CASE FILE NUMBER: CCPC/CON/043/JM

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

BETWEEN

Mr. Peter Sumaili Chitambo	**COMPLAINANT**
AND	
Cell Site Mobile Phones and Accessories	**RESPONDENT**

BEFORE:

Commissioner Chishala Kateka	**-Vice Chairperson**
Commissioner Fredrick Imasiku	**- Member**
Commissioner Chenga Chisha	**- Member**
Commissioner Aubrey Chibumba	**- Member**
Chiti Mulenga (Proxy) Commissioner Georgina Kasapatu	**- 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 5th April, 2016, the Competition and Consumer Protection Commission ("the Commission") received a complaint from Mr. Peter Sumaili Chitambo ("the Complainant") against Cell Site Mobile Phones and Accessories ("the Respondent"). Specifically, the Complainant alleged that on 1st April, 2016, he bought a Samsung Galaxy Pocket cell phone from the Respondent worth K950.00. However, the Complainant alleged that he noticed a disclaimer on the Respondent's terms and conditions on bullet number 10 under Exclusion from warranty coverage which read, *"No Return, Exchange or Refund for phones once bought".*

Legal Contravention and Assessment Tests

~~Legal Contravention~~

It was submitted that

2. Section 5(d) of the Competition and Consumer Protection Act, No. 24 of 2010 (the Act) states that "the functions of the Commission are to investigate unfair trading practices and unfair contract terms and impose such sanctions as may be necessary". The conduct by the Respondent appeared to be in contravention of Section 48(1) of the Act.

3. 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."*

4. *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

5. To prove violation of Section 48 (1) of the Act, the following elements have to be proven;

6. Whether there is an "owner or occupier";

7. Whether there is a "Shop" or "other trading premises";

8. Whether a sign or notice was displayed;

9. Whether there is a sign or notice purported to disclaim any liability or deny any right Mr. Peter Sumaili Chitambo has under the Act";

10. Whether the disclaimer was with respect to any other law;

43

Investigations Conducted

It was submitted that

11. On 12th April, 2016, the Commission sent a Notice of Investigation to the Respondent requesting them to respond to the allegations raised against them. The Notice of Investigation was duly received by the Respondent on the same day.

Findings

The Parties

The Complainant

It was submitted that

12. The Complainant is Mr. Peter Sumaili Chitambo, a resident of Lusaka. He is a holder of National Registration Card Number 66XXXX/XX/1 and his contact Number is 097X XXXXXX. 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"*. Therefore, the Complainant is a consumer because he purchased the Samsung Galaxy Pocket for personal use; with the invoice being issued in his name under the tax invoice number 3249 dated 1st April, 2016.[1]

The Respondent

It was submitted that

13. The Respondent is Cell Site Mobile Phones and Accessories situated at Arcades Shopping Mall – Unit 10, on Great East Road in Lusaka. The Respondent's contact numbers are 0955/0966/0977XXXXXX. The Respondent has the VAT registration No. 10225729 – 13.[2] A search at the Patents and Companies Registration Agency (PACRA) revealed that the Respondent was not registered as a company. The Interpretation and General Provisions Act[3] however, defines a "Person" to include a company or association or body of persons, corporate or incorporate;

[1] Tax Invoice number 3249 dated 1st April, 2016
[2] Tax Invoice number 3249 dated 1st April, 2016
[3] The Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia

14. 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]

15. Therefore, in line with the above definitions, Cell Site Mobile Phones and Accessories though unincorporated is deemed a 'juridical person' that engages in commercial activities and thereby qualifies as an enterprise.

Submissions from Respondent[5]

It was submitted that

16. On 25th April, 2016 the Respondent's Legal Counsel M.L. Mukande & Company submitted that they were requesting for an extension of time within which to respond to the allegations by 21 days as the Counsel retained in the matter was on leave. It was submitted that although the complaint was said to have been made by one Peter Sumaili Chitambo as related the purchase of a Samsung Galaxy Pocket for K950.00 the purported receipt attached was for a Mr. Moses Kabunda relating to Samsung Galaxy J2 costing K3, 500.00. Furthermore, M.L. Mukande & Company submitted that their client was committed to consumer protection and would want to resolve the issues by sitting down with the Commission and finding an amicable resolution to the matter.

