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

2022/CCPT/048/CON

IN THE MATTER OF: SECTIONS 45(b), 46(1) AND 47(a)(iv) 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

SALOBA LIMITED — APPELLANT

AND

COMPETITION AND CONSUMER PROTECTION COMMISSION — 1ST RESPONDENT

SUNDAY MUSONDA — 2ND RESPONDENT

CORAM: Mr. J.N. Sianyabo - Chairperson
Ms. M.B. Muzumbwe - Vice Chairperson
Mr. D. Mulima - Member
Mrs. B.S. Chaila-Sichizya - Member
Mr. B. Tembo - Member

For the Appellant: Mrs. N. Chila Matowe - Messrs. Muya and Company
Mr. M. Libakeni - Messrs. Muya and Company

For the Respondent: Ms. M. Mtonga, Manager, Legal Services - Competition and Consumer Protection Commission

Ms. T. Chola, Legal Officer - Competition and Consumer Protection Commission

---

J U D G M E N T

LEGISLATION REFERRED TO

1. The Competition and Consumer Protection Act No.24 of 2010
2. The Competition and Consumer Protection (Tribunal) Rules, S.I. No.37 of 2012
3. Sale of Goods Act,-1893

CASES REFERRED TO:

1. Nyimba Investments Limited v Nico Insurance Zambia Limited (Appeal 30 of 2016) [2017] ZMSC 32 (31 March 2017)
2. DLF Universal Limited v Director of Town and Country Planning, Haryana and Others (Civil Appeal No.550/2003 dated 19.11.2010) - Supreme Court of India
3. S. Leo Harmonay Inc v Binks Manufacturing Co., 597 F.Supp. 1014 (S.D. N.Y. 1984)
4. Rajasthan State IDI Corporation & Another v Diamond and Gem Development Corporation Limited & Another (Civil Appeal No.7252/2003 dated 12.2.2013) - Supreme Court of India
5. Food Corporation of India v A.M. Ahmed and Co. & Others [AIR 2007 SC 829]
6. Deloitte and Touche v Cable Network Solutions Limited [2012/HPC/0599]

WORKS REFERRED TO:

1. Atiyah, P.S. et al. (2005). *The Sale of Goods.* (11th ed.). Pearson-Longman, London.
2. Beagle, H.G. (2018). *Chitty on Contracts (Volume II) - Specific Contracts.* (33rd ed.). Sweet & Maxwell, London.
3. Chammount, B et al. (2024). *Price Escalation in Construction Projects: Examining National and International Contracts.* Journal of Construction Engineering and Management. 150. 10.1061/JCEMD4.COENG-13918. (Accessed: 20.6.2025).

4. Garner, B. A. (2014). *Black's Law Dictionary* (10th ed.). St. Paul, Minnesota: West.

5. Gates, J. (2022). *Price escalation clauses in construction contracts.* Published on 25th November, 2022 at https://www.walkermorris.co.uk/comment-opinion/price-escalation-clauses-in-construction-contracts/ (Accessed on 7.6.2025).

6. Van der Bossche, P. (2012). *Rules on Unfair Trade in The Law and Policy of the World Trade Organisation: Text, Cases and Material.* At https://www.cambridge.org/core/books/abs/law-and-policy-of-the-world-trade-organisation/rules-on-unfair-trade/. Chapter 6, pp.507-613. (Accessed on 22.5.2025).

7. Wallace, I.N.D. (1995). *Hudson's Building & Engineering Contracts - (Volume 2).* (11th ed.). Sweet & Maxwell, London.

8. Wiewiórowska-Domagalska, A. (2015). *Unfair Trade Practices in the Business to Business Food Supply Chain.* At https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/563430/IPOL_BRI(2015)563430_EN.pdf. (Accessed on 23.10.2025).

9. Wheeler, S. and Shaw, J. (1994). *Contract Law: Cases, Materials and Commentary.* (Oxford University Press, Oxford)

TEMBO, B., Member, delivered the judgment of the Tribunal

1 INTRODUCTION

1.1 On 1st March, 2022, and pursuant to section 60 of the Competition and Consumer Protection Act No.24 of 2010 (hereinafter **"the Act"**), Saloba Limited (hereinafter **"the Appellant"**) filed a Notice of Appeal before the Competition and Consumer Protection Tribunal (hereinafter **"the Tribunal"**). The appeal assailed the Decision of the Board of Commissioners (hereinafter **"the Board"**) of the Competition and Consumer Protection Commission (hereinafter **"the 1st Respondent"**), which was delivered on 22nd February, 2022, and wherein the Appellant was found to have breached provisions of sections 45(b), 46(1) and 47(a)(iv) of the Act.

1.2 The Tribunal would also like to draw the attention of the parties to the composition of the quorum, which includes Mr. J.N. Sianyabo, who chaired the hearing but was not part of the members who considered the matter.

2 RELIEFS BEING SOUGHT

2.1 The Appellant seeks the Tribunal to grant the following reliefs:

(i) That the Decision of the Commission given on 22nd February, 2022 be quashed;

(ii) Costs; and

(iii) Any other reliefs the Tribunal may deem fit.

3 BACKGROUND

3.1 The background to the matter is that on 11th August, 2021, the 1st Respondent received a complaint from Mr. Sunday Musonda (hereinafter **"the 2nd Respondent"**) alleging that on 17th May, 2017, he purchased from the Appellant, 26 Cubic Meters (m^3) of 15 Megapascal (mpa) concrete at a unit price of ZMW920.00 (Nine Hundred and Twenty Zambian Kwacha) per m^3, which gave a total cost of ZMW23,920.00 (Twenty-Three Thousand Nine Hundred and Twenty Zambian Kwacha).

3.2 Further, the 2nd Respondent alleged that on the same day, he paid the sum of ZMW210,900.00 (Two Hundred and Ten Thousand Nine Hundred Zambian Kwacha) to purchase 222m^3 of 20mpa concrete at a price of ZMW950.00 (Nine Hundred and Fifty Zambian Kwacha) per m^3. Furthermore, the 2nd Respondent alleged that on

18th June, 2017, and after receiving a discount of ZMW2,160,00 (Two Thousand One Hundred and Sixty Zambian Kwacha), he paid a sum of ZMW130,000.00 (One Hundred and Thirty Thousand Zambian Kwacha) to purchase 118m^3 of 25mpa concrete that was initially priced at ZMW1,120.00 (One Thousand One Hundred and Twenty Zambian Kwacha) per m^3.

3.3 In addition, the 2nd Respondent alleged that the Appellant delivered the 26m^3 of 15mpa concrete in full but only 122m^3 out of the total of 222m^3 of 20mpa concrete, leaving a balance of 100m^3 valued at ZMW95,000.00 (Ninety-Five Thousand Zambian Kwacha). The 2nd Respondent also submitted that he agreed with the Appellant to receive 84.82m^3 of 25mpa concrete at a price of ZMW1,120.00 (One Thousand One Hundred and Twenty Zambian Kwacha) per m^3 against the ZMW95,000.00 (Ninety-Five Thousand Zambian Kwacha) balance. The 2nd Respondent alleged further that with the agreement, the Appellant was to deliver a total of 202.82m^3 of 25mpa concrete.

