

IN THE FAIR COMPETITION TRIBUNAL

AT DAR ES SALAAM

TRIBUNAL APPEAL NO. 17 OF 2019



M/S. TONNERBYTES AND SUPPLIES LIMITEDAPPELLANT

VERSUS

M/S. I.S.M. STATIONERY LIMITED1ST RESPONDENT

THE CHIEF INSPECTOR OF MERCHANDISE

MARKS ACT2ND RESPONDENT

JUDGEMENT

The appellant, Tonnerbytes and Supplies Limited, aggrieved by the decision and award of the 2nd respondent hereinabove delivered on 18th October, 2019 appeals to this Tribunal against the respondents hereinabove on the following grounds, namely:

1. That the Honourable Committee erred in law and facts by holding that, the appellant herein is not a registered trademark

owner in Tanzania of the mark '**Focus**' and proceed to hold that the appellant has no exclusive rights over the said mark.

2. That the Honourable Committee erred in law and facts in failing to determine that, the disputed goods were counterfeited, hence, the 1st respondent infringed the appellant's exclusive right regarding the trade mark '**Focus**'.
3. That the Honourable Committee erred in law and facts for failing in circumstances to hold that, the 1st respondent's seized goods should be returned while they were in fact counterfeited goods.
4. In view of the circumstances set out herein above, the Honourable Committee totally misdirected itself in delivering the alleged decision subject of this appeal in favour of the 1st respondent by failing to consider and appreciate the law and evidence on record tendered by the appellant.

On the totality of the above grounds, the appellant prayed that, this Tribunal be pleased to allow this appeal and declare the appellant as the lawful registered owner of the mark "**Focus**", set aside the 2nd respondent's decision with costs and any other relief this Honourable Tribunal may deem fit.

Upon being served, the 1st respondent filed a reply to the memorandum of appeal in terms of Rule 19 of this Tribunal's Rules, 2012, by disputing all grounds of appeal as unmerited.

Consequently, the 1st respondent invited this Tribunal to be pleased to dismiss this appeal with costs.

The 2nd respondent, upon being served with the grounds of appeal, filed a reply to the memorandum of appeal by noting the first ground of appeal but disputed the rest of the grounds. In the event, the 2nd respondent invited this Tribunal to dismiss this appeal with costs.

In order to understand the gist of this appeal, we found it imperative to give, albeit in brief, the facts pertaining to this appeal. By formal complaint lodged before the Chief Inspector by the appellant, on counterfeited goods in the brand of '**Focus**' allegedly being sold by the 1st respondent in the market, the 2nd respondent raided the stores of the 1st respondent on 10th January 2019 and seized vide **Seizure Notices FCC/SN/001B/0952 and FCC/SN/0001B/0425** 118 cartons of counter books, subject of this appeal. On 20th January 2019, the 1st respondent filed a formal claim against the seizure notices to the Chief Inspector stating, among others, that the seized goods were not counterfeited goods. The Chief Inspector, accordingly, formed a Committee to hear and determine the dispute.

The Committee upon hearing the respective submissions from the parties in dispute decided and ordered that:-

- i. The decision of the Chief Inspector that the seized counter books marked Focus are counterfeited in terms of section 3

and 6 of the Merchandise Marks Act, Cap 85 is hereby quashed

- ii. The seized counter books branded "FOCUS" with Seizure Notices NOs. **FCC/SN/001B/0952** and **FCC/SN/0001B/0425** be returned to the claimant (I.S.M. Stationery) with immediate effect.

Aggrieved by the above orders, the appellant preferred this appeal, hence, this judgement, after hearing the parties on merits.

When this appeal was called for hearing, the appellant was enjoying the legal services of Messrs. Dimesh Mauji, and Charles Epaphras, learned advocates. The 1st respondent had the legal services of Mr. Omari Msemo, learned advocate, and the 2nd respondent had the legal services of Ms. Hadija Ngasongwa, learned advocate. The learned advocates were all ready for hearing.

Mr. Epaphras rose to argue the appeal and orally submitted that he prays that, their grounds of appeal, skeleton written arguments and list of authorities filed be adopted in the determination of this appeal in favour of the appellant. Mr. Epaphras added that, the appellant has exclusive rights to use the mark '**FOCUS**' which was registered on 16th July 2018. Mr. Epaphras wondered the decision of the Committee, in that, despite evidence of registration which was before the Committee, still the Committee erred in law to hold that the goods were not counterfeited against the available evidence that they were counterfeited.

