



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. MISC. E049 OF 2021**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF**

**CERTIORARI, MANDAMUS AND PROHIBITION**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD....RESPONDENT**

**THE ACCOUNTING OFFICER,**

**KENYA MEDICAL SUPPLIES AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**KENYA MEDICAL SUPPLIES AUTHORITY.....3<sup>RD</sup> RESPONDENT**

**NUFLOWER FOODS AND NUTRITION PVT.....4<sup>TH</sup> RESPONDENT**

**EX PARTE: TECHNO RELIEF SERVICES LIMITED**

**JUDGMENT**

**Introduction**

1. The Public Procurement Administrative Review Board (the 1<sup>st</sup> Respondent herein) delivered a decision on 29<sup>th</sup> March 2021 in PPARB Application No. 34 of 2021, in which it dismissed the Request for Review filed by Techno Relief Services Limited, the *ex parte* Applicant herein. The said request for review and application was made with respect to Tender Number GF ATM HIV NFM-20/21-O1T-011 for Supply of Nutritional Supplements which was floated by the Kenya Medical Supplies Authority and its Accounting Officer, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein. The said Tender was awarded to Nuflower Foods and Nutrition PVT, which is joined as the 4<sup>th</sup> Respondent herein.

2. The *ex parte* Applicant consequently filed an application by way of a Notice of Motion dated 23<sup>rd</sup> April 2021, upon being granted leave, wherein it is seeking the following orders:

**1. THAT the Court be pleased to grant judicial review order of Certiorari to remove into this Honourable Court and quash the decision of the 1st Respondent dated 29th March, 2021 in Review Case number 34 of 2021· Techno Relief Services Limited Vs- The Accounting Officer of Kenya Medical Supplies Authority, Kenya Medical Supplies Authority & Nuflower Foods and Nutrition PVT Limited.**

**2. THAT the Court be pleased to grant judicial review order of Mandamus to compel the 1st respondent to re hear and determine PPARB Case Number 34 of 2021 by considering the Applicants filed and served; Written Submissions, List of Authorities, Further Affidavit, Replying Affidavit to the 2nd and 3rd Respondent's Grounds of Opposition and the Applicant's written submissions to the 2nd and 3rd Respondents Grounds of Opposition.**

**3. THAT the Court be pleased to grant judicial review order of Prohibition to remove into this honourable Court and prohibit the 3rd and 4th respondent's from entering into a binding contract in respect of tender No. GF ATM HIV NFM - 2021-01T-o11 for supply of Nutritional Supplements to Kenya Medical Supplies Authority that form the subject matter of this application.**

**4. THAT the Court be pleased to grant such further and other reliefs that this honourable court may deem just and expedient to grant.**

**5. THAT costs of this application be provided for.**

3. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 6<sup>th</sup> April 2021, a verifying affidavit sworn on the same date and a supporting affidavit sworn on 23<sup>rd</sup> April 2021, both by Ketan. K. Goswami, the *ex parte* Applicant's Tender and Product Development Manager. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed a replying affidavit sworn on 30<sup>th</sup> April 2021 by Edward Njoroge, the 2<sup>nd</sup> Respondent's acting Chief Executive Officer, in response to the application. Mr. Nyaburi, the counsel for the 4<sup>th</sup> Respondent, orally indicated during the hearing of the application that it was supporting the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Cases and would not file any pleadings. The 1<sup>st</sup> Respondent on its part did not file any response to the application, nor participate in the hearing thereof.

4. A summary of the parties' respective cases is set out in the following sections

#### **The *ex parte* Applicant's Case**

5. The *ex parte* Applicant averred that the 1<sup>st</sup> Respondent, acted unprocedurally, irrationally, illegally and unreasonably by firstly, failing and/ or refusing to consider the *ex parte* Applicant's filed written submissions, list of authorities, further affidavit, replying affidavit to the Grounds of Opposition and the *ex parte* applicant's written submissions to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents Ground of Opposition.

6. Further, that the 1<sup>st</sup> Respondent only considered the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' written submissions which were filed on the 29<sup>th</sup> March 2021 whereas the *ex parte* Applicant's written submissions were filed on 25<sup>th</sup> March 2021. In addition, that the Interested Party filed its written submissions on the 30<sup>th</sup> March 2021 whereas the 1<sup>st</sup> Respondent rendered its on the 29<sup>th</sup> March 2021. In this respect the *ex parte* Applicant pointed out that the 1<sup>st</sup> Respondent's Board Circular No. 2/2020 dated 24<sup>th</sup> March 2020, directed in paragraph six (6) thereof that all requests for review applications would be canvassed by way of written submissions together with all documentation filed before it.

