

THE COMPETITION AND CONSUMER
PROTECTION TRIBUNAL
HOLDEN AT LUSAKA

2021/CCPT/024/CON

IN THE MATTER OF:

SECTION 49 (1) 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

KALASA MWANSA

APPELLANT

AND

COMPETITION AND CONSUMER PROTECTION
COMMISSION

1ST RESPONDENT

JOLLY MOBILE LIMITED

2ND RESPONDENT

CORAM:

Mr J N Sianyabo - Chairperson

Mr D Mulima - Member

Mrs B S Chaila-Sichizya - Member

Mr B Tembo - Member

For the Appellant:

In person

For the 1st Respondent:

Ms M Mtonga - Manager, Legal Services - CCPC

For the 2nd Respondent:

Absent

JUDGEMENT

Legislation referred to:

1. Competition and Consumer Protection Act No.24 of 2010

SIANYABO, J.N., Chairperson, delivered the judgment of the Tribunal

INTRODUCTION

1. This matter relates to a Notice of Appeal brought before the Competition and Consumer Protection Tribunal (hereinafter “the Tribunal”) by Mr Kalasa Mwansa (hereinafter “the Appellant”) against the decision of the Board of Commissioners of the Competition and Consumer Protection Commission (hereinafter “the Board”) made on 5th February, 2021, following investigations by the Competition and Consumer Protection Commission (hereinafter “the 1st Respondent”) pursuant to section 49 (1) of the Competition and Consumer Protection Act No.24 of 2010 (hereinafter “the Act”), alleging that the 2nd Respondent was involved in unfair trading practices.

RELIEFS BEING SOUGHT

2. The Appellant seeks the following reliefs:
 - (i) that the Tribunal overturns the decision of the Board;
 - (ii) full refund;
 - (iii) costs;
 - (iv) interest; and
 - (v) any other relief the Tribunal may deem fit.

BACKGROUND

3. On 2nd September, 2020, the 1st Respondent received a complaint from the Appellant against Jolly Mobile Limited (hereinafter “the 2nd Respondent”)

whose conduct appeared to have breached section 49 (1) of the Act.¹ Specifically, the complainant alleged that on 31st August, 2020, the Appellant purchased a Tecno F1 mobile phone at the cost of ZMW 970.00 (Zambia Kwacha Nine Hundred and Seventy) from the 2nd Respondent. The Appellant alleged that the phone had a one-year warranty. The Appellant alleged that on the same day he purchased the phone, while using it, he noticed that the phone was heating up. The Appellant further alleged that on 1st September, 2020, he returned the phone to the 2nd Respondent with a view to getting a refund or replacement but to no avail. He further alleged that he was advised by the 2nd Respondent to take the phone to the 2nd Respondent's Carl Service Centre to be repaired, as the phone was still within the one-year warranty period, and the Appellant obliged. On 2nd September, 2020 the Appellant alleged that he was contacted by the 2nd Respondent to collect the phone and was informed by the 2nd Respondent's officers that the heating up was normal. The Appellant disagreed with the 2nd Respondent and requested to pay an additional amount of K329.00 to get an Infinix mobile phone which was costing ZMW 1,299.00 (Zambia Kwacha One Thousand Two Hundred and Ninety-Nine), but the 2nd Respondent refused. The Appellant therefore demanded a refund of the ZMW 970.00 (Zambia Kwacha Nine Hundred and Seventy) or that he be allowed to pay the additional amount of ZMW 329.00 (Zambian Kwacha Three Hundred and Twenty-Nine) to enable him get an infinix mobile phone.

4. Having received the complaint from the Appellant, the 1st Respondent duly served a Notice of Investigations and an accompanying letter on the 2nd

¹ Record of Proceedings, p. 1

Respondent on 7th September, 2020.² On 24th September, 2020, the 1st Respondent had a meeting with the 2nd Respondent at the 1st Respondent's office. On 2nd October, 2020, the 1st Respondent submitted the phone in question to the Department of Electrical and Electronic Engineering of the School of Engineering at the University of Zambia (hereinafter "UNZA") for assessment.³

5. According to the Technical Assessment Report by UNZA dated 9th October, 2020, UNZA submitted that the phone came on after switching it on, indicating that it was working. UNZA submitted that the phone was put to charge for upto 3 hours, sim card inserted for full network operation and with data on to access internet. UNZA further submitted that the phone in question started heating up upon switching on mobile data and when accessing internet. UNZA further submitted that the phone in question had a low random-access memory (RAM) at 1GB internal RAM which stored dynamic data and temporary data causing overheating. UNZA concluded that the phone's operations were okay according to its device storage capacity of 8 GB storage. Furthermore, UNZA submitted that the battery would also need to be replaced in the nearest future due to the inherent ambient caused by the RAM.⁴
6. In view of the foregoing, the 1st Respondent produced a Preliminary Report in November, 2020, which recommended that the case be closed under section 49(1) of the Act on the basis that the 2nd Respondent did not violate the Act.⁵ The Preliminary Report which contained the findings of the investigations was

