IN THE FAIR COMPETITION TRIBUNAL

AT DAR ES SALAAM

TRIBUNAL APPEAL NO. 5 OF 2021

TANZANIA ELECTRIC SUPPLY CO. LTD

(TANESCO) .....APPELLANT

VERSUS

MAMA SAMSON KAPANGE.....1ST RESPONDENT

ENERGY AND WATER UTILITIES REGULATORY

AUTHORITY (EWURA).....2ND RESPONDENT

JUDGMENT

The 1st respondent, Mama Samson Kapange is a client of the appellant herein, a Government entity responsible for the production and supply of electricity in the country. She enjoys services of the appellant in form of electricity supply. The 2nd respondent, the Energy and Water Utilities Regulatory Authority (EWURA) is an autonomous multi-sectoral regulatory authority established by the EWURA Act Cap 414 of the laws of Tanzania. The dispute that culminated into this appeal arose in April, 2017 when the 1st respondent, was denied access to purchase electricity on what was alleged by the appellant to be a previous outstanding electricity bill of Tshs.

10,286,625.73/- ("the debt".). Following several correspondences between the two parties which proved futile, on the 23rd day of August 2018, the 1st respondent lodged a complaint at the 2nd respondent on ground that she was not aware of the debt despite the fact that she has been a client of the appellant from the year 1996 holding a meter No. 07052966178 installed on her resident on Plot No. 484, Block "E" Sinza E Dar-es-salaam.

Having heard the parties, the 2nd respondent made a decision in favor of the 1st appellant upon making a finding that the said debt was barred by time limitation pursuant to the Law of Limitation Act, Cap. 89, R.E 2019 ("the LLA"). Consequently, the 2nd respondent ordered cancellation of the debt by the appellant and a refund of all the money that was deducted from the 1st respondent's subsequent deductions of the debt from her electricity purchases. The appellant was also ordered to pay the 1st respondent damages for the inconveniences caused as well as costs. Aggrieved by the said decision, the appellant lodged this appeal on the following grounds:

1. That the trial authority erred in law and in fact when held that the respondent is limited to claim the electricity bill within a period of six years pursuant to the Law of Limitation Act, Cap. 89.
2. That the trial authority erred in law and in fact when it failed to properly evaluate the evidence on record leading to unjust decision.

On those grounds, it was the appellant's prayer that:

1. This appeal be allowed and the whole decision of the authority be quashed and set aside.
2. Any other orders or reliefs this Honorable Tribunal may deem fit and just to grant.
3. Each party bear its own costs.

When this appeal came for hearing on the 20th day of May, 2022, the appellant was represented by Mr. Steven Urassa, learned Advocate, Ms. Farida Sued and Ms. Faika Mamuya both learned State Attorneys and Ms. Lucian Benedict Legal Officer. The 1st respondent was represented by Mr. Cuthbert Mbilingi, learned advocate while Mr. Patrick Malogoi, learned Principal State Attorney, fended for the respondent. We appreciate the lengthy and well researched submissions that were advanced by all parties.

On our part, we find that the two grounds of appeal should be determined together owing to the fact that they all address the same issue, whether the appellants powers to collect outstanding bills of electricity was subject to the law of limitation. Looking at the decision of the 2nd respondent, the final and conclusive finding was that the relationship between the appellant and the 2nd respondent was contractual one and since the laws regulating the electricity supply did not provide for time limitation for recovery of outstanding debts, then the parties (appellant and 1st respondent) were subjected to the Law of Limitation hence the debt was found to be barred by limitation.

Ms. Sued made submissions on behalf of the appellant. She submitted that the dispute arises from a bill in arrears from a conventional meter that was

within the 1st respondent's premises who is a customer of the appellant since 1998. The meter was changed to a LUKU meter and the bill in arrears that was in the conventional meter was transferred to a LUKU, a transfer which was disputed by the 1st respondent. Referring to the 2nd respondent's conclusive remarks in dismissing the decision; where she held that the disputed debt has accrued since the year *1996 which is 25 ago hence time barred; Ms. Sued submitted that* the 2nd respondent placed reliance on Part I item 7 of the LLA which restricts suits based on contract to a limitation of 6 years. Having found that neither the Electricity General Regulations (GN No. 63/2011) nor the Electricity Supply Operational Rules (GN 387/2019) provides for a limitation within which the appellant can claim defaulted bills or bills in arrears, the 2nd respondent resorted to the LLA and dismissed the claim. She argued that their first ground of appeal is on the basis of this finding of the 2nd respondent, that the second respondent erred in law and in fact when it held the appellant is limited to claim electricity bills within 6 years pursuant to the Law of Limitation.

