

**‘SHOPPING PRODUCT CONSUMER’S’ RIGHT TO REDRESS IN ZAMBIA**

By

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A dissertation submitted to the University of Zambia in partial fulfillment of the requirements for the award of Bachelors of Laws Degree (LLB)

UNZA

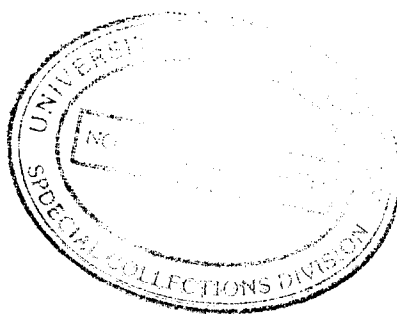


2012

## DECLARATION

I, MUKUKA PATIENCE C. (Computer Number : 27000427), DO HEREBY declare that the contents of this directed research paper are entirely based on my findings and ingenuity and I have endeavored to acknowledge where the work herein is not mine. I further depose to the best of my knowledge that this work has never been presented in any University for academic purposes.

I HEREBY take full responsibility for the contents, errors, defects and omissions that may appear herein.



14<sup>th</sup> May, 2012.

Date

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THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

L410- DIRECTED RESEARCH

I recommend that the obligatory essay prepared under my supervision,

By

Mukuka Patience C.

Entitled:

‘SHOPPING PRODUCT CONSUMER’S’ RIGHT TO REDRESS IN ZAMBIA

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

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Prof M. Munalula

Date

(Supervisor)

## ABSTRACT

The Competition and Consumer Protection Act in Section 49(1) provides that: “A person or an enterprise shall not supply a consumer with goods that are defective, not fit for the purpose for which they are normally used or for the purpose that the consumer indicated to the person or the enterprise.” It further provides that the person or enterprise who contravenes this section shall pay a penalty and the consumer is entitled to a refund or replacement of the defective good. This paper analyses this section and attempts to investigate its meaning.

This paper found that in light of section 49 which provides for the consumer’s right to redress, the Competition and Consumer Commission has been entrusted with handling complaints from consumers. It has put in place a redressal mechanism through which consumer’s complaints are heard. This paper observes that the provision in section 49 is a necessary step in the furtherance of consumer’s right to redress. The adequacy of this provision also relates to the enforcement mechanism and awareness. The enforcement of this provision is not adequate because the Consumer Protection Authority has limitations which range from financial to human resource limitations as well as consumers not being acquainted with their rights.

It further recognizes that the key stakeholders have major roles to play in promoting and enforcing these rights both at policy and practical level. These include the media, Consumer Protection Authority, sector regulators, academia, policy makers and the civil society. The recommendations are that consumer awareness should be strengthened; there should be sufficient resource funding, improvement of relations between consumer protection bodies, separation of competition and consumer laws, decentralization of the Consumer Protection Authority, Improve consumer education and put up a toll free line to encourage reporting of cases of violation.

## DEDICATION

This obligatory essay is dedicated to my father RODRICK C. MUKUKA and my Uncle CHRIS KANGALE the biggest and most important influences in my life. This obligatory essay is a culmination of the effort you tirelessly put in to help me achieve my dream of becoming a lawyer. It was never easy for you but you always persevered and strived for the best for me.

I also dedicate this work to my siblings, LUMBO MUKUKA and SUMI MUKUKA, to whom I hope this work, serves as a motivation to work even harder than I have. This is a yard stick set for you to succeed.

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## Chapter One

### General Introduction

#### 1.0 Introduction

Zambia enjoys a free market economy since the transition from a command economy in the early 1990's.<sup>1</sup> This has led to flooding the market with cheap and poor quality goods some of which are defective or do not work as expected. Consumers often return them to the traders when these goods do not work as intended but in most cases traders refuse to refund or exchange them on ground that it is their policy not to return or refund once goods are sold. It is a common trend in Zambia to find disclaimers or notices stating that, “goods once bought cannot be returned or refunded.”<sup>2</sup> In addressing these modern and prevailing commercial practices, government has enacted the Competition and Consumer Protection Act No. 24 of 2010 to ensure that interests of consumers are protected. In Zambia, the concept of consumer protection is very recent. Before the enactment of the new act, Consumer Protection laws were not in consolidated form. There had been a growing realization that the law as it stood did not give sufficient protection to the Consumer.

This research is therefore intended to provide an analysis of the shopping product Consumers right to redress in Zambia. This analysis will focus on the reality of section 49 of the Act in protecting the right to redress. An additional analysis will be made to show the adequacy of this section in protecting a Consumer's right to redress in comparison to other commonwealth

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<sup>1</sup> F. Mutati, 'National Assembly Deliberations on the competition and consumer protection bill,' BPZ/LMM, (27<sup>th</sup> July,2010) G.1

<sup>2</sup> The Post, 13<sup>th</sup> September, 2010

countries. This research will further investigate whether this section is responding to a mischief or is just part of the necessary mechanism for the transition to a free market economy.

This chapter focuses on the statement of the problem, rationale and objective of the research, specific research questions and research methodology. Chapter two will focus on the concept of Consumer rights, Consumer Protection and the Shopping Product Consumer's right to redress in Zambia. Chapter three will compare the Shopping Product Consumer's right to redress in Zambia to other Commonwealth countries. Chapter four will look at the role of stakeholders in Consumer Protection. Chapter five endeavors to conclude and give recommendations.

### **1.1 Problem Statement**

The Zambian economy is led by the private sector.<sup>3</sup> Despite assumptions holding otherwise, this may result in numerous unfair and anti-competitive trade practices as well as exploitation of consumers in the private commercial sector,<sup>4</sup> as the aim of many private businesses is to maximize profits. Though many consumers rush into buying the so called cheap goods, these goods have proved to be expensive in the long run. When these goods are defective, many traders refuse to refund or exchange them. A cursory glance at most shops in Lusaka Kamwala Shopping Complex, COMESA market and the Town Center markets shows the attitudes of most traders. Billboards that state, 'goods once bought cannot be returned or refunded' are common and these writings can largely be attributed to the attitudes of traders in Zambia towards consumers. In this context, this research investigates whether Zambia has effective and efficient institutions that protect consumers, let alone a consumer protection law in spite of the existing practice.

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<sup>3</sup> Museba Bwembya, 'Competition Law in Zambia: The Relevancy and adequacy of such laws in Consumer Protection,' 2010. P.1

<sup>4</sup> Ibid

To curtail this attitude of traders, the Competition and Consumer Protection Act No. 24 of 2010 provides that “a person or enterprise shall not supply a consumer with goods that are defective, not fit for the purpose for which they are normally used or for the purpose that the consumer indicated to the person or enterprise.” It further provides that if a person or enterprise contravenes the above provision, the consumer should be refunded the price paid for the goods or the goods replaced with those that are free from defect within seven days.<sup>5</sup> Additionally, one of the eight basic rights of a consumer is the right to redress. Consumers are mostly on the weaker bargaining side with trained or experienced traders and therefore may experience unfair trade practices. Consequently, it is imperative that their rights be protected. It is therefore, the aim of this research to analyze the effectiveness of this new act in addressing the right of a shopping product consumer to redress, refund and compensation.

## **1.2 Objectives of the Research**

The ultimate objective of this research is to analyze the effectiveness of section 49 of the Competition and Consumer Protection act No.24 of 2010 in the promotion of a ‘shopping product consumer’s right to redress, refund and compensation. It analyses the effect of introducing this right in Zambia, the challenges likely to be faced by the body that is responsible for enforcing this right. This research aims at critically analyzing whether this law in section 49 is adequate to defend or address the rights to redress, refund and compensation of a shopping product consumer, what role stakeholders can play in ensuring that this right is protected and how awareness of consumer’s rights can be created. This research investigates the mischief that was sought to be remedied by this section.

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<sup>5</sup>The Competition and Consumer Protection Act, Section 49

The following are the specific objectives: firstly, to give a comprehensive understanding of what a Shopping Product Consumer is. Secondly, to give a comprehensive understanding of what the right to redress, refund and compensation involves both locally and internationally. Thirdly, find out the responsibilities that both a Trader and a Consumer have in ensuring that this right is satisfied. Finally, to determine how stakeholders can create awareness of these rights.

### **1.3 Rationale of the Research**

The sole aim of the trader is to make profit. Therefore, some traders may not be concerned with the quality of goods they provide their consumers. Ever since the reform and opening up of Zambia's economy, consumers have more courage to safeguard their rights as a result of rising consumer awareness worldwide. This research naturally takes the protection of consumers interests as the starting point. A consumer's justifiable and legal consumption closely connects with the satisfaction of his or her basic human rights. The alternate purpose of offering products is to satisfy the needs of people which are a product of human rights. Any misrepresented product characteristics are not simply a fraction of breach of trust, but an international violation of the basic rights and interests of human beings.

In particular, when consumers receive misleading information about food, medicine, electrical appliances, auto spares and housing, the product can pose a threat to the Consumer's life or quality of living. All Zambian consumers therefore, should devote themselves to the protection of consumer rights and see it as part of the fight for human rights.

To this end, they need to maintain individual rights and interests by resorting to laws while also protecting the collective rights of their fellow citizens. This can be done by exposing harmful products through media. They can only do this if they are well acquainted with their rights.