Further Submissions from the Respondent[6]

It was submitted that

17. On 18th May, 2016 a Learner Legal Practitioner from M.L. Mukande & Company; Mrs. Lillian S. Nkamba collected a copy of the tax invoice number 3249 dated 1st April, 2016 from the Commission bearing the name of Mr. Peter Sumaili Chitambo to enable them clarify with their records which were showing a Mr. Moses Kabunda relating to Samsung Galaxy J2 costing K3, 500.00. After collecting the copy of the tax invoice in question, Mrs. Nkamba submitted that they would submit their full response to the Notice of Investigations in the following week beginning 23rd May, 2016.

18. However, no further response to the Notice of Investigations was received from M.L. Mukande & Company in the week beginning 23rd May, 2016.

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[4] Competition and Consumer Protection Act No. 24 of 2010
[5] Letter from the Respondent dated 25th April, 2016
[6] Meeting with the Respondent's Respondent's Learner Legal Practitioner from M.L. Mukande & Company dated 18th May, 2016

45

Submissions to the Commission Report

It was submitted that

19. After approval of the Draft Report, the Commission on 7th June, 2016 sent the Report to the Respondent and the Complainant to make further submissions based on the Commission's findings.

Submissions from the Respondent

It was submitted that

20. On 13th June, 2016, the Respondent through their Legal Practitioners M.L. Mukande & Company submitted that their client's company was a limited company trading in phones and other electronics. The Respondent submitted their client's limited warranty terms and conditions. The warranty terms and conditions provided that "*the mobile phone purchased is warranted against the defects in material or workmanship under normal use for the applicable warranty period listed below:*

    i. *The warranty period is three (3) months,*
    ii. *The warranty period commences from date of purchase,*
    iii. *Customers are advised to retain their sales receipts as this will be used to determine the expiry date of the warranty,*
    iv. *If the product becomes defective during the warranty period, Cellsite will at its sole option and without charge for materials or labour repair the product or replace the product with a new product or functionally equivalent product."*

21. The Respondent submitted that according to the terms and conditions of the warranty, if the product became defective during the warranty period, Cellsite would at its sole option and without charge for materials or labour repair the product or replace the product with a new product or functionally equivalent product; the warranty did not affect the consumer's statutory rights or the consumer's rights against the dealer from their purchase or sales agreement; all phones returned on account of defectiveness are subject to a diagnosis by Cellsite before they are repaired or replaced; diagnosis is to be done within 72 hours; and all warranty phones once found to be defective would be repaired or replaced within 21days. The Respondent however submitted that there were exclusions to the warranty coverage and among the exclusions was the clause which stated *"no return, exchange or refund for phones once bought"*.

22. The Respondent submitted that the provisions in the warranty terms and conditions clearly showed that the customer had a right to return defective products within the warranty period; the Respondent had the duty to repair the customer's defective products within the warranty period and the Respondent had an obligation to replace the customer's defective products if not repaired. The Respondent submitted that the exclusion clause did not override a consumer's statutory rights including their right to return a product if any.

23. Further, the Respondent submitted that the *"no return, exchange or refund for phones once bought"* clause referred to phones that were in perfect working condition. The Respondent submitted that there was no universal right to return non-defective goods under the Competition and Consumer Protection Act except where goods were defective and not fit for the purpose they were bought for. The Respondent submitted that the exclusion clause was a fair trading practice in terms of Section 45 of the Competition and Consumer Protection Act. The Respondent submitted that they did not accept return of phones in good working condition because; when a consumer buys a phone, the moment he/ she inserts a sim card, the sim card and the phone create a permanent digital footprint both on the network and internet such that if the consumer commits a crime the police would track the phone's IMEI number, Secondly, the Respondent submitted that all phones came with manufacturer's warranty. This was the warranty that enabled the Respondent to replace defective phones. When a customer returned a defective phone, the Respondent submitted that they replaced it with another one and then sent the defective phone to the manufacturer to have it replaced. However, the manufacturer would not replace a non-defective and fully functional phone. This therefore meant that the Respondent would be stuck with a used phone which could not be sold as a new phone because the seal on the packaging would have been broken.

24. As regards Section 48 of the Act, the Respondent further submitted that the disclaimer did not disclaim any liability or deny any right that a consumer had under the Act. The Respondent submitted that under the Competition and Consumer Protection Act, other than for defective and goods not fit for purpose, there is no *carte blanche* consumer right to return goods which are not defective and are fit for the purpose they are bought. The Respondent submitted that the clause in question refers to phones that do not have any defect at all. There being no right to return non defective and functional goods, they saw no reason why the disclaimer or exclusion clause was in breach of the provisions of the Act.

