IN THE FAIR COMPETITION TRIBUNAL OF TANZANIA
AT DAR ES SALAAM
APPEAL NO. 1 OF 2010

ORYX OIL COMPANY LIMITED ---------- APPELLANT

VERSUS

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

(APPEAL ARISING FROM THE DECISION OF THE ENERGY AND WATER UTILITIES REGULATORY AUTHORITY (EWURA) DATED 25TH OF JANUARY 2010)

JUDGEMENT

This is an appeal from a decision of the Energy and Water Utilities Regulatory Authority (EWURA) (also referred to in the Act as the "**Authority**") set out in its letter with reference EWURA/42/3/Vol ii/178 dated 25th January 2010.

EWURA (the respondent), a regulatory authority, is a body corporate established under section 4 of the EWURA Act No. 11 of 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."

Sections 19(1) and (2) and 20(1) of the EWURA Act read:-

"19-(1) The Authority may conduct an inquiry where it considers it necessary or desirable for the purpose of carrying out its functions.

(2) The Authority shall conduct an inquiry before exercising a power to –

(a) grant, renew or cancel a licence other than a class licence;

(b) regulate any rate or charge;

(c) adopt a code of conduct.

20-(1) In carrying out its functions and exercising its powers under this Act, and under sector legislation in relation to particular markets for regulated services, the Authority shall take into account –

(a) whether the conditions for effective competition exist in the market;

(b) whether any exercise by the Authority is likely to cause any lessening of competition or additional costs in the market and is likely to be detrimental to the public;

(c) whether any such detriments to the public are likely to outweigh any benefits to the public resulting from the exercise of the powers."

Under the Petroleum Act No. 4 of 2008 the respondent is in addition authorized and required to carry out certain regulatory functions in respect of the petroleum supply, that is, all operations and activities for or in connection

with importations, landing, loading, transformation, transportation, storage, distribution and wholesale or retail trade of petroleum and petroleum products.

Sections 5(1) and 44(1) of the Petroleum Act, 2008 read:-

"5-(1) The Authority shall perform technical, economic and safety regulatory functions in respect of the petroleum supply.

(2) Without prejudice to the functions conferred upon the Authority under subsection (1), the Authority may –

(a) issue, renew, suspend or cancel construction approvals and operational licences;

(b) monitor petroleum quality and standards;

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(h) prescribe and cause to be published in the *Gazette* and in at least one Kiswahili and one English newspaper technical, economic and safety standards of services;"

"44-(1)A person may distribute petroleum or petroleum products only if such petroleum or petroleum products conform(s) with the quality, safety and environmental specification set by the Minister."

Under section 2 of the Tanzania Standards Act, Cap. 130 R.E. 2002

"**specification**" means a description of any commodity by reference to its nature, quality, strength, purity, composition, quantity, dimension, weight, grade, durability, origin, age or other characteristics, or to any substance or material of or with which, or the manner in which, any commodity may be manufactured, produced, processed or treated;

"**standard**" means a set of rules or conditions, approved, prescribed or recommended by the Bureau, which relate to or govern the specification, code of practice, safety, trade description, sampling method, testing method or any other aspect, quality, nature or matter relating to or connected with –

(a) the production or marketing of any commodity; or

(b) any component, raw material, machinery, instrument, apparatus or other thing used, directly or indirectly, in the production or marketing of any commodity,

And includes, in relation to metrology, provisions approved or prescribed by the Bureau relating to the fundamental unit or physical constant and the testing of instruments and apparatus used for the determination of weights and measures, and "**standardisation**" means the provision or promotion of standards."

The functions of TBS as provided under section 4 of the Standards Act are ***inter alia*** to undertake measures for quality control of commodities of all descriptions and to promote standardisation in industry and commerce and to make arrangements or provide facilities for the examination and testing of commodities and any material or substance from or with which, and the manner in which, they may be manufactured, produced, processed or treated.

The procedure for sampling and testing of petroleum products by EWURA is set out in the Energy and Water Utilities Regulatory Authority (Petroleum Products Sampling and Testing) Rules, G.N. No. 31 of 2008 (hereinafter also referred to as the "**Sampling and Testing Rules**" or "**G.N. No. 31 of 2008**"or the "**Rules**") the relevant parts whereof read as follows:-

"2-(1) These Rules shall apply to all Regulated Suppliers offering Regulated Services in the Mainland Tanzania.

(2) All Regulated Suppliers engaged in wholesale, retail, consumer installation and transportation of Petroleum Products shall carry out their Regulated Services in accordance with these Rules.

(3) The purpose of these Rules is to ensure that the procedure for sampling and testing of Petroleum Products in all Licensed Facilities is –

(a) safe;

(b) transparent; and

(c) properly conducted."

