



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 364 OF 2015

REPUBLICAPPLICANT

VERSUS

KENYA BUREAU OF STANDARDS.....RESPONDENT

EX-PARTE POWEREX LUBRICANTS LIMITED

JUDGEMENT

1. Section 14(1) of the Standards Act, Cap. 496 (“the Act”) provides that:

“14. Power of inspectors

(1) An inspector may for the purposes of this Act, at all reasonable times—

(a) enter upon any premises at which there is, or is suspected to be a commodity in relation to which any standard specification or standardization mark exists;

(b) inspect and take samples of any commodity or any material or substance used, or likely to be, or capable of being used in the manufacture, production, processing or treatment thereof, and cause any container within which there is or is suspected to be any quantity of any such commodity, material or substance, to be opened;

(c) inspect any process or other operation which is or appears likely to be carried out in those premises in connexion with the manufacture, production, processing or treatment of any commodity in relation to which a standard specification or a standardization mark exists;

(d) require from any person the production of any book, notice, record, list or other document which is in the possession or custody or under the control of that person or of any other person on his behalf;

(e) examine and copy any or any part of such book, notice, record, list or other document which appears to him to have relevance to his inspection or inquiry, and require any person to give an explanation of any entry therein, and take possession of any such book, notice, record, list or other document as he believes may afford evidence of an offence under this Act;

(f) require information relevant to his inquiry from any person whom he has reasonable grounds to believe is or has been employed at any such premises or to have in his possession or custody or under his control any article referred to in this subsection;

(g) seize and detain, for the purpose of testing, any goods in respect of which he has reasonable cause to believe that an offence has been committed;

(h) seize and detain any goods or documents which he has reasonable cause to believe may be required as evidence in any proceedings for any offence under this Act.”

2. On 21st October, 2015 Antony Mithamo Kathiri and Fredrick Bosongo who are inspectors with the Respondent, Kenya Bureau of Standards visited the factory of the ex-parte Applicant, Powerex Lubricants Limited and in exercise of the powers granted to them under the said subsection 14(1) collected samples and issued a seizure and detention notice. On 23rd October, 2015 the Applicant moved this Court and obtained leave to challenge the Respondent’s actions by way of judicial review.

3. Through the notice of motion application dated 26th October, 2015 the Applicant therefore prays for orders that:

“a) CERTIORARI do issue to remove to this Honorable Court and quash the decision by respondent for seizure and detention of all goods in the applicant’s factory, dated 21st October 2015

b. PROHIBITION do issue to prohibit the Respondent in any manner whatsoever or otherwise interfering with the applicant’s facility and operations on the basis of the seizure and detention order of 21st October 2015.

c. The cost of this application be provided for.”

4. A perusal of the Applicant’s verifying Affidavit and statutory statement filed together with the chamber summons application for leave discloses the grounds upon which the Applicant seeks relief as procedural impropriety, abrogation of natural justice, breach of legitimate expectation, unreasonableness and malice.

5. It is the Applicant’s case that when the Respondent’s inspectors visited the factory, they did not disclose the basis of their actions only stating that they were seizing and detaining all the goods on suspicion of violation of standards. The Applicant’s officers were directed to cease production and not to sell any of the products already produced.

6. It is the Applicant’s averment that no reasons were given for the drastic action and neither was the Applicant informed of the next course of action. It is the Applicant’s case that the Respondent’s action was bereft of natural justice, egregious, done in bad faith, malicious and fraught with procedural impropriety.

7. The Applicant contends that the Respondent was acting with a predetermined set mind and towards a predetermined result as the inspectors had threatened to shut the factory before even entering the premises.

8. The Applicant states that although it was informed that there was a complaint about emissions from the factory, such a complaint does not fall within the Respondent’s jurisdiction.

9. The Applicant asserts that the seizure and detention order was made without any findings and communication of any findings. Further, that the seizure included goods like hydraulic oil which ought not to have been seized as they do not have Kenyan standards.

10. It is the Applicant's case that had the inspectors been enforcing compliance, they would have first disclosed the defects in the products and asked it to remedy the defects instead of shutting down the factory and halting production.

11. It is therefore the Applicant's proposition that Respondent's decision was draconian and failed to adhere to the expectations of fair administrative action as enshrined in Article 47 of the Constitution. According to the Applicant there was no disclosure of its fault, no revelation of any accusation and no opportunity to explain or remedy the same was ever availed.

