IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(Civil Jurisdiction)

Appeal No. 179/2015
SCZ/8/261/2015

B E T W E E N :

TOKYO VEHICLES LIMITED **APPELLANT**

AND

COMPETITION AND CONSUMER PROTECTION COMMISSION **RESPONDENT**

Coram: **Mambilima, CJ, Malila and Musonda, JJS,**
on 8th August, 2018 and 22nd October, 2018

For the Appellant: Mr. K. Chenda, Messrs Simeza Sangwa & Associates

For the Respondent: Mrs. M. Banda-Mwanza, Director, Legal and Corporate Affairs, Competition and Consumer Protection Commission (CCPC)

JUDGMENT

MALILA, JS, delivered the Judgment of the Court.

Cases referred to:

1. *Pamodzi Hotel v. Godwin Mbewe (1987) ZR 56*
2. *Michael Mabenga v. Sikota Wina, Mafo Wallace Mafiyo and George Samulela (2003) ZR 110.*
3. *Bater v. Bater (1950) 2 ALL ER 458.*
4. *Sithole v. The State Lotteries Board (1975) ZR 106.*
5. *Communications Authority of Zambia v. Vodacom Zambia Limited (2009) ZR 196 at 211.*

6. *Re B (2008) UL HL3.*
7. *Musuku Kalenga Building Ltd., Winnie Kalenga and Richman's Money Lenders Enterprises SCZ No. 4 of 1999.*

Other works referred to:

1. *Black's Law Dictionary (8th edition 2004).*
2. *Halsbury's Laws of England (4th edition) Vol. 17(1).*
3. *Criminal Procedure Code chapter 88 of the laws of Zambia*

This appeal implicates the interpretation of some provisions of the Competition and Consumer Protection Act No. 24 of 2010 (the Act). Though not the most pellucid of statutes, the Act has made a direct and wide-ranging impact upon trade, industry and consumer affairs in Zambia, bringing significant innovation in the field of consumer protection and equally substantial changes in the area of competition law.

Enforcement of consumer rights can now occur at two levels: first, at a purely private, self-help level, where an aggrieved consumer is at liberty to invoke common law or statutory law principles such as those pertaining to the law of tort, contract or sale of goods, to pursue private civil remedies. Second, at the public/institutional level where statutory institutions, such as the respondent in the present appeal, are

mandated to undertake measures to protect consumers. Here the sanctions could be both civil and criminal in nature.

In the present appeal, an aggrieved consumer chose to invoke the public level machinery to redress his grievances.

The appellant is in the business of selling used and new motor vehicles, including agricultural equipment such as tractors. In April 2012, a Mr. Webster Shamfuti (the buyer) purchased from the appellant a Massey Ferguson Tractor, Model 375. Two days after collecting it, he experienced unusual problems with it. The tractor could not start. He thus lodged a complaint with the appellant who promptly dispatched a mechanic to attend to the fault. The mechanic replaced the battery and the tractor was functional again. This, however, was not the end of the buyer's irritation with the tractor. It in fact was just the first of the many agonizing experiences the buyer was to endure with his 'new' acquisition.

Several months after taking possession of the tractor, on the 1st November 2012 to be exact, the buyer once again had a distressing experience with it. He called the appellant to report a

multitude of faults that he had discovered with the tractor. The catalogue of those problems included a hard-steering wheel, a non-functional indicator and a defective night light. Yet again, a mechanic was sent by the appellant to the buyer's place. He duly rectified the faults.

The buyer's troubles with the tractor were, however, not over. On 12th November 2012, he reported further faults with the tractor to the appellant. These included a burst water pipe, defective brakes, oil leakages, loose grill bolts and a punctured rear tyre. Once more, the appellant sent its mechanic to attend to the tractor.

The buyer must, however, have had enough of it. Feeling that his patience had been fully tested, he returned the tractor to the appellant on 18th June, 2013 together with the ownership registration document. He did not leave matters there. He also proceeded to lodge a complaint with the respondent in his quest to compel the appellant to refund the purchase price.

The respondent considered the buyer's complaint and, in particular, whether the appellant had violated the provisions of the Act, more specifically section 46(1) and 49(1). It came to the conclusion that in its interaction with the buyer, the appellant had not engaged in any unfair trade practice contrary to section 46(1) as read together with section 45(b) of the Act, nor did it falsely represent that the tractor it sold to the buyer was new, contrary to section 47(a)(iii). However, the respondent held the view that the appellant did engage in the sale of a defective product contrary to section 49(1) of the Act. In consequence of this finding, the appellant was given a written warning to desist from supplying defective products to the consuming public.

