IN THE COMPETITION AND CONSUMER PROTECTION TRIBUNAL
HOLDEN AT LUSAKA

APPEAL NO. 2019/007/COM

BETWEEN:

KASENGO HOLDINGS LIMITED **APPELLANT**

AND

INNOVATIVE VENTURE LIMITED **1ST RESPONDENT**

COMPETITION AND CONSUMER PROTECTION COMMISSION **2ND RESPONDENT**

CORAM: Mr. Willie A. Mubanga, SC (Former Chairperson), Mrs. Eness C. Chiyenge (Chairperson), Mrs. Miyoba B. Muzumbwe-Katongo (Vice Chairperson), and Mr. Buchisa Mwalongo (Member)

For the Appellants: Mr. S. Mbewe – Messrs. Keith Mweemba Advocates

For the 1st Respondent: Mr. Patrick Kabanshi, Company Director

For the 2nd Respondent: Mrs. M.M. Mulenga (Manager, Legal & Corporate Affairs), Ms. M. Mtonga (Senior Legal Officer) and Ms. V. Bukali (Legal Officer) – Competition and Consumer Protection Commission

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JUDGMENT

Legislation referred to:

1. The Competition and Consumer Protection Act No. 24 of 2010, sections 16, 45 and 46.
2. The Competition and Consumer Protection (Tribunal) Rules, S.I. 37 of 2012, rules 14, 15, 18, and 29.
3. Fees and Fines Act, Cap 45.
4. The Markets and Bus Stations Act No. 7 of 2007, sections 3, 4, 5, 6, 10, 13 and 16.
5. Local Government (Street Vending and Nuisances) Regulations, Cap. 281.
6. Criminal Procedure Code Act, Cap. 88.

Cases referred to:

1. Zambia Airports Corporation Limited v. Competition and Consumer Protection Commission and Zambia Export Growers Association 2016/CCPT/010/COM.

IN THE COMPETITION AND CONSUMER
PROTECTION TRIBUNAL
HOLDEN AT LUSAKA

APPEAL NO. 2019/007/COM

KASENGO HOLDINGS LIMITED

AND

MASON AFRIT VENTURE LIMITED

COMPETITION AND CONSUMER PROTECTION COMMISSION

CORAM: Mr. Willie N. Mutuna

Stanley Mwanguku, and his partner concerning the matter [illegible]
not want any competition within their premises;

4. In the Notice of Investigation and accompanying letter, the Appellant [illegible]
conduct complained of appeared to be in breach of section [illegible]
Protection Act No. 24 of 2010 (the Act). The Appellant was [illegible]
allegations, which they did by letter dated 17th October 2016 from their Advocates [illegible]
M. Mukuka and Company. The gist of the response was that the Appellant was [illegible]

2. MRI, Tombwe& Precision v. Competition and Consumer Protection and 2 Others Appeal 2017/CCPT/001 -003/COM (consolidated appeals).
3. Salomon v. Salomon and Company Limited[1895-1899] All E.R. 33.
4. MacniciousMwimba v. Airtel Networks Zambia Plc Appeal 2014/ CCPT/015/ CON.
5. Parkdale Custom Built Furniture Pty. Ltd. V. Puxu Pty. Ltd.(1982) 149 Clr 19.
6. Italian School of Lusaka v. Competition and Consumer Protection Commission & Sajeev Nair Appeal 2016/CCPT/017/CON.
7. Gotv Zambia Broadcasting Limited v. Competition and Consumer Protection Commission and Ronald Chunka Appeal 2017/CCPT/004/CON.

Other works referred to:

1. Slaughter and May, "A general overview of the European Competition rules applicable to cartels, abuse of dominance, forms commercial cooperation, merger control and state aid", June 2016.
2. Black's Law Dictionary, 8th Edition.

Chiyenge, EC, Chairperson, delivered the judgment of the Tribunal

BACKGROUND

1. This is our judgment on an appeal from a decision of the Competition and Consumer Protection Commission (the 2nd Respondent) dated 22nd May 2019 against Kasengo Holdings Limited (the Appellant). According to the 2nd Respondent's Record of Proceedings (the Record of Proceedings), in September 2016, the 2nd Respondent received a complaint from the Operations Manager of Innovative Ventures Limited (the 1st Respondent), a Mr. Patrick Kabanshi.
2. The gist of the complaint, reflected in the Notice of Investigation issued to the Appellant dated 5th October 2016 and accompanying letter (at pages 5-7 of the Record of Proceedings) was that on 5th September 2016, employees from KabweBrimas Take Away, a subsidiary of the Appellant illegally and forcibly confiscated Hungry Lion value packs and various drinks from their passenger customers on board a ZAMPOST Bus Services bus heading to Ndola. It was also alleged that they confiscated K150 cash, two cell phone charger, and a thermal bag belonging to the 1st Respondent.
3. It was also alleged that the complainant met with the proprietor of the Appellant, Mr. Stanley Mwanguku, and his partner concerning the matter and that the latter said they did not want any competition within their premises.
4. In the Notice of Investigation and accompanying letter, the Appellant was informed that the conduct complained of appeared to be in breachofsection8oftheCompetition and Consumer Protection Act No. 24 of 2010 (the Act). The Appellant was requested to respond to the allegations, which they did by letter dated 17th October 2016 from their Advocates Messrs. E. M. Mukuka and Company. The gist of the response was that the Appellant was surprised

that the 2nd Respondent appeared to support practices of people going on other people's business premises and displaying and selling their goods without the owner's permission. That it was wrong for the 2nd Respondent to support such vending. (See pages 8-9 of the Record of Proceedings).

5. Subsequently, on 29th May 2017, the 2nd Respondent issued another Notice of Investigation accompanied by a letter. In this Notice and letter, the 2nd Respondent added more facts and stated that the complainant alleged that the employees from Brimas Take Away in Kabwe used violence, intimidation and threats to stop the complainant from conducting their business by illegally and forcibly confiscating (the goods earlier mentioned). That it was alleged that when the 1st Respondent's employees were about to deliver food to their customers, employees from Brimas Take Away confiscated the food purchased on behalf of passengers together with the thermos bag where the food was packed. That the said employees also grabbed foodstuffs from the passengers who had already received their orders. That they also confiscated the chargers and K150 which was supposed to be used to purchase the passengers' food.

6. It was further alleged that the employees from Brismas Take Away also harassed and threatened an employee of the 1st Respondent, who followed them into the Take Away and requested for the return of the confiscated items. That the request was not heeded and the Brismas employees told the 1st Respondent's employee to stop operating from their premises because he was disturbing their business. That the complainant stated that this was the second time Brimas Take Away employees had behaved in that manner. The 2nd Respondent alleged that the Appellant's conduct appeared to be in breach of sections 16 (1) and 45 (c) of the Act.

   (See pages 12-15 of the Record of Proceedings)

7. Again the Appellant responded by letter from their Advocates, dated 8th June 2017. The Advocates basically repeated their earlier response, stating that they did not think the legislature can pass a law which allows a person to sell their goods at another person's business premises. That in this instance, the complainant bought food stuffs from Hungry Lion and went to sell at Brimas premises. The Advocates challenged the 2nd Respondent to take out process so they could face the complainant and threatened that they would institute judicial review proceedings. They also warned the 2nd Respondent to conduct a search at PACRA to ascertain names they used in legal correspondence. **(See pages 1-17 of the Record of Proceedings)**

8. Meanwhile, by letter dated 25th October 2016, the 2nd Respondent had written to the Town Clerk, Kabwe Municipal Council inquiring into the running of Bus Stations in Kabwe. The Town Clerk responded by letter dated 7th November 2016 as follows:

   "In reference to your letter dated 25th October, 2016 in which you inquired on the running of Bus Stations in Kabwe, I wish to state that Kabwe Municipal Council is not operating any Bus Station in Kabwe, the Council is currently in the process of constructing the Bus Station.

   In view of the aforementioned there are only private owned bus stations as listed below.

