THE REPUBLIC OF UGANDA

THE ELECTRICITY ACT CAP.145

THE ELECTRICITY TRIBUNAL (PROCEDURE) RULES, 2012

COMPLAINT NO.EDT/10 OF 2016

KAMBA PETROLEUM (U) LIMITED ..... COMPLAINANT

VERSUS

UMEME (U) LIMITED ..... RESPONDENT

JUDGMENT

Before: Charles Okoth Owor - Chairman, Anaclet Turyakira-Vice Chairman, Moses Musaazi - Member

The Complainant Kamba Petroleum (U) Limited filed this complaint against Umeme (U) Limited, the Respondent, seeking the orders of this tribunal to declare that the Respondent unlawfully connected other customers to the Complainant's meter leading to overbilling the Complainant and sought to recover lost monies paid on account of overbilling.

In its response, the Respondent denied any liability to the Complainant contending that it carries out its duties lawfully and in a professional manner and that the interlinking of customers on the Complainant's supply was an act of third parties, for which the Respondent was not responsible and that when the anomaly was brought to its attention, the same was promptly rectified.

Against the above pleadings the parties filed a joint scheduling memorandum. In the memorandum, the following facts were agreed:-

1. The Complainant is a private company incorporated in Uganda and the Respondent is a body corporate and an electricity distributor in Uganda.
2. While the Respondent's servants or agents were processing a meter point, several customers were inter linked with cables supplying the Complainant's factory.

Taken by Alan Bagumd 27/2/18

Received by Marion Mukiibi c/o Mukiibi, Namanya Advocates 6th/03/2018

3. As a result of the said anomaly, the Complainant was overbilled by the Respondent who lost money in paying high electricity bills.

4. The Complainant filed a complaint with the Respondent and the anomaly was confirmed by the Respondent in their letter dated 18th February 2015.

The following facts were disagreed:-

1. That the interlinking of other customers' meters to the Complainant's meter was done in 2012.

2. That there were only 12 meters interlinked to the Complainant's meter.

The parties agreed to the following issues for determination by the tribunal:

1. Whether the Respondent unlawfully connected other customers to the Complainant's meter?

2. Whether the Respondent overcharged the Complainant's meter?

3. Whether the Complainant is entitled to the remedies prayed for?

Issue No.1: Whether the Respondent unlawfully connected other customers to the Complainant's meter;

It is to be noted that the admission of the facts by the Respondent – particularly agreed facts' Nos.2, 3 and 4 above, is a departure from the original pleadings where the Respondent had claimed the connection was an act of third parties for which it was not responsible.

Given the available documentary evidence in the Respondent's letter of 18th February 2015, acknowledging the interlink; (see CEX'D') and the Verification team report CEX 'D' we think it was only proper for the Respondent to make this early admission. We also think Learned Counsel, Ingabire Bonny from Shonubi, Musoke Advocates, who represented the Respondent, acted in a professional manner when after the weight of evidence she conceded to the above facts.

We associate ourselves with the proposition made in **Yusuf Ali Mohamed Osman Vs. DT Dobbie & Co. (T) Ltd 1963 EA p.288** where it was held that "***facts admitted need not be proved but they are regarded as established.***"

In order for the Respondent to succeed that the interlink was lawful, it had to prove that the same was within the law. No such evidence has been adduced.

On the other hand, the Complainant has established that the interlink was without his knowledge and consent and caused it loss by way of payment of excessive bills; a fact also admitted by the Respondent. We are of the belief that the Complainant has succeeded in this aspect.

That the connection of other consumers to the Complainant's supply system was an unlawful act was in our view a foregone conclusion and the issue should never have been put to the tribunal for determination.

Our conclusion on the issue is that the Respondent unlawfully connected other customers to the Complainant's meter.

Issue No.2: Whether the Respondent overcharged the Complainant's meter:

Having admitted that other customers (whether 19 as alleged by the Complainant or 12 as established by a verification team), the issue of whether the Complainant was over charged by inference leads to the conclusion that the Complainant was presumably overcharged.

If other customers were consuming power and that power was billed to the Complainant, logically it follows that the Complainant was being overbilled and the only question would be the amount of overbill.

Although the Respondent admitted that the customers were connected to the Complainant's meter and it was agreed in para 3 of the Scheduling Conference notes that the Complainant "lost money in paying high electricity bills"; Learned counsel for the Respondent in her submissions contended that since the Respondent upon receiving the complaint took steps to investigate and later corrected the anomaly and credited the Complainant with UGX.2,745,968 (REX8); then there was no overbill.

