

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

APPLICANT:

Mr. Raymond Kufekisa

COMPLAINANT

AND

**Crispy Chicken Restaurants Zambia Limited
- T/A KFC Zambia Limited**

RESPONDENT

BEFORE:

Commissioner Angela Kafunda

- Chairman

Commissioner Stanford Mtamira

- Member

Commissioner Emmanuel M. Mwanakatwe

- Member

Commissioner Sinkambala M. Musune

- Member

Commissioner Derrick Sikombe

- Member

DECISION

Below is a summary of the facts and findings presented by the Competition and Consumer Protection Commission ("the Commission") to the Board of the Commission following investigations it carried out in the above case.

Introduction and Relevant Background

It was submitted that:

1. On 22nd March 2023, the Competition and Consumer Protection Commission ("the Commission") received a complaint from Mr. Raymond Kufekisa ("the Complainant") against Crispy Chicken Restaurants Zambia Limited - T/A KFC Zambia Limited ("the Respondent"). Specifically, the Complainant alleged that on 17th March 2023, he observed the Respondent's advertisement for an "On the double box" food combination at a price of K95.00 in the Zambia Daily Mail Newspaper dated 17th March 2023. The Complainant alleged that the combination would contain a drink, pieces of chicken and french fries. The Complainant alleged that based on this, he decided to visit the Respondent's East Park Mall outlet to purchase the food combination on 17th March 2023.

The Complainant alleged that he was charged a price of K105.00 for the “On the double box” instead of the K95.00 that was advertised. The Complainant alleged that he engaged the Respondent’s salesperson identified as Ms. Mwelwa but was informed that they had since changed the price. The Complainant demanded that the Commission investigate the conduct by the Respondent.

Legal Contravention and Assessment Tests

Legal Contravention

It was submitted that:

2. The alleged conduct appeared to have contravened Section 45(a) as read together with Section 46(1); and Section 51(1) of the Competition and Consumer Protection Act, No.24 of 2010 (“the Act”). However, preliminary investigations into the matter revealed that the most applicable sections given the circumstances were Section 47(b)(i) and Section 51(1) of the Act.

3. Section 47(b)(i) of the Act states that;

“A person who, or an enterprise which makes a false or misleading representation concerning the price of any goods or services is liable to pay the Commission a fine not exceeding ten percent of that person’s or enterprise’s annual turnover or one hundred and fifty thousand penalty units, whichever is higher.”

4. Section 51(1) of the Act states that:

“A person or an enterprise shall not charge a consumer more than the price indicated or displayed on a product or service.”

5. Section 51(2) of the Act states that: *“A person who, or an enterprise which, contravenes subsection (1) is liable to pay the Commission a fine not exceeding ten percent of that person’s or enterprise’s annual turnover.”*

Assessment Tests

It was submitted that:

6. For the purpose of proving violation of Section 47(b)(i) of the Act, the following elements have to be proved;

Whether Crispy Chicken Restaurants Zambia Limited - T/A KFC Zambia Limited is a “Person” or an “Enterprise”

Whether Crispy Chicken Restaurants Zambia Limited - T/A KFC Zambia Limited falsely or misleadingly represented the price of any goods or services

7. For the purpose of proving violation of Section 51(1) of the Act, the following elements have to be proved;

Whether Mr. Rayment Kufekisa as a consumer was charged more than the price indicated or displayed on a product

Investigation Conducted

It was submitted that:

8. The Commission duly served a Notice of Investigation and accompanying letter on the Respondent on 11th April 2023. The Commission reviewed the Respondent's response as well as the Complainant's submissions regarding the case. The Commission also reviewed the articles submitted by both parties in determining the matter. The Commission contacted Zambia Daily Mail Newspaper to get their submissions for the conclusive determination of the case.

Findings

The Parties

The Complainant

It was submitted that:

9. The Complainant is Mr. Raymond Kufekisa, holder of National Registration Card (NRC) number 324476/61/1 and passport number ZP021060 residing at 4XXX, Mwinilunga Road in Lusaka. For any other part of the Act except Part III, a consumer is defined as, "*any person who purchases or offers to purchase goods or services otherwise than for the purpose of resale 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.*" The Complainant is therefore a consumer as envisaged under the Act as he purchased an "On the Double box" on 17th March 2023, from the Respondent's East Park outlet for his consumption.¹

¹Receipt number 168589 and order number 489

The Respondent

It was submitted that:

10. The Respondent is Crispy Chicken Restaurants Zambia Limited trading as KFC Zambia Ltd, whose registered address is Makeni Mall, Kafue Road, Lusaka. A search at PACRA revealed that the company is registered with registration number 120150134953. According to the Act, an “enterprise” means *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*². Therefore, the Respondent is an enterprise as envisaged by the Act because the Respondent engages in the supply of fast foods to consumers on a commercial basis. The Respondent is part of a chain of restaurants with locations in over 150 countries across the world.

