

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL NO. 23 OF 2017-18**

BETWEEN

M/S ALVIC BUILDERS (T) LIMITEDAPPELLANT

AND

PUBLIC PROCUREMENT REGULATORY

AUTHORITY.....RESPONDENT

DECISION

CORAM

- | | | |
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| 1. Mrs. Rosemary A. Lulabuka | - | Ag. Chairperson |
| 2. Eng. Francis T. Marmo | - | Member |
| 3. Eng. Aloys J. Mwamanga | - | Member |
| 4. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | |
|------------------------|---|----------------------|
| 1. Ms. Florida Mapunda | - | Senior Legal Officer |
| 2. Ms. Violet Limilabo | - | Legal Officer |
| 3. Mr. Hamis Tika | - | Legal Officer |

FOR THE APPELLANT

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| 1. Mr. Elias Kisamo | - | Advocate, Makoa Attorneys |
| 2. Mr. Alex Kilala | - | Managing Director |

FOR THE RESPONDENT

- | | | |
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| 1. Ms. Maria Mng'ong'o | - | Legal Officer |
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The Appeal was lodged by M/s Alvic Builders (T) Limited (hereinafter referred to as "**the Appellant**") against the Public Procurement Regulatory Authority, commonly known by its acronym PPRA (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of the Debarment Order issued by the Respondent on 14th November 2017.

After going through the records submitted by the parties to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**"), the facts of the Appeal can be summarized as follows:-

The Respondent through a letter dated 15th November 2017 communicated the Debarment Order against the Appellant which prevented them from participating in public procurement for a period of one year from 14th November 2017 to 13th November 2018.

The Appellant became aware that his firm had been debarred from participating in public procurement on receiving information from a third party, one James Kiduna of Telephone No. 0754 476863 on 23rd November 2017. The Appellant followed up the matter to the Respondent and was informed that the Debarment Order was issued after they failed to submit defense as required by the notice of intention to debar dated 27th September 2017. The Appellant denied to have received the notice of debarment and on 4th December 2017 they wrote a letter to the Respondent requesting to be given the said Notice. Having not received the said notice and being dissatisfied with the Debarment Order issued, the Appellant lodged this Appeal on 11th December 2017.

SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal may be summarized as follows;

- a) That, the Debarment Order issued against the Appellant violated their Constitutional right in that, the Respondent failed to ensure that they were accorded an opportunity to be heard before the decision to

debar them was taken. They argued further that; debarment is a punitive sanction as it curtails to a certain degree lawful undertakings of the Appellant's activities. Thus, before issuing the said order the Respondent ought to have accorded the Appellant the right to be heard.

- b) That, the debarment of the Appellant from participating in public procurement was shrouded with secrecy and apparently violated the mandatory provisions of the Public Procurement Act of 2011 (hereinafter referred to as "**the Act**") and Public Procurement Regulation GN. No. 446 of 2013 as amended (hereinafter referred to as "**GN. No 446 of 2013**"). The Debarment decision was not in strict conformity with the requirement of Section 62 of the Act read together with Regulations 93, 94, 95, 96, 97, 98 and 99 of GN. No 446 of 2013.
- c) That, at the time the Respondent issued a debarment order; they were constituted as a tribunal for purposes of determining right. In that regard, the Respondent ought to have considered basic requirement of the law. The Respondent's failure to accord the Appellant right to be heard contravened Article 13(6)(a) of the Constitution of the United Republic of Tanzania which requires a party be heard before being condemned. The Appellant expounded further that, the Respondent also violated the basic Human Right principle which prohibit a party to be condemned unheard.
- d) That, despite the fact that the Appellant's full particulars were known by the Respondent and this include; postal address, physical address, email and mobile numbers, they neglected to ensure that the Appellant was duly served with the notice of debarment. Regulation 96 of GN. No. 446 of 2013 vests the said duty to the Respondent; however, they failed to comply with such a mandatory requirement.

- e) That, the Respondent's letter dated 15th December 2017 addressed to Tanzania Posts Corporation seeking confirmation if the notice of intention to debar was delivered to the Appellant, is a sufficient proof that at the time the Respondent debarred the Appellant they were not certain if the latter was served with a debarment notice or not.
- f) That, the Respondent's act of debarring the Appellant without according them right to be heard contravened the laws of the land; thus, such a decision cannot stand as it is unlawful in the eyes of the law.

