IN THE FAIR COMPETITION TRIBUNAL OF TANZANIA

AT DAR ES SALAAM

BEFORE:

HON. R. H. SHEIKH, J/CHAIRMAN

MR. A.K. JUMA, MEMBER

DR. M.M.P. BUNDARA, MEMBER

TRIBUNAL APPEAL NO. 1 OF 2011

TANZANIA ELECTRIC SUPPLY
COMPANY LIMITED .....APPELLANT

VERSUS

CLEMENT BERNARD ALPHONCE .....1ST RESPONDENT

ENERGY AND WATER UTILITIES
REGULATORY AUTHORITY .....2ND RESPONDENT

30/11/2012

Coram: Hon. R.H. Sheikh, J/Chairman
Hon. Ali K. Juma, Member
Hon. Dr. M.M.P. Bundara, Member - Absent

Appellant:	Tanzania Electric Supply Co. Ltd
For the Appellant:	Mr. Rwazo, Advocate IMMMA Advocates
1st Respondent:	Clement Bernard Alphonce
For the 1st Respondent:	Present in person
2nd Respondent:	EWURA
For the 2nd Respondent:	Mr. Galeba, GRK Advocate
T/C:	Beda Kyanyari

JUDGEMENT

The 1st respondent/complainant herein complained to the 2nd respondent on 6th March, 2008 that the appellant herein had unlawfully disconnected power at his milling machine located at Kibaigwa in Dodoma since April, 2004. By letter dated 23/02/2008 addressed to the 2nd respondent (EWURA) the 1st respondent claimed an order for the reconnection of power at his milling machine, payment of compensation for loss of income at the rate of Tshs. 40,000/= per day (take home) totaling the sum of shillings Tshs. 55,960,000/= as of 23/02/2008, *inter alia*. The appellant when called upon by the 2nd respondent to report on how it had dealt with the matter stated that the 1st respondent was connected with electricity power supply line at his milling machine premises in March 2000 and that his initial monthly consumption

trend was 2,341 units for April, 2000, 2,341 units for May, 2000 and 2,683 for June 2000. However, the consumption trend changed to 13 units for February, 2001, 223 units for July 2001, 173 units for September, 2001 and 81 units for April, 2002. In view of the drastic drop in the complainant/1st respondent's consumption, the appellant was forced to conduct an investigation at the complainant's site which revealed that the electricity meter seals at the complainant's premises (milling machine) were broken. The investigation also revealed that the meter recording of power usage was very low in comparison with the recording registered in an ordinary milling machine of the same type and size. Following that discovery the appellant removed the complainant's meter and sent it to its workshop at Kurasini in Dar es Salaam for testing and *in lieu* thereof a new meter was installed. The appellant's laboratory test results revealed that the meter had been tampered with and as a result recorded 76.14% below standard while the allowable error was +/- 2% only.

After duly hearing the respective parties on the complaint lodged by the 1st respondent herein, in a decision dated 31/12/2010, the 2nd respondent made a finding that the appellant had illegally disconnected power from the 1st respondent's premises and further, ordered the appellant to

reconnect power in the 1st respondent's premises and to pay the 1st respondent the sum of Tshs. 28,668,914.33 as compensation for loss of profit resulting from of the unlawful disconnection of power. The 2nd respondent also ordered that the amount payable as compensation as aforesaid would be subject to payment of appropriate tax. The appellant was aggrieved with the decision of the 2nd respondent and has filed this appeal against the findings and the whole of the decision of the 2nd respondent.

In the amended Memorandum of Appeal lodged in this Tribunal on 09/03/2011 the appellant has raised the following five grounds:

1. That the Authority erred in law and in fact in holding that the appellant failed to prove that the meter was tampered with.
2. That the Authority erred in law and in fact in holding that the disconnection was illegal.
3. That the Authority erred in law and in fact in holding that the act of the appellant of testing the meter at her own meter testing workshop was contrary to the rules of natural justice.

4. That the Authority erred in law and in fact in holding that the respondent was entitled to compensation sum of Tshs. 28,668,914.33 or at all.
5. That the Authority erred in law and in fact in holding that the respondent was earning the claimed income of Tshs. 40,000 per day.

The respondents have resisted the appeal.

