

IN THE FAIR COMPETITION TRIBUNAL OF TANZANIA
AT DAR ES SALAAM

APPEAL NO. 2 OF 2009

THE GREAT WALL TRADING CO. LIMITED .. APPELLANT
VERSUS
CHIEF INSPECTOR OF MERCHANDISE MARKS
..... RESPONDENT

(APPEAL ARISING FROM THE DECISION OF THE CHIEF INSPECTOR
OF MERCHANDISE MARKS at the Fair Competition Commission)
DATED 24TH OF JUNE 2009)

JUDGEMENT

This is an appeal from a decision of the Chief Inspector of Merchandise Marks dated 24/06/2009 set out at the end of a record of a meeting described/referred to by the respondent in its letter of the same date, as “the summary of proceedings” held in the Chief Inspector’s office.

The Chief Inspector is a regulator appointed under S.2 of the Merchandise Marks Act No. 20 of 1963 as amended by S.4(a) of Act No.19 of 2007 charged under the Act with the duty to control and regulate the use of marks and trade descriptions in relation to merchandise.

The appellant THE GREAT WALL TRADING COMPANY LTD of P.O. Box 9481, Dar es Salaam is a limited liability company carrying on business in Tanzania with a place of business (warehouse) at Mikocheni Area, Dar es Salaam. The appellant is allegedly the registered proprietor of the "NUK" Trade Mark which was registered by the Registrar of Trade/Service Marks in Dar es Salaam on 30/04/2008 as is shown by a copy of the Certificate of Registration which is undisputed.

Briefly the undisputed historical background to this appeal is that on 5-7/05/2009 the Chief Inspector seized certain electrical goods including 3456 cartons of distribution boxes and 137 cartons of gear switches from the appellant's warehouse in Mikocheni which were suspected to be counterfeit goods. The respective Notices of Seizure of the goods dated 5th, 6th and 7th May 2009 were issued to and in the name of one Vince HU of P.O. Box 9481 Dar es Salaam. The appellant, the Great-Wall Trading Co. Ltd, as the owner of the seized goods (2nd claimant) and one HU ZANYU alias VINCE HU, (1st claimant), an employee of the appellant, had on 29/5/2009 under Regulations 31(4) and 34 of the Merchandise Marks Regulations G.N. 89/2008 filed/ submitted/put a claim for the restoration of the said electrical goods seized by the Chief Inspector. By a letter from the Fair Competition Commission (FCC) dated 8/6/2009 from the Director General of the FCC, Mr. HU ZANYU was summoned to appear before the Chief Inspector on 12/6/2009 at 9.00 am to answer charges of importing and selling goods in contravention of the Merchandise Marks Act 1963 as amended. The letter was signed by J.E. Mponela Advocate, for the Director General.

On 12/6/2009 the appellant had appeared through his advocate Mr. Dickson Mtogesewa while VINCE HU appeared in person in proceedings held in the Chief Inspector's Office which were, according to the record of the proceeding, presided over by "the Director of Compliance (Moderator)" one Mr. Gregory Ndanu of FCC. Present during this "proceeding" were Michael Shilla, the acting Chief Inspector and John Mponela, Head of the Anti-Counterfeit Department of FCC. At the outset the Director of Compliance who was also referred to as a "Moderator" made it clear that during the proceeding they intended to adopt a mediation approach and that what was being conducted was a mediation. The appellant was invited to address the meeting. The record of the proceeding reveals that what followed was nothing but a mediation or discussion for a settlement.

In his submission on behalf of the appellant Mr. Mtogesewa who was representing the appellant basically re-stated what had been stated in the claim application, that the appellant is the registered owner of the NUK trade mark in respect of certain electrical merchandise, that the goods that were seized by the Chief Inspector were not counterfeits, and that the appellant was the lawful owner of the goods; Mr. Mtogesewa called upon the Chief Inspector to release the goods to the owner.

