

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

2021/CCPT/036/CON

IN THE MATTER OF:

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

NEER CONSTRUCTION LIMITED

AND

VIOLET MALALA MAINZA

COMPETITION AND CONSUMER PROTECTION COMMISSION



APPELLANT

1ST RESPONDENT

2ST RESPONDENT

CORAM:

Mr. J.N. Sianyabo - Chairperson

Mrs. M.B. Muzumbwe-Katongo - Vice Chairperson

Mr. D. Mulima - Member

Mrs. B.S. Chaila-Sichizya - Member

Mr. B. Tembo - Member

For the Appellant:

Ms. S. Banda - Legal Officer, Neer Construction Limited

For the 2nd Respondent:

Ms. M. Mtonga - Manager, Legal Services, Competition
and Consumer Protection Commission

J U D G M E N T

LEGISLATION REFERRED TO:

1. The Competition and Consumer Protection Act, 2010
2. The Competition and Consumer Protection (Amendment) Act, 2023
3. The Competition and Consumer Protection (Tribunal) Rules, 2012

CASES REFERRED TO:

1. Transactional Payment Solutions Limited v Brunelli Construction Zambia Limited:
2017/HP/2149

OTHER REFERENCES

1. Garner, B. A. (2007). *Black's Law Dictionary* (7th ed.). St. Paul, Minnesota: West.

SICHIZYA, B.S.C., Member, delivered the judgment of the Tribunal.

1 INTRODUCTION

This matter relates to a Notice of Appeal brought before the Competition and Consumer Protection Tribunal (hereinafter “**the Tribunal**”) by Neer Construction Limited (hereinafter “**the Appellant**”) against the decision of the Board of Commissioners of the Competition and Consumer Protection Commission (hereinafter “**the Board**”) made on 10th June, 2021, following investigations by the Competition and Consumer Protection Commission (hereinafter “**the 2nd Respondent**”) pursuant to section 49(5) of the Competition and Consumer Protection Act No.24 of 2010 (hereinafter “**the Act**”), alleging that, the Appellant was involved in an unfair trading practice.

2 RELIEF BEING SOUGHT

The Appellant prayed that:

- i. The Tribunal quashes the decision of the Board as the basic ingredients of unfair trading practices were not satisfied; and
- ii. an assessment of the total cost of the uncompleted work be conducted to ascertain the amount owed to the 1st Respondent.

3 BACKGROUND

3.1 On 4th December, 2020, the 2nd Respondent received a complaint from Ms. Violet Malala Mainza (hereinafter “the 1st Respondent”) alleging that on 9th September, 2020, she engaged the Appellant to complete her unfinished house in Lusaka’s Meanwood Ibex Hill area. The 1st Respondent alleged that a payment of ZMW235,000.00 (Two Hundred and Thirty-Five Thousand Zambian Kwacha) was made towards the completion of first stage works, which included, *inter alia*, plumbing, electricity wiring, plastering, window and ceiling board installation, before proceeding to the second stage of the project. The 1st Respondent alleged that the total duration of the works from start to finish was eight (8) weeks for both stages. The 1st Respondent further alleged that by 4th December, 2020, the works for the first stage of the project had not been completed. The 1st Respondent thus sought assistance from the 2nd Respondent demanding for a refund of ZMW117,050.00 (One Hundred and Seventeen Thousand and Fifty Zambian Kwacha) from the

Appellant. In the 1st Respondent's view, the amount represented fifty percent (50%) of the works that were not completed by 4th December, 2020.

3.2 Following receipt of the complaint, the 2nd Respondent sent to the Appellant a Notice of Investigation (hereinafter "the Notice") and an accompanying letter dated 9th December, 2020, which documents were received by the Appellant on 12th January, 2021.¹ The said documents outlined the complaint as submitted to the 2nd Respondent by the 1st Respondent, and stated a possible violation of section 49(5) of the Act. Further, the letter stated the 2nd Respondent's mandate in the matter pursuant to section 55(4) of the Act. Furthermore, the Appellant was required to provide a written response to the Notice and the accompanying letter within fourteen (14) days of receipt.

3.3 According to an internal memo of even date and authored by one Brim Lombe², an investigator in the employ of the 2nd Respondent, on 18th January, 2021, the Appellant's Project Manager, one Mr. Neeraj Choudhary visited the office of the 2nd Respondent. It was reported that Mr. Choudhary submitted during the meeting that the 1st Respondent did not inform the Appellant about the complaint before reporting the matter to the 2nd Respondent. Mr. Choudhary further submitted that the Appellant only became aware of the complaint upon receipt of the Notice on 12th January, 2021. Furthermore, Mr. Choudhary requested that the Appellant be given an

¹ CCPC, *Record of Proceedings*, 15th September, 2021, pp.23-24

² *Ibid.*, pp.25-26

opportunity to inspect the subject premises and address all the issues raised by the 1st Respondent in the complaint to the 2nd Respondent.

3.4 On 22nd January, 2021,³ Brim Lombe authored another internal memo to the 2nd Respondent in which it was stated that another meeting was held with the 1st Respondent and the Appellant at the 2nd Respondent's office. Subsequently, a record of minutes was produced and furnished to the parties.

3.5 2NDRESPONDENT'S FINDINGS FOLLOWING INVESTIGATION OF THE COMPLAINT

3.6 On 27th January, 2021, the 2nd Respondent through its investigator, Brim Lombe visited the 1st Respondent's premises to carry out physical inspections in order to verify the allegations of the 1st Respondent. The physical meeting revealed that:⁴

- i. Wiring for security lights consisting of twelve (12) points and one point for the geyser was not installed. Further a cable from flat one (1) to flat two (2) for meter separation was not installed;
- ii. Manhole covers were not installed on three (3) manholes and the eighteen (18) meter sewer pipe was not connected;
- iii. Aluminum windows and burglar bars - holes that were supposed to drain rain water were plastered together with the aluminum windows,

³ CCPC, *Record of Proceedings*, 15th September, 2021, pp.27-29

⁴ Ibid, pp.30-31

causing rain water to seep through the house. The windows were not opening properly and two (2) of the bathroom windows had broken window panes. The physical inspection also revealed that the material used on the burglar bars was too soft and due to this the bars were shaking easily. Reveals on the windows were also not done and cracks could visibly be seen on the walls of the house; and

iv. Ceiling board - the cornices were separating from the walls and the sunken rhino board ceiling had visible cracks.

