

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 85 OF 2019

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

MTN ZAMBIA LIMITED

APPELLANT

AND

COMPETITION AND CONSUMER

RESPONDENT

PROTECTION COMMISSION

CORAM: Chashi, Lengalenga and Ngulube, JJA

ON: 18th and 24th February and 31st March 2021

For the Appellant:

S. Chisenga, Messrs Corpus Legal
Practitioners

For the Respondent:

M. Mtonga (Ms.) In- House Counsel,
Competition and Consumer Protection
Commission

J U D G M E N T

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

1. **Attorney General v Million Juma (1984) ZR, 1**
2. **Matilda Mutale v Emmanuel Munaile - SCZ Judgment No. 14 of 2007**
3. **North - Western Energy Company Limited v Energy Regulations Board (2011) ZR, 513**

Legislation referred to:

1. **The Competition and Consumer Protection Act No. 24 of 2010**
2. **The Competition and Consumer Protection Commission Guidelines of Practice and Procedure, 2014**

Other works referred to:

1. **Black's Law Dictionary, 6th and 8th editions, Brian A. Garner, Thomson West**
2. **Concise Oxford English Dictionary, 11th edition, Oxford University Press**

1.0 INTRODUCTION

- 1.1 This appeal is against the Judgment of **The Competition and Consumer Protection Tribunal** (the Tribunal) delivered
- 1.2 on 26th February 2019. In the said Judgment, the Tribunal dismissed the appeal by MTN Zambia Limited (the Appellant) against the Competition and Consumer Protection Commission (the Respondent).

2.0 BACKGROUND

- 2.1 The background to this matter was ably captured in the Judgment of the Tribunal.
- However, in order to have a clear picture and understanding of the matter and for ease of reference and clarity, it is prudent that we recapitulate the said background.
- 2.2 On 2nd November 2017, Abraham Mokano (the Complainant) filed a complaint by way of letter against the Appellant. The said complaint appears at page 124 of the record of appeal (the record). According to the complaint, the Complainant on 11th September 2017, bought 10GB home pack bundles worth K260.00. That two days later, on 13th September, he discovered that his internet connectivity was off. The following

day, the Complainant brought the issue to the Appellant's attention. The Appellant's counter staff informed the Complainant that the bundles had expired, which the Complainant refused to accept. That was because, according to the Complainant's 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.

2.3 When the matter was escalated to the Appellant's IT department, the Complainant was told that it would be resolved within 24 hours. However, it was not resolved. The Complainant's grievance was mainly as follows:

- (1) He did not agree that he could use 10GB within 48 hours as 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.

2.4 On 31st October 2017, the Respondent engaged the Appellant by telephone with the view of resolving the matter using advocacy and the Appellant advised that it would look into the matter. This is evidenced by the Respondent's internal

memorandum dated 3rd November 2017 appearing at page 125 of the record. On 3rd November 2017, the Respondent inquired from the Complainant, who advised that the matter had not been resolved.

2.5 Vide Notice of Investigation and an 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 and stated that the Appellant's conduct appeared to be in breach of Section 49 (5) of **The Competition and Consumer Protection Act**¹ (the Act). The Respondent warned the Appellant of the consequence of not responding to the Notice issued pursuant to Section 55 (4) of the Act. The Appellant was requested to respond by way of a statement within 14 days, providing any document, article or item relating to the investigation; and any other information which could assist in the effective determination of the investigation.

2.6 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.

- 2.7 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. The preliminary report also concluded that the Appellant had previously breached Section 49 (5) of the Act for which it was fined K500.00.
- 2.8 The preliminary report concluded that the Appellant engaged in unfair trading practices and was in violation of Section 49 (5) and further that the Appellant violated Section 55 (5) of the Act when it did not respond to the Notice of Investigation. The following recommendations were made in the report:
- (1) A fine of 0.5 % of the annual turnover in accordance with Section 49 (6) of the Act and in line with Respondent 's guidelines for issuance of fines for being a repeat violator of Section 49 (5);
 - (2) Reconnection of internet at the Complainant's house within ten (10) days of receipt of the Boards decision; and

- (3) The Appellant be prosecuted for not responding to the Notice of Investigation in accordance with Section 55 (5) of the Act.

