THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION NO. 380 OF 2008

ARISING FROM MISCELLANEOUS CAUSE NO. 156 OF 2008

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW SEEKING THE PREROGATIVE ORDERS OF CERTIORARI AND PROHIBITION BY MESSRS CLEAR CHANNEL INDEPENDENT (UGANDA) LTD

CLEAR CHANNEL INDEPENDENT (U) LTD::::::::::::::APPLICANT

VERSUS

PUBLIC PROCUREMENT AND
DISPOSAL OF PUBLIC ASSETS AUTHORITY::::::::::RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

RULING:

This application for Judicial Review was brought under Section 38 (1) (b) and (c) of the Judicature Act, Cap. 13 (as amended by Act 3 of 2002), Rules 6, 7 and 8 of the Civil Procedure (Amendment) (Judicial Review) Rules S. 1 75 of 2003; and Rules 3 and 4 of the Law Reform (Miscellaneous Provisions) (Rules of Court) (Rules S1 79 – 1). It is for an order of certiorari, to quash the findings, remarks and recommendations in the impugned Report so far as they relate to the applicant; and for an order of prohibition, directed to the respondent prohibiting the Civil Aviation Authority and/or anyone else from implementing the recommendation of the Report under review.

The evidence before the court consists of the affidavit of one Ian Parker, the General Manager of the applicant; the affidavit in reply sworn by one Cornelia K. Sabiiti, Director Legal and Compliance of the Respondent, the impugned Report and numerous other correspondences on the matter.

The background to the case can briefly be stated as follows:
The applicant is a business company, mainly dealing in Billboard advertising. Prior to the matter under review, it had been in charge of bill board advertisement at Entebbe International Airport for a period of more than five years.

From the pleadings, the applicant submitted a bid to the Civil Aviation Authority for the tender of the Management of Advertisement at Entebbe International Airport following a request for bids by the said Civil Aviation Authority. It is the applicant's case that its bid was unjustly and unreasonably rejected by the said Civil Aviation Authority and the tender was awarded to M/s Alliance Media Ltd.

It is instructive to note that the decision sought to be reviewed is not that of the Civil Aviation Authority but that of the respondent.

This is because, according to the applicant, upon the Civil Aviation Authority ('the CAA') rejecting its tender bid, it (the applicant) applied to the respondent for Administrative Review of the said decision as by law established. The respondent in its review process found that the tender process had been marred by several irregularities and omissions. Despite these findings, however, it (the respondent) allowed the tender process to continue. Hence this action.
At the conferencing the parties framed the following issues for the determination of the court:

1. Whether or not the respondent erred in law when it allowed the tender process to proceed despite having found irregularities in the tender process.

2. Reliefs, if any.

The parties then agreed that they address their arguments to court by way of written submissions.

Counsel:
Mr. Arthur Ssempebwa for the applicant.
Mr. George Kallemera for the respondent.

Before I delve into the determination of the two issues above, let me make a comment or two on the subject of Judicial Review in the context of this matter.

Judicial Review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions, or who are engaged in the performance of public acts and duties. Those functions/duties/acts may affect the rights or liberties of the citizens. Judicial review is a matter within the ambit of Administrative Law. It is different from the ordinary judicial review of the court of its own decisions, revision or appeal in the sense that in the case of ordinary review, revision or appeal, the court's concerns are whether the decisions are right or wrong based on the laws and facts whereas the remedy of judicial review, as provided in the orders of mandamus, certiorari and prohibition, the court is not hearing an appeal from the decision itself but a review of the manner in which the decision was made. The court is not, therefore, entitled on an application for judicial review, to consider whether the decision was fair and reasonable. Lord Hailsham of St. Marylebona L.C set the tone as regards the purpose of judicial review in the following terms:

> ***"Since the range of authorities, and the circumstances of the use of their power, are almost infinitely various, it is of course unwise to lay down rules for the application of the remedy which appear to be of universal validity in every type of case. But it is important to***

remember in every case that the purpose of remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized or joined by law to decide from itself a conclusion which is correct in the eyes of the court."

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

I agree with the above legal principle. I will accordingly proceed to the determination of the issues.

Issue No. 1: Whether or not the respondent erred in law when it allowed the tender process to proceed despite having found irregularities in the tender process.

From the impugned Report, on receipt of the application by M/s Clear Channel Independent, the Authority (the respondent) instituted an investigation in accordance with PPDA Regulation 350 (1) (b) and directed the Accounting Officer of CAA to suspend the procurement process and submit the procurement file and inform all bidders accordingly (Paragraph 3.1).

These were then the findings of the respondent on the applicant's specific complaints:

"5.2 Entity's response to the complaint by M/s Clear Channel.

The response by CAA to M/s CCI's complaint was made by the Procurement Manager and not the Accounting Officer of CAA. This is in breach of Section 26 (g) and PPDA Regulation 345 (1). There are no CC minutes on investigation of this complaint and the decision taken. There is no evidence that Accounting Officer of CAA investigated the complaint. The Manager procurement of CAA went ahead and responded to the bidder, and there is no evidence that this matter was forwarded to the AO or proof of delegation of authority for the Procurement Manager to respond on behalf of Accounting Officer."

