IN THE FAIR COMPETITION TRIBUNAL
AT DAR ES SALAAM

IN THE MATTER OF AN APPEAL NO. 5 OF 2018

BETWEEN

NDOLELA HYDRO LIMITED.....APPELLANT

Versus

ENERGY AND WATER UTILITIES REGULATORY AUTHORITY (EWURA).....RESPONDENT

JUDGEMNT

This appeal arises from the decision of the respondent that denied the appellant's application for a provisional electricity generation licence on the Masigira Hydro Power site.

The facts of the case are such that on 9th July, 2013 Rift Valley Energy (now known as "Ndolela Hydro Limited) (hereinafter referred to as "the Appellant") presented a feasibility study for the Masigara/Ndolela site to the Ministry of Energy and Minerals (hereinafter referred to as "the Ministry") and other stakeholders,

and were advised on the 10th July, 2013 by the Ministry to apply for the necessary Generation and Water Use permits. On the 17th July, 2013 the Appellant submitted an application to the respondent for a provisional generation licence. On 22nd July, 2013 the respondent received similar application for the same site from Mkonge Energy Systems (now known as Tanzania Masigira Power Ltd (TMPL)); not a party to the present appeal.

Having received the two applications, the respondent reviewed both applications and discovered that the two companies intend to develop the project on the same site. The respondent therefore halted the licensing process pending resolution of the land issue. On 15th December, 2015 the respondent issued its decision wherein it stated the following:

> "EWURA has recently received evidence that, Ndolela African Plantation Limited (NAPL) has been acquired by Silverlands Luxembourg (Silverlands). NAPL under the new owners has committed part of its land for the development of the project to whoever is approved as the developer by the relevant authorities. EWURA has also received a Government decision through the Ministry of Energy and Minerals recognizing Tanzania Masigira Power Limited as the developer of the Masigira Hydro Power Project. Note that one of the criteria for issuance of a licence is that the applicant has to show support of the initiative from the Ministry of Energy and

Minerals. The EWURA Board of Directors at its 103rd Ordinary meeting held on 7th December, 2015 denied your application for a provisional electricity generation licence due to the Government decision to recognize TMPL as the developer of the Masigira Hydro Power Site through a letter that is attached for your easy of reference."

Aggrieved with the above decision, the Appellant filed its appeal to this Tribunal with six grounds of appeal, namely:

1. That in granting the provisional generating licence to Mkonge Energy Systems Company Limited also known as Tanzania Masigira Power Limited, EWURA erred in law and fact, failing to act independently by allowing its decision to be influenced by the Government's decision through the Ministry of Energy and Minerals to recognise Tanzania Masigira Power Limited as the developer of the applied for Masigira Hydro Power Site;

2. That, EWURA erred in law and fact by allowing a decision to grant or not the provisional electricity generation licence to be made by the Ministry of Energy and Minerals;

3. That in granting the provisional electricity generation licence to Tanzania Masigira Power Limited also known as Mkonge Systems Company Limited, EWURA erred in law

and fact by considering grounds and matters beyond that is what is provided under Rule 10 Electricity Generation Rules GN 321 of 2012;

4. That in grating the provisional generating licence to to Tanzania Masigira Power Limited also known as Mkonge Systems Company Limited and rejecting the Appellant's application, EWURA erred in law and fact by engaging into an extra-legal procedure of considering applications for provisional generating licences. In particular EWURA erred in law and fact in engaging in a process applicable to competitive tenders while there was no tender invited for grant of the licence provisional generating licence;

5. That EWURA erred in law and fact by entertaining an application for provisional electricity generation licence submitted by to Tanzania Masigira Power Limited on July 22, 2013 and disregarded an earlier application for the same provisional electricity generation licence submitted by Ndolela Hydro Limited on July 17, 2013 on the same hydro site, Masigira Hydro Power Site; and

6. That in preferring the later application for provisional generating licence made by Mkonge in place of that made by the Appellant EWURA erred in law and fact by failing to publish their decision in an English newspaper.

With the above grounds, the Appellant ask for the Tribunal for the following orders:

a) An order setting aside the decision of EWURA refusing to grant the provisional electricity licence to the Appellant;

b) An order setting aside the decision of the EWURA granting the provisional electricity generation licence to Tanzania Masigira Power Limited;

c) An order directing EWURA to reassess both applications based on electricity generation rues and other legal provisions and regulations regulating the tender procedures;

d) Costs;

e) Any other orders which this Tribunal may deem necessary.

Having been served with the Memorandum of Appeal, the respondent filed its reply to the memorandum of appeal denying all the allegations and further stated that the application by Tanzania Masigira Power Limited (TMPL) was assessed and decided on the strength of Rule 10 of the Electricity (Generation) Rules GN No. 321 of 2012 having met the requirements under Rule 8(1) and (2) of the Electricity (Generation) Rules GN 321 of 2012 and other relevant laws and it was a mandatory requisite

for the developer to submit to the respondent, among others, a letter of support from the then Ministry of Energy and Minerals of which both initially submitted but none was issued with a licence pending resolution of the land issue.

