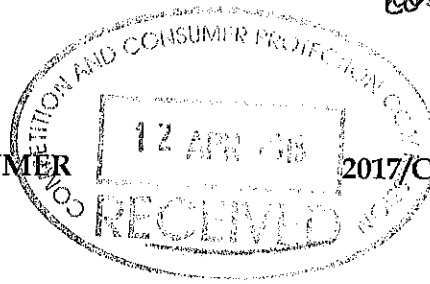


THE COMPETITION AND CONSUMER
PROTECTION TRIBUNAL
HOLDEN AT LUSAKA



2017/CCPT/004/CON

complaint

DLCA

FCA

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12/4/18

IN THE MATTER OF:

SECTION 45(a), SECTION 46(1), SECTION 46(2)
'AND SECTION 16 (1) OF THE COMPETITION
AND CONSUMER PROTECTION ACT, NO 24
OF 2010

BETWEEN:

GOtv ZAMBIA BROADCASTING LIMITED

APPELLANT

AND

COMPETITION AND CONSUMER
PROTECTION COMMISSION

1ST RESPONDENT

AND

RONALD CHUNKA

2ND RESPONDENT

CORAM:

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

For the Appellant:

Mrs. B. Chanda and Mrs. V. Chitupila-Messrs AB &
David Legal Practitioners

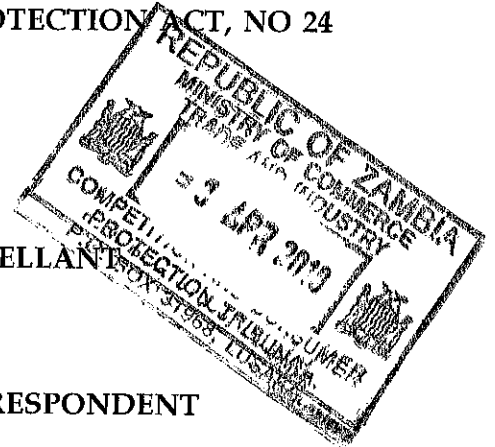
For the 1st Respondent:

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

For the 2nd Respondent:

Non-Appearance

JUDGMENT



Legislation referred to-

Competition and Consumer Protection Act, No. 24 of 2010

Anti-Terrorism Act, Act No. 21 of 2007

Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia

Penal Code, Chapter 87 of the Laws of Zambia

Prohibition of the Development, and the Production, Stockpiling and use of Chemical Weapons, Act No. 2 of 2007

Guidelines for Issuance of Fines, 2014

Consumer Rights Act, 2015, of the United Kingdom.

Cases referred to-

Airtel Networks Zambia Plc V. The Competition and Consumer Protection Commission, and Macnicious Mwimba V. Airtel Networks Zambia Plc & Competition and Consumer Protection Commission, 2014/CCPT/015/CON,

Australian Competition and Consumer Commission v. Coles Supermarkets Australia PTY Limited [2014] FCA 634,

Chitambala Ntumba v The Queen (1963-1964) Z. AND N.R.L.R. 132,

Havells India Ltd & Anr vs Amritanshu Khaitan & Others CS(OS) 107/2015,

Pep Stores Zambia Limited v. Competition and Consumer Protection Commission 2016/CCPT/013/CON

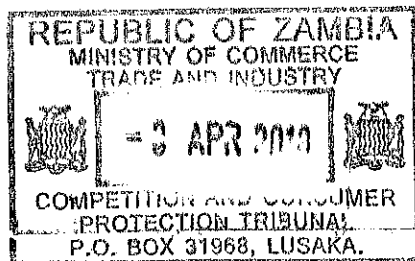
Regina v. Imperial Tobacco Products Ltd. 25 64 Can. Pat. R. 3, 2 Can. Crim. Cas.2d 533, 16 D.L.R.3d 470 (Aita, Sup. Ct. 1970),

Savenda Management Services v. Stanbic Bank Zambia Limited (Appeal No. 37/2017/ [Selected Judgment No. 10 of 2018]

Spar Zambia Limited v. Danny Kaluba and CCPC 2016/CCPT/009/CON.

Vangelatos and Metro Investments Limited and Others Selected Judgment No. 35 of 2016

Other Works



An Introduction to Digital Terrestrial Television (DTT) Broadcasting, September 2004, available at <http://www.digitaltv.gov.hk/consumer/pdf/DTT-PPT.pdf>

"*Misleading Advertising*" available at <https://www.ccpic.ie/consumers/shopping/misleading-advertising/>

O.J. Firestone, *The Economic Implications of Advertising*, (Toronto, 1967), p.1

J. J. Quinlan, Q.C., '*Combines Investigation Act - Misleading Advertising and Deceptive Practices*' in *Ottawa Law Review* pp. 277-295, at p.288 available at https://commonlaw.uottawa.ca/ottawa-law-review/sites/commonlaw.uottawa.ca/ottawa-law-review/files/21_5ottawalrev2771971-1972.pdf

Ronald I. Cohen, '*Misleading Advertising and the Combines Investigation Act*' in *McGill Law Journal*, Vol.15, available at <http://lawjournal.mcgill.ca/userfiles/other/4738017-cohen.pdf>

Robin Jeffrey, *India's Newspaper Revolution: Capitalism, Politics and the Indian-Language* Oxford University Press, New Delhi, 2000, p.55

The Law Dictionary-Featuring Black's Law Dictionary, Free Online Legal Dictionary 2nd Ed, available at <https://thelawdictionary.org/recommend/>

The Free Legal Dictionary, available at <https://legaldictionary.thefreedictionary.com/recommendation>

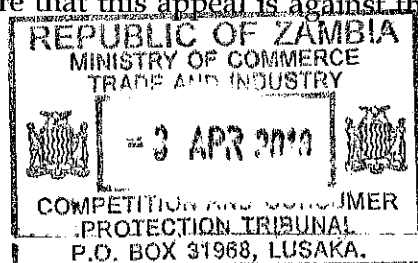
Discussion Paper-What Do We Mean by Vulnerable or Disadvantaged Consumers? Published by Consumer Affairs Victoria, 2004, Section 2,p.3

National Consumer Council (UK), *Consumer Disadvantage*, Consultation Paper (October 2000),

Pushpa Girimaji , *Misleading Advertising and Consumers*, Indian Institute of Public Administration. Delhi 2006

Brief Facts of Case

The facts of the appeal as presented in the Record of Proceedings (hereinafter the "Record") by the Competition and Consumer Protection Commission (hereinafter the "1st Respondent") are that this appeal is against the decision of the Board of the 1st



Respondent (hereinafter the "Board") which determined, among others, that GOtv Zambia Broadcasting Limited (hereinafter the "Appellant") be fined 0.05% of its annual turnover for violation of section 45(a) of the Competition and Consumer Protection Act No. 24 of 2010, and desist from misleading consumers into buying bouquets that have lesser channels than is advertised.

The brief facts of this case are that on 18th February, 2016, the 1st Respondent received a complaint against the Appellant on alleged unfair trading practices. Specifically, it was alleged that the Appellant was providing fewer channels to subscribers from other provinces such as the Copperbelt as compared to subscribers for the GOtv Extra Bouquet but charging the same ZMW85.00. The complainant alleged that in Lusaka, customers were paying ZMW85.00 for forty-seven (47) channels while customers in Kitwe were paying the same amount for thirty-five (35) channels. It was alleged that the number of channels were not always all available as at times fewer than 35 channels were received.

Consequently, the 1st Respondent carried out investigations into the matter which appeared to be a breach of section 16(1), 16 (2) (c) and 45(a) of the Competition and Consumer Protection Act No. 24 of 2010 (hereinafter the "Act").

Section 16(1) of the Act provides-

16.(1) An enterprise shall refrain from any act or conduct if through abuse or acquisition of a dominant position of market power, the act or conduct limits access to markets or otherwise unduly restrains competition, or has or is likely to have adverse effect on trade or economy in general."

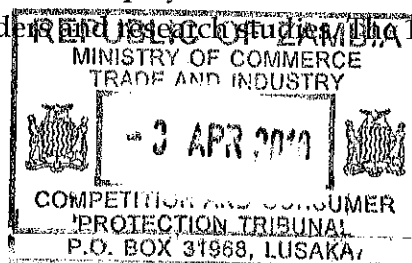
Section 16(2) (b) of the Act reads-

- (2) For purposes of this Part, "abuse of a dominant position "includes-...*
(c) applying dissimilar conditions to equivalent transactions with other trading parties;...

Section 45(a) of the Act provides-

- 45. A trading practice is unfair if-*
(a) it misleads consumers;...

Perusing through the Decision of the Board, we find that investigations were conducted by the 1st Respondent by way of inquiry through the issuance of a Notice of Investigation which was sent to the Appellant on 10th May, 2016. The 1st Respondent also interviewed relevant market players, and obtained information from industry experts, reports, stakeholders and research studies. The 1st Respondent also reviewed



a wide array of secondary data from research studies in the sector, and conducted a survey to ascertain the distribution of channels for the GOtv Extra Bouquet by issuing questionnaires to GOtv subscribers in Lusaka, Livingstone, Kabwe and Kasama in which it was found that subscribers from Livingstone and Kabwe were receiving fewer than 34 channels. (Page 37 of the Record refers)

The Board having considered the facts, evidence and submissions in the case, decided that the Appellant -

1. be fined 0.05% of its annual turnover for violation of section 45(a) of the Competition and Consumer Protection Act No. 24 of 2010, and to desist from misleading consumers into buying bouquets that have lesser channels than is advertised;
2. provides a free service for the GOTV Extra Bouquet for three months in all affected broadcasting zones for all the affected clients; and
3. charge its consumers only for channels provided for each bouquet and should indicate through its agents, advertising materials or any other media that the number of channels per bouquet may vary depending on location.

The decision of the Board dated 20th December, 2016, was communicated to the Appellant by way of a letter of even date, and received by the Appellant on 18th January, 2017. The Appellant being dissatisfied with the Board decision appealed to this Tribunal based on the following grounds:

1. that the decision of the Board is irrational and unlawful as the decision is neither founded on the facts presented to the CCPC nor its powers under the Act;
2. that the Board failed to apply its mind to the historical and regulatory challenges faced by the Appellant;
3. that there was procedural impropriety in the manner in which the Board arrived at the Decision;
4. that the Remedies imposed by the Board are arbitrary, disproportionate, vague and therefore unenforceable; and
5. that the Board, in rendering its decision, did not take into account mitigating factors.

The Appellant seeks the following relief:

1. that the Tribunal dismisses the Board's decision and substitutes it with the following:
 - (1) GOtv Zambia Ltd be warned for violation of section 46(1) of the Act and further to avoid engaging in conduct that intentionally or



unintentionally misleads consumers into buying bouquets that have fewer channels than what is advertised;

- (2) GOtv Zambia Ltd be advised not to offer bouquets that are fewer than the minimum number of channels indicated in its advertising material unless it expressly indicates in the advertising material that the number of channels vary by location.

The 1st Respondent in its Notice of Grounds in Opposition to Grounds of Appeal filed on 22nd March, 2017, submitted that they intended to oppose the whole appeal on the following grounds:

1. the decision of the Board was on firm ground, rational and lawful as the said decision was made within the mandate given under the Act and on the facts presented to the 1st Respondent;
2. the Board decision is backed by law as the Board duly directed its mind to the historical and regulatory challenges purportedly faced by the Appellant;
3. contrary to the Appellant's assertion, there was no procedural impropriety in that the Board followed procedure to the letter when arriving at the decision;
4. the remedies imposed by the Board are sound at law, proportionate, clear and well within the enforceability of the Appellant; and
5. contrary to the Appellant's assertion, the Board did take into account all mitigating factors in arriving at its decision

The 1st Respondent sought the following relief:

1. that the Tribunal upholds the decision of the Board dated 20th December, 2016;
2. the appeal be dismissed with costs as it lacks merit; and
3. any other relief that the Tribunal deems fit.

The Appellant and the 1st Respondent did not call any witnesses, but made both written and oral submissions.

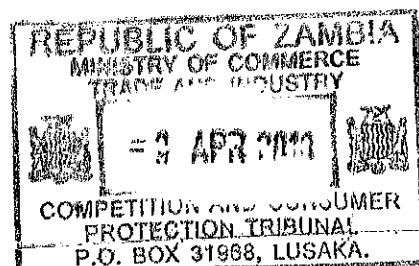
The 2nd Respondent did not make any submissions.

Appellant's Submissions

1. **Ground One (that the decision of the Board is irrational and unlawful as the decision is neither founded on the facts presented to the CCPC nor its powers under the Act)**

The Appellant made the following submissions:

- (1) that in rendering the Decision, the Board did not take into account all relevant facts, material and information before it in arriving at its decision. The Appellant submitted that the Decision of the Board did not reflect the fact that the Board took into account-



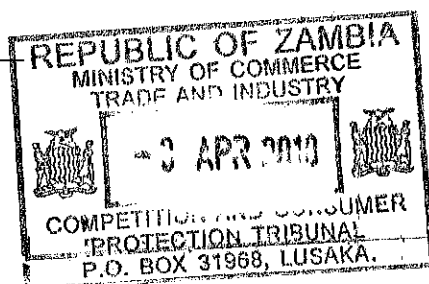
- (a) the Appellant's submissions regarding the regulatory limitations that prevented it from providing the same number of channels in all its geographic locations; and
 - (b) that consumers were not prejudiced as the price charged by the Appellant for its bouquets did not change as more channels were being added.
- (2) in its Supplementary Submissions in Support of Notice of Appeal (hereinafter the "Appellant's Supplementary Submissions"), that the remedies imposed by the Board in the Decision are *ultra vires* the powers of the 1st Respondent and its Board as set out in the Act and are, therefore, null and void and liable to be set aside. In this regard, the Appellant drew the attention of the Tribunal to section 46 of the Act which sets out the penalties that may be imposed on a party who is found to have engaged in unfair trading as set out in section 45, and in particular to section 46(2) which prescribes a penalty of a fine.

