IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MAIN REGISTRY

AT DAR ES SALAAM

MISC CIVIL CAUSE NO 41 OF 2023

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF THE DECISION FROM PUBLIC PROCUREMENT APPEALS AUTHORITY DATED 17TH AUGUST2023

BETWEEN

M/S SIMBA LOGISTIC EQUIPMENT SUPPLY LTD..... APPLICANT

VERSUS

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

TANZANIA-ZAMBIA RAILWAY AUTHORITY.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

R U L I N G

23rd October & 13th November 2023

CHUMA, J:

In the instant application, the applicant M/S Simba Logistic Equipment Supply Ltd is essentially seeking this Court to grant three substantive orders: **one;** is for a prerogative order of Certiorari to quash the whole decision of the 1st respondent dated 18th August 2023 in which the 1st respondent is alleged to have been erred in law and fact by denying the applicant right to appeal and **two;** for prerogative order of mandamus to compel the 1st

respondent to intervene and appropriately act within its mandate and halt 2nd respondent directives/notice dated 22nd May 2023 for being ultra vires and in contravention of the law and grant the applicant execution of the remaining work of supply of the Railway wooden sleepers. Costs and any other orders the court may deem fit and just to grant.

The application has been brought by the Chamber Summons made under the provisions of, *inter alia*, Section 2 (1) and (3) of the Judicature and Application of Laws Act (Cap 358 R.E 2019), Section 17 (1) and (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act (Cap 310 R.E 2019), Rule 8 (1) (2) and (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fess) Rules G.N No 324 of 2014 and Section 95 of the Civil Procedure Code (Cap 33 R.E 2019). The said Chamber Summons is supported by an affidavit duly sworn by Ronald Kato, the Principal Officer of the applicant.

The application is confronted with strong opposition contained in the counter affidavit sworn by Violet Simeon Limilabo, the Principal Legal Officer of the 1st respondent which was lodged before the Court on the 26th day of September 2023.

When the matter was called on for hearing on 23.10.2023, Ms. Kiiza assisted by Ms. Mushi, both learned counsels appeared for the applicant while Mr. Sanga and Ms. Kilonzo, learned State Attorneys appeared for the respondents.

Arguing the application, Ms Catherine Kiiza learned Counsel having so adopted the Chamber Summons together with the supporting affidavit and

the statement of the applicant as part of the oral submissions at the hearing contended that the application before the Court is for judicial review made under the provisions predicated in the Chamber Summons supported by an affidavit. It was submitted that the reliefs sought by the applicant are for prerogative order of certiorari and mandamus respectively. The learned advocate proceeded to underscore the grounds under which the reliefs are sought, first, she argued that the decision by 1st respondent is tainted in violation of the applicable Procurement Regulation resulted from dismissing an appeal that was properly lodged, second being that the decision of 1st respondent is null and void for misinterpreting the provision of Section 97 (1) (2) (b) of the Public Procurement Act Cap 410.

Elaborating on whether the appeal was time-barred or not before 1st respondent, Ms. Kiiza submitted that the decision was issued on 3rd July 2023 and the appeal was filed on 11th July 2023 by calculation she argued that the appeal was within 7 days prescribed under the provision of Section 97 (2) of the Public Procurement Act hence the 1st respondent wrongly dismissed the appeal brought before it. The learned advocate added that the provision of Section 96 (6) of the Public Procurement Act requires the decision to be delivered within seven working days and the accounting officer is bound to state the reasons and direct measures to be taken. Ms Kiiza proceeded to argue that the provision of Section 96 (7) of the Public Procurement Act gives room in case a ruling is not delivered within 7 days, one can appeal directly to the appeal authority.

The learned advocate further submitted that the applicant being aggrieved by a tender disqualification applied for administrative review on

23rd May 2023 of which the accounting officer was required to deliver the ruling on 30 May 2023 as dictated under the provision of Section 96 of the Public Procurement Act. It was argued that instead of delivering the decision the accounting officer requested the applicant on the 29th day of May 2023 a detailed explanation of the complaint contrary to the legal requirement. Ms Kiiza was of the view that the letter received by the applicant for detailed information was not a decision as required by the law.

She further contended that the applicant complied within 7 days by giving detailed information as requested as the same was supplied on 5th June 2023 and the accounting officer replied to the applicant on 3rd July 2023 and proceeded to dismiss the applicant's application. Ms Kiiza contended that considering the chain of communication between the applicant and 1st respondent the decision was ruled out on 3rd July,2023. The learned advocate was of the view that the calculation ought to have reckoned from 3rd July 2023 when the applicant received the decision in issue.

