



UNIVERSITY OF LUSAKA

SCHOOL OF LAW

**THE LEGAL AND REGULATORY FRAMEWORK ON ICT VIS-A-VIS CONSUMER
PROTECTION IN ZAMBIA: LESSONS FROM BOTSWANA, SOUTH AFRICA AND
THE UNITED KINGDOM**

BY:

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**An obligatory essay submitted to the University of Lusaka (UNILUS) in partial
fulfilment of the requirements for the award of the Bachelor of Laws (LLB)
Degree**

2023

DECLARATION

I, BWALYA CHEWE, do hereby declare that this dissertation titled “**THE LEGAL AND REGULATORY FRAMEWORK ON ICT VIS-A-VIS CONSUMER PROTECTION IN ZAMBIA: LESSONS FROM BOTSWANA, SOUTH AFRICA AND THE UNITED KINGDOM**”, which is hereby submitted to the School of Law at the University of Lusaka as part of the requirements for the award of the Bachelor of Laws (LLB) degree, is my original work and has not previously been submitted for the award of a degree at this or any other institution.

The sources that have been used or quoted have been indicated and duly acknowledged as complete reference.

Supervisor: MR THOMAS MALAMA

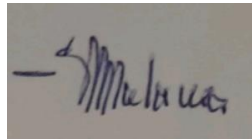
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SUPERVISOR'S RECOMMENDATION

I Thomas Malama recommend that this dissertation prepared under my supervision by Bwalya Chewa [LLB20119023] entitled THE LEGAL AND REGULATORY FRAMEWORK ON ICT VIS-A-VIS CONSUMER PROTECTION IN ZAMBIA: LESSONS FROM BOTSWANA, SOUTH AFRICA AND THE UNITED KINGDOM, be accepted for examination. I have checked it carefully and I'm satisfied that it fulfils the requirement pertaining to the format laid down in the regulations governing directed research.

Mr Thomas Katuma Malama

A rectangular box containing a handwritten signature in blue ink. The signature appears to be 'T. Malama' with a horizontal line to the left of the first letter.

.....
2023

DEDICATION

This dissertation is dedicated firstly to God Almighty Jehovah, for his mercy and strength. It is further dedicated to my mother, for her unwavering support.

ACKNOWLEDGEMENTS

First and foremost, I am incredibly grateful to God for being with me throughout this journey. Without Him, this journey would certainly have been impossible.

I also express my sincerest gratitude to my supervisor, Mr. Thomas Malama, for the guidance and supervision he rendered to me throughout this study. I am grateful for his time, patience, and effort in carefully reviewing each submitted chapter. His profound expertise and wisdom were essential throughout the writing of this thesis. It was a privilege to be supervised by him.

I am grateful to the course lecturer, Dr. K. Lumbwe, for his tireless efforts in lecturing and guiding us during the L400A and L400B courses. I also thank the Undergraduate Research coordinator, Ms. Ntemena Mwanamwamba, for her timely reminders, disbursement of information and overall coordination, which made the daunting L400A and L400B courses bearable.

I am grateful to my Mother for all her support, love and encouragement. I also thank the rest of my family members for the support they rendered throughout this period, especially regarding accommodation and transportation, particularly my Brother as well as my aunt and uncle, Grace and Andrew Kapula. I also acknowledge my friends and the various members of my class for their emotional and academic support. I especially thank Farai Mudadi for his love and support, Murray Mulala and Kainda Kachungu for their consistent academic assistance, and David Kalengesa for efficiently performing his role as class representative.

Finally, I would like to thank the University of Lusaka's members of staff. In particular, the lecturers, the cleaning staff, the maintenance staff, the security staff, and the administrative staff, for ensuring we had a conducive, clean, safe, secure, and sustainable learning environment. I am especially grateful to every lecturer that has lectured me. They not only imparted in me the requisite knowledge, but also gave me a practical understanding of various aspects of the law and allowed me to consult them on many matters on which I needed clarity.

I am grateful for all who are mentioned above, as well as the many others who aided and supported my academic journey. If I had the liberty of naming all of them, I am afraid this document would exceed a hundred pages.

ABBREVIATIONS

BOCRA: Botswana Communications Regulatory Authority.

CRA: Communications Regulatory Authority Act.

EC: Electronic Communications.

ECA: Electronic Communications Act.

ICASA: Independent Communications Authority of South Africa.

ICT: Information and Communications Technology.

ICT Act: Information and Communications Technology Act.

OFCOM: Office of Communications.

TRS: Telecommunications Relay Service.

ZICTA: Zambia Information and Communications Technology Authority.

LIST OF STATUTES

Consumer Protection Act No. 68 of 2008

The Communications Act Chapter 21 2003

The Communications Regulatory Act No. 19 2012

The Consumer Protection Act No. 5 of 2018

The Electronic Communications Act No. 28743 of 2005

The Information and Communication Technologies Act No. 15 of 2009

The Independent Communications Authority of South Africa No. 13 of 2000

The Public Finance Management Act No. 1 of 2018

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ABSTRACT

Information Communication and Technology (ICT) comprises a wide range of products such as Laptops, mobile phones, and ICT services such as telephone calling and internet services. ICT services have an important place in our day-to-day lives. It is for this reason that many companies and individuals are in the business of providing ICT services and products.

This study examined the legal and regulatory framework that protects Zambian consumers of ICTs. In order to accomplish this, the study outlined the meaning of ICT consumer protection with respect to the Zambian jurisdiction, which is the protection of consumers of electronic communication products and services. Zambia's legal and regulatory framework on ICT Consumer Protection was then examined. Through the utilisation of research articles, newspaper articles and interviews, the study brought out some of the challenges facing Zambian consumers and revealed the deficiencies in the legal and regulatory framework that are responsible for the said challenges. Thereafter, the legal and regulatory frameworks on ICT Consumer Protection in Botswana, the United Kingdom and South Africa were examined in order to draw lessons that could be applied to the Zambian legal and regulatory framework.

Literature by scholars well versed on the subject were used to write this dissertation. Interviews were also utilised. The research found that Zambia's legal and regulatory framework on ICT consumer protection has many deficiencies. Recommendations to deal with these deficiencies have been derived from an analysis of the legal and regulatory frameworks on ICT Consumer Protection belonging to Botswana, the United Kingdom, and South Africa, of which the latter two were found to be the most comprehensive.

CHAPTER ONE

1.0 INTRODUCTION

Information Communications Technology (ICT) can be defined as technology that uses diverse technological tools and resources to transmit, create, store, share or exchange information (UNESCO).¹ According to the Information Communication Technologies Act (ICT Act), this may be done through the utilisation of hardware, software, networks, and media.² Some examples of ICTs are Short Messaging Services (SMS), Application Programming Interfaces (API), computers, the internet, mobile devices, software applications, social media platforms, and other digital tools and services that are used to create, process, store, and share information.

ICT services are essential features of everyday life. They are used for entertainment, trade, business, and communication purposes. Telecommunication services enable people around the world to carry out synchronous communications despite being thousands of miles away from one another. We can call the police, medics, and other emergency services when we need help. At times, the difference between life and death is a phone call. ICT has also made it easier for individuals to carry out commercial activities through online transactions. It also facilitates various forms of entertainment, such as online video and audio streaming. ICTs have become such an intrinsic part of our lives that doing away with them would cause havoc and turmoil.

Due to the necessity of ICT, many individuals and corporations have ventured into the provision of ICT services. However, because ICT services are in such high demand and are paramount for the performance of day-to-day activities, there is a persistent danger of such ICT service providers compromising service standards in order to maximise profits at the expense of the consumer. Therefore, the ICT Act gives the Zambia Information and Communications Technology Authority (ZICTA) the mandate to protect consumers of ICT services from sub-standard and harmful services that service providers may offer. ZICTA does this by invoking provisions of principal legislation, regulations, and guidelines it issues for consumer protection. The above-

¹ UN Educational, Scientific and Cultural Organisation (UNESCO), Constitution of the United Nations Educational, Scientific and Cultural Organisation (UNESCO), 2009, available at: <https://unesdoc.unesco.org/ark:/48223/pf0000186547> (accessed 8th March 2023)

² Section 2 of the Information and Communications Technologies Act no 15 of 2009

referred provisions form the legal and regulatory framework on ICT consumer protection in Zambia.

1.1 BACKGROUND OF THE PROBLEM

The first sight of telecommunications (and by extension, ICT) in Zambia can be dated back to 1913, when Northern Rhodesia's first manual telephone exchange was installed in Livingstone. ICT has come a long way since 1913, with new developments such as SMS and mobile internet.

In 1994, the Telecommunications Act Chapter 469 established the Communications Authority of Zambia (CAZ). The function of the authority was to regulate telecommunication services in Zambia. However, CAZ's consumer protection mandate only extended to telecommunication services as opposed to all ICT services.³ Section 5(2)(b) of the then Telecommunications Act stated that the function of the authority shall be "to promote the interests of consumers of such telecommunication services in respect to prices charged for and the quality and variety of such services". At the start of the 20th century, the ICT sector developed globally at an unprecedented speed. Despite new ICT technologies coming to light, the nation's interaction with ICTs remained considerably low. In 2007, on the 28th of March, Zambia launched the National ICT policy⁴. The policy aimed to boost access to ICTs nationwide. The policy's ultimate goal was, and still is, to ensure that every citizen has access to ICT services by the year 2030.⁵ As a result of the policy's introduction, the exposure of Zambians to more advanced forms of ICT increased. The need, therefore, arose for the scope of the legal and regulatory framework to be expanded to cover the regulation of the new ICT services. Because of this, parliament enacted the Information Communication Technologies Act⁶ (ICT Act), which among others, enhanced the consumer protection scope to include the new services alluded to

³ Section 5(2) (b) of the Telecommunications Act Chapter 469

⁴ Lusaka Times, 'Levy to Launch ICT Policy' **Lusaka Times**, (26th March 2023) available at: <https://www.lusakatimes.com/2007/03/27/levy-to-launch-ict-policy/> (accessed 11th March 2023)

⁵ Ministry of Communications and Transport, "National Information and Communication Technology Policy", 2006, available at: <https://thezambian.com/wp-content/uploads/2007/04/Zambia-Information-and-Communication-Technology-Policy.pdf> (accessed 8th March 2023)

⁶ Professor Lungwana then Minister of Communications and Transport, Parliamentary Proceedings, 4th August 2009, available at: <https://www.parliament.gov.zm/node/1583> (accessed 10th March 2023)

above. The ICT Act repealed the Telecommunications Act and renamed the regulator the Zambia Information and Communications Technology Authority (ZICTA).

The ICT Act allocated the mandate of protecting consumers of ICT products and services to ZICTA, the ICT sector regulator. ZICTA is, under the ICT Act, required to create and implement a legal and regulatory framework that protects consumers from substandard services. Sections 67, 68 and 69 provide for the issuance of Quality-of-Service Guidelines, guidelines for handling consumer complaints and a code of conduct for service providers, respectively.

Apart from developing and issuing the above components of the regulatory framework, ZICTA is also expected to enforce the said framework's provisions with respect to service providers. Major service providers in Zambia's ICT Sector include MTN Zambia, Zamtel and Airtel Zambia. The three telecommunication giants have dominated the Zambian ICT market so much so that it is almost impossible to eliminate one without major repercussions for the Zambian people. While Beeline Telecom, trading as Zed Mobile, has entered the mobile service market, the company is yet to have its first subscriber or be seen to have otherwise launched its services.

1.2 STATEMENT OF PROBLEM

Section 6, Section 67(1), Section 68, and Section 69 of the ICT Act place upon ZICTA the mandate of protecting consumers of ICT products and services. ZICTA, in response to the obligation outlined above, has issued the following regulatory instruments which are currently in force:

- (a) Quality of Service Guidelines of 2019; and
- (b) Consumer Protection Guidelines 2019; and
- (c) Code of Conduct for Service Providers.

Despite this, the general feeling among the public is that the quality of the services offered by licensees in the Zambian ICT sector is poor and below expectations. Even Mr. Felix Mutati, the Minister of Science and Technology, described the quality of service provided by mobile network operators as "poor".⁷ Following the above, the

⁷ Micahel M, Zambia's Tech Minister calls for ICT 'reboot' **ITWeb** 31 October (2022) available at: <https://itweb.africa/content/j5alrvQAAQGvpYQk> (Accessed 08/04/23)

Minister gave his directive to ZICTA to raise the sector's performance to acceptable standards, as he intimated that the quality of service had fallen below not only Zambian standards but regional ones as well.⁸ It is argued that the cause of this predicament is, at least in part, the inadequacy of the current legal and regulatory framework on ICT consumer protection.

