IN THE FAIR COMPETITION TRIBUNAL

AT DAR ES SALAAM

TRIBUNAL APPEAL NO. 8 OF 2018

VODACOM TANZANIA PLC .....APPELLANT

VERSUS

TANZANIA COMMUNICATIONS

REGULATORY AUTHORITY (TCRA) ..... RESPONDENT

JUDGMENT

Vodacom Tanzania PLC (hereinafter referred as the appellant) is one of the eight (8) major mobile network operators in Tanzania and TCRA (hereinafter referred as the respondent) is the regulatory authority in Tanzania that regulates telecommunications, broadcasting, postal services; providing allocation and management of radio spectrum, covering electronic technologies and other Information and Communication Technologies (ICT) application and for related matters.

The instant appeal pertains to the interconnection determination No. 5 of 2017 issued by the respondent on December, 2017. It had an effect of reviewing down the interconnection charges/termination charges or rates which were applicable up to

31st December, 2017. The appealed Interconnection Determination No. 5 of 2017 with its glide path became effective from 1st January, 2018 to run up to 31st December, 2022.

According to Interconnection Determination No. 5 of 2017, the voice calls termination rate from 1st January, 2018 was 15.60 TZs, from 1st January, 2019 was 10.40 TZs from 1st January, 2020 will be 5.20 TZs, from 1st January, 2021 will be 2.60 TZs, and from 1st January, 2022 will be 2.00 TZs.

The appellant being aggrieved with the afore decision of the respondent in respect of the Interconnection Rates Determination No. 5 of 2017 dated 29th December, 2017 filed this appeal on the following grounds:

1. The respondent erred in law and fact by issuing Interconnection Rates Determination No. 5 of 2017 in contravention of Sections 16(1) and 19(1) of The Tanzania Communications Regulatory Authority Act Cap 172 (R.E.2002) which require the respondent to, *inter alia,* regulate interconnection arrangements between telecommunications operators only after the respondent has enquired and determined there is a market failure in the mobile call termination market under Section 27(a) of the Electronic and Postal Communications Act, 2010.

2. In the alternative, and without prejudice to ground 1 above, the respondent erred in law and fact by issuing Interconnection Rates Determination No. 5 of 2017 in contravention of its duty under Section 19 (1) of the Tanzania Communications Regulatory Authority Act Cap 172 (R.E.2002) which requires the respondent to apply appropriate remedies to address marked failure which will not lessen competition, cause additional costs in the market or otherwise detriment the public.

3. The respondent erred in law and fact by failing to (a) state briefly the submissions made by *inter alia,* the appellant and (b) give a reasoned decision as required by Rule 10(2) of The Tanzania Communications Regulatory Authority (Procedure Rules of Inquiry) 2004 and accordingly the decision cannot stand;

4. The respondent erred in law and fact by issuing Interconnection Rates Determination No. 5 of 2017 in contravention of *inter alia* its duties to promote effective competition and economic efficiency, to protect the financial viability of efficient suppliers and to promote the availability of Mobile Communications Services to all consumers including low income, rural and disadvantaged consumers under Section 59(1) of

The Tanzania Communications Regulatory Authority Act Cap 172 (R.E.2002).

5. The respondent erred in law and fact by issuing Interconnection Rates Determination No. 5 of 2017 without taking into consideration the criteria set out in Section 16(2) of The Tanzania Communications Regulatory Authority Act Cap 172 (R.E.2002) together with the criteria set out in regulation 9 and 10 of The Electronic and Postal Communication (Interconnection) Regulations 2011:

   i. Criteria under Section 16(2) of The Tanzania Communications Regulatory Authority Act.

      a) The costs of supplying the increased network traffic and capacity.

      b) International benchmarks for interconnection prices (mobile termination rates).

      c) Financial implications of the determination.

      d) The consumer and investor interest.

      e) The return on assets in the mobile telecommunications industry.

ii) Criteria under regulations 9 and 10 of the Electronic and Postal Communications (Interconnection) Regulations

a) Forward – looking long run incremental costs.

b) Current costs of modern equipment technology.

c) Levels of the costs that would occur in a competitive and contestable market and;

d) Relevant and efficiently incurred costs that would promote effective competition.