Under Rule 3 –

- "**Authority**" means the Energy and Water Utilities Regulatory Authority established under Section 4 of the Act;

- "**Licensed Facility**" includes but not limited to the depots, warehouses, road tankers, railways wagons, Consumer Installation, buildings, storage tanks and dispensing pumps in respect of which the Regulated Supplier has been granted the licence;

- "**Operator**" means a competent person who, for the purpose of these Rules, shall be deemed to have the authority and the ability to –
  (a) grant inspectors access to relevant premises and facilities to facilitate the performance of their duties;
  (b) in all circumstances, detect any defect weakness within the retail outlet or depot premises and make an authoritative judgement as to its suitability for further use;
  (c) answer questions raised by the inspectors; and
  (d) witness the sampling process;

- "**Petroleum Products**" for the purpose of these Rules shall have the same meaning as that ascribed to it by any relevant law and includes motor

spirit (petrol), gas oil (diesel), kerosene, Jet-AI, Aviation Gas, fuel oils, propane, butane, lubricating oils, and bitumen, but shall not include natural gas;

- "**Regulated Services**" means any goods or services supplied or offered for supply in the petroleum sector;

- "**Regulated Supplier**" means any person engaging in activities or in connection with Regulated Services;

- "**Sampling Procedure Guidelines**" means the set of instructions prepared by the Authority on how to conduct the sampling and testing of Petroleum Products;

- "**TBS**" means the Tanzanian Bureau of Standards established under section 3(1) of the Standards Act.

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Rule 4(4) and (5) read:-

"4-(4) The Authority shall conduct sampling procedures in accordance with –

(a) these Rules;

(b) the Petroleum Products Sampling Procedures and Safety Manual as may be revised from time to time by the Authority; and

(c) the Authority's Guidelines on Petroleum Products marketing discipline as may be revised from time to time.

4-(5) Petroleum Products samples shall be retained for a period not exceeding two months after the date of collection."

Rule 5(4) reads:-

"5-(4) The Inspectors shall, upon arrival at the Licensed Facility and identifying themselves, deliver to the Operator –

(a) the Sampling Procedures Guidelines; and

(b) the Sample Collection Forms."

The relevant parts of Rule 6 read as follows:-

"6-(5) The Inspectors shall during the sampling process take three samples for each Petroleum Product from the Licensed Facility.

(6) In respect of the three samples described under sub-rule (5), the Inspectors shall|:

(a) deliver one sample to the Operator for safe storage in the Licensed Facility's sample storage trunk for possible re-testing;

(b) deliver one sample to one of the laboratories listed pursuant to Rule 7(1) for testing; and

(c) retain one sample for possible re-testing.

(7) The Authority shall properly document the chain of custody of the three samples described under sub-rule (6).

(8) The Authority may, upon taking a Petroleum Product sample pursuant to this Rule, order the temporary closure of the Licensed Facility, either in whole or in part, pending release of the test results of the samples taken where:

(a) the Authority determines that continuing operations of the Licenced Facility will pose an imminent risk of damage to property or danger to the public or the environment; or

(b) the Authority finds that several complaints have been leveled against the same Regulated Supplier;

(c) the Authority has obtained provisional test results that indicate that the tested Petroleum Products are non-conforming; or

(d) the Regulated Supplier admits that the sample Petroleum Products are non-conforming."

The relevant parts of Rule 7 read as follows:-

"7-(1) The Authority shall, before testing Petroleum Products compile a list of laboratories that are capable of undertaking analysis of Petroleum Products samples in accordance with Tanzania Bureau of Standards Specifications.

(2) The Authority shall select laboratories under sub-rule (1) on the basis of the following criteria –

(a) the ability of the laboratory to conduct specific tests as per TBS published Petroleum Products specifications;

(b) whether the laboratory is equipped with up-to-date and calibrated instruments and supplies consistent with t he scope and volume of tests to be conducted;

(c) the laboratory's reputation in the community on matters of professionalism and ethical behavior;

(d) information related to the laboratory's participation in voluntary accreditation programs and its current certification status;

(e) ease of communication, particularly in respect of questions arising; and

(f) timely delivery of test results.

(3) The Authority shall bear costs for sampling and testing Petroleum Products.

(4) Petroleum Products samples delivered to the laboratory for testing pursuant to sub-rule (6)(b) of Rule 6 shall be tested against TBS published Petroleum Products specifications.

(5) The Authority shall, within fourteen days after taking the sample, communicate the results of all sample tests to the respective Regulated Supplier.

(6) Where the test results indicate that the sample is in conformity with TBS specifications, the Authority shall notify the respective Regulated Supplier accordingly and take no further action.

(7) Where the results indicate that the sample does not conform to TBS specifications, the Authority shall notify the Regulated Supplier of the results and the appropriate action the Authority intends to take as specified under Rule 9 and in the First Schedule."

Rules 8 and 9 read as follows:

"**8-(1) The Authority shall, where any person disputes the results delivered under Rule 7(7), conduct a re-test of the samples and the costs of re-testing shall be borne by the person disputing the first results.**

(2) Where the Authority determines to conduct re-testing procedures, the Authority shall require the sample retained by the Regulated Supplier and the sample conserved by the Authority to be re-tested in two separate laboratories to be chosen from the list prepared by the Authority pursuant to Rule 7(1), provided that no testing shall be

conducted by a laboratory that was involved in the first testing process.

(3) The Regulated Supplier, Complainant or their representatives may be present for the re-testing process.

(4) In the event that the Regulated Supplier, Complainant or their representatives refuse or fail to appear for the re-testing described under sub-rule (3) the Regulated Supplier or Complainant shall be deemed to have waived their right to witness the re-testing procedure and to have authorized the Authority to proceed with such re-testing in their absence.

