

IN THE COMPETITION AND CONSUMER  
PROTECTION TRIBUNAL

2016/CCPT/017/CON

HOLDEN AT LUSAKA

BETWEEN:

ITALIAN SCHOOL OF LUSAKA

APPELLANT

AND

COMPETITION AND CONSUMER PROTECTION  
COMMISSION

1<sup>st</sup> RESPONDENT

SAJEEV NAIR

2<sup>ND</sup> RESPONDENT

Coram: Willie A. Mubanga, SC (Chairperson), Miyoba B. Muzumbwe-Katongo (Vice  
Chairperson), Chance Kabaghe (Member), Rocky Sombe (Member) and Eness  
C. Chiyenge (Member)

For the Appellant: Ms. S. Namusamba - Shamwana & Company

For the 1<sup>st</sup> Respondent: Mrs M.M. Mulenga - Manager, Legal & Corporate Affairs  
Ms M. Mtonga - Legal Officer

For the 2<sup>nd</sup> Respondent: In Person

For the Times of Zambia: Mr. Chitengi - Director, Legal Services

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RULING

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Legislation referred to:

1. Competition and Consumer Protection Act, section 71
2. Penal Code, Chapter 87 of the Laws of Zambia, sections 4 and 116 (1) (d)
3. Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia, section 25

Cases referred to:

4. Chrysler Canada Ltd. v. Canada (Competition Tribunal) [1992] 2 SCR 394.
5. CBC v. Quebec Police Commission, [1979] 2 SCR 618
6. Keable v. Canada (AG), [1979] 1 SCR 218
7. Rev. Tegerepayi Gusta and Elias v. The People (1988) S.J. (S.C.) S.C.Z. Judgment No. 29 of 1988

Other works

8. David Stratas, "A Unique Approach to Interpreting the Scope of Tribunal Powers: Justice Gonthier and the cases of Chrysler and Québecair" [cidsl.org/gonthier/public/pdfs/papers](http://cidsl.org/gonthier/public/pdfs/papers)



The background to this Ruling is that by letter dated 8<sup>th</sup> October 2015, Mr. Sajeep Nair (to whom we shall refer as "the 2<sup>nd</sup> Respondent") lodged a complaint with the Competition and Consumer Protection Commission (to whom we shall refer as "the 1<sup>st</sup> Respondent") against the Italian School (to whom we shall refer as "the Appellant"). According to the 1<sup>st</sup> Respondent's Record of Proceedings, the gist of the complaint was that on 14<sup>th</sup> August 2015 he paid the Appellant school fees for his two daughters who were in Grade 9 and Grade 11 respectively. The 2<sup>nd</sup> Respondent in his complaint alleged that on 24<sup>th</sup> September 2015 the Appellant de-registered both his daughters due allegedly to vulgar language used by his younger daughter during an examination. The 2<sup>nd</sup> Respondent demanded re-registration of his two daughters. In their response to the investigations launched by the 1<sup>st</sup> Respondent, the Appellant, while confirming the de-registration of the 2<sup>nd</sup> Respondent's two daughters and refund of the K30,200, denied that the de-registration was due to the alleged use of vulgar language by his younger daughter but alleged that this was due to the 2<sup>nd</sup> Respondent's conduct of not cooperating with the school and making defamatory statements against the school's management. The Appellant further informed the 1<sup>st</sup> Respondent that it had commenced court action against the 2<sup>nd</sup> Respondent.

(See pages 8-9, 25 - 27, 28, 29, 30, 31, 33 - 35, 36, 37, 38, 55 and 59 of the Record of Proceedings)

For the purposes of this Ruling, we do not intend to delve into the findings and verdict of the Board of Commissioners of the 1<sup>st</sup> Respondent; suffice it to state that the Appellant was dissatisfied with the decision of the Board and appealed to the Tribunal. It was in the process of the appeal proceedings before the Tribunal that the Appellant raised a complaint against the 2<sup>nd</sup> Respondent and the Times of Zambia Newspaper concerning contents of an article that was published in the newspaper on Friday 3<sup>rd</sup> February 2017 titled 'Italian School violated CCPC Act' and another article that was subsequently published, on 11<sup>th</sup> February 2017, titled 'CCPT sets date for Italian School case'.

