

**CONSUMER CONTRACTS UNDER THE ZAMBIAN LAW:
DOES LEGISLATION PROVIDE ADEQUATE CONSUMER
PROTECTION?**

BY

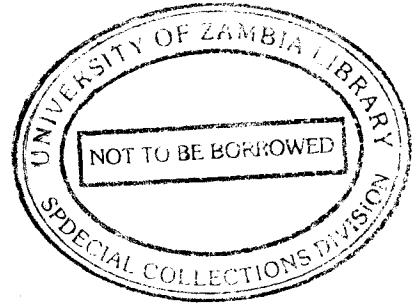
EUSTACE M. NG'OMA

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

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THE UNIVERSITY OF ZAMBIA
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OBLIGATORY ESSAY

On

**CONSUMER CONTRACTS UNDER THE ZAMBIAN LAW: DOES
LEGISLATION PROVIDE ADEQUATE CONSUMER PROTECTION?**

By

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A dissertation submitted to the School of Law of the University of Zambia in partial fulfillment of the requirements for the award of the bachelor of laws (LL.B.) degree.

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

I recommend that this Obligatory Essay prepared under my supervision by EUSTACE M. NG'OMA entitled:


**CONSUMER CONTRACTS UNDER THE ZAMBIAN LAW: DOES LEGISLATION
PROVIDE ADEQUATE CONSUMER PROTECTION?**

be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements relating to the format as laid down in the regulations governing obligatory essays.



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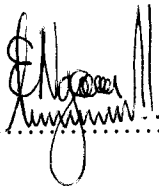
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DECLARATION

I, **EUSTACE M. NG'OMA**, Computer No. **22057331**, DO HEREBY declare that the contents of this research are based on my findings and that I have not used any person's work without acknowledging it.

Signature:.....

DEDICATION

This work is dedicated to my family for all the love and support they have shown and rendered to me throughout my life.

ABSTRACT

The contents of this dissertation reveal the findings of a research conducted on the status of consumer contracts under Zambian law. The objective of the study was to examine whether there is adequate consumer protection provided under Zambian law. With the concept of freedom of contract being well pronounced in contract law, a question is often posed as to whether there is any real need for consumer protection as opposed to letting the parties be free to negotiate whatever contract terms they deem fit. The simple answer to this question is 'yes', the supporting argument being that in ordinary commercial transactions the individual consumer usually stands at a disadvantage as compared to the trader in terms of both getting the ultimate satisfaction from the product or services he/she buys and in getting effective redress in the event that the goods or services are found to be of substandard or poor quality. The reality, however, is that in the simple transactions of the market place, the consumer is, no doubt, taken to be his own guide. When he buys a kilogramme of tomatoes or takes a garment for dry cleaning at a laundry, he has only himself to blame if the tomatoes were unripe or the fabric of the garment gets damaged in the process. Yet, even in medieval times, the law stepped in to protect the buyer of adulterated wine or mouldy bread. Today, with an enormous variety of goods available for purchase, many of them pre-packed or mechanical or of intricate workmanship, so that any deficiencies are inevitably hidden, far greater consumer protection is called. In the complex field of consumer services too – repairers, dry cleaners, garages, insurance companies – legal rules are required to redress the natural imbalance between the individual consumer and 'Them'.

An argument is advanced that the current laws that address consumer welfare do not provide adequate protection to the individual consumer in the event that they purchase goods that are defective or unsafe, or they acquire services that are poorly done. Correlative to this argument the study shows how Victorian ideas of freedom and sanctity of contract, embodied in court decisions, stand in the way of the much needed reform. It is further argued that the institutions that look into specific aspects of consumer welfare have failed to sufficiently provide the needed support to the consumer as they lack the resources to adequately support their efforts. It is therefore advanced that there is a strong need for more comprehensive legislative intervention, stronger institutional set-up and wider approaches to consumer welfare in order to build a more efficient system for consumer protection in Zambia.

ACKNOWLEDGEMENTS

A work of this kind is never done by one person. It is not without difficulty to record my indebtedness to a number of people who have inspired me at different stages of my career and also to recognise friends and colleagues who have silently given me their unwavering support in all my intellectual pursuits. In getting through this work the sound and heartbeat of the work remains my own. However, through all the sentences, paragraphs and chapters of this paper also lay the concerted efforts of other people who helped make this work an academic success.

First of all I thank the almighty God for making it possible for me to reach my final year of law school and for making this paper a reality. To him I give the glory. To my family Thanks for the encouragement, support and love you have shown me all the way.

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I remain accountable for any shortcomings in the work.

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Sale of Goods Act 1893

Standards Act, Chapter 416 of the Laws of Zambia

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LIST OF ACRONYMS

CITEE	Centre for International Trade, Economics and Environment
CUTS	Consumer Unity and Trust Society
MCTI	Ministry of Commerce Trade and Industry
PACRO	Patents and Companies Registration Office
ZCC	Zambia Competition Commission
ZACA	Zambia Consumers Association
ZACCI	Zambia Chambers of Commerce and Industry
ZABS	Zambia Bureau of Standards

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND: THE THEORY UNDERLYING CONSUMER PROTECTION

Consumer protection is a form of government regulation which protects the interests of consumers, as well as all the activities of consumer organisations designed to ensure the protection and enforcement of consumer rights in the market place through advocacy and consumer education. Recognition that consumers could be at a disadvantage in contracting with businesses came as early as the nineteenth century. The earliest forms of consumer protection were designed to discourage fraudulent trading practices such as excessive pricing and short measure, and to protect the consumer from the dangers associated with such practices. In England, bread, beer, meat and fuel were singled out from the earliest times as being the commodities which the Crown, through the justices of the peace or other local courts, should regulate both as to quantity and quality.¹ Thus in 1709, for example, a statute was passed to protect her majesty's subjects from 'covetous and evil disposed persons' who sold bread that was not the due assize or for more than it was worth.² Short weight or quality was punishable by fine or, in more serious cases, flogging. The most efficacious penalty was excommunication.³

¹ The justices of the peace or the mayors of the boroughs were therefore empowered to fix the weight and price of bread and bakers had to mark their loaves with their size and quality. A somewhat similar system prevailed as regards to pricing, weighing and marking of coal from 1664.

² B.W. Harvey, The Law of Consumer Protection and Fair Trading, p. 2.

³ Ibid.

The concept of consumer protection to the ordinary person throughout the eighteenth century would thus, at least mean (a) protection from excessive prices levied on primary commodities, and (b) protection from short measure.⁴ The nineteenth century, however, saw a rise in the maxim of *caveat emptor* (buyer beware) which was strongly called for by advocates of *laissez faire*⁵. It was felt that it was only fair that each man should look out for himself and should not blame anyone when he purchased defective goods because he had the freedom of choice. However, due to the increase in the number of goods that could not be readily examined by the buyer, the courts began to limit *caveat emptor*. The courts began to imply terms into contracts, especially those for the sale of goods, which made sure the buyer got a fair deal by, for example, requiring that the goods were fit for their purpose. In 1893, the first Sale of Goods Act was passed which codified the existing case law. Most of the law protecting consumers was embodied in this Act. This was in the form of a number of implied warranties regarding purchased goods. The Act thus contributed significantly to the weakening of *caveat emptor*.

By the twentieth century, however, it was clear that the efficacy of the 1893 Act was not sufficient and more drastic action was needed. With the coming of industrialization and modernization came technologically complex goods and services, such as packaged foods, which the consumer could not easily inspect before purchasing. The fact that businesses became richer and more powerful than their customers also meant that they had access to good lawyers, and as fast as the courts found terms to imply into contracts,

⁴ Ibid.

⁵ A doctrine which taught that society was no more than a collection of self-interested individuals, each of whom was the best judge of their own interests, and should, as far as possible, be left alone to pursue those interests.

businesses found ways to draw up contracts excluding themselves from liabilities. As a result, the Legislature in most countries such as the United Kingdom and the United States of America began to intervene in consumer contracts by passing a series of Acts designed to protect the interests of consumers. Such intervention was a move away from the traditional idea that the parties to a contract should be left to negotiate the best possible bargain for themselves, and was also a recognition that in many situations, ordinary consumers will be contracting with large, powerful organisations and effectively have no power to negotiate a favourable deal, or sometimes even a fair one.

Thus while the earliest forms of consumer protection were designed to discourage fraudulent trading practices and to protect the consumer from danger, the main justification for intervening on behalf of consumers today is that the nature of modern markets is such that consumers can no longer make prudent shopping decisions. The paternalism which legislation provides to protect the consumer, as Harvey notes, is therefore normally justified in modern times by the idea of inequality of bargaining power between the consumer and the vendor.⁶ In Australia, for example, an important consumer protection measure was justified as follows:

“In consumer transactions unfair practices are widespread. The existing law is still founded on the principle known as *caveat emptor* – meaning ‘let the buyer beware’. That principle may have been appropriate for transactions conducted in village markets. It has ceased to be appropriate as a general rule. Now the marketing of goods and services is conducted on an organized basis and by trained business executives. The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods or services on terms and conditions suitable to the vendor. The consumer needs protection by the law and this Bill will provide such protection.”

⁶ B.W. Harvey, The Law of Consumer Protection and Fair Trading, p. 13.

Another aspect of consumer protection relevant to the philosophy behind the need to protect the consumer is the problem of claiming compensation against the large producer where the goods or services are defective. Litigation is disproportionately costly and troublesome to the small consumer. So policy has been to encourage producers to adopt codes of practice where under legitimate complaints are promptly dealt with on the one hand, and also encourage small claims and arbitration procedures to solve actual disputes expeditiously, cheaply and relatively informally. The philosophy embodied in this type of consumer protection is now found in most of the developed jurisdictions in Europe and elsewhere in the Western world.