² Record of Proceedings, pp. 6-8

³ Ibid., pp. 9-10

⁴ Op. cit., pp. 11-12

⁵ Record of Proceedings, pp. 13-20

availed to the parties in accordance with section 55 (10) of the Act before presentation to the Technical Committee of the Board for its determination.⁶

7. The Board, at its 48th Board of Commissioners Adjudication Meeting held on 5th February, 2021, considered the matter. The Board, in its decision, directed that the case against the 2nd Respondent was closed as it did not violate section 49 (1) of the Act.⁷ The decision of the Board was communicated to the parties in letters dated 26th February, 2021.⁸
8. In view of the Board's Decision, the Appellant filed before the Tribunal, a Notice of Appeal dated 1st April, 2021. In response, the 1st Respondent filed the Notice of Grounds in Opposition to Grounds of Appeal dated 21st April, 2021. Thereafter, the 1st Respondent filed its Heads of Argument on 22nd June, 2023, and the Appellant filed his Heads of Argument on 7th July, 2023.
9. In response to the Grounds of Appeal, the 1st Respondent in its Grounds in Opposition averred that the Board did not err in law and in fact when it held that the Respondent was not in violation of section 49 (1) of the Act.
10. In view of the above, the 1st Respondent sought the following reliefs:
 - (i) that this Tribunal upholds the decision of the Board dated 5th February, 2021;
 - (ii) that the Appeal be dismissed forthwith with costs as it lacked merit; and
 - (iii) any other relief that this Tribunal deemed fit.

⁶ Ibid., pp. 21-22

⁷ Op.cit., pp. 27-36

⁸ Record of Proceedings, pp. 37-38

APPEAL HEARING

11. The Tribunal wishes to put it on record that this matter is one of the matters that were carried over from the previous Tribunal. The record shows that the matter came up for hearing on 18th January, 2022, but could not proceed because the 2nd Respondent was not represented and the legal status and whereabouts of the 2nd Respondent were unknown. The Tribunal directed that under the circumstances, it could not proceed to hear the matter and urged the Appellant to ascertain the legal status and physical address of the 2nd Respondent and revert to the Tribunal by 18th March, 2022. The matter was not heard until the Tribunal was dissolved, and following our appointment, we heard the matter *de novo*.

Appellant's submissions

12. The Appellant indicated to the Tribunal that he wished to rely on his Heads of Argument filed on 7th July, 2023.

13. In the said Heads of Argument, the Appellant recounts the facts as contained in the background of this ruling. He emphasised that his ground of appeal was that the Board erred in law and in fact when it held that the Respondent was not in violation of section 49 (1) of the Act, which provided 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..."

14. In view of the above provision, the Appellant submitted that a person or enterprise was deemed to have violated section 49 (1) when a person or

enterprise supplied goods to a consumer which are either defective, not fit for the purpose for which they are normally used; or not fit for the purpose that the consumer indicated to the person or enterprise.

15. With regard to the defectiveness of the mobile phone, the Appellant referred the Tribunal to the definition of "defective" with reference to a product by *Black's Law Dictionary, 8th Edition*, which defines it as one that contains an imperfection or shortcoming in a part essential to the product's safe operation, and also by *Black's Law Dictionary, 4th Edition*, which defined it as lacking in some particular which is essential to the completeness, legal sufficiency or security of the object spoken of. The Appellant argued that the definitions were in line with the definition on the 1st Respondent's website which defines 'defective' as consumables, commercially produced and distributed goods that are dangerous or harmful for normal use or is inherently dangerous due to the nature of the design, assembly, or manufacture or have a malfunction. He further referred the Tribunal to the definition of 'imperfection' (as used in *Black's Law Dictionary, 8th Edition*), and the *Oxford Advanced Learner's Dictionary, 10th Edition*, which defines an imperfection as a fault, weakness or undesirable feature that it has, and 'completeness' (as used in *Black's Law Dictionary, 4th Edition*) as the state or condition of having all the necessary or appropriate parts.

