THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

Arising from Miscellaneous Cause No.90 of 2010

IN THE MATTER OF SECTIONS 38 (1) (b) (c) & (d) AND 38 (2) JUDICATURE AS (AMENDED)

AND

IN THE MATTER OF AN APPLICATION FOR PREROGATIVE ORDER OF CERTIORARI, PROHIBITON AND INJUNCTION BY M/S MOTORCENTRE EAST AFRICA LIMITED

MOTORCENTRE EAST AFRICA LTD::::::::::::::::::::::::::::::::::APPLICANT

VERSUS

PUBLIC PROCUREMENT &

DISPOSAL OF ASSETS AUTHORITY::::::::::::::::::::::::::::::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, SI 2009 No.11. It seeks orders that:

a) A prerogative order of Certiorari be issued against the respondent and its servants or agents quashing the decision to suspend the applicant for a period of one year commencing the 22nd April, 2010.

b) An order for Injunction and Prohibition restraining the respondent from suspending and or excluding the applicant or its directors participating in public procurement or disposal proceedings for one year.

c) Costs of this application be provided for.

Counsel:

Mr. Brian Kaggwa for the applicant

Mr. Charles Opio Ogwang for the respondent

The Background:

From the pleadings, on 13/11/2009 the Accounting Officer of the Office of the President published a notice stating that the applicant was the best evaluated bidder for the supply and delivery of vehicles to the Office of the President. While the bid process was still underway, one of the bidders, M/s Kampala Nissan Ltd, applied for Administrative review before the Accounting Officer, alleging invalidity of the Manufacturer's Authorization which the applicant herein, M/s Motor Centre East African Ltd, had submitted for the procurement.

At a meeting held on 15/12/2009, the Contracts Committee discontinued the procurement process. Then on 23/02/2010 the Office of the President, through its accounting officer, applied to the respondent recommending the suspension of the applicant on the ground that the Manufacturer's Authorization letter on which the procuring entity had based the applicant's successful bid evaluation was forged and therefore illegitimate. And on 22/04/2010 the respondent made a decision to suspend the applicant. Hence this application for Judicial Review.

The 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 the 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.

The court is not, therefore, entitled on an application for judicial review to consider whether the decision was fair and reasonable. Lord Hailsham of St Marylebone LC stated the purpose of judicial review in the following terms:

"Since the range of authorities, and the circumstances of the use of their powers, are almost infinitely various, it is of course unwise to lay down rules for the application of the remedy which appear to be of universal validity in every type of case. But it is important to remember in every case that the purpose of remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law…….

The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized or enjoined by law to decide from itself a conclusion which is correct in the eyes of the court."

See Chief Constable of North Wales Police vs Evans [1982] 3 ALL E.R. 141 at p.143 h – 144 a.

I agree.

For this reason each case must be determined on its own merits. At the conferencing, the parties indicated to court that they did not intend that any of the deponents of the affidavits for and against the application be cross-examined. Accordingly a time table was set for the filing and service of the written submissions to the respective parties. In his written submissions, learned counsel for the applicant proposed three issues for determination.

1. Whether the respondent acted ultravires when it failed to adhere to the mandatory provisions of the law in arriving at its decision to suspend the applicant.
2. Whether the respondent breached the cardinal principles of natural justice in arriving at its decision to suspend the applicant and its directors for a period of one year.
3. Whether the applicant is entitled to the remedies sought, if any.

Issue No.1: Whether the respondent acted ultravires when it failed to adhere to the mandatory provisions of the law in arriving at its decision to suspend the applicant.

The thrust of the applicant's arguments on this point is that the procedure followed by the respondent to arrive at the decision to suspend the applicant was ultravires.

From the pleadings and submissions of counsel, the power to suspend a Provider is contained in Section 94 of the PPDA Act, 2003. It reads:

> ***"94. A provider who does not comply with this Act, regulations or guidelines made under this Act, shall be suspended by the Authority from engaging in any public procurement or disposal function for a period to be determined by the Authority on a case by case basis."***

The procedure for doing so is provided for under PPDA Regulations, SI 2003 No.70, Regulations 348 – 351.

The relevant Regulations provide as follows:

"348. A provider may be suspended from participating in public procurement or disposal assets proceedings for breaching the Code of Ethics for providers.

349. (1) A recommendation to suspend a provider shall be submitted to the Authority in writing by a Contracts Committee.

