

IN THE MATTER OF THE COMPETITION AND CONSUMER
PROTECTION TRIBUNAL
HOLDEN AT LUSAKA

2022/CCPT/014/CON

IN THE MATTER OF:

SECTION 47(b)(v) AND SECTION 49(1) OF THE
COMPETITION AND CONSUMER PROTECTION
ACT NO.24 OF 2010

IN THE MATTER OF:

THE COMPETITION AND CONSUMER
PROTECTION (GENERAL) REGULATIONS, 2011,
STATUTORY INSTRUMENT NO.97 OF 2011

IN THE MATTER OF:

THE COMPETITION AND CONSUMER
PROTECTION (TRIBUNAL) RULES 2012,
STATUTORY INSTRUMENT NO.37 OF 2012

BETWEEN

HENG LI INVESTMENTS LIMITED

AND

COMPETITION AND CONSUMER PROTECTION COMMISSION

APPELLANT

RESPONDENT

CORAM:

Mr. J.N. Sianyabo - Chairperson

Mrs. M.B. Muzumbwe-Katongo - Vice Chairperson

Mr. D. Mulima - Member

Mrs. B.S. Chaila-Sichizya - Member

Mr. B. Tembo - Member

For the Appellant:

Mr. E. Zulu, Consultant, Heng Li Investments Limited

Ms. L. Mulemba, Staff Member, Heng Li Investments Limited

Ms. L. Chalwe, Staff Member, Heng Li Investments Limited

For the Respondent:

Ms. M. Mtonga, Manager, Legal Services, Competition and
Consumer Protection Commission

R U L I N G

LEGISLATION REFERRED TO

1. Competition and Consumer Protection Act. No.24 of 2010 (As Amended)
2. Competition and Consumer Protection (Tribunal) Rules, S.I. No.37 of 2012

CASES REFERRED TO

1. Access Bank Zambia Limited v Attorney-General (9 of 2018) [2019] ZMCC 21 (27 March 2019)
2. Stanley Mwambazi v Morester Farms Limited [2007] SCZ ZR 108

WORKS REFERRED TO:

SIANYABO, J.N., Chairperson, delivered the Ruling of the Tribunal

1 INTRODUCTION

1.1 This ruling relates to an interlocutory application brought before the Competition and Consumer Protection Tribunal (hereinafter “**the Tribunal**”) by the Competition and Consumer Protection Commission (hereinafter “**the Respondent**”) pursuant to Rule 19 of the Competition and Consumer Protection (Tribunal) Rules, Statutory Instrument No.37 of 2012 (hereinafter “**the Rules**”).

2 RELIEF BEING SOUGHT

2.1 The Respondent seeks the Tribunal to dismiss the Notice of Appeal filed by the Appellant on 22nd August, 2022, for having been filed out of time.

3 BACKGROUND

- 3.1 The brief facts of the matter are that on 20th July, 2021¹, the Respondent received a complaint from one Mr. Emmanuel Sichone (hereinafter “**the Complainant**”) alleging that on 11th May, 2021, he purchased a 12V 100AH Gamistar Solar Battery from the Appellant at a cost of ZMW2,500.00 (Two Thousand Five Hundred Zambian Kwacha). The battery, which was charged by solar panels, was used to power up a solar fridge through a solar power controller. However, after a while, the Complainant alleged that he noticed that the battery was losing power quicker than the old battery it had replaced.
- 3.2 The Complainant further alleged that though the battery would be fully charged by 11:00 hours it would quickly discharge after sunset, and would be cut-off by the controller. Furthermore, the Complainant alleged that he returned the defective battery to the Appellant and it was serviced. However,

¹ CCPC. *Record of Proceedings*, 7th June 2021, pg.1-2

despite being serviced, the battery still performed poorly. In addition, the Complainant also alleged that the Respondent had given a three (3) month rather than the twelve (12) month warranty given by the manufacturer. On the basis of the foregoing, the Complainant is alleged to have requested for either a refund or replacement.

3.3 Following investigations, the Respondent's Board of Commissioners (hereinafter "the Board"), on 6th December, 2021 cited the Appellant (then referred to as the Respondent) for breaching section 47(b)(v) of the Competition and Consumer Protection Act No.24 of 2010 (hereinafter "the Act") and directed as follows:

- i. The Respondent is fined 0.5% of their annual turnover with the applicable cap in line with the Commission's Guidelines for Administration of Fines, 2019, for breach of Section 47(b)(v) of the Act in accordance with Section 47 of the Act...;*
- ii. The Respondent is ordered to submit their latest books of accounts within thirty (30) days of receipt of the Board Decision so that the Commission determines how much they are liable to pay in accordance with Section 5(d) of the Act; and*
- iii. The Respondent is ordered to give past and future purchasers of Gamistar batteries a one-year warranty from the date of purchase in line with the indicated manufacturer's warranty on the label;*

3.4 Further, any party aggrieved by the Decision was advised to file an appeal with the Tribunal within thirty (30) days of receipt of the Decision.

