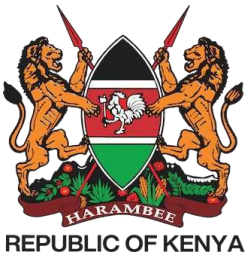

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APP. NO. 59 OF 2019

REPUBLIC.....APPLICANT

VS

MEDICAL PRACTITIONERS & DENTISTS BOARD....1ST RESPONDENT

THE PROFESSIONAL CONDUCT COMMITTEE OF THE MEDICAL

PRACTITIONERS AND DENTISTS BOARD.....2ND RESPONDENT

AND

MIO ON BEHALF OF MIO (A MINOR).....1ST INTERESTED PARTY

GEOFFREY MUIRURI KINGANGA.....2ND INTERESTED PARTY

AND

DR. SUNIL VINAYAK.....1ST EX PARTE APPLICANT

DR. SUNIL VINAYAK TRADING AS

"SMILE AFRICA DENTAL CLINIC" .....2ND EX PARTE APPLICANT

CONSOLIDATED WITH

MISC. CIVIL APP. NO. 63 OF 2019

DR. GEOFFREY MUIRURI KINGÁNGÁ.....EX PARTE APPLICANT

VS

PROFESSIONAL CONDUCT COMMITTEE.....1ST RESPONDENT

THE MEDICAL PRACTITIONERS &

DENTISTS BOARD.....2ND RESPONDENT

AND

MIO (SUING ON BEHALF OF MO).....1ST INTERESTED PARTY

DR. SUNIL VINAYAK.....2ND INTERESTED PARTY

JUDGMENT

Introduction

1. This judgment disposes two consolidated suits, namely, Judicial Review Miscellaneous application numbers JR No. **59** of 2019 and **63** of 2019.The common thread between the two suits is that both seek to review the decision rendered by the Professional Conduct Committee (herein after referred to as the PCC) in PCC Case No. **2** of 2018, *MIO on behalf MIO v Dr. SunilVinayak and Dr. Geoffrey King'ang'a Muiruri* made on **13th** September 2018. The applicants in the unstant suits were the Respondents in the said disciplinary proceedings.

2. As was held in *Korean United Church of Kenya & 3 Others v Seng Ha Sang*,[1] consolidation of suits is done for the purposes of achieving the overriding objective of expeditious and proportionate disposal of civil disputes. Consolidation saves costs, time and effort and makes the conduct of several actions more convenient by treating them as one action. The rationale behind consolidation of matters is to avoid conflicting judgments, save time and money by clubbing together matters involving common questions of fact and law.

3. Dr. Sunil Vinayak, the applicant in No **59** of 2019 is a Dental Surgeon practising as such in the name and style off Smile Africa Dental Clinic (the Clinic) which is the second applicant in the said case. Dr. Geoffrey Muiruri King'ang'a, the applicant in miscellaneous App No. **63** of 2019 is a consultant anesthesiologists. He is named as the second Interested Party in miscellaneous application No. **59** of 2019.

4. **MIO**, the first Interested Party in the both suits is a minor suing though his father and next of friend **MIO**. He was the complainant in the disciplinary proceedings against the applicants which yielded the impugned decision.

5. The Medical Practitioners and Dentists Board is sued as the first Respondent in No **59** of 2019 and as the second Respondent in No. **63** of 2019. It is established under section **3 (1)** of the *Medical Practitioners and Dentists Act*[2] (herein after referred to as the Act). Pursuant to section **3(2)** of the Act, it is a body corporate with perpetual succession and a common seal capable, in its corporate name, of— (a) suing and being sued; (b) taking, purchasing or otherwise acquiring, holding, charging and disposing of movable and immovable property; and (c) doing or performing all such other things or acts necessary for the proper performance of its functions under the Act as may lawfully be done or performed by a body corporate. Vide the Health Laws (Amendment) Act, 2019,[3] the word "Board" was replaced with the word "Council." Accordingly, the word "Board" or "Council" shall hereinafter where the context so admits mean the Medical Practitioners and Dentists Board.

6. The Professional Conduct Committee (herein after referred to as the PCC) sued as the second Respondent in No. **59** of 2019 and as the first Respondent in No. **63** of 2020 is established under Rule **4 (A)** of the *Medical Practioners and Dentists (Disciplinary Proceedings) (procedure) Amendment Rules*, 2013 (herein after referred to as the Rules).

7. A brief summary of the factual matrix which triggered both suits is apposite. My reading of the respective party's pleadings is that the factual background is essentially common ground or uncontroverted. On **26th** August 2015 the 1st Interested Party took his son, MIO, then 11 years old to the Clinic where he was admitted for multiple dental extractions, cleaning, fissure sealants, filings and fitting of braces under general anesthesia

8. Dr. Muiruri administered the anaesthetist drug(s) on the patient and Dr. Vinayak performed the dental procedures. There is no dispute that the patient suffered a cardiac arrest on the operating table. Following CPR[4] the patient was restarted on isoflurane[5] to allow the dentist to complete the procedure. The patient was subsequently transferred to the M.P. Shah Hospital ICU where he was managed for out of hospital cardia arrest, hypoxic brain injury and reduced level of consciousness. On 12th September 2015 he was discharged with severe encephalopathy[6] and in a vegetative state.[7]

9. Arising from the foregoing, the patient's father lodged a complaint against the applicants with the Council. The Preliminary Inquiry Committee (herein after referred to as the PIC) upon considering the complaint recommended:- (a) That the complaint had merit and the matter be referred to the PCC, and (b) that the Board will prefer and serve appropriate notice of inquiries and or charges upon Dr. Geoffrey King'ang'a Muiruri and Dr. Sunil Vinayak.

10. The PCC evaluated the material before it and heard all the parties and as concerns Dr. Sunil Vinayak it directed that:-

> *i. the 1st Respondent to suspend the 1st Applicant's private practice and retention licences under the provisions of section 20(5) of the Act for 6 months from the date of the ruling;*
>
> *ii. the 1st Applicant for grant of a new license as provided under section **21 (2)** of the Act upon lapse of the period set out in order **(i)** above;*
>
> *iii. the 1st Applicant is directed to pay the Board the Board sum of Kshs. 200,000/= within a period of 30 from the date hereof being part cost of the Committee's sitting;*
>
> *iv. that the first applicant is directed to enter into mediation with the complainant with a view to compensating him and report the progress to the Board within **90** days;*
>
> *v. Smile Africa Dental Clinic is directed to stop performing procedures under general anaesthesia forthwith and to also cease operating a theatre within the Clinic until the facility is inspected and approved by the Board. The said Board shall be at liberty to give such further directions as it may deem fit.*

11. Regarding Dr. Muiruri, the PCC directed that:-

i. the Committee directs the Medical Practitioners and Dentists Board to suspend the private practice and retention licenses of Dr. Geoffrey King'ang'a Muiruri under the provisions of section 20 (5) of the Act for a period of six months from the date hereof;

ii. Dr. Geoffrey Kingángá Muiruri shall be at liberty to apply for grant of a new license as provided under section 21 (2) of the Medical Practitioners and Act upon lapse of the period set out in order (i) above;

iii. Upon an application being lodged by Dr. Geoffrey Kingángá Muiruri under order (ii) above, the Medical Practitioners and Dentists Board shall constitute a Fitness to Practice Committee as set in Rule 3 of the Medical Practitioners and Dentists (Fitness to Practice) Rules, 2016 to assess his fitness to practice as medical practitioner and thereafter the said Committee shall make appropriate recommendations to the Board for the Board's further action;

iv. Dr. Geoffrey Kingáng'a Muiruri is directed to pay the Medical Practitioners and Dentists Board the sum of Kshs. 150,000/= within a period of 30 days from the date hereof being part cost of the Committees sitting.

v. Dr. Geoffrey Kingángá Muiruri is directed to enter into mediation with the complainant as relates to compensation and thereafter report the progress to the Chairman of the Medical Practitioners and Dentists Board within 90 days from the date hereof.

12. Even though both cases challenge the same decision, and notwithstanding the fact that they arise from wholly the same set of facts and circumstances, for the sake of brevity, I will briefly summarize the facts and core grounds cited by each applicanr separately.

Miscellaneous Application No. 59 of 2019

13. Dr. Sunil Vinayak is the first applicant in the above suit. The second applicant in the suit is himself trading as Smile Africa Dental Clinic. He states that the Act and the rules require the disciplinary inquiry to be held only by the Board. He states that section **20** of the Act does not permit the PCC to regulate the medical profession nor does it have jurisdiction to conduct disciplinary proceedings or discipline medical practitioners or their practices.

14. He states that even if the PCC had jurisdiction under Rule **4A**, its decision directing the Board to suspend his private practice licence and retention was in excess of, or outside its jurisdiction provided under Rule **4A(c)**, hence the decision is null and void. He states that the PCC cannot usurp the statutory functions of the Board or arrogate to itself a function reserved for the Board under section **20** of the Act. Also, he states that even if the Board could lawfully ratify the PCC's decision, no evidence of such ratification was tendered.

15. He also states that the amended Rules establishing the PCC enacted under Section **23** of the Act were imported into the Act by Gazette Notices numbers **21** of 2012 and **223** of 2013 and the rules contravene the Constitution and the Act and ought to be quashed. He further states that the PCC acted illegally in purporting to make orders against the Clinic which was not a party to the proceedings before the PCC. Additionally, he states that the Act has no jurisdiction over medical institutions, and only the Board, duly constituted as a tribunal, is empowered to conduct an inquiry into the conduct of Medical Practitioners or Dentists, and there is no provision entitling the Board to delegate such powers or functions to any other committee. Lastly, he states that unless the orders sought are granted, he will be compelled to comply with an illegal decision contrary to legitimate right to a fair hearing and a fair administrative action.

Reliefs sought

16. As a consequence of the foregoing, Dr. Sunil Vinayak prays for:-

A. An order of certiorari to remove into this Honourable Court and to quash the decision of the 2nd Respondent dated 13th September 2018.

