

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

**2014/CCPT/011/CON**

**IN THE MATTER OF: SECTION 45(a) AND (b), AND (46(1))  
OF THE COMPETITION AND  
CONSUMER PROTECTION ACT NO.  
24 OF 2010**

**IN THE MATTER OF: THE COMPETITION AND  
CONSUMER PROTECTION  
(TRIBUNAL) RULES, STATUTORY  
INSTRUMENT NO. 37 OF 2012**

**BETWEEN:**

**MBWE MOTORWAYS LIMITED**

**APPELLANT**

**AND**

**COMPETITION AND CONSUMER  
PROTECTION COMMISSION**

**RESPONDENT**

**CORAM:** Mr. W. A. Mubanga – Chairperson  
Mrs. M. Kawimbe - Vice Chairperson  
Mr. R. Sombe – Member  
Mr. C. Kabaghe – Member  
Mrs. E. Chiyenge - Member

**For the Appellant:** Mr. Stanley Bwalya, Public Relations Officer, Mbwe Motorways

**For the Respondent:** Mrs. M. B. Mwanza, Director Legal and Compliance,  
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**

**Cases referred to:**

1. **Blyth v Birmingham Waterworks Company (1856) 11 Ex Ch 78**
2. **Hadley v Baxendale [1854 EWHC J70**
3. **Southern Cross Motors Vs. Competition and Consumer Protection Commission 2013/CCPT/002/CON**
4. **Union Bank Zambia Limited Vs. Southern Province Cooperative Marketing Union Limited [1997] S.J. 30 SC**

This appeal is against the decision of the Competition and Consumer Protection Board (hereinafter called “the Respondent”) that ordered Mbwe Motorways (hereinafter called “the Appellant”) to be fined 1%, representing a base fine of 0.5% plus an additional 0.5% for other factors.

The brief facts of this case are that on 23<sup>rd</sup> January 2013, the Respondent’s office in Kitwe received a complaint from Ms. Nancy Mumba alleging that the Appellant had engaged in unfair trading practices towards her.

Ms. Mumba claimed that she bought a bus ticket from the Appellant in Nakonde to travel to Kitwe on 8<sup>th</sup> January 2013. Ms. Mumba was not able to travel with her goods back to Kitwe on the bus that she boarded as the Appellant’s bus carrier was full on that particular day. Ms. Mumba also claimed that the Appellant assured her that her goods, which consisted of a bag of rice and a sack of potatoes, respectively valued at K640 and K150 would be transported on its next bus to Kitwe.

Ms. Mumba further alleged that after she had arrived at her destination, several days went by without her goods arriving. She was then prompted to arrange for alternative transport to ferry her goods from Nakonde to Kitwe using a proxy. When her goods arrived in Kitwe, she was unable to collect them personally, and thus instructed her brother whom she had given a full description on what was expected to collect the goods on her behalf. Later, upon her inspection of the goods, she discovered that the goods were not hers and that the bag of rice belonged to another person, who she came to identify as a Mr. Netta of Mufulira.

Ms. Mumba also claimed that as she was arranging for the re-delivery of Mr Neta’s goods, the Appellant became hostile towards her and even laid a complaint to the Police alleging that she had stolen goods belonging to another client. After much persistence, the Appellant eventually returned Ms. Mumba’s goods to her. She claimed that as a result of the late delivery, she had lost out on business.

Disillusioned by the Respondent’s decision, the Appellant filed an undated appeal before the Tribunal stating two grounds:

- (i) That the Board erred in law and fact to find from the evidence, that it had collected, that the Appellant had breached Section 49(5) of the Competition and Consumer Protection Act (hereinafter called "CCP Act"). This was because the Appellant had transported the goods within a reasonable period, within which the goods could reasonably have been expected to be transported. The Appellant also contended that the goods had already been transported to Mufulira, when Ms. Mumba instructed her proxy to collect them from the Appellant's store room at Nakonde.
- (ii) That Ms. Mumba through her proxy was negligent in collecting the wrong goods from the Appellant's store room at Nakonde, hence the confusion that arose and the delay in resolving the matter quickly. The Appellant also stated that Ms Mumba's repeated refusal to transport Mr. Netta's goods to the Appellant's bus stop stand at KMB station in Kitwe also contributed to the delay in the delivery of her goods.

