



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 34 OF 2020

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE STANDARDS TRIBUNAL.....RESPONDENT

AND

HARLEYS LIMITED.....INTERESTED PARTY

EX PARTE APPLICANT: KENYA BUREAU OF STANDARDS

RULING

Introduction

1. The Kenya Bureau of Standards, which is the *ex parte* Applicant herein, is a body corporate established under the Standards Act, Cap 496 of the Laws of Kenya, whose functions include promoting standardization in industry and commerce among others. The Respondent is the Standards Tribunal, also established under the Standards Act, to hear and determine appeals from the decisions of the Applicant. The Interested Party is a limited liability company with registered offices in Nairobi and is engaged in the business of wholesale distribution and importation of pharmaceutical products in Kenya which include among others adult diapers.

2. The *ex parte* Applicant is aggrieved by the decision made on 27th September 2019 by the Respondent, which allowed an appeal lodged by the Interested Party's in Standards Tribunal Appeal No. 5/2019. The Respondent's decision also set aside the *ex parte* Applicant's decision dated 6th June 2018, which condemned the Interested Party's consignment imported vide Certificate of Conformity No. S-2018/05/479416 as sub-standard.

3. The *ex parte* Applicant accordingly filed a substantive Notice of Motion dated 13th February 2020, after this Court granted it leave and dismissed the Interested Party filed a Notice of Preliminary Objection dated 3rd March 2020 upon finding that the alternative procedure in Rule 29 of the Standards Tribunal (Practice and Procedure) Rules of 2013 is not only inadequate, but also inappropriate to determine the dispute between the parties in the instant application.

4. The *ex parte* Applicant is seeking the following orders in its Notice of Motion application dated 13th February 2020:

a. An order of Certiorari to remove into this Court for the purposes of its being quashed forthwith the proceedings of and the decision/judgement of the Respondent herein dated 27th September 2019, which in the main set aside the Applicant's decision dated 6/6/2018 and that found that the 1st Interested Party's goods/consignment imported under Certificate of Conformity No. S-2018/05/479416 did comply with Kenya Standards Specifications for Disposable Adult Diapers KS-2662:2016.

b. That cost of this Application be awarded to the *ex parte* Applicant.

5. The application is supported by the grounds on its face, a Statutory Statement dated 6th February, 2020 and a Verifying Affidavit sworn on even dated by Birgen Rono, the *ex parte* Applicant's Head of the Administration. The Respondent did not file any response to the application

nor participate in its hearing, while the Interested Party filed a replying affidavit sworn on 10th December 2020 by Rupen Mulchand Shah, one of its Directors. The parties' respective cases are as follows.

The ex parte Applicant's Case

6. The *ex parte* Applicant averred that on 31st May 2018, one of its agents drew samples of the Interested Party's consignment for testing at the point of entry in Mombasa. Further, that the testing was done against the Kenya Standards KS 2662:2016: Kenya Standards Specification Adult Diapers, and the sample was found to be non-compliant. Therefore, that through a letter dated 6th June 2018, the *ex parte* Applicant notified the Interested Party that the goods were sub-standard. However, that this notwithstanding the consignment was cleared and released into the market.

7. It was further deponed that the Directorate of Criminal Investigations (DCIO) in **Nairobi CMC Criminal Case No.1783/2018 - Republic vs. Kiprono Cole Bullut & Others** consequently preferred charges against persons/entities suspected to have participated in the unlawful release of the substandard consignment, including directors/agents of the Interested Party, the *ex parte* Applicant's officers and officers of Kenya Revenue Authority. Additionally, that the Interested Party, being aggrieved with the decision of the *ex parte* Applicant dated 6th June 2018, appealed to the Respondent and that its Notice Motion dated 19th October 2018 was initially heard and dismissed on 22nd March 2019. That the Interested Party subsequently filed a supplementary appeal and supplementary schedule of documents after obtaining leave of the Respondent on 22nd July 2019, and that during hearing of the same the Respondent admitted into evidence tangible samples of diapers which had not been previously supplied to the *ex parte* Applicant.

8. The *ex parte* Applicant averred that it wrote to the Respondent seeking to arrest the ruling pending directions on the sample of the diapers admitted into evidence. However, that the Respondent delivered its Judgement allowing the Interested Party's appeal, and granted the following orders:

- a. The Interested Party's goods or consignment did comply with the set Kenya Standard Specifications for Disposable Diapers Adult Diapers KS: 2662:2016.
- b. Setting aside of the decision of the Applicant communicated to the Interested Party in the letter ref no. KEBS/COR/KLD/23/5/VOL54(84) of 6th June 2018.

