IN THE MATTER OF THE COMPETITION AND CONSUMER PROTECTION ACT NO. 24 OF 2010 **2013/CCPT/002/CON**

AND

IN THE MATTER OF THE COMPETITION AND CONSUMER PROTECTION TRIBUNAL RULES 2012

AND

IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE BOARD OF THE COMPETITION AND CONSUMER PROTECTION COMMISSION CASE FILE NO. CCPC/CO/162

BETWEEN:

SOUTHERN CROSS MOTORS — **APPELLANT**

AND

THE COMPETITION AND CONSUMER PROTECTION COMMISSION — **RESPONDENT**

Coram: Mr. W A Mubanga – Chairperson
Ms L. Kasonde, Mr. C. Kabaghe and Mr. R. Sombe – Members

For the Appellant: Mr. N. Nchito SC – Nchito & Nchito
For the Respondent: Mrs L. Tembo – Director-Legal & Enforcement

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RULING

Authorities cited:

1. Section 49(5) Competition and Consumer Protection Act No. 24 of 2010
2. *Hick v Raymond* [1893] AC 22, [1891-94] All ER Rep 491.
3. Number 1-205 of the Uniform Commercial Code
4. *Augustine Kapambwe v Danny Maimbolwa and The Attorney General (1981) ZR 127 (SC).*

This is an appeal by the Appellants against the decision of the Competition and Consumer Protection Commission ("The Respondent") dated 17th August 2012. The facts of the case are as follows:

1. Ms. Suzika Sichinga (hereinafter called 'the Complainant' as she was before the Respondent) lodged a complaint against the Appellant before the Respondent alleging that the Appellant supplied her a service, whose period for delivery was agreed , within an unreasonable period around the agreed time. The facts, as set out by the Respondent in the Decision are as follows:

2. The Complainant took her vehicle to the Appellant for repairing of brakes and 5 point service (hereinafter referred to as 'the first repairs') on 10th March, 2011 as per job card number 10Z44170 dated 10th March, 2011.

3. On 4th April, 2011 she paid a deposit of K6,898,813.00 using cheque number 114, thereby authorizing the Appellant to start working on the vehicle.

4. The Appellant said that it would take 6 weeks to repair the vehicle.

5. From 4th April, 2011 the repairs would have been completed by 16th May, 2011. The Complainant paid the balance of K7,022,897.00 of the total bill of K13,918,711.00 as per invoice

number 10Z53539 given to her by the Appellant date 19th July 2011.

6. The Respondent called the Complainant on 6th July, 2011 informing her that her car has been repaired and the she could collect it. This was 7 weeks more than the 6 weeks period the Appellant and the Complainant had agreed on.

7. Body works repairs were not done on the vehicle in time as a Ms. Mwenda (the person that had negligently damaged the Complainant's car) had not yet paid for the works in full, though she had paid only K5,000,000.00 on 17th June, 2011.

8. The Complainant took the vehicle to the Appellant for the second time on or around 9th September, 2011 (hereinafter referred to as 'the second repairs') after an accident on the 9th September, 2011.

9. She asked the Respondent to work on the body due to the two accidents.

10 The quotation was K28,241,290 dated 15th September, 2011.

11 On 13th October 2012, Mr. Botha, the Appellant's Manager, wrote to the Complainant stating that the parts for her vehicle had arrived the previous day and asked her to authorise the Appellant to start working on her vehicle, which she did in writing on 15th October, 2011.

12 She was told that the works would take one month. However, it took two months. Further, despite the vehicle being ready in December, 2011, the Appellant only informed the Complainant in February, 2012.

13 To date, no payment has been made towards these repair works as the Appellant did not request the Complainant to make payment before commencement of repairs works on the vehicle.

14 The Complainant has not yet settled her bill with Respondent.

15 The Commission held in the Decision that the Appellant was in breach of the Act and that it be warned to desist from such conduct since they are first offenders.

