

CASE FILE NUMBER: CONS/01/03/2022/00378/DCS

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

BETWEEN

Mrs. Christabel Mainza Mumba

COMPLAINANT

AND

**I.Q. Fashions Zambia Limited
T/A Fashion World**

RESPONDENT

BEFORE:

Commissioner Chenga Chisha

- Chairman

Commissioner Fredrick Imasiku

- Member

Commissioner Aubrey Chibumba

- Member

Commissioner Nsangwa Allen Ngwira

- Member

DECISION

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:

1. On 1st March, 2022, the Competition and Consumer Protection Commission (“the Commission”) received a complaint from Mrs. Christabel Mainza Mumba (“the Complainant”) against Fashion World (“the Respondent”). Specifically, the Complainant alleged that on 23rd February, 2022, she engaged the Respondent in order to purchase a dress. The Complainant alleged that she picked out some dresses that were on

promotion and that in the process of trying them out, she smeared make-up on one dress that did not have a price tag. The Complainant alleged that she then went to see the Store Manager and explained what had happened and informed her that she would purchase the dress. The Complainant alleged that the Store Manager informed her that the dress was K400.00. The Complainant alleged that she did not have money to buy that particular dress but offered to have it dry cleaned. The Complainant alleged that the Store Manager declined the offer and informed her that she needed to buy the dress by putting it on lay-by. The Complainant alleged that she paid K100.00 towards the lay-by purchase. The Complainant was therefore demanding for a refund of K100.00.

2. The Commission observed a statement that read, "**NO EXCHANGE OR REFUND ON LAYBYES**" on the receipt that was issued to the Complainant by the Respondent.

Legal Contravention and Assessment Tests

Legal Contravention

It was submitted that:

3. The alleged conduct appeared to have contravened Section 46(1) as read with Section 45(c) and Section 48(1) of the Competition and Consumer Protection Act, No.24 of 2010 ("the Act").
4. Section 45(c) of the Act states that: "*A trading practice is unfair if it places pressure on consumers by use of harassment or coercion; and thereby distorts, or is likely to distort, the purchasing decisions of consumers.*"
5. Section 46(1) of the Act states that: "*A person or an enterprise shall not practice any unfair trading.*"
6. Section 46(2) of the Act states that: "*(2) 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 or one hundred and fifty thousand penalty units, whichever is higher.*"
7. Section 48(1) of the Act states 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 written law.*"

8. Section 48(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

For the purpose of Section 46(1) as read with Section 45(c) the following assessment tests will be used;

It was submitted that:

9. Whether the Respondent is a “Person” or “Enterprise”;
10. Whether there was a trading practice; (Whether conduct was during trading);
11. Whether the trading practice placed pressure on a consumer by use of harassment or coercion; and thereby distorted, or likely to distorted, the purchasing decision of the consumer.

For the purpose of Section 48(1), the following assessment tests will be used;

It was submitted that:

12. Whether there is an “Owner” or “Occupier”;
13. Whether there is a trading premise”;
14. Whether a sign or notice was displayed;
15. Whether the sign or notice purported to disclaim any liability or deny any right a consumer has under the Act.

Investigations Conducted

It was submitted that:

16. The Commission served a Notice of Investigation (“NOI”) on the Respondent on 7th March, 2022. The Commission conducted a telephone interview with the Respondent on 15th March, 2022 and with the Complainant on 13th April, 2022. On 11th April, 2022 the Commission visited the Respondent’s premises to inspect the dress in question.

Findings

The Parties

The Complainant

It was submitted that:

17. The Complainant is Mrs. Christabel Mainza Mumba, a holder of National Registration Card (NRC) number 2XXXXX/XX/1, whose contact number is 097X XXXXXX. The Complainant is a resident of Chalala area in Lusaka.¹ 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*”² Therefore, the Complainant is a consumer as envisaged under the Act as she made a partial payment to the Respondent for a dress for personal use.³

The Respondent

It was submitted that:

18. The Respondent is I.Q. Fashions Zambia Limited T/A Fashion World. The Respondent is a retailer of apparel and their physical address is Cairo Road, Lusaka. A search at the Patents and Companies Registration Agency (“PACRA”) revealed that the Respondent is a local company registered under registration number 120140123975. Section 2 of the Act defines an enterprise as, “*a firm, partnership, joint-venture, corporation, company, association and other juridical persons, which engage in commercial activities, and includes their branches, subsidiaries, affiliates of other entities, directly or indirectly, controlled by them.*”⁴ Therefore, the Respondent is an enterprise within the definition of the Act, as it is a company that engages in the supply of apparel for women and children.

