

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

MISCELLANEOUS CAUSE NO.71 OF 2018

NITRO CHEMICALS (U) LTD----- APPLICANT

VERSUS

THE ATTORNEY GENERAL----- RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application for Judicial Review under Article 42 of the Constitution, Section 36 of the Judicature Act as amended, Rules 3, 4, 6, 7 and 8 of the Judicature (Judicial Review) Rules, 2009, Section 98 Civil Procedure Act for the following Judicial review orders;

- 1.) An Order of Certiorari to issue against the respondent quashing the decision of the Minister of Internal Affairs made on the 23rd day of November, 2017 stopping further renewals of importation licenses of commercial explosives into the country.
- 2.) A Declaration that the Minister of Internal Affairs acted ultra vires and illegally when he made the decision of 23rd November 2017 without giving the applicant a hearing.

- 3.) An Order of Mandamus doth issue compelling and directing the respondent to rescind the decision made on the 23rd of November 2017 that in effect stopped the applicant from being granted a license to make further importation commercial explosives in Uganda.
- 4.) An Order of Prohibition doth issue prohibiting the respondent, its agents or servants from implementing the Minister's decision.
- 5.) An Order of Injunction doth issue restraining the respondents, its agents or servants from making any further orders/directives against the applicant for nonrenewal of importation licenses of commercial explosives.
- 6.) An Order awarding general, aggravated and exemplary damages for the anguish, inconvenience, injury suffered by the applicant's business and the good will due to the Respondent's illegal actions against the applicant.
- 7.) Provision be made for costs of this application.

The grounds in support of this application were stated briefly in the Notice of Motion and in the affidavits in support of MIHIR SANGHRAJKA Ibrahim but generally and briefly state that;

- 1) The applicant was licensed to deal in commercial explosives for use in mining, quarrying and construction sectors of Economy since 15th November 2004 in Uganda and the same has always been renewed.
- 2) That on the 18th day of September 2017, the applicant applied to the Permanent Secretary Ministry of Internal Affairs through the Government Security Officer for the renewal of a dealers and

magazines license for the year 2018 in accordance with the provisions of the Explosives Act (Cap 298).

- 3) That on the 23rd day of November 2017, the applicant received a letter signed by the Minister of Internal Affairs communicating to the applicant the decision not to renew any importation licenses.
- 4) That in the said decision/letter, the Minister noted that the Government of Uganda had commissioned a Company named Kyoga Dynamics Limited, as the only factory for the manufacture, sell and /deal in commercial explosives and for that reason, the Minister decided not to renew the applicant's importation license of commercial explosives.
- 5) That the decision of the Minister was made without having regard to the due process of the law was ultra vires, illegal and unfair to the applicant and in breach of the company fundamental right to a fair and just treatment.
- 6) That the Minister had no capacity and/authority to make such a decision not to renew the Applicant's license and such a decision is illegal and a total disregard to the due process of the law, since the power to issue, renew and revoke a license to sell, deal in and/dispose of commercial explosives is vested in the Engineer-in Chief and not the Minister.
- 7) That the Minister's decision was irrationally made with no regard to the heavy investment of the applicant company has made so far as the acquisition of premises at Magamaga Army Barracks, Mayuge District from the Government of Uganda for the construction and

operation of a storage facility and warehouse for the commercial explosives.

- 8) That the Minister ought to have consulted the various stakeholders including the applicant company to solicit the different views about the proposed ban on the importation and dealing in commercial explosives before making the impugned decision thus a total abuse of power and authority and the same is null and void.

The respondents opposed this application and filed an affidavit in reply through its Permanent Secretary/Accounting Officer-Benon M. Mutambi in the Ministry of Internal Affairs and an Additional Affidavit in Reply briefly stating that;

1. That the decision not to renew the license was made in light of the threat of terrorism and in the interest of National Security and it was not against the rules of natural justice.
2. That the power to issue, renew and revoke licenses for sale, deal in and/dispose of commercial explosives is vested in the Engineer in-Chief which office does not exist in the Ministry of Internal Affairs.
3. That the decision communicated in the letter dated 23rd November, 2017 does not infringe on the applicant's right to fair and just treatment and it was not irrational nor was it an abuse of power and authority as alleged.
4. That the Minister executed the duties of the Engineer-in-Chief on the basis that such an office does not exist in the structure of the Ministry of Internal Affairs.

5. That the decision of the Minister was not irrational but was aimed at regulating the supply of commercial explosives in the interest of National Security.

