

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

2012/CCPT/028/CON

IN THE MATTER OF:

**SECTION 52 (1) OF THE
COMPETITION AND CONSUMER
AND PROTECTION ACT, NO. 24 OF
2010**

IN THE MATTER OF:

**THE COMPETITION AND
CONSUMER PROTECTION
(GENERAL) REGULATIONS 2011,
STATUTORY INSTRUMENT NO.
97 OF 2011**

IN THE MATTER OF:

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

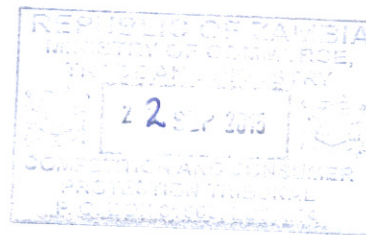
BETWEEN:

ZAMBIAN BREWERIES PLC

APPELLANT

AND

**THE COMPETITION AND
CONSUMER PROTECTION
COMMISSION**



RESPONDENT

CORAM:

Mr. W. A. Mubanga, SC, – Chairperson, Mrs. M. M. Kawimbe - Vice Chairperson, Mr. R. Sombe - Member, Mr. C. Kabaghe - Member, Mrs. E. C. Chiyenge – Member

For the Appellant:

Mr. A. J. Shonga, Jnr. - SC, Mr. S. N. Lungu, Shamwana & Co. and Mrs. D. Bwalya, Zambian Breweries Plc, In-House Counsel

For the Respondent: Mrs. M. B. Mwanza - Director, Legal and Corporate Affairs, Competition and Consumer Protection Commission and Mrs. M.M. Mulenga - Manager, Legal and Corporate Affairs, Competition and Consumer Protection Commission

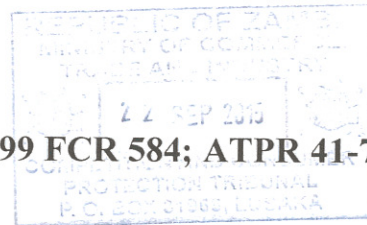
JUDGMENT

a. **Legislations referred to:**

1. **Competition and Consumer Protection Act, No. 24 of 2010**
2. **Competition and Consumer Protection (Tribunal) Rules 2012**
3. **Food and Drugs Act, Chapter 303 of the Laws of Zambia**

b. **Cases referred to:**

1. **Cook Vs Pascmimo Limited [200] 99 FCR 584; ATPR 41-767**



This is an appeal by **Zambian Breweries PLC** (hereinafter called the “Appellant”) against the directive of the **Competition and Consumer Protection Commission** (hereinafter called the “Respondent”) which found that:

*“The facts and evidence of this case have shown that **Zambian Breweries PLC** is in breach of section 52(1) of the **Competition and Consumer Protection Act** (“the Act”), No. 24 of 2010.”*

and directed that:

“The Board orders that since the Castle Lager beer in question was not suitable for consumption according to the findings of the Food and Drugs Act as well as the Zambia Bureau of Standards which revealed that the bottle was not tampered with Zambian Breweries Plc should be prosecuted because there is a violation of section 52(1) of the Act.”

The background to this appeal is that on 11th August, 2011 the Respondent received a complaint from a Mr. Mwaba Ntenga claiming that he found a foreign particle identified as a sachet labelled “18+ Special Brandy” in a bottle of Castle Lager beer.

He also claimed that he purchased the said Castle Lager beer from a place called Tall Trees, and noticed long after the purchase, that the Castle Lager bottle had a foreign particle in it. That after the discovery, Mr. Ntenga decided to take the contaminated Castle Lager beer bottle to the Appellant’s offices, where he was seen by a Mr. Allan Bwalya the Customer Liaison Manager. It was said by Mr. Ntenga that Mr. Bwalya asked him to hand over the said Castle Lager beer bottle, to him for testing.

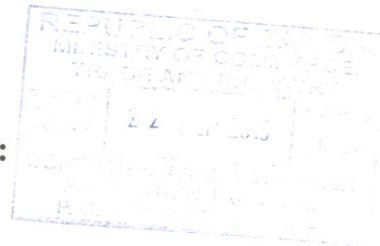
However, Mr. Ntenga refused to hand over the said Castle Lager beer bottle and instead decided to take it to the Zambia Bureau of Standards offices for independent testing. He was subsequently referred to the Respondent’s offices, by the Zambia Bureau of Standards, where he laid a complaint against the Appellant. The Respondent was said to have carried out investigations on the said Castle Lager beer bottle as well as referring it to the Zambia Bureau of Standards and the Food and Drugs Laboratory for testing.

Against that background, the Respondent went ahead to consider the case and found the Appellant wanting in respect of Section 52(1) of the Competition and Consumer Protection Act (hereinafter called the "Act"). Disillusioned by the Respondent's directive, the Appellant lodged this appeal before the Tribunal on 6th December, 2012, stating the following grounds:-

1. That the Respondent erred in finding that the Appellant had breached section 52(1) of the Competition and Consumer Protection Act, No. 24 of 2010;
2. Alternatively that the Respondent erred in finding the Appellant culpable without evidence being adduced to show that the complainant purchased the alleged defective product from Tall Trees;
3. The Respondent erred in ignoring the fact that there was no evidence to show that the complainant purchased the alleged defective product from the Appellant;
4. That the Respondent erred in finding as it did in clause 2.2 of its decision that one of the elements to be proved is whether the person or 'enterprise' has supplied a consumer with goods that do not conform to mandatory consumer safety standards for the class of goods set by the Zambia Bureau of Standards or other relevant competent body;
5. That the Respondent erred in failing to find that had the bottle originated from the Appellant it was physically impossible for the alleged foreign matter to have been found in the said bottle and in the state it was found;
6. That the Respondent erred in finding the fact that the said bottle was allegedly sealed at the time it was tested by the Zambia Bureau of Standards meant that the foreign matter was inserted into the bottle by the Appellant;

7. That the Respondent erred in holding as it did in paragraph 5.5.2 that the Appellant be deemed to have supplied the product in issue;
8. That the Respondent erred in relying on the provisions of section 30(2) of the Food and Drugs Act Chapter 303 of the Laws of Zambia as it wrongly concluded that the bottle in question was supplied by the Appellant;
9. That the Respondent erred by falling into undesirable bias by allowing its decision to be influenced by the Appellant's previous conviction; and
10. That the Respondent erred in failing to recognize that the Zambian Bureau of Standards is not competent to carry out tests to prove whether a bottle has been opened prior to being sealed.

