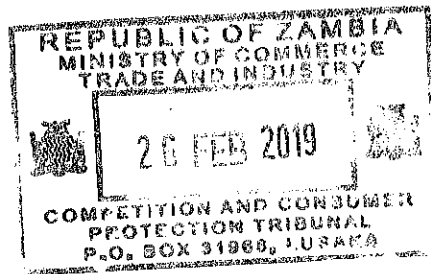


THE COMPETITION AND CONSUMER
PROTECTION TRIBUNAL
HOLDEN AT LUSAKA

APPEAL No.
2018/CCPT/001/COM

BETWEEN:
LAFARGE ZAMBIA PLC



APPELLANT

AND

COMPETITION AND CONSUMER PROTECTION

RESPONDENT

CORAM: Mr. Willie A. Mubanga, SC – Chairperson
Mrs. Miyoba B. M. Katongo - Vice Chairperson
Mr. Rocky Sombe - Member
Mrs. Eness C. Chiyenge - Member
Mr. Chance Kabaghe-Member

For the Appellant: Mr. S. Chisenga and Ms. M. Namwila-Corpus Legal Practitioners

For the Respondent: Mrs. M. M. Mulenga, Manager-Legal and Corporate Affairs and Ms. M. Mtonga, Legal Officer-Competition and Consumer Protection Commission

RULING

Legislation referred to-

Competition and Consumer Protection Act, No. 24 of 2010
Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia
High Court Act, Chapter 27 of the Laws of Zambia
Subordinate Courts Act, Chapter 28 of the Laws of Zambia.
State Proceedings Act, Chapter 71 of the Laws of Zambia
Competition and Consumer Protection (Tribunal) Rules, Statutory Instrument No. 37 of 2012

Cases referred to-

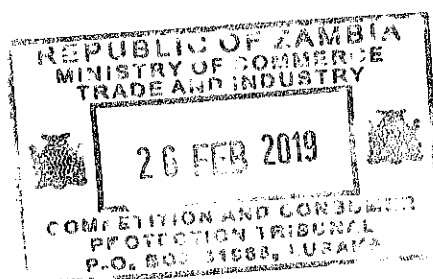
Morelle Ltd v Wakeling [1955] 2 QB 379
Huddersfield Police Authority v. Watson (1947) 2 All ER 193
Zambia National Holdings Limited and United National Independence Party (UNIP) v. The Attorney-General (1994) S.J. 22 (S.C.)
Miyanda v The High Court (1984) Z.R. 62
Zambia Revenue Authority and Armcor Security Limited Appeal No. 72/2014 SCZ/8/49/2014
Zambia Revenue Authority v. Fellimart Investment Limited Supreme Court Judgment No. 24 of 2017 (Appeal No. 174 of 2014)
Mbilidyx Engineering and General Supply v. National Breweries PLC and the Competition and Consumer Protection Commission 2016/CCPT/012/CON
MTN (Zambia) Limited v. Competition and Consumer Protection Commission (in Re Abraham Makano) Appeal No. 2018/CCPT/009/CON
MTN (Zambia) Limited and Competition and Consumer Protection Commission (in Re Cryson Mwambwa) Appeal No. 2018/CCPT/010/CON

Other Works referred to-

Halsbury's Laws of England 3rd Edition Vol.9, page 581, paragraph 1352
Invoking the Doctrine of per incuriam by M. Govindarajan
Available
at https://www.taxmanagementindia.com/visitor/detail_article.asp?ArticleID=5220
visited on 14th September, 2018 at 10:53 hours

Brief Facts of Case

1. The brief facts of the case are that the Competition and Consumer Protection Commission (hereinafter "the Respondent") initiated investigations in May, 2013, based on alleged abuse of a dominant position of market power in the cement sector by Lafarge Cement Zambia PLC (hereinafter "the Appellant"). In particular, on 6th August, 2013, the Respondent commenced investigations against the Appellant over allegations for over pricing of cement covering a five year period from 2008 to 2012. The Board of the Respondent on 14th December, 2017, found the Appellant to have contravened sections 16(1) and



section 16(2)(f) of the Competition and Consumer Protection Act No. 24 of 2010 (hereinafter "the Act").

