THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 93 OF 2020

[ARISING FROM THE TRIBUNAL RULING DATED 22ND OCTOBER 2020 IN APPLICATION NO.10 OF 2020)

MBARARA UNIVERSITY OF SCIENCE & TECHNOLOGY …….…… APPELLANT

VERSUS

1. **PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY**
2. **M/S STEAM INVESTMENTS (U) LTD…….……. RESPONDENTS**

BEFORE: HON. JUSTICE SSEKAANA MUSA

JUDGMENT

This Appeal is against the decision of the PPDA Appeals Tribunal dated 22nd October 2020 brought by Mbarara University Science and Technology under Section 91 M of the PPDA Act 2003 as amended, Section 16 of the Judicature Act Cap 13 and Order 43 of the Civil Procedure Rules seeking orders that;

1. That judgment of the Public Procurement and Disposal of Public Assets Appeals Tribunal dated 22nd October 2020, delivered at Kampala in Application No. 10 of 2020, awarding the Respondent the reliefs and remedies be set aside.
2. The decisions of the 2nd Respondent dated 3rd August 2020 and 22nd September 2020 as well as any order and directions as stated therein and actions that arose out of the same be set aside.
3. The decision of the Appellants Accounting Officer dated 25th June 2020 and all actions and directions as stated therein as well as actions that arose out of the same be restored.
4. That the Appellant recovers the costs of this Appeal.

The Appellant's Orders prayed for are based on the following grounds;

1. That the Public Procurement and Disposal of the Public Assets Appeals Tribunal erred in law and fact when it ruled that the Applicant executed a contract with M/s Block Technical Services Limited during the period of Administrative Review.

2. That Public Procurement and Disposal of Public Assets Appeals Tribunal erred in law and fact when upheld the erroneous decision of the 1st Respondent dated 3rd August 2020, allowing payment of administrative review fees out of the statutory prescribed period.
3. That the Public Procurement and Disposal of Public Assets Appeals Tribunal erred in law and fact when it ruled that the guidance of the Accounting Officer was perfunctory and thus that it was done to defeat Administrative Review process
4. That the Public Procurement and Disposal of Public Assets Appeals Tribunal erred in law and fact when I failed to consider the submissions of the Applicant on the non-authentic and verified documents presented by the second respondent M/s Steam Investments (U) Limited
5. That the Public Procurement and Disposal of Public Assets Appeals Tribunal erred in law and fact when it awarded costs against the Applicant on the basis of insufficiency guidance by the Accounting Officer and execution of the contract during the Administrative Review period.

Back ground

The Appellant initiated the procurement for the construction of the Faculty of Computing and Informatics Block Phase 2 at its Kihumuro main campus. On 4th June 2020, the Appellant's contracts Committee awarded the contract for the construction of the Faculty of Computing and Informatics Block Phase 2 to Block Technical Services at a contract price of UGX. 6,294,863,880

Being dissatisfied with the reasons given by the Appellant for elimination of its bid, the 2nd Respondent applied for administrative review to the Appellant's Accounting Officer on 19th June 2020. The application for administrative review was accompanied by a bank transfer form of UGX. 5,000,000/= as administrative review fees to Mbarara University of Science and Technology's Bank of Baroda Bank Account No. 95050200000293

On 25th June 2020, the Accounting Officer dismissed the application on the ground that the Appellant did not receive the payment of the administrative review fees since the 2nd Respondent made the payment on an account that had been closed on 4th July 2019 on the instructions of the Ministry of Finance Planning and Economics Development to all commercial banks.

On 2nd July 2020, the 2nd Respondent applied for administrative review to the 1st Respondent on the ground that the Appellant's Accounting Officer wrongfully dismissed its application for payment of administrative review fees to a non-existent bank account.

The 1st Respondent considered the application for Administrative Review and on 3rd August 2020, upheld it on the ground that the Accounting Officer wrongly dismissed the application

since the 2nd Respondent had paid the administrative review fees as evidenced by Bank of Baroda transaction on 18th June 2020. The 1st Respondent directed the Accounting Officer to guide the 2nd Respondent on which Bank account to pay the fees within three days of the guidance and handle the application on its merits

On 4th August, 2020, the Accounting Officer provided a payment link to the 2nd Respondent; payments.must.ac.ug for purpose of payment of administrative review fees and further provided Mr. Frank Turyatunga as the contact in case of the need for technical assistance.

On the 10th August 2020, the Appellant's Accounting Officer requested for guidance from the 1st Respondent given that payment of administrative review fees had not been received from the 2nd Respondent within 3 day window as guided by the 1st Respondent's directive

On 11th August 2020, the 2nd Respondent wrote to the Accounting Officer, expressing frustration with using the payment link and non-corporation of the contact provided

On 13th August 2020, the 1st Respondent further guided the Accounting Officer to advise the 2nd Respondent to use any other method of payment provided under paragraph 2 of the PPDA Guideline 1/2017 on guidance on administrative review fees if the payment link provided was not working

On 18th August 2020, the Appellant's Accounting Officer for administrative review for failure to comply with the 3 days window provided to pay the Administrative review fees in the 1st Respondent's decision.

On 24t August 2020, the 2nd Respondent being dissatisfied with the decision of the Accounting Officer dated 18th August 2020, made a fresh application for administrative review to the 1st Respondent on the ground that the Accounting Officer was unjustified in dismissing their application for failure to pay Administrative Review fees.

On 26th August 2020, the 1st Respondent suspended the procurement process with the exception of the requirement to extend the bid validates of all the bidders. The Appellant was also reminded to extend bid validities at the hearing conducted before the 1st Respondent on 9th September 2020

On 22nd September 2020, the 1st Respondent upheld the application on the ground that whereas the 2nd Respondent was provided with a link for purposes of payment of Administrative Review fees, the Appellant's Accounting Officer failed to sufficiently guide the bidder on how to use the link payments.must.ac.ug which is a payment platform for various student's fees, with no provision for administrative review fees and therefore there was an intention to defeat the process of payment of administrative review fees when the

entity failed to address the challenges faced by the 2nd Respondent in effecting the payment through the link provided.

On 23rd September 2020, the Appellant's Accounting Officer, complying with the ruling of the 1st Respondent guided the 2nd Respondent on the necessary steps to follow in making payments through the link

On 26th September 2020, the 2nd Respondent paid UGX 5,000,000 as administrative review fees on Account No. 000000006397 in Post Bank using the guidance provided by the Appellant's Accounting Officer in the letter dated 23rd September 2020

On 6th October 2020, the Appellant appealed to the PPDA Appeals Tribunal against the decision of the 1st Respondent, raising threes substantive issues

During the proceedings before the Tribunal, the 1st Respondent shockingly learnt that the bids had expired on 21st September 2020 and the Appellant had not extended the bid validities. Furthermore, that the Appellant had executed a contract with Block Technical Services, the best evaluated bidder on the 11th August 2020 during the administrative review period

On 21st October 2020, the Tribunal dismissed the Appellant's appeal affirmed the decision of the 1st Respondent with regard to the issue of payment of administrative review fees and set aside the illegal contract executed between the Appellant and Block Technical Services Ltd.

