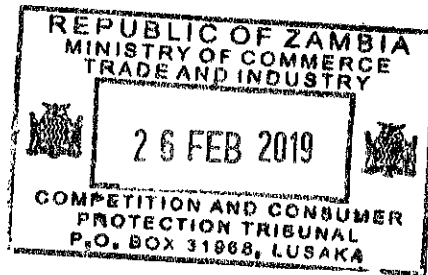


IN THE COMPETITION AND CONSUMER PROTECTION TRIBUNAL  
HOLDEN AT LUSAKA

BETWEEN:

MTN ZAMBIA LIMITED

AND



APPELLANT

COMPETITION AND CONSUMER PROTECTION  
COMMISSION (IN RE CRYSON MWAMBWA)

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 and Corporate Affairs  
Mrs. Mtonga and Ms. N. Pilula, Legal Officers – Competition and Consumer Protection Commission

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JUDGMENT

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**Legislation referred to:**

1. Competition and Consumer Protection Act No. 24 of 2010, sections 5 (d), 45 (a), 46 (1) and (2), 47 (a) (ii) and 49 (5), (6) and (7); 55 (1); 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.

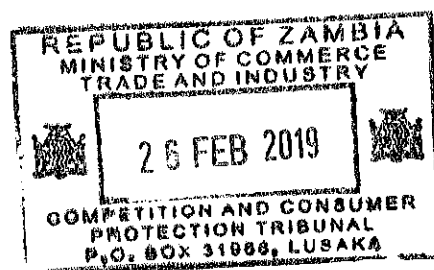
1. The background to this judgment is that Mr. Cryson Mwambwa (whom we shall refer to as "the Complainant") filed a complaint with the Competition and Consumer Protection Commission (which we shall refer to as "the Respondent") against MTN Zambia Limited (which we shall refer to as "the Appellant"). This was by way of a formal complaint filed on 30<sup>th</sup> May 2017, to which the Complainant attached copy of a letter he had written to the Appellant dated 7<sup>th</sup> March 2017. (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 12<sup>th</sup> March 2017, the Complainant received a message from the Appellant at 10:55 hours which stated, "*first to score promotion and win a smart phone*". He said he entered and predicted P. Daka then the message disappeared and there came a different one, which he attached to his letter of complaint to the Appellant. It read, "Y'ello, thank you for your entry into the Football First to Score promotion. Good Luck! (See page 4 of the Respondent's Record of Proceedings"
3. The Complainant in his letter went on to state that the football game was Zambia vs. Senegal at Heroes Stadium and that his prediction came true. He further alleged that on 13<sup>th</sup> March 2017, he went to the Appellant company to find out. That he was told that he had won but he was advised to go back on Tuesday as this day (Monday) was a holiday. That on 14<sup>th</sup> March 2017, he was told to wait as the Appellant was still compiling the list of all the winners. That when he went back after a week, he was told that the winners had already collected their prizes. He went on to inquire of the Appellant how he was left out when he had made the correct prediction as required by the Appellant. Finally, he said upon complaining, he was advised to write the letter to the CEO.
4. The Respondent wrote a Notice of Investigation to the Appellant, together with an accompanying letter, both dated 1<sup>st</sup> June 2017. The Respondent said the conduct complained of by the Complainant appeared to be contravention of section 46 (1), as read with section 45 (a) and section 47 (a) (ii) of the Competition and Consumer Protection Act, No. 24 of 2010 ("the Act"). The Respondent outlined the Complainant's allegations as per the letter of complaint and added that the Complainant had alleged that he did not receive a response from the Appellant despite writing a letter of complaint to the CEO. Further, that the Complainant alleged that on 18<sup>th</sup> May 2017, he made a follow up but the Appellant told him they would call him around 09:00 hours but did not do so. Further, that the Complainant was demanding that he be given the smartphone prize he won in the competition promotion. (See pages 5-7 and 8-9 of the Respondent's Record of Proceedings).