16. In view of the above, the Appellant submitted that the report by UNZA supported his evidence that the phone in question overheated, experienced rapid battery drainage, heated up, and that its low RAM of 1GB caused overheating. He buttressed his point by referring to the definition of overheating from the *Oxford Advanced Learner's Dictionary, supra*, which defines

overheating as 'excessive heating' and 'excessive' as "beyond what is typical or normal... usually in a negative way". He, therefore, submitted that the phone in question was limited by excessive heating, that is, beyond what is typical or normal, thereby confirming the evidence given by him on his experience while using the phone, that is, that it was abnormally heating up to the point that the Appellant returned it to the 2nd Respondent. He argued that the undesirable feature was an imperfection that rendered the phone in question defective, as envisaged by section 49 (1) of the Act. He concluded that the fact that the UNZA Report indicated that the battery of the mobile phone was to be replaced in the near future due to the ambient caused by the RAM was itself evidence of an inherent limitation substantiating its defectiveness. He stated that a phone that overheated and rapidly drained power had a malfunction, that is, failure to work properly. In that regard, the Appellant submitted that the phone could not be said to be okay or not defective as contained in the report by UNZA.

17. On the aspect of the mobile phone not being fit for the purpose for which it is normally used, the Appellant submitted that the purpose of a mobile phone, particularly in the modern era, inherently included internet connectivity and usage without facing issues such as overheating and excessive battery draining. Further, he submitted that internet connectivity was key because of the mobile applications on the smartphones. In view of this, the Appellant argued that considering that the mobile phone overheated when connected to the internet and the battery drained rapidly, the mobile phone in question was not fit for the purpose for which smartphones were normally used. He concluded on the aspect of fitness for purpose by stating that considering that the Tecno F1 was a smartphone, it followed that the said phone was in violation of section 49 (1)

of the Act because it was not fit for the purpose for which such phones were normally used.

18. In his final submission, the Appellant addressed the aspect of the phone not being fit for the purpose he indicated to the person or enterprise. The Appellant submitted that at the time of purchasing the mobile phone, he indicated to the salesperson of the 2nd Respondent that he intended to use the mobile phone for internet so that his clients could interact with him *via* whatsapp and facebook. He submitted that this fact was not disputed by the 2nd Respondent and that the response from the salesperson was that the Appellant should choose a phone according to his preference and budget. He added that based on that response, he was given several options to choose from and chose the Tecno F1, based on the recommendation of the salesperson of the 2nd Respondent. The Appellant submitted that in view of the defects already outlined, such as phone draining rapidly when he used internet, the phone was not fit for use for business online. He, therefore, buttressed that the 2nd Respondent violated section 49 (1) of the Act.

1st Respondent's Submissions

19. The 1st Respondent relied on the Heads of Argument filed on 22nd June, 2023 and augmented the same with oral arguments. Ms M Mtonga, counsel for the 1st Respondent, begun her submission by giving a background as already adumbrated above. She indicated the events and processes from the time the complaint was lodged by the Appellant to the time the Board made its decision. In her substantive arguments, counsel referred to section 49 (1) of the Act, and identified the three elements under the provision as follows:

- (i) the goods are defective
- (ii) goods are not fit for the purpose for which they are normally used; or
- (iii) for the purpose that the consumer indicated to the person or enterprise.

20. She submitted on the above elements, *seriatim*. With regards to what was defective, counsel for the 1st Respondent referred to the definition of ***Black's Law Dictionary, 8th Edition, supra***, and emphasised that an enterprise is only liable if it was proved that the product in question was defective, not fit for the purpose or for the purpose indicated by the consumer to the enterprise. She stated however that *in casu*, UNZA stated in its report that the phone in question had a low RAM 1GB internal RAM stores dynamic data and temporary data, causing overheating. She referred the Tribunal to the Samsung website which explains RAM as the part of the phone that was used to store the operating system (OS) and where the apps and data currently in use are kept. Therefore, she submitted that because the Tecno F1 was designed with a small storage, this implied that the data stored on the RAM should not be larger than 1GB, failure to which the Tecno F1 phone would overheat. However, she submitted that the operations of the phone were found to be okay, which was an adverb that meant "in a satisfactory manner or to a satisfactory extent". Ms Mtonga submitted that the 1st Respondent was not an expert in electronic products and therefore sought the opinion of UNZA. In view of this, she stated that the expert opinion by UNZA was clear that the cause of the overheating was the overloading of the data on the RAM, which was designed to hold data of not more than 1GB. She added that despite the low RAM, the operation of the phone was satisfactory. She further stated that the Appellant was able to use the phone for receiving calls, accessing internet and other necessary

applications downloaded on the phone. In view of this, she argued that the overheating did not render the phone defective, as the size of the storage required that data stored should not exceed 1GB. Furthermore, she apprised the Tribunal that the phone was, in fact, a low-grade phone which was still able to be utilised for what it was meant for.

21. With regard to what the Appellant said to the salesperson on the purpose for the phone, that is, for conducting business online via internet, counsel for the 1st Respondent submitted that the Appellant did not adduce any evidence to corroborate his statement. She augmented this position *viva voce* by stating that the statement by the Appellant was an afterthought as this was not brought to the attention of the 1st Respondent. when the complaint was lodged. She submitted that the burden of proof was on the Appellant to prove that he did inform the 2nd Respondent's salesperson of the purpose for which he intended to use the phone.