NAME OF OPERATORS	*NAME OF BUS STATION*	*LEVY COLLECTED*
1. *C. Vwalika*	*Vwalika*	*Yes*
2. *Stanley Mwankuku*	*Brimas*	*Yes*
3. *Tutwa Ngulube*	*Sonnet*	*No*
4. *Bus and Taxis Drivers Association of Zambia*	*Bus Drivers Association of Zambia*	*Yes*

The running of all Bus Stations in Kabwe is governed by the Markets and Bus Station Act No. 7 of 2007. ....

Yours faithfully,

(Signed)
Ronald M. Daka
TOWN CLERK
KABWE MUNICIPAL COUNCIL"

9. Subsequently, the 2nd Respondent produced a (preliminary) report in February 2018 which was sent to the Appellant for response before being finalised into a Staff Papers in May 2019. The Board Paper formed the basis of the Decision of the Board of Commissioners subject of the appeal.

10. The 2nd Respondent determined that the relevant market comprised:

    (a) Product market being twofold (i) the provision of bus station services to long distance buses on the Lusaka – Ndola route; and (ii) the delivery of food to passengers using the post bus services; and

    (b) The geographical market being Kabwe.

11. In the report and Staff Paper, as well as the Decision, the 2nd Respondent said it conducted a survey of Bus Stations operations in Kabwe and established that the Appellant enjoyed a market share of 55% of the business of bus station. The 2nd Respondent also stated that it had received submissions from the complainant, Mr. Patrick Kabanshi (director of the 1st Respondent). The submissions are basically the same complainant's allegations, but with additional information that the 1st Respondent was in the business of general supply with various product and service lines. That Nitumeni Errand and Courier Services was one of the product and service lines. That the 1st Respondent had developed a system by which the errand and courier service collected various items for delivery on behalf of customers. That this service included getting orders from bus passengers for different brand meals, such as Debonairs, Steers, Hungry Lion and Subway, as the passengers chose. That the errand and courier service would buy the meal and deliver it to the passenger at the point of delivery, in this case at Kabwe. That Kabwe was a convenient pick up point for deliveries of food ordered by passengers. That this was because buses enroute from Lusaka to Ndola stopped at Kabwe for conveniences, to buy refreshments and food.

12. The 2nd Respondent further stated that it had received submissions from the 1st Respondent's worker, a Mr. Mwaba Luonde, who purchased and together with a co-employee delivered the Hungry Lion food stuffs to the passengers who had made orders with the 1st Respondent. That (he basically repeated the same facts as outlined in the complaint, as to how the employees of Brimas Take Away came on the bus and harassed him and his colleague and confiscated the food stuffs and other items from them and from passengers who had already collected their orders). Further, that he followed the Brimas employees into the Brimas Take Away and requested them to hand back the food stuffs and other items but they refused and told him to stop operating from their premises because they were disturbing their business. That he knew they were employees of Brimas Take Away because he had seen them working there.

13. The report also outlined submissions from the affected passengers who related the incident, confirming that they were approached by workers from Nitumeni whilst on the PostBus in Lusaka and ordered food stuffs through them to be delivered to them upon reaching Kabwe. That at Kabwe, when people who came to deliver the food were doing so, some people (intruders) entered the bus and grabbed the food which was being delivered and from the passengers who had already collected their food stuffs. That afterwards the intruders and the men who had come to deliver the food went into Brimas Take Away. And that they knew the people who grabbed the food were from Brimas as they afterwards went into Brimas. That later the employees who had come to deliver the food came back and explained that the intruders were upset because the passengers had already ordered their food from Lusaka and were not buying from their Take Away. The passengers who made the submissions were Ms. Princess Maina, Ms. Emah Gondwe and Ms. Rebecca Bwalya. Ms. Maina specifically submitted that the two intruders harassed the two employees of the 1st Respondent while Ms. Bwalya said that the intruders told the passengers that they should buy food from Lusaka if they did not want to buy from their restaurant.

14. The Appellant in their submissions through their Advocates said, in addition to the contents of the letters earlier outlined, in a telephonic conversation that they were not sure who owned the Take Away but that the Council was responsible for overseeing bus station operations in Kabwe. That the Appellant owned the premises around Brimas where the buses operated from. As to whether the Appellant paid any levy, the Advocates said they were not aware, but as for the question of trespass, the Advocates said the 1st Respondent were selling food on the Appellant's premises without the owners' permission while the owner also sold food on the same premises.

15. In addition, the Appellant in response to the preliminary report repeated the contents of their earlier letters, the gist of which is that no person had authority to trade on private premises in the same goods the owner dealt in. And added that if the 2nd Respondent wanted to help or protect the complainant the best way to do it would be to help him secure his own premises. That they did not see the relevance of the report to the complaint. That the 2nd Respondent's ideas contained in the report were not applicable to the matter. That the Appellant was not concerned with the relationship that the Council had with other business places. That the

issues of dominance raised in the report did not appear to have any relationship with the allegations against the Appellant. That the Advocates did not understand how the 2nd Respondent came to the conclusion that the 1st Respondent was conducting good business practices while the Appellant who owned the place and paid all dues to the Council was engaged in bad business practices.

16. The 2nd Respondent's reports further stated that they wrote to the Kabwe Municipal Council on 3rd September 2018, requesting for lease and licensing agreements and any other documentation to guide their analysis of the case. That the Council responded by letter dated 19th October 2018 and submitted that "the Council had not yet issued any lease or license agreements to any private bus operators to ascertain a bearing on competition and consumer protection." And that "they would inform the Commission as soon as they finalised any agreements with operators. That the Council further submitted that the Markets and Bus Stations Act No. 7 of 2007 regulated the running of bus stations and that this Act provided for the operation of private bus stations through Private Public Partnerships (PPPs). That the Council submitted that currently all bus stations were privately owned but governed by the said Act. Further, that there were no formal contracts with the operators of these stations and that the Council was in the process of drafting MoUs with regards to the operations of these bus stations.

(See pages 42-55 of Record of Proceedings (preliminary) report of February 2018; pages 81-92 Staff Paper of May 2019; and pages 112-124 the Decision)

17. The 2nd Respondent's findings in its Decision dated 22nd May 2019 confirmed the findings reflected in the reports, particularly in the Staff Paper. Specifically, the Board confirmed the determination of the relevant market, and upon its deliberations reached the following key findings:

    (a) **Determination of Dominance.** That the Appellant was dominant in the market as it held 55% of the market share in the relevant market, being 25% more than the 30% threshold stated by section 15 of the Act for a dominant position to exist.

    (b) **Market power.** That the Appellant had some degree of market power in the market for bus station services in Kabwe because of its unique position, preference by bus drivers and passengers alike, it did not face any import competition and its customers do not wield any level of countervailing power towards them in the provision of their services.

    (c) **Whether there is conduct.** That when the Appellant and their employees saw the 1st Respondent delivering food to their customers, the Appellant made a decision to disrupt the Appellant from delivering the food that the passengers had purchased through the 1st Respondent. The Appellant instructed its employees from Brimas to grab the foodstuffs and other items. The Appellant made the decision to grab the foodstuffs after coming to the conclusion that the 1st Respondent was competing with their food outlet situated at the bus stop. Hence these actions amounted to conduct.

(d) **Whether the conduct is likely to limit access to markets or unduly restrain competition or have or is likely to have adverse effect on trade or the economy in general.** That, the conduct of the Appellant's employees was likely to limit access to a market as the 1st Respondent's relied on having access to passengers who are travelling between cities via Kabwe at the bus station. That, by using force, coercion and intimidation to compel the 1st Respondent's employees to stop offering their services to passengers, the 1st Respondent's employees stopped operating and eventually stopped offering the services to the passengers. Although, there were alternatives for the 1st Respondent, those alternatives were not guaranteed. In addition, the alternatives were likely to result in inefficiencies in the bus service as the bus operators would have to stop twice in order to enable the 1st Respondent to conduct their business. Thus, the Appellant's conduct limited access to the market for the 1st Respondent.

