IN THE COMPETITION AND CONSUMER PROTECTION TRIBUNAL

2016/CCPT/017/CON

HOLDEN AT LUSAKA

BETWEEN:

ITALIAN SCHOOL OF LUSAKA — APPELLANT

AND

COMPETITION AND CONSUMER PROTECTION COMMISSION — 1st RESPONDENT

SAJEEV NAIR — 2ND RESPONDENT

Coram: Mr. Willie A. Mubanga, SC (Chairperson), Mrs. Miyoba B. Muzumbwe-Katongo (Vice Chairperson), Mr. Chance Kabaghe (Member), Mr. Rocky Sombe (Member) and Mrs. Eness C. Chiyenge (Member)

For the Appellant: Mr. A. J. Shonga, Jr., SC - Messrs. Shamwana & Company Assisted by Ms. S. Namusamba - Messrs. Shamwana & Company

For the 1st Respondent: Mrs. M.M. Mulenga (Manager, Legal & Corporate Affairs); Ms. M. Mtonga (Legal Officer); and Ms. L. Mwape (Legal Officer) - Competition and Consumer Protection Commission

For the 2nd Respondent: Mr. H. Kabwe - Messrs. Hobday Kabwe & Company

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JUDGMENT

Legislation referred to:

1. Competition and Consumer Protection Act, sections 5 (f) and (l), 45 (b), 46 (1), 49 (5), 53 and 55 (3).
2. Education Act No. 23 of 2011, section 26
3. Competition and Consumer Protection (General) Regulations, S.I. 97 of 2011.

Cases referred to:

4. The Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Limited, [1953] 1 Q.B. 401
5. Airtel Networks Zambia Plc v. Macnicious Mwimba & Competition and Consumer Protection Commission 2014/CCPT/015/CON
6. Director of Public Prosecutions v. Ngandu and Others (1975) Z.R. 253 (S.C.).

7. MRI Seed Zambia Limited, Tombwe Processing Limited and Precision Faming Holdings Limited v. Amiran Zambia Limited, ATS Agrochemicals Limited and Competition and Consumer Protection Commission, Appeal Nos. 2017/CCPT/001/COM, 2017/CCPT/002/COM, and 2017/CCPT/003/COM

8. Director General of Fair Trading v First National Bank [2002] 1 AC 482; [2001] UKHL 52

9. Flint v. St. Augustine High School, 323 So.2d 229, 233 (La.App. 4th Cir.1975), 325 So.2d 271 (La.1976).

10. Blouin v. Loyola University, 506 F.2d 20 (5th Cir.1975).

11. Wahba v. New York University, 492 F.2d 96 (2nd Cir.1974).

Other works referred to:

12. Chitty on Contracts: General Principles, 3rd Edition (Sweet and Maxwell) 2008, paragraphs 2 – 001, 2 – 002, 2 – 003 and 2 - 007.

13. Gleeson, CJ.: M Gleeson, "The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights" Address to Victoria Law Foundation, Melbourne, 31 July, 2008), p. 20.

14. Rosalee S Dorfman, "The Regulation of Fairness and Duty of Good Faith in English Contract Law: A Relational Contract Theory Assessment" (Published on 13th October 2015) at page 112. http://newjurist.com/fairness-in-english-contract-law.html

15. Jeannie Paterson, "The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts" (2010) 33 Melbourne University Law Review 940. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1669008

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1. The background to this judgment is that by letter dated 8th October 2015, Mr. Sajeev Nair (to whom we shall refer as "the 2nd Respondent") lodged a complaint with the Competition and Consumer Protection Commission (to whom we shall refer as "the 1st Respondent") against the Italian School of Lusaka (to whom we shall refer as "the Appellant").

2. We reproduce below the whole text of the 2nd Respondent's letter of complaint to the 1st Respondent. This is particularly in view of the fact that the Appellant has raised issues concerning the contents of the letter of complaint. The letter reads as follows:

"Dear Sir,

RE: COMPLAINT AGAINST THE ITALIAN SCHOOL OF LUSAKA FOR UNFAIR TRADE PRACTICES

I wish to bring the following complaint to the attention of the Competition and Consumer Protection Commission (CCPC).

I have two daughters namely Ananya Nair (grade ix) and Amrita Nair (grade xi) enrolled with the Italian School of Lusaka for school education since 2009.

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Since February 2015, I had disagreements and written communication with the School regarding some arbitrary practices and illegal suspension of my younger daughter Ananya Nair, which was done not in conformity with the school code of conduct. Therefore, I raised the matter with the School Board and the Ministry of Education in writing in February 2015. The school did not agree with the complainant, therefore asked the Complainant to apologise, which was rejected by the Complainant.

The School re-opened for the new academic session in August 2015. The duration of the first term is from 24th August to 11th December 2015. The complainant paid the full fee of ZMW30,000 for the term for both the children. (copy attached)

In early September 2015, the School refused to register the elder daughter Ananya Nair for a study trip services to Italy scheduled in October 2015. It was questioned by the parent and the reason given for discriminatory treatment was that the school had outstanding differences as parent had raised some issue at School with the Ministry of Education. This discriminatory treatment and the refusal to provide the school services have been stated in a signed letter by the Vice Chairman of the School Trust Mr. Maxon Mbale dated 14th September, 2015. (copy attached)

On 24th September, 2015 the School Vice Chairman issued a signed letter intimating to the complainant that School had deregistered both the Children from the School with immediate effect and School is lo (sic) longer able to provide the education services to the Children. This is despite the fact that School has agreed to provide the services by enrolling the children since 2009 as well as collecting the fees in advance for the full term.

As a result of the arbitrary decision of the School to expel Amrita Nair a final year IGSSE O level student by the School is a grave injustice, considering the fact that the Italian School is a sole provider of Italian language course which the student has taken as subject for the IGCSC final exam to be held in May-June 2016. As a result of the above stated deregistration from the School, both the Children were deprived of the lessons since 24th September, 2015.

The above stated decision of the School to deny education services to both the students amounts to unfair trade practice/refusal to provide a service seem to be a violation of the various provisions of the Competition and Consumer Protection (Amendment) Act, 2013.

I would also like to bring to your attention that School has been engaged tied selling of uniform and for the past several years and the complainant has forced to buy the uniforms and text books from the school at exorbitant prices.

In this regard, I would request your office to investigate the compliant (sic) and if found the mattes (sic) a violation of relevant Act, please provide redress for denial of service and also award adequate compensation to the Complainant.

The persons responsible for the School Matters are Mr Gaudenzio Rossi, the School Board Chairman and the Administrator Ms Tania Fachin.

Yours faithfully,

(signed)
Sajeev Nair"

(The said letter of complaint is at pages 3 - 4 of the 1st Respondent's Record of Proceedings, re-filed with amended page numbers on 1st September 2017.)

3. The 1st Respondent carried out investigations into the matter. For similar reasons as we have outlined above with respect to reproduction of the letter of complaint, we reproduce the content, in substance, of the 1st Respondent's Notice of Investigation and the accompanying letter dated 16th October 2015 addressed to the Appellant. The documents appear at pages 7 and 8 - 9 of the 1st Respondent's Record of Proceedings. The Notice of Investigation reads as follows:

   "On 12th October, 2015, the Competition and Consumer Protection Commission ("the Commission") received a complaint from Mr. Sajeev Nair ("the Complainant") against you which appears to be in breach of Section 46 (1) as read together with Section 45 (b) and Section 49 (5) and Section 53 (1)[1] of the Competition and Consumer Protection Act, No. 24 of 2010 ("the Act"). Specifically, the Complainant alleges that he had on 14th August, 2015, paid K30,200.000 to your school for school fees for his two daughters. The Complainant alleges that he had one child in grade nine (9) and the other in grade eleven (11). The Complainant alleges that on 24th September, 2015, you deregistered his two daughters from your school. The Complainant alleges that you deregistered them due to allegedly vulgar language used by his young daughter during exam time. The Complainant now demands to have his two daughters re-registered.

   You are hereby requested to respond to this Notice within Fourteen (14) days of receipt thereof.

   DATED this .... day of .... 20 ....

   (Signed)

   ____

   Executive Director"

4. The letter accompanying the Notice, in addition to reflecting the substance of the contents of the Notice, reads as follows:

   "I wish to advise you that the Competition and Consumer Protection Commission ("the Commission") is mandated under the Act to ensure that there is fair trading between traders and consumers in all market segments in Zambia. I therefore, wish to draw your attention to the fact that failure to respond to this notice which is issued pursuant to Section 55 (4) of the Act is a criminal offence.

   Section 55 (4) reads as follows:

   'For purposes of an investigation under this section, the Commission may, by notice in writing served on any person, require that person to- (a) furnish to the Commission, in a statement signed by that person or, in the case of a body corporate, by a director or member or other competent officer, employee or agent of the body corporate, within the time and in the manner specified in the notice, any

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[1] The words "and Section 53 (1)" were a handwritten insertion.

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information pertaining to any matter specified in the notice which the Commission considers relevant to the investigation.'

Further, Section 55 (5) of the Act reads as follows:

'A person who, or an enterprise which, contravenes subsection (4) 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'

The Commission hereby requests you to provide the following information for its investigation within 14 days of receipt of this notice:

1. A Statement responding to the allegations levelled against you

.... In the interim, if you wish to seek further details and / or clarification on any aspect of this letter or need assistance, you may get in touch ....

Yours sincerely,

(Signed)

Chilufya Sampa
Executive Director"

5. The Appellant, by letter dated 13th November, 2015 from its Advocates, Messrs. Shamwana and Company, responded to the 1st Respondent's said letter (though referred to as dated 19th October 2015; which date we believe was an error as we have not seen such a letter in the 1st Respondent's Record of Proceedings or in any of its supplementary records of proceedings, or in the Appellant's Bundle of Documents filed on 20th January 2017). The letter of response is at pages 38 – 39 of the Record of Proceedings re-filed on 1st September 2017 and in substance it reads as follows:

"....

Your letter dated 19th October, 2015 addressed to our client has been forwarded to us to respond on their behalf. Our client has advised us as follows:

It is true that the Complainant paid the sum of K30,200.00 to our client as school fees for his two daughters. It is also true that the Complainant's daughters were de-registered on 24th September, 2015 and a full refund was made to the Complainant through his advocates.

The reason for the de-registration of the Complainant's daughters was not, however, due to the alleged use of vulgar language by his daughter, but due to the conduct of the Complainant. There was an incident that occurred at the school on or about 19th February 2015, where it was reported to the School's Head teacher that the Complainant's daughter had used an obscene and unacceptable acronym in the course of answering a question a question in an Italian grammar test. Following the incident, the school took appropriate disciplinary action against the child and subsequently the child continued her studies.

However, the Complainant, contrary to the Conditions of enrolment to which he had made an undertaking to adhere, failed to cooperate with the school. In the process of

his verbal and written responses to the action taken by the school, he made a number of defamatory statements. In spite of the school's concerted efforts to settle the matter amicably, he refused to cooperate and resolve the disagreement. It is for the foregoing reasons that the school was left with no option but to de-register both his daughters from the school, as the Complainant's action had made keeping his daughters at the school untenable. A court action has since been commenced against the Complainant.

Our client's position, therefore, is that they have not practiced unfair trading, and neither have they compromised the standards of honesty and good faith that they are reasonably expected to meet. Further, they have advised that it is not they, but the Complainant, who has breached the provisions of the contract between himself and the school by his failure to cooperate with them with regards to the behaviour of his child.

You may wish to know that the Complainant has not only complained to you. He has retained a lawyer who has written a letter of demand threatening to sue. He has also complained to the Ministry of Education, who summoned our client for an explanation. Mr. Nair has also complained formally to the Human Rights Commission, who have opened an investigation. Our client views all these multiple complaints as harassment. They too, you will agree, are entitled to the same protection of the law as he is calling into aid.

We shall be happy to provide you with any further information regarding this matter.

Yours faithfully,
(signed)
SHAMWANA AND COMPANY"

6. Following its investigations, the 1st Respondent's finding and recommendations to the Board, contained in its Preliminary Report at pages 41 – 51, were served on the Appellant, soliciting its response before presentation of the report to the Board for its determination. (Covering letter, with copy to the 2nd Respondent, at page 40 of the Record of Proceedings.)

7. In its background, the report repeated the allegations contained in the 1st Respondent's Notice of Investigation and accompanying letter dated 16th October 2015, which we have previously reproduced. The report also reflects submissions from the 2nd Respondent as follows:

"21. The Complainant submitted a letter dated 12th May 2015 that the Respondent asked the Complainant to formally apologise to the School Board and Management to allow for the matter to be amicably settled. However, the Complainant refused to formally apologise contending that his daughter was suspended without consulting him as per the school code of conduct." (Page 45 of the Record of Proceedings)

"22. .... The Respondent confirmed that their school de-registered the Complainant's two daughters and a full refund of the K30,200.00 was given to the Complainant through the Complainant's advocates. The Respondent submitted that the Complainant's daughters' de-registration was not, however, due to the alleged use of vulgar language by his daughter, but due to the conduct of the Complainant. The Respondent submitted that there was an incident that occurred in or about 19th February 2015, where it was reported to the school's Head Teacher that the

Complainant's daughter had used an obscene and unacceptable acronym in the course of answering a question in an Italian grammar test.

23. The Respondent also stated that following the incident, the school took appropriate disciplinary action against the child and subsequently the child continued her studies. The Respondent stated that the Complainant, contrary to the provisions of the conditions of enrolment to which he had made an undertaking to adhere, failed to cooperate with the school and made a number of defamatory statements. The Respondent stated that despite the school's concerted efforts to settle the matter amicably, he refused to cooperate and resolve the disagreement. The Respondent stated that it was for the foregoing reasons that the school was left with no option but to de-register both his daughters from the school, as the Complainant's actions had made keeping the Complainant's daughters at the school untenable. The Respondent further submitted that a court action has since been commenced against the Complainant." (Page 46 of the Record of Proceedings)

8. In summary, the findings in the Preliminary Report include the following:

"24. … the Respondent de-registered the Complainant's two daughters.

25. …the Complainant refused to formally apologise to the School Management for allegedly being uncooperative and making defamatory statements.

25. … the Complainant was not summoned for a meeting with the School Management before suspending his daughter as stipulated by the code of conduct. The Complainant was asked to apologise in a letter dated 12th May, 2015 after his daughter was suspended.

26. … the Respondent instituted legal proceedings against the Complainant."

9. Among other content of the Preliminary Report is a discussion of the concepts of standards of honesty and good faith, and reasonable care and skill, as well as findings relating to the circumstances of the suspension of one of the Complainant's daughters. The report also contains a finding that a binding contract existed between the Appellant and the 2nd Respondent on the basis of offer and unconditional acceptance. That regardless of what transpired, the Appellant did not formally write to the 2nd Respondent nor did they summon him for a meeting before they suspended his daughter. That this was not in line with the School Disciplinary Committee Code of Conduct which required the school head to call or write to the parents or guardians for a decision to suspend a child. Further, that the Appellant requested the 2nd Respondent through a letter dated 12th May, 2015 to apologise after his daughter was already suspended. And that the 2nd Respondent did enter into an agreement with the Appellant to adhere to the code of conduct. (Pages 48 – 49 of the Record of Proceedings, paragraphs 32 - 38)

10. The Preliminary Report ends with a conclusion that the Appellant did engage in unfair trading practices and hence was in violation of Section 46 (1) as read with Section 45 (b) of the Act and in violation of Section 49 (5) of the Act by failing to supply a service to a consumer with reasonable care and skill. It was recommended that the Appellant be warned and that it re-registers the Complainant's two daughters. There was, however, a finding that there was no unfair contract term (in terms of Section 53 (1) of the Act) causing a significant imbalance in the parties' rights and obligations arising from the contract

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under the Appellant's school's Code of Conduct relating to the disciplinary procedure. (Pages 49 – 51 of the Record of Proceedings, paragraphs 39 – 46)

11. The 1st Respondent's Board rendered its decision on 25th August 2016. In essence, the decision adopted the said findings and arrived at the verdict as per the Preliminary Report. The only additions in the record of the Board's Decision were further submissions from the 2nd Respondent and the Appellant which were recorded as received and dealt with by the 1st Respondent as follows:

    (a) By letter dated 25th April, 2016, the 2nd Respondent requested the 1st Respondent to help him get redress for costs he incurred in finding temporary school for his two children following their de-registration. The 2nd Respondent also said that Appellant had not given him the K30,200.00 refund. The 1st Respondent advised the 2nd Respondent that it did not award compensation but only refund or replacement and that he could take court action for compensation.