The Appellant averred that whereas the Board has the power to impose a fine, the Board does not have the authority or power to impose the remedies set out in paragraphs (ii) and (iii) of the Decision of the Board, which paragraphs provide, in part, as follows:

- (ii) *...the Appellant provides a free service for the GOto Extra Bouquet for three (3) months in all affected broadcasting zones for all its affected clients; and*
- (iii) *... the Appellant ... charge its consumers only for channels provided for each bouquet and should indicate through its agents, advertising materials or any other media that the number of channels per bouquet may vary depending upon location.*

The Appellant further averred that neither section 46(2) nor the Act set out any residual power of the 1st Respondent to impose a penalty or remedy other than the penalty specified. The Appellant drew a contrast between section 46(2) and sections 49(3), 49(4), 50(4), 52(3) and 52(4) which empower the CCPC or its Board to impose other remedial measures for the conduct proscribed in those sections. The Appellant submitted that the Board, being a creature of Statute, does not enjoy any powers other than those conferred upon it or the CCPC in the enabling legislation. In this regard, the Appellant cited the Supreme Court case of Zambia Revenue Authority vs. Armcor Security Limited¹, in which case it was held, *inter alia*-

¹ Appeal 72 of 2014



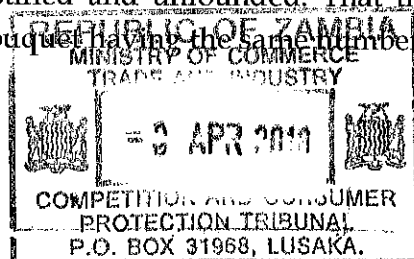
It is therefore our view that in the absence of an express provision under the Revenue Appeals Tribunal Act and Regulations that specifically vests the Revenue Appeals Tribunal with the power to grant a stay of execution pending appeal, the Revenue Appeals Tribunal cannot assume such jurisdiction and grant a stay pending appeal as such power is not provided for under the enabling legislation...

- (3) that the imposition of a fine is not mandatory in the wording under section 46(2) of the Act, and averred, in this regard, that the use of the word "liable" does not connote an absolute liability. The Appellant cited Black's Law Dictionary of Law which defines the word "liable" to include the following: "*subject to or likely to incur (a fine, penalty, etc.)*", and averred that the ordinary language of section 46(2) does not make it obligatory to impose a penalty in all instances, but only when appropriate. The Appellant submitted that this was particularly important bearing in mind that it is possible for a firm to be found to have contravened the Act albeit in circumstances of *bona fide* error or as a result of circumstances beyond its control, and that to conclude that the imposition of a penalty is mandatory even in such circumstances would defeat the purposes of the Act which is to deter and punish wilful contraventions of the Act. The Appellant further submitted that the words "*is liable to pay the Commission a fine*" grant the power to impose a penalty without dictating that one must be imposed, and that the CCPC, therefore, has discretion whether or not to impose a penalty, having duly considered the circumstances of each case before it. The Appellant noted that the CCPC has, in the past, issued warnings to first offenders as opposed to imposing a fine. Accordingly, a warning should have been issued by the Board.

2. **Ground Two (The Board failed to apply its mind to the historical and regulatory challenges faced by the Appellant)**

The Appellant submitted that-

- (1) the Board, in rendering its decision, did not engage with the submissions made by the Appellant and the 1st Respondent in its investigations, regarding the regulatory limitations that impacted on the Appellant's ability to provide all consumers with the same number of channels throughout Zambia;
- (2) the requested additional frequency was provided by ZICTA at varying times covering varying locations;
- (3) the Board did not consider or address itself to the history of the product and the evolution of the availability of frequencies rendering the Board's position unjustified and unfounded. That the Appellant launched its GOtv Extra Bouquet having the same number of channels and charging



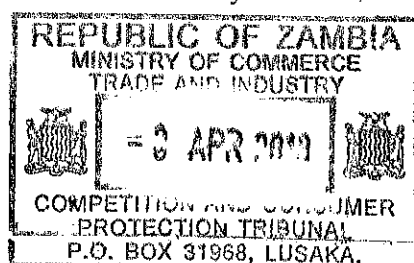
the same price (ZMW60.00) in all the locations where it was launched. The GOtv service started on a single frequency comprising 20 channels, and was launched on a staggered basis between 2011 and 2013. The towns covered were Chingola, Kafue, Kitwe, Lusaka, Livingstone and Ndola (the initial towns), followed by Chipata, Choma, Kabwe, Kasama and Solwezi in 2015 when two frequencies were awarded to these towns. With respect to the initial towns, a second frequency was awarded in Lusaka and Kafue in December, 2015, and in June 2016 for Chingola, Kitwe and Ndola. The Appellant submitted that the variance in the number of channels offered had thus been resolved with the addition of the second frequency in the initial towns;

- (4) the Appellant's pricing approach has always been to ensure that pricing is predictable by consumers. That any price increases it has effected have been on occasion of factors such as inflation and exchange rate depreciations, and that it has held the prices at the same level since February, 2016;
- (5) in areas where ZICTA had not availed an additional frequency, the Appellant maintained the same price that it had always charged save for annual increases or those necessitated by factors outside the Appellant's control such as exchange rate depreciations; consumers were not made any worse off than they were prior to the discrepancy in frequencies and consequent channel discrepancies; and that the investigation started as a result of a complaint relating to the difference in channels between GOtv Extra before it became GOtv Plus when the second frequency was awarded (a difference of 10 channels). The Appellant submitted that on account of the foregoing, the subscriber was not prejudiced, and the Appellant did not benefit financially; and
- (6) the Appellant's business model is based on the offering of a bouquet of channels as a service with a price for that service and not for individual channels;

3. **Ground Three (There was procedural impropriety in the manner in which the Board arrived at the Decision)**

The Appellant submitted that-

- (1) the Board in rendering the decision did not follow procedure as required by law, equity and the rules of natural justice;
- (2) the decision of the Board does not reflect what information was presented to the Board by the investigations team which led it to arrive at the decision it ultimately reached;

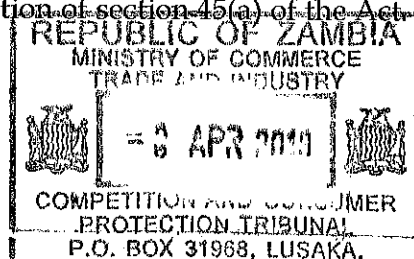


- (3) the Board's findings are materially different from the recommendations made by the 1st Respondent's investigations team in its Preliminary Report to which the Appellant was given an opportunity to respond;
- (4) the Board's decision provides no justification for deviating materially from the recommendations in the Preliminary Report, nor the relevant considerations which, in its view merited the harsher sanctions it imposed;
- (5) the Board having determined that it wished to deviate from the recommendations set out in the Preliminary Report should have afforded the Appellant an opportunity to be heard and to make representations regarding any finding of fact and any proposed remedies and penalties as contemplated by the Board;
- (6) aspects of the investigation included technical information which required the Appellant to be present before the Board in order for the Appellant to give a proper explanation as the Preliminary Report was being considered;
- (7) the Board's failure to afford the Appellant the right to be heard violates core principles of natural justice and has prejudiced the Appellant, and the breach of the Appellant's right to be heard on matters which materially affect its reputation, business and operating model renders the decision unlawful and liable to be set aside; and
- (8) had the Appellant been aware of what the Board had contemplated, it would, in its response to the Preliminary Report, have addressed the Board regarding the inappropriateness of the contemplated remedies, penalties on the facts, law and economics.

4. **Ground Four (The remedies imposed by the Board are arbitrary, disproportionate, vague and therefore, unenforceable)**

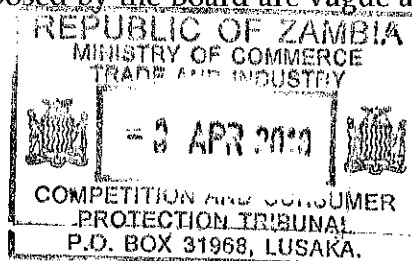
The Appellant submitted that-

- (1) paragraph 26 of the Decision of the Board, can be summarised as follows:
 - (a) the Appellant does not have market power to abuse its dominant position;
 - (b) the Appellant misled the consumers by advertising a product as having 34 channels and costing ZMW 90.00 while in fact fully aware that in some areas, the product was not as advertised; and
 - (c) the Appellant benefited financially from this conduct at the expense of unsuspecting customers;
- (2) from the Decision, the impugning conduct is misleading advertising in contravention of section 45(a) of the Act. However, the Decision neither



provides information or facts relied on other than those set out in paragraphs (i) to (iii) nor does it set out the Board's reasoning as to how the remedies being sought are linked to the conduct found to be in contravention of the Act; that the Decision does not articulate why remedies are warranted in this case, or how the remedies address the conduct or any presumed harm ensuing from the conduct. This renders the Board's decision arbitrary and disproportionate;

- (3) because the Board did not find an adverse finding with respect to unfair pricing, by parity of reasoning and by operation of the law, the Board cannot impose any remedy that seeks to address conduct that has not been found to be in contravention of the Act. In the absence of any substantiated reasoning, the Appellant is not in a position to determine the basis of the remedy that *"the Appellant charges consumers only for channels provided for each bouquet and should indicate that the number of channels per bouquet may vary depending on location"*;
- (4) the Appellant's pricing to all subscribers to GOtv Extra and subsequently GOtv Plus Bouquet remained the same in spite of the fact that it had added channels in some locations;
- (5) the Appellant's pricing model is to offer bouquets comprising a number of channels at a particular price;
- (6) as regards the misleading advertising allegations, findings and remedies, to the extent that the Board's remedy in paragraph 27(iii) of the Decision (namely that the Appellant *charges consumers only for channels provided for each bouquet and should indicate that the number of channels per bouquet may vary depending on location*) was premised on the implicit assumption that consumers were misled and charged for channels that were not provided, the Board did not provide any analysis or justification in its Decision to substantiate its Decision;
- (7) the Board's Decision does not reflect due regard being had to the regulatory challenges faced by the Appellant, that this conduct does not justify the cumulative imposition of the penalty and the remedies are therefore disproportionate to the *bona fide* mistake made by the Appellant;
- (8) the Board erred in its finding that the Appellant engaged in this conduct to benefit financially at the expense of unsuspecting customers. Implicit in this finding is that the Board concluded that the Appellant willfully misled consumers with the intention of benefitting financially, and that this conclusion is not supported by any facts presented to the Board by the investigation team or the reasoning in the Board's Decision; that the remedies imposed by the Board are vague as it is not clear whether the



remedy set out in paragraph 27(iii) relates to unfair pricing or misleading advertising;

- (9) the fines are excessive and disproportionate and that the Commission should have considered the gravity of the offence. The Appellant also cited paragraph 10(i) of the 1st Respondent's Guidelines for Issuance of Fines, 2016, which provides as follows:

When the Commission makes an order imposing a penalty on an enterprise, such order shall be in writing, shall specify the offence, the factors the Commission took into consideration in arriving at the amount to be paid" ...,

- (10) the Board did not state what considerations it made in arriving at its decision; and
- (11) the non-imposition of a fine was appropriate it being in keeping with the practice of the 1st Respondent with respect to first offenders.

5. **Ground Five (The Board did not take into account mitigating factors)**

The Appellant submitted that the Appellant was a first offender and was willing to accept lesser enforcement options. The Appellant also averred that a warning, as a consequence, would have sufficed. The Appellant again made submissions with respect to regulatory and policy constraints which affected its ability to air all the channels in some areas and cited paragraph 10 of the Guidelines, 2016, that are not in effect.

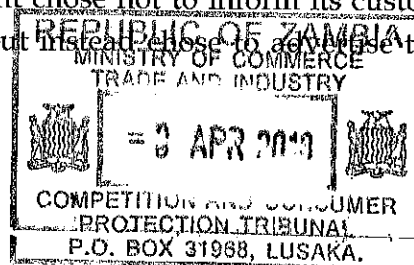
1st Respondent's Submissions

The 1st Respondent in its submissions filed on 26th May, 2017, submitted as set out below.