12. The Applicant contends that the Respondent's actions cannot be explained considering that two months earlier, it had licensed all the products like it had done each year since production commenced in 2011. It is the Applicant's case that having consistently submitted its products to the Respondent for testing for four years including in July, 2015, it had legitimate expectation that it would continue to carry on business without undue interference from the Respondent until the year 2016.

13. According to the Applicant, it can only be presumed that the Respondent, prior to issuing permits to the Applicant, had tested the samples of all the products and found them compliant with the applicable standards. The Respondent's actions therefore breached its legitimate expectation that it would be allowed to carry out production until the time for renewing the licences.

14. The Applicant contends that the decision to seize and detain its products was drastic thus making it unreasonable and punitive. It is the Applicant's case that whereas Section 14(1)(g) and (h) of the Act allows for seizure and detention, the action must be grounded on an inspector having cause to believe that an offence had been committed. The Applicant asserts that there was no basis for believing that a crime has been committed as the products in question had been permitted by the Respondent.

15. The Applicant asserts that the standards in respect of its products are of such a technical nature that one cannot determine any violation of standards by plain vision without prior testing. As such, the Applicant avers, the inspectors could not have reached a reasonable conclusion that crime had been committed by simply looking at the factory and the bottled products.

16. The Applicant also faults the inspectors for shutting down its factory without notice or availing it an opportunity to be heard.

17. The Applicant contends that evidence of the Respondent's malice can be deduced by the fact that on 27th April, 2015 the National Environment Management Authority (NEMA) had shut down its facility on allegation that the residents of Imara Daima had complained about foul air in the vicinity. It ordered the factory reopened on 16th June, 2015 only to close it again on 6th July, 2015. The Applicant avers that the 2nd closure order was only lifted after it obtained orders from the National Environment Tribunal directing the reopening of the factory.

18. According to the Applicant, it reads similarity in the manner and approach taken by NEMA and the Respondent. Further, that the Respondent's inspectors even questioned the general manager about the closure of the factory by NEMA. The Applicant therefore reads malice in the actions of the Respondent and asserts that the Respondent's action was merely an attempt to circumvent the ruling of the National Environment Tribunal.

19. The Respondent opposed the application through grounds of opposition dated 2nd November, 2015 and the replying affidavit of Antony Mithamo Kathiri sworn on 4th November, 2015.

20. The two documents convey the Respondent's reply to the application as follows. It is the Respondent's position that issuance of relevant permits to the Applicant does not operate as an estoppel of its statutory powers to continuously inspect products in the market for compliance with

standards, specifications and quality to protect the public. It is the Respondent's opinion that the doctrine of legitimate expectation cannot be invoked so as to shield the Applicant from routine inspection to ensure compliance with standards.

21. The Respondent avers that the visit to the Applicant's premises was a routine inspection in compliance with its statutory mandate. Its inspectors upon reasonable suspicion took samples of the suspect goods for testing and inspection at its laboratories. In accordance with their mandate, the inspectors issued a sample collection form and a seizure notification to confirm the taking of samples and to ensure that the goods left behind were not interfered with by the Applicant pending the outcome of the results. It is the Respondent's statement that the inspectors did not close the factory as they did not have the mandate to do so.

22. The Respondent asserts that the results would be communicated to the Applicant once the tests had been concluded. The Respondent denied malice or bad faith in the conduct of the inspectors, stressing that they were only performing their statutory duties. It is the Respondent's view that the Applicant has not demonstrated any illegality, irrational or breach of rules of natural justice to warrant issuance of the orders sought.

23. The Respondent insists that the seizure notification is not actual seizure of the Applicant's products and closure of the factory but is only meant to protect the suspect goods from interference pending the release of the results. Further, that the testing of the goods is not only pegged on Kenyan standards but also other standards including international standards. It is the Respondent's case that the Applicant will be at liberty to challenge the results once they are communicated. The Respondent therefore holds the view that these proceedings are premature.

24. The Respondent contends that the Applicant's case offends Order 53 Rule 4 of the Civil Procedure Rules, 2010 by introducing fresh grounds not relied upon at the leave stage. Further, that the application is defective as the facts are contained in the statement instead of the affidavit.

25. The Respondent asserts that the application should be dismissed as the Applicant has not pursued the alternative remedy of appeal to the Standards Tribunal established by Section 11 of the Act.

26. It is also the Respondent's case that these proceedings are not merited as Section 17 of the Act protects it from claims and complaints as regards standardization and specification.

