

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DODOMA

APPEAL CASE NO. 134 OF 2012

BETWEEN

M/S AIDAN PUBLISHERS LTD APPELLANT

AND

PRIME MINISTER'S OFFICE –
REGIONAL ADMINISTRATION
AND LOCAL GOVERNMENTRESPONDENT

DECISION

CORAM

1.Hon. A.G. Bubeshi -	Chairperson
2.Mr. H.S. Madoffe -	Member
3.Mr. F.T. Marmo -	Member
4.Mr. K.M. Msita -	Member
5.Ms. B.G. Malambugi -	Secretary

SECRETARIAT

1.Ms. E.V.A. Nyagawa –	Principal Legal Officer
2.Ms. F.R. Mapunda -	Legal Officer I

FOR THE APPELLANT:

1. Ms. Fatma .A. Karume – Advocate, IMMA Advocates
2. Mr. Khalaf Salim Rashid – Director

FOR THE RESPONDENT:

1. Ms. Ziada .A Msangi – Director of
Procurement
2. Mr. Edwin Mgendera – Assistant Director, Legal Services
3. Mr. Sudi Magotta – Principal Education Officer
4. Mr. Herry Mdong'ala – Supplies Officer

This decision was scheduled for delivery today 16th day of November, 2012, and we proceed to deliver it.

The Appeal at hand was lodged by M/s Aidan Publishers Ltd (hereinafter to be referred to as "the Appellant") against the Prime Minister's Office Regional Administration and Local Government, commonly known by its acronym PMO-RALG (hereinafter to be referred to as "the Respondent").

The said Appeal is in respect of Tender No. ME/022/2011/2012/G/14 (A-L) for Procurement of Text Books and Teachers' Guides for Primary Schools (hereinafter to be referred to as "the tender").

According to the documents submitted to the Authority as well as oral submissions during the hearing, the facts of the Appeal may be summarized as follows:

In April 2012, the Respondent informed M/s Macmillan Aidan Ltd, through telephone that they were intending to invite them to participate in the tender, whereby the said firm replied that, they had changed their name to M/s Aidan Publishers Ltd. The Respondent therefore

requested the Appellant to submit proof of change of name.

On 23rd April, 2012, the Respondent *vide* a letter referenced CAB 51/307/01A/43 invited the Appellant to participate in the tender under Appeal to be conducted through single-source method. The Appellant was requested to confirm their participation in the said tender.

On 24th April 2012, the Appellant *vide* a letter referenced APL/04/024/2012 confirmed participation in the disputed tender. On the same date they wrote another letter without reference number, in which a copy of the Certificate of Change of Name from Macmillan Aidan Ltd to Aidan Publishers Ltd issued on 31st January, 2012, was attached. The second letter informed the Respondent, that:

- Macmillan Aidan Ltd had been renamed Aidan Publishers Ltd;

- with effect from the date on which the name was changed, Macmillan Aidan Ltd ceased to operate and that all communications, transactions, records, signing and legal obligations were to be conducted under the name of Aidan Publishers Ltd;
- Macmillan Aidan Ltd had not changed in any way, had not been liquidated or dissolved in anyway, and had not changed its constitution; and
- the rights and obligations of Macmillan Aidan Ltd had remained the same, except for the name which was changed to Aidan Publishers Ltd.

On 30th April, 2012, the Respondent held a pre-bid meeting whereby all tenderers were informed that the Tender Document needed to be revised and that they were to be supplied with a new version.

On 8th May, 2012, the Ministry of Education and Vocational Training *vide* a letter referenced ED/EMAC/PATA/Vol.II/366, which was a response to the

Appellant's letter dated 7th February, 2012, informed the Appellant that the Ministry would not offer new EMAC Certificates for the approved titles under Macmillan Aidan Ltd but new certificates would be issued in respect of new titles and revised editions under the new name of Aidan Publishers Ltd.