9. The *ex parte* Applicant's case is that the Respondent acted *ultra vires* and/or in excess of its powers and mandate by setting aside the decision of the Applicant dated 6th June 2018, and proceeding to order that the *ex parte* Applicant's goods and/or consignment did comply with the set specifications. It was contended that Section 11 of the Fair Administrative and Actions Act and in particular 11 (e) and (h) only grants the Respondent powers to set aside the *ex parte* Applicant's administrative action/decision and remitting the matter for consideration by the *ex parte* Applicant, with or without directions.

10. Additionally, that the Respondent assumed the powers of the *ex parte* Applicant by declaring that the sample diapers complied with the set standards, and acted unreasonably and contrary to the doctrine of legitimate expectation by finding that it does not matter at what point or stage the goods are marked. Further, that Legal Notice No.12 Regulation 5 gives the *ex parte* Applicant the mandate to re-inspect goods imported into the country accompanied by a certificate of compliance.

11. It was further contended that the Respondent failed to take into account the existence of an active criminal case, and acted *ultra vires* and in breach of natural principles of fair hearing by admitting into evidence during hearing tangible samples, without affording the *ex parte* Applicant a discovery opportunity/and or opportunity to verify and rebut authenticity of the same. In addition, that the Respondent acted unreasonably by arriving at two different decisions on the same subject and issues, and upholding the *ex parte* Applicant's decision in its ruling dated 22nd March 2019, while in the other dated 27th September 2019 finding that the subject goods were compliant albeit without an appeal and/or review being lodged before it.

12. Lastly, that the Respondent acted unlawfully, unreasonably and in breach of the doctrine of legitimate expectation, when it admitted that the markings could have only been made after importation, and at the same time quashing the decision of the *ex parte* Applicant that was made on or before the goods were cleared and/or released to the market in accordance with Legal Notice No.127 dated 19th June 2018. It was averred that the Respondent failed to take into account circumstances under which the consignment was released into the market after being declared sub-standard this being the subject of a criminal case.

The Interested Party's Case

13. The Interested Party averred that the instant judicial review proceedings are an attempt to influence and affect the proceedings in **Nairobi CMC CR 1783 of 2018- R vs Kiprono Bullut & 9 Others** and are not concerned with the merit of the Respondent's judgment of 27th September, 2019 in **Standards Tribunal Appeal No 5 of 2018 - Harleys Ltd vs KEBS**. Further, that the application is anchored on a gross misapprehension of the law as espoused in Article 47 of the Constitution, Sections 11 and 16(c) of the Standards Act, and Rules 3(2) and 13(1)(a) of the Standards Tribunal (Practice and Procedure) Rules 2012.

14. It was averred that the Interested Party is a leading and renowned pharmaceutical distribution company, and that Drimaxx disposable adult diapers are among the Interested Party's quality imports. In addition, that the Interested Party was granted relevant approval by the *ex parte* Applicant to import the Drimaxx Adult Diapers, after SGS (formerly "Société Générale de Surveillance"), an inspection and verification company contracted by the *ex-parte* Applicant for the provision of Pre-Export Verification of Conformity to Standards (PVoC) on imports to Kenya, had on 4th May 2018 lawfully examined the goods imported by the Interested Party by applying the parameters under KS 2662:2016 Kenya Standard Specifications for Disposable Adult Diapers, and satisfied itself that the goods conformed to the requisite standards by issuing a Certificate of Conformity. The Interested Party annexed a copy of the KEBS Inspection and Approval Document, and

of the Certificate of Conformity No S-2018/05/479416 issued in respect of the subject goods.

15. The Interested Party averred that in a letter dated 6th June, 2018 the Applicant notified it that the samples of the disposable adult diapers tested against the requirements of KS 2662:2016 Kenya Standard Specifications for Disposable Adult Diapers complied on all quality and functional parameters, but failed to comply in marking. The Interested Party contended that labelling/markings is a non-critical parameter as it has no bearing on health, safety, environment/quality performance, as evidenced by the *ex parte* Applicant's operational guidelines in *CPR 173 -Inspection Process INS/OP* at item 3.1.5 and 3.1.6 on definition of critical and non-critical parameters, a copy of which was attached. Consequently, on 3rd September 2018, it wrote to the *ex parte* Applicant disputing the accuracy and veracity of the findings, and requested for re-analysis asserting that its products had met the required standards. However, that the letter did not elicit any response neither was any re-analysis, re-testing and /or re-examination done, proposed or intended to be done.

16. Therefore, and being aggrieved by the *ex parte* Applicant's decision the Interested Party lodged an appeal and an interlocutory application before the Respondent, seeking appropriate orders. Further, that the Respondent, after hearing both parties delivered its judgement of 27th September 2019, wherein it set aside the *ex parte* Applicant's decision and declared the Interested Party's goods as compliant, which was in line with the provisions of Section 16C of the Standards Act. The Interested Party averred that this decision was brought to the attention of the magistrate presiding over the trial Court in **CMCC Cr 1783 of 2018**, and that the Office of the Director of Public Prosecution sought time to revert with instructions of withdrawal of charges. According to the Interested Party, the instant judicial review proceedings were thereupon instituted as an afterthought to influence the proceedings in **CMCC Cr 1783 of 2018**, whose substratum has collapsed.

17. The Interested Party's case is that section 11 of the Standards Act allows any person aggrieved by a decision of the *ex parte* Applicant to appeal to the Respondent, and that Rule 3 (2) of the Standard Tribunal (Practice and Procedure) Rules, 2012 provides that nothing in the rules should limit/affect the tribunal's inherent power to make decisions for the ends of justice or to prevent abuse of the process of the Tribunal. Specifically on the allegations of its irregular supply of samples to the Respondent, the Interested Party responded that section 16H(2), Standards Act empowers the Respondent to regulate its own procedure; and, further under Rule 2, of Tribunal's Rules of Procedure 2012, the Tribunal is empowered to "*receive evidence, hear submissions from parties and do anything lawfully required to enable the Tribunal reach a decision.*"

18. It was averred that leave to lodge a supplementary statement of appeal and a supplementary schedule of documents was granted *inter partes* on 5th July 2019, and duly served on the *ex parte* Applicant, and that Items no. 5 and 6 on the supplementary schedule of documents were adult diapers samples branded "Dramaxx" and "Tena". Therefore, that it is dishonest to suppose that there was evidence supplied during the hearing without affording the *ex parte* Applicant a discovery opportunity whereas the samples were served and acknowledged, and the Respondent acted lawfully and within its jurisdiction in properly receiving the samples in evidence.

19. Further, that the Respondent did not undertake any resampling nor retesting of samples as alleged, nor indicate so in its judgment, for the reasons that the samples were contrary to the law not kept with nor availed to the Tribunal for retesting. The Interested Party in this respect averred that Regulation 6.9.1 of the Standard Tribunal Rules and Regulations provides that test results for goods that are non-compliant are subject to technical analysis involving experts in the relevant fields, and that under Section 16F of the Standards Act the Tribunal through its chair may appoint such expert advisers in respect to matters before it.

20. The Interested Party's response to that the *ex parte* Applicant's claims that the Respondent had arrived at two different decisions was that the first decision was on an interlocutory application by way of a Notice of Motion dated 19th October, 2018, while the second decision was a judgement on the main appeal with conclusive findings against the evidence tendered. It was deponed that the *ex parte* Applicant had a right to appeal the decision of the Tribunal in the High Court but instead instituted judicial review proceedings, yet the hearing and determination of Standards Appeal No.5 of 2018 was lawful, fair and just. Further, that the issue before the Tribunal concerned the correctness under the law of the decision of 6th June, 2018 that specific marking parameters on the packaging were alleged to have been unsatisfied, and the Interested Party detailed how it had satisfied these said parameters in its affidavit. In conclusion, it was averred that the legal effect of the quashing of the *ex parte* Applicant's decision by the Tribunal was to revert to the Certificate of Compliance issued through SGS, which certified the products as compliant.

The Determination

21. The application was canvassed by way of written submissions, and Lilan & oech Associates LLP, the *ex parte* Applicant's advocates on record filed submissions dated 27th November 2020, while CM Advocates LLP for the Interested Party filed submissions dated 4th February 2020. The main issues canvassed by the parties were whether the Respondent acted lawfully, and if the remedies sought are merited. Counsel for the *ex parte* Applicant relied on the provisions of the Standards Act, and Section 11(e) and (h) of the Fair Administrative Actions Act, 2015 to submit that the Respondent acted *ultra vires*, and that its decision was illegal and irrational.

22. It was further submitted that under section 11 (e) and (h) of the Fair Administrative Actions Act, the Respondent ought to have remitted the matter for reconsideration by the *ex parte* Applicant, instead of making a declaration that the goods in question conformed to the applicable standards, which power is the *ex parte* Applicant's sole preserve as provided under section 4 of the Standards Act and Regulation 3 of the Standards (Quality Inspection of Imports) Regulations, 2009. Counsel cited the cases of **Republic vs National Employment Authority & 3 others Ex Parte Middle East Consultancy Services Limited [2018] eKLR** and **Keroche Breweries Limited & 6 others vs. Attorney General & 10 others [2016] eKLR** for the position that *the doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised.*;

23. On the assertion that the Respondent's decision was irrational, counsel for the *ex parte* Applicant submitted that the goods brought before the Tribunal by the Interested Party did not form part of the subject matter of the dispute. In addition, it was submitted that the Respondent failed to take into consideration the existence of a criminal case that reinforced the *ex parte* Applicant's submissions that the goods had been released into the market irregularly. Further, it was submitted that if the goods had not been released irregularly, the samples of the said goods would have been produced in court. To buttress this argument counsel cited the High Court case of **Republic v National**

Employment Authority & 3 others Ex Parte Middle East Consultancy Services Limited (supra) that every judgment must be read as applicable to the particular facts proved, and also cited the case of **Keroche Breweries Limited & 6 Others v. Attorney General (supra)** for the position that an administrative action cannot be said to be procedurally fair where a decision is arrived at based on the consideration of the version of only one side.

24. In conclusion, the counsel relied on the case of **New Italcycor Limited v Kenya Bureau of Standards & another [2019] eKLR** for the proposition that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. It was submitted that the Respondent made a finding on matters that were strictly provided for in law to be decided on by the *ex parte* Applicant. Also cited in this respect was the case of **R vs. Public Procurement and Administrative Board Ex-Parte Zhongman Petroleum & Natural Gas Group Company Ltd [2010] eKLR** where it was held that *where a tribunal acts without jurisdiction, its decision is a nullity.*

25. The Interested party submitted that the Respondent is established under section 16A of the Standards Act, and under section 16C, it has jurisdiction to confirm, set-aside, vary or make such other order as it deems appropriate where a person is aggrieved with the decision of Kenya Bureau of Standards (the *ex parte Applicant herein*), *the Standards Council or the Kenya National Accreditation Service (KENAS)*. Further that the Respondent followed due process and acted lawfully in hearing and determining the Appeal No 5 of 2018.

26. The Interested Party in this regard reiterated its averments that jurisdictionally and procedurally, the law under section 16H(2) of the Standards Act as read with Rules 2 and 3(2), of the Standards Tribunal's Rules of Procedure, 2012, and Article 159(2) of the Constitution, empowers the Respondent to regulate its own procedure. Further, the Tribunal is empowered to receive evidence, hear submissions from parties and do anything lawfully required to enable it reach a decision and make such orders as may be necessary to ensure the ends of justice are met. The Interested Party submitted that it had through its averments demonstrated that the Respondent's adjudicatory process was conducted in full compliance with the law, and that its finding accorded with applicable Kenyan standard on adult diapers being KS 2662:2016 Kenya Standard-Disposable Adult Diapers Specifications as regards the aspect of markings.

28. In conclusion, the Interested Party submitted that parties cannot be allowed to clog the Court's limited time, by misrepresentation, bad faith and unmerited applications. Further, that the instant proceedings are not justified, and that the Applicant must bear the cost on a full indemnity basis. Reliance was in this regards placed on the decisions to this effect in **Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 Others [2009] KLR** and **R vs PPARB ex-parte Symphony Technologies Ltd (K) & 2 Others [2016] eKLR**.