Initially, the complaint was raised by the Appellant's counsel, Ms. Namusamba, at our hearing on 6<sup>th</sup> February 2017. Counsel alleged that the first article contained inaccuracies and that the reporter, a Ms Cassey Kayula had informed her that she got the information from the 2<sup>nd</sup> Respondent. Counsel produced the article in question and referred us to paragraphs 4 and 5 which read as follows:

"He said only one child allegedly committed the said offence of uttering vulgar words but, but the school ended up suspending both with a view to expel hence his decision to remove them before the final step was taken.

He was now seeking a refund from the school after his children were chased from school for using vulgar language during the examinations."

Counsel for the Appellant urged the Tribunal to issue a warning to any reporters that sit in its proceedings to ensure that they provide accurate news articles. Counsel, while noting the absence of the 2<sup>nd</sup> Respondent, who was only added to the appeal



proceedings as the 2<sup>nd</sup> Respondent later at the same hearing, also requested that he be warned to desist from providing inaccurate information to the media.

At our sitting on 1<sup>st</sup> March 2017, counsel for the Appellant again complained that the Times of Zambia had published an article on 11<sup>th</sup> February 2017 in which it stated that the earlier article and this same Article were based on information obtained from the CCPT tribunal proceedings and CCPC Board's decision obtained by the author and not an interview or statement from Mr. Nair. Counsel produced the article in issue, titled 'CCPT sets date for Italian School case' and referred to paragraph 7. The paragraph read:

**"This article as well as the earlier one dated February 3 this year are based on information obtained from the CCPT tribunal proceedings and CCPC Board's decision obtained by the author and not an interview or statement from Mr. Nair."**

Counsel for the Appellant reiterated her allegation that the author of the first article had informed her that she had interviewed the 2<sup>nd</sup> Respondent who provided her with the information she published. The 2<sup>nd</sup> Respondent in response said he did not give any interview or statement, but that he talked to the reporter about the inaccuracies in the first article, following which in the second article it was stated that he had not given any interview or statement.

We deferred our ruling pending hearing the newspaper editor and authors of the article who were summoned to appear before the Tribunal, pursuant to section 71 (1) and (2) of the Competition and Consumer Protection Act which states:

*"(1) The Tribunal may – (a) order the parties or either of them to produce to the Tribunal such information as the Tribunal considers necessary for purposes of the proceedings; or (b) take any other course which may lead to the just, speedy and inexpensive settlement of any matter before the Tribunal.*

*(2) The Tribunal may summon witnesses, call for the production of, or inspection of, books, documents and other things, and examine witnesses on oath, and for those purposes, the Chairperson is hereby authorised to administer oaths."*

On the 6<sup>th</sup> of April 2017, we heard the matter. Counsel for the Appellant reiterated the complaint that on 3<sup>rd</sup> February 2017, the newspaper had published the article complained of contents of paragraph 4 and 5 of which were not in the record of proceedings before the 1<sup>st</sup> Respondent or the Tribunal. Further, that the statements were untrue and the author of the article had advised that the same were obtained from the 2<sup>nd</sup> Respondent. Counsel further complained about the newspaper article of 11<sup>th</sup> February 2017 in which the author denied that the contents of the earlier article were provided by the 2<sup>nd</sup> Respondent.

The core issues presented by the Appellant's complaint are:



1. whether the 2<sup>nd</sup> Respondent and/or the Times of Zambia published inaccuracies or untruths concerning the proceedings before the Tribunal; and
2. if so, what offence this constitutes, if any, and what powers, if any, the Tribunal has to deal with the offence.

The two respective authors of the newspaper articles were examined on oath. Ms Cassey Kayula said she worked as a reporter for the Times newspaper and that her duties included research, collecting information and reporting. Under cross-examination by counsel for the Appellant, Ms. Namusamba, Ms. Kayula confirmed that she was the author of the article published in the Times newspaper of 3<sup>rd</sup> February 2017. She said she got the information contained in paragraphs 4 and 5 of the article from a document she obtained from the 2<sup>nd</sup> Respondent, which she said she had stored on her computer. Ms. Kayula retrieved the document, which she said was the decision of the 1<sup>st</sup> Respondent. She conceded that the content of the said paragraphs of the article were not in the document. Asked if she then lied in that article, she said it was a misunderstanding that it was only one child who had used vulgar language. As to the question whether she took any step to retract or correct the information, Ms Kayula replied that they had retracted the statement through the article that was later published on 11<sup>th</sup> April 2017. She said she was not in a position to make the correction herself. She said the retraction was done when the inaccuracy was brought to her attention.

