APPEAL NO. 2018/CCPT/009/CON

IN THE COMPETITION AND CONSUMER PROTECTION TRIBUNAL HOLDEN AT LUSAKA

BETWEEN:

MTN ZAMBIA LIMITED — APPELLANT

AND

COMPETITION AND CONSUMER PROTECTION COMMISSION (IN RE ABRAHAM MAKANO) — RESPONDENT

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

For the Appellant: Mr. C. Ngaba and Ms. M. Namwila – Corpus Legal Practitioners

For the Respondent: Mrs. M.M. Mulenga, Manager, Legal & Corporate Affairs
Mrs. M. Mtonga and Ms. N. Pilula, Legal Officers – Competition and Consumer Protection Commission

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JUDGMENT

Legislation referred to:

1. Competition and Consumer Protection Act No. 24 of 2010, sections 5 (d), 49 (5), (6) and (7); 55 (1), (4) and (5); and 84 (1) and (3).
2. Competition and Consumer Protection Commission Administrative and Procedural Guidelines, 2014.

Cases referred to:

1. North-Western Energy Company Limited v. Energy Regulation Board (2011) ZR 513.
2. Zinka v. The Attorney-General (1990 - 92) ZR 73 (SC).
3. Macnicious Mwimba v. Airtel Networks Zambia Plc (2014/CCPT/015/CON).
4. MTN Zambia Limited v. The Competition and Consumer Protection Commission (2013).
5. The Republic of Botswana, Ministry of Works Transport and Communications, Rinceau Design Consultants (Sued as a firm previously T/A Kz Architects) v. Mitre Limited (1995) S.J., S.C.Z. Judgment No. 20 of 1995.
6. Leopold Walford (Z) Ltd v Unifreight 1985 Z.R. 203
7. Vodacom v. Communication Authority, Appeal no. 98 of 2008.
8. Preston v. Inland Revenue Commissioners (1985) 2 All ER, at page 341.

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1. The background to this judgment is that Mr. Abraham Makano (whom we shall refer to as "the Complainant") filed a complaint with the Competition and Consumer

Protection Commission (which we shall refer to as "the Respondent") against MTN Zambia Limited (which we shall refer to as "the Appellant"). This was by way of a formal complaint filed on 2nd November 2017, to which the Complainant attached copy of a letter he had written to the Appellant. (See pages 1-2 and 3 of the Respondent's Record of Proceedings). We have deliberately provided a detailed background because much of the issues in the appeal hinge on the events.

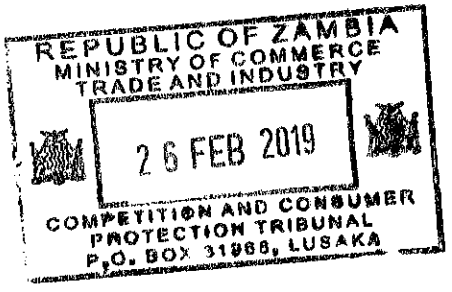
2. The gist of the complaint, according to the letter of complaint addressed to the Appellant and referred to in the foregoing paragraph, was that on 11th September 2017, the Complainant bought 10GB home pack bundles worth K260 and that two days later, on 13th September, he discovered that his internet connectivity was off. That on 14th September, the Complainant brought this to the Appellant's attention before counter staff whom he named in his letter. That she informed him that the bundle had expired, which he refused to accept because according to his usage he could not have used 10GB in 48 hours, considering that he only switched on the internet router as and when he needed to use the internet.

3. That the matter was escalated to IT department and the Complainant was told that it would be resolved within 24 hours but, according to the letter of complaint, it was not resolved. Specifically, the Complainant's grievance was twofold, namely:

    1. He did not agree that he could use 10GB within 48 hours. His history showed that each time he bought 10GB in the last 12 months, it took about 12-14 days.
    2. Lack of seriousness on the Appellant's part to resolve the issue within 24 hours.

4. According to the Respondent's Internal Memo appearing at pages 4-5 of the Respondent's Record of Proceedings, on 31st October 2017, the Respondent engaged the Appellant by telephone conversation with a view of resolving the matter using advocacy and the Respondent advised that it would look into the matter. On 3rd November, the Respondent inquired of the Complainant who stated that the matter had not been resolved.

5. By Notice of Investigation and accompanying letter dated 9th November 2017, the Respondent notified the Appellant that it had officially commenced investigations into the matter. The Respondent outlined the complaint as contained in the Complaint's letter referred to above, stating that the conduct appeared to be in breach of section 49 (5) of the Competition and Consumer Protection Act, No. 24 of 2010 (which we shall refer to as "the Act"). The Respondent warned of consequences of not responding to the Notice issued pursuant to section 55 (4) of the Act. The Appellant was requested to respond to the Notice within 14 days, by way of a statement responding to the allegations; providing any document, article or item relating to the investigation; and any other information which could assist in the effective determination of the investigation. (See page 6 and pages 7-9 of the Respondent's Record of Proceedings).



