



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc. Appli. 1171 of 2004

AMARCO KENYA LTD.....APPLICANT

Versus

THE MINISTER FOR FINANCE1ST RESPONDENT

THE COMMISSIONER, MONOPOLIES

& PRICES COMMISSION.....2ND RESPONDENT

JUDGMENT

By the Notice of Motion dated 29th September 2004 the ex parte Applicant seeks the following orders of Judicial Review against the Minister for Finance and the Commissioner for Monopolies and Prices Commission:

- 1) Certiorari to bring before the Hon. Court and quash the gazette Notice No. 5100 published on the 9th July 2004 by the Minister of Finance arbitrarily, capriciously, unreasonably and in total disregard for the law and the principles of natural justice.
- 2) Prohibition to restrain the Respondents either by themselves, agents or servants from interfering with the Applicant's business in purported enforcement of S. 21 of the Restrictive Trade Practices, Monopolies and Price Control Act Cap 504, of the Laws of Kenya or in enforcement of Gazette Notice 5100 of 9th July 2004.
- 3) Costs of the application.

The application was expressed to be brought pursuant to Order 53 Rule 3 (1) Civil Procedure Rules and Sections 8 and 9 of the Law Reform Act, Cap 26 Laws of Kenya. Mr. Ligunya, Counsel for the Applicant said that the application is premised on the supporting affidavit of John Kariuki and its annexures sworn on 24th September 2005 and submissions dated and filed on 15/13/05. Brief facts underlying this dispute are that the Applicant is the proprietor of a computer software called AIMS 2000 and the sole value added reseller of a software known as Cyber Quarry Cyber Screen (hereinafter initialed as CQCS) which is owned and supplied by an organization from the U.K. called Cyber Science Corporation. That a complaint was filed by a company called INSPAC Technologies, the proprietors of a software programme called INSOFT to the 2nd Respondent with regard to alleged business practices against the Applicant. Inspac's software can only run on a CQCS platform. That the Applicant is

authorized to supply to licensed parties, the CQCS database, upon the licensees signing a tripartite agreement with the Applicant and the Corporation in which the licensee is allowed to use the database for internal purposes only and an equipment installed on the site. That it is the Corporation upon approving the licenses, supply the database to be installed by the Applicant and the Applicant does not retain any copies of the software. That the software called INSPAC was developed using CPCS database. It was developed in violation of the tripartite agreement signed with Lakester Insurance Company a licensee. That they used the unauthorized access to develop INSOFT software which was an infringement of AIMS software and also violation of the tripartite agreement with Lakester. That INSPAC Technologies presented their software a commercial, to compete with AIMS and to protect its interest, the Applicant demanded a withdrawal of INSOFT from the market but INSPAC did not withdraw it.

United Insurance Company desired to use INSOFT software and requested supply of CQCS database and but the Applicants contended that it was unconscionable to the Applicant as it would mean connivance and abetting a product developed in violation of its own rights. A report was made to the 2nd Respondent by INSPAC as a restrictive Trade Practice. That the 2nd Respondent condemned the Applicant unheard and requested the 1st Respondent to order the applicant to supply the CQCS database to INSPAC Technologies contrary to the Act. That the order made by the Respondent was not capable of compliance by the Applicant as it would be faced with penal consequences. That is why the Applicant moved this court to have the order gazetted on 9th July 2004, Gazette Notice 5100, quashed for breaching rules of natural justice, for being impossible to perform, ultra vires the provisions of Sections 15,16,17 and 18 of the Restrictive Trade Practices, Monopolies and Price Control Act, Cap 504 Laws of Kenya, being erroneous on the face of it, being unreasonable and founded on irrelevant considerations.

