DLS 17/6/22
PMA

COMPETITION AND CONSUMER PROTECTION TRIBUNAL **APPEAL No. 2021/CCPT/037/CON**

HOLDEN AT LUSAKA



BETWEEN:

RADIAN STORES RETAIL LIMITED **APPELLANT**

AND

THE COMPETITION AND CONSUMER PROTECTION COMMISSION **RESPONDENT**

CORAM: Mrs. Eness C. Chiyenge (Chairperson), Mrs. Miyoba B. Muzumbwe-Katongo (Vice Chairperson), and Mr. Buchisa K. Mwalongo (Member)

For the Appellant: Mr. L. Mwamba – Messrs. Simeza Sangwa and Associates

For the Respondent: Mrs. M.B. Mwanza (Director, Legal and Corporate Affairs); Mrs. M.M. Mulenga (Manager, Legal and Corporate Affairs); Ms. M. Mtonga (Senior Legal Officer); and Ms. S. Mafuta (Legal Officer) – Competition and Consumer Protection Commission

---

JUDGMENT

Legislation referred to:

1. The Competition and Consumer Protection Act No. 24 of 2010, sections 49 (5), (6) and (7); and 53.
2. The Competition and Consumer Protection (Tribunal) Rules, S.I. 37 of 2012, Rule 18.
3. Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia, section 4 (3).
4. The Consumer Protection Act of 1987 (England), section 11.

Cases referred to:

1. Italian School of Lusaka v. Competition and Consumer Protection Commission and Sajeev Nair 2016/CCPT/017/CON.
2. Eyre v. Measday [1986] All E.R. 488.
3. Gut Springenheide GmbH and Rudolf Tusky v. Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung Case C-210/96.
4. Hartog v. Colin & Shield [1939] 3 All E.R. 566.
5. South African Consumer Goods and Services Ombudsman Case, No. 2014 ZACGSO 16.
6. Blyth v. Birmingham Waterworks Company (1856) 11 Exch. 78.
7. Southern Cross Motors v. Competition and Consumer Protection Commission 2013/CCPT/002/CON.

8. Imbwe Motorways Limited v. Competition and Consumer Protection Commission 2014/CCPT/011/CON.
9. Competition and Consumer Protection Commission v. Yambe Driving School 2017/CCPT/006/CON.
10. Caswell v. Powell Duffryn Associated Collieries Limited (1940) A.C. 152 at 177.
11. Spar Zambia Limited v. Danny Kaluba and Competition and Consumer Protection Commission 2016 /CCPT/009/CON.
12. Mwansa v. Zambian Breweries, Appeal No. 153 of 2014 (2017) ZMSC 42.
13. Sata v. Zambia Bottlers, SCZ Appeal No. 1 of 2003.
14. Chwee Kin Keong and Others v. Digilandmall.Com Pte Ltd [2001] 1.S.L. 502 (C.A.).

Other Works referred to:

Clerk and Lindsell on Tort (London, Sweet & Maxwell, 1995).

CHIYENGE, Chairperson, delivered the judgment of the Tribunal.

INTRODUCTION AND BACKGROUND

1. This is our judgment in this appeal which was filed by Radian Stores Retail Limited (hereinafter referred to as "the Appellant") from a decision of the Competition and Consumer Protection Tribunal (hereinafter referred to as "the Respondent") dated 10th June 2021, and served on the Appellant on 20th July 2021. The Respondent determined that the Appellant had violated sections 49 (5) and 53 (1) of the Competition and Consumer Protection Act, No. 24 of 2010 (hereinafter referred to as "the Act").

The complaint

2. The Respondent's Decision subject of the appeal was made following its investigations into a complaint made by one Ms. Mutale Wakunuma on 29th September 2020 (hereinafter referred to as "the Complainant") against the Appellant. The complaint alleged that on 19th July 2020, the Appellant issued an online advertisement titled *"Saving'a na Solar"* with a range of solar lights on offer. The Complainant's letter of complaint, emailed to the Respondent on 25th September 2020, read as follows (relevant parts only):

> *"Dear Executive Director,*
>
> *I write to lodge a complaint against Radian online. On July 19, 2020, Radian online issued an advertisement titled "Savingá na Solar" with a range of Solar lights on offer. We opted to purchase a number of units of 200 watts street solar lights which they advertised at K2.65. When we followed the link on the advertisement, we were only able to purchase 28 pieces, as the site*

indicated that they had run out of stock. We made payment and selected in-store pick up from their Manda Hill store.

A week later, we visited the store to check on our consignment as the online update on our purchase was not changing from processing to complete. Manda Hill store informed us that they had not received any stock for us but that they would follow up with their online department and revert by end of day. We never heard back from them. After that, on August 2nd, Radian online proceeded to issue a "Savingá na Solar 2" with different prices on the same pieces they had previously advertised. On 11th August, we received an email informing us that there had been error and that we should refer to the terms and conditions on pricing errors. We were then given an option to get a refund or purchase something of equivalent value. Having not responded to the email, we received a call offering us the same options .... We requested a meeting with their management as we felt the process had not been handled correctly. This was the last we heard from them. We now write to seek your intervention in this matter.

Some important things of note may include:

The advert was circulated through their Whatsapp group on 18 July, 2020. Until the advert of August 2nd which implied a second offering rather than correction, there was no recall or correction of the advert.

I have included in attachment some screen shots that may be helpful for your consideration.

I am a resident of Lusaka, Plot number 58, 10th Avenue, Beresford Estate, Lilayi.

Radian stores has physical outlets in Lusaka's central business district with other stores in other locations, including Manda Hill where we were supposed to have collected our consignment from. Their indicated address on google is:

....
....
....
....

We look forward to hearing from you soon.

With thanks and kind regards,

Ms. Mutale Wakunuma
Managing Director

Institute for Social Policy in Africa (ISPA)
....

director@instituteforsocialpolicyafrica.com
....

....
...." (Italics ours)

(See pages 1–2 of the Record of Proceedings (the RoP) filed by the Respondent on 18th August 2021, for internal investigation authorisation processes; 3–4 for the letter of complaint and 5–9 the accompanying Appellant's online advertisement wherein among other products the street light in issue (JAYB Solar Led Street Light 200W) was listed (priced at K2.65, reduced from K3,500.00); and Appellant's order and email dated 11th August 2020 from the Appellant to the Complainant.)

3. Upon receiving the complaint, the Respondent instituted investigations in respect of which it issued a Notice of Investigation dated 5th October 2020 together with an accompanying letter. The Respondent outlined a summary of the complainant's allegations in the Notice of Investigation (and in the accompanying letter). The Respondent stated, *inter alia*, that the conduct complained of appeared to be in breach of section 49 (5) of the Act. The Notice (and letter) read (substantive parts only):

> *"The Competition and Consumer Protection ... received a complaint from Ms. Mutale Wakunuma ("the Complainant") against Radian Stores Retail Limited ("the Respondent") which appears to be in breach of section 49 (5) of the Competition and Consumer Protection Act, No. 24 of 2010, ("the Act"). Specifically, the Complainant alleges that in (sic) 19th July, 2020 the Respondent issued an online advertisement titled Saving'a na Solar" with a range of solar lights on offer. The Complainant alleges that she opted to purchase 28 of 200watt street lights which they advertised at K2.65 as the site indicated that the Respondent had run out of stock.*
>
> *The Complainant alleges that a week later, she visited the Respondent to check on her consignment as the online update on her purchase did not changed (sic) from "Processing" to "Complete". The Complainant submitted that the Respondent informed her that they had not received any stock and that they would follow up with their online department and revert by the end of the day. The Complainant alleges that on 2nd August, 2020, the Respondent proceeded to issue a "Saving'a na Solar 2" advertisement with different prices on the same items they had previously advertised. The Complainant alleges that on 11th August 2020, she received an email informing her that there had been an error on the prices listings and that she needed to refer to the terms and conditions on pricing errors. The Complainant alleges that they were given an option of getting a refund or purchasing something of an equivalent value. The Complainant now demands that she be issued the items she purchased."*

4. The Respondent requested the Appellant to respond to the allegations within fourteen days of receipt of the Notice of Investigation. That, further (per the accompanying letter), the Appellant was to provide information as to (i) whether it had a redress policy with regards to the products provided by it, and (ii) any other information pertaining to the matter, which may assist in the effective determination of the investigation in accordance with section 55 (4) of the Act.

(See pages 10-14 of the RoP for Notice of Investigation and accompanying letter.)

The Appellant's Response to Notice of Investigation

5. The Appellant responded to the Notice of Investigation by letter dated 7th October 2020 **(see letter at pages 15 - 16 of the RoP)**, stating that the Appellant wished to set the record straight on the allegation. We summarise the Appellant's response as follows:

(i) That the Appellant *"issued an online advertisement to stimulate the promotion"* on Solar streetlights on 19th July 2020 on its Facebook, titled *"Savingá na Solar"(referenced as Addendum 1 to the letter, which is the online advertisement issued on 19th July 2020 lasting up to 15th August 2020, but which Addendum did not reflect the product in issue* **(JAYB Solar Led Street Light 200W)**, *but only 30W, 60W and 90W).* **(See Addendum 1 at page 17 of the RoP.)**

(ii) That in response to customers who sought upper range models, the Appellant on 3rd and 6th August 2020 once more via same Facebook page ran an advertisement titled *"Savingá na Solar* 2" maintaining the three street lights (referred to in Addendum 1) at the same prices, but also adding a totally different range of solar street lights which were not with built in solar panels but with separate panels, mid and upper range (20W, 30W, 100W, 150W200W. **(Referenced as Addendums 2 and 3 to the letter, at pages 18 and 19 of the RoP, respectively.)**

(iii) That after the second promotion (which, according to subparagraph (ii) above and Addendum 2 to the letter, at page 17 of the RoP, was advertised on 3rd August 2020), the Appellant received an order from the Complainant sent on 2nd August 2020 for 28 x 200W Solar streetlights whereby the Appellant had on actual website product page put unit price of K2.650 instead of the correct promo price of K2,650, as there ought to have been a coma instead and not a dot, an error which was duly noticed on 3rd August 2020. **(Referenced as Addendum 4 at pages 20–22 of the RoP, being Appellant's email letter dated 2nd August 2020 to the Complainant acknowledging the order, and stating that it was processing her payment/awaiting her payment depending on her method of payment; listing the 28 product items priced at K2.65 each.)**

(iv) That the Appellant rectified the error, reflected in Addendum 4 referred to in subparagraph (iii) above, via an advert in the Social Media (which the Appellant did not produce), and that this was evidently an inadvertent error and ought to be distinguished from unfair trading practice, stating that such was obviously not their intent.

(v) That the Appellant relied on its terms and conditions as applicable and becoming operative relating to online issues or errors, referenced as Addendum 5, at pages 26 to 35 of the RoP), wherein it is stated, *"If we discover an error in the price or product details of goods ordered or reserved, we will inform you as soon as possible (e.g. prior to the goods being dispatched or in-store prior to the collection of the goods). We will provide you the option of reconfirming your order at the correct price or cancelling it. If we are unable to contact you, we will treat the order as cancelled. If you choose to cancel and have already paid*

for the goods you will receive a full refund." **(See document referenced in the Appellant's letter as Addendum 5, in the paragraph titled *"Online price and product details errors"*, at page 31 of the RoP.)**

(vi) That without delay, the Appellant informed the Complainant of the inadvertent pricing error via a phone call on 4th August 20209 and email on 11th August 2020 (referenced as Addendum 6, though the email was not produced in the RoP[1]), in which the Appellant offered the Complainant options such as buying the product at the correct price, getting another product for the amount already paid, or a full refund, to which there was no response.

(vii) That the Complainant was in breach of the terms and conditions (of Addendum 5, preamble) especially focusing on 200W Solar streetlights which, according to the Appellant, were not part of the promotion *"Saving'a na Solar"* run from 19th to 31st July 2020, but appeared in *"Saving'a na Solar 2"*; hence between these dates the Appellant had no record that a Ms. Mutale Wakunuma purchased 200W Solar Streetlights per online. That thus the Appellant questioned as to how a week later the Complainant reckoned to check on her order of 28 x200W when the said lights were not on promotion as she purported as according to the Addendums referenced 1, 2 and 3 there was as yet no issuance of *"Saving'a na Solar 2"* advert. That the Complainant's order only appeared after the introduction of the item in issue in the *"Saving'a na Solar 2"* advert.

(viii) That pursuant to their terms and conditions, and despite not receiving a response from the Complainant of the proposed options for resolution of the issue, the Appellant issued instructions to its bank to credit the Complainant the full refund and that this was done **(reference Addendums 7 and 8, but not produced in the RoP).**

(ix) That accordingly, the Appellant refuted all allegations, including of unfair trade practice.

6. The Appellant did write another letter on the same date, with substantially the same contents as the first one whose contents we have outlined above. **(See pages 23 – 24 of the RoP.)**

(See pages 15 – 39 of the RoP for the Appellant's whole response to the Notice of Investigation and accompanying letter, including attachments referred to as Addendums.)

---

[1] The email dated 11th August 2020 from the Appellant to the Complainant was later produced as Exhibit "MA3" to the Appellant's Affidavit in Support of Notice of Appeal filed on 19th August 2021.

7. The Respondent produced its Preliminary Report in March 2021 in which it alleged that the Appellant appeared to have contravened sections 49 (5) and 53 (1) of the Act and referred to the penalties and remedies stipulated in subsections (6) and (7) of section 49 and subsections (2) and (3) of section 53, respectively.

