

DLCA

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

2016/CCPT/010/COM

IN THE MATTER OF :

SECTION 48(1) OF THE COMPETITION
AND CONSUMER PROTECTION ACT
No. 24 OF 2010

IN THE MATTER OF:

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

BETWEEN:

CELL SITE MOBILE PHONES AND
ACCESSORIES



APPELLANT

AND

PETER S. CHITAMBO

1ST RESPONDENT

COMPETITION AND CONSUMER PROTECTION
COMMISSION

2ND RESPONDENT

CORAM:

Mr. W. A. Mubanga, SC-Chairperson
Mrs. M.B. Muzumbwe-Katongo-Vice Chairperson
Mrs. E. Chiyenge-Member
Mr. R. Sombe-Member

For the Appellant:

Mr. M.L. Mando, Messrs M.L. Mukande & Company

For the 1st Respondent:

Mr. Peter S. Chitambo (In Person)

For the 2nd Respondent:

Mrs. M. M. Mulenga, Manager-Legal and Corporate
Affairs, Competition and Consumer Protection
Commission
Ms. M. Mtonga, Legal Officer, Competition and
Consumer Protection Commission

JUDGMENT

Legislation referred to-

Competition and Consumer Protection Act No. 24 of 2010

Case Law referred to-

Leader v. Duffery (1888) 13 APP. CAS. 294,

Zambiri Traders Limited v. CCPC 2014/HPC/0011,

The Competition and Consumer Protection Commission v. Zambiri Traders Limited 2012/CCPT/002/CON

ZAMM Imports Limited v. CCPC 2014/CCPT/008/CON

Zambiri Traders Limited v. The Competition and Consumer Protection Commission 2014/HPC/0011

Spar Zambia Limited v. Danny Kaluba and CCPC 2016/CCPT/009/CON

Samuel Miyanda v. Raymond Handahu (1993-1994) ZR 187

Violet Kesenge Bwalya and Others v. ZAMTEL, COMP/70 and 75/2010

Indo Zambia Bank Limited v. Mushaukwa Muhanga, Judgment No.26 of 2009

Dorval v Dorval 2006 SKCA 21

Other references/Works

Definition of Universal by Merriam Webster available at <https://www.merriamwebster.com/dictionary/universal>

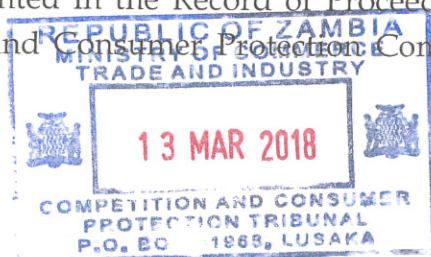
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Your Rights to Return Goods Bought Online – A Scan of the Return Policies of Online Retailers in Australia, Consumer Action Law Centre, December 2011, available at <https://consumeraction.org.au/wp-content/uploads/2012/01/Consumer-guarantees-and-online-retailers-december-2011.pdf>

Lululemon Pays Infringement Notices available at <https://www.accc.gov.au/media-release/lululemon-pays-infringement-notice>

Brief Facts of the Case

The facts of the appeal as presented in the Record of Proceedings (hereinafter the "Record") by the Competition and Consumer Protection Commission (hereinafter



the "2nd Respondent") or the Commission as the context may require are that this appeal is against the decision of the Board of the 2nd Respondent (hereinafter the "Board") which determined, among others, that Cell Site Mobile Phones and Accessories (hereinafter the "Appellant") or the Respondent as the case may require be fined 0.1% of its annual turnover with a cap of ZMW20, 000.00 for display of a disclaimer on their terms and conditions for violation of section 48(1) of the Competition and Consumer Protection Act No. 24 of 2010 (hereinafter "the Act"), and to submit their latest books of accounts so that the Commission determines how much they are liable to pay.

The brief facts of the case are that on 5th April 2016, the Commission received a complaint from Mr. Peter Sumaili Chitambo against Cell Site Mobile Phones and Accessories. 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".

The Appellant appeared to be in violation of Section 48(1) of the Competition and Consumer Protection Act (hereinafter referred to as the "Act") which provides-

48. (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.*

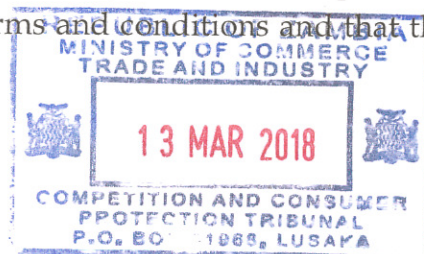
(2) *A person who, or an enterprise which, contravenes subsection (1) is liable to pay the Commission a fine not exceeding ten percent of that person's or enterprise's annual turnover.*

On 12th April, 2016, the Commission sent a Notice of Investigation to the Respondent requesting them to respond to the allegations raised against them.

Perusing through the Decision of the Board, we find that investigations were conducted by the 1st Respondent by way of inquiry through the issuance of a Notice of Investigation which was sent to the Appellant on 12th April, 2016, which Notice of Investigations was duly received by the Appellant

The Board having considered the facts, evidence and submissions in the case, decided that the Respondent (i.e. the Appellant herein)-

- (1) removes the disclaimer from the terms and conditions in question ; and
- (2) be fined 0.1% of its annual turnover with a cap of ZMS 20,000 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.

The decision of the Board dated 17th October, 2016, was communicated to the Appellant by way of a letter dated Thursday 10th November, 2016, and received by the Appellant on 14th November, 2016.

