



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A)

CIVIL APPEAL NO. 65 OF 2016

BETWEEN

KENYA MEDICAL SUPPLIES AUTHORITY.....APPELLANT

VERSUS

REVITAL HEALTH (EPZ) LIMITED.....1ST RESPONDENT

PUBLIC PROCUREMENT OVERSIGHT AUTHORITY...2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

(Appeal from a Judgment and decree of the High Court of Kenya at Mombasa, (Muriithi, J.) dated 29th October, 2015

in

Constitutional Petition No. 75 of 2015)

JUDGMENT OF THE COURT

The appellant invited bids for the supply of syringes by a public advertisement as Tender No. KEMSA/KHSSP - OIT11/2011 - 2013 PROCUREMENT OF NON - PHARMACEUTICALS (LOTS). The funding of the tender was expressed in the Invitation for Bids (IFB) as a credit to the Kenya Government from the International Development Association (IDA) towards the cost of Health Sector Support Project (HSSP). IDA is established in the Articles of Association of the International Bank of Reconstruction and Development, whose object is poverty reduction by providing interest-free credits and grants for programmes that enhance economic growth, reduce inequalities and improve people's living conditions. Kenya is a member of IDA by virtue of the provisions of the International Development Association Act (Cap. 465). IDA as a full juridical personality has the capacity to, among other things contract. Participation in the tender was through **'the international competitive bidding procedures specified in the World Bank's Guidelines: Procurement under IBRD Loans and IDA Credits'**.

The bid for the 1st respondent, a manufacturer of medical products was unsuccessful. Clause 38 of the Instructions to Bidders (ITB) incorporating the World Bank Guidelines stipulates that:

“38. (1) Prior to the expiration of the period of bid validity, the Purchaser will notify the successful Bidder in writing by registered letter or by cable, to be subsequently confirmed in writing by registered letter, that its bid has been accepted.

38. (2) The notification of award will constitute the formation of the Contract.

38. (3) Upon the successful Bidder’s furnishing of the signed Contract Form and performance security pursuant to ITB Clause 40, the Purchaser will promptly notify each unsuccessful Bidder and will discharge its bid security, pursuant to ITB Clause 19.” (Our emphasis).

Pursuant to this, the successful bidder was notified of the award and by operation of the foregoing provision, a contract was concluded. Thereafter, the 1st respondent and other unsuccessful bidders were notified. This course was sanctioned by **sections 6 and 7** of the Public Procurement and Disposal Act, 2005 (PPDA) which state that:

“6. (1) Where any provision of this Act conflicts with any obligations of the Republic of Kenya arising from a treaty or other agreement to which Kenya is a party, this Act shall prevail except in instances of negotiated grants or loans.

7. (1) If there is a conflict between this Act, the regulations or any directions of the Authority and a condition imposed by the donor of funds, the condition shall prevail with respect to a procurement that uses those funds and no others”. (Our emphasis).

The dispute leading to this appeal revolves around these provisions because they tend to give preferential treatment to winners of tenders that are donor funded. Specifically, it was contended that by permitting parties to conclude the contract before those whose bid are not successful are notified, the aforesaid **sections 6 and 7** and Clause 38.3 ran afoul to **Article 47** of the Constitution, which guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair; and where there is likelihood of that person’s right or fundamental freedom being adversely affected by an administrative action, the person has the right to be given written reasons for the action. It was also argued that **section 67**, the PPDA was equally breached. The section provides for simultaneous notification of the outcome of the tender to all participating entities and prohibits conclusion of the contract before the expiration of at least fourteen days following the notification of the results. It provides that;

“67. (1) Before the expiry of the period during which tenders must remain valid, the procuring entity shall notify the person submitting the successful tender that his tender has been accepted.

(2) At the same time as the person submitting the successful tender is notified, the procuring entity shall notify all other persons submitting tenders that their tenders were not successful.

.....

68. (2) The written contract shall be entered into within the period specified in the notification under section 67(1) but not until at least fourteen days have elapsed following the giving of that notification.