1.2 STATEMENT OF RESEARCH PROBLEM

In today's era consumer contracts have become more complex than they were even as little back as a decade ago. The reasons for this are obvious - modernisation and vast technological advancement has made the lives of human beings more complex and this has inevitably extended to commercial transactions. Thus today, there is great complexity in the goods and services that consumer acquire. For example there are things like pre-cooked and pre-packed foods and products, electronic commerce, mobile phone services and various cosmetics on the market, things which were not in existence some years back. Whereas in the past consumers were expected to use their judgment to select good quality products and services, today's consumer has little technical knowledge of the product (and sometimes even services) he/she purchases. The principle of *caveat emptor* (let the buyer beware) is no longer of reasonable application because most pre-packed products, for

example, cannot be reasonably inspected before purchase. Greater risks of poor quality or unsafe products therefore face the consumer. As a result common law principles developed in the pre-nineteenth century and even legislation that has been in existence for over twenty, or even ten, years is slowly becoming outdated and does not cover many issues that may arise in today's commercial world. There is therefore need for up-to-date legislation to govern such matters.

In addition to the complexity of goods and services today, enormous changes have also occurred in the way consumers acquire these goods and services. The post-Second World War has seen a move towards large scale retail businesses such as supermarkets, and this has been the trend in Zambia as well over the past decade. This has placed consumers in a weaker bargaining position as far as consumer contracts are concerned. They are often faced with unfair terms in the form of exemption clauses that attempt to exclude or limit the liability of the trader, such as that for a defective product, which, otherwise they would be subject to. The complexity of this problem has been accelerated by the growing popularity of standard term contracts. Furthermore, consumers today are able to purchase goods via e-commerce over the internet. In such a transaction, the consumer has got no opportunity to suspect the genuineness of the persons he/she is dealing with online and this places them at a great risk of being swindled of their money by fraudsters. It is therefore essential that the government has authority, through appropriate legislation, to protect its citizens through from unfair contract terms, price gouging, and other abusive market prices by manufacturers or retailers that are only interested in reaping large profits even at the expense of the unsuspecting consumer.

1.3 OBJECTIVE OF THE STUDY

The main objective of this research was to examine whether Zambian law, as it currently stands, sufficiently governs the various commercial transactions in today's era that affect consumers. The specific research questions were:

1. To explain who is a 'consumer';
2. To identify, examine and analyse the existing law in Zambia that governs consumer contracts, particularly contracts for the sale of goods and supply of services;
3. To identify and discuss specific problems that arise in consumer contracts such as defective products, unsafe products, unfair contract terms, poor quality services and price gouging' and analyse whether the existing law adequately deals with these issues; and
4. To conduct a comparative study with legislation in other jurisdictions in order to provide suggestions on how the existing law governing consumer contracts can be reformed to meet the challenges of the 21st Century.

1.4 DEFINITION OF CONCEPTS

Consumer:

This is any person who either purchases or offers to purchase goods otherwise than for the purpose of resale; or to whom a service is rendered.⁷

⁷ Section 2 of Cap 417.

Consumer Contracts:

These are the type of contracts people make when, as ordinary individuals, they buy or hire goods, or pay for services such as hairdressing, done for them.⁸ They generally include contracts for the sale of goods; contracts for the supply of services; contracts for hire; and consumer credit.

A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.⁹

Contracts for the supply of services are contract where one person engages another to render services such as hairdressing, window cleaning or plumbing. They also cover contracts in which a service is performed and goods supplied at the same time, often called work and materials contracts.¹⁰

Contracts for hire are those where goods are hired by one person from another. They are contracts under which one party gives possession of goods to another, to be used for purposes agreed between them, in return for consideration. Such contracts should be distinguished from a hire purchase contract, the latter being a contract for bailment of goods coupled with an option to purchase.

⁸ C. Elliott and F. Quinn, Contract Law, (5th ed.), p. 321.

⁹ s. 1(1).

¹⁰ C. Elliott and F. Quinn, Contract Law (5th Ed.), 2005, p.331.

Consumer credit is a general term used to refer to any loan or extension of credit to an individual for personal, family or household use not involving real estate, usually on an unsecured basis and providing for monthly repayment. The most common forms of consumer credit include hire-purchase, personal loans and the credit card account.

Consumer protection:

This is a form of government regulation which protects the interests of consumers, as well as all the activities of consumer organisations designed to ensure the protection and enforcement of consumer rights in the market place through advocacy and consumer education.

Consumer protection is linked to the idea that consumers have rights by virtue of being consumers, and to the formation of consumer organisations which help consumers make better choices in the market place. Generally consumer rights have been considered by Consumer International to include the right to safety from product-related hazards, the right to information about products, the right to reject unsatisfactory products or services, and the right to redress when the complaint is justified. Consumers also have the right to choose from a variety of products in a market place free from control by one or few sellers, and are entitled to be heard in governmental decision-making that affects them and to be assured that their interests will receive full sympathetic consideration in the formulation of policy. In addition have a right to a clean and healthy environment: consumers need to be assured that suppliers of goods and services will not pollute or destroy the environment.

1.5 RESEARCH METHODOLOGY

The major method of data collection that was deployed in carrying out this study was desk research. The findings of this research were thus based on information from books on the subjects, enacted legislation, draft legislation and judicial decisions. Articles from journals and newspapers as well as student dissertations were also referred to. In addition interviews with officers concerned with consumer welfare were conducted. Sources from the internet were also used.

1.6 ORGANISATION OF THE STUDY

The rest of this dissertation is structured as follows: Chapter two analyzes the law that protects consumers in contracts for sale of goods; particular concern being with problems relating to the quality and prices of goods. The chapter further discusses the control of monopolies in Zambia. Chapter three discusses the law regulating contracts for the supply of services. The fourth chapter reviews the role played by three institutions – the Zambia Competition Commission, the Zambia Bureau of Standards and the Zambia Consumers Association – in the promotion and enforcement of consumer rights. Finally chapter five presents both the conclusions drawn from the findings of the study and a comparative study of consumer protection legislation in foreign jurisdictions. Recommendations are thereafter made.

The concern throughout the study has been with Zambian and English law though, where necessary, parallels and ideas from other jurisdictions have been drawn. Since consumer protection is a very wide topic which cannot be fully discussed in an academic paper of this sort, this study will be confined to contracts for the sale of goods and for the supply of services.

CHAPTER TWO

CONTRACTS FOR THE SALE OF GOODS

2.1 INTRODUCTION

This Chapter will analyze the law that protects consumers in contracts for sale of goods. As aforementioned, a contract for sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price.¹¹ The main problems that consumers face in contracts for sale of goods relate to the quality and price of products. This chapter examines how the consumer is given redress to these problems under the common law and statute by discussing issues relating to quality of goods, price of goods, the control of monopolies and consumer responsibilities.

2.2 QUALITY OF GOODS

Every consumer that purchases goods anticipates that the particular goods are of good quality, or at least some expected quality. There are, however, instances where one purchases goods that are of poor quality as compared to other similar goods. Liability relating to poor quality or defective products in such instances can either be placed on the manufacturer of the product or on the retailer (seller). This is can either be under common

¹¹ Section 1, Sale of Goods Act, 1893.

law or under statute. Under this heading, the chapter discusses the liability placed on manufacturers and the seller of poor quality products.

Besides the Sale of Goods Act 1893, other most important pieces of legislation in this area are the Competition and Fair Trading Act, the Trademarks Act, the Food and Drugs Act, and the Standards Act.

2.2.1 Manufacturer's liability

Consumers often find themselves in a situation where they purchase a product such as an electrical appliance or even food stuffs which, upon using, is found to be defective. As far as contract law is concerned, consumer protection generally involves rights against retailers, since it is the retailer with whom the contract is usually made. As between a manufacturer and consumer, the broad principle is clear: there is no contract, no legally enforceable agreement between them where there is no direct sale. There are, however, three ways in which manufacturers may be liable directly to the consumer. This may be under a manufacturer's guarantee; as a result of the manufacturer's negligence; and under provisions of the Trademarks Act, the Food and Drugs Act, and the Standards Act.

Guarantees

One way in which a direct contract may come into existence between a manufacturer and a consumer stems from the manufacturer's 'guarantee' or 'warranty'. This is a written statement by the manufacturer of a product to repair or replace it if it is found to be

imperfect within a certain period of time after purchase by a consumer. Guarantees are now common with what are known as 'consumer durables,' and especially with electrical and mechanical goods. In Zambia, however, manufacturers of such goods as electrical or mechanical appliances are very limited in number, if at all in existence. Most such goods are imported. It is not usual to find a Zambian-manufactured product with a term of guarantee given for it.

A manufacturer who gives a guarantee can be made liable under it if the product is found to be defective. How far the manufacturer is bound, however, depends on the on precisely what the guarantee says. Some guarantees are, no doubt, so vague that they could not possibly be treated as contracts. Whatever the case a provision in the Zambian Competition and Fair Trading Act¹² provides that where a guarantee is given, it should not be limited to a particular geographic area or sales point, falsely represent that the product is of a particular, model or quality, or falsely represent that the product is new.¹³

But the major problem in connection with guarantees is with regard to their legal status. The legal status of a guarantee under Zambian law still remains unsettled as it is no clear whether it is legally enforceable. This is in contrast with the position in United Kingdom where the position has been clarified by the regulation 15 of the Sale and Supply of Goods to Consumers Regulations 2002. The regulation provides that where goods are sold to a consumer with a guarantee, this takes effect as a contractual obligation. The guarantee must lay down in plain, intelligible English the contents of the guarantee and

¹² Chapter 417 of the Laws of Zambia.

¹³ Section 12 (c) of Cap 417.

the essential information necessary for making claims under it. This is how far the legislation goes into making provision for guarantees.

Negligence

If goods actually harm the end consumer, the manufacturer may be liable for negligence.

An important line of cases arising from the classic case of *Donoghue v Stevenson*¹⁴ established the principle that a manufacturer of goods is under a duty of care not to put on the market goods which could harm the ultimate consumer. This principle gives an additional layer of protection to the consumer in that the consumer is not required to have a contractual relationship with the manufacturer in order to have rights against them.

Lord Atkin¹⁵ laid down the following principle¹⁶ in 1932:

“A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of immediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer’s life or property, owes a duty to the consumer to take that reasonable care.”¹⁷

The court saw no reason why the same set of facts should not give one person a right in contract and another concurrent right in tort, and discarded the ‘privity of contract’ fallacy which contract law provided.¹⁸ Not only does the manufacturer owe a duty to the

¹⁴ [1932] AC 562.

