REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. E039 OF 2022

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....RESPONDENT

AND

LT. COL (RTD) B.N NJIRAINI

THE ACCOUNTING OFFICER(KEBS).....1ST INTERESTED PARTY

CIC GROUP INSURANCE.....2ND INTERESTED PARTY

EX PARTE APPLICANT.....MADISON GENERAL INSURANCE KENYA LTD

JUDGMENT

1. The Application before this Court is the Ex parte Applicant's Notice of Motion application dated 7th April,2022 seeking a raft of Orders as follows;

> *i. An Order of Certiorari to bring into this Honourable Court for purposes of being quashed the decision of the Public Procurement Administrative Review Board in Review Application No.19/2022 in regard to* ***TENDER NO. KEBS/T007/2021-2022 FOR PROVISION OF STAFF MEDICAL INSURANCE COVER.***
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> *ii. An order of mandamus directing the Respondent to review the confidential bundle/documents and make a fresh determination as to whether the 2nd Interested Party complied with all mandatory requirements in the tender document and in particular requirement under Section III paragraph 2.1 item MR24 of the Mandatory Requirements Criteria.*
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> *iii.* ***THAT*** *costs of and incidental to this application be provided for.*

2. The Application is supported by the grounds on its face, a Statement of Facts and Verifying Affidavit sworn by Hazoron Wambugu. Both are dated 1st April,2022.

3. The Ex Parte Applicant herein was a participant in **TENDER NO. KEBS/T/007/2021-2022 FOR PROVISION OF STAFF MEDICAL INSURANCE COVER** and in a letter dated 15th February,2022 the Procuring Entity communicated that its bid was not successful at the financial evaluation stage as its price was not competitive. The Entity communicated that the 2nd Interested Party hereinafter also referred to as CIC GROUP INSURANCE had emerged as the successful bidder with a total tender sum of **Kshs. 186,142,836**.

4. The Ex parte Applicant aggrieved by the said decision wrote a letter dated 21st February,2022 to the Procuring Entity requesting a debriefing on the Ex parte Applicant's tender in terms of ranking in line with the debriefing requirements set in the Standard Tender Document and reconsideration of the Notification of Intention to award in line with the evaluation criteria set out in the tender document.

5. In response, the Procuring Entity in its letter dated 24th February,2022 disclosed the financial rankings of all participants in the bid process and reiterated that the evaluation was done strictly in compliance with the criteria set out in Section 3 of the Tender Document.

6. It is the Ex parte Applicant's case that it had industry knowledge that the 2nd Interested Party does not possess business permits covering major towns that is Nairobi, Mombasa, Kisumu, Nakuru and Eldoret and therefore it could not meet the mandatory requirement under Section III paragraph 2.1, item MR24 of the mandatory requirements criteria. The bid according to the Ex parte Applicant was therefore unresponsive.

7. The Ex parte Applicant subsequently lodged an instant request for review challenging the decision of the Procuring Entity to award the subject tender to the 2nd Interested Party. It was observed that in the Procuring Entity's response dated 11th March,2022 the said business permits were not annexed and it was the Ex parte Applicant's legitimate expectation that at the very least the Respondent would review the confidential bundle provided by the Procuring Entity in accordance with Section 67(3) of the Act and ascertain whether or not the 2nd Interested Party complied with all the mandatory requirements contained under Section III, paragraph 2.1, item MR24 of the mandatory requirements criteria.

8. In its decision dated 22nd March,2022, the Respondent dismissed the Ex parte Applicant's Request for Review on the basis that the Ex parte Applicant failed to prove its allegation that the 2nd Interested Party did not possess business permits covering major towns. It is the Ex parte Applicant's case that the Respondent's decision was unreasonable and irrational as the Board held that it was upon the Ex parte Applicant to prove the 2nd Interested Party did not possess the said business permits.

9. The Respondent is said to have abdicated its duty as is provided under Section 28 as read with section 167 (1) of the Act to review the confidential bundle of documents availed to it. The said decision is said to have sanctioned the Procuring Entity's transgressions of awarding the subject tender to a non-responsive tenderer in contravention to Article 227(1) of the Constitution,2010.

