

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 20 OF 2009

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CISE DISPENSERS (U) LTD ::: APPELLANT
VERSUS

EXECUTIVE SECRETARY,
10 **NATIONAL DRUG AUTHORITY::: RESPONDENT**

CORAM: HON JUSTICE A.E.N MPAGI-BAHIGEINE, JA
HON JUSTICE C.K BYAMUGISHA, JA
HON JUSTICE S.B.K. KAVUMA, JA

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*(Appeal from the decision of High Court of Kampala (Justice Elizabeth Musoke)
dated the 22nd December 2008 in Misc. Application No. 355/2008)*

JUDGEMENT OF A.E.N MPAGI-BAHIGEINE, JA

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This is a first appeal, arising out of the judgement of the High Court, dated 22nd December 2008, dismissing Miscellaneous Application No. 0355/08, vide which the appellant was seeking orders of certiorari, mandamus, a permanent injunction and a number of declarations against the respondent.

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The background.

The appellant operated an Allied Professional Health Unit in Rubaga Division, Kampala District. On 25-07-08, officials from the respondent accompanied by some police officers entered the appellant's premises which they inspected, searched and
30 impounded some drugs found thereon. They listed them as appears in Annexure 'B' to the appellant's affidavit.

The respondent claimed that the premises were not licensed. The impounded drugs were taken to the CID Headquarters at Kibuli. The Manager of the appellant was

arrested and taken to Wandegeya Police Station. The appellant has, since the inspection, stopped its operation of the Health Unit.

Mr. Kituuma-Magala appeared for the Appellant while Ms. Ruth Sebatindira was for
5 the Respondent.

The appeal consists of three grounds:

1. **That the learned trial judge erred in law and in fact in holding that the National Drug Policy and Authority Act and the Allied Health Professionals Act complement each other.**
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2. **That the learned trial judge erred in fact in holding that some of the drugs found at the premises of the appellant were restricted drugs.**
3. **That the learned trial judge erred in law and in fact in holding that the impounded drugs be dealt with in accordance with the law without being
15 definite or specific in her ruling.**

Submissions on Ground No. 1.

Mr. Kituuma for the appellant argued that the **Allied Health Professionals Act (AHPA) Cap 268]** and **The National Drug Policy and Authority Act (Cap 206) (NDPAA)** do not complement each other though the learned judge erroneously held
20 otherwise.

The legislature expressly identified the scope of authority within the short title and notice. Learned counsel was of the view that when looking at the preambles of the two Acts, it is apparent that the import of **Cap 206** as against **Cap 268** is that the later
25 Act amended and or repealed and or varied the provisions of the former Act in relation to the functions of the Allied Health Professionals.

Citing **Lord Evershed's Interpretation of Statutes [11th Edition Sweet & Maxwell]** at pages 153 to 154, counsel submitted that it is a cardinal rule of interpretation that when a provision of a later Act is inconsistent with or repugnant to those of an earlier
30 Act, the two cannot stand together, the earlier one stands impliedly repealed. Thus, **Cap 268** repealed **Cap 206** by necessary implication.

This principle of statutory construction was discussed and applied in **Civil Appeal No. 12 of 1985, David Sejjaaka Nalima v Rebecca Musoke** where, however, the

court further explained that there cannot be any repeal where the two Acts canvass different objects.

He pointed out that when **Section 35 Cap 268** is read together with **Section 48 of**
5 **Cap 268**, it is only the Council under the (AHP) Act that is mandated to inspect and not the National Drug Authority. Thus **Section 35 of Cap 268** amended the earlier **Section 5 of Cap 206**, enumerating the functions of the National Drug Authority.

Consequently, regardless of the fact that the premises and the dispenser were not licensed, the National Drug Authority had no authority to enter, let alone, inspect the
10 appellant's premises. Furthermore, in light of **Section 21 of Cap 268** the dispenser is a holder of a Diploma by the name of Kakungulu Moses. He is also a holder of a license issued by the Council. The dispenser, therefore, had the authority to operate the dispensary. His activities are specifically regulated by the Allied Health Professionals Council under the Act.