In support of its notice of appeal, the Appellant also filed undated Heads of Argument before the Tribunal through its representative Mr. Stanley Bwalya, Public Relations Officer, Mbwe Motorways. The gist of his arguments was that the Respondent's decision was made in error of law and fact.

Mr. Bwalya submitted that at the time when the events occurred, the Appellant was operating courses of travel between Nakonde and Mufulira on a bi-weekly basis on Tuesdays and Saturdays. As such a bus would load and depart Nakonde on Tuesdays and arrive in Kitwe and Mufulira on Wednesdays. The same bus would load and depart Nakonde on Saturdays and arrive in Kitwe and Mufulira on Sundays.

He also pointed out that Ms. Mumba's goods, which were the subject of this appeal, were transported and delivered to Kitwe on 16<sup>th</sup> January, 2013. He also alleged that even though Ms. Mumba had agreed to have her goods transported on the 13<sup>th</sup> January, 2013, the Appellant's delivery of Ms. Mumba's goods on 16<sup>th</sup> January 2013 was within a reasonable period and around the agreed time. Mr. Bwalya then referred us to Section 49(5) of the CCP Act.

He insisted that the Appellant did not run a bus service from Nakonde on 18<sup>th</sup> January 2013, but did so on 16<sup>th</sup> January 2013. He further argued that Ms. Mumba's goods could not have been in the Appellant's store room at Nakonde on 18<sup>th</sup> January, 2013, because they had already been delivered on the 16<sup>th</sup> January 2013 in Kitwe.

He also argued that Ms. Mumba's proxy had collected the wrong goods from the Appellant's store room in Mufulira and that due to his negligence; Ms. Mumba was not able to collect her goods from Kitwe at the appointed time. As a consequence thereof, Ms. Mumba's goods were taken to the Appellant's yard in Mufulira where uncollected goods are stored. It was his contention that given the high volume of

goods collected, it was impossible for the Appellant to know which goods belonged to a customer.

The Appellant prayed before the Tribunal to quash or overturn the order that had been made by the Respondent to fine it.

In response to the appeal, the Respondent on 17<sup>th</sup> February, 2015 through its Learned Counsel, Mrs. M. B. Mwanza filed a notice of grounds in opposition to appeal which averred that:

1. The Appellant breached Section 49(5) of the CCP Act by failing to deliver Ms. Mumba's goods within the agreed period of time.
2. The only party that was negligent in the case was the Appellant, which delayed in delivering Ms. Mumba's goods.
3. There was a contract between the Appellant and Ms Mumba though not reduced into writing.

The Respondent's prayer before the Tribunal was that it should dismiss the appeal and uphold its decision.

In support of the notice of opposition to appeal, Learned Counsel for the Respondent also filed in Heads of Argument on 17<sup>th</sup> February, 2015 before the Tribunal. In those submissions, she argued that the Appellant owed its client a service, which was reasonable and with care and skill. She also argued that Ms. Mumba's goods which were perishables should have been delivered on the next immediate and available bus as promised by the Appellant. Mrs. Mwanza further submitted that the Appellant did not inform Ms. Mumba that it would be unable to transport her goods within the agreed time frame. Thus, Ms. Mumba was compelled to make her own transport arrangements in order to have her goods delivered to her in good time.

Learned Counsel for the Respondent, also contended that any reasonable person would have prioritised the delivery of Ms. Mumba's goods as there was a valid contract, though orally expressed between the Appellant and herself. In support of her assertion Mrs. Mwanza referred us to our decision in the case of **Southern Cross Motors v Competition and Consumer Protection Commission 2013/CCPT/002/CON**, and the case of **Hadley v Baxendale [1854] EWHC J70**.

