



**Keystar Enterprises Limited v Kenya Bureau of Standards (Tribunal Appeal 3 of 2018) [2018] KEST 33 (KLR) (23 November 2018) (Ruling)**

Neutral citation: [2018] KEST 33 (KLR)

**REPUBLIC OF KENYA  
IN THE STANDARDS TRIBUNAL  
TRIBUNAL APPEAL 3 OF 2018  
GM MBURU, CHAIR, H SIGEI, MS MAKHANDIA, P MUNGAI & L ABDIWAHID, MEMBERS  
NOVEMBER 23, 2018**

**BETWEEN**

**KEYSTAR ENTERPRISES LIMITED ..... APPELLANT**

**AND**

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

**RULING**

**Introduction**

1. The Appellant is a limited liability company incorporated and domiciled in Kenya. In the ordinary course of its business the Appellant imports reusable sanitary towels to be supplied to marginalised communities in Kenya and those in poverty stricken and war torn areas in South Sudan.
2. 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.
3. This appeal was filed in this Tribunal on 17<sup>th</sup> September 2018 by the Appellant being dissatisfied with the Respondent's decision of rejecting to clear the Appellant's goods on the basis that Kenya does not have a Standard for reusable sanitary towels. The said decision is contained in the Respondent's letter dated 3<sup>rd</sup> September 2018. The appeal was set for hearing on 25<sup>th</sup> October 2018 with the parties filing written submissions subsequently. Both parties were represented.
4. The relief sought by the Appellant was for the appeal to be allowed, an order to set aside the Respondent's decision refusing to clear the Appellants goods, a declaration that the respondent decision contained in the letter dated 3<sup>rd</sup> September 2018 is contrary to the law and thus void and in the alternative and without prejudice, the Appellant to be allowed to export the goods to its destination of choice and costs for the suit.



## Summary of facts

5. The Appellant submitted its Request for Certification (RFC) of reusable sanitary towels from Egypt on 15<sup>th</sup> April 2018 and a Certificate of Conformity (CoC) was issued on 24<sup>th</sup> May 2018 by the Respondent's Pre-Export Verification of Conformity (PVoC) agent, SGS – Egypt.
6. Based on the details contained in the CoC, the invoice for the subject matter goods (Invoice Number E002/2018) was issued on 2<sup>nd</sup> February 2018, test report for the goods is dated 18<sup>th</sup> April 2018 and 19<sup>th</sup> April 2018, inspection report is dated 1<sup>st</sup> May 2018. Packaging list for the goods is dated 2<sup>nd</sup> May 2018 and the Bill of Lading is dated 8<sup>th</sup> May 2018. The goods arrived in Kenya from Egypt on 29<sup>th</sup> May 2018 at the Inland Container Depot in Nairobi (ICDN).
7. The Respondent through a letter dated 7<sup>th</sup> May 2018 addressed to its PVoC agents directed the agents not to certify reusable sanitary towels and to reject any requests presented for certification due to health and safety concerns.
8. Upon arrival of the goods, the Appellant requested for clearance of the goods and the Respondent directed the Appellant to first obtain an approval and or clearance letter from the Ministry of Health (MOH). MOH responded raising concerns over the hygienic management of reusable sanitary towels and the need to develop a standard for reusable sanitary towels.
9. On 10<sup>th</sup> August 2018, the Appellant wrote to the Respondent requesting the Respondent to clear its goods held at Inland Container Depot in Nairobi. The Respondent replied on 3<sup>rd</sup> September 2018 declining to clear the Appellants goods citing health concerns and lack of an applicable standard for reusable sanitary towels in Kenya. The decision of the Respondent contained in the letter dated 3<sup>rd</sup> September 2018 formed the basis of this appeal.

