

IN THE HIGH COURT FOR ZAMBIA
AT THE DISTRICT REGISTRY

2015/HK/709

HOLDEN AT KITWE

(Civil Jurisdiction)

B E T W E E N:

AFRICA SUPERMARKET LIMITED

APPELLANT

AND

HANDFORD CHAABA
COMPETITION AND CONSUMER
PROTECTION COMMISSION

1ST RESPONDENT
2ND RESPONDENT

Before the Honourable Mr. Justice J. H. Mbuzi

For the Appellant: Mr. W. Kaunda – Messrs William Nyirenda &Co

For the Respondent: N/A

JUDGMENT

Cases referred to:

1. *Consumer Protection Commission vs. Tokyo Vehicles Limited*
2. *Bob Zinka vs. The Attorney General*

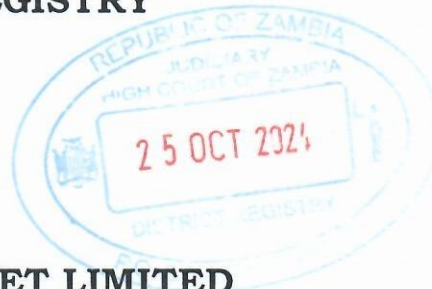
Legislation referred to:

1. *Competition and Consumer Protection Act No. 24 of 2010.*
2. *The Food and Drugs Act.*

1.1 Genesis

1.1 On 20th June, 2014, a decision was rendered by the 2nd Respondent's Board against the Appellant necessitating an appeal to the Competition and Consumer Protection Tribunal (the Tribunal).

1.2 The Tribunal rendered its decision, invariably upholding the decision of the Board. It is against that decision that this appeal



out of time has been lodged via a Notice of Appeal dated 7th November, 2015.

- 1.3 The lodgement of the appeal was concurrent with the application for a stay of the judgment that was granted on 2nd November, 2015. The decision being challenged is hereunder explained.

2.0 Evidence and Decision of the Tribunal

- 2.1 The facts of this case are scarcely controverted. They are that on **9th January, 2014**, the 1st Respondent visited the Appellant supermarket variously known as Shoprite on Cairo Road in Lusaka. He was in a company of one Luyamba Mpanga – a Director Mergers and Monopolies who is a fellow employee in the 2nd Respondent organization.
- 2.2 Upon inspection, the investigator discovered 'Take 5 Mango flavor' drinks on the Appellant's shelves, being sold at a discounted price of K2.99 (originally K7.99). Notably, the expiration date was January 5, 2014. After purchasing one and obtaining a receipt for evidentiary purposes, the issue was reported to Godfrey Chitabe, Administration Manager of the 2nd Respondent.
- 2.3 Upon investigation, the Appellant disclosed to the 2nd Respondent that four units of the disputed beverages were inadvertently displayed. Following prompt notification by the 1st Respondent, the items were immediately withdrawn to safeguard the company's reputation for quality and affordability, consistent with its stringent expiration policies.
- 2.4 Upon these brief facts, the Tribunal held that the Appellant's actions constituted a contravention of Section 52(1) of the Competition and Consumer Protection Act, specifically by offering expired goods for sale, and that the 1st Respondent's purchase for evidentiary purposes did not mitigate this breach.