The Appellant's prayer before the Tribunal was:



- a) A declaration that the decision of the Respondent which decided that the Appellant had breached section 52(1) of the Act and directed that the Appellant be prosecuted be set aside;
- b) An order that the Respondent pay costs; and
- c) Any other relief that the Tribunal may deem fit.

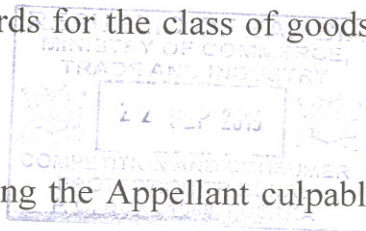
In response to the Appellant's Notice of Appeal, the Respondent filed a Notice of Grounds in Opposition to Appeal, on 27th December, 2012 before the Tribunal averring that:

1. The Respondent did not err in finding that the Appellant had breached section 52(1) of the Act because the Appellant did in fact sell a Castle Lager

beer containing foreign matter as evidenced in the findings from the Food and Drugs Laboratory and the Zambia Bureau of Standards.

The Zambia Bureau of Standards indicated in its report that the measurement of the crown diameter was within the normal range whereas the results from the Food and Drugs Laboratory revealed that the foreign matter was a sealed sachet labeled “18+ Special Brandy”.

2. Contrary to the Appellant’s assertion in Ground 2 of its Notice of Appeal, there was no finding that Mr. Ntenga purchased a defective product from Tall Trees but rather that the complainant purchased a product that did not conform to the mandatory safety standards for the class of goods set by the Zambia Bureau of Standards.



That the Respondent did not err in finding the Appellant culpable as it was common cause that the Appellant is the sole producer and supplier of Castle Lager. Much as the complainant purchased the beer from Tall Trees, it is a known fact, as aforementioned, that the Appellant is the sole producer and supplier of Castle Lager and that Tall Trees was supplied by the Appellant. In this regard, the burden to show that the Castle Lager came from none (sic) other than the Appellant’s plant lay on the Appellant.

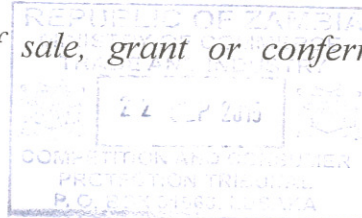
3. That the Respondent did not err in deciding that the complainant purchased the Castle Lager from Tall Trees as he submitted to the Respondent that the Castle Lager was purchased from Tall Trees, notwithstanding the lack of a receipt, as it is common knowledge that consumers do not typically get receipts when consuming beverages from off the counter.

Further, that it was not relevant as to whether the complainant purchased the said Castle Lager beer from Tall Trees or not as Castle Lager is produced and supplied by the Appellant to its distributors, who in turn distribute to bottle stores that ultimately sell it to the consumers and therefore, the burden is on the Appellant to show that the Castle Lager is not its product.

4. That the Respondent did not err in its finding in clause 2.2 of its decision because to prove that there was a sell of any goods, it had to be shown that there had been a supply. Section 2 of Act defines ‘*supply*’ as ‘*includes, in relation to –*

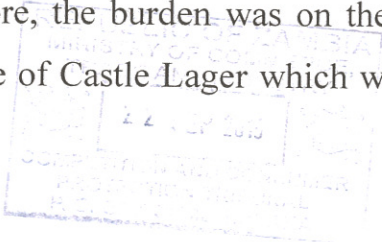
a) *goods, the supply, including resupply, by way of sale, exchange, lease, hire or hire purchase of the goods; and*

b) *Services, the provision by way of sale, grant or conferment of the services’.*



5. That it was not in issue as to the physical impossibility or indeed possibility as to how the foreign matter got into the bottle and that it was not incumbent upon the Respondent to show how meticulous the Appellant is in its production. However, it was for a fact that the foreign matter was in the bottle as evidenced by the findings of the Food and Drugs Laboratory.

6. That it was not an allegation but rather a fact that the bottle was sealed and was not tampered with by the complainant as evidenced by the findings from the Zambia Bureau of Standards, which indicated in its report that the measurement of the crown diameter was within the normal range.

7. That the Respondent was on firm ground in holding that the Appellant be deemed as having supplied the product in issue as the Appellant is the sole producer and supplier of Castle Lager in Zambia, unless the Appellant proved otherwise.
8. The Respondent did not err in relying on the provisions of section 30(2) of the Food and Drugs Act, Chapter 303 of the Laws of Zambia as the said section gives a presumption of the authenticity of the thing in issue unless the contrary is proved. And therefore, the burden was on the Appellant to rebut the presumption that the bottle of Castle Lager which was adulterated was not its product.
9. That the Respondent did not err and did not fall into "undesirable bias" as its decision was based on the direct evidence as well as the findings from the Food and Drugs Laboratory and the Zambia Bureau of Standards. The Respondent used the Appellant's previous conviction as an aggravating circumstance for purposes of determining the appropriate sanction.
10. Contrary to the Appellant's assertion in Ground 10 of its Notice of Appeal, the Zambia Bureau of Standards was competent to carry out tests to assess whether or not a bottle cap had been tampered with before being placed back. The Zambia Bureau of Standards is a body corporate established by the Standards Act, Chapter 416 of the Laws of Zambia and its functions include the examination and testing of commodities to which standards apply.

The Respondent's prayer before the Tribunal was that all the Appellant's ten (10) grounds of appeal were unfounded, baseless and a complete misdirection at law and should be dismissed.

In support of its appeal, the Appellant called four (4) witnesses who testified before this Tribunal. As its first witness, the Appellant called Mr. Jack Chibawe (now deceased) who was its Brewing Manager at the time. We shall continue to refer to him as AW1. His testimony was to show the Tribunal how clear beer was brewed by the Appellant. He also informed the Tribunal of the ingredients that are found in beer, which he named as portable water, Barley malt, Maize grits, hops and spices for flavor.

It was further his evidence that the process of brewing beer begun with the combining of raw material particularly the malt, which is crushed in a Mill mixed with water at the temperature of 45 degrees. The Maize ingredient would then be boiled separately and combined with the other ingredients in a vessel called the mash torn.

