



REPUBLIC OF KENYA

IN THE STANDARDS TRIBUNAL AT NAIROBI

TRIBUNAL APPEAL NO. 1 OF 2016

BETWEEN

THARAKA HONEY BEE PRODUCTS LIMITEDAPPELLANT

AND

KENYA BUREAU OF STANDARDSRESPONDENT

RULING

Introduction

The Appellant is a limited liability company incorporated under the now repealed Companies Act, Cap 486 of the laws of Kenya. The Appellant is domiciled in Kenya and part of its business entails manufacture and sale of drinking water and water products.

The Respondent is a body corporate established under Section 3 of the Standards Act, Cap 496 of the Laws of Kenya whose mandate includes among others; promoting standardization in industry and commerce and controlling use of Standardization Marks and Distinctive Marks.

This appeal was filed at this Tribunal on 27 May 2016 by the Appellant having been dissatisfied by the Respondent's decision to suspend its permit for manufacturing bottled water products. The relief sought by the Appellant was to set aside the Respondent's decision of suspending the Appellants permit and a declaration that the Respondent's decision to suspend the Appellant's permit was illegal and against the principles of natural justice. The Appellant also prayed for costs and any other order(s) the Tribunal may deem appropriate.

Summary of facts

The Appellant was engaged in the manufacture of drinking water and water products in accordance with the permits issued by the Respondent on 26th March 2014 with Standardization Mark Number 14483 for Drinking Water and Tharaka Cool. The permit was effective from 9th January 2014 with an expiry date of 8th January 2015. The Appellant was also issued with a permit for Flavoured Water and Fruity H2O on 26th March 2014 with a Standardization Mark Number 17589 effective 26th March 2014 and with an expiry date of 25th March 2015.

On 18 November 2015 the Appellant applied for exemption from renewal of the above mentioned permits which were expired. The ground for the exemption application was non-production of goods; the non-production was occasioned by lack of water following a change of premises. The Respondent allegedly never responded to the request for exemption from renewal of the said permits.

The Respondent on 9th May 2016, invited the Appellant to a meeting and informed the Appellant that permits of over 300 water bottling firms would either be cancelled or revoked and the Appellant became aware of the suspension of its permits on 11 May 2016 when the respondent published a list of suspended permits for water bottling firms on its official website.

The parties did not appear for hearing on scheduled dates but filed their written submission and as a result this Tribunal decided to dispose of the matter by way of written submissions.

Appellant's case

The Appellant contends that no permit capable of suspending existed due to the fact the said permits had expired and a renewal not sought for but rather an exemption from renewal of permits lodged with the Respondent on account of non-production of the products in question. The appellant also contended that no reasons were provided by the Respondent for the action of suspending its permits.

In its Statement of Appeal and Supporting Affidavits, the Appellant brought forward two grounds of appeal, the first ground of appeal is

failure to observe rules of natural justice on the Respondent's part and misapprehension and misapplication of the law.

In their submissions filed on 22 September 2016, the appellant submitted that the Respondent's actions of suspending its permits were against rules of natural justice and amounted to misapprehension and misapplication of the law. Under the first ground, the Appellant argues that it was neither provided with the reasons for suspension of its permit nor granted an opportunity to be heard as it became aware of the suspension of its permit when the Respondent published a list of suspended permits for water bottling on its official website. To buttress this ground of appeal, the Appellant sought to rely on Article 47 of the Constitution of Kenya, 2010, Section 4 of the Fair Administration Act No. 4 of 2015 and various court precedents on principles of natural justice.

On the second ground of appeal, the Appellant argues that the Respondent misapplied and misapprehended the law because none of the grounds for suspension of permits provided for under the Standardization Marks (Permits and Fees) Regulation 1977 are applicable to them because there was no production of the goods in question and no permit capable of being suspended and hence the alleged action of suspending its permits was not backed by law and hence futile.

Respondent's case

On their part, the Respondent vide their written submissions filed on 11 October 2016 submitted that the Appellant's permits in question were never renewed in 2016 and hence the decision to suspend them. The Respondent further submitted that they owe a duty of care to the general public to ensure that health of the general public is not compromised and that consumers only consume products that are certified by the Respondent and in view of this the Respondent published a list of suspended permits for water bottling firms as it had emerged that there were bottling firms that were operating without permits or expired permits and the Appellant was one of them. The Respondent pointed out that every permit is valid for one year and must be renewed after one year.

According to the Respondent, the Appellant ought to have renewed its permits if they intended to continue producing their water products or should have notified the Respondent of their decision to stop producing water products.

In their response, the Respondent averred that their action of suspending the Appellant's permit followed due process in accordance with Section 10A of the Standards Act and Regulation 11 of Standards Marks Permits and Regulations 1977 as well as Chapter 13 of the 2010 Constitution. Finally, the Respondent contended that their actions were in good faith and in the interests of the public and prayed that the Appellant's case be dismissed with costs.