Therefore, this study will make a significant contribution on consumer behavior and consumer protection.

#### **1.4 Specific Research Questions**

- i. What does protecting the Shopping Product consumer's right to redress and refund involve?
- ii. Is the shopping product consumer's right to redress and refund in Zambia as adequate as other commonwealth jurisdictions?
- iii. How can the promotion and enforcement of the right of a consumer in Zambia be realized?

#### **1.5 Research Methodology**

This research is supported by both primary and secondary information. The primary information includes statutes and judicial decisions. Text books, journal articles, newspaper articles, student's dissertations, internet sources, research at the National Assembly library, South African Embassy, Law Association of Zambia Library, and the Competition and Consumer Protection Commission Annual Reports constitute the secondary sources of information.

There were some limitations that were incurred in the course of this research. Some organisations that were supposed to assist with information pertaining to this research could not avail the information. Secondly, some of the information that was given for the purposes of this research is confidential and therefore this research could not disclose the names of the cases that the Competition and Consumer Protection Commission has dealt with.

## **1.6 Conclusion**

The liberalized economy presently enjoyed in Zambia may cause numerous unfair and anti-competitive trade practices as well as exploitation of Consumers in the private Commercial sector. The Zambian parliament has enacted the Competition and Consumer Protection act No.24 of 2010. The objective of this research therefore, is to give a comprehensive understanding of section 49 of this act which provides for the right to refund. Also, to give an understanding of what this right involves and how awareness of this right can be created. The next chapter will now look at the concept of Consumer rights and protection. It will also look at what the Shopping Product Consumer's right to redress involves.

## Chapter two

### The Concept of Consumer Rights Protection and Shopping Product Consumer's Right to

#### Redress

#### **2.0 Introduction**

This chapter aims at the following four objectives: to give an understanding of the concept of consumer rights and consumer protection. To give an understanding of a 'Shopping Product' Consumer, to explain what the right to redress involves and investigate the state of the Consumer's right to redress and its enforcement before the enactment of the Competition and Consumer Protection Act No.24 of 2010 and the state of this right after the enactment of the new Act. Then, a conclusion shall be drawn from the issues raised.

#### **2.1 The Concept of Consumer Protection**

The Molony committee under the chairmanship of Mr. J.T. Molony was appointed by the British government to report on what changes in the law were desirable for the further protection of consumers. Their report was made in 1962. The committee defined consumer protection as "an amorphous conception that cannot be defined. It consists of those instances where the law intervenes to impose safeguards in favor of purchasers and hire purchasers the effect of which is to provide satisfying treatment"<sup>1</sup>

It is thus laws intended to protect the consumer against defective and unsatisfactory goods and services frequently provided by producers and sellers of commercial goods. Defective in this

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<sup>1</sup>Gordon Borrie and A.L. Diamond, *The Consumer, Society and the law* (London: MacGibbon and Kee, 1964), 10

sense has two meanings. For instance in *Henningsen v Bloomfield Motors*,<sup>2</sup> Mr. *Henningsen* purchased a new car and gave it to his wife. As his wife was driving the car, within a week of delivery, the steering went out of control and the car hit a brick wall. She was injured and the car was a total loss. The other meaning of defect is where the product is 'safe but shoddy' though shoddiness may be severe so that the item does not work. Simply put, a defective product is unmerchantable.<sup>3</sup> The protection covers a very wide field ranging from the protection of consumers from unsafe products, fraudulent trading practices by businessmen, substantial goods and services and naturally guarding against exploitation through excessive prices. The protection thus ensures that the consumer gets what he freely bargains for and at a fair price.

The marketing of goods and services is conducted on an organized basis by trained and skilled businessmen leaving the untrained consumer in a weaker bargaining position. Some of the goods and services do not measure up to standard and some maybe unsafe to consumers. In developing countries like Zambia where the means of most consumers are limited and levels of illiteracy are high, there is need to tighten consumer protection. The recognition of interests of consumers and their protection can be said to be a somewhat recent movement as compared to other movements such as those for the promotion of human rights.

The Act provides for the existence of the Competition and Consumer Protection Commission which acts as a 'watchdog' for consumer welfare in Zambia. The Competition and Consumer Protection Tribunal is a quasi-judicial body that hears complaints against any unfair practices. It is also created by the Act.

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<sup>2</sup> [1960] 32 NJ 358

<sup>3</sup> Stephen, W. Hewitt, *Manufacturer's Liability for Defective goods* (London :BSP Professional books,1987), 7-8

## 2.2 The Concept of Consumer Rights

Basically a right is a claim on other persons that is acknowledged and reciprocated among the principals associated with that claim. However, rights must be understood by somebody in order to have legal existence.<sup>4</sup> Therefore, if no one understands their consumer rights they cannot claim them. Indeed, the understanding of these rights is a prerequisite to their legal existence. It is imperative therefore, that the consumer who is to enjoy these rights is clearly defined.

A consumer is defined in section 2 of the Act as any person who purchases or offers to purchase goods or services supplied by an enterprise in the course of business, and include a business person who uses the product or service supplied as an input to its own business, a wholesaler, a retailer and a final consumer. Therefore, the meaning of consumer in the context of this discussion is understood in the light of the Act.

Before the existence of consumer laws, the existing law was founded on the principle known as caveat emptor meaning, "Let the buyer beware". That principle may have been appropriate for transactions conducted for second hand goods. 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 executives.<sup>5</sup> The consumer needs to know his or her rights because he or she is no match for the businessmen who attempt to persuade the consumer to buy goods or services on terms and conditions suitable to the vendor.

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<sup>4</sup> The Post, 2<sup>nd</sup> August 2010.

<sup>5</sup> Brian. W. Harrvey, The Law of Consumer Protection and Fair Trading (London: Butterworth's 1978), 13-14

### 2.3 Who is a Shopping Product Consumer?

In order to understand a Shopping Product Consumer, one should first understand the different types of Consumers. There are three different types of Consumers, such as Shopping Product Consumers, Convenience Consumers and the Specialty Product Consumers. A category in which a Consumer falls has much to do with the product which he/she is buying. A Convenience Consumer buys convenience products. These are products that appeal to a very large market segment. They are generally consumed regularly and purchased frequently. Examples include most household items such as food, cleaning products, and personal care products. From the marketer's perspective the low price of convenience products means that profit per unit sold is very low. In order to make high profits marketers must sell in large volume. Consequently, marketers attempt to distribute these products in mass through as many retail outlets as possible.<sup>6</sup>

Specialty Products Consumers are a type of Consumers that buy Specialty Products. These are products that tend to carry a high price tag relative to convenience products. Consumption may occur at about the same rate as convenience products but consumers are much more selective. In fact, in many cases consumers know in advance which product they prefer and will not shop to compare products. But they may shop at retailers that provide the best value. Examples include high-end luxury automobiles, expensive champagne, and celebrity hair care experts. The target markets are generally very small and outlets selling the products are very limited to the point of being exclusive.<sup>7</sup>

Finally, Shopping Product Consumers are Consumers who purchase products on a less frequent schedule compared to Convenience products. Consumers are willing to spend more time locating

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<sup>6</sup>Kay Balbi, *Categories of Consumer Products*. <http://www.knowthis.com> visited on 10<sup>th</sup> January, 2012.

<sup>7</sup> Ibid

these products since they are relatively more expensive than convenience products and because these may possess additional psychological benefits for the purchaser, such as raising their perceived status level within their social group. Examples include many clothing products, personal services, electronic products and household furnishings. Because Consumers are purchasing less frequently and are willing to shop to locate these products, the target market is much smaller than that of convenience goods. Consequently, Marketers often are more selective when choosing distribution outlets to sell their products.<sup>8</sup> This is the category of Consumers that this paper will concern itself with.

With the advancement of technology, millions of people across the globe have opted to shop online. The same standards of consumer rights apply to online shoppers as well. The number of online shoppers in six key European markets has risen to 31.4 percent from 27.7 percent last year. This means that 59 million Europeans use the Internet regularly for shopping purposes. However, not only does the number of online shoppers grow, the volume of their purchases also increases over-proportionally. In the US, online sales are forecasted to exceed \$36 billion in 2002, and grow annually by 20.9 percent to reach \$81 billion.<sup>9</sup> Therefore, online Shoppers are regarded as a category of Consumers.

#### **2.4 What the right to Redress involves**

Redress means, to set straight or right, to make up for (compensate), to remove the cause of grievance or complaint, seeking a remedy.<sup>10</sup> Redress refers to compensation for economic harm.

The modern era is a time of ultra-modern, highly complicated and sophisticated technology,

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<sup>8</sup>Kay Balbi, *Types of Consumers*. <http://www.knowthis.com>- 20<sup>th</sup> October, 2011.

<sup>9</sup>T.I.P. Monsuwe and K. Ruyter, *What-drives- Consumers- to- shop- Online?* International Journal of Service Industry Management (G. Emerald publishing co. 2004), 107-121 <http://www.IJSl.co.za> -accessed on 25<sup>th</sup> January, 2012.

