**THE COMPETITION AND CONSUMER PROTECTION TRIBUNAL** **APPEAL NO. 2021/CCPT/035/CON**

**HOLDEN AT LUSAKA**

BETWEEN:

**EL-GIBOR ENTERPRISES LIMITED** **APPELLANT**

**AND**

**THE COMPETITION AND CONSUMER PROTECTION COMMISSION** **1ST RESPONDENT**

**LEAH ZULU** **2ND RESPONDENT**

**CORAM:** **Mrs. Eness C. Chiyenge (Chairperson), Mrs. Miyoba B. Muzumbwe-Katongo (Vice Chairperson), and Mr. Buchisa K. Mwalongo (Member)**

For the Appellant: Mr. Cheelo Mwiinga of Messrs Lennard Lane Partners

For the Respondent: Mrs. M.M. Mulenga, Manager Legal Services and Ms. S. Mafuta, Legal Officer – Competition and Consumer Protection Commission

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**JUDGMENT**

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**Legislation referred to:**

The Competition and Consumer Protection Act No. 24 of 2010, section 49 (5), (6) and (7).

**Case referred to:**

Plant Construction Plc v. Clive Adams Associates and JHM Construction Services Ltd (1998) EWHC QB 335 (9th March, 1998).

**Other Works referred to:**

Black's Law Dictionary, 8th Edition, at page 504

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## Introduction

1. This is the Judgment on an appeal by El Gibor Enterprises Limited (hereinafter referred to as "the Appellant") against the decision of the Competition and Consumer Protection Commission (hereinafter referred to as "the 1st Respondent") dated 18th December, 2021.

**Background**

2. The said decision of the 1st Respondent found the Appellant to be in violation of section 49(5) of the Competition and Consumer Protection Act No. 24 of 2010(hereinafter referred to as "the Act") and subsequently fined 0.5% of the Appellant's s turnover. The 1st Respondent also ordered the Appellant to refund one Leah Zulu (hereinafter referred to as "the 2nd Respondent") the sum of ZMW 43,000 being a deposit paid by the 2nd Respondent to the Appellant under a contract entered into around October 2020 for the manufacture and supply of goods, being burglar bars, door frames and grill doors.

3. The 1st Respondent's decision which the Appellants seeks to impugn is based on a complaint made by the 2nd Respondent to the 1st Respondent in which she claimed a refund of the sum of ZMW 43,000.00 she paid to the Appellant pursuant to the said contract.

4. Upon receipt of the said complaint, the 1st Respondent instituted investigations into the circumstances which led to the complaint before it. The findings of the said investigations were that the Appellant failed to exercise reasonable care and skill in the manufacturing and supply of the burglar bars by using wrong sizes on some of the deformed steel bars and wrong spacing between the steel bars, and that it was therefore guilty of the violating Section 49 (5) of the Act.

**Appeal and Appeal Proceedings**

5. The Appellant being dissatisfied with the findings and decision of the 1st Respondent appealed to this Tribunal and filed three grounds of appeal as follows:

    i. That the Board erred in fact when they did not consider the submissions by the Appellant that payment of close to 50% of the agreed price gave the permission to the Appellant to start manufacturing the goods as was agreed by the parties.

    ii. That the Board erred in fact when they disregarded the Appellant's submission that the materials complained of (Y14) does not exist in Zambia. ("the does" own submission by Appellant)

    iii. That the Board erred in fact when it disregarded the Appellant's submission that the complainant only sought a refund when her brother fell sick, and she needed medicine for his treatment, and only talked about shortcomings in the Appellant's work when she was informed that the money had already been used.

6. The 1st Respondent filed its responses to the grounds of appeal as follows:
    i. In response to ground one, the record shows that the 1st Respondent did not err in fact as all submissions from the Appellant were taken into consideration thus being on firm ground pursuant to section 49 (5) of the Act.

ii. Contrary to the Appellant's assertion in ground two, the record shows that the 2nd Respondent took into consideration all submissions that were made by the parties prior to making its decision.

iii. In response to ground three, the 1st Respondent will show at the hearing of the appeal that its decision was premised on relevant evidence and the Respondent acted correctly and reasonably in coming up with its decision.

7. We heard the appeal on 9th September 2021. Counsel for the Appellant opted not to call any witness and indicated that the Appellant would rely of the Record of Proceedings (RoP) filed by the Respondent. Counsel for the 1st Respondent also opted to totally rely on the RoP, while the 2nd Respondent did not appear despite having been in attendance at the previous sitting on 23rd August 2021 when the appeal was scheduled for hearing. We accordingly issued directions for filing of submissions and reserved our judgment to be delivered thereafter. Counsel for the Appellant and counsel for the 1st Respondent did file their submissions, the 1st Respondent's being the last and filed on 6th October 2021. The 2nd Respondent did not file any submissions despite having been served with our record of proceedings for 9th September 2021 and subsequently the Appellant's and the 1st Respondent's respective submissions.

