



REPUBLIC OF KENYA

IN THE STANDARDS TRIBUNAL AT NAIROBI

TRIBUNAL APPEAL NUMBER 5 OF 2018

BETWEEN

HARLEY'S LIMITEDAPPLICANT

VERSUS

KENYA BUREAU OF STANDARDS.....RESPONDENT

RULING

Introduction

The Applicant is a limited liability company with registered offices in Nairobi. They are in the business of whole sale distribution and importation of pharmaceutical products in Kenya, which include among others adult disposable diapers by name Drimaxx, 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 functions among others include promoting standardization in industry.

The appeal was filed on 19th October, 2018 together with a notice of motion application when the Applicant was dissatisfied by the Respondents test results which indicated that the Applicants goods comprising of 2469 pieces of medium, 2100 pieces of large and 1960 extra large Drimaxx Adult diapers all valued at Kshs.170,000.00/- had failed to meet the respective standards. The decision was communicated by the Respondent vide their letter to the Applicant dated 6th June, 2018. Both parties were represented and the matter was disposed by way of submissions on 25th January, 2019.

SUMMARY

In the normal course of business the Applicant imported disposable adult diapers on or about May 2018. Prior to importation, the goods were inspected by a duly appointed agent of the Respondent SGS India. The Applicant was issued with Pre-verification of Conformity (PVoC) vide a Certificate of Conformity (CoC) No. S-2018/05/479416 on 4th May, 2018. The copy of the Certificate was attached to the schedule of document produced.

Upon arrival to the country the goods were inspected by the Respondent and the documents accompanying the goods approved and the Respondent subsequently issued the Applicant with KEBS inspection and approval documents Ref. No. CD2018KEBSKEBSIA0001033285 which copy was produced. The goods were then released to the Applicant.

That subsequently on 31st May, 2018 the Respondent agent, one Daniel Kimonge in the course of routine surveillance collected samples of the Applicant's goods from the consignment for testing. In a letter dated 6th June, 2018 the Respondent informed the Applicant that the goods were tested against the requirements of KS 2662: Kenya standards specification for Disposable Adult Diapers and failed to comply with the set standards

The letter dated 6th June, 2018 was received by the Applicant on 27th September, 2018 and they responded through a letter dated 3rd September, 2018 to the Respondent disputing the results of the tests and asking for a re-analysis.

Pursuant to the letter dated 6th June, 2018 the office of director of Public prosecutions preferred charges against the Directors of the Applicants as per the charge sheet stamped on 24th September, 2018 with connivance to commit an offence under Section 9(3) (b) of the East African Community Customs Management Act No.1 of 2005 and wilful disobedience of statutory duty contrary to Section 130 of the Penal Code Cap 63 Laws of Kenya.

Applicants Case

The Applicant contends that the Respondent through its Pre-Export Verification of Conformity (PVoC) agent SGS India issued a Certificate of Conformity (CoC) which was a requirement before importing the diapers. On the strength of this, the Applicant proceeded to import the diapers. They then argue that the Respondent cannot be heard to say that the goods were substandard.

It's also the contention of the Applicant that after receiving the letter dated 6th June, 2018 from the Respondent, they wrote back requesting for a reanalysis of the goods and have received no response to date.

The Applicant also avers that the alleged failure of the goods do not affect the quality in that the Respondent's rejection of the goods was on the basis of failure in marking i.e that the number of diapers in a package was not indicated.

Respondents Case

The Respondent case is anchored on the failure of the goods to meet KS2662:2016. That the goods failed to meet the standards as relates to marking. The Respondent contends that their inspector while performing their market surveillance duties collected samples of diapers belonging to the Applicant and when they were subjected to testing as per the Kenyan standards, they were found not compliant. The Respondent submitted that their inspectors in their ordinary course of duty can seize and detain any goods which the inspector has a reasonable cause to believe are non-compliant for purposes of testing and verification with the set standards.

