IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO. 48 OF 2023

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR PREROGATIVE ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF CHALLENGING THE DECISION OF THE 1ST RESPONDENT DATED 14.09.2023 DISMISSING AN APPEAL CASE NO. 09 OF 2023-24

BETWEEN

M/S DEZO CIVIL CONTRACTORS CO. LIMITED.....1ST APPLICANT
M/S HARASINI ENTERPRISES LIMITED.....2ND APPLICANT

AND

PUBLIC PROCUREMENT
APPEALS AUTHORITY.....1ST RESPONDENT

PUBLIC PROCUREMENT
REGULATORY AUTHORITY.....2ND RESPONDENT

OCEAN ROAD CANCER INSTITUTE.....3RD RESPONDENT

THE ATTORNEY GENERAL
OF THE UNITED REPUBLIC OF TANZANIA.....4TH RESPONDENT

RULING

09 & 21/11/2023

KAGOMBA, J

The applicants herein have been debarred by the 2nd respondent from participating in public procurement for a period of ten (10) years on account of fraudulent conduct . Their appeal to the 1st respondent was dismissed on 14th September, instant, vide Appeal Case No. 09 of 2023-24. They are aggrieved by the decision of the 1st respondent and now seek leave of this court to file for judicial review aiming at obtaining orders of *certiorari* and *mandamus* against the impugned decision.

The applicants' application for leave is made under Rules 5(1), 5(2), 5(2)(a)-(d) and 5(3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedures and Fees) Rules, 2014 (henceforth "GN No. 324 of 2014"); sections 18(1) and 19(1)-(3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act,[Cap 310 R.E 2019]; Section 2(1) and (3) of the Judicature and Application of Laws Act, [Cap 358 R.E 2019] and section 95 of the Civil Procedure Code, [Cap 33 R.E 2019].

The application is supported by two affidavits affirmed by Sheikh Mohamed Bawazir (henceforth "Bawazir") and Yasini Ramadhani Manyanzira (henceforth "Manyanzira") for the 1st and 2nd applicant, respectively.

The respondents, who are categorical that they don't oppose the granting of the leave, have nevertheless filed a notice of preliminary objection on a point of law that; the affidavits in support of the application are defective for containing new facts in paragraphs 4,5,6,7,8,9,10, 12, 17, 18, 19, 20, 21, 22, 23 and 24 which are not in statement contrary to rule 5(2)(a),(b),(c) and (d) of GN No. 324 of 2014.

When the preliminary objection and the application were called on for hearing, Elipendo Kazimoto and Hilmar Danda, learned Principal State Attorneys and Ayubu Sanga learned State Attorney appeared for the respondents, while Audax Vedasto and Franko Mahena, both learned Advocates represented the applicants.

Mr. Sanga took the lead in arguing the preliminary objection for the respondents. He restated the respondent's views that based on the chamber summons and the applicants' affidavit, the applicants have satisfied the requirements of the law for leave to be granted. He mentioned those criteria as; proof of interest in the case, filing the application promptly within the period of six months set by the law, exhaustion of domestic remedies and having an arguable case. He however, denied conceding the main case.

According to Mr. Sanga, what makes this application contentious is some of the averments introduced in the applicants' affidavits which are alien

to the statement filed in court. His key contention is that while GN No. 324 of 2014 requires that an application for leave shall be accompanied by a statement and an affidavit verifying the same, the purpose of the law is to reduce what is stated in the statement into evidence, emphasizing that the statement is not the evidence *in se* but the affidavit is. It is Mr. Sanga's further contention that, the affidavits had to contain facts which are in the statement and not new matters.

In furthering his above contention, Mr. Sanga impugned paragraph 4 of the affidavit of Bawazir, paragraphs 5 and 6 of both affidavits, paragraph 7 of the affidavit of Manyanzira, which is similar to paragraph 8 in Bawazir's affidavit and paragraph 8 of the affidavit of Manyanzira, which is similar to paragraph 9 in Bawazir's affidavit.

Learned Attorney also cited paragraph 9 of the affidavit of Manyanzira, which is similar to paragraph 10 in Bawazir's affidavit; paragraph 10 of Manyazira's affidavit which is similar to paragraph 11 in Bawazir's affidavit; paragraph 12 of Manyanzira's affidavit which is similar to paragraph 13 in Bawazir's affidavit, and paragraph 17 of Manyanzira's affidavit, which is similar to paragraph 18 in Bawazir's affidavit.

Other impugned paragraphs are 18 of Manyanzira's affidavit, which is similar to paragraph 19 in Bawazir' affidavit; paragraph 20 of Manyanzira's affidavit which is similar to paragraph 21 in Bawazir's affidavit; 21 of Manyanzira's affidavit, which is similar to paragraph 23 in Bawazir's affidavit and, lastly, paragraph 23 of Manyanzira's affidavit, which is similar to paragraph 25 in Bawazir's affidavit. Mr. Sanga dropped paragraph 24 in Manyanzira's affidavit for having no problem.

Regarding the consequences of the cited defects, Mr. Sanga contended that those paragraphs are rendered defective for contravening mandatory provisions of rule 5(2) (a) to (d) of GN 324 of 2014. He argued that an affidavit, in this type of application, is required to verify the facts stated in the statement, the reason for it being referred to as a "verifying affidavit". According to him, the remedy is to expunge all the offensive paragraphs whereafter the court will gauge whether what remains can sustain the application, which in his opinion it does. He, therefore, prayed the court to expunge the cited paragraphs, with no order as to costs.

To bolster his contention and prayer, Mr. Sanga cited the decision of this court in **Quality Inspection Services Inc. Japan vs. Public Procurement Authority & 3 Others,** Misc. Civil Cause No. 45 of 2022 at

page 22, urging the court to uphold the same legal position for predictability of the law.

In his reply submission, Mr. Vedasto firstly suspected the source of his counterpart's contention that the affidavit is there to verify what is stated in the statement. He finds no such words in the cited provision of rule 5(2)(a) to (d) of GN No. 324 of 2014. It is his contention that an application for leave has three documents namely; a chamber summons, an affidavit and a statement, which have to be read together to determine whether the application discloses an arguable case for leave to be granted by court. He sees no legal requirement that these documents must contain same wording, but should state the same case in substance.

Based on the above understanding, Mr. Vedasto went on to demonstrate how the two affidavits contain the same substance as is in the statement. As for paragraph 4 in Bawazir's affidavit, he submitted that it provides an introduction to the court, which is similar to the contents of paragraph 6 in the statement.

He argued further that the contents of paragraphs 5,6,7,8 and 9 of both affidavits are informing the court that the 1st and 2nd respondents discussed and agreed to tender together, which indeed they did. He said

that these contents are contained, in substance, in paragraph 7 of the statement.

It was Mr. Vedasto's further reply that the contents of paragraphs 12 and 13 of Bawazir's affidavit which talk about revocation of the power of attorney is contained, in substance, in paragraph 10 of the statement.

He argued that the contents of paragraphs 17,18,19,20, 21, 22 and 23 in Bawazir's affidavit are substantially the same as contents of paragraphs 16,17,18,19 20 and 21 in Manyanzira's affidavit and are telling the court that the applicants appealed to the 1st respondent against the decision of the 2nd respondent, after which they were served with a reply of the respondents in that appeal which stated that it contained 15 annexures but the reply so served to the applicants did not contain such annexures. He said, these contents are the same in substance as paragraph 14, 15 and 16 of the statement.

As for paragraph 23 in Manyanzira's affidavit, learned counsel submitted that it is talking about the way the hearing of the appeal proceeded before the 1st respondent, being substantially the same complaint as what is stated in paragraph 16 and 17 in the statement.

It was Mr. Vedasto's humble opinion that even if it were a rule that facts in the affidavit must be the same as in the statement, the two affidavits would satisfy that requirement for being substantially the similar in both affidavits and in the statement.

As for the case of **Quality Inspection Services Inc. Japan vs. Public Procurement Authority & 3 Others (supra),** Mr. Vedasto argued that the operating words used by the court are "not reflected" as opposed to the words "not copied" to insinuate that it is not the rule that averments must be exactly the same. He also argued that the cited case is not intended to be applied in each and every case and for each type of document.

Mr. Vedasto argued further that his counterpart presented the principle of law in the opposite, saying that he expected him to show facts in the statements which are not verified in the affidavit rather than asking the court to verify non-existing facts in the statement.

Learned counsel for the applicants, was at one with his counterpart in the latter's observation that the remaining paragraphs would support the application. For this reason, he urged the court to find that the determination of the point of preliminary objection would a mere academic exercise. He

prayed the court to consider the grounds stated under paragraph 22 of the statement and proceed to grant the application.

In his rejoinder, Mr. Sanga conceded that the contents of paragraph 10 in Manyanzira's affidavit which is similar to paragraph 11 in Bawazir's affidavit is substantially the same as paragraph 8 of the statement and that he no longer had any qualms with it. He made similar concession to the contents of paragraph 12 in Manyanzira's affidavit, which is similar to paragraph 12 in Bawazir's affidavit for being substantially the same as paragraphs 9 and 10 in the statement. Save for the prayer to grant leave as sought by the applicants, the learned State Attorney opposed the rest of the submission by Mr. Vedasto and maintained his submission in chief.

Having considered the above rival submissions, this court has two issues to determine: Firstly, whether the affidavits in supports of the application are defective for containing new facts in paragraphs 4,5,6,7,8,9,17,18,19,20,21, 22 and 23, hence merit to be expunged. And, secondly, whether the applicants' application for leave to file for judicial review has merit.

The first issue, which arises from the preliminary objection raised by the respondents, is beaconed on the provision of rule 5(2) (a) to (d) of GN No. 324 of 2014, which states thus:

> *"(2) An application for leave under sub-rule (1) shall be made ex parte to a judge in chambers and be accompanied by-*
>
> *(a) A statement providing for the name and description of the applicant;*
> *(b) The relief sought;*
> *(c) The grounds on which the relief is sought;*
>
> *and*
>
> ***(d) affidavits verifying the facts relied on.***
>
> [Emphasis added]

Basing on the decision of this court in **Quality Inspection Services Inc. Japan vs. Public Procurement Authority & 3 Others (supra)**, Mr. Sanga's contention is that what is stated in the statement has to be verified by the affidavit, in which case both the statement and the affidavit have to contain similar contents, which is not the case in the instant matter. He has not opposed the views of his counterpart that the law, as quoted, does not require the copying of the same averments from the statement to the verifying affidavit, rather it requires the contents in both documents to be substantially the same. Mr. Sanga's standpoint is that even if the views of his counterpart were to be observed, there are averments in the verifying

affidavits which do not arise from the statement. He wants those paragraphs in the affidavits expunged.

Despite being astonished as to where his counterpart fetched that position of the law, Mr. Vedasto holds the view that the contents of the affidavits are substantially the same as the contents in the statement, the point of view which Mr. Sanga does not wholly agree with.

Having deeply considered these rival arguments, I agree with Mr. Sanga that the purpose of the affidavit, in accompanying the chamber summons in applications for leave to file for judicial review, is to verify the facts stated in the statement. This is my take from rule 5(2)(d) of GN No. 324 of 2014 and is the position taken by this court (S.C. Moshi, J, as she then was) in **Quality Inspection Services Inc. Japan vs. Public Procurement Authority & 3 Others (supra),** which I subscribe to. In determining this point, Hon. S.C.Moshi, J briefly stated as follows:

> *"On the 7th point of objection, I agree with Mr. Sanga that you cannot introduce facts which are not reflected in the statement, ... verification in an affidavit should verify the facts stated in the statement, it is true that paragraph 17 contains facts not in the statement".*

One crucial rule of construction of statutes is that, as far as possible, the words of a statute must be construed so as to give a sensible meaning to them. (See: **Odgers' Construction of Deeds and Statues**, 5th edition, Universal Law Publishing Co. Pvt. Ltd, 2013, at page 237). The interpretation I can give to the provision of rule 5(2) (a) to (d) of the GN No. 324 of 2014 is that, while the chamber summons enjoins the applicant to appear before a judge in chambers essentially for an *ex parte* hearing of his leave application, the same must be accompanied, on one hand, by a statement which provides for all the necessary details specifically the name and description of the applicant; the relief sought; and the grounds on which the relief is sought. This appears to me to be a full briefing to the court on what the application is all about. The rationale here is to inform the judge every relevant detail he or she needs to know about the application, given that the same would normally be heard *ex parte* and determined within a short period of fourteen (14) days. However, the facts presented in such a briefing need to be verified through a sworn affidavit, which is what accompanies the application, on the other hand.

Mr. Sanga correctly stated that it is the affidavit and not the statement which can be taken as evidence. In this situation, the affidavit is not supposed to introduce new facts but verifies what is stated in the statement.

By introducing new facts, the affidavit is rendered defective to the extent of the offensive averments contained therein.

I have perused the affidavits of Messrs. Manyanzira and Bawazir alongside the statement filed by the applicants. It appears to me that while it is generally true, as submitted by Mr. Vedasto, that the contents of the impugned paragraphs are in sync with what is stated in the statement, it is equally true, as submitted by Mr. Sanga, that some of the contents in some of the paragraphs are, indeed, excessive and have the effect of connoting and introducing new facts alien to the statement. I shall demonstrate.

The contents of paragraph 4 in Bawazir's affidavit is generally the same, in substance, as paragraphs 6 and 7 in the statement, when read together, save for the words; *"who and whose company has been known to me for a long time, with some papers indicating that.."* These words, together with the contents of paragraph 5 in both affidavits, would connote that it is Manyanzira, and by extension the 2nd applicant, who enticed the 1st applicant to make a joint bid, a fact which even if it could be true, is nowhere in the statement and its purpose in this application cannot immediately be appreciated. To this extent, paragraph 4 of Bawazir's affidavit is defective. Hence, the words quoted above are accordingly expunged.

As correctly rejoined, by Mr. Sanga the averments in paragraphs 5 of both affidavits about registration and classes of contractors, the reasons for forming a joint venture and which of the two companies is registered in which class are all substantially new facts not contained in the statement. Hence, the entire paragraphs 5 in both affidavits are found to be new averments. The same are also expunged accordingly.

Likewise, the content of paragraph 6 in both affidavits which connotes that it is Manyanzira's 2nd applicant who approached Bawazir's 1st applicant with a proposal for a joint venture, and how the board unanimously agreed to the proposal are facts alien to the statement. Hence, save for the facts that the two companies entered a joint venture agreement, and the number of shares taken by each side, the rest of the averments therein are newly introduced matters and are accordingly expunged.

Paragraph 7 in Manyanzira'a affidavit which is similar to paragraph 8 in Bawazir's affidavit also introduces new averments about who and how the tender was submitted which details are nowhere in the statement. The said respective paragraphs in the affidavits are somewhat mischievous and should suffer the same consequence relatively. The respective paragraphs are expunged, save for the fact that a joint venture agreement was executed

on 19th May, 2023 for the purpose of the joint tendering and parties agreed on the apportionment of profits/benefits as stated thereat.

As regards paragraph 8 in Manyanzira's affidavit, much as it connotes that what was submitted to the 3rd respondent includes the terms of the joint venture agreement. This cannot be said to be entirely new fact. In my considered view, this averment is substantially of the same kind as the content of paragraph 7 in the statement. The same and its corresponding paragraphs 9 in Bawazir's affidavit are therefore maintained.

Paragraph 9 in Manyanzira's affidavit contains entirely excessive averments not found anywhere in the statement, in substance. The same is also expunged alongside its corresponding paragraph 10 in Bawazir's affidavit.

As regards paragraph 17 in Manyanzira's affidavit, and its sister paragraph 18 in Bawazir's affidavit, save for the fact that the applicants were served with an incomplete reply, having some annexures missing and fact of hiring Advocate Audax Vedasto, the two paragraphs introduce other averments not substantially contained in the statement. To that extent, the same are also expunged.

Paragraph 18 in Manyanzira's affidavit which is similar to paragraph 19 in Bawazir's affidavit, contain new averments altogether concerning the

meeting between the applicants and their advocates and the questions asked by the said Advocates. Nothing of the kind was stated in the statement. For this reason, these paragraphs are also expunged.

My scrutiny of the contents of paragraphs 19, 20, 21, 22 and 23 of Manyanzira's affidavit in relation to what is supposed to be verified from the statement, I couldn't find anything substantially the same. These paragraphs introduce new facts. Suffice to state here that the said averments are also expunged.

In a nutshell, save as otherwise observed and decided above, it is true, as submitted by Mr. Sanga, that the contents of paragraphs 4, 5,6,7,9,17,18,19,20,21, 22 and 23 as contained in the Manyanzira's affidavit and in the corresponding paragraphs in Bawazir's affidavit are not substantially the same as the facts stated in the statement. The new averments in the affidavit verify nothing from the statement, contrary to what the court considers to be the purpose of rule 5(2) (d) of the GN No. 324 of 2014.

As to whether the legal requirements for granting of leave have been satisfied by the applicant, the guidance is in the case of **Emma Bayo vs Minister for Labour and Youths Development & 2 Others,** Civil Appeal No. 79 of 2012, CAT, Arusha, the Court of Appeal held that:

"It is at the stage of leave where the High Court satisfies itself that the applicant for leave has made out any ***arguable case to justify the filing of the main application****. At the stage of leave the High Court is also required to consider* ***whether the applicant is within the six months limitation period*** *within which to seek a judicial review of the decision of a tribunal subordinate to the High Court. At the leave stage is where the* ***applicant shows that he or she has sufficient interest to be allowed to bring the main application****. These are the preliminary matters which the High Court sitting to determine the appellant's application for leave should have considered while exercising its judicial discretion to either grant or not to grant leave to the applicant/appellant herein." [Emphasis added].*

Guided as above, and as submitted by the learned counsel for both sides, even after expunging the cited paragraphs above, the remaining averments in the applicants' affidavits and statement still hold this application. It is not disputed that the applicants have come to court timely, within six months of the impugned decision; they have exhausted the available remedy which is an appeal to the 1st respondent; they have interest in the matter as shareholders, directors and Managing Directors of the respective debarred companies, and they have an arguable case based on a claim of denial of right to a fair and full hearing, among other grievances.

For the above reasons, the application has merit. Accordingly, leave is granted to the applicants to apply for orders of *certiorari* and *mandamus* as prayed, in accordance with the law. Each party to bear own costs.

Dated at **Dodoma** this 21st day of November, 2023.

ABDI S. KAGOMBA
JUDGE