

IN THE COMPETITION AND CONSUMER  
PROTECTION TRIBUNAL FOR ZAMBIA  
HOLDEN AT LUSAKA

2015/CCPT/009/CON

SLC  
PM  
13/7

**BETWEEN:**

TAJA INVESTMENT T/A PUMA  
FILLING STATION LONGACRES

APPELLANT

AND

COMPETITION AND CONSUMER  
PROTECTION COMMISSION



1<sup>ST</sup> RESPONDENT

MR ANDREW MUSENGA MUSUKWA

2<sup>ND</sup> RESPONDENT

VEHICLE CENTRE LIMITED

3<sup>RD</sup> RESPONDENT

**CORAM:**

Mr. W.A. Mubanga, SC. (Chairperson), Mr R. Sombe  
(Member), Mr. C. Kabaghe (Member), Mrs. E.  
Chiyenge (Member)

**For the Appellant:**

Mr. K.M. Simbao, Mulungushi Chambers

**For the 1<sup>st</sup> Respondent:**

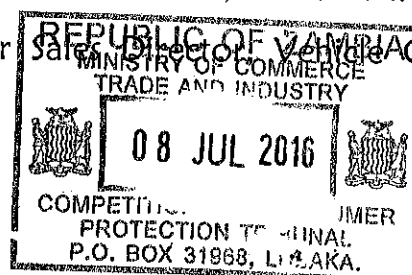
Mrs. M.M. Mulenga, Manager, Legal and  
Corporate Affairs, Competition and Consumer  
Protection Commission, Mrs. M.C. Kabwela,  
Legal Officer, Competition and Consumer  
Protection Commission

**For the 2<sup>nd</sup> Respondent:**

Mr. N. Mulemba, AMC, Legal Practitioners

**For the 3<sup>rd</sup> Respondent:**

Mrs. L. Tembo, Ms. B.M. Chanda, AF and  
David Legal Practitioners, Mr. M. Van  
Niekerk, After Sales Director, Vehicle Centre  
Zambia



1.

**Authorities referred to:**

- (1) Section 49(1) of Act No. 24 of 2010
- (2) Section 49(2) of Act No. 24 of 2010
- (3) Competition and Consumer Protection Commission and Hill Jam Investments Limited (Abel Kalumba) Cause No. 2014/CCPT/006
- (4) Section 71(1)(b) of Act No. 24 of 2010
- (5) Rule 27(e) of the Legal Practitioners Rules 2002
- (6) Competition and Consumer Protection Commission and Tokyo Vehicle Limited under Case No. 2014/HP/A/1018

---

**J U D G M E N T**

---

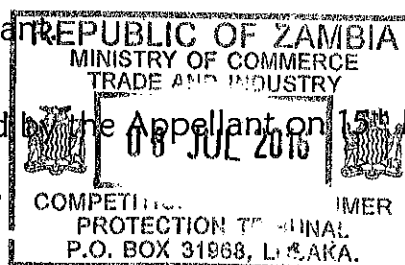
The appeal before this tribunal arises out of the decision of the Competition and Consumer Protection Commission made on 13<sup>th</sup> February, 2015 which decided as follows; namely that:

- (a) The 2<sup>nd</sup> Respondent (Taja Investments T/A Puma Filling Station Longacres) and now the Appellant be warned for violating Section 49(1) of the Act;
- (b) That the said Taja Investments T/A Puma Filling Station Longacres be directed to pay costs incurred in repairing the Complainant's (Andrew Musenga Musukwa's) vehicle.

We wish to clarify that when the matter was heard before the Board of the Competition and Consumer Protection Commission under Case No. CCPC/CON/225 the 2<sup>nd</sup> Respondent was Taja Investments T/A Puma Filling Station Longacres while before this tribunal the 2<sup>nd</sup> Respondent is cited as Mr Andrew Musenga Musukwa and that can cause confusion because the then 2<sup>nd</sup> Respondent is now the Appellant.

