

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISCELLANEOUS CAUSE NO.116 OF 2018

IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW

M/S PRINCESS PHARMACY ----- APPLICANT

VERSUS

NATIONAL DRUG AUTHORITY----- RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application for Judicial Review under Section 33,36,37,38 of the Judicature Act as amended, Rules 3,5,6,7 and 10 of the Judicature (Judicial Review) Rules, 2009 seeking orders that;

- a) A declaration that the applicant fulfilled all the statutory requirements for the issuance of licence to operate a retail pharmacy at her location in Bubajjwe Zone Bwaise 1 Kawempe Division Kampala City under the NDA Professional (Licensing Guidelines 2017).
- b) A declaration that the applicant is a fit and proper pharmacy to be issued with a licence to operate a retail pharmacy at her location in Bubajjwe Zone Bwaise 1 Kawempe Division, Kampala City.
- c) An Order of Prohibition to issue against the respondent from subjecting the Applicant to the requirements of the NDA professional (Licensing Guidelines 2018)
- d) An Order of certiorari quashing the decision of the respondent made against the applicant on 6th April 2018.
- e) An order of mandamus be issued against the respondent compelling her to issue the applicant with a licence to operate a retail pharmacy at her location Bubajjwe Zone, Bwaise 1 Kawempe Division.
- f) General damages and costs of this application be provided for.

g) Any other relief deemed appropriate by this Honourable court.

The grounds in support of this application were stated in the supporting affidavit of the applicant but generally and briefly state that;

- I) The applicant applied for issuance of a licence to operate a retail pharmacy in 2017 and upon inspection of her premises by the respondent, the respondent found that the applicant met all the requirements for issuance of licence as per the guidelines of 2017 and advised the applicant to submit a formal application to be issued with the same, which the applicant did submit in 2017.
- II) The respondent in her decision made on 6th April 2018, informed the applicant that her application has been rejected because it does not conform to the National drug authority Guidelines for 2018.
- III) At the time of submission of the application by the applicant, the applicable licensing guidelines were those of 2017 and not those of 2018 and that the law does not apply retrospectively.
- IV) The decision made by the respondent rejecting to issue the applicant with a licence to operate a retail pharmacy is tainted with illegality and irrationality.

The respondent opposed this application and averred in their affidavit in reply by David Nahamya that the applicant did not take any further steps to pursue his application not until 9th January 2018 when he lodged his application for licence. The respondent avers that it is impossible and impracticable to grant a 2017 licence in 2018.

That the respondent accordingly informed the applicant by letter dated 6th April 2018 that whereas his application was lodged in 2017, he did not pursue his application to conclusion in 2017.

The applicant contended in reply to the respondent's affidavit that she acted promptly upon receipt of communication from the respondent on the evening of 29th December 2017, the last working day of 2017 and thereafter went to the respondent's regional office in Nakawa on 2nd January 2018, the first working day of 2018 to seek guidance on the form of application and other requirements, upon which was advised to only submit specified documents and they complied by submitting the on 6th January 2018.

To appreciate the decision of this court I find it proper that I lay down the chronological sequencing of the events leading to this application as shown from the pleadings.

- a) The applicant applied on 4th December 2017 for a licence to operate a pharmacy in 2017 under the licensing guidelines of 2017.
- b) The respondent carried out a pre-inspection who advised the applicant to provide proof of rent, design the premises as per required standard of retail pharmacy premises, and stock the prescribed drugs, hire a pharmacist and auxiliary staff among others.
- c) The applicant complied with the above advice and recommendations and he invited the respondent to come and inspect the said premises.
- d) The respondent again inspected the premises on 13th December 2017 and the documents and found that the applicant had met all the requirements for issuance of a licence as per the Licensing Guidelines of 2017 and advised the applicant in writing to submit a formal application to be issued with a licence to operate a retail pharmacy.
- e) That the respondent made a formal communication of the outcome of the inspection in a letter dated 29th December 2017 by David Nahamya-Director Inspectorate & Enforcement.
- f) The applicant made further inquiries about his application, he was advised by the respondent that she did not need to submit a formal application as indicated in the letter but only submit specified documents on-line since the applicant had already made the application to that effect.
- g) The applicant submitted the documents as advised by the respondent and was later informed by the respondent that her application had passed screening and was advised to pick an invoice from the respondent and pay the requisite fees for the license and suitability of premises.
- h) As the applicant was waiting for the licence to be issued to operate a retail pharmacy, she was served with a letter rejecting her application on ground that it did not comply with the licensing Guidelines of 2018.