The second witness examined on oath was Delphine Hampande Zulu. She said she had worked for the Times newspaper for 12 years and that her duties included gathering information, editing and publishing. Under cross-examination by counsel for the Appellant, Mrs. Zulu confirmed that she was the author of the second article published on 11<sup>th</sup> February 2017. She confirmed that she had read Ms Kayula's article of 3<sup>rd</sup> April 2017 and was made aware of the inaccuracies of paragraphs 4 and 5. Asked what steps she took to retract the statements, Mrs. Zulu's response was that this led to the second article which she authored. She, however, conceded that her story did not contain a retraction but claimed that what was missing was an apology. She further said that, though she indicated in her article that the earlier article was based on information obtained from the Tribunal proceedings and the 2<sup>nd</sup> Respondent's Board decision, she had not verified the story and she did not attend the proceedings before the 1<sup>st</sup> Respondent and the Tribunal. Under re-examination by counsel for the Times newspaper, the witness said the earlier story was not an opinion but fact and that the second article was a subsequent story and that an apology could come by way of a subsequent story.

We have considered the issues before us critically. We have found, from the evidence as presented by the contents of the two articles subject of the complaint, the testimonies of the two authors examined on oath, and in light of the records of proceedings before this Tribunal, that the newspaper published inaccuracies and untruths. As the two witnesses conceded, the contents of the publications in issue were nowhere in any of the records referred to. We also find as a fact that the contents



of the first article were not retracted by the newspaper, which fact was admitted by the author of the second article, Mrs. Delphine Zulu.

We further find as a fact that the two articles contained other inaccuracies and untruths concerning the Tribunal proceedings. For example, it was reported in the article published on 3<sup>rd</sup> February 2017 that, "... the CCPC Tribunal chairperson Willie Mubanga when the matter came up during the hearing at Mulungushi Conference Centre, adjourned the matter to 6<sup>th</sup> February this year for judgment ...." The appeal had not been heard and the adjournment was for hearing of matters in the appeal. Secondly, contrary to the author's claim that "counsel representing Mary Carlos Events did not show up forcing the Commission to move the case to February 6 this year", the Respondent, Mary Carlos Events, was not represented by a lawyer.

Furthermore, the claim in the last paragraph of the second article that the earlier article was based on information obtained from the CCP Tribunal proceedings and CCPC Board's decision was not entirely true in that, as we have already stated, the disputed contents of the earlier article were not supported by any of the records referred to, which are before the Tribunal.

We are, however, not persuaded that the 2<sup>nd</sup> Respondent was the source of the information in dispute, since Ms. Kayula testified that he gave her the 1<sup>st</sup> Respondent's decision, which she said was the source of her article. She also said she had misunderstood certain facts.

The next question is what offence, if any, was committed by the Times Newspaper and what powers, if any, the Tribunal has to deal with the same. First of all, we need to make it clear that we address the complaint raised by the Appellant only in so far as the same concerns the proceedings before the Tribunal in this appeal and not for any other purpose. Therefore, this ruling shall not be used by any of the parties or any other person for any other purpose.

In so far as the Tribunal is concerned, the publications in issue may constitute criminal contempt in that they are a misrepresentation of the proceedings before this Tribunal. Section 116 of the Penal Code, Cap. 87 of the Laws of Zambia, which prescribes criminal contempt, states as follows:

- "(1) Any person who-
- (a) ...
  - (b) ...
  - (c) ...
  - (d) while a judicial proceeding is pending, makes use of any speech or writing, misrepresenting such proceeding, or capable of prejudicing any person in favour of or against any parties to such proceeding, or calculated to lower the authority of any person before whom such proceeding is being had or taken; or



- (e) ...
- (f) ...
- (g) ...
- (h) ...
- (i) ...

*is guilty of a misdemeanour and is liable to imprisonment for six months or to a fine not exceeding seven hundred and fifty penalty units.*

*(2) When any offence against paragraph (a), (b), (c), (d) or (i) of subsection (1) is committed in view of the court, the court may cause the offender to be detained in custody, and at any time before the rising of the court on the same day may take cognizance of the offence and sentence the offender to a fine not exceeding six hundred penalty units or, in default of payment, to imprisonment without hard labour for one month.” (italics and underline ours)*

We are of the firm view that the term “judicial proceeding” referred to in subsection (1) (d) includes proceedings before a tribunal. Section 4 of the Penal Code defines “judicial proceeding” as including “any proceeding had or taken in or before any court, tribunal, commission of inquiry, or person in which evidence may be taken on oath;”.

