REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 187 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSAL ASSET DISPOSAL ACT, 2015

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSAL REGULATIONS, 2006

AND

IN THE MATTER OF SECTIONS TENDER NO. SEKU/PROC/ONT/032/2017-2018, PROVISION OF CONSULTANCY

SERVICES FOR THE DEVELOPMENT OF BACHELOR OF LAWS (LLB) CURRICULUM

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....RESPONDENT

AND

HASSAN MUTEMBEI & COMPANY ADVOCATES.....INTERESTED PARTY

AND

SOUTH EASTERN KENYA UNIVERSITY..... ..EX PARTE APPLICANT

JUDGMENT

The Parties.

1. The *ex parte* applicant is a public University established pursuant to a Charter granted to it under the Universities Act.[1]

2. The Respondent is Public Procurement Administrative Review Board, a central independent procurement appeals review board established under section **27** of the Public Procurement and Asset Disposal Act[2] (herein after referred to as the act). Its functions pursuant to section **28** of the act are reviewing, hearing and determining tendering and asset disposal disputes; and to perform any other function conferred to it by the Act, Regulations or any other written law.

3. The Interested Party is a law firm registered as a business name and/or advocates of the High Court of Kenya trading in the name and style of M/s Hassan Mutembei & Company Advocates.

Factual matrix.

4. The ex parte applicant states that on or about May 2017, it developed an Annual Procurement Plan for the year 2017/2019 with a budget provision of ***Ksh. 3,000,000/=*** *for the purposes of developing the Bachelor of Laws Curriculum. It further states that in compliance with the act, it a prepared a tender document-Request for Proposals-RFP for "Consultancy Services for the Development of Bachelor of Laws (LLB) Curriculum" being Tender No. SEKU/PROC./ONT/032/2017-2018 and advertised it on* ***30th*** *January 2018.*

5. The ex parte applicant also states that following the advertisement, the University received bids from only two bidders, namely, the Interested Party, and, a one ***Dr. Linda Musumba****. It further states that its tender opening Committee opened the bids on* ***14th*** *February 2018, and, that, the ex parte the Interested Party had quoted a bid sum of* ***Ksh. 16,927,184/=*** *while* ***Dr. Linda Musumba*** *had quoted a bid sum of* ***Ksh. 4,896,500/=.***

6. Additionally, the ex parte applicant states that on or about ***5th*** *March 2018, the Tender Evaluation Committee scrutinized the bid documents and determined that* ***Dr. Linda Musumba*** *did not meet all the conditions hence had failed in the technical evaluation, and, that, the Interested Party was the only bidder who had passed the technical evaluation. Accordingly, the Evaluation Committee did not proceed with financial evaluation which is only done when more than one bidder pass the technical evaluation. In its report, the committee recommended that the procuring entity negotiates the bid/Tender sum with the Interested Party.*

7. Further, the ex parte applicant avers that pursuant to the provisions of the act, on or about ***15th*** *March 2018, its Chief Procurement Officer forwarded to the Vice-Chancellor a Statement of Professional Opinion on the Tender opining that since the budgetary provision was less than what the successful bidder had quoted, under the law, the procuring entity could negotiate with the bidder in order to meet the budgetary sum or it could cancel/terminate the procurement proceedings.*

8. The ex parte applicant further states that on ***3rd*** *May 2018 its Vice Chancellor received the following documents contained in one parcel from the Respondent, namely:- a letter dated* ***16th*** *April 2018 from the Respondent requesting the ex parte applicant to respondent within* ***5*** *days; a Request for Review dated* ***18th*** *April 2018 and a supporting Affidavit; A Notification of Appeal dated* ***19th*** *April 2018; a Hearing Notice dated* ***24th*** *April 2018 indicating that the matter was scheduled for hearing on the* ***2nd*** *May 2018.*

9. Additionally, the ex parte applicant states that the said documents were served to it via Postal Corporation of Kenya EMS Services, Shipment Waybill No. ***0063584*** *on the* ***2nd*** *May 2018 at* ***3*** *PM the same day the Request for Review was being heard. Also, the ex parte applicant states that even though the Request for Review was filed on* ***19th*** *April 2018, the Respondent did not dispatch the documents until the* ***25th*** *April 2018 as evidenced by the Waybill, and, that, considering that there was a weekend and a holiday in the intervening period, the courier had only* ***2*** *days to deliver the parcel.*

