

**IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA**

**2014/HPC/0011**

(Appellate Jurisdiction)

**IN THE MATTER OF:** SECTION 75 OF THE COMPETITION AND  
CONSUMER PROTECTION ACT 2010

**IN THE MATTER OF:** AN APPEAL AGAINST THE DECISION OF THE  
COMPETITION AND CONSUMER PROTECTION  
TRIBUNAL

**BETWEEN:**

ZAMBIRI TRADERS LIMITED



**APPELLANT**

**AND**

THE COMPETITION AND CONSUMER PROTECTION  
COMMISSION

**DEFENDANT**

**BEFORE THE HON. MR JUSTICE JUSTIN CHASHI IN  
CHAMBERS ON THE 3<sup>rd</sup> DAY OF JUNE, 2014**

*For the Appellant:* A. Chungu (Mrs) Messrs Christopher Russell Cook & Co.  
*For the Respondent:* The Director - Legal and Enforcement ✓

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

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**Legislation referred to:**

1. The Competition and Consumer Protection Act, 2010

**Cases referred to:**

2. Wilson Masautso Zulu v Avondale Housing Project Limited (1982) ZR 172
3. Philip Mhango v Dorothy Ngulube and Others (1983) ZR 61

This is an appeal by the **Appellant Zambiri Traders Limited** against the **Respondent The Competition and Consumer Protection Commission**. The appeal is against the Ruling of The Competition and Consumer Protection Tribunal which was delivered on the 4<sup>th</sup> day of December 2013.

In the said Ruling, the Tribunal held that a prima facie case against the Appellant had been established and granted a Mandatory Order against the Appellant to comply within fourteen days. It is against the aforesaid Tribunal's Ruling that the Appellant now appeals.

According to the Notice of Appeal filed on the 16<sup>th</sup> day of January 2014, the Appellant advanced four (4) grounds of Appeal as follows:

1. **That the Learned Tribunal erred in fact and law when they ruled that the Appellant had displayed disclaimers on its receipts thereby contravening Sections 48 (1) and Section 48 (2) of The Competition and Consumer Protection Act, 2010;**
2. **That the Learned Tribunal misdirected itself by attaching insignificant weight to the evidence brought forward in supporting the Appellant such that they failed to shift the evidential burden to the Respondent on a number of critical issues namely;**
  - (a) *That the Appellant had sufficiently removed any purported disclaimers in contravention of **the Competition and Consumer Protection Act 2010**,*

- (b) *That, the Respondent misinformed the Appellant that the matter was resolved and was not to be pursued,*
- (c) *That contrary to the Respondents claim, the Respondent did not send a reminder to the Appellant to comply with the issued directions,*
- (d) *That the Appellant had complied with the Directive issued by the Respondent.*

**3. That the Learned Tribunal misdirected themselves when they failed to make any determination on the reasonableness of the Respondents application for a mandatory Order under Section 64 (1) of the Competition and Consumer Protection Act 2010;**

**4. That the Learned Tribunal erred in fact and in law by not considering the Respondents failure to abide by their statutory duties to allow the Appellant to make representations under Section 64 (2) of The Competition and Consumer Protection Act 2010 before applying for a mandatory Order.**

On the 5<sup>th</sup> day of February 2014, the Respondents filed a response to the grounds of appeal as follows:

- (1) That the Honourable Tribunal did not err in fact and in law when they ruled that the Appellant had displayed disclaimers on its receipts thereby contravening **Sections 48 (1) and 48 (2) of The Competition and Consumer Protection Act No. 24 of 2010 (the Act)** as the Tribunal had correctly interpreted the meaning of the aforementioned Sections and also relied

upon a copy of the Appellants receipt which is on page 8 of the record of appeal which clearly shows a disclaimer "Goods once sold shall not be accepted back".

**(2) That the Honourable Tribunal did not misdirect itself on the evidence adduced by the Respondents based on the following reasons:**

- (a) *The Appellant did not adduce any evidence to show proof that it had removed any disclaimers on its receipts following an inspection conducted by the Respondent. In addition a position as to whether or not such disclaimers had been removed by the Appellant is not the issue but the fact that a disclaimer was found on the Appellants receipt on the 13<sup>th</sup> day of October 2011 when the Respondent conducted an inspection on the Appellants premises. Display of the disclaimers are treated as strict liabilities cases in line with Section 48 of the Act,*
- (b) *At no time did the Appellant adduce evidence before the Tribunal to prove their allegation that one of the Respondents Officers had informed the Appellant that the matter had been resolved. In fact the Appellant was not even able to identify nor mention any names of the Respondent's Officers as having resolved the matter in issue. Further the Appellant did not call a handwriting expert to analyse the writing on the bottom right page on the directive on page 5 of The Record of Appeal to prove that it was attributable to one of the Respondent's Officers,*

(c) *Contrary to the Appellants assertion in paragraph (c) of ground (2) the Respondents Communication of 16<sup>th</sup> May 2012 shown at page 16 of the Record of Appeal, was notice enough for the Appellant to comply with the directive as it was given to the Appellant at least five (5) months before the Respondent actually made an application to the Tribunal for a mandatory Order. As the record will show, the application for a mandatory Order was only made on 29<sup>th</sup> day of October 2012,*

(d) *The Appellant made no attempt to comply with the Respondents directive as the Appellant did not submit its books of accounts to enable the Respondent calculate its turnover so as to impose a fine in line with the statutory mandate placed upon the Respondent; neither did the Appellant inform the Respondent that it had removed all disclaimers from its receipts.*