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

Two issues were proposed for court's resolution;

- 1. *Whether the decision complained of is tainted with illegality and irrationality.***
- 2. *Whether the applicant is entitled to the remedies sought?***

ISSUE ONE

Whether the decision complained of is tainted with illegality and irrationality?

Counsel for the applicant submitted that the respondent decision in a letter dated 6th April 2018 purporting to reject the applicant's application for license to operate a retail pharmacy, the respondent was *functus officio* because the said application had already been determined and approved and the applicant was only waiting for the licence.

The respondent's counsel on the other hand submitted that the applicant submitted the documents for clearance in January 2018, which was a new licensing year under which the 2018 Professional licensing Guidelines were applicable.

He further submitted that the applicant's documents were cleared in error and receipts issued to the applicant, which went ahead to pay the necessary fees.

The respondent counsel also submitted that; the respondent realized the grave error it had made and was willing to refund the applicant's fees, however, the applicant chose to sue the respondent.

In Uganda, the principles governing Judicial Review are well settled. Judicial review is not concerned with the decision in issue but with the decision making process through which the decision was made. It is rather concerned with the courts' supervisory jurisdiction to check and control the exercise of power by those in Public offices or person/bodies exercising quasi-judicial functions by the granting of Prerogative orders as the case may fall. It is pertinent to note that the orders sought under Judicial Review do not determine private rights. The said orders are discretionary in nature and court is at liberty to grant them depending on the circumstances of the case where there has been violation of the principles of natural Justice. The purpose is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected to. ***See; John Jet Tumwebaze Vs Makerere University Council & 2 Others Misc Cause No. 353 of 2005, DOTT Services Ltd Vs Attorney General Misc Cause No.125 of 2009, Balondemu David Vs The Law Development Centre Misc Cause No.61 of 2016.***

For one to succeed under Judicial Review it is trite law that he/she must prove that the decision made was tainted either by; illegality, irrationality or procedural impropriety.

The dominant consideration in administrative decision making is that public power should be exercised to benefit the public interest. In that process, the officials exercising such powers have a duty to accord citizens their rights, including the right to fair and equal treatment.

The gist of the complaint in this case is that the applicant was denied a licence of 2017 which would have enabled him to operate a retail Pharmacy business in Kampala. The effect of not

being issued with the licence would be denial to do the said business in Kampala since the 2018 guidelines barred any licensing of new pharmacies in Kampala.

The background of this application is that the applicant on 4th December 2017, applied for inspection of premises for the purpose of setting up a pharmacy. The respondent accepted the said application notwithstanding the fact that it was coming to close of the year.

The respondent proceeded to inspect the premises and approved of them on 13th December 2017 but for reasons best known to them they proceeded to write a communication to the applicant on 29th December 2017 which was the last working day of the year. A copy of the said letter is reproduced here.

(Letter head) **National Drug Authority**

29th December 2017

1132/ID/NDA/12/2017

Mutebi Ramathan
Mramah26@gmail.com
Kawempe
0772030835

**PROPOSED LOCATION FOR A RETAIL PHARMACY ALONG TULA ROAD
OPPOSITE AVIS INDUSTRY, KAWEMPE DIVISION-KAMPALA DISTRICT**

Reference is made to your letter received on 4th December 2017 on the above subject.