The Appellant being dissatisfied with the Board decision appealed to this Tribunal based on the following grounds:

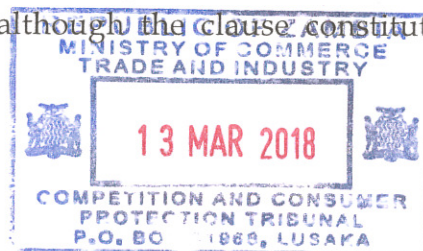
- (1) The Commission misdirected itself both in fact and in law when it found that the Appellant was in violation of section 48(1) of the Act;
- (2) The Commission misdirected itself both in law and in fact when it focused on one clause of the Limited Warranty, terms and conditions instead of reading the Limited Warranty terms conditions, as a whole;
- (3) The Commission misdirected itself in law and fact when it failed to take into consideration or dismissed the Appellant's submission on the special position electronics such as phones occupy on the market; and
- (4) The Commission misdirected itself in law and in fact when it fined the Appellant a fine equivalent to 1% of its annual turnover with a cap of ZMW20, 000.00.

The fourth ground of appeal was added by the Appellant following the grant, by this Tribunal, of leave to amend grounds and Notice of Appeal, on the 27th of March, 2017,

The 1st Respondent did not file a Notice of Grounds in Opposition to Grounds of Appeal.

The 2nd Respondent, in its Amended Notice of Grounds in Opposition to Grounds of Appeal filed on the 27th of April, 2017, submitted that they intended to oppose the whole appeal on the following grounds:

- (1) The Board of Commissioners did not misdirect itself in fact and in law when it found that the Appellant was in violation of section 48(1) of the Act, because the Appellant displayed a disclaimer on their terms and conditions with the words "*No Return, Exchange or Refund for phones once bought*";
- (2) The Board of Commissioners was on firm ground when it focused on one clause of the Limited Warranty, Terms and Conditions in that the subject clause, at Bullet point No. 9 has singular force which would be detrimental to a consumer if enforced, although the clause constitutes but a part of the general exclusion clauses;



- (3) Contrary to the Appellant's assertion in ground three, the Board of Commissioners did take into consideration all the submissions made by the Appellant and the same were included in the Board Decision;
- (4) That contrary to the Appellant's assertion at Ground 4, the 2nd Respondent did not fine the Appellant 1% of their annual turnover but 0.1% of their annual turnover with a cap of K20, 000 well within the confines of the law.

The 2nd Respondent sought the following relief:

- (1) That the Tribunal upholds the decision of the Board dated 20th December, 2016;
- (2) The appeal be dismissed with costs as it lacks merit; and
- (3) Any other relief that the Tribunal deems fit.

The Parties did not call any witnesses, but the Appellant and the 2nd Respondent made submissions as set out below.

Appellant's Submissions

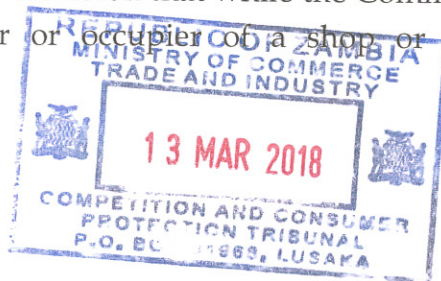
The Appellant submitted with respect to -

- (1) Ground One (**The Commission misdirected itself both in fact and in law when it found that the Appellant was in violation of section 48(1) of the Act**)-that the words used in section 48(1) of the Act are very clear and there is no ambiguity in them. The Appellant further submitted that for one to be captured under section 48(1), it must be shown by the Commission that-
 - (a) the Appellant is an owner or occupier of a shop or trading premises;
 - (b) the Appellant caused to be displayed a sign or notice;
 - (c) the sign or notice purports to disclaim liability or deny a right that the 1st Respondent possesses under the Act or other written law.

The Appellant cited the cases of-

Samuel Miyanda v. Raymond Handahu (1993-1994) ZR 187, Violet Kesenge Bwalya and Others v. ZAMTEL, COMP/70 and 75/2010 and Indo Zambia Bank Limited v. Mushaukwa Muhanga, Judgment No.26 of 2009, which cases spoke to the literal interpretation of words used when they are expressed in terms that are clear-with nothing requiring or suggesting that they be interpreted otherwise.

It was the Appellant's submission that while the Commission showed that the Appellant is an owner or occupier of a shop or trading premises, the



Commission had failed to show that the Appellant caused to be displayed a sign or notice and that the sign or notice purported to disclaim liability or deny a right that the 1st Respondent possesses under the Act or any other written law.

The Appellant further submitted that-

- (a) details contained in a receipt book cannot be said to be on display, and that to extend the meaning of "display" to the terms and conditions on a receipt is to stretch the meaning of the section too far;
 - (b) under the Act, the 1st Respondent did not have the universal right to return goods once bought, and that in each case, the Tribunal has to look at the circumstances of the case. In this vein, the Appellant challenged the 2nd Respondent to show this Tribunal which section of the Act gives a universal right to consumers to return goods once bought. Learned Counsel for the Appellant further submitted that the Appellant gave reasons (pp. 24 to 25 of the Record of Proceedings refers) that the offending clause was not intended to deny consumers their rights but only relate to people who sought to return phones for no reasons at all because such phones become second hands and cannot be returned to the manufacturer for exchange.
 - (c) Bullet point number 14 clearly stipulates that-
This warranty does not affect the consumer's statutory rights or the consumer's rights against the dealer from their purchase or sales agreement-
and that in view of this rider clause, it is beyond reason that the Commission can allege that the Appellant breached the Complainant's statutory rights under the Act.
- (2) **Ground 2 (The Commission misdirected itself both in law and in fact when it focused on one clause of the Limited Warranty, Terms and Conditions instead of reading the Limited Warranty, Terms and Conditions as a whole)**

Learned counsel for the Appellant submitted-

- (a) that the relationship between the 1st Respondent and the Appellant is contractual, and that the terms on the receipt form part of the terms of that contract. In this regard, the Appellant further submitted that the principles of interpreting contracts are well settled-the document must be looked at as a whole. The Appellant cited the case of *Leader v. Duffery (1888) 13 APP. CAS. 294*, in which Lord Halsbury, L.C. stated, *inter alia*, that *...you must, if you can, ascertain what the meaning is of the whole instrument taken as a whole in order to give effect, if it be possible to do so, to the intention of the framer of it.*



The Appellant also submitted that contrary to this principle, the Commission cherry picked one clause from the receipt and found the Appellant liable, and that had the Commission considered the document as a whole, it could have arrived at a different conclusion. The Appellant did not state what this conclusion might have been.

