

IN THE COMPETITION AND
CONSUMER PROTECTION TRIBUNAL
HOLDEN AT LUSAKA

DLCA 12/7
FMA

CAUSE NO. 2012/CCPT/025/CON
CAUSE NO. 2014/CCPT/004/CON

IN THE MATTER OF:

SECTION 52 (1) OF THE COMPETITION AND
CONSUMER PROTECTION ACT NO. 24 OF
2010

IN THE MATTER OF:

SECTION 60 OF THE COMPETITION AND
CONSUMER PROTECTION ACT NO. 24 OF
2010

IN THE MATTER OF:

THE COMPETITION AND CONSUMER
PROTECTION (TRIBUNAL) RULES, 2012, S.I.
37 OF 2012

BETWEEN:

ZAMBIAN BREWERIES PLC

AND

COMPETITION AND CONSUMER PROTECTION COMMISSION
(Re Likando Kamayoyo and Re Julius Kamanga)



APELLANT

RESPONDENT

CORAM: Mr. Willie A. Mubanga, SC (Chairperson), Mr. Chance Kabaghe (Member),
Mr. Rocky Sombe (Member) and Mrs. Eness C. Chiyenge (Member)

For Appellant: Mr. A. Shonga, SC and Mr. S. Lungu - Messrs Shamwana & Co.

For Respondent: Mrs. M. B. Mwanza - Director, Legal & Corporate Affairs
Mrs. M. M. Mulenga - Manager, Legal & Corporate Affairs

JUDGMENT

Legislation referred to:

Section 52(1) and (2), 60 and 68 of the Competition and Consumer Protection Act, No. 24 of 2010

Cases referred to:

1. The Competition and Consumer Protection Commission v. Hill Jam Investments Limited (2014)
2. Africa Supermarket Trading as Shoprite Zambia v. The Competition and Consumer Protection Commission (2014)
3. Tokyo Vehicle Ltd 2014/HP/A/1018



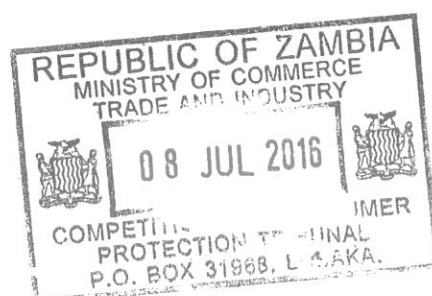
This is a consolidated appeal from decisions of the Respondent against the Appellant in two separate cases whose facts are similar. The two appeals were consolidated pursuant to Rule 12 of the Competition and Consumer Protection (Tribunal) Rules, 2012, S.I. 37 of 2012.

At the time of hearing this appeal, the Tribunal panel included Mrs. Maria M. Kawimbe, who was the Vice Chairperson. Mrs Kawimbe has since been appointed Judge. Therefore, this is a majority judgment.

Briefly, in the case of Julius Kamanga, facts are that on 13th June 2011 the Respondent received a complaint from Mr. Julius Kamanga (the Complainant) in which he alleged that he had bought a bottle of Mosi lager beer in Garden compound in Lusaka and he alleged that the said bottle of Mosi contained foreign matter. The Respondent alleges to have carried out investigations into the complaint; inter alia, that it consulted the Zambia Bureau of Standards who conducted a sealage test on the said bottle of Mosi and found that the crown was not ampered with. Further, that the Respondent consulted the Public Health Department and the Food and Drug Control Laboratory on the contents of the bottle in question. Furthermore, that the findings of the Food and Drug Control laboratory were that the foreign matter in the beer bottle in question was identified as a sealed sachet labelled "18" + Special Brandy". In response to the Respondent's preliminary report findings, the Appellant's position on the matter was that the Respondent's report was not conclusive since it did not show whether a forensic test was conducted to determine that the product in question was indeed the Appellant's product or not. Further, that the sealage test was not sufficient proof to show that the product was not originally tampered with. The Respondent went on to state that since it was not accorded an opportunity to conduct a verification and/or identification tests on the product in question, it was difficult for them to comment meaningfully on the matter.

