

**IN THE FAIR COMPETITION TRIBUNAL**

**AT DAR ES SALAAM**

**TRIBUNAL APPEAL NO. 3 OF 2012**



**NTULLY HUGGINS.....APPELLANT**

**VERSUS**

**MIC TANZANIA LIMITED.....1<sup>ST</sup> RESPONDENT**

**TANZANIA COMMUNICATIONS REGULATORY**

**AUTHORITY .....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

Ntully Huggins (the appellant) is appealing against the decision of the Tanzania Communications Regulatory Authority, (also known by its acronym "TCRA"), the 2<sup>nd</sup> respondent herein, in its decision dated 8<sup>th</sup> June, 2012. In essence, the appellant has requested this Tribunal to declare him an overall winner of JIKOKI promotion for all prizes amounting to Tanzanian Shillings four hundred eighty million only (480,000,000/=). The said promotion was conducted by MIC Tanzania Ltd (TIGO), licensed and supervised by Gaming Board of Tanzania (hereinafter referred to as "the Gaming Board") as a regulator of the gaming activities in Tanzania.

Briefly, the historical background giving rise to this appeal is that on 31<sup>st</sup> January, 2012 the appellant lodged a complaint before TCRA in respect of a lottery promotion in the name of "JIKOKI" run by the 1<sup>st</sup> respondent, TIGO in which he was a player. The appellant complained that he noticed irregularities that included postponement of the lottery that ended up running for 72 days only instead of the intended 114 days. He also complained that he received text messages encouraging him to continue participating even after the advertisement that postponed the lottery and that each text message was charged at Tanzanian Shillings three hundred sixty thousand only (360/=). He agreed that although he won airtime and free SMS, his concern was that he never won Tanzanian Shillings five million only (5,000,000/=) which was one of the prizes. Mr. Ntully Huggins submitted that on following up this matter with TCRA, he was advised by TCRA to lodge his complaint with the Gaming Board which found out that he never won the prize. The appellant then lodged a complaint with the 2<sup>nd</sup> respondent (TCRA) who heard the complaint and found that the appellant's claim of being a winner of the Tanzanian Shillings five million only (5,000,000/=) in the lottery was adequately addressed by the Gaming Board who have the legal mandate for lotteries and, therefore, his claim for compensation was not granted. TCRA also found that the conduct by TIGO of continuing sending text messages to the appellant persuading him to participate in the lottery and

charging him Tanzanian Shillings three hundred sixty thousand only (360/=) per text message while the lottery had already been withdrawn amounted to dishonesty.

In view of the above finding, TIGO was ordered by TCRA to pay the appellant Tanzanian Shillings eight million only (8,000,000/=) being compensation for cheating the appellant by persuading him to continue participating in the lottery when the same was already withdrawn. In addition, TIGO was ordered to pay TCRA a fine of Tanzanian Shillings ten million only (10,000,000/=) for breaching consumer protection regulations and also to write an apology letter to the appellant.

Being dissatisfied with the above decision, Ntully Huggins filed current appeal challenging TCRA decision on the following grounds:

1. TCRA erred in law and in fact by granting the Appellant unsubstantiated award of Tanzanian Shilling eight million only (8,000,000/=) without any legal basis instead of awarding the Appellant the prize of Tanzanian Shillings four hundred eighty million only (480,000,000/=) as an overall winner of the "JIKOKI" promotion;
2. TCRA erred in law and/or in fact by failing to act in accordance with the principles of natural justice and procedural fairness;

3. TCRA erred in law and in fact by failing to evaluate the evidence fairly, abide with statutory requirements applicable to investigatory and adjudicatory authorities in economic regulation and competition matters;
4. TCRA erred in law and/or in fact by failing to address itself to the Appellant's complaint including failure to give right information and/or give misleading information to the Appellant; and
5. TCRA erred in law and/or in fact by referring the matter to the Gaming Board of Tanzania and acting contrary to "Mwongozo wa Kuwasilisha Malalamiko ya Mteja wa Mawasiliano".

