IN THE

PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO 10 OF 2015-16.

BETWEEN

M/S PERNTELS COMPANY LIMITED……………………………………APPELLANT

AND

PUBLIC PROCUREMENT REGULATORY AUTHORITY……1ST RESPONDENT

MKINGA DISTRICT COUNCIL……………2ND RESPONDENT.

DECISION.

CORAM

1. Hon. J (rtd) Vincent K.D.Lyimo - Chairman
2. Eng. Francis T.Marmo -Member
3. Ms. Monica P. Otaru - Member
4. Mr. Ole-Mbille Kissioki - Secretary

SECRETARIAT

1. Mrs. Toni S. Mbillinyi - Principal Legal Officer
2. Ms. Violet S. Limilabo - Legal Officer
3. Mr. Hamisi O. Tika - Legal Officer

FOR THE APPELLANT

1. Ms.Madina Chenge -Advocate, IMMMA Advocates
2. Ms. Antonia Agapiti -Advocate, IMMMA Advocates
3. Mr. Richard Magembe -Managing Director

FOR THE 1ST RESPONDENT

1. Ms. Winifrida Samba - Manager, Contract Management.
2. Ms.Maria G.Mng'ong'o -Legal Officer

FOR THE 2ND RESPONDENT

1. Mr. Hospis Mwaswanyia -District Solicitor
2. Mr. Edson Saguti -Council Technician

This Decision was due for delivery today 25th November 2015 and we proceed to do so.

This Appeal was lodged by M/s PERNTELS COMPANY LIMITED (hereinafter referred to as "the Appellant") against the PUBLIC PROCUREMENT REGULATORY AUTHORITY (PPRA) and MKINGA DISTRICT COUNCIL (hereinafter referred to as the 1st and 2nd Respondents respectively). It is in respect of the debarment of the Appellant emanating from the performance of Contract No. No.LGA/133/2014/FR/W/10 for Periodic Maintenance, Routine Maintenance and Spot Improvement of Bosha-Muzi and Kauzeni-Churwa-Kuze Roads (hereinafter referred to as "the Contract").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), as well as oral submissions by the parties during the hearing of the Appeal, the facts of this Appeal may be summarized as follows:

On 7th November 2014, the Appellant and the 2nd Respondent executed Contract No. LGA/133/2014/FR/W/10 at a contract price of TZS 30,025,000/=. The works consisted of:

- Preliminary and general items
- Site Clearance
- Light grading
- Light reshaping
- Culvert desilting
- General work on routine, periodic and spot improvement as per BOQ

The completion date was set to be three months from the date of the start date of the works.

On 8th December 2014, the 2nd Respondent issued Certificate No 1 in respect of the above Contract. It was indicated that the works executed were worth TZS. 23,545,000/= and the Appellant was required to complete the remaining works before he could claim the remainder. The 2nd Respondent instructed the Appellant of the

above requirement through a letter with Ref. LGA/133/2014/2015/RF/W/10/11 dated 23rd December 2014.

The Appellant complied with the instructions and remedied the shortfalls identified by the 2nd Respondent. Upon completion, the Appellant through his letter dated 26th January 2015, wrote to the 2nd Respondent handing over the works and claimed his outstanding amount of TZS. 8,775,638/=.

According to the Appellant, the 2nd Respondent's site supervisor inspected the completed works and confirmed verbally that the works had been successfully completed as per the terms of the Contract save for few areas that were flooded. Apart from the verbal assurances, the 2nd Respondent's Engineer by his letter dated 27th May 2015, wrote to the Accounting Officer confirming that the Appellant had completed the works and that Interim Certificate No.2 should be issued to the Appellant for payment of TZS. 4,043,200/-. The said letter was also copied to the Appellant who was told to go to collect the said Certificate and the payments.

After the Appellant had collected the said payments, he inquired as to when the balance of TZS. 4,043,200/- would be paid. That is when he was informed that the said amount would not be paid until he had completed shortfalls addressed to him through the 2nd Respondent's letter dated 24th February 2015, which the Appellant denied to have received.

The Appellant visited the 2nd Respondent's offices whereby he was served with the letter dated 24th February 2015 and upon noting the contents therein, the Appellant wrote to the 2nd Respondent a letter dated 3rd June 2015, requesting the Respondent to reconsider the costs for mobilizing personnel for the rectification of the works which had been declared as successfully completed. There was no response from the 2nd Respondent until 7th October 2015 when the Appellant read from the Guardian newspaper the Notice of

Debarment published by the 1st Respondent. The Notice showed that Appellant had been barred from participating in the construction industry in Tanzania for a period of two years.

