IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2015/HPC/A0527

BETWEEN:

COMPETITION AND CONSUMER PROTECTION COMMISSION — APPELLANT

AND

RACHEL MHONE CHAMA — RESPONDENT

CORAM: Hon. Lady Justice Dr. W. S. Mwenda at Lusaka the 2nd day of May, 2018.

For the Appellant: Mrs. M. B. Mwanza, In-house Legal Counsel.

For the Respondent: No Appearance.

JUDGMENT

Cases referred to:

1. *Competition and Consumer Protection Commission v. Omnia Fertiliser Zambia Limited SCZ Selected Judgment No. 51 of 2017.*
2. *JCN Holdings Limited, Post Newspapers Limited and Mutembo Nchito v. Development Bank of Zambia (2013) Z.R. 299.*
3. *New Plast Industries v. The Commissioner of Lands and Attorney General SCZ Judgment No. 8 of 2001.*

Legislation referred to:

1. *Section 2 of the Competition and Consumer Protection Act No. 24 of 2010.*
2. *Sections 60 and 68 of Act No. 24 of 2010.*
3. *Sections 58, 59, 61 and 62 of Act No. 24 of 2010.*

Publication referred to:

Bryan A. Garner (ed) Black's Law Dictionary, 10th Edition (Thomson Reuters, USA, 2009).

This is an appeal by the Appellant against the decision of the Competition and Consumer Protection Tribunal handed down on 30th October, 2015, to the effect that the Respondent herein is a consumer within the definition of Section 2 of the Competition and Consumer Protection Act No. 24 of 2010 (hereinafter to be referred to as "the Act").

The brief facts leading to this appeal are that the Respondent lodged a complaint with the Appellant by letter dated 16th July, 2015, wherein she stated that she and her husband Darius Chama were entrepreneurs who had, some time in 2013, imported adult diapers from China for the purpose of reselling them in Zambia. The said diapers were transported from Dar es salaam to Kapiri Mposhi via

the Tanzania Zambia Railway Authority (TAZARA) and ultimately to Lusaka from Kapiri Mposhi by road. The 695-case consignment of diapers arrived at the Port of Dar es Salaam in Tanzania around December, 2013 where they were marooned for about four months at a TAZARA Goods Shed. When the diapers reached Lusaka, the Respondent discovered that 402 of the 695 cases were spoilt as they had been soaked by the rains while in the custody of TAZARA. According to the Respondent, TAZARA accepted responsibility for the damage to the goods. To this effect, TAZARA gave the Respondent a credit note in the sum of US$13,824.84, which did not cater for the tax paid to the Zambia Revenue Authority, amounting to ZMW3,696.60 and the transportation from Kapiri Mposhi to Lusaka. The Respondent acknowledged having received two payments from TAZARA amounting to ZMW48,214.56. The Respondent was now claiming a sum of ZMW180,900.00 for the 402 cases of diapers at ZMW 450.00 per case, interest and opportunity cost.

The Respondent filed a complaint to the Appellant who declined to entertain it on the ground that she did not qualify to be a consumer within the meaning of Section 2 of the Act, in particular,

Section 2 (1) (b) of the Act because, according to the Appellant, the Respondent purchased the goods or services for the purpose of business or trade. Being dissatisfied with the Appellant's decision, the Respondent appealed to the Tribunal through a letter dated 23rd September, 2015 where she requested the Tribunal to interpret the word "consumer" and whether she qualified to be a consumer considering the nature of the transaction in question. The Tribunal sat and determined that the Respondent did qualify as a consumer, a determination appealed against before this Court.

