

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 47 OF 2023 - 2024

BETWEEN

M/S SUNSHINE MINING LIMITED..... APPELLANT

AND

THE MINING COMMISSION 1ST RESPONDENT

THE MINISTRY OF MINERALS.....2ND RESPONDENT

RULING

CORAM

- | | |
|-------------------------------------|---------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Adv. Rosan Mbwambo | - Member |
| 3. Mr. Rhoben Nkori | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

- | | |
|-------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Agnes Sayi | - Senior Legal Officer |
| 3. Ms. Violet Limilabo | - Senior Legal Officer |
| 4. Mr. Venance Mkonongo | - Legal Officer |

FOR THE APPELLANT

- | | |
|------------------------|-----------------------|
| 1. Mr. Emmanuel Tayari | - Business Consultant |
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| 2. | Mr. Kisusi Rashid | - Advocate - Xclusive Consult |
| 3. | Mr. Victor Mwijage | - Internal Lawyer |
| 4. | Mr. Yang Yangi | - Share Holder |
| 5. | Mr. Sylvester Andrew | - Coordinator |

FOR THE RESPONDENT

- | | | |
|----|----------------------|--|
| 1. | Ms. Jackline Kinyasi | - State Attorney - OSG |
| 2. | Ms. Hadija Ramadhani | - Legal Officer - Mining
Commission |
| 3. | Mr. Leons Welengeile | - Chief Executive Officer - Mining
Commission |
| 4. | Mr. Raymond Baravuga | - Senior Legal Officer - Ministry of
Minerals |
| 5. | Mr. Benson Makala | - Legal Officer - Mining
Commission |
| 6. | Mr. Daudi Mtamike | - State Attorney - Mining
Commission |

M/S Sunshine Mining Limited (hereinafter referred to as "**the Appellant**") has lodged this Appeal against **the Mining Commission** (hereinafter referred to as "**the 1st Respondent**") and **the Ministry of Minerals** (hereinafter referred to as "**the 2nd Respondent**"). The Appeal is in respect of Tender No. BAFEX RL/01/2024 for Development of Retention Licenses (RL 0010/2014, RL 0011/2014 and RL 0012/2014)



previously owned by Bafex Tanzania Limited (hereinafter referred to as **"the Tender"**).

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

On 4th April 2024, the 2nd Respondent through Habari Leo Newspaper invited eligible tenderers to participate in the Tender. The deadline for submission of tenders was set on 23rd April 2024. Tenders were to be submitted to the 1st Respondent. On the deadline, three tenderers, the Appellant inclusive submitted their tenders.

The received tenders were subjected to evaluation. After completion of the evaluation process, the Evaluation Committee recommended award of the Tender to M/S Shanta Mining Company Limited.

On 13th June 2024, the 1st Respondent issued a letter of notification of award to the Appellant. The letter informed the Appellant that the Tender has been awarded to M/S Shanta Mining Company Limited (the successful tenderer). In addition, the letter stated that the Appellant's tender was not successful as it did not comply with all the requirements provided in the Tender Document, hence, it was ranked the second out of three tenderers.

Being dissatisfied with its disqualification, on 14th June 2024, the Appellant submitted a complaint to the 1st Respondent. The Appellant complained that the 1st Respondent did not give reasons which led to its disqualification



contrary to the requirements of Section 60(3) of the Public Procurement Act No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") and Regulation 231(2) of the Public Procurement Regulations, GN. No. 446 of 2013 as amended (hereinafter referred to as "**the Regulations**").

On 19th June 2024, the 1st Respondent issued its decision which dismissed the Appellant's complaint. On 21st June 2024, the Appellant wrote a letter to the 2nd Respondent indicating its dissatisfaction with the 1st Respondent's decision. In addition, the Appellant filed this Appeal on 25th June 2024. On 11th July 2024, the 2nd Respondent issued its decision against the Appellant.

