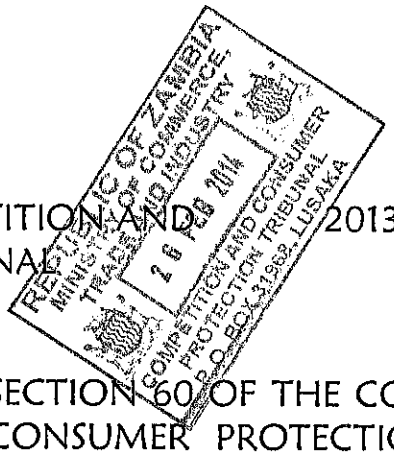

IN THE MATTER OF THE COMPETITION AND CONSUMER PROTECTION TRIBUNAL HOLDEN AT LUSAKA

2013/CCPT/008/COM

IN THE MATTER OF: SECTION 60 OF THE COMPETITION AND CONSUMER PROTECTION ACT NO. 24 OF 2010

IN THE MATTER OF: THE COMPETITION AND CONSUMER PROTECTION (TRIBUNAL) RULES, STATUTORY INSTRUMENT NO. 37 OF 2012

B E T W E E N:

MOTOR ACTION SERVICES LIMITED — APPELLANT

AND

THE COMPETITION AND CONSUMER PROTECTION COMMISSION — RESPONDENT

JUDGMENT

Legislation

1. Section 9(1) (a) and (2) of Act No. 24 of 2010
2. S55 (6) of Act No. 24 of 2010

Decided Cases

3. Zambia Revenue Authority Vs Hitech Trading Company Limited SCZ Judgment No. 40 of 2000 (unreported)

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4. Augustine Kapembwa Vs Danny Maimbolwa and Attorney General: 1981 ZLR Page 81
5. Victor Namakando Zaza Vs ZESCO – SCZ Judgment No. 18 of 2001
6. Sichula and Another Vs Chewe (2000) ZR Page 56
7. Khalid Mohammed Vs The Attorney General : 1982 ZLR Page 49

This appeal before the Tribunal is against the decision of the Respondent given on the 14th day of December 2011 which decided as follows:-

(i) That the agreement between the fifteen (15) companies be terminated forthwith.

(ii) That Top Gear Limited as the leader of the cartel is hereby fined a penalty of 2% of annual turnover as per latest audited accounts (i.e 1% for being leader and 1% for the agreement.)

(iii) That the remaining fourteen (14) enterprises be each fined a penalty of 1% of annual turnover as per latest audited accounts.

(iv) That each of the enterprises submits their latest audited accounts to the commission within 14 days of the receipt of this decision.

(v) That the individuals who appended their signatures to the agreement be warned not to engage in similar conduct in future and that they be

considered first offenders for the purposes of the Respondents records.

The Appellant filed its Notice of Appeal against the Respondent's Judgment on 14th June, 2013 with three grounds, namely;

1. The Commission erred when it held that the Appellant acted in league with the motor repairers to manipulate repair costs by fixing trading conditions in absence of evidence suggesting so and that the evidence of the communiqué provided shows untested signature of Appellant.

2. The Commission lacks evidence of the Appellant attending motor repairers meetings, by way of meeting minutes and attendance lists.

3. The Appellant or indeed its representatives did not sign the communiqué. The attached communiqué sent to insurers purportedly signed by Appellant lacks merit as the Commission did not carry out any authenticity test of the Appellant's signature.

4. The Commission rushed its decision without separately investigating the Appellant and without affording the Appellant a chance to be heard on the matter and thus charging the Appellant prematurely for actions of others in the motor repair industry based on unsubstantiated information against the Appellant.

5. The attached communiqué signature page (marked 'Annex I') sent to insurers purportedly signed by the Appellant is a total misrepresentation of the Appellant and the Appellant denies signing the said communiqué.

6. The attached e-mail pages (marked 'Annex II, III and V') provided by the Commission showing alleged communication amongst motor repairers does not in any way indicate involvement of the Appellant in the string of communication amongst culprit motor repairers.