(5) The results of the re-testing shall be final and no further testing shall be conducted.

(6) The Authority shall make a final determination on the test results from the two laboratories taking into account the results of the first test and communicate such determination to the Regulated Supplier, Complainant and the public.

9-(1) Where the results from the re-test are found to be not in conformity with the TBS specifications, the Authority shall take appropriate actions that shall comprise all or any of the following:

(a) a fine as described in the First Schedule; or

(b) an order for compensation to any person for damages caused by the non-conforming Petroleum Products; or

(c) order the Regulated Supplier at its expense to immediately correct or dispose of all non-conforming Petroleum Products in

accordance with Good Petroleum Industry Practices and environmental law; and

(d) order the Regulated Supplier to pay compensation in respect of any damage resulting from such disposal.

9-(2) The Authority may, in addition to the actions described under sub-rule (1), order for suspension or revocation of the Licence as per the First Schedule."

The appellant, **ORYX OIL COMPANY LIMITED**, is a limited liability company with its registered office at Plot No. 2, Mandela Road, Kurasini Industrial Area, Dar es Salaam engaged in and carrying on the business of supplying and selling of petroleum products in the United Republic of Tanzania under a Petroleum Products (Wholesale) Licence issued on 24th June 2009 by EWURA pursuant to section 7(1)(b)(i) of the EWURA Act Cap. 414 and section 7 of the Petroleum Act, 2008.

Under the licence "**Petroleum Products Wholesale Business**" means the business of selling a Petroleum Product in Bulk Quantity and to conduct any activity reasonably required in connection thereto or incidental thereto, including the handling, possession, conveying and storage of such a Petroleum Product. The undisputed historical background to this appeal may be briefly stated as follows: On 26/11/2009 the respondent, as part of a routine checkup of the quality of petroleum products sold or offered for sale in different petroleum stations located in the country, had sent an inspector one **NATHANIEL EDWARD** to inspect a depot in Moshi owned and operated by the appellant. The inspector during the inspection of the Moshi depot took three (3) samples of three petroleum products from different storage tanks. Out of

the three the samples taken were: one from MSP (Sample No. ORYMSHMSP) from tank No. 02 and two from Automotive Gas Oil (Sample No. ORYMSHGO and Sample No. ORYMSHGO2) from tanks Nos 06 and 04 respectively. One sample of each product was left for storage at the Moshi depot, one sample of each product was retained by EWURA and the remaining sample of each product was sent to **INTERTEK CALEB BRETT LABORATORY** for testing and analysis. On 18/12/2009 the Depot Manager, Bruno Tarimo, was served with a Compliance Order issued by the respondent informing the appellant of the sample test results. According to the Compliance Order, the results of the test indicated that whereas the samples drawn from tanks No. 06 and 04 which contained automotive gas oil were in conformity with TBS specifications, the results on the Research Octane Number (RON) for sample No. ORYMSHMSP drawn from tank No. 02 which contained MSP (petrol) indicated a RON of 90.9 instead of the required minimum of 93, implying that the RON did not meet the standard approved specifications of TBS. On the basis of the above findings, the appellant was ordered to:

"(a) immediately quarantine tank No. 02 located at its Moshi Depot and not to sell any petroleum products from the said tank until when otherwise directed by EWURA; and

(b) show cause in writing within seven (7) days from the date hereof why severe punishment should not be taken against it for selling or offering for sale off-specification Petroleum Products."

By a letter dated 20/12/2009 addressed to the Director General of the respondent, the appellant acknowledged receipt of the Compliance Order and informed him that upon retesting the product the finding showed a RON of 92. In the letter aforesaid, the author also proposed that a retesting of the product for the RON be conducted. He also gave his opinion as regards the probable reasons for the deterioration of the RON. There was no reply from the respondent to the aforesaid letter from the appellant. On 25/01/2010 the

appellant received a letter from the respondent informing the appellant of the respondent's decision to close down the Moshi Depot for a period of 12 months effective 14/12/2009 and in addition to pay a fine of Tshs.10,000,000.00. According to the appellant (and this is undisputed), under Rule 8 of the EWURA (Petroleum Products Sampling and Testing) Rules 2008, where any person disputes the initial results of a sample test taken by the respondent, the respondent has an obligation to retest in the presence of the appellant the samples taken at two laboratories other than the laboratory in which the initial sample was tested. The appellant is aggrieved with the decision of the respondent to close down the Moshi Depot for a period of 12 months communicated in the letter dated 25/01/2010 and complains inter alia that the respondent had failed to comply with the procedure laid down by the EWURA (Petroleum Products Sampling and Testing) Rules 2008 and that EWURA had wrongly imposed a penalty under Rule 9 and the First Schedule of the EWURA Rules 2008 for the alleged failure by the appellant to ensure that the petroleum products offered for sale were in conformity with TBS specifications.

In the Memorandum of Appeal lodged in this Tribunal on 03/02/2010 the appellant has raised the following grounds of appeal:

1. The Respondent erred in law by failing to comply with the procedure laid down by the Energy and Water Utilities Regulatory Authority (Petroleum Products Sampling and Testing) Rules, 2008.
2. The Respondent acted ***ultra vires*** in ordering the closure of Moshi Depot.

