IN THE FAIR COMPETITION TRIBUNAL

AT DAR ES SALAAM

TRIBUNAL APPEAL NO. 4 OF 2014

TANZANIA ELECTRIC SUPPLY

COMPANY LIMITED ..... APPELLANT

VERSUS

ROBINSON TRADERS COMPANY

LIMITED..... 1ST RESPONDENT

ENERGY AND WATER UTILITIES

REGULATORY AUTHORITY ..... 2ND RESPONDENT

JUDGMENT

This is an appeal arising from the decision of the Energy and Water Utilities Regulatory Authority, (also known by its acronym "EWURA"), the 2nd respondent herein, dated 8th August, 2014 in Complaint No. EWURA/33/4/201. The decision is in respect of a complaint by the 1st respondent, Robinson Traders Company Limited, against Tanzania Electric Supply Company Limited

(popularly known by its acronym "TANESCO"), the appellant herein. The 1st respondent complained before EWURA against unlawful power disconnection at its business premises located at Manzese Chama area along Morogoro Road in Dar es Salaam. The appellant disconnected power on 15th January, 2013 due to unpaid bills. The 1st respondent disowned the unpaid bills and claimed that the outstanding debt amounting to Tanzanian Shillings four million nine hundred twenty three thousand one hundred seven cent forty five only (4,923,107.45) belongs to another person (one M.S. Omary) who was a previous tenant whom they do not know and have no working relationship and therefore they cannot be held liable for the unsettled bill of the previous tenant.

After hearing both parties and evaluating the evidence adduced before it, EWURA held in favour of the 1st respondent. EWURA held that the transfer of the debt from the previous tenant to the 1st respondent was not proper and the reasons advanced by the appellant for that transfer were not supported by the law or good electricity industry practices. In addition, the appellant was ordered to pay the 1st respondent Tanzanian Shillings twenty million only (20,000,000/=) as general damages.

TANESCO, being dissatisfied with the decision of EWURA lodged notice of appeal on 26th August, 2014. Through the memorandum

of appeal which was filed on 29th August, 2014, the appellant raised the following grounds of appeal:

1. The Board of Directors of EWURA erred in law and fact in ignoring the testimony of RW1 and RW2.
2. The Board of Directors of EWURA erred in law and fact in awarding the complainant compensation to the tune of 20,000,000.00 without justification.
3. The Board of Directors of EWURA erred in law and fact by failing to evaluate evidence before it therefore reaching at wrong decision.

The respondents, through their replies to the memorandum of appeal, have vigorously opposed the appeal by stating that before arriving at its decision the 2nd respondent considered testimonies of both RW1 and RW2 contrary to what the appellant has claimed. Moreover, the respondents stated that the 2nd respondent rightly awarded damages to the 1st respondent after holding that the 1st respondent suffered loss as a result of illegal power disconnection by the appellant. The respondents further stated that the 2nd respondent thoroughly analyzed the evidence before it and ultimately gave a reasoned decision. In addition, the 2nd respondent stated that its decision cannot be faulted since the appellant did not dispute the fact that the ground for disconnecting power from the 1st respondent's premises was a debt of a different customer.

Apart from pleadings, parties also filed list of authorities and skeleton arguments in accordance with rules 22 and 28 of the Fair Competition Tribunal Rules, G.N. No. 219 of 2012 (hereinafter referred to as "the FCT Rules").

At the hearing day, Ms. Batilda Mally, learned advocate, appeared for the appellant; Mr. Miraji Mavula, principal officer, appeared for the 1st respondent and Mr. James Kabakama, learned advocate of GRK Advocates appeared for the 2nd respondent.

On ground 1 of appeal, Ms Mally submitted that according to the testimonies of RW1 and RW2, the appellant carried out a debt collection campaign in 2012 in which the 1st respondent was found to be among the bad debtors with accumulated bills amounting to Tanzanian Shillings four million nine hundred twenty three thousand one hundred seven cent forty five only (4,923,107.45) through a conventional meter bearing number 91QB461963 linked with account number 51016274 in the name of M.S. Omary. In addition, Ms Mally stated that RW1 and RW2 testified that the conventional meter disappeared from the premises without following proper procedures. Ms Mally further stated that RW1 and RW2 testified that a LUKU meter was installed in the same place that the convention meter was located. Ms Mally averred that since the location has not changed and the conventional meter was removed without following proper procedures, the appellant could transfer the debt to the

meter found in the area as it did in this case when the debt in the name of M.S. Omary was transferred to the name of Robison Traders Company Limited.