7. Secondly, that the 1<sup>st</sup> Respondent made an error of law, considered irrelevant considerations and was unreasonable in its findings that the *ex parte* Applicant's bid was non responsive. In particular, that the 1<sup>st</sup> Respondent made an error in law in making an irrational and unreasonable finding that the *ex parte* Applicant provided a Certificate of Analysis for RUTF products with Batch Number 2024700 , which was clearly different from batch Number 421020 indicated on the Test Report issued on 31<sup>st</sup> October 2020 for the RUTF products to be supplied for the RUTF products to be supplied by the Applicant, which finding was different from the reasons given by the 3<sup>rd</sup> Respondent in declaring the applicant's bid as non-responsive. In addition, that the *ex parte* Applicant's bid was also responsive for providing RUSF for the age of six (6) months old.

8. Lastly, that the 1<sup>st</sup> Respondent failed to appreciate that the 3<sup>rd</sup> respondent considered irrelevant considerations not part of the Tender requirements in the Tender Document to declare the *ex parte* applicants bid as non-responsive, which was the gist of Review Case Number 34 of 2021.

9. Therefore, that the 1<sup>st</sup> Respondent's dismissal of the *ex parte* Applicant's request for review case number 34 of 2021 violates Section 79 and 80(1) & (2) of the Public Procurement and Disposal Act and Article 227 of the Constitution of Kenya, that advocates for a procurement regime that is fair, equitable competitive and effective.

10. The *ex parte* Applicant annexed copies of the subject tender documents, and of the pleadings filed in, and impugned decision made by the 1<sup>st</sup> Respondent on 29<sup>th</sup> March 2021 in PPARB Application No. 34 of 2021.

#### **The Response**

11. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents' case explained in response that Government of Kenya received a grant from the Global Fund to fight AIDS, Tuberculosis and Malaria under New Funding Model (NFM) for the Year 2020/2021, which it was intended to use part of the proceeds to fund payments under the contract(s) for the Supply of Nutritional Supplements. Accordingly, that the 2<sup>nd</sup> Respondent, on behalf of the Government of Kenya, Ministry of Health and Global Fund invited tenders for Supply of Nutritional Supplements, and that a total of 11 bidders who submitted their bids in response to the tender herein.

12. Thereafter, that upon evaluation by the evaluation committee, it was discovered that the *ex parte* Applicant's bid was not responsive for the reasons that firstly, the batch number in the Certificate of Analysis for item 1 "Ready to Use therapeutic food (RUTF)" paste, 500kcal/92g did not match the batch number on the sample provided and the *ex parte* Applicant. Secondly, that the *ex parte* Applicant provided a product for item 2 "Ready to use supplemental food (RUSF)" paste, 500kcal/92g that was made for children of 6 months and older instead of age 5 years and above, as required and provided for in the technical specifications in the tender document. Therefore, that as a result the *ex parte* Applicant was declared non responsive at the technical evaluation stage and sent a notification of the same.

13. The 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents also confirmed that they filed pleadings in, participated in the hearing of Request for Review No 34 of 2021, and stated that the 1<sup>st</sup> Respondent by circular 2 of 2020 dated 24<sup>th</sup> March 2020 informed all litigants that there will be no physical

hearings of application for reviews, and that the 1<sup>st</sup> Respondent shall rely on the pleadings and evidence filed and by parties. Further, that the 1<sup>st</sup> Respondent considered all the relevant facts in arriving at its decision which was within its mandate under the Public Procurement and Asset Disposal Act 2015.

14. On the allegations by the *ex parte* Applicant that the 1<sup>st</sup> Respondent made an error in law in making an irrational and unreasonable finding on the issue of the Certificate of Analysis for RUTF products item 1 "Ready to Use therapeutic food (RUTF)" paste, 500kcal/92g, the said Respondents averred that the 1<sup>st</sup> Respondent has a statutory duty to adjudicate on tender proceedings that have been placed before them including but not limited to whether a bidder complied with the mandatory requirements of the tender. In addition, that the 1<sup>st</sup> Respondent discharged its mandate properly by observing pleadings and confidential documents submitted by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents pursuant to section 63(e) of the Public Procurement and Asset Disposal Act 2015, and by examining the *ex parte* Applicant's original bid so as to arrive at its determination.

15. Furthermore, that the 1<sup>st</sup> Respondent in considering the application for review noted that the *ex-parte* Applicant made an admission that they did not comply with the requirement in the tender document and sought that the same be excusable by virtue of section 79 of Public Procurement and Asset Disposal Act 2015. It was averred that the 1<sup>st</sup> Respondent, in determining whether the *ex-parte* applicant's application for waiver of the requirements of the tender document were founded in any fact and/or law, observed and stated that the requirement that the Ready to use supplemental food (RUSF)" paste, 500kcal/92g be for persons aged 5 years and above was a mandatory requirement and thus not capable of any circumvention. Therefore, that the 1<sup>st</sup> Respondent's decision was made in full and proper application of the law and thus satisfied the rationality test.