The Head of the Anti-counterfeit Department of FCC in turn commented that they were not disputing that the appellant was the registered owner of the trade mark in the country and proceeded to interpret the relevant law dealing with counterfeit goods i.e the Merchandise Marks Act 1963. Mr. Mtogesewa in the course of the proceeding pointed out that the 1st claimant i.e VINCE HU is an

employee of the appellant and that the respective Notices of Seizure of the goods do not disclose the problem of the seized goods. He asserted that the goods are not counterfeit. In response the Head of the Anti-counterfeit Department stated that the goods are counterfeit because they contravene the Merchandise Marks Act, and further that the NUK brand is not manufactured by the company named as the manufacturer in the appellant's submission. The Acting Chief Inspector on his part pointed out that the goods must expressly indicate where they were made or manufactured and who the manufacturer is. Finally Mr. Mtogeseva learned counsel provided the Chief Inspector with the web address: www.uk-switch.com, indicating that this was the address of the manufacturer of the goods. The record of the meeting held on 12/6/09 reveals that thereafter the Chief Inspector gave the decision reproduced hereunder:-

"THE CHIEF INSPECTOR'S HOLDING:

After going through the submissions as submitted by the claimant and after revisiting the detailed and oral submissions by both parties (now reduced to writing) the Chief Inspector still has the opinion that the seized goods indeed contravene the provisions of the Merchandise Marks Act, 1963.

The Chief Inspector is of the view that the goods do not satisfy the law as to qualify their circulation into Tanzania market.

That is to say:

- (a) The goods have false/misleading trade description.
- (b) They do not indicate as to who is the manufacturer.

The claimant is at liberty to accept the Chief Inspector's decision or/to pursue his matter further.

Signed

CHIEF INSPECTOR/INSPECTOR OF THE MERCHANDISE MARKS ACT.

Dated this day 24th day of June, 2009".

The decision indicates that it was signed by the Chief Inspector/Inspector of the Merchandise Marks Act, as reproduced hereinabove.

The appellant is aggrieved with the decision of the respondent and complains, inter alia, that the respondent had failed to exercise jurisdiction conferred upon him, that he had improperly adopted a mediation approach and that the respondent had thereby denied the appellant the right to be heard.

In the Memorandum of Appeal lodged in this Tribunal on 3/7/2009 the appellant has raised the following grounds of appeal:

1. That Chief Inspector of the Fair Competition Commission, henceforth FCC, erred in law in failing to himself properly seize and exercise trial jurisdiction conferred upon him to preside over, hear and decide the appellant's claims;

2. The Chief Inspector of FCC erred in law in not properly trying the merits of the appellant's claims in a quasi judicial manner as required under the law;
3. The Chief Inspector of FCC erred in law and in fact in not making a proper and valid decision;
4. The Chief Inspector of FCC erred in law and in fact in proceeding to decide the claim in breach of the rules of natural justice in that;
 - 4.1 He decided the claim without affording the appellant a dequate and fair hearing
 - 4.2 His seizure of the subject merchandises was made without notifying the appellant, assigning any reasons thereof or pointing out their specific problems as required under the law thereby causing the appellant to prejudicially defend himself without first there being any adequate adverse allegations raised against him, and
 - 4.3 He proceeded to decide over matters and issues not raised or complained by him in his own notice of seizure, Exhibit GW 01 and GW 02 to the Claim nor defended by the appellant;
5. That the Chief Inspector of FCC erred in law and in fact in declining and/or failing to accord opportunity to the appellant to adduce his substantive pre-notified evidence

to the effect that the subject goods were trademarked and in fact duly labeled of their manufacturer as required under the law.

6. That the Chief Inspector of FCC purported decision is flawed in substance, law and procedures in so far as he proceeded without necessary public enquiries as required under the law;
7. That the Chief Inspector of FCC erred in law and in fact and contradicted himself having correctly conceded and admitted that the appellant was the lawful proprietor of the "NUK" trade mark in Tanzania over subject electrical merchandises and having NOT found them as being counterfeit/offending goods in proceeding to yet again hold the same as of misleading trade description and not indicating the manufacturer;
8. That the Chief Inspector of FCC erred in law in taking a commercially devastating and extreme act causing severe financial loss of seizing the appellant's merchandises in lieu of demanding disclosure of manufacturer as required of him under the law.
9. That the Chief Inspector of the FCC decision is erroneous in law for defeating his very core duty to promote fair competition of electrical and other goods in the Tanzanian market there being in evidence no any intellectual property rights of any third party or at all infringed or violated by the appellant;

