THE FAIR TRADING COMMISSION
BEFORE THE BOARD OF COMMISSIONERS

IN THE MATTER OF THE CONSUMER PROTECTION ACT, 2010;

FAIR TRADING COMMISSION
VS.
CONTINENTAL STORES (PTY) LTD

Case No: CPA/INS16/65

Complainant – Fair Trading Commission
Respondent – Continental Stores (Pty) Ltd

QUORUM:
Mr. Victor Pool – Presiding Chairperson
Mr. Philippe Chong-Seng – Commissioner
Mr. Michael Nalletamby – Commissioner

For the Complaint: Ms. Karine Dick – Legal Officer (FTC)

For the Respondent – Ms. Alexandra Benoiton – Attorney-At-Law

RULING

[1]The Fair Trading Commission conducted a routine inspection at the business premises of Continental Stores (Pty) Ltd, situated at Revolution Avenue, Victoria on the 3rd of November, 2016 pursuant to Section 33(1)(j) of the Fair Trading Commission Act, 2009 whereby it was observed that 206 items were being displayed for sale without displaying to the consumer a price in relation to those goods contrary to Section 20(1) of the Consumer Protection Act, 2010 which provides that "*Subject to this subsection (2), a retailer shall not display any goods for sale without displaying to the consumer a price in relation to those goods.*" The respondent was served with a compliance notice on the 23rd of November, 2016 with pursuant to Section 72 of the same Act directions to remedy the breach. The Commission conducted a follow-up visit at Continental Stores (Pty) Ltd on the 14th of March, 2017 to ensure compliance with the compliance notice whereby it was allegedly found that the respondent was in continuous breach of section 20(1) by displaying for sale 134 different items without displaying to the consumer a price in relation to those goods.

[2]The Commission filed a case before the Board of Commissioners for the contravention of Section 20(1) and Section 72 of the Consumer Protection Act, 2010 and the parties appeared before the Board for a hearing of the matter. Ms. Karine Dick, Legal Officer of the Fair Trading Commission represented the complainant (the Commission) in the matter and she called two witnesses in support of her case. The evidence of the two Fair Trading Commission officers, namely Senior Analyst of the Market Surveillance Department and Principal Analyst of Competition Department, Mr. Erol Sophola, were to the effect that the items in breach were all cold items and during their inspections they did not see any price affixed either on the products, on the freezers or anywhere. They provided several documents as exhibits including photographs of the items listed as being in breach of Section 20(1) of the Consumer Protection Act, 2010.

[3]In its defence, the respondent, being represented by Ms. Alexandra Benoiton, Attorney-At-Law, gave evidence through three witnesses namely, Ms. Jovana Nourrice, Ms. Medeline Arnephy and Mr. Gonsalves Morin, who all vehemently contested to the non-affixation of prices.

[4]Both parties made oral submissions to conclude their case. Ms. Dick submitted that the respondent has been found in contravention of the Consumer Protection Act, 2010 on more than one occasion and has had sufficient time and opportunity to remedy the breaches so as to be compliant with all provisions of the Consumer Protection, Act, 2010. Ms. Dick prayed that the Board imposes a penalty pursuant to Section 70 of the Act for the contravention of Section 72 and further enforce the provisions of Section 67(1) for the contravention of Section 20(1) of the Act while having regard to the nature, duration, gravity and extent of the contravention in relation to the number of items found in breach and the length of time the breach had been taking place. The respondent is a well-known company that has been in existence for many years hence the penalty should be one that acts as a deterrent factor to ensure that Consumer Protection Act, 2010 is respected. Ms. Benoiton, for the respondent, submitted that out of thousands of items being sold at Continental Stores the only items deemed to have been in breach were found in a freezer and a standing chiller and from the first visit only three products from a list of fourteen were found to still be in breach of Section 20(1) of the Consumer Protection Act, 2010. Ms. Benoiton submitted that the respondent had presented evidence from three witnesses who all stated that the said prices were always on display on the freezer and chiller and that although the pictures produced by the Commission showed that the prices were not displayed on each individual item they did not show that the prices had not been affixed elsewhere. Ms. Benoiton asked the Board take notice of fact that it is normal practice for chilled or frozen items to have their prices

affixed elsewhere other than on the product itself for the reason described by the witnesses that the prices fall off because of the cold. Ms. Benoiton also requested the Board to consider the fact that the compliance notice served was in relation to fourteen particular products and that during the subsequent compliance visit nine new products were observed and the respondent was not given opportunity to rectify the matter. Counsel also submitted that should the Board feel that the respondent should be penalised that the respondent should not incur any increased penalty for having a well-known shop that has been in existence for a long time as opposed to a new shop and also to take into consideration that out of the thousands of items being sold at Continental Stores only 134 were deemed to be in breach during the compliance visit which in her view lessens the gravity and extent of the alleged breach.

[5]Having heard all the evidence adduced before it the Board retired to deliberate on the matter. The Board appreciated that all three respondent witnesses gave cogent and corroborative evidence to the effect that the prices were found on the body of the chiller and freezer. Whereas officers of the Commission were adamant that no prices were affixed anywhere. The photograph produced by the officers of the Commission does not provide proof of non-affixation of prices but only that they were not affixed on the individual product and Section 20(3)(a) of the Consumer Protection Act, 2010 provides that *"A price is adequately displayed to a consumer if, in relation to any goods or services a written indication of the price expressed in the currency of the Republic is annexed or affixed to, or written, printed, stamped or located on, or otherwise applied to the goods or to, any band, ticket, covering label, reel, shelf or other thing used in connection to the goods or on which the goods are mounted for display or exposed for sale."* The Board is of the view that a picture of the freezer(s) and chiller(s) in their entirety would have put this matter to rest beyond a reasonable doubt and with the absence of such evidence the Board has to rely on testimony evidence and attribute the relevant weight to such evidence. In the circumstances the Board feels that the case was not proven to the acceptable standard.

[6]Based on the foregoing the Board of Commissioners finds that the Commission has not been able to prove its case as stated in their notice of motion. The case is hereby dismissed.

[7]The parties are free to appeal against this ruling (*see Section 77 of the Consumer Protection Act, 2010 and Section 44 of the Fair Trading Commission Act, 2009)*

We rule accordingly.

Pronounced by us on this 13th day of February, 2018.

Mr. Victor Pool
Presiding Chairperson

Mr. Philippe Chong-Seng
Commissioner

Mrs. Jenna Thelermont
Commissioner

Mr. Michael Nalletamby
Commissioner