Upon receipt of the Appeal, the Appeals Authority notified the Respondents about the existence of the Appeal and required it to submit a Statement of Reply. In Response thereof, the Respondents raised a Preliminary Objection (PO) on points of law to wit: -

- i) That the Public Procurement Appeals Authority lack jurisdiction to entertain this Appeal; and*
- ii) The Appellant has not exhausted remedies stipulated under the Mining Act Cap. 123 and the Mining (Mineral Rights Applications by Tender) Regulations, 2020.*



When the matter was called on for hearing the following issues were framed which covers the raised PO and the merits of the Appeal, namely: -

1.0 Whether the Appeal is properly before the Appeals Authority;

2.0 Whether the disqualification of the Appellant's tender was justified;

3.0 Whether the award of the Tender to the successful tenderer was proper in law; and

4.0 What reliefs, if any, are the parties entitled to?

After framing the issues, parties were directed to address the first issue relating to the PO before embarking on the merits of the Appeal.

SUBMISSIONS BY THE RESPONDENTS ON THE PO

The Respondent's submissions were made by Ms. Jackline Kinyasi, learned State Attorney from the Office of the Solicitor General. She commenced on the first issue by stating that the Tender was advertised in accordance with Sections 15 and 71 of the Mining Act [Cap 123 R.E. 2019] (hereinafter referred to as "**the Mining Act**"). According to the learned State Attorney the referred provisions empower the Minister responsible for mining to advertise the tender and award it to a tenderer who will promote the development of mineral resources in the designated area. The learned State Attorney added that the procedures for conducting the Tender



process and modality of lodging complaints are provided under the Mining (Mineral Rights Applications by Tender) Regulations, GN. No. 484 of 2020 (hereinafter referred to as "**the Mining Regulations**"). The learned State Attorney submitted that paragraph 1 of the tender advertisement indicated clearly that the Tender process would be governed by the Mining Act and its Regulations. She contended that the Act and its Regulations do not apply to the Tender, because applications by Tender for mining licence is not a procurement under the Act. Section 3 of the Act has defined the word "*procurement*" *"means buying, purchasing, renting, leasing or otherwise acquiring any goods, works, or services, including description of requirements, selection and invitation of tenderers, preparation and award of contracts."* The learned State Attorney elaborated that the definition of the word procurement comprises of the goods, works or services. The Tender does not fall within the definition of the term procurement.

The learned State Attorney submitted that the Tender was floated by the Minister for purposes of issuing a mining licence on the designated area. Thus, the Respondents are not acquiring goods, services or works which could be regulated by the Act and its Regulations. She added that this Tender process would not end up with the signed contract as required by the Act and its Regulations. The successful tenderer for this Tender would be required to apply for the mining licence from the 1st Respondent for purposes of extraction of minerals. Thus, there was no procurement in this Tender, the learned State Attorney contended.



The learned State Attorney stated that the Appellant was aware of the law that regulated the Tender process. After receipt of the notification of award and being dissatisfied, it filed its complaint to the 1st Respondent on 14th June 2024. The 1st Respondent issued its decision on 19th June 2024. Upon receipt of the 1st Respondent's decision and being dissatisfied, on 21st June 2024 the Appellant filed an Appeal to the 2nd Respondent. The learned State Attorney asserted that the Appellant's conduct in this regard shows that it was aware that the dispute resolution under this Tender process was governed by the Mining Regulations and not the Act and its Regulations.

In support of her submissions, the learned State Attorney cited PPAA Appeal Case No. 6 of 2023-2024 between ***M/S China Electronic Power Equipment and Technology Company Ltd VS Tanzania Electric Supply Company Limited*** and PPAA Appeal Case No. 22 of 2023-2024 between ***M/S Ourmast Group Kingshurst Consultants JV and Tanzania Petroleum Development Corporation***. In the referred Appeal Cases, the Appeals Authority dismissed the Appeals for want of jurisdiction. According to her, the reason for dismissal was that the Tender Document specified the applicable law for the Tender. The specified laws ousted the jurisdiction of the Appeals Authority.