Submissions from the Respondent³

It was submitted that:

11. In a letter to the Commission dated 12th April 2023, the Respondent submitted that they regretted to learn that adverts posted in Zambia Daily Mail Newspaper on 3rd, 10th, 17th, 24th and 31st March 2023 were posted in error and the prices displayed were outdated and misled consumers. The Respondent submitted that after receiving the Commission’s notice of investigations, the following were their findings.
12. The Respondent submitted that the advert was posted in Zambia Daily Mail Newspaper on 3rd, 10th, 17th, 24th and 31st March 2023 showing incorrect prices for 3 meal offerings. The Respondent submitted that the menu prices for their products were increased on 1st March 2023, including the advertised products. The Respondent submitted that all other adverts for the three meal offerings indicated the correct price, including in store menu displays.
13. The Respondent submitted that an instruction was sent to Zambia Daily mail on 28th February 2023, to run the abovementioned advert every Friday for the month of March 2023 as the Easter feast advert was not yet ready. The Respondent submitted that the instruction was sent by the Respondent’s outsourced marketing agency who acted incorrectly on their own behalf, outside the agreed operating procedures, without seeking approval, agreed

² Competition and Consumer Protection Act No. 24 of 2010.

³ Letter to the Commission responding to the Commission’s notice of Investigation dated 8th November 2022

marketing calendar and without managements knowledge. The Respondent submitted that Zambia Daily Mail did not send the advert proof for signing which was against industry standards.

14. The Respondent submitted that they tried to engage the stated employee to establish why they did not engage better with the Complainant and honour the advertised price, however, they submitted that they did not have any employee named "Mwelwa"⁴ at their East Park Mall outlet or any other outlet.
15. The Respondent submitted that they had put in place some mitigating factors to ensure that similar occurrences did not reoccur. The Respondent submitted that;

"An annual marketing calendar is agreed upon and signed off between KFC management and the marketing agency including promotions, adverts and the form in which the advert will be published.

All advertising requires the Country Managers approval/ sign off before posting.

All forms of advertising require proofs to be provided for sign off.

KFC Zambia policy is to honour any advertised price if there is an advertising error."

16. The Respondent submitted that in addition to the above measures, the following would be put in place:

A warning letter has been sent to the marketing agency regarding the importance of adhering to the agreed operating procedures and marketing calendar and that no adverts are to be published without the CMs⁵ sign off, failure to do so will result in termination of the contract.

Strict adherence by publishing partners to provide proofs for sign off before publishing.

An internal memo circulated regarding the company's policy on honouring prices that are displayed incorrectly.

⁴ The Commission notes that there was an error in the employee's name spelling "Mwelwa" instead of "Mwela", the likely reason for the discrepancy

⁵ CM is implied to mean Country Manager

Refresher training to be carried out to all employees by the HR team on how to handle such occurrences and honouring advertised pricing. This training is to be concluded by the end of April 2023.

17. The Respondent submitted that it was of the view that the above provided information would suffice to prove that KFC Zambia had sufficient mitigation measures in place and that the occurrence should not have happened and was not an intentional act but resulted from human error and policies and procedures not being followed correctly. Further to this, the Respondent submitted that KFC Zambia had investigated the matter and instituted sufficient mitigation measures to prevent such an occurrence from happening again and to give the Commission the confidence that KFC Zambia adheres to fair trading practices.

Submissions from Zambia Daily Mail Newspaper

It was submitted that:

18. In a letter to the Commission dated 27th April 2023 the Zambia Daily Mail newspaper provided articles responding to the Commission's request for information. The Commission further contacted Ms. Hildah Phiri on 20th April 2023, an employee of Zambia Daily Mail and the contact person for KFC contract, regarding the correspondence with the Respondent. It was submitted that the Respondent had worked with Zambia Daily Mail for a period of over 4 years. It was submitted that their contact person was a consultant named Ms. Jane Witz who dealt directly with Zambia Daily Mail. Zambia Daily Mail further submitted that the procedure was such that the Respondent sent "camera ready"⁶ advertisements for publishing on specific dates in accordance with the agreement.
19. Zambia Daily Mail further submitted that the instruction to publish the advertisement that was published on 17th March 2023 was received on 28th February 2023 at 17:28 via email and read in part as follows:
- "Please can we carry on with one advert per week - front page solus if you have, using the Box Club material."*
20. The Commission noted that the box club material referred to had been published by Zambia Daily Mail in the previous month of February 2023 and the contact person was instructed to continue with the same promotion. The

⁶ *Camera ready* implied that the advert sent to Daily Mail was ready for publishing and no changes would be made to the content, it would be published exactly as received

Commission observed that the box club material in question contained the following products.