The learned advocate also contended that a point of illegality must be reflected on the face of the record. To bring the point home, she referred to the case of **Lyamuya Construction Company Limited Vs Board of Registered Trustees of Young Women Christian Association of Tanzania Civil Application No. 10 of 2020**. Ms Kiiza was of the submission that, it was illegal for 1st respondent to dismiss the applicant's appeal which was properly lodged in accordance to Section 97 of the Public Procurement Act. The learned advocate further complained that 1st respondent did not properly interpret the provisions of Sections 96 and 97 of the Public Procurement Act.

Another ground on irregularity, which Ms. Kiiza termed the same as procedural irregularity rests on contravention of the provision of Section 96 (6) of the Public Procurement Act which dictates that the decision by the 2nd respondent be delivered within seven working days. The learned advocate submitted that instead of delivering the decision within seven working days, the 2nd respondent requested more details from the applicant hence the decision was improperly reached and contravened the law and procedure. For emphasis, Ms. Kiiza referred this Court to the case of **Taher H. Muccadam Vs Director Urban-Rural Planning Ministry of Land and Housing Tribunal Development and Another Miscellaneous Cause No 12 of 2023.**

As regards the conditions for the order of certiorari to stand, she cited the decision of the Court of Appeal of Tanzania in the case of **Sanai Murumbe and Another Vs Muhere Chacha [1990] TLR 54** by insisting the first condition that the 1st respondent decided the matter by taking into account matters which it ought not to have taken into account. She proceeded to submit that the letter dated 29th July 2023 was a mere letter inquiring detailed information but the proper decision she argued, was delivered on 3rd July 2023. The learned advocate referred this Court again to the decision of the Court of Appeal of Tanzania in the case of **Rahel Mbuya Vs Minister for Labor and Youth Development and Another Civil Appeal No 121 of 2005** cited with approval the decision of Supreme Court of India the case of **Hari Vishnu Kamath Vs Ahmed Ishague AIR 1955 SC 233** on principles which the Court is duty bound to consider before granting an order of Certiorari.

Given the above submission, Ms. Kiiza argued the Court, firstly to issue an order of certiorari to quash the decision of the 1st respondent for being illegal, secondly an order of mandamus be issued to compel the 1st respondent to act within its mandate and set aside the 2nd respondent's directives for being utra vires for contravening the law, third an order to compel the 2nd respondent to grant to the applicant an execution of the remaining work of supplying modern slippers.

Arguing against the application, Mr. Ayubu learned State Attorney vigorously resisted the submission made by her learned Sister in support of the application. Having so adopted the counter affidavit together with the reply to the statement of the applicant as part of the oral submissions at the hearing, from the outset, the learned state attorney reminded the Court of the substantive prayers sought by the applicant in the Chamber Summons, that is to say, an order of certiorari and mandamus. Mr. Ayubu contended and reminded this Court of the known principle that the parties are bound by their pleadings. He proceeded to state the impact of the Court from entertaining the statement from the bar which does not form part of the evidence as stated in the case of **James Gwagilo Vs AG [2004] TLR.1961**

Responding to the prayer of certiorari pegged in the Chamber Summons and elaborated during the submission, the learned State Attorney contended that the 1st respondent is a watchdog of Public Procurement Proceedings to oversee the procedural legality of procurement processes. That being the case Mr Ayubu argued that 1st respondent can either confirm or vary the decision brought before it. The learned State Attorney conceded the law guiding the conditions for certiorari celebrated in the case of Sanai

Murumbe (supra) that all conditions must be met for the Court to issue an order of Certiorari.

Responding to the question of interpretation of the provisions of Section 97 (1) (2) of the Public Procurement Act, Mr. Ayubu contended that the provision was properly interpreted by 1st respondent as paragraph 5 of the affidavit in support of the application, the applicant confirmed that she applied for administrative review on 23rd May 2023. The learned advocate submitted that the applicant applied for administrative review after knowing that the provisions of Sections 95 and 96 of the Public Procurement Act give power to the 1st respondent to entertain appeals from the Accounting Officer.

Mr. Ayubu proceeded to argue that the provisions of Section 95 and 96 PPA provide for 7 days for filing the submission of a complaint to the accounting officer which the same was complied with by the applicant under paragraph 5 of the affidavit in support of the application. It was argued that Regulation 105 of the Public Procurement Regulations provides on how the contents of the complaint are supposed to be framed which the applicant failed to meet the same. Furthermore, the learned State Attorney referred this Court to the decision of **Ms. Aqua Power Tanzania Ltd (T/S Turbine Tech) vs. the Public Procurement Appeal Authority and 3 Others Miscellaneous Cause No 32 of 2021** at pages 18 & 19 on what constitutes administrative review or complaint.