We think this argument is not helpful to the Respondent as the act of overbilling, which is the subject of this issue had already taken place.

Actions taken by the Respondent were basically remedial and mitigatory in nature, but do not remove the fact of the Complainant having been overcharged in the first place.

The second issue therefore is also resolved in favour of the Complainant.

Issue No.3: Whether the Complainant is entitled to the remedies sought:

We think this issue is the actual bone of contention.

In its pleadings filed in the tribunal on 8th December 2016, the Complainant made allegations of breaches of duty by the Respondent but did not make any specific prayers. However, in the Witness Statement of the Complainant's first Witness MBAINE NEKEMIA (CW1), which was adopted as the Complainant's evidence in chief under para 18 thereof, the witness said "*The Complainant is entitled to a refund of the monies unlawfully collected by the Respondent, damages and costs.*" We think the sentence sequences the orders sought although there was no mention for the specific amounts prayed for.

In her submission, Counsel for the Complainant – Grace Mukiibi Byaruhanga), contended that the Respondent failed in its duty to maintain standard metering equipment at the Complainant's factory, which breach caused overbilling of the Complainant's account. She relied on Regulation 7.1.1(b) of the Electricity (Primary Grid Code) Regulation 2003. For avoidance of doubt, under Regulation 7.1.1, it is stated as follows:

A licensee shall, in accordance with the licensee's specifications to be approved by ERA –

(a) .....

(b) ***provide, install and maintain standard metering and necessary ancillary equipment, at a suitable location to be provided by the consumer***.

Since the account was exclusively for the Complainant and the Complainant had not consented to the connection of other customers, there was no doubt a

breach of duty by the Respondent to the Complainant and the issue is the consequences of the breach.

In an attempt to prove the actual loss, the Complainant prayed to the tribunal to look at the bills of the years 2010 to 2015. The bills were marked as

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The Learned Counsel in her submissions under para 4.3.8.1 tabulated the bills beginning September 2012 to January 2015, the time when the overbill started and ended and July 2015 to July 2016 after the rectification of the problem.

As pointed out the Complainant in its Statement of Claim did not make any specific claim of the amount paid as a result of the overbill. No amount was specified in the evidence of CW1 as having been paid by the Complainant as overbill. In the submissions, besides listing a litany of bills and figures, no effort has been made by the Complainant to specify the amount overbilled by the Respondent and, therefore recoverable from the Respondent.

By its own evidence, the Respondent did not give regular bills.

The bills tabulated under para 4.3.8.1 of the Complainant's submission are for specific months and the other months are unspecified. Other than the comparisons being made in the submission between the bills prior to rectification and after the rectification, the bills do not clearly show which amounts were genuinely consumed by the claimant (because it was also consuming) and the amounts consumed by the other consumers which would constitute the amount overbilled.

By its own evidence, CW1 testified that the Complainant's factory normally started work at about 8-9am daily and closed at 7-8pm.

In busy times, there was allegedly no specific time for opening and closing. The factory worked seven days a week and sometimes in shifts. This in our view is evidence of optimum consumption.

No attempt however, was made by the Complainant to demonstrate to the tribunal at least the average monthly genuine bills which would enable us to reasonably determine the amount surpassing that average bill.

Since the tribunal has not been guided on the amount overbilled, no order shall be made for refund of a specific amount as none has been specifically pleaded and or shown by evidence.

The other issue of contention is the date when the overbill started. For the Claimant it is alleged the overbill started 2010. According to CW1 the Complainant's staff discovered the anomaly in 2012 when the Complainant's power was disconnected and the "villagers" (other customers) invaded the Complainant and alleged that CW1 was a bad person who disconnected their homes. This led to the Complainant's director, CW1 to check the power connection which action eventually established the interlink which was later confirmed by the Respondent.

No positive step however seems to have been taken till 22nd January 2015 when the Complainant made a formal complaint to the Respondent. The letter was exhibited as exhibit **CEXA**. The Complainant alleged that he had in the meantime made verbal complaints, which the Respondent denies.