16. Lastly, the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents contended that the current application does not challenge the decision making process by the 1<sup>st</sup> Respondent but rather the merits of its decision, and that this Court does not have jurisdiction to determine the merits of the decision of the Board but only to address itself to any procedural impropriety thereof. Accordingly, that if the *ex parte Applicant* is aggrieved with the interpretation or perceives a misapprehension of the law by the Board the proper forum would be to appeal the decision and not to file for judicial review. It was their case that in the circumstances the *ex-parte* applicant has not tabled any evidence of any procedural impropriety committed by the 1<sup>st</sup> Respondent in hearing and determining PPARB 34 of 2021.

17. In conclusion, it was stated that the 1<sup>st</sup> Respondent procedurally conducted itself in a fair and just manner as it heard all the parties to the review, considered all documents of evidentiary value and the submissions placed before it and as such the decision was rationale, reasonable, logical, lawful and within the mandate and jurisdiction as provided by the Public Procurement and Asset Disposal Act 2015 and the Public Procurement and Disposal Regulations 2006.

### **The Determination**

18. The instant application was canvassed by way of written submissions. The advocates for the *ex parte* Applicant, Kipyator Kibet & Associates Advocates filed submissions dated 23<sup>rd</sup> April 2021, while Ongánda & Associates, the advocates for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, filed submissions dated 3<sup>rd</sup> May 2021.

### **On this Court's Jurisdiction**

19. I note that the bulk of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submissions were on this Court's jurisdiction, which needs to be addressed as a preliminary issue of law. Counsel for the said Respondents, while citing Article 47 of the Constitution and section 7 of the Fair Administrative Action Act on the scope of judicial review, reiterated that this Court's jurisdiction is limited to reviewing the decision making process, and not the merits of the 1<sup>st</sup> Respondent's decision. Various judicial authorities were cited for this position, including **Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 Others [2012] eKLR, M/S Master Power Systems Limited v Public Procurement Administrative Review Board & 2 others [2015] Eklr, Republic v Disciplinary Committee & another Ex-Parte Daniel Kamunda Njue [2016] eKLR**, wherein it was submitted that judicial review is not concerned with whether a decision is wrong or erroneous. According to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the 1<sup>st</sup> Respondent, being a specialized tribunal, is better placed to hear and determine matters relating to public procurement than this Court.

20. It is necessary to restate the parameters of this Court's judicial review jurisdiction, in determining whether or not it has jurisdiction to hear and determine the instant application. Article 165 of the Constitution details the jurisdiction of the High Court, and provides in sub-Article 6 that the High Court has supervisory jurisdiction over any person, body or authority that exercises a quasi-judicial function or a function that is likely to affect a person's rights. The High Court's supervisory jurisdiction is in this respect exercised either through judicial review, or through its appellate jurisdiction.

21. The traditional remit of a judicial review Court was stated in the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300** thus:

**“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).**

**Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....**

**Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.**

**Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”**

22. Judicial review has now also been entrenched as a constitutional principle pursuant to the provisions of Article 47 of the Constitution, which provides for the right to fair administrative action, and section 7 of the Fair Administrative Action Act in this regard provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision. In addition, it was emphasized by the Court of Appeal in ***Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act, reveals an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator.***

23. The standards of merit review set out in section 7 (2) of the Act are as follows:

**(2) A court or tribunal under subsection (1) may review an administrative action or decision, if-**

**(a) the person who made the decision-**

**(i) was not authorized to do so by the empowering provision;**

**(ii) acted in excess of jurisdiction or power conferred under any written law;**

**(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;**

**(iv) was biased or may reasonably be suspected of bias; or**

**(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;**

**(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;**

**(c) the action or decision was procedurally unfair;**

**(d) the action or decision was materially influenced by an error of law;**

**(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;**

**(f) the administrator failed to take into account relevant considerations;**

**(g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;**

**(h) the administrative action or decision was made in bad faith;**

**(i) the administrative action or decision is not rationally connected to-**

**(i) the purpose for which it was taken;**

**(ii) the purpose of the empowering provision;**

**(iii) the information before the administrator; or**

**(iv) the reasons given for it by the administrator;**

**(j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;**

**(k) the administrative action or decision is unreasonable;**

**(l) the administrative action or decision is not proportionate to the interests or rights affected;**

**(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;**

**(n) the administrative action or decision is unfair; or**

**(o) the administrative action or decision is taken or made in abuse of power**

24. It is evident from this provisions that this Court has jurisdiction to review the decisions of subordinate courts and quasi-judicial bodies, of which the 1<sup>st</sup> Respondent is one. It is also inaccurate and one-dimensional to classify this Court's review jurisdiction as being limited to the decision making process of an administrative body or subordinate court, as it is evident that the Court can also review the merits of a decision in judicial review. The applicable restraints in the exercise of its judicial review jurisdiction are that the Court must be careful not to usurp and interfere with the matters entrusted to an administrative body or subordinate court to decide in the first instance, as its jurisdiction is supervisory. In addition, the Court cannot substitute its decision or preferred outcome with that of the said bodies or courts, hence the restrictions on the extent of merit review that can be undertaken in judicial review.