Wherefore, the appellant asked the Tribunal for the following orders:

a) An order setting aside the decision of the Respondent in Interconnection Rates Determination No. 5 of 2017

b) An order compelling the respondent to conduct a fresh interconnection market review including review of the costs study on interconnection rates and comply with;

i) Its duty to undertake reviews of charges and rates and apply appropriate remedies under Sections 16(1) and 19(1) of The Tanzania Communications

Regulatory Authority Act Cap 172 (R.E.2002) read together with Section 27 (a) of The Electronic and Postal Communication Act, 2010.

ii) Its duty to protect the financial viability of efficient suppliers and to promote the availability of regulated services to all consumers including low income, rural and disadvantaged consumers as required by Section 5 (1) of The Tanzania Communications Regulatory Authority Act Cap 172 (R.E. 2002).

iii) The Criteria laid out in Section 16(2) of The Tanzania Communications Regulatory Authority Act, Cap 172 (R.E.2002) and regulations 9 and 10 of The Electronic and Postal Communications (Interconnection) Regulation 2011.

c) An order compelling the respondent to make a reasoned determination and comply with the requirements of rule 10(2) of The Tanzania Communications Regulatory Authority (Procedure Rules of Inquiry) 2004 by taking into consideration all the submissions made and provide reasons why the respondent supports or rejects the said submission in their final determination.

d) Costs of this appeal.

e) Any other order which the Tribunal deems fit.

In reply to the memorandum of appeal, the respondent disputed all the grounds advanced by the appellant and submitted as follows:

As regards the first ground of appeal, the respondent stated that the Interconnection Rates Determination No. 5 of 2017 was issued in accordance to the law and upon approaching expiry of Interconnection Determination No. 3 of 2013 on 31st December, 2017 and there being no signs of negotiation for new interconnection agreements among the Telecommunication Network Service Providers (TNSP) including the appellant.

On the second ground of appeal, the respondent stated that there is no competition in the interconnection or termination market.

As far as the third ground of appeal is concerned, the respondent stated that the alleged facts are contained in the said Determination issued by the Respondent whereof the determined rates extracted from were published in the Government Gazette on 29th December, 2017 and became operative since 1st January, 2018.

In respect of the fourth ground of appeal, the respondent stated that Interconnection Rates Determination No. 5 of 2017 was

issued based on a report on full costs of services study on telecommunication in Tanzania undertaken by an Independent Consultant called M/S Inyte Consulting who gathered information from all stakeholders in the industry including the appellant. Thus, the said consultant used the Bottom up Long Run Incremental Cost study Methodology (HVLRIC), which is assumed the appropriate basis for determining costs based interconnection rates internationally due to the facts that it is a forward looking and considers all relevant and efficiently incurred costs that are based on a Modern Efficient Operator (MEO), and which aims at promoting competition, economic efficiency as well as protection of telecommunication services consumers interests in the market.

With regards to the fifth ground of appeal, the respondent stated that Interconnection Rates Determination No. 5 of 2017 was conducted in accordance with the relevant provisions of the law and the circumstances prevailing in the telecommunication industry at the time being.

In the circumstances of the foregoing, the respondent prayed for the dismissal of the appeal in its entirety with costs as setting aside the Interconnection Determination No. 5 of 2017 will surely cause an untold chaos and anarchy to the Telecommunication Industry in Tanzania.

At the hearing of the appeal, the appellant was represented by Burure Ngocho, Advocate from IMMMA Advocates and Juvenalis J.

Ngowi from East African Law Chambers. The respondent on its part was represented by Henry L. N. Chaula and Joseph Mbogela, Advocates.