The appellant therefore prayed for, among other things, a declaration that he was the winner of the "JIKOKI" promotion for all prizes amounting to Tanzanian Shillings four hundred eighty million only (480,000,000/=) which should be paid to him by TIGO, a refund of the participation costs incurred during the promotion and general damages amounting to Tanzanian Shillings one billion five hundred forty million only (1,540,000,000/=) for pain and sufferings as a result of misrepresentation by the 1<sup>st</sup> respondent.

The respondents have resisted the appeal. The 1<sup>st</sup> respondent filed its reply to the amended memorandum of appeal on 6<sup>th</sup> November, 2013. The 2<sup>nd</sup> respondent opted not to file a reply to

the amended memorandum of appeal and instead adopted its reply to the original memorandum of appeal.

Skeleton arguments were filed by only the 1<sup>st</sup> respondent on all grounds of appeal in accordance with rule 28 of the Fair Competition Tribunal Rules, G.N. No. 219 of 2012, (hereinafter referred to as "the Fair Competition Tribunal Rules") which arguments were supplemented by oral arguments. Unlike the 1<sup>st</sup> respondent, the appellant and 2<sup>nd</sup> respondent did not file skeleton arguments but only proceeded by oral submissions and arguments.

At the hearing, the appellant appeared in person, while TIGO was represented by Ms Arua Yusufali of Law Associates Advocates and TCRA was represented by Mr. Ally Hassan Bwanga, advocate.

Arguing ground 1 of appeal, the appellant submitted that the award by TCRA was inadequate and was not based on any law. The appellant also submitted that he was cheated by TIGO because not all text messages sent by him to "JIKOKI" promotion were counted despite payments of Tanzanian shillings three hundred sixty only (360/=) per single SMS. Furthermore, the appellant submitted that TIGO initially announced that "JIKOKI" promotion would end on 29<sup>th</sup> July, 2010 but without notice extended the promotion to 22<sup>nd</sup> August, 2010 which actually ended on 23<sup>rd</sup> August, 2010 contrary to the Electronic and Postal

Communications Act, No. 3 of 2010 (hereinafter referred to as "EPOCA").

Arguing ground 2, the appellant contended that TCRA did not follow the law in dealing with his complaint as required by section 40(1) of the Tanzania Communications Regulatory Authority Act, 2003 (hereinafter referred to as the "TCRA Act"). He submitted that section 40(1) requires TCRA to first investigate the matter then refer the complaint to the supplier with a request that the supplier should consider or reconsider the complaint and if not resolved, refer the complaint to a Committee for decision.

As regards ground 3 of appeal, the appellant asserted that TCRA did not consider the evidence adduced on how TIGO violated his rights. According to the appellant, the proceedings before TCRA lacked information on the exhibits produced by the appellant and as such he feels that justice has not been done.

Turning to ground 4 of appeal, the appellant stated that his complaint was on "JIKOKI" promotion conducted by TIGO as shown in his letter dated 23/09/2010 in which the appellant requested TCRA to investigate the matter and award him prizes daily, weekly and overall winner something which TCRA did not do.

As for ground 5, it was an argument by the appellant that TCRA erred in directing him to first refer his complaint to the Gaming Board while it had the mandate to deal with the matter. The

appellant further submitted that a lot of time was wasted to follow up the matter with the Gaming Board and in the end his rights were also lost following the Gaming Board pronouncement that he was not the winner of the "JIKOKI" promotion as he did not attain the required points.

In response, Miss Arua Yusufali, learned counsel for TIGO, argued that the appellant has totally misconceived the essence of the "JIKOKI" promotion which was conducted under the supervision of the Gaming Board. Miss Arua Yusufali submitted that the prizes in the promotion were not to be won by a single person and as any other game, some people won and some people lost, the appellant being one of those who lost.

Miss Arua Yusufali further submitted that the authority which is mandated to supervise all promotions and gaming activities in Tanzania is the Gaming Board.

The appellant wants to convert this Tribunal to be the authority which deals with declaring Gaming winners of promotions without any factual evidence or legal stand of his claim. 1<sup>st</sup> respondent's counsel further stated that due to the fact that Jikoki promotion was open to everybody to participate, it is only those who have reached the required points who become winners and TIGO through Gaming Board is the one which pronounce the winner and not any other authority.

The learned counsel for the 1<sup>st</sup> respondent further submitted that the appellant intends to misdirect this Tribunal that he was not given a fair hearing or reasons for the decisions. It was Miss Arua Yusufali view that the decision embodies reasons which led TCRA to reach the said decision.