2.9 The preliminary report was served on the Appellant on 23rd January 2018 and it 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.

2.10 From the letter written by the Appellants advocates, Messrs Corpus Legal Practitioners, dated 22nd January 2018 and addressed to the Respondent, the Appellant had held a meeting with the Respondent on 29th January 2018 at which the Appellant undertook to revert to the Respondent by 2nd February 2018. That however, the Advocates in their letter 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.

2.11 On 2nd February, 2018, the Appellant wrote directly to the Respondent, making reference to the letter dated 8th January

2018, which letter addressed various other issues between the two parties. Of interest in the said letter, the Appellant confirmed that it had engaged its advocates services in respect to this subject matter 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 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.

2.12 On 5th February 2018, the Respondent wrote to the Appellant's Advocates accepting their request for extension of time within which to respond to the preliminary report, to 14th February 2018.

2.13 However, 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 preliminary report by the deadline of 14th

February 2018. That however, by letter dated 22nd February 2018, the Appellant's Advocates wrote to the Respondent, thanking them for the extension of time within which to respond to the preliminary report.

The Appellant further informed the Respondent that they had received confirmation from the Complainant that he had withdrawn his complaint. The Appellant in light of the withdrawal hoped that the complaint and the investigations had been resolved. The Appellant stated that they would be grateful to receive confirmation of the position.

2.14 The Respondent neither responded to the Appellant's advocates nor to the Complainant's letter of withdrawal of complaint until it rendered its decision on the matter on 26th April 2018. The Respondent's Board assessed the Appellant's conduct subject of the complaint and the offence and penalty including restitution. 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 in breach of Section 49 (5) of the Act. The Board also considered that previously the Appellant was found to have breached Section 49 (5) of the Act in the case involving Ms. Lungowe Akapelwa and fined K500.00.

2.15 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 provisions 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 Investigations 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.

3.0 APPEAL FROM THE DECISION OF THE BOARD TO THE TRIBUNAL

3.1 Dissatisfied with the decision of the Board, the Appellant appealed to The Tribunal advancing three grounds of appeal couched as follows:

- (1) That the Respondent erred in law when it abrogated its **Competition and Consumer Protection Commission Guidelines on Practices and Procedure, 2014** (the Guidelines) 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.
- (2) That the Respondent erred in law and fact when it breached rules of natural justice which gave the Appellant the right to be heard when the Respondent proceeded to render its 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.

- (3) That the Respondent erred in law and fact when it failed to notify the Appellant of the Respondent's refusal to withdraw the 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 complaint.

3.2 The Tribunal after considering all the issues raised, the arguments by the parties and the guidelines; on the first ground concluded that, the Respondent did not err in law nor did it abrogate the Guidelines when it denied the request for withdrawal of the complaint without informing the Complainant in writing of the reasons for the decision.

3.3 According to the Tribunal, the issue raised by the Appellant under this ground, was whether the Respondent in rejecting the withdrawal erred and abrogated its own Guidelines by not

informing the Complainant in writing of the reasons for the decision to deny the withdrawal. The Tribunal opined that, there is no provision in the Guidelines requiring that before the Respondent denies a request for withdrawal of the complaint, it must inform the Complainant. The Tribunal's interpretation of paragraph (iv) was 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.

3.4 The Tribunal further opined that the words "the Complainant will be informed" are passive and not active and not couched in mandatory terms. That even if the paragraph had been couched in mandatory terms, it would not result in a mandatory obligation on the Respondent. That, this being a procedural guideline and therefore merely regulatory or directory, it was not mandatory on the Respondent.

3.5 As regards the second ground, the Tribunal held that, the Complainant did not suffer any prejudice by not being informed of the Respondent's decision. That the Appellant had no right under the guideline to be informed on the

Respondent's decision rejecting the withdrawal of the complaint.