6. In January 2018, the Respondent prepared a preliminary report in which the Appellant was cited as having possibly breached section 49 (5) of the Act, inviting consequential punitive and restitutive measures per subsections (6) and (7) respectively, all of which provisions were quoted. The preliminary report also recorded that the Appellant did not respond to the Notice of Investigation, which is an offence attracting a penalty upon conviction, not exceeding one hundred thousand penalty units or imprisonment for a period not exceeding one year, or both.

7. The preliminary report also recorded that the Appellant had previously breached section 49 (5) of the Act, for which the Respondent had by decision rendered on 29th August 2017 fined the Appellant K500.

8. The report concluded that the Appellant engaged in unfair trading practices and was in violation of section 49 (5) and further that it violated section 55 (5) of the Act when it did not respond to the Notice of Investigation. The following recommendations were set out (paraphrased):

   (i) A fine of 0.5% of the total annual turnover in accordance with section 49 (6) of the Act and in line with the Respondent's guidelines for issuance of fines for being a repeat violator of section 49 (5).

   (ii) Reconnection of internet at the Complainant's house within ten days of receipt of Board decision.

   (iii) (Appellant) be prosecuted for not responding to the Notice of Investigation in accordance with section 55 (5) of the Act.

   (See pages 10-17 of the Respondent's Record of Proceedings)

9. The Respondent served the preliminary report on the Appellant on 23rd January 2018 by letter dated 22nd January 2018, which was copied to the Complainant. The Respondent requested the Appellant to respond to the report within seven (7) days of receipt, prior to the report being presented to the Technical Committee of the Respondent's Board for its determination. (See pages 18-21 of the Respondent's Record of Proceedings.)

10. According to a letter from the Appellant's Advocates to the Respondent dated 31st January 2018, the Appellant had held a meeting with the Respondent on 29th January 2018 at which the former undertook to revert by 2nd February 2018. However, the Advocates asked for more time than earlier directed by the Respondent, that is 14 days from the date of the Advocates' letter, in order to enable them obtain instructions. (See pages 22-23 of the Respondent's Record of Proceedings.)

11. By letter dated 2nd February 2018, the Appellant directly wrote to the Respondent, making reference to a letter dated 8th January 2018. But apparently the letter referred to addressed various other matters between the two parties as evidenced by its absence from the Respondent's Record of Proceedings and the Appellant's Amended Affidavit Verifying Facts on Appeal. Of note, however, is that in the letter

of 2nd February 2018, the Appellant confirmed that it had engaged its Advocates' services with respect to the subject matter of this appeal and to seek extension of time. The Appellant went on to state that its failure to respond to some of the Respondent's correspondence was not deliberate but due to the fact that the Commercial Specialist who was the erstwhile primary contact person with the Respondent's office had resigned and particulars of the new contact person were communicated to the Respondent by letter dated 31st August 2017, but she had been out of the country for treatment. (See pages 24-27 of the Respondent's Record of Proceedings.)

12. By its letter dated 5th February 2018 addressed to the Appellant's Advocates, which was received the same day, the Respondent accepted the former's request and extended the period within which to respond to the preliminary report to 14th February 2018. On 14th February 2018, the Complainant wrote to the Respondent withdrawing the complaint against the Appellant, stating that they had reached a mutually beneficial arrangement. On the other hand, the Appellant did not respond to the Respondent's preliminary report by the deadline of 14th February 2018, but by letter dated 22nd February 2018, the Appellant's Advocates wrote to the Respondent as follows (quoting only the relevant part):

> *"We refer to our letter dated 31st January 2018 and thank you for granting us an extension within which to respond to the preliminary report.*
>
> *We have received confirmation from our client that this matter was withdrawn by the Complainant on 14th February 2018. Find enclosed a copy of the withdrawal letter for your ease of reference.*
>
> *In light of the withdrawal, we trust that the complaint has been resolved and the investigation discontinued by your office. Accordingly, we would be grateful to receive your confirmation of this position."*

(See pages 31-32 Respondent's Record of Proceedings.)

13. The Respondent neither responded to the said Appellant's Advocates' letter nor to the Complainant's letter of withdrawal of complaint until it rendered its decision on the case on 26th April 2018. The Respondent's Board assessed the Appellant's conduct subject of the complaint and the offence and penalty including restitution in terms of section 49 (5), (6) and (7) of the Act, which state as follows:

> "(5) *A person or an enterprise shall supply a service to a consumer with reasonable care and skill or within a reasonable time or, if a specified time is agreed, within a reasonable period around the agreed time.*
>
> *(6) A person who, or an enterprise which, contravenes subsection (5) is liable to pay the Commission a fine not exceeding ten percent of that person's or enterprise's annual turnover.*
>
> *(7) In addition to the penalty stipulated under subsection (6), the person or enterprise shall –*

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

(b) if practicable and if the consumer so chooses, perform the service again to a reasonable standard."