According to the Notice of Appeal filed by the Appellant on 15<sup>th</sup> May, 2015

2.



the following are the grounds of appeal upon which the Appellant relied:

- "(1) The Commission misdirected itself in deciding that the 2<sup>nd</sup> Respondent be warned for violating Section 49(1) of the Act;*
- (2) The Commission misdirected itself in deciding that the 2<sup>nd</sup> Respondent be directed to pay for costs incurred in repairing the Complainant's vehicle;*
- (3) That the Commission did not exhaust other possibilities that could have caused damage to the Complainant's fuel system;*
- (4) That the Commission misdirected itself in deciding that out of a number of a hundred vehicles that got fuel from the Appellant tank only (1) the Complainant's vehicle was affected".*

According to the Notice of Appeal the Appellant is seeking the following relief, namely (1) that it be ordered that the Appellant was not in breach of Section 49(1) of the Act and;

that it be ordered that costs incurred in repairing of the Complainant's vehicle either be borne by the 2<sup>nd</sup> Respondent or the 1<sup>st</sup> Respondent.

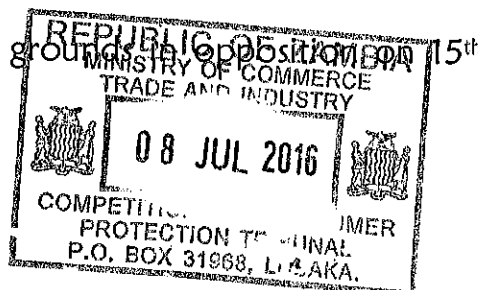
The Appellant did on the 11<sup>th</sup> June, 2015 file additional grounds of appeal as follows:

*"(1) That the Committee glossed over the evidence because of the status of the Complainant.*

*(2) The verdict of the Committee is not supported by the Body of the Ruling".*

The 1<sup>st</sup> Respondent filed its notice of grounds of opposition on 15<sup>th</sup> July, 2015 as follows:

3.



- “1. Contrary to the Appellant’s assertion in ground one, the 1<sup>st</sup> Respondent did not misdirect itself in deciding that the Appellant had breached Section 49(1) of the Competition and Consumer Protection Act No. 24 of 2010 (the Act), as it had been proved that the Appellant had supplied contaminated fuel to the 2<sup>nd</sup> Respondent which caused serious damage to the 2<sup>nd</sup> Respondent’s motor vehicle. Further, the 1<sup>st</sup> Respondent did not misdirect itself as it is the practice of the 1<sup>st</sup> Respondent to warn a first time violator of the Act. As this Honourable Tribunal will note that the 1<sup>st</sup> Respondent was actually very lenient with the Appellant as a breach of Section 49(1) of the Act entails prosecution in the Court of law.
2. Contrary to the Appellant’s assertion in ground two, the 1<sup>st</sup> Respondent did not misdirect itself in deciding that the Appellant pays the costs incurred by the 2<sup>nd</sup> Respondent in an effort to rectify the damage caused to the motor vehicle through the supply by the Appellant of contaminated fuel.
3. Contrary to the Appellant’s assertion in ground three, the 1<sup>st</sup> Respondent did exhaust all possibilities that could have caused damage to the 2<sup>nd</sup> Respondent’s motor vehicle. It was clearly established that the said motor vehicle’s fuel system was damaged due to the contaminated fuel that the Appellant had supplied. The vehicle was subjected to computerized testing at Vehicle Centre Limited which detected the contaminated fuel. Further, the 1<sup>st</sup> Respondent during the course of investigations made enquiries on the effects of contaminated fuel on a vehicle by obtaining third party views from Toyota Zambia, Action Auto and Southern Cross Motors. These three reputable Motor Vehicle Companies

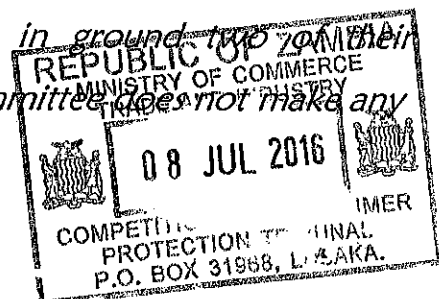
4.



responded to the 1<sup>st</sup> Respondent's enquiry advising the effect of contaminated fuel on a motor vehicle. The third party views are reflected on Pages 72 - 78 of the 1<sup>st</sup> Respondent's Record of Proceedings.