From the grounds of appeal reply, skeleton arguments and submission of counsels of both sides, the first issue to be dealt by this Tribunal is:

> *"Whether Interconnection Rates Determination No. 5 of 2017 issued by the respondent was contrary to the provisions of Section 16(1) and 19(1) of The Tanzania Communications Regulatory Authority Act Cap 172 (R. E. 2002) read together with Section 27(a) of The Electronic and Postal Communication Act, 2010 (hereinafter referred to as EPOCA).*

It is indisputable to both parties that Section 16 (1) of The TCRA Act empowers the respondent to regulate telecommunication rates and charges. To be specific and for ease of reference, Section 16 (1) (*supra*) provides:

> *"Subject to the provision of Sector legislation and licences granted under the legislation, the Authority shall carry out reviews of rates and charges"*

Further, there is no dispute between the parties that Section 19 (1) of the TCRA Act (*supra*) requires the respondent to apply appropriate remedies to address market failure which will not

lessen competition, cause additional costs in the market or otherwise detriment the public. For clarity, Section 19 (1) of The TCRA Act provides:

> "In carrying out its functions and exercising its powers under this Act, and sector legislation in relation to particular markets for regulated services, the Authority shall take into account
>
> a) Whether the conditions for effective competitions exists 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.

It is further not in dispute by both parties that Section 27(a) of EPOCA (*supra*) requires the respondent to regulate interconnection arrangements between network operators where there is market failure. Section 27 (a) of EPOCA states:

"The Authority shall (a) regulate all interconnection arrangements between network service licensees where there is market failure."

The appellant has argued that, prior to issuing an Interconnection Rates Determination No. 5 of 2017, the respondent neither conducted any inquiry nor did the respondent determine that there is a market failure in the mobile call termination market for the respondent to review the charges and rates charged on interconnections as required by Section 27(a) of EPOCA.

The appellant was of further argument that the respondent did not submit any evidence to the appellant showing that the respondent had determined that there is a market failure in the mobile call termination market as per the requirement of Section 27(a) of the EPOCA which would have entitled the respondent to exercise its powers under Section 16 (1) and 19(1) of the TCRA Act read together with Section 27 (a) of the EPOCA.

In its skeleton arguments, the appellant did define the term market failure to mean; a state of fact showing that the interconnection market has failed. It was the appellant contention that an investigation and determination that the market has failed was not done by the respondent in this case. Thus, there is nothing even in the "Incyte report" to suggest that there was market failure. The respondent merely assumed that there was market failure.

In response to the first issue, the respondent was of submission that to the end of 31st December, 2017 there was no any move by the network operators to commercially negotiate and agree on the interconnection rates that would be applicable post determination No. 3 of 2013. Hence predicted market failure which necessitated the respondent, to conduct an inquiry to determine the interconnection rates applicable post 31st December, 2017 and all general factors mentioned in Section 19 (1) of Cap 172 (*supra*) which have been amplified in Section 16(2) of the same Act were all taken into consideration. The respondent invited this Tribunal to see whether there was market failure to empower the respondent to issue the impugned interconnection Determination.

It was the respondent submission that the provisions of Section 27(a) of EPOCA do not say how the respondent is supposed to establish the existence of market failure.

The respondent went on to respond that Section 18(1) of TCRA empowers the respondent to hold an inquiry. Section 18(1) (supra) is to be read together with Section 18 (2) which makes it mandatory to conduct an inquiry in items mentioned under paragraphs (a) –(c) of the Section.

In furtherance to the above, the respondent maintained that there is no mandatory requirement of conducting market failure. Thus, TCRA Act was enacted in 2003 while EPOCA was enacted in

2010. In that regard, according to the respondent, the enactment of EPOCA came with new development but Section 18 was left intact. So, the legislature did not intend that market failure should be one of the items.

The respondent was of view that it can use any means to establish market failure including the prevailing circumstances. In the light of the foregoing, it behooves this Tribunal to consider whether the question of market failure is the mandatory factor that compels the respondent to intervene by issuing Interconnection Determination. No doubt, the powers bestowed to the respondent under Section 27(a) of EPOCA are enormous in regulating interconnection but only when there is market failure. In the circumstances of this case, the Tribunal has to strike a balance as to when can it legally be established that there is a market failure. The Tribunal is of two considered view. First, as correctly argued by the appellant, market failure can be established by conducting an inquiry. Second, market failure can impliedly be established if the network providers do not reach negotiation until about the expiry of the interconnection determination. In the later, the respondent is empowered to regulate interconnection rates and as a matter of necessity intervene to rescue the situation.