¹⁵ In *Donoghue v. Stevenson* [1932] AC 562.

¹⁶ This is sometimes known as the ‘narrow rule’ in *Donoghue v. Stevenson*.

¹⁷ At p. 599.

¹⁸ Under contract law only the buyer had the right to sue the seller for defective goods and this right was strictly limited against the seller. A buyer had no similar right of action against the manufacturer since he had no contract with the manufacturer, even if the defect was clearly attributable to the manufacturer’s fault.

buyer of his goods, but to all persons whom he ought to reasonably have in contemplation. In *Donoghue v Stevenson* itself, Mrs. Donoghue was not the buyer; nevertheless, the manufacturer of the ginger beer ought to have contemplated that persons other than purchasers would drink the beer, and that they would be closely and directly affected by his acts in making and bottling the ginger beer. He therefore owed her a legal duty to be careful.

Thus under the rule in *Donoghue v Stevenson*, a consumer of a defective product in Zambia can rely on the rule to make manufacturers liable for various defective products ranging from food stuffs to household commodities. An examination of a number of cases¹⁹ that have been tried in the Zambian courts reveals that *Donoghue v Stevenson* has received considerable application in as far as consumer protection against defective products is concerned. More interesting is the fact that the courts have been prepared to interpret 'product' quite broadly to even include spare parts, industrial chemicals and even motor vehicles, as was the case in *Duly Motors (Z) Ltd. v Patrick Katongo and Livingstone Motor Assemblers*²⁰ where the Supreme Court awarded damages to the plaintiff for the loss of a motor vehicle which got damaged beyond repair just ten days after he bought it from the first defendants.

Statutory liability

¹⁹ Such as *Duly Motors (Z) Ltd. v Patrick Katongo and Livingstone Motor Assemblers* (1986) Z.R. 61; *Michael Sata v Zambia Bottlers*, SCZ No. 1 of 2003; *Continental Restaurant and Casino Ltd Vs Arida Mercy Chulu* S.C.Z. No. 28 of 2000; *Zambia Breweries plc Vs Reuben Mwanza*, SCZ No. 59 of 2000.

²⁰ (1986) Z.R. 61

Besides liability under the common law tort of negligence, a manufacturer can also be liable for poor quality goods under Statute. This can either be under provisions of the Standards Act, the Trademarks Act and the Food and Drugs Act.

The purpose of the Standards Act²¹ is, *inter alia*, to provide for standards of quality control for certain commodities. Section 17 of the Act empowers the Minister to issue compulsory standards for particular commodities when that it is necessary or expedient to do so for the promotion of public safety or otherwise in the public interest. Pursuant to this section compulsory standards have been issued under the Standards (Compulsory Standards) (Declaration) Order, 2003²². The order sets compulsory standards relating to various consumer commodities such as bottled water, beer (both clear and opaque), laundry soaps, cooking oil, flavoured drinks, and various other commodities. Furthermore, section 12(e) of the Competition and Fair Trading Act prohibits the supply of any product which is likely to cause injury to health or physical harm to consumers, when properly used, or which does not comply with a consumer safety standard which has been prescribed under any law.

The Food and Drugs Act²³ also imposes duties and liabilities on manufacturers. The Food and Drugs Act was enacted in 1972 to protect the consumer against the sale of food which is adulterated, unwholesome or unfit for human consumption, and to prohibit the sale of drugs, cosmetics and medical devices that may pose a health hazard to the

²¹ Chapter 416 of the Laws of Zambia

²² S.I. No. 43 of 2003.

²³ Chapter 303 of the Laws of Zambia

consumer. The Act prohibits manufacturers of food stuffs, drugs, cosmetics and medical devices from supplying poisonous, unwholesome or adulterated food and drugs, cosmetics and medical devices that may injure the health of the consumer, and also imposes a duty on the manufacturers to ensure that their products are of prescribed standards failure to which they shall be guilty of an offence.²⁴ Under regulation 2 of the Food and Drugs (Warranty) Regulations 1972, no manufacturer or distributor of, or dealer in, such products is allowed to sell the products unless he gives to the vendor a warranty. This regulation in effect protects retailers from manufacturers. The rationale of the regulation is that if manufacturers supply the wholesalers and retailers with high quality goods, the ultimate consumer will receive goods of a high quality.

Further protection of the consumer is offered by the Trade Marks Act.²⁵ This Act gives the proprietor of a registered trademark the exclusive right to use the trade mark in relation the goods to which the trademark relates, and prohibits any person who, not being the proprietor of the trade mark or a registered user thereof from using a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion in the course of trade in relation to any goods in respect of which it is registered.²⁶ Consumers often develop an emotional attachment to certain trademarks, based on a set of desired qualities or features in a product bearing such a trademark. The exclusive right of use of a trademark given to the trademark owner therefore helps consumers from being

²⁴ Sections 3-19.

²⁵ Chapter 401 of the Laws of Zambia.

²⁶ Section 9(1).

misled by unscrupulous manufacturers of inferior quality products who try to falsely portray their products as being those of a reputable manufacturer.

2.2.2 Duties of the Seller

Many of the duties that a seller of goods owes to his customer are to be found in the Sale of Goods Act, 1893. This is an English statute which was received in the Zambia legal system as an English Act of general application through the English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia. In the United Kingdom, the 1893 Act has since been amended through the Misrepresentation Act and the Sale of Goods Act 1979 (consolidating).²⁷ The Act implies certain terms in contracts for the sale of goods and these terms are conditions that the Act imposes upon the seller towards the buyer. However, due to freedom of contract, the parties may opt to exclude any or of these implied terms. The Sale of Goods Act also offers the buyer a number of remedies such as damages, rejection of the goods and revocation of the contract of sale. The graduated duties laid upon the seller are contained in sections 13-15 and are as follows:-

- (i). The goods, if bought by description, must correspond with their description.
- (ii). Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, the goods should be reasonably fit for such purpose.

²⁷ M. Malila, Commercial Law in Zambia, 2006, p.

(iii) The goods must be of merchantable quality.²⁸

(iv) In the case of a contract for sale of goods by sample, the goods must correspond with the sample.

The courts have interpreted these rules favourably to the consumer. These conditions may be regarded as 'graduated' because the buyer may rely on them in a kind of 'series' so to speak. In other words, if the first one fails he may use the second, and if this also fails, he may have recourse to the third. In practice, however, the Sale of Goods Act is predominantly used for commercial transactions as opposed to consumer sales.

Apart from the implied conditions in the Sale of Goods Act, the provisions of the Food and Drugs Act apply to retailers as well. The Act prohibits the sale of food which is adulterated, unwholesome or unfit for human consumption, and the sale of drugs, cosmetics and medical devices that may pose a health hazard to the consumer. The seller is also prohibited from selling to the prejudice of the purchaser any food, drug which is not of the nature, or is not of the substance, or is not of the quality, of the product demanded by the purchaser.²⁹ It should be noted, however, that the Food and Drugs Act only covers food, drugs, cosmetics and medical devices, whereas the Sale of Goods Act is of an all embracing nature because it includes all types of goods, according to the definition of 'goods' in section 62 of the Act.

²⁸ Provided that if the buyer examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

²⁹ Sections 6 and 11.

As regards imported products which are subject to import quality standards, sellers or distributors of such products are, under the Standards (Imports) (Quality Monitoring) Regulations, 2003, deemed to warrant to the immediate purchaser that the product conforms to all requirements under the Act.³⁰

2.2.3 Application of the Statutes

The enactment of Statutes such as the Food and Drugs Act, the Standards Act and the Competition and Fair Trading Act have played a vital role in promoting and protecting the health and rights of consumers. With the enactment of the Standards Act, for example, most consumer products are now subject to certain minimum standards which manufacturers must satisfy before their products can be certified fit for sale to the public. Despite the existence of such legislation, however, the practice of producing low quality goods is still evident among manufacturers in Zambia, especially in the beverage sector. Complaints about people having found foreign matter in beer or soft drinks and of adulterated flavoured drinks are often reported.³¹ About two years ago a story was unleashed by a ZNBC reporter where Shoprite, one of the largest supermarkets in the country, was revealed to have stocked rotten vegetables and eggs in their back store of their Livingstone branch. In another recent incident, a story was carried by the *Sunday Post* on May 20, 2007, in which one of the opposition political parties were reported to have taken the management of Spar supermarket, Arcades, to task over alleged recycling of expired foodstuffs.

³⁰ Regulation 11.

³¹ In 2001, for example, a resident from Kabwata Township told the Chilenje Legal Advice Centre paralegal officer that he would sue Zambia Bottlers for finding foreign particles in a Coca-Cola bottle. (LRF News, Issue No. 25, March 2001)

These are just a few of the reported cases that clearly show a contravention of section 3(b) and (c) of the Food and Drugs Act which prohibits the sale of sale of poisonous, unwholesome or adulterated food. Such conduct is also a breach of section 14(2) of the Sale of Goods Act which implies a condition that a seller's goods must be of merchantable quality, and section 12(e) of the Competition and Fair Trading Act which prohibits the supply of any product which is likely to cause injury to health or physical harm to consumers, when properly used.

The non-adherence to the law by manufacturers and sellers is also coupled by certain defects in the law itself in as far as protection of consumer rights and interests is concerned. This is particularly so with the Sale of Goods Act.

One major shortcoming of the Sale of Goods Act arises from the theory that the duties of the seller are imposed, not by the general law, but as terms implied in the contract of sale. The contract of sale is between the seller and the buyer, and thus the seller can be made liable *only* to the buyer and to no one else.³² There is clearly a need, at least in the context of consumer protection, to reconsider this rule that benefits under a contract can only be enforced by a party to the contract.

³² G. Borrie and A.L. Diamond, The Consumer, Society and the Law, 1964, p. 66. This is also illustrated in the case of *Priest v Last* [1903] 2 K.B. 148 where the buyer of a water bottle was successful in an action against the chemist for injuries suffered by his wife. But there was no question of his wife in such circumstances being able to sue the chemist to recover damages for her injuries because she had not bought the bottle – she was not party to the contract.