Issues for determination

The issues for determination are as follows;

1. Did the Appellant have a valid permit capable of being suspended?
2. Does the law provide for exemption from renewal?
3. Was there contravention of principles of natural justice by the Respondent?
4. Did the Respondent follow the law in suspending the Appellant's permit?
5. What are the available remedies in the circumstances of this case

Our determination

The Respondent functions as stipulated under Section 4 of the Standards Act include among others; promoting standardization in industry and commerce and controlling the use of Standardization Marks and distinctive marks. Section 9 (2) of the Standards Act provides that where a Kenya Standard has been declared, the Minister on the advice of the Council, shall, by order in the *Gazette*, prescribe a date after which no person shall manufacture or sell any commodity, method or procedure to which the relevant specification or code of practice relates unless it complies with that specification or code of practice.

According to Section 10 (1) (a) of the Standards Act, The National Standards Council shall, by notice in the *Gazette*, specify a separate mark, to be known as a Standardization Mark for application to any commodity which is the subject of a Standard declared as a Standard by the Kenya Standards Council.

Section 10 (3) of the Standards Act provides that any person who intends to manufacture any commodity that is regulated by a standard shall notify the Bureau in the prescribed form of his intention and the Bureau, if it is satisfied that he is capable of manufacturing the commodity in accordance with the relevant Kenya Standard, shall issue him with a permit to use the respective Standardization Mark.

The Kenya Standards Council has declared various standards on drinking water and water products and as such the manufacture and or sale of drinking water and water products is subject to certification and a permit being granted by the Respondent.

Section 10 (5) of the Standards Act provides that a permit may be issued subject to conditions to be specified therein, which conditions may be varied from time to time, and any person to whom it is issued shall comply with those conditions.

Section 10A of the Standards Act and Paragraph 11 of the Standardization Marks (Permits and Fees) Regulation, 1977 stipulates instances

where a permit may be cancelled, suspended or revoked.

Section 10A of the Standards Act provides as follows:

(1) The Bureau may where it is satisfied that the holder of a permit—

(a) has not complied with any condition specified therein; or

(b) has not manufactured any commodity to which the permit relates to the relevant Kenya Standard of approved specification, as the case may be; or

(c) has ceased to manufacture the commodity, to which the permit relates, cancel, or suspend the operation of, a permit; and suspension under this subsection may be for such period, not exceeding one year, as the Bureau deems fit.

(2) The provisions of subsection (1) shall be in addition to, and not in derogation of, the power to prosecute for an offence under this Act.

Paragraph 11 of the Standardization Marks (Permits and Fees) Regulation, 1977 provides as follows:

The Director or any other officer authorized by the Bureau may suspend or revoke a permit –

a) If it is ascertained that the permit-holder has used the Standardization Mark on or in connection with commodities which do not comply with the requirements set forth in the applicable Kenya Standards;

b) If any of the fees specified in regulation 8 of these regulations have not been paid; or

c) The permit holder is adjudged bankrupt; or

d) The permit-holder transfers his business to another person; or

e) The Kenya Standards on which the issue of the permit was based is withdrawn by the Bureau.

We do find that the Appellant was issued with two permits to use Standardization Marks. The first permit is Permit Number 37251 with Standardization Mark Number 14483 issued on 26th March 2014 for Drinking Water and Tharaka Cool. The permit was effective from 9th January 2014 with an expiry date of 8th January 2015. The second permit is Permit Number 37162 with Standardization Mark Number 17589 for Flavoured Water and Fruity H2O and was issued on 26th March 2014 with an effective date of 26th March 2014 and an expiry date of 25th March 2015.

Attached to the permit are conditions for use of KEBS Standardization Mark which reads as follows;

This permit is issued subject to the provisions of the Standards Act, Cap 496 Laws of Kenya and Standardization Marks (Permits and Fees) Regulations which include:

a) The permit-holder shall comply with the general and specific conditions and scheme of supervision and control which the Kenya Bureau of Standards may issue from time to time.

b) The permit is not transferable.

c) Costs incurred by inspection to determine whether commodities to which the Standardization Mark has been applied fulfil the applicable requirements set forth by the Kenya Bureau of Standards shall be borne by the permit-holder to the extent specified in the scheme of supervision and control of commodities listed in the permit.

d) The right to use the permit only applies to the commodities listed in the permit.

e) Costs incurred in applying the Standardization Mark shall be borne by the permit-holder.

f) The Bureau reserves the right to revise the regulations of making standardized commodities.

g) If the Kenyan Standard or approved specification on which the permit is based is revised, the permit shall be valid only if the permit-holder agrees to comply with the requirements set out in the revised Kenya Standard or approved specifications.

h) The permit is valid for the period shown unless otherwise suspended or revoked.

The breach of any of the conditions contained in this permit constitutes an offence under the provisions of the Standards Act and the Standardization Marks (Permit and Fees) Regulations.

