IN THE FAIR COMPETITION TRIBUNAL

AT DAR ES SALAAM

TRIBUNAL APPEAL NO. 6 OF 2012

NATIONAL OIL (TANZANIA) LIMITED.....APPELLANT

VERSUS

THE ENERGY AND WATER UTILITIES REGULATORY AUTHORITY.....RESPONDENT

JUDGMENT

This appeal arises from the decision of the Energy and Water Utilities Regulatory Authority (EWURA), the respondent herein, made in Compliance Order No. 06-08-2011 dated 19th August 2011.

EWURA, 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." (Emphasis ours)

Under the Petroleum Act No. 4 of 2008 EWURA 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 importation, landing, loading, transformation, transportation, storage, distribution and wholesale or retail trade of petroleum and petroleum products.

Petroleum sector in most of the countries in the world is among the priority and lead sectors in the socio-economic setting. The prominence of this sector lies in its role of facilitating the social-economic development by providing critically intermediate input to other sectors of the economy. The quality of petroleum products is of major importance for industrial costs, welfare of all households and international competitiveness. Therefore, be it regular or adhoc inspection of petroleum products by EWURA, it is for country economic growth.

Sections 5(1) of the Petroleum Act, 2008 reads-

"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;

.....

.....

(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;" (Emphasis ours)

The appellant, **National Oil (Tanzania) LIMITED**, is a limited liability company engaged in and carrying on the business of supplying and selling of petroleum products to the public in the United Republic of Tanzania.

The undisputed historical background to this appeal may be briefly stated as follows:- On 17th July, 2011 the respondent, as part of a routine inspection of the quality of petroleum products at retail outlets, had sent an inspector to check on the quality of petroleum products offered for sale to the public at Petro Mafinga Service Station in Mafinga owned and operated by the appellant. Upon arrival at the station, the inspector was informed that the manager was absent. The inspector left without collecting the required samples. On 25th August, 2011 the appellant, was served with a Compliance Order dated 19th August, 2011 issued

by the respondent informing the appellant that the refusal to allow the inspector to collect petroleum samples for testing was contrary to rule 7 (2) of the Petroleum (Marking and Quality Control) Rules (GN No. 210/2010) and rule 5 (2) of the Petroleum (Sampling and Testing) Rules (GN No. 211/2010).

On the basis of that contravention, the appellant was ordered to stop selling or offering for sale petroleum products to the public at the Petro Mafinga Service Station. And in addition, he was required to show cause in writing within 7 days why severe punishment should not be taken against the appellant for refusing the inspector to perform his official duties. By a letter dated 25th August, 2011 the appellant acknowledged receipt of the Compliance Order and stated that the inspector had agreed to meet the manager at the station, but did not wait for the manager to come and that the inspector was also not willing to meet the station manager at the police station or show up on the following day as agreed.

On 26th August, 2011 EWURA wrote back to the appellant stating that the appellant through his letter dated 25th August, 2011 failed to show cause why severe punishment should not be taken against him for refusing the inspector to perform his official duties on 17th July, 2011. Respondent also ordered the Petro Mafinga Service Station to remain closed until a fine of Tshs.

7,000,000/= is paid. The appellant paid the fine on 29th August, 2011 albeit under protest after which EWURA allowed Petro Mafinga Service Station to re-open and continue with business on the same day.

In the Memorandum of Appeal lodged in this Tribunal on 25th October, 2012 the appellant has raised the following grounds of appeal:

1. The Respondent erred in law and in fact in holding that the Appellant had violated Rule 7 (2) of the Petroleum (Marking and Quality Control) Rules (GN No. 210/2010) and Rule 5 (2) of the Petroleum (Sampling and Testing) Rules (GN No. 211/2010).
2. The fine of Tshs. 7,000,000/= was unlawfully charged and collected by the Respondent.
3. The Respondents decision comprised in its compliance order (No. 06-08-2011) dated 19th August, 2011 went against the legal maxim *Nemo judex in causa sua*, that is, no one can be a judge in his own cause.

In the Reply to the Memorandum of Appeal filed by the respondent, the respondent has maintained that the decision was in compliance with the relevant laws and that the respondent evaluated all facts before invoking its regulatory powers on the

matter. It is further asserted that the fine imposed on the Appellant was lawful and falls within the ambit of regulatory functions of the respondent.

The appeal was argued by way of written submissions.

