REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 605 OF 2017

REPUBLIC...APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD...RESPONDENT

AND

TRIPPEX CONSTRUCTION COMPANY LIMITED........1ST INTERESTED PARTY

EDMAR ENTERPRISES LIMITED...................................2ND INTERESTED PARTY

EX-PARTE APPLICANT..RONGO UNIVERSITY

JUDGMENT

The parties.

1. The ex parte applicant is Rongo University, a University established under the Universities Act[1] situated within Migori County.

2. The Respondent is the Public Procurement Administrative Review Board established under section **27** of the Public Procurement and Asset Disposal Act[2] (herein after referred to as the act). Its functions as spelt out in section **28** of the act include reviewing, hearing and determining tendering and asset disposal disputes and performing any other function conferred to the Review Board by the Act, Regulations or any other written law.

3. The first and the second Interested Parties are limited liability companies incorporated in Kenya.

The ex parte applicant's case.

4. Pursuant to leave of this court granted on **6th** February 2018, the ex parte applicant seeks an order of certiorari to quash the entire decision of the Respondent dated **13th** April 2017 in Request for Review No. **32** of 2017 with regard to Tender No. **RU/OT/13/16-18** for construction of the proposed campus Gate and Gate House at Rongo University and seeks costs of this suit.

5. The core grounds relied upon in support of the application are:-

i. that the process was procedurally improper as the Respondent did not afford the ex parte applicant an opportunity to challenge the purported industry standards it relied upon in arriving at its decision;

ii. that it was unreasonable and irrational for the Respondent to base its decision on conjuncture that the project in the first month of defects period which is an industry standard of six months;

iii. that the Respondent abused its powers by unfairly and without any lawful excuse delaying to provide the ex parte applicant with the written award for purposes of filing Judicial Review and thereby violated its right to fair administrative action and access to justice guaranteed by Article 47, 48 and 159 (2) (d) of the Constitution and the Fair Administrative Action Act;[3]

*iv. that the Respondent abused its power by directing the ex parte applicant to re-evaluate the first Interested Party's tender within **14** days of the decision thereby denying the ex parte applicant the statutory stay of **14** days of the decision and foreclosed its right to challenge the same contrary to section **175 (1)** of the act;*

*v. that the Respondent acted in a manner that frustrated the legislative purposes for which it was established by re-instating the first Interested Party's tender for re-evaluation, in that it failed to give effect to fairness, equality and competition contrary to Articles **10** and **227 (1)** of the Constitution and section **3** of the act;*

*vi. that the first Interested Party's bid was declared non-responsive and was accordingly disqualified at the preliminary evaluation stage for not providing a valid NCA Category **6** and above and successfully challenged the disqualification vide Request for Review No. **17** of 2017.*

vii. that the ex parte applicant's bid was evaluated and found to be technically unresponsive and disqualified it;

*viii. that on **24th** March 2017, the first Interested Party filed Request for Review No. **32** of 2017 seeking to annul the tender award to the second Interested Party and on **13th** April 2017, the Respondent upheld the Request for Review and directed the ex parte applicant to re-evaluate the first Interested Party's technical bid and that the Respondent released its written award on **25th** April 2017.*

Court's directions.

6. On **3rd** October 2017, the court directed that the application be served upon the Respondent's and the Interested parties and scheduled the matter for **9th** October 2017. However, on the said date, there was no evidence of service as ordered, hence the court directed service to be effected and fixed the matter for **23rd** October 2017. On the said date there was no evidence of service, hence, the court fixed the matter for **31st** October 2017. Again, on the said date, service had not been effected, hence, the court adjourned the matter to **27th** November 2017. But, on the said date, there was no appearance by the parties, hence, the matter was re-scheduled for **29th** January 2018. However, in absence of evidence of service, the matter was adjourned to **6th** February 2018. Again, on the said date, there was no appearance for the Respondent and the Interested Parties, but, the court was satisfied that service had been effected and granted the ex parte applicant leave to commence these proceedings.

7. The matter came before me for the first time on **6th** June 2018. On the said date there was no evidence of service upon the Respondents. I directed that service be effected and fixed the matter for **17th** July 2018. On the said date, Miss Chimau appeared for the Respondent, but there was no appearance for the Interested Parties. There was nothing to show that the Interested Parties had been served. Owing to the previous numerous adjournments, I directed the Respondent's counsel to file their Response within **14** days and fixed the matter for mention on **26th** September 2018. However, on the said date, the Respondent's counsel had not filed any papers, hence, I reserved a date for Judgment and proceeded to render the determination n the basis of the basis of the material before the court, the law and authorities.

