendant's Parts Manager to order the spare part from Damier Germany, and it was flown to Zambia.

He agreed that the petitioner complained against the 1st respondent to Damier Germany, and that the 1st respondent made a report to Damier Germany. RW2's evidence was that the 1st respondent followed protocol in rectifying the problem with the petitioner's vehicle. He however agreed that the report that was sent to Damier Germany was not before court. RW2's testimony was that he joined the 1st respondent on 7th July, 2015, and therefore, he was not privy to incidents before he joined.

It was RW2's evidence that the 1st respondent denied being responsible for the first power steering failures on the petitioner's vehicle, even though they occurred before RW2 joined the 1st respondent. He ended his cross examination by stating that the 1st respondent did not withdraw the appeal, and that on the said appeal, the fine was reduced to 0.5% of the 1st respondent's annual turnover. RW2 was not cross examined by Counsel for the 2nd and 3rd respondents.

RW3 was Joseph Mutale, an investigator with the 2nd respondent. He told the court that at the time of his testimony, he had worked with the 2nd respondent for six (6) years. This witness took the court through his qualifications, stating that he is a holder of a Bachelor of Arts Degree in Development Studies that was obtained from the University of Zambia, and a Masters of Arts Degree in Development Studies, obtained from the University of Lusaka. In terms of his duties, RW3's testimony was that he receives complaints relating to unfair trade practice.

He confirmed that the petitioner lodged a complaint against the 1st respondent with the 2nd respondent over the manner it repaired his vehicle. RW3 confirmed having deposed the affidavit in opposition to the affidavit verifying the amended petition on behalf of the 2nd respondent. His testimony was that he relied on the said affidavit in its entirety.

When cross examined by Counsel for the petitioner, he testified that the 2nd respondent regulates competition in Zambia. That in doing so, the 2nd respondent ensures that there is no uncompetitive competition amongst the players in the industry. He further stated that the 2nd respondent is involved in protecting consumers by ensuring that there are no unfair trading practices by investigating complaints. Additionally, the 2nd respondent sensitizes consumers on their rights and obligations.

RW3 further in cross examination agreed that in paragraph 7 of the answer, the 2nd respondent states that the 1st respondent did not exercise care when repairing the petitioner's vehicle. This he stated was because the technician admitted to having used contact adhesive when repairing the petitioner's vehicle, which was an incorrect procedure. RW3 also stated that according to paragraph 9 of the said answer, the correct procedure should have been to advise the petitioner that the power steering reservoir tank needed to be replaced.

He agreed that the 2nd respondent also found that the 1st respondent did not give the petitioner a relief vehicle within reasonable time, after having promised him so. RW3 further agreed that paragraph 17 of the 2nd respondent's answer states that the petitioner suffered loss at the 1st respondent's hands, and the 2nd respondent ordered that the petitioner should be compensated elsewhere.

Still in cross examination, RW3 agreed that paragraph 15 of the 2nd respondent's answer states that the Board did not render a decision in favour of the petitioner, and that according to the 2nd respondent, the decision was made in favour of the State. When referred to the decision of the Board at page 12 of the petitioner's bundle of pleadings, RW3 testified that the complainant was the petitioner, and the respondent was

the 1st respondent. Further, that the government was not a party to that decision, and that the 2nd respondent did not receive a complaint from the State.

He agreed that the 2nd respondent did not make a finding that the State had suffered loss, but that it was the petitioner who had suffered such loss, and needed to be compensated. RW3 further in cross examination, testified that the fine of 0.5% administrative penalty that was imposed on the 1st respondent translated into K50, 000.00, and that the State recovered it as a result of the loss that the petitioner suffered.

He agreed that if the petitioner had not lodged the complaint, the State would not have received that money. RW3 however maintained that the petitioner had no property rights in the 2nd respondent's decision, reiterating that the decision was in favour of the State and not the petitioner. His position was that under the Competition and Consumer Protection Act, an individual who wins a case is not awarded any money, and they have to seek compensation before the courts of law.

RW3 agreed that where one's money is taken away from them, say by stealing, they have the right to get it back. He agreed that for one to commence an action to recover damages or compensation in the High Court, they need to have money, and they also need to have money to engage Counsel. Further, that where one obtains a favourable decision from the Board of the 2nd respondent, but they have no money to sue, to enforce that decision, the decision will be of no economic value.

RW3 denied that currently, it is only the 2nd respondent that is benefiting by receiving administrative penalties. He agreed that the Competition and Consumer Protection Act does not allow the State to share the fine

with the complainant. He did not know how the administrative penalties are used after they are paid, as the money is paid directly to the State, and not the 2nd respondent. RW3 did not know if the fines become public funds.

RW3 in cross examination by the Counsel for the 1st respondent agreed that he investigated the complaint that was lodged by the petitioner. He also agreed that the 1st respondent replaced the power steering reservoir that its' technician damaged on the petitioner's vehicle, before the decision of the Board of the 2nd respondent was made. He further agreed that by the time the Board rendered its' decision, the petitioner had been given back the vehicle. RW3 also stated that the fine was paid into the State account.

When cross examined by Counsel for the 3rd respondent, RW3 testified that the petitioner had complained about damage to the power steering reservoir tank of his vehicle. That the Board of the 2nd respondent resolved that the 1st respondent had replaced the damaged power steering reservoir tank, and therefore, the root of the petitioner's complaint had been addressed. He stated that the 1st respondent was fined 0.5% of its' annual turnover as it was a second offender.

RW3 agreed that the fine did not just relate to the petitioner's complaint, but other violations. He concluded his cross examination by testifying that the petitioner did not have any property rights in the fine, as the Board did not direct that he be paid.

In re-examination, RW3 testified that if the 2nd respondent had ordered that the petitioner be paid compensation, it would have been outside its mandate. Further, that fines are paid to the State, because any violations

of the Act are against the State. That marked the close of the respondents' cases.

I have considered the evidence and the submissions. It is common cause that the petitioner used to take his motor vehicle Mercedes Benz GL500, registration number DPN1, for service and repairs with the 1st respondent, who is a Mercedes Benz registered dealership. It is not in contention that on 16th September, 2015, the petitioner's Mercedes Benz vehicle, registration number DPN1 experienced a power steering system failure.

It is not in dispute that the said failure was attributed to the 1st respondent's mechanic and foreman having repaired the power steering oil reservoir with bostik and clamping it, after the technician damaged the said power steering oil reservoir, when the vehicle was taken to the 1st respondent for repair of the air conditioning system of the vehicle.

It is common cause that the 1st respondent admitted that the damage was caused to the power steering oil reservoir by its technician, and that the same was repaired with bostik. The 1st respondent further admitted that the damage and repair was not reported to it's management or the petitioner, and the vehicle was released to the petitioner. There is no dispute that the 1st respondent replaced the damaged power steering reservoir, after the said damage was brought to its' attention.

It is not in contention that the petitioner lodged a complaint against the 1st respondent with the 2nd respondent for the damage that was caused to his vehicle. It is also not in dispute that the Board of the 2nd respondent found the 1st respondent guilty of unfair trading practices, and it fined the 1st respondent 0.5% of its annual turnover as

administrative penalties, which came to K50, 000.00, and the said money was paid to the State.

It is common cause that the Board of the 2nd respondent in its decision did not award the petitioner any compensation for the loss, and it directed him to sue for the said compensation before the courts of law. The question is whether the petitioner is entitled to the reliefs sought? The first three (3) claims in the petition are as follows;

1. *A declaration that a citizen of Zambia who lodges a complaint against a person or an enterprise under the provisions of the Competition and Consumer Protection Act No 24 of 2010 (The Act) has personal property rights in the judgment and/or the decision rendered in his favour by the Board of the Competition and Consumer Protection Commission or the Competition and Consumer Protection Tribunal.*

2. *A declaration that the Government's taking of the proceeds of the judgment or decision rendered in favour of a citizen under the Act in the form of administrative penalties at 5% or 10% of the offending person's or enterprise's annual turnover without any provision for civil law remedies such as payment of compensation or damages to the injured citizen is tantamount to regulatory expropriation, taking or confiscation of a citizen's property by the State without compensation, contrary to Article 16 of Zambia's bill of rights and is in breach of Zambia's international commitments to the protection of property of its citizen's and therefore illegal and unconstitutional.*

3. *A further declaration that the failure by the Act to provide for the enforcement of breaches of the Competition and Consumer Protection*

Act deprives the citizens of Zambia, the right of access to civil law remedies, such as compensation, damages, and equitable remedies contrary to Articles 7 and 8 of the Universal Declaration of Human Rights of 1948 and Articles 3 and 4 of the African Charter on Human and People's Rights, and therefore illegal and inequitable.

The petitioner abandoned the fourth claim as indicated in the submissions that were filed. The three (3) claims turn on whether the failure by the ***Competition and Consumer Protection Act No 24 of 2010*** to provide for civil law remedies in the form of compensation or damages for persons who successfully lodge complaints against individuals or enterprises for unfair trading practices, and instead providing for fines as penalties against individuals or entities found guilty of such breach, which fines are payable to the State, amounts to regulatory expropriation, and is in breach of the Bill of Rights of the Constitution of the Zambia?

As can be seen from the petition, the affidavits and the documents filed in this matter, after the petitioner took his vehicle to the 1st respondent for repair of the air conditioning system of the vehicle, sometime in August, 2015, the technician employed by the 1st respondent damaged the power steering oil reservoir of the vehicle. It has also been seen that instead of the damage being reported to management of the 1st respondent, the technician under the guidance of the workshop foreman repaired the damaged power steering oil reservoir with glue, and clamped it.