Arguing ground 1 of the appeal, the appellant submitted that on the material date, that is 17th July, 2011, at around 17hours the respondent's inspector visited Petro Mafinga Service Station. At the material time and date the station manager was absent. The inspector asked the pump attendant for the station manager's mobile number which was provided to the inspector as requested. The inspector spoke with the manager and the manager asked the inspector to wait for him for about one hour at the station. When the manager came the inspector had already left the station. The manager called the inspector who advised the manager to go to the police station where the inspector had already reported the matter. At the police station the manager gave his statement after which a police officer called the inspector for purposes of accompanying the manager back to the station. The inspector's response was that he was engaged in another activity thus, directed the manager to meet with him at the station next morning. On the following day, the manager waited until 09:30 am when he called the inspector only to find out that the inspector had already left for Dar Es Salaam. The

next time the manager heard from EWURA was when a compliance order was served on Petro Mafinga Service Station. The appellant submitted that the Respondent erroneously and unlawfully concluded that the Appellant had violated Rule 7 (2) of the Petroleum (Marking and Quality Control) Rules (GN No. 210/2010) while there was no evidence apparent on record that the appellant had refused to allow the inspector to conduct the inspection contrary to section 39 of EWURA Act, Cap 414 (R.E. 2006) which requires the respondent to issue compliance orders upon being "satisfied" that an offence has been or is about to be committed. Neither the compliance order nor the respondent's letter of 26th August, 2011 account for any evidence relied upon in condemning the appellant.

Submitting further, the appellant stated that Rule 7 (5) of GN No. 210/2010 allows the respondent to seek assistance of law enforcement agencies in carrying out its duties. The respondent did not utilize Rule 7 (5) and has given no reason for not complying with the rule.

With regard to violation of rule 5(2) of the Petroleum (Sampling and Testing) Rules (GN No. 211/2010) the appellant submitted that no violation to the rule was committed as both the staff at the station and the manager provided all the assistance required by the inspector such as giving the manager's phone number,

returning to the station within the agreed time, visiting the police station as advised and waiting up at the station the next day. There is no evidence that the appellant refused to give samples for inspection. On the contrary, there is evidence that the sample collection form was countersigned by staff at the station.

As regards ground 2 of the appeal, the appellant submitted that the fine was imposed and collected without any legal basis. The appellant's counsel pointed out that natural law demands fine to be imposed after proving violation of the law. It was further submitted that the respondent having completely failed to give evidence of the violation should not have imposed the fine on the appellant at all.

As regards ground 3 of the appeal the appellant submitted that rules of natural justice have not been observed by the respondent. The respondent became a judge in his own cause, failed to give the appellant an opportunity to be heard before condemning the appellant and ordering the closure of Petro Mafinga Service Station and failed to give reasons for its decision. Citing the case of **IPTL Vs. SCBHK & Others, Civil Revision Number 1 of 2009, Court of Appeal of Tanzania, Dar Es Salaam (unreported),** the appellant submitted that failure to follow the rules of natural justices vitiates proceedings and make the decision null and void.

Responding to ground 1 of the appeal counsel for the respondent submitted that rule 7 (2) of GN No. 210/2010 read together with rule 5(2) of GN No. 211/2010 constitute the offence committed by the appellant. The denial of access to the inspector to collect samples for whatever reason is the material factor. It is immaterial whether or not the station manager is present or the pump attendant is credible. The appellant did not deny the fact that the manager did not allow the pump attendant to give access to the inspector to collect samples as stated in the compliance order appealed against. The inspector was not bound by the request of the manager to wait for him, meet at the station or return on the next day. Refusal at the first instance is what matters subsequent acts are immaterial. The respondent stated that "if the product is in order why should the manager not allow the staff in the field to allow sample to be taken? If all was pure why should he want to meet the inspector personally?" Submitting further, the respondent stated that the claim by the appellant that the sample collection form was countersigned by the employee of the appellant is misleading since the form was signed on 24th August, 2011 after the incidence of denying access to the inspector had already occurred.

Countering ground 2 of the appeal, learned counsel for the respondent submitted that the appellant contravened the law and

the consequences for contravention is provided under rule 9 of GN No. 211/2010 which is a fine of Tshs. 7,000,000/=. This fine was imposed after due consideration of the defense contained in the letter dated 25th August, 2011 in which there was no denial by the appellant of refusal to give access to the inspector.