The combined mash is thereafter kept in the vessel for 3 hours at varying temperatures of between 45 degrees to 63 degrees and finally 76 degrees; after which it would be pumped into a lauter turn which separates the liquid from the solid part.

Through the perforated floor of the lauter turn only liquid would be allowed to pass through, to the exclusion of any undesired impurities. The liquid would then be

taken into a wort kettle, an industrial boiler, where hops are added for flavor and heated thereafter to temperatures of up to 90 degrees.

In addition AW1 testified that after 45 minutes, the wort was moved to the whirlpool, where the spent hop to the size of 100th of a millimeter were removed and that only liquid could pass through. Yeast would be added to the wort and given a 9 day fermentation period. During this stage, samples are taken to the testing panel and to the Microbiological Laboratory at the Appellant's offices where various tests were undertaken.

AW1 further testified that the brewed beer would be taken through a high – pressure filter operating at 8 bars. He stated that this filter was a lot tighter and could only allow particles, which are 1000th of a millimeter. Then the beer would be analyzed at the Appellant's Laboratory to ascertain if the temperature was at 0 degrees or below, the colour was within specification and that the value was within the gas content in terms of Oxygen and Carbon dioxide.

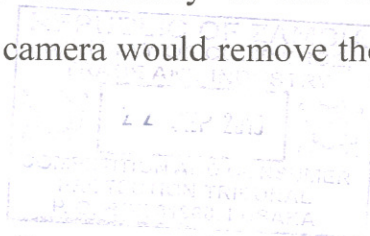
In cross-examination, the witness reiterated his testimony and insisted that beer bottles were cleaned through a machine called a bottle washer, which has a series of compartments. He also stated that these compartments have caustic water and that the temperatures were usually in the range of 80 degrees Celsius.

The second witness called by the Appellant was Mr. Peter Mphango, the Unit Manager Packing, who we shall continue to refer to as AW2. He testified on the process of cleaning and packaging of the bottles from the time the bottles left the crates up to the point, where the crates of beer are offloaded from the pallets. He

also stated that the Appellant employed women whose main task was to sort out bottles and to make sure that only suitable bottles were packed into crates.

It was further his evidence that the women had the responsibility of removing all defective bottles and bottles that did not have bottle tops from the crates. AW2 Also affirmed AW1's testimony on the washing process of bottles in the washer; and emphasized that the washing was so vigorous that any particles that would be found in the bottles would be flashed out.

AW2 also gave evidence that after washing, bottles were placed on a conveyer belt where they passed through an All Surface Empty Bottle Inspector, a high frequency camera that can detect any abnormality in the bottles. Once an abnormality was detected in a bottle, the camera would remove the bottle from the conveyer belt.



In the event that a bottle with some impurity managed to pass through the washer, the camera would still detect it. Thereafter, the clean bottles would move towards the filler, where the bottles are filled with beer, using a computerized process. He added that the nozzle that is used to fill the beer into the bottles is very thin and it is impossible at this stage for anything to be placed into the bottle.

AW2 stated that after the filling, the bottles were subjected to further testing, through another computerized camera that monitored the level of the beer in the bottles and where the levels were found to be lower than prescribed, such bottles would be removed from the conveyer belt. The bottles would then move to the

crowning stage where bottle tops were placed onto them by a machine; and thereafter labeled and placed into crates.

Before the witness was cross-examined, an application was made by Counsel for the Appellant to move the Tribunal to its premises for a tour of its Brewery plant. The Tribunal together with the Respondent toured the Appellant's Brewery plant and were able to experience the processing of beer brewing and packing as described by AW1 and AW2.

In cross-examination, the witness repeated most of what he had said during his examination in chief. He added that as far as he was concerned, there was no way an impurity could find itself or be placed in a bottle.

The third witness called by the Appellant was Mr. Stephen Mazimba, Metrology Manager, Zambia Bureau of Standards, who we shall continue to refer to as AW3. He testified that the Appellant was fully certified in the production of beer by the Zambia Bureau of Standards and produced various certificates granted to the Appellant by the Zambia Bureau of Standards. AW3 also testified that the Appellant was accredited not only to the Zambia Bureau of Standards but also to other international companies that dealt with standards. The witness was not cross examined by the Respondent.

The fourth witness called by the Appellant was Mr. Allen Bwalya, Customer Liaison Officer at the Appellant Company, who we shall continue to refer to as AW4. He repeated most of what AW1, AW2 and AW3 had said in their evidence. He also added that the Appellant was certified by the International Certification

Network and went on to produce a number of ISO certificates appearing at pages 14-15 of the Record of Proceedings.

It was also his evidence that he met Mr. Mwaba Ntenga the complainant on 11th August, 2011, who had taken the said Castle Lager beer, which had a foreign particle to the Appellant's offices. He testified that Mr. Ntenga claimed that he bought the said beer from Tall Trees in Makeni and later discovered that it had a foreign particle in it. It was further his evidence that he had asked Mr. Ntenga to leave the said bottle with him for testing at the Appellant's Laboratory, but Mr. Ntenga declined.

AW4 further testified that he wanted to have the said bottle tested so that he could ascertain whether it was one of the Appellant's products; granted that there are a lot of counterfeit products of Castle Lager Beer on the Zambian market. In addition AW4 testified that it was open to any person in Zambia to import beer products from anywhere.

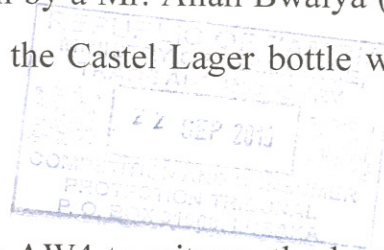
It was further AW4's testimony that other than the inspection of the product, it was prudent to establish the features on the bottle, such as the manufacturing date, expiry date as well as the batch number. AW4 stressed that without the verification, it would be impossible to determine whether the alleged Castle Lager beer bottle was one of the Appellant's products or not.

In addition, AW4 alleged that when Mr. Ntenga approached him, his interest was only on the amount of compensation and thus refused to leave the said bottle for appropriate tests. AW4 also alleged that the purpose of a crown test is to

determine whether a bottle has a leak or not, and is not meant to conclude whether a bottle has been opened or not. It was also his evidence that there were certain diameters that are prescribed on each bottle and that the crown test confirmed if each bottle filled its diameters.

