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**IN THE HIGH COURT FOR ZAMBIA
THE PRINCIPAL REGISTRY
AT LUSAKA**

HPR/085/2013

(Criminal Jurisdiction)

Between:

THE PEOPLE

AND

PEP STORES-ZAMBIA



Before the Hon. Mr. Justice C.F.R. Mchenga SC in open court on the 10th of October, 2013 at Lusaka.

For the People : F. Nyirenda, State Advocate, National Prosecution Authority

For the Accused : N/A

JUDGMENT

Cases referred to:

1. **The People v Makhokha [1967] Z.R. 173**
2. **Patel v The People [1969] ZR 132**
3. **The People v Patel [1968] Z.R. 169,**

Legislation referred to:

1. **The Competition and Consumer Protection Act, Act No. 24 of 2010, Section 52**
2. **The Food and Drugs Act, Chapter 303 of the Laws of Zambia, Section 3(b)**
3. **The Criminal Procedure Code, Chapter 87 of the Laws of Zambia, Sections 90(1), 135, 137, 308 and 338(1)**



The accused, PEP Stores-Zambia, appeared before the Subordinate Courts charged with one count of the offence of Selling Goods that do not Conform to the Mandatory Safety Standards of the Class of Goods set by the Zambia Bureau for Standards or other relevant Competent Body contrary to Section 52(1) of the Competition and Consumer Protection Act, Act No. 24 of 2010 as read with section 3(b) of the Food and Drugs Act, Chapter 303 of the Laws of Zambia. The particulars of offence alleged that Pep Stores-Zambia on the 14th of February, 2013 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, did practice unfair trading practices by selling one (1) bar of expired 90g Cadbury Dairy Milk Chocolate with batch no. 6001065036144 to a customer contrary to Section 52(1) of the Competition and Consumer Protection Act No. 24 of 2010 as read with Section 3(b) of the Food and Drugs Act Chapter 303 of the Laws of Zambia

The accused, which appeared in court through its representative Paul Mbewe, the Human Resource Manager, pleaded guilty to the charge and admitted the facts after they were ^{read} out. Following the plea of guilty and admission of the facts, the accused was convicted and a fine of 500,000 penalty units imposed, in default of the payment 9 months simple imprisonment. A day after imposing the fine, the learned trial magistrate formed the opinion that the fine was excessive. She invoked the provisions of **Section 338(1) of the Criminal Procedure Code** and brought her decision to the attention of the High Court. *

Before dealing with the issue of whether the fine of 500,000 penalty units was excessive and therefore wrong in principle, I am going to consider whether the charge was properly drawn; whether the facts disclosed any offence and; whether a sentence of imprisonment in default of paying the fine was appropriate in this case.

The statement of offence and particulars of offence on which the accused took plea read as follows:

STATEMENT OF OFFENCE

Sell of goods that do not conform to the mandatory safety standard for the class of goods set by the Zambia Bureau of Standards or other relevant competent body



contrary to Section 52(1) of the Competition and Consumer Protection Act, Act No 24 of 2010 as read with Section 3(b) of the Food and Drugs Act Chapter 303 of the Laws of Zambia.

PARTICULARS OF OFFENCE

Pep Stores-Zambia on the 14th of February, 2013 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, did practice unfair trading practices by selling one (1) bar of expired 90g Cadbury Dairy Milk Chocolate with batch no. 6001065036144 to a customer contrary to Section 52(1) of the Competition and Consumer Protection Act No. 24 of 2010 as read with Section 3(b) of the Food and Drugs Act Chapter 303 of the Laws of Zambia

Section 137 of the Criminal Procedure Code prescribes how charges should be drawn. In part, it provides as follows:

The following provisions shall apply to all charges and informations and, notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Code, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this Code:

(a)

(i) A count of a charge or an information shall commence with a statement of the offence charged, called the statement of offence;

(ii) the statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence and, if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence;

(iii) after the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary;

Provided that, where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or an information, nothing in this paragraph shall require any more particulars to be given than those so required;

(iv) the forms set out in the Second Schedule or forms conforming thereto as nearly as may be shall be used in cases to which they are applicable; and in other cases forms to the like effect or conforming thereto as nearly as may be shall be used, the statement of offence and the particulars of offence being varied according to the circumstances in each case;



(b).....

(c).....