    (b) On 9th May, 2016, the Appellant's lawyers informed the 1st Respondent that they had given a cheque to the 2nd Respondent's lawyers, and the 1st Respondent therefore advised him to contact his lawyers for the refund. Further, that on 10th May 2016 the 2nd Respondent confirmed that his lawyers collected the refund cheque in October 2015.

12. The 1st Respondent's Board directed that the Appellant stands warned for violating Section 46 (1) as read together with Section 45 (b) of the Act, and that such conduct would in future attract a fine. The Board also directed that the Appellant stands warned for violating Section 49 (5) of the Act, and that such conduct would in future attract a fine. The Board further directed the Appellant to register the 2nd Respondent's two daughters (that is re-register).

13. The Appellant appealed the whole decision which decided that **"The facts of this case have shown that the Board determined that the Respondent did engage in unfair trading practices and breached Section 46 (1) as read with Section 45 (b) and Section 49 (5) of the Act"**. The grounds of appeal are reflected in the Amended Notice of Appeal filed on 23rd February 2017. The 1st Respondent filed Notice of Grounds of Opposition to the Amended Notice of Appeal on 27th February 2017. The 2nd Respondent also filed Grounds in Opposition to the Appeal on 27th February 2017, after we joined him as a party on 6th February 2017. We shall deal with the grounds of appeal and the corresponding arguments on both sides later in this judgment.

14. The Appellant has sought the following relief:

    (a) A declaration that the decision of the (1st Respondent) which decided that the Appellant was in violation of Section 46 (1) as read with Section 45 (b) and Section 49 (5) of the Competition and Consumer Protection Act No. 24 of 2010 be set aside.

    (b) An order that the (1st) Respondent pays costs.

    (c) Any other relief that the Tribunal may deem fit.

15. In terms of documentary evidence, we note that in addition to his letter of complaint, the 2nd Respondent furnished to the 1st Respondent documents which are contained in its Record of Proceedings re-filed on 1st September 2017 (after correcting page numbers), and Supplementary Record of Proceedings filed on 9th January 2017. Some of these documents were referred to in the 1st Respondent's Preliminary Report and in the Board Decision. The

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1st Respondent filed a (further) Supplementary Record of Proceedings on 13th October 2017 containing a letter from the Appellant to the 2nd Respondent. Further, the Appellant filed, with leave of the Tribunal, a Bundle of Documents on 20th January 2017.

16. At the hearing of the appeal, parties referred to some of the documents outlined above. The Appellant called four witnesses, namely; Tanya Fachin, the Appellant's Administrative Manager (AW1); Monde Nyambe, the Appellant's Deputy Head and History teacher (AW2); Muriel Ferris, the Appellant's School Secretary (AW3); and Lalitha Seshamani, the Appellant's Head of School (AW4). The 1st Respondent called one witness, Bravo Muchu (a Provincial Investigator for the 1st Respondent). The 2nd Respondent opted not to call any witness. At the conclusion of the hearing of the appeal on 25th January 2018, we directed that the Appellant files their submissions by 15th February 2018, the Respondents by 8th March 2018, and that any submissions in reply be filed by 15th March 2018.

17. Counsel for the Appellant, in compliance with the directions, filed their submissions on 15th February 2018. The 1st Respondent was non-compliant and filed theirs on 19th March 2018. The Appellant filed their Reply on 16th April 2018 and has indicated at the outset that the 1st Respondent filed their submissions out of time and that these were served on them on 22nd March 2018, which was well out of time. The Appellant has further raised a question as to whether the Tribunal will consider the 1st Respondent's submissions in light of the provisions of Rule 27 of the Competition and Consumer Protection (Tribunal) Rules, S.I. 37 of 2012 (the Tribunal Rules).

18. Our position is that parties should comply with the time frames directed by the Tribunal. If for some reason a party is unable to file a document or take any other step within a specified time, the Tribunal may, on application in writing by a party before the expiration of the time fixed, stating the grounds, extend the time pursuant to Rule 27 of the Tribunal Rules. The 1st Respondent neither asked for leave nor had the courtesy to explain why they filed their submissions out of time. We have, however, checked with the Tribunal Secretariat records; the records do not show when the 1st Respondent was served with the Appellant's submissions. We further note that in essence we gave the Appellant and the Respondents 21 days each for filing their submissions and the Appellant 7 days for its reply. It was an oversight on our part that we did not specify that the time frames included service of the submissions on the other parties. This left open the time for the Secretariat to serve the documents. Therefore, for reasons of practicality and in the interest of justice, in line with section 71 (1) (b) of the Act, we order that our earlier directions are varied retroactively in order to make allowance for service of the submissions by the Secretariat. Accordingly, we accept the 1st Respondent's submissions filed on 19th March 2018 and the Appellant's submissions in Reply filed on 16th April 2018.

19. We, however, hasten to issue a warning to parties appearing before this Tribunal as well as to the Secretariat that the Tribunal's proceedings are intended to be speedy. Therefore, in future time frames for filing and service of documents shall be precisely stated and adhered to, with extensions granted to parties on written applications and only in deserving circumstances.

20. Moving forward, we observe that the submissions, particularly those by counsel for the Appellant, are lengthy. We nonetheless commend counsel for the Appellant and counsel for the 1st Respondent for their spirited arguments, which we have endeavoured to make use of. We have seriously considered the appeal and dealt with the grounds of appeal (some of which have been consolidated), the evidence and the law in respect thereof in the

order in which counsel for the Appellant and counsel for the 1st Respondent have argued the same.

GROUND FOUR

21. This ground of appeal is as follows:

That the (1st) Respondent erred in that whilst it correctly found that a contract existed between the Complainant and the Appellant, it failed to properly make a finding as to what constituted the full terms of the contract.

22. The Appellant has stated that this ground of appeal stems in part from the analysis and conclusion of the 1st Respondent at page 64 of the Record of Proceedings under paragraph 42 which states:

"Further, there was an offer by the Respondent which was accepted by the Complainant with the payment of K30,200. Based on the above, there was therefore a contract."

23. The Appellant observes that this finding was made under the deliberations and analysis in relation to Section 53 (1) of the Act. Further, that the Appellant in asking this Tribunal to set aside the 1st Respondent's decision has presented two issues; the first being that the 1st Respondent erred when it investigated the alleged contravention of this particular section when it had not been authorised by the Executive Director. The Appellant has further argued that RW1 conceded that the Executive Director's permission is required before an investigation is launched and that accordingly the Executive Director's permission was sought for the Appellant to be investigated for breach of Sections 53 (1), 49 (5), 45 (b) and 46 (1). Reference has been made to the request for authorisation at pages 1 – 2 of the Record of Proceedings (which also reflect the authorisation). The Appellant has argued that the investigation was only authorised with respect to Sections 49, 45 and 46 and, further, that this fact was conceded by RW1 during the hearing of the appeal.

24. The Appellant has further argued that despite the fact (which fact RW1 stated in re-examination) that the Appellant was not found in violation of Section 53 (1) of the Act, the 1st Respondent's unauthorised act rendered its whole decision a nullity. This, the Appellant has gone on to argue, is because it is impractical to separate portions of the decision from each other, and therefore it either stands as is or falls if parts of it do not have the support of the law.

25. We shall deal with the first issue, which in our view raises the question of jurisdiction of the 1st Respondent to investigate and reach a decision concerning the particular section in issue in the absence of the Executive Director's authorisation to investigate its violation.

26. In response to the Appellant's argument, the 1st Respondent has argued that the Appellant's argument is unfounded and has no legal basis, adding that an investigator has leverage as he or she carries out an investigation to extend the scope of provisions (beyond those cited in the authorisation to investigate), as long as they have reasonable grounds to believe that such other provisions have been violated. The 1st Respondent has further argued that what is important is that the party investigated had an opportunity to be heard, which opportunity was given to the Appellant. The 1st Respondent has gone on to argue that although the Appellant opted to keep silent, the investigation was duly concluded as shown at page 50 of the Record of Proceedings, more specifically paragraph

41, and the Appellant was not found wanting in respect of that section. That the issue of section 53 (1) is therefore a non-issue.

27. In reply, the Appellant has argued that authorisation for an investigation is *sine qua non* (meaning that the authorisation was an absolute necessity or indispensable[2]), and that an investigation without it or in excess of it invalidates the entire result flowing from the irregular investigation. That the 1st Respondent being a creature of statute, its boundaries are set by statute and it is not at liberty to act *ultra-vires* the Act that regulates it. Further, that the fact that the Appellant was not found wanting under the section in issue is irrelevant. And that the 1st Respondent has not cited any authority to support its assertion that the law allows the investigator to exceed the authority granted by the Executive Director.

28. The starting point in determining this issue are the statutory provisions from which the 1st Respondent derives its investigative powers. Section 5 of the Act pronounces the 1st Respondent's functions and states in paragraphs (d), (f) and (l), which in our view are the relevant provisions to the issue at hand, that its functions are to-

    (d) investigate unfair trading practices and unfair contract terms and impose such sanctions as may be necessary;

    (f) act as a primary advocate for competition and effective consumer protection in Zambia; and

    (l) do all such acts and things as are necessary, incidental or conducive to the better carrying out of its functions under this Act.

29. Regulations 10 and 11 of the Competition and Consumer Protection (General) Regulations, S.I. No. 97 of 2011 provide the investigative procedure in the following terms:

    10. (1) An officer of the Commission who wishes to undertake an investigation under the Act shall apply to the Executive Director for authorisation of the investigation in Form IV set out in the First Schedule.

    (2) For purposes of sub-regulation (1), the Executive Director's written instruction to an officer or inspector of the Commission to undertake an investigation shall be deemed to be an authorisation for investigation.

    11. The Commission may issue a person under investigation with a notice of investigation set out in Form V in the First Schedule.

30. At the hearing of the appeal, RW1 under cross-examination conceded that he did not obtain authority to investigate the Appellant under section 53, and that he did not notify the Appellant of an investigation under that section, but that nonetheless he went ahead and investigated under the section. This was in reference to the application for authority to investigate and the authority to investigate granted by the Executive Director appearing at pages 1- 2 of the Record of Proceedings, the Notice of Investigation and accompanying letter appearing at pages 7 and 8 – 9, and the Preliminary Report at pages 41 – 51 of the same record.

31. We observe in passing that in the Record of Proceedings at pages 7 and 8 (Notice of Investigation (reproduced at the outset) and accompanying letter dated 16th October 2015 signed by the Executive Director, there is a hand-written amendment by way of insertion

[2] Black's Law Dictionary

of "and section 53 (1)". In light of RW1's testimony that the Appellant was not notified of investigation under section 53, we conclude that the 1st Respondent made this insertion in the aftermath of the investigation, which conduct is unprofessional. We accordingly condemn it.

32. Coming to the question of the effect of the investigation in issue on the result flowing from it, we find no authority for the proposition that the irregularity should lead to nullification of the entire, or even partial, result of the investigation. The Appellant has offered no authority on the subject. Neither has the 1st Respondent in its response offered any authority to the contrary.

33. We take the view that authority to investigate the 2nd Respondent's complaint was granted, except that the authority fell short on the detail in relation to the identified sections of the Act in that it did not include section 53. The Notice of investigation disclosed the subject matter as de-registration from the Appellant's School of the 2nd Respondent's two daughters. The purpose of investigation was indicated to the effect of determining what appeared to be violations of sections 45 (b), 46 (1) and 49 (5) of the Act. Thus, the requirements of section 55 (3) of the Act were fulfilled. Section 55 (3) states that:

    "The Commission shall, upon opening an investigation, as soon as practicable, give written notice of the investigation to the person who is the subject of the investigation or to an enterprise which is suspected to be a party to the matter to be investigated and shall indicate in the notice, the subject matter and the purpose of the investigation." (Emphasis ours)

34. However, in terms of the procedure employed, Form IV containing the authority to investigate issued pursuant to the application made under Regulation 10 (1) of the Competition and Consumer Protection (General) Regulations (the Regulations), section 53 was not identified among the provisions allegedly contravened. Likewise, the Notice of Investigation, issued in terms of Regulation 11 (Form V) also fell short.

35. The substantive law that confers jurisdiction on the 1st Respondent to investigate unfair trading practices and unfair contract terms, among other functions, and requires that notice of investigation shall be given to the person subject of the investigation, indicating the specified information, is the Act itself (Sections 5 (d) and (l); and 55 (3), respectively. Regulations 10 and 11, and the prescribed Forms IV and V are not the substantive law but merely procedural as to how an investigation is to be conducted. Furthermore, Regulation 10 (1) only requires an officer wishing to conduct an investigation to make an application in Form IV. In terms of identifying provisions of the Act, the form indicates that "the alleged offence appears to be a contravention of section ...", meaning this information is only indicative; therefore, it could change in the course of an investigation. Logically, it follows that similarly the sections reflected in the authorisation are merely indicative. This status is reasonable by the very nature of an investigation. In practice, the position can only be ascertained once the investigation has been undertaken. It is also instructive that the Act does not void an investigation conducted outside or beyond the indicated sections.

36. Furthermore, Regulation 10 (1) does not go further to prescribe the content of authorisation. And, although Form IV contains a form of authority, sub-regulation (2) goes on to state that:

    "For purposes of sub-regulation (1), the Executive Director's written instruction to an officer or inspector of the Commission to undertake an investigation shall be deemed to be an authorisation for investigation."

37. Therefore, the form of authorisation in Form IV is not mandatory, but merely for internal administrative direction. Similarly, Form V provided under Regulation 11, which states, "The Commission may issue a person under investigation with a notice in Form V ...," is not mandatory but gives administrative direction.

38. In so deciding, we also give cognisance to the fact that the nature of the mandate of the 1st Respondent, such as to "investigate unfair trading practices and unfair contract terms and impose such sanctions as may be necessary" and to "do all such acts and things as are necessary, incidental or conducive to the better carrying out of its functions under this Act" is such as would render it absurd and practically impossible to make a formal application to investigate, issue a formal authorisation and a fresh Notice of Investigation each time an issue arises in the course of an investigation.

39. Indeed, section 55 (3) only requires issuance of Notice of Investigation upon opening an investigation; it does not require the formal notice to be re-issued in the event of change in the scope of investigation. It should, therefore, suffice for purposes of natural justice that following the Notice of Investigation, any change in the scope of investigation is brought to the attention of an affected party. This notification can be by way of a preliminary report, as in this case, giving the Appellant an opportunity to be heard on all issues covered by the investigation, including any additional issue such as alleged violation of a provision of the Act.

40. In this regard, we hasten to mention that we do not agree with the 1st Respondent that the fact that the 1st Respondent did not reach an adverse finding against the Appellant with respect to section 53 rendered the issue under discussion a non-issue. The Appellant was entitled to put up the proposition that the investigation was unauthorised and therefore illegal. In the same vein, the Appellant had a right to appeal against what it believed to be an unauthorised or illegal investigation; therefore, the matter is properly under review in these appeal proceedings.