Guiding principles.

8. The starting point for an evaluation of the proper approach to an assessment of the constitutional validity of outcomes under the State procurement process is Article **277 (1)** of the Constitution. The Article provides that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and

cost-effective.

9. The national legislation prescribing the framework within which procurement policy must be implemented is the Public Procurement and Asset Disposal Act[4] (hereinafter referred to as the Act) and The Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as the Regulations). A decision to award a tender constitutes administrative action so the provisions of Article **47** of the Constitution and the Fair Administrative Action Act[5] from which a cause of action for the Judicial Review of administrative action arises, apply to the process.[6]

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

11. An administrative decision is flawed if it is illegal. A decision is illegal if it: - **(a)** contravenes or exceeds the terms of the power which authorizes the making of the decision; **(b)** pursues an objective other than that for which the power to make the decision was conferred; **(c)** is not authorized by any power; **(d)** contravenes or fails to implement a public duty.

12. Statutes do not exist in a vacuum.[7] They are located in the context of our contemporary democracy. The Rule of Law and other fundamental principles of democratic constitutionalism should be presumed to inform the exercise of all official powers unless Parliament expressly excludes them. There may even be some aspects of the Rule of Law and other democratic fundamentals which Parliament has no power to exclude.[8] The courts should therefore strive to interpret powers in accordance with these principles.

13. Judicial Review remedies are meant to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the ‘‘four corners’’ of their powers or duties. They are also acting as guardians of Parliament’s will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament’s enactments.

14. Where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[9]One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

15. There is a long-established and fundamental distinction between appeal and review. A court of appeal makes a finding on the merits of the case before it; if it decides that the decision of the lower court or tribunal was wrong, then it sets that decision aside and hands down what it believes to be the correct judgment. By contrast, in Judicial Review the reviewing court cannot set aside a decision merely because it believes that the decision was wrong on the merits. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects.

16. Judicial Review is about the decision making process, not the decision itself. The role of the court in Judicial Review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach' Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

17. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. As was held in Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji**[10]**:-

"Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant......."

18. The grant of the orders or Certiorari, Mandamus and Prohibition is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought.

Relevant Statutory Provisions.

19. Section **173** of the Act provides for the powers of the Review Board. It provides that upon completing a review, the Review Board may do any of the following- **(a)** annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety; **(b)** give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings; **(c)** substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings; **(d)** order the payment of costs as between parties to the review in accordance with the scale as prescribed; and **(d)** order termination of the procurement process and commencement of a new procurement process.

20. The above section has been the subject of determination in numerous case in this Country. Discussing a similar provisions in The Public Procurement and Disposal Act,[11] which was repealed by the current act, the Court of Appeal in Kenya Pipeline Ltd vs. Hyosung Ebara Company Ltd.[12]

"The Review Board is a specialized statutory tribunal established to deal with all complains of breach of duty by the procuring entity. By Reg. 89, it has power to engage an expert to assist in the proceedings in which it feels that it lacks the necessary experience. S. 98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with."

21. **Lord Reid** in **Animistic -vs- Foreign Compensation Commission[13]** held that:-

"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in questions. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

22. Section **79 (1)** of the Act defines Responsiveness of tenders. It reads that "A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents."

23. Section **80** of the Act on evaluation of Tenders provides:-

80. Evaluation of tenders

(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected under section 82(3).

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)—

(a) the criteria shall, to the extent possible, be objective and quantifiable;

(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and

(4) The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation.

(5) The person responsible for procurement shall, upon receipt of the evaluation report prepared under subsection (4), submit such report to the accounting officer for approval as may be prescribed in regulations

(6) The evaluation shall be carried out within a maximum period of thirty days.

(7) The evaluation report shall be signed by each member of evaluation committee.