On 5th June, 2012, the revised Tender Document was issued to all tenderers, save for the Appellant.

The Respondent wrote a letter referenced CAB.51/307/66 dated 2nd May, 2012, informing the Ministry of Education and Vocational Training that:

- M/s Macmillan Aidan Ltd who had been authorized by the Education Material Approval Committee (hereinafter to be referred to as "EMAC") to publish and sell 19 books for primary schools was not eligible to participate in the tender under Appeal as they were blacklisted by the World Bank.

- By virtue of Section 57(2) of the Public Procurement Act (hereinafter to be referred to as "the Act") once a firm has been blacklisted by, amongst others, an international organization it is automatically blacklisted from conducting business in Tanzania.
- Macmillan Aidan Ltd had changed its name to Aidan Publishers Ltd, hence ceased to be amongst the listed firms eligible to participate in the tender under Appeal.

They also sought guidance from the Ministry of Education and Vocational Training on the way forward.

The Ministry of Education and Vocational Training *vide* a letter referenced PY/BC/40/256/01/21 dated 20th June, 2012, requested the Appellant to clarify their relationship with Macmillan Ltd (UK) which had been blacklisted by the World Bank as the said ban equally applied to its subsidiaries.

In reply to the request from the Ministry of Education and Vocational Training, on 28th June, 2012, the Appellant *vide* unreferenced letter, informed them that:

- in November 2011, Macmillan Ltd (UK) sold its shares in Macmillan Aidan Ltd to ADA Group Tanzania Ltd which is wholly owned by Tanzanians, whereby the Directors of the purchaser decided to change its name to Aidan Publishers Ltd;
- there was no business-oriented relationship between Macmillan Ltd (UK) and the Appellant;
- Aidan Publishers Ltd was jointly owned by ADA Group Tanzania Ltd and Mr. Khalaf Salim Rashid and that the new owners have never been associated or blacklisted by the World Bank; and
- they requested the said Ministry to look for a way to enable the Appellant to obtain new EMAC Certificates so that they can proceed to conduct business.

On 10th July, 2012, the Respondent *vide* a letter referenced DB.291/298/01/01/23, informed the Appellant that following PPRA's issuance of a list of blacklisted firms, including Macmillan Aidan Ltd, the Ministry of Education and Vocational Training had released a new list of eligible publishers which neither included the Appellant nor Macmillan Aidan Ltd. They were advised to contact the Ministry of Education and Vocational Training, for further clarification.

On 24th July, 2012, the Appellant wrote to the Respondent and the Ministry of Education and Vocational Training seeking clarification on their exclusion from the tender process. In disputing the aforementioned exclusion, the Appellant raised the following points:

- Aidan Publishers Ltd held exclusive rights to 19 textbooks which were amongst those listed on the textbooks for use in Government primary schools.

- On 5th June, 2012, all the other tenderers, except the Appellant, were given the revised edition of the Tender Document; that such conduct was unfair and discriminatory, as there was no justification thereof.
- Their name, to wit, M/s Aidan Publishers Ltd did not appear in the list of blacklisted firms issued by the World Bank.

Having received no reply from the Respondent and Ministry of Education and Vocational Training, on 2nd August, 2012, the Appellant filed an application for administrative review to the Respondent's Accounting Officer disputing their blacklisting as well as exclusion from participating in the tender under Appeal.

On 7th August, 2012, the Respondent *vide* a letter referenced DB.291/298/01/01/23 informed the Appellant that due to debarment by the World Bank of Macmillan Ltd (UK) and its subsidiaries, the Ministry of Education and Vocational Training had re-allocated the

Titles which were to be supplied by the Appellant and that the new list of publishers had already been provided with the requisite Tender Document.

On 9th August, 2012, the Appellant *vide* a letter referenced AIDAN/PPRA/01/2012 sought clarification from the Public Procurement Regulatory Authority (hereinafter to be referred to as "PPRA") on whether the blacklisting of Macmillan Ltd (UK) applied to Aidan Publishers Ltd.