3.7 In view of the foregoing, the 2nd Respondent produced a Preliminary Report in March 2021, which recommended that the Appellant breached section 49(5) of the Act as it failed to complete works on the 1st Respondent's unfinished house within a reasonable time.

4 1st RESPONDENT'S RESPONSE TO THE PRELIMINARY REPORT

4.1 The 1st Respondent did not submit any response to the 2nd Respondent's Preliminary Report.

5 APPELLANT'S RESPONSE TO THE PRELIMINARY REPORT

5.1 In a letter dated 11th March, 2021, the Appellant submitted through its lawyers Japhet Zulu Advocates that the Appellant performed the works to the required standard and did not accept liability. It was further submitted that there was no justifiable basis upon which the 1st Respondent was entitled to a refund of ZMW117,050.00 (One Hundred and Seventeen

Thousand Zambian Kwacha) amounting to fifty percent (50%) of the contractual amount of ZMW235,000.00 (Two Hundred and Thirty-Five Thousand Zambian Kwacha), especially that works were done to near completion.

6 DECISION OF THE BOARD

6.1 The 2nd Respondent proceeded to finalise its investigations and referred the matter to the Board for adjudication. The Board, at its adjudication meeting held on 10th June, 2021, considered the matter, and concluded that the facts and the evidence in the case had shown that the Appellant had engaged in unfair trading practices and was thus in violation of section 49(5) of the Act. The Board thus directed that;

- i. The Appellant be fined 0.5% of its annual turnover for violating section 49(5) of the Act in accordance with section 49(6) of the Act.
- ii. The Appellant refunds the 1st Respondent the ZMW117,050.00 (One Hundred and Seventeen Thousand and Fifty Zambian Kwacha) for incomplete works at the house within ten (10) days of receipt of the Board decision in accordance with section 49(7) of the Act.
- iii. The Appellant submits its latest annual books of accounts to the commission for calculation of the actual fine within thirty (30) days of receipt of the Board decision in accordance with section 5(d) of the Act.

7 THE APPEAL

7.1 In view of the Board's decision the Appellant filed before the Tribunal a Notice of Appeal and Heads of Argument dated 18th August, 2021, and in response, the 2nd Respondent filed a Notice of Grounds in Opposition to the Grounds of Appeal on 15th September, 2021. Thereafter, the Appellant filed a list of authorities and skeleton arguments on 11th March, 2022. The Appellant further submitted another list of authorities and skeleton arguments on 13th April, 2022. Furthermore, on 21st April, 2022 the 2nd Respondent submitted a list of authorities and a response to the Appellant's submission. Finally, on 6th May, 2022 the Appellant filed a reply to the 2nd Respondent's submission.

8 GROUNDS OF APPEAL

8.1 In appealing the Board's decision, the Appellant advanced the following grounds of appeal:

- i) That the commission erred in law and in fact, when it awarded the respondent compensation for breach of due care and skill and within a reasonable time on the basis that the work was not completed 21 days following the agreed completion date.*
- ii) That the Commission erred in law and in fact when it found that the Appellant had engaged in unfair business practices despite having not considered the evidence in totality in rendering its decision, when the record shows that the decision was an exact replica of the 1st*

respondent's allegations and that the commission failed to consider the evidence in its totality.

iii) That the commission erred in law and in fact when it found the Appellant liable for unfair trading without taking into consideration the amount of work that was done and the circumstances that lead to the delay in execution of the full contract.

9 1ST RESPONDENT'S REPLY TO THE GROUNDS OF APPEAL

9.1 There was no response to the grounds of appeal from the 1st Respondent.

10 2ND RESPONDENT'S REPLY TO THE GROUNDS OF APPEAL

10.1 The 2nd Respondent filed its notice in opposition to the ground of appeal on 15th September, 2022 as follows;

- i. The record will show that the board did not award compensation to the 1st respondent for breach of due care and skill on the basis that the work was not completed within the agreed 21 days.*
- ii. Contrary to the Appellant's assertion in ground 2, the 2nd Respondent was on firm ground when it found that the Appellant had engaged in unfair trading practices for non-completion of the work, and further, the record will show that the commission did consider all the evidence before rendering its decision.*

iii. The 2nd Respondent was on firm ground when it found the Appellant liable for unfair trading practices as the record will show, no reasons for the delay to execute the full contract were advanced by the Appellant during the investigation.

11 APPEAL HEARING

When the appeal came up for hearing, Counsel for the Appellant sought the guidance of the Tribunal considering that all documents were submitted, and that they were merely waiting for the judgment. Furthermore, counsel for the Appellant upon being guided that we would proceed with the hearing by the Tribunal relied on the documents already submitted.

12 APPELLANT'S SUBMISSIONS

12.1 The following were the submissions of the Appellant.

Ground one

That the commission erred in law and in fact, when it awarded the respondent compensation for breach of due care skill and within a reasonable time on the basis that the work was not completed 21 days following the agreed completion date.

12.2 Counsel for the Appellant stated that ground one (1) dealt with the awarding of compensation to the 1st Respondent for breach of due care and skill and failure to execute the contract within a reasonable time. In her opening submissions, counsel for the Appellant submitted that where there was a

suspicion of breach of due care and skill due to undue delay, there must be evidence clearly demonstrating the breach as guided by the Supreme Court in the case of *Mwenya and Another v Kapinga*⁵, where the Supreme Court stated as follows:

“It may be said that time is essential firstly, if the parties expressly stipulate in the contract that it shall be so; secondly, if in a case where one party has been guilty of undue delay, he is notified by the other that unless performance is completed within a reasonable time the contract will be regarded as at end; and lastly, if the nature of the surrounding circumstances or of the subject makes it imperative that the agreed date should be precisely observed”.