To support the first ground, Ms. Sued submitted that item No. 7 of Part I of the LLA does not apply in so far as claiming of bills in arrears is concerned, therefore not applicable in this case. Her main point of argument was whether the appellant is barred by the cited provisions, submitting that the bill in arrears that is in issue is on failure to pay an electricity bill falls, terming it as a continuing breach of a contract. She submitted further that a continuing breach of a contract has the effect of postponing the commencement of the limitation period and unlike the provisions of item 7 of the first schedule of LLA whereby cause of action in breach of contract

limited to six years, an accrual being the date when the cause of action arose under Section 5 of the LLA. She hence argued that when the breach in question is an ongoing breach, it has the effect of postponing the limitation period. She supported her argument by citing the provisions of Section 7 of the Law of Limitation which provides:

> *"Where there is a continuing breach of contract or a continuing wrong independent of contract, a fresh period of limitation shall begin to run at every moment of the time during which the breach or the wrong, as the case may be, continues."*

She then submitted that Section 7 of the LLA contemplates such cases whereby the party to the contract dishonors a promise but continues to enjoy service that is rendered by the other party to the contract. That similarly in this case, it is evident on record that despite default in payment of the electricity bill, electricity was never disconnected from the 1st respondent premises as she continued to enjoy service rendered by the appellant today, a fact which solidify that the relationship between the first respondent and the appellant subsists.

Ms. Sued submitted that the conventional meters, unlike LUKU meters, are post-paid meters whereby the customer will pay at the end of the month and on default the bill will be carried forward to the next month as the customer continues to enjoy services. She hence emphasized that the second respondent erroneously referred to item 7 of the Schedule to the LLA limiting the appellant to claim bills within six years while the same falls squarely within the requirements of section 7 of LLA as an ongoing breach.

That at no point did the first respondent deny the bill, she merely asserted that because it is a long overdue debt and because she was never informed of the same, then she in not entitled to pay. Further that no proof was produced to prove that indeed the said bill was paid and in its award the 2nd respondent acknowledged it hence the issue on whether or not the electricity was consumed was never contested and the second respondent had found the same.

Ms. Sued also raised an argument that the appellant being a public institution, a company whose shares are 100% owned by the Government, then the debt in issue is a government debt. She then argued that item 23 of Part I of the schedule to the LLA provides for limitations in as far as suits by or on behalf of the Government to be *sixty years. She concluded that* being a government debt, it is safe to say that item No. 23 of Part I of the schedule to the LLA is applicable.

In reply, Mr. Malogoi started with the issue of continuing breach. He submitted that Ms. Sued has misconceived the issue because it is clearly stated in the evidence that the first respondent was connected to electricity in 1998 using a conventional meter, a postpaid meter. That the said meter was replaced with a pre-paid meter in 2008 so if there were any arrears of bill at all, they ended in 2008 when the postpaid meter was installed. He argued that from 2008 to date, the 1st respondent has been using a prepaid meter which she only consumes what she pays and therefore debt arrears accrue from 2008 to date hence there is no continuous breach because to have a continuing breach from 1998-2017, one has to show that the bill arrears for the whole of that period which is not our case. He

hence argued that the provisions of Section 7 of the LLA that there was a continue breach of contract has no merits.

On the citation of the provisions of Para 23 of the LLA by Ms. Sued, Mr. Malogoi submitted that although the appellant is wholly owned by the Government, the debt in question cannot be termed as a Government debtor be subjected to the limitation period of 60 years. His submission was that before this Tribunal is an appeal originating from a consumer complaint, and not a Government Suit. His argument was that a Consumer complaint is governed by the consumer disputes settlement rules GN 428/2020 and the EWURA Act Cap 414. On the other hand, argued Mr. Malogoi, a suit by or on behalf of the Government would have been filed by the Attorney General in ordinary Court and be governed by the Government Proceedings Act, Cap. 5 R.E 2019.That Ms. Sued's submissions would have made sense if the appellant had filed a suit specifically stating that it was a suit against the government under the Civil Procedure Code, Cap. 33 R.E 2019 ("the CPC") and there she would have applied the provisions of item 23 of the LLA.

Mr. Malogoi submitted further that the appellant being wholly owned by the Government does not make these proceedings Government proceedings, neither does it make the appellant the Government, because the definition of the Government under the LLA includes a local government authority. That under Cap 1, Interpretation of Laws Act, the Government is defined as "the Government of the United Republic" and in that respect therefore, the appellant is not the Government in as far as the

definition of the Government is concerned. He emphasized that the appellant is a legal person, a corporate entity with its seal and capacity to sue and be sued in its own name. He concluded that the appellant being a legal person separate from its owners and providing electricity services to the 1st respondent under a contract, is bound by the provisions of Section 3 and para 7 of the Schedule to the LLA in the sense that they cannot initiate a claim under that contract for supply of electricity after the period of six years.