On 14th August, 2012, the Business Registrations and Licensing Agency (hereinafter to be referred to as "BRELA") *vide* a letter referenced MIT/RC/35244/13, which was responding to the Appellant's letter of 2nd July, 2012, informed them that the Directors of M/s Aidan Publishers Ltd were Mr. Khalaf Salim Rashid (Tanzanian), Mr. Ryan Christopher Vaz (Indian) and Ms. Leila Magreth Abdallah (Tanzanian). Further that, the shareholders thereof were Mr. Khalaf Salim Rashid who owns 6,000 shares and ADA Group Limited owning 24,000 shares.

According to information obtained from BRELA by this Authority, the shareholders of ADA Group Tanzania Ltd were Mr. Fredrick Mbuya and Mr. Khalaf Salim Rashid while its Directors were Mr. Fredrick Mbuya (Tanzanian), Mr. Khalaf Salim Rashid (Tanzanian) and Mr. Kwang Hwy Lee (South Korean). However, during the hearing Mr. Khalaf Salim Rashid stated that, the said company is wholly owned by himself and his wife.

On 22nd August, 2012, PPRA *vide* a letter referenced CCA 151/191/01/"G"/68 informed the Appellant that their company was not among the blacklisted firms and that it was upon the Respondent to establish whether the ban of M/s Macmillan Ltd (UK) extended to M/s Aidan Publishers Ltd.

On 30th August, 2012 the Respondent communicated their decision on the Appellant's application for review *vide* a letter referenced DB.291/298/01/40, whereby the Appellant's application was rejected on the following grounds:

- (i) The publishing company which was originally invited to tender was M/s Macmillan Aidan Ltd. However, the Appellant denied having any relationship with Macmillan Aidan Ltd through their letter to the Ministry of Education and Vocational Training dated 17th July, 2012.
- (ii) M/s Aidan Publishers Ltd did not have titles which were approved by EMAC and therefore were not eligible to participate in the tender.

Being dissatisfied with the Respondent's decision, the Appellant applied for administrative review to PPRA on 3rd September, 2012.

On 2nd October, 2012, PPRA rendered its decision in respect of the Appellant's complaints whereby it held that:

- The World Bank ban on Macmillan Ltd (UK) extended to Macmillan Aidan Ltd which is now M/s Aidan Publishers Ltd.

- Since the approved titles were those of a debarred company, even if it was established that the Appellant had relationship with M/s Macmillan Aidan Ltd, the Appellant would not have been allowed to supply the said books from a debarred company.
- The Appellant was debarred from participating in public procurement in Tanzania pursuant to Section 57(2)(a) of the Act.

Being dissatisfied with PPRA's decision, on 8th October, 2012, the Appellant lodged their Appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "the Authority").

SUBMISSIONS BY THE APPELLANT

The Appellant's documentary, oral submissions as well as responses from questions raised by Members of the Authority during the hearing, may be summarized as follows:

That, the Appeal is based on the following grounds:

- PPRA had erred in law and in fact by holding that the World Bank ban placed on Macmillan Ltd (UK) from participating in the World Bank's procurement proceedings was an encumbrance.
- Having established that the Appellant had never been blacklisted by PPRA, a foreign country, international organization or other foreign institutions on grounds of fraud or corruption, PPRA erred in law by holding that Section 57(2) of the Act barred the Appellant as a subsidiary of Macmillan Ltd (UK) from participating in public procurement.
- PPRA is empowered by the law to extend a ban applicable to a contractor to its subsidiary, then such powers and a ban ceases when that subsidiary stops to belong to or to have a relationship with the banned company. Thus, PPRA erred in law and in

fact by banning the Appellant when it was no longer a subsidiary of Macmillan Ltd (UK).

- The Respondent erred in law and in fact for failure to recognize that the said books on the approved list of textbooks and the EMAC Certificates belonged to the Appellant.