Section 26 (g) provides as follows:

"26. The Accounting Officer of a procuring and disposing entity shall have overall responsibility for the execution of the procurement and disposal process in the procuring and disposing entity, and in particular, shall be responsible for –

(a) ***– (f) …….***

(g) ***Signing contracts for procurement or disposal activities on behalf of the procuring and disposing entity; (h) – (j) ……"***

The section is couched in mandatory terms, by use of word "shall", CAA breached it and the respondent took notice of the said breach.

"5.3 Solicitation Document of CAA/SRV/07 – 8/00016 CAA did not use the standard SBD of PPDA as required in the PPDA Act Section

62 (1) and regulation 128 (2) and there is no evidence that a waiver or clearance was sought from the Authority to use a different SBD as per regulation 129."

Section 62 (1) of the Act is also couched in mandatory terms. It provides:

"62 (1) A procuring and disposing entity shall use the standard documents provided by the Authority as models for drafting all solicitation documents for each individual procurement or disposal requirement."

Regulation 128 (1) provides for use and choice of standard solicitation documents. It provides:

"128 (1). The use of the standard solicitation documents issued by the Authority, as the basis for each individual solicitation document shall be mandatory, except where otherwise provided in these Regulations."

Again, it was the respondent's finding of fact that CAA acted in breach of this mandatory legal requirement.

In 5.4, under Requirements of Eligibility, the respondent found as follows:

"In drawing up the tender document, CAA did not provide sufficient details on the requirements. CAA indicated lack of knowledge of regulation 186 (2) which states the requirement for documentary evidence. CAA misinterpreted regulation 186 (1) (e) to mean provision of documentary evidence and therefore failed M/s CCI on this ground. The Authority finds that CAA erred on this ground."

And under 5.5, Financial Bid Opening, the respondent found that:

> ***"The financial bid of Alliance Media was opened on 12th March 2008 according to PP form 35; Record of bid opening. Evaluation was done on 17th March 2008 and Display on 26th February 2008. The Display of BEB was done before evaluation process was completed. CAA displayed notice of best technically evaluated bidder before considering the financial bid."***

And under 5. 6, Third Party Procurement Agent, the respondent found that:

> ***"CAA contracted the services of SMARTBUY (U) LTD a third party procurement party to carry out the evaluation and an evaluation report was given to CAA on 19th February 2008. This firm was approved by the CC but the Authority notes that no clearance was sought from PPDA to use the services of this firm, prior to their agreement. This is in breach of PPDA regulation 40."***

On the basis of the above irregularities and breaches of the law, the respondent came to the conclusion that the procurement process was marred with procedural irregularities and omissions in particular:

- ***The Evaluation process was mismanaged due to the misinterpretation of the application of ITB 7 (f).***

- ***The Evaluation Committee by passed some of the requirements in Addendum I during the evaluation process to the disadvantage of one of the bidders.***

- ***The Contracts Committee erred by approving a third party procurement and Disposal agent without obtaining approval from PPDA.***

- ***The Procurement Manager assumed the rules of the Accounting Officer by handling the complaint of the bidders.***

What this means in practical terms is that the Authority (the respondent) found procedural flaws in the entire tender process: acting in breach of Section 26 (g) and PPDA Regulation 345 (1); acting in breach of Section 62 (1) and Regulation 128 (1); acting in contravention of Regulation 186 (2), etc. In short the respondent found that the tender process had not been done in strict compliance with the law or at all.

What then was the respondent expected to do in those circumstances?

The general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity are well known. The authorities were reviewed in De Souza vs Tanga Town Council [1961] E. A. 377.

The principle, so far as it affects the present case, is that if a statute prescribes, or statutory rules or regulations binding on a domestic tribunal prescribe, the procedure to be followed, that procedure must be observed.

It is trite that when an administrative body does something, which it has in law no capacity to do or does it without following the proper order, it is said to have acted illegally. This will be a ground for applying for orders of Certiorari, mandamus or prohibition because such an act is beyond powers and hence ***ultravires***.

See: ***Annebrit Aslund vs A. G. Miscellaneous Cause No. 441 of 2004.***

The question for the court is not whether the error can be corrected but whether such decision is reviewable. In the case of High Court, where such error is found, the order of mandamus may be issued compelling the body to do its duty, or in case it did not have jurisdiction, its decision may be quashed by issuing the order of certiorari, the likes of the one sought herein. In the instant case, the answer to the problem presented to the

respondent by the applicant lay in the application of section 91 (2) of the Act, that is, to annul in whole or in part the unlawful decision of CAA. Instead of doing so, after declaring that the tender process was done contrary to the law, the respondent went ahead to authorize CAA to proceed with the procurement process.