(3) No contract is formed between the person submitting the successful tender and the procuring entity until the written contract is entered into”. (Emphasis supplied).

It appears to us that the 1st respondent was not, *per se* aggrieved by the outcome of the tender but by the terms of the contract which are sanctioned by the provisions of **sections 6 and 7** aforesaid. Indeed before the court below, the 1st respondent’s submissions were limited to the question of whether **sections 6 and 7** were in violation of the Constitution to the extent that they oust the machinery for fair administrative action.

Its bid having failed and convinced that there was a friction between **sections 6** and **7** aforesaid and Clause 38 of the ITB incorporating the World Bank Guidelines on the one hand and Article 47 of the Constitution on the other hand, the 1st respondent petitioned the High Court to;

“(a)..... find that Clause 38.3 of..... Tender No. KEMSA/KHSSP-OIT11/2011-2013 PROCUREMENT OF NON PHARMACEUTICALS (LOTS) contravenes the Constitution as it offends the provisions of Article 47 of the Constitution and as such any award by the 2nd Defendant to the successful bidder of the 2nd Respondent’s Tender No. KEMSA/KHSSP-OIT11/2011-2013 PROCUREMENT OF NON PHARMACEUTICALS (LOTS) for LOT 4 should be declared null and void.

(b) direct the 2nd Respondent to commence a new procurement process to procure the products so specified in the 2nd Respondent’s Tender No. KEMSA/KHSSP-OIT11/2011 - 2013 PROCUREMENT OF NON PHARMACEUTICALS (LOTS) for LOT 4 in line with the provisions of the Constitution.

(c).....declare that the 1st and 3rd Respondents have failed to advise the 2nd Respondent, the 1st, 2nd, and 3rd Interested Parties and the petitioner on the constitutionality of Clause 38.3 of the 2nd Respondent’s Tender No. KEMSA/KHSSP-OIT11/2011-2013 PROCUREMENT OF NON PHARMACEUTICALS (LOTS) being in conflict with section 9 (sic) of the Public Procurement and Disposal Act and Article 47 of the Constitution thereby causing the petitioner to suffer great loss and damage.

(d).....issue a conservatory order.....prohibiting any further execution and or satisfaction by the 2nd Respondent and or any other party of the Tender No. KEMSA/KHSSP-OIT11/2011-2013 PROCUREMENT OF NON PHARMACEUTICALS (LOTS) for Lot 4.

(e).....grant an order to the 1st and 2nd Respondent that the petitioner is constitutionally entitled to all information held by the 2nd Respondent into the application, evaluation and implementation of the Tender No. KEMSA/KHSSP-OIT11/2011-2013 PROCUREMENT OF NON PHARMACEUTICALS (LOTS).

(f).....determine the appropriate manner of awarding compensation to the petitioner to compensate for the petitioner’s suffering, losses and damages arising for the Respondent’s violations of the petitioner’s fundamental rights and freedoms.

(g) Costs of this Petition.

(h) Damages and or any other relief provided by the Court”.

In other words, and relevant to this appeal, the petition only questioned the constitutionality of Clause 38.3 and to the extent that **sections 6** and **7** of the PPDA, exempts the operation of **section 67(2)** in cases of donor funds, they too were inconsistent with the Constitution and therefore void.

The combined effect of the submissions of the appellant and the parties on its side was that, by **Article 2 (6)** of the Constitution, any treaty or agreement signed or entered into by the State became part of the law of Kenya and would prevail in case of conflict with the provisions of the PPDA in terms of **sections 6 (1)** and **7 (1)** of the Act; that by virtue of **section 6(1)**, tenders at the instance of multi-lateral donors, like World Bank and its affiliates are exempt from operations of the Act; that that provision is based on both good sense and logic and therefore such agreements cannot be subjected to municipal laws; that the 1st respondent had failed to establish any basis for the alleged violations; that the 1st respondent was estopped from challenging the constitutionality of **section 6(1)** of the Act because it had freely and fully participated in the tender process and was at all times aware that it was financed by IDA and conducted through the international bidding procedures under the World Bank Guidelines on procurement; that those

guidelines provided specific remedies and avenues for redress; that the 1st respondent had been furnished with all the information it had requested for and also promptly given reasons why its bid was unsuccessful.