Counsel for the Respondent before the address of the Appeal raised preliminary objections, which are;

i) The Appellant is estopped to bring this appeal before this honourable court for reasons that it partially and substantially implemented the decision it challenged before the tribunal and before this honourable court.
ii) That this Appeal is an abuse of judicial process for which this honourable court should not condone.
iii) That this Appeal is brought in bad faith, it is illegal, and a violation of the procurement laws and process.
iv) That the Appellant comes to this honourable court with dirty hands yet the maxim is "he who seeks equity must come with clean hands or do equity".

It is to my attention that counsel for the appellant raised preliminary objections before the appeal should be heard, however having addressed my mind to them, I will later handle the Appeal as is, because the issues raised in the preliminary objections happen to intertwine with the case at hand. So in this regard the Appeal shall be heard on its merit.

Representation

The Appellant was represented by *Mr. Mugumya Timothy*, 1st Respondent was represented by *Ms Mary Akiror* and the 2nd Respondent was represented by *Mr. Kigenyi Emmanuel*.

Duty of Court

It is true that the duty of this Court as first appellate court is to re-evaluate evidence and come up with its own conclusion.

This position was reiterated by the Supreme in the case of ***Kifamunte Henry v Uganda SCCA No. 10 of 1997***, where it was held that;

> "*The first appellate court has a duty to review the evidence the evidence of the case and to reconsider the materials before the trial Judge. The appellate Court must make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it*."

I have taken the above principles into account as I consider the Appeal. I have considered the record of proceedings and the lower Court/tribunal and have considered the written submissions of both parties.

Whether the Accounting Officer was right to dismiss the 2nd Respondents application for Administrative Review?

Counsel for the Appellant, defined Administrative review as the process of handling complaints arising out of alleged breaches of the procurement law. An administrative review is initiated when a complaint from a bidder is made, claiming to have lost or is at the risk of losing a tender due to a breach of procurement law or as a result of errant actions by a Procuring and Disposing Entity or competitors. When a complaint is lodged, the Administrative Review (i.e. the Accounting Officer or PPDA) re-examines how the Procuring and Disposing Entity managed the procurement process to determine whether it was carried out in accordance with the law. However, before the same can happen and to have a valid complaint worth investigating before the Accounting Officer the following must be clearly done.

a) A complaint is first submitted to the Accounting Officer upon payment of a prescribed fee
b) A complaint should be submitted within 10 working days from the date the bidder first became aware or ought to have become aware of the facts giving rise to the complaint

The requirements of an application for Administrative review are clearly pointed out in **Section 90 and 91 of the PPDA Act 2003** as amended and paramount to that is it should be accompanied with payment of the relevant administrative review fees and lodged within the prescribed time.

Section 90 (1) (a) of the PPDA Act 2003 states the requirements of an administrative review application/ complaint to the Accounting Officer and in particular requires that:

a) *It shall be in writing and shall be submitted to the Accounting Officer of the procuring and disposing entity with the prescribed fee, and a copy shall be given to the Authority*
b) *It shall be made within ten working days from the date the bidder first becomes aware or ought to have become aware of the circumstances giving rise to the complaint.*

Regulation 11 (1) of the PPDA Regulations (Administrative Review) 2014, provides that *the fees for Administrative Review shall be paid to the procuring and disposal entity on submission of the complaint in accordance to the schedules provided there in.*

Regulation 6 (1) (a), 2 and 3 of the PPDA Regulations (Administrative Review) 2014, provides that *an investigation by the Accounting Officer can only be carried out by the Accounting Officer if the Administrative review fees have been paid by the Applicant and received by the entity, otherwise, the matter should be dismissed without investigation.*

Looking at **Regulation 6 (1) (a)** as seen above, reading with emphasis on the word "shall" making it mandatory, (1) An Accounting Officer shall not investigate a complaint where- (a) the complaint does not fulfill the requirement of **Regulation 4 and Section 90 (1) (a) of the Act and Regulation 6 (4)** states that a bidder who is aggrieved by a decision of the Accounting Officer made under sub regulation (3), may within ten working days from the receipt of the notification from the Accounting Officer, make a complaint to the Authority.

Counsel for the Appellant submitted that in the instant case, that the 2nd Respondent M/S Steam's application did not fulfill all the above requirements, as its Application for Administrative Review dated April 17th June, 2020, because it was not accompanied by the Administrative Review fee. The 2nd Respondent on its own volition and without the guidance of the Entity/Appellants' Accounting Officer dated 25th June 2020, the Accounting Officer attempted to put the same in an account the Appellant had apparently guided them on paying for a previous Administrative Review 3 years ago in the first phase of this project but which is now unfortunately a non-operational account

Counsel further submits that the Respondent, confirmed that it paid the money on that account as it had ever paid to the same account way back in 2017 when it applied for Administrative Review to the Appellant instead of seeking fresh guidance as shown in the Accounting Officers response. (Item 9 page 117 paragraph 3 (c). It is for this lack of inquiry and negligence on the part of the 2nd Respondent that the 2nd Respondent ended up attempting to pay on a closed account, hence breaching the provisions of **Section 90 of the PPDA Act** and locking themselves out of the Administrative process for having an incompetent complaint (paragraph 5 (c) page 117)

The Government of Uganda had issued a directive to all commercial banks through Ministry of Finance, Planning and Economic Development to close all existing revenue collection Accounts of all universities and other tertiary institutions by 30th June 2019. Therefore, the account on which they had paid fees on was closed way back and thus payment of Administrative Review fees were not effected as required by law (Item 12 and 16). Counsel further submitted that from the facts and looking at the previous inquiry by the 2nd Respondent under item 15 of the record of Appeal which is in line with the PPDA Guidelines 1/2017 on Administrative Review fees specifically guideline 1 (a) and (b) that state that the Accounting Officer shall provide guidance to a bidder seeking administrative review on the value of the Administrative review and they will use the same guidance to pay, it goes without saying that in guiding the bidder on the value they would also be guided on where to pay like was done in the past. Equity assists the vigilant and from the facts, the 2nd respondent was not vigilant enough to make inquiries and only has itself to blame for the attempted payment to a non-operational account. He further submits that courts of law are enjoined to apply jointly the principles of equity, good conscience and natural justice when arriving at a decision.

Counsel cited the case of **Galleria in Africa Ltd v. Uganda Electricity Distribution Co. Ltd Supreme Court Civil Appeal No.8 of 2017 page 9, Hon. Justice Mwondha** JSC held in a dispute in which the issue was whether non-compliance with formal requirements of the PPDA Act and Regulations was fatal, that, "*The provisions of the PPDA are the life engine of its objectives. The provisions in issue are clear. The objectives of the Act for all purposes and intents are to achieve fairness, transparency and value for money procurement, among others. Therefore, breach of the provisions is not a mere irregularity since it goes to the core of the Act*"

It was thus counsel's submission that payment of the prescribed fee for an Administrative Review to be heard by the accounting officer is not a minor irregularity or flimsy ground but a condition precedent as stipulated in **Section 90 (1) (a) of the PPDA Act, 2003** as amended. This argument is buttressed by the impugned decision of the authority dated 3rd August, 2020 that made payment of the fees a condition to be fulfilled by the 2nd respondent M/S Steam, before the accounting officer could handle their complaint on its merits. It is for the same reason that the accounting officer of the entity justifiably dismissed Steam's application by his decision dated 25th June, 2020 in line with the law. (Item 17). There was no complaint before the accounting officer as the same had not met the required prescribed form as stipulated by the law since the prescribed fees had not been paid which in effect locked the 2nd respondent out of the administrative review process hence the dismissal.

