

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0025 OF 2017
(Arising from PPDA Appeal Tribunal Application No. 0015 of 2017)

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ARUA MUNICIPAL COUNCIL APPELLANT

VERSUS

10 **ARUA UNITED TRANSPORTERS SACCO RESPONDENT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

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Using the selective bidding method, on 17th May, 2017 Arua District Local Government (the appellant) invited bids for the management and collection of revenue from Arua Taxi Park for the period running from July 2017 to June 2018 at a reserve price of shs. 16,874,000/= per month. On 17th May, 2017 the appellant received two bids; one from Arua Taxi Operators Cooperative Savings and Credit Society Limited (hereinafter referred to as the "Taxi Operators Society") at shs. 18,767,900/= per month and the other from the respondent, Arua United Transporters Cooperative Savings and Credit Society Limited (hereinafter referred to as the "Transport Operators Society") at shs. 18,875,900/= per month.

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25 The appellant's Evaluation Committee considered the two bids and in its report dated 12th May, 2017 disqualified the Transport Operators Society at the technical evaluation stage on account of its lack of the required experience. Only the Taxi Operators Society proceeded to the financial evaluation and was recommended for award of the contract. Notice of the best evaluated bidder was displayed on 12th June 2017 whereupon the Contracts Committee awarded the contract to the
30 Taxi Operators Society at the price of shs. 18,767,900/= per month.

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 15th June 2017 applied to the Chief Administrative Officer,

Arua for Administrative Review, contesting the award of the contract to their competitor where it argued that; in awarding the contract to the Taxi Operators Society, the appellant had disregarded key considerations, especially Guideline No. 4 (i), (ii), (iii), (iv) and (v) of *The Revised Policy Guidelines on Management and Levying of Parking Fees in Local Government's Public Services* of 13th February, 2017 requiring, among other things, that taxi park operators should not exceed a period of two years. They contended that the appellant had failed to implement this requirement since the Taxi Operators Society had managed Arua Taxi Park for three consecutive years. It further contended that it had been unfairly disqualified for failure to submit evidence of experience and record of past performance, yet they had submitted documents to that effect. In the alternative, they argued that the requirement of experience was applied selectively and ought to have been waived.

The Chief Administrative Officer on 10th July, 2017 issued his decision in accordance with section 90 (2) of *The Public Procurement and Disposal of Public Assts 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 and dismissed it.

Being dissatisfied with the decision of the appellant's Chief Administrative Officer, the respondent applied further to the Public Procurement and Disposal of Public Assets Authority for administrative review. Before the PPDA, the respondent presented more or less the very same grounds and arguments it had presented to the Chief Administrative Officer before. It argued that the appellant's Chief Administrative Officer had failed to deliver his decision on the application for review within the statutory time, the procuring and disposing entity had failed to adhere to *The Revised Policy Guidelines on Management and Levying of Parking Fees in Local Government's Public Services* of 13th February, 2017, its bid had been unfairly eliminated for lack of experience in managing taxi parks at the technical evaluation stage and faulted the appellant for having adopted the selective bidding method. Instead the Accounting Officer had in the meantime during the period of administrative review, temporarily engaged the services of the Taxi Operators Society, the contested best evaluated bidder, which was wrongful.

In its decision delivered on 7th August, 2017 the Public Procurement and Disposal of Public Assets Authority dismissed the application on grounds that; although the appellant's Chief Administrative Officer had delivered his decision five days out of time, the respondent had sought and obtained the remedy provided for by section 90 (3) of *The Public Procurement and Disposal of Public Assets Authority Act*. The appellant had correctly adopted the selective bidding method in accordance with *The Revised Policy Guidelines on Management and Levying of Parking Fees in Local Government's Public Services* of 13th February, 2017. The evaluation criteria under the bidding document required "experience in similar works" and the respondent had not provided evidence of experience in managing taxi parks and was thus correctly evaluated as non-responsive to that requirement. There was no merit in the contention that the appellant had temporarily engaged the services of the Taxi Operators Society. The application was consequently rejected under the provisions of section 91 (4) of *The Public Procurement and Disposal of Public Assets Authority Act* and recommended that the appellant ensures that the operator is procured and engaged in accordance with *The Revised Policy Guidelines on Management and Levying of Parking Fees in Local Government's Public Services* of 13th February, 2017 and that the Accounting Officer should in future adhere to the statutory time frame of delivering decisions in respect of applications for administrative review within fifteen working days.

Still dissatisfied with the decision of the Public Procurement and Disposal of Public Assets Authority, the respondent on 28th August, 2017 applied to the Public Procurement and Disposal of Public Assets Tribunal, for review of that decision. There, the respondent advanced the grounds, that;- the Public Procurement and Disposal of Public Assets Authority had erred in law and fact in deciding that the appellant had adhered to *The Revised Policy Guidelines on Management and Levying of Parking Fees in Local Government's Public Services* of 13th February, 2017. It had also erred in deciding that the appellant was right in eliminating the respondent on grounds of experience despite the fact that the selective bidding method had been used. It further erred in deciding that the respondent had by the time of filing its application before the Authority, received the decision of the appellant's Chief Administrative Officer and further that it was proper for the appellant to let the Taxi Operators Society to continue managing the taxi park.

Upon hearing the application, the Public Procurement and Disposal of Public Assets Tribunal issued its decision in summary form on 12th September, 2017 in accordance with section 91L (7) of *The Public Procurement and Disposal of Public Assets Authority Act, 2003*. It allowed the application, directed the appellant to refund the respondent's administrative review fees, directed
5 a re-evaluation of the bids in compliance with *The Revised Policy Guidelines on Management and Levying of Parking Fees in Local Government's Public Services* of 13th February, 2017, pronounced the interim arrangement by the appellant to be irregular and inconsistent with that policy, awarded the respondent costs and indicated that the reasons for those determinations would be contained in a detailed decision to be delivered on notice. By the time of consideration
10 of the instant appeal though, the Tribunal had not delivered its detailed decision.

The appellant challenges that decision in the instant appeal on the following grounds;

1. The members of the PPDA Appeals Tribunal erred both in law and fact in deciding that the decision of the PPDA Authority of 7th August, 2017 should be set aside.
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2. The members of the PPDA Appeals Tribunal erred both in law and fact in deciding that Arua Municipal Council failed to implement the government policy on management of public service vehicle parking areas dated 13th February, 2017.
- 20 3. The members of the PPDA Appeals Tribunal erred both in law and fact in deciding that the interim arrangement by the appellant (Arua Municipal Council) to collect revenue should be disbanded.
- 25 4. The members of the PPDA Appeals Tribunal erred both in law and fact in awarding the respondents costs.

In support of those grounds of appeal, the learned State Attorney Ms. Rita Kirungi argued in respect of ground two, that whereas *The Revised Policy Guidelines on Management and Levying of Parking Fees in Local Government's Public Services* came into effect on 1st March, 2017, and
30 the appellants were bound to follow them, it was wrong for the PPDA Appeals Tribunal to have required the appellant to apply retrospectively, Guideline 4.1 which is about rotation of service

providers after a period of two years. The guidelines could not be given retrospective effect. It is regulation 38 (4) (a) and (b) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006; S.1 39 of 2006*, that sets the requirements to follow in developing a shortlist for selective bids. The authority may use any of the options provided for there. That is the reason why the two; the "Taxi Operators Society" and the " Transport Operators Society" were contacted to present their bids. The respondent was faulted on experience, which criteria is permitted by Regulation 38 (5) (d). The PPDA Appeals Tribunal decided that the appellant should not have considered experience because it would result in creating a monopoly. To the contrary, the appellant is not to disregard the requirements because this is to do with revenue. Monopoly is prevented by rotation after two years and not by disregarding the requirements provided for by the regulations. The experience had to be in revenue collection or similar works, which experience is not necessarily limited to taxi parks management but could have been acquired from engagement in activities of a similar nature, which the respondent had not.