## Appellant's case

10. The Appellant contends that the Respondent through its Pre-Export Verification of Conformity (PVoC) agent, SGS – Egypt issued a Certificate of Conformity (CoC) to the Appellant affirming that the Appellant's goods had conformed to the Kenya Standards and or specifications as required by law and on the strength of the CoC the Appellant imported the reusable sanitary towels in Kenya.
11. The Appellant argued that the Respondent cannot purport to reject a CoC issued by its agent on the basis that they had directed the Agent not to issue such CoC. In the Appellant's view the Respondent is bound by the decisions of its agent under the doctrine of principal-agency relationship. The Respondents are therefore bound by the acts of its agent, SGS – Egypt and they cannot purport to reject a CoC issued by SGS – Egypt.
12. It is the Appellant's case that the Appellant has been importing reusable sanitary towels since 2014 against manufacturer's specifications, a fact that is not contested by the Respondent. Further, the Appellant contends that the Respondents' PVoC Program Operations Manual provides for use of manufacturer's specifications for conformity in instances where there is no approved national standard.

## Respondent's case

13. On their part, the Respondent argued that SGS - Egypt, the Respondents' appointed Pre- PVoC agent had no authority to issue the CoC in question because they had been expressly instructed by the Respondent not to certify and to reject CoC applications for reusable sanitary towels.



14. According to the Respondent, the basis of certification or verification is Kenya standards or approved specifications and in the current case the CoC shows that the basis of certification of the Appellant's reusable sanitary towels was manufacturer's specifications which is in breach of the law because in the Respondent's view manufacturer's specifications cannot form the basis for certifications since they are not established by consensus and approved by the Respondent or declared as a Kenyan Standard under Section 9(1) of the [Standards Act](#) or an approved specification under Section 10(1)(b) of the [Standards Act](#).
15. The Respondent further argues that the Appellant had knowledge of their decision and contents of their letter dated 7<sup>th</sup> May 2018 prohibiting importation of reusable sanitary towels and as such should not have proceeded to import the goods in question. They further aver that the Appellant's goods were not in the high seas at the time when the said letter or instructions were sent to PVoC agents.
16. The Respondent also argues that the Appellant has not produced any evidence and or document showing the date of arrival of the container in Kenya other than their letter of 10<sup>th</sup> August 2018 in which they allege that container no. CAIU917831-4 (40 fts) S.T.C usable sanitary towels under Bill of Lading BL AL893085 dated 14<sup>th</sup> May 2018 arrived at ICDN Embakasi on 29<sup>th</sup> May 2018.

### **Issues for determination**

17. The following issues were identified for determination;
  1. What are the applicable standards or approved specifications for reusable sanitary towels in Kenya?
  2. Did the Respondent comply with such standards or approved specifications at the time of importation?

### **Determinations**

18. What are the applicable Standards or approved specifications for reusable sanitary towels in Kenya?
19. The Respondent argued that the Appellant cannot be allowed to import reusable sanitary towels in Kenya because there does not exist a Kenyan standard for reusable sanitary towels and in rejecting this argument the Appellant averred that they have been importing reusable sanitary towels against manufacturer's specifications. This necessitated the question of whether there is an applicable standard or approved specifications in Kenya for importation of reusable sanitary towels.
- 20.. Section 9 (1) of the [Standards Act](#) provides that the Council may by notice in the Gazette declare any specification or code of practice framed or prepared by the Bureau to be a Kenya Standard.
21. Rule 3 of The Verification of Conformity to Kenya Standards of Imports Order, 2005 which was in force in the period in question states that a person who imports goods must ensure that the goods meet Kenyan Standards or approved specifications.



22. Kenyan Standards, approved specifications and specifications are defined in Section 2 of the [Standards Act](#) as follows:-

“Kenya Standard” means a specification or code of practice declared under Ssection 9(1);

“approved specification” means a specification in respect of which a standardization mark has been specified under section 10(1)(b);

“specification” means a description of any commodity by reference to its nature, quality, strength, purity, composition, quantity, dimensions, weight, grade, durability, origin, age or other characteristics, or to any substance or material of or with which, or the manner in which, any commodity may be manufactured, produced, processed, treated, tested or sampled.

21. Section 10 (1) of the [Standards Act](#) provides as follows:

The Council shall by notice in the Gazette, specify a separate mark, to be known as a standardization mark, for each of the following purposes:

- (a) application to any commodity which is the subject of an order under Ssection 9(2); and
- (b) application to a commodity which is not the subject of an order under Ssection 9(2) but concerning the manufacture or sale of which the Council has approved as specification.