8. The Respondent outlined the following provisions as applicable to the facts of the case:

> "The alleged conduct appears to have contravened section 49 (5) and section 53 (1) of … ("the Act").
>
> Section 49 (5) of the Act states that: *"A person or an enterprise shall supply a service to a consumer with reasonable care and skill or within a reasonable time or, if a specific time was not agreed, within a reasonable period around the agreed time."*
>
> Section 49 (6) of the Act states that: *"A person who, or an enterprise which, contravenes subsection (5) is liable to pay the Commission a fine not exceeding ten percent of that person's or enterprise's annual turnover."*
>
> Section 49 (7) of the Act states that: *"In addition to the penalty stipulated under subsection (6), the person or the enterprise shall-*
>
> *(a) within seven days of the provision of the service concerned, refund to the consumer the price paid for the service; or*
>
> *(b) If practicable and if the consumer so chooses, perform the service again to a reasonable standard."*
>
> Section 53 (1) of the Act states that: *"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."*
>
> Section 53 (2) states that: *"An unfair contract or an unfair term of a contract between a consumer and an enterprise act shall not be binding."*
>
> Section 53 (3) states that: *"Notwithstanding subsection (2), a contract shall bind the parties if it is capable of being enforced without the unfair term."*

9. The Respondent reached the following relevant findings (outlining only those pertinent to issues in the appeal):

> *(a) Whether the Complainant was a consumer*
>
> The Respondent referred to the definition of "consumer" in section 2 (1) of the Act, *"any person who purchases or offers to purchase goods or services otherwise than for the purpose of re-sale, but does not include a person who purchases goods or services for the purpose of using the goods or services in the production and manufacture of any other goods for sale, or the provision*

of another service for remuneration;" That, therefore, the Complainant was a consumer as she purchased street lights from the Respondent for her personal use.

(b) *Review of the Complainant's Order Number 410005301*

Among other findings, repeated elsewhere in the findings, the Respondent found that the Appellant got in touch with the Complainant to let her know the correct price of streetlights but she insisted on getting the streetlights at the price they were displayed given that she had already made the payment.

(c) *Whether the Appellant provided a particular service to the Complainant with reasonable care and skill*

(i) The Respondent, referring to section 2 (1) of the Act, stated that the term "service" is defined, *"includes the carrying out and performance on a commercial basis of any engagement, whether professional or not, other than the supply of goods, but does not include the rendering of any services under a contract of employment;"* The Respondent determined that there was evidence that the Appellant provided a retail service to the Complainant, as evidenced by order Number 41000531 dated 2nd August 2020.

(ii) With respect to definition of "reasonable care", the Respondent referred to Black's Law Dictionary, stating that the term is *"a test of liability for negligence, the degree of care that a prudent and competent person engaged in the same line of business or endeavour would exercise under circumstance."* Further, that "reasonable skill" is defined as *"the skill ordinarily used by persons engaged in a particular business."*[2]

(iii) The Respondent established that the Complainant made an online purchase of 28 Solar Led Street Lights from the Appellant that were displayed at K2.65 each at a grand total of K74.20. That, however, the Appellant did not give the items to her on the basis that they had made an error on the pricing of the streetlights as the actual price was K2,650 and not K2.65.

(iv) The Respondent noted that the mistake was genuine, and did not benefit the Appellant in any way, but that the Appellant was not prudent enough to ensure that before putting up an advertisement, all the information was correct. That the Appellant had a responsibility to ensure that all the information in respect of the pricing of their products was correct before uploading on their online platform. Considering the products were on promotion, any reasonable man would have believed that the Respondent had a special promotion on the items in question hence the price of K2.650. That, therefore, the Appellant did not exercise reasonable care and skill when supplying their services to the Complainant, and thus violated section 49 (5) of the Act.

---

[2] Quoting Black's Law Dictionary, 8th Edition, p. 504.

(d) *Whether there was a "contract" or "term of contract" between an enterprise and a consumer*

With respect to section 53 (1), the Respondent referred to the definition of "contract according to Black's Dictionary, "An agreement, upon sufficient consideration, to do or not to do a particular thing."[3] That the Complainant entered into a contract with the Appellant to supply her with the 28 JayB Solar Led Street Lights and paid a consideration of K74.20.

(e) Furthermore, with respect to section 53 (1), the Respondent determined the question: *Whether the contract or term of contract caused a significant imbalance in the parties rights* as follows:

(i) In defining "imbalance", the Respondent referred to Longman Dictionary of Contemporary English, stating, "a lack of fair or correct balance between two things, which results in problems or unfairness."[4] That in order for courts to determine whether a term is unfair, the courts will consider two things: firstly, if the term has been incorporated into the contract, and secondly if the term covers the loss in question.

(ii) That in considering if the (allegedly) unfair term or terms have been incorporated into the contract, the general rule is that the term must be brought to the attention of the contracting party before or at the time the contract was made. That if the term was not brought to their attention it cannot be said that they had accepted the term and therefore the term will not be part of the agreement. The Respondent's finding was that the Complainant was privy to the Appellant's terms and conditions on their online platform stating, "*If we discover an error in the price or product details of goods ordered or reserved, we will inform you as soon as possible (e.g. prior to the goods being dispatched or in-store prior to the collection of the goods). We will provide you the option of reconfirming your order at the correct price or cancelling it. If we are unable to contact you, we will treat the order as cancelled. If you choose to cancel and have already paid for the goods you will receive a full refund.*" That the terms clearly indicated to the Complainant the redress that the Appellant would provide if it was discovered that there was an error on the price. That, therefore, the terms were incorporated into the contract.

(iii) Regarding whether the term covered the loss in question, the Respondent outlined the options available to the Complainant, per the terms, but that, however, the terms though incorporated into the contract, were unfair as it caused significant imbalance on the part of the Complainant. That the terms caused a significant imbalance in that she had paid for the items as displayed on the Respondent's site but did not receive them on the basis that the Appellant

---

[3] Ibid, 4th Edition, p. 394.

[4] Longman Dictionary of Contemporary English, p. 810.

made a mistake regarding the price. That the term indicated to the Complainant that despite the Appellant wrongly advertising the price of an item and it so happened that a customer purchased that item, and the Respondent realised their mistake, their customer had no right to claim the item despite having satisfied the transaction. That the terms of contract caused an imbalance on consumers as it gave the Appellant leeway to act negligently by wrongly displaying the price on an item and after it had been purchased by a customer deny giving the customer that item.

10. In conclusion, the Preliminary Report contained recommendations for determination of the case, as follows:

    (i) The (Appellant) be fined 0.5% of its annual turnover for breach of section 49 (5) of the Act in accordance with subsection (6), and in line with the (Respondent's) Guidelines for Issuance of Fines.

    (ii) The (Appellant) supplies to the Complainant the 28 Jayb Solar Led Lights with a wattage of 200 that she purchased from them at K2.65 each at a grand total of K74.20 within (10) days of receipt of the Board decision in accordance with section 5 (d) of the Act.

    (iii) The (Appellant) re-writes their terms and conditions and submit them to the (Respondent) for review within thirty (30) days of receipt of the Board Decision in line with section 5 (d) of the Act.

(See pages 40-51 of the RoP)

11. The Respondent served the Preliminary Report on the Appellant with a request for the latter to respond to the findings before the same would be presented to the Technical Committee of the Board (of Commissioners).

The Appellant's response to Preliminary Report

12. The Appellant responded to the findings in the Preliminary Report by letter dated 10th March 2021, in which it stated as follows:

    (a) The Appellant was concerned/disappointed:

        (i) That the investigations omitted comparative computation of figures of purported sale of item arising from the Appellant's inadvertent mistake in pricing error whereas the disparity is so wide in terms of total amount due and owing to the Appellant; despite this the report put the Appellant at an unfair disadvantage.

        (ii) That the report ought to distinguish trade practices, such as Shop Counter Trade differing from online trade, and this omission constitutes a serious flaw as Website use of terms and conditions will vary in application.

(iii) In the Respondent's letter of 5th October 2020, a response was sought only on allegations in respect of breach of sections 49 (5) of the Act whereas the report also brought up section 53 (1), thus taking the Appellant by surprise and depriving it an opportunity to rebut.

(b) That relating to some important findings in the report:

(i) The Appellant's record was clean like an open book, free from any previous violations such as involving section 49 (5) or the latest quoted section 53 (1) of the Act.

(ii) The inadvertent technical pricing mistake of K2.650 instead of K2,650 was genuine irrespective (sic) of benefit.

(iii) The Complainant was privy to the applicable terms and conditions whereof she ought to be aware of the terms of the Appellant's Online Shopping Website context and on this they reckoned that her intent to get any item was subject to procedural process as opposed to reliance on purchase *per se*.

(iv) The Respondent established that the Appellant got in contact with the Complainant and informed her of the pricing error and disclosed to her the correct price, consistent with the Appellant's procedure which she ought to have been aware of.

(c) With respect to findings on (i) *"whether Radian Stores Limited supplied a particular service to the Complainant with care and skill"* (paragraph 33), the finding that "there was evidence that the (Appellant) provided retail service to the Complainant as evidenced by the Complainant's Order Number 410005301 dated 2nd August 2020; and (ii) *"whether there is a "contract" "term of contract" between an enterprise and a "consumer"* (paragraph 37), the conclusion that *"... the Complainant got into a contract with the (Appellant) to supply her with 28 Jayb Solar Led Street Lights and paid a consideration of K74.20 as evidenced by the Complainant's Order Number 410005301 ..."* That in both assessments, the Respondent erred (either due to wrong assumption or if the Appellant had been allowed to respond earlier) to jump to conclusion that the complainant's order was evidently a contract whereas, according to the Appellant, it did not amount to a contract. Referencing the Appellant's Terms and Conditions (earlier outlined in Addendum 5 to its letter in response to the Notice of Investigation), clauses on Orders, Delivery Process, Delivery Options and Delivery Rates, which become operative per disclosed procedural process, namely:

> *"The order placed by you through the Website shall be deemed an offer from you to buy the product(s) specified as per the order to Radian Online ("Order"). On receipt of the Order, the Website will automatically generate an email/SMS confirming receipt of your Order. Your receipt of 'Radian Online order confirmation' email/SMS is only an*

*acknowledgment of receipt of your Order and **does not** constitute an acceptance of your Order by Radian Online.*

Radian Online lists availability information for products on the Website. Please note that the stock situation changes dynamically, you will be informed by email if any product(s) you have ordered is/are out of stock for any reason and an estimated availability date will be provided for when the products will be expected to be in-stock again. Subject to availability of the product(s) ordered, Radian Online will confirm its acceptance by SMS confirming the dispatch of the product(s) to your address/store of choice as specified in your Order ("Dispatch SMS"). The Order shall be deemed accepted by Radian Online on your receipt of the Dispatch SMS, failing which the order will be cancelled.

You shall have the right to cancel your order any time prior to your receipt of Dispatch SMS without any liability. Any cancellation after receipt of Dispatch SMS shall be subject to reimbursement of 10% charge of total invoice value ("cancellation Charges") to cover the cost of expenses (including shipment charges) incurred by Radian Online. This charges may be waived at the sole discretion of Radian Online." **(Refer to Terms and Conditions in Addendum 5 to letter of response to Notice of Investigation, at pages 32–33 of the RoP.)**

(d) That, therefore, from the Website Terms and Conditions, it can be clearly seen that the Complainant's Order Number 4100005301 assigned and received via the Radian Online Order Notification email dated 2nd August 2020 is in actual fact merely an acknowledgment of receipt of the Order and did not constitute an acceptance of the Complainant's offer. That the Appellant dispelled any implication or inference as mistakenly drawn as if there arose a binding contract with the Complainant whereas not at all.

(e) That it is common doctrine that when a trader advertises a product/service for sale, the consumer is given "an invitation to treat", which means that the consumer is invited to make an offer to buy. Once and if an offer is accepted via procedure put in place as aforesaid, and unless via completion thereof, a binding contract may be formed and only thereafter a consumer can insist on claims of items per advertisement, except the current situation obviously differed.

(f) The Appellant provided various scenarios whereby consumers place orders and later cancel the same without paying, or by denying online/electronic payment or by asking for refund, to which the supplier obliges because no binding contract has been entered into. That if traders were to claim that there are binding contracts in such scenarios, then it would be extremely bad for consumers.

(g) That, further, in its terms outlined on the Website, the Appellant took great care and skill (which should not be overlooked by focussing on the inadvertent error), inter alia, by the following:

(i) In likelihood of unforeseen cases of inadvertent pricing errors or out-of-stock situations, the manner of actions the Appellant would take to resolve those issues before entering into contract or after entering into contract.

(ii) That the consumer should discontinue proceeding with use of the Appellant's online shopping service or to make an offer or to enter into contract with the Appellant should she/he find the terms and conditions unfair or imbalanced.

(iii) Accurately provided to the Complainant, the product specifications, the product image/illustrations, the state of the products (New or Used) and the warranty applicable to the products she may have wished to offer to buy.

(iv) Accurately provided to the Complainant, via Facebook social media page on 19th July 2020, the WAS and NOW prices for the 3 solar streetlights with built-in panels (especially the 30W, 60W and 90W models) advertised and purported to have been seen by the Complainant and which influenced his (sic) intention to place an order.

(v) Accurately provided to the Complainant, via page on Website where the solar lights were listed on promotion, the accurate prices and details of the remaining 8 other solar street lights which were part of the same promotion.

(h) That, it would be very unfortunate for the Respondent focus solely on the inadvertent error on the one item, ignoring all the information and procedures provided to the Complainant before making the offer to buy, accurately and with reasonable care and skill.

(i) Further, that for argument sake, even if pricing were the sole litmus test, it ought to be noted that besides the inadvertent pricing error there were list of others nine different models of streetlights, accurately advertised on the Website (inclusive the 200W in question) and a reasonable man would or ought to have raised query or notified the Appellant on the figures.

(j) The Appellant submitted a Table, allegedly reflecting data as at 2nd August 2020 coinciding with when the Complainant visited the Website, pointing to the "WAS" price and next to an item the "NOW" price. That, on average there was a 29% discount on the products, and thus any reasonable person would have either raised a query or notified the Appellant about the 200W solar street light which was uniquely discounted at a whopping 99.92%, which made it even cheaper than the smallest entry level solar streetlight with separate panel (20W model) priced at K1,050.00, yielding 99.97% cheaper. The Appellant produced other Tables; all the Tables as shown below.