3.4 Furthermore, the 2nd Respondent alleged that the Appellant, however, only managed to deliver 166.5m^3 of 25mpa concrete leaving a balance of 36.32m^3, which the Appellant refused to deliver. In addition, the 2nd Respondent alleged that the Appellant informed him that delivery of the remaining cubic meters of concrete would be done at a new price of ZMW1,880.00 (One Thousand Eight Hundred and Eighty Zambian Kwacha) per m^3. The 2nd Respondent alleged that this was unfair because he had purchased the 25mpa concrete at a price of ZMW1,120.00 (One Thousand One Hundred and Twenty Zambian Kwacha) per m^3.

The 2nd Respondent demanded that the Appellant delivers the remaining cubic meters of concrete in accordance with the price of ZMW1,120.00 (One Thousand One Hundred and Twenty Zambian Kwacha) per m^3 that the 2nd Respondent paid.

3.5 Aggrieved by the response of the Appellant, the 2nd Respondent sought the intervention of the 1st Respondent in a complaint filed on 11th August, 2021.

3.6 Following receipt of the complaint, the 1st Respondent sent to the Appellant a Notice of Investigation (hereinafter the **"Notice"**) and accompanying letter dated 20th August, 2021, which documents were received by the Appellant on 23rd August, 2021.[1] The said documents outlined the complaint as submitted to the 1st Respondent by the 2nd Respondent, and stated the 1st Respondent's mandate in the matter pursuant to section 55 of the Act, which read, as the law stood at the time, *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; [and]

[1] CCPC., *Record of Proceedings*, dated 3rd June, 2022, pp.11-16

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

3.7 Further, the Appellant was required to respond to the Notice and the accompanying letter *in scripto* within 14 days of receipt.

3.8 On 7th September, 2021, the 1st Respondent received a written reply dated 27th August, 2021, from the Appellant's lawyers GM Legal Practitioners, in which it was submitted that:[2]

(i) The Appellant was aware of the complaint, which had been brought to its attention by both the 2nd Respondent, and his Advocates;

(ii) The Appellant was of the considered view that over four (4) years after the purchase and payment for the concrete lapsed before the 2nd Respondent requested for the delivery to be made to its chosen site. This period was in the Appellant's considered view, inordinate. Further, the Appellant submitted that, the prices of inputs in the manufacture of concrete had drastically increased over the intervening period, such that it was not commercially tenable to supply the concrete at the 2017 rates;

(iii) The Appellant advised the 2nd Respondent to consider the matter resolved following delivery of concrete at the prices prevailing in mid-2021; and

[2] CCPC., *Record of Proceedings*, dated 3rd June, 2022, pp.18-19

(iv) That the Appellant had neither engaged in any unfair trading practice, abrogated any provisions of the Act nor misrepresented its products.

3.9 Following further inquiry from the 1st Respondent, the Appellant's lawyers in a letter dated 21st September, 2021[3], submitted *inter alia* that:

> ***"1. ...***
>
> ***7. We confirm that our Client did enquire from the site Manager for Mr. Musonda's site in Mufulira whether they could deliver more concrete to the site at which point it was advised that the site was not ready to receive the concrete and that they will advise once they were ready. This was in the period following the initial delivery of the concrete as contracted.***
>
> ***8. We have been instructed to reiterate that the concrete trade custom in [sic] that delivery is only made once the site is ready and customer advises that concrete can be delivered. This is so owing to the fact that once concrete is batched it must be used on the dame [sic] day or it will go to waste. Our Client was always ready in the intervening four (4) years to deliver the concrete if requested. It was never requested to deliver the concrete or at all.***
>
> ***9. ...***

[3] CCPC., *Record of Proceedings*, dated 3rd June, 2022, p.20

10. ..."

3.10 Similarly, responding to the 1st Respondent's inquiry on 27th September, 2021[4], the 2nd Respondent submitted *inter alia* as follows:

> ***"...the agreement with Saloba was that I pay for all grades of Premix concrete and that they will deliver as per my request...I went with money enough only to pay for the Blinding and Foundation Footing and Ground Floor Slab as the site was not ready at this time...I was advised by Saloba to pay in advance even for the upper floor Slab and Columns as this will not affect the price of procuring concrete...Have they delivered all the quantities as we purchased? NO...They are saying because they have changed the price from what we bought from them in 2017 to the current price. Their reasoning is that because of passage of time. But our argument is that this is the reason we paid in advance so we are not affected by price changes as agreed with Saloba...they want their price to change but our money is still the same. No appreciation to our money..."***

3.11 To support his submissions, the 2nd Respondent presented copies of the quotations, purchase order, and receipts.[5]

4 1st RESPONDENT'S FINDINGS FOLLOWING INVESTIGATION OF THE COMPLAINT

4.1 Upon completion of investigations, and in line with the provisions of section 55(10)

---

[4] CCPC., *Record of Proceedings,* dated 3rd June, 2022, pp.21-22
[5] Ibid., pp.6-10

of the Act, the 1st Respondent published a Preliminary Report, which was served on the Appellant and 2nd Respondent on 10th November, 2021. The Preliminary Report stated *inter alia* that the 1st Respondent found the Appellant to have violated provisions of section 45(b) of the Act as read together with section 46(1), and section 47(b)(i) of the Act. The said statutes state *inter alia* as follows:

> ***"45. A trading practice is unfair if...(b) it compromises the standard of honesty and good faith which an enterprise can reasonably be expected to meet...and thereby distorts, or is likely to distort, the purchasing decisions of consumers.***
>
> ***46. (1) A person or an enterprise shall not practice any unfair trading.***
>
> ***47. A person who, or an enterprise which —***
>
> ***(a)...***
>
> ***(b) makes a false or misleading representation concerning—***
>
> ***(i) the price of any goods or services;***
>
> ***(ii) ...***
>
> ***is liable to pay the Commission a fine..."***

4.2 The 1st Respondent also established that:

(i) On 13th May, 2017, the 2nd Respondent obtained a quotation from the Appellant to purchase various types of concrete;

(ii) On 17th May, 2017, the 2nd Respondent paid ZMW23,920.00 (Twenty-Three Thousand Nine Hundred and Twenty Zambian Kwacha) and ZMW210,900.00

(Two Hundred and Ten Thousand Nine Hundred Zambian Kwacha) for the purchase of 26m^3 of grade 15mpa concrete and 222m^3 of grade 20mpa concrete, respectively;

(iii) On 18th June, 2017, the 2nd Respondent obtained a new quotation for 118m^3 of 25mpa concrete, at a new price of ZMW1,120.00 (One Thousand One Hundred and Twenty Zambian Kwacha) per m^3. Delivery was to be at the 2nd Respondent's request;