24. **Issues for determination.**

25. The ex parte applicant's assault on the impugned decision as I understand it is premised on five fronts, namely; illegality, unreasonableness, irrationality, abuse of power and frustrating legislative purpose. I have distilled the following issues for determination:-

a. Whether the decision rendered by the Review Board is tainted by illegality.

b. Whether the decision is unreasonable and irrational.

c. Whether the Review Board abused its powers.

d. Whether the Respondent acted in manner that frustrated the legislative purpose.

a. Whether the decision rendered by the Review Board is tainted by illegality.

26. The ex parte applicant's counsel argued that a decision is amenable to review on grounds of error in law.[14] He argued that by illegality, it means that the decision maker must understand the law[15] and that an administrative decision is flawed if it is illegal. Citing De Smith's Judicial Review, counsel argued that a decision is illegal if it contravenes or exceeds the terms of the powers which authorizes the making of the decision or pursues an objective other than that which the power to make the decision was conferred, or, is not authorized by any power or contravenes or fails to implement a public policy.[16]

27. Counsel argued that the Respondent committed an illegality by:- **(i)** purporting to waive the procedure prescribed under

Regulations **73 (2) (b), 16 (5) (a), 47** and **48** of the Public Procurement and Disposal Regulations (the Regulations); and, **(ii)** waiving the ex parte applicant's right to specify the requirements under section **60 (1) (2), 75 (2), 79 (1), 80 (2)** of the act. He also argued that the Board committee an illegality by directing the ex parte applicant to conduct post qualification evaluation on the first Interested Party contrary to section **83** of the act.

28. The record shows that the ex parte applicant in its memorandum of response filed on **29th** March 2017 challenged the application on the same grounds, namely, that the Request for Review was incompetent by dint of failure by the applicant before the Board to comply with the procedure prescribed by Regulation **73 (2) (b)** of the Regulations. Addressing the said challenge, the Board stated that it was guided by the provisions of Regulation **73 (2) (b)** which provides inter alia that the Request shall be accompanied by such statements as the applicant considers necessary in support of its request. The Review Board after addressing its mind to the issues before it and the Regulations noted that the Request for Review largely challenged the evaluation of the tender and the marks awarded to the applicant which are matters that would ordinarily be contained in the evaluation report supplied to the Board. The Board proceeded to find that the absence of a statutory statement was not fatal to the applicant's case and disallowed the objection by the ex parte applicant herein.

29. On the alleged breach of section **80 (2)** of the Act, the Board examined the technical evaluation criteria in the tender document and the scoring and the provisions of section **80 (2)** of the act and Regulation **49 (1)** and concluded that the applicant before it was not correctly awarded marks and some of its marks were not given to it resulting in a score well below the **70** mark threshold. It held that the procuring entity breached the provisions of section **80 (2)** of the Act.

30. The power of the Court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where **illegality, irrationality** or **procedural impropriety** has been proved. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.[17]

31. In Council of Civil Service Unions v. Minister for the Civil Service**[18]** Lord Diplock enumerated a threefold classification of grounds of Judicial Review, any one of which would render an administrative decision and/or action in concern, ultra vires. These grounds are; illegality, irrationality and procedural impropriety. Later judicial decisions have incorporated a fourth ground to Lord Diplock's classification, namely; proportionality.[19]What Lord Diplock meant by "Illegality" as a ground of Judicial Review was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it. His Lordship explained the term "Irrationality" by succinctly referring it to "unreasonableness" in Wednesbury Case.[20] By "Procedural Impropriety" His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere.

32. The role of the court in Judicial Review proceedings was well sated in Republic vs National Water Conservation & Pipeline Corporation & 11 Others[21]where it was held that once a Judicial Review court fails to sniff any illegality, irrationality or procedural impropriety, it should down its tools forthwith.

33. Judicial intervention is posited on the idea that the objective is to ensure that the agency did remain within the area assigned to it by Parliament. If the agency was within its assigned area then it was prima facie performing the tasks entrusted to it by the legislature and hence not contravening the will of Parliament. A decision which falls outside that area can therefore be described, interchangeably, as: a decision to which no reasonable decision-maker could have come; or a decision which was not reasonably open in the circumstances.

34. No argument has been presented in this case before to show that the Review Board acted outside its legal mandate or that it improperly exercised its discretionary powers. It is an established principle of law that the courts should not substitute their judgment for that of the agency.