The Appellant filed a Notice of Appeal on 27th November, 2015, wherein it stated that being dissatisfied with the judgment of Competition and Consumer Protection Tribunal (henceforth referred to as "the Tribunal"), it intended to appeal against the whole of the said judgment. The Appellant has raised four grounds of appeal as follows:

1. The Tribunal erred both in law and in fact by finding that the Respondent herein qualified as a consumer contrary to Section 2 of the Competition and Consumer Protection Act ("the Act");

2. The Tribunal erred in fact and therefore, misdirected itself at law by proceeding with the notion and determining that the letter of clarification from the Respondent amounted to a Notice of Appeal;

3. The Tribunal erred both in law and in fact by finding that the letter from the Appellant to the Respondent communicating the legal status of the Respondent in relation to the Act amounted to a decision within the meaning of Section 60; and

4. The Tribunal misdirected itself at law by handling a matter in relation to which it had no jurisdiction.

The appeal came up for hearing on 22nd May, 2017. The Respondent was not in attendance, but hearing proceeded in her absence after the Court satisfied itself through an Affidavit of Service filed into Court by the Appellant on 16th May, 2017, that the Respondent was served with the Notice of Hearing for the sitting and therefore, was aware of the proceedings. Learned Counsel for the Appellant in her submissions, basically augmented the arguments submitted in the Heads of Arguments filed into Court by the Appellant on 27th November, 2015.

The Appellant's argument in relation to ground one, namely, that the Tribunal erred both in law and in fact by finding that the Respondent herein qualified as a consumer contrary to Section 2 of the Act, is that the said section, particularly subsection (b), precludes the Respondent from being treated as a consumer in that she sought the transportation service from TAZARA for her to advance her trading business through offering a sales service, for remuneration. That consequently, the Respondent does not qualify to be categorised as a consumer within the meaning of the Act.

Section 2(1) of the Act defines "consumer" in the following terms:

" "consumer" means –

(a) for the purposes of Part III, any person who purchases or offers to purchase goods or services supplied by an enterprise in the course of business, and includes a business person who uses the product or service supplied as an input to its own business, a wholesaler, a retailer and a final consumer; and

(b) for the purposes of the other Parts of this Act, other than Part III, any person who purchases or offers to purchase goods or services otherwise than for the purpose of re-sale, but does not include a person who purchases goods or services for the purpose of using the goods or service in the production and manufacture of any other goods for sale, or the provision of another service for remuneration;"

According to the Appellant, the present case is distinguishable from an earlier case decided by the Tribunal, namely, the case of

Mbwe Motorways Limited v. Competition and Consumer Protection Commission[1], for the reason that in that case the complainant had purchased goods for consumption and not resale as was the position in the case in *casu*.

The Appellant argued grounds two and three together, which for ease of reference, are reproduced here. Ground Two is that the Tribunal erred in fact and therefore, misdirected itself at law by proceeding with the notion and determining that the letter of clarification from the Respondent amounted to a Notice of Appeal; and Ground Three is that the Tribunal erred both in law and in fact by finding that the letter from the Appellant to the Respondent communicating the legal status of the Respondent in relation to the Act, amounted to a decision within the meaning of Section 60 of the Act.

The Appellant's arguments under these two grounds of appeal are, firstly, that the letter written by the Respondent to the Tribunal seeking an interpretation of the word "consumer" and whether she qualified to be a consumer considering the nature of the transaction in question, was just that and did not amount to a Notice of Appeal

so as to have the Tribunal handle the issue as an appeal. It is the Appellant's argument that there ought to have been a decision arrived at by the Appellant from which an appeal would have lain to the Tribunal; that there was no such decision by the Appellant. The Appellant cited Section 60 of the Act which states as follows:

> *"60. 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."*

The Appellant argues that the order or direction in contemplation of the law is one arrived at in form of a decision by the Appellant. That this is done by hearing the parties to a complaint on the merits. In further support of its argument, the Appellant quoted Black's Law Dictionary, 8th Edition (no page number supplied) where the word "decision" is defined as:

> *"A judicial or agency determination after consideration of the facts and the law; especially a ruling, order or judgment pronounced by a court when considering or disposing of a case."*

According to the Appellant, it is clear that no decision was arrived at by the Appellant in this case as the enterprise complained of (TAZARA), was never even heard. That there was, therefore, no

basis upon which the Respondent was heard by the Tribunal and that in this sense, the Tribunal acted *ultra vires*.

