REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 256 OF 2019

IN THE MATTER OF ARTICLES 22(1), 23, 258 (1) AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 20, 35, 40, 47 AND 50 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTIONS 4 AND 6 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF SECTIONS 3, 4, 5, 5A, 6, 7, 9 & 62 OF THE BETTING, LOTTERIES AND GAMING ACT

AND

IN THE MATTER OF REGULATIONS 2 & 3 OF THE BETTING, LOTTERIES AND GAMING REGULATIONS, 1966

AND

IN THE MATTER OF ALLEGED VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF PERSONS ENGAGED IN THE BUSINESS OF BETTING, LOTTERIES AND GAMING

BETWEEN

GAMECODE LIMITED.....PETITIONER

VERSUS

LITI WAMBUA.....1ST RESPONDENT

BETTING CONTROL AND LICENSING BOARD.....2ND RESPONDENT

JUDGMENT

The Parties

1. The Petitioner is a limited liability company incorporated in the Republic of Kenya under the provisions of the Companies Act.[1]

2. The first Respondent is the Acting Director of the second Respondent.

3. The second Respondent is a statutory body established under section 3 of the Betting, Lotteries and Gaming Act [2](herein after referred to as the Act), and is responsible for regulating the gaming and betting industry in Kenya.

4. On 3rd July 2019, the Petitioner filed a Notice of Motion dated the same day seeking to *inter alia* leave to amend its Petition dated 1stJuly 2019 in terms of the proposed amended Petition annexed thereto. The application was allowed on 4th July 2019, and, the court ordered that the proposed amended Petition be deemed to be properly filed. However, the amended Petition does not name Safaricom Limited as an Interested Party in these proceedings. No application was made either orally or otherwise to join Safaricom Limited as an Interested Party, nor did the court in its own motion make such an order.

5. However, I note from the record that Mr. Ohaga, counsel for Safaricom Limited appeared in court on 16th July 2019 and thereafter continued to participate in these proceedings appearing for Safaricom Limited, the "Interested Party" though his client was not formerly enjoined in these proceedings.

6. I note that the Safaricom Limited was introduced in these proceedings for the first time as an "Interested Party" in an application filed by the Petitioner dated 15thJuly 2019 seeking to cite the Respondents for contempt. The only orders sought against Safaricom in the said application were an order seeking to compel them to unblock the Petitioners pay bill numbers and an order restraining Safaricom Limited from acting on any directive given by the Respondents. The said application was never prosecuted! However, it is not clear how the Petitioner expected to obtain the orders against a non-party in the said application.

Court's directions

7. At the request of the parties, this Petition was heard alongside two other Petitions, namely, Petition numbers 271 of 2019 and 252 of 2019. The three Petitioners raise similar issues. In addition, the Petitioners' Advocate's submissions in the three Petitions are substantially similar. The Respondents' counsel and counsel for the Interested Party's" pleadings and their respective submissions are identical in the three Petitions. Inevitably, the court's judgments in the three Petitions will be identical in many respects since the facts present identical issues.

8. In order to expedite the hearing and determination of the three Petitions, the court directed that all pending interlocutory applications in the said Petitions be compromised and that the Petitions do proceed for hearing.

Factual Matrix

9. The Petitioner states that it is engaged in betting business in Kenya under a license issued by the second Respondent under the Act, which expired on 30thJune 2019. It common ground that section 4 of the Act gives the second Respondent the power to issue licenses and permits under the Act. It is not in dispute that section 9 of the Act provides that a license issued under the Act shall expire on 30thJune of the subsequent year following the date of issuance of the license.

10. The Petitioner states that it has at all material times satisfied the requirements under the Act while applying for renewal of its Bookmakers licenses. It states that vide a letter dated 11thApril 2019, it submitted its application for renewal of it Bookmakers license for 2019/2020. It also states that the second Respondent acknowledged the application. The Petitioner states that in support of the application, it submitted the following documents:-

i. Bankers cheques for renewal fees of 113 shops that are due for renewal;

ii. Names of the Petitioner's directors supported by a CR-12;

iii. A copy of the 2018/2019 Licence;

iv. Audited accounts for 2018;

v. The number and type of games that the Petitioner offers;

vi. The Petitioner's physical address of operation;

vii. The Petitioner's IP address and registered domain name;

viii. A list of the Petitioner's pay bill numbers;

ix. Names of all the Petitioner's employees and copies of work permits for foreign employees;

x. The name of the Petitioner's odds provider and the service agreement therein;

xi. The Petitioner's current number of registered and active customers'

xii. The prevailing terms and conditions;

xiii. The average amount of customer deposits the Petitioner holds on a weekly basis;

xiv. A summary of the Petitioner's performance for the last two years; and

xv. Measures the Petitioner has put in place to promote responsible gaming.

11. The Petitioner also states that it informed the first Respondent that it was willing to clarify the information that it submitted under the cover of the said letter, and, in absence of a response, it wrote to the first Respondent on 30 thApril 2019 seeking to confirm whether its documents were sufficient for the renewal of the license.

12. It also states that the first Respondent failed to respond to the said letters, prompting it to write to the first Respondent on 18thJune 2019 seeking an update on its Application. It also asked whether there was any outstanding issue that could prevent the issuance of the licence, but the first Respondent failed to reply. It states that it wrote again on 24th June 2019, but, as at 30thJune 2019, there was no response.

13. The Petitioner states that after the lapse of the 30th June 2019 deadline, it received a letter dated 1stJuly 2019 from the second Respondent stating that its application lacked merit on account of pending investigations into its compliance with set licence conditions and regulatory requirements.

Alleged constitutional violations

14. The Petitioner states that it has always satisfied the requirements provided under the Act in submitting its applications for its annual Bookmakers licences and it is for this reason that the second Respondent continued to issue the Petitioner with its licences. In view of the foregoing, the Petitioner states that it had a legitimate expectation that the second Respondent would communicate its decision on the Application in a timely manner, and, that, the second Respondent is enjoined by Article 47 of the Constitution to do so expeditiously, efficiently, lawfully and fairly.

15. In addition, the Petitioner states that the second Respondent ought to have informed it of its decision approving or denying the application together with reasons, hence, its silence and inaction is an affront to the rules of natural justice and the right to a fair administrative action guaranteed under Article 47 of the Constitution.

16. Further, the Petitioner states that the receipt of the decision after the expiry of its 2019/2020 Licence clearly shows that the Respondents intended to prevent it from operating legally as at 1st July 2019. The Petitioner further states that communicating the decision after the expiry of its license is procedurally unfair, unlawful and unreasonable and violates its right to a fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In addition, the Petitioner avers that the second Respondent's inaction and failure to communicate its decision in a timely manner as well as the second Respondent's decision of 1st July 2019 was motivated by bad faith and ill motive because:-

a. The Petitioner provided the second Respondent with the necessary documentation required to issue the 2019/2020 License, in accordance with the Act as it did when it submitted its previous applications for the same license.

b. Vide a letter dated 18thMarch 2019, the second Respondent reminded the Petitioner to submit its application for the renewal of its 2018/2019 License, which shows that the second Respondent was considering its application. In addition, the first Respondent was in communication with the Petitioner regarding the renewal of its license for the year 2019/2020.

c. The second Respondent stamped the Petitioner's letters dated 11th April 2019, 30th April 2019, 18thJune 2019 and 24thJune 2019 as duly received, hence, it was all along aware of the Petitioner's Application; hence, its three months silence was deliberate.

d. Communicating the denial of the license a day after the expiry of the 2018/2019 License shows that the denial was a calculated move aimed at ensuring that its 2018/2019 expires, thereby preventing it from having a valid license as of 1st July 2019.

e. Without the second Respondent's license, the Petitioner cannot operate its business.

17. The Petitioner also states it has a right to be informed of the decision on the Application, and, that had the second Respondent communicated on time, it would have had a chance to correct the Application in time.

18. The Petitioner states that Section 5(3) of the Act, which provides that the Respondent may render its decision to decline or approve an application for the renewal of a license, without giving reasons, cannot override the provisions of Article 47 of the Constitution which dictates that written reasons be availed. Accordingly, the Petitioner states that Section 5 (3) of the Act is void to the extent of its inconsistency with the Constitution, and, that, failure to provide reasons violated its right to information under Article 35 of the Constitution.

19. Further, the Petitioner states that the Respondent denied it an opportunity to address concerns in respect of the Application before the expiry of its license, and also denied it the opportunity to be heard before the decision of 1st July 2019 was communicated, in total violation of its right to a fair hearing under Article 50 of the Constitution.

20. In light of the foregoing, the Petitioner states that it can only mean that there was an intricate scheme to unconstitutionally and illegally

deny it its 2019/2020 License.

21. The Petitioner further states that in view of the impugned decision, its business is now at risk, which is a violation of its right to property guaranteed under Article 40 of the Constitution, and, unless the orders sought are granted, it will suffer irreparable harm and damage, including the risk of being arrested.

Reliefs sought

22. The Petitioner seeks the following orders:-

a. This Honourable court be pleased to hold and declare that the 2nd Respondent's decision of 1st July 2019 rejecting the Petitioner's application submitted on 11th April 2019 for the renewal of its 2019/2020 Bookmaker's license is in contravention of Articles 47 & 50 of the Constitution for failure to provide the Petitioner with reasons for the said decision and failure to provide the Petitioner with the opportunity to be heard before the decision was rendered and is therefore null and void.

b. This Honourable Court be pleased to grant an order of certiorari to remove into this court for the purposes of quashing, the 2nd Respondent's decision contained it its letter dated 1st July 2019 rejecting the Petitioner's application for the renewal of its 2019/2020 Bookmaker's License.

c. This Honourable Court be pleased to hold and declare that section 5(3) of the Betting, Lotteries and Gaming Act is unconstitutional to the extent that it allows the 2nd Respondent to render decisions without providing reasons, which is in total contravention of the right to fair hearing and the right to be heard as enshrined under Articles 47 and 50 of the Constitution.

d. This honourable Court be pleased to issue an injunction and/or a conservatory order restraining the Respondents by themselves, their agents, servants or anybody directed to act on their behalf from in any manner howsoever interfering with the Petitioner's business and/or stopping the Petitioner from continuing to trade after 30th June 2019 on the basis of the impugned decision pending the issuance of a decision in accordance with the law.

e. This Honourable court be pleased to issue an injunction and/or a conservatory order restraining the Respondents by themselves, their agents, servants or anybody directed to act on their behalf from in any manner howsoever from unlawfully harassing any of the Petitioner's servants, agents, employees as they engage in the Petitioner's business after 30thJune 2019 on the basis of the impugned decision pending the issuance of a decision in accordance with the law.

f. This Honourable court be pleased to issue an injunction and/or a conservatory order restraining the Respondents by themselves, their agents, servants or anybody directed to act on their behalf from in any manner howsoever from intruding into licensed premises of the Petitioner on the basis of the impugned decision pending the issuance of a decision in accordance with the law.

g. This honourable court be pleased to hold and declare that the 2nd Respondent's deliberate failure and/or refusal to render a decision on the Application and provide reasons for its failure to render the decision in light of the deadline of 30th June 2019 is unlawful and constitutional and contravenes the provisions of Articles 20, 35, 40 and 47 of the Constitution as described in paragraph d above.

h. The costs consequent upon this Petition be provided for.

i. Any other remedy or such other orders as this Honourable Court may deem just and expedient in the circumstances to remedy the violation of the Petitioner's fundamental constitutional rights and freedoms.