It was also a submission by Miss Arua Yusufali that the appellant misconceived the gist of his complaint before TCRA that it was based on consumer complaints and not investigation or adjudication of economic regulation and competition matters. The learned counsel further submitted that TCRA was right to refer the appellant to the Gaming Board as the complaint was fitting squarely within the jurisdiction of the same. She therefore, contended that TCRA erred in law in entertaining the complaint which was already determined by the Gaming Board and proceeded to award Tanzanian Shillings eight million only (8,000,000/=) to the appellant and Tanzanian Shillings ten million only (10,000,000/=) to itself. Miss Arua Yusufali concluded her arguments that the appellant has misdirected himself and has proposed prayers which cannot be entertained at the appellate stage.

Mr. Bwanga, learned counsel for TCRA, had nothing to say apart from merely saying that he stood by the decision made by TCRA which is the subject of this appeal.



In his rejoinder, the appellant stated that the procedures laid down by the Electronic and Postal Communications Act, 2010 (hereinafter referred to as "EPOCA") on promotions and offers were not followed in carrying out the JIKOKI promotion. Mr. Huggins further submitted that TIGO did not disclose information on how the points were counted, compiled and allocated to players and that there were misleading advertisements on the duration of the promotion and how winners were selected. All these, he said, violated his rights. In addition, Mr. Huggins stated that he was ignorant of the law and procedures of the Gaming Board and that TCRA having been entrusted with administration of the TCRA Act erred in engaging the Gaming Board of Tanzania in the matter.

We have taken time to carefully consider arguments and submissions presented by the respective parties in this appeal. However, before we proceed with our decision, we would first like to point out that mobile telecommunication service/ICT is an important tool and enabler for socio-economic development and physical interaction. However, in order for this reality to become practical there is a need to observe the governing policies, legal and regulatory framework in each participating industry for ensuring sustainable economic development and consumer welfare. Similarly, gaming activities play a vital role in economic development and improved social-welfare due to their ability to generate leisure to its customers, revenue to the government

through taxation, employment opportunities and direct proceeds to the participating individuals. The benefits of conducting promotional lottery in mobile telecommunication services include:

- (i) enhanced efficiency of gaming activities and associated processes: it does not take much time, there are special lottery machine when one plays. It also widens participation of the society as it becomes easier for more members of the society to take part through mobile telecommunications and, even participants from economically disadvantaged areas such as rural and hilly can participate;
- (ii) supporting the implementation of the National Strategy for Growth and Reduction of Poverty (NSGRP/MKUKUTA II) by availing opportunities for access to financial capital by all segments of the economy;
- (iii) ensuring accountability and confidence through established FIRM REGULATORY FRAMEWORK where the Gaming regulator ensures adequate observation of gaming procedures through licensing while the ICTs regulator-TCRA ensures supply of efficient telecommunications services through telecommunications infrastructure;

- (iv) promoting utilization of telecommunication services;  
and
- (v) generation of income to the players.

The Gaming Board on behalf of the government collects fees and levy from the gaming activities and deposits two thirds (2/3) of the total collections to the government coffers. The remaining one third (1/3) is used to carry out regulatory functions which again have benefits to the public.

According to the National Policy on Gaming Activities, the Gaming activities are classified in three groups. **Group I** comprises casinos, slot machines and bingo halls. These are owned and operated by the private sector and regulated by the Government. **Group II** consists of National Lotteries, that is, nation-wide lotteries. These are owned and regulated by the Government but contracted to the private sector through competitive bidding. And lastly, **Group III** which is composed of other gaming activities, that is, promotional lotteries, society lotteries, community based lotteries, and one-off bingo just to mention a few. These are open to the public and are regulated by the Government. It is, therefore, our observation that the license issued to TIGO was on group III which was about promotional lotteries.

According to the National Policy on Gaming Activities, the institutional arrangement of the Gaming Industry like other

regulated sectors in the country, involves the Government (in this case the Ministry of Finance) as policy maker, independent regulator (the Gaming Board), operators who are the licensees and consumers who are the players and beneficiaries of the lotteries. In the following table, various promotions already conducted in the country under the same arrangement are given.