As regards ground 2 of appeal, Ms Mally submitted that the only concern is how the 2nd respondent arrived at the awarded amount of Tanzanian Shillings twenty million only (20,000,000/=) as general damages. Ms Mally further submitted that in his testimony the 1st respondent (CW1) indicated that business was not that good thus he intended to enrich himself from the appellant.

With respect to ground 3 of appeal Ms Mally invited this Tribunal to go through the evidence of RW1 and RW2 and evaluate the same. Ms Mally further submitted that had the 2nd respondent properly evaluated the evidence the decision would have been different.

Opposing the appeal, Mr. Mavula, principal officer of the 1st respondent submitted that Ms Mally's argument that testimonies of RW1 and RW2 were ignored lacks merit. Mr. Mavula added that 2nd respondent considered testimonies of both RW1 and RW2 in reaching at the decision. Mr. Mavula further asserted that both the conventional meter and the LUKU meter belonged to the appellant who, prior to installation of the same, received connection fees and carried out inspection of the premises thus,

the appellant was responsible to ensure payment of unpaid bills and not transfer debts from one customer to another.

As regards ground 2 of the appeal, Mr. Mavula submitted that compensation awarded to the 1st respondent for loss of business for the period of 6 months is fair since the 1st respondent expected to earn a total of 40 million in a year. Mr. Mavula added that in awarding the 20 million as compensation, the 2nd respondent considered the value of the business. Naturally, award of compensation is required when a party has suffered loss as decided in numerous cases attached to the list of authorities, insisted Mr. Mavula.

Submitting on ground 3 of appeal, Mr. Mavula stated that EWURA properly evaluated all evidence tendered before it and reached at the right decision. Mr. Mavula requested the Tribunal to confirm the decision and dismiss the appeal with costs.

On his part, Mr. Kabakama, learned counsel for the 2nd respondent, argued grounds 1 and 3 of appeal together. Mr. Kabakama argued that the 2nd respondent looked at whether the 1st respondent was responsible for the unpaid bills from the meter in the name of M.S. Omary. The 2nd respondent saw no connection at all between the 1st respondent and M.S. Omary. RW1 and RW2 completely failed to show how the 1st respondent is connected with the previous customer, M.S. Omary. Mr, Kabakama further submitted that in RW1 and RW2 testimonies,

two reasons were given for transferring the debt to the 1st respondent. One, they assumed that the conventional meter was replaced by LUKU meter and two, they could not trace the whereabouts M.S. Omary. These reasons were very lenient and unsupported, thus, grounds 1 and 3 of appeal lack merit, insisted Mr. Kabakama.

With respect to ground 2 of appeal, Mr. Kabakama submitted that according to the complainant's witness, disconnection of power was done without notice contrary to section 26 (3) of the Electricity Act, Act No. 10 of 2008 (hereinafter referred to as "Electricity Act") and therefore the disconnection was illegal. Mr, Kabakama further submitted that based on this illegal disconnection, the award of compensation to the 1st respondent was done after assessing the evidence in which the 2nd respondent found that for the inconvenience caused to the 1st respondent 70 million claimed by the 1st respondent was inordinately high and reduced the amount to 20 million.

By way of rejoinder, Ms Mally submitted that the connection between M.S. Omary and the 1st respondent was shown in the testimonies of RW1 and RW2 who testified that many houses in Magomeni and Manzese areas were inherited. Ms Mally further stated that many of the new owners of those houses remove conventional meters, without notifying TANESCO, and install LUKU meters. With regard to power disconnection notice, Ms

Mally submitted that notice to disconnect power is normally done through the media.

We have carefully considered submissions and arguments advanced by the contending parties in this appeal. Starting with ground 1 of appeal, RW1 – Mr. Musa Ngozongozi, an accountant working with TANESCO and RW2 – Ms. Shukrani Mkweche, electrician also working with TANESCO, believe the 1st respondent to be the owner of both accounts and the other one in the name of M.S. Omary and other in the name of Robinson Traders Co. Ltd. The reason behind this notion is given in their testimonies which read as follows:

> **RA:** How then did M.S. Omary's debt enter Robinson Trader's account?
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> **RW1:** Many houses in the Magomeni and Manzese areas were inherited and where there was once a conventional meter, we found a LUKU meter with TANESCO never having received any notice so we assume that the LUKU meter replaced the conventional meter.
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> **RA:** Is Robinson Traders, M.S. Omary?
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> **RW1:** No
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> **RA:** If that is not the case then how can you move M.S Omary's debt to Robinson Traders?
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> **RW1:** We found a LUKU meter where the conventional meter was. So by assumption, Robinson Traders was involved in the removal of

the old meter. There are many incidences of unlawful meter removal in those areas

RA: How is Robinson Traders involved in this debt?