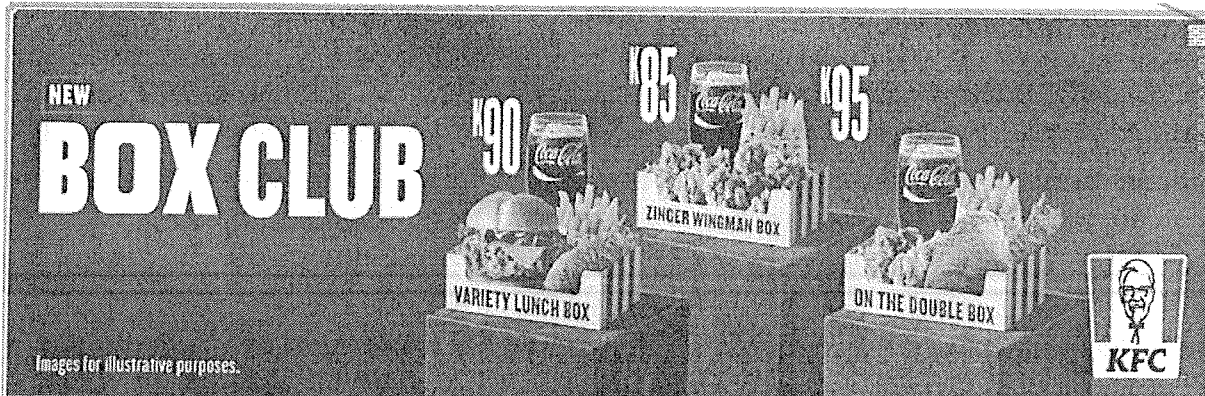


Figure 1- Extract of Zambia daily Mail Newspaper dated 17th March 2023

21. The Commission noted that the last product on the advertisement dated 17th March 2023 valued at K95.00 ran on every Friday of the month of March 2023, i.e. 3rd, 10th, 17th, 24th and 31st March 2023.
22. Zambia Daily Mail further submitted that their procedure for publishing was such that firstly, a client requested for a quotation, then Zambia Daily Mail issued a quotation and awaited approval from the client. It was submitted that once the client approves, Zambia Daily Mail would run the advert as per the clients request with the dates specified. The Zambia Daily Mail submitted that finally, the client was invoiced once the adverts started running. Zambia daily mail submitted that once the content was received, they would normally send through the cuttings of the content as published in the papers for the information of their clients at their discretion together with the invoice.
23. Zambia Daily mail further submitted a copy of the invoice issued to the Respondent indicating the dates 3rd, 10th, 17th, 24th and 31st March 2023 when the advert was published.

Submissions to the Commission Preliminary Report

It was submitted that:

24. After approval of the Commission Preliminary Report, the Report was sent to the parties for further comments and the Respondent made submissions as outlined below:

Respondent's Submissions to the Commission Preliminary Report⁷

It was submitted that:

25. In a letter to the Commission through the Respondent's legal representatives dated 21st August 2023, the Respondent submitted that their client did not act in breach of Section 51(1) or indeed any other provision of the Act and urged the Board to acquit their client accordingly. The Respondent's lawyer gave the responses below;
26. *The Respondent did not charge a price different from what was displayed or indicated on any of its products. (1st contention)*
27. The Respondent's lawyer submitted that it was their considered view that for there to be breach of Section 51(1) of the Act, the Respondent must have charged the Complainant higher than that which was indicated on the Respondent's in store menus or displays. The Respondent submitted that Section 51(1) of the Act provided as follows:

A person or an enterprise shall not charge a consumer more than the price indicated or displayed on a product or service.
28. The Respondent's lawyer submitted that their reading of the above provision showed that for an offense to be committed under Section 51(1) of the Act, the allegedly misleading price must have been indicated on the product on display. This includes situations such as where a shop owner puts a price tag on a product, which is lower than the price at which the product is actually sold. The Respondent referred to the case of Spar Zambia Limited -v- Danny Kaluba cited by the Commission addressed this situation.
29. The Respondent's lawyer submitted that the situation in the instant manner was different because there was no allegation that the Respondent's in store adverts and menus displayed a price different from what was charged. The Respondent's lawyer submitted that they had also verified the information with the Respondent that the price of K105.00 at which the product was sold to the Complainant was the same one that was displayed on all the in-store menus and displays. The Respondent's lawyer submitted that the lower price of K95.00 was not displayed anywhere in the Respondent's store. The Respondent's lawyer contended that the inadvertent publication of the lower price of K95.00 in the newspaper did not amount to displaying or indicating a wrong price on the product or service.