It is pursuant to this background that the Appellant now appeals. The Appellant has two grounds of Appeal namely:

1. **The Commission erred when it held that the Appellant did not supply the Respondent a service within a reasonable time period taking into account the circumstances.**

2. **That the Commission erred in admonishing the Appellant thereby rendering it a first offender.**

The Appellant argued the two grounds together as follows:

To establish that a breach of the above provision of the Act has occurred, one needs to show, where a time is agued, that an unreasonable amount of time has been taken in providing the service agreed over the agreed time. They argued that this is what the Respondent should have satisfied itself of. They submitted that the services offered to the Complainant were supplied in a reasonable period around the periods agreed upon in each case on the following grounds:

Firstly, the Appellant argued that the Respondent in its Notice of Grounds in Opposition filed before this Honourable Tribunal on 8th February 2013 in paragraph one (1) argues as it held in the Decision, that the Appellant took seven weeks more than agreed to complete the first works. The Appellant submitted that the Board erred in basing its finding on this fact when, in the Decision, at page 6 and 7, it outlined 'relevant findings' and, at (vii) it found that *'Body works repairs were not done on the vehicle in time as Ms. Mwenda (the person that had negligently damaged the Complaint's car) has not yet paid for the works in full, though she had paid only K5, 0 00,000.00 on 17th June 2011.'*

The Appellant submitted that the Respondent, having found as a fact that the works were not completed due to a deposit not being paid by a

third party and having accepted this as a 'relevant finding' could not in the same breathe find the Appellant liable based on this.

The Appellant argued that in the case of **Hick v Raymond [1893] AC 22; [1891-94] All ER Rep 491** the unloading of cargo was delayed because of a strike which took place after the contract was made and it was there held that, in those circumstances, it cannot be said that the consignees had failed to perform the contract within a reasonable time because of the supervening event of the strike. They argued that in a similar vein, Ms. Mwenda's delay in paying, as properly found by the Respondent, delayed the first repairs and therefore, delay could not be attributed to the Appellant.

The Appellant argued that the Respondent also erred in not making an inference from the Complainant taking the car to the Appellant for the second repairs that the Complainant was reasonably satisfied with the first repairs and the time in which they were done. The Appellant argued that a dissatisfied customer will not reasonably give return business to a service provider.

Further, the Appellant argued that the Respondent held in the Decision that the Appellant had taken a month more than agreed to complete the works the second time the car was taken in for repairs and took a further three (3) months to inform the Complainant of the car being ready for collection. The Appellant submitted that the Complainant did not follow up to check if her car was ready and did not even adduce evidence before the Respondent that she in fact made attempts to collect her car. In this vein, the Appellant submitted that it was the Complainant's duty to find out if her car had been repaired and in the absence of any finding to the effect that she made efforts to inquire on whether or not her car had been repaired, no damage was caused to her.

Furthermore, the Appellant argued that the email to the Complainant from Mr. Rudi Botha, the Appellant's General Manager, exhibited in the Respondent's notice to Produce at page 4 (herein called 'the first email') shows, in paragraph 6 that the Complainant had visited the Appellant's

workshop in December 2011 and shown happiness with the work done on her car. She further asked that further works be done to her car on a complimentary basis. They argued that the delay in the Complainant getting her car is attributed to her own further instructions which were not denied before the Respondent. They further argued that the Complainant was in fact told that her car would be ready in a few days from the date she requested further 'complimentary work'. She adduced no evidence to show that she followed up the matter a few days later to check if in fact the car had been repaired.

The Appellant submitted that if in December the Complainant was still giving further instructions for repairs, let alone complimentary ones, her car could reasonably have been returned to her before then. The Appellant argued that in any case, an email from the Appellant's General Manager to the Complainant which is page 5 and 6 of the Respondent's produced documents in the eighth bullet shows that the Complainant was in fact given a discount of Eight Million Kwacha (K8, 000,000) after she requested for it in an email, exhibited at page 7 of the Respondent's Notice to Produce, to the Appellant's General Manager, Rudi Botha. The Appellant argued that if the Complainant had in fact suffered any damage, and we still submit she had not, such damage cannot be attributed to the Appellant. They argued that the complimentary works done on her car during a time she claimed that her car should have been returned to her and further, the massive discount, we submit, must, reasonably, be seen as clear indication not only of the fact that the delays in delivering the service were largely caused by the Complainant but also that there was nothing unreasonable about the time within which the service to the Complainant was rendered.

The Appellant argued that it is also a fact that Rudi Botha, the Appellant's General Manager gave a directive that all communications with the Complainant go through him because the Complainant refused to deal with anyone else in the Appellant's organization and the Appellant should not be penalized for complying with the client's wishes.

