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

2016/CCPT/009/CON

IN THE MATTER OF: SECTION 51, (1) AND (2) OF THE COMPETITION AND CONSUMER PROTECTION ACT NO. 24 OF 2010

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

BETWEEN:

SPAR ZAMBIA LIMITED — APPELLANT

AND

DANNY KALUBA — 1ST RESPONDENT

COMPETITION AND CONSUMBER PROTECTION COMMISSION — 2ND RESPONDENT

CORAM: Mr. Willie A. Mubanga, SC - Chairperson
Mrs. Miyoba B. Muzumbwe-Katongo - Vice Chairperson
Mr. Rocky Sombe - Member
Mr. Chance Kabaghe – Member,
Mrs. Eness C. Chiyenge - Member

For the Appellant: Mrs. C. Ngulube legal counsel of Victoria Dean Advocates

For the 1st Respondent: Danny Kaluba

For the 2nd Respondent: Mrs. M. M. Mulenga, Manager Legal and Corporate Affairs; Ms. M. Mtonga, Legal Officer, Competition and Consumer Protection Commission

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JUDGMENT

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1. **Legislation referred to:**

   Competition And Consumer Protection Act, No. 24 of 2010 section 51 (1) and (2)

2. **Cases referred to:**

a) **CHITAMBALA NTUMBA v THE QUEEN** (1963-1964) Z. AND N.R.L.R. 132,

b) **SHERRAS V. DE RUTZEN** [1895] 1 Q.B. 918

c) **HOBBS V.WINCHESTER CORPORATION** [1910] 2 KB 471

d) **CUNDY V. LE COCQ** (1884) 13 Q.B.D. 207

e) **REYNOLDS V.G. H. AUSTIN AND SONS LTD** [1951] 1 All E.R. 606; and

f) **JAMES AND SONS LTD. V. SMEE; GREEN V. BURNETT** [1954] 3 All E.R., 273

The facts of the appeal as presented in the Record of Proceedings by the 2nd Respondent are that on 14th December 2015, the 2nd Respondent received a complaint from a Mr. Danny Kaluba (who we shall refer to as 1st Respondent) against Spar Zambia Limited (who we shall refer to as the Appellant). Specifically, the 1st Respondent alleged that on 13th December, 2015, he went to the Appellant's Shop (Spar Soweto) to buy Ilya sour milk Lacto 500 ml. He alleged that the price displayed on the product in the Respondent's shop was K3.30 but when he went to pay he was charged K5.00 at the counter. The Complainant alleged that he complained about the price to the cashier but she referred him to the store manager. He alleged further that when he complained to the shop manager he was asked to complain to the floor manager who was not around at the time. The Complainant alleged that he asked the manager to redress him but the store manager failed to redress his problem. The Complainant alleged that he sought to be refunded his K1.70

Consequently, the 2nd Respondent carried out investigations into the matter pursuant to Section 5(d) of the Competition and Consumer Protection Act No 24 of 2010 (herein after referred to as the Act) that states that-

" 5. *The functions of the Commission are to investigate-*

(d) unfair trading practices and unfair contract terms and impose such sanctions as may be necessary".

In addition the 2nd Respondent relied upon Sections 51(1) of the Act. Section 51 (1) of the Act reads-

(1) A person or an enterprise shall not charge a consumer more than the price indicated or displayed on a product or service.

Perusing through the Decision of the Board of Commissioners of the 2nd Respondent, we find that investigations were conducted by the 2nd Respondent by way of inquiring through the issuance of a Notice of investigation which was sent to the Appellant on Thursday, 17th December, 2015 and that the Appellant made submissions in relation to the allegations raised through a letter dated 28th December, 2015.