(e) **Whether conduct by the Appellant places pressure on consumers by use of harassment or coercion and thereby distorted, or was likely to distort, the purchasing decisions of consumers.** That, passengers were harassed by the Appellant's actions to grab their food. Despite there being no information that the passengers purchased any food from the Appellant's restaurant, the intimidation used by the Appellant's employees was tantamount to harassment and was likely to distort the purchasing decisions of consumers.

(See pages 136-137 of the Record of Proceedings, in the Decision)

18. The Board of Commissioners decided that:

(a) The (Appellant) refunds Three Hundred Thirty Kwacha (K330) to all passengers that were affected.

(b) The (1st Respondent) should report to the police for the theft of the thermal bag and money amounting to K150.

(c) The (Appellant) be fined 1% of their total annual turnover for violating section 16 (1) of the Act.

(d) The (Appellant) be fined 0.5% of their total annual turnover for violating section 46 (1) as read together with section 45 (c) of the Act.

(e) The (Commission) liaise with the Ministry of Local Government and highlight concerns of entering into PPPs without formal documentation in accordance with section 5 (g) of the Act.

NOTICE OF APPEAL AND HEARING OF THE APPEAL

19. The Appellant filed Notice of Appeal on 19th June 2019, which was later amended by consent order issued on 4th November 2019. Upon an application, we added the 2nd Respondent to the

appeal, who filed grounds in opposition to the appeal, which were also amended consequentially. We deal with the amended grounds of appeal later in our determination of the appeal. The Appellant in seeking relief urged us to set aside orders of the 2nd Respondent and to grant any other relief as may be fit and just.

20. As our sitting on 7th November 2019, counsel for the Appellant and counsel for the 2nd Respondent stated that they intended to rely on the Record of Proceedings in terms of the evidence and that the parties would file their respective arguments upon which the Tribunal would then proceed with judgment. We agreed to proceed accordingly and issued directions for the filing of the parties' respective heads of argument and reserved our judgment. The Appellant and 2nd Respondent filed their heads of argument on 6th and 20th November 2019 respectively. Messrs. Keith Mweemba Advocates and Messrs. E.M. Mukuka and Company, co-Advocates for the Appellant split the heads of argument between them.

21. On 18th November 2020 we scheduled a conference at which we explained that we had been unable to deliver the judgment due to the diminished membership of the Tribunal and the Covid - 19 pandemic. We explained that in view of the requirement of Rule 31 (2) of the Competition and Consumer Protection (Tribunal) Rules, S.I. 37 of 2012 (Tribunal Rules) that we deliver judgment within sixty days, the parties needed to renew the appeal proceedings. However, the Appellant and the 1st Respondent were absent. We again scheduled another conference on 19th March 2021 at which all the parties attended. All the parties agreed to renew the appeal proceedings by the record and for the Tribunal to proceed with delivery of the judgment based on the record.

22. We are grateful for the resourceful arguments submitted by counsel for the Appellant and counsel for the 2nd Respondent respectively. We shall refer to these as we see fit in our determination of the appeal.

CONSIDERATION AND DETERMINATION OF THE APPEAL

23. We have seriously considered the appeal and grounds of appeal. Many of the grounds of appeal are interrelated so we deal with them together.

Ground one: *The Commission erred in law by interviewing the Complainant and not the Appellant thereby denying the Appellant hearing which was a breach of the Rules of natural justice.*

Ground three: *The Commission erred in using research on the Appellant's business without involving the Appellant's personnel which rendered the research inaccurate.*

Ground four: *The Commission believed the Complainant without comparison without comparison with the response from the Appellant and instead utilised a submission from counsel for the Appellant which was not evidence.*

Ground six: *The Commission erred in both law and fact when it only interviewed the Complainant and its witnesses in its investigations thereby not fully according the Appellant and its witnesses the opportunity of being heard at the first instance in breach in breach of the rules of natural justice.*

24. These grounds of appeal raise the issue of fair hearing, which is a principle of natural justice, as well as the related issue of procedural fairness in the administration of justice. Indeed, it is cardinal, as we have now and again said, that parties are given a fair hearing during the investigative process (as well as at the hearing of the appeal, of course).

25. Counsel for the Appellant have argued that the Complainant was given ample opportunity to give evidence to the 2nd Respondent while the same was not done for the Appellant. (See submissions by Messrs. E.M. Mukuka) Counsel for the Appellant further argued that failure to give the Appellant and its witnesses the opportunity to give personal statements and submissions was a grave error and a breach of rules of natural justice. Counsel lamented that the 2nd Respondent interviewed the director of the 1st Respondent who was the complainant and some witnesses[1] while restricting its contact on the Appellant's side to its counsel, leaving out personnel including those alleged to have illegally and forcibly confiscated the purported foodstuffs. (See arguments by Messrs. Keith Mweemba Advocates)

26. Counsel for the Appellant have argued the principle of fair trial or hearing forcefully and cited well known cases on the subject, namely; **Major Isaac Masonga v. The People** (2009) ZR 242; **Shilling Bob Zinka v. The Attorney-General** (1990-1992) ZR 73; **Matale v. Zambia Privatisation Agency** (1995-1997) ZR 157; and **General Medical Council v. Spackman** (1943) A.C. 627.

27. Counsel for the 2nd Respondent have, on the other hand, argued that the Appellant was given ample opportunity to be heard in line with provisions of the Act relating to investigations under section 55. Counsel referred to the two notices of investigation that were issued, stating that the second one was issued as the conduct complained of seemed to border more on sections 16 (1), and 45 (c) as read together with section 46 (1). Counsel said the Appellant responded to the allegations through their Advocates. Further, that the Appellant was also requested to respond to the preliminary report. That the Appellant's Advocates chose to respond by barely denying the allegations and being rude to the 2nd Respondent.

28. We have examined the two Notices of Investigation and the accompanying letters addressed directly to the Appellant, the contents of which we summarised earlier in the background to this judgment and we need not repeat those contents here. We, however, for emphasis in this respect, find it necessary to state that after stating the allegations in the notices and the accompanying letters, which were issued pursuant to section 55 (4), the 2nd Respondent went on to state, in the letters:

> "Section 55 (4) of the Act reads as follows:
>
> > **'For the purpose of an investigation under this section, the Commission may, by notice in writing served on any person, require that person to-**

[1] In the investigation reports and the Decision, the witnesses are recorded as persons who were among the passengers on the PostBus subject of the case.

(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 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 not exceeding one year, or to both.'**

The Commission hereby requests your response to the allegations raised against your company within 14 days of receipt of this notice.

In the meantime, if you wish to seek further details and/or clarifications on any aspect of this letter or need assistance, you may get in touch with the undersigned on telephone number ..... or email: ....."

(See pages 5-7 and 11-13 of the Record of Proceedings)

29. We observe that the Appellant was at liberty to include whatever information in its response to the allegations, including any statements from its own witnesses. But in fact in both instances, the Appellant did not itself respond directly, but chose to do so through its Advocates Messrs. E.M. Mukuka and Company. **(See pages 8-9 and pages 16-17 of the Record of Proceedings)** Messrs. E.M. Mukuka did not seize the opportunity to seek engagement between his client and the 2nd Respondent, but rather shielded the Appellant and issued statements on its behalf. In the first letter, the Advocates said in substance in response to the allegations:

> *"We are surprised that your Commission appears to support the practices that would permit people to go to someone business premises and display and sell their goods without the permission of the owner of the premises. This to us is trespass and if the owner of the premises complains that is what you call that anti-competitive.*
>
> *We are of the view that it was wrong for you to support such vending and we are ready to defend our client from your actions.*
>
> *Lastly your Commission seems to always to accept complaints on their face value without proper finding."*

30. Furthermore, the letter in response to the second Notice of Investigation and accompanying letter, which as we earlier said, the 2nd Respondent had addressed to the Appellant, like the initial Notice and letter, read in part:

> "....
>
> ....

... No one has a right to order goods and go and sell there at the shop or premises of another businessman. We do not think that the Zambian Legislature can pass a law which can work like that. In the instant case this is what the complainants in this matter did. They bought food stuff from hungry lion and went to Brimas to sell at Brimas premises which was built by our client at its own individual expense.