10. In response, the Respondent filed a Replying Affidavit sworn by Philip Okumu, the Acting Board Secretary of the Respondent. The Affidavit is sworn on 12th April,2022. Mr. Okumu urged that all parties were afforded an opportunity to file and urge their respective positions and that the main issue that crystallized for determination was whether the Ex parte Applicant had substantiated its case in respect to the allegation of the 2nd Interested Party not possessing the said business permits. It was argued that it was the Ex parte Applicant who stood to fail in the instant Request for Review if no evidence was given at all by either party to the Request for Review.

11. Mr. Okumu urged that, in arriving at its decision, the Board was alive to all issues raised by parties and well informed of the provisions of the law applicable and the facts and issues raised. It is the Respondent's case that it acted well within its jurisdiction and observed the rules of natural justice and acted lawfully, fairly and reasonably in exercise of its statutory mandate under section 28 as read together with section 173 of the Act.

12. The 1st Interested Party also filed a Replying Affidavit sworn by Jane Ndinya, the Chief Manager Supply Chain of KEBS on 14th April,2022. In the Affidavit she contends that the Ex parte Applicant has not adduced any evidence to establish that the Request for Review was conducted in an unprocedural manner even though the responsibility to supply evidence was on the Ex parte Applicant.

13. Further, it was urged that the allegation by the Ex parte Applicant that the Respondent did not review the Confidential documents presented before it is false as at page 20 of the determination the Board states as follows;

> *"The Board has considered each parties' pleadings, cases, documents, written submission, list of authorities and confidential documents submitted to it by the Respondent pursuant to Section 67(3) (e) of the Act and find the following issues call for determination…."*

14. It is the 1st Interested Party' case that the application before this court is an appeal disguised as a judicial review application and that more so the Ex parte Applicant has failed to satisfy the laid down grounds and principles of judicial review which include illegality, procedural impropriety and irrationality. The application before this court according to the 1st Interested Party is tailor made to frustrate the implementation of the contract dated 6th April,2022 entered into between the 1st and 2nd Interested Party, where the 2nd Interested Party is scheduled to begin offering services as of 1st May,2022.

15. The 2nd Interested Party also filed a Replying Affidavit sworn by Lorna Karaka, the Business Development Manager Medical Division, CIC General Insurance Limited. According to the 2nd Interested Party the Procuring Entity issued three Addenda to the tender as follows;

> *(a) Addendum No.1 dated the 24th November, 2021 where it was clarified that the tender number for the medical insurance was TENDER NO. KEBS/T007/2021/2022 as opposed to TENDER NO. KEBS/T006/2021/2022 as indicated in the advertisement;*
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> *(b) Addendum No.2 dated the 2nd December, 2021 where the closing date was extended to the 12th January,2022 and time for submission and opening was set for 10;00AM;*
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> *(c) Addendum No.3 dated 15th December,2022 where we were informed that the tender document was revised and the clarifications sought were addressed under the revised tender document.*

16. The 2nd Interested Party is said to have submitted its bid under the revised tender document together with five other bidders. These bidders were APA Insurance with a bid amount of Kshs. 177,398,743/=, Liaison Group with 194,291,286/=, Madison General Insurance

Kenya Limited with 210,083,911/=, Britam General Insurance Company 210,083,911/=, Jubilee Insurance 228,893,522/= and UAP Old Mutual Insurance Company with 292,763,984/=.

17. It is the 2nd Interested Party's case that it complied with all the mandatory requirements under the tender document including submitting business permits as proof of its coverage in major towns as well as all other towns it carries out business in.

18. Further, it was urged that bid evaluation is a preserve of the Evaluation Committee which is guided by the provisions of section 80 of the Act and which found that the 2nd Interested Party's bid conformed with all the eligibility and mandatory requirements under the tender document. The 2nd Interested Party affirmed that it has the required professional skills and personnel, technical and financial resources to execute to satisfaction the provision of services under the tender.