5. The Appellant was requested to respond to the Notice within 14 days of receipt of the Notice and accompanying letter. In the accompanying letter, the Respondent specifically requested the Appellant for a statement responding to the allegations; and Terms and Conditions of the promotion.
6. In response by letter dated 11<sup>th</sup> July 2017, the Appellant stated findings of an internal investigation, amongst which were the following:
  1. The Appellant was running a competition to allow all its Pre-Paid subscribers, except for MTN staff, and community pay phones to predict which Zambian player would score the first goal in the under 20 AFCON final match between Zambia and Senegal.
  2. The first 10 who guessed correctly won smart phones while the next 10 won K20 airtime each (the mobile numbers were drawn on Tuesday morning on March 14<sup>th</sup> 2017.
  3. The message sent to subscriber was "Smartphone Prize!! SMS the Name of the Zambian player who will score first to 223 @K0.21/SMS.
  4. Mr. Mwambwa (the Complainant was not amongst the first 10 subscribers and as such did not win.

The Appellant attached to its letter the mechanics (rules/procedures) of the promotion. (See pages 10-13 of the Respondent's Record of Proceedings).

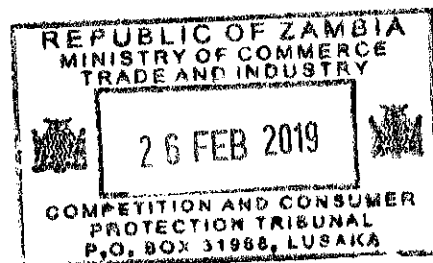
7. In the ensuing email correspondence between officers of the Respondent and the Appellant, the latter confirmed that the Complainant participated in the promotion. The Appellant was requested by the Respondent to provide the advert for the promotion and the avenues used to advertise the promotion, but there was no response to the request. (See pages 14-17 of the Respondent's Record of Proceedings).
8. In January 2018, the Respondent prepared a report among which were the following findings:
  1. The Complainant participated in "*the football first to score promotion and win a smartphone*" competition.
  2. The terms and conditions for the competition were that the first 10 who guessed correctly won smartphones each from the Appellant while the next 10 won K20 airtime each.
  3. The Appellant did not avail the terms and conditions to the Complainant prior to participating in the promotion.
  4. Those who participated and won confirmed receipt of their prizes from the Appellant.



5. The Appellant did not give the Complainant a position as to whether or not he had won the competition from 14<sup>th</sup> March 2017 up to the time he lodged a complaint with the Respondent.
6. The Appellant had a previous violation of section 49 (5) of the Act.
9. The report indicated that following issuance of the Notice of Investigation to the Appellant dated 1<sup>st</sup> June 2017, another Notice was served on the Appellant on 2<sup>nd</sup> January 2018 which included section 49 (5) of the Act. (see paragraph 26 at page 22 of the Respondent's Record of Proceedings). There is no dispute that both notices were served on the Appellant; we note that in its Amended Affidavit Verifying Facts on Appeal, the Appellant referred to and produced copy of the Notice of Investigation dated 28<sup>th</sup> December 2017, marked "NS1", which is apparently the second as it includes section 49 (5) of the Act. Paragraph 32 of the report, at page 24 of the Record of Proceedings indicates that on 3<sup>rd</sup> January 2018, the Respondent contacted the Appellant for further submissions on the investigation, but the latter responded that it had already made its submissions on the subject matter.
10. The report also concluded, on the basis of the findings, that it was established that the Appellant engaged in unfair trading practice, in violation of section 46 (1) as read together with section 45 (a); section 47 (a) (ii) and section 49 (5) of the Act, inviting consequential punitive and restitutive measures per subsections (6) and (7) respectively, all of which provisions were quoted.
11. It was also recommended in the report that:
  1. The Complainant be awarded the smartphone prize by the Appellant as he made a correct prediction.
  2. The Appellant being a first time offender be fined K500 for violation of section 46 (1) as read with section 45 (a) of the Act in accordance with section 46 (2) of the Act.
  3. The Appellant being a first time offender of section 47 (a) (ii) of the Act be fined K500 in accordance with section 47 of the Act.
  4. The Appellant being a second time offender of section 49 (5) be fined 0.5% of its annual turnover.