1. **Ground One**

The 1st Respondent submitted that-

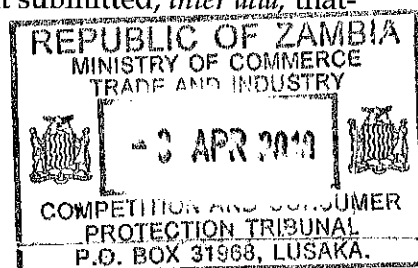
- (1) the Board did take into consideration all the relevant facts, material and information before it arrived at its decision, and that the Decision and the Report contained all the information which was submitted to the Board, and the same was adjudicated upon. The 1st Respondent, in this regard, referred to paragraphs 10 to 13 set out on page 133 of the Record, and paragraph 27 of the Decision set out at page 136 of the Record. The 1st Respondent submitted that taking into account the Appellant's submissions did not connote consensus between the Appellant and the 1st Respondent;
- (2) customers in affected areas were prejudiced as they were made to pay ZMW3.50 per channel and not ZMW2.65 per channel;
- (3) the Appellant chose not to inform its customers about this differential treatment, but instead chose to advertise the provision of 34 channels



- knowing fully well that this was not feasible, which amounted to misleading conduct contrary to the provisions of the Act;
- (4) as per sections 5(d) and 5(f) of the Act, the Board was empowered to investigate unfair trading practices and unfair contract terms and impose such sanctions as may be necessary, and to act as a primary advocate for competition and effective consumer protection in Zambia. The 1st Respondent further submitted that it investigated allegations of unfair trading practices under section 46(1) and (2) as read together with section 45(a) of the Act, and that the Board adjudicated on the matter and found that the Appellant had engaged in an unfair trading practice, and that in addition to the fine set out under section 46(2) of the Act, the Board found it necessary to impose further sanctions in line with sections 5(d) and (f) of the Act;
 - (5) the directive that the Appellant provide a free service for three months was necessary in that it was meant to remedy the affected customers for the period the Appellant charged them more for less channels, and the Appellant benefited more from the affected consumers who paid ZMW90.00 for less than 34 channels contrary to the advert placed by the Appellant. The directive was also necessary to deter the Appellant from similar future conduct;
 - (6) section 5(d) clothes the 1st Respondent with authority to exercise the powers so exercised, and propagating otherwise would be tantamount to eroding the 1st Respondent's ability to effectively carry out its mandate as by law prescribed. In this regard, the 1st Respondent cited the case of Zambia Revenue Authority v. Armcor Security Limited, Appeal No. 72 of 2014. The 1st Respondent also cited Mica Zambia Limited v. Competition and Consumer Protection Commission 2014/CCPT/010/CON, whereunder the wider powers that the Board has in enforcing the law were recognised by this Tribunal, and the Tribunal upheld the decision of the Board requiring the Appellant to, *inter alia*, revise the disclaimer to avoid contravening the Act;
 - (7) a strict and literal reading of section 46(2) of the Act does not in any way suggest that the imposition of a fine is not mandatory and that this section is not a standalone section but augments section 46(1) so as to give it logical conclusion; that section 46(1) is an absolute proscription of unfair trading; and that there is no defence that can absolve the Appellant from liability in the event of an abrogation;

2. Ground Two

The 1st Respondent submitted, *inter alia*, that-



- (1) the Board duly directed its mind to the historical and regulatory challenges purportedly faced by the Appellant, and the same are reflected in the Staff Paper on page 100, paragraphs 18 to 21 of the Record of Proceedings and the Board Decision at page 133 of the Record;
- (2) the Appellant, despite being aware of the challenges it was facing, proceeded to charge consumers ZMW85.00 per month and misled consumers by the masses by advertising that it was availing all the 34 channels to subscribers without giving any qualification as relates to location restrictions;
- (3) the Appellant ought, as such, to have either priced its bouquet differently from those accessing all 34 channels or should have run their advertisements based on the most minimal allocation they could avail consumers so that consumers make informed decisions; and
- (4) the Appellant's failure to take steps to advise its clientele the challenges of obtaining a second frequency formed the basis of the Board's finding of a violation, by the Appellant, of section 46(1) and 45(a) of the Act regardless of historical and regulatory challenges.

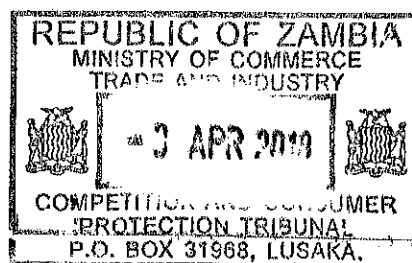
3. **Ground Three**

The 1st Respondent submitted that-

- (1) there was no procedural impropriety in that the Board followed the law to the letter when arriving at the decision. The 1st Respondent cited, in this regard, section 55(1) of the Act and stated that a Notice of Investigations was sent to the Appellant, and that the Appellant submitted documents pursuant to the said Notice of Investigations. The 1st Respondent also cited section 55(10) of the Act and submitted that a Preliminary report was made available to the Appellant, pursuant to which the Appellant made submissions which are reflected at pages 58 to 60 of the Record. The foregoing actions by the 1st Respondent amounted to it being accorded the opportunity to be heard;
- (2) the Appellant did not request audience before the Board even if Part IV, paragraph 11 of the Administrative and Procedural Guidelines permits the making of such a request; and
- (3) the recommendations made by the 1st Respondent's management to the Board, following investigation, are merely suggestions as to how the matter should be handled, which leaves the Board the power to substitute the recommendations in the manner that they consider fit as the adjudicative wing.

4. **Ground Four**

The 1st Respondent submitted that-



- (1) the remedies imposed by the Board of Commissioners are sound at law, proportionate, clear and well within the enforceability of the Appellant. In this regard, the 1st Respondent drew the attention of this Tribunal to the Appellant's own submission in a letter dated 10th November, 2017, set out at pages 58 to 60 of the Record, and in particular paragraph 5, wherein the Appellant admitted its failure to set out in its advertisements and marketing messages that the number of channels on its GOtv Plus Bouquet varied depending on area due to regulatory limitations on available frequencies which impact on the number of channels available. The Appellant also submitted that the Guidelines relied upon by the Appellant were not yet in effect.

5. **Ground Five**

The 1st Respondent submitted that the Board did take into account mitigating factors.

Appellant's Submissions in Reply

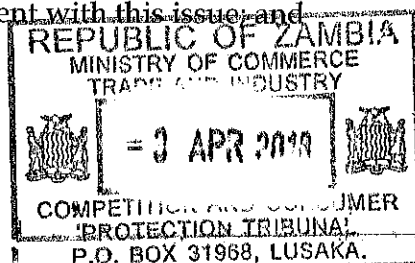
The Appellant filed its Submissions in Reply on 2nd June, 2017, and to some extent, reiterated most of its submissions in support of the Appeal. The Appellant submitted, *inter alia*, that-

1. **Ground One**

- (1) In arriving at its decision, the Board should have outlined its reasoning and review of the evidence, and in this regard, cited the case of Esan v Attorney General (Selected Judgment No. 47 of 2016), in which the Supreme Court dealt with the requirement by an administrative body to give reasons or reasoning for arriving at a decision. The Appellant further cited the case of the Minister of Home Affairs, The Attorney General v. Lee Habasonda (Suing in his own behalf and on behalf of the Southern African Centre for the Constructive Resolution of Disputes (SCZ Judgment Number 23 of 2007)) in which the Supreme Court stated-

Every judgment must reveal a review of the evidence, where applicable a summary of the arguments and submissions, if made, findings of fact, the reasoning of the court on the facts and the application of the law and authorities, if any, to the facts;

- (2) the same number of channels were emitted across the country, and the inability of consumers to receive all 34 channels was not a design of the Appellant but was a consequence of the regulatory constraints and signal distribution, both of which the Appellant has no control over;
- (3) the preliminary report by the 1st Respondent, the staff paper and the final board decision all do not show any evidence concerning the alleged financial benefit or gain derived by the Appellant, let alone any engagement with this issue; and



- (4) the exercise of power by an administrative body beyond the provisions of the enabling statute is illegal and therefore null and void, and in this regard restated the case of Zambia Revenue Authority vs. Armcor Security Limited (*Supra*);

2. **Ground Three**

The right to be heard, in terms of the rules of natural justice and the precedent set by the courts entails the right to know the alleged contraventions, the facts on which such allegations are based and the right to be heard in respect of any sanction that may be imposed in the event of a finding. This right to be heard can only be exercised before the adjudicative body, the Board;

3. **Ground Four**

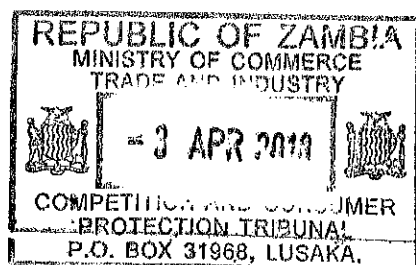
The 1st Respondent's submission that it can impose any remedy (including civil damages and imprisonment) it deems necessary by virtue of the provisions of section 5 of the Act, whether or not the Act confers on it the power to do so is not tenable and is contrary to the basic principles of statutory interpretation and the precedent emanating from the highest courts in the Republic of Zambia regarding the exercise of their power by statutory entities.

4. **Ground Five**

- (1) The Appellant submitted that the case of Spar Zambia Limited v. Danny Kaluba and the CCPC 2016/CCPT/009/CON (hereinafter "the Spar Case") in which this Tribunal held, *inter alia*, that the Board had no power to issue a warning could not be relied on retrospectively by the 1st Respondent as a premise for the penalties imposed against the Appellant, and that this is a trite principle of law.
- (2) the Secretariat and the Board did not use any case law references to assist them in dissecting the elements that go into proving a case of 'misleading consumers'.

1st Respondent's Submissions on the Calculation of Fines

The Tribunal, for its benefit, summoned the Commission to address the Tribunal on the manner in which fines are calculated. The Parties to this Appeal were invited to the hearing. On the 10th day of October, 2017, Kondwani Kaonga, Senior Investigator, Measures and Monopolies, an officer of the Commission appeared before the Tribunal and explained, to the Tribunal, the calculation of fines based on its Guidelines for Issuance of Fines, 2014 (hereinafter the Guidelines, 2014).



While the Appellant made submissions regarding the correctness of the formula, the same will not be addressed by the Tribunal as the correctness of the formula was not a ground of appeal advanced by the Appellant.

Consideration of Case by Tribunal

The Tribunal thanks the Appellant and the 1st Respondent for the submissions they made *in casu*. The Tribunal has considered the said submissions, the Record, and legislation and jurisprudence governing consumer rights and protection. The Grounds of Appeal are addressed, in turn, below.

1. Ground One (that the decision of the Board is irrational and unlawful as the decision is neither founded on the facts presented to the CCPC nor its powers under the Act)

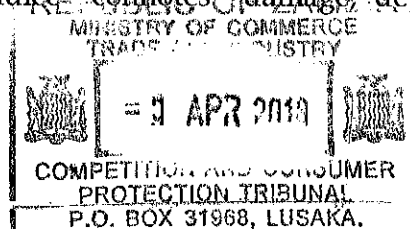
The Tribunal has considered the submissions made by the Parties and-

- (1) with respect to the submission that the 1st Respondent did not take into account the Appellant's submissions regarding the regulatory limitations that prevented it from providing the same number of channels in all its geographic locations-the Tribunal finds that on the face of it, this submission seems to find veracity in the fact that the Decision does not make specific reference to the Board having considered the same submission prior to arriving at its Decision.

Nonetheless, the Tribunal has considered the Record before it and notes that the said regulatory and historical challenges are set out at pages 100 and 133 thereof. As the Appellant's submissions form part of the Record of Proceedings before the Board of the 1st Respondent, the Tribunal duly concludes that the Board paid due consideration to the same prior to arriving at its decision. The Tribunal finds, therefore, that the submission by the Appellant is not tenable;

- (2) with respect to the submission that consumers were not prejudiced as the price charged by the Appellant for its bouquets did not change as more channels were being added-the Tribunal notes the submission by the Appellant dispelling any prejudice on the part of consumers as such consumers were not subjected to price changes as more channels were being added.

The Tribunal considered the meaning of the word "prejudice", and notes that "prejudice" connotes "damage, detriment, disadvantage,



harm, hurt, impairment, injustice, irreversible damage, loss, unfairness, wrong ". It also means "harm or injury that results or may result from some action". In the context set out in the submissions of the Appellant, the words "were not prejudiced" entail, by way of example, "did not suffer damage, detriment, harm, hurt, impairment, injustice, irreversible damage, loss, unfairness, wrong".²

The long and short of the Appellant's submission, therefore, is that consumers who had subscribed to GOtv Extra Bouquet in the hope of enjoying the full content thereof as advertised, but lived in areas where regulatory challenges made it impossible to enjoy the said content were not disadvantaged or did not suffer detriment or injury, because these regulatory challenges were subsequently resolved, and more channels added at no cost to the consumer. In other words, consumers who were unable to view the full content of the GOtv Extra Bouquet, despite having paid the full subscription for the Bouquet, did not suffer any detriment or injury, because the Appellant was subsequently able to air the full content, and additional channels were added at no cost to consumers.

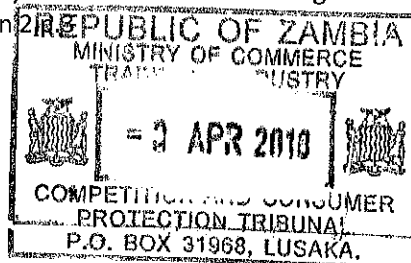
For the purpose of understanding the full import of the Appellant's submission, the Tribunal selected the words 'detriment' and 'injury' in the consumer context, and applied their respective connotations to the Appellant's submission.

The Tribunal considered the meaning of 'detriment' when used with respect to a consumer. The Tribunal notes that our Act does not define what constitutes 'detriment' to a consumer. The Tribunal considered literature from other Commonwealth States and notes that in Australia, 'Consumer detriment' is defined to include, "in addition to physical harm or monetary loss associated with a purchase, satisfaction less than a consumer's reasonable ex ante expectation and the denial of a transaction sought by a consumer"³ [Emphasis ours]

In the United Kingdom (the UK"), the UK National Consumer Council defines 'consumer detriment' to be "*any ... loss suffered by a consumer*

² *Legal Dictionary*, available at <https://legal-dictionary.thefreedictionary.com/prejudice> visited on 21/02/2018 at 02:20 hours.

³ Discussion Paper-What Do We Mean by Vulnerable or Disadvantaged Consumers? Published by Consumer Affairs Victoria, 2004, Section 2.



during, or as a result of, a transaction, or arising from a denial or absence of a transaction”⁴ Consumer detriment is also identified as “the utility loss to consumers from making misinformed or uninformed choices.”⁵ [Emphasis ours]

The Tribunal also considered ‘injury’ in the consumer context, and notes that our Act does not define injury. That notwithstanding, injury to a consumer could take many and varied forms, including loss of money from a purchase when the product proves to be objectively unsatisfactory (e.g. a purchased good does not work) and a refund is not readily obtainable.⁶

The Appellant’s submission, redrafted in line with the foregoing, definitions would take the form of any one or more of the following variations:

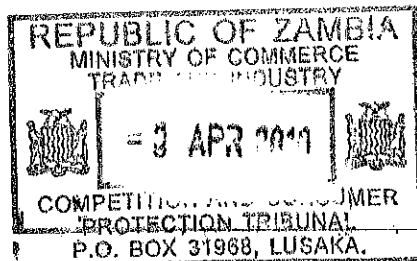
- (1) notwithstanding that the GOtv Extra Bouquet offered fewer channels than advertised by the Appellant, consumers did not suffer monetary loss associated with the purchase of the Bouquet, because GOtv subsequently provided extra channels at no cost to consumers;
- (2) consumers who subscribed to the GOtv Extra Bouquet in areas where the Bouquet offered fewer channels did not experience satisfaction less than the consumers reasonable ex ante expectation because GOtv subsequently provided extra channels at no cost to consumers;
- (3) consumers were not deprived of the full enjoyment of the GOtv Extra Bouquet, notwithstanding that the said Bouquet offered fewer channels than advertised because GOtv subsequently provided extra channels at no cost to consumers; or
- (4) consumers did not suffer any loss of money for the purchase of a GOtv Extra Bouquet with fewer viewable channels than advertised, because GOtv subsequently provided extra channels at no cost to consumers.