Petitioner's further Affidavit

23. Joe Muturi, the Petitioner's Chief Finance officer swore the further affidavit dated 3rdJuly 2019. He reiterated the contents of the affidavit in support of the Petition and annexed copies of all the documents the Petitioner submitted in support of their application for the license. He averred that the second Respondent failed to inform them the requirements they did not comply with.

Respondent's Replying Affidavit

24. **Liti Wambua,** the first Respondent herein and the second Respondent's Acting Chief Executive Officer/Director swore the Replying Affidavit dated 22ndJuly 2019. He averred that the Petitioner being a company must lawfully authorize, by way of a resolution, the institution of any suit against any party or person. He deposed that such authority, which must be under the seal of the Petitioner Company, has not been availed in the instant case.

25. He further averred that the second Respondent has a statutory duty to issue, renew, vary and/or cancel licenses and permits under the Act. He deposed that an application for a bookmaker's license is considered and/or determined in accordance with *inter alia* the provisions of Sections 4, 5 and 5A of the Act.

26. Mr. Wambua averred that a bookmakers license issued under the Act unless otherwise provided expires on the 30th of June next following the date of issue, and, that, the second Respondent has been statutorily empowered to control and regulate betting and gambling in the country. Further, he averred that, once a bookmaker's license expires, the licensee has to make a fresh application for its renewal in

accordance with the law and such an application must satisfy all the legal and regulatory requirements.

27. Mr. Wambua averred that it is not automatic for an expired license to be renewed but the same will only be renewed once an applicant has complied with all the necessary regulatory requirements, and, that, no licenses are renewed where an applicant has failed to comply with any of the requirements for renewal.

28. He averred that the Petitioner is well aware of the regulatory requirements that must be fulfilled before its license is renewed, and, that, the conditions were brought to its attention as at the time of obtaining the expired license. Further, he averred that in considering whether to renew the license, the applicant's compliance with the conditions of the previous license is relevant.

29. He deposed that the Petitioner submitted its application for renewal of its bookmaker's license for the FY 2019/2020 and upon considering the same; the second Respondent established that the Petitioner had not fulfilled its tax payment obligations running to billions of shillings it had collected from the gambling public. He added that the Petitioner's license expired on 30thJune, 2019 as provided under Section 9 of the Act.

30. Further, he averred that the Petitioner was aware of the consequences of not paying betting taxes and the conditions for the 2018/2019 license, which would lead to non-renewal of the same for the period 2019/2020. He added that despite the foregoing, the Petitioner failed to avail evidence of payment of applicable betting tax, by providing copies of the bank deposit, slips indicating payments at the applicable rates.

31. Mr. Wambua averred that once an application for renewal of a bookmaker's license has been received, the second Respondent is empowered to conduct due diligence to ascertain whether the applicant is fit and proper to hold a bookmakers license.

32. He averred that vide a letter dated 11th June, 2019, the second Respondent notified the Petitioner of the need to fully comply with the requirements in order to enable the board consider its application, but the Petitioner failed to comply. He stated that it is utterly false and malicious for the Petitioner to allege that it was not updated on the status of its application or that its letters in that regard were ignored.

33. He deposed that the Petitioner's application was found to lack merit on account of noncompliance with the law by failing to avail evidence of payment of the applicable betting taxes and/or failing to meet its tax obligations and the said decision was effectively communicated to them vide a letter dated 1st July, 2019.

34. He maintained that any licensee who fails to pay the applicable betting/gambling taxes is not a fit and proper person to hold the license. He averred that the instant Petition is solely intended to circumvent the renewal process for the license, and, that, it is an attempt to obtain a license without complying with the law and the set conditions.

35. Mr. Wambua stated that the second Respondent has no objection to the renewal of the license subject to satisfying all the conditions under the law, and, subject to the Petitioners directors' going through a security vetting clearance.

36. He averred that the security officers undertake the investigations relating to national security and intelligence and as such, such information is exempted from disclosure within the meaning of Section 6 of the Access to Information Act.[3]

37. He deposed that the Petitioner was kept informed of the status of its applications, and that it was treated equally before the law. He denied that the Petitioner's constitutional rights were violated.

38. In addition, he averred that the Petitioner, as a global gaming company, knows too well the strict regulation and compliance levels required of such gaming companies, and, that, the strict regulatory demands as explained above are meant to protect the State and public interests in the legalization and operation of gambling/betting activities and also for national security reasons.

39. He averred that because of the foregoing, it was incumbent for the second Respondent to notify Safaricom details of those who are unauthorized to trade under the Act because only those with valid licenses are permitted to maintain pay bill numbers and short codes. He deposed that Safaricom should not be forced to break the law by allowing unlicensed operators to continue operating gambling activities without a valid license.

40. He also averred that this court must put the rights and interests of the wider public first in matters relating to the regulation of the gambling/betting industry. He further stated that the alleged rights are not absolute and any limitation imposed by the board by virtue of the challenged decision is reasonable in an open and democratic society.

41. In addition, he averred that the Petitioner may apply for a review of the impugned decision; hence, this Petition was instituted before the said decision was made, and offends the doctrine of exhaustion of remedies. He also averred that the alleged discrimination or denial of access to justice has not been proved.

42. He maintained that the impugned decision was arrived at in accordance with the law and that the applicant has not demonstrated sufficient grounds to warrant the orders sought.

43. He stated that the Petitioner was given written reasons for the decision, and, that, so long as the Petitioner complies with the law, the second Respondent will have no basis to interfere with their business. He also averred that prayer (d) of the Petition is malicious and not sanctioned by the law, and, that, it seeks to legitimize carrying out of gaming/betting activities without a valid license, which impedes the legal duty bestowed upon the second Respondent.

Respondent's Notice of Preliminary objection

44. In addition to the above Replying Affidavit, the Respondents filed a Notice of a Preliminary Objection dated 30 thJuly 2019 stating *inter alia* that the Petition offends the provisions of Section 3 (12) of the Act. In addition, it states that the Petition offends sections 4(1)(a) & (c), 5, 5A and 9 of the Act by asking this court to unlawfully assume the second Respondent's statutory responsibilities and grant the Petitioner a license through the back door.

45. They also stated that the orders sought have the effect of suspending the operation of Sections 4, 5, 5A and 9 of the Act and offend the doctrine of presumption of constitutionality enjoyed by the said provisions.

46. In addition, they stated that the suit offends the provisions of Section 9(2) & (3) of the Fair Administrative Action Act[4] (FAA Act) by failing to exhaust all the available internal dispute resolution mechanisms before moving this court. They also stated it offends section 9(1) of the Access to Information Action Act[5] by purportedly filing the instant suit even before the period for which the information sought by the Petitioner under Article 35 of the Constitution regarding its application for renewal of its expired license has lapsed.

47. Further, the Respondents maintain that this suit offends the provisions of Section 62 of the Act for failing to file an appeal against the decision. Lastly, they stated that there is no resolution or a legal instrument under the Petitioner's seal executed by its directors and minutes authorizing the institution of this suit.

Safaricom Limited (*"The Interested Party's")* Replying Affidavit

48. Isaac Njoroge Kiberenge, Safaricom's Legal Counsel, Financial Services swore the Replying Affidavit dated 23 rd July 2019. He averred that Safaricom was only joined in this Petition through a contempt application without the leave of the court or a court order, and, that; it has not been named in the amended Petition.

49. He deposed that Safaricom Limited provides a platform for digital payment solutions and holds an M-pesa Account for the collection and disbursements of funds for the Petitioner's betting and gambling business, and, that, the Petitioner was required at all material times to hold a valid license from the first Respondent as provided in their contract.

50. Mr. Kiberenge averred that vide a letter dated 10thJuly 2019, the second Respondent informed Safaricom that licenses of various companies in the betting and gaming industry among them the Petitioner had expired. He deposed that the second Respondent informed it that the said licenses were not renewed until the affected companies met certain outstanding renewal requirements including the outcome of an ongoing due diligence to determine whether they were fit and proper to hold the said licenses.

51. He averred that the second Respondent directed Safaricom Limited to suspend the Petitioner's Pay bill account and other short codes until otherwise advised.

52. He also averred that it was a term of the contract between Safaricom Limited and the Petitioner that the Petitioner, would obtain and renew all permits, licenses and authorizations required for the performance of its obligations under the agreement, hence, in absence of a valid agreement, the Interested Party was entitled to suspend the service either wholly or partially. He deposed that the Petitioner has not demonstrated that the Interested Party violated its rights.

Issues for determination

53. I find that the following issues distil themselves for determination:-

a. Whether the second Respondent erred by failing to consider the Petitioner's application for a license on grounds of non-compliance with tax payment.

b. Whether the second Respondent failed to provide reasons for the impugned decision.

c. Whether the second Respondent acted ultra vires its statutory powers.

d. Whether the second Respondent violated the Petitioner's right to legitimate expectation.

e. Whether the second Respondent abused its powers and or acted maliciously.

f. Whether the impugned decision violated the Petitioners right to be heard.

g. Whether the impugned decision is grossly unreasonable.

h. Whether the Petitioner's right to information was violated.

i. Whether the first Respondents was improperly joined in this Petition.

j. Whether section 5 (3) violates Article 47 of the Constitution

k. Whether the impugned decision violated the Petitioners right to property under Article 40 of the Constitution.

l. What is the status of Safaricom Limited in these proceedings?

m. Whether the Petitioner is entitled to any of the prayers sought.

a. Whether the second Respondent erred by failing to consider the Petitioner's application for a license on grounds of non-compliance with tax payment.