(See pages 19-31 of the Respondent's Record of Proceedings for the whole report and service thereof on the Appellant and Complainant)

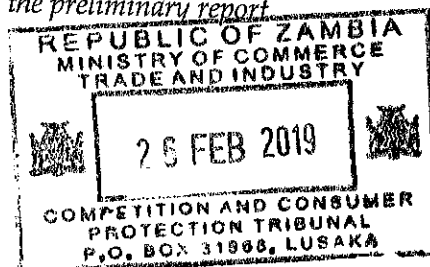
12. The Respondent served the preliminary report on the Appellant on 25<sup>th</sup> January 2018 by letter dated 23<sup>rd</sup> January 2018, which was copied to the Complainant. The Respondent requested the Appellant to respond to the report within seven (7) days of receipt, prior to the report being presented to the Technical Committee of the



Respondent's Board for its determination. (See page 18 of the Respondent's Record of Proceedings.)

13. According to a letter from the Appellant's Advocates to the Respondent dated 31<sup>st</sup> January 2018, the Appellant had held a meeting with the Respondent on 29<sup>th</sup> January 2018 at which the former undertook to revert by 2<sup>nd</sup> 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. The Respondent granted the extension and directed the Appellant to respond on or before 13<sup>th</sup> February 2018. (See pages 32-34 of the Respondent's Record of Proceedings.)
14. By letter dated 2<sup>nd</sup> February 2018, the Appellant directly wrote to the Respondent, making reference to a meeting held on 30<sup>th</sup> January 2018. But apparently the letter referred to addressed various other matters between the two parties. Of note, however, is that 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 correspondent 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 the new contact person had been out of the country for treatment. (See pages 36-37 of the Respondent's Record of Proceedings.)
15. On 14<sup>th</sup> February 2018, the Appellant's Advocates not having responded to the Respondent's report by 13<sup>th</sup> February 2018, requested for more time indicating 16<sup>th</sup> February 2018. (See email at page 34 of the Respondent's Record of Proceedings.) There is no evidence on record that the request was granted.
16. According to minutes on the Respondent's Record of Proceedings, on 16<sup>th</sup> February 2018, representatives of the two parties and the Complainant met. The representative of the Appellant expressed its readiness to redress the Complainant by giving him the smartphone, but that the Complainant wanted to seek the Respondent's advice. The representative of the Respondent advised that it was in order for him to receive the smartphone because that was one of the recommendations in the report. Further, that the Complainant was free to drop his withdrawal letter since he received the phone and that the Executive Director would guide on the way forward. The Complainant wrote and served the letter withdrawing the complaint the same day. (See pages 38-40 of the Respondent's Record of Proceedings.)
17. The Appellant did not respond to the Respondent's preliminary report, but by letter dated 22<sup>nd</sup> February 2018, the Appellant's Advocates wrote to the Respondent as follows (quoting only the relevant part):

*"We refer to our letter dated 31<sup>st</sup> 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 16 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 page 41 Respondent's Record of Proceedings.)

18. 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 26<sup>th</sup> April 2018. The Respondent's Board assessed the Appellant's conduct subject of the complaint and the offences and penalties and restitution in terms of sections 46 (1), (2); 45 (a); 47 (a) (ii) and 49 (5), (6) and (7) of the Act, respectively which state as follows:

45. A trading practice is unfair if –

(a) it misleads consumers;

46. (1) A person or an enterprise shall not practice any unfair trading.

(2) A person who, or an enterprise which, contravenes subsection (1) is liable to pay the Commission a fine not exceeding ten percent of that person's or enterprise's annual turnover or one hundred and fifty thousand penalty units, whichever is higher.

