

**THE COMPETITION AND CONSUMER
PROTECTION TRIBUNAL
HOLDEN AT LUSAKA**

2016/CCPT/012/CON

DLCA

IN THE MATTER OF:

**SECTION 8 AND SECTION 16(1) OF
THE COMPETITION AND CONSUMER
PROTECTION ACT, NO 24 OF 2010**

BETWEEN:

MBILIDYX ENGINEERING AND GENERAL SUPPLY

APPELLANT

AND

NATIONAL BREWERIES PLC

RESPONDENT

**COMPETITION AND CONSUMER
PROTECTION COMMISSION**

2ND RESPONDENT



CORAM:

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

For the Appellant:

In-person

For the 1st Respondent:

Mr. S. Lungu of Shamwana and Company

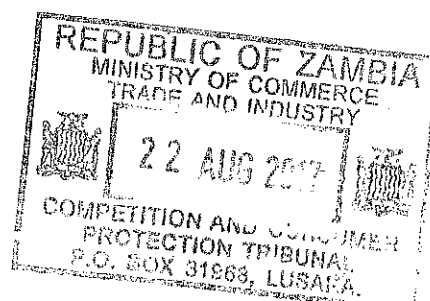
For the 2nd Respondent:

Mrs. M. M. Mulenga, Manager Legal and Corporate Affairs; Ms. M. Mtonga, Legal Officer; and Ms. L. Mwape, Legal officer-
Competition and Consumer Protection Commission (CCPC)

JUDGMENT

Cases referred to:

1. Spar Zambia Limited v. Danny Kaluba & Competition and Consumer Protection Commission 2016/CCPT/009/CON
2. Pep Stores Zambia Limited v. Competition and Consumer Protection Commission 2016/013/CCPT/CON



Legislation referred to:

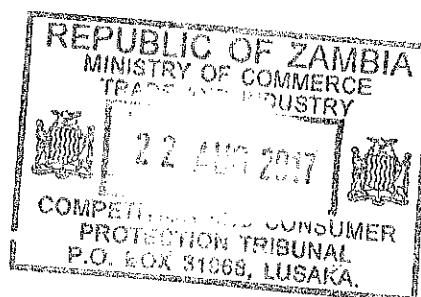
Competition and Consumer Protection Act, No. 24 of 2010, Sections 8 and 16 (2) and (3).

The facts of the appeal as presented in the Record of Proceeding by the Competition and Consumer Protection Commission (hereinafter called "**2nd Respondent**") are that this appeal is against the decision of the 2nd Respondent's Board which determined that the National Breweries Plc (hereinafter called "**1st Respondent**") breached section 8 and section 16 (2) of the Competition and Consumer Protection Act, No. 24 of 2010 (hereinafter referred to as "**the Act**") and ordered the 1st Respondent to notify the 2nd Respondent on the nature of the agreements held with distributors in relation to zoning of the market in the distribution of their products and that the Complainant (who is the Appellant) be included in the 1st Respondent's distribution system if he met the requirement set by the 1st Respondent.

The 2nd Respondent received a complaint from the Appellant, Mr. Dykes R.T. Mwenifumbo (hereinafter referred to as "**Appellant**") against 1st Respondent. The complaint was lodged on 29th October 2014. The Appellant alleged that the 1st Respondent had orally given him a "go ahead" to open a depot for the distribution of shake shake beer in Kwacha East Kitwe. The Appellant alleged that he did a market survey in the said area and found that the retailers were not well served and that is how he decided to open the depot. The Appellant further alleged that after supplying him once the 1st Respondent stopped supplying him claiming that Kwacha East belonged to another distributor. The Appellant alleged that the 1st Respondent did not inform him that he could not distribute in the area at the time he started making consultations about setting up a depot in the area. The Appellant also alleged that he was later informed by the 1st Respondent to trade under one distributor named Mungoti Limited because they were not registering new agents or distributors.

Consequently, the 2nd Respondent carried out investigations into the matter which appeared to be a breach of Sections 8, 16(1) and 16 (2) (b) of the Act. Section 8 of the Act reads, "*Any category of agreement, decision or concerted practice which has as its object or effect, the prevention, restriction or distortion of competition to an appreciable extent in Zambia is anti- competitive and prohibited.*"

Section 16(1) of the Act reads, "*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 economy in general*"



Section 16(2) (b) of the Act reads, "For purposes of this part, "abuse of a dominant position includes limiting or restricting production, market outlets or market access, investment, technical development or technological progress in a manner that affects competition."

Perusing through the Decision of the Board of the 2nd Respondent, we find that investigations were conducted by the 2nd Respondent by way of inquiry through the issuance of a Notice of Investigation which was sent to the 1st Respondent on, 17th November, 2014. The 2nd Respondent also interviewed the distributor of the area and another distributor who was involved in the matter. The 2nd Respondent also conducted a survey in the area and made consultations with some bar owners who acted as third-party sources of information.

The Board of the 2nd Respondent having considered the facts, evidence and submissions in the case, decided that the 1st Respondent breached Section 8 and Section 16 (2) of the Act. The Board also issued a Directive that:

- 1) The 1st Respondent must notify the 2nd Respondent on the nature of the agreements held with distributors in relation to zoning of the market in the distribution of their products; and
- 2) The Appellant be included in the 1st Respondent's distribution system if they met the requirement set by the 1st Respondent.

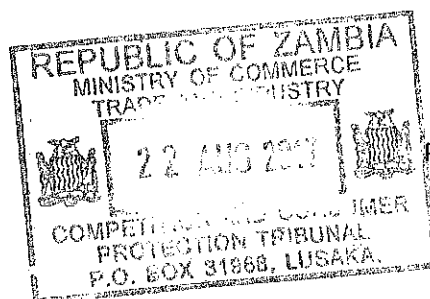
The decision of the Board and its Directive were communicated to the Appellant and the 1st Respondent accordingly.

The 1st Respondent, responded to the Directive of the 2nd Respondent in a letter dated 31st August, 2016 in which among other things it stated as follows:

"We note therein the Board Directive hereunder.

National Breweries Plc must notify the Commission on the nature of the agreements held with distributors in relation to the zoning of the market in the distribution of products and the complainant must be included in the distribution system if it meets the requirements."

In their response, they reiterated that they did not enter into zoning agreements with distributors, although market demand and dynamics dictated the success and areas in which these distributors operate.



The 1st Respondent also stated that they had not up to that date received any formal application for a distributorship from the complainant. However, in the event that the complainant contacted them, they would duly consider the application.

The Appellant in his affidavit dated 12th October, 2016 indicated that he in fact had applied to be reinstated as a distributor by way of a letter dated 17th February, 2016.

However, the Appellant having been dissatisfied with the Board decision dated 11th April, 2016 appealed to this Tribunal based on the following grounds and reliefs:

Ground One: The condition newly applied does not reinstate me. Taking me into technical way to put me off the truck. After previously qualified enough and supplied first consignment.

Ground Two: That 100 crates or so at a time is not reasonable enough to need 2x10 truck, to be applied by me.

Ground Three: That my survey wouldn't need such capacity as stated, due to self collection at the wholesale shop.

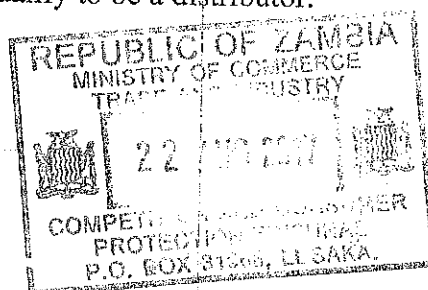
The relief sought by the Appellant is compensation.

The 1st Respondent in its Notice of Grounds in Opposition to Appeal submitted that it intended to oppose the whole appeal as follows:

- (1) The decision of the 2nd Respondent did not reinstate the complainant but ordered that it be included on the 1st Respondent's distribution system if it met the requirements set by the 1st Respondent.
- (2) That the Complainant failed to meet the requirements set by the 1st Respondent.

The 2nd Respondent in its Notice of Grounds in Opposition to appeal submitted that they intended to oppose the whole appeal on the following grounds:

- (1) The Board of Commissioners could not reinstate the Appellant because he was not a distributor of the 1st Respondent, hence the Board Directive that the Appellant be included in the 1st Respondents distribution system if the Appellant met the requirements.
- (2) In response to grounds 2 and 3 the requirements for distribution have been set by the 1st Respondent in relation to the nature of their products hence the need for the Appellant to meet the said requirements and qualify to be a distributor."



The 2nd Respondent's prayer was:

- (1) That the appeal be dismissed with costs as it is unfounded, baseless and a complete misdirection at law;
- (2) That the decision of the Board of Commissioners be upheld; and
- (3) For any reliefs that the Tribunal deems fit.

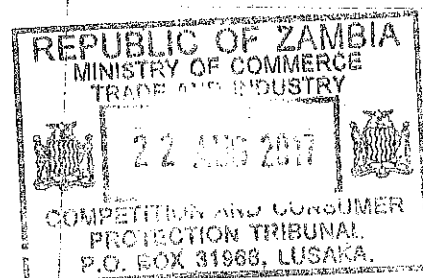
We have considered this appeal and evaluated the grounds of appeal on the one hand and the grounds of opposition to the appeal by both respondents. We have also reviewed the record of proceedings before the 2nd Respondent filed by the 2nd Respondent.