Mrs. Mwanza further averred that the Appellant was the only negligent party in the instant case, as it had delayed the delivery of Ms. Mumba's goods and without reasonable justification. In that instance, she referred us to the case of **Blyth v Birmingham Waterworks Company (1856) 11 Ex Ch 78**, and to a passage in our decision in **Southern Cross Motors** on service delivery.

Her prayer before the Tribunal was that the Appellant's appeal should be dismissed with costs to the Respondent.

The Appellant's representative Mr. Bwalya in response to the Respondent's arguments, urged us not to hold that the Appellant had breached Section 49(5) of the CCP Act. He reinforced most of his earlier submissions and referred us to the Learned Author, **Granville Williams, in Learning the Law 11<sup>th</sup> ed. Page 109** on interpretation and the case of **R. v. Roberts [1908] 1KB 407** on evidence.

We are indebted to the Learned Counsel for the Respondent and Mr. Bwalya representing the Appellant for their spirited arguments, which we will refer to in our judgment.

We have considered all the issues advanced in support and against the appeal by the parties and take the view that there are only four issues which require our resolution. These being:

- 1) Whether the Appellant breached Section 49 (5) of the CCP Act, when it insisted that Ms. Mumba's goods had been transported within a reasonable time.
  - 2) Whether Ms. Mumba was negligent in collecting the wrong goods from the Appellant's store room at Nakonde; and or whether the Appellant was in fact the negligent party by delaying the delivery of Ms. Mumba's goods.
  - 3) Whether there was a contract between the Appellant and Ms. Mumba.
  - 4) Whether the Respondent properly directed itself in fining the Appellant 1% which is a base fine of 0.5% plus the additional 0.5% for other factors.
- 1) **Whether the Appellant breached Section 49 (5) of the CCP Act, when it insisted that Ms. Mumba's goods had been transported within a reasonable time.**

It was argued by Mr. Bwalya the Appellant's representative that Section 49(5) of the CCP Act had been misinterpreted by the Respondent. He also argued that where a specified time was agreed on a service, that service could be supplied within a reasonable period and around the specified time. Mr. Bwalya further argued rather unhelpfully that according to Granville Williams in Learning the Law 11<sup>th</sup> edition, page 109 that the court cannot curtail a statute to leave out a case that the statute literally includes. He insisted that delivering Ms. Mumba's goods on 16<sup>th</sup> January, 2015 constituted a reasonable time and referred us to R V Roberts [1908] 1 KB 407, which we also found to be unhelpful.

In opposition, the Respondent's Counsel argued that the Appellant did not provide Ms. Mumba with a service that had reasonable care and skill and within a reasonable time. She helpfully referred us to our decision in the case of **Southern Cross Motors**, where we held that and reproduced here below as follows:

*“The concept of reasonableness is quite a nebulous concept in common law. The general rule is that performance of a contract must be precise and exact, that is, a party performing an obligation under a contract and exactly to the standard required by the contract. Sometimes the standard may be strict for instance in the case of statutory implied terms of quality in contracts for the sale and supply of goods. Whether the alleged performance satisfies this criterion is a question to be answered by construing the contract so as to see what the parties meant by performance and then by applying the ascertained facts to that construction, to see whether that which has been done corresponds to that which was promised”.*

From the foregoing, we are clearly not only bound by our decision but also find that it does not offend what is generally accepted as reasonableness. In saying so, we find it necessary to reproduce Section 49 subsection 5 of the CCP Act which provides:

*“A person or an enterprise shall supply a service to a consumer with reasonable care and skill or within a reasonable time or, if a specified time was agreed, within a reasonable period around the agreed time.”*

Our understanding of the said Section 49 sub section 5 is that, where there is a significant imbalance in the parties rights and obligations under a contract, the natural inclination of an adjudicator should be to favour the weaker party. By saying so, our view is that it is not reasonably necessary to protect the interest of the party that would be advantaged by an unfair condition. In this sense, Section 49 sub section (5) requires that a consumer should be provided a service that is reasonable and within a reasonable time.

