IN THE FAIR COMPETITION TRIBUNAL

AT DAR ES SALAAM

TRIBUNAL APPEAL NO 5 OF 2020

TANZANIA ELECTRIC SUPPLY COMPANY LTD

(TANESCO) ....APPELLANT

VERSUS

ABDUL AZIZ BRUNO NGOMUO ....1ST RESPONDENT

ENERGY AND WATER UTILITIES REGULATORY

AUTHORITY (EWURA) ....2ND RESPONDENT

JUDGEMENT

The appellant, Tanzania Electric Supply Company Limited (herein after in this judgement to be referred as 'TANESCO') aggrieved by the decision of the 2nd respondent (herein after in this judgement to be referred as 'EWURA') ordering the 1st respondent be restored to tariff category D1 from tariff category T1 and costs, appeals to this Tribunal

armed with two grounds of appeal couched in the following language, namely:-

1. That the decision was made in an error of the law.
2. That the award issued was based on improper assessment of evidence.

Based on the two grounds of appeal above, the appellant seeks from this Tribunal the following orders, namely:-

1. The entire award appealed against be set aside.
2. This appeal be determined in favour of the appellant.
3. Costs of the appeal be borne by the respondents.

Upon being served with the memorandum of appeal, the 1st respondent did not bother to file a reply to the memorandum of appeal and as such absented and denied himself from participating in this appeal. This Tribunal ordered the matter to proceed ex-parte against him upon being satisfied that the 1st respondent was duly served. Upon being served, the 2nd respondent duly filed reply to the memorandum of appeal as required under Rule 19 of this Tribunal's Rules, 2012, by strongly disputing the merits of this appeal by stating that, its decision was based on law, proper assessment of evidence and invited this Tribunal to dismiss this appeal with costs for being baseless and devoid of merits.

The facts pertaining to this appeal are not complicated. On 22nd October 2018, the 1st respondent lodged a complaint at EWURA against the appellant's refusal to restore him to customer category

tariff D1 from customer category tariff T1in respect of his residential house located at Masaika street in Babati township, in Manyara region.

The facts go that, the said house is both for residential and commercial use. Because of the dispute between residential users and commercial users of electricity, the 1st respondent applied and purchased a separate metre for each tenant from the appellant. This separation, upon installation, made the 1st respondent use of electricity drop below 75 units per month over three months and as such applied for the restoration from customer category tariff T1 to D1, in order to enjoy the benefits of customer category tariff D1. Further facts are that, the appellant denied the prayer because the 1st respondent do not qualify since the house is used for both residential and commercial purposes and is in urban area which according to TANESCO Tariff Adjustment Order, 2016 at para 10(i) do not allow the restoration for urban houses.

The facts state further that, the 2nd respondent upon hearing parties on merits decided and ordered that, the appellant should transfer back the 1st respondent to customer category tariff D1 in accordance to Tanesco Adjustment Tariff Order, 2016 and the appellant was condemned to pay costs. Aggrieved by the 2nd respondent's decision, the appellant has come to this Tribunal by way of appeal, hence this judgment, after hearing the appeal inter parties.

When this appeal was called for hearing, the appellant had the legal services of Mr. Karonda Kibamba, learned Principal State Attorney. And on the adversary part, the 2nd respondent had the legal services of Ms. Hawa Lweno, learned advocate.

Mr. Kibamba, learned Principal State Attorney, arguing the appeal was brief to the point that, he preferred two grounds of appeal and in support of the same, he filed skeleton written arguments which he prayed that same be adopted to form part of his submission in chief. Mr. Kibamba, therefore, prayed that, based on his grounds of appeal and skeleton written arguments this appeal be allowed as prayed with costs.

In the skeleton written arguments, Mr. Kibamba at the outset framed two issues for the determination of this appeal, namely:-

1. Whether the decision reached was made in error of the law.
2. Whether the award issued was not based on the evidence proffered.

Starting with the first issue, Mr. Kibamba pointed out that, this appeal originates from the 2nd respondent interpretation of the **TANESCO TARIFF ADJUSTMENT ORDER 2016 G.N.** 119- 2016, hereinafter referred to as "the Tariff Order" mostly condition 10(h) and (i) of the Order and the awarding of costs which were not prayed for.