10. The ex parte applicant further states that under Regulation ***74(3)*** *of* The Public Procurement and Disposal Regulations, 2006 (herein after referred to as the Regulations), *it is entitled to respond to the Request for Review within* ***7*** *days, hence, it was deprived of the said opportunity. Additionally, the ex parte applicant contends that having received the Request for Review documents and the Hearing Notice after the hearing, it was not possible for it to attend the hearing, and, that, upon perusing the Review Board proceedings, it established that the matter proceeded on* ***2nd*** *May 2018 and the following order was issued:-*

> *a. The Procuring Entity's decision dated* ***5th*** *April 2018 terminating the Tender for Provision of Consultancy Services for the Development of Bachelor of Laws (LLB) Curriculum on Tender No. SEKU/PROC/ONT/032/2017-2018 be annulled and the same is set aside.*
>
> *b. The Procuring Entity is directed enter into a contract Tender for Provisions of Consultancy Services for the Development of Bachelor of Laws (LLB) Curriculum on Tender No. SEKU/PROC/ONT/032/2017-2018 within a period of fourteen (14) days from today's date.*
>
> *c. The applicant is awarded the costs of the Request for Review to be agreed or taxed.*

Legal foundation of the application.

11. The application is founded on grounds that the Respondent acted ultra vires the act, the Regulations, and, that, it violated the rules of Natural Justice by condemning the ex parte applicant un heard.

12. It is contended that the decision is unjust and unfair and that its implementation would amount to violating express provisions of the law and furtherance of an illegality.

13. Additionally, the ex parte applicant contends that the decision is irrational and unreasonable to the extent that it requires the ex parte applicant to commit public funds without any budgetary approval.

14. Lastly, it is contended that the impugned decision violates Articles ***47*** *and* ***50*** *of the Constitution and the Fair Administrative Action Act*[3] *in that the Respondent failed to accord the ex parte applicant equal treatment before the law and an opportunity to be heard.*

The Reliefs sought.

15. As a consequence of the foregoing, the *ex parte* applicant seeks the following orders:-

*a. An order of **Certiorari** to quash the award, order and/or decision of the Public Procurement Administrative Review Board in Public Procurement Administrative Review Board Application No. **53** of 2018 made on the **2nd** May 2018.*

*b. **That** the court be pleased to give such other or further orders as it may find just and expedient in the circumstances.*

*c. **That** the costs of and occasioned by this application be provided for.*

Respondent's Replying Affidavit.

*16. **Philip J. Okumu**, the Respondent's Principal Officer, swore the Replying Affidavit dated **9th** October 2018. He averred that on **19th** April 2018, the Interested Party filed a Request for Review before the Respondent challenging the impugned decision, and, that, the Respondent served a copy upon the ex parte applicant notifying it of the pending Review and requiring it to make an appearance for the hearing of the Review in accordance with Regulations **74(1)(2).***

*17. He also averred that the Respondent held the hearing on **2nd** May 2018, but the ex parte applicant did not attend or request for adjournment, and, in compliance with Regulation **80(a)** the hearing proceeded and judgment was delivered the same day. Further, he averred that the Respondent in making its decision was within its powers as provided under section **173** of the act. Additionally, he averred that the ex parte applicant has not demonstrated that the Respondent was guilty of unreasonable exercise of power in arriving at its decision. He also deposed that the decision was made within the confines of the law after reviewing all the material placed before the Respondent and in line with its mandate to uphold competitive and cost effective public procurement processes. Lastly, he deposed that the ex parte applicant has not demonstrated that the Respondent in arriving at its decision was guilty of an illegality, impropriety of procedure or irrationality to warrant the variance of the decision, and, that, the ex parte applicant is challenging the merits of the decision.*

The Interested Party.

*18. On **21st** May 2018, the firm of **Anyoka & Associates** filed a Notice of Appointment to act for Interested Party, but they never filed any pleadings nor did they participate in the proceedings.*

Issues for determination.

19. Upon analyzing the diametrically opposed facts presented by the parties, I find that the following issues distil themselves for determination, namely:-

a. Whether the impugned decision was tainted by procedural impropriety.

b. Whether the impugned decision is tainted with illegality.

*a. **Whether the impugned decision was tainted by procedural impropriety.***

*20. **Mr. Eric Mutua**, counsel for the ex parte applicant submitted that the ex parte applicant was not granted a hearing, and, that, no hearing notice was served upon it, hence, the decision was in violation of the rules of natural justice. He submitted that the decision violated Articles **47** and **50** of the Constitution and the Right to a Fair Administrative Action Act.*[4] *To buttress his argument, he cited the Indian Supreme Court in Mohinder Singh Gill v Chief Election Commissioner*[5] *where the court traced the roots of natural justice and emphasized its importance in decision making processes. He also cited JMK v MWN & Another*[6] *where the Court of Appeal citing other decisions*[7] *stated that courts have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be affected by a decision before the decision is made.*