Finally, the Appellant prayed for the following reliefs;

- i) Declaration that the Appellant's debarment was tainted with massive irregularities;
- ii) The Respondent's decision to debar the Appellant from participating in public procurement be vacated for violating the laws;
- iii) The Respondent be ordered to foot the costs of this Appeal as per the following break down;
 - a) Appeal filing fees TZS 200,000.00
 - b) Advocates fees TZS 10,000,000.00

REPLY BY THE RESPONDENT

The Respondent's submission on the grounds of the Appeal may be summarized as follows;

- a) That, the debarment process conducted by the Respondent followed the laid down procedures as per the Act and GN. No 446 of 2013.
- b) That, the facts constituting the breach of Tender No. PA/082/2016-17/MBY/173 which led to his debarment were disclosed to the Appellant through a Notice of Intention to debar with Ref. No. PPRA/PA/082/"H"/86 dated 27th September 2017. In that notice, the

Appellant was required to submit his defense in writing within fourteen days and failure to do so would lead to the presumption that the Appellant had no objection to the debarment.

- c) That, the notice of intention to debar was duly served to the Appellant by using Tanzania Post Corporation Pcum services (Pcum). The parcel was collected by the postal Pcum staff on 28th September 2017 whereby a receipt No. 5321396 was issued. Before debarment of the Appellant Pcum confirmed to the Respondent vide a telephone call that the letter had been successfully delivered to the intended addressee.
- d) That, the Appellant failed to submit his defense in relation to the allegation of failure to comply with Bid Securing Declaration and refusal to perform the contract raised by the Bank of Tanzania (BOT) Mbeya Branch. As a result the Respondent debarred the Appellant's firm.
- e) That, the documents evidencing proof of service was still in the hands of the Tanzania Posts Corporation. The same was requested by the Respondent on 15th December 2017 vide a letter with Ref. No. PPRA/PA/082/"H"/73. However, up to the deadline of submitting statement of reply to the Appeals Authority the Respondent had not received the said proof.
- f) That, the Respondent communicated its decision to debar the Appellant vide a letter with Ref. No. PPRA/PA/082/"H"/67 dated 15th November 2017. The said decision contained summary of findings of facts and reasons thereof. The Respondent debarred the Appellant's firm from participating in public procurement for a period of one year from 14th November 2017 to 13th November 2018.
- g) Finally the Respondent prayed for the following reliefs;

- i) Dismissal of the Appeal in its entirety for lack of merit and the Appellant bear his own costs; and
- ii) Any other relief the Appeals Authority deems fit and just to grant.

ANALYSIS BY THE APPEALS AUTHORITY

From the above submissions, the Appeals Authority is of the view that there are two (2) triable issues to be determined. These are:-

- **Whether the Appellant's debarment is proper in law; and**
- **What reliefs if any, are the parties entitled to**

Having identified the issues, we proceed to determine them as hereunder:-

1.0 Whether the Appellant's debarment is proper in law

In resolving this issue the Appeals Authority considered the Appellant's claim that they have been debarred without being accorded right to be heard contrary to the requirement of the law. In substantiating the validity of the Appellant's argument, the Appeals Authority revisited Regulation 96 of GN. No. 446 of 2013 which is reproduced herein below;

96(1)"Where the Authority determines that there are grounds for debarment on the basis of the produced information, documents and evidences, **the Authority shall within twenty one days from the date of receiving the evidence, issue to a respective tenderer a notice of debarment.**

- (2) **The notice of debarment shall inform the tenderer of the facts constituting grounds for the proposed debarment.**
- (3) **The notice shall require the tenderer to make written representation showing cause why he should not be**

debarred from participating in public procurement for a period specified pursuant to the Act and these Regulations.

- (4) **The tenderer shall respond to the notice referred to in sub-regulation (3) of this regulation within fourteen days from the date of receiving the notice**". (Emphasis added)

The above quoted provisions entail that the Respondent is obliged to ensure that a tenderer who is proposed to be debarred should be accorded the right to be heard by being informed reasons that led the said proposal and be allowed to submit his defence before debarment.

The records before the Appeals Authority indicate that after the receipt of the proposal for debarment, the Respondent issued a notice to debar to the Appellant dated 27th September 2017. The said notice was sent to the Appellant vide Tanzania Posts Corporation Pcum services. The Appeals Authority observed further that, the Respondent proceeded to debar the Appellant on 14th November 2017 before receiving neither confirmation that the notice to debar had been received nor a statement of defence from the Appellant.