Another major defect in the protection afforded by the Sale of Goods Act is perpetuated by the principle of freedom of contract in section 55 which permits the parties to exclude any of the implied conditions in the Act by a simple clause in the contract or order form. Although exclusion clauses are not common in cash sales, it is common to find in a number of retail shops notices stuck to the customers' attention stating that once a good is bought and taken 'no return of it or refund will be accepted'. In the motor trade, it is usual for the seller to require the buyer to sign an order form which contains conditions of sale. Among these conditions, almost invariably, is to be found something like 'All conditions and warranties, express or implied, statutory or otherwise, are hereby excluded.' It may be unrealistic to pretend that this is no major injustice which the Sale of Goods Act permits. Sellers should not be permitted to exclude all their obligations in such a manner.

From the provisions of section 14(3) of the Sale of Goods Act, it will also be noticed that there is no duty imposed on the seller if the goods are sold under a patent or other trade name, even if their purpose is known. This is an unfair exception on the consumer's part especially in the light of the large number of pirated and imitated products from the Far East that flood the markets today which are very difficult for the consumer to detect due to the great technological 'skill' that product imitators are investing. A good example is the 'Sony' label which has been falsely used on a number of electrical appliances such as DVD players, CD players and television sets which are not genuine Sony products. A buyer who, for example, requests for a Sony DVD player cannot rely on section 14 if the product turns out not to be fit for its intended purpose. Indeed the Maloney Committee on

Consumer Protection had no hesitation in saying that the 'patent or other trade name' provisions ought to be deleted.³³ The English Sale of Goods Act 1979 has since omitted this provision in section 14.

Further the requirement that goods be of 'merchantable quality' in section 14(2) ought to be changed to a more precise phrase like 'satisfactory quality' because 'merchantable quality' is too imprecise. The limitation of the Food and Drugs Act on the other hand is that it only covers food, drugs, cosmetics and medical devices.

The above concerns are worsened by the fact that a considerable number of Zambians are semi-literate and do not particularly take keen interest in understanding Statutes. To most Zambians, therefore, the provisions of the Sale of Goods Act and other legislation mentioned above remain irrelevant. Besides, the majority sales take place in open local markets where individual buyers and sellers openly strike oral bargains, examine the goods, and payment of and delivery effected simultaneously.³⁴ It will therefore be a question of whether one has got a good bargain at that point. Where goods are sold by street vendors, neither party could truly identify and locate the other should either party be unhappy with the bargain. Even where the sale takes place in a shop, the primary concern of the parties is to conclude the deal and move on without any contemplation of possible consequences of breach of any sale condition or warranty.³⁵ Also Zambian people are generally not very litigious. Courts are the last places many people would like

³³ G. Borrie and A.L. Diamond, *The Consumer, Society and the Law*, 1964, p. 63.

³⁴ M. Malila, *Commercial Law in Zambia*, 2006, p. 122.

³⁵ *Ibid.*

to go. Besides, litigation is costly and inconveniencing and many people try to avoid it. Moreover, many consumer sales transactions in Zambia involve small sums of money, the kind of money that would not justify full-scale litigation.

From these observations it is clear that consumer protection law in Zambia is not very well developed and as such very few people are aware of their rights as consumers. This calls for concerted efforts on consumer education by both the governmental and non-governmental consumer welfare institutions. A pertinent question, as Malila notes,³⁶ is, therefore, whether the interpretation of the Sale of Goods Act 1893 should take cognizance of the local circumstances.

3.2.4 The challenge posed by electronic commerce

The advent of electronic commerce (e-commerce) in modern commercial transactions has posed a great challenge on the law of sale of goods. E-commerce allows consumers to purchase goods through transactions that are agreed, settled and transferred in an open network environment, such as the internet, exchanging digital information. As a result there are several security problems that are of concern to the consumer. First, authentication of the person in the internet is not easy. It is easy for anyone to set up a website and falsely claim to offer products that can be purchased online with a credit card. Such a site cannot be easily distinguished from a genuine one, especially where a site of a well known online store such as Wal-Mart and E-bay has been falsified and there is no sign of falsification in it. This makes it extremely difficult for consumers to

³⁶ Ibid.

complain about an invalid purchase in a truly anonymous system. Secondly, it is possible for anyone to get into the computer server of a cyber shop through the Internet. As a result issues of privacy are questioned. To what extent are consumers willing to reveal personal data without being sure it is being kept in a secure repository or whether it is being accessed by several others? While e-commerce is not yet in wide use in Zambia, the challenges it poses in commercial transactions need to be considered and, perhaps, planned for as people are slowly getting acquainted to faster methods of transacting and in a few years' time e-commerce will be seen as a more convenient method of buying goods such as vehicles from other countries.

2.3 THE PRICE OF GOODS

'Price' may be defined as the amount that a product sells for per unit.³⁷ It reflects what society is willing to pay. Prices guide the decisions of consumers when buying goods. For example, one may decide to buy a packet of Boom detergent paste instead of Omo washing powder because Omo is more expensive. Prices therefore play a very important role in a market economy and it is not surprising that much of economic theory focuses on the factors that influence and determine prices. This makes the control of prices in the market a necessity to protect consumers from extortionate prices.

2.3.1 How are prices of goods controlled?

³⁷ K.E Case and R.C Fair, Principles of Economics (6th Ed), p. 39.

Basically there are two structures of price fixing. First, prices may be fixed or controlled by the state. Secondly, determination of prices may be left to manufacturers, retailers, producers and other businessmen. The latter system is called the price system and is the system used in most capitalist countries.

The danger of leaving the determination of prices to manufacturers and producers is that they may fix the price at what economists call the 'market price'. The market price is the highest price at which the goods in question can be sold. This market price is often exploitative and the consumer can do almost nothing about it. The government may, therefore, in such instances ask manufacturers and producers to sell their goods and products at a certain minimum price, especially when there is a shortage of a commodity which threatens a high rise in its price. The main statute providing limitations on the pricing of goods is the Control of Goods Act, Chapter 421 of the Laws of Zambia. This Act enables the President, inter alia, to provide, by regulation, for the control of the retail prices of any manufactured or unmanufactured commodity. Under section 3(1) (b) the President may, by Statutory Instrument, whenever it appears necessary or expedient to control the distribution, disposal, purchase and sale or the wholesale or retail prices of any commodity, and to make such regulations as appear to him to be necessary or expedient for such purposes. According to section 6 of the Act any person who contravenes the Act or any order made there under shall be liable to a fine not exceeding one million five hundred thousand penalty units or to a term of imprisonment not exceeding five years, or to both.

Ever since the enactment of this statute in 1954, the only regulations made so far regarding the control of prices relate to prices of petrol³⁸ and agricultural products.³⁹

As regards resale price maintenance, there is no particular statute that imposes a duty on retailers to comply with resale price conditions specified by the manufacturer. It is not unheard of, therefore, to find certain retailers selling a commodity at a price considerably higher than the recommended retail price especially when there is a shortage of such a commodity. Some retailers are in the habit of hiding certain essential commodities such as mealie meal and sugar and only re-stock them on the shelves when there is a shortage so that they can charge excessively more than the usual price for them since consumers will have no choice but to buy on that amount. This is a bad practice that should be curtailed. The only relevant provision of the law on this issue is section 12(a) of the Competition and Fair trading Act which prohibits any person from withholding or destroying producer or consumer goods, or render unserviceable or destroy the means of producing and distributing such goods with the aim of bringing about a price increase. The effectiveness of this provision remains on paper. In 1981 an effort was made to control commodity prices by the establishment of the Prices and Incomes Commission under the Prices and Incomes Commission Act No. 9 of 1981. Amongst the functions of the Commission were the recommendation of a comprehensive prices and incomes policy to be approved by government; the supervision of the implementation and execution of prices and incomes approved by government; and the investigation of issues likely to

³⁸ Control of Goods (Petrol Prices) Order, S.I. No 232 of 1967 and S.I. No. 22 of 1968.

³⁹ Control of Goods (Agricultural Products Prices) Regulations SI No 390 of 1967, Act No.13 of 1994.

affect any current or future prices. Regrettably, however, the Prices and Incomes Commission Act has since been repealed and no substitution has been made.

2.4 CONTROL OF MONOPOLIES

A monopoly is the complete control of trade in particular goods or the supply of a particular service.⁴⁰ According to section 2 of the Competition and Fair Trading Act, a monopoly undertaking means a dominant undertaking or an undertaking which, together with not more than two independent undertakings produces, supplies, distributes or otherwise controls not less than one half of total goods of any description that are produced, supplied or distributed throughout Zambia; or provides or otherwise controls not less than one half services that are rendered in Zambia or any substantial part thereof. In both cases, the fundamental criteria for identifying a monopoly is that at least more than one half of the supply of goods or services supplied in Zambia are supplied by one person or one group.

It has long been realised that the interests of the consumer are threatened when a substantial part of the output of an industry is under the control of one enterprise.⁴¹ Monopoly power can readily exploit the consumer by fixing prices so as to provide excessive profits, it can limit the consumer's choice, and it can hold up the development of new techniques because there is little incentive for change. A company that exercises a

⁴⁰ Oxford Advanced Learner's Dictionary (6th ed.), p. 759.

⁴¹ G. Borrie and A.L. Diamond, The Consumer, Society and the Law, p.

monopoly power in the manufacture of certain goods may also tend to care less if they produced low quality goods as consumers would buy them anyway due to lack of alternative choice. This was the case in Zambia before liberalization of the economy where state-owned enterprises like Superloaf bakery dominated the supply of bread in the country and on various occasions, foreign matter, mostly in the form of sack-cloth and string, were found in the bread.⁴²

In 1994 a Commission, the Zambia Competition Commission was created under the Competition and Fair Trading Act to look into all allegations relating to monopolies and restrictive trade practices referred to it by any person or initiated on its own.⁴³ From the wording of the Act, it is interesting to note that the Act does not per se prohibit monopolies, but only the 'abuse' of monopoly power which prevents, restricts or distorts competition to an appreciable extent in Zambia. Section 7(2) reads:

Subject to the provisions of subsection (1), enterprises shall refrain from the following acts or behaviour if, through abuse or acquisition of a dominant position of market power, they limit access to markets or otherwise unduly restrain competition, or have or are likely to have adverse effect on trade or the economy in general

To control monopolies so as to prevent them from abusing their power, the Commission keeps a structure of the production of goods and services in Zambia under review to determine where concentration of economic power exists whose detrimental impact on the economy outweighs efficiency advantages, if any. However, there are no guidelines

⁴² M. Kondolo, How effective is the law on consumer protection in Zambia and to what extent is the public aware of its existence? Obligatory Essay submitted to the School of Law, 1985.