In the Reply to the amended Memorandum of Appeal filed by the 2nd respondent, the 2nd respondent has maintained that the decision complained about cannot be faulted, that in arriving at the decision the 2nd respondent had on evidence received satisfied itself that there was no evidence to prove the alleged meter tampering or that the meter seal was broken and therefore the disconnection was illegal and further that the meter test conducted in the appellant's workshop was contrary to the rules of natural justice and in particular to the provisions of sections 10 and 31(1) of the EWURA Act , Cap 414 R.E 2002 and that due to the illegal disconnection the 1st respondent is entitled to monetary compensation for the loss incurred as a result of the disconnection of power at the 1st respondent's milling machine.

At the hearing the appellant was represented by Mr. G. Nyika of IMMMA Advocates while the 1st respondent was represented by Mr. Mgare learned advocate and Mr. Kabakama of G.R.K. Advocates appeared for the 2nd respondent.

In his oral submissions in support of the appeal, Mr. Nyika learned counsel for the appellant opted to argue together the first, second and third grounds of appeal while the last two grounds were also argued together.

In arguing the first three grounds of appeal, learned counsel for the appellant submitted that the findings of the appellant that the meter inspection was not conducted in accordance with the law and that there was no evidence to prove that the seal of the meter was broken when the meter was taken to the 1st respondent's premises were erroneous, that the meter inspection report tendered in the proceedings before the 2nd respondent (exhibit C3) revealed that the seal of the meter had been broken and some of the wires in the meter were cut and as a result of which the meter was reading by less than 76.14% of the actual power consumed. Mr. Nyika further submitted that section 31(1) of the Electricity Act, Cap. 131 R.E 2002 does not require the licensee (the appellant) to ask the electricity inspector to test its meters

and that this section is only applicable when there is a dispute as to whether the meter is properly functioning and/or whether it is properly registering the power consumed. It is Mr. Nyika's argument that if the 1st respondent was dissatisfied with the outcome of the inspection then he ought to have referred the matter to the electricity inspector under section 31 of the Act.

The learned counsel for the appellant further submitted that failure by the appellant's witnesses to see the broken seal with their naked eyes should not have been taken by the 2nd respondent as conclusive proof that the appellant had failed to prove that the meter seal had been broken because **one,** broken seals and cut wires cannot be seen by the naked eyes and **two**, whether or not a meter seal had been broken is a matter subject to testing in a testing station as was properly done by the 1st respondent in the instant case and **three** the appellant is under section 22 of the Electricity Act empowered to test the accuracy of the working standards of meters in its station. It is Mr. Nyika's contention that the requirement by the 2nd respondent for eye witness evidence of the broken seal and its reliance on the mere inability of the appellant's witness to see with his eyes the broken seal or the lack of such evidence was unfairly subjective. He added that in carrying out the meter testing exercise, the

appellant is not required, under the law, to involve the consumer who is given the right to dispute the findings by referring his objection to the electricity inspector or any other authority with power to determine such dispute and that it was wrong for the 2nd respondent to find that the appellant had failed to prove that the meter had been tampered with and that therefore the disconnection was illegal. It is also Mr. Nyika's argument that the 2nd respondent was wrong to find that the act of the appellant of testing the meter at its workshop was against the rules of natural justice since in carrying out the meter testing exercise, the appellant was not acting as a judicial or quasi – judicial body and therefore the rules of natural justice did not apply.

With regard to the last two grounds of appeal learned counsel for the appellant argued that the awarded amount of Tshs. 28,668,914.33 as compensation for loss of profit was neither claimed nor proved by the 1st respondent and that the sum of Tshs. 40,000/= per day that was claimed by the 1st respondent for loss of income (take home each day) was not proved that the receipts from its customers at the milling machine cannot prove the profits and/or the daily take home of the 1st respondent and that the receipts aforesaid tendered by the 1st respondent can at best only

prove the amount collected for services rendered to customers at the milling machine. Mr. Nyika asserted that the 1st respondent ought to have produced as evidence audited accounts of his business which would have provided proof of his total income, operating costs and profit/loss of the business.

