IN THE FAIR COMPETITION TRIBUNAL OF TANZANIA
AT DAR ES SALAAM
APPEAL NO. 1 OF 2008

Dar es Salaam Water and Sewerage Authority (DAWASA) ---------- **APPELLANT**

VERSUS

Energy and Water Utilities Regulatory Authority (EWURA) ---------- **RESPONDENT**

(APPEAL ARISING FROM THE DECISION OF THE ENERGY AND WATER UTILITIES REGULATORY AUTHORITY (EWURA), ORDER NO. 08-001 DATED 8TH APRIL, 2008 AND DELIVERED ON 15TH APRIL, 2008)

JUDGEMENT

This is an appeal from a decision of the Energy and Water Utilities Regulatory Authority (EWURA) made on 15th April, 2008, Order No. 08-001 dated 8th April, 2008.

EWURA (the respondent) is a body corporate established under section 4 of the EWURA Act, 2001 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 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; and

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

(f) 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, which are as follows:

(a) to perform the functions conferred on the Authority by legislation;

(b) subject to sector legislation –

  (i) to issue, renew and cancel licences;

  (ii) to establish standards for goods and services;

  (iii) to establish standards for the terms and conditions of supply of goods and services;

  (iv) to regulate rates and charges;

  (v) to make rules for carrying out the purposes and provisions of this Act and the sector legislation;

(c) to monitor the performance of the regulated sectors in relation to –

  (i) levels of investment;

  (ii) availability, quantity and standard 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) in the case of petroleum and natural gas, to regulate transmission and natural gas distribution;

(e) to facilitate the resolution of complaints and disputes;

(f) to disseminate information about matters relevant to its functions;

(g) to consult with other Regulatory Authorities;

(h) to perform such other functions as are conferred on the Authority;

(i) to administer this Act.

The appellant, the Dar es Salaam Water and Sewerage Authority (DAWASA), is a body corporate established under section 4 of the Dar es Salaam Water and Sewerage Authority Act No. 20 of 2001, Cap 273 R.E. 2002 to secure and maintain the continued supply of water for all lawful purposes and to construct and maintain sewerage disposal works and services inter alia as provided under section 6 of the DAWASA Act. Under section 7 DAWASA is authorized to appoint an Operator to perform the functions and exercise the powers which are vested on it by the Act on such terms as may be specified in a concession, contract or agreement entered into between DAWASA and the Operator.

Under section 8 of the Act DAWASA is empowered to make a concession providing for the lease and temporary transfer of its fixed and landed assets to the Operator for the purpose of providing water supply and sewerage

services over the whole of the DAWASA Designated Area, i.e. the City of Dar es Salaam and part of the Coast Region.

Section 24.-(1) of the DAWASA Act provides:

"24.-(1) DAWASA shall charge and collect tariffs, fees or other charges for water supplied, sewerage or other services rendered or facilities availed to consumers in accordance with the rates authorized by EWURA and published in the *Gazette* and in at least one Kiswahili and one English newspaper circulating in the area concerned.

(2) The Owner or Occupier of any premises in respect of which tariffs, fees or other charges are payable under this Act shall be liable for payment of those tariffs, fees or other charges.

(3) When any premises are occupied by two or more persons, each person shall be jointly and severally liable for the payments referred to in this section.

(4) The payments referred to in this section shall be paid to such officer or at such office as DAWASA may, from time to time, notify in the *Gazette.*

(5) DAWASA may cut-off or withdraw the supply of water or sewerage services from any premises in respect of which any tariffs or charges in connection with the supply of services have not been fully paid within thirty days following receipt by the Owner or Occupier of a default notice."

Under section 25(1) of the DAWASA Act it is provided that DAWASA and the Operator shall, in the exercise of their respective functions be subject to regulation by EWURA, and the conditions under the Licence and the concession (Lease Agreement). Under clause 7 of the Licence EWURA is empowered to regulate DAWASA and the Operator (the Parties) in the exercise of their functions under the Lease Contract in relation to Customer Tariff issues and under Clause 7.6 in particular, to approve the indexation formula applied in the computation of tariffs for water supply and sewerage services, *inter alia*. Under Section 5B of the Water Laws (Miscellaneous Amendments) Act No. 1 of 1999 it is provided that the Operator and DAWASA in the exercise of their respective functions shall be subject to regulations by EWURA. Under section 26 of the DAWASA Act, EWURA is empowered to inter alia exercise licensing and regulatory functions in respect of water supply and sewerage services in the DAWASA Designated Area and section 26(c) in particular, empowers EWURA to examine and approve tariffs chargeable for the provision of water supply and sewerage services as submitted by DAWASA.