That, Macmillan Ltd (UK) was blacklisted by the World Bank in April 2010 for corrupt practices in Southern Sudan. The said ban was extended to its subsidiaries, including Macmillan Aidan Ltd which was its subsidiary at the time when that ban was imposed.

That, a decision was made to extricate itself from Macmillan Ltd (UK) in order to ensure the survival of Macmillan Aidan Ltd, as the latter was not involved in the activities of the former in Southern Sudan which led to the ban. It was therefore deemed necessary for Macmillan Aidan Ltd to distance itself from the toxic relationship with Macmillan Ltd (UK) whereby the former sold its 80% shares to ADA Group Tanzania Ltd.

That, having acquired total ownership of M/s Macmillan Aidan Ltd, the new owners decided to change the name to Aidan Publishers Ltd which became effective on 31st January, 2012. By that time, the Appellant had already detached themselves from Macmillan Ltd (UK) and therefore the ban should not have applied to them as they were not a subsidiary of Macmillan Ltd (UK) any more.

That, the Appellant was not banned for its activities, rather the ban emanated from the Appellant's unfortunate association with Macmillan Ltd (UK). Since the Appellant had not committed any wrongdoing, it was unfair for them to be penalized for the wrongdoing of their principal, namely, Macmillan Ltd (UK). Thus, extending the ban to Aidan Publishers Ltd was inequitable. If the Authority upholds PPRA's decision, it would affect an innocent party, namely, the Appellant.

That, they had never denied having relationship with Macmillan Aidan Ltd as alleged by the Respondent; instead, they insisted that the said firm is the same as

Aidan Publishers Ltd. By virtue of Section 31(4) of the Companies Act, Cap. 212 (hereinafter to be referred to as "the Companies Act"), a mere change of name does not affect the rights and obligations of a company.

That, the change of name does not connote that the original personality ceased to exist altogether, as that person becomes a new being but with the same "DNA".

That, since the change of name has neither affected the Appellant's rights nor its obligations, the EMAC Certificates issued in the Appellant's previous name, to wit, M/s Macmillan Aidan Ltd now belong to the Appellant. Further that, Macmillan Aidan Ltd and the Appellant are one and the same company with the same registration number 35244 issued by BRELA. Thus, the Respondent erred in holding that the Appellant is not eligible, in that, the said Certificates do not belong to them.

That, the invitation to tender was made to the Appellant and not Macmillan Aidan Ltd. Thus, the Appellant should

be allowed to participate in the tender under Appeal as they are eligible to tender, in that, they own the EMAC Certificates which were originally issued to Macmillan Aidan Ltd.

That, in deciding this Appeal the Authority should be guided by, *inter alia*, logic, rationality and policy.

Finally, they prayed for the Authority to do the following:

- declare that, given the fact that the Appellant is no longer a subsidiary of Macmillan Ltd (UK), the Appellant is free to participate in public procurement, that is, the Appellant is not covered by the ban;
- declare that, all titles that belonged to Macmillan Aidan Ltd now belong to the Appellant by virtue of Section 31 of the Companies Act; and

- order the Respondent to pay the Appellant costs to the tune of USD 7,500 as per the following breakdown:
 - (i) USD 3,500 as consultation fee;
 - (ii) USD 3,500 as legal fees for the Appeal at hand;
 - (iii) USD 500 for transport to/from Dar-es-Salaam – Dodoma, accommodation and meals.

REPLIES BY THE RESPONDENT

The Respondent's documentary and oral submissions as well as responses from questions raised by Members of the Authority during the hearing, may be summarized as follows:

That, following the Memorandum of Understanding (hereinafter to be referred to as "MOU") between the Respondent and the Ministry of Education and Vocational Training, it was agreed that procurement of Text Books and Desks for Primary Schools using BAE

System Funds was to be done through collaboration by the two ministries.