14. The Respondent's Board's finding was that the Appellant had sold the home data bundles to the Complainant as alleged and that according to him, the internet connectivity was terminated within two days of purchase. Further, the Commission found that when the Complainant lodged a complaint with the Appellant, the latter did not take the necessary steps to provide him with information regarding how the 10GB data bundles depleted within a period of two days. The Board found that since the Appellant was engaged in the business of supplying internet data bundles, they were expected to exercise reasonable care and skill in the way they provided the service to the Complainant and to provide him with adequate information regarding his complaint within a reasonable period of time. The Board determined that the Appellant was therefore in breach of section 49 (5) of the Act.

15. The Respondent's Board further considered the Appellant's conduct in relation to section 55 (5) of the Act and observed that the Appellant acknowledged receipt of the Notice of Investigation on 9th November 2017. It was the Board's finding therefore that by not responding to the Notice, the Appellant breached subsection (5) of section 55 of the Act.

16. The Board also considered that previously, the Appellant was found to have breached section 49 (5) of the Act in a case involving Ms. Lungowe Akapelwa and fined K500.

17. In conclusion, the Board determined that the Appellant engaged in unfair trading practices and was in violation of section 49 (5) of the Act. Further, that despite the Appellant having redressed the Complainant, and the Complainant having written to the Respondent to withdraw the case, the Board was of the view that the conduct of the Appellant amounted to breach of the said provision of the Act as it failed to redress the Complainant within reasonable time and only did so after the Respondent's intervention. Further, that the Appellant did not respond to the Notice of Investigation and only redressed the Complainant after receiving the preliminary report of the Respondent's findings. The Board directed that the Respondent be fined 0.5% of the total annual turnover in accordance with section 49 (6) of the Act and in line with the (Respondent's) guidelines for issuance of fines for being a repeat violator of section 49 (5).

(See pages 37-47 of the Respondent's Record of Proceedings.)

18. In its Amended Notice of Appeal filed on 2nd October 2018, the Appellant appealed *"the whole decision of the Respondent in which the Appellant was fined 0.5% of its total annual turnover in accordance with section 49 (6) of the ... (the Act) and in line with the guidelines for issuance of fines for being a repeat violator of section 49 (5)."* The

Appellant's grounds of appeal are dealt with below. The Appellant seeks the following reliefs:

1. That the entire decision be set aside;
2. Legal costs; and
3. Any other relief that the Tribunal may deem necessary.

19. In its Notice of Grounds in Opposition to Grounds of Appeal, filed on 5th October 2018, the Responded opposed the appeal and its grounds of opposition are reiterated in its Heads of Argument which we have considered below. The Respondent urged the Tribunal to uphold the Respondent's decision and to dismiss the appeal with costs. Further, that the Tribunal grants any other relief found fit.

20. In the course of our proceedings, on 27th August, 28th September and in particular on 7th December 2018, counsel for the Appellant indicated that they intended to rely on the Amended Notice of Appeal and Affidavit Verifying Facts filed on 2nd October 2018, together with the Heads of Argument filed on 25th October 2018. On their part, counsel for the Respondent indicated that they would rely on the Notice of Grounds in Opposition to Grounds of Appeal and the Heads of Argument both filed on 5th November 2018. We granted the parties' request and reserved judgment.

21. We note that the documents in the Respondent's Record of Proceedings are not in dispute and that the Appellant's Amended Affidavit Verifying Facts on Appeal is not disputed or controverted. We, however, also observe that in substance of fact, its contents are a repetition of documents that are in the Respondent's Record of Proceedings, save for statements that are in essence allegations or claims of matters requiring interpretation of the law and deduction from facts that are common cause. Interpretation and deduction are a preserve of the Tribunal. We therefore proceed on the basis of affidavit evidence to the extent that stated facts are common cause.

22. We have considered the issues raised in the appeal. We are indebted to counsel on both sides for their arguments and we shall refer to them as we see necessary.

GROUND (a)

That the Respondent erred in law when it abrogated its Competition and Consumer Protection Commission Guidelines of Practices and Procedure, 2014 when it denied the request for withdrawal of the complaint by one Abraham Makano ("the Complainant") without informing the said Complainant in writing of the reasons for the decision to deny the said withdrawal.

23. Under Ground (a), the Appellant has argued at length that the Respondent abrogated the guidelines cited in its ground of appeal, in particular Guideline 8 of the Competition and Consumer Protection Guidelines of Practice and Procedure, 2014, which reads as follows:

(i) A Complainant may make a request to withdraw a complaint lodged before the Secretariat in writing stating the reasons. The Secretariat shall exercise its

discretion in making a decision whether or not to grant the request for withdrawal, taking into account such factors as relate to public health, public interest or any other factor as may be determined by the case at hand.