In the alternative and without prejudice to the foregoing:

3. The Respondent erred in law and in fact by failing to comply with the principles of natural justice by failing to accord the Appellant with the

right to be heard before reaching the decision of closing down the Moshi Depot.

In the alternative and without prejudice to the foregoing:

4. The Respondent erred in law by failing to conduct an inquiry before ordering the closure of Moshi Depot for twelve months.
5. The Respondent erred in law and in fact by giving the Applicant a retrospective punishment.
6. The Respondent erred in law and in fact by failing to balance between the rights and obligations of the consumers and that of the regulated suppliers.
7. The Respondent erred in law and in fact by failing to take into account before reaching its decision, the conditions for effective competition existing in the market and whether or not the decision to close down the Moshi Depot is likely to cause any lessening of competition or additional costs in the market and is likely to be detrimental to the public.

The respondent has resisted the appeal.

In the Reply to the Memorandum of Appeal filed by the respondent, the respondent has maintained that the decision to close down the Moshi Depot cannot be faulted as this was not the first time that the appellant was found to be not in compliance with the EWURA Rules, that in January 2008 ORYX was found selling and offering for sale petroleum products that were off specifications and that being the first offence the appellant was penalized by payment of a fine. It is further asserted that in the instant case the tests conducted by Intertec Caleb Brett Laboratory found that the sample taken from tank No. 02 containing MSP indicated a RON content of 90.9 instead of the required minimum of 93, meaning that the product was off specifications by TBS standards, and that despite the Compliance Order issued by the

respondent requiring the appellant to show cause why severe punishment should not be imposed for the offence, the appellant had failed to present any reasonable defence, leading to the decision by the respondent to close down the Moshi Depot, as stated in the letter dated 25/01/2010. In the Reply, the respondent also asserts that the order for closure of the Depot is a lawful order made in full compliance with the sampling and testing procedures provided under the EWURA Rules 2008 read together with Schedule 1 thereto, that there was no legal requirement to hold an inquiry prior to ordering the closure of the Depot, that the appellant having been afforded an opportunity to be heard had failed to put up any defence, that the letter from the appellant dated 20/12/2009 written in response to the Compliance Order was an admission of the non-conformity of the product, that the punishment inflicted on the appellant was not retrospective and that in reaching the decision the respondent had taken into account the rights of the consumers and regulated suppliers, in particular the need to protect consumers against off-specifications petroleum products.

At the hearing the appellant was represented by Ms Fatma Karume of IMMMA Advocates, while the respondent was represented by Messrs Galeba and James Kabakama of G.R.K. Advocates.

We deem it necessary to put it on record that the appellant had also filed an application - Application No. 1 of 2010 – seeking an order suspending the operation of the order closing the applicant's Moshi Depot pending the hearing and determination of this Appeal which application was adjourned by consent of the respective learned counsel. When this Appeal came for hearing with the consent of the respective counsel, it was ordered that all the affidavits filed in support of and against Application No. 1 of 2010 be adopted in this Appeal as the evidence in chief of the respective deponents or additional evidence to form part of the record of this Appeal, in pursuance of Rule 30(2) of the Fair Competition Tribunal Rules, 2006. Accordingly, the affidavits of **NICK**

MCALEER in support of the Application for Suspension of the Closure and the Affidavit in Reply of **NATHANIEL EDWARD** filed against the Application were adopted and copies thereof filed in this Appeal as additional evidence to form part of the record of the Appeal. This being the case, the parties were accordingly allowed to cross-examine the deponents of the respective affidavits. In their respective submissions, learned counsel for both sides presented arguments on the basis of the affidavit evidence and the oral evidence given by Nathaniel Edward.

In her submission in support of the Appeal, Ms Karume, learned counsel for the appellant basically adopting the affidavits filed in support of the application, asserted that the respondent had failed to comply with the sampling procedure provided in the EWURA Rules, that during the inspection the inspector had not supplied the appellant with the Sampling Procedure Guidelines as required under Rule 5(4)(a) of the EWURA Sampling and Testing Rules, and that EWURA had not complied with the requirement to deliver the test results to the operator within 14 days of taking the samples, as required under Rule 7(5) of the EWURA Sampling and Testing Rules, G.N. NO. 31 of 2008. Ms Karume argued that the non-delivery of the sampling guidelines put the operator at a disadvantage, and that it was important for the operator to be given the sampling guidelines as they inform the operator about the sampling process, the manner of appealing and other rights such as the right to have the sample retested in two separate laboratories in the presence of the representatives of the regulated supplier or complainant, as provided under Rule 8 of the EWURA Sampling and Testing Rules. It is Ms Karume's contention that the non-delivery of the sampling guidelines denied the appellant its right to have the sample retested under Rule 8 and instead the appellant took the sample and had it tested independently, whereupon the result indicated a RON of 92. As regards ground 4, Ms Karume submitted that under the Rules the appellant is not empowered to suspend or close down a depot; it can only suspend a wholesale licence on a second offence and revoke a licence on a