RW2: Robinson Traders has installed a new meter where M.S. Omary's meter was and we don't know where M.S. Omary is. The debt is owed at that area and we place the debt there so that we can recover our money.

RA: What is the procedure for debt collection?

RW2: When there is a debt on a conventional meter, we disconnect the power and recover our money. If the meter is missing we transfer the debt where the meter was even if there is a new meter with a different owner.

It is the contention of the appellant that the 2nd respondent erred in not considering RW1 and RW2 testimonies which link Mr. M.S. Omary with Robinson Traders. With all due respect, we cannot agree with that submission. Robinson Traders, being a limited liability company, is a distinct person from M.S. Omary and the two are not connected at all. The contract between TANESCO and M.S. Omary is distinct from the contract between TANESCO and Robinson Traders. It is elementary that under the doctrine of privity of contract, a person cannot acquire rights or be subject to liabilities arising out of a contract to which he is not a party. We must hurriedly say that imposing M.S. Omary liabilities on

Robinson Traders amount to unfair business practice which should be condemned.

It is evident that TANESCO unfairly imposed the liability of Mr. M.S. Omary on Robinson Traders out of despair as there was a customer who did not pay and he was nowhere to be found. Being the only supplier of electricity in our country, TANESCO forcibly subjected Robinson Traders to pay for Mr. M.S. Omary's debt. We find this practice as oppressive since it seeks to exploit customers who have been legally connected with electricity only to be disconnected later on the basis of previous customer's liability. It is high time now that TANESCO should abandon this practice and work to strengthen its debt collection mechanism.

From RW1 and RW2 testimonies the debt collection campaign took place from August 2012 to December 2012, in which the 1st respondent was found to be among the bad debtors, while connection of power to the 1st respondent was done in November, 2012. If the 1st respondent was among the bad debtors as claimed by RW1 and RW2, why then was the 1st respondent supplied with power prior to settlement of the debt. RW1 testified that the house was renovated thus, it was not easy to link the conventional meter with the house. He also stated that there was no power connection infrastructure such as bracket or service line thus, the surveyor was not able to establish if the premises were supplied with electricity before. All these reasons, however sound,

do not legally justify the imposition of a liability of Mr. M.S. Omary on Robinson Traders. Therefore, this ground of appeal must fail for lack of merit.

Coming to ground 2 of the appeal, the appellant contend that the 2nd respondent erred in awarding general damages amounting to Tanzanian Shillings twenty million only (20,000,000/=) without justification. Looking at the 2nd respondent's decision at page 7, the part awarding general damages state as follows:

> "With regard to general damages, the Complainant is not under a specific duty to strictly prove the loss suffered. However, the Complainant will still be under duty to prove that he actually suffered and the amount claimed should correspond with the real loss suffered and the court will exercise its discretion in deciding on the reasonable amount to be paid. In this complaint, the Complainant claims for payment of TZS 70 million as general damages. **Having evaluated the amount claimed and taking into account the nature of business the Complainant is undertaking, i.e. small scale business and their size, we are satisfied that the said amount is on the higher side. We have decided therefore to reduce the amount**

payable as general damages to TZS 20 million. (Emphasis by the Tribunal)

From the evidence on record, the appellant did not dispute that the indebted meter was in the name of Mr. M.S. Omary. In addition, the appellant did not dispute that power disconnection was conducted on the basis of the debt in the name of Mr. M.S. Omary. Section 28 (1) of the Electricity Act No. 10 of 2008 (hereinafter referred to as "the Electricity Act") gives power to the appellant to disconnect power on two scenarios: one, when a customer has unlawfully connected electricity; and two when a customer is in breach of his contractual obligation in respect of electricity supply. Otherwise disconnection of electricity is unlawful and the customer is liable to compensation. Section 26 (5) of the Electricity Act provides as follows:

> **(5)** Subject to rules made by the Authority, **a licensee shall be liable to compensate the customer who suffers loss of property or physical injury as a result of an act of licensee which amounts to-**
>
> **(a) unlawful disconnection of electricity**
>
> (Emphasis by the Tribunal)

The 2nd respondent found that the 1st respondent is not liable to pay the debt in the name of M.S. Omary. In addition, the 2nd respondent found that the appellant's decision to transfer M.S.

Omary debt to Robinson Traders ultimately disconnecting power was neither supported by the law nor good electricity industry practice. The 2nd respondent also found that the 1st respondent suffered loss as a consequence of power disconnection by the appellant. Therefore, the basis upon which the 2nd respondent awarded general damages is evident. In such a scenario, the purpose of an award of damages is to put the 1st respondent in the position he would have been had the power disconnection not occurred. Therefore, damages would only be awarded to compensate the 1st respondent against whom a wrong has been committed specific damage.

