

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**  
**CIVIL APPEAL No. 0003 OF 2016**  
**(Arising from PPDA Appeals Tribunal Application No. 5 of 2015)**

**PUBLIC PROCUREMENT AND DISPOSAL  
OF PUBLIC ASSETS AUTHORITY** ..... **APPELLANT**

**VERSUS**

**PAWOR PARK OPERATORS AND  
MARKET VENDORS SACCO** ..... **RESPONDENT**

**Before: Hon Justice Stephen Mubiru.**

**JUDGMENT**

On 27<sup>th</sup> April 2015, Arua District Local Government published in the Daily Monitor Newspaper, an invitation to interested bidders for the management of markets in the District. Three bidders, including the respondent, had submitted their bids for Pawor Market by the closing date of 18<sup>th</sup> May 2015. Following an Open Domestic Bidding procurement process, the Contracts Committee on 4<sup>th</sup> June 2015 awarded the contract to one of the bidders chosen as the best evaluated bidder. Notice of the best evaluated bidder was displayed on 4<sup>th</sup> June 2015.

Being dissatisfied with the decision of the Contracts Committee, and in accordance with section 139 (1) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* the respondent on 17<sup>th</sup> June 2015 applied to the Chief Administrative Officer, Arua for Administrative Review, contesting the award of the contract to their competitor where it argued that; the best evaluated bidder had a bid of shs. 2,520,000/= yet the respondent had offered a sum of shs. 3,064,000/= which was the highest of all three bids. The respondent had complied with all the bid conditions yet they were denied the contract on grounds that their average bank balance for the required period stated in the evaluation criteria failed to demonstrate financial capacity to pay as per the terms of the reference. Being eliminated on

account of being newly registered was wrong. The evaluation Committee was wrong when it decided that the respondent had failed to provide its audited accounts for the last two years yet the respondent was a newly registered SACCO and it had only opened a bank account on 9<sup>th</sup> April 2015. The contracts Committee was wrong to approve a process that deviated from the Standard Forms issued by the appellant and in not invoking Regulation 74 of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* to seek clarification rather than reject the bid. The Contracts Committee further failed to implement the Government Policy on the Development and Management of markets in City, Municipalities and Towns, when it awarded the contract to a bidder who is not a market vendor.

The Chief Administrative Officer on 3<sup>rd</sup> July 2015 issued his decision in accordance with section 90 (2) of *The Public Procurement and Disposal of Public Assets Act, 2003* and Regulation 139 (5) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*. By that decision, he concluded there was no merit in the application for administrative review on grounds that; although the respondent was a newly registered SACCO, the market vendors interviewed denied knowledge of its existence. The bank statement which they submitted together with their bid was for the period from 9<sup>th</sup> April 2015 to 13<sup>th</sup> May 2015 yet the bid conditions required a statement covering the previous six months, i.e. November 2014 – April 2015. Although the respondent's bid price was shs. 3,064,000/= its average bank balance was only shs. 738,000/= which was not indicative of its capacity to pay the bid price three months in advance. The respondent further failed to submit its audited accounts for the previous two years as required by the evaluation criteria. The Evaluation Committee was therefore right in rejecting the respondent's bid since under section 8 of *The Public Procurement and Disposal of Public Assets Act, 2003* together with Regulation 13 of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* it was empowered to reject non-compliant bids. Both the Evaluation Committee and the Contracts Committee acted independently in rejecting the respondent's bid for non-conformity and in not invoking Regulation 74 since the respondent's bid was not merely non-compliant in form but was rather materially non-compliant. Considering that the procuring entity adopted the Open Domestic Bidding method, it was not wrong for the Contracts Committee to award the contract to the best evaluated bidder who happened not to be a market vendor. He therefore rejected the application as devoid of merit.

Being dissatisfied with the decision of the Chief Administrative Officer, Arua, the respondent on 15<sup>th</sup> July 2015 applied to the appellant for further administrative review. Before the appellant, the respondent presented more or less the very same grounds and arguments it had presented to the Chief Administrative Officer before. It argued that having been the highest bidder, the procuring entity had erred in not finding it to be the best evaluated bidder. The procurement entity had erred in determining its financial incapacity. It should have exempted the respondent as well from the requirement to submit audited accounts for the past two years on grounds that it was a newly registered SACCO yet to convene its Annual General Meeting to appoint an Auditor. It should also have been exempted from submitting a bank statement for the past six months since it had only opened the account on 9<sup>th</sup> April 2015. Instead of rejecting the bid, the procuring entity ought to have sought clarification from the respondent relating to those omissions. The respondent therefore prayed that the direct procurement method should be adopted instead to grant it the contract since it is the only eligible registered market vendors' SACCO qualified to benefit from the Government Policy on the Development and Management of markets in City, Municipalities and Towns. It further prayed that the appellant should recommend to the procuring entity to enter into direct negotiations with it in accordance with Regulation 127 of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*.