This was the Appellant's case in defence of which the Respondent called four (4) witnesses. The first was Mr. Mwaba Ntenga who was the complainant in the proceedings before the Respondent. We shall continue to refer to him as RW1. He testified that on Saturday, 11th August, 2011, he stopped over at a place called Tall Trees to buy Castle Lager beers on his way from Kafue. After he bought the beers, he noticed that one of the bottles had a foreign particle in it, which he later came to identify as a sachet labelled "18+ Brandy".

On the Monday following that Saturday, RW1 testified that he took the said bottle to the Appellant's offices, where he was seen by a Mr. Allan Bwalya (AW4). He confirmed that AW4 requested him to leave the Castel Lager bottle with him for testing, but he declined.



RW1 also testified that he was requested by AW4 to witness the bottle cleaning process at the Appellant's plant. He accepted the invitation and an appointment was consequently made for him to view the cleaning process at 14:00 hours. Thereafter RW1 went back to AW4's office where again, he was asked to leave the said Castle lager beer bottle for testing by AW4 but declined.

After leaving the Appellant's offices, RW1 testified that he consulted two colleagues who advised him to take the said bottle to the Zambia Bureau of

Standards. In turn an official at Zambia Bureau of Standards advised him to take the Castle Lager beer bottle to the Respondent's offices, where his complaint was processed by a Ms. Inonge Mulozi. RW1 also handed over the said Castle Lager beer bottle to Ms Mulozi. It was further his evidence that his reason for going to the Appellant's offices was to find out how the foreign particle got in the Castle Lager beer bottle and how many bottles had been similarly affected in the past.

In cross-examination, RW1 gave contradictory evidence on the following aspects: on page 1 of the Record of Proceedings, RW1 claimed that he had gone to Tall Trees to buy breakfast for his family; while before the Tribunal he testified that he had gone to Kafue to buy meat for his family and had stopped over on his way back to buy beers at Tall Trees. Further, in his statement at page 1, RW1 did not mention the fact that he had bought some beers at Tall Trees. He also could not recollect the date the incident was said to have happened, which differed from the one he gave in his statement as 23 July, 2011, but gave a different date during examination in chief.

In our view, these discrepancies and inconsistencies concerning the purpose of RW1's trip on the material date and lack of certainty of dates when the incident occurred, seriously discredited RW1's evidence.

It was also RW1's evidence he paid cash for the (five) 5 Castle Lager beers that he bought. He however, conceded that he was not given a receipt for the purchase and that it was difficult to establish if he had bought the said beers from Tall Trees.

Under further cross-examination, he stated that 15 days elapsed before he reported the matter to the Zambia Bureau of Standards. During that time the Castle Lager bottle had remained in his custody. He also stated that it had taken him long to take the bottle to the Zambia Bureau of Standards because he had been preoccupied with his business.

RW1 refuted AW4's claim that he was only interested in compensation and maintained that his reason for going to the Appellant's offices was to find out the number of bottles that had been found with foreign particles in them. RW1 testified that he did not return the said bottle to Tall Trees to find out how the foreign particle had entered the bottle. It was his further testimony that he was aware that a number of beer brands were sold at COMESA market, which included Windhoek, Castle dumpies, Black Label, Wines, Brandy, Castle Lager beer etc.

In re-examination, RW1 stated that Castle beer products were the same, regardless of where they were bought. He also pointed out that he had been reluctant to leave the said bottle at the Appellant's offices, because he preferred an independent test to be carried out, outside the Appellant's offices.

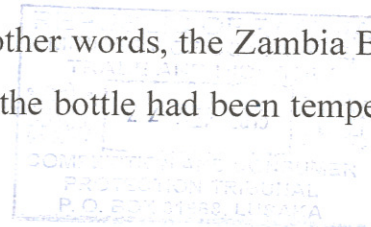
The second witness for the Respondent was Daniel Musonda Mutale, a Senior Meteorologist at the Zambia Bureau of Standards, who we shall continue to refer to as RW2. His evidence was that he was responsible for calibrations at his work place. He testified that the Zambia Bureau of Standards calibrations depended on values that were received from clients; as Zambia Bureau of Standards does not have its own values. He also testified that his involvement in this case was as a

result of an instruction that he had received from his Director, to measure a Castle Lager beer bottle that had been submitted for testing by the Respondent.

He went on to testify that on 26th August, 2011, he measured the diameter of the said Castle Lager beer bottle, using a veneer caliper ten times at different positions, in order to obtain accurate measurement results. He then measured the bottle at ten different height conditions, to determine if the shape of the bottle top was irregular.

He went on to describe his investigation findings which are contained in the report appearing at page 10 of the Record of Proceedings. These include the identity of the bottle, the customer's name, ZABS calibration number and reference of the calibration certificate, environmental conditions, and the values of the diameter of the bottle.

He further testified that the Zambia Bureau of Standards report did not show proof that the bottle top was tempered with or not. In other words, the Zambia Bureau of Standards report was not conclusive on whether the bottle had been tempered with or not.



In cross-examination, RW2 testified that he did not examine the contents of the bottle, but only performed height and diameter examinations. The examination of the bottle was a visual one and his purpose was to determine if the bottle had been tempered with or not. By that he meant if a person had attempted to open the bottle or not. He repeated the conduct of bottle examination as was given under examination in chief and supplemented that his test results could not confirm if the bottle top had been opened or not.

RW2 conceded that there was a difference between his report and the Respondent's decision as compared at pages 10 and 24 of the Record of Proceedings. He also asserted that his report was final and that the text showing a different result in the Respondent's decision at page 24 of the Record of proceedings was erroneous.

On the question regarding the reference certificate, at page 10 of the Record of Proceedings ZABS/LC/11/109, RW2 testified that he had used the Appellant's certificate, because his assumption was that the said Castle Lager beer bottle belonged to the Appellant. He however, did not verify this information. After the cross-examination, RW2 was not re-examined.

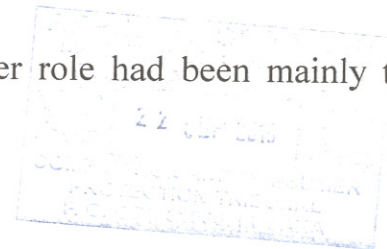
The third witness called by the Respondent was Mrs. Margaret Sakala, a retired Public Analyst and Chemist at the Food and Drugs Laboratory, Ministry of Health, who we shall continue to refer to as RW3. She testified that she was on duty on 26th October, 2011 when she received a sample of a Castle Lager beer bottle that had been referred to the Laboratory for testing by a Ms. Juarita N. Mumba, an Environmental Health Technologist at Lusaka City Council.