47. A person who, or an enterprise which –

(a) falsely represents that –

(i) ...;

(ii) any services are of a particular standard, quality, value or grade;

(iii) ...;

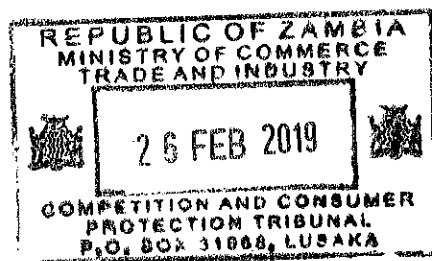
(iv) ...; or

(v) ...; or

(b) ...;

*is liable to pay the Commission a fine not exceeding ten percent of that person's or enterprise's annual turnover or one hundred and fifty thousand penalty units, whichever is higher.*

49. (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 specific time was 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.”

19. The Respondent's Board's finding was that the Appellant made a false representation to the Complainant about the competition because it did not provide adequate information. The Respondent observed that the terms and conditions of the competition were not availed to the Complainant in the SMS prior to participating in the competition. That, therefore, the Appellant breached section 46 as read together with section 47 (a) (ii) of the Act.

20. The Respondent's Board also found that the Appellant did not give the Complainant as to whether or not he had won the competition from 14<sup>th</sup> March 2017 up to the time he lodged the complaint. The Board observed that having conducted the draw on 14<sup>th</sup> March 2017, the Appellant could have simply informed the Complainant of the outcome instead of delaying for close to three months. The Board concluded that the Appellant's conduct was not reasonable and amounted to breach of section 49 (5) of the Act.

21. The Board further found that the Complainant wrote a letter withdrawing the complaint.

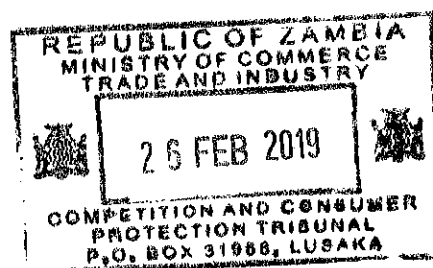
22. All in all, the Respondent's Board concluded that the Appellant engaged in unfair trading practice and that it violated section 46 (1) as read together with sections 45 (a), 47 (a) (ii) and 49 (5) of the Act. The Board further directed that the Appellant be fined as follows:

(i) As first time offender, 0.5% of annual turnover for violation of section 46 (1) as read with section 45 (a) of the Act in accordance with section 46 (2) of the Act.

(ii) As first time offender, 0.5% of annual turnover for violation of section 47 (a) (ii) of the Act in accordance with section 47 of the Act.

(iii) As second time offender, 0.5% of annual turnover for violation of section 49 (5) of the Act in accordance with section 49 (6) of the Act.

(See page 52, paragraph 42; and pages 54-56 of the Respondent's Record of Proceedings)

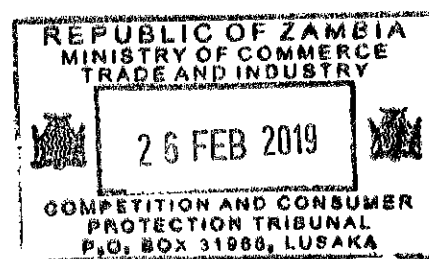


23. In its Amended Notice of Appeal filed on 2<sup>nd</sup> October 2018, the Appellant appealed the whole decision of the Respondent and sought the following reliefs:
- (i) That the entire decision be set aside;
  - (ii) Legal costs; and
  - (iii) Any other relief that the Tribunal may deem necessary.
24. In its Notice of Grounds in Opposition to Grounds of Appeal, filed on 5<sup>th</sup> October 2018, the Respondent 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 as found fit.
25. In the course of our proceedings, on 27<sup>th</sup> August, 28<sup>th</sup> September and in particular on 7<sup>th</sup> December 2018, counsel for the Appellant indicated that they intended to rely on the Amended Notice of Appeal and Affidavit Verifying Facts filed on 2<sup>nd</sup> October 2018, together with the Heads of Argument filed on 25<sup>th</sup> October 2018. On their part, counsel for the Respondent indicated that they would rely on the Amended Notice of Grounds in Opposition to Grounds of Appeal filed on 5<sup>th</sup> October 2018 and the Heads of Argument both filed on 5<sup>th</sup> November 2018. We granted the parties' request and reserved judgment.
26. 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.
27. 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 1