**PROMOTIONS BY VARIOUS MOBILE PHONE OPERATORS IN TANZANIA BETWEEN JULY, 2012 TO APRIL, 2015**

S/N	LISENSEE	NAME OF PROMOTION	DATE ISSUED	EXPIRED ON	LICENCE NUMBER
<b>JULY, 2012/2013</b>					
1.	Mic Tanzania Ltd t/n TIGO	Tigo agent	24 <sup>th</sup> Sept. 2012	22 <sup>nd</sup> Dec. 2012	102
2.	Mic Tanzania Ltd t/n TIGO	Shinda na Tigo pesa	24 <sup>th</sup> Sept. 2012	22 <sup>nd</sup> Dec. 2012	103
3.	Mic Tanzania Ltd t/n TIGO	Consumer smart card	26 <sup>th</sup> Sept. 2012	24 <sup>th</sup> Dec. 2012	104
4.	Huawei Technologies Co. Ltd (TIGO)	Purchasing for smart phone	1 <sup>st</sup> Dec. 2012	28 <sup>th</sup> Feb. 2013	107
5.	Star Fish mobile	Festival campaign	4 <sup>th</sup> Dec. 2012	1 <sup>st</sup> Feb. 2013	112
6.	Mic Tanzania Ltd (TIGO)	Sinda Tiketi ya Sinem a na Tigo	1 <sup>st</sup> Jan. 2013	25 <sup>th</sup> Jan. 2013	121
7.	Mic Tanzania Ltd (TIGO)	Funga Mwaka na Tigo Promotion	24 <sup>th</sup> Jan. 2013	25 <sup>th</sup> Jan. 2013	122
8.	Mic Tanzania Ltd (TIGO)	Shinda Iphone 5 au Nokia ASHA 200	16 <sup>th</sup> Jan. 2013	18 <sup>th</sup> Feb. 2013	123
9.	Mic Tanzania Ltd (TIGO)	Jiunge & Tigo rafiki ushinda Ascend Y200	18 <sup>th</sup> Jan. 2013	18 <sup>th</sup> Feb. 2013	124
10.	Mic Tanzania Ltd (TIGO)	Smart card promotion	31 <sup>st</sup> Jan. 2013	30 <sup>th</sup> April, 2013	128
11.	Vodacom Tz. Ltd	Promotion lottery	4 <sup>th</sup> April 2013	5 <sup>th</sup> April, 2013	135
12.	Mic Tanzania Ltd (TIGO)	Funga mwaka na Tigo	9 <sup>th</sup> April, 2013	8 <sup>th</sup> May, 2013	138
13.	Vodacom Tz. Ltd	Cheka nao	22 <sup>nd</sup> May, 2013	21 <sup>st</sup> July, 2013	144
14.	Vodacom Tz. Ltd	Taifa stars	13 <sup>th</sup> June, 2013	15 <sup>th</sup> June, 2013	145
15.	Airtel	Big Brother Chase	20 <sup>th</sup> June, 2013	9 <sup>th</sup> Sept. 2013	146
16.	Vodacom Tz. Ltd	Saba saba	28 <sup>th</sup> June, 2013	7 <sup>th</sup> July, 2013	147
<b>JULY, 2013/2014</b>					
17.	Mic Tanzania Ltd (TIGO)	Recharge and win a Bajaji	18 <sup>th</sup> July, 2013	17 <sup>th</sup> Sept. 2013	149
18.	Vodacom Tz. Ltd	Download and win	16 <sup>th</sup> Sept. 2013	12 <sup>th</sup> Oct. 2013	157
19.	Mic Tanzania Ltd (TIGO)	Tigo grazy days	27 <sup>th</sup> Sept. 2013	25 <sup>th</sup> Oct. 2013	161
20.	Vodacom Tz. Ltd	Mpesa wakala	11 <sup>th</sup> Nov. 2013	22 <sup>nd</sup> Dec. 2013	168