The additional affidavit was deposed by Owinjo David- Senior Superintendent of Police currently serving as a Government Security Officer attached to Ministry of Internal Affairs briefly stating as follows;

1. That following the 2010 twin bombing in Kampala which claimed 176 lives and hundreds wounded, on the basis of other considerations concerning national security, the National Security Council took a decision that Government enters into a partnership with a competent company to regulate commercial explosives in the country.
2. That on 18th November, 2016-Kyoga Dynamics Limited, a local factory for the production of commercial explosives which was strategically significant to the security and development was commissioned in Nakasongola District by the Government of Uganda.
3. That the current storage of facilities for explosives do not conform to International standards/ designs especially safety and security standards required for the manufacture and storage of explosives.
4. That there is limited knowledge and expertise among magazine owners who were formerly dealing in the manufacture and supply of explosives. When inspection was done on the applicants premises it was discovered that there are stock piles of expired explosives at their magazines in Magamaga.

5. That the stock piles of explosives at the Applicant's premises do not meet the standard technical designs and are a threat to safety and security.
6. That the explosives are a serious matter of national security and the President issued a directive stopping the renewal of the licences of private companies that have been involved in the importation of these explosives.
7. That following the Directive by the President, the Minister of Internal Affairs informed all distributors that there would be no further renewals of the importation licences of commercial explosives.
8. That the directive by the President and communication by the Honourable Minister is not illegal or irrational but is intended to ensure proper regulation in regard to the manufacture, use, storage and supply of explosives in the country.
9. That the National Security Council advised the Government against the renewal of importation and exportation licences of private companies dealing in commercial explosives on the premise that local/exclusive production and management of these materials would enhance the National Counter Terrorism efforts.
10. That in the interest of national security, the grounds for the Minister's decision do not in any way constitute a violation of the Applicant's right to fair and just treatment as enshrined under Article 42 of the Constitution.

At the hearing of this application the parties were advised to file written submissions which I have had the occasion of reading and consider in the determination of this application.

Four issues were proposed for court's determination;

1. Whether the Application before court raises grounds for Judicial Review?
2. Whether the Minister of Internal Affairs followed due process in cancelling the Applicant's license authorizing it to deal in explosives?
3. Whether the Minister's decision referred to above was ultra vires, tainted with illegality, irrationality and procedural impropriety?
4. Whether the Applicant is entitled to the remedies sought in this Application?

I shall resolve only the 3rd issue since it covers whatever the applicant is challenging and the rest of the 1st and 2nd issues. The applicant was represented by *Mr Kagoro Friday Roberts* and *Ms. Ann Karungi* whereas the respondent was represented by *Ms Jackie Amusungut (SA)*.

Whether the Minister's decision referred to above was ultra vires, tainted with illegality, irrationality and procedural impropriety?

The applicant submitted the power to issue, renew and revoke licenses for sale, deal in dispose of commercial explosives is vested with the Engineer in-Chief. Therefore, according to the applicant's counsel the actions were tainted with illegality since the Minister acted without lawful authority and outside the lawful mandate.

The applicant's counsel further contended that the communication of the Minister without giving an applicant an opportunity to be heard before the decision can be taken clearly shows that the Minister acted irrationally moreover without lawful authority.

The applicant submitted that the Minister's decision not to renew the applicant's license communicated by letter shows that due process of law was not followed by the Minister prior to cancellation of the applicant's licence. Therefore, according to the applicant, the Minister acted unfairly and impartially in arriving at the decision to cancel the applicant's licence.

The respondent's counsel submitted that the Minister of Internal affairs had no power to grant or renew licences since the same is vested in Chief Engineer and the powers that the Minister was purporting to exercise are not conferred on him by the Act. It was the contention of the respondent counsel that the issuance and renewals of Explosives is vested with the Engineer in-Chief.

Therefore, since the office of Engineer in-Chief does not exist in Ministry of Internal Affairs, and then the decision of the Minister of Internal Affairs was aimed at regulating the supply of commercial explosives in the interest of National Security. Citing the case of *Makula International Ltd v His Eminence Cardinal Nsubuga & Another [1982] HCB 11*, argued that once an illegality is brought to the attention of court cannot be allowed to stand. Such illegality overrides all questions of pleadings including any admissions made.

The respondent further submitted that national security matters are enforced by security agencies who act on the directions of the President. The National Security Council, established in 2000, reports directly to the President and comprises Cabinet Ministers, ISO, ESO, Army and Police

Officials, most of which are appointed by the President. See *Section 4 of the National Security Council Act*.

Analysis

The applicant applied for permission to deal in Commercial Explosives in Uganda to the Permanent Secretary Ministry of Internal Affairs and was advised to get in touch with Government Security Officer (GSO) based at the Ministry of Internal Affairs. The different permits have always been issued under the hand of Permanent Secretary Ministry of Internal Affairs.

The person responsible for the issuance and renewal of Dealers and Magazine Licences has always been the Government Security Officer and has always renewed the same. The applicant now seems to challenge the whole arrangement of issuing and renewal of licence and or stopping of the renewal of licence by the Minister. The arguments of the applicant seem to be approbating and reprobating to the extent that they have taken full benefit of licences issued by an officer not mentioned in the Act.