<sup>10</sup> Longman Dictionary of contemporary English, 2<sup>nd</sup> ed. (London: Longman group Ltd 1987).

trade and industry. The 21st century saw great economic change in market place. In the realm of supply of goods, globalization and the advancement of technology have a tremendous impact on the production, distribution and consumption of goods. This new phenomenon has led to a major concern on the market place as the guarantor of the best interest of consumers. The disparity in the consumers' bargaining power, resources and knowledge vis-à-vis traders in market place has led to a need for a better legal protection in the realm of supply of goods. However, achieving a fair balance between the needs of market providers and the consumers is indeed a major challenge to law makers.

The underlying principle of consumer redress is that if a consumer actually sustained any loss or damage, he should be entitled to compensation. Consumer protection laws of various countries therefore include within their ambit a very clear set of remedies to compensate economic harms suffered by their consumers because the right to redress involves that a Consumer should receive a fair settlement of just claims including compensation for misrepresentation, shoddy goods or unsatisfactory services.

To that effect, section 49(1) of the Competition and Consumer Protection Act No.24 of 2010 provides that;

A person or an enterprise shall not supply a consumer with goods that are defective, not fit for the purpose for which they are normally used or for the purpose that the Consumer indicated to the person or the enterprise.

It further provides that;

a person who, or an enterprise which, contravenes subsection (1) shall within seven days of the supply of the goods concerned, refund the Consumer the price paid for the goods, or if practicable and if the Consumer so chooses, replace the goods with goods which are free

from defect and are fit for the purpose for which they are normally used or the purpose that the Consumer indicated to the person or enterprise.<sup>11</sup>

The effect of these provisions is that the disclaimers that we see in Shops or Supermarkets stating that “once goods are bought cannot be returned or refunded” are now illegal by virtue of section 43 which prohibits disclaimers and section 49 which requires a trader to make a refund or a replacement. So whether a trader puts up such a disclaimer or not, the Consumer has a right to be refunded.

Additionally, it is important to explain guarantees and warranties and how purposeful they are to a Consumer. The necessity of a guarantee emerged as a means of protection to safeguard the right of the consumer. With the strength of the guarantee, a seller is liable to make the complete replacement of the purchased item, in case it was found to be below the prescribed standard. This is given by the seller or the manufacturer of a product to the customer and remains valid for a fixed period. The guarantee is a legal instrument irrespective of whether the customer paid for the article or not.<sup>12</sup>

Likewise, the warranty is also an instrument to safeguard the rights of a consumer. It requires payment on the part of the customer to make it legally viable as in the case of an insurance policy. With the strength of the warranty, the seller or the manufacturer is liable to face the judicial courts if the seller or the manufacturer fails to comply with the provisions of the warranty on their part. Warranty is only relevant to the repairing of articles. A guarantee is generally given by manufacturers whereas the warranty is provided by most of the retail sellers

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<sup>11</sup>The Competition and Consumer Protection Act No.24 of 2010, Subsection (3)

<sup>12</sup>Srinivasa V. Raghavan. *Difference between Guarantee and warranty*. <http://www.differencebetween.net>- visited on 21<sup>st</sup> January, 2012.

or distributors. For instance, in a case of motorcycle purchase, there is the guarantee from the manufacturer and the seller has to provide the warranty on the motorcycle.<sup>13</sup> The differences between a guarantee and a warranty can be summarized as follows:<sup>14</sup>

A guarantee is always free. A warranty attracts charges as the insurance policy. Secondly, the guarantee is a commitment to make good defects of a product or a service in a fixed period. A warranty looks after the repairing of a new article within the validity period. Thirdly, a guarantee is a legal contract without any payment. A warranty received on payment is also a legal instrument with which the seller can be brought to book. Fourthly, a guarantee is applicable irrespective of the provision of the warranty. A warranty is free to go together with a guarantee issued on the same article.

A warranty is the most purposeful to a Consumer because a Consumer pays for the product in whole or in part before he/she can acquire it. In simplest terms, a warranty is a promise of quality given by the seller or manufacturer of a product to the buyer at the time of the sale. Generally, it is believed that a warranty implies the provision of getting the article repaired if the product is defective and can be provided only by a manufacturer or service provider.<sup>15</sup>

There are two types of warranties; express and implied warranty. An implied warranty is an unwritten and unspoken promise that the product sold is in good working order and will do what it is supposed to do. For instance, a refrigerator is expected to keep food cold and a Washing Machine is expected to remove dirt from clothes. Warranties typically include replacement or repair of defective products, price refunds and sometimes include reimbursement for consequential damages. Therefore, the seller is required to remedy the problem by repairing or

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<sup>13</sup> Ibid

<sup>14</sup> S. S. V. Raghavan. The Difference between guarantee and warranty.

<sup>15</sup> The Post, 23<sup>rd</sup> January, 2012.

replacing the product.<sup>16</sup> An express warranty on the other hand is an explicit offer made voluntarily by the seller that a product will perform according to particular expectations.

## **2.5 Shopping Product Consumer's right to Redress and Refund before the enactment of the new act and Enforcement**

The law governing Competition and Consumer welfare was contained in the Competition and Fair Trading Act of 1994.<sup>17</sup> It attempted to protect the Consumer against fraudulent Trade practices and economic exploitation. It was enacted to encourage Competition, prohibit anti-competitive trade policies, regulate monopolies, protect Consumer welfare, as well as strengthen the efficiency of production and distribution of goods and services. The act established a Commission<sup>18</sup> and a Council whose functions were to monitor, control and prohibit behavior which is likely to adversely affect Competition and fair trading in Zambia.<sup>19</sup> The act further attempted to protect the Consumer's right to redress and refund by stating that,

A person shall not exclude liability for defective goods; in connection with the supply of goods and services, make any warranty limited to a particular geographic area or sales point; falsely represent that products are of a particular style, model or origin.<sup>20</sup>

This means that the previous act had also made provision for the Consumer to be refunded in the case of defective goods. However, the act did not prohibit the display of disclaimers stating that once bought, goods cannot be refunded so many traders in Zambia took advantage of this.

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<sup>16</sup> The Post.

<sup>17</sup> Cap 417

<sup>18</sup> The Competition and Fair Trading Act cap 417 of the laws of Zambia, Section 4.

<sup>19</sup> The Competition and Fair Trading Act cap 417 of the laws of Zambia, Section 6(1)

<sup>20</sup> The Competition and Fair Trading Act cap 417 of the laws of Zambia, Section 12

The implementation of cap 417 was a challenge. The enforcement powers of the Zambia Competition Commission and the penalties therein were not effective enough. The Commission did not have the teeth to bite so to speak. The act did not state what would happen if traders engaged in prohibited acts. The commission had to resort to the courts for enforcement of the law even for cases that would have otherwise be efficiently and effectively handled. Some of the provisions of the law were vague and outdated with definitions that are not exhaustive, thus leaving out key elements of competition. This had enforcement difficulties.<sup>21</sup>The act did not even state who between the Consumer and the Commission was to take a complaint to the trader and what the liabilities were, whether civil or criminal. These rights were merely persuasive and not legally enforceable in Zambia under the previous act.<sup>22</sup>

Even though the Commission seemed toothless, it had dealt with some cases of refund before the enactment of the new act. In 2007, the Commission saw the number of fast track cases that were reported and handled reduce to 97 as opposed to 112 cases handled in 2006. These fast track cases that were handled included the following three cases:<sup>23</sup>

Firstly, there was allegation of unfair trading against ABYSSINA Computer Centre. This is a case in which ABYSSINA Computer Centre sold the complainant a defective flash disc worth K590, 000. A meeting was held with the trader and the flash disc was replaced on 23<sup>rd</sup> March, 2007. Secondly, there was another allegation of unfair trading against Al Jawad Investment. This is a case in which the complainant was sold a defective Sharp television set worth K550, 000. The trader repaired the TV set after the Commission's intervention. Another case which involved

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<sup>21</sup> F. Mutati, 'National Assembly Deliberations on the Competition and Consumer Protection Bill,' BPZ/LMM, (27<sup>th</sup> July 2010) G.2

<sup>22</sup> The post, 2<sup>nd</sup> August, 2010.

<sup>23</sup> Zambia Competition Commission. Dealing with Enforcement and Compliance: Annual Report. 2007 P.55

a refund this time was a complaint made against Cosmic Motors who sold a Consumer a wrong specification of a rear-end shock absorber worth K295, 000. The Consumer was refunded after intervention from the Commission.

These cases cited above are only a tip of the ice berg when compared to the number of cases that the Commission had dealt with before the enactment of the new act. The commission publishes annual reports every year which contain, among other things, the cases they handled for that particular year. However, as stated earlier on the act had its own challenges and due to a number of developments in the area of competition law and consumer protection over the years, it became necessary for the law to be revised.

## **2.6 Shopping Product Consumer's right to redress and refund under the new act and its Enforcement**

To deter traders from escaping liability after supplying defective goods to consumers, the Competition and Consumer Protection act provides that no person shall supply defective goods to a consumer or that are not fit for the purpose for which they are normally used or for the purpose that the consumer indicated to the trader.<sup>24</sup> If someone contravenes this section, the act provides that the goods should be replaced or the consumer be refunded.<sup>25</sup> The act further provides that a person or an enterprise is required to supply a service with reasonable care and skill or within the agreed period of time and failure to do so, attracts liability to pay a fine to the commission and refund the consumer for the price paid for the goods or services or perform the service again. This was the view adopted in the case of *Donoghue v Stevenson*.<sup>26</sup> Lord Atkins

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<sup>24</sup>The Competition and Consumer Protection Act, Section 49(1)

<sup>25</sup>The Competition and Consumer Protection Act, Section 49(3)(a) and (b)

<sup>26</sup> (1932) AC 562

gave a test which is to serve as a guide in deciding whether reasonable care or a duty of care can be said to exist. He stated,

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who then in law is my neighbor? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

The Commission may actually recall a product from the market or order the enterprise to pay 10 per cent of their turnover where the product reappears on the market. Product recall simply means a request to return to the maker a batch or an entire production run of a product, usually due to the discovery of issues that put consumer safety at risk.<sup>27</sup> The rationale for product recall is concerned with forestalling injury. Goods and services offered to consumers must be such that, under normal or foreseeable conditions of use, they present no risk to the health of or safety of consumers.<sup>28</sup>

The question that arises therefore is what happens if a trader supplies goods to a Consumer that are defective but the trader refuses to refund or replace them? The Competition and Consumer Protection Commission has put up what is called a redress procedure. This is a procedure that one has to use if they have a complaint against a trader or an enterprise. There are many instances when consumer rights have been violated and because of the long procedures, consumers usually give up and their concerns or violations are not redressed. The Competition and Consumer Protection Commission has a consumer complaints desk where consumers can

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<sup>27</sup> The Post, 13<sup>th</sup> September, 2010.

<sup>28</sup> Stephen, W. Hewitt, *Manufacturer's Liability for Defective goods*. 164.

complain by giving full details of the violation such as name of the violator, date of the violation, location, time where possible, nature of the complaint and the complainant's full particulars.

There are four ways in which a consumer can lodge a complaint and these are by: physical visit to the Commissions offices, phoning or faxing the Commission, writing a letter to the Commission and emailing them or by making an electronic complaint through their website. The Commission first has to determine whether the complaint can be dealt with under the act. If the complaint involves one of the regulated sectors for example energy, telecommunication, medicines or pensions and insurance, it will normally be passed on to the relevant regulator.

Refunds by traders under the Act are available when there is concrete evidence of a breach of one of the provisions under part VII of the Act by a trader. Consumers have a right to cancel the purchase transaction or contract and demand a refund. In order to obtain a refund, the consumer should return goods within a reasonable time; not dispose of, lose or destroy the goods; not allow the goods to become unchangeable or unmerchantable through failure to take reasonable care to preserve them; not damage the goods by using them in an abnormal way; provide proof of purchase where possible, which could include a cash register receipt or a witness; and where acknowledgeable, provide details of a violation of section 49 of the act.<sup>29</sup> The aim of all these rules is to provide a fair go for both the Consumer and the trader. The act is not designed to protect Consumers only.

The commission first checks if there has been a legal contravention of section 49 if the complaint made is against a defective product. For instance in one case,<sup>30</sup> that the Commission dealt with under the new act, there was an allegation of sale of a defective television against a named retail

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<sup>29</sup> Competition and Consumer Protection Commission. *Lodging a complaint redress process: brochure.*

<sup>30</sup> Case No. CCPC/CON/029

shop in Lusaka. The complaint was that a Consumer had purchased a television set worth K600,000. He further alleged he had only used the television for an hour and it went off on its own. He returned the television and got a replacement but the replacement also stopped working. He returned it too and asked for a refund from the trader but the trader refused. He was told that the trader did not offer refunds for electrical appliances. He was told that he would be offered a refund on the condition that 16 per cent was deducted from the actual cost of the television.

The Commission usually carries out an assessment test to determine if a particular situation applies to the act and also in order to see if the facts given are having legal contravention. It uses the five step test as follows:

Firstly, whether there is a person or an enterprise. A Person or an Enterprise is interpreted as defined by the Act in section 2. In this instant case, the shop was found to be a commercial enterprise. Secondly, whether the enterprise has supplied goods is another issue to be determined by the Commission. Supply has also been defined by the Act as including, in relation to goods the supply, including resupply, by way of sale, exchange, lease, hire or hire purchase of the goods. The issuance of the receipt at this stage becomes very necessary as an indication of supply. The supply should have been made to a consumer is the third test. A consumer is also defined by the act. Then, the fourth and fifth test whether there has been a violation of the act (section 49 in this case). If so, whether there is a defect in the goods and whether the goods are not fit for the purpose for which they are normally used or for the purpose that the consumer indicated to the person or enterprise. The Commission then makes a conclusion and recommendations. For instance in the above case, the commission found that the four assessment tests were satisfied and reached at the following conclusion

It can therefore be reasonably concluded that the shop being an enterprise supplied a defective good to a Consumer contrary to section 49(1) of the Competition and Consumer Protection Act which prohibits the supply of defective or unsuitable goods or services to consumers. It is further concluded that it was only after the cases were reported to the commission that the respondent was willing to refund or replace after having initially refused.<sup>31</sup>

The Commission recommended that the respondent be given a warning to desist from denying liability for defective products and if such conduct is seen in the future, the respondent would be liable to a fine. Hence the case was closed.

## **2.7 Conclusion**

This chapter has helped us to understand that a Shopping Product Consumer is one who purchases products on a less frequent schedule compared to convenience products and are more expensive. These may include clothes, personal services or electronic products and household furnishings. The Shopping Product Consumer's right to redress involves being refunded for defective or shoddy goods supplied to the Consumer or the replacement of a defective good, as well as repair goods that are under warranty. Before the enactment of the Competition and Consumer Protection Act, the law governing Consumer welfare was the Competition and Fair Trading Act Cap 417 of the laws of Zambia. Due to its inadequacies in protecting Consumers rights and developments in the area of Competition law, it became necessary for this law to be revised. If someone has a complaint under the new Act, the Commission has put up a redress procedure that one has to use. After looking at the assessment tests to find out if the case is within the ambit of the Act and after other investigations, the Commission reaches a conclusion and makes recommendations. A person or enterprise that fails to comply with the Commissions decisions is fined 10 per cent of the annual turnover.

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<sup>31</sup> Case No. CCPC/CON/029/PG3

## Chapter Three

### Consumer's Right to Redress in Zambia Compared to South Africa

#### 3.0 Introduction

This chapter is primarily aimed at comparing consumer right to redress in Zambia to South Africa. It attempts to investigate whether South Africa has consumer protection laws and whether they provide for consumer's right to redress and refund. It further investigates the institutions that promote consumer rights in South Africa and the role that stakeholders in South Africa play in consumer rights issues. This chapter will also look at the lessons that Zambia can learn from South Africa. A conclusion shall then be drawn.

#### 3.1 Consumer Rights in South Africa

Unlike Zambia which has competition laws and consumer laws in one statute, South Africa has a Consumer Protection Act which is separate from its competition laws. It was signed in 2009. It recognizes international consumer rights and gives effect to them in law. The implementation was postponed to April 2011.<sup>1</sup>The Consumer Protection Act was intended to significantly change the manner in which goods and services are marketed to consumers, as well as the relationships, transactions and agreements between consumers and producers, suppliers, distributors, importers, retailers, service providers and intermediaries of and in relation to goods and services. The Consumer Protection Act was essentially intended to apply to every transaction for the supply, in the ordinary course of business, of goods or services to consumers in exchange for consideration. It was also intended for the promotion of any goods, services of suppliers thereof, within South Africa, as well as to the goods or services that are supplied or performed.

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<sup>1</sup>Werksmans Law firm. *Consumer law*. [http:// www.werksmans.co.za/103-](http://www.werksmans.co.za/103-) visited on 12th February, 2012.

### 3.1.0 Right to redress and refund

A consumer in South Africa has the right to redress and refund as provided for in its Consumer Protection Act. The Act has its own definition of a consumer.

A consumer or Buyer is defined as “one who buys, uses, maintains and disposes of products and/or services.” Although, many may still be familiar with the doctrine of “Let the Buyer Beware” this is no longer the case with the advent of Consumer Protection law. Consumers now have up to six months to return faulty or unsafe goods.<sup>2</sup> A consumer has a choice between the supplier repairing or replacing the goods, or refunding a consumer in full. If the product fails again within the next three months, the supplier is once again obliged to replace it or refund the consumer. This applies only to the general wear and tear of a consumer’s appliances, not gross negligence on his/her part.<sup>3</sup> The supplier may charge a small amount to repackage the product. The Consumer may return goods to the Company (the shop where he purchased the goods), and receive a full refund of any consideration paid for those goods, if the Company has delivered goods to the Consumer in terms of an agreement arising out of Direct Marketing, and the Consumer has rescinded (cancelled) that agreement by giving notice to the Company within 5 business days of the goods being delivered to the Consumer. Goods must be returned within 10 business days at the Consumer’s risk and expense.

The Company must return any payment received from the consumer within 15 business days after receiving such notice or receiving the returned goods. The consumer may return goods to the Company and receive a full refund of any consideration paid for those goods in the event that the Consumer did not have an opportunity to examine the goods before delivery, and the

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<sup>2</sup>Michalsons. *Return or Refund rights*. <http://www.hgr.co.za/index.php> (visited on 16<sup>th</sup> February, 2012).

