

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 31 OF 2020-21

BETWEEN

M/S STAR MEDIA (T) LTD.....APPELLANT

AND

TANZANIA FOOTBALL FEDERATION.....RESPONDENT

RULING

CORAM

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| 1. Hon. Justice (rtd) Suda Mjasiri | - Chairperson |
| 2. CPA. Fredrick Rumanyika | - Member |
| 3. Dr. Leonada Mwangike | - Member |
| 4. Ms. Florida Mapunda | - Ag. Secretary |

SECRETARIAT

- | | |
|------------------------|------------------------|
| 1. Ms. Agnes Sayi | - Senior Legal Officer |
| 2. Ms. Violet Limilabo | - Senior Legal Officer |

FOR THE APPELLANT

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| 1. Mr. Herman Lupogo | - Advocate, Reno Advocates |
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FOR THE RESPONDENT

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|--------------------------|---------------------------------|
| 1. Mr. Rahim Shaban | - Advocate, Tradelink Attorneys |
| 2. Mr. Paul R. Bilabayee | - Member, Finance Committee |

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3. Mr. Boniface Wambura - Director of Media and Marketing
4. Mr. Mohamed Mkangara - Head of General Secretary Office

This Appeal was lodged by **M/S Star Media (T) Ltd** (hereinafter referred to as "**the Appellant**") against **Tanzania Football Federation** commonly known by its acronym **TFF** (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. TFF/00/2021/01 for the Request for Proposal of the Sale of Broadcasting Rights (hereinafter referred to as "**the Tender**").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**") the background of this Appeal may be summarized as follows: -

On 2nd April 2021, the Respondent through the Daily News and Mwananchi newspapers invited qualified firms to submit their Technical and Financial Proposals for the Tender. The deadline for submission of proposals was set for 23rd April 2021 at 15.00 hours. By the deadline only four (4) proposals were received from the following firms namely;

1. M/S Tanzania Broadcasting Corporation (TBC);
2. M/S Star Media (T) Ltd;
3. M/S Azam Media Ltd; and
4. M/S Agape Associate Limited.

The selection process for this Tender was in accordance with the Quality and Cost Based Selection (QCBS) procedures as indicated in the Request For Proposal (RFP).

The received proposals were subjected to evaluation which was conducted in two phases, namely; evaluation of technical and financial proposals. The technical proposals were evaluated in two stages, namely; preliminary and detailed evaluation. Each responsive Technical Proposal was given scores based on the earmarked criteria and sub-criteria. The pass mark stated in the RFP was 70 points out of 100. At the preliminary evaluation stage, the proposals by M/S Agape Associate Limited and M/S Star Media (T) Ltd were disqualified for being non-responsive to the RFP.

The remaining two (2) proposals were subjected to detailed evaluation. At this stage, two proposals by M/S Tanzania Broadcasting Corporation (TBC) and M/S Azam Media Ltd met the minimum score by scoring 81% and 94% respectively. Thus, the firms qualified for financial evaluation.

The opening of financial proposals took place on 3rd May 2021. The proposals were evaluated in four stages namely; preliminary examination, correction of arithmetic errors, financial scores and combined highest technical and price. After completion of the Evaluation process, the Evaluation Committee recommended award of the Tender to M/S Azam Media Ltd who had a higher score of 97.60 points. The firm offered the tender price of Tanzania Shillings One Hundred Ninety One Billion Two Hundred Forty Nine Million Ninety Five Thousand Two Hundred and Twelve (TZS 191,249,095,212.00) only.

The Respondent by a letter dated 4th May 2021, informed the Appellant that its technical proposal was not responsive to the requirements provided in the RFP. The Appellant failed to submit a Local Broadcasting

License from Tanzania Communication Regulatory Authority (TCRA) as per Clause 14 of the Proposal Data Sheet (PDS) instead it submitted a National Network Facilities License.

Dissatisfied, on 12th May 2021, the Appellant applied for administrative review to the Respondent challenging the reason for its disqualification. The Respondent did not respond to the Appellant's application for administrative review, thus on 21st May 2021 the Appellant lodged this Appeal before the Appeals Authority.

After the Appeal was lodged, the Appeals Authority notified the Respondent about the Appeal and required it to submit its reply. In response to the grounds of Appeal, the Respondent raised a preliminary objection (PO) on two points of law to wit:-

- i. The Respondent is neither a public entity nor does it receive subvention from the Government of Tanzania; and
- ii. The Appellant has sued a wrong party.

During the hearing the Appeals Authority directed the parties to address it on the points of law first before proceeding with the substantive merits of the Appeal.

SUBMISSIONS BY THE RESPONDENT

In relation to the first point of law, the learned counsel for the Respondent submitted that Section 2(1) of the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") provides clear guidance on its applicability. According to the said provision, the Act applies to procurements conducted by procuring

entities, non governmental entities for procurement financed by public funds and in public private partnership (PPP) projects.

The learned counsel submitted further that according to Section 3 of the Act, a procuring entity is a public body or unit established and mandated by the Government to carry out public functions. The learned counsel submitted that, the Respondent is neither a public entity nor does it receive subvention from the Government of Tanzania. Counsel for the Respondent added that, the Respondent is not registered and / or recognized by the Public Procurement Regulatory Authority (PPRA) as one of the Government's procuring entity and has no Procuring Entity (PE) number.

The learned counsel expounded further that, the Respondent is a non-governmental, non-profit organization registered in the United Republic of Tanzania under the National Sports Council Act No. 12 of 1967 as amended in 1971. According to Article 5(3) of the Respondent's constitution, the Respondent manages its own affairs independently without influence of third parties or political interference.