8. The sixty days within which we should have delivered the judgment having lapsed, in terms of Rule 31 (2) of the Competition and Consumer Protection (Tribunal) Rules, S.I. 37 of 2012, the Appellant renewed the appeal by letter dated 10th February 2022 and both the Appellant and the 1st Respondent opted to proceed by the record. Judgment was reserved.

**Legal Arguments**

9. In respect of ground one of appeal, in sum, the Appellant argued that the 2nd Respondent was in breach of the *"payment plan contract*", shown at page 5 of the RoP in that she was supposed to pay K85,000 for the works in specified instalments due October, November and December 2020, but instead only paid K43,000 in November 2020. That despite the alleged breach, the Appellant allowed her to pay at the time she did in order to facilitate commencement of the works. Further, that per the RoP at page 21, line 12 the Appellant indicated that the 2nd Respondent gave him authority to commence the works via WhatsApp message, but the 1st Respondent's Decision did not take cognizance of this in its Decision.

10. Counsel for the Appellant further referred to the RoP at page 51, line 2 (paragraph 2) where the 1st Respondent in its Decision stated that the Complainant alleged that she told the (Appellant who was respondent in those proceedings) not to commence any works until they gave her a contract with correct specifications, design and materials to be used for the burglar bars and grill doors, but that the 1st Respondent did not interrogate the allegation in its decision. That the 1st Respondent did not establish why more than 50% of the contract sum was paid to the Appellant before the 2nd Respondent had sight of the signed contract. Further that the WhatsApp communication at page 8 of the RoP confirms that she allowed the works to commence,

whereupon receipt of the sample she responded, *"yes this is what I want, what size is in between"* to which the Appellant responded "*it's small and it is 8cm*". That the 2nd Respondent then confirmed saying "*thanks, as discussed increase to 12cm*". Counsel concluded that the communication showed that the parties had indeed agreed that the Appellant should commence the works and that if the written contract was to be an integral part of the contract the 2nd Respondent would not have paid the sum she paid, albeit in breach of the payment plan.

11. In respect of ground two, counsel for the Appellant argued that in its Decision (reference page 59 of the RoP, paragraph 26), the 1st Respondent's Board of Commissioners agreed with the Appellant's submission that on the Zambian Market there was no size Y14 deformed steel bars. That therefore the 1st Respondent should not have faulted the Appellant. Furthermore, counsel argued that since the Appellant is not a manufacturer of the deformed bars but acquires the materials in bulk from known suppliers, it is the supplier who should shoulder the blame and not the Appellant who did not know that among the stock it bought there were some that measured 14mm because it was uncommon to find such on the Zambian market.

12. Furthermore, counsel argued that in its investigation report and decision (reference page 55 of the RoP, paragraph 17), the 1st Respondent stated that an on the spot check at the Appellant's premises revealed that the Appellant (who was respondent in the proceedings below) had made a total of 21 burglar bars with some having a spacing of between 11cm and 14cm between the deformed steel bars instead of 12cm as specified by the 2nd Respondent. That it is clear that the 1st Respondent did not take down the number of the defective burglar bars out of the 21 to warrant rejection. That a blank condemnation does not show that the investigations were complete and that the Appellant spent money to procure the material and it would be a serious injustice to allow rejection of the goods manufactured because one or two burglar bars were found to be defective. That reliance on the investigation by the Board was prejudicial to the Appellant.

13. In respect of ground three, counsel for the Appellant submitted that clearly the 1st Responded out-rightly rejected the Appellant's submission that the 2nd Respondent only sought refund because her brother fell ill and she needed money for his treatment. Counsel made reference to page 59 of RoP, paragraph 30, where the 1st Respondent said*, "However, this submission was not considered as a finding and consequently in the analysis of the report as it was a mere allegation without supporting evidence*". Counsel submitted that when the allegation was raised, the 1st Respondent should have investigated it with the same zeal it exhibited in investigating the complaint. That is, that a simple inquiry could have been made as to whether she had a sick brother at the material time and if confirmed, that would have put the 1st Respondent's Board in a better position to dispense justice on a balance of probability.

