

CASE FILE NUMBER: CONS/06/01/2022/00032/DL

**IN THE MATTER BEFORE THE BOARD
OF THE COMPETITION AND CONSUMER
PROTECTION COMMISSION**

BETWEEN

Ms. Musonda Chipili.

COMPLAINANT

AND

Kumbi General Dealers

RESPONDENT

BEFORE:

Commissioner Chenga Chisha

- Chairman

Commissioner Fredrick Imasiku

- Member

Commissioner Aubrey Chibumba

- Member

Commissioner Nsangwa Allen Ngwira

- Member

DECISION

Below is a summary of the facts and findings presented by the Commission to the Board of the Commission following investigations carried out in the above case.

Introduction and Relevant Background

It was submitted that:

1. On 7th January, 2022 the Competition and Consumer Protection Commission (“the Commission”) received a complaint from Ms. Musonda Chipili (“the Complainant”) against Kumbi General Dealers (“the Respondent”). Specifically, the Complainant alleged that on 3rd February, 2020, she purchased fifty (50) pockets of Mphamvu Cement from the Respondent at a unit cost of K99.00 per pocket. The Complainant alleged that she paid a total of K4,950.00 for the 50

pockets of cement. The Complainant alleged that she did not collect the cement immediately, as such, she informed the Respondent's Salesman that she would collect the cement when her builder was ready to use it. The Complainant alleged that around October, 2020, she went to the Complainant's store (container) to collect the cement, however; the Respondent refused to give it to her, indicating that they did not have proof that she did not collect the 50 pockets of cement immediately after she purchased it. The Complainant alleged that she continued following up on the matter with the latest being in June, 2021, but the Respondent refused to give her the cement. The Complainant alleged that at the back of the receipt number 15777 it was indicated that the cement was not collected. The Complainant therefore demanded that the Respondent gives her the 50 pockets of Mphamvu cement.

2. Initially the Commission instituted investigations in the matter under Section 49(5) of the Competition and Consumer Protection Act, No. 24 of 2010 ("the Act"). As such, the Notice of Investigation and accompanying letter were served on the Respondent. However, during the process of investigations the Commission found that the matter appeared to have bordered on Section 46(1) as read together with Section 45(b) of the Act. Hence, this case was analyzed under Section 46(1) as read together with Section 45(b) of the Act.

Legal Contravention and Assessment Tests

Legal Contravention

It was submitted that:

3. The alleged conduct appears to have contravened Section 45(b) as read together with Section 46(1) of the Competition and Consumer Protection Act, No.24 of 2010 ("the Act").

4. Section 45(b) of the Act states that:

"A trading practice is unfair if it compromises the standard of honesty and good faith which an enterprise can reasonably be expected to meet and thereby distorts, or is likely to distort the purchasing decisions of consumers."

5. Section 46(1) of the Act states that:

“A person or an enterprise shall not practice any unfair trading.”

6. Section 46(2) of the Act states that:

“A person who or an enterprise which contravenes subsection (1) is liable to pay the Commission a fine not exceeding ten percent of that person’s or enterprise’s annual turnover or one hundred and fifty thousand penalty units, whichever is higher.”

Assessment Tests

For the purposes of Section 45(b) as read together with Section 46(1) of the Act, the following assessment tests will be used;

It was submitted that:

7. Whether the Respondent is a “person” or an “enterprise.”
8. Whether the trading practice compromised the standard of honesty and good faith which an enterprise is reasonably expected to meet and thereby distorted or was likely to distort the consumers purchasing decision.

Investigations Conducted

It was submitted that:

9. The Commission duly served the Notice of Investigation and accompanying letter on the Respondent on 18th January 2022 as evidenced by the acknowledgement of receipt. The Commission also reviewed the receipt issued to the Complainant dated 3rd February, 2020.