The instructions to RW3 were to identify the foreign particle that was in the Castle Lager beer bottle. It was her testimony that before she proceeded to conduct the test, she discovered that the said Castle Lager beer bottle was sealed and thus she decided to carry out a physical examination. From that examination, she detected a foreign particle, which she came to identify as a sachet labeled "18+ special brandy". Afterwards she prepared a report which appears at page 11 of the Record of Proceedings.

During cross examination, RW3 maintained that the bottle she was asked to examine was sealed and had a foreign particle in it. She emphasized that she did not temper with the bottle, as her purpose was to confirm the foreign particle and not the contents of the bottle. Thus, she did not want to interfere with the evidence. She also testified that the foreign particle was visible to the eye even though the bottle was sealed.

She conceded that the assumption she made on the liquid in the bottle was made on the basis that she was holding a Castle Lager beer bottle. She also testified that she had not been requested to take any tests to show that the said bottle had been tempered with.

In re-examination, RW3 underscored the fact that her role had been mainly to confirm the foreign particle that was in the said bottle.



A Subpoena was issued to the fourth witness, after an application to the Tribunal by Counsel for the Appellant to call a Ms. Inonge Mulozi, an Investigator in the employment of the Respondent. We shall continue to refer to her as RW4. Her evidence was that she is the one who investigated RWI's complaint. Following investigations, she prepared a report based on certain factors, including the fact that RW1 bought a contaminated Castle Lager beer without a receipt from Tall Trees.

RW4 testified that she did not go to Tall Trees to ascertain if the contaminated bottle of beer had been bought from there. However, RW4 had subjected the said Castle Lager bottle to tests; that is the one test conducted by the Zambia Bureau of

Standards and the other by the Food and Drugs Laboratory under the Ministry of Health.

RW4 pointed out that in her view; the test results from the Zambia Bureau of Standards were not conclusive. Thus, she decided to give an opinion on the Zambia Bureau of Standards report as shown at page 16, paragraph 4.3.2 of the Record of Proceedings. She gave an opinion, notwithstanding the fact that experts at Zambia Bureau of Standards carried out tests and arrived at results that were inconclusive. RW4 insisted that she did not change the results of the Zambia Bureau of Standards experts, but only gave an opinion on their expert report.

RW4 conceded that her opinion appearing on page 16 of the Record of Proceedings had left out the words "or not" as provided in the Zambia Bureau of Standards report. She further insisted that while the Zambia Bureau of Standards was mandated to carry out tests, it was her view that the conclusion in its Report was incorrectly stated.

She also conceded that she did not ascertain the contents of the liquid in the bottle, even though it was a Castle Lager beer bottle. However, she concluded that given the type of bottle and label, the bottle belonged to the Appellant. She testified that she did not know if the Appellant had any specifications for its products and that she did not take the bottle to the Appellant to establish if it belonged to the Appellant.

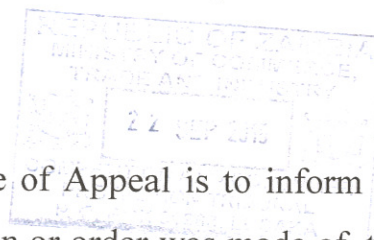
RW4 further testified that when she realized that the Zambia Bureau of Standards report was inconclusive, she approached the Food and Drugs Laboratory to assist

her on the interpretation of the said report. She was advised by officials from the Food and Drugs Laboratory that an inconclusive result meant that the result is not certain.

At the end of the trial, Learned Counsel for the Appellant submitted in writing and we are highly indebted to Counsel for his industrious arguments. We did not on the other hand receive any submissions from the Respondent. However, we do not intend to reproduce the said submissions here save to refer to them later in the judgment.

From the evidence led, we find the material facts are in common cause. These are as next following, that RW1, Mr. Mwaba Ntenga registered a complaint before the Respondent alleging that he bought a Castle Lager beer from a place called Tall Trees. He later discovered that the said Castle Lager beer had a foreign particle in it labeled "18+ Special Brandy". While the said bottle was tested by the Zambia Bureau of Standards and Food and Drugs Laboratory, it was not tested by the Appellant. We also find in common cause, that there was no receipt to confirm where the Castle Lager beer had been purchased from.

We will begin by stating that the purpose of a Notice of Appeal is to inform an appellant body and the party in whose favour a decision or order was made of, the unsuccessful party's intention to seek a review of the case. A Notice of Appeal therefore states in brief the portions of law and fact that the unsuccessful party seeks the review on.

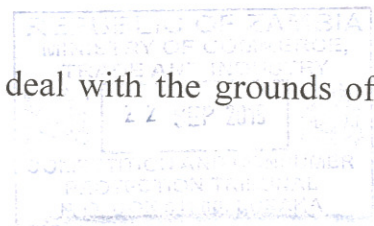


In our view the purposes of such review are twofold. They firstly, seek to provide a process for correction of errors; and secondly, to clarify and or interpret law. On the other hand, if a successful party deems it fit, it may file a counter appeal in the same appeal process.

The purpose of a counter appeal is to oppose the appeal that has been taken out by an adversary. In other words, a Notice of Grounds in Opposition to appeal (or counter appeal) will seek only to counter the appeal of an adversary and to bring out new aspects of appeal that are not part of an adversary's grounds of appeal. It should not canvas substantive arguments of an opponent, which can be more efficiently dealt with in Heads of Arguments.

Thus, we find that the Respondent's tendency of routinely presenting substantive arguments in the Notices of Grounds in Opposition to appeal is irregular, unprocedural and only creates a duplication or multiplicity of arguments, which is not helpful to the process of review. We would therefore urge the Respondent to desist from this practice, as it is not even regulated by the Competition and Consumer Protection (Tribunal) Rules of 2012.

Having made this point clear, we shall now proceed to deal with the grounds of this appeal, which in our view are all related.