(2) **…….**

(3) **……**

(4) ***A recommendation to suspend a provider shall include:***

a) ***the name of the provider***

b) ***the grounds for the recommendation to suspend the provider;***

c) ***details of the procurement or disposal proceedings or contract to which the recommendation relates;***

d) ***documentary or other evidence supporting the recommendation; and***

e) ***any other information relevant to the recommendation.***

350. (1) Upon receipt of a recommendation to suspend a provider, the Authority shall immediately –

a) ***notify the provider, giving full details of the recommendation and inviting him or her to submit information in his or her defence; and***

b) ***institute an investigation.***

(2) **……**

(3) **……..**

(4) ***The Authority shall issue its decision within twenty one working days after the date of receipt of the recommendation and the decision shall indicate whether the recommendation is upheld or rejected, the reasons for this decision and details of any suspension imposed.***

351 (1) ***Where a recommendation to suspend a provider is upheld, the Authority shall suspend a provider from participating in public procurement or disposal proceedings.***

(2) ***The period of suspension shall be at the discretion of the Authority but shall take into account the nature and severity of the offence, ay mitigating circumstances, ay previous suspensions and the period of suspension imposed in comparable cases.***

(3) ***A suspension shall be communicated to a provider in writing and shall state –***

a) ***that the provider is excluded from participating in any public procurement or disposal proceedings for the period of suspension;***

b) ***the reasons for the suspension and the period of the suspension;***

c) **…….**

d) **…….**

(4) **……..……**

(5) **……..**

(6) **…….**

(7) **……..”**

There is evidence that upon receipt of the application recommending the suspension of the applicant, the respondent notified the applicant by letter, giving full details of the recommendation and invited the applicant to submit information and/or evidence in its defence. A copy of the letter is annexed to the affidavit in reply sworn by Cornelia K. Sabiiti, marked ‘B’.

In view of this evidence, court is satisfied that Regulation 350 (1) (a) of the Regulations was duly complied with.

According to paragraph 9 of Ms Cornelia Sabiiti’s affidavit, a meeting was convened by the respondent on 9/4/2010 and attended by officials of the Office of the President, the deponent and the applicant’s lawyer. A copy of the Investigation Report is annexed to the affidavit of Ms Sabiiti marked ‘I’. Its existence is not challenged by the applicant. In

view of this evidence, Court is also satisfied that there was due compliance with Regulation 350 (2).

From the pleadings, court is satisfied that the respondent duly invited the applicant to submit information or evidence in its defence which the applicant did through its lawyers, M/s Impala Legal Advocates and Consultants. A copy of the applicant's defence is also annexed to the affidavit of Ms Sabiiti marked 'G.' There was therefore due compliance with Regulation 350 (3).

There is evidence further that the respondent invited the applicant to a hearing at the respondent's office and the applicant indeed attended with its lawyer and made submissions to the Committee. A copy of the letter inviting the applicant to the meeting is annexed to Ms Sabiiti's affidavit and marked 'H.'

Learned Counsel for the respondent has submitted that the procedure followed before reaching the decision was in accordance with the prescribed provisions of the PPDA Act and the Regulations.

In view of what I have said above, court is in agreement with learned counsel's submission.

I now turn to the applicant's submissions that:

(i) The respondent failed to deliver its decision on the recommendation to suspend it in a timely manner as stipulated under PPDA Regulation 350 (4), that is, within 21 days; and

(ii) The respondent failed to communicate its decision.

I have already indicated that the respondent receive the application to suspend the applicant on 23/2/2010 and made its decision on 22/4/2010. Clearly, there was non-compliance with Regulation 350 (4).

The respondent has conceded to the breach. It has stated, however, that the omission to deliver its decision within 21 working days did not in any way prejudice the applicant; that in any case the enforcement of the applicant's penalty was delayed by the respondent's delay in delivering its decision. It has invoked to its aid the provisions of Article 126 (2) (e), of the Constitution which mandates courts to administer substantive justice without un due regard to technicalities.

The applicant has submitted that the breach was not a mere technicality but a factor that vitiated the respondent's decision. I have addressed my mind to the able arguments of both counsel and the cited authorities. It is in my view not necessary to comment on each of them. Suffice it to say, however, that Regulation 350 (4) appears to be couched in mandatory terms through the use of the word 'shall.' Be that as it may, I am of the considered view that the word 'shall' in that Regulations is not intended to be mandatory but directory as the purpose of the Regulations is merely to ensure expeditious determination of disputes under the PPDA Act rather than the ouster of the jurisdiction of the Authority over the matter after the prescribed period. I am saying so because the Regulation does not state the legal consequences of failure of the Authority to determine the matter within the prescribed period. If the law maker had intended it to have a mandatory effect as argued by learned counsel for the applicant, they would have said so. I am fortified in concluding thus by the Court of Appeal decision in ***Edward Byaruhanga Katumba vs Daniel Kiwalabye Musoke Civil Appeal No.2 of 1998*** which was interpreting a similar legal provision [S.143 (2)] of the Local Government Act. The court held that the word 'shall' in that legislation was not intended to be mandatory but directory, to ensure expeditious hearing and determination of election petitions filed under the Act.