19. The application was canvassed by way of written submissions. The Ex parte Applicant herein filed written submissions dated 19th April,2022 while the Respondent filed submissions dated 20th April,2022. The 1st and 2nd Interested Parties' also filed their submissions on 21st April,2022.

20. In its submissions the Ex parte Applicant identifies 4 issues for determination and that is whether the Respondent's decision is unprocedural, whether the Respondent's decision is contrary to the Ex parte Applicant's legitimate expectation, whether the Respondent's decision is irrational and unreasonable and whether the Ex parte Applicant is entitled to the orders sought.

21. On the first issue it is submitted that nowhere in the 32-page decision by the Respondent is it mentioned that the Respondent had reviewed the confidential bundle/documents and ascertained that the 2nd Interested Party had complied. This according to the Ex parte Applicant tainted the Respondent's decision with procedural impropriety.

22. The cases of **Republic v Kenyatta University Ex parte Martha Waihuini Ndungu [2019] eKLR** and **Jane Kiongo & 15 Others v Laikipia University & 6 Others [2019] eKLR** are cited on what constitutes legitimate expectation. It is submitted that Section 7(2)(m) of the Fair Administrative Action Act obligates this Honourable Court to review an administrative action or decision if the same violates the legitimate expectations of the person to whom it relates to.

23. On whether the Respondent's decision is irrational and unreasonable the Ex parte Applicant cites the cases of **Konton Trading Limited v Kenya Revenue Authority & 3 Others [2018] eKLR** and **Republic v Public Procurement Administrative Review & 2 Others Ex parte Pelt Security Services Limited [2018] eKLR.**

24. It is the Applicant's case that there has been an implicit shift in judicial review to include aspects of merit review of administrative action. To support this argument, the case of **Sunchan Investment Limited v Ministry of National Heritage & Culture & 3 Others [2016] eKLR** is cited.

25. It is further submitted that the above jurisdiction is limited to the extent that the Court cannot substitute its decision with that of the Respondent, it can only remit the matter back to the Respondent.

26. The possession of business permits by the 2nd Interested Party for the said towns at the time of submission, it is urged, was information within the special knowledge of the 2nd Interested Party, the Procuring Entity and the Respondent and as such by dint of section 112 of the Evidence Act, the burden of proof lies with the 2nd Interested Party and Procuring Entity.

27. On the final issue the Court of Appeal case of **Kenya National Examination Council v Republic Ex parte Geoffrey Githenji Njoroge & 9 Others [1997] eKLR** was cited where the Court discussed the nature of judicial review remedies. It is the Ex parte Applicant's case that from the foregoing it has established that the Respondent's decision was unprocedural, irrational and unreasonable and as such it entitled to the orders sought.

28. In conclusion, it is contended that contrary to the provisions of Article 227(1) which provides that in awarding a tender the Procuring Entity must ensure that the process is fair, equitable, transparent, competitive and cost-effective the Procuring Entity went ahead to award the subject tender to a non-compliant tenderer and the said transgression was sanctioned by the Respondent in its decision.

29. The Respondent in response, urges that the High Court's jurisdiction in judicial review is circumscribed by the provisions of the Law Reform Act which confers to the court the jurisdiction to issue any of the three judicial review orders and that a fairly well settled criterion has been developed for issuance of the said orders as was held in the case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.**

30. In addition, the Respondent submits that a party must demonstrate that a Tribunal has committed an error of law for the Court to issue the said judicial review orders and also demonstrate that there was a mistake that goes to the jurisdiction of the tribunal. It was submitted that misinterpretation of the law is not sufficient to move a judicial review application. To buttress this argument counsel cites the cases of **Republic v Public Procurement Administrative Review Board; Leeds Equipments & Systems Limited (interested Party); Ex parte Kenya Veterinary Vaccines Production Institute [2018] eKLR, Republic v Public Procurement Administrative Review Board & 2 others [2019] eKLR, Kenya National Examination Council vs Republic, Ex parte Geoffrey Gathenji & 9 Others** (*supra*), **Republic v Public Procurement Administrative Review Board; Shenzhen Instrument Co. Limited & another (Interested Party) Ex parte Kenya Power and Lighting Company Limited [2019] eKLR, Municipal Council of Mombasa v Republic & another [2002] eKLR, Republic v Kenya Power & Lighting Company Limited & Another [2013]e KLR and Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] KLR.**

