

REPORTABLE ZLR(12)

Judgment No. 25/11
Civil Appeal No. SC 124/11

KDB HOLDINGS (PVT) LTD v MEDICINES CONTROL
AUTHORITY OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
GARWE JA, CHEDA AJA & OMERJEE AJA
HARARE, OCTOBER 4, 2005 & NOVEMBER 15, 2011

Advocate D Ochieng, for the appellant

S Njerere, for the respondent

OMERJEE AJA: This is an appeal against the judgment of the Administrative Court of Zimbabwe which upheld the decision by the respondent to order the destruction of gloves that it had found to be defective.

The background facts which are largely common cause in this matter are as follows: On 12 July 2010, the appellant applied to the respondent in terms of the Medicines and Allied Substances Control (Gloves) Regulations S.I. 1 of 2006. The appellant sought regulatory approval of Muller and Vale Latex examination gloves Batch Number 003050001000 which the appellant intended to distribute in Zimbabwe for medical purposes. The gloves were subjected to tests and failed. The respondent directed the appellant to destroy the entire batch save for 1 980 boxes that had already been authorized by the respondent to be supplied to Harare Hospital. The appellant wrote

to the respondent seeking permission to return the gloves to the manufacturer and obtain a replacement batch. The respondent declined to grant permission but re-affirmed its decision to direct that the gloves be destroyed. The appellant appealed against the directive to the Administrative Court. The Administrative Court dismissed the appeal wherefore the appellant has appealed to this Court.

The only issue which arises for determination during this appeal is whether or not the finding by the court *a quo* that the respondent had the power to order destruction of the gloves was a correct finding.

The court *a quo* having found that once the respondent had formed the opinion that it was not in the public interest that the gloves be availed to the public, it (the respondent) was entitled to prohibit the sale, supply or delivery of the gloves to any person for any reason whatsoever. The court *a quo* held that the respondent was accordingly empowered to order destruction of the gloves on the basis that such destruction was ‘reasonably incidental’ to the respondent’s power to ensure ‘that the gloves are not available to the public for any reason’.

The relevant section of the Medicines and Allied Substances Control (Gloves) Regulations S.I. 1 of 2006, (hereinafter referred to as “the regulations”) is s 12.

It provides as follows:

“Where the authority is of the opinion that the withdrawal of any batch of gloves is necessary for the protection of the public, the Authority may require any person to withdraw such batch of gloves in accordance with the procedure as determined by the Authority.”

A reading of this provision reveals that it was never the intention of the legislature to confer upon the respondent the power to order destruction. The courts generally try to give effect to legislative intention. The regulations simply empower the respondent to prescribe a procedure for the withdrawal of the gloves from the market for the protection of the public. The court *a quo* misinterpreted the provision by holding that the power to destroy faulty gloves could be inferred from the regulations.

The power to order destruction ought not to be lightly inferred from the regulations. This principle was affirmed by Beadle CJ in *Van Heerden v Queen's Hotel (Pty) Ltd* 1973(2)SA 14 (RAD, at p.26 where he said:

“Courts are extremely loath to read into an Act words which are not there. They will only do so, when not to do so, will lead to an absurdity so glaring, that it could never have been contemplated by the legislature.”

Had the legislature intended such a drastic measure it would have said so expressly in either the Act or the regulations. It is clear from similar provisions of other enactments that, where the legislature intends to confer the power to destroy articles, it has expressly said so. For example s 12(1) of the Foods and Foods Standard Act [*Cap. 15:04*] authorizes unless good cause is shown, the destruction of food found to be prohibited for sale or manufacture for sale. Section 27(4) of the Public Health Act [*Cap. 15:09*] authorizes a local authority to destroy any article that cannot be disinfected for the purpose of preventing the spreading or eradication of any infectious disease.

It is apparent that where the legislature has deemed that the goods or articles, as the case maybe, should be destroyed, the legislature has expressly provided for such power. Furthermore, the legislature has also laid down a form of judicial control where the party whose products are to be destroyed, is approached by the authorities, to show cause why the goods may not be destroyed. This approach is in keeping with principles of fairness and natural justice.

It was held in *re Munhumeso & Ors* 1994 ZLR 49(SC):

“that derogations from rights and freedoms which have been conferred should be given a strict and narrow, rather than a wide, construction. Rights and freedoms are not to be diluted or diminished unless necessity or intractability of language dictates otherwise.”

For the court *a quo* to hold that destruction is ‘reasonably incidental’ to the respondent’s power to ensure ‘that the gloves are not available to the public for any reason’ was a misdirection. This Court is of the view that the power to order destruction cannot reasonably be inferred *in casu*.

A proper construction of the purpose and scope of the powers conferred upon the respondent shows that the regulations do not support an inference in favour of a power authorizing destruction of the gloves. It sets out a procedure for the withdrawal of the gloves from the market of medical consumers. It is clear from the language used that the purpose of this provision is to provide measures to regulate and preserve the existence of the gloves and not their destruction.

In the circumstances it follows that the order of the court *a quo* cannot stand. Accordingly, it is ordered as follows:

1. The appeal is allowed with costs.
2. The order of the court *a quo* is set aside and the following substituted:

- “(i) The appeal be and is hereby allowed with costs.
- (ii) The respondent’s directive to the appellant dated 6 September 2010 that it destroys Muller Vale Latex Examination Gloves Batch Number 003050001000 (the Gloves) be and is hereby declared to be unlawful and is hereby set aside.”

GARWE JA: I agree

CHEDA AJA: I agree

Coghlan, Welsh & Guest, appellant’s legal practitioners

Honey & Blackenberg, respondent’s legal practitioners