



**REPUBLIC OF KENYA**

**IN THE STANDARDS TRIBUNAL AT NAIROBI**

**TRIBUNAL APPEAL NUMBER 2 OF 2017**

**BETWEEN**

**SINOTRUCK MACHINERY & EQUIPMENT COMPANY LIMITED.....APPELLANT**

**VERSUS**

**KENYA BUREAU OF STANDARDS.....RESPONDENT**

**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The Appellant is a limited liability company incorporated under the now repealed Companies Act, Cap 486 of the laws of Kenya.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 its principal business activity is selling of heavy duty trucks and spare parts from SINOTRUK which is a leading manufacturer of heavy duty trucks based in China. Some of the spare parts that the Appellant sells either singly or in vehicles include starter batteries known as “Sinotruck 165AH” and “Youpean Sinopec 170AH” which are the subject matter of this suit.

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

This appeal was filed at this Tribunal under a Certificate of Urgency on 29<sup>th</sup> December, 2017 by the Appellant being dissatisfied with the Respondent’s decision of condemning the appellant’s starter batteries as substandard and ordering for the repossession, seizing and destruction of the said starter batteries.

The relief sought by the Appellant was an order restraining the Respondents or its agents from entering and or searching the Appellant’s premises, confiscating, holding, carting away, destroying and or dispossessing the Appellant of its starter batteries. The Appellant also prayed for costs of the suit.

**Summary of facts**

On 11<sup>th</sup> July 2017 the respondent received a complaint from a customer of the Appellant who had bought two vehicle batteries from Embakasi, Nairobi area on 13<sup>th</sup> June 2017 that the starter batteries were not performing as expected.

On 13<sup>th</sup> July 2017 the Respondent sampled lead acid battery for testing vide Sample Collection Form number85869, the sample collection was witnessed by the Service Manager for the Appellant, one Yan Suogang. The samples were submitted for tests in the Respondents laboratory vide Sample Submission Form Number. 170432 of 17<sup>th</sup> July 2017.

The samples were tested against Kenya Standard for Lead-acid starter batteries Part 1, KS 185-1: 2007 and the test results were produced on 24<sup>th</sup> August 2017 vide Laboratory Test Report reference number BS201723006 and BS20173008 respectively. On 15<sup>th</sup> September 2017 further results were issued vide Laboratory Test Report reference number BS201726282.

The Respondent wrote to the Appellant on 11<sup>th</sup> September 2017 notifying them of the results of the samples collected from the Appellant and tested being sample BS201723006 & BS201723008, the Respondent indicated that the said samples failed to comply with the requirements of the Standard in Effective Capacity (critical performance parameter) and marking and consequently instructed the Appellant not to offer the said batteries for sale. The Appellant was instructed to keep the batteries aside for collection and destruction by the Respondent’s officers.

On 11<sup>th</sup> December 2017, the Respondent issued a Seizure Notification of 18 starter batteries at the Appellants premises and prohibited the appellant from selling the said batteries either singly or in vehicles. The Appellant was further directed to set the batteries aside for collection

and if within 14 days from the date of Seizure Notification no reasonable prove of compliance is provided the batteries shall be disposed forthwith.

Being dissatisfied with the actions of the Respondent and apprehensive of their goods being seized and destroyed the Appellant filed this appeal on 29<sup>th</sup> December 2017 under a Certificate of Urgency seeking conservatory orders to restrain the Respondent from seizing and or destroying the starter batteries. The Respondent filed its Statement of Response on 30<sup>th</sup> January 2018.

On 18<sup>th</sup> January 2018, the tribunal issued conservatory orders *ex parte* which were confirmed *inter parties* on 2<sup>nd</sup> February 2018. The orders restrained the Respondent from seizing and destroying the goods pending the hearing and determination of the appeal and required the Appellant to preserve the subject matter goods pending the hearing and determination of the appeal.

