

IN THE COMPETITION AND CONSUMER
PROTECTION TRIBUNAL FOR ZAMBIA
HOLDEN AT LUSAKA

2017/CCPT/006/CON

BETWEEN:

THE COMPETITION AND CONSUMER
PROTECTION COMMISSION



APPLICANT

AND

YAMBE DRIVING SCHOOL

RESPONDENT

CORAM: Mr Willie A Mubanga, S.C. (Chairperson), Mrs B M Katongo (Vice Chairperson), Mrs E C Chiyenge (Member), Mr Rocky Sombe (Member) and Mr Chance Kabaghe (Member).

For the Applicant: Mrs M Mulenga - Manager Legal and Corporate Affairs - CCPC appearing with Ms Mtonga - Legal Officer - CCPC.

For the Respondent: Yikona Evans - (Appearing in person)

JUDGMENT

The Applicant, the Competition and Consumer Protection Commission, has applied for a mandatory order against Yambe Driving School, hereafter called "the Respondent". This application arises upon a complaint from Mr Kennedy Jere against the Respondent to investigate allegations of unfair trading against the Respondent.



According to the Notice of Investigation dated 18th October, 2015, the Applicant officially commenced investigations against the Respondent on the following allegations:

“That on the 21st August, 2015, the Applicant received a Complaint from Mr Kennedy Jere referred to as the “Complainant” against the Respondent which appeared to be in the breach of Section 48(1) and 53 (1) of the Competition and Consumer Protection Act No. 24 of 2010 and specifically the Complainant alleged that on 8th July, 2015, he enrolled at the Respondent Driving School for a refresher course. The Complainant alleged that he paid K300-00 for five days. The Complainant alleged that he was unable to undertake the course due to circumstances beyond his control. He further alleged that he sought a refund but the Respondent refused to refund him. The Complainant alleged that he was informed by the Respondent that the tuition fee once paid was not refundable and the Complainant sought to be refunded. The Complaint was summarized in the application in Form IV completed by him. The Applicant also observed a disclaimer on the Respondent’s Form which read “tuition fee once paid is non-refundable” and an unfair contract herein which read “installment on full course would attract the addition of K50-00”.

The Respondent was given 14 days within which to respond to the Notice. The Notice was also accompanied by a letter dated 16th October, 2015,



which essentially summarized the contents of the Notice but added issues relating to the Applicant's mandate to ensure that there is fair trading between traders and consumers in all market segments in Zambia. The Respondent was also informed in the said letter that failure to respond to the Notice is a criminal offence.

According to the record of proceedings on Page 8 the Respondent was served with the Notice and acknowledged its receipt.

In its response to the Notice by letter to the Applicant dated 22nd October, 2015, the Respondent stated the following:

- (1) That the Applicant had in actual fact paid K300-00 tuition fee to the Respondent for a refresher course;
- (2) That the Respondent made arrangements with the Complainant to start training but the Complainant disappeared and only showed up when he went to ask for his refund. The Respondent informed the Complainant it had no money on that particular day as the money it received from students was spent on fuel and other logistics;
- (3) That the Respondent agreed with the Complainant that he goes back to the Respondent later to collect the refund or in the



alternative finds someone who was willing to attend the course and once that person paid that same amount would be refunded to the complainant;

- (4) That surprisingly the complainant never showed up as agreed with the Respondent for purposes of collecting his refund and that the next thing by him was to lodge a complaint with the Applicant.

The complaint filed by the Complainant with the Respondent, was taken to the Applicant's Board for determination.

From the record it is clear that on the 10th November, 2015, the Complainant submitted that he had been refunded K250-00 by way of redress.

After the Respondents Board's deliberations the following were its determination and directive issued on 20th June, 2016, namely;

- (a) That in line with the Respondent's guidelines on fines as a first offender with regard to Section 48(1) the Respondent pays the Applicant a fine of 0.1% of the total annual turnover with a Cap of K20-000 for the display of that disclaimer on the form of fees;



- (b) The Respondent submits its latest annual books of accounts to the Commission for the calculation of the actual fine within 30 (thirty) days of the receipt of the directive;
- (c) The Respondent removes the disclaimer from their form of fees in question or any other invoice with the same;
- (d) The case be closed for the allegation of violation of Section 53(1) of the Act;
- (e) The Respondent be ordered to refund the Complainant the balance of K50-00 as the money was not paid in installments.
- (f) That any party aggrieved with this order or directive may within 30 (thirty) days of receiving this order or directive appeal to the Competition and Consumer Protection Tribunal.