21.	Mic Tanzania Ltd (TIGO)	Tigo grazy days	10 <sup>th</sup> Dec. 2013	24 <sup>th</sup> Dec. 2013	170
22.	Mic Tanzania Ltd (TIGO)	Dance for joy when you win cash.	13 <sup>th</sup> Dec. 2013	10 <sup>th</sup> Feb. 2014	173
<b>JULY, 2014/2015</b>					
23.	Airtel Tanzania Ltd.	Spin to win	24 <sup>th</sup> Dec. 2014	9 <sup>th</sup> Jan. 2015	241
24.	Airtel Tanzania Ltd	Yatosha Bundles	2 <sup>nd</sup> Feb. 2015	23 <sup>rd</sup> Mar. 2015	244
25.	Vodacom	Jaymillions	7 <sup>th</sup> Jan. 2015	16 <sup>th</sup> April, 2015	

Whether or not, the players know exactly what is happening may be a matter of debate.

In this appeal the licensee is TIGO and the consumer is Mr. Ntully Huggins. The question is "How does TCRA become a respondent in the case?" Since the primary business of TIGO is regulated by TCRA and TCRA has participated in resolving the dispute between TIGO and the consumer, it goes without saying that TCRA is a necessary party in the case.

It has been stated by this Tribunal in a number of cases (see for example the cases of **Tanzania Breweries Ltd versus Serengeti Breweries Ltd and Fair Competition Commission, Tribunal Appeal No.4 of 2010 (unreported)** and **Vodacom & Zantel versus TCRA Consolidated Tribunal Appeal no. 2 and 4 of 2011 (unreported)**) that Regulatory Authorities are joined as parties on appeal, so that they can defend their own decisions by advancing arguments and making submissions on how they have arrived at a certain decision. It is important to distinguish regulatory adjudication from adjudication in normal courts of law.

In regulatory adjudication, the same institution is; the investigator, prosecutor and judge. This is not the case with normal courts of law. TCRA have substantial interest in the sectors that they regulate and definitely in the outcome of the case regardless of whether they acted suo moto or upon a complaint. Apart from interest in the outcome of cases in the sector, section 6(1) of TCRA Act No. 3 of 2010 pronounces facilitation of dissolution of complaints and disputes as one of the functions of the authority. This function is also mentioned in the Second schedule to the TCRA Act as amended in item No. 16.

Having said so, we find it necessary to point out that we have noted with concern the way in which the learned counsel for the 2<sup>nd</sup> respondent behaved during the hearing of this appeal. Learned counsel did not advance any arguments in support of the decision by TCRA apart from merely saying that he stood by the decision made by TCRA. With much respect, this behavior must be condemned.

In other words, learned counsel for TCRA, therefore, ought to have advanced arguments and made submissions to defend the decision by TCRA and not merely saying that he stood by the decision made by TCRA. The manner in which learned counsel for TCRA handled this matter, surely demonstrates lack of seriousness and/or negligence on his personal capacity and as an officer of the court, as an advocate. As officers of the court (and

for this matter, this Tribunal), advocates are expected to be well prepared for the hearing and advance their arguments in the able manner to assist the Tribunal to reach at a fair and just decision. Counsel for the 2<sup>nd</sup> respondent, by not defending the decision by TCRA, has not only failed to discharge his duty as an officer of the court/Tribunal, but also in a way acted as a stumbling block for this Tribunal to adjudicate appeals/applications efficiently and expeditiously. TCRA as a sector regulator in communications is supposed to provide expertise not only on matters before it, but also before this Tribunal and any other forum, in accordance to its regulatory functions.

Now coming back to our decision, TIGO raised the question of jurisdiction of TCRA in both the reply to the amended memorandum of appeal, skeleton arguments and oral submissions in entertaining the complaint that was lodged before it on 31<sup>st</sup> January, 2012. Admittedly, from the proceedings, the issue of jurisdiction by TCRA to entertain this complaint was neither raised nor discussed. The record shows that the appellant first approached TCRA which declined to entertain his complaint and advised him to lodge his complaint with the Gaming Board, which found that the appellant was not the winner, something which was also found by TCRA in its decision. Since learned counsel for TCRA refused to give the Authority's position on the matter, the reasons for entertaining the matter after referring the same to the Gaming Board were not provided. Nevertheless, it

being a point of law, the issue of jurisdiction can be raised at any stage of proceedings even on appeal. Thus, we are of the firm view that there is a necessity of determining whether at the first instance TCRA had jurisdiction to entertain this matter of JIKOKI promotion originating from the gaming activities.