35. In judicial Review proceedings, the court can only determine the process not the merits of the decision. The arguments advanced by counsel for the ex parte applicant were raised and considered by the Board. By inviting this court to re-consider the same issues amounts to inviting this court to engage in a merit review which is an appellate function hence outside the scope of Judicial Review jurisdiction.

36. Illegality is divided into two categories: those that, if proved, mean that the public authority was not empowered to take action or make the decision it did; and those that relate to whether the authority exercised its discretion properly. Grounds within the first

category are simple ultra vires and errors as to precedent facts; while errors of law on the face of the record, making decisions on the basis of insufficient evidence or errors of material facts, taking into account irrelevant considerations or failing to take into account relevant ones, making decisions for improper purposes, fettering of discretion, and failing to fulfill substantive legitimate expectations are grounds within the second category.

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

38. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be the Constitution, a statute or delegated legislation. The courts when exercising this power of construction are enforcing the Rule of Law, by requiring public bodies to act within the ''four corners'' of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments. The Courts have a duty to ensure citizens respect and observe the Constitution. In my view, failure or refusal by the court to exercise this duty would be treason to the Constitution.

39. Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle which, is inextricably linked to the Rule of Law. Guidance can be obtained from the South African case of AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another where the court held as follows:-

*"(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . . Public power . . . can be validly exercised only if it is clearly sourced in law"***[22]**

40. Differently put, whether a law, act, omission, decision or conduct is invalid is determined by an objective enquiry into its conformity with the Constitution[23] and the relevant statutory provisions and applicable Regulations. The court is obliged not only to avoid an interpretation that clashes with the constitutional values, purposes and principles but also to seek a meaning that promotes constitutional purposes, values, principles, and which advances Rule of Law, Human Rights and Fundamental Freedoms in the Bill of Rights and also an interpretation that permits development of the law and contributes to good governance.

41. A proper construction of the impugned decision, the provisions of Constitution and the Act leaves me with no doubt that the Respondents' action is firmly grounded on the law. Put differently, the ex parte applicant has not demonstrated that the Board acted ultra vires its statutory mandate. In particular, I have addressed my mind on the issues framed by the Board, while addressing the same issues raised in this case and the Boards interpretation and findings on Regulation **73 (2) (b)** and section **80 (2)** of the Act. It is my view that the ex parte applicant's argument is an invitation to this court to delve into a merit review which is outside the scope of Judicial Review. Simply put, the ex parte applicant has not demonstrated illegality. Instead, he seeks to overturn the decision on merits. I decline the invitation to venture into a merit review. The impugned decision has not been shown to be ultra vires or outside its functions. In fact a look at section **173** of the Act shows that the orders made fall within ambit and scope of the said section.

b. **Whether the decision is unreasonable and irrational.**

42. Counsel for the ex parte applicant argued that under section **7 (2) (i) (iii) (iv)** of the Fair Administrative Action Act,[24] a decision is amenable to Judicial Review on grounds of unreasonableness and irrationality. He argued that a decision must be based on materials and reasoning that logically support the existence of facts consistent with the pronouncement in order to stand sensibly and not self contradictory once it is revealed.[25] He cited Republic vs Inspector General of Police & Another ex parte Patrick Macharia Nderitu[26]whereby it was held that to succeed in an application for Judicial Review, an applicant has to show that the decision or act complained of is tainted with illegality, irrationality or procedural impropriety. Counsel referred to paragraph **30** of the decision and argued that the observation therein was an error a specialized body could not make, hence, the decision was

irrational and unreasonable.

43. Since counsel invites this court to find that the decision is irrational, perhaps I should say something about the test for rationality. True, Rationality, as a ground for the Review of an administrative action is dealt with in Section **7(2) (i)** of Fair Administrative Action[27] which provides that:-

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

i. the administrative action or decision is not rationally connected to-

a) the purpose for which it was taken;

b) the purpose of the empowering provision;

c) the information before the administrator; or

d) the reasons given for it by the administrator."

44. The test for rationality was stated as follows by Chaskalson P, in Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others:-**[28]**

"The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."

45. In Trinity Broadcasting (Ciskei) v ICA of,[29] Howie P stated the rationality test as follows:-

"In the application of that test, the reviewing Court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at."

46. It is necessary to consider the test of reasonableness. Reasonableness, as a ground for the review of an administrative action is dealt with in Section **7 (2) (k)** of the Fair Administrative Action Act.[30] A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.