The appellant considered the application and in its decision of 8<sup>th</sup> August 2015, rejected it. The reasons given were that; although the respondent was the highest bidder, it was not the best evaluated bidder. This was because the bidding document had indicated that technical compliance would be the method of evaluation of the bids. Under that method, any bid found to be non-responsive at any stage would be eliminated and would not be considered at the subsequent stages. The respondent's bid was found to be non-responsive at the first stage for failure to meet the financial capacity requirement. Bidders were required to demonstrate access to or availability of financial resources to pay the monthly bid amount quoted, three months in advance. To qualify, the requirement was that the bidder's monthly bank balances for the last three months must not be less than three times the monthly quotation. For that reason, the bidding document required attachment of the bidder's bank statement for the previous three months, i.e. November 2014 – April 2015. The respondent's bid price being shs. 3,064,000/= it required a minimum monthly average closing balance of shs. 9,204,000/= yet its average bank

balance was only shs. 798,000/= for April 2015 and 678,000/= for May 2015. Not only did the respondent fail to provide a bank statement covering the required period, but even the statement it provided failed to demonstrate financial capacity to pay as per the terms of reference. The requirement to submit audited accounts for the previous two years and a bank statement for the previous six months was mandatory for all bidders, none of which the respondent was able to meet. The nature of the respondent's non-conformity was not a mere minor omission but a material deviation which could not be corrected under Regulation 74 of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*. The Government Policy on the Development and Management of markets in City, Municipalities and Towns is meant to benefit owners of stalls, kiosks, etc. In markets yet none of the owners or operators of stalls, kiosks, etc. in Pawor Market are members of the respondent. Departure from the Government policy was occasioned by the absence of organised associations of owners of stalls, kiosks, etc. in Pawor Market hence the resort to the Open Domestic Bidding method, which the procurement entity was justified in adopting. The application was therefore found to have no merit and was rejected. The appellant then authorised the procurement entity to proceed with the procurement. It further directed the procurement entity not to refund the administrative review fee paid by the respondent.

Still dissatisfied with the decision of the appellant, the respondent on 26<sup>th</sup> August 2015 applied to the Public Procurement and Disposal of Public Assets Tribunal, for review of the appellant's decision. There, the respondent contended and advanced one ground, that;-

1. The appellant had erred in law and in fact by upholding the procurement entity's decision to ignore the Government Policy Decision on the Development and Management of markets in City, Municipalities and Towns (the Reservation Scheme).

In its written submissions, the respondent argued that the Government Policy on the Development and Management of markets in City, Municipalities and Towns issued by the Ministry of Local Government in 2007, by which it was decided that in awarding such contracts, priority should be given to market vendors' SACCOs. The appellant therefore erred in relying on its verification exercise without taking into account the fluidity of membership of such SACCOs

without a permanent, constant membership. It further erred in adopting a procurement method not consistent with the policy. It should have adopted the Restricted Domestic Bidding method under the provisions of section 82 of *The Public Procurement and Disposal of Public Assets Act, 2003* by which the bidding should have been limited to sitting SACCOs only. The Open Domestic Bidding method should only have been adopted after finding the bidders under the Restricted Domestic Bidding method non-responsive. The due diligence conducted by the appellant ought to have been done before commencement of the procurement process.

In its written submissions to the Tribunal, the appellant contended that it undertook a verification exercise in Pawor Market on 8<sup>th</sup> August 2015 where it found that the persons listed as members in the respondent's bid were not operating on the ground as owners of stalls, kiosks, etc. in Pawor Market. The respondent therefore could not be a beneficiary of the policy.

In its decision, The Tribunal found that the aim of the Government Policy on the Development and Management of markets in City, Municipalities and Towns issued by the Ministry of Local Government in 2007 is that the owners of stalls, kiosks, etc. in markets should register under associations which will then be given first priority in re-development and management of markets. In its own admission to the appellant, the respondent indicated that its members whose photographs appeared in its bid were not "on the ground" and therefore were not in the category of beneficiaries for whom the policy was meant, and dismissed the application on that ground. However the Tribunal went ahead to observe that the procurement entity had in the procurement process, customised the Standard Bidding Document issued by the appellant for use in the procurement of services for the management of Public Vehicle Parking Areas. The procurement entity had no authority to customise a Standard Bidding Document and put to an entirely different use without the prior approval of the appellant. The tribunal therefore found that the entire process was *void ab initio* and therefore a nullity. For that reason the appellant had come to a wrong conclusion. The tribunal therefore set aside the decision of the appellant advising the procurement entity to proceed with the procurement and not to refund the administrative review fee paid by the respondent. It instead ordered the Chief Accounting Officer of the procurement entity to refund the administrative review fee paid by the respondent and awarded the respondent shs. 2,000,000/= to cover its out of pocket expenses and costs.