In view of the position of the Appeals Authority on the above cited PPAA Appeal cases, the learned State Attorney requested the Appeals Authority to apply the same principle in this Appeal. According to paragraph 1 of the



Tender advertisement, the applicable law for this Tender is the Mining Act and the Mining Regulations. Therefore, the Act and its Regulations are not applicable to the circumstances of this Tender.

On the 2nd point of the PO, the learned State Attorney submitted that upon being dissatisfied with the 1st Respondent's notification of award issued through a letter dated 13 June 2024, the Appellant filed a complaint to the 1st Respondent on 14th June 2024. The 1st Respondent issued its decision on 19th June 2024. Aggrieved further, the Appellant submitted the appeal to the 2nd Respondent on 21st June 2024. The 2nd Respondent was required to issue its decision within fourteen days. Before the 2nd Respondent issued its decision, the Appellant filed this Appeal on 25th June 2024. The learned State Attorney submitted that the Appellant was required to wait for the 2nd Respondent's decision before taking any further steps.

The learned State Attorney submitted that after receipt of the 2nd Respondent's decision and being aggrieved, the Appellant ought to have applied for judicial review to the High Court in accordance with Section 17 of the **Law Reform (Fatal Accidents and Miscellaneous Provisions) Act** Cap 310 R.E. 2019. The Appellant should not have filed an Appeal before the Appeals Authority. This is due to the fact that the governing laws for this tender, ousts the jurisdiction of the Appeals Authority to entertain the Appeal.

The learned State Attorney concluded her submissions on the PO by stating that the Appellant has erred in law for simultaneously pursuing two



avenues which are governed by different laws in seeking remedy. That is, the Appellant has followed the dispute resolution procedures under the Mining Regulations and is seeking redress on the same matter before the Appeals Authority under the Act and its Regulations. The Appellant's act should be considered as forum shopping which is strictly prohibited under the law. Thus, the learned State Attorney prayed that the Appeal be dismissed for being improperly before the Appeals Authority.

REPLY BY THE APPELLANT ON THE PO

The Appellant's submissions were led by Mr. Emmanuel Tayari, Business Consultant assisted by Mr. Kisusi Rashid, learned Advocate. Mr. Emmanuel stated that Section 2(1)(a) of the Act provides guidance on the applicability of the Act. The provision states categorically that the Act will apply to all procurement and disposal by tender undertaken by a procuring entity except where it is provided otherwise.

The Appellant submitted that Section 2(1)(a) of the Act provides for the mandatory applicability of the Act on all public procurement. The Act is a specific law which governs public procurement in this country. According to him, once there is a specific law, the same prevails over the general law.

The Appellant submitted further that much as the application of mineral right by tender as provided for under Section 15 and 71 of the Mining Act, the same has not excluded the Respondents from using the Act and its Regulations when conducting its tenders. The Appellant added that Section 2(5) of the Act states clearly that once there is a conflict with other



laws on matters relating to public procurement, the requirement of the Act prevails.

On the Respondents' proposition that the Tender is not a procurement process, the Appellant contended that procurement has two parts. The first part is as relied upon by the Respondents while the second part relates to disposal of public assets by Tender. The Appellant asserted that the Tender falls under disposal as the Respondent intends to dispose of the identified areas through a grant of a mineral right. Therefore, the Tender is governed by the Act and its Regulations as it falls under public procurement.

The Appellant stated that paragraph 1 of the Tender advertisement has not stipulated the law applicable for this Tender. Instead, it stipulates the powers of the Minister responsible for minerals to invite applications for mining licence by tender. Thus, the Appellant averred that the Tender falls under the ambit of the public procurement. Hence, the Act and its Regulations apply. In view of this position of the law, the Appeals Authority has jurisdiction to entertain the Appeal, the Appellant contended.