⁴³ Section 6 of the Competition and Fair Trading Act, Cap 417.

of factors that the Commission is to take into account in determining whether a particular matter is likely to adversely affect the economy.

The usefulness of the provisions regulating monopolies in the *Zambian Competition and Fair Trading Act* are of little benefit to the consumer. This is because the provisions are more concerned with promoting fair competition among business enterprises in the same sector and the welfare of the economy as a whole, rather than the interests of individual consumers. This is despite the adverse impact that monopoly power can have on consumers when it is used to exploit the consumer by fixing prices so as to provide excessive profits, or used to limit the consumer's choice by imposing restrictions on where or to whom or in what form or quantities goods supplied or other goods may be sold or exported. As compared to the position in the UK, there is a significant disparity. In the UK, the Monopolies and Mergers Commission is also tasked to investigate and report on whether an identified activity in question 'operates, or may be expected to operate, against the *public interest*.'⁴⁴ In addition, investigation may be required into prices charged or recommended for goods or services, refusal to supply goods or services or preferences given to any person in relation to the supply of goods or services. Such powers afford more adequate consumer protection against abuse of monopoly power, unlike the case in Zambia. There is therefore need to amend the legislation on monopolies to provide for 'public interest' as a factor to be taken into account in determining whether there is abuse of monopoly power by an enterprise.

⁴⁴ Section 49 of The Fair Trading Act.

In conclusion the law protecting consumers in contracts for the sale of goods is not sufficient as most of it is outdated and fragmented in various pieces of legislation. No law provides for the maintenance of recommended retail prices by retailers, and the framework for controlling monopoly power is more concerned with ensuring fair competition among businesses than with protecting the interests of the consumer. The existing legislation needs to be revised or new legislation put in place to address these issues. The next chapter discusses consumer protection in contracts for the supply of services.

CHAPTER THREE

CONTRACTS FOR THE SUPPLY OF SERVICES

3.1 INTRODUCTION

The transactions considered in the previous chapter were related to the supply of goods, but the consumer is also concerned with the supply of services: the cleaning, washing, and repairing of clothes, furniture, cars and all the many articles which help to make the twenty-first century household. These are contracts for the supply of services, and are the concern of this chapter. Like all contracts, the rights of the parties are governed by what is expressly agreed. But often nothing is said of the more important questions, such as the standard of workmanship and the care to be taken of the goods being handled, and here the law steps in with *implied terms*. Unfortunately, apart from piece meal provisions in a few statutes, there is no single specific legislation in Zambia that provides consumer protection clauses to govern contracts for the supply of services. Most of the implied terms are, therefore, provided by the common law.

4.2 PROBLEMS IN CONTRACTS FOR THE SUPPLY OF SERVICES

Two problems have caused most litigation in contracts for the supply of services: the loss of, or damage to goods received for cleaning or repair, and the use of faulty materials, or faulty workmanship, in repairing them. In Zambia, such problems are common with regard to service providers such as launderers, bricklayers and garages.

Another problem in contracts for service is that of exclusion clauses. Most service providers, for example, laundries usually exclude themselves from liability for any damage or loss that may be caused to the garments they undertake to dry clean. Where they accept some liability this is limited to a certain amount only. A number of laundries in Lusaka, for example, exclude liability for shrinkage of a garment or damage to buttons and zippers, as well as liability for loss of a garment due to theft or fire. Where they accept liability they only undertake to pay up to five or ten times the cost of the laundry service for that garment.⁴⁵ Also, clauses providing that 'All goods left at owner's risk' are very usual in cloak rooms at public stations, libraries and supermarkets. A check around car parks in Lusaka where motorists are allowed to park their vehicles at a fee also revealed similar clauses excluding the car park owners from liability for theft of any vehicle parked in the premises.

Problems may also arise as to the cost of services. When shoppers make a purchase they nearly always know the price in advance. If they are unhappy about the price being asked, they do not buy the goods. The same is true for some types of service. Dry cleaners, shoe repairers, furniture removers and hairdressers usually indicate their prices for the job they are asked to do, enabling consumers to shop around till they find a price that suits them. However, with some jobs the service provider may be reluctant to give a firm quotation because he has little idea until he starts work of what the job will entail. This is true of car and electrical repairs, for example. A consumer who has been given no

⁴⁵ This is true of Lusaka Dry Cleaners and Imperial Dry Cleaners.

idea of what the price will be is clearly in a very vulnerable position, and those who need work carried out in an emergency are especially at risk. Even if the consumer suspects that the charge is exorbitant, it takes courage to refuse to pay for work already done. Once the job is completed he/she is likely to pay the bill either because they want their goods back (as is the case of cars and small electrical repairs) or because they fear retaliatory action by the service provider, in the form of a court action or a sale of the goods under section 3 of the Disposal of Uncollected Goods Act.⁴⁶

With the coming of mobile phone technology in Zambia, complaints about mobile phone services have also been common. Since January 2005, the Communications Authority has received numerous complaints from consumers with regard to the mobile telecommunications services in Zambia. The most common ones being poor network particularly Celtel (effect of the change of switch), difficulties by callers from outside Zambia to access Telecel (now MTN) and Celtel networks, inflated bills, and restricted window calling.⁴⁷ Telecel decided to reduce the calling window after having allowed its customers to have a liberal arrangement over this. Some customers have found it difficult to accept the change.⁴⁸

Other consumer complaints concern delay in performance of services. Parties may agree on the time within which a job should be completed but the contractor ends up taking a longer time. The problem is more acute where the parties do not agree on a time limit and the customer feels that the contractor has taken unreasonably long to perform the service.

⁴⁶ Chapter 410 of the Laws of Zambia.

⁴⁷ Consumer Watch, Issue No. 2, April 2005. <http://www.cuts-international.org>, 12th September 2007.

⁴⁸ Ibid.

3.3 THE LEGAL FRAMEWORK ADDRESSING THE PROBLEMS

3.3.1 THE COMMON LAW

The common law has stepped in to provide the consumer with redress against grievances relating to the performance of services, such as loss of, or damage to goods received for cleaning or repair; the use of faulty materials, or faulty workmanship, in repairing them; late performance of work, exclusion clauses and exorbitant charges for services rendered. This response has been through implying terms into the contracts and interpreting clauses in favour of the consumer. These are discussed below.

Implied terms

The following terms are implied in contracts for the supply of services.

(a) Reasonable Skill

A service provider that professes to possess certain skill should discharge such skill proportionate thereto in the discharge of his duty. It is an implied term under common law that where services are provided to consumers the service should be rendered with reasonable skill, and that the supplier is in breach of this term for failure to do so. As regards this common law position, Willes J stated in 1858 that:

“When a skilled labourer, artisan or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes – *spondes peritiam artis*. Thus, if an apothecary, a watch-maker, or an attorney be

“... I think that the true view is that a person contracting to do work and supply materials warrants that the materials which he uses will be of good quality and reasonably fit for the purpose for which he is using them, unless the circumstances of the contract are such as to exclude any such warranty.”

The somewhat difficult question of the liability of the service provider in such cases depends on the terms, expressed or implied, of the contract, and must be determined on their effect.⁵² If the circumstances show that the particular purpose of the materials was made known to the service provider and that the work is of the type which the service provider holds himself out to perform either by himself or his servants or sub-contractors, and, no less important, if the circumstances also show that the customer relied on the service provider's skill and judgment in the matter, an absolute implied warranty of fitness for the intended purpose will be found to exist.

(b) Time

Work started late or performed slowly can cause as many problems as work done badly. Complaints about the time element in a service fall into two categories. There are those cases where a date for the commencement or completion of the work has been agreed between both parties and subsequently ignored by the supplier, and there are others – the more common – where no time limit is agreed but the consumer thinks the contractor has taken unreasonably long to perform the service. In the former the terms are clearly contractual and the consumer can sue the supplier for breach of an express term as to time. In the latter case, courts have held that there is an implied term that the supplier will

⁵² C.J. Miller and B.W. Harvey, Consumer and Trading Law: Cases and Materials, p 117.

carry out the service in a *reasonable time*.⁵³ What is a reasonable time is a question of fact and will obviously depend on the nature of the work done.

(c) Fitness of buildings

At common law it is quite clear that where a purchaser buys a house from a builder who contracts to build it, there is a threefold implication; that the builder will do the work in a good and workmanlike manner; that he will supply the proper materials; and that the building will be reasonably fit for habitation.⁵⁴ Thus in *Collett v Van Zyl Bothers Ltd.*,⁵⁵ it was held that where defects are discovered in the house that a builder was contracted to build the plaintiff has a common law right of action against the builder for breach of contract, a right which no defects clause in the contract could take away.

Remedies for breach of implied terms

The usual remedy for breach of any of these implied terms is damages. Under the rule in *Hadley v Baxendale*⁵⁶ the damages recoverable are those in respect of consequences arising naturally i.e. according to the usual course of things from the breach, or 'such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as a probable result of the breach of it.

The service provider may also be liable under negligence for breach of a duty of care towards the customer. This may occur, for instance where he undertakes to give advice to someone whom he should have known would rely on it and without any effective

⁵³ Per Harman LJ in *Charnock v Liverpool Corp.* [1968] 3 All ER 473.

⁵⁴ Per Denning M.R. in *Hancock v B.W. Brazier (Anerly) Ltd.* [1966] 2 All ER 901 at 903.

⁵⁵ [1966] ZR 65.