They submitted that this mandate is provided for under **Section 14 of the Standards Act Chapter 496 Laws of Kenya** on Powers of inspectors.....

a. (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;

b. (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.

It is the strength of the provision that one Mr.Kimonge drew samples of the Applicant consignment for testing. Unfortunately for the Applicant the diapers failed to meet the requirements of the said standard and the Respondent proceeded to communicate the findings to the Applicant vide the letter dated 06/06/2018.

Both parties in their submissions identified their respective issues for determination as follows;

- i. Whether the Applicant has proved its case to warrant grant of orders sought in the application
- ii. Who should bear the cost of the proceedings,
- iii. Whether the Applicant 's goods and or consignment complied with the set Kenya Standard
- iv. Whether the prayers sought by the Applicant should be granted.

In our analysis, we have merged the four issues to three as below and dealt with them individually. (a)Whether the Applicant's

goods and/or consignment complied with the set Kenya Standard and whether the CoC preclude the Respondent from carrying further tests (b) whether the Applicant has proved its case to warrant grant of the orders sought and (c) who should bear the costs of the proceedings.

It is clearly stated on the CoC that KEBS may reject a consignment covered by the CoC if found to be nonconforming at the port of entry. This when read with the provisions of **Section 14 of the Standards Act Chapter 496 Laws of Kenya** on Powers of inspectors.....

a. (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;

b. (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.

The import is that CoC is not a final document and the Respondent has the power to seize the goods either at the entry point or market and subject them to further retesting which results can overrule the CoC as evidenced in this case.

As to whether the Applicant's goods and or consignment complied with the set Kenya standard, it was the Applicant's submission that the goods subject to this application met the requirements for approval for both pre and post importation by the Respondent through its duly appointed agent SGS. They submitted that they fully complied with the requisite Kenya standard specification for marking. That their inspection for conformity was done in the country of origin and issued with Pre-Export Verification of Conformity (PVOC) vide a certificate of conformity No. s-2018/05/479416 issued on 4th May, 2018. The certificate has been produced as exhibit 4 in the pleadings filed by the Applicant.

We have inspected the certificate under reference and noted the following salient issues relevant to this application and qualifications thereto;

a. That it is valid for three months from the date of issuance

b. That it is issued under the authority of PVoC programme, for and on behalf of Kenya Bureau of Standards,

c. That it does not discharge the exporter from their contractual obligations in relation to quality and quantity of the goods,

d. That it does not discharge the exporter or the importer from exercising all their rights and discharging all their liabilities,

e. That KEBS may reject the consignment covered by this CoC if found to be non-conforming on verification at the port of entry.

We shall return to analyse these provisions in the certificate later in this ruling.

It has also been submitted that the Import Sampling Form as well as Sample Submission Form submitted by the Respondent's inspector indicated the condition of the goods as "good", and released "normal" and "good" respectively. This position was not controverted by the Respondent in their response or submissions.

The Applicant thus submits that the decision of the Respondent in its letter dated 6th June, 2018 was irrational, unreasonable and failed to take into consideration the approvals prior issued by its duly appointed agent and should be set aside.

The Applicant further submitted that the failure by the Respondent to accord them an opportunity even after seeking for resampling amounts to unfair administrative action on the part of the Respondent and takes away its legitimate expectation as enshrined in the Constitution and the law. The actions smack the rules of natural justice.

It concluded by submitting that it has established a case as against the Respondent and the application should be allowed with costs payable to it.

The Respondent on its part submitted in the main on the relevant statutory mandates and its obligations as well as those of suppliers and or traders in meeting the regulatory demands on goods and services to consumers.

It submitted that the Respondent's consignment did not meet the set standards in marking and accordingly the consignment was substandard. The findings according to the Respondent were arrived following samples drawn and tested against the requirements of KS 2662:2016 The Kenya Standard Specification for Disposable Adult Diapers and the laboratory results as were submitted on 6th June, 2018.