There are several reasons behind the weakness of the current framework. One reason is that the framework does not guarantee the compensation of consumers in the event of suffering loss from mobile service providers. The framework also fails to provide sufficient protection for consumers with disabilities. Another reason is that the current framework does not ensure ZICTA's autonomy. The current framework also gives non-punitive penalties for breach of provisions, with the current sanctions being mere drops in the ocean in the view of major companies. The result is that licensees can not only afford the fines, but they can also budget for them.

Furthermore, the existence of Zamtel on the electronic communications market poses a challenge. ZICTA is required to be fair and impartial in the execution of its mandate. As both entities report to the same Minister, imposing any meaningful sanctions on Zamtel potentially stands as a challenge on the part of ZICTA. What applies to MTN and Airtel must apply to Zamtel if the facts of the situation are the same. It is not far-fetched to perceive a situation where both Zamtel as well as the privately owned licensees breach provisions of the law and attract sanctions that would affect the licensees' operations or profitability. Because the Government would most likely prevent ZICTA from imposing the sanction, the other erring licensees, too, would have to be excused. The result is that the appropriate action against the erring licensees would not be taken. Which takes away the deterrent effect sanctions are supposed to carry.

The purpose of this study will be to examine the current Legal and regulatory framework on ICT Consumer Protection comprising, among others, the ICT Act, regulations, and guidelines issued by ZICTA. The framework will be analysed to determine whether it adequately deals with consumer protection matters in the

⁸ Ibid

Zambian ICT sector. The study will seek to unearth deficiencies the current legal and regulatory framework may have and provide proposals to deal with the deficiencies.

The proposals referred to in the previous paragraph will be drawn from the innovative legal and regulatory frameworks of South Africa, Botswana, and the United Kingdom.

STATEMENT OF THE TOPIC

The Legal and Regulatory Framework on ICT Vis-a-Vis Consumer Protection in Zambia: Lessons from Botswana, South Africa and The United Kingdom.

1.3 RESEARCH OBJECTIVES

The Main objectives of this study shall be:

- (a) To define ICT consumer protection and discuss what it encompasses.
- (b) To examine the adequacy of the current legal and regulatory framework of consumer protection in the Zambian ICT sector.
- (c) To draw lessons from the legal and regulatory framework on ICT consumer protection in Botswana, South Africa, and the United Kingdom.

1.4 RESEARCH QUESTIONS

- (a) What is ICT consumer protection and what does it involve?
- (b) How adequate is Zambia's ICT Consumer protection legal and regulatory framework?
- (c) What lessons can Zambia draw from the consumer protection frameworks of Botswana, South Africa, and the United Kingdom?

1.5 SIGNIFICANCE OF THE STUDY

ICT plays a vital role in our lives, so it is all the more important for Zambia to have an adequate and efficient legal and regulatory framework protecting every ICT consumer from poor and harmful ICT services. This study will show what exactly is encompassed by ICT consumer protection. The study will determine whether Zambia's legal and regulatory framework adequately regulates ICT consumer protection. This research will provide ideas for improving the current legal and regulatory framework on ICT Consumer Protection. This will enable ZICTA to adequately protect consumers

of ICT services and products. The study will also add to the body of knowledge relating to ICT Law, a relatively new and ever-evolving field of law.

1.6 SCOPE OF STUDY

This study will mainly focus on the current legal and regulatory framework on ICT Consumer Protection comprising the ICT Act, and relevant regulations, such as the Consumer Protection Guidelines and Consumer Code of Conduct. The study will also consider the legal and regulatory frameworks on ICT consumer protection enforced by the Independent Communications Authority of South Africa (ICASA), the regulator of the ICT sector in South Africa, the Office of Communications (OFCOM), the ICT service regulator of the United Kingdom, as well as that implemented by the Botswana Communications Regulatory Authority (BOCRA), the ICT regulator in Botswana.

1.7 DEFINITION OF KEY TERMS

Consumer: An individual who subscribes to ICT products or services from a service provider.

Consumer Protection: The practice of protecting consumers of ICT services from sub-standard or harmful services provided by service providers.

Electronic Communication service: means a service provided using one or more electronic communications networks.⁹

Electronic Communications networks: means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, radio, optical or other electro-magnetic means, including satellite networks, fixed, circuit and packet switch, internet, mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting and cable television networks, irrespective of the type of information conveyed.

Information and Communication Technology: means the use of diverse technological tools and resources to transmit, store, create, share or exchange information.¹⁰

⁹ Section 2 of the Information and Communications Technologies Act no 15 of 2009

¹⁰ ibid

Licence: means licence issued by the stated authority.

Network service: means a service for the carrying of information, in the form of speech or other sound, data, text or images, using guided or unguided electromagnetic energy, but does not include services provided solely on the consumer side of the network boundary.¹¹

OFCOM: Office of Communications (The ICT service regulator in the United Kingdom)

Regulator: A public entity tasked with regulating the ICT environment of a country.

Service Provider: An individual or entity offering ICT services to consumers.

Telecommunication: means the transmission of speech, music, or other sounds; visual image; electronic or other data; signals capable of being interpreted as or converted to sounds, images or data; or signals for the actuation or control of machinery or apparatus; by telephone, facsimile, telex, teleprinter or any other device or means whose principle utilises electrical, magnetic, electromagnetic or electrochemical energy or any combination of them.¹²

Telecommunication Relay Services: are services that allow people who are deaf and hard of hearing to communicate with users without disabilities in a manner similar to a traditional telephone call.

1.8 LITERATURE REVIEW

The topic of consumer protection in the ICT sector is one of international concern. Numerous authors have written on the subject. This literature review is a compilation of the views of various scholars and authors on the subject of ICT consumer protection and ICT regulation, two of whom are Zambian.

Subhashish Gupta first defines ICT as any system, application or networking component or hardware that enables man to interact with the digital world. ICTs have found themselves to be so useful in our day-to-day lives. The development of ICTs

¹¹ No. 8

¹² Section 2 of the Telecommunications Act Chapter 469

comes with great promise but also comes with many pitfalls which bring in the need for regulation to curtail the pitfalls.¹³

The scholar is focused on the interaction between technology, the business environment, society and regulation in ICT industries. He alludes to a reality of ICT, that it is ever developing. Each development is bound to come with pitfalls. Having exposed challenges in the Zambian framework, this dissertation will provide possible solutions drawn from consumer protection frameworks existing in other jurisdictions. The development of regulations to curtail these pitfalls can never end. The more ICT develops, the more consumers of the new developments will need reinforced protection.

Katwamba Mwansa states that as far as ICT consumer protection is concerned, there are two competing interests at play, that of businesses and consumers. Generally, consumers make decisions to incur expenses with the view of reaping maximum benefits from the services and goods they procure. Service providers, on the other hand, are in business to make profits and, in doing so, hope to minimise their costs as much as possible. Though the consumer pays for the goods, the suppliers are often the stronger parties, as they are more structured than the unorganised and ill-informed consumers, hence the need for consumer protection.¹⁴

Katwamba Mwansa highlights a key concept of ICT consumer protection. The biggest suppliers of ICT services are large companies with ample financial resources that overlap the strength of the everyday consumer. Though not the sole rationale, the imbalance between the two is a major reason for ICT consumer protection laws.

Krystyna Niziol believes that another factor behind the power imbalance between the two that puts the consumer in a weaker position is that the service provider has more knowledge and experience with ICTs than the consumer.¹⁵

¹³ S Gupta, 'The Interaction between technology, business environment, society, and regulation in ICT industries' (2022) 34 IIMB Management Review 103

¹⁴ K Mwansa 'Status of Consumer Protection in Zambia' (Empowering regulators to protect consumer rights, Lusaka, 2009) available at <https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/40868/128966.pdf?bitstreamId=46260&locale-attribute=fr> (accessed 13th March 2023)

¹⁵ K Niziol, 'The challenges of consumer protection law connected with the development of artificial intelligence on the example of financial services (chosen legal aspects)' (2021) 192 Procedia Computer Science 4103

The entity supplying the services and goods ideally knows more about the nature of the same goods and services than the paying consumer. Such a position makes it easier for the supplier to exploit the oblivious consumer.

Patrick D.M. Burrow is of the view that information is a vital part of consumer protection. For consumers to make informed decisions on services best suited for them, they must be well informed of the services being presented to them by the service providers.¹⁶

As was earlier highlighted by Katwamba Mwansa, a consumer makes a payment with the view that he should get his/her money's worth. Adequate information about the product being purchased keeps the supplier from taking advantage of an oblivious consumer and enables the consumer to purchase the right product or service according to his/her needs. Adequate information thus serves as a means of ICT consumer protection. In agreeing with the above authors, the author of this dissertation will, among others, seek to observe whether the Zambian consumer protection regime ensures that consumers are adequately informed. Where not, the dissertation will provide an appropriate remedy for such a scenario.

David Mukosa identified low literacy levels as a problem in Zambia's handling of ICT consumer protection. The author notes that despite Zambia's low literacy levels, the regulator disseminates most consumer protection information in English.¹⁷

Although David Mukosa made this observation in 2009, the same is true today. As will be shown in this study, most people are unaware of the consumer rights they possess. The irony is that the same consumers, however, are expected to report to the regulator whenever their rights are violated. Consumers knowing and understanding their rights is crucial to consumer protection. Once a consumer knows and understands his/her rights, they can identify when the said rights are being violated and report such violations to the regulator. This dissertation becomes paramount in that it seeks to single out shortcomings of the Zambian consumer

¹⁶ P.D.M Barrow, 'Just Enough: Empowering Fixed-Line Telecommunications Consumers through a Quality of Service Information System'(2007) ESRC Centre for competition policy and School of Computing Sciences, available at: <https://ueaeco.github.io/working-papers/papers/ccp/CCP-07-02.pdf> (accessed at 19th April 2023)

¹⁷ D Mukosa, 'Empowering regulators to protect consumer rights in the ICT sector: Baseline Position Zambia 2009' (LINK Centre, Graduate School of Public & Development Management (P&DM) University of the Witwatersrand 2011) 9

protection regime, including those related to the failure of the regulator to effectively communicate with consumers.

Isabelle Gross, Charley Lewis, and Russell Southwood state that over time, consumers become better acquainted with issues affecting them and their rights. However, the introduction of new ICT services raises new consumer protection issues. It is, therefore, the regulator's responsibility to monitor the ICT Sector closely and predict the kinds of issues that may become prevalent in the future.¹⁸

The authors above allude to a key force behind the need for consumer protection, the constant development of ICT services. The regulator must keep abreast with such changes because ICT services and products are ever evolving and advancing. Anything short of the above will almost definitely lead to an inefficient and ineffective consumer protection regime. As its ultimate goal, this dissertation seeks to have an efficient and effective consumer protection regime in Zambia.

Alison Gillwald, indicates that ICT consumer protection is important, as it creates a level of trust that allows for the further development of ICT and incorporation of ICT in daily activities.¹⁹ This dissertation will play a role in establishing an effective consumer protection regime and the development of ICT and its incorporation in daily activities. This is essential as the world progresses into the digital age.

Elena Agibalova, in outlining the vulnerable sectors of consumers that need more attention, posited that businesses and service providers do not often develop digital goods and services tailored to the specific needs of minority groups of people with limited ICT skill sets, such as the elderly, less educated and differently abled.²⁰

Those differently abled form a part of the consumer base, and regulation must be put in place that ensures service providers provide services for them as well, be they disabled, less educated or elderly. This will put them on equal footing as the rest of

¹⁸ I Gross, C Lewis and R Southwood, 'Consumer Best Practices in The Telecom Sector' (The Learning Information Networking Knowledge (LINK) Centre, 2009) 10

¹⁹ Alison G, 'The State of ICT in South Africa' (2018) available at https://www.africaportal.org/documents/18400/after-access-south-africa-state-of-ict-2017-south-africa-report_04.pdf (accessed 12 May 2008)

²⁰ E Agibalova, 'Consumer Protection in the digital environment' (2020) 109 SHS Web of Conferences 1

the consumer base. The adoption of recommendations that will be provided in this dissertation will play a role in achieving the above.

Jane Winn and Nicolas Jondet give an interesting perspective on the topic at hand. The scholars acknowledge that with the rapid growth and development of ICT Product markets, older pieces of legislation will not be able to adequately address the new challenges facing consumers. As such, they propose new consumer protection laws that differ not only in substance but in form as well. They propose that new ICT consumer protection laws must harmonise ICT standards developed by private parties (in response to global market forces) with national consumer protection laws.²¹

This is an opinion the researcher agrees with. ICT is constantly developing, and often, legislators and regulators may not have the requisite know-how and information necessary to draft legislation and other regulatory instruments essential in the face of a new technological age. A situation in which the acceptable standards of newer ICTs are incorporated into national legal systems at the time of their inception would prevent leaving the consumer vulnerable. The author of this dissertation, in agreeing with the above, thus seeks to foster a consumer regime that is duly advanced and appropriate in the face of advanced technology.