On the 21st February, 2017, the Applicant filed before this Tribunal a Notice of application for a mandatory order that the Applicant having directed that a fine of 0.1% of the annual turnover with a cap of K20,000-00 from the display of a disclaimer in the form of fees and K50-00 refund to the Complainant and that since the issuance of the directive, the Respondent has refused or neglected to comply with the Applicant's Board's Directive. The Notice of application was accompanied by an Affidavit in Support of Notice



sworn by one Royd Banda also filed on 21st February, 2017. The grounds in support of the Notice of application are summarized in paragraphs 4 to 14 of the said affidavit and need not be repeated. The Applicant's Boards directives are also referred to in the Applicant's affidavit earlier summarized as (a) to (f) on Pages 4 to 5 of this Judgment.

According to the contents of paragraphs 15 and 16 of the Applicant's affidavit the Respondent has to date not submitted its books of accounts to enable the Applicant calculate the actual fine, neither has the Respondent refunded the K50-00 to the Complainant. The Applicant also seeks the indulgence of the Tribunal to grant a mandatory order to enable the Applicant be paid its fine of K20,000-00 and K50-00 refund to the Complainant from the Respondent.

The Respondent in response to the Applicant's affidavit filed on 21st February, 2017, stated in its affidavit filed before this Tribunal on 14th March, 2017 and taken out by one Evans Yikona, who described himself as a Local Court Magistrate and the proprietor of Yambe Driving School, deposed, inter alia, as follows:

- “(a) That the contents of the Applicant's affidavit are not accurate in that the Complainant was paid the



K300-00 he claimed and had acknowledged receipt. In support thereof the Respondent exhibited a document marked "EY1" in the Respondent's affidavit;

- (b) That the Complainant had disappeared just after making the payment only to suddenly, show up with a demand and as the refund was being organized he rushed to the Applicant and again demanded a refund which was given to him by the Respondent's Secretary one Mercy Mutale as shown in exhibit "EY1";
- (c) That the Respondent does not admit that it was wrong in anyway and insists that it refunded the Complainant K300-00 and not K250-00 as alleged by the Applicant;
- (d) That the Respondent does not see the justification for the demand of K20,000-00 as Kennedy Jere got his refund in total and the K50-00 being talked about was not retained by the Respondent as alleged;
- (e) That it is just reasonable to close this case and not to threaten or harass the Respondent over a K50-00 which Jere even collected".



The Applicant filed an Affidavit in Reply to the affidavit in opposition to an application for a mandatory order on 5th April, 2017. In the said affidavit the Applicant reiterates;

- (a) That in response to the contents of paragraph 4 of the affidavit in opposition the Applicant maintains that those contents are true;
- (b) that in response to paragraphs 5 and 6 of the affidavit in opposition the Complainant had informed the Applicant that the Respondent had only refunded him K250-00 and that based on that information the Applicant had proceeded to apply for a mandatory order before this Tribunal;
- (c) That refunding the Complainant does not absolve the Respondent of the conduct engaged in which was a violation of Act No. 24 of 2010;
- (d) That the Respondent violated the Act by displaying a disclaimer on their form of fees hence the imposition of a fine as an erring enterprise;
- (e) That the Respondent still has an obligation to pay the fine of 0.1% of its annual turnover with a Cap of K20,000-00 in accordance with the Applicant's guidelines on the issuance of fine and finally;



- (f) That the Respondent has defaulted against the directive issued by the Board to date and now has to be mandated to make good the default within a time to be specified by the Tribunal.