2. Sections 16(1) and 16(2)(f) of the Act provide, respectively-

16. (1) *An enterprise shall refrain from any act or conduct if, through abuse or acquisition of a dominant position of market power the act or conduct limits access to markets or otherwise unduly restrains competition, or has or is likely to have adverse effect on trade or the economy in general.*

(2) For purposes of this Part, "abuse of a dominant position" includes –

(f) *charging an excessive price to the detriment of consumers;*

3. The Appellant was fined-

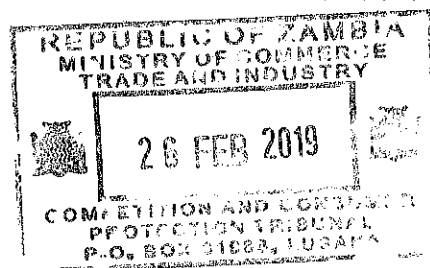
(1) 2.5% of annual turnover for the application of abusive loyalty discounts in contravention of section 16(1) of the Act;

(2) 2.5% for discriminating the domestic market against the international market and the Lusaka market segment against the rest of the country in contravention of section 16(1) of the Act; and

(3) 5% for excessively pricing the domestic market of cement in contravention of section 16(2)(f) of the Act.

4. The Board of the Respondent made further directions which comprised measures to be undertaken by Lafarge so as to prevent further contraventions of the Act.

5. The Appellant has appealed against the decision of the Respondent and filed its Notice of Appeal on 17th January, 2018. The Tribunal shall not burden itself with the details thereof as the same are not the subject of this matter. The Appellant also filed *Ex-parte* summons to stay execution of the decision dated 14th December, 2017, pending determination of the appeal by the Tribunal on the 21st of February, 2018, and its Affidavit in support of *Ex-parte* summons to stay execution of the Respondent's decision on the 20th of February, 2018. Following direction from the Tribunal to the effect that there was need for the Appellant to file a further Affidavit to show the merit of the Appellant's appeal, the Appellant filed a Further affidavit in support of *Ex-parte* summons to stay execution of the Respondent's decision on the 2nd of March, 2018.



6. The contents of the said documents (such as have been referred to in paragraph 5) will not be reproduced as they are on record, but excerpts thereof will be referred to by the Tribunal as and when necessary.
7. Learned Counsel for the Parties did not make any oral submissions.

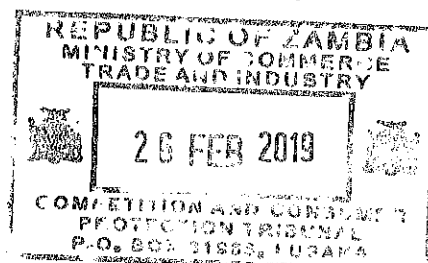
Issue for determination by the Tribunal

8. The issue for determination by this Tribunal is the question of whether or not this Tribunal has the power to grant a stay of execution of the decision of the Respondent. This question is considered below.

Does the Tribunal have power or jurisdiction to grant a stay of execution of the decision of the Respondent?

9. It suffices to note that the Parties did not address the question of whether or not the Tribunal has jurisdiction to grant a stay of execution of the decision of the Respondent.
10. Learned Counsel for the Appellant did, however, inform the Tribunal that a Consent Order signifying that the Parties had consented to the application for an Order to stay execution of the Respondent's decision had been filed, and that the Appellant was unable to uplift the order as there was a requirement that the Appellant file an Affidavit before the Secretariat, which Affidavit it had since filed. Learned Counsel for the Respondent confirmed this position.
11. The Tribunal considered the documents submitted by Learned Counsel for the Appellant, for which documents it is grateful.
12. The Tribunal notes that it is trite that a Court or Tribunal cannot exercise jurisdiction which has not been conferred upon it either expressly or impliedly, by or under an Act of Parliament. It is for this reason that in the case of *Mbilidyx Engineering and General Supply v. National Breweries PLC and the Competition and Consumer Protection Commission 2016/CCPT/012/CON* this Tribunal stated-