54. Prof. Githu Muigai, appearing for the Petitioner with Faith Macharia faulted the second Respondent for failing to renew the Petitioners license on account of tax disputes. He referred to an order issued in JR No. 184 of 2019, a tax dispute between the Petitioner and the Kenya Revenue Authority in which the court granted a conditional stay of implementation of an enforcement action pending the hearing of the case. He also referred to a tax disputes at the Tax Appeals Tribunal involving the Petitioner and the Kenya Revenue Authority, and added that Kenya Revenue Authority consented not to take action pending the hearing of the dispute.

55. Mr. Ogosso, counsel for the Respondents cited the preamble to the act, and argued that it is not possible to delink tax issues from the second Respondent's operations, and, that, the second Respondent does not collect taxes, but only requires proof that the taxes have been paid.

56. The pertinent question is whether tax compliance is a relevant consideration while considering an application for gaming and betting license under the Act. With tremendous respect, the parties did not accord this issue sufficient weight in their arguments yet it was one of the reasons cited for the refusal. Mr. Ogosso's position was that the second Respondent only requires a tax clearance certificate from the Kenya Revenue Authority. The Petitioner's counsel admits that there exists tax disputes between the Petitioner and the Kenya Revenue Authority in other forums, and, that, the Kenya Revenue Authority had consented not to take action-pending determination of the disputes.

57. If, in the exercise of its discretion, an authority takes into account considerations, which the courts consider not to be proper, then in the eyes of the law it has not exercised its discretion legally. On the other hand, considerations that are relevant to a public authority's decision are of two kinds. These are mandatory relevant considerations (that is, considerations that the statute empowering the authority expressly or impliedly identified as those that must be taken into account), and discretionary relevant considerations (those which the authority may take into account if it regards them as appropriate). If a decision-maker has determined that a particular consideration is relevant to its decision, it is entitled to attribute to it whatever weight it thinks fit, and the courts will not interfere unless it has acted in a *Wednesbury*-unreasonable manner. This is consistent with the principle that the courts are generally only concerned with the legality of decisions and not their merits.

58. The law on relevant and irrelevant considerations was explained in *R. v. Somerset County Council, ex parte Fewings*[6] in which Lord Justice of Appeal Simon Brown identified three categories of considerations that decision-makers need to be aware of:-[7]

a) those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had;

b) those clearly identified by the statute as considerations which must not be had; and

c) those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so.

59. Lord Justice Brown elaborated that for the third category, there is "a margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process," subject to *Wednesbury* unreasonableness.

60. The Singapore case of *City Developments Ltd. v. Chief Assessor*[8] illustrates a similar point. The Court of Appeal stated, "Where a wide range of considerations needs to be taken into account or a power is conferred on an authority exercisable on the authority's 'satisfaction', the courts are reluctant to intervene in the absence of bad faith or capriciousness." It also said, "What is or is not a relevant consideration will depend on the statutory context."[9]

61. This courts duty is to determine whether it has been established that in reaching its decision, an administrative body directed itself properly in law; and, had in consequence taken into consideration matters, which upon the true construction of the Act it ought to have considered and excluded from its consideration matters that were irrelevant to what he had to consider. When determining if a decision-maker has failed to take into account mandatory relevant considerations, the courts tend to inquire into the manner in which the decision-maker balances the considerations.

62. However, once the decision-maker has taken into account the relevant considerations, the courts are reluctant to scrutinize the manner in which the decision-maker balances the considerations. This can be gleaned from the case of *R. v. Boundary Commission for England, ex parte Foot,*[10] where the Court of Appeal of England and Wales was unwilling to overrule certain recommendations of the Commission as it had rightfully taken all the correct considerations laid down in the relevant statute. The Court emphasized that the weighing of those relevant considerations was a matter for the Commission, not the courts.[11]

63. The above statement of law was endorsed in *Tesco Stores Ltd. v. Secretary of State for the Environment,*[12] a planning law case. Lord Hoffmann discussed the "distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority."[13] His Lordship stated:-

> *"Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at."*

64. Turning to the substance of the issue under consideration, the necessity to comply with the obligations imposed by Articles 209 and 210 of the Constitution has resulted in the enactment of numerous interrelated statutes, regulations and directives. This, in turn, has given rise to a convoluted set of laws, rules and requirements. Among these is the common requirement that a person aspiring to occupy a public office, a bidder seeking to participate in a public procurement process, an applicant for a business licence, or a person seeking to incorporate a company or even to open a bank account, submits a Certificate of Tax Compliance issued by the Kenya Revenue Authority.

65. In practice, public procuring entities and public bodies regulating various activities usually include a condition in their application documents that applicants must submit tax clearance certificates issued by the Kenya Revenue Authority among other requirements. Tax clearance certificates play an important role in our economy and are, almost without exception, a requirement when a person submits a tender or bid for doing business with government or applies for a business licence.

66. Our Constitution requires a purposive approach to statutory interpretation[14] a position eloquently stated in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*,[15] where Ngcobo J stated:-

> *"The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, s 39(2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the 'spirit, purport and objects of the Bill of Rights."*

67. The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law.[16] 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."****[17]***

68. A contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute. A contextual interpretation of a statute, therefore, must be sufficiently clear to accord with the rule of law.[18] In *Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice and Others****[19]*** 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."*

69. The above excerpt is useful while ascertaining the purpose of a statute. This position becomes clear if we read the preamble to the enabling Act, which reads *"an Act of Parliament to provide for the control and licensing of betting and gaming premises****; for the imposition and recovery of a tax on betting and gaming****; for the authorizing of public lotteries; and for connected purposes."* Differently put, from the clear wording of the preamble to the Act, it is not possible to de-link the requirement for tax compliance from the license requirements under the Act. Thus, a purposive, contextual and faithful reading of the Act will inevitably conclude that proof of payment of taxes arising from gaming and betting business operated under the Act is a relevant consideration while determining whether to grant or refuse to grant a license under the Act. To conclude otherwise is not only to be unfaithful the statute but would amount to treason to the enabling statute.

70. Perhaps, it would be fitting to recall the words attributed to Elie Wiesel, a holocaust survivor who remarked that "....we must always side with the Rule of Law." [20] This is because law is the bloodline of every nation. The end of Law is justice. It gives justice meaning. It is by yielding Justice that law is able to preserve order, peace and security of lives and property, make the society secure and stable, regulate and shape the behaviour of citizens, safe guard expectations, function as a means of governance, a device for the distribution of resources and burdens, a mechanism for conflict resolution and a shield or refuge from misery, oppression and injustice. Through the discharge of these functions, the law has today assumed a dynamic role in the transformation and development of societies. It has become a instrument of social change.[21]

71. Before I exist my exposition on the role of law, I find it fit to cite *Republic v Speaker of the Senate & Another ex parte Afrison Export Import Limited & Another****[22]*** in which I paraphrased the words of Baroness Helena Kennedy QC, a woman activist and chair of the British Council[23] who said that:-

> *"Law is the bedrock of a nation, it tells who we are, what we are, what we value...almost nothing else has more impact on our lives. The law is entangled with everyday existence, regulating our social relation, and business dealings, controlling conduct, which could threaten our safety and security, establishing the rules by which we live. It is the baseline." (Emphasis added).*

72. Thus, when an application of a license under the Act is declined, the reasons for declining the license must be defendable in a court of law. The question is, whether the cited reasons in this case are defendable under the enabling statute. The converse is whether tax payment is not a relevant consideration while considering an application for the license. To address these questions, it is imperative to examine the relevant provisions. As discussed above, a reading of the preamble leaves no doubt that the purpose and scope of the Act includes *imposition*

and recovery of a tax on betting and gaming.

73. Section 5 of the Act provides as follows:-

> *(1) A person who desires to obtain, renew or vary a licence or permit under this Act shall make application to the Board in the form and manner prescribed.*
>
> *(2) On receipt of an application under subsection (1), the Board may make such investigations or require the submission of such declaration or further information as it may deem necessary in order to enable it to examine the application.*
>
> *(3) After making investigations and considering any information or declaration as may have been required in terms of subsection (2), the Board may either grant, renew or vary a licence or permit or refuse a licence or permit or renewal or variation thereof without reason given: Provided that—*
>
> *(i) no licence or permit shall be issued under this Act unless and until the Board has satisfied itself that the applicant is a fit and proper person to hold the licence or permit and that the premises, if any, in respect of which the application is made are suitable for the purpose;*
>
> *(ii) no licence shall be issued under this Act unless the Board has sent a copy of the application for the licence to the local authority within whose area of jurisdiction the applicant proposes to conduct his business and has given the local authority reasonable opportunity to object to, or make recommendations with respect to, the application.*
>
> *(4) A person who knowingly makes a false statement or declaration in an application for, or a renewal or variation of, a licence or permit shall be guilty of an offence and liable to a fine not exceeding five thou*

74. The above section provides *inter alia* that *the Board may make such investigations or require the submission of such declaration or further information as it may deem necessary in order to enable it to examine the application.* The ambit of this provision has not been challenged. I find no serious argument before me to suggest that proof of tax payment is not a relevant consideration within the ambit of the above provision, bearing in mind the preamble statement discussed above.

75. An assessment of the fairness and lawfulness of the decision making process must be independent of the outcome of the process. In other words, what is important is not whether the application for the license was unsuccessful. What is relevant is the materiality of compliance with the application requirements.

76. The proper approach is to establish, factually, whether an irregularity occurred in processing the application and arriving at the impugned decision. Then the irregularity, if established, must be evaluated to determine whether it amounts to a ground for the court to annul the decision. This legal evaluation must, where appropriate, take into account the materiality of any deviance from the legal requirements, by linking the question of compliance to the purpose of the legal requirements, before concluding that a ground to annul the decision has been established.

77. Consistent with the above approach, the first question is whether an irregularity occurred in this case. At the centre of this contest is the question of payment of betting taxes and or proof of withholding tax payment.

78. Relevant to the above question is section 55A of the Act. It provides that (1) There shall be a tax to be known as gaming tax chargeable at the rate of fifteen per cent of the gaming revenue. (2) The tax shall be paid to the Collector by a person carrying on a gaming business on the 20th day of the month following the month of collection. The Act defines "Collector" as follows- *Means the Commissioner-General appointed under the Kenya Revenue Authority Act.* It also defines "tax" as follows- *Means any charges, fees, levies or impositions imposed under this Act*.