We had also asked you to serve on us any process you may wish to take out so that we come and meet whoever is the complainant. We also indicated that should you take a bullish approach we shall subject you to judicial review apart from taking things up with relevant ministries.

...."

31. Had counsel chosen to civilly engage with the 2nd Respondent, he would have taken time to understand the 2nd Respondent's investigative procedures, as reflected not only in the Act, but also in the 2nd Respondent's Administrative and Procedural Guidelines 2014 issued under section 84 of the Act. Among other things, these guidelines require a complainant to provide evidence upon which the 2nd Respondent may proceed to investigate a complainant. A person accused of conduct complained of is also given an opportunity to respond, as was the case here.

32. According to the Guidelines, when the secretariat has prepared the initial (preliminary) report, the person alleged to have violated the Act is given an opportunity to respond to the report. This was done in this instance, by letter dated 18th April 2019 (see pages 40 and 41 of the Record of Proceedings). The guidelines state that the response can either be in writing or a request can be made to make oral submissions before the Board of Commissioners prior to their determination of a case. Counsel for the Appellant again responded by letters (see pages 67, and 69-70 of the Record of Proceedings being letters from Messrs. Tutwa S. Ngulube & Company and Messrs. E.M. Mukuka and Company).

33. We have also observed that earlier, counsel for the Appellant Mr. Emmanuel Mukuka was interviewed telephonically on some of the issues contained in their letters and the interview is part of the record in the reports and the Decision. As far as we see, what counsel for the Appellant have referred to as evidence or statements or submissions by the 1st Respondent's witnesses were provided by way of interviews conducted by the 2nd Respondent telephonically.

34. There is no fixed format of the form of information the Appellant could have presented in response to the allegations. We are actually surprised by the tenor of Counsel's letters in response to the allegations, which we find rather antagonistic. Pitifully, counsel's letters fell short of a formal discourse recognising the 2nd Respondent's statutory mandate and according it cooperation. We advise counsel that whereas, no doubt, they are expected to represent their client's case with vigour, they should at the same time do so with courtesy, which is a hallmark of the legal profession. In choosing to shield their client from the 2nd Respondent's probe, counsel should have utilised all avenues which were open for their client to provide all the evidence it was willing to provide, if any, including statements from its employees or other agents whom they knew or believed were involved in the incident complained of.

35. Later at the hearing of the appeal, again the Appellant could have tendered oral or affidavit evidence testifying to the issues subject of the appeal. They chose to go by the evidence in the Record of Proceedings. Though all material evidence is expected to be given at first instance in the investigative process, the Tribunal Rules provide for evidence pertaining to the proceedings before the 2nd Respondent, subject of an appeal, to be heard. Rules 14, 15, 18, and 29 state as follows:

"14. At the hearing –

(a) the appellant or applicant shall present the evidence on which the appeal or application is based, as the case may be; 15th June, 2012 Statutory Instruments 211 Proceedings of Tribunal Quorum Proceedings to be consolidated Default of appearance Tribunal hearing;

(b) the respondent shall adduce evidence to rebut the evidence of the appellant or applicant;

(c) the appellant or applicant may address the Tribunal by way of reply to the respondent's evidence;

(d) the appellant or applicant and the respondent may call a witness to adduce evidence; and

(e) both parties may, at the conclusion of the hearing, present oral or written submissions to the Tribunal.

15. (1) The Tribunal may receive, as evidence, any statement, document, information or other matter that may assist it to deal effectively with an appeal, whether or not the evidence would be admissible in a court of law.

(2) The Tribunal may take judicial notice of any fact.

(3) Evidence before the Tribunal may be given orally or, if the parties to the proceedings consent or the Chairperson of the Tribunal so orders, by affidavit.

(4) The Tribunal may, at any stage of the proceedings, make an order requiring the personal attendance of any deponent for examination and cross examination.

16. ....

17. ....

18. The Tribunal may, during the hearing, receive such additional information relating to the appeal or application as it may consider necessary to enable it dispose of a matter.

29. Tribunal shall observe the principles of natural justice and shall hear all the evidence tendered and representations made by, or on behalf of, the parties or application. "

36. We hasten to make it clear, lest we be misunderstood, that the evidence expected at the hearing of an appeal is that touching the matters which were before the 2nd Respondent and over which it exercised its decision. We have made it clear in a number of cases that have come before the Tribunal that evidence that is altogether new and was not presented to the (2nd Respondent) can only be introduced with leave of the Tribunal in justified deserving circumstances, e.g.

where a party demonstrates that it did not have, for a good reason, or was not accorded, the opportunity to present the evidence. This is to avoid compromising fairness and justice in appeal processes.[2] The point we are making is that if a party believes and is able to demonstrate that it was not given ample opportunity to state its case during the investigative proceedings and the adjudication process before the (2nd Respondent), that can be remedied so that the Tribunal's decision is made on the basis of fairly exhaustive facts and evidence. The Appellant did not seize the opportunity to tender evidence before the Tribunal, but decided to proceed on the basis of the evidence in the Record of Proceedings, which evidence it is open to the Appellant or any other party to question, as counsel have in fact done in its grounds of appeal and arguments.

37. The Appellant having waived its right to give whatever other evidence it could have tendered during the investigative process and at the hearing of the appeal, it is precluded from alleging in its arguments that it was not sufficiently heard. In any case, we have determined that the Appellant had ample opportunity to tender all the evidence it would have wished to adduce before the 2nd Respondent.

38. We therefore agree with the 2nd Respondent that the Appellant was given ample opportunity to tender its own evidence and narration of the event. Grounds one, four and six accordingly fail for lacking merit. We proceed to consider the next issues, which cut across all the grounds of appeal, i.e.:

    (a) *Whether or not the relevant market was correctly determined; and*
    (b) Whether or not the Appellant is the party answerable for the alleged conduct.

39. The foregoing issues have been raised by counsel for the Appellant Messrs. Keith Mweemba Advocates. It is the position of competition law that the relevant market should not be too broadly or too narrowly defined[3], as that may render the scope or context of the alleged conduct to be too broad or too narrow. The relevant market has been determined as comprising:

    (a) "Product market being twofold (i) the provision of bus station services to long distance buses on the Lusaka – Ndola route; and (ii) the delivery of food to passengers using the post bus services; and
    (b) The geographical market being Kabwe.

40. What we see of the relevant market as determined is that if anything, it could perhaps be suggested that the definition is too narrow in respect of paragraph (a) (ii) in that the

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[2] See our rulings in a number of appeals, notably the Zambia Airports Corporation Limited v. Competition and Consumer Protection Commission and Zambia Export Growers Association 2016/CCPT/010/COM; MRI, Tombwe & Precision v. Competition and Consumer Protection and 2 Others Appeal 2017/CCPT/001 -003/COM (consolidated appeals).

[3] See "A general overview of the European Competition rules applicable to cartels, abuse of dominance, forms commercial cooperation, merger control and state aid", June 2016.

Appellant's alleged conduct could well likely affect the delivery of food to passengers on buses using Brimas Bus Station other than the PostBus services. However, no prejudice has been brought to bear on the Appellant, resulting from the relevant market as determined by the 2nd Respondent. We will therefore not interfere with the determination of the relevant market.

41. An issue has also been raised as to the party that should have been made answerable for the alleged conduct, i.e. whether Brismas Snack Pitch Limited or the Appellant. Typically competition and consumer protection laws target conduct of enterprises, whether perpetrated directly or indirectly through the agency of subsidiaries or other associated enterprises. The law makes itself enforceable as broadly as possible without company law bottlenecks with respect to distinctions between companies as separate legal personalities, such as pronounced in **Salomon v. Salomon and Company Limited** [1895-1899] All E.R. 33. The term 'enterprise' is not even restricted to companies, but all kinds of business entities.

