THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISCELLANEOUS CAUSE NO. 30 OF 2010

IN THE MATTER OF SECTIONS 41 AND 42 OF THE JUDICATURE ACT (CAP 13) AS (AMENDED)

AND IN THE MATTER OF AN APPLICATION FOR THE PREROGATIVE ORDER OF MANDAMUS, PROHIBITION AND INJUNCTION BY SEMWO CONSTRUCTION COMPANY LIMITED

M/S SEMWO CONSTRUCTION COMPANY ::::::::::::::::::::::::APPLICANT

VERSUS

RUKUNGIRI DISTRICT LOCAL GOVERNMENT ::::::::::::::::RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

RULING

This application for judicial review was brought under Sections 41 and 42 of the Judicature Act (Cap.13) and Rules 3, 5, 6 and 7 of the Judicature (Judicial Review) Rules, S I No.11 of 2009. It is for orders that:

1. A prerogative order of Mandamus be issued against the Chief Administrative Officer of Rukungiri District Local Government ordering him to abide by the directive of the Public Procurement and Disposal of Public Assets Authority and recommendation of the Technical Evaluation Committee that the contract for Kagashe Town supply be awarded to the applicant.
2. An order of injunction and prohibition restraining the Respondent from re-tendering the contract for Kagashe Town Water Supply.
3. Costs of the application be provided for.

Counsel:

Mr. Christopher Madrama for the applicant.

Mr. Wanyama for the respondent.

SUMMARY OF FACTS

1. ***On 28/08/2009 the respondent published a notice inviting bids for the construction of Kagashe Town Water Supply and Sanitation Scheme in Rukungiri District. The project is funded by a grant from Austria (not Australia) through the Austrian Development Agency and the European Union.***
2. ***The applicant submitted its bid and on 25/09/2009, the respondent opened bids from seven firms that had submitted their bid documents.***
3. ***On 14/10/2009 the Evaluation Committee recommended that the Construction of Rukungiri Town Council Water Supply and Sanitation Scheme be awarded to the applicant at a bid price of Shs.1,256,860,994/=.***
4. ***On 20/10/2009, the respondent's Contracts Committee reviewed the evaluation report and declined to award the tender to the applicant.***
5. ***A notice of best evaluated bidder was displayed on 21/10/2009 indicating that M/s Sualf Construction Limited was the best evaluated bidder at Shs.1,402,611,227/=.***
6. ***The applicant being dissatisfied with the decision of the Contracts Committee applied to the Chief Administrative Officer (the CAO) for administrative review on 30/10/2009 after paying the requisite fee of Shs.1,000,000/=.***
7. ***On 12/11/2009, the CAO informed the Procurement and Disposal Unit (the PDU) of the complaint lodged by the applicant and further instructed the PDU to suspend the process to enable a review of the complaint in accordance with the Local Government (Public Procurement and Disposal of Public Assets) Regulations, 2006.***
8. ***On 12/11/2009, the CAO appointed an Administrative Review Committee to review the process.***
9. ***On 18/11/2009, the Administrative Review team submitted its report to the CAO of the respondent.***

10. ***On 19/11/2009, the CAO communicated the decision of the Administrative Review team to the applicant disallowing the applicant's complaint.***

11. ***The applicant being dissatisfied with the decision of the CAO applied to the Public Procurement and Disposal of Public Assets, the PPDA, on 24/11/2009 for review.***

12. ***On 26/11/2009, the PPDA communicated to the CAO of the respondent informing him of the application for Administrative Review by the applicant and directed the CAO to suspend the procurement process and submit the procurement action file to PPDA by 10/12/2009. On 3/12/2009 the CAO submitted the procurement action file to PPDA and on the same date the PPDA communicated to all the bidders who participated in the above procurement process inviting them to submit relevant information.***

13. ***On 11/12/2009, PPDA convened an administrative review hearing which was attended by the CAO and other members of the respondent and in a communication dated 23/12/2009, PPDA upheld the applicant's application and stated inter alia in their decision that the CAO abides by the decision of the Evaluation Committee which had recommended that the contract be awarded to the applicant and the applicant be refunded its Shs.1,000,000/=.***

14. ***On 5/01/2010 the CAO notified the contracts committee of the said decision of PPDA. However, on 6/01/2010 the Contracts Committee convened a meeting to consider the decision of PPDA and disagreed with it. The disagreement was communicated to the CAO who in turn communicated the Committee's disagreement to PPDA on 20/01/2010.***

15. ***On receipt of the communication regarding the disagreement, the PPDA again invited the CAO, members of the Contracts Committee and the head of procurement on 27/01/2010 for a meeting to resolve the disagreement and a review meeting was held by PPDA to that effect on 2/02/2010.***

16. ***PPDA communicated its decision in a letter dated 5/02/2010 apologizing for any inconvenience caused by the anomalies that were contained in its earlier Administrative Review decision. It (PPDA) also informed the CAO that there were no longer any existing bids, the validity period of the bids***

having expired on 23/12/2010 and there having been no request by the Entity to the bidders to extend their bid validity as provided for under Regulation 49 (5) of the Local Governments (PPDA) Regulations, 2006. In light of the above, PPDA advised the respondent to inform the bidders that the bids have expired and therefore are no longer valid.

