REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 468 OF 2017

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION LIMITED.....1ST INTERESTED PARTY

SCANAD KENYA LIMITED.....2ND INTERESTED PARTY

EX PARTE:

TRANSCEND MEDIA GROUP LIMITED

JUDGMENT

Background

1. On 17th April 2017, the Independent Electoral & Boundaries Commission, the 1st Interested Party herein, advertised for a "Request for Proposals for Provision of Strategic Communication and Integrated Media Campaign Consultancy Services" (hereinafter "Tender No. IEBC/45/2016-2017"). Transcend Media Group Ltd (hereinafter "the Applicant") and Scanad Kenya Ltd (hereinafter "the 2nd Interested Party") submitted proposals pursuant to the said advertisement, whereupon the 1st Interested Party invited both the Applicant and 2nd Interested Party for negotiations.

2. This action prompted the Applicant to file its First Request for Review (PPARB Application No 50 of 2017) with the Public Procurement Administrative Review Board, the Respondent herein, in which it challenged the negotiation processes. The Respondent delivered its ruling on the first Request for Review on 16th June 2017, wherein it directed the Respondent to proceed and complete the procurement process.

3. Thereafter, on 29th June 2017, the Applicant received a notification of the 1st Interested Party's intentions to contract with the 2nd Interested Party. The Applicant consequently filed a Second Request for Review on 13th July 2017 with the Respondent (PPARB Application No 63 of 2017), challenging the award of Tender No. IEBC/45/2016-2017 to the 2nd Interested Party. On 24th July 2017, the Respondent delivered its ruling dismissing the Second Request for Review, and directed the 1st Interested Party to immediately conclude the procurement process and enter into a contract with the 2nd Interested Party.

4. The ruling by the Respondent of 24th July 2017 on the Applicant's Second Request for Review is the subject of the current judicial review proceedings. The current proceedings were commenced by a Chamber Summons application for leave dated 25th July 2017, which was supported by a statement of even date, and a verifying affidavit sworn on 25th July 2017 by Lai Muthoka, the Applicant's Executive Director. Upon being granted leave, the Applicant filed a substantive application by way of a Notice of Motion dated 2nd August 2017. The Applicant's Advocates on record, Onyoni Opini & Gachuba Advocates, also filed two sets of submissions dated 7th March 2018 and 3rd April 2018 respectively, in support of the application.

5. The Applicant is seeking the following prayers in its application:

> **a) An order of Certiorari to remove to the High Court for purposes of quashing, the entire decision of the Respondent dated 24th July 2017 in Request for Review No. 63/2017 with regard to Request for Proposals for Provision of Strategic Communication and Integrated Media Campaign Consultancy Services (Tender No. IEBC/45/2016-2017).**
>
> **b) An Order of Remission of the matter for re-consideration with directions that the Respondent do direct the 1st Interested Party to re-evaluate the proposal in accordance with section 131-133 of the Public Procurement and Asset Disposal Act 2015.**

6. The said application was opposed by the 1st and 2nd Interested Parties. The 1st Interested Party filed a replying affidavit sworn on 2nd August 2017 by Mahamud Jabane, its Manager for Legal Services, and Grounds of Opposition dated 4th August 2017 that were filed by its Advocates on record, Lubulellah & Associates. The said Advocates also filed submissions dated 21st March 2018. The 2nd Interested Party's Advocates on record, KTK Advocates, also filed Grounds of Opposition dated 1st August 2017 and submissions dated 23rd March 2018. The Respondent did not file any response to the application.

7. When the application came up for hearing on 25th July 2018, the counsel for the Applicant and Interested Parties submitted that they would rely on the pleadings and submissions filed as aforementioned.

The Applicant's Case

8. The Applicant's grounds for the relief sought are firstly, that the Respondent acted illegally by failing to give effect to the procedure of competitive negotiations under sections 132 and 133 of the Public Procurement and Asset Disposal Act 2015, and by failing to find that the 1st Interested Party breached sections 128(1) &(2) of the Act by engaging in consecutive negotiations before declaring the proponent with the highest combined score, and by asking the proponents to reduce their financial proposals.

9. Further, that the Respondent failed to distinguish between the consecutive negotiations prescribed under sections 128 and 129 of the Act, and the competitive negotiations under sections 131 and 133 of the Act. Finally, that the Respondent acted illegally by finding that the Applicant was not entitled to the 20% margin of preference.

10. It was submitted in this regard that section 7(2) of the Fair Administrative Action Act 2015 empowers this Court to review an administrative action if it was materially influenced by an error of law. The Applicant urged that consecutive negotiation as provided for in sections 128 and 129 of the Public Procurement and Asset Disposal Act 2015 limits negotiation to the proponent who has submitted a successful proposal, and leads to the conclusion that negotiations can only take place after notification of an award pursuant to section 87 of the Act.