4. Contrary to the Appellant's assertion in ground four, the 1<sup>st</sup> Respondent did not misdirect itself as there was no survey undertaken as to how many of the Appellant's clients were served with contaminated fuel as the Complainant was. The 1<sup>st</sup> Respondent dealt with the Complainant herein in line with evidence provided. In case damage of this nature is relative to the affected motor vehicles therefore a reaction of one vehicle cannot be used as a yardstick for others. The fact remains that the Complainant's vehicle became faulty after the Appellant was served with contaminated fuel. The computerised test results as well as the expert view from renowned Motor vehicle enterprises speak for themselves.
5. Contrary to the Appellant's assertion in ground one of their additional grounds of appeal, the 1<sup>st</sup> Respondent did not gloss over any evidence as it conducted thorough investigations in the matter in casu; including obtaining third party views which had nothing to do with the 2<sup>nd</sup> Respondent's so called status as the 2<sup>nd</sup> Respondent is a Consumer as per the definition in the Act and has the right to lodge a complaint with the 1<sup>st</sup> Respondent when any of his rights under the Act are violated. Further, the Appellant will be put to strict proof to show how the so called 'status' of the 2<sup>nd</sup> Respondent influenced the decision of the 1<sup>st</sup> Respondent.
6. Contrary to the Appellant's assertion in ground two of their additional grounds of appeal, the Committee does not make any

5.



*directives but basically presents a case before the Board of Commissioners who then makes a determination and gives directives to an erring enterprise. The Board directive on Page 121 of the Record of proceedings is evidence to this effect.*

*For the foregoing reasons, the Appellant's Appeal should be dismissed in its entirety with costs as it lacks merit".*

Section 49(1) of Act No. 24 of 2010 provides as follows:

*"49(1) A person or enterprise should not supply a Consumer with goods that are defective, not fit for the purpose for which they are normally used or for the purpose that the Consumer indicated to the person or enterprise.*

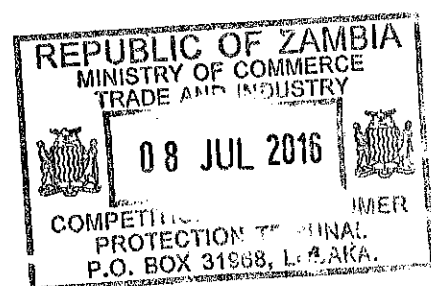
*(2) A person who or an enterprise which, contravenes subsection (1) commits an offence and is liable upon conviction.*

*(a) To pay a fine not exceeding five hundred thousand penalty units; and*

*(b) To pay the Commission, in addition to the penalty stipulated under paragraph (a) a fine not exceeding ten percent of that person or enterprises annual turnover".*

In the tribunals' judgment relating to the case of the Competition and Consumer Protection Commission and Hill Jam Investments Limited (Abe/Kalumba) Cause No. 2014/CCPT/006 this tribunal at Pages 6 to 7 made its finding as follows:

*"The Applicant's investigation according to the evidence on record appears to have been conducted on the premise that the alleged conduct of the Respondent amounted to a breach of Section 49(1) of Act No. 24 of 2010".*



Section 49(1) provides as follows:-

*"A person or an enterprise shall not supply a Consumer with goods that are defective, nor fit for the purpose for which they are normally used or for the purpose that the Consumer indicated to the person or the enterprise."*

S49(2) provides as follows:-

*"A person who or an enterprise which, contravenes S49(1) commits an offence and is liable upon conviction*

*(a) to a fine not exceeding five hundred penalty units and*

*(b) to pay the commission, in addition to the penalty stipulated under paragraph (a) a fine not exceeding ten percent of that person or enterprise's annual turnover."*

*"Our understanding of S49(2) of the Act is that if one contravenes S49(1) of the Act one is amenable to a fine in a criminal Court because contravention of S49(2) results into committing an offence and makes one liable to conviction."*

*"And our understanding of the term 'conviction' is that that only occurs in criminal proceedings. Our further understanding of 49(2) is that to move it the Applicant has to institute criminal proceedings against a person or an enterprise in a criminal Court. The term 'conviction' is defined in "words and phrases legally defined Volume 1 A - C" at Page 344 as follows:-*

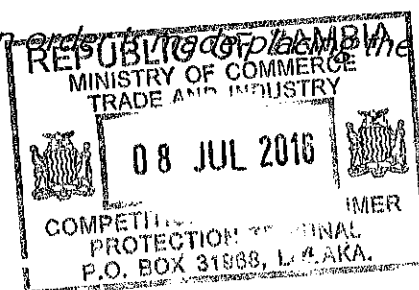
*"Conviction includes (a) a finding of guilt*

*(b) a finding that a person is not guilty by reason of insanity*

*(c)...*

*(d) a conviction of an offence for which an order of imprisonment*

7.



