

**THE ENERGY AND WATER UTILITIES REGULATORY AUTHORITY
(EWURA)**

COMPLAINT NUMBER: EWURA 33/2/213 OR GA.71/309/33

LANDMARK FILLING STATION LIMITED..... COMPLAINANT

VERSUS

DAR OIL LIMITED..... RESPONDENT

AWARD

*(Made by the Board of Directors of EWURA at its 143rd Ordinary Meeting held at
Dodoma on the 23rd day of August 2019)*

1.0 Background Information

On 10th August, 2016, the Energy and Water Utilities Regulatory Authority ("the Authority") received a complaint from Landmark Filling Station Limited of Mbande Village, Kongwa District in Dodoma Region ("the Complainant") against Dar Oil Limited ("the Respondent"). The Complainant is claiming against the Respondent for either payment of TZS 44,480,000.00 as a refund for undelivered petroleum products or delivery of 38,000 litres of petroleum products.

The Complainant alleges that, on 13th May, 2016 they paid to the Respondent the total of TZS 53,480,000.00 for the purpose of purchasing 38,000 litres of petroleum products from the latter. The Complainant further alleges that despite the payment made, no petroleum products were delivered by the Respondent. The Complainant further claims that after a long follow up involving Police intervention the Respondent refunded them

the sum of TZS 9,000,000.00 only hence the balance of 44,480,000.00 remains outstanding.

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 where they denied any liability on the ground that they acted as agents of another entity namely MAFCO Oil Co. Limited. Although the Respondent acknowledged receiving the monies from the Complainant they claims that they were unable to deliver the consignment due to the failure by MAFCO Oil Co. Ltd to hand over the consignment to them.

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 between September, 2018 and June, 2019. During the hearing, Mr. Kike Mzige, learned advocate appeared for the Complainant whilst the Respondent was represented by Harold Mabeyo, learned advocate. After conclusion of the hearing, both parties expressed their desire to file final submissions. The Division ordered the final submissions to be filed by 12th June, 2019 and both parties filed the submissions as ordered. During hearing the following three issues were framed for determination:

- (a) whether the Respondent's failure to deliver the purchased fuel should be attributed to a third party;*
- (b) whether the Respondent is liable to refund the Complainant the balance of TZS 44,480,000 which is outstanding; and*
- (c) what reliefs are the parties entitled to, if any?*

At the hearing, Ms Fatuma Ramadhani Mganga the Director of the Complainant's company testified as the only Complaint's witness (CW) and she tendered a bank statement dated between 10th May, 2016 and 14th May, 2016 which was admitted as exhibit **C1**. The Respondent called Mr. Andrew Fernandes Kowero, who is the Director of the Respondent as the only witness (RW). Mr. Kowero tendered the copy of a deposit bank slip of TZS 9,000,000.00 which was admitted as exhibit **R1**.

3.0 Decision

In arriving at 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. 380 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 final written submissions. Our decisions on the issues raised during hearing of the matter are as follows:

Issue No. 1: Whether the Respondent's failure to deliver the purchased fuel should be attributed to a third party

From the pleadings and testimonies from witnesses, it is not disputed that the Complainant paid the Respondent the sum of TZS 53, 480,000.00 intended for the purchase of 24,000 litres of petrol fuel and 14,000 litre of diesel fuel. The parties are also in agreement that the said consignment totaling 38,000 litres of petroleum products was not delivered to the Complainant. Further to that the parties are in agreement that the sum of TZS 9,000,000.00 was refunded to the Complainant by the Respondent and that the outstanding balance is TZS 44,480,000.00.

CW stated that the Complainant had no written contract with the Respondent but they had a business relationship for about six months. CW

said that the Complainant's company ordered and paid for fuel from the Respondent. CW said that they believed that the Respondent was a licensed seller. CW further narrated that all the previous orders had been paid for and delivered without any problem save for the order which is a subject of this complaint. CW prayed that the Respondent be ordered to either refund to the Complainant the outstanding balance or deliver the undelivered consignment to the Complainant.

In their defence the Respondent claimed that their failure to deliver the Complainant's consignment was due to failure by MAFCO Oil Limited to deliver the said consignment to the Respondent. RW testified that the Respondent acted only as an agent of the MAFCO Oil Co. Ltd and that the monies received by the Respondent were handed over to MAFCO Oil Co. Ltd. RW further said that the Complainant knew about MAFCO but refused to deal with MAFCO directly instead they chose to pay for and receive their consignments through the Respondent. The business relationship between the Respondent and the Complainant lasted only for six months within which the Complainant had successfully ordered, paid and received nine consignments.

