THE REPUBLIC OF UGANDA

THE ELECTRICITY DISPUTES TRIBUNAL

IN THE MATTER OF A COMPLAINT NO.04/2011 BY

JINJA DISTRICT LOCAL GOVERNMENT AGAINST ESKOM (U) LIMITED

JINJA DISTRICT LOCAL GOVERNMENT ..... COMPLAINANT

VERSUS

ESKOM (U) LIMITED ..... RESPONDENT

RULING

This is an application by the Jinja District Administration (JDA) herein referred to as "the Complainant" seeking the orders of this honourable Tribunal to make orders to compel M/s Eskom (U) Limited herein "the Respondent" to pay to it shs.88,804,137/= and shs.2,826,744, 114.44 being outstanding Royalties payable to the complainant for the years 2003 and 2004 respectively.

When this matter came up for hearing on 7th March 2012 both Mr. John Matovu representing the Complainant and Mr. Mwesigwa for the Respondent informed the Tribunal that they had an interaction and hoped to have the matter "sorted" out. They requested for 2 weeks adjournment which was granted to them. On 30th March, 2012, Mr. Matovu Counsel for the Complainant in the absence of Counsel for the Respondent informed the Tribunal that no agreement had been reached and the matter was adjourned to 30th April, 2012.

On 3rd August 2012 Mr. Matovu appeared alone. Although there was evidence that the Respondent's Counsel was served there was nobody for the Respondent and no explanation was given for the absence. Mr. Matovu informed the Tribunal that Electricity Regulatory Authority (hereinafter to be referred to as "ERA") had previously determined the rates for royalties paid by the Respondent to the

Complainant and the Respondent was paying according to these rates. He argued that against that background there was no need to take formal evidence and prayed that the parties be allowed to file written submissions which prayer was granted and directions given as to the dates of filing the submissions and responses.

On 7th August 2012, however M/s Shonubi, Musoke & Co Advocates writing on behalf of their client, the Respondent wrote to the Tribunal registering their preliminary objection which centered on the Tribunal's jurisdiction to entertain the complainant regarding payment of royalties when according to them the power to determine such royalties was vested in ERA under Section 75(8) of the Electricity Act and not the Tribunal.

In light of the ruling given on 3rd August, 2012 allowing the parties to file written submissions, the Tribunal declined to entertain the preliminary objection at that time. More so, when such preliminary objection was being raised by a way of a letter. Since then both parties have filed their respective submission and have in particular submitted on the issue of jurisdiction of the Tribunal to entertain the Complaint.

The case for the complainant is as we understand it that under Sec.75 (7) of the Electricity Act 1999 (hereinafter referred to as "the Act"), a holder of a hydro power generation licence is under obligation to pay royalties to the district administration in which such licensee operates. To this extent that the Respondent which operates within the complainant's district is obliged to pay royalties to the complaint. There seems to be no dispute over this.

The second assertion by the complainant is that such royalties payable have been determined by ERA in its ruling of **14th May 2004**. Thirdly the Complainant asserts that the Respondent has been paying royalties in accordance with the rates fixed by ERA save that it is in arrears of shs.88,904,132.74 for the year 2003 and shs.2,826,744,114.44 for the period 2004.

The complainant wants this Tribunal to enforce payment of the said amount.

On the contrary, the Respondent argues that while it is obliged to pay royalties to the complainant, such royalties have not been determined by ERA as required by sec.75 (7) of the Act.

It contends that it was not party to the 14th May ruling by ERA where rates were fixed and therefore is not bound by such ruling. It also disputes the authenticity of documents submitted by the complainant as representing (its gross revenue).

The complainant's Counsel framed 3 issues for determination by the Tribunal:

(i) Whether the Electricity Dispute Tribunal has jurisdiction to entertain this matter.

(ii) Whether M/s Eskom (U) Limited, the Respondent is liable.

(iii) Whether the Complainant is entitled to remedies sought in the complaint.

Both parties filed written submissions in support of their respective cases. We shall proceed to resolve the issues.

Issue No. 1: Whether the Electricity Disputes Tribunal has jurisdiction to entertain this matter.

As pointed out above, the issue of jurisdiction was also raised by the Respondent as a preliminary point. It is contended for the Respondent that the power to determine royalties where no such royalties are mutually agreed lies with ERA under S.78 (8). The underlying argument of the Respondent is that the rates payable have never been agreed to in terms of Sec.78 (7) or determined by ERA in terms of Sec. 78 (8).

We understand the argument of the Respondent as being that this Tribunal can only enforce rates which have either been agreed to by the parties or determined by ERA.

In support of the argument that the Tribunal has no jurisdiction to enforce rates that have neither been agreed to nor determined by ERA the learned Counsel for the Respondent referred to several cases namely **ATHANAS KIVUMBI VS. EMMANUEL PINTO, Petition No. 5 of 198, and BAKU RAPHAEL VS. AG.** We shall refer to these cases later in the ruling.

For his part Mr. Matovu, learned Counsel for the Complainant contended that the Tribunal is clothed with the authority to determine this matter.

He relies on Sec.109 (1 & 3) of the Act.