12.3 Counsel for the Appellant also made reference to section 49(5) of the Act which states as follows;

“Completion should be within a reasonable time or if a specific time was agreed, within a reasonable period around the agreed time.

Counsel for the Appellant contended that notwithstanding the fact that the completion was to be within two (2) months from the date of the contract, the 2nd Respondent fell into error when it held that the contract between the Appellant and the 1st Respondent was conditional in respect of the time of completion. She stated that on the contrary,

⁵ SCJ No.4 of 1998

there was nothing in the contract that stated or indicated that time was of the essence. Counsel for the Appellant further submitted that the 2nd Respondent's decision based on time was not in order as what was being regarded as reasonable time was subjective.

12.4 Counsel for the Appellant averred that work didn't necessarily need to be completed on or before the agreed date but rather within a reasonable period especially that the contract did not expressly state that time was of the essence. Additionally, she argued that in the case at hand there were extenuating circumstances known to both parties that caused the delay. One of which was the state that the structure was in, with walls that were not straight and as such the Appellant had to correct these walls prior to commencing its work. Further, some of the openings were below the standard size of opening and the Appellant had to break and bring the openings to the right standards.

Counsel for the Appellant also submitted that the Appellant had communicated these delays to the 1st Respondent and indicated that it was ready to commence works on the second stage of the contract as it was completing the works in the first stage of the contract. Counsel submitted that despite the Appellant's communication, the 1st Respondent did not honor her end of the bargain and as such, the Appellant did not commence the works in the second stage. She submitted that the Appellant also later discovered that the 1st Respondent had engaged another contractor for the works. Counsel for the Appellant further submitted regarding the findings by the 2nd Respondent that the Appellant was in breach of the due care and skill when it was found that, *inter alia*, the ceiling boards had visible cracks, the cornices were detaching, and that the wiring for twelve (12) points were not done. In response to this, counsel for the Appellant referred to the case of **Bolam v Friern Hospital Management** in which it was established as follows:

“Where you get a situation, which involves the use of specialized skill or competence, then the test of whether there has been negligence or not is not the test of the man on top of a Clapham omnibus because he has not got this special skill. A man may not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient to be exercising the competent skill of an ordinary competent man exercising that particular art”.

12.5 Counsel for the Appellant further cited the case of **Plant Construction PLC v Clive Adama Associates and JHM Construction Services Limited** where it was held that a contractor's performance of his contract with skill and care of an ordinary competent contractor, will depend on all circumstances.

12.6 In view of the cases cited above, counsel for the Appellant submitted that in construction, eventualities such as cracked ceilings occurred. She stated, however, that they were not fatal as they could easily be rectified. Thus, in the Appellant's view, no evidence adduced by the 2nd Respondent showed that the actions of the Appellant lacked due care and skill.

12.7 Counsel for the Appellant further drew the attention of the Tribunal to the allegations raised by the 2nd Respondent that the quality of the burglar bars was substandard. Section 18 (1) of the Standards Act No. 4 of 2017 provides that-

“The bureau shall publish a Zambian National Standard, including an amendment or withdrawal of the Zambian National Standard, in the Gazette”.

12.8 From the foregoing, counsel for the Appellant contended that the quality of the burglar bars that were used was in conformity with the standard given by the Zambia Bureau of Standards. She added that due diligence was done, and the material used was in accordance with the set standards. In view of this, counsel for the Appellant submitted that the 2nd Respondent should therefore, state what tests were applied in establishing that the burglar bars

were substandard. She further stated that the quality of burglar bars to be used was discussed between the parties, as was stated in an email exchange between the parties.⁶ In the said email, it was expressly agreed that the quality of the material used on the burglar bars was based on the agreement between the two (2) parties and the quotation was based on the agreed standard. Therefore, according to counsel for the Appellant, the argument on the quality of the burglar bars could not be sustained.

12.9 Lastly, counsel for the Appellant submitted that with regard to the finding that the aluminum windows were not airtight, she stated that it was due to wrong measurements given by the 1st Respondent which measurements the Appellant relied on as evidenced by an email dated 22nd October, 2020⁷. She further submitted that rectifying this defect was just a matter of replastering the walls and scheming around the widows to stop the leakage.

1ST RESPONDENT'S SUBMISSIONS

12.10 There were no submissions from the 1st Respondent.

2ND RESPONDENT'S SUBMISSIONS

12.11 In response to the Appellant's first ground of appeal, the 2nd Respondent averred that the record showed that the Board did not award compensation to the 1st Respondent for breach of due care and skill on the basis that the

⁶CCPC, *Record of Proceedings*, 15thSeptember, 2021, p.16

⁷ Ibid., p. 18

work was not completed within the agreed twenty-one (21) days.⁸ The word used by the Board was “refund” and not “compensation”. She argued that the word ‘refund’ has been defined in **Black’s Law Dictionary, 11th Edition**, to mean “... the money returned to a person who overpaid...” while the word ‘compensation’ has been defined as “...to make an amendatory payment to; to recompense (for an injury) ...”

12.12 The 2nd Respondent further referred to a case of **Macnicious Mwiimba v Airtel Networks Zambia PLC and the Competition and Consumer Protection Commission**⁹, where the Tribunal stated as follows, at page 10,

“in consequence, we conclude that the commission and the Tribunal have no jurisdiction to award damages or compensation as sought by the complainant for what he alleges to have suffered. In so concluding, we follow the decision we made in the case of Espine Hamusonde v Izwe Loans Limited and the Competition and Consumer Protections Commission, Appeal No. 2012/CCPT/010/CON. In that decision, we held that the commission had no jurisdiction to award damages to or compensation to the Appellant, who was the complainant, and therefore the ground of appeal before the Tribunal failed...”

12.13 Counsel for the 2nd Respondent therefore submitted that in view of the above the Board did not act contrary to the position of the Tribunal, as it

⁸ CCPC, *Record of Proceedings*, 15th September, 2021, pp. 49 and 62 para45 (ii)

⁹ Appeal No. 2014/CCPT/015/CON

had directed that the Appellant refunds the 1st Respondent for the work not completed in relation to the 1st phase of the project. She further submitted that the direction given by the Board was supported by law, as shown under section 49(7) which states that:

“In addition to the penalty stipulated under subsection (6), the person or enterprise shall -

(a) Within seven days of the provision of the service concerned, refund to the consumer the price paid for the service...”