In similar vein, I hold as I must that the word 'shall' in Regulation 350 (4) was not intended to be mandatory but directory. To decide otherwise would be to perpetuate an absurdity.

As regards the alleged failure by the respondent to communicate its decision to the applicant, the applicant submitted that annexture 'J' to Ms Sabiiti's affidavit in reply is an illegal creation by the respondent to try to manoeuvre around the illegalities against the applicant.

It has been submitted by learned counsel for the respondent that it did not forge annexture 'J' because copies of it were delivered to the Accounting Officer of the Entity, the Chairperson Contracts Committee and Head of the Procurement and Disposal Unit of the entity. She has conceded to the errors in the letter communicating the decision of the respondent but submitted that the errors did not affect it veracity.

Although learned counsel has asserted that other stakeholders received copies of it, implying that it was not written after the applicant had complained about it, this assertion has not been verified in the sense that none of them has given evidence to that effect. I do not think that failure to lead such evidence would of itself support the assertion that it is a forgery.

True, the manner of its construction raises suspicion that it may have been an after thought but suspicion alone is not evidence. In any case the requirement for it is a matter subsequent to the impugned decision itself. As I observed in ***Miscellaneous Cause No.289/2010*** for an interim order, although the applicant claimed that the respondent had not communicated its decision to them formally, the applicant had in its possession a report that indicated that it had been suspended from participating in any government procurements for a year. The respondent attached a copy of that report to both applications. Although Reg. 351 (3) requires that a suspension be communicated to a provider in writing, it does not provide a format thereof. It appears to me that the Report itself if delivered to the provider would constitute adequate communication to the provider as to the decision made against it. I am of the considered view that as long as the jurisdiction and the grounds to suspend the applicant existed and the suspension was carried out in strict observance of the rules of natural justice, the omission to issue the letter would be over looked as long as the decision maker's report was itself availed to

the provider. Courts have time and again been implored not to treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature: ***Tarlol Singh Saggu vs Roadmaster Cycles (U) Ltd CACA No.46 of 2000.***

Accordingly, even if I had accepted the applicant's argument that annexture 'J' was not in existence by the time the applicant raised the issue, I would still have held that the omission was a mere error or lapse that would not necessarily vitiate the respondent's decision.

For the reasons stated above, I am inclined to accept the submission of learned counsel for the respondent that there is no merit in the applicant's complaint in this regard.

The concept of ***ultravires*** is one to control the actions by a public body not authorized necessarily, or by implication, by law. Thus since anything done not authorized by law is ***ultravires***, judicial review will stop the unlawful action. I have already indicated that the omission by the respondent to deliver the decision within 21 days and failure to deliver the letter to the applicant as alleged even if it had been proved, would not vitiate the respondent's decision to suspend the applicant. Learned counsel for the respondent has submitted that the two would not fall in the category of ***ultravires*** acts or omissions. Believing, as I do, that ***ultravires*** means 'beyond the scope, in excess of legal power or authority, in excess of the authority conferred by law,' I am in full agreement with learned counsel for the respondent's submission.

With the greatest respect to the applicant, its reliance on the concept of ***ultravires*** in the circumstances of this case is out of context.

I would answer the first issue in the negative and I do so.

Issue No.2: Whether the respondent breached the cardinal principles of natural justice in arriving at its decision to suspend the applicant and its directors for a period of one year.

The applicant's submission on this point is based on the respondent's alleged failure to carry out independent investigations and evaluations regarding the impugned Manufacturer's Authorization letter; and the respondent's alleged failure to evaluate or re-evaluate the whole evidence, record and the administrative review proceedings of the Accounting Officer, before it arrived at the impugned decision.

I have already indicated that the PPDA Regulations, especially Reg. 350 thereof, lays down the procedure to be followed by the respondent in an application for suspension of a provider who breaches the Code of Ethics. I have also already indicated that the respondent substantially followed the procedure laid down in the said Regulation. The right to a hearing before being condemned is enshrined in Article 28 (1) of the Constitution. A fair trial, or a fair hearing, under this Article of the Constitution means that a party should be afforded opportunity to, inter alia, hear the witnesses of the other side testify openly; that he should, if he chooses, challenge those witnesses by way of cross-examination; that he should be given opportunity to give his own evidence, if he so chooses, in his defence; that he should, if he so wishes, call witnesses to support his case.

See *Charles H. Twagira vs Uganda, Criminal Appeal (S.C) No.27 of 2003* and ***Rose Mary Nalwadda vs Uganda Aids Commission, HCMA No.0045 of 2010*** (unreported).

Learned Counsel for the respondent has submitted that counsel for the applicant has not in any way illustrated how the respondent acted in breach of the above principles of the law in relation to judicial review.