22. Pursuant to Legal Notice No. 78 of 15th July, 2005 by the then Minister for Trade and Industry PVoC Program was started on 29th September 2005 by the Respondent. PVoC Program is a conformity assessment program applied to products at the respective exporting countries, to ensure their compliance with the applicable Kenyan Technical Regulations and Mandatory Standards or approved specifications.

23. The PVoC Program is designed to provide maximum flexibility to exporters and importers by providing four (4) possible routes for obtaining the CoC/COI. The route applied depends on the frequency of exporters’ shipments to Kenya and the level of compliance they are able to demonstrate initially when applying for certification. The routes are briefly summarized below:

Route A (Consignment inspection and Testing): Under this Route, products to be shipped have to be both tested and physically inspected to demonstrate conformity to relevant standards. This route is open to all products being exported by either traders or manufacturers.

Route B (Product Registration) : This route offers a fast track certification process for goods with reasonable and consistent levels of quality through registration of such products by the PVoC Agent. Product registration is recommended to Exporters having frequent shipments of homogenous products. The registration is valid for a period of one year. Shipments of registered products are exempted from mandatory testing and certification may be based on physical inspection only. However, regular testing of registered product is still required to ensure product conformity throughout the registration period.

Route C (Product Licensing): This route is open only to manufacturers who can demonstrate existence of a quality management system in their production or manufacturing process. It involves auditing of such production processes and licensing of products manufactured



thereof by authorized PVoC Agent(s) in line with ISO Guide 28: 2004. On successful conclusion of this process, the manufacturer will be presented with a License for the relevant products valid for a period of one (1) year. Licensed products shall be subject to random physical inspection by authorized PVoC Agent(s) prior issuance of Certificate of Conformity and subsequent shipping of the same. However, the PVoC Agent(s) shall carry out limited testing during the license valid period.

Route D (Consolidated Cargo Imports): This route is open only to registered importers of consolidated cargo.

24. By practice, The PVoC Agent(s) will review the Request for Certification (RFC) received from the exporter before determining the most appropriate certification route and the applicable standard to be used in the certification process.
25. PVoC Programme anticipates a situation where there could be no Kenyan standard but there exists approved specifications such as manufacturer's standards for example Route C (Product Licensing) is open to manufacturers who can demonstrate existence of a quality management system in their production or manufacturing process. It involves auditing of such production processes and licensing of products manufactured thereof by authorized PVoC Agent(s) in line with ISO Guide 28: 2004.
26. The Respondent's letter of 7<sup>th</sup> May 2018 acknowledges that importation of reusable sanitary towels has been previously approved based on manufacturers specifications. It was also the Appellant testimony that they have been importing reusable sanitary towels based on manufacturer's specifications, a fact that the Respondent has not contested.
27. While it is not in dispute that there is no pronounced Kenyan standard for reusable sanitary towels in Kenya it is our considered view that through the PVoC Programme there does exist approved specifications (manufacturer's specifications) which forms the basis of previous importation of reusable sanitary towels. However, the approved specifications were revoked effective 7<sup>th</sup> May 2018.

**1. Did the Respondent comply with such standards or approved specifications at the time of importation?**

28. We note that the Appellant submitted its Request For Certification (RFC) of reusable sanitary towels from Egypt on 15<sup>th</sup> April, 2018 and a Certificate of Conformity (CoC) was issued on 24<sup>th</sup> May 2018 by the Respondent's Pre-Export Verification of Conformity (PVoC) agent, SGS – Egypt.
29. Based on the details contained in the CoC it emerges that the invoice for the goods (Invoice Number E002/2018) was issued on 2<sup>nd</sup> February 2018, test report for the goods is dated 18<sup>th</sup> April 2018 and 19<sup>th</sup> April 2018, inspection report is dated 1<sup>st</sup> May 2018. Packaging list for the goods is dated 2<sup>nd</sup> May 2018 and the Bill of Lading is dated 8<sup>th</sup> May 2018. The goods arrived in Kenya from Egypt on 29<sup>th</sup> May, 2018 at the Inland Container Depot in Nairobi.
30. Based on the above chronology of events we are convinced that the Appellant started the importation process way before certification through manufacturer's specifications was revoked by the Appellant vide its letter dated 7<sup>th</sup> May 2018. Consequently, the Respondent can only reject clearing of the goods based on retesting at point of entry but not on account of having revoked the approved specification that were applicable when the Appellant commenced the importation process and obtained all the requisite documentation for importation including a CoC from SGS – Egypt which is an agent of the Respondent.