Counsel for the 1st Respondent submitted that **Section 90 (7) (a) of the PPDA Act, 2003**, provides that a contract shall not be entered into by an accounting officer with a provider during the administrative review period. The 1st respondent submits that the administrative review process/period commences at the accounting officer and ends at the PPDA Act, 2003. At

tribunal rightly found that the administrative review period under **Part VII of the Act** is both sequential and continuous. In other words, the time period is unbroken and runs until all the processes provided for under Part VII are exhausted. At paragraph 9 page 6 of its decision, the Tribunal further found that the 1st respondent made its decision on 3rd August 2020 and any aggrieved party could appeal against that decision to the tribunal within 10 working days which expired on the 17th August 2020

The 1st respondent further submits that the accounting officer had 15 working days within which to issue a decision on the application for administrative review since the 1st respondent had issued a decision directing the appellant to guide the 2nd respondent on how and where to pay administrative review fees within three days of the decision and handle the application on its merits and the appellant did not appeal the 1st respondent's decision and therefore was bound to comply before the expiry of the administrative review timeline. In the instant case, the appellant breached the provision of **Section 90 (7) (a) of the PPDA Act, 2003** when it executed a contract with Block Technical Services Limited on the 11th August 2020 during the administrative review period citing the case of **Galleria in Africa Ltd v. Uganda Electricity Distribution Co. Ltd Supreme Court Civil Appeal No.8 of 2017 page 9**

He further cited the case of **Roko Construction Limited v. PPDA & Seyani Brothers Ltd (HCCS No. 59 of 2019), Lady Justice Mugambe** in dealing with the issue of a contract signed during the administrative review period, held that, "*An illegally procured contract under the PPDA Act cannot be successfully defended by any section under the Regulations. No provision in the Act or Regulations can bar the Tribunal and Court from addressing an illegality once brought to its attention. Also in* ***Makula International Limited v. His Eminence Cardinal Nsubuga [1982] HCB 11,*** *it was held that a Court cannot sanction what is illegal and an illegality once brought to the attention of the Court overrides all questions of pleadings including submissions made thereon. No Court ought to enforce obligations alleged to arise out of a contract or transaction which is illegal if the illegality is brought to the notice of the Court*"

The 1st Respondent, submitted that the applicant could not proceed to sign a contract without completion of the administrative review process as set out in the Act and the Regulations and therefore, the signing of the contract by the accounting officer during the administrative review period was in breach of the provisions of **Section 90 (7) (a) of the PPDA Act 2003**. The contract between the entity and Block Technical Services Ltd was signed on 11th August 2020, five days after the decision of the 1st Respondent. The administrative review process was still ongoing since:

i. Following the decision of the 1st Respondent, there is a window or period of ten working days within which a contract should not have been signed under **Section 91 L (1) (c) of the PPDA Act, 2003;** and/or

ii. The administrative review process had not been concluded since there was a pending application before the accounting officer following the decision of the 1st respondent.

Counsel for the 2nd Respondent submitted that this issue was determined by the Authority in the 2nd Respondent's application of the 17th June, 2020 and the authority gave its decision in respect of the same. The decision was duly implemented by the appellant in its letter dated 4th August 2020.

He further submitted that the appellant bringing back this issue is an abuse of court process for it to argue an issue it complied with and never appealed the authority's decision in respect of the same to the tribunal. This appeal is not against the decision of the authority in the application of the 17th June 2020, but it's against the decision of the tribunal and we pray that this issue is disregarded with the contempt it deserves.

Analysis

According to Justice Stephen Mubiru in the case of **Public Procurement and Disposal of Public Assets Authority v. Peace Gloria (Civil Appeal-2016/6) [2017] UGHCCD 11** "*The Public Procurement and Disposal of Public Assets Tribunal lies at the apex of the administrative review structures in the area of public procurement and disposal of public assets. This administrative review structure, comprising both internal and external review options, provides a mechanism by which a person can seek redress against a procurement decision made by a procurement entity that affects them. It also provides a mechanism for an inexpensive and expeditious rectification of such decisions if they are wrong. It is comprised of four tiers; at the lowest ranks are the primary decision makers constituted by the procurement organs of the various procurement entities such as the Evaluation Committees, Contracts Committees and so on. A person aggrieved by decisions taken at that level has recourse to the next tier which is that of the Senior Management level of the procurement entity.*

This usually is at the level of the Accounting Officer of the entity. That level marks the end of the internal administrative review process. Internal review is easy for applicants to access, and enables a quicker and more inexpensive means of re-examining decisions where applicants believe a mistake has been made. A person aggrieved by the internal review mechanisms, then has recourse to the two tiers of external review constituted first by an application to the appellant (The Public Procurement and Disposal of Public Assets Authority) and finally by an application to the Public Procurement and Disposal of Public Assets Tribunal."

According to the facts, the 1st Respondent relied on Section 91 L (1) (c) of the PPDA Act, 2003, that the administrative review process was still ongoing since:

i. Following the decision of the 1st Respondent, there is a window or period of ten working days within which a contract should not have been signed under **Section 91 L (1) (c) of the PPDA Act, 2003;** and/or

ii. The administrative review process had not been concluded since there was a pending application before the accounting officer following the decision of the 1st respondent.

To which I agree with because the matter was now out of his hands and now to the authority. In such an instance this would be contempt of the decision given by the authority. Like counsel for the 2nd Respondent reiterated this issue was determined by the Authority in the 2nd Respondent's application of the 17th June, 2020 and the authority gave its decision in respect of the same. The decision was duly implemented by the appellant in its letter dated 4th August 2020 and bringing back this issue is an abuse of court process for it to argue an issue it complied with and never appealed the authority's decision in respect of the same to the tribunal.

I therefore state that the accounting officer was wrong to dismiss the 2nd Respondents application for administrative review

Whether the 1st Respondent had the legal mandate to investigate, hear and determine the 2nd Respondent's complaint to it and order payment of administrative review fees outside the statutory period?

Counsel submitted that the 2nd respondent dissatisfied with the said decision, appealed to the Authority/1st Respondent on the 2nd day of July, 2020 and the Authority by its decision dated 3rd August, 2020 ruled in its favor and directed that 2nd Respondent be allowed to pay the administrative review fees within three days of the accounting officer's guidance, well outside the prescribed statutory timelines. (Items 18, 19 and 20)

It is also counsel's submission that the Authority acted ultra vires when it handled the appeal in both instances a position; they claim to have raised before the Authority and the Tribunal but was overruled. It's was their submission that the authority had no jurisdiction to refer the matter back to the accounting officer with instructions as to allow the 2nd Respondent pay administrative review fees as its power under **Section 91 (2) of the PPDA Act 2003,** as amended are limited. **Regulations 9 (1) (c) and (2) of the PPDA Regulations (administrative review) 2014,** state that the authority determines that the complaint does not comply with **Sections 90 and 91 of the Act. Regulations 9 (2) and (3)** states that *the same should be dismissed without investigation and the dismissal should be communicated in writing to the complaint* and **Regulation 9 (4)** provides for Appeal to the Tribunal by an aggrieved complainant of the decision but does not specify any timelines. This was a case where clearly administrative review

fees have not been paid by the complaint/2nd Respondent and one the Authority should have dismissed, however it opted not to do so but order them to pay the fees out of the prescribed period contrary to the law.

