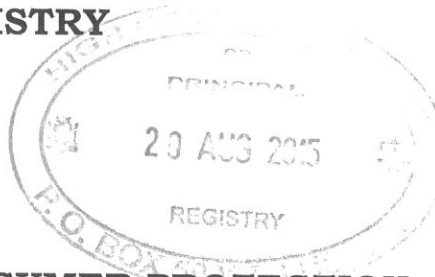


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Appellate Jurisdiction)

2014/HP/A1018



BETWEEN:

**COMPETITION AND CONSUMER PROTECTION
COMMISSION**

APPELLANT

AND

TOKYO VEHICLE LIMITED

RESPONDENT

*Before the Hon. Mrs. Justice A. M. Banda – Bobo on 20th day of August,
2015*

FOR THE APPELLANT:

Mrs. M. B. Mwanza, Legal
counsel.

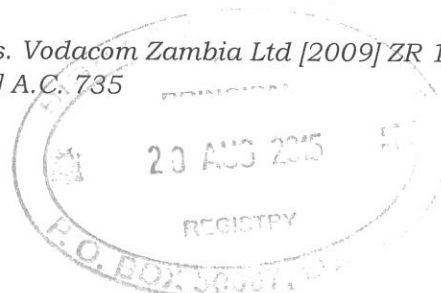
FOR THE RESPONDENT:

Mr. K. Chenda, Simeza,
Sangwa and Associates,
Lusaka.

J U D G M E N T

Case referred to:

1. *Pamodzi Hotel vs. Godwin Mbewe* [1987] ZR 56
2. *Michael Mabenga vs. SikotaWina, Mafo Wallace Mafiyio and George Samulela* [2003] ZR 110
3. *Communications Authority of Zambia vs. Vodacom Zambia Ltd* [2009] ZR 196
4. *Canada Sugar Refining Co. vs. R.* [1898] A.C. 735



5. *Samuel Miyanda v Raymond Handahu [1993-1994] Z.R. 187*

Legislation and other works referred to:

- *The Competition and Consumer Protection Act No. 24 of 2010*
- *The Criminal Procedure Code Chapter 88 of the Laws of Zambia*
- *The Subordinate Court Act Chapter 28 of the Laws of Zambia*
- *Black's Law Dictionary 8th edition (2004 Thomson West)*
- *Dworkin, G.D.Odger's Construction of Deeds and Statutes 9th ed. (London Sweet& Maxwell 1967)*

The delay in delivering this Judgment is regretted. The same was occasioned by circumstances beyond the Court's control.

This is an appeal from the decision of the Competition and Consumer Protection Tribunal ("**The Tribunal**") dated 25th March, 2014.

The background of this case so far as is relevant to this appeal is that on or about 26th November, 2012, the appellant received a complaint from one Webster Davy Shamfuti ("the complainant") to the effect that he had purchased a brand new Massey Ferguson 375 Tractor from the respondent on or about 18th May, 2012. The said tractor cost ZMW 116, 400.00, after a 3 percent discount from the original price of ZMW 120,000.00. The gist of the complaint was that the tractor in question was defective.

The board of commissioners of the appellant considered the submissions and evidence presented by both the complainant as well as the respondent and made the following determination:

- 1) That the respondent did not engage in the unfair trade practices and hence was not in contravention of Section 46 (1) as read with Section 45 (b) of the Competition and Consumer Protection Act ("The Act").**
- 2) That the respondent did not engage in falsely representing that the tractor was new and subsequently the respondent was not in contravention of section 47(a)(iii); and**
- 3) That the respondent did engage in the sale of a defective product contrary to section 49 (1) of the Act.**

The board of commissioners of the appellant subsequently made directives on 26th April, 2013, that:

- I. The appellant writes to the respondent, warning them to desist from supplying consumers with defective products contrary to section 49 (1) of the Act since they are a first offender;**
- II. The respondent be ordered to refund the complainant the total cost of the tractor, being ZMW 116,400.00 failure to which a mandatory order should be obtained from the Tribunal;**
- III. The complainant be advised to pursue the ZMW 20,000.00 compensation claim in the Small Claims Court.**

The respondent being dissatisfied with the decision of the board aforementioned appealed to the Tribunal on the following grounds:

- 1) The Competition and Consumer Protection Commission ("the Commission") erred in fact and in law when it made a determination that the appellant had committed the offence of contravention of section 49 (1) of the Act;**
- 2) The Commission erred in fact and in Law by failing to consider that the appellant did not make any representations to the complainant prior to the purchase of the tractor nor did the complainant, make known to the seller the particular purpose for which the tractor was required, so as to show that the said complainant relied on the appellant's skill or Judgment in purchasing the tractor;**
- 3) The Commission erred in fact and in law by failing to investigate and consider evidence of the storage, usage and maintenance of the tractor by the complainant and/or his agents or servants;**
- 4) The Commission erred in fact and in law by failing to investigate and consider evidence of other persons who purchased tractors of the same make and model from the appellant; and**
- 5) The Commission erred in fact and in law by offering credibility to the complainant's unsubstantiated claim for compensation in the sum of K20,000.00 and in volunteering advice that the claim be pursued before the Small claims Court.**

They sought the following remedies:

- 1. a declaration that the appellant herein has no jurisdiction to make a determination that the offence of sale of a defective product has been committed contrary to section 49 (1) of the Act;**

- 2. A declaration that a determination that an offence has been committed by contravention of section 49 (1) of the Act can only be made by a Court of competent jurisdiction and only upon conviction, can the provisions of section 49 (3) be invoked for a refund to a complaint;**
- 3. Alternatively, that the circumstances of the case do not support a finding that the respondent herein had breached section 49 (1) of the Act; and**
- 4. An order that the relevant parts of the decision of the appellant herein delivered at Lusaka on 26th April, 2013 in respect of a complaint by the within named complainant be quashed or set aside.**

In its decision subject of these proceedings the Tribunal upheld grounds one and three but dismissed grounds two, four and five.

The appellant filed a Notice of Appeal with the following grounds:

- I. The Tribunal erred both in law and in fact by finding that both the Tribunal and the respondent have criminal Jurisdiction pursuant to section 49 (1) and 49 (2) of the Act No. 24 of 2010.**
- II. The Tribunal erred in fact and therefore misdirected itself at law by failing to take into account the evidence filed to support the investigations that had been concluded by the respondent.**
- III. The Tribunal erred both in law and in fact by finding that the claimant must seek redress in his individual capacity through another forum.**

Suffice to say that ground three was abandoned by consent order.

In her skeleton arguments appellant's counsel Mrs. M.B. Mwanza quoted **section 49 (1) of the Act** contending that the literal interpretation of the said provision entails that there is a clear and strict prohibition of supply of defective products. According to counsel, the institution is the Commission as provided under **section 5 (b) and (d) of the Act**. The sanctions that the Commission usually imposes on enterprises or persons that have violated any provisions of the Act, it was argued, are administrative in nature as shown by the order aforementioned saying in the main that the said order was made in accordance with **section 49 (3) of the Act**.

The sanctions under the foregoing section, counsel contended, can be imposed by the Commission on a violator of the law without a matter being taken to the Courts of law for determination. It was further contended that the said **section 49 (3)** is not an extension of **section 49 (2) of the Act**, but constitutes a detached subsection, directly speaking to **subsection 1**, albeit independent of **subsection 2**.

In counsel's view, a determination that a person has violated **section 49 (2)** under the Act, can only be made by a court of competent jurisdiction as the word "conviction" in the subsection imputes criminal liability. Making further reference to **section 5 (2) of the Criminal Procedure Code Chapter 88 of the Laws of Zambia (Cap 88)** and **section 19 of the Subordinate Court Act Chapter 28 of the Laws of Zambia**, counsel argued that only the

Subordinate or High Court as the case may be have the jurisdiction to try criminal offences under the Act.

Arguing ground two, counsel contended quoting **section 55 (3) of the Act** that the Commission did issue a Notice of Investigation to the respondent to which according to counsel the respondent responded by accepting the allegations against it by conduct in that it sent mechanics to attempt to fix the problem with the defective tractor subject of the complaint by one Webster D. Shamfuti. That given the extent and complexity of the defects on the tractor, the Commission did not need to conduct an investigation as its condition had been admitted by the respondent.

Counsel made reference to **Order 21 rule 1 of the High Court Rules** and in sum submitted that in view of the preceding paragraph and considering that the burden of proof in the present case is on a balance of probabilities, this Court should uphold this ground.

It is worth noting that there were final submissions by the appellant which for some curious reason were largely a rehash of the skeleton arguments. I find it unnecessary and unhelpful to consider the same at length.