The appellant was also ordered to refund to the buyer the sum of K116,400, being the purchase price for the tractor. The respondent went further to advise the buyer to pursue, in the Small Claims Court, compensation in the sum of K20,000 from the appellant.

Being unhappy with the decision of the respondent the appellant appealed to the Competition and Consumer Protection Tribunal (the Tribunal), alleging a series of misdirections and errors on the part of the respondent. In particular, the appellant complained that the respondent was wrong to find that it had committed an offence under section 49(1) of the Act; that the respondent should have considered whether the appellant had made any representations to the buyer prior to the purchase of the tractor and/or whether the buyer had made known to the appellant the particular purpose for which the tractor was required so as to show that the buyer had relied on the appellant's skill or judgment.

The appellant also accused the respondent of failing to investigate and consider evidence of the storage, use and maintenance of the tractor by the buyer or his servants or agents, and the bearing which that might have had on the state of the tractor. Additionally, the appellant contended that the respondent should have considered evidence pertaining to the experiences of other purchasers of similar tractors from the appellant.

It was a further contention of the appellant before the Tribunal that the respondent was wrong to have accorded credibility to the buyer's unsubstantiated claim for compensation by volunteering advice to the buyer to pursue a claim for K20,000 compensation against it in the Small Claims Court.

After hearing the parties' respective cases, the Tribunal made a number of findings. Its view was that section 49(1) of the Act made it a criminal offence for any person to supply to a consumer, goods that are defective or are otherwise not fit for the purpose for which they are normally used. Such offence required to be investigated and proved beyond reasonable doubt. In this case, the respondent did not have sufficient evidence to support the conclusion which it came to namely, that the tractor was inherently defective. The finding of the respondent that the appellant had violated the provisions of the Act was thus reversed.

The Tribunal also held that both the respondent and the Tribunal have power and jurisdiction to make a determination that an offence of selling defective goods had been committed under section 49(1) and 49(2) of the Act.

As regards the grievance relating to representation, or the absence thereof, by the appellant to the buyer in respect of the condition of the tractor, the Tribunal held that any such representations were irrelevant to answering the question whether a crime had or had not been committed under section 49(1).

The Tribunal dismissed the claim by the appellant that the respondent could only have properly come to the conclusion it did if it had cared to consider the experiences of other purchasers of similar tractors from the appellant. In doing so, the Tribunal pertinently observed that the fact that there may have been no defects in the tractors sold to other buyers by the appellant did not confirm that the appellant could not sell a defective tractor to the buyer.

Concerning the advice given by the respondent to the buyer to pursue a claim for compensation before the Small Claims Court, the Tribunal held that the respondent was entitled to give such advice by way of what the Tribunal called 'obiter recommendations.'

Aggrieved by the decision of the Tribunal, the respondent appealed to the High Court on three grounds. The first related to the jurisdiction of the respondent and the Tribunal. It was contended that the Tribunal erred both in law and in fact by finding that both the Tribunal and the respondent have criminal jurisdiction pursuant to section 49(1) and 49(2) of the Act.

The second ground of appeal was that the Tribunal erred in fact and, therefore, misdirected itself in law by failing to take into account the evidence filed to support the investigations that had been conducted by the respondent.

In the final ground, the respondent claimed that the Tribunal erred both in law and in fact by finding that the claimant must seek redress in his individual capacity through another forum, to wit, the Small Claims Court.

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After hearing the parties and considering the submissions made on their behalf, the learned High Court judge formed the view that the appeal hinged on the broad question whether the respondent and/or the Tribunal, as the case may be, is empowered to hear, make recommendations and determine matters arising under section 49(1) and (2) of the Act.

On the issue whether both the Tribunal and the respondent have criminal jurisdiction under the Act, the learned judge held, construing the law as she understood it, that neither the Commission nor the Tribunal had authority to preside over criminal proceedings.

As regards the question whether there was a misdirection on the part of the Tribunal when it did not take into account the evidence filed to support the investigations that had been conducted by the respondent, the learned judge agreed that the Tribunal failed to take into account the evidence that supported the investigations conducted by the appellant and thus misdirected itself. In sum the High Court upheld the appeal by the respondent.

The appellant was aggrieved by the High Court judgment and hence the current appeal. Seven grounds were enlisted. They were structured thus:

GROUND ONE

That the court below erred both in law and fact by holding that the whole appeal hinged on the question of whether the Commission and the Tribunal (as the case may be) was empowered to hear, make recommendations, or determine matters arising under section 49(1) and (2) of the Competition and Consumer Protection Act.