The appellant is dissatisfied with that decision and has appealed to this court on six grounds, namely;

1. The members of the PPDA Appeals Tribunal erred in failing to dismiss the application after dismissing the sole ground of appeal raised by the Respondent (Pawor Park Operators and Market Vendors SACCO).
2. The members of the PPDA Appeals Tribunal erred in law and fact in framing the customisation of bidding documents as a ground for review and on making a decision on the said ground although it was not raised by the appellant and the respondent had not been given prior notice to respond to the said ground.
3. The members of the PPDA Appeals Tribunal erred in law and fact in deciding that Arua District Local Government used a bidding document that was a deviation from the Standard Bidding Document issued by the Authority for a different purpose, without seeking and obtaining approval from the Authority (Appellant) to use the bidding document.
4. The members of the PPDA Appeals Tribunal erred in law and fact in failing to consider and take into account the fact that at the material time there was no Standard Bidding Document for the management of markets issued by the Authority.
5. The members of the PPDA Appeals Tribunal erred in law and fact in deciding that the customisation of the Standard Bidding Document under Regulation 48 of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* is limited to minor or cosmetic change.
6. The members of the PPDA Appeals Tribunal erred in law and fact in awarding the respondent costs of shs. 2,000,000/= (two million shillings).

At the hearing of the appeal, counsel for the respondent was absent although duly served as evidenced by the return of service filed in court. None of the officials of the respondent or their counsel was present in court. Counsel for the appellant was allowed to proceed ex-parte. He abandoned the fifth ground. Submitting in support of the first ground of appeal, counsel for the appellant Mr. John Kalemera argued that since the parties had submitted only one issue to the tribunal for decision, it was irregular for the tribunal to formulate its own issue regarding the

customisation of the bidding documents, which had neither been raised by the applicant nor the respondent. By doing so, the Tribunal violated the rules of natural justice since the appellant was not notified and could not prepare its defence adequately in this respect. The Tribunal became applicant and adjudicator at the same time. He argued that since the appellant rejected the sole ground in the application presented to it, the application failed and that should have been the end of the matter. In respect of grounds 2, 3 and 4, he submitted that the Tribunal erred in taking judicial notice of the customisation by the procurement entity, of the Standard Bidding Document issued by the appellant for the management of Public Vehicle Parking areas, especially since it was never brought to the attention of the parties. Regarding ground 6, he submitted that the respondent should not have been awarded costs after the sole ground of its application had been rejected.

Grounds one up to four of this appeal question the scope of powers exercisable by the Public Procurement and Disposal of Public Assets Tribunal when considering applications from decisions of the appellant. The Public Procurement and Disposal of Public Assets Tribunal was established by section 91B of *The Public Procurement and Disposal of Public Assets (Amendment) Act, 2011*. Under section 91 I (6) of the same Act, for the purposes of reviewing a decision of the appellant, the Tribunal has powers to a) affirm the decision of the Authority; (b) vary the decision of the Authority; or (c) set aside the decision of the Authority, and (i) make a decision in substitution for the decision so set aside; or (ii) refer the matter to the Authority for reconsideration in accordance with any directions or recommendations of the Tribunal.

The Public Procurement and Disposal of Public Assets Tribunal lies at the apex of the administrative review structures in the area of public procurement and disposal of public assets. This administrative review structure, comprising both internal and external review options, provides a mechanism by which a person can seek redress against a procurement decision made by a procurement entity that affects them. It also provides a mechanism for an inexpensive and expeditious rectification of such decisions if they are wrong. It is comprised of four tiers; at the lowest ranks are the primary decision makers constituted by the procurement organs of the various procurement entities such as the Evaluation Committees, Contracts Committees and so on. A person aggrieved by decisions taken at that level has recourse to the next tier which is that

of the Senior Management level of the procurement entity. This usually is at the level of the Accounting Officer of the entity. That level marks the end of the internal administrative review process. Internal review is easy for applicants to access, and enables a quicker and more inexpensive means of re-examining decisions where applicants believe a mistake has been made. A person aggrieved by the internal review mechanisms, then has recourse to the two tiers of external review constituted first by an application to the appellant (The Public Procurement and Disposal of Public Assets Authority) and finally by an application to the Public Procurement and Disposal of Public Assets Tribunal.

Any of the above-mentioned tiers, may take a merits review or a complaints handling approach in addressing the grievance referred to it. Merits review of a decision involves a consideration of whether, on the available facts, the decision made was a correct one while the complaints handling processes relates to reviewing the way the decision was made, including issues such as whether the actions or decisions made may be unlawful, unreasonable, unfair or improperly discriminatory. The complaints approach may also sometimes deal with the merits of the decision made, where the merits are inextricably interwoven with the procedural considerations.

Merits review is the process by which a person or body, other than the primary decision maker, reconsiders the facts, law and policy aspects of the original decision and determines the correct decision, if there is only one, or the preferable decision, if there is more than one correct decision. Merits review involves standing in the shoes of the original decision maker, reconsidering the facts, law and policy aspects of the original decision. In a merits review, the whole decision is made again on the facts. The objective of merits review is to ensure that procurement decisions are correct or preferable, that is to say, that they are made according to law, or if there is a range of decisions that are correct in law, the best on the relevant facts. It is directed to ensuring fair treatment of all persons affected by a decision, and improving the quality and consistency of primary decision making. The correct decision is made in a non-discretionary matter where only one decision is possible on either the facts or the law. However, where a decision requires the exercise of discretion or a selection between possible outcomes, judgement is required to assess which decision is preferable. Merits review concerns the review of both the factual basis and the lawfulness of a decision. It allows all aspects of an



administrative decision to be reviewed, including the findings of facts and the exercise of any discretions conferred upon the decision-maker (see Dr David Bennett AO QC, *“Balancing Judicial Review and Merits Review,”* (2000) 53 Admin Review 3.)