3.6 In respect to the third ground, the Tribunal opined that no right was created by the Guidelines 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 the complaint. That therefore, by not informing the Complainant or the Appellant, the Respondent did not violate any right. Furthermore, that the procedural guidelines do not have in view the Appellant; the Appellant is obligated by the Act to respond to the Notice of Investigation.

3.7 The Tribunal in view of the aforesaid, found no basis for the allegation that the Respondent's failure to respond to the Appellant's 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 refusal to withdraw the complaint.

4.0 APPEAL TO THIS COURT

4.1 Disenchanted with the Judgment of the Tribunal, the Appellant has now appealed to this Court recasting the same three grounds of appeal which were before the Tribunal now couched as follows:

(1) That the Competition and Consumer Protection Commission Tribunal erred in law and fact when it found that the Respondent did not err in law or violate its Competition and Consumer Protection Commission Guidelines of Practice and Procedure, 2014 by not informing the Complainant of its decision to reject the withdrawal of complaint and reasons thereof as the Respondent had the discretion to choose to inform the Complainant of its reasons to reject the withdrawal of complaint in the aftermath of the decision of the Respondent's Board.

(2) That the Competition and Consumer Protection Tribunal erred in law and fact when it found that the Appellant was not denied the right to be heard by the Respondent when the Respondent neglected to inform either the

Complainant or the Appellant of its decision to reject the withdrawal of complaint and its reasons thereof.

- (3) That the Competition and Consumer Protection Tribunal erred in law and fact when it found that the Respondent's failure to respond to the withdrawal of complaint or the Appellant's letter dated 22nd February 2018, did not give rise to a legitimate expectation that the Respondent would not proceed to render its decision without first notifying the parties of its refusal to withdraw the complaint.

5.0 ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 In arguing the appeal, Mr. Chisenga, Counsel for the Appellant, relied on the Appellant's heads of argument filed into court on 24th May 2019. In arguing the first ground of appeal, Counsel submitted that the literal rule of interpretation is the first resort where words are precise and unambiguous and contended that the same principles applied when interpreting the guidelines issued pursuant to an enabling provision in statute. The cases of **Attorney General v Million Juma¹** and **Matilda Mutale v Emmanuel Munaile²**

were in that respect relied on, where the Supreme Court stated that where the words of the statute are precise and unambiguous, then no more can be necessary than to expound on those words in their ordinary and natural sense.

5.2 According to Counsel, the Tribunal erred when it held that the use of the word “will” in paragraph 8 of the Guidelines is not mandatory but discretionary. It was submitted that the Tribunal’s understanding on the implication of the word was erroneous. Our attention was drawn to the learned authors of **Black’s Law Dictionary**¹ where the word is defined as follows:

“Will; an auxiliary verb commonly having the mandatory sense of “shall” or “must”. It is a word of certainty, while the word “may” is one of speculation and uncertainty.”

5.3 It was submitted that the word is mandatory. Therefore, the Tribunal erred when it found that the use of the word conveys an idea of actions at volition or will. That paragraph 8 (iv) of the Guidelines is couched in mandatory terms and does not provide for discretion.

5.4 Counsel also referred us to the learned authors of Halsbury's Laws of England, Administrative Law at paragraph 91, page 201 where it is stated that:

“In many cases, the legal consequence of non-compliance with procedural or formal requirements has been recorded as wholly or partly dependent upon the answer to the question whether the requirement is to be classified as mandatory or directory, but a variety of meanings have been attached to this distinction. Where statute provides a mandatory procedure, it must be followed. The suggestion that statutes which are not mandatory are merely permissive or an indication of what is desirable is probably not correct. However, it appears that where a provision is construed as merely directory, substantial compliance will suffice. Further a party complaining of a directory requirement must show some prejudice, whereas this is not a precondition of relief where the requirement is held to be mandatory.”