*21. Additionally, to further buttress his argument, **Mr. Mutua** relied on the Court of Appeal decision in Judicial Service Commission v Gladys Boss Shollei & Another*[8] *in which the court stated that the right to a fair hearing under Article **50(1)** of the Constitution encompasses several aspects among them the right to be informed of the case against the person, the opportunity to present his side of the story or challenge the case against him, and, the benefit of a public hearing before a court or other independent and impartial body.*

*22. **Miss Ngelechei,** the Respondent's counsel submitted that in making the impugned decision, the Respondent remained faithful to its powers under section **98** of the act, and, that, it acted in accordance with the provisions of Regulation **80(a)** which provides that i*f on the day set for the hearing of a review for which due notification has been given- (a) the applicant appears and the procuring entity fails to appear, the hearing of the request for review shall proceed in the absence of the procuring entity unless the Review Board deems it fit to adjourn the hearing. *Further, counsel submitted that the Respondent has demonstrated that service was effected as required.*

23. As a prelude to resolving the issue under consideration, I find it convenient to start by addressing the basics which are fundamental to the issue at hand. A decision suffers from procedural impropriety if in the process of its making the procedures prescribed by statute are not followed or if the "rules of natural justice' are not adhered to. Decision makers must act fairly in reaching their decisions. This principle applies solely to matters of procedure, as opposed to considering the substance of the decision reached.

24. Broadly, there are three bases on which a decision maker may owe a duty to exercise its functions in accordance with fair procedures. *First,* legislation or another legal instrument which gives a decision making power may impose a duty to follow specific procedures. The requirements relating to procedure contained in the statute or other instrument must be complied with. However, failure to comply with required procedures does not automatically mean that the decision which follows is invalid. The courts take a range of factors into account in deciding whether or not to nullify a decision.

25. *Second,* no-one may be the judge in his or her own cause. This strikes at decision making where the decision maker is connected with the party to the dispute or the subject matter. In this context, justice should not only be done, but should be seen to be done. Consequently, appearance of bias may be as relevant as actual bias.

26. *Third,* no person against whom an adverse decision might be taken should be denied a fair hearing to allow them to put their side of the case. What constitutes a fair hearing depends on the particular circumstances of the case. These include the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it has to work.

27. *Fourth,* statutes often require that decisions made under them to be supported by reasons.

28. The term *procedural impropriety* was used by Lord Diplock in the House of Lords decision *Council of Civil Service Unions v. Minister for the Civil Service**[9]*** to explain that a public authority could be acting *ultra vires* (that is, beyond the power given to it by statute) if it commits a serious procedural error. His Lordship regarded procedural impropriety as one of three broad categories of judicial review, the other two being illegality and irrationality.[10]

29. Procedural impropriety generally encompasses two things: procedural *ultra vires*, where administrative decisions are challenged because a decision-maker has overlooked or failed to properly observe statutory procedural requirements; and common law rules of natural justice and fairness.[11] Lord Diplock noted that "failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice," is a form of procedural impropriety.[12]

30. The common law rules of natural justice consist of two pillars: impartiality (the rule against bias, or *nemo judex in causa sua* – "no one should be a judge in his own cause") and fair hearing (the right to be heard, or *audi alteram partem* – "hear the other side").[13] More recent case law from the UK tends to refer to a duty of public authorities to act fairly rather than to natural justice. One aspect of such a duty is the obligation on authorities in some cases to give effect to procedural legitimate expectations. These are underpinned by the notion that a party that is or will be affected by a decision can expect that he or she will be consulted by the decision-maker before the decision is taken.[14]

31. The courts, using the language of "natural justice" and, more recently and more dramatically, "fairness", have brought about a situation in which a broad range of statutory authorities are subject to the observance of at least a modicum of procedural decency.[15] That a decision is against natural justice does not mean merely that it is against evidence or wrong in law; it means that the decision is such a one that the person appealing has not had his case properly considered by the Judge who decided it.

32. A decision contrary to natural justice is where the presiding Judge or Magistrate or Tribunal or decision maker denies a litigant some right or privilege or benefit to which he is entitled to in the ordinary course of the proceedings, as for instance refusing to allow a litigant to address the court, or where he refuses to allow a witness to be cross-examined, or cases of that kind.[16]

33. Article **47** of the constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[17]Further, there is a right to be given reasons for any person who has been or is likely to be adversely affected by administrative action.[18]Each of these prescriptions fit the recognized grounds for judicial review of administrative actions.