The vehicle was released to the petitioner who experienced failure of the power steering in September, 2015. The evidence shows that the petitioner lodged a complaint with the 2nd respondent against the 1st

respondent for unfair trading practices on 17th November, 2015, pursuant to Section 54 of the Competition and Consumer Protection Act No 24 of 2010. The Board of the 2nd respondent rendered its decision on the petitioner's complaint, which decision is at pages 13-22 of the petitioner's bundle of documents. At page 21, the decision of the Board is stated as follows;

> ***36. The Board hereby directs that;***
>
> ***i. The respondent is fined 0.5% of its annual turnover since they are a second violator on Section 49(5) of the Act.***
>
> ***ii. The complainant seeks adequate compensation from the courts of law for failure by the respondent to provide him with a relief vehicle at the time they were repairing his vehicle.***

It is clear from the decision of the Board that the fine, being 0.5% of the 1st respondent's annual turnover that the 1st respondent was directed to pay, was payable to the State. The Board directed that the petitioner seeks adequate compensation from the courts of law, for the failure by the 1st respondent to provide him with a relief vehicle at the time they were repairing his vehicle.

The petitioner submits that the fundamental principle which underpins the law of damages is that whatever damages are awarded, the principle is compensation. That this therefore means that a plaintiff is to receive monetary terms, no more and no less, his actual loss, as was stated in the case of ***Livingstone v Rawyards Coal Co*** *(1)*. The submission is that Lord Blackburn in that case stated that;

> ***"Where any injury is to be compensated by damages, in settling the sum of money to be given for damages, you should nearly as possible get at the sum of money which will put the party who has been injured, or who has suffered, in the same position he would have been in, if he had not sustained the wrong for which he is now getting compensation".***

That this principle was reiterated in the cases of ***Burton v Egg & Egg Pulp Marketing Board*** *(16)*, ***The Albazero*** *(6)* and ***Johnson v Agnew*** *(8)*. The petitioner further submits that the principle of compensation is also known as the principle of *restitution in integrum:* restoration to the position the petitioner was in before his motor vehicle was damaged, as per ***Black's Law Dictionary by Bryan A. Garner, 8th Edition*** at page 1339.

Further reference is made to ***McGregor on Damages, 15th Edition*** at paragraph 1-021 which states the purpose of an award of damages as;

> ***"To give a claimant compensation for the damage, loss or injury that he has suffered. While it is easier to arithmetically calculate pecuniary loss in money, non pecuniary loss is not so calculable because money is not awarded as a replacement".***

It is contended that the 1st respondent's witnesses admitted that they used an incompetent mechanic to work on the petitioner's motor vehicle, and that they did not disclose the poor workmanship to the petitioner. The petitioner states that anything could have happened to his life as a result of that poor workmanship. Further, the petitioner was inconvenienced for over forty (40) days, as he had no vehicle to use. It is

submitted that repair to the damaged vehicle only goes to mitigate the damage to the petitioner's car.

Reliance is placed on the case of ***Industrial Gases Limited v Waraf Transport Limited and Mussah Mogeehaid*** (17) stating that the Supreme Court in that matter did not interfere with the award that was given by the High Court of K4 million (unrebased), as damages for loss of the truck. It is submitted that this award was given over twenty (20) years ago, and that in this matter, the 2nd respondent benefitted K50, 000.00 as administrative penalties for a citizen's loss.

The petitioner contends that for the damage to the car and the inconvenience for forty (40) days, the sum of K60, 000.00 would have been a more Solomonic award to the petitioner, with interest and costs, after taking into account the replacement of the damage to the vehicle. The petitioner also submits that currently, damages suffered by members of the public under the ***Competition and Consumer Protection Act No 24 of 2010*** remain uncompensable, as the Act makes no provision for civil law remedies such as damages, injunctions and awards for compensation under the Act.

Thus, the Board of the 2nd respondent and the Competition Tribunal do not have jurisdiction to grant civil law remedies under the Act. It is the petitioner's submission that this failure by the Act to provide for civil law remedies, as a constitutional issue, can best be understood by the legal nature of the decision or judgment of a competent court and tribunal, such as the 2nd respondent. In this regard, the petitioner submits that the legal nature of a decision of the 2nd respondent, and that of any competent court, is that it is a chose in action.

Reliance is placed on the learned authors ***Marcus Smith & Nico Leslie, The Law of Assignment, 2nd Edition, Oxford, 2013*** at page 60, where it is stated that;

> ***"A judgment is a chose in action, and can be assigned like any other".***

Further, that in the case of ***Crooks v Newdigate Properties Limited*** [27] it was held that a consent order signed by the parties is a chose in action, and can therefore be assigned to third parties. Thus, as a decision of any competent court or tribunal such as the 2nd respondent's Competition Tribunal is a chose in action, and it constitutes constitutional property in Zambia. This it is submitted, is because, ***Article 266 of the Constitution of Zambia Amendment Act No 2 of 2016*** defines property as;

> ***"Property includes a vested or contingent right to, or interest in or arising from;***
>
> ***a) Land, permanent fixtures on, or improvements to land.***
>
> ***b) Goods or personal property.***
>
> ***c) Intellectual property.***
>
> d) ***Money, choses in action or negotiable instruments"***

The submission is that the decision of the 2nd respondent's tribunal being a chose in action, a citizen of the Republic of Zambia, like the petitioner, acquired constitutional property right in that decision. However, that constitutional property right that citizens acquire in decisions rendered by the 2nd respondent's tribunals are economically

valueless, by virtue of the fact the Competition and Consumer Protection Act No 24 of 2010, makes no provision for civil law remedies.

The petitioner states that this in effect amounts to regulatory taking of citizen's property by the State, without due compensation. As to what is regulatory taking of citizen's property by the State, the petitioner submits that it is the physical taking or rendering economically valueless a citizen's property, as a result of the government regulation of a certain economic activity, in this case, the regulation of competition in Zambia.

Reference is made to the learned writers ***Thomas P. Mclish, Akin Gump Strauss, Hauer & Feld LLP Washington DC*** in the article, ***Natural Resources Development and the Administrative State: Navigating Federal Agency Regulation and Litigation, February, 2019*** in that regard. Further reliance is placed on the judgment of the Supreme Court of the United States of America in the case of ***Penn Central Transport Co v New York City*** [7], stating that it was held in that case that government's intensive regulation of certain economic activity could also amount to regulatory taking of it "goes too far".

The petitioner also submits that in the case of ***Lucas v South Caroline Coastal Council*** [14], the Supreme Court held that regulatory taking of a citizen's property occurs when a government regulation completely or partially eliminates the economic use or value of property. The petitioner further submits that in order for a citizen to prove regulatory taking, they must establish the following three (3) issues;

1. That they possess a recognizable property interest or right.
2. That the property has been taken by the government for a public purpose.

3. That the taking was either physical or regulatory taking.

As regards the first requirement, it is submitted that the decision that the Board of the 2nd respondent rendered was in favour of the petitioner, which is a chose in action, recognizable as constitutional property right under Article 266 of the Amended Constitution.

In relation to the second requirement, the petitioner submits that the petitioner's property rights in the decision of the 2nd respondent's Board, was taken for a public purpose, as although the decision was rendered in favour of the petitioner as a citizen, only the government benefited from it, in the form administrative penalties, which are used for the public purpose of regulating competition in Zambia.

With regard to the third requirement, it is submitted that there was regulatory taking in this case, as Mr Mutale RW3, told the court that if a citizen does not have money to enforce the decision at the High Court, then the decision of the 2nd respondent and its Competition Tribunal are of no economic value, because the Competition and Consumer Protection Act does not have provision for civil law remedies such as damages, orders for specific performance and injunctions.

In order words, the Competition and Consumer Protection Act has no remedies for breaches suffered by citizens, and these breaches remain uncompensable under the Act. The petitioner however, submits that Supreme Court in the case of ***George Peter Mwanza and Melvin Beene v the Attorney General*** *(34)* guided that breaches of the Bill of Rights cannot remain uncompensable. That in that case, the Supreme Court noted that Article 11 of the Constitution offers general protection of civil

and political rights, and that a violation of any distinct right under the Bill of Rights, is also a violation of Article 11.

The submission is further that it is clear that Article 11 does not countenance the loss of property without compensation. Thus, the provisions in the Compensation Act, which only provide for public enforcement of the Act, by way of administrative penalties, without any provision for civil law remedies, such as the payment of damages, amounts to a violation of Article 11 of the Constitution.

The submission is also that the courts enjoy concurrent jurisdiction, in terms of administering both law and equity, as provided in Section 13 of the High Court Act, Chapter 27 of the Laws of Zambia. That one of the principles of equity is that "***equity does not suffer a wrong without a remedy***". Further, that the national values enshrined in Article 8 of the Zambian Constitution as amended, include equity, and the failure by the Competition and Consumer Protection Act to make provision for private enforcement of the Act is inequitable.

The petitioner also in his submissions states that the Competition and Consumer Protection Act No 24 of 2010 was greatly influenced by the competition law of the European Union (EU). He states that EU competition law initially did not provide for private enforcement of its competition law by way of civil law remedies. That it was only in the case of ***Courage v Crehan*** [19] that the court directed and guided the member states, that individuals within the European Union were to be granted the right to seek compensation such as damages resulting from competition law infringements.

