IN THE HIGH COURT FOR ZAMBIA **2014/HP/A/048**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Appellate Jurisdiction)

B E T W E E N :

COMPETITION AND CONSUMER PROTECTION COMMISSION **APPELLANT**

AND

PUMA ENERGY ZAMBIA LIMITED **RESPONDENT**

For the Appellant : *Ms. Mulenga Legal Counsel, Competition and Consumer Protection Commission.*

For the Respondent : *Mr. N. Nchito S.C. and Mrs. Chakoleka of Messrs Nchito & Nchito*
Messrs Chibesakunda & Company Advocates

J U D G M E N T

CASE AUTHORITIES REFERRED TO:

1. *Lexecon, Inc Vs. Milberg Weiss Berhad Hynes & Lerach 523 US 26*
2. *Rastelli Vs. Warden, Metro Correctional Centre 2d cir. 1986*
3. *The Attorney General and Another VS. Lewanika and Others (1993-94) ZR 164*
4. *Luciano Mutale and Jackson Chomba Vs. Newstead Zimba (1988-1989) ZR 64 (SC)*
5. *The Minister Of Information And Broadcasting Services The Attorney General Vs. Fanwell Chembo and Others (SCZ Judgment Number 11 Of 2007)*
6. *Zinka Vs. The Attorney General (1990-1992) ZR 73 (SC)*
7. *General Medical Council Vs. Spackman [1943] A.C. 627*

LEGISLATION AND OTHER WORKS;

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

This is an appeal against the Ruling of the Competition and Consumer Protection Tribunal delivered on 6th August, 2014. The Appellant filed 3 grounds of appeal as follows;

1. *The Tribunal erred both in law and fact by imputing a blanket procedure on how Merger Compliance affronts under the Competition and Consumer Protection Act No. 24 of 2010 were to be dealt with by the Appellant in blatant disregard to the intention of the legislature.*
2. *The Tribunal erred in law and grossly misdirected itself in fact by finding that Section 64 of the Act was a mandatory section and further that the invocation thereof was precursory to the invocation of Section 37 of the Act, when in fact not.*
3. *The Tribunal starkly erred both in law and fact by finding that the Appellant acted ultra vires the Act, as it had no jurisdiction to invoke Section 37 of the Act without first applying for a Mandatory Order before the tribunal; and consequently rendering the Appellant's decision against the Respondent null and void.*

The Appellant in its heads of argument dated 2nd September 2014 began by narrating the background of the matter in issue between the parties. It is pertinent to recite the historical background.

Prior to 2011, the Respondent Puma Energy Zambia PLC (formerly known as BP Zambia) was a subsidiary of BP Africa Limited. BP Africa was owned by BP International. BP Africa distributed hundred percent (100%) BP lubricant products in the Zambian Market.

Castrol Oil Limited owned hundred percent (100%) share assets in the Castrol branded petroleum products which were distributed hundred percent (100%) by Spectra Oil Corporation Limited in the Zambian market.

In 2001, BP International Limited and Castrol Oil Limited sought authorization to merge and enshrine hundred percent (100%) Castrol rights in BP Zambia. The Appellant, Competition and Consumer Protection Commission approved and authorized this arrangement on 15th of August, 2001 on condition that the Castrol branded products should be distributed in the Zambian market by an independent distributor. Danatech Investments Limited was appointed by BP Africa as the 100% sole distributor of the Castrol products by an agreement dated 4th June, 2002.

In 2004, BP Africa and BP Zambia applied for review and variation of the 2001 authorization and the 2002 approval conditions with respect to the distribution of Castrol products. BP sought the right to distribute Castrol products to certain key customers i.e. the mines within Zambia whilst still enabling Dana Oil to distribute such products to the bulk of its Zambian users.

The Appellant declined to allow BP Zambia enshrine the rights of Castrol Lubricants in BP Zambia thereby upholding the 2001 conditional authorization.

The Appellant stated that BP Africa abrogated the conditions of the 2001 merger between BP International Limited and Castrol Oil Limited. The abrogation was brought to the attention of BP Africa. BP Africa resolved to rectify the breach by implementing the project known as *Ukuguqula* strategy. The business model of the strategy was that BP Africa would appoint Danatech as the sole distributor

of Castrol Products and preclude BP Zambia in the Castrol lubricant marketing and sales within Zambia.