14. The 1st Respondent argued Grounds one and two together. The 1stRespondent submitted that the RoP shows that the1stRespondent did not err in fact as the submissions from the Appellant were taken into consideration thus being on firm ground. The 1stRespondent further argued that

contrary to the Appellant's assertion in ground two the record shows that the 1st Respondent took into consideration all the submissions that were made by the parties prior to making its decision pursuant to section 49 (5) which reads as follows:

> "***A person or an enterprise shall supply a service to a customer with reasonable care and skill or within a reasonable time, or if a specific time agreed, within a reasonable period around the agreed time."***

15. The 1st Respondent further cited section 2 of the Act that defines "services" to include:

> **"*The carrying out and performance on a commercial basis of any engagement, whether professional or not, other than the supply of goods, but does not include the rendering of any services under a contract of employment.***

The 1st Respondent submitted that the above provision of the law encompassed the relation between the 2nd Respondent and the Appellant.

16. The 1st Respondent further submitted that besides the Appellant and the 2nd Respondent agreeing on a payment plan, it is illustrious from the submissions of the 2nd Respondent and the Appellant having not disputed the fact that the 2nd Respondent had asked the Appellant not to proceed with the making of the burglar bars and door frames until the Appellant had given her a contract with the correct specifications, design and the materials to be used as indicated at page 12 of the RoP) where messages were shared between the 2nd Respondent and the Appellant. That from the records herein an inference is drawn that the parties agreed on this term but the Appellant instead sent the 2nd Respondent a different sample of the steel burglar bar which had vertical bars as opposed to horizontal bars as per her request.

17. The 1st Respondent further submitted that the record shows that on 9th December, 2020, the Appellant sent to the 2nd Respondent a further sample of the burglar bar which was in accordance with her specifications. That when the 2nd Respondent inquired about the spacing between the bars the Appellant informed the 2nd Respondent that it was 8cm and the 2nd Respondent requested the Appellant to increase the spacing to 12cm. The 2nd Respondent further requested to see the sample again once it was done but the Appellant did not return to her (see pages 8 and 9 of the RoP).

18. The 1st Respondent further submitted that the Appellant being an adept and specialized in manufacturing aluminum sliding doors, casement windows, office partitioning, curtain walls, suspended ceiling, as could be envisaged on page 4 of the RoP, is expected to act professionally and provide to its customers a reasonable service with care and skill. The 1st Respondent further argued tha tthe failure by the Appellant to adhere to the agreed specifications amounts to the violation of section 49(5) of the Act.

19. The 1st Respondent further submitted that Black's Law Dictionary, 8th Edition at page 504 defines reasonable care and skill as follows:

"***Having precaution or diligence as may fairly and properly be expected or required having regard to the nature of actions, or of the subject matter, and the circumstances surrounding the transactions" and reasonable skill is defined as: "such skill as ordinary possessed and exercised by persons of common capacity, engaged in the same business or employment".***

20. The 1st Respondent further cited the case of **Plant Construction Plc v. Clive Adams Associates and JHM Construction Services Ltd (1998) EWHC QB 335 (9th March, 1998)** and the brief facts are as follows:

    *The contract concerned Ford and Plant to design and build two pits for engine mount rigs and a suspension rig at Ford's research and engineering Centre at Danton. The Court of Appeal had to consider the principles duty to warn and the implied terms of skill and care in the context of dangers known to the contractor. Plant was to be responsible for damage to the works caused by its own negligence. Plant was responsible for all the acts and omissions of its sub-contractor and that any assistance rendered by Ford would not release Plant from being responsible for the works.*

21. The1stRespondent further submitted that Clive Adams the structural engineers engaged by Plant and JHM were sub-contractors for the sub-structural work involving shoring excavations and roof support. The roof collapsed because of insufficient support. Ford sued Plant who settled the claim. Plant then brought claims for breach of contract against Clive Adams and JHM who also settled the claims. JHM alleged that they followed the instructions given to them by an engineer employed by Ford in designing and executing the works.

22. The holding in the case of Plant Construction Plc is as follows:

    ***"JHM was contractually obliged to carry out the temporary works of supporting the roof in the way in which and to the design by which they were so instructed by Ford. Factual extent of the performance required by the implied term that a contractor will perform his contract with the skill and care of an ordinarily competent contractor, will depend on all the circumstances.***

    ***Given crucially that the temporary roof support works were obviously dangerous and were known to JHM to be dangerous, JHM's implied obligation to perform with skill and care carried with it an obligation to warn of the dangers which they perceived.***

    ***The facts that the design and details of the temporary works were imposed by Ford, that Plant had Clive Adams as their consulting engineer, that others were at fault, or that JHM were contractually obliged to do what Ford instructed did not negate or reduce the extent of performance of the implied terms.***
    ***JHM's duty extended to giving proper warnings about risk."***

23. The 1st Respondent submitted that the above cited case which is of persuasive value clearly demonstrates that there was no duty of care and skill by the Appellant in the way they made the deformed steel bars. That this is can be seen from the communication the Appellant and the 2nd Respondent had exchanged on pages 7 to 12 of the RoP. That the Appellant was clearly told by the 2nd Respondent about the specifications of the deformed steel bars and correct size, but the Appellant did not act with reasonable care and skill when they proceeded to make the deformed steel bars, door frames and burglar bars contrary to the specifications required by the 2nd Respondent.