The Appellant submitted that they did not deny that the Ilya sour milk bought at Spar Soweto outlet were displayed at the price of K3.30 while the complainant was charged K5.00 at the till. The Appellant submitted that the 1st Respondent did not engage with anyone in the store but went straight to the 2nd Respondent's office without having any discussion with the Appellant at either the store level or head office level contrary to the 1st Respondent's allegations that he notified the store manager and the matter was not redressed. The Appellant submitted that they engaged the customer on 24th December 2015 following request of the customer's contact details from the 2nd Respondent. The Appellant indicated that from previous experience with similar cases, they are aware that the 2nd Respondent has advised that it would be preferable for the customer to engage management at the time an error is found. The Appellant further stated that once all options fail then it would be reasonable to expect a customer to seek recourse through the 2nd Respondent's office; however the Appellant was not given that opportunity in the matter at hand prior to it being reported to the 2nd Respondent.

The Appellant further submitted that the error that occurred on the pricing of this particular packet of sour milk was a system error and that they can confirm that the said price difference was rectified, therefore, the said error was neither deliberate nor intentional. The Appellant further submitted that it makes every effort to ensure that it fully complies with the provisions of the Act and other applicable legislation. The Appellant further submitted that it had put measures in place in a bid to ensure that the said mistake does not happen again. The Appellant also submitted that such a case had never occurred with the outlet in question.

The Board of Commissioners of the 2nd Respondent having considered the facts, evidence and submissions in the case, resolved that the Appellant breached Section 51 (1) of the Act. However, the Board observed that the Appellant did not breach Section 46 (1) as read together with section 45(a) and (b) of the Act. Consequently, the Board decided that:

(i) The Appellant refunds the 1st Respondent K5.00 and

(ii) The Appellant be warned for breaching section 51(1) of the Act as future breach of the sections will attract a fine of 0.5% of the annual turnover

However, the Appellant having been dissatisfied with part of the decision of the Board dated 13th June, 2016 decided to appeal to this Tribunal based on the following grounds and reliefs:

(a) Ground One: That there is no justification for the level of punishment bestowed on the Appellant in that it is the Appellant's first time to violate section 51(1) of the Act and a punishment of a fine of 0.5% of its annual turnover on future breach of the said section is severe and not commensurate to the nature of the offence taking into account all the circumstances;

(b) Ground Two: That the Commission did not take into account when ruling that the Appellant shall be fined for future breaches, the fact that no serious damage was suffered by the complainant following the alleged breach;

(c) Ground Three: That the Commission did not take into account when ruling that the Appellant be fined on a future breach the fact that the price discrepancy had been brought about as a result of a systems error which was immediately corrected;

(d) Ground Four: That the Commission did not take into account when delivering its ruling the fact that the value of the discrepancy in question was only K1.70 and nor did it take into account the explanation given by the Appellant for the discrepancy;

(e) Ground Five: That the Commission did not take into account the fact that there was no evidence to suggest that this type of offence was being committed by the Appellant on an ongoing basis or deliberately

(f) Ground six: That stating that the Commissionwill impose a fine on future breach is unreasonable based on the circumstances of the offence and taking into account that the Commission recognised that the Appellant was willing to redress the complaint when it engaged him to seek ways of redressing [illegible]

(g) Ground seven: That the fine on future breach is unreasonable based on the fact that the offence was clearly not committed intentionally and that the Appellant was prompt in its response to the complainant. Further the Commission's review of the Appellant's file revealed that there were no prior cases involving the respondent under section 51(1) of the Act

The Appellant sought the following relief:

a) That the part of the ruling that provides that future breach of section 51(1) of the act will attract a fine of 0.5% of the Respondent's annual turnover be reversed;
b) That the Appellant be cautioned against committing a similar offence without the threat of a fine.

The 2nd Respondent in its heads of arguments argued as follows:

1. Ground one;

The Board of Commissioners was on firm ground in its decision to warn the Appellant for violating section 51 (1) of the Competition and Consumer Protection Act No. 24 of 2010 and to inform the Appellant that for any future breach of the said section a fine of .05% will be imposed on them. The 2nd Respondent further argued that the Board of Commissioners found that the 1st Respondent had purchased Ilya sour milk from the Appellant on 13th December, 2015. This was evidenced by a receipt bearing a transaction number 2753041 and this fact was confirmed by the Appellant. Furthermore, the Board of Commissioners found that the the Illya sour milk was displayed at a price of K3.30 but the 1st Respondent was charged K5.0 at the till. The Appellant was found to have violated section 51 (1) of the Competition and Consumer Protection Act No. 24 of 2010 which states that:

> ***"A person or an Enterprise shall not charge a consumer more than the price indicated or displayed on a product or service."***

The Appellant argued further that the provision of the act clearly prohibits an enterprise to charge more than the price indicated on the product. The intention of the enterprise at the time of committing this violation is irrelevant to the fact in issue. Further that Section 51(2) of the Act provides for the payment of a fine not exceeding 10% of that person's or enterprise annual turnover. At page 36 of the Record of proceedings the Board of Commissioners gave a directive to warn the Appellant because they were first time violators of section 51(1) of the Act. The 2nd Respondent argued further that the Board of Commissioners has the discretion to either warn or

fine the erring enterprise or person and the factor taken into consideration when directing a warning is whether the person or enterprise are first time violators.

2. Ground two

The 2nd Respondent argued that contrary to the Appellant's assertion at paragraph b-d the Board of Commissioners was on firm ground when it ruled that the Appellant shall be fined for future breaches as the said ruling was made within the ambit of section 51(1) and (2) of the Competition and Consumer Protection Act No. 24 of 2010. They argued further that section 51(1) and (2) of the Act prohibits an enterprise or a person to charge a consumer more than the price displayed and in the event that there is a violation, the erring enterprise is fined not exceeding 10% of its annual turnover. The 2nd Respondent argued further that the provision does not state that the consumer must suffer damage in order for a fine to be directed by the Board of Commissioners. The facts in issue are that the Appellant herein did charge the consumer more than the price displayed, but since they are first time violators, the Board of Commissioners exercised their discretion that they be warned; that a future violation will indeed attract a fine of the annual turnover as stipulated in the Act. They further argued that redressing the consumer does not absolve the Appellant of the violation of the Act, neither do system errors which are the responsibility of the Appellant. They further argued that if enterprises are advancing the system errors as excuses for non compliance with the provisions of the Act, the protection of the consumers will be defeated.

3. Ground five

The 2nd Respondent argued that with respect to ground (e), the Board did not err when it made its decision without taking into account the perpetual commissioning by the Appellant of the offence complained of or lack thereof. The Appellant in ground five of their heads of argument have stated that there is no evidence to suggest that this type offence was being committed by the Appellant on an ongoing basis or deliberately. They argued further that section 51(1) of the Act is an actionable per se offence, which means that there is no need to show proof of the allegation to constitute a legal action. Therefore there was no need to show proof that the Appellant had been committing the said violation on an ongoing basis.

4. Ground six

The 2nd Respondent argued that contrary to the position taken by the Appellant at ground (f), the Board of Commissioners was on firm ground and Acted

reasonably and within its mandate in its decision to warn the Appellant that breach of section 51(1) in future would attract a fine.

5. Ground seven
   The 2nd Respondent argued that there was no err on the part of the Board of Commissioners as it acted reasonably when it warned the Appellant to be fined for future breach of section 51(1) of the Act as such future fines would be on point with the letter of the law. The Appellant further argued that the 2nd Respondent only warned the Appellant to desist from similar conduct in the future. This simply implied that in the event that the Appellant violates the said provision again, then a fine would be imposed on the Appellant in accordance with section 51(2) of the Act.

In conclusion the 2nd Respondent argued that the Board of Commissioners was on firm ground when it warned the Appellant for violating section 51(1) of the Act, and that the violation is one which the Appellant themselves acknowledge to have committed. There is nothing wrong in informing the Appellant that in the event there is s violation of section 51(1), a fine of .05% of their annual turnover will be imposed.

At this juncture, the Tribunal wishes to delve into the substance of the Appeal before it and deliver a reasoned judgment on the matter. Our approach in arriving at the reasoned judgment shall focus on the grounds of appeal, heads of arguments and considerations of the Tribunal proceedings.