79. Also relevant is section 29A of the Act. It provides:-

> *(1) There shall be a tax to be known as betting tax chargeable at the rate of fifteen per cent of the gaming revenue.*
>
> *(2) The tax shall be paid to the Collector by the licensed bookmaker on the 20th day of the month following the month of collection.*

80. The above provisions speak for themselves. In my view, any argument suggesting that proof of tax payment is not a legal requirement for the grant of the licence is legally frail. Such an argument flies on the face of the preamble to the Act, the above sections and the purposive interpretation of the statute. In addition, from the annexures to the Petitioner's Affidavit, it is evident that there exists a tax dispute between the Petitioner and the Kenya Revenue Authority. It was admitted that there is a dispute at the Tax Appeals Tribunal. The existence of the said disputes cast doubts on the Petitioner's tax compliance status and unless the said disputes are resolved in its favour, its application will stand non-compliant. This is because a clear reading of the Act leaves no doubt that tax compliance is a relevant consideration. The Petitioner states that it provided a Tax Compliance Certificate. That may be so. However, proof that it had paid taxes provided under the Act was not provided.

81. In any event, the existence of tax disputes in court complicate the Petitioner's position. Whereas the existence of such cases is not conclusive proof of its non-compliance unless the said cases are determined in its favour, its compliance status under the Act will remain legally frail if not questionable.

82. In view of my analysis herein above, it is my conclusion that proof of payment of tax is not only a relevant consideration, but also a requirement under the Act. It follows that the assault of impugned decision on this ground fails.

83. By way of orbiter, I am inclined to observe that the energy expended in this case ought to have been directed in resolving the tax related disputes. This is because a resolution of the said cases in favour of the Petitioner will cut the ground upon which the rejection for its license was founded and open the door for the Respondents to consider its application in accordance with the law. So long as the tax disputes remain unresolved, the Petitioners application for the license will remain legally frail because as the preamble to the Act suggests, payment of Betting and Gaming Tax is umbilically linked to the statutory requirements for the licence.

b. Whether the first Respondent failed to provide reasons for the impugned decision.

84. Prof. Githu Muigai submitted that the impugned Decision simply informed the Petitioner that the Renewal Application lacked merit on account of pending investigation into the Petitioner's compliance with set licence conditions and regulatory requirements. He argued that it is unusual and in any event very unlawful to reject the Renewal Application pending investigations as the alleged investigations would need to be completed first, findings be made and the outcome of the investigations would then need to be communicated to the Petitioner. He argued that the Respondent could only make an informed decision after the investigations. He further argued that the Respondents never informed the Petitioner about the alleged investigations or the nature of the investigations. He argued that the Impugned decision was premature since the Respondents did not have any basis for rejecting the Renewal Application.

85. He submitted that the Petitioner had the right to be informed of the decision within a reasonable period. He argued that the failure was procedurally unfair, unlawful and unreasonable and in total violation of the Petitioner's right to fair administrative action under Article 47 of the Constitution that is expeditious, efficient, lawful, reasonable and procedurally fair.

86. Mr. Ogosso argued that the second Respondent considered the Petitioner's application and found that it lacked merit and reasons were given to that effect. He stated that the decision was effectively communicated and delivered to the Petitioner.

87. Section 4(2) of the FAA Act provides that "every person has the right to be given written reasons for any administrative action that is taken against him," a position that was reiterated by the Court of Appeal in *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 other.*[24] However, cases are context sensitive. The Petitioner moved to court on 1st July 2019. The Letter communicating the refusal is dated the same day. The letter stated that the application lacked merit because of pending investigations into compliance or otherwise with set license conditions and regulatory requirements.

88. I have already reproduced section 5(3) of the Act, which provides that after making investigations and considering any information or declaration as may have been required in terms of subsection (2), the Board may either grant, renew or vary a licence or permit or refuse a licence or permit or renewal or variation thereof without reason given. To the extent that the said provisions permits the second Respondent to grant or refuse to grant a licensed without giving reasons, the impugned decision is legally sound since it conforms with the said provision.

89. It is also common ground that early as 18th March 2019, the second Respondent wrote to the Petitioner reminding it that its license was due to expire on 30th June 2019. In the same letter, it set out the requirements to accompany the application. Among the requirements in the said letter is evidence of compliance with section 29A (1) & (2) of the Act reproduced earlier. The said section deals with betting tax. In its letter dated 1st July 2019, the second Respondent stated that the Board had considered the Petitioner's application and determined that it lacks merit on account of pending investigations into the Petitioner's compliance with set license conditions and regulatory requirements. The conditions were stated in the said letter.

90. The Petitioner submits that it was not provided with reasons. I have already held that tax payment is a not only a relevant consideration while determining whether to grant the license in question, but also a legal requirement under the Act as appears in the preamble to the Act and sections 29A and 55A of the Act. I have also stated above that under section 5 (3) of the Act, the second Respondent is not obliged to provide reasons.

91. The Petitioner has not availed evidence that it complied with section 29A (1) (2) of Act. In any event, the Petitioner states that its license was rejected because of non-payment of tax and went further to annex court documents showing that it has an unresolved tax dispute with the Kenya Revenue Authority. This leaves me with no doubt that the Petitioner is aware why its license was declined. As stated earlier, the Petitioner ought to have spared its energy to resolve the tax disputes before coming to this court because in the said tax disputes lies the reasons why its application failed.

92. Ideally, a person affected by an administrative decision is entitled to reasons in order to challenge the decision in court. The Petitioner is already in court and has not demonstrated that the alleged absence of reasons prejudiced its right to exercise its right to file this Petition. For a court to uphold a plea for refusal to be provided with reasons, the nature of the impugned decision and the peculiar circumstances of the case are relevant. In its pleadings, the Petitioner gave a detailed account of the events leading to the rejection of its application. It also alluded to the question of the tax dispute it has with the Kenya Revenue Authority, which leave me with no doubt that it was aware of the reasons why its application is was rejected.

c. Whether the first Respondent acted ultra vires its statutory powers.

93. The Petitioner's counsel submitted that the second Respondent is bound to exercise its administrative functions in accordance with the Constitution and the Fair Administrative Action Act[25] (FAA Act). In support of this proposition he cited *Samuel Kahiu & 373 others v Betting Control & Licensing Board & 6 others; Association of Gaming Operators-Kenya & another (Interested Parties)*,[26] in which the court stated that:-

"The importance of this right to fair administrative action as a constitutional right in our Article 47 cannot be over emphasized.

The Court of Appeal had the following to say in the case of Judicial Service Commission v Mbalu Mutava & another [2014] eKLR;

"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."

In the case of Dry Associates Ltd v Capital Markets Authority and Another, [2012] eKLR the Court observed;

"Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the Law Reform Act (Cap 26 of the Laws of Kenya) but is to be measured against the standards established by the Constitution."

94. Mr. Ogosso's submission on the issue under consideration was that section 5A of the Act provides the applicable criteria, and, that the second Respondent acted within its powers. He maintained that the criteria is a statutory requirement. He proposed that the court could direct the applicant to submit a fresh application in accordance with the law.

95. It is an established position that public bodies, no matter how well intentioned, may, only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decision to be allowed to stand, it must be demonstrated that the decision is grounded on law. As such, the Respondents' actions must conform to the principle of legality. Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle, which, is inextricably linked to the rule of law. Guidance can be obtained from the South African case of *AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another* where the court held as follows:-

"the doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . . Public power . . . can be validly exercised only if it is clearly sourced in law"[27]

96. Courts are similarly constrained by the doctrine of legality, i.e to exercise only those powers bestowed upon them by the law.[28] The concomitant obligation to uphold the rule of law and, with it, the doctrine of legality, is self-evident. In this regard, the first Respondent is constrained by that doctrine to enforce the law by ensuring that its decisions and in particular grant or refusal of a license conform to the relevant provisions of the law governing the process.

97. The respondent has not only a statutory duty but also a moral duty to uphold the law and to see to due compliance with the law governing grant of the licenses under the act. It would in general be wrong to whittle away the obligation of the first Respondent as a public body to uphold the law. A lenient approach could be an open invitation to the first Respondent to act against its legal mandate and pose a real danger of compromising both the process of issuance of the licenses and its mandate of regulating the betting and gaming industry.

98. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations. A person applying for a license under the Act is bound to adhere to the terms of the licensing process. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the ''four corners'' of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments. Where discretion is conferred on the decision-maker, the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[29]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.

99. In *Council of Civil Service Unions v. Minister for the Civil Service*[30] 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.*[31]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.[32] 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.

100. The role of the court in such cases was well sated in *Republic vs National Water Conservation & Pipeline Corporation & 11 Others*[33]where it was held that once a Judicial Review court fails to sniff any *illegality, irrationality* or *procedural impropriety*, it should down its tools forthwith. 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. In such a case, a court will not interfere with the decision. A decision, which falls outside that area, can therefore be described, interchangeably, as: - a decision to which no reasonable decision-maker could have come; or a decision, which was not reasonably open in the circumstances.

101. 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.

102. 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.

103. The constitutional and legislative licensing framework entails prescripts that are legally binding. The fairness and lawfulness of the licensing process and the ensuing decision must be assessed in terms of the provisions of the enabling statute and the FAA Act. 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.

104. I find no contest that the enabling statute confers mandate upon the second Respondent to grant or refuse to grant licenses under the Act. It is required to conduct a full and complete evaluation of the application and satisfy itself that it complies with the law and the set requirements. It would be unlawful for the second Respondent to pass a decision awarding a license in circumstances where there has not been a full and complete compliance. Complete evaluation includes due diligence. To do otherwise is to engage in an illegality and such a decision will be tainted by an error of the law.

105. In order to give meaning to section **5** of the act, regard must be had to its wording, read in context, and having regard to the purpose of the entire statute as discerned from the preamble to the Act and the dictates of Article, **10** and **47** of the Constitution. Read against this backdrop, the plain wording of the relevant provisions and the scheme of Act make it clear that the provisions are meant to ensure a fair and transparent licensing process. My reading of the Act leave me with no doubt that it precludes an applicant who has not passed the due diligence test from being awarded a license. Consistent with above legal framework, prior to the award of a license, conduct of due diligence is legally permitted. The law permits refusal to grant a license where the conditions have not been met or cancellation of a license or refusal to renew a license where conditions are not satisfied.

106. There is a need to appreciate the difference between formal shortcomings, which go to the heart of the process, and the elevation of matters of subsidiary importance to a level, which determines the fate of the application for a license. I am conscious of the ever-flexible duty of a public body to act fairly. However, fairness must be decided on the circumstances of each case.