In response, respondent's counsel Mr. K. Chenda started by referring to **Black's Law Dictionary 8th edition (2004 Thomson West), P.1102** on the definition of obiter dictum which is said to be ***"a judicial comment made while delivering a judicial opinion but one that is unnecessary to the decision in the case and therefore not precedential"***

Further reference was made to **Pamodzi Hotel vs. Godwin Mbewe¹** and **Michael Mabenga vs. SikotaWina, Mafo Wallace Mafiyo and George Samulela²**. According to counsel the portion which the commission seems aggrieved by is in fact a mere opinion in form of obiter dictum that came after the actual decision of the Tribunal. It in fact had no bearing on the overturning of the Commission's decision. Given the foregoing, counsel argued that it was absurd for the commission to advance its first ground of appeal to challenge the Ruling of the Tribunal in as far as it relates to the respondent.

Additionally, counsel contended that the success of ground one of the appeal cannot reverse the entire ruling of the tribunal but only the obiter dicta. The gravamen of Mr.Chenda's argument seems to have been that since as he saw it, ground 1 had nothing to do with the respondent but more with the statutory interpretation of the Commission and Tribunal's power and jurisdiction, the Commission should have instead moved the High Court for interpretation of the relevant law without joining respondent as a bystander in this ground.

Counsel urged this Court to dismiss this ground.

Coming to ground two, counsel invited the Court to examine the letter written to the Commission and authored by the respondent. In counsel's view, if there was anything to be implied from the said letter, it was that the problems faced by the tractor were attributable to the complainant.

My attention was drawn to the case of **Communications Authority of Zambia vs. Vodacom Zambia Ltd**³ upon which counsel contended that an appellate court such as this one should not lightly interfere with findings of fact and that in the main this was not a proper case to so interfere. He buttressed this argument by contending not only that the Commission had itself to blame but also that there was nothing presented before this Court to justify the exercise of its exceptional power to reverse the findings of fact of the tribunal which tried the matter and had the opportunity of not just perusing the documentary evidence but observance of the demeanour of the witnesses who testified before it.

In sum counsel prayed that this appeal be dismissed with costs.

In reply, appellant's counsel countered by submitting that it was gravely erroneous for the respondent to gloss over the Tribunal's decision to reverse the appellant's decision as regards the defectiveness by terming it an orbiter dictum.

It was further submitted that it was clear from the ruling that the reason why the complainant in this case had the reliefs initially awarded by the respondent obliterated by the Tribunal was because the Tribunal opted to exercise jurisdiction *ultra vires* its mandate. The same counsel contended, should be overturned.

With respect to ground two, counsel was of the view that this Court should ignore the respondent's argument. This she said was because it was not true that the letter written by the respondent was not, as alleged by the respondent, simply to blame the

complainant for the defects in the tractor, but a response to the Notice of Investigation that was served upon the respondent by the appellant. In addition, it was submitted that the said respondent had not adduced evidence to the appellant or before the Tribunal to show that they had indeed proved that the problems that the complainant complained of had been caused by misuse or lack of knowledge of how to operate the said tractor.

While agreeing with the holding in **Communications Authority of Zambia vs. Vodacom Zambia Ltd (supra)**, appellant's counsel submitted that under the circumstances of the present case the case was quoted out of context. The reasons according to counsel were that firstly, there was a misdirection at law by the Tribunal, as it thought it did have power to adjudicate and determine criminal cases when in fact not. The result of this apparent misdirection according to counsel was that the Tribunal failed to take into account the evidence that supported the investigations conducted by the appellant including the formulation that the evidence adduced did not meet the standard of proof required in criminal cases; when the case before them was not of a criminal nature.

Counsel submitted that the Tribunal misapprehended facts meriting interference. In sum counsel urged this Court to grant the remedies sought.

I have anxiously considered the written submissions and authorities therein.

Ignoring arguments on the fringes, the question on which this whole appeal hangs is whether the Commission and or the Tribunal as the case may be is empowered to hear, make recommendations or determine matters arising under **section 49 (1) and (2) of the Act**. There were as said earlier, two grounds of appeal. I will deal with each in turn.

Section 49(1) and (2) on which the first ground of the appeal to the effect that The Tribunal erred both in law and in fact by finding that both the Tribunal and the respondent have criminal Jurisdiction under the Act provide as follows:

49(1) A person or enterprise shall not supply a consumer with goods that are defective, not fit for the purpose for which they are normally used or for the purpose that the consumer indicated to the person or the enterprise.

