THE ENERGY AND WATER UTILITIES REGULATORY AUTHORITY

(EWURA)

COMPLAINT NUMBER GA.71/309/61

FUEL MASTER (T) LIMITED ..... COMPLAINANT

VERSUS

STAR OIL (T) LIMITED..... RESPONDENT

AWARD

(Made by the Board of Directors of EWURA at its 145th Ordinary Meeting held at Dodoma on the 31st day of October, 2019)

1.0 Background Information

On 13th October, 2017, the Energy and Water Utilities Regulatory Authority ("the Authority") received a complaint from Fuel Master (T) Limited ("the Complainant") against Star Oil (T) Limited ("the Respondent"). The Complainant is claiming for payment of TZS 75,680,000.00 as a refund for undelivered petroleum products, TZS 381,926,000.00 as loss resulting from

undelivered petroleum products, general damages and cost of the complaint.

The Complainant alleges that, on 29th July, 2016 they paid to the Respondent a total of TZS 75,680,000.00 for the purpose of purchasing 43,000 litres of petroleum products from the latter. The Complainant further alleges that despite the payment made, no petroleum products were delivered by the Respondent.

Upon receipt of the complaint, the Authority required the Respondent to file the reply to the complaint in terms of Rule 5(1) of the Energy and Water Utilities Regulatory Authority (Complaints Handling Procedure) Rules, 2013. The Respondent filed the reply accordingly denying any liability on the ground that all ordered petroleum products were delivered to the Complainant as per the order.

Efforts to mediate the parties were taken under the supervision of the Complaints Unit of the Authority and proved futile and thus the matter was referred to the Division of the Authority for hearing.

2.0 Hearing Stage

The hearing of this matter was conducted on 21st November, 2018, 28th -29th March, 2019, 3rd June, 2019. During the hearing, Mr. Kung'e Wabeya, learned advocate appeared for the Complainant whilst the Respondent was represented by Dr. Masumbuko Lamwai, learned advocate. After conclusion of the hearing, both parties expressed their desire to file final submissions. The Authority ordered the final submissions to be filed by 25th June, 2019 and both parties filed the submissions as ordered. However,

mindful with the position that the Authority is not bound to adhere to strict rules of procedure but to ensure the ends of justice is met, the Authority, after both parties have closed their respective evidence and filed the final submissions, summoned NSK to testify on specific issues regarding the dispute. NSK, although not paraded as witness during the proceedings by either party, was considered as a key witness in order to achieve the ends of justice. In particular, NSK was required to testify on whether they received any petroleum products from the Respondent under the instruction of the Complainant during the months of July and August, 2016. Consequently, Mr. Kamal Aggarwal, the Senior Manager with NSK appeared before the Authority on 4th October, 2019 for testimony.

Before starting the hearing the following three issues were framed for determination:

(a) whether the Complainant paid TZS 75,680,000 to the Respondent in order to purchase fuel;
(b) if issue number one is in the affirmative, whether the Respondent failed to deliver the purchased fuel; and
(c) what reliefs are the parties entitled to, if any?

At the hearing, the Complainant testified as (CW1) and also called Mr. Almodard Simon Mkoko as the second witness (CW2). The Respondent paraded one witness called Mr. Urmish Antania (RW). The Authority, on its own motion summoned Mr. Kamal Aggarwal, the Senior Manager from NSK as the Authority's witness (AW), to testify on specific matters. The Complainant tendered the Police Loss Report Ref. CD/IR/R/B/1938 as exhibit "C1", List of Fuel Purchases as exhibit "C2" and Profit Calculation Sheet as exhibit "C3". The Respondent tendered the un-signed List of Fuel Purchases as exhibit "R1" and a set of documents containing invoices,

delivery note, loading orders, calibration charts and motor vehicle registration cards for various purchases which are collectively marked as exhibit "R2 $(_{A-N})$".

3.0 Decision

In arriving to our decision, we have considered the applicable law including the EWURA Act Cap. 414, the Petroleum Act Cap 392, the Petroleum (Wholesale, Storage, Retail and Consumer Installation Operations) Rules, GN. No. 729 of 2018 and the Energy and Water Utilities Regulatory Authority (Consumer Complaints Settlement Procedure) Rules, 2013 (GN No. 10/2013). We have also examined the oral testimony of the witnesses together with the tendered evidence and exhibits. Our decisions on the issues raised during hearing of the matter are as follows:

Issue No. 1: Whether the Complainant paid TZS 75,680,000 to the Respondent in order to purchase fuel