Findings

The Parties

The Complainant

It was submitted that:

10. The Complainant is Ms. Musonda Chipili a resident of Lusaka.¹ Section 2 of the Act defines a consumer as, *“any person who purchases or offers to purchase*

¹ CCPC Form IV dated 8th November, 2021

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”² Therefore, the Complainant is a consumer as envisaged under the Act as she purchased cement from the Respondent for her personal use and benefit.³

The Respondent

It was submitted that:

11. The Respondent is Kumbi General Dealers, whose registered address is Silverest Area, Along Great East Road, Lusaka. A search at the Patents and Companies Registration Agency (PACRA) showed that the Respondent is registered with PACRA with registration number 320080144976.⁴ According to the Act, an “enterprise” means *a firm, partnership, joint-venture, corporation, company, association and other juridical persons, which engage in commercial activities, and includes their branches, subsidiaries, affiliates or other entities, directly or indirectly, controlled by them.* Therefore, the Respondent is an enterprise as envisaged under the Act as they are a company engaged in commercial activities of supplying building materials to the general public.

Submissions from Respondent⁵

It was submitted that:

12. The Respondent made submissions to the Notice of Investigation in a letter dated 2nd February, 2022. The Respondent submitted that the Complainant purchased 50 bags of Mphamvu cement on 3rd February, 2020 from the Respondent’s Silverest outlet in Chongwe, Lusaka. The Respondent submitted that they were only informed by the Complainant on 22nd July, 2021, that the cement was never collected. The Respondent submitted that they requested for a receipt and other necessary documentation from the Complainant to substantiate her claims. The Respondent submitted that the Complainant produced the receipt which indicated that she had indeed purchased the cement and she further indicated that she did not collect it despite being in touch with the company on several occasions. The Respondent submitted that they carried out a thorough inventory

² Competition and Consumer Protection Act No. 24 of 2010

³ Complainant’s receipt number 15777 dated 3rd February, 2020

⁴ Company PACRA search conducted on 28th February, 2022.

⁵Response letter from the Respondent dated 2nd February, 2022

investigation and discovered that they did not owe the Complainant the unclaimed cement and that the 50 bags of cement were collected according to the Respondent's cash sale receipt (which was submitted to the Commission). The Respondent refuted the writings at the back of the receipt that was issued to the Complainant on grounds that although there was a signature below the writing "not collected" belonging to their Salesperson, it did not indicate the full names of the sales representative and the date the transaction took place as per practice.

13. The Respondent submitted that the Complainant informed them that she had been communicating with one of their employees of the Respondent, who assured her that the 50 bags of cement were in stock, however, the driver did not give any satisfactory response when he was queried. The Respondent submitted that they inquired why the Complainant chose to communicate with the driver when she could have communicated directly with the company through the cell phone number written on the receipt. The Respondent submitted that they further inquired why the Complainant did not physically visit the Silverest branch to claim for the cement. The Respondent submitted that the Complainant did not give any satisfactory answers to these queries. The Respondent further submitted that because of the above reasons they suspected that the Complainant's claims were fraudulent and therefore, they advised the Complainant to report the matter to the police so that a professional investigation could be conducted as the transactions appeared to border on an individual Salesperson and not the company. The Respondent submitted that they would fully cooperate with the law enforcement agencies.

Review of the Receipts for the Complainant⁶

It was submitted that:

14. A review of the receipt issued to the Complainant dated 3rd February, 2020 with receipt number 15777, revealed that the Complainant made a total payment of K4, 950.00 for fifty (50) pockets of Mphamvu cement. Furthermore, a review of the back of the Complainant's receipt issued in the Respondent's name was written "*not collected*" and undersigned by a Mr. Oliver.

Further Submissions from the Complainant

It was submitted that:

⁶ Complainant's receipts dated 3rd February, 2020.

15. On 28th January, 2022, the Complainant submitted that when she went to buy the cement, a man attended to her who she later found out was the Respondent's driver. The Complainant submitted that she bought the cement on 3rd February, 2020 and around October, 2020, she went back to collect her cement but the Respondent refused to give her the cement. The Complainant submitted that around December, 2020, she went back to collect the cement but the Respondent's driver told her that she could only collect 35 pockets. The Complainant submitted that she did not want to collect less than what she had paid for, therefore, she chose to report the matter to the Commission.

Meeting with the Respondent, the Complainant and the Respondent's driver held on 5th April, 2022 at the Commission's office.