GROUND TWO

That the court below erred in both law and fact by holding that the sanctions which the respondent (herein) or the Tribunal usually imposes on enterprises or persons who have violated any of the provisions of the Act are not criminal but administrative in nature and do not therefore require adjudication by a court of competent jurisdiction.

GROUND THREE

That the court below erred in law and fact by rejecting the submission that the Tribunal's remarks which formed the subject of ground 1 of the appeal (below) were made obiter and did not affect the substantive decision of the Tribunal.

GROUND FOUR

That the court below erred both in law and fact by holding that the Tribunal failed to take into account the evidence that supported the investigations conducted by the respondent herein.

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GROUND FIVE

That the court below erred both in law and fact by holding that the case before it was a proper case in which it could interfere with the findings of fact.

GROUND SIX

That the court below erred both in law and fact by holding that based on the documentary evidence and even without observing the demeanor of the witnesses, it was clear that the Tribunal misdirected itself.

GROUND SEVEN

That the court below misdirected itself in law and fact by upholding the appeal and reversing the holding of the Tribunal.

At the hearing of the appeal, Mr. Chenda, learned counsel for the appellant, indicated that he was placing reliance on the heads of argument filed in support, as well as the heads of response filed in reply to the arguments in opposition filed on behalf of the respondent.

In those heads of argument grounds one and three were argued together; grounds four and six were equally considered together while grounds five and seven were argued compositely. Ground two of the appeal was abandoned.

In arguing the first set of grounds, we were referred to the meaning of *obiter dictum* as given in *Black's Law Dictionary* and

to our decisions in *Pamodzi Hotel v. Godwin Mbewe*[1] as well as *Michael Mabenga v. Sikota Wina, Mafo Wallace Mafiyo and George Samulela*[2]. All these authorities were cited for no more a purpose than to stress the obvious point that an *obiter dicta* remark is a judicial comment made in the course of rendering a judicial opinion but which is made as a by-the-way comment, not forming part of the actual decision, and which therefore does not have precedential significance.

Turning to the judgment of the lower court, Mr. Chenda took umbrage with the framing of the issue for determination by the trial judge. He quoted a portion of the lower court's judgment which reads as follows:

> *'Ignoring arguments on the fringes, the question on which this whole appeal hangs is whether the Commission and or the Tribunal as the case may be in empowered to hear, make recommendations or determine matters arising under section 49(1) and (2) of the Act.*

The point the learned counsel made was simply this; that the lower court misapprehended the issue that was laid before it for determination. That issue was whether or not the Tribunal was right to hold that both the Tribunal and the respondent have criminal jurisdiction under to section 49(1) and 49(2) of the Act.

court made it appear to be. The result was that the court was barking up a wrong tree.

A further contention on behalf of the appellant was that whatever the answer to the issue raised by the learned judge could not provide the legal basis for reversing the ruling of the Tribunal.

Assuming the issue were resolved in the negative, the implication would be that the Commission did not have power to make its decision that the appellant had breached section 49(1) and was a first offender. In that event, the High Court would have been bound to uphold the ruling of the Tribunal which reversed the decision of the Commission. On the other hand, if the question were resolved in the affirmative, then the court below would have had no basis for disagreeing with the *obiter* remarks of the Tribunal or indeed to use its disagreement with the Tribunal as a basis for reversing the decision of the Tribunal.

The argument by the appellant was, in a word, that the lower court framed for itself, an issue which had no bearing on the overall outcome of the matter before it.

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The final instalment of the appellant's argument against the lower court as regards grounds one and three was that despite framing for itself an issue it considered constituted the plinth of the grievance before it, the lower court did not make any determination as to whether the Tribunal and the Commission could hear, make recommendation or determine matters arising under section 49(1) of the Act. It instead focused its energies on section 49(2) of the Act. According to the learned counsel for the appellant, this was a critical lapse on the part of the court as the decision of the Commission, which caused grief to the appellant, was expressed to have been founded on section 49(1) so that by reason of its own question, the court was obligated to pronounce itself on that very section.

For the foregoing reasons, we were urged to uphold grounds one and three.

The appellant's learned counsel then turned to argue grounds four and six. The cause of complaint in the two grounds is evidentiary in substance. The first point made in support of these grounds was that the standard of proof required in civil

matters is not fixed but varies depending on the seriousness of the subject matter. We were referred to paragraph 426 of *Halsbury's Laws of England* 4th edn. which states that:

> *To succeed on any issue the party bearing the legal burden of proof must (1) satisfy the judge or jury of the likelihood of the truth of his case by adducing greater weight of evidence than his opponent; and (2) adduce evidence sufficient to satisfy them to the required standard and degree of proof. The standard differs in criminal and civil cases.*
>
> *In civil cases the standard of proof is satisfied on a balance of probabilities. However, even within this formula variations in subject matter or in allegations may affect the standard required. It is commonly said that the more serious the allegations, for example fraud, crime or professional misconduct or the sexual abuse of children, the higher will be the required degree of proof.*

The learned counsel also cited the cases of *Bater v. Bater*[3] and *Sithole v. The State Lotteries Board*[4] to buttress the point.