<sup>3</sup> *ibid*

consumer has as a result rejected delivery of those goods due to the goods: not being of a type and quality reasonably contemplated in the agreement and not conforming to the sample or description or the sample and description (in the instance that both were provided) provided to the consumer; and if it was a special order, the goods do not reasonably conform to the material specifications. Goods must be returned to the Company at the Company's risk and expense within 10 business days after delivery to the consumer.<sup>4</sup>

The consumer may return goods to the Company and receive a full refund of any consideration paid for those goods in the event that it was communicated to the Company that the goods must satisfy a particular purpose. This is if the Company ordinarily offers to supply such goods; or acts in a manner consistent with being knowledgeable about the use of such goods, and the goods have been found to be unsuitable for that particular purpose. The consumer has informed the Company of the unsuitability of such goods within 10 business days after delivery of the goods to the consumer.<sup>5</sup>

The consumer Protection Act specifically identifies the consumer's rights to good-quality products, in good working order, free of any substantial defects, and fit for their purpose. Within 6 months after the delivery of any goods to a consumer, the consumer may return the goods to the Company, without penalty and at the Company's risk and expense, if the goods fail to satisfy the requirements and standards contemplated above. The Company must, at the direction of the

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<sup>4</sup>[www.jurispub.com/cart.php?m=product-detail&p=68](http://www.jurispub.com/cart.php?m=product-detail&p=68) (visited on 18<sup>th</sup> February, 2012).

<sup>5</sup>Business law voice. *Consumer Protection Act*. <http://www.johannesurgbusinesslawvoice.com>- (visited on 20<sup>th</sup> February, 2012).

consumer, either repair or replace the failed, unsafe or defective goods; or refund to the consumer the price paid by the consumer, for the goods.<sup>6</sup>

If the Company repairs any particular goods or any component of any such goods, and within 3 months after that repair, the Failure, Defect or Unsafe feature has not been remedied, or a further failure, defect or unsafe feature is discovered, the Company must: replace the goods; or refund to the consumer the price paid by the consumer for the goods.

The Consumer Protection Act consolidates the rights of consumers and attempts to promote what has been termed a fair, accessible and sustainable marketplace for consumer products and services. The Consumer Protection Act of South Africa sets national standards for consumer protection and deals with the protection of consumers from injuries or hazards caused to them as a result of purchasing defective and inferior goods. Claims for harm caused by defective goods can also be made under the law even where there is no direct contractual relationship between the manufacturer or other supplier of products and the person who uses them and suffers harm.<sup>7</sup> However, in such cases, and prior to the enactment of the consumer Protection Act, a person who suffered harm would have to prove fault on the part of the person against whom the claim was made. Suppliers may not circumvent the provisions of the Act with contract wording. For example, the Consumer Protection Act affords customers the right to inspect goods, which suppliers may not refuse through the use of wording in their contracts with customers. The Consumer Protection Act also deals with the marketing of goods. Consumers will have the right to restrict unwanted direct marketing (including promotional email and telesales).

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<sup>6</sup>Wendy Knowler. *Consumer Protection Act*. <http://www.icol.co.za/news> (visited on 20<sup>th</sup> February, 2012).

<sup>7</sup>Creamer media Reporter. *Product Liability* <http://www.polity.org.za/article> (visited on 19<sup>th</sup> February, 2012).

Additionally, if a consumer bought goods as a result of direct marketing, he/she will be entitled to cancel the sale of those goods within a specified period.

The Supreme Court of Appeal (SCA) previously refused to impose strict liability where a claim was raised against a manufacturer of a defective product, who was not the seller of the product, where there thus was no privity of contract between the manufacturer and the consumer. The SCA indicated that the principles which are applicable under the law of sale, as discussed above, could not simply be grafted onto a situation governed by the law and that, if strict liability for defective products were to be imposed, it was the legislature that must do so. This is precisely what the legislature has now done through the enactment of section 61 of the Consumer Protection Act.<sup>8</sup>

The consumer now has a number of avenues available to him or her including referring complaints to alternative dispute resolution, referring a complaint to a particular ombudsman identified in the Consumer Protection Act or referring a matter to the National Consumer Commission. The National Consumer Commission may also investigate matters relating to consumer complaints or any contravention of the Consumer Protection Act in much the same way as the Competition Commission enjoys similar powers in respect of competition matters.<sup>9</sup>

A compliance notice is issued by the National Consumer Commission and sets out a contravention or alleged contravention of the Consumer Protection Act by a supplier. The compliance notice is the first step in an investigation by the National Consumer Commission into

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<sup>8</sup>Gilfillan Bowman. *Consumer Protection Act and Product Liability*. <http://www.bowman.co.za> (Visited on 19th February, 2012).

<sup>9</sup>Creamer Media Reporter. *Product liability*.

an apparent contravention of the Consumer Protection Act. The Consumer Protection Act also provides for class actions.<sup>10</sup>

Class actions allow for economic and efficient litigation by avoiding duplication; allow a large number of claimants whose claims are based on a well defined question of fact or law to have their matters heard in one proceeding. It protects defendants from inconsistent obligations that may arise in multiple suits managed individually, and assist in settling many claims by class members spread over a large geographic area.<sup>11</sup> The Act allows not only individuals, but relevant consumer watchdogs to provide consumer complaints or reports of product failures, defects, hazards, personal injury, illness or damage to property caused wholly or partially as a result of a product failure, defect or hazard to the Commission. That in turn may trigger a peremptory product recall initiated by the Commission.<sup>12</sup>

Fines may be imposed in terms of section 112 of the Consumer Protection Act and may not exceed the greater of 10% of the supplier's annual turnover during the preceding financial year or a R1 000 000. In this regard, the Consumer Protection Act makes express provisions for vicarious liability, which allows any employer to be held liable jointly and severally with its employee for a contravention of the Consumer Protection Act. Certainly the courts are empowered by the Act to award proved damages, against a supplier for collective injury to all or a class of consumers generally. These are to be paid on any terms or conditions that the court considers just and equitable and suitable to achieve the purposes of the Act.<sup>13</sup>

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<sup>10</sup> *ibid*

<sup>11</sup> Creamer Media Reporter. *Product liability*.

<sup>12</sup> Creamer Media Reporter. *Product liability*.

<sup>13</sup> *ibid*

Those purposes include the promotion and advancement of the social and economical welfare of the consumer in South Africa by providing for an accessible, consistent, harmonized, effective and efficient system of redress for consumers. In dealing with any matter brought before the court in terms of the Act the court must develop the common law as necessary to improve the realization and enjoyment of consumer rights generally that will include South Africa's common law in respect of access to the courts and class actions. The Act provides for resolution of consumer complaints by the Commission, Tribunal, Ombudsman or Consumer Court which appear to be appropriate forum with the relevant jurisdiction and power to resolve product liability claims under the Act.<sup>14</sup>

### **3.1.1 What Role Stakeholders play in consumer rights issues**

There are a number of institutions that deal with consumer rights issues in South Africa as follows; the South African National Consumer Union (SANCU), South African Bureau of Standards, National Consumer Commission and other non-governmental organisations and non-profit organisations.

The South African National Consumer Union is a voluntary Non Governmental Organization (NGO) and Non-Profit Organization (NPO). It functions as an umbrella organization. It aims to promote consumers awareness of their rights, responsibilities and bargaining powers. It has a Motto, "Communication and Consultation before Confrontation."<sup>15</sup>

SANCU supports the investigations by the Competition Commission. For instance, it investigated Collusion found in the food sector and concluded that it was unacceptable and

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<sup>14</sup>Creamer Media Reporter. Product liability.

<sup>15</sup>South African National Consumer Union. *Chairman's Address*. <http://www.SANCU.co.za> (Visited on 5th February, 2012).

deserved heavy fines. It hoped these severe penalties would act as a deterrent in future. In this regard it is the role and responsibility of independent consumer organizations such as South African National Consumer Union (SANCU) to continue lobbying for Consumer Rights and work closely with the Department of Trade and Industry and the National Consumer Commission in drawing up the various regulations as required by the Act.<sup>16</sup>

The South African Bureau of standards (SABS) reports on Technical committee work and about new standards being written and SANCU members represent the consumers view on a variety of committees, in particular the Consumer Policy Committee of the International Standards Organization.