Submission from the Respondent's driver and the Managing Director

It was submitted that:

16. The Respondent's driver Mr. M. Oliver submitted that in 2021, he was contacted by the Complainant pertaining the cement she had purchased from him. The Respondent's driver submitted that he informed the Complainant that he could only give her thirty-four (34) bags of cement out of fifty (50) bags on account that he had given sixteen (16) bags of cement to his friend from SINOMA to balance with stock taking. The Respondent's driver submitted that he agreed to the Complainant's purchasing of fifty (50) bags from their silverest outlet.⁷
17. The Respondent's Managing Director Mr. Vincent Sakuya submitted that he responded to the Notice of Investigation based on the information he had received from his employees. The Respondent submitted that the Complainant took a year before contacting him about the cement purchased. The Respondent submitted that when he visited his silverest outlet for stock taking, he was informed that there were thirty-four (34) bags of cement belonging to his client.⁸ The Respondent submitted that it was the cashier's responsibility to ensure that the date, name of the cashier, signature written in front of the receipt. The Respondent submitted that the Complainant would have contacted the number on the receipt after she saw that their driver was not giving her the cement. The Respondent's Director submitted that since it was his driver who transacted and was in contact with the Complainant he was not informed. The Respondent

⁷ Physical meeting at the Commission's Office with the Complainant, the Respondent and the Respondent's driver on 5th April, 2022.

⁸ Physical meeting at the Commission's Office with the Complainant, the Respondent and the Respondent's driver on 5th April, 2022.

submitted that despite the Complainant having a contact number on the receipt belonging to him, the Complainant did not contact him. The Respondent submitted that later on he was finally contacted by the Complainant and he advised her to report the matter to the police for the full investigations to be conducted.

18. The Respondent submitted that they were willing to refund the Complainant the full amount of K4, 950.00 but, in two (2) instalments within two months starting on the 30th April, 2022. The Respondent submitted that the prices of products kept on rising, hence they could either offer the Complainant the cement at the prevailing price of K135.00 per bag equivalent to the monetary value of K4, 950.00 on the receipt resulting into 36 bags of cement.⁹

Submission from the Complainant to the meeting

It was submitted that:

19. The Complainant submitted that she delayed to collect the bags of cement from the Respondent as she was nursing her dad who eventually passed away. The Complainant submitted that even during the course of 2020 and 2021 she kept contact with the Respondent's driver. The Complainant submitted that she wanted the cement and not the refund. The Complainant submitted that she was willing to accept forty-five (45) bags of cement out of the fifty (50) purchased. The Complainant submitted that the 36 bags of cement offered to her which was equivalent to the currently monetary value would disadvantage her.

Submissions to the Commission's preliminary Report

It was submitted that:

20. After approval of the preliminary report, the Commission sent the report to the Complainant on 25th April, 2022 and to the Respondent on 29th April, 2022 to make further submissions based on the Commission's findings.

Submission from the Complainant to the Commission's preliminary Report.

It was submitted that:

⁹ Physical meeting at the Commission's Office with the Complainant, the Respondent and the Respondent's driver on 5th April, 2022.

21. There were no submissions from the Complainant to the Commission's preliminary report.

Submission from the Respondent to the Commission's preliminary Report.

It was submitted that:

22. There were no submissions from the Respondent to the Commission's preliminary report.

Relevant Findings

It was submitted that:

23. The Commission found that the Complainant on 3rd February, 2020, purchased fifty (50) pockets of Mphamvu cement at the total cost of K4, 950.00 but alleged that she did not collect the cement as indicated on the Complainant's receipt.¹⁰
24. The Commission found that the Complainant dealt with the Respondent's driver during the transaction at the Respondent's Silverest outlet, but the owner (Director) of the business was not aware of the transaction.¹¹
25. The Commission established through the submission from the Respondent that the Respondent refuted the writings at the back of the receipt that was issued to the Complainant on grounds that although there was a signature below the writing "not collected" belonging to their salesperson, it did not indicate the full names of the sales representative and the date the transaction took place.¹²

Previous cases involving the Respondent

It was submitted that:

26. A review of the case file for the Respondent revealed that there was no previous case in which the Respondent was found to have breached Section 46(1) as read together with Section 45(b) of the Act.

¹⁰ Complainant's receipt dated 3rd February, 2020

¹¹ Physical meeting at the Commission's Office with the Complainant, the Respondent and the Respondent's driver on 5th April, 2022.

¹² Submission from the Respondent

Analysis of Conduct

For the purposes of Section 45(b) as read together with Section 46(1), the following assessment tests will be used;

Whether the Respondent is a “person” or an “enterprise”.