By its decision dated 21st November 2013, the Respondent Board of Commissioners determined that facts and evidence of the case had shown that the Appellant had supplied a Mosi lager beer to the complainant and that the Appellant was therefore in violation of section 52(1) of the Competition and Consumer Protection Act. The Board further directed that the Appellant be prosecuted for the said violation.

Similarly, in the case of Likando Kamayoyo, facts are that on 4th April 2012 the Respondent received a complaint from Mr. Likando Kamayoyo against Zambia Bottlers, a subsidiary of Zambian Breweries Group Plc (the Appellant). The Complainant alleged that on 2nd April 2012 he bought one crate of Coca Cola and one crate of Fanta from his workmate, a Ms Lucy Chakumbira, who allegedly bought the two crates from Red Sea Distributors in Chawama. The Complainant alleged that nine of the Fanta bottles contained small foreign particles. According to the Respondent, it carried out investigations into the complaint of which it notified the Appellant. Further that the investigations included sealage tests of the alleged nine Fanta Bottles conducted by the Zambia Bureau of Standards which revealed that the bottle tops of three of the nine Fanta bottles had not been tampered with while the tops for remaining six bottles appeared to have been tampered with. According to the Respondent's



Record of Proceedings at page 17, the Appellant had not responded to its Notice of Investigations.

The Respondent's Board of Commissioners on 2nd October 2012 determined that the facts and evidence of the case had shown that the Appellant was in breach of section 52(1) of the Competition and Consumer Protection Act cited above.

In the case of Julius Kamanga, the Appellant appealed on the following grounds:

1. That the Respondent erred in finding that the Appellant had breached section 52(1) of the Competition and Consumer Protection Act No. 24 of 2010;
2. Alternatively, the Respondent erred in finding the Appellant culpable without evidence being adduced that Mr. Julius Kamanga purchased the alleged defective product from the Appellant;
3. That the Respondent erred in finding that the Appellant sold goods under consideration to a consumer;
4. That the Respondent erred in failing to find that had the bottle originated from the Appellant it was physically impossible for the alleged foreign matters to have been found in the said bottle and in the state it was found, on account of the bottling methods employed by the Appellant;
5. That the Respondent erred in finding that the fact that the said bottles were allegedly sealed at the time they were tested by the Zambia Bureau of Standards meant that the foreign matter was inserted in the bottles by the Appellant;
6. That the Respondent erred in presuming that the bottles containing the alleged defective product actually contained product manufactured by the Appellant without subjecting the said contents to laboratory tests;
7. That the Respondent erred by falling into undesirable bias by allowing decision to be influenced by the Appellant's previous convictions;
8. That the Respondent erred in failing to recognise that the Zambia Bureau of Standards is not competent to carry out tests to prove whether a bottle had never been opened prior to being sealed;

The Appellant also sought the following reliefs:

1. A declaration that the decision of the Respondent which decides that the Appellant has breached Section 52(1) of the Competition and Consumer Protection Act No. 24 of 2010 and which directs that the Appellant be prosecuted be set aside.



2. An order that the Respondent pay costs;
3. Any other relief the tribunal may deem fit.

Similarly, in the case of Likando Kamayoyo, the Appellant appealed on the following grounds:

1. That the Respondent erred in finding that the Appellant had breached section 52(1) of the Competition and Consumer Protection Act No. 24 of 2010;
2. Alternatively, the Respondent erred in finding the Appellant culpable without evidence being adduced that the Complainant purchased the alleged defective product from the complainant's work mate;
3. That the Respondent erred in ignoring the fact that there was no evidence to show that Red Sea Distributors purchased the alleged defective product from the Appellant;
4. That the Respondent erred in finding as it did in 2.2 of its decision that one of the elements to be proved is whether the "person" or "enterprise" has supplied a consumer with goods that do not conform to a mandatory consumer safety standard for the class of goods set by the Zambia Bureau of Standards or other competent body;
5. That the Respondent erred in failing to find that had the bottle originated from the Appellant it was physically impossible for the alleged foreign matter to have been found in the said bottle in the state it was found;
6. That the Respondent erred in finding that the fact that the said bottles were allegedly sealed at the time they were tested by the Zambia Bureau of Standards meant that the foreign matter was inserted in the bottles by the Appellant;
7. That the Respondent erred in presuming that the bottles containing the alleged defective product actually contained product manufactured by the Appellant without subjecting the said contents to laboratory tests;
8. That the Respondent erred in relying on provisions of Section 30(2) of the Food and Drug Act Chapter 303 of the Laws of the Republic of Zambia as it wrongly concluded that the bottles in question were supplied by the Respondent (sic);
9. That the Respondent erred by falling into undesirable bias by allowing decision to be influenced by the Appellant's previous convictions;