12.14 Counsel for the 2nd Respondent also submitted that the Appellant had been consistent with the fact that it did not execute the contract within the agreed two (2) months as expressly stated in the contract, specifically in clause 4 of the contract between the Appellant and 1st Respondent¹⁰. Furthermore, she submitted that the physical inspection conducted by the 2nd Respondent during its investigation established the following:

- i. The wiring for the security lights consisting of twelve (12) points and one (1) point for the geyser had not been installed. Cable running from flat one (1) to flat two (2) for meter separation had not been installed.
- ii. Plumbing- manhole covers were not put on three (3) manholes and the eighteen (18) meter sewer pipe was not connected

¹⁰CCPC, *Record of Proceedings*, 15thSeptember, 2021, p.7

allowing rainy water and mud to enter the waste pipes. Two (2) shower trays were not fitted in the bathrooms.

- iii. Holes that were supposed to allow rainy water to be drained were plastered together causing water to enter the house.
- iv. Furthermore, the windows were not opening properly and two (2) windowpanes in the bathroom were broken.
- v. The sunken rhino board ceiling had visible cracks and the cornices were separating from the walls.

12.15 In addition, counsel for the 2nd Respondent submitted that as shown in the record of proceedings, six (6) works were supposed to be done by the Appellant at the first stage of the project were as follows:

- i. Plastering /external/internal
- ii. Rhino ceiling/ timber works
- iii. Electricity wiring
- iv. Plumbing
- v. Aluminum windows
- vi. Burglar bars

12.16 However, counsel explained that the Appellant had argued that eventualities occurred to ceiling boards and that it was something that could easily be repaired. In response to this, counsel for the 2nd Respondent submitted that this showed a lack of care and skill on the part of the Appellant who was perceived by the 1st Respondent to possess knowledge and skill in the construction industry. Further, she submitted that the Appellant had argued that the installation of twelve (12) points for the streetlights and manhole covers, works were still underway, but noted that this was way past the two (2) months deadline that was specified in the contract within which to finish the project. Counsel for the 2nd Respondent further submitted that the foregoing was an admission on the part of the Appellant that the findings of the 2nd Respondent were indeed correct.

12.17 In her final submission, counsel for the 2nd Respondent stated that the Board was on firm ground when it directed that the Appellant refunds the 1st Respondent for the work not completed, entitling the 1st Respondent to a refund of ZMW117,050.00 (One Hundred and Seventeen Thousand and Fifty Zambian Kwacha).

13 APPELLANT'S REPLY TO THE 2ND RESPONDENT'S SUBMISSIONS

13.1 Counsel for the Appellant admitted that the terminology used was incorrect, as compensation and refund did not mean the same thing. However, she maintained that it did not change the narrative of this matter, which was that a substantive amount of work was done and as such awarding a refund of fifty percent (50%) was unjustifiable.

13.2 Counsel further averred that the contract was in two (2) stages and the failure to complete the first phase of the contract was due to the bad state that the structure was found in, as such the Appellant spent a lot of time rectifying the defects, hence the delay. Furthermore, counsel averred that the delay on the second stage was substantially caused by the 1st Respondent's non-payment for the second stage of contract.

13.3 Regarding the submission above, counsel for the Appellant submitted that since eventualities occurred in construction due to unforeseen circumstances, that was why in every construction project there were contingencies. These, according to counsel, were downside risk estimates meant to mitigate risks and were held in reserves to deal with unforeseen circumstances. It was further submitted that it was unfair for the 2nd Respondent to base their argument of a lack of care and skill without effectively addressing issues in construction works.

13.4 Concerning the installation of security lights and manhole covers and the two (2) months period that had elapsed from the date of submitting that works were underway, counsel for the Appellant admitted that there was a delay. However, counsel for the Appellant stated that the delay was due to the fact that the Appellant's managing director had travelled out of the country for an emergency and his absence was communicated to the 1st Respondent prior to his travel. Counsel for the Appellant further submitted that despite this, all materials for works that had not been completed were purchased and delivered to site, awaiting installation.

13.5 Counsel for the Appellant further averred that the refund of ZMW117, 050.00 (One Hundred and Seventeen Thousand and Fifty Zambian Kwacha) was unjustifiable as ninety-five percent (95%) of the works in the first stage had already been done. She submitted that the cited delays in fitting twelve (12) light points, manhole covers, plastering the holes for rainy water and cracks in the ceiling would not amount to ZMW117,050.00 (One Hundred and Seventeen Thousand and Fifty Zambian Kwacha).

Grounds two and three

13.6 Counsel for the Appellant submitted that she wished to argue grounds two and three together as they related to the same issue. She submitted that the

2nd Respondent based its findings of unfair business practices on section 45 of the Act and section 12 of the Competition and Fair-Trading Act¹¹.

13.7 In view of the provisions cited above, counsel for the Appellant submitted that it was evident that unfair trading included misrepresentation, false presentation of a good or service, non-compliance with the main standard and causing injury to a consumer. It was therefore, her position that the Board failed to properly direct itself when it held that the Appellant had engaged in unfair business practices, when the ingredients necessary to render an act unfair were not satisfied. In her view, the non-completion of the works was because of the poor workmanship performed by the previous contractor, which position had been stated in an alleged exculpatory letter sent to the 2nd Respondent on 25th January, 2021, and failure by the 1st Respondent to make payments for the second phase of the works. She stated that this was despite timely communication by the Appellant that it was ready to commence with the works. Counsel for Appellant submitted that this was evidenced by an email dated 7th November, 2020¹², in which the Appellant stated that ten (10) days prior to that email, parties had agreed that the second phase of works would commence after payment for the second phase of the contract had been made. Therefore, the second phase

¹¹ Chapter 417 of the laws of Zambia (Repealed). The Tribunal, however, notes that the Competition and Fair-Trading Act chapter 417 of the laws of Zambia was repealed by the Act. Therefore, the reference to the repealed law will have no bearing on the decision of the Tribunal.