They concluded by submitting that the prayers sought cannot be granted for if they were to be granted, there will exist serious breach of public health and safety and occasioned failure to protect the consumer.

We have gone through and analysed the documents filed herein and considered at length the annexed evidence in form of certificates and other documents. They have given us a very in-depth and insight of the issues at hand and indeed crystallized our understanding of the subject matter herein.

It is not disputed herein the statutory role of the Respondent under the Standard's Act including the conduct of regular checks and tests to ensure compliance with the standards. This mandate is donated under **Section 14** of the Standard's Act, cap 496 of the Laws of Kenya. It is also not in dispute that the consumers, the business community and the general public are protected by law in all the products and supplies made available in the market to the extent that such goods and services meet the standards set.

It is the Applicant's case that the Drimaxx Adult Diapers met the standards set by the Respondent. This assertion has been supported by approvals and certificates issued to the Applicant. The question we have agonized and seek to answer is what is the standard required for Drimaxx Adult Diapers"

In the Pre-Export Verification of Conformity certificate issued to the Applicant, the Standard required to be met in law is the Standard under nominative reference KS 2662:2016 (**See annexed PVoC at page 4**). This is the same standard referenced by the Respondent in its response and other documents.

The specifications to this standard were approved on 27th September, 2016 under KS 2662:2016 and ICS 59.080.30. Under the standard, it is provided the qualities and characteristics of disposable adult diapers to ascertain in testing including the rate of absorbency, absorptive capacity and delivery moisture content. In the present case, these were met by the Applicant's products.

Besides the above characteristics, the product is required to meet other physical characteristics including packaging and marking. We shall deal with the marking, as this is the main aspect of the dispute before us.

Marking is provided under specification 6.2 on both primary and secondary packages. It provides that the diaper packages shall be marked with legible and indelible pre-printed marking bearing the following information in English or Kiswahili:-

- a. Manufacturer's name, address and /or trademark
- b. Importer/distributor's name, address (if applicable)
- c. Number of diapers in a pack*
- d. Size of adults that the diaper is meant for
- e. Instruction for use (optional for secondary package)
- f. Instructions for storage and disposal
- g. Country of origin

h. Date of manufacture and expiry; or best before

i. Batch number

j. warranty period; and

k. Each package shall have the relevant quality mark

For a product to be certified to be in conformance to the relevant standard, all the parameters in terms of quality of the product itself to packaging must meet the set criteria. The Applicant says, its product conform to the standard, the Respondent says it does not.

It is noteworthy at this juncture that the Respondent does not dispute in all its pleadings filed herein the quality of the Drimaxx Adult Diapers imported by the Applicant. What has come out to be the dispute is the marking. This is evident from the Laboratory Test Reports under sample reference number BS201818341 and the letter to the Applicant of 6th June, 2018.

What then is the main issue for determination before us is the decision vide the letter dated 6th June, 2018 by the Respondent flowing from the test of the diapers against the requirements of KS 2662:2016 where it failed to comply in marking.

We already enumerated above what marking comprised of. We have looked at the analysis in the Laboratory Test Report availed to us, Kenya Bureau of Standards Inspection and Approval Document in particular on Item Details, Sample Submission Form (imports), the Respondent's letter dated 6th June, 2018 communicating the decision of the Respondent as well as the letter dated 3rd September, 2018 from the Applicant to the Respondent.

A product is cleared if and only if it meets the set standards. We are not aware and have not been told either if there are exemptions to this requirement. That being the position in law, is the Applicant's product compliant for purposes of clearance.