31. In conclusion it is submitted that a Judicial review court is only concerned with the fairness of the process under which the impugned decision or action was reached and once a judicial review court gives a clean bill of health to the process, it must down its tools without considering the merits of the decision. In addition, the Respondent urges that judicial review orders of certiorari, mandamus and prohibition are public law remedies and the court has the ultimate discretion to either grant or not to grant the remedies to the successful applicant. The Respondent urges that in the event that this Honourable Court is inclined to uphold the Ex parte Applicant's prayers, then the Respondent should not be condemned to pay costs.

32. The 1st Interested Party, identifies 3 issues for determination and that is the jurisdiction of the Court in Judicial review proceedings, whether the Ex parte Applicant has made out a case for the grant of judicial review orders and which party should bear the costs of these proceedings.

33. On the first issue it is submitted that a Court sitting on Judicial Review is only concerned with the lawfulness of the process by which the decision was arrived at, and that it can only set aside the decision of a tribunal if it is satisfied that the process the tribunal used to arrive at its decision was flawed in certain defined and limited respects. To support this argument, the case of **Republic vs. The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 Others [2013] eKLR** is cited. It is argued that the Ex parte Applicant has failed to satisfy the laid down grounds and principles of judicial review which include illegality, procedural impropriety and irrationality as was held in the case of **Republic vs. Public Procurement Administrative Review Board & Another ex parte Gibb Africa Ltd & Another [2012] eKLR.**

34. The case of **Republic v Public Procurement Administrative Review Board & 2 others Exparte Rongo University [2018] eKLR** is also cited where the Court held that unless it is proved that the tribunal abused its powers when making its decision and the said decision is illegal, irrational or un-procedural, the court should not disturb the decision of the tribunal. In addition, that Certiorari is a discretionary remedy, and the discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

35. It is the 1st Interested Party's submission that Judicial Review does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. Further that Ex parte Applicant's argument goes to the merits of the determination by the Respondent rather than to the aspects of procedural fairness and rules of natural justice. It is submitted that the argument by the Ex Parte Applicant that the Respondent erroneously held that the burden of proof was on the Applicant yet the information was within the special knowledge of Respondent, 1st and 2nd Interested Parties, is an issue that goes to the merit of the impugned finding and could only have arisen in the context of an appeal against the said finding. The case of **R V Administrative Review Board Ex Parte Hoggers Limited [2015] eKLR** is cited in this regard.

36. The 2nd Interested Party in its submissions identifies 3 issues for determination that is whether the decision of the Respondent is unprocedural, whether the Respondent's decision is contrary to the Ex Parte Applicant's legitimate expectation and whether the Respondent's decision is irrational and unreasonable.

37. On the first issue it is submitted that as was held in the Supreme Court case of **Samson Gwer & 5 others vs Kenya Medical Research Institute & 3 others (2020) eKLR** a claimant has to prove its case by laying substantial material before a court and it is only after such proof has been made that a Respondent is called upon to disprove the Applicant's case and/or to prove the respondent's case.

38. It is also submitted that in its response the Respondent notes that county governments are public offices where any concerned citizen/person may seek confirmation as to whether a person, whether natural or legal, who operates a business in such a county has been issued with business permits noting that they are public documents. The Ex-Parte Applicant, it is contended, did not furnish the Respondent with any proof that it sought and obtained the said permits from the county government.

39. On the 2nd issue it is submitted that the Ex parte Applicant's legitimate expectation collapses on both fronts of the test applied in establishing whether there was legitimate expectation. Counsel submits that the doctrine of legitimate expectation was discussed at length in the case of **Republic v Council of Legal Education & 2 others Ex Parte Mitchelle Njeri Thiongo Nduati [2019] eKLR**. It is the 2nd Interested Party's case that the doctrine of legitimate expectation cannot operate against the clear provisions of statute, in this case being the law with respect to burden of proof.