At the hearing of the appeal, the learned advocate Samah Salah appeared for the Appellant while the learned advocate John Mhangate appeared to represent the respondent.

Pursuant to Rule 28 of the Fair Competition Tribunal Rules, 219 of 2012 the Appellant filed its skeleton arguments of which the learned advocate Salah adopted it during the oral hearing. The learned advocate further expounded the skeleton arguments by stating that the six grounds of appeal revolve around four main issues. The first issue is whether in making its decision of 15th December, 2015 acted independently. The counsel argued that the respondent did not act independently because in its decision the respondent was influenced by the sector Ministry. She contended that the Ministry's decision on who should develop the project is not one of the factors that the respondent was required to consider in terms of Rule 7 (2) of the Electricity (Generation Services) Rules 2012. She argued that the respondent authority to decide on among other matters electricity generation licences application is contained under Rule 10 (2) of the Electricity (Generation Services) Rules 2012 and in terms of Section 7 (1) (a) and (b) (i) of the EWURA Act, the respondent is vested with

power to decide on such matters without recourse to the sector Ministry. The respondent is an independent agency as such it was an error for the respondent to allow abdicate its powers and authority granted by the law to be influenced by the Ministry.

The second issue is whether the respondent considered grounds and matters beyond that is provided under Rule 10 of the Electricity (Generation Services) Rules 2012 and engaged in extra legal procedure of considering applications for provisional generation licences. Counsel Samah contended that the law under Rule 10 of the Electricity (Generation Services) Rules 2012 provides for three grounds or factors that the respondent is required to consider in deciding on application of provisional licences. The counsel contended that the preference by the Ministry as to who should be allowed to develop a particular power project is not one of the grounds. She said there is no request or application which has to be made to the Ministry for one to develop a particular power project. She argued that there is even no procedure for the application to be treated as a tender process or otherwise which would bring the Ministry into the picture for such preference. It was the view of the counsel that the respondent acted ultra vires by considering matters which are beyond or outside the ambit of the law. She therefore prayed for the decision of the respondent to be quashed. In support of her contention, she referred this Court to the cases of **Jama Yusuph**

V Minister for Home Affairs [1990] T.L.R 80 in which the court cited with approval the decision of Lord Denning in the case of **Padfield Vs Minister of Agriculture, Fisheries and Food** [1968] AC 997 where it was stated: *"It shows that when a minister is given discretion and exercise discretion and exercise it for reasons which are bad in law the courts can interfere so as to get him on the right road."*

The third issue is whether the respondent failed to publish its decision in an English newspaper. It was contended that Rule 9 of the Electricity (Generation Services) Rules 2012 requires the respondent to publish a notice of the application in at least two circulating newspaper, one in Swahili and the other being in English. Counsel Samah pointed out that there is no publication which was made in an English newspaper. She said the purpose of publication is to invite the public to submit their remarks, comments or objection against the applications on the provisional licence. She argued that failure to publish led to denial of a right to be heard. She said in the case of **O'Reily Vs Macmann** [1983] AC 227 it was underlined that natural justice is minimum standards of fair decision making which may not be necessary imposed by law but implied to in determination of individual rights. Further in the case of **Mbeya-Rukwa Auto Parts & Transport Limited Vs Jestina George Mwakyoma**, Civil Appeal No. 45 of 2002 where it was held:

"In this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) include the right to be heard amongst the attributes of the equality before the law...."

For the last issue whether the Appellant should be awarded costs, the learned counsel argued that in **Devram Nanji Dattani Vs Haridas Kalidas Dawda** [1949] 16 EACA 35 it was held that a successful litigant can only be deprived of his costs where his conduct has led to litigation. She argued that in determining costs, the Tribunal has to look at the conduct of the parties, the subject of litigation, the circumstances which led to the institution of the legal proceedings, the events which eventually led to their termination, the stage at which the proceedings were terminated, the manner in which they were terminated, the relationship between the parties and the need to promote reconciliation amongst the disputing parties. The counsel argued the illegal action of the respondent forced the Appellant to seek remedies from the Tribunal therefore the Appellant is entitled to costs.

The learned counsel for the respondent made a general reply to all the issues by arguing that the powers of the respondent to grant or award licences are contained under Section 7 (1) (b) (i) of the EWURA Act, Cap. 414 and Section 5 of the Electricity (Generation Services) Rules 2012. He said these two pieces of legislations have mandated the respondent to make rules that it

would enable it to properly perform its functions. He submitted that Rule 8 (2) of the Electricity (Generation Services) Rules 2012 enumerates items that need to be accompanied in the application for provisional licence including "any other document the authority may require" as stipulated under Rule 8 (2) (f) of the Electricity (Generation Services) Rules 2012. Counsel Mhangate contended that the applicant received two applications which has all the requirements to be provided with the licence but there was an issue of land. He contended that initially both applicants had a support from the Ministry because under Part VIII of the Electricity Act, the Ministry is responsible for policy issues. The learned counsel argued that the final support of the Ministry was in favour of TMPL as such the Appellant's application had to be declined.

Regarding acting ultra vires, he said the respondent acted within the law as the support from the Ministry in terms of rule 8 (2) (f) of the Electricity (Generation Services) Rules 2012 was required.

