REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

MISC APPLI 645 OF 2005

IN THE MATTER OF FACTORIES AND OTHER PLACES OF WORK (SAFETY AND HEALTH COMMITTEES) RULES 2004

REPUBLIC…….……APPLICANT

Versus

ATTORNEY GENERAL…….……1ST RESPONDENT

CHIEF MAGISTRATE MAKADARA LAW COURT…..……2ND RESPONDENT

ONESMUS T. NDEGWA…….……..3RD RESPONDENT

EX PARTE

ASSOCIATED STEEL LIMITED K.R.PATE VIBHAKER SHELAT

JUDGMENT

By the Notice of Motion dated 18th May 2005 the ex parte Applicants, Associated Steel Ltd., K.R. Patel and Vibhakar Shelat, seek orders of Judicial Review against the Attorney General, the Chief Magistrate's Court Makadara Law Courts and Onesmus T. Ndegwa. The orders sought are as follows:-

(1) That the court do issue an order of prohibition to permanently stay proceedings in Nairobi Chief Magistrate's Court Makadara CRC 1008/05, Republic v Associated Steel Ltd., K.R. Patel and Vibhakar Shelat;

(2) That the court do issue an order of certiorari to quash the 3rd Respondent's decision to charge the Applicants in CRC 1008/05 in Makadara Chief Magistrate's Court.

The Application is supported by a Verifying Affidavit sworn by Vibhakar Shelat, the manager of the 1st Applicant and a statement of facts, both dated 5th May 2005. The Applicants' counsel, Mr. Munyu also filed Skeleton Arguments on 14th December 2006.

Mr. Bitta, counsel for the Respondent relied on an affidavit sworn on 1st November 2005 by Onesmus Ndegwa, the Provincial Occupation Health and Safety Officer.

It is the Applicants case that on 4th March 2005, the Applicants were charged before the Chief Magistrate's Court under the Factories Act. They denied the offences and the case was set down for hearing. It is the Applicants' contention that at the time of preferring the charges, the Minister had not gazetted any Health Committee

under the Factories & Other places of work (Safety and health Committees) Rules, 2004 and the Rules could not have been breached or enforceable; that the Rules were gazetted on 24th March 2004 when the charges had been preferred and the charges were therefore ultra vires the powers of the Respondent; that the Rules can not have a retrospective effect; the institution of the charges was irrational and unreasonable.

I think it is necessary that I set out the charges that the Applicants face before the Makadara Chief Magistrate's Court.

Count I

Failing to furnish means required by Occupational Health and Safety Officers for entry in a factory, inspection and inquiry contrary to Section 6 (2) as read with Sections 72(1), 72 (5) and 73 of the Factories and other places of work Act, Cap 514 (as amended by the Factories Amendment) Act No. 1 of 1990 Laws of Kenya

Particulars of the Offence

On 11th February 2005, K.R. Patel being the director of Ms Associated Steel Ltd., and Vibhakar Shelat being the manager of Ms Associated Steel Ltd. and Ms Associated Steel Ltd. being the occupiers of the factory situated on plot No. 209/12091 along Mombasa Road, failed to furnish for Occupational Health and Safety Officer, namely John Waweru and Waweru Kariuki the means required to enter the said factory for inspection.

Count 2

Failing to have a trained person placed in charge of First Aid Box contrary to Rule 7 of the Factory (First Aid) Rules L.N. 160 of 1977 as read with Sections 50 (1), 72 (5) and 73 of the Factories and other places of work Act Cap 514 as amended by the Factories (Amendment Act No. 1 of 1990) Laws of Kenya.

Particulars of the Offence

On 11th February 2005, the 2nd and 3rd Applicants failed to have persons who have undergone a training in first aid application and holds certificate of competence to be in charge of the First Aid Box at the factory.

Count 3

Failing to have the Safety and Health Committee members trained in Occupational Health and Safety contrary to Rule 12(1) as read with Rule 15 of the Factories and other places of work (Safety & Health Committees) Rule 2004 Legal Notice 31.