SAVING'A NA SOLAR 1 - 19th July to 31st August 2020

Item number	Product name	Retail price	Promo price	Saving to consumer	Price reduction %
D-LEDSTLSOL-30W	All-in-one solar street light 30W	750.00	500.00	250.00	33%
D-LEDSTLSOL-60W	All-in-one solar street light 60W	1,000.00	600.00	400.00	40%
D-LEDSTLSOL-90W	All-in-one solar street light 60W	1,250.00	800.00	450.00	36%

SAVING'A NA SOLAR 2 - 1st Aug to 31st Aug 2020

PB-SOLSTL-P-20W	Solar street light with Panel 20W	1,315.00	1,050.00	265.00	20%
PB-SOLSTL-P-30W	Solar street light with Panel 30W	1,625.00	1,250.00	375.00	23%
PB-SOLSTL-P-50W	Solar street light with Panel 50W	1,940.00	1,250.00	690.00	36%
D-LEDSOLSTL-100W	Solar street light with Panel 100W	2,315.00	1,750.00	565.00	24%
D-LEDSOLSTL-150W	Solar street light with Panel 150W	2,750.00	2,000.00	750.00	27%
D-LEDSOLSTL-200W	Solar street light with Panel 200W	3,500.00	2,650.00	850.00	24%

PRICE GLITCH DUE TO TECHNICAL ERROR ON WEBSITE ONLY (DID NOT AFFECT PHYSICAL STORES

D-LEDSOLSTL-200W	Solar street light with Panel 200W	3,500.00	2.65000	3,497.35	99.92%

(k) The Appellant submitted that pricing errors, particularly by online retailers was not uncommon and referred to the following examples:

(i) Pricing error made by Amazon who cancelled orders for **Hewitt-Packard iPaq** handheld computers, which had been priced at £7.32 instead of the normal selling price of £275. (https://www.pinsentmasons.com/out-law/guides/amazons-pricing-error).

(ii) **Next** mistakenly sold £1198 sofas for £98 after online discount glitch. **Next** then discussed with their local Trading Standards office how to deal with any orders that had been placed at the wrong price and that they were within their rights to 'cancel the order at any time prior to dispatch'. That according to their terms and conditions, Next reserved the right to cancel an order at any time prior to dispatch.

(https:/www.thismoney.co.uk/money/news/article-2088281/Next-mistakenly-sells-1-198-sofas-98-online-discount-glitch.html)

(iii) HP apologised after an error on its website let shoppers buy expensive laptop computers for less than £2. One device was listed with a previous sale price of £2,378, but was "reduced" to £1.58 (https://www.bbc.com/news/technology-36941960).

(j) Further, that in many cases, online shopping traders are unaware of the issue until they notice their sales numbers suddenly increased, but their revenue has not. That it can often take days for the problem to be noticed. That there are many possibilities that lead to the incorrect pricing; human error, miscommunication, or even a technical error in the internal or external software used by the Appellant's Website. That as the Respondent noted, this was a genuine error, an unfortunate error which the Appellant noticed and acted on as quickly as possible, thus the Appellant found it odd for the Respondent to find the Appellant in breach of section 49 (5) under pretext that *"it was our responsibility to ensure all the information with regards to pricing of ... products were correct before uploading it on ... online platform"*. The Appellant referenced paragraph 35 of the report, and submitted that "any human ... may falter, arguing that therefore the Respondent's finding that the inadvertent pricing mistake was genuine and did not benefit the Appellant in any way ought to prevail. That, this was especially in view of the fact that online shopping is a fairly new phenomenon in Zambia and clear cut laws regulating online shopping facilities or services (referred to as 'distance contracts' in some countries) were still anticipated. Further, that such laws would protect the interest of both enterprises and consumers especially in the context of inadvertent price errors. The Appellant made reference to what they called international Best Practices and Policies on inadvertent errors as seen on websites such as those of Amazon. The Appellant argued that the errors were mutually understood, not disputed by their respective consumer protection statutory bodies.

(See Appellant's submissions in response to Respondent's Preliminary Report (letter) at pages 53-58 of the RoP)

13. Following these submissions, the Respondent produced another report, also dated March 2021, in which they reflected extensively, almost entirely, the submissions they had received from the Appellant on the Preliminary Report (at pages 65-72 of the RoP). In the Report, the Respondent did not, in its assessments and analysis, address the Appellant's submissions made in response to its Preliminary Report. The Report reflects exactly the same recommendations as in the Preliminary Report.

(See Report at pages 59-79 of the RoP.)

14. The Board of Directors, in their Decision dated 10th June 2021, repeated the contents of the said Report and issued directions per the recommendations contained in the Preliminary Report and the Report. **(See the Decision at 83-104 of the RoP)**

APPEAL AND HEARING OF THE APPEAL

15. The Appellant filed, on 19th August 2021, Notice of Appeal against the whole Decision of the Respondent on three grounds, which we outline later in the part in which we deal with "CONSIDERATION AND DETERMINATION OF APPEAL". The Appellant accompanied the Notice of Appeal with an Affidavit in Support, contents of which we likewise outline later. We observed that in the Affidavit in Support, the deponent, while reproducing some documents that were presented to the Respondent and form part of the RoP, also introduced documents that were not produced during the proceedings before the Respondent. Specifically, these are internal emails in Exhibit marked "MA1". Though we do not make it a habit to allow new evidential material that was not presented in the proceedings from which an appeal is lodged, we did not take issue with the Appellant. This is because in our view, the emails do not in any material way deviate from contents of other documents in the RoP, and the Respondent did not raise any objection.

16. The Respondent filed Grounds in Opposition to Grounds of Appeal, and affidavit in opposition to the appeal, in which the Respondent contested certain facts alleged in the Affidavit in Support. We deal with the Respondent's Grounds in Opposition and affidavit in opposition later in the part in which we deal with "CONSIDERATION AND DETERMINATION OF APPEAL", indirectly as part of the Respondent's submissions.

17. The Appellant and the Respondent opted not call any witnesses and instead filed arguments/submissions in support, in opposition to, and in reply, respectively. The latest arguments were filed by counsel for the Appellant on 3rd December 2021, in line with the order of directions we issued at our sitting on 4th November 2020. However, in the course of reviewing the proceedings, we found that certain documents we needed for determination of the appeal were missing from the RoP. These were the letter the Appellant allegedly sent to its bank instructing it to refund the money it had received from the Complainant and the bank statement reflecting the refund, which documents were referred to as Addendums to the Appellant's letter of response to the Notice of Investigation (at pages 15-16 of the RoP). We also needed to call the Complainant to testify concerning certain facts.

18. On 1st February 2022, we issued an Order to Produce, directing the Appellant to produce the two said documents with the Respondent's consent, seeing that the Appellant had purportedly produced the documents to the latter. We also issued summons to the Complainant to appear before us as a witness so she could testify to certain facts concerning which we needed clarity. We sat on 15th February 2022 at which session the Complainant and we granted the Appellant more time to produce the documents.

19. However, the Appellant through its Advocates not only produced a document called "Supplementary Record of Proceedings" out of time, but the same was not done with the consent of the Respondent, per the terms of the Order to Produce. On 31st March 2022, we issued Further Order and Directions expunging the "Supplementary Record of Proceedings" and granting liberty to the Appellant to apply to produce pursuant to Rule 18 of the Competition and Consumer Protection (Tribunal) Rules, S.I. 37 of 2012. This was served on the parties on 12th April 2022. Seeing that the ten (10) days within which the application to produce (if any) was to be made has expired, we proceeded to deliver our judgment.

CONSIDERATION AND DETERMINATION OF APPEAL

20. We have considered the three grounds of appeal, as well as the arguments by counsel for the respective parties, for which we are grateful. We have also evaluated the evidence presented in the RoP. We proceed by dealing with Ground Two, which is procedural, before coming to Ground One and Three, which are substantive.

Ground Two

21. *Ground Two* states, "The *Commission erred in law and in fact by invoking section 53 of the Act which was not a subject of any investigations conducted by the Commission.*" In connection with this ground of appeal, counsel for the Appellant in their arguments have referred us to section 55 (3) of the Act, which states,

> *"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)

22. Counsel for the Appellant have also referred us to the case of **Mutantika v. Chipungu SCZ No. 13 of 2014**, in which the Supreme Court held, *"Both provisions are couched in mandatory manner as each uses the word "shall". The two rules are therefore not regulatory as they do not give the Court discretionary power."* Further, submitted that a Notice of Investigation is akin to a charge sheet; that it lays out the alleged offences so that the accused person knows the offence alleged against him. And that he can only properly defend himself when he knows what is alleged against him. That therefore failure to indicate the subject matter in the Notice of Investigation is fatal; hence the Respondent has no power to punish for an offence that it did not indicate in the Notice of Investigation, but which the Appellant only came to know about from the Preliminary Report. That the Respondent ought to have issued another Notice of Investigation.

23. In opposing the ground of appeal, counsel for the Respondent submitted that during the investigation the Respondent decided that the case also bordered on section 53 (1) of the Act, and that the said provision was brought to the attention of the Appellant in the

Preliminary Report. Counsel referred us to our holding on the subject matter in the case of **Italian School of Lusaka v. Competition and Consumer Protection Commission and Sajeev Nair 2016/CCPT/017/CON (the Italian School of Lusaka case)**.

24. In considering this ground of appeal, we have recalled that this is an issue we have had occasion to determine in a previous case where it was raised. This was in **the Italian School of Lusaka case**, referred to by counsel for the Respondent. The argument raised by the appellant in that case was to the effect that the provision in question which the Respondent in its preliminary report purportedly found the appellant to have violated was not a subject of investigation per the authority for investigation granted to the officer concerned in line with the Respondent's procedures and was not contained in the Notice of Investigation. In light of the facts of the issue being raised in the present case being on all fours with the said case, we reproduce extensively our holding in the said case:

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 2011provide 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. …….. ….

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. ....

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."* **(See paragraphs 28-30; 32-39; and 41-42)**

25. Clearly the provisions of the Act and the related Regulations differ in content and context from the provisions that the Supreme Court had to deal with in the case of **Mutantika v. Chipungu**, cited by counsel for the Appellant. For instance, in the present case, as in **the Italian School of Lusaka case**, which we determined, (i) the Notice of Investigation is required to be issued as soon as practicable upon opening an investigation, stating the subject matter and purpose of investigation per section 55 (3); and (ii) the Respondent has the discretion whether or not to use the Form provided by Regulation 11 issued pursuant to section 55 (3), i.e., stating the provisions of the Act allegedly violated.

26. In the present case, the Notice of Investigation states, *"The Competition and Consumer Protection ... received a complaint from Ms. Mutale Wakunuma ("the Complainant") against Radian Stores Retail Limited ("the Respondent") which appears to be in breach of section 49 (5) of the Competition and Consumer Protection Act, No. 24 of 2010, ("the Act"). Specifically, the Complainant alleges that ..."* and outlines the alleged facts. Contrary to counsel for the Appellant's argument comparing the a Notice of Investigation issued under the Act to a charge sheet, our view is that, unlike a charge sheet, which is drawn following conduct of an investigation, a Notice of Investigation issued pursuant to section 55 (3) cannot be drawn with precision because the full facts and circumstances are yet to be established by the competition authority. It is sufficient if the person being investigated has been informed of the subject and purpose of investigation by the alleged facts and indicative breach, enabling an evaluation of the possible scope of investigation and provisions of the law that the facts may invoke. The facts and circumstances of a case may in the course of an investigation seem to relate to more provisions, or relate to a provision, other than that earlier outlined in the Notice of Investigation as the provision which "appeared" to have been violated. This is especially so given the context of the law in question, which has several provisions for protection of consumers, of which more than one may be invoked depending on the established facts and circumstances of the case.

27. In light of all the considerations we have outlined above, it would be superfluous and practically absurd to expect the Respondent to issue another Notice of Investigation, pretending that the Respondent has opened another investigation, upon a preliminary finding of fact in the course of investigation invoking an allegation of breach a violation not earlier indicated in the Notice of Investigation. In our view, the practical interpretation and application of section 55 (3) ought to focus on the objective, that is, affording the person who is being investigated to know the subject matter (not necessarily the full scope of the provisions of the Act that are likely to have been violated) and to be heard as early as practicable once the investigation has started. The Respondent fulfilled this by way of the Notice it issued upon opening the investigation and later by bringing its preliminary findings, which included an added allegation that the Appellant had also violated section 53 (1) of the Act, to the Appellant's attention and soliciting a response thereto. The Appellant respondent extensively, as shown in the RoP, which response we have outlined in summary in the background to this judgment.

28. The Supreme Court case referred to by counsel for the Appellant can be distinguished from the present case, particularly the context of the respective laws, as we have just outlined. The Supreme Court case dealt with a matter in which the appellants' counsel failed to file their Heads of Argument as required by the Supreme Court Rules and the appellants and counsel did not appear at the hearing of the appeal. The appellants applied to the Court to restore the appeal (which the Court had dismissed) to the active cause list. The Court stated that the Court had dismissed the appeal for *"(i) the failure to file Heads of Argument contrary to Rule 70 (1) and (ii) Non-appearance of both the Appellants and their Counsel from Court at the hearing contrary to Rule 71 (1) of the SCR."* The Court went on to state:

> *"As reflected in the Ruling, the Court also took into account the fact that the Appellants and their Counsel were aware of the hearing date as they had in fact, been reminded in writing of the hearing date and the need to file Heads of Argument by the learned Counsel for the Respondent. The Court also noted that the Record of Appeal was filed as far back as June, 2012.*
>
> *On the failure to file Heads of Argument and the Appellants' explanation that they did not know the reason why their Counsel did not file the Heads of Argument and their earnest plea that they should not be prejudiced by the default, negligence and/or incompetence of their Counsel, our response is that Rules 70 (1) of the* ***SCR*** *and 58 (5) as amended by Statutory Instrument No. 26 of 2012 are mandatory. Both provisions are couched in a mandatory manner as each uses the word "****shall****". The two Rules are therefore, not regulatory as they do not at all give the Court discretionary power. The Rules provide, respectively, as follows:-*
>
> > *"58 (5) The appellant shall file in the Registry thirteen hard copies of the record of appeal, including an electronic copy thereof, together with the heads of argument."*
> >
> > *"70 (1) An appellant or respondent who will be represented by a practitioner at the hearing of the appeal shall prepare a document setting out the main heads of his argument together with the authorities to be cited in support of each head. (Underlining ours for emphasis only)."*

29. In particular, the Court held that breach of Rule 58 (5) was fatal to the appeal. In so doing, the Court took into account that counsel had been reminded of the need to file the heads of argument and noted that the Record of appeal was filed as far back as 2012. It is obvious that filing the heads of argument was mandatory and that failure to do so was fatal to the appeal. The defect had not been cured despite counsel having been reminded of the need to file heads of argument and counsel did not appear at the hearing of the appeal, for which short-comings they had no excuse. A mandatory procedural requirement if not complied with can be fatal if the defect is not cured. In the present case, there it is not in dispute that the Notice of Investigation, which is mandatory, was actually issued *as soon as practicable, upon opening the investigation.* The Notice of Investigation indicated the subject matter and the purpose of the investigation, which in our view was sufficient. That is, a complaint against the Appellant which (at that stage of the investigation) appeared to be a violation of section 49 (5) of the Act.