24. The 1stRespondent further submitted that the RoP shows that the Appellant made contradictory statements in its submissions. That to be more specific, pages 53 and 54 shows that the 1st Respondent received a response from the Appellant which necessitated the findings of the 1st Respondent's decision. That the Appellant stated that the Complainant made a payment of close to 50% of the agreed price meaning that she gave consent to the Appellant to start the work.

25. Further, that the Appellant contended that there was a finding that they had used Y14 deformed steel bars instead of Y16 and that there was no Y14 on the Zambian market, and that only available sizes were Y10, Y12, Y16, and Y20.That the Appellant at page 56, paragraph 18 of the RoP submitted inter alia that:

> ***"……further the Respondent argued that all the bars used on the burglar bars were <u>Y16 deformed steel bars despite their diameter being 14mm (Y14). The Respondent submitted that he had purchased the deformed steel bars although the consignment also had the Y14 deformed steel bars." (Underlined for Our Emphasis)***

26. The 1stRespondent further argued that the Appellant made contradictory statements in that in one vein, it said Zambia had no Y14 steel bars but contradicted himself by submitting that the consignment that came with the Y16 steel bars, had Y14 steel bars and this just goes to confirm that the 2nd Respondent's visit to the Appellant's shop. Further, that on page 38, paragraph 16 and page 39, paragraph 17 and 18 respectively of the RoP confirm that when the 1st Respondent went to visit the Appellant's shop, the Appellant had already made a total of 21 burglar bars with some having a spacing of between 11cm and 14 cm between the deformed steel bars instead of 12cm as specified by the Complainant. The 1st Respondent further found that on some burglar bars, the Appellant used Y14 deformed steel bars instead of Y16 deformed steel bars.

27. That based on the above contradictions, the 1st Respondent did take into consideration all the submissions made by the Appellant during investigations and all the way through to the Board's determination and Decision. That therefore, based on the aforementioned, this ground does not hold any water and must fail.

28. In response to this ground, the 1st Respondent argued that the decision of the Board of Commissioners was premised on the relevant evidence and that the Board of Commissioners acted correctly and reasonably in coming up with its decision.

29. The 1stRespondent argued that the Appellant's assertion that the 2nd Respondent contacted them and demanded for a refund because her brother was unwell was only raised at a point of responding to the 1st Respondent's preliminary report as it can be seen at (pages 48 and 49 of the RoP). That the 1st Respondent did not at any point during its investigations refer to this assertion. That it is therefore that the 1st Respondent's argument that this is an afterthought argument as the record will show that this matter is purely premised on the Appellant's failure to provide a service to the 1stRespondent with reasonable care and skill in accordance with the provisions of section 49 (5) of the Act.

30. The 1stRespondent further submitted that it is clear from the case in casu, that the Appellant was engaged to carry out a service of making aluminum windows and door frames. That the 2nd Respondent did make an initial payment of the sum of ZMK 43,000.00 as a down payment. That the Appellant (page 8 of the RoP) decided to make deformed steel bars with wrong specifications which is contrary to what the 2nd Respondent had requested for. That the Appellant therefore failed to provide a service to the 2nd Respondent which was expected or required of them and the assertion that the 2nd Respondent wanted a refund because of her brother who was unwell was merely an afterthought.

31. The 1stRespondent finally deposited that the 2ndRespondent has endeavoured to show that the Appellant violated sections 49(5) of the Ac; therefore it is their submission that this Tribunal should uphold the decision of the Board of Commissioners and dismiss the appeal in its entirety with costs to the 1st Respondent as it lacks merit, is frivolous, vexatious, and meant to delay the administration of justice.

