

**EDT. APPEAL NO. 1 OF 2006**

**ELECTRO-MAXX UGANDA LTD. – Appellant**

**Vs.**

**ELECTRICITY REGULATORY AUTHORITY.-Respondent**

**Ruling**

By an action termed an Appeal, the Appellant, ELECTRO-MAXX (UGANDA) LTD on 12 October 2006 filed a grievance, EDT APPEAL NO. 1 OF 2006 against ELECTRICITY REGULATORY AUTHORITY, the Respondent, seeking the following reliefs:

- a) The appeal to be allowed.
- b) The resolution to award a licence be revoked or the decision awarding the licence to JACOBSEN ELECTRO AS to generate and sell 50MW thermal electricity at Mutundwe be quashed, set aside and the licence be cancelled or repudiated.
- c) The BOT licence for the 50MW thermal electricity generation at Mutundwe be awarded to the applicant
- d) In the alternative, and without prejudice to the prayer in (c), the evaluation process for the 50MW thermal electricity generation at Mutundwe be re-opened and re-started afresh.
- e) JACOBSEN ELECTRO AS be disqualified from the entire bidding process for the 50MW thermal electricity generation at Mutundwe
- f) The Appellant be awarded costs of this appeal.

At the commencement of the hearing of EDT Appeal No.01 of 2006 between Electro-Maxx - Uganda Ltd. AND Electricity Regulatory Authority (ERA) that took place on Wednesday 21-February 2007 at Amber House Kampala before;

Charles Okoth – Owor  
Percy Night Tuhaise  
John Genda Walala

} ***Members of ELECTRICITY DISPUTES TRIBUNAL***

and Ketrh Katunguka, the Registrar, in attendance; the Tribunal made a ruling in response to an objection by Mr. Magellan Kazibwe, Counsel for Electro-Maxx-Uganda Ltd, and promised to make a ruling upon objections raised by Mr. Mohamed Mbabazi, Counsel for the Electricity Regulatory Authority(ERA).

Counsel for Electro-Maxx, objected to ERA being afforded an opportunity to be heard and address the EDT, on the ground that it had failed to respond in writing to the pleadings filed by the appellant(Electro-Maxx), even after being called upon by the Registrar to do so. ERA therefore had no *locus standi*.

Counsel for ERA countered that in their opinion this was an appeal in the sense that it was a proceeding brought before a higher body as understood in ordinary civil courts. The appellant's pleadings did not therefore necessarily call for written pleadings in response. The ERA however had intended to raise objections to the hearing of the appeal.

The EDT after listening to both parties ruled that considering the lack of common understanding from the outset ,as to the technical nature of the action before it; but more importantly, in the interest of natural justice, which EDT is enjoined by Section 111(4) of the Electricity Act to pursue ,ERA be allowed audience. ERA was invited to present its preliminary objections to the Appeal, proceeding.

Counsel for ERA argued that, Appeal E.D.T. 1 of 2006 against E.R.A is incompetent and not maintainable.

The major grounds advanced by ERA's Counsel were as follows:-

(1) ERA is a quasi judicial body. According to ERA's counsel, the functions of ERA under Section 10, of the Electricity Act CAP 145 and more particularly Sections 10 (a) (i) and 10 (b), are;

(a) to issue licenses for the generation, transmission, distribution or sale of electricity.

(b) to receive and process applications for licences. These provisions coupled with the statutory prescriptions under S.11 of the said Act stating how ERA is to perform its functions and exercise its powers to wit: In a manner that is;

- Open and objective
- Fair and reasonable
- Non discriminatory; and promotes fair competition:  
constitutes ERA into a quasi judicial body.

In his opinion it would be procedurally and substantively wrong to make ERA a party to an Appeal before the Electricity Dispute Tribunal (EDT) because it is a quasi – judicial body, otherwise, E.D.T and judicial bodies like Magistrates Courts would also be parties to appeals against their rulings. This would bring about an absurdity. He prayed that the Appeal before the Tribunal be dismissed on this ground.

Counsel for Electro-Maxx (U) Ltd argued that:

- (a) A Cause of action exists against ERA; it having managed and controlled the entire bidding process which process, Counsel argued was flawed.
- (b) No provision exists in the said Electricity Act that expressly immunizes ERA from action against it, and that section 109 of the Act which stipulates the jurisdiction of the Tribunal does not expressly exclude ERA from the jurisdiction of E.D.T where complainants against ERA exist.
- (c) Counsel drew the attention of the Tribunal to Sec. 38 (2) of the said Act which states that "A person aggrieved by the refusal of the authority to grant a licence may appeal to the tribunal". This constitutes ERA a Party to such an appeal; Counsel argued.