Grounds One to Seven:

We shall consider all the grounds of the appeal together as they are interrelated. In summary, it is alleged that the 2nd Respondent erred in that it did not take into account the circumstances of the case; that the Appellant did not intentionally charge the 1st Respondent a price that was higher than that displayed but that this was due to a system error which was rectified as soon as it was brought to the Appellant's attention. The questions we must address ourselves to are:

1. Whether the alleged contravention of section 51 (1) is one to which the common law presumption of the requirement of proof of *mens rea* (a guilty mind) applies; and
2. If so, whether the Appellant unintentionally committed the act complained of.

In addressing ourselves to the first issue, we observe that distinguishing between offences to which the common law presumption of the requirement of proof of a guilty mind and those to which the presumption does not apply has been subject of court decisions for centuries. In our jurisdiction, for instance, the law was reviewed extensively by Mr. Charles, J. in the High Court (appeal) case of **CHITAMBALA NTUMBA v THE QUEEN** (1963-1964) Z. AND N.R.L.R. 132, in which the learned Judge made the observations outlined below.

> In 1895, in **SHERRAS V. DE RUTZEN** [1895] 1 Q.B. 918 at page 921, Wright, J, stated the law, as it appeared to have developed by then, in these words: '
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> > "There is a presumption that *mens rea,* an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by works of the statute creating the offence or by the subject matter with which it deals, and both must be considered . . ."
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> He then went on to say that the classes of statutes in which the presumption has been found to have been negatived may perhaps be reduced to three:
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> > (i) those by which the legislature has seen fit, in the public interest, to prohibit under penalty acts which are not criminal in themselves;
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> > (ii) those prohibiting under penalty acts which amount to a public nuisance;
> >
> > (iii) those allowing proceedings in criminal form as a summary mode of enforcing civil rights.
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> The learned judge's attempt to classify the statutes in which the common law presumption was commonly found to have been rebutted led many subsequent judges to concentrate more on whether or not a particular statute fitted into one of the categories of exceptions than upon whether or not it was necessary to exclude the presumption in order to achieve effectively the manifest objects of the legislature. As a result the authorities on the subject had become ... confusing by 1943 ...."

In reviewing the confusion that ensued in the interpretation of the law on the presumption, Charles J cited observations by Jordan, CJ, in **R. V. TURNBULL** (1943) 44 S.R (N.S.W.) 608; 18 A.L.J., of conflicting decisions that ensued from the **SHERRAS V. DE RUTZEN** case. Lord Jordan labelled some of the decisions as decided on

conjectures. In his judgment, Charles, J., quoted extensively from decided cases on the subject, which in summary can be said to have formulated the following principles:

1. At common law there must always be *mens rea* to constitute a crime; if a person can show that he acted without *mens rea* that is a defence to a criminal prosecution.
2. Unless a statute, either expressly or by necessary implication, rules out *mens rea* as a constituent part of a crime the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.

These principles were acted on in several later cases by the King's Bench Divisional Court, presided over by Lord Goddard (for example, in **HARDING V.PRICE** [1948] 1 All E.R. 283, 68 T.L.R 111; **REYNOLDS V. G. H. AUSTIN AND SONS LTD.** [1951] 1 All E.R. 606; and **GARDNER V. AKEROYD** [1952] 2 All E.R. 306).

In Lim **CHIN AIK V. REGINAM** [1963] 1 All E.R. 223, Lord Evershed, in giving the advice of the Board, which consisted of himself, Viscount Radcliffe and Lord Devlin, referred to the dictum of Wright, J, in **SHERRAS V. DE RUTZEN** and quoted the second principle with approval. He then said, of determining the intention of the legislature where a guilty mind as an ingredient of the offence is not expressly ruled out by the legislature:

> "The adoption of these formulations of principle does not, however, dispose of the matter. Counsel for the respondent, indeed, as their Lordships understood, did not challenge the formulations. But the difficulty remains of their application. What should be the proper inferences to be drawn from the language of the statute or statutory instrument under review . . .? More difficult perhaps still: what are the inferences to be drawn in a given case from the ' subject-matter with which (the statute or statutory instrument) deals '?
>
> Where the subject-matter of the statute is the regulation for the public welfare of a particular activity - statutes regulating the sale of food and drink are to be found among the earliest examples - it can be and frequently has been inferred that the legislature intended that such activities should be carried out under conditions of strict liability. The presumption is that the statute or statutory instrument can be effectively enforced only if those in charge of the relevant activities are made responsible for seeing that they are complied with. When such a presumption is to be inferred, it displaces the ordinary presumption of *mens rea*. Thus sellers of meat may be made responsible for seeing that the meat is fit for human consumption and it is no answer for them to say that they were not aware that it

was polluted. If that were a satisfactory answer, then as Kennedy, L.J., pointed out in **HOBBS V.WINCHESTER CORPORATION** [1910] 2 KB 471 at pages 482-5, the distribution of bad meat (and its far-reaching consequences) would not be effectively prevented. So a publication may be made responsible for observing the condition of his customers - **CUNDY V. LE COCQ** (1884) 13 Q.B.D. 207.

But it is not enough in their Lordships' opinion merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim. This principle has been expressed and applied in **REYNOLDS V.G. H. AUSTIN AND SONS LTD** (supra) and **JAMES AND SONS LTD. V. SMEE; GREEN V. BURNETT** [1954] 3 All E.R., 273. Their Lordships prefer it to the alternative view that strict liability follows simply from the nature of the subject-matter and that persons whose conduct is beyond any sort of criticism can be dealt with by the imposition of a nominal penalty. This latter view can perhaps be supported to some extent by the dicta of Kennedy, L.J., in **HOBBS V. WINCHESTER CORPORATION** (supra) and of135 Donovan, J, in **R. V. ST. MARGARET'S TRUST LTD. [1958] 2 ALL E.R. 289 AT PAGE 293**. But though a nominal penalty may be appropriate in an individual case where exceptional lenience is called for, their Lordships cannot, with respect, suppose that it is envisaged by the legislature as a way of dealing with offenders generally. Where it can be shown that the imposition of strict liability would result in the prosecution and conviction of a class of persons whose conduct could not in any way affect the observance of the law, their Lordships consider that, even where the statute is dealing with a grave social evil, strict liability is not likely to be intended."

The learned Judge Charles in concluding his judgment in the **Chitambala Ntumba** case then went on to state:

"It follows, in my judgment, that the rule relating to *mens rea* as an element of a statutory offence is this: In the absence of express provision for the offence containing a mental element, it is presumed that the legislature intended that the

offence can only be committed by persons with knowledge of the existence or occurrence of the facts or circumstances constituting it. That presumption may be negatived expressly or impliedly. It is negatived impliedly if, but only if, the offence is created in such terms and context as clearly manifest an intention to make it one of absolute liability, or if the substantial suppression of the mischief at which the offence is directed would not be achieved unless the offence was one of absolute liability.

In determining whether absolute liability is necessary to achieve a substantial suppression of the mischief at which the offence is directed regard is to be had to the nature of the offence: to the nature of the mischief to which the offence is directed: to "knowledge" covering actual knowledge, correct belief and deliberate ignorance but not careless ignorance (see as to that, Nkoloso v. The Queen H.P.A. 12763); to the burden of proving knowledge often being lightened by the accused having the burden of adducing evidence of ignorance, as his state of mind is a matter peculiarly within his own knowledge; and to the extent to which the ignorant are likely to indulge in the mischief and defeat its suppression. Even when necessity is revealed for construing the offence as covering the carelessly ignorant, the necessity may not extend to including the ignorant without fault within the scope of the offence. In that case the provision creating the offence is to be construed as if it contained the words " knowing of or with reason to believe " in respect of the facts constituting the offence."

In the appeal before us, in reviewing the wide array of authorities on the subject matter, we bear in mind that typically the offences dealt in the cited cases would, in our jurisdiction, be categorised as criminal offences and adjudicated upon by criminal courts, though they are not contained in the Penal Code, Chapter 87 of the Laws of Zambia.