27. The Respondent denies acting in tandem with NEMA and asserts that whatever it did was done in pursuance of its mandate which is distinct and separate from that of NEMA.

28. Finally, the Respondent contends that the Applicant's claim that its right to fair administrative action as protected by Article 47 of the Constitution has been breached is farfetched as the said protection is not applicable to the facts and circumstances of this case. Further, that the claim for alleged breach of the right to fair administrative action is premature as mechanisms for enforcement of the right can only commence after the results are released.

29. The Applicant's Managing Director, Sarabjeet Singh Sethi replied to the Respondent's case by swearing a further affidavit on 10th November, 2015. Through the said affidavit, the Applicant concedes that routine inspection is indeed permitted after licences have been issued. However, the Applicant contends that in its case there was no reasonable suspicion to shut down its factory.

30. The Applicant avers that the inspectors informed its manager that they had seized all the goods meaning that the operations and sales had ceased. The Applicant deposes that all its goods were seized and it is therefore a fallacy for the Respondent to claim that the goods were only sampled.

31. The Applicant asserts that the Respondent violated Section 14B(3) of the Act by failing to release the results of the laboratory tests by 3rd November, 2015.

32. The Applicant submits it was allowed to operate after complying with its obligations under the Act and it was thus unreasonable in the Wednesbury sense for the Respondent to act as it did. The case of **Robert Makau & 27 others v Municipal Council of Mombasa [2015] eKLR** is cited to show what amounts to Wednesbury unreasonableness.

33. On the claim that its legitimate expectation was breached, the Applicant cited the case of **Royal Media Services Ltd & 2 others v Attorney General & 8 others [2014] eKLR** to demonstrate that the doctrine of legitimate expectation can be invoked to thwart maladministration.

34. According to the Applicant, it had no alternative remedy as Section 11 of the Act only allows appeals against the decisions of the Bureau or Council.

35. The Respondent on its part insisted that the decisions of the inspectors are appealable to the Standard Tribunal established under the Act. Further, that Section 9 of the Fair Administrative Action Act, 2015 requires that parties, except in exceptional circumstances, exhaust alternative remedies before seeking judicial review. The Respondent cited the decision in **Republic v Anti Counterfeit Agency & others ex-parte Omega Chalk Industries Ltd [2015] eKLR** to stress this legal principle.

36. It is the Respondent's position that the right to a hearing was not available to the Applicant as availing a hearing would have defeated the purpose of the entire exercise. This submission is supported by a passage in **ex-parte Omega Chalk Industries Ltd** (supra) in which Odunga, J stated that:

“I agree with the interested party that a reading of the above provisions and taking into account the mischief that these provisions were meant to cure, it would defeat the purpose of the Act to require the person in whose possession suspected counterfeit goods are to be heard before the power of seizure is exercised.”

37. The Respondent further submitted it was not bound by the rules of natural justice as it was carrying out an investigative role. A statement in **Selvarajan v Race Relations Board [1976] 1 All ER 12** is cited in support of the proposition. At page 19 of the judgement Lord Denning MR observed that:

“In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on the persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the investigating body itself must come to its own decision and make its own report.”

38. The case of in **Republic v Municipal Council of Ruiru ex-parte Stephen Kimani Mihiu [2015] eKLR** is also cited to buttress this position.

39. From the pleadings and submissions of the parties, the main issue for determination in this matter is whether the Applicant has established grounds for grant of judicial review orders.

40. The starting point would be to determine whether the application herein is defective. The

Respondent has identified two reasons why the Applicant's application is bad in law.

41. The first ground is that the Applicant has introduced new grounds in the notice of motion which were not relied upon when leave was sought and granted. Secondly, the Respondent contends that the application is defective as the statement, and not the affidavit, is the one which contains the facts in support of the application.

42. The Respondent is indeed correct that Order 53 Rule 4(1) of the Civil Procedure Rules, 2010 provides that **"...no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement."** The application is thus confined to the grounds and relief contained in the statutory statement.

43. It is also a correct statement of the law by the Respondent that Rule 1(2) of the said Order 53 provides that an application for leave **"...shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and grounds on which it is sought, and by affidavits verifying the facts relied on."** The affidavit is thus the conveyor of the facts relied upon in an application for leave and subsequently the notice of motion.

