



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, KARANJA & KOOME, JJ.A)**

**CIVIL APPEAL NO. 143 OF 2016**

**KENYA BUREAU OF STANDARDS ..... APPELLANT**

**AND**

**POWEREX LUBRICANTS LIMITED ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Korir, J.) dated 15th March, 2016)*

in

(JUD.REV.C.No. 3 of 2015)

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**JUDGMENT OF THE COURT**

1. Kenya Bureau of Standards (the appellant) is a statutory body established under the Standards Act, Cap 496 of the Laws of Kenya. Among its duties is the formulation, monitoring and regulation of various standards within the country.
2. On the other hand, Powerex Lubricants Limited (the respondent) is a limited liability company which is involved in the manufacture of automotive and industrial oil products from recycled oil.
3. In the course of its duties, the appellant visits factories, supermarkets and other business premises unannounced, to inspect products for conformity with the set standards. They also respond to specific complaints lodged with them and visit premises where non-compliance with the Standard Act is suspected. This is all within their mandate prescribed under **Section 14** of the Standards Act.
4. On 21st October, 2015 the appellant paid an impromptu visit to the respondent's premises and informed the respondent's directors that a complaint had been received relating to foul emissions from their factory. They also wanted to inspect some of the respondent's products for conformity with the relevant standards. After doing their rounds, the appellant's Inspectors took various samples of the respondent's products for testing in their laboratories. These included radiator coolant, hydraulic 37, gear oil, engine oil, brake fluid and Automatic Transmission Fluid (ATF). They issued the respondent with a samples collection form which was duly signed by the collecting officer and a representative of the respondent.
5. They also issued a seizure notification on the respondent's products and detained the same on suspicion

of standards violation. According to the seizure notice No. SL 235, issued by the appellant, they seized all **“Power Brands Goods”**. The effect of this drastic action was to bar the respondent from dealing with any of the products it had in stock. Their plea to be informed of the deficiency of the goods was not responded to. According to the respondent, its operations were completely shut down by the said seizure of its products, yet they were not informed what it was that they needed to remedy. It was the respondent’s case that their products had been inspected only two months prior to that inspection and they had been approved and licences issued. Shutting down their factory without giving them a hearing or telling them what remedial action they needed to take was unreasonable, capricious and against the rules of natural justice.

6. The respondent consequently moved to the High Court by way of Judicial Review in Judicial Review Case No. 364 of 2015 seeking orders of certiorari to remove to the High Court and quash the seizure and detention notice dated 21st October, 2015; and an order to prohibit the appellant from interfering in any manner with the respondent’s facility and operations on the basis of the impugned seizure order. In its affidavit in response to the application, the appellant, through Anthony Mithamo one of its inspectors, admitted visiting the respondent’s premises and collecting samples of its products for testing in its laboratories. The appellant nonetheless, denied having shut down the respondent’s factory saying that they had only issued the seizure and detention notice on the products as they awaited the testing of the samples they had collected from the respondent’s factory.

7. Parties filed their submissions and highlighted them before **Korir J.** who in a judgment rendered on 15th March, 2016 allowed the respondent’s notice of motion and quashed the seizure notice dated 21st October, 2015, and allowed the respondent to continue its operations while awaiting the laboratory results of the samples collected by the appellant from the respondent’s factory. While exonerating the appellant of any malice in the manner it had handled the respondent, the learned Judge found that the appellant had closed the respondent’s factory without disclosure of the reasons for its decision; and that the appellant’s decision was tantamount to withdrawing the respondent’s licences without giving it an opportunity to be heard.

8. The learned Judge however made a finding to the effect that the collection of the samples for testing was proper, and the appellant should continue with the tests and convey the results to the applicant and take any action it deemed necessary upon receipt of the results. It is worth noting however that if the samples were ever tested, then no such results were released to the respondent. Instead of testing the samples and taking any lawful action prescribed under the Standards Act depending on the laboratory test results, the appellant decided to move this Court by way of this appeal to challenge the findings of the learned Judge.

