

**NESTLE LANKA LTD.
VS
CONSUMER AFFAIRS AUTHORITY AND ANOTHER**

COURT OF APPEAL
SRIPAVAN J
BASNAYAKE J
CA 2146/2004
30TH JUNE, 2005
11TH JULY, 2005

Consumer Affairs Authority Act, 09 of 2003 Section 18 (1), (2), (3) – essential goods – Increase of price – discretionary power – compliance with procedural requirements – is it imperative ? – can the authority refuse an application for a price increase in its entirety – should reasons be given ? – if reasons are not given is it fatal ?

The petitioner sought the approval from the Respondent Authority for an increase in the price of its full cream milk powder products Nespray and Nido, as full cream powder is an essential good for the life of the community, the retail or whole sale price of milk powder cannot be increased without the prior written approval of the Respondent Authority. The approval sought was refused.

Held

- (1) When an application is made to get the approval to increase the retail/ whole sale price the authority would have to –
 - (i) hold an inquiry ;
 - (ii) see whether such increase is reasonable ;
 - (iii) approve any other increase as the authorities may consider reasonable.
- (2) No inquiry has been held, reasons have not been given for the refusal – the impugned decision is illegal and invalid.
- (3) The Respondent authority cannot refuse an application for a price increase in its entirety, thus the impugned decision is not a decision in terms of section 18(4) and hence is void and a nullity.
- (4) Application for a price increase remains undetermined as the purported decision is not a decision in the eyes of the law.

Per Sriipavan J.

“function of a Judge is to give effect to the expressed intention of parliament as stated in the Enactment. If the words of an Act are plain and clear a Court must follow them and leave it to Parliament to set it right rather than alter those words to give a different interpretation.”

Application for a Writ of Certiorari and Writ of Mandamus.

Sanjeewa Jayawardene with Suren de Silva for Petitioner.

N Idroos S. C., for Respondent

July 18th, 2005

SRIPAVAN, J

The Petitioner is a public company duly incorporated in Sri Lanka and produces internationally known branded products such as Nespray, Lactogen, Nestomalt, Milo etc at its factory at Pannala.

The Minister of Commerce and Consumer Affairs acting under and in terms of Section 18(1) of the Consumer Affairs Authority Act, No. 09 of 2003 by order published in the Gazette prescribed "full cream milk powder" as an essential good to the life of the community. Thus in terms of Section 18(2) of the said Act, the manufacturers and/or traders cannot increase the retail or wholesale price of milk powder except with the prior written approval of the first respondent Authority.

The Petitioner by its application dated 02nd September, 2004 sought the approval of the first respondent Authority for an increase in the price of its full cream milk powder products Nespray (01Kg, 400g and 200g packs) and Nido (01Kg and 400g packs) as evidenced by P6. Along with the application, the petitioner submitted a detail cost structure for Nespray and Nido together with supporting documents to enable the first respondent Authority to consider the price increase sought. By letter dated 08th September, 2004, the first respondent Authority called for further information from the petitioner which was duly furnished by it by letter dated 10th September, 2004. Again, the first respondent by letter dated 14th September, 2004 sought further clarification from the petitioner which was replied by the petitioner on the same day as evidenced by the documents marked P7 (b) and P7 (c) respectively. The petitioner was informed by letter dated 24th September, 2004 received by fax on 27th September, 2004 and by post on 29th September, 2004 marked P8 and P8(a) respectively that its application for the increase of the prices of Nespray and Nido had been rejected. No reasons whatsoever were adduced for the said rejection. The petitioner seeks, *inter-alia*, an order in the nature of a writ of certiorari to quash the said determination of the first respondent dated 24th September, 2004 marked P8/P8(a).

The preamble to the Consumer Affairs Authority Act, No. 09 of 2003 reads thus :-

"Whereas it is the policy of the Government of Sri Lanka to provide for the better protection of consumers through the regulation of trade and the prices of goods and services and to protect traders and manufacturers against unfair trade practices and restrictive trade practices..."

Accordingly, the Act not only provides better protection to consumers but also protects traders and manufacturers against unfair trade and restrictive practices. For purposes of convenience Section 18(3) of the said Act is reproduced below.

"A manufacturer or trader who seeks to obtain the approval of the Authority under sub section (2), shall make an application in that behalf to the Authority and the Authority shall, after holding such inquiry as it may consider appropriate :-

- (a) approve such increase where it is satisfied that the increase is reasonable ; or
- (b) approve any other increase as the Authority may consider reasonable.

and inform the manufacturer or trader of its decision within thirty days of the receipt of such application."

This section makes it mandatory that when a manufacturer or trader makes an application to the first respondent Authority in order to get the approval to increase the retail or wholesale price, the Authority shall act in the following manner :

- (i) To hold an inquiry as it may consider necessary ; and
- (ii) Approve such increase where it is satisfied that such increase is reasonable ; or
- (iii) Approve any other increase as the Authority may consider reasonable.