7. The Commission erred in point of law and fact in that the Commission did not recognise the need of checking the evidence purported to them and thus violating the fundamental nature of natural justice.

8. The Commission erred and misdirected itself in making findings against the Appellant when in fact Appellant was not part to the said communiqué sent by others to insurance companies.

The Appellant prayed that the Tribunal Orders the dismissal of the whole case.

The Respondent in response to the Appellant's grounds and in its Notice of Grounds in Opposition to Appeal filed on 18th September 2013 stated as follows:-

1. That contrary to the Appellants assertion in Ground One, the Respondent was on firm ground when it concluded that that the Appellants acted in

league with other motor repairers as documents were collected during the Respondent's investigations which revealed that the Appellant's representative or agent did in fact append his signature to an agreement that was circulated to 15 panel beating firms (inclusive of the Appellant), to charging the same price for issuing various quotations to consumers. The signing of the said agreement by the Appellant entailed consent by the Appellant to participate in the collusion, contrary to section 9(1) of the Competition and Consumer Protection Act (the Act) No. 24 of 2010.

2. That further, contrary to the Appellant's assertion in Ground Two, it prudent to that horizontal agreements are prohibited per se and it is immaterial whether or not there was direct evidence linking the Appellant having been part of the meeting to discuss the fixing of prices and other trading conditions and thus the signing of the agreement by the Appellant is proof enough showing an expression of willingness to participate in the said conduct and therefore making them an offender under of the provisions of the Act.

3. That contrary to the Appellants assertion in Ground Three, the Agreement does indicate a number of firms that consented to the conduct through their signing the said document. The onus thus rests on Appellant to show that the signature signed against their name was neither theirs nor that of any of its representatives.

4. That further on, contrary to the Appellants assertion, horizontal

agreements are tested as per se offences which entails that they are strictly prohibited and there is no justification that an offender can give for engaging in such conduct.

5. That contrary to the assertion of the Appellant in Ground Seven, the Respondent did check its documents and indeed found sufficient evidence linking the Appellant and others to the alleged conduct through the agreement that was signed and is on record on Pages 3 – 4 of the Respondent's Record of Proceedings.

Facts

The facts leading to this appeal are that the Respondent received a complaint from NICO Insurance Zambia Limited hereinafter called "the Complainant" on 1st September, 2011 alleging that they had received a communiqué from 18 garages in Lusaka to the effect that the garages intended to be charging for obtaining quotations for repairing motor vehicles that had been insured.

According to the Complainant, its concern was that this development would impact negatively on consumers of insurance products (particularly motor insurance). They further sought clearance on whether what these companies were doing was legal.

In support of its complaint the Complainant had attached a copy of the "communiqué" from the panel beaters which was marked as Exhibit Annex I and appears on Pages 3 and 4 of the Record of Proceedings.

The Respondent noted from Annex I that the 15 companies that provide panel beating services had agreed to fix the prices for issuing various types of quotations to their potential clients and that according to Annex I it appeared

the reason for charging for quotations was for the companies to recover some of the expenses they incurred when making quotations such as telephone calls, paper, cartridges, ink etc. In its wisdom the Respondent noted that this matter raised two issues, namely, the decision by the companies to charge for issuing quotations and the decision to fix actual charges (prices) for issuing various types of quotations.

The Respondent's investigations flowing from the aforesaid complaint raised a reasonable suspicion that Section 9(1)(a) of Act No. 24 of 2010 hereinafter referred to as "the Act" had been breached.

Section 9(1)(a) of the Act provides as follows:-

> "9(1)(a) A horizontal agreement between enterprises is prohibited per se, and void, if the agreement
> (a) Fixes, directly or indirectly or purchase or a selling price or any other trading conditions
> (b).....
> (c).....
> (d).....
> (e)....."