According to Mr. Kibamba, the interpretation of the 2nd respondent of the pointed paragraphs of the Order was unfounded and contrary to

law and for ease of reference, the said paragraphs provides as follows:

10(h) connect to D1 tariff category all new single phase domestic customers in rural area.

And

10(i) transfer a D1 category to T1 customer category tariff in the event that such a D1 customer purchases more than an average of 75 KwH in a period of three consecutive months.

Mr. Kibamba went on to argue that, paragraph 10(h) of the Order was meant to cover new customers in rural areas, with single phase, and use must be that of domestic use with low energy users. The 2nd respondent's interpretation of the Tariff Order, therefore, to cover customer category tariff in urban areas was wrong interpretation of the law despite the 2nd respondent admitting at page 8 of the award second paragraph that the provision was meant for new connections for rural customers and not otherwise, in particular, the complainant being an urban customer, then, the condition does not cover him but the 2nd respondent went on to order his transfer in disregard of the law.

Mr. Kibamba faulted the 2nd respondent to base his decision in the case of **Clement F. Joseph v. Tanesco, EWURA /33/1/450 of 2017** but which, according to him, was given *per incurium* with no legal value to be related to this case in dispute.

On the applicability of paragraph 10 (i) of the Order, it was the arguments of Mr. Kibamba that, paragraph 10(i) qualifies condition 10(h) for customers in rural areas who are connected to tariff D1 when consuming more than 75 Kwh for three consecutive months are to be permanently transferred to T1 and strongly submitted and argued that, no vice versa transfer of tariffs. The learned Principal State Attorney argued that, the permanent transfer of tariff has its origin from Order, 2013, G.N. 10 Of 2013 and as such concluded that transfer from D1 to T1 is permanent and does not give room for transfer from T1 to D1, and therefore, the interpretation of the 2nd respondent was wrong and need to be quashed and set aside.

Another point taken in the first ground is that, the 2nd respondent erred in granting costs which were not pleaded in the complaint form. In support of these allegations, the learned Principal State Attorney cited the case of **TANESCO v. Michael Musa Makoi and EWURA, Tribunal Appeal No. 22 of 2018,** in which it was held that:

> **"However, this Tribunal noted that the Authority entertained some of the claims not even included in the claim form of complaint and made decision based on such claims. This cannot be accepted. If for any reason, a party wants to add some claims not in the original claim form, the best approach is to allow amendment of the claim form and additional documentary evidence to be relied upon. The Authority, being a quasi-judicial body which decide rights of the parties need to do so judiciously**

thriving to achieve substantial justice inter parties. Therefore, anything entertained out of the claim form may not help the parties to get their rights. We direct the Authority to take into account of this directive."

On the basis that no such claim was prayed in the claim form, then, it was the argument of the learned Principal State Attorney that, the grant of costs in the circumstances of this appeal was made out of context and prayed that we allow the appeal on this point too.

On the 2nd ground of appeal, Mr. Kibamba argued that, the evidence on record readily disqualified the 1st respondent from the claims of transfer for the reasons that; one, he is in town or urban area; and two, the house is used for commercial and residential purposes. To bolt up his arguments, the learned Principal State Attorney quoted the proceedings of the Authority which showed that had the 2nd respondent considered and assessed the evidence properly, its finding could not have been different.

Another point taken and argued is that there was no evidence tendered to prove the allegation of using below 75KwH.

On the totality of the above reasons, it was the humble conclusion of Mr. Kibamba that, the award was reached as the result of improper interpretation of paragraph 10 (h) and (i) of the Tariff Order and not on the weight of evidence and went on to pray that this Tribunal be pleased to allow this appeal with costs and declare that Tariff category D1 is for customers from rural area and cannot be extended to urban

area customers. Paragraph 10(i) only qualifies paragraph 10 (h) in case a rural customer uses more than 75 KWh in three consecutive months, then qualifies to be transferred to tariff T1. Transfer of D1 to T1 is one way and permanent and not vice versa. The Tariff Order does not cover customers who are once connected to T1 to be transferred to D1, customers whose premises are used for commercial purposes and separation of metres to solve tenants dispute is not a condition for change of the status of the house.