In respect of the business structure, BP Zambia and its contract with customers would be split into two as follows;

i. *BP Africa would retain 95% of the core business of BP Zambia.*
ii. *BP Africa would hand over to Danatech 5% of its none core contracted customers by BP Zambia in BP products as well as rights to directly supply the Castrol lubricants within its rights.*

Danatech was to be referred to as the Multi-Branded Distributor (MBD) as it would supply both products. BP Africa would enter into an agreement called the MBDA on BP products.

The Appellant authorized the MBDA unconditionally through an application by Danatech. The Appellant stated that its motivation of the unconditional authorization by the Respondent was based on the fact that Danatech was not dominant in the relevant market and the MBDA was only adding the BP products supply to restricted BP Africa customers called the none-core accounts and further that BP Africa's market would be diluted; that the product would be safer. Danatech undertook to appoint nine distributors in nine provinces of Zambia in order to implement the MBDA.

In 2007, Danatech wrote to the Appellant indicating that BP Africa notified Danatech that it would supply both brands through BP Zambia as a 'service provider', to clear customs and that it would invoice Danatech as a transit point bearing in mind the authorization of Castrol and its restrictions on BP Zambia. The operations would not alter the authorization as the right of Castrol would be as authorized and Danatech would have interface with the

customers. BP Zambia was to render services to both BP Africa and Danatech only.

The Appellant provided advice consistent with its 2001 authorization and amongst others stated that the Castrol lubricants were to be independently distributed as done in the time of Spectra Oil.

In 2010, BP Africa and the Respondent made a joint application seeking approval to acquire 75% interest in BP Zambia from BP Africa. In 2011, the Appellant approved the merger on condition that the Castrol Distribution Agreement of 2002 involving Danatech and BP Africa remains in force as previously authorized.

The Appellant received a complaint from the market that Danatech was abrogating the condition of 2001 *vis a vie* distribution of Castrol Lubricants by allowing BP Africa to sell the product to it through the Respondent. Thereafter the Appellant wrote to the Respondent and Danatech bringing to their attention the allegation of abrogation of the 2005 condition by their action of advertising that it was the authorized Castrol distributor in Zambia.

In 2012, the Respondent and Danatech requested the Appellant's permission to continue the practice by the Respondent of supplying Danatech with Castrol lubricants instead of Danatech sourcing the lubricants directly from BP Africa.

The appellant submitted that on 1st February and 30th April, 2012 it directed the parties to revert back to the 2001, 2002, 2004 and 2011 authorized status of independent distribution of Castrol lubricants.

It was further submitted that the Respondent and Danatech continued to perpetuate the practice.

On 30th April, 2012 the Appellant appealed the directive of 1st February, 2012 without staying execution. The Appellant in its decision of 17th August held that the appeal was made out of time and did not act as a stay of its directive and further that the Respondent be fined 2% of its annual turnover as provided for under *Section 37 of the Competition and Consumer Protection Act* due to non-compliance with the directive of the Appellant.

Being dissatisfied with the Commission's decision, the Respondent appealed to the Tribunal seeking to quash the directives of 1st and 30th March, 2012.

The Tribunal found in favour of the Respondent hence the appeal before this Court.

In ground one it was contended that the holding by the tribunal to the effect that *Section 61 of the Competition and Consumer Protection Act* is the enabling *Section* where there is non-compliance by the Respondent followed by *Section 64* as the implementing apparatus and further the holding that *Section 37* comes to the tail end in the invocation of the provisions of the cited sections is a grave error both in Law and fact.

Section 61 of the *Act* was referred to which provides for remedies in merger control.

It was argued that it was from this investigation that the conditions highlighted in the background were given requiring that an independent distributor from BP Zambia be found to handle the Castrol lubricants so as to maintain competition in the relevant market. It was further argued that *Section 61* was not in issue at the time the Appellant issued a directive to fine the Respondent as

it had been dealt with as a pre-requisite to approving the merger between BP International and Castrol Oil Limited.