In the circumstances of the instant case, it is our view that the Appellant breached Section 49(5) when it failed to deliver Ms Mumba's goods on the very day that she bought a ticket to travel to Kitwe from Nakonde. It is also our further view that the Appellant had an option of selling a ticket to Ms. Mumba to travel on the next available bus, considering that she had perishable goods that should not have left her possession. We would venture to say that if the Appellant had taken that course of action, then it would have certainly avoided the unnecessary quagmire that it found itself in.

Thus, we also do not accept the Appellant's arguments that it was reasonable to transport Ms. Mumba's goods, three days after her return to Kitwe, taking into account the nature of her goods. We would therefore agree with Mrs. Mwanza, Learned Counsel for the Respondent that the services of the Appellant were

unreasonable and lacked the skill and diligence that they should have been carried out with and reject the Appellant's arguments.

**2) Whether Ms. Mumba was negligent by collecting the wrong goods from the Appellant's store room at Nakonde; and or whether the Appellant was in fact the negligent party by delaying the delivery of Ms. Mumba's goods.**

It was argued by the Appellant that Ms. Mumba was negligent in sending her proxy to collect goods on her behalf, when she had not given them a proper description of the goods. The Appellant also argued that it could not be reasonably expected to identify a client's goods when it had high volumes of goods to process in its store room at Nakonde. It was stated to the Tribunal that the Appellant mainly relied on a client identifying his or her goods, whereupon they would be released into their custody by its store's officer.

In converse, Learned Counsel for the Respondent submitted that the Appellant was indeed the negligent party. She alleged that the Appellant had given its store room keys to a person who was not in the employment of the Appellant; and who released the goods in issue to the Appellant's proxy. Learned Counsel for the Respondent referred us to the case of **Blyth v Birmingham Waterworks Company (1856) 11 Ex Ch 78**, where negligence was defined as:

*"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done."*

We would go further and state that the tort of negligence has four elements. Therefore, in order to establish whether there was any negligence or not by either party; it is prudent for us to assess the elements of negligence *vis-a-vis* the facts of this case.

The first element of negligence supposes that there must be a duty on the part of the wrong doer to conform to a certain standard or conduct. In this circumstance, we find that the Appellant who is a transporter of human beings and goods is required to adhere to the terms of carriage issued by it. In saying so, it is our hope and expectation that the terms of carriage practised by the Appellant are within those accepted and practised by enterprises involved in similar business. For this reason, the element of duty naturally weighs more on the Appellant than the consumer. As a result, we find that the Appellant owed Ms. Mumba a duty which it failed to perform and was in breach of the standard or conduct required of such an enterprise.

The second element of negligence recognizes that a wrong doer owes a duty to the affected party and that such duty should not be breached. We assert that in the instant case there was a duty created on the Appellant to transport Ms. Mumba's goods on 13<sup>th</sup> January 2015. However, this duty was breached when the Appellant, who obviously had more muscle in the transaction changed the terms of carriage of Ms. Mumba's goods to a later date. In our view this diversion offended what was genuinely expected by the consumer Ms. Mumba, in that, the delivery of her goods was not provided with reasonable care and skill. We are fortified in our assertion by what we said in the case of **Southern Cross Motors v Competition and Consumer Protection Commission** on service delivery and rightfully referred to us by Learned Counsel for the Respondent, that is:

*“We would also like to make a general observation about the levels of service delivery in the country. We would like to urge service providers of their duty to provide high quality services and to be responsive to the needs of consumers.”*

It is our hope going forward that service providers in this country will strive to improve the quality of service offered to consumers.

The third element of negligence entitles us to comment whether as a result of the breach, actual or proximate cause of injury has occasioned to the affected party. In this case we are convinced that Ms. Mumba suffered injury in that her perishable goods were unreasonably withheld by the Appellant, while it maintained its strong position without inconvenience. This element of negligence in our view was certainly satisfied.