third offence, and that the suspension or revocation of a licence may only be made under certain circumstances provided under section 19(2) of the EWURA Act, which requires the holding of a public inquiry. With respect to grounds 6 and 7, Ms Karume argued that, while under Rule 9(2) of G.N. No. 31 of 2008 EWURA has the discretion to order a suspension or a revocation of a licence as provided in the First Schedule, this discretion must be exercised judicially after taking into consideration a number of factors provided in section 6 of the EWURA Act, which include the need to promote efficiency, protect consumers, competition and to balance the rights of consumers, suppliers and investors and the fact that there is no evidence of adulteration of the product. Learned Counsel was emphatic that to close down the depot because 30,000 litres (1 truckload) of unadulterated petrol were found off specifications was unreasonable, unfair and oppressive. As regards ground 5, Ms Karume submitted that by making the order retrospectively effective from 14/12/2009 the respondent had automatically condemned the appellant to a breach of the order since the depot was conducting business as usual from 14/12/2009.

In response, Mr Galeba and Mr Kabakama, learned counsel for the respondents, maintained strongly that the decision to close down the depot cannot be faulted, that the appellant had committed a second offence and the penalty imposed was in accordance with the law. As regards the non-compliance with the sampling and testing procedures, in particular the requirement for the inspector upon arrival to deliver to the operator the Sampling Procedure Guidelines and to deliver the test results within 14 days, they submitted that the procedure having been published in G.N. No. 31 of 2008 had become law and it was presumed that the appellant's Depot Manager was aware of the Rules and unless an injustice is established to have been occasioned to the appellant, the omission to deliver the Guidelines cannot be used to vitiate the entire sampling proceeding and/or the decision. They added that the non-delivery of the results within 14 days as required was due to the fact that the

testing of some parameters had to be done in Mombasa, which accounted for the delay.

Learned counsel for the respondent further submitted that ground 3 is misconceived as the appellant was given the right to be heard but failed to present a defence and by the letter dated 20/01/2009 the appellant had clearly admitted that the product was indeed off specifications. As regards ground 4, he contended that under the provisions of the EWURA Act, section 19(2), an inquiry is required to be held by the respondent only before exercising his power to: (a) grant, renew or cancel a licence other than a class licence; (b) regulate any rate or charge; and (c) adopt a code of conduct. He argued that none of these scenarios was applicable in this case and therefore the requirement to hold an inquiry could not come into play. What EWURA did was to carry out its function of monitoring of petroleum quality and standards under section 5(2)(b) of the Petroleum Act No. 4 of 2008. He asserted that under the EWURA Act the respondent has tremendous powers; it is empowered under section 16 of the Act to ***inter alia*** issue or cancel licences, under clause 29(6)(a) of the licence granted by EWURA on 24/06/2009, to suspend/close down part of the business/operations of a licensee and under section 21(c) of the licence to restrict the conduct or performance of certain licensed activities, and under section 5(1) and 5(2)(b) of the Petroleum Act it is mandated to deal with an operator in a practical manner while conducting its regulatory functions of monitoring petroleum quality and standards. He further argued that in any case, as the respondent's decision related to the closure of only the offending facility (the Moshi Depot) it was not in any way prejudicial to either the appellant or to competition in general, adding that the order for the closure of the depot was in fact more lenient than would have been a suspension of the licence which would have affected and even put to halt the appellant's operations countrywide.

As regards ground 6, Mr Galeba contended that while EWURA had the power to cancel or suspend a licence it had decided to close down only one of the four depots owned by the appellant in pursuance of the need to balance the rights and obligations of the consumers and those of the regulated suppliers and to promote competition. Lastly, Mr Kabakama submitted that the punishment imposed was not retrospective as the offence was established on the day the Compliance Order was issued, that is on 14/12/2009.

The appellant relied on their affidavit evidence only while the respondent in addition to the affidavit evidence brought one witness NATHANIEL EDWARD who gave additional evidence followed by cross examination by Ms Karume, learned counsel for the appellant. In his oral evidence Mr Edward basically explained the procedure adopted during the inspection of the Moshi depot on 26/11/2009. He admitted that: (1) upon arrival at the depot he and his companions did not deliver to the Depot Manager the Petroleum Sampling and Testing Guidelines; and (2) after the tests were conducted the results thereof were communicated on 18/12/2009 that is after the fourteen-day limit set in the Rules, G.N. No. 31 of 2008. He explained that the delay in communicating the results of the tests was due to the fact that the sample-taking exercise was conducted in two regions – Kilimanjaro and Arusha – within the same week and that one of the laboratory tests was conducted in Mombasa, Kenya, and secondly, that after receiving the results from the laboratories there was further delay as he had to prepare an internal technical report of the results for submission to his superiors before the results could be released.

This witness testified that upon arrival at the depot for inspection on 26/11/2009 he introduced himself and his colleague to the Depot Manager and told him of the purpose of their visit, that they were there to conduct an inspection of the depot and they were going to take samples of the petroleum products from different tanks so as to test the quality and standard of the said products. He admitted that he did not give the Depot Manager the EWURA

Petroleum Sampling Procedure Guidelines. He said exposure to sunlight, atmosphere and altitude may affect the RON and result in lower RON content thereby rendering the product off-specifications, that the operator had the obligation to ensure that the petrol was not exposed to light, atmosphere or altitude or anything which may affect its quality and lead to its deterioration, that it was possible for petrol to be off-specifications without being adulterated and that a product may be off-specifications due to long storage. He also opined that while a lower RON level has a negative impact on the engine of a motor vehicle the fact that the RON was 90.9 did not mean that the product was necessarily adulterated, but once a product was found off-specifications it may not be offered for sale.