**Analysis and Determination**

32. The Tribunal has carefully perused the RoP, the Appellant's grounds of appeal and the 1stRespondent's response to the grounds of appeal. The Tribunal has also perused the parties' respective submissions. We deal with each ground of appeal separately. However, before we do so, we deal with the ingredients of the offence in section 49 (5) of the Act, which reads:

> **"*A person* or *an enterprise shall supply a service to a customer with reasonable care and skill or with reasonable time, or if a specific time agreed, within a reasonable period around the agreed time."***

33. We do not agree with counsel for the 1st Respondent that the service in issue is that defined in "services" in section 2 of the Act. This is because the said definition expressly excludes the provision of goods. We determine that the context of section 49 (5) captures both "a service" and "services" in terms of their definitions under section 2 of the Act. This is because exclusion of either of the two would defeat the objectives of consumer protection reflected in the Act and

result in absurdities. We further determine that in the present case, the works in issue are on all fours with the definition of "service". The Act defines "service" as *"includes the sale of goods, where the goods are sold in conjunction with the rendering of a service*". The service in the present case entailed the Appellant manufacturing goods that were to be supplied to the 2nd Respondent.

34. As for the meaning of reasonable care and skill, Black's Law Dictionary, 8th Edition at page 504 defines reasonable care and skill as follows:

> ***"Having precaution or diligence as may fairly and properly be executed or required, having regard to the nature of action, or of the subject matter, and the circumstances surrounding the transactions*** whereas skill is referred to as***, "Such skills as ordinarily possessed and exercised by persons of common capacity, engaged in the same business or employment."***

35. In light of the requirements of section 49 (5) of the Act, the applicable definition of "service" and the definition of reasonable care and skill outlined in Black's Law Dictionary, it is our view that reasonable care and skill expected in the provision of a service such as the one in the present case would ordinarily entail that the Appellant would provide the specifications of the burglar bars and door frames, including the design(s), materials to be used and their sizes. Secondly, the specifications may, if need be, require samples (sometimes including prototypes) of fabricated goods. In our view, this was important in the present case whether the said specifications related to the goods the Appellant generally manufactured and supplied on the market, from which a consumer would simply make their choices, or the specifications were prepared on a custom-made basis, tailored to the consumer's (2nd Respondent's) description of what she desired to be made. Alternatively, it may be the case that the parties agreed that the specifications of the burglar bars and door frames to be manufactured and supplied were left to the Appellant as the supplier to determine in whatever manner it chose.

36. Whatever the case may be, at the very least, it is reasonable to expect that the parties should have agreed as to the specifications. Further, that the supplier's duty to supply the service with reasonable care and skill in the terms of section 49 (5) would entail that the goods met the agreed specifications or, in the latter scenario, that the supplier determined the specifications and that the goods supplied fitted the specifications, the goods procured and their purpose. In our view, these specifications are not only a matter of expectation in the provision of the kind of service under review, in light of the reasonable care and skill demanded by section 49 (5) of the Act. The specifications are also a matter of practicality for the kind of service under review. We take this position because in the absence of such agreement, it is most likely that the ensuing transaction becomes a matter of trial and error and disputes between the parties as to exactly what has been agreed.

37. Having determined the ingredients of the offence in section 49 (5), in applying the same to determine the appeal according to the facts of the case as highlighted in the RoP, and the grounds of appeal, the following questions will underpin our analysis and determination:

    (1) Whether the specifications were agreed between the parties and if so at what stage this was done, or whether the 2nd Respondent left the specifications to the Appellant to determine in whatever manner and if so whether the Appellant did so and at what stage.

    (2) If the specifications were agreed whether the Appellant in supplying the service met the specifications.

    (3) If the specifications were determined by the Appellant, whether the Appellant in supplying the service met the specifications and the goods fitted the goods that were procured and their purpose.

**Ground one**

38. The first Ground of appeal is that the Respondent erred when they did not consider the submission by the Appellant that payment close to 50% of the agreed price gave permission of the Appellant to start manufacturing the goods as was agreed. In response thereto, the 1stRespondent submitted that the record of proceedings will show that all submissions from the Appellant were taken into consideration. The gist of the Appellant's contention in ground one appears to be that had the 1stRespondent considered the fact that the 2nd Respondent's payment of a deposit to the Appellant gave permission to the Appellant to acquire material for the manufacture of the ordered goods, the 1st Respondent would not have ordered a refund of the K43,000 to the 2nd Respondent as the monies paid had been used up for the purpose as said.

39. Further, that per the RoP at page 21, line 12 the Appellant indicated that the 2nd Respondent gave him authority to commence the works via WhatsApp message, but the 1st Respondent's Decision did not take cognizance of this in its Decision. Counsel for the Appellant referred to the RoP at page 51, paragraph 2 where the 1st Respondent in its Decision stated that the Complainant alleged that she told the Appellant not to commence any works until they gave her a contract with correct specifications, design and materials to be used for the burglar bars and grill doors, but that the 1st Respondent did not interrogate the allegation in its decision. That the 1st Respondent did not establish why more than 50% of the contract sum was paid to the Appellant before the 2nd Respondent had sight of the signed contract. Further that the WhatsApp communication at page 8 of the RoP confirms that she allowed the works to commence, whereupon receipt of the sample she responded, *"yes this is what I want, what size is in between"* to which the Appellant responded "*it's small and it is 8cm*". That the 2nd Respondent then confirmed saying "*thanks, as discussed increase to 12cm*". Counsel concluded that the communication showed that the parties had indeed agreed that the Appellant should commence the works and that if the written contract was to be an integral part of the contract the 2nd Respondent would not have paid the sum she paid, albeit in breach of the payment plan.