The matter was fixed for hearing by mutual consent on 27<sup>th</sup> March 2018 but parties agreed to dispense the matter by way of written submissions. The Appellant filed a further affidavit on 19<sup>th</sup> April 2018 and further replying affidavit was filed by the Respondent on 9<sup>th</sup> May 2018. The Appellant filed their written submissions on 23<sup>rd</sup> May 2018 while the Respondent written submissions were filed on 7<sup>th</sup> June 2018.

### **Appellant's case**

The Appellant contends that their starter batteries had been duly inspected and complied with the applicable standards and more particularly the starter batteries were deemed to have complied with the Pre Export Verification of Conformity (PVoC) which is a body headed by the Respondent which is specifically designated to monitor standards relating to imports in Kenya.

The Appellant also argued that the Respondent ought to have recognized that the starter batteries had further complied with CAQC Certification and Environmental Management System Certificate of Conformity Certification and based on this it was the Appellant's contention that the starter batteries complied with Kenya Standard for Lead-acid starter batteries Part 1, KS 185-1: 2007.

It was also the respondent's case that the starter batteries tested did not belong to the appellant due to the fact that laboratory tests reports and the samples collected per the Sample Collection Forms differed. According to the appellant their starter batteries sampled were BS20126282 and BS20173008 while batteries tested and reports issued were for BS201723006 and BS201726282. To the Appellant, starter battery BS201726282 was not in the sample collected by the Respondent and as such the alleged results for this starter battery cannot attributed to the Appellant's starter battery. The Appellant concluded by indicating that no tests were carried out on their starter batteries and as such prayed that this Honourable Tribunal stops the Respondent from destroying or prohibiting the Appellant from selling the starter batteries singly and or in vehicles.

### **Respondent's case**

On their part, the Respondent argued that the Appellant starter batteries did not meet the applicable standards as evidenced by laboratory results reference number BS201723006 and BS201723008 dated 24<sup>th</sup> August 2018. The Respondent averred that results referenced as BS201723006 and BS201723008 are the actual results from the sample collected in Appellants outlets because the Sample Collection Form is serialized (KEBS-1) 85869 and the serial number is reflected in the Sample Submission Form (KEBS-2). The sample submission form is also serialized 170432 and the said serial number is captured in the test results with test reports referenced BS201723006 and BS201723008 clearly indicating Sample Submission Form reference number 170432.

The Responded indicated that test report referenced BS201726282 and dated 15<sup>th</sup> September 2017 was a confirmatory test report with samples drawn from the market. It is the Respondents case that the laboratory results for both the samples and confirmatory tests indicated that the starter batteries failed to comply with the requirements of KS 185-1:2007 with respect to effective capacity parameter and marking parameter.

The respondent also indicated that at no time had they cleared or deemed the starter batteries compliant. They argued that the Appellant failed to produce the Certificate of Conformity (CoC) and that PVoC is not a body but an act of verification of conformity to relevant product standards.

As regards CAQC Certification and Environmental Management System, the Respondent averred that these were system certification and not product compliance certification. System certification cannot replace and are nor equivalent to product standards, they are not mandatory under Kenyan law and were issued in other jurisdictions by authorities which are strangers to the Respondent.

The Respondent concluded their case by emphasizing that they have an obligation to ensure that products offered for sale in Kenya comply with relevant standards, there being no existence of conflicting results and that the Appellant had failed to produce Pre- Export Verification of Conformity.

### **Issues for determination**

The issues for determination are as follows;

1. Does the Respondent have a duty to test imported goods for compliance with Kenya Standards and Specifications if the goods have pre-shipment documentation and certification?
2. Did the respondent have pre-shipment certification confirming compliance with Kenyan Standards and requirements and is the

Respondent bound by such pre-shipment certification?

3. Did the goods tested and results thereon belong to the Appellant?

4. Were the appellant goods compliant with the applicable standards in Kenya.

### **Determinations**

#### ***Does the Respondent have a duty to test imported goods for compliance with Kenya Standards and Specifications if the goods have pre-shipment documentation and certification?***

One of the core functions of the Respondent under Section 4 (1) (a) of the Standards Act is to promote standardization in industry and commerce and it is pursuant to this mandate that the Respondent has declared a Kenya Standard for Lead-acid starter batteries, KS 185-1:2007.