We will address the issue of jurisdiction by looking at the provisions on functions and powers of the TCRA in the TCRA Act as amended by Act No. 3 of 2010, the EPOCA and other relevant legislation.

Section 6 of the TCRA Act as amended by Act No. 3 of 2010 provides as follows:-

6. (1) The functions of the Authority shall be –

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

(b) subject to sector legislation-

(i) to issue, renew and cancel licences;

(ii) to establish standards for regulated goods and regulated services;

(iii) to establish standards for the terms and conditions of



- supply of the regulated 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 including in relation to-
- (i) levels of investment;
  - (ii) availability, quality and standards 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) to facilitate the resolution of complaints and disputes;
- (e) to take over and continue carrying out the functions formerly of the Tanzania Communications Commission and Tanzania Broadcasting Commission;

- (f) to disseminate information about matters relevant to the functions of the Authority;
- (g) to consult with other regulatory authorities or bodies or institutions discharging functions similar to those of the Authority in the United Republic of Tanzania and elsewhere;
- (h) to administer this Act;
- (i) to perform such other functions as may be conferred on the Authority by this Act or any other law."

The TCRA Act also under section 15(1) provide as follows:

S. 15-(1) Subject to the provisions of this Act, the Authority shall have power 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.

(2) Without limiting the powers conferred under subsection (1), the Authority shall also have the following powers –

- (a) such powers as may be conferred on it by sector legislation;
- (b) such powers as provided for under the Second Schedule;

The Second Schedule to the TCRA Act provides for powers of the Authority as follows:

1. To grant radio frequency licences for electronic communication purposes and to supervise and enforce compliance with the provisions of such licences.

2. To grant licences for operating electronic communication and postal services and to supervise and enforce compliance with the provision of such licences.

3. To give directions to any person granted a licence under this Act or any regulations made thereunder.

4. To levy such charges and fees for the granting of licences, radio frequency spectrum rights, administration of radio frequency spectrum registrations, equipment approvals, sellers of electronic communication equipments and electronic communication apparatus and other services

provided by the Authority as may in its opinion be appropriate.

5. To give general guidelines in determination of tariffs.

6. To lay down standards and codes of conduct to be observed by all operators and users of electronic communications and postal system and services.

7. To regulate the interconnection of and access to systems of operators of electronic communication and postal systems and services.

8. To control and regulate the management and allocation of numbering plans and schemes electronic communications and postal systems and services.

9. To control and regulate and interference to electronic communications system in the United Republic by radio waves or, electrical or other means.

10. To control and regulate the importation for sale dealing in and use of

electronic communication equipment and electronic apparatus.

11. To utilize all the property of the Authority, movable and immovable, in such manner as the Authority may think expedient including the raising of loans by mortgaging such property.

12. To lease or let, with or without taking a premium, any property vested in or acquired by it or to grant easements, rights of way, temporary licences or other rights or privileges over, under through of in respect of any land or building belonging to or vested in the Authority upon such terms and conditions as the Authority think fit.

13. To carry out such other works or activities as may appear to the Authority to be requisite, advantageous or convenient in pursuance of its regulatory role with a view to making the best use of any of the assets of the Authority.

14. To engage in conjunction with other authorities, international agencies or organizations in matters or regulation for the purposes of promotion electronic

communication and postal systems and services.

15. To enter into all such contracts for the supply of goods or materials or for the execution of works or any other contract as may be necessary for the discharge of its duties and functions under this Act.

16. To receive and process complaints by users of electronic communication and postal services.

17. To impose sanctions set by regulations for the violation by any licensed operator of any law or under the terms of its licence.

18. To conduct administrative processes and hearing to resolve technological issues, inter-carrier disputes, user complaints or other matters which affect the structure and functioning of the electronic communication or postal sectors of the United Republic.

19. To ensure the proper maintenance of accounting systems by all licensed operators.

20. To guarantee equal access to monopoly or other licensed electronic communications.

21. To homologate and establish a process for authorization of equipment permitted to be connected to the electronic communications network in the United Republic.

22. To homologate and establish a process for authorization of equipment permitted to be connected to the electronic communications network in the United Republic.