The argument that counsel made is that a contravention of section 49(1) of the Act is criminalized by section 49(2). It should, therefore, follow that the civil proceedings based on alleged violation of section 49(1) call for a higher standard of proof than simply on a balance of probabilities. Counsel argued that although the Tribunal should not have adopted the criminal standard of proof in a civil matter, it should nonetheless have

adopted a higher standard since the allegations were so serious as to be criminalized by law.

For this reason, counsel submitted that the court should have upheld the ruling of the Tribunal as the evidence showed that the Commission's investigations did not bring up sufficient evidence to muster the higher threshold required in the circumstances. Mr. Chenda referred us to portions of evidence adduced before the Tribunal by a Mrs. Eunice Phiri Hamavhwa, a Research Analyst of the respondent, in his quest to persuade us to accept his view that the evidence before the Tribunal did not reach the higher degree of proof demanded by the circumstances of the case.

According to counsel for the appellant, the Tribunal had its own serious misgivings with the quality of evidence adduced as weighed against the higher standard required and clearly stated so in its ruling, and yet, the court below concluded that the Tribunal failed to take into account the evidence that supported the investigations conducted by the appellant. He submitted that the evidence was insufficient as it did not even involve the

physical inspection of the tractor. The Commission's investigation, according to the appellant's counsel, was casual and involved a 'mere desk work exercise'. We were thus implored to uphold grounds four and six.

Grounds five and seven both related to overturning findings of fact by an appellate court. In paraphrase, the two grounds take issue with the court's decision to interfere with the Tribunal's findings of fact on the appellant's culpability in relation to the tractor, and reversing them. Counsel cited the case of *Communications Authority of Zambia v. Vodacom Zambia Limited*[5] where we re-echoed the point that findings of fact by a lower court will only be reversed where they are perverse or made in the absence of relevant evidence, or upon a misapprehension of facts, or where the findings are such that on a proper view of the evidence, no trial court acting correctly could reasonably make.

According to the learned counsel, none of the established conditions for reversal of a lower court's findings of fact existed

in the present case. We were thus prodded to uphold grounds five and seven of the appeal.

The respondent, for its part, filed heads of argument on 7th July, 2016. It is upon those heads of argument that Mrs. Banda-Mwanza, learned counsel for the respondent, intimated she would rely to oppose the appeal. Additionally, Mrs. Banda-Mwanza made extensive oral submissions.

In reacting to grounds one and three of the appeal, counsel for the respondent supported the decision of the learned High Court judge. She invited us to consider the relief sought by the appellant before the Tribunal following the initial decision of the respondent commission. According to the learned counsel, the appellant had implored the Tribunal to make a finding that the respondent had no jurisdiction to determine that the offence of sale of a defective product had been committed contrary to section 49(1) of the Act, and further that a determination be made that an offence in contravention of section 49(1) could only be made by a court of competent jurisdiction. Only upon

conviction could the provision of section 49(3) be invoked for a refund to a complainant.

The respondent's position, according to the learned counsel, has always been that as an administrative body, it could not make any determination on issues bordering on criminality as that was a preserve of courts of competent jurisdiction; that the respondent was clothed with authority under section 49(3) of the Act to make determinations without recourse to courts of law as the provision, read together with section 49(1), imputed civil liability which could be effectively dealt with by the respondent using its administrative powers.

According to the learned counsel, it was the issue of jurisdiction raised by the appellant that the Tribunal dealt with when it concluded that both the Tribunal and the respondent had jurisdiction to determine criminal liability under the Act. Counsel further argued that had the appellant not raised the issue of jurisdiction of the respondent under section 49(3), the Tribunal would not have dealt with the issue in the first place.

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The short point that counsel for the respondent made was that the framing by the High Court of the issue on jurisdiction arose directly from the finding of the Tribunal, which finding was predicated on the appellant's challenge of the respondent commission's statutory power under the Act in the manner described. The decision on jurisdiction was, according to the appellant's counsel, not *obiter.*

On a general note, it was submitted by the learned counsel for the respondent that the cases cited by counsel for the appellant regarding *obiter dicta* remarks were inapplicable to the present case.