30. Further, as we said in **the Italian School of Lusaka case**, even assuming the investigation was conducted in breach of section 55 (3) to the extent that the Notice of Investigation did not include an allegation that it appeared that section 53 (1) had been breached, the Appellant having been given an opportunity to be heard (and having in fact been heard) on the alleged violation of section 53 (1), evidence gathered in the investigation (assuming it was illegally obtained evidence) is admissible, if relevant to the case. We cited a number of authorities in this respect. The Act does not invalidate evidence unearthed in an investigation if it reveals a violation of the Act other than that alleged in the Notice of Investigation. Grounds Two of appeal therefore fail.

Ground One

31. We proceed to consider Ground One of appeal which states, *"The Respondent erred in law and fact by holding that Radian Stores contravened section 49 (5) of the Act."* Under this ground of appeal, counsel for the Appellant have submitted, *inter alia*, that in July 2020, the Appellant ran an online advertisement for sale of street lights specifically the 30W, 60W and 90W with inbuilt solar panels. That on 1st August 2020, the Appellant ran another advertisement for upper range models street lights, particularly 20W, 30W, 50W, 100W, 150W and 200W.

32. Further, that on 2nd August 2020, the Appellant received an order from the Complainant for 28 200W street lights at the advertised price of K2.650. That this was a non-working day and before payment was processed, the Appellant communicated the anomaly to the Complainant by phone call on 4th August 2020 and by email dated 11th August 2020. That the Complainant was informed that the order could not be processed due to the pricing error. That the Respondent later issued a report in which it adjudged that the Appellant contravened both sections 49 (5) and 53 (1) of the Act and ignored various issues raised by the Respondent. Counsel for the Appellant asserted in their arguments that these facts are undisputed. We, however hasten to point out that this assertion is inaccurate. We later deal with some of the outlined facts that are in dispute or contradict evidence or statements on record.

33. Counsel for the Appellant have argued that the Respondent erred in its holding because (i) there was no supply of a service; and (ii) even assuming there was a supply of service, the Appellant was not negligent (i.e., the Appellant did not supply the service without reasonable care and skill). Counsel referred to the definition of "services" in the Act, referred to by the Respondent in its reports and Decision, *"include the carrying out and performance on a commercial basis of any engagement, whether professional or not, other than the supply of goods, but does not include the rendering of any services under a contract of employment;"*. Counsel haveargued that supply of goods is expressly excluded from the definition, and cannot therefore be a subject of the offence under section 49 (5) of the Act. Counsel, however, also referred to the definition of "service" in the Act, *"includes the sale of goods, where the goods are sold in conjunction with the rendering of a service;"* and submitted that where

the goods are sold in conjunction with a service, the sale would be a service to which section 49 (5) would apply.

34. Counsel have gone further to argue that in the present case the transaction was only a supply of goods online, without a service. That since this transaction was a sale of goods, which did not materialise, section 49 (5) does not apply since the Appellant cannot be held to have been negligent in the supply of a service when in actual fact it did not supply any service.

35. Counsel for the Appellant have further argued that even assuming there was a supply of a service (which is denied), the supply would begin from the time the order was made; that before that there was no relationship of consumer and supplier between the Appellant and the Complainant and the Appellant owed no duty of care to perform a service with reasonable care and skill to the Complainant. That in this regard, since the error in the pricing of the goods was made before the order was received, the Respondent erred in holding the Appellant in contravention of section 49 (5).

36. Furthermore, that the advert was merely an invitation to treat, meaning that the Complainant's order was an offer which was not accepted by the Appellant. That since there was no contract, the Appellant did not provide a service to the Complainant.

37. Counsel have further argued that the Appellant was not negligent thereby contravening section 49 (5). That, in this regard, the Respondent made a finding of fact that the error was genuine and did not benefit the Appellant in any way, which should have had an impact on the determination of whether or not the Appellant was negligent. That, in their view, this finding meant that the error was made carelessly and that a reasonable person would not make that error. Citing the case of **Eyre v. Measday [1986] All E.R. 488**, counsel have submitted that the objective test of reasonable care and skill is the level of care that a reasonable person would exercise in such circumstances.

38. Further that since the error was genuine, any reasonable person acting in the circumstances of the Appellant would make the same error. That the error in this case is that the price for the street lights was listed as K2.650 instead of K2,650; that this involved putting a full stop instead of a comma, hence the finding that it was genuine; that in online transactions any reasonable person can make an error. Further, that that is why those who are prudent have designed online terms and conditions to address such issues.

39. That in other jurisdictions such as South Africa and Europe, a supplier is not held negligent where there is a huge discrepancy between the advertised price and the original price, the rationale being that an average consumer who is reasonably well informed and reasonably observant would know that the price was advertised in error, and cited the holding of the European Court of Justice in the case of **Gut Springenheide GmbH and Rudolf Tusky v. Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung Case C-210/96**, that *"In order to determine whether a description, trademark or promotional description or*

statement is misleading, it is necessary to take into account the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect." Further, cited the English case of **Hartog v. Colin & Shield [1939] 3 All E.R. 566,** in which the High Court held that *"The plaintiff could not reasonably have supposed that the offer expressed the real intention of the persons making it and must have known it to have been made by mistake. The plaintiff did not by his acceptance of the offer make a binding contract with the defendant."*

40. Counsel further referred us to a South African Consumer Goods and Services Ombudsman Case, No. 2014 ZACGSO 16, in which it was held, *"The supplier is not bound to provide the consumer with a couch at the incorrectly advertised price. Using the reasonable consumer test, the advertisement published in a catalogue by the supplier was not misleading because of the large discrepancy with the actual price."* The Ombudsman in its analysis gave an extensive exposition of the South African consumer protection law concerned and the position of the law in other jurisdictions. We shall refer to some of this material later in our determination of the question whether section 49 (5) was breached.

41. Counsel have submitted that in light of these decisions, the reasonable consumer test ought to be considered in the circumstances of the present case, the test being whether a reasonable consumer would have noticed that there was an error; so that if so then the Appellant should not be held to have been negligent. That the price in issue was advertised at K2.650 when in fact the original price was K2,650, yielding a huge discrepancy, and that therefore any reasonable consumer would have noticed that there was an error in the pricing. That the Complainant knew that it was an error, but instead deliberately chose to take advantage of the error. Further, that the Respondent did not take all these factors into account, thereby falling into error.

42. Counsel have also referred us to the terms and conditions put up by the Appellant relating to its online advertising on its website, which we have earlier outlined in the background to this judgment, stating, *"If we discover an error in the price or product details of goods ordered or reserved, we will inform you as soon as possible (e.g. prior to the goods being dispatched or in-store prior to the collection of the goods). We will provide you the option of reconfirming your order at the correct price or cancelling it. If we are unable to contact you, we will treat the order as cancelled. If you choose to cancel and have already paid for the goods you will receive a full refund."* That the Complainant ignored the said terms and conditions and instead launched a frivolous complaint.

43. In response to the Appellant's submissions, counsel for the Respondent have submitted that section 49 (5) makes it mandatory for an enterprise to *"supply a service to a consumer to do so with reasonable care and skill or within reasonable time, if a specific time was agreed, within a reasonable time around the agreed time."* In terms of the standard of care, counsel cited the holding in the case of **Blyth v. Birmingham Waterworks Company (1856) 11 Exch. 78,** *"Negligence is the omission to do something which a reasonable man, guided upon these considerations which ordinarily regulate the conduct of human affairs would do, or doing something*

which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done."

44. Counsel also referred us to cases previously decided by this Tribunal, namely; **Southern Cross Motors v. Competition and Consumer Protection Commission 2013/CCPT/002/CON,** wherein the concepts of "duty of care" and "reasonable (care)" in the carrying out of a contractual obligation were discussed; and the case of **Imbwe Motorways Limited v. Competition and Consumer Protection Commission 2014/CCPT/011/CON,** in which the Tribunal determined that in order to attribute negligence there ought in the first place be a duty of care, and that the complainant suffered injury as a result of the breach. Counsel have submitted that in the present case, (i) the Appellant has an online platform on which it runs promotions and provides the prices and mode of payment, and therefore the expectation is that the online service must be provided in line with laid down standards. That the displayed prices are the correct prices; these being the prices which guide the consumer in making purchasing decisions. That the Complainant relied on the displayed price. That therefore the Appellant's backtracking on constituted failure to perform its service with care and skill and amounted to breach of the statutory standard provided in section 49 (5).

45. Counsel for the Respondent have further argued that the Appellant had a duty, once the Complainant placed the order, to sell and deliver the goods to her, but it resiled from performing that duty and instead relied on its online terms and conditions on *"price and product details errors"*. That the term relied upon offended the expectation as to the price and was in breach of the duty of care. And that the Complainant suffered injury when the Appellant cancelled the order.

46. Counsel have gone on to state that in its response dated 7th October 2020 at paragraph two on page 15 of the RoP, the Appellant attached an advert dated 19th July appearing at page 17 being a promotion, showing solar street lights for 30W priced at K500; 60W priced at K600; and 90W priced at K800. Further, that page 18 of the RoP shows an advert of more solar street lights dated 2nd August 2020 and that page 19 shows pan advert of all in one street lights on special offer dated 6th August 2020, specifically the Jayb solar street lights with panel as follows: 100W K1,750; 150W K2,000 and 200W K2,650.

47. Counsel have submitted that on the other hand, the Complainant in her letter of complaint at pages 3 and 4 of the RoP attached a screenshot of the Appellant's advert as at 2nd August 2020 and that the advert at page 5 shows the street light in issue Jayb solar led street light 200W; 100W and 60W on promotion with old prices replaced with new ones. That the displayed price for the street light in issue was K2.65, at which the Complainant placed an order as shown in lines 20-33. That, however, in its submissions of 7th October 2020, the Appellant indicated the price as K2.650 as opposed to K2.65. That according to the Appellant, the price ought to have had a comma as opposed to *"a dot as is distinctly visible to the eye"*, yet in the adverts produced by the Appellant, none of them showed the price of

K2.650. Further that according to the Appellant, they noticed the error and the technical team rectified it as shown at page 19 of the RoP. That the Appellant did not produce any document showing the alleged error, hence a contradiction between what was submitted by them and what was submitted by the Complainant.

48. Further, that in establishing the actual price displayed by the Appellant for the item in issue, the Respondent referred to pages 20-22 of the RoP, which is an email from the Appellant to the complainant confirming receipt of the order. That the order further showed that the Complainant purchased the street lights in issue at K2.65 each as opposed to K2.650. That in its investigation, the Respondent in good faith noted that the error was genuine in the sense that the Appellant did not derive a benefit from the error. That, however, this did not negate the Appellant from having abrogated section 49 (5), and neither did giving the Complainant the option to purchase another product of the same value or a refund. Counsel referred to this Tribunal's holding in the matter of an application for a mandatory order in the case of **Competition and Consumer Protection Commission v. Yambe Driving School 2017/CCPT/006/CON**, wherein it was held, inter alia, that *"the act of refund ... does not absolve the Respondent of the breach"*, and argued that use of the term "shall" assigns strict liability. Counsel also referred to a case in which this Tribunal held concerning violation of section 51 (1) mandatorily prohibiting an enterprise from charging a higher price than displayed on a product or service. The Tribunal held in the case of **Spar Zambia Limited v. Danny Kaluba and Competition and Consumer Protection Commission 2016 /CCPT/009/CON (the case of Spar Zambia Limited and Danny Kaluba)** (the Spar case)**:**

> *"In a supermarket store, such as the Appellant's, unsuspecting consumers can be enticed to buy a product or service by the lower price displaced only to pay a higher price at the till. While some consumers may notice the price difference, others may not. More broadly, there is an element of distortion of competition when a seller purports to be selling a product or service at a lower price than others in the market. Ultimately, there is a real risk of an increased turnover in volume and numbers and value at the expense of consumers and to the detriment of competition, thereby defeating the policy behind the legislative provision.*
>
> *Furthermore, we are of the view that the said public policy and the suppression of the mischief would be defeated if the offence was not one of absolute liability because implementation of the requirement of the law is exclusively a responsibility of the Appellant and the 2nd Respondent is not privy to the process by which the Appellant secures adherence to the law. Whether or not the act in issue was committed deliberately by negligence or honest mistake despite all the diligent efforts are matters within the exclusive knowledge of the Appellant.* (Underline ours)"

49. That, therefore, the error being within the exclusive knowledge of the Appellant, the burden cannot be shifted to the consumer to be aware of the possibility of the Appellant to make errors in pricing. That the Appellant owes consumers in the country a duty, as it provides its retail services online and physically, to do so with reasonable care and skill. That in the case of **Southern Cross Motors**, earlier referred to, the Tribunal stated at page 16, *"... we would also like to make a general observation about the levels of service delivery in the country. We would*

like to urge service providers of their duty to provide high quality services and to be responsible to the needs of consumers."

50. In reply, counsel for the Appellant argued that first and foremost counsel for the Respondent had not responded to a number of issues they had raised, notably (i) that section 49 (5) was not applicable because there was no supply of service and that even assuming there was supply of service, the supply began when the order was received and not before that, when the error was made. Further, in reply to the Respondent's submissions, that the law of negligence required that it be demonstrated that the Complainant suffered damages, citing the Supreme Court in the case of **Mwansa v. Zambian Breweries Appeal No. 153 of 2014 (2017) ZMSC 42,** and in the case of **Sata v, Zambia Bottlers SCZ No. 1 of 2003**. And that the mere fact that the Complainant did not buy the street lights did not amount to damages.

51. Further, that on duty of care, counsel on both sides were in agreement that this was only created when the order was placed, as an online advertisement is only an invitation to treat extended to the whole world and thus before an order is placed, no duty of care exists. Counsel repeated that after the order was received, the Appellant's conduct was flawless as it informed the Respondent of the error immediately and the options. Further, reiterated the objective test of reasonableness, and whether the Complainant could be said to have failed the standard of reasonableness. Citing the holding in the case of **Chwee Kin Keong and Others v. Digilandmall.Com Pte Ltd [2001] 1.S.L. 502 (C.A.),** *"From these exchanges, between the appellant and Desmond, the former knew that the offer of $66 per printer was too good to be true and that it must have been a mistake. The first appellant wanted to buy more to make more easy money. He even asked Desmond why the latter only bought three printers. Eventually, when the first appellant managed to obtain access into the HP Website, he placed an order for 100 printers. We agree with the trial judge when he held that the first appellant was "fully aware of the likely existence of an error ...."* Counsel argued that no reasonable consumer can expect to buy these street lights at K2.65 and that the Complainant obviously knew there was an error and wanted to take advantage, hence the order for 28 solar street lights. That the case of Yambe Driving School could not assist the Respondent's case because the present case had nothing to do with refunds.

52. In order to determine this ground of appeal, we have found it necessary to first of all determine certain questions of fact that are either explicitly in contention between the parties or the Respondent did not reach findings in respect thereof and/or the Respondent's findings appear not to be consistent with the RoP. We have addressed the facts we need to establish below in the form of issues or questions.

    (a) On what dates the Appellant's first, second and third online advertisements for its products were run and what products were advertised and at what prices, as well as what date the Complainant placed the order.

53. Contrary to counsel for the Appellant's submission, contradictory claims have been made between submissions by the Complainant and the Appellant and the two parties' respective counsel on these issues. According to the letter of complaint, this is what transpired:

> *On July 19, 2020, Radian online issued an advertisement titled "Savingá na Solar" with a range of Solar lights on offer, they opted to purchase a number of units of 200 watts street solar lights which they advertised at K2.65. They made payment and selected in-store pick up from their Manda Hill store.*
>
> *A week later, they visited the store to check on their consignment as the online update on their purchase was not changing from processing to complete. Manda Hill store informed them that they had not received any stock for them but that they would follow up with their online department and revert by end of day. They never heard back from them. After that, on August 2nd, Radian online proceeded to issue a "Savingá na Solar 2" with different prices on the same pieces they had previously advertised. On 11th August, they received an email informing them that there had been error and that they should refer to the terms and conditions on pricing errors. They were then given an option to get a refund or purchase something of equivalent value. Having not responded to the email, they received a call offering them the same options. They requested a meeting with their management as they felt the process had not been handled correctly. This was the last they heard from them.*

54. The Complainant also alleged that the advert was circulated through their WhatsApp group on 18 July, 2020. That up to the advert of August 2nd which implied a second offering rather than correction, there was no recall or correction of the advert. She attached some screen shots that she hoped might assist the Respondent in its investigations. The claim was reflected by the Respondent in its background in the RoP, except that to the alleged visit a week later, the report adds 26th July 2020 (which date we have not seen where it came from). We have looked at the screen shots at pages 5-6 of the RoP and we have seen the Appellant's adverts of JAYB SOLAR STREET LIGHT 200W with price of K2.65 and old price of K3,500; JAYB SOLAR STREET LIGHT 100W with price of K1,750.00 and old price of K2,315.00; JAYB SOLAR STREET LIGHT ALL IN ONE with price of K600.00 and old price of K1,000.00. The page has three messages at the bottom (in small and larger letters): *"Your offer has been successfully created! Your order # is: 410005301. We will email you an order confirmation with details and tracking info inside."*; *"You can track your order by creating an account."*; *"Your order has been successfully created! Your order # is 410005301. We will email you an order confirmation with details and tracking info inside. A letter with further instructions will follow."*

55. We have not seen the date of the said advert and the messages. Since these are copied documents, we cannot assume that they were generated on the same dates. However, we have observed that the Appellant's email dated 2nd August confirming the order reads, *"YOUR ORDER # 410005301 Placed on 2, 2020, 7:53:58 P.M."* Therefore, we conclude, in the absence of any evidence supporting the Complainant's claim that the online system delayed responding, that the order was placed on 2nd August 2020

56. On the other hand, as we have outlined in the background part of the judgment, the Appellant claimed in its letter of 7th October 2020 as follows (concerning which we have made some observations insert):

    (i) That the Appellant *"issued an online advertisement to stimulate the promotion"* on Solar streetlights on 19th July 2020 on its Facebook, titled *"Savingá na Solar"(referenced as Addendum 1 to the letter, which is the online advertisement issued on 19th July 2020 lasting up to 15th August 2020, but which Addendum did not reflect the product in issue* (**JAYB Solar Led Street Light 200W**), *but only 30W, 60W and 90W).***(See Addendum 1 at page 17 of the RoP)**

    (ii) That in response to customers who sought upper range models, the Appellant on 3rd and 6th August 2020 once more via same Facebook page ran an advertisement titled *"Savingá na Solar* 2" maintaining the three street lights (referred to in Addendum 1) at the same prices, but also adding a totally different range of solar street lights which were not with built in solar panels but with separate panels, mid and upper range (20W, 30W, 100W, 150W200W. (We observe that the second advert purportedly run on 3rd August 2020 only shows one solar street light without the price despite the caption saying *"Due to popular demand we have added more Solar Street Lights!")* (pages 18-19 of the RoP). **(Referenced as Addendums 2 and 3 to the Appellant's letter, at pages 18 and 19 of the RoP, respectively).**

    (iii) That after the second promotion (which, according to subparagraph (ii) above and Addendum 2 to the letter, at page 17 of the RoP, was advertised on 3rd August 2020), the Appellant received an order from the Complainant sent on 2nd August 2020 for 28 x 200W Solar streetlights whereby the Appellant had on actual website product page put unit price of K2.650 instead of the correct promo price of K2,650, as there ought to have been a coma instead and not a dot, an error which was duly noticed on 3rd August 2020 (we have not seen the price of K2.650).

57. In its letter of 10th March 2021, in response to the Respondent's Preliminary Report, the Appellant submitted a Table, allegedly reflecting data as at 2nd August 2020 coinciding with when the Complainant visited the Website, pointing to the "WAS" price and next to an item the "NOW" price. Produced in the Table were purported details of adverts for products: (i) **SAVING'A NA SOLAR 1** advertised for 19th to 31st August 2020, which appear to be the same as those earlier reflected in Addendum 1 to their letter of 7th October 2020, with the exception that according to their earlier letter the advert was captioned as valid from 19th July to 15th August 2020 (page 17 of RoP); (ii) **SAVING'A NA SOLAR 2** advertised for 1st to 31st August 2020, which appear to be the same in some content as those earlier reflected in Addendums 2 and 3 to their letter of 7th October 2020, with the exception that according to their earlier letter the advert was captioned as ran on 3rd (not 1st) August and 6th August 2020 (pages 18-19 of the RoP). **(See Table reproduced in the background to the judgment.)**

Counsel for the Appellant have claimed that the advert **SAVING'A NA SOLAR 2** was run on 1st August 2020 and that this was the basis of the Complainant's order which they alleged she made on 2nd August 2020. We have not seen any evidence supporting these claims. We have accepted that the order was made on 2nd August 2020 but quite clearly from its own purported adverts produced before the Respondent in the proceedings appealed from, the advert SAVING'A NA SOLAR 2 was run on 3rd and 6th August 2020. How then if this was the advert on which the Complainant relied was she able to place an order on 2nd August 2020?

58. As for the alleged details in both adverts, we have not seen the "WAS" prices side by side with the "NOW" prices in the purported adverts produced in the earlier letter of 7th October 2020, except for that allegedly run on 19th July 2020. We have also not seen in the advert **SAVING'A NA SOLAR 2** the erroneous price as indicated at K2.6500, or K2.650, contrary to the Appellant's and counsel's assertions. The product in issue, which according to the Appellant appeared in its 3rd and 6th August 2020 advert, only shows the price K2,650. The Appellant has also not produced the erroneously priced advert, which they claimed in their letter(s) to have been corrected via social media. Neither have we seen the purported publication correcting the error. On the other hand, the Appellant's letter of confirmation of receipt of the order shows the price for the product as K2.65 each.

59. We observe that the purported contents of the **SAVING'A NA SOLAR** produced by the Appellant (at page 17 of the RoP) run on 19th July 2020 does not contain the product in issue. The Appellant has questioned the validity of the Complainant's claim that she placed her order on the basis of the advert of 19th July 2020, but in doing so have not produced what they purport to have been the erroneous advert. On the other hand, the Complainant produced what she claimed to be screen shots of the advert of 19th July 2020 on the basis of which she said she placed the order. We observe that though the date of the screen shots does not show, her claim is credible because there is no advert we have seen produced by the Appellant showing the erroneous pricing, on the basis of which she could have placed the order.

60. In light of the above analysis, taking into account the evidence before us, our findings on these questions are:

    (i) The dates the Appellant's first, second and third online advertisements for its products were run on 19th July 2020 (valid up to 15th August 2020); 3rd August 2020 (valid up to 31st August 2020); and 6th August 2020 (valid up to 31st August 2020).

    (ii) The products in the first advert are those shown in the Complainant's screen shots in her letter at page 5, which shows the product in issue (200W) as priced at K2.65 (not K2.650 or K2.6500) and shows the old price as K3,500.

    (iii) We reject the Appellant's claim that the first advert had (only) the 30W, 60W and 90W solar street lights produced in its letter of 7th October 2020 (at page 17 of the RoP) and reflected in the Table in its letter of 10th March 2021 in response to the

Preliminary Report. This is in view of the Appellant's failure to produce the erroneous advert and in light of the more credible evidence produced by the Complainant, which included the solar street light in issue.

(iv) The purported second advert produced at page 17 of the RoP is questionable for, inter alia, not showing detail including old prices (e.g., in the subsequent letter, at pages 56 of the RoP) per the Appellant's claim that there were new and old prices reflected in the adverts. Also, the purported advert shows only one light when the caption reads, *"Due to popular demand we have added more Solar Street Lights!* We accordingly reject the purported advert.

(v) The purported third advert produced at page 19 is also questionable in that we do not see the old prices, only the new, whereas the Appellant has claimed that the adverts showed the new and old prices. We also reject the purported advert.

(vi) We conclude that the Complainant placed the order on 2nd August 2020, the date on which it was confirmed by email.

61. We proceed to the next question:

(b) When did the Appellant inform the Complainant of the error?

62. The Complainant alleged that the Appellant communicated the error to her in their letter of 11th August 2020, which the Appellant later produced in its Affidavit in Support of the Notice of Appeal as Exhibit marked "MA3". The Appellant has claimed that it communicated to her initially by phone on 4th August 2020. However, it did not produce any supporting evidence that indeed it had made a call to her on that date, and no reference of such a call was made in its letter of 11th August 2020. Therefore, we find that the Appellant informed the Complainant of the error by email on 11th August 2020.

(c) Whether or not the Complainant paid for the items she ordered and, if so, whether or not the Appellant refunded the Complainant and on what date

63. The Respondent's findings were that the Complainant indeed paid for the order the total sum of K74.20. In its Preliminary Report, subsequent Report and Decision subject of appeal. The Respondent ordered the Appellant to supply her the lights which she had fully paid for. The Appellant maintained in its letters that it offered the Complainant options such as buying the product at the correct price, getting another product for the amount already paid, or a full refund, to which there was no response. (See email dated 11th August 2020, Exhibit "MA 3" to Affidavit in Support of Appeal stating *inter alia, "Would you like to shop something else on the website within that price range or would you like a refund?"*).

64. Further, the Appellant has claimed in its letter of 7th October 2020 that, pursuant to the terms and conditions, and despite not receiving a response from the Complainant of the proposed options for resolution of the issue, the Appellant issued instructions to its bank to credit the Complainant the full refund and that this was done (**reference Addendums 7 and 8, but not**

produced in the RoP). In her oral evidence before us, pursuant to summons we issued to her, the Complainant testified that she was refunded (and that she saw a notification to this effect on her phone). Although she could not recall the exact date, she estimated this to have been two months after the Appellant informed her of the alleged error in the pricing. Under cross examination by counsel for the Appellant whether the refund was reflected in her bank account on 8th October 2020, which counsel said was the date reflected in the Appellant's bank statement, the Complainant said she could not remember the specific date. We accept that the Appellant effected the refund about two months after notification of the alleged error, which could be the date of 8th October 2020 put to the Complainant in cross examination by counsel.

65. In their arguments, counsel for the Appellant have argued, in reference to a case cited by counsel for the Responded stating that a refund did not cure the violation in issue, that the present case is not about refunds. We hold the view that the issue of refund is pertinent in this appeal and we deal with it in context later. Meanwhile, we proceed to the next questions.

(c) Was the error genuine and without benefit to the Appellant?

66. The Respondent's finding was that the error was genuine and that it was without benefit to the Appellant. The Appellant has heavily canvassed the argument that this finding should have led to a finding that the Appellant did not breach section 49 (5). Further, that the gap between the original price of the product in issue (K3,500) and the erroneous price (K2.65) was so incredible that it made it a ridiculous proposition which an average consumer who is reasonably well informed and reasonably observant would know that the price was advertised in error (referring to the objective test of "reasonableness").