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In respect of ground three, she submitted that as a result of the delay occasioned by the process of the administrative review, individuals were contacted to collect revenue as the review process went on. These individuals were picked by the Municipal Council Divisions by decision of the Town Clerk. The town clerks of the respective Divisions selected individuals who in their view had the capacity to collect revenue in the meantime. They considered experience of the persons selected. The PPDA Appeals Tribunal overstepped their mandate which was to review the decision of the Council as regards the award of the contract and not the interim measures taken pending the determination of the application by the respondent for administrative review. The PPDA Appeals Tribunal disregarded the information that was placed before it at page 40 paragraph 8 of the record of appeal to the effect that the best evaluated bidder was not in charge, but rather individuals. Disbanding the interim arrangement would mean that the Council would not have revenue from that activity.

With regard to ground four, she submitted that the PPDA Appeals Tribunal erred in awarding costs. Citing *PPDA v. Arua Kubala, H.C.A. 005 2016* where this court held that costs should be guided by the rules of natural justice, she argued that from the record, the appellant was never

given opportunity to address the Tribunal as regards the issue of costs. It was not one of the exceptional cases where an award of costs would be justified. The hearing took only two hours. She prayed that the decision of the PPDA Appeals Tribunal be set aside and substituted with the decision of the appellant and the costs be awarded to the appellant.

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In response, counsel for the respondent, Ms. Harriet Namata submitted that although in holding 4 of the summary decision, the actual reasons behind the decision were not specified, summary decisions are delivered by the PPDA Appeals Tribunal as a matter of practice. In holding 4 the appellants were supposed to refund the administrative review fee. The refund should have been effected before the appeal. In respect of ground 2, the bidding process was by selective bidding. The respondent was selected and was on the short list. The respondent was unsuccessful because of lack of experience. Under regulation 58 (5) (a) fair and equal opportunity should be given to the providers. The respondents had some experience and should not have been disqualified, although they did not submit any proof of experience. Regulation 5 (b) is meant to guarantee rotation of different service providers. Under the guidelines it was to be two years. The guidelines were a revision and should have been applied retrospectively. Using the same provider, "Taxi Operators Society," who had already served two years, was wrong and they should not have been found to be ineligible. This is based on the principle of fairness and competition. The appellant still collects revenue and thus is in contravention of the guidelines.

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With regard to ground three, the Tribunal should not be faulted. According to the case of *Kubala v. PPDA*, the Tribunal has those powers. The PPDA Appeals Tribunal acts as a court. It had the mandate to make a determination of the case as articulated by the applicant. The interim arrangement by the appellant affects the process in that they picked persons who are members of the best evaluated bidder. They should have advertised, which they did not. They could have selected past providers and that should also be subject to a bidding process.

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With regard to ground 4, the Tribunal was justified in awarding costs to the respondent. In the *Kubala Case* it was held that such awards should be made only if it is satisfied that it is fair to do so where the party failed to comply with directions. The appellant was collecting revenue on a daily basis and did not consider that the best evaluated bidder had already served for more than

two years and so should not have been eligible. Since the appellants failed to abide by the enactment, the Tribunal was justified in awarding the costs. Costs follow the event. Proceedings before the PPDA are classified as litigation because there are two disputants. After the decision of the tribunal there was no order of stay. The interim arrangement should have been disbanded.

5 She prayed that the appeal should fail and the costs be awarded to the respondent.

In reply, counsel for the appellant submitted that the interim measure was not an issue before the Tribunal and therefore should not be raised now. In reviewing the decision of the Authority, the Tribunal is not a court. It stands in the shoes of the original decision maker. The argument that
10 the appellant should not have selected the agents it did should be left to the discretion of the appellant to determine who collects revenue temporarily. The phrase fair and equal opportunity should not be confused with trial and error. If a bidder had no experience, they should not be considered. Consideration of experience as one of the criterion is not by choice, it is a requirement of the law. As regards administrative fees, it is clear in the case of *Equity Bank (U)*
15 *Ltd v. Were, Misc Application 604 of 2013* that an appeal is not a stay of execution. The reasons advance for costs cannot stand. They are no reasons given by the Tribunal. She reiterated her prayer that the appeal succeeds.

The grounds of appeal raised in the instant appeal, fault the PPDA Appeals Tribunal for multiple
20 errors in its re-consideration of the external administrative review of the tendering process by the Public procurement and Disposal of Public Assets Authority (hereinafter referred to as the PPDA) on the one hand and on the other the internal administrative review by the procurement entity. They also hinge on its finding that the tenders were not evaluated properly. Counsel for the appellant though, was prevented from presenting the first ground of appeal on account of
25 violating the requirement that a ground of appeal should set forth concisely, distinctly and without argument or narrative, the grounds of objection to the decision appealed against, specifying the point(s) which is or are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the court to make (see *Katumba Byaruhanga v. Edward Kyewalabye Musoke, (1999) KALR 621*). Generalised grounds of appeal are ordinarily struck
30 out. Accordingly ground one of the appeal is struck out.

In appeals of this nature it is not the Court's role to embark on a re-evaluation or re-assessment exercise of the bids. The court's role instead is to review the decision of the procurement entity, the internal and external administrative review decisions subsequent thereto and determine whether: (a) the rules of public procurement have been applied, (b) the facts relied upon by the
5 procuring and disposing entity and the internal and external review bodies subsequent thereto are correct in relation to matters of judgment or assessment, and (c) a manifest error has occurred or not. (see *Lion v. Firebuy Limited* [2007] All ER (D) 177 and *Letting International v. Newham London Borough Council* [2008] EWHC 1583 (QB)).

10 All public procurement must conform to the three pillars of integrity, transparency and accountability. Decision-making criteria at all stages must be clear, justifiable and objective. An obligation is imposed on every procuring and disposing entity to act in a manner compatible with the integrity and openness of the process as contained in the PPDA Act, the Regulations and applicable policies in order to prevent the procuring and disposing entity from unilaterally and
15 unfairly departing from the procedures put in place for the attainment of the objectives of the three pillars. The court must review the procedure to ensure that there has been no manifest error of assessment or misuse of powers, while recognising that the procurement entity, both internal and external administrative review bodies, have a margin of appreciation (the space for manoeuvre that courts are willing to grant them in fulfilling their obligations under the
20 procurement laws and policies). Whereas the court will consider whether a fair balance exists taking into account the circumstances of each case, the avoidance of arbitrariness, the possibility of other alternatives for achieving the aim in question, procurement entities should be able to exercise a certain measure of discretion.

25 The second ground of appeal faults the PPDA Appeals Tribunal in deciding that the appellant erred in failing to implement *The Government Policy on Management of Public Service Vehicle Parking Areas* dated 13th February, 2017. It is contended by counsel for the appellant that the government policy, in the material aspect relating to limiting awards of tenders for revenue collection to an individual service provider to a maximum of two years, could not operate
30 retrospectively while counsel for the respondent contends that since the policy came into effect on 1st March, 2017 and the appellant made the award three months later on 12th June, 2017,

having commenced the procurement process on 2nd May, 2017, it was bound to implement the policy. The relevant aspect of the policy states as follows;

4) **Procuring the Services of Park Operators.**

- 5 i) The procurement process for the Management Services for Parks in Local Governments shall be reserved for Park Operators in accordance with the PPDA Act's Reservation Scheme for a period not exceeding two years. All processes and stages of procurement must be to as stipulated in the relevant regulations.

10 This policy directive appears to be a response to the realisation that the management of public service vehicle parking areas sector within Local Governments had hitherto been monopolised by a very small selection of suppliers. A sector in which potential competitors face high entry barriers and incentives towards efficiency may be weakened. It is a measure intended to address
15 monopoly by increasing competition and opening up more opportunities for smaller, less established suppliers. It serves the purpose of advancing equality of opportunity, supporting small to medium size firms accessing the Local Government marketplace through the provision of services, enhancement of their industry and business capability and the provision of development opportunities to their membership. This policy though has an inherent shortcoming
20 of enhancing the possibility of allocation of procurement contracts to possibly less-efficient firms in the name of avoiding monopoly. Countervailing monopoly may as a result inadvertently result in inefficiency. It is not for this court nevertheless to determine the propriety of the policy. By and large the courts observe restraint in deciding the validity of issues involving policy. Since, Courts do not sit as an appellate authority over the policy considerations, this court cannot
25 examine the correctness, suitability and appropriateness of the policy. In this context, policy means a settled or definite course or method adopted by a Government.

Administrative review tribunals, such as the PPDA Appeals Tribunal, are not bound by policy, but they will be reluctant to depart from policy without good reason. This has been the position
30 ever since the landmark decision in the Australian case of *Drake v. Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577; 2 ALD 60*. It was decided in that case that decision-makers charged with the responsibility of undertaking merits review should generally apply ministerial policy unless the policy was unlawful or “there are cogent reasons to the contrary.”

Nevertheless, it is incumbent on this court to determine the scope of operation of that policy in so far as it may impact on existing rights and interests of the citizens. The Courts will not interfere in the policy and rules making domain of the executive unless the policy is in violation of the Constitution, smacks of arbitrariness, favouritism or is a total disregard of the law. On the face of
5 it, the policy in issue in the instant case may not have such effect but the argument advanced is that if applied retrospectively, it may have the effect of retrospectively depriving a category of service providers, of which the "Taxi Operators Society" is one, of vested legal rights. Such an effect, whether by Act of Parliament or Government policy, would be unjust and unconstitutional since according to article 26 (2) of *The Constitution of the Republic of Uganda, 1995* no person
10 may be deprived compulsorily of property or any interest in or right over property, except in accordance thereto.

Therefore, policy decisions will not be construed as having a retrospective effect to the extent to which they divest persons of accrued or vested rights. A retroactive policy operates as of a time
15 prior to its issuance, i.e. operates backwards, by changing the practice from what it was. On the other hand, a retrospective policy operates for the future only. It is prospective, but it imposes new results in respect of a past event, i.e. it looks backwards and attaches new consequences for the future to an event that took place before the policy was issued. It changes the practice from what it otherwise would be with respect to a prior event. While retroactivity invalidates what was
20 previously valid and vice versa by affecting transactions which were already completed before it came into operation since it enacts that as at a past date the practice shall be taken to be that which it was not, with retrospectivity the policy is prospective in operation but it imposes new results with regard to past events by attaching new consequences for the future to an event which took place before the policy was issued, or creates a new obligation or imposes a new duty in
25 regard to events already past. A policy is retrospective in its effect if it takes away or impairs a vested right acquired under existing policy or creates a new obligation or imposes a new duty or attaches a new disability in regard to events already past.

Valuable property rights may exist in real property, chattels or choses in action. A person who
30 makes an investment or transactional decision based on what the law or policy is at the time, may be disadvantaged if the law or policy is changed retrospectively before completion of the

transaction. It is said to be unjust because it disappoints justified expectation. It impairs existing rights and obligations, e.g. by invalidating current contracts or impairing existing property rights. Completed transactions are therefore construed as not affected by such policies, unless the intention to the contrary is clear.

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By way of analogy, retrospective legislation is generally defined as legislation which ‘takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past (see *Craies on Legislation*, 9th edition, p 432). According to the *Oxford Dictionary of Law*,
10 retrospective (or retroactive) legislation is: "Legislation that operates on matters taking place before its enactment, e.g. by penalizing conduct that was lawful when it occurred. There is a presumption that statutes are not intended to have retroactive effect unless they merely change legal procedure" (see Elizabeth A Martin (ed), *Oxford Dictionary of Law* fourth edition, 1997, p 406). Retrospective legislation is an expression sufficiently comprehensive to include all statutes,
15 whether civil or criminal, which operate upon antecedent transactions, rights or remedies.

There is a strong latent sentiment against retrospective legislation, probably in consequence of the injustice and oppression to which it might give rise if allowed to affect antecedently acquired rights or destroy the obligation of existing contracts. Retrospective laws being in their nature
20 odious, it ought never to be presumed the legislature intended to pass them, where the words will admit of any other meaning. Since the impairment of vested rights is frequently made the test of the constitutionality of a retrospective statute, it becomes important to determine what interests are properly to be included in that phrase.

25 In the instant case, it has to be determined whether applying this policy retrospectively would deprive the "Taxi Operators Society" of any vested rights or accrued interests or attaches a new disability in regard to events already past. What would constitute an acquired or accrued right or interest in the present situation is the question. In *Director of Public Works and Another v. HO PO Sang and Others [1961] AC 901*, the Privy Council considered such a question having regard
30 to the repealing provisions of Landlord and Tenant Ordinance, 1947 as amended on 9th April, 1957. It was held that having regard to the repeal of Sections 3A to 3E, when applications

remained pending, no accrued or vested right was derived. It merely conferred hope or expectation that the Governor in Council would exercise his executive or ministerial discretion in his favour and the first appellant would thereafter issue a certificate. This case thus suggests that a mere hope or expectation of favourable governmental action does not constitute an acquired or
5 accrued right or interest, hence is not a vested interest.

A vested right or interest is therefore in the nature of a right that has accrued, or is secured, to its possessor and is not contingent on any event that may or may not occur. For that reason a "legitimate" or "settled expectation" to obtain a permission or award of a contract is not a right
10 in relation to "ownership or possession of any property" for which the expression "vest" is generally used. Legitimate or settled expectation cannot be countenanced against public interest and convenience which are sought to be served by the stated policy.

In light of the fact that there is no right that generally applicable rules or policies will remain
15 unchanged forever, the concept of vested rights attempts to achieve fairness by balancing of public and private interests; the public interest in uniform current rules and policies and the private interest in securing reasonable good faith investment-backed expectations. Generally, new rules and policies apply equally to all persons. Vested rights, however, protect those property owners who have relied on specific actions taken under existing rules or policies by the
20 local governments. A vested right is the right to continue a use, complete a transaction or performance of a contract as it was approved, despite subsequent changes to the rules or policies. The concept is handy in the determination of the question whether a previously approved use, transaction or performance has ripened to the point that it should be allowed to exist, even though it would not conform to the new regulations or policy. In order to show vested rights, the
25 owner must: (i) obtain a valid governmental approval; (ii) reasonably rely upon the approval; (iii) make a substantial expenditure; (iv) act in good faith; (v) and experience detriment to comply.