In the case of *Stephen Seruwagi Kavuma v. Barclays Bank Uganda Limited (HCMA No. 634 of 2010)* the court noted that, it is well known principle of equity that one cannot approbate and reprobate all at the same time. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that *“a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then, turn round and say it is void for the purpose of securing some other advantage,”* (See. *Verschures Creameries Ltd v. Hull & Netherlands Steamship Co. Ltd, [1921] 2 KB 608, at 612.*)

The applicant's challenge should have acknowledged that indeed the officer designated under the Explosives Act does not exist and the same

function has always been executed by an officer assigned those roles which ought to have been performed by the Engineer-in-Chief who is the Government Security Officer. This means that the challenge of the Minister's powers not to allow the renewal should have been challenged as an intrusion on the powers of the Government Security Officer.

The respondent's counsel seems to concede that licences issued to the applicant for some time were tainted with illegality since they were never issued by an officer designated under the Explosives Act cap 298. Therefore, this illegality has been brought to the attention of court and overrides everything as it was held in the case of *Makula International Limited v His Eminence Cardinal Nsubuga & Another CACA No. 4 of 1981*.

The Explosives Act Cap 298 is an old legislation enacted in 1936 and no amendments have ever been made to it. The concerned officers were applying the same with necessary modification and the said improvisation was not provided for under the Act. The challenge of the applicant is what has woken up the concerned officers to seek a legal opinion of the Attorney General in their letter dated 6th March 2018 about issuance and renewal of Licences to dealers in Explosives.

It is therefore my finding that the issuance of Licences and permits was illegal and it required the amendment of the Act to bring it in conformity with current structures of government instead of assigning an officer not provided under the Explosives Act. This is a matter for law reform to harmonise the Explosives Act.

Secondly, the applicant is challenging the letter by the Minister for Internal Affairs dated 23rd November 2017 signed by the Minister briefly stating;

"On the 18th November 2016, Kyoga Dynamics Limited, a factory for production of commercial explosives was commissioned at Nakasongola District by the

Government of Uganda. The factory is a joint venture between Luwero Defense Industries and NORONCO (a Chinese Company)

Local production of these materials by the National Defence Industries enhances the national Counter Terrorism efforts by exclusive production and management of commercial explosives in the country.

Besides, developing internal capacity to produce such materials also promotes our own local industries.

This is therefore, to formally notify you that there shall be no further renewals of the importation licenses of commercial explosives into the country.

Minister of Internal Affairs.

The Minister was under the directive of the President in a letter dated 21st December, 2016 which stated inter alia; *“This is, therefore, to direct you not to renew the licenses of private companies that have been involved in the importation of these explosives.”*

The decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. The courts must accord public bodies or decision makers leeway in applying the law and avoid routinely substituting judicial judgment for that of the decision maker or public body. Where there is a dispute as to the extent of the power, it is ultimately for the court to determine the correct legal meaning and extent of the power exercised. See ***Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 at 410***

It is necessary to explain the basis on which that ordinary business of government is conducted, and the simple and satisfactory explanation is that it depends heavily on the ‘third source’ of powers, i.e powers that have not been conferred by statute in a narrow sense but are normal powers that

give effect to the entire legislation. This is because a body like Parliament can have no mind; it is not possible to 'consolidate individual intentions into a collective, fictitious group intention'. Therefore the provisions of a statute need to be understood in the context of the purpose of the statute as whole. It requires an understanding of the context in which it was enacted and 'mischief' at which it was aimed. See *R. (on the application of Shrewsbury and Atcham BC v Secretary of State for Communities and Local Government* [2008]EWCA Civ 148 [2008] 3 All ER 548

The Minister for Internal Affairs has powers in any legislation as to the policy guidance and giving effect to the legislation in question. The Minister issued a general directive to all distributors and was not targeting the applicant only. It is not true that the Minister cancelled the licence of the applicant as has been submitted by the applicant's counsel. The Explosives Act provides for licences to be renewed every end of year, and the general guidance on the change of policy was made pursuant to the National Security concerns over commercial explosive in Uganda.

The powers of the Minister of Internal Affairs are indeed incidental functions that are not in conflict with the specific powers conferred under the Act. The Act provides that the Minister has the right to hear any challenge to the decision to revoke any licence issued under the Act. Therefore, any action the Minister takes must be justified by law and in relation to issuance and renewal of licences for which is vested with appellate powers which defines its purpose and justifies its existence. The statutes normally impose a duty on the line Minister to ensure that the desired goal and purpose is achieved. Even when purposes are clearly specified in legislation, the law permits authorities or decision-makers to undertake tasks that are 'reasonably incidental' to the achievement of those purposes provided they do not contradict any statutory power.

