Sollatek Kenya Limited v Kenya Bureau of Standards (Tribunal Appeal E010 of 2023) [2024] KEST 1635 (KLR) (18 October 2024) (Judgment)

Neutral citation: [2024] KEST 1635 (KLR)

REPUBLIC OF KENYA

IN THE STANDARDS TRIBUNAL

TRIBUNAL APPEAL E010 OF 2023

GM MBURU, CHAIR, MS MAKHANDIA, P MUNGAI, A ONG'INJO & E LANGAT, MEMBERS

OCTOBER 18, 2024

BETWEEN

SOLLATEK KENYA LIMITED ..... APPELLANT

AND

KENYA BUREAU OF STANDARDS ..... RESPONDENT

JUDGMENT

A. Introduction

1. The Appellant is limited liability Company licensed to carry on Business within the Republic of Kenya.

2. The Respondent, Kenya Bureau of Standards (hereinafter "KEBS") is a body corporate established under Section 3 of the *Standards Act*, Cap 496 of the Laws of Kenya (*Standards Act*) whose functions among others include promoting standardization in industry.

3. The Appellant filed written submissions dated 19th June 2024 in support of this appeal and relied on the Statement of Appeal dated 1st November 2023, Supplemental Statement of Appeal dated 7th March 2024 and a Further Statement of Appeal dated 25th April 2024 together with the relevant accompaniments.

4. In opposition to the appeal, the Respondent filed its written submissions dated 15th July 2014 [we note that the Respondent may have erroneously indicated the year as 2014 as opposed to 2024. Nonetheless we note that they were filed in 2024]. The Respondents filed their response to the appeal vide Statement of Response dated 30th November 2023, Further Statement of Response dated 2nd April 2024 together with the relevant accompaniments.

B. Summary Of The Appeal

5. The matter arose following a Notification of Seizure dated 17th October 2023 ("impugned notice" or "Notification of Seizure") issued by the Respondent to the Appellant for seizure of certain goods comprising of Universal Multi-Guards MGX W6U and MGX W4U (hereinafter the "Seized Goods" or 'subject goods').

6. Being aggrieved by the decision of the Respondent in the impugned notice, the Appellant lodged an appeal to this honourable Tribunal under Section 11 of the *Standards Act* challenging the seizure notice.

7. It is the Appellant's case that:

   a. The impugned notice is unsupported in law and fact for reasons that the respondent admitted to applying an inapplicable standard to fault the Seized Goods and instead disregarded the certification approval (KEBS Local COC/COR approval dated 12th May 2023).

   b. The Seized Goods complied with the required Kenyan Standards EAS 495-2:2008 13, A Plugs, Socket Outlets, Adaptors and Connection Units – specifications for Switched and Unswitched Socket Outlets.

   c. The Seized Goods were had been inspected for conformity with Kenyan Standards by the Respondents at port of entry and issued with a KEBS COC/COR approval document dated 12th May 2023.

   d. The Seized Goods were subjected to and successfully passed the manufacturer's tests for electrical safety assessment as well as conformity under British Standard BS5733:2010.

   e. The Respondent's decision in the impugned notice violates Sections 4, 5(1) and 7(2) of the Fair Administrative Actions Act as well as Article 40 & 47 of *the Constitution* for failing to take into account the approvals issued previously by the Respondents and lack of natural justice hence ought to be reviewed and set aside by the Tribunal.

   f. The majority of electronic consumer goods are designed to allow for both spectra i.e. 120V & 60Hz on the one hand and 240V & 50Hz on the other hence supposition of malfunctioning or electrocution is far-fetched.

   g. The Appellant therefore seeks an order to vary or setting aside the impugned notice of seizure, for any other order that the tribunal may deem just and equitable and for costs to issue.

8. The Respondent on the other hand contends that:

   a. The approved standard for sockets in Kenya is KS EAS 495-2:2008 and there currently does not exist a Kenyan Standard for universal socket outlets as the conversion of the different types of electrical plugs from different countries is done via adaptors and not through socket.

   b. Different countries adhere to different standards for electric plugs hence the need for use of portable adopters for conversion instead of universal sockets.

   c. The Respondent seized the Seized Goods in line with its statutory powers under Section 14(1) (a) and (g). The seizure and inspection of the goods the subject of this appeal was carried out by the Respondent's market surveillance team in accordance with the governing instrument being the KEBS CPR 180 – Market Surveillance Procedure MKS/OP Manual and NOT the KEBS CPR 173 Inspection Process INS/OP Manual.

d. The samples of the Seized Goods were tested against the applicable standard being KS EAS 495-2:2008 and by the test results dated 1st November 2023 were found to be non compliant in the parameter of construction of aperture dimensions.

e. Although the Appellant sought audience to resolve the misunderstanding amicably on the ground that the standard KS EAS 495-2:2008 was not applicable to the seize goods, it was the Respondent's contention that the same was not capable of being amicably resolved given that the subject goods had failed the test and cannot be reworked.

f. The Respondent thus urged the Tribunal to dismiss the appeal with costs.

