

**IN THE FAIR COMPETITION TRIBUNAL OF TANZANIA
AT DAR ES SALAAM
APPEAL NO. 3 OF 2008**



**TANZANIA INTERNATIONAL CONTAINER
TERMINAL SERVICES LIMITED (TICTS) ----- APPELLANT
VERSUS**

- 1. SURFACE & MARINE TRANSPORT
REGULATORY AUTHORITY (SUMATRA) ----- RESPONDENT**
- 2. SUMATRA CONSUMERS CONSULTATIVE
COUNCIL ----- INTERVENER**

**(APPEAL ARISING FROM THE DECISION OF SUMATRA
IN ORDER NO. SMTRA/06/2008
DATED 11TH JUNE, 2008)**

JUDGEMENT

This is an appeal from a decision of the Surface & Marine Transport Regulatory Authority (SUMATRA), Order No. SMTRA/06/2008.

SUMATRA is a body corporate established under section 4 of the SUMATRA Act No. 9 of 2001, charged under section 5 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 low 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 complaints and disputes may be initiated and resolved;*
 - (iii) *the duties, functions and activities of the Authority;*
- (f) *taking into account the need to protect and preserve the environment.*

The functions of SUMATRA are set out in section 6(1) of the SUMATRA Act which are as follows:-

- (a) *to perform, the functions conferred on the Authority by sector legislation;*
- (b) *subject to sector legislation –*
 - (i) *to issue renew and cancel licences;*
 - (ii) *to establish standards for regulated goods and regulated services;*
 - (iii) *to establish standards for the terms and conditions of supply of the regulated goods and sources;*

- (iv) *to regulate rates and charges;*
 - (v) *to make rules;*
- (c) *to monitor the performance of the regulated sectors, including, in relation to –*
 - (i) *levels of investment;*
 - (ii) *availability, quality and standards of services;*
 - (iii) *the cost of services;*
 - (iv) *the efficiency of production and distribution of services; and*
 - (v) *other matters relevant to the Authority;*
- (d) *to facilitate the resolution of complaints and disputes;*
- (e) *to take over and continue carrying out the functions formerly of the Tanzania Central Freight Bureau set out in section 4, 4A and 4B of the Tanzania Central Freight Bureau Act, 1981;*
- (f) *to disseminate information about matters relevant to the functions of the Authority;*
- (g) *to consult with other regulatory authorities or bodies or institutions discharging functions similar to those of the Authority in Tanzania or elsewhere;*
- (h) *to administer this Act;*
- (i) *to perform such other functions as may be conferred on the Authority by this Act or any other law.*

The appellant is the licensed operator of the Dar es Salaam Container Terminal and the Kurasini Inland Container Depot, and the major provider of cargo handling services at the Port of Dar es Salaam, under a ten year lease (which was further extended for fifteen years) with the Tanzania Ports Authority (TPA) from 10th September 2000.

The undisputed historical background to this Appeal may be briefly stated as follows:

On 18th April, 2008 the Tanzania Ports Authority (TPA) submitted to the respondent on its own behalf and on behalf of Tanzania International Container Terminal Services Limited (TICTS), the appellant an application for an upward revision of tariffs charged for storage and removal of containers at the Dar es Salaam Container Terminal. The proposed tariff increase was allegedly intended to alleviate the congestion problems at Dar es Salaam port and discourage shippers from turning the port into a storage area. This was meant to be one of the measures for containing the congestion that prevails at the port. After evaluating the application and holding a public inquiry, the respondent basically made a finding to the effect that the tariff increase proposal was unjustifiably high and uncompetitive. On 11th of June, 2008 the respondent issued Order No. SMTRA/06/2008 in which it gave extensive directives

for the increase of tariff scales which were effectively less than the requested scales.