However, while we hold the view that it is arguable that subsection (2) of section 116 of the Penal Code provides explicit jurisdiction to a tribunal with respect to the specified contempt offences committed in view (in the face) of the Tribunal, we note that there are no provisions in the Competition and Consumer Protection Act explicitly giving power to the Tribunal to conduct proceedings for contempt committed in the face of the Tribunal or for contempt *ex facie curiae* (not in view or face). Unless the jurisdiction is explicitly granted by a statute that sets out the powers of a particular tribunal, typically, courts have held that administrative tribunals do not have the jurisdiction to conduct proceedings for contempt *ex facie curiae*. One of the various considerations is that contempt proceedings put at risk the liberty of a person, hence the need for such a power to be exercised only by courts of law.

However, we note as a matter of interest that the subject of tribunal powers to hold contempt proceedings is an area where the development of the law is active, particularly in light of the role that such tribunals are increasingly playing in the administration of justice. For example, the Supreme Court of Canada had, prior to the case of *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* [1992] 2 SCR 394, held that express vesting of power by a statute setting out an administrative tribunal’s powers was necessary for it to conduct proceedings for contempt *ex facie curiae* (*CBC v. Quebec Police Commission*, [1979] 2 SCR 618 at 639) and that administrative tribunals did not have inherent jurisdiction in such cases (*Keable v. Canada (AG)* [1979] 1 SCR 218 at 249-50). The Supreme Court had also pronounced that vesting such a power in administrative bodies (as opposed to reserving the same with courts of criminal jurisdiction) would be “liable to result in inquiries which may well involve... areas which are practically impossible to define in terms of jurisdiction and



completely foreign to its own area of jurisdiction" (CBC v. Quebec Police Commissioner, supra at page 638)

In the Chrysler case, the Competition Tribunal issued an order requiring Chrysler to resume supplying automobile parts to one of its customers. Later, competition officials, having formed the view that Chrysler was not complying, filed a motion in the Competition Tribunal for an order directing Chrysler and others to show cause why they should not be held in contempt. The legislation that set out the Tribunal's powers did not expressly vest it with power to conduct proceedings for contempt *ex facie curiae*. The Supreme Court found that the Tribunal did have the power to conduct proceedings for contempt *ex facie curiae*. The Tribunal's success has been attributed to the rather novel approach taken by Justice Charles Gonthier. (See David Stratas, "A Unique Approach to Interpreting the Scope of Tribunal Powers: Justice Gonthier and the cases of Chrysler and Québecair" [cidsl.org/gonthier/public/pdfs/papers](http://cidsl.org/gonthier/public/pdfs/papers)).

Justice Gonthier is credited with having acknowledged the earlier authorities and confirmed that the Tribunal could only have jurisdiction if its statute clearly said so. Approaching interpretation of the statute as "read in context", he identified the purposes of the statutes that governed the Tribunal and the role of the Tribunal in carrying out those purposes. He also examined the purposes of the regulatory framework in those statutes, and the regulatory framework itself, in order to ascertain the functions of the Tribunal and how it carried out those functions.

Justice Gonthier's view in addressing the submission that criminal prosecutions under the Act were available for contravening or failing to comply with orders of the Tribunal was that such proceedings would take place in criminal court where the expertise of the Tribunal would not be present. In his view, "given the complexity of orders..., monitoring their application could not be made a completely separate process, before a court of general or criminal jurisdiction, without a corresponding loss of effectiveness" (at page 408).

From this novel examination of function, statutory purpose and expertise of the Tribunal, Justice Gonthier concluded that Parliament intended the Tribunal to oversee the subject-matters of orders and that Parliament was "strongly concerned" with compliance. Further, subsection (2) of section 8 gave many powers to the Tribunal, such as the power to call witnesses and to demand production of documents, for the purposes of "enforcement" and "other matters necessary or proper for the due exercise of its jurisdiction."

In Justice Gonthier's view, recognition of the Tribunal's power to punish for contempt committed *ex facie curiae* did not give the Tribunal a broad and dangerous jurisdiction, nor was it somehow contrary to the superior courts' normal jurisdiction over such matters. In this regard, he looked at aspects of the function and the expertise of the Tribunal, and its relationship with the court system. On the Tribunal's function, he observed that the very issues that prompted the making of the order would inform the issue whether contempt was present. On the issue of expertise, he held that "the



Tribunal is in fact better suited than a superior court to decide these matters.” Finally, he noted that any decisions on issues of contempt would be “subject to full review by the Federal Court of Appeal.”