As for ground 3 of the appeal, learned counsel for the respondent submitted that all powers of the respondent are provided by the law. The respondent has powers not only to enforce the EWURA Act but also the Petroleum Act under which GN No. 210/2010 and GN No. 211/2010 are made. If the appellant think that such powers result into violation of rules of natural justice the remedy is not to appeal to this Tribunal but to challenge the laws empowering the Respondent to act as a regulator, administrator and investigator. Unless the laws are changed, the respondent shall continue to enjoy legal powers provided by law.

Submitting further, counsel for the respondent stated that rule 7 (5) of GN No. 210/2010 allows the respondent to seek assistance of law enforcement authorities in ensuring compliance. The assistance is with respect to a transport unit only and not otherwise. In addition, counsel for the respondent stated that the respondent is also at liberty to exercise the discretion to seek assistance or not.

Lastly, counsel for the respondent submitted that a penalty on the appellant was imposed by the Director General while inspection was conducted by the inspector. Before imposing the fine on the appellant, the appellant was given seven (7) days to show cause why the appellant denied access to the inspector. The appellant did not deny the allegations in the compliance order. Upon consideration of the defense, the respondent was not satisfied thereafter imposed the fine. Thus, rules of natural justice were complied with.

In the rejoinder submission, counsel for the appellant emphasized that the appellant did not violate GN No. 210/2010 and GN No. 211/2010. The appellant's counsel stated that the respondent in his response letter dated 26th August, 2011 to the appellant's letter dated 25th August, 2011 failed to consider arguments by the appellant that the inspector acted in such a way that hindered the collection of samples. The inspector neither demanded to conduct the inspection in the absence of the station manager while at the station, nor made any written statement at the police indicating refusal by the station manager to give access to conduct inspection. The respondent acted arrogantly and arbitrarily basing on the uncontrolled power instead of acting in good faith and fairly.

Counsel for the appellant reiterated that the appellant failed to prove violation of the law by the appellant, hence, the fine imposed was unlawful. In addition, learned counsel submitted that although the respondent has administrative functions, condemnation of operators through closure of service stations and imposition of fines is *quasi judicial* in nature, thus, rules of natural justice should apply. The respondent by failing to prove that it was obstructed to perform its duties in writing as required under rule 7(5) of GN No. 210/2010 and by failing to prove non-compliance as required under section 7 (2) of GN No. 211/2010 indicate apprehension of bias. "In the absence of written records, the respondent becomes the undisputed master of everything," learned counsel vehemently submitted. The decision by the respondent to impose a fine of Tshs. 7,000,000/= is based on no reason, thus, the decision is null, insisted appellant counsel.

At the outset we wish to state that it is of vital importance that the supply of petroleum products conforms to quality, safety and environmental standards to ensure sustainable development. Supply of petroleum products should only be allowed if such products are of the desired quality and standard. Section 44(1) of the Petroleum Act, 2008, provides:

> **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. (Emphasis ours)

As regards regulation of petroleum products, the respondent has, among other powers, powers to carry out inspections or other monitoring and enforcement actions to ensure that petroleum products offered for sale to the public conform to the quality and standards. These inspection powers are provided under section 20 of the Petroleum Act and Rule 7 of GN No. 210/2010.

Section 20 of the Petroleum Act reads:

20.-(1) .....

(2) .....

(3) For the purpose of carrying out inspections or other monitoring and enforcement actions, the Authority may at any time, enter upon any area, premises or working place where construction works or petroleum supply operations are being performed by a licensee. . (Emphasis ours)

Rule 7 of GN No. 210/2010 reads:

7.-(1) An inspector may, at any time, take a sample of a petroleum product from a licensed facility or a transport unit and carry out tests and examinations to determine the presence and concentration levels of the markers in the sample. (Emphasis ours)

In exercising its inspection powers, the respondent is required to act in accordance with the law. Rule 4 of GN No. 211/2010 reads:

4.-(1) The Authority shall conduct sample procedures in accordance with the Act and these rules. (Emphasis ours)

Let us now turn to ground one of appeal. Did the appellant violate rule 5(2) of GN No. 211/2010 and rule 7 (2) of GN No. 210/2010? Is there any reliable evidence to establish violation of rule 5(2) of GN No. 211/2010 and rule 7 (2) of GN No. 210/2010 by the appellant?

