

IN THE COMPETITION AND CONSUMER
PROTECTION TRIBUNAL FOR ZAMBIA
HOLDEN AT LUSAKA

2015/CCPT/017/CON

BETWEEN:

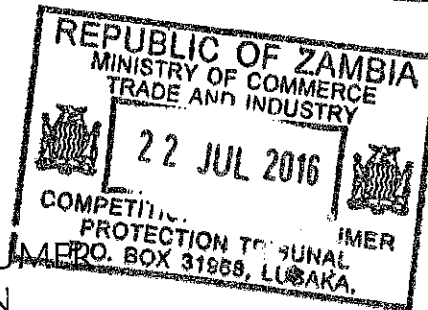
AFRICAN SUPERMARKETS LIMITED T/A
SHOPRITE CHECKERS



APPELLANT

AND

MR. DAVID NYIMBILI



1ST RESPONDENT

COMPETITION AND CONSUMER
PROTECTION COMMISSION

2ND RESPONDENT

CORAM:

Mr. W. A. Mubanga, SC. (Chairperson), Mrs. E. C. Chiyenge (Member), Mr. R. Sombe (Member), Mr. C. Kabaghe (Member),

For the Appellant:

Mr. W. B. Nyirenda, SC of William Nyirenda & Co. Mr. K. Bota also of William Nyirenda & Co.

For the 1st Respondent:

Mr. David Nyimbili (In person)

For the 2nd Respondent:

Mrs. M. Mwanza - Director Legal and Corporate Affairs, Mrs. L. M. Mwape - Legal Officer.

Authorities referred to:

- (1) Section 47(b)(iii) of Act No. 24 of 2010, Section 5 and Section 55(1) of the Act
- (2) Administrative and Fines Guidelines of 2014
- (3) Section 84 of the Act No. 24 of 2010
- (4) Longman Dictionary of Contemporary English

J U D G M E N T

This appeal is against the decision of the Competition and Consumer Protection Commission (*hereinafter referred to as the 2nd Respondent*)

delivered on 14th September, 2015 appearing on Pages 64 to 73 of the Record of Proceedings filed in the Tribunal Secretariat on 2nd November, 2015.

The Appellant filed its Notice of Appeal against the said decision on 14th October, 2015. The grounds of appeal were separately attached and appear as follows:

Ground One:

"The Commission erred in fact and law to proceed to make a determination of the Complaint without any Submission from the Complainant. The Complainant had effectively abandoned his Complaint and there was therefore no Complaint for the Commission to deal with.

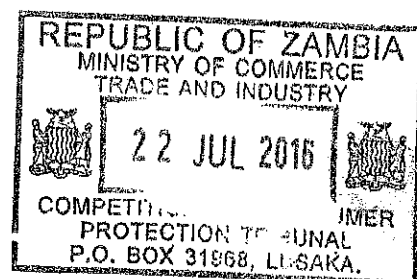
Ground Two:

The Commission erred in law and in fact to substitute the purchase of a product made by the Commission in place of or in addition to that purportedly made by the Complainant and proceed as if hearing the Complaint of the Complainant. There was no Complaint from the Complainant before the Commission by any Complainant but the Commission preferred a cause in which it was at once the Investigator, Prosecutor and Judge hearing its own cause contrary to the rules of natural justice.

Ground Three:

The Commission erred in law and fact to hold that the Appellant made a misleading, misrepresentation concerning the place of origin of the product complained of. The label on the product complained

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of was factual and not misleading. The Complaint if ever was not misleading at all.

Ground Four:

The Commission erred in law and in fact to hold that the Appellant was in breach of Section 47(b)(iii) of the Competition and Consumer Protection Act. The Appellant was not in breach of the said provision of the law or at all.

Ground Five:

The Commission erred in law and in fact to fine the Appellant a baseline of 0.5% of their annual turnover. This is unreasonable and unconscionable and arrived at arbitrarily.”