On 02/09/2005 DAWASA (Lessor) entered into a Lease Agreement with the Dar es Salaam Water and Sewerage Corporation (DAWASCO), the Operator, appointing the Operator to perform the functions and exercise the powers which are vested on DAWASA within the Designated Area. Pursuant to section 25(2) of the DAWASA Act, a Licence was granted by the Minister for Water and Livestock Development (the then regulator before the coming into operation of the EWURA Act) to the Operator to operate and maintain a water and sewerage system in the DAWASA Designated Area. On

12/12/2005 the Lease Agreement entered into by the appellant and the Operator on 02/09/2005 was amended and restated and it was provided in the restated Lease Contract that the Operator and the Lessor shall be subject to regulations by the Regulatory Authority established under the EWURA Act, i.e. EWURA. The Lease Agreement provides that the computation for tariff adjustment shall be subject to a predetermined indexation formula. The Lease Agreement sets out a mechanism for periodic adjustments for water and sewerage tariffs. Article 40 of the Lease Agreement provides as follows:

"40 **REVIEW OF OPERATOR TARIFF**

40.1 Objective of the review of the Operator Tariff

(a) The Lessor shall review the Operator Tariff and the Indexation Formula in order to:-

(i) take account of the changes and trends in economic and technical conditions;

(ii) reflect the data to be established during the "Enhanced Monitoring Period" as described in Appendix N; and

(iii) ensure that the Indexation Formula is representative of actual cost changes.

The Lessor shall recommend any changes to the Operator Tariff resulting from such a review, to the Regulator for approval under the Act.

(b) Subject to Article 35.3 any review of the Operator Tariff, is without prejudice to the Operator's right to require the application of the indexation formula adjustment in accordance with Article 35.2.

Apparently, since July 2005, i.e. since the commencement of the Lease in July 2005, there has been only one tariff adjustment made, that is, in July 2006, with an increase of 35.9% and 29.2% for water supply and 19% for sewerage services in respect of the services provided by the Operator under the Lease Agreement.

The undisputed historical background to this appeal may be briefly stated as follows: On 08/01/2008 the appellant submitted an application for a tariff increase of 22% for water supply and 18.5% for sewerage services effective from 01/01/2008. DAWASA's proposal for the tariff increase was based on the recent increase in electricity costs and the prevailing inflation. After seeking information from DAWASA and considering the application, the respondent in a decision dated 08/04/2008, Order No. 08-001 disallowed the application. In its decision, EWURA, while acknowledging that DAWASA had correctly applied the indexation formula in computing the requested tariff increases, made it clear that it found the tariff increases sought by the appellant unreasonable and unenforceable. EWURA was of the view that the existing tariffs for water supply and sewerage services already produced a surplus, thereby making the proposed increase unreasonable; that due to the non-achievement of performance targets by DAWASCO and the laxity of DAWASA in taking appropriate measures under the Lease Agreement, the tariff increase would unfairly burden the customers. EWURA was also firm that DAWASA's failure to submit a

methodology used for assessing the submitted consumption for unmetered consumers rendered it difficult for it (EWURA) to confirm the assessment proposed in the application. EWURA found the proposed tariff increase to be unenforceable on the ground that the basis for charging unmetered customers was not established.

In the Memorandum of Appeal lodged in this Tribunal on 23/05/2008 the appellant has raised 8 grounds of appeal:

1. The Respondent erred in law and in fact by disallowing the Appellant's application No. TR-W-03-001 for a Tariff Adjustment and submitted on 8th January 2008 for a tariff increase for water supply and sewerage services.
2. The Respondent erred in law and in fact by not correctly taking into account the terms of the Lease Agreement signed on 12 December 2005 between the Appellant as the Lessor and the Dar es Salaam Water and Sewerage Corporation as the Operator which provides a mechanism for the periodic adjustment of water and sewerage tariffs.
3. The Respondent erred in law and in fact by holding that the existing tariffs for water supply and sewerage services already produce a surplus; and that an increase of the existing tariffs would be unreasonable.
4. The Respondent erred in law and in fact by holding that the Appellant does not take the appropriate measures as per the Lease Agreement

and is too lax in relation to the non-achievement of the performance targets by Dar es Salaam Water and Sewerage Corporation.