In their respective skeleton written arguments, the learned counsel for the appellant raised several issues some of which were not covered in their memorandum of appeal, such as the appellant was not afforded right to be heard. This issue will not detain this Tribunal much as the same was not among the grounds of appeal and no leave was prayed to amend the memorandum of appeal.

However, in their skeleton written arguments, the learned advocates for the appellant argued jointly grounds number one to three, inclusive. The basis of their arguments in these three grounds was that, the Committee erred in law and facts for failure to consider the law and evidence tendered before it and made a decision not based on evidence and the law.

On the fourth ground of appeal, it was the brief submissions of the learned advocates for the appellant that, same was raised similarly on the basis of arguments in the first three grounds raised and argued.

On the totality of the above grounds and arguments, the learned advocates for the appellant prayed that this appeal be allowed with costs.

In reply, the 1st respondent repeated in his preamble the arguments he raised before Committee but which arguments were found by the Committee misplaced and misconceived on the procedure of how to handle disputes by the Chief Inspector. The learned advocate for the 1st respondent went on to argue three grounds argued by the

appellant jointly that, no proof was ever tendered by the appellant that, she is an exclusive registered owner of the mark '**FOCUS**' subject of this appeal and same cannot be introduced now through this appeal. Principally, the learned advocate for the 1st respondent repeated again the testimony of the parties in the Committee on how the 1st respondent came into possession of the counter books in question by purchase from Supplier Store Limited. In support of his argument, he cited the cases of **AZIZ ABDALLAH v. REPUBLIC [1991] TLR 71** and **MWAJUMA MBEGU v. KITWANA AMANI [2004] TLR 410** and a number of decisions which we have taken note of at this juncture.

In reply to the fourth ground of appeal, the learned advocate for the 1st respondent submitted that no evidence was tendered to challenge the evidence of the 1st respondent that, the disputed goods were purchased from Supplies Store Limited and it is uncalled for to raise such arguments now.

In the totality of the above reply, the learned advocate for the 1st respondent prayed that this appeal be dismissed with costs.

The 2nd respondent, Ms. Ngasongwa started by giving the background to this appeal and went on to tell the Tribunal that, Chief Inspector cannot conduct search and seizure without evidence as to the registration of the mark complained thereof. In this, the learned advocate was candid that, proof of registration of the mark '**FOCUS**' was submitted before the Chief Inspector and before the Committee

and referred the Tribunal to page 24 of the proceedings where she categorically stated that, the registration of the mark '**FOCUS**' was done on 27th December, 2018 and the documentary evidence is before the Committee. In this respect, the learned advocate for the 2nd respondent conceded that, it was wrong and an error for the Committee to hold that, the mark 'FOCUS' was not registered and the appellant had no exclusive rights over that mark, while the evidence on record was to the contrary.

The learned advocate for the 2nd respondent went on pointing out that, during hearing at all material time, the 1st respondent stated that they bought the disputed counter book from PP VENTURE from India but no evidence was submitted to that effect, hence, proving that the disputed counter books were counterfeited in all respects. The learned advocate for the 2nd respondent went on to argue and referred the Tribunal to page 30 of the proceedings where there is proof that, they were counterfeited goods as the mark of I.S.M Stationery was in the boxes seized.

On the basis of the above reasons, the learned advocate for the 2nd respondent invited this Tribunal to allow this appeal with no order as to costs to the 2nd respondent.

In rejoinder, the learned advocate for the appellant submitted that, the goods seized were counterfeited and the invoices submitted were of 2017, which when compared the goods are not the ones bought in 2017.

In conclusion, the learned advocates for the appellant prayed that, this appeal be allowed with costs.