⁷ Letter to the Commission from Mwenye & Mwitwa Advocates (the Respondent's legal representatives) dated 21st August 2023

30. The Respondent's lawyer submitted that the law was settled that when interpreting the provisions of written law, words must be given their natural and ordinary meaning. The Courts (or any other decision maker) had no jurisdiction to read words into the statute. The Respondent's lawyer submitted that this was the guidance of the supreme court in the case of Attorney General -v- Million Juma (1984) ZR 1 and repeated in the case of Agro Fuel Investment Limited -v- Zambia Revenue Authority SCZ Judgement No. 11 of 2012 where it was stated as follows:

The primary rule of interpretation of statutes is that the meaning of any enactment is to be found in the literal and plain meaning of the words used, unless this would result in absurdity, in which case the Court's authority to cure the absurdity is limited.

31. Similarly, in the case of Samuel Miyanda v Raymond Handahu (1993-1994) Z.R. 187 the supreme court stated as follows:

It is not what the legislature meant to say or what their supposed intentions were with which the court would be concerned; the courts duty is to find out the expressed intention of the legislature. When the language is plain and there is nothing to suggest that any words are used in technical sense or that the context requires a departure from the fundamental rule, there would be no occasion to depart from the ordinary and literal meaning and it would be inadmissible to read into the terms anything else on grounds such as of policy, expediency, justice or political exigency, motive of the framers, and the like: See for instance Capper v Baldwin (2), per Lord Parker. C.J., at p.61 especially from letters E to G.

32. The Respondent's lawyer submitted that in line with the forgoing, they contended that the intention for the legislature as expressed in the literal meaning of Section 51(1) of the Act was very clear and unambiguous. The Respondent's lawyer submitted that Section 51(1) criminalises the charging of a price which was different from that which was displayed or indicated on the product. The Respondent's lawyer submitted that they therefore contended that an advert placed in a newspaper was not a display or an indication of a price on the product. The Respondent's lawyer submitted that they urged the Board to decline the Commission's invitation to expand the scope of Section 51(1) to include newspaper adverts which were not covered under the enactment. The Respondent's lawyer submitted that it was trite law that criminal provisions must be interpreted respectively and not expansively.

33. *The Respondent's lawyer submitted that, even assuming, but without in any way conceding that the placement of an advertisement in a newspaper amounted to a breach of Sections 51(1), the same was not an act of the Respondent and the Respondent could not be held liable for the same (2nd Contention)*

34. The Respondent's lawyer referred to paragraph 35 of the preliminary report which read as follows;

The Commission notes that the Respondent, through their agent, negligently instructed Zambia Daily Mail to carry on with an advertisement whose prices had changed, causing the Complainant to decide to trade based on wrong information and consequently being charged more.

35. The Respondent's lawyer submitted that as rightly observed by the Commission in the above excerpt from the preliminary report, the advertisement was not placed by their client, but its independent marketing agent. The Respondent's lawyer submitted that this position was also confirmed by the response from the Zambia Daily Mail. The Respondent's lawyer submitted that it was incontrovertible that the Respondent had no sight of the advertisement before it was placed in the newspaper. The question that stood for determination was, therefore whether the Respondent could be held liable for the negligent acts of an independent contractor.

36. The Respondent's lawyer submitted that the correct position of the law was that a person cannot be held liable for the negligent acts of an independent contractor. The Respondent's lawyers submitted that for as long as the erroneous advertisement was negligently placed by an independent contractor without the verification and approval of the Respondent, they contend that the Respondent could not be held liable for the same.

37. *The Respondent's lawyer submitted that the Commission's findings were influenced by facts which were not supported by evidence. (3rd Contention)*

38. The Respondent's lawyer submitted that the Commission in its preliminary report at paragraph 32 found that the Respondent proceeded to charge the Complainant a price which was higher than that which was advertised even after the Complainant brought the matter to our client's attention. Similar assertions could be found in the last paragraph 35 of the preliminary report.

39. The Respondent's lawyer submitted that the finding appeared to be based on the Complainant's claim that he engaged one of the Respondent's employees named Ms. Mwelwa on the issue. The Respondent's lawyer submitted that in

the Respondent's letter to the Commission date 12th April 2023, the Respondent clarified that at the material time, they did not have any employee bearing that name. The Respondent's lawyer submitted that despite the clarification, the Commission proceeded to find that there was an engagement between the Complainant and the Respondent regarding the issue. The Respondent's lawyer submitted that put differently, the Commission preferred the version of the Complainant to that of the Respondent without giving reasons for disbelieving the Respondent and believing the Complainant. The Respondent's lawyer submitted that it was a cardinal rule of adjudication that a decision maker who was faced with conflicting statements must give reasons for believing one statement over the other.