3. *That contrary to ground (3) of the appeal, the Tribunal did not misdirect itself on the reasonableness of the Respondents application for a mandatory Order before it under Section 64 (1) of the Act as this is a duty conferred upon the Respondent by law in situations where an enterprise fails to comply with any direction given by the Respondent or undertaking given to the Respondent like the Appellant did.*

4. *Contrary to the Applicant's assertion in ground (4) the law in Section 64 of the Act clearly provides for the process to be followed in situations where a party wishes to seek audience*

*with the Respondent or challenge a directive given by the Respondent. The Appellant opted not to use the law that they now wish to rely upon. The Respondent further wishes to buttress its position by repeating ground (2)(c) above.*

5. *For the foregoing reasons, the Appellants appeal should be dismissed in its entirety with costs as it is but an abuse of the Court process and it is totally unmeritorious.*

I have carefully perused and analysed the grounds of Appeal and those in opposition. I have also taken time to go through the record of Appeal and in particular the Ruling of the Competition and Consumer Protection Tribunal aforestated.

I have taken note that the parties also filed their respective written submissions as directed by the Court. Given the nature of this Appeal, although I appreciate the efforts made by both parties in filing their submissions, in my view, it will not be necessary to refer to them for the reasons which will follow.

From the manner the grounds of Appeal have been couched, it is evidently clear that the grounds of Appeal are clearly against the Tribunal's findings of facts.

It must be emphasized that this being an appellant Court, it should be seen to take great exception to interfering in findings of fact whether they are from lower Courts or subsidiary bodies such as Tribunals.

There are a plethora of authorities on this subject matter such as the cases of **Wilson Zulu v Avondale Housing Project Limited**<sup>2</sup> and **Philip Mhango v Dorothy Ngulube and Others**<sup>3</sup> where the Supreme Court held that as a general rule, the Appellant Court does not reverse findings of fact by the trial Court except where the Appellant Court is satisfied that such findings in question were either perverse or made in the absence of any relevant evidence or upon misapprehension of those facts.

In my view, nothing bordering on the exception to that general rule has been brought to my attention by Counsel for the Appellant, so as to falter the Tribunal on its findings of fact and bring them within the ambit of the exception. That said, however, this matter will not pass without my making observations on certain issues of interest.

The Appellant having been served with a directive on the 13<sup>th</sup> day of October 2011, that its conduct was contrary to **Section 48** of **The Competition and Consumer Protection Act**<sup>1</sup> (the Act), the Appellant's attention was drawn to the relevant law and was therefore put on proper enquiry that they were now under investigation and should have taken the matter seriously and reverted to the aforesaid Act, so as to inquire as to what was expected of them. The Appellant cannot therefore be seen to be relying on ignorance of the law. As the old axiom in fact goes: **Ignorance of the law is no defence.**

It would also seem that the Appellant attached a casual and cavalier approach to the all matter, than the seriousness it deserved by as alleged engaging in discussions with the Respondents employees, whose identities could not even be disclosed to the Tribunal.

If the Appellant had given this matter the serious attention and consideration it deserves, especially that it carries with it very serious sanctions of hefty fines, it would have responded by either submitting the formal books of accounts as requested within the stipulated time or engaging in meaningful correspondence. If that was done and the Respondent was of the view that there was no need to pursue the matter as it had been settled as alleged by the Appellant, the Appellant would have been in a position to demand something formal and in writing to that effect and that would have added credence to the Appellants assertions, than the matter stands now.

I note the contents of Subsection 4 of Section 55 of The Act which states as follows:

**“For the purpose of an investigation under this Section, the Commission may, by notice in writing served on any person require that person to-**

*(a) furnish to the Commission in a Statement signed by that person or in the case of a body corporate, by a director or member or other competent Officer, employee or agent of the body corporate, within the time and in the manner*



*specified in the notice, any information pertaining to any matter specified in the notice, any information pertaining to any matter specified in notice which the Commission considers relevant to the investigation or,*

- (b) Produce to the Commission or to a person specified in the notice, any document or article as specified in the notice which relates to any matter specified in the notice which the Commission considers relevant to the investigation or,*
- (c) .....(not relevant)".*

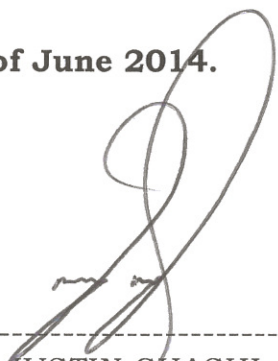
That is the formal approach I earlier alluded to as opposed to the Appellant's conduct in the matter.

As regards Section 64 of the Act, this is a double edged sword. Not only does it give the Commission powers of enforcement of directions and undertakings through the Tribunal, but it also gives a party who has without reasonable cause to comply to make amends by complying through a mandatory Order within a stipulated time as was the case with the Appellant. Therefore, in my view this provision is not meant to prejudice or in any way punish any party, but is meant to give a party in default an opportunity to make good for the default. And if indeed the Appellant had all along been cooperative and willing to submit the books of accounts, why has it become difficult now. Neither has any explanation been advanced by the Appellant as to its difficulties now.

In view of the aforestated and the views I have taken in this matter, this appeal has no merits and is forthwith dismissed with costs to the Respondent, same to be taxed in default of agreement.

The Appellant is hereby **Ordered** to comply to the mandatory **Order** within fourteen (14) days from the date of this Judgment.

**Dated at Lusaka this 3<sup>rd</sup> day of June 2014.**



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JUSTIN CHASHI  
**HIGH COURT JUDGE**