

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

2021/CCPC/004/CON

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

SECTION 49(5) 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 COMMISSION

APPLICANT

AND

JANECON INVESTMENT

RESPONDENT



CORAM:

Mr. J.N. Sianyabo - Chairperson

Mrs. M.B. Muzumbwe - Vice Chairperson

Mr. D. Mulima - Member

Mrs. B.S. Chaila-Sichizya - Member

Mr. B. Tembo - Member

For the Applicant:

Mr. C. Bwalya, Legal Officer - Competition and Consumer
Protection Commission

For the Respondent:

No Appearance

J U D G M E N T

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

CASES REFERRED TO:

1. Neer Construction vs Violet Malala and Competition and Consumer Protection Commission 2021/CCPT/036/CON
2. El-Gibor enterprises Limited Vs Leah Zulu and Competition and Consumer Protection Commission 2022/HP/1352

OTHER REFERENCES:

1. Garner, B. A. (2009). *Black's Law Dictionary* (9th ed.). St. Paul, Minnesota: West.

SICHIZYA, B, member, delivered the Ruling of the Tribunal

1 INTRODUCTION

1.1 This is a judgment on the application for a 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 16th April, 2024, 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 alleged that Janecon Investments trading as Jadex Contractors (hereinafter “**the Respondent**”) having been found to have breached section 49(5) of the Act, had failed without any reasonable cause to comply with the directives of the Decision of the Board of

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

Further the Tribunal would like to draw the parties to the composition of the coram which includes Mr J.N Siyanyabo who chaired the hearing but was not part of the members who considered the matter. For this reason, his name does not appear on the panel of signatories.

2 RELIEF BEING SOUGHT

- 2.1 The Applicant seeks the Tribunal to grant it a Mandatory Order compelling the Respondent to comply with the directives of the Board.

3 BACKGROUND

- 3.1 The background to the matter is that on 2nd December, 2022, the Applicant received a complaint¹ from one Ms. Winnie Kasoma Pele (hereinafter “**the Complainant**”), alleging that she engaged the Respondent to install aluminium windows and doors at her property in Vorna Valley, at a total cost of ZMW88,000.00 (Eighty-Eight thousand Zambian Kwacha) from the Respondent. The Complainant alleges that in November 2020, she paid a downpayment of ZMW45,000.00 (Forty-Five Thousand Zambian Kwacha) according to the agreed terms and conditions which stated that the payment would be made in three (3) instalments as follows;

- i. ZMW45,000.00 (Forty-Five Thousand Zambian Kwacha) in November 2020.
- ii. ZMW30,000.00 (Thirty Thousand Zambian Kwacha) in April 2021.
- iii. ZMW13,000.00 (Thirteen Thousand Zambian Kwacha) after completion of works.

¹ CCPC., *Record of Proceedings* dated 16th April 2024, p.3
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3.2 The Complainant further alleged that the agreement was that the Respondent would install the windows once the roofing at her house was completed. The Complainant made an additional payment of ZMW20,000.00 (Twenty Thousand Zambian Kwacha) in February, 2021 and a further ZMW10,000.00 (Ten Thousand Zambian Kwacha) in April, 2021.

3.3 The Complainant alleged that in July, 2021, she contacted the Respondent advising them to proceed with the installation of the aluminium works. However, the Respondent only commenced installation in September, 2021. Although the Respondent commenced with the installation of the windows and doors, they did not install all the windows in the following rooms:

- i. Sitting room windows;
- ii. Kitchen windows;
- iii. Garage windows;
- iv. Office;
- v. Master bathroom; and
- vi. Two spare bedrooms.

The Complainant further alleged that the Respondent claimed that they failed to complete the installation on account of wrong measurements taken.

3.4 The Complainant further alleged that from September, 2021, she made several follow ups to the Respondent to complete the installation, but she was unsuccessful. Aggrieved by the non-response of the Respondent, the Complainant on 28th November, 2021, sought the intervention of the Applicant, who by way of a Notice of Investigation (hereinafter “NOI”) and accompanying letter dated 7th December, 2022,

informed the Respondent of an impending investigation. 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.²

3.5 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—

(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.

