IN THE FAIR COMPETITION TRIBUNAL

AT DAR ES SALAAM

TRIBUNAL APPEAL NO. 1 OF 2012

TANZANIA ELECTRIC SUPPLY COMPANY LIMITED..... APPELLANT

VERSUS

NYARONYO MWITA KICHEERE .....1ST RESPONDENT

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

JUDGMENT

This appeal arises from the decision of the Energy and Water Utilities Regulatory Authority (EWURA), the 2nd respondent herein, made in Compliance Order No. 06-08-2011 dated 10th January 2012. The appellant, Tanzania Electric Supply Company Limited (also known by its acronym "TANESCO") has appealed against part of the decision of EWURA directing the appellant to pay Mr. Nyaronyo Mwita Kicheere ("the 1st respondent")

Tanzanian Shillings Nine hundred sixty thousand only (960,000/=) as special damages and Tanzanian Shillings three million only (3,000,000/=) as general damages.

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

On 17th September, 2008 the 1st respondent lodged a complaint at EWURA against TANESCO for disconnecting power on his premises located at Ubungo Msewe area, Dar es Salaam for non-payment of electricity bills amounting to Tanzanian Shilling five hundred fifty four thousand two hundred sevent one cents sixty two only (554,271.62). In his complaint the 1st respondent stated that he had rented out his house in 2004. The appellant disconnected power from his house due to non-payment of bills by his tenants in 2005. The 1st respondent discovered that his tenants were involved in illegal connection of power and thus reported the matter to the appellant and requested the appellant to remove the service line and install a LUKU meter. The appellant directed the 1st respondent to first clear the outstanding bill which he did in August 2006.

Installation of the LUKU meter was done in October 2008. The installation took place after the 2nd respondent had directed the appellant to resolve the 1st respondent's complaint in the letter

dated 23rd September, 2008. The 1st respondent complaint before EWURA based on the discovery of reconnection of power to the house done without installation of LUKU meter. Thus, the conventional post paid meter caused another accumulation of unpaid bills by tenants between August, 2006 and May, 2008, ultimately disconnection of power by the appellant in August 2008. As a result, the tenant residing in the premises terminated his lease agreement with the 1st respondent.

By a letter dated 30th October, 2008 addressed to EWURA, the appellant stated that even though the LUKU meter was installed, the 1st respondent was barred from buying electricity pending clearing of the outstanding debt and interest thereof in full.

The 1st respondent being dissatisfied with the appellant's demand complained again to EWURA on 9th November, 2008. In his subsequent complaint the 1st respondent stated that the appellant had breached their earlier agreement on the reconnection of electricity through the LUKU meter. The appellant breached the contract by reconnecting power through the old post paid meter resulting in unaccounted power usage by tenants.

In their decision, the 2nd respondent found, among other things, that the appellant had a duty of care which he had breached. On the other hand, the 1st respondent took all necessary steps to

rectify the occurrence of illegal power connection and accumulation of bills. Consequently, the 1st respondent was granted damages.

Being dissatisfied by the aforesaid decision, the appellant filed Memorandum and Record of Appeal on 1st February, 2012 raising the following grounds of appeal:

1. The Authority failed to evaluate the facts as adduced/tendered by the parties and therefore arrived at the wrong decision.
2. That the Authority erred in law and in fact in holding that the Appellant was negligent.
3. That the Authority erred in law and in fact in holding that the claimed loss of rental revenue was occasioned by delay in LUKU installation.
4. That the Authority erred in law and in fact in holding that the 1st Respondent was entitled to payment from the appellant, of unearned rental revenue.
5. That the Authority erred in law and in fact in holding that the 1st Respondent was entitled to payment from the appellant, of unearned rental revenue of Tanzanian Shillings Nine hundred sixty thousand only (960,000/=). That the Authority erred in law and in fact in holding that the 1st Respondent was entitled to damages.

6. That the Authority erred in law and in fact in holding that the Respondent was entitled to damages of Tanzanian Shillings Three million only (3,000,000.00).

On 28th February, 2014 the 1st respondent after being granted extension of time cross-appealed against the decision of EWURA raising following grounds of appeal:

1. The Authority did not consider the terrible difficulties the appellant went through following up the matter with the 1st Respondent and during hearing conducted by the 2nd Respondent.
2. The Authority did not take into consideration the fact that the cross-appellant is a media and legal consultant and advocate who missed up opportunities when following up the matter.
3. The Authority did not take into consideration the arrogance shown by the 1st respondent before and during hearing of the matter and offer punitive damages.