Dr Michael P. Okom states that in carrying out its functions in the local environment (including the making of regulations), an ICT regulator must adhere to certain international standards, because the actions of one regulator may trigger off multiple reactions that may affect other parts of the world.²²

The author of this dissertation agrees with Dr Okom. The regulator must try by all means to ensure the regulatory regime is in accord with accepted international standards, in particular, the best practice of ICT consumer protection. This dissertation, therefore, will draw lessons from best practice.

1.9 METHODOLOGY

Research Approach: The approach this research shall use is the qualitative research approach.

²¹ J Winn and N Jondet, 'A "New Approach" to Standards and Consumer Protection' (2008) 31 University of Washington School of Law 459

²² M.P Okom, 'The Impact of the Telecommunications Regulatory Agency on Consumer Protection in Nigeria' (2018) 06(07) International Journal of Scientific Research and Management 59

Research Design: The research design to be used is the evaluative research design.

Research Type: The research type used shall be a comparative study, drawing lessons from Botswana, South Africa, and the United Kingdom.

Study Population: The research population shall consist of authors, researchers and prominent academicians who have endeavoured to study, write on or discuss the topic at hand. The population will also include the experiences of members of the public who are affected by ICT consumer protection in Zambia.

Sample size: The researcher will target people or entities who possess sufficient knowledge on the subject matter. The researcher shall also incorporate the views and experiences of members of the public who are affected by ICT consumer protection in Zambia.

Sampling technique: The sampling technique to be used is purposive sampling.

Data Collection: The methods of Data Collection to be used in this research shall be indirect and direct observation, as well as unstructured, semi-structured and structured qualitative interviews.

Data Analysis: The data analysis to be used shall be thematic analysis and content analysis.

Ethical Consideration: The researcher will abide by and comply with ethical guidelines given by the University of Lusaka with regard to research. The researcher shall, therefore, acknowledge by way of referencing all sources used in the study using the OSCOLA style of referencing. The researcher shall also obtain permission from the University of Lusaka to carry out this research. With regards to interviews, permission shall be obtained from the interviewees as to whether or not they consent to be interviewed.

CHAPTER TWO: THE MEANING OF ICT CONSUMER PROTECTION AND WHAT IT ENCOMPASSES

2.0 INTRODUCTION

This Chapter shall discuss the general meaning of ICT Consumer Protection and what it entails. In doing so, it will briefly examine the historical background of the legal phenomenon. It shall then discuss ICT Consumer Protection as it is under the legal jurisdictions of Zambia, Botswana, South Africa, and the United Kingdom.

2.1.0 CONSUMER PROTECTION

The Oxford Law Dictionary defines a consumer as an individual who enters into a contract other than in the course of business to obtain goods or services from those who supply them in the course of business²³. The same Law Dictionary defines consumer protection as the protection, especially by legal means of consumers²⁴.

Many authors have described Consumer Protection as a relatively new legal concept. Until the 19th century, quality was a matter of second importance for most consumers²⁵. Generally, consumers had to verify for themselves the quality of the goods they purchased and only in the presence of gross negligence could the seller have been held liable. The first country in which consumerism had established itself was the United States, where, based on the protests of the poorest strata of the American proletariat, federal regulations were then enacted, imposing a required level of authenticity in foods and medicines. The spirit of consumerism would later spread to Europe in the 1950s when the British Government and Denmark recognized the social importance of the problem and considered it necessary to offer consumers the opportunity to express themselves on issues that were reserved for both producers and traders by creating special protection bodies.²⁶ The first consumer organizations were born in Denmark in 1947 and in Great Britain in 1955, where the Government created the Consumer Council to enable consumers to express themselves on issues reserved for producers and traders. However, the real normative breakthrough came with the Single European Act; it modified the Treaty of Rome by strengthening the role

²³ J Law E Martin A Dictionary of Law (7ed, Oxford University Press, 2013) 127

²⁴ Antonella C 'International Law and Consumer Protection' available at https://www.nyulawglobal.org/globalex/International_Law_Consumer_Protection1.html#_edn2 Hauser Global Law School Program 2021 (accessed 21 July 2023)

²⁵ *ibid*

²⁶ *ibid*

of the Economic and Social Committee, to which powers to protect the consumers were attributed.

2.1.1 ICT CONSUMER PROTECTION

Ironically, the development of legal consumerism in Europe coincided with the development of Information Technologies. In 1943, when Thomas Watson, then chairman of IBM, said, “I think there is a world market for maybe five computers,” it was not yet clear how computers and other ICTs would change the lives of ordinary consumers.²⁷ By 2008, it became clear that consumers’ lives were being transformed by goods and services that incorporate ICTs.²⁸ As new technologies have become pervasive in the lives of ordinary consumers, what were once minor or isolated challenges to the framework of consumer protection law became major issues giving birth to the branch of consumer protection law known as ICT Consumer Protection.

ICT Consumer Protection can, therefore, be defined as the legal protection of consumers of ICT goods and services from harmful and sub-standard ICT goods and services. It involves setting regulations that prevent predatory pricing,²⁹ sub-standard quality, exploitation of consumers, fraud, and many other things. Jurisdictions all around the world have various ways of addressing ICT consumer protection.

2.2 ICT CONSUMER PROTECTION IN ZAMBIA

Under the Zambian ICT Legal framework, a consumer is defined by Section 2 of the Information and Communications Technologies (ICT) Act as a person to whom an electronic communication service or someone who purchases electronic communication products for purposes other than business.³⁰

An electronic communication service is defined by section 2 as a service provided by “transmission systems...switching or routing equipment and other resources which permits the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed, circuit and packet switch, internet, mobile terrestrial networks, electricity cable systems, to the extent that they are used for the

²⁷ J Winn and N Jondet, ‘A “New Approach” to Standards and Consumer Protection’ (2008) 31 University of Washington School of Law 459

²⁸ *ibid*

²⁹ S Gupta, ‘The Interaction between technology, business environment, society, and regulation in ICT industries’ (2022) 34 IIMB Management Review 103

³⁰ Section 2 of the Information and Communications Technologies Act no 15 of 2009

purpose of transmitting signals, networks used for radio and television broadcasting and cable television networks, irrespective of the type of information conveyed.”³¹ To make matters simpler, a Zambian ICT consumer is someone who acquires services relating to the transmission or conveyance of information, including, among others, internet services, short messaging services (SMS) and telecommunication services. Electronic Communication products refer to hardware devices that are used for conveyance or transmission of information. Common examples include, cellular phones, and laptops. Therefore, under the Zambian legal framework, ICT consumer protection means the protection of consumers of Electronic Communication (EC) services and products. It is for that reason that the guidelines and regulations corresponding to ICT Consumer protection set by ZICTA mainly apply to telecommunication service providers such as MTN Zambia, Zamtel, Airtel Zambia and internet service providers, among others.

As a side note, although internationally recognised as a form of ICT, in Zambia, broadcasting is regulated separately from other forms of ICT by the Independent Broadcasting Authority Act (IBA), which deals with consumer protection as it specifically relates to broadcasting.

2.3 ICT CONSUMER PROTECTION IN BOTSWANA

The Communications Regulatory Authority Act 2012 (CRA) governs Botswana’s ICT sector. Unlike the Zambian legislation, the CRA does not define who a consumer is. Instead, it is defined by Botswana’s Consumer Protection Act. According to the latter legislation, a consumer means any person or non-profit making organisation to whom or to which any commodity is offered, supplied or made available, where such person or organisation does not intend to apply the commodity for the purposes of resale, lease, rendering services or the manufacture of goods for gain. Much like the Zambian jurisdiction, Botswana’s framework equally excludes businesses from the definition of consumer.

Although the CRA does not define the term consumer, the country’s ICT Consumer Protection framework reveals that consumer protection encompasses the protection of consumers of telecommunications (inclusive of ECs), internet, radio

³¹ *ibid*

communications and broadcasting services, with more focus on telecommunications and internet services.

2.4 ICT CONSUMER PROTECTION IN SOUTH AFRICA

South Africa's ICT framework, much like Botswana's, does not define who a consumer is. The term consumer is defined by the Consumer Protection Act of 2008. Unlike Zambia and Botswana, the legislation defines a consumer as (1) a person to whom goods and services are marketed to, (2) a person who has already entered into a contract to acquire the said goods and services, (3) or a beneficiary of the goods and services that have been acquired (if the circumstance permits)³². Unlike Zambia and Botswana, individuals obtaining services and products for business purposes are not excluded.

The relevant provisions on Consumer Protection are found in Chapter 12 of the Electronic Communications Act (ECA). The Chapter's consumer protection provisions are aligned to the users of services of licensed service providers who are granted licenses under Chapter 3 of the ECA Act. These are Electronic Communication Services and broadcasting services. Therefore, in South Africa, ICT consumer protection's scope incorporates both broadcasting and electronic communication services.

2.5 ICT CONSUMER PROTECTION IN THE UNITED KINGDOM

The Communications Act of 2003 is the principal legislation that regulates the ICT sector in the United Kingdom. The detailed legislation covers multiple services, including broadcast and postal services. Under section 405(5) of the Communications Act, a consumer is defined as³³

- (a) Persons to whom the service, facility or apparatus is provided, made available or supplied (whether for their personal use or business purposes).
- (b) Persons for whose benefit the service, facility or apparatus is provided, made available or supplied or for whose benefit persons falling within paragraph (a) arrange for it to be provided, made available or supplied.

³² Section 2 of Consumer Protection Act, no.68 of 2008 (South Africa)

³³ Section 405(5) of the Communications Act 2003

(c) Persons whom the person providing the service or making the facility available, or the supplier of the apparatus, is seeking to make into persons falling within paragraphs (a) and (b).

(d) Persons who wish to become persons falling within paragraph (a) or (b) or who are likely to seek to become persons falling within one or both of those paragraphs.

As can be seen, there are a few notable differences between the definition of consumer under Section 405(5) of the Communications Act and the Zambian ICT framework. For one, Zambia's excludes individuals using ICT services for business purposes to classify as consumers, whilst the Communications Act incorporates them. Furthermore, the Communications Act thereby ensures consumers are awarded consumer protection before they even become subscribers or actual consumers as shown by Section 405(5) (c) and (d). It also accommodates people on whose behalf the services are acquired for. A further reading of Section 405 shows that ICT Consumer protection in the UK extends to services, facilities, and apparatus.

Perhaps the reason why most African countries focus on ECs is because most other ICT innovations such as video streaming services, are developed by innovators who have juridical presence in other states. On the other hand, for ICT services, such as ECs, it is more practical for EC service providers, such as MTN, to set up a base in a host country in order to provide the services to the country's populace. This is because unlike other forms of ICT such as video streaming services, ECs require physical infrastructure such as signal towers and optic fibre cables.

2.6 CONCLUSION

This chapter discussed what ICT consumer protection entails in the general sense, as well as what it entails in Zambia's jurisdiction. The chapter also discussed the gist meaning of ICT consumer protection in the United Kingdom, South Africa, and Botswana, the countries which lessons shall be drawn from.

CHAPTER THREE: EXAMINING THE ADEQUACY OF ZAMBIA'S LEGAL AND REGULATORY FRAMEWORK ON ICT CONSUMER PROTECTION

3.0 INTRODUCTION

This chapter shall explore Zambia's current legal and regulatory Framework on Information Communications Technologies (ICT) Consumer protection and examine its adequacy. In doing so, it will identify relevant consumer protection-related stakeholders in the ICT Sector and explore salient provisions of the ICT Act, including those relating to Consumer Protection and Quality of Service.

3.1 STAKEHOLDERS OF THE ICT CONSUMER PROTECTION LEGAL AND REGULATORY FRAMEWORK

To appreciate Zambia's current framework, it is paramount to first gain acquaintance with the environment that the framework seeks to regulate. The ICT Sector is composed of various stakeholders. With regards to Zambian ICT consumer protection, the key stakeholders are consumers, service providers and the Zambia Information Communications Technologies Authority (ZICTA). The ICT Act regulates the Zambian ICT sector. It is the supreme authority (subject to the constitution) on the legal regulation of ICTs in Zambia.³⁴

3.1.1 CONSUMERS

A consumer is defined by Section 2 of the ICT Act as a person to whom an electronic communications service is rendered and includes any person who purchases electronic communications products otherwise than for re-sale but does not include a person who purchases any electronic communications products for the purpose of using them in the production and manufacture of any other goods or articles for sale. Simply put, the definition includes only "end users" to the exclusion of those purchasing the services for resale or the production of other goods or articles.