In addition, the second schedule to **Section 137 of The Criminal Procedure Code** has set out the format for drawing up a charge. The statement of offence was not drawn in conformity with **Section 137 (a)(ii) of The Criminal Procedure Code**. Instead of having a short description of the offence in it the prosecutor reproduced the whole ^{Section 91} margin note. A short description in the statement of offence would have either been:

Sale of goods in breach of mandatory safety standards contrary to Sections 52(1) and (2) of the Competition and Consumer Protection Act, Act No 24 of 2010

or:

Sale of Unwholesome Food contrary to Sections 3(b) and 31 of the Food and Drugs Act Chapter 303 of the Laws of Zambia.

In the case of a charge under Section 52 of the **Competition and Consumer Protection Act**, was necessary to include both subsections (1) and (2) because subsection (1) only creates the offence, while the penalty for committing the offence is set out in subsection (2). Similarly, the statement of offence for a charge under **Section 3 the Food and Drugs Act** there was need to include Section 31 because that is where the penalty for the offence is set out. In cases where penalty is not found in the provision that creates the offence, it is the practise to include not only the provision creating the offence, but also the one setting out the penalty in the statement of offence.

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Further, **Section 137(iii) of the Criminal Procedure Code** provides that after the statement of the offence, particulars of such offence shall be set out in ordinary language. In this case, the statutory provisions allegedly breached by the accused were included in the particulars of offence. This was not supposed to be the case as they had already set out in the statement of offence.

Section 135 of the Criminal Procedure Code, which also deals with the drawing up of charges, provides as follows:



(1) Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts or form, or are a part of, a series of offences of the same or a similar character.

(2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.

(3) Where, before trial, or at any stage of a trial, the court is of opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, or that for any other reason it is desirable to direct that any person should be tried separately for any one or more offences charged in a charge or information, the court may order a separate trial of any count or counts of such charge or information.

It will be noted from the statement of offence that the accused was charged under both the **Competition and Consumer Protection Act** and the **Food and Drugs Act**. Section 52 of the **Competition and Consumer Protection Act** provides as follows:-

- (1) A person or an enterprise shall not sell any goods to consumers unless the goods conform to the mandatory safety standard for the class of goods set by the Zambia Bureau of Standard or other relevant competent body.
- (2) A person who, or an enterprise which, contravenes Section (1) commits an offence and is liable, upon conviction-
 - (a) to a fine not exceeding five hundred thousand penalty units or to imprisonment for a period not exceeding five years or to both; and
 - (b) to pay the commission, in addition to the penalty stipulated under paragraph (a), a fine not exceeding 10 percent of that person's or enterprises annual turnovers.
- (3).....
- (4).....

In the case of **Section 3(b) of the Food and Drug Act**, it provides that:

- Any person who sells any food that;
- (a) has in or upon it any poisonous or harmful substance; or
 - (b) consists in whole or in part of any filthy, putrid, rotten, decomposed, or diseased substance or foreign matter, or is otherwise unfit for human consumption; or



(c) is adulterated shall be guilty of an offence.

Section 3(b) does not have any penal provision but it is set out in **Section 31**, which provides as follows:

(1)

(2) A person found guilty of an offence under this Act for which no special penalty is provided shall be liable on conviction-

(a) in the case of a first offence, to a fine not exceeding one thousand penalty units or to imprisonment for a term not exceeding three months, or to both;

(b) in the case of a subsequent offence, to a fine not exceeding two thousand penalty units or to imprisonment for a term not exceeding six months, or to both;

Scrutiny of both **Section 52 of the Competition and Consumer Protection Act** and **Section 3(b) of the Foods and Drugs Act** establishes that they create two distinct offences which carry different penalties. To prove a charge under **Section 52 of the Competition and Consumer Protection Act**, evidence must be led establishing that the goods that were being sold did not conform to mandatory safety standards for that class of goods as set by the Zambia Bureau of Standards or any other body with the mandate to set such standards. In the case of a charge under **Section 3(b) of the Foods and Drugs Act**, the evidence must establish that food had in it a filthy, putrid, rotten, decomposed, diseased, foreign matter or substance unfit for human consumption.

Handwritten note:
We must have to rely on s.52 as the chocolate sample did not go to food & drugs lab.

It follows, that while it was competent to charge the accused with two offences in one charge sheet if they arose from the same facts, **Section 135(2) of the Criminal Procedure Code** required that they should have been set out in separate counts. In the case of **The People v Makhokha (1)** it was held that where a charge contains more than one distinct offence or offences that are independent of each other, it is said to be bad for duplicity. The charge in this case was bad or irregular for duplicity because it contained two distinct offences in one count; one created by **Section 52 of the Competition and Consumer Protection Act** and the other, by **Section 3(b) of the Foods and Drugs Act**.



