IN THE COMPETITION AND CONSUMER PROTECTION TRIBUNAL

2014/CCPT/010/CON

HOLDEN AT LUSAKA

In the Matter of: Sections 48 (1) and 53 (1) of the Competition and Consumer Protection Act, No. 24 of 2010

BETWEEN:

MICA ZAMBIA LIMITED **APPELLANT**

AND

THE COMPETITION AND CONSUMER PROTECTION COMMISSION **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 the Appellant: Mr. Enock C. Chingina, Group Finance Manager – Union Gold Group of companies

Mr. Samuel Chileshe, I.T. and Floor Manager

Mr. Benefit Phiri, Accountant

For the Respondent: Mrs. M.B. Mwanza -Director Legal & Corporate Affairs

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JUDGMENT

Legislation referred to:

1. Sections 48, 55, 84 and 85 of the Competition and Consumer Protection Act, No. 24 of 2010

Cases referred to:

2. Alubisho v The People (1976) Z.R. 11 (Sc)

3. Jutronich, Schutte and Lukin v The People (1965) Z.R. 9 (C.A.)

The background to this appeal is that an employee of the Respondent by the name of Mr. Chester Njobvu, lodged a complaint with the Respondent that the Appellant had displayed a disclaimer in

its hardware store at Arcades Shopping Mall, in Lusaka, which appeared to violate provisions of the Competition and Consumer Protection Act, No. 24 of 2010. The disclaimer read:

> *"Please be advised that we are not able to give cash refunds. We will consider an issuance of a credit note in order to exchange the returned goods for other goods from the store only subject to the following:*
>
> - *Goods must be in new and unused condition and in original packaging where applicable*
> - *Original receipts must be produced*
> - *Returning purchases must be from within last seven days from purchase*
> - *Goods will be replaced up to the full value only no cash back*
> - *Managers' authorization is discretionary"*

(Pp. 1 -2 of the Record of Proceedings)

The Respondent was of the view that the disclaimer appeared to be in breach of Sections 48 (1) and 53 (1) of the aforementioned Act and decided to conduct an investigation, concerning which it informed the Appellant by letter dated 11th March 2014, enclosing a Notice of Investigation. (Pp. 3 – 6 of Record of Proceedings)

The Appellant responded by letter dated 7th April 2014 in which it explained the disclaimer as follows "quoting only relevant parts):

- *Cash refunds. We tried to word our phrasing carefully since in line with most retailers we are certainly loathe to offer cash refunds. However ... we can refund in cash particularly in certain circumstances at the discretion of senior management. The huge majority of our customers are happy to just accept a credit note for replacement purchases.*
- *Goods in new and unused condition. This is very standard for all consumer goods since we are not able to accept any goods which are not in any way suitable for resale. Naturally being a hardware we may for example in certain circumstances accept a loose screwdriver which may have been used once but this is entirely at Management discretion.*
- *Original receipts required. This is in our view quite normal and justifiable as irrefutable proof of purchase.*

- *Seven days period. We are not able to extend beyond this for reasons of quality control of any goods being returned. We try to be strict on this however as above, we can and sometimes do use our management discretion. ....*

- *Goods replaced to full value, no cash back. We do believe that this is justified and we strive to avoid additional complications wherever possible.*

- *Management authority is discretionary. We do understand different situations and requirements and it is certainly fair to say that we exercise Management discretion on many occasions ....*"

(P. 7 of the Record of Proceedings)

At the conclusion of the investigation, the Respondent issued a Preliminary Report to which it invited the Appellant's reaction, under cover of a letter dated 14th April 2014. The Respondent's preliminary findings with respect to section 48 (1) of the Act were, *inter alia*, that:

a) The Appellant had displayed the disclaimer on its Arcades outlet, being its trading place, on its checkout counter.

b) The Appellant's notice (return policy) under investigation did purport to disclaim any liability and to deny some rights that consumers had under the Act, specifically the right to a full refund, if the product is defective or if a service was provided without reasonable care and skill. For example, under section 49 (1) of the Act which prohibits the supply of defective and unsuitable goods and services, consumers have been given the right to have defective products replaced or to be refunded.