15 The trial judge, therefore, erred in her finding that in order to operate a health unit under the Allied Health Professionals Act, the person had to be licensed under the National Drug Authority Act because both Acts complement each other.

For the respondent, Ms. Sebatindira submitted that the learned trial judge was right in
20 holding that the appellant was required to comply with the provisions of both Acts to the extent that is required.

The trial judge applied the purposive interpretation principle and found that the fulfilment of the object under the Allied Health Professionals Act does affect the requirements under the National Drug Policy and Authority Act.

25 The purpose of (AHP) Act, Cap 268, was to provide for the regulation, supervision and control of Allied Health Professionals, and to establish the council responsible for registering, licensing and disciplining these professionals whereas the National Drug Policy and Authority Act (Cap 206) was passed to deal with drug regulation and to provide for licensing and approval of premises, to implement the national drug policy
30 and to control the importation and sale of pharmaceuticals, control quality of drugs, and licensing the dispensers of restricted drugs. Section 29 (a) of Cap 268 clearly provides that the Allied Professionals may establish, engage in and manage private common health conditions such as dispensers to manage drug shops, compounding and preparation of mixtures as may be approved by the National Drug Authority.

Thus, other than conforming to the Allied Health Professionals Act, the appellant was obliged, prior to commencing and throughout the business, to adhere to the National Drug Authority and Policy Act. Counsel, therefore, prayed court to disallow this ground of appeal.

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Court’s findings on Ground 1.

Concerning the relationship between the National Authority and Drug Policy Act, and the Allied Health Professionals Act, the trial judge observed:

10 *“The relevant laws, that is to say, the National Drug Policy and Authority Act, and the Allied Health Professionals Act, as the Court understands them, complement each other. It therefore follows that subjection of a person to one of the Acts does not exclude subjection to the provision of the other”*

The short title to Cap 206, the National Drug Policy and Authority Act (NDPAA) – 3rd December 1993 states:

15 *“An Act to establish a national drug policy and a national drug authority to ensure the availability at all times of essential, efficacious and cost effective drugs to the entire population of Uganda, as a means of providing satisfactory health care and safeguarding the appropriate use of drugs”.*

20 Therefore, the purpose of this **Cap 206** was to establish the national drug policy authority charged with the authority of ensuring the availability of the essential drugs and to regulate the use of drugs in Uganda.

Section 5 thereof prescribes the functions of the drug authority which is to implement the national drug policy. The section specifically mentions pharmacies without
25 mentioning dispensers. The section refers to maintaining the quality of drugs.

On the other hand, the Allied Health Professionals Act Cap 268 provides for:

30 *“.....the regulation, supervision and control of the allied health professionals and to provide for the establishment of a council to register and license the allied health professionals and for other connected matters”.*

Hence, the purpose of this (AHP) Act is purely to regulate supervise and control the allied professionals.

Section 2 provides for the Allied Health Professionals council whose functions are laid down under **Section 4** and are limited to regulating the standards of the Allied Health Professionals, supervising their registration, approving their institutions and qualifications as well as other matters incidental thereto.

5 It is thus clear the functions of the council do not include the licensing of pharmacies, registration of drugs, promoting the national use of drugs, regulation and control of the manufacture production, importation, marketing and use of drugs, which functions are the preserve of the National Drug Authority.

10 **Section 29 (a)** of the AHPA specifically provides that dispensers who manage drug shops, compounding and preparation of mixtures have to be approved by the National Drug Authority.

Thus, much as the Allied Health Professionals Council may license a health professional to operate a drug shop in Uganda, the quality and regulation of the use of
15 the drugs has to be approved by the National Drug Authority. In that regard, it is correct to assert that the National Drug Policy and Authority Act and the Allied Health Professionals Act complement each other.

Concerning the argument by Mr. Kituuma-Magala that the AHPA Cap 268 amended,
20 varied or repealed the provisions of the National Drug Authority Act by necessary implication, although both Acts do provide for the inspection of premises, they however envisage totally distinct mischiefs.

Section 51 of Cap 206 provides for inspection of premises in order to ensure that there is no abuse of drugs in the premises and that the conditions for storing,
25 manufacturing, marketing, importing and exporting safe drugs have been met.