The Respondent on their part made the following submissions:

1. The Respondent argued that contrary to the Appellant argument, the bone of contention or the main argument in the case before this Honourable Tribunal is the provision of a service with reasonable care and skill and within a reasonable time. Section 49(5) of the Competition and Consumer Protection Act No. 24 of 2010 "the Act' provides as follows:

   "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"

   The Respondent argued that nowhere in its grounds in opposition does the Respondent argue that the repair works on the Complainant's vehicle took seven weeks but allude to the fact that the Complainant took her vehicle to the Appellant on 10th March 2011 and only collected her car on 19th July 2011 which is more that the six weeks period agreed upon with the Appellant. The Respondent argued that therefore, the Respondent was in order when it held that the Appellant had breached subsection 5 of section 49 of the Act in that not only was the Appellant required by the law to provide service within a reasonable time but if a specific time was agreed, like in this case, within a reasonable period around the agreed time. Further, the Respondent argued that the Complainant's car came to the Appellant on the 10th March 2011 and was only released to the Complainant on the 6th July 2011 which is 12 weeks or 3 months contrary to the 6 weeks agreed upon. They argued that this cannot be considered as reasonable period or reasonable period the agreed time.

2. The Respondent argued that, due to the delay in repairing the Complainant's car, the Complainant incurred transport related expenses during the period when the car was with the Appellant. They argued that the delay did not only occur the first time that the Complainant took her car to the Appellant when she was advised to that her car would be repaired in one month but was only released to her after six months. They further argued that this clearly shows that the Appellant failed in its duty as provided under section 49(5).

3. The Respondent submitted that the Complainant cannot be faulted for taking back her vehicle to the Appellant for the second time. They noted that the Appellant is a reputable institution and that to the best of the Complainant's knowledge, it is the only one in Zambia that has the dealership in Mercedes Benz and thus the Complainant had an expectation that her car would be repaired by the Appellant professionally and expeditiously. They argued that when the Appellant advised the Complainant that her car be worked on in 6 weeks in the first instance and in one month in the second instance, she believed that the Appellant was talking as a professional that had the relevant skills to conduct repair works on her car within the agreed time frame.

4. Further, the Respondent argued that the Appellant does acknowledge in the heads of argument on page 5 in the last paragraph that at both times that the Complainant took her vehicle to Appellant, the car was not worked on during the agreed period. They argued that in the first instance it was 6 weeks but it took almost three months for repairs to be done. They further argued that the Appellant is on record having acknowledged the delay in repairing the Complainant's vehicle in the email on page 4 of the Respondent's grounds in opposition which is also on page 23 of the record of proceedings. They argued that the second time, the Appellant promised to work on the car within a month but it took 6

months which clearly is an unreasonable period. They also argued that even when the works on the Complainant's car were completed on or about the 15th December 2011, the Appellant neglected to inform the Complainant that the repair works had been completed until the Complainant followed it up via a telephone call to Mr. Botha whilst he was in Kitwe on or about the 16th February 2012. This is evident from the letter from the Appellant to the Respondent on page 15 of the Respondent's record of proceeding.

5. The Respondent argued that contrary to the Appellant's argument, the Complainant has no duty to be constantly following–up the Appellant to find out if the repair works on her car has been completed. They argued that the duty to communicate the status of the repairs was with the Appellant however who had advised the Complainant that her car would be worked on within certain periods. They also argued that the Complainant used to make follow ups on her own through a representative (Elias Chama) who would check the progress of the repair works on her car. Further, they argued that on Page 15 of the Respondent's record of proceedings in paragraph 10 shows that the Complainant used to go the Appellant's premises to check the progress on her car and further on the same page in paragraph 15, the Appellant does acknowledge that the works on the vehicle were complete before the Appellant's General Manager, Mr. Rudi Botha left for his Christmas break in South Africa who failed to inform the Complainant that her car was ready for collection.

6. The Respondent argued that contrary to the Appellant's argument, there was clearly no need to delay the works to the Complainant's car just because the Complainant had been given a discount if so, the Appellant should have denied the Complainant the discount she had requested for.