In the instant appeal, there is no doubt that the network providers had not reached consensus on the interconnection

rates. The Interconnection Determination No. 3 of 2013 was about to expire on 31st December, 2017. Had the respondent not intervened and issued the impugned Determination No. 5 dated 29th December, 2017 there could not be any interconnection regulation and direction on the market.

In view of the foregoing, the Tribunal do subscribe to the definition of market failure as enlightened by the appellant. However, the correct state of affairs by the time the respondent issued the impugned Interconnection Determination was that the Network Providers had failed to reach agreement on interconnection rates. In that regard there was market failure in interconnection market.

The Tribunal is of further view that the two days' time that remained to reach expiration of the Interconnection Determination No. 3 of 2013 was a reasonable time for intervention as there was no amicable agreement to the stalemate interconnection rates.

Going further through the records, the Tribunal noted that the respondent complied with the requirement of conducting an inquiry. The last paragraph at page 6 of the Determination No. 5 on cost-based interconnection rates among telecommunication network providers reads:

"The Panel of Inquiry was appointed by the Authority in accordance with Rule 6(1) of the Tanzania Communications Regulatory Authority (Procedure for Rules of Inquiry) rules, 2004. The notice of inquiry was published in the Government Gazette as Government Notice No 470 on 24th November, 2017. The same was published in the daily newspaper namely; the Majira and Mwananchi on 30th November, 2017. The Notice of Inquiry was served to all TNSP and other parties named in the Notice of Inquiry."

At page 7 of the Determination No. 5 of 2017 it reads further:

"The Procedure laid down in Section 18 of the TCRA Act, 2003, and the Tanzania Telecommunication Regulatory Authority (Procedure for Rules of Inquiry) Rules of 2004..... The Panel of Inquiry established that all operators are in support of evidence based, cost oriented mobile termination rates. Furthermore, operators agree on the gradual reduction of interconnection rates, but differed on rate and degree of reduction. Five operators namely; Airtel Tanzania Limited, Benson Informatics, Smile Communications Tanzania Limited, Tanzania Telecommunication Co. Ltd and Vieltel Tanzania Ltd accepted the result and proposed even more aggressive reduction of the interconnection rates.

MIC Tanzania Ltd, Vodacom Tanzania Ltd and Zanzibar Telecommunication Co Ltd, opposed the results and each

proposed different glide path of interconnection rates arguing that drastic decreased in interconnection rates will affect their financial sustainability, capacity to invest and subsequently impair the quality of the telecommunication services being offered."

It follows, therefore, that the respondent complied with the requirement of Sections 16(1) and 19(1) of The TCRA Act and Section 27 (a) of EPOCA prior issuing the impugned Interconnection Determination as it did *inter alia* make inquiry prior making such decision.

The second and fourth grounds of appeal were argued jointly by the appellant. There are two issue on that regard:

1. Whether the respondent in issuing Interconnection Determination No. 5 of 20017 contravened the provision of Section 19(1) of Cap 172 particularly paragraph (b) which requires TCRA to consider that any exercise of its power is likely to cause any lessening of competition or additional costs in the market or otherwise detriment to the public.
2. Whether the respondent issuance of Interconnection Determination No. 5 of 2017 contravened the provision of Section 5(1) of The TCRA Act which vest the duty on the authority while discharging its function among other things to strive to promote effective competition and

economic efficiency to protect the financial viability of efficient suppliers and to promote availability of mobile communications services to all consumers including the low income, rural and disadvantaged consumers.

In arguing the afore two issues, the appellant submitted that Section 19(1) of TCRA Act sets out conditions (a) – (c) to be considered on the issue of market failure and competition.