¹²CCPC, *Record of Proceedings*, 15th September, 2021, p.16

of the contract could not be commenced since payment had not been made. Furthermore, Counsel stated that the 1st Respondent engaged another contractor before the Appellant commenced the works in the second phase of the project, to carry out the works stipulated in the second phase of the contract.

13.8 In concluding their submissions on this matter, counsel for the Appellant submitted that it was essential for a party to demonstrate that it had performed its obligations under the contract and was entitled to enforce it. She submitted that the 1st Respondent contributed to the delay.

13.9 Counsel for the Appellant, therefore, submitted that the allegations of unfair trading practice were unsubstantiated, as a substantive amount of work according to the first phase was done and the house was in a habitable state as could be seen in photos marked “NC1” and “NC26”. To buttress her argument, counsel for the Appellant cited a case of **MacCormick v Grogan** and stated that equity did not allow statute to be used as an instrument of fraud as such an act would result in unjust enrichment.

13.10 In her final submission, counsel referred to section 3 (2) of the Law Reform (Frustrated Contract) Act¹³, which states that:

“ (2) All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as “the time of discharge”) shall, in the

¹³ CAP 73 of the Laws of Zambia

case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable.

Provide that, if the party to whom the sums were so paid or payable incurred expense before the time of discharge in or for the purpose of the performance of the contract, the court may, if it considers it just to do so having regard to all the circumstances of the case , allow him to return or as the case may be, recover the whole or any part of the sums so paid or payable, not so being an amount in excess of the expenses so incurred”.

Counsel for the Appellant submitted that substantial performance of the contract was done, although not full and complete performance, it was sufficient to satisfy an agreement especially that performance, in good faith, was made. Further, counsel for the Appellant stated that delay did not amount to breach of contract or unfair trading especially that this delay was due to extenuating circumstances and in part due to the 1st Respondent's failure to hold her end of the bargain. Counsel for the Appellant, therefore, prayed that the decision of the Board be quashed as the basic ingredients of unfair business where not satisfied. Further, counsel for the Appellant

prayed that an assessment of the damage be conducted to avoid unjustly enriching the 1st Respondent.

14 1ST RESPONDENT'S SUBMISSIONS

14.1 There were not submissions from the 1st Respondent.

15 2ND RESPONDENT'S SUBMISSIONS

15.1 Counsel for the 2nd Respondent submitted that contrary to the Appellant's assertion in ground two, the Board was on firm ground when it found that the Appellant engaged in unfair trading practice for non-completion of the work, and further, that the record showed that the Board did consider all evidence before rendering its decision. She further submitted that the Board was on firm ground when it found the Appellant liable for unfair trading practices as the record showed no reason for the delay to execute the contract in full were advanced by the Appellant during the investigation.

15.2 Counsel for the 2nd Respondent submitted that the 2nd Respondent's mandate as stated in the Act was, among others, to safeguard and promote competition, protect consumers against unfair trade practices, and investigate unfair trading practices and unfair contract terms and impose sanctions as may be necessary. In this regard, counsel for the 2nd Respondent submitted that the 2nd Respondent protects consumers through carrying out investigations of unfair trading practices. She emphasised that a trading practice will be deemed unfair under section 45 of the Act if:

(a) It misleads consumers.

(b) It compromises the standard of honesty and good faith which an enterprise can reasonably be expected to meet; or

(c) It places pressure on consumers by use of harassment or coercion.

And thereby distorts, or likely to distort, the purchasing decisions of consumers.

15.3 Counsel for the 2nd Respondent further stated that the above, however, did not imply that offences listed under part VII of the Act could be categorised as unfair trading practices and gave an example of the violation that the Appellant was found to have committed under section 49(5) of the Act. Counsel for the 2nd Respondent added that the provisions of the Act made it mandatory for an enterprise or a person who had been engaged in offering a service to a consumer to exercise reasonable care and skill as it delivered the service. She submitted that an enterprise had a contractual obligation to carry out a service with reasonable care and skill and that created a

performance obligation which was analogous to the standard of care in negligence. She emphasised that it was an implied duty to exercise the level of skill and care expected of another reasonably competent member of the profession.

15.4 The 2nd Respondent's counsel also submitted that in view of the above, the Appellant being in the field of construction was reasonably expected to be competent in its field, therefore, the Appellant should have ensured that works of the first phase were performed with reasonable care and skill. Counsel added that the evidence on record suggested otherwise. Counsel cited the case of **Southern Cross Motors v Competition and Consumer Protection Commission**¹⁴, at page 14 of judgement, where the Tribunal discussed the concept of reasonableness by stating the following:

“... the concept of reasonableness is quite a nebulous concept in common law. The general rule is that performance of a contract must be precise and exact. That is, a party performing an obligation under a contract and exactly to the standard required by the contract. Sometimes the standard may be strict, for instance in the case of statutory implied terms of quality in contracts for sale and supply of goods. Whether the alleged performance satisfies this criterion is a question to be answered by construing the contract so as to see what the

¹⁴ 2013/CCPT/002/CON

parties meant by performance and then applying the ascertained facts to that construction, to see whether that which has been done corresponds to which was promised...”

15.5 Counsel for the 2nd Respondent submitted that the contract between 1st Respondent and the Appellant was clear on terms of duration of the contract as well as the type of works that were to be executed. She further submitted that by the Appellant’s own admission, the project was not completed within the stipulated two (2) months as stated in the contract, neither did the Appellant complete the work by the time of investigation by the 2nd Respondent. Furthermore, counsel for the 2nd Respondent submitted that the Appellant was shifting blame on the previous contractor when the facts in issue were directly related to works that were performed by the Appellant. In the Appellant’s skeleton arguments, the Appellant admitted to not completing the works for the first stage of the project and argued that the cracks in the ceiling board could be repaired as they were “eventualities”. In counsel for the 2nd Respondent’s view, this was failure on the part of the Appellant to perform its obligation under the contract at the standard required of the Appellant and at the agreed time specified in the contract or within reasonable time around the agreed time.