40. The case of **Supreme Court in the Petition No. 17 of 2015 John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others [2021] eKLR** is also cited where the Court discussed the purpose and application of Judicial Review. In conclusion it is submitted that the Ex parte Applicant has failed to demonstrate the alleged grounds of procedural impropriety, legitimate expectation, irrationality and unreasonableness by the Respondent in its decision and therefore its application should be dismissed with costs.

Analysis and determination

41. Arising from the application, the statement of facts, the verifying affidavit, the responses and learned submissions by counsel, the broad issue for determination is whether the applicant has established a case for the grant of judicial review orders of certiorari to quash the decision of the respondent and mandamus to direct the respondent to review the confidential documents and make a fresh determination on compliance by the 2nd Interested party. In answering this issue, auxiliary questions on the scope of judicial review and the doctrine of legitimate expectation will be key and the answers thereof shall feed to the success or failure of the motion herein.

42. The jurisdiction of the Board in the Request for review application no. 19 of 2022 is not contested. That jurisdiction is expressly conferred under section 28 (1) (a) of the Public Procurement and Asset Disposal Act (The Act). In carrying out that mandate, the Board is enjoined to ensure that all public procurements and disposals conform to the Act and the principles of public procurement set out under Article 227(1) of the constitution of Kenya.

43. A person aggrieved by the decision of the Board has recourse before this court by dint of section 175 of the Act. The emphasis I would wish to lay here is that the recourse is one under the judicial review jurisdiction of this court and *not an appellate one.* The court, thus, would be exercising its supervisory powers over the board through sniffing for any whiff of illegality, irrationality or procedural impropriety. In **Council of Civil Service Unions v Minister for the Civil Service (1985) A.C. 374,410** Lord Diplock stated as follows:

> ***"My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.***
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> ***By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.***
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> ***By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.***
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> ***I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."***

44. The ex parte applicant's grouse against the respondent's action is summarized in grounds upon which the Notice of Motion is based and which I reproduce here;

> *a) On 22nd March, 2022 the Public Procurement Administrative Review Board delivered its decision in Review Application No. 19/2022 in regard to TENDER NO. KEBS/T007/2021-2022 FOR PROVISION OF STAFF MEDICAL INSURANCE COVER.*
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> *b) Vide the said decision, the Respondent dismissed the Applicant's Request for Review through which the Applicant was challenging the decision of the 1st Interested Party to award the subject tender to the 2nd Interested Party on the ground that the latter did not meet one of the mandatory requirements under the tender document, to wit: proof of business permits for major towns, that is to say, Nairobi, Mombasa, Kisumu, Eldoret and Nakuru.*
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> *c) The said decision is unprocedural as the Respondent abdicated its responsibility under Section 28 as read with Section 167(1) of the Public Procurement and Asset Disposal Act (hereinafter 'the act') to review the confidential bundle/documents availed to it by the Procuring Entity in accordance with Section 67 of the Act.*
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> *d) Further, the Respondent's decision is contrary to the Applicant's legitimate expectations that the Respondent will at the very least review the confidential bundle of documents and ascertain whether the 2nd Interested Party complied with all the mandatory requirements contained in the tender document and in particular the requirement under Section Ill paragraph 2.1, item MR24 of the mandatory requirements criteria.*
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> *e) In addition, the said decision is irrational and unreasonable as the Respondent held that that the Applicant is the one to prove that the 2nd Interested Party did not meet mandatory requirements yet this information is within the special knowledge of the 2nd Interested Party, the Procuring Entity and the Respondent through the confidential bundle of documents.*
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> *f) If the decision of the Respondent is left to stand, the Procuring Entity will proceed and award the subject tender to a non-responsive/noncompliant tenderer- which is a gross and contemptuous disregard of the Act and the principles of public procurement set out under Article 227(l) of the Constitution of Kenya.*
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> *g) It is in the interest of justice and public interest that the orders sought herein be granted.*
>
> *h) This Honourable Court has the power, and in the circumstances of this case, the obligation to quash the decision of the Respondent herein.*

45. From those grounds, it is clear that the applicant's main ground in the challenge to the relevant procurement process before the Board was that the 2nd Interested Party did not meet one of the mandatory requirements under the tender document to wit; proof of business permits

for major towns, that is Nairobi, Mombasa, Kisumu, Eldoret and Nakuru. The Board is faulted for failure to review the confidential bundle/documents availed to it by the procuring entity.