- 2.5 The tribunal interrogated the words “*sell any goods to customers*” and asserted that same did not mean being sold to ordinary customers who are not in the 1st Respondent’s standing as an employee of the 2nd Respondent. It was emphasised that the object of Section 52(1) was to prevent sale of goods that do not meet mandatory safety standards set by the Zambia Bureau of Standards or other competent body from being sold to consumers. That the expired drink was infact sold to the 1st Respondent.
- 2.6 The Tribunal also interrogated the word “*consumer*” as appears in Section 52(1) and drew its meaning from Section 2 of the Act to hold that the 1st Respondent fitted into that definition as he did not purchase the drink for re-sale or for using it in the production and manufacture of any other goods for sale.
- 2.7 In relation to the argument on the applicability in this case of the provisions of the Food and Drugs Act, as embodied in Section 3(b) Tribunal held that the food was unfit for human consumption. That the said Act sets out the safety standard, in that it gives an un-exhaustive description, and prohibits the sale of unfit food.
- 2.8 The Tribunal however declined to pronounce itself and referred to a criminal count to issues relating to the words “*mandatory safety standards*” and “*competition body*” as appears in Section 52(1) of the Competition and Consumer Protection Act and the Food and Drugs Act respectively, as it held the view that the terms were used in reference to a criminal court since a criminal offence is the one created.
- 2.9 In sum, the Tribunal recommended the prosecution of the Appellant and granted leave to either party to appeal to this Court.
- 3.0 **Grounds of Appeal and Arguments by the Parties**
- 3.1 Distraught by this decision, an appeal has been lodged as earlier stated on the following grounds.

(1) The Tribunal erred in law and fact to hold that the quick settlement of a matter before the Commission by way of admission and payment of fines is not proper when actually the applicable statute accommodate such settlement.

(2) The Commission erred in law and fact by not recognising that the Appellant's act of selling the Subject Product to the 1st Respondent was contrary to its policy and altogether under compulsion of an officer of the 2nd Respondent, one Hanford Chaala, the Commission's Public Relations Officer and the 1st Respondent hereto.

(3) The Commission erred in law and fact for considering the Subject Product as falling under the provisions of the Food and Drugs Act when in fact not and for holding that the Appellant was in violation of section 52(1) of the Competition and Consumer Protection Act as read with section 3(b) and section 4 of the Food and Drugs Act. No evidence was led to the Commission relating to any foreign matter in or rottenness, decompositions or unfitness for human consumption of the Subject Product or at all.

(4) The Commission erred in law and in fact to direct that the Appellant be prosecuted over a complaint brought about by a Senior employee of the commission and who under compulsion of the Appellant bought the Subject Product and originated the process herein hereby consisting the commission to be a judge in its own cause contrary to the rules of natural justice.

- 3.2 Firstly, the grounds of appeal appear to attack the decision of the Commission [Board] which was appealed to the Tribunal. I would want to believe that this was inadvertency on the part of the Appellant and the grounds are in fact in reference to the decision of the Tribunal. I therefore excuse this error.
- 3.3 Ground one of the appeal asserts that the Tribunal committed an error of law in holding that the 2nd Respondent lacked jurisdiction over offenses under Section 52(1). Counsel for the Appellant submits that the Act does not oust the Commission's jurisdiction, but rather prescribes the investigative process, thereby affirming the Commission's authority to adjudicate said offenses.
- 3.4 In opposing this argument Counsel for the Respondents submitted that the Tribunal was on *terra firma* in determining that admission and payment of Fines was not proper in this case. That from the wording of **Section 52(2)** it is only at a point of conviction that the penalty is imposed. That all the 2nd Respondent is able to do is determine, on the investigation conducted and evidence gathered, that there is a case worthy presenting before a court of competent jurisdiction for prosecution in its quest to secure a conviction. In this regard the case of **Consumer Protection Commission vs. Tokyo Vehicles Limited**¹ was cited in aid. It was therefore concluded that the Respondent has no jurisdiction to hear and determine cases of that are criminal in nature but that the settlement of the same can only be made in line with Criminal Procedure Code Cap 88 of Laws of Zambia.
- 3.5 The starting point in determining this ground is by examining the provisions of the Act. Section 52 (1) and (2) posits that:

“(1) A person or an enterprise shall not sell any goods to consumers unless the goods conform to

the mandatory safety standard for the class of goods set by Zambia Bureau of Standards or other relevant competent body.