34. The issue that inevitably follows is whether the impugned decision was arrived at in breach of the rules of natural justice. The concept and doctrine of Principles of Natural Justice and its application in Justice delivery system has by now assumed the importance of being, so to say, "*an essential inbuilt component*" of the mechanism, through which decision making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement. It ensures a strong safeguard against any Judicial or administrative; order or action, adversely affecting the substantive rights of the individuals.

35. As was held in *Local Government Board v. Arlidge,**[19]*** *"...those whose duty it is to decide must act Judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a tribunal whose duty it is to meet out justice."* Similarly, in *Snyder v. Massachussets,*[20] the Supreme Court of the United States observed that there was a violation of due process whenever there was a breach of a *"principle of Justice so rooted in the traditions and conscience of our people as to be ranked as fundamental*."

36. More fundamental is the fact that the applicability of the principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not. De Smith, in his *Judicial Review of Administrative Action,*[21] observed, *"Where a statute authorizes interference with properties or other rights and is silent on the question of hearing, the courts would apply rule of universal application and founded on principles of natural justice."* **Wade** in *Administrative Law**[22]*** says that principles of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power.

37. As Sir William Wade in his Administrative Law put it "Natural justice is concerned with the exercise of power, that is to say, with the acts and orders which produce legal results and in some way alter someone's legal position to his disadvantage. The constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations. Generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.[23]

38. Section **4** of the Fair Administrative Act[24] re-echoes Article **47** of the Constitution and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In all cases where a person's rights or fundamental freedoms is likely to be affected by an administrative decision, the administrator must give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision where applicable; a statement of reasons; notice of the

right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action. It is noteworthy that some of these elements are mandatory while some are only required where applicable.

39. Subsection **4**[25] further obliges the administrator to accord affected persons an opportunity: to attend proceedings in person or in the company of an expert of his choice; a chance to be heard; an opportunity to cross-examine persons who give adverse evidence against him; and request for an adjournment of proceedings where necessary to ensure a fair hearing.

40. Procedural fairness contemplated by Article **47** and the Fair Administrative Action Act[26] demands a right to be heard before a decision affecting ones right is made. Whether or not a person was given a fair hearing of his case will depend on the circumstances and the type of the decision to be made. The minimum requirement is that the person gets the chance to present his case. In the most recent edition of De Smith's Judicial Review of Administrative Action, it is asserted:- "The emphasis that the courts have recently placed on an implied duty to exercise discretionary powers fairly must normally be understood to mean a duty to adopt a fair procedure. But there is no doubt that the idea of fairness is also a substantive principle."[27]

41. The standards of fairness are not immutable. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.[28] Accordingly, the courts look at all the circumstances of the case to determine how the demands of fairness should be met.[29] In addition, the foregoing implies that the range of procedural protection will vary, depending on the context, with greater protections in some contexts rather than others. Courts have also used “fairness” as an explanation of other grounds of review. The courts have also used fairness as the explanatory basis for reviewing mistakes of fact. Courts also use fairness to rationalize judicial review of decisions based on “wrongful” or “mistaken” assessments of evidence. However, in all of the above contexts, fairness has operated as a conclusion or explanatory norm of the main ground for judicial review (for example, illegality or substantive legitimate expectations) rather than as the primary norm *per se* by which the relevant administrative decision was judged.

42. There are five mandatory procedures that must be followed when performing an administrative action that has a particular impact on a person or persons. These are that the affected person must be given, before the decision is taken, Adequate notice of the nature and purpose of the proposed administrative action, A reasonable opportunity to make representations; After the decision is taken, A clear statement of the administrative action; Adequate notice of any right of review or internal appeal; and Adequate notice of the right to request reasons.[30]

43. “Adequate notice” means more than just informing a person that an administrative action is being proposed. The person must be given enough time to respond to the planned administrative action.

44. A reasonable opportunity to make representations is a key requirement. The length of time a person should be given to make representations will be different in different circumstances. This should include an opportunity to raise objections, provide new information, or answer charges. A “reasonable opportunity to make representations” can sometimes mean that a person affected by administrative action must be given a hearing where that person can make a verbal input. At other times, it may only mean that a person should be allowed to submit written representations to an administrator who must read and think about them.

45. The Constitution says administrative action must be lawful, reasonable and procedurally fair and that reasons must be given for administrative action that adversely affects rights. There are two parts to the idea of procedural fairness:- It is unfair for an administrator to make a decision that adversely affects someone without consulting them first. Similarly, an administrator should not make a decision affecting someone without first hearing what they have to say. The decision-making process must be free from any real or apparent partiality, bias or prejudice.