11. Secondly, that the Respondent failed to consider the 2nd Interested Party's shareholding structure as a basis of application of the margin of preference, and in order to determine whether the Applicant was entitled to a 20% margin of preference.

12. Thirdly, that the Respondent abused its power and violated the Applicant's rights to equal benefit of the law, fair administrative action, access to justice and right to a fair hearing by directing the 1st Interested Party to immediately conclude the procurement process by entering into a contract with the 2nd Interested Party , thereby denying the Applicant the statutory stay of 14 days and foreclosing its right to challenge the same, contrary to section 175(1) of the Public Procurement and Asset Disposal Act 2015.

13. Further, that the Respondent abused its judicial authority by favoring the Interested Parties in the dispute, and failing to direct the 1st Interested Party to re-evaluate the Applicant's and 2nd Interested Party's proposal. That the Respondent thereby frustrated the legislative purpose for which it was established, as it has failed to give effect to fairness, equality and competition contrary to the Constitution and the Public Procurement and Asset Disposal Act 2015.

14. The Applicant averred that it submitted a proposal pursuant to the Request for Proposals and scored a technical score of 82% and that its financial proposal was for Kshs 477,385,312/=, while that of the 2nd Interested Party was Kshs 764,393,224/=; and that they were invited for negotiations by the 1st Interested Party which meant that they were the successful proponent. He attached the Financial Opening Minutes as evidence in support of this averment. However, that the 1st Interested Party also invited the 2nd Interested Party for similar negotiations, which was a mis-application of the consecutive negotiation process

The 1st Interested Party's Case

15. The 1st Interested Party in its replying affidavit gave an account of the events that happened after its request for proposals for Tender No. IEBC/45/2016-17, until the ruling by the Respondent dismissing the Applicant's Request for Review on 24th July 2017, as highlighted in the foregoing. The 1st Interested Party denied having made a declaration or sent any notification to the Applicant that the Applicant's proposal was successful. It stated that the Respondent's decision was valid and legal , and the 1st Interested Party was under a legal obligation to implement the directions given therein.

16. Furthermore, that the 2nd Interested Party has substantially performed the contract and what remains of it is nominal, and the Respondent's decision was made within its discretionary jurisdiction to uphold the greater public interest of ensuring that the rights of the Kenyan electorate are upheld and promoted. In addition, that the Applicant had not established or proved any grounds upon which an order of certiorari may be granted, and that an order of remission of the matter for reconsideration would undermine the Respondent's authority,

and would be an abuse of the judicial review process as it is designed to impose the court's opinion for that of the Respondent.

17. It was also urged that the Respondent's jurisdiction to hear and determine a request for review is limited by law to 21 days after receiving a request , and the High Court may not extend the jurisdiction of the Respondent beyond the statutory limitations to entertain a request for review, even for reconsideration on the basis of a Remission Order.

The 2nd Interested Party's Case

18. The 2nd Interested Party in its grounds of opposition stated that the application was defective, vexatious and an abuse of the process of Court, and any prejudicial orders would have delayed the General Elections process and would not have been in the public interest. Further, that the application had failed to establish that the Respondent acted in absence or excess of jurisdiction or in violation of the law, in entering into negotiations with the 2nd Interested Party. In addition that there is no order of remission in law, and the Applicant had failed to establish that the 2nd Interested Party is non-Kenyan. Therefore that the application discloses no reasonable cause of action.

The Determination

19. The four substantive issues that require to be determined in this application are firstly, whether the Respondent acted illegally in upholding the 1st Interested Party's award of the contract to the 2nd Interested Party pursuant to section 130 and 131 of the Public Procurement and Asset Disposal Act of 2015 (hereinafter "the Act"). Secondly, whether the Respondent made an error of law in failing to apply the 20% margin of preference in favour of the Applicant. Thirdly, whether the Respondent failed to take into account relevant considerations, and lastly, whether the Applicant is entitled to the remedies sought.

20. On the first issue, the Applicant's argument is that the Respondent misinterpreted and misapplied the law applicable to negotiated Request for Proposals under section 128 of the Act vis-a vis competitive negotiated request for proposal under section 131 to 133 of the said Act. According to the Applicant the two are distinct procedures which cannot be intertwined, and that the negotiations under section 128 are limited to the proponent that has submitted the successful proposal, and can therefore only take place after the notification of an award pursuant to section 87 of the Act.

21. However, that in the present case, the 1st Interested Party engaged the Applicant and 2nd Interested Party concurrently without requesting them to submit revised proposals, leading to arbitrary reduction of prices by asking the two bidders to reduce their financial proposals to match the budget, and then found that the two bidders tied in the highest combined score within the meaning of section 131(b) of the Act, thereby using a procedure not known in law. Furthermore, that the competitive negotiations procedure under section 132 of the Act was therefore inapplicable.