Both parties are in agreement that the PPDA Act applied to the impugned procurement. The basic public procurement and disposal principles appear in Sections 43 – 54 of the Act. In short, all public procurement and disposal must be conducted in accordance with the Act. The reason is simple: because of entrenched corruption and institutionalized incompetence in most Government Departments, it is necessary that tenders be handled in an open manner to minimize complaints of unfairness. The procurement process therefore has well laid out guidelines for procurement and disposal of assets. For instance, there must be no discrimination in public procurements. The process must promote transparency, accountability and fairness (section 45) or else every allocation of a government tender or contract will be challenged. The contract must be awarded to the bidder with the best evaluated offer ascertained on the basis of methodology and criteria detailed in the bidding documents. The Statute prescribes the means. Those means must be employed in the interests of fairness.

From the findings of the respondent, the relevant methodology and criteria were flouted by CAA. It is surprising that the respondent could choose to ignore them and even offer no reason for doing so. It was in my view a sad day in the field of procurements, what with CAA behaving as if the Act didn't exist, or if it existed, wasn't necessary to be followed.

The writs of certiorari are a means of controlling bodies of persons having legal authority to determine questions affecting the rights of others and having the duty to act judicially. With reference to certiorari, the learned authors of Harlisbury's Laws of England (3rd Edn, Vol. 11 p. 62) have this to say:

> ***"When the inferior tribunal has jurisdiction to decide a matter it cannot (merely because it incidentally misconstrues a Statute, or admits illegal evidence, or rejects legal evidence, or misdirects itself as to the weight of evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction. If, however, an administrative body comes to a decision which no reasonable body could ever have come to, it will be deemed to have exceeded its jurisdiction, and the court can interfere."***

I agree.

It is trite that a challenge to a quasi-judicial body's exercise of discretion can be sustained if:

(i). bad faith was exhibited.

(ii). absurdity was present.

(iii). legally relevant issues were ignored.

(iv). improper motives were demonstrated.

(v). the point of the statute was frustrated.

See: ***R vs Secretary of State for Environment, Ex parte Hammersmith & Anor [1991] 1 A. C 521.***

Relating the above principles to the instant case, it is clear to me that legally relevant issues were ignored in okaying the tender process by the respondent. The decision went against the body of evidence and the point of the PPDA Act was frustrated by the very body put in place to safeguard it. The frustration was to the applicant's prejudice. It was an absurd decision.

Learned Counsel for the respondent has submitted that the respondent's decision was arrived at after a careful consideration of the law and facts before them in the presence of both parties and the decision of CAA was upheld.

With the respect, I do not agree with learned Counsel's reasoning on this point. Having come to the conclusion that "the procurement process by CAA was marred with procedural irregularities and omissions," the tender award was ineffectual and therefore invalid in law. Issues of the power of attorney, income tax clearance and evidence of social security contributions were not issues raised before the Authority by the applicant. These issues were therefore immaterial in as far as the application for administrative review before them was concerned. The award having been made by improper means was tainted with illegality as the respondent correctly found. Since there was a procedure to correct it under S. 91 (2) of the Act, it could not be allowed to stand. And this is regardless of whether or not the applicant could indeed have failed to win the tender in a fairly conducted process.

In ***Makula International Ltd vs His Eminence Cardinal Nsubuga & Anor [1982] HCB 11*** *at p. 15 the law regarding illegality was stated thus:*

> ***"A court of law cannot sanction what is illegal and illegality once brought to the attention of the court overrides all questions of pleading including admissions made thereon……."***

To decide otherwise would be to condone an illegality since the award had been made contrary to established procedure.

For the reasons stated above, the respondent erred in law when it allowed the tender process to proceed despite the procedural flaws.

I so find.

Issue No. 2: Reliefs, if any.

The concept of ***ultravires*** is one to control the actions of persons or public bodies not authorized necessarily, or, by implication, by law. Since anything done not authorized by

law is ***ultravires***, judicial review will stop the unlawful action as refusal to do so would be effectively to validate an ***ultravires*** act. A competent court of law cannot do so.

From the above analysis of the law and evidence on the matter, the applicants have proved to the satisfaction of the court on a balance of probabilities that the decision of the respondent was a nullity and so was the purported award by CAA.
The effect of a nullity was stated in ***Macfay vs United Africa Co. Ltd [1961] 3 ALL E.R. 1169 thus:***

> ***"If an act is void, then it is a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."***

I agree.

Applying the same principle to the facts herein, in view of the finding that there was no valid award by CAA which could be okayed by the respondent, the purported blessing of CAA's award by the respondent was contrary to law, illegal, void and a nullity on account of non-compliance with the provisions of PPDA Act. I would therefore allow the application for judicial review, grant the orders of certiorari and prohibition sought herein and order a repeat of the tender process.

I do so.

As regards costs, in keeping with the principle that costs follow the event, the applicant shall have the taxed costs of the application against the respondent.

Orders accordingly.

Yorokamu Bamwine

JUDGE

14/04/2009

14/04/2009:

Mr. Arthur Sempebwa for applicant

Mr. George Kallemera for respondent

Court:

Ruling delivered.

Yorokamu Bamwine

JUDGE

14/04/09