47. In Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Other**s[31]** O'Regan J approved the reasonableness test which was stated as follows by Lord Cooke in R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd.**[32]**

"*The simple test used throughout was whether the decision in question was one which a reasonable authority could reach. The converse was described by Lord Diplock* **[1976] UKHL 6***;* **[1976] 3 All ER 665** *at 697***[1976] UKHL 6***; ,* **[1977] AC 1014** *at 1064 as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt'. These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers. ... Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the chief constable has struck a balance fairly and reasonably open to him."*

48. In Carephone (Pty) Ltd v Marcus NO**[33]** per Froneman JA, stated the test as follows:-

"In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' in some way or another. As long as the judge determining [the] issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness

thereof, but to determine whether the outcome is rationally justifiable, the process will be in order."

49. The ex parte applicant invites this court to annul the impugned decision on grounds of unreasonableness and irrationality. The test of Wednesbury unreasonableness has been stated to be that the impugned decision must be "objectively so devoid of any plausible justification that no reasonable body of persons could have reached it**[34]** and that the impugned decision had to be "verging on absurdity" in order for it to be vitiated.[35]

50. The above stringent test has been applied in Australia. In Prasad v Minister for Immigration,[36] the Federal Court of Australia considered the ground. The Court held that in order for invalidity to be determined, the decision must be one which no reasonable person could have reached (at 167) and to prove such a case required "something overwhelming" (at 168). It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt (page 168.3), and when "looked at objectively… so devoid of any plausible justification that no reasonable body of persons could have reached them" (at 168).

51. A decision which fails to give proper weight to a relevant factors may also be challenged as being unreasonable.[37] It is a well-established principle that if an administrative or quasi-judicial body takes into account any reason for its decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated.[38]

52. Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with weather the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law. Differently stated, the following propositions can offer guidance on what constitutes unreasonableness:-

i. Wednesbury unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably;

ii. This ground of review will be made out when the Court concludes that the decision fell outside the area of decisional freedom which that legislative assumption authorizes, that is, outside the "range" within which reasonable minds may differ;

iii. The test of unreasonableness is whether the decision was reasonably open to the decision-maker in the circumstances of the case. To say that the decision was "not reasonably open" is the same as saying that "no reasonable decision maker" could have made it;

53. If a statute which confers a decision-making power is silent on the topic of reasonableness, that statute should be construed so that it is an essential condition of the exercise of the powers that it be exercised reasonably. The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.

54. Legal unreasonableness comprises any or all of the following, namely; specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others.[39]

55. The Court's role remains strictly supervisory. It is concerned with determining whether there has been a lawful exercise of power having regard, in particular, to the terms, scope and purpose of the statute conferring the power. In circumstances where reasonable minds might differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the Court disagrees, even emphatically, with the outcome or justification. If there is an evident, transparent and intelligible justification for the decision or if the decision is within the 'area of decisional freedom' of the decision-maker, it would be an error for the Court to overturn the decision simply on the basis that it would have decided the matter differently.

56. I have carefully examined the impugned decision. I have also considered the final orders made. There is nothing to show that a reasonable Tribunal, faced with the same set of facts and the law would have arrived at a different conclusion. In other words, applying the above tests of unreasonableness and irrationality, I find that the ex parte applicant has not demonstrated that the decision tainted with unreasonableness or irrationality. The grounds cited largely touch on the merits of the decision as opposed to

grounds for appeal.

57. Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at arbitrarily, capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter.

58. I find useful guidance in Court of Appeal decision in Kenya Pipeline Ltd vs. Hyosung Ebara Company Ltd**[40]** that "*The Review Board is a specialized statutory tribunal established to deal with all complains of breach of duty by the procuring entity. From the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.*"

59. An administrative functionary that is vested by statute with the power to consider and make a decision is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary.

c. Whether the Review Board abused its powers.

60. Counsel for the ex parte applicant argues that the Review Board abused its power by unfairly and without any lawful excuse delaying to provide the ex parte applicant with the written award for the purpose of filing Judicial Review, hence a violation of section **6 (4)** of the Fair Administrative Action Act.[41] He also argued that the Respondent abused its powers by directing the ex parte applicant to re-evaluate the first Interested Party's tender within **14** days from the date of the decision.