22. Counsel for the 1st Respondent concluded her submissions by stating that the findings of the Board were based on facts, evidence and the law. Further, she reiterated that the evidence on record was that the overheating was because of the overloading of the data on the RAM, which was designed to hold data of not more than 1GB, and despite this, the operation of the phone was satisfactory. She added that there was no evidence on record suggesting that the Appellant indicated to the 2nd Respondent the exact use of the mobile phone and that the law suggested that the goods in question must either be defective, not fit for the purpose or for the purpose indicated to the enterprise. She stated that none of the three elements were proved, hence no violation of section 49

(1) of the Act. She stated, therefore, that the appeal lacked merit and should be dismissed.

CONSIDERATION OF THE MATTER

23. The Tribunal considered the evidence before it and the applicable law. The crux of the matter is the determination whether the phone in question was defective as envisaged by section 49 (1) of the Act. This is pertinent because if found to be defective, the decision of the Board would effectively be set aside and the Appellant would then be entitled to a refund as prayed.

24. From the authorities cited by both parties, it is not in dispute that for a product to be considered defective, it should have at least one of the following qualities:

- (i) an imperfection or shortcoming in the product's safe operation;
- (ii) dangerous, or harmful for normal use;
- (iii) inherently dangerous due to its nature or design, assembly or manufacture; or
- (iv) a malfunction.

25. The question whether the phone in question was defective is a technical one.

In this regard, the Tribunal considered, among other things, the testimony of the Appellant to support his position, the 1st Respondent's submission, as well as the evidence by experts on record.

26. The summary of the Appellant's position is that the phone was defective because when he used it, it overheated and experienced rapid battery drainage. He argues that UNZA supported his position when it stated in its report that the

phone started heating up upon switching on mobile data and when accessing internet.

27. The 1st Respondent relied on the expert evidence of UNZA and reiterated that the phone was not defective but was just a low-grade phone.

28. The expert evidence provided by the Carl Care Service Centre and UNZA was cardinal to resolving the matter before the Tribunal. Suffice to state that the weight attached to the opinion of the former is much less than the latter because it is part of the 2nd Respondent who were accused of selling a defective phone. However, the evidence by UNZA, a third party in the matter, without an interest to serve, would be considered of more evidential value. In view of this, we agree with the 1st Respondent that the phone was not defective but was merely a low-grade phone unsuitable for internet browsing and had low storage capacity for downloads from facebook, whatsapp or other similar applications, a position arrived at based on the Report by UNZA.

29. Further, with regard to the assertion by the Appellant that he informed the salesperson the purpose for which he intended to use the phone, we wish to state that the burden of proof was on the Appellant to prove this and the fact that the 2nd Respondent did not dispute it was not sufficient to prove that indeed he indicated to the 2nd Respondent that he needed to use the phone for interaction with his customers *via* facebook and whatsapp applications. A perusal of the record shows that this aspect was not stated in the Application for Authorisation for Investigation⁹, and the Notice of Investigation, and was only raised by the Appellant in his response to the Preliminary Report that was sent to him indicating that the 1st Respondent did not breach section 49 (1) of

⁹ Record of Proceedings, p. 1

the Act.¹⁰ In terms of timelines, the complaint was made to the 1st Respondent on 2nd September, 2020, and the Appellant only raised the aspect of informing the salesperson of the 2nd Respondent what the purpose of the phone was in his letter dated 27th November, 2020, after the Preliminary Report of the investigations had been sent to him. Therefore, based on the record, we agree with the 1st Respondent that the assertion by the Appellant that he informed the 2nd Respondent of the purpose for which the phone would be used was an afterthought as the only argument, initially, was the overheating of the phone which was the basis of his conclusion that the phone was defective.

30. In summation, we agree with the finding of the Board that the phone in question was not defective as envisaged by section 49 (1) of the Act.

CONCLUSION

31. In conclusion, it is the Tribunal's considered view that the 2nd Respondent did not violate section 49(1) of the Act. We, therefore, uphold the decision of the Board.

Each party shall bear its own costs.

Any party aggrieved with the Judgment may appeal within thirty (30) days of receipt of the judgment.

¹⁰ Ibid., p. 23

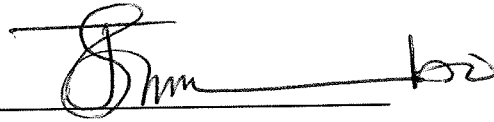
Dated the

21

day of

MARCH

2024



Mr J N Sianyabo

CHAIRPERSON



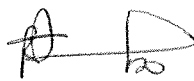
Mr D Mulima

MEMBER



Mrs B S Chaila - Sichizya

MEMBER



Mr B Tembo

MEMBER