3.5 Aggrieved by the Board's Decision, the Appellant filed a Notice of Appeal

(hereinafter “the Appeal”) on 22nd August, 2022. However, upon being served with the said Appeal, the Respondent then raised a preliminary issue by way of summons dated 25th October, 2022, arguing that the Appeal had been filed out of time.

3.6 Unfortunately, the preliminary issue could not be heard owing to expiration of the term of office for members of the Tribunal sitting at the time.

3.7 Following appointment of new members of the Tribunal, the case came up for hearing on 13th July, 2023, on which date the preliminary issue was heard.

4 GROUNDS OF APPLICATION

4.1 The summons to raise a preliminary issue were accompanied by an affidavit in support dated 25th October, 2022, and deposed to by one Natalie Chabulembwa, an investigator in the employ of the Respondent. The affidavit stated in paragraphs 7 and 8 as follows:

“7. That the Appellant’s appeal has been filed outside the stated 30 days period from the date the Appellant received the Board Decision on 21st January, 2022. Therefore, the Appellant’s 30 days started to run on 21st January, 2022 and was due to expire on 21st February, 2022.

8. That on this premise, I humbly apply to this Honourable Tribunal to dismiss the appeal as it has been filed out of time.”

5 APPLICATION HEARING

5.1 The application was heard on 13th July, 2023, and in its opening remarks, the Tribunal sought confirmation from the Appellant, if it was aware that a

preliminary issue was raised by Respondent. The Tribunal further guided the Appellant that the preliminary issue had to be dealt with first prior to hearing of the Appeal.

- 5.2 In response, Mr. Emmanuel Zulu, a consultant for the Respondent, acknowledged that summons raising the preliminary issue were served on his client.

6 APPELLANT'S SUBMISSIONS

- 6.1 The Appellant did not submit any written arguments or list of authorities in opposing the preliminary issue raised in the summons, and other accompanying documents filed by the Respondent.
- 6.2 However, in responding *viva voce*, Mr. Zulu conceded that the Appeal was filed out of time. He further submitted that the delay was due to the Respondent's inability to contact him over a long period of time. Furthermore, Mr. Zulu pleaded that the Tribunal does not dismiss the Appeal but hear it in the interest of justice for the Appellant.

7 RESPONDENT'S SUBMISSIONS IN REPLY

- 7.1 As part of its evidence, the Respondent filed an affidavit in support of summons to raise a preliminary issue pursuant to Rule 19 of the Rules, which is dated 25th October, 2022, and was deposed to by Ms. Natalie Chabulembwa, a regional investigator in the employ of the Respondent. Ms. Natalie Chabulembwa averred in paragraph 7 of the Respondent's affidavit supporting raising of the preliminary issue that the Appeal was filed beyond the thirty (30) days period from the date when the Appellant received the Board Decision. She further averred that having received the Board Decision on 21st January,

2021, the Respondent was expected to file an Appeal on or before 21st February, 2021.

7.2 The Respondent's counsel, Ms. Malibase Mtonga, in responding to the Appellant's *viva voce* submission, argued that the Respondent opposed the Appeal being heard out of time. Ms. Mtonga further submitted that as the law provides, and as argued in the heads of argument, the Tribunal was not vested with power to grant leave to appeal out of time.

7.3 In addition, Ms. Mtonga submitted that in opposing the Appeal, the Respondent would rely on the documents that it filed before the Tribunal.

7.4 In its skeleton arguments, the Respondent's main argument was premised on section 60 of the Act, which states as follows:

"A person who, or an enterprise which, is aggrieved with an order or direction of the Commission under this part may, within thirty days of receiving the order or direction, appeal to the Tribunal."

7.5 Citing section 60 of the Act, the Respondent argued that the Appellant lodged its Appeal before this Honorable Tribunal on 22nd August, 2022, which was six (6) months outside the prescribed thirty (30) days period. Thus, the Appellant ought to suffer the consequences of its action. And to buttress this point, the Respondent cited a plethora of cases, *inter alia*, the case of ***Access Bank (Zambia) Limited v Attorney General*** (hereinafter "the Access Case"), where the court held as follows:

"...We sounded a warning to litigants who choose to ignore the rules of court that they do so at their own peril and risk the appeal being

dismissed."²

7.6 Lastly, the Respondent prayed that the Appeal be dismissed with costs.

8 APPELLANT'S REPLY TO THE RESPONDENT'S SUBMISSIONS

8.1 There were no further submissions from the Appellant.

9 CONSIDERATION OF THE MATTER

9.1 In analysing the preliminary issue raised by the Respondent, the Tribunal considered answers to the following questions to be key in determining the direction that the case would take:

- I. The question of whether the Appeal was indeed filed out of time;
- II. If it truly was filed out of time, was there any justifiable reason why such an event happened?; and
- III. With the Appeal having been filed late, should the matter still be heard?