The laboratory test results identified three items of non-compliance. As regards the requirement on the number of diapers in a pack, the Applicant stated that the pack is marked as ML10, L10, XL10 which according to them clearly meant Medium 10 packs, Large 10 packs and Extra Large 10 packs. We unfortunately did not have the benefit of physically examining the packages, this being an interlocutory application. Looking at KEBS Inspection and Approval Form, the Item Details provided as three items. Under Item 1 it provided that the package quantity is 1, the quantity is 2460 comprising Mediums 10s. Under Item 2 the package provided that package quantity is 1 and the quantity is 2100 Large 10s. Under Item 3 the package quantity is 1 and quantity of 1920 Extra Large 10s. As already found, the parameters for testing is provided as Parameter No. 2: Number of Diapers in a pack.

It is our considered view that on parameter No. 2 as far as the number of diapers in a pack is concerned, the Applicant's diapers did not comply. The descriptions in the inspection form and the response does not answer the question on non-compliance. One is still unable to tell the number of adult male diapers in a pack where it has only been declared as 1 package comprising 1920 diapers of Mediums 10s. Indeed the Applicant's package does not tell the number of diapers in a pack. We have been guided in making this finding by **Section 87 of the Consumer Protection Act, 2012 and the case of Mark Ndumia Ndung'u vs. Nairobi Bottlers Ltd & Another (2018)eKLR.**

This leads us to a consideration on the approvals and certification by SGS, the duly appointed agent of the Respondent. The Pre-Export Verification of Conformity (PVoC) was issued to the Applicant prior to the importation of the subject goods. This certificate together with other approvals indeed confirmed compliance to the standards required. The goods were indeed imported upon the receipt of the approvals. The agent was acting on behalf of the Respondent. The big question we agonized over is the place of the PVoC and approval *vis a vis* the extend of mandate of the Respondent in law.

We obtained solace in the notes to the PVoC certificate as listed and as already referenced above, that KEBS is entitled to reject the consignment covered by the PVoC if found to be non-conforming on verification at the port of entry. In the instant case, we are convinced that the Respondent was entitled and rightly so in later rejecting the goods after confirming non-conformity upon sampling and testing even where there existed a CoC from its duly appointed agent. The Applicant is deemed to have been privy to this possibility of rejection and as such the doctrine of legitimate expectation does not apply to this instant.

Having found as we have above, it is our considered view then that the Applicant's goods and or consignment did not comply with

the set Kenya standard and we so find.

On the joint aspects of relevant quality mark and warranty period considering our finding above on non-conformity in marking the number of diapers per pack, any finding otherwise on these issues is of no consequence.

As a result therefore, the prayers cannot be allowed at this instance. The Applicant has not established a case as against the Respondent. The Applicant has failed to achieve the threshold for the grant of the orders sought particularly where the subject matter of the application touches on public health and consumers whose lives are at the centre of the disputes between the parties herein; one as an importer and investor seeking besides the business interest to improve the lives of the citizens and the other a regulatory agent mandated to maintain standards and quality of goods supplied to the market.

Turning to the prayers available, we warn ourselves that it is trite law that parties are bound by their pleadings. In the absence of a prayer for retest, this Tribunal cannot grant what a party did not ask for. In response to the submissions that the Applicant sought for retesting, the Respondent submitted that the request came late after criminal proceedings had commenced against the directors of the Applicant. We have also noted that the letter was written almost 3 months after the letter of 6th June, 2018 that is on 3rd September, 2018. We cannot read malice on the part of the Respondent for their inaction on the letter and their submissions before us.

Be that as it may, criminal proceedings are independently commenced by other entities other than the Respondent. We have not been shown any evidence that the proceedings were commenced following a written complaint by the Respondent. We do not wish to say more.

For the aforesaid reasons, the Notice of Motion application dated 19th October, 2018 and filed the same date is hereby dismissed with each party bearing their own costs.

Dated and delivered at Nairobi this 22nd day of March 2019

Gladys Muthoni Mburu

(Chairperson)

Hillary Sigei

(Member)

Moses Sande Makhandia

(Member)

Peter Mungai

(Member)

Delivered in the presence of:

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