Having considered carefully the arguments of both counsels on this ground, the following is our view:-

1. Section 4 of the said Act under which ERA is established constitutes ERA, a body corporate which may sue and be sued in its corporate name.
2. Section 38(2) of the Act empowers a person aggrieved by the refusal of the "authority" to grant a licence to appeal to the Tribunal. Under Sec. 3 (c) of the said same Act, "authority" means the Electricity Regulatory Authority established under Section 4, which is the party in this Action.
3. Under Sections 10 (a) and (b) of said Act the functions of the said authority, is to issue licences, and to receive and process application for licences.

From the above, we are inclined to believe that ERA can be made a party to an appeal before E.D.T such as this one preferred by Electro-Maxx Uganda Ltd; and considering that the power to licence an entity to generate or sale electricity is with it. ERA is properly a Party to this action.

The Electricity Act Cap 145 in Section 11 enjoins ERA to perform its functions and exercise its powers in a manner that is:-

- Open and objective
- Fair and reasonable
- Non discriminatory and
- Promotes fair competition

Section 11( 1) and (2) read together with the functions of the authority under S.10 of the said Act appeal to constitute ERA into a licensing body and thus an administrative / or Executive body as its powers are basically administrative, although provisions of Section 11 enjoin it to exercise those powers in an open, objective, fair and non discriminatory manner. The said section 11 imposes on ERA a duty to exercise its

powers under S.10, judiciously! ERA as a licensing authority therefore acts administratively but is required by the law to act fairly. The term or idea of the "quasi-judicial" has attracted definitions and comments by various persons and writings. Black's Law Dictionary (Eighth Edition) describes it as an adjective "relating to, or involving an executive or administrative official's adjudicative acts"; de Smith and Brazier in Constitutional and Administrative Law (seventh edition Pg583) say that "Quasi-judicial is, on the whole, a superfluous adjective which increases rather than diminishes confusion. Usually it means a discretionary (administrative-type) decision preceded by a judicial-type procedure....but the term is also sometimes used to describe the final decision itself and sometimes to describe the preliminary procedure." David Foulkes in Administrative Law (Seventh edition) says that the idea of quasi-judicial has been defined as 'only an administrative decision, some stage or element of which possesses judicial characteristics' In our opinion, the fact that ERA is required by Section 11 of the said Act to exercise its powers and functions in a fair and unbiased manner, does not necessarily constitute ERA into a "quasi-judicial" body, nor preclude it from being made a party to this grievance. In our opinion, ERA is a body corporate that by law and fact can be made a party to an appeal before the EDT under Sect.38(2) of the said Act, and is rightly a party in this action. The ERA cannot be equated to EDT. The EDT is a Statutory Tribunal, an integral part of the machinery of justice in the State, while the ERA, under Sect.10 of the Act, is a licensing authority, and its decisions in that respect are administrative. It is our view that this ground of objection fails.

Briefly, Counsel for ERA also argued that (2) Pursuit of the reliefs sought by Electro-Maxx Uganda Ltd through E.D.T Appeal No. 1 of 2006, had been overtaken by events and decisions taken. And as a result, pursuit of this petition would be in vain. He elaborated that Electro-Maxx sought among others the following reliefs:

- (i) The evaluation process for the 50 MW thermal electricity generation to be re-opened and re-started afresh.
- (ii) The resolution to award a licence be revoked or the decision awarding the licence to Jacobsen Electro AS to generate and sell 50MW thermal electricity be quashed, set aside and the licence be cancelled or repudiated.

Counsel for ERA submitted that both Electro-Maxx and ERA on 6<sup>th</sup> December 2006 in a meeting agreed that re-evaluation of the proposals originally submitted to ERA may proceed.

He referred to a note written to the Permanent Secretary, Ministry of Energy by the Registrar of E.D.T dated 6/12/06 informing him of this position, as a record of that meeting, and decisions taken.

Counsel submitted that by that / by this act, Electro-Maxx agreed to a re-evaluation of the bids. He submitted that a revaluation of the said 'bids by government subsequently took place.

Counsel's understanding appears to be that; by a revaluation agreed upon by Electro-Maxx and ERA taking place, the relief / sought (re-evaluation) in the said Appeal is satisfied; and further that by the fact of the re-evaluation being carried out, the

resolution to award a licence to Jacobsen Electro As, was by implication set aside or revoked, to enable the re-evaluation to take place.