7. Further, the Respondent argued that contrary to the Appellant's argument that the Complainant did not want to deal with any other staff, the Appellant has not adduced any evidence to show that the Complainant had communicated with the Appellant stating that she did not want to contact other officer of the Appellant. They argued that it is on record that on page 15 of the record of proceedings that it was actually the Appellant's General Manager who had instructed other officers not to contact the Complainant and directed that any contact with the Complainant had to be through his office. The Respondent argued that the Appellant's General Manager became aware of the Complainant's case when she wrote a letter dated 14th July 2011 which is on page 4 of the Respondent's record of proceedings to the Appellant in which she was complaining of the delays to complete the repair works on her car.

8. They further argued that contrary to the Appellant's argument, the Respondent exercised maximum leniency towards the Appellant as a first offender by warning them to desist from the conduct in issue as a breach of section 49(5) of the Competition and Consumer Protection Act No. 24 of 2010 entails paying a fine to the commission of up to 10% of an enterprises turnover.

After the parties had made their initial submissions in their respective heads of argument, the Complainant was called to give her testimony on the issue of whether she had made any follow ups on whether the car was ready in the second instance. She testified as follows:

'Tribunal:	***After Christmas, they didn't come back to you?***
Complainant:	***They closed. No one was answering. After Christmas, I received word that the MD requested for me.***

Tribunal:	***How did you get this information?***
Complainant:	***We had been quarrelling about his employees.... I Had another Court Case. The Southern Cross employees injected themselves into the matter. I took the affidavit in January and to follow up my car. Nobody told me to go to Southern Cross in January. I took initiative. I went there unannounced because I was upset. I was told that the MD was out of Town.*** ***...When I Asked If I could speak to anybody else, they said no. After my initial argument with the staff, I could only deal with the MD.***
Tribunal:	***Did you try to find out if the car was ready?***
Complainant:	***I was told that I could only deal with the MD and nobody else had authority to release it.***
Tribunal:	***In February, did you make another follow up?***
Complainant:	***I had Mr. Chama who would check for me.... I don't think the car was ready.'***

The Appellant did not call a rebuttal witness. The Appellant argued that this testimony showed that the Complainant had insisted on only dealing with the Appellant's Managing Director; a fact that was disputed by the Respondent.

Findings of fact

As per the Ruling of the Supreme Court in the case of *Augustine Kapembwa v Danny Maimbolwa and the Attorney-General* (1981) ZR 127 (SC) that the Courts should be slow to interfere with the findings of

fact by a trial court, we adopt the findings of fact made by the Competition and Consumer Protection Commission as follows:

Relevant findings

(i) The Complainant took her vehicle to the Respondent for repairing of breaks and 5 point service on 10th March, 2011 as per job number 10Z44170 dated 10th March, 2011.

(ii)On 4th April, 2012 (*sic 2011)*, she paid a deposit of K6, 898,813.00 using cheque number 114, thereby authorizing the Respondent to start working on the vehicle.

(iii) The Respondent said that it would take 6 weeks to repair the vehicle.

(iv) From 4th April, 2012 (*sic* 2011) (the date of her authorizing the Respondent to start working on the vehicle) the repairs would have been completed by 16th May, 2011 (i.e. 6 weeks).

(v)The Complainant paid the balance of K7, 022,897.00 of the total bill of K13, 918, 7109.00 as per invoice number 10Z53539 given to her by the Respondent dated 19th July, 2011.

(vi) The Respondent called the Complainant on 6th July, 2011 informing her that her car had been repaired and that she could collect it. This was 7 weeks more than the 6 weeks period the Complainant and the Respondent had agreed on.

(vii) Body works repairs were not done on the vehicle as Ms. Mwenda had not yet paid for the works in full, though she had paid only K5, 000,000 on 17th June, 2011.

(viii) The Complainant took the vehicle to the Respondent for the second time on or around 9th September, 2011 after an accident on the 9th of September, 2011.

(ix) She asked the Respondent to work on the body due to the two accidents.

(x)The total quotation was K28, 241,290 dated 15th September, 2011.

(xi) On 13th October, 2012, Mr Botha, the Respondent's General Manager, wrote to the Complainant stating that the parts for her vehicle had arrived the previous day and asked her to authorize to start working on her vehicle, which she did in writing on 15th October, 2011.