22. The 1st Interested party submitted that the Applicant did not raise any complaint on the interpretation or application of sections 128, 129, 130, 131 or 133 of the Act in its Second Request for Review, and cannot raise this argument as it will be an attempt to amend its case for purposes of judicial review. The 1st Interested Party further submitted that it invited the Applicant and 2nd Interested Party for negotiations after their proposals both attained a score of 86% after the preliminary and technical evaluation. As both offers were above the budget allocation, the 1st Interested Party contended that it correctly turned to section 131 and 132 of the Act to negotiate the price, and the Respondent also found that the correct and relevant provision for purposes of undertaking any negotiations was section 131 of the Act. That the negotiations with the two bidders was also in accordance with the principles laid out in Article 227 of the Constitution in the interest of saving costs .

23. The 2nd Interested Party did not submit on this issue.

24. Section 128 of the Act provides as follows as regards negotiations entered into with a person who has submitted a successful proposal:

> **"(1) The accounting officer may negotiate with the person who submitted the successful proposal and may request and permit changes, subject to section 129(1).**
>
> **(2) If the negotiations with the person who submitted the successful proposal do not result in a contract, the accounting officer may negotiate with the second person who submitted the proposal that would have been successful had the successful proposal not been submitted.**
>
> **(3) Despite subsection (1) and (2) of this section, an offer made to any other person shall not have any price advantages over the earlier one."**

25. Section 130 and 131 of the Act on the other hand provide for competitive negotiations as follows:

> **"131. Competitive Negotiations**
>
> **An accounting officer of a procuring entity may conduct competitive negotiations as prescribed where—**
>
> **(a) there is a tie in the lowest evaluated price by two or more tenderers;**
>
> **(b) there is a tie in highest combined score points;**

(c) the lowest evaluated price is in excess of available budget; or

(d) there is an urgent need that can be met by several known suppliers.

132. Procedure for Competitive Negotiations

(1) In the procedure for competitive negotiations, an accounting officer of a procuring entity shall—

(a) identify the tenderers affected by tie;

(b) identify the tenderers that quoted prices above available budget; or

(c) identify the known suppliers as prescribed.

(2) In the case of tenderers that quoted above the available budget, an accounting officer of a procuring entity shall—

(a) reveal its available budget to tenderers; and

(b) limit its invitation to tenderers whose evaluated prices are not more than twenty five percent above the available budget.

(3) An accounting officer of a procuring entity shall request the identified tenderers to revise their tenders by submitting their best and final offer within a period not exceeding seven days.

(4) The revised prices shall not compromise the quality specifications of the original tender.

(5) Tenders shall be evaluated by the evaluation committee appointed in the initial process."

26. In light of the submissions made on this issue by the 1st Interested Party, I perused the Respondent's decision on the Applicant's Second Request for Review dated 24th July 2017 and note that the issue raised therein as regards the procedure adopted by the 1st Interested Party was whether the said procuring entity breached section 132(2)(a) of the Act by failing to disclose its budget for the procurement to the Applicant at the negotiation stage. The Respondent found that the budget was disclosed as recorded in the negotiation report. This finding is not being challenged in the present review proceedings, and also points to acquiescence by the Applicant in its Second Request for Review that indeed section 132 of the Act was applicable.

27. More fundamental though, is the fact that the issue of contravention of section 127, 128, 131, 132 and 133 of the Act was the main issue for determination in the Applicant's First Request for Review, where the arguments made by the Applicant and 1st Interested Party in the present judicial review proceedings were also made before the Respondent. The Respondent in it its decision dated 16th June 2017 found in this respect, that there was nothing wrong in the procuring entity carrying out competitive negotiations with the two bidders in order to obtain a bid that would be within the procuring entity's budget under the provisions of section 131 of the Act.

28. No evidence has been placed before this Court that the said decision by the Respondent on the First Request for Review was overturned on appeal, or quashed by a competent court of law, and the findings therein therefore still stand. Therefore, the Applicant is estopped from raising any issue in the present application about the legality of the procedure applied by the 1st Interested Party by virtue of section 175 (1) of the Act, which requires a person aggrieved by a decision made by the Respondent to seek review within fourteen days, failure of which the decision of the Respondent becomes final and binding.

29. This Court is therefore limited to reviewing the Respondent's decision on the Applicant's Second Request for Review dated 24th July 2017, and cannot determine on any issues raised and decided upon in the Applicant's First Request for Review.

30. The second issue on the application of the 20% margin of preference in favour of the Applicant was one which was considered by the Respondent in its decision on the Second Request for Review. The Applicant submitted in this regard that section 86(2) of the Act provides that a tenderer in which Kenyan citizens own at least 51% shares are entitled to 20% of their total score in evaluation, if they have attained the minimum technical score as part of the award criteria. Furthermore, that section 157(8) provides that preference be given to firms where Kenyan' citizens own 51% shares, who are entitled to 20% margin of preference.

31. However, that the Respondent failed to apply the margin of preference in favour of the Applicant, and the Respondent fell into error by misapplying the law relating to margin of preference when it held that the same is determined and based on registration of a bidder in Kenya, and is not based on shareholding by the citizens of Kenya.