107. True, a licensing body may condone some deficiencies. For example, a *bona fide* mistake should not in and of itself disqualify an applicant provided it is addressed. Substance should prevail over form. A distinction should be drawn between a material factor and the evidence needed to prove that factor. Regard must be had to the facts as a whole in the context of the applicable legislation and the principles involved; and compliance with legal requirements which involves a consideration of the degree of compliance with the law. Essentially, a failure to comply with prescribed conditions will result in an application for a license being disqualified unless those conditions are immaterial, unreasonable or unconstitutional. In the circumstances of this case, there is no convincing argument that the requirements are immaterial, unreasonable or unconstitutional. On the contrary, they are material and lawful considerations.

108. As a general principle, an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such power if it has been afforded the discretion to do so. My reading of the act is that it does not grant the second Respondent any discretion when evaluating compliance with the law unless the requirements imposed are immaterial, unreasonable or unconstitutional.

109. The provisions of the Act are in tandem with the obligation imposed by Articles **209** and **210** of the Constitution which requires taxes to be enforced by legislation. Therefore, the licensing process in the statute must be construed within the context of the entire Article **209** & **210** while striving for an interpretation, which promotes 'the spirit, purport and objects of the Article. Therefore, it is my holding that the impugned decision was made in a manner that is in conformity with the enabling statute. Put differently, the Petitioner has *not* demonstrated that the second Respondent acted *ultra vires*.

d. Whether the second Respondent violated the Petitioner's right to legitimate expectation.

110. The Petitioner's counsel argued that the impugned decision violates the Petitioner's right to a fair administrative action and the right to legitimate expectation. It was submitted that the Petitioner had legitimate expectation that the second Respondent would communicate its decision in a timely manner, but, prior to the deadline of 30thJune 2019, there was no such communication despite three written follow-ups.

111. Mr. Ogosso's rejoinder was that the grant of the license requires full compliance with the law and applicable conditions. He added that where a license has expired, the court cannot renew a dead license. He submitted that section 9 of the Act provides for expiry of the license, hence, there is no legitimate expectation to continue trading with an expired license. He submitted that legitimate expectation cannot go against clear provisions of the law. To him, a party cannot continue to trade on an expired license.

112. A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. In adjudicating legitimate expectation claims, the court follows a two-step approach. *First,* it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. *Second,* if the answer to this question is in affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, and enforce the legitimate expectation.

113. The first step in the analysis has both an objective and a subjective dimension. *First,* it is asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. This requirement also implies that individuals are required to know what the law is and consequently when a representation is lawful or not and hence can be relied upon or not.[34] Once a reasonable expectation exists, the administrator is required to act in accordance with that expectation, except if there are public interest considerations, which outweighs the individual's expectation.

114. The basic premise underlying the protection of legitimate expectations seems to be the promotion of legal certainty.[35] Individuals should be able to rely on government actions and policies and shape their lives and planning on such representations. The trust engendered by such reliance is said to be central to the concept of the rule of law.[36] Forsyth describes the impact of such trust and the role the protection of legitimate expectations play in this regard aptly as follows:-

> *"Good government depends in large measure on officials being believed by the governed. Little could be more corrosive of the public's fragile trust in government if it were clear that public authorities could freely renege on their past undertakings or long-established practices."*[37]

115. Legal certainty is not, however the only principle at play in legitimate expectation doctrine. The counter value of legality is especially important in the context of the substantive protection of legitimate expectations.[38] The fear in protecting legitimate expectations substantively is that administrators may be forced to act *ultra vires.* That would be the case where an administrator has created an expectation of some conduct, which is beyond his authority or has become beyond his authority due to a change of law or policy. If the administrator were consequently held to that representation, he would be forced to act *contra legem.* It is clear that such representations will not be upheld by the court.[39] The value of legality in law has led to the requirement that the expectation must be one of lawful administrative action before it can be either reasonable or legitimate. Legality therefore seems to take precedence over legal certainty in law. As stated above, there can be no reasonable expectation where the representation is of unlawful conduct and hence the question of legitimacy does not arise.

116. The requirements for the existence of such an expectation in South African law (whose legislation is similar to ours) were restated in *National Director of Public Prosecutions v Philips*.[40] These include:- **(i)** that there must be a representation which is "clear, unambiguous and devoid of relevant qualification," **(ii)** that the expectation must be reasonable in the sense that a reasonable person would act upon it, **(iii)** that the expectation must have been induced by the decision-maker and **(iv)** that it must have been lawful for the decision-maker to make such representation. If such an expectation exists it will be incumbent on the administrator to respect it. If the court finds that a legitimate expectation did in fact exist, it will ordinarily invalidate the administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner.

117. Discussing legitimate expectation, *H. W. R. Wade & C. F. Forsyth*[41] states thus:-

> *"It is not enough that an expectation should exist; it must in addition be legitimate….* ***First*** *of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation….. **Second**, clear statutory words, of course, override an expectation howsoever founded….. **Third,** the notification of a relevant change of policy destroys any expectation founded upon the earlier policy…."*

> *"An expectation whose fulfillment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice."* (Emphasis added)

118. It follows that statutory words override an expectation howsoever founded. Thus, a decision maker cannot be required to act against clear provisions of a statute just to meet ones expectations otherwise his decision would be out rightly illegal and a violation of the principle of legality, a key principle in Rule of Law. There cannot be legitimate expectation against the clear provisions of a statute. At the risk of repeating myself, I state that the doctrine cannot operate against clear provisions of the law and that it must be devoid of relevant qualifications. Earlier in this judgment, I reproduced the relevant provisions of section 5 of the Act, which provides for application of licenses and section 5A of the Act, which sets out the criteria for fit and proper persons. These being express requirements of the law, the doctrine of legitimate expectation cannot apply in the circumstances of this case. This is because the Petitioner has not demonstrated that it met all the requirements for the renewal or grant of the license. A case in point is the existence of cases on tax disputes between the Petitioner and the Kenya Revenue Authority and absence of evidence that it complied with section 29A (1) & (2) of the Act. In addition, the fact that it held similar licenses cannot confer legitimate expectation that once its license expired, it would be renewed automatically. This is because the renewal is subject to the conditions being satisfied. It follows that the allegation of violation of the right to legitimate expectation fails.

e. Whether the second Respondent acted maliciously, in bad faith or abused its powers

119. The Petitioner's counsel submitted that communicating the decision a day after the expiry of the previous license was a calculated move orchestrated by the Respondents to deliberately prevent the Petitioner from operating legally from 1st July 2019. He argued that the second Respondent's failure to communicate its decision in a timely manner was motivated by bad faith and ill motive because the Petitioner

provided all the necessary documents, in accordance with the Act, as it did, in its previous applications for the same licence.

120. In its Petition, the Petitioner avers that the second Respondent's inaction and failure to communicate its decision in a timely manner as well as the second Respondent's decision of 1st July 2019 was motivated by bad faith and ill motive since it was communicated after the expiry of its license. In addition, the Petitioner's counsel stated that the second Respondent's failure to reply to letters inquiring the status of the application shows that it was deliberately silent, and it had no legal cause or justification for failing to communicate between 12 thApril 2019 and 30th June 2019. Further, he argued that communicating the decision a day after the expiry of the 2018/2019 Licence shows that the second Respondent wanted to ensure that the Petitioner's 2018/2019 Licence expired and therefore had no intention of considering the Renewal Application.

121. Mr. Ogosso submitted that there can never be a legitimate expectation in favour of the Applicant that effectively ousts or contravenes the express provisions of Section 9 of the act. To support his position, he cited the Supreme Court of Kenya in *Communications Authority of Kenya & 5 Others -vs- Royal Media Services Limited & 5 Others.* ***[42]*** He argued that whereas the Applicant had the legitimate anticipation that its application would be considered in accordance with the law, it had no legitimate expectation in law that it would be able to continue to trade on an expired license. To further fortify his argument, he relied on the Court of Appeal decision in *Richard Erskine Leakey & 2 Others -vs- Ambassodor Samson Kipkoech Chemai.* ***[43]***

122. This court is being invited to find that the decision was tainted with bias, malice and abuse of powers. Differently put, was the decision arbitrary. This necessitates consideration of the elements of an arbitrary action. Arbitrary and Capricious means doing something according to one's will or caprice and therefore conveying a notion of a tendency to abuse the possession of power, malice or bias. This is one of the basic standards for reviewing administrative decisions. Under the "arbitrary and capricious" standard, an administrative decision will not be disturbed unless it has no reasonable basis. When an administrator makes a decision without reasonable grounds or adequate consideration of the circumstances, it is said to be arbitrary and capricious and can be invalidated by a court on that ground. In other words, there should be absence of a rational connection between the facts found and the choice made. There should be a clear error of judgment; an action not based upon consideration of relevant factors is arbitrary, capricious, an abuse of discretion. So is an action not in accordance with law or if undertaken without observance of procedure required by law.[44]

123. Fundamental to the legitimacy of public decision-making is the principle that official decisions should not be infected with improper motives such as fraud or dishonesty, malice or personal self-interest. These motives, which have the effect of distorting or unfairly biasing the decision-maker's approach to the subject of the decision, automatically cause the decision to be taken for an improper purpose and thus take it outside the permissible parameters of the power.

124. A power is exercised fraudulently if its repository intends it for an improper purpose, for example dishonestly, to achieve an object other than that which he claims to be seeking. The intention may be to promote another public interest or private interests. A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise.

125. A decision based on malice is usually one that is directed to the person.[45] The malice may arise out of personal animosity built up over a series of past dealings.[46] For instance, in a Canadian case the cancellation of a liquor licence was held to be an abuse of power where the decision was prompted by the proprietor's support of a religious sect, which was considered a nuisance by the police.[47] In another Canadian case it was held that a local authority cannot use its licensing power to prohibit lawful businesses of which it disapproves.[48] In an English case the decision of Derbyshire County Council to cease advertising in journals controlled by Times Newspapers, which had written articles critical of its councillors, was explicitly held to have been motivated by bad faith and therefore declared invalid for that reason alone.[49]

126. I have diligently examined the circumstances of this case. I have placed the material before me side by side with the law. I am unable to locate any element of arbitrariness, capriciousness, malice, bad faith or abuse of power. Differently stated, the Petitioner has failed to demonstrate that the impugned decision was arrived at arbitrarily and in abuse of powers conferred by the enabling statute.

f. Whether the impugned decision violated the Petitioner's right to be heard.