9. The appeal is predicated on eight grounds which in essence assail the learned Judge for misinterpreting the Standards Act and thus interfering with the powers granted to the appellant under the Act; failing to find that the respondent had alternative remedy other than Judicial Review; granting the orders sought while the respondent had failed to establish a *prima facie* case and misinterpreting the doctrine of legitimate expectation in the circumstances of the case.

10. The appeal proceeded by way of written submissions with brief oral highlights. In its submissions filed in Court on 5th September, 2017, the appellant reiterated that its officers had acted within their statutory powers under **Section 14** of the Standards Act and they had not contravened any law in their actions. They denied having shut down the respondent’s factory saying that all they needed was time to test the samples they had collected and thereafter determine the way forward depending on whether the said samples were found to be compliant with the relevant standards.

11. In their view, the respondent ought to have waited for the results of the tests which according to the appellant were supposed to be released within 14 days from the date of seizure. Before we go further with the analysis of this submissions, we need to correct a misinterpretation of **Section 14B (3)** of the Standards Act by the appellant. As rightly found by the learned Judge, the said section provides for release of the results 14 days after the tests are carried out and not after issuance of the seizure notice. For avoidance of doubt, the said section provides as follows:

3.“ **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.”(emphasis added).**

This provision does not prescribe the time within which the samples must be tested. It therefore gives leeway for a possible abuse of power as the appellant’s inspector can keep the samples untested for an indefinite time, to the prejudice of the party from whom the samples have been taken and whose operations may as well have been grounded, as in this case.

12. On the Judge’s findings that rules of natural justice had been flouted, it was the appellant’s submission that the samples were taken in the presence of the respondent’s officers; that they had been informed of the purpose of the sampling and that they had complied with the Standards Act. The appellant contended that in exercise of their statutory investigative powers, the inspectors do not need to hear representations by the respondent when the sample tests were yet to be completed.

13. Citing the cases of **Selvaranjan V. Race Relations Board** (1976) ALL ER, and **Republic V. Municipal Council of Ruiru** *ex parte Stephen Kimani Mihu* (2015) eKLR, the appellant submitted that the appellant’s officers are not bound by rules of natural justice when exercising their investigatory role. We shall revert to this issue later in this judgment.

14. On the issue of existence of an alternative remedy, it was the appellant’s case that the respondent ought to have waited for the results of the tests on the collected samples and if not satisfied with the decision taken, move to the Standard Tribunal for recourse. The cases of **Republic v. Anti Counterfeit Agency** *ex parte Omega Chalk* (2015) eKLR and **Cortec Mining Kenya v. Cabinet Secretary of Mining** (2017) eKLR were relied upon for that proposition. The learned Judge was therefore faulted for entertaining the Judicial Review motion and granting the orders sought instead of directing the respondent to pursue his claim before the Standards Tribunal.

15. In his oral highlights at the plenary hearing of the appeal, **Mr. Nyende**, learned counsel appearing for the appellant emphasized on the appellant’s inspectors’ powers under Section 14 of the Standards Act. According to him, under that provision, there is no requirement for the investigators to give the respondents a hearing. He also adumbrated the issue of failure to pursue alternative remedy provided under the Standard Act. He maintained that the appellant’s inspectors had complied with the statutory rules and urged us to allow the appeal.

16. In response to the appellant’s written submissions, the respondent filed its submissions on 6th September, 2017 submitting that this appeal is merely an academic exercise, and **“no efficacious or worthwhile order can issue out of this appeal.”** The said submission is born from the fact that the impugned judgment was executed in full, the respondents went on to trade with the products in question; the samples are still in the hands of the appellant and it was allowed to test them and take any necessary lawful action against the respondent and the appellant was not even condemned to pay costs of the suit before the High Court.

17. According to counsel, whereas the appellant’s inspectors cannot be stopped from carrying out their statutory duties, before seizing and detaining goods for purposes of testing, there must be “reasonable cause to believe” that an offence has been committed as required by **Section 14(1) (g)** of the Standards Act.