23. To research and report on new technologies.

24. To keep the government apprised of obligations under international electronic communications treaties.

25. To oversee compliance with international electronic communications treaties.

26. To cooperate technically with the government and to define strategic policy.

27. To propose national technological development.

28. To propose international electronic communications and postal policy to the government.

29. To prepare policies for development of the national technology.

30. To create criteria for the opening and restructuring of services as and where appropriate and to ensure the compatibility of public systems, interconnection and quality of service.

31. To resolve issues of interconnection between networks where the operators involved are not able to reach agreement on terms of interconnection.

32. To inform the public of reports, studies and regulations as and when published.

33. To announce in a local gazette and invite comment by interested parties on new contemplated regulation or policies.

34. To do field investigation concerning:

(a) compliance by licensed operators with the law and the terms of their licences;



(b) any allegation that a non-licensed operator is providing service;

(c) any complaints filed by or against licensed or no-licensed operators;

(d) ensuring that licensed operators are providing only those services permitted by their licences;

(e) periodic measuring of quality of service;

(f) periodic sampling of users as to quality and extent of service.

35. To receive, review and evaluate accounting and other reports required to be filled by operators.

36. To raise public awareness to the structure and regulation of the electronic communications and postal sectors.

37. To conduct or to supervise the conduct of proficiency examinations which are conditional to the grant of licences by the Authority.

38. To receive donations and contributions from any source and raise funds by all lawful means.

39. To do any other act or thing incidental to any of its functions.

Section 4 (1) of the EPOCA provides:

4.-(1) Subject to the provision of this Act, the Authority shall have the power of licensing and regulating electronic communication systems and services in the United Republic.

From the above provisions, it is obvious that TCRA was established for purposes of **exercising licensing and regulatory functions** in the communications sector (emphasis added). Licensing and regulatory functions given to TCRA with respect to public electronic communication systems is limited to provision of network facilities, network services, content services and application services (see sections 6 (1) of TCRA Act, 4(1) and 5 (1) of EPOCA). Clearly, TCRA has no jurisdiction to issue gaming licences or regulate gaming activities or even entertaining complaints originating from the gaming activities under any of the above legislations.

On the other hand, all matters pertaining to gaming activities including but not limited to gaming licenses and dispute settlement fall under the purview of the Gaming Act, No. 3 of 2003 (hereinafter referred to as "the Gaming Act") and its Regulations, G. N. No. 4 of 2003. Section 4(1) of the Gaming Act

provides for the establishment of the Gaming Board of Tanzania which is a regulator of gaming activities in this country. Section 6 of the Gaming Act provides for the powers of the Gaming Board to carry out the operation and management of the gaming activities in Tanzania.

The functions of the Gaming Board are provided for under section 7 of the Gaming Act. For ease of reference, we find it necessary to reproduce the relevant provision:

Section 7 (1) - provides:

7 (1) The Board shall perform the functions and exercise such powers as are necessary for the carrying out of such activities and the doing of such things as are necessary, advantageous or proper for the provision, protection and benefit of the gaming industry in Tanzania

(2) Without prejudice to subsection (1), the Board shall primarily oversee, monitor and regulate the conduct of gaming activities in Tanzania and in so doing it shall be responsible for:

(a) the granting, issuing, suspending, withdrawing and amending of gaming licence

and any other licence pertinent to the gaming activities.

(b) advising on the imposition of taxes, levies and fees in respect of any gaming activities and collection thereof;

(c) devising policy guidelines and setting norms and standards of conduct for lotteries and gaming activities;

(d) fostering the stability and success of gaming and to preserve the competitive economy and free competition.

(e) bringing about honest and competitiveness in gaming industry;

(f) conducting a continuous study and investigation of gaming activities for the purpose of ascertaining any defects in the rules and regulations in order to discover abuses in administration and operations of the industry and to deal with them;

(g) exercising such other incidental powers as may be necessary to ensure safe and orderly regulation of the industry including performing background checks of applicants, qualifications and registration

thereof, approving licensees internal control procedures and testing of gaming devices;

(h) defining standards, principles and procedures in respect of operations, premises, equipment, personnel, supplies procurement of services and enforcing compliance therewith;

(i) developing mechanisms for stakeholders' involvement and measures for dealing with adverse social impact of gaming activities;

(j) doing all other things which are necessary for or in connection with the performance of its functions and powers or to enable it to discharge its duties.