The Complaint filed against the Respondent is premised under S54 of Act No. 24 of 2010 which allows any person to lodge a complaint with the Commission in the prescribed manner if such a person alleges any one of the grounds under S54(a) to (g) of the Act. In the Complaint before this Tribunal the complaint appears to have been anchored on grounds under Sections 54(a), (c), and (f) which provide as follows: "S54 Any person who alleges that a person or an enterprise is

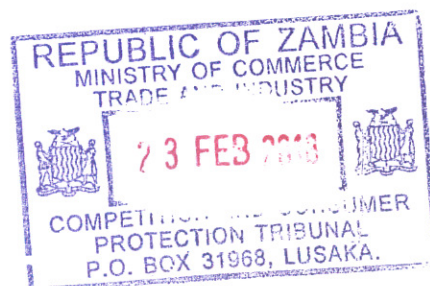
(a) practising unfair trading;

(b).....;

(c) has displayed a disclaimer at any trading premises contrary to the provisions of this Act;

(d).....;

(e).....;



(f) has concluded or is enforcing an unfair contract or term of contract to the detriment of that person;

(g)

may lodge a Complaint with the Commission in the prescribed manner and form”.

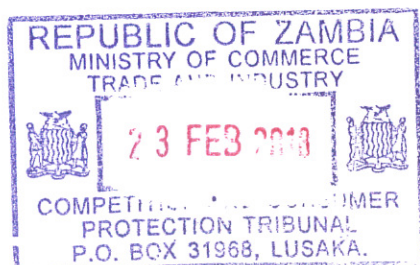
Section 53(1) of the Act provides as follows:

“In a contract between an enterprise and a consumer, the contract or a term of the contract shall be regarded as unfair if it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer”.

(2) An unfair contract or an unfair term of a contract between a consumer and an enterprise shall not be binding.

And S48 provides as follows:

(1) 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.

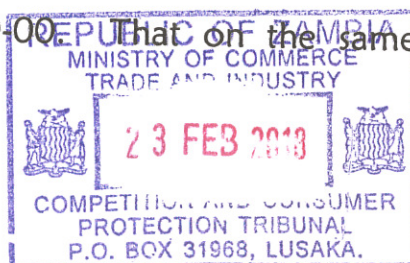


- (2) A person who, or an enterprise which, contravenes subsection (1) is liable to pay the Commission a fine not exceeding ten percent of that person's or enterprise's annual turnover.

We have read the affidavits filed by the parties herein. That is the affidavit in support of an application for a mandatory order, affidavit in opposition to the Application for a mandatory order and the affidavit in Reply to affidavit in opposition to an application for a mandatory order.

The following facts are not in dispute:

- (a) That the Complainant one Kennedy Jere had filed a Complaint with the Applicant;
- (b) That the Complainant had enrolled with the Respondent for a refresher driving course in Kabwe and that he paid K300-00 for a period of 5 days. Exhibit "RB1" shows a receipt issued by the Respondent in the sum of K300-00 in the name of Kennedy Jere and dated 8th July, 2015;
- (c) There is also exhibit "RB2" which shows a document relating to fees charged in this case refresher course for 5 days which were charged at K300-00. That on the same exhibit under

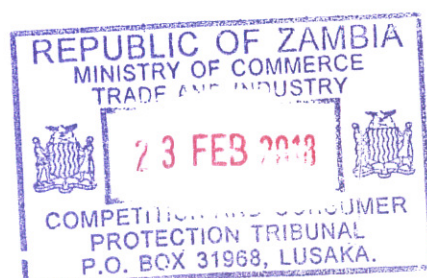


'Conditions' is provided that: "tuition fee once paid is non refundable" and that "installments on full course will attract the addition of K50-00;

(d) That the Complainant despite paying the fees did not show up meaning that he did not undergo the refresher course. It is also clear that the Complainant was only refunded K250-00 leaving a balance of K50-00. That on the 10th November, 2015 according to the Applicant's affidavit the Complainant had informed the Applicant that he had been refunded K250-00 by the Respondent. This was not disputed by the Respondent in its affidavit;

(e) It is also clear that the Respondent despite being directed to submit its books of accounts to enable the Applicant calculate the actual fine did not do so and that the Respondent has to date not refunded the Complainant the K50-00.

There is no evidence given by the Respondent that the K50-00 that the Respondent alleges was collected by the Complainant in paragraph 9 of its affidavit was in actual fact collected by the Complainant.



We are of the view that exhibit "EY1" in the Respondent's affidavit document cannot and does not support the allegation by the Respondent that the Complainant was refunded the K300-00.

