

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 09 OF 2023-24

BETWEEN

M/S DEZO CIVIL CONTRACTORS

COMPANY LTD.....1ST APPELLANT

M/S HARASINI ENTERPRISES LTD.....2ND APPELLANT

AND

PUBLIC PROCUREMENT REGULATORY

AUTHORITY.....1ST RESPONDENT

OCEAN ROAD CANCER INSTITUTE2ND RESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|---------------|
| 1. Hon. Justice (rtd) Souda Mjasiri | - Chairperson |
| 2. Mr. Rhoben Nkori | - Member |
| 3. Mr. Pius Mponzi | - Member |
| 4. Mr. James Sando | - Secretary |

SECRETARIAT

- | | |
|------------------------|------------------------------|
| 1. Ms. Florida Mapunda | - Deputy Executive Secretary |
| 2. Ms. Agnes Sayi | - Senior Legal Officer |
| 3. Ms. Violet Limilabo | - Senior Legal Officer |

FOR THE 1ST APPELLANT

1. Mr. Audax Vedasto - Advocate, Adare Advocates
2. Mr. Franco Mahena - Advocate, Mzizima Law Associates
3. Sheikh Mohamed Bawazir - Managing Director

FOR THE 2ND APPELLANT

1. Mr. Audax Vedasto - Advocate, Adare Advocates
2. Mr. Franco Mahena - Advocate, Mzizima Law Associates
3. Mr. Yassin Manyanzira - Managing Director

FOR THE 1ST and 2ND RESPONDENTS

1. Mr. Ayoub Sanga - State Attorney, OSG
2. Ms. Lilian Machege - State Attorney, OSG
3. Mr. Paul Kadushi - Director Legal and Public Affairs, PPRA
4. Mr. Hilmar Danda - Principal State Attorney, PPRA
5. Mr. Kelvin Mugashe - State Attorney, PPRA
6. Mr. Deusdedith Bishweko - Legal Officer, PPRA
7. Ms. Elipendo Kazimoto - Head of Legal Unit, ORCI
8. Ms. Florence Mkinga - Head Procurement Management Unit, ORCI
9. Mr. Fahd Afif - Head of Legal, Amana Bank

M/S Dezo Civil Contractors Company Ltd (hereinafter referred to as "**the 1st Appellant**") and **M/S Harasini Enterprises Ltd** (hereinafter referred to as "**the 2nd Appellant**") have lodged this Appeal against the **Public Procurement Regulatory Authority** commonly known by its acronym as "**PPRA**" (hereinafter referred to as "**the 1st Respondent**")

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and the **Ocean Road Cancer Institute** (hereinafter referred to as "**the 2nd Respondent**"). The Appeal is in respect of the debarment order issued by the 1st Respondent against the Appellants for submission of forged Performance Bank Guarantee and Advance Payment Guarantee that were purported to be issued by Amana Bank. The two guarantees were in respect of Tender No. PA-010/2022/2023/W/02 for the Proposed Construction of Chemotherapy and OCP Pharmacy at Ocean Road Cancer Institute (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: -

On 2nd September 2022, the 2nd Respondent floated the Tender through the Tanzania National electronic Procurement System (TANePS). The Tender was conducted in accordance with the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") and the Public Procurement Regulations, GN. No. 446 of 2013 as amended (hereinafter referred as to "**the Regulations**").

The 1st and 2nd Appellants participated in the Tender as a Joint Venture (JV). After the 2nd Respondent completed all its internal processes, the Appellants were awarded the Tender. The contract between the 2nd Respondent and the Appellants' JV was signed on 6th March 2023. As per the conditions of the contract, the Appellants were required to submit Performance Bank Guarantee and Advance Payment Guarantee within two weeks from the date of signing the contract. The Appellants through a letter dated

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13th March 2023 submitted to the 2nd Respondent Performance Guarantee No.000GUMB231530001 and Advance Payment Guarantee No. 000GUMB231430001 from Amana Bank. These Guarantees were issued on 7th March 2023.

The record of Appeal indicates that on 18th March 2023, the 2nd Respondent sought confirmation from Amana Bank through letters with Ref Nos. 07/03/VOL.IV/44 and 07/03/VOL.IV/45. The confirmation was about whether the Performance Bank Guarantee and Advance Payment Guarantee submitted by the Appellants were issued by the said Bank. Amana Bank through a letter with Ref. No. ABL/MD/BUS/2023/006 dated 30th March 2023, informed the 2nd Respondent that the two guarantees submitted by the Appellants were not issued by the Bank.