Particulars of Offence

On 16th February 2005 the 1st and 2nd Applicants failed to train members of the Safety and health Committee, at their factory which is situated on Plot No. 209/1209 along Mombasa Road.

Court 4

Failing to develop a clearly defined Safety and Health Policy in a work place, contrary to Rule 9 (f) as read together with Rule 15 of the Factories and other places of work (Safety & Health Committes) Rules 2004 Legal Notice 31 Act Cap 514 Laws of Kenya.

Particulars of Offence

On 11th February 2005, the 1st and 2nd Applicants being the occupiers of the factory on Plot No. 209/1209 failed to develop a clearly defined Safety and Health Policy.

Count 5

Failing to take practicable measures to protect persons employed against inhalation of fumes contrary to Section 51(1) as read with Sections 72 (1), 72 (5) and 73 of the Factories and other places of work Act Cap 514 as amended by Factories (Amendment) Act No. 1 of 1990 Laws of Kenya.

Particulars of Offence

On 11th February 2005, the 1st and 2nd Respondent failed to provide breathing respirators for the use of persons working in the Styllops manufacturing process.

In opposing the Application, Mr. Ndegwa deponed that their Officers visited the Applicants factory in company of police officers for purposes of inspection and that the charges preferred are not brought under the Factories and other places of work (Safety and Health Committee) Rules 2004 save for counts 3 and 4, but that counts 1 and 5 are preferred under the Principle Act while count 2 is preferred under the Factories (First Aid) Rules 1977. That the Gazette Notice of 24th March 2005 only Gazetted the approved training institutions and naming of the health advisers and it has no relationship with the developing of a factory policy and that the Rules were only meant to give guidance of the Safety Committees.

I have now considered the Application, submissions by both counsel and pleadings filed herein.

Section 69 of the Factories Act Cap 514 empowers Chief Inspectors of factories to enter factories and inspect, examine for purposes of enforcing the Act. It is notesworthy that Cap 514 came into operation in 1951 and has been revised in 1972 with amendments made to it in 1977, 1990 with the most recent amendment being the Rules made pursuant to legal Notice 31 known as the Factories and Other Places of Work (Safety and Health Committees) Rules, 2004 which came into operation on 24th March 2005. On 24th March 2005, vide Gazettee Notice 2238 of that date, the Minister appointed workplace Safety and Health advisers and also listed the institutions that were approved for training of the said officers. It is the Applicants contention that the Health advisers are appointed under Rule 10 (4) of the said Rules and are the only ones who can prefer charges and that the mechanism for enforcing the safety Rules was not in place at the time the Applicants were charged and the charges are therefore ultra vires. On the contrary, the Respondents urged that the gazettement only relates to training institutions and appointment of health advisers and only applies to count No. 4 of the charge; but that the approval of the institutions have no bearing on the development of a safety policy. Mr. Bitta considered each count and concluded that the rules that came into force on 24th March 2005 do not apply.

No doubt the gazettement of 24th March 2005 related to appointment of Health Advisers and approval of institutions for training of the health advisers.

As observed above, Mr. Munyu submitted that it is only the Health advisers who could prefer charges against the Applicants. A look at the Rule shows the contrary.

Rule 10 (4) provides for gazettement of Health and Safety advisers. Rule 11 then goes on to stipulate the duties of the Health and Safety advisers. It reads:-

"**11(1) The Safety and Health adviser shall-**

(a) carry out Safety and Health audits of the factory or workplace at the request of the occupier;

(b) advise the occupier and the members of the Committee on matters relating to occupational Health and Safety arising from the audit report;

(c) Submit a copy of the audit report to the director"

The above Rule does not empower the health advisers to prefer charges against anybody. A reading of Rule 11 clearly shows that the duties of the advisers are advisory in nature and they come into the factory on invitation by the occupiers. This is totally different from the powers donated to the chief inspectors of Health by S 69 of the Act. The Inspectors have powers to enforce the provisions of the Act and I find and hold that the inspectors had acted within their mandate in entering the factory to inspect and examine for purposes of enforcing the Factories Act.