The 1st Respondent who is also the Complainant in his response to Grounds of Appeal filed his grounds on 27th November, 2015 and stated as follows:

Ground One:

“The 1st Respondent did not at any time effectively abandon the Complaint which was submitted through email between 13th and 14th October, 2014. At no time was the Commission, thereafter, instructed to discontinue the matter or that the 1st Respondent was no longer interested in the conclusion of the matter.

Ground Two:

The 1st Respondent made a Complaint to the Commission on the product that was purchased and the Commission in their own right proceeded to investigate the Complaint through the best possible means that could validate/support the Complaint. The Commission did not substitute the purchase of the product but rather validated the Complaint and confirmed that the practice was still on-going.

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Ground Three:

The Appellant did make a misleading presentation concerning the place of origin of the product. The label on the product did display a label that stated the product was a 'PRODUCT OF ZAMBIA' and did not carry any Zambian contact details of the institution that produced the product. Instead the product carried a consciously hidden label with foreign contact details say "FRESHMARK, Cnr Kruisfontein & Old Paarl Rd, Brackenfell, 7560, Customer helpline: 0800 010709, PRODUCT OF SOUTH AFRICA". The appearance of these two labels was misleading as to the origin of the product.

Ground Four:

The Commission was satisfied that the Appellant had breached the Competition and Consumer Protection Commission Act.

Ground Five:

The Competition and Consumer Protection Commission has policies and procedures to have arrived at a fine of 0.5% of the Appellant's annual turnover."

In its Notice of Grounds in Opposition to Appeal filed on 12th November, 2015 the 2nd Respondent stated as follows:

Ground One:

"The Commission did not err in fact or in law by proceeding to make a determination of the Complaint by the 1st Respondent herein; one David Nyimbili ('the Complainant') without any Submissions from the Complainant as the said determination flowed from the Complaint lodged by the Complainant and not from Submissions made after the Commission's preliminary findings.

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Ground Two:

Contrary to the Appellant's assertion, the Commission was on terra firma by adding the purchase of a product to that made by the Complainant as this is a legally backed decision.

Ground Three:

The Commission did not err in law or in fact by holding that the Appellant made a misleading representation concerning the place of origin of the product complained of as the contradictions on the label and the actual position was blatant for all to see.

Ground Four:

Contrary to the Appellant's assertion, there was no error both in law and fact on the part of the Commission in holding that the Appellant was in breach of Section 47(b)(iii) of the Competition and Consumer Protection Act No. 24 of 2010 ('the Act') as there was an undisputable finding to this effect.

Ground Five:

Contrary to the Appellant's assertion, there was no error on the part of the Commission in fining the Appellant a sum of 0.5% of the Appellant's annual turnover as the determination of fines is clearly spelt out in the Administrative and Fines Guidelines of 2014."

The Appellant in addition to the grounds of appeal filed a Witness Statement on 15th January, 2016 taken out by one Charles Bota the Appellant's General Manager and another Witness Statement filed in the name of one Godfrey Handabile on 18th January, 2016 who described himself as Trading Manager of Freshmark which according to him is a division of African Supermarket Limited. The Appellant's witnesses also gave viva voce evidence.

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The 1st Respondent supported his grounds of appeal by filing a Response to Statement by the Appellant's Witness - Charles Bota and filed it with the Tribunal Secretariat on 17th March, 2016. He also gave viva voce evidence. The 2nd Respondent supplemented the grounds with a 2nd Respondent's Witness Statement and filed it on 18th March, 2016 taken out by one Twaambo Chuula a Public Health Officer in the employ of the 2nd Respondent. He also gave oral evidence before the tribunal.

We are indebted to the parties and their Advocates for the assistance rendered to the tribunal. In arriving at this Judgment we have considered all the arguments, Witnesses Statements filed with the Tribunal Secretariat and oral evidence.