Rule 5(2) of GN No. 211/2010 reads:

(2) A supervisor, a driver or, in their absence, any employee working at a licensed facility or a transport unit shall be required to-

(a) co-operate with inspectors;

(b) comply with any instructions or requests made by inspectors pursuant to their mandate; and

(c) grant inspectors unhindered access to any document, the licensed facility and the transport unit as appropriate. (Emphasis ours)

Rule 7 (2) of GN No. 210/2010 reads:

> **(2) An operator shall render all necessary assistance to facilitate any inspection of its licensed facility or transport unit pursuant to sub-rule (1) for purposes of testing a petroleum product.**

Inspection of petroleum products in our country is conducted in spontaneous manner at any time. There is no notice or pre-arranged meeting for inspection and collection of samples. Rule 7 (1) of GN No. 210/2010 provides:

> **7.-(1) An inspector may, <u>at any time</u>, take a sample of a petroleum product from a licensed facility or a transport unit and carry out tests and examinations to determine the presence and**

concentration levels of the markers in the sample.

(Emphasis ours)

Since there is no prior knowledge on the part of a licensed facility, any employee working at the facility is required to facilitate inspection, co – operate with the inspectors, comply with instructions or requests made by the inspector and grant unhindered access.

It is undisputed that in the present appeal, the respondent sent an inspector to inspect the appellant's licensed facility but the inspection did not take place. The respondent claimed that the inspection exercise could not be conducted because the appellant refused to give access to the inspector. The reason for denial of access put forward by the respondent is that the manager of the service station does not trust his pump attendant who was at the service station when the inspector arrived (see page 1 of the Compliance Order (NO.06-08-2011)). On the other hand, the thrust of the appeal by the appellant is that the inspector failed to collect the required samples due to omissions on the part of the inspector as submitted in the appellant's letter dated 25th August, 2011.

The inspector, when carrying on inspections is bound to follow and observe the appropriate law including GN No. 210/2010 and

GN No. 211/2010. Before collecting samples, inspectors are required under rule 5 (1) of GN No. 211/2010 to first identify themselves upon arrival at a licensed facility and after identifying themselves, inspectors are then required to deliver the sample collection form. Rule 5 (1) of GN No. 211/2010 reads:

> **5.-(1) Upon arrival at a licensed facility or a transport unit and having identified themselves, inspectors shall deliver to a supervisor, driver, or in their absence, to any employee working at licensed facility or a transport unit the Sample Collection Form.** (Emphasis ours)

Upon completion of the preliminary procedures under rule 5 (1) of GN No. 211/2010, the inspector is then required to collect petroleum samples and thereafter sign the sample collection form which has to be countersigned by a supervisor, or, in their absence, any employee working at the licensed facility. The manner upon which samples should be collected and the requirement to sign the sample collection form are provided in rule 6 and 7 of GN No. 211/2010 respectively. Rule 6 of GN No. 211/2010 provides, among others, places where petroleum samples may be taken from. Those places include storage tanks, above the ground or underground.

Even if at the time of their arrival, the supervisor or manager is not available, inspectors are required to perform their duties so long as there is any other employee at the licensed facility. Thus, the whole exercise can be conducted in the absence of and without the knowledge of the operator, supervisor or manager.

It is undisputed that at the time the inspector arrived at Petro Mafinga Service Station, the manager was absent but there were other employees working at the service station. However, it has not been established if the inspector identified himself and/or delivered the sample collection form to any employee working at the licensed facility. The sample collection form attached to the memorandum of appeal shows that it was signed by the inspector and countersigned by the employee of the appellant. However, the respondent claim that the sample collection form in the record of appeal which was signed by the inspector and countersigned by the employee of the appellant is not related to this appeal as it was signed days after the incidence had occurred (see page 4 of the respondent's written submission).

It is our considered opinion that the respondent erred in penalizing the appellant without first establishing whether or not the inspector had followed the proper procedure as provided under the law. The respondent also erred in penalizing the appellant in the absence of sufficient evidence. The issue of

whether or not the inspector was denied access to perform his duties when he called on Petro Mafinga Service Station goes to the root of the matter. In the absence of evidence supporting such denial, there is a possibility that inspectors may abuse the powers entrusted on them by the law for personal reasons and therefore negatively affect effective competition in trade and unjustly deny consumers and suppliers the protection from unfair conducts.