(iv) On 18th June, 2017, the 2nd Respondent paid ZMW130,000.00 (One Hundred and Thirty Thousand Zambian Kwacha) for 118m^3 of 25mpa concrete;

(v) The Appellant delivered 26m^3 of 15mpa and 122m^3 of 20mpa concrete leaving a balance of 100m^3 of 20mpa concrete valued at ZMW95,000.00 (Ninety-Five Thousand Zambian Kwacha);

(vi) Later, the 2nd Respondent and the Appellant agreed to use the ZMW95,000.00 (Ninety-Five Thousand Zambian Kwacha) to purchase 25mpa concrete, which translated to 84.82m^3 of 25mpa concrete;

(vii) The 25mpa concrete was not delivered immediately as the 2nd Respondent's site was not ready to receive the concrete for the upper deck slab and columns;

(viii) In 2021, when the 2nd Respondent requested delivery of the 25mpa concrete, the Appellant delivered a total of 166.5m^3 out of the total of 202.82m^3 due to the 2nd Respondent; and

(ix) The Appellant declined to supply the remaining 36.32m^3 of 25mpa concrete arguing that the price of concrete had drastically increased; already supplied

the 2nd Respondent with concrete at the prevailing prices; and the job card was closed.

4.3 Further, the Appellant was found with no previous violations of the Act.

4.4 Furthermore, the Appellant was requested to respond to the Preliminary Report within seven (7) days from the date of receipt of the letter.

5 2ND RESPONDENT'S RESPONSE TO THE PRELIMINARY REPORT

5.1 The 2nd Respondent acknowledged receipt of the Preliminary Report in an email dated 10th November, 2022, but did not make any further submissions.

6 APPELLANT'S RESPONSE TO THE PRELIMINARY REPORT

6.1 In a letter dated 23rd November, 2021[6], the Appellant submitted through its lawyers that:

(i) The 1st Respondent completely omitted consideration of the concrete industry practices and ignored the lapsed time between payment and the demand for delivery or at all as regards the reasonableness of the lapsed time in view of the changes in input prices;

(ii) It was unclear as to how the Appellant was found to have breached the provisions of section 45(b) of the Act, when the complaint related only to part of a single transaction; and

[6] CCPC., *Record of Proceedings*, 3rd June, 2022, pp.45-46

(iii) The 1st Respondent's findings would be assailed by the Appellant.

7 DECISION OF THE BOARD

7.1 In exercise of the powers vested in it under section 5(d) of the Act, the Board in its Decision of 11th February, 2022, established that the Appellant had by its conduct towards the 2nd Respondent, violated the provisions of section 45(b) as read together with section 46(1) and section 47(a)(iv) of the Act.

7.2 In view of the violations, the Board directed that,

"i. The Respondent delivers 36.32m³ of 25mpa concrete to the 2nd Respondent at the original price within ten (10) days of receipt of the Board Decision in accordance with Section 5(d) of the Act;

ii. The Respondent is fined 0.5% of their annual turnover in line with the Competition and Consumer Protection Commission Guidelines for Administration of Fines, 2019, for breach of Section 45(b) as read together with Section 46(1) of the Act in accordance with Section 46(2) of the Act;

iii. The Respondent is fined 0.5% of their annual turnover in line with the Competition and Consumer Protection Commission Guidelines for Administration of Fines, 2019, for breach of Section 47(b)(i) of the Act in accordance with Section 47 of the Act; [and]

iv. The Respondent is ordered to submit their latest books of accounts within thirty (30) days of receipt of the Board Decision so

that the Commission determines how much they are liable to pay in accordance with Section 5(d) of the Act."[7]

7.3 Further, the parties were given the liberty to appeal against any part of the Board directives within thirty (30) days of receipt of the Decision.

7.4 The Decision was served on the Appellant on 23rd February, 2022, accompanied with a letter dated 22nd February, 2022.

7.5 Having been aggrieved by the Board Decision, and pursuant to the provisions of section 60 of the Act, the Appellant sought the intervention of the Tribunal by way of Notice of Appeal (hereinafter the **"Appeal"**) filed on 1st March, 2022.

7.6 On 15th February, 2024, the Appellant made an application requesting the Tribunal to cause the 2nd Respondent to be joined to the proceedings of the matter as the 2nd Respondent. The joinder was granted on even date. Also granted was authority for the Appellant to produce documents following an application it made on 8th July, 2022. In both cases, the 1st Respondent did not object to the respective applications.

7.7 During the hearing held on 13th June, 2024, the Appellant intimated its intentions to have one Mr. Gerald Yenga subpoenaed to testify in the matter, which request the 1st Respondent did not object to. However, on resumption of the hearing on 12th September, 2024, the Appellant advised the Tribunal that it had resolved not

[7] CCPC., *Record of Proceedings*, 3rd June, 2022, pp.63-64

to have the second witness subpoenaed, and thus opted to close its case. The 1st Respondent did not object to having the Appellant's case closed.

8 GROUNDS OF APPEAL

8.1 In contesting the Board Decision, the Appellant advanced the following five (5) grounds of appeal:[8]

> ***(i) That the purported decision of the Commission was no decision at all as it lacks the fundamental requirements of an appealable decision ie [sic] the reasons upon which the decision was anchored taking into consideration the arguments advanced by the Appellant to the Commission.***
>
> ***(ii) That the comission [sic] erred in law and fact when it found that the Appellant engaged in unfair trade practices from one single transaction which transactions had attendant peculiar circumstances notwithstanding the fact that in its 12 years of business operation no such complaint has even been made against it.***
>
> ***(iii) The Commission erred in law and fact when it found that the Appellant engaged in unfair trade practices when it refused to deliver concrete to the 2nd Respondent 4 years after the payment. The lapsed two or four (4) years was inordinate as the prices of commodities requisite in the production of concrete had varied significantly rendering performance of the contract unattainable.***

[8] Saloba Limited., *Notice of Appeal* dated 1st March, 2022.

(iv) That the Commission erred in law and in fact when it made an unsupported inference from the invoice that the price of the commodity was 'locked' no matter how long it took for the 2nd Respondent to demand delivery of the concrete contrary to the Concrete Industry Trade Standards and Practices.

(v) *That the Commission erred both in Law [sic] and fact when it found that the Appellant had misrepresented its product to the 2nd Respondent when in fact not as evidence and undisputed facts available clearly indicting [sic] that it was in fact the 2nd Respondent who only knew when the site would be available to receive the Contract [sic]. The Appellant was ready and willing to deliver the concrete at all reasonable times and indeed did enquire of the delivery of the same but to no avail. There was no misrepresentation or at all for the Appellant to the 2nd Respondent.*

9 RESPONDENT'S REPLY TO THE GROUNDS OF APPEAL

9.1 In opposing the grounds of appeal filed by the Appellant, the 1st Respondent on 3rd June, 2022, filed the following responses:[9]

1. That in response to ground one, the decision of the Commission is an administrative decision that considered all the relevant findings of the investigation including the Appellant's and 2nd Respondent's submissions.