(2) A person who, or an enterprise which, contravenes sub-section (1) commits an offence and is liable, upon conviction –

(a) to a fine not exceeding five hundred thousand penalty units or to imprisonment for a period not exceeding five years, or to both; and

(b) to pay the Commission, in addition to the penalty stipulated under paragraph (a), a fine not exceeding ten percent of that person's or enterprise's annual turnover."

3.6 The question that arises in this ground is whether by the wording of this provision, the 2nd Respondent or indeed its Board has power to hear and determine criminal matters. In preventing unfair trade practices, the 2nd Respondent is empowered to investigate matters interms of Part VIII of the Act. No where does the Act vest upon it the power to try, convict and sentence an accused. The Act does not also state the court before which a matter under section 52 can be tried. Recourse may therefore be had to section 5 of the CPC which provides that:

“(1) Any offence under any written law, other than the Penal Code, may, when any court is mentioned in that behalf in such law, be tried by such court or by the High Court.

(2) When no court is so mentioned, such offence may, subject to the other provisions of this Code, be tried by the High Court or by any subordinate court.” [emphasis supplied]

- 3.7 The interpretive consequence of the above is that the Subordinate Court possesses original jurisdiction to try and, upon adduction of sufficient evidence, convict and sentence an accused. Conversely, the 2nd Respondent lacks such jurisdiction. Moreover, the High Court, as a court of first instance, is not the appropriate forum for the trial of Section 52 offence, which is not enumerated in the schedule to the Criminal Procedure Code.
- 3.8 I should supplement to emphasize the criminal justice process that all power to prosecute criminal matters in Zambia is vested in the Director of Public Prosecutions (DPP) who however reserves the right to delegate interms of section 82 of the CPC which provides that:

“The Director of Public Prosecutions may order in writing that all or any of the powers vested in him by the last preceding section, by section eighty-eight and by Parts VII and VIII, may be exercised also by the Solicitor-General, the Parliamentary Draftsmen and State Advocates and the exercise of these powers by the Solicitor-General, the Parliamentary Draftsmen and State Advocates shall then operate as if they had been exercised by the Director of Public Prosecutions: Provided that the Director of Public Prosecutions may in writing revoke any order made by him under this section.”

- 3.9 This power, however, is vested in the DPP to prosecute cases in the courts of law to the exclusion of institutions such as the 2nd Respondent which are deprived of criminal jurisdiction. It was therefore upon the 2nd Respondent to recommend the Appellant's prosecution in a court of law which has the power to determine the imposable Fine or the sentence of imprisonment. Given the aforesaid, I hold that the Tribunal's decision to preclude amicable settlement was well-founded, as the offence created by Section 52 constitutes a criminal infraction, thereby divesting the 2nd Respondent of jurisdiction to adjudicate the Appellant's culpability. Ground one is therefore devoid of merit and it fails.
- 3.10 In arguing ground two and four together the Appellant submitted that the 1st Respondent was not an ordinarily consumer interested in consuming the subject beverage, rather he was interested in gathering incrementing evidence against the Appellant. It was also submitted that in gathering this evidence he acted in concurrence with his superior who was present with him as they gathered the said evidence. That this was proved by the fact of buying one of the expired beverages after which he reported the matter. It was further submitted that the 1st Respondent's actions were clearly calculated to deter the Appellant from acting in line with his corporate policy. And therefore, that it was erroneous for the tribunal to fail to recognize this obvious malice exhibited by the 1st Respondent. Counsel submitted that the Appellant was therefore forced to transgress against itself by being made to sell an expired drink and therefore that the 1st Respondent's action was abuse of an office.
- 3.11 The Appellant also submitted that it was not granted a fair hearing as the 2nd Respondent was also part of the investigating authority and determination of the outcome of investigations. It

was further argued in reliance to the case of **Bob Zinka vs. The Attorney General**² that it was erroneous for the 1st Respondent to be a judge in his cause. It was further that the 1st Respondent by virtual of his position was an interested party and biased in the outcome of the process against the Appellant. It was concluded that there was abuse of quasi-judicial process by forcing the Appellant into a situation where it was guilty of breaching its policy.