That this position was reaffirmed in the cases of ***Vincentzo Manfredi and others v Lloyd Adrianco Assosicurazion SPA and others*** [23] and ***PFleiderer AG v Bundeskkarte Ilamt*** [28]. The submission is also that the principle of law that emerges from the decisions of the EU competition law judgments is summarized by ***Giorgio Monti*** in ***EU Law, an interest on damages for infringements of Competition Law- A Comparative Report, European University Institute, November, 2016*** as follows;

> ***"The right to effective full compensation for victims of infringements of EU competition law.....National Law must provide harmed citizens with an effective way to obtain compensation of the harm suffered by the Claimant due to infringement of EU Competition Law. National rules that would make obtaining full compensation impossible or exceedingly difficult must be set aside".***

It is submitted that following the direction by the European Court of Justice, all members of the EU amended their national laws thereby allowing their citizens to claim civil law damages for breach of competition law. An example is given of the United Kingdom which amended its ***Competition Act of 1998***, by inserting Section 47A in the Act, which enabled citizens and individuals to claim damages from Competition Appeals Tribunals for any legal harm and for losses suffered under the Competition Act, and to obtain orders of injunction.

Further, the ***Consumer Rights Act of the UK of 2015***, allows the public to commence stand alone actions against any infringer of the Competition law, without the involvement of the Competition authorities. That this is what the petitioner is asking this court to do under Article 11

of the Bill of Rights. It is also submitted that while the respondents may argue that victims of infringement of the Competition and Consumer Protection Act can commence actions in the High Court, the petitioner invites this court to consider the under privileged citizens of this country, from areas such as Kaputa, Shangombo, Muyombe, Chadiza and the shores of Lake Bangweulu, who may not afford to do so.

Thus, any favourable decision that the citizens may obtain under the competition law in Zambia will remain of no economic value, as long as they cannot afford the court fees to enforce such decisions at the High Court, as well as lawyers to represent them, and this contravenes Article 11 of the Constitution.

The petitioner further in his submissions refers to national precedent where the courts directed amendment to laws that did not make provision for compensation to victims of breaches. In this regard, the Lands Tribunal is cited as an example, stating that initially it had no jurisdiction to award compensation, and neither did it have power to cancel certificates of title.

This position was reiterated in the case of ***The Attorney-General, Ministry of Works and Supply and Rose Makano v Joseph Emanuel Frazer and Peggy Sikumba Frazer*** [18]. However, the ***Lands Tribunal (Amendment) Act No 39 of 2010*** clothed the Lands Tribunal with jurisdiction to deal with all land matters, and to even award compensation in appropriate cases, entailing that land injustices suffered by citizens are now compensable under the Lands Act.

Further in submission, the petitioner states that he is not requesting the court to nullify the Competition and Consumer Protection Act, but

rather, to declare that Sections 46, 47, 49, 82 and 86 of the said Act, which do not provide civil law remedies are incompatible with Article 11 of Bill of Rights. As evidence of the power that this court has to do so, reliance is placed on the case of ***In the matter of Section 53 (i) of the Corrupt Practices Act, No. 10 of 1980 and in the matter of Articles 20 (7) and 29 of the Constitution and in the matter between: Thomas Mumba - Applicant and the People - Respondent*** [12].

That in that case, the constitutionality of ***Section 53(1) of the Corrupt Practices Act*** was brought into question. The Section provided that;

> ***"An accused person charged with an offence under part IV shall not, in his defence be allowed to make an unsworn statement, but may give evidence on oath or affirmation from the witness box".***

However, ***Article 20(7) of the Constitution*** provided as follows;

> ***"No person who is tried for a criminal offence shall be compelled to give evidence at the trial."***

That it was held in that case that;

> ***"In countries like Zambia where there is a written constitution, the Constitution is the supreme law, any other laws are made because the Constitution provides for their being made; and are therefore subject to it. It follows therefore that unless the Constitution is specifically amended, any Act that is in contravention of the Constitution is null and void.***

> ***As the Constitution is supreme and above all the laws, and as Section 53 (1) of the Corrupt Practices Act is in direct conflict with Article 20(7) of the Constitution, I have no hesitation in declaring that Section 53 (1) of the Corrupt Practices Act is unconstitutional and therefore null and void, and it should be severed from the Act. An accused person in a criminal trial cannot be compelled to give evidence if he wants to say something in his defence".***

It is submitted that Article 11 of the Bill of Rights entitles every Zambian to compensation for any injury suffered at the hands of another person, and the failure by the Competition and Consumer Protection Act to provide for means of enforcing favourable decisions rendered in favour of victims of breaches under the Act, by awards of damages or compensation, leaves the harms made, uncompensable under the Act.

The petitioner invites this court to take into account the ***Universal Declaration of Human Rights of 1948***, to which Zambia is a signatory. That in the case of ***Attorney General v Roy Clarke*** [25], the Supreme Court guided that;

> ***"In applying and construing Zambian statutes, courts of law can take into account international instruments to which Zambia is a signatory. However, these instruments are only of persuasive value, unless they are domesticated in the laws".***

That in line with that guidance, ***Article 8 of the Universal Declaration of Human Rights*** provides as follows;

> ***"Everyone has a right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".***

Further, ***Article 17 of the said Universal Declaration of Human Rights*** states that;

> ***"1. Everyone has a right to own property alone, as well as in association with others.***
>
> ***2. No one shall be arbitrarily deprived of his property".***

The petitioner submits that these articles in the Universal Declaration of Human Rights are reflected in Article 11 of the Bill of Rights, and therefore the Competition and Consumer Protection Act No 24 of 2010, must be harmonized with the Bill of Rights.

The 1st respondent in its' submissions, states that the petitioner's claims for compensation for the failure by it to provide him with a relief vehicle are unfounded, as his vehicle was given to him within three (3) days after he reported that it was damaged. As such, there was no need for a relief vehicle.

It is further submitted that the 2nd respondent made a finding that indeed the power steering reservoir tank had been damaged, whilst the vehicle was with the 1st respondent for previous repairs, and that the 1st respondent replaced the damaged power steering reservoir tank, with a new one, and the petitioner was advised to collect his vehicle. Reference is made to ***McGregor on Damages, Vol 9, Sweet & Maxwell, 2009*** at page 1, which defines damages as;

> ***"The pecuniary compensation obtainable by success in an action for the wrong which is either a tort or breach of contract, the compensation being in the form of a lump sum awarded at one time, unconditionally and in sterling".***

That it is clear from this definition, that in order for a party to be awarded damages, they must be successful in an action for damages, and that this can only be done by showing the damage and loss that is suffered. To support this argument, reliance is placed on the case of ***Musingah v Daka*** [5] where the court held that;

> ***"On the question of damages.....the plaintiff is entitled to general damages for any loss proved to have been suffered.... It is for the plaintiff to prove damage and he must do so properly. Clearly, unsupported figures must be taken with caution".***

The case of ***JZ Car Hire Limited (appellant) v Chala Scirocco (1st respondent) Enterprises Limited (2nd respondent)*** [20] is also relied, stating that it was held in that case that;

> ***"It is for the party claiming any damages to prove the damage".***

With regard to compensation, the case of ***Lunn Poly Ltd v Liverpool & Lancashire Properties Limited*** [24], is relied on, stating that the case held as follows;

> ***"Compensatory damages is a phrase sometimes used to mean damages calculated in the ordinary way by assessing the actual financial loss suffered".***

That in this case, the plaintiff must prove to this court any loss for which he claims compensation, and the claim for the payment of K60, 000.00 is unjustified and unfounded. It is further submitted that the petitioner at the trial did not adduce any evidence of the damage that he suffered to warrant the court to make a finding in his favour for compensation or damages, for the damage caused to his motor vehicle or the failure to provide him with a relief vehicle during the period that the 1st respondent was repairing his vehicle.

The 1st respondent goes on to submit that the petitioner did not adduce any evidence to prove that the motor vehicle was brought into this country brand new, and neither was there evidence led as to the purchase price for the said vehicle. However, the service history of the vehicle as given by the 1st respondent shows that the petitioner at his own instance, took the vehicle to the 1st respondent for repair and service, and that all the faults with the vehicle, save for one, were at the instance of the petitioner.

It is submitted that the petitioner by his own evidence stated that his vehicle was fixed within (5) days, but he did not allow the 1st respondent to deliver it, and neither did he collect it, as he wanted a new one. However, RW1 and RW2 testified that the vehicle was fixed within three (3) days, but the petitioner declined to collect it. Therefore, the petitioner is not entitled to any damages, and this is more so, as the petitioner testified that when he eventually got the vehicle, it was in good condition, and he uses it.

It is added that the petitioner has therefore not shown any financial loss that he suffered, but he has shown that the vehicle is in better condition than it was before the 1st respondent fixed it. As regards the petitioner's

assertions that anything could have happened to life, when he drove the vehicle in the state that it was in before it was repaired, the 1st respondent states that this claim amounts to a claim for special damages, which ought to be proved.

