

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

2014/CCPT/008/CON

IN THE MATTER OF: SECTION 48(1) AND 60(1) OF THE
COMPETITION AND CONSUMER
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

Coram: Mr. Willie A Mubanga SC – Chairperson
Mrs. Maria M Kawimbe – Vice Chairperson
Mr. Rocky Sombe – Member
Mrs. Eness C Chiyenge – Member
Mr. Chance Kabaghe – Member

For the Appellant: Anne Donald Gray Kunda – AB & Company
Ndola

For the Respondent: M. M. Mulenga – Manager Legal and
Corporate Affairs, CCPC

BETWEEN:

ZAMM IMPORTS LIMITED

APPELLANT

AND

THE COMPETITION AND CONSUMER
PROTECTION COMMISSION

RESPONDENT

JUDGMENT

This is an appeal against the decision of the Respondents Commission made on the 17th April, 2014 to the effect that the Appellant pays the Respondents Commission 0.001 of its turnover in line with the Respondents guidelines on fines which provides for a cap of K20,000.00 on issues relating to Section 48 of Act No. 24 of 2010 and also that the Appellant submits its annual books of accounts to the Respondent for calculation of the actual fine within Seven (7) days of the receipt of the Directive.

According to the Notice of Appeal filed into this Tribunal on 23rd July, 2014 the Appellant appealed against the decision or against part of parts of the decision which decided that the Appellant was in breach of Section 48(1) of the Competition and Consumer Protection Act No. 24 of 2010 and directed that the Appellant should pay the Respondent a penalty fee of K20,000.00 being 0.001 of the Appellants turnover and that the Appellant should submit its annual books of account to the Respondent for calculation of the actual fine within Seven (7) days of the receipt of the directive.

The Appellant relied on the following grounds of appeal:-

- (1) That the Board of Commissioners erred in law and fact when it held that the Appellant was in breach of S48(1) of the Competition and Consumer Protection Act No. 24 of 2010 as the Appellant did not display any sign or notice that purported to disclaim any liabilities or deny any right that a consumer has under the act or any other written law.
- (2) Any other grounds to be availed at the hearing.

On the basis of those grounds the Appellant is seeking the following reliefs:-

- (1) The decision of the Board of Commissions be quashed
- (2) Costs of and incidental to the appeal
- (3) Any other relief the Tribunal may deem fit

The Appellant filed its Heads of Argument on 23rd November 2014 with two grounds:-

Ground 1: That the Board of Commissions erred both in law and fact when it held that the Appellant was in breach of Section 48(1) the Competition and Consumer Protection Act of No. 24 of 2010 as the Appellant did not display any sign or notice that purported to disclaim any liability or deny any right that a consumer has under the Act or any other written law.

The Appellant's advocate in her submissions as to the meaning of the word "display" quoted Section 48 of Act No. 24 of 2010 which provides as follows:-

"An owner or occupier of a shop or other trading premises shall not cause to be displayed any sign or notice that purports to disclaim any liabilities or deny any right that a consumer has under this Act or any other written law."

The Appellant also referred to the case of Mutale Vs Attorney General (1976) ZR 139 which case discusses the phrase "specifying in detail" and as to what it means in the interpretation of statute in the Kapwepwe and Kaenga cases that the courts have recognized the need to seek help from dictionaries regarding the meaning of certain words and phrases and that words should be

taken in their literal meanings which is not necessarily the dictionary sense but the sense in which words are used in common parlance with regard to the importance of defining the word “display”.

Mrs. Kunda further referred to the authors of Macmillan English Dictionary for advanced learners with regarding to the definition of the word “display” as follows:- “To put something in a particular place so that people can see it easily e.g she displayed some of her paintings at the Local Arts Festival; could you display this poster on your window?”

She further submitted that the word “display” is to expose something so that it can be easily seen.

In her submission Mrs. Kunda made reference to the fact that the Appellant issued the Receipt in dispute on 17th December, 2012 to its customer one Ndonji Kayombo for the purchase of a 270 litres Defy Deep Freezer and stamped thereon the words “No Return, No Refunds, No Exchange”.

~~She further submitted that the Appellant has denied that the act of issuing the Receipt with the said phrase constituted displaying a sign or notice that purports to disclaim any liability or deny any right that a customer has under Act No. 24 of 2010 or under any written law.~~

The Learned Counsel further submitted on the definition of the word “receipt” and in that regard made reference to the case of Skaife Vs Jackson (1824)

3BIC42 “as an acknowledgement in writing of having received a sum of money which is prima facie but not conclusive evidence of payment.”

