

IN THE MATTER OF THE COMPETITION AND
CONSUMER PROTECTION TRIBUNAL
HOLDEN AT LUSAKA

2023/CCPT/007/CON

IN THE MATTER OF:



SECTION 49(1) OF THE COMPETITION AND
CONSUMER PROTECTION ACT NO.24 OF 2010

SECTION 64 OF THE COMPETITION AND
CONSUMER PROTECTION ACT NO.24 OF 2010

IN THE MATTER OF:

THE COMPETITION AND CONSUMER
PROTECTION (TRIBUNAL) RULES 2012,
STATUTORY INSTRUMENT NO.37 OF 2012

BETWEEN:

COMPETITION AND CONSUMER PROTECTION APPLICANT
COMMISSION

AND

MOBILE CITY GENERAL DEALERS RESPONDENT

CORAM: Mr. J.N. Sianyabo - Chairperson

Ms. M.B. Muzumbwe - Vice Chairperson

Mr. D. Mulima - Member

Mrs. B.S. Chaila-Sichizya - Member

Mr. B. Tembo - Member

For the Applicant: Ms. M. Mtonga - Manager, legal services

Ms. S. Mafuta - Legal Officer

For the Respondent: Mr. M. Nyendwa - Customer services Manager

Mr. P. Kakula - Technician

JUDGMENT

LEGISLATION REFERRED TO:

1. Competition and Consumer Protection Act. No.24 of 2010
2. Competition and Consumer Protection (Tribunal) Rules, S.I. No.37 of 2012

OTHER REFERENCES:

1. Garner, B. A. (1968). *Black's Law Dictionary* (4th ed.). St. Paul, Minnesota: West.

Mulima, D., Member delivered the Judgment of the Tribunal

1 INTRODUCTION

1.1 This is a judgment on the application for Mandatory Order (hereinafter “the Application”) brought before the Competition and Consumer Protection Tribunal (hereinafter “the Tribunal”) by the Competition and Consumer Protection Commission (hereinafter “the Applicant”) on 14th May, 2023, pursuant to section 64 of the Competition and Consumer Protection Act No.24 of 2010 (hereinafter “the Act”), and the Competition and Consumer Protection Tribunal Rules, Statutory Instrument No.37 of 2012 (hereinafter “the Rules”). The Applicant alleges that Mobile City General Dealers (hereinafter “the Respondent”) having been found to have breached section 49(1) of the Act, has failed without any reasonable cause to comply with the directives of the Decision of the Board of

Commissioners (hereinafter “the Board”) of the Applicant.

1.2 The Tribunal would also like the parties to note that, while Mr. J.N. Sianyabo, chaired the hearing at the time, he was not part of the members who considered the matter.

2 RELIEFS BEING SOUGHT

2.1 The Applicant seeks the Tribunal to grant it a Mandatory Order compelling the Respondent to comply with the directive of the Board. The directive was that the Respondent should either replace the phone or refund the Complainant the sum of ZMW22,200.00 (Twenty-Two Thousand Two Hundred Zambian Kwacha).

3 BACKGROUND

3.1 The background to the matter is that on 20th December, 2021, the Applicant received a complaint¹ from one Mr. Edward Njamba (hereinafter “the Complainant”), alleging that on 12th January, 2021, he purchased a Samsung Note 20 Ultra mobile phone at the cost of ZMW22,200.00 (Twenty-Two Thousand Two Hundred Zambian Kwacha).

3.2 The Complainant stated that on 30th November, 2021, the liquid crystal display (hereinafter “the LCD”) went dark and the phone could not function at all.

3.3 The Complainant, alleged that on 2nd December, 2021, he informed the Respondent of the problems with the phone. The Complainant further alleged that the Respondent told him that the LCD of the phone was cracked hence the blank

¹ CCPC., *Record of Proceedings* dated 14th May, 2023, p.1
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screen.