B. An order of certiorari to remove into this Honourable Court and to quash Gazette Notices No. 21 dated 18th March 2012 and No 223 of 2013 dated 18th December 2013.

C. An order of prohibition restraining the PCC from either relying upon or acting on the PCC's decision or further prosecuting the pending disciplinary proceedings or preferring and/or prosecuting any other charge or charges against the Applicants.

D. An order of prohibition restraining the Medical Practitioners and Dentists from either relying upon or acting on the PCC decision or further prosecuting the pending disciplinary proceedings or preferring and prosecuting any other charge or charges akin to the charges brought against the applicants in the PCC proceedings.

*E. An order restraining and/or prohibiting the Board from invoking, implementing or in any other way acting or relying on the provisions of Rules **4A** and **10** of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules.*

F. An order of mandamus compelling the Board to forthwith restore the 1st applicant's private practice licence and retention and (to the extent that is lawfully necessary) to permit the 2nd applicant to perform procedures under general anaesthesia and operate a theatre within the 2nd applicant's clinic.

G. The costs of the application.

17. Dr. Geoffrey King'ang'a Muiruri argues that the Committee acted *ultra vires* its powers, that it exceeded its jurisdiction by making a final order suspending his private practice and retaining his licenses. He states that the decision violates his right to a fair administrative action guaranteed by Article **47** of the Constitution. He also states that Committee failed to give effect to section **20** of the Act. Additionally, he states that the impugned decision is illegal and un procedural. He also states the Ruling ordered him to pay the 2nd Respondent costs of Kshs. 150,000/- within a period of thirty (30) days from 13th September 2018.

18. Lastly, he maintains that the impugned orders were made in excess of the Respondents' jurisdiction provided under Rules **3 (a), 4A (2)** and **4A (3)** of the Rules, hence, the decision is illegal, void *ab intio* and incapable of being enforced.

Reliefs ought

19. Dr. Geoffrey Muiruri King'ang'a prays for:-

a. An Order for Certiorari to quash the entire decision of the PCC dated 13th September 2018 delivered in PCC Case No. 2 of 2018.

b. An Order prohibiting the 2nd Respondent from ratifying or effecting the Ruling of the 1st Respondent dated 13th September 2018 delivered in PCC Case No. 2 of 2018.

c. A declaration that the PCC has no power to suspend the private practise and retain licenses of doctors or make a final order in regards to the same.

d. An Order for costs.

Respondents' Replying affidavit

20. Daniel Yumbya, the Board's Chief Executive Officer swore two substantially identical Replying affidavits each dated **3rd** May 2019 in reply to each case. Because the two affidavits are identical, it will add no value to rehash both here. It will suffice to summarize the core averments and treat them as the Respondents' response to both suits. He deposed that the Board's functions as set out in the act include licensing, registration of medical and dental practitioners, licensing Medical Institutions and conducting disciplinary proceedings on complaints lodged against practitioners or Medical institutions as set out in section **20** of the Act.

21. He deposed that the Board carries out its statutory duties through committees comprising of Board Members and in some instances the respective committees may co-opt other persons or specialists if the need arises. He averred that the Board is empowered to receive complaints against medical or dental Practitioners or Medical institutions. Mr. Yumbya deposed that a complaint was lodged with the Board on 2nd November 2015 or thereabouts by the first Interested Party on behalf of the minor against the applicants in both suits.

22. He averred that upon receipt of the complaint, the Board wrote to the applicants requesting their responses and copies of documents relating to the treatment and management of the patient to enable the Board's Preliminary Committee to undertake an inquiry on the complaint. He deposed that the Board wrote to M.P. Shah Hospital requesting for copies of the patient's file and other documents relating to the treatment and management of the patient because a review of the complaint indicated that the patient had been transferred to M.P. Shah Hospital for ICU care. He deposed that MP Shah Hospital supplied copies of the documents pertaining to the treatment and management of the patient at the hospital. Additionally, he deposed that Dr. Sunil Vinayak filed statements as set out in the verifying affidavit while Dr. Geoffrey Muiruri King'ang'a filed an affidavit. He deposed that both applicants were supplied with various documents and reports in response to the complaint.

23. He averred that the PIC is a Committee of the Medical Board established under Rule **4** for purposes of undertaking inquiries by discussions in instances where the documents are sufficient or through hearing witnesses. He deposed that the PIC comprises of practitioners and consultants in different specialities in Medicine and Dentistry and that they discuss matters before them while considering the evidence and documents presented before the Committee. He averred that upon evaluating and considering the documents presented before it, the PIC recommended that the complaint has merit and the matter be referred to the PCC; and, that the Board will prefer and serve appropriate notice of inquiries and or charges upon the applicants.

24. He also deposed that the findings and recommendations of the PIC were adapted by the full Board and subsequently communicated to the applicants vide the letter dated 21st July 2016, but the applicants did not challenge or appeal against the decision. Mr. Yumbya deposed that the Board comprising of members of the PCC reviewed the complaint and the documents and thereafter an oral hearing was held on 22nd June 2018 where the applicants were represented by advocates. He averred that the PCC made its findings and recommendations as set out in the ruling of 13th September 2018 which was approved by the second Respondents Board as stated at page **47** of the ruling.

25. He averred that the PCC acted within its jurisdiction under the Act and the Rules. He averred that section **20** of the Act empowers the Board to undertake disciplinary proceedings and any person aggrieved by the decision may appeal to the High Court within a period of 30 days.

26. He deposed that the applicants were aware of the decision, and that they were represented by advocates who communicated with the Board as evidenced by the correspondence annexed to his affidavit. He deposed that these proceedings were filed out of time and that section **4 (14)** of the Act gives the Board powers to regulate its own procedure subject to the act and to any rule made under section **23**. He deposed that the Board and the PCC cannot be faulted for the manner in which it conducted the inquiry. Lastly, Mr. Yumbya deposed that Rule **10Y**

grants the PCC powers to make diverse orders after hearing a complaint and that the application lacks merit.

Applicant's Supplementary Affidavit

27. Dr. Sunil Vinayak swore the supplementary affidavit dated **21st** June 2019 in support of his application to amend his Notice of Motion and also in reply to the above Replying affidavit. He deposed that despite completing the duration of his suspension, the Board had failed to restore his private practice and retention licenses, hence, it seeks to punish him beyond the terms of the PCC's decision.

28. He deposed that there is no evidence that the impugned ruling was made in consultation with the full Board. He also deposed that it is questionable whether the Board can delegate its functions. He deposed that the fact that the applicants did not challenge the decision cannot be held against them nor can it be said that the applicants can waive their rights to challenge a body which acted without jurisdiction.

29. Regarding the averment that the applicants ought to have preferred an appeal within **30** days, he deposed that an appeal can only be made against a decision made by the full Board after an inquiry held as provided under section **20(6)** of the Act. He deposed that the proceedings were conducted by the PCC and not the full Board.

30. Lastly, he deposed that judicial review proceedings can be instituted within **6** months, that the decision was availed to them on **1st** November 2018, one and a half months late, and in any event, the period between **20th** December and **13th** January is excluded under the rules.

Respondents' further affidavit

31. Daniel Yumbya swore the further affidavit dated **13th** September 2019. He deposed that the PIC was properly constituted in accordance with Rule **3** and that it considered all the evidence before it in addition to applying their professional expertise in assessing the complaint. He also deposed that the PCC acted within its jurisdiction. He deposed that the PIC's and PCC's decisions were approved by the Medical Council then known as the Full Board of the Medical Practitioners and Dentists Board in line with the Act and the Rules. Additionally, he deposed that he was aware that an application for a license or renewal of a license must be in the prescribed form as provided under the Medical Practitioners and Dentists (Forms and Fees) Rules.

32. Mr. Yumpya averred that once an application is submitted to the Council it is reviewed by the relevant Committee and it's at that stage an inspection of the clinic can be carried out and thereafter the facility may be permitted to operate in line with its license. He deposed that both applications lack merit and are an abuse of the court process because the PCC acted within its jurisdiction as provided under the Act and the Rules. He deposed that the applicant cannot challenge the constitutionality of Gazette Notices through these proceedings, and, that it is within the Medical Council's mandate under the Act and the Rules to rely and act on the decision made by the PCC in such manner as it may deem necessary.

33. He deposed that these applications were filed contrary to section **20** of the Act which provides for an appeal to the High Court within a period of **30** days. Lastly, he deposed that it is in the interests of the general public for the Medical Council to be allowed to perform is functions as stipulated in the Act and the applicable Rules considering the nature of the complaint and the required expertise to determine such complaints.

Applicant's advocates' submissions in Misc. application No. 59 of 2019

34. Mr. Inamdar, counsel for the applicants in number **59** of 2019 submitted that the Board's jurisdiction is derived from section **20** of the Act and the Rules which provide for the establishment of a PIC to investigate, on a preliminary basis, complaints of serious professional misconduct made against medical practitioners and dentists by members of the public and to recommend, in appropriate cases, for a full inquiry to be held.

35. He argued that the Rules provide for the procedure to be adopted by the Board at the hearing of any inquiry and the manner in which it is to consider the party's submissions before determining the matter. He submitted that that Legal Notice Nos. **21** of 2012 and **223** of 2013 substantially widened the powers of the PIC and introduced the PCC the effect of which was to usurp the statutory powers of the Board under section **20** of the Act. He argued that the said amendments granted the PIC and the PCC disciplinary functions reserved for the Board by the Act. He argued that the PIC and the PCC are statutory creatures hence their decisions are amenable to judicial review.[8]

36. On the argument that the applicants ought to have appealed to the High Court, Mr. Inamdar submitted that the right of appeal to the High Court can only lie against a decision of the Board made under section **20(6)** of the Act. He argued that the PCC's decision was not a decision of the Board. He further submitted that the existence of an alternative remedy is not a bar to bringing judicial review proceedings. He relied on *R v Senior Resident Magistrate Mombasa exp H L & another**[9]*** which cited Sir William Wade in *Administrative Law* for the proposition that *"an appeal and review exist for different purposes, the first concerning merits and the second, legality, and that review of legality is the primary mechanism for enforcing the rule of law under the inherent jurisdiction of the courts. If an applicant can show illegality, it is wrong in principle to require him to exercise a right of appeal. Illegal action should be stopped in its tracks as soon as it is shown."* He also argued that there is no basis for the assertion that these proceedings were brought out of time.