32. Reliance was placed on various judicial decisions including **Henry Asava Mudamba vs Institute of Certified Public Accountants of Kenya (2015) e KLR** and **Kenya Pipeline Company Limited vs Hyosung Ebara Company Limited & 2 Others (2012) e KLR** on instances when a decision maker is deemed to have committed an error of law.

33. The 1st Interested Party on its part submitted that the section 86(2) and 157(8)(a) of the Act did not apply to the tender, as the Applicant did not attain the highest technical score. Further, that the Respondent acted within the law as Applicant has not evidence to justify exclusive preference under section157(8)(a) (ii) of the Act. The 2nd Interested Party on the other hand submitted that it is a public company

incorporated in Kenya under the provisions of the Companies Act , and that even if the Respondent was to apply the margin of preference in favour of the Applicant, it would not have resulted in the Applicant being declared the lowest evaluated bidder in terms of price.

34. In determining the issue at hand, this Court is further guided by the circumstances when a public body shall be deemed to have made an error of law as expounded in **Halsbury's Laws of England, 4th Edition** at paragraph 77 as follows:

> **"There is a general presumption that a public decision making body has no jurisdiction or power to commit an error of law; thus where a body errs in law in reaching a decision or making an order, the court may quash that decision or order. The error of law must be relevant, that is to say it must be an error in the actual making of the decision which affects the decision itself. Even if the error of law is relevant, the court may exercise its discretion not to quash where the decision would have been no different had the error not been committed. Where a notice, order or other instrument made by a public body is unlawful only in part, the whole instrument will be invalid unless the unlawful part can be severed. In certain exceptional cases, the presumption that there is no power or jurisdiction to commit an error of law may be rebutted, in which case the court will not quash for an error of law made within jurisdiction in the narrow sense. The previous law which drew a distinction between errors of law on the face of the record and other errors of law is now obsolete. A public body will err in law if it acts in breach of fundamental human rights; misinterprets a statute, or any other legal document, or a rule of common law, takes a decision on the basis of secondary legislation, or any other act or order, which is itself ultra vires; takes legally irrelevant consideration into account, or fails to take relevant considerations into account, admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence, misdirects itself as to the burden of proof, fails to follow the proper procedure required by law; fails to fulfil an express or implied duty to give reasons or otherwise abuses its power."**

35. The Applicant relied on section 86(2) of the Act, which provides as follows as regards evaluation criteria of a successful tender:

> **"(2) For the avoidance of doubt, citizen contractors, or those entities in which Kenyan citizens own at least fifty-one per cent shares, shall be entitled to twenty percent of their total score in the evaluation, provided the entities or contractors have attained the minimum technical score."**

Section 157 of the Act on the other hand provides for participation by candidate in the allowed preferences, and section 157(8) provides as follows in this regard

> **(8) In applying the preferences and reservations under this section—**
>
> **(a) exclusive preferences shall be given to citizens of Kenya where—**
>
> > **(i) the funding is 100% from the national government or county government or a Kenyan body; and**
> >
> > **(ii) the amounts are below the prescribed threshold;**
> >
> > **(iii) the prescribed threshold for exclusive preference shall be above five hundred million shillings;**
> >
> > **(b) a prescribed margin of preference shall be given—**
> >
> > **(i) in the evaluation of tenders to candidates offering goods manufactured, assembled, mined, extracted or grown in Kenya;**
> >
> > **or**
> >
> > **(ii) works, goods and services where a preference may be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed.**

36. In addition, Article 227(2) of the Constitution provides that:

> **"An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—**
>
> > **(a) categories of preference in the allocation of contracts;**
> >
> > **(b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;**
> >
> > **(c) sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and**
> >
> > **(d) sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices."**

37. The Respondent in its decision dated 24th July 2017 held as follows as regards the application of the above cited statutory provisions and the margin of preference of 20%:

"The second ground of review on the basis of which the Applicant sought to have the decision of the Procuring Entity annulled and which has been captured in issue (c) above is the contention that the Procuring Entity ought to have applied a margin of preference of 20% on the Applicant's negotiated tender price.

The basis for the above assertion was that the Applicant was a wholly owned Kenyan company whereas the majority of the Interested Party's shareholders were foreigners.

The Board has perused all the documents which were submitted to it by all the parties and finds that in order to be entitled to the application of a 20% margin of preference, the Applicant was under a duty to produce evidence to show that it was entitled to the benefit of the application of the provisions of the law relating to preference in it's favour.