That being said, the questions to be determined by the Tribunal are questions of fact which can be summarised as follows:

⁴ National Consumer Council (UK), Consumer Disadvantage, Consultation Paper (October 2000), p. 4.

⁵ Discussion Paper, Op. Cit, p.11

⁶ Ibid, p. 10



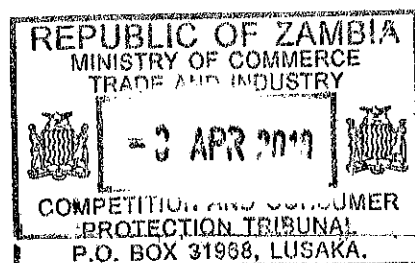
- (1) is it true that consumers were not deprived of the full enjoyment of the GOtv Extra Bouquet, notwithstanding that the said Bouquet offered fewer channels than advertised because GOtv subsequently provided extra channels at no cost to consumers? and
- (2) is it true that consumers did not suffer any loss of money for the purchase of a GOtv Extra Bouquet with fewer viewable channels than advertised, because GOtv subsequently provided extra channels at no cost to consumers?

In order to respond to the foregoing questions, it is necessary, in our view, to apply the objective test of reasonable expectation of enjoyment of the channels specifically advertised and purchased. It is also necessary to determine the issue of value for money spent on the channels that were purchased.

A perusal of the Record shows that there was a complaint from a viewer named Peter Kalifungwa from the Copperbelt Province regarding the disparity in content between GOtv Extra Bouquet in Lusaka and on the Copperbelt, with Lusaka having as many as 47 channels, and the same Bouquet on the Copperbelt having fewer channels, but subject to the same subscription fee (Pages 1 and 131 of the Record refer).

A perusal of the Record also shows a complaint received from Ronald Chunka, the 2nd Respondent herein, who complained, in writing, to a GOtv Agent in Kabwe that he had bought the GOtv Plus Bouquet at ZMW 90.00, but later on discovered that it had fewer channels than advertised, and that had he been informed about the reduced content of the Bouquet, he would have made an informed decision. (Pages 28 to 31 of the Record apply). Mr. Chunka implored GOtv to add all the channels advertised in GOtv's Brochure as attracting a subscription fee of ZMW90.00.

From the foregoing, it is evident that the two consumers, at the time they lodged their respective complaints, expected to be able to view the total number of channels advertised by the Appellant as comprising GOtv Extra, and GOtv Plus, Bouquets, to which Bouquets they had respectively subscribed. However, the said Bouquets fell short of their description. Consequently, the Tribunal finds, as a fact, the two consumers were deprived of the full enjoyment of the GOtv Extra Bouquet, or GOtv Plus, Bouquet as the areas in which the two consumers



lived could not receive the total number of channels emitted by the Appellant.

It is also evident that the two consumers expected the content of the Bouquets for which they had paid subscription to match the subscription they had paid-for example 47 channels for ZMW 85.00 This expectation is evident from the following excerpts from the two consumers:

"The Complainant alleged that Multichoice was charging K85 for 47 channels on GoTV in Lusaka but in Kitwe the Respondent was charging the same amount but offering less channels..."

(Page 1 of the Record refers); and

"...I selected a bouquet for over 34 channels a month which costs K90.00 per month. When I got home and tuned in the new channels, I discovered that some channels which are displayed in the GOtv Brochure are not there...what I want is for GOtv to quickly add up all the channels as shown on their marketing brochure for K90. 00 per month."

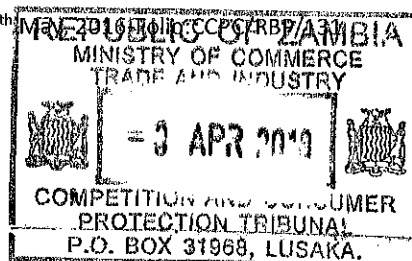
(Page 29 of the Record refers)

The Tribunal also notes paragraph 22 on page 67 of the Record, which falls under the heading '**Submissions by GOtv Zambia Limited to the Allegations**'⁷. The said paragraph provides-

The parties submitted that they have not increased the price of the premium bouquet in the cities that have access to more channels even if they felt that a price increase in such areas would have been justifiable.

The Tribunal finds that the foregoing submission by the Appellant constitutes an inadvertent admission, by the Appellant, that the increase in channels constituted sufficient justification for the increase in the price, payable by consumers, for subscription. That is to say, the Appellant has inadvertently admitted that while it could have increased the price of subscription payable by consumers for additional channels, it elected not to. The Tribunal finds that on account of this admission, albeit inadvertent, the Appellant owed a corollary duty to reduce the subscription payable by consumers for the GOtv Extra Bouquet in areas where only part of the Pay TV content advertised by the Appellant as constituting GOtv Extra Bouquet was capable of being viewed. The Tribunal further finds that the failure by the Appellant to effect such price reduction prejudiced consumers as they were made to pay for a

⁷ Letter received from GOtv on 17th



service that was not capable of being offered by the Appellant, albeit being advertised by the Appellant. The Tribunal also finds that the bargain by consumers is not in the additional channels which were subsequently, and subjectively and unilaterally provided by the Appellant. Rather, what was at stake was to be found in the specific transactions with consumers.

On the basis of the foregoing, the Tribunal finds it erroneous for the Appellant to submit that consumers were not prejudiced as the price charged by the Appellant for its bouquets did not change as more channels were being added.

- (3) with respect to the submission that the imposition of a fine is not mandatory in the wording under section 46(2) of the Act, and the submission, in this regard, that the use of the word “liable” does not connote an absolute liability- the Tribunal disagrees with the Appellant for the following reason: in our jurisdiction, and legislative drafting style, the legislative draftsman employs the words “liable to”, in the context of a penalty, to mean “shall be liable to” or “is subject to”, i.e. where the words “is liable to” or “shall be liable to” (in the context of a penalty) are used, there must be some punishment meted out. This is evident from the crafting of penal sanctions under legislation such as the Penal Code⁸, the Anti-Terrorism Act⁹, and the Prohibition of the Development, and the Production, Stockpiling and use of Chemical Weapons¹⁰.

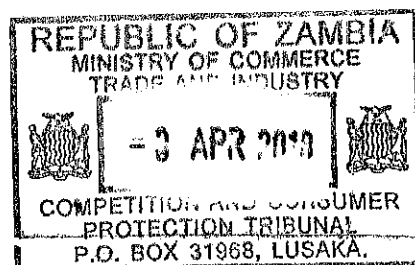
The Tribunal takes judicial notice of the use, in our jurisdiction, of the words “may be liable” where a penal provision is intended to be permissive, and in this regard, refers to, among others, sections 138(1), 138(3), 139, 140, 141, 142, 144(1), 150, and 155 of the Penal Code, and sections 8(2), 10(2), 13(2) and 14(2) of the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons. The Tribunal further notes that despite the permissiveness of these sections, a minimum term of imprisonment must be imposed.

The Tribunal also considered section 43 of the Interpretation and General Provisions Act which provides-

⁸ Chapter 87 of the Laws of Zambia

⁹ No. 21 of 2007

¹⁰ No. 2 of 2007



43. (1) *Where in any written law a penalty is prescribed for an offence against that written law, such provision shall mean that the offence shall be punishable by a penalty not exceeding the penalty prescribed.*

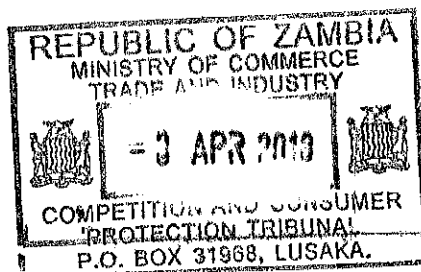
It is the considered view of this Tribunal that the provision is self-explanatory, leaving no room for any mystery as regards its intention—there must be a minimum penalty. To suggest, therefore, that the word “liable” is permissive and not peremptory is absurd, as it would entail the permissiveness of all penal sanctions contained in our Statute Book. One can only imagine the debauchery, wantonness and anarchy that would characterise our nation if this Tribunal or even the courts of law were to sustain such an argument and its consequent permissiveness—leaving criminals to satisfy their hankerings in the hope of escaping the long arm of the law with a mere warning.

On account of the foregoing, the Tribunal finds that the Board does not have the authority to issue a warning, but must impose a fine, and in this regard cites its case *Pep Stores Zambia Limited v. Competition and Consumer Protection Commission 2016/CCPT/013/CON*, in which we referred to the case of *Vangelatos and Metro Investments Limited and Others*¹¹, where the Court held that:

... Where a Court takes it upon itself to exercise a jurisdiction which it does not possess its decision amounts to nothing. Jurisdiction must be acquired before judgment is given. It can be discerned from the foregoing position of the Law, that the absence of jurisdiction nullifies whatever decision follows from such proceedings. This is the position because, the power of this Court (like that of any other Court created by the Constitution of Zambia Act) is vested in it by the People of Zambia to be exercised justly in accordance with the Constitution and any other Laws. The exercise of such power, in the absence of jurisdiction, amounts to an abrogation of the confidence reposed in the Courts by the People and a contravention of the Constitution and other laws...”

The Tribunal also restates its position as set out in the Spar Case whereunder we held that the Board does not have the power to issue a warning to an offender in lieu of a fine as the Act does not clothe the Board with such authority. The Tribunal notes, having perused the Guidelines, 2014, that they do not confer upon the Board the power to issue warnings in lieu of a fine, and that even if they did confer such power, the same would be inconsistent with the enabling legislation, i.e. the Act, and, therefore, would be void.

¹¹ Selected Judgment No. 35 of 2016



The Tribunal therefore finds that the Board acted well within its legal authority when it imposed a fine on the Appellant as opposed to issuing a warning.

On account of the foregoing, **Ground One of the appeal must fail, and is, therefore, dismissed.**

2. **Ground Two (The Board failed to apply its mind to the historical and regulatory challenges faced by the Appellant)-**

The Tribunal has considered the submissions of the Parties regarding the historical and regulatory challenges faced by the Appellant, and the failure, or otherwise, of the 1st Respondent, in its investigations, to take the said challenges into account. The Tribunal has also considered the Record, and agrees with the submissions of the 1st Respondent that the Board duly directed its mind to the historical and regulatory challenges purportedly faced by the Appellant, and the same are reflected in the Staff Paper on page 100, paragraphs 18 to 21 of the Record and the Board Decision at page 133 of the Record.

The Tribunal will not overburden itself by delving into its reasoning in this regard as the same is set out in the Tribunal's consideration of Ground One.

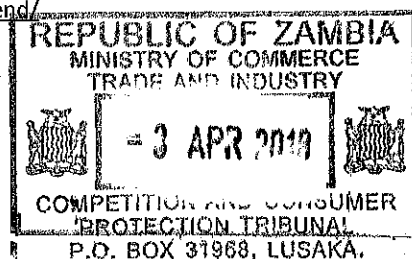
On account of the foregoing, **Ground Two of the appeal must fail, and is, therefore, dismissed.**

3. **Ground Three (There was procedural impropriety in the manner in which the Board arrived at the Decision)-**

(1) with respect to the submission by the Appellant that the recommendation of the technical committee was different from the Board Directive- the Tribunal considered the meaning of "to recommend" or "recommendation".

"To recommend" is defined as to advise, to suggest, to counsel or to speak in favour of.¹² Recommendation means "admonition, advice, advocacy, approbation, approval, boost, certificate, commendation, counsel, credential, encouragement, endorsement, esteem, good opinion, guidance, injunction, instruction, judgment, laudation, motion,

¹²The Law Dictionary-Featuring Black's Law Dictionary, Free Online Legal Dictionary 2nd Ed, available at <https://thelawdictionary.org/recommend/> visited on 21/02/2018 at 11:05 hours



opinion, praise, prescription, proposal, proposition, reference, suggestion, support, testimonial, tip, tribute”¹³

Recommendations are not binding in nature.

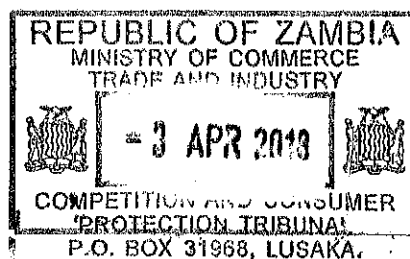
In the case of *Savenda Management Services v. Stanbic Bank Zambia Limited (Appeal No. 37/2017) [Selected Judgment No. 10 of 2018]* the Supreme Court agreed with the Court of Appeal and counsel for the Respondent regarding the nature of a recommended practice. The Supreme Court held, *inter alia*, that the phrase “a recommended practice”, *viewed in isolation, is a suggestion or advice*, albeit that the Court ultimately did not restrict itself to looking only at the phrase whose interpretation was sought.¹⁴

Based on the above, the Tribunal finds that a recommendation in the Preliminary Report is merely just that-a recommendation. The Tribunal also finds that such recommendations are made at a lower level, within an administrative arrangement of the 1st Respondent, to the Board, which is the highest body. They are neither intended to be binding on the Board nor to oust the jurisdiction of the Board to independently consider violations or contraventions of Competition and Consumer Protection law, and to determine appropriate penalties for such violations or contraventions. The Tribunal further finds that recommendations are intended to guide the Board what would constitute appropriate punishment in the circumstances of each case presented before it. In any event, even if the recommendation was binding on the Board, the warning set out in the recommendation is not sound at law as the Board does not have the power to issue warnings. Accordingly, this submission is not tenable;

- (2) with respect to the Appellant’s submission that it should have been accorded the right to be heard on the findings of the Tribunal as they differed from what was contained in the Preliminary Report, the Tribunal notes that other than the harsher sanctions imposed by the Board in its Decision dated 20th December, 2016 (see pages 130 to 137 of the Record), the Appellant did not state the extent of those differences). The Tribunal will, therefore, not engage its mind in the arduous task of presuming what the extent of those differences is. The Tribunal will, as

¹³ The Free Legal Dictionary, available at <https://legal-dictionary.thefreedictionary.com/recommendation> visited on 21/02/2018 at 11:05 hours

¹⁴ See paragraph 132 of the Judgment.