In the Memorandum of Appeal lodged in this Tribunal on 25th of July, 2008 the appellant has raised the following three grounds:-

- (a) That the Review Committee of the Respondent erred in law and fact by failing to guide itself properly as required under Section 26(2) of the Surface and Marine Transport Regulatory Authority Act, 2001 thereby denying itself the opportunity to inform itself sufficiently of the circumstances justifying the application for raising tariffs.
- (b) That the Review Committee of the Respondent generally erred in making the Order by relying on facts not forming part of the submission by Tanzania Ports Authority (TPA) and disregarding TPA's submissions and for not having given the Appellant sufficient opportunity to respond to the issues raised by other stakeholders.
- (c) That the Review Committee of the Respondent erred in ordering that in lieu of waiving storage charges on cargoes not delivered to otherwise ready and willing consignees for reasons attributable by TPA or the Appellant such

consignees must be compensated in money terms at the rate(s) that they would otherwise be charged by TPA or the Appellant if they delayed to take delivery of their storage cargoes. The respondent has resisted the Appeal.

In its letter of application dated 18th April, 2008 TPA had requested the following tariff increases:

(a) Storage Rates:

(i) Domestic Traffic: Imports and Exports:

Current rates

- Day 1 – 7 free period
- Day 8 – 30 is US\$ 20/TEU/Day

Proposed rates

- Day 1 – 7 remain free period
- Day 8 – 15 US\$ 40/TEU/Day
- Day 16+ to be US\$ 50/TEU/Day

(ii) Transit Traffic: Imports:

Current rates

- Day 1 – 15 free period
- Day 16+ US\$ 20/TEU/Day

Proposed rates

- Day 1 – 25 free period
- Day 16+ US\$ 50/TEU/Day

(iii) Transit Traffic: Exports

Current rates

- Day 1 – 21 free period
- Day 22+ is US\$ 20/TEU/Day

Proposed rates

- Day 1 – 21 free period
- Day 22+ US\$ 50/TEU/Day

(b) Removal Charges

Removal charges currently are US\$ 36/TEU and US\$ 72/FEU and the proposal is to increase them to US\$ 150/TEU and US\$ 225/FEU.

(c) Other TPA Proposals include:

(i) Incentive scheme for quick clearance of containers at the port. TPA/TICTS offers to give a rebate of US\$15 for TEU and US\$25 for FEU on containers removed from the Port within 72 hours after vessel has completed discharge. Current rates are US\$10 per TEU and US\$20 per FEU.

(ii) Free storage for delays caused by TPA/TICTS

TPA and TICTS undertake not to charge storage on cargo whose documentation is complete but they have failed to deliver to customer/consignee due to operational problems on their part.

At the hearing of the Appeal the appellant was represented by Mr C. Rwechungura of Rex Attorneys while the respondent was represented by Mr H. Songoro. Mr O. Kikoyo, learned counsel, had appeared for the intervener, the SUMATRA Consumer Consultative Council.

The Order appealed from reads as follows:

"4. ORDER

In view of the foregoing and in an effort to assist faster clearance, the Board decides and directs as follows:

- 1) *Storage charges for up to 21 days – **status quo to be maintained.***
- 2) *Storage charges from day 22+ for local imports and exports and transit import and exports the present rates US\$ 20 per day **be doubled** to US\$40 instead of the requested increase of US\$50/TEU/day from day 16 for local and from day 22 for transit.*
- 3) *Removal charges be doubled from current rate of US\$ 36 TEU to 72/TEU and from US\$ 72/FEU to US\$ 144 instead of the proposed rates of US\$ 150/122/TEU/FEU.*
- 4) *Rebates for customers who are able to take delivery of their cargo within 72 hours **be enhanced** from*

US\$ 10/TEU to US\$ 20 and from US\$ 20 to US\$ 40/TEU instead of the proposed rates of 15/25 TEU/FEU.

- 5) *In lieu of **waiving storage charges** on cargoes not delivered to otherwise **ready and willing** consignees for reasons attributable to TPA/TICTS, such consignees **must be compensated in money terms at the rate or rates** that they would otherwise be charged by TPA/TICTS if they delayed to take delivery of their cargoes.*
- 6) *The increased tariff scales under paragraphs 2, 3 and 4 above, **shall be applicable for six months** from the date of implementation, after which the impact of the measures taken will be reviewed."*

As stated earlier, the appellant had appealed against the entire Order No. SMTRA/06/2008. However, at the hearing Mr Rwechungura, learned counsel abandoned the grounds of appeal in respect of all the items in the aforesaid Order, save those which relate to storage charges as set out in items 4 (1), (2) and (5) of the Order.