There is merit in this submission. The evidence on record shows very clearly that the impugned decision was arrived at after according the applicant an opportunity to be heard. At the hearing of the suspension application, the record is evident that the

applicant was confronted with the issue of forgery. The only answer by the applicant with regard to this issue was that they had been given the document by their agent which, they contended, would not make them liable for using the forged documents. Our law recognizes that ***qui facit per alium, facit per se*** (he who does something through another does it himself).

Although the applicant accuses the respondent of not adequately investigating the issue of forgery, even in the instant application the applicant has not made any attempt to cast doubt on the finding of the respondent that the Manufacturer's Authorization which was submitted during the bidding process was forged. Clearly this was the reason for its suspension. It was not enough for the applicant to argue that it was not the author of the document in issue or that it was not aware that the document was illegitimate and submitted it in good faith. The fact remains that it was a forged document. It is immaterial that other companies had been getting similar Authorizations from the same source or that the applicant had used similar documents in other procurements. Two wrongs do not make a right. If indeed the document was originated by the applicant's agent as it alleges, the acts of the agent are binding on it as the principal. The fraud of its agent is imputed on the applicant. As learned counsel has correctly observed, a court of law cannot sanction what is illegal and an illegality once brought to the attention of court overrides all questions of pleading. The reason for the law's refusal to give effect to such transactions is commonly put in the Latin Maxim ***ex turpi causa non oritur actio*** ('no claim arises from a base cause').

The policy was well summarized by Lord Mansfield C. J. in ***Holman vs Johnson Cowp. 343*** when he declared:

> ***No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If the cause of action appears to arise*** *exturpi causa……..*.***the court says he has no right to be assisted.***

In the instant case the illegality has been brought to the attention of the court. The applicant has no right to be assisted.

The applicant has also submitted that the respondent failed to take into consideration the flaws in the Administrative Review process before the Accounting Officer before it (the respondent) arrived at its decision. I do not think that this accusation holds any water. The respondent did not handle the matter as an appeal or application for review arising out of the Contracts Committee to award the tender to another bidder. The respondent handled the application recommending the suspension of the applicant under Section 94 of the PPDA Act and the enabling regulations made there under. The two procedures are different. Even then there is evidence that the Accounting Officer, Office of the President, carried out investigations which established that the impugned Manufacturer's Authorization letter was forged and illegal. There is no evidence before this to the contrary. I do not think that the applicant's complaint that there was leakage of information in its bid holds any water either. Learned Counsel for the respondent has submitted that the respondent adhered to the principles of natural justice and carried out an independent investigation which established that the Manufacturer's Authorization letter submitted by the applicant was indeed forged and that the suspension of the applicant was conducted in accordance with the provisions of the PPDA Act and Regulations.

For the reasons stated above, I am unable to fault learned counsel's submission. It is well grounded both in fact and law.

I would also answer the second issue in the negative and I do so.

Issue No.3: ***Whether the applicant is entitled to the remedies sought.***

It is trite that judicial review can be granted on three major grounds:
Illegality, irrationality and procedural impropriety.

'illegality' is when the decision making authority commits an error of law in the process of taking a decision.

An exercise of power not vested in the decision making authority is such an instance.

'Irrationality' is when the decision making authority acts so unreasonably that, in the eyes of court, no reasonable authority addressing itself to the facts and the law before it would have made such a decision. Such a decision must be so outrageous in its defiance of logic or acceptable moral standards that no sensible person applying his/her mind to the question to be decided could have arrived at such a decision.

'Procedural' impropriety on the hand is when the decision making authority fails to act fairly in the process of its decision making. It includes failure to observe the basic rules of natural justice or to act with procedural failure by an administrative authority or tribunal to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.

See: ***Council of Civil Service Unions vs Minister for the Civil Service [1985] 1 A.C. 374.***

In view of what I have stated above, it is plain to me that none of the aforesaid grounds is applicable to the proceedings and/or the impugned decision of the respondent. In light of the applicant's failure to establish even a single ground of procedural impropriety to warrant setting aside the decision of the respondent and in light of the fact that the applicant has not come to court with clean hands, court is unable to grant the reliefs sought. The long and short of what I have said above is that it falls short of any valid ground on which court can exercise its discretion to review the impugned decision. I decline to exercise the said discretion. The application therefore fails.

For reasons stated above, I would dismiss the application with costs to the respondent and I do so.

Yorokamu Bamwine

JUDGE

4/10/2010

4/10/2010

Jasper Oketa holding brief for Brian Kaggwa, counsel for applicant.

Charles Opio Ogwang for the respondent.

Applicants absent.

Court:

Ruling delivered.

Yorokamu Bamwine

JUDGE

4/10/10