To determine whether or not the Rules gazetted on 24th March 2005 have a bearing on the charges that the Applicants face and whether the Respondents acted ultra vires their powers or whether the Applicants were charged before the enforcement machinery came into being under the gazettement of 24th March 2005, I will consider each individual charge that the Applicants face separately in relation to the Rules that came into force on 24th March 2005.

In **Count I,** the applicants are charged with failing to furnish means required by occupational Health and Safety Officers for entry in a Factory, inspection or inquiry contrary to Sections 69 (2) as read with S.72 (1) 72 (5) and 73. Sections 72 and 73 are the penal Sections while the duty of the occupier is created under Section 69(2). That Section reads:-

"**S.69 (2) the occupier of every factory and his agents and servants, shall furnish the means required by an inspector as necessary for an entry, inspection, examination or inquiry or the taking of samples, or other use for the exercise of his powers under this Act in relation to that factory"**

The above charge is brought pursuant to provisions of the Act as amended in 1990. The Rules made in 2004 have no bearing on the above Provisions and therefore on that charge nor is appointment of advisers and approval of institutions for training of advisers made under the 2004 Rules applicable to the above charge.

Count II relates to the failure by the Applicants to have a trained person placed in charge of a First Aid Box contrary to Rule 7 Factories (First Aid Rules LN 160 (1977) as read with Ss.50 (1), 72 (5) and 73 of Cap 514 as amended in 1990. Rule 7 of the Factories (First Aid) Rules 1977 provides as follows:-

"**Rule 7 No person shall be placed in charge of a First Aid Box or board unless he or she has received adequate training in the application of first aid to injured persons and holds a certificate of competence issued by –**

(i) The St. John Ambulance of the St. John Council of Kenya, or

(ii) The Kenya Red Cross Society or

(iii) Such other body or society as may be approved from time to time by the Chief Inspector of Factories, provided that any certificate of competence issued in accordance with this paragraph shall be valid for one year only and must be renewed annually."

The above rule is made pursuant to Section 50 of the Factories Act which provides that each factory has

to provide and maintain a first aid box which has to be readily accessible. Again I, find that this Rule had been in force since 1977. It has no bearing on appointment of Safety and Health advisors or approval of institutions for training the advisers which was the subject of the LN 31 of 2004.

In **Count 3** the Applicants were charged with the offence of failing to train committee members in occupational Health and Safety contrary to Rule 12(1) and Rule 15 of the 2004 Rules in L N 31. They are alleged to have failed to train their members.

In my view this is the only charge that touches on legal Notice 31 that came into force after the charges had been preferred. It is in the legal Notice that approved the institutions for training and also appointed Safety and Health advisers. The Applicants could not have been expected to train the advisers before they were appointed and institutions set up in accordance with the Rules.

The appointments of advisers are made pursuant to Rule 10 and these appointments were made on 24th March 2005 when the gazettement of the Health advisers and approved institutions were gazetted. It is the only charge that can be the subject of review.

In **Count 4** the Applicants were charged with failing to develop a clearly defined Safety and Health Policy in a work place contrary to Rule 9 (f) as read with Rule 15.

Rule 9 provides as follows:-

”**9 (f) The occupier shall – develop a clearly defined Safety and Health policy and bring it to the notice of all employees at the work place and send a copy of the policy to the director”**

Rule 15 is the penal provision if there be contravention of the above rules. Development of a Health and Safety policy, had in my view, no bearing on the gazettement of the Health and Safety advisers or the approval of institutions which was gazetted on 24th March 2005. Formulation of a policy on Health had to be in place to enable the Health and Safety advisers to function.

In **Count 5** the Applicants are charged with the offence of failing to take practicable measures to protect persons employed against inhalation of fumes contrary to Section 51 (1) as read with S. 72 (1) 72 (5) and 73 of the Factories Act as amended in 1990.