From the pleadings and testimonies from witnesses, this issue will not detain us more and we shall be quick to answer it in the affirmative. The Respondent at the material date was a licensed wholesaler of the petroleum products and the Complainant is doing retail business of the petroleum products. It is alleged that on 29th July, 2016, the Complainant paid the Respondent a total of TZS 75,680,000.00 for the purpose of purchasing 43,000 litres of petroleum products from the latter. The Respondent, by virtue of the Amended written Statement of Defence admitted to have received the stated amount from the Complainant. Furthermore, the only defence witness (RW) did not dispute receiving TZS 75,680,000.00 for the purpose of selling 43,000 litres of petroleum products to the Complainant. Therefore, the first issue is answered affirmatively in

that the Complainant paid TZS 75,680,000.00 for the purpose of purchasing 43,000 litres of petroleum products from the Respondent.

Issue No. 2: Whether the Respondent failed to deliver the purchased fuel

Since we have decided the first issue in affirmative, the dispute now lies on whether the 43,000 litres of petroleum products purchased from the Respondent were actually delivered to the Complainant. In determining this issue, we have evaluated the testimonies of CW1, CW2, RW, AW and further examined all the documents tendered by the parties as exhibits. We have also considered the industrious final submissions from counsels for both parties. CW1, the Complainant herein, testified that he operates petrol stations in Kigoma Region and he has been purchasing petroleum products (products) from the Respondent from 2014 to 2017. After making payment for the products, the Complainant sends the Order to the Respondent together with the name of the driver who will collect the products, a copy of the driver's licence and a bank's deposit slip. Upon collection, the driver transports the products to the Complainant's petrol stations in Kigoma. On 10th June, 2016, the Complainant paid TZS 200,000,000.00 to the Respondent for the purchase of 126,000 litres which were to be delivered in three trucks. The Order was delivered accordingly and the last truck was loaded in August, 2016.

CW1 further testified that on 29th July 2016 they ordered 43,000 litres of petroleum products from the Respondent costing a total of TZS 75,680,000. The Order was paid for but not delivered thus the Complainant forced to source the products from an alternative supplier to keep the business running. Nevertheless, the Complainant did not produce or tender any copies of the written Order for this purchase. CW1 made efforts to secure

this delivery without success and decided to report the matter to police. He testified that the Order delivered on 13th August, 2016 did not relate to the money deposited on 29th July, 2016. The witness concluded his testimony by praying refund of TZS 75,680,000.00, TZS 381,926,000.00 as loss resulting from undelivered petroleum products, general damages and cost of the complaint.

CW2 testimony was brief and straight forward. He testified that he practices his trade with Fuelmaster (T) Ltd- Kigoma as an Assistant Accountant since 2008. However, he does not possess any accounting qualification and he performs his duties out of experience. CW2 testified that on 29th July 2016 his employer paid the Respondent TZS 75,680,000 for purchasing 43,000 litres of petroleum products. However, the consignment was not delivered as there was a dispute between the parties where the Respondent claimed to have delivered the consignment and the Complainant disputing delivery. CW2 further testified that non delivery of the consignment has caused the Complainant to suffer loss of TZS 381,926,000.00 as at September, 2017. However, he failed to demonstrate the alleged loss professionally based on the accounting principles.

On the Respondent's side, RW who is a Chartered Accountant and works as a General Manager with the Respondent testified that on 29th July, 2016 they received TZS 75,680,000.00 from the Complainant for purchasing 43,000 litres of petroleum products. Somewhere in August, 2016 the Complainant claimed non delivery of the purchased fuel Order and the Respondent requested the Complainant to provide purchase records for reconciliation. After reconciliation, it was noted that the material consignment was delivered to the Complainant as ordered save that there were some payment pending in favor of the Complainant amounting to TZS 12,042,500.00. However, RW did not tender any document as a result of reconciliation. Furthermore, RW tendered Exhibits R2 (A-N) which indicates

that previous orders by the Complainant were invoiced and delivered either in the name of Fuel Master (T) Limited or any other person authorized by the Complainant. RW prayed for dismissal of the complaint with cost.

AW testified that NSK has never transacted any business with the Complainant and there is no document whatsoever in their records relating to Fuel Master. Regarding the Respondent, AW testified that they are their long time suppliers and they know each other for quite sometimes. However, AW testified further that NSK did not transact any business with the Respondent for the period between July and August, 2016.

We have examined all the testimonies and evidences tendered, together with the final submissions by counsels for both parties. As affirmed in the first issue, there is no dispute that the Complainant paid TZS 75,680,000 to the Respondent for the purchase of 43,000 litres of petroleum products. The issue is now whether the purchased products were actually delivered to the Complainant. The Complainant has, throughout the proceedings, denied to have received the products. In his final submissions, the counsel for the Complainant insisted that the Order paid for on 29th July, 2016 was not delivered and there is no any invoice or delivery order to prove that such order was delivered.