25. Coming to the permissible merit review, firstly, as shown by the applicable standards of review in section 7 of the Fair Administrative Action Act, the legality of decision making extends beyond merely the process, and include aspects of reasonableness, proportionality and fairness of the decision. Secondly, the merit review by a judicial review Court may extend to correcting any errors made by a decision making body as to the existence of precedent facts, and in the application and interpretation of the law, in reviewing the legality of the decisions, and if the bodies have acted within their powers. Hence the remedies available to a judicial review Court in this regard of quashing illegal decisions and requiring public bodies to apply the correct law and procedure.

26. In the instant application, the *ex parte* Applicant has not only raised concerns as regards the procedure of decision making employed by the 1<sup>st</sup> Respondent, which is what is claimed by the Respondents to be the proper province of this Court's jurisdiction, but also on the reasonableness of the resulting decision, which is also within the remit of the said jurisdiction, as demonstrated in the foregoing. The said application is therefore properly before this Court.

27. This Court will therefore proceed to determine the three substantive issues before the Court, namely whether the 1<sup>st</sup> Respondent acted fairly and procedurally in making the decision dated 29<sup>th</sup> March 2021 in PPARB Application No. 34 of 2021, whether the said decision by the 1<sup>st</sup> Respondent was reasonable and rational, and whether the relief sought by the *ex parte* Applicant is merited.

#### ***On Whether the 1<sup>st</sup> Respondent acted fairly and procedurally***

28. The *ex parte* Applicant submitted in this respect that it filed its Request for Review with the 1st Respondent on 9th March 2021, while the 2nd and 3rd Respondent filed and served grounds of opposition to the request for review on the 15<sup>th</sup> March 2021 and a Replying Affidavit on 17<sup>th</sup> March 2021. Further, that the 4th Respondent filed and served its Replying Affidavit on the 22<sup>nd</sup> March 2021, and that the *ex parte* Applicant thereupon filed and served its Written Submissions, List of Authorities, Further Affidavit, replying affidavit to the Grounds of Opposition on 25<sup>th</sup> March 2021. Subsequently, that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent filed and served its written submissions on the 29<sup>th</sup> March 2021, whereas the 4<sup>th</sup> Respondent filed and served its Written Submissions of the 30<sup>th</sup> March 2021.

29. The *ex parte* Applicant's grievance is that while the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' submissions were considered by the 1<sup>st</sup> Respondent in the impugned ruling, its own submissions were not considered. The *ex parte* Applicant in this respect referred the Court to a statement in the ruling delivered by the 1st Respondent on 29<sup>th</sup> March 2021 in PPARB Application No. 34 of 2021 that acknowledged that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had filed submissions on the *ex parte* Applicant's Request for Review, but does not aver to the existence of the other parties' submissions. Furthermore, that the *ex parte* Applicant complied with requirement of paragraph 6 of the 1st Respondent's Circular No 2/2020 dated 24th March 2020 that all requests for review were to be canvassed by way of written submissions and documentation filed before it.

30. The *ex parte* Applicant relied on various judicial decisions on the application of the principles of fairness and natural justice, including **Republic vs Public Procurement Administrative Review Board & 2 others Ex Parte MIG International Limited & Another (2016); e KLR, Zhongman Petroleum & Natural Gas Group Company Ltd vs The Public Procurement and Administrative Review Board and 3 Others (2010) eKLR; Onyango Oloo vs. Attorney General (1986-1989) EA 456; General Medical Council vs. Spackman (1943) 2 All ER 337; Ridge vs. Baldwin (1963) 2 All ER 66; Kabale District Local Government Council and Others (2008) 2 EA 300; and Republic Vs- Vice Chancellor Jomo Kenyatta University of Agriculture and Technology [2008]**. Lastly, the *ex parte* Applicant submitted that Article 227 of the Constitution requires procurement systems to be fair, equitable, transparent, competitive, and cost-effective.