The learned counsel for the appellant further argued that the 2nd respondent without any evidence wrongly computed loss of income and thereafter proceeded to award special damages, which were not specifically claimed by the 1st respondent, contrary to the law and procedure which require that special damages be specifically claimed and proved. In support of his argument learned counsel for the appellant cited the cases of; (a) **Cooper Motors Corporation (T) Limited versus Arusha International Conference Centre [1991] TLR 165** and (b) **Zuberi Augustino versus Anicet Mugabe [1992] TLR 137**.

In response, Mr. Mgare learned counsel for the 1st respondent maintained that the decision of the 2nd respondent finding that the appellant had failed to prove that the meter was tampered with cannot be faulted, that it is on evidence that the appellant's witnesses who visited the 1st respondent's premises for purposes of inspecting the

meter did not see any broken seal but only found that the meter was not properly functioning and that it is only later, when the meter was taken to the appellant's workshop, that it was reported that the meter seal was broken. It is Mr. Mgare's argument that since the seal can be seen with the naked eye the appellant's witness ought to have seen that the seal was broken when he went to inspect the meter at the 1st respondent's premises. Learned counsel further argued that the report tendered by the appellant before the 2nd respondent on the findings of the meter testing (exhibit C3) that the seal was broken ought to have corroborated/matched with the evidence of the eye witness since a broken seal is a visible defect which does not require testing by an expert as opposed to invisible defects which require testing by specialized machines/equipment.

Mr. Mgare added that the inspection report (exhibit C3) cannot be relied upon because it was issued by the appellant's Kurasini workshop and not by an electrical inspector as provided in section 31(1) of the Electricity Act. While conceding that the appellant was under section 22 of the Electricity Act empowered to test the meter, Mr. Mgare submitted that after the meter inspection the appellant ought to have referred the findings as a dispute to the electrical inspector who is a neutral party empowered to

resolve disputes between licensees (appellant) and consumers under the Electricity Act, to determine whether or not there was tampering of the meter, and that in the instant case the appellant acted as both a complainant, prosecutor and a judge without involving the 1st respondent in the meter testing exercise or providing the 1st respondent with an opportunity to be heard contrary to the rules of natural justice. Mr. Mgare was emphatic that as the relevant procedures were not followed the disconnection was illegal as rightly held by the 2nd respondent.

With respect to the last two grounds of appeal, the learned counsel for the 1st respondent argued that the sum of Tshs. 28,668,914.33 and Tshs. 40,000.00 awarded to the 1st respondent was not only proved but also specifically claimed. He added that the receipts submitted by the 1st respondent evidenced the basis of the income earned per day as well as daily gross revenue amounting to Tshs. 40,000 which justified the 2nd respondents' findings that the 1st respondent was entitled to an estimated gross revenue of Tshs. 62,960,000 for the period from 9th September, 2006 to 31st December, 2010 adjusted to Tshs. 28,668,914.33 after taking into account various expenses such as electricity consumed and labour charges.

The learned counsel for the 1st respondent also argued that the amount claimed was Tshs. 55,920,000 as at February, 2008 while the amount awarded for the period from September, 2006 to December, 2010 was 62,960,000 which was in fact lower than what was claimed. He asserted that since the amount was claimed and proved by the production of various receipts the cases cited by the learned counsel for the appellant are irrelevant and distinguishable.

Mr. Kabakama learned counsel for the 2nd respondent in his submissions in reply made it abundantly clear that he was fully supportive of the submissions and arguments presented by learned counsel for the 1st respondent. In addition Mr. Kabakama submitted that while under section 22 of the Electricity Act, the appellant is required to provide the administrative machinery for testing and the day to day maintenance of the apparatus for the supply of power the section does not provide remedies where tampering and defects are discovered when testing a meter. He added that it is section 31 of Electricity Act Cap. 131, which provides the procedure to be followed when tampering is discovered. Learned counsel for the 2nd respondent asserted that after the inspection and discovering that there was tampering and upon non-compliance by the 1st respondent with the one month notice set out in exhibit C3 the appellant ought to

have acted in accordance with section 31 of the Electricity Act, that is, referred the matter as a dispute to the electrical inspector. It is Mr. Kabakama's contention that it was erroneous and improper for the appellant to impose the penalties imposed on the 1st respondent without first referring the matter to the electrical inspector.