40. This Tribunal takes note that the Appellant and 2nd Respondent agreed on a payment plan, which is reflected at 5 of the RoP dated 20th October 2020 and we note the receipt in respect of the K43,000 at page 6 dated 5th November 2020. However, neither the pay plan nor the receipt contains specifications of the burglar bars, door frames and grill doors and neither indicate an agreement for the Appellant to proceed with the works. Piecing together WhatsApp communication between the prties, we get the following picture:

    *(a)* After the K43,000 had been paid, on 28th November 2020 (at page 12 of the RoP), the 2nd Respondent wrote, *"Good morning, do not proceed with making burglar bars etc until I see them especially on the specs we need to agree"*.

    (b) It is apparent from the WhatsApp communication between the parties on 9th December 2020 appearing at page 8 of the RoP[1] and quoted by counsel for the Appellant that the parties had at that time discussed the specifications at least partially, namely that the spacing between the bars should be 12cm and not the 8cm appearing in the photo sent by the Appellant. We also note that the Appellant had apparently sent the 2nd Respondent photos of burglar bars on 5th December, appearing at pages 10 and 11 of the RoP. In the WhatsApp messages appearing at page 9 of the RoP, the 2nd Respondent stated that the Y16 (steel deformed bars) should be upright not across and she included a picture, and that the spacing should be small, not what he had done; that it was ugly.

41. It is therefore our finding that on the evidence on record, the pay plan dated 20th October 2020 or payment of the K43,000 on 8th November 2020 did not constitute agreement for the Appellant to proceed with the works. The pay plan was simply that – a pay plan. The payment was simply a part payment. There is nothing that prevents a pay plan being made and/or part payment being made before specifications are agreed. We in fact find on the evidence that at that point the parties had not agreed on the specifications; that the 2nd Respondent did on 28th November 2020 tell the Appellant not to proceed with making the burglar bars and the other items until she had seen them and agreed on the specifications; the Appellant sent the 2nd Respondent photos of window burglar bars and grill doors on 5th December 2020 and her reaction was that the Y16 (steel deformed bars) should be upright not across and she included a picture, and that the spacing should be small, not what he had done; that it was ugly; on 9th December 2020, the Appellant sent a photo of burglar bars and the 2nd Respondent's reaction was as quoted by counsel for the Appellant, *"yes this is what I want, what size is in between"* to which the Appellant responded "*it's small and it is 8cm*". That the 2nd Respondent then confirmed saying "*thanks, as discussed increase to 12cm*".

42. We further find on the basis of the WhatsAPP conversations that the parties later came to agreement on the specifications, at least on the size of the steel bars (Y16) and the spacing between them (12cm). At paragraph 34 of the RoP, the 1st Respondent in its Decision stated that

[1] Date provided by the 2nd Respondent in her statement at page 7, and not disputed by the Appellant.

it found through the WhatsApp messages that on 28th November 2020, the 2nd Respondent told the Appellant not to proceed with making the burglar bars until she saw the sample and agreed on the materials to be used and the design. In light of the evidence we have outlined, and the 1st Respondent's findings, we do not agree with the Appellant's assertion that the 1st Respondent did not interrogate the 2nd Respondent's claim that she told the Appellant not to commence any works until they gave her a contract with correct specifications, design and materials to be used for the burglar bars.

43. Therefore, the claim that the part payment constituted an instruction to go ahead with the manufacture is arbitrary, with no legal or factual basis. The justification suggested by the Appellant that it had already spent the K43,000 on materials cannot not stand in law. A refund in the terms of section 49 (7) (a) can be ordered even where a service has been performed if it falls short of the standard of reasonable care and skill. The subsection reads, *"In addition to the penalty stipulated under subsection (6), the person or the enterprise shall-*

    *(a) within seven days of the provision of the service concerned, refund to the consumer the price paid for the service;*

44. We also note that on 26th March 2021 when the 1st Respondent visited the Appellant's shop. the Appellant declined giving the 2nd Respondent a written contract with the demanded specifications. Further, that the Appellant gave the 1st Respondent an explanation to the effect that it did not issue written contracts for projects that cost less than K100,000 (See page 40 of the RoP, at paragraph 18). We have already determined that the service under review entailed the duty to exercise reasonable care and skill on the part of the Appellant as the supplier, per section 49 (5) and that this entailed that the work ought to have been based on specifications, which in this case we have found in respect of the burglar bars were agreed between the parties later after payment of the K43,000, though not reduced to a written contract.