**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 the Complainant without informing the said Complainant in writing of the reasons for the decision to deny the said withdrawal.**

28. Under ground 1, the Appellant has argued at length that the Respondent abrogated the guidelines cited in its ground of appeal, in particular paragraph 8 of the Competition and Consumer Protection Guidelines of Practice and Procedure, 2014, which reads as follows:

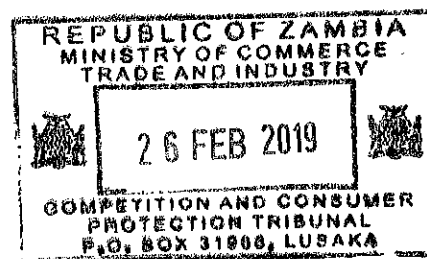




- (i) *A Complainant may make a request to withdraw a complaint lodged before the Secretariat in writing stating the reasons. The Secretariat shall exercise its discretion in making a decision whether or not to grant the request for withdrawal, taking into account such factors as relate to public health, 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.*

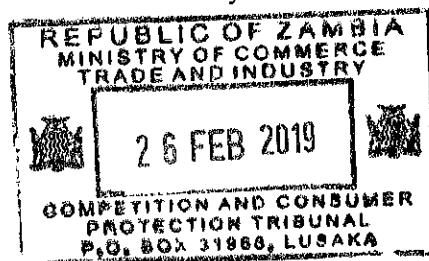
29. Counsel for the Appellant has argued and cited a number of authorities on the principle that the literal rule of interpretation (i.e. the plain meaning of a statute) should be applied where the words used are precise and unambiguous as the case of the guidelines in issue. Counsel has further argued that paragraph (iv) is couched in mandatory terms by using the word "will". Counsel has also canvassed that the Respondent did to respond to the Complainant's letter and the Appellant's letter at pages 28 and 32 respectively of the Respondent's Record of Proceedings. Further that instead, the Respondent proceeded to render its decision at pages 37-45, whilst aware of the letter of withdrawal. Further that the Respondent made a conscious decision not to inform the Complainant and the Appellant of the reasons for the refusal of withdrawal of the complaint which was in violation of Paragraph 8 (iv) of its Guidelines.

30. On the other hand, counsel for the Respondent's argument is that it did not abrogate its guidelines because it has discretion under the guidelines to accept or reject a request for withdrawal. Counsel has cited section 5 (d) of the Act which mandates the Respondent to investigate unfair trading practices and argued that it follows that a request to withdraw is not automatic. 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 provisions of the Act, which conduct affected other consumers who participated in its promotion subject of the complaint. Further that the Respondent was conscious of the need to deter the Appellant and that as a mobile service provider, the



Appellant deals with consumers on a daily basis, which requires that it provides services with reasonable care and skill and that they represent the correct standard of their products and services.

31. As we have stated in our earlier judgment today in the case of **MTN Zambia Limited v. The Competition and Consumer Protection Commission 2018/CCPT/009/CON**, in which the Appellant filed a similar appeal and argued in similar terms on all three grounds of appeal, this 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 does it question that the Respondent decided that the Appellant violated provisions 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 does the ground of appeal concern question the Respondent's discretion to reject a withdrawal of a complaint.
32. 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).
33. Although there is no direct evidence on record that the Secretariat rejected the withdrawal which the Complainant submitted on 16<sup>th</sup> 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 reflected in the Board's decision. The question still remains whether the Respondent erred in law by denying the Complainant the withdrawal without informing him in writing giving reasons.
34. As we said in our earlier judgment today which we have referred to above, 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.
35. 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 is discussed further under Ground 2.