That, according to the MOU, twelve publishers were to be invited to participate in the tender process, including Macmillan Aidan Ltd. At the time when the Respondent was identifying the publishers to be invited to collect the Tender Document, it came to their knowledge that Macmillan Aidan Ltd had changed its name to Aidan Publishers Ltd.

That, they thereafter requested the Appellant to substantiate the change of their name. The Appellant through their letter dated 24th April, 2012, explained the status and relationship of the two companies as follows:

“Following a change of ownership of Macmillan Aidan Limited the company has now been renamed as AIDAN PUBLISHERS LIMITED. This is with effect from the date of certificate as attached henceforth the Company will cease to operate as Macmillan Aidan and all communications, transactions,

records, signature and legal obligations will be conducted under the name of AIDAN PUBLISHERS LTD. For the purpose of clarity the Company has not changed in anyway, it has not been liquidated or dissolved in any way nor have there been changes to its constitution. The rights and obligations of the Company therefore remain the same. The only change is the name to Aidan Publishers Limited.”

That, upon receipt of the above mentioned letter the Respondent sought clarification on the matter from the Ministry of Education and Vocational Training as Macmillan Ltd (UK) and all its subsidiaries were debarred by the World Bank. Further that, the Appellant claimed to have taken over all the rights and obligations of Macmillan Aidan Ltd.

That, in order to qualify for award of the tender the tenderers were required to submit, *inter alia*, valid EMAC Certificates for each of the titles that a tenderer was to tender for. Failure to provide the said Certificates

would amount to non compliance with the requirements of the Tender Document.

That, according to the Respondent's understanding, the Appellant does not possess the EMAC Certificates as indicated by the Ministry of Education and Vocational Training in their letter dated 08th May, 2012.

That, in deciding this Appeal the Authority should be guided by the law and nothing else.

Finally, the Respondent prayed that, the Appeal be dismissed for lack of merit.

ANALYSIS BY THE AUTHORITY

Having gone through the documents and having heard the oral arguments from parties, the Authority is of the view that the Appeal is centered on four main issues, namely;

- whether the debarment of Macmillan Ltd (UK) extends to the Appellant;

- whether it was proper for PPRA to blacklist the Appellant;
- whether the change of name from Macmillan Aidan Ltd to Aidan Publishers Ltd affected ownership of the EMAC Certificates; and
- to what reliefs, if any, are the parties entitled to.

Having identified the issues in dispute the Authority proceeded to resolve them as follows:

1.0 Whether the debarment of Macmillan Ltd (UK) extends to the Appellant

In resolving this contentious issue, the Authority revisited the Appellant's submissions that, the debarment of Macmillan Ltd (UK) does not extend to them on the reasons that Macmillan Ltd (UK) sold its shares in Macmillan Aidan Ltd to ADA Group Ltd. Thus, the "subsidiary" status which existed between Macmillan

Ltd (UK) and Macmillan Aidan Ltd came to an end after the sale of the said shares. The Appellant contended further that the sale of shares necessitated the change of name from Macmillan Aidan Ltd to Aidan Publishers Ltd as the Appellant company was no longer a subsidiary of Macmillan Ltd (UK).

In reply to the Appellant's arguments the Respondent submitted that, the Appellant's act of changing the name and shareholding to prove that they were not related to Macmillan Ltd (UK) was a mere trick deployed to extricate themselves from the World Bank ban. However, according to their own admission the change of name per se does not absolve them from their previous legal obligations. Thus, the debarment of Macmillan Ltd (UK) equally affected them as they were one of their subsidiaries.