46. In response, the Board through Mr. Philip Okumu, the acting Board secretary, in his replying affidavit avers that the main issue for determination was whether the applicant substantiated its case in respect of the allegation that the 2nd Interested Party does not possess business permits covering major towns as required under MR 24 of Clause 2.1 Mandatory requirements of 2. Preliminary examination for determination of responsiveness of Section III-Evaluation and Qualification Criteria at page 27 of 85 of the tender Document. He avers that the Board found that the applicant failed to prove the allegation that the 2nd Interested Party does not have the business permits as it is the applicant who stood to fail in the instant Request for review if no evidence at all was given by either party to the Request for review.

47. In its reasoned decision, I note the Board has done a marvelous and correct review and conclusions on the law of evidence and specifically on the question of the burden of proof. Upon evaluation of the material before it, this is what the board concluded;

> *"Turning to the circumstances of this instant Request for Review, we note that the same is entirely hinged on the Applicant's own industry knowledge that the Interested Party does not possess business permits covering major towns specifically Nairobi, Mombasa, Kisumu, Nakuru and Eldoret as captured in paragraphs 13 and 14 of the instant Request for Review and paragraph 10 of the Statement in Support of the instant Request for Review. Just to be clear, the Applicant is not alleging that the Interested Party does not have countrywide coverage but is instead alleging that the Interested Patty does not have business permits covering major towns. The Applicant has adduced no evidence whatsoever to support its allegation claiming that the burden of proof shifted to the Interested Patty to demonstrate compliance with MR24.*
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> *We do not agree with the Applicant that the burden of proof has shifted to the Interested Party. We say so because, we have hereinbefore established that the burden of proof rests with he who alleges, and in this instant, the Applicant. Secondly we have established that such burden of proof remains static throughout court proceedings, like the current proceedings before this Board, and it is only the evidential burden of proof that may shift to a respondent, in this instant the Respondent and the Interested Party, depending on the nature and effect of the evidence adduced by the Applicant. In the instant Request for Review, no evidence whatsoever has been adduced by the Applicant before the Board for the Board to assess whether or not the evidential burden of proof has shifted to the Respondent and Interested Patty for them to disprove the Applicant's allegation.*
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> *We have studied the Finance Acts of Nairobi City County, County Government of Mombasa, County Government of Kisumu, County Government of Nakuru and County Government of Uasin Gishu (in which Eldoret falls) and note that for one to run a business in either of the named counties, one must apply for and be issued with either a business permit or trade licence by the concerned County Government. An example is Section 5(2) of the then Mombasa County finance Act, 2019 which provided as follows:*
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> *'5. Business Licences and Permits*
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> *(2) A person who intends to carry out any of the businesses listed in the or under the schedule or the single business permit regulation shall apply for a licence or permit from any of the of the county offices or such other designated agents as shall be prescribed by the County Government from time to time.*
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> *County Government offices are public offices that form part of the collectivity of offices, inter alia, comprising of Government of the Republic of Kenya known as the State, when used as a noun, under Article 260 of the Constitution and which State has a constitutional obligation to give public information to a citizen pursuant to Article 35 of the Constitution on the right to access information held by the State.*
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> *We are of the considered opinion that a concerned citizen/person, (whether natural or legal) may seek confirmation from the concerned County Government to confirm whether a person, whether natural or legal, who operates business in such a County has been issued with a business permit noting that business permits are public documents.*
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> *We note that the Applicant did not furnish the Board with any proof that it sought and obtained as a matter of fact (from Nairobi City County, County Government of Mombasa, County Government of Nakuru, County Government of Kisumu and County Government of Uasin Gishu) that the Interested Party had not been issued with a business permit but rather decided to rely on what in our considered opinion are the Applicant's own beliefs, thoughts and apprehensions.*
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> *It is clear that the burden lies with the Applicant to prove its allegation that the Interested Party does not have business permits covering major towns specifically Nairobi, Mombasa, Nakuru, Kisumu and Uasin Gishu because it is the Applicant who stands to fail in the instant Request for Review if no evidence at all is given by either part/ to the Request for Review.*
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> *In the circumstances, we find the Applicant has failed to substantiate its case with respect to the allegation that the Interested Party does not possess business permits covering major towns specifically Nairobi, Mombasa, Kisumu, Nakuru and Eldoret as required under MR 24 of Clause 2.1 Mandatory Requirements of 2. Preliminary examination for Determination of Responsiveness of Section Ill Evaluation and Qualification Criteria at page 27 of 85 of the Tender Document. Consequently, the Applicant has also failed to substantiate that in awarding the subject tender to the Interested Party, the Respondent breached the provisions of the Tender Document, the Act, Regulations 2020 and the Constitution.*
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> *The effect of our finding on the first issue framed for determination is that the Request for Review has no legs to stand on and the same is ripe for striking out. Consequently, we shall not proceed to address the second issue framed for determination."*