45. This ground of appeal fails.

**Ground two**

46. The Appellant in ground two contends that the 1st Respondent erred in fact when it disagreed with the Appellant's submissions that the materials complained of (Y 14) does not exist in Zambia. The gist of the Appellant's argument is that the 1st Respondent having so agreed, since the Appellant is not a manufacturer of the deformed bars but acquires the materials in bulk from known suppliers, it is the supplier who should shoulder the blame and not the Appellant who did not know that among the stock it bought there were Y14 steel bars.

47. The Appellant contended that there was a finding that they used Y14 deformed steel bars instead of Y16 because there was no Y14 on the Zambian market and the only available sizes wereY10, Y12, Y16 and Y20. However, page 38, paragraphs 16 and page 39, paragraphs 17 and 18 of the RoP confirm that when the 1st Respondent went to visit the Appellant's shop, the

Appellant had already made a total of 21 burglar bars with some having a spacing of 11cm and 14cm between the deformed steel bars instead of 12cm as requested by the 2nd Respondent. The 1st Respondent further found out that on some burglar bars the Appellant used Y14 deformed steel bars.

48. Counsel for the Appellant also submitted that the 1st Respondent found that the Appellant had made a total of 21 burglar bars with some having a spacing of between 11cm and 14cm between the deformed steel bars instead of 12cm as specified by the 2nd Respondent, the 1st Respondent did not take down the number of the defective burglar bars out of the 21 to warrant rejection. That the Decision of the 1st Appellant constituted an injustice because if one or two only were defective there would be no justification for total rejection of all the goods, hence the investigation was incomplete. That reliance the Board's reliance on the investigation in its Decision was prejudicial to the Appellant.

49. The gist of the 1st Respondent's response was that the record shows that the 1stRespondent took into consideration all submissions that were made by the parties prior to making its decision. Counsel for the 1st Respondent also referred to what they called contradiction in the position taken by the Appellant, that while on the one hand it had maintained that there were no Y14 deformed steel bars, it also claimed that the Y14 that were found among the burglar bars it had made were in the stock it had ordered from known suppliers.

50. We note that the only dispute by the Appellant in terms of what the 1st Respondent found when it visited the Appellant's shop was that the finding that some burglar bars were spaced between 11cm and 14cm was rather erroneous and that this was because the margin of error could only be 1%. (See letter of response to the Preliminary Report, at page 48 of the RoP) We note that in its report, the 1st Respondent had stated that it had carried out measurements. We also note that the Appellant did not make any submission as to what the discrepancies were in terms of the spacing between the burglar bars, particularly those that were found faulty. Furthermore, the Appellant did not explain what it meant by "margin of error can only be 1%". Is this per the margin of error allowed according to standards in that trade? If so, which standards, and was the Appellant actually within that margin of error?

51. We also note that the Appellant in its said letter in response and in contending did not go as far as stating exactly how many burglar bars fell short of the agreed spacing (12cm) and size (Y16). We note that during the inspection carried out by the 1st Respondent, the 2nd Respondent submitted that she was willing to work with the Appellant on condition that he prepared and gave her a contract with the right specifications and materials to be used on the burglar bars and door frames.

52. We find no basis on which the 1st Respondent can be faulted in that clearly the Appellant did not adhere to the agreed specifications; and the Appellant refused the 2nd Respondent's proposition that to redress the situation, the Appellant prepares a contract outlining the

specifications. We find the Appellant's rejection of the proposed solution unreasonable in light of the experience the parties had gone through which is on the record and which we have earlier outlined. This experience was marked by errors and rejections of samples initially, which included the use of 8cm spacing contrary to the agreed specifications (which the Appellant, in its letter in response to the Preliminary Report, said was because it wanted to impress the 2nd Respondent by applying shorter spacing). The transaction later culminated in the manufacture of some items that did not adhere to the agreed specifications. The Appellant did not suggest that the defects were marginal in proportion to the whole job, but rejected the proposition simply on account that its policy was that it did not prepare a contract for jobs costing less than K100,000. In other words, the Appellant preferred to adhere to its policy instead of exercising due care and skill in carrying out the service, as the circumstances clearly demanded.

