IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(CIVIL JURISDICTION)

APPEAL NO.172/2015
SCZ/8/195/2015

BETWEEN:

PUMA ENERGY ZAMBIA PLC — APPELLANT

AND

COMPETITION AND CONSUMER PROTECTION COMMISSION — RESPONDENT

CORAM: Chibomba, Malila and Kaoma, JJS

On: 1st March, 2016 and 09th March, 2016

For the Appellant: Mr. N. Nchima, SC of Nchito & Nchito
For the Respondent: No Appearance

JUDGMENT

KAOMA, JS, delivered the Judgment of the Court.

Cases referred to:

1. ***Edward Jack Shamwana v The Attorney General (1988–1989) Z.R. 44***
2. ***The Minister of Information and Broadcasting Services, The Attorney General v Fanwell Chembo and Others – SCZ Judgment No. 11 of 2007***
3. ***Luciano Mutale and Jackson Chomba v Newstead Zimba (1988-1989) Z.R. 64***
4. ***Vaher v London Society of Compositors (1913) AC 107***
5. ***Mususu Kalenga Building Limited, Winnie Kalenga v Richmans Money Lenders Enterprises (1999) Z.R. 27***

Legislation:

1. ***The Competition and Consumer Protection Act No. 24 of 2010, sections 9, 37, 61, 63, 64 and 82.***
2. ***The Competition and Consumer Protection (Tribunal) Rules, rule 4***
3. ***The Interpretation and General Provisions Act, Cap 2, sections 3 and 4***
4. ***The Criminal Procedure Code, Cap 88, section 5.***
5. ***Black's Law Dictionary, 6th and 8th edition***

This is an appeal against the judgment of the High Court at Lusaka dated 30th June, 2015 wherein the court held that the respondent is empowered to impose financial penalties including those falling under section 37 of the *Competition and Consumer Protection Act, No. 24 of 2010* (the Act) without recourse to any Court or Tribunal unless on appeal.

The brief history of this matter is that prior to 2011, the appellant existed as BP Zambia Plc, a subsidiary of BP Africa Limited which was owned by BP International. BP Africa had 100 per cent distribution of BP lubricant products on the Zambian market. On the other hand, Castrol Oil Limited owned Spectra Oil Corporation Limited which distributed one hundred per cent of Castrol branded petroleum products.

On 15th August, 2001, the respondent granted BP Africa conditional approval for BP Africa to acquire Castrol Oil. The condition set was that Castrol branded products should be distributed in Zambia by an independent distributor, preferably, a local distributor who should not be associated with the BP Plc Group. Following this conditional approval, Danatech Investments Limited (now Dana Oil) entered into a distribution agreement with BP Africa in 2002 whereby Dana Oil was to be the sole distributor of Castrol branded products marketed, or made available by BP within Zambia.

In 2004, BP Africa and BP Zambia applied for review and variation of the 2001 authorisation and the 2002 approval conditions in respect of Castrol branded products distribution. BP Zambia sought the right to distribute Castrol branded products to key customers such as the mines in Zambia while Dana Oil was to remain with the bulk of the customers on the market. The respondent declined to allow BP Zambia have the rights of distributing Castrol branded lubricants on the Zambian market.

BP Africa abrogated the conditions of the 2001 merger between BP International Limited and Castrol Oil Limited. When the abrogation was brought to the attention of BP Africa by the respondent, BP Africa resolved to rectify the breach by implementing the "*Ukuguqula* project strategy", a model under which BP Africa would appoint Dana Oil as the sole distributor of Castrol branded products and preclude BP Zambia in the Castrol lubricant marketing and sales in Zambia. By this strategy, BP Africa was to retain 95% of the core business of BP Zambia while 5% of BP Africa's non-core contracted customers by BP Zambia in BP products as well as rights to directly supply the Castrol lubricants within its rights was handed over to Dana Oil which became a multi-branded distributor (MBD) supplying both products namely Castrol branded and BP products.

BP Africa then entered into a Multi-Brand Distributor Agreement (MBDA) on BP products. The respondent unconditionally authorised the MBDA in 2006 after an application by Dana Oil for reasons that: Dana Oil was not dominant in the relevant market; the MBDA was only adding BP products supply to restricted BP Africa customers called the non-core accounts thereby diluting BP Africa's market and that the product would be safer. In order to implement the MBDA, Dana Oil undertook to appoint 9 distributors from the nine provinces of Zambia at the time.