A party claiming vested rights must demonstrate that it incurred extensive obligations or substantial expenses in diligent pursuit of the use, transaction or performance previously
30 approved under the existing policy or rules. The doctrine of vested rights generally provides that where more restrictive rules are enacted or policies are passed, a property owner will be

permitted to complete a use, transaction or performance of a contract that the amendment has rendered nonconforming where the owner has undertaken substantial investment and made substantial expenditures, with the approval of the Local Government, prior to the effective date of the policy amendment.

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A policy is retrospective if it takes away or impairs a vested right acquired under existing policies, or creates a new obligation, or imposes a new duty, or attaches a new disability in regard to events already past. The evidence before the procurement entity, the internal and external administrative review bodies in the instant case did not show that the "Taxi Operators Society" had existing rights and obligations, e.g. current contracts or existing property rights as at 1st March, 2017 which would be invalidated or impaired by retrospective application of clause 4 (i) of *The Government Policy on Management of Public Service Vehicle Parking Areas* dated 13th February, 2017. Applied retrospectively, it therefore did not have the capacity to impair any vested rights acquired under the existing policy existing prior to 1st March, 2017, or create a new obligation, or impose a new duty on the "Taxi Operators Society."

The evidence however showed that when applied retrospectively, the policy would attach a new disability to the "Taxi Operators Society's" previous operations under the then existing policy, in regard to events already past. On account of previous tenders obtained before the new policy came into effect, it would deny the "Taxi Operators Society" an opportunity to compete under the new policy based on activities which were unrestricted in temporal terms, permissible and had been undertaken under the previous policy. Therefore, *The Government Policy on Management of Public Service Vehicle Parking Areas* dated 13th February, 2017 could not be construed as having a retrospective effect. It can only apply prospectively. The PPDA Appeals Tribunal on that basis erred in faulting both the Chief Administrative Officer of the appellant and the PPDA in not applying clause 4 (i) of the policy retrospectively, when subjecting the appellant's procurement decision to internal and external administrative review respectively, so as to disqualify the "Taxi Operators Society" from the bidding process.

Having come to the right decision not to exclude the "Taxi Operators Society" from the bidding process on account of clause 4 (i) of *The Government Policy on Management of Public Service*

Vehicle Parking Areas dated 13th February, 2017, the appellant adopted the Selective Procurement Procedure. Selective tendering is a procurement method that limits the request for tenders to a select number of service providers. Only those service providers invited by the procuring and disposal entity may submit tenders. Section 82 of *The Public Procurement and Disposal of Public Assets Act, 2003* and Regulation 32 (e) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006; S.1 39 of 2006* (hereinafter referred to as the Regulations), permit a procuring and disposing entity to use selective national bidding as one of the available procurement practices and methods. According to Regulation 38 (1) (a) thereof, selective national bidding may be used where the services are available only from a limited number of providers. At the time the bidding process commenced, Government had put in place a policy by which it was decided that in awarding such contracts, priority should be given to taxi operators' SACCOs. Competition is as a result limited to only firms shortlisted or invited by the procuring and disposal entity.

By virtue of that policy which established a preference or a reservation scheme, the "Taxi Operators Society" and the "Transport Operators Society" were the only two pre-selected possible suppliers considered to be suitable for the proposed contract. Regulation 38 (5) (d) of the said Regulations demands that a bidder is not to be included unless he or she is expected to satisfy fully the qualification requirements of competence, capacity, resources and experience required for the execution of the bid in question. Therefore their selection was presumably based on their professional competence (staff and equipment), relevant experience, financial capability and integrity. The next step is to apply the evaluation criteria specified in the solicitation or tender documents and adjust each tender as appropriate using the evaluation criteria. Only the criteria specified in the solicitation or tender documents can be applied. No new criteria may be introduced at evaluation and all specified criteria must be applied. Specified criteria cannot be waived during evaluation.

On basis of the fact that the appellant's Evaluation Committee produced a combined technical and financial evaluation report, it appears that the appellant adopted a one-stage single envelope method by which all stages of the evaluation were conducted together; the first stage being the technical evaluation involving review and assessment of compliance of the submitted tender with

mandatory criteria, specified in the solicitation documents, and the second stage being the financial evaluation, involving a review and assessment of the pricing submitted by the compliant bidder. It is contended by counsel for the respondent that the "Transport Operators Society" having been invited to present its bid, it was subsequently treated unfairly when its bid
5 was at the technical evaluation stage, subjected to the test of experience as one of the criterion and thereby rejected as for non-compliance.

It is trite that in undertaking both stages of evaluation of bids, a procuring and disposal entity must be unbiased and there should be no preferential treatment. All bids should be considered on
10 the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document. There should be no undisclosed preferences, no secret preferences and no discussions or decisions made, except above-board. Fairness is best achieved by the procuring and disposal entity applying the pre-set rules or criterion to the existing bids, as those bids appear on their face. The
15 procuring and disposal entity owes a duty to the bidders to consider the bids fairly without favouring or giving an unfair advantage to one over another. The duty of good faith and fairness is embedded in the bidders' reasonable expectation of the procuring and disposal entity's compliance with the rules and criterion stipulated in the solicitation documents, as guiding the procurement process. In this context, unfairness that is material is the obvious unfairness which
20 concerns the procuring and disposal entity not playing by the rules it has set as opposed to unfairness arising from the rules themselves being the source of the perceived unfairness. The overall process, must be fair, consistent, objective, unbiased, and impartial. This is achieved by avoiding acting in an arbitrary manner and considering only the evidence presented within the bids, as submitted. No prior knowledge of a bidder or their bid may be taken into account.

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In *Buttcon Ltd. v. Toronto Electric Commissioners*, (2003) 65 O.R. (3d) 601 (Ont. S.C.J.), the Ontario Superior Court of Justice concluded that the duty of fairness entailed bids being considered according to the same criteria. The court in that case was asked to consider a similar issue in the context of a request for bids for a design / build project. The case presented a golden
30 opportunity for the Court to spell out the true nature of this newly evolving duty of fairness, existing outside of Contract. In that case, four short-listed bidders submitted design / build bids

for a new service centre facility. The bids ranged greatly in both design and price. Two of the proposals had a capital cost of just over \$27 million, while the other two (including Buttcon's) were over \$40 million. After carrying out the detailed evaluation of all proposals, Toronto Hydro selected the second lowest-priced bidder who proceeded to build the new service centre. In the
5 meantime, Buttcon and other members of its design team complained that the process had been fatally flawed and the result unfair. Buttcon argued Toronto Hydro had selected a non-compliant bidder and therefore breached its obligations to the other bidders. Had the successful proponent been properly disqualified, Buttcon alleged it would have been awarded the contract instead. Buttcon sued for damages, claiming that Toronto Hydro's conduct had caused Buttcon to lose
10 the opportunity to earn the anticipated profits. The Court went on to consider whether a further legal duty fell on Toronto Hydro to be fair, outside of any implied contractual obligation arising under the contract. It held that the procuring and disposal entity does owe a duty to consider bids fairly without favouring or giving an unfair advantage to one over another, even without a contract having arisen.