48. That, on the face of it, is a sound legal conclusion. But is it a sound one when one considers the facts and circumstances in our instant

case? Does the conclusion take into account that the Board has access to confidential documents from the procuring entity and the effect of such access in the resolution of the Request for review before it? Under Section III of the tender document: Evaluation and Qualification criteria, and specifically under clause 2.1 on Mandatory requirements, Item MR24, the mandatory requirement was;

> *''Must have countrywide coverage with proof of business permits. The coverage must include major towns: Nairobi, Mombasa, Kisumu, Nakuru and Eldoret.''*

49. It goes without saying that any responsive tender would of necessity have countrywide coverage with proof of business permits and the coverage would have to include Nairobi, Mombasa, Kisumu, Nakuru and Eldoret. The confidential bundle/documents were forwarded to the Board by the procuring entity as would be expected under section 67 of the Act. In hearing the request for review, the Board is obligated to consider the documents sent to it under confidential cover. Notably, these documents are not available to the tenderers/parties. A cursory look at the tender documents would readily reveal to the Board whether the 2nd Interested Party herein met the mandatory requirement on countrywide coverage with proof of business permit. That was a duty on the part of the Board in playing its part in ensuring that the procurement process abided by the principles of procurement set in Article 227 (1) of the constitution and the guiding values and principles expounded under section 3 of the Act. And in carrying out this duty, there is no rocket science to unravel. It is a simple mechanical exercise requiring no innovation. This duty is not a light one. It has constitutional as well as statutory underpinning.

50. I have scoured through the request for review proceedings and more particularly the Decision of the Board. I have not come across any indication that the Board considered all the material before it to confirm that the 2nd Interested Party's tender was compliant. Instead, what manifests from the record is a spirited effort by the procuring entity to require the applicant to prove the non-compliance of the 2nd Interested party, a position the Board agreed with. Put simply, the Board has the mandate and the wherewithal to confirm and pronounce itself over the responsiveness or lack thereof of a tender once a challenge is mounted. The Board cannot run away from this duty. It is worthy of note that the Board in its decision never pronounced itself on the compliance of the 2nd Interested party but rather based its finding on the premise that the applicant had failed to prove that the 2nd Interested Party did not have the permits in question.

51. The jurisdiction and powers of the Board are enormous. The Board is the primary superintendent of public procurement and disposal processes. Its role was described in lofty terms by the Court of Appeal in **Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 Others [2012] eKLR** as follows;

> ***'' The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. By Reg. 89, it has power to engage an expert to assist in the proceedings in which it feels that it lacks the necessary experience. S. 98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.***
>
> ***Having regard to the wide powers of the Review Board we are satisfied that the High Court erred in holding that the Review Board was not competent to decide whether or not the 1st Respondent's tender had met the mandatory conditions. The issue whether or not the 1st Respondent's tender was rightly rejected as unresponsive was directly before the Review Board and the Board had jurisdiction to deal with it.''***

52. In our instant suit the Board despite having the competency and jurisdiction to decide whether or not the 2nd Interested Party's tender had met the mandatory conditions, shirked its responsibility by failing to consider the confidential documents accessible by it and make a definite finding on the issue. By so doing, the Board failed to consider a relevant matter, indeed a key one at that, in making the impugned decision.