Upon the said publication, the Appellant visited the 1st Respondent's offices only to find that there were several letters addressed to him which he had not received. Among those were the following;-

- A letter dated 1st June 2015 in which the 2nd Respondent acknowledged that the Appellant's work was successfully completed in accordance to the terms of the Contract;
- A letter dated 24th July 2015, from the 2nd Respondent terminating the Contract for poor execution of the works by the Appellant;
- A letter dated 31st July 2015, from the Contractors Registration Board (CRB) requiring the Appellant to show cause within 14 days as to why it should not be barred from carrying out construction works in Tanzania.

SUBMISSIONS BY THE APPELLANT

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

First, that the Appellant had executed the works and handed over the same in accordance with the terms of the Contract, as evidenced by the two Interim Payment Certificates No 1 and 2 issued by the 2nd Respondent.

Second that the Appellant had not been granted the right to be heard prior to being barred and blacklisted by the 1st Respondent.

In expounding the second ground of appeal, the learned counsel for the Appellant referred the Appeals Authority to various decided authorities in support of the argument that the Appellant had no Notice of the debarment proceedings.

The learned counsel started by making reference to the provisions of the Public Procurement Act and its Regulations. She submitted that the purpose of Section 96 (1), (3) and (4) of the Public Procurement Act (Act) is to accord a tenderer the right to be heard before blacklisting. To the contrary, the 1st Respondent did not accord the Appellant this right. Further, the 1st Respondent did not comply with the requirements of Section 82 of the Interpretation of Laws Act, Chapter 1, 2002 R.E. by failing to properly address the said letter to the Appellant since it did not contain the registered physical address. The learned counsel argued that under the said Act, read together with the Companies Act, Chapter 212, the address of the Appellant was his physical address which had been availed to the 2nd Respondent who in turn should have given it to the 1st Respondent. She submitted that the letter addressed to the Appellant did not contain his whereabouts. Thus, the 2nd Respondent did not fulfill its obligation of informing the 1st Respondent the correct address of the Appellant.

Furthermore, the counsel submitted that, Section 470 of the Companies Act, Cap 212 of R.E. 2002 provides the manner in which communication amongst the parties should be. That includes the physical and postal addresses of the recipient. The learned counsel for the Appellant argued that the 1st Respondent's Notice in this Appeal did not comply with such requirement, that's why the letter was returned unclaimed. The presumption of the law is that the letter is deemed to have been delivered to the recipient only if it is not returned. When the letter is returned to the sender it would only mean that the intended recipient had not been contacted. The learned counsel rested her submissions by referring this Appeals

Authority to a number of decided cases to support her argument that the Appellant had not been notified and that he had not been given the opportunity to be heard on the debarment proceedings. She cited the following cases:-

(i) The National Bank of Commerce Limited versus National Chicks Corporation Limited *et al,* Commercial Case No. 11 of 2014, unreported;

(ii) Eriyazal Senkuba V. Uganda Credit and Savings Bank, [1965] E.A,

(iii) R .V. London Quarter Sessions [1956] 1 All E.R and

(iv) Beer V. Davies [1958] 2 All E.R,

To conclude on the submissions, the Appellant also stated that the provisions allow the Respondent to embark on disbarment proceedings upon expiration of 14 days from the date of service of the Notice. In this case, since the letter had been returned unserved, the 1st Respondent ought not to have engaged in the disbarment proceedings. Further, the Appellant insisted that the Respondent did not follow procedures envisaged under Clause 27 of the General Conditions of the Contract which required parties to settle their disputes by mutual discussion or arbitration procedures and prayed for the following orders:-

a. A declaration that the act of the Respondents banning and blacklisting them being null and void;

b. An order requiring the 2nd Respondent to pay the outstanding sum of TZS. 3,224,000/- due and payable under the contract;

c. General damages to be assessed in such manner as this Appeals Authority deems fit; and

d. Costs of this Appeal.

THE REPLIES BY THE 1ST RESPONDENT

In response to the Appellant's grounds of Appeal, the 1st Respondent's replies may be summarized as follows;

That, the 2nd Respondent conducted inspection of the works performed by the Appellant and observed that they were not completed as per the terms of the Contract.

That, the 1st Respondent communicated to the Appellant through the same address as other letters claimed to have been received by them but denied the assertion that the Appellant was denied the opportunity to be heard.