In 2007, Dana Oil wrote to the respondent informing it that BP Africa notified Dana Oil of its (BP Africa's) decision to supply both brands (BP products and Castrol branded products) through BP Zambia as a service provider, to clear customs and that it would invoice Dana Oil as a transit point bearing in mind the authorisation of Castrol branded products and restrictions on BP Zambia. According to BP Africa, the operations would not affect the authorisation as the right of distributing Castrol products would be as authorised and Dana Oil would have interface with customers. The respondent provided advice consistent with its 2001 authorisation maintaining that Castrol lubricants were to be independently distributed as it was at the time of Spectra Oil.

In 2008, the appellant and Dana Oil entered into a Distributorship Agreement in which it was agreed that Dana Oil (the Distributor), shall procure the products exclusively from BP Zambia PLC or such other party as BP may nominate from time to time. The respondent expressed ignorance of this agreement as it was of the view that the same abrogated the spirit of the 2001 authorisation. In 2010, BP Africa and Puma Ireland made a joint application seeking approval for Puma Energy (Ireland) Holdings Limited to acquire 75 interests in BP Zambia from BP Africa. This proposed merger was approved by the respondent in 2011 on condition that the Castrol distributorship agreement involving Dana Oil should remain in force as previously authorised by the Commission.

The respondent received a complaint from the market to the effect that Dana Oil was abrogating the condition of 2001 regarding the distribution of Castrol branded products by allowing BP Africa to sell the products to it through the appellant and the appellant's act of advertising itself as a Castrol products distributor in Zambia.

On 1st February, 2012 the respondent wrote to the appellant and Dana Oil notifying them of the allegation relating to the abrogation of the 2001 approval and the 2002 agreement between BP Africa and Dana Oil and directed that Castrol products distribution in Zambia remain independent. It was also directed that Dana Oil procures its Castrol products from BP Africa and BP products from the appellant. In March, 2012 the respondent issued another directive for the appellant to comply with the directive given in February, 2012.

In an effort to find an amicable solution, Puma Ireland wrote the respondent on 23rd March, 2012 and the latter responded on 26th March, 2012 reiterating that its position remained unchanged. On 17th April, 2012 Puma Ireland again wrote to the respondent setting out its understanding of the issues involved in the matter and stated that none of the parties involved had breached the law. In April, 2012 the respondent replied and repeated that the appellant still needed to comply with the February and March, 2012 directives.

On 27th April, 2012 the appellant filed before the Competition and Consumer Protection Tribunal (the Tribunal), a notice of appeal, an application for leave to file the notice of appeal out of time and its supporting affidavit and also filed an application for stay pending the determination of the appeal. On 8th May, 2012 the respondent wrote to Puma Ireland giving its detailed response to the issues Puma had raised in its letter of 17th April, 2012. The respondent reiterated that its February and April directives still applied. On 14th June, 2012, Puma Ireland made a 'without prejudice' proposal to the respondent suggesting ways of resolving the issues including a proposal to submit an application for review of the various approvals.

On 17th August, 2012 the respondent's Board of Commissioners made a decision wherein it determined that the respondent should ignore the parties' appeal to the Tribunal since it was made out of time and it did not act as a stay of the respondent's directive. The respondent's Board further decided that the appellant be fined 2% of its annual turnover as provided under section 37 of the Act as the appellant had demonstrated with impunity that it did not want to comply with the respondent's directives.

The fine was to act as deterrence to the appellant against non-compliance with conditions set by the respondent on various transactions involving Puma. Dana Oil was also fined 0.1% of its annual turnover so that it could willingly abide by the respondent's directive and as deterrence against non-compliance. The penalty was also meant to send a strong signal to various market players not to engage into similar conduct. The two parties were granted the right to appeal within 30 days.

Dissatisfied with the decision of the respondent, the appellant appealed to the Tribunal on nine grounds. Of relevance to this appeal is ground one which read as follows:

> ***"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."***

Even if nine grounds were raised, the only relief sought was that the respondent's directives issued on 1st February and 30th April, 2012 be quashed; that the appeal and attendant applications filed by the appellant on the 27th April, 2012 be heard by the Tribunal and or the Secretariat where applicable and that the decision to fine the appellant be overturned. The Tribunal was of the view that once ground 1 was resolved in favour of the appellant, it was not necessary to consider the other grounds.