3.1.2 THE AUTHORITY

The Zambia Information and Communications Technology Authority (ZICTA) regulates Zambia's ICT Sector. Its board performs the agency's functions. The agency's functions are performed by its board. The board is comprised of the following

³⁴ Section 3 of the Information and Communications Technologies Act no 15 of 2009

- (a) a representative of the ministry responsible for—
 - (i) communications technology;
 - (ii) home affairs;
- (b) a representative of an agency responsible for national security;
- (c) a representative of the Attorney-General; and
- (d) five other persons with relevant knowledge and experience in matters relating to this Act.³⁵

With the numerous consumer complaints prevalent in the country, such as poor service and speedy internet bundle depletion,³⁶ it is alarming that there is no guarantee of having a representative of agencies responsible for consumer-related matters sit on the Board.

The ICT Act only provides for one qualification criteria with respect to the five persons appointed by the Minister, which is the requirement to possess relevant knowledge and experience in matters relating to the Act. It, however, provides for disqualifications under Paragraph 2(5) of the First Schedule of the ICT Act.³⁷ According to this provision, a person shall not be appointed as a member of the Board if that person – (a) is a Member of Parliament; (b) is an office bearer or employee of a political party; (c) has a direct financial interest in the sector; (d) is a relative or associate of a member referred to in subparagraph (1) (b) and(c); (e) is an undischarged bankrupt; (f) is legally disqualified from performing the functions of a member; or (g) is convicted of an offence under this Act or any other written law and sentenced to a term of imprisonment exceeding six months, without the option of a fine.

Paragraph 6(3) of Part One of the First Schedule provides for the circumstances by which a vacancy on the board shall be created under the ICT Act, which is (a) if a board member dies, (b) if the member is adjudged bankrupt, (c) on the expiry of one

³⁵ First Schedule Part I Paragraph 2 of the ICT Act as amended by the Information and Communication Technologies (Administration of Authority) Regulations, 2022

³⁶ Interview with Juba Sakala, Executive Secretary, of the Zambia Consumers Association, 22nd October 2023

³⁷ First Schedule Part I Paragraph 2 of the ICT Act as amended by the Information and Communication Technologies (Administration of Authority) Regulations, 2022

month's notice, resigns, in writing, to the Minister; (d) if the member is absent from three consecutive meetings of the Board of which the member has had notice, without the prior approval of the Board, (e) ceases to be a representative of the ministry or organization that nominated the member; (f) if legally disqualified from performing the functions of a member; or (g) is convicted of an offence under this Act or any other written law and sentenced to a term of imprisonment exceeding six months without the option of a fine.

There is however a minor inconsistency that may foment ambiguity. Paragraph 2(5) of the First Schedule of the ICT Act ensures that office bearers or employees of political parties, and those with a direct financial interest in the sector are not appointed to the Board. However, Paragraph 6(3) of the same schedule omits to mention that the office of a member becomes vacant when a member who wasn't such at the time of appointment either becomes an office bearer or employee of a political party or acquires a direct interest in the sector. The current rendering may be misunderstood to allow a person to join a political party or acquire an interest in the sector provided the above occur after such individual is appointed as a board member.

The minister appoints all members of ZICTA's board.³⁸ According to the statute, ZICTA is, save as otherwise provided, to function as an autonomous body.³⁹ In our view, this autonomy is compromised by the fact that the board members are solely appointed by the minister. This is especially so considering that the Minister is legally empowered to give the Authority such general directives concerning the carrying out of its functions under the Act as the Minister considers necessary or expedient and the Authority is compelled to give effect to such directives. To ensure checks and balances, Board members should have been appointed by the Minister subject to ratification by the legislature. The executive, which is the most political arm of government, thus has too much influence on the Board and consequently on the operations of ZICTA. This is a point of concern given the functions ZICTA performs under the ICT Act, especially the regulation of ICT service providers in a market that consists of a government owned entity, Zamtel, as will be seen in later paragraphs.

³⁸ Paragraph 2(1) of Part I of the First Schedule of the Information and Communications Technologies Act no 15 of 2009 (as Amended)

³⁹ Section 5 Information and Communications Technologies Act no 15 of 2009

The Authority may also be said not to be financially independent as the official interpretation of provisions of the ICT Act as read with those in the Public Finance Management Act, 2018 is that ZICTA is compelled to transmit all the monies it collects in the course of regulating the sector to the Government. The Legislature then appropriates funds as reflected in the National Budget to the Authority.

All in all, the law governing the composition of Zambia's Regulatory Authority is relatively weak. Mainly because it fails to ensure the independent functioning of the authority.

Aside from consumer protection, ZICTA has twelve other functions. Not only are consumer protection issues a daily occurrence, but in the ICT sector, consumer protection issues are ever-evolving.⁴⁰

It should be commended that, in practice, ZICTA has cordial relations with the Zambia Consumer Association (ZACA.) In fact, at present, ZACA's Executive Secretary sits on one of the committees that develop regulations governing the ICT sector.⁴¹ This is an excellent initiative by ZICTA. There needs to be a link between the consumer and the regulator, as it enables the regulator to best protect the consumer. It would have been even better if such an initiative was embedded in the statute.

3.1.3.0 SERVICE PROVIDERS

Service Providers under the ICT Act are persons who provide network services as well as electronic communications services. Although there are various other ICT services, these are the only services given attention as far as the ICT Act, and by extension, Zambian ICT consumer protection is concerned. They are also the only ICT services one needs a license from ZICTA under the ICT Act to offer commercially to the public.

One requires a service licence to provide electronic communication services. This license is granted under Section 10 of the ICT Act. Licences issued by ZICTA may either be network licence, which allows the holder to construct, own or make available an electronic communications network, or provide a network service, or a service

⁴⁰ S Gupta, 'The Interaction between technology, business environment, society, and regulation in ICT industries' (2022) 34 IIMB Management Review 103

⁴¹ Interview with Juba Sakala, Executive Secretary, of the Zambia Consumers Association, email correspondence, 20th October 2023

licence, which allows the holder thereof to provide one or more electronic communications services. The decision to grant a license is made by ZICTA following scrutiny of the application against set criteria. The Act provides for two prerequisites before a license can be granted. The first is that the application for a license must be in accordance with the ICT Act. The second is that the applicant must be financially and technically capable of meeting the obligations set out for licensees by ZICTA as well as the terms and conditions of the licence⁴². Applicants are expected to show that their level of investment can enable them to grow in the geographic market (i.e. provincial or national) they are applying for at an incremental rate of at least 15 per cent per annum⁴³. The researcher believes that, given the limited number of service providers on the Zambian market, it is absurd that service providers are expected to meet financial benchmarks that are too stringent before they can enter the market. Setting up a business is challenging. Among the challenges is acquiring vast amounts of capital needed to commence operations. Providing Electronic Communication services requires complex and expensive equipment. It often takes a while before the profits the business makes can compensate for the amount of capital that shareholders have to input. During that time, a business must pay taxes to the government on the profits it makes, it must meet various obligations it has under the Companies Act 2017 as well as the Income Tax Act, and it must also meet its obligations to other stakeholders such as creditors, all while avoiding bankruptcy. Prescribing technical as well as financial requirements that are too stringent discourages potential service providers from penetrating the market. There are already legal mechanisms implemented by the Income Tax Act and the Companies Act that ensure companies are financially in check. Having more undue regulations and expectations to meet discourages potential investors,⁴⁴ resulting in fewer competitors on the electronic communications market. Having a small number of competitors on the market leads to poor quality of services due to suppliers getting complacent. It also limits the options available to consumers.⁴⁵ There is a need to open up Zambia's

⁴² Section 12 of the Information and Communications Technologies Act no 15 of 2009

⁴³ Guideline 10.6(b) of the Licensing Guidelines

⁴⁴ M Ghodsi, 'How do technical barriers to trade affect foreign direct investment? Tarriff jumping versus regulation haven hypotheses' (2020) 52 Structural Change and Economic Dynamics 269

⁴⁵ R Whish and D Bailey Competition Law (7ed, Oxford University Press, 2012) 19

Electronic Communication Services Market by lessening the requirements to provide such services under the ICT Act.

Licenses granted by ZICTA contain terms and conditions, which may be varied either at the licensee's request or by ZICTA in instances where such variation is necessary to address the concerns of members of the public and consumers. The service provider itself may also cancel its license for any reason whatsoever. Where a licensee decides to cancel the license, it shall notify the Authority in writing and shall agree with the Authority on the terms and conditions of the surrender of the licence.⁴⁶

Section 16 prohibits licensees from transferring, ceding, pledging, assigning, or otherwise disposing of, or encumbering, a licence without the prior approval of the Authority.

Section 18 provides for the suspension and cancellation of licenses. The measure is at the sole discretion of the authority and may be made if the license holder; obtained the license by fraud or submission of false information or statements; contravenes the ICT Act or any other written law relating to the licence or any terms and conditions of the licence; fails to comply with a decision or guidelines made by the Authority; enters into receivership or liquidation or takes any action for voluntary winding up or dissolution; enters into any scheme of arrangement, other than for reconstruction or amalgamation, upon terms and within such period as may previously have been approved in writing by the Authority; is the subject of any order that is made by a court or tribunal for its compulsory winding up or dissolution; has ceased to fulfil the eligibility requirements under this Act; or the suspension or cancellation is in the public interest. Interestingly, despite numerous violations (which many a time have been at the expense of consumers) of provisions of the ICT Act and guidelines set by ZICTA, the Authority has only exercised this discretion with respect to a major licensee once, in 2019 when it cancelled Vodafone's license for failing to meet financial and technical requirements under Section 12 of the ICT Act.⁴⁷ Developments leading to the

⁴⁶ Section 15 of the Information and Communications Technologies Act no 15 of 2009

⁴⁷ Robert, 'ZICTA withdraws Vodafone License' ZNBC(19 September 2019) available at: <https://www.znbc.co.zm/news/zicta-withdraw-vodafone-license/> (accessed at 21st September 2023)

cancellation entail that the cancellation was solely based on the network company's financial struggles.⁴⁸

Many reasons can be advanced as to why ZICTA seldom suspends and revokes licenses despite there having been good reasons over the years to do so. The first reason is Zambia's meagre number of service providers. As of 2023, there are only four service providers, MTN Zambia, Zamtel, Airtel Zambia and Zedmobile (the latter of which at the time of this research had not started offering services to the public). The country is heavily dependent on the first three network providers aforementioned. Most consumers maintain their service providers despite numerous let-downs, not because they are pleased with the services but because they feel they have little choice.⁴⁹ Another reason is Zamtel's presence in the ICT market. Zamtel is a government owned body. ZICTA is expected to be fair and impartial in executing its mandate. If ZICTA were to impose suspensions and cancellation of licenses on service providers, Zamtel would not be spared. Zamtel, like ZICTA, is a body entirely under the control of the Government of Zambia. Because Government interests would most likely prevent ZICTA from imposing such extreme sanctions, the other erring licensees, too, would have to be excused.

3.2 ICT ACT

As shown in the previous paragraphs, the ICT Act is the main source of legal authority on an ICT consumer protection in Zambia. Not only does it prescribe and regulate the entities that make up the ICT Consumer Protection Environment, but the ICT Act also has provisions that deal directly with consumer protection. The first is Section 14(3) of the ICT Act. Under the subsection, ZICTA is allowed to vary the terms and conditions of a license to protect the interests of consumers. The next is Section 47(13) of the ICT Act,⁵⁰ which requires licensees to provide detailed billing information to enable the consumers to verify whether or not they have been billed correctly. The other is ZICTA's mandate to carry out consumer protection,⁵¹ as has already been mentioned.

⁴⁸ M Malakta, 'Vodafone Zambia up for Sale' ITWeb (19 September 2019) available at: <https://itweb.africa/content/JN1gP7OYZodqjL6m> (accessed at 23rd September 2023)

⁴⁹ No.41

⁵⁰ As amended by Act No. 3 of 2010

⁵¹ Section 6(2)(f) of the Information and Communications Technologies Act no 15 of 2009

The other key provisions in the ICT Act are those providing for the creation of guidelines and regulations that make up the rest of the ICT Consumer Protection framework. These are the Code of Conduct Guidelines for ICT Service Providers, the Consumer Protection Guidelines and the Quality of Service Guidelines.