2. The Commission did not err in law and in fact when it found that the Appellant had engaged in unfair trade practices from one single

[9] CCPC., *Notice of Grounds in Opposition to Grounds of Appeal* dated 3rd June, 2022.

transaction, which transaction had attendant peculiar circumstances notwithstanding the fact that in its 12 years of business operation no such complaint had been made. This is because the Competition and Consumer Protection Act No. 24 of 2010 (the Act), does not require the unfair trade practice to occur two or more times for it to qualify as a violation.

3. In response to ground three, the Respondent was on firm ground when it investigated the matter and found the Appellant had engaged in unfair trade practices. As the record will show that the delivery period agreed by the Appellant and the 2nd Respondent was open-ended.

4. The Commission did not err in law and in fact when it made an inference from the quotation issued by the Appellant to the 2nd Respondent that the cement would be delivered "as requested" and a full payment of the cement was made by the 2nd Respondent which meant that the 2nd Respondent would not be affected by any future price increments of the cement.

5. In response to ground five, the record will show that the Appellant declined to deliver the concrete when it was requested by the 2nd Respondent on the basis that the price had drastically increased. This amounted to a misrepresentation of the price, as the Appellant had in fact changed the price.

9.2 Further the 1st Respondent sought the following reliefs:

(i) That the Honourable Tribunal upholds the decision of the Board of

Commissioners dated 11th February, 2022.

(ii) The Appeal herein be dismissed forthwith with costs, as it lacks merit.

(iii) Any other relief the Tribunal deems fit.

9.3 The Tribunal also noted that the 1st Respondent did not file an Affidavit in Support of its opposition to the grounds of appeal.

10 THE APPEAL HEARING

10.1 The substantive matter was heard on 13th June, 2024, during which the Appellant called a witness, one Mr. Hanson Musowe, a former employee of the Appellant (hereinafter **"AW"**).

11 APPELLANT'S EVIDENCE-IN-CHIEF

11.1 During evidence-in-chief led by learned counsel Mr. Mahape Libakeni, **AW** testified that sometime in June, 2017, the 2nd Respondent's site engineer, one Mr. Gerald Yenga contacted the Appellant and requested for quotations for the supply of specific types of pre-mix concrete. **AW**, further testified that the 2nd Respondent then paid the Appellant a sum sufficient to purchase 15mpa and 20mpa concrete. According to **AW**, it was agreed that the products would be delivered in batches as and when the 2nd Respondent requested.

11.2 In addition, **AW** testified that after collecting the concrete for the foundation, a balance of ZMW95,000.00 (Ninety-Five Thousand Zambian Kwacha) remained on the 2nd Respondent's account with the Appellant. Furthermore, Mr. Gerald Yenga

is said to have on 17th June, 2017, paid an additional sum of ZMW130,000.00 (One Hundred and Thirty Thousand Zambian Kwacha) bringing the balance on the 2nd Respondent's account to ZMW225,000.00 (Two Hundred and Twenty-Five Thousand Zambian Kwacha). **AW** also testified that henceforth, the 2nd Respondent agreed to collect 25mpa concrete.

11.3 **AW** testified that delivery of the 25mpa concrete commenced on 21st June, 2017, according to the 2nd Respondent's instructions, with the first shipment being for a quantity of 6.5m^3 of 25mpa concrete at a price of ZMW1,050.00 (One Thousand and Fifty Zambian Kwacha) per m^3. Further, **AW** testified that another shipment of 6.7m^3 of 25mpa concrete at a price of ZMW1,050.00 (One Thousand and Fifty Zambian Kwacha) per m^3 was made, followed by 16m^3 of the same product at a price of ZMW1,150.00 (One Thousand One Hundred and Fifty Zambian Kwacha) per m^3. There were subsequent deliveries of 12.5m^3 and 4m^3 both at a price of ZMW1,150.00 (One Thousand One Hundred and Fifty Zambian Kwacha) per m^3. **AW** added that the 4m^3 was delivered in January, 2018 after which the 2nd Respondent is said to have been preparing construction of a suspended floor. Furthermore, **AW** testified that owing to a reported collapse of the upper deck of the building, the Appellant did not deliver concrete between January and November, 2018.

11.4 In further testimony, **AW** submitted that deliveries resumed on 12th November, 2018 at a price of ZMW1,250.00 (One Thousand Two Hundred and Fifty Zambian Kwacha) per m^3, with the last delivery being made on 26th July, 2021 at a price of

ZMW1,880.00 (One Thousand Eight Hundred and Eighty Zambian Kwacha) per m^3. Furthermore, **AW** testified that there was no time during the earlier deliveries that the 2nd Respondent raised any concerns over the price until in July, 2021.

11.5 **AW** emphasised that four (4) years had elapsed between November, 2018 and the last delivery in July, 2021, when a dispute ensued after the 2nd Respondent demanded that the Appellant uses the old prices to determine the quantity of concrete to be delivered.

11.6 **AW** also explained that according to industry practice, pre-mix concrete is delivered the same day that it is prepared as it is susceptible to set, if not used immediately. **AW** further submitted that key ingredients have a short shelf life of not over eight (8) months, thus making it difficult for the Appellant to store them for four (4) years without the risk of losing quality. Additionally, **AW** testified that the key ingredients were also susceptible to price variation owing to the direct influence of prices of petroleum, and electricity. On account of the foregoing, **AW** submitted that the price of concrete could not be locked down for more than a few months.

11.7 **AW** also disputed the 2nd Respondent's submission to the 1st Respondent that there was an agreement with the 2nd Respondent to lock the price of the concrete.

12 CROSS EXAMINATION OF THE APPELLANT'S WITNESS

12.1 During cross examination led by the 1st Respondent's learned counsel Ms. Malibase Mtonga, **AW** confirmed that the quotations, purchase order and receipts contained

in the Record of Proceedings (hereinafter **"ROP"**)[10] were issued to the 2nd Respondent by the Appellant. **AW** further confirmed that the quotation dated 18th June, 2017, was for the sum of ZMW132,160.00 (One Hundred and Thirty-Two Thousand One Hundred and Sixty Zambian Kwacha). He also testified that the 2nd Respondent was afterwards given a discount on the quoted amount resulting in the sum of ZMW130,000.00 (One Hundred and Thirty Thousand Zambian Kwacha) being paid for 25mpa pre-mix concrete.

12.2 In response to Ms. Mtonga's question on whether any of the documents adduced indicated fluctuation of prices, **AW** testified that none stated as such. In similar vein, **AW** also testified that the documents did not specify a delivery date but that notwithstanding, the waiting period could not have been four (4) years, as this was inordinate.

12.3 Furthermore, **AW** denied that the Appellant declined to deliver but that a reconciliation of the account had established that the balance of 25mpa pre-mix concrete to be collected was $24m^3$ and not $36.32m^3$ expected by the 2nd Respondent. In addition, **AW** testified that the $24m^3$ was delivered to the 2nd Respondent.