In its judgment rendered on 6th August, 2014 the Tribunal held that:

> ***"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."***

Further, 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 s. 37 of the Act, ... 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."**

According to the Tribunal, section 61 of the Act is the section which enabled the respondent to investigate the appellant's conduct of non-compliance. Section 64 follows as an implementing section and the respondent ought to have applied to the Tribunal for a Mandatory Order requiring the appellant to make good the default. And section 37 comes to the tail-end as it provides for sanctions or punishment.

The respondent was dissatisfied with this decision and, therefore, appealed to the High Court on three grounds. The gist of the grounds of appeal was that the Tribunal erred in law and fact by imputing a blanket procedure on how merger compliance affronts under the Act were to be dealt with by the respondent; the Tribunal misdirected itself by finding that Section 64 of the Act was mandatory and precursory to the invocation of section 37 of the Act; and the Tribunal was wrong in finding that the respondent acted ultra vires the Act.

In her judgment, the learned High Court judge held, in brief, that the respondent had jurisdiction to fine the appellant under section 37 of the Act; that the respondent acted within its jurisdiction as conferred by the Act; and that section 64 (1) of the Act is not a mandatory provision.

Aggrieved by the decision the appellant now appeals to this Court on three grounds as follows:

1. ***The Court below erred in law and fact when it held that the respondent had jurisdiction to fine the appellant under Section 37 of the Competition Act and that it is not mandatory for the respondent to obtain a Mandatory Order of Compliance from the Competition and Consumer Protection Tribunal***

2. ***The Court below erred in law and fact when it held that the Competition Consumer Protection Tribunal erred in law and fact by finding that the respondent acted ultra vires the Act without jurisdiction.***

3. ***The Court below erred in law and fact when it held that Section 64(1) of the Act is not a mandatory provision.***

In support of the grounds of appeal, Mr. Nchito, SC relied on the appellant's filed heads of argument and augmented the same with oral submissions. State Counsel argued grounds one and three together while ground two was argued separately. He submitted on grounds one and three that the court below erred when it held that the respondent is empowered to impose financial penalties including those falling under section 37 of the Act without recourse to any Court or Tribunal unless on appeal; that the respondent had the jurisdiction to fine the appellant; and further that it is not mandatory for the respondent to obtain a Mandatory Order of compliance from the Tribunal. State Counsel cited sections 37, 61, and 64 of the Act which we shall refer to in the course of this judgment where necessary.

State Counsel observed that the court below was correct when it determined that section 61 of the Act empowers the respondent to give directions it considers necessary, reasonable and practical after an investigation into uncompetitive practice of a party to a merger. He then submitted that this means that section 61 is the enabling provision in the case of investigations. According to State Counsel, after an investigation, section 64, which provides for application by the respondent to the Tribunal for a Mandatory Order, is used for the enforcement of directions and undertakings. And only after the enforcement of a determination under a mandatory order is not complied with can the fine under section 37(c) of the Act be imposed.

State Counsel contended that in determining the intention of the Legislature, the Court must look at, firstly, the subject matter, and secondly, the object in view. As authority for this argument he cited the case of *Edward Jack Shamwana v The Attorney General*[1] where we stated that a mandatory or absolute provision must be observed or fulfilled exactly whereas it is enough if a directory requirement is observed or fulfilled in substance; and that in order to understand the words used in an Act it is natural to enquire what is the subject matter with respect to which they are used and the object in view.

State Counsel further submitted that section 64 of the Act does not give the respondent the option or discretion to issue mandatory orders on its own as that section is clear and unambiguous contrary to what the court below stated. As authority, the case of *the Minister of Information and*

Broadcasting Services and the Attorney General v Fanwell Chembo and Others[2] was cited on statutory interpretation.

It was also contended that rule 4(4) of the *Competition and Consumer Protection (Tribunal) Rules, Statutory Instrument No. 37 of 2012*[2], gives a mandatory procedure for the respondent to follow when making an application for mandatory orders from the Tribunal and that there is no provision in any Statutory Instrument which provides a procedure for the respondent to issue mandatory orders and thereby fine on its own motion. We were urged to dismiss the determination by the court below that the respondent had jurisdiction to fine the appellant without first obtaining a mandatory order from the Tribunal and to uphold the latter's decision.