⁵⁶ [1854] 9 Exch. 341.

disclaimer, or in professional negligence cases such as where a person contracts privately with a medical doctor for the performance of an operation or where a person contracts the services of a lawyer for professional legal advice or representation in litigation. In *Lyons Brooke Bond (Z) Ltd. Zambia Tanzania Road Services*⁵⁷ the court stated that 'loss, damage or misdelivery of goods in possession of a carrier is *prima facie* evidence of negligence and the carrier is liable unless he can establish that the loss or damage occurred without any negligence or fault or misconduct of himself or any of his servants. Similarly in *Industrial Finance Co. Lt. v Jacques Partners*,⁵⁸ Sakala J, held that:

“Where a lawyer has instructions from a client, he has a professional duty to protect his client so that when it is shown that the advocate has failed to exercise his duty to the cost of his client, the lawyer must make good and pay for that damage.”

Exclusion clauses

In as much as the parties may be taken to have consented to such terms, courts have the power to review exclusion to ensure that they are reasonable. The first concern of the courts, when faced with an exclusion clause which must be treated as part of the contract between the two parties, is as to its meaning. The reluctance of the possessor to reveal too plainly that he is seeking to exclude his legal obligations leads to clauses that are obscure and ambiguous. The courts interpret such clauses narrowly, and the benefit of any doubt is given in favour of the consumer on the principle that to exclude a liability imposed by the law must be a clear agreement.⁵⁹ This is known as the *contra proferentem* rule.

⁵⁷ [1977] ZR 317.

⁵⁸ [1980] ZR 75.

⁵⁹ G. Borrie and A.L. Diamond, The Consumer, Society and the Law, 1966, p. 155.

Thus in *A.M.I. Zambia v Peggy Chibuye*⁶⁰ the appellants carried on business of among other things, storage of goods for customers. The respondent's goods were stored with the appellant and it was subsequently discovered that the goods had been stolen. When the respondent sued, the appellant sought to rely on an exemption clause which stipulated that the goods would be stored at 'owner's risk'. The trial judge found that the exemption clause had not been brought to the respondent's attention and gave judgment for respondent. On appeal the Supreme Court, finding in favour of the respondent, held that "whether an exemption clause in a contract is to be deprived of effect or not should be because of the breach being a fundamental one. Where the parties' bargaining power was evenly matched, it is a question of construction whether the exclusion clause is sufficiently wide to give exemption or limit liability from the consequences of the breach in question." On the facts, the court found that the appellant could not have been exempted from their own wrong doing by the misconduct of their own staff as there was no suggestion that the clause 'at owner's risk' had been given a definition in the contract so that it would have been necessary to ascertain its meaning like any other clause in a contract.

The position at common law is that a consumer can only hold the possessor liable for negligence; the consumer takes the risk of loss not due to the possessor's negligence.⁶¹

⁶⁰ [1999] Z.R. 50.

⁶¹ G. Borrie and A.L. Diamond, *The Consumer, Society and the Law*, 1966, p. 163.

Cost of services

As far as the cost of services is concerned, unfortunately, consumers are not afforded any protection by the Zambian law in circumstances where they feel that they have been excessively charged by the service provider. If no price was agreed, it seems that the consumer will have to pay the for the price charged after the work has been completed, and where a consumer finds that an agreed price is much higher than other similar service providers charge for similar amount of work, the consumer will have to stick to the agreed price no matter how high it is to avoid being in breach of contract. Under the doctrine of consideration, the courts will not inquire into the adequacy of the consideration given, or whether the agreement is harsh or one-sided.⁶² The reason for this has been to avoid the interference with the bargain actually made by the parties. Therefore, such problems relating to cost of goods or services, as Treitel notes⁶³, are more appropriately dealt with by special legislation or by administrative measures than by the ordinary process of civil litigation. This calls for the need to have legislation that governs the supply of services which should provide controls on how service providers charge for their services. This will prevent or reduce the exploitation of consumers. The courts are not well equipped to develop a system of price control, and their refusal, as a general rule, to concern themselves with the adequacy of consideration is a reflection of this fact.

⁶² G.H. Treitel, The Law of Contract (10th ed.), p. 71.

⁶³ Ibid.

3.3.2 STATUTORY PROVISIONS

Though no specific and comprehensive legislation provides for consumer rights in contracts for the supply of services, there have been few efforts in certain legislation to address consumer rights. For example section 12 of the Competition and Fair Trading Act prohibits conduct that is likely to mislead the public as to the nature, price, availability, characteristics, suitability for a given purpose, quantity or quality of any services. With the recent developments in the mobile communication industry that has seen a rise in mobile communication users, regulations have also been put in place to provide for consumer welfare. Under the Telecommunications (Consumer Protection) Regulations 2004, for instance, a consumer has, among others, the following rights, the right to full disclosure of services, rates, terms and conditions provided by the service provider; the right to lawful personal privacy which includes protection against unauthorized access to or use of their personal conversation or information; the right to high quality, reliable service from both service providers and the regulator; and the right to accurate and understandable bills for products and services they authorized and to fair prompt redress for problems they may have with the bills or that may arise during use of those products or services. In addition a consumer has the right to select a service provider and services of his/her choice.⁶⁴

⁶⁴ Regulations 5 and 7.

3.4 APPLICATION OF THE LAW

Despite the above common law consumer-protective principles, very few Zambians enforce their consumer rights whenever a problem relating to procurement of services arises. Zambian consumers are generally not very litigious as litigation tends to be very inconveniencing and others are just not comfortable with it. The costly and prolonged nature of litigation also contributes to the limited enforceability of consumer rights. A few Zambians that have money and patience to resort to litigation have been able to sue service providers such as laundries, garages, legal practitioners and private medical practitioners for negligence in the performance of services. On the most, however, problems relating to faulty or delayed work are usually either resolved between the parties or, as often is the case, the consumer just decides to 'forget about them'.

CHAPTER FOUR

CONSUMER PROTECTION INSTITUTIONS

4.1 INTRODUCTION

This chapter will examine the role played by certain institutions in promoting and enforcing consumer protection rights. The following institutions will be studied: The Zambia Competition Commission, the Zambia Bureau of Standards, and the Zambia Consumer Association.

4.2 THE ZAMBIA COMPETITION COMMISSION

The Zambia Competition Commission (ZCC) is a statutory body corporate established under Section 4 of the Competition and Fair Trading Act. The Competition and Fair Trading Act was enacted to, *inter alia*, encourage competition in the economy by prohibiting anti-competitive trade practices, to regulate monopolies and concentrations of economic power, and to protect consumer welfare. In striving to regulate competition the government realized that the law on competition should deal directly with the interests of consumers by protecting consumers' rights, especially the right to full and accurate information when purchasing goods and services. This is what led to the inclusion in section 12 of Cap 417, the prohibition of unfair trading practices that violate consumer rights and the granting, to ZCC, of authority enforce these provisions.

4.2.1 Consumer Welfare

The Commission's main role in promoting consumer welfare comes by virtue of section 12 of Cap 417. Section 12 of the Act primarily focuses on protecting the welfare of consumers from unfair trading. The Act prohibits persons or businesses providing goods or services from making false or misleading representations as to the nature, quality, standard, characteristics, value or origin of goods or services. The Act further prohibits the exclusion of liability for defective goods as well as the withholding of goods with the aim of bringing about a price increase.

In order to achieve the consumer welfare objectives of section 12 of the Act, the Commission provides information for the guidance of consumers regarding their rights under the Act. The Commission has also been involved in government discussions aimed at establishing a Consumer Protection Law and maybe create a national institution which will be charged with consumer welfare.

The commission is also empowered to carry out, on its own initiative or at the request of any person, investigations in relation to the conduct of business so as to determine whether any enterprise is carrying on unfair trade practices and the extent of such practices, if any. The Commission's work largely flows from the market place, in the form of information received about possible breaches of the Act and other complaints and inquiries. The Commission also undertakes investigations on its own initiative and upon Government directions.

The Commission has a consumer complaint desk where consumers can report their complaints giving full details of the violation(s) of section 12 such as the name or shop, date of violation, location, time (where possible), nature of complaint, and the complainant's full particulars. This can be written or done verbally. In 2001 violations under Section 12, tied with violations under section 7 (anti-competitive trade practices) for new cases received stood at 23%. According to the Commission's report, this evidenced that consumers were increasingly becoming aware of their rights and the role the Commission plays in safeguarding those rights.

The Commission takes a consultative approach in its investigations involving, where necessary, sector regulators such as the Communications Authority, the Energy Regulation Board, and the Pensions and Insurance Authority, and has integrated the work of various consumer groups such as the Zambia Consumer Association (ZACA) and Consumer Unity and Trust Society (CUTS) in its programmes, with a view to strengthening the position of consumers on the market and satisfying their interests.

4.3 THE ZAMBIA BUREAU OF STANDARDS

The Zambia Bureau of Standards (ZABS) is a statutory national standards body for Zambia established under an Act of Parliament, the Standards Act, Chapter 416 of the Laws of Zambia. The main function of the Bureau is to prepare Zambian standards for products and to promote their use. A "standard" is a document approved by a recognized body that provides, for common and repeated use, rules, guidelines or characteristics for

products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.⁶⁵ ZABS is the major provider of standards for different products such as mineral water, beer, soaps, canned foods and various household electrical appliances.

The Bureau also makes arrangements and provides facilities for the examination and testing of materials and substances from which commodities are manufactured or processed, and also conducts pre-export inspection of commodities. Products that have been certified by the Bureau as meeting the set quality standards have a certification mark or logo on them which consumers can check to see whether the product is of certified standard or not.

4.3.1 Consumer Welfare

The main role that ZABS plays in the promotion of consumer welfare is through the preparation of minimum standards for consumer products. ZABS recognizes the fact that standards play a very important role not only to manufacturers for competition purposes, but to consumers as well. Consumers expect certain minimum quality standards for certain products to satisfy their various tastes. Setting minimum quality standard for commodities such as food products, cosmetics, drinks and bathing soaps also helps to ensure that such commodities, when manufactured, are safe for the consumers' use. Under the Standards Act, for instance, ZABS is mandated by law to monitor the quality

⁶⁵ According to the World Trade Organisation and Conformity Assessment Quality Infrastructure.

of electronic appliances to ensure that they meet local and international quality standards. ZABS verify electrical appliances for durability, safety and quality. For instance, the standard ZS 106: PART 1:1997 set by the Bureau deals with the safety of electrical appliances for household and similar purposes, the rated voltage of appliances being not more than 250V for single-phase appliances and 480V for other appliances. By so doing, ZABS therefore helps to ensure that consumers are provided with quality products that are safe for use.