46. It should be recalled that section **7 (2)** of the Fair Administrative Action Act[31]provides for grounds of review which include bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power. Thus, for the Court to review an administrative decision, an applicant must demonstrate the above grounds. In fact, not all of them must be proved. Even prove of one of the above is sufficient to invalidate the decision.

47. It is my conclusion that the *ex parte* applicant has demonstrated the existence of procedural impropriety in the circumstances of this case. Put differently, the ex parte applicant has established violation of the principles of Natural Justice and the provisions of Articles 47 and 50 of the Constitution and the Fair Administration Action Act.[32]The documents were received by the *ex parte* applicant on the day the hearing was taking place. In all fairness, that cannot be construed as adequate notice. The *ex parte* applicant was denied the opportunity to be heard.

b. Whether the impugned decision is tainted with illegality.

*48. **Mr. Mutua** submitted that the impugned decision is ultra vires the provisions of the act and the Regulations. He referred to the documents showing that the budgetary provision for the procurement was **Ksh. 2,500,000/=** and that the Interested Party had quoted a sum of **Ksh. 16,927,184/=.** He argued that under section **44(1) (2)(a)** of the act, the accounting officer of a procuring entity is primarily responsible to inter alia ensure that the procurement of goods, works and services of the public entity are within the approved budget of that entity. He also argued that in light of the foregoing provisions, the ex parte applicant's Vice-Chancellor as the accounting Officer relied on the provisions of section **63(1)(b)** of the act to terminate the procurement proceedings. It was his submission that implementing the decision will contravene the law.*

*49. **Miss Ngelechei's** submission was that it is outside the scope of Judicial Review jurisdiction for the court to correct a decision, but can only interfere on grounds of illegality, impropriety of procedure or irrationality.*[33] *She cited Republic v Kenya Revenue Authority ex parte Yaya Towers Limited*[34]*in support of the argument that Judicial Review in not concerned with merits of a decision, but the decision making process and that the purpose of Judicial Review proceedings is to ensure that the individual is given a fair treatment by the authority to which he has been subjected to but not to determine whether the decision is correct in the eyes of the court.*[35]

*50. She also cited Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 Others **[36]** in which it was stated that the*

Review Board is better equipped to handle disputes relating to breach of duty of the procuring entity, hence its decisions in matters within its jurisdiction should not lightly be interfered with. Counsel also argued that an applicant must demonstrate that the tribunal committed an error of law which goes to the jurisdiction of the tribunal, and, that, misinterpretation of the law is not sufficient.

51. Lastly, she argued that this application is an appeal disguised as a Judicial Review application and ought to be dismissed[37]*and that Judicial Review orders are discretionary and the court is not bound to grant them and may decline where the circumstances so warrant.*[38]

52. Again, I deem it fit to start addressing this issue by re-stating the basics. A decision to award a tender constitutes administrative action. An administrative decision is flawed if it is illegal. A decision is illegal if it: - **(a)** contravenes or exceeds the terms of the power which authorizes the making of the decision; **(b)** pursues an objective other than that for which the power to make the decision was conferred; **(c)** is not authorized by any power; **(d)** contravenes or fails to implement a public duty.

53. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations or the Tender terms and conditions. A procuring entity is bound to adhere to the terms of the procurement process. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the ''four corners'' of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments. Where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[39]One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

54. *The ex parte applicant's counsel placed reliance on the provisions of section **44(1)(2)** of the act which provides the responsibilities of the accounting officer in the following words:- **(a)*** An accounting officer of a public entity shall be primarily responsible for ensuring that the public entity complies with the Act; **(b)** ensure that procurements of goods, works and services of the public entity are within approved budget of that entity; **(c)** ensure compliance with sections **68, 147**, **148** and **149** of the Public Finance Management Act;[40] **(g)** ensure the procurement and asset disposal process of the public entity shall comply with this Act; **(j)** ensure compliance with any other responsibilities assigned by this Act or any other Act of Parliament or as may be prescribed in Regulations.

55. Section **68** of the Public Finance Management Act[41] provides for responsibilities of accounting officers for national government entities, Parliament and the Judiciary in the following language:- **(1)** An accounting officer for a national government entity, Parliamentary Service Commission and the Judiciary shall be accountable to the National Assembly for ensuring that the resources of the respective entity for which he or she is the accounting officer are used in a way that is—**(a)** lawful and authorized; and **(b)** effective, efficient, economical and transparent. Subsection (2) of the act provides that in the performance of a function under subsection **(1)**, an accounting officer shall—**(a)** ensure that all expenditure made by the entity complies with subsection **(1).**