The National Regulator for Compulsory Specifications (NRCS) and the Legal Metrology Division gives bi-monthly reports on inspections of products, and prosecutions. The NRCS has taken strict measures against non-compliance of goods and has on occasion destroyed non-compliant products, for example, dangerous paraffin stoves. It has done inspections and monitoring of shops to ensure that the mass of a loaf of Bread is correct. They have occasionally found that the deficiencies were up to 5-9%. The NRCS, by way of extensive inspections ensure that retailers comply with compulsory specifications. SANCU is fortunate that the Executive Committee has been strengthened by the active participation of persons who have retired from active employment and are now making a contribution to the Consumer Cause on a voluntary basis. They were co-opted to various portfolios. SANCU was invited to participate on a TV programme dealing with the counterfeit R200.00 notes and was part of a panel, which consisted of the Reserve Bank and the Ombudsman for Banking Services. This is important because Consumer journalists are the lifeblood of consumerism. SANCU does not handle complaints per

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<sup>16</sup> Ibid

se as its main task is to guide consumers as to the correct process and place to complain be it the Provincial Consumer Affairs Offices or Ombudsman.<sup>17</sup>

Of the complaints that are handled by the office directly, SANCU has a 99% success rate in favour of the consumer. 3 640 complaints were received from Sept 2009 to August 2010. The top five for this period were:

During the past year SANCU worked closely with certain Cell phone providers and consumer's complaints were resolved in time and to the benefit of the consumer. There were a few success stories such as faulty new vehicles being replaced. Vehicle repairs which were under warranty were also repaired by various garages after an intervention by SANCU. SANCU sends out various items of consumer interest/alerts to consumers.<sup>18</sup> The topics are on a wide range of interesting consumer rights issues.<sup>19</sup> The Commission may co-operate with, facilitate and otherwise support consumer protection groups who provide consumer advice and education activities, consumer-related publications, promotion of consumer rights and advocacy of consumer's interests and represent consumers, either specifically or generally in court.

Accredited consumer protection groups act to protect the interests of the consumer individually or consumers collectively in any matter in any forum contemplated by the Act or intervene in any such forum as well. In dealing with any matter brought before the court in terms of the Act the court must develop the common law as necessary to improve the realization and enjoyment

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<sup>17</sup>South African National Consumer Union. *Chairman's Address*.

<sup>18</sup>South African National Consumer Union. *Chairman's Address*.

<sup>19</sup>South African National Consumer Union. *Chairman's Address*.

of consumer rights generally, that will include South Africa's common law in respect of access to the courts and class actions.<sup>20</sup>

### **3.2. Lessons for Zambia**

For consumer rights to be effectively enforced there is need for all key stakeholders in competition enforcement to also effectively play their part. This seems to have been largely wanting in the repealed Competition and Fair Trading Act Cap 417. Knowledge about the role that these players can play in Zambia seems not to have been disseminated as it should have been. Hence, enforcement has proved to be a challenge.

Additionally, consumers are ignorant of their rights; hence being subjected to continuous abuse. This knowledge gap has cultured a situation where a number of violations go unnoticed and unearthed. This has made the adequacy of the regulatory and enforcement process difficult.<sup>21</sup> If this goes on, it is likely that the objectives of the new law might not yield the intended results owing to this non-inclusive approach, a fate suffered by the previous Act.

There are a number of lessons that Zambia can learn from the South African consumer protection laws. The very fact that South Africa has separated its competition laws from its consumer laws is a lesson that Zambia can learn from. The separation of specific areas of law has the advantage of defining adequately what that area of law should contain. If competition laws and consumer laws are put into one statute, there is a high possibility that the legislature may give more attention to one than the other. If consumer laws are put into one statute, it can cover the rights of a consumer adequately in order that there may be no loop holes. Additionally, separating the two

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<sup>20</sup>Wendy Knowler. *Consumer Protection Act*.

<sup>21</sup>Simon Ngo'na. *State of Consumer Protection in Zambia*. <http://www.consumerdiaries.wordpress.com/consumer> – accessed on 10<sup>th</sup> October, 2010.

laws can avoid the possibility of one institution dealing with both competition and consumer issues. If one institution deals with competition issues and consumer issues, the balance may tilt either to competition issues or consumer issues so there may not be a balance between the two.

Secondly, as stated earlier on, South Africa has a system where people who retire from active employment may join the South African National Consumer Union as volunteers if they wish. This is advantageous because an institution dealing with consumer issues may have all the work force that is needed. As a result creating consumer awareness and enforcing consumer rights would not be much of a problem because of the readily available staff.

Fourthly, South Africa has provincial technical committees that deal with consumer rights issues at provincial level. This enables people who are in the rural areas to benefit from this decentralized system as opposed to having a centralized system.

### **3.3. Conclusion**

In view of the foregoing, this chapter has seen that South Africa has a Consumer Protection Act which is separate from its competition law. This Act provides for the South African consumer's right to redress and refund. This chapter has also found out that the main institution dealing with consumer rights issues in South Africa is South African National Consumer Union which promotes consumer rights and facilitates consumer awareness in South Africa as well as makes consumer alerts to the public. Zambia's lessons are to provide a mechanism through which retirees can volunteer to work for institutions that promote human rights, provide for class actions and develop provincial technical committees in each province to deal with consumer rights issues at provincial level. The next chapter will look at the role of stakeholders in promoting and creating consumer rights awareness in Zambia.

## Chapter Four

### The Role of Stakeholders in Promoting, Protecting, Enforcing and Creating Awareness of

#### Consumer Rights in Zambia

#### 4.0 Introduction

This chapter aspires to discuss the role of stakeholders in promoting, protecting, enforcing and creating consumer rights awareness in Zambia. It attempts to investigate what the key stakeholders are, their expected roles and the conditions that should be precedent in order for them to discharge their roles. This chapter will look at the role of stakeholders both at policy level and practical level. A conclusion shall then be drawn.

#### 4.1 The Key Stakeholders

These are entities that are affected by operations of a system. Stakeholders need to understand and adequately perform their specific roles and each stakeholder needs training to effectively perform his role. Therefore, programmes of awareness on competition and consumer issues and their benefits are critical for their successful engagement. Stakeholders need to complement each other, rather than step on each other's toes. However, resources may not be enough, hence the need to call upon the development partners.<sup>1</sup> Consequently, advocacy is a means in establishing a cadre of advocates for competition and consumer related issues. This implies that the role of stakeholders is significant both at policy and practical level.

Policies are generally made at cabinet level and endorsed by parliament. It is the responsibility of these wings to lay out favorable policy and legal frameworks and to release resources for

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<sup>1</sup> CUTS International, *Role of Stakeholders in Effective Implementation of the Competition and Consumer Protection Act, Zambia*. (Lusaka: CUTS International India, 2011), 21.

functioning of institutions for their effective implementation, monitoring and accountability. However, for all these to happen, the parliamentarians, the cabinet and other government stakeholders need to appreciate the benefits of competition and consumer protection reforms.<sup>2</sup>

The appreciation of the tenets of these reforms should be extended to competition and consumer agencies, mandated to implement these laws and policies and other stakeholders who should also carry out activities aimed at promoting competition culture and awareness and also undertake competition advocacy. Therefore, the following stakeholders have a vital role to occupy in the promotion, enforcement, protection and awareness creation processes; policy makers, competition agency, consumer protection authority, civil society, academia, sector regulators, the media, business associations, the legal fraternity and judiciary.

#### **4.1.1 Competition and Consumer Protection Authority**

The competition agency is the institution established by the competition law to charge with enforcement. This is a decisive factor in the establishment of a competition culture. The competition agency is expected to facilitate the effective enforcement of competition law.<sup>3</sup> Competition law has a correlation to consumer rights. Consumers have a right to choose. They can only be able to choose if there a number of things to choose from. For a consumer to be able to choose from a number of products there must be competition on the market. Inevitably, there must be communication with consumers and other stakeholders. There must be activities that are aimed at promoting competition culture and awareness. The competition agency should also undertake competition advocacy. The competition and consumer protection Act in this regard empowers the competition and consumer protection commission to carry out investigations

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<sup>2</sup> Ibid

<sup>3</sup> Cornelius Dube. *Capacity Building Workshop for Stakeholders for the effective Implementation of Competition and Consumer Act, 2010*. Lusaka, Golden Bridge Hotel, 7<sup>th</sup> March, 2011. Lusaka, Zambia.

either on its own initiative or based on a complaint. The law also allows the setting up of a Tribunal which should hear applications for review of determinations of the commission granting or revoking authorization.<sup>4</sup> How then does the competition agency go about fulfilling its responsibility?

There are conditions that should be precedent in order for this agency to please its role. There should be subject knowledge and skills. It should have the skill and knowledge to deal with issues of competition. There should be enough financial and human resources. The staff should be skilled and trained adequately to deal with such matters. This agency should have functional autonomy. There should be no political interference whatsoever. At the same time, the competition agency should have a good interface with complementary institutions. There should be no competition between these institutions.<sup>5</sup>

The consumer protection authority has legal backing for consumer interest. The consumer authority is expected to have a number of roles to play. It should facilitate effective enforcement of consumer law. It should ensure that there is strict compliance with consumer and competition laws. For instance, the Commission together with public health inspectors and the ministry of health personnel took time to inspect shops in each town of the Central, Muchinga and Northern Provinces of Zambia. They removed a lot of products from the shelves of unscrupulous traders. Most of the traders did not dispute that they were selling substandard products that were not durable.<sup>6</sup> The practice of denying liability was found to be rampant by the commission in these provinces. Most consumers complained of electrical products being defective and each time they

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<sup>4</sup> The Competition and Consumer Protection Act of 2010, sections 55 and 67

<sup>5</sup> Cornelius Dube. *Capacity Building Workshop for Stakeholders for the effective Implementation of Competition and Consumer Act, 2010*. Lusaka, Golden Bridge Hotel, 7<sup>th</sup> March, 2011. Lusaka, Zambia.