Now it is not disputed that the Inspector who went to inspect the Moshi depot did not upon arrival deliver to the Operator/Depot Manager the Sampling Procedure Guidelines. The requirement to deliver the Guidelines is mandatory under Rule 5(4) and the omission to do so cannot be lightly dismissed as has been urged on behalf of the respondent. The words "**shall**" and "**deliver**" in the Rule aforesaid underscore the need and importance of bringing to the notice of the Operator of a Licensed Facility at each inspection, the Sampling Procedure Guidelines setting out the procedure as well as the rights and obligations of the Regulator and a Regulated Supplier during the entire sampling and testing process. The fact that the appellant was in January 2008 undisputably found selling and offering for sale petroleum products that were off-specifications cannot in any way lessen the respondent's obligation to deliver the Guidelines to the Depot Manager upon arrival at the depot for inspection, as required under Rule 5(4) of the Rules. We cannot, therefore, accede to the contention by learned counsel for the respondent that the sampling and testing procedure process having been provided for in Parts II and III of G.N. No. 31 of 2008 it is deemed that the appellant had notice or was aware of the manner in which the sampling and testing process was to be conducted. Indeed, going by the definition of "**Sampling Procedure**

Guidelines" in Rule 3 of G.N. No. 31 of 2008 and the provisions of Rule 5(4), it is clear that the Sampling Procedure Guidelines are not the same as the Rules under G.N. No. 31 of 2008, and that they are intended to be a separate set of instructions prepared by EWURA on how to conduct the sampling and testing of petroleum products and which the respondent is mandatorily required to deliver to the Operator upon arrival at a Licensed Facility at each inspection. However, from the evidence on record and from the respective arguments by learned counsel it is not even established or clear whether or not these Guidelines in fact exist or whether they were prepared by EWURA as envisaged under Rule 3 of the Rules and required as is implicit in Rule 5(4).

We will say without further ado that in the present case the non-delivery of the Guidelines as required put the appellant at a disadvantage and has thereby occasioned grave injustice to the appellant, who evidently unaware of the requirement for re-testing and the procedures to be adopted under Rule 8 of G.N. No. 31 of 2008 where a person disputes the results of a test conducted by EWURA, proceeded to conduct an independent test of the product whereupon the results indicated a RON of 92. Clearly, the re-test conducted independently by the appellant made it impossible for another re-test to be conducted under Rule 8 of G.N. No. 31 of 2008, which would have been the proper procedure under the law. To this extent, we are inclined to agree with Ms Karume that had the Guidelines been delivered to the Depot Manager by the Inspector upon arrival for inspection the appellant would not have found it necessary to take the sample retained by them for an independent re-testing of the product.

The complaint about the failure to communicate the results of the sample tests to the appellant within fourteen days also has merit. The samples were undisputably taken on 26/11/2009 and the results were not communicated to the appellant until 18/12/2009 by way of the Compliance Order, 8 days after the fourteen-day limit set out in Rule 7(5) of G.N. No. 31 of 2008. As stated earlier, in his oral evidence the Inspector RW1 explained that the delay was

attributable to the fact that the sample had to be tested in Mombasa and that after receiving the results there were some internal reporting procedures to be complied with before communicating the results to the appellant. However, the fact remains that the requirement for communicating the results within fourteen days after taking the samples is a mandatory requirement and non-compliance with the requirement is a breach which cannot be disregarded. In order to regulate a regulator must himself be in full compliance with the law, rules and regulations and ensure the highest standards of efficiency and competence in order to attain the objectives of the intended regulation. It would indeed be a fallacy and unjust to condone the lapses by a regulator in observing the rules while at the same time penalizing a regulated supplier for an alleged offence under the same rules. Such conduct would surely amount to an application of double standards. The omission to conduct a re-test besides being a contravention of the mandatory provisions of Rule 8(1) has also, in our view, denied the appellant the right to have the test conducted in its presence.

The decision ordering the closure of the appellant's Moshi Depot set out in the respondent's letter dated 25/01/2010 reads as follows:-

> **"During the petroleum quality inspection exercise conducted on 26th November 2008, you were found selling/offering for sale off-specification petroleum products at your depot located at Moshi Municipality in Kilimanjaro region for the second time. ……**
>
> **The decision to close the station was made pursuant to the provisions of the First Schedule to the EWURA (Petroleum Sampling and Testing) Rules, GN No. 31 of 2008.**

On the basis of the foregoing you are notified that you are not allowed to operate Oryx Oil Co. Ltd – Moshi Depot for a period of twelve (12) months effective from 14th December 2009. If you feel aggrieved by this decision you may wish to appeal to the Fair Competition Tribunal within twenty-one (21) days from the date hereof."