The Appellant submitted that it was not the intention of the legislature to have offences under the *Competition and Consumer Protection Act (the Act)* to be dealt with by first invoking *Section 61* and *64* before proceeding to invoke the provisions of *Section 37* of the said Act.

The Appellant contended that it was only after investigations, in line with *Section 61*, that the conditions for the merger were made, as far back as 2002. The Appellant submitted further that it is not mandatory to invoke *Section 64* of the *Act* having found an enterprise wanting. *Sections 64* and *37* of the *Act* may be used on their own. It is for this reason that the Appellant decided to invoke the provisions of *Section 37* of the *Act*. It was argued that the Appellant was within the confines of the law when it invoked the provisions of *Section 37*.

In ground two, the Appellant contended that the Tribunal erred in law and misdirected itself in fact by finding that *Section 64* of the *Act* was a mandatory Section and further that the invocation thereof was precursory to the invocation of *Section 37* of the *Act* when in fact not. It was further contended by the Appellant inter-alia that it is a settled position in the statute books that the ordinary use of the word 'shall' entails a mandatory position whereas the word 'may' entails a permissive position. The cases of ***Lexecon, Inc Vs Milberg Weiss Berhad Hynes & Lerach*** [(1)] and ***Rastelli Vs Warden, Metro Correctional Centre*** [(2)] were cited as authority for the above

propositions. The use of the word 'may' in *Section 64* of the *Act* does not make it a mandatory provision. Therefore in ensuring that defaults are made good of, by erring enterprises the Appellant is vested with discretion to deal with the matter either administratively or indeed apply for a Mandatory Order under *Section 64* of the *Act*. The Appellant should not be penalized for exercising its discretion in this regard.

The Appellant argued that failure by an erring enterprise to pay a fine would automatically invoke the provisions of *Section 86 (1)* of the *Act*, making such fine a debt due to the State and may be recovered as a civil debt.

In ground three the Appellant contended that the Tribunal erred both in law and fact by making a finding to the effect that the Appellant acted ultra vires the Act as it had no jurisdiction to invoke *Section 37* of the *Act* without first applying for a Mandatory Order before the Tribunal. It was further contended that the Appellant's functions are spelt out in *Section 5* of the *Act*. The language of a statute gives guidance as to how powers are to be exercised under that particular statute. If the words of the statute are precise and unambiguous, then no more can be necessary than to expand on those words in their ordinary and natural sense. It was submitted that this reasoning is in line with decision of the Court in the case of ***The Attorney General and Another Vs Lewanika and Others*** [3].

The Appellant asserted that *Section 37* of the *Act* bestows upon it administrative powers to impose fines of up to 10% on enterprises that are found to have contravened the said provision. I was referred to the case of ***Luciano Mutale and Jackson Chomba Vs***

Newstead Zimba [4] where the Court, in a nutshell, stated that a statute usually gives power for certain actions to be taken and in the absence of such power, actions taken will be considered *ultra vires* the statute in question.

It was the Appellant's contention that it had the requisite jurisdiction and power to fine the Respondent as provided for by the *Competition and Consumer Protection Act.* In this regard the Appellant sought the following reliefs;

1. *That the Judgment of the Tribunal dated 6th August, 2014 be quashed.*
2. *A finding that the Appellant has jurisdiction to impose fines under Section 37 of the Act.*
3. *An Order that Section 64 of the Act is not a mandatory section, and*
4. *An Order that the directives made by the Appellant on 1st February, 2012, 30th April, 2012 as well as 17th August, 2012 be upheld.*

In its heads of response dated 26th February, 2015 the Respondent, argued that if the Appellant was of the opinion that the Respondent had not complied with its directives, it ought to have applied to the Tribunal for a Mandatory Order to require that the Respondent make good its alleged default.

It was submitted that the Appellant has no power under the *Act* to make Orders punishing alleged non-compliance without first applying to the Tribunal for a Mandatory Order. This position is in line with *Section 64 of the Competition and Consumer Protection Act, 2010.* Further, *Rule 4 of the Competition and Consumer Protection*

(Tribunal) Rules, SI No. 37 of 2012 provides for a procedure to be followed when invoking a Mandatory Order. The Appellant cannot issue such an Order on its own motion neither is the Appellant given an option under *Section 64* to either apply for Mandatory Order or issue one on its own motion.