In order to substantiate the validity of the parties' arguments, the Authority deems it proper to revisit submissions by parties *vis-a-vis* the applicable law. In so doing the Authority started by revisiting the World

Bank's list of debarred companies for the year 2010, where it was observed that Macmillan Ltd (UK) was among the debarred companies and "Footnote 9" thereof contained more details on the debarment order. The Authority reproduces the said Footnote 9 which reads as follows;

"The ineligibility of Macmillan Limited extends to its subsidiaries. The period of ineligibility may, under certain circumstances, be reduced by up to three years based on cooperation with the World Bank Group and the development and implementation of an effective corporate compliance program" (Emphasis supplied)

Having observed that the debarment of Macmillan Ltd (UK) extends to its subsidiaries, the Authority revisited submissions by parties. It was noted that, the Appellant conceded that the ban affected Macmillan Aidan Ltd which at the time of the ban was a subsidiary of Macmillan Ltd (UK); the latter owned 80% shareholding in Macmillan Aidan Ltd now Aidan Publishers Ltd and the other 20% were owned by Mr. Khalaf Salim Rashid.

Upon further review of the documents submitted, the Authority noted that Macmillan Aidan Ltd was incorporated in November 1998. It was noted further that, after the Appellant had learnt that Macmillan Ltd (UK) had been barred by the World Bank and such a debarment automatically extended to Macmillan Aidan Ltd, as they were among its subsidiaries, they decided to buy the shares of Macmillan Ltd (UK) in order to end the relationship which existed between them. The decision to sever the said relationship was reached after it was realized that they were being punished for mistakes they did not commit resulting in failure to conduct their business during the debarment period. Following changes in the shareholding structure, the Appellant decided to change their name from Macmillan Aidan Ltd to Aidan Publishers Ltd since Macmillan Ltd (UK) was no longer a shareholder in Macmillan Aidan Ltd.

From the above facts the Authority observes that, it is not disputed that Macmillan Aidan Ltd was among the

subsidiaries of Macmillan Ltd (UK) at the time of the debarment.

The Authority is of the view that, the Appellant's decision of changing ownership and name of the company after the debarment was meant to circumvent the ban by the World Bank. It is further noted that, Mr. Khalaf Salim Rashid who owned 20% of the banned subsidiary company, namely, Macmillan Aidan Ltd is one of the Directors and the majority shareholder in the Appellant Company.

The Authority is of the further view that, the debarment of Macmillan Ltd (UK) and its subsidiaries is a punishment for fraud and corrupt practices committed in Southern Sudan. The argument that the Appellant did not commit the said wrong cannot stand as it is not possible to prove that they neither participated nor benefited from the said malpractice of Macmillan Ltd (UK) as the benefits to them could be direct or indirect. Furthermore, when a company associates itself with another it must be prepared to enjoy the benefits

accruing thereof and likewise to suffer the consequences of any wrongdoing arising out of that relationship.

The Authority considered the Appellant's contention that, they be allowed to continue with their business on the ground that they are no longer a subsidiary of Macmillan Ltd (UK). In so doing the Authority revisited Clause 1.16 of the World Bank Procurement Guidance Procedures (hereinafter to be referred to as "the World Bank Guidelines"), with respect to fraud and corruption which provides as follows:

" Fraud and Corruption

1.16 It is the Bank's policy to require that Borrowers (including beneficiaries of Bank loans), bidders, suppliers, contractors and their agents (whether declared or not), sub-contractors, sub-consultants, service providers or suppliers, and any personnel thereof, to observe the highest standard of ethics during the procurement and execution of Bank-financed contracts..."
(Emphasis added)

The Authority observes that, the above quoted Clause emphasizes on the need to fight fraud and corruption in public procurement by observing the highest standards of ethics by procuring entities (borrowers), tenderers and any personnel thereof.

The World Bank's position is further cemented by Section 57(2) of the Act which invokes international cooperation in fighting fraud and corruption in public procurement. The said provision is reproduced herein below:

"57(2) A supplier, contractor or consultant shall be blacklisted and barred from participating in public procurement proceedings for period of time where: -

- (a) A supplier, contractor or consultant has been blacklisted and barred from taking part in public procurement by a foreign country, international organization or other

foreign institutions on grounds other than fraud or corruption;

(i) shall automatically be blacklisted and barred from participating in public procurement in the United Republic for such periods as is barred by that foreign country, international organization or foreign institution;

(ii) plus a further period to a total maximum of ten years." (Emphasis added)

In view of the above quoted provision and the noble intentions thereof, the Authority is of the settled view that the said intention of debarment could easily be defeated if blacklisted firms were allowed to simply change ownership structure and name during the debarment period.