We will discuss the grounds of appeal by the Appellant as follows:

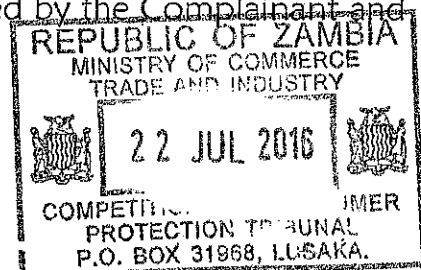
Ground 1

The argument in ground one is essentially that there is no Complaint before us to consider on the basis that the Complainant abandoned the Complaint. And also that the 2nd Respondent (*the Commission*) erred both in law and in fact to proceed to make a determination without any Submission from the Complainant.

The 1st Respondent (David Nyimbili) in response stated that he did not at any time effectively abandon the Complaint which was submitted through email between 13th and 14th October, 2015. And that at no time was the 2nd Respondent instructed to discontinue the matter or that the 1st Respondent was no longer interested in the conclusion of the matter.

In response the 2nd Respondent argued that it did not err in fact or law by proceeding to make a determination. Essentially that the said determination flowed from the Complaint lodged by the Complainant and

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not from Submissions made by the Commission's Preliminary findings.

We do not agree with the Appellant that the Complaint was abandoned. This Complaint appears on Pages 1 and 2 of the record of the proceedings. Mr Nyimbili also drew our attention to the emails appearing on Pages 3 and 4 of the record as well as that on Page 4 asking for the various details. We also have not seen any document to show that Mr Nyimbili had sent a letter to the 2nd Respondent withdrawing the Complaint. The Appellant has not produced any such document indicating he would no longer proceed with the Complaint.

We also note that Mr Nyimbili appeared before us and gave evidence and was cross-examined. This surely is not the conduct of someone abandoning the Complaint or withdrawing it. In any event the 2nd Respondent would have informed the tribunal for the record that in fact the Complainant had abandoned his Complaint. Now, this is a person who filed his response to grounds of appeal on 27th November, 2015 and also the response to Statement by the Appellant's Witness Godfrey Handabile filed on 7th March, 2016. We find that there is no evidence that the Complainant abandoned his Complaint and hereby dismiss ground 1 for being without merit.

Ground 2

The Appellant argues that the 2nd Respondent erred in law and in fact to substitute the purchase of a product made by the Commission in place of or in addition to that purportedly made by the Complainant and proceed as if hearing of the Complainant and that there was no Complaint from the Complainant before the Commission by any Complaint but the Commission preferred a cause in which it was at once the Investigator, Prosecutor and Judge hearing its own cause, contrary to the Rules of natural justice.

The 1st Respondent in response thereto argued that, the made a copy

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to the Commission on the product that was purchased and the Commission in their own right proceeded to investigate the Complaint through the possible means that could validate/support the Complaint. And he further argued that the Commission did not substitute the purchase of the product but that validated the Complaint and confirmed that the product was still on going. It was argued on behalf of the 2nd Respondent that contrary to the Appellant's assertion the Commission was on terra firma by adding the purchase of a product to that made by the Complainant as this was a legally backed decision.

We are in agreement with the arguments made on behalf of both 1st and 2nd Respondents as it relates to ground 2.

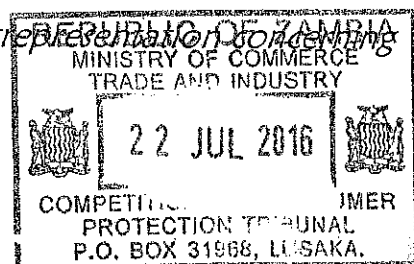
Our finding is that the Appellant has failed to prove that the 2nd Respondent erred by substituting the purchase of a product made by the 2nd Respondent in place of or in addition to that purportedly made by the Complainant. The Appellant also failed to prove that there was no Complaint by the Complainant before the 2nd Respondent by any Complainant and that it preferred a cause in which it was once the Investigator, Prosecutor and Judge hearing its own cause contrary to the rules of natural justice. We are of the view that there is nothing that the 2nd Respondent did which is contrary to the powers vested in it under Section 5 and Section 55(1) of Act No. 24 of 2010. In fact the 2nd Respondent had undertaken to investigate on its own initiative in terms with Section 55(1) of the Act.