The Respondent contended that where a statute is clear and unambiguous it is expected that the said statute should be read as it is and in its ordinary meaning. I was referred to the case of ***The Minister of Information And Broadcasting Services, The Attorney General Vs Fanwell Chembo and Others*** [5] where the Supreme Court stated that;

> ***"(1) The fundamental rule of interpretation of Acts of Parliament is that they ought to be construed according to the words expressed in the Acts themselves. The word construe means, reading the statute in whole and not piece meal.***
>
> ***(2) If words of a statute are in themselves precise and unambiguous, then no more can be necessary than to expand those words in their natural and ordinarily sense.***
>
> ***(3) The trial judge took a route of examining the sections in broad terms without examining the words, or phrases thereby glossing over the sections and adding his own interpolations.***
>
> ***(4) It is not the duty of the courts to edit or paraphrase the laws passed by Parliament. The duty of the courts is to interpret the laws as found on the statute."***

The Respondent contended that the Appellant's decision to fine it without initially applying for a mandatory order from the Tribunal meant that the Appellant's decision was *ultra vires* the *Competition and Consumer Protection Act, 2010,* thereby making the decision null and void. I was referred to the cited case of ***Luciano Mutale and***

Jackson Chomba Vs Newstead Zimba [4] where the Court emphasized the need for measures taken to have a statutory basis failure to which such measures will be considered null and void.

It was the Respondent's contention that it was not in breach of any condition and it tried to bring this fact to the attention of the Appellant on numerous occasions. The Order fining the Respondent 2% of its annual turnover was illegal having not emanated from the decision of the Tribunal.

In the alternative, should the Court be inclined to allow the appeal, the Respondent submitted that the Court should Order that the entire matter be reheard by the Tribunal. The Tribunal Ruling which is subject of this appeal did not take into account all the grounds raised before it by the Respondent.

The other 8 grounds before the Tribunal essentially deny that the Respondent breached any of the directives in issue to warrant the fine that the Appellant ordered it to pay.

It was contended that the effect of the Court allowing the appeal without ordering that the matter be reheard would be that the Respondent would suffer damage without being heard. This in essence would be in breach of the rules of natural justice. I was referred to the cases of ***Zinka Vs The Attorney General*** [6] and ***General Medical Council Vs Spackman*** [7] with regards the Court's inherent mandate to ensure that the principles of natural justice are upheld.

The Respondent submitted that the appeal be dismissed with costs, and in the alternative, that the matter be sent back to the Tribunal for consideration of the Respondent's other 8 grounds which were not considered.

I have considered the appeal by the Appellant, Competition and Consumer Protection Commission. I have further considered the ruling by the Tribunal subjected of the appeal, the authorities cited and the arguments by the Learned Counsel on record.

The historical background facts are not disputed between the Parties and are as stated earlier on and need no repetition suffice to state that upon alleged breaches of the 2001 Merger Conditions and other subsequent Conditional Agreements by the Respondent the Appellant imposed on Puma Energy Zambia Limited a fine of 2% of its annual turnover. The Respondent appealed the decision to the Tribunal which overturned the Appellant's decision by holding that *Section 61 of Act Number 24 of 2010* is the enabling Section in the case of non-compliance by the Respondent, further that the implementing section is *Section 64* and that *Section 37* comes at the tail end of the invocation of the provisions.

The Tribunal in its Judgment of 6th August held that;

> ***"The Board of Commissioners erred in fining the Appellant without first applying to this tribunal for a Mandatory Order in line with Section 64 of the Competition and Consumer Protection Act Number 24 of 2010".***

The other relevant holding was to the effect that;

> ***"We hold that there was no evidence of an application to this tribunal by the Respondent on the basis of Section 64 of the Act and that if there had been such application and a Mandatory Order granted requiring the Appellant to make good the default within a time specified in the Order, the Respondent in that event would have assumed jurisdiction to invoke sanctions under S37 of the Act, would have been on firm ground ... since there was no***

jurisdiction on the part of the Respondent to exercise such power, such purported exercise of power rendered the fine null and void".

The Tribunal went on to set aside the imposed fine of 2% for want of jurisdiction.