127. The Petitioner's counsel argued that the rejection of the Application without granting the Petitioner a right to be heard and address any concerns raised prior to the deadline of 30thJune 2019 is a flagrant breach of the Petitioner's right to a fair hearing as enshrined under Article 50 of the Constitution.

128. He described the refusal as unfair and a blatant violation of the right to be heard and the right to fair administrative action. Counsel submitted that the Petitioner should not be made to suffer dire consequences as a result of the Respondents' ill motives as doing so would be promoting the violation of its right to fair administrative action and right to fair hearing, as guaranteed under Articles 47 and 50 of the Constitution respectively.

129. Mr. Ogosso's did not expressly address this issue.

130. In recent years, the common law relating to Judicial Review of administrative action based on procedural impropriety has undergone a rather remarkable transformation. The courts, using the language of "natural justice" and, more recently and more dramatically, "fairness," have brought about a situation in which a broad range of statutory authorities are subject to the observance of at least a modicum of procedural decency.[50] That a decision is against natural justice does not mean merely that it is against evidence or wrong in law; it means that the decision is such that the person appealing has not had his case properly considered by the decision maker.

131. In *Local Government Board v. Arlidge,* ***[51]*** Viscount Haldane observed, *"...those whose duty it is to decide must act judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting*

the case made. *The decision must come to the spirit and with the sense of responsibility of a tribunal (or body) whose duty it is to meet out justice."*

132. The constitution recognizes a duty to accord a person procedural fairness when a decision is made that affects a person's rights, interests or legitimate expectations.[52] Procedural fairness contemplated by Article **47** and the FAA Act demands a right to be heard before a decision affecting ones right is made. In the most recent edition of De Smith's Judicial Review of Administrative Action, it is asserted:- "The emphasis that the courts have recently placed on an implied duty to exercise discretionary powers fairly must normally be understood to mean a duty to adopt a fair procedure. But there is no doubt that the idea of fairness is also a substantive principle."[53]

133. However, what is important is that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not. De Smith, in his *Judicial Review of Administrative Action*,[54] observed, *"Where a statute authorizes interference with properties or other rights and is silent on the question of hearing, the courts would apply rule of universal application and founded on principles of natural justice."* **Wade** in *Administrative Law*[55] says that principles of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power.

134. However, the standards of fairness are not immutable. They may change with the passage of time, both in the general, and in their application to decisions of a particular type. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. [56]Accordingly, the courts look at all the circumstances of the case to determine how the demands of fairness should be met.[57]

135. The above position was elucidated in *J.S.C. vs Mbalu Mutava*[58] where the Court of Appeal held that the right to a fair administrative action under Article 47 is a distinct right from the right to a fair hearing under Article 50(1) (2) of the Constitution. The court stated that fair administrative action broadly refers to administrative justice in public administration. It is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional and statutory duties guided by constitutional principles and policy considerations and that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law.[59]The Court of Appeal was emphatic that fair hearing under Article 50 (1) applies in proceedings before a court of law or independent and impartial tribunals or bodies.

136. The decision complained of is refusal to grant or renew a business license. The requirements for the license are specified in the act. An applicant submits his or her application and all the required documents. The second Respondent reviews the application to confirm conformity with the prescribed requirements and communicates the decision to the applicant. Such an exercise does not require a hearing. In fact, to require the second Respondent to hear every application just to confirm conformity with the set requirements would in my view not be reasonable and would unnecessarily place a heavy burden on the Board. My above observation is supported by the fact that the enabling statute should be construed as granting discretion to the decision maker to satisfy himself that the requirements of the license have been met. I find solace in the following passage from the South African Court of Appeal in the judgment of Nugent JA in *Kemp and Others v Wyk and Others*[60]

> "*A public official who is vested with a discretion must exercise it with an open mind but not necessarily a mind that is untrammeled by existing principles or policy. In some cases, the enabling statute may require that to be done, either expressly or by implication from the nature of the particular discretion, but, generally, there can be no objection to an official exercising a discretion in accordance with an existing policy if he or she is independently satisfied that the policy is appropriate to the circumstances of the particular case. What is required is only that he or she does not elevate principles or policies into rules that are considered to be binding with the result that no discretion is exercised at all. Those principles emerge from the decision of this Court in Britten and Others v Pope* **1916 AD 150** *and remain applicable today."*

g. Whether the impugned decision is grossly unreasonable.

137. The Petitioner states that the receipt of the decision after the expiry of its 2019/2020 Licence shows that the Respondents wanted to prevent it from operating legally after 30th June 2019. He argued that the said action is procedurally unfair, unlawful and unreasonable and in total violation of its right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Petitioner contended that the impugned decision is grossly unreasonable and lacks legal basis.

138. Mr. Ogosso did not directly address this ground of assault.

139. A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. The simple test used throughout was whether the decision in question was one, which a reasonable authority could reach. The converse was described by Lord Diplock[61] as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.' Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the decision maker has struck a balance fairly and reasonably open to him.[62]

140. The test of *Wednesbury unreasonableness* has been stated to be that the impugned decision must be *"objectively so devoid of any plausible justification that no reasonable body of persons could have reached it*[63] and that the *impugned decision had to be "verging on absurdity" in order for it to be vitiated*.[64]This stringent test has been applied in Australia[65] where the court held that in order for invalidity to be determined, the decision must be one which no reasonable person could have reached and to prove such a case required "something overwhelming." It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt and when "looked at objectively, is so devoid of any plausible justification that no reasonable body of persons could have reached them." Given the facts of this case, and the statutory requirements, I am not persuaded that a different tribunal properly addressing

itself to the same facts and circumstances could have arrived at a different conclusion.

141. Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with weather the decision falls within a range of possible, acceptable outcomes, which are defensible with respect to the facts and law. Put differently, whether the decision falls outside the range of possible acceptable outcomes applying the same set of facts and the law.

142. The following propositions can offer guidance on what constitutes unreasonableness. *First, wednesbury* unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably. *Second,* this ground of review will be made out when the court concludes that the decision fell outside the area of decisional freedom, which that legislative assumption authorizes, that is, outside the "range" within which reasonable minds may differ. *Third,* the test of unreasonableness is whether the decision was reasonably open to the decision-maker in the circumstances of the case. To say that the decision was "not reasonably open" is the same as saying that "no reasonable decision maker" could have made it.

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

144. Legal unreasonableness as I understand it comprises of any or all of the following, namely; specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others.[66]

145. In circumstances where reasonable minds might differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the court disagrees, even emphatically, with the outcome or justification. If there is an evident, transparent and intelligible justification for the decision or if the decision is within the 'area of decisional freedom' of the decision-maker, it would be an error for the court to overturn the decision simply on the basis that it would have decided the matter differently.

146. Applying the above jurisprudence, tests and principles to the facts and circumstances of this case, it is my firm conclusion that the Petitioner has not demonstrated that a reasonable person properly directing his mind to the facts, circumstances and the law could have arrived at a different decision.

h. Whether the Petitioner's right to information was violated

147. The Petitioner argues that the impugned action and silence in rendering a decision and failure to provide reasons why the application was declined violated its right under Article 47. It was Prof. Muigai's submission that the Respondents rendered a decision and purported to undertake investigations to fish for reasons. He submitted that the Petitioner was not notified about the details of the investigations that were being undertaken against it.

148. Mr. Ogosso's response was that the information in question is in the nature of intelligence and security investigations, hence, it cannot be released because it is privileged under section 6 of the Access to Information Act.[67]

149. *First*, section 5 (3) of the Act provides in clear terms that after making investigations and considering any information or declaration as may have been required in terms of subsection (2) of the said section, the Board may either grant, renew or vary a licence or permit or refuse a licence or permit or renewal or variation thereof without reason given. To the extent that this provision permits the Board to decline the license without giving reasons, then, the refusal to give reasons is firmly grounded on the said provision.

150. *Second*, the Access to Information Act[68] was enacted to give effect to the constitutional right of access to any information held by the State. The formulation of the provisions of the Act casts the exercise of this right in peremptory terms – the requester ?must be given access to the information so long as the request does not fall within the exceptions in section **6** of the Act. Under our law, therefore, the disclosure of information is the rule and exemption from disclosure is the exception.

151. Under section **6** of the Act, that there are ?reasonable and justifiable limitations on the right of access to information. The purpose of section **6** is to protect from disclosure certain information that, if disclosed, could cause material harm to, amongst other things: the defence, security and international relations of the Republic; the economic interests and financial welfare of the Republic and commercial activities of public bodies; and the formulation of policy and taking of decisions by public bodies in the exercise of powers or performance of duties conferred or imposed by law.

152. The burden of establishing that the refusal of access to information is justified rests on the state or any other party refusing access. This position was clearly expressed by the Constitutional Court of South African in *President of the Republic of South Africa & Others vs M & G Media Limited* [69] where it was held that:-

> *"The imposition of the evidentiary burden of showing that a record is exempt from disclosure on the holder of information is understandable. To place the burden of showing that a record is not exempt from disclosure on the requesting party would be manifestly unfair and contrary to the spirit of... the Constitution. This is because the requester of information has no access to the contents of the record sought and is therefore unable to establish that it is not exempt from disclosure under the Act. By contrast, the holder of information has access to the contents of the record sought and is able to establish whether or not it is protected from disclosure under one or more of the exemptions ..... Hence .....the evidentiary burden rests with the holder of information and not*

with the requester."

153. Ultimately, the question whether the information put forward is sufficient to place the record within the ambit of the exemption claimed will be determined by the nature of the exemption and whether the reasons cited fall within the ambit of section 6 of the Act. The reasons cited are intelligence reports and security investigations. A reading of section 6 of the Access to Information Act[70] leaves me with no doubt that the information in question fall within the permitted exceptions.

i. Whether the first Respondent was improperly joined in this Petition

154. Mr. Ogosso submitted that section 3 (12) of the act shields the second Respondent's employees from personal liability where they act in good faith and urged the court to strike off their names from these proceedings.

155. The Petitioner's counsel did not address this issue.

156. Section 3 of the act establishes the Betting Control and Licensing Board, consisting of— (a) a chairman, not being a public officer, to be appointed by the Minister by notice in the Gazette; (b) the Permanent Secretary to the Treasury or a person deputed by him in writing in that behalf; (c) the Permanent Secretary of the Ministry for the time being responsible for the Police or a person deputed by him in writing in that behalf; (d) the Permanent Secretary of the Ministry for the time being responsible for Betting, Lotteries and Gaming or a person deputed by him in writing in that behalf; and (e) such other persons, not exceeding five in number, as the Minister may, by notice in the Gazette, appoint.