Counsel further cites **Section 91 (2) (a) and (b) of the PPDA Act 2003,** stating clearly and limiting the powers conferred upon the Authority in case it does not dismiss a claim and these are;

a) To prohibit a procuring and disposing entity from taking any further action; or
b) Annual in whole or in part an unlawful act or decision made by the procuring and disposing entity

None of them raises any residual powers to order payment of fees past the prescribed time, as was ordered by the 1st Respondent in its ruling an action we consider ultra vires and should be set aside, from what comes out from the facts the decision of the accounting officer was not lawful in any way but within the confines of the law.

It was counsel's submission that that the drafters of these legislations clearly didn't intend for the authority and the entity through the accounting officer to investigate and handle a complaint where the complainant does not fulfill the requirements of **Section 90 and 91** but to dismiss without investigation such a complaint as it is considered incompetent and warrants dismissal. The authority therefore had no locus handling the appeal either the first time or the second time as the complaint filed by M/S Steam /2nd Respondent was incompetent from the onset for lack of paying the administrative review fees in the prescribed time and hence it locked itself out of the administrative review process.

Counsel for the appellant cited the case of **M/S ETC Agro Tractors & Implements Ltd v. PPDA. App. No. 9/2014**, the applicant flouted the provisions of the law **Section 90 (1) (a) of the PPDA Act 2003** requiring an application for administrative review to be accompanied by the prescribed fee, the authority declined to consider the application for review of the decision of the accounting officer holding that failure to pay the prescribed fees rendered the application incompetent, null and void. This ruling was upheld by the tribunal on appeal. In making its decision the authority stated that the complaint had been dismissed by the accounting officer for non-payment of fees, the applicant was not properly before the authority which rendered the complaint incompetent and warranted its dismissal by the authority.

This means that an administrative authority must act within the powers conferred upon it by the legislature may well be considered the foundation of administrative law and administrative power is generally derived from legislation. Legislation confers power on administrative authorities for specified purposes, sometimes laying down the procedure to be followed in respect of exercise of such power or abuses power, such acts are liable to be rendered invalid

on the ground of substantive ultra vires. When an administrative authority acts in contravention of mandatory rules stipulated in the legislation or does not comply with the principles of natural justice, such acts are liable to be rendered invalid on the ground of procedural ultra vires. Thus the general presumption is that the legislature, when conferring powers on administrative authorities, does not intend that those authorities should exceed or abuse that power.

Counsel submitted that in the instant case, the authority disregarded the legislation and acted ultra vires the same hence its actions were illegal. This means that the accounting officer's action to dismiss the complaint filed by the 2nd Respondent for flouting the prescribed period for payment of administrative review fees was valid and the actions of the authority to investigate and order the 1st Respondent to pay the administrative review fees out of the statutory period, were ultra vires. In **Makula International Limited v. His Eminence Cardinal Nsubuga [1982] HCB 11,** it was held *that a court of law cannot sanction what is illegal and illegality once bought to the attention of court overrides all questions of pleadings, including any admissions made thereon.* The same was held in **Uganda Railways Corporation v. Ekwaru & others C.A No. 185 of 20.**

According to the facts, it's clear there were illegalities by the 1st Respondent in its handling of the complaint before it and the Tribunal cast a blind eye to the same and opted to gloss over and sanitize these illegalities. This in the applicant's view was erroneous in law and fact, it amounted to a miscarriage of justice and was prejudicial to both the appellant and the best evaluated bidder M/S Block Technical Services Ltd. The illegalities associated with the ultra vires actions of the 1st respondent in breach of the mandatory provisions of **Regulations 9 (1) (c) and (2) as well as Regulation 9 (2) and (3) of the PPDA Regulations of the PPDA Regulations (Administrative Review) 2014**, and the disregard of this irregularity by the Tribunal amount to sufficient cause to set aside both the Tribunal and the 2nd Respondents rulings and hence the restoration of the appellants accounting officers decision and actions arising out of the same.

Counsel for the 1st Respondent submitted that the tribunal at paragraph 2 and 3, page 11 of its decision, at page 21 of the record, relied on its previous decision in **International Procurement Consultants v. PPDA (Application No. 14 of 2015)**, which is fortified by the decision of **Lawrence Muwanga v. Stephen Kyeyune (SCCA No. 12 of 2001)** to the effect that court has residual powers to order a party to pay proper fees and such an order is made in the interest of justice. The PPDA Appeals tribunal therefore rightly found that the court has residual powers to order a party to pay proper fees and such an order is made in the interest of justice. The 1st respondent submits that it would be a gross injustice for a bidder who has paid the right amount of administrative review fees to be disadvantage on the basis that such payment has been made to a closed account where such bidder could not have reasonably been expected to

know that the accounts had been closed since it was not privy to the instructions of the Ministry of Finance.

Counsel cited **Article 126 (2) (e) of the Constitution** enjoins courts to ensure that substantive justice is rendered without undue regard to technicalities and therefore it would be in the interest of justice to enable the 2nd Respondent pay the fees on a right account.

The 1st respondent further submits that a party cannot approbate and reprobate at the same time. Having implemented the decision of the 1st respondent by providing sufficient guidance to the 2nd respondent on 23rd September 2020, the appellant cannot turn around to allege that such decision of the tribunal was ultra vires. In the case of **Stephen Seruwagi Kavuma v. Barclays Bank Uganda Limited (HCMA No. 634 of 2010)** cited by the 2nd respondent, to the effect that, it is well known principle of equity that one cannot approbate and reprobate all at the same time. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "*a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then, turn round and say it is void for the purpose of securing some other advantage*," (**See. Verschures Creameries Ltd v. Hull & Netherlands Steamship Co. Ltd, (1921) 2 KB 608, at p.612 per Scrutton, L.J.)**

The 1st respondent therefore submits that the appellant is estopped from challenging the decision of the 1st respondent having acted on the same.

Counsel for the respondent did not submit on issue 2

Analysis

Like I cited earlier on, that The Public Procurement and Disposal of Public Assets Tribunal lies at the apex of the administrative review structures in the area of public procurement and disposal of public assets. As per the facts, the Authority had already given a decision which was acted upon by the Appellant, however seemed to have changed their mind in half way of performance.

If the Appellant felt they were not in agreement with the decision they would have appealed against it rather than act on it half way. Their half way acting on it meant they had agreed to it. Just like counsel for the 1st Respondent stated "that a party cannot approbate and reprobate at the same time. Having implemented the decision of the 1st respondent by providing sufficient guidance to the 2nd respondent on 23rd September 2020, the appellant cannot turn around to allege that such decision of the tribunal was ultra vires."

It is in this regard that I agree with the 1st Respondent that the Appellant is estopped from challenging the decision of the Authority. Secondly, the appellant never challenged the same before the tribunal; therefore the same cannot be a subject of appeal in this court.

Whether the guidance given by the accounting Officer was sufficient or perfunctory?

Counsel submitted that the Tribunal in its ruling upheld the ruling of the 1st Respondent dated 22nd September 2020 that the Appellants guidance was insufficient and perfunctory in nature and intended to defeat the payment of administrative review fees by failing to address the challenges faced by the 2nd Respondent. It is our submission that this was an erroneous decision and to the detriment of the appellant as the best evaluated bidder had already started on the works. In order to determine if this was so, it was counsel's submission that it would be imperative for this honourable court to re-evaluate the evidence on record asking itself a few questions in the process, including but not limited to, how the guidance in question was phrased and why as well as what the reasons for the claim of insufficient guidance by the 2nd Respondent were, when they were raised and how they were proved and if their actions were justified.