5. The Respondent erred in law and in fact by holding that the flat rate tariff increase for un-metered customers is unenforceable allegedly because the basis and methodology for charging un-metered customers was not established.

6. The Respondent erred in law and in fact by ordering the Appellant, on or before the earlier of 30 September 2008 or the date on which the Appellant submits its next application for tariff adjustment, to (i) review the Operator Tariff and the Indexation Formula to reflect the actual cost of service and other conditions as specified in Article 40.1.(a) of the Lease Agreement; (ii) present for review and approval a detailed updated assessment on water consumptions for un-metered customers in the designated areas; (iii) review the Lease Contract to the Respondent's satisfaction to ensure that the performance targets set therein are updated accordingly.

7. The Respondent erred in law and in fact by ordering the Appellant to ensure that satisfactory progress is made towards the attainment of the performance targets stipulated in the Lease Agreement Contract by 30 June 2009.

8. The Respondent erred in law and in fact by ordering the Appellant to provide information to the Respondent about its financial and operating condition in accordance with the requirements of the Respondent and by holding that this information will be used to evaluate the Appellant's performance and that this performance

evaluation will be used by the Respondent to determine the reasonableness of all future for tariff adjustment.

In his submission in support of the appeal Dr Kapinga, learned counsel for the appellant, asserted that the decision/ruling and its purported basis therefore were wholly contradictory and an abrogation of the respondent's powers and functions to regulate and approve rates and tariffs under section 7(1)(b)(iv) of the EWURA Act as revised by G.N. No. 91 of 2006. He contended that the decision also violates section 26(c) of the DAWASA Act Cap. 273 R.E. 2002. He argued that the power of the respondent to regulate and approve tariffs under section 7 of the EWURA Act and section 26 of the DAWASA Act must be exercised in accordance with the provisions of the Lease Agreement and the Licence, and in particular the indexation formula set out in the Lease Agreement between the appellant and the Operator, that the appellant had furnished to the respondent all the necessary information/data required by the respondent when considering an application for adjustment of tariffs, and that so long as the tariff increase sought by the appellant meets the criteria prescribed in the Lease Agreement the respondent is bound to automatically approve the tariff adjustment.

Dr Kapinga further asserted that under Clause 7.6 of the Licence granted to the appellant, EWURA as the regulator is empowered to approve the indexation formula set out in Appendix k of the Lease Agreement applied in computation of customer tariff for water supply and the customer tariff for sewerage services, that the respondent having approved/accepted that the

computation was in accordance with the indexation formula applied by the appellant in the tariff adjustment, approval of the adjustment ought to be automatic. It was argued that in taking into account factors other than those set out in the Lease Agreement and the Licence the respondent had contravened section 50(2) of the EWURA Act which recognizes the Licence and agreements entered into prior to the coming into force of the EWURA Act. Dr Kapinga added that the EWURA Act prohibits EWURA as the regulator to act in a manner prejudicial to the parties to the agreements and Licence.

Grounds 1 and 2 were argued together. The appellant relying on section 26(c) of the DAWASA Act and Articles 33.6 and 35 and Appendix k of the Lease Agreement asserted that the respondent had wrongly disallowed the adjustment requested especially since in its decision it (EWURA) acknowledged that the tariff increment was in accordance with the indexation formula.

The respondent resisted the appeal by filing a Reply to the Memorandum of Appeal.

On grounds 1 and 2 Mr Kabakama, learned counsel for the respondent who was assisted by Mr. Galeba at the hearing of this appeal, asserted that the application for tariff increase had been properly considered by the respondent in accordance with the guidelines for the evaluation of tariff applications and that a public inquiry was duly conducted.