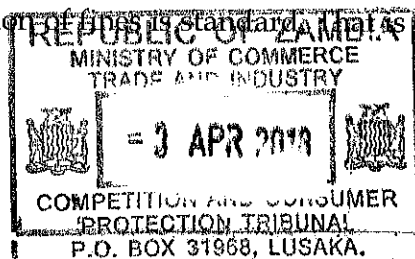


such, confine its findings on this submission to the Appellant's right to be heard on the harsher sanctions imposed by the Board.

The Tribunal has considered the evidence on record, and finds as a fact that the Appellant was, initially, accorded the right to be heard when it was served, by the 1st Respondent, with the Notice of Investigation and the Preliminary Report to which it responded. Accordingly, the legal question to be dealt with is whether or not the Board denied the Appellant the right to be heard when it became apparent to the Board that it would impose harsher sanctions different from the sanctions set out in the recommendations by the Technical Committee.

The Tribunal also considered the procedure employed by the 1st Respondent in the investigation of alleged violations of the Act, and subsequent adjudication of those violations. The Tribunal takes judicial notice of the fact that mitigation forms an important aspect of the procedure employed by adjudicating bodies, including the 1st Respondent, in the sentencing of, or imposing sanctions on, offenders. From a perusal of the Record, it is evident that in its comments on the Preliminary Report, the Appellant did advance the historical and regulatory challenges it had faced as factors in mitigation. Page 79 of the Record refers, in this regard. That notwithstanding, the Appellant submitted, *inter alia*, that had it been aware of the penalties the Board contemplated, it would, in its response to the Preliminary Report, have addressed the Board regarding the inappropriateness of the contemplated remedies, penalties on the facts, law and economics. [Emphasis ours]

The Tribunal finds that the law (in particular the Act, supplemented by the Guidelines) sets out the penalties applicable *in casu*. The Tribunal also notes the 1st Respondent's submissions regarding the calculation of fines and, in particular the factors taken into consideration, and the formula employed in the calculation of fines. The Tribunal finds that while the Appellant was entitled to set out factors in mitigation (which it did in response to the Preliminary Report), to accord the Appellant an opportunity to be heard so that the Appellant can address the **inappropriateness of the penalty** [emphasis ours] is an academic exercise as the law is self-prescriptive with respect to the penalties prescribed for violations or contraventions of the Act, and the formula for the calculation of fines is standard. That is to say, the law prescribes



penalties for violations of the Act, and the Guidelines, 2014, set out the standard formula to be employed in the calculation of fines to be imposed. The Board's hands are, therefore, tied to the extent that the penalties imposed by the Board must be confined to the law, and the calculation thereof done in accordance with the Guidelines, 2014. Accordingly, the Tribunal finds there is no mitigation (in addition to what the Appellant had already offered) that could alter the quantum of the fine payable by the Appellant, as the said quantum is dependent on the formula; and

- (3) with respect to the Appellant's submission that aspects of the investigation included technical information which required the Appellant to be present before the Board in order for the Appellant to give a proper explanation as the Preliminary Report was being considered-The Tribunal finds, from a perusal of the Record, that it does not reveal anything that is so technical about the information which requires the Appellant to have been physically present before the Board.

On the basis of the foregoing, **Ground Three of the appeal must fail, and is, therefore, dismissed.**

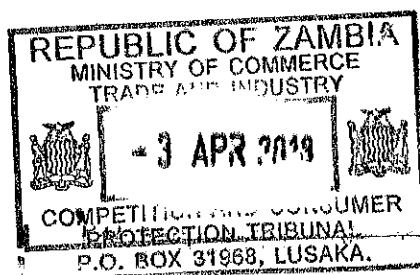
4. **Ground Four (The remedies imposed by the Board are arbitrary, disproportionate, vague and therefore, unenforceable)-**

- (1) with respect to the Appellant's submission that the Decision neither provides information or facts other than those set out in paragraphs (i) to (iii) of paragraph 27 of the Decision nor does it set out the Board's reasoning as to how the remedies sought are linked to the conduct found to be in contravention of Act, the Tribunal considered the Record and finds that even if there is minimal reference, by the Board, to the facts upon which the Board's Decision was based there is overwhelming evidence on record to show that the Appellant engaged in an unfair trading practice whereunder it misled consumers as to the content of the GOtv Extra Bouquet contrary to section 45(a) of the Act.

The Tribunal has also considered section 5 of the Act, and in particular paragraphs (d) and (f) which provide as follows:

5. *The functions of the Commission are to –*

- (d) *investigate unfair trading practices and unfair contract terms and impose such sanctions as may be necessary;*



- (f) *act as a primary advocate for competition and effective consumer protection in Zambia;...*

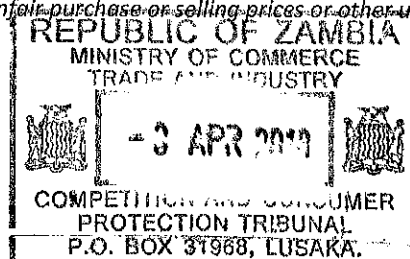
The Tribunal finds that the facts having, in themselves, revealed the commission of an unfair trading practice, warrant the remedy set out in paragraph 27(i) of the Decision. The Tribunal, having considered sections 5(d) and 5(f) of the Act, finds that the Commission was well within its mandate when it directed that the Appellant "*charges consumers only for channels provided for each bouquet and should indicate that the number of channels per bouquet may vary depending on location*", the said directive being enhanced consumer measures necessary for the protection of the rights of consumers in Zambia;

- (2) with respect to the Appellant's submission that because the Board did not find an adverse finding with respect to unfair pricing, by parity of reasoning and by operation of the law, the Board cannot impose any remedy that seeks to address conduct that has not been found to be in contravention of the Act- the Tribunal notes that while it is correct that the Board did not make a finding of abuse of dominant position, and that unfair selling prices constitute an aspect of abuse of dominant position (as per section 16(2)(a) of the Act¹⁵), the Tribunal finds that the offence of unfair pricing can be committed outside the context of the offence of abuse of dominant position. It is for this reason that the legislators of the Act crafted two distinct offences namely abuse of dominant position (as per section 16 of the Act) and unfair trading practice (as per section 45 of the Act as read with section 46). The Tribunal, accordingly, finds that the Board was on firm ground when it made a finding that the Appellant had violated section 45 of the Act, and imposed a remedy in respect of unfair trading practices, of which misleading consumers is a component (as per section 45(a) of the Act);
- (3) with respect to the Appellant's submission that its pricing to all subscribers to GOtv Extra, and subsequently GOtv Plus, Bouquet remained the same in spite of the fact that it had added channels in some locations-the Tribunal finds that in making this submission, the Appellant inadvertently confirmed that the addition of more channels entitled the Appellant to increase the subscription fee (and *vice versa*) albeit the Appellant elected not to exercise this right;

¹⁵ Section 16(2)(a) of the Act provides-

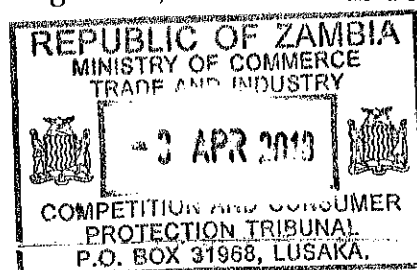
For purposes of this Part, "abuse of a dominant position" includes—

(a) imposing, directly or indirectly, unfair purchase or selling prices or other unfair trading conditions;



- (4) with respect to the Appellant's submission that its pricing model is to offer bouquets comprising a number of channels at a particular price-the Tribunal finds that while this may well be the Appellant's model, the Appellant *in casu*, while having offered and emitted a bouquet of 34 channels under the name GOtv Extra Bouquet to certain customers at ZMW 85.00 (and later at ZMW 90.00), the said GOtv Extra bouquet, in fact did not comprise the number of channels advertised, albeit that this failure was not attributable to the Appellant. The Tribunal further finds that this being the case, the Appellant should have revised its pricing downwards to ensure cost effective service provision, or in the alternative, that the Appellant should have-
- (a) withdrawn its GOtv Extra bouquet from the affected areas in preference for a bouquet offering the channels, or a compilation thereof, capable of being aired by the Appellant; or
 - (b) informed consumers of its inability to air all the channels advertised, on account of regulatory difficulties, to enable consumers make an informed decision pertaining to subscription to GOtv Extra;
- (5) with respect to the Appellant's submission that as regards the misleading advertising allegations, findings and remedies, to the extent that the Board's remedy in paragraph 27(iii) of the Decision was premised on the implicit assumption that consumers were misled and charged for channels that were not provided, and that the Board did not provide any analysis or justification in its Decision to substantiate its Decision-the Tribunal considered the Record, and in particular, the Appellant's submissions regarding regulatory limitations and the evidence set out in the Record.

The Tribunal notes the letter from the Zambia National Broadcasting Corporation ("ZNBC") to MultiChoice Zambia Limited dated 4th December, 2015, whereunder ZNBC permitted the Appellant to use 482 MHz as its second frequency whilst awaiting feedback from the Zambia Information and Communications Technology Authority ("ZICTA") regarding the acquisition of an additional frequency. (See pages 117 to 119 of the Record). The Tribunal notes that the evidence is sufficient to establish that the Appellant was not able to provide to consumers all the channels advertised by the Appellant on account that it did not have a second frequency. The Tribunal further finds that because the Appellant had, by way of advertisements such as that at page 124 of the Record, offered, among others, the GOtv Plus Bouquet whereunder it



offered over 34 channels per month, the Appellant owed, to any and all who subscribed to this product, the duty to inform such subscribers that the viewable Pay TV content was not as advertised. The Tribunal also noted the mitigation by the Appellant set out on page 79 of the Record, and in particular, paragraph 5 which provides-

5. *GOtv acknowledges that its advertising and marketing messages did not indicate that the number of channels on its GOtv Plus Bouquet varied depending on area due to regulatory limitations on available frequencies which impacted on the number of channels available.*

On the basis of the foregoing, it is the considered view of this Tribunal that notwithstanding the truth of the Appellant's submission that the Board did not, in its Decision, provide any analysis or justification to substantiate its Decision, the facts on record speak glaringly of advertisement that is misleading.

Consideration of Misleading Advertising

In order to comprehensively understand what misleading advertising entails, the Tribunal first addressed its mind to advertising and its connotations from both the seller's and the consumer's perspective.

Advertising

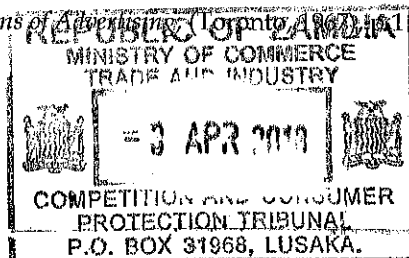
The Tribunal found that "*advertising is essentially a thing to induce consumption to make people buy things they do not want.*"¹⁶ In terms of their usefulness, it has been advanced that advertisements are "*constructive only until they serve the reason for which they are shaped i.e. to create awareness among the public regarding a new or an existing product. Since advertisements are basically made to promote a product or a service, one does not see any exaggeration in the way they extol the virtues of the product. But when it goes beyond that and deliberately utters a falsehood or tries to misrepresent facts thereby misleading the consumers, then it becomes objectionable.*"¹⁷

It has also been advanced that by way of advertisements, the seller seeks to advise a potential buyer of goods and services for sale, their quality, their usefulness, their effectiveness, their availability, their price, and all the other elements of information which may affect the buyer's decision to purchase the items advertised."¹⁸ If the seller is going to make representations to the public about comparative value, performance, efficiency or other

¹⁶ Robin Jeffrey, *India's Newspaper Revolution: Capitalism, Politics and the Indian-Language* Oxford University Press, New Delhi, 2000, p.55

¹⁷ Pushpa Girimaji, *Misleading Advertising and Consumers*, Indian Institute of Public Administration, Delhi 2006 Pg.3

¹⁸ O.J. Firestone, *The Economic Implications of Advertising* (Toronto, 1967) p.1



characteristics of the seller's product or service, the seller is expected to do so responsibly.¹⁹

It has been said of the consumer, "in his efforts to obtain the most for the dollars he has to spend, the consumer needs a substantial amount of information about the properties of merchandise and services and about the prices prevailing in the market. There is so much of this information that he cannot possibly rely entirely on his own resources and to a substantial degree he must rely on the sellers."²⁰ The purpose of advertising, therefore, from the point of view of the consumer, is to provide the consumer with information relating to the qualitative and quantitative characteristics of the product which is being advertised.²¹

As is evident from the foregoing, the basic principle underlying advertisements is for the seller to promote, in a responsible manner, a product or a service. Advertisement which utters a falsehood or is misrepresentative of facts pertaining to the product or service so as to mislead customers is considered objectionable. One form of objectionable advertisements, and which constitute a cardinal aspect of this appeal are advertisements that are false or misleading.

Misleading Advertisements

The Tribunal considered the Act and found that it neither defines misleading advertising nor sets out its elements. Accordingly, the Tribunal considered the laws of other Commonwealth states for guidance.