This requirement was stated as follows by the High Court on the case of Republic –vs- The Public Procurement Administrative Review Board £x-parte Athi Water (Nai HC JR Misc. APPL. No. 402 of 2016 consolidated with Misc. Appl. No. 405 of 2016

"200: In other words the spirit procurement legalization must of necessity reflect the Constitutional principles relating thereto hence the stipulation that the successful tender shall be the tender with the lowest evaluation price requires that an evaluation be first undertaken and only after the tender passes all the stages of evaluation does the consideration of the lowest tender come into play. Similarly the consideration of preference can only come into play after an evaluation has shown that the tenderer has surmounted the hurdles under Article 227 of the Constitution. To jump to the preference before satisfying oneself that the Constitutional threshold has been met should render the decision to be tainted with illegality which is one of the grounds of issuance of judicial review relief".

The Board has perused all the documents relied upon by the Applicant in an attempt to show that the majority shareholders of the Interested Party were foreigners and finds the only acceptable evidence for establishing the directorship and the shareholding of a company which is registered under the provisions of the Kenya Companies Act is that contained in the documents held by the Registrar of Companies but not that which is contained in Annual Reports, Journals or such other similar documents.

The CR 12 issued by the Registrar of Companies and which was produced by the Applicant as annexture LM6 shows that the following were listed as the directors and shareholders of the Interested Party:-

Names	Address	Nationality	Shares
Bharat Thakrar	P.O. Box 34537-00100, Nairobi	Kenyan	1
Jonathan Neil Egger	P.O. Box 34537-00100, Nairobi	British	Nil
AyubIssaq Ahmed	P.O. Box 34537-00100, Nairobi	Kenyan	Nil
Non Director Shareholder			
WPP Scangroup Ltd	P.O. Box 34537-00100, Nairobi		249,999
Total			250,000

In addition to the CR 12 produced by the Applicant, the Interested Party in the Replying Affidavit sworn by Mr. Reuben Mwangi the Head of Its Legal Department on 19th July 2017, the Interested Party produced a certificate of Registration of WPP Scangroup Limited showing that the said Company was registered under the provisions of the Kenya Companies Act on 15th June 2015.

It is therefore plainly evident from the above two documents that the Interested Party which was the bidder in this tender is a private limited liability company duly incorporated in the Republic of Kenya and that the said company is owned by one Mr Bharat Thakrar who holds 1 share and M/s WPP Scangroup Limited which holds 249,999 shares.

It is additionally evident from the two documents that WPP Scangroup Limited is a Public Company registered in Kenya under the Provisions of the Companies Act.

The Board wishes to observe that it is a principle of basic company law that under the provisions of the Kenyan Companies Act, a company is a separate legal entity from its shareholders and is entitled in its own right to own and hold shares in another company. Where such a company is registered in Kenya, the company is deemed to be a resident and a citizen of Kenya for all intents and purposes and the shares owned or held by it are deemed to be owned or held by a citizen of the Republic of Kenya.

The legal principle that a company is a separate legal entity from its shareholders has been recognized and upheld in several decisions as illustrated by the case *Victor Mabachi & Anor – vs- Nurtun Bates Ltd (Nai CA 247 of 2005)* where the Court of Appeal held that a company as a body corporate is a persona juridicae with a separate independent identity in law, distinct from its shareholders, directors and agents.

Where a company registered in Kenya holds share in another company, it is entirely irrelevant to establish who the shareholders of the company owning or holding shares in another company are for the purposes of applying the law on preference.

It was therefore not necessary for the Procuring Entity to lift the veil and find out who the shareholders of WPP Scangroup Limited were for the purposes of determining whether the Interested Party was a wholly or substantially foreign owned company.

The Board therefore finds based on the undisputed evidence set out above that both the Applicant and the Interested Party companies are wholly owned and controlled by persons who are citizens of the Republic of Kenya and that both fall within the definition of citizen contractors under the definition contained in Section 2 of the Public Procurement and Asset Disposal Act (2105). None of the two companies was therefore entitled to be given preferential treatment over the other and the Procuring Entity was well within its right to declare the Interested Party's bid as the successful bid.

The second ground of the Applicant's Request for Review as framed under issue number III therefore fails and is disallowed.

38. The Respondent in its decision applied company law principles and upheld the separate corporate entity and legal personality of the corporate shareholder of the 2nd Interested Party, as independent and distinct from its members, as was recognised in **Salomon v Salomon & Co Ltd (1897) AC 22,** and further deemed the corporate shareholder of the 2nd Interested party namely WPP Scangroup Ltd to be a Kenyan citizen on account of being registered in Kenya.

39. Section 2 of the Public Procurement and Disposal of Assets Act defines a "citizen contractor" to mean a person or a firm wholly owned and controlled by persons who are citizens of Kenya. The relevant factors that determine citizenship according to the section and for purposes of the application of section 86(2) and 157(8) of the Act is therefore the ownership and control of a firm or company, and not its registration in Kenya. In addition, no distinction is between a parent firm and subsidiary firms in section 2 of the Act, and therefore all firms must be subjected to the same threshold in determining Kenyan citizenship.

