IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISC.CIVIL CAUSE NO. 22 OF 2020

IN THE MATTER OF APPLICATION FOR ORDERS OF CERTIORARI AND MANDAMUS

BETWEEN

EMERGING MARKET POWER (T) LTD.....APPLICANT

AND

THE PUBLIC PROCUREMENT APPEALS AUTHORITY.....1ST RESPONDENT
THE ATTORNEY GENERAL .....2ND RESPONDENT

RULING

Date of the Last Order: 22/09/2021
Date of the Ruling: 28/10/2021

NANGELA, J.;

This is an application for the orders of certiorari and mandamus. The application has been brought by way of a chamber summons filed under section 101 of the Public Procurement Act, 2011 (as Amended), section 2 (1) and 2 (3) of the Judicature and Application of Laws Act, Cap 358 R.E 2019], section 19 (2) and (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310 R.E 2019], Rule 5 (1), (2) and (3) of the Law Reform (Fatal Accidents and Miscellaneous) Provisions) (Judicial Review

Procedure and Fees) Rules, 2014 (Government Notice No. 324 of 2014) and section 95 of the Civil Procedure Code, Cap 33 R.E 2019.

As usual, the current application is supported by an affidavit of one Zabron Mwaipopo who is the principal officer of the Applicant, together with the Statement of the Applicant. In the statement, the reliefs sought are three, namely:

(i) an order of certiorari to quash the decision of the 1st Respondent, an order for mandamus to direct 1st Respondent to issue an order directing the TANESCO to re-open and restart a tender,

(ii) costs of this application to be borne by the 1st Respondent, and

(iii) any other relief in favour of the Applicant.

The grounds upon which those reliefs are based are also as follows:

1. That the 1st Respondent was in error in law by deciding that the Applicant was ineligible for lacking the power of Attorney of a Lead Member.
2. That the 1st Respondent erred in law for holding that the Applicant

lacked a locus standi due to the expired Power of Attorney.

3. That the 1st Respondent erred in law by deciding that the Applicant lacked locus standi based on an international document.
4. That the 1st Respondent erred in law and fact by not deciding that the Applicant was eligible to apply for administrative review in relation to TANESCO.
5. That the 1st Respondent erred in disregarding numerous valid and meritorious grounds of appeal.

By way of background based on the pleadings filed by the parties herein, it all started sometimes on 20th September 2018, when the Tanzania National Electricity Supply Company, better known by its acronym TANESCO, issued an Invitation for Qualification of Large Wind Power Generating Projects.

The tender **No.PA/001/2018-19/HQ/N/034** had called upon various applicants to submit Request for Qualification (RFQ) and, the 19th day of October 2018, was a deadline submission date. On the appointed date (i.e., the 19th day of October, 2018) the Applicant herein did submit, on behalf of a consortium of players, the requisite Request for Qualification (RFQ). For clarity purposes, the Consortium

was made of the Applicant together with *Vestas Wind System A/S* (through *Wind Power A/S*); *Emerging Markets Power (NI) Limited*; *Climate Investor One*; and *JCM Power*.

On the 2nd day of December 2018, and for undisclosed (unavoidable) reasons, TANESCO cancelled/annulled the tender and that annulment was made public. However, on the 5th day of August 2019, after some months down the line, TANESCO issued a fresh request for the proposals (RFP) for the Tender, together with Profoma Power Purchase Agreement (PPA). The RFP was to be submitted by the 8th day of December 2019. Even so, the date of receipt of proposal was rescheduled or postponed on a number of times, the first time being the 8th day of January 2020. On the first postponement TANESCO issued a statement of rationale or clarification, Ref. SMP/IMP/PMU/19/18/494, clarifying the reasons for the delay.

On the 18th October, 2019, however, the Applicant had written to TANESCO expressing its concerns and sought for explanations regarding the postponement but could not be availed with such explanations. On the 24th December 2019, yet another statement was issued by TANESCO delaying the date of receipt of the RFP to 14th February 2020. The Applicant submitted the RFP on that new date set by TANESCO. On the 1st day of June 2020, TANESCO notified the Applicant that, its Technical Proposal had been

disqualified, ranking last out of all proposals received, and, that, its Financial Proposal was not going to be considered. Dissatisfied by that decision, the Applicant applied for an Administrative Review of the decision by TANESCO.

On the 17th day of June 2020, TANESCO provided the Applicant with breakdown of the Applicant's Technical Proposal's scores. On the 18th day of June 2020 affirmed its decision and the reasons for the disqualification. Still dissatisfied, the Applicant lodged an Appeal to the Public Procurement Appeals Authority (**PPAA**) against TANESCO's decision. Unfortunately, the Applicant's efforts were not greeted with a smile, since, the appeal lodged before the **PPAA** got dismissed on the ground that, the Applicant lacked the requisite ***locus standi*** to file it. Still displeased, on 3rd August 2020, vide **Miscellaneous Civil Application No. 37 of 2020**, the Applicant succeeded to obtain leave of this Court to file an application for Judicial Review. That leave of the Court was granted on 19th November 2020, hence, this application.

On 2nd December 2020, the Applicant filed this Miscellaneous Cause No. 22 of 2020, seeking for orders of Certiorari and Mandamus to quash the decision of the 1st Respondent and to direct the 1st Respondent to issue an order directing TANESCO to quash the decision to disqualify the Applicant from the Tender process. The Respondents has contested this application by way of filing their counter

affidavit. They also raised preliminary legal issues which, nevertheless, were overruled by this Court on 13th July 2021, as the points raised were matters for which evidence would be required to ascertain them and could be raised in the course of the hearing and disposal of the application.

When this application was thus scheduled for its hearing, Mr. Reginald Martin was the learned Advocate represented the Applicant, while Ms Gati Mseti, learned State Attorney, represented for the Respondents. On the material date, it was agreed that, it be disposed of by way of written submission. I issued a schedule of filing of the written submissions/ and, I am glad that both learned counsels for the parties herein filed their respective submissions timely, as ordered by the Court.

In his submissions, and adopting the contents of the affidavit and statement of the Applicant as forming part of his submission, Mr Reginald supported the Applicant's prayers. He submitted that, the decision of the 1st Respondent dated 17th July 2020 which dismissed the Applicant's Appeal for lack of *locus standi*, should be quashed and set aside. He contended further that, an order of mandamus should issue directing the 1st Respondent to order TANESCO to nullify its administrative decision which was the subject of Appeal before the 1st Respondent in respect of Tender No. PA/001/2018-19/HQ/N/034.

The learned counsel for the Applicant relied on the cases of **Mary Tuyate vs. Grace Mwambenja and another,** Land Appeal No. 42 of 2019, (unreported), **Lujuna Shubi Balonzi vs. Registered Trustee of CCM** [1986] T.L.R. 203, and **R vs. Paddington, Valuation Officer, ex parte Peachey Property Corpn Ltd** [1996] 1 QB 380 to explain what does the concept of **locus standi** is all about.

It was Mr Reginald's submission that, for one to be lacking *locus standi*, he/she must have no right or interest in that particular matter at hand. He submitted that, in this particular matter, the Applicant was not just a stranger or a '*busybody*', but was one among other bidders who participated in the bidding process. As such, it was contended, the Applicant had all rights to bring the claims against TANESCO before the 1st Respondent.

Mr Reginald submitted further on the issue of expired Power of Attorney, this being one of the decisive issues discussed in the 1st Respondent's decision sought to be quashed. According to him, that particular Power of Attorney was still valid since it was issued and accepted by TANESCO previously, only that, TANESCO had extended deadline in which the RFP's were to be submitted twice. He referred this Court to **Annex.EMP-3** and **4** attached to the application.

The learned counsel for the Applicant contended that, that particular Power of Attorney was issued with expectation that the tender process was to be completed by 31st January 2020. He contended that, the Applicant acted on the assumption that another Power of Attorney was to be produced during the award of tender as per Regulation 9(10) (d) of the Public Procurement Regulation, 2013.

To buttress his point and the unambiguous nature of Regulation 9 (10) (d) of the Public Procurement Regulation, 2013, reliance was placed on the decision of the Court of Appeal in the case of **R vs. Mwesiga Geofrey and Another**, Crim. Appeal No.355 of 2014, regarding unambiguous words of a statute and what the Court should do. As such, he concluded that, the 1st Respondent acted erroneously in deciding and dismissing the Applicant's appeal.

It was the Applicant's views that, the 1st Respondent was supposed to adjudicate the matter laid before it since, the latter's reliance on Clause 1.4 of the Joint Bidding Agreement was erroneous. He contended that, the erroneous nature of such reliance was based on the fact that, the matter placed before the 1st Respondent was neither a bid, project nor contract between the Applicant and the 1st Respondent, but, was rather, a procurement related dispute for which the 1st Respondent was required to adjudicate. Looked at differently, however, what the

Applicant is contending is that, the 1st Respondent dealt with a matter which was yet to be materialized. As such, the Applicant pressed for orders of certiorari and mandamus to be issued.

On the 16th day of August, 2021, the Respondents filed their joint written submission. Contesting the application, the learned State Attorney adopted the counter affidavit filed in this Court and submitted that, the argument that the Applicant had valid authority to appeal before the 1st Respondent (and even to bring this Application) is misplaced.

She maintained that, the Applicant lacked authority not only to bring up the appeal but also to lodge this application. She placed reliance on **Clause 1.4 of the Joint Bidding Agreement** which the Applicant argued that was erroneously relied upon by the 1st Respondent. It was her further submission that, this Application, and even the Appeal which was dismissed by the 1st Respondent, was in relation to the bid in question.

Consequently, it was contended that, the Applicant was/is bound to produce authoritative documents which authorizes the Applicant to file both the Appeal and even this Application. To support her submission, reliance was placed on the cases of **Balonzi** (supra), and **Prof. Gabriel Ruhumbika vs. Commissioner for Lands & 2 Others,** Land Case No.130 of 2004 (unreported).

The learned State Attorney for the Respondents contended that, the Applicant participated in the tendering process as a consortium of five companies and executed a joint bidding agreement which bound all members of the consortium, for which Clause 1.4 of that Joint Bidding Agreement applies.

It was argued, and this being a fact which was also observed by the 1st Respondent in her impugned decision, that, this Application, the Applicant did not attach any document proving that the latter was entitled to act on behalf of the Consortium, and, for that matter, the Applicant lacked *locus standi*, then and now. It was noted that, the 1st Respondent was able to point out an anomaly which was to the effect that the Applicant the Power of Attorney granted to one Zabron Mwaipopo authorized him to submit bid on behalf of the Applicant and not the consortium and, that, the said Power of Attorney, was issued before the Consortium came into existence.

The learned State Attorney dismissed as baseless, the Applicant's argument that, the expiration of the Power of Attorney before the submission of the proposals was due to the extended deadline for submission which was the making of TANESCO. She maintained that, Clauses 4.1.6 and Table 1 item 2 of the Joint Bidding Agreement required that a bidder should submit a valid power of attorney.

Moreover, relying on Regulation 9 (10) (d) of the Public Procurement Regulation, 2013, the learned State Attorney submitted that, the Applicant ought to have been appointed as a lead member of a consortium and a valid Power of Attorney was a necessity to confer authority to act for and on behalf of the members. It was on that basis that the learned State Attorney for the Respondents submitted that, there was/is irregularities on the part of the Applicant making it clear that the Applicant lacks *locus standi* to bring this application before this Court as well. She prayed that, the application should be dismissed with costs.

In a brief rejoinder submission, the learned counsel for the Applicant pressed on the Court to uphold its submissions. He reiterated the submission that, the Applicant was one of the bidders who took part in the bidding process and so had **locus standi**. He rejoined that, the Applicant is affected by the unfair processes that led to her disqualification and so it was right for her to pursue for her rights, even in this Court. He rejoined further that, the 1st Respondent was supposed to resolve the issue of wrongful decision. The rest of the rejoinder submissions by the Applicant were a repeat of what had already been submitted in chief, and, for that matter, I see no reasons as to why I should reproduce them.

From the above rival submissions by the parties' learned counsels, the issue which I am called upon to

consider is whether I should grant the prayers sought by the Applicant.

As I noted earlier in this ruling, the Application at hand is one on judicial review. Judicial review is a specialized remedy in public law by which the High Court exercises a supervisory jurisdiction over inferior courts, tribunals or other public bodies.

In **Chief Constable of North Wales Police vs. Evans** [1982] 1 W. L. R. 1155 at 1160 the Court was of the view, concerning judicial review process, that, its purpose:

> "... is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that authority constituted by law to decide the matters in question."

In our jurisdiction, the right to judicial review is enshrined in under Article 13(6)(a) of the Constitution of the United Republic of Tanzania. As such, judicial review is a matter of right and a quest for fair treatment provided for. It is worth noting, however, that, much as it is a matter of right and fairness, as I noted here above, it is a settled view as well that any pursuit of any right befits a person who has sufficient direct interest and authority to pursue it.

In a nut shell, a person must have "**locus standi** " or simply "**have standing**" —that is, the legal capacity— to launch judicial review proceedings so as to challenge the legality of administrative legislation or of a government policy or decision.

In the current application, the issue of *locus standi* has resurfaced in the submissions as earlier, when the Respondent's brought it as a preliminary objection to the application; I rejected it, the reason being that, it necessitated reference to other evidential materials, hence, could be argued in the normal way as an important legal issue but not as a purely preliminary objection.

That being said, in her submissions in opposition to the granting of the prayers sought by the Applicant, the learned counsel for the Respondents raised the same issue. She contended that, the Applicant lacks *locus standi* to, not only bring this application before this Court, but also lacked such standing even before the 1st Respondent. In response, the learned counsel for the Applicant contended that, the Applicant had standing to bring up the matter, not only before this Court but also had it before the 1st Respondent.

In my humble view, if one is to be able to disentangle that impasse facing the parties, one has to look into the facts which gave or denied the Applicant *locus standi* before the 1st Respondent and whether such would also apply in

this Court. It should be remembered, however, that, the matter at hand arose from a decision of the 1st Respondent.

In its decision, it was made clear, as it has as well been stated in this application, that, in the tender process leading to the decision by TANESCO which was appealed against before the 1st Respondent herein, the Applicant took part in that process as a "consortium of companies." What the 1st Respondent did was to verify if at all the Applicant had the authority to act for and on behalf of the consortium she was representing.

The evidence looked at was a Power of Attorney which, nevertheless, was found to have expired and, further, that the same was not issued by the Consortium as per the Joint Bidding Agreement. Those were pointed out as grounds which proved that the Applicant lacked the requisite standing to bring the appeal and, hence, the 1st Respondent dismissed the appeal.

Having looked at such a background, one would ask: does the same reasoning apply to the present scenario which is challenging the decision of the 1st Respondent? In other words, *is the Applicant lacking locus standi to bring this application before this Court?* Before I respond to that question, perhaps I should refer to the case of English decision in the case of **AXA General Insurance Ltd v Lord Advocate [2011] UKSC 46.** In that case Lord Reed made certain comments of general application, which I find

to be useful in my discussion as well. His Lordship Reed had the following to say:

> "A requirement that the applicant demonstrate an interest in the matter complained of will not however operate satisfactorily if it is applied in the same way in all contexts. In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of: the type of interest which is relevant, and therefore required in order to have standing, will depend upon the particular context. In other situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law. I say "might", because the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court, any more than it requires that every allegation

> of criminal conduct must be prosecuted. Even in a context of that kind, there must be considerations which lead the court to treat the applicant as having an interest which is sufficient to justify his bringing the application before the court. What is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus as conferring standing, depends therefore upon the context, and in particular upon what will best serve the purposes of judicial review in that context."

From the above quoted views of Lord Reed, it is clear that context matters a lot if one is to decide whether an applicant as the one at hand does possess sufficient interest warranting that he be heard on judicial review or not. To bring that understanding to the current application, it is clear, as it may be observed from the facts of this case, that, the Applicant herein knocked at the doors of this Court seeking to challenge the decision on the 1st Respondent, an administrative tribunal whose decisions are subject to the supervisory powers of this Court. That being the case, is the Applicant lacking the requisite standing before this Court?

In my view, the facts are clear that, the Applicant was a participant in the tendering process whose results were the subject of an appeal before the 1st Respondent. It is also observed from the facts that the Applicant was acting in a consortium of other companies. That being said, it is clear, therefore, that, as regards whether the Applicant has *locus standi* in respect of this present application, the answer should come out affirmatively. The Applicant being an interested party in the tendering process does posses the requisite standing to question the legality, rationality or propriety of the decision of the 1st Respondent. Whether that decision can be challenged or not will depend on a different set of things or reasoning.

That being said, the next point is *whether the decision of the Public procurement Appeals Authority was tainted with defects which would warrant this Court to quash it as prayed for by the Applicant.*

As a matter of common knowledge, when exercising its supervisory powers under judicial review process, the duty of this Court is not to examine the evidence in order to form an opinion regarding whether the decision of the lower tribunal was correct or not. Neither is the Court made to substitute in place what should have been a correct decision as if it is sitting as in exercise of its appellate powers.

As a matter of essence, when determining whether the application for the order of certiorari and mandamus is maintainable or not, what this Court is invited to do is to examine the legality of the processes through which the impugned decision of the public authority or tribunal was arrived at. Was it arrived at through a flawless process? Moreover, the Court may as well be invited to look at the decision itself and find out whether it falls within the category decisions which, if looked at, would be declared as unreasonable.

An application for judicial review of an administrative action can therefore be anchored on four principles, which were aptly captured by this Court in the case of **James Gwagilo vs. Attorney General** [1994] T.L.R 73, at page 84, while referring to the English decision in the case of **Council of Civil Service Unions vs. Minister for the Civil Service** [1984] 3 All ER 935. In the **Gwagilo's case,** Mwalusanya, J (as he then was) named the four grounds upon which a decision of a public authority namely:

> "**illegality** (failure to follow the law); **procedural impropriety** (failure to observe the principles of natural justice and failure to act with procedural fairness); **irrationality** (making a decision which is outrageous in its defiance of logic or of accepted moral

> standards that no reasonable person who had applied his mind to it could have made such a decision); and **proportionality** (that the means employed by a decision-maker are no more than is reasonably necessary to achieve his or her legitimate aims)." (Emphasis added).

The above stated principles were also stated authoritatively by the Court of Appeal in the case of **Sanai Murumbe and Another v. Muhere Chacha [1990] T.L.R. 54.** In that case, the Court of Appeal held, in regard to the order of certiorari, that:-

> "An order of certiorari is one issued by the High Court to quash the proceedings and the decision of a subordinate court or a tribunal or a public authority where, among others, there is no right of appeal. The High Court is entitled to investigate the proceedings of a lower court or tribunal or a public authority on any of the following grounds, apparent on the record. **One**, that the subordinate court or tribunal or public authority has taken into account matters which in ought not to have taken into

> account. **Two**, that the court or tribunal or public authority has not taken into account matters which it ought to have taken into account. **Three**, lack or excess of jurisdiction by the lower court. **Four**, that the conclusion arrived at, is so unreasonable that no reasonable authority could ever come to it. **Five**, rules of natural justice have been violated. **Six**, illegality of procedure or decision.

Let me now apply the above noted principles to the current application, and respond to the issue I had raised earlier here above. In the first place, and having examined the grounds upon which the application is premised (as per paragraph 5 of the accompanying statement) as well as the Applicant's submission, nowhere has it been stated or contended that the decision of the 1st Respondent is being challenged on the ground of procedural impropriety, irrationality or proportionality.

However, as per the 5th paragraph of the statement accompanying the chamber summons, which contains the grounds upon which the application is premised, and, taking onto account the Applicant's submissions, it is clear to me that, what the Applicant raised before this Court is an issue of illegality of the 1st Respondent's decision. And, if I am to

summarize the grounds, the illegality alleged by the Applicant, seems to fall on two limbs which are, nevertheless closely connected.

The **first one** is in regard to the alleged failure on the part of the 1st Respondent to appropriately follow the law, in this regard Regulation 9 (10) (d) of the Public Procurement Regulations, 2013, and thus, ending up in dealing with a matter which was yet to be materialized. That particular Regulation provides that:

> "A joint venture, consortium, or association shall appoint [a] lead member who **shall have authority** to bind the joint venture, consortium or association and the lead member shall at the time of contract award confirm the appointment by **submission of power of attorney** to the procuring entity." (Emphasis added).

The **second limb** is in respect of the alleged 1st Respondent's act of taking into account, in her decision, matters which it ought not to have taken into account. In particular, the Applicant has alleged that, the 1st Respondent took into account an internal document (Joint Bidding Agreement) in dismissing the Applicant's Appeal.

As regards the **first limb**, the question which I have asked myself is: *Can it be said that the 1st Respondent failed to follow the law when making its decisions?* In my view, the question will receive a negative response. As I said earlier, looking at the impugned decision, it is clear that it was obtained through a rigorous legal process that afforded both parties right to be heard. In his submission, however, the learned counsel for the Applicant has contended that, Regulation 9 (10) (d) of the Public Procurement Regulations, 2013, called for submission of the Power of Attorney at the time of award not before.

In its decision, the 1st Respondent made a finding that; the Applicant herein had infringed not only the said regulation but also Clause 1.4 of the **Joint Bidding Agreement** in that, the Applicant lacked authority to act for and on behalf of the members of the consortium of companies for which the Applicant sought to represent as a lead member.

As I scrutinize the decision and the respective Regulation, I see no reason why I should quash the 1st Respondent's decision on that ground. I hold it to be so because of two things. First, the above cited Regulation 9(10) (d) of the Public Procurement Regulations, 2013, is very clear. It calls upon **'a lead member'** appointed by a joint venture, consortium or association to posses **"authority"** to bind the joint venture, consortium or

association. That is the first step and, as the 1st Respondent clearly stated, that is a mandatory requirement. The provision is clear as it says the appointed lead member "**shall have authority** to..."

The second step to it is that of submitting a power of attorney at the time of contract award to confirm the appointment of the lead member. As such it was appropriate for the 1st Respondent to be satisfied, first and foremost, that, the Applicant possessed such authority entitling her to act for and on behalf of the consortium, in the first place.

Secondly, it is also clear from the decision of the 1st Respondent, that, when the Applicant was tasked to substantiate that she had authority to act for the consortium she sought to be acting for, there was a concession on her part that she lacked such authorization. In that premise, it is clear to me that the 1st Respondent demand for authority upon which the Applicant pegged her mandate to act for the Consortium she purported to be representing, was a purely procedural matter sanctioned by the law and which cannot be faulted.

In short, since a finding was made, that the Applicant lacked authority to act for the consortium, one cannot seek to quash that decision by applying for orders of certiorari and mandamus on the ground that the 1st Respondent

failed to "follow the law". Instead, it is clear that the 1st Respondent had properly "followed the law".

In respect of the **second limb**, it would as well, inappropriate to seek to quash the 1st Respondent's decision on the ground that the 1st Respondent took into account matters which she ought not to have taken into account. In my view, the Joint Bidding Agreement which the 1st Respondent took into account in the course of making its decision cannot be regarded as an extraneous matter.

I hold it to be so because it was the very document upon which the Applicant purported to be acting as a lead member of the consortium. As such, it was procedurally justified, on the part of the 1st Respondent to have a look at what that agreement said in relation to the participant to the tender who purported to be a lead member in a consortium of companies who bids jointly.

For that matter, it was appropriate on the part of the 1st Respondent to ask itself whether the Applicant (who appeared before the PPRA as an appellant) had the proper standing before it, prior to taking any further step in dealing with the appeal that was before the 1st Respondent. As such, and taking into account the circumstances as they unfolded before the 1st Respondent, I see no ground upon which the orders of certiorari and mandamus, which the applicant seeks, should be pegged.

For the reasons as explained herein above, I find the application to be lacking merits. The decision of the 1st Respondent is hereby confirmed and I hereby dismiss this application with costs.

It is so ordered.

DATED AT DAR-ES-SALAAM ON 28TH OCTOBER 2021

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DEO JOHN NANGELA
JUDGE