In this appeal, however, we are not dealing with a criminal offence but a regulatory offence which is penal in nature. Indeed, neither the 2nd Respondent nor this Tribunal has the jurisdiction to adjudicate on criminal offences in the Competition and Consumer Protection Act. It is firmly established, as guided by the **Sherras v. De Rutzen** case and subsequent case law, that (regulatory or public welfare) offences by which the legislature has seen fit, in the public interest, to prohibit under penalty acts which are not criminal in themselves, do not carry the common law presumption of the requirement of *mens rea*, if the offence is created in such terms and context as clearly manifest an intention to make it one of absolute liability. One way in which this legislative intention is implied is if the substantial suppression of the mischief at which the offence is directed would not be

achieved unless the offence was one of absolute liability. Other factors have been cited as the gravity of the penalty.

The question in the present case therefore arises as to what is the mischief (public policy) behind the provision in issue? In part, the public policy can simply be stated as found in the title of the Act itself and that of Part VII – "Competition and Consumer Protection". Specifically, s. 51 (1) is intended to protect consumers from paying a higher price from that for which a product or service is offered (as displayed) by the seller. In a supermarket store, such as the Appellant's, unsuspecting consumers can be enticed to buy a product or service by the lower price displayed only to pay a higher price at the till. While some consumers may notice the price difference, others may not. More broadly, there is an element of distortion of competition when a seller purports to be selling a product or service at a lower price than others in the market. Ultimately, there is a real risk of an increased turnover in volume and value at the expense of consumers and to the detriment of competition, thereby defeating the public policy behind the legislative provision.

Furthermore, we are of the view that the said public policy and the suppression of the mischief behind the provision would be defeated if the offence was not one of absolute liability because implementation of the requirement of the law is exclusively a responsibility of the Appellant and the 2nd Respondent is not privy to the processes by which the Appellant secures adherence to the law. Whether or not the act in issue was committed deliberately, by negligence or honest mistake despite all diligent efforts are matters within the exclusive knowledge of the Appellant. Requiring the 2nd Respondent to prove a guilty intention on the part of a supplier of consumer goods and services in the position of the Appellant would make prosecution of such offences almost impossible and thereby defeat the suppression of the mischief.

Even if, for argument sake, for the avoidance of penalising a person who is morally blameless, one was to fall back on categorising the offence as not one of absolute liability but as a strict liability offence in which proof of *mens rea* is not required, but leaving it open to the defendant to prove, on a balance of probabilities, that he/she took "all reasonable care"; or that the accused person reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he/she took "all reasonable steps to avoid the particular event", we find that in the present case the Appellant merely alleged but did not tender any evidence to show that the act complained of was due to a system error, let alone one which it took all reasonable steps to avoid. The Appellant did not adduce evidence showing how long the act complained of had been going on and the value of the total differential price.

We further observe that the Appellant has no excuse for not having adduced documentary or other evidence to prove its claim that the act in issue was due to system error, particularly that the 2nd Respondent had in its notice of investigation at pages7 directed the Appellant to submit a statement in response to the allegation. Neither has the Appellant produced any document to prove its claim in the appeal proceedings

In light of our observations above and from the evidence submitted by both the Appellant and the 2nd Respondent, respectively, it is clear that the Appellant breached section 51(1) of the Competition and Consumer Protection Act No. 24 of 2010.

In consequence, the Appellant's appeal fails on all grounds. Furthermore, in our view, the penalty, being a mere warning, is not supported by the Act. Subsection (2) of section 51 mandatorily prescribes a fine of not more than ten per cent of the offender's annual turnover. We accordingly order that the 2nd Respondent imposes an appropriate fine based on the prescribed penalty, in accordance with section 51 (2) of the Act and its Guidelines developed pursuant to section 84 of the Act.

We order that the Appellant shall bear the costs of the appeal. The parties are informed of their right to appeal to the High Court within thirty (30 days).

Delivered at **Lusaka** this **14th day of February, 2017.**

Mr. Willie A. Mubanga, SC
Chairperson

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MINISTRY OF COMMERCE
TRADE AND INDUSTRY
14 FEB 2017
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