

**IN THE MATTER BEFORE THE BOARD
OF THE COMPETITION AND CONSUMER
PROTECTION COMMISSION**

BETWEEN

Ms. Elina Mukonde

COMPLAINANT

AND

Nkassy Fashion Line

RESPONDENT

BEFORE:

Commissioner Angela Kafunda	- Chairperson
Commissioner Stanford Mtamira	- Member
Commissioner Emmanuel M. Mwanakatwe	- Member
Commissioner Sikambala M. Musune	- Member
Commissioner Derrick Sikombe	- Member

DECISION

1. Below is a summary of the facts and findings presented by the Commission to the Board of the Commission following investigations carried out in the above case.

Introduction and Relevant Background

It was submitted that:

2. On 23rd January 2023, the Competition and Consumer Protection Commission (“the Commission”) received a complaint from Ms. Elina Mukonde (“the Complainant”) against Nkassy Fashion Line (“the Respondent”). Specifically, the Complainant alleged that on 1st December, 2022 she purchased a dress and high heeled shoes at the cost of K2,000.00 and K1,000.00 respectively from the Respondent. The Complainant alleged that the Respondent informed her that the dress was a high-end product and she was guaranteed of the quality. The Complainant alleged that on 3rd December, 2022 she wore the dress and after two (2) hours the cloth on the dress began to peel off. The Complainant alleged that she engaged the Respondent on the damages on the dress. The Complainant alleged that the Respondent informed her that she could return the dress with a view of replacing it within a weeks’ time. The Complainant alleged that after a week

she followed up with the Respondent and also visited their store, but she could not find any dress that she liked. The Complainant alleged that on 6th January, 2023 she engaged the Respondent for a refund as it had been over a month but the Respondent informed her that they did not give refunds. The Complainant was demanding for a refund from the Respondent.

3. Furthermore, the Commission observed a notice on the Respondent's Instagram page stating that, "*No X cash refunds exchange before 48hrs allowed*" which appeared to be a disclaimer. The Commission also observed a notice on the Respondent's Facebook post which advertised the dress in question dated 17th September, 2022 stating that, "*No X cash Refunds Exchange allowed within 48hrs.*" which appeared to be a disclaimer.
4. Initially the Commission instituted investigations in the matter under Section 48(1) and Section 49(1) of the Act. As such, the Notice of Investigation was sent to the Respondent. However, during the process of investigations the Commission found that the matter appeared to be bordering only on Section 48(1), hence, this case was analysed under Section 48(1) of the Act.

Legal Contravention and Assessment Tests

Legal Contravention

It was submitted that:

5. The alleged conduct appeared to have contravened Section 48(1) of the Competition and Consumer Protection Act No. 24 of 2010 ("the Act").
6. Section 48(1) of the Act stated 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 this Act or any other law."

7. Section 48(2) of the Act stated that:

"A person who, or an enterprise which contravenes subsection (1) is liable to the Commission a fine not exceeding ten percent of that person's or enterprise's annual turnover."

Assessment Test

It was submitted that:

The following assessment tests were used to prove violation of Section 48(1) of the Act;

8. Whether the Respondent was an “owner” or “occupier” of a shop or other trading premises;
9. Whether a sign or notice was displayed;
10. Whether the sign or notice purported to disclaim any liability or deny any right a consumer had under the Act or any other law; and

Investigations Conducted

It was submitted that:

11. The Commission duly served the Notice of Investigation (NoI) and its accompanying letter on the Respondent on 8th February 2023. The Commission held a meeting in the Commission’s board room with both the Complainant and the Respondent on 20th April 2023.

Findings

The Parties

The Complainant

It was submitted that:

12. The Complainant was Ms. Elina Mukonde, holder of National Registration Card number 30XXXX/XX/1, whose contact number was 0972XXXXXX and was a resident of Salama Park, Lusaka.¹ Section 2 of the Act defined a consumer as, “*any person who purchases or offers to purchase goods or services otherwise than for the purpose of re-sale, but does not include a person who purchases goods or services for the purpose of using the goods or services in the production and manufacture of any other goods for sale, or the provision of another service for remuneration*”². Therefore, the Complainant was a consumer as envisaged under the Act because she purchased a dress and high heeled shoes from the Respondent for personal use and not for resale.