In addition, State Counsel submitted that section 37 of the Act creates an offence for which the respondent does not have jurisdiction as criminal liability can only be determined after a criminal trial which can only be dealt with by either the High Court or the Subordinate Court.

In respect of ground two, State Counsel contended that in fining the appellant without first applying to the Tribunal for a mandatory order as required by section 64 of the Act, the respondent acted without authority and therefore ultra vires the Act. To support this argument, State Counsel cited the case of *Luciano Mutale and Jackson Chomba v Newstead Zimba*[3] where we pointed out that where a person or institution acts ultra vires its powers, the remedy is to consider the decision made as null and void.

State Counsel reiterated that the order fining the appellant 2 per cent of its annual turnover was illegal and further that the respondent acted ultra vires the Act as it did not have jurisdiction to fine the appellant without following the procedure laid down in section 64 of the Act.

It was also State Counsel's position that the appellant did not show impunity, but was of the view that it was not in breach of any condition and attempted on numerous occasions to engage the respondent to demonstrate this. He maintained that the appellant did not, in effect, abrogate the February, 2012 directive to warrant the fine erroneously imposed on it. It was State Counsel's argument that the issue of fines in this case could only lawfully have been decided by the Tribunal after issuing the Mandatory Order of compliance and not by the respondent.

Alternatively, State Counsel argued that section 37 of the Act is titled as 'Offences relating to mergers' and as such, attaches criminal liability, which cannot be determined by the respondent. He cited section 3 of the *Interpretation and General Provisions Act*[3] and reiterated that the appellant could not have been fined without first being prosecuted in the Subordinate

Court and being found guilty as is set out in section 5 of the *Criminal Procedure Code*, Cap 88[4].

In his oral submissions, State Counsel repeated some of the arguments in the written heads of argument and added that even if the respondent has to fine, it must still follow the rules of natural justice, particularly the right to be heard. That the appellant was not heard by the respondent before being fined as all that preceded the fining was a meeting then a without prejudice letter was written by the appellant to the respondent where the former proposed a settlement and then it was fined.

According to State Counsel, this was one of the issues raised before the Tribunal which formed part of the eight grounds which were never heard by the Tribunal and further the issue was raised in the court below. We were urged to uphold the appeal.

In opposing the appeal, counsel for the respondent of Messrs. Chonta, Musaila & Pindani Advocates had filed heads of argument in response to the appellant's heads of argument on 19th February, 2016. In addition, they filed a notice of non-attendance pursuant to rule 69 of the Supreme Court Rules, Cap 25 of the Laws of Zambia on 23rd of February, 2016 and so, they did not attend the hearing of the appeal.

Counsel for the respondent argued the three grounds of appeal altogether. It was submitted that section 61 of the Act gives the respondent the authority to give directions it considers necessary, reasonable and practical to remedy, mitigate or prevent the substantial lessening of competition; and that such remedies include fines under section 37 of the Act. It was contended that if the Legislature had intended that the respondent should first apply to the Tribunal under section 64, before invoking section 37, the Act would have expressly stipulated this but there is no provision in the Act which requires the respondent to invoke section 64 before resorting to section 37.

It was also contended that section 63(1) of the Act gives the respondent the authority to review compliance with directions given by it and the performance of undertakings given by an enterprise. Upon such review, the respondent is empowered by section 37(c) of the Act to impose a fine on an enterprise which intentionally or negligently fails to comply with conditions stated in a determination or with undertakings given as a condition of a merger approval. It was further submitted that once a fine is imposed by the respondent, and if there is no compliance by the fined enterprise, the respondent has the discretion to decide whether to seek a mandatory order of compliance from the Tribunal under section 64.