41. We further take the position taken by our superior courts that non-compliance with regulatory procedural rules is merely an irregularity which is curable. There is a plethora of High Court and Supreme Court decisions on the subject. In the case of **The Republic of Botswana, Ministry of Works Transport and Communications, Rinceau Design Consultants (Sued as a firm previously T/A Kz Architects) v. Mitre Limited (1995) S.J.,** S.C.Z. Judgment No. 20 of 1995, the Supreme Court held that the High Court Rules were rules of procedure and were therefore regulatory and any breach should be treated as a mere irregularity which was curable. The Court cited its earlier decision in **Leopold Walford (Z) Ltd v Unifreight** 1985 Z.R. 203 at page 205 where the Court said:

> "As a general rule, breach of a regulatory rule is curable and not fatal."

42. In the case before us, even if there had been an obligation to comply with the form of Executive Director's Authority in Form IV and Notice of Investigation in Form V with respect to specifically indicating section 53 (1) as one of the provisions of the Act possibly violated, the failure to do so would have been curable and not fatal. Furthermore, we would be satisfied that this irregularity was cured by way of adoption of the investigative officer's act when the Acting Executive Director acted on the investigative officer's Preliminary Report by sending the report to the Appellant and soliciting its response before the 1st Respondent's Board's determination. The report dealt with, among others, investigation under section 53 (1), in respect of which the Appellant was exonerated. (Pages 40 and 41 – 51 of the Record of Proceedings) In addition, the fact that the Appellant was given an opportunity to respond to the preliminary investigative report would be

said to have cured any prejudice to the Appellant that may have occurred by reason of the Notice of Investigation not indicating section 53 (1) as one of the provisions which appeared to have been contravened by the Appellant.

43. We have considered the Appellant's argument that findings in respect of the other sections would fall away if the finding in respect of section 53 (1) cannot stand on account of lack of authority to investigate. Section 53 (1) deals with unfair contract or contract term and is therefore distinct from sections 46 (1) and 45 (b), which prohibit unfair trading practice and give a definition of unfair trading practice, respectively. Section 53 (1) is also distinct from section 49 (5), which mandatorily requires a person or enterprise to supply a service to a consumer with reasonable care and skill, among others.

44. In the recent matter of an application for leave to appeal out of time by **Invesco Limited** 2018/CCPT/004/COM, we held that, in line with section 4 of the Acts of Parliament Act, Chapter 3 of the Laws of Zambia, each section or subsection of an Act is an enactment. We cited that section, which states, *"Where an Act contains more than one enactment, it shall be divided into sections and sections containing more than one enactment shall be divided into subsections."* We further held that section 71 (1) (b), which was in question, could not be interpreted in a manner as to contradict or oust or limit or qualify another enactment of the statute. Following that reasoning in the present case, even if we had found in favour of the Appellant on the alleged irregularity affecting section 53 (1), the irregularity would not automatically render the investigation or result thereof in relation to the other sections void. It is not unusual in preferring charges to cite more than one section or subsection of an Act as allegedly contravened based on the same set of facts or series of events, in which case none or one or more or all may be sustained, depending on circumstances and findings of a tribunal or court.

45. Therefore, we cannot accept the Appellant's argument that it is impractical to separate portions of the 1st Respondent's decision from each other, and that it either stands as is or falls if parts of it do not have the support of the law (i.e. allegedly because the investigation in respect of section 53 (1) did not have the support of the law).

46. In any case, assuming the Appellant's argument that the whole investigation was tainted by lack of authority of the Executive Director to investigate under section 53 (1) had been valid, we would still take the position of courts in our jurisdiction with respect to admissibility of illegally obtained evidence both in civil and criminal law. The fact that it turned out later that the investigating officer's authority to investigate and the Notice of Investigation issued to the Appellant had not specified section 53 (1) as one of the provisions of the Act allegedly contravened could not render the evidence collected by the 1st Respondent in the course of that investigation inadmissible or the resulting decision void or voidable. Illegally obtained evidence is admissible in our courts if it is relevant, and there is an abundance of authorities on the subject.

47. In the case of **Liswaniso v. The People** (1976) Z.R. 277 (S.C.), the Supreme Court held as follows:

   "(i) Apart from the rule of law relating to the admissibility of involuntary confessions, evidence illegally obtained, e.g. as a result of an illegal search and seizure or as a result of an inadmissible confession is, if relevant, admissible on the ground that such evidence is a fact regardless of whether or not it violates a provision of the Constitution (or some other law).

   (ii) <u>The evidence of search and seizure of the currency in the case under consideration, although based upon an irregular search warrant, was rightly admitted by the trial</u>

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MINISTRY OF COMMERCE
TRADE AND INDUSTRY
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court because that evidence was a relevant fact. (Per curiam) Any illegal or irregular invasions by the police or anyone else are not to be condoned and anyone guilty of such an invasion may be visited by criminal or civil sanctions." (Underline ours)

48. The above Supreme Court holding was more recently cited in the High Court case of **The People v. Joseph Chipawa, Webby Chibende** (HP/222/2010) ZMHC (6 January 2011), in which it was held that "Apart from involuntary confessions, evidence illegally obtained, is, if relevant, admissible regardless that it violates a provision of the Constitution, or some other law."

49. We hasten to point out, however, that as observed by the Supreme Court in the **Liswaniso** case, courts do not condone irregular or illegal conduct or dereliction of duty on the part of law enforcement agencies or officers. They may suffer adverse consequences for their acts or omissions.

50. We close our discussion of this particular issue by observing that findings in respect of the other sections might, however, fall away on the basis of legitimate merit-based considerations. This is, however, not a subject of this ground of appeal. The real issue in this ground of appeal is whether the 1st Respondent erred in that whilst it correctly found that a contract existed between the 2nd Respondent and the Appellant, it failed to properly make a finding as to what constituted the full terms of the contract. This brings us to the second issue raised by the Appellant under this ground of appeal; that there was an incorrect finding as to what amounted to the contract between the Appellant and the 2nd Respondent.

51. The Appellant has argued that the Conditions of Enrolment, appearing at page 3 of the Appellant's Bundle of Documents formed a cardinal and inseparable part of the contract between the parties. That it was, as the name suggests, a condition of enrolment without which enrolment would have been refused. That as such, the 1st Respondent ought to have found that the Conditions of Enrolment formed part of the contract and examined its impact on the relationship between the parties. That RW1 acknowledged that the Appellant had said that it de-registered the 2nd Respondent's two daughters because the 2nd Respondent had acted contrary to the Conditions of Enrolment in which it had made an undertaking to the Appellant. That it is trite that in order to ascertain the relationship between the two parties, one needed to have looked at that document. That bizarre as it seemed, the 1st Respondent did not request for the document, in spite of its powers to call for production of any document or article which it considers relevant to an investigation, and that neither did the 1st Respondent consider the contents of the document.

52. In response, the 1st Respondent has argued that the School Code of Conduct was part of the contract which the Appellant was supposed to adhere to strictly both in terms of the suspension and the de-registration of the 2nd Respondent's two daughters. Citing the Code of Conduct at page 12 of the Record of Proceedings, particularly page 15 at which the general aim of the Code is stated, the 1st Respondent has charged that the Appellant is selective in its application of the governing documents between the parents and the School, preferring only that which favours the Appellant and overlooking that which should favour both the school on the one hand, and the parents and pupils on the other hand. And that by this selective approach, the Appellant is failing to uphold the standard of honesty and good faith which it is expected to adhere to. That the Appellant is glossing over its wrong conduct and pinning the blame upon the 1st and 2nd Respondents, expecting consumers to be bound by and unable to escape any of their obligations or to enforce any of their rights.

53. The 1st Respondent has gone on to charge that it is because of an unbalanced enforcement of rights under contract law, with businesses wielding greater power than consumers, that there are consumer protection laws in place.

54. The 1st Respondent has further argued that in its cross-examination the Appellant derailed RW1 to a point of conceding that the letter of complaint did not talk about de-registration. The 1st Respondent, citing the letter at page 3 of the Record of Proceedings, lines 26 – 29 (see letter reproduced at the outset of this judgment), has argued at length that the 2nd Respondent's complaint included both the suspension of his daughter and the de-registration of both his daughters. The 1st Respondent has argued that it had not newly introduced the issue of de-registration. Further, that the issue of the refund of the K30,200 school fees is not new as could be seen at page 46 of the Record of Proceedings where it stated that the 2nd Respondent had acknowledged receipt of the refund from the Appellant.

55. In reply, the Appellant has asserted that it did not overlook the importance of the Code of Conduct and that its argument was consistently, particularly in the final two paragraphs of its submissions, that the Conditions of Enrolment should have been considered in addition to the documents which the 1st Respondent referred to in making its decision. That the Appellant's contention was that the Code of Conduct was only a part of the contract and that as the Conditions of Enrolment which also constituted part of the contract were not considered, the 1st Respondent could not have fairly determined the issue before it. That it is on that account that the Appellant seeks to impeach the finding, as the 1st Respondent failed to take into account what constituted the entire agreement.

56. In our understanding of the issue at hand in this ground of appeal, it is not in dispute that the letter of complaint raised both the issue of suspension of the 2nd Respondent's daughter Ananya and the issue of de-registration of both his daughters. Furthermore, the Appellant, when cross-examining RW1, did not lead him to deny that the letter of complaint mentioned de-registration at all, but that it did not mention the alleged use of vulgar language by one of the two girls as the reason for their de-registration. In addition, that the 1st Respondent did not deal with the issue of de-registration in its Preliminary Report and the Board's Decision. The 1st Respondent has missed the point in its argument.

57. It is also our understanding that there is no dispute that the Code of Conduct constituted an important part of the contract between the parties. In fact, the Behavior Contract for each of the two girls, appearing at pages 24 of the Record of Proceedings (for Amrita) and page 14 of the Supplementary Record of Proceedings filed on 9th January 2017 (for Ananya), indicate that the Class teachers and Head Teacher on the one hand signed the Code of Conduct (appearing at pages 12 – 24 of the Record of Proceedings and at pages 8 -14 of the said Supplementary Record of Proceedings) and that each of the girls agreed to abide by the rules set out in the Code of Conduct, and to that end appended their signatures. The document was also counter-signed by their parent, the 2nd Respondent, in respect of each of the girls. Both are dated 16th September 2014.

58. At the hearing, AW1, Tanya Fachin, said she had held the position of Administration Manager at the Appellant's School for 25 years and that she was responsible for school placements, attending to parents prospecting for school and carrying out enrolment procedures for students. That upon a student successful completion of an assessment test, a child was offered a place and that based on this offer, the parent was called to the administration office and provided with the registration enrolment form, copy of the school fees structure along with a booklet, which is a code of conduct. That the registration enrolment form was completed with family information, student information, and

medical information and attached the conditions of enrolment agreement. That the conditions of enrolment were quite a few, but also requested that parents would participate at all times with the school in relation to the student's social behaviour, wellbeing, code of conduct, discipline and many other aspects. That parents were supposed to sign that they had read and agreed to the conditions of enrolment.

59. Later, after the Appellant obtained leave to file their Bundle of Documents which had earlier been irregularly filed, AW1 identified the conditions of enrolment agreement as that at page 3 of the Bundle. Under cross-examination, the witness, in reference to paragraph (b) of the document, stated that her interpretation was that the parent would work with the school with respect to the rules; that the document governed the relationship between the parent and the school and that the document signified that the parent would abide as to the conduct with the school in relation to the child.

60. AW4, Lalitha Seshamani, the School Head Teacher referred to and identified the document at pages 12 – 24 of the Record of Proceedings as the Code of Conduct. The witness testified that this document was signed by a student (referring to the attached behaviour contract at page 24) upon reaching secondary School, that is Grade 7 and that it regulated the behaviour of a student and his or her relationship with the School in terms of his or her behaviour. The signature of the student signified that the student understood and accepted to abide by the rules.

61. AW4 also referred to and identified the Conditions of Enrolment at page 3 of the Appellant's Bundle of Documents. The document was signed by the 2nd Respondent in April 2009 and, according to this witness, the document would be signed at the outset by a parent before a placement would be made; that it was important that the parent signed this agreement with the school because when a child was brought in, the School did not sign a contract with the child, it signed the agreement always with the parent, because these two, that is the school and the parent were both very important for the educational achievement of the child. That without the parent's involvement, it was impossible for the school to reach out to a child. Under cross-examination, AW4 stated that a parent must agree to these conditions and then agree to abide by those rules before a place was offered at the school, and that if the parent did not sign the Conditions of Enrolment, the child was not offered a place. Further, that once the child was enrolled, all these conditions would apply and that was what the parent was agreeing to.

62. The 1st Respondent's Preliminary Report, and Board Decision alike, indicate that the Appellant had responded to its Notice of Investigation and that it had stated that the reason for the de-registration of the 2nd Respondent's two daughters was not the alleged use of vulgar language by one of the girls but the 2nd Respondent's misconduct. That is, contrary to the Conditions of Enrolment to which the 2nd Respondent had made an undertaking to adhere, he failed to cooperate with the school and made a number of defamatory statements. At the hearing of the appeal, RW1 confirmed the Appellant's response.

63. Therefore, it is not in dispute that the two documents each constituted part of the contract between the Appellant and the 2nd Respondent. What is in dispute is:

    (a) whether the 1st Respondent in its investigations and decision considered the Conditions of Enrolment as part of what constituted the contract between the parties, besides the Code of Conduct; and

    (b) if not, whether the 1st Respondent erred in its finding because it did not consider the Conditions of Enrolment as part of what constituted the contract.

64. In considering the question whether a contract existed, the 1st Respondent did not consider what constituted the contract, but merely appeared to have asked itself and answered the question whether there was an offer and unconditional acceptance. This may have been due to the case law which guided the 1st Respondent. **The Pharmaceutical Society of Great Britain v. Boots Cash Chemists** (Southern) Limited, [1953] 1 Q.B. 401, which the 1st Respondent cited concerned goods displayed in a pharmaceutical store. It was held that articles on display are generally not offers but an invitation to treat. The customer makes an offer to purchase the goods and the trader will decide whether to accept the offer, and the contract is completed by payment of the price.

65. In the case before us, the contract in question does not concern goods on display in a shop but is a standard form contract for school services provided by the Appellant. Chitty on Contracts[3], specifically on the subject of formation of contracts, states in paragraphs 2 - 001 and 2 - 002 as follows:

> "The first requirement for the formation of a contract is that the parties should have reached agreement. Generally speaking, agreement is reached when an offer made by one of the parties ... is accepted by the other ...." (Paragraph 2 -001) (Emphasis ours)
>
> "In deciding whether the parties have reached agreement, the courts normally apply the objective test .... Under this test, once the parties to all outward appearances agreed in the same terms on the same subject matter, then neither can, generally, rely on some unexpressed qualification or reservation to show that he had not in fact agreed to the terms to which he appeared to agree." (Paragraph 2 - 002) (Emphasis ours)

66. Furthermore, offer and acceptance are defined in paragraphs 2 -003 and 2 - 027 as follows:

> "An offer is an expression of willingness to contract on specified terms made with the intention ... that it is to become binding as soon as it is accepted by the person to whom it is addressed." (Paragraph 2 - 003)
>
> "An acceptance is a final and unqualified expression of assent to the terms of an offer." (Paragraph 2 - 027) (Emphasis ours)

67. The nature of the complaint, the issues it raised, and the agreements produced or referred to by the 2nd Respondent and the Appellant in their correspondence or other communication with the 1st Respondent are instructive. In order to arrive at a conclusion that a contract existed, the 1st Respondent ought to have examined the two documents signed by the respective parties, defined how the parties related to each other contractually, and identified the binding terms of contract particularly those relevant to the issues raised in the complaint.

68. In ascertaining the existence of contract, we will not attempt to define the rights and obligations of the parties arising from the contract(s) as it is not necessary for purposes of this ground of appeal. It is clear from the documentary and oral evidence given by AW1, AW4 and RW1 that the Conditions of Enrolment were offered by the Appellant to and accepted by the 2nd Respondent as part of the terms of offer of school places for the two girls. At the outset, the document states, "Before a placement can be made, it is vital that Parents understand the financial and other implications of acceptance. You are effectively entering into a contractual agreement with the school: ...."