17. ***On 10/02/2010 the CAO wrote to all bidders informing them that the validity of the bids expired which rendered all bids null and void and on 3/03/2010 the respondent gave notice to the applicant of the re-tendering process and advised the applicant that the bids were due to close on 19/03/2010. On 18/03/2010 court issued an interim order halting the re-tendering and procurement process pending hearing of the parties on the applicant's application in court.***

At the conferencing the parties agreed that the sole issue for determination is: *"whether the decision of the PPDA issued on 23/12/2009 is binding on the respondent."*

Upon determination of that issue, the court will also make determination as to the remedies, if any.

REMEDY OF JUDICIAL REVIEW

It is trite to say that judicial review is concerned not with the decision per se, but with the decision making process. Essentially judicial review involves an assessment of the manner in which a decision is made, it is not an appeal and the jurisdiction is exercised in a supervisory manner, not to vindicate rights as such, but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality. For this reason each case must be determined on its own merits.

It is not disputed that PPDA communicated a decision to the respondent in a letter dated 23/12/2009. The decision was that the respondent abides by the decision of the Evaluation Committee where it was recommended that the contract for Kagashe Town Water Supply be awarded to M/s Semwo Construction Company Limited. It is also not

disputed that subsequent to this decision the same body, the PPDA, wrote to the respondent on 5/02/2010 rescinding its earlier directive on the matter (paragraph 16 above).

The long and short of the applicant's case is that upon making its decision and communicating it to the parties on 23/12/2009, the PPDA became ***functus officio***; that it no longer had jurisdiction to look into the matter again. The respondent does not agree.

As I see it, the issue for determination is a question of law, revolving on interpretation of the relevant and statutory provisions. The statutory provisions in question are contained in ***The Local Government (Public Procurement and Disposal of Public Assets) Regulations, 2006***. I will for the sake of convenience refer to them as the ***Regulations.***

The law governing procurements requires that public procurement and disposal transactions be conducted in accordance with the basic principles set out in the relevant laws. The reason is that government tenders must be handled in an open manner to minimize the perception of corruption. The procurement authority therefore has well laid out guidelines for procurement and disposal of assets.

I will now relate the above principle to the facts in this case.
Under Rule 43 (8) of the Regulations, ***a contract shall be awarded to the bidder with the best evaluated offer ascertained on the basis of the methodology and criteria detailed in the bid documents.***

And under Rule 72 (1), ***an evaluation shall be conducted by an evaluation Committee, which shall report to the contracts committee through the procurement and disposal unit.***

Then under Rule 80 (1), ***a financial comparison shall be conducted to examine and compare financial bids and determine the best evaluated bid.*** Sub-rule (2) provides a

rider to the above: the financial comparison shall only be conducted on a bid that is eligible and administratively compliant.

From the pleadings, the applicant's bid had a problem. They had attached a Transaction Tax Clearance Certificate issued by URA which had no Seal and yet the document itself contained a warning to the following effect:

> ***"NOTE: this Certificate is valid ONLY if it is produced to the authority granting the facility in its ORIGINAL FORM and it MUST be fully embossed and sealed with the official seal."***

The Evaluation Committee overlooked the above fault and cleared the applicant's bid. I have already indicated that the Evaluation Committee is responsible to the Contracts Committee. When the Evaluation Committee's report reached the Contracts Committee, the latter faulted it on account of the defective transaction Tax Clearance Certificate. The Committee was of the view, and quite correctly in my view, that the value of a document lies in what is written on that document; that what was written on the document was self-explanatory and did not require further authentication. The Committee accordingly declined to award the tender to the applicant.

It is noteworthy that long after the decision of the Contracts Committee declining to award the tender to the applicant, the applicant sought intervention of URA on the Tax on the Tax Clearance Certificate. In a letter dated 18/12/09, the Commissioner General, Ms Allen Kagina, confirmed that the Certificate had been issued by her office. As I said this was long after the event, after the Contracts Committee had declined to award the tender to the applicant and had instead awarded it to Sualf Construction Co. Ltd, without itself referring the matter back to the Evaluation Committee for another in-put. Hence the notice of the best evaluated bidder displayed on 21/10/2009 indicating that ***Sualf Construction Co. Ltd*** was the best evaluated bidder at Shs.1,402,611,227/= (point No.5 above).

From the pleadings also the applicant being dissatisfied with the decision of the Contracts Committee applied to the CAO for administrative review of the decision of the Contracts Committee. It did so after paying the requisite fee of Shs.1,000,000/=. It is not in dispute that the CAO informed the PDU of the complaint lodged by the applicant, directed the PDU to suspend the process to enable a review of the process and appointed an Administrative Review Committee to review the process. It is also not in dispute that the CAO had the power to act as he did. Similarly, it is also not in dispute that the applicant had the power to contest the decision of the Contracts Committee through seeking an administrative review. Regulation 136 (1) was on its side.

The Administrative Review Committee constituted by the CAO came to the conclusion that the Evaluation Committee failed to carry out proper preliminary evaluation of bids when they ignored the validity clause in the Transaction Tax Clearance Certificate. The Committee further agreed with the Contracts Committee's position that the said Certificate without a seal was invalid and held that the applicant's bid failed at the preliminary stage.

Again the applicant was not satisfied with that position. It sought the intervention of the PPDA. This was in accordance with Regulation 140 (1). It is common ground that PPDA's initial response was that the decision of the Administrative Review Committee instituted by the CAO was wrong. Its decision was contained in a letter to the CAO dated 23/12/2009. It is also common ground that in a subsequent twist of events the said PPDA back tracked on its declared stand on the matter and rescinded its earlier decision.

Is it therefore correct to say, as the applicant contends herein, that the decision of PPDA issued on 23/12/09 was binding on the respondent?

Learned Counsel for the applicant has made his argument in a rather long winded manner. He could have been a little more brief on the matter. Be that as it may, his point as I understand it, is that any person aggrieved by the decision of the accounting officer applies to PPDA under Regulation 140 (1); that these provisions are hierarchical; that an

applicant cannot first apply to the PPDA, therefore when he reaches the PPDA, the applicant's Statutory remedies to obtain a review of the decision is exhausted; that no further statutory provisions are available to consider the decision of the PPDA. That it follows that the decision cannot be revisited except by way of judicial review as has been done in this case. Hence the submission that upon making its decision and communicating it to the parties on 23/12/2009, the PPDA became ***functus officio***, that is, that it no longer had jurisdiction to revisit its decision.

I have given considerable attention to the able arguments of both counsel. I must admit that judicial writing on this area of the law, that is, ***functus officio***, in our jurisdiction is very scarce. In plain language, ***functus officio*** is a latin expression meaning ***'having discharged his duty.'*** Once a judicial officer has convicted a person charged with an offence before him/her, he/she is ***functus officio***, and cannot rescind the sentence and try the case.

Essentially, the rule as derived from common law is that the court has no jurisdiction to re-open or amend a final decision, except in two cases: (1) where there has been a slip in drawing up the judgment, or (2) where there has been an error in expressing the manifest intention of the court: ***In re Swire (1885) 30 Ch.D.239***. The underlying rationale for the doctrine is clearly more fundamental: that for the due and proper administration of justice, there must be finality to a proceeding to ensure procedural fairness and the integrity of the judicial system. The point could not have been better expressed than Sopinka J. did in the Canadian case of ***Chandler vs Alberta Association of Architects [1989] 2 S.C.R 848*** when he said (861 – 62).

> ***"As a general rule, once ……..a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances……"***

To this extent, the principle of ***functus officio*** applies in the context of Mr. Madrama's argument. I would hasten to add, however, that it is based on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision is subject to a full appeal. The idea is that if a court is permitted to continually revisit or reconsider final orders simply because it has changed its mind or wishes to continue exercising jurisdiction over a matter, there would never be finality to a proceeding. The principle ensures that subject to an appeal, parties are secure in their reliance on the finality of superior court decisions.

I must now relate this principle to the instant matter.

The PPDA is not a court of law. It acts as an administrative review body when a matter is referred to it. Therefore, after a decision is made pursuant to an application for review under the Act or the Regulations, its general powers are exhausted. But, unlike in typical courts of law where the rule of ***functus officio*** is over emphasized, there are other statutory provisions, in the case of PPDA, which enable it to be moved to re consider and/or review its own decision. Under Regulation 5 (1), it is accorded an administrative over-sight function of ensuring procurement and disposal entities' strict compliance with the law. Under Regulation 10 (1), where a competent authority disagrees with the findings and recommendations of the Authority, the competent authority is empowered to state the findings and recommendations of the report with which it disagrees; the reasons for the disagreement; and, any alternative recommendations or measures proposed. The competent authorities include any procuring and disposing entity: Regulation 9 (2) (g).

And under Regulation 10 (2), upon receipt of a response stating a disagreement, the Authority shall, within a period of 21 working days, call a meeting with a competent authority seeking to resolve the disagreement. I have already indicated that as a general rule, once an administrative tribunal has reached a decision in respect of a matter before it in accordance with its enabling statute, that decision cannot be revisited. However, it can do so if, inter alia, it is authorized by statute. In other words it cannot afterwards, in the absence of statutory authority, alter its award except to correct clerical mistakes or errors

arising from an accidental slip or omission. It would appear to me that in this case, PPDA was not ***functus officio*** when it handed down its decision of 23/12/2009 because its jurisdiction in the matter was not exhausted given that under Regulation 10 (1) the respondent could still disagree with the findings and recommendations and under Regulation 10 (2) the PPDA was duty bound to listen to them again. Under the Regulations, therefore, the PPDA did not lack jurisdiction to re-hear the respondent's complaint and remedy it. To this extent, Mr. Madrama's argument must fail and it fails.

Turning now to the merits of this application, prerogative orders as we all know are issued against persons or bodies bound to explain or defend in any forum the decisions they make in the performance of their duties. The idea is that the decision-maker must understand correctly the law that regulates his decision-making power and give effect to it. This involves identifying parameters set by the empowering statute and having regard to whether the decision-maker has exercised a power for an improper purpose; has made any mistake of fact; or has applied the law inconsistently. This being so, I'm a little puzzled that the applicant has adopted the course herein. The PPDA which the applicant claims made a wrong decision is not a party in this application. It is in fact not an application for certiorari, to quash the PPDA's findings and orders but an application for an order of mandamus against the respondent, the party who did not make the impugned findings and orders. I have already indicated that the PPDA had the power derived from the Act and the Regulations to entertain the respondent's complaint. This power to revisit the matter granted to PPDA by the Regulations is in my view a clear affirmation that the ***functus officio*** rule need not always be rigidly applied to tribunals in the administrative context. The PPDA simply lacks the power to dictate decisions to the bodies it supervises. They make their own decisions. In these circumstances, I would agree with the submission of learned counsel for the respondent that the applicant has failed to prove existence of a statutory duty on the respondent to abide by the PPDA directive contained in its letter of 23/12/2009. It has further failed to prove existence of a breach of duty to give rise to a cause of action against the respondent.

I have already indicated that the applicant's lead prayer is for an order of mandamus against the respondent. Mandamus is a prerogative writ to some person or body to compel the performance of a public duty. From the authorities, before the remedy can be given, the applicant must show a clear, legal right to have the thing sought by it done, and done in a manner and by a person sought to be coerced. The duty whose performance is sought to be coerced by mandamus must be actually due and incumbent upon that person or body at the time of seeking the relief. That duty must be purely statutory in nature, plainly incumbent upon the person or body by operation of law or by virtue of that person or body's office, and concerning which he/she possesses no discretionary powers. Moreover, there must be a demand and refusal to perform the act which it is sought to coerce by judicial review.

In the instant case, the PPDA took it upon itself to dictate a decision to the respondent. This was exercise of more jurisdiction than it had. The respondent resisted it within the mandate given to it by the enabling Regulations. The PPDA has since re-considered its earlier stand and apologized to the respondent for misleading it. This alone undermines the applicant's application for an order of mandamus and prohibition, restraining the respondent from re-tendering the contract in question. The respondent has invited all eligible bidders, including the applicant, to participate in a re-tendering process. In all these circumstances, it is immaterial that the bids may or may not have expired as the PPDA and the respondent have advised. Accordingly, the applicant has also failed to demonstrate lack of an alternative remedy or that the one that exists is inconvenient, less beneficial, or totally ineffective. The application was filed on 12/03/2010, a week to the close of the second bidding process.

The other remedy of injunction would apply, for example to prevent an *ultravires* action taking place. It has not been demonstrated to court that the invitation for fresh tenders is *ultravires* the respondent's mandate. In the absence of a clear legal right in issue, I have not found this case a proper one in which court should exercise its discretion in favour of granting any of the reliefs sought. I would therefore uphold the submission of learned counsel for the respondent that this application lacks merit.

I would dismiss it with costs to the respondent and I so order.

Dated at Kampala this 31st day of May,2010.

Yorokamu Bamwine
JUDGE