It was further argued by her that it is customary in most stores for the retailer to issue a Receipt for the transaction at the point of sale where a retail transaction is completed after a customer makes a payment to the merchant in exchange for goods or services.

The Learned Counsel’s further argument was that perusal of the Receipt in question showed that it was a reasonably sized document that is serialized confirming that it originated from a book containing similar Receipts. Being an acknowledgement in writing of sums received, the said receipt and the writings thereon were only availed to the customer at the point of sale.

And therefore, it was submitted by Learned Counsel that the Appellant did not display the Receipt in that the word “display” in its natural and literal and usual sense as envisaged by the Act does not include the issuance of a Receipt to a customer at the point of sale. And that the Appellant did not put the Receipt in a particular way so that it could easily be seen by its customers.

It was further submitted by Mrs Kunda inter alia, that in ordinary parlance the word “display” presupposes putting up something so that it can be seen and used to bring information to the attention of customers and that “display” therefore entails putting up in such a place as to be easily seen or observed and that it requires the overt act of putting up something with a view of attracting

the ocular attention of passers. That it must engage the eye so as to attract or inform people as to its contents.

In essence, it was therefore submitted that the Appellants act of endorsing the words in question in the Appellant's various serialized receipts did not constitute displaying neither the receipt nor its contents.

The Appellant in its submissions conceded that the Appellant did issue the receipt containing the phrase "No Return, No Refunds, No Exchange" but denied that issuance of the said receipt did breach the Act as the same was not displayed as envisaged by the Act. That in addition the Appellant did submit to the Board of Commissioner that the practice employed by the Appellant was such that its customers were at liberty to return any goods that were later found to be defective or unsuitable for use and that in that regard the consumer was never denied their right to seek redress after purchasing defective or unsuitable products.

The Appellant also argued that it noted from the deliberations that the Board of Commissioners ~~did not direct its mind to the practice employed by the Appellant of redressing its customers which practice in fact embraces the rights of the consumers under the Act.~~

The Appellant in its arguments further stated that the record held by the Commission would show instances when the Appellant has redressed its customers even when the customer makes frivolous claims to the Commission.

The Appellant in its submissions gave examples of Mr Ndonji Kayombo and Mr Canicius Mazuba being refunded by the Appellant for the items bought from it on 3rd April 2013 and 10th April 2013 respectively and therefore that that act confirms and validates the arguments that though the receipt issued by the Appellant had the words “No Return, No Refund, No Exchange” the practice employed by the Appellant, contrary to the implication of these words, was to allow for return, refunds or replacement.

Under Ground 1 the Appellant did also make submissions regarding allegations against a renowned chain store having been favourably treated despite it having conspicuously displaying a notice offending the Act and that this is evidenced in the notice to produce documents filed by the Appellant.

In Ground 2 the Appellant submitted that the Respondent erred in law and in fact when it failed to find that it did not address its mind to the provision of Section 5(1) of the Act when it issued a notice of investigation against the Appellant.

The Appellant argued that the record will show that the complaint alleging breach of S48(1) was raised against the Appellant on the Respondents initiative after the case officer noticed a stamped disclaimer on Receipts issued to a Mr Ndonji Kayombo and Mr Canicius Mazuba after they had lodged complaints of unfair trading with the Commission against the Appellant.

That while the same Act allows the Commission all such acts and things as are necessary incidental or conducive to the better carrying out of its functions

under the Act it is curious as to why it was quick to raise a Notice of Inquiry on a matter the Commission would have been keen to educate the Appellant on the undesirability of having the phrase “No Return, No Refunds, No Exchange” on the Receipt.

In response to the Appellants submissions the Respondent filed its submissions on 16th February, 2015 and in the main argued as follows:-

- 1) That the Respondent established that the conduct by the Appellant was in breach of Section 48(1) of Act No. 24 of 2010 which provides any other things that an owner or occupier of a shop or other trading premises shall not cause to be displayed any sign or notice that purports to disclaim any liability or deny any right that a consumer has under the Act or any other written law.
- 2) That the Oxford Dictionary at www.oxforddictionary.com has defined the word “display” as put (something) in a prominent place in order that it may readily be seen and that a look at the Appellants invoice issued by the Appellant shows the words “No Return, No Refund and No Exchange” clearly displayed and that that was why the complainants were able to pick it and lodge a complaint about the issuance of Receipts with such terms.
- 3) That the words that are used in Section 48(1) of the Act were not at all ambiguous but very clear in that they prohibited an enterprise from denying the consumer their rights as contained in the Act or any other written law through display of disclaimer and that by displaying the disclaimer the Appellant was effectively taking away the rights of the

consumers who transacted with them in that such consumer could not return goods once they had bought such goods, also the consumers could not ask for a refund and neither could they ask for the goods to be exchange for another. It therefore followed that the consumer was precluded from getting value for their money as well as merchantable products that were fit for purpose of consumption or demand for goods that were in good working order as such products were sold at buyers risk.

