IN THE MATTER OF THE COMPETITION AND
AND CONSUMER PROTECTION TRIBUNAL

2012/CCPT/003

COMPETITION AND CONSUMER PROTECTION COMMISSION
21 NOV 2013
RECEIVED

HOLDEN AT LUSAKA

BETWEEN:

TOP GEAR AND NINE (9) OTHERS — APPELLANT

AND

COMPETITION AND CONSUMER PROTECTION COMMISSION — RESPONDENT

CORAM: Mr Aubbie Mubanga – Chairperson, Ms. Mutinta Natala Siansima - Deputy Chairperson, Mr. Chance Kabaghe, Mr. Rocky Sombe - Members on 30th June July 2013

For the Appellant: Mr. M. Lisimba- Messrs Mambwe Siwila & Lisimba Advocates

For the Respondent: Ms Marian Mwalimu Mulenga – Manager - Legal
Ms. Liya B. Tembo – Director – Legal and Enforcement – Competition and Consumer Protection Commission

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RULING

Cases referred to:

1. **Frederick Jacob Titus Chiluba v Attorney-General Appeal 125 of 2002**
2. **Lumbwe v UNZA Council (1998) unreported**

Legislation and Works referred to:

1. **The Competition and Consumer Protection Act No. 24 of 2010**
2. **Black's Law Dictionary 9th Edition**

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This is an appeal against the decision of the Respondent delivered on 14th December 2011 in which the Respondent's Board decided as follows:

a) There was horizontal agreement established between the enterprises in the relevant market of panel beating and that the act committed falls within the meaning of "agreement" as defined within the scope of the Act
b) That agreement was horizontal in nature as it was between competitors
c) The agreement was established for purposes of directly or indirectly fixing the trading conditions in the relevant market
d) The assessment criteria for establishing of a case under Section 9 of the Act had been met and that the 15 Respondents had contravened section 9 (1) (a) of the Act
e) That each Appellant to pay 1% of the total turnover and the 1st Appellant 2% of total turnover

The Appellants' appeal has five grounds of appeal and these are:

1. The Commission fell into error when it held that the Appellants had contravened 9 (i) (a) by agreeing to fix selling prices or trading conditions. The question that the Commission should have posed was, "what were the entities engaged in trading?" Our Submission is that the garages are not in the business of quotation. A garage can proceed with works on any vehicle without a quotation. Quotations are not per se a perquisite for works to be done on any vehicle. So it is not correct to conclude that it was a trading condition as it does not form the basis of any change or price in the final product. It is not an unnecessary expense on the garage.

   We submit that "agreement" the context and scope of the Act must be that which forms the basis of the business. It must go towards the core business. Otherwise, they will be fined for agreeing to be having lunch at 16 hours everyday.

2. The agreement cannot be said to have been horizontal on the "agreement" if we may call it that as it did not constitute the business for which the competitors are engaged.

3. The Commission should have addressed its mind to the trading conditions in the relevant market.

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What are Competitions in the relevant market engaged to do? Have they established the business for purposes of giving quotations? Can it be reasonably concluded that no work is done without a quotation? Can a job be concluded legally without first having recourse to a quotation? Are quotations products of the individual firms?

4. The Commission was in error when it held that the criteria for establishing of a case vide section 9 of the Act had been met. We submit that the rules of Natural Justice were not adhered to when arriving at the decision that was arrived at by the Commission. Firstly, the Commission was the Judge in its own complaint. Secondly, the Respondents were not given an opportunity to try the veracity of the evidence tendered at the hearing. There was no opportunity given to the Respondent, the Appellants herein, to give their side of the case. They were not given a chance to cross examine their accusers. Under such settings, the Commission could not have arrived at a just decision that the case was established and well founded under Section 9 of the Act.

5. In the unlikely event that this Appellant Tribunal finds for the Commission, We submit that the penalty is astronomical and oppressive. The complaint tried was for quotations only, that is what should be the basis upon which any penalty, if at all, should be based. We submit that the penalty meted against the Appellants was excessive and must be revised.