3.3 CODE OF CONDUCT GUIDELINES FOR ICT SERVICE PROVIDERS

These guidelines are developed by ZICTA under Section 69 of the ICT Act. According to this section, the Authority must prepare a code of conduct for licensees and persons exempt from holding licenses under this Act. The code is to prescribe how licensed and unlicensed service providers are to conduct themselves with respect to consumers. This is part of the ICT Consumer protection framework because the business practices of service providers affect consumers. Section 69(2) outlines the composition of the Code of Conduct Guidelines. The guidelines are to deal with (a) the provision of information to consumers regarding services, rates and performance; (b) the provisioning and fault repair of services; (c) the advertising or representation of services; (d) the provision of, and access to, network services by persons with disabilities; (e) consumer charging, billing, collection and credit practices; and any other matter relating to the provision of services under the ICT Act.

The current Code of Conduct is in the form of guidelines and contains twenty–two guidelines encompassing the cardinal issues outlined under Section 69(2). For instance, guideline one instructs service providers to provide their consumers with accurate information on their services through print as well as electronic means. Service providers are to ensure the consumer is fully aware of the service provider’s terms and conditions before entering into a contract. This includes subscribers subscribing to a mobile network for the first time. The main goal of consumers is to maximise their utility in the services they procure,⁵² as such, they often pick the services best suited to their economic capacities and to do this, they need adequate information. Guideline 4 instructs service providers to provide customer care centres that are accessible to all consumers, including people with disabilities. The 5th guideline instructs service providers to ensure that consumers with disabilities have

⁵² K Mwansa ‘Status of Consumer Protection in Zambia’ (Empowering regulators to protect consumer rights, Lusaka, 2009) available at <https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/40868/128966.pdf?bitstreamId=46260&locale-attribute=fr> (accessed 13th March 2023)

equal access to ICT services on an equal basis as their abled counterparts. Guideline 7 instructs service providers to advertise in a manner that does not mislead consumers. Their advertisements must contain sufficient information about the said service. Under guideline 8 a licensee is to provide consumers with service bills that are clear and well-organised. All charges should be accompanied by a brief, clear, and non-misleading description of the service that was rendered. The charges billed should correspond to the services requested and received by consumers.

With the provisions that have been highlighted, one may wonder why consumers in Zambia still face issues such as poor customer service due to unqualified staff⁵³ and why we still have numerous reports of consumers being billed inappropriately.⁵⁴ A common reason why guidelines of any form face compliance issues is weak enforcement mechanisms. Examples of weak enforcement mechanisms include weak monitoring systems. Guideline 20 gives provision for the monitoring of adherence to these guidelines. Under this guideline, the Authority shall conduct audits “from time to time” to ensure compliance. The researcher believes that poor compliance with the Code of Conduct is due to irregular monitoring envisaged under Guideline 20. Consumer issues arise every day, and the regulator needs to be regularly updated to ensure that the guidelines are being complied with by Service providers. Furthermore, conducting audits to monitor compliance with such guidelines at regular intervals would be a cumbersome form of monitoring. There is a need to adopt a more efficient way to ensure that these guidelines are adhered to.

3.4 CONSUMER PROTECTION GUIDELINES

Section 68 of the ICT Act states, “The Authority shall establish guidelines for the making, receipt and handling of complaints of consumers regarding the provision of services regulated under this Act.” These guidelines are known as “Consumer Protection Guidelines.” The first and foremost objective of guidelines under Section 68 is to give guidance on how complaints made by consumers are to be handled. The

⁵³ Interview with Juba Sakala, Executive Secretary, of the Zambia Consumers Association, email correspondence, 20th October 2023

⁵⁴ M Mofya, ‘Airtel explains fast depleting bundles’ **News Diggers**(5 October 2023) available at: https://diggers.news/local/2023/10/05/airtel-explains-fast-depleting-bundles/?fbclid=IwAR1jKSmbP_Ly0gw1jN9bVtjFxZiNSeg2178w6Lsv4ZdKsZotUES0EZGBbs (accessed at 12th October 2023)

section further goes on to state that the guidelines may also include procedures for meeting consumer needs and requirements, the compensation of consumers in the event of a breach of the Code of Conduct, the protection of consumer information and the provision of information to consumers regarding services, rates and performance.⁵⁵ However, those mentioned above are only included in the consumer protection guidelines at the Authority's discretion. The only mandatory component of the consumer protection guidelines is the receipt and handling of consumer complaints found in Section 68(1). The current guidelines pursuant to Section 68 are the Consumer Protection Guidelines of 2019. They are composed of a total of 27 guidelines, of which six are related to the handling of consumer complaints, whilst the rest are in line with section 68 (2) of the ICT Act. However, not everything listed under Section 68(2) appears in the guidelines. For instance, the current Consumer Protection Guidelines do not have a provision for the compensation of consumers in the event of a breach of the Code of Conduct guidelines. This of course, is a cause for concern, given that many consumer complaints pertain to the Code of Conduct. What is even more baffling is the fact that ZICTA is guaranteed the right to impose a fine for breach of the Code of Conduct whilst the consumer does not enjoy the right to claim compensation for the said breach despite being the one that suffered financial loss.

Guidelines 7 to 12 deal with the handling of complaints. The 7th guideline deals with complaint-handling procedures. Under the guideline, service providers are required to produce a complaint handling procedure that is easy to understand and must be communicated to the consumer. All complaints are to be resolved by the service provider's complaint procedure within seven days. If the consumer, is dissatisfied, he/she may lodge a further complaint to ZICTA, who is required to resolve the complaint within 21 days of receipt of the complaint. Should the complaint fail to be resolved by ZICTA, a consumer can appeal to the tribunal.

Sadly, guidelines 7-12 fail to provide the minimum content requirement for the complaint procedures of service providers. Each service provider is at liberty to adopt its own. It is important to note that consumers are less likely to appeal to the Authority to resolve their disputes, especially if their financial loss is not substantial. Most

⁵⁵ Section 68(3) of the Information and Communications Technologies Act no 15 of 2009

consumer complaints, therefore, begin and end with the service provider. The current guidelines put the service providers in complete control to determine the outcome of the dispute resolutions with its consumers.

There are, of course, a few upsides to these guidelines. For instance, the guidelines contain excellent provisions for the protection of children from accessing harmful and illegal content on the internet. With regard to bundled services, licensees are mandated to inform consumers when their bundles are about to be depleted. They are also mandated to avail the consumer the option to opt in or opt-out from their ongoing service supply upon depletion of a bundle to avoid consumers being charged from their main account. This means that when a bundle such as a data bundle depletes, users must receive a notification prompting them to decide on whether to continue to be connected to the internet and be charged on their main accounts or have their connection turned off.

Just like the Code of Conduct guidelines, these guidelines have a weak monitoring system. This is evident from numerous complaints made by consumers⁵⁶. Under the Consumer Protection Guidelines, the Authority is to monitor the sector's performance and customer satisfaction at least once every two years. Once in two years is not enough for the authority to stay abreast with the ICT sector. There must be frequent liaising between the Authority and the consumer.

3.5 QUALITY OF SERVICE GUIDELINES

Section 67 of the ICT ACT empowers ZICTA to prepare Quality of Service Guidelines. Quality of Service Guidelines are minimum standards of performance that every ICT service provided by service providers must meet. For example, according to the Quality-of-Service Guidelines (QoS), an SMS should take no more than ten seconds to be delivered to its desired recipient. The QoS provide for other standards relating to various characteristics of electronic communication services, such as the minimum acceptable standards for the quality of voice during a telephone call (for the user listening) and the minimum requisite strength and speed of network for data

⁵⁶ M Nalwimba, 'ZACA urges ZICTA to deal with Mobile Service Providers providing poor services' News Diggers(10 October 2023) available at: https://diggers.news/local/2023/10/10/zaca-urges-zicta-to-deal-with-mobile-service-providers-providing-poor-services/?fbclid=IwAR04eF6iPMha_0frB15G3Ri19iQ1vXUC-qAcPc1O-wt2B8fP30-NeovZXHw (accessed at 12th October 2023)

services. The QoS, unlike the other consumer protection guidelines, are highly technical. The guidelines provide for means and ways to measure the quality of the various services and the minimum accepted standards each service must meet. The quality of service–related guidelines currently in force are the Quality of Service Guidelines of 2019.

One Information Technology expert⁵⁷ believes that the Quality of Service Guidelines uses language that is very technical and cannot be easily understood by the everyday consumer. He stated that because of this, most consumers do not understand how certain services are supposed to function or are to be measured. He was further of the opinion that it would benefit consumers if they were to be availed of a basic understanding of the guidelines. This is a reasonable opinion by the expert. Given that the guidelines are meant to protect the consumer, it only makes sense that the average consumer must be able to get the gist of what the guidelines provide for to know whether his/her service provider is compliant or not. This will enable consumers to make well-informed complaints to the Authority as they will have the guidelines as a basis for their complaints.

Of interest, however, is that despite the Code of Conduct guidelines and Consumer Protection Guidelines stating that service providers must provide electronic Communication services (ECS) to people who are disabled, such as those hard of hearing, there is no provision in the QoS guidelines that provides for the assessment of such services. When asked about this, the interviewee mentioned in the previous paragraph said, “It is not an impossibility to incorporate people with disabilities. Outside Zambia, there are technologies and software that incorporate disabled people such as the deaf.” The interviewee is right. There are numerous technologies and software that allow those differently-abled to make use of ICT services, including those offered by service providers. An example of such a service is telecommunication relay services (TRS). TRSs are ECSs that allow people who are deaf to place calls to standard telephone users. Although the use of TRSs continues to increase around the world, including in African countries, the lack of provisions for the assessment of TRSs and other types of ICTs that are designed for those differently abled in the QoS is

⁵⁷ Interview with IT Specialist, (interviewee opted to be anonymous) conducted physically on the 24th of July 2023

probably the reason behind the lack of innovation of such ICTs in Zambia. Under the current framework, it seems that providing ICTs for people with disabilities is a goal rather than a requirement.

No provision in the ICT Act directly requires ZICTA to draw perspectives from the general population of consumers during the forming of Consumer Protection Guidelines. Having been involved in the drafting of ZICTA guidelines, the IT expert earlier referred to stated that, “the drafting of Quality-of-Service Guidelines do not incorporate the views of people from other industries. Despite some ICT users stemming from other sectors, the drafting of Quality of service guidelines is overseen by IT technicians with minimal input from other sectors.” The interviewee further opined that this is why we have a situation of the guidelines not incorporating services designed for those differently-abled.

In contribution to the point brought out in the previous paragraph by the interviewee, the researcher believes that one prevalent problem with Zambia’s consumer protection framework is the lack of the key stakeholder, the consumer. It is commendable that ZICTA engages with ZACA. However, the ICT Act must ensure there is a stronger link between the consumer and the regulator by ensuring there is more representation of consumers from all sectors and walks of life.

3.6 CONCLUSION

This chapter examined the legal provisions relating to consumer protection in Zambia’s ICT sector. The main problems affecting ICT consumer protection in Zambia can be narrowed down to seven. The ICT Act does not ensure the autonomy of the regulatory authority. There are not enough service providers on the market. There is a weak connection between consumers and the regulatory body. There is a lack of engagement with consumers and the consumer protection framework. There is a lack of comprehensive and specific provisions providing for the consumer protection of persons with disabilities. There is a weak enforcement mechanism in the form of a poor monitoring system and a lack of clear guidelines on consumer compensation. And the presence of a parastatal on the ICT market.

CHAPTER FOUR: DRAWING LESSONS FROM THE LEGAL AND REGULATORY FRAMEWORK ON ICT CONSUMER PROTECTION IN BOTSWANA, SOUTH AFRICA AND THE UNITED KINGDOM

4.0 INTRODUCTION

Chapter 3 explored Zambia's legal framework governing ICT Consumer Protection. The examination revealed seven inadequacies of the framework and its resultant social problems. In this chapter, we shall explore how Botswana, South Africa and the United Kingdom have addressed these inadequacies by examining their frameworks.

4.1 THE UNITED KINGDOM

The United Kingdom (UK) has a comprehensive ICT Consumer Protection framework. Its main authority is the Communications Act of 2003 and the General Conditions of Entitlement as prepared by OFCOM. It is called the General Conditions of Entitlement because of the general rule that any entity is entitled to offer electronic communication services as long as they comply with the General Conditions of Entitlement.⁵⁸

4.1.1 ENTITLEMENT OF SERVICE PROVIDERS

Under the Communications Act, there is no requirement for one to obtain a license to run an electronic communications Network or an electronic communications service. The only exception to this is if radio spectrum is involved in providing the service or network. Currently, the United Kingdom has four major network providers and over fifteen electronic communications service providers.⁵⁹ The network providers sell their coverage to numerous electronic communications service providers, who then offer electronic communication services to everyday consumers known as end users. This allows the big four network providers to focus on making the network available, whilst electronic communications service providers focus on meeting the needs of consumers. As a result of such a free market, competition is enhanced, and consumers have a wide range of service providers to choose from. Service providers will strive for the consumer's preference by improving the quality of their customer care and service delivery, thereby enhancing the consumer experience.