10. That the Chief Inspector of FCC erred in law in interfering, not respecting and not giving effect to the appellant's exclusive rights to use in commerce his lawfully acquired Tanzanian "NUK" trade mark over the subject electrical merchandises as provided under the law, and
11. That the Chief Inspector's decision is in effect unfair, excessive and disproportionate to any mischief there being other fair and effective remedy, to wit for the appellant to verifiably remedy any industrial lapses/shortcomings, if any,

The respondent has resisted the appeal.

In the Reply to the Memorandum of Appeal filed by the respondent, the respondent has maintained that the Director General of the Fair Competition Commission having been appointed the Chief Inspector, did not err in law in failing to himself exercise the jurisdiction, that the appellant was given the opportunity to be heard before the Chief Inspector of Merchandise Marks Act and to adduce evidence in summary proceedings held in the Chief Inspector's office, that the fact that the seized goods were labelled does not mean that they were not counterfeit, that an inquiry is not required to be held by the respondent in the instant case, and that an inquiry is only required to be held where a person complains about the infringement of his intellectual property right.

At the hearing the appellant was represented by Mr. Mtogese, while the respondent was represented by Messrs Ndanu and Mponela learned counsels.

We deem it necessary to put on record the fact that the appellant had also on 24/09/2009 filed an application seeking an order for the release of the seized "NUK" Trade Marked Distribution Boxes and Gear switches pending the hearing and determination of the substantive appeal, which application was on 27/04/2010 by consent of the respective learned counsels consolidated with the main appeal under the provisions of rule 20 of the Fair Competition Tribunal (FCT) Rules 2006, and accordingly the affidavits filed for and against the application for restoration of the seized goods were adopted to form part of the record of this appeal.

During the hearing of this appeal on 27/04/2010, upon an oral application by Mr. Ndanu learned counsel for the respondent, a preliminary objection raised in the respondent's Reply to the Memorandum of Appeal on the competency of the appeal was marked abandoned. Thereafter on 28/04/2010 the preliminary objections raised by the appellant/applicant challenging the competence of the Reply to the Memorandum of Appeal and the Counter affidavit filed by the respondent were also marked abandoned.

In his submission in support of the Appeal Mr. Mtogese learned counsel for the appellant asserted that under regulation 34 of the Merchandise Marks Regulations G.N. No. 89 of 2008 the Chief Inspector is required to preside over matters relating to complaints/claims for restoration brought by the owner of goods

seized, that under S.2 C (1) and 2 C(2) of the Merchandise Marks Act No.20 of 1963 as amended by Act No.19/2007 the respondent is vested with the jurisdiction to determine the claim which was made by the appellant, that the proceeding having been improperly presided over by the “moderator” instead of the Chief Inspector was a nullity and that the purported mediation approach adopted was unlawful as it is not provided for under any law. It was further submitted, inter alia, that the respondent did not afford to the appellant the opportunity to adduce evidence or to present a defence and that the Chief Inspector had based his decision on mere allegations.

As regards ground 6 Mr. Mtogese added that the respondent was under regulation 38(1) of the Merchandise Marks Regulations required to hold a public inquiry upon receipt of the owner’s/appellant’s claim for restoration of the seized goods alleged to be counterfeit goods. He asserted that the decision was a nullity due to non-compliance with the requirement to hold a public inquiry.