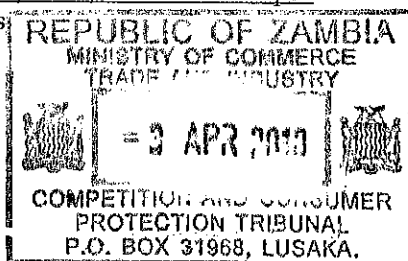
In the case of *Havells India Ltd & Anr vs Amritanshu Khaitan & Others CS(OS) 107/2015*, (an Indian case) Mr. Justice Manmohan stated with respect to misleading advertisements-

41. This Court is also of the view that for any advertisement to be considered misleading, two essential elements must be satisfied. First, misleading advertising must deceive the persons to whom it is

¹⁹ J. J. Quinlan, Q.C., 'Combines Investigation Act - Misleading Advertising and Deceptive Practices' in *Ottawa Law Review* pp. 277-295, at p.288 available at https://commonlaw.uottawa.ca/ottawa-law-review/sites/commonlaw.uottawa.ca.ottawa-law-review/files/21_5ottawalrev2771971-1972.pdf visited on 20/02/2018 at 05:56

²⁰ *Ibid*

²¹ Ronald I. Cohen, 'Misleading Advertising and the Combines Investigation Act' in *McGill Law Journal*, Vol.15, available at <http://lawjournal.mcgill.ca/userfiles/other/4738017-cohen.pdf> visited on 20/02/2018 at 20:52 hours



addressed or at least, must have the potential to deceive them. Secondly, as a consequence of its deceptive nature, misleading advertising must be likely to affect the economic behaviour of the public to whom it is addressed, or harm a competitor of the advertiser...

In the case of *Australian Competition and Consumer Commission v. Coles Supermarkets Australia PTY Limited [2014] FCA 634*, the Federal Court of Australia had this to say concerning criticism that there was no evidence of a person having been misled (at pages 12 - 13):

Half-truths may be misleading by the insufficiency of information that permits a reasonably open but erroneous conclusion to be drawn:...

In Canada, for a claim to be misleading, it must be proven that: (i) a representation has been made, (ii) to the public, (iii) to promote a product or business interest, (iv) that is literally false or misleading (or with a false or misleading general impression) and (v) that the claim is "material" (i.e., likely to influence a consumer into buying or using a product or otherwise altering their conduct).²²

The Tribunal further found that advertising is seen as misleading if it involves false, misleading or deceptive information that is likely to cause the average consumer to act in a way they might otherwise not. Advertising may also be considered misleading if important information that the average consumer needs to make an informed decision is left out.²³ It also occurs when a claim about a product or service is materially false or misleading, in an attempt to persuade the consumer to buy it.²⁴

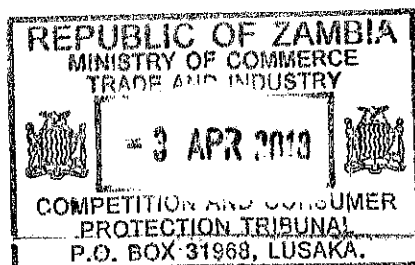
Based on the foregoing, the question to be determined by this Tribunal is "did the Appellant engage in misleading advertising?" i.e.-

- (a) was the representation made to the public to promote a product or business interest?
- (b) was the representation literally false or misleading (or with a false or misleading general impression), or a half truth (i.e. a statement that conveys only part of the truth, especially one used deliberately in order to mislead someone)?
- (c) was the representation material, (i.e., likely to influence a consumer into buying or using a product or otherwise altering their conduct or likely to affect the economic behaviour of the public to whom it is addressed, or harm a competitor of the advertiser?

²² J. J. Quinlan, Q.C., Op.cit

²³ "Misleading Advertising" available at <https://www.ccpc.ie/consumers/shopping/misleading-advertising/>
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²⁴ *Ibid*



- (d) did the representation deceive the persons to whom it was addressed or at least, must have the potential to deceive them?

The questions are addressed in turn below:

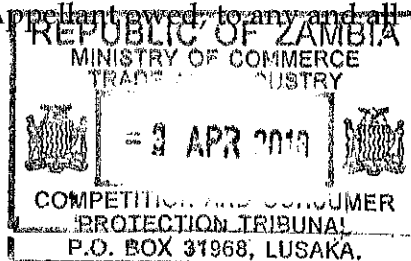
- (a) Was the representation made to the public to promote a product or business interest?

A perusal of the evidence set out in the Record shows that the Appellant advertised its GOtv Plus Bouquet as is evidenced by the photocopy, presumably of the brochure referred to by the 2nd Respondent in the 2nd Respondent's Application for Authorisation of Investigation (Form IV) (Pages 28, 29 and 31 of the Record refer).

- (b) Was the representation literally false or misleading (or with a false or misleading general impression), or a half truth (i.e. a statement that conveys only part of the truth, especially one used deliberately in order to mislead someone)?

The Tribunal perused the Record and finds as a fact that the Appellant was aware of its inability to air all the 34 channels that the Appellant had advertised to the public as comprising the GOtv Extra Bouquet, or that consumers would not be able to view the Pay TV content as advertised (Page 79 of the Record of Proceedings refers). In this regard, the Tribunal notes, in particular, the letter from the Zambia National Broadcasting Corporation ("ZNBC") to MultiChoice Zambia Limited dated 4th December, 2015, whereunder ZNBC permitted the Appellant to use 482 MHz as its second frequency whilst awaiting feedback from the Zambia Information and Communications Technology Authority ("ZICTA") regarding the acquisition of an additional frequency. (See pages 117 to 119 of the Record).

The Tribunal further notes that the foregoing evidence is sufficient to establish that the Appellant was not able to provide to consumers all the channels advertised by the Appellant on account that it did not have a second frequency. The Tribunal finds, as a fact, that notwithstanding the Appellant's inability to air the entire content of the GOtv Extra Bouquet in certain parts of the country, the Appellant advertised its GOtv Extra Bouquet as if it were possible for consumers to view the full Bouquet. The Tribunal also finds that because the Appellant had, by way of advertisements such as that at page 124 of the Record, offered, among others, the GOtv Plus Bouquet whereunder it offered over 34 channels per month, the Appellant owed to any and all who subscribed to this



- product, the duty to inform such subscribers that the viewable Pay TV content was not as advertised. The Appellant's failure to undertake that duty rendered the advertisement misleading.
- (c) Was the representation material, (i.e., was the representation likely to influence a consumer into buying or using a product or otherwise altering their conduct or likely to affect the economic behaviour of the public to whom it is addressed, or harm a competitor of the advertiser?

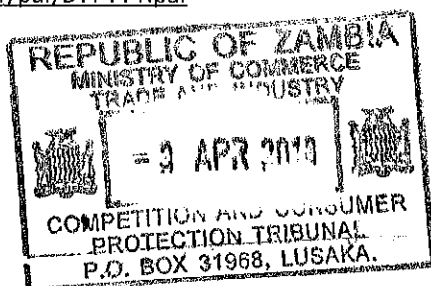
The Tribunal perused the Record and noted the following findings in the Preliminary Report on the Allegations of Abuse of Dominance against GOtv Zambia dated June, 2016 (pages 32 to 49 of the Record):

- (i) *That Pay Television offered by GOtv Zambia differs from other players as they used Digital Terrestrial Technology to transmit. Further, the content offered by GOtv mainly focused more on content that is produced in Africa...GOtv provides the greatest selection of local channels made in Africa for Africa. In addition, the number of channels were unique in that GOtv provided channels that ranged from as low as 20 channels on the GOtv value bouquet to about 46 channels on the GOtv Plus Bouquet...(page 41 of the Record, paragraph 34);*
- (ii) *GOtv was transmitted via transmitters to subscribers at reasonable prices (page 41 of the Record, paragraph 37); and*
- (iii) *Star Times, Muvi TV, My TV and Zuku TV seem to provide similar content with prices that are in the same range as GOtv. In the event that GOtv Limited therefore failed to provide their service, consumers could switch to the other alternative Pay TV providers (page 42 of the Record, paragraph 42).*

The Tribunal, also considered the following advantages of *Digital Terrestrial Technology*: improved reception and picture quality, supports new services like high definition television (HDTV) and multimedia or interactive services carry more contents in one channel, support mobile or portable reception, and better use of frequency spectrum, among others.²⁵

On the basis of the foregoing description of the content provided by GOtv Zambia in paragraphs 1 and 2, the Tribunal concludes that the prospect of a consumer being able to view all the channels advertised as constituting the GOtv Extra Bouquet at minimal

²⁵ *An Introduction to Digital Terrestrial Television (DTT) Broadcasting*, September 2004, available at <http://www.digitaltv.gov.hk/consumer/pdf/DTT-PPT.pdf>
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sums was attractive enough to influence consumers to subscribe to the GOtv Extra Bouquet, to the disadvantage of other Pay TV providers.

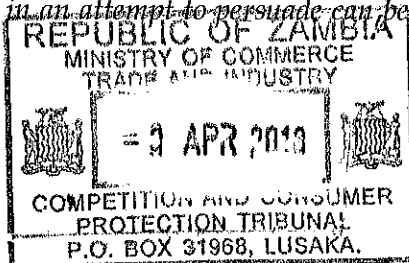
- (d) Did the representation deceive the persons to whom it was addressed or at least, must have the potential to deceive them?

From the evidence on record with respect to the 2nd Respondent, the Tribunal can only infer that the 2nd Respondent was deceived into believing that by purchasing the GOtv Extra Bouquet, he would be able to view all of the channels advertised as forming the GOtv Extra Bouquet. This is evident from page 29 of the Record where the 2nd Respondent stated in the Application for Authorisation of Investigation as follows: "...I asked her why she did not tell me the previous day when I was paying for the subscription that some channels in the brochure are not there because if she had informed me, I would have made an informed decision."

That notwithstanding, in the case of Airtel Networks Zambia Plc V. The Competition and Consumer Protection Commission, and Macnicious Mwimba V. Airtel Networks Zambia Plc & Competition And Consumer Protection Commission, 2014/CCPT/015/CON, (hereinafter the "Macnicious Case") this Tribunal citing the case of Australian Competition and Consumer Commission v. Coles Supermarkets Australia PTY Limited [2014] FCA 634, concluded that evidence that members of the public were actually misled is not conclusive. In the case of Australian Competition and Consumer Commission v. Coles Supermarkets Australia PTY Limited the Federal Court of Australia had this to say concerning criticism that there was no evidence of a person having been misled (at pages 12 – 13):

"Where conduct or representations is or are directed to members of the public at large, the conduct or representations must be judged by their effect on "ordinary" or "reasonable" members of the class of prospective purchasers:

Evidence that someone was actually misled or deceived may be given weight. The presence or absence of such evidence is relevant to an evaluation of all the circumstances relating to the impugned conduct. Where the conduct and representations are to the public generally and concern a body of simple direct advertising, the absence of individuals saying they were misled may not be of great significance. There was no such evidence here. The ACCC was criticised for that. That criticism is unfounded. The objective assessment of advertising using ordinary English words in an attempt to persuade can be undertaken without the



lengthening of a trial by the bringing of witnesses of indeterminate numbers. Language, especially advertising, seeking to raise intuitive senses and associations, can have its ambiguities and subtleties. The task of evaluating the objective character and meaning of the language in the minds of reasonable members of the public is not necessarily one that will be assisted in any cost-effective manner by calling members of the public. The question is one for the Court: *Taco Company of Australia v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 202.

Lord Gibbs C.J. said in this respect, and in agreement with Smithers J. and by Fisher J. in the case of *McWilliam's Wines Pty. Ltd. v. McDonalds System of Australia Pty. Ltd* (1980) 49 FLR 455; 33 ALR 394-

... I agree too with those learned judges that the court must decide objectively whether the conduct is misleading or deceptive or likely to mislead or deceive, and that evidence that members of the public have actually been misled is not conclusive" [Emphasis ours]

On the basis of the foregoing facts, the Tribunal is satisfied that the Appellant engaged in misleading advertising. The Tribunal notes, however, that the Appellant submitted that it did not intend to mislead consumers with respect to the advertisement of the GOtv Extra Bouquet. This raises the question of whether or not *mens rea* or guilty mind is an element of section 45(a) of the Act as read together with section 46.

The question to be determined, in this regard, is whether *mens rea* or guilty mind is an element of sections 45(a) of the Act.

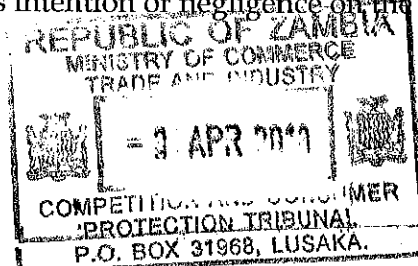
Does section 45(a) of the Act require the element of *mens rea* or guilty mind?

Section 45(a) of the Act as read together with section 46 provides-

45. A trading practice is unfair if—
(a) it misleads consumers;

...
and thereby distorts, or is likely to distort, the purchasing decisions of consumers.

According to the legislative drafting style employed in Zambia, section 45(a) does not require *mens rea* or guilty mind. This is evident from the absence of the words "knowingly", "intentionally" or "with intent to" which words are used by our learned legislative draftspersons to connote the requirement of *mens rea* or guilty mind (For example, section 37 of the Act which requires intention or negligence on the part of an offender)



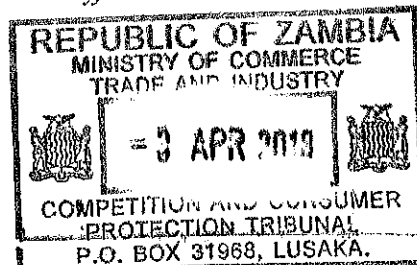
This Honourable Tribunal extensively considered the question of whether the element of *mens rea* was required with respect to section 51(1) in the case of *Spar Zambia Limited v. Danny Kaluba and CCPC 2016/CCPT/009/CON*. In that case, this Honourable Tribunal cited the case of *Chitambala Ntumba v The Queen (1963-1964) Z. AND N.R.L.R. 132*, in which the learned Judge Charles in concluding his judgment stated-

"It follows, in my judgment, that the rule relating to mens rea as an element of a statutory offence is this: In the absence of express provision for the offence containing a mental element, it is presumed that the legislature intended that the offence can only be committed by persons with knowledge of the existence or occurrence of the facts or circumstances constituting it. That presumption may be negatived expressly or impliedly. It is negatived impliedly if, but only if, the offence is created in such terms and context as clearly manifest an intention to make it one of absolute liability, or if the substantial suppression of the mischief at which the offence is directed would not be achieved unless the offence was one of absolute liability.