31. The Respondent argued that its agent SGS – Egypt received through its liaison office in Nairobi, a letter and or instructions from the Respondent not to carry out any certification of reusable sanitary towels based on manufacturer’s specifications without the Respondent’s prior approval. SGS-Egypt however proceeded to issue the Appellant with a CoC contrary to the Respondents’ express instructions and without authorization and in the Respondent’s mind SGS - Egypt was to blame for the losses suffered by the Appellant and not the Respondent.
32. Having determined that a CoC was issued, we must now turn to the issue of whether the CoC issued by SGS – Egypt is invalid by virtue of the Respondent having instructed the agent not to certify and to reject any request for certification of reusable sanitary towels. It is common ground that SGS-Egypt is a PVoC agent of the Respondent. However, the Respondent did not produce any evidence before this Tribunal to show that its agent was served with the letter informing them not to certify and to reject any request for certification of reusable sanitary towels. The Respondent only produced a letter addressed to the liaison office of the PVoC agent and this is not sufficient proof that the PVoC agent or even the liaison office were served with the instruction prohibiting certification of reusable sanitary towels.
33. We also note that the letter dated 7<sup>th</sup> May 2018 was issued after the certification process had started because the RFC was submitted on 15<sup>th</sup> April 2018, test report done on 18<sup>th</sup> April 2018 & 19<sup>th</sup> April 2018, inspection report done on 1<sup>st</sup> May 2018 and CoC issued on 24<sup>th</sup> May 2018. It is clear that most of the certification procedures had been done prior to the Respondent letter of 7<sup>th</sup> May 2018 and in the absence of evidence to show that SGS – Egypt or the Liaison office was served with the letter dated 7<sup>th</sup> May 2018 we have no choice but to conclude that they were not aware of such instructions and that is why they proceeded to issue the CoC.
34. The Appellant was also not copied or served with the said letter dated 7<sup>th</sup> May 2018 and as such the Respondent cannot be heard saying that the Appellant was aware of its decision to prohibit certification and importation of reusable sanitary towels. In any event the certification process had started way before the letter of 7<sup>th</sup> May 2018 was issued.
35. For the above reasons we find that the Appellant had a valid CoC issued by the Respondent at the material time which formed the basis of importing reusable sanitary towels into Kenya. It would be different if the Appellant had sought to obtain a CoC post 3<sup>rd</sup> September 2018 when the Appellant had been expressly made aware that reusable sanitary towels cannot be imported in Kenya against manufacturer’s specifications as had been the practice.
36. In view of the foregoing, it is our considered view that the Respondent’s decision vide its letter dated 3<sup>rd</sup> September 2018 was unfair and unjustified and therefore make the following orders.
  1. The appeal herein is allowed based on the foregoing reasons;
  2. The decision by the Respondent refusing to clear the Appellants goods contained in their letter dated 3<sup>rd</sup> September 2018 is hereby set aside and declared null and void;
  3. The Respondent is directed to clear the subject matter goods in accordance with applicable procedures; and
  4. Each party to bear its costs for the appeal.

**DATED AT NAIROBI THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2018**

**GLADYS MUTHONI MBURU - (CHAIRPERSON)**

**HILLARY SIGEI - (MEMBER)**



**MOSES SANDE MAKHANDIA - (MEMBER)**

**PETER MUNGAI - (MEMBER)**

**LUL ABDIWAHID - (MEMBER)**

Delivered in the presence of:

