

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**  
**CIVIL APPEAL No. 0004 OF 2016**  
**(Arising from PPDA Appeals Tribunal Application No. 6 of 2015)**

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

**VERSUS**

**BASAAR ARUA BUS OPERATORS  
COOPERATIVE SOCIETY LIMITED** ..... **RESPONDENT**

**Before: Hon Justice Stephen Mubiru.**

**JUDGMENT**

Sometime during the year 2015, Yumbe District Local Government initiated the process of procurement of services for the management of Merwa Market for the Financial Year 2015 / 2016. On 14<sup>th</sup> April 2015, its Contracts Committee approved a four member Evaluation Committee for the bidding process. Having decided to adopt the Open National Bidding method, the bid notice was published in The New Vision newspaper of 20<sup>th</sup> April 2015. The bidding document required that bidders submit a written commitment to pay for three months in advance if given the contract. A total of six business entities, including the respondent, picked bidding documents and submitted their respective bids. After considering the bids, the Evaluation Committee issued its report dated 21<sup>st</sup> May 2015. The respondent was one of the two entities whose bid was eliminated at the preliminary evaluation stage for failure to attach a Commitment Letter for Advance Payment for three months. On 22<sup>nd</sup> May 2015, the Contracts Committee awarded the contract to the best evaluated bidder. The Notice of the Best Evaluated Bidder was displayed on the same day.

Being dissatisfied with the decision of the Evaluation Committee, the respondent on 2<sup>nd</sup> June 2015 applied to the Accounting Officer of Yumbe District Local Government for Administrative

Review where it argued that it had submitted a Bid Securing Declaration in lieu of a written commitment to pay for three months in advance if given the contract. The Accounting Officer on 2<sup>nd</sup> July 2015 issued his decision by which he rescinded the award of the contract by the Contracts Committee. Still dissatisfied with the decision of the Accounting Officer, the respondent appealed further to the appellant. The respondent contended that although its bid did not contain a written commitment to pay for three months in advance if given the contract, instead of finding their bid to be non-responsive at the preliminary evaluation the Evaluation Committee ought instead to have invoked Regulation 74 (1) of *The Local Governments Public Procurement and Disposal of Public Assets Regulations, 2006* empowering the Evaluation Committee to request for clarification of information supplied by the bidder or to request for additional documents from a bidder.

The appellant disagreed and found instead that the Evaluation Committee was right when it rejected the respondent's bid at the preliminary evaluation stage for non-responsiveness on account of its failure to attach a written commitment to pay for three months in advance if given the contract, which was one of the conditions in the bid documents. It also found that Regulation 74 (2) of *The Local Governments Public Procurement and Disposal of Public Assets Regulations, 2006* precluded use of the power to request for clarification of information supplied by the bidder or to request for additional documents from a bidder for purposes of; (a) altering or amending the bid price, except to correct errors; or (b) changing the substance of the terms and conditions of the bid; or (c) substantially alter anything which forms a crucial or deciding factor in the evaluation of the bid. In the appellant's view, invoking Regulation 74 (1) for purposes of requesting a submission of a written commitment to pay for three months in advance if given the contract would violate Regulation 74 (2) (c) because that commitment was a material omission forming "a crucial or deciding factor in the evaluation of the bid." The appellant rejected the respondent's application, advised Yumbe District Local Government to proceed with the procurement process and not to refund the Administrative Review fees which had been paid by the respondent.

Still being dissatisfied with the decision of the appellant, the respondent applied to the Public Procurement and Disposal of Public Assets Tribunal, to review the decision. There, the

respondent contended that the appellant had erred when it found that Evaluation Committee was right in rejecting the respondent's bid at the preliminary evaluation stage for non-responsiveness on account of its failure to attach a written commitment to pay for three months in advance if given the contract. It further argued that the appellant erred in finding that the Evaluation Committee could not have invoked Regulation 74 (1) of *The Local Governments Public Procurement and Disposal of Public Assets Regulations, 2006* for purposes of requesting a submission of a written commitment to pay for three months in advance if given the contract since such a decision would have violated Regulation 74 (2) (c) because that commitment was a material omission forming "a crucial or deciding factor in the evaluation of the bid."

In its written submissions to the Tribunal, the appellant contended that it had properly exercised its discretion when it upheld the decision of the Evaluation Committee rejecting the respondent's bid at the preliminary evaluation stage for non-responsiveness on account of its failure to attach a written commitment to pay for three months in advance if given the contract, which was one of the conditions in the bid documents. It further submitted that the respondent's argument that its Bid Securing Declaration sufficed in lieu of the written commitment to pay for three months in advance if given the contract was misconceived since the declaration is meant to ensure the financial capability of bidders and thus eliminate unserious bidders and applies only to a Restricted Domestic Bidding process rather than the Open National Bidding process as was adopted in the instant case. The appellant justified further its finding that the Evaluation Committee could not have invoked Regulation 74 (1) for purposes of requesting a submission of a written commitment to pay for three months in advance if given the contract since such a decision would have violated Regulation 74 (2) (c) because that commitment was a material omission forming "a crucial or deciding factor in the evaluation of the bid."