The 1st respondent submitted that the agreement or the guidelines in question did not constitute law as contemplated under **Article 2 (6)** of the Constitution, as properly found by the learned Judge; that only Parliament, under the Constitution, is vested with the power to make law; that Clause 38.3 was in complete breach of **section 67 (1) and (2)** of the Public Procurement & Disposal Act (repealed) which when read with **section 93 (2) (c)** of the same Act denied the 1st respondent the right of review of the tender award; and that the learned Judge so rightly found.

The learned Judge was of the view that, from the submissions made before him by counsel for the 1st respondent, the exact scope of reliefs sought could be narrowed down to exclude some of the claims like the right to information and the right to fair hearing, which had been made in the petition. In the learned Judge's estimation, through that elimination only three issues were left for his determination;

“(a) Whether the provisions of section 6(1) and 7(1) of PPDA are unconstitutional.

(b) Whether the PPDA apply to the procurement the subject of this petition.

(c) Whether Clause 38.3 of the 2nd Respondent’s Tender is unconstitutional”.

Ultimately, and in answer to the above questions, the learned Judge came to the conclusion that **sections 6(1) 7(1)** are not inconsistent with the Constitution; but, that Clause 38.3 of the tender was unconstitutional for offending the provisions of **Article 47** of the Constitution on fair administrative action; that the 1st respondent’s constitutional right to fair administrative action under **Article 47** of the Constitution was violated by the use of the World Bank’s Guidelines which did not afford it an opportunity for administrative review, judicial review or appeal on the merits against the procurement process and the award of the tender to the successful bidder; and that as a consequence, the 1st respondent was entitled to damages for breach of its right to fair administrative action, the quantum of which **“would be determined upon presentation by the parties of submissions thereon together with any relevant affidavits as the parties would wish to present”**.

We have carefully considered the brief written submissions in which the appellant sought to persuade us to find that the learned Judge improperly found that **Article 47** was violated by Clause 38.3 and that he further committed a grave error in holding that Clause 38.3 was equally in violation of **section 67** of the Public Procurement and Disposal Act. The respondent, which on the other hand, has submitted that the tender in question did not constitute a treaty or convention as contemplated in **Article 2(6)** of the Constitution; that the learned Judge properly directed himself on the violation of **section 67** by Clause 38.8; and that it did not conform to **section 4(3) (c)** of the Fair Administrative Action Act.

On a first appeal from the decision of the High Court, we remind ourselves that our role is to reconsider the evidence on record, evaluate it afresh and draw our own conclusions. See **Kenya Ports Authority V Kuston (Kenya) Limited** (2009) 2EA 212. We begin our consideration of the appeal by making reference to **Article 227(1)** of the Constitution of Kenya which requires that:

“227. (1) 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.

(2) 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)

(b)

(c)

(d)” (our emphasis).

At the time of trial, the law in place was the Public Procurement and Disposal Act, 2005 (No. 3 of 2005), which was subsequently repealed by the Public Procurement and Asset Disposal Act, 2015. The object of the former, it was stated, was to establish procedures for procurement that would;

“(a)

(b)**promote competition and ensure that competitors are treated fairly;**

(c)**promote the integrity and fairness of those procedures;**

(d) **increase transparency and accountability in those procedures;**

(e).....**increase public confidence in those procedures; and**

(f)

Like the learned Judge, we are satisfied that **sections 6(1) and 7 (1)** are not inconsistent with the Constitution. As a matter of fact, in its amended petition the 1st respondent did not pray for any declaration with regard to **sections 6 (1) and 7 (1)**. It is Clause 38.3 that it asked the court to declare to be in contravention;

“.....**of the Constitution as it offends the provisions of article 47 of the Constitution and as such any award by the 2nd Defendant to the successful bidder of the 2nd Respondent’s Tendershould be declared null and void”.**

We reiterate that it was the case for the 1st respondent that Clause 38.3 was inconsistent with **Article 47** of the Constitution for it permitted the conclusion of the contract with the successful bidder even before it was notified of its failed bid, thereby denying it an avenue and opportunity to seek administrative review.