On his part, Mr. Mbilingi was brief. On the issue of limitation of time, he submitted that it is clear and even the counsel for the appellant argued that there was and still there is a contract between the appellant and the 1st respondent. That under the provisions of Section 3 read together with item 7 of the schedule to the LLA, the appellant had to claim his debt not more than six years after accrual. He also pointed out that the 1st respondent was connected with the service of the appellant since 1996 and they claimed that since 1996 the respondent was not paying her bills and that they realized that the debt accrued in 2008. He then argued that even after the year 2008, the time was limited to claim the debt because from 2008-2017 when the debt started to be collected, more than 6 years had passed therefore it was wrong for the appellant to deduct 50% of the money when the 1st respondent was paying her bill.

On the issue of continuation of breach of contract, Mr. Mbilingi submitted that there is no such breach because when the conventional meter was changed to LUKU meter, the 1st appellant enjoyed the services when she pays and if she does not pay it means that she does not get service. That it

was wrong for the appellant to deduct 50% of the purchase of the 1st respondent because the debt claimed is time barred. He concluded that failure to comply with time limitation is fatal and the available remedy is to dismiss the appeal or stop the deduction of the 50% of purchasing power at the risk of hardship of the appellant.

In rejoinder Ms. Sued submitted that the main element or character that determines a breach to be a continuing one is the subsistence of the contract or continuity of the relationship between parties. She then draw a distinction between this scenario and a breach emanating from a normal contract like say of supply of goods arguing that the contract between TANESCO and its customers has no fixed duration of time. She argued that the assertion that the change from a convention meter to a LUKU meters stopped breach from being an ongoing one is totally misplaced because it goes without saying that even after changing of meters, the 1st respondent continued to enjoy services under the same contract of service. That there was no cessation of relationship and that Section 7 of the LLA aims at recoursing in breaches whereby there is room for recovery of the debt. She then reiterated her submissions that failure to pay a bill in arrears constitutes an ongoing breach and goes squarely with the requirements of Section 7 of the LLA.

On the submission that Rule 23 of the LLA restricting Government suits to 60 years is not applicable on the ground that the complaint at hand is a consumer complaint, Ms. Sued rejoinder submission was that Mr. Malogoi's

argument that if the appellant is at all the Government institution would have proceeded with the procedure to file government suit; is misplaced.

Having heard the submissions of the parties, we find it prudent to begin with the issue whether the current debt in question is a Government debt or not. In a bid to rescue their case, Ms. Sued argued that the appellant being a public institution, a company whose shares are 100% owned by the Government, then the debt in issue is a government debt. She then argued that item 23 of Part I of the schedule to the LLA provides for limitations in as far as suits by or on behalf of the Government to be sixty years. She concluded that being a government debt, it is safe to say that item No. 23 of Part I of the schedule to the LLA is applicable.

According to Ms. Sued's submission, the 1st Respondent owed Tanesco a debt of 10,289,625 and referring to TANESCO as a public institution whose 100% shares are owned by the government then the debt owed to the 1st defendant qualifies as a government debt. The learned Counsel reiterated further that Part I, item 23 of the 1st Schedule of the LLA correctly fits the situation at hand as it provides limitation of 60 years in as far as suits by or on behalf of the government are concerned. This implies an extension of time to accommodate the claim from 12 years to 60 years thus permitting the Appellant's claim against the 1st Respondent. The consequence of the contention is to award an enjoyment of 24 more years to the Appellant within which to claim for the outstanding debt from the 1st Respondent.

In reply, Mr. Malogoi argued that the appellant being wholly owned by the Government does not make these proceedings Government proceedings,

neither does it make the appellant the Government, because the definition of the Government under the LLA includes a local government authority. He emphasized that the appellant is a legal person, a corporate entity with its seal and capacity to sue and be sued in its own name. He concluded that the appellant being a legal person separate from its owners and providing electricity services to the 1st respondent under a contract, is bound by the provisions of Section 3 and para 7 of the Schedule to the LLA in the sense that they cannot initiate a claim under that contract for supply of electricity after the period of six years.

Having considered the parties' argument on the qualification of the current debt as a government debt, it is our hesitant reaction that moneys owed to the Appellant does not qualify as government debt since, as argued by Mr. Malogoi, which we agree with, the Appellant is a public institution but not a government within the definition of the Interpretation of Laws Act. Even if such was the case, the outstanding amount and its arrears in interest would not qualify as government debt hence is subjected to item 7 of the LLA. It is thus our considered view that the Appellant is a public institution with separate legal personality capable of entering into contracts with other persons legally permitted to do so, for which the LLA would apply just as a party to a contract and not otherwise.

Going to the issue of continuing breach, we find it pertinent that we define the meaning of cause of action, when it accrues and the exception to the general purview. A cause of action is said to accrue so as to trigger the commencement of the statute of limitations period for the purpose of

seeking relief when all of the factual circumstances necessary to establish a right of action have occurred. The accrual is determined in relation to the plaintiff's right to be entitled to some reliefs within the periods prescribed by the law of limitation according to the kind of relief sought. In the case at hand, the issue is when the cause of action accrued for the appellant to have claimed relief. The respondents hold that the cause of action accrued in 1996-2008 when the meter was changed from conventional to LUKU, while the appellant maintains that it is a continuing breach. The concept of continuing is an exception to the general rule above, as to when the cause of action arises. In cases of continuing breach, a fresh period of limitation accrues every time during which the breach continues. In such cases, the criteria for determination of the period when the cause of action arose is not whether the right or its corresponding obligation is a continuing one, but whether the wrong is a continuing one.

Now looking at the case at hand, the appellant's claimed debt dates back to at least the latest(not the furthest) to the year 2008 when the meters were changed from conventional meter. This is when the obligation would have at least accrued the latest because from then, the payment mode of the services drastically changed from the postpaid one where debts would accrue to the pre-paid mode where the services have to be bought before they are enjoyed. Now as we have held earlier, the criteria for determining the period when the cause of action arose is not whether the right or its corresponding obligation is a continuing one, but whether the wrong is a continuing one. By the former, undisputedly so, the right of the 1st respondent to enjoy the services of the appellant has never ceased, neither

is her obligation to pay for those services, which she undisputedly fulfill through her LUKU meter whereby the appellant keeps on deducting 50% of the payment. However, the important thing to be looked upon is whether the wrong is a continuing one. The wrong in this case is the failure to pay for the bill which allegedly accrued to the disputed debt. As per the facts and evidence, the alleged wrong of non-payment of bill stopped in the year 2008 when the appellant changed the 1st respondent's meter to a LUKU meter, a pre-paid mode of payment. Therefore even if we were to term the breach to be a continuing breach during the period when the 1st respondent was using post-paid conventional meter, the breach stopped being continuing one when those terms of payment changed. The appellant was therefore duty bound to collect his accrued bill from the year 2008 when the mode of payment changed by changing the meters, and that is when the continuing breach stopped and at least the latest time when the right to claim relief or the cause of action arose. The issue of continuing breach is therefore not applicable to this case.

Having so found that there was no continuing breach, so what was the situation on the ground? According to the evidence, between 1996 and or 1998 and the year 2008, the appellant changed the accounting systems several times from *Wang* to *Custima* and to *HiAffinity* (or Higher Affinity). The Meter Numbers included:

a) First Conventional Meter: ELEC/41831525 (Page 74 of records of Proceedings) used up to 2008

b) First LUKU Meter: 372096522033 of 2008 (or 2010) Page 85 used between 2008 and December 2010
c) The Last and current LUKU Meter: 07052966178 (Page 74) used from Dec 2010 to date.

All these changes would have provided the appellant with an opportunity to claim bill arrears from the previous meter. However, there is no evidence from the Appellant to substantiate that for each of these changes, communications were made to the 1st Respondent to confirm that information, including any bill arrears, were correctly transferred across the changing accounting systems. Without such confirmation, there is a high potential for wrong information transfers across customer accounts, hence posing a potential risk of erroneous bills transferred to the 1st Respondent's customer account No. 51009526. This would have been a subject of analysis had the bill been claimed within the time prescribed by the law, something which the appellant failed to do. At this end, we are in agreement with the submissions of Mr. Malogoi that the appellant being a legal person separate from its owners and providing electricity services to the 1st respondent under a contract, is bound by the provisions of Section 3 and para 7 of the Schedule to the LLA. Since the latest time within which the breach would have accrued is the year 2008 and the time limit to file action for breach of contract under Para 7 to the schedule of the LLA is six years, then the appellant was barred by limitation of time hence the claim was time barred.

Having so determined that the claim was time barred, we see no need to dwell on the second ground of appeal on the analysis of evidence because it will be much of an academic exercise. All said and done, the appellant was barred by the hands of time to have claimed the debt arrears from the 1st respondent. We therefore see no need to interfere with the findings and decision of the 2nd respondent. The appeal before us lacks merits and it is hereby dismissed. The 1st appellant shall have her costs for this appeal.

Dated at Dar-es-Salaam this 08th day of June, 2022.

Hon. Judge Salma M. Maghimbi – Chairperson

Eng. Boniface G. Nyamo-Hanga – Member

Dr. Hanifa T. Massawe – Member

Judgment delivered this 8th day of June, 2022 in the presence of Ms. Farida Sued, Advocate and Ms. Luciana Benedict, Legal Officer for the Appellant, Mr. Cathbert Mbilingi Advocate for the 1st Respondent and in the absence of the 2nd Respondent.

Hon. Judge Salma M. Maghimbi – Chairperson

Eng. Boniface G. Nyamo-Hanga – Member

Dr. Hanifa T. Massawe – Member

08/06/2022