

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

**APPLICANT:**

**Ms. Mwiche Lukutati**

**COMPLAINANT**

**AND**

**Andre Entertainments**

**RESPONDENT**

**BEFORE:**

**Commissioner Chenga Chisha**

**- Chairman**

**Commissioner Frederick Imasiku**

**- Member**

**Commissioner Nsangwa Ngwira**

**- Member**

**Commissioner Aubrey M. Chibumba**

**- Member**

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**DECISION**

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

**Introduction and Relevant Background**

***It was submitted that:***

1. On 22<sup>nd</sup> February 2022, the Competition and Consumer Protection Commission ("the Commission") received a complaint from Ms. Mwiche Lukutati ("the Complainant"), holder of National Registration Card (NRC) number 709838/11/1 against Andre Entertainments ("the Respondent"). Specifically, the Complainant alleged that that on 3<sup>rd</sup> November 2021, she engaged the Respondent to supply her with a Marquee to be used for her kitchen party on 6<sup>th</sup> November 2021. The Complainant alleged that she paid an amount of K5,000.00 to the Respondent for the Marquee. The Complainant alleged that on 6<sup>th</sup> November 2021, the day of the event, the Respondent did not show up or have the Marquee delivered. The Complainant alleged that she engaged the Respondent for a refund but had not been refunded. The Complainant demanded that a refund of K5,000.00 be given to her.

## **Legal Contravention and Assessment Tests**

### **Legal Contravention**

#### ***It was submitted that:***

2. The alleged conduct appeared to be in contravention of Section 46(1) as read together with Section 45(a), Section 47(a)(i) and Section 49(5) of the Competition and Consumer Protection Act, No. 24 of 2010 ("the Act"). However, the Commission dropped investigations into Section 46(1) as read with Section 45(a) as well as Section 47(a)(i) of the Act thus the Commission investigated the matter under Section 49(5) of the Act.
3. Section 49 (5) of the Act states that: "*A person or an enterprise shall supply a service to a consumer with reasonable care and skill or within a reasonable time or, if a specific time was agreed, within a reasonable period around the agreed time.*"
4. Section 49(6) of the Act states that: "*A person who, or an enterprise which, contravenes subsection (5) is liable to pay the Commission a fine not exceeding ten percent of that person's or enterprise' annual turnover.*"
5. Section 49(7) of the Act states that: "*In addition to the penalty stipulated under subsection (6), the person or the enterprise shall – (a) within seven days of the provision of the service concerned, refund to the consumer the price paid for the service; or if practicable and if the consumer so chooses, perform the service again to a reasonable standard.*"

### **Assessment Tests**

#### ***It was submitted that:***

*The following assessment tests were used to consider Section 49(5) of the Act:*

6. Whether Andre Entertainments is a "Person" or "enterprise".
7. Whether Andre Entertainments supplied a particular *service* to a consumer.
8. Whether Andre Entertainments supplied a service to the consumer within a reasonable time or; if a specific time was agreed, within a reasonable period around the agreed time.

## **Investigations Conducted**

### ***It was submitted that:***

9. The Commission duly served a Notice of Investigation and an accompanying letter on the Respondent on 1<sup>st</sup> March 2022. The Commission reviewed the Complainant's receipt number 602 dated 3<sup>rd</sup> November 2021 and various submissions made regarding the matter.

## **Findings**

### **The Parties**

#### **The Complainant**

### ***It was submitted that:***

10. The Complainant is Ms. Mwiche Lukutati, a resident Lusaka.<sup>1</sup> Section 2 of the Act defines 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;*"<sup>2</sup> Therefore, the Complainant is a consumer as envisaged under the Act because she paid an amount of K5,000.00 for a 200-seater marquee from the Respondent for her kitchen party as evidence by receipt number 602.<sup>3</sup>

#### **The Respondent**

### ***It was submitted that:***

11. The Respondent is Andre Entertainments, situated at Plot No. 13542, Kasama Road, Chalala, Lusaka and their nature of business is the supplying of assorted materials for corporate functions, weddings and kitchen parties. The Respondent is registered with the Patents and Company Registration Agency (PACRA) as a company with registration number 320110181055. According to Section 2 of 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, a affiliates or other entities, directly or indirectly, controlled by them.*" Therefore, Andre Entertainments is an enterprise as envisaged under the Act as it is a

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<sup>1</sup> CCPC Form IV.