- (b) that according to the terms on the receipt-
 - (i) customers have the right to return defective goods
 - (ii) the Appellant has an obligation to repair defective goods; and
 - (iii) the customer has a right to get a replacement phone if the Appellant fails to fix the defective phone.
- (3) **Ground 3 (No submissions were made in this regard. The Commission misdirected itself in law and in fact when it failed to take into consideration or dismissed the Appellant's submission on the special position electronics such as phones occupy on the market)**
- (4) **Ground 4 (The Commission misdirected itself in law and in fact when it fined the Appellant a fine equivalent to 1% of its annual turnover with a cap of ZMW20, 000.00.)**

The Appellant submitted that in conclusion, the Commission penalised the Appellant up to ZMW 20,000=00, and that this penalty was excessive.

2nd Respondent's Submissions

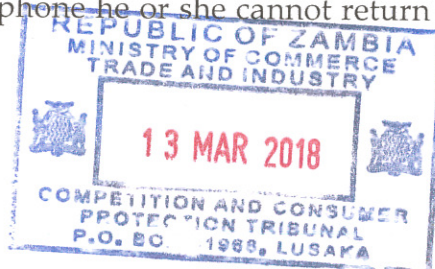
The 2nd Respondent made the following submissions:

(1) Ground 1

The Board of Commissioners did not misdirect itself both in fact and in law when it found that the Appellant was in violation of section 48(1) of the Act because the Appellant displayed a disclaimer on their terms and conditions with the words "No Return, Exchange or Refund for phones once bought". Learned Counsel for the 2nd Respondent referred to pages 3 and 4 of the Record wherein the Appellant's Tax Invoice bearing the said disclaimer was displayed.

Learned Counsel for the 2nd Respondent noted, from the terms and conditions, the three month warranty which commences from the date of purchase, and the provision to the effect that in the event that the product becomes defective, the Appellant will repair the said product or have the product replaced. Learned Counsel submitted that-

- (a) clause 10 of the 'Exclusion from Warranty Coverage' suggests that once a consumer buys a phone he or she cannot return or request a refund in



- the event that the phone is defective, which is in contradiction with the clause in relation to warranty; and
- (b) the said clause 10 is a disclaimer as it negates the right of redress of a consumer, and is prohibited under section 48(1) of the Act.

Learned Counsel for the 2nd Respondent cited, in this regard, the case of Zambiri Traders Limited v. CCPC 2014/HPC/0011, in which the High Court upheld the decision of this Tribunal where it had stated that a *prima facie* case had been established against the Respondent for display of a disclaimer.

(2) **Ground 2**

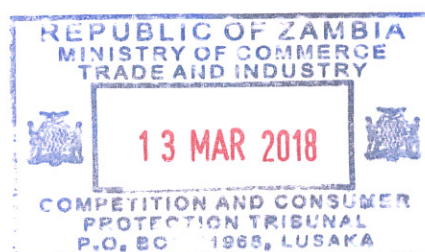
Learned Counsel for the 2nd Respondent submitted that-

- (a) the Board of Commissioners was on firm ground when it focused on one clause of the 'Limited Warranty, Terms and Conditions' as Bullet point No. 9 has singular force which would be detrimental to a consumer if enforced, although the clause constitutes but part of the general exclusion clauses; and
- (b) inasmuch as the Appellant has a clause providing a three month warranty, the said warranty is negated by the clause in contention which makes it categorical that phones once bought cannot be exchanged or returned.

(3) **Ground 3**

Learned Counsel for the 2nd Respondent submitted that the Board of Commissioners did take into consideration the Appellant's submissions and that the same were included in the Board Decision. Counsel referred to the Record, and in particular to-

- (a) the Notice of Investigation sent to the Appellant on 12th April, 2016, pursuant to section 55(4) of the Act, and the Appellant's response thereto requesting 21 days within which to respond to the allegations levelled against them;
- (b) the request made on the 18th of May, 2016, by a representative of the Appellant for a copy of the tax invoice from the 2nd Respondent for purposes of verifying with their records;
- (c) the 2nd Respondent's Preliminary Report which was sent to the Appellant for comment;
- (d) the Appellant's comments dated 13th June, 2016, on the Preliminary Report, and reflected at pages 37 to 39 of the Record; and
- (e) pages 45 to 48 of the Record which show that the Board of Commissioners considered the Appellant's submissions



(4) Ground 4

Learned Counsel for the 2nd Respondent submitted that the Appellant was not fined 1% of its Annual turnover but 0.1% thereof.

In conclusion, Learned Counsel for the 2nd Respondent cited the case of ZAMM Imports Limited v. CCPC 2014/CCPT/008/CON in which this Tribunal defined the word 'display' in the context of section 48(1) of the Act as meaning "to notify inform or send a message to one who is a customer or consumer publicly or privately," and that the word "'display' cannot only be restricted to the public, on a wall, bill board, notice board or public place but also on a receipt..."