9.2 Ms. Natalie Chabulembwa deposed in paragraph 7 of the Respondent's affidavit supporting raising of the preliminary issue that the Appeal was filed outside of the thirty (30) days period from the date when the Appellant received the Board Decision. In considering the Respondent's affidavit and the other evidence adduced *in casu*, the Tribunal corroborated the Respondent's submission that the Appellant filed the Appeal on 22nd August, 2021. By our count, this was a period of seven (7) months from the date of receipt of the Board Decision. Our finding confirmed the Respondent's argument that the Appellant had filed its Appeal out of time. Based on the foregoing, the Tribunal is of the considered view that the Appellant took a very pedestrian attitude

² [2019] ZMCC 21

towards the matter.

9.3 Having established that the Appeal was filed out of time, the Tribunal considered whether there was any justifiable reason for the action. In answering this question, the Tribunal noted the oral submission of the Appellant's consultant, Mr. Zulu, who attributed the extensive delay to his client having been unable to contact him over a period of time, leading to expiration of the thirty (30) days window for successful filing of the Appeal. While it may be understood and noted that the Appellant has a right to the choice and type of representation, there was no justifiable reason for the Appellant not seeking alternative representation once it became apparent that Mr. Zulu was not reachable.

9.4 Further, Mr. Zulu had also submitted *viva voce* that it was important for the Tribunal to hear the Appeal, in the interest of justice for his client. However, it may please the Appellant to know that the Tribunal stands for justice and fairness at all times in its deliberations. In doing so, we note the holding of the Supreme Court in the case of *Stanely Mwambazi v Morester Farms Limited* (hereinafter "the Mwambazi Case"), where it stated, *inter alia*, as follows:

*"...(ii) It is the practice in dealing with bona fide inter-locutory applications for courts to allow triable issues to come to trial despite the default of the parties...but it is not in the interest of justice to deny him the right to have his case heard..."*³

³ [2007] SCZ ZR 108

But even where justice has to be done, the Supreme Court further held in the Mwambazi Case, *supra*, that:

“(iii) For this favourable treatment to be afforded there must be on [sic] unreasonable delay, no mala fides and no improper conduct on the action on the part of the applicant.”⁴

- 9.5 Although there is no evidence of neither *mala fides* nor improper conduct on the part of the Appellant, there is clearly that of an unreasonable delay in filing of the Appeal, the subject of the preliminary issue.
- 9.6 The consequences of the pedestrian attitude of the Appellant *in casu*, and the resultant failure to file the Appeal within the stipulated time, could be equated to there being no grounds of challenging the Board Decision. Further, the crafters of the Act included time limits therein, *inter alia*, for purposes of ensuring that justice is delivered expeditiously for both parties in a matter. Otherwise, without time limits there would probably be an environment of anarchy where parties do as they please. In addition, such a situation could likely lead to inefficient use of the Tribunal’s limited time.
- 9.7 Furthermore, the Tribunal is of the considered view that the Appellant had an opportunity to file the Appeal on time but slept on it’s rights. The reason of non-communication between the Appellant and its consultant, is clearly not a justifiable cause to allow the hearing of the Appeal.
- 9.8 Having stated the above, the Tribunal is indebted to the parties for their respective submissions *in casu*.

⁴ [2007] SCZ ZR 108

10 TRIBUNAL DECISION

10.1 Based on the foregoing, the Tribunal concludes that the Appellant filed its Appeal out of time.

10.2 Having been filed out of time, the Appeal is hereby dismissed.

10.3 Costs are awarded to the Respondent to be agreed and in default of agreement, assessed by the Tribunal.

A party aggrieved with a decision of the Tribunal may appeal to the Court of Appeal within thirty (30) days of the determination of the matter.

Dated the

day of

2025



Mr. J.N. Sianyabo
CHAIRPERSON



Mrs. M. B. Muzumbwe-Katongo
VICE CHAIRPERSON



Mr. D. Mulima
MEMBER



Mrs. B. S. Chaila-Sichizya
MEMBER



Mr. B. Tembo
MEMBER