36. 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 2

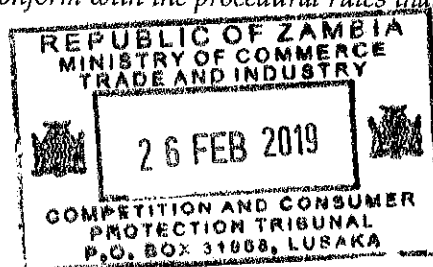
**That the Respondent erred in law and fact when it breached rules of natural justice which give the Appellant the right to be heard when the Respondent proceeded to render a decision regarding the complaint by the Complainant without advising the Appellant that the withdrawal of the complaint by the 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.**

37. 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**, 4<sup>th</sup> 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.”*

38. 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."*

39. 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."*

40. Counsel has further referred us to this Tribunal's ruling in an interlocutory application (delivered on 29<sup>th</sup> 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."*

41. 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 26<sup>th</sup> 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.

42. 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 responded.

43. Counsel for the Respondent has argued that in response to the Appellant's Advocates' letter of 31<sup>st</sup> January 2018 requesting for extension of time within which to respond to the Respondent's preliminary report, the Appellant was granted extension up to 13<sup>th</sup> February. That, however, the Appellant's Advocates did not respond, but instead on 14<sup>th</sup> February 2018 sent an email requesting for more time



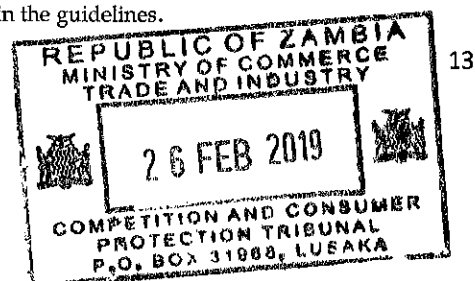
to respond by 16<sup>th</sup> February. Further, that no response to the report came, but on the 16<sup>th</sup> February 2018, the Complainant wrote a letter withdrawing the complaint and the Appellant's Advocates later on 22<sup>nd</sup> February 2018 wrote to the Respondent stating that it had received confirmation from its client that the complaint had been withdrawn and trusted that the investigation was discontinued. Further, that the Appellant should have responded to the preliminary report, referring to Guideline 8 (iv) and (v)<sup>1</sup>, which state 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."*

44. Counsel for the Respondent has further argued that the Appellant was given ample time to respond and that communication to a complainant on whether or not a matter has been withdrawn is not to a respondent (the Appellant in this case).
45. 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 the 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.
46. We have already determined under Ground 1 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 reasons thereof.
47. 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 on individual interests, the greater is the likelihood of procedural or formal provisions being held to be mandatory."*
48. 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**

<sup>1</sup> Apparently, Guideline number 8 has been erroneously repeated in the guidelines.



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.

49. 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.
50. Furthermore, according to Black's Law Dictionary, a guideline is "a practice that allows leeway in its interpretation."<sup>2</sup> 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.*

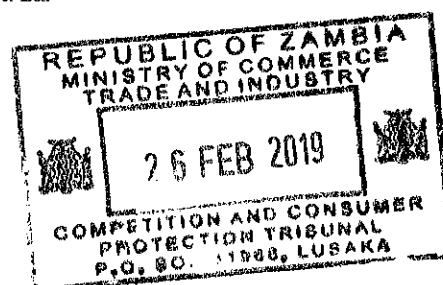
*(3) The guidelines issued by the Commission under this Act shall bind all persons regulated under this Act.*

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."

51. 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 the period. In this very case before us, the Respondent demonstrated that flexibility in its application of the guidelines.
52. 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.

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<sup>2</sup> Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.

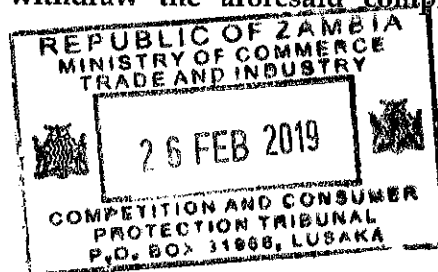


This is in line with its function of investigating under section 5 of the Act, and its powers to investigate under section 55 (1) of the Act, whether on its own initiative or on a complaint made by any person.

53. 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.
54. 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 22<sup>nd</sup> 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 served the Notice of Investigation and it is on record that it responded to the Notice. The Appellant was also given ample time within which to respond to the preliminary report, the time for which was extended to 13<sup>th</sup> February 2018 upon request by its Advocates.
55. 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 22<sup>nd</sup> 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 official deadline of 13<sup>th</sup> February 2018, but they wrote the letter nine days later.
56. 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.
57. 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.