The Notice of Motion was opposed and Dr. Peter Muchoki Njoroge the Commissioner, Monopolies and Prices Commission, filed a replying affidavit dated 21st January 2005. Mr. Muchoki swore a lengthy affidavit setting out the events that led to the ministerial order that is now under challenge. That the Applicant alleged intellectual property infringement, by United Insurance Co. Ltd. vide their letter dated 5th August 2003 (PMN 3) and there after various Correspondence between the parties went on till INSPAC, the Interested Party, asked the Respondent to intervene and uphold the principle of fair trading in accordance with Cap 504 Laws of Kenya. That the Respondent acting pursuant to S. 15(1) of that Act, asked the Applicant to respond to the complaint by INSPAC. The complaint by Inspac was that the Applicant had refused to supply the said INSPAC with CQCS database. On failing to receive any response from the Applicant, the Respondent sent reminders and the Applicant replied on 25th November 2003 justifying their refusal, one reason being that they had a contract with Cyberscience Corporation U.K. and could not subcontract without the permission of Cyberscience. Despite requests, the Respondent was unable to get a copy of the contract between Cyberscience and the Applicant to confirm the conditions of the contract. That since the Applicant's reply to the complaint did not comply with S. 15 of the Act, the Applicant was invited to negotiate a consent under S. 15 (3). The meeting to discuss the consent was to be held on 21st February 2004 (PMM 12) but the Applicant did not attend and instead asked for a deferment. The Applicant was later invited to a meeting to discuss recommendations to be made to the Minister under S. 16 of the Act but the Applicant again failed to show up for the meeting on 30th March 2004. The meeting proceeded as scheduled, and made recommendations. It was found that INSPAC's Insoft was a superior software to that of the Applicant's, AIMS 2000 and that both were registered. It was therefore recommended that the Ministerial order to regulate the anti competitive behaviour of the Applicant as laid down in the Act be made. The minutes of the said meeting were exhibited as PMM 15. It is the Respondents contention that the Applicant was accorded a chance to be heard but he declined/neglected to attend the meetings. That the applicant also failed to show any evidence of infringement and in any event, if there was any, they should have followed due process and if indeed they were bound by a contract with the parent company, they should have informed them. The Respondents denied having been in breach of Rules of natural justice or any law statutory provisions.

On 22nd July 2005 Justice Emukule ordered that Inspac Technology be enjoined to this suit as an Interested Party. It was following the Chamber Summons dated 6th May 2005 by the Interested Party. In the affidavit of James Mbutia the director of Inspac, dated 6th July 2005 in support of the Chamber

Summons the Interested Party set out why they should be enjoined to these proceedings. He deposed that Inspac is the registered owner of a computer software known as Insoft. On 9th May 2003 Inspac was invited to a tender for United Insurance (JD1) and won the bid. Since the software was built on CQSS database owned by Cyberscience Corp Ltd. whose sole agent was the Applicant, United Insurance wrote to Amarco to supply the CQCS database to Inspac but on 5th August 2003, the Applicant declined to sell the said software (JD 2) alleging intellectual property infringement. In October 2003 the Interested Party wrote to Cyberscience asking to be sold the database directly but the said Cyberscience declined stating the Amarco was their sole agent. That is when the Interested Party lodged a complaint with the Respondent on 24th October 2004 citing breaches of Restrictive Trade Practices Monopolies Cap 504 (JD 5). Despite various attempts, Amarco refused to comply and on 9th July 2004 the Minister for Finance issued a Ministerial Order under Kenya Gazette Notice No. 5100 requiring Amarco to sell the database to the Interested Party (JD 6). The Interested Party also filed skeleton arguments dated 3rd June 2006 in opposition to the motion. In their submission, as a result of the Applicant's action the Interested Party is locked out of business and the refusal to comply with the order is meant to drive the Interested Party out of business which is an offence under S.10 of Cap 504.

I have considered the Notice of Motion, the affidavits filed both in support and in opposition to the Notice of Motion, the rival submissions made by both Counsel. Mr. Ligunya told the court that in support of the Notice of Motion dated 24th September 2004, they relied on the affidavit dated 24th September 2004 and sworn by John Kariuki and the annexures thereto. The Interested Party Inspac Technologies filed submissions dated 3rd August 2006 in opposition to the motion. Their Counsel did not appear.