44. I have perused the Applicant's application for leave and I agree with the Respondent that the statement is indeed populated by facts. It does however contain the requirements of a statement to wit **"the name and description of the applicant, the relief sought, and the grounds on which it is sought."**

45. The verifying affidavit sworn by Sarabjeet Singh Sethi also carries the facts of the case. The Applicant is thus guilty of overkill by putting the facts both in the statutory statement and the verifying affidavit. The Applicant cannot be accused of failure to comply with the rules in such circumstances. On the claim that new grounds were introduced in the notice of motion, I find that the Respondent did not identify the new grounds. I also did not see them myself.

46. The Applicant is however guilty of introducing a new ground through the further affidavit. The Applicant alleges that the Respondent breached Section 14B(3) of the Act. This ground which is new was introduced without following the requirements of Order 53 Rule 4(2) of Civil Procedure Rules, 2010. However, there are grounds upon which the Applicant sought and obtained leave and those are the grounds which will determine the success or failure of the Applicant's case. For record purposes, I will nevertheless determine whether the Respondent contravened Section 14B(3) of the Act.

47. Another important preliminary point is whether the Applicant should have pursued the alternative remedy of appeal instead of opting for judicial review. The Respondent is indeed correct that where a process has been provided for seeking relief, that procedure should be adhered to. In the case of **Republic v National Environmental Management Authority, Court of Appeal at Nairobi, Civil Appeal No. 84 of 2010** the Court of Appeal stated that:

"The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it."

48. In the case before me, the Respondent has propagated the view that the Applicant's application is premature. Although I do not entirely agree with the Respondent's position, I find that the action taken by the Respondent may not have been ripe for challenge by way of an appeal. The actions of

the Respondent's inspectors were, however, injurious to the Applicant and judicial review was the ideal remedy in the circumstances of this case. The Applicant was therefore entitled to approach this Court for relief. The Applicant cannot be accused of adopting a wrong procedure as this was the only option available to it at that time.

49. I now proceed to consider the grounds in support of the Applicant's case. The Applicant contends that the Respondent violated its right to a fair administrative process as guaranteed by Article 47 of the Constitution. The Applicant asserts that it was never told of the accusations against it and neither was it given an opportunity to respond to any accusations. The Respondent's reply is that the Applicant will be accorded an opportunity to defend itself after the results of the tests on the samples collected come out.

50. The already reproduced Section 14(1) of the Act clearly shows that the Respondent's inspectors have powers to enter premises, inspect and take samples in respect any process or operation; require production of documents and take copies of the same; require information; seize and detain goods for testing; and seize and detain goods or documents as evidence. However, as was pointed out by the Applicant, in order to exercise the power to seize and detain goods for purpose of testing an inspector should have **“reasonable cause to believe that an offence has been committed.”**

51. The Applicant's case that its products had been tested in August, 2015 by the Respondent has not been rebutted. What one deduces from the Respondent's replying affidavit and grounds of opposition is that the Respondent's inspectors were carrying out routine inspection. The Applicant has then posed the question as to how they could have detected shortcomings with the quality of its products by just looking at them.

52. According to the Applicant it was informed by the inspectors that people residing in residential areas near its factory had complained about the odour from the factory. The Applicant's case is that matters of environment do not fall under the jurisdiction of the Respondent. Further, that NEMA had already acted on that complaint and its closure order was set aside by the National Environment Tribunal in Nairobi Tribunal Appeal No. NET/153/2015. NEMA had also been directed on the steps to take.

53. It is important to note that the Applicant's operations were fully licensed by the Respondent. The Applicant therefore had a legitimate expectation that it would be allowed to continue operating as long as it manufactured products that met the standards prescribed by the Respondent. The Respondent's inspectors could only act where it had information or doubts about the quality of the Applicant's products. The reasonable thing to do would have been to collect samples and allow operations to continue as tests were awaited.

54. In the 8th Edition of **Garner's Administrative Law**, B. L. Jones and K. Thompson observed at page 259 that:

“We may turn next to the operation of *audi alteram partem* in relation to decisions as to privileges, or ‘licences’. It is first necessary to note various different kinds of decisions that may be taken in relation to privileges. For example, the decision may be to revoke an existing ‘licence’, to refuse to review an existing ‘licence’, or to refuse the initial grant of a ‘licence’. In relation to each of these types of decision the expectations of the person affected is of much significance. Did the citizen have legitimate expectation of success, or was he simply ‘hoping against hope’ of obtaining, retaining, or being granted renewal of, a ‘licence’? How do these factors influence the manner of operation of the *audi alteram partem* rule?”