67. In making a determination of the question, we first of all find it useful to address our minds to whether an advert with incredibly low prices of goods or services can be deliberate and/or beneficial to the concerned enterprise. The answer is in the affirmative. Some jurisdictions with advanced consumer protection laws specifically provide against what is termed as "bait marketing" or "bait advertising". In a nutshell, "bait marketing" or "bait advertising" is false advertising which takes various forms such as advertising a product at ridiculously low prices so as to entice unsuspecting or curious consumers. Once they make orders, they are then told some excuse like "out of stock", while at the same time being offered to switch to alternative products at higher prices. Online adverts are especially susceptible to such kinds of false adverts. In online sales, there would potentially be a high turnover of offers from consumers who will have paid moneys in advance, which they can claim in refunds afterwards if they decline buying other products.[5]

---

[5] See consumer protection laws of other jurisdictions such as England, Australia and the United States of America. A synopsis of laws of these jurisdictions was given in the South African Case, No. 2014 ZACGSO 16, referred to by counsel for the Appellant in their arguments.

68. In our jurisdictions where that field of law is still developing, such matters may fall under provisions of Part VII of the Act such as sections 45 and 46 (prohibiting unfair trading practices); section 47 (false or misleading representations); section 49 (5) (requiring a supplier of a service to a consumer to do so with reasonable care and skill), which is the provision we are concerned with in this case; and section 51 (1) (prohibiting a supplier from charging a consumer a price other than that displayed and where more than one price is displayed, requiring the supplier to charge the lowest price).

69. Potentially, the Appellant in the circumstances of this case, like any supplier in similar circumstances, could end up with an extraordinarily high turnover of consumers (prospecting to buy advertised goods) and advance payments in its account. This likelihood is something the Appellant in fact alluded to in its response to the Respondent's Preliminary Report as one of the ways that a supplier may discover an honest pricing error. Whether or not the error is deliberate (bait marketing or advertising), the affected consumers may be offered to use the money they have advanced the supplier on other goods or services, or be given a refund (as in the present case). This may take place much later after a supplier has kept the money in their account for some time, and some consumers may not seek and get refunds if not automatically effected. Thus, the supplier may benefit from consumers unjustly.

70. We observe that online shopping in Zambia is steadily growing and in this regard, we take judicial notice of the advancements in IT, including use of the internet for online shopping. According to information availed on the ZICTA Website, mobile internet users were 10 million as of second quarter of 2021[6]. These prospects implicate the need for vigilant consumer protection measures, including laws specifically regulating such service. The development also calls for enforcement of existing provisions of the Act, such as section 49 (5), requiring suppliers to provide a service with reasonable care and skill.

71. We have seen no evidence in the RoP supporting the Respondent's finding that the error was genuine and did not benefit the Appellant. For example, we have not seen any evidence of disclosure by the Appellant to the Respondent of consumer responses to the erroneous advert, the orders placed by consumers and advance payments made in respect thereof[7], apart from that in respect of the Complainant.

72. However, on account of the outrageously low erroneous price of K2.65, and the finding that the Appellant has no previous record of the conduct it was found guilty of, we give the benefit of doubt to the Appellant and find that the error was genuine and not deliberate or bait marketing/advertising. Be that as it may, we are unable to reach a finding as to whether or not the Appellant benefitted from the erroneous pricing through online orders and advance payments.

---

[6] ZICTA ICT statistics portal Table titled Q2 2021: http://onlinesystems.zicta.zm:8585/statsfinal/index.html.

[7] Such account could be shown without personal details of the specific consumers.

73. The question whether the finding that the error was genuine would automatically lead to a finding that the Appellant exercised reasonable care and skill is something we determine later in the judgment. We are also firm in our finding that the Appellant kept the Complainant's small amount of money for about two months. Again, we deal with the question later as to what this finding may lead to in terms of the reasonable care and skill required of the Appellant per section 49 (5) of the Act.

74. Having outlined the parties' respective submissions and made findings of fact in respect of some questions that may have implications on the determination of ground one of appeal, we move to consider legal issues raised in this ground of appeal here below. However, before we delve into the specific questions of law, we find it necessary, as we have done in a number of cases previously, to state at the outset that primarily our interpretation of provisions of the Act is guided by the Act itself and other laws of Zambia having a bearing on the subject provisions, where such other laws are not inconsistent with the Act. Also, relevant consumer protection legislation and case law of other jurisdiction. We emphasise that legislation and case law of other jurisdictions may be useful to the extent consistent with provisions of the Act in issue. Similarly, common law principles, e.g., of contract law or torts, though not always relevant to consumer protection provisions of the Act, may be a useful aid to our interpretation of provisions of the Act where appropriate.[8]

75. We have found that counsel on both sides have cited some case law of other jurisdictions without highlighting how these are pertinent to provisions of the Act. In our interpretation and application of the Act, we do not take such decisions on face value without persuasion that they are indeed relevant to the provisions of the Act. We have endeavoured to review some of the case law cited by counsel, but the purpose of arguments that are augmented by authorities may be lost if counsel do not afford the Tribunal ability to make meaningful comparisons by bringing out the facts, the laws in issue and their relevance to the present case.

76. We also find it necessary to point out that we take the approach per the universal principle of interpretation of consumer laws or rights, that if a provision of the Act may have more than one meaning, it must be given the interpretation that best promotes the spirit and purposes of the Act, and that will best improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in the relevant provisions of the Act, as the weaker parties.[9] However, this principle is not a blank cheque for consumers not

---

[8] See pronouncements we have made in cases such as Insurers Association of Zambia and 15 Others v. Competition and Consumer Protection Commission Cause No. 2018/CCPT/022/COM.; and Pangaea Securities Limited v. Competition and Consumer Protection Commission Cause No. 2017/CCPT/005/COM.

[9] This is derived from the principle known as "the rule of *contra proferentem*". This principle is applied universally including in Zambia. The principle is reflected in the South African Guidelines on interpretations of the consumer protection law (see ADVISORY NOTE 2: INCORRECT PRICING provided by the office of the Consumer Goods and Services Ombudsman to guide suppliers and consumers of their rights and obligations under the Consumer Protection Act with regard to pricing errors. http//cgso.org.za. Seen on 31st January 2022 at 20:00 hrs.

to take whatever measures may reasonably be expected of them in their dealings with suppliers, or to take advantage of suppliers by seeking to gain unjustly.

77. We now proceed to consider the legal issues.

(a) Whether or not there was an agreement between the Appellant and the Complainant to sell the goods, and if not whether this is fatal to the Respondent's case.

78. We agree with counsel for the Appellant's arguments that the general position of the law is that adverts for supply of goods or services are invitations to treat, as shown by the authorities cited and outlined in their submissions. This is trite particularly for supply of goods and services conducted online, where adverts may reach a large number of targeted consumers. Such adverts cannot, save in noted exceptions, be said to constitute an offer to supply, as such would lead to the absurd result that all who respond accepting the offer are taken to have entered into agreement with the supplier to sell the goods. We therefore accept that in the present situation, an agreement to sell the goods would only be said to have been formed if the Appellant had accepted the Complainant's order as provided in the terms and conditions which the Complainant was found to have accessed and accepted when she transacted online.

79. In the result, there was no agreement to sell the goods in issue which the Complainant had ordered and paid for in advance. The question, therefore, arises whether the absence of such a contract was fatal to the case alleged against the Appellant. Section 49 (5), (6) and (7) reads:

> "(5) *A person or an enterprise shall supply a service to a consumer with reasonable care and skill or within a reasonable time or, if a specific time was agreed, within a reasonable period around the agreed time.*
>
> (6) *A person who, or an enterprise which, contravenes subsection (5) is liable to pay the Commission a fine not exceeding ten percent of that person's or enterprise's annual turnover.*
>
> (7) *In addition to the penalty stipulated under subsection (6), the person or the enterprise shall-*
>
> *(a) within seven days of the provision of the service concerned, refund to the consumer the price paid for the service; or*
>
> *(a) if practicable and if the consumer so chooses, perform the service again to a reasonable standard."*

80. The Respondent, in its finding that the Complainant was a consumer, referred to the definition in section 2 (1) of "consumer", which states in paragraph *(b) "... any person who purchases or offers to purchase goods or services otherwise than for the purpose of re-sale, but does not include a person who purchases goods or services for the purpose of using the goods or services in the production and manufacture of any other goods for sale, or the provision of another service for remuneration;"* We note that the definition encompasses both a person who purchases or who offers to purchase goods or services (other than for resale). As we have earlier stated, the definition envisages an actual consumer or prospective consumer who offers to purchase goods or services.

81. The Respondent's finding was that the complainant was a consumer as she purchased street lights from the Respondent for her personal use. While we have rejected the finding that the Complainant purchased the goods, since she merely placed an order, we find that, by placing an order, she offered to buy the goods. In fact, this position was confirmed by the Appellant in their submissions and arguments. For instance, the Appellant's Terms and Conditions (in Addendum 5 to its letter in response to the Notice of Investigation), on Orders, Delivery Process, Delivery Options and Delivery Rates, stated that *"The order placed by you through the Website shall be deemed an offer from you to buy the product(s) specified as per the order to Radian Online ("Order"). On receipt of the Order, the Website will automatically generate an email/SMS confirming receipt of your Order. Your receipt of 'Radian Online order confirmation' email/SMS is only an acknowledgment of receipt of your Order and **does not** constitute an acceptance of your Order by Radian Online.*

82. As to whether she did so for personal (or direct use) and not for re-sale, the Respondent did not elaborate the basis of its finding. We have, however, noted that the Appellant was supplying the goods as a retailer. According to the Licensing Act, Chapter 393 of the Laws of Zambia, which governs the conduct of retail business, a retailer is defined in section 2 (1) for purposes of PART VII under which the two sections of the Act subject of the appeal fall, as *"a person who sells goods by way of business (whether in conjunction with any other business or not) to other persons reasonably believed by the seller to purchase such goods for a purpose other than the resale thereof by those other persons"*.

83. The Appellant, whom the law requires to reasonably establish that the goods it is selling are not for re-sale, has not disputed the Respondent's finding that the Complainant intended the goods for personal use, nor alleged that it made a mistake in its belief to that effect. In fact, the Appellant later offered to sell the Complainant the same products at the correct price.

84. Notwithstanding that there was no contention concerning the fact whether the goods were intended for personal use, the issue being one that is core to provisions falling under Part VII of the Act, we summoned the Complainant and examined her on the issue, *inter alia*. In response to our question what she intended to use the lights for, her response was that she "purchased" the lights for installation at the family's 5 acre land. Therefore, we arrive at the finding that the goods were intended for personal use. Thus, the Complainant was a consumer for purposes of Part VII of the Act, within the meaning assigned by section 2 (1) of the Act.

85. However, the finding that there was no agreement to sell the goods in issue was not fatal because the offence in issue does not depend on that, as supply of a service includes other elements which we discuss in the next questions. We proceed to the next questions:

(b) Whether or not there was a "service" rendered by the Appellant

(c) Whether there was a duty of care on the part of the Appellant

86. Section 49 (5) requires an enterprise, *inter alia,* to supply a service with reasonable care and skill. The Respondent in its findings referred to the definition of the term "services" in section 2 (1) of the Act defined as "*includes the carrying out and performance on a commercial basis of any engagement, whether professional or not, other than the supply of goods, but does not include the rendering of any services under a contract of employment;*" This definition refers to commercial supply of all types of services but excludes the supply of goods. The Act has distinguished these particular services from a service involving supply of goods. However, our view is that, read in context, "a service" in section 49 (5) should be construed to refer to both "service" and "services", as defined in section 2 (1) of the Act, respectively. The term "service" is defined, "*includes the sale of goods, where the goods are sold in conjunction with the rendering of a service;*"

87. Although we are of the view that both terms "service" and "services "are applicable to section 49 (5), in the present case the applicable definition is that of "service". We note that counsel for the Appellant, while denying the application of "service" to the case, have addressed the possibility that this may in fact be the more relevant definition to consider. In our view, simply put, the term "service" relates to transactions involving a mix of both sale of goods and the rendering of an associated service. In some jurisdictions, contracts relating to sale of goods mixed with rendering of an associated service are referred to as "*mixed goods and services contracts*". One source states:

> *"In many cases, an agreement between a consumer and a trader won't be for just goods, services or digital content but will contain aspects of more than one of these - for example, electronic equipment may contain digital content, or a garage may fit parts during a car service.*
>
> *For 'mixed' contracts like these, the general rule is that all the relevant parts of the Consumer Rights Act 2015 apply - for example, the goods elements of the contract attract the rights and remedies associated with goods, and the services elements attract the rights and remedies for services."*[10]

88. Therefore, the question is whether the goods that the Complainant ordered to purchase entailed the rendering by the Appellant of some associated "service". Counsel for the Appellant have argued that in the present case the transaction was only for supply of goods via online platform, without a service. That since this transaction was a sale of goods, which did not materialise, section 49 (5) does not apply because the Appellant cannot be held to have been negligent in the supply of a service when in actual fact it did not supply any service.

89. We have critically considered these arguments. First of all, we go back to definitions of relevant terms in the Act. The term "service" is defined in section 2 (1) as "*includes the sale of*

---

[10] Business Companion: trading standards law explained. Guidance for England, Scotland and Wales https://www.hants.gov.uk › business › goods and services. Seen on 31st January 2022 at 20:45 hrs.

goods, where the goods are sold in conjunction with the rendering of a service;". Furthermore, the term "sale" is defined as "*includes an agreement to sell or offer for sale, the furnishing of a quotation, whether verbally or in writing, and any other act or notification by which willingness to enter into any transaction for sale is expressed;*". In addition, the term "supply" is defined as "*includes, in relation-*

(a) to goods, the supply, including resupply, by way of sale, exchange, lease, hire or hirepurchase of the goods; and
(b) services, the provision by way of sale, grant or conferment of the services;

90. By reason of the extended meaning assigned to "sale", sale of goods in the context of the Act is not synonymous with contract of purchase of goods, which is described in the definition of "sale" as "an agreement to sell". Thus the sale of goods contemplated in the supply of a service in section 49 (5) includes the processes referred to therein which may or may not lead to a an agreement to sell being entered into. Thus the phrase "where the goods are sold" in the definition of "service" relates to the processes referred to in the definition of "sale" and the actual sale of goods or any of these processes. That is, whether or not the goods are actually sold, a process entailing the furnishing of a quotation and/or any other act expressing willingness to enter into a transaction for sale qualify as comprising "supply of a service" for purposes of section 49 (5) of the Act. We also note that all the three terms are defined in a way that is extensive by use of the word "includes".