At the level of internal administrative review, the merits review process involves reconsideration of the decision by a more senior person within the same procurement entity in which the decision was made. An internal merits review process involves a determination whether the right decision was made and is not a complaints handling system dealing only with complaints about the way in which the decision was made. Apart from providing a quick, simple and cost effective way to address an incorrect decision, internal review provides the procurement entity with an opportunity to quickly correct its own errors, while at the same time enabling more senior decision-makers to monitor the quality of the original primary decision making. This can then be dealt with by directly addressing the issue with the decision maker. The internal review undertaken by the procurement entity in response to the application ought to be thorough. This should include obtaining and placing on the record a full statement as to what occurred from any officer within the entity who may have direct knowledge. This is important for the efficacy of any external review that may take place thereafter, in which event access to precise evidence of what might have occurred, may not be readily available. Hopefully this was achieved in the instant case with the respondent’s application to the Chief Administrative Officer of Arua District Local Government.

In considering whether a decision should be subject to internal or external administrative review and the type of review that should be available, whether a merits or complaints review, the common law principles of natural justice apply. The basic principles of natural justice require that a person whose interests might be adversely affected by the decision be provided with an opportunity to present their case to the relevant decision-maker (the right to be heard), be notified in advance that a decision is to be made and be given an opportunity to respond (procedural fairness), and have the matter determined by an unbiased decision-maker (an absence of bias). It is imperative that the reasons for its decision, and the material that it considered in making it, should be squarely and unequivocally revealed at every level of the structures. It is the function of each of the tiers to determine whether the decision made was, on

the material before it, the correct or preferable one. The issue was brought the attention of both parties and submissions were invited from both of them. In the event that counsel for the appellant required more time to prepare his response, he had the option to seek an adjournment for that purpose, which he did not take. I have therefore not found any breach of the rules of natural justice in the instant case as contended by counsel for the appellant.

Unlike judicial review which holds public officials accountable for the correct exercise of their powers, rather than the fairness of their decision with reference to the merits of the case, administrative merits review concerns the reconsideration of both the factual basis and the lawfulness of a decision, and is thus wider than judicial review, which is limited to the latter.

Judicial review is different from administrative merits review because the court cannot look at the substance of the decision maker's assessment of the facts, only the process by which that decision was made. The courts cannot remake the decision, so typically the remedies available from judicial review involve remitting the decision to the original decision maker with an order to remake the decision according to law. A court engaging in judicial review will generally not disturb factual findings, the assessment of credibility, the attribution of weight to pieces of evidence or the exercise of discretion, since this would be to intrude into the "merits" of the decision. Unlike external administrative merits review tribunals, courts are not entitled to re-visit the substance of the challenged decision. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. Within the adversarial system, the function of the courts is not to pursue the truth but to decide on the cases presented by the parties. Administrative merits review tribunals, resources permitting, may inquire more widely than courts, and may adopt a function closer to that of pursuing the truth than that which a court may adopt. As statutory agencies, both The Public Procurement and Disposal of Public Assets Tribunal and the appellant's interests lie in the correct and preferable application of the relevant legislation and policy to procurement decisions, rather than on the procedural limitations of pleadings and arguments as found in courts of law. Administrative merits review allows for examination of the evidence with a view of reviewing agency forming its own view about the substantial merits of the case. Conduct of

proceedings by both external procurement administrative review agencies ought to be more of an inquiry than adjudication.

This for example is evident in Regulation 140 (3) (d) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* which authorises the appellant upon receipt of an application for administrative review, to conduct an investigation and during such an investigation, to consider; (i) the information and evidence contained in the application; (ii) the information in the records kept by a secretary contracts committee; (iii) information provided by staff of a procuring and disposing entity (iv) information provided by the other bidders; and (v) any other relevant information, under Regulation 140 (5) thereof.

The comment made by The Australian Law Reform Commission, in its report “*Managing Justice: A Review of the Federal Civil Justice System*”, published in 2000, is instructive on this point. The Commission in that report commented:

In review tribunal proceedings there is no necessary conflict between the interests of the applicant and of the government agency. Tribunals and other administrative decision making processes are not intended to identify the winner from two competing parties. The public interest ‘wins’ just as much as the successful applicant because correct or preferable decision making contributes, through its normative effect, to correct and fair administration and to the jurisprudence and policy in the particular area. The values underpinning administrative review are said to encompass the desire for a review system which promotes lawfulness, fairness, openness, participation and rationality. The provision of administrative review can be seen to fit neatly into a model of pluralist and participatory democracy. (see Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89), Australian Government Publishing Service, Canberra, 2000, at p 758 [9.11].)

I construe the argument advanced by counsel for the appellant that by the PPDA Tribunal formulating its own issue regarding the validity of the extent of customisation of the Standard Bidding Document the appellant had issued for the management of Public Vehicle Parking Areas to the procurement of management and revenue collection from markets by the procurement entity was a violation of the rules of natural justice, as envisioning the role of the tribunal to be comparable to that of a court of law. The argument that the PPDA Tribunal descended into the

arena as applicant and adjudicator at the same time when it did that as conceiving administrative merits review in the light of a judicial adjudication. An external administrative merits review is not in the nature of an appeal. An External merits review involves fresh consideration of a primary decision by an external body, in this case by the appellant as a regulator and the tribunal as the final external administrative review agency. External administrative merits reviewers exercise the power of the original procurement entity's decision maker.