40. The Respondent's lawyer submitted that the Commission went further at paragraph 33 of the preliminary report to state that by virtue of the advertisement being posted in the Zambia daily mail newspaper on 3rd, 10th, 17th, and 31st March 2023, it was highly likely that several other customers who read the newspaper on the said dates were misinformed on the prices being offered by the Respondent. The Respondent's lawyer contended that this finding was highly speculative and lacked evidential footing. Additionally, by suggesting that other consumers other than the Complainant were allegedly affected, the Commission veered into prospecting the Respondent for the offences allegedly committed against other unknown people and for which there was no complainant or evidence in support and this also influenced the Commission's decision making process. The Respondent's lawyers submitted that they therefore urged the Board to disregard those assertions.
41. The Respondent's lawyer concluded by assuring that although the Respondent could not be answerable for the wrongs of the independent contractor, the Respondent nonetheless regretted the inadvertent mistake of its marketing agent and had put in place sufficient control measures to ensure that such a mistake did not repeat itself. The Respondent's lawyer submitted that the Respondent was a law-abiding corporate citizen that was committed to promoting consumer welfare and would never engage in unfair trading practices. The Respondent's lawyer thanked the Commission for the engagement on the issue and looked forward to hearing from the Commission.

Commission's Response to the Respondent's Submissions

It was submitted that:

42. In response to the **1st Contention**, the Commission maintains that the advertisement posted in the newspaper depicting the food combination as well as the corresponding price clearly amounted to a display of a replica of the

prices being charged for the food combination. This is so because the purpose for placing the advertisement in the newspaper was to display the various (promotional) offers available in the store with the corresponding prices and a consumer who had sight of this could pick an affordable bundle and make an order with the Respondent.

43. The Commission holds that the advertised price of the product shows two items, namely the food combination and the corresponding price. The Commission notes that the Respondent's lawyer makes reference to two items that indicated the correct price in paragraph 29, which are the in-store displays and menus. The underlying fact remains that both the in-store displays and the menu outline two items, which are, the food combinations and the respective prices. It is therefore incoherent to assume that the price displayed was not on the product when in fact the food menu and the in-store displays also do not have the actual product. In such a scenario, it can be concluded that the placing of the food combination and the corresponding price as being indicative of what the consumer was to find in store still amounted to display in accordance with Section 51(1) of the Act.
44. The Commission notes that the Respondent operates in such a way that they have in-store menus that give a pictorial representation of the available food and the corresponding prices, this is different from a retail store where the price can be displayed with the actual product next to it. In a restaurant, the price is displayed on either a menu or an in-store display where a consumer makes a choice, then the food is subsequently delivered. At the actual point of delivery of the product, there is no price displayed. Does this then imply that the section is not applicable to such sales? Emphatically no. Therefore, the advertisement in the Daily Mail newspaper which showed the same items depicted by the in-store display and menu had the exact same effect and should be treated the same.
45. In the case of ***Carlill v Carbolic Smoke Ball Co. (1982) 2 QB 484*** where a reward of \$100 was promised to any person that contracts influenza after having used a ball three times in accordance with specific instructions. This information was observed on a newspaper advert placed by the defendant. In one instant, the Complainant purchased some balls, used them in line with the guidance and caught a flu. The Complainant sought to claim the \$100 reward, but the defendant raised arguments that the advertisement was a mere invitation to treat and not an offer. The defendant argued that the advert was a sales puff which lacked intent to be an offer; that it was not possible to make an offer to the world; that there was no notification of acceptance; that the wording was too vague to constitute an offer and that there was no

consideration since the offer did not specify that the user of the balls must have purchased them.

46. The court of appeal held that Mrs. Carlill was entitled to the reward as the advert constituted an offer of a unilateral contract which she had accepted by performing the conditions stated in the offer. The court rejected all the arguments put forward by the defendant. In a similar fashion, the advertisement posted with the food combination at a particular price cannot be separated from the Respondent's obligation to supply the product at the same price. By virtue of the Complainant opting to purchase the product at K95.00, he was entitled to receive the food combination accordingly.
47. In addition, the Commission notes, contrary to the Respondent's lawyer's submission in paragraph 32, that Section 51(1) of the Act is not a criminal provision and therefore the interpretation and application of the Section can be used expansively. As such, the argument in the first contention cannot hold.
48. Furthermore, without in any way discrediting the above submission, the Commission notes according to figure 2 below that the Complainant made their purchase through the Respondent's 'drive thru' meaning that at no point did the Complainant enter the Respondent's store to have sight of the in store displays or indeed the menus allegedly consisting of the correct prices. This shows that the only price display that the Complainant had sight of was on the Respondent's advertisement for which he was charged higher.