61. The impugned decision is dated **13th** April 2017. By his own admission, **Prof. Samuel Gudu** at paragraph **7** of his affidavit avers that the award was released on **25th** April 2018. A simple arithmetic shows that the decision was released on the **12** day before the lapse of **14** days provided for challenging the decision. This resolves that argument that Respondent abused its powers by delaying to release the decision. This argument has no merit.

d. Whether the Respondent acted in manner that frustrated the legislative purpose.

62. The ex parte applicant's counsel argued that by re-instating the first Interested Party's tender for re-evaluation, the Respondent frustrated the legislative purpose for which it was established as it failed to give effect to fairness, equality and competition contrary to Article **10** and **227** of the Constitution and section **3** of the Act. He argued that frustration of legislative purpose entails arriving at a decision in a manner that fails to promote the purpose of the law in consideration.[42]

63. Despite counsel making citing frustration of legislative purpose, he did not go into detail to expound on this submission within the context of this case. In fact I am unable to discern the relevancy of counsels submissions on this point from the brief submissions he made on the point.

64. Legislative or purpose is the term that the courts have given to their analysis of the historical documents originally generated when the statute in question was under consideration in the Legislature. Whenever the interpretation of a legislative enactment becomes an issue in a case, the courts will commonly resort to the Rules of Statutory Construction to determine the proper application of the statutory language to the facts at hand. In applying the Rules of Statutory Construction, the courts have routinely held that the "cardinal" principle of statutory construction is that the court must choose that interpretation that most nearly effectuates the purpose of the Legislature.

65. The Court determines the Legislature's intention by examining the problem faced by the Legislature when it considered the bill that enacted the language in question, the public policy issues that the problem raised and the drafting solutions that emerged during legislative consideration of the bill.

66. The evidence that the courts have used to assist them in making this determination has come from the legislative documents that

were prepared before, during and sometimes immediately after the bill in question moved through the legislative process. Counsel did not find it fit to expound on this rich area of the law.

67. A statute is an edict of the legislature[43] and the conventional way of interpreting a statute is to seek the 'intention' of its maker. It is the judicature's duty to act upon the true intention of the legislature. The courts have to objectively determine the interpretation with guidance furnished by the accepted principles.[44] If a statutory provision is open to more than one interpretation the court has to choose that interpretation which represents the true intention of the legislature.[45] the function of the courts is only to expound and not to legislate.[46]

68. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. Where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[47]One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

69. The narrow question I discern from the counsel's argument on this issue is an invitation to this court to examine the powers of the Review Board under the Act and to determine whether its decision falls within its statutory powers. At the risk of repeating myself, I will address this question by recalling the provisions of Section **173** of the Act which reproduced earlier. The section provides that upon completing a review, the Review Board may do any of the following- ***(a)*** *annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;* ***(b)*** *give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;* ***(c)*** *substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;* ***(d)*** *order the payment of costs as between parties to the review in accordance with the scale as prescribed; and* ***(d)*** *order termination of the procurement process and commencement of a new procurement process.*

70. I find no serious argument before me to put the Board's decision outside its scope under the above section or any of the provisions of the Act. On the contrary, the Respondent is vested with powers to make the decision in question. A look at the decision and the above section leaves me with no doubt in my mind that the decision is within the ambit of its statutory powers. Differently stated, if we place the above provision side to side with the impugned decision, the test would be whether the former squares with the later.

71. No abuse of powers has been proved. It has not been shown that this power was not exercised as provided for under the law. It has not been proved that the Respondent acted outside its powers or the decision was arrived at after taking into account irrelevant or extraneous matters. It is my view that the nature and circumstances of the decision fall into the category of areas which are not disturbed by the courts unless the decision under challenge is illegal, irrational, or un-procedural.

72. Differently stated, a look at the decision rendered by the Review Board and the facts presented before it and its application of the law to the facts before it leaves me with no doubt that a reasonable tribunal properly exercising its mind to the law and the facts could have come to the same conclusion. Asking this court to fault the decision on the grounds cited amounts to a merit Review.

Final orders.

73. Applying the tests discussed above to the facts of this case, it is my finding that the ex parte applicant have not established the requisite tests to persuade the court to grant the order of certiorari sought.

