

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 22 OF 2022-23

BETWEEN

M/S RADSA INTERNATIONAL COMPANY

LIMITEDAPPELLANT

AND

REGIONAL REFERRAL HOSPITAL

TABORA.....RESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|---------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Ms. Ndeonika Mwaikambo | - Member |
| 3. Mr. Rhoben Nkori | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

- | | |
|------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Violet Limilabo | - Senior Legal Officer |

FOR THE APPELLANT

- | | |
|-------------------------------|---------------------------------|
| 1. Mr. Paul Mnzava Nyangarika | - Advocate- Nyangarika Advocate |
| 2. Mr. Haruna Hamisi | - Advocate- Nyangarika Advocate |
| 3. Mr. Mussa H. Maarufu | - Managing Director |



FOR THE RESPONDENT

- | | |
|---------------------------|---|
| 1. Mr. Silinde Gumada | - Legal Officer |
| 2. Mr. James B. Ngimbudzu | - Ag. Medical Officer (Ag. MOI) |
| 3. Mr. Silas A. Kassanga | - Environmental Health Officer (EHO) |
| 4. Mr. Amelkior Kulwizila | - Principal Procurement Officer |
| 5. Ms. Jenipher Aman | - Ag. Head of Procurement
Management Unit (Ag. HPMU) |
| 6. Mr. Magunga Mnyambo | - Information and Communication
Technology Officer |

This Appeal was lodged by **M/S Radsa International Company Ltd** (hereinafter referred to as "**the Appellant**") against Regional Referral Hospital Tabora - Kitete (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. ME/007/2022-2023/NC/TRRH/00032 for Cleaning and Gardening Services at the Regional Referral Hospital Tabora – Kitete (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: -

The Tender was conducted through Mini Competition method as specified in the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") and the Public Procurement Regulations as amended (hereinafter referred to as "**the Regulations**").



On 13th October 2022, the Respondent invited fifteen (15) tenderers to participate in the mini-competition. The deadline for submission of tenders was 19th October 2022. By the deadline four tenders were received including that of the Appellant.

On 31st October 2022, the Appellant wrote a letter to the Respondent requesting to be informed of the status of the Tender, as the invitation letter indicated that the execution of the contract would commence on 1st November 2022. The said letter was copied to the Regional Administrative Secretary-Tabora (RAS-Tabora).

On 14th November 2022 RAS-Tabora wrote a letter to the Respondent enquiring on the status of the said Tender. The Respondent through a letter dated 25th November 2022, with Ref. No. AB.78/88/01C/93 responded to RAS-Tabora by informing him that, it intends to re-advertise the Tender under Appeal for the reasons that the user department was not involved and some tenderers failed to access the Tender on TANePS, thus were unable to participate. The said letter was copied to the Appellant.

Dissatisfied with the information contained in the Respondent's letter addressed to RAS-Tabora, on 6th December 2022, the Appellant applied for administrative review to the Respondent. The Appellant challenged the reasons advanced by the Respondent on the ground that if the user department was not involved where did it obtain specifications of the Tender and the budget thereof. Furthermore, fifteen (15) tenderers were



invited to participate and four responded to the invitation, hence it cannot be claimed that some tenderers failed to participate.

The Appellant filed this Appeal on 23rd December 2022. On the same date the Appellant received the Respondent's response on its application for administrative review dated 13th December 2022.

When the matter was called on for hearing the following issues were framed:-

- 1.0 Whether the Appeal is pre-maturely before the Appeals Authority;**
- 2.0 Whether the Appellant's complaints relating to Tenders postponed by the Respondent previously are properly before the Appeals Authority;**
- 3.0 Whether the Respondent's decision to re- advertise the Tender was justified; and**
- 4.0 What reliefs, if any, are the parties entitled to.**

SUBMISSIONS BY THE APPELLANT

In this Appeal the Appellant was represented by Mr. Paul Nyangarika and Mr. Haruna Hamisi, learned Advocates. Mr. Hamisi argued the appeal. On the first issue the learned counsel submitted that Regulation 105 and 106 of the Regulations requires a tenderer who is aggrieved by the decision of the accounting officer on an application for administrative review to file an Appeal before this Appeals Authority within seven working days of becoming aware of such a decision.