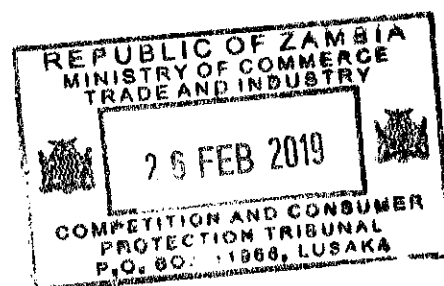
### GROUND 3

**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.**

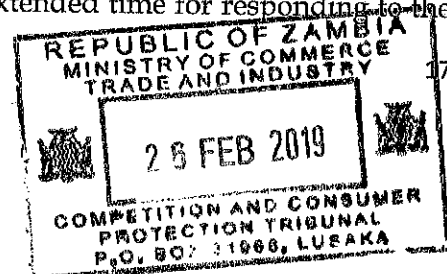
58. Counsel for the Appellant has argued that the Respondent violated the legitimate expectation that the Respondent would not proceed to render the decision without notifying the Appellant of its refusal to withdraw the Complainant's complaint. Further, that the legitimate expectation arose from the Respondent's own guidelines which provide that the Respondent ought to notify the reasons for denying withdrawal of a complaint in writing. Further, that the legitimate expectation was created due to the Respondent refusal or neglect to respond to the Complainant and the Appellant, and also due to the Respondent's own representations that the Appellant would be guided on the way forward, quoting the Minutes at page 38 of the Respondent's Record of Proceedings, "*Mrs Hamavhwa further guided that the Complainant was free to drop his withdrawal letter since he received the phone and the Executive Director will guide on the way forward. The Complainant submitted that he was satisfied with the redress he received.*"
59. 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.
60. 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.*"
61. 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.*"

62. In response, counsel for the Respondent has argued that the Respondent is not obligated by law to notify the Appellant of its refusal of withdrawal of a complaint. That while the Respondent should have informed the Complainant, this communication was not to the Appellant. Counsel has cited the meeting of 16<sup>th</sup> February 2018 at which the Respondent's officers guided the Complainant that he was free to receive the Smartphone as it was one of the recommendations given in the preliminary report and that he was at liberty to drop off his letter of withdrawal, and that the Executive Director would advise on the way forward. Counsel has argued that nowhere in those minutes did the Respondent advise the Appellant and the Complainant that the investigation had closed.
63. 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."*
64. Counsel has argued that the Respondent did not give any assurance to the Complainant or the Appellant that the investigation would be discontinued due to Complainant's withdrawal of the complaint and further, that neither does the guideline in issue give assurance that a complaint is withdrawn automatically. Furthermore, that by 16<sup>th</sup> February 2018 at the latest, taking into account the Appellant's request of 14<sup>th</sup> February for further extension, the Appellant should have submitted its response to the preliminary report. And that while the issue of communication of the decision of refusal of withdrawal of complaint was a procedural issue, the preliminary report raised substantive issues of violation of the Act to which the Appellant should have responded.
65. We have keenly considered this ground of appeal. As we have concluded under grounds 1 and 2, there was no right that 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 an accused person (the Appellant in this case), but a complainant. The Appellant remained answerable for those alleged violations unless and until otherwise determined by the Respondent.
66. In its letter of 22<sup>nd</sup> February 2018 at page 41 of the Respondent's Record of Proceedings, which was written long after its extended time for responding to the



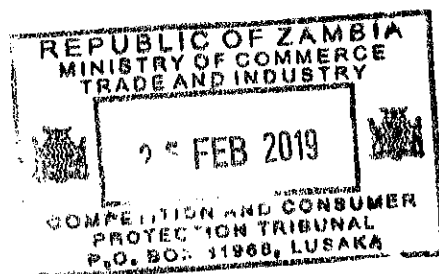
preliminary report had expired, the Appellant did not specifically state that its failure to respond was because of withdrawal of the complaint. The Appellant's Advocates did not even make a request that in the event the Respondent did not accept the withdrawal it should be afforded another opportunity to respond to the preliminary report. Instead, 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 the 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.