Submitting in support of the appeal, learned counsel for the appellant Mr. Kelvin Mlawi consolidated first and second grounds of appeal; third, fourth and fifth grounds of appeal; sixth and seventh grounds of appeal.

Citing the case of **Zuberi Augustino v. Anicet Mugabe**, [1992] TLR 137 Mr. Mlawi submitted that for a party to succeed in claiming negligence, all the three ingredients namely, a duty of care, breach of that duty, and damages must be established. Mr. Mlawi further submitted that although the 2nd respondent held that the third ingredient was satisfied, there was neither proof of termination of the lease agreement nor proof that the termination was due to power disconnection. Thus, there was no proof of damages caused by the delay in supplying the LUKU meter as found by the 2nd respondent. Since damages were not proved, the appellant cannot be liable in negligence, maintained Mr. Mlawi.

Submitting further, appellant's counsel stated that before awarding special damages the claimant must plead and prove the same as argued in the case of **Cooper Motors Corporation (T) Limited v. Arusha International Conference Centre** [1991] TLR 165 and **Stanbic Bank Tanzania Limited v. Abercrombie & Kent (T) Limited** Civil Appeal No. 21 of 2001 (unreported). He therefore contended that the 2nd respondent erred in awarding the 1st respondent Tanzanian Shillings Nine hundred sixty thousand only (960,000/=) as rental payments he would have received under the terminated lease agreement without evidence as to the termination of the lease and the amount of rent paid monthly.

Lastly, citing the case of **Dharamshi V. Karsan** [1974] E.A. 41 Mr. Mlawi submitted that the 2nd respondent erred in law in awarding general damages of Tanzanian Shillings three million only (3,000,000/=) in addition to quantifiable damages.

In opposition, learned counsel for the 1st respondent Mr. Flugence Massawe, submitted that the appellant does not dispute those first two ingredients of negligence. The third ingredient has clearly been proved by the 1st respondent. A lease agreement with one Mr. Yeyeye was admitted in evidence as exhibit C4 by the 2nd respondent. The lease was terminated on the ground of power disconnection.

As regards special and general damages Mr. Massawe submitted that the 1st respondent demonstrated how he had suffered from the delay in installation of the LUKU meter and disconnection of power. The 1st respondent followed the matter for more than two years exhausting his resources and in the course the 1st respondent experienced actual loss, mental anguish, disturbances, frustrations and mistreatment. In addition, Mr. Massawe stated that the contention by Mr. Mlawi that general damages cannot be awarded in addition to quantifiable damages is a misconception as both can be awarded.

On his part, learned counsel for the 2nd respondent Mr. Juvenalis Ngowi, adopted the submissions by Mr. Massawe and further added that exhibit C3 confirms that the appellant had breached the duty of care by failing to install the LUKU meter for a certain period in spite of the same being paid for. Mr. Ngowi submitted that the appellant did not dispute the fact of lease agreement termination before the 2nd respondent and therefore the appellant cannot raise it on appeal. He further submitted that proof of termination of the lease agreement can be seen at page 3 of the proceedings of 25th November, 2009 and that the 1st respondent testified that the tenant stayed for just a week and the appellant did neither object nor plead any evidence opposing the oral testimony of the 1st respondent.

In addition, Mr. Ngowi submitted that EWURA is empowered under section 35 of Energy and Water Utilities Regulatory Authority Act Cap. 414 R.E. 2002 (hereinafter referred to as "the EWURA Act"), among others, to order a party to pay money without specifying whether it is specific or general damages. Thus, it was his view that the 2nd respondent acted within its jurisdiction.

In his rejoinder submission, Mr. Mlawi reiterated that the appellant was not liable for negligence because the 1st respondent failed to prove damages. The 1st respondent admitted to have

leased the premises even when there was no power. There is no evidence to back up the 1st respondent argument that the lease agreement was terminated following power disconnection. There is also no evidence that the 1st respondent was subjected to mistreatment. Section 35 of EWURA, does not empower the 2nd respondent to grant general damages in addition to quantifiable damaged.