<sup>6</sup> The Post, Monday 16<sup>th</sup> January 2012.

would try to seek recourse from the traders, they would be told that it's the manufacturers fault.<sup>7</sup> Effective enforcement includes having a redress procedure in case of a consumer's grievance. It should establish linkages with other consumer movements like CUTS International and Zambia Consumers Association (ZACA). It should be in the forefront of promoting general awareness of consumer issues. It should create partnership with the relevant ministries.

However, in order for this role to be fulfilled, there must be knowledge of the subject by the consumer authority staff. This means that they should be well trained to deal with consumer issues both before a complaint is made and after it has been made. This includes having sufficient human and financial resources. Therefore government should include consumer protection authorities in the nation's yearly budget. The consumer authority should have functional autonomy. There should be no political interference and there should be good interface with complementary institutions.

The consumer authority requires the capacity to engage in campaigns of awareness through pamphlets, the publication of newsletters, occasional papers, and radio and television discussions targeting the population as a whole. The commission has since its inception produced seven different pamphlets and several posters as a means of public awareness. The commission has considerably high media profile and is frequently quoted in the national press, particularly radio and newspapers. CUTS International which is a consumer unit and trust society has assisted in producing pamphlets and posters popularizing competition regulation in Zambia.<sup>8</sup>

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<sup>7</sup> Ibid

<sup>8</sup> CUTS International, *Enforcing Competition Law in Zambia*. Zambia Consumers Association, Africa Resource Centre, 2002, 37.

However, the situation in Zambia shows otherwise. On 22<sup>nd</sup> November 2011 the National Reference Group held a meeting. The objectives of forming this group are to deliberate on the inputs of countries and to create a base for launching advocacy for a healthy competition culture. It comprises the following organisations and persons; consumer organisations and other civil society with a demonstrated interest in economic issues, experts and interested persons from academia and the media, business and chambers of commerce, competition and regulatory authorities, trade union leaders and politicians. Towards the end of this meeting the researcher presented a summary analysis of responses of the stakeholder questionnaire on awareness of competition concerns in the economy. The following was revealed:

The majority of the respondents (66 percent) were aware of the existence of competition law. However, of those who said they were aware, less than a quarter (22 percent) thought that the law was adequate. It can therefore be said that most people think that the law on competition is inadequate. The majority did not know that there was consumer protection law in Zambia. It seems evident therefore that the Competition and Consumer Protection Commission should mount or intensify awareness raising activities regarding the provisions of the law on consumer protection so that everyone concerned should know about it. This shows that civil society has done little to inform citizens about their consumer rights.<sup>9</sup> Therefore, the Commission should carry out more awareness activities. It should also use alternative and varied ways of publicizing their activities to improve public awareness.

Secondly, the Commission receives insufficient budgetary allocation from the government of Zambia. In fact, grants received from 1998 to 1999 declined in absolute terms while its

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<sup>9</sup> CUTS International, *Enforcing Competition Law in Zambia*. Zambia Consumers Association, Africa Resource Centre, 2002, 42.

expenditure keeps increasing. This lack of funding has led to the under staffing of the Commission.<sup>10</sup> Over the last three years there has been improvement in terms of the staff turnover at the Commission but there is still a weakness in that the Commission is still not able to offer competitive conditions of service to its officers. For example between April 2011 and June 2011 the Commission lost 19 percent of its professional staff.<sup>11</sup>

Thirdly, the Commission has inappropriate office premises to house the Commission and provide a poor corporate image. It has low national coverage. The Commission only has presence in Lusaka and Kitwe. This has caused many challenges in addressing consumer cases.

#### **4.1.2 Policy Makers**

Policies are generally made at policy level and endorsed by parliament. Policy makers include government officials (ministers) who make policies together with members of parliament. Policy makers are expected to lay out conducive policies and legal frameworks. In order for these policies to be conducive, there should be consultation from the experts in the field of competition and consumer laws. Government should release resources for the functioning of institutions that deal with consumer issues. It should also monitor the accountability of these institutions.<sup>12</sup> In order to achieve the foregoing, there first should be appreciation of benefits that come from

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<sup>10</sup> Ibid

<sup>11</sup> Competition and Consumer Protection Commission. *Strategic Plan: Promoting a Competitive Culture for Sustained Economic Growth and Wealth Creation* (Lusaka : 2011), 15-16

<sup>12</sup> Cornelius Dube. *Capacity Building Workshop for Stakeholders for the effective Implementation of Competition and Consumer Act, 2010*. Lusaka, Golden Bridge Hotel, 7<sup>th</sup> March, 2011. Lusaka, Zambia.

competition and consumer reforms. Policy makers should have the capacity to implement these policies.<sup>13</sup>

#### **4.1.3 Civil Society and Consumer Organisations**

The simplest way to see civil society is as a “third sector” distinct from government and business. It essentially refers to intermediary institutions such as professional associations, Labour unions and religious groups.<sup>14</sup> This refers to voluntary social organisations and institutions that advocate for rights of consumers. These include CUTS international, Zambia Consumers Association and Consumer Alliance of Zambia, to mention but a few. These organisations are expected to act as watchdogs for competition and consumer authorities and consumers. They should help the consumer authority to generate awareness on competition and consumer issues. They should mobilize the consumer’s voice on the need for protection of consumer rights and advocate as well as put pressure on the reformation of competition and consumer protection. What then is the surroundings precedent in order to achieve this?

In order for civil society and consumer organisations to satisfy their role, there should be understanding of competition and consumer issues. They should put in place structures and capacity for interaction with various stakeholders and should be alert to consumer issues. There should also be support from development partners. Civil society should work hand in hand with sector regulators.

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<sup>13</sup> CUTS International, *Role of Stakeholders in Effective Implementation of the Competition and Consumer Protection Act, Zambia*. (Lusaka: CUTS International India, 2011), 21-29

<sup>14</sup> The World Bank, *Defining Civil Society*. [Http://www.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/O,contentMDK](http://www.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/O,contentMDK). Accessed 4<sup>th</sup> April, 2012.

#### **4.1.4 Sector Regulators**

These are regulatory authorities established by other specific legislation. All sector specific regulatory bodies deal with technical aspects of the industry. These would include Zambia Information and Communication Technology Authority (ZICTA) which provides for the regulation and licensing of broadcasting and communication activities. Energy Regulation Board (ERB), which regulates energy supplies and consumption. It stipulates conditions for electricity generation, transmission, distribution of commercial energy such as petroleum products and coal as well as the establishment of solar energy utilities.<sup>15</sup>

These are expected to promote competition in their respective sectors, make decisions that have a bearing on competition and protect consumer interest in their sectors. Before that can be done, they must have sufficient resources to carry out these tasks. There should be a good legal framework to regulate their powers and functions. There is need to harmonize the regulation of technical and market behavior economic agents between sector regulators and the competition authority. They should also have a good interface with the competition and consumer authority. They should communicate with the media. A question could be posed as to the role that the media should play when it comes to consumer issues.<sup>16</sup>

#### **4.1.5 The Media**

These are all avenues of communication with the general public either through print or electronic. The expected role of the media is to promote greater public awareness of issues

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<sup>15</sup> CUTS International, *Enforcing Competition Law in Zambia*. Zambia Consumers Association, Africa Resource Centre, 29

<sup>16</sup> Cornelius Dube, Capacity Building Workshop for Stakeholders for the effective Implementation of Competition and Consumer Act, 2010. Lusaka, Golden Bridge Hotel, 7<sup>th</sup> March, 2011. Lusaka, Zambia.

related to the consumer as well as awareness on institutions and encourage a good legal framework. Since the topic of consumer rights is new in Zambia, the media is an important avenue of consumer rights awareness. It can do this through giving hints on possible anti-competitive areas and consumer violation and give constructive criticisms on the shape the consumer rights issues should take.<sup>17</sup> Therefore, there should be availability of trained reporters so that they can be well acquainted with consumer issues. This is important because the lifeblood of consumer issues lies in the media. As a result, the media plays an important role in consumerism. The media plays a pivotal role in educating, unearthing, exposing and informing a diverse audience on competition and consumer protection issues and it is a greater partner in any capacity building or any advocacy mission.<sup>18</sup> There should be willing contributors in terms of authoring articles and reports as well as press releases.

#### **4.1.6 Academia**

This comprises universities, colleges and other research institutions. The role of the academia is to promote and facilitate policy research on competition and consumer policy issues. In order to improve human resource, there should be training courses on competition and consumer issues. There should be capacity building programmes for officials. However, for this to happen, there should be acceptance of competition and consumer issues into university curricular. Researchers should have knowledge of competition and consumer issues. Such a role cannot be well executed

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<sup>17</sup> Ibid

<sup>18</sup> CUTS International, *Role of Stakeholders in Effective Implementation of the Competition and Consumer Protection Act, Zambia*. (Lusaka: CUTS International India, 2011), 21-29

if those in academics have not yet incorporated competition and consumer issues into their curricular.<sup>19</sup>

#### 4.1.7 Business

This mainly comprises the entities that are regulated by competition and consumer issues. These too have a role to play. Business persons are expected to compete fairly and avoid consumer violations. They should put to mind Mahatma Gandhi's words when he said; "a customer is the most important visitor on our premises; he is not dependent on us. We depend on him. He is not an interruption to our work. He is the purpose of it. He is not an outsider in our business. He is part of it. We are not doing him a favour by serving him. He is doing us a favour by giving us an opportunity to do so." It is unfortunate that companies mind profits more than consumers.<sup>20</sup> Business persons should be the source of information for competition and consumer authorities. Business associations should help each other promote their understanding on competition among members. They should not be agents of anti-competitive behavior. Therefore, there should be competitive neutrality as well as acceptance of competition reforms especially by big businesses. Businesses should have strict compliance policies. Business persons should put to mind corporate social responsibility. Corporate social responsibility is about how Companies manage business processes to produce an overall positive impact on society. Companies need to answer two aspects of their operations. Firstly, they need to answer the quality of their management both in terms of people and processes. Secondly, they must answer the nature of, and quantity of their impact on society in various areas.<sup>21</sup> Therefore, corporate social responsibility is the continuing

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<sup>19</sup> Cornelius Dube

<sup>20</sup> Cha cha, is this a true Mahatma Gandhi quote? <http://www.answers.yahoo.com/question/index> Accessed on 4<sup>th</sup> April, 2012.