C. Issues For Determination

9. Each party framed their issues and submitted on the same in their written submissions.

10. Having reviewed the issues as framed by the parties and having considered the pleadings of the parties as well as their detailed respective submissions, we have taken the liberty and have identified two (2) substantive issues for determination as follows:

a. Issue No. 1 – "Whether the Respondent's administrative action as regards the Appellant's correspondence dated 31st October 2023 violated the Fair Administrative Actions Act (FAAA) and Article 47(1) of *the Constitution*"

b. Issue No. 2 – "Whether the impugned Notification of Seizure was lawful." In this regard, three sub-issues arise as follows:

a. Whether the Respondent had power to inspect or seize the Seized Goods;

b. Whether prior certification precludes the Appellant from inspection or seizure of the subject goods; and

c. Whether absence of a Kenyan Standard on the Seized Goods absolves the Appellant.

11. We now turn to consider each of the issues above sequentially.

Issue No. 1: Whether the Respondent's administrative action as regards the Appellant's correspondence dated 31st October 2023 violated the Fair Administrative Actions Act (FAAA) and Article 47(1) of *the Constitution*.

12. This first issue stems from the letter dated 31st October 2023 by the Appellant to the Respondent.

13. The Appellant claims that it wrote to the Respondent with a view of amicably resolving an apparent misunderstanding and the Respondent's inaction was a violation of its right to fair administrative action as set out in the *Fair Administrative Action Act* (FAAA) and Article 47 of *the Constitution*. To that end, the Respondent argues that failure, omission or refusal to take action amounts to an administrative action as defined under section 2 of the FAAA.

14. The Appellant thus notes that an apt and formal response to their said letter would have obviated this Appeal and saved judicial time.

15. The Respondent on the other hand submitted that in exercise of its statutory power under Section 14 of the *Standards Act*, it did not have to hear representations while tests were ongoing. The Respondent further submitted that the tests are scientific and that once the tests are out the same cannot be

negotiated, but can only be challenged through a contrary expert opinion which had not been provided by the Appellant.

16. From the onset, we observe the following in respect to the subject letter of 31st October 2023:

    a. It was written 1 day before this appeal was filed.

    b. the subject letter was written jointly by 5 suppliers of universal sockets and universal socket outlets;

    c. the letter sought audience for a meeting from the managing director of the Respondent at 'his earliest convenience'.

    d. The letter did not provide any timeline within which the Respondent was to comply but rather left it to the discretion of the Respondent and to that end asserted that they would be more than willing to accommodate the Respondent's Managing Director's schedule.

17. It is our view and we so find that whereas the FAAA and *the Constitution* grants the rights to fair administrative action, the Appellant's action to request for a meeting at the convenience of the managing director and then turn around the following day to file this appeal claiming a violation of their rights is not only disingenuous but unreasonable to say the least on their part. Even if the Respondent had intention to fulfil the request, no chance was availed to it. Adequate time ought to have been provided within which to comply before making such a claim. In any event the letter did not provide any timeline for compliance. This therefore, seems to us to be a case in which the Appellant was ticking a box by writing a letter and immediately thereafter claim violation of its right.

18. While an administrative action is expected to be taken expeditiously, efficiently, in a reasonable manner, lawfully and fairly as provided for under Section 4(1) of the FAAA, the Appellant filed this appeal without granting the Respondent the opportunity to comply.

19. Given that neither the *Standards Act* nor the FAAA or even *the Constitution* has provided specific timeframe within which an administrative action is to be taken, we respectfully hold that to demand compliance within 1 day by the Respondent is unreasonable and as such find that the Respondent did not violate Section 4, 5(1) & 7(2) of the Fair Administrative Actions Act as read with Article 40 & 47 of *the Constitution*.

Issue No. 2: Whether the impugned Notification of Seizure was lawful

20. In addressing this second substantive issue of the lawfulness of the impugned notification, we consider the sub-issues thereon as to whether the Respondent had power to inspect the seized goods, the effect of prior certification and whether the same precludes the Respondent from inspecting or seizing the Seized Goods and finally the effect of the absence of a Kenyan Standards on the Seized Goods.

Whether the Respondent had power to inspect or seize the Seized Goods

21. It is common ground among both parties that the subject goods were seized in Naivas Supermarket, Simba Mall in Kisumu. The parties however hold different views as to whether the seizure was lawful or justified. While the Appellant submits that the inspection and seizure was unlawful and unjustified, the Respondent contends that it had the power under the *Standards Act* to undertake the inspection and seizure.