31. Article 47 of the Constitution, and the provisions of the Fair Administrative Act in this regard now import and imply a duty to act fairly by a decision maker in any administrative action. The Fair Administrative Action Act defines an administrative action to include - (i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or (ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

32. In addition, section 4 (3) and (4) of the Fair Administrative Action Act lays down the procedure to be adopted by decision makers as follows:

**“(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**

**(a) prior and adequate notice of the nature and reasons for the proposed administrative action;**

- (b) an opportunity to be heard and to make representations in that regard;
  - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
  - (d) a statement of reasons pursuant to section 6;
  - (e) notice of the right to legal representation, where applicable;
  - (f) notice of the right to cross-examine or where applicable; or
  - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to-
- (a) attend proceedings, in person or in the company of an expert of his choice;
  - (b) be heard;
  - (c) cross-examine persons who give adverse evidence against him; and
  - (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”

33. The Fair Administrative Action Act therefore applies to the 1<sup>st</sup> Respondent in the exercise of its statutory authority and powers and as a quasi-judicial body, in respect of the decisions that it makes that may affect the rights of parties before it. Procedural fairness in administrative action is embedded in the natural justice requirements that no man is to be a judge in his own cause, no man should be condemned unheard and that justice should not only be done but seen as done as illustrated in sections. The core of the duty to act fairly therefore is the need to ensure that a person affected by a decision has an effective opportunity to make representations, before it is made and by an impartial decision maker. The Court of Appeal in this respect held as follows in Judicial Service Commission vs Mbalu Mutava & Another [2015] eKLR:

**“The term “procedurally fair” used in Article 47(1) by a proper construction, imports and subsumes to a certain degree, the common law including rules of natural justice which means that common law is complementary to right to fair administrative action.**

34. The relevant test for breach of the duty to act fairly is set out in the text on Judicial Review: Principles and Procedures by Jonathan Auburn, Jonathan Moffett and Andrew Sharland, at paragraph 5.28 as follows:

**“For a claim for judicial review based on an allegation of a breach of the duty to act fairly to succeed, it is not enough for the claimant merely to establish that there has been a defect in the relevant decision-making process, the claimant must also show that any defect (or the cumulative effect of several defects) rendered the procedure as a whole unfair.... The focus must always be on the fairness of the procedure as a whole, and not simply on the fairness of particular elements of it.”**

35. The applicable test therefore, is whether the procedure employed as a whole, complied with the requirements of fairness in the particular circumstances of a case. I have in this regard perused the impugned ruling delivered on 29th March 2021, and note that while the 1<sup>st</sup> Respondent did not acknowledge that the *ex parte* Applicant and the 4th Respondent herein had filed submissions on the *ex parte* Applicant’s Request for Review in the said ruling, it extensively referred to the grounds raised in the Request for Review and made findings thereon. To this extent, the *ex parte* Applicant was accorded an opportunity to be heard, as its main pleadings was considered. The defect that is alleged by the *ex parte* Applicant in this regard is that its legal representations were not considered during the hearing process.

36. The central issue in determining whether procedure fairness requires legal representation and by extension legal submissions, is whether an individual can fairly be expected to represent himself or herself. The factors that are relevant in this regard are the nature of the decision making, particularly whether they are informal or formal hearings held, with legal representation being found to be necessary in formal hearings of an adversarial in nature. Other factors that will necessitate legal representation include the importance of what is at stake, the stage of decision making and in particular whether it is at final stages, the complexities of any issues of fact and law. I am in this regard persuaded by the holding by Toulson J. in R (Dr.S) vs Knowsley NHS Trust (2006) EWHC 26(Admin) at paragraph 101

**“It may be that in many cases legal representation would be unnecessary, but the question in each case must be whether the doctor can reasonably be expected to represent himself or whether legal representation is necessary in order to enable him to be able properly to present his case. I do not see that this can be a matter of presumption but must depend on the circumstances, including particularly the complexity of the allegations and the evidence.**

37. Likewise, in R. vs the Secretary of State for the Home Department ex p. Tarrant (1985) QB 251, Webster J. set out six considerations of the conditions under which a prisoner facing internal disciplinary proceedings should be given access to legal representation. They were: first, the seriousness of the charge and potential penalty; second, whether points of law are likely to arise; third, the capacity of the prisoner to present his own case; fourth, procedural difficulties; fifth, the requirement for reasonable speed in determining the charge and, sixth, the need for fairness between prisoners and prison staff.

38. The relevant factors were largely present in the hearing of *ex parte* Applicant's Request for Review, which was a contested hearing between various parties dealing with technical requirements of the subject tender, and the application of the Public Procurement and Asset Disposal Act to the disputed issues. Additionally, parties were specifically required by the 1<sup>st</sup> Respondent to file and serve written submissions and documents being relied upon. The hearing before the 1<sup>st</sup> Respondent was therefore a technical and complex hearing, and the *ex parte* Applicant would have needed legal assistance in making its representations, which it did through the legal submissions filed.