(ii) *The Secretariat may deny a request for withdrawal of a complaint in order to serve public interest. In this regard, the Secretariat may consider whether there is an overriding public interest that it needs to serve which outweighs the Complainant's interest in a case requested for withdrawal. Such public interest could be determined by considering whether there are many other complaints of the same or similar nature against the same Respondent or whether the conduct in question has had or is likely to have negative impact on large scale in the market.*

(iii) *Where a request for withdrawal of a complaint is denied, the Secretariat shall retain any evidence submitted in support of such complaint for purposes of carrying out its investigations.*

(iv) *The Complainant will be informed in writing of the reasons for the decision of the Secretariat.*

24. Counsel for the Appellant has argued and cited a number of authorities on the principle that the literal rule of interpretation (i.e. the plain meaning of a statute) should be applied where the words used are precise and unambiguous as the case of the guidelines in issue. Counsel has further argued that paragraph (iv) is couched in mandatory terms by using the word "will". Counsel has also canvassed that the Respondent was aware of the letter of withdrawal but neglected to respond and made a conscious decision not to inform the Complainant and the Appellant of its decision. Counsel has cited paragraph 31 of the decision wherein the Respondent's Board *"deliberated that despite the Respondent having redressed the Complainant and the Complainant having written to ... withdraw the case, the Board was of the view that the conduct ... amounted to a breach of the said provision of the Act."* (At page 43 of the Respondent's Record of Proceedings.)

25. On the other hand, counsel for the Respondent's argument is that it did not abrogate its guidelines because it has discretion to accept or reject a request for withdrawal, and has cited section 5 (d) of the Act which mandates the Respondent to investigate unfair trading practices. Further, that in exercising its discretion whether or not to accept a withdrawal of a complaint, the Respondent needs to ensure that it complies with the Act. Further, that in this case, the Respondent proceeded to render the decision based on the fact that the Appellant violated section 49 (5) of the Act. That, while admitting that the Respondent did not adhere to the laid down procedure in relation to informing the Complainant of its decision, it did not abrogate the Act. And further that the work of the Appellant is of public interest in that it deals with the general public or consumers on a daily basis, which requires that it provides proper services and goods.

26. The ground of appeal as we understand it does not raise an issue whether the Respondent was mandated to investigate the complaint in terms of section 5 (d) of

the Act, nor question that the Respondent decided that the Appellant violated section 49 (5) of the Act. It does not even question that the Appellant was not informed of the decision, even though, surprisingly, counsel for the Appellant at the close of their arguments on this ground of appeal made reference to the Appellant as well. Nor yet again does the ground of appeal concern itself with the question whether the alleged breach raised an issue of public interest, as argued by counsel for the Respondent.

27. Rather, the issue raised by this ground of appeal is whether the Respondent, in rejecting the withdrawal, erred in law by abrogating its own guidelines in that it did not inform the Complainant in writing of the reasons for the decision to deny the said withdrawal (whether on grounds of public interest or otherwise, as stipulated in the guidelines).

28. Although there is no direct evidence on record that the Secretariat rejected the withdrawal which the Complainant submitted on 14th February 2018, we accept the position taken by both parties that the Secretariat did reject the withdrawal. There can be no other reasonable inference because the matter proceeded for determination and the subject of withdrawal was deliberated upon by the Board in its decision. The question still remains whether the Respondent erred in law by denying the Complainant the withdrawal without informing him in writing giving reasons.

29. We have not seen any provision in the guideline requiring that before the Respondent denies a request for withdrawal of a complaint, it must inform the Complainant per paragraph (iv). The information to the Complainant, in writing, of the reasons for the Respondent's decision is simply that - information - and it is future action, i.e. in the aftermath of the decision to reject. We have noted that counsel for the Respondent in its Heads of Argument have stated that the Respondent's failure to respond to the Complainant's withdrawal letter was a technical oversight. There is no evidence to that effect. In any case, our interpretation of the paragraph is that the Respondent could in its discretion even chose to inform the Complainant in the aftermath of the final decision of the Board; there is no time frame.

30. Furthermore, there is no authority for the Appellant's proposition that paragraph (iv) is couched in mandatory terms by use of the word "will". To the contrary, it is trite that the drafting style in our jurisdiction, as in many other Commonwealth jurisdictions, employs the word "shall" for obligatory or mandatory action. We understand the words "will" as conveying the idea of acting on volition or at will, which is not mandatory. We also note that the words "The Complainant will be informed" are passive, not active. Moreover, even if the paragraph had been couched in mandatory terms, it would not result in a mandatory obligation on the Respondent. This being a procedural guideline and therefore merely regulatory or

directory, it would not be mandatory on the Respondent. This is discussed further under Ground (b).

31. Therefore, we conclude that the Respondent did not err in law nor did it abrogate its Competition and Consumer Protection Commission Guidelines of Practices and Procedure, 2014 when it denied the request for withdrawal of the complaint without informing the Complainant in writing of the reasons for the decision. This ground of appeal fails.

GROUND (b)

That the Respondent erred in law and fact when it breached rules of natural justice which give the Appellant the right to be heard when the Respondent proceeded to render a decision regarding the complaint by the Complainant without advising the Appellant that the withdrawal of the complaint by the Complainant was denied which would have forewarned the Appellant on the need to respond to the preliminary report on allegations of unfair trading practices against the Appellant.