- 4) That the Appellants conduct is squarely captured under S48(1) of the Act in that at law a disclaimer is a statement denying responsibility intended to prevent civil liability arising from particular acts or omissions. And that it is therefore clear that the reason the Appellant put those words on the Receipt was for purposes of denying consumers any responsibility the Appellant would have towards concerned consumers as well as denying consumers their rights.
- 5) With regard to statutory interpretation, the Respondents submission was that the case at hand that issue does not arise and should not even arise as the breached section is very clear and is not at all ambiguous.
- ~~6) That Section 48(1) of the Act is very clear and plain words have been used therein such that the literal interpretation has to be used when construing it and that in view of the Appellants position, what has to be addressed by the Tribunal is what the legislature's intention was when it enacted the Act and that is where the mischief rule comes into play.~~
- 7) That the mischief rule attempts to determine the legislature's intention and the main aim of that rule is to determine the "mischief or defect" that the statute has set out to remedy with the example given of the introduction

of S48(1) in the current Act with the repeal of the competition and Fair Trading Act which had no such provision.

- 8) That mischief Rule being termed now as the purposive construction of the statute and submit that this tribunal takes a similar approach and considers the purpose why the Act was enacted with particular attention to S48(1) and having submitted this poses a question as to what was the purpose, essence or motive of the Appellant displaying such a disclaimer on its invoice issued to consumers? And in answer thereto submits that it is for the purpose of denying consumers their right to redress.
- 9) That in fact the question of refunding the complainants is not the issue. The issue is the display of the disclaimers that deny consumers their right to redress consumers their rights to redress.
- 10) That the submissions on alleged discrimination against the Appellant be ignored for among other reasons that the third party being referred to as a chain is not a party to those proceedings.
- 11) With regard to Ground 2 submits that the Act in question does not have S5(1) and that in fact S5 stipulates the functions of the Respondent.
- 12) Finally that the Appellant submits that in this instance cannot argue that the disclaimer was not placed in a place where it could easily be seen and that the placing of the disclaimer on the receipt/invoice was notice enough to all consumers that transacted with the Appellant.

We are greatly indebted to both Appellants and Respondents Counsels submissions which have significantly assisted this Tribunal into arriving at this Judgment.

This appeal is against the decision given by the Respondent on 17th April 2014 to the effect that the Appellant was in breach of S48(1) of the Competition and Consumer Protection Act No. 24 of 2010 as directed that the Appellant should pay the Respondent (commission) a penalty fee of K20,000.00 being 0.001 of the Appellant turnover and that the Appellant should submit its annual book accounts to the Respondent Commission for the calculation of the actual fine within Seven (7) days of the receipt of the Directive.

The question that this Tribunal ought to ask itself is was the Appellant in breach of S48(1) of Act No. 24 of 2010. And flowing from that did the Appellant as owner or occupier of a shop or other trading premises cause to be displayed any sign or notice that purported to disclaim any liability or deny any right that a consumer has under the Act or any written law?

In order to answer that question we need to look at the invoice/cash sale which is exhibited in the Respondents Record of Proceedings filed herein on 8th September, 2014 at Page 1 thereof and shown as Invoice No. 261982 issued in the name of Mr Kayombo of House No. 5717 Riverside including National Registration Card No. 127390/65/1 and cell number 0955/0977 393822. That is dated 17th December, 2012 issued in the sum of K2,070,000.00 (unrebased). There is also on that Tax Invoice/Cash Sale the Appellants various details including VAT Reg No. 10121779 – 23. There is also stamped on that document the following words though not very visible “No Return, No Refund, No Exchange.”

We also need to take into account what the Appellant has submitted in relation

to that issue in its submissions in particular at Page 3 paragraph 3 of its submissions from the bottom the following words appear, “we submit that the Appellant did issue the receipt in dispute on 17th December 2012 to its customers one Ndonji Kayombo for the purchase of a 270 litre Defy Deep Freezer and stamped thereon was the phrase “No Return, No Refund, No Exchange. The said Receipt is marked 1 in the Record of Proceedings.” What we understand as being submitted on behalf of the Appellant is that the words referred to were endorsed in the receipt in question but that the Appellant’s action did not constitute display or notify the consumer so as to contravene S48(1) of the Act.