The guidance given by the accounting officer is as follows;

4th AUGUST 2020 GUIDANCE BY THE ACCOUNTING OFFICER

"Following the decision of the PPDA regarding your application for administrative review in respect of ……., the following is the link to enable you pay the fees: payments.must.ac.ug. In case of need for technical assistance in effecting the payment, please get in touch with Mr. Frank Turyatunga at fturyatunga@must.ac.ug or phones 0772-572953/0752-572953."

Looking at the above guidance it should be noted that this guidance provided the only one way to pay the entity as the same link was designed by Uganda Revenue Authority, which collects all government revenue and is the only way money can be paid and reflected as coming from an activity of the entity/appellant specifically as it goes to the consolidated fund where it would be hard to determine from whom it comes.

This states the response of the Respondent's complaint after the guidance;

11TH AUGUST 2020 COMPLAINT BY TE 2ND RESPONDENT

"Whereas you provided a link to enable us pay the fees namely: payments.must.ac.ug. When we go to the link the system requires an invoice No. and Student Registration Number which of course do not apply to our situation.

We have tried to seek assistance from Mr. Turyatunga at Mobile Tel Nos. 0772-572953/0752-572953 but he has refused to pick up our phone calls and the two times he has picked (when we used different numbers) he hung up as soon as he realized it was Steam Investments Ltd.

In the circumstances we hereby appeal to you to request your officer to co-operate rather than engage in tactics to frustrate us."

As seen from the complaint above, the above guidance was given to the 2nd Respondent by the Appellants accounting officers on the 4th of August 2020, the 2nd Respondent then had a 3 day window in which it was permitted to pay the fees and this was up to 7th August 2020. The 2nd Respondent did not effect the payment within the prescribed 3 day window and only complained about the challenges of use of the web link and accessing Mr. Frank Turyatunga on the 11th of August 2020 a day after the accounting officer had written a letter to the authority informing it of the 2nd Respondent's non-compliance with its decision. This to us was clearly an afterthought.

Counsel submitted that that it is evidently clear that the 2nd Respondent had various ways they could have informed the entity, as can be seen in the letter of advice of payment given by the accounting officer dated 4th day of August, 2020 which included phone numbers and emails and it's our submission that none of these were used by the said 2nd Respondent during the three (3) day period (4th to 7th August, 2020), despite attempts to claim otherwise.

Counsel submitted on the question on sufficiency, that it would really be easily answered using the reasonable man standard/test and if the decision making of the 2nd Respondent would fall within this standard or were their actions negligent. This test asks the question of how a reasonable person would have behaved in circumstances similar to those in which the 2nd respondent was presented with at the time and if their actions were reasonable or negligent. It's our position that the 2nd Respondent was negligent in action and we shall prove it hereunder;

a) Delayed and after thought complaint

From the facts presented the 2nd Respondent was presented in the accounting officer's guidance with options on how to pay the administrative review fees and what to do if it faces any challenges, including contacting Mr. Frank Turyatunga by email or phone call.

It would be expected therefore that as claimed in the complaint above having failed to use the link to pay, they would have tried to contact Mr. Turyatunga by either means or better still communicated to the accounting officer of their challenges within the 3 day period. However, from the facts it's clear that the only complaint in writing they could present was the afterthought complaint dated 11th August 2020, 5 days after the 3 day grace period window to pay fees had elapsed

b) Fraudulent/Non-Authentic call data records

The 2nd Respondent further its claim that they were facing challenges using the link in the guidance given by the accounting officer and had shared the same with the entity, insists that he never used the alternative mode of communication of emailing the entity when they encountered a challenge with payment as they opted to use the option of calling but that the accounting officer kept them engaged on phone promising to sort out the issue and guide them better until the 3 day period run out. Take note that it further stated on its own violation that it could buttress its claim with verified copies of telephone print out showing their managing director in contact with the accounting officer and had made several attempts to reach Mr. Frank Turyatunga.

The 2nd Respondent indeed submitted to the authority on 15th September 2020 the "alleged" MTN Call data print outs showing calls between their managing director and the accounting officer of the authorities detailed ruling that were later proven to be forged/non-authentic by the MTN expert before the Tribunal hence fraudulently acquired. It did not share any proof that he indeed contacted Mr. Frank Turyatunga on phone at all.

Counsel further submitted that looking at all these claims and allegations by the 2nd Respondent in the facts presented, it's clear that there was no proof that the 2nd Respondent attempted to contact the Appellant accounting officer and neither did they attempt to contact the person they had been given to assist them Mr. Frank Turyatunga, but to the contrary their actions after thought complaints and presentation of fraudulent call data records, go a long way to prove our case that they were to cover up their negligence.

It is then counsel's confirmation that the 2nd Respondent failed the reasonable man test and their negligence should not be visited on the appellant or the best evaluated bidder and the Tribunal as well as the 1st Respondent were unjustified to ignore all this especially the fraudulent data call records and decide that the guidance was insufficient. **(See, Makula International Ltd v. His Eminence Cardinal Nsubuga & Anor (1982) HCB 11**, on court sanctioning illegalities once brought to their attention above). It is not in dispute that use of the link may have needed technical assistance and indeed for that same reason the accounting officer clearly provided a technical person to assist the 2nd Respondent, whom they could contact through telephone call or email.

Counsel submitted that the issue is ***whether they indeed attempted to use any of these options within the 3 day window to attempt to pay fees*** and it's our submission that they did not and hence were locked out of the administrative review period and had to resort to aforethought complaints and fraudulent documents to buttress the same. This means the guidance was sufficient and the tribunal was wrong to ignore all the facts and uphold the 1st Respondent ruling dated 22nd September stating it was not. Had the 2nd Respondent for any

reason found any challenges with the same it would have been only prudent for them to bring the same to the attention of the Appellant through any of the available options in the guidance given.

The 1st Respondent indeed following these communications wrote back to the accounting officer in a letter dated 13th August 2020, 6 days after 3-day grace period had expired, in which they were directing him to guide the 2nd Respondent on other modes of payment if the payment link is not working. The accounting officer in a letter dated 18th August 2020 to the 2nd Respondent and copying in the 1st Respondent informed them that it cannot handle the complaint of the 1st Respondent which had been filed earlier on 19th June 2020 as they had failed to pay the administrative review fees contrary to the law and reiterated its earlier dismissal. It also informed the parties that the advice of the 1st Respondent though appreciated was functus officio as the same had already pronounced itself on the matter in its ruling of 3rd August 2020

Counsel for the 1st Respondent submitted that on 3rd August 2020, it issued a decision in which it directed the Appellant's accounting officer to guide the 2nd Respondent on how and where to pay the administrative review fees within three days. The decision was however not implemented by the appellant, notwithstanding the fact that it was not appealed against and therefore was binding on the appellant. The appellant's letter dated 4th August 2020 page 169 of the record of appeal is perfunctory to the effect that it provided the 2nd Respondent only a link (payments.must.ac.ug), which is a payment platform for various students' fees with no provision for administrative review fees, with no further instructions on how to use or access the link.