The revocation of a privilege may generally be regarded as comparable to the act of taking away ‘property’. It will usually defeat the privilege-holder's legitimate expectation that it will continue for its initially granted time-span, and accordingly the *audi alteram partem* rule will normally apply with some vigour. Such has, for example,

been shown in cases where members have been expelled from clubs without the substantial procedural rights which the courts have been prepared to imply into their contracts of membership.

Conversely, one who had no more than a mere hope of favour and failed to obtain it has lost nothing, save an advantage to which he had no legitimate expectation. The demands of procedural justice will in such a case be significantly less great.”

55. The opinion of the learned authors is clearly applicable to the Applicant’s situation. For four years, its products had passed the Respondent’s tests. Three months prior to the inspectors’ actions, the Respondent had issued permits to the Applicant indicating that its products met the standards. Unlike in **ex-parte Omega Chalk Industries (1993) Limited (supra)** where the issue involved counterfeit goods, here we are talking of a licensed manufacturer making its own products.

56. In the Applicant’s circumstances a seizure and detention order of all its goods was too harsh as it brought its operations to a halt. It was not proportionate to whatever transgressions the Applicant had committed. The seizure and detention of all the goods could not allow the Applicant to trade. The inspectors had other powers which they could have exercised. They could have seized and detained the samples without closing down the factory by seizing all the goods therein. Their action went against the Applicant’s legitimate expectation that the permits issued to it by the Respondent would enable it manufacture products for a full year as long as it met the specifications which led to the grant of the permits.

57. Another ground upon which the Applicant seeks relief is that the Respondent is in breach of Section 14B(3) of the Act. The subsection states:

“Where the goods are released under subsection (1) or retained under subsection (2), the inspector shall ensure that the samples are tested and the results thereof released to the manufacturer, importer, possessor, dealer, seller or agent within fourteen days after the testing period of such samples.”

58. The Applicant’s case is that the results ought to have been released within fourteen days from the date of the raid on its premises. That is not what the law states. The law requires the results to be released within fourteen days **“after the testing period of such samples.”** The Applicant did not disclose what the testing period of the samples taken from its factory was. The disclosure of the results of the tests is not fourteen days after the collection of the samples as the Applicant appears to imply.

59. On its part the Respondent sought refuge under Section 17 of the Act which reads:

“The fact that any commodity complies or is alleged to comply with a Kenya Standard or approved specification or has or is alleged to have been manufactured in accordance with any such specification, or that a standardization mark is used in connection with any commodity, shall not give rise to any claim against the Government, the Council, or the Bureau or any member or employee thereof”.

60. The said Section is self-explanatory. It protects the Respondent from claims arising from its certification of products. The cited provision does not apply to a situation where a manufacturer is complaining of abuse of power by the Respondent.

61. The Applicant also urged this Court to find that the Respondent acted in concert with NEMA with a view to frustrating the decision of the National Environment Tribunal. From the material placed before the Court, I cannot impute any malice in the actions of the Respondent. The inspectors did indeed act with a heavy hand but that cannot be equated to malice.

62. In this case, I am satisfied that the Applicant has demonstrated that its factory was closed without

disclosure of the reasons for the decision. The Applicant was also not given an opportunity to be heard. The Applicant was entitled to know why a seizure and detention order whose effect was to close its business had been issued. That is not to say that the Respondent's inspectors should not have taken samples. They were allowed to do so by the law but the drastic step of seizing and detaining all the goods in the factory amounted to withdrawing the licences without informing the Applicant of the accusations against it and without giving it an opportunity to respond to the allegations.

63. In circumstances, the seizure and detention order, as conveyed through the seizure notice dated 21st October, 2015, is called into this Court and quashed. The Applicant is therefore at liberty to continue its operations as it awaits communication of the results of the samples taken from its factory. For avoidance of doubt, the process of collecting samples for testing through the sample collection forms dated 21st October, 2015 and 4th November, 2015 remains valid. The Respondent is at liberty to test the samples and convey the results to the Applicant. Once the results are out, the Respondent is also at liberty to take any action permitted by the law.

64. In view of the outcome of this matter, I direct each party to meet own costs of these proceedings.

Dated, signed & delivered at Nairobi this 15th day of March, 2016

W. KORIR,

JUDGE OF THE HIGH COURT