¹ CCPC Form IV dated 20th January, 2023.

² Competition and Consumer Protection Act No. 24 of 2010

The Respondent

It was submitted that:

13. The Respondent was Nkassy Fashion Line, Shop No. 7 next to Texaco 1, Northmead market, Northmead, Lusaka with contact number 0973XXXXXX. According to Section 2 of the Act, an “enterprise” meant “*a firm, partnership, joint-venture, corporation, company, association and other juridical persons, which engage in commercial activities, and includes their branches, subsidiaries, affiliates or other entities, directly or indirectly, controlled by them*”³. In view of the above definition, the Respondent was an enterprise as envisaged under the Act as it was registered with the Patents and Companies Registration Agency (PACRA) as a company with Registration No. 320200012862 and was engaged in the commercial activities of supplying assorted clothing and shoes to the public.

Submissions from the Respondent⁴

It was submitted that:

14. On 15th February 2023 the Respondent through Mr. Simon M. Lungwebungu from Messrs SCPM Legal Practitioners submitted that they were instructed by the Respondent (“their client”) in relation to the investigations against themselves on allegations of unfair trading practices, as set out in the letter dated 30th January 2023 received by the Respondent on 10th February 2023.
15. The Respondent submitted that their client instructed them to request for the particulars and/ or details of the alleged breach of the Act. The Respondent submitted that this was to enable them to obtain proper instructions from their client and advise them accordingly.
16. The Respondent submitted that in case of any clarification, the Commission should contact the undersigned (“Simon M. Lungwebungu”) on email address simonl@scpmlegalpractitioners.co.zm or on phone number +260772XXXXXX. The Respondent submitted that in the intervening period, the Commission should acknowledge safe receipt of the letter by signing on their return copy.

Commissions Response to the Letter to the Respondent⁵

It was submitted that:

17. The Commission responded to the letter from the Respondent dated 15th February, 2023.

³ Competition and Consumer Protection Act No. 24 of 2010

⁴ Letter from the Respondent dated 15th February, 2023

⁵ Commission response letter to the Respondent dated 22nd March, 2023

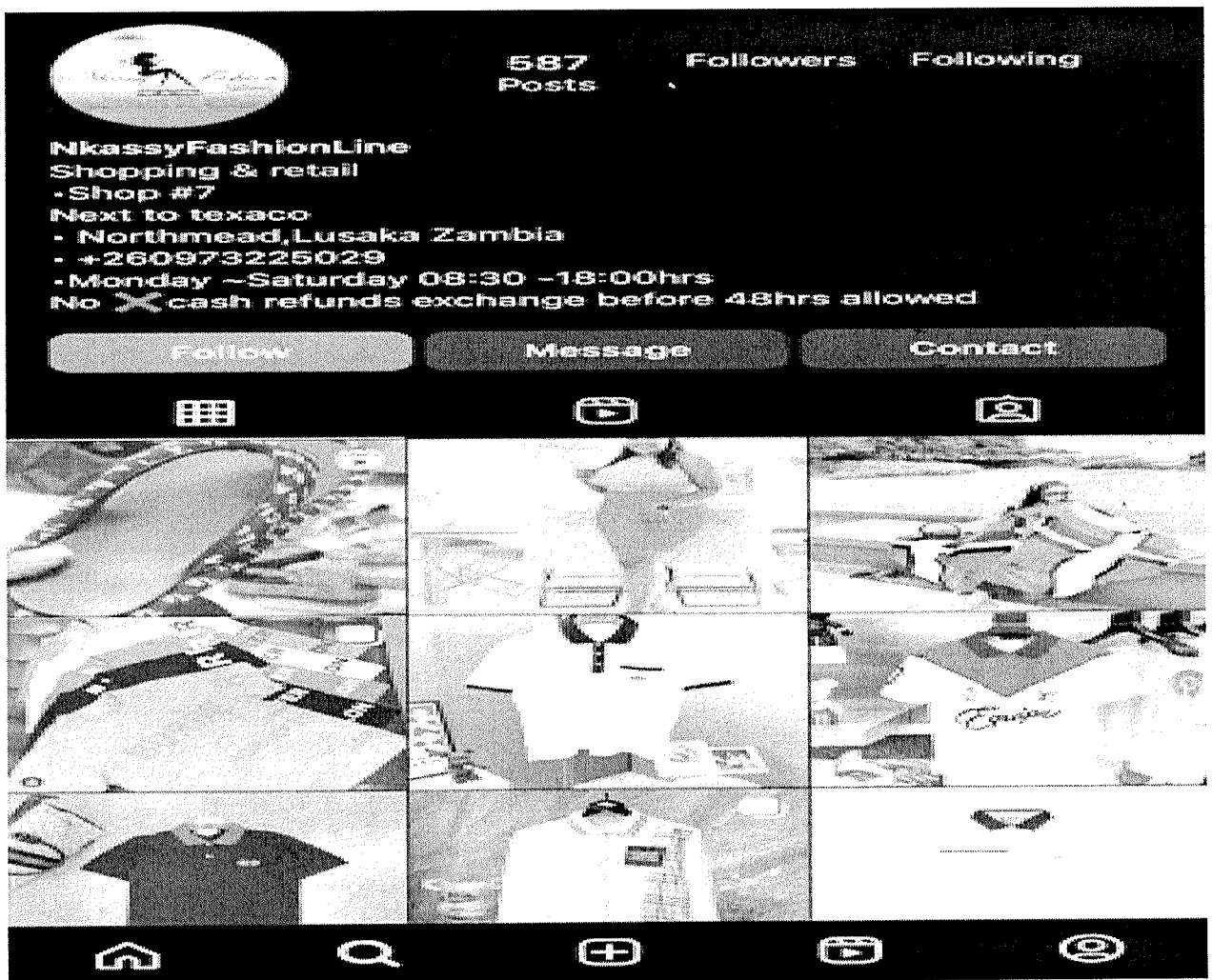
18. The Commission noted that SCPM Legal Practitioners would be representing the Respondent. The Commission submitted that further to their request for the particulars and/ or details of the alleged breach, the Notice of Investigation and the accompanying letter of investigation were resent to SCPM Legal Practitioners on 24th March, 2023.
19. The Commission noted that the dress in question was in possession of the Respondent. The Commission requested that the Respondent submits it to the Commission for further assessment.

Review of the Respondent's Instagram Page

It was submitted that:

20. On 27th January, 2023, the Commission visited the Respondent's Instagram page under the name NkassyFashionLine. It was revealed that there was a notice on the page's biography section which stated "No X cash refunds exchange before 48hrs allowed" as shown in picture 1 below.

Picture 1: Respondent's Instagram Page



Review of the Respondent's Facebook page

It was submitted that:

21. On 27th January, 2023, the Commission visited the Respondent's Facebook page under the name Nkassy fashion line. It was revealed that on 17th September, 2022 there was a notice on the picture advertising the dress in question which stated "No X cash Refunds Exchange allowed within 48hrs" as shown in picture 2 below.

Picture 2: Respondent's Facebook Page



Review of the Complainant's bank statement

It was submitted that:

22. A review of the bank statement submitted by the Complainant to the Commission dated 31st December, 2022, revealed that the Complainant

transferred a total amount of K3,000.00 to 26097XXXXXX9 on 1st December, 2022.

Record of meeting held at the Commission⁶.