According to Section 4 (1) (i) of the Standards Act, the functions of the Respondent include also to provide for the testing at the request of the Minister, and on behalf of the Government, of locally manufactured and imported commodities with a view to determining whether such commodities comply with the provisions of the Standards Act or any other law dealing with standards of quality or description.

Section 14 (1) (g) of the Standards Act provides that the powers of the Respondent inspectors include among others to seize and detain, for the purpose of testing, any goods in respect of which the Respondent has reasonable cause to believe that an offence has been committed. Section 9 (4) of the Standards Act provides that any person who contravenes the provisions of an order under subsection (2) shall be guilty of an offence. Subsection 2 provides that 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. The import of Section 14 (1) (g) read together with Section 9 (2) and (4) is that the Respondent has a legal duty to ensure that products being sold in Kenya are compliant with applicable standards. In our considered view, the respondent has been empowered to seize goods on suspicion that such goods are not compliant with applicable standards regardless of whether such goods had been subjected to pre-import verification.

Paragraph 5 of the Legal Notice 78 on Verification of Conformity to Kenya Standards of Imports Order, 2005 provides that *all goods which are specified by the Kenya Bureau of Standards in accordance with Paragraph 2 shall be subjected to verification of conformity to Kenya Standards or approved specifications in the country of origin by an inspection body authorized by the Respondent, and may be re-inspected at the port of entry by the Respondent if it is deemed necessary.*

The Respondent whether on suspicion of contravention of standards or upon a complaint from the public has power to inspect or in any other way deemed appropriate enforce applicable standards on both imported goods and locally manufactured goods. We have not found any exemption in law to the above requirements on account of imported goods and we therefore find that the Respondent was well within its powers and mandate to sample and tests goods imported and being sold in Kenya by the Appellant.

#### ***Did the respondent have pre-shipment certification confirming compliance with applicable Kenyan Standards and requirements and is the Respondent bound by such pre-shipment certification?***

The Tribunal is called upon to make a decision on whether the appellant's starter batteries had met applicable standards and that relevant documents and evidence exists as proof on the same.

The appellants states "That the Respondent failed to take notice of the fact that the batteries of the appellant (Sinotruck 165AH and Youpeara Sinopec 170AH brands) have compiled with quality management system of CAQC and is in conformity with GB/T/1900-2008/ISO9001:2008 standard and have also complied with the environmental Management Systems Standards GB/T24001-2004/ISO14001:2004 and thus the goods cannot be said to be substandard.

In response to this, the respondent stated in their statement of response, grounds for opposition (i) that "The CAQC certification and environmental management system of conformity is not a product standard but a management system certification furthermore CAQC and Environmental Management System of conformity is not equivalent to KS 185-1:2007 and cannot be used for product testing.

The Appellant further in their submissions dated 25<sup>th</sup> May, 2018 averred that the starter batteries had complied with pre-export verification of conformity.

The above ground of appeal is solely pegged on whether the appellant had documents in proof that their goods had gone through the relevant testing and certified as having met the standards set by the appellant for such in this country.

Under the Standards Act, the Respondent is the only body mandated to monitor, set out and enforce standards of the goods in question. The Respondent is also mandated to carry these functions through their appointed agents. Before proceeding further, this Tribunal needs to identify the documents that are expected to be issued by the Respondent in certification of goods.

According to the Respondent, the only document that is issued to confirm validity of goods is Certificate of Conformity (CoC) which can only be issued by the Respondent or its appointed agent after duly testing the goods as per the parameters set out as the standards for a particular commodity. It is the contention of the respondent that in absence of CoC, any goods in the market in this country are deemed not to have gone through any testing and therefore, subjected to tests by the respondent. The Respondent contends this was the case with the Appellant's goods in question.

The Appellant's case is that the product went through the necessary tests and they produced two certificates namely:

- (i) CAQU which is a Quality Management System Certificate.
- (ii) Environmental Management System Certificate of Conformity.