In his rejoinder, learned counsel for the appellant reiterated that the computation of special damages made by the 2nd respondent was improper as it was not based on evidence adduced by the complainant/1st respondent or proved by the 1st respondent, and that there is no evidence on labour charges, electricity charges and depreciation. He added that the argument by learned counsel for the 1st respondent about visible and invisible defects is without substance since neither party put questions to the witness (appellant's employee) as to whether or not he saw that the seal was broken or whether the purpose of the visit to the 1st respondent's premises was to check whether the meter seal was broken or not and therefore it would not be proper to infer an answer to a question that was never put to the witness by either of the parties. While not disputing that it is the electrical inspector who is vested with the jurisdiction to resolve disputes between a licensee and a consumer arising from questions such as, whether or not the meter is

functioning properly or has been tampered with, Mr. Nyika was emphatic that any such dispute can only arise between a licensee (appellant) and a consumer after the testing of a particular meter, that it is upon the party who is dissatisfied with the test results to refer the dispute to the electrical inspector and that in the instant case it was for the 1st respondent to refer the matter to the electrical inspector under section 31 of the Act if he was aggrieved with the test result showing that the meter was tampered with.

Lastly, learned counsel for the appellant submited that the appellant did not impose penalties as claimed by the learned counsel for the 2nd respondent that the appellant only claimed the value of the actual electricity consumed plus charges of carrying out the inspection and thereby appellant neither contravened section 31 read together with section 10 of the Electricity Act, nor failed to prove that the meter had been tampered with as found by the 2nd respondent.

MUTAEKULWA MUTEGEKI Acting Director General and Director of Water and Sewerage, EWURA, (TW1) who was summoned by the Tribunal *suo motu* testified that there is in fact no appointed electrical inspector as required by the Electricity Act, that the 2nd respondent is currently preparing regulations which will provide the procedure for the

appointment of electrical inspectors and that in the meantime, in lieu thereof an electrical inspector for purposes of the Electricity Act may be appointed from amongst qualified persons in the market when and as the need arises, and that the appointment is being done and hoc pending the regulations/rules the preparation of which is under way.

We have carefully evaluated the evidence on record and the respective arguments advanced by the respondent learned counsel within the context of the relevant provisions of the applicable law which is basically the Electricity Act Cap. 131 as amended which has now been repealed by the new Electricity Act, 2008 which commenced on 28/06/2008. At this juncture it is appropriate to point out that learned counsel in arguing the appeal properly relied extensively upon the provisions of Cap.131 (the repealed Act) since it is not disputed that the disconnection of power in the 1st respondent's premises was made in April, 2004 while the complaint by the 1st respondent was lodged with EWURA in March, 2008 during which time the repealed Electricity Act Cap. 131 as amended was the law applicable. (see **Empire Theatres Ltd v. Tanzania Exhibitors Ltd [1970] E.A. 650** and section 32 of the Interpretation of Laws Act, CAP 1 R.E. 2002).

EWURA (the 2nd respondent), a regulatory authority, is a body corporate established under section 4 of the Energy and Water Utilities Regulatory Authority (EWURA) Act No. 11 of 2001, Cap. 414, R.E 2002 charged under section 6 of the Act with the duty, in carrying out its functions, to strive to enhance the welfare of Tanzania society by:

(a) Promoting effective competition and economic efficiency;

(b) Protecting the interests of consumers;

(c) Protecting the financial viability of efficient suppliers;

(d) Promoting the availability of regulated services to all consumers including law income, rural and disadvantaged consumers;

(e) Enhancing public knowledge, awareness and understanding of the regulated sectors including:

  (i) The rights and obligations of consumers and regulated suppliers;

  (ii) The ways in which complaint's and disputes may be initiated and resolved; and

  (iii) The duties, functions and activities of the Authority;

  (iv) Taking into account the need to protect and preserve the environment.

The functions of EWURA are set out in section 7(1) of the EWURA Act and under section 10(1) of the Electricity Act Cap. 131 EWURA (2nd respondent) was empowered to appoint electrical inspectors for the purposes of the Act.