It was submitted that:

23. On 20th April 2023, the Commission held a meeting with the Complainant, the Respondent and SCPM Legal Practitioners (“the Respondent’s legal representative”) represented by Mr. Simon Lungwebungu at the Commission Offices. The meeting was held at the Commission’s initiative to find a solution to the complaint that was brought to the Commission’s attention.
24. The Respondent submitted her details as Nkandu Chambalile and contact number as 097XXXXX29 in the attendance register.
25. The Respondent submitted that she was receiving new stock of clothes on 21st April, 2023 and the Complainant could return to the shop and choose a dress of her choice.
26. The Complainant submitted that she was not agreeable to a replacement dress, and she would only accept a refund of 75% of the cost of the dress, which was an amount of K1,500.00.
27. The Respondent agreed to redress the Complainant by way of a refund K1,500.00 on Tuesday, 25th April, 2023 as per the Complainant’s request.
28. The Commission further went on to discuss the violation of Section 48(1) of the Competition and Consumer Protection Act (“the Act”). The Commission submitted that they had noticed that the Respondent displayed a disclaimer on their Instagram page which stated, “No X cash refunds ~~exchange~~ before 48hrs allowed”. The Commission informed the Respondent that display of disclaimers was prohibited and if found wanting, an enterprise would be fined 0.5% of their turnover with a cap of K30,000.00. The Commission submitted that display of a disclaimer could be on receipts, on the wall, on a Facebook page or even on an Instagram page.
29. The Respondent submitted that they displayed the disclaimer because they encountered an instance where their client purchased a dress and after two (2) weeks, their client returned the dress alleging that it was too big. The Respondent submitted that after going through their client’s Facebook page it was found that she had posted pictures in the dress. The Respondent submitted that following that encounter they decided to display the disclaimer

⁶ Meeting with the Respondent at the Commission dated 20th April, 2023

but that they did redress when any of their clients had a problem with any product purchased from their shop.

30. The Respondent's legal representative submitted that the Respondent was a small enterprise trying to make ends meet and as such requested if their client could be issued a warning and be allowed to draft new terms and conditions which would be submitted to the Commission for approval.
31. The Commission submitted that unfortunately Section 48(1) of the Act was a matter to do strict liability which was accompanied by a fine. The Commission submitted that displaying a disclaimer limited liability on the Respondent and that in instances that a consumer purchased a product which was found to be defective or not fit the purpose, the mere display of a disclaimer informed consumers that they did not have the liberty to return that product to the Respondent.
32. The Commission submitted that unfortunately the Commission did not issue warnings. The Commission submitted that only after the Commission's Board had given a directive on the case and the Respondent submitted their financial books for the calculation of the fine, could the Respondent then negotiate for the fine to be reduced.
33. It was agreed in the meeting that on Tuesday, 25th April, 2023 the Complainant would be refunded an amount of K1,500.00 by the Respondent and that the matter on Section 49(1) of the Act would be closed.

Further Submissions from the Complainant⁷

It was submitted that:

34. On 25th April, 2023 the Complainant submitted that she was given a refund of K1,500.00 by the Respondent.

Response Letter to the Respondent⁸

It was submitted that:

35. The Commission responded to the Respondent's request during the meeting held at the Commission on 20th April, 2023 to explain the alleged provision of the Act that the Respondent appeared to have violated.
36. The Commission submitted that as the Respondent was aware, a notice was observed on the Respondent's Instagram page which stated that "*NO X CASH REFUNDS EXCHANGE BEFORE 48HRS ALLOWED*" which appeared, prima facie, to deny some rights that a consumer had under the Act. The

⁷ Telephone conversation with the Complainant dated 25th April, 2023.

⁸ Commissions Response Letter to the Respondent dated 26th May, 2023

Commission submitted that for example, the right to a cash refund when supplied with defective or unsuitable goods or services. The Commission submitted that the alleged conduct appeared to be in violation of Section 48(1) of the Act which stated 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 this Act or any other law*”.

Further Submissions from the Respondent⁹

It was submitted that:

37. On 5th June, 2023 the Respondent’s legal representatives through Mr. Simon M. Lungwebungu from Messrs SCPM Legal Practitioners submitted that they no longer acted on behalf of the Respondent. They submitted that the Commission should kindly address all further communication directly to the Respondent. The Respondent’s legal representatives submitted that they had enclosed the letter dated 26th May, 2023 which was served on them on 29th May, 2023.