We are satisfied that the words “No Return, No Refund and No Exchange” were endorsed on the receipt issued to the Complainant. What this Tribunal has to determine is whether those words were in contravention of S48(1) of the Act. We are of the view that the words used in S48(1) are plain and unambiguous and agree with the Respondent’s submissions to that effect. The word “display” simply means to notify, inform or send a message to one who is a customer or consumer publicly or privately. The word “display” can also be stretched to displaying on a consumer’s or customer’s Receipt. To that extent “display” cannot only be restricted to the public, on a wall, bill board, notice board or public place but also on a receipt because as stated by Mrs. Mwanza in her submissions how did Mr Kayombo get to know about the words endorsed on the Receipt which resulted into his reporting to the Respondent?

We are therefore not persuaded by the Appellants argument that the practice employed by the Appellant was such that its customers were at liberty to return any goods that were later found to be defective or unsuitable for use and a

further argument that the Complainant was therefore never denied his right to seek redress after purchasing defective or unsuitable products.

We are not also persuaded by Mrs Kunda's apparent argument that the Appellant is absolved of the consequences of breaching S48(1) of the Act simply because both Mr Ndonji Kayombo and Mr Canicius Mazuba were refunded money for the items bought from the Appellant on 3rd April, 2013 and 10th April, 2013 respectively while at the same time arguing that though the Receipt issued by the Appellant had the three words her client did allow for return, refund or replacement. This would have been a perfect ground for mitigation before the Respondent but not a defence to the allegation that S48(1) was breached by the Appellant.

In our considered view S48(1) falls in the category of the term "strictly liability". The term "strictly liability" is defined in Blacks Law Dictionary, Seventh Edition by Bryan A Gordon Editor in Chief at Page 926 as follows:-

"strictly liability: liability that does not depend on actual negligence or intent to harm but that is based on the breach of an absolute duty to make something safe."

The key words in S48(1) in helping us to define strict liability are as follows:

"An owner or occupier of a shop or other premises shall not cause to be displayed any sign or notice that purported to disclaim any liability of deny any right that a consumer has under this Act or any other written law."

The Appellant therefore falls into the category of an owner or occupier of the premises with the duty of not displaying any sign or notice that purports to disclaim any liability which it breached by endorsing the three words on the Receipt.

In our view the probable defence to strict liability circumstances is for instance for the Appellant, in this case to have pleaded that the Receipt with its endorsement did not belong to it, or that someone fraudulently put the offensive words on it. But the Appellant having conceded in its submissions that the Receipt was its property and words were originated by it clearly qualify it to the category or league of those breaching the provisions of Section 48(1) of that Act.

With regard to the Appellant's reference to a renowned claim and the allegation that it is being unfavourably treated we are of the considered view that if the so called chain store had been joined to these proceedings and issues

raised to that effect we would have had jurisdiction to discuss or make a directive accordingly. But as of now our hands are tight. However if the Appellant feels so strongly about that issue it can file a complaint under S55(1) of the Act. We consider that reference as totally undesirable and unacceptable and dismiss it accordingly.

With regard to Ground 2 we agree with the Respondent that the Act does not provide for Section 5(1) and not Section 5 in fact provided for functions of the Respondent.

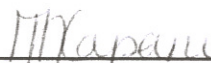
As submitted by the Respondent the Appellant has rightly argued that the Commission has power to investigate complaints on its own initiative or upon a consumer lodging a complaint alleging breaching of the Act and if in conducting investigations the Respondent discovers another breach it has a duty to conduct such investigations and impose sanctions should it determine that a violation of the Act has taken place.

We are satisfied that the conduct of the Appellant amounted to a breach of Section 48(1) of the Act. We uphold the Respondent's Directive and dismiss the Appeal. Any party aggrieved with this Judgment may appeal within Thirty (30) days of the receipt of this Judgment.

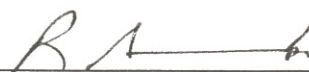
Dated the 21st day of August 2015.



Mr. Willie A Mubanga SC
Chairperson



Mrs. Maria M Kawimbe
Vice - Chairperson



Mr. Rocky Sombe
Member



Mrs. Eness C Chiyenge
Member



Mr. Chance Kabaghe
Member