The inspection which was carried out on 13th December 2017 indicated that your proposed location meets requirements of NDA Professional (Licensing) Guidelines 2017, as per Section **4.8.3.3** which states; “*New Pharmacies may only be licensed to operate in Kampala District in*

areas proven to be outlying and underserved (For guidance purposes these shall be areas with no retail pharmacy within a radius of 500 meters).”

You are advised to formally apply for operation of a retail pharmacy in the new location. You may contact the NDA Regional office, **Nakawa** for processing of your license for 2017.

Yours faithfully,

David Nahamya (Mr)
DIRECTOR, INSPECTORATE & ENFORCEMENT

The above letter was written on the 29th December 2017 and it was received by the applicant in the evening of the same day. This was the last working day for the year 2017. The respondent's offices opened in the 2018 on 2nd January 2018. That is when the applicant lodged his documents.

In accordance with the said letter, the respondent staff went ahead and he submitted the different documents including a Request for NDAMIS Login Credentials on 4th January 2018 by its Pharmacist.

The respondent being satisfied by the applicant's application sent an email to the applicant confirming that the applicant's application had passed screening test and the applicant was directed to pick an invoice from the respondent to pay for license.

The email reads as follows;

“This is to notify you of that your premise application for the premises PRINCESS PHARMACY (U) LIMITED at the physical location KAMPALA and postal address 75617, Clock Tower with supervising pharmacist Samuel Kiruyi having registration number 1068 has passed application screening”

The applicant proceeded to set up the pharmacy in accordance with the professional guidelines, stocking the Pharmacy with the different drugs and also paid for the Inspection for suitability & Operating Licence 2018 on 30th January 2018.

The refusal to grant the applicant a licence was indeed very unfair and was also done without according the applicant a hearing, since the application was already approved and any change in the position required the respondent to explain to the applicant rather than just changing position to her detriment.

The power of authorities to change policy is constrained by the legal duty to be fair (and other constraints which the law imposes). A change of policy which would otherwise be legally

unexceptionable may be held unfair by reason of prior action, or inaction, by the authority. See **R (Bhatt Murphy) v Independent Assessor [2008] EWCA Civ 755**

If the public authority has distinctly promised to implement a policy in a specific manner for a specific person or group who would be substantially affected by a change, then ordinarily it must keep its promise. Acting contrary to the legitimate expectation would be to act unfairly as to perpetrate an abuse of power. See **Ayikoru Gladys versus The Board of Governors of St Mary's Ediofe Girls Secondary School HCCS No. 26 of 2016**

The principle of legitimate expectation is concerned with the relationship between public administration and the individual. It seeks to resolve the basic conflict between the desire to protect the individual's confidence in expectations raised by administrative conduct and the need for the administrators to pursue changing policy objectives. The principle means that expectations raised as a result of administrative conduct may have legal consequences. Either the administration must respect those expectations or provide compelling reasons why the public interest must take priority.

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 origins of this ground of review is traced in the case of **Schmidt vs Secretary of State for Home Affairs [1969] 1 All ER 904**. Lord Denning noted that;

"It all depends on whether he has some right or interest or, I would add, some legitimate expectation of which it would not be fair to deprive him without hearing what he has to say"

Applying this principle to the facts of the case, Lord Denning said:

"A foreign alien has no right to enter this country except by leave, and if he is given leave to come for a limited period, he has no right to stay for a day longer than the permitted time. If his permit is revoked before time expires, he ought, I think, to be given an opportunity of making representations; for he would have a legitimate expectation of being allowed to stay for the permitted time. Except in such a case, a foreign alien has no right-and, I would add, no legitimate expectation-of being allowed to stay. He can be refused without reasons given and without a hearing. Once his time has expired, he has to go"

In the case of **AG of Hong Kong vs Ng Yuen Shiu [1983] 2 All ER 346**, the Privy Council held that, in light of the statement by the Government, the respondent had a legitimate expectation of being accorded a hearing.