(xii) She was told that the works would take one month. However, it took two months. Further, despite the vehicle being ready in December, 2011, the Respondent only informed the Complainant in February, 2012.

(xiii) To date, no payment has been made towards these repair works as the Respondent did not request the Complainant to make payment before commencement of repair works on the vehicle.

(xiv) The Complainant has not yet settled her bill with the Respondent.

The Law

Section 49(5) of the Competition and Consumer Protection Act No. 24 of 2010 ("the Act") states as follows:

"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"

In both instances the Complainant was provided with a specific timeframe within with her vehicle would be repaired and ready for delivery. In the first instance it was six weeks and this was exceeded by seven weeks. In the second instance it was one month and this was exceeded by three months. Section 49(5) of the Act states that where a specific time is agreed the service must be performed within a reasonable time around that time. The concept of reasonableness is quite a nebulous concept in common law. The general rule is that performance of a contract must be precise and exact. That is, a party performing an obligation under a contract must perform that obligation exactly within the time frame set by the contract and exactly to the standard required by the contract. Sometimes the standard may be strict for instance in in the case of statutory implied terms of quality in contracts for the sale and supply of goods. Whether the alleged performance satisfies this criterion is a question to be answered by construing the contract so as to see what the parties meant by performance and then by applying the ascertained facts to that construction, to see whether that which has been done corresponds to that which was promised. The Act however is requires the Tribunal to ascertain what was reasonable in the circumstances. In deciding what was reasonable in the circumstances, we are guided by the Uniform Commercial Code applied in the Commonwealth of the United States of America. Number 1-205 of the Uniform Commercial Code provides direction on what is a reasonable time; it states:

(a) "Whether a time for taking an action required by the Uniform Commercial Code is reasonable depends on the nature, purpose, and circumstances of the action.

(b) An action is taken reasonably if it is taken **at or within the time agreed** or, if no time is agreed, within a reasonable time".

We concur with this definition in its entirety. It is clear that the delay was well outside what was agreed by the parties. It is only left to examine whether there were any mitigating circumstances that warranted the delay as decided in the case of **Hick v Raymond [1893] AC 22; [1891-94] All ER Rep 491** referred to by the Appellant in their heads of argument.

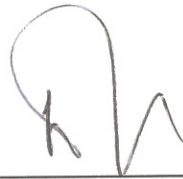
In the first instance the Appellant has argued that the delay in repairing the body works was occasioned by the delayed payment of the K5,000,000.00 deposit by Mrs. Mwenda, the person with whom the Complainant had been involved in an accident. Mrs. Mwenda only made the payment on 15th June 2011. While this is a reasonable excuse, there does not appear to have been any communication to the Complainant to advise her of the reason for the delay and that is a lapse on the part of the Appellant.

In the second instance, the Appellant had argued that the two month delay between the time the vehicle was ready for collection in December 2011 and the time when the Complainant was informed that the vehicle was ready for collection some two months later was a lapse on their part. The Appellant had initially argued that the Complainant had not tried to mitigate the circumstances by making follow ups. The subsequent testimony of the Complainant clarified that the Complainant had made follow ups however the Appellant's staff were reluctant to deal with the Complainant in the absence of their Managing Director. The Appellant's Managing Director has conceded that this was a lapse on the Appellant's part. In the circumstances there is no reasonable excuse for the delay in advising the Complainant that her car was ready for collection. Even if there had been a reasonable excuse for this lapse, the fact still remains that in the second instance the instructions to work on the car were given on 13th October 2011 and the car was only ready in December 2011 which was over the agreed period that the works on the car should have been done. Once again we find that on both counts the delay was unreasonable.

In conclusion we find for the Respondent in this matter and uphold the decision of the Competition and Consumer Protection Commission warning against untimely service. As this is the Appellant's first offence, we order that each party bears its own costs. 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 responsive to the needs of consumers.

Leave to appeal within 30 days is granted.

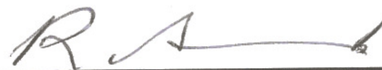
Dated the day of 2014



Mr Willie A Mubanga
Chairperson

Ms Linda Kasonde
Member

Mr Chance Kabaghe
Member



Mr Rocky Sombe
Member