While external administrative merits review tribunals share many of the features of a court, including adherence to the rules of procedural fairness, impartial decision-making and the provision of written reasons, the inquisitorial function allows such tribunals to better investigate the truth and the merits of a matter, and to take a wider variety of considerations into account when making decisions. Such tribunals are ideally served by cooperative, helpful parties, providing them with relevant material, and eschewing an adversarial approach to their opponents. The aim of achieving the correct or preferable decision is a far more attractive one than the more constrained goal of courts to determine the correct decision, irrespective of administrative justice. That notwithstanding, although external administrative merits review decision makers may take an inquisitorial function in the sense that they may obtain information outside what the applicant places before them, this does not mean that they have a general duty to undertake their own inquiries in addition to information provided to them by the applicant and otherwise.

Section 91 I (6) of *The Public Procurement and Disposal of Public Assets (Amendment) Act, 2011*, confers upon The Public Procurement and Disposal of Public Assets Tribunal wide powers to set aside the original decision and substitute it with a new decision of its own. Implicit within such a power is the authority to consider both the lawfulness of the procurement decision it is reviewing and the facts going to the exercise of discretion, whether raised by the applicant or not, provided all interested parties are provided with an opportunity to present their case (the right to be heard), are notified in advance that a decision is to be made on basis of that material and are given an opportunity to respond (procedural fairness), determine the matter in an unbiased manner (an absence of bias) and give reasons for the decision. The most common metaphor to describe the functions of an external administrative review tribunal engaging in merits review is

that it stands in the shoes of the decision-maker (see *Minister for Immigration and Ethnic Affairs v. Pochi (1980) 31 ALR 666 at 671*). The power to set aside the original decision and substitute it with a new decision of its own requires the PPDA Tribunal to stand in the shoes of the original decision maker, reconsider the facts, law and policy aspects of the original decision. It is authorised to exercise all the powers and discretions that are conferred on the person who made the decision under review based on the material that was before and that which ought to have been before that person, whether or not that person took all that material into account or not, provided that it is material which ought to have been reasonably taken into account.

The metaphor by Smithers J in *Minister for Immigration and Ethnic Affairs v Pochi (1980) 31 ALR 666 at 671* that; “in reviewing a decision the Tribunal is to be considered as being in the shoes of the person whose decision is in question,” conveys the notion that the external administrative merits review tribunal may re-make a decision, as if it were the original decision-maker. The PPDA Tribunal does not have to find legal error first. The question for the determination of the PPDA Tribunal is not whether the decision which the appellant made was the correct or preferable one on the material before it. The question for the determination of the PPDA Tribunal is whether that decision was the correct or preferable one on the material before the PPDA Tribunal. This includes material that was before the primary decision maker including that which ought to have been before it. Merits review tribunals typically have powers to affirm a decision, vary it, set it aside and make a substitute decision, or set it aside and remit it to the original decision-maker for reconsideration. The ability to make a substitute decision is one of the defining characteristics of merits review.

The PPDA Tribunal in performing its administrative review role, functions more like a court at first instance. It is not an Appeals Tribunal whose powers may be limited by law or restricted to questions of law and, only with the Appeal Panel’s leave, which may be extended to the merits. Section 91 I (6) of *The Public Procurement and Disposal of Public Assets (Amendment) Act, 2011*, does not contain such restrictions. The PPDA Tribunal is required to determine the substantive issues raised by the material and evidence advanced before it and, in doing so, it is obliged not to limit its determination to the “case” articulated by an applicant if the evidence and material which it accepts, or does not reject, raises a case on a basis not articulated by the

applicant. In doing so, it may frame the case differently from how it has been framed by the parties. In some cases such as this, failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, or to take into account an obvious fact or point of law, could constitute a failure to review.

Therefore in the instant appeal, the PPDA Tribunal did not err in considering an aspect of the material before it which the appellant ought to have considered but did not, i.e. that Regulation 48 (1) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* is limited to minor cosmetic change and is not a blank cheque for overhauling the entire bidding document. Further, that permitting such customisation would be allowing the appellant to abdicate its obligations under section 7 (1) (d) and (e) of *The Public Procurement and Disposal of Public Assets Act, 2003*. As a result, that the bidding document issued by the procurement entity in the instant case was a complete deviation from the Standard Bidding Document the appellant had issued for the management of Public Vehicle Parking Areas, for which reason the procurement entity should instead have invoked Regulation 10 of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* to apply to the appellant for specific authorisation in writing, for approval of deviation from the use of the document. The Tribunal concluded that the entire bidding process, by virtue of that unauthorised deviation, was *void ab initio* and thus a nullity.

