

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

2014/CCPT/00

IN THE MATTER OF: SECTION 64(1), 49(1) OF THE COMPETITION AND CONSUMER PROTECTION ACT NO. 24 OF 2010

IN THE MATTER OF: THE COMPETITION AND CONSUMER PROTECTION GENERAL REGULATION, 2011, STATUTORY INSTRUMENT NO. 97 OF 2010

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

Coram: Mr. Willie A Mubanga – Chairperson
Mrs. Maria M Kawimbe – Vice Chairperson
Mr. Rocky Sombe – Member
Mrs. Eness C Chiyenge – Member
Mr. Chance Kabaghe – Member

For the Applicant: Mrs. M. B. Mwanza – Director Legal and Corporate Affairs
Mrs. Marian M. Mulenga – Manager, Legal & Corporate Affairs – Competition and Consumer Protection Commission (CCPC)
Mrs. M. M. Chilufya – Prosecutions Counsel

For the Respondent: Mr. Iven Mulenga – Iven Mulenga & Company

BETWEEN:

THE COMPETITION AND CONSUMER
PROTECTION COMMISSION

APPLICANT

AND

HILL JAM INVESTMENTS LIMITED (ABEL KALUMBU)

RESPONDENT

RULING

Legislation referred to:

1. **STATUTORY INSTRUMENT NO. 37 OF 2012**

Rule No. 4 of the Competition and Consumer Protection (Tribunal) Rules of 2012

2. **SECTION 64(1) OF COMPETITION AND CONSUMER PROTECTION ACT NO. 24 OF 2010**

This is an application by the Applicant for a Mandatory Order that the Respondent herein **HILL JAM INVESTMENT LIMITED** having been served with a **DIRECTIVE** failed refused or neglected to refund the Complainant and Mr. Abel Kalumbu the full amount of K1,650,000.00 used to purchase an alleged defective chain saw and further to pay the Applicant a fine of 0.02% and as such failed to abide by the commission's directive dated 14th December, 2012. The application is made pursuant to Section 64(1) of the Competition and Consumer Protection Act, No. 24 of 2010 as read together with Competition and Consumer Protection (Tribunal) Rules, 2012 specifically Rule No. 4. Section 64(1) of the Competition and Consumer

Protection Act, No.-24 of 2010 which states that “Where the Commission determines that an enterprise has failed, without reasonable cause, to comply with a direction or undertaking, it may, subject to subsection^o (2), apply to the Tribunal for a mandatory order requiring the enterprise to make good the default within a time specified in the order”.

And Competition and Consumer Protection (Tribunal) Rules, 2012 specifically Rule No. 4 stipulates that “An application for a Mandatory Order by the Commission to the tribunal shall be made in Form II set out in the Schedule.”

The Form II cited above was filed before this Tribunal on 9th January, 2014 and that is the **Notice of Application for a Mandatory Order** that the Commission stated in the Affidavit in Support of its application.

The notice of application is accompanied by an Affidavit in Support of Inter Partes Summons for a Mandatory Order filed into this Tribunal on 9th January, 2014 and taken out by one Chester Njobvu. According to that Affidavit and in particular paragraphs 5 to 11 of the Affidavit the deponent of the Affidavit, the said Chester Njobvu who is employed as an Investigator with the Applicant deposed among other things that on 20th June, 2012 the Applicant received a complaint from Mr Abel Kalumbu who alleged that on 31st August, 2011 he bought a chain saw from Hill Jam Investment Limited at a cost of K1,650,000.00 (K1,650.00 rebased) which machine was tested upon purchase and it seemed to be working just fine. In support thereof he produced proforma invoice No. 13259 showing proof of payment and marked as exhibit “CN 1”.

It is further deposed in the Affidavit that Mr Kalumbu kept the machine until December 2011 when he intended to use it at his farm when he discovered that the machine could not cut large trees but could only cut small trees. The Complainant further alleged that the said chain saw would only loosen up when cutting trees despite being tightened.

It was also averred in the Affidavit of the said Mr Njobvu that the Complainant returned the said machine in January 2012 and explained the machines defect but that he was informed by the Respondent that he should have reported the matter earlier so that the machine could be returned to Korea together with other machines that had since been returned to the Respondents company. The Complainant was ultimately advised by the Respondent to buy another machine as the Respondent could do nothing about the damaged one.

According to Mr Ndhlovu's Affidavit the machine in question was taken to the Applicant and tested. The result was that it failed to function despite several attempts to switch it on.