1st respondent being a trader whose operations depend on electricity, there can be no doubt that the power disconnection injured the 1st respondent's credit and reputation to some extent. The injury to credit and reputation is evident from the testimony of CW1, Miraji Mavula – Marketing Manager of the 1st respondent. CW1 testified that they lost revenue amounting to Tanzanian Shillings fifty four million only (54,000,000/=) for the period of six months when power was disconnected. In addition, CW1 testified that the 1st respondent had running contracts which it could not perform and loan which it could not service.

We must admit that, general damages are not easily quantifiable in money terms due to the nature of the loss suffered. The award

and quantum of general damages are in the discretion of the decision maker.

Lord Wright in **Davies v. Powell Duffryn Associated Colliers Ltd. [1935] 1 KB 354, 360,** referring to a decision by Greer, U, said –

> **"In effect the court, before it interferes with an award of damages should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these reasons or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference."**

Bearing in mind the decision quoted above and looking at the circumstances of this particular case, we are of the well considered view that the 2nd respondent neither acted on a wrong principle of law nor misapprehended the facts in awarding the general damages. Moreover, the quantum of awarded general damages is not inordinately high considering the circumstances of the case. We hesitate to agree with the appellant that the 2nd respondent erred in law and fact in awarding damages amounting to 20,000,000 (Tanzanian Shillings Twenty Million). In the result, we also dismiss ground 2 of appeal.

Lastly, regarding the issue of evaluation of evidence, the appellant has requested this Tribunal to go through testimonies of all witnesses and find that the 2nd respondent failed to evaluate the evidence before it therefore reaching at the wrong decision.

In the case of **Peters v Sunday Post Limited (1958) EA 424** Sir Kenneth O'Connor, P. after considering **Watt v Thomas (1947) AC 484** stated as follows at page 429:

> "It is a strong thing for an appellate court to differ from the finding on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellant court itself have come to a different conclusion".

Looking at proceedings, tendered exhibits, submissions and pleadings by parties, it is not disputed that the debt that was imposed on the 1st respondent belonged to Mr. M.S. Omary, a distinct person. The appellant, without any justification, imposed the debt on Robinson Traders.

The appellant failed to establish a link between Mr. M.S. Omary and Robinson Traders apart from showing that Mr. M.S. Omary used to reside in the same premises as Robinson Traders. CW1 testified that they were not owners of the premises but merely tenants. It is evident that Mr. M.S. Omary was also a tenant. The appellant failed to buttress her case by showing the link between the 1st respondent and M.S. Omary. Perhaps, the landlord could have provided answers to many of the questions.

RW1 and RW2 testified that the conventional meter and the LUKU meter were located in the same place, which made them to assume that Robinson Traders and M.S. Omary were linked. Neither, RW1 nor RW2 testified on how could the 1st respondent, who was connected with electricity in mid 2012, be among the bad debtors in August – December 2012, when the debt collection campaign took place, while the 1st respondent was using LUKU meter which is prepaid.

In addition, the appellant, being the supplier of electricity, owned the conventional meter as well as the LUKU meter and was in charge for their installation, maintenance and eventually removal. Thus, it is the responsibility of the appellant to collect unpaid bills from appropriate customers who have caused the accumulation. The appellant should not allow customers who have conventional meters to enjoy power supply if in arrears for more than one month. Moreover, RW2 testified that her employer issued a

directive regarding transfer of the debt from M.S. Omary to the 1st respondent. This practice of transferring debts from one meter to another belonging to different customers is illegal and the appellant should stop burdening customers with debt that they did not generate.

Furthermore, RW2 testified that power installation is not allowed in premises where there is debt from previous occupier and that Robinson Traders received power because there was no communication between different departments. In order to rectify the matter, the appellant should have notified the 1st respondent and look at the best way to address the problem, not abruptly disconnecting power without any notice.

The inevitable conclusion is that the evidence before the 2nd respondent justifies the decision reached. This ground of appeal too lacks merit.

In the event, and for the reasons stated above, this appeal lacks merits. We accordingly dismiss the same in its entirety with costs.

It is so ordered.

Judge Z.G. Muruke – Chairman

Prof. Adolf Mkenda – Member

Mrs. Nakazael L. Tenga – Member

28/4/2015

Judgment delivered this 28th day of April, 2015 in the presence of Mr. Miraji Mavura, Director of 1st respondent, Mr. Rwehumbiza for the 2nd respondent and in the absence of the appellant duly notified.

Judge Z.G. Muruke – Chairman

Mrs. Nakazael L. Tenga – Member

28/4/2015