The Appellants augmented their grounds with submissions filed on 20th June 2013. It was the Appellants' submission that there was procedural impropriety on the part of the Commission in regard to this matter. The Appellants referred the Tribunal to Section 55 (6), 55 (3) and 55 (4) of the Competition and Consumer Protection Act No. 24 of 2010. The above mentioned sections provide as follows:

> ***55 (6) "The Commission may, where it has reasonable grounds to believe that the giving of written notice under subsections (3) and (4) may materially prejudice its investigations, defer the giving of such notice until after the investigation is concluded.***
>
> ***55 (3) The Commission shall, upon opening an investigation, as soon as practicable, give written notice of the investigation to the person who is the subject of the investigation or to an enterprise which is suspected to be a party to the matter to be***

investigated and shall indicate in the notice, the subject mater and the purpose of the investigation.

55 (4) For the purpose of an investigation under this section, the Commission may, by notice in writing served on any person, require that person to -

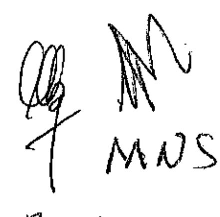
a) furnish to the Commission, in a statement signed by that person or, in the case of a body corporate, by a director or member or other competent officer, employee or agent of the body corporate , within the time and in the manner specified in the notice , any information pertaining to any matter specified in the notice, which the Commission considers relevant to the investigation;

b) produce to the Commission, or to a person specified in the notice, any document or article, as specified in the notice, which relates to any matter which the Commission considers relevant to the investigation; or

c) appear before the Commission, or before a person specified in the notice, at a time and place specified in the notice, to give evidence or to produce any document or article specified in the notice."

The Appellants submitted that Section 55 (6) of the Act does not waive the giving of notice, that it merely defers until after the investigation is concluded and that there was no evidence adduced before this Tribunal or indeed before the Board that notice was ever given to the Appellants to these proceedings. The Appellants further submitted that at the hearing of the complaint by the Board, there was no representation from any of the Appellants and that this was in direct conflict with Section 55(6) as read together with the rest of Section 55 but particularly Section 55(3) and 55 (4) of the Act. The Appellants submitted that this was against the principals of natural justice which inter alia provided for the right to be heard and in support of this argument referred the Tribunal to a number of authorities and works including the case of ***Ridge Vs Baldwin [1964] A.C 40, Shilling Bob Zinka Vs Attorney General - SCZ No. 9 of 1991*** *and* ***Halsbury Laws of England, 4th Edition.***

It was contended on behalf of the Appellants that Section 55 of the Act provides for the right to be heard or make representation in as far as it provides for notice to be given. The Appellants argued that in the case in casu, there was express provision for notice to be given either before investigations - Section 55 (3) and 55 (4) or after investigations are concluded- Section 55(6) but before decision is made and that this presumption was irrebuttable.



The Appellants submitted that there was no confirmation of who had received any of the warrants exhibited from page 5 to 12 of the Record of Proceedings, that the memo that was purportedly the basis of the alleged horizontal agreement was addressed to the insurance companies, that no particular insurance company was indicated and that the complaint NICO Insurance Zambia Limited were not called to testify at the hearing and therefore could not confirm the allegations. In conclusion, the Appellants submitted that there was no fairness in the manner that the Board dealt with the case against the Appellants.

The Appellants thus argued that the decision arrived at was null and void and must be quashed.

In response to the Appellants' appeal, the Respondent filed an Affidavit in Response to Appeal and Respondent's submissions to Appeal on 16th November 2012 and 28th June 2013 respectively. The Respondent argued that the conduct of the Appellants was captured under Section 9 (1) (a) of the Competition and Consumer Protection Act No. 24 of 2010 and was *prohibited per se*. The Respondent submitted that there was evidence showing that the Appellants were engaged in a cartel to fix trading conditions in the relevant market. The Respondent referred to emails from one Savage – Director for Top Gear indicating the actual rates agreed for issuing quotations; suggesting there should be different charge for areas outside Lusaka and indicating an agreement to stop paying commissions as evidence pointing to this fact. These are contained in the Affidavit in Response to Appeal and marked PM2-PM5. It was submitted that the agreement by the Appellants was horizontal in nature because it was between competitors who operated at the same level of the market and therefore no justification could be given for the conduct the Appellants engaged in as the law had been violated.