The appellant was of submission that, as per the report of Ernest and Young, the respondent was obliged to consider the setting of MTR at above the level calculated by TCRA in order to maintain stability in the market and mitigate the risk of intensifying price competition which will allow the operators to invest in new services while balancing the price and interest of consumers. In view of the appellant, the respondent's decision will have negative effect to the market.

In reply, the respondent was of submission that the appellant failed to address and mention what are the appropriate remedies before establishing that there is market failure.

The respondent went further to respond that while issuing Determination No. 5 of 2017 it did not interfere the appellants monopoly in its networks. That means all operations including the appellant are free to charge whatever they want. Thus, the respondent just regulated the interconnection charges because it

enabled the public to communicate with one provider to another. Thus, this is intended to protect fair competition in the industry and public interest in the industry.

On the argument that it added costs to the appellant to increase investment to meet the demands, it was the reply submission of the respondent that the appellant network is not fixed. Thus, the appellant did not tell as to how much its network can accommodate and how much will be invested. Indeed, it is not necessary that increased subscribers will be handled by the appellant because other operators can do the same.

The Tribunal have taken cognizance of the parties' arguments. We do agree with the appellant that interconnection rates have to be costs based and commercially feasible. In this appeal, however, out of eight telecommunication network operators five of them agreed with the interconnection rates issued by the respondent. As replied, the appellant has not demonstrated sufficiently as to how the new rate will be commercially not feasible, especially after taking into account that all network operators work under the same environment.

The Tribunal is further mindful that the provision of mobile phone service is based on the principle of Universal Service Obligation, which is a social need whose cost must, of necessity be borne by all network operator. It is under the same principle the respondent is legally duty bound to regulate interconnection

charges to protect telecommunication service and public interest by enabling communication between network subscribers of one telecommunication operator to another.

As the new interconnection rate is intended to all network operators and majority of them have no issue with it, the tribunal is of equal findings that the respondent has accorded equal treatment of customers of an interconnect provider and those of the requesting party. Therefore, Section 5(1) of the TCRA Act (Supra) has not been violated. Again, as correctly replied by the respondent, there was no proof as to how the respondent's decision will have negative results in the market.

Though the Tribunal do subscribe to the appellant's intention of increasing subscribes as it does to other network operators, we find the issue of market failure as envisaged under Section 19 (1) (b) of The TCRA Act (supra) was well addressed when tackling the first ground of appeal. It follows, therefore, that the second and fourth grounds of appeal are hopeless and stand to fail as well.

As regards the third ground of appeal, the appellant argued that rule 10(2) of the TCRA Procedure Rules on Inquiry requires the respondent in making a decision to state briefly the submission made by the persons entitled to appear and who did appear at the inquiry, its decision and the reasons for the decision.

The appellant impugned the respondent's decision to impose the reviewed rates and charges for the interconnection for the years 2018 to 2022 as it did not state anywhere in its decision the appellant's submission. It was argued by the appellant that failure to state the appellant's submission in the respondent decision and failure to disclose the reasons reached by respondent in charging the appellant with the reviewed charges and rates of interconnection is an irregularity which affect the validity of the decision which goes to the root of the respondent Interconnection Rates Determination No. 5 of 2017

In response, the respondent disputed the third ground of appeal. It was the reply submissions that all stakeholders including the appellant were briefly stated in the reasoned decision of the respondent, in particular at page 27-31 of item 1 and page 2 and 4 of item No. 2.

The Tribunal do entirely agree with the appellant that a decision without reasons is not a decision at all. Reasons assists litigants to know the extent of how their arguments have been understood and analyzed by the decision maker; reasons minimize arbitrariness, reasons assist the appellate Court /Tribunal to know if the decision was made with apparent error. (**SEE BAHATI MOSHI MASBILE T/A NDONO FILING STATION V. CAMEL OIL (T), CIVIL APPEAL NO. 216 OF 2018, HCT DSM DISTRICT REGISTRY AT PAGE 6).**

The Tribunal further agrees that analysis of the party's submission or evidence is integral part of a valid decision.