Submissions to the Report

It was submitted that:

38. After the Preliminary report was approved, it was duly served on the Respondent and the Complainant on 22nd and 28th August 2023 respectively, for them to make their submissions to it.

Submission from the Complainant¹⁰

It was submitted that:

39. In an email dated 28th August, 2023 the Complainant submitted that she had received and perused through the Commission’s preliminary report availed to her.
40. The Complainant submitted that she was happy with the outcome and appreciated the Commission for the prompt action. The Complainant submitted that there were a number of business owners in Zambia who were adamant to the consequences of the policies they made minus knowing the legally provided ones under the laws of Zambia. The Complainant submitted that she hoped that more business owners could be made aware of this to avoid future cases.

⁹ Letter from the Respondent dated 5th June, 2023

¹⁰ Email from the Complainant dated 28th August, 2023

Submissions from the Respondent¹¹

It was submitted that:

41. In a letter delivered to the Commission on 28th August 2023, with reference “*Request for Leniency and Waiving of Fine*” the Respondent through Ms. Nkandu Chambalile their Administration Manager submitted that they were writing to the Commission to request the Commission’s understanding and leniency regarding an incident relating to the Respondent’s refund and exchange policy. The Respondent submitted that they genuinely regretted any inconvenience or misunderstanding caused and kindly requested the Commission’s consideration in waiving the fine imposed on themselves.
42. The Respondent submitted that wilfully, they had successfully completed the preparation of their company’s books of accounts and submitted them for the Commission’s review and records. The Respondent submitted that as a law-abiding business entity, they understood the importance of maintaining accurate financial records and complying with all regulatory requirements.
43. The Respondent submitted that they liked to inform the Commission that their company had removed its “*no refund, no return*” policy. The Respondent submitted that they understood the importance of customer satisfaction and strived to provide a positive shopping experience. The Respondent submitted that as evidence of the change, they had attached the terms and conditions which incorporated a refund and return policy. The Respondent submitted that they appreciated the Commission’s attention to the matter and looked forward to serving their customers better in the future.
44. The Respondent submitted that they thanked the Commission for their attention to the matter, and looked forward to the Commission’s acknowledgement of the receipt of their company books and their support in ensuring compliance with consumer protection regulations.

Relevant Findings

It was submitted that:

45. The Commission found that on 1st December 2022, the Complainant purchased a pair of high heeled shoes and a dress at a total cost K3,000,00 from the Respondent.¹²

¹¹ Respondent’s letter delivered to the Commission on 28th August, 2023

¹² Complainant’s bank statement dated 31st December, 2022.

46. The Commission established that the Respondent displayed a notice which read “*No X cash refunds exchange before 48hrs allowed*” on their Instagram page.¹³
47. The Commission established that the Respondent displayed a notice which read “*No X cash Refunds Exchange allowed within 48hrs*” on the picture of the dress in question published on 17th September, 2022 on their Facebook page.¹⁴
48. The Commission established that on 25th April, 2023 the Complainant was given a refund of K1,500.00 by the Respondent for the dress she purchased.¹⁵
49. The Commission established that the Respondent had deleted their notice which read “*No X cash refunds exchange before 48hrs allowed*” on their Instagram page.¹⁶
50. The Commission established that as of 28th August, 2023 the notice “*No X cash Refunds Exchange allowed within 48hrs*” on the picture of the dress in question published on 17th September, 2022 was still present on the Respondent’s Facebook page.¹⁷
51. The Commission established on 28th August, 2023 the Respondent submitted their latest books of accounts.¹⁸

Previous cases involving the Respondent.

It was submitted that:

52. A review of the Respondent’s case file revealed that there was no previous case against the Respondent in which they were found to have breached Section 48(1) of the Act.