It can be deduced from the above cases that legitimate expectations may include expectations which go beyond legal rights, provided that they have some reasonable basis. Secondly, the legitimate expectation may be based on some statement or undertaking by, or on behalf of, public authority which has the duty of making the decision, if the authority has through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied an inquiry. Thirdly, when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it would act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty.

The applicant in this matter had a legitimate expectation that he would be granted a licence upon receipt of the letter from the Director Inspection and Enforcement on the 29th day of December 2017. Indeed the said letter stated that

“You are advised to formally apply for operation of a retail pharmacy in the new location. You may contact the NDA Regional office, Nakawa for processing of your license for 2017.”
(emphasis added)

One of the requirements for a legitimate expectation to be effective is that the promise, the representation that gave rise to the expectation, should be clear, unambiguous and unqualified.

This is an essential requirement because the person cannot claim to have expected the public authority to act in a particular way if the representation was unclear or was ambiguous or qualified-in such circumstances, it would not be reasonable for the applicant to have relied on such an expectation.

In the instant case the applicant expected the respondent as a public body to grant him a licence on the basis of the 2017 guidelines upon which his approvals and clearances had earlier been made. But the respondent rigidly and in abuse of authority refused and insisted that the guidelines of 2018 were operative and this implied that the applicant cannot operate from the approved premises since the new guidelines bars new approvals in Kampala.

I do not agree with submission of counsel for the respondent that the applicant made the application for licence belatedly. It was still the duty of the respondent to inform the applicant that it was not possible to complete the process within the time frame.

In addition by the time respondent wrote a letter to the applicant on 29th December 2017. They were fully aware that the new guidelines would take effect on 1st January 2018, but further encouraged the applicant to lodge the necessary documents for issuance of the 2017 licence.

Secondly, the applicant challenges the decision to deny her a licence as being irrational.

Irrationality/unreasonableness has been defined to mean when there has been such gross unreasonableness in the decision taken or act done, that no reasonable authority addressing itself to the facts and law before it would have made such a decision. Such a decision is said to be in

defiance of logic and acceptable moral standards. *See: Council of Civil Unions Vs Minister of the Civil Service [1985] AC 374.*

The question that this court must answer is whether the impugned decision of the respondent was tainted with gross unreasonableness given the circumstances of this case as presented and discussed above.

The circumstances of this case as set out herein above are very clear, the respondent took a lot of time to make necessary approvals for the applicant and for reasons not availed in any communication decided to inform the applicant on the last working day of the year 29th December 2017. Therefore it was quite unreasonable for the respondent to insist on using guidelines of 2018 and yet the applicant's application process had started in 2017.

The said decision of 6th April 2018 was indeed in defiance of logic and common sense since the same respondent had approved and allowed the applicant to continue with the approval process on the basis of 2017 guidelines.

In the result this issue is resolved in the positive against the respondent.

ISSUE TWO

Whether the applicant is entitled to the remedies sought in the application.

1. The applicant has satisfied court that the decision of the respondent dated 6th April 2018 was tainted with illegality, unfairness and irrationality. An order of *Certiorari* does issue quashing the said decision. The said decision is therefore quashed.
2. The applicant also sought an order of *Mandamus*, compelling the respondent to issue a licence to operate a retail pharmacy shop at her location in Bubajjwe Zone Bwaise 1, Kawempe Division, Kampala City.

An order of *Mandamus* issues compelling the respondent to issue a licence of 2017 to enable the applicant operate within the earlier approved premises and then his licence should be renewed to enable her operate in accordance with the 2018 Guidelines.

3. The applicant has sought General damages. This is awarded or given for the loss the law presumes natural and probable consequence of the wrong. It is intended to compensate the applicant. The applicant has indeed suffered damage since the time of refusal to grant a licence through hire of professional staff and other support staff who are entitled to earn a monthly salary, rent and general expenses for maintenance of the premises. This court awards the applicant a sum of 15,000,000/= as general damages for the loss so far incurred.

4. The applicant is awarded costs of the application.

I so order.

SSEKAANA MUSA
JUDGE
16th /08/2018