The grounds of appeal are not very clear in relation to the decision of the 2nd Respondent, but they appear to focus on the determination relating to the question of the inclusion of the Appellant on the 1st Respondent's list of distributors.

However, we have considered in totality the proceedings before the 2nd Respondent, including the Board of Commissioners, which determined that the 1st Respondent had breached Section 8 of the Act and section 16(2) of the Act. However, the 2nd Respondent, having decided that the 1st Respondent had breached Sections 8 and 16(2) of the Act, did not pronounce itself on the penalty. The Act is very clear on the penalty. Section 16 (3) reads, "*An enterprise that contravenes this section is liable to pay the Commission a fine not exceeding ten percent of its annual turnover*". We recall that in the case of **Spar Zambia Limited v. Danny Kaluba & Competition and Consumer Protection Commission** 2016/CCPT/009/CON, where we dealt with a provision of the Act which is similar to Section 16(2) and (3), we held that the law mandatorily prescribes a fine of not more than ten (10) per cent of the offender's annual turnover to be levied.

We have observed that instead of levying a fine, the 2nd Respondent directed the 1st Respondent to notify the Commission on the nature of the agreements held with its distributors and that if the Appellant met the requirements he should be included on the distribution system.

Apart from finding fault with the 2nd Respondent's failure to fine the 1st Respondent in accordance with Section 16(3) of the Act, we also find its directive faulty in that the 2nd Respondent had conducted investigations relating to the 1st Respondent's agreements with distributors, pursuant to the Appellant's complaint; yet in its directive, it deferred to the 1st Respondent for information and determination as to the Appellant's eligibility to be appointed as a distributor. We also find it anomalous that in giving the directive, the 2nd Respondent did not refer to the legal basis or source of the power it was purporting to exercise.



In exercising its mandate, it is incumbent upon the 2nd Respondent to determine matters before it with finality. Furthermore, its decisions should be based on authority reposed in it by law, and this should be clear on the record. The term 'Decision' is defined by Blacks Law Dictionary Seventh Edition by Bryan A. Garner, Editor M Chief at Page 414 as follows:

"Decision – A Judicial determination after consideration of the facts and the law especially a Ruling, Order or Judgment pronounced by a Court when considering or disposing of a Case" – decisional adj. See Judgment, opinion".

The word "Judgment" is defined in the same Dictionary at Page 846 as follows:

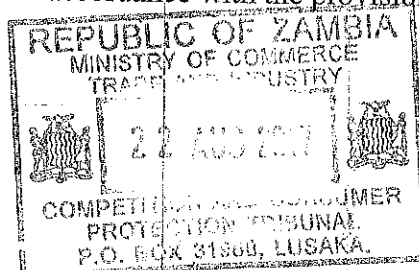
"Judgment" A Court's final determination of the rights and obligations of the parties in a case. The term Judgment includes a decree and any order from which an appeal lies".

We are of the view that, in the circumstances of the appeal before us, the term 'decision' is synonymous with the term 'judgment' as an appeal lies to this Tribunal from a decision of the 2nd Respondent. Furthermore, we find no lawful basis for the 2nd Respondent's said directive. 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..."

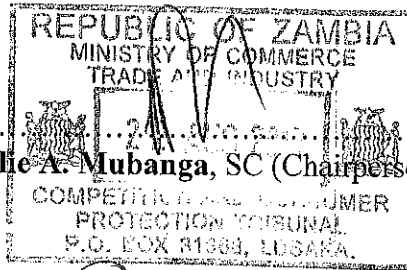
The Appellant has been seeking compensation apparently for alleged violation by the 1st Respondent of contractual rights and obligations. We repeat what we have said on many occasions in the past; that neither the 2nd Respondent nor the Tribunal has jurisdiction to award compensation. Such relief may be sought from courts of law.

In consequence of what we have outlined above, in line with the power vested in the Tribunal by Section 71(1)(b), we set aside the directive of the 2nd Respondent for want of jurisdiction. We also refer the matter back to the 2nd Respondent for the Board of Commissioners to determine the penalty to be imposed on the 1st Respondent in accordance with the provisions of Section 16(3).



In the circumstances, we find it fair that each party bears its own costs. Any person aggrieved with this decision may appeal to the High Court **within Thirty (30) days.**

Delivered at Lusaka this **22nd day of August, 2017.**



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Willie A. Mubanga, SC (Chairperson)

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Eness C. Chiyenge (Member)

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Rocky Sombe (Member)