In determining whether absolute liability is necessary to achieve a substantial suppression of the mischief at which the offence is directed regard is to be had to the nature of the offence: to the nature of the mischief to which the offence is directed: to "knowledge" covering actual knowledge, correct belief and deliberate ignorance but not careless ignorance (see as to that, Nkoloso v. The Queen H.P.A. 12763); to the burden of proving knowledge often being lightened by the accused having the burden of adducing evidence of ignorance, as his state of mind is a matter peculiarly within his own knowledge; and to the extent to which the ignorant are likely to indulge in the mischief and defeat its suppression. Even when necessity is revealed for construing the offence as covering the carelessly ignorant, the necessity may not extend to including the ignorant without fault within the scope of the offence. In that case the provision creating the offence is to be construed as if it contained the words " knowing of or with reason to believe " in respect of the facts constituting the offence."

This Tribunal further noted, in the Spar Case, that-

"In this appeal, however, we are not dealing with a criminal offence but a regulatory offence which is penal in nature. Indeed, neither the 2nd Respondent nor this Tribunal has the jurisdiction to adjudicate on criminal offences in the Competition and Consumer Protection Act. It is firmly established, as guided by the Sherras v. De Rutzen case and subsequent case law, that (regulatory or public welfare) offences by which the legislature has seen fit, in the public interest, to prohibit under penalty acts which are not criminal in themselves, do not carry the common law presumption of the requirement of mens rea, if the offence is created in such terms and context as clearly manifest an intention to make it one of absolute liability. One way in which this legislative intention is implied is if the substantial suppression of the mischief at which the offence is directed would not be achieved unless the

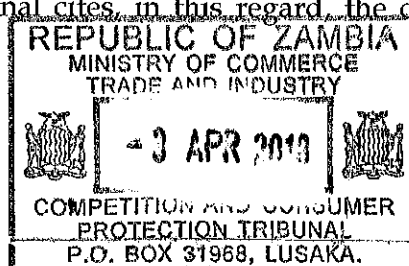


offence was one of absolute liability. Other factors have been cited as the gravity of the penalty.

This Tribunal in the case before us, in determining whether the offence set out in section 46 is one of strict liability as opposed to criminal liability, considered the public policy behind the prohibition of misleading advertising. The Tribunal found that in part, the public policy can simply be stated as found in the title of the Act itself and that of Part VII - "Competition and Consumer Protection". Specifically, section 46 is intended to protect consumers from misleading advertisements and the potential harm or injury that may be occasioned on a consumer or feelings of general dissatisfaction, on the part of the consumer, that may result as a consequence of misleading advertising. Section 46 is also intended to protect consumers' right to information, the right to choice, and the right to be protected against unsafe goods, which may result as a consequence of misleading advertising. Section 46 seeks to prevent the distortion of the market or competition which results when sellers disseminate false or deceptive claims concerning their products. The Tribunal also found that the section is also intended to protect businessmen and women from dishonest competition on account of misleading advertising.

Furthermore, we are of the view that the said public policy and the suppression of the mischief behind the provision would be defeated if the offence was not one of absolute liability because implementation of the requirement of the law is exclusively a responsibility of the Appellant and the 1st Respondent is not privy to the processes by which the Appellant secures adherence to the law. Whether or not the act in issue was committed deliberately, by negligence or honest mistake despite all diligent efforts are matters within the exclusive knowledge of the Appellant, and requiring the 1st Respondent to prove a guilty intention on the part of a supplier of consumer goods and services in the position of the Appellant would make prosecution of such offences almost impossible. This would, inevitably, defeat the suppression of the mischief.

Even if, for argument sake, for the avoidance of penalising a person who is devoid of a guilty mind, thereby making *mens rea* a requirement, the Tribunal is of the considered view that the Appellant, having become aware of its limitation, owed, to members of the public, the duty to provide information pertaining to the said limitation and the negative effect thereof on the number of channels available, in certain areas, under the GOtv Extra Bouquet. The Tribunal finds, as a fact, that the Appellant, for reasons best known to it, failed or neglected to execute this cardinal duty. This failure or neglect by the Appellant is wherein *mens rea* or guilty mind is imputed to the Appellant. The Tribunal cites, in this regard, the case of Regina v.



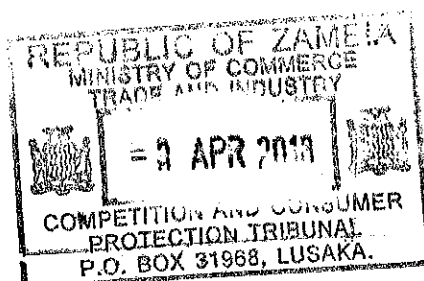
Imperial Tobacco Products Ltd. 25 64 Can. Pat. R. 3, 2 Can. Crim. Cas.2d 533, 16 D.L.R.3d 470 (Aita. Sup. Ct. 1970), in which the charges arose out of an advertising campaign by the accused company involving a new brand of cigarettes. The charges on which convictions were registered related to the use of signs containing the statement "\$5 in Every Pack of New Casino." There was neither five dollars in each pack nor anything else that could be exchanged for that amount or its equivalent. Each pack contained a game in which the purchaser had one chance in four hundred to select a winning combination and thus obtain five dollars after answering a skill-testing question.

The trial court stated that the phrase complained of, literally taken, amounted to a statement of fact that was untrue. So far as the question of mens rea was concerned, the court was of the opinion that it was not an essential ingredient of the offence of causing to be published an untrue statement of fact.

Based on the foregoing, the Tribunal finds the facts on record justify the finding made by the Board;

- (6) with respect to the Appellant's submission that the remedies imposed by the Board are vague as it is not clear whether the remedy set out in paragraph 27(iii) relates to unfair pricing or misleading advertising-the Tribunal has considered this submission, and has perused the Decision of the Board, and finds that the context in which the remedy was accorded is misleading advertising, which falls within the ambit of unfair trading practices prohibited under section 45(a) of the Act. The Tribunal's reasoning regarding the finding of misleading advertising is set out in the preceding paragraphs, and for this reason the Tribunal will not belabour the point;
- (7) with respect to the Appellant's submission that the fines are excessive and disproportionate and that the Commission should have considered the gravity of the offence and that the Board did not state what considerations it made in arriving at its Decision contrary to paragraph 10(i) of the 1st Respondent's Guidelines for the Issuance of Fines, 2016-the Tribunal considered the Guidelines cited by the Appellant, and agrees with the 1st Respondent that the same cannot be relied on by the Appellant as they are but a draft and fall short of the procedural requirements that speak to their entry into effect as set out in section 84 of the Act. The said section provides, in part, as follows:

84. (1) *In the exercise of its functions under this Act, the Commission may make such guidelines as are necessary for the better carrying out of the provisions of this Act.*



(2) *The Commission shall publish the guidelines issued under this Act in a daily newspaper of general circulation in Zambia, and the guidelines shall not take effect until they are so published.*

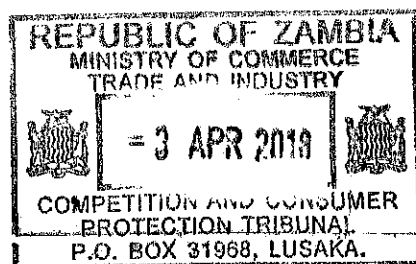
The Tribunal, accordingly, considered the Guidelines, 2014, which are in effect, having satisfied the requirements of section 84 of the Act, having been published in the Zambia Daily Mail, dated Wednesday 25th June, 2014. The Guidelines, 2014, set forth the manner in which fines to be issued by the Board will be determined (the Preamble to the Guidelines, 2014, refers). The Tribunal notes guideline 6(iv) which provides-

(iv) *The starting point of each financial penalty will be determined by the gravity of the offence (which is represented by "B") Thereafter, each repeat offence will carry an additional punitive percentage of 0.5%. The formula for calculating the penalty is therefore as follows:*
$$B_1 + 0.005(n-1)$$

The Tribunal also notes guideline 6(v) which provides, with respect to unfair trading practices, that *...the baseline penalties shall vary depending on the gravity of the offence....*

The Tribunal further notes the baseline fine for an unfair trading practice is 0.5% of turnover (See Table 2 of the Guidelines, 2014), and that while the fines therein are to be considered as indicative, as per our judgment in the Macnicious Case, the 0.05% fine imposed by the Board (see paragraph 27(i) of the Decision) is markedly different from the said baseline. The Board did not indicate how it arrived at a fine different from that set out in its Guidelines, 2014, or advance the considerations it made in so doing. To that extent, the Tribunal finds that the fine of 0.05% of turnover is arbitrary in the sense that it appears to be a random figure imposed without justification.

With respect to the disproportionality of the fine, the Tribunal is constrained to pronounce itself as the Appellant has not availed, to the Tribunal, information pertaining to its annual turnover. Accordingly, the Tribunal refers the calculation of the fine back to the Board. The Tribunal further directs that in calculating the fine to be imposed on the Appellant, regard should be had to whether or not the Appellant is an MSME, i.e. a Micro, Small or Medium Enterprise within the meanings attributed, respectively, thereto in the 2008 Policy Document on Development of MSMEs. This will determine whether or not the baseline and the indicative capping thereon set out in the Guidelines, 2014, will be applicable to the Appellant. In the Macnicious Case, this Tribunal held, *inter alia*,



...It has not escaped our attention that the background to the indicative cappings appearing in Table 2 is the consideration that the majority of enterprises found in violation of provisions on unfair trading practices are MSMEs, and that these categories of businesses should not be strangled by burdensome fines.

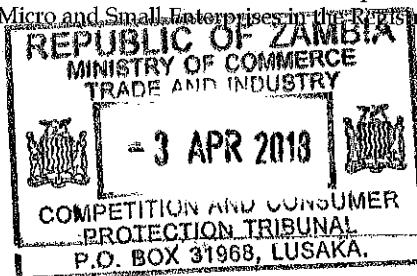
Airtel is not in any category of MSMEs.²⁶ ...Accordingly, we are of the view that in applying the Commission's fines guidelines,...a graduated escalation in the indicative capping covering large companies categorised according to turnovers would be appropriate.

The Commission is further ordered to indicate the factors it will take into consideration in arriving at the fine to be imposed on the Appellant;

- (8) with respect to the Appellant's submission that the non-imposition of a fine was appropriate it being in keeping with the practice of the 1st Respondent with respect to first offenders-the Tribunal finds that the practice, by the Board, of the non-imposition of fines with respect to first offenders erroneous as the law demands, as a minimum mandatory punishment, that a fine be imposed. The Tribunal will not delve into its reasoning behind this finding as the reasoning, in this regard, is set out under Ground One;
- (9) with respect to the Appellant's submission that the 1st Respondent can impose any remedy (including civil damages and imprisonment) it deems necessary by virtue of the provisions of section 5 of the Act, whether or not the Act confers on it the power to do so is not tenable and is contrary to the basic principles of statutory interpretation and the precedent emanating from the highest courts in the Republic of Zambia regarding the exercise of their power by statutory entities-the Tribunal considered the submissions of the parties. The Tribunal also considered the Act, and in particular, section 5(d), and notes that the sanctions contemplated thereunder are not set out. The Tribunal, therefore, undertook the task of deciphering what the intention of the legislators was. In this regard, the Tribunal considered the tenets of competition and consumer law, in general, and the objects of the Act, and the role of the Commission.

The Tribunal found that, in broad terms, competition and consumer law is not only intended to deter acts of an anti-competitive nature through the imposition of penal sanctions against offenders, but is also intended to ensure that consumer rights are upheld and protected by, among others:

²⁶ The 2008 policy document on development of MSMEs gives an indication of categories of MSMEs. A Micro Enterprise's features include an annual turnover of not more than K150,000. A Small Enterprise's annual turnover ranges from K51,000 to K300,000. A Medium Enterprise's annual turnover ranges from K300,000 to K800,000. (Ministry of Commerce, Trade and Industry: The Micro, Small and Medium Enterprise Development Policy, 2008 (Final). See also similarly ZDA's definition of Micro and Small Enterprises in the Registration Form (page 5).



offering redress where consumers have suffered loss as a result of restrictive business or anti-competitive trade practices (such as offering refunds); preventing or reducing the risk of the occurrence or repetition of restrictive business, or anti-competitive trade, practices which may include measures which may have the effect of improving compliance with consumer law more generally; and enabling consumers to choose more effectively between persons supplying or seeking to supply goods or services by, *inter alia*, communicating negative information about a business to consumers in order to assist them in exerting market discipline, and thus improve the functioning of the relevant market.²⁷ These measures are, in the United Kingdom, specifically referred to as Enhanced Consumer Measures, categorised, respectively, as measures falling under the Redress Category, the Compliance Category and the Choice Category.²⁸

The ordering of redress as contemplated by the Tribunal is to be distinguished from the ordering of damages on account of, *stricto sensu*, breaches of contract which this Tribunal has, in the past, held, it has no authority to do.