On its part, the Respondent's witness- Lubega Patrick, a system Operating Regulations Officer, who had previously worked as a Metering Engineer for the Respondent stated that the Respondent received the Complainant's letter on 22nd January 2015. He told the tribunal that upon receipt of the letter, he made an investigation and found that during the process of installing an Automated Meter Reader (AMR) in December 2014, some customers were mistakenly interlinked to the Complainant's meter. He said that upon this discovery, he immediately got in touch with the Complainant and on 22nd February 2015, a joint verification committee including representatives of the Complainant, Saddam Hussein and Muyini Stephen, found 12 customers had been wrongly connected to the Complainant's account. The report of the committee was admitted as Complainant's exhibit **CEX2**.

The witness further testified that the interlink was thereafter removed and customers isolated in mid February 2015. He relied on meter adjustment sheet which was admitted in evidence as Respondent's exhibit **REX5(i)**

He also testified that a refund of ugx.3,246,002/= plus VAT of ugx.500,034/= wrongly charged to the Complainant's account was credited to the

Complainant's account. While the witness admitted that the interlink was erroneous, he denied it was negligent.

In her submission Counsel for the Respondent submitted that since the error was rectified and overbilled amount paid, no further loss was incurred by the Complainant.

It is clear from the above evidence of the Complainant and the Respondent that it is not clear when the interlink was made.

In resolving the impasse the tribunal must decide on balance of probability which version it is to believe; the one of the Complainant that the interlink was in 2012 or that of the Respondent that it was 2014.

The Complainant testified that in 2010-2012 the factory was making losses of ugx.50-60 million, presumably because of interlink. There is no evidence to support this. Assuming it was; we agree with the Respondent's Counsel that it is not plausible that the Complainant, a profit oriented company would make such loss from 2010 for the next 5 years, only to officially complain in 2015.

We hesitate to accept the Complainant's testimony in that respect.

On the other and, taking into account the course of events as narrated by Mr. Lubega, we are ready to believe his version that the interlink started in 2014 when the Respondent was installing the Automated Meter Reader AMR. This is confirmed by the Complainant's letter dated 22nd January 2015 CEXA and the Respondent's letter dated 16th February 2015 CEXC and the notification report dated 26th February 2015 CEXD and the evidence of rectification evidenced in REX5(i) earlier referred to.

We also believe Mr. Lubega when he says that when the matter was brought to the attention of the Respondent in 2015, the same was rectified and the other customers were isolated.

We however do not believe Mr. Lubega that the Respondent's action was in the circumstances immediate as it took one month to rectify the problem. The witness provided no evidence to justify the delay of one month before rectifying the anomaly.

The other element to consider in this issue is the number of customers interlinked to the Complainant's supply. According to CW1 there were as many as 50 customers interlinked on the Complainant's account. (He later said they were 19.)

According to the Respondent's witnesses, only 12 verified customers were interlinked.

Both parties agree that there was a verification of the customers done by the Respondent in the presence of one Hussein Sadam and Muyoni Stephen, representatives of the Complainant, to establish the number of customers interlinked on the Complainant's meter. The parties signed a list containing 12 people and is marked as REX2. We think the parties must be bound by this joint report and accordingly, we accept 12 as the number of customers illegally connected to the Complainant's account.

In the course of his evidence, the Complainant's witness and director, Nekemia Mbaine CW1, told the tribunal that as a result of the Respondent's action, the Complainant suffered loss by payment of penalties to the Complainant's coffee buyers arising out of poor quality which resulted from the Respondent's intermittent power cutoffs. The witness also made claims, that because of the same power interruptions, the Complainant was not able to make timely deliveries. The witness relied on documents CEK, the EU Contract, CEL CEM, which were documents of the Complainant, purportedly in proof that the Complainant was paying penalties as a result of poor quality coffee brought about by intermittent cut-off of power by the Respondent at the Complainant's coffee factory.

We shall not go through this evidence in detail. First of all it is now trite law that special damages must be strictly pleaded and strictly proved, although this proof may not necessary be by documentary evidence.

We think the fundamental question to ask here is, whether these special damages were pleaded and proved.

On 22nd January 2015 the Complainant wrote to the Respondent. In the letter it said "Kamba Petroleum (U) Ltd has suffered a loss in monetary value of over ugx.300,000/= by paying for unconsumed energy and other inconvenience of various disconnections".....

On 5th December 2016 the Complainant filed a claim for "overbilling", payment of exaggerated sums of money for bills for 2 ½ years and loss of money by paying outrageous bills.

In his Witness Statement the Complainant's witness in para 18 states "*The Complainant is entitled to a refund of the monies unlawfully collected by the Respondent, damages and costs.*"

No mention is made as to what type of damages and the quantum of such damages.