 47

25. The Respondent submitted that they were willing to find an amicable settlement of this matter. The Respondent further submitted that, on a strictly without prejudice basis, they were willing to remove the exclusion clause complained of and or frame it in more specific terms. As regards the fine, the Respondent submitted that the Commission reconsiders it, taking into account the factors raised[7].

Submissions from the Complainant

It was submitted that

26. There were no submissions to the report from the Complainant.

Relevant Findings

It was submitted that

27. The Commission found that the terms and conditions on bullet number 10 under Exclusion from warranty coverage attached to the tax invoice number 3249 dated 1st April, 2016,[8] had a disclaimer which read, ***"No Return, Exchange or Refund for phones once bought".***

28. The Commission found that the Respondents were willing to find an amicable settlement of this matter and to remove the exclusion clause complained of and or frame it in more specific terms.

Previous cases involving the Respondent

It was submitted that

29. A review of the case file for the Respondent revealed that there were no previous cases against the Respondent. Hence this was the first time the Respondent had been alleged to have engaged in unfair trading practices.

Analysis of Conduct and Observations

It was submitted that

30. Analysis for violation of Section 48 (1) of the Act:

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[7] Letter from the Respondent's Legal Practitioner's M.L Mukande dated 13th June, 2016
[8] Tax Invoice number 3249 dated 1st April, 2016

Whether there is an "Owner" or "Occupier"

It was submitted that

31. Black's Law dictionary 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, the black's law dictionary defines an Occupant, *"as one who has possessory rights in, or control over, certain property or premises"*.[9] The Interpretation and General Provisions Act[10], defines a "Person" to include a company or association or body of persons, corporate or incorporate". Therefore, the Respondent is the owner of the company and is purported to have displayed a disclaimer on bullet number 10 of their terms and conditions under Exclusion from warranty coverage attached to the tax invoice number 3249 dated 1st April, 2016.[11]

Whether there is a trading premise"

It was submitted that

32. In general terms, the trading premise that issued the terms and conditions attached to the tax invoice number 3249 dated 1st April, 2016 is owned by Cell Site Mobile Phones and Accessories. Therefore, there was a trading premise.

Whether a sign or notice was displayed;

It was submitted that

33. The Commission found that the Respondent had displayed the disclaimer of *"No Return, Exchange or Refund for phones once bought"* on bullet number 10 of the terms and conditions under Exclusion from warranty coverage attached to the tax invoice number 3249 dated 1st April, 2016.[12]

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[9] Black's Law Dictionary eighth edition 2004
[10] The Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia
[11] Tax Invoice number 3249 dated 1st April, 2016
[12] Tax Invoice number 3249 dated 1st April, 2016

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

It was submitted that

34. The High Court ruling in **Zambiri Traders Limited Vs the Commission** found that disclaimers were treated as strict liabilities cases in line with Section 48(1) of the Act.[13] The words *"No Return, Exchange or Refund for phones once bought"* displayed on the Respondents terms and conditions purported to the Complainant that they had no option of being redressed once they had paid for any goods or services.

35. The Commission further found that the clause reversed the effect of the terms and conditions of the warranty because there was no qualification that the clause in question applied only to phones that were in good working condition/ order as the clause stood on its own. The Commission found that, it would be expected that if a product was in good working condition, a customer would not have reason to return it to a trader. Therefore, the Commission established that the disclaimer purported to disclaim liability or deny any right to a consumer such as the Complainant.

Board Deliberation

36. Having considered the facts, evidence and submissions in this case, the Board resolved that based on the above stated High Court Ruling, the Respondent was in violation of Section 48(1) of the Act for having displayed a disclaimer on their terms and conditions with words *"No Return, Exchange or Refund for phones once bought"*.

Board Determination

37. The facts and evidence of this case have shown that the Respondent was in violation of Section 48(1) of the Act.

Board Directive

38. The Board hereby directs that:

39. The Respondent removes the disclaimer from the terms and conditions in question.

[13] Zambiri Traders Limited Vs CCPC delivered on 3rd June, 2014

40. The Respondent is fined 0.1% of its total annual turnover with a cap of ZMW 20,000.00 for display of a disclaimer on their terms and conditions and that they are ordered to submit their latest books of accounts so that the Commission determines how much they are liable to pay.

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 17th October, 2016

Kaleka

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Vice Chairperson

Competition and Consumer Protection Commission