[3] Chitty on Contracts: General Principles, 3rd Edition (Sweet and Maxwell) 2008.

69. It is also necessary to identify the other terms of this document relevant to the subject matter(s) of the complaint. The subject matter of the complaint, as could be ascertained from the letter of complaint, is the alleged arbitrary practices and illegal suspension of the 2nd Respondent's younger daughter, Ananya Nair, contrary to the School Code of Conduct, as well as the alleged illegal or arbitrary de-registration of the two girls from the school. The relevant terms to suspension and de-registration of a pupil in the Conditions of Enrolment are:

    A. Introductory paragraph b), which reads, "The most important element of this agreement is:

        a) ....

        b) That you will cooperate fully with the school as regards to consultations and correspondence with relation to the academic progress, social development, and behaviour of the child.

    B. <u>In addition:</u>

        1) ....

        2) ....

        3) ....

        4) A pupil and his parents and guardian shall observe the Rules and Regulations in force at the School.

        5) The School Disciplinary Committee reserves the right to suspend, terminate the attendance of any pupil whose conduct or behaviour is, in the opinion of the Committee, not acceptable.

    (See document at page 3 of the Appellant's Bundle of Documents)

70. The terms of the Code of Conduct relevant to the subject matters of the complaint are outlined as follows (numbering not necessarily the same as in the document):

    A. General Aims

    - ....
    - ....
    - ....
    - To promote good behaviour and self-discipline among the children
    - ....
    - To enhance the learning environment of the school by promoting a sense of mutual respect among all members of the school
    - To maintain active cooperation between home and school
    - To ensure consistency in the application of rules and sanctions
    - To outline the structure of fair and agreed sanctions that will be available to teachers and the school in response to negative behaviour

    (Page 15 of the Record of Proceedings)

    B. To the Students

    At the Italian School we expect you will:

        1. ....

2. ....
3. ....
4. Show respect for yourself and all members of the school community ....
5. ....
6. Follow rules ....

(Page 16 of the Record of Proceedings)

C. **BEHAVIOUR MANAGEMENT**

At the Italian School we believe in developing self-control, self-responsibility and expect the students to accept the consequences of actions. .... We ... discourage bad behaviour. However, in cases of unacceptable behaviour we remind the pupil of their responsibilities and generally get a favourable response. Before serious sanctions are applied the teachers usually try out the following;

- Quiet word
- Special mention
- Reminder of school or class rules
- Short instruction
- Seek explanation – why student is doing it
- Change position in class – temporary isolation from group
- Longer interview away from class group
- Loss of minor privileges
- Note in homework journal for signature / chat with parents

Short detention and/or lines (signed) /appropriate piece of writing /other duties

(Page 18 of the Record of Proceedings)

SANCTIONS

2. **Incident Records**

Records of lapses in behaviour will be maintained in the Class Incident Book as such (sic):

- Lack of respect to a member of the school community (e.g. rudeness, rowdy behaviour, disrupting class)
- ...
- ....
- ....
- ....
- ....
- ....

A record showing three lapses will automatically result in detention during break/lunch time. Persistent lapses will result in the student being monitored through a Daily Assessment Sheet.

(Page 19 of the Record of Proceedings)

3. **Detention**

Detention at break/lunch time may be given and recorded in the school diary for the following. However, cases of a serious nature should be referred directly to the Disciplinary Committee:

- ....
- ....
- ....
- ....
- ....
- Vulgar language, spoken written or through gestures
- ....
- ....
- ....
- ....
- ....

NOTE: Detention records for the above will be maintained in the student's diary and parents need to countersign this. Repeated accumulation of detention will result in the parent /guardian being called in for a meeting and/or Friday detention.

(Page 20 of the Record of Proceedings)

8. **Suspension**

In the case of a behavioural lapse of a serious or persistent nature, the matter is referred by the staff members to the School Disciplinary Committee (SDC).

The SDC reviews the case and the Head calls the parent(s)/guardian(s) for a meeting and explains the grounds on which the decision to suspend the child was made. A written note is issued to the parent to confirm the decision. The suspension period may range from two to five days.

Suspension may be given for the following:

- Continuous breaches of school rules.
- ....
- ....
- ....
- ....
- ....
- ....
- ....

(Pages 21 – 22 of the Record of Proceedings)

9. **Deregistration from school**

Deregistration is the ultimate sanction imposed by the school, and is employed by the School Disciplinary Committee in extreme cases of indiscipline or gross misconduct. The SDC reviews the case and the Head calls the parent(s)/guardian(s) for a meeting and explains the grounds on which the decision to deregister the student was made.

A student may be deregistered for any extremely serious breach(es) of the school rules including:

- ....
- ....
- ....
- ....
- ....
- ....

NOTE: The School Management reserves the right to be the final arbitor in the interpretation of School Rules.

(Page 22 of the Record of Proceedings)

SUMMING UP

The emphasis in the school is always on promoting good behaviour and respect for all .... (Page 23 of the Record of Proceedings)

71. In addition, we have examined relevant statutory provisions, in particular that prescribe for codes of conduct in the education sector in which the Appellant operates its business, that is, the Education Act, No. 23 of 2011. This Act provides prescriptions for codes of conduct in schools; therefore, it is contextually relevant to the provisions of the Competition and Consumer Protection in issue, as *pari materia*. In a number of our decisions, such as the case of the **Airtel Networks Zambia Plc v. Macnicious Mwimba & Competition and Consumer Protection Commission** 2014/CCPT/015/CON, we have dealt with the subject of sectoral laws, which is pertinent particularly in view of the reality that the Act under which the 1st Respondent operates cuts across all sectors of the economy. In that case, we cited Lord M. Gleeson, then Chief Justice of Australia, on his reflections on the subject of context in interpretation of statutes:

   "The apparent meaning of the legislative provision is only but the starting point; courts have to consider all relevant contextual material (within the statute itself and outside of it). This calls for extensive research and full knowledge of the context, which includes the statute and the subject matter or matters it covers."[4]

72. In the final analysis, we cited the Supreme Court decision in the case of **Director of Public Prosecutions v. Ngandu and Others** (1975) Z.R. 253 (S.C.) in which the Court said:

   ".... But as this court has said (see for instance Sinkamba v Doyle [1]) ordinary meanings or dictionary meanings of words or phrases, while they may properly be used as working hypotheses or starting points, must always in the final analysis give

[4] Gleeson, CJ.: M Gleeson, "The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights" Address to Victoria Law Foundation, Melbourne, 31 July, 2008).

way to the meaning which the context requires; and we use the word "context" in its widest sense as described by Viscount Simonds in Attorney-General v H.R.H. Prince Augustus [2] at page 53:

> '. . as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy.'"

We will, accordingly, make reference to provisions of the Education Act and regulations thereunder to the extent we find relevance to matters before us.

73. We have noted that the 1st Respondent addressed itself to the question whether the Appellant was an enterprise or person for purposes of the Act, and that the 2nd Respondent was a consumer within the meaning of section 2 of the Act. We, however, find that it was also necessary in determining the existence of a contract in the circumstances of the case to examine the capacity of the 2nd Respondent's two daughters to contract in their own right. In the absence of information as to the age of the two girls, we do not know whether they were minors, i.e. below 21 years. They most likely were minors since they were in Grade 9 and Grade 11 respectively. In any event, we are satisfied that at common law, for centuries the position has been that contracts for apprenticeship and education rank among contracts of necessities and can therefore be enforced by or against minors.[5] In the case of **Water v. Everard** [1891] 2 Q.B. 369, it was held that the liability for necessary instruction duly provided to a minor stood upon the same footing as that for ordinary necessities supplied to him.

74. Section 26 of the Education Act, dealing with learners, under Part IV of the Act (on LICENCES), provides as follows:

> "26. (1) An education board or a board of management shall, in consultation with the learners, teachers and parents at the educational institution, adopt a code of conduct for the learners.
>
> (2) A code of conduct shall establish a disciplined and purposeful school or college environment and improve and maintain the quality of the learning and training process.
>
> (3) The head of institution may, in consultation with the board of management at the educational institution, determine guidelines for consideration by the education board concerned in the adoption of a code of conduct.
>
> (4) Nothing contained in this Act exempts a learner from the obligation to comply with the code of conduct of the educational institution attended by the learner.
>
> (5) A code of conduct shall contain provisions of due process to safeguard the interests of a learner or any other party involved in any disciplinary proceeding."
>
> (Emphasis ours)

75. We conclude that according to common law and by statutory provision, specifically section 26 (4) and (5) of the Education Act outlined above, the 2nd Respondent's two

[5] Ibid, paragraph 8- 002 and 8 – 004.

daughters had capacity to contract in their own right and were bound by the terms of the Code of Conduct.

76. The Conditions of Enrolment were between the Appellant and the 2nd Respondent. While the Code of Conduct regulated the behaviour of the 2nd Respondent's two daughters, who were signatories and principal parties, it also bound the 2nd Respondent in that according to the Conditions of Enrolment, he was required to cooperate fully with the school as regards to consultations and correspondence with relation to, among others, social development, and behaviour of each child. He was also bound by the Conditions of Enrolment to observe the Rules and Regulations in force at the School. The Rules and Regulations included the Code of Conduct. In addition, he was bound by the term stating that the School Disciplinary Committee reserved the right to suspend, terminate the attendance of any pupil whose conduct or behaviour was, in the opinion of the Committee, not acceptable.

77. However, in our view, the contractual terms themselves as well as action flowing therefrom were expected to be subject to common law principles, such as avoidance of arbitrariness or abuse of power as well as statutory standards. Specifically, statutory provisions relating to consumer protection, specifically those relating to unfair trading practices and unfair contract or term of contract, in terms of sections 45 and 46, 53 of the Competition and Consumer Protection Act, respectively, and section 49 (5) relating to provision of services with reasonable care and skill. In contextual reference to these statutory provisions are prescriptions of the Education Act with respect to codes of conduct.

78. Thus, we have established that there was a contract between the Appellant on the one hand and the 2nd Respondent and his two daughters on the other hand, as evidenced by the Appellant's offer and the 2nd Respondent's and his daughters' acceptance of the terms of the two documents, respectively. We have also established that there are statutory provisions which had a bearing on the contract.

79. In so determining, we have observed that the 1st Respondent arrived at its finding and conclusion that there was a contract without clearly demonstrating how the contract was formed and the terms. Hence, the 1st Respondent also failed to define the relationships between the parties in reference to the contract. The 1st Respondent in its narrow analysis only referred to the suspension clause in the Code of Conduct (Clause 8 at pages 21 and 22 of the Record of Proceedings), in considering the issue of possible violation of-

    (a) section 45 (b), i.e. whether the Appellant practised unfair trading by compromising the standard of honesty and good faith which an enterprise can reasonably be expected to meet and thereby distorted, or was likely to distort, the purchasing decisions of the 2nd Respondent;

    (b) section 49 (5) concerning the question whether the Appellant supplied a particular service to the 2nd Respondent with reasonable care and skill; and

    (c) section 53 (1), i.e. whether the contract caused a significant imbalance in the parties' rights and obligations.

80. We conclude that the analysis in the 1st Respondent's Preliminary Report and the Board Decision by which its Board concluded that there was an offer and unconditional acceptance signified by payment of the school fees lacks substance. Although the 1st Respondent correctly found that the Appellant was engaged in trading, this was not a

transaction for sale of goods displayed in a shop or market, as we have earlier stated. Also, by paying the school fees, the 2nd Respondent was merely fulfilling the consideration for the contract of service. Establishing the foundation for the existence of the contract was essential in addressing the complaint and effectively carrying out and concluding an investigation. Without that foundation and without the essential terms of contract relevant to the complaint and investigation being identified, the conclusion that a contract existed between the Appellant and the 2nd Respondent was superficial. Accordingly, the Appellant succeeds on this ground of appeal.

GROUNDS ONE, TWO AND NINE

81. These grounds of appeal are as follows:

    1. That the (1st) Respondent erred in failing to properly consider and set out the applicable standards of honesty and good faith that the Appellant was expected to meet.

    2. That the (1st) Respondent erred in finding that the Appellant had compromised standards of honesty and good faith.

    9. That the (1st) Respondent erred in finding that the Appellant violated Section 46 (1) as read together with Section 45 (b) of the Competition and Consumer Protection Act No. 24 of 2010.

82. In arguing these grounds of appeal, the Appellant has contended that in order to arrive at the conclusion that the Appellant had engaged in unfair trading, the 1st Respondent ought to have set out the standards of honesty and good faith that the Appellant was expected to meet. The Appellant has cited the finding relating to section 45 (b) read together with section 46 (1) of the Act, at pages 62 – 63 of the Record of Proceedings. It reads:

    "The concept of good faith includes an obligation on the parties to cooperate in achieving the contractual objectives and ensuring compliance with honest standards of conduct that are reasonable and having regard to the interests of both parties. Regardless of what transpired, the Commission observed that the Respondent did not formally write to the Complainant nor did they summon him (the Complainant) for a meeting before they suspended his daughter. This was not in line with the School Disciplinary Committee (SDC) Code of Conduct which required the school head to call or write to the parents or guardians for a decision to suspend a child. The Commission also found that the Respondent requested the Complainant through a letter dated 12th May, 2015 to apologise after his daughter was already suspended without formally or calling him (the Complainant). From the facts given, the Complainant did enter into agreement with the Respondent to adhere to the code of conduct compromised the standard of honesty and good faith which distorted or was likely to distort Mr. Sajeev Nair's purchasing decisions."

83. The Appellant has further argued that the 1st Respondent concluded that the Appellant had compromised the standard of honesty and good faith without fully considering the contractual objectives of both parties as discussed under ground four. That the 1st Respondent considered the matter of the 2nd Respondent's daughter's suspension and his version of events as the entire basis for this finding. Further, that in its Preliminary Report and Board Decision, the 1st Respondent did not take into account its failure to put the Appellant on notice that the scope of the investigation went beyond what was contained

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in the Notice of Investigation, which was the matter of de-registration of the 2nd Respondent's two daughters. The Appellant referred to section 55 (3) which we have already quoted in our consideration of ground four. That the Notice of Investigation related to the de-registration while the Preliminary Report and Board Decision focussed almost entirely on the issue of the suspension of one of the 2nd Respondent's two daughters, which issue the Appellant has alleged to have been redundant.

84. The Appellant has gone on to argue that the 1st Respondent did not consider the Conditions of Enrolment that the Appellant alluded to in its response to the Notice of Investigation, which constituted part of the contract and was important in deciding whether there was compliance with the standards that were expected of the Appellant.

85. The Appellant has argued that in any case, the Appellant's evidence before the Tribunal was that the procedures of the School Code of Conduct were followed. Further, that contrary to the 1st Respondent's allegation in its Preliminary Report and Board Decision that the 2nd Respondent was not written to confirming the suspension of his daughter, the document at page 1 of the (further) Supplementary Record of Proceedings shows the position to be otherwise. That even RW1 who testified that the 1st Respondent did not have any evidence from the Appellant stating that the 2nd Respondent was called for a meeting, confirmed the letter from the Appellant to the 2nd Respondent confirming that his daughter had been suspended; hence the 1st Respondent was aware although the Preliminary Report stated otherwise.

86. The Appellant in its arguments has concluded that it is difficult to ascertain how the 1st Respondent could have reached the conclusion that the standards of honesty and good faith the Appellant was expected to meet were compromised, in relation to sections 45 (b) and 46 (1) of the Act. The Appellant has urged us to set aside this decision.

87. In response, the 1st Respondent has argued that the real issue was that the Appellant had failed to follow laid down procedure which hinged on unfair trading practices. That the Appellant had suspended the 2nd Respondent's daughter Ananya Nair for alleged use of abusive language which could not be substantiated. That the procedure for suspension is laid down in the Appellant's Code of Conduct (pages 21 - 22 of the Record of Proceedings), more particularly in clause "8. Suspension", which we have referred to in our consideration of ground four.