15.6 Counsel for the 2nd Respondent further averred that although the Appellant had argued that the 1st Respondent contributed to the delay of the project, it was her view that the Appellant, being the one possessed with the construction skills, ought to have known that the project would not be

completed within the agreed time. Furthermore, the Appellant knew the exact works that needed to be done in the first stage of the project, but instead waited for the 1st Respondent to complain about the non-completion of works. Counsel for the 2nd Respondent submitted that this was clear negligence on the part of the Appellant and contrary to this Tribunal's emphasis on enterprises providing high quality services to consumers. She fortified her position by citing the **Southern Cross Motors case**, *supra*, at page 16 of the Judgment where this Tribunal observed as follows:

“we would also like to make a general observation about the levels of service delivery in the country. We would like to urge service providers of their duty to provide high quality services and to be responsible to the needs of Consumers”.

15.7 Counsel for the 2nd Respondent submitted on the aspect of the Appellant citing repealed law which the Tribunal has already addressed. She also submitted that the Appellant's submission that the non-completion of the work was because of the poor work done by the contractor that built the structure, which position was not communicated to the 2nd Respondent during investigations, or in the letter from the Appellant's lawyers¹⁵, was merely an afterthought on the part of the Appellant.

15.8 Counsel for the 2nd Respondent also drew the Tribunal's attention to e-mail communications between the Appellant and the 1st Respondent and stated

¹⁵CCPC, *Record of Proceedings*, 15thSeptember, 2021, pp.35-47

that e-mails showed that a meeting was held between the Appellant and the 1st Respondent at which meeting the 1st Respondent raised a number of concerns regarding the works done by the Appellant. She submitted that as evidenced by the emails, the Appellant committed to work on the 1st Respondent's concerns but did not follow through with its commitment and continued to trivialise the extent of the poor service rendered to the 1st Respondent. She argued that this was evident from the persistence on the part of the Appellant in its submissions during the investigation and on appeal, that the Appellant could repair and complete the works, despite the 1st Respondent having given the Appellant an opportunity to do so.

15.9 Counsel for the 2nd Respondent submitted that although the Appellant had argued that no evidence was taken into consideration, the record will show that meetings were held with the Appellant, 1st Respondent and 2nd Respondent and that the Appellant's submissions were taken into consideration. Furthermore, counsel for the 2nd Respondent submitted that the 2nd Respondent visited the premises in question to assess the works done and prove or disprove the 1st Respondent's allegations.¹⁶ She submitted that the evidence was taken into consideration and by the Appellant's own admission to the extent that the works were not completed within the specified time and that there was still some work that needed to be done with the wiring, plumbing, windows, burglar bars and ceiling board. Furthermore, she submitted that no reasons were advanced by the Appellant

¹⁶CCPC, *Record of Proceedings*, 15thSeptember, 2021, pp.32-39

for the delay in completing the project¹⁷ and the Appellant instead suggested resolving the matter amicably, without admitting its wrongdoing.

15.10 Counsel for the 2nd Respondent cited the case of **Blyth v Birmingham Waterworks Company**¹⁸ where the court stated that negligence was the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

15.11 Counsel for the 2nd Respondent submitted that Blyth established the appropriate tests for the behavior of the general public and not for the behavior of members of a more limited group, who have or hold themselves out as having specialist skills such as architects or engineers. She submitted that in the **Bolam case**, *supra*, the court refined the test established in the Blyth case in order to accommodate specialist skills and the court applied the following test:

'... where you get a situation, which involves the use of some specialist skill or competence, then the test of whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus because he has not got this special skill. A man may not possess the highest expert skill at the risk of being found negligent. It is well established law that

¹⁷ CCPC, *Record of Proceedings*, 15th September, 2021, p.47

¹⁸ (1856)11 Ex Ch 78

it is sufficient to be exercising the ordinary skill of an ordinary competent man exercising that particular art.'

15.12 Counsel for the 2nd Respondent finally argued that the Appellant failed to provide a service to the 1st Respondent with reasonable care and skill and within the specified time of two (2) months and within reasonable time around the agreed time. In view of this, counsel submitted that the Board was on firm ground when it found that the Appellant had violated Section 49(5) of the Act, and thereby awarding the 1st Respondent a refund of ZMW117,050.00 (One Hundred and Seventeen Thousand and Fifty Zambian Kwacha), in accordance with Section 49(7)(a) of the Act. Counsel concluded that the appeal lacked merit and should be dismissed.

16 APPELLANT'S REPLY TO THE 2nd RESPONDENT'S SUBMISSIONS

16.1 Counsel for the Appellant, in replying to the 2nd Respondent's submission on ground two and three, submitted as below.

16.2 While counsel for the Applicant agreed that the 2nd Respondents mandate was, among others, to safeguard and promote competition by protecting consumers against unfair trading practices, she submitted that in as much as the law conferred that duty on the 2nd Respondent, that duty must be exercised with fairness. She further submitted that all circumstances ought to have been taken into consideration before arriving at a decision. Furthermore, regarding the offences listed in part VII of the Act, counsel for the Appellant submitted that these offences could not be categorised as

unfair trading practices. She argued that the acts or omissions of the Appellant did not constitute unfair trading practices as provided under section 45(5) of the Act.

16.3 Counsel for the Appellant also submitted that the 1st Respondent was not misled in any way nor was there any compromise of the standard of honesty and the Appellant acted in good faith. She added that the 1st Respondent was in no way put under pressure by harassment or coercion. As such counsel for the Appellant submitted that the ingredients needed to constitute an offence of unfair trading practice were not satisfied. In this regard, counsel argued that the Appellant performed its duty with care and skill and, therefore, could not be discredited based on unforeseen circumstances.

16.4 Counsel for the Appellant further submitted that the Appellant possessed the required knowledge, skill and attitude needed to perform its duty successfully and the minor hiccups faced during the course of its engagement could not warrant incompetence. She posited that performance indicators assessed competence and from the substantive work done by the Appellant, it could not be said to have been incompetent. In view of this she submitted that the 2nd Respondent's allegations were unfounded.