Although during cross examination the Complainant attempted to belatedly put some figure and refer to the exhibits above referred to, no attempt is made to specify on which dates there was an interruption, how much coffee was damaged and to what extent.

There was no chain of evidence of movement of the coffee from the factory to the end buyer to confirm the alleged penalties under article 23 of the EU Contract produced in evidence were occasioned by the Respondent's acts of intermittent disruption of power supply to the Complainant's factory.

It is doubtful that the Complainant was sure of the case for special damages it was putting to the tribunal as against the Respondent. Given our review of the pleadings, the evidence of the parties and the submissions of Counsels, it is our considered opinion that the special damages were not specifically pleaded and neither were they specifically proved. We are thus unable to grant any amounts as special damages.

We have already ruled that the connection of the extra 12 people to the Complainant's supply system was illegal.

In her submission under para 4.3.11, Counsel for the Complainant submitted that the Respondent was negligent both in interlinking the customers and also in delaying to settle the matter.

In her response, Counsel for the Respondent although admitting the interlink of 12 customers on the Complainant's supply, contended that it was a mere mistake and not negligence. She further contends that since the Respondent took only 2 months to rectify the anomaly, no damages should be payable.

In the case of **Heaven Vs Pender 1883 11 QB 507,** it was held

"*Actionable negligence consists of the use of ordinary care and skill towards a person to whom the defendant owes a duty of observing ordinary care and skill, by which neglect the plaintiff without contributory negligence on his part has suffered the injury of his person or property.*" In an article produced by Cornell Law School on the overview of 'negligence' the elements that constitute negligence were identified. They are as follows:-

(a) The existence of a legal duty that the defendant owes to the plaintiff
(b) The defendant's breach of that duty
(c) Plaintiff's suffering of an injury
(d) Proof that the defendant's breach caused the injury (typically defined through proximate cause).

In our view the actions of the Respondent were not simply an excusable mistake but were offensive to the clear provisions of the provisions Regulation 7.1.1 (b) of the Electricity (Primary Grid Code) Regulation 2003, which impose a duty on the Respondent to provide, install and maintain standard metering equipment and necessary ancillary equipment.

The Respondent had a duty of care imposed on it by the law to act diligently and professionally and avoid acts that would be detrimental to others. The Respondent by connecting 12 customers on the Complainant's supply was in breach of that duty and the breach has resulted in suffering or injury to the Complainant. This was negligence which entitles the Complainant to damages.

In case of **Eclipse/EDIL Soil JVC Co. Vs. Kampala City Council HCT-00-CC-CS-0256-2005** Hon Justice Yorokamu Bamwine held; "*General damages are what may be presumed by law to be the necessary result of the defendant's tortious acts." He added "The Plaintiff may not prove that he suffered general damages. It is enough if he shows that the defendant owed him a duty of care which he breached.*"

We also refer to the case of **Sylwan Kakugu Tumwesigye Vs. Trans Sahara International General Trading; CC No.95/2005** where Hon Justice Kiryabwire J stated;

"*General damages is such as the law presumes to result in the infringement of a legal right. It is the natural and probable consequence of the breach. The plaintiff is required only to assert that such damage has been suffered but need not be strictly questioned.*"

In the instant case the Complainant has not only proved breach of duty of care by the Respondent, but has proved it incurred loss although legally it has not been able to prove the precise figures. It is the duty of the tribunal to assess the general damages and we hereby access the same at ugx.30,000,000/= which amount we believe is fair amount considering that the Complainant is a profit oriented business, that is shown to have suffered loss by among others paying unspecified amounts of money previously for power it never consumed and the general cost of the inability to use the unspecified sums of money for the period in issue, and the inconvenience suffered as a result of the wrongful connections and subsequent disconnection of the Complainant's supply.

The Complainant is also entitled to costs,

In summary, the following orders are made:

1. The connection of other customers to the Complainant's meter was unlawful.
2. The Complainant's meter was over-charged.
3. The claim of the Complainant for special damages is declined.
4. The Complainant is awarded ugx.30,000,000/= as general damages in compensation for loss and inconveniences
5. The Complainant is entitled to costs of this complaint.

We so order.

Charles Okoth Owor ----------

Chairman

Anaclet Turyakira ----------

Vice Chairman

Moses Musaazi ----------

Member

23/2/2018