According to the letter the decision to close down the depot was made pursuant to the provisions of the First Schedule to the EWURA Rules, G.N. No. 31 of 2008. It is not disputed that the appellant had been previously in January 2008 found selling and/or offering for sale petroleum products which were off-specifications. The respondent contends that the appellant did not in its letter of 20/12/2009 dispute the results of the tests conducted by EWURA and that the letter in fact contains an admission of the non-conformity of the product with the TBS standards.

Now the questions to be addressed are: Is the letter dated 20/12/2009 an admission that the product was off-specifications? If it was not an admission, was the alleged offence proved? Is there any reliable evidence to establish that the product was off-specifications under the Rules, G.N. No. 31 of 2008? Again, was it proper and/or lawful for the respondent to impose the penalty of closing the depot? Was the respondent justified in imposing the penalty pursuant to the provisions of the First Schedule of the EWURA (Petroleum Sampling and Testing) Rules, G.N. No. 31 of 2008? The answers to all these questions are in the negative. In the first place, upon careful consideration of the letter dated 20/12/2009 we are of the firm opinion that the letter does not contain admissions or constitute an admission of the test results. In the letter it is clearly stated that a re-test conducted independently by the appellant showed a RON of 92 and that the appellant had received no reports or complaints from its staff or customers about the effects or any reduction in the performance of the product. Admittedly, in the penultimate paragraph the appellant said ***inter alia***:

"We however acknowledge that this does not meet the TBS specification and propose the following remedial action:

- **Re-test the contents of Tank No. 2 if possible at two different lab facilities for consistency.**
- **Test the Mogas currently stored at our Kurasini Terminal for blending at Moshi.**
- **Request ITS to recommend a blending ratio to increase the RON back to 93.**
- **Blend the recommended volume into our tank at Moshi.**
- **Retest for RON and if on specification seek your approval to continue service to our customers.**
- **Should the blend ratio be excessive that will result in us holding too much stock for current demands we will uplift and return to Dar es Salaam for blending at our Kurasini Terminal."**

By proposing a re-test of the product in Tank No. 2 at two different laboratories it seems clear to us that the appellant has in the letter indicated that it is disputing the results of the test conducted by EWURA under Rule 7(7). Under Rule 8(1) of the Rules it is provided that where any person disputes the results under Rule 7(7) it is mandatory for a re-test of the samples of the product to be conducted by EWURA during which re-testing process the appellant had the right to be present. The respondent therefore ought to have and was indeed mandatorily required to conduct a re-test of the product under Rule 8, the results of which re-test would have been final (see Rule 8(5)). Regrettably, by then the sample of the product left with the appellant under Rule 6(6)(a) for possible re-testing was no longer available, having been used in the re-test conducted independently by the appellant, indicating that it was no longer possible to re-test with the samples taken as envisaged under Rule 6(6) of the Rules. The fact that it was no longer possible to re-test leaves

the result of the test conducted by EWURA disputed and hence inconclusive. In the circumstances, was the respondent justified in imposing the penalty? Going by the provisions of Rule 9(1) of G.N. No. 31 of 2008, in particular the words "**where the result from the re-test is found to be not in conformity with the TBS specifications ……**" the penalties for nonconforming products may only be imposed **where a re-testing having been conducted under Rule 8 of the EWURA Sampling Rules the sample is found to be not in conformity with the TBS specifications**. This is crucial and clearly the imposition of a penalty or penalties under Rule 9 and the First Schedule is subject to a re-testing of the sample being conducted in accordance with Rule 8. In the instant case there is no dispute that such re-testing of the sample was not carried out. In the letter dated 20/12/2009 the appellant had requested a re-testing of the product in Tank No. 2 at two different laboratories for the RON, etc. However, without commenting on this request the respondent by its letter dated 25/01/2010 conveyed the decision to close down the depot. The condition to re-test was not complied with and thereby the appellant was denied the right to have a re-test of the samples to be conducted. This omission was crucial. The results still remain disputed and inconclusive as stated earlier and hence we find that the respondent was not justified under the Rules to impose any penalty upon the appellant.

Secondly, it is pertinent to note that in the list of punishments provided under the First Schedule, on a second offence the punishment for a Regulated Supplier with a wholesale licence is a fine of Tshs.10,000,000.00 and suspension of the licence for a period of up to twelve months. As pointed out by Ms Karume, the closure of the depot was not among the penalties provided under Rule 9 or the First Schedule. In the First Schedule it is clearly provided that EWURA may only **suspend a licence** on a second offence and in the event of a third offence it may order a revocation of a licence or suspension of the management team. While the fine of Tshs.10,000,000.00 could have been lawfully imposed had the second offence been proved, EWURA was not

empowered to order the closure of the Moshi Depot for twelve months even had the offence been proved. Assuming that the re-test of the product had been conducted in terms of Rule 8 and the offence was established under Rules 8 and 9 (and in the instant case the re-test was undisputably never conducted), what EWURA ought to have done, this being a second offence, was to suspend the appellant's wholesale licence for a period of up to twelve months, as provided in the First Schedule of the Rules, and that is only after having duly conducted an inquiry as required under section 19(2) of the EWURA Act, 2001. To this extent the complaint by the appellant about not holding the inquiry and not having been given the right to be heard has merit. However, the point is, no re-testing was conducted as required and because of this the appellant was not liable to any punishment. Under Rules 8(5) and 9 it is implicit that the offence was not proved and therefore EWURA had no authority or justification to impose any penalty upon the appellant for the alleged second offence. The respondent clearly acted ***ultra vires*** in not only ordering the closure of the Moshi Depot but also imposing the fine of Tshs.10,000,000.00 since, we repeat, the offence was not proved by re-testing as required by the rules. We find merit in grounds 1, 2, 3 and 4 which are accordingly allowed.