40. The reliance on the registration of a firm in Kenya as determining its citizenship for the purposes of the application of the provisions of the Act on margins of preference was thus the first error on record that was made by Respondent, and was ultra vires section 2 of the Act. Its decision that the Applicant and the Interested Party companies are wholly owned and controlled by persons who are citizens of the Republic of Kenya and that both fall within the definition of citizen contractors under the definition contained in Section 2 of the Public Procurement and Asset Disposal Act was thus erroneous as it was based on the wrong application of the law.

41. In addition, the ownership and control of a company stated in section 2 of the Act is by the shareholders, and legally all shareholders are owners of the companies and accordingly have power over the actions of the company. However, in practice, it is usually those with the greater numbers who exercise control over the companies, hence the requirements in section 86(2) of the Act that Kenyan citizens must own at least 51% shares of tenderer, for it to benefit from the 20% margin of preference. The control over a company can also occur by the holding of majority of shares by another company or person as was the case with the 2nd Interested Party.

42. Therefore, section 2 of the Public Procurement Act specifically requires a piercing of the corporate veil to determine who the shareholders of a firm are; their citizenship; and the ownership and control that the said shareholders exert; as a company is a separate legal entity which is independent and distinct from its shareholders. It was held in **Adams v Cape Industries PLC [1990] Ch 433** that the corporate veil could be disregarded in cases where it was being used for a deliberately dishonest purpose or as a device or facade to conceal the true facts, and in cases turning on the wording of particular statutes, which are considered as exceptions to the rule in **Salomon v A Salomon and Co Ltd [1897] AC 22.**

43. Furthermore, in the House of Lords decision in **Prest vs Petrodel Resources Ltd 2013 UKSC 34,** after reviewing various decisions on the subject, Lord Sumption explained the principles that will justify the piercing of the corporate veil as follows:

27. In my view, the principle that the court may be justified in piercing the corporate veil if a company's separate legal personality is being abused for the purpose of some relevant wrongdoing is well established in the authorities. It is true that most of the statements of principle in the authorities are obiter, because the corporate veil was not pierced. It is also true that most cases in which the corporate veil was pierced could have been decided on other grounds. But the consensus that there are circumstances in which the court may pierce the corporate veil is impressive. I would not for my part be willing to explain that consensus out of existence. This is because I think that the recognition of a limited power to pierce the corporate veil in carefully defined circumstances is necessary if the law is not to be disarmed in the face of abuse. I also think that provided the limits are recognised and respected, it is consistent with the general approach of English law to the problems raised by the use of legal concepts to defeat mandatory rules of law.

28.The difficulty is to identify what is a relevant wrongdoing. References to a "facade" or "sham" beg too many questions to provide a satisfactory answer. It seems to me that two distinct principles lie behind these protean terms, and that much confusion has been caused by failing to distinguish between them. They can conveniently be called the concealment principle and the evasion principle. The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not

disregarding the "facade", but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both categories, but in some circumstances the difference between them may be critical. This may be illustrated by reference to those cases in which the court has been thought, rightly or wrongly, to have pierced the corporate veil ……

34.These considerations reflect the broader principle that the corporate veil may be pierced only to prevent the abuse of corporate legal personality. It may be an abuse of the separate legal personality of a company to use it to evade the law or to frustrate its enforcement. It is not an abuse to cause a legal liability to be incurred by the company in the first place. It is not an abuse to rely upon the fact (if it is a fact) that a liability is not the controller's because it is the company's. On the contrary, that is what incorporation is all about…..

35. I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. …"

44. Applying the above principles to the present application, the wording of section 2 of the Public Procurement and Asset Disposal Act of necessity requires that the corporate veil be disregarded, and an interrogation made of all firms that are bidding for tenders under the Act whether as holding or subsidiary firms, so as to determine the application of, and confer the benefits of the margin of preferences set out under section 86(2) and section 157(8) of the Act. Another compelling reason why such lifting of the corporate veil is required is so as to avoid evasion or abuse of the said provisions by firms whose majority ownership or control is not held by Kenyan citizens, by circumventing the requirements demanded by the definition of a citizen contractor in section 2 of the Act .

45. To this extent, the finding by the Respondent that it was not necessary for the procuring entity to lift the veil and find out who the shareholders of WPP Scangroup Limited were, for the purposes of determining whether the 2nd Interested Party was a wholly or substantially foreign owned company was made in error of the law.

46. The Applicant's submissions on the third issue on whether the Respondent failed to take into account relevant considerations were that section 7(2(d) of the Fair Administrative Action Act provides that the court may review the Respondent's decision if it failed to take into account relevant considerations. That in this respect, the Respondent failed to consider whether the 2nd Interested Party's shares were 100% owned by citizens of Kenya after the Applicant had furnished the Respondent with the evidence that only 29% of the 2nd Interested Party's shares were owned by citizens of Kenya. Further that the Applicant also furnished the Respondent with the evidence that its shares were 100% owned by citizens of Kenya. The Applicant contended that the Respondent instead considered an irrelevant issue of where the 2nd Interested Party was registered as a basis of application of the 20% margin of preference.