28. In considering the issue whether the Respondent acted lawfully, this Court is guided by the circumstances when a public body shall be deemed to have made an error of law as expounded in **Halsbury's Laws of England, 4th Edition** at paragraph 77 as follows:

"... A public body will err in law if it acts in breach of fundamental human rights; misinterprets a statute, or any other legal document, or a rule of common law, takes a decision on the basis of secondary legislation, or any other act or order, which is itself ultra vires; takes legally irrelevant consideration into account, or fails to take relevant considerations into account, admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence, misdirects itself as to the burden of proof, fails to follow the proper procedure required by law; fails to fulfil an express or implied duty to give reasons or otherwise abuses its power."

29. The Respondent is in this respect a Tribunal established under section 16A of the Standards Act, and its powers and jurisdiction are set out in section 16C, wherein it is provided that upon an appeal, the Respondent may confirm, set aside or vary the decision or act in question and may make such other order as the Tribunal considers appropriate, including an order with respect to the payment of costs. In addition, under section 16D the Tribunal is given powers to give directions on a matter involving a point of law or of unusual importance or complexity upon reference to it by the *ex parte* Applicant, and under section 16F, to appoint an advisor with expert knowledge in matters relating to standards to assist in the determination of a matter before it.

30. The Standards Tribunal (Practice and Procedure) Rules, 2013 detail the procedure to be followed in this regard in the hearing of appeals and references, and as pointed out by the Interested Party, section 16H provides that the Respondent can regulate its procedure subject to the procedure provided in the said Rules. The procedural and substantive powers granted to the Respondent are therefore quite wide, and in particular, there is no limitation as regards the orders the Respondent may make, as urged by the *ex parte* Applicant.

31. In addition, it is notable that what the impugned decision by Respondent was on an appeal, as opposed to an application for review. It is not disputed that the Interested Party appealed the decision by the *ex parte* Applicant dated 6th June 2018 that the Interested Party's samples of adult disposable diapers failed to meet the marking parameters of the applicable standard. The Respondent in did note as follows in page 1 of its judgment as regards the subject matter of its determination:

"The Appellant is a limited liability company with registered offices in Nairobi. They are in the business of wholesale distribution and importation of pharmaceutical products in Kenya, which include among others adult disposable diapers by the name DraiMaxx, the subject of this appeal.

The Respondent is a body corporate established under Section 3 of the Standards Act , Cap 496 laws of Kenya whose function s among others include promoting standardization in industry.

The appeal was filed on 19th October, 2018 together with a notice of motion application by the appellant challenging the decision of the Respondents test results that its consignment had failed to meet the standard specifications vide communication through the letter of 61h June, 2018. On 22nd June, 2019 the Tribunal pronounced itself on the notice of motion where it dismissed the application for want of a case warranting the interim orders prayed for in the application..."

32. It is evident therefore, that the impugned decision was the final decision by the Respondent on the Interested Party's appeal and that the earlier decision it made was on an interlocutory application, contrary to the *ex parte* Applicant's assertions. Section 11 of the Standards Act in this respect provides that any person who is aggrieved by a decision of the *ex parte* Applicant may within fourteen days of the notification of the act complained of being received by him, appeal in writing to the Tribunal.

33. In an appeal, as opposed to a review, the judicial body normally conducts a re-hearing of the dispute in question de novo, including making findings of fact and on the merits of a decision, and it has the power to set aside a decision or confirm it in its entirety with or without conditions or alterations. In judicial review, the reviewing body is concerned with the legality of a decision, and the grounds for challenging the legality, as well as the remedies available are prescribed.

34. Most importantly, in an appeal a judicial body can substitute its own decision with that appealed from, unlike in review, and in this case the Respondent was expressly provided with the power to do so under section 16C of the Standards Act. In addition, the remedies under section 11 of the Fair Administrative Action Act that were relied on by the *ex parte* Applicant to impugn the Respondent's decision, were inapplicable in the circumstances of the appeal before the Respondent.

35. This Court therefore finds that the Respondent acted lawfully and within its powers in the hearing of the subject Interested Party's appeal, and making of the judgement of dated 27th September 2019. Further, that if the *ex parte* Applicant was aggrieved with the merits of the decision, he ought to have appealed as provided for in section 16G of the Standards Act.

The Disposition

36. Arising from the foregoing reasons, this Court has reached a conclusion that the *ex parte* Applicant's Notice of Motion dated 13th February 2020 is not merited. The said Notice of Motion is accordingly dismissed with costs to the Interested Party.

37. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 9th DAY OF JULY 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 9TH DAY OF JULY 2021

J. NGAAH

JUDGE