The 1st Respondent submitted that, the procedures to debar the Appellant were followed as prescribed by the law. The Appellant was issued with a Notice of Intention to debar with Ref. No. PPRA/LGA/133/52 dated 12th August 2015, and the Appellant was required to submit his defense in writing to the 1st Respondent. The said Notice was communicated through the Appellant's registered mail box address and as per several communications the Appellant made with the 2nd Respondent prior to and after the award of the contract. However, the Appellant did not respond to the Notice despite several reminders issued by the Post Office. In support of its submissions, the 1st Respondent tendered certified copies of receipts in respect of registered postal parcel which contained the Notice of debarment. The said receipts are Nos. RD 029241161TZ dated 25th August 2015, 2nd September 2015 and 17th September 2015 from the Post Office, Kariakoo Branch respectively, to show service of the 1st, 2nd and 3rd reminders made by the Post Office. The 1st Respondent stated that these receipts were issued as evidence of the reminder notices (FORM P13) which were issued and collected by the mail renter but without collecting the registered parcel. He argued that whoever, collected the notices (P13) consciously avoided retrieving the registered parcel.

The 1st Respondent submitted also that a public notice to require the Appellant and other bidders to collect their Notices was also published in the PPRA website and in the Tanzania Procurement Journal (TPJ) Vol. VIII, 37th Edition dated 15th September, 2015 and Vol. VIII, 38th Edition dated 22nd September 2015, respectively. Through the said notices, the Appellant was required to submit his defense on or before 29th September 2015, which was within the timeframe of thirty days stipulated under Section 62 of the Act and Regulation 98 of the Public Procurement Regulations (G.N. 446 of 2013). However, the Appellant failed to submit his defense by the set deadline.

That, the Notice of intention to debar issued to the Appellant clearly stipulated that if the Appellant fails to submit his defense within the given time, it would be presumed that he had no objection to the debarment. Henceforth, the Board of Directors of PPRA through a Circular Resolution No. 08 dated 1st October, 2015 approved the Appellant to be debarred from participating in public procurement for a period of two years from 2nd October, 2015 to 1st October, 2017.

With regard to various authorities cited by the Appellant to support his case, the 1st Respondent submitted that the same are distinguishable. The Appellant in this case was served with three reminders (P13) referred to above, which were always retrieved from the Post by the owner of the mail box but at the same time avoiding to collect the registered parcel. Furthermore, the post box which the Appellant was using is one which belongs to Richard Magembe, the Managing Director of the Appellant. This is evidence that the Appellant Company shared the same registered address and postal address with Magembe.

Wherefore, the 1st Respondent prays as follows-

i. The Appeal be dismissed in its entirety for lack of merits;

ii. Costs of the Appeal; and

iii. Any other relief as Appeals Authority may deem fit to grant.

THE 2ND RESPONDENT'S RESPONSE TO THE GROUNDS OF APPEAL

The 2nd Respondent's replies to the Appellant's grounds of appeal may be summarized as follows:

The Appellant had never completed the works as per the Contract and there was no project hand over. The 2nd Respondent further submitted that the interim certificates so issued were in respect to works which had been certified as completed and that in this Appeal there is no final certificate of completion.

With regard to the blacklisting, the 2nd Respondent submitted that the process of blacklisting the Appellant was done by the 1st Respondent and was in accordance with the law. The 2nd Respondent prayed for dismissal of the Appeal for lack of merits.

ANALYSIS BY THE APPEALS AUTHORITY

Based on the submissions by both parties, there are two issues calling for determination. And these are;

a) Whether the execution of the works under the Contract was in conformity with the terms and conditions of the Contract; and

b) Whether the Appellant was denied the right to be heard at the debarment proceedings.

It will be observed that all issues relating to the execution of the Contract or management thereof between the Appellant and the 2nd Respondent are issues which ought to have been deliberated upon by the parties had the Appellant responded to the Notice of Intention for debarment. In view of this observation, the Appeals Authority will not delve into those issues which are within the mandate of the 1st Respondent. Therefore, there remains one issue for determination by this Appeals Authority. And that is, whether the Appellant was denied the right to be heard before debarment.

In resolving this issue, the Appeals Authority revisited the availed documents and observed that indeed the 1st Respondent issued a Notice of Intention to debar the Appellant on 12th August 2015, and the same was sent to the Post Office for service to the Appellant on 13th August 2015. The Appeals Authority has noted that there were three reminders issued by Kariakoo Post Office Branch because the registered parcel intended for service onto the Appellant had remained uncollected. There is no doubt that the registered parcel was finally returned to the sender. The main issue is whether the Appellant was duly served as alleged by the 1st Respondent.