67. Therefore, the Appellant's Advocates' letter could not validly be said to give rise to a legitimate expectation in the terms described by the Appellant or at all. We have also critically evaluated the minutes at page 38 of the Respondent's Record of Proceedings quoted by counsel for the Appellant. This meeting was held on 16<sup>th</sup> February 2018, by which date the formal deadline for submission on the preliminary report (13<sup>th</sup> February) had expired. The minutes read as follows:

*"... This is in connection with the matter which Mr. Mwambwa Cryson ("... the Complainant") in which he alleged that he participated in the "first to score and win a smartphone" promotion and won but was not given the prize hence the complaint to the Commission to help him get his phone.*

*The Respondent, through their Senior Manager Commercial Legal, Mr Siamoondo submitted that they were ready to redress the Complainant by giving him his prize (Smart phone). The Respondent submitted that before this was the case, the Complainant wanted to seek advice from the Commission. Mrs Eunice Hamavhwa guided that the Complainant was at liberty to receive the phone as that was one of the recommendations in the report. Mrs Hamavhwa further guided that the Complainant was free to drop his withdrawal letter since he received the phone and the Executive Director will guide on the way forward. The Complainant submitted that he was satisfied with the redress he received."*

68. Our understanding of the context of the meeting and the content of the proceedings of the meeting is that in essence the settlement was between the Appellant and the Complainant and that the Appellant would have given the Complainant the Smartphone without the need for this meeting with the Respondent. That is, the Appellant would have done so if it were not for the Complainant's insistence that he wanted to be sure that he was free to receive the phone and that he was also free to write to withdraw the complaint. The Respondent's response was that he was free to receive the phone as it was one of the recommendations in the report; further, that he was also at liberty to write to withdraw the complaint and the Executive Director would guide on the way forward.



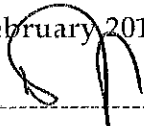
69. The guidance provided by Mrs. Hamayhwa was directed at the Complainant who was the person who needed guidance. The guidance to be given by the Executive Director as to the way forward would reasonably be understood to refer to the question whether or not the withdrawal would be accepted, concerning which the Respondent would communicate to the Complainant. It would be stretching the words used too far to suggest that the Respondent was promising that in the event the Respondent proceeded with the investigation, the Appellant would be given more time to respond to the report or that before the Board rendered its decision on the report, the Complainant or the Appellant would be informed. There was no mention of such matters. In fact, beyond the recommendation that the Appellant gives the Complainant the Smartphone, the report dealt with substantive issues of violations of sections 46 (1) as read together with sections 45 (a), 47 (a) (ii) and 49 (5) of the Act, of which the Appellant was found in breach, and for which penalties were recommended. It is instructive that these violations and penalties were not conditioned on the Complainant not receiving the Smartphone.

70. In light of what we have said, we find no basis for the position taken by the Appellant that the guidelines in issue, the Respondent's failure to respond to the Complainant's and Appellant's letters, and the proceedings of the meeting of 16<sup>th</sup> February 2018 between the three parties gave rise to a legitimate expectation that the Respondent would not proceed to render its decision without first notifying the Appellant of its refusal to withdraw the complaint. This ground of appeal therefore fails too. The Appellant is unsuccessful on all the three grounds of appeal.

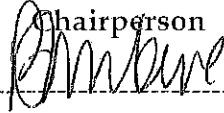
71. In conclusion, the appeal is dismissed with costs to the Respondent. The costs to be agreed and in default to be assessed by the Tribunal.

72. 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 26<sup>th</sup> day of February 2019


  
Willie A. Mubanga, SC


Chairperson

  
Miyoba B. Muzumbwe-Katongo

Vice Chairperson

  
Chance Kabaghe  
Member

  
Rocky Sombe  
Member

  
Eness C. Chiyenge  
Member