In his submission in support of the appeal, Mr Rwechungura, learned counsel asserted that the tariff review was meant to address the problem of congestion at the Dar es Salaam, the aim being the reduction of the dwell time of 21 days to 7 days, that the respondent's decision to maintain the status quo of 21

days only legitimized the deliberate delays by consignees in collecting the consignments in order to take advantage of low storage charges at the Port and that the respondent had misdirected itself in the application of the provisions of section 16 (1) and (2), which spell out the factors that guide SUMATRA when setting rates and charges. On the question of competitiveness, Mr. Rwechungura argued that the respondent had misdirected itself in assuming that only 15 per cent of the containers at the Port belong to customers who have completed all necessary procedures for taking delivery of their cargo. It was also contended that the respondent had relied on wrong figures in its analysis, had not used current port storage rates and removal charges but had relied on inapplicable Mombasa tariffs in considering comparative international benchmarks when reviewing the application for tariff increase, and that SUMATRA had, in its decision on items 4 (1) and (2) of the Order, not taken into account the provisions of section 16 (2)(d) or (e). As regards item 4 (5) of the Order, it is Mr Rwechungura's contention that the issue of compensation for delay in delivering cargo to "otherwise ready and willing consignees" was never part of the application by TPA, that this is a new issue for which the appellant was not given an opportunity to assess the financial implications of payment of compensation and in particular to say how damaging payment of compensation of this nature would be to the appellant. The

learned counsel was emphatic that item 4(5) on compensation was made without having due regard to section 16 (2)(d) and (g) of the Act and that it is discriminatory as it relates to TICTS/TPA only and not to other cargo handlers such as airlines.

In the Reply to the Memorandum of Appeal, it is stated that the Order appealed from was made in accordance with the powers, functions and duties conferred upon the respondent by the SUMATRA Act, in particular sections 5 and 16 (2) of the Act. It was further stated that in making the decision the respondent had relied on TPA's application/proposal for tariff increases, the reasons in support thereof and the findings of the stakeholders' meeting held on 09th May, 2008 by the respondent in accordance with section 18 of the SUMATRA Act, 2001.

Countering the submissions by Mr. Rwechungura, Mr. Songoro, learned counsel for the respondent maintained that the decision appealed from cannot be faulted, that the respondent had properly applied section 16 (2) of the Act in coming to its decision, that the application by TPA was not based on financial implications but was rather confined to reducing dwell time, and there was nothing in the application by TPA or the PowerPoint presentation to the stakeholders about financial implications necessitating the proposed tariff revision. Nor was

there any submission on the investor interest. Mr Songoro contended that dwell time is only one of the many factors/constraints contributing to the congestion and that there are other factors such as the inefficiency of the clearance process which account for the congestion. He asserted that reducing the dwell time to the 7 days proposed by TPA would not be in the interest of the general public. Learned counsel added that, in making the determination on TPA's application, the respondent had taken into account, in addition to the reasons given by TPA, the consumer and investor interests in accordance with section 16 (2) (e) of the SUMATRA Act. In addition, it was contended that the proposed storage rates were not competitive as compared to those of Mombasa and would make Dar es Salaam comparatively unattractive and uncompetitive, which would be contrary to section 16 (2) (b) of the SUMATRA Act.

As regards ground (b) of the Grounds of Appeal, Mr Songoro asserted that the respondent had relied on the submission made by the applicant and TPA in giving the decision, that a public inquiry was duly held and the respondent, who was physically represented during the stakeholders' meeting of 09th May, 2008 (by Mr. Cassian Ngamilo, the Terminal Manager responsible for Operations), though given sufficient opportunity to respond to the issues raised by the stakeholders, did not

make any submission either before or after the determination. Nevertheless SUMATRA had, in the course of deciding the application, addressed the appellant's concerns and even enhanced the upward revision of the storage charges with the objective of discouraging the port being used as storage area.