Regarding the fourth element, we agree with the decision of the Respondent that urged Ms. Mumba to seek damages from the Appellant through the Small Claims Court. This in our view affirms the position that damages resulted to Ms. Mumba as a result of the negligent acts of the Appellant.

All in all we find that the Appellant acted negligently towards Ms. Mumba and that there was no negligence on the part of Ms. Mumba towards the Appellant.

### **3) Whether there was a contract between the Appellant and Ms. Mumba**

From what we have stated above, we have no doubt that there was a valid contract between the Appellant and Ms. Mumba through the sale of the bus ticket in exchange for consideration. We must say that the arguments that have been offered by Learned Counsel for the Respondent are rather unhelpful, as there is no need for us to prove the existence of a contract between the parties.

However, even for the purposes of an argument, we would still be fortified in asserting that there was a valid contract between the parties as all the elements of



contract were met. That is to say, there was an offer through the sale of the bus ticket by the Appellant to transfer Ms. Mumba and her goods to Kitwe, which she accepted. There was consideration in that Ms. Mumba paid for her ticket and transportation of her goods. Further, that the ticket which was issued to Ms. Mumba by the Appellant on carriage created a legal relationship between the parties. Undeniably, these circumstances led to the creation of a valid contract between the parties and there is no need for the Tribunal to give further comment.

**4) Whether the Respondent properly directed itself when fining the Appellant 1% which is a base fine of 0.5% plus the additional 0.5% for other factors.**

This is yet another occasion where we wish to reiterate our decision in the case of **MICA Zambia Limited vs Competition and Consumer Protection Commission 2014/CCPT/010/CON** wherein we held as follows:

*“First and foremost, we must state the position that the question of imposition of fines on offenders,... is within the discretion of the Respondent ... the Respondent has issued Guidelines for the exercise of this discretion, to be applied considering facts and circumstances of each case (The Competition and Consumer Protection Act 2010, Guidelines for Issuance of Fines, made pursuant to power given to the Respondent by Section 84 of the Act).”*

While we are guided by our decision, we however find a lot of discomfort in leaving it to the Respondent to fine the Appellant an additional 0.5% fine for other factors. In our view, these other factors have not been disclosed by the Respondent and on face value would appear to canvass a fine that is compounded in nature. In this regard, we are guided by the case of **Union Bank Zambia Limited v Southern Province Co-operative Marketing Union Limited (1997) S.J. 30 (S.C.)** wherein the Supreme Court held that:

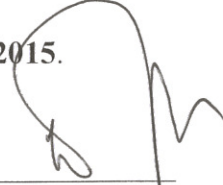
*“An unusual rate of interest such as compound interest requires express agreement, or in the alternative, evidence of consent or acquiescence to such a practice or custom.”*

The Court also observed that:

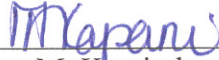
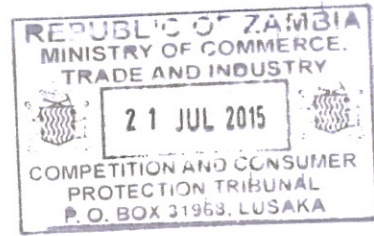
*“Above all, even if there had been such an agreement, it would have been liable to be struck down and not enforced for being penal objectionable at common law. We are not surprised that Government intervened to affirm the common law when it passed a Statutory Instrument (No. 179 of 1995) under the Banking and Financial Services Act (21 of 1994) to formally ban penal interest.”*

The parties are informed of their right to appeal to the High Court within **thirty (30)** days of this Judgment.

Dated at **Lusaka** this **21<sup>st</sup> day of July, 2015.**




Mr. W. A. Mubanga  
Chairperson



Mrs. M. Kawimbe  
Vice Chairperson

Mr. R. Sombe  
Member

Mr. C. Kabaghe  
Member



Mrs. E. Chiyenge  
Member