It is not disputed that after receipt of the application the applicant had conducted a public inquiry as required under section 19(2) of the EWURA Act and that in the inquiry the Government Consultative Council was present. The respondent, in its Reply, stated that in arriving at the decision it (the respondent) had properly analysed the information provided by the appellant, taken into account the opinions of all stakeholders, and the rising operational and other costs suffered by the appellant.

Mr Kabakama asserted that the decision complained about cannot be faulted and argued that the respondent as the regulator was empowered under section 17 of the EWURA Act and section 26(c) of the DAWASA Act to review and determine tariff applications and that what the respondent did was in fact to bring the appellant and the Operator in compliance with the provisions of the Lease Agreement. It was his contention that the respondent's decision was not in any way prejudicial to either the appellant or the Operator. He added that in the Order complained about the respondent had given certain directions to the parties relating to the current assessment of tariffs for unmetered customers which were in accordance with the Lease agreement and the indexation formula, and in particular in accordance with Articles 33.1 and 40.1 of the Lease Agreement. It was further argued that section 50 of the EWURA Act is not binding upon the respondent because the current version of the Lease Agreement dated 12/12/2005 came into force after the effective date of the EWURA Act, that is 01/10/2005. Mr. Kabakama further contended that the respondent, in dealing with the tariff application was not confined to the provisions of the Lease Agreement and Licence alone, that in the exercise of

its powers the respondent is also guided by the provisions of section 17(1) and (2) of the EWURA Act and section 26(c) and (d) of the DAWASA Act and that section 17(2) of the EWURA Act aforesaid sets out other factors which the respondent may take into consideration when examining/determining a tariff application. Mr Kabakama argued that the mere fact that the appellant had in computing the tariff increase properly applied the indexation formula set out in Appendix k to the Lease Agreement does not bind the respondent to automatically grant the Application.

It is not disputed that EWURA had followed due process in arriving at the decision and that a public inquiry was duly held. Indeed, there is no dispute that the computation for tariff adjustments is subject to a predetermined indexation formula set out in the Lease Agreement. Nor is it disputed that in its decision EWURA had stated that DAWASA had correctly applied the indexation formula when computing the proposed tariff increase. The question is, is the approval of the tariff increase in the circumstances automatic? Is the indexation formula the only factor to be taken into account by EWURA when determining applications for adjustments? Upon careful consideration of the relevant provisions of the law pointed out to us by the learned counsel for the respondent, this Tribunal's answer to the question is in the negative. The Regulator is not confined to the Lease Agreement, nor is it bound by the terms of the Lease and/or the Licence as it is not a party to either of the aforesaid Documents. As seen earlier hereinabove, the respondent derives its power to determine and approve tariffs charged by DAWASA from a number of legal provisions besides the Lease Agreement, including section 26(c) of the DAWASA Act and Section

17 of the EWURA Act. Section 17 of the EWURA Act sets out the factors that the respondent is required to take into account when determining rates and charges.

The relevant parts of section 17 of the EWURA Act read as follows:

"17.- (1) Subject to the provisions of sector legislation and licences granted under the legislation, the Authority shall carry out regular reviews of rates and charges.

(2) In making any determination setting rates and charges, or establishing the method for regulating such rates and charges, the Authority shall take into account –

(a) the cost of making, producing and supplying the goods or services;
(b) the return on assets in the regulated sector;
(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 desirability of establishing maximum rates and charges, and in carrying out regular reviews of rates and charges;
(f) any other factors specified in the relevant sector legislation;
(g) the consumer and investor interest; and
(h) the desire to promote competitive rates and attract market;
(i) any other factors the Authority considers relevant."

In its ruling the respondent made the following findings:

”3.0 BASIS OF THE RULING

The Lease Agreement provides that computation for tariff adjustments shall be subjected to a pre-determined indexation formula. DAWASA correctly applied the relevant economic changes in the indexation formula to come up with the requested tariff. Although DAWASA correctly computed the requested tariff, EWURA has determined that the requested tariff increase is unreasonable and un-enforceable based on the following findings:

(i) With the current tariff DAWASCO is able to meet its planned expenditure for the financial year 2007/2008, with a surplus of TZS 2.78 billion equivalent to 8.06 percent. Section 40.1(a)(iii) of the *Lease Agreement* gives DAWASA powers to review both the operator's tariff and its indexation formula to ensure that it represents the actual cost changes and takes into account the changes and trends in economic and technical conditions. Inaction on the part of DAWASA does not encourage the operator to improve its operational efficiency. In short EWURA finds that an increase to the existing tariff which already produces a surplus is unreasonable.