Counsel submitted that this letter can be contrasted with appellant's letter issued on 23rd September 2020 after the 1st Respondent's decision dated 22nd September 2020. The letter dated 23rd September 2020, marked R21 at page 146 of the record of appeal provided detailed and sufficient guidance to the 2nd Respondent on how to make payment of the administrative review fees using the link. In the letter dated 4th August 2020, the accounting officer failed to sufficiently guide the bidder on how to use the link to pay administrative review fees and therefore did not comply with the 1st Respondent's decision dated 3rd August 2020. As submitted by Counsel that the required guidance on payment of administrative review fees was provided to the 2nd Respondent on 23rd September 2020 after a contract had been signed on 11th August 2020 during the administrative review period and the bids had expired, which disadvantaged the 2nd Respondent's since its statutory right to administrative review was frustrated.

The tribunal therefore rightly found that the appellant's letter dated 4th August 2020 was perfunctory since it did not sufficiently guide the 2nd Respondent on how to pay the

administrative review fees and that by providing sufficient guidance on 23rd September 2020 after a contract had been signed during the administrative review period and the bids had expired. The appellant's accounting officer acted in bad faith and with intent to frustrate the 2nd Respondent's right to exercise the remedy of administrative review.

Counsel for the 2nd Respondent submitted that this issue does not arise from the decision of the Tribunal and pray the same is disregarded. Be that as it may, the guidance by the accounting officer was not sufficient and perfunctory. As it was rightly observed by the 1st Respondent, when a detailed procedure was given by the appellant a payment of UGX. 5,000,000 (Five million) was made. This fortifies our submissions that the earlier guidance was insufficient. Adopting our response and submission before the tribunal at page 139 of the record of proceedings

Analysis

The Appellant claims to have guided the 2nd Respondents sufficiently. Through his communication of a link and contact person in case of any challenges, while the 2nd respondent in his response claims the link given required Invoice No. and Student Registration Number, and the contact person never picked calls for assistance and when they picked it was only after the 2nd Respondent used a different number.

Perfunctory has been defined to mean "*performed merely as a routine; hasty and superficial or lacking interest, care, or enthusiasm, indifferent or apathetic*" **(See. Dictionary.com)**

As earlier on stated in the 1st Respondent's submission, the 3 day window was one to provide the 2nd Respondent with all the required information to pay for the administrative review fees and not the process of filing an administrative review complaint. The fact that earlier on the account provided was closed, it was human to direct the 2nd Respondent accordingly. The reason I defined the term "Perfunctory" before dwelling on these facts is to analyze the actions/attitude of the Appellant after the decision by the 1st Respondent given. Their actions and attitude clearly put in context the definition above. They were requested to avail other options but only availed one, which one had already issues attached to it. For an Entity such as Mbarara University, to only have one account collecting all monies coming to the university is very difficult to believe. This leaves a lot of questions to be answered by the management.

Their actions/attitudes prove that they did not want to abide with the decision, however they had to so. The Appellant's act of signing the contract with another firm while the process was going on, already shows that they did merely as a routine lacking any interest or care in the matter before them. They only wanted to frustrate the 2nd Respondent. Thus the guidance given by the accounting officer was perfunctory.

Whether the tribunal was right to disregard the non – authentic call records submitted by the 2nd respondent and if the same guided the decision of the 1st respondent?

Counsel for the appellant submitted that the tribunal was wrong to disregard the non-authentic call records presented to the 1st respondent in an attempt to prove its case. This is so for a number of reasons one is that an illegality was unearthed by the appellant before the tribunal indeed by presenting a witness with primary evidence on the same issue and court cannot be seen to ignore and gloss over illegalities

Secondly the respondent furnished the authority fraudulent call data records to buttress their claim that they were in touch with the accounting officer of the appellant who wasted their time and caused them to be locked out of 3 day grace period granted by the authority to pay the fees, without these calls data records then there would be no proof that they attempted to pay the fees and failed and were not assisted by the entity apart from their afterthought letter dated 11th August 2020. The question still remains, how did the authority or the tribunal justify that the accounting officer had an intention to defeat the process of payment of administrative review fees by the 2nd respondent and that they never addressed the challenges faced by the 2nd respondent.

Counsel for the applicant also submitted that it's not in dispute that using the link may have required technical assistance but this was availed by the accounting officer in his guidance, the challenges is the 2nd respondent could not prove without the fraudulent call records any attempt to use the assistance or the link apart from an afterthought complaint 5 days after the deadline for payment had lapsed. It is very clear from the above extracts of the ruling by the 1st respondent that they indeed relied on the "alleged" MTN call data print out records by M/S Steam Investments Limited while making their ruling as it was material in proving the failure of the 2nd respondent in following the guidance given by the applicants accounting officer to pay the administrative fees within the prescribed time was not of their own doing but that of the entity which frustrated any attempts of payment by not picking their calls or assisting them pay.

It is our further position that the same call data records should have been verified by the 1st respondent and shared with the appellant to analyze and rebut before being taken into evidence by the authority as there was ample time to do so, since they were received on the 15th of August 2020 and the ruling was made on 22nd August 2020 but the same were not and the entity only found out when it received the ruling. It is thus our submission that the call data records were material to the ruling and if they were not considered as alleged by the 1st respondent and the tribunal then they should not have formed part of the record.

Counsel reiterated that from everything presented in the facts there was no proof that the 2nd respondent attempted to contact the appellant accounting officer and neither did they attempt to contact person they had been given to assist them Mr. Frank Turyatunga, but have only

stopped at making allegations and presenting fraudulent call data records to prove their case, which seems to have formed basis that the accounting officer of the appellant was aiming to defeat the administrative review payment and so the same cannot be ignored.

Counsel for the 1st respondent submitted that his decision dated 22nd September 2020 was not premised on the "MTN Uganda call data" as alleged by the appellant. The basis for the 1st respondent's decision, which the tribunal considered at paragraph 1 at page 13 and 14 of the Tribunal decision at page 24 of the record was the fact that the appellant failed to sufficiently guide the 2nd Respondent on how to make payments using the payment link, which is a payment platform for various students' fees with no provision for administrative review fees. Furthermore that when the 1st Respondent accessed the link, it confirmed that the 2nd Respondent had to seek further assistance from the appellant on how to use the link and therefore concluded that the 2nd Respondent had faced challenges in making payments.

Counsel submitted that the tribunal further did not attach any significance to the disputed phone calls between the 2nd Respondent and the Appellant's Mr. Frank Turyatunga. The tribunal considered the fact that on 3rd August 2020, the 1st Respondent had directed the Appellant to guide the 2nd Respondent on how and where to pay administrative review fees and this was a binding decision which had to be complied with. The Tribunal further found that the 1st Respondent's decision of 3rd August 2020 was not mere advice which the Appellant could ignore and therefore the appellant had a legal obligation to provide sufficient guidance on how to use the link for payment of the administrative review fees. The guidance of 4th August 2020 was perfunctory. Having failed to comply with the directives of the 1st Respondent, it did not matter whether and how the phone calls were made to beg the Appellant to comply. The Tribunal confirmed the 1st Respondent's decision that the Appellant failed to provide sufficient guidance to enable the 2nd Respondent effect payment of administrative review fees.