2nd Contention

It was submitted that:

49. The Commission maintains that it would be unreasonable for the Respondent to disclaim liability for the actions of their independent contractor. It is evident that the actions of their independent contractor directly led to the Complainant interacting with the Respondent by way of the decision to purchase. Furthermore, the contractor did not supply any service to the Complainant and was in no way a party to the transaction. The internal procedures of the Respondent in their interaction with their independent contractor are unknown to the consumer and had no effect on his purchasing decision. Further, the fact that this advertisement was posted in the Daily Mail newspaper, with the Respondent's brand and that it was in public domain, requires that the Respondent be concerned about the authenticity of the content being published, whether or not it was verified by the Respondent.

As such, the Commission maintains that the 2nd argument is immaterial to the case being proved.

3rd Contention

It was submitted that:

50. The next issue was relating to the lack of clarification of the name of the transacting employee on the part of the Commission. The Commission takes note that there was a typographical error in spelling of the name of the individual that engaged with the Complainant. However, as per the evidence submitted to the Commission by the Complainant in figure 2 below, the Complainant engaged with Mwela.
51. Lastly, the submission of the number of people that may have been misinformed because of the publishing of the advertisements in the newspaper was a potential impact assessment based on the number of times the erroneous publication was made and the number of people that read the newspaper on a daily basis. The Commission maintains that the submission needs no evidence to prove or disprove as it remains a notorious fact that other people may have never noticed the price difference but ended up paying more while others may have noted the difference and opted not to purchase, all of which could not be proved with certainty.

Relevant Findings

It was submitted that:

52. The Commission found that on 28th February 2023, the Respondent, through their contracted agent, Ms. Jane Witz, instructed Zambia Daily Mail via email to run a *box club* promotion that had been running in the previous month of February 2023. The Commission found that the box club promotion had various food products indicated with their respective prices. The Commission found that the *box club promotion* also included an “*on the double box*” meal worth K95.00 consisting of a soft drink, french fries and chicken pieces.⁸
53. The Commission found that on 17th March 2023, the Complainant, after seeing the advertisement published by the Respondent in the Zambia Daily Mail Newspaper dated 17th March 2023 (figure 1), visited the Respondent’s East Park Mall outlet and requested for the “*on the double box*” food combination advertised at K95.00.

⁸ Email correspondence between the Respondent’s agent Ms. Jane Witz and Zambia Daily Mail marketing team dated 28th February 2023

Analysis of Conduct

It was submitted that:

57. In analysing the case for possible violation of Section 51(1) of the Act, the following assessment tests are used:

Whether Crispy Chicken Restaurants Zambia Limited is a “Person” or an “Enterprise”

It was submitted that:

58. Refer to paragraph 10 of the report.

Whether Crispy Chicken Restaurants Zambia Limited falsely or misleadingly represented the price of any goods or services

It was submitted that:

59. False representations or misrepresentation is “*any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts*”.¹¹ Misrepresentation can therefore be thought of as a misleading statement or conduct with the potential to induce one to make a decision or act in a way that they ordinarily would not. False or misleading representation is necessitated by the asymmetry in information that exists between enterprises and consumers in doing business as enterprises have more information about the product they are offering. Further, such a representation can be made knowingly for the purpose of exploiting the consumer, or unknowingly by reason of negligence or lack of attention to detail.
60. In the case at hand, the Commission established that the Complainant observed an advertisement in Zambia Daily Mail newspaper dated 17th March 2023 for an “*on the double box*” meal priced at K95.00. On the same day, the Complainant visited the Respondent’s store to purchase the same item only to be informed that the product was available but at K110.00, a price different from what had been advertised. The Commission established that by virtue of the Respondent’s advertisement, the Complainant was misled into thinking that there was an *on the double box* meal available at the Respondent’s store being sold for K95.00 when in fact not.
61. The High court of Zambia in the case of ***Airtel Networks Vs CCPC and Macnicious Mwimba*** on 30th August 2019 ruled that the advertisement issued by the Respondent was *meant to deceive and did in fact deceive* consumers in

¹¹ Black’s Law Dictionary 4th Ed. Rev., p1152

54. The Commission found that on the same date, the Respondent charged the Complainant a price of K105.00 for the “*on the double box*” food combination as evidenced by transaction number 168589 and order number 489 at the drive thru (see figure 2 below). The Commission noted that the Complainant also purchased other food items not of interest to this investigation.⁹
55. The Commission found that the Respondent’s food prices included in the promotional publication published on 17th March 2023 were revised upwards in the Respondent’s stores on 1st March 2023.¹⁰