We understand the Appellant's arguments in the grounds to be as follows:

1. Whether the Appellant breached section 52(1) of the Competition and Consumer Protection Act?

2. Whether the assessment test that was conducted by the Respondent took into account the following considerations namely:
 - (i) How the Appellant sold the said Castle Lager beer to RWI?
 - (ii) Whether physical investigations were conducted to show if the Castle Lager beer was bought from Tall Trees in the absence of a receipt?
 - (iii) If tests were conducted to show that the contents of the Castle Lager beer was indeed Castle beer?
 - (iv) What mandatory safety standards were applied by the Zambia Bureau of Standards or other competent body to show that the Appellant was in breach of the same?
3. Whether the Respondent interpreted the results of the sealage test correctly?
4. Whether the Castle Lager beer bottle originated from the Appellant and if the Appellant had supplied the defective product?
5. Whether the Respondent erred in relying on section 30(2) of the Food and Drugs Act, Chapter 303, when it wrongly concluded that the Appellant had supplied the bottle in question?
6. Whether the Respondent erred by falling into undesirable bias by allowing its decision to be influenced by the Appellant's previous convictions?
7. Whether the Respondent erred in failing to recognize that the Zambia Bureau of Standards is not competent to carry out tests to prove whether a bottle has been opened prior to being sealed?
1. **Whether the Appellant breached section 52(1) of the Competition and Consumer Protection Act?**

The arguments advanced by the Appellant were that the Respondent erred in finding that the Appellant had breached the provisions of section 52(1) of the Competition and Consumer Protection Act.

According to the Respondent, the assessment test to provide the violation of this section, as listed in 2.2 of the report of the decision (on page 22 of the record of proceedings) was:

- a. *Whether the accused is a person or an enterprise.*
- b. *Whether the person sold goods under consideration to a consumer*
- c. *Whether the person or enterprise has supplied a consumer standard for the class of goods set by Zambia Bureau of Standards or other relevant competent body.*

The Appellant went on to analyse the assessment tests that were conducted by the Respondent and asserted that it had no difficulty with the conclusion that it was an enterprise. It however took issue with the casual link that was established by the Respondent between the Castle Lager beer was supplied by Tall Trees and the Appellant. The Appellant further took issue with the Respondent's investigation, which it considered not to have been done properly. Further that there was no evidence advanced to show how products supplied by the Appellant did not conform to safety standards.

On the other hand the Respondent main averment was that it did not err in finding that the Appellant had breached Section 52(1) of the said Act.

Section 52(1) of the Competition and Consumer Protection Act provides that:

“A person or an enterprise shall not sell any goods to consumers unless the goods conform to the mandatory safety standards for the class of goods set by the Zambia Bureau of Standards or other relevant competent body.”

In our view, what this provision entails is that there must be a class of goods upon which mandatory safety standards are set by a recognized competent body.

It is also our view that these mandatory safety standards should be crafted in such a way that they will ensure the safety of a consumer. We would venture to say that the purpose of mandatory safety standards is also to regulate products that are likely to be harmful or dangerous to consumers.

We must say that from our reading and inspection of the Record of Proceedings, we have been unable to trace any of the mandatory safety standards of the competent bodies.

It has not escaped our attention that the Appellant’s production plant employs a number of measures that are meant to assure the safety of its products as testified by AW1 and AW2, whose evidence we note was not challenged by the Respondent. Further, we must say, our own visitation of the Appellant’s plant helped us to remove the doubt that would have been created in our minds, had we not visited the Appellant’s plant to have a first-hand feel of its safety standards.

We are thus persuaded that in the absence of evidence suggesting that these safety measures and standards demonstrated by the Appellant in the manufacturing plant were compromised, then we must find in favour of the Appellant.

Therefore, on the basis of the foregoing, we would be inclined to agree with the Appellant that it did not breach Section 52(1) of the Act.

2. Whether the assessment test that was conducted by the Respondent took into account the following considerations namely:

(i) How the Appellant sold the said Castle Lager beer to RW1?

The Appellant's argument under this issue was that the Respondent did not show how the Appellant was said to have sold the beer to RW1. Counsel for the Appellant drew our attention to the case of **Cook Vs Pascmino Limited [200] 99 FCR 584; ATPR 41-767**, appearing at page 17 of the Record of Proceedings; wherein it was stated that:

“A supply of goods and services must occur as part of a bilateral transaction or dealing under which the other party acquired those goods and services.”

Counsel for the Appellant fortified his argument by referring the Tribunal to the evidence of AW4 who testified that there were a number of counterfeit products of Castle Lager beer on the Zambian Market. It was AW4's further testimony that the high number of counterfeit products was attributed to the fact that it was open to any person in Zambia to import beer from any source. Thus, he averred that it was

difficult to ascertain if the said Castle Lager beer was one of the Appellant's products.

On the other hand and in an attempt to persuade us the Respondent argued that RW1 purchased the said Castle Lager beer from Tall Trees. Thus, it was not relevant to show that the Appellant had sold the said Castle Lager beer to RW1. That the fact that Castle Lager is a product which is produced and supplied by the Appellant to its distributors, who in turn distribute it to bottle stores, was sufficient.

We have seriously considered this issue and are reminded of the old common law principle, which states, that in every case, "*a person that alleges must prove his case.*" In casu the allegor is the Respondent and therefore it is incumbent on the Respondent to prove its allegations against the Appellant, as the enterprise that sold the said contaminated Castle Lager beer to RW1 or from the supplier from whom RW1 bought it.

We also agree with the principle as stated in the case of **Cook Vs Pasmenco**, that a supply of goods and services occurs as part of a bilateral transaction between parties. Thus, from the evidence before us, we find that it has not been proved how the Appellant supplied the contaminated beer to RW1. This is in view of the fact that, the supply of beer in the country is unrestricted and allows the participation of other persons or enterprises. Further, the Appellant led evidence, which was not challenged that there are counterfeit castle lager sold on the market.

It therefore does not automatically follow that because the Appellant is the known supplier of Castle Lager beer, then it is the enterprise that sold the said Castle

Lager beer to RW1. This has to be proved by the Respondent. We therefore reject the arguments advanced by the Respondent on the issue and find in favour of the Appellant.

(ii) Whether physical investigations were conducted to show if the Castle Lager beer was bought from Tall Trees in the absence of a receipt?