Consideration of Case by Tribunal

The Tribunal thanks both Parties for the submissions it made *in casu*. The Tribunal has considered the said submissions, the Record, and legislation and jurisprudence governing consumer rights and protection against disclaimers. The Grounds of Appeal are addressed, in turn, below.

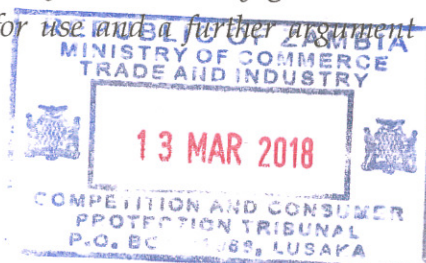
(1) Ground 1 (The Commission misdirected itself both in fact and in law when it found that the Appellant was in violation of section 48(1) of the Act);

The Tribunal has considered the Appellant's submissions made by the Parties and finds as follows:

- (a) with respect to the Appellant's submission that details contained in a receipt book cannot be said to be on display, and that to extend the meaning of "display" to the terms and conditions on a receipt is to stretch the meaning of the section too far-

The question of whether or not a disclaimer on a receipt amounts to a display of the said disclaimer was considered by this Tribunal in the case of ZAMM Imports Limited v. the Competition and Consumer Protection Commission, 2014/CCPT/008/CON in which we held, *inter alia*-

We are of the view that the words used in S48(1) are plain and unambiguous and agree with the Respondent's submissions to that effect. The word "display" simply means to notify, inform or send a message to one who is a customer or consumer publicly or privately. The word "display" can also be stretched to displaying on a consumer's or customer's Receipt. To that extent "display" cannot only be restricted to the public, on a wall, bill board, notice board or public place but also on a receipt;... We are therefore not persuaded by the Appellants argument that the practice employed by the Appellant was such that its customers were at liberty to return any goods that were later found to be defective or unsuitable for use and a further argument that the Complainant



was therefore never denied his right to seek redress after purchasing defective or unsuitable products.

The Tribunal also addressed the question of disclaimers on receipts in the case of *The Competition and Consumer Protection Commission v. Zambiri Traders Limited 2012/CCPT/002/CON*, and found, as a fact, *inter alia*, that the Respondent did display disclaimers on its receipts. The Tribunal notes that this decision was upheld by the High Court in the case of *Zambiri Traders Limited v. The Competition and Consumer Protection Commission 2014/HPC/0011*¹.

The Tribunal having, in previous cases, pronounced itself as to the meaning of "display" in terms of section 48(1) of the Act is not persuaded that the circumstances of the present case warrant a diversion from the meaning that this Tribunal has, in the past, accorded to the word "display", or that that to extend the meaning of "display" to the terms and conditions on a receipt is to stretch the meaning of the section too far, as has been submitted by counsel for the Appellant;

- (b) with respect to the Appellant's submission that under the Act, the 1st Respondent did not have the universal right to return goods once bought, and that in each case, the Tribunal has to look at the circumstances of the case-

The Tribunal considered the submissions of Learned counsels for the Appellant and the 2nd Respondent. In order to provide greater coherence to the Appellant's submissions in this regard, the Tribunal considered the use, by Learned counsel for the Appellant of the words "universal" in relation to the right, of consumers, to return goods once bought. The Tribunal found that "universal" means -

- (i) *including or covering all or a whole collectively or distributively without limit or exception; especially : available equitably to all members of a society*²; or
- (ii) *having relation to the whole or an entirety; pertaining to all without exception; a term more extensive than "general," which latter may admit of exceptions*³.

¹ Delivered on 3rd June, 2014

² Definition of Universal by Merriam Webster available at <https://www.merriam-webster.com/dictionary/universal> visited on 12/03/2018 at 07:23 hours



On the basis of the meanings of the word “universal” rendered above, the Appellant, in effect, submitted that the Act does not provide to all without exception, the right to a refund.

The Tribunal, in order to establish the veracity or otherwise of this submission considered the provisions of the Act and found that the right to a refund is set out in section 49(1) of the Act, read together with section 49(3) of the Act which provide, respectively, as follows:

49. (1) 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 or for the purpose that the consumer indicated to the person or the enterprise.

(3) A person who, or an enterprise which, contravenes subsection (1), shall

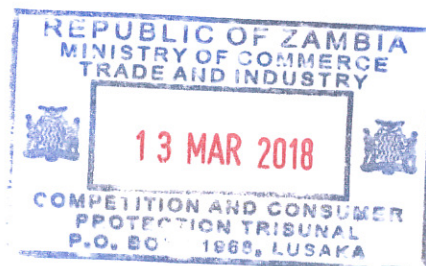
- (a) within seven days of the supply of the goods concerned, refund the consumer the price paid for the goods; or*
- (b) if practicable and if the consumer so chooses, replace the goods with goods which are free from defect and are fit for the purpose for which they are normally used or the purpose that the consumer indicated to the person or the enterprise.*

Clearly, the right to a refund is limited to a consumer who have been supplied *with goods that are defective, not fit for the purpose for which they are normally used or for the purpose that the consumer indicated to the person or the enterprise.*

To this extent, the Tribunal agrees with the submissions of Learned Counsel for the Appellant that the Act does not accord consumers a universal right to a refund.

- (c) with respect to the Appellant’s submission that the offending clause was not intended emphasis to deny consumers their rights but only relate to people who sought to return phones for no reasons at all because such phones become second hands and cannot be returned to the manufacturer for exchange [Emphasis ours]-

³ “What is UNIVERSAL?” The Law Dictionary-Featuring Black’s Law Dictionary Free Online Legal Dictionary 2nd Ed, available at <https://thelawdictionary.org/recommend/> visited on 12/03/2018 at 07:26 hours



The Tribunal notes that the Appellant's, in effect, submitted that it lacked the intention (*mens rea*) to deny consumers their rights, and that the disclaimer only relates to people who sought to return phones for no reasons at all.

The question then to be determined, in this regard, is whether *mens rea* or guilty mind is an element of section 48(1) of the Act.

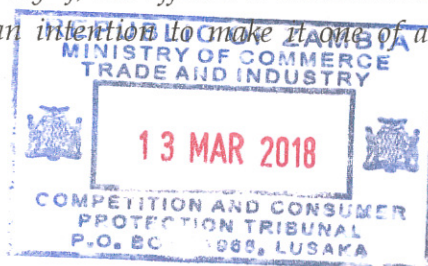
Does section 48(1) of the Act require the element of *mens rea* or guilty mind?

A perusal of section 48(1) of the Act shows that the section does not require *mens rea* or guilty mind. This is evident from the absence of the words "knowingly", "intentionally" or "with intent to" which words are usually used by our legislative draftspersons to connote the requirement of *mens rea* or guilty mind, as in the case of section 37 of the Act which provides-

37. An enterprise which ***intentionally or negligently*** –
- (a) implements a merger that is reviewable by the Commission without the approval of the Commission;
 - (b) implements a merger that is rejected by the Commission;
or
 - (c) fails to comply with conditions stated in a determination or with undertakings given as a condition of a merger approval;
- commits an offence and is liable to a fine not exceeding ten percent of its annual turnover.[Emphasis ours]

This Tribunal extensively considered the question of whether the element of *mens rea* was required with respect to section 51(1) in the case of *Spar Zambia Limited v. Danny Kaluba and CCPC 2016/CCPT/009/CON*. In that case, this Honourable Tribunal cited the case of *Chitambala Ntumba v The Queen (1963-1964) Z. AND N.R.L.R. 132*, in which the learned Judge Charles in concluding his judgment stated-

"It follows, in my judgment, that the rule relating to mens rea as an element of a statutory offence is this: In the absence of express provision for the offence containing a mental element, it is presumed that the legislature intended that the offence can only be committed by persons with knowledge of the existence or occurrence of the facts or circumstances constituting it. That presumption may be negatived expressly or impliedly. It is negatived impliedly if, but only if, the offence is created in such terms and context as clearly manifest an intention to make it one of absolute liability, or if the



substantial suppression of the mischief at which the offence is directed would not be achieved unless the offence was one of absolute liability.

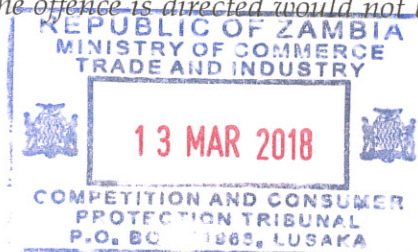
*In determining whether absolute liability is necessary to achieve a substantial suppression of the mischief at which the offence is directed regard is to be had to the nature of the offence: to the nature of the mischief to which the offence is directed: to "knowledge" covering actual knowledge, correct belief and deliberate ignorance but not careless ignorance (see as to that, *Nkoloso v. The Queen* H.P.A. 12763); to the burden of proving knowledge often being lightened by the accused having the burden of adducing evidence of ignorance, as his state of mind is a matter peculiarly within his own knowledge; and to the extent to which the ignorant are likely to indulge in the mischief and defeat its suppression. Even when necessity is revealed for construing the offence as covering the carelessly ignorant, the necessity may not extend to including the ignorant without fault within the scope of the offence. In that case the provision creating the offence is to be construed as if it contained the words "knowing of or with reason to believe" in respect of the facts constituting the offence."*

He set out three classes of statutes in which the presumption has been found to have been negative as-

- (1) *those by which the legislature has seen fit, in the public interest, to prohibit under penalty acts which are not criminal in themselves;*
- (2) *those prohibiting under penalty acts which amount to a public nuisance; and*
- (3) *those allowing proceedings in criminal form as a summary mode of enforcing civil rights.*

This Tribunal further noted, in the Spar Case, that-

*"In this appeal, however, we are not dealing with a criminal offence but a regulatory offence which is penal in nature. Indeed, neither the 2nd Respondent nor this Tribunal has the jurisdiction to adjudicate on criminal offences in the Competition and Consumer Protection Act. It is firmly established, as guided by the *Sherras v. De Rutzen* case and subsequent case law, that (regulatory or public welfare) offences by which the legislature has seen fit, in the public interest, to prohibit under penalty acts which are not criminal in themselves, do not carry the common law presumption of the requirement of mens rea, if the offence is created in such terms and context as clearly manifest an intention to make it one of absolute liability. One way in which this legislative intention is implied is if the substantial suppression of the mischief at which the offence is directed would not be achieved unless the*



offence was one of absolute liability. Other factors have been cited as the gravity of the penalty.

This Tribunal, in the case before us, in determining whether the offence set out in section 48(1) is one of strict liability as opposed to criminal liability, also considered the public policy behind the prohibition of disclaimers. The Tribunal finds that in part, the public policy can simply be stated as found in the title of the Act itself and that of Part VII – mainly “Competition and Consumer Protection”. Specifically, section 48(1) is intended to correct the misconception that consumers do not have the right to return substandard or defective goods or demand for remedies in case of defective or imperfect service because of the "No Return, No Exchange" notice in the receipts or anywhere in a shop or other trading premises.⁴ The Tribunal also finds that the provision is intended to ensure consumer rights and guarantees.⁵ This is evident from the provisions of section 48(1) of the Act which sets out in part-

48. (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 ... deny any right that a consumer has under this Act or any other written law.

The Tribunal notes that Consumer Guarantees are legal protections for consumers buying goods or services. They provide a consumer with rights when the consumer buys goods or services, by guaranteeing the goods or services will not be faulty or unsafe, and will do what the consumer reasonably expect them to do.

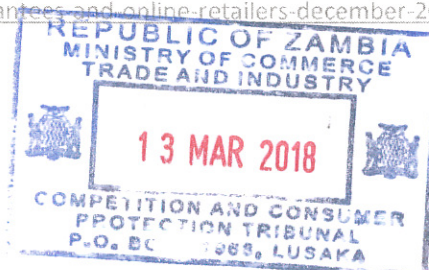
Some guarantees when a consumer purchases goods are:

- (i) they must be of acceptable quality, meaning they are safe (for intended or predictable uses) and that they durable and not faulty;
- (ii) if the consumer has told the seller what the consumer plans to use the goods for, or if the seller has told the consumer that the goods will do a certain thing, they must be able to be used that way;
- (iii) that goods must match their description (if the goods have been purchased based on a description from the seller);

⁴ *Your Rights to Return Goods Bought Online—A Scan of the Return Policies of Online Retailers in Australia*, Consumer Action Law Centre, December 2011, available at <https://consumeraction.org.au/wp-content/uploads/2012/01/Consumer-guarantees-and-online-retailers-december-2011.pdf>

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⁵ *Ibid*



- (iv) the manufacturer of the goods must take steps to ensure that repairs and spare parts are available for a reasonable time after the purchase; and
- (v) if the manufacturer or seller has given guarantees in addition to a consumer's rights under the law (for example a 'lifetime guarantee'), they must honour those guarantees.

Consumer guarantees akin to those listed above are to be found, *inter alia*, in section 49 (1) of the Act which provides as follows:

49. (1) 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 or for the purpose that the consumer indicated to the person or the enterprise.

The Tribunal further finds that some of the main guarantees when a consumer purchases services are-

- (i) services must be carried out with the care and skill a consumer would expect; and
- (ii) services must be carried out within a reasonable time.⁶

Similar consumer guarantees are to be found in section 49(5) of the Act which provides-

(5) A person or an enterprise shall supply a service to a consumer with reasonable care and skill or within a reasonable time or, if a specific time was agreed, within a reasonable period around the agreed time.

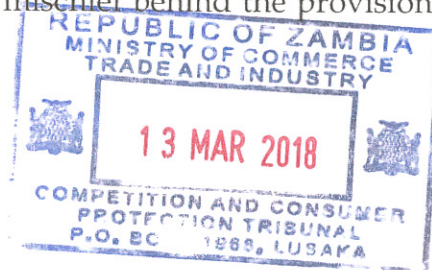
Evidently, consumer guarantees confer upon consumers the right to-

- (i) the protection of the interests of the consumer, and also promote the consumer's general welfare;
- (ii) protection against hazards to health and safety;
- (iii) protection against deceptive, unfair and unconscionable acts and practices by sellers; and
- (iv) redress.

Conversely, consumer guarantees establish standards of conduct for business and industry.

Furthermore, this Tribunal is of the view that the said public policy and the suppression of the mischief behind the provision would be defeated

⁶ *Ibid*



if the offence created by section 48(1) of the Act was not one of absolute liability because implementation of the requirement of the law is exclusively a responsibility of the Appellant and the 2nd Respondent is not privy to the processes by which the Appellant secures adherence to the law. Whether or not the act in issue was committed deliberately, by negligence or honest mistake despite all diligent efforts are matters within the exclusive knowledge of the Appellant, and requiring the 2nd Respondent to prove a guilty intention on the part or a supplier of consumer goods and services in the position of the Appellant would make prosecution of such offences almost impossible. This would, inevitably, defeat the suppression of the mischief.

On the basis of the foregoing, the Tribunal finds as a fact that section 48(1) of the Act is one of strict liability, intended to prevent sellers from deceiving consumers into believing that they cannot return or exchange the goods or avail of other remedies in case of hidden faults or defects, or any charge not known to consumers. Sellers are thus obliged to honour their implied warranties and grant corresponding remedies to consumers.

The Tribunal also considered the rendering of Bullet point 15 which provides *“No Return, Exchange or Refund for phones once bought”*. The Tribunal finds as a fact that a literal interpretation of the Bullet point is that it applies without distinction. That is to say, the Bullet point entails that there can be no return, exchange or refund, in any circumstance, for phones once bought- even when there is a problem with the goods like a defect or lack of due care and skill. The Tribunal is of the view that had the Appellant intended Bullet point number 15 to apply only to people who sought to return phones for no reason at all, the Appellant would have expressed the content of the Bullet point to reflect that fact. In the case of Lululemon Athletica Australia Pty Ltd. (hereinafter *“Lululemon”*), from 1 May 2017 to 24 May 2017, Lululemon listed sale items on its website under the heading *“We Made Too Much”*. The web page read *“We made a little extra – don’t be shy, help yourself. It’s yours for keeps so no returns and no exchanges”*. The Australian Competition and Consumer Commission (hereinafter *“the ACCC”*) stated that, by this statement, Lululemon represented that consumers were not entitled to return and obtain a refund for, or exchange, these products under any circumstances.⁷

⁷ *“Lululemon Pays Infringement Notices”* available at



Lululemon was fined penalties totalling \$32,400 following the ACCC issuing three infringement notices for alleged false or misleading representations about consumer guarantee rights.

Even if *mens rea* was a requirement, the Tribunal finds that because the provision, in and of itself, is crafted so as to exclude returns, exchanges, or refunds in all circumstances without exception. This fact would, in itself, impute, to the Appellant, *mens rea* assuming that the ingredient had been required.

On account of the foregoing, the Tribunal is not persuaded by the Appellant's submission that the purported offending clause was intended to relate only to people who sought to return phones for no reason at all.

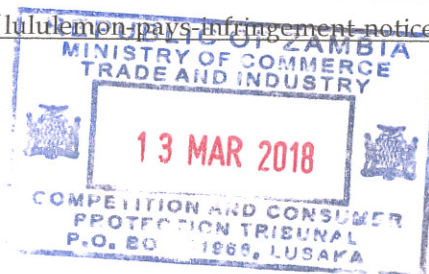
Accordingly, the Tribunal finds that the requirement of intention or guilty mind as inferred by the Appellant cannot be sustained and further that even assuming that the Tribunal had concluded that *mens era* was a requirement this would be imputed by the language of the bullet point in issue.

- (d) with respect to the Appellant's submission that Bullet point number 14 clearly stipulates that-

This warranty does not affect the consumer's statutory rights or the consumer's rights against the dealer from their purchase or sales agreement-

and that in view of this rider clause, it is beyond reason that the Commission can allege that the Appellant breached the Complainant's statutory rights under the Act-

The Tribunal, in considering, as a whole, the "Limited Warranty, Terms and Conditions" displayed on the reverse of the Appellant's receipt (page 4 of the Record refers) considered the character of warranties on the one hand, and terms and conditions of contract, on the other hand. This was intended to determine the import of Bullet point 14, the extent or scope of its application, and to establish whether this "rider clause", to borrow the language of the Appellant, negated the disclaimer in Bullet point number 15 which provides, "No Return, Exchange or Refund for phones once bought", and which lies at the centre of this Appeal.



The Tribunal found that a warranty is a written or verbal promise which a seller or manufacturer makes about their goods and services. It implies a formal assurance given to the customer about the truth of the state of the product are true and declares that the manufacturer will be responsible for the repair or replacement, if found defective.

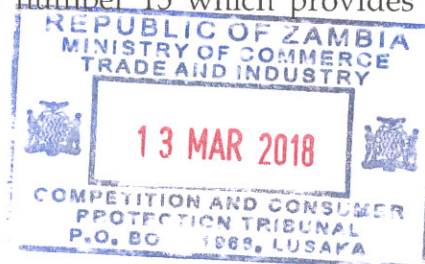
Generally, a Return and Refund Policy constitutes terms which make the conditions of a purchase clear. It gives consumers an idea of what to expect and helps them assess the risk of purchasing a product and a "No Return, No Refund Policy" normally allows a user to cancel the service but there are no refunds given to consumer for previous use. Return and Refund Policies also make purchases more likely in the sense that. If a customer considers a new item, they want to purchase it risk-free in case it does not work out for the customer.

From a perusal of Bullet point number 14 it is evident that, that Bullet Point relates, or applies, to those provisions of the Limited Warranty, Terms and Conditions of the Appellant that constitute, or fall within the category of warranties, and not to provisions that constitute the Terms and Conditions of the Appellant. That is to say, the wording of Bullet point number 14 entails that any provision of the Limited Warranty, Terms and Conditions of the Appellant that by its very character constitutes a warranty does not, among others, diminish the rights of the consumer. The Tribunal finds that on account of the foregoing, and considering the latin maxim of interpretation *expressio unius est exclusio alterius* which means "... to express one thing is to exclude another"⁸, that the Bullet point cannot be extended to apply to Bullet point number 15 which is not a warranty but a term of the contract. In the view of this Tribunal, had the Appellant intended the Bullet point to apply to terms and conditions as well, the provision would have borne the following or other similar wording-

This limited warranty, and the terms and conditions set out herein, do not affect the consumer's statutory rights or the consumer's rights against the dealer from their purchase or sales agreement.

Even if it was true, as submitted by Learned counsel for the Appellant, that Bullet point number 14 entails that the consumer's statutory, or consumer, rights are not affected, the Tribunal finds that on account of the rendering of Bullet point number 15 which provides "No Return,

⁸ Dorval v Dorval 2006 SKCA 21, per Justice Cameron



Exchange or Refund for phones once bought”, Bullet point number 15 when read together with the other warranties and terms and conditions of contract brings to nought, or negates, the other warranties and terms and conditions of contract-akin to multiplying a whole figure by zero. That is to say that what the Appellant, with the one hand, accords to the consumer through the Limited Warranty, Terms and Conditions, it takes away entirely with the other. This, in effect, misleads or deceives consumers into believing that they cannot return or exchange the goods or have recourse to other remedies in case of hidden faults or defects, unknown to them. This, the Tribunal finds, is what the legislators sought to prevent when they proscribed the display of disclaimers in section 48(1) of the Act.

On the basis of the foregoing, the Tribunal is not persuaded by the Appellant’s argument that in view of Bullet point number 14, (the ‘rider clause’), it is beyond reason that the Commission can allege that the Appellant breached the Complainant’s statutory rights under the Act.

This ground of appeal must fail and is, therefore, dismissed.

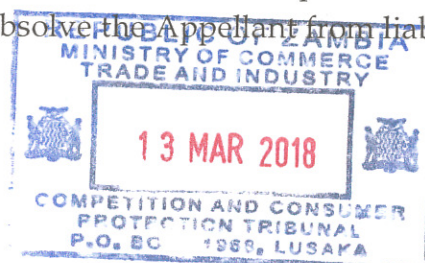
(2) Ground 2

The Tribunal considered the submissions of both parties and finds as follows:

- (a) with respect to the Appellant’s submission that the relationship between the 1st Respondent and the Appellant is contractual, that the terms on the receipt form part of the terms of that contract, that the principles of interpreting contracts require that the document must be looked at as a whole so as to give effect to the intention of the framer of it, that contrary to this principle, the Commission cherry picked one clause from the receipt and found the Appellant liable, and that had the Commission considered the document as a whole, it could have arrived at a different conclusion.