<sup>21</sup> Mallan Baker. *Corporate Social Responsibility*. <http://www.mallanbaker.com/csr-> accessed on 2nd April, 2012.

commitment by businesses to behave ethically and contribute to economic development while improving the quality of the work force and their families as well as of the local community and society at large. They also need help from the legal fraternity.

#### **4.1.8 The Legal Fraternity**

These comprise mainly legal practitioners and the judiciary. Legal practitioners for business and competition agencies also carry a heavy yoke. They are expected to educate clients on compliance mechanisms; help the judiciary establish case law. They should ensure careful enforcement of laws by guarding against carelessness. They should help identify loopholes in the administration system so that protection of consumer rights is enhanced. Therefore, there should be proper understanding of the provisions of the law and its overall goal. There should be training programmes for lawyers. It is also important to have a quick justice delivery system. This is where the judiciary now comes in.<sup>22</sup>

The judiciary is seen as an end. Consequently, the efficiency of the system is very important. The expected roles of the judiciary would be to ensure that there is efficient disposal of related cases or trials in order to establish case law. Therefore, there should be knowledge on the subject of consumerism. The judiciary should provide an advantageous platform that is different from that of deciding common criminal cases.

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<sup>22</sup> CUTS International, *Role of Stakeholders in Effective Implementation of the Competition and Consumer Protection Act, Zambia*. (Lusaka: CUTS International India, 2011), 21-29

## **4.2 Conclusion**

In view of the foregoing, stakeholders need to understand and adequately perform their specific roles. Various stakeholders need to complement each other and not step on each other's toes. Each stakeholder needs training to effectively perform its role and advocacy is key in establishing a cadre of advocates through training programmes. Programmes on awareness of competition and consumer issues and their benefits are critical for success. Resources constraints may be a major challenge for various stakeholders hence the need to partner with development partners. The next chapter will focus on the recommendations and final conclusion.

## Chapter Five

### Recommendations and Conclusion

#### 5.0 Introduction

This chapter serves to provide recommendations and a conclusion on the issue of ‘Shopping Product Consumers’ right to redress in Zambia. The recommendations shall focus on any proposals that may improve awareness of consumer rights and consumer’s right to redress as tools for consumer protection. Following this, a general conclusion shall be reached.

#### 5.1 Recommendations

**i) Strengthening consumer awareness:** One of the most vital aspects of implementing a consumer protection regime is the awareness of consumers about their rights. Without such awareness, the implementation of consumer protection provisions under the Competition and Consumer Protection Act may face various obstacles as the burden of investigating unfair trade practices and consumer rights violation shall fall on the commission. The commission should therefore engage in activities that improve awareness on competition issues and the rights that consumers hold under such issues. Activities of awareness will empower consumers with knowledge on what their rights are and how the implementation of these rights operates. This will relieve the commission of some of its duty to initiate investigations which demand resources as some of these investigations shall result from complaints of consumers that are well informed.

**ii) Sufficient Resource Funding:** The Competition and Consumer Protection Commission should be well funded both financially and in terms of human resource. It should improve its financial base. Dependency on government funds leaves this office open to government interference

through funding. Instead of making internal improvements, which in the short run will depend on government willingness to support the commission, one way to raise resources is through alliances and collaboration with independent institutions. Additionally, lack of sufficient funding has led to understaffing. As consumers become more aware of their rights the need for increased personnel will become more and more evident. It should have facilities that are fairly adequate. The commission should have a library and documentation centre. It should have adequate communication facilities. Notwithstanding its responsibility for various competition promotional activities, the commission could also encourage the participation of academic and independent institutions in engaging in research and advocacy activities related to competition issues.

**iii) Improving Relations between Consumer Protection Bodies:** the commission should work hand in hand with institutions such as the *Zambian Bureau of Standards* to make sure that the interests of consumer are wholly covered under the relevant bodies. Without such co-ordination, the risk of not adequately covering all aspects of consumer protection suffices as well as the possibility of an overlap of functions of such bodies. To achieve such co-ordination, ventures such as conferences and seminars involving the relevant consumer protection bodies should be instituted.

**iv) Separation of Competition and consumer laws:** It is important to acknowledge that there are several areas in which competition and consumer protection policies and laws may interact. However, the rationale behind having separate policies and laws is that market failures or anticompetitive conditions may, under some circumstances, not only be issues for the enforcement of competition law but could also harm consumer's rights, for which protection might best be under the consumer protection policy. Due to lack of perfect complementarities between the two laws and the importance that each law has in the economy, one law to cater for

both issues might entail omissions of other key provisions in making a condensed law. Both competition and consumer protection laws have big dimensions; simplifying them to make them fit in one law is not an easy task. An example of a country that has separated competition laws from consumer laws is the South African Consumer Protection Act.

v) **Decentralization:** this is the transfer of power or authority to local government. The offices of the Competition and Consumer Protection Commission are only situated in Lusaka and the Copperbelt. This means that if anyone has a complaint to make in Mpulungu which is one of the furthest points in Zambia, he can only go to Lusaka or the Copperbelt. This usually prevents consumers from reporting unfair trade practices because of the expense one would have to incur just to make a complaint. Therefore, the local authority should be trained in this regard for them to be able to handle consumer rights issues. It also would be of help to the commission if provision could be made to report consumer rights violations to the police in order to relieve part of the burden that the commission has.

vi) **Widen the Definition of Consumer:** the definition of consumer in the Act is limited. It should be wide enough to include not only direct consumers but also other beneficiaries. Any other buyer is also considered as a consumer. A good example of an Act that has recognised a consumer in this sense is the Indian Consumer Protection Act of 1984. Secondly, part VII of the Act concerns consumer protection but lacks any mechanism for grievance redressal. How a consumer can file his/her complaint should be clearly outlined, where this could be done (jurisdiction) and the manner or procedure of filing a complaint as well as the procedure for disposing complaints. The role of stakeholders and other consumer organisations should be highlighted in the redressal process.

### **vii) Toll free line**

To enhance communication between the Competition and Consumer Protection Commission and consumers, as well as encourage reporting of consumer rights violations, provisions should be made for a toll free line which consumers can use to make complaints. This would especially be useful for persons that stay in places where the commission has no offices.

**viii) Education:** this is an important tool for creating consumer rights awareness. It should be noted that promotion of consumer welfare is the common goal of consumer protection and competition policy. At the root of both consumer protection and competition policy is the recognition of an unequal relationship between consumers and producers that often exists. Protection of consumers is accomplished by setting minimum quality specifications and safety standards for both goods and services and establishing mechanisms to redress their grievances. Therefore, consumers should not only be educated about their rights but also the quality that the products they buy should have.

It is imperative therefore that these issues are taken into account if consumer protection is to be enhanced in Zambia. Once these issues are addressed, the Competition and Consumer Protection Commission will have the muscle to protect consumers and legitimate businesses.

## **5.2 General Conclusion**

The previous chapters have considered the state of a 'shopping product consumers' right to redress in Zambia. It is clear that the repealed Competition and Fair Trading Act cap 417 of the laws of Zambia did not have provisions relating to a consumer's right to redress apart from section 12 which denied traders exclusion from liability. It did not have adequate provisions to

effectively protect consumer's right to redress in Zambia and the commission was not given the 'teeth to bite' by the Act.

However, the new Competition and Consumer Protection Act in part VII provides for rights that a consumer in Zambia can enjoy. Section 49 now provides that a consumer that is supplied with a defective product may have the product replaced or may be refunded the money paid for the product. This means that the consumer's grievance can be redressed through this provision. If a trader fails to comply with this requirement, a consumer can make a complaint to the consumer protection commission. The commission has set up a redress procedure that one has to follow if a complaint is to be made. The commission in its redress procedure carries out some assessment tests to ensure that the complaint made is within the ambit of the Act. Section 48 further prohibits traders from excluding themselves from liability by putting up disclaimers that deny any right that a consumer has under the Competition and Consumer Protection Act.

The previous chapters have also looked at consumer rights in South Africa and the lesson that Zambia can learn from the state of consumer rights in South Africa. Further this document has also discussed the role of stakeholders in promoting, enforcing, protecting and creating consumer rights awareness in Zambia.

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