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The purpose of a technical evaluation is to identify and reject bids that are incomplete, invalid, or which contain material deviations from the solicitation or tender documents and therefore are not to be considered further. At this stage, attention is directed toward deficiencies that, if accepted, would provide unfair advantages to the bidder. Sound judgment must be used. Simple
20 omissions or mistakes arguably occasioned by human error should not be grounds for rejection of a bid. As a general rule, major deviations are those that, if accepted, would not fulfil the purposes for which the tender was requested, or would prevent a fair comparison with tenders that are properly compliant with the solicitation or tender documents. It is for that reason that Regulation 81 (5) of *The Local Governments (Public Procurement and Disposal of Public
25 Assets) Regulations, 2006; S.1 39 of 2006*, requires that an evaluation report should contain reasons for the rejection of any bid and details of any non-material deviations accepted and the way in which they have been quantified and taken into account in the financial comparison. The key is that the evaluation must be conducted according to the criteria and methodology specified in the solicitation documents.

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At the technical evaluation stage, mandatory criteria and any rated criteria are assessed on a simple pass / fail basis. Each bid is evaluated on its own merits solely against the published evaluation criteria. Bids cannot be compared one to another to arrive at results. Bids that fail to meet any of the mandatory or rated criteria will be considered non-responsive. In keeping with
5 the duty of fairness, any ambiguities in the published criteria should be interpreted in favour of the bidders. Although they are not precluded from seeking clarifications, procuring and disposal entities are not obliged (particularly in the context of a selective procedure) to seek clarification of tenders where a tender is imprecise or fails to meet a technical criteria (see the Court of Justice of the European Union (CJEU) case of *SAG ELV Slovensko a.s and others v. Urad pre verejne*
10 *obstaravanie, Case No. C- 599/10*). The Court stated that correction or “amplification” of details of a tender may be sought on an exceptional basis, particularly where it is clear that the tender requires “mere clarification” or to “correct obvious material errors,” provided that such amendment does not in reality lead to the submission of a new tender and is applied to all bidders.

15

No prior knowledge of or experience with a bidder or its bid on the part of the Evaluation Committee may be taken into account to arrive at an evaluation outcome. Failure to demonstrate the requirement as stated in the published criteria may result in a finding of non-responsiveness (in the case of a mandatory element) or a reduction in the number of points achieved (in the case
20 of a rated element); as applicable based on the nature of the criteria being applied and any rating scale specified in the solicitation document. Not only should care be taken to find proof of the required criteria in what appears to be the appropriate section of the bid, but also the Evaluation Committee must make sure to take the time to read the rest of the bid, it may be there. Information cannot be ignored just because it is in the "wrong" section of a bid.

25

In the instant case, in her solicitation or tender documents, the appellant required bidders to have "experience in similar works" and they had to provide evidence of experience and record of past performance. The appellant evaluated the respondent's bid at the first stage for technical compliance and found that the respondent had not provided evidence of experience in managing
30 taxi parks and hence found the bid to be non-responsive. Whereas Regulation 38 (5) (d) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006; S.1*

39 of 2006, stipulates that in the selective procurement method a bidder is not to be included unless he or she is expected to satisfy fully the qualification requirements of competence, capacity, resources and experience required for the execution of the bid in question, inclusion of a bidder is based on expectation of capacity to satisfy the requirements, and is not a certification
5 of that capacity. It is an assumed experience that has to be proved at the time of submitting the bid. The onus remains on the bidder to submit documents that prove the assumed experience.

The requirement of experience is a criterion prescribed by the Regulations. Prescribed evaluation criteria cannot be changed or waived during the process of evaluation of tenders. The same
10 criteria must be used for each tender across the board. Fairness to all bidders participating in the process will require the decision as to experience to be based on established facts rather than asserted or assumed facts. Decisions may not be taken in accordance with a rule or policy without regard to the merits of the particular case. Where a claim is made to possess the experience that is required in the solicitation, but this experience is not substantiated in the bid,
15 the bid does not provide the type and level of evidence required in the solicitation, hence justifying the finding that it is non-responsive.

Once the bid fails to meet any of the mandatory criteria, it should be rejected as non-responsive. Non-responsiveness in this context means that the bid is simply not eligible for further
20 consideration or award. It is improper for the PPDA Appeals Tribunal to have ignored a material consideration. If a material regulation exists, this is a relevant factor to be considered by the PPDA Appeals Tribunal. Policy cannot alter a legislative power or the manner or basis for its exercise, but it can explain or describe the way, in general, it should be exercised.

25 Only those bids or tenders that have successfully passed the technical evaluation and which have been accepted for detailed evaluation may proceed to be examined at the financial evaluation phase. At this stage, the tenders must be evaluated in order to arrive at the selection of the preferred bidder. Procurement and disposal entities when deciding which bid to accept may do so on the basis of either: the lowest or highest price only or the most economically advantageous
30 tender, using various criteria such as price, period for completion, running costs, profitability, technical merit. Bids will generally be assessed first on a number of pass / fail criteria before the

single preferred bidder is selected. Using this approach, unrealistic bids with either costs shown at levels impossible to achieve or for bidders who show that they are completely inexperienced or have completely inappropriate equipment, can be rejected.

- 5 The successful bidder must come across as a cohesive entity rather than just a collection of people coming together for bidding purposes. An assessment is necessary to determine how well it will perform the desired function in comparison with the other bidders, and over what life span it will continue to operate efficiently. The commercial viability of bidders and their businesses needs close analysis at this stage. A business must be viable and have the resources it needs to
- 10 carry out a Local Government contract efficiently and effectively. The purpose of the financial evaluation is thus not necessarily to identify the highest or lowest bidder but rather the most economically advantageous tender. The responsive bid offering the best value may or may not necessarily be the one with the highest or lowest price. In order to accurately determine best value, a logical systematic evaluation procedure covering all aspects of the evaluation process
- 15 must be followed.

The service provider must be able to provide the Local Government with a good and reliable service to ensure the smooth running of government activities and lower the risk of any disruption or delay to public services. Cheaper or inferior services which may actually cost more

20 in the long term as maintenance costs may well be greater. A detailed technical or professional capability assessment and a commercial and financial analysis of the bids, and the businesses tendering, must be made to determine which tender represents best value for the Local Government and the public interest. To make this analysis, the Evaluation Committee considers the bid in its entirety and only the information provided by the bidder in its bid. While

25 information presented within a bid may be verified with references provided therein (where specified in the solicitation), no prior knowledge of or experience with a bidder or its bid on the part of the Evaluation Committee may be taken into account to arrive at an evaluation outcome.

Decisions on Local Government procurement should be made on the basis of value for money.

30 The tendered price alone is seldom an accurate indicator for comparison of either the potential contractor's ability to perform the required task, or the total cost of performing the task over

time. Value for money requires a comparison of costs, benefits and alternative outcomes. Other qualitative factors such as, the financial strength of the contractor's business, their past performance and capacity for customer service, along with boosting local economic development (see *Varney v. Hertfordshire County Council, 2011*] EWCA Civ 708). According to Regulation
5 43 (4) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*; S.1 39 of 2006, all procurement is to be conducted in such a manner as to maximize competition and achieve value for money irrespective of the method of procurement used or the nature of the services to be procured. This demonstrates that the Local Governments' overriding priority is to obtain value (rather than focus on price), delivered through a service
10 provider's technical / professional capability, its commercial soundness and ability to enhance local development. I have not found anything on the record to suggest that the appellant did not take such consideration into account when awarding the contract to the remaining bidder.