⁵⁸ Section 45 of the Communications Act 2003

⁵⁹ Sajni S 'Mobile Phone Networks: a simple guide' available at <https://www.comparethemarket.com/mobile-phones/content/a-guide-to-mobile-network-operators/> (accessed 10 October 2023)

To ensure OFCOM stays abreast of new significant entrants in the market, Section 33 of the Communications Act gives OFCOM the power to designate certain electronic communication services. The effect of this is that service providers who intend to offer the designated service must notify OFCOM of their intentions to do so before offering the services.⁶⁰ Section 33(5) provides for the information a notification is required to contain. This information is such that it would enable the service provider to be identified by OFCOM.⁶¹ This enables OFCOM to best regulate service providers.

In addition, the general Conditions help ensure that service providers are technically capable of offering services. They also play a major role in consumer protection.

4.1.2 GENERAL CONDITIONS OF ENTITLEMENT

Section 51 of the Communications Act provides for the General Conditions of Entitlement. The conditions are set by OFCOM, the authority that regulates the ICT sector in the UK. Section 51(2) provides for matters that should be in the General Conditions of Entitlement. Unlike Zambia's Consumer Protection Guidelines, the matters under subsection one are not open to the authority's discretion. The matters include protection of end-users of public electronic communications services; network access and interoperability of services; protection of the integrity of public electronic communications networks and services; prevention (in accordance with European Community obligations) of interference with networks and services; provision for financial contributions towards the cost of universal service; provision of networks and services in the event of disaster; protection of public health; and compliance with relevant international standards, the resolution of disputes between such providers and any of their customers where the complaint relates to contractual conditions, or to the performance of a contract for the supply of an electronic communications network or service] and the provision of remedies and redress in respect of matters that form the subject-matter of such complaints or disputes.

Under the General conditions of entitlement, all service providers are required to have dispute resolution procedures. These procedures are subject to the approval of OFCOM. However, before OFCOM grants such approval, all dispute resolution

⁶⁰ Section 33(1) of the Communications Act 2003

⁶¹ Section 33(5) of the Communications Act 2003

procedures must meet the requirements under Section 54 of the Communications Act. OFCOM are required to set general conditions requiring service providers to set dispute resolution procedures subject to OFCOM's approval According to Section 54(2) OFCOM are not to approve dispute procedures unless they are satisfied that the arrangements under which the procedures have effect (a) are administered by a person who is for practical purposes independent (so far as decisions in relation to disputes are concerned) of both OFCOM and the communications providers to whom the arrangements apply; (b) give effect to procedures that are easy to use, transparent and effective; (c) give, in the case of every communications provider to whom the arrangements apply, a right to each of his consumers, to use the procedures free of charge; (d) ensure that all information necessary for giving effect to the procedures is obtained; (e) ensure that disputes are effectively investigated; (f) include provision conferring power to make awards of appropriate compensation; and (g) are such as to enable awards of compensation to be properly enforce. Of key importance are subsections (a), (f) and (g).

As alluded to in the previous paragraph, under the Communications Act, each service provider is to have a dispute resolution procedure, just like Zambia. However, under the Communications Act, the dispute procedure must provide for the administration of disputes by individuals who are independent of both OFCOM and the service provider. The procedures furthermore include provisions conferring the power to make awards of appropriate compensation to the consumers and are such as to enable awards of compensation to be properly enforced. It is a known fact that the service provider is in a much stronger position in comparison to the consumer. They are more structured and more informed than the often unorganised and ill-informed consumers,⁶² subsections (a), (f) and (g) are therefore a great way of putting the aggrieved consumer and service provider on a much more equal footing as far as dispute resolution is concerned, enabling the consumer to seek a more amicable remedy without the need of appealing to the Authority.

⁶² K Mwansa 'Status of Consumer Protection in Zambia' (Empowering regulators to protect consumer rights, Lusaka, 2009) available at <https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/40868/128966.pdf?bitstreamId=46260&locale-attribute=fr> (accessed 13th March 2023)

As for the enforcement of the General Conditions, there are one of two resultants for failing to abide by the general conditions. In cases where the contravention is less severe, OFCOM can fine the service provider.⁶³ In serious matters/urgent matters, OFCOM can either restrict or suspend the service provider's entitlement.

In so much as service providers are entitled to provide services in the UK, OFCOM can suspend or restrict such entitlement. This suspension or restriction is done in cases of urgency under Section 98 of the Communications Act. In such cases, OFCOM is left with little discretion. The only discretion OFCOM has is to choose between either suspending or restricting the service provider's entitlement.⁶⁴ The Urgent matters are, according to Section 98 (2), where there is (a) serious threat to the safety of the public, to public health or national security; (b) serious economic or operational problems for persons (other than the contravening provider) who are communications providers or persons who make associated facilities available; or (c) serious economic or operational problems for persons who make use of electronic communications networks, electronic-communications (EC) services or associated facilities. Such suspension or restriction may be for a particular type of EC service or all types of EC services. Once the entitlement is taken away a service provider shall no longer offer such electronic communications services.

4.1.3 CONSUMER ADVISORY PANEL

Section 16 (2) of the Communications Act provides for the establishment of a Consumer Advisory Panel. The function of the Panel is primarily to advise OFCOM on consumer issues relating to the provision of electronic communications networks and services standards of service, quality and safety for such services, the handling of complaints made by persons who are consumers of such services, the provision of remedies and redress for such complaints and other matters necessary for the efficient protection of consumers. The Panel is made specifically for consumers of electronic communication services.⁶⁵ Aside from the functions allocated to Section 16(3) of the Communications Act, in establishing the Panel, OFCOM must ensure the Panel is

⁶³ Section 96A of the Communications Act 2003

⁶⁴ Section 98(4) of the Communications Act 2003

⁶⁵ Section 16(5) of the Communications Act 2003

capable of carrying out Consumer Research,⁶⁶ which is a function designated to OFCOM by the Act.

Consumer Research is a good way of protecting consumers. The research aims to ascertain the state of public opinion from time to time on how electronic communications networks and electronic communications services are provided, the experiences of consumers concerning the handling by service providers of complaints made to them by such consumers, the experiences of such consumers concerning the resolution of disputes with communications providers or with persons making associated facilities available, the interests and experiences of such consumers concerning other matters that are incidental to, or are otherwise connected with, their experiences of the provision of electronic communications networks and electronic communications services or the availability of associated facilities. Although OFCOM is not mandated to follow the advice given to it by the Panel, it is obliged to consider the said advice it is given whilst it executes its functions.⁶⁷ This includes the results the consumer panel obtains from its research⁶⁸.

Section 17 of the Communications Act provides for the composition of the panel. The number of members the Panel has is subject to OFCOM's discretion. However, it must consist of a chairman.⁶⁹ All Panel members are appointed by OFCOM subject to the approval of the Secretary of State. In deciding who to appoint, OFCOM must take into account that the panel should be capable of giving informed advice on the interests of the following persons: disadvantaged persons, persons who have low incomes, persons who have disabilities, persons living in rural areas, persons living in urban areas, small businesses and the elderly.

In fulfilling its functions and obligations, the Panel may form committees to assist it. Every committee created by the Panel must have at least one member from the Consumer Advisory Panel.

⁶⁶ Section 16(6)(a) of the Communications Act 2003

⁶⁷ Section 16(7)(a) of the Communications Act 2003

⁶⁸ Section 16(7)(b) of the Communications Act 2003

⁶⁹ Section 17(1) of the Communications Act 2003

The UK's Consumer Advisory Panel is a means by which the interests of the consumers are represented, protected and promoted. It can be likened to a bridge between the consumer and the regulator.

4.2.0 SOUTH AFRICA

The Electronic Communications Act (ECA) of South Africa is the primary legislation governing ICTs in South Africa. The relevant consumer protection provisions are in Chapter 12 of the said Act. One commendable feature of South Africa's framework is Section 70 of the ECA Act, which states that the Authority must prescribe a code for people with disabilities that will apply to all service providers. South Africa's principal legislation explicitly provides for the consumer protection of consumers with disabilities.

4.2.1.0 CODE FOR PERSONS WITH DISABILITIES REGULATIONS

One of the most challenging parts of consumer protection is protecting the interests of consumers with disabilities. This is an even more daunting task when dealing with those who are deaf. ICASA, in pursuance to Section 70 of the ECT Act, has in place the Code for Persons with Disabilities Regulations. These regulations aim to put those with disabilities, such as people who are deaf or hard of hearing, on equal footing as those without disabilities. To accomplish this, it places various specific mandates on electronic communication service providers for their services offered to be more suitable for those with disabilities. There are a total of 12 guidelines in these regulations. Attention, however, shall be focussed on two essential guidelines.

4.2.1.1 NATIONAL RELAY SYSTEM

This is provided for by Guideline 6. Guideline 1 defines a national relay system as phone services operated by interpreters that enable persons with Disabilities to communicate by phone, via an interpreter, with a person who has no disabilities. Guideline 6 mandates service providers to provide for NRS, which translates voice to text and vice versa on calls made by persons who are deaf or have hearing or speech impairments. Annexure A describes in more detail how this is to be achieved. The main feature of the NRS is the Video Relay Service.

A Video Relay Service (VRS) allows hard of hearing and deaf people to use video technology to communicate in a manner similar to a traditional telephone call via a South African Sign Language interpreter (SASLI.) For example, upon placing a phone

call, a user who is deaf will be transferred to a video call with the SASLI. The deaf person then signs to the SASLI. The SASLI then speaks (via phone) to the hearing person. The hearing person replies (speaks) to the SASLI, and the Sign Language Interpreter then translates (signs) the response to the deaf person (who can see the interpreter on their mobile phone, computer, or video screen). This process takes place simultaneously.⁷⁰

The service provider's VRS must be accessible on PC software, Tablet software, smartphone software applications, Television interface or Videophone. All service providers are therefore required to have interpreters on hand to make this possible.

4.2.1.2 GENERAL REQUIREMENTS FOR COMMUNICATION AND INFORMATION PROVISION TO PERSONS WITH DISABILITIES FOR INDIVIDUAL ELECTRONIC COMMUNICATION SERVICE ("I-ECS") LICENSEES

This guideline is the 7th guideline of the regulation. It aims to give disabled persons the same consumer rights as their abled counterparts.

Guideline 7(6) provides for access to information. For instance, service providers are to make available advertisements and promotions for products and services specifically designed for persons with Disabilities in accessible formats to relevant organisations of persons with Disabilities in every province upon request. Furthermore, where practicable, they provide, upon request, printed material outlining accessible products for persons with Disabilities in simple and reader-friendly languages.

Guideline (7)1 mandates all service providers to ensure emergency services can be accessed by persons with disabilities, and guideline 7(4) states that all service providers must ensure employees who can provide customer service and communicate with persons with Disabilities in all its stores.

4.2.2 INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

Section 3 of the Independent Communications Authority of South Africa (ICASA) Act establishes ICASA, the authority that regulates South Africa's ICT sector. ICASA acts through council members appointed under Section 5. ICASA is independent, subject only to the relevant laws, such as the ICASA Act itself, the ECT Act and the

⁷⁰ Annexure A 1.1.1 of the Code for Persons with Disabilities Regulations 2021

Constitution of South Africa. It is to function without any political or commercial interference.⁷¹

There are a total of 9 council members, one chairperson and eight council members appointed by the minister subject to the approval of the National Assembly. According to Section 5(3) of the ICASA Act, Persons appointed to the Council must be persons who (a) are committed to fairness, freedom of expression, openness and accountability on the part of those entrusted with the governance of public service; and (b) when viewed collectively (that is when the nine are viewed collectively) (i) are representative of a broad cross-section of the population of the Republic; and (ii) possess suitable qualifications, expertise and experience in the fields of, amongst others, broadcasting, electronic communications and postal policy or operations, public policy development, electronic engineering, law, marketing, journalism, entertainment, education, economics, finance or any other relevant expertise or qualification.