That a mere threat to one's life is not enough to warrant an order for special damages being granted, as actual loss must be shown. As authority, ***Halsbury's Laws of England, 4th Edition Reissue, Vol 12(1) at paragraph 812 at page 268*** is relied on. The submission is that the said paragraph defines special damages as;

> ***"Special damage refers to those losses which must be proved, whereas general damages are those which will be presumed to be the natural or probable consequence of the wrong complained of, with the result that the plaintiff is required only to assert that such damage has been suffered".***

Further, that the case of ***Philip Mhango v Dorothy Ngulube and ors*** *(10)* held that;

> ***"Any party claiming a special loss must prove that loss and do so with evidence which makes it possible for the court to determine the value of that loss with fair amount of certainty".***

That while the petitioner contends that his life was in danger when the 1st respondent's mechanic repaired the power steering oil reservoir that it's technician damaged, he ought to have adduced evidence showing the harm to his life. However, RW1 in his testimony stated that there will be no adverse effect when the power steering is not operative, and as such,

in the absence of evidence showing the actual harm suffered by the petitioner, he cannot be awarded special damages.

It is further submitted that the petitioner relies on the case of ***Livingstone v Rawyards Coal Co*** *(1)*, to establish that he is entitled to monetary damages, but ***Black's Law Dictionary, 9th edition*** defines actual damage as;

> ***"An amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses".***

Therefore, the petitioner has not proved the actual loss that he suffered at the hands of the 1st respondent. It is also submitted that the petitioner has not shown why this court should award him compensation, especially that the 1st respondent fixed his vehicle, and it paid the fine of K50, 000.00 that was imposed by the 2nd respondent. The case of ***Patrick Dickson Ngulube v Rabson Malipenga*** *(31)* is relied on, stating that the court in that matter held that;

> ***"We are therefore persuaded by Mr Okware's argument when he cites the case of Eastwalsh Homes Limited v Anatal Developments Limited 1993 12 OR 675, that courts should be reluctant to award damages for speculative claims".***

The case of ***Robins v National Trust Co*** *(4)* is also relied on, with the submission being that it was stated in that case that;

> ***"The general rule is Ei qui affirmat non qui negat incumbit probation".***

That this means that the burden of proof lies on him who alleges, and not on him that denies, and this was reiterated in the cases of ***Zambia***

Railways Limited v Pauline S Mundia, Brian Sialumba *(26)* and ***Wilson Masauso Zulu v Avondale Housing Project Limited*** *(9)* among a plethora of authorities.

It is also submitted that contrary to the submissions by the petitioner that he was inconvenienced for forty (40) days, without a luxurious vehicle, no evidence to that effect was adduced. The submission is that his vehicle was fixed within three (3) days, but he declined to get it. It is contended that the submission amounts to giving evidence at the bar, and the case of ***Jamas Milling Company Ltd v Imex Ternational (PTY) Ltd*** *(21)* is relied on, stating that it was observed in that case that;

> ***"He was not aware of the fax at the time they were before the Court. He did not receive the fax. His was giving evidence from the Bar. The failure by Mr. Nyirenda to swear an affidavit explaining what happened must incur our disapproval".***

The 2nd respondent on the other hand, in its submissions, refers to its' mandate as stipulated in the Competition and Consumer Protection Act No 24 of 2010. The submission is that the preamble of the Act sets out the two fold mandate of the 2nd respondent as;

> ***"to safeguard and promote competition; protect consumers against unfair trade practices;"***

That from this, the mandate of the 2nd respondent is to protect consumers against unfair trading practices, and regulate the conduct of enterprises operating in Zambia. It is also submitted that flowing from this, the 2nd respondent is clothed with power to impose administrative penalties on any erring enterprises.

This power to fine can be seen from the decision of the Board of Commissioners dated 13th June, 2016, which is exhibited as 'DPN1' to the affidavit verifying the petition, wherein, the 1st respondent was found to have violated Section 49(1) of the Act, and was directed to pay 0.5% of its annual turnover.

The 2nd respondent further submits that in order for it to be consistent in the manner that it carries out its mandate, and for the easier understanding of the law by the general public, Section 84 of the Act empowers the 2nd respondent to issue guidelines. Thus, a number of guidelines have been issued, which include guidelines on the issuance of fines, which were first published and gazetted in 2014, and were reviewed in 2019.

That with regard to this case, the 2014 guidelines apply, whose policy objective empowers the 2nd respondent;

a) *To impose fines which reflect the seriousness of the violation.*

b) *To ensure that fines deter future behavior or others from contravening the Act; particularly part III, IV, VII and VIII, and ensure compliance with the law.*

Further, that guideline 4 states that;

> *All offences punishable under the Act including Sections 9, 10, 16, 21, 37, 46, 47, 48, 49, 50, 51, 52, 55 provide for offences punishable by financial penalties to be imposed by the Commission without recourse to any court or abiter, unless on appeal.*

That in this matter, the 1st respondent was found to have violated Section 49(5) of the Act, which section empowers the 2nd respondent to

impose a fine of not more than ten (10) percent of the enterprise's annual turnover. That in arriving at that position, the 2nd respondent was guided by guideline 7 which provides for aggravating factors and mitigating factors when imposing the fine.

Further, guideline 6, table 2, provides baselines on the issuance of fines, depending on the turnover of the enterprise. That in this case, the 1st respondent's annual turnover was above K1, 000, 000.00, hence the applicable base finding being the K50, 000.00 that was paid by the 1st respondent. The 2nd respondent reiterates that the Competition and Consumer Protection Act does not make provision for the award of compensation for any loss suffered by a consumer, although it has powers to order refund, replacement of goods or redoing of services.

It is submitted that the case of ***Airtel Networks Zambia Plc v The Competition and Consumer Protection Commission and Macnicious Mwimba*** (30) held that the Commission and the Tribunal do not have jurisdiction to award damages or compensation as sought by the complainant for what he is alleged to have suffered. That in the case of ***Espine Hamusonde v Izwe Loans Limited and the Competition and Consumer Protection Commission,*** (29) the Tribunal stated that;

> ***"Our understanding of that judgment is that a statute created body, can only deal with matters under such a statute. In other words, it cannot exercise any other jurisdiction outside such a statute. In saying so, we assert that this is the case in point with respect to the 2nd respondent. We do not agree that the 2nd respondent has power beyond that which is provided in the CCPA. Thus, we consider that any exercise of power outside the CCPA would be nugatory and void ab initio".***

Therefore, the 2nd respondent cannot act outside the provisions of the Act, as doing so would be ultra vires. It is also submitted that the 2nd respondent took cognizance of the fact that the petitioner needed to be compensated, but the 2nd respondent had no power to make such a directive, and that is why it directed that the petitioner seeks compensation from the courts of law, for the failure by the 1st respondent to provide him with a relief vehicle, while his vehicle was being repaired. Further, it imposed sanctions on the 1st respondent, in line with Section 5(d) of the Act.

The 2nd respondent also refers to the fact that the petitioner testified that it is not money that he wanted, and that the fine that was imposed on the 1st respondent was a meagre K50, 000.00. That had the petitioner wanted to be compensated, he would have commenced an action for compensation before the courts of law. It is further submitted that Counsel for the petitioner in the submissions has cited a plethora of authorities that would have aided the petitioner's case in pursuance of the action for damages, as opposed to filing a petition in blatantly frivolous and vexatious circumstances.

The 2nd respondent also submits that the petitioner in the submissions is attempting to mislead the court by equating it to a court of law, when he refers to the legal nature of a decision of the 2nd respondent, and that of any competent court. It is submitted that the 2nd respondent is an administrative body, and that ***Black's Law Dictionary, 8th Edition*** defines administration as;

> ***"inter alia, in public law, the practical management and direction of the executive department and its agencies".***

Thus, the 2nd respondent is just but a government agency that is clothed with administrative adjudication, which is defined in ***Black's Law Dictionary*** as;

> ***"The process used by an administrative agency to issue regulations through an adversary proceeding".***

That as the 2nd respondent's Board exercises administrative adjudication, any directives that it gives to an erring enterprise should only be what the law provides for, and therefore, it has limited jurisdiction, and cannot award compensation to a consumer. Thus, the 2nd respondent cannot be equated to a court. Further, the 2nd respondent unlike the High Court, does not have unlimited jurisdiction within the law, as stated in the case of ***Zambia National Holdings Limited and United National Independence Party (UNIP) v. the Attorney-General*** *(15)*.

As to who owns the decision dated 13th June, 2016, the 2nd respondent submits that when the 2nd respondent investigates a complaint, a report is submitted to the Board of Commissioners for adjudication. It is stated that the report bears the names of the complainant and the enterprise against whom the complaint is lodged. These names are maintained until the decision of the Board is made, but where there is an appeal to the Tribunal, the names change to that of the aggrieved person with the decision of the Board and the 2nd respondent, as provided in Section 60 of the Act.

That this is because the 2nd respondent has to defend the decision of the Board of Commissioners. It is submitted that from this, it can be seen that the 2nd respondent cannot appeal against its own decision, but can only defend once an appeal is lodged with the Tribunal. It follows

therefore, that the decision dated 13th June, 2013 is a decision of the 2nd respondent, even though the names of the parties are the petitioner and the 1st respondent, and the fine imposed on the 1st respondent belongs to the State, who is represented by the 2nd respondent, as provided in Section 86(1) of the Act.

The 2nd respondent refers to ***Section 28 of the Public Finance Management Act No 1 of 2018***, which provides that;

> ***"General revenue collected by appointed agents on behalf of government shall be transmitted to the consolidated fund as prescribed by the Treasury".***

That Section 2 of that Act defines an appointed agent as;

> ***"An institution engaged by government to collect general revenue on its behalf and public funds".***

Further, that general revenue is defined in the same section 2 as;

> ***"Income accruing to the Republic through taxes, fees, fines, levies, charges, sale of government property and shares, loans, donations and grants raised from within or outside Zambia due to the republic".***

Based on these sections, the 2nd respondent's submission is that it is an appointed agent of the State, as enshrined under the Public Finance Management Act, to remit every collected general revenue to the State. That Section 28(6) of the Public Finance Management Act criminalises the failure to remit general revenue to the State. Thus, the 2nd respondent cannot share the fine paid by the 1st respondent with the petitioner.