He asked the E.D.T not to close its eyes to the fact of re-evaluation having been agreed to by Electro -Maxx, and having taken place.

He added that disqualifying Jacobsen Electro As from the entire bidding process as sought in the Appeal by Electro-Maxx (U) Ltd would adversely affect Jacobsen which is not a party to the Appeal.

Mr. Magellan Kazibwe , Counsel for Electro-Maxx (Uganda) Limited, on the other hand among others argued that;

- (a) This Appeal being the first case preferred against ERA under the Act, be entertained so that ERA becomes aware that it will be taken to task.
- (b) The reliefs sought in the Appeal were maintainable and within the jurisdiction of the Tribunal and that the Tribunal may proceed to grant them under Section 109 of the Electricity Act Cap 145.

Related thereto, he submitted that all actions and communications were "Without prejudice" to the hearing of the appeal, and requested that no reference be made to the re-evaluation exercise agreed upon and or undertaken. He submitted that the Tribunal may in its wisdom still decide to order a revaluation and cancellation of the licence. He objected to counsel for ERA, drawing the attention of the Tribunal to a letter dated 14/02/2007 from the Minister of Energy to the Prime Minister copied to other concerned, ministers, governmental bodies and the Tribunal, briefing him of the progress of the re-evaluation process. He argued that Electro -Maxx as a Party to the re-evaluation had not been communicated to the contents of the letter.

- (c) He also argued that in the alternative, the Tribunal should proceed as if no "conclusion" outside it has been reached because, according to him, the Tribunal should exercise its discretion to a logical conclusion. We suppose "the conclusion" he meant were the agreement of the parties on 6/12/2006 for re-evaluation to take place, and the fact that a re-evaluation was to take place / was taking place or had taken place.  
He prayed that this objection be overruled with costs.

We have carefully considered the arguments of both counsels, all the facts and circumstances in respect of this ground of objection to the proceedings continuing. We have come to the following considered views :-

- (a) We agree with Counsel for Electro-Maxx that the re-evaluation was to be conducted, without prejudice to the hearing of the appeal. The fact of the EDT proceeding to listen to the parties hereto, starting with entertaining the various objections raised by the parties is a fact to the proceedings taking place.
- b)The fact of the parties hereto (Electro-Maxx and ERA) and as a matter of fact Jacobsen, agreeing to a re-evaluation process of the three original bids, and the fact

that the re-evaluation is taking place / has taken place rendered the reliefs sought by way of this Appeal largely moot! Upon a re-evaluation being agreed upon by ERA and Electro-Maxx, (and Jacobsen as a matter of fact agreeing to participate in it) the need of E.D.T. to order a re-evaluation of the bids ceased, and the decision to award a licence to Jacobsen to generate and sell thermal power under the initial evaluation process ceased to have effect. The major reliefs that Electro-Maxx had sought to obtain by way of this Appeal have been obtained without the need for hearing this appeal! A hearing to obtain the same reliefs would be for academic purposes.

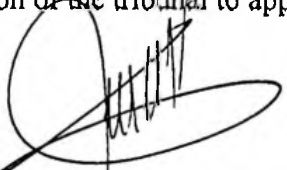
c)The Tribunal would not be affording Jacobsen natural justice to disqualify it from the entire bidding process when it has not been afforded an opportunity to be heard or defend itself. Moreover the parties hereto have already agreed to re-evaluation which includes the bid of Jacobsen. This relief will not be granted

d)The Tribunal will also not consider the relief prayed for: *ipso facto* to award the licence to generate electricity to ElectroMaxx. There is / has been a revaluation agreed upon by Electro-Maxx, ERA, and it is not logical to consider this prayer in light of this fact!

In the circumstances, the Tribunal upholds ERA's objection to further hearing of this Appeal on the Ground that the Reliefs sought have, by and large been effected by actions which the parties hereto agreed to and participated in as stated above, and the other reliefs are consequently not sustainable, or by the fact implicitly effected.


Considering the facts and circumstances of this case, the Tribunal is of the view that each party bears its own costs. So ordered

The attention of the parties is drawn to the provisions of The Electricity Act. Cap. 145, which empower the tribunal of its own motion or upon application by an aggrieved party, to review its judgments and orders; and any person aggrieved by a decision of the tribunal to appeal to the High Court.

  
CHARLES OKOTH-OWOR (Chairman)

9/03/07

  
PERCY NIGHT TUHAISE (Vice Chairperson)

  
JOHN GENDA WALALA (Member)