In exhibit "EY1" the signature of the receiver of the money though the space is provided for it does not appear. The only items shown on that document are "receipt No. 269" and "the amount of K300-00" and in the middle of the document the word "Refunded." At the bottom of exhibit "EY1" there are also some entries including a signature supposedly appended on 30th October, 2015, it is not clear whose signature that is. There is no evidence that it is the Complainant's. We are satisfied that on record there is no evidence that K50-00 was refunded to the Complainant. We are of the view that the condition stated in exhibit "RB2" to the effect that "installment on full course will attract the addition of K50-00" is the reason for the non refund of the K50-00 and that is why in our view the Respondent withheld that amount to date so as to provide for "the attraction of the addition of K50-00".

We are in agreement with the Applicant's argument in paragraph 8 of its affidavit in Reply that the act of refunding the Complainant let alone part refund does not absolve the Respondent of the breach of Sections 48(1) and 53(1) of Act No. 24 of 2010. This is because the breach of Section 48(1) would have already taken place, the words used in Section 48(1) are "shall



not cause to be displayed.....” which in itself means strict liability. Equally the word used in Section 53(1) are “shall,” as follows: “a term of the contract shall be regarded as unfair if it causes a significant imbalance on the parties’ rights and obligations arising under the contract to the detriment of that person”. In our view the withholding of K50-00 by the Respondent was an act exercised to the detriment of the Complainant as he was entitled to the refund of the full K300-00.

We are also in agreement, as deposed in paragraph 9 of the affidavit in Reply, that the Respondent violated the Act by displaying a disclaimer on exhibit “RB2” which is a list of applicable fees. The display of the disclaimer by the Respondent has also not been disputed by the Respondent.

We are of the further view that on the basis of the evidence before us the Respondent did cause to have displayed “exhibit “RB2” which was the Notice that purported to deny any right that the Complainant has under this Act, that is, the right not to be charged an additional K50-00 on the basis of condition 3 laid down in exhibit “RB2”.

We are also of the considered opinion that Section 48(1) has to be read with 54 (a), (c) and (f) which grounds support the provision under 548(1) and 553(1) of the Act.

The acts of the Respondent not only amounted to practising unfair trading but also displaying a disclaimer at its trading premises contrary to the cited provisions of the Act and also imposing an unfair contract or terms or



conditions to the detriment of the Complainant which were the basis of his complaint against the Respondent with the Commission. We are in agreement with the Applicant that on the evidence before us, the said practice attributable to the Respondent was also in violation of S53(1) of the Act which inter alia, provides that a term of contract shall be regarded as unfair if it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer, in this case to the detriment of the Complainant.

Section 53(2) provides that an unfair contract or an unfair term of a contract between a consumer and an enterprise shall not be binding, and we accordingly find that the contract between the Complainant and the Respondent being unfair, was not binding.

We further note that since the decision of the Applicant's Board was delivered on 20th June, 2016, the Respondent, if it was aggrieved would have exercised its right of appeal within 30 days of receiving the order and cannot at this stage raise issues relating to K300-00 having been refunded by it to the Complainant and also alleging that the K50-00 balance was collected by the Complainant without providing proof to that effect.

We are therefore of the opinion that there is no merit in the Respondent's affidavit in opposition and do not find a basis for interference with the Decision of the Applicant's Board made on 20th June, 2016, and are in



agreement with the Applicant's application for a mandatory order against the Respondent.

We therefore order that the Respondent submits its latest annual books of accounts to the Applicant for calculation of the actual fine as decided by the Commission's Board within 30 days as at the date of the Applicant's Decision. And also that the Respondent pays the fine of 0.1% of its annual total turnover with a Cap of K20,000-00 for the display of a disclaimer on the catalogued fees.

The Respondent is also ordered to refund the Complainant the K50-00 which was withheld by it as penalty. We further order that the Applicant shall within thirty days from the date of this Judgment give a report on the execution of our order for submission of the annual books of accounts as well as payment of the fine and refund. Costs are for the Applicant to be agreed and in default of agreement to be assessed by the Tribunal.

A person aggrieved with this Judgment may appeal to the High Court within thirty days.

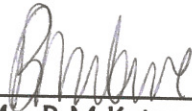
Dated the

23rd



Mr W A Mubanga, SC.
CHAIRPERSON

February
2018



Mrs B M Katongo
VICE CHAIRPERSON

Mrs E C Chiyenge
MEMBER



Mr Rocky Sombe
MEMBER

Mr C Kabaghe
MEMBER