In response Mr. Ndanu learned counsel for the respondent maintained that the decision by the Chief Inspector can not be faulted, that the appellant was given the opportunity to be heard, that before making the decision the Chief Inspector had orally demanded evidence as to who is the manufacturer of the goods to prove that the trade marks registered in favour of the appellant were genuine and comply with the provisions of S. 10(1) of the Merchandise Marks Act as amended by Act No.19 of 2007, and that the Chief Inspector had considered whether the goods have false or misleading trade descriptions as defined in S.2(1) and (2) of the Merchandise Marks Act. As regards the complaint about the Chief

Inspector not having presided over the hearing of the claim for restoration of the seized goods, Mr. Ndanu submitted that the Director General of the Fair Competition Commission who is the Chief Inspector by virtue of SS. 2 A(1), and 2 B of the Merchandise Marks Act and S.65 (1) of the Fair Competition Tribunal Act 2003 was present during the proceeding, and that the office of the Chief Inspector was properly constituted during the determination of the complaint from which this appeal arises as demonstrated in the minutes of the proceedings held in the Chief Inspector's office on 12 June, 2009.

Mr. Ndanu was firm that the procedure for hearing complaints provided in regulations 31 (1), (2) and (3), 34, 39 (2), 40, 41 and 42 was duly complied with.

Under Section 2 of the Merchandise Marks Act as amended by S. 4(a) of Act No.19 of 2007 "Chief Inspector" means a Chief Inspector of merchandise marks appointed by the Minister for the purposes of this Act and includes an inspector. Sections 2A, 2B, 2C, 2D and 182 of the Merchandise Marks Act as amended by S.4 of Act 19 of 2007 read;

2A.-(1) The Minister shall appoint a Chief Inspector and other inspectors necessary for the purposes of the execution of this Act.

(2) Appointment of inspectors shall be published in the Government Gazette.

2B.-(1) The Chief Inspector shall, for the purpose of execution of this Act, have powers to do all or any of the following-

- (a) Conduct investigation and cause investigation to be conducted on suspected person who breach the provisions of this Act;
- (b) Initiate proceedings before the Court in the manner stipulated under this Act;
- (c) Examine any person, either alone or in presence of another person as he thinks desirable with respect to matters under this Act; and
- (d) Demand from the supplier of goods information relating to particulars of the manufacturer of those goods suspected to violate the provisions of this Act.

(2) Where the supplier has not given information under paragraph (d) of subsection (1) within fourteen days, the supplier of such goods shall be presumed to be the manufacturer of such goods.

2C.-(1) Notwithstanding the provisions of this Act, the Chief Inspector may entertain complaints in respect of counterfeited goods by the owners who are injured by the counterfeits and may conduct summary trials under the procedures laid down in the regulations made by the Minister.

(2) Any person who is aggrieved by the final decision of the Chief Inspector may appeal to the Fair Competition Tribunal within fourteen days from the date of such decision.

- (3) For the purposes of this section “final decision” means a decision which is not an intermediate verdict pending the final ruling.

2D. The powers of the Chief Inspector may be delegated to such persons or public institutions as the Minister may direct on the advice of Chief Inspector.

S. 18A (2) (a) reads:-

- (2) Without prejudice to the generality of the provisions of subsection (1), the Minister may make regulations-

(a) Prescribing the procedure for summary proceedings conducted by the Chief Inspector on complaints referred to him on alleged counterfeited goods by the owner of the trade mark counterfeited.

Under the regulations the Chief Inspector has the power to, inter alia, investigate any breach of the provisions of the Act, and detain or seize any goods which he reasonably suspects to be counterfeit goods. Under regulation 5 the Chief Inspector may conduct or cause to be conducted a public enquiry in respect of any serious breach of the provisions of the Act or the Regulations and regulation 12 provides for summary proceedings before the Chief Inspector. Regulations 5, 6(1), 12, 30(1) and 31(1), (3), (4) read as follows:

5.-(1) The Chief Inspector may conduct or cause to be conducted a public enquiry in respect of any serious breach of the provisions of the Act or these Regulations.

6.-(1) The Chief Inspector may delegate in writing any of his functions to a public officer or public institution subject to his directions as he may think fit.