- 3.12 In opposing ground two and four the Respondents have argued that both grounds are misplaced as they speak to the decision of the 2nd Respondent as opposed to the decision of the Tribunal.
- 3.13 It was contended that when the 1st Respondent and his supervisor went to the Appellant's shop they observed that the said expired beverages were stocked on the shelves and the request to have them removed was not honored. That the 1st Respondent and his supervisor are customers first before being employees of the 2nd Respondent. It was also contended that the real question in this matter is the fact that the drinks were expired and displayed for sale and were in fact sold. That it is not proper to segregate between customers working for the 2nd Respondent and those which do not because a consumer should to be regarded as such regardless of their working relationship with the 2nd Respondent.
- 3.14 In relation to the *Bob Zinka case* cited by the Appellant it was argued that the said authority is not only misplaced but sits out of context as section 5 of Act lists the functions of the 2nd Respondent. It was also argued that in this case the 2nd Respondent conducted its own investigations and found that the Appellant was wanting.
- 3.15 As regards the Appellant's company policy it has been argued that the facts of this matter speak for themselves as the Appellant

displayed for sale expired products in their shop. That it cannot be said therefore that the breach was as the result of the 1st Respondent buying the product and not as the result of the Appellant displaying and actually selling the expired products to the customers.

- 3.16 Now the real is whether the Appellant breached the provisions of the Act thereby violating its own internal policy. The Appellant displayed for sale to unsuspecting customers expired beverages. The 1st Respondent who works for the 2nd Respondent which has the mandate to investigate such violations had occasion to buy one. I do not see how the 1st Respondent abused his authority for buying what was displayed for sale, or to allege that he compelled the Appellant to breach its own corporate policy. The violation by the Appellant was in the display for sale of the expired beverages - whether the buyer be the 1st Respondent or not. Similarly, the question of bias cannot succeed absent proof that the 1st Defendant participated in the decision that was made against the Appellant by the 2nd Respondent which is mandated to gather evidence against erring institutions. According to Halsbury's Laws of England:

"The test applicable in all cases of apparent bias, whether concerned with justices, members of inferior tribunals, jurors or with arbitrators, is whether, having regard to all the relevant circumstances, there is a real possibility of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard with favour, or disfavour, the case of a party to the issue under consideration by him. In considering this question, all the circumstances

which have a bearing on the suggestion that the judge or justice is biased must be considered. The question is whether a fair minded and informed observer, having considered the fact, would conclude that there was a real possibility that the tribunal was biased... It is because the court in the majority of cases does not inquire whether actual bias exists that the maxim that Justice must not only be seen to be done but be seen to be done is applied, and the court gives effect to the maxim by examining all the material available and considering whether there is a real possibility of bias...."[emphasis added]

- 3.17 In the instant case, the 1st Respondent's role ended at gathering evidence presented before a body where the Appellant had an opportunity to be heard and there was nothing wrong with that. He did not participate in the actual decision making. To me, these circumstances have no bearing on the suggestion that the 2nd Defendant was biased in dealing with the Appellant. In any case, the issues involved are for the court to deal with as determined in ground one. This ground equally lacks merit and it fails.
- 3.18 In arguing ground three the Appellant contended that there was no evidence lead as to any foreign matter or rottenness, decomposition or unfitness for human consumption or at all and there was no reference to the Zambia Bureau of Standards which is a body the 2nd Respondent has the duty to consult under Section 52(1) of the Act. It was also argued that the Respondent's own testimony was that there were no tests done on the subject product to prove the contention that the standards set by the relevant statute were violated and thus there was no basis to find

the Appellant guilty under the Food and Drugs Act. In making these arguments section 3(b) and section 4 of the Food and Drugs Act were referred to.