3.6 On 13th January, 2023, a meeting was convened between the Applicant, Complainant and Respondent. Where it was agreed that the Respondent would complete the installation of windows and doors by 27th January, 2023. However, by 2nd February, 2023, the Respondent had not visited the premises to complete the works as agreed. In view of the above the Applicant decided to prepare a report on these findings. The Respondent was given five (5) days to respond and show cause as to why the Applicant

² CCPC., *Record of Proceedings* dated 16th April 2024, pp.8-12

should not proceed with preparing a report.

3.7 On 13th February, 2023 the Respondent replied to the NOI via email citing the reasons why they delayed in the installation of the aluminium works at the complainant's site. The Respondent also acknowledged having received the letter, alleging that they were involved in unfair trading practice. They further alleged that they had been ready to install the aluminium as of 22nd January, 2021, however, according to them the client was not ready as they were still installing the roof. The contents of which are in the Record of Proceedings.³

3.8 As part of the investigation, the Applicant, on 6th March, 2023, sought expert services from Thorn Park Construction Training Centre, which was requested to carry out a physical inspection of the works that were done by the Respondent. The external consultant rendered its findings in a report dated 15th March, 2023⁴. According to the report, the works done by the Respondent were not professionally done and needed to be redone. Details of the report were that:

- I. Fly screens were not installed on all windows;
- II. Master bedroom doors were not closing fully, and it had no locking system;
- III. Two glass panes were not installed on the passage windows and there was no locking system;
- IV. Tv room door was not closing properly, and it had no locking system;
- V. Almost all the doors and window frames had no rubbers for waterproofing and cushioning;
- VI. Wrong glass types in garage windows and

³ CCPC., *Record of Proceedings* dated 16th April 2024, p.16

⁴ *ibid.*, pp.20-22

vii. Two other toilet windows had no locking system and no glass pane.

3.9 Upon completion of investigations into the matter, the Applicant served the Respondent with the letter dated 12th May, 2023⁵, and accompanying preliminary report⁶, in which it was established that the Respondent failed to exercise reasonable care and skill in installing the aluminium windows and doors, and as such breached section 49(5) of the Act, which reads as follows:

“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.”

3.10 Further, the Applicant found no previous violations of the Act by the Respondent.

3.11 Furthermore, the Respondent was expected to respond to the preliminary report within seven (7) days from date of receipt of the letter.

4 RESPONDENT’S RESPONSE TO THE PRELIMINARY REPORT

4.1 The Respondent did not respond to the preliminary report.

5 DECISION OF THE BOARD

5.1 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 11th August, 2023, determined that the Respondent’s conduct was in breach of section 49(5) of

⁵ op. cit., p.43

⁶ op. cit., pp.23-42

the Act. The Board further directed that,⁷

- i. The Respondent is fined 0.5% of their annual turnover for breach of Section 49(5) in accordance with Section 49(6) of the Act and the Commission's Guidelines for Administration of Fines 2019...;*
- ii. The Respondent submit their latest annual books of accounts within thirty (30) days of receipt of the Board directive so that the Commission determines how much they are liable to pay for breach of Section 49(5) of the Act in accordance with Section 5(d) of the Act. ...; and*
- iii. The Respondent supplies windows, doors, flyscreens and block and redoes the work at the complainant's residence within 10 days of receipt of the board decision.*

5.2 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.

5.3 The directives were served on the Respondent by way of a letter dated 29th August 2023⁸, in which the Applicant advised that the full report of the Board Decision would be communicated in due course.

6 RESPONDENT'S RESPONSE TO THE BOARDS DECISION

6.1 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.

6.2 Following the non-response to its letter of 29th August, 2023, the Applicant wrote to the Respondent again on 6th November, 2023, in which letter the Respondent was

⁷ op. cit., p.57

⁸ CCPC., Record of Proceedings dated 16th April 2024, p.88

reminded of its obligations arising from the Board's Decision. Further they were advised that the Applicant would be proceeding to apply for a Mandatory Order to compel them to comply with the decision of the board.

6.3 In view of the protracted neglect of the directives, on 16th April, 2024, the Applicant filed a Notice of Application for a Mandatory Order, the Application was supported by an affidavit dated 16th April, 2024, and deposed to by one Faith Mwamba Tembo, a Provincial investigator in the employ of the Applicant.

7 THE APPLICATION

7.1 The grounds in support of the Notice of Application are contained in paragraphs 4 to 18 of the affidavit in support, which shall not be repeated but stated *inter alia* that the Respondent had to date not attended to the Complainant, contrary to the directives of the Board.