16.5 In addition, counsel for the Appellant submitted that the Appellant denied the assertions made by the 2nd Respondent in its entirety and that most of the work had been done to the structure which was not part of the contract before proceeding to commence the works as per contract. Furthermore,

counsel for the Appellant argued that contrary to the 2nd Respondent's allegations that it did not indicate the 1st Respondent contribution to the delay in its initial argument, she submitted that the Appellant had engaged the 1st Respondent on how works were progressing.¹⁹ She stated that the email on record clearly showed that the Appellant had indicated why there was a delay and that the communication was attributing the delay to the bent walls which needed to be plastered twice by the Appellant. She argued that this was necessary to put the structure in good condition before proceeding with the works.

16.6 Counsel for the Appellant further submitted that the Appellant held meetings with the 1st Respondent after an email was sent to the 1st Respondent communicating the progress that had been made as at 22nd October, 2020. She submitted that the 1st Respondent raised a concern with the Appellant over the delay of the works and that the Appellant explained what caused the delay and assured the 1st Respondent that works were underway. Additionally, that the Appellant informed the 1st Respondent of the need to commence the second stage of the works and requested for payment, which was not made.

16.7 Counsel for the Appellant submitted concerning evidence gathered by the 2nd Respondent. Counsel argued that the Appellant's contention was not over the meetings held and recorded, but the decision made by the 2nd

¹⁹CCPC, *Record of Proceedings*, 15thSeptember, 2021, p.17

Respondent to award the 1st Respondent a refund of ZMW117,050.00 (One Hundred and Seventeen Thousand and Fifty Zambian Kwacha) without considering the amount of work that was done by the Appellant. She further argued that in so far as the contract was not executed fully, the amount of work done could not amount to fifty percent (50%) of the works.

16.8 In her final submission, counsel for the Appellant intimated that in the Appellant's alleged exculpatory letter sent to the 2nd Respondent in January, 2021, reasons for the delay were advanced and that the request to have the works done was made. Additionally, the reasons for the delay were also advanced during the meetings that were held with the parties. In view of this, counsel for the Appellant submitted that the Appellant entirely denied the allegation that it failed to perform its work with reasonable care and skill.

17 CONSIDERATION OF THE MATTER

17.1 The Tribunal has considered the submissions and skeleton arguments from both parties, and the Record of Proceedings. Based on this, the following facts are not in dispute:

- i. There was a contract between the Appellant and 1st Respondent which defined the terms and conditions of engagement.

- ii. The 1st Respondent made a payment of ZMW235,000.00 (Two Hundred and Thirty-Five Thousand Zambian Kwacha) to the Appellant for the first stage of the contract, according to the agreed terms of the contract.
- iii. The Appellant did not execute works to the 1st Respondent's expectation, nor did it complete the works.
- iv. The 1st Respondent lodged a complaint to the 2nd Respondent highlighting her dissatisfaction with the Appellant's performance of the contract. The 2nd Respondent carried out the due process of investigation and its Board rendered a decision.
- v. The Appellant appealed to this Tribunal to set aside the decision of the Board made on 10th June 2021, wherein the Board held that the Appellant violated section 49(5) in accordance with section 49(6) (d) of the Act.

18 TRIBUNAL'S DECISION

Ground one

18.1 That the Board erred in law and in fact, when it awarded the 1st Respondent compensation for breach of due care skill and within a reasonable time on the basis that the work was not completed twenty-one (21) days following the agreed completion date.

18.2 From the outset, the Tribunal wishes to state that that the Board did not award compensation to the 1st Respondent for breach of due and skill on the basis that work was not completed within the agreed contract periods. Counsel for the Appellant in arguing the first ground of appeal used the word 'compensation' instead of 'refund', a mistake which counsel for the 2nd Respondent highlighted in her submissions and went further to define and differentiate the two words and their diverse meanings in this context. In her reply counsel for the Appellant acknowledged the mistake made in their submissions and indicated that the word they should have used in this context was 'refund' and not 'compensation'.

18.3 Having considered the evidence in the Record of Proceedings, and the submissions of the parties, it is clear that the basis of the dispute between the parties is a contract. According to Black's Law dictionary, 7th Edition, *a contract is an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law*. This means the agreement creates terms, conditions and obligations that the parties should abide by for the duration of the contract. Generally, *a breach of contract occurs when a contract has gone unfulfilled or when one of the parties neglects their responsibilities as outlined in the agreement*²⁰. Contrary to counsel's assertion that there was no breach of contract, it is the Tribunal's view that a breach of the contract occurred. In the case of **Transactional Payment Solutions Limited v Brunelli Construction**

²⁰<https://www.upcounsel.com/not-fulfilling-a-contract> visited on 20-03-2024 at 21.00hrs CAT

Zambia Limited²¹, the High Court, at page J7, referred to the learned author of Law of Contract, P. Richards, on the effect of non-performance of a binding contract who states as follows;

“Where a person fails to perform their side of the contract then subject to the mitigating factors, they will be in breach of the contract. A breach of contract will always give rise to a claim in damages, no matter how minor or serious the nature of the breach. Whether an innocent party is entitled to treat the contract as at an end, so that they can treat the contract as discharged, depends on whether the breach is so serious that it goes to the root of the contract, that is, there is a breach of a primary obligation”.

In casu, the terms of the contract were clear, and they were binding on the parties and enforceable by law. In the Transactional Payment Solutions case²², *supra*, counsel referred to the learned authors of *Chitty on Contracts* who state the general rule relating to the performance of a binding contract as follows:

“The general rule is that a party to a contract must perform exactly what he undertook to do. When an issue arises as to whether performance is sufficient the court must construe the contract in order to ascertain the nature of the obligation (which is a question of ‘mixed fact and law’) in that the court decides whether the facts of the actual performance

²¹2017/HP/2149

²²*Ibid.*, p.J6

satisfy the standard prescribed by the contractual provisions defining the obligation”.