And S9(2) of the Act provides as follows:

> "9(2) A person who contravenes subsection (1) commits an
>
> offence and is liable upon conviction, to a time not exceeding five hundred thousand penalty unless or to imprisonment for a period not exceeding five years or to both"

And S9 (3) provides as follows:

> "9(3) An enterprise that contravenes subsection (1) is liable to pay the commission a fine not exceeding ten percent of its annual turnover."

According to the Respondent the evidence collected thus far referred to proved that there was a horizontal agreement between the enterprises which fixed directly or indirectly trading conditions in the market in question.

It was common cause that unannounced searches were conducted by the Respondent under S55 (6) of the Act and four (4) out of the fifteen (15) companies whose names are shown in Annex I at Lusaka on 29th September, 2011 and that the decision to search only 4 out of the 15 companies was arrived at on account of limited personnel. The companies that were searched were:-

(1) Top Gear Limited;
(2) Auto Sport Centre Limited;

(3)Mumtaz Motors; and

(4)All Terrain Motors

Though emails marked as Annex II – IV were allegedly retrieved from Auto Sport Centre Limited these were not produced in the Record of Proceedings for this Tribunal to draw the conclusion as to where those emails were coming from, whose email addresses they were and what was being discussed in them. There were also emails emanating from topgear@zamnet.zm (from Mr Savage) sent on 5th August, 2011, 8th August, 2011, 17th August, 2011 and 23rd August, 2011 respectively which among other things indicated the actual rates agreed on for issuing quotations, showing that the said rates were agreed at a meeting held on 4th August, 2011 and also a suggestion thereat that there should be different charges for areas outside Lusaka, and an agreement to stop paying commissions and Notice of Meeting for 8th September, 2011 at 16:00 hours. Regarding these emails there were no details or evidence as to who the owners of these email addresses were and to which companies they were sent or addressed.

It is worth noting however that no minutes or list of those attending the meeting of 4th August, 2011 with signatures against their names and companies were exhibited in the Record of Proceedings.

There were also no witness statements that were allegedly obtained from persons interviewed who included, Mr Majid Patel of Mumtaz Motors, Mr Pearson Sakala of All Terrain Motors and Mr Savage of Top Gear Limited produced in the Record of Proceedings. Let alone witness statements from the other eleven companies.

The Parties Grounds of Appeal as they relate to the Facts

In the First Ground of Appeal it is argued that the Commission erred when it held that the Appellant acted in league with other motor repairers to manipulate repair costs by fixing trading conditions in absence of evidence to that effect and that the evidence of the communiqué shows untested signature of the Appellant.

In response thereto it has been argued on behalf of the Respondent in Ground One that the Respondent was on firm ground when it concluded that the Appellant acted in league with other motor repairers as documents were collected during the Respondent's investigation which revealed that the Appellant' representative or agent did in fact append their signature to an agreement that was circulated to 15 panel beating firms (inclusive of the Appellant) to start charging same price for issuing various quotation to consumers and that therefore the signing of the said agreement by the Appellant entailed consent by the Appellant to participate in the collision, contrary to Section 9(1) of the Competition and Consumer Protection Act (The Act) No. 24 of 2010.

Our understanding of the argument in Appellant's Ground One is that there is no evidence that the Appellant acted in league with the 14 other companies in the alleged manipulation. The second issue raised is that there is an untested signature of the Appellant. As stated hereunder we would tend to agree with this position. This is considering that there was no witness who either produced

evidence as to which individual represented the Appellant company in the alleged signing of the agreement in question. If there was Affidavit evidence taken out by such a witness who would have witnessed the signing of the agreement and identified such witness by name and in what capacity there would have been ground to convince this tribunal that indeed the Appellant acted in league with the other companies in the alleged scheme. The next part raised is that the Appellant's representatives signature was untested. We understand the use of the word 'untested' as meaning that there was no proof or evidence that the signature against the Appellant's name on Annex I was that of the Appellants company's representative and that such evidence would have been in form of a handwriting expert. If there was no handwriting expert but there was a witness identifying the signatory as stated before that would have in our view sufficed on a preponderance of probabilities.