With respect to the issue of the notice, the Respondent argued that the search warrants used to search the Appellants' business premises were sufficient notice pursuant to Section 55 (3) of the Act as the warrants indicated the subject matter and the purpose of the investigation. The Respondent submitted that the Commission was empowered to carry out investigations on a complaint made by any person or at its own initiative under Section 55 (1) of the Act, that upon receipt of a complaint from NICO Insurance Zambia Limited, the Commission noted that the matter raised issues of cartelistic behavior and acted on its own initiative to investigate the matter. The Respondent thus argued that the named insurance company had no role to play as a witness as the actual investigation carried out did not relate to the concern raised by the Complainant. The Respondent ended by submitting that there was fairness in the manner that the

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Board of the Commission dealt with the case against the Appellants and thus we were urged to uphold the decision of the Board.

At the hearing of the appeal, both the Appellant and the Respondent gave oral evidence to emphasize the salient points in their written submissions. In his oral submissions on behalf of the Appellants, Mr. Lisimba emphasized that the search was done pursuant to Section 55 (6) of the Competition and Consumer Protection Act which provides for deferring of notice until after investigations are concluded and that the section did not waive the giving of notice. It was submitted that the right to be heard was grossly ignored by the Respondent and therefore the decision arrived at was null and void and must be quashed.

Ms. Mulenga, on behalf of the Respondent, argued that the giving of notice under Section 55 (4) and Section 55 (6) was not mandatory and further that it was not mandatory for the Commission to furnish documentation. Ms Mulenga submitted that the word used in this section was "may" not "shall". It was the Respondent's contention that the particular conduct that the Appellants were engaged in was captured under Section 9 (1) (a) of the Competition and Consumer Protection Act No. 24 of 2010 which conduct was illegal *per se*. The Respondent submitted that the Appellants' conduct was meant to totally disadvantage consumers who would have been left out without much of a choice if all the Appellants were charging the same price for issuance of quotations. It was prayed that the decision of the Respondent be upheld with costs to be borne by the Appellants.

We have carefully considered the evidence before this Tribunal in its entirety and the submissions including the authorities cited by Counsel. It has not been disputed that the Appellants were all in the business of providing panel beating services which was their trade. It is also clear to us that the Appellants held meetings to discuss the issue of charging for quotations. In a letter dated 8th February, 2012 and received by the Tribunal Secretariat on 10th February, 2012 Mr. M. Lisimba indicated that they intended to appeal against the decision of the Tribunal. Among other things, Mr. Lisimba stated as follows:

> ***"The background of the matter is that the panel beaters had been experiencing situations where by individuals come to the various Panel Beaters requesting for quotations but never see the business brought. Meanwhile they spend a lot of money to buy stationery for the quotations and they waste time inspecting these vehicles.***

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So they decided to propose to the insurance companies that they be allowed to charge for the quotations in order to avoid time wasters bothering for quotations.

Whilst this was being discussed the competition and Consumer Protection Commission picked it up and concluded that the garages had colluded in the business. Hence the decision."

In deciding whether or not a horizontal agreement was established by the Appellants' conduct, we must consider the provisions of Section 2 (1) and Section 9 of the Competition and Consumer Protection Act No. 24 of 2010 which provide as follows:

2 (1) ***"horizontal agreement" means an agreement between enterprises each of which operates, for the purpose of the agreement, at the same level of the market and would normally be actual or potential competitors in that market.***

9 (1) ***A horizontal agreement between enterprises is prohibited per se, and void, if the Agreement-***

(a) fixes, directly or indirectly, a purchase or selling price or any other trading conditions,

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

Further, the Act in Section (2) (1) defines "agreement" to mean "***any form of agreement, whether or not legally enforceable, between enterprises which is implemented or intended to be implemented in Zambia and includes an oral agreement or a decision by a trade association or an association of enterprises."***

In light of the foregoing, we are satisfied on the documentation before us that the Appellants' conduct contravened Section 9 (1) (a) of the Competition and Consumer Protection Act No. 24 of 2010 as it clearly falls within this definition. It is clear to us that there was a horizontal agreement between the Appellants which agreement fixed directly the trading conditions in the relevant market. It has not been disputed by the Appellants that there was a decision made by them to charge for issuing quotations and a decision to fix prices for issuing these quotations as

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well as the fact that all the companies cited in this case operate at the same level of the market and are actually competitors.