47. The 1st Interested Party on its part submitted that no evidence has been tendered to show that the tender was 100% funded from the National Government or County Government or a Kenyan Body. Further, that that the 1st Interested Party also relies on donors for support to its electoral processes and that there is no reasonable, factual or legal basis for applying preferences on the tender under litigation. Lastly, that it is the Applicant's legal onus to establish by evidence its entitlement to such preference and it has failed to do so.

48. The 2nd Interested Party's position on this issue was that the Applicant has failed to prove that the Respondent failed to take into account relevant considerations by applying its mind only to the registration and not the shareholding structure of the 2nd Interested Party. Moreover, there was no evidence furnished on the foregoing during the hearing of the case and the same cannot be entertained now as this is an appeal and not a review on the case.

49. A perusal of the decision by the Respondent shows that there was evidence placed before it on the Applicant's and 2nd Interested Party's shareholding which it reproduced in its decision and considered. In particular, the Respondent found that the only acceptable evidence for establishing the directorship and the shareholding of a company which is registered under the provisions of the Kenya Companies Act, is that contained in the documents held by the Registrar of Companies. The Respondent in this respect considered the CR 12 on the 2nd Interested Party's shareholding issued by the Registrar of Companies, and which was produced by the Applicant.

50. The Respondent also considered as material a certificate of registration of WPP Scangroup Limited showing that the said Company was registered under the provisions of the Kenya Companies Act. Finally it also concluded that from the said evidence that where a company registered in Kenya holds share in another company, it is entirely irrelevant to establish who the shareholders of the company owning or holding shares in another company are for the purposes of applying the law on preference.

51. Odunga J. held as follows in **Zachariah Wagunza & Another vs. Office of the Registrar Academic Kenyatta University & 2 Others, (2013) eKLR** on the duty of a decision maker to take into account relevant considerations:

"Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration."

52. In the present case, the Respondent clearly took into account an irrelevant factor of the registration of WPP Scangroup Limited in determining is citizenship status for purposes of the Public Procurement and Disposal of Assets Act, as a result of the errors of law made by

the Respondent as found in the foregoing. It thus follows that the Respondent also erred in failing to consider any evidence that was put before it as regards the shareholders of WPP Scangroup Limited, which was a material factor in determining whether the said company was owned or controlled by Kenyans, and to what extent, pursuant to sections 2, 86(2) and 157(8) of the Act.

53. It is also noteworthy that from the Respondent's decision, it is not evident which evidence it considered in reaching its conclusion that the Applicant was wholly owned and controlled by persons who are citizens of the Republic of Kenya. It is thus the finding of this Court that the Respondent did take into account irrelevant considerations and failed to take into account relevant considerations in reaching its decision on the citizenship of the Applicant and 2nd Interested Party.

54. Lastly, on the remedies sought, the Applicant sought two remedies of certiorari and remission. The Applicant submitted that it had met the threshold for the grant of order of certiorari. As regards the order sought of remission, the Applicant relied on section 11(1)(e) of the Fair Administrative Actions Act, which empowers the High Court to remit the matter to the Respondent with or without declarations, and contended that the hearing then becomes a fresh hearing to be undertaken within 21 days. Further, that section 11 and 12 of the Fair Administrative Actions Act had also expanded on the reliefs that one can seek in judicial review.

55. The 1st Interested Party submitted that the application herein is about a tender that was awarded and the contract signed and implemented prior to the General Elections held on 8th August 2017, and is therefore overtaken by events. Furthermore, that judicial review is a discretionary remedy, and the court will not act in vain bin making orders that are incapable of implementation and serve no useful purpose. Reliance was in this regard placed on the decision in **Peris Wambogo Nyaga vs Kenyatta University (2014) e KLR** .

56. Further, that under section 171 of the Public Procurement and Asset Disposal Act, the Respondent is obligated to complete its review within 21 days after receiving the request for review, and has no jurisdiction to reconsider the request for review outside the statutory timelines, nor does this Court have jurisdiction to order the Respondent to reconsider the same outside the statutory timelines or with predetermined direction. The decision in **Republic vs Municipal Council of Eldoret ex parte Peter Gicharu Ngige (2005) LLR 8519 CAK** was cited for this proposition.

57. The 2nd Interested Party was of the view that the prayer for remission does not fall within the purview of judicial review, and relied on the decisions in **Sanghani Investment Limited vs Officer in Charge of Nairobi Remand Home and Allocation Prison (2007) e KLR** and **Republic vs Cabinet Secretary, Ministry of Interior and Coordination of National Governement & 2 Others ex parte Patricia Olga Howson (2013) e KLR** in this regard. The 2nd Interested Party also cited various judicial decisions on the scope of judicial review remedies, to argue that the Applicant had not demonstrated the allegation that the Respondent had acted in excess of their jurisdiction, and has therefore not met the threshold for the grant of the orders of certiorari.