88. The 1st Respondent has argued that the reason there is such a procedure is to give the parents or guardians an opportunity to be heard. That the 1st Respondent had observed that the Appellant did not formally write to the Complainant nor call him for a meeting before suspending his daughter. That the Appellant's conduct therefore compromised the standard of honesty and good faith which an enterprise can reasonably be expected to meet and is in clear violation of section 45 as read with section 46 of the Act. Further that the Appellant's line of argument is tantamount to justifying its wrong doing and glossing over its wrongful conduct while pinning the blame on the Respondents. The 1st Respondent has gone on to outline the objectives of consumer protection laws as to protect consumers who are on the weaker bargaining side from unbalanced enforcement of contractual rights.

89. The 1st Respondent has further argued that the grounds for suspension which were set out in the Code of Conduct did not include use of vulgar language and that punishment for use of vulgar language whether oral or written was provided for under the heading "detention", which appears at page 20 of the Record of Proceedings. That therefore the Appellant did not adhere to its own Code of Conduct, and that this amounted to not being honest as well as failing to uphold the principles of good faith, contrary to the law.

90. The 1st Respondent has gone on to argue that the Appellant erred when it de-registered the 2nd Respondent's two daughters on the ground that the 2nd Respondent misconducted himself, as the Code of Conduct, at page 22 of the Record of Proceedings, did not state misconduct of a parent as a ground for de-registration of a pupil.

91. The 1st Responded has concluded by arguing that the Appellant violated its own Code of Conduct both when it suspended the 2nd Respondent's daughter Ananya and when it de-registered the two girls. And that this conduct amounted to compromising the standard of honesty and good faith which an enterprise can reasonably be expected to meet.

92. In reply, the Appellant has stated that its argument was not that only the parent was expected to abide to the contract in its entirety and not the school. That the Appellant's witnesses had confirmed that the Code of Conduct guided students and teachers while the Conditions of Enrolment were between the parent and the school.

93. That the Appellant's contention was that the decision was erroneously made and that not all the relevant elements were considered, that the Appellant was surprised that the 1st Respondent which had failed to consider the Appellant's reason for the de-registration of the 2nd Respondent's two daughters devoted the entire final paragraph of page 4 of its submissions discussing fairness and balanced rights. The Appellant has urged that on the strength of the evidence before us, the finding that the Appellant engaged in unfair trading must be assailed.

94. The 2nd Respondent did not file submissions, but we have considered his grounds in opposition in which he has argued that the Appellant erred grossly by not complying with the letter and spirit of the Code of Conduct by detaining for hours and suspending his younger daughter, Ananya, on 19th February 2015, for writing three English alphabet letters, "WTF", in an Italian grammar test without adequate considerations.

95. In considering this ground of appeal, we have observed that the 1st Respondent did not fully address itself to the contents of the letter of complaint but singled out the de-registration of the two girls, which it claimed the 2nd Respondent had alleged was on account of the younger daughter's alleged use of vulgar language in an examination. This was the subject matter. The possible violation of sections 46 (1), 45 (b), and section 49 (5) were the purpose of investigation. This is according to the 1st Respondent's Notice of Investigation and accompanying letter of 16th October 2015. We must state straight away that in the letter of complaint and all other documents furnished by the 2nd Respondent and filed by the 1st Respondent, there is no allegation that the two girls were de-registered because of the alleged use by the younger one of vulgar language during an examination. Although at the hearing under cross-examination, RW1 claimed that he had collected that information orally, he could not point to any record of such information having been given in whatever form. Neither is there any such record before us. The Appellant having responded and given its own reason for the de-registration, surprisingly, in the Preliminary Report and Board Decision, there is no finding at all concerning this subject.

96. In determining the issue of suspension, the 1st Respondent referred to the Code of Conduct, particularly clause 8 on "suspension". This was in its analysis of the standard of honesty and good faith in relation to sections 45 (b) and 46 (1); reasonable care and skill in relation section 49 (5); and whether there was an unfair contract or term of contract in relation to section 53 (1), (with the analysis relating to section 53 (1) being favourable to the Appellant). Then the 1st Respondent arrived at the verdict that the Appellant had violated section 46 (1) as read with section 45 (b) and section 49 (5). We have not seen any

analysis related to the de-registration of the two girls, though at the end, the 1st Respondent directed the Appellant to re-register the two girls. We therefore agree with the Appellant that the 1st Respondent in its investigation went beyond or deviated from what was stated in its Notice of Investigation. We also agree that the Preliminary Report and Board Decision dwelt almost entirely on the subject of suspension of the 2nd Respondent's younger daughter.

97. However, we cannot set aside the findings and verdict arrived at by the 1st Respondent merely on the basis that the scope of the investigation went beyond or deviated from what was contained in the Notice of Investigation, which was the matter of de-registration of the 2nd Respondent's two daughters. This is because of the reasons we have already given in our consideration of ground four of appeal. We have determined that there is no requirement for the 1st Respondent to issue another Notice of Investigation in the event that the scope of investigation changes. It was sufficient that later the Appellant was put on notice of the change. This was when the Preliminary Report, which subsequently formed the basis of the Board Decision, was served on the Appellant with a request for the Appellant to respond before the report was submitted to the Board for its determination. We have also determined that, in any case, evidence obtained during an investigation not conducted in compliance with the law is admissible if it is relevant.

98. Nor would we set aside the findings and verdict merely on the basis that the 1st Respondent did not consider the Conditions of Enrolment, which constituted part of the contract between the Appellant and the 2nd Respondent. The question whether the findings and verdict were erroneous can only be conclusively determined upon an evaluation of matters that weighed or ought to have weighed or ought not to have weighed the 1st Respondent in its determination of the case. This is particularly in light of the Tribunal's mandate to hear all the parties' evidence, including its discretion to receive additional evidence as is necessary to enable the Tribunal dispose of the appeal justly (Rules 14, 15, 18 and 29 of the Competition and Consumer Protection (Tribunal) Rules, S.I. 37 of 2012).[6] The distinction between the jurisdiction of courts and appellate tribunals was restated by the Supreme Court in its decision in the case of **Attorney-General v Phiri** (1988 – 1989) ZR 121; that <u>it is not the function of the Court to interpose itself as an appellate tribunal within the domestic disciplinary procedures to review what others have done; and that the duty of the Court is to examine if there was the necessary disciplinary power, and if it was exercised in due form.</u> The Tribunal is enjoined by law to address itself to the totality of what is before it.

99. Section 45 (b) reads, "A trading practice is unfair if-

    (a) ...;

    (b) it compromises the standard of honesty and good faith which an enterprise can reasonably be expected to meet; or

    (c) ...;

    and thereby distorts or is likely to distort, the purchasing decisions of consumers.

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[6] In our Ruling on an application for leave to produce documents on appeal in the case of **MRI Seed Zambia Limited, Tombwe Processing Limited and Precision Faming Holdings Limited v. Amiran Zambia Limited, ATS Agrochemicals Limited and Competition and Consumer Protection Commission**, Appeal Nos. 2017/CCPT/001/COM, 2017/CCPT/002/COM, and 2017/CCPT/003/COM, we held that the Tribunal may allow a party to adduce evidence though it was not before the Competition and Consumer Protection Commission if it is additional or further information relating to issues in the appeal as is necessary to enable the Tribunal dispose of it justly.

Section 46 (1) reads, "A person or an enterprise shall not practice any unfair trading"

100. The 1st Respondent in its analysis in its Preliminary Report (at page 46, paragraph 34) and in the Board's Decision (Page 62, paragraph 36), discussed the concept of good faith as including an obligation on the parties to cooperate in achieving the contractual objectives and ensuring compliance with honest standards of conduct that are reasonable and having regard to the interests of both parties. The 1st Respondent cited an internet article on the subject accessed in April 2013, which we have been unable to find. Without identifying and examining the contractual objectives in issue, the 1st Respondent stated that regardless of what transpired, the Appellant violated the Code of Conduct in that it did not formally write to the Complainant nor did they summon him for a meeting before suspending his daughter. The 1st Respondent alleged that this was not in line with the Code of Conduct which, it said, required the school head to call or write the parents or guardians for a decision to suspend a child.

101. The 1st Respondent also found that the Appellant requested the 2nd Respondent, through a letter dated 12th May 2015, to apologise after his daughter was already suspended without compliance to the said procedures. Further, that the 2nd Respondent had entered into an agreement to adhere to the Code of Conduct and that the standard of honesty and good faith was compromised which distorted or was likely to distort the 2nd Respondent's purchasing decision. The 1st Respondent did not explain how the Appellant's conduct distorted or was likely to distort the 2nd Respondent's purchasing decision.

102. First of all, we must consider whether the 2nd Respondent's younger daughter's suspension was in line with the Code of Conduct or other contractual terms, which we have outlined in our consideration of ground four above. Among the objectives of the Code are:

(a) To promote good behaviour and self-discipline among the children
(b) To enhance the learning environment of the school by promoting a sense of mutual respect among all members of the school
(c) To maintain active cooperation between home and school
(d) To ensure consistency in the application of rules and sanctions
(e) To outline the structure of fair and agreed sanctions that will be available to teachers and the school in response to negative behaviour

103. According to the Conditions of Enrolment, the 2nd Respondent was expected to "cooperate fully with the school as regards to consultations and correspondence with relation to the ... behaviour of the child". The 2nd Respondent had also agreed that the Disciplinary Committee reserved the right to suspend, terminate the attendance of any pupil whose conduct or behaviour was, in the opinion of the Committee, not acceptable. We find the following stipulations in the Code of Conduct to be cardinal:

"Before serious sanctions are applied the teachers usually try out the following;

- Quiet word
- Special mention
- Reminder of school or class rules
- Short instruction
- Seek explanation – why student is doing it
- Change position in class – temporary isolation from group

- Longer interview away from class group
- Loss of minor privileges
- Note in homework journal for signature / chat with parents

Short detention and/or lines (signed) /appropriate piece of writing /other duties" (Page 18 of the Record of Proceedings)

"Detention at break/lunch time may be given and recorded in the school diary for the following. However, cases of a serious nature should be referred directly to the Disciplinary Committee:

- ....
- ....
- ....
- ....
- ....
- Vulgar language, spoken written or through gestures
- ....
- ....
- ....
- ....
- ....

NOTE: Detention records for the above will be maintained in the student's diary and parents need to countersign this. Repeated accumulation of detention will result in the parent /guardian being called in for a meeting and/or Friday detention."

(Page 20 of the Record of Proceedings)

"In the case of a behavioural lapse of a serious or persistent nature, the matter is referred by the staff members to the School Disciplinary Committee (SDC).

The SDC reviews the case and the Head calls the parent(s)/guardian(s) for a meeting and explains the grounds the decision to suspend the child was made. A written note is issued to the parent to confirm the decision. The suspension period may range from two to five days."

The Code of Conduct goes on to specify misbehaviour for which suspension may be given, which does not include use of vulgar language.

(Pages 21 – 22 of the Record of Proceedings)

104. In express terms, suspension was not among the sanctions prescribed for use of vulgar language. However, the Code provided that in the case of a behavioural lapse of serious nature, the matter is referred by the staff members to the Staff Disciplinary Committee. We also note that the Code provided that the School Management reserved the right to be the final arbitor in the interpretation of School Rules (Page 22 of the Record of Proceedings). We further note that the Conditions of Enrolment stipulated that School Disciplinary Committee reserved the right to suspend, terminate the attendance of any pupil whose conduct or behaviour was, in the opinion of the Committee, not acceptable.

105. In interpreting the said contractual provisions, we bear in mind that the common law principle against arbitrariness or abuse of power in the exercise of discretion is reflected in or implied by statutory standards, as we have earlier stated. These standards have a bearing on consumer protection, as we shall discuss later.

106. To start with, there is the provision in section 26 (5) of the Education Act; that "a code of conduct shall contain provisions of due process to safeguard the interests of a learner or any other party involved in any disciplinary proceeding." The doctrine of due process invokes a requirement that the provisions of the Code should embody fairness and justice substantively and procedurally, as opposed to arbitrariness. The essential elements of due process in relation to law are instructive here. These elements have been defined in Black's Law Dictionary as implying "notice, an opportunity to be heard, and the right to defend in an orderly proceeding."[7]

107. In this country, due process is statutorily required of public education institutions regulated under the Education Act. Section 27 provides, "A learner at a public, aided or community educational institution shall be subject to such disciplinary measures and procedures as the Minister may, by statutory instrument, prescribe." Section 34 goes on to give power to the Minister to make regulations, among others, for the context of a code of conduct for learners; and the procedure, terms and conditions for suspension, expulsion and re-admission of a learner from an education institution. The regulations made under the repealed Education Act, Chapter 134 (which continue in force by virtue of section 15 of the Interpretation and General Provisions Act to the extent that they are not inconsistent with the current Education Act No. 23 of 2011) prescribe the grounds on which a pupil in a public, aided or community educational institution may be suspended; etc. These regulations also provide due process, that is for the pupil and parent to be heard.[8]

108. On the other hand, no regulations have been made for private education institutions; therefore, they are governed by contractual rights and obligations. However, private schools are, by virtue of section 26 (5) of the Education Act, mandatorily required to provide for due process in their codes of conduct.

109. In some jurisdictions, such as the United States of America (USA), disciplinary sanctions and procedures in private education institutions are matters of contractual rights and obligations. In the case of **Flint v. St. Augustine High School**, 323 So.2d 229, 233 (La.App. 4th Cir.1975), 325 So.2d 271 (La.1976), the Court of Appeal stated that a private institution had almost complete autonomy in controlling its internal disciplinary procedures. Additionally, that a private institution was entitled to a very strong but rebuttable presumption that its internal administrative actions were taken in absolute good faith and for the mutual best interest of the school and the student body. (at 235, n. 1).[9] In this connection, the courts have held that in the absence of statutory intervention, claims which allege that a private institution's practices have violated constitutional guarantees shall not be entertained. (Per **Blouin v. Loyola University**, 506 F.2d 20 (5th Cir.1975); **Wahba v. New York University**, 492 F.2d 96 (2nd Cir.1974).[10]

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[7] Sixth Edition, page 500.

[8] Part VI, Regulations 24 and 25 of the Education (Primary and Secondary Schools) Regulations (made under the Education Act Chapter 134 of the Laws of Zambia (amended by the Education Act No. 13 of 1994 and repealed by the Education Act No. 23 of 2011), as amended by S.I. 2 of 1994, applicable only to Government and aided schools. The Regulations prescribe the grounds on which a pupil may be suspended, etc., and provide due process for the pupil and parent.

[9] Discussed in **Ahlum v. Administrators of Tulane Educ. Fund**, infra.

[10] Ibid.

110. We observe that even in the USA, where due process in private education institutions mimic standards in public education institutions, for example by contractual provision, these have been recognised by courts. In a 1993 Louisiana Court of Appeal case **Ahlum v. Administrators of Tulane Educ. Fund** 617 So. 2d 96 (La. Ct. App. 1993)[11], had this to say:

> "The fact that the judiciary adheres to this policy of judicial restraint does not render the actions of a private institution inviolate. As the language in *Flint* recognizes, the power of a private institution is not absolute: "That is not to say that due process safeguards (in private institutions) can be cavalierly ignored or disregarded." *Id.* at 235. The disciplinary decisions of a private school may be reviewed for arbitrary and capricious action. *Babcock v. Baptist Theological Seminary*, 554 So. 2d 90, 97 (La.App. 4th Cir.1989); citing *Lexington Theological Seminary v. Vance*, 596 S.W.2d 11 (Ky.Ct.App.1979); *Tedeschi v. Wagner College*, 49 N.Y.2d 652, 427 N.Y.S.2d 760, 404 N.E.2d 1302 (1980); *Coveney v. President & Trustees of Holy Cross College*, 388 Mass. 16, 445 N.E.2d 136 (1983). Therefore, if the record indicates that Tulane's actions in suspending Ahlum were arbitrary and capricious, then its decision may be reviewed by the judiciary."