18. On the issue of failing to pursue an existing alternative remedy, learned counsel submitted that the said cause of action only accrues after the bureau or the council makes a decision that is appealable to the Standards Tribunal. No recourse lies against an arbitrary or unreasonable act by the appellant’s inspectors. Counsel maintained that the appellant’s inspectors had acted in a manner that was irrational, unreasonable, illegal, procedurally improper and in breach of natural justice and the respondent was therefore entitled to challenge their decision by way of judicial review. The respondent had proved its case before the court to the required standard and the orders were properly issued. He urged the Court to

dismiss the appeal, particularly as the same is already spent.

19. Having analysed the facts of the matter as presented by the pleadings before trial court, we shall now reconsider the same afresh *vis-avis* the grounds of appeal herein, submissions by counsel and the law and arrive at our independent conclusion. This is as is expected of us by **Rule 29 (1)(a)** of the Rules of this Court expounded and applied in many of our decisions. See **Selle -vs- Associated Motor Boat Co.** [1968] EA 123, **Kuston (K) Ltd vs. Kenya Ports Authority** [2009] 2 EA, 212 where this Court expressed:

***“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. 270).”***

20. To start with, we must point out that we find it curious that even after being given a go ahead by the High Court, the appellant has not found the need to test the samples seized from the respondent to confirm whether indeed the products in question met the standards threshold or not. If indeed the appellants had reasonable cause or ground to believe that the products were faulty, why did they not go ahead and complete the exercise as the law and the High Court enjoined them to do? In our view, this would only be because the appellants did not have sufficient reason to believe that the products were substandard, otherwise they would not have abandoned their **“statutory duty”** to investigate the said products. This conduct in our view is just an extension of the unreasonable and inexplicable behaviour the appellant is being accused of.

21. Having said that, we now turn to the germane issues in this appeal which we have identified for determination. These are:

- i. Interpretation and scope/application of section 14 of the Standards Act
- ii. Failure to pursue alternative remedy; scope of judicial review
- iii. Legitimate expectation
- iv. Whether the respondent proved its case

**Section 14** of the Standards Act provides:-

**(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) An inspector entering any premises under this section shall, if so required, produce for inspection by the person apparently in charge of the premises the certificate issued to him under section 13(2) and may take with him thereon such persons and such equipment as may appear to him to be necessary.*

*(3) Where—*

*a) premises to which this section relates are unoccupied; or*

*b) the owner, occupier or person in charge thereof is temporarily absent; or*

*c) entry thereon is refused or obstructed, the inspector may use such force as is reasonably necessary to effect entry:*

*Provided that in the case of an entry under paragraph (a) or (b)—*

*(i) reasonable steps shall be taken prior to entry by the inspector to find the owner, occupier or person in charge of the premises to be entered; and*

*(ii) the premises shall be left by the inspector as effectively secured against trespassers as he found them.*

*(4) Any person who resists, hinders or obstructs an inspector acting in the course of his duty under this section or who wilfully fails to comply with any requirements lawfully made thereunder shall be guilty of an offence.*

*(5) In this section—*

*“premises” includes an aircraft, vehicle or vessel, all within the meaning of section 2 of the Customs and Excise Act (Cap. 472).”*

22. From the above provision, there is no doubt that the appellant’s officers had the legal mandate to enter the respondent’s premises and carry out investigations as to whether there was any likely contravention of the Standards Act. When it comes to seizure and detention of the goods as was the case here, there must exist **“reasonable cause to believe that an offence has been committed.”** The inspectors cannot just descend on the premises and cart away products without any tangible reason, or without disclosing any

and seek to hide behind Section 14 of the Standards Act. They must act without malice, caprice, unreasonableness and within four corners of the law. What then does **“reasonable cause to believe”** mean? The word **“reasonable”** is difficult to define particularly in the abstract. This is so because it tends to call for subjective interpretation. In ordinary English parlance, it would mean fair, proper, moderate, not harsh, even justifiable to an extent, not petty, trivial or frivolous, open minded etc. It must always be interpreted within the context of the circumstances it is applied or used. According to the Black’s Law Dictionary, **“reasonable cause”** is the same as **“probable cause”** and amounts to **“more than bare suspicion, but less than evidence that would justify a conviction.”** Defining **“reason”** Ramanatha Aiyar in **“The Major Law Lexcon (4th edition 2010)** states:

**“Reason is “the very life of law, for when the reason of a law once ceases, the law itself generally ceases because reason is the foundation of all Laws.”**

The reasonable belief must therefore be founded in the law. It denotes good faith, rationality and cannot be based on mere pretence or surmise.