ZABS receives complaints from consumers relating to the quality of various commodities they purchase. On receipt of such complaints, the Bureau undertakes a quality test on the alleged commodity (where necessary) and if the product is found to be of inferior standard, the manufacturer or seller is asked to replace the commodity or return the sum that was paid for it. Where the commodity is in breach of a compulsory standard, the supplier will, in addition, be guilty of an offence and shall be liable on conviction to a fine not exceeding five thousand penalty units or to imprisonment for a term not exceeding one year, or to both.⁶⁶ According to a ZABS technical officer, the Bureau receives, on average, about ten complaints per month, most of them relating to household electrical appliances and fruit flavoured drinks, on which it undertakes a quality test to verify the complaint. If a commodity fails to meet the minimum standards the Bureau asks the seller to replace the commodity or return the purchase price to the consumer and may also take the manufacturer to task as to why it manufactures products of poor

⁶⁶ Section 11, Standards Act.

standard. The Bureau also appoints inspectors that, occasionally, inspect commodities that are offered for sale in places such as supermarkets.

As a way of safeguarding the interests of consumers, the Bureau also undertakes a quality control measure of various products that are imported into the country through its Import Quality Monitoring Scheme (IQMS). ZABS ensures that imported products meet the compulsory Zambian standards set under Statutory Instruments 41 and 78 of 2003, and 120 of 2006. Statutory Instrument No. 78 of 2003 demands that importers notify ZABS before importing any electrical goods and also to inform ZABS when the goods do arrive in the country in readiness for inspection. Upon inspection, goods that do not meet the quality standards are destroyed. ZABS's emphasis is more on safety as can be attested by ZS 106: PART 1:1997. Thus even when goods are counterfeit if they meet safety standards then ZABS allows the importer or trader to merchandise arguing that the jurisdiction to check for trademarks and curtail the proliferation counterfeit goods on the market is with the Patents and Companies Registration Office (PACRO), not ZABS.

Currently ZABS has officers at Chirundu, Nakonde, Livingstone and Mwami borders to monitor imports, with the aim of protecting consumers.⁶⁷

4.4 THE ZAMBIA CONSUMERS ASSOCIATION

The Zambia Consumers Association (ZACA) was first officially registered in 1977 under the Societies Act. Then it was called the Consumers Protective Association of Zambia.

⁶⁷ *Consumer Watch*, IssueNo.2, Vol. 2, April 2005.

ZACA is a voluntary organisation dedicated to the protection of the consuming public. It is an independent and non-profit making body with its offices located in Kitwe in the Copperbelt Province of Zambia.

The main aim of ZACA is the protection of consumers' rights. It does this through advocating for consumer rights and providing information to consumers about products and services which it thoroughly tests. ZACA educates consumers through various media such as the press and also gives consumers an independent appraisal through the medium of the electronic newsletter, '*Consumer Watch*', a joint initiative of the Consumer Unity & Trust Society-Africa Resource Centre (CUTS-ARC) and the Zambia Consumer Association, published with the objective of enhancing consumer welfare through sensitization, information dissemination and capacity building of consumers, business entities and government.

4.4.1 Response to consumer issues in Zambia

One of the biggest challenges for consumers and consumer organisations today is liberalisation and globalisation.⁶⁸ While liberalisation has benefits for consumers in terms of wider choice of goods and services and open markets, the reality for weak economies like Zambia is that the strong economies have flooded the markets of developing economies with a lot of poor quality products, which fail to perform, and as a result

⁶⁸ According to ZACA Executive Secretary, Muyunda Ililonga.

consumers lose out. As ZACA Executive Director pointed out, products mainly from the Far East are a typical example of sub-standard products that have flooded the Zambian market. Such products range from toys, electrical goods and building materials, which are not reliable at all. "Some products work for 1 day, 1 week, 1 month and the consumers do not get value for money", he said. As a remedy, ZACA has therefore proposed that a committee comprising of the Ministry of Commerce, Trade and Industry (MCTI), Zambia Competition Commission (ZCC), ZABS, Zambia Chamber of Commerce and Industry (ZACCI) and the Zambia Consumers Association be constituted to address this matter and make policy recommendation to Government.

The other major consumer issue ZACA has thrived to address is access to essential utilities - water and electricity. Recently a proposal was made by the national power supply company, ZESCO, to increase the cost of electricity by 15 percent. This would have made the cost of electricity too high for most Zambian to afford. Already Zambia has the highest electricity tariffs in the southern African region. The proposal therefore met fierce opposition from the Manufacturers Association of Zambia, Zambia Consumers Association and individuals. Leading the protest, ZACA Executive Secretary charged that increasing tariffs on the already costly electricity would compromise the ability of many domestic consumers to pay and therefore access electricity. Further, the effect will be an increase in production cost and hikes in a number of commodity prices.⁶⁹ The proposed tariff increment is yet to be implemented.

⁶⁹ Ibid.

ZACA has also spoken out on behalf of consumers on various other issues. In 2005 ZACA expressed outrage at the persistent water shortages that were experienced in some parts of Lusaka and demanded for immediate remedial measures by the utility company, Lusaka Water and Sewerage Company and threatened legal action in the event of failure. Parts of Chelstone residential area had experienced water shortages for weeks forcing consumers to walk long distances in search of water. The problem was soon rectified. ZACA also welcomed Government policy to introduce Boards to oversee the management of markets and bus-stations in the Country. “Consumers have great stake in these sectors. It’s important that they have a voice in the management of these public utilities. Efficiently managed markets and bus-stations will bring benefits to consumers” said ZACA Executive Secretary.

The Zambia Consumer Association has contact with consumer bodies in many countries in Africa and the world, and is affiliated to regional and international consumer organizations such as the Consumer International and World Consumer Movement.

4.5 PERFORMANCE ANALYSIS OF THE INSTITUTIONS

The three institutions discussed above all thrive to do their level best in the promotion of consumer welfare in Zambia. The performance of these institutions, however, is not very effective and this has culminated into little success in as far as promoting and enforcing consumer rights is concerned. This is because these bodies suffer chronic under funding and, with regard to ZCC and ZABS, also have a shortage of qualified and experienced workforce as professionals leave to work in developed countries for new economic

opportunities. As a result, ZABS and ZCC, for instance, cannot carry out regular inspections in stores to ensure that products being offered for sale to the public are of good quality. On the most, the task is left to the unsatisfied consumer to take his/her complaint to the Commission or the Bureau if they are unsatisfied about the goods or services they buy and want to seek redress. Looking at the attitude of the Zambian consumers very few would be willing to enforce their rights to such an extent of reporting their complaints to authorities such as ZCC or ZABS. This explains the little number of complaints that these two institutions record monthly and the large influx of substandard electrical and other consumer products (mostly from the east) on the Zambian market.

ZACA has the further disability of lack of authority to enforce its aims and objectives. Its efforts only go as far as advocating for the observance consumer rights and can only seek the intervention of authorities such as ZCC and ZABS to enforce these rights. Their efforts, therefore, if not backed by such intervention may be futile.

In addition these institutions are not available in all nine provinces of Zambia. ZCC and ZABS are located in Lusaka, with ZABS only having inspectors of imported products in selected boarder towns, while ZACA's office is in Kitwe. This severely limits the consumer's access to these bodies whenever he/she has a complaint to report. As a result liberalisation versus a weak regulatory regime is leading to a flood of poor quality goods in the country and that is a big concern. Furthermore it must be noted, from the provisions and arrangement of Cap 417, that ZCC's main concerns appears to be the regulation of competition among businesses and not consumer welfare. As a result the

Commission only pays lip service to consumer issues as their attention is more focused on ensuring fair competition among various players in various businesses sectors.

In conclusion, it can be said that ZCC, ZABS and ZACA play important roles in promoting and enforcing consumer rights. The contribution of these institutions in achieving these aims, however, is very limited due to the poor funding and manpower shortage that these institutions face that limits their operations. These problems are coupled with the centrality location of the institutions which makes access to them by consumers in all nine provinces of the country difficult. There is, therefore, urgent need to adequately finance these bodies and open up even at least one branch in every province, or perhaps have a specific institution tasked with the enforcement of consumer rights.

The next and last chapter concludes the study and provides recommendations of what measures can be taken to strengthen the legal and institutional framework for the better protection of consumer rights.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUSIONS

Approximately 23 years after the UN adopted consumer guidelines in 1985, Zambia being a member of the UN has shown significant efforts in meeting the set guidelines in the area of consumer protection by taking steps such as the establishment of the Zambia Competition Commission, which is vested with the powers to investigate consumer abuses, consumer education, and consumer redress as well as promoting and protecting the economic interests of consumers, the ZABS which ensures that consumers have access to quality and safe products that meet both national and international standards and other several sectoral regulatory boards such as the Drug and Poisons Board, the Energy Regulation Board, and Communications Authority.

Nevertheless, the issue of consumer protection in Zambia has become acute especially since the liberalisation of the Zambian economy in the early 1990s. This can be observed by the influx of counterfeit goods in the market, and the number of consumer abuses that are dealt with by relevant agencies. The law on consumer protection has been developed on a piecemeal basis over the years and is found in a variety of legislation such as the Sale of Goods Act 1893, the Competition and Fair Trading Act, the Food and Drugs Act, and the Standards Act. It is peculiar to note that consumer abuses have continued to

flourish in spite of the existing law, i.e., section 12 of the Competition and Fair Trading Act, Cap 417 of 1994, which aims to give both consumers and sellers a fair deal. The profiteer and hoarder trader has continued to cheat and fleece consumers through artificial price hikes, substandard and adulterated goods and shoddy services, while the government has failed to make strong laws and even fully implement the available ones on consumer rights. As the Chairman of the Helpline Trust of Pakistan, Hamid Maker, said “developing countries have become dumping grounds for substandard, expired foods, beverages, medicines and other items. Their markets are full of these products, which are being marketed openly without the fear of punishment.”⁷⁰

It is the opinion of this paper that the various laws that currently provide protection to consumers in contracts for the sale of goods and the supply of services is insufficient. First of all, the consumer protection laws are scattered in various pieces of legislation such as the Sale of Goods Act 1893, the Competition and Fair Trading Act, the Food and Drugs Act, and the Standards Act. This makes enforcement of one’s rights rather difficult and cumbersome as it will require reference to various piecemeal legislation to effectively submit and argue a complaint against a manufacturer, seller or service provider.