In an application for Judicial Review orders, the affidavit to be relied upon in arguing the Notice of Motion is that filed along with the Chamber Summons and if any other affidavit has to be filed, it has to be with the leave of the court. Order 53 Rule 4 provides as follows:

“4 (1) copies of the statement accompanying the application for leave shall be served with the notice of motion and copies of any affidavits accompanying the application for leave shall be supplied on demand and 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 statement.

(2) The high court may on the hearing of the motion allow the said statement to be amended and may allow further affidavits to be used if they deal with new matters arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use a further affidavit, he shall give notice of his intention and of any proposed amendment of his statement, and shall apply or demand copies of any such further affidavit.

(3)”

Although the Respondent did not raise any objection to the Applicant relying on the affidavit dated 24th September 2004, the law is clear, that the affidavit to be relied upon in arguing the Notice of Motion is that filed with the Chamber Summons. The Respondents filed their replying affidavit on 9th February 2005 and the affidavit dated 24th September 2004 cannot be a further affidavit made in reply to the Respondent's affidavit. This is because a further affidavit can only be filed with the leave of the court in reply to matters deposed to by another party (Order 53 Rule 4 (1)). There is no evidence that the Applicant got the leave of the court to file the affidavit dated 24th September 2004 and it is irregularly on record and is hereby struck out. I have seen the affidavit in support of the Chamber Summons dated 10th September 2004. Though it seems to be basically similar to the one dated 24th September, 2008, yet the affidavit dated 10th September 2004 contains 26 paragraphs while that of 24th September 2004 has 28 paragraphs. Though the Respondent may have referred to the affidavit of 10th September 2004, it is not the one served on the Respondents. As per paragraph 2 of Dr. Peter M. Njoroge's affidavit, they were served with the affidavit dated 24th September 2004. The court cannot accept an affidavit that was never

served on the Respondents to support the Notice of Motion. The Notice of Motion is naked and lacks any evidence in support thereof and is therefore incompetent and is for striking off.

The core of this dispute that led to the ministerial Order which is sought to be quashed was the dispute between the Applicant and INSPAC (EA) Technologies Ltd the Interested Party herein, over alleged infringement of intellectual property Rights and Restrictive Trade Practices. That is common ground. Since the Applicant failed to supply the database the Interested Party was locked out of business as it cannot perform the tender that it won with United Insurance. I will now set out the impugned Ministerial Order. It reads;

“GAZETTEE NOTICE NO. 5100

THE RESTRICTIVE TRADE PRACTICES MONOPOLIES AND PRICE CONTROL ACT (CAP 504)

MINISTERIAL ORDER

In exercise of the powers conferred by Section 18 (1) and 2 of the Restrictive Trade Practices, Monopolies and Price Control Act, the Minister for Finance makes the following order:-

- a) That Amarco Kenya Ltd. shall supply for a just and reasonable price, the CQCS database to Inspac Technologies Ltd and others entitled to the use of CQCS database;**
- b) That Amarco Kenya Ltd shall desist in future, the practice of refusal to supply the CQCS database to Inspac Technologies Ltd and others;**
- c) That the supply specified herein must be undertaken within sixty(60) days following the date of publication of this order;**
- d) That Amarco Kenya Ltd. shall strictly and deligently observe the terms of this order, failure to which the relevant penal provisions under the Act shall be invoked.**

Dated the 30th June 2004

DAVID MWIRARIA

Minister for Finance”

Does the Notice of Motion have any merits? The Applicant alleges that rules of natural justice were flouted in that they were never given a hearing before the impugned order was made. That even if there were any hearings, they were ex parte and they were never indulged even if the notice of the meetings was too short. To the contrary, the Respondent and Interested Party contends that they complied with Section 15(1) of the Act after the complaint was made by Inspac and asked the Applicant to comment on the allegations. The Respondent exhibited the said letter dated 13th November 2003 exhibited as PMM 6. At the last paragraph on the 2nd page the commissioner required the Applicant within one week to comment on the allegations in question and indicate the measures to take to conform with the Act. Perhaps it is proper that I set out the provisions of S.15(1). It reads:-