It was also submitted that the wording of sections 37 and 64 of the Act are precise and unambiguous, no more can be necessary than to expound the words in the said sections in their natural and ordinary sense when construing the sections. Counsel for the respondent also relied on the case of *Edward Jack Shamwana v. Attorney General*[1] which cited with approval the dictum from the case of *Vaher v. London Society of Compositors*[4] that:

> ***"Now it is the "universal rule", as Lord Wensleydale observed in Grey v Pearson that in construing statutes, as in construing all other written instruments, "the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid absurdity and inconsistency, but no further."***

Counsel for the respondent then submitted that the word that fell for determination in section 64 of the Act was '**may'** and that the learned High Court Judge rightly interpreted section 64 relying on section 4(4) of the *Interpretation and General Provision Act*[3]. It was further submitted that section 4(4) of the *Interpretation and General Provision Act*[3] must be employed in the interpretation of section 2 of the same Act with regard to the definition of the word 'offence'.

Counsel for the respondent argued that an 'offence', therefore, is not necessarily a crime, felony or misdemeanour requiring prosecution as argued by the appellant. That an offence may also be a contravention or other breach of, or failure to comply with, any written law for which a penalty is provided.

It was contended that the offence created by section 37 of the Act is not a crime requiring prosecution but it is rather a civil wrong for which the penalty of a fine is provided. It was counsel's position that this construction is supported by the fact that the offence created in section 37 of the Act does not require conviction; that by intentionally omitting a requirement for conviction, the legislature created a civil wrong, rather than a crime.

Counsel for the respondent contrasted section 37 with section 9(2) of the Act and then argued that section 9(3) reinforces the fact that section 37 does not create a crime and therefore provides for an administrative fine as opposed to the crime under section 9(2). It was submitted that since no criminal liability attaches to the violation of section 37 of the Act, no need for prosecution thereunder arises, before the imposition of a fine; and that the learned High Court Judge cannot be faulted for upholding the respondent's appeal in the court below. We were urged by counsel for the respondent to dismiss the appeal.

We have thoroughly considered the grounds of appeal and the arguments by the parties and the authorities cited. We have also considered the judgment the subject of this appeal and the record of appeal. Before considering the grounds of appeal, we propose to deal first with the oral argument made by State Counsel Nchito that the appellant was not heard by the respondent before imposing the fine in breach of the rules of natural justice. We were referred to the appellant's arguments in the court below, particularly at page 894 of the record of appeal and to ground four of the nine grounds that were before the Tribunal.

We have considered the above argument and we agree with the trite position that no person should be judged without being given an opportunity to be heard on the allegations against him. To start with, State Counsel argued that the issue of being fined without being heard was raised by the appellant in the court below. But it seems to us that what the appellant raised in its heads of argument at page 894 of the record is the fact that it was not heard by the Tribunal on the other eight grounds of appeal which included ground four wherein the appellant contended, albeit in the alternative, that in hearing an appeal to the Tribunal against the respondent, the Board of Commissioners acted in breach of the rules of natural justice, specifically that one cannot be judge in his own case.

As we said in the case of *Mususu Kalenga Building Limited, Winnie Kalenga v Richmans Money Lenders Enterprises*[5], and in various other cases on the point, where an issue was not raised in the court below, it is not competent for any party to raise it in this court.

In any case, it is clear from the record of appeal that the respondent and the appellant exchanged several correspondences on the abrogation of the Conditional Authorisation that was granted in respect of the merger between BP International Limited and Castrol Oil Limited. The respondent also held a meeting with the appellant and Dana Oil on 24th January, 2012 and advised them to restore the Castrol products distribution in line with the respondent's 2002 decision before making an application for review of the Conditional Authorisation as opposed to their continued abrogation.

Thereafter, on 1st February, 2012 the respondent gave the directive to the parties to restore the Castrol products distribution in line with the 2002 decision by 30th April, 2012. In its correspondence to the respondent dated 17th April, 2012, the appellant submitted that the arrangement between the appellant and Dana Oil under which the appellant supplied Castrol products to Dana Oil and sold such products directly to certain customers was approved by the respondent and as such, did not amount to an abrogation of the Conditional Authorisation.

In light of the foregoing, it is our considered view that the appellant was given an opportunity to be heard by the respondent before being fined by the Board of Commissioners in the decision of 17th August, 2012. Anyhow, the decision of the Board of Commissioners at pages 41 to 53 of the record of appeal reveals that the appellant was given an opportunity to be heard on the allegation of abrogating the conditional authorisation.