10. That the Respondent erred in failing to recognise that the Zambia Bureau of Standards is not competent to carry out tests to prove whether a bottle had never been opened prior to being sealed;

The Appellant also sought the same reliefs as in the case of Julius Kamanga.

The Tribunal heard evidence, including a visit to the Appellant's plant for a sample view of the Appellant's production processes. Counsel for the Appellant and Counsel for the Respondent made written submissions. However, we will not delve into the said evidence and submissions made by Counsel as we have found that there is an issue of jurisdiction which goes to the root of the consolidated appeal. We have noted that in both decisions, the Respondent decided that the Appellant be prosecuted for violation of subsection (1) of section 52 of the Competition and Consumer Protection Act, No. 24 of 2010. The subsection read together with subsection (2) constitutes a criminal offence. Section 52(1) and (2) of the Competition and Consumer Protection Act states as follows:

"(1) A person or an enterprise shall not sell any goods to consumers unless the goods conform to the mandatory safety standard of the class of goods set by the Zambia Bureau of Standards or other relevant competent body.

(2) A person who, or an enterprise which, contravenes subsection (1) commits an offence and is liable, upon conviction –

(a) to a fine not exceeding five hundred thousand penalty units or to imprisonment for a period not exceeding five years, or to both; and

(b) to pay the Commission, in addition to the penalty stipulated under paragraph (a), a fine not exceeding ten percent of that person's or enterprise's annual turnover."

In our view, the question whether or not in the circumstances of the two cases the Appellant violated subsection (1) of the section 52 of the Act cannot be determined by way of appeal to the Tribunal; the alleged criminal offence can only be determined by a court of competent criminal jurisdiction before whom criminal proceedings against the Appellant are instituted. We have previously held that neither the Competition and Consumer Protection Commission nor the Tribunal have jurisdiction to determine an alleged offence requiring criminal conviction. Cases in point include our Ruling in the case of **The Competition and Consumer Protection Commission v. Hill Jam Investments Limited (2014)** where we held that once there is an allegation of a criminal offence, it can only be determined by a competent court of criminal jurisdiction, which requires that criminal proceedings be instituted. We also held the same position in the case of **Africa Supermarket Trading as Shoprite Zambia v. The Competition and Consumer Protection Commission (2014)**. Furthermore, we are fortified by the decision of the High Court in the case of **Tokyo Vehicle Ltd** in which it was held, *inter alia*, that this Tribunal does not have jurisdiction to determine alleged criminal offences.



The Respondent did not raise the question of jurisdiction during the hearing or in its submissions or in any other similar appeal before the Tribunal. In fact in each of the two cases, the Respondent's Board of Commissioners advised that any party aggrieved was at liberty to appeal to the Tribunal.

We are alive to Section 60 of the Act which provides that, "A person who, or an enterprise which, is aggrieved with an order or direction of the Commission under this Part may, within thirty days of receiving the order or direction, appeal to the Tribunal." Further, that section 68 provides in part that, "The functions of the Tribunal are to –

(a) hear any appeal made to it under this Act;

However, the jurisdiction of the Tribunal is limited in that it has no criminal jurisdiction. The appeal therefore fails for lack of jurisdiction. In view of the circumstances of this appeal, each party shall bear its own costs.

Any party aggrieved with this decision may appeal to the High Court within thirty days.

Delivered at Lusaka this 8th day of July 2016



Aubbie W. Mubanga, SC
Chairperson



Chance Kabaghe
Member



Rocky Sombe
Member



Eness C. Chiyenge
Member