- 3.4 The Complainant disputed that the LCD was cracked and therefore, sought an independent opinion from Samsung Service Center (hereinafter “Samsung”) located at East Park Mall. Further, the Complainant alleged that upon Samsung inspecting the phone, it was found that it was the internal components of the phone that were damaged and not the LCD. Furthermore, the Complainant stated that he informed the Respondent of the outcome of the consultations with Samsung. However, the Respondent refused to either fix or refund the Complainant the cost of the phone.
- 3.5 Aggrieved by the refusal of the Respondent to either fix the phone or refund the cost of the phone, the Complainant on 20th December, 2021, sought the intervention of the Applicant, who by way of a Notice of Investigation (hereinafter “NOI”) and accompanying letter dated 28th December, 2021, informed the Respondent of an impending investigation.² Further, the Respondent was advised to respond to the communication within fourteen (14) days of receipt thereof. However, the Respondent did not respond to the documents.
- 3.6 The NOI also drew the Respondent’s attention to its obligations under section 55 of the Act, which reads *inter alia* as follows:

“(4) For the purpose of an investigation under this section, the Commission may, by notice in writing served on any person, require that person to—

² CCPC., *Record of Proceedings*, dated 14th May, 2023, p.5-6

(a) furnish to 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;

(5) A person who, or an enterprise which, contravenes subsection (4) commits an offence and is liable, upon conviction, to a fine not exceeding one hundred thousand penalty units or to imprisonment for a period not exceeding one year, or to both.

3.7 The Respondent, replied to the Applicants NOI by way of a letter dated 5th January, 2022³. The Respondent stated that:

- i) The phone had a one (1) year warrant of software;
- ii) The phone was assessed and found to have a problem with the LCD;
- iii) The Complainant was advised to replace the LCD at a cost of ZMW7,500.00 (Seven Thousand Five Hundred Zambian Kwacha) but he declined; and
- iv) The phone being out of warranty could neither be replaced nor the Complainant refunded.

3.8 As part of the investigation, the Applicant, on 6th January, 2022⁴, sought consultancy services from the University of Zambia, School of Engineering (hereinafter “UNZA”), which rendered its findings in a report dated 26th

³ CCPC., *Record of Proceedings*, dated 14th May, 2023, p.9

⁴ Ibid., pp.12-13

December, 2021⁵. According to the report, the phone was non-functional owing to a faulty engine. The report further stated that the battery could not recharge hence not powering the phone.

4 APPLICANT'S FINDINGS FOLLOWING INVESTIGATION OF THE COMPLAINT

4.1 Sometime in March 2022, upon completion of preliminary investigations into the matter, the Applicant served the Respondent with a Preliminary Report and accompanying letter dated 24th March, 2022⁶, in which it was established that the Respondent failed to honour the conditions of the warranty on the phone. The conduct of the Respondent was in breach of section 49(1) of the Act, which reads as follows:

“A person or an enterprise shall not supply a consumer with goods that are defective, not fit for the purpose for which they are normally used for or for the purpose that the consumer indicated to the enterprise.”

4.2 Further, the Applicant found previous violations of the Act by the Respondent involving a Mr. Josiah Phiri⁷.

5 RESPONDENT'S RESPONSE TO THE PRELIMINARY REPORT

- i) The Respondent replied via an email dated 7th April, 2022, in which it submitted as follows:
 - ii) That the Complainant purchased the phone in January and used it for eleven (11)

⁵ CCPC., *Record of Proceedings* dated 14th May, 2023, pp.14-15

⁶ *Ibid.*, p16-24

⁷ op.cit., p.35

months without any issues;

- iii) That the warranty was for software and not hardware;
- iv) That the Applicant returns the phone for re-examination stating that the phone had been examined by different technicians other than of those in the employ of the Respondent;
- v) That the Complainant had not sought permission from it prior to taking the phone to the Samsung Service Center; and
- vi) That it had LCDs in stock and therefore, wanted access to the phone so that it could test the phone.

6 APPLICANT'S SUBMISSIONS IN REPLY

6.1 The Applicant submitted as follows:

- i) That the Respondent had refused to repair the phone and alleged that the phone had no hardware warranty;
- ii) That it noted the Respondent concerns over the technical report submitted by UNZA; and
- iii) That the phone was evidence in the investigations and could therefore, not be returned to the Respondent.