12.-(1) Any person who has reasonable grounds to suspect an importation or the exportation of counterfeit marks or pirated copies in violation of his intellectual property rights, or any offending goods may make an application in writing to the Chief Inspector which shall provide the following particulars-

- (a) the grounds for seeking the suspension or the release of the offending goods from Customs control;
- (b) the names of the suspected counterfeiters or infringers;
- (c) the possible destinations from or to which the offending goods are consigned;
- (d) the reliable information as to the offender's or residence or address, the place of storage of the goods, or location of the infringer's factory or business premises;
- (e) adequate facts evidencing a prima facie case of infringement; and

(f) a sufficiently detailed description of the offending goods to make them readily recognizable by the proper officer of Customs Department.

30.-(1) The Chief Inspector may; upon information received enter and search any premises reasonably suspected to contain offending goods and may, if necessary use force to obtain access to such premises.

31.-(1) Any goods found upon a search by the Inspector to be offending goods shall be liable to detention or seizure and shall be stored either in a Customs Warehouse in respect of goods in Customs areas, or in a government warehouse, or in any other case, in such private premises or godown or retail shops as the Chief Inspector may determine as a proper place facility for storage.

(3) A receipt shall be issued in respect of any goods detained or seized on Form I as set out in the First Schedule.

(4) The owner of the goods seized or detained may submit a claim for the release of the goods, or may request for compoundment if he admits the offence in writing.

As candidly pointed out by Mr. Mponela who was assisting Mr. Ndanu during the hearing of this appeal counterfeit law is a new area in our law. The Merchandise Marks Act 1963 only became operational from 15/04/2005 by G.N. No. 94 of 2005 and the

Merchandise Marks Regulations 2008 came into operation on 20/6/2008, G.N. No. 89/2008. By Notice published in the Daily News paper issue of 22/07/2008 the Minister for Industries appointed the Director General of the Fair Competition Commission to be “the inspector” to carry out the functions specified in the Act. It is not clear whether the appointment of the Chief Inspector was published in the Government Gazette as required under S.2A (2) of the Merchandise Marks Act.

We have carefully considered the respective arguments advanced by learned counsel in their oral submissions. The questions to be addressed are whether the proceeding held in the Chief Inspector’s office in respect of the seized goods was proper and in accordance with the law, whether the Chief Inspector had failed to exercise the jurisdiction vested upon him for hearing complaints, and whether the appellant was denied the opportunity to be heard.

On jurisdiction we will say without much ado that the Director General of the Fair Competition Commission having been appointed as the Chief Inspector has the powers of the Chief Inspector which must be exercised by him unless delegated to another person as directed by the Minister under S.2D of the Act. Accordingly during the hearing of complaints he is required to preside over the matter and it would be improper for him to delegate this function to any person unless it is done in accordance with S.2D of the Act and regulation 6(1) of the Regulations. Admittedly the functions of the Chief Inspector are many and it would be unrealistic to expect him not to get assistance from his subordinate officials in the Fair Competition Commission, in carrying out his functions such as investigations, inspections or seizure of goods. However when it

comes to making a decision such as determination of a complaint it is the Chief Inspector himself who is empowered to hear and decide unless he has delegated his powers under S.2 D of the Act and regulation 6(1). We accordingly agree entirely with the appellant that the respondent had erred in failing to preside over the appellant's complaint.

As regards the complaint that the appellant was not given the opportunity to be heard, as stated hereinbefore the "summary" of the proceedings held in the office of the Chief Inspector on 12/06/2009 (which is written in the format of minutes of a meeting) reveals that the proceeding was nothing but a mediation exercise or process which was chaired by Mr. Gregory Ndanu, Director of Compliance ("Moderator"), during which meeting the Acting Chief Inspector was present, among others. It seems clear from the summary of the proceedings that the decision of the Chief Inspector was made on the basis of this proceeding which was conducted like a mediation. The word 'Mediation' has been defined in Black's Law Dictionary, 8th Edition as – "A method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution". Clearly a mediation contemplates the presence of an independent third party who acts as a mediator. It was improper for the Chief Inspector to adopt this mediation method as there is no legal provision in the Act or regulations permitting such a procedure, nor was there any independent person or third party to act as a mediator.