42. The Appellant acknowledged through its counsel that it was operating the Brismas Restaurant/Take Away on the bus station premises. Counsel quoted the broadly inclusive definition of 'enterprise' under section 2 of the Act, which states, " *'enterprise' means a firm, partnership, joint-venture, corporation, company, association and other juridical persons, which engage in commercial activities, and include their branches, subsidiaries, affiliates or other entities, directly or indirectly controlled by them;*"

43. We therefore do not see any merit in counsel for the Appellant's argument and reject it. It should be sufficient to determine whether or not the Appellant perpetrated the alleged conduct, whether directly or indirectly (through Brimas Restaurant/Take Away). However, for the avoidance of doubt, any penalty should be borne by the cited party, the Appellant, if found in violation of the law. Our understanding is that the terminology "their total annual turnover", used by the 2nd Respondent relates to the Appellant's total turnover. Furthermore, the penalty for violation of section 45 (c) as read with section 46 (1) of the Act is, in terms of subsection (2) of section 46, *"a fine not exceeding ten percent of that ... enterprise's annual turnover or one hundred and fifty thousand penalty units, whichever is higher"*. The 2nd Respondent would be acting *ultra-vires* the law to impose a percentage of the Appellant's turnover that is not higher than one hundred and fifty thousand penalty units. Penalty units are calculated according to the prevailing rates prescribed by the Fees and Fines Act, Cap. 45. We move to consider other grounds of appeal.

Ground two: *The Commission erred in law by not inquiring why the Complainants chose the Appellant's premises as the place where to take the food that was purported to be bought while at Lusaka and not any other area. (Section 46, 45)*

Ground eight: *The Commission erred both in law and fact when it held that the Appellant had violated section 46 (1) as read together with section 45 (c) of the Act and subsequently fined it 0.5% of their annual turnover when in fact it did not substantiate that any consumer was harassed or coerced to purchase food or service only from the Appellant. (Section 46, 45)*

44. Counsel for the Appellant Messrs. E.M. Mukuka and Company have argued on these grounds of appeal, but it seems that their grounds of appeal have a mix up in numbering, not following the amended version. Nonetheless, we have endeavoured to capture the arguments under the appropriate grounds of appeal. Counsel have argued in reference to the 2nd Respondent's finding in the report that *"when the Appellant and their employees saw the 1st Respondent delivering food to their customers, the Appellant made a decision to disrupt the Appellant from delivering the food that the passengers had purchased through the 1st Respondent. The Appellant instructed its employees from Brimas to grab the foodstuffs"*, that in the report there is a complete lack of description of the area where the alleged incident took place. Whether in fact the incident took place at the Appellant's place and not some public or neighbouring place. That further, the report should have said (the 1st Respondent's) employees were delivering the food to the place owned by the Appellant. That, it is their argument that somebody cannot buy food from Hungry Lion and go and sell it at Brimas at a profit and if Brimas complains then the Commission should penalise it. That, it was unfortunate that the Complainant implicated the Appellant since there are three bus stations in the area where the incident took place, namely, Brimas, Big Bite and Sonnet and people in the area continuously move from one place to another. As for the finding stating that the Appellant made a resolution to grab the food, counsel asked where on the record the resolution was, and if it was not in writing on what basis that conclusion was reached.

45. Counsel further argued that the place being a private property, the owners have a right to protect it against any unauthorised entries and it defies all reason that Hungry Lion food packs should be sold at Brimas and not Hungry Lion itself. That, the conduct complained of was in defence of property, and the Complainant did not seek permission or if permission was refused, the Complainant should not have taken it upon itself to dare the owner.

46. Counsel further argued that there was no evidence to substantiate that any consumer was forced or asked to purchase food from the Appellant. Further, quoting section 45, that the provision does not apply to the situation at hand because of the proximity of the area where the Complainant bought the food. That, in any case, there is no evidence anyone asked the passengers to buy food from the Appellant. That, all that the Appellant wanted was to stop the Complainant from doing what they wanted to do at their premises.

47. Counsel further made some statements which we reject out-rightly as evidence from the Bar being tendered in counsel's submissions, that (i) the Complainant had earlier asked for permission to sell from the premises which was not accepted; and (ii) the Complainant had written *"Prior to this we had a physical meeting with the proprietor of Kasengo .... Regarding the complaint. But then they insisted that they did not want any competition within their premises."*This was in reference to the Complainant's letter of complaint at page 3 of the Record of Proceedings, where the Complainant made this statement after stating that the 1st Respondent's lawyers had since the incident written to the Appellant demanding refund as well as damages with respect to loss of customer confidence and business. Counsel reacted to the statement by stating that the Appellant only knew of the initial request which it rejected

and did not recall any **"physical meeting with the Complainant"**. These are not arguments but evidence from the Bar. However, counsel has gone on to argue that the Appellant disagreed that others can enter another person's snack shop with their own snacks.

48. Counsel for the Appellant Messrs. Keith Mweemba Advocates have also argued under the grounds of appeal. Counsel cited Black's Law Dictionary, 8th Edition on definition of 'harassment' as *"words, conduct, or action (usu. Repeated or persistent) that, being directed at a specific person, annoys, alarms or causes substantial emotional distress in that person and serves no legitimate purpose. Harassment is actionable in some instances as when a creditor uses threatening or abusive tactics to collect a debt."* Counsel also cited the same authority for definition of 'coerce', as *"To compel by force or threat" and 'coercion' as (1) compulsion by physical force or threat of physical force. (2) Conduct that constitutes the improper use of economic power to compel another to submit to the wishes of one who wields it."*

49. Counsel has gone on to state that what is envisaged in section 45 (c) of the Act is the exploitative anti-competitive conduct that affects the consumer of the product in the relevant market, thus the effect based approach must be employed to determine whether there has been pressure placed on the consumer by harassment or coercion envisaged in section 45 of the Act.

50. Counsel has further argued, citing the author of **Bullen & Leak & Jacob's Precedents of Pleadings** (London, Sweet & Maxwell, 20008), paragraph 55-02 that many acts of harassment might constitute torts in their own right and actionable as such. That, it is incumbent upon the Tribunal to distinguish acts of harassment or coercion envisaged in competition law as set out in section 45 (c) of the Act as opposed to those that might constitute torts and actionable as such. That, on this basis, looking at the facts of the case and on critical perusal of the letter of complaint at page 3 of the Record of Proceedings, it is their position that the purported harassment or coercion does not exhibit anti-competitive elements envisaged in section 45 (c) of the Act. That this is on account of the fact that there is no evidence on record demonstrating that the 1st Respondent's employees or purported passengers were pressured by harassment or coercion to purchase food, beverages or other merchandise only from the Appellant or from any of its purported subsidiaries including Brimas Snack Pitch Limited.

51. Counsel has gone on to submit that the said stance they have taken may explain why the 2nd Respondent's decision at page 138 of the Record of Proceedings (which counsel argues neither reflects any competition issue nor falls within the mandate of the 2nd Respondent) that (i) the Appellant refunds the amount of K330 to all the passengers affected; and (ii) that the Complainant should report to the police for the theft of the thermal bag and money amounting to K150.

52. Further, that the assertion by the Complainant and its witnesses that the employees of the Appellant said that the employees of the Complainant were "disturbing the restaurant business" cannot, in itself, be proof of an anti-competitive conduct envisaged in the Act. And that, in any case, neither the Appellant nor Brimas trade in merchandise such as phones or thermo bags.

53. On their part, counsel for the 2nd Respondent have argued in respect of ground two that the 1st Respondent did not deliver the food to the Appellant's premises but rather to the passengers on the PostBus who had ordered the food to be delivered to them on the bus at Kabwe enroute to their destination. That therefore the 1st Respondent through its business line Nitumeni were mere agents of the passengers who ordered the food to be bought for them and delivered to them at Kabwe. That the 1st Respondent were not selling the food but merely delivering it to the passengers on the PostBus.

54. Counsel further submitted that Brimas bus station which was owned by the Appellant was one of the four privately owned bus stations in Kabwe. That both public and privately owned bus stations do allow passengers to buy food and refreshments and use conveniences.