Regarding ground (c), Mr. Songoro asserted that the issue of compensation for undelivered cargo was not a new issue, that it arose from the letter of application for tariff revision by TPA dated 18th April, 2008, that the matter was deliberated at the stakeholders' meeting of 09th May, 2008 and that in evaluating the decision the respondent had taken into account consumer and investor interest.

It was further argued that if the appellant discharged its functions efficiently there would be no need for payment of compensation.

Mr Kikoyo, on behalf of the intervener, made it clear that he fully supported Mr Songoro's submission on the issue of consumer interest, dwell time as well as the penalty of compensation. He was emphatic that the order made by the respondent was proper and in the interest ^{of} competitiveness and efficiency, and that its aim was to make the appellant

responsible for any negligence on its part in the provision of its services.

We have carefully considered the arguments presented by the contending learned counsel. Section 16 (2) of the SUMATRA Act sets out the factors that the respondent is required to take into account when making any determination setting rates and charges. Section 16 (2) aforesaid reads as follows:

"16 (2) In making any determination setting rates and charges, including maximum rates and charges, or establishing the method for determining such rates and charges, the Authority shall have regard to –

- (a) the costs of making, producing and supplying the goods or services;*
- (b) the desire to promote competitive rates and attract the market;*
- (c) any relevant benchmarks including international benchmarks for prices, costs and return on assets in comparable industries;*
- (d) the financial implications of – the determination;*
- (e) the consumer and investor interest;*
- (f) the return on assets in the regulated sector;*
- (g) any other relevant sector legislation;*
- (h) any other factors the Authority considers relevant."*

It is not disputed that SUMATRA had followed due process in arriving at the decision and a public inquiry was duly held, as required under the provisions of section 18 (2) of the SUMATRA Act, and the appellant was adequately represented at the public inquiry. It is also evident from the report made by SUMATRA while evaluating the application, that there are a number of factors which account for the congestion at Dar es Salaam harbour other than the dwell time. Clearly, under section 16 (2) of the SUMATRA Act the respondent was entitled and **even required to have regard to other factors such as the desire to promote competitive rates and attract the market, and the consumer and investor interest.** As regards the contention by the appellant that SUMATRA had, in its determination of TPA's application for tariff revision, relied on figures which were different from the figures set out in the appellant's financial statements, upon additional evidence taken by this Tribunal under Rule 30(1) of the Fair Competition Tribunal Rules, 2006 this Tribunal is satisfied that indeed, there are differences in some of the figures shown in the SUMATRA Report and those stated in the appellant's Annual Reports for 2004, 2005, 2006 and 2007. For example, according to the respondent's report, the total containerized cargo traffic (TEUs) for the year 2004 was 227,114 at Dar es Salaam Port, while according to the appellant, the figure is 259,369 for the same

year. Similarly, according to the SUMATRA analysis, the number of containers handled at the Container Terminal in 2005 was 258,389 whereas according to TICTS the total was 293,919. In 2006 the respondent's figure for the total number of containers was 272,700 while according to the report relied on by the appellant the figure for the same year was 307,791 and in 2007 SUMATRA's report shows a figure of 333,980 while according to the appellant the total number of containers for the year was 343,498. However, we do not find the discrepancies in the number of containers handled at the Container Terminal to be a relevant input or factor in the determination of tariffs or an application for tariff review. For this reason, we are of the firm view that the discrepancies pointed out are not material and have not in any way affected the decision by the respondent or prejudiced the appellant.

The appellant has also produced additional evidence showing discrepancies between the Mombasa tariffs of 1995 evidently relied on by the respondent in its analysis of TPA's application and the current Kenya Ports Authority's tariffs for Mombasa Port. However, upon careful consideration of the additional evidence and for reasons stated hereinafter, we are satisfied that any error or omission by the respondent on account of reliance on disputed figures did not occasion injustice, in the light of the provisions of section 16 (2) of the SUMATRA Act.

As regards Item 4 (1) of the Order on storage charges, we are inclined to agree with the respondent that raising tariffs in itself is not the solution to the congestion problem at the Dar es Salaam Port. Clearly there are other factors which contribute to the aforesaid congestion other than the dwell time, such as the inefficiency of the clearance process and poor infrastructure. Increasing tariff itself will not solve the problem of congestion at the Port. Indeed, it may in fact lead to endless revisions of tariffs to the detriment of consumers, and thereby become a vicious circle. This Tribunal does not find the reason given for the tariff increase in the TPA letter of application very persuasive.