(ii) EWURA Order No. 06-001 of July 13th, 2006 to DAWASA directed that "Failure in meeting performance targets (as specified in the Lease Agreement) shall be considered by EWURA in evaluating the reasonableness of all future requests for tariff adjustment". Most of key performance targets were not achieved by DAWASCO and no corresponding action was taken by DAWASA as per the *Lease Agreement*. Also DAWASCO's non attainment of the performance

targets set in the *Lease Agreement* is a major Auditor's qualifying note in its Audited Accounts for year 2006/2007.

EWURA is of the opinion that non achievement of performance targets by DAWASCO and the laxity of DAWASA in taking appropriate measures as per the *Lease Agreement* is at the expense of (i) the customers – who end up receiving poor services which do not reflect value for money, and (ii) the Government (the investor) by failure to achieve the intended national targets of improving water services to the population in the designated areas.

(iii) Section 33.5(a) of the *Lease Agreement* requires the operator to charge un-metered customers based on current assessment of consumptions. However, the submitted un-metered assessed consumptions were conducted before July 2006, which may misrepresent the present consumption thus leading to inappropriate flat rate charges in the respective areas. DAWASA also failed to submit to EWURA a methodology used for assessing the submitted consumption for un-metered consumers (which are more than 50 percent of all customers), thereby rendering it difficult for EWURA to confirm the assessment proposed in the application. EWURA finds the requested flat rate tariff increase to be unenforceable since the basis for charging un-metered customers was not established."

In his submissions Mr Kabakama contended inter alia that in coming to the decision the respondent had taken into consideration beside the Lease Agreement, the financial implications of the determination, the consumer

and investor interest and other factors that it considered relevant, as provided in section 17(2) of the EWURA Act. Indeed, this Tribunal is of the view that under the provisions of section 17(2), EWURA is, when determining tariffs, not only empowered but required to take into consideration factors other than the Lease Agreement. We have no doubt that EWURA had properly taken into consideration factors other than the Lease Agreement. Accordingly, grounds 1 and 2 have no merit.

As regards ground 3, the appellant denied that there would be a surplus as alleged in the decision complained about. Dr Kapinga forcefully contended that it was erroneous to deny the adjustment on the basis of mere budget projections of a surplus in the appellant's budget on account of budgeted equity investment by the Government of Shs. 2 billion that may not even be injected. Mr Kabakama in response contended, *inter alia,* that under section 17(2) of the EWURA Act the respondent is entitled and even required to take into account the financial implications of the tariff adjustment and the consumer and investor interests. Upon careful consideration of the respective arguments, we are inclined to agree with the respondent that it would be unreasonable to overburden customers with high tariffs arising from the inefficiency of the parties (DAWASA and DAWASCO) and laxity in collection of bills by DAWASCO. However, we also tend to agree with the appellant that the budgeted equity investment of Shs. 2 billion by the Government and the resultant surplus of Shs. 2.78 billion projected by the respondent or even the surplus of Shs. 97 million shown in DAWASA's budget for the year 2007/2008 are mere projections and cannot be a basis or a factor for disallowing the tariff increase.

As regards ground 4, Dr Kapinga submitted that finding No. 3(ii) on which the respondent's decision is based is erroneous, that non-attainment of the performance targets set in the Lease Agreement is only a factor in a review under Article 40.3, that the provisions of Article 40.3 of the Lease Agreement are only applicable in a major review, that as the review sought was less than six years from the commencement of the Lease Agreement, EWURA need not take into account other factors, e.g. performance targets, and that it was premature to rely on Article 40.3 in denying the adjustment as that Article can only be relied upon after six years. In its reply the respondent stated that the appellant had not complied with Article 46 of the Lease Agreement and had failed to impose appropriate and covenanted financial penalties on DAWASCO for the latter's failure to meet performance targets as required in the Lease Agreement (Index N). Mr Kabakama submitted that performance targets are a factor to be taken into account under the provisions of Article 40.2(c) (as pointed out by the Auditors) as well as in Index N. The relevant parts of Article 40.2 of the Lease Agreement read as follows:

"40.2 Procedure and Frequency of Operator Tariff Reviews and Criteria for Determination

(a) A review of the Operator Tariff shall occur only as a result of any of the following events:

(i) The Major Review;

(ii) An Interim Review;

(iii) An Annual Review; or

(iv) At the direction of the Regulator pursuant to Article 40.4(b).