In the present appeal, however, as replied by the decision maker of the impugned Interconnection Determination No. 5 of 2017, the decision of the respondent was backed up with reasons. At page 43 of the impugned Interconnection Determination No. 5 of 2017 the Authority questioned on whether should the new rates be introduced using a glide path? The Authority recorded as follows:

> "Economic efficiency suggests that an immediate return to cost-based rates will favour consumers and stimulated competition, but the scale of the necessary reduction is such that it is likely to cause serious disruption to the network operators business plans. This may be especially true for Halotel, Zantel and TCCL, where MEO are above their reported costs levels. We, therefore propose a glide path over the period 2018 – 2022 as shown in figure 3.3"

The asserted figure 3.3 contains the impugned Interconnection Determination Rates. Indeed, we have noted true that the position of the appellant and other network operators was considered by the responded in its decision. As such, the third ground of appeal is devoid of merits and the same stand to fail in its entirety.

The last issue was on whether the respondent issuance of Interconnection Determination No. 5 of 2017 contravened the provision of Section 5 (1) of TCRA Act which vests the duty on the authority while discharging its function among other things to strive to promote effective competition and economic efficiency to protect the financial viability of efficient suppliers; and to promote availability of mobile communications services to all consumers including the low income, rural and disadvantaged consumers.

Further, whether the respondent in its decision complied with the requirement provided under regulations 9 and 10 of The Electronic and Postal Communication (interconnection) which set out criteria to be considered by the respondent before computing the charged rates for interconnection based on forward – looking long run incremental costs, current costs of modern equipment technology, levels of the costs that would occur in a competitive and constable market and based on the relevant and efficiently incurred costs that would promote effective competition.

The appellant argued that the respondent had a burden of demonstrating that it has complied with the requirement of Section 16 (2) of the TCRA Act and regulations 9 and 10 of the Interconnection Regulation in determining the rates and charges of interconnection for the years 2018 to 2022.

The appellant called upon the Tribunal to note that the matters to be considered under Section 16 (2) and regulations 9 and 10 are cumulative, meaning the respondent does not have to choose one and leave the rest. All the factors have to be considered. While the Tribunal do agree with the appellant on the point of considering all the factors under Section 16 (2) and regulation 9 and 10 (supra), the respondent have a duty of weighing the factor effect.

In this appeal, as properly replied, the respondent considered the costs of supplying increased network traffic and capacity on international benchmarks for interconnection prices (mobile termination rates) which were set based on the cost of interconnecting in Tanzania. The respondent considered as well the interconnection rates of India and Canada. The other interconnection rates considered by the respondent were of Kenya which is USD 0.010 and of Uganda which is USD 0.26.

The respondent further considered the financial implication of the determination and consumers and investor interest where by the respondent agreed with the majority of the operators and other stakeholders that reduction of interconnection charges should translate to reduction of retail tariffs.

Moreover, the respondent considered the return on assets in the mobile telecommunication industry including forward looking Long Run Incremental Costs (LRIC) as it reflects at page 3 and

pages 37, 41 and 47, costs of modern equipment technology as it reflects at page 34 as well pages 17-42, on levels of the costs that would occur in a competitive and constable market and on the relevant and efficient costs that would promote efficient competition.

Therefore it is the firm considered opinion of this Tribunal that the respondent action complied with section 5(i) of TCRA Act and Regulations 9 and 10 of the Electronic and Postal Communications (interconnection) and as such this limb of the ground of appeal lacks merits and has to fail.

In the end, we find the appeal to be seriously wanting in merits and we proceed to dismiss the appeal in its entirety with costs. Order accordingly.

Hon. Judge Stephen M. Magoiga – Chairman

Hon. Yose J. Mlyambina – Member

Dr. Theodora Mwenegoha- Member

17/12/2019

Judgment delivered this 17th day of December, 2019 in the presence of Mr. Laurean Magaka, Ms. Iwure Mwanda Advocates for the appellant and Mr. Joseph Mbogela Advocate for the respondent.

Hon. Judge Stephen M. Magoiga – Chairman

17/12/2019