23. In the Indian case of **Ganga Saran & Sons v. I.T. officer**, AIR 1981 SC 1363, the expression reasonable belief was held to mean **“the existence of rational and intelligible nexus between the reasons and the belief, so that on such reasons, no one properly instructed on facts and the law could reasonably entertain the belief.”**

24. In this case, the belief was that an offence under the Standards Act had been committed. The basis of the **“belief”** was not stated and it was therefore difficult for anybody to assess whether the same was ‘reasonable’ or not. Was the action devoid of bad faith, was it justifiable?

25. In our view, without indicating the basis of the belief that an offence had been committed, and why that belief existed, there is no ‘reason’ that could be attributed to that action. In our view, no basis was laid to support the belief let alone showing that it was ‘reasonable.’ A decision that was going to paralyse the respondent’s operations ought to have been explained to the respondents. The appellant claims that it did not shut down the respondent’s business. We note however that the seizure notice referred to **“all the powermax products”**. This would inevitably mean that the appellant could not deal with any of those products until the appellant inspected the samples, at its own leisure, before submitting the results within 14 days after inspection. We also note that Standards Act gives the appellant discretion to allow a trader to continue trading in the same products pending the testing and submission of the results of the collected samples. In this case no such discretion was exercised in favour of the respondent.

26. That conduct cannot, in our view be said to be rational or fair. It cannot be reasonable. The appellant cannot argue that its officers do not have a duty to explain their actions. In our view, the Standards Act may be silent on such a requirement but the test of reasonableness within the context of **Section 14(1)** of the Standards Act behoves the inspectors to explain their reason for believing that an offence is likely to be committed. There cannot be, in our view, any legal regime that can be immunised from observing the peremptory rules of natural justice. Where rules of natural justice have been denied; where an action is bereft of reasonableness or rationality, then clearly, the case becomes a good candidate for judicial review orders. This was the case here.

27. Did existence of an alternative remedy bar the respondent from moving to the Judicial Review Court? We think not. Where the available alternative remedy is less effective or efficacious, then a party cannot be barred from seeking recourse in judicial review. In this case, the respondent’s business had been paralysed, samples had been taken and in order for the door to the Standard Tribunal to be opened, the tests had to be carried out, result communicated 14 days after the tests and the decision of the Board or Council had to be in place. Yet there was no time limit within which the samples were supposed to be tested. As was observed earlier, two years down the line, the said samples have yet to be tested. Would it have been rational to expect the respondent to wait indefinitely for the cause of action to accrue yet it could not trade? That in our view is the height of unreasonableness. We also note that by the time the respondent herein moved to court on Judicial Review, no cause of action that could be taken to the Standards tribunal had crystallised. The circumstances of this case were therefore clearly distinguishable

from the *Cortec Mining case (supra)*. Moreover, the Court did not delve into the merits of the case and only dealt with the process and left the merits to be determined after the results of the tests on the samples, which tests were never carried out.

28. Lastly on the issue of legitimate expectation, we find the doctrine inapplicable in this case. We need not go into detail as to what legitimate expectation entails. It suffices for us to state that the fact that the respondent had been allowed to renew its licenses only a few months earlier, after its products had been duly tested, did not give rise to an expectation that there would be no impromptu tests on its products during the life of the licences. Under **Section 14** of the Act, the appellant can knock at their premises any time for inspection on compliance with the law, as long as there is “**reasonable cause**” or “**reasonable belief**” that an offence is being committed.

29. We think we have said enough to demonstrate that this appeal lacks merit. We dismiss it with costs of the appeal being awarded to the respondent.

**Dated and delivered at Nairobi this 2nd day of March, 2018**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**