Further, the 2nd respondent's mandate is to regulate the conduct of business in the markets to ensure that they conform with the Act, and that consumers are protected against unfair trading practices. Therefore, fines cannot be shared with the petitioner, as this would be illegal, and the decision of the 2nd respondent belongs to the State, and the petitioner has no property rights in it.

On whether there has been regulatory expropriation of the petitioner's rights or interest in the decision dated 13th June, 2016 by State, the 2nd respondent submits that the petitioner relies on Article 16 of the Constitution, which provides that no property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired without adequate compensation.

It is submitted that ***Black's Law Dictionary, 8th Edition*** defines expropriation as;

> ***"The taking over of privately owned property by the government".***

The 2nd respondent states that government may engage in expropriation for purposes that are beneficial to the general public. It is further submitted that the petitioner may have rights or interests in the decision that was delivered by the Board of the 2nd respondent to the extent of being redressed within the boundaries of the law that he chose to lay his claim.

That beyond the boundaries of the law, alternative legal means may be implored, and in this case, the petitioner was adequately redressed under the Competition and Consumer Protection Act when the 1st

respondent repaired his vehicle to acceptable standard. The case of ***Tokyo Vehicles Limited v The Competition and Consumer Protection Commission*** [32] is relied on, where the complainant was directed to pursue compensation in the High Court for having been sold a defective tractor, which decision was upheld by the Supreme Court.

Reference is made to ***Section 60 of the Competition and Consumer Protection Act No 24 of 2010***, which provides that a person or enterprise that is aggrieved with the decision of the Commission has a right to appeal to the Tribunal, and that had the petitioner been dissatisfied with the decision of the Board of the 2nd respondent, he should have appealed to the Tribunal, but he did not.

On the petitioner's submission that the decision of the Board of the 2nd respondent is a chose in action, and therefore constitutes constitutional property in Zambia, the 2nd respondent refers to the definition of a chose in action, in ***Black's Law Dictionary***. It defines a chose in action as;

> ***"1. A proprietary right in personam, such as a debt, owed by another person, a share in joint-stock company, or a claim for damages in tort. 2. The right to bring an action to recover a debt, money, or thing.3. personal property that one person owns but another person possesses, the owner being able to regain possession through a law suit".***

That going by this definition, the petitioner cannot claim that the 2nd respondent expropriated his money, as the 2nd respondent does not owe the petitioner anything. It is further submitted that the petitioner in cross examination admitted that had no property rights in the K50, 000.00 that was imposed as a fine on the 1st respondent. Thus, the

submission that the decision of the Board of the 2nd respondent is a chose in action cannot stand.

Further, that even the reliance on Article 266 of the Constitution for the definition of property which includes choses in action, cannot stand, as the decision of the Board of the 2nd respondent does not qualify as a chose in action. It is also stated that the petitioner in his submissions refers to the Compensation Act not making provision for civil law remedies such as compensation, damages, specific performance and injunctions. The 2nd respondent submits that it has no knowledge of this law.

The 2nd respondent however submits that the petitioner has not even adduced any evidence to show what right or interest he has in the decision dated 13th June, 2016, and that he slept on his rights by not commencing an action before the courts of law to claim compensation as directed by the Board of the 2nd respondent. He cannot now turn around and claim that he has rights to the fine that the 1st respondent was directed to pay.

The 2nd respondent states that as the petitioner had no personal property in the decision that was made by the Board, there can be no regulatory expropriation. As to whether the Competition and Consumer Protection Act No 24 of 2010 should provide for civil law remedies, it is submitted that the Competition and Consumer Protection Policy of 2009, informed the enactment of the Act. That the vision of the policy was;

> ***"To develop and facilitate an enabling national growth environment which is transparent, equitable, and efficient***

and provides for procedural fairness and for business and consumers".

That in that policy, it was recognized that there was inadequate legal framework and agencies to deal with the various challenges faced by businesses and consumers, and that the existing legal framework did not put consumer welfare interests at the core. Further, that most consumers had not benefited from the increased competition, and they were getting unjust and unfair deals, as they were being provided with goods and services of unacceptable quality and unreasonable prices.

That while the rights of consumers are not laid down in the Competition and Consumer Protection Act, in comparison with the Bill of Rights in the Constitution, they can be inferred from the provisions, which include the right to safety, the right to be informed, among others. The submission is that Section 5 of the Act mandates the Commission to ensure protection of consumers rights. It is further submitted that the 2nd respondent is a government agency, and by virtue of that, a public body.

It therefore enforces public law and not private law. The definition of public law in ***Black's Law Dictionary*** is referred to, which is;

"The body of law dealing with relations between private individuals and the government, and with the structure and operation of the government itself".

That private law is defined in the said ***Black's Law Dictionary*** as;

"The body of law dealing with private persons and their property relationships".

Thus, the insistence that the Competition and Consumer Protection Act should provide for civil law remedies defeats the purpose for which the 2nd respondent was created. Moreover, civil law remedies can be obtained through the courts of law, and need not be provided for in the Competition and Consumer Protection Act. The submission is also that the consumer can use the decision of the 2nd respondent to claim compensation before the courts of law, an alternative which the petitioner has blatantly refused to pursue, despite the directive of the Board of the 2nd respondent.

The 2nd respondent submits that it appreciates the effort that the petitioner is making to advocate for change to the Competition and Consumer Protection Act, as it has allegedly been done in the EU. However, that Zambia is a sovereign state, should not be forgotten, and case law and precedents from other jurisdictions are not binding on the courts in Zambia, but are of mere persuasive value, unless there is a lacuna in our laws.

This therefore means that Zambia should not get on board and provide for civil law remedies in public laws, just because other jurisdictions have done so. It is the 2nd respondent's contention that right now, there is no lacuna in the Competition and Consumer Protection Act, as consumers have the option to pursue civil remedies before the courts of law. Further, the 2nd respondent has not breached any rights, and neither is the Act contrary to Article 11 of the Constitution.

The 2nd respondent further submits that the Act as it is, is meant to protect consumers from unfair trading practices and competition, and not profit them. The submission is also that any investigations carried out under the Act are borne by the 2nd respondent, and that consumers

lodge complaints at no cost at all. It is further submitted that Joseph Mutale the 2nd Respondent's witness testified that fines imposed on erring individuals and enterprises are used for the 2nd respondent's operations as appropriated by Parliament, as well as monies paid to the 2nd respondent by way of fees, levies, grants and donations, as provided in Section 10 of the Act.

Thus, the submission by the petitioner that citizens from far flung areas who are victims of consumer rights violations will have no redress is not true.

The 3rd respondent submits that the first question for determination is whether a person that is aggrieved, and who obtains a favourable decision from the 2nd respondent has property in the decision. The definition of property in ***Article 266 of the Constitution*** is referred to, and it is stated that ***Black's Law Dictionary, 2nd Edition*** defines judgment as;

> ***"As an official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or a suit therein being litigated and submitted to its' determination".***

The case of ***Torkington v Magee*** [(2)] is stated as having defined a chose in action as;

> ***"A chose in action is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action and not by taking physical possession".***

That included in choses in action are rights of action on a contract, the rights to debts of all kinds, rights to damages for breach, rights arising from commission of a tort, the right to recover property, and documents including bonds, bills, notes, cheques, bills of lading, stocks and insurance policies. The 3rd respondent submits that a judgment is simply a decision of a court regarding the rights and liabilities of the parties in a legal proceeding or action, and that there can be no property in a judgment.

Thus, the petitioner is misguided in stating that because the judgment was in his favour, he has property rights in it. The 3rd respondent further contends that a judgment is not a chose in action, as a chose in action entails regaining possession of the claimed property through a law suit. However, a judgment debt is a chose in action, as a person is entitled to sue on a judgment debt.

On whether there was regulatory expropriation of the decision of the Board of the 2nd respondent, the 3rd respondent also refers to the definition of regulatory expropriation in **Black's Law Dictionary**, as given by the 2nd respondent. ***Article 16 of the Constitution*** is also referred to. The 3rd respondent submits that regulatory expropriation requires that a person claiming it must have an interest or rights over the property in question.

It is stated that the petitioner has no property in the decision of the Board of the 2nd respondent, and he therefore cannot claim regulatory expropriation against the 3rd respondent. The 3rd respondent submits that an administrative penalty is a fine or a fee, which a regulator imposes for contravention of an Act or a regulation, and that consumer

and protection law is public law, and any violations of that public law is a violation against the State.

It is submitted that the purpose of an administrative penalty is to deter would be offenders, and to protect the public from the offenders. Thus, the petitioner cannot claim to have property in the proceeds of a judgment which does not belong to him, or indeed in the administrative penalty that does not belong to him, and he admitted so in cross examination.

As regards whether the petitioner should be compensated under the Competition and Consumer Protection Act No 24 of 2010, the submission is that currently, that law does not make provision for the payment of compensation. However, the Act does provide for civil law remedies through the courts of law, and the Board of the 2nd respondent directed the petitioner to obtain compensation through the courts of law.

The 3rd respondent contends that there is no lacuna in the law when it comes to civil law remedies, as consumers have the option of proceeding to court to claim compensation. Thus, there is no contravention of any human rights instruments or the law.