55. Specifically, in relation to ground eight where the Appellant has stated that the 2nd Respondent erred both in law and fact when it held that the Appellant had violated section 46 (1) as read together with section 45 (c) of the Act when in fact it did not substantiate that any consumer was harassed or coerced to purchase food or service, counsel's heads of argument appear to place this underground seven. We believe perhaps, as in the case of counsel for the Appellant Messrs. E.M. Mukuka and Company, there must be a mix up because of the earlier grounds of appeal which were amended. Nonetheless, we relate the arguments to the appropriate ground of appeal, namely ground eight.

56. Counsel for the 2nd Respondent have argued that in terms of section 45 (c) of the Act, consumers should not be forced under any circumstances into purchasing any goods or services. That a consumer has a right to chose where they purchase or receive a service. That in this instance, when the Appellant and their employees noticed the 1st Respondent delivering food to their customers, they decided to disrupt them from delivering the food. That the Appellant instructed their employees from Brimas to grab the food from the passengers. That this was done through the use of force and intimidation. That despite there being no evidence that the passengers bought food from the (Brimas) restaurant, they were harassed hence distortion of purchasing decisions.

57. Counsel further submitted that the conduct in issue borders on competition and consumer protection. That the Appellant run a bus station that accommodated buses enroute, which buses carried passengers who had the right to make purchasing choices. That the Appellant's conduct distorted the purchasing decisions of the passengers.

58. We have considered the evidence, the arguments and the applicable laws. First and foremost, it is not in dispute that the incident complained of occurred. Counsel for the Appellant Messrs. E.M. Mukuka in response to the allegations (in their first letter dated 8th October 2016 at pages 8-9 of the Record of Proceedings) did not deny the incident, but alleged that they (1st Respondent's employees) went to the Appellant's premises and displayed and sold goods without the owner's permission. In the second letter dated 8th June 2017, counsel said they (1st Respondent) *"bought food stuffs from hungry lion and went to Brimas premises which was built by our client at his own individual expense."* (Pages 16-17 of the Record of Proceedings). Finally, in

their letter dated 8th May 2018 (at pages 69-70 of the Record of Proceedings), in response to the (preliminary) report, counsel for the Appellant wrote, *"The section you have quoted does not give authority to any person to go and trade on a private premise in the same goods that the owner of the premises deals in."* From this discourse, we have also established that it is not in dispute that the Brimas Bus Station and Brimas Restaurant/Take Away located at Brimas bus station were owned or operated, directly or indirectly, by the Appellant. We have further established that the reason for the incident was that the Appellant, being the owner or proprietor of the Bus Station and Brimas Restraunt/Take Away, was protecting the food supply business conducted on the premises.

59. We have also accepted the evidence of the 1st Respondent's employee Mr. Luonde, who said he was one of the two employees who went into the PostBus to deliver the food to passengers. We have also accepted the evidence of the passengers Ms. Princess Maina, Ms. Emah Gondwe, and Ms. Rebecca Bwalya who said they had ordered the food whilst on the PostBus in Lusaka, to be delivered to them in Kabwe enroute to their destinations. The sum total of the evidence of these witnesses is that the following has been established:

    (a) The passengers concerned whilst on the PostBus in Lusaka ordered food to be bought and delivered to them by the 1st Respondent through its business line Nitumeni.

    (b) The PostBus stopped at Kabwe, specifically at the Brimas bus station, enroute to its final destination.

    (c) Whilst the PostBus was stationed at Brimas Bus Station in Kabwe, two employees of the 1st Respondent entered the bus and started giving out food packs to passengers who had made their orders.

    (d) Whilst the food delivery process on the PostBus was going on, some employees of Brimas Restaurant/Take Away came on the bus and grabbed the food packs together with the thermo bag from the two employees of the 1st Respondent and food from passengers who had already received their packs.

    (e) The said Brimas Restaurant/Take Away employees also took away from the employees of the 1st Respondent two cell phone chargers and K150 cash.

    (f) The food and the other items were not returned to the 1st Respondent's employees..

    (g) The reason for the Brimas Restaurant/Take Away employees' conduct was to protect the Appellant's food business operated on the premises.

60. We reject suggestions by counsel for the Appellant that perhaps the incident took place at some neighbouring place, and that it did not involve employees from Brimas Restaurant/Take Away. This proposition contradicts the Appellant's statements submitted through counsel and, of course, the evidence of affected passengers themselves.

61. We now consider the position of the law. Section 3 (1) of the Act states, *"Except as otherwise provided for in this Act, this Act applies to all economic activity within, or having an effect within,*

Zambia." (Emphasis ours). Section 42 of the Act states, *"Subject to section 3[4], the economic activities of an enterprise in a sector where a regulator exercises statutory powers is subject to the requirements of Part III"*. Thus per section 3 (1) of the Act, the Act applies to all economic activities in the country and per section 42, all economic activities of an enterprise in a sector governed by a statutory regulator are subject to the requirements of Part III, which relates to restrictive business and anti-competitive trade practices and includes section 16 which prohibits abuse of dominant position.[5]

62. We have established that bus stations and food supply businesses operated on bus stations all fall under the statutory regulatory powers of local authorities per the Markets and Bus Stations Act No. 7 of 2007. Among other things, this means economic activities in bus stations, being under the statutory regulatory powers of local authorities, are specifically subject to the requirements of Part III of the Act we are concerned with herein, including section 16 subject of appeal.

63. We note that among the objects of the Markets and Bus Stations Act, as stated in the long title, are to provide for the establishment and regulation of markets and bus stations, to provide for the establishment of management boards for markets and bus stations. Moreover, sections 4, 5 and 6 of this Act provides for, inter alia, the establishment of markets and bus stations; control and management of markets and bus stations by local authorities and management boards established under this Act; and establishment, maintenance, conduct and management of a market or bus station by a person in partnership with a local authority and with the approval in writing of the Minister. These sections state as follows:

> *"4. (1) The Minister or a local authority, with the approval of the Minister, may establish markets and bus stations.*
> *(2) ....*
>
> *(3) A local authority, may enter into public-private partnerships, with the prior approval of the Minister given in writing.*
>
> *(4) ....*
>
> *(5) ....*
>
> *5. (1) All markets and bus stations shall be under the control of a local authority having jurisdiction in the area in which they are situated.*
>
> *(2) A market and bus station shall be managed by –*
>
> *(a) a local authority in that area; or*
>
> *(b) a management board.*

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[4] Section 3 provides, inter alia, in subsection (1), which we have already quoted, that the Act shall apply to all economic activity in Zambia.

5 We shall come to section 16 later; at this juncture, we merely mention it for full context of the law.

(3) A market and a bus station shall be managed and operated in accordance with the Food and Drug Act, the Public Health Act and the Weights and Measures Act.

6. (1) A person shall not, except in partnership with a local authority and with the approval of the Minister -

a) establish any market or bus station in any area;

(b….; and

(c) maintain, conduct or manage a market or a bus station in contravention of this Act.

64. Furthermore, section 10 provides for the appointment and powers of markets and bus stations inspectors in the following terms:

"10. (1) The Minister, or a local authority with the approval of the Minister, may appoint inspectors to ensure compliance with this Act.

(2) An inspector shall be provided with a certificate of appointment which shall be produced by the inspector when any person requires it to be produced.

(3) An inspector may, during an inspection –

(a) examine and make copies of any books, records or other documents containing information relevant to the administration or enforcement of this Act or any regulations or by-laws made under this Act;

(b) examine any computer and retrieve any information relevant to the administration or enforcement of this Act or any regulations or by-laws made under this Act;

(c) open and inspect any package or container;

(d) inspect any premises in market, bus station or market street; and

(e) examine or inspect anything relevant to the administration or enforcement of this Act or any regulation or by-laws made under this Act."