58. The scope of the remedy of certiorari was discussed by the Court of Appeal in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** *inter alia* that:

> **"an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter."**

59. On the remedy of remission, this Court is granted the inherent powers by section 3A of the Civil Procedure Act to make such orders that are necessary in the interests of justice. Specifically on remission, section 11 (1) of the Fair Administrative Action Act which provides as follows as regards the orders this Court can make in judicial review proceedings which have now been greatly expanded:

> **(1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order-**
>
> **(a) declaring the rights of the parties in respect of any matter to which the administrative action relates;**
>
> **(b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;**
>
> **(c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;**
>
> **(d) prohibiting the administrator from acting in particular manner;**
>
> **(e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;**
>
> **(f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;**
>
> **(g) prohibiting the administrator from acting in a particular manner;**
>
> **(h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;**

(i) granting a temporary interdict or other temporary relief; or

(j) for the award of costs or other pecuniary compensation in appropriate cases.

60. Section 11(1)(e) thus also grants jurisdiction to the Respondent to reconsider any matter that is remitted to it by this Court.

61. The decisions cited by the 2nd Interested Party, namely **Sanghani Investment Limited vs Officer in Charge of Nairobi Remand Home and Allocation Prison (supra)** and **Republic vs Cabinet Secretary, Ministry of Interior and Coordination of National Government & 2 Others ex parte Patricia Olga Howson (supra) e KLR** in this regard addressed the remedies that can be granted under section 8 and 9 of the Law Reform Act, and specifically whether a declaration could issue under the said sections, and not the remedy of remission. Likewise the remedy of remission was not sought, nor was it in issue in **Republic vs Municipal Council of Eldoret ex parte Peter Gicharu Ngige (supra).**

62. This Court has found that the Respondent made various errors of law in its decision dated 24th July 2018, which decision cannot therefore stand, and is amenable for quashing. This Court however notes that the remedy sought of remission by the Applicant is with respect to issues on which it did not succeed, and I will thus grant the appropriate remedy in the circumstances.

63. Arguments have also been made as regards the availability of the said remedies and their practicability, on the ground that there has been substantial performance of the awarded contract by the 2nd Interested Party. As Odunga J. noted at the stage of granting leave in his ruling delivered herein on 4th August 2017, a procuring entity which enters into a contract during the pendency of judicial review proceedings does so at the risk that the Court may quash the decision, and thereby nullify the contract with attendant consequences.

64. In addition, this Court cannot ignore and acquiesce to illegalities or errors of law because it will cause inconvenience or loss to parties, or apply the doctrine of the public interest to condone illegalities, as to do so would encourage impunity in the procurement processes. The decision in **Peris Wambogo Nyaga vs Kenyatta University (supra)** is in this regard distinguished on the ground that the Court found that the public body therein had not committed an illegality.

65. It was also held as follows in this regard by Nyamu J (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati, [2008] KLR 728**,:

> **"Section 2 of the Public Procurement and Disposal Act, 2005 is elaborate on the purpose of the Act and top on the list, is to maximize economy and efficiency as well as to increase public confidence in those procedures. The Act was legislated to hasten or expedite the Procurement Procedures for the benefit of the public…The intention of efficiency is noble and must be appreciated if the development agenda is to be achieved. The Court cannot ignore that objective because it is meant for a wider public good as opposed to an individual who may be dissatisfied with the procuring entity. However the Court must put all public interest considerations in the scales and not only the finality consideration. The said Act also has other objectives namely to promote the integrity and fairness of the procurement procedures and to increase transparency and accountability. Fairness, transparency and accountability are core values of a modern society like Kenya. They are equally important and may not be sacrificed at the altar of finality. The Court must look into each and every case and its circumstances and balance the public interest with that of a dissatisfied applicant."**

66. Therefore any attendant consequences of the orders given herein will have to be deliberated upon by the affected parties, and a decision made thereon if need be, in the appropriate fora.

67. I therefore find that the Applicant's Notice of Motion dated 2nd August 2017is merited and accordingly order as follows:

> **I. An order of Certiorari be and is hereby granted to remove to the High Court for purposes of quashing, the entire decision of the Respondent dated 24th July 2017 in Request for Review No. 63/2017 with regard to Request for Proposals for Provision of Strategic Communication and Integrated Media Campaign Consultancy Services (Tender No. IEBC/45/2016-2017).**
>
> **II. The Applicant's Request for Review No. 63/2017 with regard to Request for Proposals for Provision of Strategic Communication and Integrated Media Campaign Consultancy Services (Tender No. IEBC/45/2016-2017) be and is hereby remitted to the Respondent for reconsideration and re-evaluation of the Applicant's and 2nd Interested Party's proposals and evidence, including the application of the margin of preference, in accordance with the applicable provisions of the Constitution and the Public Procurement and Asset Disposal Act.**

DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF OCTOBER 2018

P. NYAMWEYA

JUDGE