111. We are aware that the Appellant is wholly private. Accordingly, in light of section 26 (5) of the Education Act, the relevant provisions of the two contractual documents before us must be evaluated in such a manner as requires the right to be heard on a disciplinary measure such as suspension before a decision is taken.

112. On the reading of section 26 (4) of the Education Act, which affirms pupils' obligation to comply with codes of conduct, and the two contractual documents, it is fair to state that it was the expectation of the parties when they were entering into contract that suspension could be imposed for a behavioural lapse of a serious nature; even where such behaviour fell in a generic category for which other less severe sanction was provided, where such sanction would not reflect the seriousness of the behavioural lapse in question. (Per clauses 3 (detention) and 8 (suspension) of the Code of Conduct) Therefore, the School Disciplinary Committee, being administratively the final arbiter in the interpretation of the Code of Conduct cannot, without justification, be faulted for determining that the use of vulgar language on an examination paper, that is the acronym "WTF", meaning "What The Fuck", was a behavioural lapse of a serious nature warranting suspension. The decision can only be faulted if it is found that it was arbitrarily or unfairly arrived at, devoid of evidence of use by the 2nd Respondent's daughter of such language or evidence of the meaning of the acronym "WTF", or without giving her an opportunity to be heard or to defend herself. Ultimately, we will have to contextually relate all such matters to our evaluation of provisions of the Competition and Consumer Protection Act in issue. We turn to the evidence.

113. In his evidence, AW2, who testified that he was the Deputy Head of the School and a member of the School Disciplinary Committee, said on or about 19th February 2015, he was going around the school on duty, when the Italian teacher invited him to her class. That apparently, there was an urgent matter of concern, which had arisen in the classroom and this was to do with very bad results in an Italian test the students had written. That the teacher was very agitated about a script by Ananya Nair (the 2nd Respondent's younger

[11] The case can be accessed on http://www.courtlistener.com/opinion/1099250/ahlum-v-admrs-of-tulane-education-fund/

daughter). That the teacher pointed to some place on the script where the student had written something which the teacher had found offensive.

114. AW2 identified the Italian examination script (pages 1 - 2 of the Appellant's Bundle of Documents) on which the 2nd Respondent's younger daughter, Ananya, had written the acronym "WTF" in response to a question at pages 2. The teacher had inserted a comment "Don't you think I know what WTF is???". The witness said his interpretation of the acronym was that it was a profanity, standing for "What The Fuck" and that the Italian teacher had circled the acronym on the examination script and inserted her comment. So, he went on to testify from the context what the initials stood for. That he informed the Head teacher about this incident, and she called for the girl and the Head questioned her if she knew the interpretation of the acronym. The witness said the child said she knew the interpretation, and that the Head further asked her, to state the meaning of the acronym, which the child did, though very embarrassed. That she said the acronym stood for "What The Fuck". And that afterwards the girl went with the Head to her office.

115. AW2 went on to testify that later that day, around 13:00 hours, the Head Teacher called for a Disciplinary Committee meeting. So, the Head Teacher, himself and the Deputy Head - Primary, Mr. Prats, (Disciplinary Committee members) met. That realising that this was unprecedented in the history of the school, that in an examination a child could actually write a profanity, they thought this was bordering on insubordination, and that to a teacher it was defamation. Further, that in line with Cambridge procedures and regulations for examinations, profanity on an exam script could actually lead to disqualification of the child in an examination. That realising the unprecedented nature of the case, and also the gravity of the wider implication of the case, they decided that the child be suspended for two days.

116. That later the same day, around 15:00 hours, the witness met with the 2nd Respondent as he was walking around the school. That he asked where his daughter was and he told him that the child had gone with the Head of the school to her office. And so, he asked him to go to the Head's office. But rather than head the direction of the Head's office, he saw him walk towards the direction of the car park.

117. That the following day Friday, they had a function at school. The function is called Carnivale. It is a carnival procession and a kind of a Holiday. And then Monday, which was the 23rd of February, the witness saw the 2nd Respondent in the company of his wife, around 08:00 hours, and that he literally stormed into his office. That the 2nd Respondent was extremely aggressive and agitated and he was challenging the decision of the school, concerning what had happened to his child. That realising the mood in which he was, the witness opted not to entertain him in his office, because he was literally abusive. After a while, he appeared to calm down, and so they had a discussion. That he explained to him what had happened in the Italian class, but it appeared he had his own interpretation of events in the classroom. His interpretation of events was that they had publicly shamed his child and that they had subjected her to some form of mental torture, by subjecting her to a very long interview in AW2's office. That he went on to challenge the decision of the school, among the issues he repeatedly stated, was that the due process of the Code of Conduct was not followed. Then after this confrontation, the meeting was closed.

118. AW2 further testified that after this incident, on the 23rd or about 24th of February 2015 the 2nd Respondent wrote him an email, to which he also attached another email. The attachment was going to the Board of the School. In the attachment, he made a lot of allegations about the school, for example, that the school was retrogressing to a level of animal farm; that the teachers at the school were unprofessional and did not deal with the

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issues in the school professionally. That in the other email directed to AW2, he was asking him to confirm the discussion of the meeting he had with him, some of the allegations in the letter, were according to AW2 untrue. AW2 identified these emails as that at pages 8 – 9 of the Appellant's Bundle of Documents and the attachment as that at page 25 of the Record of Proceedings.

119. Under cross-examination by counsel for the 1st Respondent, AW2 testified concerning the School Disciplinary Committee procedures that first and foremost, the Head Teacher informs the parent. That as to applicable sanctions for misbehaviour, he said if there was a behavioural issue, teachers referred to the Code of Conduct, but then they would further analyse the wider implications and ramifications of the behavioural issue. That in this particular case, the Committee was guided by clause 8 of the Code of Conduct on "suspension" when it imposed the 2 days suspension. He said the procedure was that the Committee went as far as making the decision and thereafter to confirm the decision, the Head called for a meeting with the parents to inform them of decision. And that he was aware that in this case, the Head Teacher called the 2nd Respondent, though for evidence of that he referred to other witnesses.

120. Cross-examined by the 2nd Respondent's counsel, AW2 reiterated that, when they questioned her, the 2nd Respondent's younger daughter had given them an interpretation of the acronym "WTF", though quite embarrassed about it.

121. In re-examination, AW2 explained that according to procedure, following the Committee's decision to suspend a pupil, the Head of the school would call for a meeting with the parents and then communicate in writing, to confirm the decision. Further, that clause 8 of the Code did not prescribe how a parent was to be called.

122. AW3, Ms. Muriel Christine Grindley-Ferris, testified that she was the School Secretary at the Appellant's school. That late in the morning of 18th of February, 2015 the Head Teacher came with Ananya to her office and asked her to sit down and while she waited, the Head Teacher asked the witness to call the 2nd Respondent. That she called his number and did not get a reply. That she looked up his office landline number which the witness had in her database and got through to a lady. That she asked her to pass on the message to the 2nd Respondent to come and see the Head of the school. The Respondents had nothing to cross-examine this witness.

123. AW4, the Head Teacher of the Appellant School testified that when she was informed of and saw the "WTF" acronym on the examination script, she asked the 2nd Respondent's daughter Ananya to elaborate what she had written. That she was embarrassed, she put her head down. That she then walked with her to the reception area and asked her to sit there. That she asked the School Secretary (AW3), to call the 2nd Respondent to come and see her. That the Secretary tried for quite some time and the witness also tried his number but both failed. That then AW3 said she had another number, which was in her data sheet, so she called the number and left a message for the 2nd Respondent to come to the school and see the Head Teacher.

124. That after this, the witness sent word for the Deputy Head Primary, and Deputy Head Secondary (AW2) to discuss this disciplinary issue. They called the Disciplinary Committee of the School, to agree on a decision and inform the 2nd Respondent when he came, which they thought would be very soon, approaching lunch time. That they agreed this was very serious, at the level of secondary school. The student had used vulgar language, more so used to question the Italian teacher who was the examiner; that this was very disrespectful. That the script was a formal piece of document, not a note written to a child. That looking at it from the point of view of teaching Ananya, the importance of

examination scripts, they agreed to inform the 2nd Respondent that suspension for 3 days would give her time to reflect on her mistake and ensure that she would never ever do it again. That so they waited for the 2nd Respondent to come, unfortunately, he did not come and it was lunch time, so she stepped out of her office. The Deputies had gone by then. That she found Ananya was still sitting there and that her father had not come, hence she told her to go for lunch and come back thereafter, as AW4 needed to see her father. So, both took lunch break. That when AW4 got back, she saw Ananya sitting at the reception.

125. AW4 went on to testify that in the afternoon, the School had a scheduled rehearsal, for a function at the Italian Cultural Centre, which is called carnivale, which was happening the following day. That AW4 went to the rehearsal but told Ananya to tell the 2nd Respondent, if he came, that she would like to see him. That when the rehearsal was over, AW4 got back to the office and Ananya was not there; she was surprised. That she stepped out and saw AW2. She remembered that he asked if she saw the 2nd Respondent and she respondent in the negative. That this was the end of the school day and there was a sense of urgency; this was because the next day, they had a carnival which was not a school day, it was a holiday and she could not call the 2nd Respondent for a serious meeting on that day. She decided she would retire for the day and call him from home. The witness said communicating with him was very important that day. That she tried but did not get any response. But late in the evening, the 2nd Respondent called her. So, she explained to him what had happened and that children made mistakes and needed to be taught. That they had decided Ananya needed time off, to think through and that next day was carnival, she would not miss school, but 2 days after that she would stay at home and would return to school on Wednesday. That this would help her to remember not to do the same thing again.

126. That after this communication, the 2nd Respondent was fine; he disconnected and then on Friday was the carnival. Ananya did not come. That they were also busy and not in the office, but outside. That on Monday, AW4 got back and followed up the matter by writing a follow up letter on the suspension, which was usually the practice. She identified the letter as that in the (further) Supplementary Record of Proceedings filed on 13th October 2017, dated 23rd February 2015. She said that in the letter she thanked him for calling her and explained to him the decision the School Disciplinary Committee had taken - to suspend his daughter and when she was to return and that she should apologise to the Italian teacher.

127. Under cross-examination by counsel for the 1st Respondent, AW4 testified that when seen in context, in this case vulgar language called for suspension. That this was so in this case because in an examination situation, they followed rules that only the answer is written, no vulgar language is allowed anywhere in an examination situation. That use of vulgar language between children, in a playground would not warrant suspension but if it was against a teacher, and in an examination situation, they considered it to be serious. So, it graduated to a serious sanction. That this was not stated in the Code of Conduct; the School Code of Conduct was not definitive as not everything was stated in it. That Ananya was not detained and that the reason she had not instructed her to go back to school while they awaited her father's arrival was that the day was over; it was lunch time, so she asked her to go for lunch as they waited for her father to come. That she was surprised to find Ananya at the reception after lunch because it was lunch break. That she thought she was waiting her instruction, so she told her to go.

128. The 2nd Respondent did not cross-examine this witness on the substance or procedures of the Code of Conduct, except in relation to the de-registration of the two girls which is not under review in this ground of appeal.

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129. The Appellant in its evidence does not dispute the allegation, which was RW1's later evidence, that the 2nd Respondent was not heard before but informed after the sanction was imposed by the School Disciplinary Committee. What we first of all need to determine is whether the 2nd Respondent's daughter was properly and fairly found to have committed the alleged offence.

130. In our view, the examination manuscript referred to, at pages 1 - 2 of the Appellant's Bundle of Documents, particularly at page 2 was clear proof of the offence. There could be no reasonable dispute that the acronym "WTF" stood for "What The Fuck". The School authorities interpreted it and the girl herself confirmed the interpretation of the acronym. By any objective moral standards, this was vulgar language which was aggravated by the fact that she used it on an examination script and was targeted at the examiner.

131. Furthermore, although the Appellant's Code of Conduct did not provide for it, due process was observed in that the girl, who was the principal party to the Code of Conduct and who was the one involved in the disciplinary proceedings, was called and interviewed by the Head Teacher (AW4) in the presence of the Deputy Head Secondary (AW2) and she confirmed the interpretation of the acronym. In this regard, we bear in mind the wording of section 26 (5) of the Education Act, which states, "A code of conduct shall contain provisions of <u>due process to safeguard the interests of a learner or any other party involved in any disciplinary proceeding</u>." (Emphasis ours) The 2nd Respondent was neither the pupil (learner) nor involved in the disciplinary proceedings. If the legislature had intended the due process to extend to parents or guardians, there would have been express legislative provision to that effect.[12]

132. Neither have we found any provision in the Code of Conduct requiring that the 2nd Respondent should have been called or written to before the decision to suspend his daughter was taken. Clause 8 stated, "The SDC reviews the case and the Head calls the parent(s) ... for a meeting and explains the grounds on which the decision to suspend the child was made. A written note is issued to the parent to confirm the decision." We are satisfied from the Appellant's evidence, particularly the testimonies of AW2, AW3 and AW4, which we have outlined above, that these provisions were followed. AW3 testified that she left a message for the 2nd Respondent at his office, that he should come and see the School Head Teacher. AW4 testified that she informed him of the decision of the Disciplinary Committee, the reasons, purpose and duration of the suspension and that to confirm the decision, she wrote the letter appearing in the (further) Supplementary Record of Proceedings filed by the 1st Respondent. There is no evidence on record to the contrary.

133. In our attempt to provide an understanding of sections 45 (b) as read with section 46 (1) of the Act, we have reviewed the said provisions of the Act in the context of what is commonly understood as "standard of honesty and good faith" at common law and in consumer protection legislation, according to decided cases. The piecemeal development of the doctrine of honesty and fair dealing (good faith) in English contract law has been steadily growing, though perhaps outmatched by other jurisdictions. The duty of good faith is increasingly implied by courts or by statutory intervention in a number of jurisdictions. One author on the subject puts it this way[13]:

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[12] As in the case of public, aided and community schools, per Part VI, Regulations 24 and 25 of The Education (Primary and Secondary Schools) Regulations. Ibid.

[13] Rosalee S Dorfman, "The Regulation of Fairness and Duty of Good Faith in English Contract Law: A Relational Contract Theory Assessment" (Published on 13th October 2015) at page 112. http://newjurist.com/fairness-in-english-contract-law.html

"The long-standing US recognition of a doctrine of good faith and subsequent adoption in numerous common law countries indicates that the doctrine is no marker between civil and common law. In addition, the Scottish case *Smith v Bank of Scotland*[14] is strong House of Lords authority for recognising a broad principle of good faith. Recently Canada has recognised an implied duty of good faith in commercial contracts in some situations.[15] An Australian judge summed up the imperative reason for Australia and other jurisdictions to have a contractual duty of good faith: the duty of good faith 'is in these days the expected standard, and anything less is contrary to prevailing community expectations.'[16] .... Honesty and fair dealing are rooted social norms. These should be recognised as a positive duty rather than maintaining the traditional assumption that freedom of contract constitutes a negative freedom .... This shared value is rarely inserted into the written contract, since even to do so may suggest dishonesty.[17] The social expectation of honesty has already been recognised in the House of Lords case of *HIH Casualty v Chase Manhattan Bank*.[18] In that case a statement was interpreted by Lord Bingham[19] and Lord Hoffmann[20] to exclude deceit, based on a shared expectation of honesty and good faith."

134. In our decision in the case of **Airtel Networks Zambia Plc v. Macnicious Mwimba & Competition and Consumer Protection Commission**, which we have cited previously, we quoted Lord Bingham's finding in the leading House of Lords case of **Director General of Fair Trading v First National Bank** [2002] 1 AC 482; [2001] UKHL 52 on the question of good faith, which fell to be determined in the context of a statutory prohibition of unfair contract term. He said:

"The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 of the regulations. Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice. Regulation 4(1) lays down a composite test, covering both the making and the substance of the contract, and must be applied bearing clearly in mind the objective which the regulations are designed to promote."