56. It is established that the starting point for an evaluation of the proper approach to an assessment of the constitutional validity of outcomes under the State procurement process is Article **277 (1)** of the Constitution. The Article provides that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. The national legislation prescribing the framework within which procurement policy must be implemented is the Public Procurement and Asset Disposal Act[42] (the Act) and The Public Procurement and Disposal Regulations, 2006 (the Regulations). A decision to award a tender constitutes administrative action so the provisions of Article **47** of the Constitution and the Fair Administrative Action Act[43] from which a cause of action for the Judicial Review of administrative action arises, apply to the process.[44]

57. Section **3** of the Act provides that Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—***(a)*** *the national values and principles provided for under Article 10;* ***(b)*** *the equality and freedom from discrimination provided for under Article 27;****(c)*** *affirmative action programmes provided for under for under Articles 55 and 56;* ***(d)*** *principles of integrity under the Leadership and Integrity Act, 2012;* ***(d)*** *the principles of public finance under Article 201;* ***(e)*** *the values and principles of public service as provided for under Article 232;* ***(e)*** *principles governing procurement profession, international norms;* ***(f)*** *maximization of value for money;* ***(g)*** *…and ….*

58. Statutes do not exist in a vacuum.[45] They are located in the context of our contemporary democracy. The rule of law and other fundamental principles of democratic constitutionalism should be presumed to inform the exercise of all official powers unless Parliament expressly excludes them. There may even be some aspects of the rule of law and other democratic fundamentals which Parliament has no power to exclude.[46] The courts should therefore strive to interpret powers in accordance with these principles.

59. *Section **63** of the act provides for termination or cancellation of procurement and asset disposal proceedings in the following words:- **(1)*** An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—**(a)** the subject procurement have been overtaken by—**(i)** operation of law; or **(ii)** substantial technological change; **(b)** inadequate budgetary provision.

60. Clearly, section **63** of the Act imposes a statutory obligation upon the procuring entity to terminate the tender award on any of the grounds stated therein. Those grounds are not stated therein for cosmetic purposes. A tender cancelled under any of the grounds stated in the said provision cannot be said to offend the principle of legality.

61. In order to discharge its burden under section **63** of the Act, all that the Respondent was required to establish is existence of inadequate budgetary provisions. Annexed to the documents filed before the Review Board is a letter dated **5th** April 2017 addressed to the Interested Party clearly stating the reason for the cancellation. Ultimately, the question whether the Respondent provided a reason for the cancellation. There was no material before the Review Board to show that the Interested Party ever questioned the reason given. The question is whether the procuring entity gave a reason for the cancellation. In my view it did which reason falls within the permissible grounds under section **63** of the Act.

62. What must be borne in mind is that public procurement has a constitutional underpinning as clearly stated in Article **227**. In addition, the scheme of the act is such that procurement process must strictly conform to the constitutional dictates of transparency, openness, accountability, fairness and generally the rule of law and such rights cannot be narrowly-construed.

63. In my view, had the review Board considered the constitutional and the statutory underpinning of procurement processes, it would have in my view arrived at a different conclusion. The fact that a matter is heard *ex parte* does not lessen the burden on the part of the Review Board to satisfy itself on such a basic principle of the law, that is, s*ection **63** of the act provides for termination or cancellation of procurement and asset disposal proceedings prior to signing of a contract on grounds of inadequate budgetary provision. This is a legal ground that would in ordinary circumstances turn on the jurisprudential cannons of a decision maker.*

64. In *Council of Civil Service Unions v. Minister for the Civil Service**[47]*** Lord Diplock enumerated a threefold classification of grounds of Judicial Review, any one of which would render an administrative decision and/or action *ultra vires*. These grounds are; *illegality, irrationality* and *procedural impropriety*. Later judicial decisions have incorporated a fourth ground to Lord Diplock's classification, namely; *proportionality.*[48]What Lord Diplock meant by *"Illegality"* as a ground of Judicial Review was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it. His Lordship explained the term *"Irrationality"* by succinctly referring it to *"unreasonableness"* in Wednesbury Case.[49] By *"Procedural Impropriety"* His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere.

65. Judicial intervention is posited on the idea that the objective is to ensure that the agency did remain within the area assigned to it by Parliament. A decision which falls outside that area can therefore be described, interchangeably, as: a decision to which no reasonable decision-maker could have come; or a decision which was not reasonably open in the circumstances.

66. Illegality is divided into two categories: those that, if proved, mean that the public authority was not empowered to take action or make the decision it did; and those that relate to whether the authority exercised its discretion properly. Grounds within the first category are simple *ultra vires* and errors as to precedent facts; while errors of law on the face of the record, making decisions on the basis of insufficient evidence or errors of material facts, taking into account irrelevant considerations or failing to take into account relevant ones, making decisions for improper purposes, fettering of discretion, and failing to fulfill substantive legitimate expectations are grounds within the second category.