*offender on probation, discharging his absolutely or conditionally.”*

We are therefore of the view that the intention of the legislators in enacting S49(2) of the Act was that any breach of S49(2) would lead to one's prosecution which would lead to conviction if found guilty. And the word “guilty” is usually associated with criminal proceedings and not proceedings like the ones before us.

In the Hill Jam Case Supra the tribunal set aside the Board of Commissioners' decision to the effect that the Respondent refunds the Complainant the full amount of K1,650,000-00 to purchase the Chain Saw be set aside.

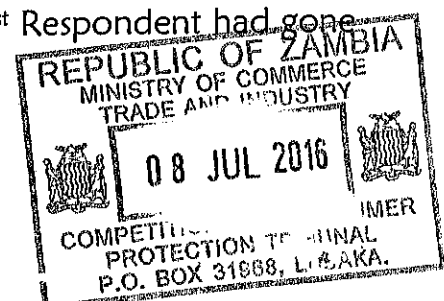
It was also ordered the fine imposed on the Respondent be set aside for want of jurisdiction.

In a case decided by the High Court the same principle was repeated. And this was in the case of Competition and Consumer Protection Commission and Tokyo Vehicle Limited under Case No. 2014/HP/A/1018 in which Section 49(1) of the act was extensively discussed and this tribunal's decision in which it proceeded to enter Judgment when it has no criminal jurisdiction was reversed.

We therefore of the view that considering the decisions discussed in this Judgment that is Hill Jam by this tribunal and Tokyo by the High Court it is clear that Section 49(1) as read with Section 49(2) relate to Criminal Jurisdiction for which this tribunal has none.

We therefore decline to entertain this appeal for want of jurisdiction with each party to bear its own costs because of the circumstances obtaining in this matter. We are of the conviction that if the 1<sup>st</sup> Respondent had gone

8.





further in its Judgment and considered the provisions of Section 49(2) of the Act it would also have come to the conclusion as we have.

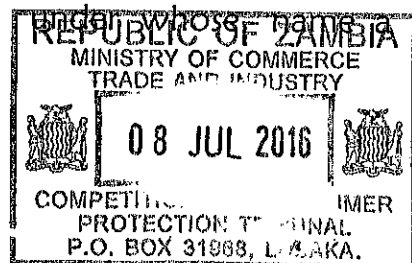
Under Section 71(1)(b) of the Act which reads as follows: *“571(1)(b). The tribunal may (a).....(b) take any other course which may lead to the just, speedy and inexpensive settlement of any matter before the tribunal”*; under this Section this tribunal can on its own motion and in the interest of speed and cost effectiveness take a course which may lead to just and speedy settlement of the matter before it. And this is the reason we have exercised our discretion under § 71(1)(b) of Act No. 24 of 2010.

For the reasons stated and considering that even if we proceeded all the way in analyzing the facts and the law relating thereto notwithstanding our lack of jurisdiction such would have resulted into parties' continued incurring of expenses and time and that course would be prejudicial to the parties. We accordingly decline to proceed with the Judgment on its merit for want of jurisdiction. Under the circumstances therefore the 1<sup>st</sup> Respondent's decision made on 13<sup>th</sup> February, 2015 be and is hereby set aside for want of jurisdiction.

Having said that we will however proceed to consider an issue which appears to have been recurring during the various proceedings before this tribunal, that is, that of unqualified persons appearing before it

### Appearing Of Unqualified Persons Before The Tribunal

At one of the hearings of this matter the tribunal at its own instance raised an issue relating to Mrs Liya Tembo who appeared on behalf of the 3<sup>rd</sup> Respondent, (Vehicle Centre Limited) and introduced herself as an advocate from the Firm of A B and David. The tribunal's position at that particular hearing was that it appeared improper for Mrs Liya Tembo who is employed by Financial Intelligence Unit and



practising certificate was issued, to also appear in the capacity of an advocate from the Private Law Firm in the name and style of A B and David. Mrs Tembo when asked to clarify her status confirmed that she was still in the employ of Financial Intelligence Unit a Public Body but that she was on leave with authority from her employer to act in a private capacity.

In those circumstances the tribunal also gave an opportunity to the other advocates acting for parties in this matter as to their position on the issue but the parties' advocates were not helpful to the tribunal on the issue raised. Upon further consultation the tribunal was of the view that it needed to seek an opinion on the issue from the regulator of all Legal Practitioners in Zambia in particular, the Legal Practitioners Committee of the Law Association of Zambia. The tribunal under its letter to the Legal Practitioner Committee dated January 26, 2016 did seek the Committee's Opinion on that issue.