Where a bidder seeks to challenge award of the contract on the basis that the tenders were
15 evaluated incorrectly, then it needs to show that there was a manifest error on the part of the procuring and disposal entity (see *Lion Apparel Systems Limited v. Firebuy Limited, [2007] EWHC 2179 (Ch)*). The court must carry out its review with an appropriate degree of scrutiny to ensure that the principles for public procurement have been complied with, that the facts relied upon by the procuring and disposal entity are correct and that there is no manifest error of
20 assessment or misuse of power, i.e. whether the procuring and disposal entity has not complied with its obligations as to equality, transparency or objectivity. In relation to matters of judgment, or assessment, the procuring and disposal entity does have a margin of appreciation so that the court should only disturb the procuring and disposal entity where it has committed a "manifest error." A case of "manifest error" is a case where "an error has clearly been made."

25

I have carefully scrutinised the processes, the criteria used and the reasons for the decisions made by the appellant as the procuring and disposal entity, the appellant's Chief Administrative Officer upon internal administrative review and the PPDA upon external administrative review. I have not found any erroneous application of the rules of public procurement. I have found instead that
30 the facts relied upon by the appellant as the procuring and disposing entity and the internal and external review bodies subsequent thereto, are correct in relation to matters of judgment or

assessment. Whereas Regulation 38 (5) (b) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006; S.1 39 of 2006*, requires procuring and disposal entities to ensure rotation of short-listed service providers, in the instant case, after the technical evaluation only one bidder was left. This provision could thus not be invoked or applied. Overall,
5 I have not found that any manifest error occurred such as would have justified the decision of the PPDA Appeals Tribunal, which delivered its summary decision without specification of the reasons behind the decision.

Moreover, although there may be situations where the reasons for the decision are obvious and
10 do not require a detailed answer to every argument, decision-makers invariably do have a duty to give reasons for their administrative decisions. As a rule of law, all decision-makers must act fairly and rationally which means that they must not make decisions without reasons. The reasons must be adequate to show how the decision was reached. They must be reasons which are not only intelligible, but which deal with the substantial points that have been raised (see *Re Poyser and Mills Arbitration [1963] 1 All ER 612, [1964] 2 QB 467*).
15

Indeed by virtue of article 42 of *The Constitution of the Republic of Uganda, 1995* conferring upon any person appearing before any administrative official or body the right to be treated justly and fairly, there is an emerging commonly held view that persons affected by
20 administrative decisions have a right to know the reasons on which they are based, in short, to understand them. At the very least, the decision-maker must be able to justify his or her decision. There is a related duty to explain the tribunal's assessment of the more important pieces of evidence and to provide reasons for choosing to give (as the case may be) no, little, moderate or substantial weight thereto. Lord Lane CJ in *R. v. Immigration Appeal Tribunal ex parte Khan*
25 *[1983] QB 790 at page 794* said:

The important matter which must be borne in mind by Tribunals is that it must be apparent from what they state by way of reasons first of all that they have considered the point which is at issue between the parties and they should indicate the evidence on which they have come to their conclusions. Where one gets a decision of a
30 Tribunal which either fails to set out the issue which the Tribunal is determining either directly or by inference, or fails either directly or by inference to set out the basis on which it has reached its determination on that issue, then that is a matter which will be very closely regarded by this Court and in normal circumstances

would result in the decision of the Tribunal being quashed. The reason is this. A party appearing before a Tribunal is entitled to know, either expressly stated by it or inferentially stated, what it is to which the Tribunal is addressing its mind. In some cases it may be perfectly obvious without any express reference to it by the Tribunal; in other cases it may not. Second, the Appellant is entitled to know the basis of fact on which the conclusion has been reached. Once again in many cases it may be quite obvious without the necessity of expressly stating it, in others it may not

The Privy Council has also made a notable contribution to this subject. In *Stefan v. General Medical Council* [1999] 1 WLR 1293, Lord Clyde stated as follows: “the advantages of the provision of reasons have often been rehearsed. They relate to the decision making process, in strengthening that process itself, in increasing the public confidence in it and in the desirability of the disclosure of error where error exists. They relate also to the parties immediately affected by the decision, in enabling them to know the strengths and weaknesses of their respective cases and to facilitate appeal where that course is appropriate.” Therefore, parties are entitled to know on what grounds their cases are decided. It is also of importance that the legal profession should know on what grounds cases are decided, particularly when questions of law are involved. And this Court is entitled to the assistance of the Tribunal by an explicit statement of its reasons for deciding as it did.

The duty to give reasons is a function of the rule of law and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties, especially the losing party, should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know whether the Tribunal has misdirected itself and thus whether he or she may have an available appeal on the substance of the case. Where no reasons are given it is impossible to tell whether the Tribunal has gone wrong on the law or the facts, the losing party would be altogether deprived of his or her chance of an appeal unless the Court entertains the appeal based on the lack of reasons itself. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not. Where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the PPDA Appeals Tribunal must enter into the issues canvassed before it and explain why it prefers one case over the other.

The extent to which this duty to give reasons applies will vary according to the nature of the decision, in the light of the circumstances of the case. The PPDA Appeals Tribunal's reasons need not be extensive if its decision makes sense. The degree of particularity required will depend entirely on the nature of the issues falling for decision. In the instant case though, the most striking feature of the decision made by the PPDA Appeals Tribunal is that it is unreasoned, unexplained and un-illustrated. While the PPDA Appeals Tribunal reversed the decision of the PPDA robustly and unambiguously, it did not explain why it did so. The necessary illumination, illustration and exposition are totally lacking. Whereas the PPDA Appeals Tribunal undertook to provide the reasons at a later date on notice, by the time of hearing this appeal (more than three months later), none had been provided.

Whereas in certain contexts, reasons for findings of this kind can properly be inferred, however, this is not possible in the present case. There is substantial prejudice occasioned to a losing party where the reasons for the decision are totally lacking or so inadequately or obscurely expressed as to raise a substantial doubt whether the decision was taken after due consideration by the PPDA Appeals Tribunal. Secondly, a losing party is substantially prejudiced where the considerations on which the decision is based are not explained sufficiently clearly to enable him or her reasonably to assess the prospects of succeeding in an appeal. Thirdly, a losing party is substantially prejudiced by a decision in which the considerations on which it is based, particularly where as in this case they relate to public procurement policy, are not explained at all or sufficiently clearly to indicate what, if any, impact they may have in relation to the decision of future applications for administrative review.

This was not a case whose determination was essentially an exercise of discretion. It is a decision where it was necessary to resolve issues of law and fact yet for lack of reasons it does not disclose how the issues were resolved. It is a decision which depended on disputed issues of fact and there are no reasons provided to show how those issues were decided. The appellant has satisfied the court that this failure is such as to raise a substantial doubt as to whether the decision was based on relevant grounds and was otherwise free from any flaw in the decision-making process. This of itself would afford a ground for quashing the decision.

Moreover, section 91 I (6) of *The Public Procurement and Disposal of Public Assets (Amendment) Act, 2011* requires that for the purposes of reviewing a decision of the Authority, the PPDA Appeals Tribunal must make a decision in writing and give reasons for the decision, including its findings on material questions of fact and reference to the evidence or other material on which those findings were based. That section 91 I (7) thereof requires the PPDA Appeals Tribunal to issue their decision within a period of not more than ten working days after receiving an application for review, is not an excuse for its failure to comply with the mandatory statutory requirement to give reasons. In light of the statutory requirement to give reasons, even when the PPDA Appeals Tribunal chooses to deliver a summary judgement, it should at a minimum by way of reasons provide an outline of the story which has given rise to the application, a summary of the basic factual conclusions and a statement of the reasons which have led it to reach its conclusion on those basic facts.