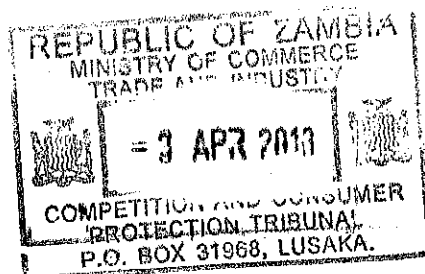
The Tribunal is of the view that in the absence of the authority to impose such measures, the Commission would fail to fully uphold and protect consumer rights, and, consequently, fail to implement the Act efficaciously. Accordingly, the Tribunal finds that contrary to the assertions made by the Appellant regarding the interpretation of section 5(d), and in particular, the nature of the sanctions that can be imposed thereunder, the legislators intended to confer upon the Commission, the power to impose sanctions akin to Enhanced Consumer Measures to give the Act efficacy. Even if this were not so, the legislators, in the thinking of the Tribunal, intended to ensure the efficacy of the law when Parliament enacted the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia, and in particular, section 25 which provides-

25. *Where any written law confers a power on any person to do or enforce the doing of an act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.*

²⁷ Cartwright, Peter (2016) *Redress, Compliance and Choice: Enhanced Consumer Measures and the Retreat from Punishment in the Consumer Rights Act 2015*. Cambridge Law Journal . ISSN 1469-2139 (In Press)

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²⁸ See section 219A(2), 219A(3) and 219A(4) of the Consumer Rights Act, 2015. See also Cartwright, Peter (2016) *Redress, Compliance and Choice: Enhanced Consumer Measures and the Retreat from Punishment in the Consumer Rights Act 2015, Supra*



The Tribunal, having considered the foregoing provision and the need for the Commission to give effect to section 5(d) and 5(f) of the Act, and to uphold and protect the rights of consumers against restrictive business, and anti-competitive trade, practices in general, finds that the sanctions referred to in section 5(d) of the Act are sanctions akin to enhanced consumer measures.

The Tribunal also finds that the Commission, in exercising or giving effect to its mandate set out in sections 5(d) and 5(f) of the Act has the power to order enhanced consumer measures provided that the same are not implemented in an arbitrary manner or a manner that is disproportionate to the party required to implement the measure.

This, however, is not to confer upon the Commission the power to impose a term of imprisonment as it is trite law that one's right to liberty can only be curtailed where the law explicitly provides for such curtailment, that is to say, a term of imprisonment cannot be imposed on a person where the law does not prescribe imprisonment.

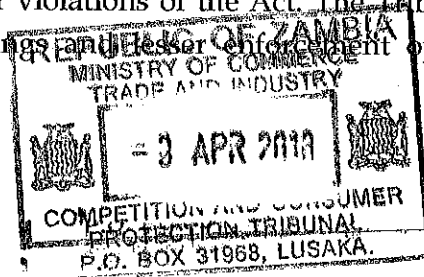
On the basis of the foregoing, the Tribunal finds that the Appellant's submissions in support of this ground of Appeal are largely untenable, save for the submission to the extent that the fine imposed was arbitrary, and in respect of which this Tribunal has ordered a recalculation, and that the factors considered in calculating the fine to be imposed on the Appellant be stated. To this extent, this ground of appeal succeeds.

The Tribunal will address the remedies set out in paragraph 27(ii) and 27(iii) of the Board's Decision when it addresses the remedies sought by the Appellant, and simultaneously address the Appellant's submissions regarding the arbitrariness, disproportionality and unenforceability of the said remedies.

5. **Ground Five (The Board did not take into account mitigating factors)**

- (1) with respect to the Appellant's submission that the Appellant was a first offender and was willing to accept lesser enforcement options, and that a warning, as a consequence, would have sufficed-

The Tribunal finds that the Commission does not have the power to issue a warning or to impose other lesser enforcement options in lieu of a fine where the law specifically prescribes a fine as a penalty for contraventions or violations of the Act. The Tribunal's reasoning with respect to warnings and lesser enforcement options (that is to say



enhanced consumer measures) is set out under Ground Four, and as such, will not be repeated. Notwithstanding that, warnings and lesser enforcement options may be issued or imposed in addition to a fine, where the law prescribes a fine, in line with section 5(d) of the Act; and

- (2) with respect to the Appellant's submission that the Spar Case in which this Tribunal held, *inter alia*, that the Board had no power to issue a warning could not be relied on retrospectively by the 1st Respondent as a premise for the penalties imposed against the Appellant, and that this is a trite principle of law-

The Tribunal finds that this argument is not tenable. This is because the Act which does not empower the Board to issue warnings to persons who have been found to have contravened the Act, was in effect at the time the Appellant committed the offence which was subsequently investigated by the Commission, and in respect of which the Decision, which is the subject of this appeal was passed- having been enacted by the Parliament of Zambia in 2010. Accordingly, the Tribunal, in holding, in the Spar Case, that the Respondent (i.e. the CCPC) had no power to warn the Appellant merely espoused what is, by law, provided)

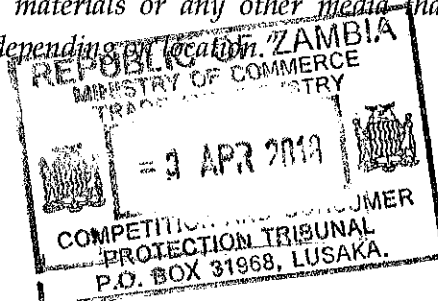
On the basis of the foregoing, **Ground Five must fail, and is, therefore, dismissed.**

Having addressed the Appellant's Grounds of Appeal, it is incumbent upon the Tribunal to address the relief sought by the Appellant. The same is addressed below.

Specific Remedies Sought by the Appellant

The Tribunal notes that the "*Board having considered the facts, evidence and submissions in the case, decided that the Appellant -*

1. *be fined 0.05% of its annual turnover for violation of section 45(a) of the Competition and Consumer Protection Act No. 24 of 2010, and to desist from misleading consumers into buying bouquets that have lesser channels than is advertised;*
2. *provides a free service for the GOTV Extra Bouquet for three months in all affected broadcasting zones for all the affected clients; and*
3. *charge its consumers only for channels provided for each bouquet and should indicate through its agents, advertising materials or any other media that the number of channels per bouquet may vary depending on location.*"



The Tribunal also notes that the Appellant seeks the following remedy:

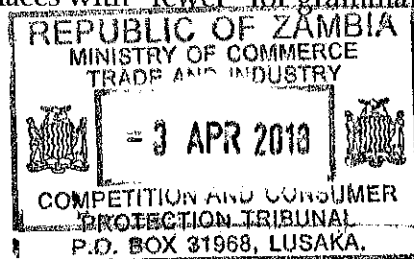
That the Tribunal dismisses the Board's decision and substitutes it with the following:

- (1) *GOtv Zambia Ltd be warned for violation of section 46(1) of the Act and further to avoid engaging in conduct that intentionally or unintentionally misleads consumers into buying bouquets that have fewer channels than what is advertised*
- (2) *GOtv Zambia Ltd be advised not to offer bouquets that are fewer than the minimum number of channels indicated in its advertising material unless it expressly indicates in the advertising material that the number of channels vary by location.*

In order to determine whether or not to grant the relief sought by the Appellant, the Tribunal assessed the relief sought against the individual directives set out in the Board's Decision.

- (1) with respect to the directive set out in paragraph 27(i) of the Board's decision, the Tribunal notes its finding that the fine imposed on the Appellant of 0.05% of its annual turnover absent an explanation for the Board's departure from the 0.5% set out in the Guidelines, 2014, is arbitrary. The Tribunal also notes its finding that a warning cannot be issued in lieu of a fine where the law specifically prescribes a fine for a violation or contravention of the Act. The Tribunal further notes that on account of these findings, the same will not be addressed again by the Tribunal, in considering the Directive in paragraph 27(i) of the Decision. The Tribunal will confine its consideration to whether or not the words "*and to desist from misleading consumers into buying bouquets that have lesser channels than is advertised*" (as per the Board's Decision) should be replaced with the words "*and further to avoid engaging in conduct that intentionally or unintentionally misleads consumers into buying bouquets that have fewer channels than what is advertised*"

The Tribunal finds that the words "desist" and "avoid" are synonymous, and for that reason is inclined to maintain the word "desist" as used in the Board's Decision. The Tribunal also finds that as *mens rea* is not an ingredient of the offence set out in section 46, it is of no import to qualify the offence with the words "intentionally or unintentionally misleads" as what is of importance in cases of strict liability such as the one presented before this Tribunal is the determination, in each case, of culpability. Once this is established, the warning to be issued to the offender would be futuristic, requiring the offender to simply "desist from misleading consumers". Accordingly, the Tribunal maintains the wording set out in the Board's Decision, save for the word "lesser" which the Tribunal replaces with "fewer" for grammatical coherence.



- (2) with respect to the Board’s Decision in paragraph 27(ii), the Tribunal has critically examined paragraph (ii) of the Board’s decision and finds that while it falls within the Redress Category of enhanced consumer measures (to use the language of the UK Consumer Rights Act, 2015), which the Tribunal has found that the Board is empowered to undertake in exercise of its authority under sections 5(d) and 5(f) of the Act, the Board did not provide any information as to the quantum used to arrive at the sanction. That is to say, the Board did not stipulate, among others, how many channels were actually aired by the Appellant, and conversely, how many were not; what is the price attributable to that part of the Pay TV content that was aired and that which was not; how many people were subscribers to the GOtv Extra Bouquet at the time of the contravention (that is to say, how many affected consumers existed at the time of the contravention?); the extent of the financial benefit to the Appellant; and the cost, to the Appellant, of giving effect to this directive. The lack of the foregoing information renders the directive, at best, arbitrary. The possibility of the directive being disproportionate to the offence committed by the Appellant and for which it was found wanting by the Board is also high, as the cost of implementing the directive may far exceed the actual loss suffered by affected consumers.

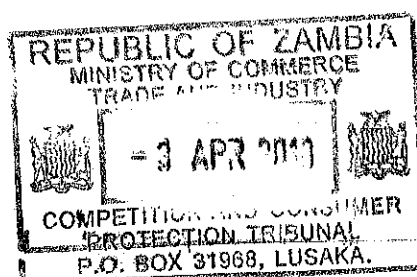
For this reason, the Tribunal quashes this specific directive as it is arbitrary, disproportionate and unenforceable.

- (3) with respect to the Board’s directive set out in paragraph 27(iii), the Tribunal finds that the same also constitutes an enhanced consumer measure which the Board can, in exercise of its powers under section 5(d) and 5(f) of Act, undertake. That notwithstanding, the Tribunal assessed whether or not the remedy was arbitrary, disproportionate, vague and therefore, unenforceable, warranting that it be replaced with the alternative wording suggested by the Appellant.

The Tribunal considered various pieces of legislation which make provision for consumer rights in the context of viewable content. Notable, is the Consumer Rights Act, 2015, of the United Kingdom. That Act provides, *inter alia*, that digital content should be as described and that every contract to supply digital content should be treated as including a term that digital content will match any description of it given by the trader to the consumer.²⁹ Provision is made also for the right to repair or replacement where the digital content does not conform-with repair being interpreted to mean “to make it conform”.³⁰ Where

²⁹ See section 36(1)

³⁰ *Ibid*, section 43



repair is not possible, or a trader has failed to undertake repairs within a reasonable time, a right to price reduction is conferred on consumers.³¹

The Tribunal notes that while our Act may not specifically make provision regarding viewable content and how contracts for the provision thereof ought to be construed, it is trite law that a contract whereunder a product is sold by description contains an implied condition that the product will match the description. This principle is recognised in, among others, section 13 of the Sale of Goods Act, 1893, and section 49 of our Act. Section 13 of the Sale of Goods Act, 1893, provides, in part-

Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description.

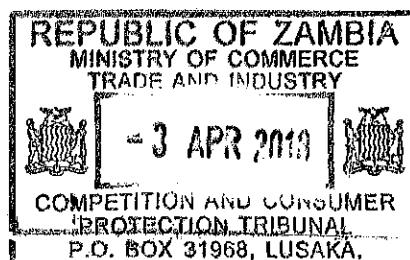
On the basis of the foregoing, the Tribunal is persuaded to apply this principle to contracts to supply Pay TV, i.e. contracts to supply Pay TV should be treated as including an implied term of contract to the effect that the Pay TV content shall match any description of it given by the trader to the consumer. The Tribunal finds that it is imperative, especially where consumers are paying for Pay TV content, that contracts pertaining to the provision of Pay TV content be construed as including the term, if Pay TV content providers are to refrain from misleading consumers. The Tribunal is also persuaded, for the protection of consumers of Pay TV content, to impute, to consumers of Pay TV content, the right to repair or replacement where the Pay TV content does not conform, and the right to price reduction where repair is not possible, or a provider fails to undertake repairs within a reasonable time, similar to the right provided under the UK Consumer Rights Act, 2015.

The Tribunal has also considered the submissions of the Appellant with respect to its pricing model, and notes that while the Appellant submitted that it does not charge per channel, it did not inform this Tribunal how it actually determines the price of its bouquets. That being the case, the Tribunal finds that in order to ensure that consumers rights are protected, and that they are accorded the right to price reduction in as transparent a manner as possible where the Pay TV content is not as advertised, and to give effect to the Board's Decision, that paragraph (iii) be maintained as per the Board's Decision.

The Appeal is therefore dismissed save for the following:

- (1) the Tribunal's finding that the fine of 0.05% of turnover is arbitrary in the sense that it appears to be a random figure imposed without justification, and in respect of which the Tribunal has ordered a recalculation by the 1st

³¹ See section 44



Respondent, with regard to be had to whether or not the Appellant is an MSME, and that the factors taken into consideration in calculating the fine to be imposed on the Appellant be stated;

- (2) with respect to the directive set out in paragraph 27(i) of the Board's decision, the Tribunal's substitution of the word "lesser" with the word "fewer" for grammatical coherence so that the words "*and to desist from misleading consumers into buying bouquets that have lesser channels than is advertised.*" now read "*and to desist from misleading consumers into buying bouquets that have fewer channels than is advertised.*"; and
- (3) the Tribunal's quashing of the Board's Decision in paragraph 27(ii) on the basis that the same is arbitrary on account of the fact that the Board did not provide any information as to the quantum used to arrive at the sanction, and is disproportionate and unenforceable, and that the possibility of the directive being disproportionate to the offence committed by the Appellant and for which it was found wanting by the Board is also high, as the cost of implementing the directive may far exceed the actual loss suffered by affected consumers.

In view of the foregoing outcome in which both sides have partially succeeded, each party shall bear its own costs.

Any party aggrieved by this decision may appeal to the High Court within thirty days of this judgment.

Dated at Lusaka this 3rd day of April, 2018.

Mr. W. A. Mubanga, SC

Mrs. M.B. Muzumbwe-Katongo

Mr. R. Sombe

Mrs. E. Chiyenge

Mr. C. Kabaghe