As regards Item No. 4 (2), we find that the discrepancies between the figures relied on in the respondent's evaluation of the application and those in the financial statements of the appellant have not occasioned any injustice to the appellant, since clearly the respondent has already granted a 100 per cent increase (from US\$ 20 per day to US\$ 40 per day instead of the proposed US\$ 50) on storage charges as set out in the aforesaid Order. Admittedly, it does not match the proposed storage rate, nor does it match the current Kenya Ports Authority's tariff rates for Mombasa Port. However, we are satisfied for the reasons given by the respondent, that

Item 4 (2) of the Order complained about cannot be faulted, in particular the need to consider investor/consumer interest and the desire to promote the competitiveness of the rates of Dar es Salaam Port in comparison to, e.g. Mombasa Port, and attract the market. Again, in our opinion, the respondent is not bound to increase the tariffs to the level set in the current Mombasa Port rates, especially if the objective is to make Dar es Salaam Port comparatively more competitive, in line with the provisions of section 16(2)(b) of the SUMATRA Act.

Coming to the issue of compensation stipulated in Item 4 (5) of the Order, we are satisfied that this is not a new issue; it was brought out in TPA's application where it is stated:

"TPA and TICTS undertake not to charge storage on cargo whose documentation is complete but we have failed to deliver to customers/consignee due to operational problems on our part."

It is therefore, our finding that the issue was tabled for deliberations at the stakeholders' meeting. The appellant cannot therefore be heard to say that they were not given the opportunity to be heard or to state how adversely the payment of compensation would affect them financially. In any case, as

pointed out by Mr. Songoro, loss if any on account of payment of compensation may undoubtedly be avoided if the appellant improves its services and minimizes delays in delivering to customers/consignees. Moreover, we cannot accede to the arguments that the compensation is discriminatory since clearly, according to Order 4 (5), consignees would be equally charged by TPA/TICTS if they delayed to take delivery of their cargoes. On the contrary, it would, in our opinion, be grossly discriminatory if the consignees were charged a penalty for late collection of their cargoes whereas the appellant, the service provider was not similarly obliged to compensate **ready and willing** consignees for late delivery for reasons attributable to TPA/TICTS.

In the premises, SUMATRA having followed the required procedure including conducting a public inquiry before reaching its decision, we are satisfied that the decision cannot be faulted. The appeal has no merit and is hereby dismissed with costs.

Having said that, we must also put on record the fact that in the course of the hearing, Mr Songoro had disclosed the fact that the Order complained about had as of the hearing date yet to come into operation, it being subject to approval by the TPA Board and the working out of an acceptable modality. Be as it

may, the fact is that it would be only just, fair and convenient for all concerned if the necessary parameters and standards were prescribed at the earliest, setting out the basis for holding the appellant liable for delay in delivering to consignees who have completed the documentation process and are **ready and willing** to take delivery.

The respondent is accordingly ordered to make rules to govern the entire process of charging/granting a penalty/compensation related to delays in delivery or taking delivery of cargoes at the Dar es Salaam Container Terminal at Dar es Salaam Port. In this connection, the respondent may find it useful to consider the practices obtaining in other African ports such as Mombasa, Beira and Durban.

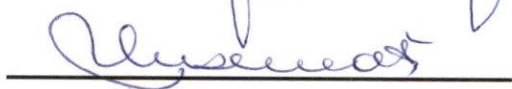
R.H. Sheikh J., Chairman



Felix Kibodya, Member



Prof J.M. Lusugga Kironde,



Member

Date: 03rd October, 2008

Judgment delivered in chambers in the presence of Mr. Sinare and Mrs. Slaa Advocates for the Appellant and Respondent respectively and in the absence of the Intervener, this 29th day of December, 2008.

A handwritten signature in black ink, appearing to be 'D. Sinare', written over a horizontal dashed line.

REGISTRAR