67. The *ultra vires* principle is based on the assumption that Judicial Review is legitimated on the ground that the courts are applying the intent of the legislature. Parliament has found it necessary to accord power to ministers, statutory bodies, administrative agencies, local authorities and the like. Such power will always be subject to certain conditions contained in the enabling legislation. The courts' function is to police the boundaries stipulated by Parliament. The *ultra vires* principle was used to achieve this end in two related ways. In a narrow sense it captured the idea that the relevant agency must have the legal capacity to act in relation to the topic in question. In a broader sense the *ultra vires* principle has been used as the vehicle through which to impose a number of constraints on the way in which the power given to the agency has been exercised: it must comply with rules of fair procedure, it must exercise its discretion to attain proper and not improper purposes, it must not act unreasonably etc. The *ultra vires* principle thus conceived provided both the basis for judicial intervention and also established its limits.

68. The power of the court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where **illegality, irrationality** or **procedural impropriety** has been proved. A proper construction of the impugned decision and the relevant provisions of the law cited herein above leave me with no doubt that the impugned action tainted with an error of the law. Put differently, the *ex parte* applicant has demonstrated that the Respondent acted *ultra vires* its statutory mandate and that the decision is tainted with *unreasonableness.*

69. Reasonableness, as a ground for the review of an administrative action is dealt with in Section **7 (2) (k)** of the Fair Administrative Action Act.[50] A court or tribunal has 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. The simple test used throughout is whether the decision in question is one which a reasonable authority could reach. The converse was described by Lord Diplock[51] as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.'

70. The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused. Legal unreasonableness comprises any or all of the following, namely; specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others.[52]

Conclusion and final determination.

71. The role of the court in judicial review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach' Judicial review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere.

72. *Certiorari* issues to quash a decision that is *ultra vires*.[53] Review on a writ of *certiorari* is not a matter of right, but of judicial discretion. A petition for a writ of *certiorari* will be granted only for compelling reasons. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis

of evidence and sound legal principles.

73. Since the grant of the orders or *certiorari*, *mandamus* and *prohibition* is discretionary, the court is entitled to take into account the nature of the process against which Judicial Review is sought and satisfy itself that there is reasonable basis to justify the orders sought. In this regard, it is important to mention that what emerges is that the *ex parte* applicant's decision to cancel the tender has a constitutional and a statutory underpinning. Differently stated, the award was cancelled pursuant to a statutory provision. The Respondents decision was tainted with illegality an its implementation if permitted will offend the principle of legality.

74. In *Daniel Ingida Aluvaala and another vs Council of Legal Education & Another*,[54]I observed that:-

> *"Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decisions to be allowed to stand, it must be demonstrated that the decision is grounded on law.*
>
> *As such, the Respondents actions must conform to the doctrine of legality. Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle which, is inextricably linked to the rule of law. Guidance can be obtained from the South African case of AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another where the court held as follows:-*
>
> *"(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . Public power . . . can be validly exercised only if it is clearly sourced in law"**[55]***
>
> *Courts are similarly constrained by the doctrine of legality, i.e to exercise only those powers bestowed upon them by the law.**[56]** The concomitant obligation to uphold the rule of law and, with it, the doctrine of legality, is self-evident. In this regard, the Respondent is constrained by that doctrine... by ensuring that its decisions conform to the relevant provisions of the law...*
>
> *The respondent has not only a statutory duty but also a moral duty to uphold the law and to see to due compliance with the law and Regulations.... "*

75. In view of my analysis and determinations of the issues discussed above, the conclusion becomes irresistible that the *ex parte* applicant's application dated **17th** May 2018 succeeds. Consequently, I allow the application and order as follows:-

> *a. An order of **Certiorari** be and is hereby issued quashing the award, order and/or decision of the Public Procurement Administrative Review Board in Public Procurement Administrative Review Board Application No. **53** of 2018 made on the **2nd** May 2018.*
>
> *b. **That** no orders as to costs.*

Signed and Dated at Nairobi this **4th** day of **March** 2019

John M. Mativo

Judge

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[1] Act No 42 of 2012.

[2] Act No. 33 of 2015.

[3] Act No. 4 of 2015.

[4] Act No. 4 of 2015.

[5] AIR 1978 SC 551.

[6] {2015} eKLR.

[7] Citing *Onyango v A.G* {1986-1989}EA and *Mbaki & Others v Macharia* {2005] 2EA 206 at page 210.

[8] {2014}eKLR.

[9] *Council of Civil Service Unions v. Minister for the Civil Service* [1984] UKHL 9, [1985] 1 A.C. 374, House of Lords (UK).