Sections 10, 31(1)(2), 33 and 52 of the Electricity Act Cap. 131 R.E 2002 provide as follows:

> 10. (1) The Authority may, from time to time, appoint one or more fit and proper persons to be electrical inspectors for the purposes of this Act.
>
> (2) It shall be the duty of an electrical inspector-
>
> (c) to examine and test any meter intended for ascertaining the value of the supply, upon being required to do so either by the licensee or by a consumer and to settle any dispute which may arise between the licensee and the consumer concerning the accuracy of the meter;
>
> 10(4) Any electric inspector may at all reasonable times and upon informing the occupier of that intention enter any premises to which electricity is supplied for the purpose of inspecting and testing the electric supply lines, service-lines, meters, fittings, works and apparatus for the supply and use of electricity installed

in the premises and of ascertaining if the provisions of this Act or of the rules made under the Act, are being complied with.

31. (1) If any dispute arises between any consumer and the licensee as to whether any meter or other apparatus, by which the value of the supply is ascertained, whether belonging to the consumer or to the licensee, is or is not in proper order for correctly registering that value or as to whether that value has been correctly registered by any meter or other apparatus, that dispute shall be determined upon the application of either party by an electric inspector and the electrical inspector shall also order by which of the parties, the costs of and incidental to the proceedings, shall be paid and the decision of the electric inspector shall be final and binding on all parties the reading of the meter shall be conclusive evidence as to the value of the supply, in the absence of fraud.

Section 52 (1) (a) and (b) of the Electricity Act provides:

> 52 (1) A licensee or any person authorized by a licensee may, at any reasonable time and upon informing the occupier of such intention, enter any premises to which

electricity is or has been supplied by the licensee to him, for purpose of-

(a) inspecting or testing electric supply-line, meter, fitting, works and other apparatus for the supply of electricity, which belong to the licensee;

(b) ascertaining the amount of electricity supplied or the electrical quantity contained in the supply;

Taking into consideration the powers granted to the licensee under section 52 above, then the dispute should have occurred at the time when the licensee/appellant entered the 1st respondent's premises to inspect or test the meter at the point at which the appellant established that the meter was improperly recording power usage. Once the licensee/appellant entered the 1st respondents' premises and established/ascertained that the meter was not in proper order for correctly registering the value of the supply of electricity consumed then the appellant was obliged to inform the 1st respondent and if the 1st respondent disputed this finding the appellant ought to have referred the matter as a dispute and applied for determination of the dispute by the electrical inspector under section 31(1) of the Electricity

Act. Under the provisions of section 31(2) of the Act it was unlawful for the appellant to disconnect or remove the meter from the 1st respondent's premises and have it tested in its Kurasini workshop as the appellant did, until the dispute had been determined by the electrical inspector. Section 10(4) of the Electricity Act empowers the electrical inspector to enter any premises to which electricity is supplied for the purpose of inspecting and testing, among other things, meters installed in the premises. Accordingly while the appellant as a licensee has the right to enter and inspect meters, he is prohibited from removing any meter from the premises unless he does so upon the authorization or determination of a dispute by the electrical inspector. (see sections 31(2) and 52(1)(c) of the Electricity Act).

It is our opinion, therefore, that the appellant having entered the premises of the 1st respondent to inspect and test the meter and having established that the meter was not in order was obliged to apply to the electrical inspector under the provisions of section 31(1) and (2) of the Act for examination and testing of the meter outside the premises of the 1st respondent. The appellant failed to comply with the laid down procedure as laid down in the Electricity Act contrary to section 33 of the Electricity Act and as a result the acts of the appellant of removing the meter and

disconnecting electricity supply from the 1st respondent's premises were unlawful in our view. We also agree with Mr. Mgare that the appellant's act of testing the disputed meter at the Kurasini workshop without involving the 1st respondent was contrary to the rules of natural justice which require no one to be a judge of his own cause and every person to be given the opportunity to be heard. Indeed as testified by TW1 there is in fact no appointed electrical inspector as required by the Electricity Act and in the circumstances the appellant as a licensee was in a better position than 1st respondent to apply to the 2nd respondent to appoint one to determine the dispute. The 2nd respondent also cannot be spared criticism for its failure to appoint electrical inspectors as required under section 10(1) of the Act.