37. It was Mr. Inamdar's position that that the enabling statute envisages an inquiry by the Board and no other body. He cited section **20 (1)** of the Act and submitted that it expressly provides that a doctor can only be found culpable for professional misconduct "after inquiry by the Board." He also argued that the Board's only power under section **20(1)** is that it "may, subject to subsection **(9),** remove a name from the register or cancel any licence. He argued that section **20(9)** provides that the Board shall not remove the name of a person from the register, or cancel any licence granted to a person, under subsection (1) unless at least **10** members of the Board so decide.

38. He argued that the PCC's orders purportedly made under Rule **10 Y** not only contravene the Act but exceeds the powers given to the Board by the Act. He cited *R v Attorney-General & 4 Others, Ex-p Diamond Hashim Lalji and another**[10]*** for the proposition that judicial review does not deal with merits of the case but only with the process. Mr. Inamdar urged the court to grant the orders sought arguing that the Respondents have failed to respond to the proven facts.[11] He submitted that the PCC's decision was without jurisdiction and/or *ultra vires* the Board's powers because section **20** of the Act provides that an inquiry is to be held by the Board and not by any Committee delegated by it. He relied on Bowen LJ in *Leeson v General Medical Council* [12] that:-

> *"The only thing which the Courts can investigate when proceedings of the General Medical Council of this character are brought before them is whether the domestic forum has acted honestly within its jurisdiction. The jurisdiction is defined by the statute. There must be an adjudication by the General Medical Council of infamous conduct in some professional respect, and that adjudication must be arrived at after due enquiry. The statute says nothing more, but in saying so much it certainly imports that the substantial elements of natural justice must be found to have been present at the enquiry. There must be due enquiry. The accused person must have notice of what he is accused. He must have an opportunity of being heard, and the decision must be honestly arrived at after he has had a full opportunity of being heard. With respect to the charge made, the charge of which he has notice, it is a charge of infamous conduct in some professional respect, and the particulars which should be brought to his attention in order to enable him to meet that charge ought to be particulars of conduct which, if established, is capable of being viewed by honest persons as conduct which is infamous. That is all."*

39. Mr. Inamdar submitted that the PCC had no jurisdiction to entertain any inquiry at all. He relied on *Hypolito Cassiano de Souza v Chairman and Members of Tanga Town Council*[13] for the proposition that *"if a statute prescribes, or statutory rules and regulations binding on the tribunal prescribe, the procedure to be followed, that procedure must be observed. … in such a case the tribunal, which should be properly constituted, must do its best to act justly and reach just ends by just means… It must act in good faith and fairly listen to both sides."*

40. He submitted that in the absence of specific provisions in the Act entitling the Board to delegate any powers, the Board has no right do so nor can such power be implied or inferred. To fortify his argument, he cited *Apollo Mboya v Attorney General & others**[14]*** for the holding that *"it is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature, the court cannot not go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot legislate itself."* Additionally, he cited *R v Medical Practitioners & Dentists Board & 2 others Ex-p Majid Twahir & another**[15]*** for the holding that a body must operate within the limits set by the enabling law and ought not to expand its jurisdiction through administrative craft or innovation

41. Regarding Legal Notice Numbers **21** of 2012 and **223** of 2013 as read with Rules **4A** and **10**, he argued that they entitle the PCC to conduct inquiries, impose punishments (including suspensions) and levy costs. It was his submission that these Rules not only usurp the disciplinary function of the Board as specified under the Act but are also in direct conflict with section **20** of the Act. He relied on *R v Commissioner for Co-operatives ex parte Kirinyaga Tea Growers Co-operatives Savings and Credit Society Ltd* [16]which held that no statute allows power to be exercised arbitrarily, capriciously or in bad faith. He cited section **24(2)** of the *Statutory Instruments Act*[17] which provides that a statutory instrument shall not be inconsistent with the provisions of the enabling legislation. He cited section **31(b)** of the *Interpretation and General Provisions Act*[18] which provides that where an Act confers power on an authority to make subsidiary legislation, no subsidiary legislation shall be inconsistent with the provisions of an Act. Lastly, he cited section **7(1) (g)** of the *Fair Administrative Action Act**[19]*** which provides for judicial review orders to issue where the administrator acted on the directions of a person or body not authorized or empowered by any written law to give such directions.

42. Mr. Inamdar also cited *Pastoli v Kabale District Local Government Council & Others**[20]***and Lord Diplock in *Council of Civil Servant Unions v Minister for the Civil Service**[21]*** which laid down the grounds for judicial review and argued that the impugned decision is tainted with illegality. To advance his argument that the Gazette Notices offend the substantive Act, he cited the *Twahir* case (supra) in which the Board argued that the introduction of subsidiary legislation in the form of *Medical Practitioners and Dentists (Private Medical Institutions) Rules 2000* conferred jurisdiction on the Board to discipline medical institutions, but the court rejected this line of reasoning contending that if there was a lacuna in the Act, such lacuna could only be cured by the amendment of the Act and not sneaked in by way of subsidiary legislation where there is no express power in the Act enabling such subsidiary legislation to be made.

43. Mr. Inamdar's advanced what he described as an alternative argument which he supported by citing *Kenya Hospital Association t/a Nairobi Hospital v Medical Practitioners and Dentists Board & 4 others*[22] which found that the Board could exercise discretion to delegate its powers but strictly subject to ratification by it. He argued that the PCC and the Board acted unreasonably and irresponsibly, contrary to the Act and the principles of natural justice, and that it grossly erred in law and acted in excess of or outside its jurisdiction. He submitted that the decision is thus *ultra vires* the Board's powers as spelt out under the Act.

44. Mr. Inamdar submitted that the protection given by the law to a medical practitioner or dentist is based upon two well-settled principles. The first involves the holding of an inquiry to enable the applicant to know what case he has to meet. The second is to afford the applicant a full opportunity to be heard. He urged this court to authoritatively interpret the law and to quash the impugned decision.[23] It was Mr. Inamdar's submission that the PCC has no right to "direct" the Board to do anything or make an order permitting the 1st applicant to reapply for a licence nor does it have powers to ask for costs or compel the 1st applicant to enter into mediation "with a view to compensate" the 1st Interested Party. He maintained that none of these matters are provided for in, let alone sanctioned by the Act.

45. He argued that the PCC (or the Board) failed to consider the evidence in breach on of the principles of natural justice and section **20(2)** of the Act, Rule **7(f)** & **10U** of the Rules. To buttress his argument, he cited *General Medical Council v Spackman**[24]*** for the proposition that *"due inquiry" does involve at least a full and fair consideration of any evidence that the accused desires to offer, and, if he tenders them, hearing his witnesses,' and that the practitioner charged is entitled to a judgment the result of the considered deliberation of his fellow practitioners. They must, therefore, hear him and all relevant witnesses and other evidence that he may wish to adduce before them*.[25]

46. Regarding the order restraining the Clinic from performing procedures under general anaesthesia or operating a theatre, he argued that there were no charges against the Clinic which at the material time was licensed to operate as a private medical institution. He submitted that even if it were assumed that the Board had jurisdiction to regulate and/or discipline a medical institution, in the absence of any charge being brought against it, the PCC's decision to order the Clinic to stop performing procedures under general anaesthesia and to cease operating a theatre is without any legal basis or foundation. He submitted that the clinic, as an independent body in its own right and recognized by the Board as such, was never called upon to defend itself and cannot be bound by a decision made against it.

47. Mr. Inamdar submitted that no order can be made or enforced against a person who was neither a party nor heard in the proceedings in which the order was made.[26] He also argued that an administrative action cannot be said to be procedurally fair where a decision is arrived at based on issues which were not the subject of investigation by the Tribunal unless the charges are amended and a proper opportunity given to the party charged to respond thereto.[27] He reiterated that the Board has no jurisdiction under the Act to regulate the conduct of medical institutions. He submitted that where a body conducts itself in a manner that does not meet the criteria set out in Article **47** of the Constitution regarding procedural fairness, *certiorari* is an appropriate remedy to quash the decisions.[28]

48. Regarding the prayer to quash the Gazette Notices, and the counter argument that the plea is time barred, Mr. Inamdar submitted that the advent of the 2010 Constitution and the effect of Article **47** in the enactment of the *Fair Administrative Actions Act*[29] radically changed the landscape in which the rigors of time limits in applying for judicial review orders have been vitiated. To buttress his argument, he cited *R v Kiambu County Executive Committee & 3 others ex-p James Gacheru Kariuki & others**[30]* in which the court refused to be bound by a six-month set time limit to bring judicial review applications holding that Articles **47** and **23** of the Constitution have the functional effect of blitzing the bifurcation between challenges to the exercise of public power using the traditional mechanism of judicial review rooted in the common law (and, in Kenya, the Kenya Law Reform Act) and those based expressly on the Constitution and noting that the same judicial reliefs were now available under both the Constitution and the *Fair Administrative Actions Act*[31] which had no time limits.

49. On the plea for Prohibition, he submitted that the legal basis for this prayer is grounded on questions surrounding the PCC and Board's conduct and *bona fides* arguing that in the event the decision is quashed the Board will press fresh charges. He submitted that owing to the past conduct of the PCC and the Board, there is a likelihood any future inquiry will be tainted with bias. To buttress his argument, he cited the overriding duty of the High Court to prevent what would be tantamount to permitting an oppression to be perpetrated by an inferior tribunal on a citizen citing *Joram Mwenda Guantai v Chief Magistrate**[32]* and *Stanley Munga Githunguri v Republic*.[33]

50. Further, Mr. Inamdar submitted that the writ of prohibition can issue where it is likely that a perverse decision will be, or is likely to be, reached if the matter were to proceed as was held in *Kadamas v Municipality of Kisumu.**[34]* Lastly, he cited *Law Society of Kenya v Centre for Human Rights and Democracy & 13 others**[35]* for the holding that if it is proved that the tribunal, person or authority has deviated from the established and set beacons or pathway or legal criteria as delineated and demarcated for it and has run wild and amok, and at worst has gone on a frolic of its own, become an unruly horse and engaged in caprice, malice, witch-hunting and a wild goose chase running helter-skelter, it is the duty of the High Court through its supervisory jurisdiction to pull the leash and firmly point the delineated legal path that the tribunal, person or authority is enjoined by law to tread and to follow.