Furthermore, the Authority considered the Appellant's argument that, logic has to be applied in this Appeal as

the law is silent in a situation where the tenderer ceases to be a subsidiary of the debarred company, and does not concur with the Appellant as there is no lacuna as claimed. Since what really matters is whether at the time of the debarment the affected party was a subsidiary of the banned company. Additionally, under Section 57(3) of the Act, the debarred company is not allowed to commence new businesses. The Authority reproduces the said provision which states as follows;

“A supplier, contractor or consultant blacklisted under Sub section (2) shall not be allowed to start new supplies, contracting or consulting firm during that period.” (Emphasis added)

It is the considered view of the Authority that, the intention of the provision of Section 57(3) of the Act is to prevent companies from scheming ways to circumvent the ban.

From the above provision the Authority observes that both Macmillan Ltd (UK) and Macmillan Aidan Ltd made a deliberate decision to change the shareholding structure of the latter, in order for it not to be a subsidiary of the former and thus escape the debarment sanction. That action equally goes against the spirit of Section 57(3) of the Act.

The Authority is of the settled view that the logic behind Section 57(3) of the Act is to prevent banned firms from starting new businesses so as not to render the blacklisting exercise nugatory. Hence, the Appellant's argument that they had ceased to be a subsidiary of Macmillan Ltd (UK) as of 31st January, 2012; and that the ban cannot be extended to them is not acceptable; considering the Appellant's repeated assertion that Aidan Publishers Ltd and Macmillan Aidan Ltd are one and the same.

Having satisfied itself that the said ban extends to the Appellant, the change of name notwithstanding, the Authority concurs with Paragraph 6.2.5 of PPRA's

decision. For purposes of clarity the Authority reproduces the said paragraph hereunder;

“In determining whether the ban of M/s Macmillan Limited extends to M/s Macmillan Aidan Limited now Aidan publishers Limited CRC found that M/s Macmillan Limited was debarred by the World Bank not to participate in Public procurement since 29th April, 2010. So it means when M/s Macmillan Aidan Limited was being sold to M/s ADA Group Ltd on 17th November, 2011, the company was already debarred. Since it has been established that M/s Macmillan Aidan Limited was a subsidiary company of M/s Macmillan Limited, the World Bank ban on Macmillan Limited also extends to Macmillan Aidan Limited now Aidan Publishers Limited.” (Emphasis supplied)

Based on the above findings, the Authority is of the settled view that, the ban which was imposed on Macmillan Aidan Ltd also extends to the Appellant.

Accordingly, the Authority's conclusion on the first issue is that the debarment of Macmillan Ltd (UK) extends to the Appellant.

2.0 Whether it was proper for PPRA to blacklist the Appellant

In resolving this issue the Authority considered the Appellant's argument that PPRA has erred in law for blacklisting them, in that, after the change in shareholding they were no longer a subsidiary of the Macmillan Ltd (UK). Thus, they were not supposed to be blacklisted.

In reply thereof the Respondent submitted that, the blacklisting by PPRA was in accordance with Section 57(2) of the Act. Thus, it cannot be argued that PPRA had erred in law for blacklisting the Appellant.

In resolving the contentious arguments the Authority considered its findings made under the first issue that,

the debarment equally applied to the Appellant, thus it was proper for PPRA to blacklist them.

Therefore, the Authority's conclusion in respect of the second issue is that, it was proper for PPRA to blacklist the Appellant.