<sup>2</sup> Competition and Consumer Protection Act No. 24 of 2010

<sup>3</sup> Complainant's Receipt Number 602 dated 3<sup>rd</sup> November 2021.

company which engages in commercial activities of supplying assorted materials for events.<sup>4</sup>

### **Submissions from Respondent**

#### ***It was submitted that:***

12. There were no submissions received from the Respondent despite the Notice of Investigation having been served on them on 1<sup>st</sup> March 2021.

### **Review of the Complainant's Receipt**

#### ***It was submitted that:***

13. A review of the Complainant's receipt number 602 dated 3<sup>rd</sup> November 2021 revealed that the Complainant made a payment of K5,000.00 to the Respondent for the supply of a 200-seater marquee.<sup>5</sup>

### **Review of Contract form**

#### ***It was submitted that:***

14. A review of the Contract form between the Respondent and Complainant dated 3<sup>rd</sup> November 2021 revealed that Mr. Anderson Zulu and Ms. Mwiche Lukutati entered into an agreement to deliver a 200-seater marquee on 6<sup>th</sup> November 2021 in Chalala. Further the Commission noted the third condition on the agreement which stipulated that, "*in case the service provider does not provide the service as agreed, the client shall take legal action.*"
15. The Commission noted that the contract was signed by both the Complainant and the Respondent on 3<sup>rd</sup> November 2021.

### **Further submissions from the Complainant**

#### ***It was submitted that:***

16. The Commission contacted the Complainant to establish whether the Respondent had redressed her. The Complainant submitted that she had been contacted by the Respondent to verify how payment could be made but she had not received any payment from the Respondent.

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<sup>4</sup> Complainant's Receipt Number 602.

<sup>5</sup> Ibid

## **Submissions to the Report**

### ***It was submitted that:***

17. After approval of the draft report, the Commission sent the Report to the parties on 18<sup>th</sup> May 2022 to make further submissions based on the Commission's findings. None of the parties submitted any comments despite acknowledging receipt of the report.

## **Relevant Findings**

### ***It was submitted that:***

18. The Commission established that on 3<sup>rd</sup> November 2021 the Complainant paid an amount of K5,000.00 to the Respondent for the supply of a 200-seater marquee to be delivered for the Complainant's kitchen party to hold on 6<sup>th</sup> November 2021.<sup>6</sup>
19. The Commission further found that the Respondent had not delivered the marquee on 6<sup>th</sup> November 2021, the day of her kitchen party despite the two parties being bound by the agreement signed on 3<sup>rd</sup> November 2021<sup>7</sup>.
20. The Commission established that the Respondent did not formally respond to the Notice of Investigation duly served on 1<sup>st</sup> March 2022.

## **Previous cases involving the Respondent**

### ***It was submitted that:***

21. A review of the Respondent's case file held with the Commission revealed that there were no prior cases in which the Respondent had been found to have breached Section 49(5) of the Act.

## **Analysis of Conduct**

### ***It was submitted that:***

22. In analysing the case for possible violation of Section 49(5) of the Act, the following assessment tests are used:

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<sup>6</sup> Complainant's Receipt Number 602 dated 3<sup>rd</sup> November 2021.

<sup>7</sup> Contract between Complainant and Respondent dated 3<sup>rd</sup> November 2021.

**Whether Ms. Mwiche Lukutati is a “consumer” under the Act;**

***It was submitted that:***

23. Ms. Mwiche Lukutati is a consumer pursuant to Section 2 of the Act according to paragraph 10 of the report.

**Whether Andre Entertainments is a “Person” or “Enterprise”;**

***It was submitted that:***

24. Refer to paragraph 11 of the report.

**Whether Andre Entertainments supplied a particular service to a consumer;**

***It was submitted that:***

25. The Act defines a “Service” “to include the carrying out and performance on a commercial basis of any engagement, whether professional or not, other than the supply of goods, but does not include the rendering of any services under a contract of employment”.<sup>8</sup> The Respondent had entered into an agreement with the Complainant to deliver a 200 seater marquee on 6<sup>th</sup> November 2021 in Chalala after a payment of K5,000.00 as evidenced by receipt number 602 dated 3<sup>rd</sup> November 2021<sup>9</sup> and as such supplied the Complainant with a service.

**Whether Andre Entertainments supplied a service to a consumer within a reasonable time or, if a specific time was agreed, within a reasonable period around the agreed time;**

***It was submitted that:***

26. According to the Black’s Law Dictionary,<sup>10</sup> Reasonable time is defined as, “*the time needed to do what a contract requires to be done, based on subjective circumstances*”. Reasonable time, therefore, refers to the generally acceptable time or period within the agreed time for the parties in a contract to perform their obligations in an industry. In this context, the standard practice in the retail sector with regards to issuance of items after a customer has made payment or at the agreed time if the necessity is in future.
27. In the case under review, the Commission established that on 3<sup>rd</sup> November 2021, the Complainant paid the Respondent K5,000.00 for the supply of a

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<sup>8</sup> Competition and Consumer Protection Act No. 24 of 2010

<sup>9</sup> Complainant’s Receipt Number 1068 dated 8<sup>th</sup> September 2021.