12.4 There was no cross-examination from the 2nd Respondent.

[10] CCPC. *Record of Proceedings* dated 3rd June, 2023, pp.6-8

13 RE-EXAMINATION OF THE APPELLANT'S WITNESS

13.1 AW reiterated during re-examination that the delay by the 2nd Respondent would have been considered as reasonable, if it was anything between six (6) to eight (8) months and not four (4) years. Further, AW testified that the four (4) years wait was due to collapse of the deck. He also testified that initial preparation of the deck took about one (1) year before it collapsed.

14 APPELLANT'S SUBMISSIONS

14.1 The Appellant failed to comply with the Tribunal's order to file its Heads of Argument and List of Authorities by 31st October, 2024. As at the date of the judgment, the Appellant has neither filed a formal explanation for the lack of submission nor an application for extension of the deadline.

15 RESPONDENTS' SUBMISSIONS

15.1 There having been no Heads of Argument and List of Authorities filed by the Appellant, the respective respondents did not have an opportunity to respond.

16 APPELLANT'S REPLY TO THE RESPONDENT'S SUBMISSIONS

16.1 For similar reasons advanced earlier, there was no reply to the respective respondents' submissions.

17 CONSIDERATION OF THE MATTER

In considering the matter, the Tribunal examined the Appellant's Notice of Appeal, Notice of Grounds in Opposition to Grounds of Appeal, the 2nd Respondent's evidence

provided in the ROP, the additional documentation filed by the Appellant on 8th July, 2022, and the oral testimony of **AW**. Based on the referenced documents, the following facts are not in dispute:

(i) That on 11th August, 2021, the 1st Respondent received a complaint against the Appellant from the 2nd Respondent;

(ii) The complaint alleged that on 17th May, 2017, the 2nd Respondent purchased from the Appellant a volume of 26m^3 of 15mpa concrete at ZMW920.00 (Nine Hundred and Twenty Zambian Kwacha) per m^3, and 222m^3 of 20mpa concrete at ZMW950.00 (Nine Hundred and Fifty Zambian Kwacha) per m^3, respectively. The products were paid for in full in the sum of ZMW234,820.00 (Two Hundred and Thirty-Four Thousand Eight Hundred and Twenty Zambian Kwacha).

(iii) That on 18th June, 2017, the 2nd Respondent purchased 118m^3 of 25mpa concrete at ZMW1,120.00 (One Thousand One Hundred and Twenty Zambian Kwacha) per m^3, and received a discount of ZMW2,160.00 (Two Thousand One Hundred and Sixty Zambian Kwacha) on the total price due;

(iv) That the 2nd Respondent received full delivery of 26m^3 of 15mpa concrete and 122m^3 of 20mpa concrete leaving a balance of 100m^3 of 20mpa concrete valued at ZMW95,000.00 (Ninety-Five Thousand Zambian Kwacha);

(v) That the balance of 100m^3 of 20mpa concrete was subsequently converted to the equivalent of 84.82m^3 of 25mpa concrete at a rate of ZMW1,120.00 (One Thousand One Hundred and Twenty Zambian Kwacha) per m^3. This brought the total quantity of 25mpa concrete to 202.82m^3; and

(vi) That according to the 2nd Respondent, a total of 166.5m^3 of 25mpa concrete was delivered by the Appellant leaving a balance of 36.32m^3;

17.1 What is in dispute is as follows:

i) The price at which the 2nd Respondent purchased the 25mpa concrete. The 2nd Respondent argued that he paid for the product in advance in order to lock-in the price. However, the Appellant through its witness submitted that the price could not have been frozen for four (4) years, while input prices increased.

ii) Arising from the price variations, the total quantity to have been delivered to the 2nd Respondent by the Appellant became a point of contention.

17.2 Further, the Tribunal noted that the Appellant opposed the Decision of the Board by raising five (5) grounds of appeal, which will now be considered *seriatim*.

18 GROUND ONE

18.1 The Appellant's opening contention was that in arriving at its Decision, the Board did not take into consideration the arguments advanced by the Appellant. As such the Decision was said, to lack the fundamental requirements of an appealable decision. However, in opposing the allegation, the 1st Respondent contended that all relevant findings of the investigation, and submissions of the parties were considered by the Board.

18.2 Therefore, in considering this ground of appeal, the Tribunal first perused the Act and noted that under section 55 the 1st Respondent is empowered to request a

party to submit information to assist in the investigation of a matter. The referenced section 55, 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;***
>
> ***(b) produce to the Commission, or to a person specified in the notice, any document or article, as specified in the notice, which relates to any matter which the Commission considers relevant to the investigation; or***
>
> ***(c) appear before the Commission, or before a person specified in the notice, at a time and place specified in the notice, to give evidence or to produce any document or article specified in the notice."***

18.3 The Tribunal also perused evidence contained in the ROP adduced by the 1st

Respondent, and established that on 23rd August, 2021[11], the Appellant received a letter and Notice dated 20th August, 2021, from the 1st Respondent. The said documents informed the Appellant of the allegations levelled against it by the 2nd Respondent, and the potential violations of the law thereof. In addition, the Appellant was requested to respond within fourteen (14) days of receipt thereof.

18.4 The Appellant accordingly responded to the Notice on 27th August, 2021[12], and made further submissions dated 21st September, 2021[13]. Earlier, on 29th July, 2021, the Appellant had responded to the 2nd Respondent's demand letter dated 26th July, 2021[14].

18.5 The Tribunal further noted that in both the Preliminary Report dated November 2021, and the Decision dated 11th February, 2022, the 1st Respondent cited the Appellant's submissions.

18.6 Having assessed the available evidence, it is the Tribunal's considered view that the fact that the Board decided against the Appellant did not necessarily mean that the Appellant's submissions were not taken into consideration, in arriving at the Decision. Ground One therefore, fails.

19 GROUND TWO

19.1 In the second ground, the Appellant assailed the Board's finding of unfair trading

---

[11] CCPC. *Record of Proceedings* dated 3rd June, 2023, pp.16-17
[12] Ibid., pp.18-19
[13] Op.cit., p.20
[14] Op.cit., p.3-4

practices, alleging that the decision was based on one complaint, which was the first against the Appellant. In evaluating this argument, the Tribunal also noted the Board's finding that the Appellant was a first offender under the law. In opposing the ground of appeal, the 1st Respondent had submitted that the Act does not require the unfair trade practice to occur multiple times for it to qualify as a violation.

19.2 Based on the foregoing, the Tribunal found it imperative to refer to section 45 of the Act, which states 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

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."

19.3 Upon perusal of the Act, in the Tribunal's considered view section 45 does not set a minimum number of times that an offence has to be committed in order to be considered inimical to the law. Had there been a threshold number of violations for a party to be considered in breach of the law, the Act would have said so. The ground is frivolous and as such fails.