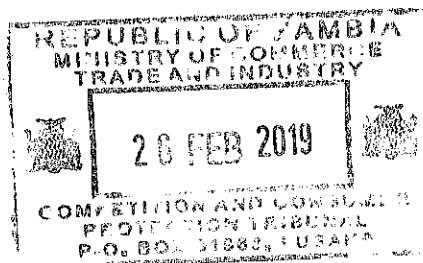
In our ruling on a preliminary point of jurisdiction in the case of Pep Stores Zambia Limited v. Competition and Consumer Protection Commission 2016/CCPT/013/CON we referred to the case of Vangelatos and Vangelatos



and Metro Investments Limited and Others (Selected Judgment No. 35 Of 2016), where the Court held that:

“... Where a Court takes it upon itself to exercise a jurisdiction which it does not possess its decision amounts to nothing. Jurisdiction must be acquired before judgment is given. It can be discerned from the foregoing position of the Law that the absence of jurisdiction nullifies whatever decision follows from such proceedings. This is the position because, the power of this Court (like that of any other Court created by the Constitution of Zambia Act is vested in it by the People of Zambia to be exercised justly in accordance with the Constitution and any other Laws. The exercise of such power, in the absence of jurisdiction, amounts to an abrogation of the confidence reposed in the Courts by the People and a contravention of the Constitution and other laws...”

13. The Tribunal further notes the case of Zambia National Holdings Limited and United National Independence Party (UNIP) v. The Attorney-General (1994) S.J. 22 (S.C.) in which the Supreme Court addressed the issue of jurisdiction. In that case, the Supreme Court, recalling what was said in the case of Miyanda v The High Court (1984) Z.R. 62 at page 64 stated, with respect to jurisdiction, that in the one sense, jurisdiction entailed “... the authority which a court has to decide matters that are litigated before it”, and in another sense, it entailed “...the authority which a court has to take cognisance of matters presented in a formal way for its decision.” The Supreme Court went on to state that authority of each of the courts was delimited by the appropriate legislation. The Supreme Court stated that such limits related to “... the kind and nature of the actions and matters of which the particular court has cognisance or to the area over which the jurisdiction extends, or both.”
14. The Tribunal also notes the case of the Zambia Revenue Authority and Armcor Security Limited Appeal No. 72/2014 SCZ/8/49/2014 (hereinafter “the Armcor Security Case”) in which case the question of the jurisdiction of the Revenue Appeals Tribunal ((hereinafter “the RAT”) as it then was) was



considered by the Supreme Court. The Supreme Court, noting the provisions of the RAT Act stated-

... it is clear that the RAT was established to carry out specific functions which are clearly spelt out by the provisions of the Act. In the exercise of its functions, the RAT is guided by the provisions of the Regulations contained in Statutory Instrument No. 11 of 1998 which provides, inter alia, for specific powers of the RAT. It is therefore, our firm view that in the absence of express provision under both the RAT Act and the RAT Regulations that specifically vests the RAT with power to grant a stay of execution pending appeal, the RAT cannot assume jurisdiction to grant a stay of execution pending appeal as such power is not provided for under the enabling legislation. Allowing the RAT to do so would amount to sanctioning the RAT to clothe itself with power/jurisdiction which the legislature did not give it...It is also our firm view that had that been the intention of the Legislature to empower the RAT to grant stays pending appeal, such power would have been expressly provided for under the RAT Act or indeed the RAT Regulations. Therefore, in the absence of express provision granting such power, the RAT has no jurisdiction to grant a stay of execution pending determination of an appeal before it.

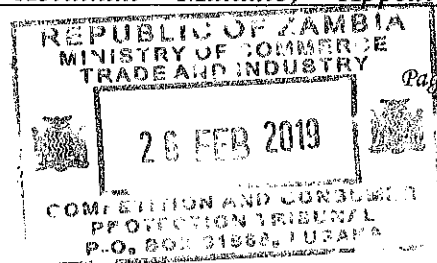
15. The Tribunal also notes the case of Zambia Revenue Authority v. Fellimart Investment Limited Supreme Court Judgment No. 24 of 2017 (Appeal No. 174 of 2014 (hereinafter the "Fellimart Case") in which the Supreme Court stated-

We, therefore, are of the considered opinion that in the absence of an express legislative provision giving the Tribunal power to stay the execution of decisions of the Appellant, the Tribunal does not have that power...

16. The Tribunal further notes Halsbury's Laws of England 3rd Edition Vol.9, page 581, paragraph 1352 in which the authors stated-

No Tribunal by misinterpretation of the law which gives it jurisdiction can purport to exercise a greater jurisdiction which it does not in fact possess.

17. In the cases of MTN (Zambia) Limited v. Competition and Consumer Protection Commission (in Re Abraham Makano) Appeal No.



2018/CCPT/009/CON and MTN (Zambia) Limited and Competition And Consumer Protection Commission (in Re Cryson Mwambwa) Appeal No. 2018/CCPT/010/CON in which this Tribunal considered whether or not it has jurisdiction to grant stays of execution of the Respondent's decisions, the Tribunal having considered the foregoing factors pronounced that in light of those factors it was evident that in order for the Tribunal to exercise power or jurisdiction to grant stays of execution, that power or jurisdiction should be expressly set out by law.

18. The Tribunal then critically examined the provisions of both the Act and the Tribunal Rules and established, for a fact, that there is no express provision therein that clothes the Tribunal with the power or jurisdiction to grant stays of execution pending appeal.
19. Having found that the Tribunal has no jurisdiction to grant stays of execution of the Respondent's decisions, the Tribunal also addressed the question of whether or not the law impliedly empowers, or confers upon it power or jurisdiction to grant stays of execution of the decisions of the Commission.

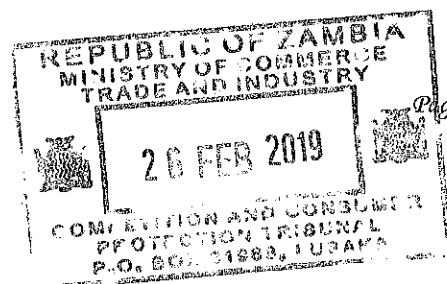
This question is addressed below.

Does the Tribunal have the implied power or jurisdiction to grant a stay of execution of the decision of the Respondent?

20. The Tribunal considered section 25 of the Interpretation and General Provisions Act which makes provision for implied power. That section provides-

25. Where any written law confers a power on any person to do or enforce the doing of an act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.

21. The Tribunal notes that in the past, it has, recognising the absence of an express power to grant stays of execution, granted stays of execution of the decisions of the Commission on the basis of the foregoing section, and in most cases, with the consent of the parties. The question, therefore, to be

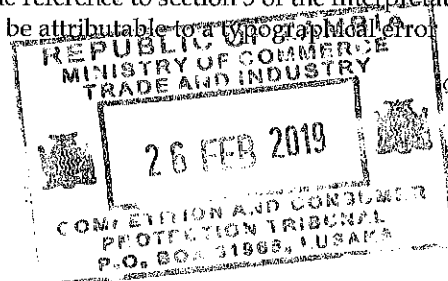


determined by the Tribunal is whether or not it has properly invoked the provisions of section 25 of the Interpretation and General provisions Act.

22. The Tribunal notes, in this regard, the Armcor Security Case, in which the Supreme Court addressed the use, by the RAT, of section 25 of the Interpretation and General Provisions Act to grant stays of execution pending appeal. In the opinion of the Supreme Court it was “... a misdirection for the learned appellate Judge to have relied on the provisions of section 25 of the Interpretation and General Provisions Act to come to the conclusion that the RAT had incidental and ancillary power in exercising the appellate jurisdiction to grant stays of execution pending disposal of an appeal before it.” The Supreme Court stated that this was so because that section 25 could not “... be construed to extend the powers/jurisdiction of the RAT to include powers that the RAT has not been expressly vested with by the enabling legislation under which the power to grant a stay pending appeal is said to have been exercised by the RAT in the current case.”
23. The Tribunal further notes the Fellimart Case in which our Supreme Court again considered the question of implied power *vis a vis* the granting of stays of execution. The Supreme Court, having noted that “... the Learned judge in the lower court basically inferred the power to grant a stay of execution from the fact that the above provisions gave the Tribunal jurisdiction to ‘hear and determine appeals’ under the CUSTOMS AND EXCISE ACT”, went on to state-

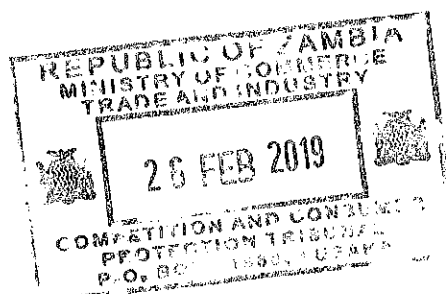
In this regard, the court agreed with the ruling of the Tribunal, that it would be erroneous to think that the Tribunal could be given authority without the law inferring some enforcement mechanisms to ensure compliance with orders of the Tribunal. The court held, after taking into account the provisions of section 5(2)(f) of the Customs and Excise (Amendment) Act No. 2 of 2001 and Section 5¹(sic) of the Interpretation and General Provisions Act that “the Revenue Appeals Tribunal, whilst seized of an appeal, has inherent, implied and ancillary powers to grant Stays of Execution against the recovery of disputed demand of tax.”... we have carefully studied the provisions of the REVENUE APPEALS TRIBUNAL ACT, CUSTOMS

¹ With the utmost respect, the Tribunal notes that the reference to section 5 of the Interpretation and General Provisions Act is erroneous and appears to be attributable to a typographical error



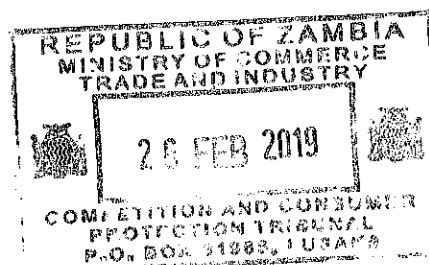
AND EXCISE ACT and the INTERPRETATION AND GENERAL PROVISIONS ACT and reiterate our position in the ARM COR SECURITY CASE, that there is no provision in any of these statutes from which a power to stay execution can be inferred. In our opinion, if Parliament wanted the Tribunal to have power to grant a stay of execution, it would have provided for that power expressly...The jurisdiction to hear and determine appeals from the Appellant does not invariably mean that the Tribunal has power to stay decisions of the Appellant. Under our legal system it is trite law that an appeal does not operate as a stay of execution...In addition, a stay of execution is not granted as a matter of right; the court's power is discretionary...We, therefore, are of the considered opinion that in the absence of an express legislative provision giving the Tribunal power to stay the execution of decisions of the Appellant, the Tribunal does not have that power..."

24. In the Re Cryson Mwambwa and Re Abraham Makano cases we found, in effect, that although the Tribunal referred to in the foregoing excerpt is one conferred with power to hear tax appeals, a close examination of the excerpt shows that the Supreme Court pronounced itself in a very broad and general manner, with respect to jurisdiction and the manner in which section 25 of the Interpretation and General Provisions Act is to be interpreted *vis a vis* jurisdiction. On that basis we found that the only logical conclusion to be made of the Supreme Court's statements is that this Tribunal does not have implied power to grant stays of execution.
25. Having found that this Tribunal has no jurisdiction to grant stays of execution of the decisions of the Respondent, a discussion of the merit of the appeal is rendered redundant and will, therefore, not be undertaken.
26. It suffices, at this point, for the Tribunal to pronounce itself with respect to instances in the past where it has granted stays of execution of the decisions of the Commission. The Tribunal notes that these stays of execution were granted *per incuriam*.