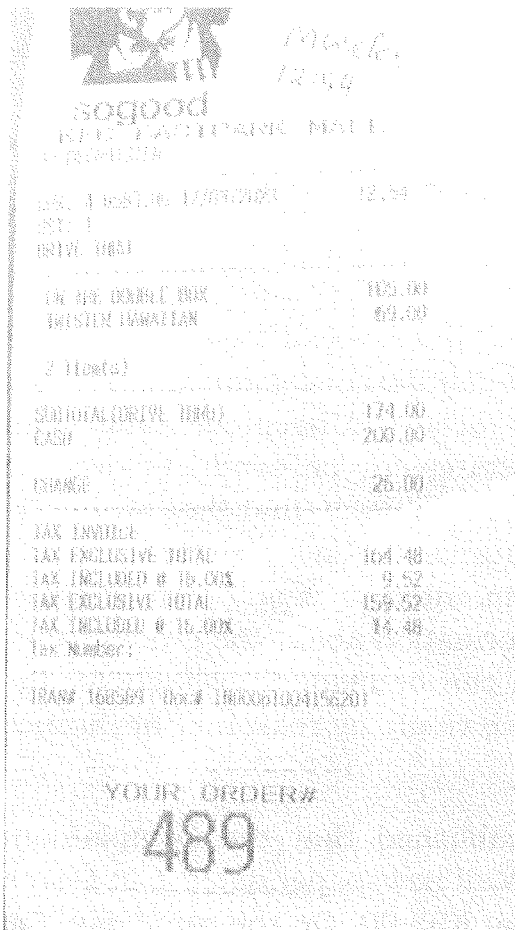


Figure 2 Receipt issued to the Complainant on 17th March 2023

Previous Cases involving the Respondent

It was submitted that:

56. A review of the Respondent’s case file revealed that there was no previous case against the Respondent in relation to Section 51(1) or indeed any other related section of the Act.

⁹ Receipt number trans#168589 dated 17th March and Zambia Daily Mail Newspaper dated 17th March 2023

¹⁰ Submissions from the Respondent in Response to the Commission’s notice of Investigation

their exercise of a *purchasing decisions*. As such the appellant's appeal was rendered destitute of any merit. It is worth noting that the key factors that were considered were; whether the advertisement was meant to deceive, whether the consumer was deceived and whether his purchasing decision was distorted.

62. The Commission cannot know the exact intention of the Respondent in placing the erroneous advert in the Newspaper, however, it can be inferred that because they stood to gain financially from the transaction, at the expense of the Complainant, their sole intention was to generate more sales by falsely representing the price. Secondly, it is evident that the Complainant was indeed deceived by being made to believe that the food promotion was available at K95.00 when in fact not. Lastly, the Complainant's purchasing decision was distorted as he was made to pay K10.00 more than the price at which he based his original purchasing decision. Therefore, the Commission concludes that the Respondent falsely represented the price of their "*on the double box*" meal and as such, were in violation of Section 47(b)(i) of the Act.

Whether Mr. Raymond Kufekisa as a Consumer was charged more than the price indicated or displayed on a product

It was submitted that:

63. According to Black's law dictionary¹², *to charge is to "demand a fee, to bill."* This definition simply means to demand an amount as a price for a service or a good to be supplied.
64. In the case at hand, the Commission established that the Complainant observed an advertisement in Zambia Daily Mail newspaper dated 17th March 2023 for an "*on the double box*" meal, and on the same day visited the Respondent's East Park Mall branch to purchase the advertised product worth K95.00. After the Complainant observed the Respondent's advertisement, he made a purchasing decision based on the information provided in the advert and acted on it. However, the Respondent charged the Complainant an amount of K105.00. Even after the Complainant brought the matter to the Respondent's attention, the Respondent proceeded to charge the Complainant a price higher than the advertised price, informing him that the price had since changed. The Complainant learned, after making payment that the prevailing price at the Respondent's outlet was different from what he observed on the advertisement, and this affected him negatively by having to pay an additional K10.00 to purchase the product. Therefore, the Respondent's advertisement misled the Complainant into thinking that the *on the double box* food combination was available at the Respondent's store at a promotional price of K95.00 when in fact the price had been adjusted upwards and he was charged K105.00.