Mr. Matovu's argument seems to be premised on the fact that the rates were determined by ERA in their ruling of 14th June 2004 whereat ERA fixed rates for 2003 at 0.5% and rates for 2004 at 1.5%. Mr. Matovu further contends that the Respondent has been paying according to those rates and is estopped from arguing that rates have never been fixed. As pointed out the Respondent has denied that any rates between them and the complainant have ever been agreed or fixed.

Sec. 109 (1) of the Electricity Act 1999 provides –**"the Tribunal shall have jurisdiction to hear and determine all matters referred to it relating to the electricity sector."** Para 103 (3) provides that "**in the exercise** of its jurisdiction under this Act, the Tribunal shall have powers of the High Court. Mr. Matovu's argument is that the above provisions give wide and sufficient powers to the Tribunal to determine this complaint. It would appear that Mr. Matovu's argument is that the provisions of Sec.109 (3) gives the Tribunal unlimited powers to determine all matters in the electricity sector just like the High Court has unlimited jurisdiction.

The Respondent counteracts this argument by contending that under the rules of interpretation where there is a general provision and specific provisions, the specific provisions take precedence over the general provisions. He argues that Sec. 109 of the Electricity Act is a general provision; Sec.78 (8) is specific.

The case of **BAKU RAPHAEL OBUDRA & ANOR Vs. AG. SCCA No.1 of 2005,** states that jurisdiction is a creature of a statute.

Therefore where a court or Tribunal as in this case exercises power not conferred upon it by law, then the proceedings or decision arising therefrom shall be a nullity.

We think that the power conferred on the Tribunal under Sec. 109 (1) of the Electricity Act is a general power. However such power must be exercised subject to any other provisions of the Act. Such provisions may be limiting or qualifying the general powers conferred by the provisions of the said Sec. 109 (1).

We respectfully agree with Counsel for the Respondent that provisions of Sec. 75 (8) limit or qualify the general powers of the Tribunal conferred by sec.109 (1) in as far as Section 78 of the Act confers the power to determine rates where no agreement has been reached between the parties on ERA and not the Tribunal.

As regards provision of section 109 (3) we think the powers conferred on the Tribunal are powers relating to the powers and practices of the High Court regarding summoning of witnesses, receiving of evidence and enforcement of decisions of the Tribunal, e.t.c. Certainly this section cannot be taken or interpreted to mean that the Tribunal can handle matters not specifically conferred upon it by the Act and that it enjoys unlimited jurisdiction as would be the case with the High Court.

We do not agree with Mr. Matovu, for the Complainant that the rates were determined by ERA in its ruling of 14th May 2004. The ruling was in respect of a matter between the Complainant and Uganda Electricity Generation Company Ltd. The Respondent is therefore right when it contends that it was not party to that ruling and therefore not bound by it.

Mr. Matovu in his reply contends that the Respondent is a successor company. With respect there was no evidence available to the Tribunal that indeed the Respondent is a successor company.

Sec. 100 of the evidence Act provides that he who alleges must prove. If Counsel had wanted to prove that indeed the Respondent was a Successor to Uganda Electricity Generation Company Limited, he would have gone a step ahead to bring further documentary evidence to prove that indeed the Respondent was a successor to Uganda Electricity Generation Company.

In the absence of such evidence we are unable to accept that assertion that the Respondent is indeed a successor to UEGCL and indeed that it is bound by the rates fixed by ERA.

But even if there was proof that the Respondent is a successor company, the rates which were fixed were clearly for the years 2003 & 2004. There was no indication in the ruling of ERA that these rates were to go beyond 2004. At page.5 of the ruling of ERA, it was stated "**Despite the above observations ERA found that there was no strong reasons to alter the parties agreement on the royalties, which shall be applicable for the year 2004 only**. Of course the situation is different if the parties agree.

Mr. Matovu has argued that the Respondent has been paying a flat rate of shs.20,000,000/= according to the rates fixed and is estopped from denying that it was not party to the ruling with ERA. As pointed out earlier the Respondent besides denying being a party to the ruling of ERA where rates were fixed also denies the figures presented by the complainant as representing the gross earnings.

Again there was no evidence to prove payment of the figures above or that the payment was pegged on the rates fixed by ERA as Mr. Matovu would want us to believe.

From the above, we agree with learned Counsel for the Respondent that the Tribunal has no jurisdiction to enforce rates which have not been fixed by ERA.

This matter is accordingly referred to ERA to fix the rates payable between the parties.

Since we have ruled that we do not have jurisdiction to entertain the matter, it is unnecessary to pronounce ourselves on the other 2 issues.

Each party shall bear its costs.

We so order.

The Complainant has a right to appeal to the High Court.

DATED at Kampala this 19th day of December, 2012.

Mr. Charles Owor - Chairman

Mr. A K Turyakira - V/Chairman

Eng. Moses Musaazi - Member

Ruling read in the presence of Mr. Daniel Lubogo holding brief for Mr. Matovu- Counsel for the Complainant and Mr. Noah Mwesigwa- Counsel for the Respondent.

19/12/2012