Secondly, Sale of Goods Act 1893, which is the main statute regulating contracts for sale of goods is outdated and still embodies doctrines of privity and freedom of contract which are undesirable in today’s world. The doctrine of privity of contract limits the ambit of the Act’s effectiveness as secondary consumers cannot bring action against a

⁷⁰ Ibid.

seller of defective goods. The only person who has a remedy under the Sale of Goods Act is the actual buyer. Therefore the donee or buyer's family members have no remedy under the Act, but only for negligence. However, even an action for negligence is highly restricted because the complainant has to show consequential damage such as personal injury to prove negligence otherwise no damages may be given. The doctrine of freedom of contract embodied in section 55 of the Act, on the other hand, allows the parties to exclude any of the implied conditions in the Act. This in effect neutralises the purpose that the implied terms in sections 13-15 were meant to serve as sellers find it relatively easy to exclude their duties stipulated in the Act.

Thirdly, though there is an Act that provides for the regulation of commodity prices, there are no issued regulations in force relating to the retail and wholesale prices of any specified commodities. Determination of prices is left entirely to manufacturers and retailers. The danger of this, as has been noted is that the manufacturers or retailers may fix market prices for commodities that are exploitative of the consumer, especially when there is a shortage of a particular essential commodity such as fuel or mealie meal.

Fourthly, the study has also discovered in that there is no piece of legislation that governs contracts for the supply of services, and yet complaints by consumers against service providers such as launderers, bailees, builders are in abundance. The courts rely on the common law to imply terms such as the exercise of reasonable skill or the performance of a service within reasonable time, in order to safeguard the consumer's interests, while other problematic issues such as those of the cost of services are left for the determination of the parties. This leaves consumers at the risk of being exploited through excessive

service charges and poor service provision. The protection granted by the common law through implied terms, as well as pricing regulations, needs to be enacted into legislation in order to be more forceful.

In addition, it has also been found that the snail pace of the judicial system in dealing with consumer cases discourages most consumers from being keen to pursue the matter through the courts of law. Worse still, though Zambia has institutions which aim at protecting consumers such as the Zambia Competition Commission (ZCC), the Zambia Bureau of Standards (ZABS), and Communications Authority, these bodies lack the capacity to investigate, litigate and monitor the increasing consumer abuses among retailers, suppliers, and manufacturers. This is due to their inadequate funding and skilled manpower.

The growing popularity of electronic commerce especially with the purchase of used cars from Japan and Dubai also raises security concerns for the consumer as authentication of the dealer on the internet is not easy and as such a consumer may easily be swindled of his/her money. E-commerce is a new concept in Zambia and there are no laws in place that regulate such transactions. Nevertheless such challenges to modern commercial transactions need to be addressed by legislation as the country advances technologically along with the rest of the world.

Due to such reasons stronger measures need to be taken by the Government and Legislature as far as consumer protection law is concerned. It is high time that all stakeholders including the government, private sector and civil society joined hands with the poor consumers against this rampant cheating and malpractice. As between the seller

and buyer of goods, as between the supplier and recipient of services, there is no doubt that the law should, in the economic interests of the community as a whole, take sides. It is no longer possible or desirable for the law to affirm its strict neutrality. It is not just a question of 'consumer protection' or 'value for money'. The production and sale of shoddy or useless articles - the shirt which shrinks and is unwearable, the gadget which breaks and is thrown away - represent a shocking waste of time, labour and raw materials which this country can ill afford. The only way to prevent this waste, short of rigid governmental control and inspection, is for the law to enforce the highest standards.

Therefore, despite the successes that government has scored in the implementation of the UN guidelines, the biggest challenge that remains is how to ensure that all stakeholders adhere to the law. As it is today, consumer protection institutions lack resource support to adequately support their efforts. It is, therefore, still desirable for Zambia to take more significant steps in building an efficient system for consumer protection. We must therefore look to legislation to achieve a better and more efficient consumer protection framework. This is because consumers are the largest stakeholders in any country and should be treated with respect and protected by strong and effective consumer protection laws. It is a result of such realization that developed countries have taken extensive measures in protecting consumers. In the UK for example, Parliament has replaced the 1893 Sale of Goods Act with a 1979 version which is broader in approach to certain issues not covered by the 1893 Act, and has also enacted a series of legislation designed to protect the interest of consumers such as the Consumer Protection Act 1987 and the Unfair Contract Terms Act 1977 (UCTA), the Trade Descriptions Act and the Supply of Goods and Services Act 1982.

The Consumer Protection Act in particular is a very commendable piece of legislation as it establishes strict liability for damage caused by defective products, meaning that a claimant does not have to establish that the manufacturer was negligent; unless the manufacturer is covered by one of the defences provided by the Act, it will be held responsible for the damage. This obviously makes things easier for the injured party than an action in tort. The UCTA on the other hand lays down rules concerning the exclusion of terms implied in the Sale of Goods Act 1979, and its provisions are strengthened by Orders and Regulations that, for instance, make it criminal to purport to introduce into a consumer transaction a term which is void by virtue of provisions of the UCTA.

Interestingly, even developing countries like India have been able to realize the importance of consumer welfare. The Indian government had established a separate Ministry for Consumer Affairs in 1986. As such, consumer protection movement in India is very strong, and due to the government’s support, there are over 5,000 consumer protection organizations and 3,000 Consumer Courts, which look after consumer interests.⁷¹ Zambia can also take similar approach to strengthen its consumer protection framework.

6.2 RECOMMENDATIONS

Having concluded the study the following are the recommendations on the findings.

- 1. Enactment of a Consumer Protection Act

⁷¹ Ibid.

In order to effectively check consumer abuse, Zambia needs a comprehensive consumer law, instead of having piecemeal legislation, so that consumers can be well protected against unfair business practices. Consumer laws should be codified into one single code of conduct like the 1987 Act of the UK which will impose strict liability on manufacturers of defective products. Such an Act may deal with all the main types of transactions in which the consumer is concerned, prohibit exclusion clauses, spell out the duties of each party in both contracts for sale of goods and supply of services, and provide remedies for the consumer. The Act would also eliminate the problem of having piecemeal legislation and the also do away with the doctrines of privity and freedom of contract. The current Competition and Fair Trading Act, which only has one section dealing with consumer welfare, does not sufficiently address consumer protection.

2. Establishment of an independent public consumer protection body

There is need for an independent public body to specifically look into issues affecting consumers and administer the consumer protection law, unlike the ZCC which is mostly concerned with regulation of competition. Such an independent regulatory body should be vested with powers to investigate, litigate and monitor consumer abuses.

3. Inclusion of consumer rights in the Constitution

Another way to strengthen consumer rights would be through the inclusion of consumer rights in the Bill of Rights in the Republican Constitution. This would make them enforceable and encourage their observance among manufacturers and sellers of goods, and providers of services.

4. Establishment of regional consumer councils

The Government can also establish regional consumer councils to deal with consumer complaints such as those about electricity, price of goods, fuel, and transport services, or it can transfer the complaints functions to local authority consumer protection departments. This would improve the redress system by making it easily available to consumers in most parts of the country.

5. Establishment of a consumer protection tribunal

The enactment of a Consumer Protection Act can be coupled with the establishment of a Consumer Protection under the Consumer Protection Act. Such a tribunal would be tasked to specifically deal with cases arising from consumer contracts. As ZACA Executive Secretary has observed, one of the biggest problems for consumers now is that it is almost impossible to get redress once their rights are infringed as courts, which deal with various cases, are slow in disposing of cases and litigation is sometimes expensive for the average Zambian. The advantage with such a tribunal would, therefore, be that it

would be a specialised court and would handle matters expediently with specialised personnel. It would also be a less costly redress mechanism for the consumer as compared to the courts.

6. Strengthening of public consumer protection institutions

Poor funding is one of the constraints of institutions such as ZABS. These institutions need to be well funded and staffed with adequate skilled manpower to enable them efficiently carry out their duties, even by their own initiative instead of always waiting for individual consumers to take complaints to them.

In conclusion, this paper may confidently say that the law on consumer protection in Zambia is inadequate and not very effective. In view of this the government and other stakeholders in both the public and private sphere need to step up efforts in providing an effective system for consumer protection.

BIBLIOGRAPHY

Borrie, G., and A.L. Diamond, 1966, **The Consumer, Society and the Law**, London: MacGibbon & Kee.

Case, K.E., and R.C Fair, **Principles of Economics (6th Ed)**

Giliker, P., and S. Beckwith, 2004, **Tort (2nd Ed)**, London: Sweet & Maxwell.

Harvey, B.W., 1978, **The Law of Consumer Protection and Fair Trading**, London: Butterworths.

Keenan, D., and S. Riches, 2002, **Business Law**, Harlow: Longman

Kondolo, M., **How effective is the law on consumer protection in Zambia and to what extent is the public aware of its existence?** Obligatory Essay submitted to the School of Law, 1985.

Malila, M., 2006, **Commercial Law in Zambia: Cases and Materials**, Lusaka: UNZA Press

Miller, C.M., and B.W. Harvey, 1985, **Consumer and Trading Law: Cases and Materials**, London: Butterworths.

Elliott, C., and F. Quinn, 2005, **Contract Law (5th Ed)**, Harlow: Longman.

Treitel, G.H., 1999, **The Law of Contract (10th ed)**, London: Sweet & Maxwell.

Newspaper Articles

Sunday Post on May 20, 2007

Journal Articles

Consumer Watch, Issue No. 2, Vol. 2, 2005.

Dawn, Safar 28, 1427, Wednesday March 29, 2006.

LRF News, Issue No. 25, March 2001)

ZABS Review, Vol. 1 No. 1, August 200.

Websites

Wikipedia, the free encyclopaedia, <http://en.wikipedia.org/consumerprotection>

Consumer Unit and Trust Society, <http://www.cuts-international.org>