7 DECISION OF THE BOARD

7.1 Upon assessing the recommendations of the investigator, and in exercise of the powers given it by section 5(d) of the Act, the Board on 9th June, 2022, determined that the Respondent's conduct was in breach of section 49(1) of the Act.

7.2 The Board further directed that,⁸

i. The Respondent gives the Complainant a replacement or a refund of K22,200.00 within ten (10) days of receipt of the Board Decision;

7.3 Furthermore, the Respondent was given the liberty to appeal against any part of the Board directives within thirty (30) days of receipt of the Decision.

7.4 The directives were served on the Respondent by way of letter dated 8th July, 2022⁹, in which the Applicant advised that the full report of the Board Decision would be communicated in due course. Subsequently, on 8th July, 2022¹⁰, the full Board Decision accompanied with a letter of even date, was served on the Respondent.

8 RESPONDENT'S RESPONSE TO THE BOARD DECISION

8.1 Despite the Board's Decision having been served on the Respondent, the Respondent neither made any representations within the required period of thirty (30) days nor acted on the Board's directives.

8.2 In view of the protracted neglect of the directive, on 14th May, 2023, the Applicant filed a Notice of Application for a Mandatory Order, pursuant to section 64 of the Act, which states *inter alia* as follows:

"64. (1) Where the Commission determines that an enterprise has failed, without reasonable cause, to comply with a direction or undertaking, it

⁹ CCPC., *Record of Proceedings* dated 14th May, 2023, p.38

¹⁰ ibid., p.39

may, subject to subsection (2), apply to the Tribunal for a mandatory order requiring the enterprise to make good the default within a time specified in the order.

(2) The Commission shall consider any representations an enterprise wishes to make before making an application under subsection (1)."

9 THE APPLICATION

9.1 The grounds in support of the Notice of Application are contained in paragraphs 5 to 23 of the Affidavit in Support, which shall not be repeated but stated *inter alia* that the Respondent had to date not refunded the Complainant, contrary to the directives of the Board.

9.2 The Tribunal noted that the Respondent did not file any Affidavit in Opposition to the Application

10 APPLICANT'S SUBMISSIONS

10.1 The Applicant's counsel, Ms. S. Mafuta then an employee of the Applicant submitted that she was applying for a Mandatory Order and would rely on the documents that were before the Tribunal, an Affidavit in Support of an Application for a Mandatory Order deponed by one Chisanga Chanda an investigator, in the employ of the Applicant and augmented by oral submissions.

10.2 Counsel for the appellant submitted that the phone was faulty and it was supported by a report generated by an independent party, UNZA. The said report stated that:

- i. The phone was inspected and there were no physical damages to the phone;*
- ii. The phone did not come on after switching [sic];*
- iii. The phone was opened for physical and visual inspection; and*
- iv. The technical assessment stated that the phone had a faulty engine.*

10.3 Counsel submitted that the phone had a warranty of one (1) year. Secondly, the claim by the Complainant was within the warranty period and counsel referred the Tribunal to the warranty agreement in the Records of Proceedings (*hereinafter “ROP”*). Lastly, counsel submitted that the Respondent should have fixed the defects of the phone as per conditions stipulated in the warranty agreement.

10.4 Lastly, Ms. Mafuta submitted that the Respondent did not comply with the directives of the Board, and she prayed that the Tribunal should uphold the decision of the Board.

11 RESPONDENT’S SUBMISSIONS

11.1 Mr. Misheck Ngwenya, an employee for the Respondent submitted that the warranty for phones only covered the Software of the phone and not the Hardware. Therefore, it would not fix the defective LED as it was a hardware problem.

11.2 Mr. Ngwenya further submitted that the Complaint had used the phone for eleven (11) months without any problems. He cast doubt that the phone defects could be attributed to the manufacturer. He submitted that the complaint could have damaged the LCD and the damage is not covered under the warranty.

11.3 Mr. Peter Kakula, a technician in the employ of the Respondent, disputed the findings of the technical report from UNZA. He further submitted that they wanted to re-examine the phone to ascertain the cause of the defects by using a different LCD that the Respondent had at their disposal.