(c) A tariff review shall take into account any findings of operational or technical performance reviewed by the Auditors and any specific issues identified in their report."

Clearly, under Article 40.2(c) the findings of the Auditors on performance targets should be taken into account in every tariff review and not only in a major review. Now it is evident that in the Annual Report of DAWASA for 2006/2007 the Auditor in its Report on the financial statements of DAWASA for the year ended 30th June 2007 was of the view that since DAWASA's revenue is made up of tariffs billed to customers by DAWASCO and lease rental paid by DAWASCO, due to serious inefficiency and weaknesses demonstrated in the performance of the Operator (DAWASCO), it was unable to confirm the accuracy and completeness of the reported revenue of Shs.7,264 million. Similarly, there is evidence that the Controller and Auditor General had pointed out a number of deficiencies within DAWASCO due to which he, the Controller and Auditor General was unable to confirm the accuracy and completeness of DAWASCO's water revenue of Tshs.14.8 million for the same period. It is clearly not disputed that the performance targets were not achieved by DAWASCO, as set in the Lease Agreement, nor has DAWASA denied the laxity in taking appropriate measures against DAWASCO as required under the Lease Agreement. The financial statements of DAWASA for the year 2006/2007 clearly show that the revenue collections were less by at least 31% of the budgeted

collections. This, in our opinion, is a relevant factor in considering a tariff review. By virtue of Article 40.2(c), this Tribunal cannot accede to the appellant's argument that performance targets are only a factor in determining tariff applications in a major review. Indeed, we can find no fault with finding No. 3.0(ii) of the basis of the ruling. This ground of complaint has no merit.

As regards ground 5, while admitting on behalf of the appellant that there are unmetered customers, Dr. Kapinga was firm that there is no requirement in the Lease Agreement, in particular in Article 33.5(a) for a methodology used for assessing consumption and charging flat rates. In its Reply to the Memorandum of Appeal, the respondent has stated that the rates for charging unmetered customers proposed by the appellant were unsubstantiated assessments, that no evidence, report or model employed to carry out the assessment was produced to enable the respondent to verify the proposed rates, that upon pressure for clarification by the respondent the appellant had belatedly, after the public hearing had taken place, submitted outdated and unrealistic data, and that to allow the flat rate tariffs proposed without the necessary substantiation would be prejudicial to water consumers in Dar es Salaam, Kibaha and Bagamoyo. Mr Kabakama basically submitted that Article 33.5(a) of the Lease Agreement requires unmetered customers to pay flat rates subject to current basis for assessment. Article 33.5(a) referred to by learned Counsel reads as follows:

"33.5 Collection of Customer Tariff

(a) The Operator shall collect the Customer Tariff from Customers assessed on the volume of water consumed on the Customers premises provided always unless and until a Customer Meter is installed on the premises of the Customer, the Customer shall be liable to pay the Customer Tariff on the current basis of assessment."

We have to agree with Mr Kabakama, learned counsel for the respondent that under Article 33.5(a) unmetered customers are charged tariffs on the current basis of assessment and accordingly the respondent had, while evaluating the application, quite rightly demanded from the appellant the current basis of assessment. After careful consideration of the respective arguments, we are in agreement that the appellant having failed to submit a methodology used for assessing the consumption by unmetered consumers, the respondent cannot be faulted for rejecting the application and finding the requested flat rate tariff increase to be unenforceable. Indeed, the aforesaid proposal for charging unmetered customers would be contrary to Article 33.5(a) of the Lease Agreement. Apparently conceding to the position taken by the respondent on this point, the appellant on 17th of August 2008 submitted data consisting of the current basis of assessment of the customer tariff clearly in compliance with the Order by the respondent. It is therefore our considered view that the finding made by the appellant in paragraph 3(iii) of the basis of its ruling is sound and the complaint by the appellant is without merit.