Counsel submitted that it should be noted by this honourable court that the Appellant did not appeal against the decision of the 1st Respondent dated 3rd August 2020 and therefore the same was binding on the Appellant as rightly found by the Tribunal. The PPDA Appeals tribunal rightly disregarded the submissions on the issue of the non-authentic and unverified documents presented by the 2nd Respondent since the said documents were never relied upon by the Respondent to arrive at its decision on the administrative review.

Counsel for the 2nd Respondent submitted that the tribunal rightly found that the 1st Respondent's decision was not premised on the alleged non authentic record and there is no piece of evidence by the Appellant to show that the 1st Respondent's decision was based on call data. This contention is baseless and equally redundant.

Counsel submitted that the observation of the authority upon which it based its findings were as follows; "Upon accessing the link by the accounting officer, the authority established that;

a) It's a payment platform for various student fees with no provision for administrative review fees

b) The link provided by accounting officer was not accompanied by sufficient guidance to enable M/S Steam Investment Ltd payment of administrative review fees

c) The guidance given by the accounting officer did not resolve the problem or difficulty that M/S M/S Steam Investment Ltd experienced in payment of the fees

d) The use of the link provided required assistance of a technical person from the University (Mr. Frank Turyatunga) who on this case was not accessible by M/S Steam Investment Ltd"

Counsel further submitted that in light of the above findings, it's not important to labor much whether phone calls were made or not. It has been established that the appellant defied the decision of the 1st respondent to give clear guidance on how to pay administrative review fees. Now they ran to this honorable court to sanctify their defiant illegal behavior for which we implore this honorable court to disregard.

Analysis

Basing on my analysis in Ground 3, the actions of the Appellant were perfunctory, there is no need to claim records that were never relied on. In case they thought that the Tribunal relied on non-authentic call records, they should have appealed which they didn't and the decision was binding. In addition the Tribunal was categorical that they never considered the alleged non-authentic records; ***"The Tribunal did not attach any significance to the disputed phone calls between the 2nd respondent and the applicant's Mr. Frank Turyatunga"***. The alleged evidence was of no value in the determination of the application by the Tribunal.

Whether there was a valid complaint before the accounting officer by the 2nd respondent or did it lock itself out of the administrative review process?

Counsel submitted that in almost all the grounds, it's our submission and that of the law, that for the process of administrative review to initiate, it must do so by an aggrieved bidder meeting all the conditions laid out in **Section 90 and 91 of the PPDA Act** and payment of prescribed fee is mandatory failure to do so makes a complaint incompetent and untenable by the accounting officer. As pleaded in the memorandum of appeal, it's not in dispute that the 2nd Respondent failed to pay the administrative review fees on two occasions and only managed to effect payment on the 26th of September 2020 after the bids had expired and a contract had been effected between the appellant and M/S Block Technical Services Ltd.

Counsel cited the case of **Galleria In Africa Limited v. UEDCL Civil Appeal No. 08 of 2017,** where it was held that *breach of the PPDA regulations that are the life engine of the objectives is no*

more irregularity but goes to the core if the Act, hence non-compliance is fatal. Section 90 (1) (a) of the PPDA Act 2003, states the requirements of an administrative review application/ complaint to the accounting officer and in particular requires that it should be made with the prescribed fee and within ten working days from the date the bidder first becomes aware or ought to have become aware of the circumstances giving rise to the complaint.

He further cites, **Regulation 11 (1) of the PPDA Regulations (Administrative Review) 2014,** provides that the fees for administrative review shall be paid to the procuring and disposal entity on submission of the complaint in accordance to the schedules provided there in. Regulation 6 (1) (a), 2 and 3 of the PPDA Regulations (Administrative Review) 2014, provides that an investigation by the accounting officer can only be carried out by the accounting officer if the administrative review fees have been paid by the applicant and received by the entity; otherwise, the matter should be dismissed without investigation. Regulation 9 (1) (c) and (2) of the PPDA Regulations (Administrative Review) 2014, state that the authority shall not investigate a complaint (emphasis added) where the authority determines that the complaint does not comply with Sections 90 and 91 of the Act.

It is for the same reasons that the accounting officer dismissed the complaint for being untenable, incompetent and fatally defective and hence there was no valid complaint before his desk. It should further be noted that in line with Regulations 9 (1) (c) and (2) of the PPDA (Administrative Review) Regulations 2014 and Section 91 (2) of the PPDA Act, and our submissions on ground 2 above, the 1st respondent powers are limited in such cases to dismissal and they had no jurisdiction to change the statutory provisions as well buttressed by **the Makula International Limited v. His Eminence Cardinal Nsubuga [1982] HCB 11** case above on who has residue powers.

In **M/S ETC Agro Tractors & Implements Ltd v. PPDA App. No. 9/2014**, the applicant flouted the provisions of the law **Section 90 (1) (a) of the PPDA Act 2003** requiring an application for administrative review to be accompanied by the prescribed fee, the authority declined to consider the application for review of the decision of the accounting officer holding that failure to pay the prescribed fees rendered the application incompetent, null and void. This ruling was upheld by the tribunal on appeal. In making its decision the authority stated that the complaint had been dismissed by the accounting officer for non-payment of fees, the applicant was not properly before the authority which rendered the complaint incompetent and warranted its dismissal by the authority.

It is thus counsel's submission that the 2nd Respondent was not vigilant enough and locked itself out of the administrative review process not once but twice an in the same interest of natural justice which cuts across the accounting officer had to consider the rights of the best evaluated bidder in the matter and entered into a contract with them. The PPDA Act 2003 and its

Regulations there under envisaged a situation where complaints come to an end hence time lines were instituted to monitor these and powers of various entities involved were limited for a reason. In the instant case not only did the 2nd Respondent breach the stipulated provisions of the law twice on payment but the 1st Respondent went a step further this breach by going beyond its mandate twice and allowing it pay outside the prescribed period to the detriment of the appellant and best evaluated bidder.

The worst case is even after presentation of all these irregularities and fraudulent acts by the 1st and 2nd Respondents to the Tribunal, the same Tribunal went a step further and opted to gloss over and sanitize these illegalities and uphold the ultra vires decisions of the 1st Respondents. It is our position that the 2nd Respondent locked itself out of the administrative review period and we implore this honorable court looking at all the facts and illegalities to agree with our submission and ratify the contract signed between the appellant and the best evaluated bidder as the same is already in operation and M/S Block Technical Services Ltd has already been given occupation and had started working on the site by the time the tribunal made its ruling.

Counsel for the 1st Respondent submitted that the award of costs against the appellant by the tribunal was justified on the ground that the tribunal took into account the appellant's refusal to guide the 2nd Respondent on how and where to pay administrative review fees as directed by the 1st Respondent. The tribunal also noted the appellant's egregious disregard of the law prohibiting execution of a contract during the administrative review period

Counsel further cited **Section 91 K (1) (d) of the PPDA Act 2003**, provides that in performing its functions the tribunal shall have power to make an order as to costs against any party. Which shall be enforceable like an order of the High court. **Section 91 I (5) (d) of the PPDA Act, 2003** further provides that in reviewing a decision before it, the tribunal may require the payment of compensation for any costs reasonably incurred by the bidder who is a party to the proceedings, as a result of an unlawful act or decision of the concerned procuring and disposing entity or of the authority. This means that the above provisions of the law empower the tribunal to award costs.