5.5 The Appellant contended that, the mere fact that a provision is procedural does not mean the Respondent has the

discretion to dispense with it. It was contended that the Appellant, if the rule was merely directory, still suffered prejudice as it did not have the opportunity to be heard on the merits of the complaint prior to the Respondent making the determination and condemning the Appellant to fines.

5.6 Counsel further drew our attention to the policy objectives and preamble to the Guidelines. That in the preamble, it states that the Guidelines are established to set forth the manner in which cases shall be dealt with by the Secretariat and its Board. It was Counsel's submission that, the Respondent is mandated to observe procedural rules that are expressly laid down in the Guidelines, which have the force of law and bind the Respondent by virtue of Section 84 of the Act.

5.7 It was further submitted that in the case of the South African jurisdiction, Section 79 of their Competition Act No. 89 of 1998, clearly provides that the Guidelines are not binding on the Competition Commission. That in contrast, Section 84 of the Act in Zambia, makes the Guidelines binding on the Commission. That if it had been the intention of the legislature in Zambia that the Guidelines should not bind the

Respondent, they would have expressly provided for that in the Act, as in the South African case.

5.8 It was further argued that paragraph 8 of the Guidelines grants the Respondent the discretion on whether to accept a withdrawal of a complaint from the Complainant or reject it. However, the guidelines go on to provide that, in an event that the Respondent denies the request for a withdrawal, the Respondent has a duty to inform the Complainant in writing, its decision to deny the withdrawal and the reasons for it.

5.9 That the Respondent's admission that it was a technical oversight on its part for failing to respond to the withdrawal letter, clearly shows that the Respondent was aware that it is bound by the Guidelines, that it had to respond to the withdrawal letter. That the failure by the Respondent to respond to the withdrawal letter was in violation of paragraph 8 (iv) of the Guidelines.

5.10 As regards the second ground of appeal, it was submitted that, as a consequence of the Respondent breaching the Guidelines as shown in the first ground of appeal, the Respondent breached the rules of natural justice which gives the Appellant

the right to be heard. It was submitted that since the Tribunal found that the breach by the Respondent of the Guidelines was procedural, the Tribunal should have ordered that the matter be tried on its merits and not endorsing the breach by finding that the Respondent had a leeway to breach its Guidelines whenever it chooses to do so.

5.11 It was contended that the Tribunal's finding that the Guidelines do not fetter the Respondent but guides the Respondent in its conduct as a regulator, as the regulator must enjoy leeway or latitude in order to give effect to the objectives of the Act, would take away the essence of administrative law requiring regularity, predictability and certainty in public bodies' dealings with the public. That as alluded to under the first ground, the Guidelines have the force of law and bind all the parties that are regulated by the Act, including the Respondent itself.

5.12 In arguing the third ground of appeal, it was submitted that legitimate expectation arose due to the Guidelines which provided that the Respondent must notify the Complainant of its decision for refusing a withdrawal and the reasons thereof.

Our attention was drawn to the case of **North-Western Energy Company Limited v Energy Regulations Board**³ where the principles of legitimate expectation were considered as follows:

“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 governments 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.”

5.13 It was Counsel’s contention that the doctrine of legitimate expectation allowed the Appellant to rely on the assumption that the Respondent would respond to the withdrawal letter or

the Appellant's letter. That if the Respondent had responded the Appellant would have been properly guided.

5.14 In conclusion, the Appellant submitted that in view of the aforestated, the Respondent's decision is invalid and ought to be quashed with costs to the Appellant.

6.0 RESPONDENT'S ARGUMENTS IN RESPONSE

6.1 In response to the first ground of appeal, Ms. Mtonga, Counsel for the Respondent, submitted that Guideline 8 (iv) is not couched in a mandatory manner and that in a broad context the Guidelines do not bind the Respondent. According to the Respondent, it is in agreement with the Appellant that the literal rule approach should be applied in this case. However, it deviates in the interpretation of the word "will". Counsel also drew our attention to the learned authors of **Black's Law Dictionary**¹ where the word "will" is defined as wish; desire; choice. That this fortifies the Tribunal's statement that the word conveys the idea of acting on volition or at will which is not mandatory.

5.2 It was submitted that, the Guidelines have illustrated instances where a mandatory obligation is created by using the words "shall" which points to the fact that there was a distinction in drafting Guideline 8 (iv) in that if it was meant to be mandatory, it would have been couched as such by using the word "shall". Furthermore, it was the Respondent's submission that it agrees with the Tribunal, in that the use of the words "the complainant will be informed" are passive, not active, as there is no timeline associated with the action.

6.3 Counsel further submitted that Section 84 of the Act under which Guidelines are issued provides as follows:

- (1) In the exercise of its functions under this Act, the Commission may make guidelines as are necessary for the better carrying out of the provisions of the Act.
- (2) The commission shall publish the guidelines issued under this Act in a daily newspaper of general circulation in Zambia and the guidelines shall not take effect until they are published.
- (3) The guidelines issued under this Act shall bind all persons regulated under this Act.

6.4 According to Counsel, the Act in Section 84 provides for whom the Guidelines shall bind, leaving anyone not catered for to fall into the category of not being bound. It was Counsel's submission that the Respondent as the regulator and not the regulated, is not bound by the Guidelines.

6.5 It was Counsel's submission that Guideline 8 (iv) is not couched in mandatory terms and therefore the Respondent in not informing the Complainant of the reasons for the refusal was not an abrogation of the Guidelines.

6.6 In response to the second ground of appeal, counsel referred to Section 55 (10) of the Act, which provides for the Commission Report that is termed as the "Preliminary Report". The said Section provides as follows:

"The Commission shall at the conclusion of an investigation under this Section, publish a report of the inquiry and its conclusion in such manner and form as it considers appropriate."

The manner and form under Guideline 9 (iv) and (v) provide that:

(iv) The Complainant (provided it is not the commission)

and the 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) of the Act.

(v) The Respondent and the Complainant have the right to respond to the Secretariat findings and shall be given seven (7) working days to respond to the 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.

6.7 It was submitted that, one Section of a statute is not supreme over another unless expressly stated so. That the same could be extended to guidelines, as one guideline cannot be supreme over another. That therefore the obligation, the Appellant had towards responding to the Preliminary Report, could not be overridden by the alleged abrogation of another guideline by

the Respondent. According to Counsel, Guideline 8 (iv) guided the actions of the Respondent towards the Complainant. That in no express or implied language can it be read that it would allow the Respondent to rely on it to determine its conduct.

6.8 Counsel argued that the sequence of events would show that the Appellant was not denied their right to be heard but instead slept on their right on their own volition and to their own detriment.

6.9 In responding to the third ground of appeal, it was submitted that the guideline does not require the Respondent to communicate to the Appellant on the withdrawal. That at all instances, the Appellant remained answerable for the allegations made against them until or otherwise determined by the Respondent.

7.0 ARGUMENTS BY THE APPELLANT IN REPLY

7.1 In reply to the Respondent's response on the first ground of appeal, Counsel for the Appellant submitted that the definition of the word "will" has been cited out of context in the Respondent's arguments. That the word "will" cited by the

Respondent is being used as a noun as it defines "will" as follows:

"Will. n.1. Wish, desire, choice < employment at will >, 1. A document by which a person directs his or estate to be distributed upon death..."

It was the Appellant's contention that the word "will" in Guideline 8 (iv) is used as a verb and not a noun. That therefore the more accurate definition of the word is as provided by the Appellant as defined by the learned authors of **Black's Law Dictionary**¹.

7.2 On the argument that the Respondent as a regulator is not bound by the Guidelines, it was submitted that the preamble states that "these guidelines are hereby established to set forth the manner in which cases shall be dealt with by the Secretariat and its Board." That there is no provision in the Guidelines that provide that the Respondent has leeway to deviate from them.

7.3 It was further argued that by virtue of Section 84 (3) of the Act, the Guidelines are applicable to all persons controlled or

subject to the governing principles or laws and have the force of law. That therefore the Respondent is subject to the Act and is controlled by it. That therefore the Respondent is regulated by the Act and to argue otherwise is flawed and erroneous.

7.4 In reply on the second ground, it was submitted that the Respondent 's abrogation of Guidelines had a snowballing effect, which led to the Appellant's failure to respond to the Report, thereby denying the Appellant the right to be heard on it. That the lack of response from the Respondent misled the Appellant to believe that the withdrawal of the complaint was accepted.

7.5 In reply to the Respondent 's arguments on the third ground of appeal the Appellant sought to repeat its entire arguments under the third ground that the Respondent violated the legitimate expectation it had created.

8.0 THE COURT'S CONSIDERATION OF THE APPEAL AND DECISION

8.1 We have considered the Judgment being impugned and the arguments by the parties. The first ground of appeal attacks

the Tribunal's finding that the Respondent did not err in law or violate the Guidelines, by not informing the Complainant of its decision to reject the withdrawal of complaint and reasons thereof, as the Respondent had the discretion to inform the Complainant.

8.2 The issue arises out of the interpretation of guideline 8 of the Guidelines which deals with provisions relating to the withdrawal of a complaint. Guideline 8 provides as follows:

“(i) A Complainant may make a request to withdraw a complaint lodged before the Secretariat in writing stating the reason. The Secretariat shall exercise its discretion in making a decision whether or not to withdraw, 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 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 a 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 the reasons for the decision of the Secretariat."

8.3 Of interest on this ground of appeal is the interpretation of Guideline 8 (iv) and in particular the word "will" as to whether it is mandatory in that it places a duty on the Respondent's Secretariat to inform the Complainant in writing, where a request for withdrawal of a complaint is denied and the reasons for doing so. Although the parties are agreed that the

wording in paragraph (iv) are precise and unambiguous, and need to be assigned an ordinary and natural sense, they seem to differ on their respective understanding of the wording.

8.4 We note that the words “shall” and “may” have been mainly used in the Guidelines to connote mandate and discretion respectively. Interestingly the word will has only been used under Guideline 8.

The learned authors of **Concise Oxford English Dictionary**² at page 1321 defines the word “shall” as “expressing a strong assertion or intention. Expressing an intention or command.” They then go on at page 1651 to define “will” as “expressing a strong intention or assertion... expressing inevitable intention.”

8.5 From the aforestated meanings, the words “shall” and “must” have the same meaning and in practice, the two words are used more or less interchangeably and that is now an acceptable part of standard English, although there ought to have been consistency by the drafters of the guidelines in the use of the words.

8.6 From the aforesaid and our understanding of Guideline 8, although the Respondent can exercise wide discretion in accepting or rejecting a withdrawal of a complaint by the complaint; when the Secretariat denies the withdraw, they are under an obligation to inform the Complainant of the rejection in writing and the reasons for doing so as provided for under the Guidelines and that duty is placed on the Secretariat and not the Board.

8.7 Our further understanding of Guideline 8 is that since that duty is placed on the Secretariat, the Secretariat must inform the Complainant of the denial before it publishes its report of inquiry pursuant to Section 55 (10) of the Act. In that vein, the duty having been placed on the Secretariat, it cannot be performed by the Board, but by the Secretariat.

We note that Guideline 8 revolves on the right of the Complainant to withdraw a complaint if the Complainant so wishes and it places a duty on the Secretariat to inform the Complainant when there is denial of the withdrawal. It therefore does not extend to a party being investigated such as the Respondent or any other third party. In short, the

Secretariat is not under any obligation to inform a party being investigated of its denial to a withdrawal of the complaint, such as the Appellant in this case.

8.8 We note that the Secretariat in this case did not inform the Complainant of its denial to the Complainant's withdrawal of the complaint and the reasons for the denial in writing. The Secretariat proceeded to prepare a preliminary report and presented the same to the Appellant, the Complainant and the Board. We further note that it is only the Board in its determination of the matter which commented on the Complainant's withdrawal which was not supposed to be the case as earlier alluded to.

