

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)  
AT DAR ES SALAAM  
CIVIL CASE NO. 20 OF 2019  
JV ALPHA FABRICATORS & OTONDE  
GROUP OF COMPANIES LIMITED.....PLAINTIFF  
VERSUS  
SONGAS LIMITED..... DEFENDANT**

*Date of last Order:26/11/2021*

*Date of Ruling:18/02/2022*

**J U D G M E N T**

**MGONYA, J.**

Before this Court is a Civil Case of which in the cause of hearing the Defendant raised 1 (one) point of preliminary objection to the effect that;

***1. That, this honourable Court lacks jurisdiction to determine the matter since the same is based on violation of the Public Procurement Act of 2011 together with the Public Procurement Appeal Rules of 2014.***

The Defendant from their submission in support of the objection averred that the law governing the Public Procurement in Tanzania is the **Public Procurement Act, 2011** (the Act). Further that the Act under the provisions of **section 95 (1), 96 (1) and 97 (1)** read together with **Rule 4** of the **Public Procurement Appeal Rules of 2014** (the rule) provides for a dispute settlement of any claim or dispute between Procuring Entities and Tenderers. **Section 95 (1), 96 (1), 97(1)** of the Act and **Rule 4** of the Rules were quoted in the Defendant's submission for ease of reference.

It is further stated that, an aggrieved party is required to file a complaint with the appeals authority which the same is referred under **Rule 3** of the Rules to mean the **Public Procurement Regulatory Authority**. It is from the provisions above that disputes between Procuring Entities and Tenderers under the Act must first be resolved by way of **Review** by the Accounting Officer. Secondly, where a Tenderer has been aggrieved by the decision of the Accounting Officer, the same may lodge an appeal to the **Public Procurement Regulatory Authority**.

It is the Defendant's submission that the matter before this Court arose out of the Defendant to have awarded the tender in which the Plaintiff awarded to Skol Building Contractors. The

Plaintiff's grievance is based on allegations that the decision to award the tender to Skol Building Contractors was in violation of the Public Procurement Act. It is from the above that the Defendant finds that this Court's jurisdiction to entertain this matter is ousted by the above mentioned sections of the Procurement Act and the Rule thereto as stated above.

In reply to the Defendant's submission the Plaintiff states that, he submits in opposition to the preliminary objection as raised by the Defendant on two grounds that the objection is improperly raised and misconceived. **Order VIII, Rule (2) of the Civil Procedure Code Cap. 33 [R. E. 2019]** requires an objection which seeks to question the maintainability or competency of the suit to be raised within the pleadings. The Plaintiff's Counsel is not in support of the manner in which the objection has been raised and has cited **Order VI Rule (1) of the Civil Procedure Code (supra)** to support the argument.

It is further the Plaintiff's Counsel averment that the objection is misconceived, under **section 95(1), 96(1) and 97(1) of the Procurement Act, 2011** and **Rule 4 of the Public Procurement Appeal Rules of 2014** as the same do not oust jurisdiction of an ordinary Court to entertain suits arising from the Public Procurement Act and the Rules thereunder. It is the plaintiff's counsel concern that, if the

Parliament intended so then the use of the words "***no court shall have jurisdiction.....***" as used in **section 4 (1) of the Land Disputes Courts Act [Cap. 216 R.E 2019]** would have been used.

It is the Plaintiff's Counsel submission that an ouster clause must be express in the sense that the provisions barring an ordinary Court from hearing a civil suit must be express. The case of ***MOSHIN SOMJI VS COMMISSIONER FOR CUSTOMS AND EXCISE AND ANOTHER [2004] TLR 66 at P. 71*** was cited to support the argument; supporting the Defendant's claim that the provision in the Public Prosecution Act ousts the jurisdiction of the matter to be tried by this Court has no wording; suggesting that the Parliament intended to oust jurisdiction of the ordinary Court over disputes arising from the Public Procurement Act and its Regulations.

In their submission the Plaintiff's Counsel avers that the Act gives the bidder option to go to the Public Procurement Regulatory Authority after review by the accounting officer or to go to ordinary Court. It is so since the wording of ***section 95 (1) states "...may seek review in accordance with section 96 (1) and 97 (1)"***.

In light of the submission by the learned Counsel for both parties and having thoroughly gone through the same

submissions. It is at this particular stage that I am able to determine the objection as raised by the Defendant.

The Defendant before this Court is of the view that the Plaintiff has filed this Civil Suit with the Court that has no jurisdiction in relation to the cause of action and nature of the matter. It should be remembered that from the records before this Court the Cause of action has raised from the Plaintiff being aggrieved by the acts of the Defendant in relation to procurement proceedings. The Defendant urges that the proper Forum is stated in the Procurement Act and not any other from what is directed under the Act.

The Plaintiff from the records before this Court is firm that this Court has jurisdiction in entertaining the matter filed before it. The Act has been drafted by the Parliament and if the Parliament intended this Court not to have jurisdiction arising from public procurement matters, the same would have been clearly stated. The provisions cited by the Public Procurement Act has utilised the word "**may**" hence the Plaintiff is not being bound by following the provisions of **sections 95 (1), 96 (1), 97 (1)** of the **Act** and **Rule 4** of the **Regulations**.

The Plaintiff reminds this Court that if the Parliament intended the matters of this nature not to be tried by ordinary Courts the use of the word "**shall**" should have been utilised.



The objection raised before this Court is upon jurisdiction of this Court in entertaining a matter that has raised from the matter governed under the **Public Procurement Act, 2011**.

The Public Procurement Act, 2011 is meant to govern, all procurement and disposals conducted in a manner that maximizes integrity, competition, accountability, economy, efficiency, transparency and achieves value for money.

From the submissions of the parties to this case, it appears that the Plaintiff in cause of the tendering and bidding was aggrieved by the acts of the tenderer for offering the bid to some other Company that he claims never took part in the bidding.

The **Public Procurement Act of 2011**, read together with the **amendments of 2016** since the Cause of action arouse after the existence of the amendments and the **Public Procurement Regulations of 2013** have designed their route into encountering it's business where one is aggrieved by a breach of a duty by a Procuring Entity.

The above is observed under the provisions of **section 95 (1) of the Public Procurement Act of 2011** which statutorily is termed as "***the right to review***" **Section 95 of the Act** provides for the right for review where one is

aggrieved by the acts of a Procuring Entity and the Review is in accordance to **sections 96 and 97 of the Act.**

The law directs that the settlement of complaints or disputes that arises between Procuring Entities and tenderers shall be reviewed by an Accounting Officer. This accounting officer is by law required to constitute an independent review panel within or outside his organization that will entertain the complaint and advice the complainant on actions to take.

It is from the above procedure that is found enshrined under the provisions of **section 96 (1), (2) of the Public Procurement Act 2011.** The same requires that complaints arising from procurements proceedings be filed and determined within the Procurement Entity and it is the Accounting Officer that is responsible in handling these matters.

Further, the **Public Procurement Act (supra)** provides for an avenue when a complainant is not satisfied with the decision of the accounting officer to refer the matter to the **Appeals Authority** for review and administrative decision. It is also in the favour of the complainant at certain circumstances to file the complaint directly to the Appeals Authority.

If the complainant is still aggrieved by the Appeals Authority, it is then that the complainant at this stage has room

It is so ordered.



**L. E. MGONYA**

**JUDGE**

**18/02/2022**

**Court:** Judgement delivered in the chamber of Honourable DR. Luambano, in the absence of both parties and their Advocates and in the presence of Richard – RMA.



**L. E. MGONYA**

**JUDGE**

**18/02/2022**