As an appellate court, this court cannot have resort to conjecture in discerning the reasons behind the decision reached by the PPDA Appeals Tribunal. I find, accordingly, that there was a failure on the part of the PPDA Appeals Tribunal to explain why it was reversing the decision of the PPDA. As there was a legal duty on the PPDA Appeals Tribunal to provide a reasoned explanation for this reversal, I consider that this failure constitutes an error of law and given the important nature of the decisions taken, I further consider that this error of law was material. The decision of the PPDA Appeals Tribunal inevitably cannot stand. For all the above reasons therefore, the second ground of appeal succeeds.

Ground three of the appeal presents the argument that the members of the PPDA Appeals Tribunal erred both in law and fact in deciding that the interim arrangement by the appellant to collect revenue should be disbanded. This ground raises issues regarding the permissible extent of a merits review of administrative decision-making. Whereas a court exercising judicial review jurisdiction has no power, at common law, to substitute its decision for that of the administrator, on the other hand, merits review is characterised by the capacity for substitution of the decision of the reviewing person or body for that of the original decision maker. Accordingly, the PPDA Appeals Tribunal is empowered to affirm or vary the decision under review, or to set it aside and either make a substitute decision or remit the matter to the original decision-maker with or

without directions or recommendations. The power to vary is a form of the power to make a substitute decision. The device of putting the reviewer "into the shoes of the decision-maker" is the most distinctive feature of the merits review system.

5 The central distinction between merits review and judicial review is that the former enables a review of all aspects of the challenged decision, including the finding of facts and the exercise of any discretions conferred upon the decision-maker, whereas the latter is concerned only with whether the decision was lawfully made. Thus, a merits review body will "stand in the shoes" of the primary decision-maker, and will make a fresh decision based upon all the evidence available
10 to it. The object of merits review is to ensure that the "correct or preferable" decision is made on the material before the review body. The object of judicial review, on the other hand, is to ensure that the decision made by the primary decision-maker was properly made within the legal limits of the relevant power. If a court finds that the decision was unlawfully made, the remedy will generally be limited to setting aside the decision and remitting the matter to the decision-maker
15 for reconsideration according to law, at least where the court's decision leaves the decision-maker with any residual discretion or where outstanding facts remain to be found.

Merits review 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. The
20 merits review tribunal, or other reviewer, considers both the lawfulness of the administrative decision it is reviewing and the facts going to the exercise of discretion. A merits review tribunal generally has wide powers to set aside the original decision and substitute a new decision of its own. The PPDA Appeals 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,
25 for the purposes of reviewing a decision, 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. Thus as a merits review tribunal, it has the authority to consider both the lawfulness of
30 the administrative decision it is reviewing and the facts going to the exercise of discretion.

In a merits review, the question is: was the decision the best decision based on the merits while in a judicial review the question is: was the decision correctly made according to law? Merits review is the function of evaluating and substituting the correct or preferable decision standing in the place of a decision maker, as opposed to enforcing the law that constrains and limits the powers of the other branches of government, that is characteristic of judicial review. On review of the merits, the question of whether there were prior procedural errors is immaterial, so long as the review tribunal avoids making them. Merits review tribunals have the power to remake decisions and to exercise the same powers and discretions as those conferred upon the primary decision maker by the enabling statute. Accordingly, the tribunal's decision has the same legal effect as the decision under review.

In undertaking an administrative review, the PPDA Appeals Tribunal may adopt one of two approaches; a review *de novo* or a re-hearing. A *de novo* review is a comprehensive type of merits review. Here the PPDA Appeals Tribunal stands in the shoes of the original decision maker and makes a fresh decision, having regard to all the material put forward. Fresh evidence can be sought or given and therefore new evidence that was not available at the time of the original decision can be put forward. The PPDA Appeals Tribunal is then required to exercise its powers whether or not there was error at first instance. In such a review, grounds for the review need not be given. The applicant just simply needs to present all the evidence and convince the PPDA Appeals Tribunal that the decision sought is the correct one, then a new decision is made.

The aim of a *de novo* review is reaching the correct or preferable decision. If, once applying the law to the facts there are a range of possible decisions, the PPDA Appeals Tribunal selects the best of the available options. There does not need to be an error in the original decision, it just makes a new decision and that decision is whatever it thinks best on basis of the available facts.

On the other hand a re-hearing is more restricted than hearing *de novo*. A re-hearing is conducted on basis of material before the original decision maker, although there may be discretion to admit fresh evidence. It involves a search for errors in the original decision rather than a completely fresh decision making process. The errors can include factual or discretionary errors e.g. too much weight having been put on one factor in particular. If there is no error, the PPDA

Appeals Tribunal cannot alter the original decision even if the PPDA Appeals Tribunal believes a better decision could have been made. This is the most common and from the record it is the procedure that was adopted by the PPDA Appeals Tribunal in the instant case. A guide on the relevant considerations when this approach is taken can be found in the Australian cases of *Re Becker and Minister for Immigration and Ethnic Affairs (1977) 1 ALD 158*, and *Re Lobo and Department of Immigration and Citizenship, [2011] AATA 705; 56 AAR 1; 124 ALD 238*, where it was held that;

1. The decision to be reviewed is determined having regard to the relevant legislative provisions conferring jurisdiction;
- 10 2. The Tribunal will address the same issues or questions as those addressed by the original decision-maker;
3. In the absence of a temporal element in the legislation requiring otherwise, the Tribunal reviews a decision as at the date it conducts its own review and makes its own decision;
- 15 4. The Tribunal may consider evidence on issues up to the date of its decision on the review;
5. The Tribunal's task is to reach the correct or preferable decision i.e. correct on the law and evidence AND where if there is more than one possible decision, the decision must be the preferable one having regard to the
20 'limits imposed by the legislation under which the decision is made and the facts of the case

The "correct or preferable" test refers to two situations: one where only one decision is lawful and therefore "correct", and another where various decisions would be lawful and the Tribunal
25 must choose the "preferable" one. Either way, the PPDA Appeals Tribunal is clearly not entitled to make an incorrect decision, even if this would be preferable. In *Drake v. Minister for Immigration and Ethnic Affairs (1979) 2 ALD 60*, Bowen CJ and Deane J said at page 68 that, "the question for the determination of the Tribunal is not whether the decision which the decision-maker made was the correct or preferable one on the material before him. The question
30 for the determination of the Tribunal is whether that decision was the correct or preferable one on the material before the Tribunal." The PPDA Appeals Tribunal should therefore be looking for the "correct" decision, where only one result can obtain and the "preferable" decision where a range of possible decisions is available.

In the instant case, the PPDA Appeals Tribunal proceeded by way of re-hearing rather than a *de novo* hearing. Under that procedure, the remedial powers of the PPDA Appeals Tribunal are activated if the decision under review was not, in the opinion of the PPDA Appeals Tribunal, the correct or preferable one on the material before the PPDA Appeals Tribunal. A decision is "correct" in the sense of being made according to law and "preferable" in the sense that it is the best decision that could have been made on the basis of the relevant facts. This formula implies that a decision must be correct, but if there is a range of decisions which could be made, all of which would be correct, the decision maker has a choice as to the preferable decision. Whereas the reasonableness standard allows the decision-maker to choose amongst those decisions, while the preferability standard gives the PPDA Appeals Tribunal the final choice between those decisions, a decision will be invalid only if it is so unreasonable that no reasonable administrator could have made it for example if it is shown that the decision-maker failed to take into account a relevant consideration, or took into account an irrelevant consideration. If it cannot be so described, a decision will not be bad simply because the PPDA Appeals Tribunal does not think it preferable in policy terms.