<sup>10</sup> Black Laws Dictionary, 4<sup>th</sup> Ed, 1968

200-seater marquee to be delivered on 6<sup>th</sup> November 2021.<sup>11</sup> It was further established that on 6<sup>th</sup> November 2021, on the day of the actual event, the Respondent did not deliver the said marquee to the Respondent despite signing a contract to guarantee that they would deliver it or provide any explanation for the conduct<sup>12</sup>. The Commission established that the Complainant required the services of the Respondent on the exact date agreed when she had her kitchen party wherein the invited guests would be accommodated. The Commission noted that the Complainant ended up hiring another firm to supply a marquee since the Respondent did not deliver as agreed. The Commission observed that a period of over five (5) months had elapsed for the Respondent to refund the Complainant for the service she had paid for but did not. The Commission noted that this time period was not reasonable to complete the redress of the Complainant for a service she paid for and did not receive.

28. The Commission, therefore, established that the Respondent breached their obligation to supply to the Complainant the marquee and failed to refund the Complainant for a period of over five (5) months. Therefore, the Respondent violated Section 49(5) of the Act.

**Whether the Respondent furnished the Commission, in a statement signed by that person or, in the case of a body corporate, by a director or member or other competent officer, employee or agent of the body corporate, within the time and in the manner specified in the notice, any information pertaining to any matter specified in the notice which the Commission considers relevant to the investigation.**

***It was submitted that:***

29. A Notice of Investigation was dully served on the Respondent on 1<sup>st</sup> March 2022. However, the Respondent did not avail the Commission with any formal response.
30. The Competition and Consumer Protection Tribunal ruling in the case of **MTN Zambia Limited Vs the Competition and Consumer Protection Commission (2013)** held that: *“the Appellants’ failure to respond to the Notice of Investigation issued by the Commission was a serious dereliction of duty on the part of the Appellant and could be construed to mean a lack of defence on their part.* The Tribunal cited **Order 18 rule 13 of the Rules of the Supreme Court (White Book) 1999 Edition** which provides that;

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<sup>11</sup> Complainant's Receipt Number 1068 dated 8<sup>th</sup> September 2021.

<sup>12</sup> Respondent contract with Complainant dated 3<sup>rd</sup> November 2021

***“Any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 14 operates as a denial of it”.***

***It was submitted that:***

31. In light of this cited provision, the Respondent’s failure to respond to the Notice of Investigation issued by the Commission amounts to an admission of guilt.

**Board Deliberation**

32. Having considered the facts, evidence and submissions in this case, the Board resolves that the Respondent did not exercise reasonable care and skill in the supply of a service to the Complainant, hence was in violation of Section 49(5) of the Act.

**Board Determination**

33. The facts and evidence of this case have shown that the Respondent engaged in unfair trading practices, hence was in violation of Section 49(5) of the Act

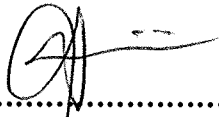
**Board directives**

34. The Board hereby directs that-
- i. The Respondent refunds the Complainant K5,000.00 in accordance with Section 5(d) of the Act within ten (10) days of receipt of the Board Decision.
  - ii. The Respondent is fined 0.5% of their annual turnover for breach of Section 49(5) in accordance with Section 49(6) of the Act and the Commission’s Guidelines for Administration of Fines 2019 (see appendix for details).
  - iii. The Respondent submit their latest books of accounts within thirty (30) days of receipt of the Board directive so that the Commission determines how much they are liable to pay for breach of Section 49(5) of the Act 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 9<sup>th</sup> Day of August, 2022.**



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**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 49(5) of the Act with the following caps;

Range (Turnover)	Cap
Below K50,000.00	K1,000.00
K50,000.00 – K250,000.00	K30,000.00
K250,000.00 – K500,000.00	K40,000.00
K500,000.00 – K1,500,000.00	K70,000.00
K1,500,000.00 – K3,000,000.00	K150,000.00
K3,000,000 – K5,000,000.00	K200,000.00
Above K5,000,000.00	K500,000.00

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

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

The Commission noted that the Respondent has not been found to be in violation of the specified section of the Act, therefore the applicable fine is 0.5% of annual turnover.