On the other hand, **Section 35** of the AHP Act (**Cap 268**) provides for inspection of the premises to ensure that they meet the requirements of an health unit as envisaged under the Act.

As pointed out above, the two Acts regulate totally two different mischiefs. It was
30 held in **SCCA No. 12 of 1985, David Sejjaaka Nalima v Rebecca Musoke** that the provisions of a later Act cannot impliedly amend, vary or repeal those of an earlier Act when they legislate upon totally two different things. The Court was considering the Succession Act and the Registration of Titles Act.

It is my view that the latter Act did not amend, vary or repeal the earlier one at all. The policy under the AHP Act is to further the health of the people by establishing an agency to govern the quality and access of medical persons to the Ugandan people. This is the same policy under the NDPA Act which is to provide cost effective drugs, and to provide satisfactory health care. The Acts are, therefore, not in conflict. Each Act serves to cover a separate facet of that policy. Thus the two Acts complement each other.

The National Drug Authority is mandated under Section 51 to investigate, enter and inspect the premises seize and take away any drug or records and other documents found on or in the premises. The respondent acted under its proper statutory mandate when it entered, inspected and seized the drugs found on the appellant's premises, where they were not supposed to be without a license.

I would dismiss ground No. 1.

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Submissions on Ground 2:

This ground is to the effect that the learned trial judge erred in law in holding that some of the drugs found at the premises were restricted drugs.

Mr. Kituuma-Magala submitted that **Sections 13, 14, 15, 16 & 17 of the NDPA Act** relied on by the learned judge to hold that the appellant and its manager were not licensed to store and dispense in the premises restricted drugs was erroneous, was in total lack of knowledge that **Cap 206** and **Cap 268** were not complementary.

This is so because a reading of **S.29 (a)** of the **AHP Act** together with the **Uganda Clinical Guidelines 2003** at page 17(1) shows the essential drug lists for Uganda at page 18(n). Page 18(k) gives the summaries of information about the levels of drugs found at page 13(1) to 13 (xviii) which can be found at various hospitals and health centres administered by enrolled nurses, clinical officers, and medical officers. As such, the appellant was not dispensing any restricted drugs.

For the respondent it was argued that Uganda Clinical Guidelines 2003 was not intended to classify drugs and did not purport to do so. The fore-word expressly states that the Guidelines were designed to provide updates, practical and useful information for lower level health facilities. The mandate to prepare a national list of essential drugs lies with the NDA under **Section 8** of the NDAP Act. The national list is not

meant to classify drugs but only lists those essential drugs considered to be the most appropriate for use in the public health system. It is **Section 12** that classifies the restricted drugs and the list is extensive on what amounts to restricted drugs are those specified in the first, second and third schedules to the Act i.e. Class A, B and C drugs. These restricted drugs were found on the premises of the appellant. Thus under **Sections 13, 14 and 15** of the NDPA Act it is only pharmacists, dentists, veterinary surgeons or licensed persons who are allowed to dispense or supply restricted drugs. The appellant did not fall under the provisions of the aforementioned sections. Learned counsel submitted that the learned judge was correct to decide that restricted drugs were found on the appellant's premises contrary to the NDPA Act.

Court's findings on Ground 2:

In arriving at the decision that classified drugs were found on the appellant's premises, the trial judge relied on the findings of an expert, Mr. Dan Kibuule, B. Pharm, M.Sc Pharmacology, Lecturer Makerere University, Faculty of Medicine. According to the expert report, the list of drugs found on the appellant's premises were as follows.

1. 122 products in Schedule 2 (Class B, Group 1: controlled drugs)
2. 47 products in Schedule 2: (Class B: II classified drugs)
3. 68 products in Schedule 3: (Class C: Group I: Licensed drugs) and other

Under **Section 12** of the NDPA Act the drugs specified in the 1st, 2nd and 3rd Schedules to the Act are classified or restricted drugs.

The provisions of **Section 13** of the NDPA Act are mandatory prohibiting anybody to deal in restricted or classified drugs except as provided under the Act.

The respondent was therefore entitled to seize the restricted drugs.