(2) A person who, or an enterprise which, contravenes subsection (1) commits an offence and is liable, upon conviction-

- a) to a fine not exceeding five hundred thousand penalty units; and*
- b) to pay the Commission, in addition to the penalty stipulated under paragraph (a), a fine not exceeding ten percent of that person's or enterprise's annual turnover.*

Authorities regarding interpretation of Statutes abound. The learned author of **Odger's Construction of Deeds and Statutes 9th edition (London Sweet& Maxwell 1967)** observe at **page 237** that

"The meaning of the statute and the intention of the legislature in enacting it can only properly be derived from a consideration of the whole enactment and every part of it in order to arrive if possible at a consistent plan. It is wrong to start with some a priori idea of that meaning or intention

and to try by construction to work that idea into the words of the statute in question."

In Canada Sugar Refining Co. vs. R.⁴ at page 741, Lord Davey opined:

Every clause of a statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject matter

Once the foregoing is done, the words in a statute have to be interpreted as bearing their natural meaning. In Samuel Miyanda v Raymond Handahu⁵ the Supreme Court observed:-

It is not what the legislature meant to say or what their supposed intentions were with which the court should be concerned; the court's duty is to find out the expressed intention of the legislature. When the language is plain and there is nothing to suggest that any words are used in a technical sense or that the context requires a departure from the fundamental rule, there would be no occasion to depart from the ordinary and literal meaning and it would be inadmissible to read into the terms anything else on ground such as policy, expediency, justice or political exigency, motive of the frames and the like....

What is clear is that **section 49** appears under **part VII** headed as "**Consumer Protection**". It is worth noting that contravention of **sections 46, 47 and 48** makes the person or entity responsible 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**", under **sections 46(2) and 47(2)** and "**...a fine not exceeding ten percent**

of that person's or enterprise's annual turnover" under **section 48(2)**. Using the foregoing principles, it becomes clear that **section 49 (2)** is not couched in the same terms. While **Section 49(1)** clearly prohibits a person or enterprise from supplying a consumer with defective goods, or goods which are not fit for the purposes intended inter alia, **subsection (2)** criminalises contravention of **subsection (1)** and makes conviction a conditional precedent for liability:

- a) to a fine not exceeding five hundred thousand penalty units; and*
- b) to pay the Commission, in addition to the penalty stipulated under paragraph (a), a fine not exceeding ten percent of that person's or enterprise's annual turnover.*

In its Ruling on page 11 the Tribunal opined:

we also hasten to add that we are of the opinion that both the Commission and the Tribunal have power and Jurisdiction to make a determination that an offence of selling defective goods has been committed pursuant to section 49 (1) and 49(2) of Act.

The Tribunal predicated its conclusion on **sections 5(1) and section 2 of Cap 88**:

5. (1) Any offence under any written law, other than the Penal Code, may, when any court is mentioned in that behalf in such law, be tried by such court or by the High Court.

However in doing so the Tribunal failed to consider **subsection (2)** which reads as follows:

(2) When no court is so mentioned, such offence may, subject to the other provisions of this Code, be tried by the High Court or by any subordinate court."

Upon a proper reading of **the Act** as a whole and taking the words as bearing their natural meaning, one draws the conclusion that section **5(1)(2) of Cap 88** captures the offence under **section 49 of the Act**. I can see no way in which Parliament's intention as expressed could be interpreted in the manner that the Tribunal chose to interpret it. The Ruling, subject of this appeal and the order therein, was made in accordance with **section 49 (3) of the Competition Act**. This was the correct thing to do as the sanctions that the Commission/ Tribunal usually imposes on enterprises or persons that have violated any provisions of **the Act**, are not criminal but administrative in nature. The said sanctions require no adjudication by a Court of competent jurisdiction such as the Subordinate or High Court as the case may be.

However, as appellant's counsel correctly argued a determination that a person has violated **section 49 (2)** under the Act, can only be made by a court of competent jurisdiction as the word conviction imputes criminal liability. A reference to **section 5(2) of Cap 88** and **section 19 of the Subordinate Court Act Chapter 28 of the Laws of Zambia**, shows that only the Subordinate or High Court as the case may be have the jurisdiction to try criminal offences under the Act.

The Tribunal as aforesaid also referred to **section 2 of Cap 88** the relevant part of which provides as follows: "***In this Code, unless the context otherwise requires- "Court" means the High Court or any subordinate court as defined in this Code....***" In my Judgment, the context of **the Act** read as a whole and the literal meaning of **Section 49 (2) of the Act** do not clothe the Commission or Tribunal with authority to preside over criminal proceedings under that section.