Concerning the argument by the appellant that the lower court made no determination as to whether the respondent and the Tribunal could hear, make recommendations or determine matters arising out of sections 49(1) of the Act, it was contended that the court did, in fact, address its mind to the question. According to counsel, jurisdiction under section 49(1) can be asserted from two fronts; the criminal front; dictated by the wording of section 49(2), and the civil front, dictated by section

49(3). The court correctly used section 49(2) to deal with the issue of jurisdiction. We were thus urged to dismiss grounds one and three.

Turning to grounds four and six, counsel for the respondent again argued that the lower court could not be faulted for the decisions it made as regards the issue of evidence. She referred us to the case of *Re B*[6] on the meaning of proof on a balance of probability and quoted the following passage:

> *If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether it happened or not ..... if the Tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof ..... if the party who bears the burden of proof fails to discharge it ..... the fact is treated as not having happened.*

Mrs. Banda-Mwanza submitted that the court below properly handled the issue relating to the standard of proof in the circumstances of the case. That standard was on a balance of probability. She went on to state that this issue was settled by way of submission and at no time did the appellant argue that the evidence should have been considered using a higher standard than on a balance of probabilities. Although the appellant had every opportunity to raise this issue in the lower

court, it did not in fact do so. Counsel submitted that on the authority of *Mususu Kalenga Building Ltd., Winnie Kalenga and Richman's Money Lenders Enterprises*[7], that issue cannot be raised for the first time on appeal and should thus be discounted.

Alternatively, counsel argued that the circumstances of the case did not warrant a higher standard of proof than the ordinary civil law one. On the available evidence, the court was able to make an assessment that the tractor supplied to the buyer was, more likely than not, defective. Grounds four and six were, to the respondent, thus without merit. Counsel prayed that we dismiss them.

As regards grounds five and seven, counsel for the respondent agreed with her counterpart's submission regarding the circumstances in which findings of fact may be upset by an appellate court. She argued however, that this was a proper case to interfere with findings of fact. Counsel quoted a portion of the Tribunal's ruling which states that had this been a civil offence, it 'would have ordinarily concluded that the faults in the tractor were as a result of inherent defects on the balance of probability.'

P. 1507

Given that the Tribunal proceeded on the footing that it had jurisdiction to determine criminal cases when in fact not, it made a determination upon a misapprehension of facts which led it to clothe itself with authority that it in fact did not legally have. Its findings were thus amenable to be upset. We were urged to dismiss grounds five and seven as well.

Heads of argument in reply were filed by the appellant's counsel on 27 July, 2018. Our reading of those heads of argument reveals that they restated the arguments already made by the appellant's learned counsel and thus do not take the appellant's position any further.

We have paid the closest attention to the issues so interestingly debated by the learned counsel for the parties and we are grateful for counsel's industry.

The arguments of counsel as structured create an impression, at least initially, that the issues for determination in this appeal are unremittingly complex. They are not.

P. 1508

Under ground one, the question posed is whether the appeal from the Tribunal to the High Court was about the power of the Commission and the Tribunal to hear, make recommendations, or determine matters arising under section 49(1) and (2) of the Act. In other words, it is about whether the lower court's identification and formulation of the issue was correct – all circumstances considered. Mr. Chenda for the appellant, thinks it was not. Mrs. Banda-Mwanza, for the respondent, thinks it was.

We do appreciate the logic in Mr. Chenda's argument that because the lower court wrongly formulated the issue for determination, she did not address the real points in contention. Our immediate reaction is that indeed, a wrong prognosis often leads to a wrong prescription. We should, however, hasten to qualify our observation; the prescription is bound to be wrong *if* the prognosis is wrong. And here we ask: was the identification of the problem to be addressed by the lower court truly wrong?

In her submissions, Mrs. Banda-Mwanza did indeed shed some useful light on this issue when she posited that whether the formulation of the issue was appropriate or not should be looked at in the context of the appellant's claim as formulated before the Tribunal. There, the appellant had sought:

> *(a) A declaration that the Competition and Consumer Protection Commission had no jurisdiction to make a determination that the offence of sale of a defective product has been committed contrary to section 49(1) of the Competition and Consumer Protection Act No. 24 of 2010.*

From the relief that the appellant had sought from the Tribunal, it is clear to us that the focus of the Tribunal's decision should be viewed in the context of the appellant's prayer in the lower court. Whatever else may have been said or submitted before the Tribunal, the question of the Tribunal's jurisdiction was, to us, paramount.