In the submissions in response, the petitioner refers to the role of the court in assessment of damages, and relies on the case of ***Emmanuel Chisenga v Zambia National Commercial Bank Plc*** *(22)*, stating that the Supreme Court in that case guided that;

> ***"We wish to say from the onset that an assessment....is not an independent inquiry of the judgment giving rise to such assessment. You cannot during assessment call for fresh***

evidence and make fresh findings on matters that are outside the scope of the judgment".

The petitioner submits that the Board of the 2nd respondent referred to this court, the determination of the compensation payable by the 1st respondent, when the 1st respondent admitted having caused damage to the petitioner's vehicle, and failed to provide him with a relief vehicle during the period that his vehicle was being repaired. The petitioner contends that this court is not dealing with the issue of liability, as the Board of the 2nd respondent established this.

The submission is that what this court should deal with is the quantum of damages payable, which in essence, is an assessment. In this regard, the petitioner submits that the respondents argue that the period is five (5) days, while the petitioner contends that it is forty (40) days, as the petitioner testified that it was over a couple of months.

The petitioner denies that this evidence is hearsay, and justifies it on the basis that when RW1 was cross examined, and asked how long it would take to import a spare part into Zambia from Germany, he was very evasive. It is further submitted that there is no evidence on record to show that the spare part was imported from Germany into Zambia.

The petitioner also submits that a spare part cannot be imported within five (5) days from Germany, looking at the distance between the two countries. Moreover, the 1st respondent did not tell the 2nd respondent that it imported the spare part within five (5) days. The petitioner states that the 1st respondent admitted having failed to provide him with a relief vehicle during the period that it was repairing his vehicle.

The petitioner also submits after the power steering failure on 16th September, 2015, the 1st respondent only gave the petitioner a report on 20th October, 2015, which is at page 27 of the petitioner's bundle of documents, and therefore, it is not true that the vehicle was repaired within five (5) days, but it is forty three (43) days.

On the essence of damages, the case of ***Zambia National Building Society v Ernest Mukwamataba Nayunda*** *(15)* is relied on, the submission being that it was held in that case that;

> ***"The essence of damages has always been that the injured party should be put, as far as monetary compensation can go, in about the same position he would have been had he not been injured. He should not be in a prejudiced position nor be unjustly enriched. Bearing this in mind and also what we said in Miller's case [1], courts should adequately compensate the injured party".***

On proof for a claim for damages, reference is made to the case of ***Industrial Gases Limited v Waraf Transport Limited and Mussah Mogeehaid*** *(17)* where the Supreme Court stated that;

> ***"We are aware that in Mhango (3) we propounded the general rule regarding the sufficiency of proof to support an award in respect of special losses. At the same time, we accepted that in an effort to do justice, trial judges have been driven into making intelligent and inspired guesses on very meagre evidence. We also still upheld the principles of not interfering unless the result was so high as to be utterly unreasonable. This is on the basis that the trial judge had a first hand feel***

> ***of the case and was better placed than an appellant court which only has the record to go by to make an assessment. Accordingly, what a trial judge has done will not be interfered with lightly; unless upon the grounds of a wrong principle or a manifest error".***

The petitioner contends that his vehicle is a state of the art on the Zambian market, and the 1st respondent admitted that its mechanic was negligent, and they failed to provide the petitioner with a vehicle for over forty (40) days. He is therefore entitled to adequate compensation to vindicate his constitutional right to own property. Reliance is placed on the case of ***Benjamin Mwelwa v The Attorney General*** *(33)*, stating that the Constitutional Court in that matter stated that;

> ***"In certain circumstances, the court may award more than the normal measure of damages, by taking into account the defendant's motives or conduct, and the damages may be aggravated damages, which are compensatory or exemplary damages which are punitive".***

With regard to the submissions by the 2nd and 3rd respondents, the petitioner submits that he is not advocating for the abolition of the fines which is a form of enforcement of the Competition and Consumer Protection Act. Further, that the argument is not about expropriation of the petitioner's property. Rather, the petitioner's contention is that there is regulatory taking of the petitioner's property.

The petitioner with reference to the case of ***Tokyo Vehicles v The Competition and Consumer Protection Commission*** *(32)* states that there are two ways of enforcing the Competition and Consumer

Protection Act. These are firstly by public enforcement, in which the 2nd respondent slaps penalties on offenders, and secondly by private enforcement where members of the public bring private legal actions against infringers of the Act.

However, the Competition and Consumer Protection Act only provides for civil penalties and imprisonment in certain cases, but does not make provision for civil law remedies such as compensation, damages, injunctions, private enforcement of the 2nd respondent's decisions, by way of writ of fieri facias, possession and legit. Thus, the petitioner's contention is that the absence of the civil law remedies is unconstitutional, and leaves the competition law injuries uncompensable under the Act.

That if a citizen does not have money to enforce the decision of the 2nd respondent in the High Court, the decision rendered in favour of such a citizen will remain useless, and will be of no value to its owner. The petitioner reiterates the decision in the case of ***George Peter Mwanza and another v The Attorney General*** *(34)*, where the Supreme Court stated that Article 11 of the Constitution provides general protection among others, the right not to be deprived of property without due compensation.

Further that the case of ***Garden Cottage Food Ltd v Milk Marketing Board*** *(13)* reinforced the principle that breaches of European competition law gives rise to claims for damages, and other relief in English courts, and any party who suffers loss as a result of infringement of competition law can seek to pursue a claim for damages either in the Chancery division of the High Court or before the Competition Appeals Tribunal.

With regard to whether the decision of the Board of the 2nd respondent amounts to property, as submitted by the 2nd and 3rd respondents, the petitioner states that while the 2nd and 3rd respondents have referred to the dictionary definition, RW3 in cross examination stated that a decision of the 2nd respondent in favour of a party represents money. The petitioner argues that a decision of the 2nd respondent in favour of a consumer represents a person's property in the form of money which it will translate into. That this is what it means to be a chose in action.

Further, Article 266 of the Constitution as amended, defines money as property, and while a consumer has property rights in the decision of the 2nd respondent, the same is of no value, as there are no civil law remedies until one spends money to enforce it in the High Court. If that is not done, the decision is useless, as it cannot be enforced under the Competition and Consumer Protection Act.

The petitioner reiterates the earlier submissions that regulatory taking is where a regulation goes too far, or if diminution in economic value caused by regulatory taking goes too far, a compensatory taking takes place, and that it does not refer to expropriation.

That the focus is on government regulation, and its effect on the citizen's property, as stated in the case of ***Pennyslavania Coal Co v Mahon*** *(3)*. The petitioner prays that the Competition and Consumer Protection Act No 24 of 2010 be harmonized with Article 11 of the Constitution. In this regard, the case of ***Chama Mutambalilo v The Attorney General*** *(35)*, is referred to, and it is submitted that it was observed in that case that the Judicial Code of Conduct is not in line with Article 220 of the Constitution.

Thus, the prayer is that this court guides that the ***Competition and Consumer Protection Act No 24 of 2010*** is harmonized with Articles 11 and 16 of the Constitution, by the inclusion of civil law remedies in the Act. This will enable losses that are suffered by consumers to be compensated under the Act itself, and not by the High Court in its original jurisdiction, like in other Commonwealth jurisdictions.

As already seen, the 1st respondent was found by the Board of the 2nd respondent to have contravened Section 49 (5) of the ***Competition and Consumer Protection Act***. The said section provides that;

> ***"(5) A person or an enterprise shall supply a service to a consumer with reasonable care and skill or within a reasonable time or, if a specific time was agreed, within a reasonable period around the agreed time".***

Sections 46 and 47 of the said Act provide as follows;

> ***"46. (1) A person or an enterprise shall not practice any unfair trading.***
>
> ***(2) A person who, or an enterprise which, contravenes sub-section (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.***
>
> ***47. A person who, or an enterprise which –***
>
> ***(a) falsely represents that –***

(b) any goods are of particular standard, quality, value, grade, composition, style or model or have a particular history or previous use;

(c) any services are of a particular standard, quality, value or grade;

(d) any goods are new;

(e) a particular person has agreed to acquire goods or services; or

(f) any goods or services have sponsorship, approval, affiliation, performance characteristics, accessories, uses or benefits that they do not have; or

(g) makes a false or misleading representation concerning –

(h) the price of any goods or services;

(i) the availability of facilities for the repair of any goods or of spare parts for goods;

(j) the place of origin of any goods;

(k) the need for any goods or services; or

(l) the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy;

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".

These sections create offences as provided in Section 82 of the Act, which states that;

> ***"82. A person who contravenes a provision of this Act for which a specific penalty is not provided for under this Act, commits an offence and is liable, upon conviction, to a fine not exceeding one hundred thousand penalty units or to imprisonment for a period not exceeding one year, or to both".***

Section 49 of the Act provides that fines ordered to be paid shall be paid to the 2nd respondent, and Section 86 of the said Act states that;

> ***"86. (1) A fine payable under this Act shall be a debt due to the State and shall be summarily recoverable as a civil debt".***

The petitioner contends that the failure by the Act to provide for civil law remedies, such as the payment of compensation, damages and injunctions among others, but only makes provision for the payment of administrative penalties by erring individuals or enterprises, amounts to regulatory expropriation. This is because only the State benefits from the fines paid by erring individuals or enterprises, while the consumer who suffers the harm as a result of the violation of the Act remains uncompensable under the Act.