On 5th April 2023, the 2nd Respondent informed the Appellants that the submitted guarantees were forged and were not issued by Amana Bank as the Appellants purported. The Appellants were required to submit a written explanation in that respect. On 6th April 2023, the Appellants through a letter with Ref. No HAR/ORCI/2023/02 denied to have processed the submitted guarantees from Amana Bank. The Appellants stated that the referred guarantees were processed without their consent by Mr. Adam Assad whom the Appellants entrusted with the Power of Attorney to transact the Tender on their behalf.

The 2nd Respondent was not satisfied with the Appellants' replies thereof. Thus, it submitted a debarment proposal to the 1st Respondent on 28th April 2023. The 1st Respondent through a

letter dated 18th May 2023, required the Appellants to show cause as to why they should not be debarred from participating in public procurement. The said letter was received by the Appellant on 1st June 2023. The Appellants through a letter dated 12th June 2023 informed the 1st Respondent that the submitted guarantees were processed by one Adam Assad who was conferred with the Power of Attorney to transact on behalf of the Appellants. The Appellants claimed that the granted powers did not authorize Mr. Adam Assad to commit the alleged forgery. The Appellants stated that the Bank guarantees were processed by Mr. Adam Assad in his own capacity without engaging the Appellants. Thus, they were not aware of the alleged forgery.

Upon not being persuaded with the Appellants' defence, the 1st Respondent through a letter dated 13th July 2023 debarred the Appellants from participating in public procurement for a period of 10 years. The Appellants claimed to have received the debarment decision on 25th July 2023. Dissatisfied with the debarment decision issued by the 1st Respondent, the Appellants lodged this Appeal on 9th August 2023.

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

- 1. Whether the Appellants' debarment was justified and in accordance with the law; and**
- 2. What reliefs, if any are parties entitled to?**

SUBMISSIONS BY THE APPELLANTS

The Appellants' submissions were made by Mr. Audax Vedasto, learned advocate. He commenced his submissions by seeking leave of the Appeals Authority to expunge the first and the third grounds of Appeal as contained in the Statement of Appeal. These were:-

- i. The 1st Respondent erred in law and fact by holding that, the Agent Mr. Adam Assad has committed forgery and making a conclusive decision that, the Appellants are liable for the forgery committed by the said Agent while the issue of forgery was reported to Police and the same is still under Police investigation.
- iii. The 1st Respondent erred in law and fact by holding that, the Appellants are liable for a criminal offence committed by an agent if at all was proved without considering the fact that, the Appellants in the said power of attorney did not authorize the commission of a criminal offence.

The Respondents did not object to the prayer. The Appeals Authority granted the leave.

The learned counsel started his submissions on the first issue by indicating that his argument would be based on two parts, namely; the 1st Respondent's jurisdiction to entertain a debarment proposal and the justification for the debarment decision. On the 1st Respondent's jurisdiction the learned counsel submitted that the 1st Respondent lacked jurisdiction to investigate and make decision on the forgery allegations. He contended that according to Regulation 94(1) of the Regulations, a debarment proposal had to be submitted to the 1st Respondent within twenty eight days of becoming aware of the circumstances giving rise to

such a proposal. According to paragraph 3(ii) of the 1st Respondent's debarment decision, the 2nd Respondent received the Performance Bank Guarantee and Advance Payment Guarantee from the Appellants on 13th March 2023. Thereafter, the 2nd Respondent sought confirmation on the authenticity of the guarantees from Amana Bank. The learned counsel asserted that Amana Bank through a letter with Ref. No. ABI/MD/OPS/PYT/GT/2023/004 dated 20th March 2023, informed the 2nd Respondent that the guarantees were not issued by the Bank.

The learned counsel contended that paragraph 2.11 of the Respondent's Statement of Reply indicated that the letter from Amana Bank was served to the 2nd Respondent on 21st March 2023. The 2nd Respondent is required by law to submit a debarment proposal to the 1st Respondent within twenty eight days. Counting from 21st March 2023, the debarment proposal ought to have been submitted by 18th April 2023. To the contrary, the 2nd Respondent submitted a debarment proposal on 28th April 2023 beyond the stipulated time limit. Thus, the debarment proposal was submitted in contravention of Regulation 94(1) of the Regulations.

The learned counsel challenged the 1st Respondent's finding as contained in paragraph 5 of the debarment decision that the 2nd Respondent received a letter from Amana Bank denying having issued the Appellants' guarantees on 31st March 2023. The learned counsel asserted that the 2nd Respondent was aware of the Amana Bank's denial of issuing the alleged forged guarantees from 21st March 2023. The contention that there was a second letter from Amana Bank regarding denial of issuance of the guarantees on 31st March 2023 would not

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change the position that the 2nd Respondent was aware of the alleged forged guarantees from 21st March 2023.

In support of his arguments the learned counsel cited the case of ***Paul Ng'wani versus Tanzania Cotton Lint & Seed Board and Another***, Commercial Case No. 22 of 2005, High Court of Tanzania, Commercial Division at Dar es Salaam (unreported). The court stated that the claim arises when facts exist giving rise to the liability of the defendant.

The learned counsel also cited the cases of ***Nazimini Mohamed Rwambo versus Maulid Tagwa and Others***, Land Appeal No. 109 of 2020, High Court of Tanzania, Land Division at Dar es Salaam (unreported); ***Rehema Athumani versus Santu Babu Tulstdas***, Land Appeal No. 224 of 2017, High Court of Tanzania, Land Division at Dar es Salaam (unreported); ***Dar es Salaam City Council versus S. Group Security Limited***, Miscellaneous Civil Application No. 405 of 2014, High Court of Tanzania, at Dar es Salaam; ***Mwananchi Communications Limited and Two Others versus Joshua K. Kajula and Others***, Civil Appeal No. 126/01 of 2016, Court of Appeal of Tanzania, at Dar es Salaam (unreported); ***Swilla Secondary School versus Japhet Petro, Civil Appeal No. 362 of 2019***, Court of Appeal of Tanzania at Mbeya (unreported); ***Fortunatus Lwanyantika Masha and Another versus Claver Motors Limited***, Civil Appeal No. 144 of 2019, Court of Appeal of Tanzania, at Mwanza and ***Moto Matiko Mabanga versus Ophir Energy PLC and others***, Civil Appeal No. 119 of 2021, Court of Appeal of Tanzania at Dodoma (unreported). The learned counsel also made reference to ***Interpretation of Statutes***, by N.S Bindra, 7th Edition 1984, at page 220.

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According to the learned counsel all the above cited cases set a principle that the course of action should be determined by facts as to when the applicant or complainant became aware of the circumstances giving rise to a dispute. He contended further that the cited cases indicate clearly that the determination of when the course of action had arisen would assist the court or tribunal to determine if it had jurisdiction to entertain the matter.

The learned counsel submitted that determination of jurisdiction is one of the paramount factor that has to be considered by any decision making body prior to determination of any matter before it. In the circumstances of this Appeal, the 1st Respondent ought to have determined if the debarment proposal has been submitted within the stipulated time limit before issuing the debarment order. Thus, since the debarment proposal was submitted beyond the stipulated time limit, the debarment decision issued thereof is invalid in the eyes of the law, the learned counsel contended.

On the justification for the debarment decision the learned counsel submitted that the 1st Respondent erred in law and fact by holding that the 1st Appellant was liable for the forged Performance Bank Guarantee and Advance Payment Guarantee. The learned counsel elaborated that the Appellants participated in the Tender as a JV known as DEZO JV HARISINI. The joint venture was entered on 19th May 2022. Paragraph 5 of the said joint venture agreement indicated that the responsibilities and obligations of the parties to the joint venture were on percentage basis. The 1st Appellant had 15 percent and the 2nd Appellant had 85 percent. The 2nd Appellant was the leading partner and therefore responsible for all acts including the guarantees submitted by the

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Appellants. The 1st Appellant was not aware of the whole process of the alleged forged guarantees and its bank was not involved. Thus, under the circumstances, the 1st Appellant is not liable for the alleged forged guarantees, the learned counsel contended.

In the alternative to the above argument, the learned counsel submitted that, if the 1st Respondent found that all the Appellants were liable for the alleged forged guarantees, the debarment punishment thereof ought to have been apportioned on the basis of percentage as stipulated in the joint venture agreement. The joint venture agreement indicated clearly that the liability of the parties would be jointly and severally on the basis of the percentages provided. Therefore, the 1st Respondent when issuing the debarment order ought to have considered the percentages in the joint venture agreement. Thus, the punishment could have been apportioned accordingly.

On the basis of the above made submissions, the learned counsel prayed that the Appeal be upheld and debarment decision/order issued by the 1st Respondent on 13th July 2023 be nullified. In the alternative to the preceding prayer, the learned counsel prayed that if it would be determined that the debarment is justified, the punishment should be apportioned on the basis of percentage as stipulated in the joint venture agreement.

REPLY BY THE RESPONDENTS

The Respondents' joint submissions were led by Mr. Ayoub Sanga, State Attorney from the Office of the Solicitor General. The learned State Attorney commenced his submissions on the 1st Respondent's jurisdiction to determine the debarment

proposal by stating that Regulation 94(1) of the Regulations states categorically that the debarment proposal has to be submitted to the 1st Respondent within twenty eight days of becoming aware of the circumstances leading to such a proposal.

The learned State Attorney submitted that the 1st Respondent received the debarment proposal from the 2nd Respondent on 28th May 2023. The 2nd Respondent indicated on the documents attached to the debarment proposal that, such a proposal was made after receiving a confirmation from Amana Bank. The confirmation stated that the Performance Bank Guarantee and Advance Payment Guarantee submitted to it by the Appellants were not issued by the said Bank as contended. The 2nd Respondent received the said letter on 31st March 2023 although it was dated 30th March 2023.

The learned State Attorney denied the alleged fact that on 21st March 2023 the 2nd Respondent received a letter from Amana Bank which refuted to have issued the guarantees submitted by the Appellants. The learned State Attorney contended that the 2nd Respondent received official confirmation from Amana Bank that the Appellants' guarantees were not issued by it on 31st March 2023. Counting from 31st March 2023, the 2nd Respondent was required to submit the debarment proposal to the 1st Respondent by 28th April 2023. The 2nd Respondent submitted the debarment proposal on 28th April 2023. Thus, the debarment proposal was submitted within the time stipulated under Regulation 94(1) of the Regulations.

The learned State Attorney submitted further that determination of when the 2nd Respondent became aware of the circumstances that led to the submission of the debarment proposal was a factual issue that had to be verified from the available documents. He contended that, the letter dated 30th March 2023 from Amana Bank to the 2nd Respondent indicated clearly that the bank's letter dated 20th March 2023 was not received by the 2nd Respondent. Therefore, Amana Bank in its letter dated 30th March 2023, stated that the Appellant's guarantees were not issued by the Bank. The learned State Attorney asserted that the available documents could verify the facts as to when the 2nd Respondent became aware of the alleged forgery.

The learned State Attorney distinguished all the cases cited by the Appellants in their submissions in that the debarment proposal was submitted within the stipulated time limit. Therefore, the issue of time and jurisdiction of the 1st Respondent did not arise in this regard. The learned State Attorney contended that the 1st Respondent had the jurisdiction to entertain the debarment proposal.

In relation to the Appellants' argument that the 1st Appellant ought not to have been debarred as it was not involved in the alleged forgery, the learned State Attorney submitted that the Appellants participated in this Tender as a joint venture of the two companies. The Appellants' JV appointed Mr. Adam Assad to be their representative in the Tender. The learned State Attorney asserted that the appointment of Mr. Assad was confirmed by the Power



of Attorney issued to him on 12th September 2022. The Power of Attorney indicated that Mr. Adam Assad was given full powers and authority on behalf of both Appellants to carry out all transactions for the Tender.

The learned State Attorney asserted that among the acts that were conducted by Mr. Adam Assad in relation to the Tender included the preparation and submission of the Performance Bank Guarantee and Advance Payment Guarantee in accordance with Clause 11.1(h) of the Instruction to Tenderers (ITT). Thus, the 1st Appellant cannot exonerate itself from the acts of its appointed attorney.

In support of his argument the learned State Attorney cited the case of **Barreto Hauliers (T) Ltd and Another versus Mohamood Mohamed Duale**, Civil Appeal No. 7 of 2018, Court of Appeal of Tanzania at Dar es Salaam (unreported). In this case the court stated that the Power of Attorney is governed by Chapter X of the Law of Contract Act, Cap 354 R.E 2019 that covers the obligations and powers of the principal and agent.

The learned State Attorney further cited the case of **North Mara Gold Mine Limited versus Emmanuel Mwita Magesa**, Civil Appeal No. 271 of 2019, Court of Appeal of Tanzania at Mwanza (Unreported). The court referred to the case of **Machame Kaskazini Corporation Limited (Lambo Estate) versus Aikaeli Mbowe**, (1984) TLR 70 at page 73 where reference was made to the case of **Marsh versus Moores** (1949) 2KB 208 at 215 where it was stated that:-

"it is well settled law that a master is liable even for acts which he has not authorised provided that they are so connected with acts



which he has authorised that they may rightly be regarded as modes, although improper modes, of doing them'.

The learned State Attorney submitted that the Appellants are vicariously liable for the acts authorized or not authorized relating to the authorized acts. In the instant Appeal, the Appellants cannot distance themselves from the acts conducted by Mr. Adam Assad in the course of execution of his duties as per the granted Power of Attorney for the Tender. Mr. Adam Assad submitted the Tender on behalf of the Appellants. Therefore, all the subsequent acts thereafter including submission of the Performance Bank Guarantee and Advance Payment Guarantee bind both Appellants.

With regard to the Appellants' arguments that the debarment order against the Appellants ought to be on a percentage basis as indicated in the joint venture agreement, the learned State Attorney submitted that percentages indicated under paragraph 5 of the joint venture agreement are in relation to the tenderers' responsibilities during the execution of the project. The learned State Attorney contended further that the provisions of the joint venture agreement were to be read as a whole and not in isolation.

The learned State Attorney stated further that Clause 11.1 of the General Conditions of Contract (GCC) states clearly that joint ventures are jointly and severally liable to the client. Since the Appellants have already entered into contracts with the 2nd Respondent, the 1st Appellant cannot exclude itself from the acts conducted by its attorney.

Based on the above made submissions and the fact that the Appellants have not disputed the existence of the forged guarantees, the learned

State Attorney stated that the Respondents have established their case beyond the balance of probabilities as required in the ordinary civil cases. The learned State Attorney cited the case of ***City Coffee Ltd versus Registered Trustee of Iloilo Coffee Group***, Civil Appeal No. 94 of 2018, Court of Appeal of Tanzania at Mbeya (unreported). In this case, the court referred to the case of ***Omari Yusuph versus Rahma Ahmed Abdulkadr*** (1987) TLR 169 at 174 where it was stated that: -

"...It is now established that when the question whether someone has committed a crime is raised in civil proceedings that allegation need to be established on a higher degree or probability than that which is required in ordinary civil cases..."

Finally, the Respondents prayed for the following orders: -

- i) Dismissal of Appeal for lack of merits; and
- ii) Costs of this Appeal be borne by the Appellants.

ANALYSIS BY THE APPEALS AUTHORITY

1.0 Whether the Appellants' debarment was justified and in accordance with the law.

In resolving this issue, the Appeals Authority considered the parties' contentious arguments. It observed that the Appeal is mainly centred on two parts, namely the 1st Respondent's jurisdiction in issuing the debarment order and the justification of the debarment decision. Having observed this, the Appeals Authority proceeds to determine the first issue in the two parts as hereunder: -

a) 1st Respondent's jurisdiction

The Appellants challenged the 1st Respondent's jurisdiction in the issuance of the debarment decision on the ground that the debarment proposal was submitted to it beyond the required time limit. Therefore, it ought not to have entertained the same. The 1st Respondent on its part stated that the debarment proposal was submitted to it within the stipulated time limit. Thus, it had the jurisdiction to determine the matter.

In ascertaining the validity of the parties' arguments, the Appeals Authority revisited Regulation 94(1) of the Regulations. This Regulation provides guidance on the time limit for submission of a debarment proposal to the 1st Respondent. Regulation 94(1) of the Regulations reads as follows: -

*"94.-(1) A person who wishes to submit a proposal for debarment of a tenderer to the Authority shall do so **within twenty eight days of becoming aware of the circumstances or grounds which give rise to the debarment.**"*

The above quoted provision entails clearly that a debarment proposal has to be submitted to the 1st Respondent within twenty eight days of becoming aware of the circumstances giving rise to the debarment.

From the facts of this Appeal, it is clear that the 2nd Respondent submitted the debarment proposal to the 1st Respondent after realizing that the Performance Bank Guarantee and Advance Payment Guarantee submitted by the Appellant in compliance with the Tender requirements were not genuine and were not

issued by Amana Bank as purported. The record of this Appeal indicates the Appellants' JV was among the tenderers which participated in the Tender. After completion of the Tender process, the Appellants' JV was awarded the contract. The Appellants were required to submit a Performance Bank Guarantee and Advance Payment Guarantee after signing the contract.

In complying with contract requirements, the Appellants through a letter dated 13th March 2023 submitted to the 2nd Respondent the Performance Bank Guarantee No.000GUMB231530001 and Advance Payment Guarantee No. 000GUMB231430001. The guarantees were from Amana Bank. Having received the Appellants' guarantees, the 2nd Respondent through a letter dated 18th March 2023 sought confirmation of its authenticity from Amana Bank. The record of Appeal indicates that Amana Bank responded to the 2nd Respondent's inquiry through a letter dated 30th March 2023. The letter indicated that Amana Bank had not issued the guarantees submitted by the Appellants. In addition, Amana Bank indicated that, it responded to the 2nd Respondent's concern through a letter dated 20th March 2023. However, it realized that the letter was not received by the 2nd Respondent as intended. Therefore, it had to re-write the second letter on 30th March 2023. The records indicate that the said letter was received by the 2nd Respondent on 31st March 2023.

The Appeals Authority considered the Appellants' contention that the response regarding the authenticity of the Appellants'

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guarantees from Amana Bank was received by the 2nd Respondent on 21st March 2023. Therefore, the 2nd Respondent ought to have submitted its debarment proposal to the 1st Respondent by 18th April 2023.

Having reviewed the record of Appeal, there is no evidence that the 2nd Respondent received a letter dated 20th March 2023 on 21st March 2023 from Amana Bank which indicated that the bank denied to have issued the Appellants' guarantees. The Appellants who alleged that the 2nd Respondent received the Amana Bank's position on the status of the Appellants' guarantees on 21st March 2023, failed to establish if the said letter was received on the alleged date.

In the absence of sufficient proof that the said letter from Amana Bank was received by the 2nd Respondent on 21st March 2023, the Appeals Authority is of the view that the circumstances giving rise to the debarment were known by the 2nd Respondent on 31st March 2023. This was when it received a letter from Amana Bank that denied to have issued the guarantees submitted by the Appellants.

Regulation 94(1) of the Regulations quoted hereinabove states clearly that a debarment proposal has to be submitted to the 1st Respondent within twenty eight days of becoming aware of the circumstances giving rise to a debarment. From the sequence of events analysed hereinabove, the 2nd Respondent became aware of the circumstances giving rise to a debarment on 31st March 2023. Counting from 31st March 2023, the 2nd Respondent ought

to have submitted a debarment proposal by 28th April 2023. The record of Appeal indicates that the 2nd Respondent submitted the debarment proposal on 28th March 2023.

From the above observations, the Appeals Authority is of the settled view that the debarment proposal was submitted within the stipulated period of twenty eight days. Therefore, the 1st Respondent had jurisdiction to determine the same.

b) Justification of the debarment decision

The record of Appeal indicates that the debarment decision was reached by the 1st Respondent following the submission of the debarment proposal by the 2nd Respondent. The said proposal was attached with a letter from Amana Bank which indicated that the Appellants' guarantees were not issued by the Bank as indicated.

The Appellants in their Statement of Appeal as well as oral submissions during the hearing did not deny to have submitted the guarantees that were purported to have been issued by Amana Bank. The Appellants' learned counsel instead indicated that the 1st Appellant was not involved. Therefore, it should not be penalized. The Appellants argued in the alternative that, if both the Appellants would be found liable of the alleged forgery, the debarment should be on the basis of liability as per the percentage indicated in the joint venture agreement.

The Appeals Authority reviewed the Tender Document and observed that Clause 61.1 (b) and 62.1 of the Special Conditions of Contract required a successful tenderer to submit the Performance Bank Guarantee and Advance Payment Guarantee.