According to the evidence before us, RW4 testified that she did not go to Tall Trees to ascertain if the said Castle Lager beer was purchased from that store. In addition, the Respondent also argued that it was not typical for consumers to get receipts when consuming beverages from off the counter. On the other hand, it was the Appellant's contention that the failure of the Respondent to thoroughly confirm whether the said Castle Lager beer was purchased from Tall Trees, went to the root of the Respondent's decision.

After taking into account the arguments advanced by both Counsels, our view is that it was incumbent on the Respondent to verify whether the said Castle Lager beer was purchased from Tall Trees. This was not done. We are therefore, inclined to agree with Learned Counsel for the Appellant that the manner in which the investigations were conducted, were indeed the root cause of this appeal.

We also wish to say that, had the Respondent paid attention to the fine details of the investigation, then it would have possibly avoided the obvious deficiencies which are apparent from the conduct of investigations. Going forward, we would like to urge the Respondent to ensure that in the future, investigations are

professionally conducted, so that only those cases that are properly investigated can be subjected to further follow-up.

(iii) If tests were conducted to show that the contents of the Castle Lager beer was indeed Castle Beer?

We note that there were no arguments advanced by the Respondent on this issue. The Appellant on the other hand contended that the evidence of RW2 and RW3 confirmed that there were no tests conducted to confirm the contents of the said Castle Lager beer. In fact, both RW2 and RW3 testified that they were not ordered to carry out bottle content tests, but rather physical tests, in respect of RW2 regarding the sealage of the bottle; and in respect of RW3 on the identity of the foreign particle that was in the bottle.

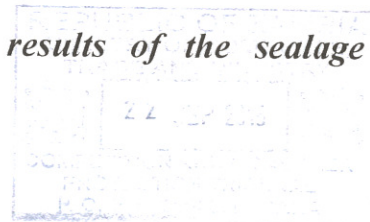
As such we have no hesitation in holding that the liquid in the Castle Lager bottle, which was not tested, could not have been Castle Lager beer.

(iv) What mandatory safety standards were applied by the Zambia Bureau of Standards or other competent body to show that the Appellant was in breach of the same?

It has not escaped our attention that the arguments under this issue are largely covered under those relating to section 52(1) of the Act. However, we wish to emphasize that so such standards were specified by the Respondent and neither have we seen any in the Record of proceedings.

We also recognize the fact that the Respondent has an overarching responsibility in consumer issues. For this reason we expect that it should take a leading role in ensuring that the requirements of section 52(1) of the Act are made known. In the absence of patently expressed mandatory safety standards of competent bodies; we would venture to say that a person or enterprise cannot be found to be in breach of such standards. We find for the Appellant on this issue.

3. *Whether the Respondent interpreted the results of the sealage test correctly?*



We have taken into account the reports that were produced by the competent bodies on this issue. We will refer to the reports of both the Respondent and Zambia Bureau of Standards appearing at pages 10 and 16 of the Record of Proceedings. At page 10 the report from Zambia Bureau of Standards states that;

*“The measurement results of the bottle top diameter (28.8+/-0.1) mm are partly within and outside limits of the prescribed G diameter (28.80+/-0.01) mm and crimp No Go diameter (28.50+/-0.01) mm. **Hence this measurement does not show proof that the bottle top was tempered with or not.**” (our emphasis)*

On the other hand the Respondent’s report at page 16 of the Record of Proceedings states that:

“4.3.2 The measurement results of the bottle top (28.8+/-0.1) mm are partly within and outside limit of the prescribed crown go diameter (28.50+/-0.01)

mm. Hence the measurement does not show proof that the bottle top was tempered with. Therefore this means that the Castle Lager beer bottle passed the sealage test." (our emphasis)

We are curious as to the reason why the Respondent left out the words "or not" that were stated in the Zambia Bureau of Standards Report. We are also curious from the evidence given by RW4 that she decided to give an expert opinion on a subject that she had no expertise on; and in total disregard of the tests that were carried out by the competent body, that is the Zambia Bureau of Standards.

We are persuaded to think that the Respondent's omission of key words and the inclusion of a different conclusion was deliberate. We are also persuaded to think that the alteration of the substance of the two reports that produced different results was equally deliberate.

It was serious professional misconduct on the part RW4 to deliberately misinterpret the Zambia Bureau of Standards report and to manipulate the results; so as to skew the Respondent's Board's decision in favor of RW1 and against the Appellant. We hope that the Respondent will take measures to curb such abuses by its officers; as well as to ensure that the rights of consumers, persons and enterprises are respected on an equal footing.

4. *Whether the Castle Lager beer bottle originated from the Appellant and if the Appellant had supplied the defective product?*

From the evidence before us, we have taken judicial notice that there are a number of sources that supply Castle Lager beer in the country, other than the Appellant. The question before us therefore is whether the said Castle Lager beer originated from the Appellant.

In this regard AW4 testified that it was impossible at face value to establish the origin of a Castle Lager beer, unless if it had been examined by the Appellant given the multiple sources of supply in the country. He also testified that the Appellant's products have certain features, which include the manufacturing date, expiry date as well as the batch number.

On the other hand RW4 in her testimony conceded that she was not aware that the Appellant had specifications for its products. She also testified that she did not take the said bottle to the Appellant to establish if it was one of its products.

In the circumstances, the answer to our question is rather obvious, that is to say, there was no evidence laid before us to establish that the Castle Lager beer bottle originated from the Appellant or was supplied by it.

It is our view that had RW4 taken the time to pursue elementary investigative procedures, such as going to the Appellant's premises to confirm whether the said bottle was one of its products or not, then she would have quickly settled the issue of the origin of the product. Since this was not done, we would totally agree with Learned Counsel for the Appellant to the extent that in the absence of the proof, it was erroneous for the Respondent to conclude that the bottle originated from the Appellant.

5. *Whether the Respondent erred in relying on section 30(2) of the Food and Drugs Act, Chapter 303 when it wrongly concluded that the Appellant had supplied the bottle in question?*

Learned Counsel for the Appellant in his submissions argued that the Respondent erred in relying on section 30(2) of the Food and Drugs Act, when it wrongly concluded that the Appellant had supplied the bottle in question. He insisted that the visual test conducted by the Food and Drugs Laboratory was not sufficient to confirm the contents of the bottle, as testified by RW3.

On the other hand, the evidence of the Respondent was that it was incumbent on the Appellant to rebut the presumption that the said Castle Lager beer bottle was not one of its product.