Therefore, the learned counsel concluded his argument on the first point of law by stating that the Appeals Authority lacks jurisdiction to entertain this Appeal as the Respondent is not a Government entity.

With regard to the second point of law, the learned counsel submitted that the Appellant has preferred this Appeal against a wrong party. The Appellant ought to have sued the Registered Trustees of the Tanzania Football Federation (TFF), to the contrary it sued the Tanzania Football Federation (the Respondent). According to the learned counsel, the

Respondent has no legal capacity to sue or being sued in its own name. It can only be sued under the Registered Trustees of Tanzania Football Federation. The learned counsel submitted further that, the Registered Trustees of Tanzania Football Federation is a body incorporated under the Trustees' Incorporation Act (Cap 318 RE. 2002). Thus, the Appellant ought to have preferred this Appeal against the Registered Trustees of Tanzania Football Federation.

In support of his argument, the learned counsel cited ***Appeal Case No. 11 of 2015-16 between M/S Nyanza Laundry and General Services Ltd against Bugando Medical Centre (1st Respondent) and M/S Ako Group Ltd (2nd Respondent)***. In the said case the Appeals Authority held that, the Appellant had preferred an Appeal against the wrong party, that is Bugando Medical Centre instead of the Registered Trustees of Bugando Medical Centre. According to Section 8 (1) of the Trustees' Incorporation Act, Cap 318 RE 2002, if an entity has a Registered Board of Trustees, any legal proceedings has to be filed against the Board of Trustees and not otherwise. Therefore, the Appellant was duty bound to find out which was the right party to be sued.

The learned counsel concluded his argument by praying that, the Appeal be dismissed with costs.

REPLY BY THE APPELLANT

In response to the first point of law, the learned counsel for the Appellant having reviewed Sections 2(1) and 3 of the Act together with the Respondent's submissions, conceded that the Respondent is not a

public body and it does not receive any subvention from the Government.

The learned counsel for the Appellant also conceded to the second point of law that it sued a wrong party with reservation that, the Respondent misled tenderers by indicating in the RFP that the procuring entity is Tanzania Football Federation and not the Registered Trustees of Tanzania Football Federation. The Respondent ought to have disclosed the correct name of the procuring entity from the beginning of the Tender process. The counsel concluded his argument by stating that, since it has conceded to the PO, no costs should be awarded against the Appellant.

ANALYSIS BY THE APPEALS AUTHORITY

In determining the PO raised, the Appeals Authority is of the view that the main issue for consideration is ***whether the Appeals Authority has jurisdiction to entertain the Appeal.***

In resolving this issue the Appeals Authority took cognizance of the fact that the learned counsel for the Appellant conceded to both points of law raised by the Respondent. Sections 2 (1) and 3 of the Act provide as follows:-

Section 2 (1) *"This Act shall apply to-*

- a) All procurement and disposal by tender undertaken by a procuring entity except where it is provided otherwise in this Act;*

b) *Non-governmental entities for procurement financed from specific public finances; and*

c) *Public Private Partnership projects in their relevant stages”.*

Section 3 ***“Procuring entity means a public body and any other body, or unit established and mandated by the government to carry out public functions.”***

[Emphasis provided]

The above quoted provisions entail that the Act applies to procurement undertaken by procuring entities, non governmental entities in procurement financed by public funds and in public private partnership projects. According to Section 3 a procuring entity is a body or unit mandated by the Government to carry out its functions.

It is evident from the record of appeal that the Respondent is a non-governmental, non-profit organization registered in the United Republic of Tanzania under the National Sports Council Act No. 12 of 1967 as amended in 1971. Article 5(3) of the Respondent’s constitution, requires the Respondent to manage its own affairs independently without the influence of third parties or political interference. Furthermore, the Consolidated Financial Statements for the year ended 31st December 2019 do not indicate that the Respondent receives subvention from the Government. During the hearing the Respondent indicated that this Tender is not funded by the Government.

Given the circumstances, the Appeals Authority is of the settled view that, the Respondent is neither a public entity nor does it receive subvention from the Government. Therefore, the jurisdiction of this Appeals Authority does not apply to procurement conducted by private entities where public funds are not involved.

In view of the above, the Appeals Authority agrees with the Respondent that it has no jurisdiction to entertain the Appeal.

With regard to the point of law that the Appellant has filed an appeal against a wrong party, the Appeals Authority revisited section 8(1) of the Trustees' Incorporation Act, Cap 318 RE 2002. According to the said section, if an entity is a Registered Trust, all powers including powers to sue or being sued are vested to the Trust. Section 6(2) of the Trustees' Incorporation Act (supra) requires every entity registered under it to include the words "Registered Trustees" in its name. The Respondent is a Registered Trustee with certificate of incorporation No. 667 issued on 19th July 2019. Therefore, the Appellant ought to have sued the Registered Trustees of the Respondent (Registered Trustees of the Tanzania Football Federation). To the contrary, the Appellant sued the TFF.

The Appeals Authority took cognizance of the Appellant's reservation that the Respondent had misled tenderers by indicating in the Tender Document that the procuring entity is TFF. The Appeals Authority is of the firm view that, despite the Respondent's omission in this regard, the Appellant's act of suing the Respondent as TFF without including the

words Registered Trustees was not proper. Thus, the Appellant had sued a wrong party.

Under the circumstances, the Appeals Authority hereby uphold the preliminary objection and dismiss the Appeal. Each party is to bear its own costs.

It is so ordered.

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

This Ruling is delivered in the presence of the Appellant and the Respondent this 29th day of June 2021.

HON. JUSTICE (RTD) SAUDA MJASIRI



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CHAIRPERSON

MEMBERS:

1. CPA. FREDRICK RUMANYIKA 

2. DR. LEONADA MWAGIKE 