On the other hand, Ms. Lweno, learned advocate, seemingly was not moved by the arguments of Mr. Kibamba. She did not file skeleton written arguments but prayed to adopt her reply to the memorandum of appeal. Ms. Lweno readily admitted that, according to paragraph 10(h) of the Tanesco Tariff Adjustment Order, 2016 G.N.119-2016, provides for all new single-phase customers in rural area. The learned advocate went on to give the history of the connection of the house in dispute and submitted that, upon separation of the metres to each tenant, the 1st respondent qualified to be transferred from tariff category T1 to D1 and supported the decision of the Authority on the reasons advanced therein. According to Ms. Lweno, the evidence on record was properly assessed and the decision of the Authority is proper and prayed that it be affirmed by this Tribunal.

On the grant of the costs, it was brief submissions of Ms. Lweno that, under section 35(1) (d) of the EWURA Act, [Cap 414 R.E. 2002] the Authority has powers to order for costs of the other party in the complaint. The learned advocate went on to cite section 35(1) (j)

which gives the Authority powers to grant other reliefs as it deems fit, and that, it was on those legal powers that the Authority granted the costs.

Ms. Lweno moved this Tribunal to dismiss this appeal with costs for want of merits.

In rejoinder, Mr. Kibamba admitted that it is true EWURA have powers to grant costs but in this appeal, the costs granted were not claimed and reiterated his prayers in his submissions in chief.

This marked the end of hearing of this appeal.

The task of this Tribunal is to determine the merits or demerits of this appeal. We find it apposite to start with the first issue whether the decision reached was made in error of the law. We have carefully heard and considered the rival submissions of the learned minds of the parties on this point, revisited the law applicable and the circumstances of this appeal, and we are of the considered opinion that, this point is merited in this appeal. The provisions of paragraph 10(h) of the Tanesco Tariff Adjustment Order, 2016 G.N. 119-2016 are **applicable to D1 tariff category all new single phase domestic customers in rural areas.** (Emphasis ours)

From the record of the proceedings, it is not in dispute that, the 1st respondent was not new single phase customer in rural area. Quite correctly as argued by the learned Principal State Attorney, and, so correctly to the opinion of this Tribunal, the Authority upon finding that the 1st respondent did not qualify for the benefits to be enjoyed

under that paragraph, was to stop there and dismiss the complaint. The act of the Authority finding that the 1st respondent did not qualify as amply stated and quoted at page 8 of the award and turned to decide otherwise was wrong and irregular.

It is further the considered opinion of this Tribunal that, once the 1st respondent did not pass the qualifications of paragraph 10(h)of the Tariff Order, it was misconception on the part of the 2nd respondent to consider the applicability of paragraph 10 (i) of the Order, because it was inapplicable in the circumstances of this appeal. Equally important, the interpretation in the complaint of **Clement F. Joseph** (*supra*) was wrong and we take the whole arguments by the learned State Attorney for the appellant that the 2nd respondent was wrong in its interpretation.

Having so found that the interpretation of paragraph 10 (h) of the Order was reached in error, the arguments by the learned counsel for the 2nd respondent are far from convincing this Tribunal to affirm a decision so glaringly made in error of the law.

The next issue is whether the award issued was based on evidence proffered. Since we have found that the 1st respondent did not qualify and his complaint was not worth to be entertained, no evidence could have changed the law to his favour. This ground too is merited. The arguments by the learned advocate for the 2nd respondent are without any merits and are hereby rejected.

In the fine, we quash the decision and award given by the 2nd respondent and other orders that were consequential to the award including the order as to costs instead we substitute it with the following orders, namely:

(i) The tariff category D1 is for new single phase domestic customers in rural areas.

(ii) That paragraph 10(i) of the Order only qualifies condition 10(h) of the Order in the event customer from rural areas who is connected to tariff D1 consumes more than 75 KWh units in three consecutive months is to be transferred to tariff category T1 which is a general user category without usage limitation.

(iii) That transfer from D1 to T1 is one way and permanent.

Finally, we allow this appeal with no order as to costs.

It is so ordered.

Dated at Dar es Salaam this 11th day of August, 2020.

Hon. Judge Stephen M. Magoiga - Chairman

Hon. Yose J. Mlyambina - Member

Hon. Dr. Theodora Mwenegoha – Member

Judgment delivered this 11th day of August, 2020 in the presence of Mr. Peter Kimweri, Legal Officer for the Appellant and Hawa Lweno Advocate for the 2nd Respondent.

Hon. Judge Stephen M. Magoiga - Chairman

Hon. Yose J. Mlyambina - Member

Hon. Dr. Theodora Mwenegoha - Member

11/08/2020