The cardinal issue raised in the appeal is whether the Appellant (Commission) had jurisdiction or power under the Act to fine the Respondent for non-compliance without applying to the Tribunal under *Section 64 (1)* and if not, whether the fine imposed on the Respondent 2% of its annual turnover is null and void.

It is not in issue that *Act No. 24 of 2010*, empowers the Commission (Appellant) to impose administrative penalties including fines up to a maximum of ten percent for specific violations. I refer to the provisions of *Section 37* of the *Act* which provides that;

"An enterprise which intentionally or negligently –

(a) Implements a merger that is reviewable by the Commission without the approval of the Commission;

(b) Implements a merger that is rejected by the Commission; or

(c) Fails to comply with conditions stated in a determination or with undertakings given as a condition of a merger approval;

Commits an offence and is liable to a fine not exceeding ten percent of its annual turnover".

Section 61 which is in issue provides for remedies in merger control, it stipulates that;

"1. The Commission may, where it determines after an investigation that an enterprise is a Party to a merger and

the creation of a merger has resulted, or is likely to result, in a substantial lessening of competition within a market for goods or services, give the enterprise such directions as it considers necessary, reasonable and practicable to-(a) remedy, mitigate or prevent the substantial lessening of competition; and

(b) remedy, mitigate or prevent any adverse effects that have resulted from, or are likely to result from, the substantial lessening of competition.

2. The Commission may, in the case of prospective merger, require an enterprise to –

(a) desist from completion or implementation of the merger in so far as it relates to a market in Zambia;

(b) divest such assets as are specified in a direction within the period so specified in the direction, before the merger can be completed or implemented; or

(c) adopt, or desist from, such conduct, including conduct in relation to prices, as is specified in a direction as a condition of proceeding with the merger.

3. The Commission may, in the case of a completed merger, require an enterprise to –

(a) Divest itself of such assets as are specified in a direction within the period so specified in the direction; or

(b) Adopt, or to desist from, such conduct, including conduct in relation to prices, as is specified in the direction as a condition of maintaining or proceeding with the merger.

Section 64 on enforcement of directions and undertakings provides that;

> ***"(1) Where the Commission determines that an enterprise has failed, without reasonable cause, to comply with a direction or undertaking, it may, subject to subsection (2), apply to the Tribunal for a Mandatory Order requiring the enterprise to make good the default within a time specified in the order".***
>
> ***(2) The Commission shall consider any representations an enterprise wishes to make before making an application under subsection (1).***
>
> ***(3) The Tribunal may provide in the order that all the costs of, or incidental to, the application shall be borne by the enterprise in default".***

The Appellant in ground one contended that the Tribunal erred by imputing a blanket procedure on how merger-compliance affronts were to be dealt with by the Commission in disregard of the intention of the legislature. The Tribunal's position was to the effect that *Section 61* was the enabling *Section*, thereafter *Section 64* was the implementation provision and that *Section 37* was at the tail end. Ground two is linked to ground one and shall be dealt with together.

I have studied the provisions of *Sections 37, 61* and *64* in issue. *Section 37 (c)* empowers the Appellant where an enterprise intentionally or negligently fails to comply with conditions stated in a determination or undertaking to fine the erring enterprise.

Section 61 empowers the Commission (Appellant) where it determines after an investigation that an enterprise is a Party to a merger or the merger created will result in substantial lessening of competition in the market for goods or services to give directions it considers necessary, reasonable and practical.

Section 64, in instances where an enterprise has failed without reasonable cause to comply with a direction or undertaking the Commission may apply to the Tribunal for a Mandatory Order requiring the enterprise to make good the default within a specified time.

The Respondent contended that the Commission had to implement *Section 61*, then apply to the Tribunal for a Mandatory Order requiring it to make good of the default within a specified time before resorting to *Section 37* of the *Act.*

In my view *Section 61* is not in issue because there is evidence adduced that the Commission did carry out an investigation following complaints received against the Respondent *vis a vie* the floating of the Merger Conditions and gave the Respondent Enterprise directions it considered necessary or reasonable.

The real issues to be determined are as follows;

(i) Whether the Appellant is empowered to impose a fine without applying for a Mandatory Order from the Tribunal

(ii) Whether there is any ambiguity in the provisions of Section 37 and 64 of the Act.