In analysing the case for possible violation of Section 48(1) of the Act, the following assessment tests were used:

Whether the Respondent was an “owner” or “occupier” of a shop or other trading premises;

It was submitted that:

53. Black’s Law dictionary defined an owner, “*as one who has the right to possess, use, and convey something; a person in whom one or more interests are*

¹³ Screenshot of the Respondent’s Instagram page taken on 27th January, 2023.

¹⁴ Respondent’s Facebook post dated 17th September, 2022.

¹⁵ Telephone conversation with the Complainant dated 25th April, 2023

¹⁶ Respondent’s letter delivered to the Commission on 28th August, 2023

¹⁷ Observation by the Commission dated 28th August, 2023

¹⁸ Respondent’s letter delivered to the Commission on 28th August, 2023

vested”¹⁹. The Black’s law dictionary defined an occupant, as “one who has possessory rights in, or control over, certain property or premises”²⁰. Furthermore, a shop in Black’s Law Dictionary is defined in part as “a building in which goods and merchandise are sold at retail”²¹. In this case, the Respondent owned a shop located at Shop No. 7 next to Texaco 1, Northmead market, Northmead, Lusaka through which they supplied clothing. As such, the Respondent was an occupier of the shop where the dress was purchased.

Whether a sign or notice was displayed;

It was submitted that:

54. In the case of ***ZAMM Imports Limited vs. the Competition and Consumer Protection Commission, 2014/CCPT/008/CON***, the Competition and Consumer Protection Tribunal (“the Tribunal”) defined the word “display” as to notify, inform or send a message to one who is a customer or consumer publicly or privately. The Tribunal further stated that 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, billboard, notice board or public place but also on a receipt...”²²
55. In line with the above case, the display of a notice could either be on the wall, at the till or printed on a receipt, invoice or any other document related to a transaction between a consumer and an owner or occupier of a shop or any other trading premises. In this regard, it was established that the notice “No X cash refunds exchange before 48hrs allowed” stated on the Respondent’s Instagram page amounted to display of a notice. It was also established that on 22nd September, 2022 a notice “No X cash Refunds Exchange allowed within 48hrs” stated on the Respondent’s Facebook page also amounted to display of a notice.

Whether the sign or notice purported to disclaim any liability or deny any right a consumer has under the Act or any other law; and

It was submitted that:

56. In establishing this question, the ***Zamm Imports case*** further highlights how disclaimers are considered under the Act. It was held by the Tribunal that;

¹⁹ Black’s Law Dictionary eighth edition 2004

²⁰ Black’s Law Dictionary eighth edition 2004

²¹ Black’s Law Dictionary (1968), 4th Edition, Henry Campbell Black, West Publishing Co. p. 1547

²² Ibid

“disclaimers were treated as strict liability cases in line with Section 48(1) of the Act.”²³

57. In the case cited above, the Tribunal ruled that by displaying a disclaimer, ZAMM IMPORTS violated Section 48(1) of the Act. The Tribunal stated that Section 48(1) fell into the category of the term strict liability meaning that the Respondent violated the Act by displaying a sign or notice purporting to disclaim liability.
58. In the case at hand, the Commission established that the words stated on the Respondent’s Instagram page, *“No X cash refunds exchange before 48hrs allowed”* and on the Respondent’s Facebook post advertising the dress published on 17th September, 2022, *“No X cash Refunds Exchange allowed within 48hrs”* purported that the consumers only redress option available was an exchange within 48 hours after purchase. However, under Section 49 of the Act, consumers are entitled to a refund in the event that they are supplied with defective or unsuitable goods or services, the Respondent displaying the notices on their Instagram page and Facebook post advertising the dress denied consumers the right to a refund and to an exchange after 48 hours, that they had under the Act.
59. Considering the facts of the matter, the notice on the Respondent’s Instagram page and on their Facebook post published on 17th September, 2022 purported to deny any liability on the part of the Respondent and to deny consumers their right to a refund or an exchange after 48 hours. In this regard, the notices on the Respondent’s Instagram page, *“No X cash refunds exchange before 48hrs allowed”* and on their Facebook post advertising the dress dated 17th September, 2022, *“No X cash Refunds Exchange allowed within 48hrs”* amounted to disclaimers. Therefore, the Commission found that the Respondent violated Section 48(1) of the Act.