Mr. Ayubu submitted that before the applicant questioned the power of the accounting officer, she ought to have first complied with Regulation 105 of the Public Procurement Regulation. Also the learned State Attorney argued that paragraph 5 of the affidavit in support of the application

evidenced that the complaint was not in line with Regulation 105 as a result 2nd respondent replied in her letter dated 29th May 2023 that was not a complaint in the eyes of the Regulation hence within 7 days 2nd respondent responded on 29th May 2023. The 2nd respondent wrongly requested the applicant to re-submit the complaint as admitted by the applicant's advocate which Mr Ayubu conceded the same as there is nowhere the applicant is required to submit detailed information.

In the absence of a complaint in law, Mr. Ayubu argued that the same was the reason for the 2nd respondent to make a decision. It was submitted by the learned State Attorney that the applicant was required to appeal to the 1st respondent from the date they came to the knowledge of the decision which is the 23rd day of May 2023 that is the 12th day of June 2023. Mr. Ayubu proceeded to argue that since the applicant filed an appeal on 11 day of July 2023, the appeal is out of time which invited for the dismissal as per the record.

On the other side of the coin, it was argued that paragraph 6 of the affidavit in support of the application disclosed the admission by the applicant that they filed a detailed submission on the 5th day of June 2023 for administrative review and 25th June 2023 the applicant reminded the 2nd respondent via letter on their submission on 5th day of June 2023. Mr. Ayubu contended that by calculation from the 5th day of June 2023, the appeal ought to have been filed on 13 June 2023.

The learned State Attorney went on to say that on page 10 of the appeal body, the 1st respondent gives the applicant the benefit of doubt by start counting seven days from 5th June 2023. According to the record, the

appeal was lodged on 11th day of July 2023 hence Mr. Ayubu argued that the 1st respondent rightly interpreted the provisions of Section 95 (1) 96 (6), and (7) and Section 97 of the Public Procurement Act. It was Mr. Ayubu's submission that in the Judicial Review forum, the applicant is required to come with clean hands as the applicant admitted that the 2nd respondent wrongly ordered them for details information, hence the applicant cannot again benefit from the wrong act done by the 2nd respondent.

Responding to the procedural irregularity, the learned State Attorney conceded and shared the same line of reasoning adopted by Ms. Kiiza that the 2nd respondent was not required to order the detailed information but rather was required to decide. It was Mr. Ayubu's submission that though the 2nd respondent wrongly ordered the applicant to re-submit detailed information which demonstrates that there was a failure by the accounting officer to decide within seven days from the date of receipt of a complaint, the remedy for an affected person was to appeal within 7 days from the date when the accounting officer ought to act or failed to act lapses.

In joining force to the submission made by her colleague, Ms. Kause State Attorney prompted this Court on the persuasive decision which laid conditions before the Court to issue an order of mandamus as held in the case of **E 933 CPL Philimatus Fredrick Vs Inspector General of Police and Another Misc Civil Cause No 3 of 2019**. The learned state attorney strongly argued that the applicant had failed to establish both conditions in their pleadings and submission.

The learned state attorney contended that 1st respondent complied with its mandate vested under the provision of Section 97 and delivered its

decision in accordance with the law. In the absence of proof, Ms. Kause argued the application to be misconceived. It was submitted that the applicant was not denied the right to be heard as paragraph 8 of the affidavit in support of the application stated clearly that the applicant was present during the hearing of the matter and she responded and afforded the right to be heard.

Mr. Ayubu was of the view that the nature of the prayers appearing in the applicant chamber summons in line with an order of mandamus as the orders sought are not within the mandate of the 1st respondent. The learned advocate contended that the powers of the 1st respondent rest on hearing an appeal only with the exclusion of the power to compel a body to grant a tender to the applicant who was disqualified in line with tender proceedings for contravening Regulation 204 (2) K for submitting defective power of attorney as admitted in paragraph 4 of the applicant affidavit.

As regards the cases cited by Ms. Kiiza in her submission in chief, Mr. Ayubu argued that the same are distinguishable as they deal with the questions of extension of time and error on the face of the record which differs from the present matter. In conclusion, the Learned State Attorney urged the Court to dismiss the application in its entirety with costs.

In her brief rejoinder, Ms. Mushi maintained and retaliated the submission in chief that the applicant is entitled to an order of certiorari. The learned advocate retained that the dismissal of an appeal brought by the applicant to the 1st respondent was wrongly done without taking into account the letter dated 29th May 2023 seeking administrative review. Ms. Mushi submitted that if the letter dated 29th May 2023 had been taken into account

by the 2nd respondent the matter would have not ended the way it was decided.