22. The Appellant at the outset makes out an argument to the effect that the Respondent does not have power contrary to the Respondent's assertion (as pleaded) to re-inspect or even seize the subject goods in exercise of its discretionary power under paragraph 7(2) of the Standards (Verification of

Conformity to Standards and Other Applicable Regulations) *Legal Notice 78/2020* (hereinafter *LN 78/2020*) except only at the port of entry and only when the Respondent finds it necessary. In other words, this is a qualified mandate and there was no justification for exercise of the same given that the goods were seized at Naivas Supermarket, Kisumu Simba Mall and not a port of entry.

23. It appears that the Respondent had pleaded this matter at paragraph 3(g) of its Statement of Response but seemed to have abandoned the same thereafter and instead pivoted towards its powers under Section 14 of the *Standards Act*. The Respondent further stated that the inspection was as a result of reports of non-complying electronics in the market.

24. In our considered view, we agree with the Appellant and we so find that paragraph 7(2) of *Legal Notice 78/2020* does indeed refer to exercise of the power of re-inspection but only at the port of entry and thus the Respondent cannot invoke the said provision under any circumstances to justify re-inspection or seizure of the subject goods at the Naivas Supermarket in Kisumu which is not a port of entry.

25. The Respondent has advanced a further argument and gone to great lengths to lay out the statutory powers of its inspectors under Section 14 of the *Standards Act* for purposes of inspection and seizure. In particular, the Respondent pointed us to Section 14(1)(a) and (g)) and submitted that it acted within this legal mandate to seize the Appellant's goods at Naivas Supermarket on the basis of physical inspection.

26. To buttress its point, the Respondent relied on the Court of Appeal decision in Kenya Bureau of Standards Vs Powerex Lubricants Limited [2018]eKLR to the effect that the Respondent has power under section 14 of the *Standards Act* to conduct impromptu inspections at any time so long as it has reasonable suspicion that an offence has been committed. The Respondent thus has powers to enter upon any premises at any time and at any place for purposes of inspection or seizure.

27. The Respondent also set out the importance of their mandate as being consumer protection and cited the decision of this Honourable Tribunal in Harley's Limited Vs Kenya Bureau of Standards [2019] eKLR.

28. The Appellant on the other hand submitted that it was a market leader and a globally renowned manufacturer in power surges and power strips in Kenya and the East African region. In order to dispose of this point, we are of the view that the status of the Appellant as a leading manufacturer cannot absolve it from compliance with the law and least of all exempt it from the provisions of the *Standards Act*.

29. As regards the statutory powers of seizure and inspection under the Act, we set out in extensio hereinbelow for greater clarity, Section 14(1)(a) and (g) as follows:

> 14. Powers of inspectors
>
> (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;
>
> (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

30. From our plain reading of the above section, it is clear to us that Section 14 of the *Standards Act* does expressly donate powers to the Respondent's inspectors to enter into any premises, inspect and seize for purposes of testing and as such we find that the Respondent had the power to enter into such premises where the subject goods were, inspect and thereupon seize the Appellant's subject goods.

31. In sum, we have considered the respective submissions by the parties on the question of whether the Respondent had the powers to inspect and seize the Seized Goods and come to the conclusion that the Respondent had indeed power to inspect and seize the subject goods in exercise of its statutory power under Section 14 of the *Standards Act*

Whether prior certification precludes the Respondent from inspection or seizure of the subject goods

32. The Appellant submits that the Seized Goods had successfully passed prior certifications for electrical safety assessment and British Standards as per the Manufacturer's Test Report dated 9th April 2023 (we note that only a Manufacturer's Test Report for one type of the goods being MGX-W4U and not MGX-W6U was provided). The Appellant similarly asserts that the Appellant inspected and certified the subject goods which were subsequently approved vide KEBS Local COC/COR Approval Document dated 12th May 2023. The Appellant thus argues that these prior certifications confirm that the Seized Goods were compliant with the product's performance and safety.

33. The Respondent on the other hand submits by citing a Court of Appeal decided case viz; Kenya Bureau of Standards Vs Powerex Lubricants Limited [2018]eKLR to the effect that "...its license ... did not give rise to an expectation that there would be no impromptu tests on its products during the life of the licenses." The Respondent equally cited the case of Royal Group Industries Kenya Limited Vs Kenya Bureau of Standards [2019] eKLR where a similar holding was reached by the judges as follows:

> As I understand it, the argument here is that since the Ex Parte Applicant has the relevant licences, they provide prima facie evidence of the quality and standards of the goods it manufactures. As the Respondent correctly points out, the fact that a manufacturer periodically sends samples of its products to the Respondent for testing does not exempt the manufacturer from market surveillance under section 14 of the *Standards Act* and neither does it establish any kind of presumption that its products meet the standards specifications.