The learned counsel contended that the Appellant filed an application for administrative review to the Respondent on 6th December 2022 after becoming aware that the Respondent intends to re-advertise the Tender. The Respondent issued its decision with respect to the Appellant's application for review through a letter dated 13th December 2022 which was received by the Appellant on 23rd December 2022. The Appellant filed this Appeal on 23rd December 2022 that is within seven working days from the date the Respondent issued its decision. Therefore, the learned counsel submitted that the Appeal is properly before the Appeals Authority as it was lodged in accordance with the law.

On the second issue the learned counsel submitted that complaints relating to Tender No. CAB.17/135/01/99 advertised on 8th January 2021, Tender No. CAB.17/135/01/133 advertised on 6th August 2021 and Tender No. ME/007/2022-2023/NS/TRRH/00032 advertised on 13th October 2022 are all properly before the Appeals Authority. The learned counsel submitted that Regulation 104 and 106(9) of the Regulations allows a tenderer who is dissatisfied with the procuring entity's conduct on any procurement process to challenge the same by way of an application for administrative review and subsequently an Appeal to this Appeals Authority. The learned counsel submitted that, upon being dissatisfied with the Respondent's act of floating tenders and re-advertising the same before finalization, the Appellant challenged the process as per the requirements of the law.



The Appellant submitted further that reference has been made to the previous floated tenders in order to provide the background of the Respondent's conduct and the trend in handling previous tenders which it intends to extend to the current Tender.

With regard to the third issue the learned counsel submitted that the Tender which is the subject of this Appeal was advertised before the process for tenders floated in January and August 2021 was finalized. Again before the Tender under Appeal was finalized the Respondent intends to re-advertise the same. The Appellant challenged the Respondent's conduct in this regard as it intends to indirectly extend the contract of service to the existing service provider.

The learned counsel contended that the Respondent had re-advertised the current tender more than two times and during all this time the contract of service was extended to the existing service provider. According to the Appellant, the Respondent's act in this regard led the existing service provider to have running contracts which is prohibited under Regulation 83(1) of the Regulations. The said Regulation prohibits procuring entities from having unlimited running contracts.

The learned counsel submitted further that according to Regulation 3 of the Regulations, the term "*running contracts*" has been defined to mean:-

"A contract extending over a period of time for an estimated or variable quantity of goods, services or works obtained through request for submission of unit rates which are applied over an



extended period of time and which offer the procuring entity to engage such tenderers without further competitive tendering'.

The learned counsel submitted further that as per the Tender opening record the Appellant was the lowest tenderer and therefore it deserved to be awarded the Tender.

Finally, the Appellant prayed for the following orders:-

- i. The Appeal Authority to intervene and require the Respondent to conduct the Tender process in accordance with the law;
- ii. The Respondent be ordered to declare the Appellant as the successful tenderer for the Tender;
- iii. A declaration that postponement of Tender No. CAB/17/135/01/99, Tender No. CAB/17/135/01/133 and Tender No. ME/007/2022-2023/NC/TRRH/00032 by the Respondent was contrary to the law;
- iv. A declaration that the Respondent's act of extending contract of the existing services provider was contrary to the law;
- v. The Respondent be ordered to compensate the Appellant the following costs:-
 - a) Appeal filing fees – TZS 300,000.00;
 - b) Legal fees;
 - c) Costs for preparations of bids – TZS 5,000,000.00;
 - d) Costs for preparation and submission of application for administrative review – TZS 4,000,000.00;
 - e) Costs for preparation of this Appeal TZS 4,000,000.00;and



- f) Costs for attending this Appeal and other overhead expenses - TZS 30,000,000.00

SUBMISSIONS BY THE RESPONDENT

The Respondent's submissions were led by Mr. Silinde Gumada, Legal Officer (State Attorney) from the Regional Administrative Secretary's Office – Tabora. On the first issue the learned State Attorney submitted that, the Appeal is pre-maturely before the Appeals Authority as the same has been filed before the finalization of the tender process. The Respondent submitted that the disputed tender process is currently at the evaluation stage and its outcome was yet to be submitted to other internal organs like Tender Board for finalization of the process. The learned State Attorney submitted that at the time the Appellant filed an application for administrative review to the Respondent, the notice of intention to award was yet to be issued.

According to the Respondent in order for a tenderer to challenge the tender process there should be a notice of intention to award which communicated the tender results. The law allows the notice of intention to award to be challenged by way of an application for administrative review and subsequently an appeal to this Appeals Authority.

The Respondent stated that since the notice of intention to award was yet to be communicated to tenderers, the Appellant's application for administrative review lodged on 6th December 2022 which was subsequently followed up by this Appeal were all lodged pre-maturely.



The learned State Attorney submitted further that the Appeal at hand is in relation to the Tender which has not been floated by the Respondent. The learned State Attorney contended that on its Statement of Appeal and its attachments the Appellant intended to challenge Tender No. ME.007/2022-2023/NC/TRRH/003. According to the Appellant the said Tender was floated on 10th October 2022. The learned State Attorney denied that the Respondent floated the above mentioned Tender on the dates indicated. The learned State Attorney therefore submitted that the Appeal is not properly before the Appeals Authority as it is based on the Tender which was not floated by the Respondent.

In relation to the second issue the Respondent submitted that Section 97 of the Act allows tenderers who are dissatisfied with the decision of the procuring entity to file an appeal to the Appeals Authority within seven working days. The Respondent submitted further that Rules 9(1) and (2), 10(1), 14(1) and (2) of the Public Procurement Appeals Rules, GN. No. 411 of 2014 provides guidance in relation to how appeals should be filed before the Appeals Authority.

The learned State Attorney stated that the Appellant's complaints in relation to tenders floated on January and August 2021 are not properly before the Appeals Authority as the same have been raised beyond the stipulated time limit. According to the Respondent, if the Appellant was dissatisfied with Respondent's conduct in relation to the tenders floated in 2021, it ought to have taken immediate steps as per the requirements of the law. To the contrary, the Appellant raised issues relating to

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tenders floated in 2021 in this Appeal. The Respondent contended that in October 2021 the Appellant wrote a letter to the Respondent indicating its dissatisfaction with regard to 2021 tenders. The Respondent responded to the raised queries. However, the Appellant opted not to take further steps as per the requirements of the law. Surprisingly, the Appellant raised the same issues in this Appeal. Therefore, the Respondent urged the Appeals Authority not to consider matters relating to previous tenders as they are out of time.

In support of his argument the learned State Attorney cited the case of **M/S Galilea Limited versus the Bank of Tanzania**, Appeal Case No. 14 of 2020/21 whereby the Appeals Authority dismissed the Appeal for being filed out of time.

The learned State Attorney submitted further that the Appellant's complaints in previous and current tenders were all lodged outside TANEPS while tenders were processed through the system. Had the Appellant lodged its complaints through TANEPS the same would have been easily dealt with by the Respondent and all the tenderers who participated in the tenders would have been aware of what is going on. The learned State Attorney submitted that since the Appellant's application for administrative review and this Appeal were all lodged outside TANEPS, therefore this Appeal is not properly before the Appeals Authority.

On the third issue the learned State Attorney submitted that, the Tender under Appeal is in existence as it is still in the evaluation stage and the



same can be verified through TANePS. The learned State Attorney denied that the Respondent had re-advertised the Tender. He therefore stated that the Appellant's claims in this regard are baseless and unfounded.

In relation to the Appellant's argument on extension of contracts, the learned State Attorney submitted that, the Respondent complied with the law in extending the contract of the existing service provider. He submitted that the Respondent's Accounting Officer is the only person vested with powers to extend the contract pursuant to Section 77(3) of the Act read together with Regulation 111(1) of the Regulations. The said provisions read as follows:-

"Sec.77 (3) the extension order shall be issued only by the accounting officer in accordance with the procedures stipulated in the regulations."

"Reg. 111 an order for extension of time may be issued only by the accounting officer, and that the reasons for granting such an order shall be fully documented in the contract implementation records."

The Respondent submitted further that, much as the law allows extension of contract there is no limitation to that effect. Contracts could be extended as long as procedures are followed. Furthermore, the law does not require that other tenderers be notified on the extensions of the contract made.



On relief the learned State Attorney submitted that, since the Appeal is pre-maturely before the Appeals Authority and it has been brought un procedurally, the Respondent prayed for dismissal of the Appeal as the same is baseless, frivolous and unfounded. The Respondent prayed further that the Appellant be ordered to pay costs of this Appeal.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether the Appeal is pre-maturely before the Appeals Authority;

In resolving this issue the Appeals Authority revisited contentious arguments by the parties. On one hand the Appellant claimed that the Respondent intends to re-advertise this Tender instead of finalizing it. On the other hand the Respondent denied to have any intention to re-advertise the Tender. The Respondent claimed that the Tender still exists and it is at the evaluation stage. Therefore, the Appellant could not have challenged any procedural irregularity by way of an application for administrative review and subsequently this Appeal, as the Tender results were yet to be communicated.

In order to ascertain the validity of the parties' contentions, the Appeals Authority reviewed the record of Appeal and observed that, the Appellant received a copy of the Respondent's letter dated 25th November 2022, addressed to RAS - Tabora. The said letter indicated that the Tender process had some shortfalls and these include; non- involvement of the user department and that some tenderers were unable to access the Tender on TANePS. The said letter also indicated that the Respondent

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intends to re-advertise the Tender. The Appeals Authority observed further that, the Respondent's intention to re-advertise the Tender was derived from the Respondent's management meeting held on 1st November 2022. Amongst the deliberations in the said meeting were that the Tender in dispute was marred with irregularities including leakage of confidential information and therefore it was resolved that a special investigation be conducted on the matter and if the said irregularity would be substantiated the Tender should be re-advertised.

The record indicates that on becoming aware that the Tender would be re-advertised, the Appellant through a letter dated 6th December 2022 applied for administrative review to the Respondent. In the said letter the Appellant challenged the Respondent's intention to re-advertise the Tender as it alleged that the same trend has been recurring in previously floated tenders. The Respondent through a letter dated 13th December 2022 which was received by the Appellant on 23rd December 2022 reiterated its position of intending to re-advertise the Tender as the user department was not involved and some tenderers were unable to access the Tender on TANEPS. Aggrieved with the Respondent's response thereof, the Appellant lodged this Appeal on 23rd December 2022. The Appeals Authority reviewed further the record of this Tender on TANEPS and observed that the Tender is still at the evaluation process.

From the record of Appeal, the Appeals Authority observed that much as the Tender process is yet to be finalized as it is at the evaluation stage, there is sufficient proof that the Respondent Intended to re-advertise the

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Tender. The Respondent's intention in this regard is clearly shown in a letter dated 25th November 2022 addressed to RAS-Tabora and the letter dated 13th December 2022 addressed to the Appellant. The Appeals Authority is of the view that, since the Appellant was not satisfied with the Respondent's act of intending to re-advertise the Tender, it was entitled pursuant to Section 95(1), 96(1) and (4) and 97(1) and (2) (a) and (b) of the Act to challenge the same. The referred provisions read as follows:-

"Sec. 95(1) Any tenderer who claims to have suffered or that may suffer any loss or injury as a result of a breach of a duty imposed on a procuring entity by this Act may seek a review in accordance with sections 96 and 97.

Sec. 96(1) Any complaints or dispute between procuring entities and tenderers which arise in respect of procurement proceedings, disposal of public assets by tender and awards of contracts shall be reviewed and decided upon a written decision of the accounting officer of a procuring entity and give reasons for his decision.

(4) The accounting officer shall not entertain a complaint or dispute unless it is submitted within seven working days from the date the tenderer submitting the complaint or dispute or when that tenderer should have become aware of those circumstances, whichever is earlier."



Sec. 97(1) A tenderer who is aggrieved by the decision of the accounting officer may refer the matter to the Appeals Authority for the review and administrative decision.

(2) Where-

(a) the accounting officer does not make a decision within the period specified under this Act; or

(b) the tenderer is not satisfied with the decision of the accounting officer;

the tenderer may make a complaint to the Appeals Authority within seven working days from the date of communication of the decision by the accounting officer or upon expiry of the period within which the accounting officer ought to have made a decision."

The above quoted provisions *inter alia* gives right to a tenderer who is dissatisfied with the procuring entity's act in respect of a procurement process to challenge the same by way of application for administrative review and subsequently an Appeal to this Appeals Authority. From the record of Appeal it is crystal clear that the Appellant was dissatisfied with the Respondent's intention to re-advertise the Tender and therefore it was proper for it to invoke the provisions of Sections 95, 96 and 97 of



the Act by filing an application for administrative review and thereafter this Appeal.

The Appeals Authority rejects the Respondent's argument that the tender process cannot be challenged prior to the issuance of the tender results or communication of the notice of intention to award. Section 95 of the Act allows a tenderer to challenge the irregularity observed at any stage of the tender process.

The Appeals Authority also considered the Respondent's assertion that the Appellant cited the wrong Tender number and therefore there is no valid Appeal before the Appeals Authority. Having reviewed the record of Appeal the Appeals Authority observed that much as the Appellant has cited the wrong Tender number on its Statement of Appeal, the Appellant's tender on TANePS contained the correct Tender number. The letter dated 28th December 2022 from the Respondent to tenderers which suspended the process also indicated the correct Tender number. Therefore, it was clearly known to both parties which Tender is in dispute. Under the circumstances, the Appeals Authority finds the act of citing the wrong Tender number on the Statement of Appeal to be not fatal.

Based on the above findings the Appeals Authority concludes the first issue in the negative that this Appeal is not pre-maturely before the Appeals Authority.



2.0 Whether the Appellant's complaints relating to Tenders postponed by the Respondent previously are properly before the Appeals Authority

In relation to this issue the Appeals Authority considered the Appellant's submissions that the Appeal at hand is in relation to the current Tender No. ME/007/2022-2023/NC/TRRH/00032. Previously floated Tender No. CAB/17/135/01/99 and Tender No. CAB/17/135/01/133 of 2021 have been referred in this Appeal to demonstrate the Respondent's previous conduct as the same trend is extended on the current Tender. The Appellant conceded that its Appeal is on the current Tender as the previous referred tenders of 2021 are out of time.

Given the concession by the Appellant that the Appeal is on the current Tender No. ME/007/2022-2023/NC/TRRH/00032, the Appeals Authority would not delve into this issue.

3.0 Whether the Respondent's decision to re-advertise the Tender was justified;

In resolving this issue, the Appeals Authority reviewed the record of Appeal and observed that on 31st October 2022 the Appellant wrote a letter to the Respondent requesting to be informed about the status of its submitted tender. The same letter was copied to RAS-Tabora. On 25th November 2022, the Appellant received a copy of the letter addressed to RAS-Tabora from the Respondent indicating that the latter intends to re-advertise the Tender as it has been observed that the user department was not involved and some tenderers were unable to access



the Tender on TANePS, hence they failed to participate. The letter indicated that the said decision was reached at its management meeting held on 1st November 2022.

The record of Appeal indicates further that the Appellant after becoming aware that the Tender would be re-advertised on 6th December 2022 it wrote an application for administrative review to the Respondent. The Appellant's application for review was replied through the Respondent's letter dated 13th December 2022. In this letter the Respondent again indicated its intention to re-advertise the Tender for the same reasons as those adduced in the letter dated 25th November 2022 addressed to RAS-Tabora and copied to the Appellant.

The Appeals Authority observed further that the Respondent on its Statement of Reply and oral submissions during the hearing before the Appeals Authority denied having intended to re-advertise the Tender under Appeal. The Respondent claimed that the Tender is in existence as it is still at the evaluation stage. Having observed that there is contradictory information on the status of the Tender, during the hearing Members of the Appeals Authority required the Respondent to clarify on the contradictions so noted. In response thereof, the Respondent stated that the Tender is still in existence and the Respondent does not have any intention of re-advertising. The Respondent stated further that letters dated 25th November 2022 to RAS-Tabora and 13th December 2022 to the Appellant respectively were written from the insistence of one of the Respondent's personnel who was not conversant with the

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matter. The Respondent insisted that the Tender still exists as no meeting of the Tender Board has taken place which has the mandate to approve the re-advertisement of the Tender. Thus, since there is no Tender Board approval on re-advertisement, the Tender still exists, the Respondent contended.

Looking at the record of Appeal, the Appeals Authority observed that the Respondent's letters dated 25th November 2022 and 13th December 2022 clearly indicated that the Respondent had an intention of re-advertising the Tender. The Appeals Authority noted further that the said letters led the Appellant to challenge the Respondent's conduct by invoking procurement review procedures as the same were official communication as to the status of the Tender.

Furthermore, the Appeals Authority observed that it was not possible for the Appellant to assume that the Tender process was ongoing while official communication from the Respondent indicated that there is an intention to re-advertise the same. The argument that the Tender Board did not approve the re-advertisement does not hold water as it is an internal process and it is not expected to be known by third parties outside the Respondent's office. Therefore, the Appellant can only rely on official communications which are letters dated 25th November 2022 and 13th December 2022.

Given the above circumstances, the Appeals Authority rejects the Respondent's arguments that the letters dated 25th November 2022 and

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13th December 2022 were not communicating the actual status of the Tender.

Having established that the Respondent has an intention of re-advertising the Tender, the Appeals Authority deemed it prudent to ascertain if the re-advertisement is justified. In so doing the Appeals Authority reviewed the letters dated 25th November 2022 and 13th December 2022 and observed that the reasons for re-advertisement were that the user department was not involved and that some tenderers were unable to access the Tender on TANEPS and therefore failed to participate. In establishing the validity of the Respondent's justification the Appeals Authority reviewed the Tender Board meeting held on 10th October 2022 and observed that the user department was involved. The minutes of the said meeting clearly indicated that the Procurement Management Unit prepared the Tender Document after receiving the requirements of the Tender from the user department. It was further observed that the list of the attendees showed that the personnel from the user department also participated on the said Tender Board meeting where the draft Tender Document was modified.

In view of the above facts the Appeals Authority finds that the user department was involved, thus the Respondent's assertion that it was not involved does not have a leg to stand on.

The Appeals Authority reviewed the Tender on TANEPS and observed that fifteen tenderers were invited to participate on this Tender and amongst them four responded by submitting their tenders. The Appeals

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Authority failed to understand the Respondent's justification that because only four tenderers participated the Tender should be re-advertised.

Section 59(3) of the Act provides as follows:-

"S.59(3) The lack of competition shall not be determined solely on the number of tenderers or persons who made proposals, and where all tenders or proposals are rejected, the procuring entity shall review the cause justifying the rejection..."

(Emphasis supplied)

From the above quoted provision, the Appeals Authority finds the Respondent's assertion that the re-advertisement was necessitated by the fact that some tenderers failed to participate on the Tender to have no basis.

In view of the above analysis the Appeals Authority finds the Respondent's decision to re-advertise the tender to have no basis. Therefore, the third issue is answered in the negative.

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

Taking cognizance of the findings made on the third issue herein above that the Respondent's decision to re-advertise the tender is not justified, the Appeals Authority hereby allow the Appeal and orders the Respondent to proceed with the Tender process in observance of the law. Each party is to bear its own costs. It is so ordered.

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

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

This Decision is delivered in the presence of the parties this 26th day of January 2023.

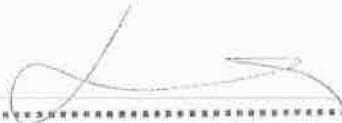
HON. JUSTICE (RTD) SAUDA MJASIRI



CHAIRPERSON

MEMBERS: -

1. MS. NDEONIKA MWAIKAMBO



2. MR. RHOBEN NKORI