Indeed, an examination of the remainder of the appellant's prayers before the Tribunal reveals that they were all related to, or connected to the declaration sought on the issue of the jurisdiction of the Tribunal. These other reliefs were structured thus:

(b) A declaration that a determination that an offence has been committed by contravention of section 49(1) of the Competition and Consumer Protection Act No. 24 of 2010 can only be made by a court of competent jurisdiction and only upon conviction, can the provisions of section 49(3) be invoked for a refund to a complainant;

(c) Alternatively, a declaration that the circumstances of the case do not support a finding that the appellant had breached the provisions of section 49(1) of the Competition and Consumer Protection Act No. 24 of 2010; and

(d) An order that the relevant parts of the decision of the Competition and Consumer Protection Commission delivered at Lusaka on 26 August, 2013 in respect of a complaint by Webster D. Shamfuti be quashed or set aside.

Can it then be said that by stating, as it did, that the appeal rested on whether or not the Commission and the Tribunal could make determinations under sections 49(1) and (2) of the Act, the lower court missed the essence of the appeal? We think not. In our view, this formulation of the issue speaks to the question of the jurisdiction of the respondent. Put simply, the question was whether the respondent commission had jurisdiction - civil or criminal - to make determinations under the stated sections. This was a fundamental issue in the determination of the whole appeal.

P. 1511

Arising from the broad question regarding the mandate of the Commission generally were the subsidiary issues whether the respondent's mandate covered the exercise of judicial functions, or anything like it; or was confined only to administrative action. Further, subsidiary questions arising had to do with the preconditions for exercising any powers that the Act conferred on the respondent commission. It is in this connection that we see questions of the standard of proof being relevant.

Mr. Chenda colourfully argued that the framing by the trial judge of the broad issue for determination was informed by an *obiter dicta* rather than the *ratio decidendi* of the Tribunal's decision. He gave, in his submission, what he considered to be the *ratio decidendi* which we reproduced early on in this judgment. In paraphrase, the Tribunal held that as the required standard of proof had not been met, it had no choice but to reverse the findings of the respondent Commission that the tractor was inherently defective.

P. 1512

After giving its reason for reversing the decision of the respondent Commission, the Tribunal then stated by way of addition, that both the respondent and the Tribunal had power and jurisdiction to make a determination that an offence under section 49(1) and 49(2) had been committed. The learned judge below picked on the latter statement by the Tribunal to frame its issue, and this is what has founded the appellant's grief.

At first blush Mr. Chenda's argument appears ingenious. The circumstances animating the stated *ratio decidendi* of the Tribunal can however not support the thesis of Mr. Chanda's argument. The Tribunal proceeded on the premise that section 49(1) created a criminal offence and the respondent commission was duty bound to investigate the matter and bring up evidence to the threshold required in a criminal matter. Before pronouncing what Mr. Chenda has quoted as forming the *ratio decidendi* of the ruling of the Tribunal, the Tribunal stated as follows:

> *"if this were a civil offence, in the absence of any proof that the faults in the tractor was vandalized or that it was used improperly as suggested by the Appellant's, we would ordinarily have concluded that the faults in the tractor were as a result of inherent defects on the*

balance of probabilities. However, section 49(2) of the Act makes it clear that breach of section 49(1) of the Act is a criminal offence which means that the standard of proof is beyond reasonable doubt" [sic!]

In our view, the Tribunal had clearly formulated the opinion that the respondent had the powers of a criminal court to pronounce on the criminal guilt of transgressor of section 49(1). It cannot, therefore, logically be contended that when the Tribunal was ventilating its views on the inadequacy of the evidence upon which the respondent found the appellant to have contravened section 49(1) it had anything other than that the respondent could not make a determination that the appellant was criminally liable under section 49(2) of the Act. In this sense, the Tribunal had of course fallen into grave errors, and the lower court judge was perfectly right to conclude, as she did, that neither the Commission nor the Tribunal has the power of a court of law to determine the criminal guilt under sections 49(1) and 49(2) of the Act.

What the respondent commission has under the Act is the power to undertake investigations and impose administrative, as opposed to criminal sanctions to erring parties.

We, therefore, hold the view that the lower court did not formulate a wrong issue when it stated that the appeal hinged on whether or not the respondent Commission or the Tribunal was empowered to hear and determine complaints under sections 49(1) and 49(2) of the Act.

Ground one and three have no merit and they are accordingly dismissed.

Grounds four and six both have to do with the evidence deployed in the proceedings below. They question the lower court's treatment or the failure to treat pieces of evidence adduced before it. The substance of Mr. Chenda's argument under these grounds is that in determining whether sections 49(1) and 49(2) of the Act had been violated, a higher standard than merely a balance of probabilities should have been employed. The respondent's investigations did not, according to counsel, yield sufficient evidence to measure up to what was required to establish an infringement of sections 49(1) and 49(2) of the Act.