¹ Complaint email dated 1st March, 2022

² Competition and Consumer Protection Act No. 24 of 2010

³ Complaint email dated 1st March, 2022

⁴ Competition and Consumer Protection Act No. 24 of 2010

Submissions from the Respondent⁵

It was submitted that:

19. On 15th March, 2022 the Respondent submitted that initially the Complainant offered to purchase the dress but changed her mind after she was informed that the cost of the dress was K400.00. The Respondent submitted that the Complainant then offered to pay for dry cleaning which they declined and informed her that they do not sell second-hand clothes and dry cleaning would then make the dress a second-hand dress. The Respondent suggested that they then offered the Complainant to pay what she was able to in order to purchase the dress as a lay-by purchase and complete the purchase when she was able to do so. The Respondent submitted that the Complainant agreed to purchase the dress and paid K100.00 towards the lay-by purchase. The Respondent submitted that after that payment the Complainant did not return to either complete the purchase or demand a refund. The Respondent further submitted that the Complainant was welcome to collect the refund or to complete the lay-by purchase.

Review of the receipt submitted by the Complainant

It was submitted that:

20. A review of the receipt submitted by the Complainant revealed that it had a notice that read "**NO EXCHANGE OR REFUND ON LAYBYES**".

Inspection of the dress

It was submitted that:

21. On 11th April, 2022 the Commission visited the Respondent to inspect the dress in question. The Commission found that the dress was a silky, flared dark pink dress. The Commission found that the dress had brown makeup stains on the inside that appeared to have been smeared on. During the inspection the Respondent submitted that the Complainant had visited them and collected a refund of the K100.00 on 7th April, 2022.

⁵ Tele-record of Conversation with the Respondent dated 15th March, 2022

Images of the dress



Submissions from the Respondent⁶

It was submitted that:

22. On 13th April, 2022 the Complainant confirmed that she had collected a refund of K100.00 on 7th April, 2022.

Submissions to the Report

It was submitted that:

23. After the approval of the Preliminary Report, it was duly served on the Respondent on 25th May, 2022 for them to make submissions to it. However, there were no submissions to the report.

Relevant Findings

It was submitted that:

24. The Commission found that the Complainant smeared brown make-up on a dark pink, silk dress while trying it on in the Respondent's store.
25. The Commission found that the Complainant offered to purchase the dress before she was informed about the price.
26. The Commission found that the Respondent informed her that the dress was K400.00 after which the Complainant changed her mind and offered to pay for dry cleaning.
27. The Commission found that the Respondent declined the Complainant's dry-cleaning offer and suggested that the Complainant purchase the dress on a lay-by basis.
28. The Commission found that the Complainant made a payment of K100.00 towards a lay-by purchase for a dress worth K400.00 that she had smeared make-up on.
29. The Commission found that the Respondent's receipt had a notice which read "**NO EXCHANGE OR REFUND ON LAYBYES**"⁷.

⁶ Tele-record of Conversation with the Respondent dated 13th April, 2022

⁷ Receipt submitted by the Complainant dated 23rd February, 2022

30. The Commission found that the Complainant had been refunded on 7th April, 2022.

Previous cases involving the Respondent

It was submitted that:

31. A review of the case file for the Respondent revealed that there was no case prior to the one being currently investigated in which the Respondent was penalised for breach of Section 46(1) as read with Section 45(c) or Section 48(1).

Analysis of Conduct

For the purpose of Section 46(1) as read with Section 45(c) of the Act, the following assessment tests will be used;

Whether the Respondent is a “Person” or “Enterprise”;

It was submitted that:

32. Refer to paragraph 18 of the report.

Whether there was a trading practice; (Whether conduct was during trading);

It was submitted that:

33. A trading practice is defined as “*a customary way of doing business.*”⁸ The Commission found that the Respondent’s customary way of conducting their business was to offer lay-by options for customers that were unable to purchase products at the time of engagement. Therefore, there was a trading practice.

Whether the trading practice placed pressure on a consumer by use of harassment or coercion; and thereby distorted, or likely distorted, the purchasing decision of the consumer.

It was submitted that:

34. According to Black’s law dictionary harassment means “*words, conduct or action that, being directed at a specific person, annoys, alarms or causes substantial emotional distress to that person and serves no legitimate*

⁸ Black’s law Dictionary, 8th Edition, p1534

purpose; purposeful vexation”, while coercion means “compulsion of a free agent by physical, moral, or economic force or threat of physical force”.

35. In the case at hand, the Commission established that the Complainant had already decided to purchase the dress she had smeared make-up on before she knew the price but changed her mind after she found out the price. It has also been established that the Complainant was offered the lay-by option as a resolution to the dress being left in a non-merchantable state. However, the Commission cannot establish whether the conduct by the Respondent annoyed, alarmed or caused substantial distress to the Complainant due to lack of evidence. Furthermore, it cannot be established whether the Complainant was compelled by physical, moral or economic force due to lack of evidence. Therefore, violation of Section 46(1) as read with 45(c) the Act could not be established.