3.0 Whether the change of name from Macmillan Aidan Ltd to Aidan Publishers Ltd affected ownership of the EMAC Certificates

In resolving this issue the Authority considered the Appellant's argument that, it is not true that they do not own the EMAC Certificates, in that, the EMAC Certificates owned by Macmillan Aidan Ltd are currently owned by Aidan Publishers Ltd. They further contended that, the name Macmillan Aidan Ltd was changed to Aidan Publishers Ltd on 31st January, 2012, but the said change did not affect ownership of titles as the said change was made in accordance with Section 31(4) of the Companies Act. Thus, the Respondent erred in law

for holding that the Appellant did not own the EMAC Certificates.

In reply thereof, the Respondent submitted that the EMAC Certificates were issued to Macmillan Aidan Ltd, and not to Aidan Publishers Ltd; thus, the Appellant cannot use the said certificates for publication purposes.

In order to ascertain the validity of the above conflicting submissions by parties, the Authority deems it necessary to review Section 31(4) of the Companies Act, which was relied upon by the Appellant. The said provision is reproduced hereunder:

“A change of name by a company under this Section shall not affect any rights or obligations of the company or render defective any legal proceedings by or against the company and any legal proceedings that might have been continued or commenced against it by its former name may be or continued or

commenced against it by its new name.”
(Emphasis supplied)

Based on the above provision, the Authority observes that, the change of name does not affect the rights and obligations of a company. Furthermore, the documents submitted before this Authority indicate that the name of Macmillan Aidan Ltd was changed to Aidan Publishers Ltd and at the time the said changes were being effected the EMAC Certificates had already been issued to Macmillan Aidan Ltd.

The Authority is of the settled view that, Macmillan Aidan Ltd and the Appellant are one and the same company. It goes without saying therefore that, the EMAC Certificates which were issued to Macmillan Aidan Ltd belong to the Appellant.

However, due to the ban which has been extended to the Appellant from Macmillan Ltd (UK), the Appellant is not eligible to participate in public tenders, that is to

say, even the EMAC Certificates cannot be used during the period in which the ban applies.

Accordingly, the Authority concludes that, the change of name from Macmillan Aidan Ltd to Aidan Publishers Ltd did not affect ownership of the EMAC Certificates.

4.0 To what reliefs, if any, are the parties entitled to

Having resolved the issues in dispute the Authority proceeded to address the prayers by parties. To start with, the Authority considered the Appellant's prayer that a declaration be issued that a ban of Macmillan Ltd (UK) does not extend to the Appellant. The Authority rejects the prayer as it has already been established under the first issue that the ban of Macmillan Ltd (UK) extends to the Appellant.

With regard to the Appellant's second prayer that, a declaratory order be issued that the EMAC Certificates which were issued in the name of Macmillan Aidan Limited belong to the Appellant; the Authority accepts

this particular prayer as it has already been established under the third issue that the EMAC Certificates rightly belong to the Appellant.

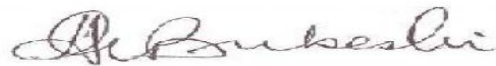
The Authority considered further the Appellant's third prayer for compensation of USD 7,500 being consultation fees, Appeal filing fees, legal fees for the Appeal at hand, accommodation and transport for attending the hearing. It is the view of the Authority that, the Appellant is not entitled to any compensation as the Appeal, to a great extent, has no merit.

As regards the Respondent's prayer that the Appeal be dismissed, the Authority rejects the prayer as the Appeal has some merits in as much as the EMAC Certificates do belong to the Appellant.

On the basis of the aforesaid conclusions, the Authority partly dismisses the Appeal and orders each party to bear their own costs.


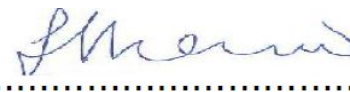
Right of Judicial Review as per Section 85 of the PPA/2004 explained to parties.

This decision is delivered in the presence of the Appellant and the Respondent this 16th day of November, 2012.



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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS:

1. MR. H. S. MADOFFE.....
2. MR. F. T. MARMO.....
3. MR. K.M. MSITA.....