At the hearing of the application, counsel for the appellant raised a preliminary objection to the effect that the respondent's bid as submitted to Yumbe District Local Government had a 30 day validity period effective from 8<sup>th</sup> May 2015 which therefore expired on 7<sup>th</sup> June 2015. Since there was no evidence that Yumbe District Local Government invoked Regulation 49 (5) of *The Local Governments Public Procurement and Disposal of Public Assets Regulations, 2006*, to extend

the validity of its bid, the respondent's bid had expired and the application by the respondent to the Tribunal was therefore an exercise in futility.

Observing that the appellant had received and considered the respondent's application challenging the decision of the Yumbe District Local Government Accounting Officer despite the fact that it had been lodged to it on 4<sup>th</sup> August 2015, several weeks after expiry of its bid which occurred on 7<sup>th</sup> June 2015, the appellant had erred when it advised Yumbe District Local Government to proceed with the procurement process and not to refund the Administrative Review fees which had been paid by the respondent. The Tribunal therefore upheld the application without having to consider the merits, vacated the decisions of the appellant and the Yumbe District Local Government Accounting Officer, ordered the Accounting Officer to refund the respondent's Administrative Review fees and awarded the respondent 750,000/= in costs.

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

1. The members of the PPDA Appeals Tribunal erred in law and fact in considering the fact of the validity of the decision of the appellant (PPDA) when determining the preliminary objection raised by the appellant concerning the validity of the respondent's (Bazaar Arua Bus Operators Cooperative Society Limited) bid.
2. The members of the PPDA Appeals Tribunal erred in law and fact in deciding that the decision of the appellant dated 4<sup>th</sup> August 2015 was incorrect.
3. The members of the PPDA Appeals Tribunal erred in law and fact in treating the preliminary objection raised by the appellant, not as a preliminary objection, but as a concession by the Authority that its decision was incorrect.
4. The members of the PPDA Appeals Tribunal erred in law and fact in deciding that the appellant had conceded that its decision advising the Entity (Yumbe District Local Government) to continue with the procurement process was incorrect, because at the time of the decision, the bids had expired.
5. The members of the PPDA Appeals Tribunal erred in law and fact in deciding that it was not useful to handle the grounds of the application as raised by the respondent and thereafter deciding to uphold the application.

6. The members of the PPDA Appeals Tribunal erred in law and fact in awarding the respondent costs of U shs. 750,000/= (seven hundred fifty thousand 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 was present in court. Counsel for the appellant was allowed to proceed ex-parte. Submitting in support of the appeal, counsel for the appellant Mr. John Kalemera argued that having found upheld the preliminary objection to the effect that the respondent's bid had long expired, the Tribunal ought to have dismissed the respondent's application instead of upholding it as it did. It was irregular for the tribunal to formulate its own issue regarding the validity of the bid at the time the appellant considered the respondent's application. By that decision, the Tribunal violated the rules of natural justice when it descended into the arena as applicant and adjudicator at the same time. The Tribunal should not have delved into matters of fact that could only properly be considered alongside the merits of the application but should have dismissed the application on basis of the preliminary objection. He prayed that the appeal be allowed with costs.

The substance of this appeal in essence questions the scope of powers exercisable by the Public Procurement and Disposal of Public Assets Tribunal when considering applications from decisions of the appellant. Under section 91B of *The Public Procurement and Disposal of Public Assets (Amendment) Act, 2011*, the Public Procurement and Disposal of Public Assets Tribunal was established. 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 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 re 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 Accounting Officer of Yumbe 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. I have 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. 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. Conduct of proceedings by both external procurement administrative review agencies ought to be more of an inquiry than adjudication.



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 bid at the time the appellant considered the respondent’s application being 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 and should not have delved into matters of fact that could only properly be considered alongside the merits of the application but rather have dismissed the application on basis of the preliminary objection 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 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 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. 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 at the time the appellant entertained the application by the respondent, respondent’s 30 day validity period effective from 8<sup>th</sup> May 2015 as submitted to Yumbe District Local Government had expired on 7<sup>th</sup> June 2015 and yet there was no evidence that Yumbe District Local Government had invoked

Regulation 49 (5) of *The Local Governments Public Procurement and Disposal of Public Assets Regulations, 2006*, to have it extended. 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 orders made vacating the decisions of the appellant and the Yumbe District Local Government Accounting Officer and ordering the Accounting Officer to refund the respondent’s Administrative Review fees are consistent with the conclusion reached by the PPDA Tribunal and within its powers conferred by section 91 I (6) of *The Public Procurement and Disposal of Public Assets (Amendment) Act, 2011*. I therefore do not find merit in grounds one to five of the appeal which grounds have consequently failed.

The final ground of appeal assails the award of costs of shs. 750,000/= 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 24<sup>th</sup> day of January 2017.

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Stephen Mubiru  
Judge