We accordingly dismiss Ground 2 for being without merit.

Grounds 3 and 4

We will consider grounds 3 and 4 together as they appear inter related. Ground 3 reads as follows: *"that the Commission erred in law and in fact to hold that the Appellant made a misleading misrepresentation concerning*

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the place of origin of the product complained of. That the label on the product complained of was factual and not misleading and that the Complaint if at all was not misleading.”

Ground 4 relates to Section 47(b)(iii) of Act No. 24 of 2010. The thrust of the argument as in ground 3 is that the Appellant did not breach the provisions of S47(b)(iii).

In response thereto the 1st Respondent, stated among other things that the Appellant did make a misleading representation concerning the place of origin of the product. The label on the product did displace a label that stated that the product was a “product of Zambia” and did not carry any Zambian contact details of the institution that produced the product. Further that instead the product carried a consciously hidden label with foreign contact details with an address in Brackenfell and indicated a product of South Africa.

With regard to ground 4, the argument was that the Commission was satisfied that the Appellant had breached the Competition and Consumer Protection Commission Act.

On behalf of the 2nd Respondent, it was argued that the Commission did not err in law and in fact by holding that the Appellant made a misleading representation concerning the place of origin of the product complained of as the contradiction on the label and the actual position was blatant for all to see. The 2nd Respondent further stated in Ground 4 that there was no error on the part of the Commission in holding that the Appellant was in breach of Section 47(b)(iii) of the Act as there was an undisputable finding to this effect.

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Section 47(b)(iii) provides as follows:

“A person who, or an enterprise which _____

- (a)*
- (i)*
- (ii)*
- (iii)*
- (iv)*
- (v)*

(a) makes a false or misleading representation concerning _____

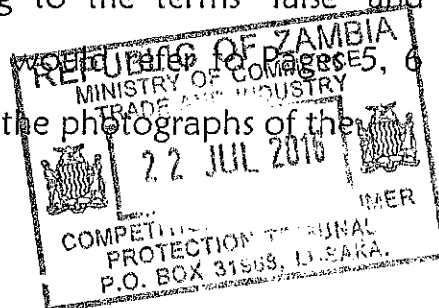
- (i)*
- (ii)*
- (iii) the place of origin of any goods;*
- (iv)*
- (v)*

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.”

According to Longman Dictionary of Contemporary English, the words “false” and ‘misleading’ are defined as follows:- At Page 365 “False is defined as not true or correct, not faithful or loyal - a false friend, not real, careless, unwise”

At Page 664 the word ‘mislead’ is defined as follows:- “to cause someone to think or act mistakenly guide wrongly. The car’s shining appearance misled me into thinking it was never when it really was; a misleading description/advertisement.”

In arriving at a decision on the issue relating to the terms ‘false’ and ‘misleading’ as defined in Section 47(b)(iii) we would refer to Pages 5, 6 and 7 of the Record of Proceedings which show the photographs of the



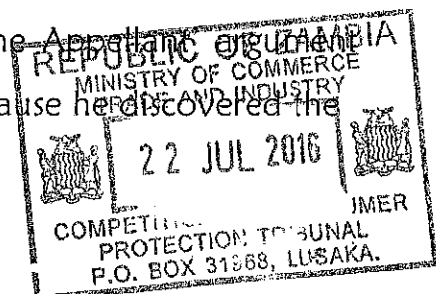
label. There is also the evidence in form of a letter from the Appellant to the 2nd Respondent appearing on Page 12 of the Record of Proceedings dated 7th October, 2014. And that although the letter is labeled on a "Without Prejudice" basis it was in response to an enquiry by the 2nd Respondent pursuant to Section 55(1) of the Act. The Appellant was therefore not entitled to responding on a without prejudice basis. We are not surprised therefore that the Appellant did not argue that the communication was not privileged.

It is explained in that letter as follows:

"In order to correctly inform the customer we began to stick preprinted "product of Zambia" Labels over the "produce of South Africa" contrary to the Appellant's claim that it correctly informed the customer by superimposing the label reading "the product of Zambia" over the reading "product of South Africa."