Grounds 6, 7 and 8 were argued together. Dr Kapinga in his submission while admitting that the respondent as the regulator is empowered to issue

directives to the appellant, strongly criticized the rejection of the appellant's application for tariff adjustment and the order requiring the appellant to review the operator tariff and indexation formula, to submit detailed updated assessment of water consumptions for unmetered customers and review of the Lease Agreement for the purpose of updating performance targets and requiring the respondent to submit information about its financial and operating status. Citing Article 40.1 and 40.2 of the Lease Agreement Dr. Kapinga argued that if the respondent found the performance of DAWASA and DAWASCO unsatisfactory it ought to have ordered an interim review under Article 40.4 of the Lease Agreement before giving the decision refusing the adjustments. Mr. Kabakama in response submitted that EWURA was under section 26(b) of the DAWASA Act, section 18 of the EWURA Act and Article 66.2 of the Lease Agreement empowered not only to seek information from the appellant relating to its financial and operational conditions, but also to examine and approve tariffs and to make all the orders that it made in its decision.

In its ruling, which is the subject matter of this appeal, the respondent after rejecting the application gave certain directions:

"4.2 On or before the earlier of September 30th, 2008 or the date on which DAWASA submits its next application for tariff adjustment, in collaboration with DAWASCO, DAWASA shall:

4.2.1 review the operator tariff and the indexation formula to reflect the actual cost of service and other conditions as specified in Section 40.1 (a) of the *Lease Agreement*;

4.2.2 present to EWURA for review and approval a detailed updated assessment of water consumption for un-metered customers in the designated areas; and

4.2.3 review the *Lease Agreement* to EWURA's satisfaction to ensure that the performance targets set therein are updated accordingly.

4.3 DAWASA shall ensure that satisfactory progress is made towards the attainment of the performance targets stipulated in the *Lease Agreement* by June 30th, 2009.

4.4 DAWASA shall continue to provide EWURA with information about its financial and operating condition in accordance with the requirements of EWURA. This information will be used by EWURA to evaluate DAWASA's performance in comparison with other utilities and the improvement of its performance over time. This evaluation will also be considered by EWURA in evaluating the reasonableness of all future requests for tariff adjustment."

Upon careful consideration of the respective arguments, we are satisfied that EWURA as the Regulator is empowered under section 26(h) of the DAWASA Act, sections 16(1) and 18(1) of the EWURA Act and Article 66 of the Lease Agreement to supervise the appellant and the Operator, and to

require the appellant to supply any information, produce any document or give any evidence that may assist the respondent in the performance of any of its functions. Section 26(h) in particular empowers EWURA as the Regulator to give directions to any person granted a licence under this Act. Under section 16(1) of the EWURA Act EWURA has wide powers to do all things which are necessary for or in connection with the performance of its functions or to enable it to discharge its duties. The respondent had, in our opinion, in the performance of its functions and duties, the mandate for and was justified in issuing the orders/directions set out in paragraphs 4.2, 4.3 and 4.4 reproduced herein.

The appellant appears to be treating EWURA as if it is party to the Lease Agreement between DAWASA and DAWASCO. This is a total misconception of the provisions of the law referred to in this judgement and the Lease Agreement between the appellant and DAWASCO. Needless to say the provisions of the Lease Agreement are not binding on EWURA.

In the premises, EWURA having undisputably followed the required procedure including conducting a public inquiry before reaching its decision, we are satisfied that save for the finding about the projected surplus in DAWASCO's budget for 2007/2008 its decision was well founded on the basis of findings Nos 3(ii) and 3(iii). This appeal has no merit and is hereby dismissed with costs. The appellant is *in fine* ordered to comply with the orders issued in paragraph 4 of the decision complained about.

R.H. Sheikh J. - Chairman _____

Jonathan A. Njau - Member _____

Prof. J.M. Lusugga Kironde - Member _____

Dated at Dar es Salaam this 26th day of September, 2008.

Delivered on 12th December, 2008 in the presence of Mr. Kamuzora learned counsel for the Appellant and Messrs Kabakama and Galeba learned counsel for the Respondents.

REGISTRAR