The task of this Tribunal now is to determine the merits or otherwise of this appeal. We have dispassionately considered the entire evidence on record and the main arguments of the parties in their written skeleton arguments and oral arguments in this appeal. However, we wish to point out that before going into the merits of this appeal, it should be noted that, the hearing and procedure before the Committee is purely inquisitorial procedure and as such not bound by the formal procedure of hearing and admission of evidence we know in courts of law. See the **Tribunal Appeal No. 17 of 2017 between DISTEL GROUP LIMITED v. FAIR COMPETITION COMMISSION**. Therefore, with due respect, the arguments by both learned advocates for the appellant and 1st respondent that, hearing was faulted for not affording them an opportunity to be heard and tender evidence, are without any backup by the record of proceedings and baseless, as all parties were fully accorded the right to be heard. The learned counsel for the parties, are hereby advised when representing their clients before the Committee or Commission to be aware of the procedures pertaining to Rule 17 of the Fair Competition Commission Rules, 2018.

With the above remarks, and after considering all evidence on record, we are of increasingly opinion that, both grounds one to three as jointly argued by the learned advocates for appellant are merited in this appeal. We will explain. **One**, the registration of the mark

'Focus' is not for the first time to appear and the same was clearly stated on record by Ms. Hadija Ngasongwa and Mr. Rajiv Desai at pages 24 and 22 respectively of the proceedings. The registration certificate was tendered and the proceedings categorically at page 24 is clear and goes that:-

"Mwenyekiti vyeti vya usajili vimeambatanishwa kama vielelezo na vipo mbele yako."

The Chairman of the Committee did not doubt or question this clear statement from the 2nd respondent. Moreover, the learned advocate for the 1st respondent neither questioned nor doubted the presence of all documentary exhibits for registration by the appellant of the brand "FOCUS". In this, we say with strong conviction and opinion that, indeed the Committee erred in law and fact for holding that, the appellant is not a registered trade mark owner in Tanzania against the strong evidence on record to the contrary.

Two, upon holding that the appellant is a registered trade mark owner, it was incumbent for the 1st respondent to disapprove the authenticity of the goods in dispute before the Committee. The 1st respondent submissions before the Committee were contradictory of themselves. At first she said the same were bought from India from PP VENTURE LIMITED, but later the story changed that, the books were purchased from Supplies Stores Tanzania Ltd and produced invoices of July 2017 and in the course of cross examining Mr. Rajiv Desai at page 30 of the proceedings, Mr. Desai was able to show that

what was bought in 2017 is different from what was seized through seizure notices, and that, there were samples submitted to show the difference. The evidence of Mr. Desai was corroborated by the submission of Ms. Ngasongwa that, the seized counter books had a mark of I.S.M Stationery showing that, indeed are counterfeited goods different from those sold in 2017 which had no label of I.S.M Stationery.

The above holding in ground two suffices to dispose of ground three, that the holding of the Committee that, the goods seized were not counterfeited while in fact they were. Therefore, the holding of the Committee was wrong as well on this point. We set aside the decision of the Committee by holding that, the seized goods were counterfeited goods.

This Tribunal has not only ended there, but upon perusing the ruling of the Committee the same was given contrary to the evidence on record. The Committee cannot turn a blind eye to the registration of the trade mark 'FOCUS' which was before it and say a letter from PP VENTURE LIMITED is an evidence to negate the glaring evidence that, the appellant is an exclusive registered owner of the mark "FOCUS" in Tanzania since July 2018. While the Committee clearly spelled the law in its ruling, but utterly failed to apply the law against the evidence on record. This clear disregard of evidence on record triggered the Committee to slide into serious legal morass in deciding the other issues as argued in this appeal.

The argument of the learned advocate for the 1st respondent that, the certification of registration is being introduced now in this appeal is not supported by evidence as already held herein above.

On the totality of the above reasons, we deservingly hold that, this appeal is merited and we consequently declare the appellant as the lawful owner of the mark "FOCUS" in Tanzania. More so, we set aside the decision of the Committee and substitute it with the holding of this Tribunal as held above. In the event, we allow the appeal in its entirety with costs to be borne by the 1st respondent in this appeal and the Committee below.

It is so ordered.

Dated at Dar es Salaam this 6th day of August, 2020.



Hon. Stephen M. Magoiga - Chairman



Hon. Mustapher Siyani - Member



Hon. Butamo K. Philip - Member

Judgment delivered this 13th day of August, 2020 in the presence of Dimeshi Mauji & Charles Epapharas, Advocates for the Appellant, Mr. Omari Msemo Advocate for the 1st Respondent and Ms. Hadija Ngasongwa, Advocate for the 2nd Respondent.



Hon. Stephen M. Magoiga - Chairman

13/08/2020