According to the Appellant the above certificates are proof that the goods had been tested and found to meet requisite standards and therefore, fit for use. However, it's the Respondent's contention that they are strangers to these certificates. The Respondent further asserts in its submissions that the CAQC Certification and Environmental Management System Certification are not product compliance certification and cannot replace and be equivalent to product standards. They further contend that system certification is not mandatory under Kenyan Law while product standards/product certification is mandatory. On perusal of these two documents, the Tribunal noted that they were both issued to China National Heavy Duty Truck Group Co. Ltd and are valid until 27<sup>th</sup> August 2017 and 15<sup>th</sup> December 2016 respectively which is prior to the date of seizure of the goods in question.

There is no documentation to indicate that the CAQU which is a Quality Management System Certificate and Environmental Management System Certificate of Conformity were issued by an agent of the Respondent. The Respondent is very clear that these certificates were issued by persons in other jurisdictions who are strangers to the Respondent. Besides this, the fact that these certificates are not equivalent to Certificate of Conformity makes them not useful at all to the Appellant's case.

The Appellant contended that they had obtained pre- verification of conformity. However, no documents were produced in support thereof. It was also the Respondent's contention that pre-verification of conformity is a document setting out the verification parameters, which goods at the point of importation are subject to. After testing and meeting the standards then Certificate of Conformity is issued. Even having established that the appellant has not shown any evidence of their goods having undergone pre-verification of conformity, such pre-verification does not in any way prevent the respondent from seizing goods in the market and retesting them especially if they receive complaints from members of public.

The burden of proving that the goods had been tested and met the standards falls squarely on the Appellant. It is noteworthy that the Appellant did not produce the necessary document namely Certificate of Conformity or even had any evidence that the products were tested and found to have met the standards by an agent of the Respondent. The only document produced was the CAQC and Environment Management System Certificate of Conformity which have no relevance whatsoever to standards in this country.

Section 21 of the Standards Act provides that where there is a conflict between the provisions of a specification declared to be a Kenya Standard under Section 9(1) of the Standards Act and a specification made or declared under any other written law the Kenya Standard shall prevail.

It follows therefore that in the absence of a Certificate of Conformity establishing the conformity of the Appellant's starter batteries to Kenya Standards, the report by the Respondent is the only admissible evidence on the quality of the Appellant's starter batteries.

***Did the goods tested and results thereon belong to the Appellant?***

On 11<sup>th</sup> July, 2017 the Respondent received a complaint from a customer of the Appellant who had bought two vehicle batteries in Nairobi, Embakasi Area. The Complainant stated that the batteries were not performing as expected. In accordance with their mandate, the inspectors of the Respondent moved in to collect samples of the starter batteries in question for testing.

On 13<sup>th</sup> July, 2017 the Respondent seized sampled lead acid starter batteries from the Appellant vide Sample Collection Form number 85869. During sampling, the representative of the Appellant was present and witnessed the sample collection of the goods and signed against the sample collection forms. The samples were submitted for tests with the sampling forms corresponding with the sample collection forms. The test and confirmatory tests were conducted on the sample lead acid starter batteries against the Kenya Standards KS 185-1: 2007.

The Respondent released the results of the tests and submitted the same to the Appellant in accordance with Section 14B (3) of the Standards Act. The subsection states as follows:

***“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.”***

The collected samples of the starter batteries (BS201723006 & BS201723008) from the Appellant's premises were tested for compliance with the Respondent's standards- Kenya Standard Specification for Lead-acid starter batteries KS 185-1:2007. What the Appellant seems to dispute in its submissions, which unfortunately was not pleaded, is the authenticity of the samples tested *vis a vis* the ones seized for testing.

The documentary evidence presented by the Respondent proved that the tests were indeed carried out in the particular samples collected. The Respondent produced the Sample Collection Form, Sample Submission Forms as well as laboratory test results forms. They were not disputed by the Appellant. Indeed a closer perusal of the laboratory test reports indicates that the actual batteries seized were the ones tested. We noted that though there was another sample BS201723008, we were not provided with the results. This tribunal however, is of the considered view that such non-submission could have been due to the fact that similar samples under BS201723006 had already been taken.