It is worth noting that in accordance with the findings in the Decision by the Respondent appealed against only 4 companies namely Top Gear Limited, Auto Sport Centre Limited, Mumtaz Motors and All Terrain Motors were searched. There is also a further finding that the investigations only obtained witness statements and interviewed Mr Majid Patel of Mumtaz Motors, Mr Pearson Sakala of All Terrain Motors and Mr Savage of Top Gear.

There is no evidence in the Decision that shows that the Appellants representative or company was searched under S55 (6) of the Act. The only evidence was that of selective search of the four(4) companies as confirmed by the Respondent, which search did not include the Appellant.

We would therefore agree with the Appellant that there was no evidence that the Appellant acted in league with the other motor vehicle repairers. There was also no evidence that that particular signature against the Appellant's name on Annex I was that of the Appellant's representative or that such a representative was interviewed or investigated as was done with the three individuals in the three named companies. There is in fact no evidence to the effect that the Appellant or its representative was interviewed or a statement was taken from them. In the absence of that would someone reasonably pin point on the Appellant was one of the alleged participants? If there was evidence that the Appellants representative was heard or interviewed an explanation thereat would have been offered by that person. But this did not happen. For those reasons we sustain the 1st Ground of Appeal by the Appellant.

With regard to Ground 2 the Appellant argues that the Commission (Respondent) lacks evidence of the Appellant attending motor repairers meeting by way of meeting minutes and attendance lists.

In response to Ground 2 the Respondent contends that horizontal agreements are prohibited per se and that it is immaterial whether or not there was direct evidence linking the Appellant having been part of the meeting to discuss the fixing of priced and other trading conditions and this the signing of the agreement is proof enough showing an expression of willingness to participate in the said conduct and therefore making them an offender under the provisions of the Act.

Granted that there is an agreement in place which is prohibited per se and that therefore that there is no legal justification for being a party to it, it is the Tribunal's position that the Respondent ought to have gone further than that argument by providing proof that the Appellant or its representative was a party to that agreement, for instance by producing a witness from the initiator of the agreement (Mr Savage from Top Gear), say the driver or courier of the agreement who allegedly was going from company to company. In our view that driver or courier would have provided either oral evidence before the Tribunal by way of identification of the signatory on behalf of the Appellant as an individual or by name or description or swore an Affidavit in Support of the assertion. The Respondent would have also gone further by having a handwriting expert providing proof that that particular signature belonged to an individual associated with the Appellant company. If the Appellant's representative had made an admission in a sworn statement or in oral evidence after taking an oath this tribunal would have agreed with the Respondent's submission.

We are therefore of the view that mere assertion by the Respondent that that particular signature was that of the Appellant's representative without evidence is not helpful to this Tribunal. It was the holding in the case of **Zambia Revenue Authority Vs Hitech Trading Company Limited SCZ Judgment No. 40 of 2000** (unreported) that "arguments and submissions at the bar spirited as they be cannot be a substitute for sworn evidence." Accordingly we find that in order for Ground 2 raised by the Respondent to hold either sworn evidence by way of Affidavit or oral evidence by one or more of their witnesses to prove

that that particular signature was connected to the Appellant's representative was mandatory. We find that arguments that have been raised in Ground 2 of the Appellant's grounds of appeal cannot be a substitute for sworn evidence.

We are therefore persuaded by the principles in the **Zambia Revenue Authority** supra that sworn evidence from the Respondent's witness would have been helpful and is mandatory. This is in addition to the principle that who alleges must prove. To that extent the benefit of doubt would be cast in favour of the Appellant. We accordingly uphold the 2nd Ground of Appeal. We are also persuaded by the holding in the case of **Khalid Mohammed Vs Attorney General 1982 ZLR at Page 49** where it was held, inter alia, that a Plaintiff cannot automatically succeed whenever a defence has failed; he must prove his case. Accordingly we find that the Respondent has failed to prove its case.