157. Section 3 (8) provides that the chairman of the Board may, with the approval of the Minister, appoint such persons to act as officers and servants of the Board as he considers requisite to enable it to discharge its duties under this Act. Subsection (10) provides that all permits and licences issued under this Act and all communications from the Board shall be under the hand of the chairman or of some person duly authorized by the chairman, notification of that authorization being published in the Gazette under the hand of the chairman.

158. Lastly, sub-section provides that no member of the Board, nor any officer or servant thereof, shall be personally liable for any act or default done or omitted to be done in good faith in the course of his duties under this Act.

159. I am alive to the fact that statutory provisions ousting the court's jurisdiction must be read restrictively. This is because the right to access the courts is constitutionally guaranteed. However, a clear reading of the above provision shows that any officer or servant of the first Respondent cannot be liable for any act or default done or omitted to be done in good faith in the course of their duties under the act.

160. *First*, a fundamental principle flowing from the above provision is that an officer or servant of the first Respondent cannot be sued where he acts in good faith. It has not been alleged or demonstrated that the second and third respondents acted in bad faith.

161. *Second*, the use of the word *shall* in the above provisions is worth noting. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions.[71]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[72] The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

162. It is the duty of courts of justice to try to get at the real intention of the Constitution or legislation by carefully attending to the whole scope of the Constitution or a statute to be considered. The Supreme Court of India has pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

163. The word *"shall"* when used in a statutory provision imports a form of command or mandate. It is **not permissive**, it is **mandatory**. The word *shall* in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.[73] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is legally mandatory.[74] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory.

164. A proper construction of section **3 (12)** above leads to the conclusion that it is couched in mandatory terms. It follows that by dint of the said provisions, the suit against the second and third Respondents is unsustainable.

j. Whether section 5 (3) violates Article 47 of the Constitution

165. It is the Petitioner's case that Section 5(3) of the Act which empowers the second Respondent to render its decision declining or approving an application for grant or renewal of a license without giving reasons cannot override the provisions of Article 47 of the Constitution which dictates that written reasons be availed. In view of the foregoing, the Petitioner argued that Section 5 (3) of the Act is void to the extent of its inconsistency with the Constitution.

166. Mr. Ogosso argued that each statute enjoys the presumption of constitutionality and that the Petitioner has not rebutted the said presumption. He further submitted that unconstitutionality of a statute is judged against provisions of the Constitution not a statute.

167. Indisputably, there exists a presumption as regards constitutionality of a statute. The Rule of presumption in favour of constitutionality,

however, only shifts the burden of proof and rests it on the shoulders of the person who attacks it. It is for that person to show that there has been a clear transgression of constitutional principles.[75] However, this rule is subject to the limitation that it is operative only until the time it becomes clear and beyond reasonable doubt that the legislature has crossed its limits. Louis Henkin wrote in *The Age of Rights*:-[76]

> *"Government may not do some things, and must do others, even though the authorities are persuaded that it is in the society's interest (and perhaps even in the individual's own interest) to do otherwise; individual human rights cannot be sacrificed even for the good of the greater number, even for the general good of all. But if human rights do not bow lightly to public concerns, they may be sacrificed if countervailing societal interests are important enough, in particular circumstances, for limited times and purposes, to the extent strictly necessary." (Emphasis added).*

168. In this regard, the standards of review laid down by courts when the validity of a statute is challenged include two main standards:-

> *a. The first is the "rationality" test. This is the standard that applies to all legislation under the rule of law;*

> *b. The second, and more exacting standard, is that of "reasonableness" or "proportionality", which applies when legislation limits a fundamental right in the Bill of Rights. Article 24 (1) of the Constitution provides that such a limitation is valid only if it is "reasonable and justifiable in an open and democratic society."*

169. It is important for the court to determine whether the reason offered is "reasonably related" to a legitimate purpose, that is to enable the first Respondent fulfill its statutory mandate. In determining reasonableness, relevant factors include - **(a)** whether there is a "valid, rational connection" between the limitation and a legitimate public interest to justify it, which connection cannot be so remote as to render the decision arbitrary or irrational. **(b)** The second consideration is whether there are alternative means of exercising the asserted right that remain open to the first Respondent.

170. A common way of determining whether a law that limits rights is justified is by asking whether the law is proportionate. Established jurisprudence on proportionality has settled on the following tests:- *(i) Does the legislation (or other government action) establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right?(ii) Are the means in service of the objective rationally connected (suitable) to the objective?(iii)Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective? (iv) Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation; in short, is there a fair balance between the public interest and the private right?* ***[77]***

171. Limitation of a constitutional right will be constitutionally permissible if - **(i)** it is designated for a proper purpose; **(ii)** the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; **(iii)** the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally **(iv)** there needs to be a proper relation ("proportionality *stricto sensu*" or "balancing") between the importance of achieving the proper purpose and the special importance of preventing the limitation on the constitutional right.

172. The Canadian Supreme Court[78](Dickson CJ) stated that to establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied.

> a. *The first criterion concerned the importance of the objective of the law. First, the objective, which the measures responsible for a limit on a constitutional right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.*[79]

> b. *Secondly, the means chosen for the law must be 'reasonable and demonstrably justified', which involves 'a form of proportionality test' with three components: First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance.'*[80]

173. When employing the language of proportionality the High Court would ask whether the end could be pursued by less drastic means, and it has been particularly sensitive to laws that impose adverse consequences unrelated to their object, such as the infringement of basic common law rights. Former President of the Supreme Court of Israel, Aharon Barak, said proportionality can be defined as *'the set of rules determining the necessary and sufficient conditions for a limitation on a constitutionally protected right by a law to be constitutionally protected.'* ***[81]***

174. The question to answer is whether the objective of section 5 (3) is necessary, that is, minimally impairs the right to be given reasons, taking into account alternative means of achieving the same objective. The function in question is processing of licenses. The requirements are provided in the Act. Some reasons fall under the exceptions provided for in section 6 of the Access to Information Act[82] discussed above details of which cannot be divulged. In such circumstances, the beneficial effects of the limitation of the right outweigh the deleterious effects of the limitation. In short, there is a fair balance between the public interest and the private right.[83]

175. First, the objective, which the measures responsible for the said limitation is designed to serve is of sufficient importance to warrant overriding a constitutionally protected right or freedom. I find that the said section meets this test.

176. Second, the section is carefully designed to achieve the objective in question. It is not arbitrary, unfair or based on irrational considerations.

177. Third, the second Respondent is required to balance the interests of society with those of individuals. It is not in public interest to disclose intelligence and security investigations. In any event, as said above, these are exempted from disclosure by section 6 of the Access to Information Act. [84]

178. Fourth, Access to Information Act[85] flows from Article 35 of the Constitution, so, it has a Constitutional under pinning. Hence, information exempted under section 6 of the Act and section 5(3) of the Act cannot be said to be unconstitutional.

k. Whether the impugned decision violated the Petitioners right to property under Article 40 of the Constitution.

179. The Petitioner's case is that because of the impugned decision, its business is now at risk, which is a violation of its right to property guaranteed under Article 40 of the Constitution, and, unless the orders sought are granted, it will suffer irreparable harm and damage, including the risk of being arrested.

180. In addition, it was argued that the Petitioner is gravely prejudiced because the second Respondent directed the Interested Party to suspend its Pay bill numbers, and, that, it will be compelled to lay off its staff members.

181. The Respondents counsel did not directly address this issue.

182. A violation of the right to property occurs when there is an unjustifiable interference with property rights. It follows that the relevant the questions to be asked when considering whether there has been a violation of the right to property guaranteed by Article 40 of the Constitution are: (i) Is there a property right, or possession, within the scope of Article 40? (ii) Has there been an interference with that possession? (iii) Does the interference serve a legitimate objective in the public or general interest? (iv) Is the interference proportionate? That is, does it strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights? (v) Does the interference comply with the principle of legal certainty, or legality?

183. First, the property in question in the instant case is alleged investment to undertake betting and gaming license and failure to operate the business. It is not in dispute that to operate the business, the Petitioner is required to have a valid license. It is also not in contention that without the license the Petitioner cannot operate the business. The license is issued subject to conditions imposed by a statute. In ability or failure to meet, the conditions led to the refusal of the license. The licensing body cannot be accused of violating the Petitioner's right to property in the circumstances of this case. Refusal to grant a license for failing to meet the requirements under the law cannot amount to unfair interference with property rights. On the contrary, granting the Petitioner a license it has not qualified for would be a gross abuse of the law.

l. What is the status of Safaricom Limited in these proceedings.

184. As stated earlier, Safaricom Limited was not sued in the original Petition or the amended Petition. It was only named as an "Interested Party" in the contempt application referred to earlier. The Petitioner and the Respondent never addressed this anomaly. Safaricom Ltd in its Replying Affidavit raised it, but still proceeded to respond to the Petition, participated in the proceedings and filed submissions.

185. It is not in doubt that Safaricom Limited has not been joined in these proceedings as either an Interested Party or a Respondent. It cannot be said by any stretch of imagination that it could have been made a party in this case by merely being named in an interlocutory application. I am persuaded beyond doubt that Safaricom Limited is not properly sued in these proceedings and no orders can issue against it.

m. Whether the Petitioner is entitled to any of the prayers sought.

186. The Petitioner asks the court to issue declaratory orders, namely, that, the impugned decision violates Articles 47 & 50 of the Constitution for failure to provide the Petitioner with reasons for the said decision and failure to provide the Petitioner with the opportunity to be heard before the decision was rendered and is therefore null and void.

187. The Petitioner also seeks a declaration that section 5(3) of the Act is unconstitutional to the extent that it allows the second Respondent to render decisions without providing reasons, in contravention of the right to fair hearing and the right to be heard as enshrined under Articles 47 and 50 of the Constitution.

188. In addition, the Petitioner invites this court to declare that the second Respondent's failure and/or refusal to render a decision on the Application, and, to provide reasons for the failure in light of the deadline of 30th June 2019 is unlawful and unconstitutional and contravenes the provisions of Articles 20, 35, 40 and 47 of the Constitution.

189. I have already made findings on the grounds upon which the above declarations are premised. However, I find it useful to add that the tests for granting a declaratory relief were settled in *Durban City Council v Association of Building Societies*[86] and confirmed in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd.*[87]The court must first be satisfied that the applicant is a person interested in an existing, future or contingent right or obligation; and if so, the court must decide whether the case is a proper one for the exercise of its discretion.