- 3.19 The Respondents opposed the arguments forwarded by the Appellant in the following manner; that the product in question had expired the reason why the Appellant has even put up an argument that by their policy the mango beverage subject of this appeal was not supposed to be on sale because they were able to determine the fact that the said beverage had expired and was therefore not fit for human consumption. It was contended that the packaging of the product speaks for itself as giving the details of when the beverage was manufactured and which day same would expire.
- 3.20 That the argument by the Appellant that no evidence was called is therefore misplaced as what was in issue at that time was to ascertain whether the 2nd Respondent arrived at the position to prosecute the case in a judicial manner. That the product in the question squarely falls within the provisions or both section 52(1) of the Act and section 3(b) of the Food and Drugs Act.
- 3.21 It was argued that a look at Section 52 clearly shows that the said section comprises of two classes of the law being criminal and administrative. It contended that section 52(1) creates the offence while section 52(2) is a penal section qualified by the fact that the penalty is only involved upon conviction which makes it fall under the auspices of criminal law. Counsel for the Respondent further went ahead to demonstrate counsel's understanding 52(4) of the Act.
- 3.22 The Appellant filed heads of argument in reply stating that the 2nd Respondent did not discharge its mandate of referring the issue

to the Zambia Bureau of Standards to give its opinion on the state of the beverage. Hence the burden of proof was not discharged.

3.23 I wish to reproduce Section 52 for the purpose of emphasizing a certain point. It is couched in the following terms:

“(1) A person or an enterprise shall not sell any goods to consumers unless the goods conform to the mandatory safety standard for the class of goods set by Zambia Bureau of Standards or other relevant competent body.

(2) A person who, or an enterprise which, contravenes sub-section (1) commits an offence and is liable, upon conviction –

(a) to a fine not exceeding five hundred thousand penalty units or to imprisonment for a period not exceeding five years, or to both; and

(b) to pay the Commission, in addition to the penalty stipulated under paragraph (a), a fine not exceeding ten percent of that person’s or enterprise’s annual turnover.

(3) A person or an enterprise shall, in addition to the penalty stipulated under sub-section (2), be liable for any loss or damage, including any indirect or consequential loss or damage, arising as a result of –

(a) the lack of conformity of the goods with the relevant standard; or

(b) the defect or dangerous characteristics on account of which the goods have been declared unsafe.

(4) The Commission may, where it has reasonable grounds to believe that a person or an enterprise is selling goods which are unsafe, after consulting with the Zambia Bureau of Standards and such other relevant competent body as it considers appropriate, apply to the Tribunal for an order that –

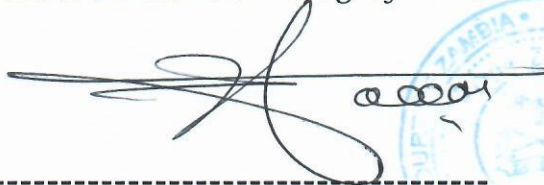
(a) goods of a certain description are unsafe and that the sale of such goods to any consumer is prohibited; or

(b) goods of a certain description already sold to consumers are unsafe and should be recalled from the market by the supplier, who shall meet any expenses of the recall as well as paying compensation to the consumer from whom the goods are recalled.” [emphasis supplied]

3.24 I am in total agreement with counsel for the Appellant that the 2nd Respondent is under obligation to consult the Zambia Bureau of Standards on the safety of goods being sold by a party. In the instant case, however, the undisputed facts deployed reveal that the beverage displayed for sale was already expired, and the consultative requirement would therefore have served no purpose. The Tribunal was therefore on *terra firma* when it held as it did. This ground too is devoid of merit. The net result is that

the appeal entirely fails and is dismissed with costs to the Respondents.

Delivered at Kitwe this 25th day of October, 2024

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by 'H M' and a flourish.

John Harrison Mbuzi
HIGH COURT JUDGE