The holding of the Supreme Court of Canada in the Chrysler case is a demonstration that it is arguable that this Tribunal, as many similar tribunals in this country, has jurisdiction to conduct proceedings for contempt *ex facie curiae*, in context of the broad objectives of the Competition and Consumer Protection Act No. 24 of 2010, and the functions and powers of the Tribunal. For instance, the Tribunal has been given various powers by the Act to issue orders requiring compliance. Examples of these powers are: section 52 (4) relating to orders for consumer product safety; section 58 relating to mandatory orders; Section 64 relating to orders for enforcement of directions and undertakings; section 71 relating to powers of the Tribunal to order production of documents, summon witnesses, etc.; and section 73 relating to orders in respect of determination of Tribunal in respect of mergers.

In our view, the Tribunal cannot be effective in the exercise of the foregoing functions and powers if the Act setting out its powers is interpreted as not giving jurisdiction to the Tribunal to enforce compliance by conducting proceedings for contempt *ex facie curiae*. It would be inappropriate for such proceedings to be conducted by a criminal court, especially in view of the specialised nature of the functions and powers of the Tribunal. Section 25 of the Interpretation and General Provisions Act, Chapter 2 fortifies this position. It states that, “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.”

It is also important to note that the exercise of such contempt jurisdiction by the Tribunal would be subject to the right of appeal to the High Court pursuant to section 75 of the Competition and Consumer Protection Act, applicable to any decision of the Tribunal.

We have, in our analysis, to an extent digressed from the subject of publications misrepresenting tribunal proceedings *per se*. This was in an effort to make distinctions with respect to types of contempt for which it is arguable that this Tribunal has jurisdiction. That is in the realm of enforcement of tribunal orders and maintaining law and order in proceedings before it. However, in our view, this jurisdiction does not extend to criminal contempt *ex facie curiae* in contravention of the Penal Code, as in the matter before us, relating to section 116 (1) (d) of the Code. This power is reserved for courts of criminal jurisdiction, as seen in the wording of subsection (2) of section 116 of the Penal Code.

In the case of **Rev. Tegerepayi Gusta and Elias v. The People** (1988) S.J. (S.C.) S.C.Z. Judgment No. 29 of 1988, the facts of the case were that it was alleged that the appellants’ lawyer told a judge, who intended to try a case between the appellants and their opponents, that the appellants had been informed by their opponents that their opponents had bribed the judge. The lawyer for the appellants requested that the





judge should retire from the case. The judge then set down a later date for an inquiry into the matter with a view to deciding a case of contempt of court. At the hearing he heard evidence and thereafter found that both the appellants were guilty of contempt of court. On appeal, the Supreme Court held that:



- (i) The action taken by the learned judge was not within the provisions of section 116 and was therefore ultra vires.
- (ii) Where the contempt is criminal or quasi-criminal, it is not proper to deal with the offence in any manner other than the institution of proceedings under section 116 of the Penal Code, unless it occurs in the face of the court. (emphasis ours)

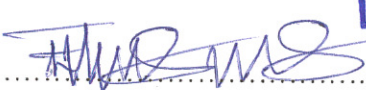
Therefore, in order to determine whether or not in the present matter contempt has been committed in terms of section 116 (1) (d) of the Penal Code, criminal proceedings would have to be instituted before a court of competent jurisdiction. Furthermore, in contempt proceedings, it is necessary to prove *mens rea* (a guilty mind).

Whereas in a proper case criminal proceedings would be justified, we find that in the circumstances of this case, restraint should be exercised. In fact, counsel for the Appellant urged the Tribunal to issue a warning. The media plays an important role in development and in particular, in promoting fair competition and consumer protection in our economy. This role calls for a high degree of professionalism, objectivity and responsibility. Accordingly, we warn the authors and the editor of the newspaper concerned that they will not only do the nation a disservice by irresponsible reporting. They also risk being cited for contempt if they do not ensure that their publications of tribunal proceedings are truthful and accurate and that reporters actually attend the hearings on which they report. We take the liberty to also warn parties in the appeal not to take it upon themselves to cause proceedings of the Tribunal to be published or to make comments or express opinions concerning the same, which could result in contempt proceedings and/or other legal proceedings.


In view of the subject matter of this ruling, we order that each party will bear their own costs.

Delivered at Lusaka this 9<sup>th</sup> day of June 2017.

Willie A. Mubanga, SC (Chairperson)   Muzumbwe B. Muzumbwe-Katongo (Vice Chairperson) 

  
Eness C. Chiyenge (Member)

  
Chance Kabaghe (Member)

  
Rocky Sombe (Member)