190. The first leg of the enquiry involves establishing the existence of the necessary condition precedent for the exercise of the court's

discretion. An applicant for the declaratory relief satisfies this requirement if he succeeds in establishing that he has an interest in an existing, future or contingent right or obligation. Only if the court is satisfied accordingly, does it proceed to the second leg of the enquiry.

191. The first stage of the enquiry relates to whether the public officer is authorized or obliged by law to render the impugned decision. The first answer to this question lies in the constitutional principle of legality. Organs of State and public officials are creatures of statute. Unlike natural persons who may commit any act, the only requirement being that the act ought to be legal, organs and officials of state are only empowered to act to the extent that their powers are defined and conferred by the Constitution and/ or by statute. Any conduct by an organ or official of state beyond their constitutional and/ or statutory powers violates the principle of legality.

192. In addition to my earlier findings on the grounds upon which the above orders are sought, applying the above considerations and principles to be factored while considering declaratory reliefs, I am no persuaded that the circumstances of this case warrant the granting of the declaratory reliefs sought.

193. The Petitioner also seeks an order of *Certiorari* to remove into this court for the purposes of quashing, the impugned decision.

194. Again, I have pronounced myself with sufficient clarity while addressing the issues discussed above. It is useful to add that an order of *Certiorari* issues to review a decision and proceedings in a lower court or a public body and determine whether there were any irregularities. I have already found that there were no irregularities. In any event, *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

195. The circumstances of this case are that the Petitioner's license has expired. Even if the court quashes the decision, (which I found there is no basis), the Petitioner cannot operate on an expired license. It will remain unable to operate for want of a license. Thus, an order of *Certiorari* cannot be the most efficacious remedy in the circumstances of this case.

196. In addition, the Petitioner prays for an injunction and or a conservatory order restraining the Respondents from interfering with its business and/or stopping the Petitioner from continuing to trade after 30th June 2019 on the basis of the impugned decision pending the issuance of a decision in accordance with the law.

197. The above prayer as framed cannot be granted. First, the Petitioner acknowledges its license has expired. Granting such a prayer would in my view amount to perpetuating an illegality. It will permit the Petitioner to operate without a license. A court of law cannot willingly and knowingly issue an order in total contravention of a statutory provision. Courts are bound by the principle of legality. Its decisions must conform to the law. Such an order would in my view be an affront to the provisions of the Act discussed above which provide that such business must be licensed.

198. The Petitioner also seeks an injunction and/or a conservatory order restraining the Respondents from unlawfully harassing any of the Petitioner's servants, agents, employees as they engage in its business after 30thJune 2019 on the basis of the impugned decision pending the issuance of a decision in accordance with the law. Again, this prayer is not available because of the reasons discussed above.

199. Lastly, the Petitioner prays for an injunction and/or a conservatory order restraining the Respondents from in any manner howsoever from intruding into licensed premises of the Petitioner on the basis of the impugned decision pending the issuance of a decision in accordance with the law. Similarly, this prayer if granted would offend the provisions of the Act and would amount to this court extending protection to an unlicensed business.

Disposition

200. In view of my analysis and determination of the issues discussed above, the conclusion becomes irresistible that the amended Petition fails in its entirety. Accordingly, I hereby dismiss the amended Petition dated 3rd July 2019 with no orders as to costs.

Signed and dated at **Nairobi** this day of 2019

John M. Mativo

Judge

Signed, dated and delivered at Nairobi this 30th day of August 2019

J. A. Makau

Judge

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[1] Cap 486, Laws of Kenya-Repealed.

[2] Cap 131, Laws of Kenya.

[3] Act No.31 of 2016.

[4] Act No. 4 of 2015.

[5] Act No. 31 of 2016.

[6] {1995} 1 W.L.R. 1037, Court of Appeal (England and Wales).

[7] Ibid, pp. 1049–1050.

[8] {2008} 4 S.L.R.(R.)

[9] p. 159, para. 17.

[10]{1983} Q.B. 600, C.A. (England and Wales).

[11] Ibid, pp. 635–637.

[12] {1995} 1 W.L.R. 759, H.L. (UK).

[13] Ibid, p. 780.

[14] 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, 25, 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.

[15] {2004} ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

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

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

[18] *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.

[19] {1999} ZASCA 72; 2000 (1) SA 113 (SCA) at para 21.

[20]Mr. Dainius Zalimas, President of the constitutional Court of the Republic of Lithuania, *The Rule of Law and Constitutional Justice in the Modern World*, 11-14 September 2017, Vilnius, Liuthania, delivering a speech at the Farewell Dinner for the 4th Congress of the World Conference on Constitutional Justice, 13th September 2017.

[21] *Masinga vs Director of Public Prosecutions and Others* (21/07) {2011} SZHC 58 (29 April 2011: High Court of Swaziland.

[22] {2018}eKLR.

[23] Published in Just Law {2004}.

[24] {2016} eKLR.

[25] Act No. 4 of 2015.

[26] {2019} e KLR.

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

[28] *National Director of Public Prosecutions vs Zuma*, Harms DP

[29] 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.

[30] {1985} AC 374.

[31] 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

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

[33] {2015} eKLR.

[34] Case C-80/89, *Behn v Hauptzollamt Itzehoe*, 1990 E.C.R. I-2659.

[35] Søren Schønberg, *Legitimate Expectations in Administrative law* 118 (2003); *C.f*. Forsyth, *The Provenance and Protection of Legitimate Expectations*, 47 CAMB. L. J. 238, 242-244 (1988). The protection of legitimate expectations are in fact still stronger in German law today than is the case in EU law, *see*, Administrative Law of the European Union, its Member States And The United States 285 (Rene

Seerden & Frits Stroink eds., 2002).

[36] Ibid.

[37] Ibid.

[38] Joined Cases 205-215/82, Deutsche Milchkontor GmbH et al. V Germany, 1983 E.C.R. 2633.

[39] Søren Schønberg, Legitimate Expectations in Administrative Law 118 (2003).

[40] 2002 (4) SA 60 (W) at paragraph 28, quoted with approval by the Supreme Court of Appeal in *South African Veterinary Council and another v Szymanski* 2003 (4) BCLR 378 (SCA) at paragraph 19 and in *Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and another* [2003] 2 All SA 616 (SCA) at paragraph 65.

[41] ***Administrative Law*****, by H.W.R. Wade, C. F. Forsyth, Oxford University Press, 2000, at pages 449 to 450.**

[42] {2014} eKLR.

[43] {2019} eKLR.

[44] See *Natural Resources Defense Council, Inc. v. United States EPA*, 966 F.2d 1292, 1297 (9th Cir. 1992)].

[45] *Lubrizol Corp Pty Ltd v Leichhardt Municipal Council* {1961} N.S.W.R. 111; *Boyd Builders Ltd v City of Ottawa* {1964} 45 D.L.R. (2nd) 211.

[46] *Smith v East Elloe RDC* {1986} A.C. 736. Personal animosity towards a party may also disqualify an adjudicator: *R. (Donoghue) v Cork County Justices* {1910} 2 I.R. 271; *R. (Kingston) v Cork County Justicesm* {1910} 2 I.R. 658; *R. (Harrington) v Clare County* Justices {1918} 2 I.R. 116; *Law v Chartered Institute of Patent Agents* {1919} 2 Ch. 276; *R. v Handley* (1921) 61 D.L.R. 656; Re ‘‘Catalina’’ and ‘‘Norma’’ (1938) 61 Ll. Rep. 360

[47]*Roncarelli v Duplessis* {1959} 16 D.L.R. (2nd) 689 at 705.

[48] *Prince George (City of) v Payne* {1978} 1 S.C.R. 458. In any event a power to regulate will not normally be constructed to allow total prohibition: *Tarr v Tarr* {1973} A.C. 254 at 265– 268. For another interesting Canadian case, see *Re Doctors Hospital and Minister of Health* {1976}68 D.L.R. (3rd) 220 (power to revoke approval as public hospital wrongfully exercised in the interests of economy). More recently, see Canadian Union of Public Employees v Ontario (Minister of Labour) [2003] 1 S.C.R. 539 (the use of a ministerial appointment power for an improper purpose).

[49] *R. v Derbyshire CC Ex p. The Times Supplement Ltd* {1991} C.O.D. 129. In *R. v Ealing LBC Ex p. Times Newspaper Ltd* {1986} 85 L.G.R. 316, councils imposed a ban on purchasing the publications of the Times Newspapers in their libraries. Watkins L.J., without going so far as to label the ‘‘shadowy’’ reasons for imposing the ban (to punish a ‘‘tyrannical employer’’) as bad faith—he called them ‘‘a transparent piece of camouflage’’—did hold the decision both irrational and an abuse of power (as well as illegal, as discussed at 5–086).

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

[51] {1915} AC 120 (138) HL.

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

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

[54] (1980), at page 161.

[55] (1977) at page 395.

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

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

[58] {2015}eKLR

[59] Ibid.

[60] (335/2004) [2005] ZASCA 77; [2008] 1 All SA 17 (SCA) (19 September 2005).

[61] {1976} UKHL 6; {1976} 3 All ER 665 at 697{1976} UKHL 6; , {1977} AC 1014 at 1064.

[62]Lord Cooke in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd,* {1995} 1 All ER 129 (HL) at 157.

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

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

[65] In *Prasad v Minister for Immigration* {1985} 6 FCR 155.

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

[67] Act No. 31 of 2016.

[68] Ibid.

[69] CCT 03/11 {2011} ZACC 32 Heard on : 17th May 2011 Decided on : 29th November 2011.

[70] Act No. 31 of 2016.

[71]*Dr Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions.* International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2).

[72] Ibid.

[73] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

[74] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

[75] See Charanjit Lal Chowdhury Vs. the Union of India and others AIR 1951 SC 41 : 1950 SCR 869

[76] Louis Henkin, The Age of Rights (Columbia University Press, 1990) 4.

[77]G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014). Cf Aharon Barak:

[78] R v Oakes [1986] 1 SCR 103 [69]–[70].

[79] R v Oakes [1986] 1 SCR 103 [69]–[70].

[80] Ibid

[81]Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 3.

[82] Act No. 31 of 2016.

[83]G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014). Cf Aharon Barak:

[84] Act No. 31 of 2016.

[85] Act No. 31 of 2016.

[86] 1942 AD 27 at 32

[87] 2005 (6) SA 205 (SCA) at para 15 to 17.