32. Counsel for the Appellant has argued that by breaching its own guidelines, the Respondent breached rules of natural justice which give the Appellant the right to be heard. Counsel has cited **Halsbury's Laws of England**, 4th Edition Vol. 1, para. 25, which provides that:

> *"The question whether non-compliance with procedural or formal requirements renders nugatory the purported exercise of a statutory power has been in issue in a very large number of reported cases, from which but a few principles can be elicited. The normal consequences of non-compliance with requirements is invalidity. Those requirements are, however, classifiable as mandatory or directory, and where provision is merely directory, substantial compliance will be sufficient, and in some cases total non-compliance will not affect the validity of the action taken. It is broadly true that such will more readily be held to be directory if they relate to the performance of a statutory duty, especially if serious public inconvenience from holding them to be mandatory, rather than to the exercise of a statutory power affecting individual interests, and that the more severe the potential impact of the exercise of a power on individual interests, the greater is the likelihood of procedural or formal provisions being held to be mandatory."*

33. Counsel has cited the case of **North-Western Energy Company Limited v. Energy Regulation Board** (2011) ZR 513, in which the High Court Judge addressed the import of procedural fairness, specifically the following:

> "12. *In keeping with the goal of procedural fairness, the courts ensure that administrative decisions or actions conform with the procedural rules that are expressly laid down in the statute, or instrument by which the jurisdiction of the administrative body or public official is conferred.*

13. An important concern of procedural justice is to provide the opportunity for individuals to participate in decisions by public authorities that affect them.

14. Another concern of procedural justice is to promote the quality, accuracy and rationality of the decision-making process. Both concerns aim at enhancing the legitimacy of the process, whilst at the same time improving the quality of decisions made by public authorities."

34. Counsel has also cited the Supreme Court case of **Zinka v. The Attorney-General** (1990 - 92) ZR 73 (SC) in which the Court addressed the importance of the rules of natural justice in relation to *"the exercise of power to deprive a person of his livelihood; or of his legal status where that status is not merely terminable at pleasure; or to deprive a person of liberty or property rights or any other legitimate interests or expectations or to impose a penalty."*

35. Counsel has further referred us to this Tribunal's ruling in an interlocutory application (delivered on 29th April 2015) in the case of **Macnicious Mwimba v. Airtel Networks Zambia Plc** (2014/CCPT/015/CON). The Tribunal had the following to say:

"... ends of justice and in particular values of rules of natural justice would be served if parties are fully accorded the opportunity of being heard at the first instance, that is, before the Commission. We acknowledge that the Tribunal cannot determine the procedure and practice of the Commission, but we urge the Commission to review its ... procedures and practice in order to contribute to the enhancement of efficiency and quality in the delivery of justice at all levels of the hierarchy."

36. Counsel has argued that as a consequence of the Respondent violating its aforesaid guidelines, the Appellant was denied its right to be heard. Further, that the lack of response to the Appellant on the subject matter misled the Appellant to believe that the withdrawal of the complaint was accepted. And further that because the Respondent violated its guidelines in not conveying to the Complainant its decision denying the withdrawal of the complaint, the Respondent's decision (Board decision of 26th April 2018) is invalid and ought to be set aside. And that the decision is also invalid and ought to be set aside on the ground that the Appellant was condemned without being heard.

37. Counsel for the Respondent has refuted the Appellant's allegation and arguments that it was denied the right to be heard, and pointed us to the Notice of Investigation to which the Appellant did not respond in spite of the criminal sanction that the conduct could attract. Counsel for the Respondent has further referred us to the Tribunal decision in the case of **MTN Zambia Limited v. The Competition and Consumer Protection Commission** (2013) in which it was held that *"the Appellants' failure to respond to the Notice of Investigation ... was a serious dereliction of duty on the part of the Appellant and could be construed to mean a lack of defence on their part."*

38. Counsel for the Respondent has further argued that in response to the Appellant's Advocates' letter of 2nd February 2018 requesting for extension of time within which

to respond to the Respondent's preliminary report, the Appellant was granted extension up to 14th February. That, however, the Appellant's Advocates did not respond, but instead the Complainant on the same day wrote a letter withdrawing the complaint and the Appellant's Advocates later on 22nd February 2018 wrote a letter to the Respondent stating that it had received confirmation from its client that the complaint had been withdrawn. Further, that the Appellant should have responded to the preliminary report. Referring to Guideline 8 (iv) and (v)[1], counsel for the Respondent has argued that the Respondent performed its part by giving the Appellant ample time, including an extension of time, within which to respond but the Appellant chose not to exercise its right thereby depriving itself of the right to be heard. Guideline 8 (iv) and (v) read as follows:

> *"(iv) The Complainant (provided it is not the Commission) and Respondent shall be notified of the Secretariat's findings and its proposed recommendation to the Board, following a complete investigation through a report pursuant to section 55 (10).*
>
> *(v) The Respondent and Complainant have the right to respond to the Secretariat's findings and shall be given seven (7) working days to respond to Secretariat's findings, in relation to Part VII cases while 14 working days will be given as regards cases contained in any other part of the Act."*

39. Counsel for the Respondent has further argued that the Appellant had an obligation to respond and that the aspect of the guidelines providing for communication to the Complainant did not relate to the Appellant; therefore, it could not be a basis for the Appellant not responding.