The Appellant distinguished all the cases cited by the Respondents for the reason that circumstances of the cited cases are different from the instant Appeal. In the cited cases, it was clearly indicated in the Tender Document that the applicable guidelines for the tender would be the World Bank Procurement Regulations. In the Tender under Appeal the governing law



was not specified. Since the Respondents are procuring entities, the Act and its Regulations apply in the disputed tender.

In relation to the second PO, the Appellant submitted that it exhausted the requirements provided under the Mining Regulations. That is, after being issued with the notification of award letter on 13th June 2024, it submitted a complaint to the 1st Respondent. The Appellant challenged the 1st Respondent's failure to state reasons for the Appellant's disqualification from the Tender process as required by Section 60(3) of the Act and Regulation 231(4) of the Regulations. The Appellant contended that the 1st Respondent issued its reply on 19th June 2024. After receipt of the 1st Respondent's response, on 21st June 2024, the Appellant lodged a notice of dissatisfaction to the 2nd Respondent as it is the accounting officer in terms of Section 15 and 71 of the Mining Act before filing an Appeal to the Appeals Authority.

Therefore, the Appellant exhausted the remedies available in the Mining Act as well as the Public Procurement Act which is the main Act that deals with procurement matters in Tanzania.

ANALYSIS BY THE APPEALS AUTHORITY ON THE PO

1.0 Whether the Appeal is properly before the Appeals Authority

In determining this issue, the Appeals Authority considered the Respondents' submissions that the Appeals Authority lacks jurisdiction to entertain the Appeal since the Tender was advertised in compliance with the Mining Act



and the Mining Regulations. The Appellant on the other hand took the view that the Tender falls under the ambit of public procurement and therefore the Act and its Regulations apply. Hence, the Appeals Authority has jurisdiction to entertain the Appeal.

In determining the parties' contentions, the Appeals Authority reviewed the record of Appeal. It observed that Paragraph 1 of the Tender Advertisement states categorically that the Tender was advertised by the 2nd Respondent in compliance with Sections 15(1) and 71 of the Mining Act. Sections 15(1) and 71 of the Mining Act read as follows:-

"15.(1) Where the Minister considers that it is in the public interest to do so he may, by notice in the Gazette or in a local newspaper, designate any vacant area other than an area already forming part of a reserved area as an area for which he invites applications by tender for -

(a) a prospecting licence or licences;

(b) a mining licence or licences; or

(c) a special mining licence or licences.

71.(1) An application for a mining licence in an area designated as an area in which applications for the relevant licence are invited by tender shall be -

(a) in the prescribed tender form;

(b) accompanied by the prescribed tender fee; and



(c) subject to the terms and conditions of the invitation to tender, shall include the matters required to be included in applications of Division B of this Part.

(2) All applications under this section shall be referred to the Commission for its advice.

(3) On receipt of a report from the Commission, the Minister shall consider the competing bids and shall select the bid which in his opinion will be most likely to promote the expeditious and beneficial development of the mineral resources of the area having regard to-

(a) the programme of prospecting or as the case may be, mining operations which the applicant proposes to carry out and the commitments as regards expenditure which the applicant is prepared to make;

(b) the financial and technical resources of the applicant; and

(c) the previous experience of the applicant in the conduct of prospecting and mining operations.

(4) The successful application under this section shall be treated as an application under section 49, which has priority over any other application."

The above quoted provisions entail that the 2nd Respondent is mandated to invite applications by tender for mining licences, consider the competing bids and select a successful applicant where in his opinion it would promote the expeditious and beneficial development of the mineral resources of the area.

The Appeals Authority observed that much as the 2nd Respondent has been empowered to advertise the Tender for grant of mineral rights, according to



Section 71(2) of the Mining Act, the 1st Respondent is mandated to receive the applications submitted by the applicants in response to the invitation to tender as advertised by the 2nd Respondent. The 1st Respondent is authorized under the Mining Regulations to receive the tender applications and evaluate them as per the provided criteria. Section 71(3) of the Mining Act requires the 1st Respondent after assessing the tenders to submit a report to the 2nd Respondent for a decision on the applicant to be granted a mineral right.