The decision of the Board contains a summary of facts and findings presented by the respondent to the Board after its investigations. Paragraph 3.2 shows that the respondent held a meeting with the appellant on 24th January, 2012 in connection with the alleged abrogation. Paragraph 3.8 indicates that in responding to the parties' letter of 17th April, 2012 wherein the parties denied abrogating the conditional authorisation, the respondent addressed each issue raised by the parties to show that they were abrogating the conditional authorisation. In our view, State Counsel's argument that the respondent did not give the appellant an opportunity to be heard before fining it is untenable and must fail.

We now turn to the merits of the appeal. We propose to deal with the grounds in the order they were argued by State Counsel Nchito. The gist of the appellant's arguments on grounds one and three is that the respondent did not have jurisdiction to fine the appellant without obtaining a mandatory order of compliance from the Tribunal in accordance with section 64 of the Act; and that section 37 creates an offence for which the respondent does not have jurisdiction because criminal liability can only be determined after a criminal trial.

The learned trial judge considered the cardinal issue raised in the appeal to be whether the respondent had jurisdiction or power under the Act to fine the appellant for non-compliance without applying to the Tribunal under section 64(1) for a mandatory order, and if not, whether the fine imposed on the appellant of 2% of its annual turnover was null and void.

In determining the issues before her, the learned trial judge examined sections 37, 61 and 64 of the Act which for expediency we set out below:

> "**PART IV: MERGERS**
> *37.* ***(Offences relating to mergers)***
>
> ***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.***
>
> **PART VIII: INVESTIGATIONS AND DETERMINATION BY COMMISSION**
>
> ***61. (Remedies in merger control)***
> ***(1) The Commission <u>may</u>, 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 a prospective merger, require an enterprise to –

(a) desist from completion or implementation of the merger insofar 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.

64. (Enforcement of directions and undertakings)
(1) Where the Commission determines that an enterprise has failed, without reasonable cause, to comply with a direction or undertaking, it may, subject to sub-section (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 sub-section (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" **(Underlining ours for emphasis).**

From the above provisions, there is no dispute, as found by the learned trial judge that section 61 empowers the respondent 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 the enterprise such directions it considers necessary, reasonable and practical.

And it is clear that in terms of section 64, where an enterprise has failed without reasonable cause to comply with a direction or undertaking, the respondent **may** apply to the Tribunal for a mandatory order requiring the enterprise to make good the default within a specified time. Furthermore, as rightly stated by the learned judge, section 64 uses the word "**may**" and under the rules of statutory interpretation, the word "**may**" connotes discretion or choice between two alternatives.

The learned judge further quoted the definition of the word **'may'** in *Black's Law Dictionary, 6th edition*[5]*, at page 979 as follows:*

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

The learned judge then stated, and in our view, rightly so, that the word '**may'** is usually used to denote optional or discretional and not mandatory conduct or action; that 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 is used in reference to; and that in the construction of statutes the word '**may'** as opposed to '**shall'** indicate a discretion or choice between two or more alternatives.

She then concluded that the provisions 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; that the Commission is empowered to impose financial penalties including those falling under section 37 without recourse to any Court or Tribunal unless on appeal; and that the use of the word '**may'** in section 64 entails that the respondent 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.

We cannot fault the learned judge for coming to the conclusions that she did. We agree that the literal rule of construction of Acts of Parliament is that they should be constructed in accordance with the intent of Parliament and that if the words of the statute are in themselves precise and unambiguous, then the words should be expounded in their natural and ordinary sense. We also agree with the learned judge that the wording of section 64 is clear and unambiguous and requires no further inquiry into the meaning of the provisions. The learned judge properly applied our decision in the case of *The Minister of Information and Broadcasting Services and another v Chembo and others*[2], where we held 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 expound those words in their natural and ordinarily sense.***
>
> ***(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 in the statute"***

And in the *Shamwana*[1] case, we stated, among other things, that the distinction between mandatory and directory provisions equally applies to ordinary statutes, and that the distinction is that an absolute requirement (or provision) must be observed or fulfilled exactly; however, it is enough if a directory requirement is observed or fulfilled in substance.

State Counsel Nchito also spiritedly argued that section 64(1) is mandatory because of the use of the word 'shall' in rule 4(4) of the *Competition and Consumer Protection (Tribunal) Rules*[2]. We are not at all persuaded by this argument. In our view, Rule 4 does not make section 64(1) mandatory. What Rule 4 entails is that should the respondent opt to apply for a mandatory order of compliance before the Tribunal under section 64(1), then it must do so using the prescribed Form II which is set out in the Schedule to the Act.