I would also disallow this ground 2.

Submissions on Ground No. 3

This is to the effect that the learned judge erred in law and in fact in ordering that the impounded drugs be dealt with in accordance with the law without being definite or specific in her ruling.

It was argued for the appellant that although the trial judge heavily relied on **S.60** of the NDPA Act which clearly stipulates how the situation ought to have been handled,

she did not invoke the provisions thereof. The appellant having expended huge sums of money on the purchase of the said drugs, the judge should have resolved the dispute by invoking **S.56** of the Allied Health Professionals Act.

5 For the respondent it was contended that **S.15 (2)** of the NDPA Act is explicit on how impounded drugs ought to be handled. Furthermore Criminal Proceedings were pending against the General Manager of the appellant, Moses Kakungulu vide **CRB 933 of 2008 Uganda v Moses Kakungulu at Buganda Road Chief Magistrate’s Court.**

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Court’s finding on Ground 3.

S.60 of the NDPA Act states:

“60 (1) A person contravening a provision of this Act commits an offence and, where no punishment is provided, is liable;

15 (a) *To cause the items in contravention to be impounded, forfeited, destroyed or disposed of in a manner prescribed by the minister.*

S.56 of the AHP directs that “a person who commits an offence under this Act is liable on conviction to a fine of not less than three hundred thousand shillings or to a term of imprisonment not exceeding three years or to both”

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I have to point out that this is not the applicable law as it does not provide any answer to the point in contention.

25 There are two clear ways of handling impounded goods. First upon impounding restricted drugs, the inspecting officer may tender reasonable payment in respect of the drugs; or secondly, the inspecting officer may decline to make payment when Criminal Proceedings have been commenced in respect of the drugs thereby giving rise to the destruction of the drugs. This is provided for under **S.51 (2)** of National Drug Policy and Authority Act:

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(2) Where a drug is taken away pursuant to this Section, reasonable payment thereof shall be tendered by the inspection officer, but

(a) no payment need be tendered in respect of a drug if the inspecting officer reasonably suspects that the drug is unfit for its purpose by reason of

deterioration, impurity, adulteration or other defect; but if the drug is later found on analysis not to be so unfit, reasonable payment shall be tendered by the inspection officer in respect of the drug which is not returned to its owner in good condition;

5 **(b)** *No payment shall be made in respect of a drug if the inspecting officer anticipates that proceedings for an offence under this Act will be brought in respect of the drugs; but if the proceedings are not commenced within six months, reasonable payment shall be tendered by the inspecting officer in respect of the drug which is not returned to its owner in good condition.*

10 In the instant case, paragraph 6 of the affidavit in support of the Notice of Motion indicates that the respondent actually impounded the drugs found in the appellant's premises on 28th July 2008. Although counsel for the respondent informed court that criminal proceedings were pending against the appellant's General Manager, Moses Kakungulu vide **CRB 933 of 2008, Uganda v Moses Kakungulu** at Buganda Road
15 Chief Magistrate's Court; it is not clear when the proceedings were commenced. That being the case the Police under the guidance of an expert should follow the above provisions if not already done.

I have gone a step further than the learned trial judge, to spell out the provisions of the disposal law. It is not normally necessary for the court to spell out the details of
20 enforcing sentence which the enforcement officers are presumed to know. In this case the judge would not know in which state the drugs might be since their seizure.

The learned judge thus did not err by not reproducing the provisions of the law. In total, I would dismiss this appeal with costs here and below. Since My Lords, C.K. Byamugisha and S.B.K. Kavuma, JJA both agree, the appeal stands dismissed as
25 above indicated.

Dated at Kampala this.....**08th**..... day of.....**October**.....2010.

A.E.N MPAGI-BAHIGEINE
JUSTICE OF APPEAL.

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JUDGMENT OF S.B.K.KAVUMA, JA

I have read, in draft the judgment prepared by The Hon Lady Justice A.E.N.Mpagi-Bahigeine, JA.

5 I agree with it and the orders made therein.

Dated at Kampala this ...08thday ofOctober....2010

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10 **S.B.K.Kavuma**
Justice of Appeal