Based on the foregoing it is clear that permits issued by the Respondent are time bound and are subject to review by the Respondent. The Appellant's permits had already expired and the same had not been renewed as required by law and from our review of the Standards Act and the Standardization Marks (Permit and Fees) Regulations, 1977 we have not found any legal provision anticipating exemption from renewal of permits.

According to condition (f) under the conditions for use of Standardization Mark a permit is valid for the period shown unless otherwise suspended or revoked. Our reading of Section 10A and Regulation 11 of the Standardization Marks (Permit and Fees) Regulations, 1977 are to the effect that a permit can only be suspended, cancelled or revoked if it is valid. Given that the Appellant's permits had already expired, a fact that is not contested by both parties we find that there was no permit capable of being suspended by the Respondent *per se*.

Having said that, we now turn into the question of whether the actions of the Respondent of including the Appellant's name in the list of suspended permits were justified or not. Section 4 of the Standards Act mandates the Respondent to promote standardization in industry and commerce and to control, in accordance with the provisions of the Standards Act, the use of Standardization Marks and distinctive marks. Based on this the Respondent, does have a duty to check against illegal use of Standardization Marks, We however note that the Appellant's permit was expired and the appellant had ceased production temporarily due to shortage of water and thus their contention that their permit was not in use and could not be suspended.

The Respondent argued that they have an obligation to notify the public of any unscrupulous deals that may be happening to the unsuspecting public as a duty of care to ensure that the health of the general public is not compromised and that consumers only consume products that are certified by them. The Respondent also submitted that their decision to publish suspended permits was due to the fact that there were bottling firms that were operating without permits or with expired permits. We are in agreement that the Respondent is mandated by law to control the use of Standardization Marks and has a duty of care to the public in ensuring the health of the general public is not compromised.

Though the appellant was not in production they had applied for an exemption from renewal of the permit and one can only speculate that this was meant to provide them an opportunity to produce and sell once they had settled down in their new premises and established new sources of water. This must have caused apprehension to the Respondent especially because new water sources and production premises must be certified prior to the use of Standardization Marks. If it was not the intention of the Appellant to resume production without renewal of permits then all the Appellant was required to do is to notify the Respondent of their change of premises without applying for exemption to renew permits. One would have expected that a change in premises would certainly trigger an inspection by the Respondent in order to certify the Appellant's use of the Standardization Mark.

The Respondent published a list of suspended permits which included firms who were either operating without a permit or whose permits were expired. The Respondent's contention is that the Appellant was included in that list because their permits were expired, a fact that the Appellant is not contesting.

The respondent did submit that they owe the public a duty of care in ensuring that only certified products are in circulation and that is the reason as to why they published a list of bottling firms whose permits had expired in order to warn the general public against consuming products from such firms and also to warn the affected firms just in case they were still in production or planning to re-introduce products without re-certification. We find this to be noble and see no malice in the actions of the Respondent. As a matter of fact, this falls squarely within the mandate of the Respondent and suffice to say, the Appellant was included in the list of suspended permits because their permits were expired.

We will now turn into the question of whether the Respondent's actions were in contravention of the rules of natural justice. The Appellant has submitted that they were not given reasons for being included in the suspension list and were also not given an opportunity to be heard and hence the claim that the Respondent's actions were in bad faith.

The Appellant admits having been called to a meeting by the Respondent on 9th May 2016, where they were informed that permits of over 300 water bottling firms would either be cancelled or revoked. The details of the meeting are scanty as none of the parties in this matter have elaborated on what transpired during the meeting but one day after the meeting the Respondent true to its word published a list of suspended permits on 11 May 2016 and the Appellant was included in the said list.

In our considered view, the fact that the Appellant's permits were expired and the Appellant had ceased production meant that they did not deserve a notification of what they were well aware of and the Respondent was acting out courtesy in notifying them that their permit was expired.

An expired and suspended permit has the same legal effect which is, one cannot produce and use a Standardization Mark and as such we see no point in the Appellant's argument that their permit though expired should not have been included in the list of suspended permits. The legal and commercial effects of suspended or expired permit as we have said before one and the same thing, especially for someone who was not producing. In any event, the law does allow the Respondent to suspend a permit of someone who has stopped producing. We find no violation of the rules of natural justice, Article 47 of the constitution and Fair Administration Act No. 4 of 2015 by the Respondent's actions.

Conclusion

We find that the appellant failed to renew or apply for renewal of their permit and that is why they were included in the list of suspended permits published by the Respondent in their official website. We therefore conclude that the Appellant had no valid permit or at all.

The Appellant is however at liberty to apply for renewal of the permit from the respondent in the event they wish to start again the production of Flavoured Water and Fruity H₂O.

In the end, following the findings above, the appeal is hereby dismissed. Each party to bear its own costs.

Dated at Nairobi this 6th day of January 2017

Gladys Muthoni Mburu

(Chairperson)

Hillary Sigei

(Member)

Moses Sande Makhandia

(Member)

Peter Mungai

(Member)