S. 51 (1) provides as follows:-

“**S 51 (1) In every factory in which, in connexion with any process carried on, there is given off any dust or fumes or other impurity of such a character and to such extent as to be likely to be injurious or offensive to the persons employed or any substantial quantity of dust of any kind, all practicable measures shall be taken to protect the persons employed against inhalation of the dust or fume or other impurity and to prevent accumulating in any workroom, and in particular, where the nature of the process makes it practicable, exhaust appliances shall be provided and maintained, as near as possible to the point of origin of the dust or fume or other impurity, so as to prevent it entering the air of any workroom.”**

The above provision has no relationship with the gazettement of Health and Safety advisers. It was in existence well before the rules were promulgated. Its invocation does not depend on the existence of the Rules. The Applicants would have been charged under the said Section with or without the gazettement Notice of 24th March 2005.

S. 27 of the Interpretation and General Provisions Act Chapter 2 Laws of Kenya, provides for publication and commencement of subsidiary legislation. It reads:-

“**27 (1) All subsidiary legislation shall, unless it is otherwise expressly provided in a written law, be published in the Gazette, and shall come into operation on the day of publication or, if it is enacted either in the subsidiary legislation or in some other written law that the subsidiary legislation shall**

come into operation on some other day, on that day, subject to annulment where applicable."

The gazette Notice of 24th March 2005 had no provision as to when it would come into force and it is therefore deemed to have come into operation on 24th March 2005, the day of the gazettement.

Could it have a retrospective effect? On the questionof retrospective Application, Section 28 of Cap 2 Laws of Kenya provides:-

"**S. 28 subsidiary legislation may be made to operate retrospectively to any date, not being a date earlier than the commencement of the written law under which the subsidiary legislation is made, but no person shall be made or become liable to any penalty whatsoever in respect of an act committed or of the failure to do anything before the day on which that subsidiary regulation is published in the gazette"**

The Applicants urged that when the Respondents charged the Applicants, the Rules had not come into force and the subsidiary legislation could not operate retrospectively. In the case of **RE MOHAMED SALEH & CO. LTD MSA H.C. 643/03** the court considered whether subsidiary legislation could have a retrospective effect and it held that as long as it does not impose a penalty for any act done or omission made before the date of its gazettement, it could apply. Likewise, in this case, if indeed the appointment of Health Officers and approval of training institutions had been material to the charges that the Applicants face, then the charges could not have been sustained because the law could not operate retrospectively. However, after a consideration of each charge above, I find that the gazettement of the Health Officers and approved institutions does not in any way affect the charges that the Applicants face, save for Count 3.

So far the Applicants have not demonstrated that Cap 514 was not enforceable, or that the 3rd Respondents acted outside their powers or that the law under which they are charged has a retrospective effect, save for Count 3. The 3rd Respondent had the statutory power to charge the Applicants if an offence was committed and there has been no evidence of irrationality, unreasonableness or malafides disclosed as against the 3rd Respondent.

As regards the 2nd Respondent, the Chief Magistrates Court Makadara, it has not been demonstrated that the court did not have the jurisdiction to hear and determine the charges or that the magistrate has acted with impropriety. The charges are properly before an independent, competent and impartial court and it is for the court to hear the evidence and determine the case on merit.

Judicial Review is discretionary remedies and the court may not grant them even if deserved. In this case only one of the charges would be subject to review and an objection can be raised before the trial Magistrate in respect thereof. The court will not grant any orders at this stage as the same can be dealt with by the magistrate along with the other charges.

The upshot of the Applicants Notice of Motion is that it is dismissed, the Applicants should go ahead and face the charges before Makadara court which has jurisdiction to hear and determine the case on merits. Costs to the Respondent.

Dated and delivered this 28th day of September 2007.

R.P.V. WENDOH

JUDGE

Mr. Macharia holding brief for Mr. Munyu

Mr. Bitta for Respondent

Court Clerk: Daniel