It was also deposed in the said Affidavit that the findings of this case were presented to the Applicant Board of Commission which directed the Respondent refunds the Complainant the full amount of K1,650,000.00 (K1,650.00 rebased) being the amount spent to purchase the machine in question. The Applicants Board of Commissioners directed further that the Respondent be fined 0.02% for engaging in unfair trading practice. The said Board's decision is dated 14th December, 2012 and is exhibited as "CN 2".

According to the Affidavit in Support of this application the Respondent has neither refunded the Complainant – Mr. Abel Kalumba nor paid the fine imposed thereby failing to comply with the Applicant's Directive.

The Applicant's prayer is that the Respondent having failed, neglected or refused to oblige to the Applicant's directive requires that this Tribunal makes the mandatory order and specify the time within which that directive should be complied with.

The Respondent does not appear to have filed an Affidavit in Opposition to this application meaning that there is no dispute to the Affidavit in Support.

When the hearing of this application came up on 24th November, 2014 at Kitwe the Respondent advocate Mr. Iven Mulenga informed this Tribunal that they had filed a Notice to Appeal against the Applicant's decision of 14th December, 2012. At that hearing Counsel failed to show copy of the Notice of Appeal filed by them and explained that he did not have a copy but that the copy was at his Lusaka office.

The Tribunal Secretariat however informed the Tribunal that they also did not have a copy. The Applicant's Counsel Mrs. Mulenga informed the Tribunal that she also did not have a copy. At that hearing the Tribunal gave the Respondent a benefit of doubt and adjourned to a date to be notified.

On the 29th April, 2015 when this application was heard at Lusaka the

Respondents advocates-were not in attendance. Not even their client was in attendance and no explanation was offered to the Tribunal as to why they were not in attendance. On that basis the Applicant proceeded with their application on the 29th April, 2015.

The Applicant's investigation according to the evidence on record appears to have been conducted on the premise that the alleged conduct of the Respondent amounted to a breach of S49(1) of Act No. 24 of 2010.

Section 49(1) provides as follows:-

“A person or an enterprise shall not supply a consumer with goods that are defective, nor fit for the purpose for which they are normally used or for the purpose that the consumer indicated to the person or the enterprise.”

S49(2) provides as follows:-

“A person who or an enterprise which, contravenes S49(1) commits an offence and is liable upon conviction

(a) to a fine not exceeding five hundred penalty units and

(b) to pay the commission, in addition to the penalty stipulated under paragraph (a) a fine not exceeding ten percent of that person or enterprise's annual turnover.”

Our understanding of S49(2) of the Act is that if one contravenes S49(1) of the Act one is amenable to a fine in a criminal Court because contravention of

S49(2) results into committing an offence and makes one liable to conviction.

And our understanding of the term 'conviction' is that that only occurs in criminal proceedings. Our further understanding of 49(2) is that to move it the Applicant has to institute criminal proceedings against a person or an enterprise in a criminal Court. The term 'conviction' is defined in "words and phrases legally defined Volume 1 A – C" at Page 344 as follows:-

"Conviction includes (a) a finding of guilt

(b) a finding that a person is not guilty by reason of insanity

(c)....

(d) a conviction of an offence for which an order is made placing the offender on probation, discharging his absolutely or conditionally."

We are therefore of the view that the intention of the legislators in enacting S49(2) of the Act was that any breach of S49(2) would lead to one's prosecution which would lead to conviction if found guilty. And the word "guilty" is usually associated with criminal proceedings and not proceedings like the ones before us.

We therefore order that we are unable to make the mandatory order sought by the Applicant for want of jurisdiction.

We therefore make the following order:-

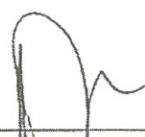
(a) that the Board directive and order that the Respondent refunds the

Complainant the full amount of K1,650,000.00 used to purchase the chain saw be and is hereby set aside.

(b) that the order that the Respondent should be fined 0.02%, where 0.005% is the base fine plus an additional 0.015% for various factors be and is hereby set aside not only for want of jurisdiction not only on part of the Applicant's Board of Commission but also on the part of this Tribunal. Leave to Appeal by either party is granted to be filed within 30 days of the date of this order.

Because of the circumstances obtaining in these proceedings each party is to bear its own costs.


Dated the 21st day of August 2015



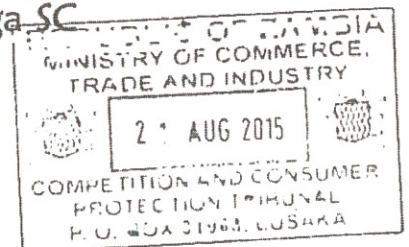
Mr Willie A Mubanga SC
Chairperson



Mrs Maria M Kawimbe
Vice - Chairperson



Mr Rocky Sombe
Member





Mrs Eness C Chiyenge
Member



Mr Chance Kabaghe
Member