40. The Appellant is seeking to assail the validity of the decision of the Respondent's Board and to have it set aside on the basis that the Complainant was not informed in writing of the Respondent's decision to reject withdrawal of his complaint per paragraph (iv) of Guideline 8 of the Respondent's guidelines, and that as a consequence the Respondent deprived the Appellant of its right to be heard.

41. We have already determined under Ground (a) that the Respondent did not err in law or violate its guidelines by not informing the Complainant of its decision to reject the withdrawal of complaint and the reasons thereof.

42. In any case, even if the guideline had used obligatory terms, such as "shall" so as to amount to procedural requirements, the common law position, as reflected in the passage from Halsbury's Laws of England cited by counsel for the Appellant, is that the question whether or not procedural requirements are mandatory depends on their objective; hence *"it is broadly true that such will more readily be held to be directory if they relate to the performance of a statutory duty, especially if serious public inconvenience from holding them to be mandatory, rather than to the exercise of a statutory power affecting individual interests, and that the more severe the potential impact of the exercise of a power*

[1] Apparently, Guideline number 8 has been erroneously repeated in the guidelines.

on individual interests, the greater is the likelihood of procedural or formal provisions being held to be mandatory."

43. In our jurisdiction, the above position has been clearly pronounced by the Supreme Court in cases where it has been held that as a general rule, rules of procedure are regulatory or directory and not mandatory. In **The Republic of Botswana, Ministry of Works Transport and Communications, Rinceau Design Consultants (Sued as a firm previously T/A Kz Architects) v. Mitre Limited** (1995) ZR 112, the Supreme Court held, *"The high Court rules, like the English rules, are rules of procedure and therefore regulatory and any breach of these rules should be treated as mere, irregularity which is curable."* At page 115, the Court went on to state, *"Rule 13 of Order 45 is therefore directory or regulatory and not mandatory."* The Court cited its earlier decision in **Leopold Walford (Z) Ltd v Unifreight** (1985) Z.R. 203 at page 205 where the Court held that as a general rule, breach of a regulatory rule is not fatal.

44. In the present case, what is in issue are procedural guidelines, which as we have earlier stated are couched in terms that give the Respondent leeway to inform the Complainant the reasons for its decision in writing, and without a time frame.

45. Furthermore, according to Black's Law Dictionary, a guideline is *"a practice that allows leeway in its interpretation."*[2] It is clear from the Act, under which the guidelines are made, that they are intended to assist the Respondent in effectively carrying out its functions under the Act. The guidelines bind the persons regulated under the Act. They do not fetter but guide the Commission in its conduct as regulator; the regulator must enjoy leeway or latitude in order to give effect to objectives of the Act. Section 84 (1) and (3) of the Act states:

> *"(1) The Commission may make such guidelines as are necessary for the better carrying out of the provisions of the Act.*
>
> (3) *The guidelines issued by the Commission under this Act shall bind all persons regulated under this Act.*

The preamble to the guidelines states, *"In applying these guidelines, the facts and circumstances of each case will be considered on a case by case basis."*

46. Even if the guidelines had been couched in obligatory terms such as "The Commission shall inform the Complainant ....", serious public inconvenience and injustice would be caused if the guidelines were to be held to be mandatory on the Respondent, resulting in every breach invalidating the process and decisions emanating therefrom. For example, in the case of Guideline 8 (v) cited by counsel for the Respondent requiring a respondent and a complainant to respond to a preliminary report within seven (7) days in the case of alleged violations under Part VII, there would be no room for the Respondent exercising its discretion to extend

[2] Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.

the period. In this very case before us, the Respondent demonstrated that flexibility in its application of the guidelines.

47. Furthermore, there was no violation of any right in that the guideline in issue does not give a complainant a substantive or enforceable right. According to the same cited guidelines, the Respondent is entitled to reject a withdrawal and proceed with an investigation and to retain material that it has obtained for purposes of evidence. This is in line with its function of investigating under section 5, and its powers to investigate under section 55 (1) of the Act, whether on its own initiative or on a complaint made by any person.

48. The Complainant did not suffer any prejudice by not being informed of the Respondent's decision. The Appellant had no right under the guidelines to be informed of the Respondent's decision rejecting the withdrawal of complaint.

49. The Appellant has alleged that as a consequence of the Respondent violating its aforesaid guidelines, the Appellant was denied its right to be heard. Further, that the lack of response to the Appellant's letter of 22nd February 2018 on the subject matter misled the Appellant to believe that the withdrawal of the complaint was accepted. We agree with counsel for the Respondent that the Appellant was given ample time within which to respond to the Notice of Investigation (concerning which it later gave excuses of internal administrative issues for its failure to respond). It was again given an opportunity to respond to the preliminary report, the time for which was extended to 14th February 2018 upon request by its Advocates.