Clearly from the above provisions, gaming activities are covered by the Gaming Act. Indeed, rule 112 of the Gaming Regulations, 2003 is very clear in its wording that **all disputes between a licensee and player of any gaming activity** shall be submitted to the Gaming Board for determination. Section 3 of the Gaming Act defines gaming activities to mean:

***"any game played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine for money, property, checks,***

*credit or credit card or any representative of value, including but without limiting the generality of the foregoing, bingo, wheel of fortune, baccarat, slot machine, horse race, lottery, wager or stake, any banking or percentage game or any other game or device approved by the Board, but does not include games played with cards in private homes or residences in which no person makes money for operating the game, except as a player, or games operated by a charitable or educational organizations approved by the Board". (Emphasis added)*

Now, the question is whether TCRA can exercise its powers to address a dispute relating to gaming activities played using electronic communication systems. If TCRA has no powers to license and regulate gaming activities, does it have powers to entertain a complaint between an operator/licensee and a player of gaming services provided through electronic communication systems? We find the answer to be in the negative. We find so because the general powers given to TCRA do not support this assumption of jurisdiction by TCRA. Section 15 (1) of the TCRA Act provides for sweeping powers to TCRA but with a qualification that those acts and/or things that are necessary for or in connection with the performance of its functions or to enable it to discharge its duties or necessary, advantageous or convenient for the efficient discharge of its functions. If this general jurisdiction

• was meant to be given to TCRA then the law should have clearly provided so. Definitely, public institutions established by any law have to be confined to their own jurisdiction otherwise it would amount to making other institutions redundant and create chaos in cases where one function is performed by more than one institution.

As already pointed out, it is our firm view that all matters pertaining to gaming activities including settlement of **all disputes** between a licensee and a player squarely fall within the jurisdiction of the Gaming Board which is a regulator of gaming activities. The mere fact the game that is the subject of determination use electronic means does not oust the jurisdiction of the Gaming Board. We cannot therefore make an inference that will usurp powers of the Gaming Board to TCRA contrary to the Gaming Act.

In view of the above, we should also point out at this juncture that even if there are subsidiary legislations empowering TCRA to entertain consumer complaints in relation to any matter pertaining to gaming activities, TCRA cannot rely on them since both the parent Act and sector legislation do not provide for such powers as such powers are vested with the Gaming Board. Such subsidiary legislations would be void for being inconsistent with the parent Act and sector legislation in terms of section 36(1) of the Interpretation of Laws Act, Cap. 1 R.E. 2002 which provides

that "subsidiary legislation shall not be inconsistent with provisions of the written law under which it is made and that subsidiary legislation shall be void to the extent of any such inconsistency".

Lack of jurisdiction goes far beyond any irregularity and it cannot simply be regarded as a mere technicality but rather a catastrophe which if overlooked will bring uncertainty and create chaos on the entire administration of justice.

Since TCRA had no jurisdiction to entertain the matter as stated above, the whole proceedings and the decision thereat are null and void. After holding so, we do not see it necessary to consider the other grounds of appeal.

In the event, and for the reasons stated above, we quash the proceedings and the decision thereat.

Costs are within the Tribunal's discretion, though they follow the event, however, in the circumstance of this particular case, we would refrain from making any order as to costs.

**DATED** at Dar es Salaam this 27<sup>th</sup> day of April, 2015



**Judge Z. G. Muruke – Chairman**





**Dr. M.M.P. Bundara - Member**

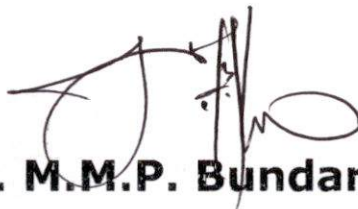


**Judge Salma Maghimbi - Member**

Judgment delivered this 27<sup>th</sup> day of April, 2015 in the presence of the appellant in person, Ms Arua Yusufali for the 1<sup>st</sup> respondent, Mr. Walter Mariki for the 2<sup>nd</sup> respondent and Mr. Beda Kyanyari Tribunal Clerk.



**Judge Z. Muruke - Chairman**



**Dr. M.M.P. Bundara - Member**