The Appeals Authority reviewed the Mining Regulations and observed that apart from providing guidance on how the received applications by tenders would be processed, it also provides guidance on dispute resolution mechanism for the disputes arising under such tender processes. Regulations 14 and 15 of the Regulations read as follows: -

14. *"Where arose unsuccessful bidder who is not satisfied with the decision of the Commission may within seven days of receiving notification letter, submit a complaint to the Executive Secretary.*
15. *Where an unsuccessful bidder is not satisfied with the decision of the Executive Secretary he may appeal to the Minister who shall make a decision within fourteen days from the date of receiving the Appeal."*

(Emphasis supplied)



Given the above provisions, the Appeals Authority is of the considered view that this Tender was governed by the Mining Act and its Regulations. Settlement of disputes arising therefrom are also governed by the Mining Act and the Mining Regulations.

The record of Appeal indicates that the Appellant was among the tenderers which participated in the Tender. Upon being aggrieved by the notification of award, the Appellant complained to the 1st Respondent pursuant to Regulation 14 of the Mining Regulations. Aggrieved further with the decision of the 1st Respondent, the Appellant Appealed to the 2nd Respondent pursuant to Regulation 15 of the Mining Regulations. The Appellant's conduct in this regard suggests that it was aware of the law governing the Tender and dispute settlement procedures.

The Appeals Authority reviewed Section 2(1),(a),(b) & (c) and 2(5) of the Public Procurement Act relied upon by the Appellant. Section 2(1), (a),(b) & (c) and 2(5) of the Act reads as follows:-

"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-Government entities, for procurement financed from specific public finances; and

(c) Public Private Partnership projects, in their relevant stages.



2 (5) Subject to section 4(1), the extent to which this Act, regulations and rules made under it conflicts with other laws, regulations or rules on matters relating to public procurement and disposal of public assets by tender, the provisions of this Act, regulations and rules made under it shall prevail."

From the above cited provision, it is evident that the Act apply to all procurement and disposal by Tender undertaken by a procuring entity. Based on that requirement, the Appeals Authority reviewed Section 71(4) of the Mining Act and observed that a successful application is treated as an application under Section 49 of the Mining Act which has priority over any other application. In addition, a successful applicant is required to apply for a mining licence under Section 49 of the Mining Act. This process differs with the procurement process under the Act. In view of the provisions of Sections 15, 71 and 49 of the Mining Act, the Appeals Authority finds that the Tender in dispute is not a procurement under the Act.

The Appeals Authority considered Section 2(5) of the Act, which provides guidance on the circumstances where the Act would prevail in the event it conflicts with other laws, regulations and rules in matters relating to public procurement and disposal of public assets. However, in view of our findings hereinabove that the Tender was not a procurement under the Act, as such there is no conflict. Under the circumstances, the Appeals Authority finds



that it lacks jurisdiction to entertain the Appeal. The Preliminary Objection is therefore, sustained.

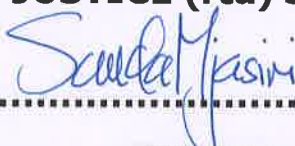
Having sustained the first point of PO, the Appeals Authority would not delve into the second point of law. The Appeals Authority hereby dismiss the Appeal for want of jurisdiction. It is so ordered.

This Ruling is binding 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 Ruling is delivered in the presence of the parties this 2nd day of August 2024.

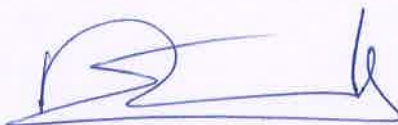
HON. JUSTICE (rtd) SAUDA MJASIRI



.....
CHAIRPERSON

MEMBERS: -

1. ADV. ROSAN MBWAMBO.....



2. MR. RHOEN NKORI.....