Although this aspect was neither part of the substantive issues raised by the “case” articulated by the respondent or that of the appellant in their respective written submissions to the PPDA Tribunal, it formed part of the material accepted by, or not rejected by either party. In framing the case differently from how it has been framed by the parties, the PPDA Tribunal did not err since it was not obliged to limit its determination to the “case” articulated by the parties. Had the PPDA Tribunal failed to take into account this obvious point of mixed law and fact, it would in the circumstances of this case have failed in its duty of external administrative merits review.

The Tribunal’s decision though is faulted on two fronts, one procedural and the other evidential, i.e.; failure to give the parties notice of the intention to consider this aspect in the determination

of the application on the one hand, and taking judicial notice of the fact that this aspect had been dealt with in the earlier *PPDA Tribunal application No. 3 of 2015; Peace Gloria v PPDA*.

First, regarding the complaint against the violation of the right to be heard, although the Tribunal has the mandate not to limit its determination to the “case” articulated by an applicant if the evidence and material which it accepts, or does not reject, raises a case on a basis not articulated by the applicant and that in doing so, it may frame the case differently from how it has been framed by the parties, this is subject to observing the rules of natural justice. For example *The Secretary of State for the Home Department v. A. M. [2015] UKUT 656 (IAC)*, was an asylum case in which the Secretary of State for the Home Department was the Appellant and the Respondent was 26 year old national of Sudan claiming asylum. Upon an appeal from the decision of Secretary of State for the Home Department to the First-tier Tribunal, the Tribunal Judge engaged in independent internet research about the background materials relied upon by the Respondent. The Tribunal Judge found that that Secretary of State for the Home Department had misinterpreted the controversial date and a result was not satisfied that this inconsistency fatally undermined the Respondent’s credibility. He instead found that there had been a very high level of consistency in the respondent’s account overall. On basis of that research, he had faulted the Secretary of State for the Home Department’s decision based on inconsistency in the respondent’s documentation but failed to disclose to the parties that he had engaged in this research. On further appeal to the Upper Tribunal (Immigration and Asylum Chamber), it was held that;

The First-tier Tribunal Judge did not engage in some kind of independent research exercise. Rather, as stated unequivocally in the decision: “I accessed the background information relied on by the Secretary of State as set out in the footnotes to the refusal letter.” This was an entirely legitimate exercise, since the Secretary of State was relying on the source materials identified in the footnotes..... Bearing in mind the context of this appeal, it is appropriate to formulate some general rules, or principles. It is important to emphasise that these are general in nature, given the unavoidable contextual and fact sensitive nature of every case.

- i. Independent judicial research is inappropriate. It is not for the judge to assemble evidence. Rather, it is the duty of the judge to decide each case on the basis of the evidence presented by the parties, duly infused, where appropriate, by the doctrine of judicial notice.

- ii. If a judge is cognisant of certain evidence which does not form part of either party's case, for example as a result of having adjudicated in another case or cases, or having been alerted to something in the news media, the judge must proactively bring this evidence to the attention of the parties at the earliest possible stage, unless satisfied that it has no conceivable bearing on any of the issues to be decided. If the matter is borderline, disclosure should be made. This duty may extend beyond the date of hearing, in certain contexts.
- iii. The assiduous judge who has invested time and effort in reading all of the documentary materials in advance of the hearing is entitled to form provisional views. Provided that such views are provisional only and the judge conscientiously maintains an open mind, no unfairness arises.
- iv. ....
- v. If a judge has concerns or reservations about the evidence adduced by either party which have not been ventilated by the parties or their representatives, these may require to be ventilated in fulfilment of the “*audi alteram partem*” duty, namely the obligation to ensure that each party has a reasonable opportunity to put its case fully. This duty may extend beyond the date of hearing, in certain contexts. In this respect, the decision in *Secretary for the Home Department v. Maheshwaran [2002] EWCA Civ 173, at [3] - [5]* especially, on which the Secretary of State relied in argument, does not purport to be either prescriptive or exhaustive of the requirements of a procedurally fair hearing. Furthermore, it contains no acknowledgement of the public law dimension and the absence of any *lis inter-partes*.

It should be noted though that unlike The Public Procurement and Disposal of Public Assets Tribunal which is enjoined to more or less conduct an inquiry, proceedings before the First-tier Tribunal in the U.K. Immigration and Asylum Chamber are an adjudication hence the closer restriction on the duty of the judge to decide each case on the basis of the evidence presented by the parties. On some occasions, fairness may require a Tribunal to canvas an issue which has not been ventilated by the parties or their representatives, but this must be done in fulfilment of each party's right to a fair hearing. The proposed general rules of dealing with the cognisance of certain evidence which does not form part of either party's case, are very instructive for that reason. The Tribunal is under an obligation to bring such evidence to the attention of the parties at the earliest possible stage, unless satisfied that it has no conceivable bearing on any of the



issues to be decided. In the instant case, the parties were not given notice of this aspect of the case yet it did not simply have a bearing but was pivotal to the issues to be decided and as a result the appellant was denied the opportunity to prepare for and address the Tribunal on it. It is an elementary principle of law that no order involving adverse civil consequences can be passed against any person without giving him an opportunity to be heard against the passing of such order. The *audi alteram partem* rule is applicable in a quasi-judicial as well as an administrative proceeding. However, not in every case where this rule is violated will a miscarriage of justice occur. Decisions will be vacated only if the violation occasioned a miscarriage of justice.