In this issue we must first establish whether there existed a binding relationship between the Complainant and the Respondent capable of enforcement. It is a fact that the payment for this particular consignment was made to the Respondent via a bank transfer on 13th May, 2016. Furthermore, the Respondent admitted, both in evidence and pleadings, to have received payments and delivered fuel consignments for the Complainant in previous dealings. It is therefore our view that the parties had established a relationship by course of dealing which is equivalent to an implied contract for supply of petroleum products. We further find credibility in the Complainant's testimony that they relied on the Respondent's representation that they were licensed oil and lubricant trader. It was further observed that during the testimony of RW that the Respondent referred to themselves as a licensed business entity in oil and

lubricants until when he was asked whether they had a licence from EWURA.

The testimony by RW revealed that, the Respondent had no licence issued by EWURA as required by section 131 (1) of the Petroleum Act Cap. 392 as well as Rule 10(1) of GN. 380/2018. We are also convinced that it is based on these misrepresentations by the Respondent that the Complainant relied on and concluded business transactions including the one which is the subject of this complaint. The Respondent's attempt to bring in one MAFCO Oil limited is therefore far-fetched since the said MAFCO is a stranger in this transaction and in as far as the Complainant- Respondent relationship is concerned. The Respondent has never submitted to the Complainant anything to suggest that they were acting on behalf of MAFCO. The Complainant paid the purchase price to the Respondent and not MAFCO and they received the refund of TZS 9,000,000.00 from the Respondent.

Based on the foregoing, we are of the settled view that the Respondent had an implied contract with the Complainant to supply petroleum products and that their failure to deliver the consignment in question cannot and should not be attributed to a third party and stranger such as the named MAFCO Oil Co. Limited. This makes the Respondent liable to the complainant for breach of the implied contract of supply of petroleum products.

We, however wish to comment on the misrepresentation made by the Respondent in this complaint. It became clear to us that the Respondent made false representation or simply misrepresentations to the Complainant with regard to the legality of their business operations. These misrepresentations however cannot render the implied contract void *ab initio*. They can instead render the contract voidable at the option of the innocent party. The remedy for such a contract to the innocent party is to either choose to affirm the contract and seek the order of specific performance to compel the other party to perform her obligations or terminate the contract and claim for damages. The Complainant in this case

has made it clear that is seeking for specific damages only and we do not think they wish to further continue their relationship with the Respondent.

Issue No. 2: Whether the Respondent is liable to refund the Complainant the balance of TZS 44,480,000 which is outstanding

Since we have decided the first issue in the affirmative, this issue should therefore not detain us, and it follows therefore that, the Respondent is liable to refund the Complainant the said sum of TZS 44, 480,000.00 which remains outstanding. It is suprising that although the Respondent submitted that they were only acting as agents yet they admitted and committed themselves to repay the Complainant's money. The testimony and the final written submissions are clear on this as they prayed to repay the money by installments. We therefore hold that the Respondent alone is responsible and liable to refund the Complainant of the balance of TZS 44,480,000.00 for the undelivered petroleum products.

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

The Complainant is claiming for payment of TZS 44,480,000.00 as a refund for undelivered petroleum products or the delivery of the undelivered products. The Respondent, on his part is praying for dismissal of the complaint without costs.

Since there was clear evidence that the Respondent had violated section 131 of the Petroleum Act, Cap.392 we cannot order specific performance of the implied contract because to do so will amount to authorizing the Respondent to continue breaking the law. In the onset we hereby hold that the Respondent be liable to refund TZS 44,480,000.00 to the Complainant. The Complainant is also awarded the costs of the complaint.

We further do hereby order that the Respondent should cease with immediate effect to engage in the petroleum products business until they comply with section 131 of the Petroleum Act, Cap.392. Additionally, and in

terms of Section 131(4) of the Petroleum Act, Cap. 392, the Respondent is ordered to pay the fine of TZS 20 million, to the Authority, for conducting petroleum products business without a licence from EWURA contrary to section 131 of the above cited Act.

GIVEN UNDER SEAL of the Energy and Water Utilities Regulatory Authority (EWURA) in Dodoma this 23rd day of August, 2019.

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NZINYANGWA E. MCHANY
DIRECTOR GENERAL