Such a consumer can only give effect to a decision rendered in their favour by the 2nd respondent by commencing an action in the High Court. This the petitioner argues may hamper the realization of such a consumer's rights, as they may only realise the fruits of the decision made by the 2nd respondent that is made in their favour, if they have money to commence such an action before the High Court, and to engage

Counsel to do that for them. That this amounts to regulatory taking as it renders a consumer's property economically valueless.

In arguing that the petitioner has property rights in the decision of the Board of the 2nd respondent, the definition of property in Article 266 of the Constitution and Blacks Law Dictionary has been referred to. That from the definition in Article 266 of the Constitution, property can be a chose in action, which may be a judgment, and it's protection is guaranteed by Articles 11 and 16 of the Constitution. Therefore, failure by the Competition and Consumer Protection Act to provide for compensation or award of damages to citizens whose successfully lay complaints under the Act, is a breach of the Constitution.

The 2nd and 3rd respondents on the other have argued that the Competition and Consumer Protection Commission is a public body and therefore, it exercises public law. Further, that the Competition and Consumer Protection Act seeks to protect consumers from unfair competition, and it also regulates the conduct of individuals and enterprises in the conduct of their trade. Therefore, in protecting consumers and regulating trade, erring individuals and enterprises are fined, if they breach the law.

In the case of ***Tokyo Vehicles Limited v The Competition Consumer and Protection Commission*** [32], a buyer, Webster Shafuti lodged a complaint against the appellant for the supply of a defective tractor, with the respondent. The appellant was found guilty of having sold the buyer a defective product contrary to Section 49(1) of the Act. As a consequence, the appellant was given a written warning, and was ordered to refund the buyer the amount of K116, 400.00, being the purchase price of the tractor. The respondent also advised the buyer to

pursue the amount of K20, 000.00 from the Small Claims Court as compensation.

The appellant being dissatisfied with the decision, appealed to the Tribunal which upheld the appeal. There were further appeals to the High Court, and the Supreme Court, and the Supreme Court at pages J1-J2 of the judgment noted that the enforcement of comsumer rights now occurs at levels; with the first being purely private self help where an aggrieved consumer is at liberty to invoke common law or statutory law principles, such as those pertaining to the law of tort, contract or the sale of goods to pursue civil remedies.

That the second level is where statutory institutions such as the Competition and Consumer Protection Commission are mandated to undertake measures to protect consumers and impose both criminal and civil sanctions. It was noted in that matter, that the aggrieved consumer chose to invoke the public level machinery to redress his grievance.

On the question of whether the Commission's entitlement to receive fines and to take other measures stipulated in section 49 (1) of the Act, should be preceded by a criminal conviction of a person who contravenes the Act, the Supreme Court found that it agreed with the learned Judge that it has administrative, rather than judicial mandate, contrary to the holding of the Tribunal.

It was also stated that the Commission is however empowered to investigate a complaint, and that it has power upon satisfying itself that a violation under Section 49 of the Act has occurred, to issue orders as it is empowered under that section, apart from Section 49 (2) (a) and (b), which are dependent upon on a conviction by a court of law.

From this case, it can be seen that the 2nd respondent herein exercises administrative powers as opposed to judicial powers. The 2nd respondent has referred to the definition of administrative adjudication, as stated in ***Black's Law Dictionary***. It defines administrative adjudication as;

> ***"The process used by an administrative agency to issue regulations through an adversary proceeding".***

The power to lodge complaints against an invidual or an enterprise in their trade, is provided for in ***Section 54 of the Competition and Consumer Protection Act No 24 of 2010***. This is in pursuance of the 2nd respondent's mandate, as spelt out in Section 5 of the Act, which partially provides as follows;

> ***"5. The functions of the Commission are to –***
>
> ***(d) investigate unfair trading practices and unfair contract terms and impose such sanctions as may be necessary;"***

Therefore, any decisions that the 2nd respondent makes with regard to unfair trading practces are meant for regulation. It accordingly follows that the 2nd respondent's decisions are not judicial in the sense of a judgment, where there are two opposing parties, but are meant to regulate the conduct of individuals or enterprises in their trade.

That being the position, an individual who chooses to complain against an individual or an enterprise in the conduct of trade with them, to the 2nd respondent, has an interest in the decision made by the 2nd respondent, by virtue of having complained. However, the decision made by the 2nd respondent as a result of a complaint, is a decision for the State, the 2nd respondent being an agent of the State, as an enforcer of public law. That is why, Section 86 (1) of the Act states that;

"86. (1) A fine payable under this Act shall be a debt due to the State and shall be summarily recoverable as a civil debt".

Consequently, a decision of the 2nd respondent in relation to a complaint lodged by a person against an individual or an enterprise under the Act is not a judgment, which confers rights on the complainant in the strict sense. Such a decision regulates erring conduct by imposing fines and the 2nd respondent may in addition to imposing fines, direct the refund or replacement of goods supplied, among others, as stipulated in Section 49 (3) and (4) of the Act. Therefore, a complainant does not acquire property rights in such a decision.

It thus follows that a decision of the 2nd respondent is not a chose in action, which is property under Article 266 of the Constitution of Zambia. The first relief claimed for a declaration that a citizen of Zambia who lodges a complaint against a person or an enterprise under the provisions of the Competition and Consumer Protection Act No 24 of 2010 has personal property rights in the decision rendered in his favour by the Board or Tribunal of the 2nd respondent fails, and it is dismissed.

As regards the second relief sought, it is that the government's taking of the proceeds of the judgment or decision rendered in favour of a citizen under the Act in the form of administrative penalties calculated at 5% or 10% of the offending person's or enterprises annual turnover without any provision for civil law remedies, such as the payment of damages or compensation to the injured citizen amounts to regulatory taking or confiscation of a citizen's property by the State without compensation, and contravenes Article 16 of the Bill of the Rights, and is also a breach of Zambia's international commitments to the protection of property of its citizens.

I have found that a decision of the 2nd respondent made under the Competition and Consumer Protection Act, is not property that a successful consumer who has lodged a complaint can claim. As rightly submitted by the 3rd respondent, ***Black's Law Dictionary 8th Edition*** defines regulatory expropriation as;

> ***"The act of government taking privately owned property against the wishes of the owner, ostensibly to be used for the benefit of the overall public".***

The petitioner in the submissions makes reference to the elements that a person has to establish in order to prove regulatory taking. These are;

1. That the person possesses a recognizable property interest or right.
2. That the property has been taken by the government for public use.
3. That there was either physical or regulatory taking.

The property referred to in this matter, is the decision that was made by the Board of the 2nd respondent, after the petitioner lodged a complaint against the 1st respondent for unfair trading practices. The decision directed the 1st respondent to pay 0.5% of its annual turnover as a fine to the 2nd respondent for the violation, which came to K50, 000.00. From the evidence on record, the fine was paid to the 2nd respondent, and RW3 testified that the 2nd respondent collects such fees on behalf of the government or the State.

So clearly, the decision in the form of the fine was paid to the State so the State took the fine. However, this does not amount to regulatory expropriation as I have found that the petitioner did not have any

property rights in the decision, although he had interest. The second claim equally fails.

The third claim is for a declaration that the failure by the ***Competition and Consumer Protection Act*** to provide for the enforcement of breaches of the Act deprives citizens of Zambia of the right to access civil law remedies, such as compensation, damages and equitable remedies. That this contrary to ***Articles 7 and 8 of the Universal Declaration of Human Rights of 1948*** and ***Articles 3 and 4 of the African Charter on Human and People's Rights***, and is therefore illegal and inequitable.

It has been seen that a fine payable by a violator of the ***Competition and Consumer Protection Act*** is payable to the government. Further, it has been seen that the Act does not provide for civil law remedies such as compensation and damages to a person who successfully lodges a complaint against a person or an enterprise under the Act. ***Article 11 of the Constitution*** provides that;

> ***"11. It is recognised and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status, but subject to the limitations contained in this Part, to each and all of the following, namely:***
>
> ***a. life, liberty, security of the person and the protection of the law;***
>
> ***b. freedom of conscience, expression, assembly, movement and association;***

c. protection of young persons from exploitation;

d. protection for the privacy of his home and other property and from deprivation of property without compensation;

and the provisions of this Part shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in this Part, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest".

This Article provides for general protection of rights. The petitioner has also relied on the ***Universal Declaration of Human Rights,*** as well as the ***African Charter on Human and People's Rights***. Zambia is a signatory to the said documents, and it is therefore bound by them. ***Article 8 of the Universal Declaration of Human Rights*** provides that;

"Everyone has a right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".

Further, ***Article 17 of the said Universal Declaration of Human Rights*** states that;

"1. Everyone has a right to own property alone, as well as in association with others.

3. No one shall be arbitrarily deprived of his property".

Therefore, the need for any aggrieved person to obtain an effective remedy for any violation of their rights is fundamental. The petitioner has made reference to other jurisdictions such as the United Kingdom (UK), having amended their consumer protection laws to provide for civil law remedies, following directives by the European Union (EU). Indeed, this is progressive, as it enables a consumer to obtain redress for violation of their consumer rights in one forum, and thereby reduces the costs of enforcement of such rights.

This is unlike what is prevailing in this jurisdiction, where an erring individual or enterprise is only subjected to the 2nd respondent's enforcement of the Act, by way of imposition of fines as penalties, and other reliefs such as a making a refund or replacement of the goods supplied, and the consumer who successfully lodges the complaint obtains no redress from such action in respect of damages or compensation.