The learned advocate retaliated that the decision of the 1st respondent was illegal by provision of Section 97 (2) (b) of the Public Procurement Act as the review dated 23rd May 2023 was addressed to the accounting officer of the 2nd respondent as evidenced by annexure 2 of the applicant affidavit and was not addressed to the appellate board which is 1st respondent. Ms. Mushi contended that the complaint was filed under Regulation 105 supra which was decided by the 2nd respondent on 23rd May 2023.

It was further maintained that the appeal was lodged on 11th July 2023 within 7 working days as required under the provision of Section 97 of the Public Procurement Act. The learned advocate retaliated that according to Section 97 (2) (b) the communication was done on 23rd May 2023.

On whether the condition for mandamus has been met or not, Ms. Mushi invited this Court to the provision of Section 101 of the Public Procurement Act which in her views empowers the applicant to apply for judicial review before the High Court as the only and available remedy. The learned advocate argued that since the appeal was dismissed the applicant's right of being heard was denied.

Ms. Mushi urged the Court to grant the application as the same has merits in law.

Having summarized the rival submissions in support and opposing the application from both parties in dispute and pleadings thereto, this court is then duty-bound to determine whether the entire application has merit or otherwise.

Before venturing upon to determine the matter under scrutiny, I feel duty bound and appropriate first to underscore the law governing a writ of certiorari and mandamus in our legal fraternity.

As a matter of general principle, the following guidelines have been formulated for a writ of certiorari to be issued; one, for correcting errors of jurisdiction when an inferior Court or tribunal acts without jurisdiction or in excess of it or fails to exercise it, two when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction as when it decides without allowing the parties to be heard or violates the principles of natural justice. Three, when the Court acts in the exercise of supervisory and not appellate jurisdiction, fourth to correct more than an error of law on the face of the record.

The above prepositions of the law were celebrated in an unbroken chain of authorities within and outside our legal fraternity such as **Sanai Murumbe and Another Vs Muhere Chacha** (1990) TLR 54, **Associated Provincial Pictures Houses Limited Vs Wednesbury Corporation** (1947) 2 ALL ER 680, **M/S Olam Tanzania Limited Vs Leonard Magesa & 2 Others** Misc. Civil Cause No. 6 of 2019, **Mohamed Jawad Mrouch Vs Ministry of Home Affair**s (1996) TLR 142, **Shabibu Badi Mruma Vs Mzumbe University and Attorney Genera**l Misc. Cause No. 20 of 2020.

Conversely, it is settled law that a writ of mandamus can only be issued where the following conditions have been satisfied by the applicant**. One** the applicant must have demanded performance and the respondents must have refused to perform**, two** the respondents as public officers must have a public duty to perform imposed on them by Statute or any other law but it

should not be a duty owed solely to state but should be a duty owed as well to the individual citizen, **three** the public duty imposed should be imperative and not discretionary one, **fourth** the applicant must have a locus standi: that is, he must have sufficient interest in the matter he is applying for and **fifth** there should be no other appropriate remedy available to the applicant.

The above conditions have been renowned in the following authorities **such as John Mwombeki Byombalirwa V The Regional Commissioner and Regional Police Commander, Bukoba** (1987) TLR 73, **Dr. Matongo Bernad Shija Vs Minister for Health and Another HC** Misc Cause No 21 of 2003, **E 933 CPL Philimatus Fredrick Vs Inspector General of Police and Another** HC misc. Civil Cause No. 3 of 2019 to mention but a few.

Having in mind the legal positions governing the matter at hand, I am now called upon to determine two distressing issues that this ruling must answer the same. **First** on the facts established, whether this is a fit case for the Court to issue for a writ of certiorari. If the answer on the first issue is affirmative, the next question is whether, on the facts established, the applicant has managed to establish the conditions entitled to a writ of mandamus and an order to allow the applicant execution of the remaining work of supply of the Railway wooden sleepers.

In deliberation on the first issue, I think the essence of seeking an order of certiorari by the applicant is based on the way the 1st respondent interpreted the provisions of **Section 95 (1) Section 96 (6), and 97 (1) (2) (b) of the Public Procurement Act Cap 410**. Subsequently, whether the conclusion reached by 1st respondent that the appeal was filed out of

time was sound in the eyes of the law. Suffice it to say the legal battle revolves around the mind and attention of the parties in this matter rests on whether or not the 1st respondent interpreted properly the provision of the Public Procurement Act when entertaining the objection raised ***suo motu*** on whether the appeal was properly before the appeals Authority.