20 GROUNDS THREE AND FOUR

20.1 In Grounds Three and Four, the Appellant was troubled by the Board's findings of unfair trading practices on account of the following:

i) Appellant's failure to complete delivery of the contracted amount of the 25mpa concrete; and

ii) The Appellant's unilateral increase of the price of 25mpa concrete.

20.2 In arriving at its Decision, the Tribunal noted that the Board considered the following of the 1st Respondent's assessment tests[15]:

20.3 Firstly, whether the Appellant was a "person" or "enterprise"? The Appellant was defined as an enterprise pursuant to the provisions of section 2 of the Act which states as follows:

> ***"" enterprise " means a firm, partnership, joint- venture, corporation, company, association and other juridical persons, which engage in commercial activities, and includes their branches, subsidiaries, affiliates or other entities, directly or indirectly, controlled by them";***

20.4 Secondly, whether the Appellant's conduct was during the course of trading? Here, the 1st Respondent adopted the definition of Garner (2004), which states as

[15] CCPC. *Record of Proceedings* dated 3rd June, 2022, pp.58-59

follows:

"Business of buying and selling, especially of commodities and securities.[16]"

20.5 According to the 1st Respondent, ***"the conduct was engaged during the course of trading or normal course of doing business as could be evidenced by the copy of the receipt dated 18th June, 2017."***[17]

20.6 Thirdly, was whether the trading practice compromised the standard of honesty and good faith, that an enterprise is reasonably expected to meet and thereby distorted or was likely to distort the consumers purchasing decision? In its submissions to the Board, the 1st Respondent defined "honesty" as ***"a sincere intention to deal fairly with others."***[18] For the definition of "good faith", the 1st Respondent relied on Garner (2004), who defined the phrase as:

"a state of mind consisting of honesty, faithfulness to one's duty or obligation and observance of reasonable commercial standards of fair dealing in a given trade or business."[19]

20.7 In fortifying its finding of the Appellant's breach of honesty and good faith, the 1st Respondent had referred the Board to the Supreme Court of Zambia's holding in ***Nyimba Investments Limited v Nico Insurance Zambia Limited***[20] (hereinafter **"the Nyimba case"**), where the bench extended the definition of such breach to

---

[16] CCPC. *Record of Proceedings* dated 3rd June, p.58
[17] Ibid., p.58-59
[18] Op.cit., 2022, p.59
[19] Op.cit., p.59
[20] (Appeal 30 of 2016) [2017] ZMSC 32 (31 March 2017)

the realm of non-disclosure as well as misrepresentation. In its submissions to the Board, the 1st Respondent tendered that the Appellant had increased the price of 25mpa concrete, and declined to supply the 2nd Respondent with circa 36.25m^3 of the product, which actions appeared to vary the nature of the contract.

20.8 The 1st Respondent also submitted to the Board that it established that the 2nd Respondent had paid for the concrete in advance on the understanding that the action would lock in the price. Further, no specific delivery date was indicated on either the quotations or the receipts issued to the 2nd Respondent by the Appellant.

20.9 In considering the referenced grounds of appeal, the Tribunal started by looking at the definition of the term **"Unfair Trading Practice"** as given in section 45 of the Act, *supra*.

20.10 Further, unfair trading practices could also be defined as:

> ***"...practices that grossly deviate from good commercial conduct and are contrary to good faith and fair dealing."***[21]

20.11 An example of an unfair trading practice is the retrospective adjustment of prices.[22]

---

[21] Wiewiórowska-Domagalska, A. (2015), *Unfair Trade Practices in the Business to Business Food Supply Chain*, at https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/563430/IPOL_BRI(2015)563430_EN.pdf., p.1. (Accessed on 23.10.2025)

[22] Ibid., p.2

20.12 According to the facts *in casu*, the Appellant, unilaterally effected a price escalation that resulted in the rise of the price of 25mpa concrete from the earlier agreed rate of ZMW1,120.00 (One Thousand One Hundred and Twenty Zambian Kwacha) to ZMW1,880.00 (One Thousand Eight Hundred and Eighty Zambian Kwacha) per m^3. It is the said price escalation that led to the series of events that culminated in this Appeal.

20.13 In justifying the price escalation, the Appellant's lawyers submitted through a letter dated 29th July, 2021 *inter alia* as follows:

> ***"2. The factual contents informing your Client's demands are materially not in dispute save to highlight the fact that your Client has demanded delivery of the concrete more than 4 years after he paid for it. This period is inordinate and not keeping with the concrete trade practices...concrete by its nature is a perishable product...It is therefore the trade practice that once purchased delivery follows within a reasonable time thereafter. A reasonable time cannot be 4 years.***
>
> ***3. Consequent for your Clients delay and owing to the massive changes in the prices of input commodities in the intervening period, the price of concrete has had a drastic shift upwards that it would not make commercial sense to supply the concrete demanded at the same prices of 4 years ago."***

20.14 The foregoing arguments were also buttressed by **AW**, who testified that during what he termed an inordinate delay in accessing the construction site, following collapse of the upper floor deck, the cost of key inputs had risen. **AW** argued that it was therefore, necessary for the Appellant to increase the price of the product.

20.15 In assessing whether the price escalation by the Appellant qualified as an act of unfair trading per Decision of the Board, the Tribunal took judicial notice of the rules on unfair trading, which include *inter alia* the requirements of an offer being firm and based on a bilateral contract.[23] On this account, the Tribunal perused the evidence on record and noted that the receipt dated 18th June, 2017[24] qualified to be considered a firm offer in addition to being a bilateral contract. Further, the Tribunal noted that the quotation indicated *inter alia* three key components, which were as follows:

(i) Terms of payment

(ii) Delivery period

(iii) Quote validity

20.16 In addition, the Tribunal observed that the quotation was valid for thirty (30) days during which period the 2nd Respondent was expected to pay cash, and receive deliveries on request. Based on the foregoing, it is the Tribunal's considered view that, in line with the common law interpretation of trade terms,

---

[23] Van der Bossche, P. (2012), *Rules on Unfair Trade in The Law and Policy of the World Trade Organisation: Text, Cases and Material.* At https://www.cambridge.org/core/books/abs/law-and-policy-of-the-world-trade-organisation/rules-on-unfair-trade/. Chapter 6, pp.507-613. Accessed on 22.5.2025

[24] CCPC., *Record of Proceedings* dated 8th June, 2022, p.8

the validity period implied *inter alia* a fixed price for the thirty (30) days provided the 2nd Respondent completed the purchase within the said period. According to the facts *in casu*, the 2nd Respondent paid for the goods within the validity period.

20.17 Furthermore, the Tribunal is of the considered view that the quotation conveyed a simple offer, whose terms became binding once the Appellant received cash payment within the stipulated time. Suffice to say that, the contract neither had a price escalation clause nor specific delivery date (underlining ours for emphasis).