To enforce their rights, for the payment of damages or compensation as a result of violation of the Act by an individual or an enterprise, the aggrieved consumer has to sue before a court of competent jurisdiction. This inevitably increases the costs of pursuing their rights. The petitioner argues that the failure by the ***Competition and Consumer Protection Act*** to provide for civil law remedies, is a contravention of ***Article 11 of the Constitution,*** as consumers who obtain favourable decisions remain uncompensated if they do not commence proceedings before the courts of law to obtain such.

Thus, the submission is that this court should declare the relevant provisions of the Act that do not provide for compensation as being incompatible with ***Article 11 of the Constitution***. Further, that this

court should direct the amendment of the ***Competition and Consumer Protection Act*** to provide for civil law remedies. Examples are cited of ***Lands Tribunal Act No 39 of 2010*** which clothed the Lands Tribunal with jurisdiction to deal with all land matters, and to award compensation in appropriate cases, unlike previously where it had no power to award compensation or cancel certificates of title.

The case of ***Thomas Mumba*** has also been relied upon to show that this court has power to declare provisions of Acts unconstitutional. The Supreme Court in the case of ***Tokyo Vehicles Limited v Competition and Consumer Protection Commission*** guided that enforcement of consumer rights can be either by way of purely private self help, through invoking the common law or statutory law principles pertaining to the law of contract, tort or sale of goods among others, or secondly through public/institutional level where statutory institutions like the 2nd respondent are engaged, which are mandated to undertake measures to protect consumers.

It can be seen from this, that a consumer in this jurisdiction who is aggrieved with an individual or an enterprise in their trade with such a consumer, may sue that individual or enterprise privately through the courts of law under the law of tort or contract, or they may engage the 2nd respondent, which is mandated to protect consumers, to enforce the provisions of the ***Competition and Consumer Protection Act***. Therefore, currently, a consumer has a choice which avenue to take in enforcing their consumer rights.

However, where they choose to engage the 2nd respondent to enforce the Act as a way of realizing their rights, they will not obtain damages or compensation as a result of any alleged violations. They will have to

claim such through the conventional courts of law. I have said that this increases the costs of realization of their rights, and may have the effect of hampering the realization of such rights, where one does not have money to sue, following a decision being rendered in their favour by the 2nd respondent.

While this is the position, there is still access to justice, whichever avenue one adopts. However, in light of the fact that other jurisdictions that have amended the consumer protection laws to provide for civil law remedies, thereby enhancing access to justice, this is something that should be advocated for and ambraced, as access to justice is fundamental, and so is access to an effective remedy.

As there is no complete bar to access to justice if one engages the 2nd respondent to enforce the provisions of the ***Competition and Consumer Protection Act***, as one can sue through the courts of law, it cannot be said that the Act contravenes ***Article 11 of the Constitution***, and ultimately the ***Universal Declaration of Human Rights*** and the ***African Charter on Human and People's Rights***. The third claim fails.

The fifth claim is for compensation for losses suffered by the petitioner. The evidence on record shows that the 1st respondent repaired the power steering oil reservoir after the 1st respondent's technician damaged it. The petitioner claims that he was inconvenienced for forty (40) days, which is the period that he claims that the 1st respondent kept his vehicle whilst it was being repaired. The 1st respondent disputes that the petitioner is entitled to be paid for the forty (40) days claimed, as there is no evidence that was adduced to support that claim.

Their contention is that the while they had told the petitioner that they would provide him with a relief vehicle while they repaired his vehicle, they did not do so, as they were unable to find a suitable vehicle, and the petitioner's vehicle was repaired within three (3) days, and he informed to go and collect it. However, he declined. Thus, there was no need to provide him with the relief vehicle.

Paragraph 28 of the affidavit in support of the amended petition states that the petitioner has not been compensated for the damage that was caused to his vehicle, and for the inconvience caused to him during the moments that the 1st respondent was working on his vehicle, and he had to make arrangements for alternative transport. I have noted that the damage that was made to the power steering oil reservoir of the petitioner's vehicle was repaired or made good.

The 1st respondent relies on the case of ***Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd*** *(24)*, stating that in that case, compensatory damages were stated as meaning damages calculated in the ordinary way by assessing actual financial loss incurred. Further reliance has been placed on ***Halsbury's Laws of England 1998, 4th Edition Reissue, Vol 12(1)*** in ***paragraph 812 at page 268*** as defining special damages as losses which must be proved, and that general damages are those which are presumed to be the natural and probable consequence of the wrong complained of.

In this matter, the natural and probable consequence of the wrongful act, was the damage to the power steering oil reservoir. The 1st respondent replaced the said power steering oil reservoir. The petitioner claims that the 1st respondent kept his vehicle for forty (4) days when they were repairing it, and he thus suffered loss. The petitioner in his

testimony did not elaborate on the vehicle that he claims he hired when the 1st respondent was repairing his vehicle, and at what cost.

Hire of an alternative vehicle falls under the head special damages, as this is not loss that was a natural and probable consequence of the damage to the power steering oil reservoir. Being special damages, that loss would have to be proved. The petitioner in the submissions states that he was inconvenienced for forty (40) days, as he was without his luxury vehicle. In his testimony, he relied on the letter at page 136 of his bundle of pleadings, which is dated 19th November, 2015, that the 1st respondent wrote to him.

That letter refers to the complaint that the petitioner made to Damier Germany against the 1st respondent, and it advises the petitioner that his vehicle had been fixed. In cross examination, the petitioner was referred to page 29 of his bundle of documents, which contains emails that were exchanged between himself and RW1. The petitioner agreed that on 21st September, 2015, RW1 had written to him advising that the vehicle had been repaired, and that it was ready to be delivered.

The petitioner further agreed that the email was written five (5) days after the vehicle taken in by the 1st respondent for repair of the damaged power steering oil reservoir. At page 28 of the petitioner's bundle of documents, is an email that the petitioner wrote to RW1 stating that he would come forward once he received the report about what the mechanic had done to his vehicle. On the same day, RW1 had responded that they had assessed the petitioner's vehicle, and had determined that it was roadworthy.

It can be seen from these emails that by 21st September, 2015, the 1st respondent had communicated to the petitioner that it had repaired his vehicle. The petitioner only responded on 2nd October, 2015, demanding a report of how the damage had been occasioned to his vehicle. It is therefore not true that the petitioner was kept out his vehicle for forty (40) days as a result of the vehicle being repaired, but rather it was because he had declined to get the vehicle, as he wanted a report.

In the case of ***Industrial Gases Ltd v Waraf Transport Ltd and Musah Mogeehard*** *(17)* relied on by the petitioner in his claim for damages for compensation, the amount of K4, 000, 000.00 that was upheld by the Supreme Court was for damages for loss of business. It was not for inconvenience. In the case of ***The Attorney-General v DG Mpundu*** *(11)*, it was stated that;

> ***"It is thus trite law that, if a plaintiff has suffered damage of a kind which is not necessary and immediate consequence of a wrongful act, he must warn the defendant in the pleadings that the compensation claimed would extend to this damage, thereby showing the defendant the case he has to meet and assisting him in computing a payment into court. The obligation to particularise his claim arises not so much because the nature of the loss is necessarily unusual but because a plaintiff who had the advantage of being able to base his claim upon a precise calculation must give the defendant access to me facts which make such calculation possible. Consequently, a mere statement that the plaintiff claims "damages" is not sufficient to let in evidence of a particular kind of loss which is not a necessary consequence***

of the wrongful act and of which the defendant is entitled to a fair warning. In other words, usual, ordinary or general damages may be generally pleaded; whereas, unusual or special damages may not, as these must be specifically pleaded in a. statement of claim (or where necessary, in a counter-claim) and must be proved".

It was observed in that matter that;

"Addis v Gramophone Company Limited, was for many years authority to bar, for instance, a servant wrongfully dismissed from his employment, for recovering damages for injured feelings or loss sustained from the fact that the dismissal itself makes it more difficult for him to obtain fresh employment. This case has since been qualified and there Is now a chain of authorities to support the recovery of damages for mental distress or inconvenience, for example, damages for frustration annoyance and disappointment could be recovered in an action for breach of contract. In McCall v Abelesz and Another, it was held (per Lord Denning, M.R.) at page 731 that:

> ***"It is now settled that the court can give damages for the mental upset and distress caused by the defendant's conduct in breach of contract. "".***

The 1st respondent agreed to give the petitioner a vehicle during the period that it was working on his vehicle, but it did not do so. Looking at the documents on record, the petitioner's vehicle was repaired within five (5) days of the incidence, and while the petitioner alleges that it is not

possible to import a spare part from Germany within five (5) days, looking at the distance between the two countries, the petitioner agreed that his vehicle has been in good working condition since the repair. Thus, he has not rebutted the defence that his vehicle was repaired within the time stated by the 1st respondent.

However, there being no evidence to show that the petitioner in fact hired a vehicle, and taking into account that he was inconvenienced only for five (5) days, I award the petitioner K3, 000.00 as damages for inconvenience, against the 1st respondent. The amount shall carry interest at the average short term deposit rate from the date of issue of the writ until judgment, and thereafter, at the Bank of Zambia lending rate until payment.

The petitioner having partially succeeded, he is awarded costs against the 1st respondent, which shall be taxed in default of agreement. Leave to appeal is granted.

DATED AT LUSAKA THE 25th DAY OF JUNE, 2020

Kaunda

S. KAUNDA NEWA
HIGH COURT JUDGE