34. We will first deal with the said Manufacturer's Test report which we have perused through the same and observe that it clearly states that it shall "not be used for regulatory purposes e.g. declaring conformance with directives and regulations." As such, it is our finding that the Manufacturer's Test report is not a statutory or prescribed form under the *Standards Act* and hence has no force of law. It is in essence a manufacturer's own local/private arrangement for its own quality control and does not therefore absolve/exempt the Appellant from compliance with Kenyan Standards or at least further tests under the *Standards Act*.

35. As regards the prior certification and issuance of a KEBS COC/COR approval, we hold and find that the same does not exempt the Appellants from any tests being done by the Respondent in exercise of their powers under Section 14 of the *Standards Act*. We are therefore persuaded and are bound by the holdings in both Kenya Bureau of Standards Vs Powerex Lubricants Limited and Royal Group Industries Kenya Limited Vs Kenya Bureau of Standards cited above that prior certification does not give rise to an expectation or presumption that the seized goods are not subject to inspection or seizure by the Respondent under Section 14 of the *Standards Act*.

36. The totality of the above is that in respect to this sub-issue, we find that prior certification in form of a Manufacturer's Test Report and the KEBS COC/COR Approval document do not exempt or absolve the Seized Goods of the Appellant from inspection or seizure by the Respondent.

Whether absence of a Kenyan Standard on the Seized Goods absolves the Appellant

37. In addressing this sub-issue, the fundamental question is whether there is in fact a Kenyan Standard that covers the Seized Goods.

38. The Respondent submits that the Kenyan Standards only provide for a standard for socket outlets/ portable socket outlets (KS EAS 495-2:2008) and that there is currently no specific Kenyan standard on universal sockets similar to those of the Appellant. As such, the Respondent thus argues that all electrical products must comply with the existing Kenyan standards for public safety. The Respondent further submits that local Kenyan standards take precedence and thus compliance with international or foreign standards does not exempt one from local standards.

39. The Respondent had undertaken a test on the Seized Goods against the relevant Kenyan Standard (KS EAS 495-2:2008) and the same failed in the parameter of construction of the aperture dimensions as per the Respondent's Laboratory Test Report dated 31st October 2023.

40. The Appellant on its part submitted that in the absence of a Kenyan Standard, then international British standards apply. The Appellant also asserts that in what amounts to approbating and reprobating at the same time, the Respondent stated that the subject goods were not compliant with the Kenyan Standard (KS EAS 495-2:2008) on the one hand and at the same time state that there is no standard on universal sockets being the subject goods. The Appellant thus poses the question "is it legally possible or juridically probable to fault a universal socket for supposed failure of a standard that does not provide for it?"

41. We take note that it is not in dispute that there is no Kenyan Standard on universal sockets. That being the case, it is thus incumbent on us to determine the implications of the Seized Goods as far as compliance to the *Standards Act* is concerned.

42. We have considered the submissions and pleadings of both parties on this matter and find that for public safety all products imported into Kenya must adhere to certain Kenyan standards from time to time declared under Section 9 of the *Standards Act*. This is also in line with paragraph 5 of the *Legal Notice No. 78 of 2020* which requires all importers to ensure all imports comply with Kenyan Standards. This means therefore that foreign or international standards cannot substitute Kenyan standards.

43. It was therefore an obligation on the part of the Appellant to ensure that before importing the universal sockets into the Kenyan territory it should have first determined if there was a Kenyan standard applicable to the imports. In the absence of a Kenyan Standard for universal sockets such as the seized goods, then it was open for the Respondent to seize the subject goods.

44. In the end, as regards this third sub-issue, it is our view that the absence of a Kenyan standard in respect to the seized goods being universal sockets does not absolve the Appellant from compliance with the *Standards Act*. The net effect is that we find that the subject goods are non-compliant with the relevant Kenyan Standard (KS EAS 495-2:2008).

45. Accordingly, in light of our findings in respect to the three sub-issues in the preceding paragraphs above, to the effect that the Respondent had power to enter, inspect and seize the subject goods, that the prior certification does not absolve the seized goods from inspection or seizure by the Respondent and finally that the absence of a Kenyan Standard does not absolve the appellant from compliance means that the impugned Notification of Seizure was lawful. This therefore answers the second issue.

D. Conclusion

46. In Conclusion, having regard to our findings in respect to Issue No. 1 and 2 above, we find that the instant appeal is not merited and thus dismiss the same with no orders as to costs.

47. Each party to bear its costs.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER, 2024

GLADYS MUTHONI MBURU

(CHAIRPERSON) .....

MOSES SANDE MAKHANDIA

(MEMBER) .....

PETER MUNGAI

(MEMBER) .....

ADRIAN ONGINJO .....

(MEMBER)

EVANS LANGAT .....

(MEMBER)

Delivered in the presence of: