

**IN THE COMPETITION AND CONSUMER  
PROTECTION TRIBUNAL  
HOLDEN AT LUSAKA**

**CASE No. 2014/ CCPT/015/CON**

DLCA  
FYA  
S/S

IN THE MATTER OF:

SECTIONS 60, 45(a), 46 (1) AND 47(a)(v)  
OF THE COMPETITION AND  
CONSUMER PROTECTION ACT NO. 24  
OF 2010

BETWEEN:

**MACNICIOUS MWIIMBA**

**AND**

**AIRTEL NETWORKS ZAMBIA PLC**

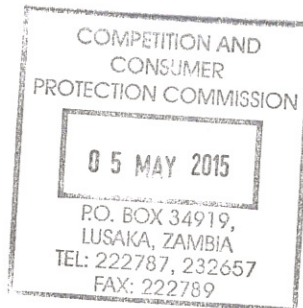
**COMPETITION AND CONSUMER PROTECTION  
COMMISSION**

**AND**

**AIRTEL NETWORKS ZAMBIA PLC**

**AND**

**COMPETITION AND CONSUMER PROTECTION  
COMMISSION**



**APPELLANT**

**1<sup>ST</sup> RESPONDENT**

**2<sup>ND</sup> RESPONDENT**

**APPELLANT**

**RESPONDENT**

**QUORUM:** Mr. Aubbie W. Mubanga (Chairperson), Mrs. Maria M. Kawimbe (Vice Chairperson), Mr. Chance Kabaghe (Member), Mr. Rocky Sombe (Member) and Mrs. Eness C. Chiyenge (Member)

For Airtel Networks Zambia Plc:

Ms. Sandra Malupande - Legal Counsel

Ms. Susan Mulikita - Director, Regulatory

For Mr. Macnicious Mwiimba - In Person

For Competition and Consumer Protection Commission:

Mrs. M. B. Mwanza - Director, Legal & Corporate Affairs

Mrs. M. M. Mulenga - Manager, Legal & Corporate Affairs

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## RULING

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### Legislation referred to:

Sections 55(4)(c) and (8); and 60 Competition and Consumer Protection Act, No. 24 of 2010.

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When this appeal came up for hearing on 26<sup>th</sup> February 2015, we raised a preliminary issue on which we invited the three parties to make written submissions, as follows;

- 1 How is Macnicious Mwiimba, the complainant in the proceedings before the Competition and Consumer Protection Commission, a party in the appeal proceedings before the Tribunal?
- 2 Whether the Competition and Consumer Protection Commission does represent the complainant's interest in the appeal?
- 3 Who is the aggrieved party and what is the position of the law about this?

The background leading to the preliminary issue is that Mr. Macnicious Mwiimba was a complainant against Airtel Networks Zambia Plc (herein referred to as "Airtel") in the proceedings before the Competition and Consumer Protection Commission (hereinafter referred to as "the Commission"), while the Commission investigated and through its Board on 20<sup>th</sup> June, 2014 determined the complaint and reached the verdict that Airtel had violated section 46 (1) as read with section 45 (a) of the Act and section 47 (a) (v) of the Competition and Consumer Protection Act, No. 24 of 2010. The Commission, however, in its decision did not impose a fine but instead issued a warning against Airtel. Mr. Macnicious Mwiimba appealed against both the Commission and Airtel. Airtel also appealed against the Commission's verdict. The two appeals, having arisen from the same proceedings, were consolidated by the Secretariat pursuant to Rule 12 of the Competition and Consumer Protection (Tribunal) Rules, 2012. However, we were of the view that it was important for the guidance of appeal proceedings in such cases to establish the status of the complainant. In addition, the consolidation of the two appeals led to a situation where Mr. Mwiimba and Airtel were appellants and the Commission and Airtel were respondents.

Subsequently, when we sat to consider the parties' submissions on the preliminary issue on 19<sup>th</sup> March 2015, we orally ruled that Mr. Macnicious Mwiimba was entitled to appeal and directed that we would give our reasons later in a written ruling. At the same time, we addressed the untidy situation resulting from the consolidation of the two appeals by directing that the two appeals would retain their individual titles while being heard in the same proceedings.



We are indebted to counsel for the Commission, counsel for Airtel and Mr. Macnicious Mwiimba for their submissions, which we found useful in reaching our decision. We are satisfied that the objective of provisions of the Act falling under Part VII is to protect the rights and interests of consumers from being violated and that the role of the Commission is to advocate for, represent and enforce the rights and interest of consumers, in line with its mandate and powers given by the Act. However, where a complainant is dissatisfied with the Commission's decision in exercise of its powers under Part VIII of the Act, such a complainant has a right to seek redress in terms of section 60. This section states in part, "*A person who, or an enterprise which, is aggrieved with an order or direction of the Commission under this Part may ... appeal to the Tribunal.*" As a matter of fact, we note that an appellant in terms of this section need not be a complainant or respondent in the proceedings before the Commission; it could be any other person who demonstrates that they are aggrieved, having an interest in the decision (for instance, consumer associations).

We, however, observe that there is a growing tendency of complainants appealing against the decisions of the Commission and parties bringing documentary evidence and witnesses (including themselves) during the appeal proceedings. The result is that in such cases the Tribunal in effect does not operate as an appellate body relying almost exclusively on the record of proceedings in the Commission. In our view, this trend is aggravated by deficiencies in the procedures and practice employed in proceedings before the Commission. Whilst the Commission enjoys wide powers under the Competition and Consumer Protection Act, No. 24 of 2010, to call for evidence and other forms of information, parties are not given ample opportunity to be heard, especially in person. For example, section 55 dealing with investigations, in subsections (4)(c) and (8) gives the Commission powers in the following terms:

*"55(4) For the purpose of an investigation under this section, the Commission may, by notice in writing served on any person, require that person to -*

*(c) appear before the Commission, or before a person specified in the notice, at a time and place specified in the notice, to give evidence or to produce any document or article specified in the notice.*

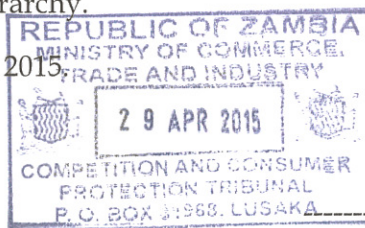
*(8) The Commission may upon giving notice under subsections (3) and (4), invite comments from any party with an interest in the matter under investigation."*

Further, the Commission's Administrative and Procedural Guidelines provide that, "Any party with an interest in a matter before the Secretariat may request to make submissions by personal appearance or in writing to the Board of the Commission prior to a decision being made ...."

Yet, we have noticed that following the lodging of a complaint, investigation and invitation to the respondent to react to the Preliminary Report, the complainant is not invited to comment on the Preliminary Report and the respondent's reaction thereto before the case is finally determined by the Commission's Board. We have also not seen in the records of proceedings before the Commission any invitation or notification to the parties that they may be heard in person or in writing by the Board of the Commission, as stated in the Commission's Guidelines. Without such invitation or notification being conveyed to the parties, the provisions are redundant since chances are that the parties are not aware of the opportunity of being heard.

While any person entitled to appeal has every right to do so, in our view, appeals should not be induced by deficiencies in procedures and practice in the Commission's proceedings. We believe that the 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 aforementioned 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.

Delivered at Lusaka this day the 29<sup>th</sup> April, 2015.



Aubbie W. Mubanga  
Chairperson

Maria M. Kawimbe  
Vice Chairperson

Chance Kabaghe  
Member

Rocky Sombe  
Member

Eness C. Chiyenge  
Member