Section 30(2) of the Food and Drug Act provides that:

“In any proceedings under this Act, the contents of any package appearing to be intact and in the original state of packing by the manufacturer thereof, shall be deemed, unless the contrary is proved, to be article of the description specified on the label.”

The significance of this section is that it presumes that where the contents of a product appear to be in an original state, then it should be taken that the label on that product comprises the said product.

From what we have observed, there is no quarrel that there was a Castle Lager beer bottle containing a foreign particle; and that the said bottle was taken to the Appellant's office by RW1. The question that results however, is whether the Appellant was given the opportunity by the Respondent to rebut the presumption provided in section 30(2) of the Food and Drugs Act.

Our view is that the Appellant had no such opportunity and is affirmed by the evidence of RW4 who did not give the Appellant the opportunity to confirm the origin of the bottle. We have no doubt therefore that the Respondent misapplied the provision of section 30(2) of the said Act and thereby fell into grave error, when it denied the Appellant an opportunity to rebut the presumption inherent the said section 30(2).

6. *Whether the Respondent erred by falling into undesirable bias by allowing its decision to be influenced by the Appellants previous convictions.*

The main argument advanced by the Respondent is that it did not fall into "undesirable bias" when it allowed its decision to be influenced by the Appellant's previous convictions. The reason given by the Respondent was that its decision was based on direct evidence from the Food and Drugs Laboratory and the Zambia Bureau of Standards.

Learned Counsel for the Appellant on the other hand contented that the Respondent fell into undesirable bias by allowing its decision to be influenced by the Appellants previous conviction. Counsel drew our attention to page 26 of the

Record of Proceedings under clause 5.5.6 whereat the Respondent referred to the case of “**The People Vs Zambia Breweries Group CR. ISP 20-2009**”, wherein

“the Zambian Breweries Group, on dates unknown but in 2008 at Lusaka District of the Lusaka Province of the Republic of Zambia, did dispense, supply, and sell dangerous matter for public consumption in the form of 375ml sealed bottle of Castle lager containing a K50,000 therein, thereby posing danger or likely harm to human life. The Zambian breweries group was charged on one count for the offence of Criminal Recklessness and Negligence contrary to Section 237(F) of the Penal Code as read with Section 12(E) of the Competition and Fair Trading Act, Cap 417 of the laws of Zambia.”

We have no doubt from the proceedings before the Respondent that the previous case was applied by the Respondent to show the aggravating circumstances against the Appellant.

We have so far specifically dealt with the arguments on the roles of Zambia Bureau of Standards and the Food and Drugs Laboratory in this case. We shall therefore restrict ourselves to the issue of the previous conviction as an aggravating circumstance for the purpose of determining the appropriate sanction.

At pages 16 and 17 overleaf of the Record of Proceedings and in particular paragraph 4.5(1) subtitled (**Previous cases involving the Respondent**) we note that the Respondent in casu stated that:

*“Zambian Breweries is not a first time offender. Previous records reveal that **Zambian Breweries** was found with a case to answer under case file ZCC/COII/253 in the case of **The People Vs Zambian Breweries Group**, CR No. ISP-20-2009. In this case, **Zambian Breweries Plc.** in 2008 had supplied a 375ml sealed bottle of Castle lager K50, 000 which was likely to cause harm to human life.”*

We have however, observed that other than a narration of the brief facts, the outcome of this cases is not stated anywhere. It is our assertion that being found with a case to answer does not establish a verdict of guilty. We would venture to say that even after a case to answer has been made against an accused person, other criminal action will follow and the final verdict will not necessarily lead to one of guilty.

In casu, the Respondent considered that the Appellant had been charged on one count of criminal recklessness and negligence. We must make it clear that a charge does not mean a conviction as the purpose of charge is merely to set out an offence against an accused person without giving a guilty verdict.

Thus the case referred to as a previous conviction by the Respondent, falls short of what amounts to a previous conviction. We are fortified therefore to assert that since the case referred to by the Respondent does not qualify as a previous conviction, then it should not have been applied by the Respondent in its decision.

7. *Whether the Respondent erred in failing to recognize that the Zambia Bureau of standards is not competent to carry out tests to prove whether a bottle has been opened prior to being sealed?*

On this issue, the Respondent argued that the Zambia Bureau of Standards was competent to assess whether or not the bottle cap in casu had been tampered with before being placed back.

Learned Counsel for the Appellant in his submissions argued that the Respondent erred by not recognizing that the Zambia Bureau of Standards was not competent to carry out tests to prove whether a bottle had been opened prior to being sealed as confirmed by RW2. Counsel for the Appellant also submitted that RW2's evidence was profound to the extent that the Zambia Bureau of Standards did not have its own standards and relied on the standards set by its clients.

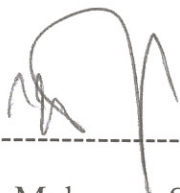
In addition, Counsel for the Appellant relied on the evidence of AW4 that the purpose of a crown test was to determine whether a bottle has a leak or not.

We are unable to conclude either way whether or not the Zambia Bureau of Standards is competent to carry out sealage tests on account of the fact that it uses values set by other bodies. Such a deduction would be unsafe, in the absence of evidence and or authorities as to whether, legally, the Zambia Bureau of Standards cannot/has not adopted those values and legitimately applied them, or, indeed, evidence that the said values are faulty as not to be relied upon.


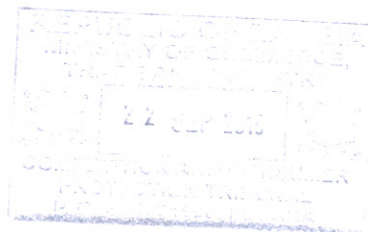
On the gamut of evidence before us, we find that the Respondent erred in directing that the Appellant be prosecuted for violating section 52(1) of the Act and we hereby set aside that directive. We order that the Respondent should pay costs to the Appellant, to be assessed in default of agreement. All in all, the Appellant has succeeded on all the grounds of appeal.

A person aggrieved with this Judgment may appeal to the High court within thirty (30) days of this decision.

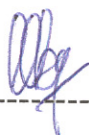
Delivered at **LUSAKA** this **22nd** day of **September, 2015**.



Willie A. Mubanga, SC
Chairperson




Maria M. Kawimbe
Vice Chairperson



Chance Kabaghe
Member



Rocky Sombe
Member



Eness C. Chiyenge
Member