Applicants' Advocates' submissions in Misc. Application No. 63 of 2019

51. Mr. Cheruiot, counsel for the applicant in No. 63 of 2019 submitted that the PCC acted in excess of its powers and jurisdiction conferred by Rules **3 (a), 4A (2)** and **4A (3**) and the Act. He cited *Kenya National Examination Council v Republic Ex parte Geoffrey Gathenji & 9 others**[36]*which held that *certiorari* and *mandamus* will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are violated. He also cited *an Application by Bukoba Gymkhana Club**[37]* and argued that the application satisfies the tests for *certiorari* and *mandamus* to issue.

52. He submitted that the PCC did not have the requisite jurisdiction to make a final determination as it did, and that it lacked lawful authority to suspend the applicant's private practice or retain his license which can only be done by the Board. He submitted that the PCC usurped the Board's role. He argued that the Board's decision must comply with Section **20 (9)** of the Act and that the PCC's powers are derived from and limited to Rule **4A (3)**.

53. Mr. Cheruiot argued that the Board did not meet the threshold set out in Section **20 (9)** of the Act because it did not have at least 10 of its members to review the complaint and proceedings in order to suspend the license. He submitted that the PCC's decision was never ratified by the Board rendering it illegal, null and void. He maintained that a decision made without jurisdiction is a nullity.[38] He submitted that the PCC's powers are limited by Rule **4A (3)** and can only be exercised subject to prior or subsequent approval by the Board. He argued that sub-rule **(f)** which purports to give wider powers to the PCC is curtailed by the qualification that it can only make recommendations to the Board and not make a final order. He argued that by rendering the decision, the PCC acted *ultra vires* its powers.

54. Counsel also argued that even if the PCC had the power to make determinations into inquiries by virtue of the Rules, the same is not contemplated under Section **20** of the Act which vests disciplinary inquiries to the Board. To support his argument, he cited Legal Notice **223** and Section **31(1) (b)** of the *Interpretation and General Provisions Act*[39] which stipulates that subsidiary legislation cannot be inconsistent with the provisions of the Act nor can it overrule the parent Act. He submitted that under section **7 (2) (i)** of the *Fair Administrative Action Act,*[40] this court has power to review an administrative decision made by a body without authority.

55. While admitting that the Medical Board under Section **4(14)** of the Act has power to regulate its own procedures, he cited *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others*[41] for the proposition that jurisdiction flows from the Constitution or legislation hence it cannot be expanded through judicial innovation or craft. He argued that the legislation explicitly deprives the PCC the power to make final determination, hence the Ruling dated 13th September, 2018 illegal.

56. Counsel submitted that the PCC under Section **4** of the Act can only make orders with prior or subsequent approval of the Board, yet there is no evidence of such approval. He argued that it was impossible to ratify a decision made in September, 2018 in July 2016. He also argued that there is no evidence that the decision to suspend the applicant's practicing license satisfied the requirement of section **20 (9)** of

the Act. To buttress his argument, he cited *Kenya Hospital Association t/a Nairobi Hospital v Medical Practitioners and Dentists Board & 4 others**[42]*** which held that the PCC is a body exercising delegated powers of the Board, hence, it could not make final decisions without the Board's ratification. He argued that where jurisdiction is donated by a parent Act, all actions carried out under the subsidiary legislation have to be ratified by the donor of such authority. To him the impugned decision was made in excess of jurisdiction and is therefore a nullity in law.

57. On the alleged failure to appeal to the High Court, he argued that no appeal could be filed because no appealable decision had been made by or ratified by the Board.

Respondent's advocates' submissions

58. Mr. Munge, the Respondents' counsel submitted that the Board's statutory functions include licensing, registration of medical and dental Practitioners, licensing Medical Institutions, and conducting disciplinary proceedings on complaints lodged against Practitioners or Medical Institutions within the Republic of Kenya as set out in Section **20** of the Act.

59. He submitted that the Council operates through Committees which may co-opt other persons or specialists when need arises. He submitted that the Medical Council is empowered to receive complaints against medical or dental Practitioners or Medical Institutions from different sources. He argued that Section **4(14)** of the Act gives it powers to regulate its own procedures subject to the Act and to any rule made under section **23**. He argued that section **23** of the Act empowers the Minister in consultation with the Medical Council to make rules generally to prescribe anything required by the Act to be prescribed and to provide for the procedure to be followed by the Medical Council in an inquiry under section **20** of the Act, amongst others.

60. Mr. Munge submitted that the PIC is established as a Committee of the Medical Board under **Rule 4** and its functions include undertaking inquiries by way of discussing matters in instances where the documents are sufficient or by hearing witnesses summoned by the Medical Council. He argued that PIC consists of Practitioners and Consultants in different specialties in medicine and dentistry and upon considering the complaint it recommended that- *(i) The complaint had merit and would refer it to the Professional Conduct Committee (PCC); (ii) The Medical Board will prefer and serve appropriate notice of inquiries and/or charge upon Dr. Geoffrey King'ang'a Muiruri and Dr. Sunil Vinayak.* He argued that the said decision was adopted by the full Board and subsequently communicated to the applicants vide the letter dated **21st** July, 2016. He argued that the applicants did not challenge the decision of the PIC nor did they appeal.

61. Mr. Munge submitted that the Council comprising of members of the PCC reviewed the complaint and documents received by the Council and thereafter invited an oral hearing and the inquiry was held on 22nd June, 2018 in which the applicants and the 2nd Interested Party were duly represented by their Advocates. He argued that the PCC made its findings and recommendations as set out in the ruling of **13th** September, 2018 and the Council approved the decision as shown at page **47** of the Ruling. He argued that the Council and the PCC cannot be faulted for the manner in which the inquiry was conducted, and that they acted within the law.

62. Mr. Munge submitted that the Rules were amended vide the LN Nos. **21** of 2012 and **223** of 2013 by inserting **Rule 4(1)** which provides for the functions of the PIC. He submitted that Rule **4(2)** provides that the PIC after considering the complaint and making such inquiries may reject the complaint or if it opines that the complaint warrants a reference to the Board for inquiry, cause it to be referred to the PCC. He argued that upon recommendation by the PIC, the Council may establish the PCC on *ad hoc* basis whose functions are set out at Rule **4A (2).** He also cited Rule **4A (3)** which provides the powers of the PCC subject to prior or subsequent approval by the Board.

63. Mr. Munge submitted that the Rules provide for the procedure to be followed by the PIC and the PCC, and, the manner in which decisions are to be made. He argued that the Rules require that the decision of the PCC and the PIC be approved by the Board which was done as evidenced by page **47** of the Ruling. To fortify his argument, he cited *Republic v Medical Practitioners and Dentists Board ex-parte Dr. Yamal Patel & 2 others**[43]*** which held that:- *"unlike the 1979 Rules, the PIC now under the 2013 Amendment Rules has power to carry out an inquiry and take action on its findings. In other words, prior to 2013 Rules, the PIC under the 1979 Rules had no power to undertake the actual inquiry and take action against the offending medical practitioner or dentist."*

64. Mr. Munge submitted that the court in the above case stated that the 2013 amendment gave more powers to the PIC, and that it was no longer the weak organ created by the 1979 Rules, but it has the mandate to investigate a complaint and impose sanctions where necessary. He argued that there is evidence that the Board was duly consulted as required under the Rules. Additionally, he cited *Republic v Medical Practitioners and Dentists Board & another, Ex Parte J. Wanyoike Kihara*[44] in which the court acknowledged that the 2013 Amendments to the Rules gave powers to the PIC, in consultation with the Board, to carry out an inquiry and determine. Further, he argued that the court in the above case held that the council simply ratifies the PIC's decision and that in adopting the decision, the Board is not to hear parties afresh. To fortify his argument, he cited *Kenya Hospital Association t/a Nairobi Hospital v Medical Practitioners and Dentists Board & 4 others.**[45]*** Fortified by the above decisions, he submitted that the impugned decision was arrived at after following the legal procedures hence the PIC and PCC did not act illegally. He submitted that the decision was ratified by the Council as is evident at page **47** of the Ruling.

65. On the constitutionality of the two Gazette Notices, he argued that the same cannot be challenged through these proceedings, more so in the manner pleaded. He argued that the Gazette Notices were issued pursuant to section **23** of the Act which empowers the Minister to make Rules for better carrying out the Act including carrying out inquiries under Section **20** of the Act. He argued that the applicants have not challenged section **23** aforesaid and cited *Evans Aseto & another v National Bank of Kenya (NBK) & another; Central Bank of Kenya & another (Interested Parties)**[46]*** where the Petitioners challenged the constitutionality of a gazette notice exempting the National Bank of Kenya from the provisions of the State Corporations Act but the court stated that *"…the constitutionality of Section 5A has not been challenged in these proceedings. The court cannot invalidate Legal Notice No. 59 of 1987 issued through Kenya Gazette Supplement No. 12 of 27th February, 2017 since the same was based on a valid law. …."*

66. He submitted that the Rules are made pursuant to Section **23** of the Act and that the Minister exercises the mandate to develop Rules pursuant to the said section. He relied on *Kenya National Examinations Council v Republic Ex parte Geoffrey Gathenji Njoroge**[47]*** for the holding that an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural

justice are not complied with or for such like reasons. He also cited *Council for Civil Service Unions v Minister for Civil Service* ***[48]*** in which the court classified grounds upon which *certiorari* can issue and submitted that the Legal Notices are neither decisions nor actions to warrant orders of *certiorari*. He submitted that the applicants can only challenge the constitutionality of the Gazette Notices through separate proceedings.

67. Mr. Munge submitted that the applicants are guilty of inordinate delay in filing the instant applications. He argued that the applicants were aware of the Ruling delivered on **13th** September, 2018 yet the applications were filed more than **6** months after the delivery of the Ruling. He submitted that section **20** of the Act grants an aggrieved person **30** days to appeal against the decision to the High Court and argued that where a statute provides for the timelines within which a party ought to challenge the decision, the provision must be adhered to. He submitted that the applicants are guilty of inordinate delay and cited *Halsbury's Laws of England* [49]thus:-*"A claimant in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the statutes of limitation equity aids the vigilant, not the indolent' or 'delay defeats equities'. A Court of equity refuses its aid to stale demands, where the claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay (laches')."*

68. Mr. Munge argued that the applicants did not challenge the jurisdiction of the PIC, but they elected to argue their case before the PCC, hence, they are estopped from challenging its jurisdiction. He submitted that whether or not a medical or dental practitioner is guilty of professional misconduct cannot be determined by the court but by the Respondent. He relied on *Republic v University of Nairobi.* ***[50]***

69. He submitted that Dr. Sunil Vinayak is the proprietor of Smile Africa, and, that the complaints made related to the operation conducted at his clinic. He argued that in the ruling, the PCC directed that the applicant's license be suspended for a period of **6** months from 13th September, 2018. He argued that the 6 months period has since lapsed, hence, the applicant ought to apply for the licenses as the law requires. To fortify his argument, he cited *Republic v Kenya National Examinations Council ex parte Gathenji & Others* **[51]** which stated that *mandamus* cannot issue where a statute imposes a duty and discretion as to the mode of performing the duty.

70. He submitted that in arriving at its decision, the PCC considered all the evidence presented before it. He relied on *Kenya Revenue Authority v Menginya Salim Murgani* ***[52]*** where the Court of Appeal stated that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures, provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed. Lastly, he cited *Republic v Aga Khan Education Services ex parte Ali Sele & 20 others*[53] which held that it is not in every situation that the other side must be heard.

The Interested Parties advocates' submissions

Mr. Chege, counsel for the Interested Parties stated that the Interested Parties did not file affidavits or submissions. He however adopted the Respondents' submissions.

Determination

71. A useful starting point is to examine how courts in other jurisdictions have construed the law in similar cases. Foreign jurisprudence is of value because it shows how courts in other jurisdictions have dealt with the issues confronting us in this matter. At the same time, it is important to appreciate that foreign case law will not always provide a safe guide for the interpretation of our Constitution. Our Constitution gives prominence to national values and principles of governance which include human dignity, equity, social justice, inclusiveness, equality, human rights and Rule of law.[54] Exercise of judicial authority is now entrenched in the Constitution[55] which underscores the Independence of the Judiciary.[56]

72. The philosophy, values and the structures of the previous Constitution had to give way to those of the new constitutional order which included enactment of new legislations, the realignment of the bureaucracy and management of institutions and the rallying of the national consciousness to the new dawn.[57] Courts are accountable to the Constitution and the law which they must apply honestly, independently and with integrity.

73. When developing our jurisprudence in matters that involve constitutional rights, as the present case does, we must exercise particular caution in referring to foreign jurisprudence[58]and develop our common law in a manner that promotes the values and principles enshrined in our Constitution. In this regard the Constitution at Article **43 (1) (a)** guarantees the highest attainable standard of health which includes the right to health care services.

74. The Supreme Court of India has on several occasions authoritatively pronounced itself on the subject of professional misconduct. As far back as in *P.J. Ratnam v. D. Kanikaram* [59]it held that the object of a proceeding in respect of professional misconduct under the *Bar Councils Act* and similar statutes is to ensure that highest standards of professional conduct are maintained; the proceedings though in a sense penal, are solely designed for the purpose of maintaining discipline to ensure that a person does not continue in practice who by his conduct has shown that he is unfit so to do.

75. Similarly in *V.C. Rangadurai v. D. Gopalan* ***[60]*** the Supreme Court of India reiterated that disciplinary proceedings are *sui generis* and are neither civil nor criminal in character and that as a rule even in exercise of appellate power the Court would not, as a general rule interfere with the concurrent finding of fact by the Disciplinary Committee unless the finding is based on no evidence or it proceeds on mere conjecture and unwarranted inferences.

76. Also, the Supreme Court of India in *Rajendra V. Pai v Alex Fernandes*[61] held that ordinarily this court does not interfere with the quantum of punishment where an elected statutory body of professionals has found one of their own kinsmen guilty of professional misconduct unless the punishment is found to be totally disproportionate to the misconduct. The Division Bench of the Court in *Satendra Singh v Union of India* ***[62]*** though in a different context held that in exercising jurisdiction under Article **226** of the Constitution of India, the Court is not to sit as a superior medical expert expressing opinions over the opinions rendered by the experts in the field.

77. The scope of interference by the courts in such matters was defined by the English Courts in *Meadow v General Medical Council*[63] and *Raschid v General Medical Council* [64]as here under:-

> *a. The panel is concerned with the reputation and standing of the medical profession, rather than with the punishment of doctors;*
>
> *b. The judgment of the panel deserves respect as the body best qualified to judge what the profession expects of its members in matters of practice and the measures necessary to maintain the standards and reputation of the profession;*
>
> *c. The panel's judgment should be afforded particular respect concerning standards of professional practice and treatment;*
>
> *d. The court's function is not limited to review of the panel decision but it will not interfere with a decision unless persuaded that it was wrong. The court will, therefore, exercise a secondary judgment as to the application of the principles to the facts of the case before it.*

78. It has further been held that since the principle purpose of the Panel's jurisdiction in relation to sanctions is the preservation and maintenance of public confidence in the profession rather than the administration of retributive justice, particular force is given to the need to accord special respect to the judgment of the professional decision-making body in the shape of the Panel.

79. In *Noratanman Courasia v. M. R. Murali* the Supreme Court of India explored the amplitude and extent of the words "professional misconduct." In arriving at the decision, the Supreme Court carried out an over-view of the jurisprudence of the courts in the area of misconduct of advocates, which can to a large scale apply to the field of Medicine. It reiterated that the term "misconduct" is incapable of a precise definition. Broadly speaking, it envisages any instance of breach of discipline. It means improper behavior, intentional wrongdoing or deliberate violation of a rule of standard of behavior. It stated that the term may also include wrongful intention, which is not a mere error of judgment. Therefore, "misconduct," though incapable of a precise definition, acquires its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of duty.

80. The standard of conduct of Doctors flows from the broad cannons of ethics and high tome of behavior. The reasonableness or otherwise of the impugned decision is to be appreciated with clear understanding of the broad definition of reasonable standards of conduct as opposed to the restrictive approach. In my view, the real question here is whether professional misconduct was established. The reasonableness or otherwise of the decision is to be discerned from the facts and circumstances captured in the Tribunal's observations and its findings. The second step is to apply the findings to the definition of what constitutes misconduct then we determine whether the decision is reasonable or otherwise.

81. Reasonableness, within the context administrative law cannot be imbued with a single meaning.[65] Pillay states that the first element of a reasonable administrative action is rationality, and the second proportionality. Rationality means that evidence and information must support a decision an administrator takes.[66] Hoexter explains that the purpose of rationality is to avoid an imbalance between the adverse and beneficial effects and to consider using less drastic means to achieve the desired goal.[67]

82. The gravamen of the applicants' case is that the impugned decision was arrived at *ultra vires* the Respondents' legal mandate, hence it's illegal, null and void. 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, Regulations or Rules.

83. The courts when exercising this power of construction are enforcing the rule of law, by requiring statutory bodies to act within the ''four corners'' of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments. Where discretion is conferred on the decision-maker, the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[68]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.

84. The Constitution requires a purposive approach to statutory interpretation.[69]The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law.[70] The often-quoted dissenting judgment of Schreiner JA, eloquently articulates the importance of context in statutory interpretation:-

> "*Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background.*"[71]

85. The Supreme Court of Appeal of South Africa in *Natal Joint Municipal Pension Funds v Endumeni Municipality*[72] acknowledged the interpretation that gives regard to the manifest purpose and contextual approach as the proper and modern approach to statutory interpretation. Wallis JA pointed out that "in resolving a problem, where the language of a statute leads to ambiguity the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation."[73]

86. In the United Kingdom, the Chancery Division of the High Court, in *In re Birdie v General Accident Fire and Life Assurance Corporation Ltd*,[74] stated the following on the contextual approach to statutory construction:-

"The real question to be decided is, what does the word mean in the context in which we here find it, both in the immediate context of the sub-section in which the word occurs and in the general context of the Act, having regard to the declared intention of the Act and the obvious evil that it is designed to remedy."

87. A contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute and must be sufficiently clear to accord with the rule of law.[75] In *Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice and Others*[76] Stopforth Olivier JA provided useful guidelines for the factors to be considered when conducting a purposive interpretation of a statutory provision:-

"In giving effect to this approach, one should, at least, (i) look at the preamble of the Act or at the other express indications in the Act as to the object that has to be achieved; (ii) study the various sections wherein the purpose may be found; (iii) look at what led to the enactment (not to show the meaning, but also to show the mischief the enactment was intended to deal with); (iv) draw logical inferences from the context of the enactment."

88. The above excerpt is useful while ascertaining the purpose of a statute. In the context of this case, this position becomes clear if we read the preamble to the enabling Act, section **3** of the Act which establishes the Medical Council, its functions as numerated in section **4** which include regulating the conduct of registered medical and dental practitioners and taking such disciplinary measures for any form of professional misconduct as stipulated in section **4 (j).** The Act also empowers the council to regulate health institutions and take disciplinary action for any form of misconduct by a health institution; and do all such other things necessary for the attainment of all or any part of its functions. Also relevant is section **20** of the act which provides for disciplinary proceedings and section **23** which provides for the enactment of the Rules for the better carrying of the provisions of the act. I will examine and contextualize these provisions shortly.