Section 6(1) provides for what disqualifies one from being appointed as a council member. The section aims to eliminate, among others, individuals with interests to serve. For example, under subsection (1), a person may not be appointed as a councillor if he or she is not a citizen of the Republic, is not a permanent resident in the Republic, is a public servant or the holder of any other remunerated position under the State, is a member of Parliament, any provincial legislature or any municipal council, is an office-bearer or employee of any party, movement or organisation of a political nature, or his or her family member has a direct or indirect financial interest in the telecommunications or broadcasting industry. Not only does the subsection guard against conflict of interest via family members, it also does so against business partners.⁷²

Section 5 describes how council members are appointed. The National Assembly submits to the minister suitable candidates for the role of councilor. The Assembly must submit a list of not less than one and a half times the number of councilors to be appointed to the minister.⁷³ The National Assembly may invite technical experts to

⁷¹ Section 3(4) of the Independent Communications Authority of South Africa Act, 2000 No. 13 of 2000

⁷² Section 6(1)(g) of the Independent Communications Authority of South Africa Act, 2000 No. 13 of 2000

⁷³ Section 5(1A)(a) Independent Communications Authority Act of South Africa Amendment Act, No. 3 of 2006.

assist in the selection, evaluation and appointment processes of councillors. According to Section 5(1A) (c), the said experts may include: (i) a person with knowledge of and experience in the industry; (ii) a person with a legal background, knowledge of the ICT sector and competition-related matters; (iii) an academic in the field of electronic communications; (iv) a representative from the labour sector; (v) a representative of consumer interests.

After the minister receives the candidates prepared by the National Assembly, the Minister must recommend to the National Assembly, from the list, persons whom he or she proposes to appoint to serve on the Council. If the National Assembly decides that the persons recommended for appointment by the Minister do not meet the qualifications outlined in Section 5(3), the National Assembly may request the Minister to review his or her recommendation. After the National Assembly approves of the Minister's recommendations, the Minister must then go on to appoint a chairperson by notice in the Gazette. The Minister is required to appoint the Chairperson or other councilor by notice in the Gazette. From the above, the only council member the minister has absolute power to appoint is the chairperson.

Section 8 deals with the removal of council members. A person's position on the council may be vacated through (a) misconduct; (b) inability to perform the duties of his or her office efficiently; (c) absence from three consecutive meetings of the Council without the permission of the Council, except on good cause shown; (d) having any other remunerative employment, occupation or office which is likely to interfere with the exercise by any such councillor of his or her functions in terms of this Act; or create a conflict of interests between such employment, occupation or office and his or her office as councillor; (e) failure to disclose conflict of interest in terms of section 12(2)(a) or voting or attendance at, or participation in, proceedings of the Council while having an interest contemplated in section 12(1)(f) his or her becoming disqualified in line with section 6(1). A councilor may only be removed from office by the National Assembly.

In as much as there is a need for ICASA to remain independent, there is also a need to ensure it properly performs its functions. To do this without compromising the independence of the Authority, section 6A (1) provides for a monitoring process. The Minister, in consultation with the National Assembly, is to establish a performance management system to monitor and evaluate the performance of the chairperson and

other councilors. The performance management system must set appropriate key performance indicators as a yardstick for measuring performance, set measurable performance targets, and set a procedure to measure and review performance at least once a year. The evaluation of the performance of the chairperson or other councilor must be conducted by a panel constituted by the Minister, in consultation with the National Assembly. After evaluating the council's performance, the panel must submit a report to the National Assembly for consideration.

4.2.3 CONSUMER ADVISORY PANEL

South Africa also has a consumer advisory panel similar to the one provided for in the Communications Act. South Africa's consumer advisory panel is provided for under Section 71 of the Electronic Communications Act (ECA). Though similar to the United Kingdom's, this Consumer Panel has a few notable differences. For one, the panel's composition and functions are prescribed by ICASA through regulation. The current regulations are the Consumer Advisory Panel Regulations prescribed under Section 71(2).

One notable difference is in the South African Panel's composition. Unlike the UK's panel, South Africa's attempts at barring members who may have an interest to serve. A person may not be appointed as a Panel Member if he /she is an office bearer or employee of a party of a political nature, is a member of Parliament, a provincial legislature or municipal council, or if his or her spouse/partner has a direct or indirect financial interest in the electronic communications, postal or broadcasting industry.⁷⁴

Another difference is that members of the public are directly involved in the appointment process of panel members. Under Regulation 8.3, the Authority is mandated to call for nominations from the public for suitable persons following an advertisement of the positions of Panel Members on the ICASA website as well as at least one national newspaper and other platforms at its discretion.

Another difference is that South Africa's panel members are appointed solely by the Authority. Unlike the UK, the appointment of South Africa's panel members does not need approval from an external authority. This, in the researcher's opinion, makes things less complicated and ensures that the panel is free from political influence.

⁷⁴ Regulation 7(1) Consumer Advisory Panel Regulations

South Africa's current Panel Regulations are commendable. They compel the panel and consumers to liaise on an annual basis.⁷⁵ This allows the panel to better understand the consumers' perspectives. It also ensures that the Authority remains in touch with the various challenges facing consumers. The researcher, however, feels that these provisions, especially the ones dealing with the composition of the Panel, must be embedded in the principal legislation, as is the case with the United Kingdom.

4.3.0 BOTSWANA

Botswana's legal framework, with regard to ICT consumer protection, is much like Zambia's. The researcher believes that, it has similar inadequacies to that of Zambia. It does, however, have one commendable feature worth drawing lessons from, which is its law on the regulation of its regulatory authority.

4.3.1 COMMUNICATIONS REGULATORY AUTHORITY

The Communications Regulatory Authority (CRA), like ZICTA, has its duties carried out by its board. The CRA Act ensures that the CRA's Board is devoid of political and external commercial influences.

According to Section 10,⁷⁶ no person shall be appointed as a member, nor shall any person be qualified to hold office as a member who (a) has in terms of any law in force in any country (i) been adjudged or otherwise declared bankrupt or insolvent and has not been rehabilitated or discharged, (ii) made an assignment to, or arrangement or composition with, his or her creditors, which has not been rescinded or set aside (b) has within a period of ten years immediately preceding the date of his or her proposed appointment, been convicted (i) in Botswana, of a criminal offence which has not been overturned on appeal or in respect of which he or she has not received a free pardon, or (ii) outside Botswana, of an offence, which in Botswana, would have been a criminal offence, and sentenced by a court of competent jurisdiction to imprisonment for one month or more without the option of a fine, whether that sentence has been suspended or not, and which conviction has not been overturned on appeal and in respect of which he or she has not received a free pardon; (c) has within two years immediately preceding the date of his or her proposed appointment, worked as a chairperson of, or director or senior manager in, or has provided full-time independent consultation

⁷⁵ Regulation 3(2)(c) Consumer Advisory Panel Regulations

⁷⁶ Section 10 of the Communications Regulatory Authority Act 2012

services to, any regulated supplier or any affiliate of that regulated supplier, whether situated within or outside Botswana; (d) is the holder of any office in any party, movement or organisation of a political nature in Botswana; (e) holds office in any district, city or town council or central government; (f) is an executive or non-executive chairperson, director or officer in a regulated supplier; (g) holds any controlling interest in any regulated supplier, or is the holder of a licence issued by the Authority, other than a licence required for his or her personal use; (h) has either himself or herself, or through a family member, a direct or indirect financial interest in the industries regulated by the Authority; (i) is a serving member of the judiciary within Botswana; (j) is not a citizen of Botswana; (k) is an employee of the Authority; or (l) who has been required to resign his or her position in accordance with section 11.

Section 11 provides various grounds upon which a board member shall vacate his/her office, one of them being if he or she becomes disqualified in terms of section 10 to hold office as a Board member.

Section 14 provides another safeguard. A person shall not, within 12 months after the expiration or termination of his or her term of office with the Board, (a) enter into any contract for the supply of services regulated by this Act to, any regulated supplier under the jurisdiction of the Authority; or (b) acquire or hold any financial interest, over 5 per cent of the issued share capital of any regulated supplier. Foreknowledge of this provision stops board members from engaging in compromising dealings, no matter how lucrative. This is important as it ensures the unbiased regulation of the ICT Sector, which is essential for consumer protection.

4.4 CONCLUSION

This chapter examined the law governing ICT consumer Protection in South Africa, the United Kingdom and Botswana. More attention was given to the provisions of the laws of these jurisdictions that address the issues Zambia has in its ICT sector brought out in Chapter Three.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.0 INTRODUCTION

This research explored ICT consumer Protection laws in Zambia, Botswana, the United Kingdom and South Africa. Apart from summarising this research, this Chapter will give recommendations on how Zambia's legal framework on ICT consumer protection can be improved, drawing lessons from the Republic of South Africa, Botswana, and the United Kingdom.

5.1 SUMMARY OF CHAPTERS

This paper consists of five chapters. Each chapter contains information supporting the title of the research, "The Legal and Regulatory Framework on ICT Vis-a-Vis Consumer Protection in Zambia: Lessons from Botswana, South Africa and The United Kingdom."

5.1.1 CHAPTER ONE

This Chapter introduced the title of this research. It highlighted the prevailing social problems born from the current legal framework and gave a background to the same. It discussed the views of various authors on the topic of ICT Consumer Protection. Lastly, it discussed how the research would be carried out.

5.1.2 CHAPTER TWO

This Chapter explored the meaning of ICT Consumer Protection. It first started by outlining the historical background of ICT Consumer protection, describing what it entails in its general form. The meaning of ICT Consumer Protection was then examined from the perspective of the Zambian, Botswana, South Africa and the United Kingdom's jurisdiction.

5.1.3 CHAPTER THREE

This Chapter explored the regulatory and legal framework governing ICT consumer protection in Zambia. The focus was on the ICT Act, the principal legislation governing the ICT sector in Zambia. It explored other consumer protection provisions in components of the consumer protection framework, including the Consumer Protection Guidelines, the Code of Conduct Guidelines for ICT Service Providers and the Quality-of-Service Guidelines. In exploring the framework, its legal inadequacies

were highlighted, which caused the prevalence of the social problems mentioned in Chapter One.

5.1.4 CHAPTER FOUR

Chapter four explored the legal and regulatory frameworks governing ICT Consumer Protection in the United Kingdom, South Africa and Botswana. In exploring these frameworks, the focus was on how these jurisdictions had addressed the legal problems brought out in Chapter Three.

5.2 RECOMMENDATIONS

Following the unearthing of the deficiencies in Zambia's ICT Consumer Protection Framework, the recommendation is that the ICT ACT be amended. Below are six key areas in which the ICT Act can be amended to enhance ICT Consumer Protection.

5.2.1 THE INTRODUCTION OF A CONSUMER ADVISORY PANEL

As was shown in Chapter 3, the linkage between the consumer and the regulator in Zambia is weak. The consumer is an integral part of the consumer protection framework and needs to be engaged. One way to do this, as has been done by South Africa and the United Kingdom, is for Zambia to establish a consumer advisory panel to be provided for under an amended ICT Act. The panel should comprise members representing the interests of various social groups in Zambia. It must comprise of, among others, people who are well informed on the needs of consumers who are deaf, blind, elderly, those in rural areas, people with high incomes and people with low incomes.

Members of Zambia's panel must not be affiliated with any political and commercial groupings that could influence their duties. Therefore, a person should not be permitted to be a Panel Member if he /she is an office bearer or employee of a party of a political nature, is a member of Parliament, or if his or her spouse/partner has a direct or indirect financial interest in the electronic communications industry. Furthermore, a person who is not a Zambian citizen, and a person who is not a permanent resident of Zambia should not be appointed as a panel member.

The consumer panel members must be selected in the same manner as they are in South Africa. The amended ICT Act must oblige the Authority to call for nominations from the public for suitable persons following an advertisement of the positions of

Panel Members on the ZICTA website and at least one national newspaper and any other platforms at its discretion. The authority may then choose suitable and qualified candidates as panel members.

The two primary duties of the consumer advisory panel must be to prepare consumer reports by carrying out consumer research and advise the authority on consumer issues. The research must pertain to the views, perspectives and concerns of consumers of electronic communication services in Zambia. The reports shall be submitted to ZICTA and must be made public for purposes of transparency. ZICTA shall, in discharging its consumer protection functions, consider these reports and the advice it obtains from the panel. The reports, along with the panel's well-informed advice, will enable ZICTA to stay up to date with consumer issues and equip it with vital consumer related information. The advisory panel should also be tasked with bolstering consumer familiarity and engagement with the consumer protection framework.

The consumer advisory panel must have two sub-committees, to be led by members of the consumer advisory panel. The purpose of these committees should be to draft recommendation consumer protection guidelines and attend to consumer complaints appealed by consumers to the authorities. The panel must be allowed to create guidelines outlining how these committees are to carry out their functions. These guidelines must be subject to the approval of the Authority.

Aside from strengthening the relationship between ZICTA and the consumer populace, this amendment will also solve the framework's enforcement problem. As was noted in Chapter Three, ZICTA rarely inspects service providers' compliance with Consumer Protection Regulations. By having a panel specialised in consumer issues, the Authority shall be up to date on contraventions of all Consumer Protection guidelines.