[10] Ibid.

[11] *Peter Leyland; Gordon Anthony (2009), "Procedural Impropriety II: The Development of the Rules of Natural Justice/Fairness", Textbook on Administrative Law (6th ed.), Oxford: Oxford University Press, pp. 342–360 at 331, ISBN 978-0-19-921776-2.*

[12] Supra, note 18.

[13] Supra, Note 20, at p 342.

[14] Ibid, page 313.

[15] David J. Mullan, *Natural Justice and Fairness - Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?* http://www.lawjournal.mcgill.ca/userfiles/other/6927003-mullan.pdf.

[16] (1897) 18 N.S.W.R. 282, 288 (S.C.).

[17] Article 47(1) of the Constitution.

[18] Article 47(2) of the Constitution.

[19] {1915} AC 120 (138) HL

[20] {1934} 291 US 97(105)

[21] (1980), at page 161.

[22] (1977) at page 395.

[23] *Kioa v West* (1985), Mason J.

[24] Act No. 4 of 2015.

[25] Ibid.

[26] Act No. 4 of 2015.

[27] See S. De Smith, *Judicial Review ofAdministrativeAction*,4th ed. J. Evans (1980), 352- 4.

[28] See R v. Secretary of State for the Home Department, ex parte Doody [1994] 1 AC 531 at 560.

[29] See also *McInnes v. Onslow*-Fane [1978] 3 All ER 211, where the Court distinguished between application, legitimate expectations, and forfeiture cases to determine the degree of procedural protection required by the situation; the implication is that the strong impact on the individual in forfeiture cases required high level procedural protection (in the form of a right to an unbiased tribunal, right to notice of the charges, and the right to be heard) while the low impact on the individual in application cases required lower levels of procedural protection (which required just the imposition of a duty to reach an honest and non-capricious decision without bias).

[30] Section 6 of the Act

[31] Act No. 4 of 2015

[32] Ibid.

[33] Citing *Pastoli v. Kabale District Local Government Council & Others* {2008}2EA 300.

[34] {2008}eKLR.

[35] Citing *Seventh Day Adventist (EA) v Permanent Secretary, Ministry of Nairobi Metropolitan Development & Another* {2014}eKLR.

[36] {2012}eKLR.

[37] Citing *Municipal Council of Mombasa v Republic & Another* {2002}eKLR.

[38] Citing *Republic v Judicial Service Commission ex parte Pareno* {2004} KLR 203 at 219.

[39] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, Statute Law in New Zealand, 3rd edn. (2003),

pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[40] Act No. 18. of 2012.

[41] Act No. 18. of 2012.

[42] Act No. 33 of 2015.

[43] Act No. 4 of 2015.

[44] See *Minister of Health and another vs New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) paras 95-97; *Bato Star Fishing (Pty) Ltd vs Minister of Environmental Affairs and others* 2004 (4) SA 490 (CC) paras 25-26.

[45] *R. vs Secretary of State for the Home Department Ex p. Pierson* [1998] A.C. 539 at 587 (Lord Steyn: ‘‘Parliament does not legislate in a vacuum. Parliament legislates for a…liberal democracy based upon the traditions of the common law . . . and . . ., unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law’’).

[46] *Jackson vs Attorney General* [2005] UKHL 56; [2006] 1 A.C. 262 at [120] (Lord Hope), [102] (Lord Steyn), [159] (Baroness Hale suggest that the rule of law may have become ‘‘the ultimate controlling factor in our unwritten constitution’’; and see J. Jowell, ‘‘Parliamentarys' Sovereignty under the New Constitutional Hypothesis’’ [2006] P.L. 262.

[47] {1985} AC 374.

[48] See, *R v Secretary of State for Home Department ex. p. Brind* {1991} AC 696, where the House of Lords rejected the test of proportionality, but did not rule it out for the future

[49] *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223.

[50] Act No. 4 of 2015.

[51] {1976} UKHL 6; {1976} 3 All ER 665 at 697{1976} UKHL 6; , {1977} AC 1014 at 1064.

[52] Justin Gleeson, “Taking stock after Li”, in Debbie Mortimer (ed) Administrative Justice and its Availability (Federation Press, 2015) 37.

[53] See *Paul Kiplagat Birgen & 25 Others v Interim Independent Electoral Commission & 2 Others* {2011} eKLR.

[54] Pet No. 254 of 2017.

[55] AAA Investments (Pty) Ltd v Micro Finance Regulatory Council [2006] ZACC 9; 2007 (1) SA 343 (CC).

[56] National Director of Public Prosecutions vs Zuma, Harms DP.