91. Therefore, in our view, the Appellant through its online retail platform was engaged in a sale when it transacted with the Complainant in that it had advertised the goods in issue quoting a price and the Complainant by her order expressed willingness to enter into a transaction (that is agreement) for sale of the goods in issue. The Appellant further quoted the same price when it acknowledged the Complainant's offer in its email of 2nd August 2020 in which it advised that it was processing the order. Furthermore, the Appellant later when it informed the Complainant that it had made an error on the price of the goods, also expressed willingness to enter into a transaction for sale of the goods at a new price.

92. In addition, the sale amounted to supply of a service in that it involved sale of goods which were being sold in conjunction with the rendering of a service. To break this down, the goods were not just being sold by themselves but entailed receiving and processing orders and advance payments; accepting the order or otherwise informing the consumer of the outcome (in this case including informing the Complainant of the pricing error and options available); conveyance of the goods to point of delivery (in the event of acceptance of the order); issuing a refund (in the event of non-acceptance of the order, as in the present case); and doing all the things incidental to this mode of rendering the service associated with this mode of sale of goods. Added to the fact that there was a supply of service, *inter alia*, because the Complainant proceeded to make the order, an agreement was entered into between the two parties that the supply of service would be governed by the online terms and conditions. To that extent, there was a contractual relationship, albeit not including an

agreement to sell the goods. However, we hasten to point out that this agreement did not exclude the operation of statutory provisions, such as section 49 since a contract cannot waive a statutory requirement unless allowed by a statutory provision.

93. The conclusions we have reached that there was a sale and a supply of a service in terms of section 49 (5) are also consistent with, though not dependent on, our view that, unlike the general position of litigation in torts and law of contract, the objectives of the consumer protection provisions of the Act and the functions of the Respondent go beyond a wrong affecting a particular consumer (as may be complained of) and encompass consumer interest and welfare at large.[11] Thus, read in full context of the Act, section 49 (5) is not limited to a service rendered to a particular buyer who has entered into a contract to sell the subject goods but more broadly extends to prospective buyers who offer to buy a service, per the definitions of the relevant terms in the Act, as we have earlier pointed out. In this regard, we note that the text of section 49 (5) includes different permutations that are disjunctive by use of the word "or".

94. Accordingly, our understanding is that use of the singular word "consumer" in section 49 (5) in relation to the requirement for a service to be supplied with reasonable care and skill includes a consumer or consumers and relates to (an) actual consumer(s) and prospective consumer(s) who offer(s) to purchase a service, as in the present case.

95. In relation to the next parts "*or within a reasonable time or, if a specific time was agreed, within a reasonable period around the agreed time*", these are prescribing time for the supply of a service to (a) consumer(s). We accordingly conclude that the part of this provision relating supply within reasonable time applies to all situations of supply of a service and demands that the service be supplied within reasonable time. It, therefore, applies to both (an) actual consumer(s) and a prospective consumer(s) who offer(s) to purchase a service. However, the last part of the provision is restricted to supply of a service where time has been agreed; hence, it applies only to a contractual relationship. Such a contractual relationship may be by way, for instance, of an agreement to sell goods or simply an agreement governing the supply of a service, such as would have been in the present case if time had been included in the terms and conditions of the Appellant's online service.

96. This interpretation of section 49 (5) is further supported by section 4 (3) and (4) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia, which states:

> *"(3) Words and expressions in a written law in the singular include the plural and words and expressions in the plural include the singular.*
>
> *(4) Where the words "or", "other" and "otherwise" are used in any written law they shall be construed disjunctively and not as implying similarity, unless the word "similar" or some other word of like meaning is added."*

---

[11] See long title of the Act; functions of the Respondent in section 5 of the Act, particularly paragraphs (b), (d), (e), (f) and (l).

97. It would be absurd and do injustice to consumers to interpret "service" in section 49 (5) of the Act in a way that does not accord the requirement for reasonable care and skill in the rendering of such a service as inviting and processing of online orders which involves advance payment for goods, as in the present case. Furthermore, it would be absurd to expect that the service contemplated in the provision should be paid for separately from payment for the goods. The definition makes it clear that the "service" is a composite involving both supply of goods and rendering of an ancillary service. The service may not involve a separate payment for the ancillary service. In the example of supply of food and waiter services in a restaurant, or online sale of food involving ancillary services such as processing of orders and advance payments and delivery, for instance, the whole service may be paid for in one package.

98. As we have stated before, the Act also looks at consumers prospectively. For instance, in the example of a restaurant supplying food using online ancillary service, if food is ordered and paid for in advance, but is not supplied because the price quoted was incorrect, the restaurant cannot defend itself by claiming that no duty arose on its part to exercise reasonable care and skill in quoting the price because there was no relationship between them at the time the price for the food was advertised (quoted). It would simply be absurd because if such a defence were allowed, then prospective consumers who offer to purchase a service pursuant to an advertisement would be taken advantage of by suppliers who would unjustly enrich themselves by quoting prices and receiving advance payments only to claim later in defence that they did not owe a duty to exercise reasonable care and skill.

99. We therefore disagree with the reasoning of counsel for the Appellant in their alternative argument that (assuming there was supply of a service) the supply of the service would begin from the time the order was made; and that before that there was no relationship of consumer and supplier between the Appellant and the Complainant. The Appellant has itself heavily canvassed the position that they supplied the online retail service for sale of goods with due care by, *inter alia*, providing terms and conditions online, including what would transpire in the event of an error in pricing. Suffice it that we have already determined that the transactions between the Appellant and the Complainant are contemplated in section 49 (5) as supply of a service. Reasonable care and skill is by statutory intervention required to be exercised in the whole process of supplying the service, i.e. including the placement of the advertisement (quoting the price), the acknowledgment of the order quoting the same price, and the refund of the money paid for the goods.

100. We note that counsel for the Respondent mainly concentrated on the argument that there was a contract for the supply of the street lights because the Complainant paid for the same at the advertised price. We have rejected this argument, though we do hold that there was supply of a service in the terms of section 49 (5), when read in context of the relevant definitions in the Act and section 4 (3) and (4) of the Interpretation and General Provisions Act. This brings us to the next question.

(d) What was the nature of the duty of care, and was the Appellant in breach of the duty?

101. Counsel for the Appellant have further argued that even assuming there was a supply of a service (which the Appellant has denied), since the error in the pricing of the goods was made before the order was received, the Respondent erred in holding the Appellant in contravention of section 49 (5). Counsel for the Respondent's main point of argument is that the requirement for a service to be supplied with reasonable care and skill is mandatory and that the provision carries strict liability, citing the holding of this tribunal in **the Spar case**, cited earlier.

102. Counsel for the Respondent have further argued that the Appellant had a duty, once the Complainant placed the order, to sell and deliver the goods to her, but it resiled from performing that duty and instead relied on its online terms and conditions on *"price and product details errors"*. That the term relied upon offended the expectation as to the price and was in breach of the duty of care. And that the Complainant suffered injury when the Appellant cancelled the order.

103. We have already determined that there was no agreement to sell the goods, but that still there was supply of a service in the terms of section 49 (5) of the Act. We have also already determined that the quoting of the price was part of the "sale" and hence part of the supply of a service. We note the convergence of thoughts on both sides (given with reservations in the case of counsel for the Appellant) to the extent that there was a duty of care on the part of the Appellant once the order was placed, though they differed on the nature of this duty. Without extensive discourse, we have already determined that there was supply of a service, being the service associated with the advertisement (quoting the price), the acknowledgement of the order (again quoting the same price), and processing of the order up to the point of taking the necessary measures required in the event of pricing error per the terms and conditions applicable to the Applicant's online retail service. In fact, the error also potentially affected consumers other than the Complainant.

104. Hence, reasonable care and skill, in our view, would cover not only the Complainant who lodged a complaint but all consumers on the Appellant's online platform potentially affected by the Appellant's failure (if any) to exercise reasonable care and skill. This statutory duty of reasonable care and skill on the part of a supplier (i.e. the Appellant in this case) is mandatory, entailing strict or absolute liability. In some statutory offences, such as careless driving, for instance, no harm may occur and hence there may be no tort, yet the conduct may still be condemned as careless.[12] The rationale for mandatory observance and strict liability in statutory offences is founded on public policy considerations as reflected in the objectives of the Act, i.e. protection of consumers (those who buy or offer to buy) from exploitation or abuse by suppliers of a service.

105. Other considerations include the enforcement of the statutory provision being rendered impracticable by defences such as absence of intention (*mens rea*) or negligence. In the case

[12] See Clerk and Lindsell on Torts, Seventeenth Edition (London, Sweet & Maxwell, 1995), paragraph 7-124.

of **Caswell v. Powell Duffryn Associated Collieries Limited (1940) A.C. 152 at 177**, Lord Wright stated that an action for breach of a statutory duty is not for negligence in the strict or ordinary sense.[13] Discussing strict liability in relation to the offence of giving a misleading indication as to the price at which any goods, services, accommodation or facilities are or may be available under section 11 of (English) the Consumer Protection Act of 1987 and alternative relief (compensation), the authors of Clerk and Lindsell on Tort state that it is a strict liability offence and the court that convicts a person of the offence has discretion to make a compensation order in respect of any personal injury, loss or damage arising from the offence.[14]

106. We have in a number of past decisions discussed policy considerations implicating strict or absolute liability in statutory offences relating to consumer protection. In **the Spar case**, we considered section 51 of the Act prohibiting charging a consumer more than the price displayed on a product or service. We said, *inter alia*:

> *"We are of the view that the said public policy and the suppression of the mischief behind the provision would be defeated if the offence was not one of absolute liability because implementation of the requirement of the law is exclusively a responsibility of the Appellant and the 2nd Respondent is not privy to the processes by which the Appellant secures adherence to the law. Whether or not the act in issue was committed deliberately, by negligence or honest mistake despite all diligent efforts are matters within the exclusive knowledge of the Appellant. Requiring the 2nd Respondent to prove a guilty intention on the part of a supplier of consumer goods and services in the position of the Appellant would make prosecution of such offences almost impossible and thereby defeat the suppression of the mischief."*

107. We also found that the Ombudsman in the South Africa **Case, No. 2014 ZACGSO 16**, cited by counsel for the Appellant, discussed the public policy around strict liability in the consumer protection provisions in issue, on subject of false pricing in adverts. Although the law imposed an administrative fine for breach in strict liability terms, the claimant could not succeed in laying a claim for specific performance of the contract. The Ombudsman explained as follows:

> *"Even if it is accepted that the supplier made a genuine error, as it claims, this in itself would not save it from liability. However, section 30(1) does not per se directly create an obligation to sell at the advertised price. It merely creates a prohibition that can lead to the imposition of an administrative fine if breached or that can ground a civil claim for damages.*
>
> *Further, being an advertisement in a brochure, section 23(9) applies, meaning that if the advertised price is an inadvertent and obvious error, the supplier is not bound by it after –*
>
> *(a) correcting the error in the displayed price; and*
>
> *(b) taking reasonable steps in the circumstances to inform consumers to whom the erroneous price may have been displayed of the error and the correct price.*

---

[13] See also discussion by Clerk and Lindsell, ibid. paragraph 11-25.

[14] Ibid, paragraph 14-50.

I cannot agree with the supplier's contention that it cannot be considered false advertising as there is an "Errors and omissions" warning in the terms and conditions printed on all its catalogue, as a supplier cannot contract out of its legal obligations under the CPA (section 48(1)(c)).

If, as alleged by the supplier, when you arrived at the store there was a warning in the form of a notice stating "Oops, we spotted a mistake," this might have been sufficient, depending upon the circumstances."

108. However, the Ombudsman did not dwell exhaustively on whether a warning of the wrong pricing in the form of a notice (i.e., other than simply hiding behind cover of terms and conditions of the advert) sufficed to absolve the alleged offender (per the escape route provided in the statutory provision) of the liability to pay the administrative fine. This was because the case turned on the question whether or not the advertised price was misleading or deceptive, so as to warrant an order for compensation. In determining the issue, she used the reasonable customer test and arrived at the conclusion that the discrepancy between the actual price or the price that a reasonable consumer might expect the price to be and the advertised price was so large that a reasonable consumer would have realised there was an error and not have been misled. Consequently, that the supplier was not bound to supply the goods at the erroneous price, which is different from whether the supplier beached his statutory duty and was liable to pay the administrative fine.

109. We have noted that a lot of the arguments advanced by counsel for the Appellant and case law cited relate to the standard of care in tort. And our determination in this respect is that first, as argued extensively by counsel for the Appellant, and also repeated to some extent by counsel for the Respondent, reasonable care and skill are measured on an objective test. That it means *"omission to do something which a reasonable man, guided upon these considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done."* **Blyth v. Birmingham Waterworks Company (1856) 11 Exch 78**, earlier cited by counsel for the Respondent.

110. We agree with this common law standard of care being applicable to the statutory duty of reasonable care and skill required by section 49 (5) of the Act, but with the qualification that intention (*mens rea*) and negligence are not ingredients of the offence. We are also, by reason of the strict liability the offence carries, of the view that the standard of a reasonably well informed and reasonably observant person borrowed from principles of tort, as argued by counsel for the Appellant, is irrelevant in determining the guilt and liability of the Appellant since the statutory duty carries strict liability. The offence is irrespective of the level of prudence expected of a reasonable consumer.

111. The nature of the breach of the statutory duty of reasonable care and skill would, therefore, apply with modifications as follows: *"omission to do something which a reasonable man, guided upon these considerations which ordinarily regulate the conduct of human affairs would*

do, or doing something which a prudent and reasonable man would not do. The defendant (Appellant) would be liable if, regardless of whether unintentionally and /or without negligence, it omitted to do that which a reasonable person would have done, or did that which a reasonable person would not have done.