135. In the case before us, the standard of honesty and good faith is not only a common law expectation but is also statutorily implied by the above outlined sections of the Act for the purpose of achieving consumer protection. However, on a proper reading of section 45 (b), the 1st Respondent's position in its Preliminary Report and Board Decision and its argument in its submissions before us could have been valid if it had been true that the

[14] Smith v Bank of Scotland [1997] UKHL 26; [1997] 2 FLR 862 (HL) 111, 121 (Lord Clyde).

[15] 156 Transamerica Life Inc v ING Canada Inc (2003) 68 OR (3d) 457, 468.

[16] Renard Constructions (ME) Pty v Minister for Public Works (1992) 44 NSWLR 349 [95] (Priestly JA).

[17] Yam Seng Pte Ltd v International Trade Corporation Ltd [2013] EWHC 111 (QBD).

[18] [2003] 2 Lloyd's Rep 61 (HL).

[19] ibid [15].

[20] 162 ibid [68].

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Code of Conduct required the Appellant to call or write to the 2nd Respondent in order to give him an opportunity to be heard before taking the decision. Because then it would have been arguable that by stipulating such a requirement in its Code of Conduct, the Appellant was expected to act honestly and in good faith by complying with that stipulation when suspending the 2nd Respondent's daughter. Further, it could have been arguable that by putting that stipulation in the Code and yet acting contrary to it in actual practice, the Appellant compromised the standard of honesty and good faith. Furthermore, that the written Code led or could have led the 2nd Respondent or any other consumer of the Respondent's services, for that matter, into making a distorted purchasing decision, when contracting, in expectation that the Appellant would uphold the stipulation in the event it contemplated the sanction of suspension. To the contrary, the 1st Respondent did not even elaborate how the 2nd Respondent's purchasing decision was distorted or was likely to be distorted. Above all, it is our finding that the Code of Conduct did not require the Appellant to call or write to the 2nd Respondent before deciding to suspend his daughter. It is also our finding that, although the Appellant did not provide for it in the Code of Conduct, it followed due process by affording the 2nd Respondent's daughter an opportunity to be heard and by actually hearing her.

136. Nonetheless, the Appellant, like all other education institutions regulated under the Education Act, is required by section 26 (5) to provide for due process in its Code of Conduct in order to safeguard the interests of a learner or any other party involved in any disciplinary proceedings. We find that this is lacking, meaning that due process is not assured to consumers of the Appellant's services, contrary to statutory requirement. As the terms of the Code stand, the school authorities can take a unilateral or even arbitrary decision and merely inform the pupil and his or her parent or guardian. However, the absence of provision for due process in the Code of Conduct has no relationship with sections 45 (b) and 46 (1), which define and prohibit unfair trading practices. We cannot conclude that the Appellant, by failing to make provision for due process in its Code of Conduct as required by statute, compromised the standard of honesty and good faith which an enterprise can reasonably be expected to meet and thereby distorted or was likely to distort the purchasing decision of the 2nd Respondent. Neither would we conclude so upon applying the objective test as to whether purchasing decisions of ordinary consumers seeking to enter or entering into contracts for the Appellant's services were or were likely to be distorted due to the Appellant's non-compliant Code of Conduct. Rather, these provisions of the Act relate to dishonest conduct or lack of good faith reflected in the substantive provisions of a contract or in the contracting or contract enforcement processes on the part of the dominant party (such as one using a standard form contract), leading to, or likely to lead to, a consumer making a purchasing decision to his or her detriment.

137. However, having reviewed all the evidence, we have observed that the Appellant reserved to itself the:

(a) power to suspend, terminate the attendance of (de-register) any pupil whose conduct or behaviour was, in the opinion of the School Disciplinary Committee, not acceptable; in which case, the School Head was required to call the parent(s) or guardian(s) to a meeting and explain the grounds for the decision, followed by written communication confirming the decision; and

(b) right to be the final arbiter in the interpretation of the Code of Conduct.

(See item (5) in Conditions of Enrolment at page 3 of the Appellant's Bundle of Documents; clauses 8 (on suspension) and 9 (on deregistration and note) at pages 21 – 22 and 23, respectively, of the Record of Proceedings)

138. The contract was also a "take it or leave it" type. At the outset, the Conditions of Enrolment state, "Before a placement can be made, it is vital that Parents understand the financial and other implications of acceptance. You are effectively entering into a contractual agreement with the school. ...." This status was made explicitly clear by AW1 and AW4 when they testified that if a parent refused to sign the Conditions of Enrolment, his or her child would not be offered a place. There was obviously no room for negotiation in this kind of contract.

139. The two girls were, on the other hand, expected to adhere to the Code while the 2nd Respondent was expected to cooperate fully with the school in relation, among others, to the behaviour of each of his daughters. He was also bound to observe the Rules and Regulations in force at the School, which included the Code of Conduct. There is nothing wrong or unusual in the Appellant enjoying such powers, in view of the nature of service it provided (education). But in the absence of contractual provisions in the Code of Conduct guaranteeing due process to a pupil, the contract could well have caused or could cause a significant imbalance in the rights and obligations between the Appellant and the 2nd Respondent's daughter or any other consumer for that matter, according to the definition of the term "consumer" in section 2 (1) of the Act,[21] to the latter's detriment. In such event, this would constitute an unfair contract or contract term per section 53 (1) of the Competition and Consumer Protection Act, dealing with unfair contract or term of contract, particularly as understood in the context of section 26 (5) of the Education Act.

140. An unfair contract or term of contract has been defined by section 53 (1) which states, "In a contract between an enterprise and a consumer, the contract or a term of the contract shall be regarded as unfair if it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."

Consumer protection legislation on unfair contract or term of contract is a common trend in Commonwealth countries. This stems from a recognition of the weaker bargaining position in which consumers stand as opposed to the powerful enterprises with whom they enter into contract. This reality is particularly glaring when it comes to standard form contracts, such as the one in issue in this appeal. One author[22] on unfair contracts observes as follows:

> "The whole point of standard form contracts is that there will be no negotiation over, or variation of, the terms of the contract. They are presented on a 'take it or leave it' basis.[23] The opportunities for consumers to read, comprehend or take advice on the terms of the contracts are typically limited.[24]

141. As in the definition of "unfair contract or contract term" by section 53 (1) of the Zambian Act, under section 24 (1) (a) of the Australian Consumer Law (ACL), unfairness

[21] For the purposes of the other Parts of the Act, other than Part III, "consumer" is defined as, "any person who purchases or offers to purchase goods or services otherwise than for the purpose of re-sale, etc.

[22] Jeannie Paterson, "The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts" (2010) 33 Melbourne University Law Review 940. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1669008

[23] George Mitchell [1983] QB 284, 297 (Lord Denning MR); Schroeder Music Publishing [1974] 3 All ER 616, 624 (Lord Diplock).

[24] Andrew Robertson, 'The Limits of Voluntariness in Contract' (2005) 29 Melbourne University Law Review 179, 180–1, 188; Robert A Hillman and Jeffrey J Rachlinski, 'Standard-Form Contracting in the Electronic Age' (2002) 77 New York University Law Review, 432–3; Melvin Aron Eisenberg, 'The Limits of Cognition and the Limits of Contract' (1995) 47 Stanford Law Review 211, 242.

of a term in a standard form consumer contract is determined by the existence of 'a significant imbalance in the parties' rights and obligations arising under the contract'. Some examples of potentially unfair terms in the ACL (e.g. section 25 (1)) suggest that the issue is whether a right given to a trader is balanced by a similar right given to the consumer. However, it is important to note that these examples are not definitive; they are meant for guidance and the examples may not always be practicable.[25] In particular, in the case of the Zambian jurisdiction, where the legislation gives no suggestions or examples, the question may be determined affirmatively if there are burdens placed on a consumer that are not balanced by concessions elsewhere in the transaction.[26]

142. For persuasive authority, among examples of unfair contract terms provided by the ACL (section 25 (1) (b)) is a term that allows one party unilaterally to determine whether the contract has been breached or to interpret its meaning, unless of course, this is necessary to protect the interest of the enterprise and the other two statutory tests provided yield negative results. The other two tests are:

(a) would cause a significant imbalance in the parties' rights and obligations arising under the contract; and

(b) would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

143. In its analysis of the Appellant's case in relation to section 53 (1), the 1st Respondent's Board, at page 65 of Record of Proceedings in paragraphs 43 and 44, referred to the famous text of Lord Bingham's finding in the House of Lords case of **Director General of Fair Trading v First National Bank**, which we have previously referred to, in which he discussed unfair term of contract in the context of provisions of Regulations[27] in which the question of significant imbalance in the rights and obligations of the parties to the detriment of a consumer fell to be determined within the framework of the regulations which included a term contrary to the requirement of good faith. The 1st Respondent further referred to definitions of "significant", as "having or likely to have influence or effect", and "imbalance" as "lack of proportion or relation between corresponding things (Paragraph 45 at page 65 of the Record of Proceedings). These references or definitions were sound but they were weighed against erroneous findings of fact on interpretation of the terms of the Code of Conduct, leading to a wrong conclusion.

144. The 1st Respondent's finding was that the Appellant did not violate section 53 (1). This finding was arrived at on the basis of the 1st Respondent's determination that the Code of Conduct "gave an opportunity to the parents or guardians to have a discussion before the final decision was made." It was the 1st Respondent's further finding that "every term of the clause ensured that a particular case was fully discussed before making a final decision." There was no basis for these findings in the wording of Clause 8 of the Code of Conduct or indeed the full context of the Code. The terms of the Code made it clear that a decision to suspend a pupil was within the exclusive power of the School Disciplinary Committee and that once a decision was made, the School Head would call the parent(s)/guardian(s) for a meeting to explain the grounds on which the decision to suspend the child was made. A written note would be issued to the parent to confirm the decision. We also heard from the Appellant's evidence that this is what actually happened in this case.

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[25] As observed by Jeannie Paterson in her comments on ACL, 943 – 944. Ibid.

[26] Ibid.

[27] Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159).

145. There was no requirement in the contract for a pupil or its parents/guardian to be heard before a decision or final decision. It is our determination that the sweeping contractual powers enjoyed by the Appellant and the obligations placed on the pupils and their parent(s)/guardian(s) ought to have been matched by provision for due process in disciplinary proceedings for serious sanctions such as suspension, expulsion or de-registration on disciplinary grounds. This is to safeguard the interests of the pupil against arbitrary or unfair sanction. Applying the objective test, the contract terms are in themselves detrimental to pupils at large who are consumers and have purchased or may offer to purchase the Appellant's services. It matters not that the 2nd Respondent's daughter did not suffer actual detriment. She did not suffer that because, though not required by the terms of the contract, the School management afforded her an opportunity to be heard and actually heard her and duly found her guilty.

146. The mischief is the absence of a corresponding right for any pupil (who is a consumer) to be heard and defend himself or herself against suspension or expulsion/de-registration on disciplinary grounds, leaving the proceedings open to arbitrariness; abuse or unfair sanction. Thus, the provision in clauses 8 and 9 of the Code of Conduct giving the School Disciplinary Committee power to make a decision to suspend or expel/de-register a pupil and only call the parent or guardian to a meeting to inform of the decision caused a significant imbalance in the rights and obligations of the parties to the detriment of the 2nd Respondent's daughters. Put objectively, the said terms cause such an imbalance to any consumer entering into contractual relationship with the Appellant.

147. We are, however, of the opinion that despite the said default, the standard form contract was and is still capable of being enforced in terms of subsection (3) of section 53, if the provision in clauses 8 and 9 of the Code of Conduct merely requiring that the parent or guardian be called to a meeting to inform of the decision is disregarded. As happened in this case, in practice, the Appellant followed due process. The Appellant suffers no penalty in terms of section 53. It is necessary, however, for the default to be addressed, which we shall deal with later.

148. There are other issues which were raised by the Respondents in the appeal proceedings. The 2nd Respondent in his grounds in opposition to the appeal alleged that his younger daughter was detained. He did not make any complaint to the 1st Respondent that his younger daughter was detained; therefore, he could not be heard to do so on appeal. In any case, we find the evidence of AW4 that she did not detain the 2nd Respondent's daughter credible and there is no evidence to the contrary. Therefore, we accept it.

149. In the appeal proceedings, the 1st and 2nd Respondents appeared to extend their proposition to arguments that the behavioural lapse in question attracted detention and not suspension (per Clause 3 of the Code of Conduct). Suffice it to state that we have determined that the Appellant was in order when it preferred the sanction of suspension for the behavioural lapse in issue, considering it serious enough to warrant the said sanction instead of detention.

150. Therefore, the Appellant succeeds on these grounds too. Instead we find the Appellant in default in terms of section 53 (1) of the Act. We also find it necessary to point out shortcomings analogous to what courts call "mistrial" on the part of the 1st Respondent. Had the 1st Respondent conducted its investigations properly and critically reviewed the letter of complaint, the Conditions of Enrolment, the Code of Conduct and related laws, and fully engaged with the Appellant and the 2nd Respondent in its investigations, it would most probably not have arrived at the erroneous findings.

GROUNDS THREE AND TEN

151. These grounds are-

3. **That the (1st) Respondent erred in finding that the Appellant did not exercise reasonable skill and care.**

10. **That the (1st) Respondent erred in finding that the Appellant violated Section 49 (5) of the Competition and Consumer Protection Act No. 24 of 2010.**

152. In light of our consideration of and conclusion on grounds one, two and nine, these grounds of appeal succeed. This is because the findings in issue hinged on the allegation and finding that the Appellant breached clause 8 of the Code of Conduct in terms of the procedure required to be followed in an event of the sanction of suspension. We have determined to the contrary.

GROUNDS FIVE, SIX, SEVEN AND EIGHT

153. These grounds are-

5. **The (1st) Respondent erred in making a directive that the Appellant register the Complainant's two daughters when it had not addressed its mind to and made a finding regarding the correctness of the de-registration of the Complainant's daughters.**

6. **That the (1st) Respondent erred in making findings based almost entirely on a flawed Preliminary Investigative report that was concluded without following the rules of natural justice.**

7. **That the (1st) Respondent erred and exceeded its jurisdiction in making recommendations in its report which amounted to an order for specific performance of a private contract.**

8. **That the (1st) Respondent erred in directing the Appellant to enforce an impractical order.**

154. The Appellant has given as background to the 1st Respondent's decision in these grounds of appeal a passage at page 55 of the Record of Proceedings in which the 1st Appellant stated as follows:

"On 12th October, 2015 the Competition and Consumer Protection Commission ("the Commission") received a complaint from Mr. Sajeev Nair ("the Complainant") against Italian School of Lusaka ("the Respondent"). Specifically, the Complainant alleged that on 14th August, 20915, he paid K30,200.00 to the Respondent for school fees for his two daughters. The Complainant alleged that he had one child in grade nine (9) and the other in grade eleven (11). The Complainant alleged that on 24th September, 2015, the Respondent de-registered his two daughters from their school. The Complainant alleged that the Respondent de-registered them due to allegedly vulgar language used by his younger daughter during exam time. The Complainant then demanded to have his two daughters re-registered."

155. The Appellant has gone on to state that following the allegation in the aforesaid passage, the 1st Respondent proceeded to direct in its conclusion that the Appellant re-registers the 2nd Respondent's two daughters. That section 55 (3) requires that the Notice of Investigation states the subject matter and purpose of an investigation. That (quoting

part of the said passage) in the Notice what was charged was that the 2nd Respondent had alleged that the reason for the de-registration of the two girls was the alleged use of vulgar language by his younger daughter. That RW1 conceded under cross-examination that the letter of complaint at pages 3 – 4 of the Record of Proceedings contained no such allegation. The Appellant went on to argue that the 2nd Respondent in his letter of complaint had not requested for re- registration but "redress for denial of a service and also ... compensation". The Appellant has cited what we stated in the case of **Rachael Mhone-Chama v. Competition and Consumer Protection Commission** - 2015/CCPT/016/CON that "in raising complaints, consumers ought to be made aware that claims for consequential loss or damages can only be entertained by courts of law".