The learned judge further found that section 37(c) of the Act empowers the respondent where an enterprise intentionally or negligently fails to comply with conditions stated in a determination or undertaking to fine the erring enterprise. In our view, the learned judge was again on firm ground. It is very clear that the respondent has been given administrative powers under section 37 of the Act to impose a fine not exceeding ten percent of its annual turnover for an offence relating to mergers without first applying to the Tribunal for a Mandatory Order of compliance.

In addition, the wording of sections 37, 61 and 64 of the Act which we have set out in full above are clear and unambiguous. The sections do not prescribe any particular order in which they should be applied by the respondent and the words used in section 37 do not, in any slightest sense, suggest that before invoking this section recourse must be had to the Tribunal or a Court of competent jurisdiction.

The holding by the learned judge that the respondent had jurisdiction to fine the appellant under section 37 of the Act; that it is not mandatory for the respondent to obtain a Mandatory Order of compliance from the Tribunal; and that section 64(1) is not a mandatory provision are, in our view, flawless. Clearly, it is within the respondent's discretion to apply for a mandatory order of compliance which, in our view, is one of the mechanisms available to the respondent in the enforcement of the provisions of the Act.

To take the matter a little further, the respondent is mandated by section 5(d) of the Act to investigate unfair trading practices and unfair contract terms and impose such sanctions as may be necessary and by section 5(l) to do all such acts and things as are necessary, incidental or conducive to the better carrying out of its functions under the Act. Further still, in terms of section 79 of the Act, the respondent may operate a leniency programme where an enterprise that voluntarily discloses the existence of an agreement that is prohibited under the Act, and co-operates with the respondent in the investigation of the practice, may not be subject to all or part of a fine that could otherwise be imposed under the Act.

It is clear to us, from the above mentioned provisions, that the respondent has inherent power, in appropriate cases, to impose a fine on an offending enterprise without recourse to the Tribunal. On the basis of all the foregoing, we find no merit in grounds one and three of the appeal and we dismiss them accordingly.

In respect of ground two, State Counsel contended that the respondent acted without authority and, therefore, ultra vires the Act. Further, that the fine imposed by the respondent was illegal as the appellant did not breach the respondent's directive to restore the 2002 position in respect of the Castrol products distribution in Zambia; and that under clause 3.2 of the agreement between BP Africa and Dana Oil any entity in the BP group could supply Castrol products except with conditions. In the alternative State Counsel submitted that the offence under section 37 attaches criminal liability, which requires prosecution in a competent court.

On the other hand, the thrust of the respondent's argument is that the offence created by section 37 is not a crime requiring prosecution but rather, it is a civil wrong for which the penalty of a fine is provided.

We have seriously reflected on ground 2 of the appeal. We shall not belabour this ground in light of what we have stated above that section 37 is a stand-alone provision and that it gives the respondent administrative power to fine an offending enterprise.

However, we have carefully examined the Conditional Authorisation of the Takeover of Castrol Oil Corporation by BP International dated 15th August, 2001 and the Distributor Agreement between BP Africa and Dana Oil of June, 2002. It is clear from the two documents that the distribution of Castrol branded products by an independent distributor was the condition precedent for the takeover pursuant to which the distributor agreement was made between BP Africa and Dana Oil.

Contrary to State Counsel's contention that the appellant was allowed to deal in Castrol branded products, we have found that clause 3.2 of the

Distributor Agreement between by BP Africa and Dana Oil did not entail that any entity in the BP group like BP Zambia or the appellant could supply Castrol products with conditions nor did it, in any way, dilute the spirit of the conditional approval which the respondent maintains to date.

Clause 3.2 of the Distributor Agreement provided as follows:

> ***"The appointment is sole and accordingly BP may supply their products to any person for his own use in the Territory but shall not knowingly supply to any other person purchasing the products for sale in the Territory. Should BP supply their products directly to any person for his own use in the territory, then and in such an event BP shall pay the distributor an amount equivalent to the commission that would have been payable by BP to the Distributor had the Distributor made such sale and supply."***

In other words, clause 3.2 did not allow BP Africa to supply Castrol products to BP Zambia for sale on the Zambian market. What BP Africa could do on account of clause 3.2 with conditions was that it could supply products to any person for his own use and not any other purpose like resale. Therefore, it is our view, that when the appellant perpetuated the distribution of Castrol products on the Zambian market, it abrogated the 2001 conditional approval of the takeover and the 2011 authorisation for the acquisition of 75 per cent interest in BP Zambia from BP Africa.