Apart from the Ag. Chief Inspector the persons present at the meeting were employees of the respective parties, i.e Fair Competition Commission and the appellant/claimant. The mediation

was improperly conducted. Anyway clearly the mediation apart from being unlawful had failed. This being the case it was improper for the Chief Inspector to make a final decision based on the purported mediation. In any case even in a lawfully conducted mediation where the parties fail to agree, the dispute must be resolved by and before a court, Tribunal, or Arbitrator, as the case may be.

The Chief Inspector ought to have conducted a hearing and given the appellant the opportunity to be heard and bring evidence.

As stated hereinabove under regulation 5, the Chief Inspector has the power to conduct a public inquiry in respect of any serious breach of the provisions of the Act or the regulations. The regulations contemplate the existence of an independent Task Force established under regulation 8 to advise the Chief Inspector in carrying out his duties and functions. We are not told if the Task Force has been established.

The procedure to be followed by the Chief Inspector upon a claim/application being made for the restoration of seized goods is set out in Regulations, 31(4), 34, 35, 36, 38, 39, 40, 41 and 42 *inter alia*, which read as follows:

31.(4) The owner of the goods seized or detained may submit a claim for the release of the goods, or may request for compoundment if he admits the offence in writing.

34. The owner of goods detained or seized as suspected offending goods may, within one month of the notice of

detention or seizure put up a claim in writing for their restoration by the Chief Inspector.

(2) If no claim is made within the period stipulated under this Regulation, the goods shall be forfeited and shall be disposed of as the Chief Inspector may determine.

35.-(1) Upon an application being filed with the Chief Inspector concerning suspected counterfeit goods on payment of the prescribed fees, the Chief Inspector shall give notice of such reference to the owner with a request to such owner to make a submission in response to the application.

(2) Appropriate fees shall be paid of the application in the manner set out in the Second Schedule.

(3) The Minister may on the advice of the Chief Inspector vary the fees payable under this Regulation by notice published in the Gazette.

36.-(1) Every submission made to the Chief Inspector under these Regulations shall be in writing signed by the person making it or by his agent and shall contain such particulars relevant to the subject matter of the submission.

(2) The submission shall include the list of names and addresses of the witnesses who the applicant proposes to call in support of his claim and a written statement of the evidence which it is proposed to be given by each of the witness.

(3) The submission shall provide-

- (a) a detailed description of the class of goods identified by reference to the Official Import List issued by the authority of the Minister for Finance and the Tanzania Revenue Authority.
- (b) the broad grounds on which the submission relies;
- (c) the particular reasons for or against-
 - (i) a restriction on sale order;
 - (ii) a restriction on importation order
 - (iii) a seizure or disposal order; or
 - (iv) any other orders stated therein as the case may require.
- (d) the standard or alternative forms of proof of origin of goods suitable in relation to the goods to which the submission relates;
- (e) the manner in which an indication of origin, trade mark or trade description should be borne by the goods if not counterfeits to which the submission relates.
- (f) Where the submission relates to the making of a restriction on sale order in respect of goods,

whether such goods should bear an indication of origin, trade mark, or trade description at the time of exposure for sale wholesale;

- (g) Whether a restriction order if made is extended-
 - (i) to samples of such goods; and
 - (ii) to blends and mixtures consisting of or containing such goods.

38.-(1) On receipt of a submission and payment of the appropriate fees under Regulation 38, the Chief Inspector shall publish in the Gazette and any news paper or media as he may think appropriate, a preliminary notice of the reference of the application to the Chief Inspector stating the nature of the application and the intention to hold a public inquiry into the application pursuant to these Regulations.

(2) The preliminary notice shall state the reference of the question to the Chief Inspector, the subject-matter of the reference and the intention to hold an inquiry on the matter under the reference.

39.-(1) After the publication of the notice in terms of Regulation 39, any person who desires to be heard at the inquiry referred to in the notice and who claims to have a substantial interest in the subject-matter of the inquiry

may apply to the Chief Inspector for leave to make a submission stating the manner in which he claims to be so interested.

(2) On receipt of an application for leave under sub regulation (1), if it appears to the Chief Inspector that the person applying to be heard has a patent and substantial interest in the subject-matter of the inquiry, he shall invite such person to make a submission in relation to the subject matter of the inquiry in accordance with these Regulations.