¹² Black Laws Dictionary, 4th edition 1968 page 265

65. Further, by virtue of the advertisement being posted in the Zambia Daily Mail Newspaper on 3rd, 10th, 17th, 24th and 31st March 2023, it is highly likely that several other consumers who read the Newspapers on the said dates were misinformed on the prices being offered by the Respondent. Zambia daily Mail newspaper produces approximately 18,000¹³ physical copies on a daily basis and the theory of potential harm is severe, thus, the extent to which the conduct reaches out is huge. This is also taking cognizance that the advert was published in the newspaper on five different occasions in the month of March (3rd, 10th, 17th, 24th and 31st March 2023) with the same error.
66. In the case of **Spar Zambia Limited Vs Danny Kaluba**, the Competition and Consumer Protection Tribunal stated that *“unsuspecting consumers can be enticed to buy a product or service by the lower price displayed only to pay a higher price on the till. While some consumers may notice the price difference, others may not. More broadly, there is an element of distortion of Competition when a seller purports to be selling a product or service at a lower price than others in the market. Ultimately, there is a real risk of increased turnover in volume and value at the expense of consumers and to the detriment of competition, thereby defeating the public policy behind the legislative provision.”*
67. In this context, the Commission notes that the Respondent, through their agent, negligently instructed Zambia Daily Mail to carry on with an advertisement whose prices had changed, causing the Complainant to decide to trade based on the wrong information and consequently being charged more. It is plausible that the Complainant decided to purchase the said product based on the advertised price which was relatively cheaper than a substitute of similar quality. It can therefore be implied that the Respondent, based on their advertisement, had a competitive advantage of K10.00, which led to the purchasing decision of the Complainant. The Commission notes that the Complainant noted the price discrepancy on the advertisement and brought it to the attention of the Respondent, but was still charged a higher price, contrary to what he saw in the advertisement. This conduct and the subsequent denial to give the consumer the product at the advertised price was to his detriment by having to pay an extra K10.00 and unfairly distorted the competition by giving the Respondent a false competitive edge over their competitors.
68. It is expected that any reasonable enterprise that engages in advertisements consistently monitors and verifies that the advertisements being published are accurate, especially considering the potential reach of these

¹³ Geoffrey Phiri 2018, Case study of Zambia Daily Mail Newspapers Limited, available at: <http://155.0.3.194:8080/jspui/bitstream/123456789/130/1/An%20assessment%20of%20the%20i mpact%20of%20online%20publications%20on%20traditional%20newspaper%20circulation.pdf>

advertisements through both physical and electronic copies of the newspaper. As such, the Commission draws the conclusion that the Respondent violated Section 51(1) of the Act.

Board Deliberation

69. Having considered the facts, evidence and submissions in this case, the Board resolves that the Respondent breached Section 47(b)(i) and Section 51(1) of the Act.

Board Determination

70. The facts and evidence of this case have shown that the Respondent violated Section 47(b)(i) and Section 51(1) of the Act.

Board Directive

71. In view of the above analysis and conclusion, it is recommended that:
- i. The Respondent refunds the Complainant a total amount of K10.00 within ten (10) days of receipt of the Board Decision in accordance with Section 5(d) of the Act;
 - ii. The Respondent is fined 0.5% of their annual turnover for 2022 for violating Section 47(b)(i) and Section 51(1) of the Act in accordance with Section 47 and Section 51(2) of the Act and in line with the Competition and Consumer Protection Commission's Guidelines for Issuance of Fines 2019 (**Refer to Annex 1**); and,
 - iii. The Respondent submits their annual books of accounts for 2022 to the Commission for the calculation of the actual fine within thirty (30) days of receipt of the Board Decision in accordance with Section 5(d) of the Act.

Note: any party aggrieved with this order or direction may, within thirty (30) days of receiving this order or direction, appeal to the Competition and Consumer Protection Tribunal.

Dated this 5th Day of December 2023



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Chairperson

Competition and Consumer Protection Commission

Annex 1 - Calculation of Fine

The Calculation of the recommended fine was determined as follows-

- (a) **The Competition and Consumer Protection Act No. 24 of 2010: Guidelines for Administration of Fines sets a base of 0.5% for offences relating to Part VII 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"> • K1,000 for turnover upto K50,000 • K10,000 for turnover above K50,000 upto K250,000 • K40,000 for turnover above 250,000 upto K500,000 • K70,000 for turnover aboveK1,500,000 • K150,000 for turnover above K1,500,000 upto K3,000,000 • K200,000 for turnover above K3,000,000 upto K5,000,000 • K500,000 for turnover above K5,000,000
Display of Disclaimer	0.5% of turnover	K30,000

- (b) **The Competition and Consumer Protection Act No. 24 of 2010: Guidelines for Administration of Fines – further provides for additions as follows-**

- (i) The starting point of a financial fine will be a fine of not less than 0.5% of annual turnover for first time offenders.
- (ii) (The starting point of a financial fine for a repeat offender will be the previous fine charged by the Commission.

(iii) Thereafter, the Commission will be adding a 10% of the fine determined in step one above for each aggravating factor.

(c) Whether the Respondent is a repeat offender under Section 51(1) of the Act;

The Commission's review of the case file for the Respondent showed that the Respondent is a first-time offender of this Provision of the Act. As such the fine will be set as **0.5%**.

(1)

(2)