7.2 The Tribunal noted that the Respondent did not file any affidavit in opposition to the Application.

8 THE APPLICATION HEARING

8.1 The matter was heard on 14th November, 2024, and only the Applicant's counsel appeared. The Tribunal was informed by its secretariat that the Respondent was served with the Notice of Hearing despite its absence. Further, the Tribunal noted that this matter had come up for hearing at an earlier date and was adjourned to the 14th of November, 2024, at the instance of the Respondent. However, the Respondent was unable to attend the proceedings, for reasons beyond his control.

9 APPLICANT'S SUBMISSIONS

9.1 The Applicant's counsel, Mr. Chitupila Bwalya submitted that the Applicant was applying for a Mandatory Order and would rely on the documents that were before the Tribunal. Suffice to say, that the Applicant had in addition to the Notice of Application for a Mandatory Order, only filed an Affidavit in Support of an Application for a Mandatory Order. No List of Authorities or Skeleton Arguments were filed by the Applicant.

10 RESPONDENT'S SUBMISSIONS

10.1 There were no submissions from the Respondent, which was not present at the hearing.

11 APPLICANT'S REPLY TO THE RESPONDENT'S SUBMISSIONS

11.1 There having been no submissions from the Respondent, there were no further arguments from the Applicant.

12 CONSIDERATION OF THE MATTER

12.1 The Tribunal considered the Notice of Application for a Mandatory Order, Affidavit filed in support of the application for a Mandatory Order, and the Record of Proceedings. Based on the referenced documents, the following facts are not in dispute:

- i. That on 2nd December 2022, the Applicant received a complaint against the Respondent from the Complainant;
- ii. That in November 2020, the Complainant engaged the Respondent to supply and install sliding aluminium windows and doors, fly nets and frames at her house at

a sum of ZMW88,000.00(Eighty-Eight Thousand Zambian Kwacha) That the agreed sum of the service was to be made in 3 instalments of ZMW45,000.00(Forty-Five Thousand Zambian Kwacha) in November 2020, ZMW30,000.00(Thirty Thousand Zambian Kwacha) in April 2021 and ZMW13,000.00(Thirteen Thousand Zambian Kwacha) upon completion;

- iii. That the parties agreed that installation of the aluminium doors and windows would commence after completion of roof construction. In view of that agreement in July 2021 the complainant requested the Respondent to commence the installation however, installation only started in September, 2021;
- iv. That the complainant made several follow-ups but to no avail and subsequently reported the matter to the Applicant-who carried out investigations in the matter and engaged the Respondent on several occasions.
- v. That the Applicant found the Respondent in violation of section 49(5) of the Act, for failing to exercise reasonable care and skill in the installation of the aluminium doors and windows at the scheduled time and in the prescribed manner.
- vi. That the Applicant followed due process by giving the Respondent an opportunity to respond to the findings and directives of the Board; and
- vii. That the Respondent has neither complied with the directives of the Board nor offered any defence against the allegations of the Complainant, and findings of the investigations.

12.2 Based on the foregoing, the Tribunal analysed all the above submission as well as documents presented before it. The question to be addressed in view of the foregoing, is whether by its actions the Respondent breached the provisions of

Section 49(5) of the Act.

12.3 Duty to exercise Reasonable Care and Skill - This is a core principle in construction and service contracts which is the implied term that the contractor will carry out the work with reasonable care and skill.

The standard of performance is that of an ordinary competent contractor. This means the work must be done properly and in a workmanlike manner, using good quality materials and meeting the standards described in the contract.

12.4 Our position is fortified by *Neer Construction Limited v Violet Mainza & CCPC*⁹.

This case dealt with the awarding of compensation for breach of due care and skill and failure to execute the contract within a reasonable time. The judgment confirms that the performance of a contractor is judged against the standard of skill and care of an ordinary competent contractor, which is dependent on all circumstances. It acknowledges that defects can occur but implies a duty to rectify them. This duty is also enshrined in the Act. In *El-gibor Enterprises Limited vs CCPC*, The tribunal found the contractor in violation of Section 49(5) of the Act for failing to exercise reasonable care and skill in the manufacturing and supply of burglar bars, having used wrong sizes and spacing. This shows that the failure to perform work to the required standard is a breach of the duty of care and can lead to statutory penalties and refunds.¹⁰