With regard to Grounds 3 to 8 we would summarise them in one group because though they are put separately they appear to be canvassing the following issues which are intertwined:-

(a) That the Appellant or its representative did not sign the communiqué and that the attached communiqué sent to insurers purportedly signed by the Appellant lacks merit as the Commission did not carry out any authenticity test of the Appellant's signature.

(b) That the Commission rushed its decision without separately investigation the Appellant and without affording the Appellants a chance to be heard on the matter and thus charging the Appellant separately for actions of

others in the motor repair industry based on unsubstantiated information against the Appellant.

(c) That the attached communiqué signature page (marked 'Annexure I') sent to insurers purportedly signed by the Appellant is a total misrepresentation of the Appellant and the Appellant denies signing the communiqué.

(d) That the attached email pages (marked "Annexure II, III and V") provided by the Commission showing alleged communication amongst motor repairers does not in any way indicate the involvement of the Appellant in the string of communication amongst culprit motor repairers.

(e) That the Commission erred on point of law and fact in that the Commission did not recognise the need of checking the evidence purported to them and thus violating the fundamental nature of natural justice.

(f) That the Commission erred and misdirected itself in making findings against the Appellant when in fact the Appellant was not part of the said communiqué sent by others to insurance companies.

In response to those grounds the Respondent summarized their arguments in Grounds 3 to 5 as follows:-

(a) That contrary to the Appellant's assertion in Ground Three, the agreement does indicate a member of firms that consented to the conduct through their signing the said document. The onus thus rests on the Appellant to show that the signature signed against their name was neither theirs nor that of any of its representative;

(b) That contrary to the Appellant's assertion horizontal agreements are treated as per se offences which entails that they are strictly prohibited and there is no justification that an offender can give for engaging in such conduct; and

(c) That contrary to the assertion of the Appellant in Ground Seven, the Respondent did check its documents and indeed found sufficient evidence linking the Appellant and others to the alleged conduct through the agreement that was signed and is on record on Pages 3 – 4 of the Respondent Record of Proceedings.

The Respondent prayed therefore that the appeal be dismissed and that the decision of the Respondent be upheld.

As stated hereunder in particular the findings that are summarized in (a) to (e) hereunder under **"findings"** we agree with the Appellants argument that either the Appellant or its representative did not sign the communiqué and in particular failure of evidence of the authenticity of that particular signature.

We also question and put to task the general conduct exhibited by the Respondent by its failure to interview or investigate the different companies as well as the Appellant except the four companies named as having been searched. What that meant was that the companies other than the four were with the Appellant being merely lumped together with the other 14 companies without justification.

We also agree that that behaviour by the Respondent amounted to a total misrepresentation of the Appellant more so for the fact that not only that the Appellant denied signing on Annexure I but that the Respondent did not bring any witness to help prove that allegation. This we find was a dereliction of duty on the part of the Respondent.

We are further in agreement with the Appellant that the emails marked Annexure II, III, V showing alleged communication amongst the accused companies did not amount to proof of involvement of the Appellant in the communication amongst the various motor repairers.

We also agree with Grounds 7 and 8 to the effect that failure to investigate the Appellant and take a statement from it or interview it amounted to a denial of natural justice and also linking it to those that has been investigated thereby making it part of the 'culprits' without justification.

Having said that we do not agree with the Respondent's submissions that merely producing an agreement with the names of motor vehicle repairers with their signatures amounted to proof that the Appellant was involved notwithstanding the Appellant's argument denying that that was its signature or that of its representative.

It was not upto the Appellant to prove that allegation the onus was on the Respondent in that he who alleges must prove not the 'accused'.

We do not agree with the Respondent argument that because horizontal agreements are per se breached or offences the Respondent need not have gone further by providing proof as to who the signatory was and whether he or she was connected to the Appellant.

We also do not agree with the Respondent's submission that the Respondent in its investigations did find sufficient evidence linking the Appellant with the others.

There is no such evidence as stated before and as summarized in (a) to (e) hereunder.
We also note that the Respondent did not traverse Grounds 4, 5, 6 and 8 of the Appellants Grounds of Appeal with the result that those grounds have remained intact and untraversed.