Counsel submitted that the question of costs to litigants in matters before the PPDA Appeal Tribunal has also been dealt with the court in the cases of **PPDA v. Peace Gloria (HCCA No. 6 of 2016), and Arua Municipal Council v. Arua United Transporters SACCO (HCCA No. 0025 of 2017),** where it was held that, "Prima facie, parties before the PPDA Appeals Tribunal ought to bear their own costs unless in particular instances, in the proper exercise of discretion, the PPDA Appeals Tribunal considers otherwise. The PPDA Appeals Tribunal should make such awards only if satisfied that it is fair to do so, having regard to whether a party has conducted the proceeding in a way by conduct such as; failing to comply with an order or direction of the Tribunal without reasonable excuse, failing to comply with the PPDA Act, the Regulations, Rules

or any other enabling enactment, seeking unnecessary or avoidable adjournments, attempting to deceive another party or the tribunal, the nature and complexity of the proceeding, a party who makes an application that has no tenable basis in fact or law or otherwise conducting the proceeding vexatiously. Furthermore, the rules of natural justice require that before awarding costs, the PPDA Appeals Tribunal must give the party to be affected by such an award, a reasonable opportunity to be heard."

The 1st Respondent submits that in the present case, the appellant breached the PPDA laws as follows:

i. It intentionally frustrated the 2nd respondent's payment of administrative review fees, refused to comply with directives of the 1st respondent as the Regulator of public procurement and disposal in regard to the payment of administrative review fees as submitted in ground two and three.

ii. Deliberately signed a contract during the administrative review period as submitted in ground one.

iii. Refused to extend bid validities despite having been aware of this obligation at all times. **Regulations 52 (3) (c) of the PPDA (Rules and services) Regulations, S.I No. 8 of 2014** provides that, when determining the duration of a bid validity period, sufficient time shall be allowed to enable a bidder to challenge the award decision before a contract is formed.

Furthermore, **Regulation 52 (5) of the PPDA (Rules and methods for procurement of supplies, works and non-consultancy services) Regulations 2014** provides that where an extension to the bid validity period becomes necessary, a bidder shall be requested in writing before the expiry of their bid, to extend the validity for a specified period to complete the process outlined in **Sub Regulation (3)**

The 1st Respondent submits that in accordance with **Sections 90 to 91 of the PPDA Act**, the administrative review period under the PPDA Act ends to the PPDA Appeals Tribunal and therefore during this period, a bidder ought to have a valid bid. This honourable court has pronounced that a bidder without a valid bid lacks locus to apply for administrative **(see Acacia Place v. Zhang Hao & Liu Ming Shu & Ors (HCCA No.58 of 2018)**

The 1st Respondent submits that by its conduct, the appellant seriously breached the PPDA Act and Regulations thereby occasioning injustice on the 2nd Respondent by frustrating its statutory right to administrative review, which justified the award of costs against the appellant by the PPDA Appeals Tribunal. He further submits that this appellate court is constrained to interfere with the discretion of the PPDA Appeals Tribunal to award costs since the appellant has not proved that the award was based on an error of principle or the amount awarded was manifestly excessive.

Counsel for the 2nd Respondent submitted that that these issues are alien to the 2nd Respondent. They have never been litigated upon neither before the authority nor Tribunal and there is in any decision in respect of the same. The facts introduced in the submission are a natural creation of counsel for the appellant and did not arise before the authority nor Tribunal therefore are submission from the bar so we would not labor to waste paper on counsel for the appellant imaginations. We therefore pray that the same be disregarded with the contempt they deserve.

Analysis

"*It is well stated that administrative review structure comprises of both the internal and external, it is comprised of four tiers and at the lowest ranks are the primary decision makers constituted by the procurement organs of the various procurement entities such as the Evaluation Committees, Contracts Committees and so on. A person aggrieved by decisions taken at that level has recourse to the next tier which is that of the Senior Management level of the procurement entity.*

This usually is at the level of the Accounting Officer of the entity. That level marks the end of the internal administrative review process. Internal review is easy for applicants to access, and enables a quicker and more inexpensive means of re-examining decisions where applicants believe a mistake has been made. A person aggrieved by the internal review mechanisms, then has recourse to the two tiers of external review constituted first by an application to the appellant (The Public Procurement and Disposal of Public Assets Authority) and finally by an application to the Public Procurement and Disposal of Public Assets Tribunal.

Any of the above-mentioned tiers, may take a merits review or a complaints handling approach in addressing the grievance referred to it. Merits review of a decision involves a consideration of whether, on the available facts, the decision made was a correct one while the complaints handling processes relates to reviewing the way the decision was made, including issues such as whether the actions or decisions made may be unlawful, unreasonable, unfair or improperly discriminatory. The complaints approach may also sometimes deal with the merits of the decision made, where the merits are inextricably interwoven with the procedural considerations.

Merits review is the process by which a person or body, other than the primary decision maker, reconsiders the facts, law and policy aspects of the original decision and determines the correct decision, if there is only one, or the preferable decision, if there is more than one correct decision. Merits review involves standing in the shoes of the original decision maker, reconsidering the facts, law and policy aspects of the original decision. In a merits review, the whole decision is made again on the facts. The objective of merits review is to ensure that procurement decisions are correct or preferable, that is to say, that they are made according to law, or if there is a range of decisions that are correct in law, the best on the relevant facts. It is directed to ensuring fair treatment of all persons affected by a decision, and improving the quality and consistency of primary decision making. The correct decision is made in a non-

discretionary matter where only one decision is possible on either the facts or the law. However, where a decision requires the exercise of discretion or a selection between possible outcomes, judgment is required to assess which decision is preferable. Merits review concerns the review of both the factual basis and the lawfulness of a decision. It allows all aspects of an administrative decision to be reviewed, including the findings of facts and the exercise of any discretions conferred upon the decision-maker ***(see Dr. David Bennett AO QC, "Balancing Judicial Review and Merits Review," (2000) 53 Admin Review 3.)***

At the level of internal administrative review, the merits review process involves reconsideration of the decision by a more senior person within the same procurement entity in which the decision was made. An internal merits review process involves a determination whether the right decision was made and is not a complaints handling system dealing only with complaints about the way in which the decision was made. Apart from providing a quick, simple and cost effective way to address an incorrect decision, internal review provides the procurement entity with an opportunity to quickly correct its own errors, while at the same time enabling more senior decision-makers to monitor the quality of the original primary decision making. This can then be dealt with by directly addressing the issue with the decision maker. The internal review undertaken by the procurement entity in response to the application ought to be thorough. This should include obtaining and placing on the record a full statement as to what occurred from any officer within the entity who may have direct knowledge. This is important for the efficacy of any external review that may take place thereafter, in which event access to precise evidence of what might have occurred, may not be readily available." (See **PPDA v. Peace Gloria (HCCA No. 6 of 2016)**

It is a shame all this was not achieved in the current case, because the 2nd Respondent was frustrated by the actions/attitude of perfunctory by the Appellant in paying the administrative review fees which is the first stage when filing a complaint.

In this regard, the complaint was valid before the accounting officer and the Appellant locked out the 2nd Respondent in the administrative review process.

Determination

The Appellant has failed to prove the grounds he premised his appeal on and the decision of the Tribunal is upheld.

I therefore dismiss this Appeal with costs

I so order

SSEKAANA MUSA
JUDGE
30th/07/2021