For the purpose of Section 48(1) of the Act, the following assessment tests will be used;

Whether the Respondent is a “Person” or an “Enterprise”;

It was submitted that:

36. Refer to paragraph 18 of the report.

Whether there is an “Owner” or “Occupier”;

It was submitted that:

37. Black’s Law Dictionary at page 1159⁹ defines an Owner, “*as one who has the right to possess, use, and convey something; a person in whom one or more interests are vested*”. Furthermore, Black’s Law Dictionary at page 1130¹⁰ defines an Occupant, “*as one who has possessory rights in, or control over, certain property or premises or; one who acquires title by occupancy.*” In line with the above definitions, the Respondent is the owner of the premises at which they conduct their business and they had exercised their right to convey something on their receipts.

⁹ Black’s Law Dictionary (2004), 8th Edition, Bryan A. Garner Editor in Chief

¹⁰ Ibid at page 1130

Whether the Respondent displayed a sign or notice;

It was submitted that:

38. In the case of **Zamm Imports Limited Vs the Commission 2014/CCPT/008/CON**, the Competition and Consumer Protection Tribunal defined the word “display” as “to notify, inform or send a message to one who is a customer or consumer publicly or privately”; and that it could be also stretched to mean “displaying on a consumer’s or customer’s receipt”.¹¹ The Tribunal further stated that, “display can not only be restricted to the public, on a wall, bill board, notice board, or public place but also on a receipt.” According to the 8th edition of the Black’s Law dictionary, to display entails to show or exhibit publicly.¹²
39. In line with the above case the exhibit of a notice can 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 line with that principle highlighted in the case, the Commission found that the Respondent had displayed a notice which read “**NO EXCHANGE OR REFUND ON LAYBYES**”¹³ on their receipt issue to the Complainant. The Commission found that the notice so displayed on the Respondent’s receipt, informed consumers that dealt with the Respondent that they would neither be refunded nor allowed to exchange products that were purchased on a lay-by basis.

Whether the sign or notice purported to disclaim any liability or deny any right the Complainant has under the Act;

It was submitted that:

40. In establishing this question, the Zamm Imports case further highlights how disclaimers are considered under the Act. It was held by the Tribunal that; disclaimers were treated as strict liability cases in line with Section 48(1) of the Act.
41. 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 the Respondent violated the Act by displaying a sign or notice purporting to disclaim liability.

¹¹ N

¹² Ibid

¹³ Receipt submitted by the Complainant dated 23rd February, 2022

42. The Commission found that the notice stating that **“NO EXCHANGE OR REFUND ON LAYBYES”** on the Respondent’s receipt dated 23rd February, 2022, disclaimed liability for the Respondent. The notice or statement implied that the consumers had no redress in the form of refund or exchange if they purchased a product on a lay-by basis. In this regard, the Respondent displayed a disclaimer and therefore, violated Section 48(1) of the Act.

Board Deliberation

43. Having considered the facts, evidence and submissions in this case, the Board resolves that they could not establish that the Respondent engaged in unfair trading practice as relates to the use of a trading practice that places pressure on consumers by harassing or coercing them and hence violation of Section 46(1) as read with Section 45(c) of the Act could not be established.
44. However, having considered the facts, evidence and submissions in this case and the decision of the High Court for Zambia in respect of disclaimers, the Board resolves that the Respondent engaged in unfair trading practices as relates to the display of a disclaimer by displaying a notice stating, **“NO EXCHANGE OR REFUND ON LAYBYES”** and hence violated Section 48(1) of the Act.

Board Determination

45. The facts and evidence of this case have shown the Respondent engaged in unfair trading practices, hence did breach Section 48(5) of the Act. However, facts and evidence of this case have shown the Respondent did not engage in unfair trading practices as relates to Section 46(1) as read with Section 45(c) of the Act, hence did not breach the said provisions of the Act.

Board Directives

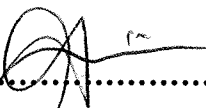
46. The Board hereby directs that:
- (i) The case is closed under Section 46(1) as read with Section 45(c) of the Act as violation of the Act could not be established.
 - (ii) The Respondent is fined 0.5% with a Cap of K30, 000.00 of their annual turnover in accordance with Section 48(2) of the Act for breach of Section 48(1) of the Act and in accordance with the

Commission Guidelines for Issuance of Fines, 2019. *(See Appendix 1 for calculation of fine).*

- (iii) The Respondent submits their latest annual books of accounts to the Commission for calculation of the actual fine within 30 (thirty) days of receipt of the Board Decision in accordance with Section 5(d) of the Act.
- (iv) The Respondent removes the disclaimer from their receipts and drafts terms and conditions on refunds and exchanges, which must be submitted to the Commission for review in accordance with Section 5(d) of the Act within ten (10) days of receipt of the Board Decision.
- (v) The Commission conducts a market inquiry which will be used to formulate guidelines for dealing with goods that are damaged by consumers before purchase.

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

Dated this 9th August, 2022



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Chairman

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 Commission Guidelines for Administration of Fines, 2019 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 Guidelines on Fines – September 2019 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 48(1);*

The Commission's review of the case file for the Respondent shows that the Respondent is a first-time offender of this Provision of the Act. As such the fine is calculated as follows:

(d) The base fine of 0.5% is applicable.