89. The starting point is the question whether the enabling statute and the Rules made thereunder confer mandate upon the Respondents to perform the impugned functions. The functions as prescribed in section **4** include regulating the conduct of registered medical and dental practitioners and to take such disciplinary measures for any form of professional misconduct; registering and licensing health institutions; carrying out inspection of health institutions; regulating health institutions and taking disciplinary action for any form of misconduct by a health institution; (n) accredit continuous professional development providers; issuing certificate of status to medical and dental practitioners and health institutions; and do all such other things necessary for the attainment of all or any part of its functions. Also relevant is section **20** of the Act which provides as follows:-

20. Disciplinary proceedings

(1) Any person who is dissatisfied with any professional service offered, or alleges a breach of standards by a registered or licensed person under this Act, may lodge a complaint in the prescribed manner to the Council.

(2) The Council may, or through a committee appointed for that purpose, inquire into any complaint of professional misconduct, malpractice or any breach of standards.

(3) Upon an inquiry held by the Council to determine the complaint made under subsection (2), the person whose conduct is being inquired into shall be afforded an opportunity of being heard, either in person or through a representative.

(4) For purposes of proceedings at any inquiry held under this section, the Council may administer oaths, enforce the attendance of witnesses and production of books and documents.

(5) The Council shall regulate its own procedure in disciplinary proceedings.

(6) Where after an inquiry, the Council determines that a person is guilty, the Council may—

(a) issue a caution or reprimand in writing;

(b) direct a medical practitioner or dentist to undergo remedial training for a period not exceeding twelve months;

(c) direct the medical practitioner or dentist be placed on probation for a period not exceeding six months;

(d) suspend, withdraw or cancel the practising licence of a medical practitioner or dentist for a period not exceeding twelve months;

(e) suspend, withdraw or cancel the licence of a health institution or a section of the health institution for a period not exceeding twelve months;

(f) permanently remove the name of a medical practitioner or dentist from the registers under section 5(3); or (g) in addition to the penalties stipulated in paragraphs (a), (b), (c), (d), (e) or (f), impose a fine which the Council deems appropriate in the circumstance.

(7) A person or health institution whose licence has been withdrawn or cancelled under subsection (6), shall forthwith surrender the license to the Council.

(8) A person or health institution whose name has been removed from the register under subsection (6)(f) shall forthwith surrender the registration certificate to the Council.

(9) A person aggrieved by a decision of the Council made under subsection (6) may, within thirty days from the date of the decision of the Council, appeal to the High Court.

(10) Notwithstanding the provisions of section 3A (5), the Council shall not remove the name of a person from the register under subsection (6) unless at least seven members of the Council are present in the inquiry.

90. The PCC is a Committee of the Council established under section **4A** of the Act. Section **4A (1) (b)** provides that the mandate of the disciplinary and ethics committee include— *(i) conducting inquiries into complaints submitted to it; (ii) regulating professional conduct; (iii) ensuring fitness to practice and operate; (iv) promoting mediation and arbitration between parties; and (v) at its own liberty, recording and adopting mediation agreements or compromise between parties, on the terms agreed.*

91. Section **23** of the Act provides for enactment of rules in the following words:-

23. Rules

The Cabinet Secretary may, after consultation with the Council, make rules generally for the better carrying out of the provisions of this Act, and any such rules may, without prejudice to the generality of the foregoing— (a) prescribe anything required by this Act to be prescribed; (b) provide for the procedure to be followed by the Board in an inquiry under section 20;

92. The applicants maintained that the PIC and the PCC usurped the functions of the Board. This argument collapses not on one but on several fronts. *First*, section **23** of the Act provides for the enactment of the rules for the purposes of carrying on the functions of the act. It follows that the rules enjoy a statutory underpinning.

93. *Second,* the rules are explicit on the mandate and functions of the PCC, a Committee of the Council established under section **4A** of the Act. Section **4A (1) (b)** provides that the mandate of the disciplinary and ethics committee includes— *(i) conducting inquiries into complaints submitted to it; (ii) regulating professional conduct; (iii) ensuring fitness to practice and operate; (iv) promoting mediation and arbitration between parties; and (v) at its own liberty, recording and adopting mediation agreements or compromise between parties, on the terms agreed.*

94. *Third, The medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) (Amendment) Rules, 2012* introduced amendments to the hitherto existing Rules, namely, the *Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules.* Rule **4** was amended as follows:-— (a) in paragraph (1), by deleting the words "and to determine and report to the Board whether an inquiry should be held, pursuant to section **20** of the Act, in respect of the medical practitioner (b) in paragraph (2) (b), by deleting the word "Board" appearing immediately before the word "together" and substituting therefor the words **"Professional Conduct Committee";** and (c) by deleting paragraph (3). 3. The principal Rules are amended by inserting the following new rule immediately after rule 4— 4A (1) There is established a **Professional Conduct Committee** consisting of the following persons appointed by the Board— (a) a chairperson; (b) two persons registered in the same profession in which a medical practitioner or dentist whose conduct is being inquired to is registered; (c) one member of the Board; (d) one person representing the general public; (e) an advocate of the High Court who shall be the legal advisor; and the Chief Executive Officer of the Board.

95. *Fourth,* in a departure from the past, the Rules provide for the functions of the PCC as follows: — (a) conduct inquiries into the complaints submitted by the PIC made under rule **4(2)** and make appropriate recommendations to the Board; (b) ensure that the necessary administrative and evidential arrangements have been met so as to facilitate the Board to effectively undertake an inquiry under rule **6**; (c) convene sittings in respective counties to determine complaints; (d) promote arbitration between the parties and refer matters to such arbitrator as the parties may in writing agree.

96. *Fifth,* paragraph **3** of the Rules provides that the PCC shall, subject to prior or subsequent approval by the Board, have power to— (a) levy reasonable costs of the proceedings from parties; (b) order a medical practitioner or dentist to undergo continuous professional development for a maximum of up to fifty points; (c) suspend licenses for medical institutions for up to six months; (d) order, closure of institutions until compliance with the requirements of the operating licence. Lastly, it also provides that the PCC may summon or correspond with persons including medical practitioners and dentists to whom a complaint relates as it thinks fit and may peruse or inspect all instruments relating to the complaint.

97. *Sixth,* as stated earlier, the Rules enacted pursuant to section **23** of the Act enjoy a statutory underpinning. It follows that the argument that the PCC lacks mandate not only collapses but is an affront to both the enabling statute and the Rules made thereunder.

98. *Seventh,* the applicants argued that the PIC and PCC acted without jurisdiction or in excess of jurisdiction. I respectively disagree. I may profitably refer to *Craig v South Australia (1995) HCA 58* which held that:-

"A jurisdictional error occurs when the extent of that authority is misconceive. Decisions affected by jurisdictional error can be quashed by judicial review. Examples of jurisdictional errors include asking the wrong question, ignoring relevant material, relying on irrelevant material, and breaching natural justice.

Jurisdictional error is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its functions and powers." (Emphasis added)

99. A reading of the powers and functions of the PCC and PIC as enumerated in the Rules leave me with no doubt that they acted within their powers. There is no basis in the argument that the said bodies fell into jurisdictional error nor has it been demonstrated that they acted wholly or partly outside the general area of their jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of their functions and powers.

100. It was argued that the Board never approved the decision. This argument is attractive. However, it collapses on the simple fact the said assertion is incorrect and misleading. Whereas a judicial review court is not required to engage in merit review or reassess the evidence with a view to arriving at a different opinion, a reading of the record shows that the PIC made its recommendations which were communicated to the applicants vide the letter dated **21st** July 2016. The letter is clear that the recommendations were adopted by the Board.

101. The record shows that the PCC proceeded to undertake the inquiry as evidenced by the applicants exhibit **SV 6.** Paragraph **141** of the ruling is relevant. It reads that "in view of the above findings the Committee deliberated at length on the eventual orders under the circumstances of the case while considering it mandate and also powers as set out in Rule **4** and consequently made the orders set out hereunder after consulting the Full Board…" The foregoing position extinguishes the argument that the Board never approved the decision. The decision was made after consulting the full Board. Mr. Inamdar insisted on production of minutes or documents to prove the Boards approval. Unfortunately Mr, Inamdar is inviting this court to engage in a merit review which is outside the scope of judicial review jurisdiction.

102. The applicants in their wisdom opted to appeal against the decision maintaining that there is no appealable decision. This is where the applicants lost the case. An appeal could have given them the forum to challenge the merits of the decision and invite the court to re-evaluate the evidence and arrive at its own conclusions as opposed to a review. 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.

103. 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. 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**[77]*:-

> *"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...."*

104. The statement appearing at page **47** of the ruling that the Board considered its mandate and powers as set out in Rule **4** and made the orders after consulting the Full Board extinguishes the argument that the decision was arrived at without the Boards approval.