In *The Secretary of State for the Home Department v. Balasingham Maheshwaran*, [2002] EWCA Civ 173, the England and Wales Court of Appeal (Civil Division) having found such a violation, went on to hold that;

Undoubtedly a failure to put to a party to litigation a point which is decided against him can be grossly unfair and lead to injustice. He must have a proper opportunity to deal with the point. Adjudicators must bear this in mind. Where a point is expressly conceded by one party it will usually be unfair to decide the case against the other party on the basis that the concession was wrongly made, unless the tribunal indicates that it is minded to take that course. Cases can occur when fairness will require the reopening of an appeal because some point of significance – perhaps arising out of a post hearing decision of the higher courts – requires it. However, such cases will be rare.

Although in the instant case the Tribunal definitely deprived the appellant of its right of being heard, in violation of the principle of natural justice, it has however not been demonstrated that the violation involved any adverse civil consequences to the appellant. It was therefore an inconsequential violation that does not require vacating the decision and reopening of the appeal before the Tribunal.

Considering the perspective of taking judicial notice of facts considered in its earlier decision in *PPDA Tribunal application No. 3 of 2015; Peace Gloria v PPDA*, section 56 of *The Evidence Act* provides for facts which “must” be taken judicial notice of. Under that provision, facts of which judicial notice may be taken need not be proved. The list of facts mentioned in that section of which judicial notice may be taken is not exhaustive. In appropriate cases, judicial notice may

be taken of facts which are unquestionably within public knowledge. Facts where shutting the decision maker's eye to their existence would in a sense be an insult to commonsense and would tend to reduce the decisional process to a meaningless and wasteful ritual. No Tribunal therefore insists on formal proof, by evidence, of notorious facts, past or present. The permissible scope of judicial notice varies according to the nature of the issue under consideration, and the closer a fact approaches the dispositive issue the more a decision maker ought to insist on compliance with the stricter criteria for judicial recognition. Under the strict criteria, a decision maker may properly take judicial notice of facts that are either (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons, or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy. Where the fact is widely known and accepted, the law of evidence permits a decision maker to take judicial notice of it. This might happen, for example, where the fact attained widespread publicity of which the decision maker and everyone else in the community is aware.

It so happens that in *PPDA Tribunal application No. 3 of 2015; Peace Gloria v PPDA* the tribunal found as a matter of fact that the procuring entity had purported to invoke Regulation 48 (1) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*, a provision limited to minor cosmetic change, instead Regulations 5 (1) (c) (ii), and 61 (1) (a) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* which permit the appellant to authorise deviations in situations where there are exceptional requirements, the market conditions require such deviation, the international standards require such deviation, or where the practices which regulate or govern the procurement make it impossible, impracticable or uneconomical to comply with the Standard Document. For that purpose, Regulation 61 (2) (e) thereof requires the procurement entity to furnish the appellant with a statement of whether the deviation is required for a single requirement or for a number of requirements of the same class over a period of time. This is a further manifestation of the intent to closely regulate the extent to which Standard Bid Documents issued by the appellant may be customised. The Tribunal found that a procurement entity which customises a Standard Bidding Document designed and issued by the appellant for the management of Public Vehicle Parking Areas, and instead applies it to the procurement of management and revenue collection of markets, does not simply undertake minor cosmetic change to it as is envisaged by Regulation 48

(1) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*, but rather undertakes a process of extensive alterations which change the nature and character of the document and the purpose to which the document was designed to be applied.

The Tribunal found as a matter of fact that these deviations were caused by the absence of any standard document issued by the appellant for the latter purpose, thereby creating a situation where it was impossible or impracticable to comply with the Regulations. The corrective measure then had to be undertaken by invoking Regulations 5 (1) (c) (ii), and 61 (1) (a) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*, if such a deviation is to be undertaken. The Tribunal's conclusion was reasonable.

The previous case and the instant one were both part of the same procurement process. The procurement entity put out a single advertisement in respect of all markets in the District. It so happens that the instant case concerns one of such markets, Pawor Market while in *PPDA Tribunal application No. 3 of 2015; Peace Gloria v PPDA* the Tribunal was concerned with another of such markets, Ejupala Market. Both cases are founded on more or less the same factual background, the only substantial difference being the character of the parties involved, one being a natural person and the other a juridical one, and the location within the District of the two markets forming the subject matter of the two sets of proceedings. In *R. v. Williams, [1998] 1 S.C.R. 1128*, it was held by the Supreme Court of Canada that;

Judicial notice is the acceptance of a fact without proof. It applies to two kinds of facts: (1) facts which are so notorious as not be the subject of dispute among reasonable persons; and (2) facts that are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy: see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1992), at p. 976.....Widespread racial prejudice, as a characteristic of the community, may therefore sometimes be the subject of judicial notice. Moreover, once a finding of fact of widespread racial prejudice in the community is made on evidence, as here, judges in subsequent cases may be able to take judicial notice of the fact. "The fact that a certain fact or matter has been noted by a judge of the same court in a previous matter has precedential value and it is, therefore, useful for counsel and the court to examine the case law when attempting to determine whether any particular fact can be noted": see Sopinka, Lederman and Bryant, *supra*, at p. 977. It is also possible that events and documents of indisputable accuracy may permit judicial notice to be

taken of widespread racism in the community under the second branch of the rule. For these reasons, it is unlikely that long inquiries into the existence of widespread racial prejudice in the community will become a regular feature of the criminal trial process.