In relation to ground four, namely, that the Tribunal misdirected itself at law by handling a matter in relation to which it had no jurisdiction, the Appellant cited Section 68 of the Act which spells out the function of the Tribunal, namely, to hear any appeal made to it under the Act and to perform such other functions as are assigned to it under the Act or any other law. It is the Appellant's argument that since there was no appeal made to the Tribunal by the Respondent but a mere request for clarification, the Tribunal had no jurisdiction to hear the Respondent by way of appeal. It is the Appellant's contention that in the circumstances of the case, it would be unsafe and against the spirit of the Act and consumer protection in general to let the decision of the Tribunal in this case to stand. That it would also pose a danger to the development of jurisprudence in the area of competition and consumer protection laws if positions of regulators in the Appellant's stead to investigate or not to investigate matters, will be subject of appeals by aggrieved parties.

Thus, the Appellant prayed that the appeal is allowed on all four grounds and the decision of the Tribunal reversed.

As earlier alluded to, the Respondent did not attend the proceedings before this Court and neither did she file any heads of arguments in response to the Appellant's heads of arguments.

I have carefully examined the documents on the Record of Appeal. I have particularly given careful consideration to the heads of arguments filed by the Appellant as well as the proceedings of the Tribunal and the judgment which gave rise to this appeal.

In order to determine ground one of the appeal, it is imperative to analyse the definition of the term "consumer" in Section 2. For convenience, the said provision is reproduced below.

> *" "consumer" means –*
>
> *(a) for the purposes of Part III, any person who purchases or offers to business, and includes a business person who uses the product or service supplied as an input to its own business, a wholesaler, a retailer and a final consumer; and*
>
> *(b) for the purposes of the other Parts of this Act, other than Part III, any person who purchases or offers to purchase goods or services otherwise than for the purpose of re-sale, but does not include a person who purchases goods or services for the purpose of using the goods or service in the production and manufacture of any other goods for sale, or the provision of another service for remuneration;"*

It is clear from the definition of "consumer" above that the term has a two-fold meaning, namely, consumer as applied under Part III of the Act and consumer as applied under the rest of the Act. A perusal of Part III of the Act clearly shows that the same does not apply to the case before this Court because the said part relates to restrictive business and anti-competitive trade practices which have the effect or object of preventing, restricting or distorting competition to an appreciable extent. There are no allegations of restrictive business or anti-competitive practices in the case in *casu*, therefore, our focus must necessarily shift to Section 2 (1) (b), which put simply, defines a consumer as any person who purchases goods or services for a reason other than for re-sale. Therefore, a person who purchases goods or services for re-sale is not considered a consumer in terms of Section 2 (1) (b) of the Act.

Applying the above provision to the facts at hand, the Respondent cannot claim to be a consumer for purposes of lodging a complaint against TAZARA with respect to the diapers since she was not the consumer of the product. However, having engaged TAZARA to transport her goods from Dar es salaam to Kapiri Mposhi, she was

a consumer of TAZARA's transportation services and therefore qualifies to be a consumer within the meaning of Section 2(1) (b) of the Act. Thus, I agree with the reasons given by the Tribunal for arriving at the conclusion that the Respondent was a consumer of the services offered by TAZARA. Indeed, the Respondent did not acquire the adult diapers from TAZARA but acquired a service for transporting her goods from Dar es salaam, Tanzania to Kapiri Mposhi, Zambia. Further, the Respondent did not acquire the transport service from TAZARA with the aim or purpose of reselling such a service to another buyer or customer or consumer nor did she acquire the service for purposes of using it in the production and manufacturing of any other goods. Section 2 of the Act defines "service" in the following terms:

> *" "service" includes the sale of goods, where the goods are sold in conjunction with the rendering of a service."*