Board Deliberation

60. Having considered the facts, evidence and submissions in this case, the Board resolves that the Respondent displayed disclaimers on their Instagram page and Facebook post on 17th September, 2022 and therefore breached Section 48(1) of the Act.

Board Determination

61. The facts and evidence of this case have shown that the Respondent did violate Section 48(1) of the Act.

²³ Zamm Imports Limited Vs the Commission 2014/CCPT/008/CON

Board Directive

62. The Board hereby directs that;

- i. The Respondent is fined 0.5% of their annual turnover with the applicable cap of K30,000.00 for breach of Section 48(1) of the Act in accordance with Section 48(2) of the Act and the Competition and Consumer Protection Commission Guidelines for Administration of Fines 2019;
- ii. The Respondent deletes the disclaimer stating that, “*No X cash Refunds Exchange allowed within 48hrs*” from all their Facebook posts and submit proof thereof to the Commission in accordance with Section 5(d) of the Act within thirty (30) days of receipt of the Board Decision; and
- iii. The Respondent develops a new return policy and submits it to the Commission for review in line with Section 5(b) of the Act within 30 days of receipt of the Board Decision.

Note: Any party aggrieved with this order or directive may, within 30 days of receiving this order or directive, appeal to the Competition and Consumer Protection Tribunal.

Dated this 19th October 2023

Elina Mukonde
.....

Chairperson

Competition and Consumer Protection Commission

Appendix 1-Calculation of Fine

The Calculation of the recommended fine was determined as follows-

- (a) The Competition and Consumer Protection Guidelines on Fines – September 2019 sets a base of 0.5% for offences relating to Section 48(1) of the Act with the following caps;

Offence	Starting Fine	Maximum Fine in Kwacha
Unfair trading practice False or misleading representation Price Display Supply of defective and unsuitable goods and services Section 49) except for Section 49(1)	0.5% of turnover	<ul style="list-style-type: none"> <li data-bbox="1082 725 1409 846">• K1,000 for turnover upto K50,000 <li data-bbox="1082 887 1409 1055">• K10,000 for turnover above K50,000 upto K250,000 <li data-bbox="1082 1084 1409 1252">• K40,000 for turnover above 250,000 upto K500,000 <li data-bbox="1082 1281 1409 1402">• K70,000 for turnover above K1,500,000 <li data-bbox="1082 1440 1409 1608">• K150,000 for turnover above K1,500,000 upto K3,000,000 <li data-bbox="1082 1637 1409 1805">• K200,000 for turnover above K3,000,000 upto K5,000,000 <li data-bbox="1082 1834 1409 1955">• K500,000 for turnover above K5,000,000

Display Disclaimer	of	0.5% of turnover	K30,000
-----------------------	----	------------------	---------

(b) The Competition and Consumer Protection Guidelines on Fines – June 2019 further provides for additions as follows-

(i) ***Prevalence of the offence, i.e., whether the conduct is widespread, and the application of a sanction is likely to have a wide deterrent effect;***

The Commission has received a number of complaints concerning disclaimers and imposition of a fine is likely to have a wide deterrent effect.

(ii) ***Whether the offender has been the subject of previous enforcement action by the Commission;***

The Respondent has not been a subject of previous enforcement by the Commission for engaging in such conduct. Thus, no additional fine should be added because this is the first time the Respondent is being fined.

(iii) ***Whether the offender has demonstrated a resistance to conciliation;***

The Respondent has not shown resistance to conciliation. It is thus recommended that no further additional fine be imposed.

(c) Therefore, the Commission has observed that the total fine sums up to the minimum fine of 0.005 or 0.5% of annual turnover subject to the applicable cap of K30,000.00.