For the contention on publication, the learned advocate submitted that the argument was not one of the grounds of appeal In any event, he said publication was done in two newspapers of English and Kiswahili which were Daily news and Mwananchi of 19th December, 2015.

Regarding costs, he said there is no law that requires the respondent to pay costs for compliance with the law. With these replies he prayed for the respondent's decision to be uphold.

In rejoinder it was insisted that there is no law that requires the respondent to consider the support from the Ministry. She pointed out that the information required under Rule 8 (2) (f) of the Electricity (Generation Services) Rules 2012 must relate to the issues listed above. On publication, she said there was a typo error on the grounds of appeal, she said instead of writing "application" it was written "decision" as such she prayed under rule 2 (2) of the Fair Competition Tribunal Rules GN 219 of 2012 for the interest of justice the ground be considered. And on costs it was maintained that costs should be provided for.

We have carefully listened to the submissions made by the counsels and we wish to start with the issue of publication. We do subscribe with the learned advocate for the respondent that the Appellant has not advanced in its grounds of appeal a complaint on publication of the application. Looking at ground number six of the appeal which we have reproduced herein in extenso which the Appellant is imploring the Tribunal to read into it "application" instead of "decision" does not seem to suggest that the Appellant was intending to state "application". The ground as it reads seems to suggest that the Appellant is complaining against the "decision" not being published. The decision which is complained

is that the respondent preferred the later application for provisional licence made by Mkonge instead of the application made earlier by the Appellant. There is no suggestion in ground number six that the Appellant was complaining about an "application" not being published. We thus concur with the learned counsel for the respondent that the complaint of application not being published was not amongst the grounds advanced by the Appellant. We have to rule out the complaint.

We wish to combine issue number one and two because they both boil down to the powers and mandate of the respondent in determining an application for provisional licence. It is not disputed by both counsels that the respondent under Section 7 (1) (a) and (b) (i) of the EWURA Act has mandate to consider an application for provisional licence. It is also not disputed that under Rule 10 (2) of the Electricity (Generation Services) Rules 2012 the respondent is required to make a decision basing on the applicant's record of compliance with the Electricity Act, the Electricity (Generation Services) Rules 2012 and other applicable laws; economic efficiency and benefit to the applicant and the public in general; and comments or representations received from the public, if any.

It is argued by the respondent that in considering the application the respondent in terms of Rule 10 (2) (a) of the Electricity (Generation Services) Rules 2012 is also required to consider

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It is argued by the respondent that in considering the application the respondent in terms of Rule 10 (2) (a) of the Electricity (Generation Services) Rules 2012 is also required to consider

whether the Appellant complied with Rule 8 (2) (f) of the Electricity (Generation Services) Rules 2012 that is whether the Appellant has a support from the Ministry. The Appellant on the other hand though acknowledged that the respondent is mandated to consider any other matters as stipulated under Rule 8 (2) (f) of the Electricity (Generation Services) Rules 2012 but such matters must relate to the matters provided generally under the same rule.

From these two contending arguments, we have to reproduce in whole Rule 8 (2) of the Electricity (Generation Services) Rules 2012, it reads:

> *"(2) The applicant shall lodge to the Authority an application form for the provisional licence which shall be in a prescribed format together with the following:*
>
> *(a) a business plan;*
>
> *(b) prescribed fee;*
>
> *(c) proof of financial capability;*
>
> *(d) site layout;*
>
> *(e) Power Purchase Agreement, memorandum of understanding or a letter of intent, if any; and*
>
> *(f) any other documentation or information the Authority may require. "*

It follows then that an applicant for the provisional licence must fill a special form and attach thereto with a business plan; fee; proof of financial capability; site layout; power purchase agreement or memorandum of understanding or a letter of intent; and any other document or information that EWURA may require. In the matter at hand it seems that the Appellant fully complied with items (a) to (e) but for item (f) wherein the respondent wanted for the Appellant to submit a letter of support from the Ministry, the Appellant failed to secure the said support. It is argued by the Appellant that is not the requirement under the law since the documents and information must relate to items (a) to (e). With due respect to the Appellant's contention, our bare reading of the above rule is not confined to the description of documents or information stated under items (a) to (e). The words used in the law are such that *"any other documentation or information the Authority may require"* which means that the respondent may request for any document or information that deems fit to consider. The law as it reads is very wide and it empowers the respondent to request for any document and or information and not necessary the said document or information must relate to the previous documents or information. We are told that the letter of support from the Ministry is one of the key documents which the respondent needed in order to issue the provisional licence. We are also told that the Appellant is fully aware of this requirement since the Appellant in its earlier

application did attach a letter of support from the Ministry. With this clear provision of the law and the fact that the Appellant was well aware of the submission of support from the Ministry we find that the respondent acted independently and within the purview of the law.

In the light of the above, we find that the present appeal has no merit. We accordingly dismiss it with costs. It is so ordered.

Dated at Dar es Salaam this 7th day of January, 2019.

Hon. Barke M.A. Sehel – Chairperson

Hon. Mustapher Siyani – Member

Dr. Theodora Mwenegoha – Member

07/01/2019