

- (c) An order of prohibition, prohibiting the 1st intended respondent or any other officer of the first intended respondent from implementing or otherwise taking further action on the basis of the impugned decision.
 - (d) An order of prohibition, prohibiting the 1st intended respondent from proceeding to implement the illegal decision of cancellation of the tender lawfully awarded to the applicant.
 - (e) An order of mandamus directing the intended respondents to reinstate the tender awarded to the applicant for supply of creosote oil to the 1st intended respondent.
 - (f) General, Special, aggravated and exemplary damages.
 - (g) Costs.
 - (h) Interest on (f) and (g) above.
- (ii) An order does issue staying any further action in the tender process including but not limited to continuing with the bidding process, re-advertisement, any other act affecting the bid awarded to the applicant pending the hearing and final determination of main application for judicial review.
- (iii) Cost of this application be provided for.

From the records, the Uganda Electricity Distribution Company Limited (UEDCL) invited bidders to bid for the supply of creosote oil to be used for the treatment of seasoned poles. Adverts were run in the New Vision and Daily Monitor of March 29, 2007 and the East African of April 2 – 8, 2007. The adverts attracted the attention of six intending bidders:

1. Sagewood Ltd UK
2. Rousant International UK
3. Fontana Auto Parts
4. A – Tech South Africa
5. Galleria in Africa
6. Eximp Agencies (UK)

An evaluation committee recommended award to **M/S Galleria in Africa Ltd** at a contract price of \$734,902, CIF Kampala. The contract committee approved the evaluation on June 5, 2007 and the notice of best evaluated bidder was issued on the same day and a letter of bid acceptance was written on June 6, 2007. In her letter of acceptance, the Accounting Officer communicated to M/S Galleria in Africa informing them that their bid had been accepted and a written contract was being drafted for signature. The letter of acceptance also informed the bidder that financial commitment to the

contract would be made upon the bidder confirming receipt of the letter of acceptance. A letter of acceptance by M/S Galleria in Africa was written on June 11, 2007.

From the records also the PPDA received an application for administrative review from M/S Rousant International UK Ltd, being one of the bidders mentioned above. The application to PPDA dated July 11, 2007 was received by them on July 12, 2007. It was initially lodged with the Accounting Officer of UEDCL as by law required on June 8, 2007.

According to the proceedings of the Public Procurement and Disposal of Public Assets Authority (the Authority), the subject matter of this application, letters were sent to all bidders informing them of the Rousant complaint and requesting for representations regarding the tender. Only one letter dated 31st July was received from one of the bidders, M/S Fontana. In their representation, M/S Fontana requested for information pertaining to: Whether the complainant M/S Rousant had a manufacturer's licence or authorization pertaining to VAT and independent proof of the complainant's legibility to trade. M/S Fontana also alluded to the fact that it was common knowledge that Powers of Attorney made outside Uganda should be notarized for it to have a binding effect in Uganda.

The authority carried out the administrative review, upheld all the grounds of appeal by M/S Rousant International UK, and informed the applicant herein, Galleria in Africa Ltd, of the cancellation and a fresh tender of creosote oil which would be run soon to be competed for by the same bidders. The applicant was not satisfied with that decision. Hence this application.

The applicant has advanced several grounds herein. They are:

- (a) That the impugned decision was illegal, contrary to the general principles and law of contract the law (sic), principles and rules of the Procurement and Disposal process and/or made contrary to the principles of Natural justice.
- (b) That the said decision was made based upon a decision reached by the 2nd intended respondent with regard to the disqualification of M/S Rousant International (UK) Ltd from the bidding process and was not in any way related to the process in which the tender was lawfully awarded to the applicant and this was contrary and in total disregard of the basic Procurement and Disposal rules and principles and to the principles of natural justice.
- (c) That the said decision was devoid of any merit.
- (d) That the applicant has been greatly prejudiced by the decision against it.

- (e) By the time of the purported cancellation, the respondent was functus officio and had no capacity to cancel the offer to the application (sic).
- (f) That the applicant was not given a hearing at all.
- (g) That the tender process was complete and therefore not cancellation (sic).
- (h) That the applicant has after executing the contract expended colossal sums of money to the project and will greatly prejudiced (sic) if leave is not granted.
- (i) That it is just and equitable that the orders sought be granted.
- (j) That the applicant is entitled to enforce her constitutional right to fair and just treatment in the regard to administrative decisions as conferred upon her by Article 42 of the Constitution.

The statement of facts is verified by two affidavits of one Azim Kassam, the Managing Director of the applicant.

Certiorari is a Latin word meaning “*to be informed of, or to be made certain in regard to*”. It is also the name given to certain appellate proceedings for re-examination of actions of a trial Court, a tribunal or inferior appellate Court. The word tribunal here is used in the widest sense. It will succeed where a tribunal acted in a manner that was ultra vires by reason of hearing a case that it lacked jurisdiction to hear. It will also succeed on the grounds that natural justice has been denied, or where there was an error of law on the face of the record. It is a discretionary order and a Court would only exercise its discretion to grant it in deserving circumstances. The rules provide that no application be made unless leave has been granted. In an application of this nature, the trial judge is enjoined to look at the statement of facts, the accompanying affidavit and any annexures that might be attached to the application, before granting leave. It is not necessary at that stage to consider whether the applicant would succeed or not. The applicant has only to present such facts as would satisfy Court that a prima facie case exists for leave to be granted: **Kikonda Butema Farms Ltd – Vs- I.G.G CACA No. 35/2002** (unreported). Leave is not granted as a matter of course. However, the Court is not supposed to consider the merits or demerits of the application. The decision as to merits can only be taken after hearing the application interpartes.

I have addressed my mind to the application, the accompanying affidavits of Azim Kassam and the arguments of counsel to Court at the hearing. The applicant herein participated in the bidding process. From the impugned report, another bidder, Rousant, was dissatisfied with the decision of the Accounting Officer in the impugned tender process. Accordingly, an application was lodged

with the Authority in accordance with Regulation 347 (1) and (2) of the PPDA Regulations, 2003 (2003 No. 70).

The Authority gave its decision at p.13 of the proceedings. The long and short of the Report is that the Authority upheld the three grounds of the application, namely:

1. That the Accounting Officer wrongly upheld the decision of the Contracts Committee that the tender was conducted under the Laws of Uganda and that the complainant was required to submit a trading licence or its equivalent.
2. That the Accounting Officer wrongly upheld the decision of the Contracts Committee to reject their bid on ground that a VAT Certificate or its equivalent was a requirement and the complainant made no comment or submission as far as it was concerned.
3. That the Accounting Officer wrongly upheld the decision of the Contracts Committee to reject their bid on ground that the Power of Attorney had to be notarized for them to have a binding effect.

The Authority also found that there were inconsistencies in the evaluation process, and the Entity violated the PPDA Act by not complying with the provisions relating to the display of the Notice of Best Evaluated Bidder and issuance of a Letter of Bid Acceptance.

Accordingly, the Authority directed that the Administrative Review fee paid by the applicant, Rousant, be refunded to them in accordance with Guideline 6 of 2003 of PPDA Regulations. The Authority made no order for the cancellation of the award either in the paragraph relating to its decision, para 6.0, or the one relating to the way forward, para 7.0. Be that as it may, it would appear that following the Report, the intended first respondent went ahead and caused cancellation of the award.

I have already observed that Review on writ of certiorari, prohibition or mandamus is not a matter of right, but a judicial discretion. A petition for the writ will be granted only for compelling reasons. Judicial Review's inherent flexibility provides an aggrieved party with a remedy where one might otherwise not exist. In the instant case, it is admitted by the applicant that the 2nd respondent did not recommend to the intended 1st respondent to cancel the tender awarded to the applicant company. This admission is contained in para 3 of Kassam's Supplementary Affidavit. In view of this admission, I do not see what has prompted the applicant to seek review of the Report. Since the intended 1st respondent did not act on any directive contained in the Report, it can only be assumed

that the intended 1st respondent mis interpreted the report or acted on its own volition to cancel the award. In my view therefore, the intended action against the intended 2nd respondent is misconceived. It is a complaint against a wrong party.

As regards the intended 1st respondent, once it is argued that the correspondence between the applicant herein and the intended 1st respondent constituted a contract between them, its alleged breach cannot be remedied through a prerogative writ of certiorari, prohibition or mandamus. It can be remedied through an action for breach of contract and/or a suit for specific performance; and, so is the argument that the cancellation is incompetent.

From the pleadings as presented to me, a suit for restraining the intended 1st respondent from committing a breach of contract is made out. Further breach can be restrained through an application under 0.41 r. 2 of the Civil Procedure Rules. This being an application for judicial review, it can only be properly taken if the applicant has no statutory remedy in relation to the pleaded grievance. The law of contract would offer a relief to the applicant.

For the reasons stated above, without prejudice to the merits or de-merits of the applicant's complaint, I have not found this a proper case in which Court should exercise its discretion in favour of granting leave to the applicant to file an application for prerogative orders. I would therefore disallow the application, without prejudice to the applicant's right to file an ordinary suit, if it so wishes. I do so.

The applicant shall bear its own costs.

Yorokamu Bamwine

J U D G E

5/11/2007

5/11/2007

Mr. David Sempala for the applicant.

Applicant's Managing Director present.

Court: Ruling delivered.

Yorokamu Bamwine

J U D G E

5/11/2007