105. The applicants insisted that the PIC and the PCC had no powers to make the impugned orders against them. This argument is appealing. However, a close examination of the final orders and the enabling statute and Rules suggests otherwise. At the risk of repeating myself, I reiterate the orders complained of below. As against Dr. Sunil Vinayak, it was decreed:- (i) *the 1st Respondent to suspend the 1st Applicant's private practice and retention licences under the provisions of section **20(5)** of the Act for 6 months from the date of the ruling; (ii) the 1st Applicant for grant of a new license as provided under section **21 (2)** of the Act upon lapse of the period set out in order **(i)** above.*

106. The impugned ruling also ordered the said applicant *to pay the Board the Board sum of Kshs. 200,000/= within a period of 30 from the date hereof being part cost of the Committee's sitting; that the first applicant is directed to enter into mediation with the complainant with a view to compensating him and report the progress to the Board within **90** days; Smile Africa Dental Clinic is directed to stop performing procedures under general anaesthesia forthwith and to also cease operating a theatre within the Clinic until the facility is inspected and approved by the Board. The said Board shall be at liberty to give such further directions as it may deem fit.*

107. Regarding Dr. Muiruri, the PCC directed that:- ***(a)** the Committee directs the Medical Practitioners and Dentists Board to suspend the private practice and retention licenses of Dr. Geoffrey King'ang'a Muiruri under the provisions of section 20 (5) of the Act for a period of six months from the date hereof; **(b)** Dr. Geoffrey Kingángá Muiruri shall be at liberty to apply for grant of a new license as provided under section 21 (2) of the Medical Practitioners and Act upon lapse of the period set out in order (i) above; **(c)** Upon an application being lodged by Dr. Geoffrey Kingángá Muiruri under order (ii) above, the Medical Practitioners and Dentists Board shall constitute a Fitness to Practice Committee as set in Rule 3 of the Medical Practitioners and Dentists (Fitness to Practice) Rules, 2016 to assess his fitness to practice as medical practitioner and thereafter the said Committee shall make appropriate recommendations to the Board for the Board's further action; **(d)** Dr. Geoffrey Kingáng'a Muiruri is directed to pay the Medical Practitioners and Dentists Board the sum of Kshs. 150,000/= within a period of 30 days from the date hereof being part cost of the Committees sitting. Dr. Geoffrey Kingángá Muiruri is directed to enter into mediation with the complainant as relates to compensation and thereafter report the progress to the Chairman of the*

Medical Practitioners and Dentists Board within 90 days from the date hereof.

108. A faithful reading of the enabling statute and the rules leaves no doubt that the said orders are anchored on the law. In fact in some of the orders, the Repondents cited the relevant provision of the law or the applicable Rule. The above orders are explicit on the provisions of the law they are founded. Section **20 (5)** empowers the council to regulate its own procedure in disciplinary proceedings. Subsection **(6)** provides that where after an inquiry, the Council determines that a person is guilty, the Council may— (a) issue a caution or reprimand in writing; (b) direct a medical practitioner or dentist to undergo remedial training for a period not exceeding twelve months; (c) direct the medical practitioner or dentist be placed on probation for a period not exceeding six months; (d) suspend, withdraw or cancel the practising licence of a medical practitioner or dentist for a period not exceeding twelve months; (e) suspend, withdraw or cancel the licence of a health institution or a section of the health institution for a period not exceeding twelve months; (f) permanently remove the name of a medical practitioner or dentist from the registers under section 5(3); or (g) in addition to the penalties stipulated in paragraphs (a), (b), (c), (d), (e) or (f), impose a fine which the Council deems appropriate in the circumstance. A reading of the amended Rules and the enabling statute leaves no doubt that the orders complained of are provided for in the law, hence the allegation that the Respondents had no powers to issue the orders collapses. Put differently, in unleashing the said orders, the Respondents acted *intra vires*.

109. The other argument sustained by the applicants' counsel is that the amendment introduced to the rules by the aforesaid Legal Notices are unconstitutional, that they offend the parent Act, hence the rules are null and void. As was held by the Court of Appeal in *Kimutai v Lenyongopeta & 2 Others*:-[78]

> *"It is elementary rule that a thing which is within the letter of a statute will, generally, be construed as not within the statute unless it also be within the real intention of the legislature, and the words, if sufficiently flexible, must be construed in the sense which, if less correct grammatically, is more in harmony with that intention…. It was necessary, in order to arrive at the real meaning, to get to the exact conception of the aim, scope and aspect of the whole Act, to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief."*

110. In other words, it is necessary, in order to arrive at the real meaning, to get to the exact conception of the aim, scope and aspect of the whole Act, to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief. My view in respect of this matter is informed by the position adopted in *Halsbury's Laws of England*,[79] to the effect that:-

> *"It is one of the linguistic canons applicable to the construction of legislation that an Act is to be read as a whole, so that an enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the Act. The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the Act is by implication modified by another provision elsewhere in the Act…"*

111. In *Amalgamated Society of Engineers v Adelaide Steamship**[80]*** Higgins J observed:-

> *"The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we consider the result to be inconvenient or impolitic or improbable."*

112. I have applied the principles of statutory construction discussed in the various authorities cited herein. I have placed the amended Rules side by side with the parent act. I find no contradiction. The Rules are consistent with the parent act. The decisions cited in support of the alleged contradiction are of no help and are totally in applicable in the circumstances of this case.

113. It was argued that the rules are unconstitutional. I must confess that arguments citing breach or non-conformity with the Constitution are appealing and cannot be taken lightly. This is because the Constitution is the supreme law of the land. I have in previous decisions argued that the disposition of issues relating to interpretation of statutes and determining constitutional questions must be formidable in terms of some statutory and constitutional principles that transcend the case at hand and is applicable to all comparable cases. In interpreting the Constitution, the court should attach such meaning and interpretation that meets the purpose of guaranteeing Constitutionalism, non-discrimination, separation of powers, and enjoyment of fundamental rights and freedoms.

114. It is useful to restate that the Constitution of a nation is not to be interpreted like an ordinary statute. As **Mahomed AJ** eloquently stated, a nation's Constitution is a mirror reflecting the national soul, the identification of the ideals and aspirations of the nation; articulates the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion.[81] In keeping with this, the Constitution must not be interpreted in 'a narrow, mechanistic, rigid and artificial' manner.[82]Save for the statement that the Rules are unconstitutional, nothing more was said to demonstrate the alleged unconstitutionality. The US Supreme Court in *U.S vs Butler**[83]*** expressed itself as follows:-

> "*When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."*

115. Parliamentary enactments enjoy a presumption of constitutionality. However, this presumption remains until the contrary is proved. The

applicants have failed to prove the contrary. The answer lies in this court juxtaposing the impugned provisions against the Articles of the Constitution and determine whether they can be read in a manner that is constitutionally compliant. Sadly, no single provision of the Constitution was cited to support the alleged unconstitutionality nor can I find any.

116. Mr. Inamdar submitted that the Board has no power to discipline private institutions. He invited the court to void that the orders against the Clinic. He also argued that the Clinic was not a party before the PIC and the PCC. In support of this argument, he cited *Republic v Medical Practitioners & Dentists Board & 2 others Exparte Majid Twahir & another.**[84]*** It is settled law that a case is only an authority for what it decides. This is correctly captured in the following passage:-[85]

> *"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. ... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. ...a case is only an authority for what it actually decides..." (Emphasis added)*

117. The ratio of any decision must be understood in the background of the facts of the particular case.[86] It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.[87] It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[88]

118. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.[89]In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[90] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[91] My plea is to keep the path of justice clear of obstructions which could impede it.

119. The facts in the above cited case were that the Hospital had granted admission and treating rights to visiting consultants on an independent contract basis and under such terms that required the Hospital to only provide such visiting consultants with specific facilities including nursing care. The visiting consultants were not employed by the Hospital. It in this background that the learned judge's decision is to be appreciated. In the instant case, Dr. Sunil Vinyak was trading as Smile Africa Dental Clinic. He owns the Clinic. The line between him and the Clinic is thin if not non-existent. He was trading in the name and style of Smile Africa Dental Clinic. He was not a consultant in the clinic. There is nothing in the file to show that the Clinic was a distinct legal entity, separate from the own. The Clinic is not a body corporate with a common seal and perpetual succession. In fact the court papers show that he was simply trading under the said name. It follows that the argument that the Clinic was not a party before the Respondents, though attractive collapses. The licenses exhibited in his papers show that he was licensed to carry on private practice at Smile Africa Westlands. Additionally, section **4 (m)** of the Act permits the Board to regulate health institutions and take disciplinary action for any form of misconduct by a health institution.

Conclusion

120. Useful guidance can be found in *Council of Civil Service Unions v. Minister for the Civil Service**[92]*** where Lord Diplock enumerated a threefold classification of grounds for the court to intervene, any one of which would render an administrative decision and/or action *ultra vires*. These grounds are; *illegality*, *irrationality* and *procedural impropriety*. Later judicial decisions have incorporated a fourth ground to Lord Diplock's classification, namely; *proportionality.*[93]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 as *"unreasonableness"* in *Wednesbury* Case.[94] 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.

121. As was held in *Republic v National Water Conservation & Pipeline Corporation & 11 others,*[95]once a Judicial Review court fails to sniff any *illegality, irrationality* or *procedural impropriety*, it should down its tools forthwith. 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, hence not contravening the will of Parliament, then a court will not interfere with the decision.

122. 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.

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

124. The constitutional and legislative framework governing conduct of Doctors and Dentists is legally binding. A patient approaching a doctor expects medical treatment with all the knowledge and skill that the doctor possesses to bring relief to his medical problem. The relationship takes the shape of a contract retaining the essential elements of tort. A doctor owes certain duties to his patient and a breach of any of these duties gives a cause of action against the doctor.

125. Expectations of a patient are two-fold: doctors and hospitals are expected to provide medical treatment with all the knowledge and skill at their command and secondly they will not do anything to harm the patient in any manner either because of their negligence, carelessness, or reckless attitude of their staff. He is expected to use his special knowledge and skill in the most appropriate manner keeping in mind the interest of the patient who has entrusted his life to him.

126. The fairness and lawfulness of the disciplinary process and the ensuing decision must be assessed in terms of the provisions of the enabling statute, Rules made pursuant to the enabling act, the Regulations and the *Fair Administrative Action Act*.[96] The proper approach for this court in reviewing the impugned decision is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground for the court to intervene. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a ground for the court to intervene has been established. Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at in excess of jurisdiction, arbitrarily, capriciously, *mala fides* or in breach of natural justice. (See *Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others.* **[97]** A reading of the enabling statute and the Rules leaves me with no doubt that it imposes a duty upon the Respondents to perform the impugned decision. It confers a discretion upon the Respondent as to the mode of performing the duty.

127. The discretionary nature of the Judicial Review remedies 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, for example where the applicant has unreasonably delayed in applying for judicial review, where the applicant has not acted in good faith, or has violated the law or committed a criminal offence or where a remedy would impede the authority's ability to perform its functions, or where the judge considers that an alternative remedy could have been pursued.