Section 64(1) makes use of the word *"may"*. It states that the commission may apply to the Tribunal for a Mandatory Order requiring the enterprise to make good the default within a time specified in the Order.

The *Author's of Black's Law Dictionary 6th Edition at page 979* have defined the word *"may"* as

"An auxiliary verb qualifying the meaning of another verb by expressing ability, competency, liberty, permission, possibility, probability or contingency".

The word may is usually employed or used to denote optional or discretional and not mandatory conduct or action. As a general rule the word *"may"* is not treated as a word of command unless there is something in context on the subject matter of the *Act* to indicate the sense that it used in reference to. It is trite that in the construction of Statutes the word *"may"* as opposed to *"shall"* indicate a discretion or choice between two or more alternatives".

In my view the provision of *Section 64 (1)* which states that the commission may apply to the Tribunal for a Mandatory Order is not mandatory to the extent that unless the Commission obtains the Order, it cannot proceed to fine an erring enterprise or enforce the fine.

It is my considered view that the Commission (Appellant) is empowered to impose financial penalties including those falling under *Section 37* herein without recourse to any Court or Tribunal unless on appeal.

It is further my considered view that the use of the word *"may"* in *Section 64* entails that the Appellant has the discretion either to apply for a Mandatory Order from the Tribunal for the enterprise to make good of the default within a certain time or to proceed to fine under *Section 37*.

The other issue raised is the issue of ambiguity in the provisions of Section 64. I have perused *Section 64* including the other provisions of the *Act.*

The literal rule of construction of *Acts of Parliament (Statutes)* is that they should be construed according to the intent of Parliament which passed the *Act.* If the words of the Statute are in themselves precise and unambiguous, then the words are expounded in their natural and ordinary sense.

In my view there is no ambiguity in the provisions of the sections in issue to require interpretation by the Court. In my view, the wording of *Section 64* is clear and unambiguous and require no further inquiry into the meaning of the provisions. The use of the word 'shall' signifies that a certain action is mandated by Statute whilst the word *"may"* grants the agent some discretion.

From my reading of the provisions in issue, I find that the Appellant had the jurisdiction to fine the Respondent and further that it is not mandatory for the Competition and Consumer Protection Commission to obtain a Mandatory Order of compliance from the Tribunal. The Appellant had the discretion to impose a fine under *Section 37* without recourse to the Tribunal. The said fine is recoverable as a debt. I refer to *Section 86 (1)* of the *Act.*

I therefore find that the Tribunal erred in law and fact by finding that the Appellant acted *ultra vires* the *Act* without jurisdiction.

I find further that the Appellant has jurisdiction to impose fines under *Section 37* of the *Act* and that *Section 64 (1)* of the *Act* is not a

Mandatory provision. I accordingly quash the Judgment of the Tribunal dated 6th August, 2014.

The Respondent in the alternative contends that should the Court be inclined to uphold the appeal then I ought to Order that the matter be sent back to the Tribunal for determination of the Respondents other eight grounds which the Tribunal did not deliberate on. I have perused the grounds contended not to have been addressed by the Tribunal. The Tribunal heard ground one which it upheld and did not consider the other grounds as it considered it not necessary.

The Respondent contends that it is imperative that the Tribunal hears the other eight grounds. Not hearing the said grounds would be an affront to the principle of natural justice. I was urged to send back the matter for determination of the other eight grounds that were not addressed by the Tribunal.

It is not in issue that the Tribunal did not consider all the grounds having upheld the appeal in respect of ground one. The Tribunal in its Judgment stated that there was no need to consider the other grounds.

The issue is whether upon upholding the appeal herein as meritorious, I ought to send back the matter to the Tribunal for the consideration of the other grounds that the Tribunal did not consider.

In my view, it would be in the interest of justice that the matter be sent back to the Tribunal for determination of the other 8 grounds of Appeal.

For the foregoing reasons, I uphold the Appellant's appeal with costs. I further Order and direct that the matter goes back before the Tribunal for determination of the other eight grounds of appeal that were not considered.

Dated the 30th Day of June, 2015

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Hon. Mrs. Justice F. M. Chishimba

HIGH COURT JUDGE