The main purpose of the Explosives Act is to regulate the manufacture, storage, sale, transport, importation, exportation and use of explosives in Uganda. The Minister's letter or directive was clearly intended to achieve that purpose and objective in order to achieve a broad but immeasurable and very strategic outcome in relation to national security. The Minister is allowed under the Explosives Act to issue guidance generally for the protection of life and property and for better carrying out the objects and purposes of the Explosives Act.

The decision of the Minister to suspend issuance and renewals of licences for commercial explosives was legal and justified in the circumstances.

Legitimate expectation.

This part of the general issue is premised on the fact that the applicant was never consulted or heard before the decision to stop any renewals of licences was effected or enforced or implemented. The applicant as a holder of a valid licence ought to have been heard or informed on the change of policy by the government.

The court agrees with the applicant's counsel submission on the principle of legitimate expectation as cited and noted in the case of *Haj Kaala Ibrahim v AG & Commissioner General URA HCMC No. 23 of 2017* that;

Therefore the principle of legitimate expectation concerns the degree to which an individual's expectations may be safeguarded in the face of a change of policy which tends to undermine them. The role of the court is to determine the extent to which the individual's expectation can be accommodated within the changing policy objectives.

The applicant was a holder of licence to deal in commercial explosives since 2004 and the same was renewed yearly upon satisfaction of the terms and conditions made thereunder in accordance with the Explosives Act.

The applicant could have developed a legitimate expectation that any change of policy would have considered their long time trading in the business and at the bare minimum to be informed in advance about any intended change of policy on commercial explosives in Uganda. In the case of *Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374* Lord Diplock stated that, for a legitimate expectation to arise, the decision:

“must affect [the]other person....by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision maker will not withdraw without giving him first an opportunity of advancing reasons for contending they should be withdrawn.”

The applicant ought to have been heard in order to know the fate of their business of dealing in commercial explosives in Uganda for which they were holders of valid licences. The Minister’s change of policy on commercial explosives ought to have been made upon consultation and information to the applicant who had partnered with government in respect of different projects and had a storage facility within the Military barracks at Magamaga, Mayuge district.

The applicant was entitled to the bare minimum requirement of fairness by being given adequate notice of the intended change of policy by the Minister for Internal Affairs before the expiry of the subsisting Commercial Explosive licence which was due to expire at the end of the year. The policy-maker is free to change his policy whenever he wants to do so given the duty of a public body to keep its discretion unfettered. Nevertheless, the fairness of his decision not to accommodate the reasonable expectations of

the people which the new policy will thwart remains a concern of the court. The courts may intervene where the new policy entirely ignores legitimate expectation, or gives manifestly improper weight thereto. See *R v Ministry of Agriculture Fisheries and Food ex p Hamble (offshore) Fisheries Ltd* [1995] 2 All ER 714

The courts recognise that the Executive can change policy and should never be restrained in changing policy but rather they should at all times avoid unfairness to persons adversely affected by the change in policy. The only exception will be considerations of public interest. Legitimate expectation cannot come in the way of public interest. Public interest prevails over private interest. *Union of India v International Trading Co.* [2003] 5 SCC 437 at 444

The doctrine of legitimate expectation is founded on the principle of reasonableness and fairness to the person affected or whose rights or benefits may be affected. In the present case, the President wrote to the Minister of Internal Affairs on 21st December, 2016 about the change of policy or ban on importation of commercial explosives. The Minister of Internal Affairs waited for a whole year to write and notify the affected parties including the applicant in his letter dated 23rd November, 2017. This was very unfair to the applicant who had applied for renewal of his commercial explosives licence.

The Minister's decision to that extent frustrated the legitimate expectation of the applicant since the notice was too short and inadequate since they had invested heavily in the business. The change of policy was abrupt and their investment in the business was never considered in the change of policy in respect of importation of commercial explosives. The Minister failed in his duty of according the persons adversely affected an opportunity to be considered in the new policy and failed to provide

proper transitional measures to cover areas like new contractual obligations already in progress or what happens to existing stock of commercial explosives and other existing contractual obligations between the applicant and the Government.

The Minister acted within the powers of the Explosives Act to stop issuance and renewal of licences but breached the applicant's legitimate expectation when he made a decision without according the applicant adequate notice.

Whether the Applicant is entitled to the remedies sought in this Application?

The applicant is not entitled to any of the orders sought due the peculiar circumstances of the case since the commercial explosive permits issued to the applicant were issued an officer not designated under the Explosives Act.

I decline to issue any Orders of *Certiorari, Mandamus, Prohibition* or *Injunction* and *damages*.

I so Order

SSEKAANA MUSA

JUDGE

6th August 2021