⁹ Neer Construction vs Violet Malala and Competition and Consumer Protection Commission 2021/CCPT/036/CON

¹⁰ El-Gibor enterprises Limited Vs Leah Zulu and Competition and Consumer Protection Commission 2022/HP/1352

12.5 **Delay and Failure to Complete within a Reasonable Time;** Where a contract does not specify a completion date, there is an implied term that the work must be completed within a reasonable time. Even where a date is specified, undue delay is a breach. (*Neer Construction Limited v Violet Mainza & CCPC*)

This case specifically dealt with compensation for a failure to complete work within the agreed time, which was considered a breach of contract and, in the context of the Act, an unfair trading practice, especially where no reasons for the delay were advanced by the contractor.¹¹

¹¹ Neer Construction vs Violet Malala and Competition and Consumer Protection Commission 2021/CCPT/036/CON pg. 39

12.6 **Failure to Rectify Defects (Non-Completion of Contract).** The contractor's failure to return and rectify the defective window installation, despite a promise to do so, aggravates the breach. This can be viewed in two ways: Breach of Contract (Failure to Complete): The works are not considered "complete" if there are defects that prevent the intended use, and the failure to remedy them is a continued breach.

12.7 **Unfair Trading Practice:** Under Section 45b of the Act, the contractor's initial defective work and subsequent failure to remedy the breach after being notified can be considered as unfair trading practice. The Respondent has an active role in enforcing these standards. In this scenario, the customer would have grounds for action based on; Breach of Contract: For the delay and the failure to perform the work with reasonable care and skill (defective installation).

There was also an aspect of Breach of Warranty/Duty to Rectify: the contractor promised to rectify the defects but did not do so.

12.8 Section 49(5) prohibits a person or enterprise from supplying any goods or services in a manner that is unfair, unjust, or unreasonable. Failure to exercise reasonable care and skill, resulting in defective work, is a violation of this section.

Our position is further fortified by Garner, (2009), who defines reasonable care as "*a test of liability for negligence, the degree of care that a prudent and competent person engaged in the same line of business or endeavour would exercise under similar circumstances.*"¹² On the other hand reasonable skill is defined as "*The skill ordinarily possessed and used by persons engaged in a particular business.*"¹³

12.9 The Respondent, despite being given several opportunities to correct their works and

¹² Garner, B. A. (2009). *Black's Law Dictionary* (9th ed.), p.204

¹³ *ibid.*, p.1514

do right by the Complainant chose not to act accordingly. Their conduct did not inspire confidence in providing a service with reasonable care and skill. Instead, it fell short of what was required of the Respondent. As a result of the Respondent's negligence, the Complainant has been highly inconvenienced despite fully paying for the service to the Respondent. Also, by neglecting to rectify and make good the defects, the Respondent deprived the Complainant of the ability to use the premises as intended.

12.10 Further, in analysing the evidence adduced by the Applicant, the Tribunal observed that the Respondent and without any concrete justification was selective in responding to the communication from the Applicant. Furthermore, even with various interventions, it was the Tribunal's considered view that by not appealing against the Board Decision, the Respondent slept on its rights to challenge the Board's directives. In not challenging the application for a Mandatory Order implicitly the Respondent accepted the Board directives; and

12.11 Finally, at the time of hearing the case, the Respondent was not present at the hearing, after adjourning the hearing at its instance.

13 TRIBUNAL'S DECISION

Based on the foregoing, the Tribunal decides as follows:

13.1 The Application is successful, and the Mandatory Order is hereby granted.

13.2 Furthermore, we order that,

- i) The Respondent re installs the aluminium windows and doors according to the agreed standard, within thirty (30) days of receipt of this judgment.
- ii) The Respondent is fined 0.5% of their annual turnover for breach of Section 49(5) in accordance with Section 49(6) of the Act and the Commission's Guidelines for Administration of Fines 2019;
- iii) The Respondent submit their latest annual books of accounts within thirty (30) days of receipt of this judgment in order for the Applicant to determine the fine that the Respondent is liable to pay for breach of Section 49(5) of the Act, in accordance with Section 5(d) of the Act.

13.3 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

2026



Mrs. M. B. Muzumbwe-Katongo
VICE CHAIRPERSON



Mr. D. Mulima
MEMBER



Mrs. B. S. Chaila-Sichizya
MEMBER



Mr. B. Tembo
MEMBER