In a case such as this where the Act does not specify the considerations that must be taken into account by the decision-maker, where relevant considerations are not specified, it is largely for the decision-maker, in the light of matters placed before him or her by the parties, to determine which matters he or she regards as relevant and the comparative importance to be accorded to matters which he or she so regards. The ground of failure to take into account a relevant consideration will only be made good if it is shown that the decision-maker has failed to take into account a consideration which he or she was, in the circumstances, bound to take into account for there to be a valid exercise of the power to decide.

According to section 91 I (6) of *The Public Procurement and Disposal of Public Assets (Amendment) Act, 2011*, the PPDA Appeals Tribunal has 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 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.

5 Whereas previously the fact that an application is made for administrative review did not of itself operate as an automatic stay of the procurement process, such that a suspension of the process would be ordered only where the Accounting Officer to whom an application is made considered that a continuation of the proceedings might result in an incorrect contract award decision or a worsening of any damage already done (see Regulation 139 (1) of *The Local Governments*
10 *(Public Procurement and Disposal of Public Assets) Regulations, 2006; S.1 39 of 2006*), or where the PPDA instructs the accounting officer to suspend any further action on the procurement where the Authority considers a suspension necessary (see Regulation 140 (4) (b) thereof), it is now mandatory that an accounting officer should immediately suspend the procurement proceedings on receiving the complaint and the prescribed fee (see section 90 (2) of
15 the PPDA Act as amended by Act 11 of 2011). It is only the PPDA Appeals Tribunal under section 91 I (5) (a) of the PPDA Act as amended by Act 11 of 2011 which has discretion to suspend the procurement process, or not to, until it makes a decision on the matter. Although the record before court does not reveal any express directive by either the PPDA or the PPDA Appeals Tribunal suspending the process, it would seem that it was understood by the all the
20 parties involved that pending the outcome of the review, no decisions would be made or approvals given which could prejudice the outcome of the review.

It is necessary for there to be a standstill to allow bidders who are aggrieved by the outcome of the process to take remedial action with a view to preventing the contract from being signed.
25 Otherwise, under the law, once the contract is signed, the bidder's only possible remedy could be damages. When the process gets to that stage, the procurement and disposal entity is put at the risk of having to pay both the successful bidder for performing the contract, and damages to the unsuccessful bidder if the claim is successful. The mandatory suspension of the bidding process by the accounting officer and the discretionary one by both the PPDA and the PPDA Appeals
30 Tribunal, although well intentioned and is critical to protecting a disappointed bidder's position, it is likely to prejudice the public interest in expeditious public procurements.

Given that the award of public contracts by their very subject matter engages issues of public interest, the decision to suspend the process is informed by the need to have regard to the balance of convenience considerations (see *Chigwell (Shepherds Bush) v. ASRA Greater London Housing Association Ltd* [2012] EWHC 2746 (QB). When determining the balance of convenience, there is need to bear in mind the public interest in ensuring that contracts are awarded promptly. If there is no immediate impact to public services or the safety of a section of society the suspension is more likely to be an appropriate decision. It may also be appropriate where an expedited administrative review process can be agreed and organised; if there might be a substantial reputational impact on the losing bidder; or if a decision that the procurement was unlawful would render the basis on which damages might be calculated just too hypothetical for any realistic assessment to take place. The administrative review body should consider whether there are serious question to be reviewed and if so, where the balance of convenience lies and if damages would be an adequate remedy. (c.f. *Halo Trust v. Secretary of State for International Development*, [2011] EWHC 87). The court can also take into account the public interest in awarding contracts and the impact on others.

Even without an express order of suspension of the process, it would appear that the appellant considered it risky to go ahead and grant the contract before conclusion of the administrative review process. Concerned about the financial risk of having to pay both the successful bidder for performing the contract, and damages to the unsuccessful bidder in the event of the application turning out to be successful, yet at the same time being mindful of the immediate impact of the suspension to public service delivery by blocked revenue from this source over a prolonged period (it is now seven months since the procurement was initiated), the appellant came up with an interim measure of revenue collection from taxi parks in its jurisdiction that is now being criticised. I have not found this decision to be unreasonable.

It has been suggested that the persons assigned and delegated in their individual capacity to collect revenue on behalf of the appellant during the interim period are *de facto* members of the successful bidder whose award is under challenge. I have not found any evidence on the record to substantiate that claim. No legal provision was cited to me as having been violated by the appellant in making this decision and neither have I been able to find any. I have neither found

anything to suggest that this decision was not "correct" in the sense of not having been made according to law, nor evidence to suggest that is not "preferable," in the sense that it is not the best decision that could have been made on the basis of the relevant facts. It is not a decision which could in any way prejudice the outcome of the review. Since it is not a decision that is so
5 unreasonable that no reasonable administrator could have made, the PPDA Appeals Tribunal erred in invalidating it. In the circumstances, ground three of the appeal succeeds as well.

The last ground faults the PPDA Appeals tribunal for having awarded costs to the respondent. One of the factors characteristic of merits review is that it is non-adversarial. This is in contrast
10 to the adversarial approach required of courts. A merits review is in substance inquisitorial (see *Bushell v. Repatriation Commission (1992) 175 CLR 408*). The Tribunal is required to reach the "correct and preferable decision ... by a process of inquiry." It "is not engaged in the resolution of an adversarial contest of the kind typical of civil litigation. The nature of merits review proceedings gives rise to fundamentally different relationships between the parties, and between
15 each party and the PPDA Appeals Tribunal, from those which pertain in adversarial proceedings. As a government agency, the parties' interests lie in the correct and preferable application of the relevant legislation and policy. In other words, the parties' interests are, at least theoretically, aligned with those of the PPDA Appeals Tribunal. The parties' obligation is primarily to assist the PPDA Appeals Tribunal in its decision-making.

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Although under section 91 I (5) (d) of *The Public Procurement and Disposal of Public Assets (Amendment) Act, 2011*, the PPDA Appeals Tribunal may require the payment of compensation for any costs, reasonably incurred by the bidder who is a party to the proceedings, as a result of an unlawful act or decision of the concerned procuring and disposing entity or of the Authority,
25 prima facie, parties before the PPDA Appeals Tribunal ought to bear their own costs, unless in particular instances, in the proper exercise of discretion, the PPDA Appeals Tribunal considers otherwise. The PPDA Appeals 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
30 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.

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Furthermore, the rules of natural justice require that before making awarding costs, the PPDA Appeals 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 Appeals Tribunal did not furnish any reason for the award. In the circumstances, this was an improper exercise of discretion and for that reason ground four of the appeal succeeds. The award of costs to the respondent by the PPDA Appeals Tribunal is hereby set aside.

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. That being the consequence of this appeal, the order of refund too is set aside.

In the final result, this appeal is allowed. The summary judgement of the PPDA Appeals Tribunal of 12th September, 2017 its findings, orders and directions as stated therein are hereby set aside. In their place, the decision of the PPDA dated 7th August, 2017 and all orders and directions contained therein are restored. The costs of this appeal are awarded to the appellant.

Dated at Arua this 14th day of December, 2017

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Stephen Mubiru
Judge,
14th December, 2017.