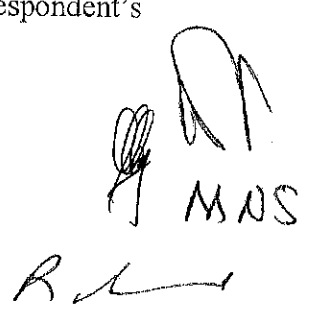
That being the case, we now turn to the manner in which the investigations were conducted by the Respondent. The Appellants contend that the rules of natural justice were not adhered to by the Commission in arriving at its decision. The Appellants have argued that there was no representation from any of the Appellants, that no notice was ever given to the Appellants, that this conduct is in direct conflict of Section 55 (6) as read together with the rest of Section 55 but in particular Section 55 (3) and 55 (4) of the Act.

Having considered the circumstances of this case and the evidence before us, we are satisfied that the Commission carried out its investigations in accordance with the provisions of the law, particularly Section 55 of the Act. The Commission used search warrants to search the premises of the Appellants in accordance with Section 55 of the Act which search warrants indicate the subject matter and purpose of the investigation. We find that the nature the of the issues raised in this matter are such that there was no need to call for witnesses at the hearing or to call the Appellants to make representations or to be heard in view of the fact that a horizontal agreement was established which was *prohibited per se* and thus the law had been violated. We do agree with the Appellants' submissions and authorities on the principals of natural justice. However, the Supreme Court clearly stated in the case of ***Frederick Jacob Titus Chiluba v Attorney-General, Appeal No. 125 of 2002*** that:

"***it is not in all cases where rules of natural justice are always applicable.***" In the cited case, the Appellant argued inter alia that the learned Judge in the court below erred in law when he held that there was no requirement for the Appellant to be given an opportunity to be heard by the National Assembly to rebut the allegations made against him... The Supreme Court held inter alia that:

> ***"it was never the intention of the framers of the Constitution that when the issue of the removal of immunity of the President arises, the former President would have the right to be heard."***

Looking at the facts and the circumstances of this particular case, it is our view that there is a valid law (The Competition and Consumer Protection Act) that was applied by the Respondent and therefore the principals of natural justice need not be strictly applied as the Respondent's



finding was primarily based on the evidence before it. It is our view that the principles of strict liability apply in this case. Further, a reading of Section 55 of the Act shows that there is no requirement for the concerned party to be heard before the decision is made.

Further, the Act under Section 55 (4) uses the word "may" and not "shall" when refereeing to the notice. We do agree with the Respondent's submission on the interpretation of the word "may" in a statute. In the case of ***Lumbwe v UNZA Council (1998) unreported***, the Court held that:

> ***"the word "shall" should be construed to mean mandatory while the word "may" in the enabling statute gives an option to do something."***

It is therefore clear that the Act confers on the Respondent the discretion to give notice under Section 55(6) the Act.

Further, Black's Law Dictionary 9th Edition defines "discretion of an act or duty" as

> ***"involving an exercise of Judgment and choice, not an implementation of a hard-and-fast rule."***

Based on the foregoing definition, it is our view that the giving of a notice in terms of Section 55 (6) is not mandatory but a matter of choice so that failure to give notice cannot be said to be ultravires or unlawful.

In light of the above, we find that the Commission was within its power when it investigated and came up with the decision of the 14th day of December, 2011 and we therefore uphold the said decision. The Commission was also in order when it fined the 1st Appellant and the rest of the Appellants 2% and 1% respectively as the Act under Section 9 (3) states that "An enterprise that contravenes subsection (1) is liable to pay the Commission a fine not exceeding ten (10) percent of its annual turnover." All the Appellants' grounds of appeal have therefore failed.

However, the Tribunal, having considered that all the Appellants were first offenders, had not yet implemented the agreement and therefore did not derive any benefit from the agreement will reduce the fines from 2% and 1% to 1% and 0.5% for the 1st Appellant and the rest of the Appellants respectively.

We award costs to the Respondent to be taxed in default of agreement.

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Leave to appeal to the High Court within 30 days from the date of this ruling is granted.

Delivered this 3rd day of October 2013

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MR WILLIE A. MUBANGA

CHAIRPERSON

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MRS M. NATALA-SIANSIMA

DEPUTY- CHAIRPERSON

....

MR. C. KABAGHE

MEMBER

....

MR. R. SOMBE

MEMBER