It was submitted that:

27. Refer to paragraph 11 of the report.

Whether the trading practice compromised the standard of honesty and good faith which an enterprise is reasonably expected to meet and thereby distorted or was likely to distort the consumers purchasing decision.

It was submitted that:

28. Honesty is defined as “*the quality of being honest*”¹³. On the other hand, the Black’s Law dictionary defines ‘good faith’ as “*a state of mind consisting of honesty, faithfulness to one’s duty or obligation and observance of reasonable commercial standards of fair dealing in a given trade or business*”¹⁴. This simply implies that the Respondent has a duty or obligation to fulfill by ensuring that they are transparent in their transactions with the consumers and that they fulfil commercial standards of fair dealing in a given business.
29. The Commission established that the Complainant on 3rd February, 2020, purchased 50 pockets of Mphamvu cement at the total cost of K4, 950.00 but did not collect them as indicated on the Complainant’s receipt.¹⁵ During the physical meeting with the Respondent, the Complainant and the Respondent’s driver on 5th April, 2022, it was established that the Complainant’s claims were genuine in that the Respondent’s driver admitted to having handled the Complainant’s transaction. The Commission established that the Complainant dealt with the Respondent’s driver during the transaction, but the owner (Director) of the business was not aware of the transaction¹⁶. The Commission established that it is trite law that employees are considered agents of persons they work for. In the case **Lloyd v Grace Smith & Co (1912) AC 716** the defendant firm had employed Mr. Sandles as their conveyancing Manager and Managing Clerk. Sandles had fraudulently induced the plaintiff, who instructed

¹³ https://www.oxfordlearnersdictionaries.com/definition/american_english/honesty

¹⁴ Black’s Law Dictionary, 8th Edition, page 713.

¹⁵ Receipt number 15777 dated 3rd February, 2022 issued to the Complainant by the Respondent.

¹⁶ Submission from the Complainant.

the firm to carry out certain transactions for her, to enter into conveyances in his favour. The principle which the House of Lords held to be applicable was stated by Lord Loreburn to be-*“if the agent commits the fraud purporting to act in the course of business such as was authorized, or held out as authorized, to transact on account of his principal, then the latter may be held liable for it.”*

30. Further attention is drawn to the case of **Lister v. Hesley Hall (2002) 1 AC 215**, which held that: *“a wrongful act is deemed to be done by a servant in a course of his employment if it is either 1) a wrongful act authorised by the master 2) a wrongful act and unauthorised mode of doing some act authorised by the master.”* Furthermore that; *“a master is liable even for acts which he has not authorised, that they may rightly be regarded as modes, although improper modes of doing them.”* Attention is also drawn to the case of **Hilton v. Thomas Burton (Rhodes) Limited (1961) ALL ER 74, 707** wherein Lord Diplock J at page 707 stated: *“I think the true test can be expressed in these words: was the servant doing something that he was employed to do? If so, however, improper the manner in which he was doing it, whether negligent or fraudulent or contrary to express orders, the master is liable.”* Thus, it is contended, an employer is **vicariously liable** for injuries to a third party caused by the employee’s negligence, even though the employee engaged in an act which is expressly prohibited by the employer. It is submitted that the test to be applied is whether the employee was doing something that they were employed to do however; improper the manner of doing it, the employer is liable whether the employee was negligent or fraudulent or acting contrary to express orders.¹⁷
31. The Commission established that the cited agency-principal judgements above stated that any act of the agent conducted within the course of business was considered as having been authorized by the principal. The Commission further established that an employer is vicariously liable for the employees conduct whether the employee was negligent or fraudulent or acting contrary to express orders. In this case and based on submissions from both parties, the salesperson (the Respondent’s driver) accepted the Complainant’s payment in the ordinary course of business as the Respondent’s salesperson at the Respondent’s outlet giving rise to liability. The Commission further established that the Complainant had no reason to suspect that the salesperson (the Respondent’s driver) was not acting on behalf of the Respondent because the salesperson was an employee of

¹⁷ Vally v Attorney General (Appeal No. 50/2017) [2017] ZMCA 15 (29 November 2017)

the Respondent at the time and had issued a receipt to the Complainant in the Respondent's name.