50. There was no justification for the Appellant not responding merely because the Complainant had written to the Respondent withdrawing his complaint; the letter did not automatically result in termination of the investigation or the case, which the Appellant's Advocates should have known. It is therefore surprising that in its letter of 22nd February 2018, the Appellant suggested that the withdrawal of the complaint meant that the matter was terminated. Furthermore, the Appellant's Advocates not only failed to respond to the preliminary report by the deadline of 14th February 2018, but they wrote the letter eight days later.

51. While it is true that the right to be heard is cardinal and that we said as much in the cited Tribunal ruling in the **Macnicious Mwimba v. Airtel** case, the facts of the present case are such that it would be stretching it too far to argue the principle here. This is because the Appellant was accorded abundant opportunity to be heard on the allegations against it. Further, the circumstances of the present case can be distinguished from the case of **North-Western Energy Company Limited v. Energy Regulation Board** because the procedural rules in that case had implications materially affecting substantive rights. In the same vein, the holding in the Zinka case emphasised the deprivation of a livelihood or a legal status where that status is not merely terminable at pleasure, or to deprive a person of liberty or property rights or any other legitimate interests or expectations or to impose a penalty. These are

serious violations of substantive rights and the guidelines in issue do not accord such rights to the Complainant, let alone the Appellant.

52. It follows from what we have concluded above that the Respondent's decision cannot be voided or set aside as canvassed. This ground of appeal fails too.

GROUND (c)

That the Respondent erred in law and fact when it failed to notify the Appellant of the Respondent's refusal to withdraw the aforesaid complaint by the Complainant, thereby violating the legitimate expectation that it would not proceed to render the decision without first notifying the Appellant of the Respondent's refusal to withdraw the Complainant's complaint.

53. Counsel for the Appellant has argued that the Respondent violated the legitimate expectation that the Respondent would not proceed to render the decision without notifying the Appellant of its refusal to withdraw the Complainant's complaint. Further, that the legitimate expectation arose from the Respondent's own guidelines which provide that the Respondent ought to notify the reasons for denying withdrawal of a complaint in writing. Counsel has cited authorities on the doctrine of legitimate expectation, which show that it is premised on the principles of fairness and reasonableness in a situation where a person has an expectation in a public body retaining a long-standing practice or keeping a promise. The case of **Vodacom v. Communication Authority,** Appeal No. 98 of 2008 was cited as authority that in our jurisdiction, the doctrine of legitimate expectation has been approved by the Supreme Court.

54. A persuasive authority where a claim of a legitimate expectation was rejected was cited as **Preston v. Inland Revenue Commissioners** (1985) 2 All ER, at page 341 where Lord Scarman said, *"In my opinion the ... correspondence does not disclose any agreement or representation that the commissioners would abandon their right and neglect duty of raising further assessments on the taxpayer before April 1983 in respect of any of the matters canvassed in the correspondence if further information showed that, notwithstanding the explanations furnished by the taxpayer in 1978, further tax was chargeable."*

55. Counsel for the Appellant also referred us to the earlier cited case of **North-Western Energy Company**, where the High Court judge considered and held as follows (relying on the earlier cited Supreme Court decision in the **Vodacom v. Communication Authority** case):

> "18. *'Legitimate expectation' arises where a decision maker has led someone to believe that they will receive or retain a benefit, or advantage including that a hearing will be held before a decision is taken.*
>
> *19. The protection of legitimate expectation is at the root of the constitutional principle of the rule of law, which requires regularity, predictability and certainty in government's dealings with the public.*

20. The doctrine of legitimate expectation derives its justification from the principle of allowing the individual to rely on assurances given and to promote certainty and consistent administration."

56. In response, counsel for the Respondent has argued that by the time the Appellant wrote the letter concerning the withdrawal of the complaint (on 22nd February 2018), the Appellant was already out of time in responding to the preliminary report. Counsel referred us to the Respondent's Guideline (vi) which states that, *"Upon the expiry of 7 working days within which parties are to respond to the Secretariat's findings, the Secretariat shall submit its findings to the Board."*

57. Further, counsel has argued that the Appellant acted recklessly by presuming that the investigation had terminated, on the basis of the letter from the Complainant withdrawing the complaint. Counsel for the Respondent has cited the case of **Vodacom v. Communications Authority**, earlier referred to, quoting its holding:

> *"Legitimate expectation arises where a decision maker has led someone to believe that they will receive or retain a benefit, or advantage including that a hearing will be held before a decision is taken. The doctrine of legitimate expectation derives its justification from the principle of allowing the individual to rely on assurances given and to promote certainty and consistent administration."*

58. Counsel has argued that the Respondent did not give any assurance to the Complainant or the Appellant that the investigation would be discontinued, and that this is inconsistent with the doctrine of legitimate expectation. Further, that neither does the guideline in issue give assurance that a complaint is withdrawn automatically.