The response to these arguments by Mrs. Banda-Mwanza was simply that the ordinary civil law standard of a balance of probabilities applied and that the evidence was sufficient to establish an infringement of sections 49(1) and 49(2) of the Act.

The issues under these grounds are twofold. First, what standard of proof should be used to determine that the provisions of section 49(1) of the Act had been contravened? Second, did the evidence that was tendered reach the desired threshold?

It is of course well-known that the ordinary civil law standard of proof is on a preponderance of the evidence. This simply means that a plaintiff must prove that her assertions are more likely true than not. However, that the respondent commission is not a court of law is beyond argument. In terms of Part VIII of the Act, it is mandated to investigate specified issues. That Part also sets out how such investigation is to be undertaken. Section 55(1) provides that:

> *"Subject to subsection (4), the Commission may, at its own initiative or on a complaint made by any person, undertake an investigation if it has reasonable ground to believe that there is, or is likely to be, a contravention of any provision of this Act."*

The Commission is empowered to impose fines and take other measures against the person who contravene the provisions of the Act. At the same time, such persons are liable upon conviction to pay fines.

Section 49(1) proscribes the supply to a consumer of goods that are defective or not fit for the purpose that the consumer indicated to the supplier. In terms of subsection (2) a person who contravenes subsection (1) commits an offence and is liable upon conviction to a fine and other penalties.

The broad question is whether the Commission's entitlement to receive fines and to take other measures stipulated in section 49(1) should be preceded by a criminal conviction of the person who contravenes that section.

We have stated already that the Commission is not a court of law. It is a statutory body that has investigatory power. It is thus not in the province of the Commission to try persons perceived to have violated the provisions of the Act including section 49. In this regard, we entirely agree with the learned High Court judge that the respondent has an administrative

rather than a judicial mandate contrary to the holding of the Tribunal that the Commission together with it (the Tribunal) have power and jurisdiction to make a determination that an offence of selling defective goods has been committed under section 49(1) and 49(2) of the Act. They don't.

Section 5(1) and (2) of the Criminal Procedure Code chapter 88 of the laws of Zambia enacts that:

> *(1) Any offence under any written law, other than the Penal Code, may, when any court is mentioned in that behalf in such law, be tried by such court or by the High Court.*
>
> *(2) When no court is so mentioned, such offence may, subject to the other provisions of this Code, be tried by the High Court or by any subordinate court.*

The decision of the respondent which caused annoyance to the appellant was made pursuant to section 49(3) of the Act which we shall reproduce shortly. In doing so the respondent Commission did not assume, nor did it purport to assume the role of a court. This being the case, it is preposterous to expect the Commission in its investigations and conclusions to be governed by rules akin to and applicable in judicial proceedings including those to do with proof and its standard. To us, there

is no such thing as investigating a matter beyond reasonable doubt, or above a preponderance of evidence.

Following any investigations that it undertakes, and where it deems appropriate, the Commission would cause a prosecution to be instituted for purposes of securing a conviction. It would not in that case sit as a court, for it is not one. It is only in such proceeding that the issue of the standard of proof would become a relevant consideration.

In our considered view, it is competent for the Commission to ascertain from its investigations whether a contravention of the Act has occurred or not and to take any measures prescribed under the Act provided such measures are not conditional upon a conviction. Our reading of section 49 of the Act is that there are some measures that the commission can take which are predicated on a conviction and others which are not. The section reads as follows:

> *"(1) A person or an enterprise shall not supply a customer 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 the enterprise.*

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

(a) to a fine...

(b) to pay the Commission, in addition to the penalty stipulated under paragraph (a), a fine...

(3) A person who, or an enterprise which, contravenes subsection (1) shall –

(a) within seven days of the supply of the goods concerned, refund the consumer the price paid for the goods; or

(b) if practicable and if the consumer so chooses, replace the goods with goods which are free from defect and are fit for the purpose for which they are normally used or the purpose that the consumer indicated to the person or enterprise.

(4) The Commission may, in addition to the penalty stipulated under subsection (2) and (3) –

(a) recall the product from the market; or

(b) order the person or enterprise concerned to pay a fine not exceeding then percent of that person's or enterprise's annual turnover..."

The question that should be answered at once is whether a finding that there has been a contravention of section 49(1) can only be made after a trial and conviction of the suspect. Put in less elevated language, can the Commission make a finding that there has been a contravention of section 49(1) if no prosecution and conviction of the alleged contravener is undertaken?