20.18 It is imperative to note that a key principal in contract law, is *pacta sunt servanda*, a Latin maxim meaning agreements must be preserved. This was also the position of the Supreme Court of India in the matter of ***DLF Universal Limited v Director of Town and Country Planning, Haryana and Others*** (hereinafter **"the DLF case"**), where it stated *obiter dicta* that:

> ***"...a Contract is interpreted according to its purpose. The purpose of a Contract is the interests, objectives, values, policy that the Contract is...designed to actualize. It comprises [sic] joint intent of the parties..."***[25]

20.19 Based on the foregoing principal, it is the Tribunal's further considered view that *in casu*, its hands would be tied in any attempt to re-write the contract.

20.20 Furthermore, it is a common rule in contract law that a rise in costs is not a sufficient justification for a supplier to increase prices retrospectively. However,

---

[25] AIR 2011 SC 1463

the Tribunal has noted that where there are extenuating factors, this rule may be waived. Among the extenuating factors are that:

(i) The delay leading to the price escalation was unforeseen; and

(ii) The delay was caused by the buyer.

20.21 In the matter of ***S. Leo Harmonay Inc v Binks Manufacturing Co.*** (hereinafter **"the Leo case"**), the court held that if the cost of escalation was due to owner-caused hinderance in the work, such as the delay of site access, the contractor could recover the cost of escalation.[26] The facts of the matter in the **Leo case**, *supra*, were that the defendant took an extensively long time to avail site maps to the plaintiff, during which time the cost of key inputs increased.

20.22 Although, the facts in the **Leo case**, *supra*, are not exactly the same as those *in casu*, there are parallels which can be drawn in that the underlying contract had no escalation clause. In addition, the Tribunal established that it took the 2nd Respondent circa ten (10) months to resume uplifts of 25mpa concrete after the collapse of the upper floor deck. The referenced collapse of the upper floor deck could be considered as an unforeseen event. The Tribunal also noted that upon resumption of uplifts in November, 2018, the 2nd Respondent continued to do so until July, 2021. This period is what the Appellant considered as inordinate for it to be expected to freeze the price, while facing escalating raw material costs.

20.23 So, what then was a reasonable delivery period *in casu*? In answering this

[26] 597 F.Supp. 1014 (S.D. N.Y. 1984)

question, the Tribunal noted the following guidance:

> ***"In the absence of an enforceable express stipulation of time, the court will normally imply a term into a contract that completion is to be within a reasonable time."***[27]

20.24 Further, Wallace (1995) guided that,

> ***"Reasonable time is...primarily a question of fact and must depend on all the circumstances which might be expected to effect the progress of the works."***[28]

20.25 Based on the facts *in casu*, it would seem that at consummation of the transaction, the Appellant genuinely had not expected the uplifts of the 25mpa concrete to span almost four (4) years. The Tribunal concurs with the Appellant that the four (4) year period in question is long and therefore, cannot be considered reasonable time. The drawn-out uplifts of the product could be considered an incident of frustration for purpose. In such circumstances, a contracting party is allowed to be relieved from its contractual obligations.[29]

---

[27] Beagle, H.G. (2018). *Chitty on Contracts (Volume II) - Specific Contracts.* (33rd ed.). Sweet & Maxwell, London., p.735

[28] Wallace, I.N.D. (1995). *Hudson's Building & Engineering Contracts - (Volume 2).* (11th ed.). Sweet & Maxwell, London., p.1119

[29] Chammount, B et al. (2024). *Price Escalation in Construction Projects: Examining National and International Contracts.* Journal of Construction Engineering and Management. 150. 10.1061/JCEMD4.COENG-13918, p.13. (Accessed: 20.6.2025)

20.26 Having realised that owing to the drawn-out period of uplifts of the 25mpa concrete, it was imperative for the Appellant to engage the 2nd Respondent, and renegotiate the terms of the simple contract entered into on 18th June, 2017. However, the Tribunal established from the evidence adduced that there were no discussions on the possible adjustment in price as a result of alleged escalation in raw material costs.

20.27 At the heart of this Appeal is the increase of a product's price after a contract had already come into effect, and where such a contract did not have a price escalation clause. So, what is a price escalation clause:

> ***"A price escalation clause (or cost escalation clause) is a contractual mechanism that facilitates the contractor passing on increased overheads to the employer. The contractor retains the ability to adjust the contract price in line with the fluctuating costs of raw materials in the market and other elements of the works at the time."***[30]

An author stated *inter alia* in an article as follows:

> ***"Price fluctuation clause usually comes into the picture when there is an expected significant swing in certain construction costs due to a nation-wide event that affects the industry as a whole."***[31]

---

[30] Gates, J., (2022). *Price escalation clauses in construction contracts.* Published on 25th November, 2022. At https://www.walkermorris.co.uk/comment-opinion/price-escalation-clauses-in-construction-contracts/. (Accessed on 7.6.2025).

[31] Koon Tak Hong Consulting Pvt. Limited. *Price Fluctuation Clauses in Construction Contracts-Tips and Traps. At* https://koontakhong.com/2024/12/13/price-fluctuation-clauses-in-construction-contracts/. (Accessed on 22.5.2025).

20.28 In *Food Corporation of India v A.M. Ahmed and Co. and Others* (hereinafter "the FCI case") the Supreme Court of India stated *obiter dicta* that,

> ***"...escalation is a typical and usual occurrence coming out of the gap of time in this inflationary era in fulfilling any contract of any sort."*** [32]

20.29 In the ***FCI case***, *supra*, and owing to delays occasioned by the Appellant, the Respondent was found to have been justified in increasing the cost of works as statutory wages had risen, even in the absence of an escalation clause in the contract.

20.30 However, in Rajasthan State IDI Corporation v Diamond and Gem Development Corporation Limited & Another, the Supreme Court held that,

> ***"A party cannot claim anything more than what is covered by the terms of [a] contract, for the reason that the contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus contract being a creative of an agreement between two or more parties, has to be interpreted giving literal meanings unless, there is some ambiguity therein."*** [33]

20.31 Based on the foregoing, it is the Tribunal's considered view that a concrete supply contract without an escalation clause, implies a fixed price for the specified quantity of concrete. This means that the Appellant agreed to supply

---

[32] AIR 2007 SC 829
[33] (Civil Appeal No.7252/2003), parag.16

the concrete at the agreed-upon price, regardless of any subsequent price fluctuation. While it is appreciated that there was an inordinate delay in completion of uplifts by the 2nd Respondent, a perusal of the evidence on record showed that, the 2nd Respondent was not informed of the price increase prior to its effect. This was like an ambush by the Appellant, hence the 2nd Respondent's reaction.

20.32 Further, the Tribunal established that the Appellant did not provide any evidence to justify the price escalation aside **AW**'s testimony that price of inputs increased. Furthermore, the Tribunal noted that **AW** testified that at each uplift of 25mpa concrete, the parties reconciled the 2nd Respondent's account and as such the 2nd Respondent was aware of the new prices. However, the Tribunal's inspection of the purchase order dated 16th July, 2017,[34] and the account statement produced on 8th July, 2022, revealed that the said documents were the Appellant's internal documents that bore no signature of the 2nd Respondent.