And from the correspondence between the appellant and the respondent, it is clear to us that the respondent did not, at any point, authorise the appellant to become the distributor of Castrol products on the

Zambian market. When the respondent directed that distribution of Castrol products be restored to the 2001 and 2002 position, the appellant in its representation to the respondent simply denied breach and argued that it was authorised to distribute Castrol products. In so doing, the appellant acted with impunity thus prompting the respondent to impose the fine under section 37 of the Act. Of course, we are mindful of what we said in the case of *Luciano Mutale and Jackson Chomba v Newstead Zimba*[3] that:

> ***"...unless a power to take the measures complained of is explicitly stipulated or it exists by necessary implication, then the measures taken in the absence of such power would be regarded as ultra vires, null and void, if not altogether illegal."***

Regarding the argument whether or not section 37 of the Act creates a crime or a civil wrong, the determination of this issue rests on the meaning to be assigned to the word 'offence' under section 37. The word 'offence' is defined by section 3 of the *Interpretation and General Provisions Act*[3] as "*any crime, felony, misdemeanour, contravention or other breach of, or failure to comply with, any written law, for which a penalty is provided*".

From this definition, it is clear that any breach of or failure to comply with any written law for which a penalty is provided is an offence.

Furthermore, the learned authors of *Black's Law Dictionary*[5] have aptly defined 'penalty' as follows:

> ***"Punishment imposed on a wrongdoer, usu. in the form of imprisonment or fine, esp., as a sum of money exacted as punishment for either a wrong to the State or a civil wrong (as distinguished from compensation for the injured party's loss) though usu. for crimes, penalties are also sometimes imposed for civil wrongs.***
>
> ***Civil penalty – a fine assessed for a violation of a statute or regulation."***

The above definition is enlightening that there are civil penalties arising from statutory violations for which a fine can be assessed. Therefore, it is our considered position that section 37 of the Act provides for a civil offence which does not require criminal prosecution under the *Criminal Procedure Code*[4] as has been argued by the appellant.

This position can be confirmed by comparing and contrasting the words used in sections 9(2), 9(3) and 82 of the Act. Section 9(2) clearly stipulates that a person who contravenes section 9(1) commits an offence **and is liable upon conviction** to a fine of up to five hundred thousand penalty units or to a term of imprisonment of not more than five years or to both (emphasis ours). On the other hand, section 9(3) reinforces our position that section 37 does not create a crime but provides for a civil penalty by its wording that an enterprise that contravenes section 9(1) is liable to pay the Commission a fine not exceeding ten percent of its annual turnover as compared to the wording of section 9 (2) which creates a crime.

Section 82 of the Act, provides for a general penalty to the effect that a person who contravenes a provision of the Act for which no specific penalty is provided for under the Act, commits an offence **and is liable, upon conviction**, to a fine not exceeding one hundred thousand penalty units or to a term of imprisonment of up to one year or to both (emphasis again ours).

In our view, if the intention of the Legislature was to create a criminal offence requiring prosecution under section 37 of the Act, the wording of that section would have explicitly stated so. It is abundantly clear that in circumstances where contravention of the provisions of the Act require prosecution, the Legislature expressly provided that a fine will only be imposed upon conviction and not otherwise.

The omission of the words '**upon conviction**' in section 37 of the Act is not without significance. It is our very firm view, that section 37 attaches no criminal liability and that there can be no criminal prosecution under that section. Therefore, the learned judge cannot be faulted for finding that the respondent did not act *ultra vires* the Act by invoking section 37 and imposing a fine on the appellant as this power is reposed in it by the Act. Therefore we find no merit in ground two and it is dismissed.

In all, the appeal is dismissed with costs to the respondent to be taxed if not agreed.

H. CHIBOMBA
SUPREME COURT JUDGE

M. MALILA
SUPREME COURT JUDGE

R. M. C. KAOMA
SUPREME COURT JUDGE