The doctrine of per incuriam

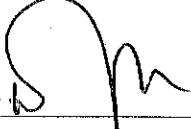
27. Under the doctrine of *per incuriam* a precedent is not binding if it was rendered in ignorance of a statute or delegated legislation. The Parties may wish to refer to the case of *Morelle Ltd v Wakeling [1955] 2 QB 379* in which it was stated that as a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. The parties may also wish to refer to *Huddersfield Police Authority v. Watson (1947) 2 All ER 193* in which Lord Godard, C.J. observed that: "*Where a case or statute had not been brought to the court's attention and the court gave the decision in ignorance or forgetfulness of the existence of the case or statute, it would be a decision rendered in per incuriam.*"
28. The Tribunal notes, as it did in the *Re Cryson Mwambwa* and *Re Abraham Makano* cases that the stays of execution of the decisions of the Commission that the Tribunal granted in the past were granted *per incuriam*, and as such are not binding.
29. That being said, the Tribunal has considered the provisions of the Competition and Consumer Protection Act that pertain to the execution of decisions of the Commission. In this regard, the Tribunal takes note of section 86(1) of the Act which provides-
- 86. (1) A fine payable under this Act shall be a debt due to the State and shall be summarily recoverable as a civil debt.*
30. The Tribunal also considered various pieces of legislation for the recovery of civil debts in Zambia as set out in, *inter alia*-sections 9 and 10 of the State Proceedings Act, Chapter 71 of the Laws of Zambia; the Subordinate Courts Act, Chapter 28 of the Laws of Zambia (see Order XVIII Rule 1, Order XXXV Rules 6, 7 and 9 and Order XLI Rule 1 of the Rules of the Subordinate Court); the High Court Act, Chapter 29 of the Laws of Zambia (see Order XIII Rule 1 and Order XXXVI Rule 9 of the Rules of the High Court); and relevant

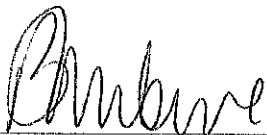


provisions of the White Book where the High Court Act is silent with respect to summary recovery of debts.

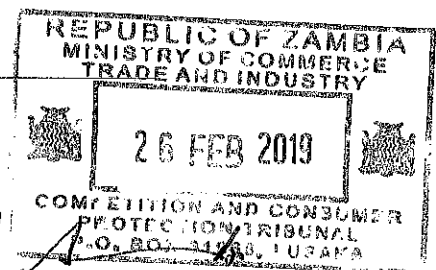
31. In our opinion, these provisions read together, operate as would a stay of execution of a decision of the Competition and Consumer Protection Commission and consequently, the fear of immediate execution should be allayed. In our rulings in Re Cryson Mwambwa and Re Abraham Makano, we put forth this opinion when we stated that in "our view, the effect of section 86(1) of the Competition and Consumer Protection Act, and the related provisions under the State Proceedings Act, the Subordinate and High Court Acts, and the White Book, respectively, inherently have the same effect as a stay of execution to the extent that, unless a debtor pays the fine of its own volition, the execution of that fine is not immediate, but is subject to the due process of law. The Appellant's fear of immediate execution should, therefore, be put to rest." Again, we hasten to caution as we did in Re Cryson Mwambwa and Re Abraham Makano that this "is not to be misconstrued as counsel or encouragement to debtors to refrain from voluntarily paying fines due to the Republic under the Act."
32. The Tribunal further opines that any application for a stay of execution can be made to the court before which the Respondent institutes proceedings for the recovery of a fine due under the Act.
33. On the basis of the foregoing, the application for stay of execution is dismissed. On account of past decisions where under this Tribunal has, *per incuriam*, granted stays of execution of the Respondent's decisions each party shall bear its own costs.
34. Any party aggrieved with this decision may appeal to the High Court within thirty (30) days of this decision.

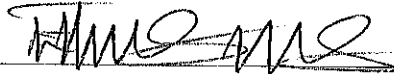
Dated at Lusaka this 26th day of February, 2019.


Mr. W. A. Mubanga, SC
Chairperson


Mrs. M.B. Muzumbwe-Katongo
Vice Chairperson


Mr. R. Sombe
Member





Mrs. E. Chiyenge
Member



Mr. C. Kabaghe
Member