The Respondent on 15th December 2017 after the receipt of the notification of the Appeal from this Appeals Authority inquired from Tanzania Posts Corporation if the notice to debar dated 27th September 2017 was duly delivered to the Appellant. Tanzania Posts Corporation vide a letter with Ref PMG/DF:4151/2017 dated 2nd January 2018, replied to the Respondent by informing them that their record do not show if the notice to debar was delivered to the intended addressee or it was returned undelivered. The third paragraph of the said letter is reproduced as follows;

.... **"unfortunately under unconceivable situation part of the important records relating to this item found missing as a result we can't tell you exactly whether the item was delivered or returned back to you"**. (Emphasis added)

The Tanzania Posts Corporation (Pcum) as a service provider acknowledged to have received the said notice but failed to substantiate if the same was delivered to the intended tenderer or it was returned undelivered. According to Clause 8.2 of the Pcum Operational Guide, a copy of the Delivery Note must be returned to the sender in the very same day or the next day. Furthermore, Clause 11.0 of the Pcum Operational Guide requires any undelivered item be returned to the sender and record to that effect be kept. The Respondent having not received either the Delivery Note or the Undelivered Report ought to have sought for confirmation if the notice to debar had been delivered to the intended recipient. From the above facts, it is crystal clear that the notice to debar was not delivered to the Appellant because neither the Respondent nor the Tanzania Posts Corporation was able to prove delivery of the same. Nevertheless, the Respondent proceeded to debar the Appellant before receiving such a confirmation. The Appeals Authority finds the Respondent's act in this regard to have contravened the requirement of Regulation 96 of GN No. 446 of 2013 which allows a tenderer to present his defence before being debarred.

The Appeals Authority considered the Respondent's argument that confirmation of the delivery of the notice to debar the Appellant was obtained through a telephone call with a service provider and rejects such argument, as according to Regulation 12(2) of GN. No 446 of 2013 any communication made orally should be reduced into writing for purposes of providing a record of confirmation of the communication. The Respondent did not have any written confirmation that the notice to debar had been received by the Appellant before proceeding to debar them.

The Appeals Authority observed further that, the Respondent had officially inquired about the delivery status of the notice to debar on 15th December 2017 after receipt of the notification of the existence of this Appeal from the Appeals Authority. The Appeals Authority is flabbergasted by the Respondent's act in this regard as they were required to have inquired about the delivery status before debarment.

Furthermore, the Respondent had all the particulars of the Appellant including Email, Mobile numbers and physical address; thus, the Appeals Authority failed to comprehend why the Respondent did not communicate directly with the Appellant regarding the receipt of the notice to debar instead of relying only on the telephone confirmation from Pcum which had no proof. The Appeals Authority is of the view that, the Respondent's conduct in this debarment process leaves a lot to be desired taking into consideration the impact of the debarment itself to the business of the Appellant and the public, specifically the employees.

The Appeals Authority hereby accepts the Appellant's argument that they have been debarred without being accorded right to be heard since the documents submitted and submissions by the parties indicate clearly and without doubts that the notice to debar was not delivered to the Appellant; hence, they were condemned unheard.

Accordingly, the Appeals Authority's conclusion on the first issue is that the debarment of the Appellant is not proper in law as the same is tainted with irregularities.

2.0 What reliefs if any are the parties entitled to

Taking cognizance of the findings above, the Appeal is hereby upheld and the debarment order issued by the Respondent is hereby quashed. Therefore, the Appeals Authority uplifts the debarment and orders the Respondent to communicate this order in the same manner the debarment was effected.

The Respondent is also ordered to compensate the Appellant a reasonable amount of TZS 3,200,000.00 as per following breakdown;

- i) TZS 3,000,000.00 - Legal fees
- ii) TZS 200,000.00 – Appeal filing fees

With regard to the prayer by the Respondent that the Appeal be dismissed in its entirety, the same cannot be granted since the Appeal has merit.

It is so ordered.

This Decision is binding on the parties and can be enforced in accordance with Section 97(8) of the Act.

The Right of Judicial Review as per Section 101 of the Act is explained to the Parties.

This Decision is delivered in the presence of the parties this 19th January 2018.



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MRS. ROSEMARY A. LULABUKA
Ag. CHAIRPERSON

MEMBERS:

1. ENG. FRANCIS MARMO



2. ENG. ALOYS MWAMANGA

