REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

HCCA NO. E 007 OF 2020

KENYA BUREAU OF STANDARDS .....APPELLANT

-VERSUS-

NEW ITALYCOR LIMITED .....RESPONDENT

JUDGMENT

1. The Standards Tribunal (**the Tribunal**) is a specialized tribunal established under The Standard Act (Cap 496) (**the Act**). Its decisions are appealable to the High Court (Section 16 G of The Act). This Appeal is one such appeal.

2. The journey of this matter began when in November 2018, New Italycor Limited (**the Respondent or Italycor**) imported food products namely Spaghetti, Tomato Puree and Macaroni into Kenya. Italycor has always maintained that before the importation, the foodstuff was tested and certified by agents in the country of origin Messrs SGS (an internationally accredited inspection body) and issued with a certificate of conformity.

3. Upon arrival, Kenya Bureau of Standards (**KBS or the Appellant**) declined to clear the products on grounds that they failed to meet the Kenyan standard. One of the functions of KBS is to provide for testing on behalf of the Government of locally manufactured or imported commodities with a view to determining whether such commodities comply with the provisions of the Standards Act or any other law dealing with standards of quality or description.

4. Aggrieved with that decision, Italycor lodged an appeal before the Standards Tribunal (being **Tribunal Appeal No. 1 of 2019; New Italycor Limited –vs- Kenya Bureau of Standards**). On 4th March 2019, the Tribunal ruled and directed that the Appellant retest and/or resample the Respondent's products and that the results be submitted before the Tribunal.

5. On 5th April 2019, counsel for KBS informed the Tribunal that the tests had been conducted and Italycor had complied with the required standard. Counsel further informed the Tribunal that they were to file a written consent. The written consent was that of 8th April 2019 in which parties agreed as follows:-

> **"That the Appeal be marked as settled with costs to the Appellant."**

6. One would have thought that the matter would end there. However, KBS refused to release the consignment and through a letter of 3rd May 2019, KBS informed Italycor that its Spaghetti Ristorante and Macaroni products had been rejected for non-compliance.

7. That decision by KBS triggered an application dated 18th October 2019 before the Tribunal. Whether that application is an Appeal as envisaged by Section 16G of The Act or simply an application coming after the appeal had been settled is a matter this Court shall be making observations on. Anyhow, the Tribunal determined the Application through a ruling dated 13th December 2019 in which the tribunal affirmed the consent and ordered that:-

> **"The Appellant to seek enforcement proceedings of the said orders."**

8. KBS is unhappy about the said ruling hence the present Appeal which raises 12 grounds.

9. Notwithstanding the dozen grounds raised, counsel for the Appellant conceded that a determination of three (3) issues resolved the Appeal. These are:-

i. Whether the Tribunal had jurisdiction to determine the application dated 17th October 2019.

ii. Whether the Applicant's commodities failed to comply with the standard.

iii. Whether the consent could be enforced against KBS.

10. Section 11 of the Standards Act provides:-

> **"Any person who is aggrieved by a decision of the Bureau or the Council may within fourteen days of the notification of the act complained of being received by him, appeal in writing to the Tribunal."**

KBS argues the application of 17th October 2019 being a challenge of the decision of 3rd May 2019 was hopelessly out of time and that the Tribunal lacked jurisdiction to extend the time for filing the application. This argument is based on the requirement of Rule 9(1) of the Standards Tribunal (Practice and Procedure) Rules that appeals from the decision of KBS be brought within 14 days of the impugned decision.

11. Whether or not the Tribunal was bereft of jurisdiction and indeed expanded time is answered by understanding the nature of proceedings that were presented by the application of 17th October 2019. Was it is a fresh appeal or an application within an already filed appeal?

12. It is true that in prayer 2 of the application, Italycor sought "leave to challenge the Respondent's impugned decision of 3rd May 2019 out of time". The Tribunal did not address itself directly on this prayer.

However, a portion of its determination reveals its stance in respect of the timelines of the proceedings before it;

> **"On the third issue, and in so far there is no application to set aside or vary the consent order so recorded, we have jurisdiction to entertain the present application, being an application post ruling but only limited to the herein below disposition by giving directions on the fact the matter was finalized upon the consent terms which were recorded and that the consent is still in force having not been set aside."**

13. The Tribunal characterized the application as an "application post ruling" and I think it was substantially correct. Appeal No. 1 of 2019 before the Tribunal was a challenge to the decision of KBS dated 6th December 2018. The decision of KBS, communicated in three letters, was that three products of Italycor failed to comply with the requirements of Kenya Standard; these were Spaghetti Ristorante, Macaroni products (fusili) and Tomato Puree.