c) With respect to section 53 (1), citing the test in the British case of Director General of **Fair Trading v First National Bank plc** [2002] 1 All ER 97 where it was held, inter alia, that a contractual term in a consumer contract is unfair if contrary to the requirement of good faith [it] causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer –

i) *Goods will be replaced up to the full value only no cash back:* It is the right of a consumer in any instance where they have purchased a defective product to demand a refund or replacement of the item. As such, this item infringed on this right and it was in abrogation of the Act.

ii) *Goods in new and unused condition.* The clause appeared to breach section 49 (1) of the Act should it relate to the sale of defective goods by the Appellant. A product had to be used by the consumer before the defect could be detected. The phrase in the clause in essence meant that the Appellant would not be held

responsible for goods that have been used or the packages of which have been opened, thus denying consumers redress in the event that the goods were defective and/or not fit for the purpose for which they were normally used.

iii) *Original receipts required.* It was important that consumers as much as possible produce evidence of having bought the product from the Appellant's shop whenever they were returning a defective product. Furthermore, production of an original receipt is necessary but not the only evidence that a consumer may produce.

iv) *Seven days period.* The clause essentially meant that goods of all description in the Appellant's shop only guarantee of seven days. The Respondent wondered what would happen to a product that malfunctioned 10 days or a month and viewed the clause as curtailing the rights of consumers as enshrined in the Act.

v) *Management authority is discretionary.* When goods were defective, the issue of discretion on the part of the seller did not arise. The clause placed the consumer at the mercy of the Manager regardless of the detriment they may have suffered, which was a violation of the Act.

The Preliminary Report further stated that a review of the Respondent's records showed that there were two prior cases reported to the Respondent involving the Appellant regarding sale of defective products and refusal to refund.

In conclusion, the Respondent's Preliminary Report stated that the Appellant appeared to violate sections 48 (1) and 53 (1) of the Act since it tended to disclaim the liability that it had under the Act with respect to defective goods.

In response to the Preliminary Report, the Appellant wrote two letters by email. The first letter was sent on 16th April 2014 and the relevant part read:

"We have read the report of April 2014 and have noted the findings therein. Our subsequent discussion with Mr. Brian Lingela also refers.

We would seek the indulgence of the Technical Committee to allow us an extension of the response so that we can better understand the correct interpretation of the Act.

However in the meantime we are undertaking an immediate revision of any disclaimers that we would wish to display.

As regards a possible fine we feel that in view of the above a fine should not be levied since this is indeed the first time that we have received any notification of any alleged offence under the section 53 of the Competition and Consumer Protection Act 24 of 2010.

We would be grateful for your comments at your earliest convenience.

Yours faithfully,

Adam Lethbridge
For Mica Zambia Limited"

The Respondent agreed to extend the period for the Appellant's response to 30th April 2014 and on 29th April the Appellant wrote the second letter which read in part:

"I have had a very instructive and comprehensive conversation with Mr. Chaaba this afternoon during which I was able to re-confirm that we have now referred to the specific areas of the Act in relation to the two main issues raised by Mr. Chester Njobvu in his original complaint:-

- *48 (1): We have as previously indicated removed all disclaimers from our store and we will be seeking the specific guidance of CCPC as and when we re-word our disclaimers in order to be fully compliant with the relevant legislation.*

- *49 (3) (a) and (b): We will continue to extend a facility for returns as agreed between the parties provided that such returns are requested within seven days (we had this in force before in fact).*

- *The specific matter of complaint by Mr. Joseph Chileshe was resolved amicably with the assistance of CCPC and this matter was successfully concluded.*

As discussed with Mr. Chaaba we have now fully understood the legislation and we confirm that we have since taken the necessary steps to ensure compliance.

We as Mica Zambia are grateful to the CCPC for bringing these issues to our attention and we trust that we can now proceed with the matter fully resolved.

Yours sincerely,

Adam Lethbridge"

The Respondent deliberated and concluded the matter when its Board by its decision of 18th August 2014:

(i) Warned the Respondent to desist from conduct in violation of Section 53(1) of the Competition and Consumer Protection Act, No. 24 of 2010 and that such future conduct would result in the Commission recommending for a fine.

(ii) Directed the Appellant to revise the disclaimer to avoid contravention of the Act.

(iii)Directed the Appellant to pay the Respondent 0.1% of its turnover in line with the Commission's Guidelines on Fines which provides for a cap of K20,000 on issues relating to Section 48 of the Act.

(iv)Directed the Appellant to submit its annual books of accounts to the Respondent for calculation of the actual fine within 30 days of receipt of the directive.

In arriving at the said decision, the Respondent essentially confirmed the earlier findings in the Preliminary Report. The Respondent further stated in its decision that other considerations it took into account were that the Appellant provided redress to a Mr. Joseph Chileshe in an earlier case only because the Respondent intervened. The Board also took note of the Appellant's removal of the disclaimer. The Respondent's Board also took into consideration that from January 2011 to June 2011 it had engaged in a rigorous sensitization campaign against display of disclaimers and traders had been given six (6) months grace period to remove all disclaimers failure to which the Respondent would fine all offenders. Since then, the Respondent had been imposing a fine on any offender for breach of section 48(1) of the Act. (Pp. 35 – 46 of the Record of Proceedings)

The Appellant made further attempts through a meeting held with the Respondent and later in writing to seek a waiver of the fine, pleading that:

a) the Appellant had removed the disclaimer;

b) the Respondent ought to provide information to traders on how to comply with the provisions of the Act

c) the Appellant was first offender; and

d) the Appellant was a member of the Union Gold Group of companies that had over the years promoted good business ethics in Zambia and continued to contribute to the national Treasury substantial amounts in various taxes yearly. (Pp. 47 – 52 of Record of Proceedings)

The Respondent's Board reviewed the case upon these further representations by the Appellant but declined to vary its earlier decision. It determined that the facts and evidence of the case showed that the Appellant contravened Section 48(1) of the Competition and Consumer Protection Act, No. 24 of 2010. (Pp. 53 – 58 of Record of Proceedings)

The Appellant has appealed the Respondent's determination mentioned in the foregoing paragraph. In its grounds of appeal, the Appellant states:

a) **The Charge** - While we do recognize that there was a disclaimer in our shop as mentioned in the (Respondent's) report, we are however, not satisfied with the manner in which this complaint was handled. It is our belief that the complainant in this matter is neither an outside interested party/customer nor the (Respondent) itself but an employee of the (Respondent). Our feeling is that the employee abused his authority.

b) **Decision** – We feel that in this case the Board's decision is biased towards the complainant being their own employee. It is very clear or vivid that the employee was not acting in good faith.

c) Action – Mica Management took immediate steps to remove disclaimers in the store upon (Respondent) raising and clarifying this matter.

d) **In addition,** the (Respondent) based its decision on the sensitization campaign it engaged in 2011 which us as appellant were not aware of.

The relief sought is waiver of the fine taking into consideration, as the Appellant pleads, the mitigating circumstances (first offender who took immediate steps to rectify the situation).

At the hearing of this appeal, Mr Chingina and Mr Benefit Phiri made submissions on behalf of the Appellant, which in essence were a repetition of the grounds of appeal. In summary, the Appellant added that, contrary to what they considered to be the norm, the complainant did not introduce himself as an officer of the Respondent but played a hide and seek game; that the role of the Commission was not to stifle business but to improve business so that better services would be offered; that the Respondent's sensitization programme was targeted at members of the public and did not specifically address businesses or traders so as to make them aware and avoid increasing the cost of doing business through fines; that the current owners of Mica Zambia Limited were not aware of the sensitization programme carried out in 2011, having bought the business in 23 months before the programme was carried out; that in the circumstances and particularly since they were a first offender, the imposition of a fine was unfair.

Counsel for the Respondent, Mrs Mwanza, argued concerning the first ground of appeal, that the Appellant had acknowledged having displayed the disclaimer; it however alleged that the officer who raised the complaint abused his authority but did not explain in what manner he did so. She went on to submit that according to the law as provided in section 55 (1) of the Act, the Respondent had authority to undertake investigations following a complaint from any person or on its own initiative. Further, that the ultimate goal of the provisions was to safeguard the rights and interests of consumers who have lesser bargaining power.

Counsel for the Respondent argued, concerning the second ground of appeal, that, as in the first ground, the Appellant had not explained how the Respondent's Board's decision was biased. She submitted that the Board's determination was in line with the law in that section 48 (1) prohibited trading premises or shop owners displaying disclaimers and subsection (2) prescribed the penalty that an offender was liable to a fine not exceeding 10% of annual turnover; in this case the Appellant was fined 0.1% of turnover with a cap of K20,000 in line with the Respondent's Guidelines on Fines.