The Respondent in turn argued that there is no pending delivery and that all orders purchased by the Complainant were delivered. The Respondent further testified that, the disputed order was delivered to NSK through truck No. T559DGB/T434ALN carrying 42,500 litres of petroleum products under the instructions of the Complainant. Responding to the question why the delivery was made to another person and not the Complainant, the Respondent tendered Exhibit R2 (A-N) showing that the Complainant used to

acknowledge delivery made to other persons under his instructions. For the disputed Order too, the Respondent insisted to have delivered the same to another person under the instructions of the Complainant. According to the Respondent, the Complainant's act of acknowledging delivery in the name of other persons and not disclosing the same in the pleadings may have made him to obtain undue business advantage which is against the established principles of equity. For this, the Respondent prayed that the Complainant is not entitled to specific performance of the contract on the reason that he has come to the Authority without clean hands. The Respondent closed his testimony by denying any liability against the Complainant, save for the TZS 12,042,500.00.

In order to make progress in determining this issue, we shall refer to Exhibit R1 and R2 (A-N) respectively. Exhibit R1 which originated from the Complainant shows that there was a delivery of 42,500 litres of petroleum products worth TZS 68,425,000.00 to NSK. The order was delivered on 13th August, 2016 vide invoice No. 09151 and trucks No. T559DGB/T434ALN. This Order is acknowledged by the Complainant but has denied that the order relates to the money deposited on 29th July, 2016. Exhibit R2 (A-N) shows that the Complainant accepted various deliveries not in his name. It was the Respondent's contention that the disputed Order was delivered to the Complainant on 16th August, 2016 through NSK vide invoice No. 09151 and truck No. T559DGB/T434ALN.

For us, the argument by the Respondent that the disputed Order was delivered to the Complainant is not appealing in our minds. The Complainant has been able to prove that he made payment to the Respondent for the purchase of 43,000 litres of petroleum products. It is now the duty of the Respondent to prove that the order was delivered to the Complainant irrespective of whether invoiced in the name of the Complainant or any person under the Complainant's instructions. The

Respondent, despite of advancing persuasive arguments, has not discharged this duty. If we take the approach suggested by Exhibit R2 (A-N), we must conclude that all deliveries were effected through a set of documents such as invoices, delivery note, copies of the registration card of the truck used to carry a particular consignment and other documents attached to Exhibit R2 (A-N). Further examination of the exhibit shows that it covers the period between 18th February, 2016 and 12th July, 2016. If the Respondent was able to tender Exhibit R2 (A-N) to prove delivery of the previous Orders to the Complainant, there was no reason why they failed to tender proof of delivery for the disputed Order alleged to be delivered on 16th August, 2016. As a matter of prudence, one would expect the Respondent to provide documentary proof for the delivery of the disputed order as done in other previous orders as per Exhibit R2 (A-N).

In any case, it is not clicking in our minds that a company like the Respondent can deliver 43,000 litres of petroleum products worth TZS 75,680,000.00 without any documentary proof. We presume and believe if the disputed order was delivered to the Complainant, the Respondent must have the records thereof and such records, in the absence of any other explanation to the contrary must be kept properly. Surprisingly, the Respondent failed to tender such delivery proof of the disputed order to prove that the order was indeed delivered to the Complainant on 16th August, 2016. Although the Respondent intended to use Exhibit R2 (A-N) as a proof of the fact that the Complainant accepted some of the Orders in the name of a different person, he failed to go further to tender similar documents for the disputed Order.

Furthermore, the Respondent stated that the disputed order was delivered to the Complainant on 16th August, 2016 through NSK vide invoice No. 09151 and truck No. T559DGB/T434ALN. There is no any document in the entire proceedings to substantiate this proposition. AW has also denied to

have received any consignment from the Respondent on this date. However, Exhibit R1 which the Respondent has based some of his testimony shows that invoice No. 09151 and truck No. T559DGB/T434ALN was in respect of the delivery made on 13th August, 2016 and not 16th August, 2016. The invoiced amount as per Exhibit R1 is TZS 68,425,000.00 and not TZS 76,372,500.00 alleged by the Respondent. There was no convincing explanation on this variation and also the Respondent did not contradict this fact. We would expect the Respondent to explain the variation of the amount in the invoice as per Exhibit R1 and that appearing in paragraph 2 of the Amended Written Statement of Defense. The Respondent too, was expected to provide comfort to the Authority that it was the same driver and truck that was used to deliver the Complainant Order on 13th August, 2016 who also delivered the disputed Order on 16th August, 2016. The only explanation on the price variation is found in the Respondent Final Submissions that the Complainant is liable to pay for the price different by virtue of the Sales of Goods Act. We shall be quick to point out that this explanation would not suffice since a single invoice cannot refer to two different amounts of money unless is amended.