53. I hasten to add that am alive to the need to avoid a merit review of the decision of the Board. This court's take is not necessarily that the Board's decision was wrong. The failure to take into account the confidential documents renders the decision unprocedural and unfair. Commenting on instances where the court should interfere, the Court of appeal in **Kenya Pipeline Company Limited v *Hyosung Ebara Company Limited & 2 Others*** *(supra) stated;*

> ***''Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter.***
>
> ***That principle was clearly enunciated by Lord Reid in <u>Anisminic Ltd Vs Foreign</u> <u>Compensation Commission [1969]</u> 1 ALL ER 208 at p. 213, para H – 214 para A where his Lordship said:-***
>
> ***"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is annullity. But in such cases the word "jurisdiction" has been used in a very wide sense and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal has jurisdiction to enter on the inquiry,*** *it has done or failed to do something in the course of inquiry which is of such a nature that its decision is a nullity.* ***It may have given its decision in bad faith. It may have made a decision which it has no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued provisions giving it powers to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it****. It may have refused to take into account something which it was required to take into account.* ***Or it may have based its decision on some matter which, under the provisions setting it***

up, it had no right to take into account. I do not intend this list to be exhaustive. But if it is decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide rightly."

54. The matter is further illuminated by the court in its decision in **Sunchan Investment Limited v Ministry of National Heritage & Culture & 3 Others [2016] eKLR.** where the Court held that;

> *"Analysis of **Article 47** of the Constitution as read with the **Fair Administrative Action Act** reveals the implicit shift of judicial review to include aspects of merit review of administrative action**. Section 7 (2) (f)** of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; **Section 7 (2) (j)** identifies abuse of discretion as a ground for review while **Section 7 (2) (k)** stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. **Section 7 (2) (k)** subsumes the dicta and principles in the case of **Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223** on reasonableness as a ground for judicial review.''*

55. In view of the foregoing, the contestations by the 1st and 2nd Interested party that it is the applicant who bore the burden to prove the 2nd Interested Party's responsiveness to the tender are devoid of any merit and the Board fell into great error in walking along with them and reaching the decision it did. The applicant has ably demonstrated before this court that a relevant consideration was not taken into account resulting in procedural impropriety and unfairness to the applicant and further, trampling on the applicant's legitimate expectation that upon presentation of his Request for review before the Board, all relevant material and documentation would be considered.

56. The issue for determination thus answers in the affirmative. The applicant has established a case for the grant of judicial review orders of certiorari to quash the decision of the respondent on the one hand, and mandamus to direct the respondent to review the confidential documents and make a determination on the 2nd Interested Party's responsiveness to Tender No. KEBS/T007/2021-2022 for provision of staff medical insurance cover.

57. **In the premises, I allow the Notice of motion dated 7th April 2022 and make the following orders;**

i. An order of certiorari be and is hereby issued to bring into this Honourable Court for purposes of being quashed the decision of the Public Procurement Administrative Review Board in Review Application No. 19/2022 in regard to TENDER NO. KEBS/T007/2021-2022 FOR PROVISION OF STAFF MEDICAL INSURANCE COVER (hereinafter the 'subject tender').

ii. An order of mandamus be and is hereby issued directing the Respondent to review the confidential bundle/documents and make a fresh determination as to whether the 2nd Interested party complied with all mandatory requirements in the tender document and in particular requirement under Section III paragraph 2.1, item MR24 of the Mandatory Requirements Criteria within 30 days hereof.

iii. Each Party to bear its own costs.

Dated, signed and **delivered** at **Nairobi** this **28th day of April 2022.**

.....

A. K. NDUNG'U

JUDGE