53. We agree with counsel for the Appellant that (for comprehensiveness of the record of investigation) the 1st Respondent should have recorded how many burglar bars were found short of meeting the specifications when it visited the shop. However, in light of the failures exhibited by the Appellant in the execution of the work, and the stance it took during the said visit in response to the 2nd Respondent's proposal aimed at redressing the situation, recording the number of defective items would not have been of use in view of the experienced failures on the record, coupled with the Appellant's refusal to meet what we have found to be a reasonable demand in the circumstances, by the 2nd Respondent. We note that the Appellant later, in its letter in response to the Preliminary Report, stated that it had redone the job and invited the 1st Respondent to inspect items. This was in April 2021. (See page 19 of the RoP, last paragraph) The 2nd Respondent had already decided not to proceed in the absence of a contract outlining the specifications. While the Act gives power to the 1st Respondent to determine if reasonable care and skill has been exercised in the supply of a service, it has no power to order a repeat job during investigations.

54. We conclude that in the circumstances, the Appellant's conduct fell short of the reasonable care and skill envisaged in terms of section 49(5) of the Act, first in failing to adhere to the agreed specifications and secondly in rejecting the 2nd Respondent's proposal aimed at redressing the defects, that the Appellant prepares a contract outlining the specifications.

55. We also hold the view that the proposition by counsel that the Appellant's supplier who allegedly included Y14 steel bars ought to shoulder the blame is untenable at law. In the case of **Plant Construction Plc v Clive Adams Associates and JHM Construction Services Ltd (1998) EWHC QB 335**, dated 9th March, 1998 the Court of Appeal considered the principles of duty to warn and the implied terms of skill and care in the context of dangers known to the contractor. Held that Plant was to be responsible for the damage to the works caused by its own negligence and Ford's negligence. That Plant was responsible for all the acts and omissions of its subcontractor and that any assistance provided by Ford would not release Plant from responsibility for the works. This case, which is persuasive authority, demonstrates that there

was no duty of care and skill to the 2nd Respondent on the part of the Appellant's supplier of the steel bars. The duty rested squarely on the Appellant.

56. Furthermore, once the duty of care is found to have been breached, the offender cannot escape the penalty stipulated in subsection (6) of section 49 of the Act. In addition, the 1st Respondent has no obligation to order performance of the service to address a defective service, unless this is practicable and if the consumer so chooses, per subsection (7) which reads, "In addition to the penalty stipulated in subsection (6), the person or the enterprise shall-

    *(a) within seven days of the provision of the service concerned, refund to the consumer the price paid for the service; or*
    *(b) if practicable and if the consumer so chooses, perform the service again to a reasonable standard.*

57. This ground of appeal fails too.

**Ground three**

58. In ground three the contention of the Appellant is that the Respondent erred in fact when it disregarded the Appellant's submission that the 1st Respondent only resorted to seeking a refund when her Brother fell sick and that she needed medicine for his treatment, when she was informed that the money had already being used and further advised the Commission that the work was redone at a very great cost on the part of the Appellant (pages 48 and 49 of the RoP).

59. Counsel made reference to page 59 of RoP, paragraph 30, where the 1st Respondent said, *"However, this submission was not considered as a finding and consequently in the analysis of the report as it was a mere allegation without supporting evidence*". Counsel submitted that when the allegation was raised, the 1st Respondent should have investigated it, and that a simple inquiry could have been made as to whether she had a sick brother at the material time and if confirmed, that would have put the 1st Respondent's Board in a better position to dispense justice on a balance of probability.

60. In response to this ground of appeal the 1st Respondent submitted that its decision was premised on relevant evidence**.**

61. We find that the claim by the Appellant lacks force as it was not supported by any tangible evidence. Therefore, the 1st Respondent was justified in treating it as a mere allegation. More importantly, such an allegation is irrelevant in view of our earlier determination that evidence on the record clearly shows that the Appellant did not conduct itself with reasonable care and skill when it provided the service to the 2nd Respondent. Furthermore, as we have already determined, once a violation of section 49 (5) has occurred, the choice whether the supplier should repeat a service in terms of section 49 (7) (b) belongs to the consumer and not the 1st Respondent. The 2nd Respondent had earlier offered to accept a repeat of the service but the

Appellant rejected what we determined to be a reasonable condition under the circumstances, which the Appellant turned down.

62. In consequence, this Tribunal is of the view that the Appellant did violate section 49(5) of the Act and therefore dismisses the Appellant's appeal in its entirety with costs to be borne by the Appellant.

63. Leave to appeal is granted.

**Delivered at Lusaka this 19th day of April 2022.**

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**Mrs. Eness C. Chiyenge – Chairperson**

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**Mrs. Miyoba B. Muzumbwe-Katongo – Vice Chairperson**

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**Mr. Buchisa Mwalongo - Member**