112. Thus, whether or not the alleged conduct was intentional, or negligent, or whether or not the a reasonably prudent consumer would realise that the price was erroneous, or whether or not the Appellant was unjustly enriched are not relevant in determining guilt and liability in terms of subsections (5) and (6) of section 49 of the Act. These factors are also irrelevant to the requirement for refund of the money paid for the service, as provided in subsection (7) (a). However, if a reasonably informed and observant consumer would have realised that the price was erroneous, it would not be practicable (realistic) and fair to order specific performance in the terms provided by subsection (7) (b) of section 49 of the Act, which states, *"In addition to the penalty stipulated under subsection (6), the person or the enterprise shall-*

(c) *if practicable and if the consumer so chooses, perform the service again to a reasonable standard."* (emphasis ours))

113. As to whether or not on the facts of this case the Appellant exercised reasonable care and skill, our conclusion is that the Appellant did not. In answering these questions, we ask ourselves whether a supplier of a service in the circumstances of the Appellant would be expected to (i) quote the price for the goods correctly, and (ii) in the event of an order not being accepted refund the money promptly. Our answer is in the affirmative. Did the Appellant fail to fulfil these expectations? Again the answer is in the affirmative. This is because the Appellant in its responses to the Notice of Investigation and the Preliminary Report did not demonstrated that it priced the goods in issue correctly when it advertised them and in fact, the same price was repeated in the acknowledgment of the order. The Appellant in its Affidavit filed before us, to which we referred earlier, only produced internal communication relating to pricing of other goods that it advertised, which did not include the goods in issue.

114. We do not know what was in the internal communication relating to the pricing of the goods in issue. As we stated in **the Spar case** which we have referred to earlier, even assuming intention and negligence had been ingredients, the onus would have been on the Appellant, who had the exclusive knowledge of the processes it undertook (if any), to show that it took due care and skill in pricing the goods correctly and that the incorrect pricing was merely a glitch as alleged by the Appellant.

115. We also find that the Appellant failed to exercise reasonable care and skill, per section 49 (5) of the Act in that refund of the money, which was also reflected in its terms and conditions for the online retail service, should have been promptly done, there being no agreement to sell the goods. Failure to refund the money until two months later constituted failure to supply the service with reasonable care and skill.

116. We note that the Appellant claimed that it did not receive a response to its letter to the Complainant. The record shows that she insisted on getting the goods instead. Neither this demand, which the Appellant was not going to perform, nor the alleged non-response discharged the obligation on the part of the Appellant to refund the money within reasonable time of the discovery of the error. As a matter of fact, in the terms of subsection (7) (a) of section 49, the refund should at the very least have been made within seven days of the discovery of the error and communication of the same to the Complainant, which according to the Appellant was even earlier than the date of the email of 11th August 2020 (as it claimed to have informed her by phone on 4th August), although in our findings we have taken the latter date as the one that was substantiated.

117. Subsection (7) (a) reads, *"In addition to the penalty stipulated under subsection (6), the person or the enterprise shall-*

> *within seven days of the provision of the service concerned, refund to the consumer the price paid for the service;"*[15]

118. In terms of the mischief, the incorrect pricing of the goods (regardless whether or not it was genuine or negligent) and holding of the money for two months could result in unjust enrichment of the Appellant at the expense of consumers (including the Complainant)

119. We have accordingly determined the scope of the statutory duty of reasonable care and skill applicable to this case arising from the service supplied. We now arrive at the conclusion that the Appellant did violate section 49 (5) of the Act. Having done so, we must address our minds to other related orders issued to the Appellant by the Respondent.

120. The Respondent's findings and counsel for the Respondent's submissions are that the Appellant was negligent and therefore did not exercise reasonable care and skill in supplying the service. This is because, allegedly, it did not ensure that the prices advertised on the platform were correct and it did not supply the goods though paid for according to the price advertised, to which the Appellant was allegedly bound.

121. While we agree with the Respondent's finding that the Appellant did not exercise reasonable care and skill in supplying the service, as we have earlier concluded, we do not agree with counsel for the Respondent's reasoning. The issue of negligence is irrelevant. We have also already determined that the Appellant was not at that point bound to sell the goods to the Complainant, though she had placed an order for supply of the goods. We have accordingly determined that there was no agreement to sell the goods.

122. Furthermore, even assuming the Appellant had accepted the order, upon discovering the erroneous price and informing the Complainant, it would not be bound to perform such agreement to sell the goods at the erroneous price because it was based on a grossly understated price in comparison to the old price. In fact, judging from her position as a managing director of an institute, she would be expected to have reasonably observed that

---

[15] The price paid for the service being inclusive of what is paid for sale of goods, as we have already stated.

the price reduction was too good to be true and therefore erroneous, or at least that something was amiss. Per the many authorities cited by counsel for the Appellant, some of which we have also referred to. This is regardless of the question of negligence on the part of the Appellant raised by the Respondent. Furthermore, the Complainant was refunded the money, albeit not within reasonable time.[16]

123. This means that the option of performance of the service provided by subsection (7) (b) of section 49 of the Act would be impracticable (as provided by the statute itself). The Respondent misdirected itself by directing the Appellant to supply the goods pursuant to its powers under section 5 (d), which reads, *"investigate unfair trading practices and unfair contract terms and impose such sanctions as may be necessary."* The provision of the Act in issue was not deficient in terms of remedies. Therefore, there was no need to resort to section 5 (d) of the Act. In any case, the Respondent's direction was disproportionate as argued by counsel for the Appellant, given that the Complainant's order was not accepted by the Appellant and the purported price reduction was grossly huge, as we have found, making it unreasonable for the Complainant to believe that it was a valid price. She was also refunded the money. While we appreciate that she may have been inconvenienced in some way, there is nothing on the record that would justify an order for her to be sold the goods at the erroneous price.

Ground Three

124. Having determined grounds two and one (in that order), we now turn to ground three: *The Commission erred in law and fact by holding that Radian Stores contravened section 53 (1) of the Act.* Much of the parties' respective arguments on this ground of appeal have already been addressed in our consideration of ground one. Therefore, we do not expect to dwell much on the same.

125. Both counsel submitted that the starting point is whether there was a contract between the Appellant and the Complainant. Counsel for the Appellant argued that the Respondent erred in reaching a finding in the affirmative as this was only an advertisement which was an invitation to treat, citing various case laws of other jurisdictions relating to the issue, and provisions of the terms and conditions of the Appellant's online retail service. We have already established that no agreement to sell the goods was created between the Appellant and the Complainant.

126. Counsel for the Appellant have further argued that, in any case, the provision in the terms and conditions allegedly offending section 53 (1) are not unfair. That the clause giving

---

[16] In reaching these findings and conclusions, we by no means underestimate the valuable contribution which persons like the Complainant make to the work of the Respondent in consumer protection. Meeting the ends of justice and the rule of law requires that all concerned play their respective roles, and this includes members of the public, regardless of whether or not there is a personal benefit.

a consumer the option of either getting a refund or reconfirming the order on the original price deals with situations where there is an error. That there is no imbalance, which perhaps might have existed if the consumer was required to forfeit the money paid. That, the Respondent's alleged imbalance is that the consumer (Complainant) paid the money but did not receive the goods. That the Respondent did not take into account that the scales were balanced because the Complainant had the option of refund or reconfirming the order.

127. Apart from the submission that there has to be a contract for supply of the goods, counsel for the Respondent have submitted that the said provision in the Appellant's terms and conditions of the online service caused a significant imbalance in that it enabled the Appellant to claim that it had made an error and resort to giving an option to a consumer to reconfirm the order or get refund of the money. That the provision in issue gave unfair strength to the supplier not to sell goods at the displayed price by claiming that there was an error.

128. We have given consideration to the ground of appeal, the Respondent's findings, the evidence and the arguments of the respective parties. To recap, section 53 (1) (which does not prescribe a financial penalty) reads:

> *"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."*

129. The allegedly offending provision in the terms and conditions of the Appellant's online retail service read, "

> *" If we discover an error in the price or product details of goods ordered or reserved, we will inform you as soon as possible (e.g. prior to the goods being dispatched or in-store prior to the collection of the goods). We will provide you the option of reconfirming your order at the correct price or cancelling it. If we are unable to contact you, we will treat the order as cancelled. If you choose to cancel and have already paid for the goods you will receive a full refund."*

130. On plain reading of section 53 (1), it may be argued that there must exist an agreement to sell the goods that has been entered into between an enterprise and a specific consumer. We have already determined that there was a contract between the Appellant and the Complainant, albeit not for actual purchase. That is, there was an agreement to supply the Appellant's service on the online terms and conditions. Therefore, the question that arises is whether those terms and conditions were unfair per section 53 (1) of the Act

131. Even assuming the aforesaid agreement had not existed, in light of the objective to protect consumers from unfair contracts or terms of contract, the provision must be construed as not restricted to situations of a contract that is already concluded with a specific consumer (such as the Complainant in the present case), but as including situations of operation of a contract or term of contract in issue in a contractual relationship with unidentified consumers (who have purchased or offer to purchase goods or services) to the detriment of such consumers. This is especially the case with standard form contracts such

as in the present case. In standard form contracts, the contract is a take- it-or-leave-it and is in operation in the market, though the affected consumers may not be specifically known to the regulator (Respondent). Were the terms and conditions in the present case in a contract? Yes, they were in a standard form contract which consumers online signed up or offered to.

132. The Respondent is empowered by the Act to initiate, on complaint or on its own motion, investigations of violations or suspected violations and to take appropriate measures. **(See sections 5 and 55 (1) of the Act)** The provisions of the Act in issue have the objective of providing consumer protection both to specific consumers, who may be complainants, and consumers of the affected goods and services at large who may have entered into contracts of sale. Therefore, if in the course of investigations the Respondents encounters unfair contracts or terms of contract being offered to consumers and enforced by a supplier, it is within its powers to investigate such practices and make a determination in terms of section 53 dealing with the subject matter.

133. In the case of **the case of the Italian School of Lusaka**, which we have earlier referred to, we said as much. In that case, the investigation of an allegation against the school affected two school children (as "complainants"), but who by the time we determined the appeal (which included section 53 of the Act) had left the school. We still proceeded with the issue on the conviction that it affected other school children who were consumers of the education services on the basis of the standard form contract.

134. The question therefore is: are the terms and conditions in issue unfair in that they cause a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumers. In **the case of Italian School of Lusaka**, we had the following to say (quoting extensively):

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."

141. 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[17] 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.[18]*

---

[17] 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

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

The opportunities for consumers to read, comprehend or take advice on the terms of the contracts are typically limited.[19]

142. *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 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.*[20]*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.*[21]

143. *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.*

144. *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*[22] *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 ...."*

145. We note definitions of "significant", as *"having or likely to have influence or effect"*, and "imbalance" as *"lack of proportion or relation between corresponding things"*, which we have accepted and applied before. We likewise do the same in this case. We have noted that in the said case, we agreed that imbalance exists when there is lack of proportion

---

[19] 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.

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

[21] Ibid.

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

between the supplier's and the consumers' rights and obligations. When the scales tilts heavily to one side. Ultimately, we held that:

> *"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.*
>
> *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."*

135. Applying the above outlined principles to the present case, we find that the terms in question do cause a significant imbalance in the parties' rights and obligations arising under the standard contract. This is because the supplier has an open-ended right, even where a contract has been confirmed, to declare an error. An alleged error could, for instance, cover circumstances of deliberate false pricing as a bait marketing strategy, or be a result of lack of due care and skill in the pricing processes. Whatever the circumstances, the Appellant is only contractually obligated to give the consumers the option of reconfirming the order to buy at the corrected price, or to cancellation and refund. In our view, these remedial measures, which the Appellant claims to be sufficient, do not provide the needed balance in the rights and obligations of the respective parties. This position is despite the fact that currently the Act contains provisions that may guard against the mischief, the purpose of section 53 is, nonetheless, to ensure that unfair contracts or contract terms struck down.

136. In terms of section 53 (2), to the extent of the imbalance, the terms of contract are not binding. This calls for urgent review of the terms and conditions under supervision of the regulator (the Respondent) to ensure that they reflect a reasonably balanced position of rights and obligations of between the respective parties.

137. Having addressed all the grounds of appeal, we now address our minds to the Appellant's plea in the arguments concerning the penal orders, some of which we have already determined.

(a) With respect to the administrative fine of 0.5% of the annual turnover, we note that the guidelines on fines of 2019 provide this as the mandatory minimum, with escalations where there are aggravating circumstances, such as repeat offenders, there is need for deterrence, and/or where there has been resistance on the part of the offender (none of which applies to the case at hand).

(b) The penalty of 0.5% of annual turnover, however, has administrative caps according to the categories based on levels of annual turnover shown in the Guidelines appended to the Decision in the RoP.

(c) The plea that the error was genuine might perhaps have been a relevant factor if the penalty had not been the minimum under the Guidelines.

138. In conclusion, we vary the Respondent's directions and order that:

(i) The verdict of the Respondent in respect of sections 49 (5) of the Act and the applicable penalty in terms of subsection (6) and the applicable Guidelines are upheld. However, we emphasise that the Respondent should observe the caps imposed in the Guidelines.

(ii) The Respondent's direction ordering the Appellant to supply the Complainant the Solar street lights is set aside.

(iii) The Respondent's direction with respect to submission of the annual books for calculation of the fine shall be complied with within thirty (30) days of receipt of this judgment.

(iv) The direction that the Appellant rewrites their terms and conditions of retail service provision and submits them to the Respondent is upheld. This is pursuant to the power vested in the Respondent by section 5 (d) of the Act. The Appellant shall do so within thirty (30) days of receipt of this judgment.

139. In light of our findings and conclusions, each party shall bear their respective costs.

140. Any party aggrieved by this judgment may appeal within thirty (30) days.

Delivered at Lusaka this 15th day of June 2022.

Mrs. Eness C. Chiyenge – Chairperson

Mrs. Miyoba B. Muzumbwe-Katongo – Vice Chairperson

Mr. Buchisa K. Mwalongo - Member