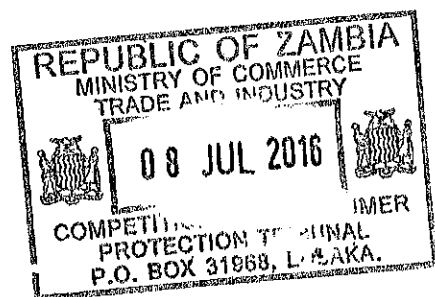
In its response the Legal Practitioners Committee in guiding the tribunal referred to the Provision of Rule 27 of the Legal Practice Rules of 2002 which provides as follows:

"27. An employed Practitioner shall practice as an Advocates or Practitioner only where the following conditions are met:

(d) The Practitioner holds a current practicing certificates;

(e) The Practitioner is appearing either on behalf of his or her employer, or under the terms of rule 30; and the Practitioner shall not act for any employee or client of the employer; and

(f) The Practitioner has practised as a Practitioner for at least three years." (Underlining ours)



The Legal Practitioners Committee did advise the tribunal that at its last sitting it spoke to Mrs Leya Tembo and directed her to no longer appear before the tribunal.

What in our opinion appears to come out of Rule 27(e) of the Legal Practitioners rules 2002 is that an employed Practitioner shall practise only where the Practitioner is appearing either on behalf of his or her employer or under the terms of rule 30 and the Practitioner shall not act for any employee or client of the employer.

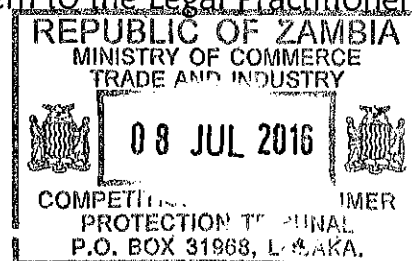
We are in agreement and satisfied that the interpretation of the Legal Practitioners Committee that an employed advocate can only act on behalf of his or her employer is the correct one and that this is the category into which Mrs Liya Tembo's situation falls.

During the proceedings the tribunal discovered that in addition to Mrs Tembo, there were two other unqualified persons appearing before the tribunal from the Appellant's and also the 2<sup>nd</sup> Respondent's advocate's firms. We consequently directed that those two persons who had introduced themselves before the tribunal as acting for the parties were not qualified to appear before it.

We have noted that the Practice and Conduct of unqualified persons appearing before the tribunal has become common, it is even of more serious concern when advocates aid and abet the breach of the Legal Practitioners Act by intentionally and knowingly appointing unqualified persons to act as agents of illegality before this tribunal.

That said, we hereby sound a warning to Practitioners who will appoint or instruct unqualified persons to appear before the tribunal that sanctions will be applied against them including reporting them to the Legal Practitioners

11.



Committee of the Law Association of Zambia because such conduct is improper and contemptuous of the tribunal.

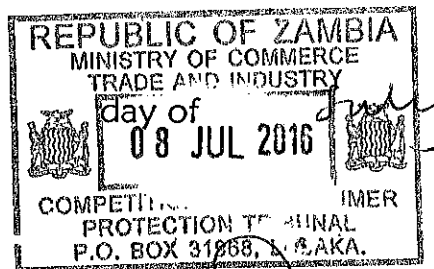
We hereby seriously reprimand Mrs Leya Tembo for breaching Rule 27(e) of the Legal Practices Rules 2002 and equally reprimand Messrs Mulungushi Chambers in particular Mr K. Simbao and ANC Legal Practitioners' Mr A M Musukwa respectively for aiding and abetting their employees or agents in breaching Rule 27(e) of Cap 30 of the Laws of Zambia.

All in all and as we have stated earlier in the Judgment the 1<sup>st</sup> Respondent's decision made on 13<sup>th</sup> February, 2015 as against the Appellant be and is hereby set aside and that for reasons stated, each party will bear its own costs.

We order that any aggrieved party has a right of appeal within 30 days of the date of this Judgment.

Dated the

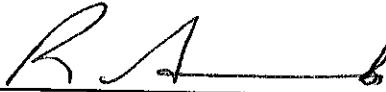
8<sup>th</sup>



2016

  
Willie Aubbie Mubanga  
CHAIRMAN

  
Mrs Eness Chishala Chiyenge  
Member



Mr Rocky Sombe  
Member



Mr Chance Kabaghe  
Member