I am fortified in drawing the foregoing conclusion because when one looks at **section 80(1)** which provides as follows:

"A court of competent jurisdiction shall have jurisdiction over any person for any act committed outside Zambia which, if it had been committed in Zambia, would have been an offence under this Act"

This section clearly states that only a court of competent jurisdiction should preside over proceedings of a criminal nature. Only that Court which implies the High Court or any subordinate court as defined in **Cap 88** has jurisdiction to deal with the offence captured under **section 49 (2)**. That section implies that it will be necessary for the prosecution to present and prove its case and for the defendant to raise a defence if any, after which the court must decide whether to convict or not. Put another way, there must be a criminal trial. Only then would the sanctions under **subsection (2)** follow. The provisions under **Section 49 (3)(4) of the Act** are independent of those in **subsection (2)** and can be enforced by the Commission without recourse to a Court of competent jurisdiction.

This construction should apply to other similar provisions in **the Act** such as **section 72** which relates to giving false evidence in any proceedings before the Tribunal.

It follows that under the circumstances and facts of the present or indeed any future case, should the Commission seek to invoke **section 49(2)**, the Commission after concluding its investigations should commence (or will have to commence) the prosecution of the matter against the respondent in the Subordinate Court or the High Court as the case may be, using the procedure under **Cap 88**. This is because as **section 4(2) of the Act** provides *inter alia*, the Commission "***shall be a body corporate...capable of suing and being sued in its corporate name....***"(emphasis added by Court)

It was argued by respondent's counsel Mr. Chenda that the remarks I have already alluded to were made obiter and that if the same were set aside; it would not affect the substantive Ruling of the Tribunal because in his view, this was not the reason for the decision that gave rise to the present ground of appeal. While I agree with Mr. Chenda's interpretation of obiter dicta and the authorities he referred this Court to, I do not agree that the words were made obiter. In my view, the holding by the Tribunal was predicated on what they thought was the standard of proof in this matter. At page 9 the Tribunal noted:

If this were a civil offence, in the absence of any proof that the faults in the tractor was vandalised or that it was used improperly as suggested by the appellants, we would

ordinarily have concluded that the faults in the tractor were as a result of inherent defects on the balance of probabilities.

The Tribunal then went on to quote several Criminal cases on burden of proof. Later at page 10 the Tribunal opined:

"As the required standard of proof has not been met, we have no choice but to reverse the finding of the Commission that the Tractor was inherently defective"

In stating the above, the Tribunal was asserting Jurisdiction in a matter where it had none. Interestingly, even though respondent's counsel argued on the basis of obiter dicta, he seemed to agree that the Tribunal had no Jurisdiction to decide as it did with respect to **section 49 of the Act** as he offered no counter argument in this respect.

This ground must therefore succeed.

As respects ground two respondent's counsel invited the Court to examine the letter written to the Commission and authored by respondent. I am however not swayed by counsel's argument in this respect. It cannot be said that what could be implied from the said letter, was that the problems faced by the tractor were attributable to the complainant. I say this because in its Ruling on page 9 aforementioned the Tribunal came to the conclusion that there was no evidence produced by the respondent herein to prove that the faults in the tractor resulted from the same being vandalised or that it had been used improperly as suggested by the appellants. Contrary to respondent counsel's assertions, the letter written by the respondent was not simply to blame the complainant

for the defects in the tractor but a response to the Notice of Investigation that was served upon the respondent by the appellant. Had the Tribunal not misdirected itself by thinking that it could adjudicate on and determine criminal cases when in fact not and placed a higher burden of proof as a consequence, it would *"ordinarily have concluded that the faults in the tractor were as a result of inherent defects on the balance of probabilities"*.

As appellant's counsel quite correctly submitted, the result of this apparent misdirection aforementioned was that the Tribunal failed to take into account the evidence that supported the investigations conducted by the appellant including the formulation that the evidence adduced did not meet the standard of proof required in criminal cases; when the case before them was not of a criminal nature.

On that basis, the case of **Communications Authority of Zambia vs. Vodacom Zambia Ltd** (supra) cannot help the respondent's case but only fortify my position that this is a proper case in which this Court can interfere with findings of fact. This Court has had occasion to, as did the Tribunal, peruse the documentary evidence and even without observing the demeanour of the witnesses, it is clear to me that the Tribunal misdirected itself. Its findings of fact in this respect therefore merit interference by this Court.

This ground also succeeds.

The net effect in view of the foregoing is that this appeal succeeds in its entirety. The holding of the Tribunal is reversed. Costs follow the event to be taxed in default.

Leave to appeal is granted.

DELIVERED AT CHIPATA THIS DAY OF AUGUST, 2015.



**MRS. JUSTICE A. M. BANDA-BOBO
HIGH COURT JUDGE**