14. The Tribunal on 4th March 2019 made the following orders:-

> **a. The Respondent is hereby directed to conduct resampling and testing of the goods in the presence of the appellant's duly appointed representative within 14 days of this date.**
>
> **b. The Applicant shall wholly meet the cost of resampling and testing to be conducted.**
>
> **c. This matter be mentioned for submission of the results ofresampling and testing on 22nd March 2019 for further directions.**
>
> **d. Costs of the Application shall be in the cause (sic).**

15. On 5th April 2019 Miss Mokeira appearing for KBS informed the Tribunal:-

> **"The tests were conducted and the Applicant has complied with the required standards. The instructions are the matter be marked as settled. The parties to file a written consent."**

The written consent set out elsewhere (paragraph 5) in this decision was then filed.

16. Now, the decision that gave rise to the application of 18th October 2019 was a letter by KBS of 3rd May 2019. In that letter KBS writes:-

> **"Subsequently, the Spaghetti Ristorante and Macaroni products have been rejected following the non-compliance and the earlier rejection letters KEBS/QAI/ICDE/15/8(14) and KEBS/QAI/ICDE/INS/15/8(16) dated 06-12-2019 and seizure notification 5L 1497 dated 07-12-2018 respectively sustained."**

17. It is crystal clear that the letter of 3rd May 2019 was revisiting an issue already resolved by the consent entered on 8th April 2019. The very basis of the appeal was a challenge of the rejection letters of 06-12-2019. On 5th April 2019 counsel for KBS had informed Court that following retesting the products had been found to comply with the standard.

18. The Application would therefore not be a new appeal in the context of Section 11 of the Act and it seems to this Court that the prayer for extension of time was superfluous. Italycor was simply asking the Tribunal to give effect to the consent entered.

19. The Court then turns to the next issue which is whether the commodities failed to comply with the Kenya standard. The Appellant argues that upon the retest two of the products failed to meet the standard once again. These are the Spaghetti Ristorante and Macaroni (fusili). Regard is given to the laboratory test reports for samples BS201911554 and BS201911537.

20. On this question the representation made by counsel for KBS and which preceded the filing of the consent has some significance. She intimated:-

> **"The tests were conducted and the applicant has complied with the required standards. The instructions are the matter be marked as settled. The parties have a written consent."**

21. This was an unequivocal representation that the applicant had complied after the retests ordered by the Tribunal had been conducted. The consent that followed marked the Appeal as settled with costs to the Italycor. That the parties settled the matter with costs to Italycor is instructive as this may affirm the importers stance that the products had all along complied with the Kenyan Standard.

22. Yet the order for retest had required the retest results to be submitted to the Tribunal and, admittedly, this was not done. Should the settlement be viewed differently? I think not, because the representative of the statutory body charged with testing for the Kenya standard had told the Tribunal that all the products had passed muster. This Court is not told why the Tribunal should have doubted the word of the said representative.

23. The consent had a context. The context was that the retests had demonstrated that the products had complied. The consent could not be taken as a standalone and the Tribunal cannot be faulted for holding;

> **"…..it is our considered view ….that when the parties filed the consent based on the fact that resampling and testing had been conducted on all products the subject matter of the appeal, they confirmed to have met the required standards."**

24. There is then the final issue whether the consent could be enforced against the Appellant. It is submitted by the Appellant that the representation that the Respondent's products had complied was based on mistake of facts. It being argued further that counsel Mokeira did not provide the results to the Tribunal. It was also contended that the statement from the Bar could not have been evidence of compliance of products which were resampled and rested.

25. Mistakes do sometimes occur and there is no doubting the validity of the following statement found in the decision of **Savings And Loan Kenya Limited v Onyancha Bw'omote [2016] eKLR** cited by the Appellant;

> **"…….. The distinction between a mistake of law and a mistake of fact is slim. As a digression, sight must not be lost to the fact that the distinction has been the subject of criticism by English courts and authors of law books (see Goff and Jone's Law of Restitution (2nd Edn, 1978, pg 91).**
>
> **In Allcard V. Walker [1896] 2 Ch.369 at pg 381 Sterling J observed that "it is not accurate to say that relief can never be given in respect of a mistake of law. It was laid down by Turner LJ in Stone V. Godfrey 5D. M. & G. 76, 90, that this court has power to relieve against mistakes of law as well as against mistakes of fact, and this statement was recognized in the judgments of the members of the Court of Appeal in Rogers V. Ingham 3 Ch.D.351, 357 and particularly by Mellish LJ who refers to it and explains it thus: "that is to say, if there is any equitable ground which makes it, under the particular facts of the case, inequitable that the party who received the money should retain it". The court in ALLCARD's Case (supra) expressed the view that "no doubt the jurisdiction is one to be carefully exercised and the facts in each case must be closely scrutinized to see which way the equity lies..."**

26. Yet, the Appellant, in fairness, should have sought the setting aside of the consent and did not have to wait until the Respondent brought the Notice of Motion of 17th October 2019 to raise the issue of mistake on the part of Ms. Mokeira. There had been no attempt to set aside the consent and this Court agrees with the Tribunal that in so far as the consent had not been set aside then it was enforceable by the Respondent.

27. In the end this Court does not find merit in the Appeal and does hereby dismiss it with costs.

Dated, Signed and Delivered in Court at Eldoret this 27th Day of May 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Kisaka for the Appellant.

Gross for the Respondent.