128. Emphasizing the discretionary nature of judicial review remedies, the court in *Republic v Judicial Service Commission ex parte Pareno* **[98]** held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised.[99]

129. **Dr. Sunil Vinayak** prays for an order *Mandamus* compelling the Respondents to restore their licenses and to permit the Clinic to perform procedures under general anaesthesia and operate a theatre within the clinic. *Mandamus* will issue to compel a person or body of persons who has failed to perform a duty to the detriment of a party who has a legal right to expect the duty to be performed.[100] Having concluded that there are ground to review the orders, it follows that the writ of *Mandamus* cannot issue. I only need to rely the Court of Appeal decision in *Makupa Transit Shade Limited & Anor v Kenya Ports Authority & Another*[101] to show that the order of *Mandamus* sought by the applicants in this case is wholly underserved:-

> "*What of the Order of mandamus" The general rule is that the issuance of mandamus is limited to where there is specific legal remedy for enforcing it or the alternative legal remedy is less convenient, beneficial and effectual.* ***[102]*** *Its scope against public bodies is limited to performance of a public duty where statute imposes a clear and unqualified duty to do that act*.***[103]*** *However if the duty is discretionary as to its implementation, then mandamus cannot dictate the specific way the decision will be exercised*. *Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.* ***[104]*** *…The applicant in addition has to show that it has a legal right to the performance of the legal duty by the party against whom it issues."*

130. Both applicants pray for the writ of *certiorari*. *Certiorari* is used to bring up into the High Court the decision of some inferior tribunal or authority in order that it may be investigated. If the decision does not pass the test, it is quashed – that is to say, it is declared completely invalid, so that no one need respect it. The underlying policy is that all inferior courts and authorities have only limited jurisdiction or powers and must be kept within their legal bounds. No material has been presented before me to show that the decision is tainted with illegality or procedural impropriety to warrant the writ of *certiorari*. As herein above concluded, it has not been demonstrated that the decision is tainted with illegality.

131. The applicants also seek an order of *Prohibition*. The writ of *Prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. A writ of *prohibition* cannot issue in the circumstances of this case.

132. In view of my analysis of the facts, the law, the authorities and conclusions enumerated herein above, the conclusion becomes irresistible that this is not a proper case for the court to unleash any of the judicial review orders sought. The upshot is that these two consolidated suits, namely Misc. No. **59** of 2019 and Misc. **63** of 2019 are fit for dismissal. Accordingly, I dismiss these consolidated suits with costs to the Respondents and the Interested Party.

Right of appeal

Signed, Delivered and Dated at Nairobi this **22nd** day of **July,** 2020

John M. Mativo

Judge

Delivered electronically via e-mail on 22nd July 2020

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[1] {2014} eKLR.

[2] Cap 253 of the Laws of Kenya.

[3] Acts No. 5 of 2019.

[4] **CPR** stands for **cardiopulmonary resuscitation**. It is an emergency life-saving procedure that is done when someone's breathing or heartbeat has stopped. This may happen after an electric shock, heart attack, or drowning. **CPR** combines rescue breathing and chest compressions. https://medical-dictionary.thefreedictionary.com/CPR.

[5] **Isoflurane** is a general inhalation anesthetic used for induction and maintenance of general anesthesia. It induces muscle relaxation and reduces pains sensitivity by altering tissue excitability.

[6] ***Encephalopathy*** is a term that means brain disease, damage, or malfunction. ***Encephalopathy*** can present a very broad spectrum of symptoms that range from mild, such as some memory loss or subtle personality changes, to severe, such as dementia, seizures, coma, or death.

[7] A **vegetative state** is when a person is awake but showing no signs of awareness. On recovery from the coma **state**, VS/UWS is characterised by the return of arousal without signs of awareness. In contrast, a coma is a **state** that lacks both awareness and wakefulness.

[8] Citing *"Judicial Review Proceedings"* by Jonathan Manning (2nd Ed) p. 2 (**No 4 of LoA**) and also *Halsbury's Laws of England* (4th Ed) Vol 1(1) para 64.) (**No 5 of LoA**).

[9] {2016} e KLR.

[10] **{**2014} e KLR.

[11] Citing *R v Lancashire County Council ex parte Huddleston* [1986] 2 All ER 941 CA at pages 942, 945-6 (judgment of Sir John Donaldson) & pages 946-947 (judgment of Parker LJ)

[12] 59 LJ Ch 233

[13] {1961} EA 377.

[14] {2018} e KLR.

[15] {2016} e KLR.

[16] {1999} 1 EA 245, 249.

[17] Act No. 23 of 2013.

[18] Cap 2, Laws of Kenya.

[19] Act No. 4 of 2015.

[20] {2008} 2 EA 300.

[21] {1984} 3 All ER 935, 950-951, HL.

[22] {2018} e KLR.

[23] Citing *Edwards (Inspector of Taxes) v Bairstow and Another* [1955] 3 All ER 48 at pages 53 and 57.

[24] {1943} 2 All ER 337.

[25] *Municipal Council of Thika v Elizabeth Wambui Kamicha* {2013} e KLR.

[26]Citing *Andrew Meme M'mwereria v Registrar Igembe South District & Another* {2014} e KLR.

[27] Citing *Gathigia v Kenyatta University Nairobi* HCMA 1029 of 2000.

[28] Citing *R v Kenya Medical Practitioners and Dentists Board & 2 others* [2013] eKLR the *Twahir* case (supra).

[29] Act No. 4 of 2015.

[30] {2017} e KLR.

[31] Act No. 4 of 2015.

[32] Civil Appeal No. 228 of 2003.

[33] {1985} KLR 91.

[34] {1985} KLR 954.

[35] {2013} e KLR.

[36] Nairobi Civil Appeal No.266 of 1996, citing Samuel *Njoroge Gitukui & 4 Others v Attorney General & another* {2017} e KLR.

[37] {1963} EA 478, 479.

[38] *Macfoy v United Africa Co. Ltd*. {1961} EA 1169 At Pg. 1172.

[39] Cap 2, Laws of Kenya.

[40]Act No. 4 of 2015.

[41]{2012} e KLR.

[42] {2018} e KLR.

[43] {2016} e KLR.

[44] {2015} e KLR.

[45] {2018} e KLR.

[46] {2019} e KLR.

[47] Civil Appeal No. 266 of 1996.

[48] {1985} A.C 374 at 401D.

[49] 4th ed. Vol. 16(2) at 910.

[50] {2002} 2 EA 572.

[51] Civil Appeal No. 266 of 1996.

[52] Civil Appeal No. 108 of 2009.

[53] High Court Misc. Application No. 12 of 2002.

[54] Article 10 (1) (a)-(e)

[55] Article 159

[56] Article 160

[57] Ibid

[58] Ibid

[59] {1964} 3 SCR 1.

[60] {1979} 1 SCC 308.

[61] {2002} 4 SCC 212.

[62] MANU/DE/2694/2009.

[63] {2007} Q.B. 462.

[64] {2007} 1 W.L.R. 1460.

[65] Hoexter, C. 2007. *Administrative law in South Africa.* Cape Town: Juta.

[66] Pillay, A. 2005. Reviewing reasonableness: an appropriate standard for evaluating state action and inaction? *South African Law Journal*, 122(2): 419-439.

[67] Supra Note 62.

[68] 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.

[69] For examples of a purposive approach to statutory interpretation, see *African Christian Democratic Party v Electoral Commission and Others* {2006} ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC); at paras 21, 2

5, 28 and 31; *Daniels v Campbell NO and Others* {2004} ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) at paras 22-3; *Stopforth v Minister of Justice and Others*; *Veenendaal v Minister of Justice and Others* {1999} ZASCA 72; 2000 (1) SA 113 (SCA) at para 21.

[70] Thornton Legislative Drafting 4ed (1996) at 155 cited in JR de Ville *Constitutional and Statutory Interpretation* (Interdoc Consultants, Cape Town 2000) at 244-50.

[71] *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 662-3.

[72] 2012 4 SA 593 (SCA).

[73] Ibid, at (610B–C).

[74]1949 Ch D 121 130.

[75] *Dawood and Another v Minister for Home Affairs and Others; Shalabi and Another v Minister for Home Affairs and Others; Thomas and Another v Minister for Home Affairs and Others* {2000} ZACC 8; 2000 (3) SA 936 (CC) ; 2000 (8) BCLR 837 (CC) at para 47.

[76] {1999} ZASCA 72; 2000 (1) SA 113 (SCA) at para 21.

[77] {2014} eKLR.

[78] {2005} 2 KLR 317.

[79] 4thedition, Butterworths 1995, Vol 44(1), Para 1484.

[80] {1920] 28 CLR 129 at 161-2.

[81] S v Acheson 1991 NR 1(HC) at 10A-B.

[82] Government of the Republic of Namibia v Cultura 2000 1993 NR328 (SC) at 340A.

[83] 297 U.S. 1 {1936}.

[84] {2016} e KLR.

[85] As observed in State of Orissa vs. Sudhansu Sekhar Misra MANU/SC/0047/1967.

[86] *Ambica Quarry Works v State of Gujarat and Ors*. MANU/SC/0049/1986

[87] Ibid

[88] *Bhavnagar University v. Palitana Sugar Mills Pvt* Ltd (2003) 2 SC 111 (vide para 59)

[89] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, Prashant Vats Versus University of Delhi & Anr. (Citing Lord Denning).

[90] Ibid.

[91] Ibid.

[92] {1985} AC 374.

[93] 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

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

[95] {2015} eKLR.

[96]Act No. 4 of 2015.

[97] Civil Appeal No. 266 of 1996 {1997} e KLR.

[98] {2004} 1 KLR 203-209.

[99] See *Anthony John Dickson & Others vs. Municipal Council of Mombasa*, Mombasa HCMA No. 96 of 2000.

[100] See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

[101] {2015} e KLR.

[102] See *Halsbury Laws of England* 4th ed. Vol. 1. Para 89.

[103] See *Manyasi v. Gicheru & 3 Others, [2009] KLR 687.*

[104] See *Halsbury's Law of England, 4th Ed Vol. 1.*