39. On the effect of the 1<sup>st</sup> Respondent's failure to consider its legal submissions, the *ex parte* Applicant has alleged that the circumstances of its disqualification from the subject tender by the 3<sup>rd</sup> Respondent which gave rise to its Request for Review were urged in its legal submissions and were thereby not considered, leading to unfavourable and unreasonable findings by the 1<sup>st</sup> Respondent. Lastly, it is notable that the 1<sup>st</sup> Respondent did not file any response to the instant application to confirm the position as regards its consideration or otherwise of the legal submissions by the *ex parte* Applicant.

40. It is therefore the finding of this Court arising from the foregoing reasons that the legal representation of the *ex parte* Applicant having been essential during the hearing of its Request for Review, the 1<sup>st</sup> Respondent's failure to consider the *ex parte* Applicant's legal submissions resulted in ineffectual legal representation, and was thus procedurally unfair.

#### ***On Whether the decision by the 1<sup>st</sup> Respondent was Reasonable***

41. The *ex parte* Applicant submissions on this issue were along two limbs. Firstly, that the 1<sup>st</sup> Respondent considered irrelevant considerations not forming part of the tender requirements in the tender document, and was thereby unreasonable. The *ex parte* Applicant contended that the 1<sup>st</sup>

Respondent in its ruling unreasonably found that it had provided a certificate of analysis for Ready to use Therapeutic Food (hereinafter "RUTF") products with Batch number 20247001, which was different from Batch Number 421020, which was the sample indicated in the Test Report issued on 31st October 2020 for RUTF products. According to the *ex parte* Applicant, the Batch Number 20247001 was the sample provided by the 3<sup>rd</sup> Respondent.

42. Secondly, that the 1<sup>st</sup> Respondent also failed to appreciate that the *ex parte* Applicant provided Ready to use Supplemental Food (hereinafter "RUSF") for children of the aged six (6) months and above, and the same could be fed on children of 5 years and above. Therefore, that this was not a material deviation to warrant the *ex parte* Applicant's bid declared as non-responsive.

43. The Fair Administrative Action Act under Section 7 provides for reasonableness as a ground for review of an administrative action. Courts and tribunals have the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. Lord Diplock in the case of **Council of Civil Service Union vs Minister for The Civil Service [1984] 3 ALL ER 935** defined unreasonableness as follows;

**"So outrageous in defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."**

44. In **Energy Regulatory Commission v SGS Kenya Limited & 2 others [2018] eKLR**, the Court of Appeal while addressing its mind as to what constitutes unreasonableness referred to the English Court of Appeal decision of **Associated Provincial Picture Houses Ltd vs Wednesbury Corporation [1948] 1 KB223**, where Lord Greene M.R in his lead judgment, agreed upon by Somerville LJ and Singleton J, stated as follows;

**"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word „unreasonable? in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting „unreasonably? Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J in Short v. Poole Corporation [1926] Ch 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."**

45. In the present case, the first limb of the issue as to whether the 1<sup>st</sup> Respondent's findings on the certificates of analysis, samples, and batch numbers produced by the *ex parte* Applicant was unreasonable requires an examination of the said finding, in light of the reasons given thereof by the 1<sup>st</sup> Respondent. The impugned finding by the 1<sup>st</sup> Respondent was on the issue it had framed as to whether the Procuring entity evaluated the Applicant's tender at the technical evaluation stage in accordance with section 79(1) and 80(2) of the Act with respect to item 1 (RUTF) and item 2 (RUSF).

46. The 1<sup>st</sup> Respondent, after setting out the averments of each party on the issue, and the requirements of the tender specifications and evaluation criteria, made the impugned finding as follows in page 14 of its decision:

**"It is worth noting therefore that the Applicant provided a Certificate of Analysis for RUTF products with BATCH**

**Number 20247001, which is clearly different from Batch Number 421020 indicated on the Test Report issued on the 31<sup>st</sup> of October 2020, for the RUTF products to be supplied by the Applicant”**

47. This observation was reiterated by the 1<sup>st</sup> Respondent in reaching the finding at page 15 of its ruling that the *ex parte* Applicant failed to satisfy the criterion found in the Tender document on the requirement that the RUTF product sample matches the batch number in the certificate of Analysis. Prior to the impugned finding, the 1<sup>st</sup> Respondent had also noted as follows at pages 13 to 14 of the ruling, and which observations formed the context of the impugned finding:

**“The Board notes that the Applicant submitted a tender in respect of two items of RUTF and RUSF manufactured by Nutriset as indicated in the manufacturer’s authorization dated 29<sup>th</sup> October 2020 found at page 00053 of the Applicant’s tender. At pages 00093 to 00097 of its tender, the Applicant attached a Certificate of Analysis known as “Complete Analysis Plumpy Nut 2020” dated 3<sup>rd</sup> November 2020 of Batch Number 20247001. The specifications indicated in the said Certificate of Analysis are for RUTF products manufactured by Nutriset.**

**The Board further notes that the Applicant attached various Test Reports issued by FareLabs Food Analysis and Research Laboratory at pages 000099 to 000125 of its bid. However, a Test Report issued on 31<sup>st</sup> October 2020 is found at page 00125 of the Bid with Batch No. 421020 relating to RUTF product proposed to be supplied by the Applicant. The other Test Reports attached at pages 000099 to 000124 of the Applicant’s bid relates to RUSF product and the Batch Numbers for all the test reports are 421020”**

48. The relevant grounds in the *ex parte* Applicant’s Request for Review before the 1<sup>st</sup> Respondent for determination were as follows:

**1. That the 2nd Respondent and/or the procuring entity failed and/or refused to appreciate that the ex parte applicant on page 000093 of its Tender Acknowledgement furnished a complete Analysis for item Ready to use Therapeutic Food (RUTF) paste, 500 kcal/929 as per the sample provided, Batch Number (K20247001) and thus the applicants bid was responsive as per Section 79 of the Public Procurement and Asset Disposal ACT NO. 33 OF 2015.**

**2. That the Certificate of Analysis from Farelabs Food Analysis and Research laboratory on page 000099 of its Tender acknowledgment matches Batch Number 421020 for RUSF- Plumpy sup (One Sample) for Item 2; Ready to use supplemental food(RUSF) paste, 500kcal/929. The applicants bid was also responsive as per Section 79 of the Public Procurement and Asset Disposal ACT NO. 33 OF 2015.**

49. It is my view that the reasoning of the 1st Respondent does not logically flow in terms of the grounds stated by the *ex parte* Applicant, and the issue it framed thereon, and there is lack of clarity as regards its findings on the *ex parte* Applicant’s bid in relation to the specific specifications and criterion required as regards the two items of RUTF and RUSF products. This is particularly so as regards the findings made on the criterion of certificates for analysis, Batch Numbers and test reports on the two items, that were urged by the *ex parte* Applicant in paragraphs 1 and 2 of its Request for Review. In this respect the findings as regards item of RUTF are not clear in the ruling, and appear to confuse with the specifications and criterion on the RUSF.

50. It is also evident from a reading of the entire ruling that the 1<sup>st</sup> Respondent appeared to have urged the issue before it along two limbs, which two limbs are however not clearly indicated and identified in the ruling, nor in its flow. To this extent, the 1<sup>st</sup> Respondent’s findings on the *ex parte* Applicant’s certificates of analysis and batch numbers on the RUTF and RUSF products is found to be unreasonable.

51. On the second limb of the issue as to whether the 1st Respondent’s decision is unreasonable on account of the deviation in the required specifications for the RUSF for children of 5 years and above not being material, the 1st Respondent’s decision and reasoning in this respect was at pages 21 to 27 of its ruling. At page 21 to 22, the 1st Respondent observed as follows:

**“The Board is mindful of the Applicant’s assertion that failure to provide RUSF product for children above 5 years was a minor deviation that ought to have been cured by section 79 (2) (a) of the Act. The said provision states as follows:-.....**

**One of the technical specifications of the RUSF at page 66 of the Tender Document, provided in mandatory terms that “the product shall be free of lumps and of large coarse particles and suitable for consumption by children above 5 years and adults”. This raises the question of whether a mandatory requirement can be classified as a minor deviation.”**

52. After considering various court decisions on the importance of mandatory requirements in procurement processes in determining the responsiveness of a tender, and the provisions of the tender document in this regard, including clarifications sought thereon, the 1<sup>st</sup> Respondent proceeded to conclude as follows at page 27 of the ruling:

**“Given the nature of the products being procured by the Procuring Entity, there was no discretion on tenderers to pick and choose the mandatory requirements to comply with and ignore others. The RUSF products will be supplied to children with moderately acute malnutrition in the age group above 5 years, in adolescents and in adults. The Board, in the circumstances has no choice but to find that the Applicant failed to comply with the requirement specified in the Tender Document when it proposed to provide RUSF products for children of 6 months.**

53. A consideration of whether this finding was reasonable requires a qualitative examination of evidence and arguments that were before the 1<sup>st</sup> Respondent as regards the specifications of the RUSF products provided by the *ex parte* Applicant, that is beyond the remit of this Court’s judicial review jurisdiction as explained in the foregoing. It is also notable in this regard that the provisions of section 28 and section 173 of

the Public Procurement and Asset Disposal Act bestow upon the 1<sup>st</sup> Respondent the jurisdiction and power to hear a tender dispute and review a tender, where an issue is raised as to whether the tender is responsive in accordance with section 79 of the Act, or whether it was evaluated in accordance with section 80 of the Act. It was also observed by the Court of Appeal in of **Kenya Pipeline Company Ltd vs Hyosung Ebara Company Limited & 2 Others** [2012] eKLR that the 1<sup>st</sup> Respondent has wide powers in this regard.

54. Therefore, the 1<sup>st</sup> Respondent's finding that the specifications of the RUSF products in the subject tender were mandatory and material cannot be faulted as being unreasonable, as the legal basis and evidence supporting the finding was explained in the ruling, and the 1<sup>st</sup> Respondent had jurisdiction to examine its nature and application of the specification. The option available to the *ex parte* Applicant is appeal the said finding, if it is of the view that it was a wrong decision.

#### **On Whether the Relief sought are merited.**

55. The *ex parte* Applicant has sought the remedies of certiorari, mandamus, including for a re-hearing of its Request for Review, and of prohibition. An order certiorari nullifies an unlawful decision or enactment, while an order of prohibition restrains a public body from acting in the manner specified in the order to restrain a threatened or impending unlawful conduct. Mandamus on the other hand requires a public body to do some particular act as specified in the order, to enforce public law duties.

56. The Court of Appeal in the case of **Republic v Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR** explained the circumstances under which these orders can issue, and they are available where unlawful conduct or a breach of duty has been demonstrated on the party of a public body or official. Section 11 (1) of the Fair Administrative Action Act also provides for additional orders that this Court can make in judicial review proceedings, which have now been greatly expanded.

57. In the present case, the ruling delivered by the 1<sup>st</sup> Respondent on 29<sup>th</sup> March 2021 in PPARB Application No. 34 of 2021 has been found to have been unprocedurally unfair, and some of its impugned findings to have been unreasonable. To this extent, the remedies of certiorari, mandamus and prohibition that are sought are therefore merited, so as to accord the *ex parte* Applicant an opportunity for the fair consideration of its Request for Review.

58. Section 11 (1) (e) and (h) of the Fair Administrative Action Act in this respect permits this court to remit a matter back to the decision maker for reconsideration, and the 1<sup>st</sup> Respondent can therefore be compelled to determine the *ex parte* Applicant's Request for Review *de novo*.

#### **The Disposition**

59. In light of the foregoing observations and findings, the *ex parte* Applicants' Notice of Motion dated 23<sup>rd</sup> April 2021 is found to be merited to the extent of the following orders:

**I. An order of Certiorari be and is hereby issued to remove into this Court for purposes of quashing, the decision of the 1<sup>st</sup> Respondent dated 29th March, 2021 in PPARB Case Number 34 of 2021 - Techno Relief Services Limited vs The Accounting Officer of Kenya Medical Supplies Authority, Kenya Medical Supplies Authority & Nuflower Foods and Nutrition PVT Limited.**

**II. An order of Mandamus be and is hereby issued to compel the 1st Respondent to re-hear PPARB Case Number 34 of 2021 - Techno Relief Services Limited vs The Accounting Officer of Kenya Medical Supplies Authority, Kenya Medical Supplies Authority & Nuflower Foods and Nutrition PVT Limited and to consider all the pleadings and submissions filed therein and served by all the parties, including the *ex parte* Applicant's Written Submissions, List of Authorities, Further Affidavit, Replying Affidavit to the 2nd and 3rd Respondent's Grounds of Opposition and the *ex parte* Applicant's written submissions to the 2nd and 3rd Respondents Grounds of Opposition.**

**III. An order of Prohibition be and is hereby issued to prohibit the 3<sup>rd</sup> and 4<sup>th</sup> Respondent's from entering into a binding contract in respect of tender No. GF ATM HIV NFM -2021-01T-011 for supply of Nutritional Supplements to Kenya Medical Supplies Authority, pending the re-hearing and determination of the *ex parte* Applicant's Request for Review in PPARB Case Number 34 of 2021 - Techno Relief Services Limited vs The Accounting Officer of Kenya Medical Supplies Authority, Kenya Medical Supplies Authority & Nuflower Foods and Nutrition PVT Limited.**

**IV. The *ex parte* Applicants' Request for Review in PPARB Case Number 34 of 2021 - Techno Relief Services Limited vs The Accounting Officer of Kenya Medical Supplies Authority, Kenya Medical Supplies Authority & Nuflower Foods and Nutrition PVT Limited be and is hereby remitted to the 1<sup>st</sup> Respondent for re-hearing and determination, within thirty days of the date of this judgment.**

**V. Each party shall bear its own costs of the Notice of Motion dated 23<sup>rd</sup> April 2021.**

60. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 25<sup>TH</sup> DAY OF MAY 2021**

**P. NYAMWEYA**

JUDGE