Failure to comply with the law on the part of the appellant has no doubt caused inconvenience and loss of income on the part of the 1st respondent which justifies the decision of the authority that the disconnection was illegal and especially since the report tendered by the appellant on the finding of the meter testing did not originate from an electrical inspector as required by the law. Moreover, in our opinion, there was no credible evidence that the meter was tampered with. As pointed out by learned counsel for the 1st

respondent the appellant's witness did not testify that he found the seal of the meter broken at the time the appellant's inspectors made the first inspection of the meter at the 1st respondent's premises on 07/05/2002. The appellant's witness merely said "…*tuligundua kuwa mita ilikuwa haisomi vizuri*". The allegation about the meter seal being broken only came up in the finding in the report by the appellant (exhibit C3) of the tests conducted at the appellant's Kurasini workshop.

For the above reasons we are satisfied that the first three grounds of appeal have no merit.

With respect to the last two grounds of appeal, we are of the view that while we agree with the 2nd respondent that the 1st respondent is entitled to compensation for loss of income during the period that the power was disconnected it is our view that the 2nd respondent had improperly made a computation of the compensation payable in the sum of Tshs. 28,668,914/33 for loss of profit as a result of the unlawful disconnection of power without any basis or evidence to support the claim on a balance of probabilities.
The 2nd respondent improperly granted compensation for loss of profit when what the 1st respondent had claimed was payment for loss of daily income and when in fact there was

no evidence such as audited accounts brought by the 1st respondent to prove loss of profit. We agree entirely with the appellant's counsel that the receipts tendered were not sufficient evidence to prove loss of profit on a balance of probabilities. However it cannot be disputed that the appellant's illegal act of disconnecting power affected his milling machine business and thereby made the 1st respondent suffer loss of income injury entitling him to compensation or reparation. On the evidence we are of the view that the appellant is entitled to pecuniary compensation for loss of income from the date of the disconnection of the power supply.

If the appellant had observed and complied with the provisions of the Act, the electricity would not have been disconnected. To redress the failure by the appellant to comply with the Electricity Act, the 2nd respondent ordered the appellant to compensate the 1st respondent for the loss of profit resulting from absence of electricity at the 1st respondents' milling station. This is, in our opinion, an order to recompense the 1st respondent for the direct, natural or probable consequences of the illegal disconnection of power.

However, as stated before the computation done by the 2nd respondent was not proper due to the fact that the 1st

respondent did not provide sufficient evidence to establish the profit and daily income that he lost. The 1st respondent merely submitted cash receipts which he himself issued.

In **Tribunal Appeal No. 1 of 2007 Juma Mpuya v. Celtel Tanzania Limited** this Tribunal stated that:

> "… damages are the pecuniary compensation obtainable by success in an action for a wrong, which is either a tort or a breach of contract, the compensation being in the form of a lump sum, which is awarded unconditionally. The object of an award of damages is to give the plaintiff or injured party compensation for the damage, loss or injury he has suffered so as to put him in the position he would have been in had the tort not been committed or had the contract been performed."

Taking into consideration that this Tribunal has found the appellant liable for the illegal disconnection we are satisfied that the appellants wrongful act entitles the 1st respondent to compensation in order to recompense the 1st respondent for the wrongful act of the appellant. Such compensation/damages need not be substantial in the absence of sufficient evidence. Taking into consideration the undeniable loss caused to the appellant due to the

appellant's illegal act of disconnecting power we are satisfied that a compensatory sum of Tshs. 20,000,000/= will meet the ends of justice. Accordingly the order for payment of Tshs. 28,668,914/33 being loss of profit awarded by the 2nd respondent is hereby quashed and instead we award the 1st respondent general damages for the injury suffered due to disconnection of power at his milling machine the sum of Tshs. 20,000,000/=. The appellant is ordered to pay Tshs. 20,000,000 (fifteen million only) to the 1st respondent. The appellant shall also pay a penalty of 4%/interest on the amount awarded herein from the date of judgment to the date of payment.

In the event grounds 1, 2 and 3
are hereby dismissed and grounds 4 and 5 succeed to the extent stated herein. We make no order as to costs.
It is so ordered.

Judgement is delivered this 30/11/2012 in the presence of the above.

Judge R. H. Sheikh – Chairman

MR. A.K. Juma – Member

DR. M.M.P. Bundara – Member - Absent