With regard to ground 5, we must also say that it was clearly improper for the respondent to impose the penalty retrospectively from 14/12/2009 just because the Compliance Order was issued on that date. It is improper to mix up the two, that is the Compliance Order and the penalty for an offence which has been established under the Rules because while the respondent may under Rule 6(8) order the temporary closure of a licensed facility or depot pending release of the test results of the samples taken, a punishment may only be imposed upon an offence being established. Regarding ground 5, again it is a general principle of the law that a person should not be punished retrospectively. Admittedly, under Rule 8 EWURA may, upon taking a petroleum product sample, pursuant to the Rule, order the temporary closure

of a licensed facility where ***inter alia*** it has obtained provisional test results that indicate that the tested Petroleum Products are non-conforming, or the Regulated Supplier admits that the samples of Petroleum Products are non-conforming. However, after conducting the required tests under the Rules, even where the offence is established, it is unlawful for the Regulator to impose a penalty retrospectively from the date of obtaining the first test results.

In the circumstances, the entire sampling and testing exercise being flawed from inception due to noncompliance with the Sampling Rules, it is our finding that the decision to impose the penalty of a fine and closure of the depot was unlawful; having been based on inconclusive test results; indeed, as the offence was not proved, the respondent was not empowered to impose or justified in imposing any penalty at all. In view of this finding, we deem it unnecessary to address grounds 6 and 7, which grounds would have relevance if the respondent had justification for punishing the appellant under Rule 9 of G.N. No. 31 of 2008. Suffice to say that under the provisions of section 6 of the EWURA Act, it is the duty of the respondent in carrying out its functions to promote effective competition and economic efficiency and to protect the interests of consumers and efficient suppliers and in the process to balance the rights and obligations of consumers and regulated suppliers. We would add that while the promotion of competition is one of the factors that the appellant is required to take into account in carrying out its functions and exercising its powers as a regulator, the desire to promote competition should not in itself be a basis for permitting a regulated supplier to sell or offer for sale products which are off-specifications. What will prevail in deciding whether or not to allow such sale in a given situation is what is provided in the relevant legislation. In the present case, what is crucial is whether or not the products are in compliance with section 44 of the Petroleum Act and the Sampling Rules.

It cannot be overemphasized that a regulatory authority must act in an exemplary manner. In order to regulate the regulated suppliers it must not

only comply with the law and the rules applicable but also must maintain and attain in the carrying out of its functions and duties the highest standards of efficiency and competency in accordance with the law without exception. It would be unjust, undesirable and unproductive for a regulator to seek to regulate and impose penalties on offending regulated suppliers while expecting to be excused for its own lapses and omissions under the same rules. This would clearly result in double standards, which would not only be contrary to the relevant legislation and rules of natural justice but would also defeat the very purpose of establishing the regulatory body.

In the premises, we find that the decision ordering the payment of the penalty of Tshs.10,000,000.00 and the closure of the Moshi Depot was unlawful due to non-compliance with the EWURA Sampling and Testing Rules G.N. No. 31 of 2008, which non-compliance materially affected the decision appealed from. The respondent had improperly imposed the punishment under Rule 9 and the First Schedule.

In the event, the appeal is hereby allowed with costs and the Decision dated 25/01/2010 ordering the closure of the Moshi Depot and the payment of a fine of Tshs.10,000,000.00 is hereby quashed. We hereby order the immediate release of the Moshi Depot, save that the disputed Tank No. 2 shall remain closed and sealed until appropriate action is taken, as envisaged under Rule 9(1)(c) to immediately correct or dispose of the alleged non-conforming product. The appellant is ordered to immediately undertake at its own expense the correction or disposal of the alleged non-conforming product. For the avoidance of doubt the appellant is ordered at its own expense to immediately undertake the correction of the product in Tank No. 2 by blending the ratio to increase the RON to the required minimum of 93, failing which the appellant is ordered to dispose of the alleged non-conforming product under the supervision of the Regulator and TBS in accordance with Good Petroleum Industry Practices and environmental law, as envisaged under Rule 9(1)(c).

The fine of Tshs.10,000,000.00 if already paid shall be refunded to the appellant.

R.H. Sheikh J., Chairman _____

Felix Kibodya, Member _____

Prof J.M. Lusugga Kironde., Member _____

Date: _____ _____ 2010

Dated at Dar es Salaam this _____ day of _____ 2010

Delivered on _____, 2010 in the presence of _____

_____

R.H. Sheikh J., Chairman _____

Felix Kibodya, Member _____

Prof J.M. Lusugga Kironde., Member _____

Date: _____ _____ 2010