5.2.2 ADDRESSING THE LACK OF REFUND PROVISIONS FOR CONSUMERS

As was noted in Chapter Three, it is difficult for consumers to obtain refunds and compensation even when they deserve it. Consumers are in a much weaker position than service providers. Their main source of compensation is through dispute resolutions under the control of the service providers. As was shown in Chapter Three, Zambia's framework does not specify what circumstances must call for refunds.

Therefore, as a start, Section 68, which deals with the making of the Consumer protection guidelines, must be amended. This is because, under Section 68, the inclusion of consumer compensation provisions is left up to the discretion of the Authority under Section 68(3)(c). Furthermore, everything from 68(3)(a) to 68(3)(i) is left to ZICTA's discretion despite being necessary to consumer protection. Section 68(3) of the ICT Act must be amended to read as follows, "The guidelines issued by the Authority under subsection (1) **shall** include procedures for (a)meeting consumer needs and requirements; (b)the handling of consumer complaints and disputes, including an inexpensive arbitration process, other than resolution of matters in the courts; (c)the reasonable compensation of consumers in the event of a breach of the **Code of Conduct, Consumer Protection and Quality of Service Guidelines**; (d)the protection of consumer information; (e) the provision of information to consumers regarding services, rates and performance". This amendment will ensure that the authority makes provisions for the compensation of consumers in the event that the service provider breaches any of the Consumer Protection Guidelines. The ICT Act must also be amended to include a fifth subsection of Section 68 dealing specifically with dispute resolution. The subsection is to prescribe the procedure of the resolution of disputes under the earlier quoted Subsection 68(3)(b). To accommodate this addition, Subsection 68(3)(b), earlier quoted above should be amended to read, "...the handling of consumer complaints and disputes, including an inexpensive arbitration process, other than resolution of matters in the courts **subject to Section 68(5).**"

Taking a leaf from the United Kingdom's Communications Act 2003, the proposed Subsection 68(5) must provide for the making of a dispute resolution procedure to be adopted by all service providers. The dispute resolution procedure must be developed by ZICTA and adopted by all service providers to ensure uniformity and certainty. By doing this, even if a consumer later changes his/her service provider, he/she shall be aware of what circumstances will warrant compensation. The dispute resolution procedure (DRP) prepared under the proposed Subsection (5) should conform to the following requirements; (a) it must provide for the resolution of disputes by a person who is, for practical purposes independent of ZICTA, the consumer aggrieved and the service provider of the consumer; (b) the DPR must be easy to use, transparent, free

of charge and effective (c) it must confer onto the independent person outlined in (a) the power to award reasonable compensation on behalf of the service provider.

These amendments will ensure the consumer's interests are protected and will minimise the need for the consumer to seek redress from the authority.

5.2.3 WEAK LAW GOVERNING AUTHORITY

There is a need to make amendments to the First Schedule of the ICT Act⁷⁷. To ensure the independence of its regulatory authority, South Africa has its parliament nominate candidates for its regulatory authority's board positions. Zambia must adopt a part of South Africa's system (subject to a few variations) to ensure the board runs effectively and independently. The number of members of the ZICTA board should be expanded to ten, with six appointed by a variation of South Africa's system and four appointed by a variation of Zambia's current system.

Therefore, Paragraph 2 of the ICT Act must be amended. Paragraph 2(2) must contain two subparagraphs, (a) and (b). Paragraph 2 (2) (a) should deal with the appointment procedure for the six board members. The National Assembly should submit to the Minister at least 24 suitable candidates. In deciding on the 24 candidates, the National Assembly should invite technical experts from members of the public to assist in selecting and evaluating the 24 candidates. Once the minister has received the candidates, he must then select six persons from the 24 to serve on the ZICTA board. In selecting these six he may receive assistance from the technical experts earlier mentioned. The minister must ensure that when viewed collectively, (i) the board represents a broad cross-section of the population of Zambia and (ii) possess suitable qualifications, expertise, and experience in the fields of Information Communications Technology, electronic engineering, law and finance.

The reason why it is best for the selection of board members to be left in the hands of the National Assembly is because it is composed of individuals holding various distinct political views. This lessens the odds of bias in the selection process of board members. The Minister, on the other hand, is a member of the cabinet and thus a

⁷⁷ First Schedule Part I Paragraph 2 of the ICT Act as amended by the Information and Communication Technologies (Administration of Authority) Regulations, 2022

member of the executive. Leaving the process of selecting board members solely to the minister is more likely to result in the selection of members who will pursue the political policies of the government of the day as opposed to the objectives of the ICT Act, which include ICT consumer protection.

Paragraph 2(2)(b) should deal with selecting the other four. After selecting the 6, the Minister shall appoint the following four more members, being; (a) one person nominated by the Zambia Consumer Association, (b) one person nominated by the Zambia Police Service, (c) one person nominated by the Information and Communications Technology Association of Zambia (d) and one other person appointed by the Minister. The Minister shall, on receiving the names of the proposed representatives under subsection (2)(b), appoint the nominees as board members.

As was shown in Chapter 3, Paragraph 2(5) seeks to block individuals with an interest to serve from serving on the board. In order to ensure this status quo continues way after a board member's appointment, Paragraph 6(3) should be amended to include subparagraph (i), which should read in its entirety as follows, "The office of a member becomes vacant if that member **becomes such a person that for purposes of paragraph 2(5) would not be nominated as a member of the board**". By doing so, if a board member later on becomes politically affiliated, he/she shall have their place on ZICTA's board vacated.

To further ensure the board's integrity, an additional sub-paragraph must be added to paragraph 6. Subparagraph 6(5), a provision inspired by Botswana's legislation, should read as follows, "A person shall not, within 12 months after his/her position on the board is vacated (a) enter into any contract for the supply of services regulated by this Act to, any regulated supplier under the jurisdiction of the Authority; or (b) acquire or hold any financial interest, over 5 per cent of the issued share capital of any regulated supplier." Foreknowledge of this provision shall discourage members of the board from engaging in compromising dealings.

There is also a need to reduce the level of authority the minister has over the functioning of ZICTA. This can be done by reducing the minister's financial control over the Authority. As of now, ZICTA must obtain the Minister's approval when deciding on financial provision. This can be done by removing the requirement for the

board to seek the Minister's approval and recommendation for any action it takes under part two of the schedule.

To further ensure the independence of ZICTA in carrying out its functions, section 6(3) of the ICT Act must be removed in its entirety.

In as much as ZICTA's performance must be assessed, such performance should be assessed by the National Assembly for reasons already discussed. With this in view, the ICT Act should provide for a monitoring process to assess the Board's performance without compromising the authority's independence. The ICT Act should provide for a monitoring process. The Act should state that the Minister, in consultation with the National Assembly, is to establish a performance management system to monitor and evaluate the performance of the chairperson and other members of the board. The evaluation should be restricted to the functioning of ZICTA under the ICT Act. The performance management system must set appropriate key performance indicators as a yardstick for measuring performance, set measurable performance targets, and set a procedure to measure and review performance at least once a year. The chairperson's and other members' performance must be evaluated by a panel constituted by the Minister in consultation with the National Assembly. After evaluating the performance, the panel must submit a report to the National Assembly for consideration. The Act must further allow the minister to remove a board member on recommendation by the National Assembly following the consideration of the Board's performance report. This will allow the minister to remove a Board member from his position if such a Board member does not execute his duties properly, as concluded by the national assembly.

Ensuring the independence of ZICTA will also fix the problem of having a parastatal on the market. Once ZICTA is independent of political influence, it can impose much-needed stronger penalties on service providers without worrying about imposing the same on Zamtel.

5.2.4 PROVISION FOR THOSE WITH DISABILITIES

As was seen, South Africa's framework takes a direct approach to providing for people with disabilities. Among people with disabilities, the deaf are probably the most disadvantaged as far as the use of electronic communication services is concerned. To handle this, an additional section to part 7 of the ICT Act should be added. The

proposed section should read as follows. “The Authority shall prescribe regulations setting out a code on people with disabilities that will apply to all categories of licences to ensure, in so far as it is possible, that persons with disabilities have access on an equal basis with others to Information communication technologies”. The aforesaid section must include a subsection that reads as follows, “provided that such regulations must make provision for (i) handling of consumer complaints and dispute resolution for people with disabilities and (ii) the provision of telecommunications relay services. The Authority may draw inspiration from the 2021 Code for Persons with Disabilities, published by South Africa’s ICASA.

5.2.5 ADDRESSING THE MEAGRE NUMBER OF SERVICE PROVIDERS

It is difficult to enforce consumer protection as effectively in a market where the number of service providers is meagre. As was shown in Chapter Three, a potential licensee must satisfy both technical and financial expectations to be given a license to operate on the market. To further open up Zambia’s ICT market, the recommendation proposed is for Zambia to adopt, in part, the United Kingdom’s system for admission of service providers onto the market. The researcher believes that, it would be difficult for the Zambian ICT framework to transition from one that requires its network providers to be licensed to one that does not require licensing. It would be challenging for the regulator to keep up and regulate new service providers. In as much as it would make it easier for new service providers to get onto the market, it would also make it easier for the same service providers to leave the market. It would still be possible to make it easier for service providers to enter the market without removing the requirement to hold a license, by limiting ZICTA’s power in the granting of licenses, and by reducing the requirements necessary to obtain a license.

ZICTA’s discretion in granting licenses can be limited by first amending Section 11(2) of the ICT Act. Under the current subsection, although required to give reason, ZICTA can reject an application on any grounds. To fix this, Section 11(2) must be amended to read, “The Authority shall, within sixty days of receipt of an application, reject the application **if such application fails to meet the requirements under Section 11(1).**” In doing this, it will be ensured that any application for a license is only rejected because the applicant failed to apply for the license in the manner prescribed by the authority, thus limiting any arbitrariness that may arise. To further ensure transparency and to encourage more stakeholders, Section 11(1) of the ICT Act

should also be amended to read, “A person intending to operate a network or provide a service under this Act shall apply for an individual licence or for a licence class licence in the prescribed manner upon payment of the prescribed fee, **provided that such fee and manner must be publicly available.**”

To reduce the requirements necessary to obtain a license and to set more clarity, Section 12(1)(b) should be amended to read as follows, “The Authority shall issue a license under this Act if the applicant is technically capable of meeting the technical obligations for network or service providers, as the case may be, set by the authority and the terms and conditions of the licence.”

The researcher believes that further opening up the electronic communications market shall increase the number of service and network providers on the market, lessening Zambia’s dependability on the three mobile network providers and allowing the authority to take needed action against offenders.

5.2.1.6 SUSPENSION AND REVOCATION OF SPECIFIC SERVICES UNDER SERVICE PROVIDER’S LICENSE

As discussed in Chapter One and Chapter Three, Zambia has a scant number of service providers, which makes it difficult for the authority to impose suspensions and revocation of licenses. In the United Kingdom, it was shown that OFCOM can suspend or restrict the provision of services by a service provider for a particular service. If this were to be applied to Zambia, ZICTA could restrict or suspend certain services for a particular licensee without suspending or restricting all the licensee’s services such as much-needed emergency services. For example, ZICTA could suspend MTN’s provision of internet services. Although MTN consumers would not be able to access MTN’s internet, they could still access emergency service, make phone calls, and send SMSs. MTN would lose out on the revenue it would have ordinarily received from providing internet services and would lose the patronage of some of its consumers. This penalty would deter them from repeating the same offence in the near and distant future and deter other service providers from committing the same offence.

Therefore, the sixth and final recommendation is for Section 18 to make provision for suspending and cancelling specific types of electronic communication services provided under the licensee’s license.

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RESEARCH CLEARANCE FORM







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TOPIC: THE LEGAL AND REGULATORY FRAMEWORK ON ICT VIS-A-VIS CONSUMER
PROTECTION IN ZAMBIA: LESSONS FROM BOTSWANA, SOUTH AFRICA AND THE
UNITED KINGDOM

Stage	Comments	Supervisor's Signature & Date	Student's Signature & Date
Research Proposal	The proposal and Chapter one were approved after effecting amendments	 17/07/23	 17/07/23
Chapter 1 – Introduction	Approved following review	 17/07/23	 17/07/23
Chapter 2 –	Amendments were proposed, agreed upon and effected.	 02/09/23	 02/09/23
Chapter 3 –	Review followed by effecting of the above and approval	 04/11/ /23	 04/11/23
Chapter 4 –	Approved after review	 06/11/23	 06/11/23

Chapter 5 – Conclusions & Recommendations	Approved upon amendments being effected	 06/11/23	 06/11/23
Table of Contents, Bibliography and Appendices	Table of contents reviewed.	 06/11/23	 06/11/23
First Draft			
Second Draft			
Final Draft	The draft was reviewed and adopted	 06/11/23	 06/11/23

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