Keeping in mind the definition of "service" above, in addition to what the Tribunal said, I would say that the Respondent did not acquire or purchase the service from TAZARA for the purpose of providing another service for remuneration. As a trader in adult diapers, the Respondent was neither rendering a service nor selling

her goods in conjunction with the rendering of a service as envisioned by Section 2 of the Act. Had she been running a nursing home where the diapers were sold in conjunction with the rendering of the nursing services, the situation would have been different (refer to the definition of "consumer" and "service" above). In the case in *casu*, however, the reason for buying the adult diapers, as the Respondent put it in the letter to the Commission of 16th July, 2015, was, plain and simple, for re-sale, although as already determined above, the diapers were not the actual service(s) purchased from TAZARA.

As the Tribunal rightly concluded, the Respondent only acquired the transportation service from TAZARA and consumed such service by way of moving her adult diapers from Dar es salaam to Kapiri Mposhi. Therefore, being a consumer of the transportation service provided by TAZARA, she qualifies as a consumer under Section 2 of the Act. For the above reasons, I find that ground one of the appeal has no merit.

Moving on to grounds two, three and four, I am of the view that the three grounds are related and I will, thus, deal with them together. Grounds two, three and four assail the decision of the

Tribunal to treat the letter of clarification from the Respondent as constituting a Notice of Appeal; the finding that the letter from the Appellant to the Respondent communicating the legal status of the Respondent in relation to the Act amounted to a decision within the meaning of Section 60 of the Act and the handling of a matter in relation to which it had no jurisdiction, respectively.

Section 60 of the Act provides that:

> *"A person who, or an enterprise which, is aggrieved with an order or direction of the Commission under this part may, within 30 days of receiving the order or direction, appeal to the Tribunal."*

It is not in dispute that the Respondent moved the Tribunal by way of a letter seeking interpretation of Section 2 (1) (a) and (b) of the Act in the wake of being informed that she did not qualify to be considered as a consumer within the contemplation of the Act. Under grounds two, three and four, the questions to be resolved by this Court, in my view are, firstly, whether or not the letter from the Appellant to the Respondent explaining the Appellant's understanding of the legal status of the Respondent in relation to Section 2 of the Act constituted an "order" or a "direction" as envisaged by Section 60 of the Act; secondly, whether or not the

letter from the Respondent to the Tribunal seeking interpretation of Section 2 of the Act amounted to a Notice of Appeal and thirdly, whether or not the Tribunal handled a matter in relation to which it had no jurisdiction.

In the case of *Competition and Consumer Protection Commission v. Omnia Fertiliser Zambia Limited and Nyiombo Investments Limited*[1], the Supreme Court adopted Black's Law Dictionary 10th Edition's definition of the word "order" as:

> *"1. A command, direction, or instruction. 2. A written direction or command delivered by a government official, especially a court or judge. The word generally embraces final decrees as well as interlocutory directions or commands."*

From the above definition of "order", it is clear that the Appellant's communication to the Respondent was not an "order" because it simply informed the Respondent that she did not qualify to be considered as a consumer within the contemplation of the Act. Further, Black's Law Dictionary defines "direction" as follows:

> *"An order; an instruction on how to proceed..."*

According to the Supreme Court in the case referred to above, a direction, once given, has to be complied with. There is no option

to disobey. The Supreme Court further stated that the word "direction" is not defined in the Act, but it would appear that the context in which it is used in Section 60 of the Act refers to directions that are specifically provided for under Sections 58, 59, 61 and 62 of the Act, which sections empower the Appellant to give directions to a person or an enterprise. Section 58 empowers the Appellant to give directions relating to restrictive agreements; Section 59 empowers the Appellant to give directions relating to distortion, prevention or restriction of competition; Section 61 empowers the Appellant to, among others, remedy, mitigate or prevent substantial lessening of competition; while section 62 allows the Appellant to grant interim measures. According to the Supreme Court, it is those kinds of directions which are appealable to the Tribunal under Section 60 of the Act.

Going by the above authority, I find that the letter from the Appellant to the Respondent was neither an order nor a direction in the context of Section 60 of the Act.