Though the aforesaid section gives certain amount of discretion to the Authority in order to decide on the increase of a reasonable price, the exercise of such discretion necessarily implies good faith in discharging public duty. The abuse of power or discretion constitutes a ground of invalidity independent of excess of power. It is to be borne in mind that when a power granted for one purpose is exercised for a different purpose or a collateral object or in bad faith, the court will necessarily intervene and declare such act as illegal or invalid. Statutory powers conferred for public purposes are conferred upon trust and not absolutely. That is to say, that they can be validly used only in the right and proper manner. The

lawful exercise of a statutory power presupposes not only compliance with the substantive and procedural conditions laid down for its performance but also with the implied requirements governing the exercise of the discretion. Thus, all statutory powers must be exercised fairly and reasonably, in good faith, for the purposes for which they are given with due regard to relevant considerations without being influenced by irrelevant considerations.

The important question that arises for consideration is whether the first respondent Authority in fact complied with the substantive and procedural requirements laid down in Section 18(3). The petitioner in paragraph 17(c) of the petition specifically states that the first respondent has violated the principles of natural justice by failing to hold an inquiry prior to rejecting the petitioner's application dated 02nd September, 2004. This averment was only denied by the second respondent in paragraph 6 of his affidavit dated 15th April, 2005. The inquiry proceedings before the first respondent Authority which is material to the respondents' case were not annexed to the affidavit of the second respondent. In the absence of any notes of inquiry, the only inference the court may draw is that in fact no inquiry was held as contemplated by Section 18(3).

When Section 18(3) prescribes the manner in which the statutory power has to be exercised, the power must be exercised in that manner alone; if the exercise of power is in utter violation of the mandatory procedure laid down therein it cannot be regarded as an act done in pursuance of the said provision. In the circumstances, I hold that the impugned decision of the second respondent without following the procedure prescribed in Section 18(3) becomes illegal, invalid and is of no force or avail in law.

The learned counsel for the petitioner urged that the first respondent Authority has no power to refuse an application sought to increase the wholesale or retail price. Counsel argued that the use of the word "shall" in the said section compels the first respondent Authority either to approve the price increase sought or approve such other price increase as the Authority considers reasonable. The responsibility of the court is to construe and enforce the laws of the land as they are and not to legislate on the basis of personal inclinations. Thus, the function of a judge is to give effect to the expressed intention of Parliament as stated in the enactment. If the words of an Act are plain and clear, a court must follow them and leave it

to Parliament to set it right rather than to alter those words to give a different interpretation, Hence, I am in total agreement with the submissions made by the learned counsel for the petitioner that the legislature in all its wisdom has not empowered the first respondent Authority to refuse an application for a price increase in its entirety. Therefore, I hold that the impugned decision of the first respondent Authority marked P8/P8 (a) is not a decision in terms of Section 18(4) and hence is void and a nullity in law.

The learned Counsel for the petitioner also submitted that no reasons were given for the decision contained in the documents marked P8 and P8(a). It is a general principle of law that whenever a right of appeal or review is given from the order of a statutory body, a duty to record findings and give reasons is implied. Reasons have to contain findings on the disputed matters that are relevant to the decision. Once proceedings commence against the first respondent Authority, it is under a legal obligation to disclose to court its reasons in arriving at the decision impugned in these proceedings. No such disclosure has been made in the case in hand. Unless the petitioner is able to discover the reasoning behind the decision, it may be unable to decide whether such decision is reviewable or not and be deprived of the protection of the law. Therefore, failure to give reasons amounts to a denial of justice and is itself an error of law.

Learned State Counsel on the other hand contended that despite the order made by the first respondent, the petitioner as averred in paragraph 22 of the petition increased the price of a 400g pack of Nespray to Rs. 146 with effect from 20th October, 2004. On this basis, Counsel argued that the illegal conduct disentitles the petitioner to the discretionary reliefs sought. If the petitioner had in fact acted illegally, the Act makes provision for the first respondent Authority to institute proceedings in the relevant Magistrate's Court against the petitioner for contravening the provisions of the Act. This however, does not prevent the petitioner from challenging the decision marked P8/P8(a) made by the first respondent Authority by following a wrong or incorrect procedure. If there has been some procedural failing such as a false or incorrect step in the procedure, the act of the Authority is condemned as unlawful and unauthorized by law. Since I have held that P8/P8(a) is devoid of any legal effect, the first respondent is under no legal duty to implement it. The decision in P8/P8(a) is a nullity and every proceeding which is followed on is also bad and incurably bad. Accordingly, the court issues a Writ of Certiorari quashing the order dated 24th September, 2004 marked P8/P8(a).

For the avoidance of any doubt, the court holds that the application made by the petitioner for a price increase remains undetermined as the purported decision marked P8/P8(a) is not a decision in the eyes of the law. In view of the conclusion reached, the petitioner is entitled to the protection of the law provided for in Section 18(4). Hence, the relief sought by the petitioner in terms of paragraph (c) of the prayer to the petition for a writ of Mandamus directing the first respondent to consider and determine the petitioner's application dated 02nd September, 2004 is refused.

The petitioner is entitled for costs in a sum of Rs. 15,000 payable by the first respondent Authority.

BASNAYAKE J. I agree.

Application refused.