As for the third ground of appeal, counsel for the Respondent argued that even though the Appellant took steps to remove the disclaimer, this could not warrant the fine being waived as the law had already been abrogated and the penalty was to flow from that breach.

In respect of the fourth ground of appeal, counsel for the Respondent submitted that where such a sensitization programme is carried out by the Respondent, the target, particularly being business and trading premises, is the general public.

We have reviewed the Record of Proceedings and other documents filed in this appeal. We have also considered the oral submissions made by both parties. We have deliberately set out a substantial part of the Record of Proceedings in the judgment bearing in mind the serious allegations of abuse of authority, bad faith and bias levelled by the Appellant against the complainant (an employee of the Respondent) and the Respondent, respectively, in the grounds of appeal.

The provision of the law in issue being section 48 of the Competition and Consumer Protection Act, we reproduce it below:

> *"48 (1) An owner or occupier of a shop or other trading premises shall not cause to be displayed any sign or notice that purports to disclaim any liability or deny any right that a consumer has under this Act or any other written law.*
>
> *(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."*

It is not in dispute that the Appellant displayed the disclaimer subject of the appeal; neither is it in dispute that the Appellant, upon being informed by the Respondent of the offence and expositions of the law being provided, removed the disclaimer. What is being contested in this appeal is the levying of the fine. According to the Appellant, the Respondent's Board, when it decided to levy the fine did not act fairly and was obviously biased in favour of the complainant who was its employee. Further, in the Appellant's view, the complainant not being an outside interested party nor the Respondent itself, in lodging the complaint, abused his authority and acted in bad faith.

In addressing ourselves to the first and second grounds of appeal, we have considered the role played by the complainant, one Chester Njobvu, an employee of the Respondent. We agree with Counsel for the Respondent that section 55(1) of the Act gives the Respondent power to undertake investigations following a complaint from any person or on its own initiative. In our view, employees of law enforcement agencies should be vigilant in bringing law breakers to book. In this case, we agree with counsel for the Respondent that the objective of the law in question is to safeguard the rights of consumers. Among the functions of the Respondent outlined in section 5 of the Act is, *"(f) act as a primary advocate for ... effective consumer protection in Zambia"*. This cannot be achieved, and it would be absurd and contrary to the letter and spirit of the law, if the Respondent's employees paid a blind eye to blatant violations of the law.

While we agree with the Appellant's submission that ordinarily employees of law enforcement agencies do introduce themselves, we also bear in mind that they are within their discretion not to do so and, just like any other person, they are entitled to file complaints of suspected offences. What would be unacceptable is maliciously framing up charges against innocent persons or being abusive or discourteous. The Appellant claimed in its submissions at the hearing of the appeal that they had informed Management of the Respondent when they met that they found the approach taken by the complainant (of not disclosing his identity) improper. We have found none of the complaints made by the Appellant in the appeal in the proceedings before the Respondent in the first instance. These are serious allegations of misconduct, which we do not expect or encourage litigants to raise for the first time on appeal. At any rate, we have found nothing in the proceedings before the Respondent suggesting abuse of authority or bad faith on the part of the complainant or bias in the decision of the Respondent's Board. To the contrary, the Appellant admitted having committed the offences complained of. Therefore, on the totality of the record before us, we find that the Appellant's allegations lack merit. We accordingly dismiss the first and second grounds of appeal.

We shall address the third and fourth grounds of appeal together. The Appellant has argued that it immediately removed the disclaimer and has further pleaded that as first offender the fine ought to have been waived. First and foremost, we must state the position that the question of imposition of fines on offenders, pursuant to the prescription given by section 48 (2) of the Competition and Consumer Protection Act, is within the discretion of the Respondent. We note that 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).

We are guided by established principles dealing with an appellate court's power to interfere with a sentence passed by a lower court in the exercise of its discretion. In the case of **Alubisho v The People** (1976) Z.R. 11 (SC), in which the case of **Jutronich, Schutte and Lukin V The People** (1965) Z.R. 9 (C.A.) was also referred to, the Supreme Court held:

i) With the exception of prescribed minimum or mandatory sentences a trial court has a discretion to select a sentence that seems appropriate in the circumstances of each individual case. An appellate court does not normally have such a discretion.

ii) In dealing with an appeal against sentence the appellate court should ask itself three questions:

1. Is the sentence wrong in principle?

2. Is it manifestly excessive or so totally inadequate that it induces a sense of shock?

3. Are there any exceptional circumstances which would render it an injustice if the sentence were not reduced?

Only if one or other of these questions can be answered in the affirmative should the appellate court interfere.