The respondent has claimed that it is not duty bound to seek the assistance of law enforcement authorities in ensuring compliance to the law when carrying out inspection of the licensed facility. It was submitted that rule 7 (5) of GN No. 210/2010 deals with transport unit only. Rule 7 (5) of GN No. 210/2010 reads:

> **7(5) The Authority may seek the assistance of other law enforcement authorities, including the police force, in carrying out an investigation, inspection or impoundment of a transport unit.**

While we agree with the construction of rule 7 (5) of GN No. 210/2010 by the respondent, we do not agree that rule 7 (5) was meant to be such restrictive because Part IV under which rule 7 (5) falls reads PROCEDURE FOR TESTING OF PETROLEUM

PRODUCTS. In view thereof, we think there is an error which needs to be corrected. Moreover, Rule 13 (3) of GN No. 210/2010 which is *in pari materia* to rule 7 (5) falls under Part VI PROCEDURE FOR IMPOUNDING A TRANSPORT UNIT specifically deals with transport unit.

Suffice to say that, under the provisions of the EWURA Act, it is the duty of the respondent, in carrying out its functions and exercising its powers, to promote effective competition and economic efficiency and to protect the interests of consumers and efficient suppliers. Thus, the regulatory functions and powers given to the respondent should be exercised fairly to ensure that the regulated sector achieve the desired outcome and contribute to the sustainable development of the country's economy. It is desirable that the respondent should, at all times, be regardful of fair and judicious exercise of its powers and at the same time conduct himself in a highly professional manner to prevent abuse, misuse, unjust and biased decisions.

It is common ground that, when determining whether or not the appellant had breached his duty under the law, the respondent was exercising *quasi-judicial* power. In that respect, it was duty bound, to ensure that, there is sufficient evidence upon which to base its decision, and provide reasonable reasons for arriving at the decision.

From the record and from the respective submissions by learned counsels, there is no evidence at all that the inspector was denied access to collect samples for testing. In addition, there is also no evidence whether or not the inspector who went to inspect the service station identified himself to the employees and/or delivered the sample collection form as required by rule 5 (1) of GN No. 211/2010. The requirement to introduce and deliver the form is mandatory and the omission to do so cannot be lightly dismissed.

We are unable to find any kind of support for the respondent's decision. A mere contention by the inspector that access was denied, no matter how good the reason given by the inspector sounds, seems to be an unsafe basis especially when such contention is not even under oath. Let us not assist in the negation of justice.

As previously stated by this Tribunal in **Oryx vs. EWURA Appeal No. 1/2010** and **BP vs. EWURA Appeal No. 2/2010;**

> **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.** (Emphasis ours)

We reiterate that the respondent must ensure the highest standard of efficiency and competence in discharging the functions entrusted upon it. The respondent acted on no evidence and unfairly penalized the appellant. Therefore, ground one of the appeal succeeds.

In the circumstances, the decision to impose a penalty of a fine and closure of the service station was unlawful, having been based on no evidence. Indeed, as the offence was not proved, the respondent was not empowered to impose or justified in imposing any penalty at all. Thus, ground two also succeeds.

As regards ground three, as earlier said when determining whether or not the respondent had breached his duty under the law, the respondent was exercising *quasi-judicial* powers. However, the respondent's primary functions are administrative in nature; thus, the respondent exercised *quasi – judicial* power

in the course of discharging its administrative functions. This does not make the respondent a *quasi – judicial* organ/body.

This *quasi – judicial* power provided to the respondent as an administrative body is a necessary tool in order for it to determine the rights of those who appear before it, after it had carried an investigation on the matter, ultimately ensuring compliance in the appropriate sub-sector. This type of set-up, where administrative bodies are vested with investigatory and adjudicatory powers in the course of exercising their administrative duties is necessary and proper for the economy of any given country. Ground three of the appeal fails.

In the event, the appeal is hereby allowed with costs to the extent stated hereinabove. The decision dated 26th August, 2011 ordering the payment of a fine of Tshs. 7,000,000 is hereby quashed. Accordingly, we order that the fine of Tshs. 7,000,000 paid by the appellant to the respondent should be refunded forthwith.

It is so ordered.

DATED at Dar es Salaam this 15th day of September, 2014.

Judge Z. G. Muruke – Chairman

Dr. M.M.P. Bundara - Member

Mr. Gregory Ndanu – Member

Judgment delivered this 19th day of November, 2014 in the presence of Dora Mallaba, Advocate for the appellant, and Goodluck Lyimo holding brief for Mr. Juvenalis Ngowi, Advocate for the respondent.

Judge Z. G. Muruke – Chairman

Dr. M.M.P. Bundara - Member

Mr. Gregory Ndanu – Member

19/11/2014