“The commissioner may take any of the following steps with respect to a person alleged to be engaged or to have been engaged in restrictive trade practices-

- a) inform the person in writing that allegations have been made and that specific evidence has been presented to substantiate the allegations, and invite the person to comment on the allegations and the evidence and to indicate what remedies (if any) that person would propose in order to bring his trade practices into conformity with this Act; or**

b) Inform the person that in his opinion the weight of the evidence supports allegations that have been made concerning the occurrences of a restrictive trade practice, and request the person to take specific steps to discontinue such practices and in addition, compensate for the past effects of such practices by taking positive steps to assist one or more existing or potential suppliers, competitors or customers to participate actively in producing or trading in the goods or services to which the allegations relate.”

The Respondents have deponed that the Applicant failed to respond to the letter of 13th November 2003 written pursuant to the above section and a reminder was written dated 25th November 2003 (PMM 7) in which the Applicant was given 7 days to respond to Inspac’s allegations and it is then the Applicant’s Advocate wrote back the letter dated 25th November 2003 trying to justify their refusal to respond, the reasons being that Inspac’s product was a competitor and that the Respondent had taken sides before hearing them. According to the Respondent, since the Applicant’s reply did not comply with Section 15(1), the Respondent Counsel move under S.15(3) to have the parties negotiate and record a consent and the Applicant was invited to negotiate vide the letter dated 19th February 2004 (PMM 12) but again the Applicant failed to attend and instead asked that the consent be sent to them (PMM 13). Having failed to attend the negotiations the Respondent on 16th March 2004 invited the Applicant to a meeting in pursuant to S.16 in which they would propose that the Minister make an order regulating the practice (PM 14) vide the minutes of the meeting of 30th March 2004. The Applicant did not attend (PMM 15) and that is why they went ahead to invoke S.18(1) to recommend that a Ministerial Order be made and hence the gazette notice. The Interested Party hence deponed to the same facts as the Respondent.

Having considered all the correspondence on record and specifically those annexed by the Respondent and Interested Party, and the sequence of events, I am satisfied that the Applicant was accorded an opportunity to be heard but refused/ignored to take advantage of it. The Applicant cannot blame the Respondent for denying them a chance to be heard.

I have also considered the provisions of Sections 15, 16 and 18 which the Applicant alleges were infringed. From a reading of the Respondent’s affidavit and what steps they took, they totally complied with the said provisions and cannot be held to be in breach of any.

As regards whether the parent company of the Applicant would have been enjoined to the dispute, there is no reason why the Applicant did not involve them. Besides the Respondents contend at paragraph 19 of Dr. Njoroge’s affidavit that they requested for the contract signed between the Applicant and Cyberscience in order for the Respondent to ascertain the nature of the contract but the Applicant refused to avail it. That is not contraverted. How would the Respondent enjoin the said Cyberscience to the dispute if they did not know the nature of the relationship between the said Cyberscience and the Applicant? It is only the Applicant who knew Cyberscience and their relationship but the Applicant failed to show the contract to the Respondent, and I find that it is only the Applicant who could have involved Cyberscience in the dispute and should have enjoined the said Cyberscience. In the circumstances, having found the motion to be incompetent, I also find no merit in the Notice of Motion as the Respondents have demonstrated that they complied with Rules of natural justice and the provisions of Cap 504 and specifically Ss. 15, 16 & 18. The Applicant will not be entitled to any of the Judicial orders which are discretionary in nature and I do order that the Notice of Motion dismissed with costs to the Respondent.

Dated and delivered this 16th day of July 2008.

R.P.V. WENDOH

JUDGE

Read in the presence of:

Mrs. Kagiri for Respondent

Daniel: Court Clerk