The Appeals Authority revisited Section 62(3)(a) and 83(2) of the Act read together with Regulation 93(3) of the Regulations. The referred provisions read as follows: -

"62(3) A tenderer shall be debarred and blacklisted from participating in public procurement or disposal proceedings if-

*(a) **fraud** or corrupt practices is established against the tenderer in accordance with the provisions of this Act;*

*83(2) **Where a procuring entity is satisfied, after due diligence, that any person or firm to which it is proposed that a tender be awarded, has engaged in fraudulent, collusive, coercive or obstructive practices in competing for the contract in question, the procuring entity shall -***

(a) reject a proposal for award of such contract; and

*(b) **report any person or tenderer, including its directors to the Authority for debarment and blacklisting in accordance with section 62 of the Act.***

*93(3) Subject to the provisions of the Act, **a tenderer shall be debarred from participating in public procurement or disposal proceedings if-***

*(a) corrupt, **fraudulent**, collusive, coercive or obstructive practices or inducement **is established against the tenderer, in which case he shall be barred for a period of ten years**".*

(Emphasis supplied)



The above quoted provisions state clearly that a tenderer may be debarred from participating in public procurement if it would be established against it that it has been involved in amongst others fraudulent conducts in the procurement proceedings.

The record of this Appeal indicates clearly that the Appellants submitted guarantees to the 2nd Respondent purported to have been issued by Amana Bank while they were not. The Appellants did not object to the finding that the submitted guarantees were not issued by the Amana Bank. In view of this observation, the Appeals Authority finds the Appellants' act of submitting guarantees that were not issued by the Bank and purported to have been issued by it, to be a fraudulent act that intended to deceive the 2nd Respondent.

In this regard the Appeals Authority finds the 2nd Respondent's act of submitting a debarment proposal to the 1st Respondent after establishing that the Appellants' guarantees were forged to be proper and in accordance with Section 83(2)(b) of the Act. In addition, the Appeals Authority is of the firm view that the 1st Respondent's act of debarring the Appellants for the period of ten years to be proper and in accordance with Regulation 93(3)(a) of the Regulations.

The Appeals Authority considered the Appellants' proposition that the debarment order should not be issued against the 1st Appellant as it was not involved in processing the submitted guarantees. In the alternative, if it would be found that the 1st Appellant is also liable, the debarment should be on the basis of

percentage as stipulated in the joint venture agreement. The Appeals Authority finds that since the Appellants participated in the Tender as a JV and appointed Mr. Adam Assad to be their lawful representative in the Tender, all the acts performed by their appointed representative (attorney) bind the JV as whole. That is to say, the 1st Appellant cannot exonerate itself from the acts conducted by the appointed representative.

Section 189 of the Law of Contract Act states clearly that a principal is bound by the act of its agent or representative. Section 189 reads as follows: -

"A Misrepresentation made or a fraud committed by an agent acting in the course of his business for his principal, has the same effect on an agreement made by such agent as if such misrepresentation or fraud had been made or committed by the principal; but a misrepresentation made or frauds committed, by an agent, in matters which do not fall within his authority, do not affect his principal".

(Emphasis supplied)

The Appeals Authority is of the considered view that paragraph 5 of the joint venture agreement relied by the Appellants that it requires partners to be punished on the percentage basis, does not support the Appellants' contention in this regard. The paragraph relates to the responsibilities of the JV partners in the execution of the contract. In that regard, the Appeals Authority finds that the debarment punishment cannot be meted out on a percentage basis.

Under the circumstances the Appeals Authority concludes the first issue in the affirmative that the Appellants' debarment is justified and in accordance with the law.

2.0 What reliefs, if any are parties entitled to?

Taking cognizance of the above made findings, the Appeals Authority hereby dismiss the Appeal and uphold the debarment decision issued by the 1st Respondent.

We make no order as to costs. It is so ordered.

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

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 14th day of September 2023.

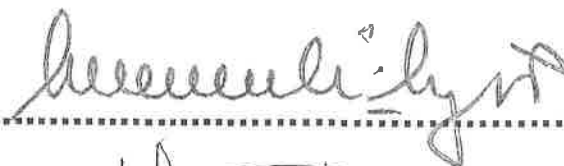
HON. JUSTICE (rtd) SAUDA MJASIRI



.....
CHAIRPERSON

MEMBERS: -

1. MR. RHOBEN NKORI



2. MR. PIUS MPONZI