Accordingly, the Tribunal on appeal would not interfere with any such fine imposed by the Respondent except upon its determination that the fine was wrong on principle or in law or that the discretion was exercised arbitrarily without justification or that the discretion was otherwise abused or that the fine is manifestly excessive or so totally inadequate that it induces a sense of shock or there were exceptional circumstances which would render it an injustice if the sentence is not interfered with.

We have noted that the Appellant confirmed the Respondent's finding that previously a complaint had been lodged with the Respondent against the Appellant for sale of defective goods and refusing to refund, until the Respondent intervened. Although the earlier offence was not against section 48(1) of the Act, we are of the view that the mitigating factor of an offender not having been the subject of previous enforcement action on similar conduct, in terms of Guideline 7 (iii) (b), would not apply to the Appellant. This is because the Appellant's earlier conduct relating to section 49(1) and (3) of the Act was similar to the conduct subject of the appeal, relating to section 48(1). The offences are similar and fall under Part VII of the Act which protects consumers by prohibiting certain trading practices. According to the table of fines under Guideline 6 (Table 2), the baseline fine for the offence in issue is 0.1% of turnover, with a capping of K20,000. We are of the view that the mitigating factor in Guideline 7(iii) (e) which the Respondent ought to consider in assessing a financial penalty to be imposed, i.e. termination of the violation as soon as the (Respondent) intervenes, was negated by the fact that the Appellant committed a similar offence previously, by reason of which it should not in the first place have displayed a disclaimer denying consumers the right to cash refunds.

We therefore agree with counsel for the Respondent that in the circumstances of the case the offence having already been committed, the penalty, which was the baseline fine of 0.1% of

turnover with a capping of K20,000, flowed therefrom and could not be waived by reason of the removal of the disclaimer.

Concerning the issue of the sensitization programme the Respondent carried out in 2011 and the six months' grace period for traders' removal of any disclaimers offending against provisions of the Act, it is our view that this was not the basis for the imposition of the fine. The basis for the imposition, as reflected in paragraph 11 at page 58 of the Record of Proceedings, was section 48 (2) of the Act, which prescribes the 10% annual turnover as maximum liability, and the Guidelines for Issuance of Fines, referred to above. The sensitization programme was mentioned in the Respondent's Board deliberations as a factor it took into consideration in its determination of the case.

We note that Section 85 of the Act provides that, *"The Commission may disseminate in such manner and form as it considers appropriate, information and advice concerning the operation of this Act."* We sympathise with the Appellant that there was a time lapse between 2011 and 2014, when the offence was found to have been committed. Further, the validity of the point made by the Appellant that ideally the Respondent should carry out sensitization programmes targeted at businesses and traders cannot be disputed. We also agree that while the provisions contravened by the Appellant are intended to protect the rights of consumers, the role of the Respondent in enforcing the law is not to stifle businesses. Campaigns aimed at promoting awareness of and compliance with the law by businesses would supplement deterrent measures such as imposition of fines. We therefore urge the Respondent to carry out such information campaigns more regularly and to target businesses and traders. This would mitigate the financial burden arising from penalties, particularly on small and medium scale enterprises. However, these probations cannot be a basis for interfering with the Respondent's decision when it considered the public sensitization programme it carried out in 2011 and that the grace period given for removal of disclaimers had since expired. We have found nothing on the record to suggest that had the Respondent not considered the sensitization programme it would not have levied the fine. The third and fourth grounds of appeal also fail.

All in all, we have found no basis for interfering with the Respondent's decision to impose on the Appellant the baseline fine of 0.1% of annual turnover with a capping of K20,000, which it has set for the offence under section 48(1) of the Competition and Consumer Protection Act, No. 24 of 2010.

In consequence, the appeal is dismissed with costs to the Respondent. Any person aggrieved with this decision may appeal to the High Court within thirty (30) days.

Delivered at Lusaka this 15th April, 2015.

Aubbie W. Mubanga
Chairperson

Maria M. Kawimbe
Vice Chairperson

Chance Kabaghe
Member

Rocky Sombe
Member

Eness C Chiyenge
Member