On cross-appeal, learned counsel for the appellant, Mr. Massawe abandoned second and third grounds of cross appeal, and submitted on the first ground. It was submitted that the 2nd respondent award was not sufficient considering the length of the matter and the difficulties the cross appellant encountered. The matter originated in 2006 and was settled by the 2nd respondent in 2012. That period was demanding in terms of time and resources. Thus, Mr. Massawe contended that the award of Tanzanian Shillings three million only (3,000,000/=) by the 2nd respondent is very little considering the economic reality over the years in pursuit of the matter. Mr. Massawe further contended that the 2nd respondent used its discretion to award damages but in doing so it was duty bound to act judiciously. He therefore invited this Tribunal to reverse the order of the 2nd respondent to a total amount of Tanzanian Shillings ten million only (10,000,000/=) being damages both specific and general.

Opposing the cross appeal, Mr. Mlawi submitted that the amount for damages awarded by the 2nd respondent took into consideration all factors contrary to Mr. Massawe claim. He further submitted that Mr. Kicheere has neither sufficiently proved the encountered difficulties nor demonstrated evidence on the economic reality at the time he pursued the matter.

On his side, Mr. Ngowi opposed the cross appeal on two main grounds. Firstly, the 2nd respondent considered all factors claimed not to have been considered and secondly damages were awarded in the exercise of discretionary powers by the 2nd respondent, thus cannot be faulted.

Mr. Massawe rejoined by reiterating that the 1st respondent took a long time to address the matter and time is of essence. Mr. Massawe emphasized that if the 2nd respondent fails to act judiciously while exercising its discretionary powers the Tribunal is duty bound to intervene.

We have carefully considered the submissions and arguments advanced by the contending learned counsels in this matter including the proceedings and the evidence submitted before the 2nd respondent. We find it important to point out that the appellant, TANESCO, is not disputing the fact that it acted negligently in failing to install the LUKU meter in the 1st

respondent's premises for the period of over two years. What is in dispute is the award by the 2nd respondent of Tshs. 960,000/= as special damages and Tanzanian Shillings three million only (3,000,000/=) as general damages to the 1st respondent. The grounds advanced by the appellant against the award of damages are that the 1st respondent did not sufficiently prove them and therefore should not be awarded at all or in the alternative only one should have been awarded.

It is trite law that special damages must be pleaded and proved specifically and strictly as decided by the Court of Appeal in **Stanbic Bank Tanzania Limited v. Abercrombie & Kent (T) Limited (*supra*)** which held:

> "The law is that special damages must be proved specifically and strictly."

The Court of Appeal in **Stanbic Bank case** adopted the definition of special damages given by Lord Macnaghten in **Balog v. Hutchson** [1950] A.C. 515 at page 525. Lord Macnaghten defined special damages as:

> "... such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their

character and, therefore, they must be claimed specially and proved strictly."

As regards general damages they are damages such as those which follow in the ordinary course out of the breach of contract or negligence. Hon. Mruma, J in **Japhet L. Lema (t/a Moshi View Hotel) vs. Tanzania Electric Supply Co. Ltd**, Commercial Case No. 3 of 2007 (unreported) quoted Lord Wright in **Monarch S.S. Co vs. Kalshanus Oliefabriker** [1949] AC 196 at page 221 which defines general damages as damages:

"... arising naturally (which means in the normal course of things)..."

Legally, general damages are not required to be specifically proved and they cannot be quantified. Thus, general damages may be awarded where the fact of a loss is shown without producing evidence as to its amount.

It cannot be disputed that in principle the 1st respondent is entitled to damages for the negligence on the part of the appellant. The appellant did not take prompt action and their negligence and carelessness is portrayed by their failure to install the LUKU meter for more than two years until after the 2nd respondent had directed the appellant to attend to the 1st

respondent's complaint by a letter dated 23rd September, 2008. A functioning system would have acted within a reasonable time. Where a party has established a right which has been infringed, thus causing him to suffer, then award of damages should be done upon consideration of the circumstances of the particular case. As stated by this Tribunal in **Juma Mpuya v. Celtel Tanzania Limited**, Appeal No 1/2007:

> "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 position he would have been in, had the tort not been committed or had the contract been performed."