In the case of **Patel v The People (2)** it was held that even where a count is bad for duplicity, a conviction shall not be reversed where it is established that the appellant knew what the count related to; was in no way prejudiced by the wording of the charge and; where there was no miscarriage of justice. There is no evidence that the accused was prejudiced in this case. However, I find that the statement of facts did not disclose any offence.

The facts were that on the 14th of February, 2013, the Competition and Consumer Protection Commission received a complaint that the accused had sold an expired bar of chocolate. Investigations were instituted and it was established that that the chocolate bar which was sold on the 14th of February, 2013, had an expiry date of 20th March, 2012. The provisions on which the charge was premised do not make it an offence to sell expired products. Section 52 of the Competition and Consumer Protection Act makes it an offence to sell goods that do not conform to the mandatory safety standards set by the Zambia Bureau of Standard or other relevant competent body. Neither does the statement of offence, particulars of offence nor statement of facts indicate the Act, Statutory Instrument or Mandatory Safety Standard that makes it an offence to sell expired food. In the case of **Section 3(b) of the Foods and Drugs Act**, it deals with the sale of unwholesome food. Other than indicating that the chocolate bar was expired the facts do not say it was unwholesome. Following the case of **The People v Patel (3)**, the learned trial magistrate should have asked the prosecutor to clarify the facts or amended the plea to one of not guilty because the facts did not disclose any offence.

Having found that the facts did not disclose any offence, it is not necessary for me to deal with whether the fine of 500,000 penalty units was excessive given the circumstances of this case. Notwithstanding, I will comment on whether the imposition of a sentence of 9 months simple imprisonment in default of payment was appropriate. Though Paul Mbewe took plea on behalf of the Pep Stores-Zambia, he was not the accused person. PEP Stores-Zambia, a corporation or body corporate was the accused person. This being the case, it was inappropriate for the learned trial magistrate to impose a prison term in default of paying the fine because a body



corporate cannot be sent to prison. Instead, she should have invoked **Section 308 of the Criminal Procedure Code** which provides as follows:

(1) When a court orders money to be paid by an accused person or by a prosecutor or complainant for fine, penalty, compensation, costs, expenses, or otherwise, the money may be levied on the movable and immovable property of the person ordered to pay the same, by distress and sale under warrant. If he shows sufficient movable property to satisfy the order, his immovable property shall not be sold.

(2) Such person may pay or tender to the officer having the execution of the warrant the sum therein mentioned, together with the amount of the expenses of the distress up to the time of payment or tender, and, thereupon, the officer shall cease to execute the same.

(3)

The learned trial magistrate should have given the accused a period within which to pay the fine and indicated that in default a warrant would be issued to levy distress on the accused's property and sale it to raise the fine and costs of execution.

Finally, the proceedings in this case were instituted following a complaint made by the Competition and Consumer Protection Commission. The relevant provisions of **Section 90 of the Criminal Procedure Code**, which deals with the institution of criminal proceedings through a complaint provides as follows:

(1) Proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant.

(2).....

(3).....

(4) The magistrate, upon receiving any such complaint, shall-

(a) himself draw up and sign; or

(b) direct that a public prosecutor or legal practitioner representing the complainant shall draw up and sign; or

(c) permit the complainant to draw up and sign;

a formal charge containing a statement of the offence with which the accused is charged, and until such charge has been drawn up and signed no summons or warrant shall issue and no further step shall be taken in the proceedings.

(5)

(6) When the magistrate is of opinion that any complaint or formal charge made or presented under this section does not disclose any offence, the magistrate shall



make an order refusing to admit such complaint or formal charge and shall record his reasons for such order.

(7).....

It is clear that when a complaint is lodged, the magistrate is not only required to consider whether it discloses an offence, but also to ensure that the charge is properly drawn either by the prosecutor or the court. A magistrate is able to draw up the charge or correct one drawn by the prosecutor because the evidence on which the complaint is based is laid before the court. It would appear, in this case, that the learned trial magistrate glossed over the issues and allowed the trial to proceed on a charge that was bad for duplicity and had a statement of offence and particulars of offence were prepared in breach of Sections 135 and 137 **The Criminal Procedure Code.**

Having found that the facts did not disclose any offence, the conviction and the sentence are set aside. Further, I order a re-trial before the same trial magistrate. This is because the first trial was flawed on the technical defects I have set out above. I am also of the view that a retrial will to meet the broader interests of justice. However, before the plea is retaken the trial magistrate must ensure that the charge is properly drawn.


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HON. C.F.R. MCHENGA, SC.
JUDGE