Furthermore, the invoice is dated 13th August, 2016 and not 16th August, 2016 which is the date alleged by the Respondent to have delivered the disputed Order. We have not been provided with any proof that the original sum on the invoice No. 09151 was actually amended to reflect price differences. Although denied by NSK, the Complainant did not dispute the Order delivery to him in NSK's name on 13th August, 2016 but stated that this Order was not a disputed one. For this, we will rule that the Order delivered on 13th August, 2016 appearing in Exhibit R1 does not relate to the disputed Order. This is corroborated by the Respondent's testimony and pleadings that the disputed Order was delivery on 16th August, 2016 hence the Order delivered to the Complainant in the name of NSK on 13th August, 2016 has nothing to do with the dispute before us.

The Respondent has raised the issue of equity in his final submissions. Considering the facts of the complaint, we shall never be tempted to take that route of argument. The dispute arose from the contract to purchase petroleum products. Under the contract, the Complainant was to make payment and the Respondent was to effect delivery of the purchased products. From the holding in the first issue, the Complainant made payments but the Respondent failed to produce any document to prove delivery and defeat the Complainant's case. Despite the Respondent's failure to prove delivery, he is now invoking the issue of equity based on the previous transactions made in the different names but acknowledged by the Complainant. For us, the previous transactions made in a different name other than that of the Complainant is not the issue at dispute. The issue is over a disputed order, whose payment was made on 29th July, 2016 and we expected the Respondent to focus much on this issue in advancing his arguments. As implied in this Award, our decision would have been different had the Respondent provided documentary proof for the delivery of the disputed Order as he did in other Orders by tendering Exhibit "R2 (A-N)". Nevertheless, we do not know any law which compels a litigant to disclose all facts even those not related to the fact in issue. As we are aware, disclosure is mandatory in insurance contracts which are regarded as contracts of *'utmost good faith'* hence voidable if the insured fails to disclose all material facts at the time of concluding the contract.

For the reasons stated above, we wind up this issue by deciding that the Respondent did not deliver to the Complainant 43,000 litres of petroleum products worth TZS 75,680,000.00 and whose payment was made on 29th July, 2016.

Issue No. 3: What reliefs are parties entitled to, if any?

The Complainant is claiming for payment of TZS 75,680,000.00 as a refund for undelivered petroleum products, TZS 381,926,000.00 as loss resulting from undelivered petroleum products, general damages and cost of the complaint. The Respondent, on his part is praying for dismissal of the complaint with cost.

Having decided in favor of the Complainant on the first and second issue, it follows that the Respondent is entitled to a refund of TZS 75,680,000.00 from the Respondent. The reason is not farfetched as the Complainant paid the money for purchasing 43,000 litres of petroleum products which was never delivered by the Respondent. Success of the Complainant to obtain refund was wholly depending on the outcome of the second issue. Since the Complainant has succeeded on the second issue too, it goes without saying that he is entitled to obtain refund of TZS 75,680,000 from the Respondent. For this, there is no other suitable remedy than refunding the money as prayed by the Complainant or delivery of the consignment as ordered.

Regarding prayers for TZS 381,926,000.00 as loss resulting from undelivered petroleum products, the totality of the evidence shows that the Complainant has failed to establish the specific damage suffered since the law requires specific damage to be proved specifically. We shall fully subscribe to the submissions by the Respondent's counsel that the alleged profit loss is a specific damage needing to be proved specifically. CW2 who tendered Exhibit C3 admitted that the same is not a Financial Statement and was prepared based on the prospective profit the Complainant would get had the disputed Order was delivered. Let alone that Exhibit C3 which indicates the prospective profit by the Complainant was not prepared by a professional accountant, but also it was not proved specifically. For the reasons herein, the claim of TZS 381,926,000.00 shall

fail. However, since the Complainant has succeeded on the first and second issue, he is entitled to general damages resulting from the breach of contract. It is trite law that general damages including the amount thereof are awarded purely on the discretion of the court, we now proceed to award the Complainant TZS 5,000,000.00 as general damages. We will further proceed to grant cost of the case to the Complainant as a successful party in this complaint.

GIVEN UNDER SEAL of the Energy and Water Utilities Regulatory Authority (EWURA) in Dodoma this 31st day of October, 2019.

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NZINYANGWA E. MCHANY
DIRECTOR GENERAL