It is clear that the two contradicting labels were accessible to Consumers thereby raising the question as to whether the two labels, if any, were a true representation of the of the place of origin of the product. If not both at least one of them was false thereby violating Section 47(b)(iii) of the Act.

Further since the label was superimposed on the other that resulted in misleading or providing a false representation to Consumers as to place of origin particularly that the Consumers were unlikely to see the superimposed label at the point of purchasing so as to make an informed decision. The 1st Respondent in his evidence said that he did not see the superimposed label at the point of purchase, until much later at home and at that point it was his view that he had been misled to believe that that was a product of Zambia when not; contrary to the Appellant's argument that the customer could not have been misled because he discovered the



misrepresentation later. It is our view that a later discovery of a false or misleading representation does not negate the fact that the representation was misleading.

We note from the Appellant's evidence that it has a wide distribution network in Zambia and also note the explanation it gave before the Commission and also before the tribunal that the application of the principle of economies of scale, would make the price for the Consumer lower in that already available pre-labels reading as "*Product of South Africa*" would be used by superimposing on that label another one reading "*a Product of Zambia*". In our view that explanation does not help the Appellant escape the violation of §47(b)(iii) of the Act.

The Appellant further argued that this did not make a misleading representation as to the place of origin of that product because according to it the product was truly a product of Zambia as reflected on the label which superimposed the South Africa label. Further more that Mr Nyimbili was not misled because at the time he was purchasing the product he did not see the South Africa label and he only did so at home.

We are of the view that our finding must be based on the representation made to the Consumer as shown on the product.

Our further view is that the findings should not be based on the explanations given by the Appellant to the 2nd Respondent or to the tribunal as to why the two labels were placed on the product .

We are therefore satisfied that the conduct of the Appellant offended the provision of Section 47(b)(iii) of the Act and amounted to making a false or misleading representation concerning the place of origin of the goods in question.



Under the circumstance, we find that there is no merit in grounds 3 and 4 and dismiss them accordingly.

Lastly Ground 5 reads as follows:

"The Commission erred in law and in fact to fine the Appellant a baseline of 0.5% of their annual income. This is unreasonable and unconscionable and arrived at arbitrarily."

Section 47(b)(iii) of the Act prescribes the Fine in the following terms.

"47(b) A person who or an enterprise which makes a false or misleading representation concerning the place of origin of any goods is liable to pay the Commission a fine not exceeding ten percent of the person's or enterprises' annual turnover or one hundred and fifty thousand penalty units, whichever is higher"

Pursuant to its powers under Section 84 of the Act the 2nd Respondent has issued guidelines on fines. The following is the applicable schedule:

"(See attached document marked Schedule A)"

We observe that in its decision the 2nd Respondent arrived at the finding that the Appellant was not a first offender which fact has not been disputed.

According to the guidelines the 2nd Respondent was on firm ground when it imposed 0.5% of the turnover which according to the guidelines carries a cap of upto K50,000-00 depending on the turnover of the Appellant.

The Appellant has not provided this tribunal with compelling reasons so as to justify interference with the penalty meted out by the Board of Commissioners.

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We are therefore satisfied that the 2nd Respondent did not act arbitrarily or that such penalty was unconscionable and dismiss ground 5 accordingly.

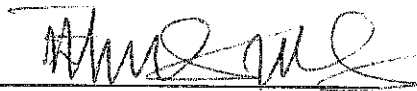
All in all the appeal fails and that costs will follow the event which in default of agreement will be taxed.

Any Party aggrieved with this Judgment has a right of appeal within 30 days from the date hereof.

Dated the 22 day of July 2016



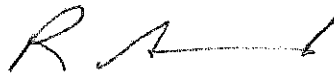
Willie Aubbie Mubanga
CHAIRMAN



Mrs Eness Chishala Chiyenge
Member



Mr Chance Kabaghe
Member



Mr Rocky Sombe
Member

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