To put the point on identification to rest, the serial numbers on the forms, the Sample Collection Form serialized 85869 was reflected

in the Sample Submission Form. The Sample Submission Form is serialized 170432 and the said serial number is captured in the laboratory test reports. This leaves no doubt in our minds that the Appellant's Lead-acid starter batteries were indeed the ones tested.

It is also instructive to note that the Appellant admits legal ownership of sample BS201723008 at Paragraph 3.2 of its written submissions dated 22<sup>nd</sup> May 2018 and in their application dated 28<sup>th</sup> December 2017 at page 4 we find Laboratory Tests Result for the said sample BS201723008. Interestingly, the Appellant has not disputed legal ownership of sample BS201726282 other than saying that it was not part of the sample collected by the Respondent. The Respondent response to this is that it was a sample collected from the market; it is indeed common ground that samples were collected on diverse dates; this fact has been admitted by the Appellant. The Appellant has also not disputed legal ownership of sample BS201723006.

We note that in compliance with Section 67 as read together with Section 35(1) of the Evidence Act, Cap 80 of the Laws of Kenya the Sample Collection Form was signed by Yan Suogang, a representative of the Appellant. He gave reasons for the collection as "Complaint Resolving". The evidence is as well corroborated and fully affirms that the tests were done.

We have found significant correlation between samples collected, samples submitted for testing and the Laboratory Tests Results and have found nothing evidentiary to prove the Appellant's assertion that no tests were carried out on the lead-acid starter batteries. It is therefore our considered view that the process of collecting and submission of samples for testing and the results obtained thereafter remain valid. We find and so hold that the Appellant has failed to establish its case on this limb.

*Were the appellant goods compliant with the applicable standards in Kenya?*

Having found that in the absence of a Certificate of Conformity or any other acceptable documentation from the Appellant establishing the conformity of the Appellant's starter batteries to Kenyan standards and specifications we are bound by the laboratory results from the Respondent and having concluded that the starter batteries sampled and tested belonged to the Appellant we now turn into the question of whether the said starter batteries met the applicable standard requirement and specifications and in so doing we stand guided by the laboratory test results from the Respondents.

Based on the laboratory test results adduced by the Respondent and which results have not been contested by the Appellant, we find that the starter batteries tested failed to meet **Kenya Standard Specification for Lead-acid starter batteries**, KS 185-01:2007 on various parameters including charge acceptance and effective capacity. Other shortcomings included failure to have a mark on class of battery, missing date of manufacture, lack of normal cranking current and missing details on country of origin and for this reasons the appellants batteries were condemned as substandard.

**The confirmatory results of 15<sup>th</sup> September 2017 carried out by Respondent also indicated that the Appellant's starter batteries were substandard as well and hence the Appellant's Lead-acid starter batteries in question were noted to have failed to comply with the specifications and requirements of Kenya Standard Specification for Lead-acid starter batteries, KS 185-01:2007.**

We are therefore convinced and rightly so by the Respondent that the batteries were indeed substandard and the actions of the Respondent did not breach any known law or right of the Appellant and we so find.

The Respondent has satisfied this Tribunal through its approach and processes including sampling, sample submission and laboratory tests results that the lead-acid starter batteries in question did not meet the applicable standards requirements and specifications and were therefore substandard and ought not to be sold singly or in vehicles.

**Conclusion**

In view of the foregoing, it is our considered view that the Respondent's actions were within its mandate as envisaged in law and we find no fault in the Respondent's decision to condemn the Appellant's starter batteries as substandard and the ensuing Seizure Notification. This appeal and the prayers herein therefore fails and the appeal is consequently dismissed.

Each party to bear its costs for the appeal.

**Dated at Nairobi this 20<sup>th</sup> day of July 2018**

Gladys Muthoni Mburu

(Chairperson) .....

Hillary Sigei

(Member) .....

Moses Sande Makhandia

(Member) .....

Peter Mungai

(Member) .....

Lul Abdiwahid

(Member) .....

Delivered in the presence of:

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2.