The Tribunal finds that the import of the Appellant’s submission is that the perusal, by the Commission, of the whole document would have laid bare the intention of the Appellant.

Accordingly, the question to be determined by this Tribunal is “will the perusal of the entire content of the Limited Warranty, Terms and Conditions displayed behind the receipt of the Appellant reveal an intention that will absolve the Appellant from liability for displaying the



words “No Return, Exchange or Refund for phones once bought” in Bullet point 15 of the said Limited Warranty, Terms and Conditions?”

The Tribunal finds that because the offence under section 48(1) of the Act is one of strict liability, which as such does not require *mens rea*, a perusal of the entire content of the Limited Warranty, Terms and Conditions so as to establish or give effect to the intention of the Appellant would be an exercise in futility, as the nature of the content of Bullet point number 15 is such that it falls within the category of disclaimers whose display is proscribed by section 48(1) of the Act.

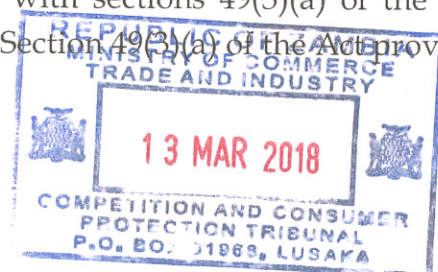
Accordingly, the Tribunal finds that the Appellant’s submissions cannot be sustained.

- (b) with respect to the Appellant’s submission that according to the terms on the receipt-
- (i) customers have the right to return defective goods;
 - (ii) the Appellant has an obligation to repair defective goods; and
 - (iii) the customer has a right to get a replacement phone if the Appellant fails to fix the defective phone.

The Tribunal finds from a perusal of the Limited Warranty, Terms and Conditions that while it is manifest that customers have the right to return defective goods, that the Appellant has an obligation to repair defective goods, and the customer has a right to get a replacement phone if the Appellant fails to fix the defective phone, the return, by the customer, of a defective phone does not permit a refund of the price paid by the consumer for the defective phone. This is evident from bullet points 16 and 18 of the Limited Warranty, Terms and Conditions which provide, respectively, as follows:

- *All Phones on warranty brought back on account of defectiveness will be subjected to a diagnosis by CellSite before they are repaired or replaced; and*
- *All warranty phones once found to be defective will be repaired or replaced within 21 days.*

These bullet points manifestly exclude the right accorded to a consumer by the Act to seek redress in the form of a refund of the price paid by the consumer for defective goods. This exclusion of the right to a refund is in flagrant conflict with sections 49(3)(a) of the Act as read with section 49(1) of the Act. Section 49(3)(a) of the Act provides-



- (3) *A person who, or an enterprise which, contravenes subsection (1), shall*
- (a) *within seven days of the supply of the goods concerned, refund the consumer the price paid for the goods;...*

Section 49(1) proscribes the supply, of consumers, with goods that are defective, not fit for the purpose for which they are normally used or for the purpose that the consumer indicated to the person or the enterprise.

However, the Tribunal finds that notwithstanding that the rights of a customer to return and replacement have been provided by the Appellant in the Limited Warranty, Terms and Conditions, on account of the disclaimer set out in Bullet point number 15 which provides *No Return, Exchange or Refund for phones once bought* , the said rights are negated.

The Tribunal is therefore, not persuaded that as per the Appellant's Limited Warranty, Terms and Conditions-

- (i) customers have the right to return defective goods;
- (ii) the Appellant has an obligation to repair defective goods; and
- (iii) the customer has a right to get a replacement phone if the Appellant fails to fix the defective phone.

This ground of appeal must fail and is, therefore, dismissed.

(3) Ground 3

The Tribunal notes that while reflected as a Ground of Appeal in its submissions, the Appellant did not make any submissions before this Tribunal on how the Commission misdirected itself in this regard. Rather, the submissions made the Appellant under this Ground pertain to Ground 4, and will, therefore, be dealt with under that head.

Accordingly, the Tribunal will not tax itself by making unfounded suppositions as to the nature of what would have been the Appellant's submissions.



This ground of appeal, on account of this technicality, i.e. the absence of submissions in support thereof, must fail and is therefore, dismissed.

(4) Ground 4

The Appellant submitted that in conclusion, the Commission penalised the Appellant up to ZMW 20,000=00, and that this penalty was excessive. The Tribunal notes that the fine imposed by the Commission on the Appellant was 0.1% of its annual turnover, and not 1% as submitted by the Appellant. The Tribunal further notes that this is in line that the fine of 0.1% of annual turnover is in line with table 2 of the 2nd Respondent's guidelines for issuance of 5 its 2014. The Tribunal also notes that Appellant has not, in aid of, or to buttress, its submission, provided this Tribunal with its books of accounts so as to enable the Tribunal objectively translate the implication, in terms of monetary value, of the fine. Consequently, the Appellant has rendered it impossible for the Tribunal to address the question of the excessiveness or otherwise of the penalty.

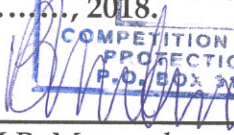
That being the case, this ground of appeal must also fail and is therefore, dismissed.

On the whole, the Tribunal does not find any reason to upset the Decision of the Board of the 2nd Respondent. This Appeal is, therefore, dismissed with costs to the 1st and 2nd Respondents to be taxed in default of agreement.

Dated at Lusaka thisday of, 2018.




Mr. W. A. Mubanga, SC


Mrs. M.B. Muzumbwe-Katongo


Mrs. E. Chiyenge


Mr. R. Sombe