18.4 Counsel went on to submit that the parties agreed on the terms and conditions of the contract and their performance. The plaintiff was under obligation to provide internet services while the defendant was required to pay for the services. Similarly, in the case under consideration, the Appellant undertook to complete the works on the 1st Respondent's project within eight (8) weeks, four (4) weeks each for stage one (1) and stage two (2). Further, the Appellant also undertook to complete the first stage of the contract within the cost of ZMW235,000.00 (Two Hundred and Thirty-Five Thousand Zambian Kwacha) and, thereafter, proceed to carry out works in stage two (2) of the contract. Therefore, the delay of stage one (1) of the works could not have been caused by the 1st Respondent's failure to pay the agreed amount for stage two (2) of the works, which at that point had not taken effect. The said works in stage two (2) of the contract were only going to commence after completion of stage one (1) of the works. The Tribunal has established that there were agreed terms in the contract which terms gave parties assurance and certainty. Furthermore, the terms gave the parties confidence and the ability to trust the other party to fulfill their end of the obligations. One of the terms in the contract was time or the period of executing the contract as stated above²³. Time is a critical factor in construction contracts. When a contract specifies a time limit for fulfilling an obligation, failing to meet that deadline is typically considered a "material" breach of the contract. As a result, the other party may be entitled to damages. The contract under consideration had a specified time

therefore, on firm ground to conclude that the Appellant did not exercise reasonable care and skill in dealing with the 1st Respondent and further that the Appellant was in breach by not completing the work within the stated contractual duration.

Grounds two and three

18.7 Grounds two (2) and three (3) relate to findings of unfair trading practices by the Appellant.

18.8 Both counsel for the Appellant and counsel for the 2nd Respondent opted to argue these two grounds as one as they were related in nature.

18.9 The Appellant committed to finish an incomplete house within two months (13th September 2020 to 13th November 2020)²⁴ from the date of execution in a thorough manner using the best materials. It was further agreed in the contract that the Appellant was to provide weekly progress reports as well as site meetings. Furthermore, the works to be completed were itemised in the said contract.

18.10 Section 45 of the Act provides as follows:

“A trading practice is unfair if -

a) It misleads consumers.

b) It compromises the standard of honesty and good faith which an enterprise can reasonably be expected to meet; or

²⁴CCPC, *Record of Proceedings*, 15th September, 2021, p.6

c) *It places pressure on consumers by use of harassment or coercion;*

and thereby distorts, or is likely to distort, the purchasing decisions of consumers”.

Based on the provisions of the Act, unfair trading practice includes misleading a consumer in relation to goods or services, and non-compliance with the main standard or causing injury to the consumer. The Tribunal considered all the submissions and evidence presented before it and is of the considered view that the Appellant in its conduct, satisfied the ingredients of unfair trading practice. The Appellant committed to deliver on its obligations to the 1st Respondent within a specified period of time and at a specified cost. The Appellant failed to deliver on these terms and, therefore, misled the 1st Respondent and compromised on the quality, standard and general terms that it was expected to meet. The Appellant further satisfied the third ingredient of unfair trading practice, as specified in section 45(c) of the Act, as it placed the burden of payment for the second stage of the contract on the 1st Respondent before completing the works and fulfilling the first stage of the contract, as agreed by the parties. The Appellant further stated that the failure by the 1st Respondent to make the payment was part of the reason why the works in stage one (1) were delayed.

CONCLUSION

18.11 The appeal fails on all of the three (3) grounds.

18.12 On the balance of law and evidence produced in the matter, the Tribunal upholds the 2nd Respondent's finding that the Appellant failed to exercise reasonable care and skill, and by so doing breached section 49(5) of the Act.

18.13 The Tribunal further upholds the 2nd Respondent's finding that the Appellant engaged in unfair trading practices.

18.14 Lastly, concerning the refund in ground one of the appeal, the Tribunal orders that the 2nd Respondent engage a government valuer from the department responsible for valuation of buildings or a private valuer agreed upon by the parties, within two (2) months of receipt of this judgment. The said valuer is required to ascertain the actual value of the refund due to the 1st Respondent which value of the works will be the refund due to the 1st Respondent and not the unvalued fifty percent (50%) equivalent to ZMW117,050.00 (One Hundred and Seventeen Thousand and Fifty Zambian Kwacha). In which case it's not a question of whether the 1st Respondent should be refunded but rather how much is to be refunded to the 1st Respondent in actual value.

18.15 Costs in the cause.

Any party aggrieved by this Judgment may appeal to the Court of Appeal within thirty (30) days of receipt of this Judgment.

Dated the 27th day of May 2024



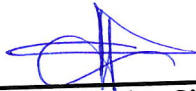
Mr. J.N. Sianyabo
CHAIRPERSON



Mrs. M. B. Muzumbwe-Katongo
VICE CHAIRPERSON



Mr. D. Mulima
MEMBER



Mrs. B. S. Chaila- Sichizya
MEMBER



Mr. B. Tembo
MEMBER

of eight (8) weeks four (4) weeks for each stage) agreed by both parties. Completion within reasonable time only takes effect if the contract duration had not been specified. The Tribunal has noted that the Appellant in its submissions has exhibited disregard for the time factor in the contract. In view of this, we disagree with the Appellant's argument that time was not of the essence under the contract.

18.5 As submitted by the 2nd Respondent, that the Appellant appeared to be trivializing their non-performance of the contract. The Appellant in its capacity as a contractor had the responsibility to assess the project during its planning stage and advise the client accordingly. Further the Appellant ought to have inspected in anticipation of any potential modifications to the contract based on the state of the existing building. In this case, a site survey should have been conducted to ascertain the state of the building prior to embarking on any new works. Additionally, the Appellant ought to have engaged in clear communication with the 1st Respondent which communication should have highlighted the challenges encountered on site and how they would to affect the contract in terms of time, cost, and quality, for avoidance of any doubt.

18.6 In view of the foregoing, the Tribunal finds that the 2nd Respondent followed the due process of investigation in concluding the matter and thoroughly considered the factors surrounding the matter. The 2nd Respondent was

²³CCPC, *Record of Proceedings*, 15thSeptember, 2021, p.6