The Appellant argued that the order or direction in contemplation of the law is one arrived at in form of a decision by the

Appellant. That this is done by hearing the parties to a complaint on the merits. The Appellant argued further, that it is clear in this case that no decision had been arrived at as the enterprise complained of, TAZARA, was never heard. That there was, therefore, no basis upon which the Respondent was heard by the Tribunal and in this sense, the Tribunal acted *ultra vires*. I agree with the Appellant's submission in this regard and the reasons for my taking this position will become apparent in a short while.

In the *Competition and Consumer Protection Commission v. Omnia Fertiliser Zambia Limited* case, the Supreme Court ruled that it is patent from Part VIII of the Act that it is only Section 60 that an aggrieved person or enterprise can use to invoke the appellate jurisdiction of the Tribunal, more so when one considers the provisions of Section 68 of the Act, which outlines the functions of the Tribunal. That it is unmistakable from Section 68 that apart from what is provided for in paragraph (b) of that section, a matter can only be taken to the Tribunal through appeal. Section 68 of the Act stipulates as follows:

> *"68. The functions of the Tribunal are to –*
> *(a) hear any appeal made to it under this Act; and*

(b) perform such other functions as are assigned to it under this Act or any other law."

The Supreme Court went on to state that the other functions referred to in paragraph (b) of Section 68 relate to applications that the Act allows appellants to make to the Tribunal under circumstances that have been specifically stated in the Act.

It is not in dispute that the Respondent did not appeal to the Tribunal in the usual manner of filing a Notice of Appeal, but wrote a letter seeking clarification from the Tribunal. This fact was alluded to by the Tribunal in its judgment, wherein it stated as follows:

"We note that the appeal did not come to the Tribunal in the usual way of a Notice of Appeal but by letter written by the Appellant dated 23rd September, 2015 addressed to the Tribunal. However, in order not to delay justice, we decided to overlook the procedural irregularity."

I hold the view that what the Tribunal brushed aside as a mere procedural irregularity was a lot more serious than that because the irregularity touched on the jurisdiction of the Tribunal to entertain the issue before it. I make this finding based on the fact that, as earlier indicated, there was no decision, order or direction from which the Respondent could have appealed to the Tribunal; and since there

was no appeal, the matter was wrongly before the Tribunal and it had no jurisdiction to hear it.

In the *Competition and Consumer Protection Commission v. Omnia Fertiliser Zambia Limited* case, the Supreme Court held that it is trite law that where a matter is wrongly before a court, including a tribunal, that court or tribunal has no jurisdiction to make any lawful order or grant any remedy. That was the conclusion the Supreme Court also arrived at in the case of *JCN Holdings Limited, Post Newspapers Limited and Mutembo Nchito v. Development Bank of Zambia*[2], where it said the following:

> *"It is clear from the Chikuta and New Plast Industries Cases that if a court has no jurisdiction to hear and determine a matter, it cannot make any lawful orders or grant any remedies sought by a party to that matter."*

In the case of *New Plast Industries v. The Commissioner of Lands and Attorney General*[3], referred to above, the Supreme Court decided as follows:

> *"Where any matter is brought to the High Court by means of an Originating Summons when it should have been commenced by a Writ, the Court has no jurisdiction to make any declaration."*

From the authorities cited above, it is evident that the Tribunal in the present case handled a matter over which it had no jurisdiction and by so doing, acted *ultra vires*. Therefore, its decision is of no effect. I find merit in grounds two, three and four.

The net result is that three out of the four grounds of appeal have succeeded. Having found that the Tribunal had no jurisdiction to make any lawful order or grant any remedy, the finding by this Court to the effect that the Respondent qualified to be a consumer under the provisions of the Act notwithstanding, the decision of the Tribunal is a nullity and is accordingly set aside.

I make no order for costs.

Dated at Lusaka the 2nd day of May, 2018.

W. S. Mwenda (Dr.)
HIGH COURT JUDGE