According to the arguments and submissions in the Respondent's Decision of the 14th December, 2011 appealed against and as they relate to Grounds 3 to 8 of the Appellant as well as Grounds 3 and 5 of the Respondent the following were the findings in the Decision as noted by the Tribunal:

Findings

(a) That it was common cause that unannounced searches were conducted on 29th September, 2011 under S55 (6) of the Act only on the following companies, namely, Top Gear Limited, Auto Sport Centre Limited,

Mumtaz Limited and All Terrain Motors out of the 15 companies named in Annex I;

(b) There were emails allegedly marked ii – iv retrieved from Auto Sport Centre Limited which were not particularized as to the sender or receiver, the date received and other details. These were not even produced or did not become part of the Record of Proceedings;

(c) There were also emails specifically emanating from the following email address, namely, topgear@zamtel.zm (Mr Savage) the 5th August, 2011, 8th August, 2011, 17th August, 2011 and 23rd August, 2011 respectively. These appear on Pages 3, 4, 6, 7 and 8 of the Notice to Produce filed by the Appellant but whose identities remain unknown;

(d) There were no minutes for the alleged meeting of 4th August, 2000 by the various company representatives with the details of those who attended, their names, addresses and phone numbers as well as signatures and what was discussed and resolved though these were referred to in the Decision; and

(e) That though Witness Statements in respect of the company representatives that were allegedly interviewed, namely, Mr Majid Patel of Mumtaz Motors, Mr Pearson Sakala of All Terrain Motors and Mr Barry Savage of Top Gear no such statements were produced before the Tribunal so as to help it establish what was stated and how it related to this appeal.

Having said that, and all in all, we have decided to interfere with the Respondent's findings on the facts on the ground in that those findings are not supported by the evidence on record.

Our interference is supported by the following Supreme Court authorities.

In the case of **Augustine Kapembwa Vs Danny Maimbolwa and Attorney General 1981 ZLR at Page 127** it was held that:

> "10. The appellate court would be slow to interfere with a finding of fact made by a trial court, which has the opportunity and advantage of seeing and hearing the witnesses but in discounting such evidence the following principles should be followed: That:
>
> (a) by reason of some non-direction or mis-direction or otherwise the Judge erred in accepting the evidence which he did accept; or
>
> (b) in assessing and evaluating the evidence the Judge has taken into account some matter which he ought not to have taken into account, or failed to take into account some matter which he ought to have taken into account; or
>
> (c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the Judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or
>
> (d) in so far as the Judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer."

In the case of Victor Namakando Zaza Vs ZESCO – SCZ Judgment No. 18 of 2001 it was held inter alia that the findings made by the trial court should not lightly be interfered with, in keeping with what this Court has said on numerous occasions in this Court.

In the case of Sichula and Another Vs Chewe (2000) ZR at Page 56 it was held that "an Appellate Court should not interfere with an award unless it was clearly wrong in some way, such as because a wrong principle has been used or the facts were misapprehended or because it is so inordinately high or so low that it is plainly or wrong estimate of the damages to which a claimant was entitled....."

For the reasons we have summarized under (a) to (e) which were inter alia, the Respondent's findings in its Decision we consider that the Respondent in its decision of 14th December, 2011 was clearly wrong when it found against the Appellant by way of misdirection. In assessing and evaluating the above evidence, thereby taking into account matters which it should not have taken into account.

For the reasons stated we are in agreement with the Appellant that it was not justified to hold it liable when there was no material to connect it to the initiator of the agreement exhibited in Annex I by way of charging of quotations, fixing prices or attending meetings.

We therefore uphold Ground 3 accordingly with the result that the Appellant

has succeeded on all grounds and that costs will follow the event and in default of agreement will be taxed.

Leave to appeal within 30 days of the date of Judgment is granted

Delivered the 26 day of February 2014

Mr Willie A Mubanga
Chairperson

Mr C Kabaghe
Member

Mr R Sombe
Member