20.33 In addition, the Tribunal's position is buttressed by the holding of the High Court of Zambia in the matter of ***Deloitte and Touche v Cable Network Solutions Limited***[35] (hereinafter, **"the Deloitte case"**), wherein it dismissed a counter-claim of the defendant on the grounds that, the defendant did not adduce any evidence of additional works done. In the said matter, the defendant had argued that owing to delays caused by the plaintiff, it had incurred additional costs for

[34] CCPC. *Record of Proceedings* dated 3rd June, 2022, p.9
[35] 2012/HPC/0599

technical and engineering works. Although, the facts in the ***Deloitte case***, *supra*, are not exactly the same as those *in casu*, the Tribunal's reference to the case is to highlight the court's emphasis on the need for evidence proving the increase in costs. *In casu*, although the Appellant attributed the price increase of 25mpa concrete to escalation in manufacturing costs, there was no adduced to support this argument.

20.34 Furthermore, the Tribunal also took cognisance of the industry practice that pre-mix concrete is manufactured and delivered only when required for use. It is therefore, a perishable good that could not have been manufactured and stored four (4) years, in advance. By the foregoing, pre-mix concrete fits the definition of future goods as:

> ***"Goods to be manufactured or acquired by the seller after of the making of the contract of sale."***[36]

20.35 Therefore, since future goods are generally not specific goods, the common rule in contract law is that ownership cannot pass until the goods are ascertained.[37] In addition, until property passes to the buyer, a seller bares all the risks associated with manufacture and delivery of a product, unless agreed otherwise.[38] *In casu*, the Appellant bore the risks of cost escalation in the absence of an explicit price variation clause in the contract.

---

[36] Beagle, H.G. (2018). *Chitty on Contracts (Volume II) - Specific Contracts.* (33rd ed.). Sweet & Maxwell, London., p.1903
[37] Atiyah, P.S. et al. (2005). *The Sale of Goods.* (11th ed.). Pearson-Longman, London., p.333
[38] Sale of Goods Act, 1893, section 20.

20.36 Based on the foregoing, it is the Tribunal's considered view that the Board was on firm ground in finding that, the Appellant engaged in unfair trading practices by increasing the product price unilaterally, and subsequently short changing the 2nd Respondent on the quantity of 25mpa concrete. The grounds of appeal therefore, fail.

21 GROUND FIVE

21.1 In Ground Five of the Appeal, the Appellant contended that the Board erred both in law and fact, when it found that the Appellant had misrepresented its product to the 2nd Respondent, when in fact not as evidence and undisputed facts available clearly indicated that it was in fact the 2nd Respondent, who knew when the site would be available to receive the concrete.

In response to Ground Five, the 1st Respondent stated that the misrepresentation was on account of the Appellant having increased the price *post facto,* and on which basis it declined to make further deliveries to the 2nd Respondent.

In order to appreciate the Appellant's position, the Tribunal referred to the provisions of section 47 of the Act, which states *inter alia* as follows:

> ***47. A person who, or an enterprise which —***
>
> ***(a)...***
>
> ***(b) makes a false or misleading representation concerning—***
>
> ***(i) the price of any goods or services;***
>
> ***(ii) ...***

is liable to pay the Commission a fine…"

21.2 According to Hayes (2024), misrepresentation can be defined as:

"A false statement of a material fact made by one party which affects the other party's decision in agreeing to the contract."[39]

21.3 Further, Hayes (2024) posited that for a charge of misrepresentation to hold, six (6)[40] basis of proof needed to be proven, namely:

a) A representation was made;

b) The representation is false;

c) The defendant knew at the time that the representation was false or recklessly made;

d) The representation was made with the intention that the plaintiff would rely on it;

e) The plaintiff did rely on the false representation; and

f) The plaintiff suffered harm by relying on the false representation.

21.4 The Tribunal also took judicial notice of the three (3) types of misrepresentation[41], namely:

a) Fraudulent. Where a party in order to entice a buyer, knowingly issues a

---

[39] Hayes, A. (2024). *What is Misrepresentation? Types and How it Works.* At https://www.investopedia.com/terms/m/mispresentation.asp

[40] Ibid.

[41] Wheeler, S. and Shaw, J. (1994). *Contract Law: Cases, Materials and Commentary* (Oxford University Press, Oxford), pp.276-277

statement that is false;

b) Negligent. Where a party in order to entice a buyer and without reasonable care issues a statement that turns out to be false; and

c) Innocent. Where a party in order to entice a buyer issues a statement that it believes at the time to be true, but eventually turns out false.

21.5 Coming to the subject of this Appeal, the Board found that the Appellant misrepresented the price of 25mpa concrete to the 2nd Respondent, when from November 2018 and onwards, the Appellant decided to increase the price from that that was agreed upon, when cash exchanged hands in June, 2017.

21.6 The facts *in casu* are that when deliveries resumed in November 2018 and onwards, following collapse of the upper deck in early 2018, the Appellant applied new prices[42]. In addition, the Tribunal perused all the documents adduced by the parties and noted the absence of evidence of affirmation by the 2nd Respondent. Therefore, it is the Tribunal's considered view that the Appellant misrepresented the price of 25mpa concrete, albeit unintentionally. Further, the Tribunal established that the 1st Respondent's finding of misrepresentation passes the six (6) tenets test of proof of the infraction. Based on the foregoing, Ground Five also fails.

22 CONCLUSION

22.1 The Tribunal concludes that the grounds of appeal advanced by the Appellant fail

[42] CCPC., *Record of Proceedings* dated 3rd June, 2023, p.9

in their entirety.

23 TRIBUNAL DECISION

23.1 Based on the foregoing, the Tribunal upholds the decision of the Board and adjudges that:

a) The Appellant delivers 36.32m^3 of 25mpa concrete to the 2nd Respondent at the original price within ten (10) days of receipt of the judgment in accordance with section 5(d) of the Act.

b) The Appellant pays the fine of 0.5% of their annual turnover for violating provisions of section 45(b) of the Act as read together with section 46(1) of the Act in accordance with section 46(2) of the Act and the applicable cap in line with the Competition and Consumers Protection Commission Guidelines for Administration of Fines, 2019;

c) The Appellant submits their latest annual books of accounts to the 1st Respondent for calculation of the actual fine in accordance with provision of section 5(d) of the Act;

d) The Appellant is fined 0.5% of their annual turnover in line with the Competition and Consumers Protection Commission Guidelines for Administrative Fines, 2019, for breach of the provisions of section 47(b)(i) of the Act in accordance with section 47 of the Act; and

e) Each party shall bear its own costs.

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

Dated the day of 2025

Ms. M.B. Muzumbwe
VICE CHAIRPERSON

Mrs. B.S. Chaila-Sichizya
MEMBER

Mr. D. Mulima
MEMBER

Mr. B. Tembo
MEMBER