With regards to the award of Tanzanian Shillings nine hundred sixty thousand only (960,000/=), the amount of rent that the 1st respondent would have otherwise earned out of the tenancy, the 1st respondent was required to plead and prove the same. Looking through the record of appeal specifically the EWURA complaint form dated 19th September, 2008, the two letters from the 1st respondent to the 2nd respondent dated 17th September,

2008 and 9th November, 2008 and the proceedings, is there any indication of claim for special damages and proof of the same?

The 1st respondent in his letter of 9th November, 2008 stated that he was prepared to buy a generator for his tenant. Part of the letter reads as follow;

> "Mwisho namtahadharisha Meneja wa Tanesco wa Magomeni kwamba **nimejiandaa kununua jenereta ili itumiwe na mpangaji wangu** hadi hapo mgogoro huu utakapoisha iwe mahakamani, iwe ewura au huko kwa fair competition commission na hata kwa fair competition tribunal au popote pengine haki itakapopatikana." (emphasis added)

Moreover, 1st respondent stated during hearing that the reason for the termination of the lease agreement is the single point of purchase which caused a lot of inconvenience to his tenant. In the proceedings dated 25th November, 2009 on page 3 the 1st respondent stated that:

> "After I brought this matter to EWURA, the house was connected with the LUKU meter, and that

power could only be supplied from Magomeni. **This practice of getting authority to purchase power from only one person (Region Manager) is unmanageable and it has forced my tenant to vacate."** (emphasis added)

In the proceedings dated 25th November, 2009 on page 4 the 1st respondent, for the first time, raised his claim for the payment of Tanzanian Shillings one hundred twenty thousand only (120,000/=) per month being income lost after termination of the tenancy agreement. The 1st respondent provided a termination letter but the same was not admitted as exhibit on the objection by the appellant that it had no contract with the tenant.

When being cross – examined by the appellant on the timing of raising the claim for special damages, the 1st respondent stated:

> "...the reason for not including it is that at that time the tenant was still there."

It is obvious that the 1st respondent did not buy the generator as he stated in his letter. The claim for special damages was raised at the hearing stage. The tenancy termination letter although produced was not admitted as evidence therefore not part of the record of appeal. The tenancy termination letter is essential to

this appeal. In the absence of proof of termination of the tenancy, we are inclined to hold as we hereby do that the evidence before the 2nd respondent did not justify the award of Tanzanian Shillings nine hundred sixty thousand only (960,000/=) being the amount of rent that the 1st respondent would have otherwise earned out of the tenancy.

Taking into consideration the trouble caused to the 1st respondent as demonstrated in the letters addressed to EWURA we are satisfied that a compensatory sum of Tanzanian Shillings three million only (3,000,000/=) as general damages meet the ends of justice.

Thus, the appeal is partly allowed to the extent hereafter explained. The 2nd respondent's decision with regard to the payment of Tanzanian Shillings nine hundred sixty thousand only (960,000/=) as the amount of rent that the 1st respondent would have otherwise earned out of the tenancy with Mr. Yeyeye is set aside.

With regard to the cross-appeal, we hold that the 2nd respondent considered all factors that the cross-appellant claimed not to have been considered. At page 11 of the decision appealed against it is stated:

> "We are also certain that the Complainant has taken time and resources to follow up on this matter with the Respondent. We understand the torment and frustration the Complainant underwent in following up this matter with the Respondent for more than two years. We would therefore, and we hereby do, award the Complainant Tanzanian Shillings three million (3,000,000/=) as general damages."

Clearly, the 2nd respondent gave due consideration to the frustration and torment Mr. Kicheere went through. Considering time which the cross appellant had to follow up the matter with the 1st respondent in the cross-appeal, the amount of general damages of Tanzanian Shillings Three million (3,000,000/=) is not inordinately low but rather fair. The cross-appeal lacks merit. It is dismissed.

Bearing the circumstances of this case, each party to bear its own costs.

It is so ordered.

Judge Z.G. Muruke – Chairman

Dr. M.M.P. Bundara – Member

Mr. Gregory Ndanu – Member

20/04/2015

Judgment delivered this 20th day of April, 2015 in the presence of Mr. F. Massawe 1st respondent, Juvenalis Ngowi for the 2nd respondent and in the absence of the appellant duly notified and Mr. Beda Kyanyari, Tribunal Clerk.

Judge Z.G. Muruke – Chairman

Dr. M.M.P. Bundara – Member

Mr. Gregory Ndanu – Member

20/04/2015