59. We have keenly considered this ground of appeal. As we have concluded under grounds (a) and (b), no right was created by the guideline in issue; the Respondent could of its own volition communicate in writing to the Complainant, giving reasons for the Respondent's decision not to accept the withdrawal of his complaint. Therefore, by not informing the Complainant or Appellant, the Respondent did not violate any right. Furthermore, the procedural guidelines do not have in view the Appellant; the Appellant is obligated by the Act to respond to the Notice of Investigation.

60. In its letter, which was written long after its extended time for responding to the preliminary report had expired, the Appellant did not specifically state that its failure to respond was because of withdrawal of the complaint. The Appellant's Advocates simply thanked the Respondent for having extended the time for its response to the preliminary report. Thereafter, they stated that they had received confirmation from their client that the complaint had been withdrawn and that therefore they trusted that the complaint had been resolved and matter discontinued (enclosing copy of the withdrawal letter). In other words, the Appellant's Advocates hoped that the withdrawal had terminated the case, but did not seek for more time to respond to the report in the event the case was not discontinued.

61. The Appellant's Advocates' letter was not responded to; but this could not validly be said to give rise to a legitimate expectation in the terms described by the Appellant or at all. There having been no request for more time from the Appellant and no agreement or assurance or affirmative response on the part of the Respondent.

62. In light of the foregoing, we find no basis for the position taken by the Appellant that the guideline in issue and the Respondent's failure to respond to its letter of 22nd February 2018 gave rise to a legitimate expectation that it would not proceed to render its decision without first notifying the Appellant of the Respondent's refusal to withdraw the complaint. This ground of appeal therefore fails too. The Appellant is unsuccessful on all the three grounds of appeal.

63. We also address our minds in passing to the decision of the Board at page 41 of the Respondent's Record of Proceedings wherein it is stated that the Board reviewed the Appellant's file in which it was found that previously the Appellant was found by the Respondent's Board to have breached section 49 (5) of the Act. That this was in the case involving Ms. Lungowe Akapelwa. The Board fined the Appellant K500 in its decision of 29th August 2017. This in our view cannot go without comment.

64. By way of comparison with the fines in Table 2 of the Respondent's 2014 Guidelines on Issuance of Fines set out for MSMEs[3], we have found that the baseline for the specified offences (which does not include those under section 49 of the Act) is 0.5% of annual turnover. The lowest indicative capping for fines is K1,000 for annual turnovers below K10,000. The highest indicative cap is K50,000 for annual turnovers in excess of K1,000,000.[4] This is instructive, particularly that Table 2 and its indicative caps were designed to protect MSMEs against burdensome fines, and the Appellant is obviously not among MSMEs. Neither are offences under section 49 of the Act captured in Table 2 and the indicative caps thereof.

65. According to principles of sentencing, penalties are intended to serve as punishment and to deter offenders and would-be offenders. The fine of K500 imposed by the Board in its decision of 29th August 2017 against the Appellant falls far below even the lowest category of annual turnovers, that is turnover below K10,000 with the indicative cap of K1,000 for MSMEs in Table 2 of the Respondent's 2014 Guidelines on Issuance of Fines. The baseline indicated for offenses outside of Table 2 is 0.5% of annual turnover. One wonders what the fine of K500 is in relation to the Appellant's annual turnover. The fine of K500 was not only arbitrary, but amounted to serious miscarriage of justice and an affront to the rule of law.

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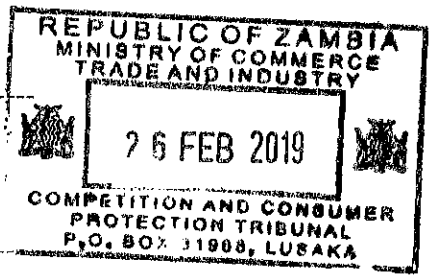
[3] The 2008 policy document on development of MSMEs gives an indication of categories of MSMEs. A Micro Enterprise's features include an annual turnover of not more than K150,000. A Small Enterprise's annual turnover ranges from K151,000 to K300,000. A Medium Enterprise's annual turnover ranges from 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).

[4] We reviewed the application of the indicative caps in our judgment delivered on 28th February 2018 in the **Macnicious Mwimba** case, earlier referred to. This was particularly so as to rationalise the application of these caps to enterprises that do not fall within the MSMEs categories. See pages 44 – 45 of the judgment.

66. In conclusion, the appeal is dismissed with costs to the Respondent. The costs to be agreed and in default to be assessed by the Tribunal.

67. A person aggrieved with this judgment may appeal to the High Court within 30 days as provided by section 75 of the Act.

Delivered at Lusaka this 26th day of February 2019



Willie A. Mubanga, SC
Chairperson

Miyoba B. Muzumbwe-Katongo
Vice Chairperson

Chance Kabaghe	Rocky Sombe	Eness C. Chiyenge
Member	**Member**	**Member**