From the parties argument and having gone through the record and ruling of the 1st respondent delivered on 17th day of August 2023 by Hon Justice (Rtd) S. Mjasiri, it was not disputed that the legal dispute on the following facts were not in controversy when the matter was landed before the 1st respondent which I am full in agreement and term them the same as uncontroverted facts were as follows: **first,** the applicant submitted its application for administrative review to the 2nd respondent on 23rd May 2023 within seven working days in accordance to the provisions of **Section 95 (1) 96 (1) (4) and 97 (1) (2) of the Public Procurement Act. Two,** 2nd Respondent issued a decision on the application for review on 29th May 2023 which was sent to the applicant via TANePS on 31st May 2023. **Third,** the applicant filed the appeal to the 1st respondent on 11 July 2023.

The issue here is when to start counting the time of filing an appeal to the 1st respondent was it from the date the applicant became aware of the circumstance leading to the appeal which was on 3rd July 2023 as alleged by the applicant's advocates or after receipt of the 2nd respondent's decision via TANePS on 31st May 2023 as propounded by respondent's advocates.

Before I resolve the above issue, it is not irrelevant to state the import of the provision of **Section 97 (1) and (2) of the Public Procurement**

Act which speaks for itself without any ambiguity whatsoever. From my reading of the foregoing provision, it is apparent that the wisdom of the Parliament imposed two options for a party who has been aggrieved by the decision of the accounting officer, that he has two remedies, first to refer the matter to the 2nd respondent for review and administrative decision and second where an accounting officer does not make decision within the period specified under the Public Procurement Act or where the party is not satisfied with the decision of an accounting officer, a party may make a complaint to the 2nd respondent.

As stated earlier, since it was not disputed that the applicant applied for review to the 2nd respondent on 23rd May 2023 within seven working days, and the fact that the 2nd respondent issued its decision for review on 29th May 2023 within seven working days provided by the Public Procurement Act, and since there is no dispute that the said decision was communicated to the applicant via TANePS on 31st May 2023, the applicant ought to have filed an appeal to the 1st respondent within seven working days reckoned from the date where the applicant received the decision of 2nd respondent which was 31st May 2023. In my settled view, filing an appeal by the applicant on 11th July 2023 regrettably was out of the prescribed time by the provisions of **Section 97 (1) and (2) of the Public Procurement Act.**

At the very worst, having strayed into the error, the applicant should have sought refuge under the provision of **Section 98 of the Public Procurement Act** by filing an application seeking leave to file the appeal out of time. In the event, I find the appeal before 1st respondent was indeed

hopelessly out of time. It follows therefore that the first limb seeking for a writ of certiorari barren of fruits. Accordingly, the same is hereby dismissed.

As regards the prayers for a writ of mandamus, as stated earlier in this ruling, let me start with the premise that in an application of this nature seeking a writ of mandamus, for the applicant to succeed in an order of mandamus, he must satisfy the cumulative conditions celebrated for a decade in our legal jurisprudence. For the easiness of reference, I will reproduce the conditions as follows: **one** the applicant must have demanded performance and the respondents must have refused to perform, **two** the respondents as public officers must have a public duty to perform imposed on them by Statute or any other law but it should not be a duty owed solely to state but should be a duty owed as well to the individual citizen, **three** the public duty imposed should be imperative and not discretionary one, **fourth** the applicant must have a locus standi that is, he must have sufficient interest in the matter he is applying for and **fifth** there should be no other appropriate remedy available to the applicant

In the matter at hand, I have considered the rival arguments on the point by the parties, the contents of the affidavit in support of the application, the statement of the applicant, and the weight of the submission made by the applicant's advocates, the pertinent question before me is whether the applicant managed to meet here in above conditions?. With due respect to the learned advocates for the applicant, these conditions are wanting in the affidavit in support of the application.

Much as I agree with the learned state attorney that in the absence of the proof in the pleading by the applicant and submission during the

hearing on the cumulative conditions the applicant's prayer for seeking a writ of mandamus is unprotected. I underline that what the law provides as cumulative conditions precedent for allowing a writ of mandamus must be reflected in the affidavit in support of the application and elaborated during the hearing, which in this matter unfortunately is missing.

In my settled view, the foregoing reason sufficiently explains why I decline the invitation extended to me by the applicant's advocates to issue a writ of mandamus as prayed in this application. Consequently, I find the second prayer sought in the chamber summons devoid of merits and the same is hereby dismissed.

In line with what has been discussed, the above discussion boils down to the conclusion that this application is without merit and I decline to grant the reliefs sought in the Chamber Summons. To that end, the application is hereby dismissed with cost. It is so ordered.

W. M Chuma

JUDGE

13/11/2023