74. Certiorari is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

75. The discretionary nature of the Judicial Review remedy sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, or where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration or legally discharge its legal mandate, or

where the judge considers that an alternative remedy could have been pursued. In this case, the Review Board only directed the procuring entity to re-evaluate the first Interested Party's tender from the technical evaluation stage and award the tender to the lowest evaluated bidder upon complying with the evaluation criteria in the tender document and in compliance with the provisions of section **86** act within **14** days from the date of the decision. It has not been shown that certiorari is the most efficacious remedy in the circumstances of this case as opposed to the order granted. Further, granting the orders sought in the circumstances of this case where the Respondent acted within its powers would amount to impeding the ability of the Board to perform its statutory mandate.

76. In view of my analysis herein above, I find and hold that the ex parte applicant has not established any grounds for this Court to grant the Judicial Review Order of Certiorari.

77. The upshot is that the ex parte applicants' application dated **12th** February 2018 is hereby dismissed with no orders as to costs.

Orders accordingly.

Signed, Delivered and Dated at Nairobi this 7th day of November, 2018

John M. Mativo

Judge

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[1] Act No 42 of 2012.

[2] Act No. 33 of 2015.

[3] Act No. 4 of 2015.

[4] Act No. 33 of 2015.

[5] Act No. 4 of 2015.

[6] See Minister of Health and another vs New Clicks South Africa (Pty) Ltd 2006 (2) SA 311 (CC) paras 95-97; Bato Star

Fishing (Pty) Ltd vs Minister of Environmental Affairs and others 2004 (4) SA 490 (CC) paras 25-26.

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

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

[9] Sir Rupert Cross, Statutory Interpretation, 13th edn. (1995), pp.172–75; J. Burrows, Statute Law in New Zealand, 3rd edn. (2003), pp.177–99. For a recent example in Canada see ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board) [2006] S.C.R. 140.

[10] {2014} eKLR.

[11] Act No. 3 of 2005.

[12]{2012} eKLR.

[13] {1969} 1 All ER 20.

[14] Citing section 7 (20 (d) of the Fair Administrative Action Act, Act No. 4 of 2015.

[15] Citing Republic vs Public Procurement Administrative Board & Another ex parte Uto Creations Studio Limited {2013}eKLR.

[16] 6th Edition at page 23.

[17] See Gauteng Gambling Board vs Silverstar Development 2005 (4) SA 67 (SCA) paras 28-29

[18] {1985} AC 374.

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

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

[21] {2015} eKLR.

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

[23] Ferreira vs Levin NO and Others; Vryenhoek and Others vs Powell NO and Others [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (Ferreira v Levin) at para 26.

[24] Act No. 4 of 2015.

[25] Citing Mahon vs Air New Zealand Ltd.

[26] {2015}eKLR.

[27] Act No. 4 of 2015.

[28] 2000 (4) SA 674 (CC) at page 708; paragraph 86.

[29] SA 2004(3) SA 346 (SCA) at 354H- 355A.

[30] Act No. 4 of 2015.

[31] {2004} ZACC 15; 2004 (4) SA 490 CC at 512, para 44.

[32] {1995} 1 All ER 129 (HL) at 157.

[33] 1999 (3) SA 304 (LAC) at 316, para 36.

[34] See Bromley London Borough Council vs Greater London Council {1983} 1 AC 768 (at [821].

[35] Puhlhofer v Hillingdon London Borough Council [1986] 1 AC 484.

[36] {1985} 6 FCR 155

[37] Minister for Aboriginal Affairs v Peko Wallsend Ltd (1986) 162 CLR 24 per Mason J (at 41).

[38] See Patel vs Witbank Town Council 1931 TPD 284 Tindall J said (at 290);

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

[40] Supra.

[41] Act No. 4 of 2015.

[42] Citing Republic vs National Police Service Commission ex parte Deniel Chacha Chacha {2016}eKLR.

[43]Vishnu Pratap Sugar works (private) ltd. v. Chief Inspector of Stamp, U.P., AIR 1968 SC 102, p. 104.

[44] R v. Secretary of State for the Environment expert Spath Holme, (2001) 1 All ER 195, p. 216(HL).

[45] Venkataswami Naidu v. Narasram Naraindas, AIR 1966 SC 361, p.363.

[46] GP Singh, Principles of Statutory Interpretation, 13th Edition, p.4.

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

(2003), pp.177–99. For a recent example in Canada see ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board) [2006] S.C.R. 140.

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