12 APPELLANT'S SUBMISSION'S IN REPLY

12.1 Ms. Mafuta contented that the warranty was valid, and that there were no provisions in the document that restricted coverage to the software only. She further submitted that, the Respondent had new warranty conditions that came into force after purchase of the phone by the Complainant. She stressed that the new conditions could not be applied retrospectively.

12.2 Counsel further submitted that the phone couldn't be released to the Respondent as it was evidence. In addition, she submitted that the Applicant was wary to handover the evidence to the Respondent as it could be tampered or tainted.

13 FAILED EX- CURIA SETTLEMENT

13.1 During the hearing, the parties agreed to attempt to settle the matter outside the Tribunal, failure of which the parties would revert to the Tribunal.

13.2 The Tribunal further directed that the phone be examined by the Respondent in the presence of the Applicants, technicians from UNZA and the Complainant. Ms. Mtonga submitted that CCPC officials, technicians from UNZA and the complainant were barred from entering the Respondent's workshop. The Applicant stated that they could not handover the phone to the Respondent, and allow them to examine

it without their presence. Thus, the settlement process collapsed.

14 CONSIDERATION OF THE MATTER

14.1 The Tribunal considered the evidence before it and the applicable law. The crucial question for the Tribunal, is to ascertain whether or not, the Phone was defective as envisaged by section 49(1) of the Act which reads as follows:

“A person or an enterprise shall not supply a consumer with goods that are defective, not fit for purpose for which they are normally used or for the purpose that the consumer indicated to the person or the enterprise...”

14.2 The Tribunal noted that this a highly technical matter. In this regard, the Tribunal considered, among other things, the evidence by experts on record.

14.3 The expert evidence provided by UNZA was cardinal to resolving this matter before the Tribunal. In summary, the report stated that phone had a defective engine.

14.4 The Tribunal notes that the Respondent, had disputed the experts' evidence from UNZA. Further, the Tribunal had directed that the Phone be re-examined by Respondent in the presence of the Applicant, experts from UNZA and the Complainant. This directive was not carried out by the Respondent. Failure to comply with the directive of this Tribunal is at the Respondent's own peril.

14.5 The evidence on record is that the phone had a defective engine meaning that the Respondent sold a defective product to the Complainant. Black's Law

dictionary defines defective as “*lacking in some particular which is essential to the completeness...*”. The Respondent’s action was therefore, a violation of section 49(1) of the Act.

14.6 The terms of the warranty on page 4, clause 9 in the R.O.P stated that “*defective parts will be replaced free of charge if the fault or defect is reported within the warranty period...*” The phone had a warranty period of twelve (12) months and the defect was reported in the warranty period. The Tribunal noted that the warranty period had not elapsed and the claim by the Complaint was valid. In addition, the Respondent did not fulfil the conditions of the warranty. In this instance, the Respondent did not replace the defective part.

14.7 The Tribunal also notes that the Respondent is not a first offender.

15 CONCLUSION

15.1 In conclusion, it is the Tribunal’s considered view that the Application for a Mandatory Order by the Applicant was rightly before the Tribunal. Further, we find that the Respondent was in breach of section 49(1) of the Act.

16 TRIBUNAL DECISION

16.1 Based on the foregoing, the Tribunal adjudges as follows:

- i. The Application is successful and the Mandatory Order is hereby granted;

16.2 Furthermore, we order that the Respondent gives the Complainant a replacement phone or a refunds ZMW22,200.00 (Twenty-Two Thousand Zambian Kwacha) being the amount the Complainant paid for the phone, within ten (10) days of receipt of this judgment;

16.3 Costs are awarded to the Applicant to be agreed and in default of the agreement, assessed by the Tribunal.

A party aggrieved by this decision of the Tribunal may appeal to the Court of Appeal within thirty (30) days of determination of the matter.

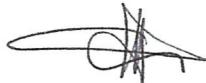
Dated the _____ day of _____ 2025



Ms. M. B. Muzumbwe
VICE CHAIRPERSON



Mr. D. Mulima
MEMBER



Mrs. B. S. Chaila-Sichizya
MEMBER



Mr. B. Tembo
MEMBER