32. Further, the Commission noted from the Respondent's submission that the Respondent refuted the writings at the back of the receipt that was issued to the Complainant on grounds that although there was a signature below the writing "not collected" belonging to their salesperson, it did not indicate the full names of the sales representative and the date the transaction took place. The Commission established that it was the Respondent's cashier/salesperson obligation to ensure that their employee issued receipts to the clients in accordance to their practice that was indicating the full names of the sales representatives and the date the transaction took place. The Commission further noted that the front part of the receipt indicated the date when the transaction took place which was on the 3rd February, 2020. In addition, the Commission through the Respondent's submissions established that the Respondent was able to identify and accepted the signature at the back of the receipt which was issued to the Complainant as belonging to their employee; thus, the Respondent could identify the name of their employee.
33. The Respondent could have charged the Complainant the penalty fee for late collection or storage rather than denying her any redress. The Action by the Respondent compromised the standard of honesty and good faith which was expected from them. Therefore, the Commission established that the Respondent was in violation of Section 45(b) as read together with Section 46(1) of the Act.

Board Deliberation

34. Having considered the facts, evidence and submissions in this case, the Board resolves that the Respondent violated Section 46(1) as read together with Section 45(b) of the Act as they failed to supply the cement the Complainant paid for.

Board Determination

35. The facts and evidence of this case have shown the Respondent engaged in unfair trading practices, hence did breach Section 46(1) as read together with Section 45(b) of the Act.

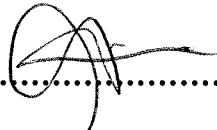
Board Directives

36. The Board hereby directs that:

- i. The Respondent is fined 0.5% of their annual turnover for violating Section 45(b) as read together with Section 46(1) in accordance with Section 46(2) of the Act and the applicable cap in line with the Guidelines for Administration of Fines, 2019 *(See Appendix 1 for details)*.
- ii. The Respondent should supply fifty (50) bags of Mphamvu cement (50 kg) to the Complainant within ten (10) days of receipt of the Board Decision in accordance with Section 5(d) of the Act.
- iii. The Respondent submits their latest annual books of accounts to the Commission for calculation of the actual fine within thirty (30) days of receipt of the Board Decision in accordance with Section 5(d) of the Act.

Note: Any party aggrieved with this order or directive may, within thirty (30) days of receiving the order to direction, appeal to the Competition and Consumer Protection Tribunal.

Dated this 9th August, 2022



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Chairman

Competition and Consumer Protection Commission

Appendix 1-Calculation of Fine

The Calculation of the recommended fine was determined as follows-

- (a) ***The Competition and Consumer Protection Act No. 24 of 2010: Guidelines for Administration of Fines 2019, sets a base of 0.5% for offences relating to Part VII of the Act with the following caps;***

Offence	Starting Fine	Maximum Fine in Kwacha
Unfair trading practice False or misleading representation Price Display Supply of defective and unsuitable goods and services Section 49) except for Section 49(1)	0.5% of turnover	<ul style="list-style-type: none"> • K1,000 for turnover upto K50,000 • K10,000 for turnover above K50,000 upto K250,000 • K40,000 for turnover above 250,000 upto K500,000 • K70,000 for turnover above K1,500,000 • K150,000 for turnover above K1,500,000 upto K3,000,000 • K200,000 for turnover above K3,000,000 upto K5,000,000

		<ul style="list-style-type: none"> • K500,000 for turnover above K5,000,000
Display of Disclaimer	0.5% of turnover	K30,000

- (b) The Competition and Consumer Protection Act No. 24 of 2010: Guidelines for Administration of Fines 2019, further provides for additions as follows-
- (i) The starting point of a financial fine will be a fine of not less than 0.5% of annual turnover for first time offenders.
 - (ii) (The starting point of a financial fine for a repeat offender will be the previous fine charged by the Commission.
 - (iii) Thereafter, the Commission will be adding a 10% of the fine determined in step one above for each aggravating factor
- (c) **Whether the Respondent is a repeat offender under Section 45(b) as read together with Section 46(1) of the Act;**

The Commission's review of its records shows that the Respondent is a first-time offender of this Provision of the Act. As such the fine is calculated as follows:

Starting with baseline fine of **0.5%**.