In the previous case, the Tribunal had found that the procurement entity had customised a Standard Bidding Document designed and issued by the appellant for the management of Public Vehicle Parking Areas, and instead applied it to the procurement of management and revenue collection from markets. This was a finding of fact made on evidence in the previous proceeding. In the subsequent application based on the same facts, it would in a sense have been an insult to commonsense and tend to reduce the decisional process to a meaningless and wasteful ritual if the Tribunal had required that fact to be proved once again by evidence in the instant proceedings. The Tribunal was justified to take judicial notice of the fact and therefore I do not find any merit in grounds two up to four of this appeal.

Grounds one of the appeal faults the Tribunal for not dismissing the application after rejecting the sole ground on basis of which it was made and instead ordered a refund of the complainant's administrative review fees. The respondent filed an application to the Tribunal based on one ground which it found lacked merit and was rejected. But having found, *proprio motu*, that the procurement entity had unlawfully customised a Standard Bidding Document designed and issued by the appellant for the management of Public Vehicle Parking Areas, and instead applied it to the procurement of management and revenue collection from markets without the appellant's prior approval, the entire process was *void ab initio* and a nullity. It is on this account that the Tribunal ordered a refund of the complainant's administrative review fees.

According to Regulation 138 (3) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*, an application for administrative review made to the Accounting Officer of the procurement entity should be accompanied by payment of a prescribed fee in accordance with guidelines issued by the appellant. *The Guideline on Administrative review Local Governments (Public Procurement and Disposal of Public Assets) Guideline, No. 5 of 2008* fixed the fee payable and further provided that in the event of a successful application, the fee paid by the applicant should be refunded. The fee will not be refunded if the outcome of

the administrative review is that the original decision is upheld. The guidelines do not provide for a partial refund in the case of partial success. Entitlement to refund is not *pro rata* the degree or level of success of the application.

In the instant case, to the extent that the appellant did not uphold the decision of the procurement entity, the application succeeded on a ground other than that submitted by the respondent. That an application has failed on the ground submitted by the applicant but the decision of the procurement entity has nevertheless been annulled, would mean that the overall result is that the application was successful. From the perspective of the applicant, it succeeded in causing the annulment of the decision, albeit in an unintended manner, but failed to attain the reliefs sought. Other than rejecting the application as having failed, the Tribunal ought instead to have found that the application had succeeded on a ground other than that advanced by the respondent. Had it drawn that conclusion, which it ought to have done, then it would follow that the respondent was entitled to a refund of the administrative review fee under the *LG (PPDA) Guideline, No. 5 of 2008*. For that reason the Tribunal made the correct decision and consequently grounds one of the appeal too fails.

The final ground of appeal assails the award of costs of shs. 2,000,000/= to the respondent by the PPDA Tribunal. Save in exceptional cases, an appellate court will not interfere with the assessment of what an administrative merits tribunal considers to be reasonable costs. It will however do so where it is shown that either the decision was based on an error of principle, or the amount awarded was manifestly excessive as to justify an inference.

Prima facie, parties before the PPDA Tribunal ought to bear their own costs, unless in particular instances, in the proper exercise of discretion, the PPDA Tribunal considers otherwise. The PPDA Tribunal should make such awards only if satisfied that it is fair to do so, having regard to whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as; failing to comply with an order or direction of the Tribunal without reasonable excuse, failing to comply with the PPDA Act, the regulations, rules or any other enabling enactment, seeking unnecessary or avoidable adjournments, causing unnecessary or avoidable, attempting to deceive another party or the

Tribunal, the nature and complexity of the proceeding, a party who makes an application that has no tenable basis in fact or law or otherwise conducting the proceeding vexatiously.

The rules of natural justice require that before making awarding costs, the PPDA Tribunal must give the party to be affected by such an award, a reasonable opportunity to be heard. I have perused the record of PPDA Tribunal. Not only is there no evidence of the appellant having been heard on the decision to award costs to the respondent, but also the PPDA Tribunal did not furnish any reason for the award apart from the general comment that, “the applicant is awarded seven hundred and fifty thousand shillings to cover its out of pocket expense and legal costs.” There is no indication whatsoever on the record as to how the PPDA Tribunal assessed the costs in order to arrive at that specific quantum. In the circumstances, this was an improper exercise of discretion and for that reason ground six of the appeal succeeds. The award of costs to the respondent by the PPDA Tribunal is hereby set aside.

In the final result, the appeal succeeds only as regards the award of costs to the respondent. The appeal against the findings of the PPDA Tribunal is hereby dismissed. Since the respondent did not appear at the hearing of this appeal, there will be no order as to costs.

Dated at Arua this 23<sup>rd</sup> day of February 2017.

.....  
Stephen Mubiru  
Judge