40. At least fourteen clear days in advance, the Chief Inspector shall publish in the Gazette and in such other Kiswahili or English newspapers and any other media with wide circulation as he may choose, notice of the date, hour and place fixed for the commencement of the holding of the inquiry.

41. Except by special leave of the Chief Inspector, no witness may be called or give evidence in an inquiry unless a statement of the evidence which he proposes to give has been previously furnished to the Chief Inspector in accordance with the provisions of these Regulations.

42. Every person who for the purpose of an inquiry furnishes any document to the Chief Inspector in accordance with these Regulations may at any time during office hours inspect such documents furnished by

himself and any other document furnished to the Chief Inspector for the purpose of the inquiry.

Regulation 36(3) (c) in particular makes it clear that the procedure provided under the Regulations commencing from Regulation 35 is also applicable where a claim/application is made to the Chief Inspector against a seizure or disposal order.

This being the case, it is our considered view that as the appellant claims to be the owner of the alleged suspected counterfeit goods seized by the Chief Inspector, the aforesaid procedure laid down in the Regulations ought to have been followed by the Chief Inspector starting from the request to the owner for presentation of a submission (regulation 35) up to the holding of a public inquiry required under regulation 38(1). A decision is made by the Chief Inspector after complying with this procedure.

We will say without further ado that the circumstances of this case required the holding of a public inquiry under regulations 35, 36, 37, 38, 39, 40, 41 and 42 before a decision being made by the Chief Inspector on the appellant's claim/complaint regarding the seizure of the goods. Mr. Ndanu in his submission contended that the procedure provided under regulations 34, 39(2), 40, 41 and 42 were complied with. But this is not enough; Mr. Ndanu has excluded the other relevant regulations. Regulation 39(2) clearly contemplates the holding of an inquiry which can only be possible by compliance with regulations 35 to 42.

We fail to see how the Chief Inspector could have complied with the procedure for hearing complaints without first complying with

regulations 35, 36, 37, 38 and 39(1). The non-compliance with the procedure for hearing complaints against a seizure order provided under regulations 35 to 42 is a material omission and has occasioned grave injustice to the appellant, who was denied the opportunity to be heard in the manner provided in the regulations. Indeed since the proceeding proceeded in the form of a mediation the appellant was not heard at all.

We cannot, therefore, accede to the respondent's assertion that a public inquiry is not applicable to seized goods but only to a submission/complaint by the owner who suspects that his intellectual property rights are violated. Under S.2 C(1) of the Merchandise Marks Act as amended and Regulations 36 (1) and (3) it seems clear that submissions under the Regulations leading to an inquiry may be made for or against any orders made by the Chief Inspector, including:

- (i) a restriction on sale order,
- (ii) a restriction on importation order,
- (iii) a seizure or disposal order, or
- (iv) any other orders stated therein as the case may be.

Indeed under S.2C (1) of the Act and Regulations 12 to 14 it is clear that it is where a person suspects an importation of counterfeit marks or printed copies in violation of his intellectual property rights that summary proceedings may be conducted by the Chief Inspector.

In the premises, we find the decision of the Chief Inspector complained about was unlawful and a nullity due to non-compliance with the procedure for hearing complainants set out in Regulations

35 to 42 of the Merchandise Marks Regulations G.N. 89 of 2008 and also due to non-compliance with the rules of natural justice.

The complaint in ground 4.2 also has merit. The Notices of Seizure did not disclose the problems the goods had as required. However in our view this omission was curable by the appellant seeking clarification.

In the event the appeal is hereby allowed with costs and the decision of the Chief Inspector dated 24/06/2009 is hereby quashed.

We accordingly hereby order that this matter be remitted to the Chief Inspector for hearing de novo, and the Chief Inspector is hereby ordered to conduct fresh proceedings in accordance with due process and procedure as set out in the Merchandise Marks Act Regulations 89 of 2008.

Hon. R.H. Sheikh J., Chairman

Dr. Malima Bundara, Member

Prof J.M. Lusugga Kironde., Member

Dated this 30th day of September, 2010.