In responding to this key question, the Appeals Authority revisited Section 82 of the Interpretation of Laws, Chapter 1, cited by the Appellant's counsel and observed that communication becomes effective once a letter is properly addressed and posted to the known address. The provision provides further that if the document is eligible and acceptable for transmission as certified mail, the service or the document may be effected either by registered post or by certified mail. The proviso reads-

S.82 *(1)Where a written law authorizes or requires a document to be served by post, whether the word "serve" or any other words "give", "deliver" or "send" or any other similar word or expression is used, service shall be deemed to be effected by properly addressing and posting (by pre-paid post) the document as the letter to the last known address and unless the contrary is proved, to have been effected at the time when the letter would have been delivered in the ordinary course of post.*

(2) Where a written law authorizes or requires a document to be served by registered post, whether the word "serve" or any other words "give", "deliver" or "send" or any other similar word or expression is used, then, if similar word or expression is used, then, if the document is eligible and acceptable for transmission as certified mail, the service or the document may be effected either by registered post or by certified mail.

From the above provisions, the Appeals Authority is of the considered view that immediately after the 1st Respondent had posted the Notice of Intention which had been correctly addressed to the Appellant, it had discharged its obligation since it was an acceptable means of transmission by law and thus they effectively communicated to the Appellant.

The Appeals Authority further revisited Section 470 of the Companies Act; Chapter 212 of the 2002 R.E. relied upon by the Appellant to verify her submissions that the 1st Respondent ought to have included the physical address of the Appellant as required by the Section. In the course of doing so, the Appeals Authority

observed that the said provision does not support the learned counsel's arguments. There is nowhere in the provision that requires a sender of a registered parcel to include the physical address of the addressee. The sender has the option of using one of the three methods. He is not obliged to use two at one and the same time. The Section reads;

> *Section 470 (1)* *" A document may be served on a company by serving it personally on an officer of the company, by sending it by post to the registered address of the company in Tanzania, or by leaving it at the registered office of the company"*
>
> *(2) A document may be served on the Registrar by leaving it at or sending it by post to his office.*

In view of the above findings, the Appeals Authority does not concur with the Appellant regarding the mode of service as argued by the counsel.

Last but not least, the Appeals Authority revisited the Appellant's cited authorities and observed that the same are distinguishable from the current Appeal. As can be discerned from the cited authorities, notice will not have been served where the parcel is returned to sender. In this case, the three receipts which had been referred to above clearly indicate that at various dates the postal office sent reminders in the form of P13. These were all collected by the mail box renter but without collecting the registered parcel. It was asserted by the 1st Respondent that the mail box renter is one Richard Magembe, the Managing Director of the Appellant's Company. By necessary implication, and this was not controverted the Appellant Company and Richard Magembe shared the said addresses. It is the firm view of the Appeals Authority that whoever

collected those reminders from the Post Office strenuously avoided, to collect the registered parcel, the subject matter of those reminders. Authority hereby finds as a fact that the Appellant was duly served with the Notice of Intention to debar him. Consequently, he was given the right to be heard. In the upshot, the Appeals Authority rejects the submissions by the Appellant.

In view of the above findings, the Appeals Authority's conclusion with regard to this issue is that, the Appellant was not denied his right to be heard before debarment.

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

Having resolved the issue in dispute, the Appeals Authority considered the prayers by the parties.

To start with, the Appeals Authority considered the prayers by the Appellant and observed that since they were accorded the right to be heard by the 1st Respondent an opportunity which was avoided, their prayers must fail.

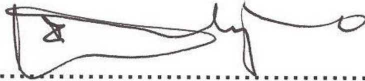
With regard to the prayers by the Respondents that, the Appeal be dismissed for lack of merits, the same is hereby upheld save for the order as to costs since the Appellant assumed his own risk. Each party to bear its own costs.

On the basis of the aforesaid findings, the Appeals Authority dismisses the Appeals for lack of merits.

The parties have their right of Judicial Review under Section 101 of the Act.

Delivered in the absence of the Appellant and the Respondents this 25th November, 2015.

Decision delivered in the absence of the Appellant and the Respondents this 25th November 2015.



JUDGE (RTD) VINCENT K.D.LYIMO

CHAIRPERSON

MEMBERS:

ENG. F. T. MARMO

MS. M. P. OTARU