65. Furthermore, per section 3 of this Act, *'premises' "includes any place, vehicle …."*. *In addition,* this Act in sections 13 and 16 provides for the establishment and functions of a management board for any market or bus station established under this Act. Functions of a board in section 16 include:

"(g) prevent vending and illegal trading in the ... bus station's vicinity"

66. Our understanding of the context of this Act, however, is that the establishment of boards and their functions does not extend to a bus station established by a private person in partnership with a local authority, as in this case Brimas Bus Station. In this regard, we accept as evidence the letter from the Town Clerk at page 11 of the Record of Proceedings which stated that at the material time the Kabwe Municipal Council was not operating any Bus Station and was at the time of writing the letter, 7th November 2016, in the process of constructing the bus station. Further, that there were only privately owned bus stations, among them Brimas Bus Station.

Further, that the running of the bus stations was governed by the Markets and Bus Stations Act No. 7 of 2007.

67. It is our view that notwithstanding that Brimas Bus Station is a privately operated bus station, it is operated under a public-private partnership arrangement with the local authority as provided by this Act. To the extent of its operation as a bus station, the premises are to be run as a public facility. According to provisions of this Act, the premises are subject to the jurisdiction of the local authority, including powers with respect to inspection of any part of the bus station or any vehicle including buses that utilise the bus station, for purposes of compliance with this Act or any regulation or by-laws made under this Act. Only inspectors appointed under this Act have power to enter and conduct inspections upon a bus parked at the bus station.

68. Counsel for the Appellant's proposition that the place being a private property, the owners had a right to protect it against any unauthorised entries and that the conduct complained of was in defence of property is not in line with the law. We are satisfied that the conduct in issue did not take place in the Appellant's restaurant/take away but on the PostBus which was stationed at the bus station enroute. The Appellant should not under the pretext of law enforcement, which is not its responsibility, pounce on a person entering a bus that is stationed at the bus stop in the normal course of bus station service, which is a service rendered to the public.

69. The premises being a bus station, passengers on the PostBus were entitled to buy, directly or indirectly through other people, food and refreshments as they liked from any legitimate food and beverage supplier, which Hungry Lion was. If in fact any illegal vending took place or was suspected at the bus station, only authorised law enforcement agents could handle that. It behoved the Appellant as operator of the bus station to make appropriate arrangements with the local authority to have lawfully appointed law enforcers in accordance with this Act. Counsel for the Appellant have, in alleging that the 1st Respondent's employees were engaged in illegal street vending, cited the Local Government (Street Vending and Nuisances) Regulations, 1992, made under the Local Government Act Cap. 281 (which regulations were revoked and replaced by S.I. 13 of 1994). These Regulations, which among other prohibitions prohibits selling of food in streets and public places, in substance read as follows:

> *"2. Subject to Regulation 3 any person who does any act specified in the First Schedule shall be guilty of an offence and shall, in respect of that offence, be liable, on conviction, to a fine set out in that Schedule.*
>
> *3. (1) Where any person is summoned under these Regulations to appear before a subordinate court or is arrested or informed by a police Admission of guilt officer that proceedings will be instituted against him, in respect of any offence committed under these Regulations, but who does not wish to appear in court, he may, before appearing in court to answer the charge against him, sign and deliver to the prescribed officer an Admission of Guilt form set out in the Second Schedule.*

(2) Where any person admits in accordance with sub-regulation (1), that he is guilty of the offence charged the procedure set out in section one hundred and twenty-one of the Criminal Procedure Code shall apply, with the necessary modifications, and he shall pay, in respect of that offence, the fine set out in the First Schedule.

(3) For the purposes of this regulation "prescribed officer" means any police officer of or above the rank of Sub-Inspector.

4. The Local Government (Street Vending and Nuisances) Regulations, 1992, are hereby revoked."

70. If the Appellant at all believed that the 1st Respondent's employees were engaged in street vending, the least the Appellant could have done would be to hand them and any suspected merchandise over to the police so that criminal proceedings would have taken their course in accordance with the Regulations and/or the Criminal Procedure Code Act, Cap. 88. The Appellant did not take that course, but instead its agents (Brimas restaurant/Take Away employees) grabbed the passengers' food and other items belonging to the 1st Respondent, which they refused to return.

71. The rule of law must be observed. One cannot be alleged to have committed a criminal offence when they were not charged and convicted by a court of competent jurisdiction. It would be a grave error and an affront to human rights and consumer rights in particular to let private bus station operators to take the law into their own hands and subject passengers or bus entrants to the kind of conduct perpetrated by the Appellants through employees of its subsidiary or associated business enterprise, Brimas Restaurant/Take Away.

72. We have accepted that the 1st Respondent was simply delivering food that the passengers had ordered to be bought and delivered to them at Kabwe through the 1st Respondent's agency. Further, that the foodstuffs were from a legitimate source Hungry Lion. It is in fact clear to us from the Appellant's own statements given through its counsel and the evidence of the 1st Respondent's employee Mr. Luonde and the passengers who gave evidence, as we have already outlined, that the only reason the Appellant took offence and conducted itself in the manner it did through employees of its business Brimas Restaurant/Take Away was because it was protecting its business from competition.

73. We have also addressed our minds to counsel for the Appellant's proposition that the conduct in issue did not amount to an offence under section 46 (1) as read together with section 45 (c) of the Act because the passengers were not compelled and did not buy food from Brimas Restaurant/Take away. And that the conduct in itself did not amount to an anti-competitive act envisaged by section 45 (c) of the Act; that it only amounted to torts that are actionable as such in courts of law. That the conduct did not amount to harassment or coercion, because in respect to the former term, the conduct was not repetitive and in respect to the latter, the passengers were not forced and did not buy the food from the Appellant's food Take Away.

74. Sections 45 (c) and 46 of the Act read as follows:

"45. A trading practice is unfair if-

(a) ...

(b) ...

(c) it places pressure on consumers by use of harassment or coercion;
and thereby distorts, or is likely to distort, the purchasing decisions of consumers.

46. (1) A person or an enterprise shall not practice any unfair trading.
(2) A person who, or an enterprise which, contravenes subsection (1) is liable to pay the Commission a fine not exceeding of that person's or enterprise's annual turnover or one hundred and fifty thousand penalty units, whichever is higher."

75. Whereas the term 'harassment' does indeed usually connote repetitive undue conduct directed at another, the term 'coercion' has rightly been defined in Black's Law Dictionary quoted by counsel for the Appellant as *(1) .... (2) Conduct that constitutes the improper use of economic power to compel another to submit to the wishes of one who wields it."* In the present case, the Appellant, being the operator of the bus station, wielded such power as would compel the passengers concerned or any others on the PostBus to, in future, not to use any person's agency, including the 1st Respondent, to buy and deliver food to them at the Brimas Bus Station.

76. Furthermore, provisions of the Act are not subject to other relief provided by law. The provisions are enforceable notwithstanding that conduct complained of may be actionable in tort or other law. The Act's core objectives are not focused on providing remedy to a complainant, but, as the long title of the Act indicates, to protect competition and consumer rights in the country's economy. As we have stated before in our adjudication of consumer issues[6], the starting point in understanding the context of the prohibitions in the Act are the statutory provisions from which the 2nd Respondent derives its investigative powers. Section 5 of the Act pronounces the 2nd 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 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.

77. We have also previously reasoned as follows in similar cases (quoting extensively for full appreciation):

"The case for determination by the Commission did not, according to our understanding of the law, hang on the basis that there was evidence that the Complainant belonged to the class of consumers contemplated by the sections in issue or subjective test whether there was evidence hat he or any particular consumer was actually misled and deceived, nor whether there was evidence of actual false representation made to the Complainant or any other such particular consumer, nor indeed evidence whether or not as a result the Complainant or such a consumer suffered damage or loss.

[6] See, for instance, our judgment in the case of Italian School of Lusaka .....

In respect of section 45, the language used captures relevant consumers at large because it includes words such as, "misleads consumers" and "or likely to be distorted", ...

The bottom line ... is that Airtel advertised the product in issue for sale to members of the public at large, which includes direct consumers contemplated by the sections in issue.

The Commission in its decision did not address itself to the class of consumers contemplated by the sections in issue, but specifically focused on the question whether or not the Complainant was misled. While this approach and evidence in respect thereof is admissible, it tends to narrow the scope of the conduct targeted by the law in question.