P. 1520

Our understanding of section 49(1) and (2) read together is that it is not a conviction that determines the contravention of section 49(1). Rather, the conviction comes after a contravention. It does not always require a court trial to ascertain that a contravention of the provisions of section 49(1) of the Act has occurred. From its investigations, the Commission may make a determination that an infringement of section 49(1) has occurred. Indeed, even on a concerned party's own admission, that it has supplied defective products, the Commission may make a determination that a transgression of section 49(1) has occurred without any prosecution being undertaken. Court action for purposes of securing a conviction may or may not follow such a determination.

The Commission may, upon satisfying itself that a violation of section 49(1) of the Act has occurred, issue such orders or directions as it is empowered to do under section 49(3), (4), (6) and (7) of the Act, subject to an aggrieved party's right under section 60 to escalate, where necessary, the issue by way of appeal to the Tribunal, a quasi – judicial body empowered to review the administrative decisions of the Commission.

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The fine under section 49(2)(a)(b) appears to us to be premised on a conviction which naturally requires a court process. However, the wording of the subsection (3) does give the Commission independent power to impose fines and order replacement of defective goods. For good measure, we also refer to subsection (5), (6) and (7) of section 49 which read as follows:

> *"(5) A person or an enterprise shall supply a service to a consumer with reasonable care and skill or within a reasonable time or, if a specific time was agreed, within a reasonable period around the agreed time.*
>
> *(6) A person who, or an enterprise which, contravenes subsection (5) is liable to pay the Commission a fine not exceeding ten percent of that person's or enterprise's annual turnover.*
>
> *(7) In addition to the penalty stipulated under subsection (6) the person or the enterprise shall –*
>
> *(a) within seven days of the provision of the service concerned, refund to the consumer the price paid for the service; or*
>
> *(b) if practicable and if the consumer so chooses, perform the service again to a reasonable standard."*

In our considered opinion the enforcement of all these provisions, unlike those of section 49(2)(a) and (b), is not dependent on a conviction by a court of law.

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Arising from what we have stated above, it follows that the respondent, not being a court, cannot exercise criminal jurisdiction or pronounce on the criminal liability of a person who, in its view, has contravened the provisions of section 49(1). That is the preserve of a court of competent jurisdiction as we have already stated. Where the Commission is minded to secure a conviction, it can only cause a prosecution to be undertaken against the violator of the relevant provision. This does not, however, mean that it cannot investigate and make its own determination as to whether or not the provision of section 49(1) of the Act, has been violated.

As regards the standard of proof, our view is that the respondent, not being a court, is not bound to employ a standard expected in criminal matters when all it does in making its investigatory findings, is to perform an administrative function.

It follows that grounds four and six of the appeal cannot succeed. They are hereby dismissed.

Ground five and seven relate to reversing the findings of fact. The appellant maintains that the conditions for an appellate court interfering with findings of fact were not satisfied.

The real question here is whether the Tribunal erred in not taking into account the evidence uncovered during the investigations conducted by the respondent.

The findings of fact which were in issue in this case relate to the Tribunal's conclusion that there was no evidence that the tractor sold to the buyer was defective. The learned High Court judge, held that there was sufficient evidence available which the Tribunal failed to take into account. That evidence was put to the appellant following the respondent's investigations into the state of the tractor sold to the buyer by the appellant. The basis of the Tribunal's overlooking of that evidence was its insistence that the evidence ought to have reached the threshold of beyond reasonable doubt. In its own words, the Tribunal admitted that it would:

> *"ordinarily have concluded that the faults in the tractor were as a result of inherent defects on a balance of probabilities."*

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We agree with the bravura judgment of the court below as well as the lucid submissions by the learned counsel for the respondent that the Tribunal proceeded on a totally wrong premise when it considered the standard of proof as being that of beyond reasonable doubt. Had the Tribunal moderated its expectations of the threshold of the necessary evidence to establish a mere contravention of section 49(1), not for purposes of a criminal conviction, it would, as it admitted in its own statement which we have quoted, have come to the conclusion that the evidence before the respondent following the complaint against the appellant, pointed to nothing but defects in the tractor sold to the buyer, thus confirming a breach of section 49(1).

We do not think the issue here is so much one of interfering with the findings of fact by the lower court as it is of merely correcting a failure by the Tribunal to apportion appropriate probative value to available evidence.

Grounds five and seven are destitute of merit and should thus suffer no better fate than the other grounds of appeal. The net result is that this appeal fails on all grounds and it is dismissed accordingly.

There shall be costs for the respondent to be taxed if not agreed.

.....
I.C. Mambilima
CHIEF JUSTICE

.....
M. Malila
SUPREME COURT JUDGE

.....
M. Musonda SC
SUPREME COURT JUDGE