8.9 In that respect, we agree that the Respondent derogated on its duty to inform the Complainant in violation of its Guidelines.

8.10 The second ground of appeal attacks the Tribunal's finding that the Appellant was not denied the right to be heard by the Respondent when the Respondent neglected to inform either the Complainant or the Appellant of its decision to reject the withdrawal of the complaint and the reasons therefrom.

8.11 As earlier alluded to under consideration of the first ground of appeal, Guideline 8, is concerned with the Complainant and does not confer any right on a party being investigated such as the Appellant. Therefore, the failure by the Respondent to inform the Complainant has no bearing and effect on the Appellant.

The Appellant cannot be seen to be advancing and arguing in promulgation of the Complainant's rights. It is clear that the Appellant is trying to champion and ride on the Complainant's rights under Guideline 8 and not its own rights.

8.12 It is clear from the facts and circumstances of this case, that the Appellant were throughout the life of the complaint afforded the right to be heard by the Respondent. On 31st October 2017, the Respondent engaged the Appellant to resolve the matter using advocacy. Despite promising that it would look into the matter, the Appellant never did.

8.13 Furthermore, the Notice of Investigation was served on the Appellants in November 2017. The Appellant were warned of the consequence of not responding to the notice. However,

they did not respond. We further note that the preliminary report was served on the Appellant on 23rd January 2018 and the Appellant was requested to respond within seven (7) days, but they did not.

Despite being given extensions of time to respond at every stage of the investigations, the Appellant never grabbed the opportunity to do so.

8.14 In our view, the Appellant was all the way guided by the Respondent and given an opportunity to respond as provided for under the Act and the Guidelines. The Appellant however never took the opportunity to respond. It is our view that the Appellant sat on its rights by failing to respond and instead wanting to take advantage of the Respondent's failure to inform the Complainant of the denial to withdraw the complaint. In the view that we have taken, the second ground of appeal has no merit.

8.15 The third ground of appeal attacks the Tribunal's finding when it found that the Respondent's failure to respond to the withdrawal of the complaint or the Appellant's letter dated 22nd

February 2018, did not give a legitimate expectation that the Respondent would not proceed to render its decision without first notifying parties of its refusal to withdraw the complaint.

8.16 Indeed as held in the **North-Western Energy Company Limited** case, 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. In the view that we have taken on the first and second grounds of appeal, we see no legitimate expectation which would have arisen in favour of the Appellant.

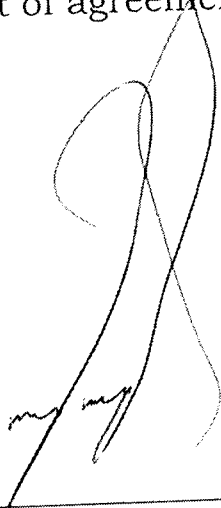
We say so in view of the fact that the Appellant was not privy to the rights and obligations conferred on the Complainant and the Respondent under Guideline 8.

8.17 In any case, the Respondent were not under obligation under Guideline to accept the withdrawal of the complaint. In the view that we have taken, this ground of appeal equally has no merit.

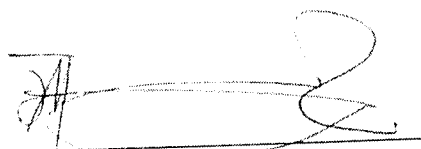
9.0 CONCLUSION

9.1 In view of the second and third grounds of appeal having been dismissed, the appeal herein is dismissed as it lacks merit.

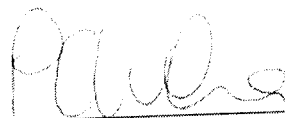
Costs are to the Respondent, to be paid forthwith. Same are to be taxed in default of agreement.



J. CHASHI
COURT OF APPEAL JUDGE



F. M. LENGALENGA
COURT OF APPEAL JUDGE



P. C. M. NGULUBE
COURT OF APPEAL JUDGE