We have found no reason to arrive at a different finding from that reached by the Commission that by calling the tariff" Unlimited Data Plan" Airtel misled the Complainant as he believed that he would continue to use the internet service despite having exhausted his fair usage quota. There was evidence to that effect on the record, which was also referred to at the hearing of the appeal, as we indicate elsewhere in this judgment. We are, however, not particularly concerned with that issue. This is because such evidence is unnecessary and would not in itself conclusively determine the question of violation of the provisions in issue in the absence of a determination on the basis of the objective test, which alone is conclusive. ....

In our view, the objective test would in respect of both sections 45 (a) and 47 (a) (v) relate to consumers who were either purchasers or prospective purchasers of internet services or products for direct consumption. In respect of section 45 (a), the objective test is whether the advertisement was misleading to ordinary or reasonable members of the public who were purchasers or prospective purchasers, for direct consumption, of internet services or products and thereby distorted, or was likely to distort, the purchasing decisions of such consumers. ...."[7]

78. In the case of **Macnicious Mwimba v. Airtel Networks Zambia Plc (Macnicious Mwimba case) (supra)**, we cited the case of the High Court of Australia case of **Parkdale Custom Built Furniture Pty. Ltd. V. Puxu Pty. Ltd.**(1982) 149 Clr 191, in which the subject section simply read *"A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."* Lord Gibbs C.J. said in paragraph 9:

    "Section 52does not expressly state what persons or class of persons should be considered as the possible victims for the purpose of deciding whether conduct is misleading or deceptive or likely to mislead or deceive. It seems clear enough that consideration must be given to the class of consumers likely to be affected by the conduct."

79. Applied to the facts and evidence in the present case, the concern of section 45 (c) is not so much that a particular passenger was harassed or coerced into actually buying food from the Appellant's Brimas Restaurant/Take Away (and there is no evidence to that effect). The concern of the law is whether the conduct of the Appellant's Brimas Restaurant/Take Away employees was such as placed or would place pressure on consumers by use of harassment or coercion, thereby distorting, or likely to distort, the purchasing decisions of consumers. The

[7] Macnicious Mwimba v. Airtel Networks Zambia Plc Appeal 2014/ CCPT/015/ CON.

conduct of the Brimas Restaurant/Take Away employees in entering upon the PostBus and grabbing the food and the words they used that the passengers *"should buy the food from Lusaka if they do not want to buy from their restaurant"* were clearly coercive, capable of distorting not only these particular passengers' purchasing decisions but also other passengers on that particular PostBus should they travel on this or any other bus or route for that matter.

80. Applying the objective standard, which is the appropriate standard in consumer protection laws such as in this case, it is reasonable to conclude that any such passengers would in future be dissuaded from buying food from any other supplier (particularly through the agency of the 1st Respondent or other similar services) than from the Brimas Restaurant/Take Away or a restaurant located at a particular bus station, as may be applicable.

81. In fact, for argument sake, if left unsanctioned, the Appellant's conduct could well not only distort the purchasing decisions of the passengers on the PostBus in issue, but also other passengers on other PostBus buses, or indeed other buses using Brimas Bus Station, who might buy food from other suppliers (through the agency of the 1st Respondent's services or other agency).

82. Counsel for the Appellant have also questioned the authority of the 2nd Respondent to issue other orders or directives as are contained in the decision. This is a matter we have addressed before. In the case of **Italian School of Lusaka v. Competition and Consumer Protection Commission & Sajeev Nair** Appeal 2016/CCPT/017/CON, we said:

> *"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 Appeal*** *2017/CCPT/004/CON. Such measures are not ultra vires the Act ... but are part and parcel of the enforcement jurisdiction of the 1st Respondent under the Act."*

83. We therefore determine that the Appellant's conduct was in violation of consumer rights per section 45 (c) as read together with section 46 (1) of the Act. The Appellant's second and eighth grounds of appeal fail. Further, that the related orders or directives issued by the 2nd Respondent were within its enforcement jurisdiction under the Act, specifically section 5 (l) of the Act. We move to the next grounds of appeal.

Ground three: The Commission erred in using research on the Appellant's business without involving the Appellant's personnel which rendered the research inaccurate.

Ground seven: The Commission erred in both law and fact when it held that the Appellant had violated section 16 (1) of the Act and subsequently fined it 1% of their annual turnover when it did not substantiate by evidence any abuse of dominant position of market power by the Appellant in the relevant market.

Ground nine: The Commission misdirected itself in both law and fact when it ruled that the Appellant had made a resolution to grab foodstuffs from passengers travelling from Lusaka

to Ndola using the PostBus after coming to the conclusion that the (1st) Respondent was competing with their outlet situated at the bus stop when in fact it did not substantiate by evidence the existence of such resolution or conclusion.

Ground ten: Commission misdirected itself in both law and fact when it concluded that the conduct or actions of the Appellant's employees to stop the Respondent's from selling/delivering foodstuffs and/or to grab foodstuffs from passengers travelling from Lusaka to Ndola on-board the PostBus was likely to limit access to a market and likely to distort the purchasing decision of the consumers when in fact such conduct is not a competition issue as the law proscribes vendors from selling foodstuffs or trading at bus stations.

84. We have considered the evidence and the arguments of counsel on both sides. Without belabouring the law relating to section 16 of the Act, we find the evidence the basis of the 2nd Respondent's decision so faulty as to render the decision erroneous. We have seen some handwritten scribbling of which we cannot make head or tail, let alone make out any discernible structure of a report. We have not seen any reliable evidence of the survey the 2nd Respondent claims to have conducted and relied upon. That is a survey of the number of buses utilising various bus stations in Kabwe by which it was concluded that the Appellant's Brisma Bus Station had a share of 55% of buses transiting through Kabwe. That therefore in terms of section 15 of the Act the Appellant's bus station enjoyed a dominant position, being above the 30% threshold.

85. Secondly, the survey was allegedly conducted in December 2017 while the conduct complained of occurred in September 2016. Assuming that the alleged outcome of the survey was correct, how would it establish a dominant position more than one year earlier? Furthermore, nothing was mentioned by the 2nd Respondent of the public Bus Station the Town Clerk in his letter said was in the process of being constructed. Could it be that in fact by then in 2017 the same had been constructed and was servicing buses, but the 2nd Respondent did not take it into account? These questions remain unanswered because there is no survey report providing essential particulars of the survey.

86. We agree with counsel for the Appellant that the so-called survey looks more like conjecture than a survey. Whereas we do not agree with counsel for the Appellant that they should have been involved in the exercise (since it is purely within the realm of the 2nd Respondent to determine how it carries out its investigation), it is nonetheless reasonably expected that such an exercise should be conducted closely to the date of occurrence of the conduct complained of and address all areas that may give rise to questions. Accordingly, the appeal is allowed in so far as it relates to the findings and penalty under section 16 of the Act.

87. Consequently, the appeal succeeds in respect of the finding that the Appellant violated section 16 (1) of the Act and the penalty of 1% of its annual turnover imposed on the enterprise. The same are accordingly set aside.

88. For the avoidance of doubt, as we have earlier stated, the penalty for breach of sections 45 (c) as read with section 46 (1) relates to the annual turnover of the Appellant. Furthermore, we order that the 2nd Respondent revisits the fine and ensures the following:

    (a) The fine as a percentage of the Appellant's annual turnover should be higher than one hundred and fifty thousand penalty units, but not exceed ten percent.

    (b) If what is stated in paragraph (a) above cannot be attained because the penalty units are higher, then the fine should be the penalty units.

    (c) The penalty units should be calculated at the prevailing rates at the time the fine was imposed as prescribed by the Fees and Fines Act, Cap. 45 (as amended from time to time).

89. In view of the outcome, each party shall bear their respective costs.

90. Any aggrieved party may appeal this decision within thirty days pursuant to section 75 of the Act.

Delivered at Lusaka this 17th May 2021.

Mrs. Eness C. Chiyenge – Chairperson

Mrs. Miyoba B. Muzumbwe-Katongo – Vice Chairperson

Mr. Buchisa Mwalongo – Member