156. The Appellant has argued that what transpired, however, was that the Notice of Investigation with incorrect and inaccurate facts was issued and formed the backbone of the 1st Respondent's investigation, its Preliminary Report and Board Decision. Challenging the power to serve the Preliminary report under section 55 (10) of the Act, the Appellant has challenged the position that there was a requirement for the report to be published and that there appears to be no provision for the release of a Preliminary Report. Further, that as the Appellant's response to the Notice related to the de-registration of the two girls, the 1st Respondent failed to adhere to rules of natural justice. That RW1 alleged that the Appellant had the opportunity to respond to the Preliminary Report when in actual fact the investigation was already concluded and the findings were going to be presented to the Board for determination.

157. That further, RW1 stated that the 1st Respondent was aware that the suspension had run its course and the girl had continued her studies and that they were aware that the reason for the de-registration was not the suspension. In conclusion, that the reasonable inference was that the question of de-registration was not considered, and that the 1st Respondent's direction amounted to an order for specific performance, which it did not have jurisdiction to order. Further, that in fact it was an impractical order. The Appellant has cited our decision in the case of **Pep Stores Zambia Limited v. Competition and Consumer Protection Commission** 2016/CCPT/013/CON, in which we held that the absence of jurisdiction nullifies whatever decision follows from the exercise of purported jurisdiction (per **Vangelatos and Vangelatos and Metro Investments Limited and Ors** Appeal No. 45 of 2014)

158. The Appellant has argued that the 1st Respondent having carried out its role by investigating the complaint in accordance with its role "to safeguard and promote competition; protect consumers against unfair trade practices" (citing the preamble to the Act), it went beyond its jurisdiction by ordering the re-registration. That this was because the contract between the parties was a private contract and the implication of the order would be to force the 2nd Respondent to adhere to certain terms which were already a source of conflict. Secondly, that the core of commercial law – the freedom to contract – would be taken away from the parties.

159. The Appellant has also submitted that the 1st Respondent should have declined to investigate the complaint as one that was frivolous and vexatious or by referring the same to an appropriate regulatory body, as the Ministry of Education had done in its letter of response to the 2nd Respondent at page 37 of the Record of Proceedings, where it advised saying, "... you may decide on the next course of action in resolving this matter", referring to the litigation route taken by the Appellant.

160. In response, the 1st Respondent has argued that the 2nd Respondent had raised the issue of de-registration of his two daughters in his letter of complaint. That the Appellant

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proceeded to de-register the two girls on the ground that their father had misconducted himself. Further, that according to the Code of Conduct, a parent's behaviour is not a ground for de-registration. That therefore, the de-registration amounted to compromising the standard of honesty and good faith which an enterprise can reasonably be expected to meet. That the Appellant was also expected to operate with reasonable care and skill, which it failed when it suspended Ananya and de-registered both girls.

161. In reply, the Appellant has merely reiterated its position that the Code of Conduct had nothing to do with the de-registration of the two girls. That, as stated in its letter in response to the Notice to Investigate and as the evidence od AW1, AW2 and AW4 revealed, it was the 2nd Respondent's subsequent misconduct that led to the Appellant de-registering the girls.

162. The 2nd Respondent did not file submissions but we have considered the grounds in opposition of the appeal in which he has argued that the Appellant erred by not complying with the Code of Conduct, particularly clause 9, with respect to review by the Disciplinary Committee prior to de-registering his two children.

163. We have given serious consideration to these arguments by the respective parties to this appeal. We start with the issue of the scope of investigation indicated in the Notice of Investigation as opposed to what came out in the Preliminary Report and the subsequent Board Decision. We have already held that the purpose of the Notice to Investigate and the prescribed content (i.e. the subject matter and purpose of an investigation, per section 55 (3) of the Act) is to put the affected person on notice and give him an opportunity to be heard. The Appellant in its letter of response to the Notice provided detail as to what had transpired, which included matters relating to Ananya's suspension. We have also decided that the Appellant having subsequently been informed of the expanded scope of investigation through the Preliminary Report to which it was requested to respond before the same was submitted for determination by the Board, the outcome of the investigations cannot be inadmissible on the basis alone of the change in the scope.

164. Further, that even if such investigations had been illegal, its results are admissible. The inconclusive question whether in terms of section 55 (10) the report required to be published at the conclusion of an investigation after a final decision was made has no bearing on the fact that the Preliminary Report was furnished to the Appellant for its attention before its submission to the Board for determination, with a request for a response. As we have earlier said, in so deciding, we give recognition to the fact that the nature of the mandate of the 1st Respondent such as to "investigate unfair trading practices and unfair contract terms and impose such sanctions as may be necessary" and to "do all such acts and things as are necessary, incidental or conducive to the better carrying out of its functions under this Act" is such as would render it impracticable to issue fresh notices each time a new issue arises in the course of an investigation. It should suffice that following the Notice of Investigation issued under section 55 (3), change in the scope of investigation is brought to the attention of an affected party, which can be by way of a preliminary report as in this case, giving that party an opportunity to be heard. We have further said that in view of our mandate as an appellate tribunal, we cannot set aside findings without an evaluation of the totality of what is before us in these proceedings.

165. In connection to the Notice of Investigation, we also reiterate something we stated in our Ruling in the case of **MRI Seed Zambia Limited, Tombwe Processing Limited and Precision Faming Holdings Limited v. Amiran Zambia Limited, ATS Agrochemicals Limited and Competition and Consumer Protection Commission** Appeal Nos. 2017/CCPT/001/COM, 2017/CCPT/002/COM, and 2017/CCPT/003/COM. We held

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that there is nothing in the letter accompanying the Notice of Investigation that precludes a person to whom the Notice and letter are addressed from producing a document or reproducing the contents of a document as part of the statement they are requested to submit. Therefore, the Appellant could as well have produced or reproduced the document embodying Conditions of Enrolment which they referred to since it considered it important in determining the subject matter of the investigation. The Appellant is the one that knew of the existence of the document and was therefore best placed to supply it in its defence, even without the 1st Respondent demanding it. Of course, an investigation that fails to follow through all the obvious leads thoroughly, such as we have said of the subject investigation, is bound to miss the mark. The 1st Respondent has suffered adverse consequences because of failing to do its work meticulously.

166. We have also addressed ourselves to the jurisdiction of the 1st Respondent in light of the arguments of the Appellant concerning the same. First and foremost, while acknowledging the objectives of the Act as set out in the preamble to the Act, cited by the Appellant, we have to look at substantive provisions of the Act in particular. We have often cited section 3 (1) of the Competition and Consumer Protection Act which provides that, "Except as otherwise provided for in this Act, this Act applies to all economic activity within, or having an effect within, Zambia." This and other provisions of the Act such as sections 5, 54 and 55 give the 1st Respondent jurisdiction that cuts across all sectors of the economy of the country. Accordingly, there is no conflict between the 1st Respondent and any sector regulator, such as the Ministry of Education. The 1st Respondent has power to deal with a complaint on matters covered by the Competition and Consumer Protection Act arising in any sector if such complaint has not been resolved by the sector regulator, or has not been conclusively prosecuted, as provided by other law. It is immaterial that the complaint in issue arose from a private commercial contract, provided it touches or appears to touch on consumer protection provisions of the Act.

167. The 1st Respondent can also make orders akin to specific performance. For example, if an enterprise is found to have contravened section 49 (5), which was in issue in this case, in addition to the penalty in subsection (6), the enterprise can be ordered to refund a consumer, or, if practicable and if the consumer chooses, be ordered to perform the service again to a reasonable standard (per subsection (7) (b)). The 1st Respondent could also give incidental orders or directions under section 5 (l) by way of enforcement measures provided such does not amount to consequential damages or compensation and is not disproportionate or impracticable. We stated our position on this subject recently in the case of **Gotv Zambia Broadcasting Limited v. Competition and Consumer Protection Commission and Ronald Chunka 2017/CCPT/004/CON**. Such measures are not *ultra vires* the Act or in violation of the freedom to enter into contract but are part and parcel of the enforcement jurisdiction of the 1st Respondent under the Act.

168. We find as a fact on the basis of the record before us that the 2nd Respondent's complaint was not resolved by the Ministry of Education, as can be seen from the letter at page 37 of the Record of Proceedings. The Appellant also alleged in its letter in response to the Notice to Investigate at pages 38 - 39 that the 2nd Respondent had issued some defamatory statements against it and that it had commenced proceedings against the 2nd Respondent in court. Counsel for the Appellant confirmed at our sitting on 27th March

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2017 that the matter in the High Court was for defamation. Therefore, there has never been any objection to the investigations or these proceedings on the basis of the pending court action. Still, having conducted investigations into the complaint, the question is, did the 1st Respondent, in the circumstances, have jurisdiction to entertain the issue of de-registration under the Act?

169. We need to address grounds five, six, seven and eight of appeal on the totality of the record before us. As we said in considering ground four, at the hearing of the appeal, AW1 referred to the Conditions of Enrolment and in her evidence in chief she said if a parent did not sign the document the child would not be placed in the school.

170. Under cross-examination by counsel for the 1st Respondent, the witness in reference to paragraph (b) of the Conditions of Enrolment stated that her interpretation was that the parent would work with the school with respect to the rules; that the document governed the relationship between the parent and the school and that the document signified that the parent would abide as to the conduct with the school in relation to the child. She further said an opportunity was given to the 2nd Respondent to apologise to the School for what the school management had found to be defamatory; he refused (referring to letters from the School Board at pages 30 and 35 of the Record of Proceedings). That in the second letter the Board communicated to the 2nd Respondent its decision to de-register the two girls on account of his resistance to cooperate with the School in resolving the disagreement. And that the school fees for the new term were refunded to the 2nd Respondent.

171. Under cross-examination by counsel for the 2nd Respondent, the witness said the de-registration was not on account of anything done by any of the 2nd respondent's daughters but that the relationship between the 2nd Respondent and the Appellant completely broke down. Similarly, as earlier stated in considering ground four, AW4 testified concerning the Conditions of Enrolment and that they governed the relationship between the Appellant and the 2nd Respondent. Further, that the two girls were not de-registered on account of the disciplinary matter but the conduct of the father which was defamatory of the school. Further, that at the time of the de-registration (in September 2015), the older girl was in Grade 10 and would have graduated from the school by the next year 2016 (Grade 11). Under cross-examination by the 2nd Respondent, she stated that the 2nd Respondent was not given an opportunity to be heard before de-registering his two daughters from School.

172. The Appellant's witnesses' evidence was not controverted in any way and we find it credible. The fact has not changed that while according to the Notice of Investigation, the Preliminary Report and Board Decision, the 1st Respondent alleged that the 2nd Respondent's two daughters had been de-registered because of the alleged use by the younger daughter of vulgar language; and the Appellant responded denying the alleged reason and giving its own version, we have not seen any evaluation of the issue in the Preliminary Report or the Decision. Therefore, we agree with the Appellant that the 1st Respondent directed that the Appellant re-registers the two girls without any evaluation and finding on the issue of de-registration.

173. If the 1st Respondent had evaluated the matter and found that the 2nd Respondent's daughter was de-registered in contravention of the Code of Conduct or other term of the contract, it would have been arguable that the Appellant compromised standards of honesty and good faith in terms of section 46 (1) as read together with section 45 (b) in that the 2nd Respondent's purchasing decision could be said to have been distorted by a misrepresentation, resulting in the girls suffering detriment. Or it would have been arguable that the Appellant failed to provide a service with reasonable care and skill, in terms of section 49 (5), resulting in detriment being caused to the girls. But the reality is that there is nothing in any of the two contractual documents or the law preventing the Appellant from de-registering the two girls on the ground of the contractual relationship between the Appellant and 2nd Respondent being untenable or any other ground than disciplinary, such as failure to pay school fees, or other serious breach of contract.

174. We have noted that the Appellant's relationship had broken down on the basis of a misunderstanding as to the rights and obligations between the parties to such an extent that the Appellant instituted court proceedings against the 2nd Respondent, alleging defamation, and de-registered his daughters. Unfortunately, it is the two girls that had to suffer the consequences as practically they could not maintain a relationship with the School independent of their parents. But such dispute did not amount to violation by the Appellant of section 49 (5) or any other provision of the Act. Thus, it was beyond the jurisdiction of the 1st Respondent.

175. As we have said earlier, the question of a direction for performance of a service being ultra vires *per se* does not arise. And while it is true that the 1st Respondent does not have jurisdiction to award damages for consequential loss or compensation, the 2nd Respondent had asked for redress for denial of service, which could if the complainant had chosen and it was practicable, be awarded in the form of an order for re-provision of the service in issue, that is by re-registration. However, in this case, we have determined that the 1st Respondent erred when it found that the Appellant violated section 49 (5) of the Act. We have also noted that while the 2nd Respondent at the time he lodged the complaint in October 2015, might have hoped or opted for re-registration, by the time the decision was made in August 2016, this remedy was no longer feasible. In fact, at the outset when we commenced the appeal proceedings, in March 2017, the 2nd Respondent confirmed that the girls had moved on in terms of schooling and that he had no desire to have the direction for re-registration enforced.

176. Therefore, the Appellant succeeds on grounds five and eight and only partially on grounds six and seven.

177. In conclusion, the Appellant succeeds on grounds one, two, three, four, five, eight, nine and ten and only partially on grounds six and seven. We set aside the decision of the 1st Respondent which decided that the Appellant was in violation of Section 46 (1) as read with Section 45 (b) and Section 49 (5) of the Competition and Consumer Protection Act. We also find that the 1st Respondent erred when it found that the contract terms of the Code of Conduct were not unfair in terms of section 53 (1). We set aside that finding and replace it with our finding that the Appellant's Code of Conduct is unfair in the terms that

read, **"and the Head calls the parent(s)/guardian(s) for a meeting and explains the grounds on which the decision to suspend the child was made. A written note is issued to the parent to confirm the decision"** (clause 8. SUSPENSION) and the terms that read, **"and the Head calls the parent(s)/guardian(s) for a meeting and explains the grounds on which the decision to deregister the student was made."** (clause 9. DEREGISTRATION FROM SCHOOL)

178. Further, in line with section 71 (1) (b) of the Act, we order that:

(a) the offending terms in clauses 8 and 9 of the Appellant's School Code of Conduct referred to in paragraph 177 above are not binding as provided by section 53 (2) of the Act;

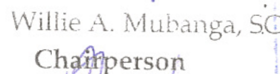
(b) the Appellant's standard form contract is capable of being enforced without the said offending terms, per section 53 (3) of the Act; and

(c) the 1st Respondent shall take an enforcement measure for the Appellant to make good the default, in consultation with the Ministry of Education, pursuant to section 5 (f) and (l) of the Act and section 26 (5) of the Education Act.

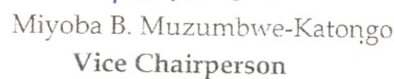
179. Since the Appellant has succeeded only partially on two of the grounds of appeal and has suffered a reversal of the 1st Respondent's finding in respect of section 53, we order that each party shall bear his/its costs.

180. A person aggrieved with the decision of the Tribunal may appeal to the High Court within thirty days of the determination in line with section 75 of the Act.

Delivered at Lusaka this 4th day of September 2018

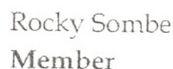


Willie A. Mubanga, SC
Chairperson

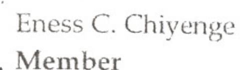


Miyoba B. Muzumbwe-Katongo
Vice Chairperson

Chance Kabaghe
Member



Rocky Sombe
Member



Eness C. Chiyenge
Member