Under **Article 2**, only general rules of international law, treaties and conventions ratified by Kenya form part of the law of Kenya. Secondly by the same Article any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of it Constitution is equally invalid. First it is only upon showing that Clause 38.3, made pursuant to World Bank Guidelines was a treaty or a convention and therefore law that the question of it being inconsistent with the Constitution can be raised. Of course any act whatsoever or omission that is in contravention of the Constitution is equally invalid. By **section 5** of the International Development Association Act, the World Bank Guidelines have the force of law. This fact takes us to the question, whether Clause 38.3 contravened **Article 47** which, as we said earlier guarantees the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair; the right to be given written reasons for any action that may be adverse.

Pursuant to **sub-Article (3) of Article 47**, Parliament has enacted the Fair Administrative Action Act. It was contended that **section 4(3) (c)** was also violated. That section provides as follows;

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

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

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable....”

On 21st June, 2012, the 1st respondent was notified that its bid was unsuccessful. On 25th June, 2012, just five days later, and in terms of Clause 38.4, the 1st respondent sought to know why it was unsuccessful. Promptly, on 13th July, 2012, the appellant replied giving reasons why the 1st respondent’s bid had failed.

In terms of Clause 26, all the bids were to be opened in public in the presence of bidders’ representatives. They were to be opened one at a time and read out and at the end of the exercise, the appellant was enjoined to prepare minutes of the exercise, which were to be signed by bidders’ representatives.

After both the successful and unsuccessful parties had been notified of the outcome, the appellant was required to publish the details of the results of the bid in **UNDB online** and in **dgMarket**. The successful bidder had 28 days from the date of receipt of the contract form to sign and date the contract. None of these steps have been alleged to have been violated. These steps, in our view are in consonance with the spirit of **Article 47** of the Constitution and **section 4 (3) (c)** of the Fair Administrative Action Act.

What is in contention, however is the provision that permits the purchaser and the successful bidder to conclude the contract before the unsuccessful bidders are notified of their failed bids. It was argued that that arrangement denied the 1st respondent a chance to challenge the award. We do not think, for the reasons below, that that *per se* would be sufficient reason to hold that the clause contravenes the fair administrative action to which the 1st respondent was entitled under the Constitution and statute.

In compliance with **section 4 (3)** of the Fair Administrative Action Act, the appellant was availed an opportunity to make representations and was given reasons why its bid failed. Under **Section 5(2)** of Fair Administrative Action Act, the 1st respondent was free to exercise its right to-

“(a) challenge any administrative action or decision in accordance with the procedure set out under the Commission on Administrative Justice Act, 2011 or any successor to the Commission on Administrative Justice under section 55 of the Commission on Administrative Justice Act;

(b) apply for review of an administrative action or decision by a court of competent jurisdiction in exercise of his or her right under the Constitution or any written law; or

(c) institute such legal proceedings for such remedies as may be available under any written law”.

The inevitable conclusion we must reach is that the learned Judge erred in finding that Clause 38.3 of the tender was inconsistent with **Article 47** of the Constitution for not affording an opportunity to the 1st respondent to challenge the award of tender or the procurement process through administrative review, judicial review or appeal on the merits. No such conclusion could be reached upon reading the relevant provisions of the Constitution and statutes.

For those reasons, the appeal succeeds. We accordingly allow it with costs, set aside the judgment and decree of the High Court issued on 29th October, 2015.

Dated and delivered at Mombasa this 23rd day of June, 2017.

ASIKE – MAKHANDIA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

*I certify that this is a true
copy of the original.*

DEPUTY REGISTRAR